

Submission from the Corner House to OGC consultation on Draft Regulations for EU Procurement Directive 2004/18/EC and proposed guidance

The Corner House is a not-for-profit research and advocacy group, focusing on human rights, environment and development. The Corner House has a particular interest and expertise in international corruption and institutional mechanisms for preventing and deterring corruption.

Article 45 of the Directive/Regulation 23 of the Draft Regulations and proposed guidance for implementation of Regulation 23

I. Introduction

1. Article 45 of EU Procurement Directive 2004/18/EC introduces for the first time mandatory exclusion from public procurement for companies and individuals convicted of particular offences. Exclusion from public procurement contracts is a powerful tool for protecting the integrity of public procurement and for deterring companies and individuals from engaging in particular offences.

2. Furthermore, the OECD has long advocated exclusion from public procurement as an important sanction that should be available for companies convicted of paying bribes to foreign public officials. Article VI of the OECD Revised Recommendations 1997 specifically states:

“Member countries’ laws and regulations should permit authorities to suspend from competition for public contracts enterprises determined to have bribed foreign public officials in contravention of that Member’s national laws and, to the extent a Member applies procurement sanctions to enterprises that are determined to have bribed domestic public officials, such sanctions should be applied equally in case of bribery of foreign public officials”.

In its Phase 2 review of UK implementation of the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, the OECD Working Group specifically recommended that the UK

“consider adopting a regime of additional administrative or civil sanctions for legal persons that engage in foreign bribery” (para 257 a)

Effective implementation of Article 45 in the UK would ensure that the UK is compliant with the OECD Revised Recommendations and is taking steps to fulfil the Working Group’s recommendation.

3. In order to ensure that Article 45 is implemented, careful consideration needs to be given to how a fair and workable exclusion system can be established both within the UK and the EU, and how to enable an effective flow of information within the UK and between Member States to ensure coherence. The British Presidency of the EU is both an incentive for the UK to show leadership in this respect, and an opportunity for it to push for harmonisation within the EU and the development of best practice on implementation of this Article.

4. This submission looks firstly at what should be included in the guidance and regulations in order to establish a fair and workable system within the UK, and secondly at what the UK government needs to be doing at an international level to encourage harmonisation.

II. Creating a workable system

5. A workable, equitable and proportionate exclusion system in the UK requires detailed guidance from the OGC to ensure that Article 45 of the Directive is applied in a consistent and equitable manner by all contracting authorities in the UK. It will also require some changes to the Draft Regulation as it currently stands.

A. Awareness of an offence

6. Paragraph 1 of the draft regulation 23 establishes the meaning of “is aware” from the EU directive as “actual knowledge”. ‘Actual knowledge’ does not imply that contracting authorities need take proactive steps to establish that knowledge.¹ However, there are likely to be many instances where a contracting authority could have no actual knowledge of a conviction unless they made the necessary enquiries. This is therefore a significant weakness that may lead to a lack of consistency in how contracting authorities apply the Regulation. Implementation could become dependent upon whether or not contracting authorities happen upon knowledge of a conviction prior to a tender.

7. The Corner House recommends that Regulation 23 read:

“... a contracting authority shall treat as ineligible and shall not select an economic operator in accordance with these Regulations if the contracting authority has actual knowledge, having made reasonable enquiries, that the economic operator or its directors or any other person who has powers of representation, decision or control of the economic operator has been convicted”

8. While it is important that the Directive should not impose too great an administrative burden on contracting authorities, it is also important that relevant checks in relation to Regulation 23 (both paragraph 1 and 4) are made. This should include making criminal record checks, checking the Companies House database of disqualified directors, making checks as to whether economic operators have been excluded from EU procurement under article 96 of the Financial Regulation (via the Early Warning System of the third party ledger run by DG Budget at the EU) and multilateral institutions (such as the World Bank debarment list), and assessing any civil judgements relating to the offences outlined in paragraph 1 of the draft Regulation. While companies excluded by the World Bank or EU or who have had civil judgements against them have not been convicted by a court and are not therefore bound to be excluded under paragraph 1 of Article 45, such exclusions or judgement would suggest ‘grave professional misconduct’, and therefore grounds for exclusion by contracting authorities under paragraph 2 (d) of Article 45. Economic operators who have defrauded the EU, multilateral institutions or other economic operators, for instance, pose serious risks to the integrity of public procurement.

