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Guide to Self-Cleaning in European Public Procurement Procedures

2021

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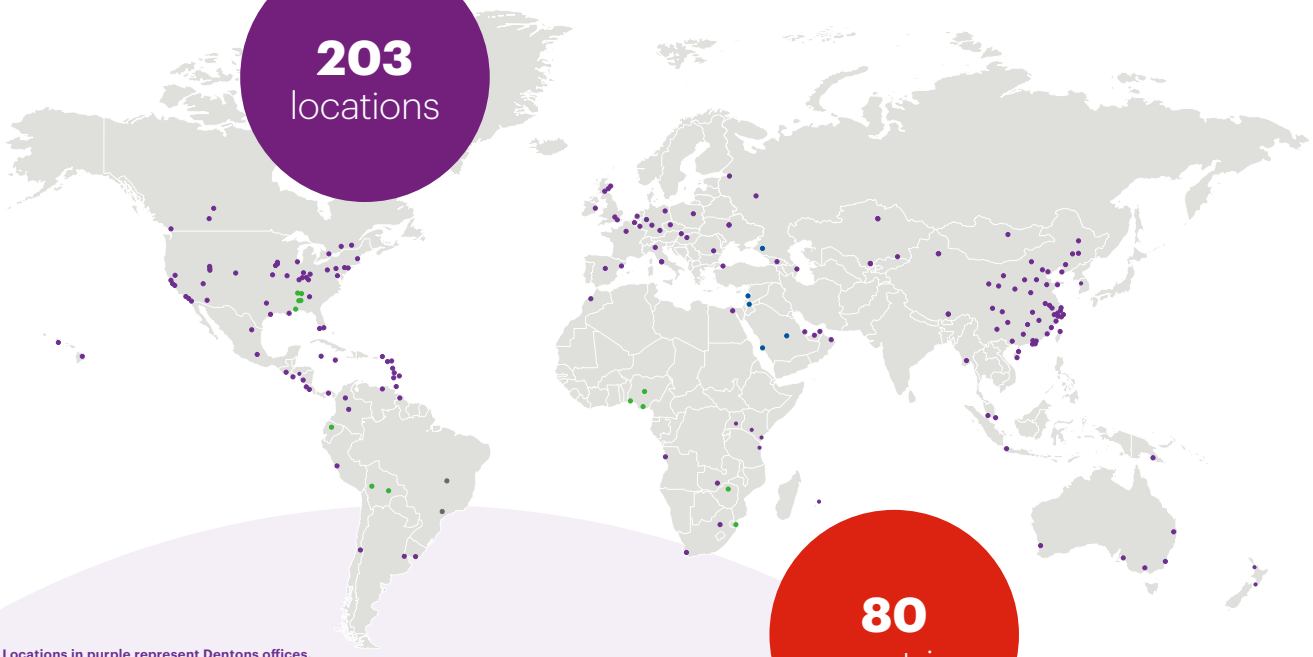

80
countries

Locations in purple represent Dentons offices.
Locations in blue represent associate firms, offices and special alliances.
Locations in green represent approved combinations that have not yet been formalized.
Locations in gray represent Brazil Strategic Alliance.

April 2021

12,000+
Total number of lawyers

14,000+
All timekeepers

19,000+
Total number of people

700+
Chambers rated lawyers

90+
Lexpert rated lawyers

80+
languages spoken

*Figures reflect combinations proposed in 2019-2021.

Foreword

It is common practice across Europe that candidates or tenderers who have committed criminal offenses or have proven to be unreliable on other grounds can be excluded from participating in public procurement procedures. This right of exclusion is enshrined in the European public procurement directives, and is based on the premise that criminal behavior, professional misconduct and similar compliance breaches can render a candidate's integrity questionable and therefore, the candidate unsuitable to be awarded a public contract.

Having said that, the European legislators recognize that everyone deserves a second chance, also within the context of tender procedures, by introducing the 'self-cleaning' option. This enables candidates or tenderers who have exhibited such misbehavior that would generally make them unsuitable for public contracts to demonstrate that they have changed their lives for the better, by proving that they have adopted compliance measures remedying the consequences of their past behavior and preventing future misbehavior. The European legislators mention specific measures to be taken:

i. compensation of damages caused by the criminal offense or misconduct;

ii. a clarification of the facts and circumstances by means of active collaboration with the investigating authorities;

iii. appropriate personnel, technical and organizational measures to prevent future misbehavior (e.g. the severance of all links with persons or organizations involved in the misbehavior, staff reorganization measures, the implementation of reporting and control systems, the creation of an internal audit structure to monitor compliance and the adoption of internal liability and compensation rules).

Dentons' *Guide to Self-Cleaning in European Public Procurement Procedures* provides an overview of how various European countries deal with self-cleaning in their respective jurisdictions, with a strong focus on what in practice is required to successfully perform self-cleaning. Covering twelve jurisdictions, it shows that the application of the European legal framework varies between the Member States.

The guide also offers insight into the consequences of COVID-19 with respect to the application of self-cleaning measures. For instance, in some countries, based on COVID-19 circumstances, the contracting authority could be entitled to derogate from the possibility of exclusion even if a mandatory exclusion ground would apply (e.g. a criminal offense) and no self-cleaning measures are taken.

For a full picture of the latest developments, a specific section is focusing on recent case law of the Court of Justice of the European Union (CJEU).

We hope that you will find the Dentons' *Guide to Self-Cleaning in European Public Procurement Procedures* useful to understand the developing legal landscape for self-cleaning procedures in the EU and the UK, and its accompanying opportunities and challenges.

This guide is provided for informational purposes only, and does not constitute advice or guidance. If you have questions regarding the practical application within any of the jurisdictions this guide covers, please find the names and contact details of lawyers and professionals included, who are happy to assist. Should you have questions or remarks of a more general nature, about the guide or the area overall, please also feel free to contact the team members via email.

International Trends and Key Insights

1

In most countries covered by this guide, the assessment of the measures undertaken within "self-cleaning" is entrusted to individual contracting authorities and no dedicated authorities on a national level are entrusted with that task – the only exception being Hungary (and to some extent Germany, going forward). This can be viewed as one of the main reasons for legal uncertainty with regard to the sufficiency of undertaken self-cleaning measures.

2

The general trend in Member States' legislation is to transpose the relevant EU provisions (article 57 section 6 of Directive 2014/24) into national legislation without introducing substantial modifications to its somewhat generic wording (with a noteworthy exception being France, which has introduced special rules for successful self-cleaning for some mandatory grounds for exclusion). Thus, in order to successfully conduct self-cleaning, detailed knowledge of national case law and legal doctrine interpreting these vague provisions will often be required.

3

In most countries, the evaluation whether individual self-cleaning measures are considered sufficient to restore a candidate's reliability is conducted on a "case-by-case" basis; there exist no official detailed instructions that – if followed – will assure a successful self-cleaning. Any individual self-cleaning measures must therefore be assessed in the context of the underlying ground for exclusion, the factual circumstances of the infringement and the specific details of the measures taken.

4

In most countries, successful self-cleaning requires that all three conditions set out in article 57 section 6 paragraph 2 of Directive 2014/24 (payment of damages, active cooperation with investigating authorities and implementation of appropriate personnel, technical and organizational measures to avoid further misconduct) are met. In some countries, on the other hand (such as the Czech Republic, Italy, Romania and the Netherlands), fulfilling one of these conditions only may be sufficient (in Spain two conditions). However, even in these countries joint fulfilment of all three premises, even if not formally required, will more likely be considered to result in a successful self-cleaning.

5

A simple declaration by a candidate or tenderer that it has implemented self-cleaning measures is generally not considered enough for successful self-cleaning. Emphasis is often put onto the obligation to provide evidence of the measures, either directly in the legal provisions or by the courts. The more extensive the evidence is, the better are the chances that the self-cleaning will be considered successful.

FOCUS ON CJEU CASE LAW

The latest generation of EU public procurement directives (Directive 2014/23/EU referring to "concession contracts" procurement, Directive 2014/24/EU referring to "classic" public procurement and 2014/25/EU referring to "sectoral" procurement – jointly the "Directives") has regulated the institution of "self-cleaning" in the regulations regarding exclusion of contractors from public procurement procedures. The "self-cleaning" procedure is generally applicable to economic operators that find themselves in a situation constituting a ground for exclusion under the applicable provisions of national law implementing the Directives. Such economic operators may provide evidence to the effect that measures have been taken which are sufficient to demonstrate their 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 EU legislator requires that the economic operator shall

(1) prove that it has paid or undertaken to pay compensation in respect of any damage caused by the criminal offense or misconduct,

(2) clarify the facts and circumstances in a comprehensive manner by actively collaborating with the investigating authorities, and

(3) take concrete technical, organizational and personnel measures that are appropriate to prevent further criminal offenses or misconduct.

The provisions of the above mentioned Directives were furthermore a subject of analysis of the Court of Justice of the European Union (the "CJEU") which has an important impact not only on the understanding of the Directives but also on the interpretation of national law provisions.

The next page provides a summary of the most important observations made by the CJEU referring to the "self-cleaning" procedure.

C-395/18 *Tim SpA*

"Self-cleaning" should also be permitted if it is not the economic operator that is liable to be excluded from the procedure, but their intended subcontractor, indicated in the economic operator's submitted bid.

C-41/18 *Meca*

Reliability is an essential element of the relationship between the successful tenderer and the contracting authority and the majority of exclusion grounds constituted by the Directives are intended to enable the contracting authority to assess a tenderer's reliability and integrity. It should be emphasized that the "self-cleaning" procedure is also ultimately aimed at the demonstration of an economic operator's reliability.

C 124/17 *Vossloh Laeis*

In order to successfully perform a "self-cleaning", an economic operator should effectively cooperate both with the contracting authorities and the appropriate investigating authorities with regard to the clarification of facts and circumstances referring to the ground for exclusion. However, if the exclusion ground has been established and clarified by a dedicated investigating authority, then the cooperation with the contracting authority may in general be limited to revealing the circumstances that are strictly necessary to demonstrate its reliability.

In this particular case, the CJEU addressed the method of performing a "self-cleaning" after a competition authority established that the economic operator was involved in a rail cartel. The CJEU stated that it is necessary to disclose the competition authority's decision on breach of competition law and also that, in principle, the disclosure to the contracting authority of the decision establishing the infringement of the competition rules by the tenderer, but applying a leniency rule to the tenderer on the ground that it cooperated with the competition authority, should be sufficient to prove to the contracting authority that that economic operator clarified, in a comprehensive manner, the facts and circumstances by collaborating with that authority. This does not however cancel the obligation to pay or undertake to pay compensation for any damage caused as well as the obligation to undertake concrete technical, organizational and personnel measures that are appropriate to prevent further criminal offenses or misconduct which are necessary to perform a successful "self-cleaning".

C-387/19 RTS infra

The CJEU strongly underlined that the national implementing conditions for the self-cleaning procedure must take into account the rights of the defense which, as a fundamental principle of EU law, apply to exclusion decisions due to their adverse effect on an individual. An integral part of the rights of the defense is the right to be heard in any procedure.

In the context of the public procurement procedure, ensuring the rights of the defense as well as the principles of transparency and equal treatment translate into the obligation of a member state to clearly inform an economic operator if evidence of corrective measures can be provided only voluntarily at the time of submission of requests to participate or in tenders and that this economic operator will not have the opportunity to provide such evidence at a later stage.

It is thus prohibited to require from an economic operator to prove at its own initiative when submitting a request to participate in a procedure or a bid in a procedure, that it has taken corrective measures to prove its reliability, if the obligation to do so does not arise from applicable national legislation or procedure documentation.

Furthermore, if an obligation to provide self-cleaning measures at the time of submitting a bid or a request for participation is established in a particular procedure, the applicable national law or tender documents must also allow an economic operator to identify, by themselves, the grounds for exclusion which may be relied on against them by the contracting authority in the light of the information contained in the tender specifications and the national rules on that subject.

Self-Cleaning Procedure in Belgium

1. Has the "self-cleaning" procedure as set out in Article 57 section 6 of Directive 2014/24 been implemented in your jurisdiction?

Yes, in Article 70 of the Public Procurement Act of 17 June 2016 ("Public Procurement Act"), which entered into force on June 30, 2017

2. If yes, could you please:

a. provide an English translation of the transposing provision;

The Belgian legislator has implemented Article 70 of the Public Procurement Act, which is quite similar to Article 57 section 6 of Directive 2014/24. Below you will find the English translation of Article 70:

Any candidate or tenderer that is in one of the situations referred to in articles 67 or 69 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 by the contracting authority, the candidate or the tenderer concerned shall not be excluded from the procurement procedure.

For this purpose, the candidate or the tenderer shall prove on its own initiative that it has paid or undertaken to pay compensation in respect of any damage caused by the criminal offense or misconduct, clarified the facts and circumstances in a comprehensive manner by actively collaborating with the investigating authorities, and taken concrete technical, organizational and personnel measures that are appropriate to prevent further criminal offenses or misconduct.

The measures taken by the candidate or the tenderer shall be evaluated taking into account the gravity and particular circumstances of the criminal offense or misconduct. In any case, this is a decision of the contracting authority which must be substantiated both materially and formally. Where the measures are considered to be insufficient, the economic operator shall receive a statement of the reasons for that decision.

An economic operator which has been excluded by final judgment from participating in procurement or concession award procedures shall not be entitled to make use of the possibility provided for under this article during the period of exclusion resulting from that judgment in the member states where the judgment is effective.

b. **indicate what in practice is required to successfully perform self-cleaning? In particular, whether the conditions set out in article 57 section 6 paragraph 2 of Directive 2014/24 (*the economic operator shall prove (1) that it has paid or undertaken to pay compensation in respect of any damage caused by the criminal offense or misconduct, (2) clarified the facts and circumstances in a comprehensive manner by actively collaborating with the investigating authorities and (3) taken concrete technical, organizational and personnel measures that are appropriate to prevent further criminal offenses or misconduct*) have to be fulfilled jointly for successful self-cleaning or is it permissible to choose or omit one of them and still demonstrate appropriate self-cleaning?**

Article 70, paragraph 2 of the Public Procurement Act indicates that the three conditions have to be fulfilled jointly.

