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The revision of the public procurement legislation – *Public Consultation no 2*

Key messages

The need for digitalization, access to good data, and better tools to ensure fair competition and good procurement practices must be at heart in the revision of the PP directives. There is clearly a need for revised rules considering e.g. both the geopolitical situation and how organised crime operates. The rules should focus on enabling public value and procedural aspects and not on what to buy. The contracting authorities should not be subject to protectionist requirements or general obligations regarding "Made in Europe"/" European preference", i.e. caution should be exercised regarding this dimension. There must be room for contracting authorities to consider resilience, sustainability, innovation and SME participation, etc. whilst being able to do trade-offs between different objectives in the individual procurement procedure. Indeed, there must be a satisfactory degree of discretionary space for good procurement practices where the contracting authorities can integrate strategic goals in a way which is grounded in reality, measurable and actionable and which steer away compliance-driven practices. That also means e.g. that contracting authorities must still be able to use the lowest price criteria when deemed suitable by the contracting authority (however, see the suggestion regarding price floors below). The European Commission and the Member States must by way of policy and guidance continue the capacity building, equipping procurement officials to deal with an ever-increasingly more complex reality. Guidance could relate to e.g., an appropriate handling of intellectual property rights that does not stifle innovation and how to avoid relative price scoring.

1. Background and information about the NAPP

The Swedish National Agency for public procurement (hereinafter the NAPP) is a governmental agency with the mission to support and develop public procurement (hereinafter PP). Our statutory tasks include to promote legal compliance, efficiency, sustainability, and innovation in PP. We do this by offering support and guidance, for example manuals, guidelines, methods, tools, etc. We also do this by carrying out capacity building in form of trainings, seminars, workshops, etc. Furthermore, the NAPP is a statistics agency with a statutory task to develop, manage and disseminate statistics on PP. Since January 1, 2021, we are responsible for managing a statistics database where information from all procurement advertisements is collected. Lastly but not least, the NAPP has the statutory task to provide guidance to regions and local municipalities on state aid matters.

The support and guidance, etc, of the NAPP target both contracting authorities and suppliers as well as other stakeholders. It is noteworthy that while having a close dialogue with different stakeholders when performing our tasks, we often hear concerns regarding the EU PP rules from both the procuring and selling side as well as other stakeholders such as organisations striving to achieve different sustainability objectives. The concerns sometimes have to do with the rules at EU level, sometimes more specifically the Swedish implementation or the application of the rules by the contracting authorities or the Swedish supervisory authority, etc.

The annual turnover of PP corresponds to more than 18 % of the Swedish GNP. In Sweden there are approximately 4000 contracting authorities and a couple of large central purchasing bodies (hereinafter CPB). One large CPB, the National Procurement Services (*in Swe "Statens Inköpscentral"*), is primarily catering to the needs of the central government bodies. The National Procurement Services is currently a department within the central government agency Kammarkollegiet but will merge with the NAPP as of 1 January 2027. Another CPB, Adda, is catering to the needs of the regions and local municipalities.

The NAPP has previously written to the European Commission within the context of the evaluation of the PP directives. To be more precise, the NAPP – in addition to answering the online questionnaire – sent a letter during the first public consultation which ended in the beginning of March 2025 (see letter in Swedish dated 6th of March 2025, reference number of the NAPP UHM-2025-0083).

Below, under section 2 "General remarks", the NAPP reiterates and elaborates on some aspects of the PP rules where it would be beneficial with revised rules. Section 3 "Miscellaneous" contains more detailed reasoning and suggestions regarding certain aspects. Thereafter, in section 4 "Exclusion grounds", the NAPP elaborates on the needs to revise specifically the exclusion grounds in the PP directives and suggests some new wordings, etc.

2. General remarks

In line with the NAPP's previous letter to the European Commission, the NAPP would like to emphasize the following.

The PP directives should be merged into one (1) single directive. Furthermore, whilst doing that, inspiration should (for simplification reasons) be drawn from the Concessions directive. One or several regulations is not an option. Firstly, the European Commission stated already in 2014, in the context of the last revision, that there is no legal basis to adopt regulation(s) in this area. Secondly, the national needs and governance models vary to such a degree that a directive at any rate appears more appropriate.

Digitalisation saves time, provides traceability (which can be useful e.g. when fighting corruption and other violations and irregularities) and provides excellent sources for collecting data (including the training and use of AI) for many different purposes such as statistics, research, monitoring societal development as well as the contracting authority's own work with continuous improvement, et al.

Reasonably, there should be an obligation for all Member States to have a central database with at least Notices and, possibly, other useful data which can be used for different legitimate purposes by vetted stakeholders.

The need for digitalisation and access to good data must be at heart in the revision of the PP directives. Still, not all data can be turned into open data. The resilience perspective and the need to protect classified or sensitive information must not be forgotten, not the least considering the current geopolitical situation but also the fact that data, e.g., can be misused by organised crime.

As regards resilience and security aspects as well as not the least the need to ensure fair competition, there is according to the NAPP, a need for revised rules considering both the geopolitical situation and how organised crime operates. In this context it must be emphasized that a contracting authority has a legitimate interest to consider a lot of security concerns without them necessarily meeting the threshold for being "national security" or "essential security interests" according to EU law, including the ECJ jurisprudence. Clearly there exists, in the experience of the NAPP, a need to consider a kind of "public security", a broader concept encompassing more than national security and essential security interests. Such security interests create a need to e.g. carry out procurement without prior Notice to a larger extent than what is deemed possible today, exclude economic operators due to beneficial owners and certain natural persons exercising *de facto* influence over an economic operator, it reasonably affects the obligation to give free and full access to procurement documents, the right to rely on sub-contractors, it strengthens the argument for allowing price floors in procurement documents, etc.

Moreover, there is at general level a need for more market dialogue, more standards (preferably European ones) that the contracting authorities can refer to (and which steer away from e.g. having to compare apples and pears when evaluating tenders), a greater flexibility to amend procurement documents during the course of a PP procedure, greater flexibility to allow changes to requests to participate/tenders and to amend contracts during the contract term, an extended possibility to enter into longer framework agreements and a need to repeal the CoopService-jurisprudence which has only added to the administrative burden without any perceived real gains. Further, the distinction (and the purpose of the distinction) between irregular, unacceptable, or unsuitable tender must be made clearer[1]. Similarly, the concept of non-economic services of general interest should be clarified considering that there can be a market for almost everything.

As regards the issue of how to calculate the value of a contract, the following may be noted. The rules are (at least by many practitioners) perceived as not grounded in operational reality. For certain products and services where the needs of the contracting authorities are more or less statistic over time, it is possible for the contracting authority to predict a proximate annual consumption of such service or product and to consider that in the planning of the operations. For other products and services, the need varies more over time and/or is not so easily predictable since it might be linked to unexpected special initiatives or projects that must be carried out under strict time restraints, etc. In light of this reality, it should be thoroughly assessed by the European Commission whether the value of a contract could be estimated on the basis of *each* contract as long as it is not obvious that the contracting authority has an intent to circumvent the rules on publication of Notices, e.g. when the relevant supervisory body can detect a pattern over time indicating such an intent and the contracting authority cannot present any objectively convincing counterarguments. Indeed, the current rules are not always easily applicable in practice, and if a more easily applicable rule is introduced, the Member States should – in order to strike a proper balance between different needs – be obliged to give the relevant national authority(/-ies) the task to monitor the aspect of possible circumvention by e.g. artificial division into smaller contracts than what appears normal considering the spend pattern of the contracting authority within a specific service/product category over time.

