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**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
COMPETITION COMMITTEE**

Director Disqualification and Bidder Exclusion – Note by the European Union

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This document reproduces a written contribution from the European Union submitted for Item 4 of the 139th OECD Competition Committee meeting on 29-30 November 2022.

More documents related to this discussion can be found at
www.oecd.org/competition/director-disqualification-and-bidder-exclusion-in-competition-enforcement.htm

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1. Sanctions for breach of EU competition rules

1. The enforcement system for the application of EU competition rules is set out in Regulation 1/2003¹. This system provides for sanctions against "undertakings" and "associations of undertakings" on infringements of competition rules.
2. Under Article 7 of Regulation 1/2003, the Commission can find that there has been an infringement of EU competition rules and may by decision require the undertakings and associations of undertakings concerned to bring this infringement to an end. In this regard, the Commission has the power to impose any remedy, whether behavioural or structural, which is necessary to bring the infringement effectively to an end, having regard to the principle of proportionality (recital 12 and Article 7 of Regulation 1/2003).
3. When the Commission finds that Article 101 or 102 of the Treaty on the Functioning of the European Union ("the Treaty") has been infringed, it may impose a fine on undertakings that have acted intentionally or negligently (Article 23 of Regulation 1/2003). Fines are intended to punish undertakings breaching EU competition law, but they should also have a sufficiently deterrent effect. According to the Commission's Fining Guidelines², the deterrence aspect should not only concern the specific undertaking sanctioned (specific deterrence) but also deter other undertakings from engaging in, or continuing, behaviour that is contrary to EU competition laws (general deterrence).
4. The legal framework under which the Commission enforces EU competition rules does not provide for sanctions against individuals. Therefore, director disqualification is not a sanction that the Commission can impose for breaches of EU competition law.
5. The legal framework for enforcement of EU competition rules, and the prohibition decisions that are adopted within that framework, do not address bidder exclusion. The possibility of bidder exclusion is, however foreseen by public procurement rules, more specifically the Public Procurement Directives³ and the Financial Regulation⁴. The Public

¹ Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (OJ L1, 4.1.2003, p.1), hereinafter "Regulation 1/2003" or "the Regulation".

² Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003 (Text with EEA relevance) OJ C 210, 1.9.2006, p. 2–5.

³ Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC (hereinafter "Directive 2014/24/EU"); Directive 2014/23/EU of the European Parliament and of the Council of 26 February 2014 on the award of concession contracts (hereinafter: "Directive 2014/23/EU"); Directive 2014/25/EU of the European Parliament and of the Council of 26 February 2014 on procurement by entities operating in the water, energy, transport and postal services sectors and repealing Directive 2004/17/EC (hereinafter "Directive 2014/25/EU"), or together referred to as "Public Procurement Directives".

⁴ Regulation (EU, Euratom) 2018/1046 of the European Parliament and of the Council of 18 July 2018 on the financial rules applicable to the general budget of the Union, amending Regulations (EU) No 1296/2013, (EU) No 1301/2013, (EU) No 1303/2013, (EU) No 1304/2013, (EU) No 1309/2013, (EU) No 1316/2013, (EU) No 223/2014, (EU) No 283/2014, and Decision No 541/2014/EU and repealing Regulation (EU, Euratom) No 966/2012 (hereinafter "Financial Regulation").

Procurement Directives concern national tenders in the EU, while the Financial Regulation concerns tenders involving EU financial resources. According to these instruments, bidders may be excluded from participation in public tenders in the EU for “*entering into agreements aimed at distorting competition*” (hereinafter also referred to as “collusion”).

2. Bidder exclusion from national tenders in the EU: the Public Procurement Directives

2.1. Introduction

6. Public tenders organised in EU Member States are subject to national procurement legislation, which is derived from the Public Procurement Directives adopted at the EU level. National laws therefore implement the requirements provided for in those directives. The main Public Procurement Directives applicable to public tenders in the EU are:

- Directive 2014/24/EU for general public procurement of goods and services,
- Directive 2014/23/EU for concession contracts,
- Directive 2014/25/EU for procurement by entities operating in the water, energy, transport and postal services sectors.

