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# Exclusion grounds - the practice of application in the EU and EFTA states



**Piotr Bogdanowicz, Jan Roliński (ed.)**

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# INTRODUCTION

This Report (“**Report**”) was prepared by the Public Procurement Law Association (“**Association**”).

The Association was established in February 2017 at the initiative of lawyers of international and Polish law firms dealing with public procurement law issues. The objectives of the Association include promoting legal standards adopted in the European Union in the field of the public procurement and concession laws, propagating knowledge on public procurement law and concession-related regulations in Poland and abroad, carrying out studies, research and analyses, including comparative analyses, with respect to public procurement and concession laws.

In September 2017, the Association prepared a report on the functioning of legal measures in EU states.

This time the Association undertook to prepare an analysis of the practice related to applying selected exclusion grounds in the Member States of the European Union and the European Free Trade Association.

The analysis carried out in the Report concerns the following exclusion grounds specified in Directive 2014/24/EU:

- exclusion of an economic operator due to grave professional misconduct, which renders its integrity questionable (Article 57 section 4 item c) of Directive 2014/24/EU);
- exclusion of an economic operator who has shown significant or persistent deficiencies in the performance of a substantive requirement under a prior public contract or concession contract which led to early termination of that contract, damages, or other comparable sanctions (Article 57 section 4 item g) of Directive 2014/24/EU); and
- exclusion of an economic operator due to (i) serious misrepresentation when providing information which was required to verify that no exclusion grounds existed or to verify that the qualifying criteria had been met, withholding this information, failing to submit documents supporting this information, or (ii) undertaking steps to unduly influence the decision-making process of the contracting authority, to obtain confidential information that may confer undue advantages upon it in the procurement procedure or to negligently

2

provide misleading information that may have a material influence on decisions concerning exclusion, selection, or award of a contract (Article 57 section 4 items h) and i) of Directive 2014/24/EU).

The issue of exclusion grounds represents a key aspect of the functioning of the public procurement system. It influences the competitiveness of the procedures organised by contracting authorities, the level of availability of contracts for market players and transparency of the public procurement system. At the same time the issue of the interpretation and practical application of the individual grounds constitutes the subject matter of keen interest of the doctrine of Public Procurement Law, appeal authorities, courts, as well as the contracting authorities and the economic operators that perform public contracts.

This Report focuses on those exclusion grounds the interpretation and application of which raises material interpretation doubts. We believe that their analysis in the legal and comparative context will be one of the elements supporting the uniform and consistent application of the exclusion grounds in accordance with Directive 2014/24/EU.

While examining the transposition of Directive 2014/24/EU by the individual Member States one must refer to Polish regulations of the Public Procurement Law. We would like to trigger a discussion on the Polish transposition of the Directive with respect to the exclusion grounds and consider how Polish regulations and their interpretation appear when compared with other European states.

The Report being the outcome of the above analysis has been drafted on the basis of answers to a set of questions included in the survey that was sent by the members of the Association to law firms from 31 EU Member States and the European Free Trade Association (the survey form and a complete list of the law firms that responded to the survey are available at the end of the Report).

Our intention was for the Report to be as practical as possible, therefore, apart from questions on legal solutions existing in the given legal system, we also asked about their functioning in practice. We would like to take this opportunity to thank our colleagues from the Association who had a vital role in the preparation of the Report.

In particular we would like to thank the members of the working teams who prepared individual chapters of the Report or collected the replies to the questionnaires sent out to law firms: Marcin Bejm (CMS Cameron McKenna Nabarro Olswang Pośniak i Bejm sp. k.),



Wojciech Hartung (Domański Zakrzewski Palinka sp. k.), Aldona Kowalczyk (Dentons Europe Dąbrowski i Wspólnicy sp. k.), Katarzyna Kuźma (Domański Zakrzewski Palinka sp. k.), Mirella Lechna (Wardyński i Wspólnicy Sp. k.), Tomasz Michalczyk (Domański Zakrzewski Palinka sp. k.), Paweł Nowicki (Uniwersytet Mikołaja Kopernika w Toruniu), Michał Orzechowski (DLA Piper Giziński Kycia sp. k.), Anna Specht-Schampera (Schampera, Dubis, Zajęc i Wspólnicy sp. k.), Jarosław Sroka (BSJP Brockhuis Jurczak Prusak Sroka Nilsson sp. k.), Anna Szymańska (Dentons Europe Dąbrowski i Wspólnicy sp. k.), Grzegorz Wąsiewski (BSJP Brockhuis Jurczak Prusak Sroka Nilsson sp. k.), Michał Wojciechowski (Domański Zakrzewski Palinka sp. k.), and Tomasz Zalewski (BIRD&BIRD Szepietowski i Wspólnicy sp.k.).

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## FOREWORD

The legal structure concerning the exclusion of a contractor from public procurement procedures plays a key role in the context of ensuring the effectiveness of the procedures. Its aim is primarily to minimise the risk of non-performance or inadequate performance of a public procurement by specific categories of contractors (performance risk) and to minimise the risk of loss of reputation by contracting authorities as a result of their cooperating with unsuitable contractors (reputational risk). The exclusion structure and the self-cleaning mechanism should also be treated as a measure leading to an improvement in the standards in force for counterparties in the public sector, gradually improving the quality of the entire public procurements system.

An analysis of the exclusion structure raises many questions concerning, inter alia, the situations in which contractors should be excluded, when and under what conditions it is worth permitting contractors to return to the public procurements market, whether exclusion should have an effect only with regard to a specific procedure or whether it may have also have an effect on future procedures conducted by contracting authorities in the relevant country or wider area, e.g. throughout the EU, and finally, who should decide on the application of such a radical measure to contractors.

The regulation on exclusion of contractors from procedures is present in all normative acts the subject of which is the granting of a public procurement. A comparative analysis of those regulations shows a common concept, this being, generally speaking, contracting authorities' intention to cooperate only with reliable and honest contractors. However, a closer look at the provisions on the issue in question reveals many discrepancies, often concerning even fundamental issues.