9. Paragraph 1 of article 45 of the EU Directive states that “contracting authorities *shall* where appropriate, ask candidates or tenderers to supply documents referred to in paragraph 3 [judicial records or equivalent documents issued by a competent judicial or administrative authority] and may, where they have doubts concerning the

¹ See for instance, House of Lords’ ruling in March 2001 (*White (A.P.) v White and the Motor Insurers Bureau*, which looked at ‘actual knowledge’ in the context of the Second EEC Motor Insurance Directive 84/5/EEC.

personal situation of such candidates or tenderers, also apply to the competent authorities to obtain any information they consider necessary on the personal situation of the candidates or tenderers”. [italics added]. Paragraph 5 of Draft Regulation 23 suggests only that “the contracting authority *may* require an economic operator to provide such information as it considers it needs to make the evaluation” [italics added]. This is weaker than the Directive, and the Corner House believes that the original wording from the Directive should apply.

10. In the long term, the UK government should consider setting up an equivalent to the Danish model, where certificates are provided by the Danish Commerce and Companies Agency to companies for a fee, which certify that the company is not bankrupt or subject to bankruptcy proceedings, has fulfilled its social security and tax obligations, and has not been convicted of any offences. Such a one-stop service would enable companies to prove to contracting authorities both in the UK and elsewhere in the EU that they are eligible to tender for contracts in relation to both paragraphs 1 and 2 of the Directive. The fact that three UK companies have already faced potential disqualification by other Member States² because they were not able to provide such certificates suggests that this should be given serious and urgent attention.

11. The Corner House recommends the best way to ensure that contracting authorities are able to make reasonable enquiries about relevant convictions is to:

- a) establish, in the guidance, a system of certification, whereby contracting authorities will include in all tender announcements the requirement for economic operators to submit a signed statement that:**
 - i) neither it, nor any of its directors nor “any other person who has powers of representation, decision or control of the economic operator”, have been convicted of the offences from 1 a) through to 1f) of the Directive**
 - ii) none of the subcontractors to be involved in bidding for the project or their relevant senior personnel, nor any of the economic operators’ parent or subsidiary companies or their relevant senior personnel, nor any company under which the economic operator has previously operated in the last five years have been convicted of offences from 1 a) to 1 f) of the Directive (see paragraph 26 below);**
 - iii) and that none of the circumstances listed in 4 a) to j) of the Directive applies to the economic operator or any subcontractors.**

A similar system of self-declaration is already operated by the ECGD³ and DFID. In Ireland, meanwhile, contracting authorities already state in their requests for tender that tenderers will only be considered eligible for inclusion in the award process if they have, among other things, submitted a statement

² Public Procurement Network, Information document, http://www.minefi.gouv.fr/daj/marches_publics/ppn/ppn-anglais/ppn-anglais.pdf

³ In the ECGD’s case, companies are currently required to make such declarations about controlled subsidiaries. Under previous procedures, the ECGD required companies to make such declarations with regard to joint venture partners and any company in the same groups as it (eg subsidiaries, parent companies and sister companies).

that none of the circumstances in paragraphs 1 and 2 of the Article 45 apply to them (with the Article as a matter of course being appended to requests for tender.)

- b) draw attention to economic operators in tender announcements and documentation that where an economic operator or the relevant personnel “is guilty of serious misrepresentation in providing any information required of him under this regulation”, they may be excluded in accordance with paragraph 4 of regulation 23;**
- c) introduce a new requirement into the regulation or the guidance that contracting authorities shall conduct a criminal records check on economic operators and shall consult the central database of excluded companies (see below section E paragraph 24);**
- d) reword the draft regulation to state that contracting authorities *shall* require economic operators to supply relevant documents to prove their eligibility for tendering;**
- e) provide contracting authorities with a list of sources (including the Companies House database of disqualified directors, the EU Early Warning System of the third party ledger and World Bank debarment list) that should be checked and how to access them;**
- f) consider setting up a one-stop shop certificate system along the lines of the Danish model.**

B. “Offences”

12. The list of offences in the draft Regulations does not include part 12 of the Anti-Terrorism Crime and Security Act 2001, section 108 of which put beyond doubt that existing offences of corruption apply to bribery of foreign public office holders, and section 109 of which extended the jurisdiction of UK court to offences committed overseas by UK nationals or bodies incorporated under UK law. This is a significant omission. Neither is the Proceeds of Crime Act mentioned in the listed offences. There is also a strong likelihood that companies accused of bribery of foreign officials for instance, may be convicted of related offences that are not listed in the regulation, such as false accounting, conspiracy to defraud or under the Theft Act.⁴ A literal reading of the regulation would mean that such companies convicted of such offences would not necessarily be treated as ineligible.

