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SESSION 2

**INTERNATIONAL PROCUREMENT DEVELOPMENTS
IN 2018—PART II: DEBARMENT IN EU PUBLIC
PROCUREMENT LAW—TENTATIVE PROGRESS OR
TREADING WATER?**

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Debarment, or the blacklisting of companies barred from participating in future public procurement procedures due to past misconduct, is a concept that is finding its way into an increasing number of public procurement regimes around the world. Whenever governments or international institutions intend to award contracts or distribute limited available resources, in particular public funds, one of their main priorities is to ensure that the recipients are reliable and trustworthy. Likewise, contracting authorities in procurement procedures generally have a strong interest in protecting the fairness of competition, in order to benefit from the economic advantages of competitive procurement. This has led to the creation of various debarment regimes around the world.

EU-wide debarment has so far been limited to procurement procedures conducted by the EU's own institutions. While several EU Member States have now established individual debarment regimes, EU legislators have so far shied away from implementing a full-fledged and mandatory Union-wide debarment system. From an EU-wide perspective, this has led to a rather insufficient patchwork, without any form of cross-debarment or significant sharing of information.

Against this unsatisfactory background, the Commission has conducted an investigation into how to improve transparency, integrity and supporting data in public procurement (“Communication from the Commission to the Institutions: Making Procurement work in and for Europe” and its appendix 4 “Overview of EU procurement implementation initiatives by end 2018” from October 2017). This investigation consequently also contained the question of an EU-wide debarment system since the Commission announced as an aim for its investigation to, *inter alia*, ‘Provide guidelines on practical application of new integrity provisions and on exclusion grounds relating to collusion, and set-up a database on irregularities’. Official results for the investigation were scheduled for 2018 but have not been published yet.

While it seems too soon to state that efforts and past initiatives to create a centralized EU-wide debarment regime and a corresponding register have met a dead end, it is suggested that ambitious initiatives pursued in the past are currently stalling. Nonetheless, a closer look at recently established de-

barment regimes in the EU may provide guidance on how such an EU-wide system could be implemented in the future.

I. LEGAL AND ECONOMIC BACKGROUND

A. The economic case for EU-wide debarment

Currently, total annual public expenditures by the member states of the EU amount to approximately EUR 2 trillion – roughly 14% of total GDP (Eurostat). In light of this immense figure, it should come as no surprise that the EU and its member states constantly strive to improve the effectiveness, fairness and integrity of public procurement procedures. To promote these objectives, a multitude of measures were established or are under consideration (“Communication from the Commission to the Institutions: Making Procurement work in and for Europe” and its appendix 4 “Overview of EU procurement implementation initiatives by end 2018” from October 2017).

Few factors, however, adversely affect public sector spending as much as corruption and fraud. It is generally estimated that collusion adds up to 20 % to the price that would be achieved in a competitive market (Anderson and Kovacic, ‘Competition Policy and International Trade Liberalisation: Essential Complements to Ensure Good Performance in Public Procurement Markets’, PPLR, 18 (2009): 67). This is why the Commission and the EU-Member States recognize the potential of EU wide debarment as an effective deterrent for fraud, corruption, collusion, obstruction and coercion, as well as a safeguard for public financial interests when implemented effectively. Debarment systems have already proven their worth in the United States and for the multilateral development banks (MDBs).

B. The legal basis of EU-wide debarment

EU public procurement law is set out in various Directives (the most important one being Public Procurement Directive 2014/24/EU) that must be implemented into national law in each EU Member State. Since the Directives leave the Member States considerable implementing discretion, each national procurement law has its particularities and deviations. This also applies to exclusion and debarment of companies that have engaged in misconduct. The Directives furthermore do not bind the EU institutions. Instead, the EU has enacted a procurement law regime for its own institutions which is mainly set out in Regulation (EU, Euratom) 2018/1046 (New Financial Regulation). It is based on the Public Procurement Directive, but is not identical.

