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Debarment of Companies in the European Union

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Introduction

Debarment has obtained significant relevance in the European context, as commercial organisations now face the threat of disqualification from public contracts on the basis of criminal misconduct. Debarment can thus be defined as the exclusion of an entity from public contracts whether as a supplier, contractor or as a service provider. This development also brings to the forefront a unique set of issues and challenges, as the debarment decision is based on the perpetration of specific offences such as bribery and fraud, which also have other legal repercussions.

Understanding Debarment in the EU

In Europe each Member State regulates debarment and the corresponding exclusion from public contracts in a different way through their domestic legislation or administrative procedures. However, drawing a general comparison across different member states, two distinct types of debarment clearly emerge:

- » **Mandatory Debarment**, i.e. the procedure that applies automatically where certain conditions are met;
- » **Discretionary Debarment**, i.e. the procedure in which public authorities have a discretionary right to debar a contractor from bidding for a public contract following fulfilment of certain conditions.

Although the legal framework is extremely diversified, an important approximation process of the various national legislations has been carried out by the European Union's institutions. This process has resulted in a new set of EU Directives on Public Procurement, which followed the Green Paper consultation on the modernisation of EU public procurement policy issued by the European Commission in January 2011.

The principal reason behind the EU reform has been the urgent need for a streamlined and flexible set of procurement rules for Member States to obtain high quality goods and services while delivering value for money from the public funds.

The New EU Public Procurement Directives

After two years of intensive scrutiny, deliberation and debate, the European Parliament and the European Council adopted three new Directives (Public Sector Contracts, Utilities Contracts, and Concessions Contracts) on 26 February 2014. The Directives were published in the Official Journal of the European Union on 28 March 2014 and came into force on **17 April 2014**. Each Member State has until 17 April 2016 to implement the new Directives in national legislation.

The new Directives are:

- a. Directive 2014/24/EU5 on public procurement, replacing the 2004 Directive for Public Sector Contracts;
- b. Directive 2014/25/EU6 on procurement by entities operating in the water, energy, transport and postal services sectors, replacing the 2004 Directive for Utilities Contracts;
- c. Directive 2014/23/EU7 on the award of concession contracts, which does not directly replace any previous directive.

Understanding Directive 2014/24/EU5

Amongst these, the Directive 2014/24/EU of the European Parliament and of the European Council of 26 February 2014 on public procurement (so called Public Sector Directive) assumes great importance in relation to the commission of economic crimes by legal entities.

Relevance of Treaty on the Functioning of the European Union

Under this Directive the award of public contracts by or on behalf of Member States' authorities must comply with the principles of the Treaty on the Functioning of the European Union (TFEU), and in particular the free movement of goods, the freedom of establishment and the freedom to provide services, as well as the derived principles, such as equal treatment, non-discrimination, mutual recognition, proportionality and transparency¹.

Conflict of Interest

In light of the European Union's interests, transparency - guarantees fair, equitable and non-discriminatory procedures. Conflicts of interest and unlawful conduct are detrimental to the proper conduct of public contract awarding procedures and the correct application of the rules. It has been assessed that corruption in public procurement costs society about EUR 2 billion. This assessment necessitated the need for strengthening legislation in this area.

Member States therefore are required to take steps to **prevent, identify and address conflicts of interest in public procurements** and, for this purpose, the European institutions have provided a new definition of „conflict of interest“; which is now defined as a situation in which persons involved in, or able to influence, the procedure by which a purchaser awards a contract have a direct or indirect financial, economic or other personal interest that could jeopardise their impartiality and independence in that procedure.

As a result, public contracts should not be awarded to economic operators who have participated in criminal misconduct or have been found guilty of corruption, fraud to the detriment of the Union's financial interests, terrorist offences, money laundering or terrorist financing. The non-payment of taxes or social security contributions is also to be considered as mandatory exclusion at the level of the Union.

¹) See Directive 2014/24/EU, Recital no 1.

Grounds of Exclusion / Debarment

Therefore, the **grounds for exclusion from public procurement procedures have been strengthened and extended**. In addition to conviction for fraud and corruption, under the new directive, grounds for exclusion also include: situations where a company has unduly influenced the decision-making process leading to the award of a contract; false statements in connection with the procedure for the award of a public contract, whether these relate to the absence of grounds for exclusion, the possession of professional, technical and financial capacities, or failure to send the necessary certificates; and agreements to distort competition.