7. The Public Procurement Directives set the scope and reasoning of the exclusion grounds and certain key provisions on implementing conditions for exclusion of a tenderer. Member States shall further specify the implementing conditions in national law, in line with EU law, without altering the scope or reasoning of the exclusion grounds.

8. In order to provide further guidance to Member States and contracting authorities, in 2021 the Commission issued a Notice on tools to fight collusion in public procurement and on guidance on how to apply the related exclusion ground.⁵ The Notice provides guidance for national contracting authorities on how to apply the collusion-related exclusion ground set out in the Public Procurement Directives.

2.2. Competence to decide on exclusion

9. Contracting authorities in the EU Member States decide whether exclusion grounds provided for in the Public Procurement Directives (including a collusion-related exclusion ground) apply to bidders in the procurements that they launch.

10. The Court of Justice of the European Union has confirmed that, under Article 57(4) of Directive 2014/24/EU, it is for the contracting authority (and not for another national authority or body) to independently assess whether an economic operator must be excluded from a specific award procedure.⁶ Contracting authorities carry out their assessment of exclusion on a case-by-case basis. In this regard, the Court of Justice has stated that “[t]he option available to any contracting authority to exclude a tenderer from a procurement procedure is particularly intended to enable it to assess the integrity and reliability of each

⁵ Notice on tools to fight collusion in public procurement and on guidance on how to apply the related exclusion ground 2021/C 91/01, C/2021/1631, OJ C 91, 18.3.2021, p. 1–28 (the “Notice”).

⁶ Judgment of 24 October 2018, *Vossloh Laeis*, C-124/17, ECLI:EU:C:2018:855, paragraph 23; judgment of 19 June 2019, *Meca*, C-41/18, ECLI:EU:C:2019:507, paragraphs 28, 31 and 34; judgment of 3 October 2019, *Delta Antrepriză de Construcții și Montaj 93*, C-267/18, ECLI:EU:C:2019:826, paragraphs 25 and 27; order of 4 June 2019, *Consorzio Nazionale Servizi*, C-425/18, paragraphs 34 and 35, as well as order of 20 November 2019, *Indaco*, C-552/18, ECLI:EU:C:2019:997, paragraph 24.

of the tenderers”, especially with a view of ensuring “the reliability of the successful tenderer, on which the contracting authority’s trust is founded”.⁷

2.3. Grounds for exclusion

11. The Public Procurement Directives list collusion as an optional ground to exclude an economic operator from an award procedure where a contracting authority has sufficiently plausible indications to conclude that the economic operator has entered into agreements with other economic operators aimed at distorting competition.⁸ The collusion-related exclusion ground is provided for in Article 57(4)(d) of Directive 2014/24/EU and it is also mirrored in Article 38(7)(e) of Directive 2014/23/EU on concessions. It may also apply to procurements covered by Directive 2014/25/EU on utilities by virtue of its Article 80(1), which applies the exclusion grounds and selection criteria as provided for under Directive 2014/24/EU.

12. The Public Procurement Directives allow contracting authorities a wide margin of appreciation to decide whether or not to exclude a tenderer from the procedure, where there are sufficiently plausible indications of collusion.⁹ In this regard, Directive 2014/24/EU specifies in recital 101 that “[i]n applying facultative grounds for exclusion, contracting authorities should pay particular attention to the principle of proportionality.” A contracting authority can be allowed to exclude an economic operator at any time during a procurement procedure, where it transpires that the economic operator is, in view of acts committed or omitted either before or during the procurement procedure, in *inter alia* the collusion related exclusion situation¹⁰.