On the level of the EU-institutions, the Commission has set up a rather coherent debarment system with its own advantages and disadvantages (see *infra* II.A). When it comes to the question of debarment at the level of the EU-Member States, the picture is very different: the relevant Article 57 of Directive 2014/24/EU neither establishes an EU-wide debarment regime nor does it contain any provisions for national debarment regimes. Article 57 only specifies the requirements under which contracting authorities must or may exclude a bidder in an individual procurement procedure. The Article contains several provisions on optional and mandatory exclusions grounds, rules on imputation of conduct by individuals to companies, as well as maximum periods of exclusion. Moreover, it establishes requirements for the possibility of “self-cleaning”, a mechanism (analogous to corporate compliance measures in U.S. practice) for bidders to regain access to procurement procedures even though an exclusion ground exists. However, the provisions set forth therein

do not oblige member states to set up a debarment regime nor do they provide any procedural rules or guidance in this regard.

The approach of Article 57 of Directive 2014/24/EU therefore significantly differs from the concept of debarment since an exclusion decision is valid only for a single procurement procedure and not for a multitude of procurement procedures over a certain period of time. Furthermore, the decision to exclude is made by the procuring contracting authority itself and not – as is often the case with debarments – by an independent and centralized authority that makes the decision for every contracting authority within its jurisdiction.

The lack of a coherent debarment regime therefore largely leaves the enforcement of Article 57 of Directive 2014/24/EU to the individual contracting authority (or to bidders if they choose to take legal action against an award to an unreliable competitor, which very rarely happens). However, contracting authorities often tend to avoid the additional work and time that is required to check bidders' integrity and reliability diligently. Authorities instead typically rely on self-declarations, and the whole question of exclusion generally degenerates into a "tick the box exercise". A contracting authority's main goal in many cases is to award a contract as quickly and easily as possible to the best bid. Hence, in public procurement practice there is a general reluctance to exclude attractive offers due to "mere" policy reasons. Nevertheless, even if a contracting authority meticulously follows the rules on exclusion, there is very often no reliable and comprehensive source for the relevant information. Without a centralized register for exclusion or debarment grounds, a contracting authority depends on and needs to trust the information provided by the participating bidders.

It should, however, be noted that Article 57 of Directive 2014/24/EU does not prohibit debarment regimes on the level of the individual EU Member State either. But since the Directive does not set up any key features or procedural rules, debarment regimes in the Member States – if existent at all – vary greatly. The only common grounds are the substantive provisions of Article 57 of Directive 2014/24/EU as described above.

This leads to the following interim conclusion: There is no coherent debarment system in the EU. Individual member states are not even obliged to establish a debarment regime. The exclusion system of Article 57 of Directive 2014/24/EU does not work well in practice, mainly because an individual contracting authority does not have access to the data necessary to determine whether an exclusion ground exists.

II. CURRENT DEBARMENT-REGIMES IN THE EU

Against the background of the status quo described above, the EU legislator will need to take action, if the EU wishes to create a comprehensive and effective EU-wide exclusion and debarment regime. Regardless of the exact implementation, a common EU-wide register or at least interconnected registers seem indispensable. Otherwise, the authorities excluding or debarring companies will not have access to the necessary information to make their decisions regarding exclusion.

The exclusion and debarment regime for the EU institutions (see below under A) and the German law establishing a national 'Competition Register' (see below under B) stand as examples of recent legislative solutions in the EU which address the different questions that must be answered when setting up an exclusion/debarment regime and its underlying register.

A. Solution of the EU for its own institutions

The European Early Detection and Exclusion System (EDES) was introduced on 1 January 2016 and consists of a centralized database accessible to all authorities implementing EU funds, which contains information on economic operators that could pose a risk to the EU's financial interests. However, far from a full-fledged debarment system, the scope of EDES is limited to public procurement (and specific other award procedures, contests or selection procedures) conducted by the institutions, bodies and executive agencies of the EU itself. In this capacity, EDES replaces the existing Early Warning System (EWS) and the Central Exclusion Database (CED), which previously served the same function. EDES is now governed by the recently introduced Regulation (EU, Euratom) 2018/1046 (New Financial Regulation). The old Financial Regulation (Regulation (EU, Euratom) 966/2012) together with its later amendments was replaced in an effort to consolidate the existing rules on EU funding and reduce the size of the overly complex regulatory framework.