13. There also needs to be clarity as to whether the Regulations cover convictions from non-EU jurisdictions. Draft Regulation 4 (2) states: “A contracting authority shall not treat a person who is not a national of and established in a relevant State more favourably than one who is”. This suggests that the exclusion measures should also apply to companies convicted of the relevant offences outside of the EU; otherwise such companies would effectively receive favourable treatment. The guidance should state clearly what contracting authorities need to do in this situation. Clearly, non-EU economic operators should also be required to make signed declarations as in 10 a) above, and be required to provide documentary evidence for their eligibility when requested by the contracting authorities.

14. The Corner House recommends that:

⁴ See OECD Working Group on Bribery, “UK: Phase 2”, March 2005, para 178

- a) **the OGC, in consultation with the relevant law enforcement agencies such as the Serious Fraud Office, conduct a review of the full list of UK offences that should be listed in Regulation 23, with a particular view to incorporating part 12 of the Anti-Terrorism, Crime and Security Act, the Proceeds of Crime Act and possible related offences, including conspiracy offences;**
- b) **either paragraph 1 (f) of draft regulation 23 or a new section under this paragraph should include language that makes clear that a conviction in any competent jurisdiction is grounds for exclusion.**

C. Derogation for “overriding requirements in the general interest”

15. Article 45 allows for Member States to “provide for a derogation from the requirement referred to in the first subparagraph for overriding requirements in the general interest”. Paragraph 2 of Regulation 23 allows for contracting authorities in the UK to “disregard the prohibition described [in paragraph 1] there if it is satisfied that there are overriding requirements in the general interest which justify doing so in relation to that economic operator”. This presumably ensures that derogations must be decided upon on a case by case basis and that generic derogations (eg for classes or types of economic operator) may not be applied by contracting authorities.

16. However, there is no definition of the phrase in the Regulation. The OGC has indicated that this phrase is “designed to cover exceptional circumstances of national emergency, for example related to the protection of life and security”. It has stated that its guidance on this article will “provide additional advice to authorities on when the derogation should be invoked”.⁵

17. If the article is to be applied fairly and consistently to ensure equal treatment to all economic operators regardless of size or origin, it is crucial that there is full transparency around the use of derogations and that use of derogations by contracting authorities are monitored centrally.

18. The Corner House recommends that:

- a) **The guidance provide a clear definition of the term ‘general interest’ and the circumstances to which it is likely to apply, and that appropriate wording regarding protection of life and security be incorporated into the regulation;**
- b) **The guidance should state that derogations require Ministerial approval;**
- c) **The guidance should state that Contracting Authorities will be required to provide a public, written, reasoned justification for adopting the derogation, copies of which will be held centrally and posted on OGC’s website.**

D. “Relevant competent authority”

19. Clearly for accessing criminal records in the UK, the Criminal Records Bureau (CRB) is likely to be the most appropriate body to assist contracting authorities. The Home Office will need to ensure that the CRB has the adequate human and financial resources to cope with criminal records checks from contracting authorities.