As regards Dynamic Purchasing Systems (DPS), it should be assessed whether the limitation that DPS can apply only to “commonly used purchases” (article 34.1 in the classical directive) must be kept, and the time limits in article 34.5 should be prolonged since sometimes there are legitimate reasons for contracting authorities to take more than 10 (or 15) days to finalise their assessment of requests to participate.

Furthermore, contracting authorities’ right to introduce qualification systems should be extended to all sectors (and not be allowed only in the utilities sector).

[1] Not even ECJ seems to be able to make the distinction, see C-376/21, para 62.

Moreover, it should explicitly be mentioned in a preamble that CPBs are allowed to operate systems of choice and similar systems where the contracting authority provides for a qualification of suppliers but does not evaluate tenders, i.e. systems not falling under the scope of formal PP.

In addition, , there is a need for clearer rules on when contracting authorities may reserve contracts to non-profit organisations (the ASADE[2]-jurisprudence including e.g. the concept of "budgetary efficiency" is not easily applicable).

Also, the NAPP stresses the need to codify the Kolin[3]- and Qingdao[4]-jurisprudence in the new PP rules whilst considering e.g., the ECHR[5] and the doctrine of legitimate expectation.

Lastly, in the context of this section with more general remarks, the NAPP would like to point out that there is a need for rules allowing contracting authorities to carry out interim PP procedures without prior Notice/call for competition, when they face review procedures. Such interim PP contracts should not be allowed to cover a longer contract term than what is objectively needed.

3. Miscellaneous – specific suggestions more in detail

3.1 Market dialogue and negotiations

In order to enhance public value, market dialogue must be increased. The NAPP judges that it would, from a value for money perspective, be a great advantage if a rule creating a general possibility, but not an obligation, for contracting authorities to negotiate in every PP procedure was introduced. Thus, the EU legislator should not limit the possibility to only certain procedures. *Nota bene* that the suggested approach is already allowed according to the Utilities directive and seems to have worked well for those sectors.

Although negotiations take time and require skills to prepare and carry out in a value-adding way, the NAPP can't see any reason not to include the *possibility* in every procedure. As a minimum, the EU legislator should introduce such a rule as an option (or opt out) at Member State level. It is noteworthy that as long as a supplier can't be sure that its tender will be subject to negotiations, there is an incentive for the supplier to hand in the best possible bid already from the outset, i.e. a general right for contracting authorities to initiate negotiations will reasonably not make tenders less attractive for the public sector. Furthermore, if a particular Member State fears increased corruption due to the possibility of carrying out negotiations, there are ways to tackle this. Firstly, there are other tools to counter corruption than banning negotiations. Secondly, a potential new rule regarding negotiations could be framed as

[2] See case C-436/20
[3] See case C-652/22
[4] See case C-266/22
[5] The European Convention on Human Rights.

a Member State option (or a possibility to opt out from it if the new rule is worded the other way around). Such an approach would cater to the national needs of those individual Member States that deem a ban on negotiations to be a crucial tool to e.g. counter corruption. In this context, it must also be stressed that the contracting authorities should have the unilateral right to decide whether to use negotiations in an individual PP proceeding or not. Thus, the supplier should never be able to count on negotiations.

As regards the scope for negotiations, there is according to the NAPP a need for contracting authorities to, when appropriate, be able to negotiate most parts of the procurement documents, i.e. even mandatory technical provisions and commercial aspects, etc. Allowing a wider scope than what is the case under the current legislation, is a trade-off between on the one hand the interest of the suppliers that read the Notice and the procurement documents and decide not to bid and on the other hand the contracting authority and those suppliers that take the time to bid. Today, when a contracting authority under the course of an on-going PP procedure realizes that it has gone too far in its requirements, it generally has to interrupt the procedure and start all over again. This is a waste of money for many parties. Considering this it should, when reviewing the PP directives, be assessed whether the EU legislator can strike a new balance where the contracting authorities are allowed to negotiate more or less everything but the exclusion grounds, the qualification and award criteria, and further that while doing so the principle of equal treatment, transparency, non-discrimination, etc. is to be upheld in relation to those suppliers that have bid, and not in relation to those suppliers that decided not to do so.

3.2 Reference in procurement documents to Standards behind paywalls

According to the PP directives, procurement documents should be made available free of charge. This poses a challenge when it comes to referring in procurement documents to standards (as a point of reference or requirement) which are behind paywalls. Generally, both contracting authorities and suppliers, in NAPP's experience, appreciate the use of standards which (at least over time) can allow for more streamlining of requirements on the buying side and thus in the long run lower transaction costs (for all parties involved).

Nevertheless, when standards exist behind paywalls there is (at least in Sweden) a legal uncertainty as to whether the contracting authority is allowed to, in the procurement documents, refer to such standards or whether the contracting authority needs to negotiate a license agreement with the organisation issuing the standard to be able to include the actual standard (as e.g. an appendix) in the procurement document and make it available (free of charge) to the economic operators interested in the specific PP procedure.[6] In the experience of the NAPP, the license agreement models are not structured to be easily applied in a PP context. Still, in practice in many cases

[6] The implications of the case C-588/21 may be debated and possibly the implications of that case should be repealed or explained in the new PP rules to avoid legal uncertainty.

not only the contracting authority but also many (at least most mature and serious) economic operators have access to the relevant standards behind paywalls because they have chosen to buy a license at some point. However, some start-ups or small companies, etc. not having a license to use a particular standard and not having decided to carry out their operations according to a certain standard, may perceive contracting authorities' requirements in relation to such standard as a hurdle, regardless of whether the relevant standard(s) is/are behind paywalls or not.

Considering the above, there is a need for clearer rules at EU level. Further, in the opinion of the NAPP, when reviewing the rules it would be wise to include an *explicit* rule allowing contracting authorities to refer to standards (i.e. standards fulfilling certain requirements) regardless of whether the standards are behind paywalls. That would increase legal certainty, and it also seems appropriate considering the positive effects of standards and the license agreements models. Still, contracting authorities are of course expected to consider the possible detrimental effects on competition (considering the situation of SMEs, etc.) when referring to standards in a specific PP procedure. However, that aspect should not be subject to legislation but for the discretion of the contracting authorities.

3.3 The in-house (Teckal) and horizontal (Hamburg) exemptions– should be extended considering the legitimate need for organizational freedom at Member State level

There is (on the purchasing side) a perceived need for an extended possibility to apply both the in-house exemption (i.e. to revise the Teckal-jurisprudence) and the horizontal exemption (the so called Hamburg-exemption) considering the legitimate interest of the Member State to decide on how to organize their governance model at the state, regional and municipal levels, including the division of responsibilities between authorities at different levels and publicly owned companies.

As regards the in-house- exemption, as a minimum it should be thoroughly assessed whether the control criterion can be framed in a more flexible way that enables many contracting authorities to – within the meaning of a new revised control criterion - exercise joint control/decisive influence over the controlled entity without e.g. each of them having to have an individual representative in the board/not having enough shares to exercise a control similar to that over its own operations. A further prerequisite could be that the controlled entity must not have any objectives on its own which are contrary to the objectives of the contracting authorities. Furthermore, the prerequisites for using the in-house exemption must all together be drafted in a clearer way.

As regards the so-called Hamburg-exemption, the limitation that the exemption only applies if the contracting authorities are to achieve *common* objectives in carrying out their public functions should be revised and made more flexible. *Nota bene* that sometimes the objectives complement each other from a public interest perspective rather than being the same, and it seems reasonable that such situations explicitly should be covered by the horizontal exemption as well. The prerequisites of the

exemption should also be made clearer all together so that the exemption becomes more easily applicable in practice.