An essential part of EDES is formed by a database operated and maintained by the European Commission (EDES-DB). EDES-DB lists economic operators that have been excluded from certain award procedure by intuitions, executive agencies and bodies of the EU itself and those which are guilty of specific white collar crimes (Friton and Wolters, 'The German Register of Competition and Its International Context', EPPPL, 119 (2018): 123 (available on Westlaw)).

1. Grounds for listing

Persons or entities will be registered in the EDES-DB in the event they are considered risks to EU financial interests or are in an exclusion situation as defined by the Financial regulation. According to Articles 136 para. 1 (c) to (h), 138 New Financial Regulation, exclusions and financial penalties may arise primarily in the following cases:

- bankruptcy, insolvency, winding-up procedures, or analogous situations
- final judgments or administrative decisions showing that a contractor is falling short of tax or social security payment obligations;
- final judgments or administrative decisions showing that a person or entity is guilty of grave professional misconduct (in particular violations of laws, professional or ethical standards);
- final judgments or administrative decisions establishing that the person or entity is guilty of fraud, corruption, participation in a criminal organisation, money laundering or terrorist financing, terrorist-related offences or offences linked to terrorist activities, or child labour;
- the person or entity has shown significant deficiencies in complying with the main obligations in the implementation of a legal commitment financed by the EU budget;
- final judgments or administrative decisions establishing that the person or entity has committed an irregularity (meaning an infringement of EU law by the contractor actually or potentially having the effect of prejudicing the EU budget);

- creation of an entity in a different jurisdiction with the intent to circumvent fiscal, social or other legal obligations of the jurisdiction of the contractor's regular place of business.

If one of the exclusion grounds listed above has been established by a court judgment or an administrative decision, the decision to exclude or financially penalise the respective person or entity is at the discretion of the contracting authority (Article 136 para. 1 New Financial Regulation). This applies to both judgments and administrative decisions of EU courts, but also to those made by courts and authorities of individual EU Member States, e.g., decisions by criminal courts. Whether court decisions by non-EU countries are relevant is not explicitly addressed. Furthermore, the contracting authority may also base its decision on a 'preliminary classification in law' (Article 136 para. 2 New Financial Regulation) in cases where no final judgment or decision is available yet. This preliminary classification is subject to further review once such a decision by the respective Member State court or authority is available.

One of the main advantages of EDES is the wide range of misconduct the EDES-DB may contain. In particular, misconduct may also be listed if there is no formal judgment or administrative decision.

2. Subject of listing

Similar to the debarment systems established by the federal government in the United States and by several MDBs, EDES-DB may include both legal and natural persons. However, as the safeguarding of the EU's budget has to be balanced with the recipients' right to private life and the protection of personal data according to the principle of proportionality, stricter rules apply to the latter (cf. New Financial Regulation, recital 16).

Acts by individuals that have given reasons for an exclusion or financial penalty lead to the listing of the company the individual acted for, if the conduct in question can be attributed to it. This is particularly the case, if the individual in question has committed an offence (i) as a member of the administrative, management or supervisory body; or (ii) if he has powers of representation, decision or control; or where a natural or legal person assumes unlimited liability for the debts of the company (Recital 66 New Financial Regulation).

It should be noted that individual misconduct may be imputed to a company even if it was not committed during activities carried out to meet obligations towards the company, meaning that even private offences of a person may trigger a registration of the company. In addition, EDES applies not only to contractors, but to subcontractors as well.

This may seem to be a strict approach. However, it bears the clear advantage of being comprehensive as the EDES-DB not only contains each ground for exclusion and debarment but also any person and entity subject to exclusion and debarment.