The preparatory works of parliament on the Public Procurement Act provide some examples of self-cleaning measures : "*This could include (i) measures concerning their organization and their personnel, such as the termination of all relations with persons or organizations involved in criminal offenses or misconduct, (ii) appropriate measures for the reorganization of personnel, (iii) the implementation of reporting and control systems, (iv) the creation of an internal audit structure to monitor compliance and (v) the adoption of internal liability and compensation rules.*"

Moreover, the Belgian legislator added that "*the candidate or the tenderer shall prove on its own initiative*" the three requirements for successful self-cleaning.

3. Has any relevant case law re. the self-cleaning procedure been issued in your country that could provide practical tips on how to perform self-cleaning in your jurisdiction? If so, could you provide a summary of the relevant points made in the judgements?

The Council of State – the Belgian administrative jurisdiction – has issued some judgements regarding the self-cleaning mechanism. Please find a summary overview of the relevant cases below:

Council of State, 12 January 2017, n° 237.029, BVBA RTS Infra and BVBA Aannemingsbedrijf Norré-Behaegel.

As mentioned above, Article 70 of the Public Procurement Act entered into force on June 30th 2017. In this case, the Council of State refused to grant direct effect to the provisions of Directive 2014/24 on self-cleaning. A contracting authority had excluded one of the candidates from the tendering process without giving the concerned undertaking the opportunity to prove its reliability. It estimated that this was not necessary because the Directive had not yet been implemented, even if the transposition deadline had already expired, since the provisions of the Directive on self-cleaning are not unconditional nor sufficiently precise.

Council of State, 29 January 2019, n° 243.537, de NV Baeck & Jansen / De Provincie Vlaams-Brabant.

A tenderer who was in judicial reorganization had concealed that fact when submitting its tender and therefore had not mentioned any corrective measures taken. The Council of State considered that the tenderer had thus breached the general obligation of precaution and that the contracting authority had rightly excluded the candidate from the tendering process.

Council of State, 7 May 2019, n° 244.404, de BVBA RTS Infra, de BVBA Aannemingsbedrijf Norré-Behaegel / het Vlaamse Gewest.

In this case, the contracting authority had excluded a tenderer for grave professional misconduct. The excluded tenderer complained that it had not been given the opportunity to demonstrate its reliability by means of corrective measures. In May 2019, the Council of State pointed out that the European Court of Justice did not explicitly decide on the question (i) whether an economic operator must take self-cleaning measures on their own initiative or (ii) whether, before being able to decide on their exclusion, they must also be invited to present the conditions to fulfil the self-cleaning measures.

On January 14, 2021 the European Court of Justice found that the self-cleaning measures have direct effect and ruled that tenderers can be required to provide proof of corrective measures at the time of their request to participate or tender if (i) this requirement is clearly, precisely and unequivocally provided for in the national legislation and (ii) if it is brought to the attention of the economic operators in the tender documents.

The contracting authority that finds that the tenderer falls within an exclusion ground must, in principle, allow the tenderer to demonstrate corrective measures, unless national law and the tender documents required this at the time of the request to participate or tender. The Court of Justice has thus provided clear guidance on whether or not economic operators should be pro-active in providing underlying evidence of self-cleaning measures. Tenderers should therefore carefully examine these before submitting their request to participate or tender.

Consequences of COVID-19

Please note that, in response to the COVID-19 pandemic, the Federal State and the three Belgian Regions (Brussels-Capital, Wallonia and Flanders) have published communications and recommendations on the consequences of sanitary measures related to COVID-19 on public procurements (the "Circulars"). Please find the links to the Circulars on Federal (here in French and Dutch), Brussels-Capital (here in French and here in Dutch), Walloon (here in French) and Flemish (here in Dutch) public procurements.

In general, the Circulars adopt or recommend the same measures, such as:

- no penalties nor sanctions against economic operators for delay or failure to perform as long as the economic operators prove it is due to Covid-19;
- the contracting authorities shall undertake to speed up the term of payment;
- the contracting authorities shall treat these measures and recommendations with common sense and in good faith; or
- the successful tenderer shall be able to request a review of the contract for unforeseeable circumstances.

None of these Circulars specifically address the self-cleaning procedure. Therefore - and for the moment – there are no specific measures in place regarding the exclusion related to COVID-19 from a public procurement procedure. This implies that, e.g. if the candidate or tenderer accused of not implementing compulsory anti-COVID-19 measures in the context of social or labor law might be a ground for exclusion, the existing self-cleaning procedure will have to be applied, i.e. the candidate or tenderer may provide evidence to the effect that the measures taken are sufficient to demonstrate its reliability despite the existence of a relevant ground for exclusion.

4. Does your country entrust the assessment of the measures undertaken within "self-cleaning" to individual contracting authorities or does it entrust other, dedicated authorities (on a central or decentralized level) with that task?

According to Article 70 of the Belgian Public Procurement Act of 17 June 2016, Belgium entrusts the assessment of the measures undertaken by the candidate or the tenderer regarding "self-cleaning" to the individual contracting authorities. The measures shall be evaluated taking into account the gravity and particular circumstances of the criminal offense or misconduct. In any case, the decision of the contracting authority must be substantiated from a material and formal perspective.

Authors: **Yolande Meyvis, Pieter-Jan Aerts**

Self-Cleaning Procedure in the Czech Republic

1. Has the "self-cleaning" procedure as set out in Article 57 section 6 of Directive 2014/24 been implemented in your jurisdiction?

Yes, the self-cleaning procedure is implemented through Section 76 of Act No. 134/2016, on public procurement, as amended (the "PPA").

2. If yes, could you please:

a. provide an English translation of the transposing provision:

Section 76 of the PPA reads:

Restoration of competence of participants in the award procedure

(1) A participant in the award procedure may prove that despite their failure to comply with the basic competence requirements under Section 74 or despite the existence of grounds for incompetence under Section 48 Subsection 5 and 6, they restored their competence to participate in the award procedure, provided they prove to the contracting entity in the course of the award procedure that they adopted sufficient remedial measures. This shall not apply for the period for which the participant in the award procedure was prohibited to perform public contracts or participate in concession award procedures.

(2) Such remedial measures may be, in particular,

a) payment of sums due or arrears,

b) full compensation for damage caused by a criminal offense or misconduct,

c) active cooperation with authorities carrying out investigation, supervision, surveillance or review, or

d) adoption of technical, organizational or personnel measures for the prevention of criminal activities or misconducts.

(3) The contracting entity shall assess whether the remedial measures adopted by the participant in the award procedure are deemed by the contracting entity to be sufficient to restore the supplier's competence with regard to the seriousness and particular circumstances of the criminal offense or other misconduct.

(4) If the contracting entity arrives at the conclusion that the competence of the participant in the award procedure has been restored, it shall not exclude them from the award procedure or shall revoke previous exclusion of the participant in the award procedure.

b. **indicate what in practice is required to successfully perform self-cleaning? In particular, whether the conditions set out in article 57 section 6 paragraph 2 of Directive 2014/24 *(the economic operator shall prove (1) that it has paid or undertaken to pay compensation in respect of any damage caused by the criminal offense or misconduct, (2) clarified the facts and circumstances in a comprehensive manner by actively collaborating with the investigating authorities and (3) taken concrete technical, organizational and personnel measures that are appropriate to prevent further criminal offenses or misconduct)* have to be fulfilled jointly for successful self-cleaning or is it permissible to choose or omit one of them and still demonstrate appropriate self-cleaning?**

A participant is not required to perform all self-cleaning measures set out in Section 76 of the PPA in order to restore its competence. The participant may opt to adopt one, more than one, or all of the measures. The contracting entity then assesses whether such (combination of) measure(s) is sufficient with respect to the particular circumstances of the case (offense/misconduct).

In theory, a participant may successfully restore its competence by adopting only one measure (e.g. by adopting an effective compliance program). However, the assessment of self-cleaning measures is left entirely up to the consideration of the particular contracting entity (with two levels of discretionary powers of contracting entity – see answer to question no.3) and the chances of the participant to successfully restore its competence will be naturally higher if it adopts multiple or even all of the aforementioned measures.

Note that the list of self-cleaning measures as implemented by Section 76 of the PPA is not exhaustive. The participant may therefore attempt to restore its competence by adopting other appropriate measures, which are not explicitly provided for by the PPA. Again, this appears to be more lenient than the Directive (as Article 57 section 6 of the Directive implies that the list of self-cleaning measures is exhaustive).

3. Has any relevant case law re. the self-cleaning procedure been issued in your country that could provide practical tips on how to perform self-cleaning in your jurisdiction? If so, could you provide a summary of the relevant points made in the judgements?

Czech case law does not provide practical tips on how to perform self-cleaning, there is, however, certain guidance in decisions of the Office for the Protection of Competition (the "OPC") on scope and nature of discretion of the contracting entity pursuant to Section 76 of the PPA with respect to self-cleaning.

Recital 102 of the Directive states that "*[member states] should, in particular, be free to decide whether to allow the individual contracting authorities to carry out the relevant assessments or to entrust other authorities on a central or decentralized level with that task.*" It follows that the member states were given the option to choose if the assessment of remedial measures is to be conducted by the contracting entities or by the public authorities (such as the OPC). From the wording of Section 76 of the PPA, we can conclude that the Czech Republic chose to entrust the assessment to the contracting entities.

With respect to the assessment, the OPC generally differentiates two categories of self-cleaning remedies undertaken by the participants:

i. straightforward remedies – such as confirmation of a payment of tax arrears or change of the managing director of the company if the previous director had a criminal record (and thus prevented the participant from proving its basic competence). If the participant undertakes such straightforward remedies and shows them to the contracting entity and the contracting entity nevertheless decides on their insufficiency, the OPC should, upon motion of the participant, annul such decision (see decision of the OPC no. ÚOHS S0361/2017/VZ). In other words, these straightforward remedies are non-discretionary.

ii. complex remedies – such as internal guidelines/compliance programs and similar complex remedies. When assessing these complex remedies, the contracting entity is limited primarily by general principles of award procedures specified in Section 6 of the PPA

(transparency, proportionality, equal treatment and non-discrimination). In such complex cases, the OPC shall not review decision-making process/assessment conducted by the contracting entity; the OPC shall only review and decide if the contracting entity met all conditions imposed by law (i.e. sufficient reasoning of the decision and adherence to the general principles of award procedure). In this regard, the decision by the contracting entity on the remedial measures equals administrative discretion (in Czech: *správní uvážení*) (see decision of the OPC no. ÚOHS-R0211/2017/VZ).

In light of the above OPC's rulings on discretion of the contracting entities, Czech courts would likely be prohibited from reviewing the discretion applied by the contracting entity with respect to the complex remedies, except for the contracting entity's adherence to general principles of award procedure and provision of sufficient reasoning of its decision.

4. Does your country entrust the assessment of the measures undertaken within "self-cleaning" to individual contracting authorities or does it entrust other, dedicated authorities (on a central or decentralized level) with that task?

As described in more detail in answer to question no. 3, the assessment of measures undertaken within self-cleaning procedure is solely undertaken by individual contracting authorities. The obligation follows from Sec. 76 para 3 of the PPA (cited above) which entrusts the assessment to the contracting authority, which, in turn, has an obligation to assess the remedial measures adopted by the participant. In addition, the assessment by the contracting authority may be subsequently reviewed by OPC in case of straightforward remedies, but not in case of complex ones (see also above).

Authors: **Michal Pelikán, Jan Tylš**

Self-Cleaning Procedure in France

1. Has the "self-cleaning" procedure as set out in Article 57 section 6 of Directive 2014/24 been implemented in your jurisdiction?

Yes, in articles L.2141-1 to L.2141-5 and L.2141-7 to L.2141-11 of the French public procurement code.

2. If yes, could you please:

a. provide an English translation of the transposing provision;

The French public procurement code distinguishes two types of grounds for exclusion from public procurement procedures: (i) mandatory grounds for exclusion and (ii) optional grounds for exclusion.

The "self-cleaning" procedure differs according to whether the ground for exclusion is mandatory or optional. It should be noted that, regarding mandatory grounds for exclusion, the "self-cleaning" procedure put into place (where it exists) also differs from one ground to another, which is specific to the French public procurement code – the relevant provisions setting out such differences are provided below.

Please note that the term "optional" does not mean that the buyer[1] has the choice to exclude but only that the economic operator is not automatically excluded from the procedure.

i. Self-cleaning procedure in relation to mandatory grounds for exclusion

Mandatory grounds for exclusion are provided in articles **L. 2141-1 to L. 2141-5** of the French public procurement code. They are based on offenses or misconducts observed by a person outside the buyer and who intervened outside the procedure (*i.e.* criminal penalties, failure to comply with social or tax obligations, violation of rules against illegal employment, judicial liquidations, bankruptcies and receiverships).

They are "as of right" which means that the buyer merely notes the presence of a ground for exclusion and the absence of any self-cleaning measures where appropriate.

Not all of the abovementioned articles provide for self-cleaning procedures.

1 Under the French public procurement code, the term "buyer" includes both notions of contracting authority and contracting entity.

Article L. 2141-1 provides for exclusion grounds in case of definitive criminal sentences, for five years from conviction. No self-cleaning measures are provided in this article.

However, following a decision on concession contracts, *Vert Marine SAS v Premier ministre (C-472/19)* of the European Union Court of Justice (EUCJ) dated June 11, 2020, the French *Conseil d'Etat* (the highest administrative court) ruled that[2] article L. 3123-1 (the equivalent of L. 2141-1 for concession contracts) was incompatible with the objectives of the Directive 2014/23 in that it does not provide for any compliance mechanism in such a case. Pending new provisions, the Conseil d'Etat ruled that this article will not apply to an economic operator who, after having been given the opportunity to present its observations, establishes within a reasonable time and by any means that it has taken the necessary measures to correct the breaches corresponding to the offence(s) for which it has been definitively convicted and, where applicable, that its participation in the award procedure is not likely to undermine equal treatment. The only exception will remain the situation in which an economic operator was sentenced by a final judgment to an exclusion from participating in public procurement procedures.