3.4 Rental agreements and public works contracts – need to revise the dividing line in view of the commercial reality et al

Another complex assessment which contracting authorities must do at their own peril under the current PP rules, is to identify the dividing line between rental agreements and Public Works Contract. By way of reminder, according to article 10 of the classical directive, the directive does not apply to Public Service Contracts for e.g., rental of existing buildings or other immovable property. However, Public Works Contracts on the other hand fall under the directive. Typically, when a contracting authority needs to rent an existing building or part thereof (e.g., the premises where it carries out its operations) refurbishments and sometimes bigger reconstructions of the building/premises need to be made to cater to the needs of the contracting authority. The commercial reality entails that the arrangement regarding the refurbishment/reconstruction often must be made with the owner of the property, the owner typically having its own preferred suppliers, etc. Then the question arises of whether the contract (rental combined with refurbishment/reconstruction) is still excluded from the scope of the directive or if is instead judged to be a Public Works Contract which normally must be procured with a prior Notice allowing competitive bidding. According to ECJ-jurisprudence, the line is crossed inter alia when "*the specifications requested by the contracting authority exceed the usual requirements of a tenant in relation to a building*". Another aspect to be considered according to the ECJ is whether a decisive influence can be identified: "*if it can be shown that that influence is exercised over the architectural structure of that building, such as its size, external walls and load-bearing walls. Stipulations concerning interior fittings may be regarded as demonstrating a decisive influence only if they are distinguished because of their specificity or scale.*" This assessment is a complex one and, at least in Sweden, it is a very contentious issue when a rental/lease agreement strays over the line and becomes a public works contract.

The challenge is sometimes similar when the contracting authority wants to build a new building on a specific piece of land/property (typically relevant pieces of land/property are scarce, at least in bigger cities): The relevant land/property can be owned by a construction company who is willing to sell the land or allow the construction of a building on it (which can be let to the contracting authority), but not to let a competitor carry out the Public Works Contract.

Considering the above, the current rules, including the ECJ-jurisprudence, pose a real risk of the contracting authorities violating the PP rules when pursuing their legitimate interests in getting access to buildings/premises catering to their needs. In the view of the NAPP, there is a need to revise and adapt the rules to the benefit of the contracting authorities in this area of the PP legislation.

3.5 The need for fair competition and greater safety for contracting authorities

Today organised crime and sometimes antagonistic countries (n.b. that they even sometimes work together) make use of not the least legitimate-looking companies to commit offences. Their modus operandi creates a significant risk in PP procedures. In this context it should be highlighted that organised crime often works cross-border. It is rather safe to say that realistically no Member State is protected from this development. In one of Europol's flagship reports, the latest European Union Serious and Organised Crime Threat Assessment (SOCTA) [7] Furthermore it is stated: "*Criminal networks and their activities are unhindered by borders, be it within the EU or between the EU and the rest of the world.*" Many of them are active in several Member States. . It should in this context be noted that many criminals do not start their own companies but rather buy existing companies (including so called companies with a history) that are legitimate at the outset/at the time of transfer of ownership. Allegedly, 80 per cent of limited companies with history are traded to individuals with a criminal intent.[8]

It is sad to say that the current PP directives and the evolved case law sometimes benefit unserious, including sometimes criminal, suppliers and create big risks for the contracting authorities having to accept suppliers and bids in situations where they genuinely fear insufficient quality during the contract term (despite fair promises in the tender), fear other kind of contract or regulatory violations (such as violations of workers' rights which can be difficult to prove). Thus, currently contracting authorities fear and risk having to do with not only unserious but to – a varying degree- sometimes even criminal companies, including owners of companies. In the NAPP's and many others' experiences this is because the contracting authorities do not presently have the proper tools to mitigate the fear and risks in a reasonable way.

When facing an economic operator in a PP procedure, the contracting authority might have access to no proof of convictions for relevant offences and the formal representation in the company board could look satisfactory, but still all the signs can be alarming and this for good reasons.

In parallel, serious suppliers fear having to compete with unserious, and sometimes criminal suppliers. In the NAPP's experience, this fear is sometimes great enough to be a disincentive for suppliers to even participate in PP procedures[9]. It is noteworthy that in a B2B context in the private sector the procuring body can disregard unserious suppliers in a much more flexible way than is currently possible under the PP

[7] Europol, *European Union Serious and Organised Crime Threat Assessment – The changing DNA of serious and organised crime*, Publications Office of the European Union, Luxembourg, 2025. The citations are found in the Executive summary.

[8] See the Report (in Swedish) "Historikbolag som brottsverktyg" from 2024 which is built on intelligence and information from a number of Swedish authorities combating crimes. The report can be found at the website of the Swedish Economic Crime Authority (www.ekobrottsmyndigheten.se) or by Google-search.

9 See e.g. this post by the Confederation of Swedish Enterprise for an example (in Swedish) Hederliga företag ska inte trängas ut av oseriösa aktörer .

directives. For that reason and more, PP procedures and public contracts present a good business opportunity for criminal actors. They usually follow the money.

It is in the NAPP's opinion alarming that unserious suppliers, that stand a slim chance of winning contracts in the private sector, find their way into public contracts. It is detrimental not only to fair competition, people in the supply chain, value for money, etc. but also to the very trust in public institutions, which is vital in a democracy.

Considering the above - in addition to digitalisation and access to good data - the possibility for contracting authorities to exclude (in a broad sense of the word) unserious suppliers must be at heart of the ongoing revision of the PP directives.

Inspiration on how to frame good tools to exclude and debar unserious suppliers can be drawn from the UK Procurement Act and publicly available guidance regarding the relevant UK provisions, etc.

Moreover, a good description on how criminals use companies as tools to commit different kind of criminal offences and regulatory violations may be found in the report 2025:20 from the Swedish National Council for Crime Prevention (in Swedish *Brottsförebyggande rådet*). The name of the report is *"Företag som brottsverktyg Upplägg, systemsårbarheter och kopplingar till den kriminella miljön"*. The report (published in December 2025) only exists in Swedish.[10]

As regards relevant reports dealing with criminals and companies, the NAPP to this letter encloses some samples:

1. An English summary of a very recent report to ESO (The Swedish name of the report is "2026:1 *Svarta siffror – en ESO-rapport om den kriminella ekonomins omfattning*"). ESO is a Swedish Expert Group on Public Economics attached to the Swedish Ministry of Finance. In the report published in January this year, the scale of the criminal economy (in terms of both turnover and profits) has been analyzed. The report also develops an analytical framework for defining the criminal economy and discusses measures to counter its development and consequences. The analysis is based on previous reports and studies from public authorities and international research.

2. The Report "*Stäng dörren för kriminella i välfärden – Strategiska åtgärder mot välfärdsbrott*" from the Confederation of Swedish Enterprise (in Swedish *Svenskt Näringsliv*), published in January 2026. The report only exists in Swedish. The report deals with the need to keep criminal actors away from the welfare system.

3. The report from the Confederation of Swedish Enterprise (in Swedish *Svenskt Näringsliv*) "Oseriösa företag i offentlig upphandling – Fler borde göra mer!", published in November 2022". The report only exists in Swedish.

[10] The report may be found at the following link Företag som brottsverktyg | Brå - Brottsförebyggande rådet

Furthermore, in section 3.6 and the following, the NAPP comes with some suggestions which in diverse ways touch upon the issue of unserious suppliers. In section 4, the NAPP specifically elaborates on formal exclusion grounds.