⁵ Hansard, Official Record, 12 July 2005, Column 896W

20. Proposals under way to ensure that there is a central authority in each Member State from whom information on criminal convictions can be obtained in order to comply with the forthcoming Council Decision on Exchange of Information from Criminal Records, should enable contracting authorities to get EU wide information in the future.⁶ The proposal by the European Commission for a digital “European Index System” allowing for automatic and direct access to information could also assist this process. However, Article 5 of the draft proposal for a Council Decision limits the use of data on convictions to criminal proceedings. According to that article “use for other purposes is governed both by the limits specified by the requested member State and by national rules governing access to the information contained in the criminal record in the requesting Member State”. This has the potential to make it difficult for contracting authorities to access information about convictions in other EU states. Agreement and clarity needs to be reached at EU wide-level that the transfer of criminal records can also be used for the implementation of Article 45. The opinion delivered by the European Data Protection Supervisor in March 2005, also suggests that the Europe-wide developments on exchange of criminal records will only be of use for the implementation of Article 45 if the offences spelled out in paragraph 1 (a) to (d) of Article 45 are included as serious crimes.⁷

21. While it has not yet been decided who will be designated central authority in the UK in order to comply with the forthcoming Council Decision, clearly it would be preferable if there were a ‘one-stop shop’ system, so that a contracting authority or economic operator would only have to go to one body to seek information about convictions. If the CRB is the designated ‘relevant competent authority’, it would make sense for them to operate such a ‘one-stop shop’.

22. The other important issue to be decided is the level of disclosure that contracting authorities should have access to from the Criminal Records Bureau. The Corner House believes that contracting authorities should be seeking ‘enhanced’ rather than ‘standard’ or ‘basic’ disclosure when approaching the Criminal Records Bureau. Enhanced disclosure would provide contracting authorities with potentially useful intelligence about matters that may need to be clarified with an economic operator before they are allowed to tender, and may help them assess whether a company should be excluded (for instance on grounds of ‘grave professional misconduct’). The necessary amendments to the Exception Order should be made to allow this.

23. The Criminal Records Bureau currently does not have access to convictions of legal persons from the Police National Computer, and would need to make changes to its IT systems and business processes in order to be able to provide this information. While there are currently very few convictions of legal persons within the UK for these offences,⁸ this may not continue to be the case, and the CRB needs to be set up in order to be able to respond to requests for disclosure about convictions of legal persons. If the CRB were not to change its systems, it is likely that contracting authorities would have to approach their local police force to do such checks.

⁶ European Commission, “Proposal for a Council Decision on the exchange of information extracted from the criminal record”, 13/10/2004, particularly article 2.

⁷ *Official Journal of the European Union*, “Opinion of the European Data Protection Supervisor on the Proposal for a Council decision on the exchange of information from criminal records (COM (2004) 664 final of 13 October 2004)”, 2005/C 58/03)

⁸ See OECD Working Group on Bribery, “United Kingdom: Phase 2”, 17/3/05, p 64-5

24. **The Corner House recommends that:**

- a) **the Criminal Records Bureau be given the appropriate staff and resources to enable it to deal with criminal records checks from contracting authorities;**
- b) **the Criminal Records Bureau offer a ‘one-stop’ shop service which includes checking for EU criminal records and assists with getting relevant information on criminal records outside the EU;**
- c) **the Exceptions Order should be amended accordingly to enable enhanced disclosure to contracting authorities;**
- d) **the Criminal Records Bureau change its IT system and business model to allow it to check for convictions of legal persons;**
- e) **the costs of disclosure applications to the Criminal Records Bureau (which are minimal) should be borne by the economic operators concerned.**

E. Further implementing conditions necessary to make the system workable:

25. Creating a Central Database of excluded economic operators at the Office of Government Commerce in order to avoid anomalies, repetition of verification efforts by contracting authorities and to share with other Member State procurement authorities.

If there is no centralised information about excluded economic operators, it is possible that an economic operator excluded by one contracting authority in the UK may be treated as eligible by another contracting authority in the UK who does not have access to the relevant information about an economic operator. In order to avoid such an obvious anomaly, to assist contracting authorities in their verification efforts and to ensure that there is consistent and equal treatment of economic operators by contracting authorities across the UK, the OGC should establish and maintain a central database of excluded companies. This would need to be constantly updated, with a requirement on contracting authorities to alert the OGC when they have excluded a company under article 45/regulation 23 within 20 working days. There should also be a requirement that contracting authorities consult this central database (see A c) above), to ensure that an economic operator excluded by one contracting authority may not be allowed to tender by another contracting authority. Several other Member States hold central databases or procurement registers. In Italy, the Public Works Authority holds such a database. In Spain, the Public Tendering Advisory Board holds records of convictions, and there is a legal requirement for authorities to provide information to the Board. In Portugal there are provisions to ensure that information on relevant convictions is passed to the central procurement authority. In Germany, Portugal and Spain, public authorities can check self-declarations and validity of documents with a central procurement register.⁹ In the US, the General Services Administration has an Excluded Parties List System available on the web.¹⁰