Although this decision concerned provisions on concessions contracts, one can assume that provisions on public contracts (notably article L. 2141-1) will also be affected.

Article L. 2141-3 provides for three types of exclusion grounds:

- **Judicial winding-up**; no self-cleaning procedure is provided.
- Personal bankruptcy or management prohibition; no self-cleaning procedure is provided.
- Admission to receivership, except if the economic operator proves that it has been authorized to continue its activities for the foreseeable duration of the contract, or benefits from a recovery plan (such possibility is a direct result of the particular context of the COVID-19 pandemic ; it was added by a law no 2020-1525 dated 7 December 2020 to support weakened companies).

All the other articles relating to mandatory grounds for exclusion provide for a self-cleaning procedure applicable to the ground(s) for exclusion listed in the said articles.

Article L. 2141-2 provides a ground for exclusion based on the failure to comply with social or tax obligations.

However, the economic operator shall not be excluded from the procedure if it establishes:

"[...] that before the date on which the buyer decides on the admissibility of its application, it has, in the absence of any implementing measures by the accounting officer or the body responsible for collection, paid the said taxes, contributions and levies or furnished guarantees considered as sufficient by the accounting officer or the body responsible for collection or, failing that, has concluded and is complying with a binding agreement with the bodies responsible for collection with a view to paying such taxes, contributions or levies, together with any accrued interest, penalties or fines." (our translation).

Article L. 2141-4 provides the grounds for exclusion based on (i) failure to comply the obligations relating to undeclared work, illegal employment, discrimination, professional inequality, (ii) failure to implement the obligation to negotiate under article L. 2242-1 of the French labor code (wages and professional equality between men and women) and (iii) criminal penalty of exclusion from public procurement contracts on a permanent basis or for a period of up to five years.

2 *Conseil d'Etat*, 12 October 2020, no 419146.

However, the economic operator shall not be excluded from the procedure if it establishes:

"[...] it has not been subject to a penalty of exclusion from procurement contracts enlisted in Bulletin no 2 of its criminal record under article 775-1 of the criminal procedure code, that it has regularized its situation, that it has settled all fines and indemnities due, that it has actively cooperated with the authorities in charge of the investigation, that it has regularized or started regularizing its situation ***as the case*** *may be in relation to the obligation to negotiate under article L. 2242-1 2° of the labor code,* ***and finally*** *that it has taken concrete measures to prevent the commission of a new criminal offense or a new misconduct."*

"[...] it obtained a stay in the proceedings as provided in articles 132-31 or 132-32 of the criminal code, a deferred sentencing as provided in articles 132-58 to 132-62 of the criminal code or a relieved sentence as provided under article 132-21 of the criminal code or articles 702-1 or 703 of the criminal procedure code" (our translation and emphasis).

Article L. 2141-5 provides the ground for exclusion based on a measure of exclusion from administrative contracts by virtue of an administrative decision taken on the ground of illegal employment.

However, the economic operator shall not be excluded from the procedure if it establishes:

"[...] it has not been subject to a penalty of exclusion from procurement contracts enlisted in Bulletin no 2 of its criminal record under article 775-1 of the criminal procedure code, that it has regularized its situation, that it has settled all fines and indemnities due, that it has actively cooperated with the authorities in charge of the investigation, and that it has taken concrete measures to prevent the commission of a new criminal offense or a new misconduct." (our translation and emphasis).

ii. Self-cleaning procedure in relation to optional grounds for exclusion

Articles L. 2141-7 to L. 2141-10 of the French public procurement code provide for optional grounds for exclusion, which are summarized as follows:

- persons who, during the previous three years, had to pay damages, were sanctioned by early termination or a comparable sanction as a result of a serious or persistent breach of their contractual obligations during the execution of a previous public procurement contract (article L. 2141-7);
- persons who undertook to influence unduly the buyer's decision-making process or to obtain confidential information conferring upon it an undue advantage in the procurement procedure, or provided misleading information likely to have a decisive influence on the decisions to exclude, to select or to award (article L. 2141-8 1°);
- persons who, through their prior direct or indirect participation in the preparation of the procurement procedure, had access to information liable to distort competition in relation to other candidates (article L. 2141-8 2°);
- persons in regard to whom the buyer has sufficient evidence or a body of serious and corroborative evidence to conclude that they have entered into an agreement with other economic operators aimed at distorting competition (article L. 2141-9); and
- persons who, by applying to the public procurement procedure, create a situation of conflict of interest which cannot be remedied by other measures (article L. 2141-10).

Article L. 2141-11 provides for the following general self-cleaning procedure:

"A buyer who intends to exclude an economic operator in accordance with this section [optional grounds for exclusion], *shall enable it to submit its observations in order to establish within a reasonable time and by any means that it has taken the necessary measures to remedy the abovementioned infringements and, where appropriate, that its participation in the public procurement procedure is not likely to compromise equal treatment"* (our translation).

b. indicate what in practice is required to successfully perform self-cleaning? In particular, whether the conditions set out in article 57 section 6 paragraph 2 of Directive 2014/24 *(the economic operator shall prove (1) that it has paid or undertaken to pay compensation in respect of any damage caused by the criminal offense or misconduct, (2) clarified the facts and circumstances in a comprehensive manner by actively collaborating with the investigating authorities and (3) taken concrete technical, organizational and personnel measures that are appropriate to prevent further criminal offenses or misconduct)* have to be fulfilled jointly for successful self-cleaning or is it permissible to choose or omit one of them and still demonstrate appropriate self-cleaning?

Under article R. 2143-3 of the French public procurement code, the bidder shall provide in its application file a sworn statement as justification that it is not concerned by any of the mandatory or optional grounds for exclusion. Failure to do so could lead to a rejection of its application.

At this stage, bidders cannot be required to provide further evidence materials[3] (and further evidence materials that the buyer may request at a later stage is strictly regulated[4]).

But in practice, if a bidder falls within the scope of one of these exclusions, it will not be able to provide such sworn statement. In case a self-cleaning procedure is possible, the bidder should therefore demonstrate such exclusion should not apply, by providing the buyer with the relevant supporting evidence.

More particularly regarding the conditions set out in article 57 section 6 paragraph 2 of Directive 2014/24, they were transposed by articles L. 2141-4 and L. 2141-5, though some French specificities were added (see above). Except where those articles specify those conditions are to be met "as the case may be", performing a self-cleaning under these articles should require fulfilling all the indicated self-cleaning measures.

However, following the abovementioned *Vert Marine SAS v Premier ministre* EUCJ decision, the Conseil d'Etat ruled that article R. 3123-16 of the French public procurement code, which is the equivalent for concession contracts of the abovementioned article R. 2143-3, was incompatible with the objectives of Directive 2014/23. Which means that this article will be rewritten, and one can assume that article R. 2143-3 on public contracts will evolve as well[5].

3 Indeed, further evidence shall only be provided by the preferred bidder (article R. 2144-4); except in the case where the buyer has limited the number of bidders admitted to continue the procedure, then it must verify and ask for supporting proof before sending the invitation to tender or participating in the dialogue (article R. 2144-5); For a recent example: Conseil d'Etat, 25 January 2019, req. no 421844.

4 Article R. 2143-6provides that the buyer shall accept as sufficient proof:
- a sworn statement as justification that the bidder is not concerned by grounds for exclusion mentioned in article L. 2141-1 and L. 2141-4 1° and 3°;
- certificates delivered by the relevant authorities and bodies as justification that the bidder is not concerned by the ground for exclusion mentioned in article L. 2141-2;
- a K-bis extract or equivalent as justification that the bidder is not concerned by the ground for exclusion mentioned in article L. 2141-3.

5 *Conseil d'Et*at, 12 October 2020, no 419146.

3. Has any relevant case law re. the self-cleaning procedure been issued in your country that could provide practical tips on how to perform self-cleaning in your jurisdiction? If so, could you provide a summary of the relevant points made in the judgements?

Notably by relying on case law from the *Conseil d'Etat*, the Department of Legal Affairs of the Ministry of Economics and Financial Affairs (*Direction des Affaires Juridiques des ministères économique et financier*) has given some guidance to the buyers as to the application of the grounds for exclusion.

Regarding mandatory measures, as mentioned above, they are "as of right", which means that:

- in cases where the exclusion is the result of a conviction or decision by a judge, the buyer does not have any room for interpreting the judgment or the (mis)conduct of the bidder; this interpretation should evolve in the future considering the *Vert Marine SAS v Premier ministre* decision;
- in cases relating to the regularity of the bidder's situation with regard to tax and social obligations, the buyer merely notes the exclusion of a procurement procedure due to the absence of documents and certificates;
- the only case where the buyer actually has to give a further opinion on the bidder's situation is regarding admission to receivership (or equivalent); in this case, the buyer must check, on the basis of the supporting documents provided by the bidder (copy of the relevant judgment(s)), that it has been authorized to continue its activity for the foreseeable duration of performance of the contract[6];
- in all cases, the self-cleaning measures do not imply any room for maneuver on the part of the buyer; assessment of the sufficiency of the remedies or considerations that may lead to a relief, suspension or adjournment of sentence shall be at the sole discretion of the administrative bodies responsible for the collection of taxes, labor inspector or judge.

Regarding the optional grounds for exclusion, the logic of the self-cleaning procedure is completely different since the buyer shall implement a contradictory procedure.

Unlike mandatory grounds for exclusion, the optional grounds for exclusion rely on facts established by the buyer: The decision to exclude the bidder from the procedure depends on the elements of assessment provided by the bidder. It is only if the information provided by the bidder does not establish that its reliability or professionalism or its participation in the procedure does not undermine equal treatment, that its exclusion may be pronounced.

It is therefore for the buyer to assess whether the information in its possession justifies the exclusion of the bidder. If the exclusion is justified, the buyer has no choice but to exclude the bidder.

In that regard, the Department of Legal Affairs of the Ministry of Economics and Financial Affairs has given the following guidance and practical tips:

- *persons who, during the previous three years, had to pay damages, were sanctioned by early termination or a comparable sanction as a result of a serious or persistent breach of their contractual obligations during the execution of a previous public procurement contract (**article L. 2141-7**);*

Only already imposed sanctions may be taken into account.

Moreover, exclusion presupposes that the sanctions actually demonstrate a serious or persistent breach of contractual obligations. For instance, a mere delay in execution of a few days does not seem likely to justify the implementation of this exclusion.

In any event, the buyer should not exclude an application file without first enabling the bidder to demonstrate its professionalism and reliability. For example, the bidder could rely on internal measures of control or audit procedures in order to demonstrate that it has implemented organizational measures to ensure that such failures could not occur in the future.

6 The *Conseil d'Etat* recently specified that the fact that the duration of performance of the contract to be awarded exceeded the period for clearance of liabilities had no impact as long as the recovery plan of the economic operator did not limit the company's ability to continue to operate its activity in the future: Conseil d'Etat, 25 January 2019, *Société Dauphin Télécom*, req. no 421844.

- *persons who undertook to influence unduly the buyer's decision-making process or to obtain confidential information conferring upon it an undue advantage in the procurement procedure, or provided misleading information likely to have a decisive influence on the decisions to exclude, to select or to award (**article L. 2141-8 1°**);*

The buyer may only initiate the contradictory procedure in case of strong evidence that the bidder has made such attempts. In case of doubt, it should only make a report to the competent authorities (it is important for the buyer to avoid any complicity in those manoeuvres).

Before excluding the bidder, the buyer shall offer the bidder the possibility to demonstrate its reliability, professionalism and lack of attempt to influence the buyer.

- *persons who, through their prior direct or indirect participation in the preparation of the procurement procedure, had access to information liable to distort competition in relation to other candidates (**article L. 2141-8 2°**);*

It is not possible to exclude, as a matter of principle, the application of a bidder who has participated, in whatever form, in the preparation of a public procurement contract. It is for the buyer to assess, on a case-by-case basis, whether such an operator has a competitive advantage over other bidders and take the necessary measures to prevent any risk of infringing the principle of equal treatment[7].

For example, the mere participation of the economic operator in the "sourcing" organized by the buyer is not sufficient to provide such ground for exclusion. In particular, where the prior collaboration of an operator has given it access to information likely to give it an advantage over other candidates, the buyer should eliminate the risk by communicating such information to all bidders. Only if the buyer cannot remedy such inequality should the application be excluded. However, the bidder should have the possibility to prove that such information does not distort competition.

- *persons in regard to whom the buyer has sufficient evidence or a body of serious and corroborative evidence to conclude that they have entered into an agreement with other economic operators aimed at distorting competition (**article L. 2141-9**);*

7 Conseil d'Etat, 29 July 1998, *Garde des Sceaux/Sté Genicorp*, req. no 177952.

The Competition Authority or as the case may be the European Commission are in charge of identifying the existence of a cartel. Apart from cases explicitly condemned by the authorities, in case of doubt, the buyer should report the situation to the competent services of the Directorate General for Competition, Consumer Affairs and Fraud Prevention (*direction générale de la concurrence, de la consommation et de la répression des fraudes*). It may also lodge a formal complaint before the Competition Authority.

- *persons who, by applying to the public procurement procedure, create a situation of conflict of interest which cannot be remedied by other measures (**article L. 2141-10**).*

The buyer shall prevent the existence of conflicts of interest[8] and take the necessary measures in order to remedy such situation[9]. The aim is to guarantee the impartiality of the decision-making process in the event that there is a link between the purchaser's staff or a service provider acting on its behalf and a candidate undertaking.

In order to assess if a conflict of interest gives rise to a legitimate doubt regarding the impartiality of the buyer, the *Conseil d'État* takes into account[10]:

- the nature, intensity and duration of the direct or indirect links (whether past or present, financial, economic, personal or family) between the person representing the contracting authority and the economic operator;
- the influence such person has been likely to exert on the outcome of the procedure in view of its functions and participation in the decision-making process.