3.5.1 Excerpt from the ESO-report on criminal economy

In the ESO-report mentioned above, the following excerpt may be found in the summary in English (the summary is included in the report and enclosed as an appendix to this letter):

"*In addition to profits derived from directly criminal activities, substantial economic surpluses can also be generated through repeated and strategic breaches of regulatory frameworks within activities that are legal in principle. Such practices may include deviations from occupational health and safety requirements, working time regulations, rules on the posting of workers, collectively agreed wage levels, licensing requirements, or administrative reporting obligations. By systematically reducing or circumventing such costs, actors can achieve competitive advantages and profit levels that functionally correspond to traditional criminal profits, while being significantly more difficult to identify, quantify and sanction. These rule-based surpluses therefore constitute a central, but largely hidden, component of the criminal economy. A key consequence of this grey zone between legal and illegal activities is the so-called spillover effect. When some actors systematically breach rules in order to lower their costs, competitive pressure arises that may also force fundamentally compliant firms to adapt in order to survive in the same market. Over time, this entails the risk of normalising regulatory non-compliance, undermining competitive neutrality and weakening trust in regulatory and supervisory systems. As a result, these forms of systematic rulebreaking produce effects that extend beyond individual markets or firms and contribute to making the phenomenon systemthreatening rather than merely market-distorting – effects that are not fully captured in the estimates presented in this report. A central finding is therefore that the criminal economy is both extensive and systemically integrated. It does not consist solely of clearly delineated illegal markets, but of a complex interaction between legal and illegal activities, legitimate businesses, system exploitation and specialised criminal services. Many of the most profitable crimes are committed within legal structures and target welfare systems, financial systems and labour market institutions. System exploitation – such as benefit fraud, labour market crime and tax evasion – emerges as the most economically significant component of the criminal economy and the source of the greatest socio-economic harm.*

The report shows that the criminal economy should be understood as a system of economic opportunities, where profitability is driven by low risks of detection, weak control mechanisms, and an infrastructure of money laundering, front persons, false invoicing, shell companies and sector-specific vulnerabilities. It is therefore closely intertwined with the legal economy and dependent on both the services of legitimate actors and deficiencies in regulatory frameworks. Furthermore, the shadow economy is likely to be larger than traditional illegal markets such as drugs and arms trafficking, and many forms of organised crime are characterised by high

levels of rationality and strong economic incentives. Money laundering constitutes a key enabling mechanism, concealing otherwise visible financial flows."

3.6 Access to the procurement documents – not always for everyone

According to article 53.1 first paragraph in the classical directive, contracting authorities shall (by electronic means) offer unrestricted and full direct access free of charge to the procurement documents from the date of publication of a notice. Moreover, according to article 21.2 in the classical directive, contracting authorities may impose on economic operators requirements aimed at protecting the confidential nature of information which the contracting authorities make available throughout the procurement procedure.

In multi-stage procedures it may sometimes be beneficial for contracting authorities not to have to decide on all aspects of the procurement documents before publishing the Notice and asking for applications to participate as well as carrying out the qualification and possible selection among interested suppliers. Furthermore, sometimes contracting authorities are (e.g., by national security legislation) prohibited from sharing information with suppliers which are not vetted from a security perspective and then article 21.2 is not enough of a safeguard that confidential information will not end up in the wrong hands (including an antagonistic nation).

Hence, not the least in multi-stage procedures (i.e. procedures where the contracting authority first carries out qualification of interested economic operators, then possibly a selection among qualified suppliers and thereafter evaluation of tenders), there should - for e.g. security and other objectively legitimate reasons – by way of an explicit rule at EU level not be an obligation for the contracting authority to grant access to all of the procurement documents at the outset and in particular not to all interested suppliers. Instead, the contracting authority should have the *explicit* right to restrict access to those parties that are invited to, e.g., the 2nd stage and that have been vetted from a security perspective/judged trustworthy from a security perspective. Still, in order to strike a proper balance with the suppliers' needs, the decision not to invite an interested party to the 2nd stage should be open to appeal (cf. the right to effective remedies, which is a particularly important principle). Also, the part of the procurement documents that are made available via e.g. a link in the Notice/in the 1st stage, should contain enough information to enable suppliers to assess whether they are interested in the contract and reasonably also whether they (from an overall perspective) stand any chance of winning it. That is, there must still be a general level of transparency. If not even that minimum level of transparency can be upheld in the Notice due to security reasons, then the contracting authority must be able to choose a PP procedure without prior Notice.

3.7 Abnormally low tenders – explicitly wider possibilities to reject such tenders plus an explicit possibility/right for contracting authorities to establish "price floors"

In the Swedish experience it is very difficult (and in practice often perceived as more or less impossible) for a contracting authority to successfully reject a tender which is judged abnormally low by the contracting authority. The reason being that the decision to reject it will in many cases be overturned in court[11]. This is in turn due to the contradictory/adversarial procedure introduced in the 2014 PP directives [12] resulting in suppliers having "learnt how to write" (sometimes only good looking) replies to questions from contracting authorities regarding a price level which is perceived as abnormally low. This benefits unserious (including sometimes criminal) suppliers and creates big risks for the contracting authorities having to accept bids in situations where they genuinely fear insufficient quality during the contract term (despite fair promises in the tender), fear other kinds of contract or regulatory violations such as violations of workers' rights which can be difficult to prove.

The assessment of whether an abnormally low tender is at hand is a complex issue. E.g., profit margins vary between different sectors, markets, etc. and in a market with fierce competition and squeezed profit margins already a very slight difference compared to a perceived normal/more average price level, can entail risks from various perspectives.

As a consequence, and in view of the on-going revision of the PP directives, in Sweden many contracting authorities and serious suppliers currently ask for - at EU level- an explicit 1) wider possibility for contracting authorities to reject abnormally low tenders as well as a 2) possibility for the contracting authorities to, at their choosing, apply price floors in order to steer away from abnormally low tenders. The need for such clearer rules at EU level exists in particular in sectors with labour-intensive services, low profit margins and/or where unserious/criminal suppliers tend to operate for other reasons (n.b. the criminals' preferred sector is not a statical thing, they can jump between different sectors depending on where vulnerabilities are discovered) but also e.g. when procuring framework agreements without an obligation for contracted suppliers to accept call-offs.

In short, the NAPP has identified a need for the EU legislator to somehow tweak the wording of the relevant provision regarding abnormally tenders so that the adversarial procedure is kept but giving the contracting authority a wider possibility to reject the

[11] In this context it may, as a point of curiosity, be noted that the threshold for bringing a PP proceeding to court in Sweden seems to be low compared to the situation in many other Member States. For instance, the supplier does not have to pay any application fee, and the supplier does not really risk anything more than the time spent on the statements/writs to the court in the case under review, including the possible cost for lawyers that the supplier may choose to hire for the case.

[12] According to the classical directive, contracting authorities shall require economic operators to explain the price or costs proposed in the tender where tenders appear to be abnormally low in relation to the works, supplies or services (Article 69.1). The tender may only be rejected where the evidence supplied does not satisfactorily account for the low level of price or costs proposed (Article 69.3).

tender if the explanations appear stereotypical offering no real/convincing proof that the supplier is in a better position than competing tenderers, etc. It is noteworthy that it is exceedingly difficult for the contracting authority to prove that the supplier cannot afford a tender with a very low price level or that the supplier intends to violate regulations, etc. It is even more difficult for a court – in the context of a review procedure (which are numerous in Sweden) – to assess whether the supplier's explanations are in fact true and reasonable or if the low price create a concrete risk. Suppliers can (sometimes with the help of lawyers) write explanations/replies to the contracting authorities which may look good on paper and use phrases that have been accepted in previous court cases regarding abnormally low tenders. The consequence in Sweden being that sometimes not only 0 SEK/euro bids have had to be accepted but even *negative* prices. In short, in cases where the supplier e.g. explains that the company can afford an extremely low price and e.g. argues that it is a strategic PP deal where the supplier is willing to take a loss to gain market shares, etc., in such cases it is difficult for the contracting authority to rebut that there is not any convincing evidence that the tender is sound and reliable. Nevertheless, should/must the bid be accepted, then the contracting authority can face a very demanding contract term where the supplier will look for loopholes, etc. in the contract, not deliver the expected quality, etc.