3. Process of listing

One of the main disadvantages of EDES are the sources of information for the register. Here, only institutions, executive agencies and bodies of the EU itself are required to forward information regarding an exclusion to the EDES-DB. The database may also include information voluntarily submitted by the European Anti-Fraud Agency (OLAF), as well as decisions of the European Central Bank (ECB), European Investment Bank (EIB), European Investment Fund and other international organisations. Even though other (EU-)authorities

may therefore report misconduct to the EDES-DB, the New Financial Regulation has failed to access all information that is readily available. In light of the fact that it serves only for procurements by EU institutions, executive agencies and bodies there is a certain logic behind this limited scope of information. However, in order to make it stronger and more comprehensive, the EDES-DB would also need to access the information available in the EU-Member States.

4. Effect of listing

In stark contrast to a number of established debarment regimes, including the debarment regime on the federal level in the United States, undertakings listed in EDES-DB are not mandatorily excluded from procurement by EU institutions, by a centralized authority altogether or via cross-debarment. Rather, it is at the discretion of the responsible EU contracting authority in an individual procurement procedure as to whether a specific undertaking is to be excluded. This decision has to be made anew in each procurement procedure the contracting authority conducts. In addition, with regard to some misconduct, a contracting authority may have a wide margin of discretion whether to exclude the bidder or not. It may not have to rely on exceptional circumstances that permit the award of a contract to a listed bidder.

The New Financial Regulation does not explicitly state whether a consultation of the register is mandatory before a contract is awarded by a contracting authority (cf. wording of Article 142 New Financial Regulation). However, according to Article 167 New Financial Regulation, contracts shall be awarded on the basis of award criteria, provided that the contracting authority has verified that the candidate or tenderer is not excluded under Article 136 or rejected under Article 141 New Financial Regulation. A comprehensive verification and thus an effective protection of the EU budget from unreliable contractors is possible only if the respective contracting authority verifies by means of EDES that no grounds for exclusion or rejection exist before awarding a contract. In addition, updated internal guidelines seem to require that contracting authorities consult the register in award procedures (Practical Guide to Contract Procedures for EU External Actions' (PRAG) section 2.6.10.1.3.C). In light of the above, it is reasonable to assume that contracting authorities are required to consult EDES-DB prior to awarding contracts.

5. Public availability of the register

Cases of exclusions and financial penalties listed in the EDES-DB are accessible only to authorized users involved in the implementation of the EU budget, meaning the register is mainly accessible to contracting authorities of the EU itself. Read-only access to the exclusion branch of the EDES-DB is available to Member State authorities and entities responsible for the implementation of EU spending programmes. If deemed necessary by the contracting authority to reinforce the deterrent effect of an exclusion and/or a financial penalty, a listing may be published on the website of the Commission (Article 140 para. 1 New Financial Regulation). As of 31 December 2018, however, only one financial penalty and 9 exclusions are currently listed publicly (the list of published entries is accessible under http://ec.europa.eu/budget/edes/index_en.cfm), reflecting the exceptional nature of such a publication. Unless justified by the severity of the misconduct or its negative impact, no personal data will be made public if a natural person is concerned. Likewise, if the confidentiality of an investigation or national judicial proceedings require it or if such a measure would prove disproportionate, the Commission will refrain from publication (Article 40 para. 2 New Financial

Regulation). Published information is limited to the name of the company, the reason for the exclusion (exclusion situation) as well as the duration of the exclusion and/or the amount of the financial penalty (Article 140 para. 1 New Financial Regulation).

6. Maximum period of listing

Depending on the committed offense, entries to the EDES-DB must be deleted after a period of 3 or 5 years, as the longest periods allowed for any exclusion or debarment.

However, the EDES does not provide for a centralized assessment of self-cleaning (compliance) measures. An excluded company rather has to provide proof of sufficient remedial measures to each contracting authority in each procurement procedure. The contracting authorities then shall revise their decision and lift the company's exclusion early (Article 136 para. 6 New Financial Regulation). The decision by a contracting authority to lift a company's exclusion early is not binding for other contracting authorities.

Self-cleaning measures must include steps to identify the cause of exclusion as well as appropriate and concrete technical, organisational and personnel measures to prevent future violations. Furthermore, they must include the compensation of harm or damages caused to the European Union, as well as payment or the securing of payment of any fines imposed or of any taxes or social security contributions.