This second condition should allow preserving the impartiality of the procedure and avoid solutions that would unduly interfere with freedom of access to public procurement. The measures taken by the buyer must be proportionate.

For example, it is only if the person representing the buyer cannot be excluded from the decision-making process that the buyer could consider excluding the bidder.

4. Does your country entrust the assessment of the measures undertaken within "self-cleaning" to individual contracting authorities or does it entrust other, dedicated authorities (on a central or decentralized level) with that task?

The French public procurement code solely refers to the "buyer" in relation to the matter of excluding or not excluding economic operators from public procurement procedures.

In practice, the assessment of grounds for exclusion and measures undertaken within "self-cleaning" lies within each contracting authority, by relying on its legal department, and/or legal and financial advisors, where appropriate.

Author: **Inès Tantardini**

8 Defined by article L. 2141-10 of the French public procurement code as a situation in which a person who takes part in the course of the public procurement procedure or is likely to influence its outcome, has directly or indirectly, a financial, economic or any other personal interest that could compromise its impartiality or independence in the context of the public procurement procedure.

9 Conseil d'Etat, 14 October 2015, *Société Applicam et région Nord Pas-de-Calais*, req. no 391105.

10 Decisions concluding the existence of a conflict of interests: Conseil d'Etat, 3 November 1997, *Préfet de la Marne*, req. no 148150; Conseil d'Etat, 14 October 2015, *Société Applicam et région Nord Pas-de-Calais*, req. no 391105; on the contrary, decisions concluding to the absence of a conflict of interests: Conseil d'Etat, 27 July 2001, *Société Degremont*, req. no 232820; Conseil d'Etat, 24 June 2011, *Ministre de l'écologie et sté Autostrade per l'Italia SPA*, req. no 347720; Conseil d'Etat, 19 March 2012, *SA groupe Partouche*, req. no 341562; Conseil d'Etat, 9 May 2012, *Commune de Saint-Maur des Fossés*, req. no 355756; Conseil d'Etat, 22 October 2014, *Sté EBM Thermique*, req. no 382495.

Self-Cleaning Procedure in Germany

1. Has the "self-cleaning" procedure as set out in Article 57 section 6 of Directive 2014/24 been implemented in your jurisdiction?

Yes, in section 125 of the ***Gesetz gegen Wettbewerbsbeschränkungen*** (Act against Restraints of Competition ("ARC") in the version published on 26 June 2013 (***Bundesgesetzblatt*** (Federal Law Gazette) I, 2013, p. 1750, 3245), as last amended by Article 10 of the Act of 12 July 2018 (Federal Law Gazette I, p. 1151).

2. If yes, could you please:

a. provide an English translation of the transposing provision;

Section 125 Self-cleaning

(1) Public contracting authorities shall not exclude an undertaking for which a ground for exclusion exists under §123 or §124 from participation in the procurement procedure where the undertaking has proven that it

1. has paid or undertaken to pay compensation for any damage caused by the criminal offense or misconduct;

2. has comprehensively clarified the facts and circumstances associated with the criminal offense or misconduct and the damage caused thereby by actively cooperating with the investigating authorities and the public contracting authority; and

3. has taken concrete technical, organizational and personnel measures that are appropriate to prevent further criminal offenses or misconduct.

Section §123 (4) sentence 2 shall remain unaffected.

(2) The self-cleaning measures taken by the undertakings shall be evaluated by the public contracting authorities, taking into account the gravity and particular circumstances of the criminal offense or misconduct. If the public contracting authorities consider the self-cleaning measures by the undertaking to be insufficient, they shall provide the undertaking with justification for the decision.

b. indicate what in practice is required to successfully perform self-cleaning? In particular, whether the conditions set out in article 57 section 6 paragraph 2 of Directive 2014/24 *(the economic operator shall prove (1) that it has paid or undertaken to pay compensation in respect of any*

damage caused by the criminal offense or misconduct, (2) clarified the facts and circumstances in a comprehensive manner by actively collaborating with the investigating authorities and (3) taken concrete technical, organizational and personnel measures that are appropriate to prevent further criminal offenses or misconduct) **have to be fulfilled jointly for successful self-cleaning or is it permissible to choose or omit one of them and still demonstrate appropriate self-cleaning?**

Successful self-cleaning according to section 125 ARC requires firstly that the company pays or commits itself to paying compensation for any damage caused by the offense or misconduct. Secondly, the company has to participate actively in the fact-finding procedure and help clarify circumstances connected with the misconduct and the damage caused by actively cooperating with the investigating authorities and the contracting authority. Thirdly, the company has to take concrete technical, organizational and personnel measures to prevent further offenses or further misconduct in the future.

The aforementioned requirements of self-cleaning are **cumulative**, i.e. the company must have taken appropriate measures in all areas of self-cleaning. The requirement to cooperate with clarifying the facts, is the second measure required by section 125. Without the facts being clarified, the contracting authority is not able to assess whether the company concerned appropriately compensated for damages and adopted proportionate measures to restore its reliability and prevent future misconduct.

If a company violated its tax, duty or fee obligations and is therefore to be excluded from the award procedure pursuant to section 123 (4) sentence 1 ARC, a **special option of self-cleaning** is available, which takes priority over the stricter general provision in section 125 ARC. According to section 123 (4) sentence 2 ARC, the affected company can restore its reliability simply by subsequently fulfilling its obligations and settling the outstanding claims or committing itself to the payment of the claims. In this respect, there is thus a legal exception to the principle that all three conditions must be cumulative.

3. Has any relevant case law re. the self-cleaning procedure been issued in your country that could provide practical tips on how to perform self-cleaning in your jurisdiction? If so, could you provide a summary of the relevant points made in the judgements?

a. Fact-Finding

aa. Public Procurement Tribunal Westphalia, Decision of 25 April 2019 - VK 2-41/18 / Public Procurement Tribunal for Southern Bavaria, Decision of 11 December 2018 – Z3-3-3194-1-45-11/16

Rulings: If a competition authority has conducted and closed proceedings against a compmany for the imposition of a fine, the company must submit this final notice of the contracting authority in an unabridged form.

Under German law, the fact-finding is to be carried out with the investigating authorities and the contracting authority. This obligation to comprehensively clarify the facts even applies, if this leads to a claim for damages by the contracting authority against the company. Hence, the contracting authority can request the final notice in its entirety even if this document contains information that can be used against the company in proceedings for damages before a civil court.

Successful fact-finding requires active cooperation with the contracting authority.

The decisions refer directly to the case-law of the ECJ, see ECJ, Judgment of 24 October 2018 - Case C-124/17.

bb. Public Procurement Chamber Thuringia, Ruling from July 12, 2017 - 250-4003-5533/2017-E-016-EF

Ruling: A tenderer must document and be able provide evidence of the self-cleaning measures. If he merely claims to have carried out self-cleaning measures, this is not sufficient to meet the legal requirements of a successful self-cleaning according to section 125 ARC.

b. Paying compensation

Public Procurement Tribunal Lüneburg, Decision of 14 February 2012 - VgK-05/2012

Ruling: If the damages have not yet been compensated, it is necessary for the company affected to submit at least a plan for compensating the damages.

c. Technical, organizational and personnel measures

aa. Higher Regional Court of Düsseldorf, Decision of 18 April 2018 - Verg 28/17

Ruling: If management staff of the company commits crimes relevant for exclusion, it is mandatory for self-cleaning that this member of the management staff be removed from his or her position.

bb. Higher Regional Court of Munich, Decision from November 22, 2012 - Verg 22/12

Ruling: If it is unclear whether the CEO of a company himself or senior executives have committed a crime relevant to the exclusion from a public procurement procedure, it is not sufficient for self-cleaning to give the executives a warning under labor law.

In a family business, it argues against successful self-cleaning if the wife of the CEO, on whose conduct the exclusion from the award procedure is based, has proxy.

cc. Higher Regional Court of Düsseldorf, Decision of 9 June 2010 - Verg 14/10

Ruling: The contracting authority is entitled to assess the success of self-cleaning measures. Courts can only review the decision of the contracting authority in order to determine whether the contracting authority has taken an arbitrary decision and whether the contracting authority has correctly taken into account the entire facts of the case.

dd. Higher Regional Court of Brandenburg, Decision of 14 December 2007 - Verg W 21/07

Rulings: For successful self-cleaning, it is necessary that employees who have been convicted with final judgement no longer work for the company or group of companies.

If a shareholder was involved in the activities leading to the exclusion of the company from the award procedure, self-cleaning requires that he/she does not act as a shareholder, irrevocably

renounces his/her rights as a shareholder and no longer exercises any influence on the governing bodies of the company or group of companies.

A structural separation of company administration and operative departments argues for a successful self-cleaning.

The following measures argue for successful prevention in the context of self-cleaning: establishment of a new audit/compliance department, establishment of a clearing house to deal with and question the offer and order strategy; future external legal review of external commission and consultancy contracts; establishment of a value management system within the group of companies; joining an NGO committed to an ethical economy.

Not all measures need to be completed at the time of the qualification test. It is sufficient if the measures have been initiated.

ee. Higher Regional Court Frankfurt, Decision from July 20, 2004 - 11 Verg 6/04

Ruling: The removal of the CEO is an acceptable measure of self-cleaning, if he or she has contributed to the circumstance leading to the exclusion of the company.

4. Does your country entrust the assessment of the measures undertaken within "self-cleaning" to individual contracting authorities or does it entrust other, dedicated authorities (on a central or decentralized level) with that task?

According to section 125 (2) of the German Act Against Restraints of Competition (ARC), Germany entrusts the assessment of the measures undertaken by the candidate or the tenderer regarding "self-cleaning" to the respective contracting authority. The measures shall be evaluated taking into account the gravity and particular circumstances of the criminal offense or misconduct. In any case, the decision of the contracting authority must be substantiated from a material and formal perspective.

Note however that self-cleaning measures by companies blacklisted in the newly introduced "Competition Register" (essentially a central public procurement debarment register administered by the German Federal Cartel Office (*Bundeskartellamt*) may be evaluated by the Federal Cartel Office. If the Federal Cartel Office determines that the measures are sufficient, the company will be taken off the Register blacklist, and the determination that the company has regained its reliability will be binding on all German contracting authorities.

Author: **Peter Braun**

Self-Cleaning Procedure in Hungary

1. **Has the "self-cleaning" procedure as set out in Article 57 section 6 of Directive 2014/24 been implemented in your jurisdiction?**

   Yes, in section 64 *(Self-cleaning/self-clarification)* of the Act CXLIII of 2015 on Public Procurement.

2. **If yes, could you please:**

   a. **provide an English translation of the transposing provision;**

   Below you will find the English translation of section 64 *(Self-cleaning/self-clarification)* of the Act CXLIII of 2015 on Public Procurement, as well as of sections 188 and 62 which are referenced therein:

   Section 64

   (1) Apart from the grounds for exclusion provided for in Paragraphs b) and f) of Subsection (1) of Section 62 - including where a misconduct or infringement provided for by law leads to exclusion by decision of the contracting authority -, any tenderer, candidate tenderer, subcontractor or entity on whose capacities the economic operator relies may not be excluded from a public procurement procedure if, according to the definitive decision of the Procurement Authority (*Közbeszerzési Hatóság*) adopted under Subsection (4) of Section 188, or according to a final court decision adopted under Subsection (5) of Section 188 in the case of administrative action brought against such decision -, the measures the economic operator has taken before the time of submission of the tender or request to participate are sufficient to demonstrate its reliability despite the existence of the relevant ground for exclusion.

   (2) If the Procurement Authority in its definitive decision adopted under Subsection (4) of Section 188 declared the economic operator reliable, or a court challenged challenged the Authority's decision by way of administrative action in a decision adopted under Subsection (5) of Section 188 and declared the economic operator reliable, this shall be accepted by the contracting authority without deliberation. The economic operator shall submit the final ruling together with the European Single Procurement Document.

   Section 188

   (1) Any economic operator who is subject to any grounds for exclusion apart from the ones mentioned in Paragraphs b) and f) of Subsection (1) of Section 62, may submit a request to the Authority for establishing that measures taken by the economic operator are sufficient to demonstrate its reliability despite the existence of a relevant ground for exclusion. A version of the petition made by means of information technology equipment shall also be made available to the

Procurement Authority in an editable format. The Procurement Authority shall verify receipt - if submitted via electronic mail - within one working day. Evidence relating to the measures taken by the economic operator shall be provided to the Procurement Authority enclosed with the request.

(2) In the interest of demonstrating its reliability, the economic operator that is subject to any grounds for exclusion shall prove that:

a) it has paid or undertaken to pay compensation - in the amount accepted by the aggrieved party - in respect of any damage caused by the criminal offense, misconduct or infringement;

b) it has clarified the facts and circumstances in a comprehensive manner by actively cooperating with the competent authorities; and

c) it has taken concrete technical, organizational and personnel measures that are appropriate to prevent further criminal offenses, misconduct or infringement.

(3) The measures referred to in Subsection (2) shall be evaluated by the Authority taking into account the gravity and particular circumstances of the criminal offense, misconduct or infringement.

(4) If the measures taken by the economic operator are considered to be sufficient, the Authority shall adopt a resolution to that effect within 15 working days of the date of receipt of the request. The rules on summary proceedings shall not apply. In such proceedings the provisions of the Administrative Procedure Act on remedying deficiencies shall apply on the understanding that the Authority shall be entitled to request the requesting client to remedy deficiencies more than once.

(4a) This deadline may be extended in justified cases on one occasion, by up to 15 working days, of which the applicant economic operator shall be notified immediately. The Authority shall send its decision to the economic operator without delay, in writing. The decisions establishing the reliability of an economic operator that is subject to any grounds for exclusion may not be conditional and may not impose any additional obligation upon the economic operator for taking further measures.

(4b) If the Authority rejected the request by way of a resolution, the economic operator that is subject to the given grounds for exclusion may re-submit the request under Subsection (1) regarding the same grounds for exclusion if it wishes to demonstrate its reliability by means of measures taken after the rejection of its previous request.