The report prepared by the Public Procurement Law Association entitled *Exclusion Grounds – the practice of application in the EU and EFTA states* shows the complexity of the problem concerning exclusion of contractors from procedures on the basis of selected provisions of Directive 2014/24/EU on public procurement and repealing Directive 2004/18/EC, and on the basis of national laws of the member states of the EU and EFTA. It should be pointed out that the Report provides a thorough discussion of Art. 57 sec. 4 items c), g), h) and i) of Directive 2014/24/EU, and the texts of the national regulations implementing the aforesaid provisions use numerous terms that are not defined. A natural consequence of that in practice of is the many doubts that arise as to an assessment of those terms in specific

cases. The said non-defined terms, serving to provide flexibility in decision-making by contracting authorities may at the same time lead to far-reaching differences in the application of legal solutions common to all EU countries. Such a situation is not conducive to certainty of legal transactions from the contractors' point of view. In this context, it is worth pointing out that this Report contains a number of unusually valuable comparative analyses concerning the implementation of the provisions contained in Directive 2014/24/EU. The findings presented concisely and legibly in the Report could be the starting point for contracting institutions in countries of the EU or EFTA when they are making decisions related to an interpretation of provisions on the exclusion of a contractor from a procedure. The Report will also be a source of valuable information for contractors interested in a public procurement in the individual countries discussed in the Report. The Report will undoubtedly also be of interest to contractors from outside the EU and EFTA that are interested in participating in public procurement markets of member states. The Report will furthermore be a base of valuable guidelines in the context of comparative analyses for other institutions granting public procurements, including multilateral development banks, such as the World Bank.

The degree of complexity of the legal structure of exclusion of contractors from a procedure and the importance of the problems in question in the context of the implementation of the rule of effectiveness of public procurements justifies a broader look at the issue. Therefore, it is also worth analysing other legal systems providing for exclusion from public procurement procedures, including the model of federal procurements of the US government set out in the Federal Acquisition Regulation (FAR). For this reason, the Public Procurement Law Association's initiative to organise a conference at the University of Warsaw for 30 September 2019, dedicated to the practice of applying grounds for exclusion in the countries of the EU, EFTA and the USA should meet approval.

Worthy of particular note in the US model is primarily the separation of specialised authorities responsible for issues of exclusion of certain categories of contractors. The US regulation dedicated to government procurements has so-called Suspension and Debarment Officers, whose sole task is to conduct proceedings in cases concerning exclusion of contractors. Accordingly, a high level of professionalism maximising the effectiveness of the structure of exclusion of a contractor from the governmental procurements system, and hence effectiveness of the entire system of governmental procurements, is achieved. The regulation contained in the US regulation of government procurements consisting in the conclusion of a so-called administrative agreement could in turn serve as a guideline for EU countries in the context of effective implementation of the self-cleaning mechanism. In this agreement, contractors undertake to take a number of

actions that will enable them to return to the public procurements market. The actions of contractors are supported by a so-called Independent Monitors giving them appropriate guidelines, while at the same time informing the relevant government agencies of the progress in the actions contractors are taking with the aim of returning to the governmental procurements market. Another interesting solution contained in the Federal Acquisition Regulation is the requirement that contractors have appropriate compliance policies in place before they join a public procurement procedure, and not as an *ex post* measure constituting one of the possible self-cleaning conditions. Thanks to that solution, most contractors intending to cooperate with the federal government must at the outset demonstrate they have appropriate regulations in place guaranteeing honesty and integrity in business.

The comparative analyses presented in the Report and the exchange of views during the conference "Grounds for exclusion – the practice of application in the countries of the EU, EFTA and the USA" should be the start for legal systems to become more integrated on the subject of exclusion of contractors from procedures, thereby contributing to an improvement in the quality of the public procurements market.

*Prof. Michał Kania*

*Silesian University in Katowice*



## DISCLAIMER

1. The Report includes information on 32 EU Member States and the European Free Trade Association.
2. The Report covers only an analysis of the manner of transposition and the practice of applying the selected exclusion grounds from the public procurement procedure in the individual EU and EFTA Member States, following from Directive 2014/24/EU on public procurement and repealing Directive 2004/18/EC<sup>3</sup>.
3. The Report only discusses the exclusion grounds indicated in Article 57 section 4 item c); Article 57 section 4 item g) and Article 57 section 4 item h) and i) of Directive 2014/24/EU.
4. The Report has been drafted based on an analysis of Polish law and the answers provided by law firms from 31 EU and EFTA Member States to the questions contained in the surveys. As a rule, we have not independently analysed the issues concerning foreign law and the practice of its application covered by the surveys.
5. The Report was prepared as at 31 July 2019.

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<sup>3</sup> OJ of 28 March 2014, series L 94, p. 65.





## DEFINITIONS

<b>Directive 2014/24/EU</b>	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 (OJ of 28 March 2014, series L 94, p. 65)
<b>Directive 2004/18/EC</b>	Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts (OJ of 30 April 2004, series L 134, 30.4.2004, p. 114)
<b>EFTA</b>	European Free Trade Association
<b>ESPD</b>	European Single Procurement Document
<b>NAC</b>	National Appeals Chamber
<b>PPL</b>	Public Procurement Law dated 29 January 2004 (i.e. Journal of Laws <i>Dz.U.</i> of 2018, item 1986, as amended)
<b>CJEU</b>	Court of Justice of the European Union
<b>EU</b>	The European Union

## SUMMARY. CONCLUSIONS

- The wording of the exclusion grounds referred to in Article 57 section 4 item c), item g), item h) and item i) of Directive 2014/24/EU raises material interpretational doubts and is far from being unequivocal;
- The content of the exclusion grounds referred to in Article 57 section 4 item c), item g), item h) and item i) of Directive 2014/24/EU has been implemented literally in the majority of the states;
- The majority of EU and EFTA states thus did not avail of the opportunity to make more precise the content of the provisions of Directive 2014/24/EU in the national legal regimes in such manner that would make it possible to minimise the interpretational doubts concerning, e.g. the relationship between individual exclusion grounds, the moment from when the exclusion period should be calculated or the self-cleaning procedure; these doubts will have to be resolved in the case law of the CJEU or of national appeal authorities;
- In the majority of the states the discussed grounds are non-compulsory; however, given the absence of an unequivocal regulation in Directive 2014/24/EU, the understanding of the notion of being non-compulsory seems to differ in the individual states;
- In the majority of the states the case law concerning exclusion grounds is scarce;
- In the majority of states the grounds are autonomous. There are, however, states where it is possible to qualify certain acts as those subject simultaneously to more than one exclusion ground, which is directly confirmed by the provisions of law or by the relevant case law;
- In the majority of the states the economic operator is excluded if 3 years have not lapsed from the date of the event being the basis for the exclusion; in some states the exclusion covers only the procedure in which the contracting