13. The Notice makes it clear that the following optional grounds for exclusion may be used in case of competition infringements:¹¹

- when the contracting authority can demonstrate by appropriate means that the undertaking is guilty of grave professional misconduct, which renders its integrity questionable¹²;

⁷ Judgment of 3 October 2019, *Delta Antrepriză de Construcții și Montaj 93*, C-267/18, ECLI:EU:C:2019:826, paragraph 26.

⁸ In accordance with Article 57(4) of Directive 2014/24/EU, contracting authorities may be required by Member States to exclude from participation in a procurement procedure any economic operator where the contracting authority has sufficiently plausible indications to conclude that the economic operator has entered into agreements with other economic operators aimed at distorting competition.

⁹ Judgment of 24 October 2018, *Vossloh Laeis*, C-124/17, ECLI:EU:C:2018:855, paragraph 23; judgment of 19 June 2019, *Meca*, C-41/18, ECLI:EU:C:2019:507, paragraphs 28 and 31; judgment of 3 October 2019, *Delta Antrepriză de Construcții și Montaj 93*, C-267/18, ECLI:EU:C:2019:826, paragraphs 25 to 29.

¹⁰ Article 57(5), second paragraph, of Directive 2014/24/EU.

¹¹ Section 5.2 of the Notice.

¹² Art. 57(4) (c) of Directive 2014/24/EU, Article 38(7) (c) of Directive 2014/23/EU, Article 80(1) of Directive 2014/25/EU, See Case C-470/13, *Generali*, Judgment of 18 December 2014, ECLI:EU:C:2014:2469, paragraph 35: “It must be observed that the concept of ‘professional misconduct’, for the purposes of that provision, covers all wrongful conduct which has an impact on the professional credibility of the operator at issue and not only the infringements of ethical standards in the strict sense of the profession to which that operator belongs (see, to that effect, judgment in *Forposta and ABC Direct Contact*, EU:C:2012:801, paragraph 27). In those circumstances, the commission of an infringement of the competition rules, in particular where that

- when the contracting authority has sufficiently plausible indications to conclude that the undertaking has entered into agreements with other undertakings aimed at distorting competition¹³;

14. Prior to the Public Procurement Directives coming into force, a finding of grave professional misconduct was the only basis for excluding an economic operator from the award procedure in cases of breaches of competition rules. This ground can still be used¹⁴, although the Public Procurement Directives now also specifically include collusion as an optional ground for exclusion. It is for the contracting authority to assess, on a case-by-case basis, which of the two grounds of exclusion to consider applicable or whether to apply both.

2.4. Remedial measures

15. The contracting authority must allow an economic operator to bring forward so called ‘self-cleaning’ measures and to assess those before any act of exclusion¹⁵, taking into account any evidence provided by that operator. Namely, the Public Procurement Directives spell out that any economic operator that is in one of the optional exclusion grounds (including the collusion-related exclusion ground), may provide to the contracting authority evidence to the effect that measures taken by the economic operator are sufficient to demonstrate its reliability despite the existence of a relevant ground for exclusion. *“If such evidence is considered as sufficient, the economic operator concerned shall not be excluded from the procurement procedure”*. On the other hand, *“where the measures are considered to be insufficient, the economic operator shall receive a statement of the reasons for that decision”*.¹⁶

16. One important self-cleaning measure for the contracting authority to take into account is whether the economic operator has *“clarified the facts and circumstances in a comprehensive manner by actively collaborating with investigating authorities.”*¹⁷ This can be particularly relevant in case of a collusion related exclusion ground. In the context of cooperation in cartel investigations under leniency and/or settlement, the Notice explains that *“an economic operator who admitted its participation in the collusion scheme, cooperated with the competition authority, paid the fines imposed and took appropriate measures to restore its reliability could be arguably considered as satisfying the conditions for its “self-cleaning”*.¹⁸ In principle, providing the contracting authority with a decision establishing the infringement of the competition rules where an economic operator has

infringement was penalised by a fine, constitutes a cause for exclusion under Article 45(2)(d) of Directive 2004/18.”