(5) The applicant may bring administrative action against the resolution rejecting the application within 15 days of receipt of the decision. The judgment of the court may not be appealed.

(6) Any person whose right or lawful interests is directly affected in a case may not participate in proceedings related to the request provided for in Subsection (1), nor any person who is considered biased. Subsections (1)-(2) of Section 147 shall apply mutatis mutandis having regard to conflict of interest concerning the persons participating in proceedings related to the request provided for in Subsection (1), with the proviso that the client organization mentioned therein shall be construed as the applicant, public procurement action shall be construed as the assessment of the request, and the date of the opening of review procedures shall be construed as the date of submission of the request. Any person affected by conflicts of interest within the meaning of this Subsection shall so inform the President of the Authority without delay, and shall remove himself from the proceedings in progress or from the preparation thereof.

Section 62 (Grounds for exclusion)

(1) Any economic operator may be excluded from participation in a contract as a tenderer, candidate tenderer, subcontractor, or from the attestation of competence:

[..]

b) where the economic operator has not fulfilled obligations relating to the payment of taxes, customs duties or social security contributions which are overdue for over a year, except if the economic operator has fulfilled its obligations by paying such debts before the time of submission of the tender or request to participate, including, where applicable, any interest accrued or fines, or if deferred payment has been authorized;

[..]

f) where the economic operator's activities are restrained for any period by final court verdict pursuant to Paragraph b) of Subsection (2) of Section 5 of Act CIV of 2001 on Criminal Sanctions in Connection with the Criminal Liability of Legal Persons, or under Paragraph c) or g) applicable to the given procurement procedure, during the period of exclusion, or if the tenderer's operations are restrained by final court order for similar reasons and by similar means;

b. indicate what in practice is required to successfully perform self-cleaning? In particular, whether the conditions set out in article 57 section 6 paragraph 2 of Directive 2014/24 *(the economic operator shall prove (1) that it has paid or undertaken to pay compensation in respect of any damage caused by the criminal offense or misconduct, (2) clarified the facts and circumstances in a comprehensive manner by actively collaborating with the investigating authorities and (3) taken concrete technical, organizational and personnel measures that are appropriate to prevent further criminal offenses or misconduct)* have to be fulfilled jointly for successful self-cleaning or is it permissible to choose or omit one of them and still demonstrate appropriate self-cleaning?

Similarly to the public procurement regulations of Austria and Germany, the Act CXLIII of 2015 on Public Procurement provides parties excluded from public procurement procedures with the possibility of self-clarification. The request for self-

clarification should be submitted by the excluded undertaking to the Public Procurement Authority ("**PPA**"). In order to be exempted from the exclusion, the company subject to an exclusion must prove its reliability by demonstrating the three following cumulative conditions:

- it has paid or undertaken to pay compensation in respect of any damage caused by the infringement;
- it has clarified the facts and circumstances of the infringement in a comprehensive manner by actively cooperating with the competent authorities; and
- it has taken technical, organizational and personnel measures that are appropriate to prevent further infringements.

Pursuant to the practices of the PPA, it first examines whether damage was caused by the infringement. If damage was caused, the PPA examines whether the aggrieved parties may be identified. If the aggrieved parties cannot be identified, the undertaking subject to exclusion should demonstrate the measures taken to address any future claims for compensation. If the aggrieved parties can be identified, the undertaking subject to exclusion should prove that the damage suffered by the aggrieved parties was compensated (e.g. by submitting waivers issued by the aggrieved parties).

Proof of the above shall be submitted to the PPA along with the request for self-clarification. The PPA's positive decision on self-clarification applies to every future public procurement procedure (i.e. the scope of self-clarification is not limited to a specific tender). However, the PPA also has wide discretionary powers to assess the self-clarification request and there is no guarantee whatsoever that such a request will be accepted and that an exemption will be granted.

3. Has any relevant case law re. the self-cleaning procedure been issued in your country that could provide practical tips on how to perform self-cleaning in your jurisdiction? If so, could you provide a summary of the relevant points made in the judgements?

Order of the Budapest-Capital Regional Court, No. 9.Kpk.720.052/2018/4.

The main objective to clarify the facts and circumstances in a comprehensive manner by actively collaborating with the competent authorities is to ensure the authority that the company recognized and condemned its infringement, and the company is actively contributing to the remedy of the situation and to the restoration of the infringed subjective rights.

Decision of the PPA dated September 28, 2016 (Decision No. 1-04655/02/2016)

The Authority considers in the course of the justification of the fact of cooperation whether the company ended its infringement immediately and the company did not argue its involvement in the infringement.

Decision of the PPA dated July 13, 2016

The Authority also takes into account in the course of its assessment if the company has started the necessary actions prior to the final decision of the Authority. The fact of active cooperation would be justified if the company provides certain data to the Authority, when the company does not have a legal obligation to provide such data.

Order of the Budapest-Capital Regional Court, No. 9.Kpk.720.052/2018/4.

The Budapest-Capital Regional Court stated in its order that "the self-cleaning procedure provides an exceptional - post-cleaning benefit to the economic operator that committed the infringement, in order to prove its reliability despite the otherwise exclusive reasons. The purpose and the subject matter of the self-cleaning procedure are to establish that the measures taken by the economic operator may sufficiently justify its reliability despite the existence of a ground for refusal".

The company must, therefore, convince the Authority of the existence of evidence that the economic operator, despite the finally established

and committed infringements, is a reliable partner for the contracting authorities and that there must be no prejudice of public procurement objectives, protected interests or values.

The purpose of self-cleaning is to examine whether the offending economic operator's "right to participate" in public procurement can be restored.

According to the concept of self-cleaning, a company that was involved in corruption in the past, may regain its right to participate in public procurement procedures if it ensures, by means of a series of extensive organizational and personnel measures, that it will not commit similar acts in the future.

In particular, it shall be examined whether the company has taken all credible and promising measures to prevent any repeat of offenses in the future.

Self-cleaning requires economic operators to adopt specific action and mind-set.

The Hungarian state can only award public contracts to responsible economic operators.

The term „credibility" in the Hungarian legislation means that the economic operator acts not only to avoid or reduce the financial consequences of the infringement but also to achieve responsible, clean future compliance, also generally co-operating with the authorities to detect any possible infringement.

4. Does your country entrust the assessment of the measures undertaken within "self-cleaning" to individual contracting authorities or does it entrust other, dedicated authorities (on a central or decentralized level) with that task?

In Hungary, the measures undertaken within "self-cleaning" are entrusted to the Public Procurement Authority of Hungary.

Due to the interest of legal certainty, the law places the powers related to self-clarification on the Public Procurement Authority, so that the law does not entrust the decision-making of the assessment of the reliability of the concerned economic operators to the contracting authorities, despite the possibility of the directive. The Public Procurement Authority - or, in the case of a judicial review, the court - may declare that the measures taken by the concerned economic operators comply with the conditions laid down by law and duly substantiate the reliability of the economic operator. The advantage of the above mentioned is that the economic operator can be sure, even before participating in the procedure, that it is not covered by the ground for refusal in question. In addition, the decisions of the Public Procurement Authority may provide guidance to the tenderer in assessing future self-cleaning measures. In accordance with the Public Procurement Directive, the Act specifies in Section 188 the types of measures that the person or organization concerned must take in order to be exempted from the exclusion. In addition to the above, the law leaves it to the discretion of the Public Procurement Authority to assess the adequacy of the measures taken in the framework of self-clarification.

Section 188 of Act CXLIII of 2015 on Public Procurement (1) Any economic operator who is subject to any grounds for exclusion apart from the ones mentioned in Paragraphs b) and f) of Subsection (1) of Section 62, may submit a request to the Authority for establishing that measures taken by the economic operator are sufficient to demonstrate its reliability despite the existence of a relevant ground for exclusion. A version of the petition made by means of information technology equipment shall also be made available to the Közbeszerzési Hatóság (Procurement Authority) in an editable format. The Procurement Authority shall verify receipt - if submitted via electronic mail - within one working day. Evidence relating to the measures taken by the economic operator shall be provided to the Procurement Authority enclosed with the request.

Author: **László Fenyvesi**

Self-Cleaning Procedure in Italy

1. Has the "self-cleaning" procedure as set out in Article 57 section 6 of Directive 2014/24 been implemented in your jurisdiction?

Yes. The Public Procurement European Directives were transposed in Italy by means of legislative decree No. 50/2016, which nowadays represents the main law dealing with procurement matters and governs the exclusion grounds in article 80 (hereinafter the "**Italian Public Procurement Code**").

2. If yes, could you please:

a. provide an English translation of the transposing provision;

The Italian Public Procurement Code expressly governs the self-cleaning measures within art. 80, sections 7-9. According to the mentioned provisions:

7. Any economic operator, or any subcontractor, subject to exclusion under Sections [...], with only reference to the circumstances where the final judgment imposes an imprisonment not exceeding 18 months or acknowledges the collaboration as mitigating factor, or subject to exclusion under section 5, may provide evidence that it has paid or undertaken to pay compensation in respect of any damage caused by the criminal offense or misconduct and it has taken concrete technical, organizational and personnel measures that are appropriate to prevent further criminal offenses or misconduct.

8. Whether the contracting authority considers the measures adopted pursuant to section 7 as sufficient, the economic operator shall not be excluded from the procurement procedure; otherwise the economic operator shall be notified of the exclusion and of the relevant reasons.

9. Any economic operator excluded from the participation to public tender procedures by a final judgment shall not rely on the possibility provided by sections 7 and 8 for the entire exclusion-period imposed by the final "judgment at hand".

b. indicate what in practice is required to successfully perform self-cleaning? In particular, whether the conditions set out in article 57 section 6 paragraph 2 of Directive 2014/24 (*the economic operator shall prove (1) that it has paid or undertaken to pay compensation in respect of any damage caused by the criminal offense or misconduct, (2) clarified the facts and circumstances in a comprehensive manner by actively collaborating with the investigating authorities and (3) taken concrete technical, organizational and personnel measures that are appropriate to prevent further criminal offenses or misconduct)* have to be fulfilled

jointly for successful self-cleaning or is it permissible to choose or omit one of them and still demonstrate appropriate self-cleaning?

In order to detail in practice the framework provided by the Italian Public Procurement Code, the National Anticorruption Authority (ANAC) issued Guideline no. 6 (on grave professional misconducts), which deals also with self-cleaning measures.

First of all, ANAC clarifies that *"the self-cleaning measures are required to be adopted within the deadline for the submission of the bids or, with reference to the certifications, within the date of the signature of the agreement with the SOA certification body. The economic operator is required to specifically point out the adopted measures within the Single European Procurement Documents or within the certification contract"*.

Consequently, in line with the case law (*ex multis,* Cons. Stato no. 481/2020), the self-cleaning measures are effective as of the time of their adoption with the result that only the public procurement procedures started after the full implementation of the measure would be reasonably safe from the risk of exclusion.

Furthermore, the mentioned ANAC's guideline no. 6 points out several examples of self-cleaning measures, i.e.:

- *"the adoption of measures aimed at ensuring adequate professional capacity of the employees, including through specific training activities;*
- *the adoption of measures aimed at improving the quality of the performance by means of works having an organizational, structural and/or instrumental nature;*
- *the renewal of corporate bodies;*
- *the adoption and effective implementation of organizational and management models suitable to prevent offenses having the same nature of those already occurred, as well as the empowerment of a body in charge of autonomous initiative and monitoring powers with the tasks of supervising the functioning of and the compliance with such a model and to proceed with the relevant updating;*
- *proof that the act was committed by a subject for his/her own benefit, or by fraudulently circumventing the organization and management models or the proof that there was no omission or insufficient supervision by the inspection body"*.

In this respect, it should be considered that the ANAC's guideline does not mandatorily require that all the mentioned self-cleaning measures shall be jointly adopted by the economic operator. However, for the admission to a public procedure, it is important that that the economic operator is able to provide evidence of an effective dissociation from the previous "misconducts" so that the public authority may opt for keeping the economic operator in the market.

3. Has any relevant case law re. the self-cleaning procedure been issued in your country that could provide practical tips on how to perform self-cleaning in your jurisdiction? If so, could you provide a summary of the relevant points made in the judgements?

- **Milan Administrative Court no. 1737/2019:** Before excluding an economic operator which pointed out the adopted self-cleaning measures, the tendering authority is required to assess (together with the economic operator) the measures at hand in order to evaluate its reliability. Otherwise, the exclusion is unlawful.
- **Rome Administrative Court no. 2771/2019:** The case law, on the one hand, confirms the existence of an obligation, for the tendering authority, to discuss together with the economic operator (in the so-called *"contradictory procedure"*) the evaluation of self-cleaning measures and the consequent exclusion measure (*ex multis,* mentioned in Milan Administrative Court no. 1737/2019); however, on the other hand, the application of the contradictory procedure requires previous compliance with the loyalty principle: thus, in the case of false or misleading declarations by the economic operator, the contracting authority is entitled to immediately adopt an exclusion measure without discussing the appropriateness of the self-cleaning measures with the private party.

- **Cons.Stato no. 598/2019:** In the context of the assessment of the appropriateness of the self-cleaning measures adopted by the economic operator (for the purpose of its admission), the contracting authority shall evaluate whether the replacement of the corporate bodies convicted for certain criminal offenses are effective or not. In this respect, regardless of the possible transfer of shares or the change of the company name, it is important that, in practice: (i) the subjects in charge of top-roles in the company have been removed from any corporate role before the deadline for the submission of the bids; (ii) the influence potentially exercised by the individuals convicted of corruption offenses has been stopped, also by means of the application of specific measures adopted by the prefect ("*Prefetto*").
- **Milan Administrative Court n. 811/2020:** The self-cleaning measures have a pro-future effect, i.e. with reference to the participation in tenders subsequent to the adoption of the measures themselves and obviously have no retroactive effect. The existence of self-cleaning measures must be appreciated on an objective level, so that the contracting station must verify whether the economic operator is in the same organizational-management situation in which the serious professional misconduct has occurred, or if this situation has changed and to what extent.