This is one of the major deficiencies of EDES. By leaving the assessment of sufficient self-cleaning in the hands of the individual contracting authorities, the readmission to government contracts after an exclusion or debarment is possible only in a time- and cost-consuming process. A more efficient alternative would be a centralized check of self-cleaning by a specialized authority, as is the case in Germany (see below).

7. Conclusion

The EDES offers a good example on how a comprehensive register for all exclusion and debarment grounds can be achieved that lists both natural persons and entities. However, the reliance only on the provision of information by EU institutions, executive agencies and bodies does not lead to a comprehensive listing of all grounds in the register. In order to achieve that, the EDES would also have to revert to authorities in the EU-Member States.

The process of exclusion and debarment as well as the check of self-cleaning measures differs substantially from international examples such as the United States and the sanctions systems of the MDBs. Since there is no centralised authority to make these decisions, there is a considerable probability that the different material provisions for debarment / exclusion and self-cleaning are implemented differently in practice.

B. THE GERMAN DEBARMENT REGIMES

The German debarment regime has a few similarities with the EDES. However, it also offers considerable differences:

The legal basis for a German 'Wettbewerbsregister' (Competition Register) was created in 2017. The future register will consolidate and centralise previously existing regional registers on a federal level and is scheduled to be implemented by the end of 2020. The German Federal Cartel Office (FCO) will serve as the responsible administrative office for the register's implementation and operation.

1. Grounds for listing

Grounds for debarment are certain administrative offences and white-collar crimes. The register will mandatorily list final judgments on offences such as fraud against public finances, money laundering, bribery, embezzlement of wages, submission agreements of tenderers and deliberate tax evasion if these can be attributed to a company. Other offenses, most notably violations of labour law provisions, will only be entered into the register if a sentence of more than three months of imprisonment, a fine of more than 90 daily rates or a fine of at least two thousand five hundred euros has been imposed on the perpetrator in a final judgement. Lastly, anti-trust decisions with a minimum penalty of EUR 50,000 will trigger a registration, regardless of whether those decisions are final or merely preliminary.

However, not all grounds for exclusion under German public procurement law are registerable. This concerns especially grounds that have no connection to administrative or criminal offences such as bankruptcy or a breach of a contract. Hence, the German register is not as comprehensive as the EDES-DB.

2. Subject of listing

The register's debarment regime is only applicable to companies. Individuals acting as representatives of a company will not personally be debarred or listed. Since German law does not provide for corporate criminal liability, offences committed by individuals must be attributed to a company before being registered. A company will be deemed responsible for a criminal offence, if the perpetrator acted in a managerial or a supervisory capacity for the company while committing the offense.

3. Process of listing

Since all grounds that are entered into the register are either penal or administrative offences, the respective competent investigative authority is responsible for reporting the necessary information to the register authority. No contracting authorities can report any misconduct relating to exclusion grounds to the register. Neither will decisions by non-German courts and authorities be documented. In addition, not even antitrust decisions by the European Commission are entered into the register.

Therefore, the German Competition Register significantly lacks completeness with regard to the sources of information. However, since it is restricted to certain administrative and criminal offences committed in Germany, the exclusive competence for reporting by the respective German investigating authority bears a certain logic. However, it is particularly unfortunate that neither antitrust decisions by the European Commission, nor – at least – exclusion information from German contracting authorities may be added to the register.

4. Effect of listing

With regards to the effect of listing, the German regime works similarly to the EDES: the contracting authorities remain responsible to assess if a company must be excluded, in every individual procurement procedure.

In order to make proper use of the register, contracting authorities are required to electronically consult the register before awarding a public contract, provided the contract value exceeds certain thresholds. During

procurement procedures below the thresholds, the consultation of the register is optional.

5. Public availability of the register

The register will not be accessible to the public. The FCO will exclusively grant access to a contracting authority during procurement procedures and to companies or individuals requesting stored information concerning themselves.

6. Maximum period of listing

The maximum period of debarment also works similarly to the EDES-regime: A company may be debarred from public contracts for three to five years, depending on the category of exclusion ground. Companies may also conduct self-cleaning measures in order to shorten their periods of debarment. Those measures must include an effort to compensate the damage incurred, active cooperation with the investigating and contracting authorities, as well as concrete technical, organisational and personnel measures to prevent further criminal offences or misconduct.