¹³ Article 57(4) (d) of Directive 2014/24/EU, Article 38(7) (e) of Directive 2014/23/EU, Article 80(1) of Directive 2014/25/EU.

¹⁴ The order of the Court of Justice of 4 June 2019 in case C-425/18, CNS, paragraphs 18 and 33.

¹⁵ Member States may also opt to entrust the assessment of “self-cleaning” measures to authorities other than the contracting authority, at either central or decentralised level.

¹⁶ Article 57(6) of Directive 2014/24/EU, Article 38(9) of Directive 2014/23/EU, Article 80(1) of Directive 2014/25/EU.

¹⁷ Article 57(6) of Directive 2014/24/EU, second subparagraph.

¹⁸ Section 5.4 of the Notice.

benefitted from leniency, should be sufficient for the economic operator to meet its evidentiary burden to prove that it did cooperate during the investigation.¹⁹

2.5. Period of exclusion

17. The period of exclusion should be determined by national legislation implementing the conditions for exclusion and, in case an exclusion is appealed, set by a final judgment. *“Where an economic operator has been engaged in conduct falling within the ground for exclusion referred to in Article 57(4)(d) of that directive, which has been penalised by a competent authority, the maximum period of exclusion is calculated from the date of the decision of that authority.”*²⁰ *“Where the period of exclusion has not been set by the final judgment, that period should not exceed three years from the date of the relevant event.”*²¹

2.6. Judicial review

18. The Public Procurement Directives do not address judicial review and leave this for the Member States to determine in their national legislation.²²

3. Bidder exclusion in tenders involving EU financial resources: the Financial Regulation

3.1. Introduction

19. The rules for organising public tenders involving EU financial resources are provided for in the Financial Regulation. The Financial Regulation establishes in Articles 135 to 145 a framework for detection of risks regarding bidders and exclusion from tenders that involve EU financial resources.

3.2. Competence to decide on exclusion

20. As the European Commission remains ultimately responsible for EU budget implementation, it is primarily for the authorising officer at the Commission to exclude a person or entity from award procedures when appropriate. When a beneficiary/partner country is the contracting authority, they shall inform the Commission when a person or entity is in a situation of exclusion. Based on that information, the Commission can choose to exclude the person or entity, or the beneficiary/partner can be entrusted to do so. Member State authorities, when managing actions using EU funds, take into account the EU exclusion decisions as appropriate and under their own responsibility.²³

21. The authorising officer takes a decision on the exclusion of a person or entity from participation in award procedures in light of their autonomy in administrative matters,²⁴

¹⁹ Judgment of 24 October 2018, *Vossloh Laeis*, C-124/17, ECLI:EU:C:2018:855, paragraph 31. Section 5.7 of the Notice.

²⁰ Judgment of 24 October 2018, *Vossloh Laeis*, C-124/17, ECLI:EU:C:2018:855, paragraph 42.

²¹ Article 57(7) of Directive 2014/24/EU. Article 57(7) of Directive 2014/24/EU does not specify the nature of the ‘relevant event’ or the time at which it occurs.

²² Section 5.1 of the Notice.

²³ Article 142(5) of the Financial Regulation.

²⁴ Recital 67 of the Financial Regulation.

based on a final judgment or final administrative decision. Before taking a decision, the authorising officer consults a Panel. In case of final judgment or final administrative decision, the authorising officer requests the Panel's recommendation on those aspects not settled by a judgment or administrative decision. The authorising officer must have regard to the recommendation of the Panel.²⁵

22. The Panel aims at ensuring coherent application of the exclusion system. It is composed of a standing high-level independent chair²⁶, two representatives of the Commission and a representative of the authorising officer. The Panel assesses at central level whether the application of administrative sanctions (financial penalty and/or exclusion and/or publication of the sanction) is justified in the cases brought to its attention by the authorising officer and issues a recommendation on whether and which sanctions to impose.²⁷ The Panel also assesses the duration of an exclusion in cases where the duration has not been set by the final judgment or the final administrative decision.