In this context it could of course be noted that generally a supplier wants, and has a most legitimate interest, to be able to compete with its best price and does not, as a starting point, appreciate price floors. Still the introduction of price floors, when used wisely, is in the NAPP's experience a tool which suppliers (and not only contracting authorities) see a concrete need for in order to ensure fair competition. The application of price floors means that the contracting authority, in the procurement documents, establishes a minimum level of price(s) or cost at an aggregate or, sometimes, when the tender contains different price categories or price components, at a more granular level. If the tender does not meet this/these minimum price (or cost) level(s), the contracting authority wants to be able to reject the tender outright without recourse to an adversarial procedure, i.e. an immediate rejection without prior dialogue.

Furthermore, the right for the contracting authority to establish price floors/minimum levels in the individual PP procedure should *not* be limited to e.g. given only circumstances where more than e.g. 50 per cent of the estimated value consists of labour costs since such an approach would give rise to a new administrative burden and legal uncertainty whether the 50% threshold is met. There is instead a need for a clear cut and easily applicable rule allowing contracting authorities to use minimum price/cost levels as a tool when they see a need for it. In this context, it should be noted that in many cases it is in the contracting authority's interest to allow full price competition and in all such cases the suppliers' legitimate interest in competing with their best price can be met. An additional argument for introducing at EU level an explicit right to allow price floors, is that it reasonably entails bigger chances of winning for suppliers focusing on delivering quality in their tenders (should it be goods, services or public works). As the European Commission is well aware of, many

voices have been raised in favor of a larger focus on quality and less on price in PP procedures.

If the European Commission does not deem it appropriate to introduce this right as a general right for contracting authorities, at least it should be introduced as a Member State option in the new PP legislation.

On a more granular level it should, when it comes to abnormally low tenders, be carefully considered whether it might be wise to change the *obligation* to reject ("shall") back to a general *right* ("may") to reject. Whereas "shall" (at least on the face of it) sends a strong signal to suppliers to act in a serious way, it also creates a risk (at least in a Swedish context) that the contracting authority faces review procedures in court if a competing supplier does not accept that the low tender from a competitor has not been rejected. Depending on whether the EU legislator finds it reasonable that a decision not to reject should be appealable in light of the remedies directive, that situation may or may not be satisfactory. Viable solutions here could be to introduce an explicit rule making it up to the individual Member State to decide whether such non-decision should be appealable or not. Another alternative is that the Member States are allowed to choose between "shall" and "may" considering their national needs and national systems. In view of the reasoning in this paragraph, the NAPP, most tentatively, writes "may reject" (and not "shall reject") and empowers the Member States to decide otherwise in the right column in the table below.

Below, the NAPP has tentatively drafted a revised rule regarding abnormally low tenders and a new rule regarding price floors.

Current wording (directive 2014/24)	**Suggested new wording in a new act**
"*Article 69.3* **Abnormally low tenders** The contracting authority shall assess the information provided by consulting the tenderer. It may only reject the tender where the evidence supplied does not satisfactorily account for the low level of price or costs proposed, taking into account the elements referred to in paragraph 2. Contracting authorities shall reject the tender, where they have established that the tender is abnormally low because it does not comply with applicable obligations referred to in Article 18(2)."	*"The contracting authority shall assess the information provided by consulting the tenderer. It may reject the tender where the evidence supplied does not conclusively account for the low level of price(s) or cost(s) proposed. Member States may provide that contracting authorities shall reject the tender, making rejection mandatory. "*
Article 67.2 (second paragraph) **Contract award criteria**	*Unchanged*

"The cost element may also take the form of a fixed price or cost on the basis of which economic operators will compete on quality criteria only."	
	New third paragraph *"The cost element may also take the form of a minimum price or cost on the basis of which economic operators will compete solely on the basis of prices/costs which are not below the minimum established by the contracting authority in the procurement documents. Contracting authorities may establish such minimum price or cost levels when evaluating merely the price or cost element as well as when using an award criteria including the best price-quality ratio.*

3.8 Evaluation criteria – past performance

Considering what has been mentioned above regarding the need for contracting authorities to focus on serious suppliers, it ought in the NAPP's view to be *explicitly* allowed for contracting authorities to evaluate bids on the basis of previous performance of the supplier. This is common in a B2B-context in the private sector and is reasonably a legitimate interest for contracting authorities as well. The obligation for the contracting authority to focus on the quality of the service(s)/good and not on the quality of the supplier when evaluating a tender seems inappropriate. Although there are currently ways for the contracting authority to consider (indirectly) the past performance of the supplier in a tender evaluation, it is unnecessarily complicated. An argument for not allowing evaluation of past performance straight out is that such an approach could – depending on how it is structured – be a hurdle for start-ups. In this context, it can be noted that not only the previous performance/track record of the economic operator but also of the representatives of the economic operator might be of interest for the contracting authority. If that dimension is duly considered by the contracting authority and reflected in the framing of the requirements, it can enable some start-ups to compete with more mature suppliers. Still, evaluation of past performance could of course be a hurdle for start-ups with leading representatives without previous business experience. If a new rule at EU level explicitly allowing evaluation of past performance was introduced, it is of course in the interest of the contracting authorities to (in the individual PP procedure) assess if the advantages of evaluating past performance outweigh the interest of making it easy for start-ups (which might e.g. have a more innovative approach than more established suppliers) to participate and win the PP procedure. In this context, it must be emphasized, as the NAPP pointed out in its previous letter to the European Commission, that all objectives cannot be met in one and the same PP procedure. In practice, trade-offs have to be made. And those trade-offs should, in the NAPP's view

generally be made by the contracting authority and not at EU level (unless the EU legislator is able to provide for adequate flexibility).

4. Exclusion grounds

In this section, the NAPP elaborates on the need to revise the current exclusion grounds and put forward some suggestions as regards possible solutions in the new PP rules at the EU level.

In some PP procedures, notably, but not exclusively, those involving security or defense concerns, the contracting authority may currently feel obliged to withhold the contract from competitive bidding primarily because of the exclusion grounds in the PP directives. Otherwise put, the contract may be subject to a direct award mainly because the contracting authority foresees difficulties in restricting the participation to sound and serious bidders using the exclusion grounds in the directives, while the contract itself is amenable to competitive bidding. Similarly, competitive bidding for a particular contract may be incompatible with national security legislation due to the perceived inability to ensure a sound procedure due to the exclusion grounds, which may force the contracting authority to award it directly while competitive bidding may otherwise have been possible.

Furthermore, notwithstanding security and defense concerns as well as national security legislation, the current exclusion grounds are not deemed satisfactory considering the need to ensure fair competition including the need to exclude unserious and sometimes even criminal suppliers from public contracts.

4.1 Mandatory exclusion grounds due to criminal convictions

According to Article 57.1 in the classical directive contracting authorities shall exclude an economic operator where that economic operator has been the subject of certain criminal convictions. The article refers to certain acts of union law (with the exception of corruption [Article 57.1 (b)], which includes "*corruption as defined in the national law of the contracting authority or the economic operator*".