**authority issued a decision on the exclusion; however, the approach differs as to the moment from which the exclusion period should be calculated;**

- **In the majority of states it is unclear whether economic operators should apply the self-cleaning procedure on a prior basis (in the application / tender offer), or only as late as upon express summons from a given contracting authority;**
- **In the majority of states it is assumed that the fact of having been involved in a court dispute concerning the legitimacy of the contracting authority terminating a contract early does not in itself constitute exclusion grounds. In principle, court proceedings pending in relation to a premature termination of a contract do not form an obstacle towards the exclusion of an economic operator.**



# REPORT

## CHAPTER I

### UNDERSTANDING OF THE CONCEPT OF THE NON-COMPULSORY NATURE OF GROUNDS IN DIRECTIVE 2014/24/EU

*Katarzyna Kuźma, Wojciech Hartung*

The provisions of Directive 2014/24/EU anticipate two basic groups of situations that, if they occur, may lead to excluding a given economic operator from participation in a procurement procedure. The above generally pertains to compulsory grounds (Article 57 sec. 1 of Directive 2014/24/EU)<sup>4</sup> and non-compulsory grounds (Article 57 sec. 4 of Directive 2014/24/EU).

The subject matter of the analysis contained in the Report is selected non-compulsory grounds, and the remarks presented herein focus on them.

One of the most important elements affecting the proper co-ordination or harmonisation of provisions in that respect is to determine the manner in which the concept of *non-compulsory* exclusion grounds should be understood, and to indicate permissible models of how these should be transposed into national regimes.

By adopting selected non-compulsory exclusion grounds to given national law, the legislator could change their nature and define them as compulsory.

As demonstrated by the analysis of the solutions adopted within the EU and EFTA states, in the states that implemented non-compulsory exclusion grounds to their national laws there are at least two totally different approaches in place. They can be characterised as follows:

- a) **providing the contracting authority with absolute freedom, which is manifested by such contracting authority deciding upon the application of a given ground**

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<sup>4</sup> Taking into account the provisions contained in Article 57 section 2 of Directive 2014/24/EU.



**within a given procedure in contract documents** (obviously, most often in the announcement concerning public procurement<sup>5</sup>). This means that it is each time up to the contracting authority whether it intends to take a given ground into account within a given procedure at all. In other words, the contracting authority may decide that within a given procedure it would resign from examining any non-compulsory grounds or that it would examine only selected grounds. This solution was adopted, for instance, in Poland<sup>6</sup> and in the Netherlands<sup>7</sup>.

As it appears, the following additional models may be distinguished within that system:

- i. e.g. in Poland, where the contracting authority indicates that it would examine a given non-compulsory exclusion ground, it would somehow automatically transform it into the basis for the compulsory exclusion. The above means that if a situation occurs that is indicated in such ground, it is not examined in practice whether the potential exclusion of a given economic operator is proportional to the violation it has committed;
  - ii. a different situation exists for instance in the Netherlands, where within the stipulated non-compulsory ground proportionality must be examined prior to the potential decision on exclusion, provided that the contracting authority announces how and on what conditions it would observe this principle<sup>8</sup>;
- b) **providing the contracting authority with partial freedom, which is manifested by the fact that non-compulsory grounds are applied on an *ex lege* basis to each procedure**, and the contracting authority is each time obliged to examine their

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<sup>5</sup> In procedures carried out without announcements, in information notes delivered to invited economic operators.

<sup>6</sup> Cf. Article 24.6 of the Public Procurement Law of 29 January 2004 (i.e. Journal of Laws *Dz.U.* of 2018, item 1986, as amended)

<sup>7</sup> CJEU of 14 December 2016, C-171/15 *Connexion Taxi Services*, EU:C:2016:948, item 30, in which it was stated that: “in the scope of the possibility of excluding economic operators due to grave professional misconduct the Kingdom of the Netherlands did not include the conditions towards the application of Article 45 sec. 2 paragraph two of that Directive in their provisions but entitled, in a regulation, contracting authorities to exercise such right. The Dutch provisions considered in the main proceedings authorise contracting authorities to announce that non-compulsory exclusion grounds, as referred to in Article 45 section 2 of that Directive, would apply to given public procurement.” The judgment pertained to the provisions of the previously applicable Directive 2004/18/EU, but its reasoning remains valid.

<sup>8</sup> *Ibidem*, item 31, 38. It should be indicated, just for the record, that the matter examined by the CJEU related only to the ground consisting in grave professional misconduct.

occurrence. Thus, the *non-compulsory* nature in this case means the right to assess a given situation and to potentially not exclude a given economic operator if such contracting authority recognises that it would not be proportional to the actions performed, with the reservation that the principle of equal and non-discriminatory treatment of economic operators is observed.

It is beyond any doubt, depending on the adopted model, that the practice of applying the non-compulsory exclusion grounds may differ. Unquestionably, such approach does not support the idea of developing a cohesive legal system concerning public procurement at the EU level, which – as it seems – was to be the goal underlying the 2014 new legislative package.

The two models have their advantages and disadvantages. For instance, the “Polish” model (item a) i. above) may, on the one hand, guarantee transparency and certainty of law at the level of a given procedure since in practice a contracting authority applies non-compulsory exclusion grounds selected by itself in a mandatory manner in the same way it applies compulsory grounds. However, on the other hand, within a given procedure a contracting authority may examine specific grounds (naturally upon a prior notification thereof to contractors), and in a subsequent procedure may waive such examination.