4. Does your country entrust the assessment of the measures undertaken within "self-cleaning" to individual contracting authorities or does it entrust other, dedicated authorities (on a central or decentralized level) with that task?

Does your country entrust the assessment of the measures undertaken within "self-cleaning" to individual contracting authorities or does it entrust other, dedicated authorities (on a central or decentralised level) with that task?"

Based on article 80, par. 8 of Legislative Decree no. 50/2016, as well as on the guidelines no.6 issued by National Anticorruption Authority, the assessment of the appropriateness of the self-cleaning measures falls under the exclusive competence of the interested contracting authority. More in detail:

- according to article 80, par. 8, *"where the contracting authority considers that the measures adopted pursuant to paragraph 7 (i.e. the self-cleaning measures) are sufficient, the economic operator shall not be excluded from the tender procedure"*;
- the guidelines n. 6 underline, in several sentences, that the assessment on the self-cleaning measures shall be carried out only by the relevant contracting authority (e.g. "*the assessment of the contracting authority* ***on the self-cleaning measures are made after the hearing of the economic operator***").

Such interpretation (i.e. concerning the exclusive competence of the contracting authority on this matter) was expressly confirmed by the same National Anticorruption Authority (determination no. 231 of March 4, 2020) which – in this context – refused to issue a legal opinion (requested by a contracting authority pursuant to art. 211 of Legislative Decree no. 50/2016) dealing with the appropriateness of the self-cleaning measures adopted by an economic operator, stating in this respect that the contracting authority represents the sole entity able to evaluate the risks arising in the specific case (taking into account, in particular, the object and the technical aspects of the public contract to be awarded as well as the public interests involved). Thus, the National Anticorruption Authority (but it is true for any other public entity) cannot replace the contracting authority in relation to the tasks connected to the assessment of the self-cleaning measures.

Author: **Ilaria Gobbato**

Self-Cleaning Procedure in The Netherlands

1. Has the "self-cleaning" procedure as set out in Article 57 section 6 of Directive 2014/24 been implemented in your jurisdiction?

Yes, in Article 2.87a of the Dutch Public Procurement Act 2012 (Aanbestedingswet 2012) (parliamentary documents II number 32440).

2. If yes, could you please:

a. provide an English translation of the transposing provision;

1. The contracting authority shall give a candidate or tenderer to whom an exclusion ground as referred to in Article 2.86, first or third paragraph, or Article 2.87 applies, the opportunity to prove that it has taken sufficient measures to demonstrate its reliability. If the contracting authority deems that evidence sufficient, the relevant candidate or tenderer shall not be excluded.

2. For the application of the first paragraph the candidate or tenderer shall demonstrate that it, in so far as applicable, has compensated or made a commitment to compensate loss ensuing from convictions for criminal offenses as referred to in Article 2.86 or from errors as referred to in Article 2.87, that it has contributed to clarifying facts and circumstances by actively cooperating with the investigating authorities and that it has taken concrete technical, organizational and personnel measures which are suitable to prevent further criminal offenses or errors.

3. The contracting authority shall assess the measures taken by the candidate or tenderer, taking account of the seriousness and the special circumstances of the criminal offenses or errors. If the contracting authority does not deem the measures which have been taken to be sufficient, it shall inform the relevant candidate or tenderer thereof, with the reasons therefor.

COVID-19

The Dutch Procurement Act provides for a derogation by the contracting authority from the mandatory or voluntary exclusion grounds on an exceptional basis, for overriding reasons relating to the public interest. This means that if an exclusion ground would apply to a specific tenderer, the contracting authority may choose to refrain from exclusion of this tenderer, if public interest reasons would be present. This is to enable contracting authorities in situations of urgency to award a contract as swiftly as possible, irrespective of whether or not the contracting party is for example

subject of a conviction by final judgement. Such a situation of urgency could be the protection of public health. In this context, the Dutch legislator has particularly mentioned the example of an epidemic outbreak where contracting authorities need to act fast. This, in combination with the European Commission qualifying Covid-19 as a public health crisis, justifies contracting authorities awarding contracts to an undertaking on which an exclusion ground applies, for reasons of Covid-19. Obviously, this can only be done if the contract is directly linked to Covid-19, such as for example the procurement of facial masks or a vaccine. Also, this deviation of the exclusion grounds must be necessary to achieve the objective (the protection of public health), and proportionate in the sense that this objective cannot be achieved by less drastic measures.

As a consequence, in the aforementioned scenario where a contracting authority deviates from the application of the exclusion grounds, contracting authorities will not get to the assessment of the self-cleaning measures and whether or not it deems those measures sufficient.

b. indicate what in practice is required to successfully perform self-cleaning? In particular, whether the conditions set out in article 57 section 6 paragraph 2 of Directive 2014/24 (*the economic operator shall prove (1) that it has paid or undertaken to pay compensation in respect of any damage caused by the criminal offense or misconduct, (2) clarified the facts and circumstances in a comprehensive manner by actively collaborating with the investigating authorities and (3) taken concrete technical, organizational and personnel measures that are appropriate to prevent further criminal offenses or misconduct)* have to be fulfilled jointly for successful self-cleaning or is it permissible to choose or omit one of them and still demonstrate appropriate self-cleaning?

The candidate or tenderer to whom the exclusion grounds apply shall have the opportunity to prove its reliability to the contracting authority. The wording "*in so far as applicable*" in the second subparagraph of Article 2.87a of the Dutch Public Procurement Act 2012 suggests that it could be possible to omit conditions that are not applicable to an individual case.

The contracting authority enjoys discretion as to the sufficiency of the evidence presented to it by the candidate or tenderer to demonstrate its reliability. When assessing the measures taken by the candidate or tenderer, the contracting authority shall take into account the seriousness and special circumstances of the criminal offenses or errors. Should the contracting authority deem the measures insufficient, it shall inform the candidate or tenderer, stating the reasons therefor. The decision of the contracting authority shall be proportionate and non-discriminatory.

3. Has any relevant case law re. the self-cleaning procedure been issued in your country that could provide practical tips on how to perform self-cleaning in your jurisdiction? If so, could you provide a summary of the relevant points made in the judgements?

Committee of Public Procurement experts, Advice 386 of February 3rd, 2017: The Committee recommends the interested parties and the tenderers to not only notify any serious professional errors that occurred in the past three years – if asked in a tender procedure – but also to include a (properly substantiated) recollection of the measures taken by them to illustrate their reliability as referred to by, among others, article 2.87a Dutch Procurement act 2012. Indeed, if sufficient measures have been implemented, there are no reasons for exclusion on this ground.

Judgment of November 19th, 2018 (file no. C/13/654709 / KG ZA 18-1011): This case concerns a criminal investigation into the bribery-related activities of the tenderer's (former) shareholder. The Amsterdam municipality excluded this party even though no conviction of said shareholder had (yet) taken place and self-cleaning measures were taken. Although the court stated that it could marginally assess the municipality's decision, it deemed the exclusion of this tenderer understandable despite the tenderer's self-cleaning measures. The court emphasized the need for governmental entities to cooperate with trustworthy entities, as the awarded contracts are funded by the public finances. The court found that the municipality therefore had a legitimate interest in avoiding every possible impression of doing business with undertakings that, directly or indirectly, were involved with the bribery of its officials.

Judgment of September 27th, 2019 (file no. C/13/671325 / KG ZA 19-898):

The Court considered that the municipality of Amsterdam had good grounds to exclude a company from public procurement since it employed X, a civil servant who was dismissed due to bribery charges. The Court noted the importance of public bodies working together with companies with doubts regarding integrity and reliability. Any appearances of a conflict of interest should be avoided, especially if it concerns public funds.

In this specific case, the company did not take sufficient self-cleaning measures by implementing a code of conduct and having the involved shareholder sell their shares and resign. This was since X was still heavily involved within the company's activities, also after objections from the municipality. Thus, exclusion from this tender was rightful and proportionate.

Judgement of March 31st, 2020, ECLI:NL:GHDHA:2020:851

A contracting authority may assess the self-cleaning measures as such, but may also take into account whether or not the tenderer has acknowledged and tackled its unlawful behavior. The way in which an organization actually deals with its past misconduct, can therefore be relevant in the assessment of its self-cleaning measures. Thereby the seriousness of the misconduct plays a role next to the question whether the misconduct has occurred recently and how expeditiously the tenderer has taken self-cleaning measures and whether they have actually been implemented. If these measures would not yet have been implemented, the contracting authority would not be able to test the measures' effectiveness.

The court found that in light of the seriousness of the errors committed by the tenderer, and the fact that self-cleaning measures aim to regain the contracting authority's trust in a tenderer, the contracting authority was entitled to take into account that the tenderer blamed external parties instead of taking responsibility for its own actions.

Judgement of May 29th, 2020, ECLI: NL: RBROT: 2020: 5153

This case considered whether actions more than three years before starting a public procurement procedure could be considered in light of the exclusion ground on "professional misconduct". It was held that the maximum period of exclusion had elapsed.

Therefore, the company in question could legitimately answer that it had not taken part in "professional misconduct". The court reaffirms that self-cleaning measures are only relevant in light of a proportionality-test. However, since the maximum period of exclusion had elapsed, self-cleaning measures (or the lack thereof) could not considered by the municipality.

4. Does your country entrust the assessment of the measures undertaken within "self-cleaning" to individual contracting authorities or does it entrust other, dedicated authorities (on a central or decentralized level) with that task?

In the Netherlands, this task is entrusted to the individual contracting authority, whose decision can be challenged in court. In its judicial review, the court will merely assess whether the contracting authority could reasonably have come to its decision, leaving primacy to the contracting authority. Besides the civil courts, there is the possibility of review of the contracting authority's decision by the Commission of Public Procurement Experts. Please note, however, that this body only issues non-binding advice, which can be put aside by the contracting authority.

Authors: **Bram Braat, Pascalle van Overbeek**

Self-Cleaning Procedure in Poland

1. **Has the "self-cleaning" procedure as set out in Article 57 section 6 of Directive 2014/24 been implemented in your jurisdiction?**

   Yes, in Article 110 sec. 2 and 3 of the Act of September 11, 2019 – Public Procurement Law (*Polish Journal of Laws* of 2019, item 2020).

2. **If yes, could you please:**

   a. **provide an English translation of the transposing provision;**

   2. A contractor shall not be excluded in the circumstances referred to in Article [...]*, if it proves to the contracting authority that it has jointly fulfilled the following premises:*

   1) it redressed or undertook to redress damage caused by its crime, offense or misconduct, including by way of monetary compensation;

   2) it clarified, in a comprehensive manner, the facts and circumstances connected with the crime, offense or misconduct and the resulting damage, by actively collaborating with the relevant authorities, including law enforcement authorities, and/or the contracting authority;

   3) it undertook concrete technical, organizational and personnel measures appropriate to prevent further crimes, offenses and misconduct, including in particular by:

   a) severing all links with persons or organizations involved in the contractor's misconduct,

   b) reorganizing personnel,

   c) implementing reporting and control systems,

   d) creating internal audit structures to monitor compliance with laws, internal regulations or standards,

   e) adopting internal liability and compensation rules applicable to cases of non-compliance with laws, internal regulations and/or standards.

   3. The contracting authority shall assess whether the measures taken by the contractor, referred to in Section 2, are sufficient to prove its reliability, given the gravity and particular circumstances of the contractor's offense. If the measures taken by the contractor, referred to in Section 2, are not sufficient to prove its reliability, the contracting authority shall exclude the contractor.

   b. **indicate what in practice is required to successfully perform self-cleaning? In particular, whether the conditions set out in article 57 section 6 paragraph 2 of Directive 2014/24 *(the economic operator shall prove (1) that it has paid or undertaken to pay compensation in respect of any damage caused by the criminal offense***

***or misconduct, (2) clarified the facts and circumstances in a comprehensive manner by actively collaborating with the investigating authorities and (3) taken concrete technical, organizational and personnel measures that are appropriate to prevent further criminal offenses or misconduct)* have to be fulfilled jointly for successful self-cleaning or is it permissible to choose or omit one of them and still demonstrate appropriate self-cleaning?**

First of all, there is a direct requirement for all the conditions transposing the wording of article 57 section 6 paragraph 2 of Directive 2014/24 to be fulfilled jointly – the Polish provision clearly indicates that *"**a contractor shall not be excluded*** [...] *if it proves to the contracting authority that it has jointly fulfilled the following premises"* **The newer Polish case law** in particular strongly emphasizes **the obligation to fully and meticulously clarify the facts which have resulted in the circumstances constituting a ground for exclusion**.

In Polish jurisprudence and case law, it is emphasized that simple clarifications are not enough to perform a "self-cleaning" and that every "self-cleaning" statement needs to be submitted along with evidence confirming measures taken by a contractor. These measures have to be sufficient to confirm that the act or omission which resulted in establishing a ground for exclusion is very unlikely to be repeated in the future. It is also necessary for the measures taken to be adequate to the established ground for exclusion.

It is also considered by a strong majority of experts to be a general rule that a self-cleaning should be performed at the stage of submitting the ESPD. However, in newer case law a stance to the contrary is sometimes presented, arguing that the contractors should be allowed to perform a self-cleaning procedure at a later stage, as preventing the contractor from carrying out a self-cleaning procedure after a ground for exclusion is established would essentially lead to automatic exclusion.

3. Has any relevant case law re. the self-cleaning procedure been issued in your country that could provide practical tips on how to perform self-cleaning in your jurisdiction? If so, could you provide a summary of the relevant points made in the judgements?

The National Chamber of Appeals (the "NAC") – the Polish public procurement appeal authority – has issued a number of judgements regarding self-cleaning procedures under the previously binding legal provisions which remain relevant up to this date. Please find some case law along with some points relevant to the question below:

Judgment of February 2nd, 2017 (file no. KIO 139/17): It should be considered a *sine qua non* condition of a "self-cleaning" procedure that the contractor acknowledges the fact that he has committed the act or omission resulting in establishing an exclusion ground to which the "self-cleaning" is to apply.