3.3. Grounds for exclusion

23. The Financial Regulation provides that the authorising officer responsible for the tender shall exclude the person or entity from participating in EU award procedures, or from being selected for implementing Union funds, "where it has been established by a final judgment or a final administrative decision that a person or an entity is guilty of grave professional misconduct", which includes "entering into agreement with other persons or entities with the aim of distorting competition".²⁸ The administrative decision on competition infringements referred to includes decisions of the Commission relating to the infringement of Union competition law or of a national competent authority relating to the infringement of Union or national competition law.

24. Exclusion is also possible in the absence of a final judgment or a final administrative decision. In such situation, the authorising officer responsible should take its decision on the basis of a "preliminary classification in law of the conduct", having regard to established facts and other findings contained in the recommendation of the Panel.²⁹

25. When taking a decision on the exclusion of a person or entity, the authorising officer (and where applicable, the Panel in its recommendation) must take into account

- the principle of proportionality,³⁰
- the rights of defence of the person or entity concerned,³¹

²⁵ Article 143 of the Financial Regulation.

²⁶ Article 143 of the Financial Regulation. The standing chair is chosen among former members of the Court of Justice of the European Union, the Court of Auditors or former officials who have at least the rank of Director-General in a Union institution other than the Commission.

²⁷ See also Commission staff working document "Early-Detection and Exclusion System (EDES) – Panel referred to in Article 143 of the Financial Regulation. 23.09.2022. SWD(2022) 302 final, 23.9.2022, at p. 2.

²⁸ Article 136(1)(c)(ii) of the Financial Regulation.

²⁹ Article 136(2) of the Financial Regulation.

³⁰ Article 136(3) of the Financial Regulation.

³¹ Recital 63 and 83 of the Financial Regulation, Article 133 of the Financial Regulation.

- the reasons not to exclude the person or entity concerned,³² and
- remedial measures sufficient to demonstrate its reliability (allowing so called “self-cleaning”).³³

26. The assessment of proportionality takes into account the existence of mitigating circumstances, such as “the degree of collaboration of the person or entity ... with the relevant competent authority and the contribution of that person or entity to the investigation.”³⁴ If an exclusion would be disproportionate on the basis of the proportionality criteria, the authorising officer will not exclude the person or entity concerned from participating in an award procedure. Other reasons not to exclude include remedial measures and indispensability to ensure continuity of service for a limited duration and pending the adoption of remedial measures (on remedial measures, see specific chapter below)³⁵.

27. Concerning the rights of defence, both the authorising officer and the Panel should guarantee the right of defence of the person or entity concerned.³⁶ Before adopting any measure adversely affecting the rights of a participant³⁷ or a recipient³⁸, the participant or the recipient should be given the opportunity to submit observations and they should be informed of the means of redress available to them for challenging such a measure.³⁹

3.4. Remedial measures

28. The “self-cleaning” measures that a person or entity has undertaken in the context of a competition law investigation are also relevant for the authorising officer’s exclusion decision. The authorising officer will not exclude a person or entity if it has taken remedial measures that are “*sufficient to demonstrate its reliability*”.⁴⁰ Article 136(7) of the Financial Regulation presents a non-exhaustive list of possible remedial measures that a person or entity can adopt. Those include (i) measures to correct the conduct and prevent its further occurrence, and (ii) proof that the person or entity has paid or secured the payment of any fine imposed by the competent authority. Successful leniency cooperation would be a clear signal that a party has undertaken in self-cleaning measures. Other

³² Article 136(6) of the Financial Regulation.

³³ Article 136(6) in conjunction with 136(7) of the Financial Regulation.

³⁴ Article 136(3)(f)(i) of the Financial Regulation.

³⁵ Article 136(6) of the Financial Regulation.