In practice, the relevant means of proof such as an extract from judicial records (cf. Article 60.2 (b)) makes no reference to these acts of union law but rather national criminal law. This presents a challenge for contracting authorities as well as economic operators as this requires them to compare national criminal judgments concerning economic operators (in practice judgments concerning certain *functionaries*, at least in Sweden where only natural persons can commit crimes) with the listed union legal acts to decide whether the economic operator should be excluded or not. In our experience, few contracting authorities possess the necessary knowledge of criminal law to decide whether a certain national criminal judgment falls within the scope of the various union legal acts or not.

The NAPP therefore suggests that the corresponding rules in the new PP legislation explicitly state that it falls within the remit of the national legislators to authoritatively

identify and stipulate what provisions of national criminal law corresponds to the catalogue currently presented in Article 57.1. In other words, it should not be necessary for contracting authorities to consult the acts of union law referred to in this article to decide whether an economic operator must be excluded or not.

At the very least, all the points in this subparagraph should make explicit mention of definitions in national law of the contracting authority in the same way as Article 57.1 (b) currently does.

Current wording (directive 2014/24)	**Suggested new wording**
"By law, regulation or administrative provision and having regard to Union law, Member States shall specify the implementing conditions for this Article."	*"By law, regulation or administrative provision and having regard to Union law, Member States shall specify the implementing conditions for this Article. They should also specify what offences in national criminal law for the purpose of application of this directive corresponds to the cases those referred to in paragraph 1."*

Furthermore, the contracting authority, in order to comply with the rules, needs to check for convictions in other countries and not only in the Member state where the contracting authority is established. As far as the NAPP is aware, there is currently no realistic way for a contracting authority to carry out such control. This dimension must be considered in the revision of the PP directives as well as the fact that in some Member States only natural persons can commit crimes. Indeed, in order to meet the objective of the rules regarding criminal convictions, a contracting authority cannot only check the economic operator (usually a company) but needs to check an unknown number of natural persons that are members of the "administrative, management or supervisory body" (and in the opinion of the NAPP, this current list is not enough to enable to a satisfactory extent the exclusion of criminal actors from public contracts, see reasoning along this line further down). And within the EU, the GDPR as well as other national legislation can create obstacles for contracting authorities to obtain the information necessary to carry out such control of individuals' convictions.

4.2 Consequences of non-mandatory grounds for exclusion made mandatory in national law

The classical directive distinguishes between mandatory and non-mandatory grounds for exclusion (cf., for instance, Article 57.3 second subparagraph and Recitals 100-101). This delineation is also evident in both the ESPD-regulation and the eForms-regulation.

It follows however from Article 57.4 first subparagraph and Article 57.5 second subparagraph, that Members States in the national PP legislation may require contracting authorities to exclude economic operators where a non-mandatory ground for exclusion applies – in other words make non-mandatory exclusion grounds

mandatory. However, transposing non-mandatory grounds for exclusion in the directive as mandatory grounds in the national legislation creates a series of challenges, notably concerning the role of representatives (Article 57.1 second subparagraph), time limits for exclusion (Article 57.7), and the rules regarding means of proof in Article 60.

For instance, a Member State may opt to require exclusion of economic operators where the company is convicted of certain crimes in addition to the ones listed in Article 57.1. Does implementing non-mandatory grounds for exclusion as mandatory grounds enable the Member States

- to require exclusion in situations where the crime is attributed to a representative rather than company?
- to provide for a maximum period of exclusion of five rather than three years?

Does such a requirement in national law affect which means of proof (evidence) the Member State may require or allow contracting authorities to accept from the economic operator in conjunction with this ground for exclusion?

Moreover, Article 57.7 requires Member States to specify the implementing conditions for this Article (i.e., exclusion grounds). The scope of this remit is unclear, as illustrated by the example in the previous paragraph. More precisely – does Article 57.7 accord any particular or additional leeway or latitude in the transposition of the requirements regarding exclusion than is generally the case when implementing union directives (as alluded to in Article 90.1)?[13]

4.3 National exclusion grounds

It is clear from the wording of the ESPD-regulation[14] as well as the eForms-regulation[15] that EU law allows Member States to include "national exclusion grounds" in their PP legislation. The NAPP assumes that these provisions are based on the jurisprudence from the European Court of Justice, C-213/07 *Michaniki* and later judgments, that allow Member States to maintain or adopt additional grounds for exclusion. However, this is not mentioned in the PP directives themselves, which gives the impression that the catalogue of exclusion grounds is comprehensive and harmonized. According to the NAPP, it is important that the right to include national exclusion grounds is explicitly mentioned in the new PP rules at EU level. Such national rules must of course not hamper the free movement/cross-border trade in an undue way but should serve legitimate objectives such as excluding unserious suppliers regardless of their nationality.

Further, in addition to adding an "other grounds for exclusion" to the list in the new PP legislation, such a new rule might explicitly have to mention that the incorporation

[13] The only other article of the directive that expressly provides for this option is Article 71.8.
[14] Confer Part III. Exclusion criteria, Section D in the ESPD-regulation (Commission Implementing Regulation (EU) 2016/7 of 5 January 2016 establishing the standard form for the European Single Procurement Document).
[15] Confer fields BG-701 and BT-67 in the eForms-regulation (Commission Implementing Regulation (EU) 2019/1780 of 23 September 2019 establishing standard forms for the publication of notices in the field of public procurement and repealing Implementing Regulation (EU) 2015/1986 ('eForms')).

of additional exclusion grounds falls within the remit of the *contracting authorities*, not just the *national legislator* or at least that the Member States have the right to opt for such an approach in their national legislation. This is because given the vast plethora of demands in e.g., the so-called EU sectoral files, it might simply in practice not be sufficient to allow national legislators to expand upon the list of possible exclusion grounds. *Nota bene*, in order for the contracting authorities to comply with the sectoral files (including delegated acts), the conditions might have to be tailored to the specifics of each PP procedure. It is currently unclear whether this is possible – for instance, the ESPD-regulation contains the wording *"Do the purely national grounds of exclusion, which are specified in the relevant notice or in the procurement documents, apply?"* This aspect must be thoroughly assessed and made clear when reviewing the directives.

To sum up, at the very least, the new PP legislation should explicitly allow for national exclusion grounds (as does the ESPD-regulation and eForms-regulation).

Current wording (directive 2014/24)	**Suggested new wording**
"By law, regulation or administrative provision and having regard to Union law, Member States shall specify the implementing conditions for this Article."	*"By law, regulation or administrative provision and having regard to Union law, Member States shall specify the implementing conditions for this Article. They may also specify other grounds for exclusions than those referred to in paragraphs 1–4."*

4.4 Representation and persons linked to the economic operator

According to Article 57.1 *in fine* in the classical directive, the obligation to exclude an economic operator which is subject of a conviction by final criminal judgment, also applies where the person convicted by final judgment is a member of the administrative, management or supervisory body of that economic operator or has powers of representation, decision or control therein ("representative"). The rules do not state that the criminal offence, to be actionable in this sense, needs to have been performed while representing the economic operator participating in the PP procedure. Also, such a limitation would in the NAPP's experience be very detrimental to the overriding purpose of the exclusion grounds. A company cannot have an intent to commit a crime. It is natural persons using companies as tools that are problematic. For reasons of legal certainty, the NAPP experiences a need for a wording in the new PP legislation that makes it clear that relevant criminal offences committed by a natural person connected to the economic operator must not have a link to the economic operator (the same is valid for many of the other exclusion grounds).[16] Instead, it is the link between the unserious and criminal or unserious natural person and the economic operator that is relevant. And the focus cannot only be on formal

[16] Confer C-178/16 *Impresa di Costruzioni*, points 34-36.

links, including direct ownership. Rather on the contrary, the track record of beneficial owners as well as e.g., natural persons with a *de facto* influence over the economic operator should be able to constitute grounds for exclusion as well. Further, it must be emphasized that this line of reasoning applies to many of the exclusion grounds, such as agreements distorting competition and grave professional misconduct. Similarly, the consequences of misconduct of subcontractors should be clarified.[17]

4.5 Maximum period of exclusion (time limits for exclusion)

According to Article 57.7 in the classical directive, Member States shall determine the maximum period of exclusion if no measures are taken by the economic operator to demonstrate its reliability.