In turn, the model presented in item b), as it appears, may increase the competitiveness of procedures by limiting excessive exclusion of economic operators in relation to defaults that, according to the rule of proportionality, do not undermine their credibility and reliability<sup>9</sup>. However, the above does not mean that the contracting authority may be vested with absolute freedom at the stage of excluding economic operators (applying grounds to them), since that would result in economic operators being left in a state of uncertainty as to the possibility of their participating in given procedures.

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<sup>9</sup> It appears that in the case of Poland, the legislator also took account of that aspect and in the new PPL suggested the application of the “Dutch” model. Cf. Article 109 sec. 3 of the Public Procurement Law of 11 September 2019: In the events *referred to in section 1 points 1-5 or 7* [these are non-compulsory exclusion grounds], *a contracting authority cannot exclude an economic operator if such exclusion would obviously be non-proportional*. The Act is to enter into force on 1 January 2021.

## CHAPTER II

### GROUND SPECIFIED IN ARTICLE 57 SECTION 4 ITEM C OF DIRECTIVE 2014/24/EU

*Michał Orzechowski, Jarosław Sroka, Anna Szymańska, Grzegorz Wąsiewski*

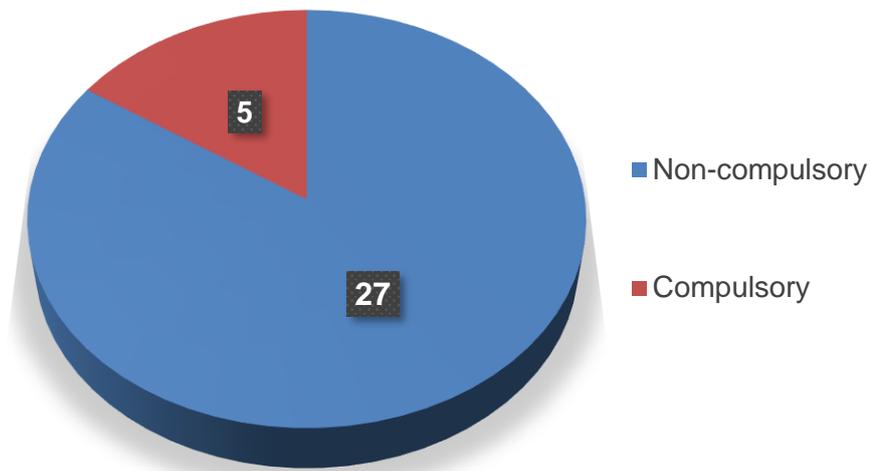
Pursuant to Article 57 section 4 item c) of Directive 2014/24/EU, the contracting authorities may exclude or be obliged by Member States to exclude any economic operator from participation in a procurement procedure where the contracting authority can demonstrate by appropriate means that the economic operator is guilty of grave professional misconduct, which renders its integrity questionable.

#### 1. ***The manner in which the exclusion ground is transposed into national legal regimes***

The exclusion ground of economic operators due to grave professional misconduct is applicable in all national legal regimes. Apart from Malta (cf. below), **the ground was formulated in all regimes in almost the same way as in Directive 2014/24/EU**. The differences, if any, (as e.g. in Sweden) come down to a different edition of the provision, however, without any changes to the substantive nature of such exclusion ground. Only in Malta have the provisions implementing the previously applicable Directives been maintained.

**In as many as twenty-seven states was the exclusion ground due to grave professional misconduct made non-compulsory**, while in only five states was it given a compulsory nature (Austria, Spain, Portugal, Slovakia, and Italy).

## The nature of the exclusion ground related to grave professional misconduct



### 2. Selected examples of application of the ground in Member States

The majority of the states decided to formulate the exclusion ground due to grave professional misconduct in a **general manner**.

A detailed catalogue of events constituting grave professional misconduct was introduced by: Bulgaria (that limited such events to disqualification due to a ban on carrying out specific professional activity), France (by means of referring to specific provisions of law), Lithuania (by means of indicating areas of law such as the violation of provisions on competition, intellectual property or professional ethics standards), and Latvia (by means of referring to specific penal and penal-administrative provisions of law).

In the absence of a detailed catalogue of events constituting grave professional misconduct or specific guidelines of the national legislator, the direction of the interpretation is generally set by the CJEU ruling issued on 13 December 2012 (C-465/11, *Forposta and ABC Direct Contact*)<sup>10</sup>. In consequence, on the one hand such a broad catalogue of grave professional misconducts will include anything that renders the economic operator's reliability questionable, while on the other hand it is necessary for the contracting authority to perform

<sup>10</sup> ECLI:EU:C:2012:801.

an individual analysis of the factual status and circumstances, taking into account the principle of proportionality.

The doctrine and the case law (which is still not very extensive) specify events that could be considered as **cases of grave professional misconduct**. They can include:

- (i) **counterfeit** (Germany - this specific case involved the forging by the economic operator's management board member of a document that was to originate from the contracting authority, irrespective of the penal law qualification);
- (ii) **ignoring the contracting authority's requests** while performing another contract which led to the occurrence of damage or difficulties in the performance of the contract (Belgium – a contract in a specific case involved immediate repair of a road, while failure to carry out the request caused a threat to the users of that road);
- (iii) **carrying out business activity without the relevant permits;**
- (iv) **price collusion** (Denmark);
- (v) **improper performance of the contract** (Belgium, Germany, Italy);
- (vi) **violation of:**
  - provisions on roadworthiness tests of vehicles (Belgium);
  - Environmental Protection Law (Croatia);
  - Labour Law provisions including collective agreements and standards regulating payment of remuneration and occupational safety standards (Croatia);
  - Competition Law (the Netherlands);
  - a confidentiality undertaking (France);
  - regulations concerning intellectual property rights (the Czech Republic);
  - professional and ethical standards (Croatia).

### 3. ***The non-performance or improper performance of another contract as grave professional misconduct***

In connection with the exclusion ground referred to in Article 57 section 4 item g) of Directive 2014/24/EU (cf. Chapter III below), **it is generally considered that the non-performance or improper performance of another contract will be examined as part of that separate ground.** Therefore, it is assumed in the majority of the states that such action or omission of the economic operator will not be treated as grave professional misconduct<sup>11</sup>.