Judgment of September 28th, 2018 (file no. KIO 1797/18): The information about the established exclusion ground should generally be included in the ESPD statement. Omitting information in that scope in the ESPD may be considered as misleading the contracting authority and thus potentially analyzed as an additional exclusion ground (the Polish implementation of article 59 (4) (h) of Directive 2014/24).

Judgment of December 8th, 2017 (file no. KIO 2443/17, 2445/17): Please note that the view presented in this judgement is contrary to the current general ruling practice of the NAC.

As the ground for exclusion is an objective circumstance, it is not modified by indicating facts to the contrary in the ESPD. Thus, an incorrect information about the existence of a ground for exclusion in the ESPD is not automatically equivalent to resigning from the possibility of performing a "self-cleaning" procedure by the contractor that submitted the ESPD. This leads to the conclusion that, if a ground for exclusion is established in the course of a contract award procedure, the contracting authority is obligated to allow the contractor at risk of exclusion to perform a "self-cleaning" procedure.

Judgment of December 8th, 2017 (file no. KIO 2443/17, KIO 2445/17): The main goal of the self-cleaning procedure cannot be considered as just a measure allowing a contractor to be awarded a public contract, but first and foremost it should prove that a contractor has undertaken the necessary and real measures to avoid establishing an exclusion ground in the future.

Judgment of May 9th, 2016 (file no. KIO 610/16): The NAC indicated some exemplary measures that can be undertaken for the purpose of self-cleaning such as:

- clarification to the competent authorities or the contracting authority of all circumstances of 'unreliable' behaviour,
- compensation for damage,
- termination of employment contract with the responsible person,
- training of staff to comply with certain rules,
- removal of people guilty of offenses from management or supervision,
- introduction of additional control systems.

Judgement of September 28th, 2018 (file no. KIO 1797/18): There is no single, specific way in which the contractor is to demonstrate his reliability, and the way in which this is to be demonstrated depends mainly on the type and causes of the event to which the self-cleaning relates.

Judgement of July 17th, 2020 (file no. KIO 1213/20): It is impossible to assess whether the measures undertaken for the purpose of self-cleaning are sufficient to avoid similar situations in the future if the contractor's explanations do not contain an exhaustive description of the state of affairs which resulted in the ground for exclusion.

4. Does your country entrust the assessment of the measures undertaken within "self-cleaning" to individual contracting authorities or does it entrust other, dedicated authorities (on a central or decentralized level) with that task?

Individual contracting entities assess the measures undertaken within "self-cleaning" in the course of the public procurement procedure. It must be emphasized that the assessment of particular contracting entities can differ – some contracting entities may find "self-cleaning" measures satisfactory while others may find the very same measures not sufficient.

There are no dedicated authorities entrusted with assessing the efficiency of "self-cleaning" measures, however the contracting entities' decisions based on the assessment of the self-cleaning measures may be subject to a review by the appeal authority should appropriate legal remedies be filed. Such review may include evaluation of the self-cleaning measures by the appeal authority.

Authors: **Aldona Kowalczyk, Adam Królak**

Self-Cleaning Procedure in Romania

1. **Has the "self-cleaning" procedure as set out in Article 57 section 6 of Directive 2014/24 been implemented in your jurisdiction?**

   Yes. The self-cleaning procedure was transposed in article 171 (which is connected to the legal provisions concerning exclusion from a public procurement procedure – i.e. article 164 to 170) of the Public Procurement Law no. 98/2016 (the "**Law**").

2. **If yes, could you please:**

   a. **provide an English translation of the transposing provision;**

   English translation of article 171 of the law:

   "(1) In any of the situations provided for in art. 164 and 167 which triggers exclusion from the award procedure, any economic operator may provide evidence in order to prove that the measures such operator has taken are sufficient to substantiate its credibility in relation to the exclusion reasons.

   (2) If the contracting authority assesses the evidence presented by the economic operator, in accordance with the provisions of par. (1), as sufficient for proving its credibility, the contracting authority shall not exclude the economic operator from the award procedure.

   (3) The evidence that an economic operator subject to any of the situations provided in art. 164 and 167 may provide to the contracting authority, in the sense of the provisions of par. (1), refers to the economic operator making the payment of or undertaking the obligation to pay a compensation in respect of possible damages caused by a criminal offense or misconduct, the clarification by the operator of the facts and circumstances in which the criminal offense or misconduct has been committed, the fact of actively cooperating with the authorities conducting the investigation, or taking concrete and appropriate measures at technical, organizational and personnel level, such as the cancellation of connections with persons and organizations involved in the inappropriate behavior, measures concerning its personnel reorganization, implementation of control and reporting rules, setting up of an internal audit structure able to verify compliance with the legal provisions and other rules or the adoption of internal rules arising from liability and payment of damages, in order to prevent further criminal offenses or misconduct.

   (31) The contracting authority shall assess the measures taken by the economic operators and evidences in accordance with the provisions of par. (3), taking into account the seriousness

and the particular circumstances of the criminal actions or deviations considered.

(32) If the measures provided for in par. (31) are not sufficient for the contracting authority, the later shall give the economic operator an explanation of the reasons that led to the decision to exclude the respective operator from the award procedure.

(4) If the economic operator has been subject to the prohibition to participate in the procedures for awarding a public procurement / framework agreement or a concession contract, as ruled by a final court ruling which has legal effects in Romania, the provisions of paras. (1) - (3) are not applicable for the entire period of exclusion set up by the respective court ruling.

(5) If the economic operator has not been subject to the prohibition to participate in the procedures for awarding a public procurement / framework agreement or a concession contract by a final court ruling, the exclusion situations provided for in art. 164 and 167 do not apply:

a) if, in case of the facts listed under art. 164, a period of five years has elapsed since the date of the final conviction ruling;

b) if, in case of the situations, facts or events referred to in art. 167, a period of three years from the date of the occurrence of the situation, fact or relevant event has expired."

b. indicate what in practice is required to successfully perform self-cleaning? In particular, whether the conditions set out in article 57 section 6 paragraph 2 of Directive 2014/24 *(the economic operator shall prove (1) that it has paid or undertaken to pay compensation in respect of any damage caused by the criminal offense or misconduct, (2) clarified the facts and circumstances in a comprehensive manner by actively collaborating with the investigating authorities and (3) taken concrete technical, organizational and personnel measures that are appropriate to prevent further criminal offenses or misconduct)* have to be fulfilled jointly for successful self-cleaning or is it permissible to choose or omit one of them and still demonstrate appropriate self-cleaning?

The legal provisions in force indicate alternative scenarios and do not impose a joint fulfillment of the three conditions mentioned above. We note that each case of self-cleaning is evaluated separately, on a case by case basis, so the authority will be inclined to positively assess the situation whenever the economic operator provides evidence in as extensive a way as possible.

As a general comment, the simple statement made by the operator is obviously not enough in order to be allowed to perform self-cleaning. Instead, such a statement needs to be accompanied by proper evidence proving the effective measures that the operator has taken. Such measures need to be proportional and adequate to the grounds of exclusion.

So far, from a practical perspective, it appears that the Romanian authorities are rather reluctant in accepting the self-cleaning of operators as they probably mistrust the capability of such operators to achieve the self-cleaning's expected results.

3. Has any relevant case law re. the self-cleaning procedure been issued in your country that could provide practical tips on how to perform self-cleaning in your jurisdiction? If so, could you provide a summary of the relevant points made in the judgements?

We have not identified so far any Romanian courts case law on the self-cleaning procedure. Given that these rules have been incorporated in the Law in May 2016, there is probably not enough time for the Romanian courts to render decisions on this specific matter.

4. Does your country entrust the assessment of the measures undertaken within "self-cleaning" to individual contracting authorities or does it entrust other, dedicated authorities (on a central or decentralized level) with that task?

Under the law, contracting authorities are in charge with the assessing the measures related to the self-cleaning" process (please see above, question 2).

Under the provisions of the Law (article 4), contracting authorities are defined as either:

a. central or local public authorities and institutions, as well as their structures which have been delegated the capacity of credit officer and which have established competences in the field of public procurement;

b. public law organisms;

c. Associations formed between one or more authorities from points a or b.

Public law organisms are defined as any entities, different from the ones included at point a), which fulfill all the following conditions:

- are registered to fulfill a general public need and not a commercial/industrial one;
- have legal personality;
- are financed, for the most part, by entities referred to in a) or by other bodies governed by public law or are subordinated, under the authority or under the coordination or control of an entity referred to in (a) or another public law or more than half of the members of the board of directors / management or supervisory body are appointed by one of the entities provided for in a) or by another public law body.

Author: **Dentons Bucharest**

Self-Cleaning Procedure in Slovakia

1. Has the "self-cleaning" procedure as set out in Article 57 section 6 of Directive 2014/24 been implemented in your jurisdiction?

Yes, in section 40 (8) – (10) of the Slovak Act No. 343/2015 Coll. on public procurement.

2. If yes, could you please:

a. provide an English translation of the transposing provision;

(8) Where the tenderer or candidate does not comply with the conditions for participation concerning the personal standing under Section 32 Subsection 1 Paragraphs a), g) and h) or may be excluded because there is a reason for their exclusion under Subsection 6 Paragraphs c) through g) and Subsection 7, they shall have the right to demonstrate to the contracting authority or contracting entity that they have taken sufficient remedial measures. Through the remedial measures, the tenderer or candidate must demonstrate that they have paid or have undertaken to pay compensation for any damage, have remedied misconduct, have sufficiently clarified disputed facts and circumstances by active cooperation with the competent authorities, and that they have taken particular technical, organizational and personnel measures intended to prevent any future misconduct, petty offenses, administrative offenses or criminal offenses.

(9) Where the prohibition of participation in public procurement was imposed on a tenderer or candidate, confirmed by the final decision in another Member State, such a tenderer or candidate shall not have the right to demonstrate to the contracting authority or contracting entity that they have taken remedial measures under the second sentence of Subsection 8, provided that such a decision is enforceable in the Slovak Republic.

(10) The contracting authority and contracting entity shall assess the remedial measures under the second sentence of Subsection 8 submitted by the tenderer or candidate, while taking account of the seriousness of the misconduct and its particular circumstances. If the remedial measures submitted by the tenderer or candidate are considered insufficient by the contracting authority or contracting entity, it shall exclude the tenderer or candidate from the public procurement.

b. indicate what in practice is required to successfully perform self-cleaning? In particular, whether the conditions set out in article 57 section 6 paragraph 2 of Directive 2014/24 *(the economic operator shall prove (1) that it has paid or undertaken to pay compensation in respect of any damage caused by the criminal offense*

***or misconduct, (2) clarified the facts and circumstances in a comprehensive manner by actively collaborating with the investigating authorities and (3) taken concrete technical, organizational and personnel measures that are appropriate to prevent further criminal offenses or misconduct)* have to be fulfilled jointly for successful self-cleaning or is it permissible to choose or omit one of them and still demonstrate appropriate self-cleaning?**

No relevant practice of the Slovak Public Procurement Office clarifying this issue is available.

As it follows from the wording of the law, the conditions must be fulfilled jointly. The experts from the area of public procurement also support this opinion.

However, please note that the explanatory memorandum to the Act on Public Procurement as well as the Procurement methodology published by the Slovak Public Procurement Office in June 2017 (none of them is legally binding) indicate, that the list of conditions is rather demonstrative.

According to the Explanatory memorandum:

"Another new institute arising from the European legislation is so called self-cleaning mechanism, purpose of which is to provide a chance to participate in the public procurement also for subjects with existing exclusion grounds, if they take sufficient remedy measures. These measures may be, for example, personal and organizational changes, introducing and realization of the control mechanisms, creation of internal audit structure, payment of compensation for the damage caused, etc."

Similarly, according to the Procurement methodology of the Public Procurement Office dated June 2017:

"The Act introduces also so-called self-cleaning mechanism, purpose of which is to provide a chance to participate in the public procurement also for subjects with existing specific exclusion grounds, if they take sufficient remedy measures. These measures may be, for example, personal and organizational changes, realization of the control mechanisms, creation of internal audit structure, payment of compensation for the damage caused, remedy of the misconduct, sufficient clarification of disputed facts and circumstances by active cooperation with the competent authorities, etc."

3. **Has any relevant case law re. the self-cleaning procedure been issued in your country that could provide practical tips on how to perform self-cleaning in your jurisdiction? If so, could you provide a summary of the relevant points made in the judgements?**

   There has been no relevant case law issued in relation to the self-cleaning procedure.

   Only methodical guidelines were issued by Slovak Public Procurement Office in specific cases, however, in relation to the self-cleaning procedure, they only conclude that:

   - *the application of self-cleaning procedure can be achieved by submitting the relevant information directly in the request to participate / tender bid or through the ESPD; and*
   - *in case of submitting ESPD, the bidder shall fill in its Part III, Section C (Grounds for mandatory exclusion) and if there are any grounds for mandatory exclusion, the bidder shall state taken measures for the purpose of self-cleaning.*

4. **Does your country entrust the assessment of the measures undertaken within "self-cleaning" to individual contracting authorities or does it entrust other, dedicated authorities (on a central or decentralized level) with that task?**

   In Slovakia it is up to each individual contracting authority to assess whether the measures within the self-cleaning procedure are sufficient / satisfactory to it. The Central Public Procurement Office does not interfere in this (apart from any revision procedures initiated by the tendering party).

Author: **Miroslava Ješíková**

Self-Cleaning Procedure in Spain

1. **Has the "self-cleaning" procedure as set out in Article 57 section 6 of Directive 2014/24 been implemented in your jurisdiction?**

   Yes. Directive 2014/24 was transposed into Spanish Law by means of Law 9/2017 on public procurement (*Ley de contratos del sector público*) ("**Law 9/2017**"), in its Article 72.5.

2. **If yes, could you please:**

   a. **provide an English translation of the transposing provision;**

   Article 72.5 of Law 9/2017 reads as follows:

   When according to this article, the issuance of a previous resolution to exclude an operator from public procurement is required, the scope and duration of the exclusion will be determined following the proceeding established by regulations that will develop this law.