Unlike the EDES, in Germany the FCO is responsible for checking the sufficiency of the self-cleaning measures a bidder has conducted. If it deems the self-cleaning efforts successful, it will remove the company from the register. This assessment is binding for all authorities awarding public contracts. Thus, approval of self-cleaning measures by the FCO in essence “clears” an otherwise excludable vendor for work before all German procuring authorities.

7. Conclusion

The starkest weakness of the German Competition Register is its lack of comprehensiveness. It also leaves the decisions for exclusion in the hands of the contracting authorities. That leaves the *status quo* intact, where the willingness of the contracting authority is one of the major factors for the question, if misconduct has any effect on the future participation in public tenders. However, the German Competition Register has one quite remarkable feature when it comes to self-cleaning. Because approval of self-cleaning measures by the FCO will “clear” the affected vendor for work before all German procuring authorities, the German Competition Register provides a huge incentive to companies to conduct self-cleaning measures if their efforts will be judged by a specialized authority, thereby creating a level playing field with clearer instructions as to the concrete steps that have to be taken.

III. OUTLOOK

If one were to speculate on the potential structure of an EU-wide debarment system, the current fragmented exclusion and debarment regimes throughout the EU make one thing clear: An automatic cross-debarment will most likely not be implemented in the near future. This is true regardless of whether the decision for a debarment or exclusion is made by a centralized EU agency or left with the contracting or debarring authorities within the EU and its Member States.

Possible solutions are the provision of a centralised EU database with information on exclusion grounds or the interconnection of existing registers on national and EU-institutional levels. This would leave it for the contracting authorities to decide on how to react to an entry. This disadvantage could be mitigated by the possibility for competitors to review the register and enforce

exclusions by way of review procedures in case the respective contracting authorities proved unwilling to do so on their own.

This leaves the question as to which authority should provide the register with the respective information on exclusion grounds. In that regard, EDES and the German register follow different approaches. While mainly contracting authorities provide the EDES-DB with information, investigating authorities fulfil that task under the German regime. The latter approach has the disadvantage that the reporting investigating authority needs to have at least a rudimentary knowledge of public procurement law in order to report all and only relevant cases to the register authority. Hence, it would also be necessary to oblige contracting authorities to report any case of exclusion including relevant underlying information. Ideally, the obligation to report would cover information on any existing exclusion ground under the applicable procurement law regime.

As a trade-off for the increased effect of a listing – as is the case in Germany – a centralised authority could decide on the sufficiency of self-cleaning measures taken by the affected vendors. Since the expected measures are generally congruent between the EU Member States, subject as they are to common procurement directives, this would also lead to a stronger and clearer interpretation of the applicable procurement law.

However, any change of the *status quo* would require the EU-legislator to become active in the form of a directive or a regulation because EU Member states public procurement law would have to be amended in at least two ways:

- The establishment of the minimum content of an entry into the registry and,
- An interface between the different registers in case the EU does not agree on establishing a common register.

It is clear that there are compelling reasons for a Union-wide debarment regime, in particular considering that not all Member States have implemented exclusion databases on their own. In the Treaties of the European Union, the Member States have given the EU a strong political mandate to fight corruption and develop a comprehensive anti-corruption policy. Expanding European cooperation on debarment could prove to be a decisive step for Europe's ongoing fight against corruption. The experiences of the United States and the MDBs show that companies take an efficient debarment regime very seriously, and that contracting authorities profit greatly when they no longer need to check the integrity of their bidders independently. While significant legal, political and practical hurdles remain, a future EU debarment system could draw from the lessons learned by the debarment regimes depicted above and by those of the United States and the multilateral development banks.

1 Dr. Fritton will address many of these issues at a free colloquium on transatlantic issues in debarment, sponsored jointly by King's College, London and George Washington University Law School, on March 18, 2019. Further information on the London event is available at <https://www.law.gwu.edu/exclusion-and-debarment-procurement>.