**In some states (among others, Belgium, Germany, Italy)** it follows, however, from the provisions of the law itself or from case law that a violation of another, prior contract may be regarded as grave professional misconduct. In consequence, it is possible in such states to qualify certain acts as ones that are subject to more than one exclusion ground, i.e. the ground related to grave professional misconduct and the ground referred to in Article 57 section 4 item g) of Directive 2014/24/EU.

### 4. ***The provision of false information to the contracting authority as part of the public procurement procedure as grave professional misconduct***

In connection with the exclusion ground related to serious misrepresentation and the ground referred to in Article 57 section 4 item i) of Directive 2014/24/EU (cf. Chapter IV below) **it is generally considered that the provision of false information to the contracting authority in the course of the procedure will be examined as part of that separate ground.** Therefore, it is assumed in the majority of the states that such action or omission of the economic operator will not be treated as grave professional misconduct.

**In Belgium,** however, it follows from the case law that the provision of false information to the contracting authority may be considered as grave professional misconduct. In consequence, it is possible in such state to qualify certain acts as ones that are subject to more than one exclusion ground, i.e. the ground described in Article 57 section 4 item c) and h) or i) of Directive 2014/24/EU.

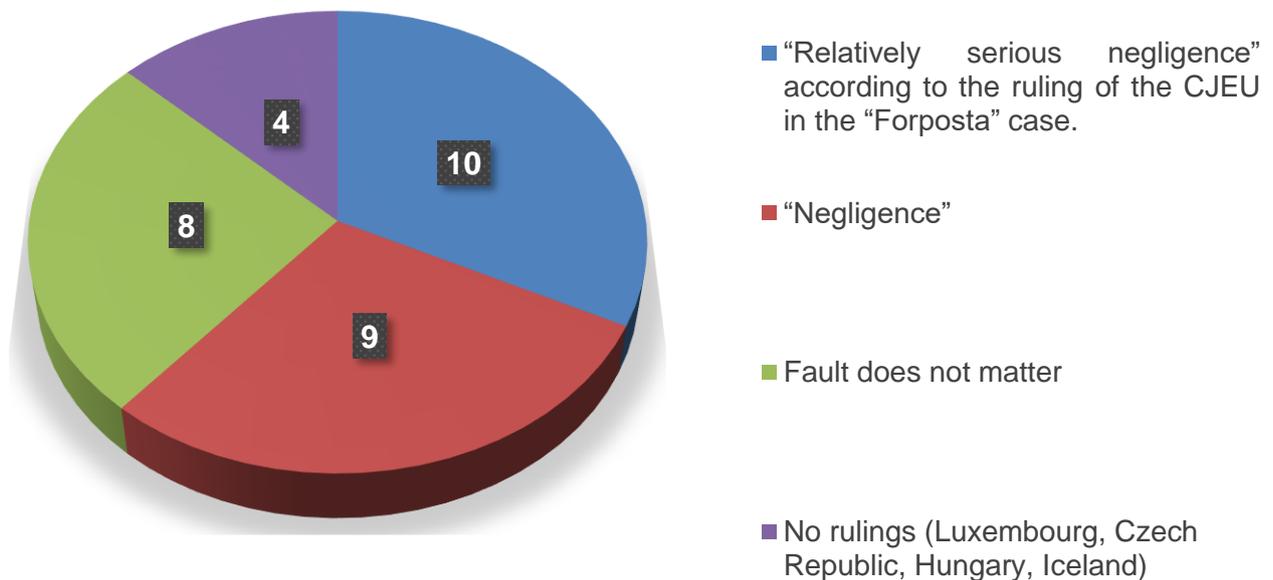
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<sup>11</sup> However, in this regard see the ruling of the CJEU in case C-41/18, *Meca*, ECLI:EU:C:2019:507. The CJEU ruled that *Article 57 section 4 items c) and g) of the Directive of the European Parliament and of the Council 2014/24/EU of 26 February 2014 on public procurement and repealing Directive 2004/18/EC should be interpreted as being an obstacle to national regulations, under which lodging a court appeal against a decision by a contracting authority to terminate a public procurement contract because of material irregularities which occurred during performance of that contract, makes it impossible for the contracting authority which organises the new tender to make any evaluation whatsoever, at the stage of selecting the tenderers, as to the reliability of the economic operator concerned by the termination.*

## 5. *The degree/type of fault required in the case law of national authorities*

The application of the exclusion ground related to grave professional misconduct is relatively rare. There are states (e.g. Luxembourg, the Czech Republic, Hungary, and Iceland) in which contracting authorities have not applied this even once. For example, the case law in the remaining states can point to certain interpretational guidelines determining the degree of fault necessary in order to apply the discussed exclusion ground.

It is worth mentioning here that in the ruling in the *Forposta* case, though issued in the context of Directive 2004/18/EC but still valid in this regard, the CJEU ruled that *the concept of ‘grave misconduct must be understood as normally referring to conduct by a given economic operator which denotes a wrongful intent or negligence of a certain gravity on its*



*part.* As a result, 10 states indicated “negligence of a certain gravity” as the minimum degree of fault required to apply this exclusion ground. In the case of 9 further states, mere negligence has been determined as sufficient to apply the analysed ground. What is interesting is that in the further 8 states the degree of fault was of no significance for the possibility of excluding the economic operator based on such ground.

## 6. **Examples of “appropriate” means in the case law and the doctrine**

It is assumed that contracting authorities have a high degree of discretion in determining which means are “appropriate” to demonstrate that the economic operator is guilty of grave professional misconduct.

In the majority of the states (18 states) it is possible to determine the occurrence of “grave professional misconduct” based on generally admissible means of evidence such as expert opinions, evidence in the form of private documents, or witness statements.

In several states the issue of a ruling by a court or public administration authority against a given economic operator stating “grave professional misconduct” is deemed as sufficient.