³⁶ Recital 83 of the Financial Regulation. The economic operator’s right to be heard in the procedure of the Panel (issuing the Panel recommendations) is set out in Article 13 of Commission Decision (EU) 2018/1220 of 6 September 2018 on the rules of procedure of the panel referred to in Article 143 of Regulation (EU, Euratom) 2018/1046 of the European Parliament and of the Council, C/2018/5788, OJ L 226, 7.9.2018, p. 7–16.

³⁷ Participant means a candidate or tenderer in a procurement procedure, an applicant in a grant award procedure, an expert in a procedure for selection of experts, an applicant in a contest for prizes or a person or entity participating in a procedure for implementing Union fund (Article 2(47) of the Financial Regulation).

³⁸ Recipient means a beneficiary, a contractor, a remunerated external expert or a person or entity receiving prizes or funds under a financial instrument or implementing Union funds (Article 2(53) of the Financial Regulation).

³⁹ Article 133 and Recital 63 of the Financial Regulation.

⁴⁰ Article 136(6) of the Financial Regulation.

additional measures, that could also be relevant in this respect, as in the case of Public Procurement Directives, include for example implementation of reporting and control systems and creation of an internal audit structure to monitor compliance⁴¹.

29. Where those conditions are met, it is possible for a person or entity to obtain a full exemption from exclusion, although the authorising officer (and where applicable, the Panel) has discretion in their assessment of whether a person or entity concerned has taken remedial measures ‘*to an extent that are sufficient to demonstrate its reliability*’. The remedial measures are assessed before the adoption of an exclusion decision, but may also be assessed after an exclusion decision has been adopted, either *ex officio* by the Panel or following a request by the person or entity concerned to the authorising officer.⁴²

3.5. Period of exclusion

30. The duration of an exclusion should be limited in time, as is the case under Directive 2014/24/EU and should be in accordance with the principle of proportionality.⁴³ In line with the Directive, the maximum duration should not exceed three years from the final judgment or the final administrative decision on the underlying conduct that forms the ground for exclusion. The Panel should assess the duration of an exclusion in cases where duration of the exclusion is not set in a final judgment or a final administrative decision on the conduct and where there is no such prior judgment or administrative decision. In these instances as well, the duration of exclusion should not exceed three years for a collusion-related exclusion ground.⁴⁴

31. The limitation period for excluding the person or entity is five years from: (a) the date of the conduct giving rise to exclusion or, in the case of continued or repeated acts, the date on which the conduct ceases, or (b) the date of the final judgment of a national jurisdiction or of the final administrative decision.

3.6. Judicial review

32. The decision of the authorising officer may be challenged before the Court of Justice of the European Union (full judicial review) by the person or entity concerned, in accordance with Article 261 of the Treaty.

4. Fines for competition law infringements and bidder exclusion under procurement rules pursue complementary policy objectives

33. Competition policy and public procurement rules have obvious links. Competition rules promote undistorted market outcomes by fighting collusion between undertakings that has as its object or effect the restriction of competition. From a public procurement perspective, collusion undermines the benefits of a fair, transparent, competition-driven and investment-oriented procurement market by restricting the access of companies to that

⁴¹ Article 57(6) of Directive 2014/24/EU and section 5.7 of the Notice.

⁴² Commission Staff Working Document: Early Detection and Exclusion System (EDES) - Panel referred to in Article 143 of the Financial Regulation Accompanying the document Report from the Commission to the European Parliament and the Council: 32nd Annual Report on the protection of the European Union's financial interests - Fight against fraud – 2020, SWD/2021/259 final, p. 12.

⁴³ Recital 77, Article 136(2) second paragraph of the Financial Regulation.

⁴⁴ Article 139(1)(b)(ii) of the Financial Regulation.

market and limiting choice for public buyers.⁴⁵ Therefore, the policy objectives behind the sanction system for collusion in the two sets of rules reinforce each other.