⁹ Simone White (ed), “Procurement and Organised Crime: and EU-Wide Study”, Institute of Advanced Legal Studies, 2000

¹⁰ For more information on how the US debarment system works, see US Government Accountability Office, “Federal Procurement: Additional Data Reporting Could Improve the Suspension and Debarment Process”, July 2005 and the George Washington University Law School, Public Law and Legal Theory Working Paper, No 88, “Suspension and Debarment: Emerging Issues in Law and Policy”, November 2003.

The Corner House recommends that the database should be public and available on OGC's website, in order to ensure transparency and accountability in how the Directive is being implemented. The database should list the name of the economic operator, reasons for exclusion, contracting authorities that have excluded the economic operator, and the length of time for the exclusion.

26. Introduction of varied but set time limits for exclusion.

There should be set periods of exclusion for economic operators depending on nature and severity of the offence, up to a limit of 5 years. Permanent exclusion may be suitable for some very serious offences which threaten the integrity of the procurement process (such as participation in a criminal organisation) or which may cause considerable loss to the taxpayer (such as repeat procurement fraud offences against public procurement bodies or procurement bodies that provide a public service). The OGC should state clearly in the guidance the recommended time limits for particular offences, including the criteria that procurement officials should take into account when coming to their decision. Criteria should include: whether the conviction has been 'spent', whether it is a repeat offence, the involvement of senior officers in the offence, whether the company reported the offence, whether the company has adequate systems in place or agrees to put such systems in place for detecting, preventing and sanctioning offences, and, in order to ensure greater equality of treatment, the economic size and market position of the operator (with the intention of protecting small businesses convicted of minor offences). *None of these criteria should be grounds for removal from exclusion, but only for the length of exclusion to be imposed.* During negotiations on article 45 of the Directive, there was a proposal put forward by the Council that an economic operator who "removed the cause of the conviction", for instance by punishing an employee who had committed acts without the operator's knowledge, could be exempted from the exclusion.¹¹ This approach was not adopted in the final version of the text and should not be taken by the OGC in its guidance. While the response of an economic operator to a conviction, including how swiftly it deals with employees responsible for offences, and the implementation of serious, concerted and independently certified measures to prevent repeat offences (including senior management responsibility for such measures and adequate resources assigned for their implementation), should be a factor to consider in how long an economic operator may be excluded, it should not be a grounds for removal from exclusion altogether. Where employees commit an offence without an operator's knowledge, it generally implies a failure of internal systems or a lack of adequate enforcement.¹² In circumstances, however, where an offence has been committed despite strong internal systems, there may be grounds for a very minimal exclusion period. In this situation, the onus must be on the economic operator to prove that this was the case, to provide evidence of its internal systems, and the contracting authority must provide a public, reasoned justification for not excluding the operator.

27. Anti-avoidance provisions: establishment of a broad scope for exclusion, including subsidiaries, subcontractors and companies with recently changed corporate identity.

¹¹ See Kirstine Drew, "Cracking Down on Corrupt Companies: a critical analysis of the EC's Public Procurement Proposals", PSIRU, September 2001

¹² See particularly the World Bank's procedures, described in Jon Moran, Jeremy Pope and Alan Doig, "Debarment as an Anti-Corruption Means: a review report", Report for the Utstein Group, September 2004, p 14

Without detailed guidance on the scope for exclusion, there would be further considerable loopholes that would allow economic operators to evade exclusion on a regular basis. EU economic operators may for instance seek to evade exclusion by using a subsidiary to apply for a contract, getting a ‘clean’ company to front a bid on which it may be a subcontractor or control by covert means such as shadow directors, or by changing corporate identity. This suggests that the Regulation should spell out clearly a ‘substance over form’ approach and that economic operators should be required to declare in their self-certifications that a) none of the subcontractors involved in the project, nor their directors, nor other relevant personnel have been convicted of the relevant offences, b) that neither their parent companies, sister companies nor subsidiaries, nor their directors nor other relevant personnel have been convicted of the relevant offences, and c) that the operator has not merged with or operated as another company that has been convicted of any of the relevant offences or whose directors or other relevant personnel have been convicted of the relevant offences, in the last five years. The Corner House believes that in order to ensure that loopholes are closed and that the exclusion process has its full deterrent effect, bids from economic operators whose subcontractors, subsidiaries/parent or sister companies, or whose previous companies were convicted of the relevant offences should also be treated as ineligible, subject to the same assessment criteria outlined in section 2 above.