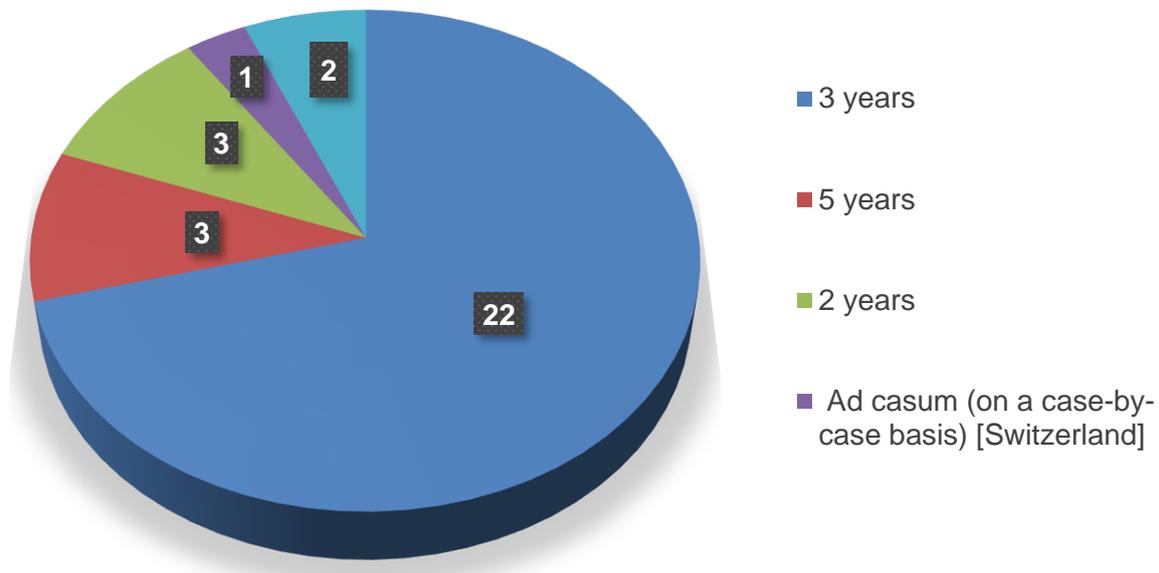
**In exceptional cases the mere institution of penal proceedings may be deemed as sufficient for the purpose of exclusion due to grave professional misconduct.** In Austria, in particular the submission of an indictment may be the ground for the economic operator’s exclusion. Certain doctrine representatives in Germany also share this position. In turn, in Sweden the exclusion ground may be the institution of proceedings by the competition authority.

## 7. **Exclusion period**

In the majority of the states the exclusion period begins to run from the date of the violation constituting the exclusion ground. 11 states deemed that this period begins to run from the court ruling or decision of a public administration authority stating the existence of “*grave professional misconduct*” becoming final and binding. Only in Switzerland is the beginning of the exclusion period determined on a case-by-case basis.

**In the majority of cases the exclusion period is 3 years (22 states).** This period is derived mainly from the wording of Article 57 section 7 of Directive 2014/24/EU. Only in the case of 3 states is this period 5 years. In a further 3 states it was shortened to 2 years. In Switzerland the provisions of law do not specify the exclusion period - it is determined on a case-by-case basis as part of the ruling issued in the given case.

## Exclusion period

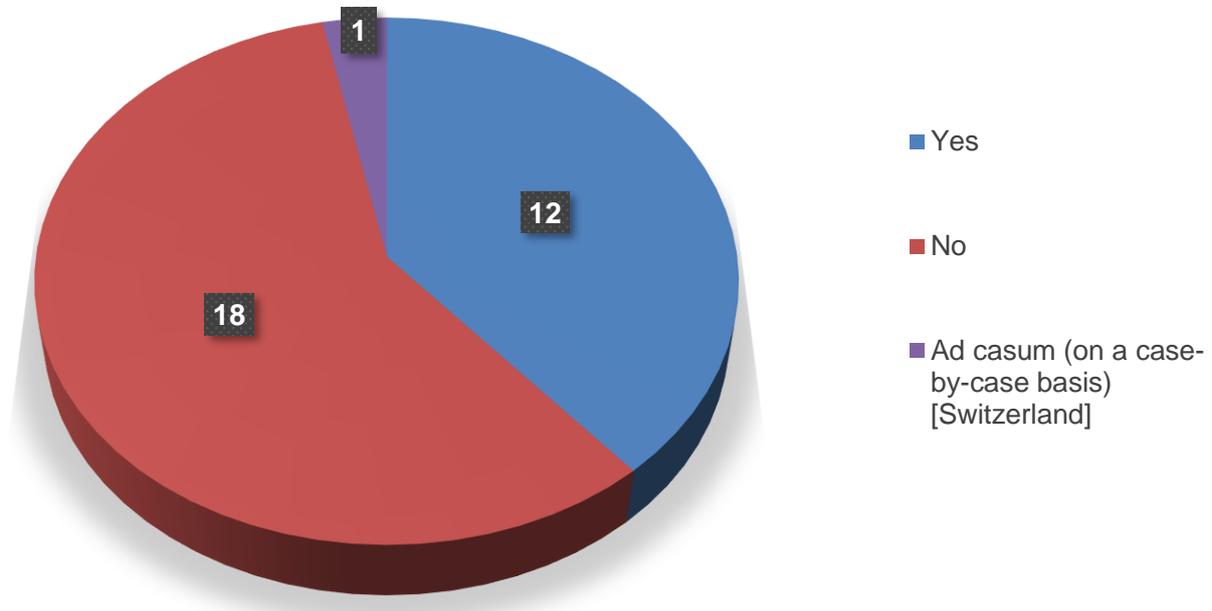


In some states (Cyprus, Spain, France, Romania, Iceland, Bulgaria, Italy) it is possible to **differentiate the exclusion period by way of a determination made by the courts or public administration authorities issuing a ruling in a given case** that grave professional misconduct has occurred (i.e. a prejudication).

An interesting solution operates in Greece where the exclusion period is - as a general rule - 3 years. However, in the announcement of the given contract the contracting authority may shorten that period in accordance with the principle of proportionality. Similar solutions have been adopted in Sweden, Norway, and Austria.

In turn, Lichtenstein has introduced an entirely different regulation according to which the exclusion is applicable solely to the procedure in which the contracting authority issued a decision on the exclusion and does not apply to future public procurement procedures.

## The admissibility of modifying the exclusion period arising from the provisions of law



### 8. *The self-cleaning option*

**In all states the economic operator that is guilty of grave professional misconduct may make use of the self-cleaning procedure.** The economic operator may do so by presenting evidence that the means undertaken thereby allow it to demonstrate its reliability.