It would be imperative to draw attention to Article 56 of the Public Sector Directive, which provides the criteria for qualitative selection, and lists a series of offences that would automatically lead to a **mandatory debarment**:

„Exclusion grounds

1. Contracting authorities shall exclude an economic operator from participation in a procurement procedure where they have established, by verifying in accordance with Articles 59, 60 and 61, or are otherwise aware that that economic operator has been the subject of a conviction by final judgment for one of the following reasons:

- a. participation in a criminal organisation, as defined in Article 2 of Council Framework Decision 2008/841/JHA;*
- b. corruption, as defined in Article 3 of the Convention on the fight against corruption involving officials of the European Communities or officials of Member States of the European Union and Article 2(1) of Council Framework Decision 2003/568/JHA as well as corruption as defined in the national law of the contracting authority or the economic operator;*
- c. fraud within the meaning of Article 1 of the Convention on the protection of the European Communities' financial interests;*
- d. terrorist offences or offences linked to terrorist activities, as defined in Articles 1 and 3 of Council Framework Decision 2002/475/JHA respectively, or inciting or aiding or abetting or attempting to commit an offence, as referred to in Article 4 of that Framework Decision;*
- e. money laundering or terrorist financing, as defined in Article 1 of Directive 2005/60/EC of the European Parliament and of the Council;*
- f. child labour and other forms of trafficking in human beings as defined in Article 2 of Directive 2011/36/EU of the European Parliament and of the Council.*

The obligation to exclude an economic operator shall also apply where the person convicted by final judgment is a member of the administrative, management or supervisory body of that economic operator or has powers of representation, decision or control therein.“

Transparency Provisions

Finally, the traceability and **transparency of decision-making in procurement procedures** is essential for ensuring sound procedures, and preventing corruption and fraud. Contracting authorities will therefore keep copies of concluded high-value contracts, in order to be able to provide access to those documents to interested parties in accordance with applicable rules on access to documents. Furthermore, the essential elements and decisions of individual procurement procedures should be documented in a procurement report. To avoid administrative burdens wherever possible, it may be permitted for the procurement report to refer to information already contained in the relevant contract award notice. The electronic systems for publication of those notices, managed by the Commission, will also be improved with a view to facilitating the entry of data while making it easier to extract global reports and exchange data between systems².

In order to implement such an electronic system, Member States will have monitoring requirements and will accordingly be implementing the following mechanisms:

- » reporting violations of public procurement rules to national audit authorities or to any other competent national authority (courts, parliaments, etc.) and making the results of their monitoring activities public;
- » submitting a report to the Commission every 3 years on the most common sources of legal uncertainty, including any problems in the application of rules; the level of participation by small and medium-sized businesses; and the prevention, detection and monitoring of cases of fraud, corruption, conflicts of interest and other serious irregularities;
- » imposing conditions on public procurers to keep copies of contracts for amounts greater than EUR 1 million for service and supply contracts and EUR 10 million for works contracts, for the entire duration of the relevant contracts. These documents must be available to the public unless national rules on access to documents and protection of personal data prevent this.

²) See Directive 2014/24/EU, Recital no 126.

Overcoming Debarment

Member States however, would be able to provide for derogation **from those mandatory exclusions in exceptional situations** where overriding requirements in the general interest make a contract award indispensable. This might, for example, be the case where vaccines are or emergency equipment that can only be purchased from an economic operator to whom one of the mandatory grounds for exclusion otherwise applies³.

Allowance however, is made for the possibility that **economic operators can adopt compliance measures aimed at remedying** the consequences of any criminal offences or misconduct and by doing so have effectively prevented future instances of misconduct. Those measures might consist of personnel and organisational reform including the severance of all links with persons or organisations involved in the misconduct, appropriate staff reorganisation 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. Where such measures offer sufficient guarantees, the economic operator in question may no longer be excluded on those grounds alone. Economic operators should have the possibility to request that compliance measures taken with a view to ensure potential re-admission to the procurement procedure be examined. However, it is left to Member States to determine the exact procedural and substantive conditions applicable in such cases. Member States are 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 decentralised level with this task⁴.

³) See Directive 2014/24/EU, Recital no 100.

⁴) See Directive 2014/24/EU, Recital no 102.