   However, an economic operator shall not be excluded if, at the hearing stage of the relevant procedure, it proves that it has paid or undertaken to pay all fines and compensations in respect of any damage caused by the misconduct as imposed by the court or administrative body which excluded the operator from public procurement, provided that the operator is declared liable for such payment, and it has taken technical, organizational and personnel measures that are appropriate to prevent further administrative offenses, among which adhering to antitrust leniency programs is included. This paragraph shall not be applicable to exclusions ordered as a consequence of any the circumstances listed in Article 71.1.a) [Article 71.1.a) refers to conviction from a long list of crimes, including bribery, influence peddling, corruption, tax and social security crimes, fraud, environmental and planning crimes, etc.]

   The resolution excluding an operator from public procurement may be reviewed at any time while it is in force if the operator proves the fulfillment of the requirements set out in the previous paragraph. The competent authority to review the exclusion shall be the same as the one which ordered it.

   As further explained in question #3 below, this article has not yet been developed. Consequently, this is the only provision governing self-cleaning in force as of today in Spain.

   b. **indicate what in practice is required to successfully perform self-cleaning? In particular, whether the conditions set out in article 57 section 6 paragraph 2 of Directive 2014/24 *(the economic operator shall prove (1) that it has paid or undertaken***

***to pay compensation in respect of any damage caused by the criminal offense or misconduct, (2) clarified the facts and circumstances in a comprehensive manner by actively collaborating with the investigating authorities and (3) taken concrete technical, organizational and personnel measures that are appropriate to prevent further criminal offenses or misconduct)* have to be fulfilled jointly for successful self-cleaning or is it permissible to choose or omit one of them and still demonstrate appropriate self-cleaning?**

Article 72.5 of Law 9/2017 provides for two cumulative requirements to successfully perform self-cleaning in the context of public procurement. Specifically, the operator must prove that:

- It has paid or undertaken to pay all fines and compensations in respect of any damage caused by the misconduct as imposed by the court or administrative body which debarred the operator from public procurement; AND
- It has taken appropriate technical, organizational and personnel measures to prevent further administrative offenses/misconduct. Among said measures, adhering to antitrust leniency programs is expressly included.

Unlike Directive 2014/24, please note that Article 72.5 of Law 9/2017 does not specifically require the clarification of the facts and circumstances involving the misconduct and neither any sort of cooperation with the investigating authorities as a requirement for self-cleaning. However, we believe such a cooperation will likely be a factor that the Spanish authorities will take into consideration when deciding on self-cleaning procedures.

Finally, it is worth noting that Article 72.5 of Law 9/2017 excludes the application of the self-cleaning procedure when the exclusion is imposed as a consequence of a criminal conviction.

3. Has any relevant case law re. the self-cleaning procedure been issued in your country that could provide practical tips on how to perform self-cleaning in your jurisdiction? If so, could you provide a summary of the relevant points made in the judgements?

In Spain, the self-cleaning procedure in the context of public procurement is relatively new. Unlike other member states, Spain did not have a similar procedure in public procurement regulations before Law 9/2017 was passed. Taking into consideration that Law 9/2017 only came into force in March 2018, there is very little practice and virtually no case law yet to shed light on how this procedure is going to be enforced in Spain.

It is expected that the Spanish government will approve in the short-medium term additional regulations developing the rather brief and imprecise provisions governing the self-cleaning procedure in Law 9/2017. Meanwhile, and despite this lack of precise and clear guidance, the possibly for operators to enforce such a procedure in the context of public procurement is unquestionable.

4. Does your country entrust the assessment of the measures undertaken within "self-cleaning" to individual contracting authorities or does it entrust other, dedicated authorities (on a central or decentralized level) with that task?

In Spain, the assessment of self-cleaning in the context of public procurement is entrusted to the contracting authority that issued the exclusion resolution. Operators are allowed to request these authorities to review their excusion by submitting evidence of self-cleaning at any time during the enforced exclusion.

However, the exclusion resolution does not always specify its scope and duration. In such cases, a subsequent administrative proceeding must be conducted before the National Public Procurement Advisory Board – NPPAB (*Junta Consultiva de Contratación Pública del Estado*) to define the limits of the exclusion. In these cases, the self-cleaning measures may be submitted at the hearing stage of this administrative proceeding to be considered – together with any other allegations – by the NPPAB before issuing the resolution that will define the scope and duration of the exclusion.

Therefore, it can be concluded that self-cleaning assessment is decentralized in Spain (at the level of the contracting authority that issued the exclusion resolution), with the exception of those cases where the exclusion resolution does not specify its scope and duration. In such cases, the assessment is centralized at the NPPAB level or the relevant regional public procurement advisory board level, depending on the location and nature of the contracting authority that excluded the operator.

In any event, as explained in previous sections, please note that the regulations governing self-cleaning in Spain are quite basic for the time being, so it is likely that this specific topic will be further regulated in the short to medium term.

Author: **Daniel Vázquez García**

Self-Cleaning Procedure in The United Kingdom

1. Has the "self-cleaning" procedure as set out in Article 57 section 6 of Directive 2014/24 been implemented in your jurisdiction?

Yes, in England, Wales and Northern Ireland by Regulation 57 of the Public Contracts Regulations 2015 ("**PCR**") and in Scotland by Regulation 58 of the Public Contracts (Scotland) Regulations 2015 ("**PCSR**").

2. If yes, could you please:

a. provide an English summary of the transposing provision;

Regulation 57(13) of PCR provides as follows:

" Self-cleaning

Any economic operator that is in one of the situations referred to in paragraph (1) or (8) 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.

(14) If the contracting authority considers such evidence to be sufficient, the economic operator concerned shall not be excluded from the procurement procedure.

(15) For that purpose, the economic operator shall prove that it has—

a. paid or undertaken to pay compensation in respect of any damage caused by the criminal offence or misconduct;

b. clarified the facts and circumstances in a comprehensive manner by actively collaborating with the investigating authorities; and

c. taken concrete technical, organisational and personnel measures that are appropriate to prevent further criminal offences or misconduct.

(16) The measures taken by the economic operator shall be evaluated taking into account the gravity and particular circumstances of the criminal offence or misconduct.

(17) Where the contracting authority considers such measures to be insufficient, the contracting authority shall give the economic operator a statement of the reasons for that decision."

The short explanation below is based on PCR. The position under PCSR is the same unless otherwise stated[11].

Paragraph 1 (a)-(n) of Regulation 57 PCR provide the general rules regarding the exclusions of economic operators during a regulated procedure, referring to convictions of certain offences in UK national law as sources of mandatory exclusions. These comprise bribery, corruption, conspiracy, money laundering, terrorism, drug trafficking, human trafficking and modern slavery. In addition to these offences, Regulation 57 paragraphs (3) to (5) also relate to the non-payment of taxes and social security contributions which can lead to either a mandatory or discretionary exclusion depending on the nature of the breach.

PCSR also makes reference to any act prohibited under the Employment Relations Act 1999 (Blacklists) Regulation 2010 as a source of mandatory exclusion. Discretionary exclusions are set out in Regulation 57(8).

Where any of the mandatory or discretionary exclusion grounds apply to an economic operator, it may use the self-cleaning mechanism under Regulation 57(13)-(17)) of PCR to demonstrate its reliability notwithstanding the existence of a ground for exclusion. The effect of these provisions is that an economic operator in a relevant exclusion situation will not be precluded from participating in the procurement process if it can demonstrate that it has implemented effective measures to remedy the consequences of any criminal offenses or misconduct.

There is an obligation on the contracting authority to evaluate any evidence provided by an economic operator in the light of the gravity and circumstances of the misconduct. If a contracting authority considers the evidence of self-cleansing to be insufficient, and wishes to exclude an economic operator form the procurement process, Regulation 57(16) requires the contracting authority to provide reasons for its decision to the economic operator.

a. **indicate what in practice is required to successfully perform self-cleaning? In particular, whether the conditions set out in article 57 section 6 paragraph 2 of Directive 2014/24 *(the economic operator shall prove (1) that it has paid or undertaken to pay compensation in respect of any damage caused by the criminal offense or misconduct, (2) clarified the facts and circumstances in a comprehensive manner by actively collaborating with the investigating authorities and (3) taken concrete technical, organizational and personnel measures that are appropriate to prevent further criminal offenses or misconduct)* have to be fulfilled jointly for successful self-cleaning or is it permissible to choose or omit one of them and still demonstrate appropriate self-cleaning?**

b. *Under reg. 57(13) of the PCR 2015,* **an economic operator must prove that it has:**

   - paid or undertaken to pay compensation in respect of any damage caused by the criminal offense or misconduct;
   - clarified the facts and circumstances in a comprehensive manner by actively collaborating with the investigating authorities; and
   - taken concrete technical, organizational and personnel measures that are appropriate to prevent further criminal offenses or misconduct.

3. **Has any relevant case law re. the self-cleaning procedure been issued in your country that could provide practical tips on how to perform self-cleaning in your jurisdiction? If so, could you provide a summary of the relevant points made in the judgements?**

11 In addition to the position in PCR procurement, The Utilities Contracts Regulations 2016 further provide for the implementation of Directive 2014/25 of the European Parliament and the Council on procurement entities operating in the water, energy, transport and postal services sectors. Utilities which are also contracting authorities are required to apply the mandatory exclusion criteria in Regulation 57 PCR when selecting economic operators to participate in regulated procurements. All utilities will have the option to apply the discretionary exclusion criteria outlined in Regulation 57 of PCR covering the non-payment of taxes or social security contributions. Similar provisions apply in the Utilities Contracts (Scotland) Regulations 2016. The Defence and Security Public Contracts Regulations 2011 ("**DSPCR**") provides for various exclusion grounds which can be found in Regulation 23. The rules oblige an authority to reject tenders from bidders which have been convicted of certain serious offenses relating to bribery, corruption and fraud. They also grant the authority with discretion to exclude bidders on other grounds concerning insolvency or gross professional misconduct. DSPCR apply throughout the UK.

There have been no reported cases which have the self-cleaning procedure, or a contracting authority's use of it, as their main focus. Regulation 57 of PCR is referred to in the cases of ***Serious Fraud Office v XYZ Limited*** [2016] 7 WLUK 21, and ***Ryhurst Ltd v Whittington Health NHS Trust*** [2020] EWHC 448 (TCC) however, in each case only as a tangential point. The self-cleaning procedure is not the focus of either case.

4. Does your country entrust the assessment of the measures undertaken within "self-cleaning" to individual contracting authorities or does it entrust other, dedicated authorities (on a central or decentralized level) with that task?

In the UK, individual contracting authorities make the assessment of the self-cleaning measures undertaken by an economic operator.

Guidance was provided by the Office of Fair Trading (the former UK competition authority) in a case which preceded the formalisation of self-cleaning under Directive 2014/24/EU. The case was concerned with a cartel in the construction industry, with the OFT uncovering a widespread practice of "cover bidding". In that case, the OFT and the Office of Government Commerce issued a guidance note which recommended that companies found to have participated in the cartel should not automatically be excluded from public tenders – in part because the practice had been so widespread and many other companies were suspected of participation.

The guidance note can be found here for more information: https://assets.publishing.service.gov.uk/media/555de4cee5274a7084000166/Information-Note2.pdf

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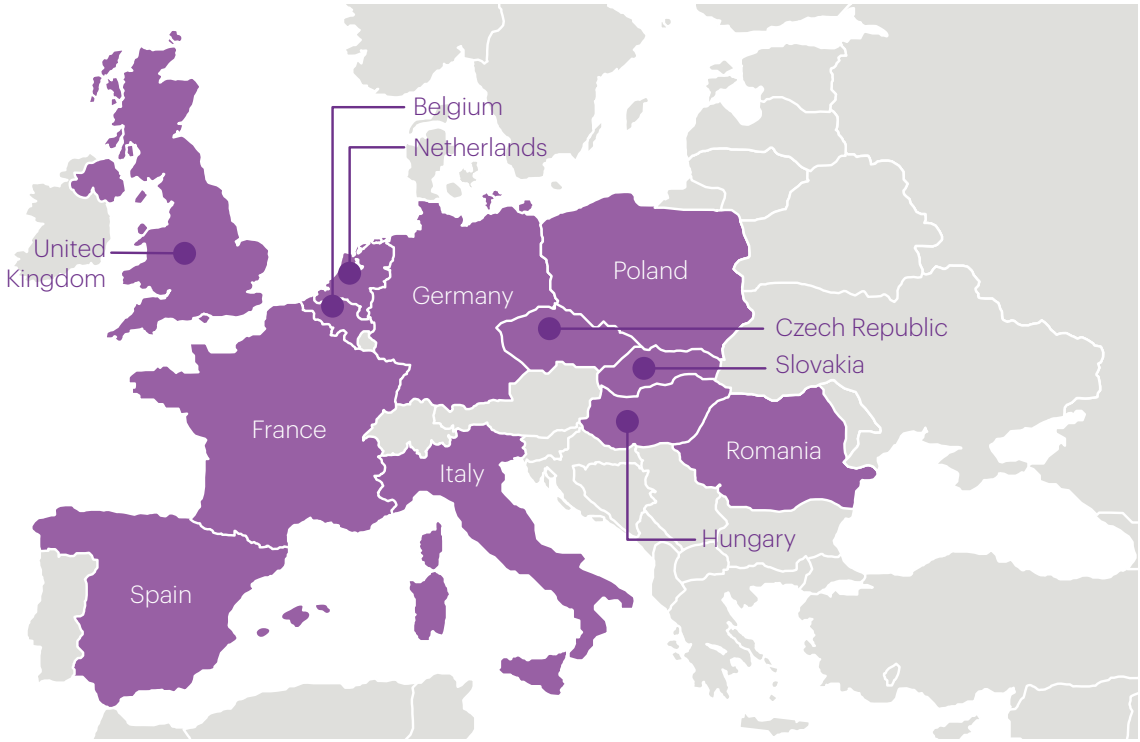

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