These limitations have several consequences.

Firstly, when these rules are applied to exclusion due to the criminal convictions listed in article 57.1, it may very well be the case that excluding the economic operator from a procurement procedure is no longer possible despite the individual convicted of the crime still being imprisoned for that offence. Five years imprisonment for offences such as participating in a criminal organization, terrorist offences, or trafficking (for example) is certainly not considered exceptional or excessive.

The same argument applies to several of the discretionary exclusion grounds. For instance, some offences and types of misconduct are difficult for the competent authorities to identify, and complicated to investigate, analyze and prosecute or otherwise act against. In these situations, a maximum period of exclusion of three years *from the date of the relevant event* may be considered simply too short a time span to allow the effective application of these rules (considering their purpose). It follows from the judgment in C-124/17 *Vossloh* that for reasons of foreseeability and legal certainty, the period of exclusion can be calculated from the date of the decision in an infringement proceeding of a competent authority, rather than from the infringement itself (cf. point 38 of that judgment). Consequently, it can be feared that many cases of relevant misconduct that should disqualify the economic operator from participating in procurement procedures fall outside the reach of the current rules.

Secondly, there seems to exist a type of “twilight zone” in situations where a relevant criminal offence has not yet resulted in a conviction by final judgment. Under the current rules, a criminal offence may result in exclusion with application of some of the discretionary grounds for exclusion where the offence has not yet rendered a final judgment (this offence may, for instance, amount to grave professional misconduct). However, this is only possible for up to three years *from the date of the relevant event*. If the offence in time results in a final judgment for one of the crimes listed in Article 57.1, exclusion is now mandatory up to five years *from the date of the conviction*. Between three years after the relevant event, and the date of the final judgment for the

[17] Confer C-395/18 *TIM* points 35 and 39–40.

criminal offence, the current rules seem not to allow for exclusion of the economic operator in these situations at all.

Thirdly, the current wording of the rule means that time limits for exclusion depend on whether the period of exclusion is determined by a "final judgment" or not. The time limits specified in this Article only apply to situations where the period of exclusion has not been set by final judgment (i.e., in Member States whose national legislation does not provide for this option, or for PP procedures where such a system does not apply). In other words, the constraints posed by Article 57.7 do not apply horizontally to PP procedures within the EU, but only to Member States and procedures where the period of exclusion is not set by a final judgement by another entity.

Current wording (directive 2014/24)	**Suggested new wording**
"By law, regulation or administrative provision and having regard to Union law, Member States shall specify the implementing conditions for this Article. They shall, in particular, determine the maximum period of exclusion if no measures as specified in paragraph 6 are taken by the economic operator to demonstrate its reliability. Where the period of exclusion has not been set by final judgment, that period shall not exceed five years from the date of the conviction by final judgment in the cases referred to in paragraph 1 and three years from the date of the relevant event in the cases referred to in paragraph 4."	*"By law, regulation or administrative provision and having regard to Union law, Member States shall specify the implementing conditions for this Article. They may, in particular, determine the maximum period of exclusion, which may be set differently for mandatory and non-mandatory grounds for exclusion."*

4.6 Measures taken by an economic operator to demonstrate its reliability ("self-cleaning")

According to Article 57.6 of the classical directive, an economic operator may take measures to demonstrate its reliability despite the existence of a relevant ground for exclusion. While this conclusion to some extent follows from the principle of proportionality, contracting authorities sometimes are obliged to accept economic operators as suppliers following public procurement procedures despite the existence of a relevant ground for exclusion.

When revising the exclusion grounds, it should, according to the NAPP, be thoroughly assessed by the European Commission whether it should be a prerogative of the contracting authority to allow for self-cleaning in PP procedures. At the very least, it should be considered whether the new PP rules should indicate that it falls within the remit of the contracting authority to examine and accept or reject the economic operator's arguments for inclusion in the PP procedure despite the existence of an exclusion ground.

Current wording (directive 2014/24)	Suggested new wording
"Any economic operator that is in one of the situations referred to in paragraphs 1 and 4 may provide evidence to the effect that measures taken by the economic operator are sufficient to demonstrate its reliability despite the existence of a relevant ground for exclusion. If such evidence is considered as sufficient, the economic operator concerned shall not be excluded from the procurement procedure. For this purpose, the economic operator shall prove that it has paid or undertaken to pay compensation in respect of any damage caused by the criminal offence or misconduct, clarified the facts and circumstances in a comprehensive manner by actively collaborating with the investigating authorities and taken concrete technical, organisational and personnel measures that are appropriate to prevent further criminal offences or misconduct."	*"A contracting authority may allow that an economic operator that is in one of the situations referred to in paragraphs 1 and 4 may provide evidence to the effect that measures taken by the economic operator are sufficient to demonstrate its reliability despite the existence of a relevant ground for exclusion. If the contracting authority considers such evidence sufficient, it may elect not to exclude the economic operator from the procurement procedure.* *In examining the measures taken by the economic operator, the contracting authority may consider whether the economic operator has proven that it has paid or undertaken to pay compensation in respect of any damage caused by the criminal offence or misconduct, clarified the facts and circumstances in a comprehensive manner by actively collaborating with the investigating authorities and taken concrete technical, organisational and personnel measures that are appropriate to prevent further criminal offences or misconduct."*

4.7 Replacement of entities which are relied upon

The classical directive allows economic operators to replace entities that they rely upon to meet the selection criteria in a PP procedure (article 63.1 second paragraph). This possibility gives rise to legal uncertainty such as whether an economic operator may successively – even indefinitely – replace entities which cannot be accepted. It is also unclear what deadline contracting authorities should allow economic operators when replacing entities. In addition to the increased administrative obligations placed on contracting authorities, application of this provision may also delay the conclusion of the procedure which is detrimental to most participants.

It is the view of the NAAP that economic operators are responsible for choosing subcontractors and entities which they rely on that meet all relevant criteria and prerequisites. The possibility of replacing entities should therefore reasonably, in the new PP legislation, be formulated as a rule that gives the contracting authority the mandate to allow economic operators to replace entities, and not as a right för economic operators to do so irrespective of circumstances.

Current wording (directive 2014/24)	Suggested new wording
"The contracting authority shall require that the economic operator replaces an entity which does not meet a relevant selection criterion, or in respect of which there are compulsory grounds for exclusion. The contracting authority may require or may be required by the Member State to require that the economic operator substitutes an entity in respect of which there are non-compulsory grounds for exclusion."	*"The contracting authority may allow the economic operator to replace an entity which does not meet a relevant selection criterion, or in respect of which there are compulsory or non-compulsory grounds for exclusion."*

4.8 The European Single Procurement Document

The 2014 classical directive introduced the European Single Procurement Document (ESPD). From a Swedish perspective, the ESPD is considered a failure that further complicated those PP procedures for which the provisions apply with no or few corresponding benefits or ameliorations. The shortcomings of the ESPD can be attributed to several factors:

- The terminology and wording of the ESPD-regulation differ from that of corresponding provisions of the PP directive, which in turn (at least in Sweden) is different from that of national PP legislation. This creates uncertainty as to what information should be provided in the various fields of the ESPD, in particular among economic operators unfamiliar with PP procedures and PP legislation.