28. Suspension of economic operators following charging until final conviction.

The Corner House believes that it may be appropriate for economic operators to be suspended while facing charges until final judgement is made. Some offences, particularly fraud and corruption offences, can take many years to prosecute. If companies facing prosecution are awarded public contracts, this would undermine confidence in the public procurement system, and also lessen the deterrent effect of exclusion. Suspension could also provide an incentive for individuals and economic operators to cooperate with investigating authorities. Suspension pending the outcome of an inquiry was recommended to the World Bank for precisely these reasons by the former US Attorney General. Case law in the UK allows for suspension from public procurement at pre-conviction stage. *R v London Borough of Enfield ex parte Unwin* (1989) established that firms may be suspended from government work if allegations are “detailed and credible”, and the conduct so serious that no responsible authority should continue the relationship, especially if substantial loss is likely. Under this ruling, firms should be given a general explanation of the reasons for suspension and be allowed to respond as soon as possible. Public authorities should ensure that they do all they can to ensure that the investigation then proceeds rapidly. In other member states, particularly France and Italy, exclusion is possible at investigation stage. The guidance should make contracting authorities aware of the possibility that they may exclude companies in these circumstances.

29. Whistleblower hotline.

The OGC establish and advertise a hotline whereby whistleblowers can report evidence of wrong-doing, false declarations etc. in relation to the procurement process.

F. Monitoring implementation: capacity at the OGC

30. If article 45 is to work in practice, it is essential that the OGC take a lead role in ensuring the exclusion system works, in providing advice and assistance to

procurement authorities and in monitoring implementation of the provision. OGC needs to ensure it dedicates adequate resources (both financial and human) to this. In particular the OGC needs to take on a lead role to ensure that contracting authorities in the UK are complying with article 45; to hold or ensure the establishment of a public and centralised database of companies in the UK that are liable for exclusion, with the length of time they are excluded, and ensure its continual update, including removal of companies after a set period of time; to ensure that a company excluded by one contracting authority is not awarded contracts by another; to monitor and hold a centralised and public database of derogations taken and justifications made for the derogations. **The Corner House recommends that the OGC designate particular staff, and preferably a small team to provide advice to contracting authorities. The Corner House also believes that OGC should provide regular training events to procurement officials on how to implement Regulation 23.**

G. International action to ensure greater harmonisation of systems for implementation of Article 45, and to encourage workable and fair exclusion systems internationally.

31. The current UK presidency of EU is a major opportunity to encourage best practice among Member States and to push for the necessary EU-wide instruments to ensure this article can work. In particular, the UK government should consider pushing at the EU for the following:

- inclusion of the offences outlined in paragraph 1 of article 45 to be included as ‘serious crimes’ for the purposes of the proposed Council Decision on the Exchange of Information from Criminal Records and for the proposed European Index System;
- an EU-wide agreement that contracting authorities in Member States will be allowed access to the information on criminal records from other Member States for the purposes of implementing article 45 of the Directive;
- an EU-wide database on excluded companies across Member States to be held and maintained (included regular updating and deleting) by Eurojust, and which contracting authorities can consult; and working for mutual recognition of exclusions, in the context of current EU level discussions on mutual recognition of disqualifications;
- monitoring of implementation of article 45 to ensure equality and fairness of treatment in public procurement across the EU (by DG Internal Market), particularly of use of derogations by contracting authorities, with regular reporting including to the European Parliament on how the article is being implemented;
- harmonisation across the EU of the implementing conditions of article 45, for instance length of time that companies or persons are excluded and exclusion of subcontractors and subsidiaries.

32. The UK government should also pursue in other international fora, such as the WTO, OECD and the UN, international agreement on the introduction of workable, fair, and proportionate exclusion systems.