34. In the context of the Public Procurement Directives, the possibility to exclude an economic operator for suspected collusion is not construed as a penalty for its behaviour before or during the award procedure⁴⁶. Exclusion rather serves as means to ensure compliance with the principles of equal treatment and competition in the award procedure, as well as to ensure the integrity, reliability and suitability of the future contractor to perform the contract⁴⁷. Under the Financial Regulation, in addition to protecting the Union's financial interests, the objective of a collusion-related exclusion ground is to ensure a deterrent effect. The deterrent effect of the exclusion is even reinforced by the possibility to publish the information related to the exclusion to ensure that the same conduct is not repeated.⁴⁸

35. Although the bidder exclusion frameworks under the public procurement rules pursue their own policy objectives, they also reinforce the objectives beyond Commission's fining policy in its fight against cartels. As explained above, fines imposed for EU competition law infringements have as their objective the punishment of the infringer, but also aim at deterring them and others from infringing competition rules in the future. Excluding cartel participants from public tenders or EU funded grants is an additional element of deterrence dissuading undertakings from engaging in anticompetitive practices, additional to the imposition of the fine by the Commission or national competition authorities.

36. Furthermore, the exclusion frameworks are also designed and implemented in a manner that is compatible with and can even foster voluntary investigation and case-resolution tools in the competition field. Active cooperation with the competition authority during the investigation, either within the leniency programme⁴⁹ and/or in the context of a settlement procedure⁵⁰, constitutes an element that should be taken into account by the tendering authority when it assesses the grounds for exclusion. This assessment could be expected under both the Public Procurement Directives (e.g. Article 57(6) of Directive 2014/24/EU) and the Financial Regulation (Article 136(6)).⁵¹

37. Under the Public Procurement Directives, an economic operator shall not be excluded from the procurement procedure when it provides evidence that measures it has taken demonstrate its reliability despite the existence of a relevant ground for exclusion and the contracting authority considers that these measures are sufficient for this purpose. One of the measures taken into account in this assessment is that the economic operator has

⁴⁵ Section 1.1 of the Notice.

⁴⁶ Section 5.2 of the Notice.

⁴⁷ Recital 101 of Directive 2014/24/EU.

⁴⁸ Recital 74 and 79, Article 140(1) of the Financial Regulation.

⁴⁹ The leniency programme is the most effective tool for detecting cartels and obtaining evidence to prove that competition law has been breached.

⁵⁰ The settlement procedures seek to ensure a speedier final resolution of the case when the parties admit their participation in the anticompetitive behaviour, and reach a "common understanding" with the Commission concerning the facts and the legal qualification of the parties' conduct.

⁵¹ See also Frequently Asked Questions (FAQs) on Leniency (Version of October 2022), Question 21: "*Does being a leniency applicant assist in avoiding exclusion from public procurement contracts, as well as avoiding financial penalties under the early-detection and exclusion system, following a cartel infringement?*" (Leniency FAQs).

clarified the facts and circumstances in a comprehensive manner by actively cooperating with investigating authorities.⁵² Under the Financial Regulation, one of the factors taken into account by the responsible authorising officer in any decision to exclude an entity is the degree of cooperation of the concerned entity with the relevant competition authority and the contribution of that entity to the competition investigation.⁵³

38. Both cooperation within the leniency regime and in the context of the settlement can be considered to be measures taken to restore the reliability of the economic operator. The active and voluntary cooperation of the leniency applicant in particular, plays a crucial role from the competition enforcement perspective. This is due to the fact that the leniency applicant voluntarily comes forward to the competition authority (the Commission or a national competition authority), discloses its participation in the collusion and hands over all relevant information, thereby contributing to proving the competition infringement. Such a level of cooperation, in combination with other remedial actions mentioned in the Financial Regulation such as compliance efforts, will demonstrate the reliability of the economic operator.

⁵² Article 57(6) of the Directive 2014/24/EU. See also Leniency FAQs.

⁵³ Article 136(3)(f)(i) of the Financial Regulation. See also Leniency FAQs.