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Rules on debarment from public tenders for infringements giving rise to competition distort
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INTRODUCTION

Exclusion grounds have existed in secondary EU Law on public procurement since 1971 but the 2004 Directive was the first time on which certain exclusions were considered mandatory

Directive 2014 covers mandatory and discretionary exclusion grounds: some of them are not new but it covers specifically a new case: "the distort of competition" (art. 57.4 d).

From Professional Misconduct to distortion of competition

- **Article 45** of now repealed **Directive 2004/18/EC of 31 March 2004 stated:**

"2. Any economic operator may be excluded from participation in a contract where that economic operator:
(c) has been convicted by a judgment which has the force of res judicata in accordance with the legal provisions of the country of any offence concerning his professional conduct;

(d) has been guilty of ***grave professional misconduct*** *proven by any means which the contracting authorities can demonstrate*"

Beaches of competition were captured by the "grave professional misconduct", see Case C-470/13, 2015, AG Maduro opinión oof 8 october 2008, para. 34.

ECJ, 18 December 2014, Case C-470/13, ***Generali-Providencia****:* **possible to exclude** from a tendering procedure "***an economic operator who has committed an infringement of competition law****, established by a judicial decision having the force of res judicata, for which a fine was imposed*" .

ENSURING FAIR COMPETITION

Article 57 ("*Exclusion grounds*") of **Directive 2014/24/EU of 26 February 2014** on public Procurement (see also recital 101):

"*4. Contracting authorities **may exclude or may be required** by Member States **to exclude** from participation in a procurement procedure any economic operator in any of the following situations:*

(c) where the contracting authority can demonstrate by appropriate means that the economic operator is guilty of grave professional misconduct, which renders its integrity questionable;

*(d) where the contracting authority has **sufficiently plausible indications** to conclude that the economic operator has **entered into agreements with other economic operators aimed at distorting competition***"

- What does "to conclude that the economic operator has entered into agreements With other economic operators" mean? Any breach of competition?

- What does "*Contracting authorities may exclude or may be required by Member States to exclude"* mean? Art. 57 permits significant discretion.

  - Depending on the implementation into national law, **the exclusion may be mandatory or voluntary.** However, contracting authorities should comply with proportionality Principle (recital 101).

    ECJ, 14 December 2016, Case C-171/15, *Connexxion Taxi Services:* appears to confirm mandatory exclusion is possible provided proportionality is observed when seriousness of misconduct is assessed; new rules also require self-cleaning option

THE ECJ RULING

Duration of exclusion:

According to article 57 (7) "*Where the period of exclusion has not been set by final judgment, that* ***period shall not exceed*** *[…]* ***three years*** from the date of the relevant event in the cases referred to in paragraph 4."

The ECJ, october 24 th 2018:
The case (Case C-124/17, Vossloh Laeis - v - Stadtwerke München) originated in Germany where a contracting authority (Stadtwerke München) excluded Vossloh Laeis GmbH ("Vossloh") from its public contract award procedure following the Bundeskartellamt's Decision fining Vossloh for its involvement in a rail track cartel until 2011.

The ruling also clarified that the three-year exclusion period for competition law infringements starts when the competition authority's decision is adopted and not when the participation to the cartel ended.

The Judgment leaves several questions open about the required standard to be reinstated as a trusted tenderer

THE CNMC FIRST DECISION

SPAIN´S NATIONAL MARKETS AND COMPETITION COMMISSION Decision, february the 14th 2019 (EXPTE. S/DC/0598/2016)

The ban is applied for the first time provided for in Article 71.1b of Law 9/2017 on Public Sector Contracts (LCSP), which states that subject to a prohibition on contracting with entities forming part of the public sector by persons who have been fined for serious offences in matters that call into question their integrity, as, among others, those of distortion of competition.

The decision does not define the duration nor the scope of the prohibition.

Such a determination –it states- must be made "by procedure in accordance with Article 72.2 of the LCSP, on the proposal of the Board State Public Procurement Consultation".
To this end, it sends a certification of the resolution to the said board and considers that the Commission may be consulted or issue a report "on the circumstances within the framework of the said procedure that allow the duration and scope of the prohibition to be graduated for each of the subjects affected in accordance with their specific participation".

The self-cleaning measures (art. 57 6)

Under article 57 (6) an economic operator should be no longer excluded if it demonstrate (sufficiently) its reliability to the contracting authority. He will have to prove:

1) Compensation for the harm has already been paid
2) The economic operator has activily cooperated with investigating authorities to clarify the facts and circumstances.
3) Adopted measures that are appropriate to prevent further offences.

Recital 102 offers details on how self-cleaning measures can be sufficiently/effectively demonstrated but under article 57 (6) it fully leaves open to the Member States (to the contrating authority) to establish whether or not the economic operator has accomplished the measures required and if enough "self cleaning" has taken place.

That means that the contracting authority will have to evaluate whether measures are sufficient taking into account the gravity and particular circumstances of the misconduct.
In the case Vossloh Laeis - v - Stadtwerke München, the ECJ ruled that even if the contracting authority can ask the economic operator cooperation in order to proof the re-establishment of its reliability, that cooperation is limited to that examination (§ 33). -