The majority of states do not have a detailed regulation on self-cleaning. The assessment of evidence presented by economic operators should take the circumstances of each case into consideration with due respect given to the principle of proportionality.

**Economic operators may present the following evidence to demonstrate that the means taken thereby allow them to demonstrate their reliability<sup>12</sup>:**

- (i) **confirmation of redressing the damage**, e.g. by paying compensation (Germany);

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<sup>12</sup> It is worth noting that in the Public Procurement Act of 11 September 2019, which is to enter into force on 1 January 2021, it was stated that the economic operator is to prove to the contracting authority that it has met all the grounds.



- (ii) **undertaking HR activities**, including bringing consequences to bear against the economic operator's employees and contractors that performed the acts or omissions resulting in the emergence of the ground, including the dismissal of such persons;
- (iii) **undertaking technical and organisational means** that are relevant for preventing further, improper conduct of the economic operator, such as:
  - carrying out induction training sessions for staff members to observe certain rules;
  - introducing additional control and intra-organisational compliance systems, along with a periodical evaluation of such systems;
- (iv) **the economic operator's cooperation with the contracting authority or with law enforcement authorities or other authorities**, e.g. anti-monopoly authorities;
- (v) **submitting an appeal** against a non-final judgement under which the contracting authority questions the economic operator's reliability (Croatia).

An interesting self-cleaning solution is available in Latvia where contracting authorities are directly entitled to submit a request for an opinion to the relevant penal or administrative authorities concerning the means presented by the economic operators as part of the self-cleaning institution.

The German doctrine stresses the necessity for economic operators to document undertaking the relevant means and draws attention to the usefulness of external audits for demonstrating the effectiveness of the activities taken by the economic operator to prevent its future improper conduct.

**In the majority of states it is unclear whether economic operators should apply the self-cleaning procedure on a prior basis or only as late as upon an express summons from the contracting authority;** This issue was clearly regulated in Estonia, where economic operators should present evidence demonstrating their reliability already with the tender offer, thus admitting that the exclusion ground is applicable thereto.



In turn, it is indicated in Greece and in Poland (though there are also contrary positions<sup>13</sup>) that effective self-cleaning may take place only at the stage of submitting a tender offer / application for admission to participate in the tender procedure or in the ESPD. In consequence, if it is determined at a later stage that a given economic operator is subject to exclusion, it will not be able to resort to the self-cleaning procedure.

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<sup>13</sup> See, for example, the ruling of the NCA in case KIO 1576/19.



## CHAPTER III

### GROUND SPECIFIED IN ARTICLE 57 SEC. 4 LETTER G OF DIRECTIVE 2014/24/EU

*Mirella Lechna*<sup>14</sup>

Under Article 57 section 4 item g) of Directive 2014/24/EU, it is possible to exclude an economic operator if it has shown significant or persistent deficiencies in the performance of a substantive requirement under a prior public contract or concession contract which led to early termination of that contract, damages, or other comparable sanctions.

#### 1. *The manner in which the exclusion ground is transposed into national legal regimes*

**This ground was introduced in all Member States, except for Ireland.** It is non-compulsory in the majority of the states. It has been made compulsory in Austria, Lithuania, Portugal, Italy, and Spain.

**In the majority of the Member States the wording of the ground is a repetition of the provisions of Directive 2014/24/EU.** In some states the wording of this provision differs from the wording included in the directive usually due to the failure to introduce the notion of “*significant or persistent deficiencies*” and due to formulating the ground only as the non-performance or material violation of the contract (Hungary, Norway, Bulgaria, Denmark, Slovakia, Spain, and Latvia).

**However, the common denominator of the exclusion grounds in the states is a requirement for the violation of the contract to be grave or significant.** In Spain an additional requirement was stipulated for the violation of the contract to be intentional or resulting from gross negligence.

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<sup>14</sup> Lawyers from the law firm Wardyński i Wspólnicy: Hanna Drynkorn and legal counsel Katarzyna Śliwak, were also involved in preparing the chapter.

There are also no major differences - as compared to the wording of Directive 2014/24/EU - with respect to the second part of the ground, i.e. the requirement for the indicated violations to lead to “early termination of that contract, damages, or other comparable sanctions”. In the case of Latvia and Slovakia, the wording of the provision is restricted solely to the termination of the contract. Termination, compensation, liquidated damages and remuneration reduction are the factors that have been indicated in Estonia.

### **Examples of conduct covered by the provision of Article 57 section 2 item g) of Directive 2014/24/EU:**

- (i) notice of termination given by the contracting authority with respect to two out of nine contracts performed by the given economic operator due to repetitively occurring violations of the contract (Estonia);
- (ii) repetitively occurring failure to provide proper performance of a material part of the contractual obligation of the economic operator of the electronic management system, which constituted the economic operator’s material obligation indicated in the contract (Hungary);
- (iii) violation of the confidentiality obligation and violation of material guarantee obligations (Germany, Finland);
- (iv) non-performance or delayed performance of one or more contractual obligations (Italy);
- (v) defectiveness of the delivered product resulting in it being unfit for the agreed purpose (Italy, Finland, Austria) or performing the order in a manner that is inconsistent with the manner specified in the contract as a result of which the effect is unfit for specific purposes (Poland);
- (vi) any activities that undermine the reliability of the economic operator e.g. withdrawing from the performance of the contract without notifying the contracting authority of the same (Finland).

## **2. “Deficiencies” of a significant or persistent nature**

The notion of “significant or persistent deficiencies” has not been defined in the Acts regulating Public Procurement Law in the individual states. Many states also lack case law

which may result from the fact that Member States have only recently implemented the provisions of Directive 2014/24/EU.

Court authorities of certain Member States (e.g. Belgium, Germany) acknowledge that this ground should be interpreted analogously to the “grave professional misconduct” ground pursuant to the wording of Article 45 section 2 item d) of the repealed Directive 2004/18/EC and taking into consideration the case law related to the said ground. This is due to the fact that both grounds for exclusion sanction the violation by the economic operator of the provisions of the contract entered into with the contracting authority. Please note that CJEU’s ruling in the *Forpost* case is also applicable to this exclusion ground.