- This uncertainty is further aggravated by the fact that the wording of the relevant provisions also differs from that of eForms and the provisions regarding Notices in the directives. Since contract Notices and the procurement documents typically contain information regarding selection criteria and exclusion grounds, this creates additional uncertainty as to what information should be provided in the ESPD.

- In particular, SMEs and economic operators new to PP who are confronted with the document find its extensiveness and complexity discouraging. There are examples of PP procedures where the ESPD forms a more extensive portion of the procurement documents than the other parts combined.

- The underlaying idea of asking economic operators whether they meet the criteria etc. set forth in legislation or the procurement documents is fundamentally faulty. Criminal, dishonest, or careless economic operators and their representatives are obviously unlikely to voluntarily provide information and evidence regarding past and present misconduct. Tenderers are more likely to be excluded from PP procedures due to misunderstandings and mistakes than for providing information that amounts to evidence that there exists a ground for exclusion.

- Moreover, it is unclear whether use of the ESPD is mandatory for contracting authorities: according to the wording of Article 59.1 "contracting authorities shall accept" the ESPD. That does not necessarily entail its mandatory use in

all PP procedures. It is the understanding of the NAPP that contracting authorities and economic operators alike – to the extent allowed for in the PP directives – tend to refrain from using the ESPD at all.

- Finally, it seems that the idea that the ESPD is a European *Single* Procurement Document has proven misguided in practice. The various Member States, contracting authorities and procurement system providers have interpreted and applied the provisions on the ESPD differently. There also exists a multitude of approaches to its incorporation in procurement systems and national databases. Consequently, an economic operator participating in PP procedures in several Member States, or even procedures run by different contracting authorities in the same state, are unlikely to perceive the ESPD as a standardized document. This situation is likely exacerbated by differing perceptions as to whether use of the ESPD is mandatory in procedures governed by the directive (see previous point).

The NAPP concludes that the provisions regarding the ESPD should be entirely removed from the new envisaged PP legislation. Notwithstanding this conclusion, the new rules should reasonably provide for the Member States and/or contracting authorities accepting self-declarations as *preliminary* evidence in PP procedures.

Current wording (directive 2014/24)	**Suggested new wording**
"Article 59 **European Single Procurement Document** *… "*	*"Member States may in their national legislation accept, or allow contracting authorities to accept, self-declarations as preliminary evidence confirming that the economic operator is not in one of the situations where a ground for exclusion applies, and that it meets the relevant selection criteria."*

4.9 Exclusions grounds in EU sectoral files

In recent years, the European Union has adopted numerous new directives and regulations that contain provisions which apply to PP procedures (nowadays sometimes called "EU sectoral files"). Many of these in turn contain rules that are parallel, or similar, to the exclusion grounds in the current PP directives. Some examples:

- According to the regulations that instituted the **restrictive measures against Russia**, it is prohibited to award any public or concession contract falling within the scope of the public procurement Directives.[18]

- The **International Procurement Instrument** provides the possibility for the Commission to impose measures against economic operators, goods, or services from third countries to Union public procurement procedures. One

[18] Adopted through Council Regulation (EU) 2022/576 of 8 April 2022 amending Regulation (EU) No 833/2014 concerning restrictive measures in view of Russia's actions destabilising the situation in Ukraine, article 5k.1.

such measure is to exclude tenders submitted by economic operators originating in that third country.[19]

- The **Deforestation regulation** allows for a penalty in the form of temporary exclusion for a maximum period of 12 months from public procurement processes (Article 25.2 d).[20]

- The **Foreign Subsidies Regulation** mandates the Commission to adopt an implementing act in the form of a decision prohibiting the award of the contract to the economic operator concerned (Article 31.2).[21]

This development gives rise to a range of new questions and challenges in PP procedures. For instance, do these provisions amount to additional exclusion grounds, or should they be classified as something else? Those provisions that should be categorized as additional exclusion grounds, do the "auxiliary" provisions in the PP directives regarding time limits, self-cleaning, and the ESPD apply? Similarly, what rules regarding evidence apply, and should e-Certis contain information regarding these rules?

In the view of the NAPP, this aspect needs to be dealt with when reviewing the PP directives.

4.10 Subcontracting

In this context, it should firstly be noted that the meaning of "sub-contractor" is not always clear under the current PP rules and that the concept is of importance when applying exclusion grounds relating to sanctions decided by the EU (e.g. sanctions against Russia), when qualifying economic operators, when evaluating tenders as well as when defining the contract terms.

Furthermore, the NAPP would like to stress that there is a difference between a rule at EU level that reduces the possibility for economic operators in PP procedures to depend on subcontracting, an option to introduce such a limitation at Member State level, and, at EU level (or as an option for Member States) making such a possibility available to contracting authorities in individual PP procedures. There is already a (limited) possibility for contracting authorities to limit the right for economic operators to rely on sub-contractors when carrying out the contract (Article 63.2 in the classical directive). That rule should preferably be worded in a clearer way.

[19] Regulation (EU) 2022/1031 of the Parliament and of the Council of 23 June 2022 on the access of third-country economic operators, goods and services to the Union's public procurement and concession markets and procedures supporting negotiations on access of Union economic operators, goods and services to the public procurement and concession markets of third countries (International Procurement Instrument – IPI).
[20] Regulation (EU) 2023/1115 of the European Parliament and of the Council of 31 May 2023 on the making available on the Union market and the export from the Union of certain commodities and products associated with deforestation and forest degradation and repealing Regulation (EU) No 995/2010.
[21] Regulation (EU) 2022/2560 of the European Parliament and of the Council of 14 December 2022 on foreign subsidies distorting the internal market.

The NAPP is against introducing a new general rule at EU level, reducing the possibility of relying on subcontracting. The NAPP is also against such a general rule at Member State level.

5. Concluding remarks

The NAPP has answered the on-line questionnaire from the European Commission but finds it very difficult to prioritize between the different statements since they tend to be intertwined in practice. Anyway, in order to avoid misunderstandings, the NAPP would like to emphasize that it believes PP to be av very important tool for achieving societal objectives which can be crucial such as e.g., resilience and sustainability. However, we oppose in many cases the idea of generally binding and/or too detailed rules at EU-level since such rules risk entailing too little room for the trade-offs (cf conflicting goals) that the contracting authorities in practice must decide on. There is no one-size-fits-all approach, and therefore the focus should be on an enabling framework of rules equipping the contracting authorities with good tools to ensure not the least value for money (in a broad sense) and fair competition.

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Anja Clausin
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Anja Clausin, Director General

Appendices:

- An English summary of the following report to ESO "2026:1 *Svarta siffror – en ESO-rapport om den kriminella ekonomins omfattning*"

- The report "*Stäng dörren för kriminella i välfärden – Strategiska åtgärder mot välfärdsbrott*" from the Confederation of Swedish Enterprise (in Swedish *Svenskt Näringsliv*). The report was published in January 2026 and only exists in Swedish.

- The report "*Oseriösa företag i offentlig upphandling – Fler borde göra mer!*" from the Confederation of Swedish Enterprise (in Swedish *Svenskt Näringsliv*). The report was published in November 2022 and only exists in Swedish.

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