In those states, examples of punishable “deficiencies” include the kinds of conduct referred to in Recital 101 of Directive 2014/24/EU, i.e. failure to deliver a product or perform the contract, significant shortcomings of the product or service delivered, making it unusable for the intended purpose, or improper conduct that casts serious doubts as to the reliability of the economic operator.

### 3. “Persistent” deficiencies

**The “persistence” ground is not uniformly interpreted in the individual member states.** In most states the term refers to an individual procurement contract that has been performed earlier, where the economic operator has breached its substantive requirements at least twice during its performance.

In some states, especially those where the concept of “persistence” is not used, even a single breach of contract is sufficient for this ground to occur. Interestingly enough, in Portugal the requirement for “persistence” has been formulated, but it is stressed in the legal doctrine that even a single breach of contract can trigger this exclusion ground if it is serious enough.

**In most states the recurrence of a breach is of key importance to the assessment of the persistence ground.** It is believed that economic operators cannot be excluded on the grounds of minor deficiencies in the performance of a prior contract. However, if such deficiencies recur, they undermine an economic operator’s reliability, which may justify its exclusion.

The perception of “persistence”, insofar it relates to the time in which a breach recurs, varies from state to state. In Italy and Germany, the ground of “persistence” is met if improper

performance of a contract continues for a longer period, but it need not have anything to do with recurrence (In German, the ground is defined as “*fortdauernd*”, which translates as “lasting”). In Finland, three minor defaults occurring within only one month have been treated in the case law as a single deficiency that is not, however, serious enough to be considered “persistent or substantive” within the meaning of the ground in question<sup>15</sup>.

**In some states, some important aspects considered in assessing the persistence of deficiencies may also include the question whether they affected the proper performance of the contract by the economic operator.** In Greece, a situation where an economic operator committed minor deficiencies in the course of performing a contract, but performed the contract in spite of those violations, was found insufficient to apply this ground.

**In the Polish statutory legislation** the concept of “significant or persistent deficiency in the performance of a substantive requirement under a prior contract,” has been replaced with “failure to perform or improper performance of a prior contract to a significant extent for reasons attributable to [the economic operator]”<sup>16</sup>. It has been pointed out in the case law that the following aspects are relevant in this regard:

- “the scope of improper performance or failure to perform the economic operator’s obligation is significant in terms of the value or subject matter when compared to the scope of the contract in place”;
- “the economic operator’s performance does not meet the contracting authority’s expectations set out in the contract”;

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<sup>15</sup> For comparison, the Polish National Appeals Chamber has found the following occurrences to be persistent: (i) failure to perform a contract concerning repetitive supplies at the Contracting Authority’s every request to the extent exceeding 10%, (ii) persistent delivery of conveyor belts with the same defective characteristics as previously – persistence in this regard has been deemed sufficiently proven if the defectiveness is confirmed by the results of tests conducted three times at different stages of contract performance. Cf. ruling of the National Appeals Chamber dated 3 February 2017, file no. KIO 139/17.

<sup>16</sup> In the new Act this ground will read differently again: “for reasons on its part, it did not perform or improperly performed to a significant degree or scope, or for a long time improperly performed, a material obligation following from an earlier public procurement contract or concession contract, which led to termination of or withdrawal from the contract, damages, substitute performance or exercise of rights in respect of statutory warranty for defects”; see Article 109, section 1 item 7 of the Act of 11 September 2019.

- “the economic operator’s performance is marked by the same commonly recurring defects, even if not in relation to the most essential requirements, including a chronic failure to meet the deadline for contract performance”<sup>17</sup>.

Therefore, even though the wording of the Polish regulation is not identical with that of Directive 2014/24/EU, the interpretation adopted by the National Appeals Chamber ensures that the underlying ground is applied in a manner conforming to Directive 2014/24/EU.

#### 4. **“Significant” deficiencies**

**The assessment whether a deficiency in contract performance has been “significant” depends on the circumstances of the specific case.** Member states develop their own general interpretation guidelines according to which this assessment is to be made. In Germany and Austria, the term “significant” is understood from the perspective of significance of the breached obligation to attaining the contract’s objectives<sup>18</sup>, the degree of fault and the consequences of improper performance to the contracting authority. According to German case law, a breach must represent a severe factual and financial burden to the contracting authority. In Austria, it is indicated that recurring delays in performance or a failure to perform the service of winter maintenance of roads have been found to represent significant deficiencies in contract performance given the threat to life and health that they entail.

#### 5. **“Substantive requirements”**

**The following aspects may be taken into account when assessing substantiveness:**

- (i) the nature of deficiencies,
- (ii) the quantity of products not delivered as compared to the quantity provided for in the contract,
- (iii) the value of the subject matter of the contract that has not been performed or has not been performed within the contractual deadline,

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<sup>17</sup> Ibidem.

<sup>18</sup> Cf. recital 101 of Directive 2014/24/EU.

- (iv) breach of contractual balance,
- (v) gravity of the breached contractual provisions,
- (vi) intentional non-performance of contract by the economic operator.

The “substantiveness” of contractual requirements is sometimes understood in accordance with the general rules of the contract (civil) law applicable in the given state (as is the case e.g. of Norway or Lithuania).

In Bulgaria, this ground is only applied in situations where the failure to perform the contract affects at least 50% of the contract’s value.

**Substantiveness of requirements is also often perceived by member states in terms of the consequences of a given breach, i.e. if a failure to perform or improper performance of a contract has led to its termination, damages or other comparable sanctions, this decides that a breach has been significant.** In most states, the consequences that must occur are “termination of the contract, damages or other comparable sanctions”, but in some states a significant breach of contract is also one that merely leads to notice of termination being given by the contracting authority (e.g. in Latvia). In Finland, while “giving notice of contract termination” is one of the sanctions that must be brought about by the deficiencies, in a situation where the contracting authority has had grounds to give notice of termination of a prior contract, but has not done so only because of the acute need for carrying out the procurement, these exclusion grounds will also be applicable. In Slovakia, a breached contractual requirement is considered substantive if its weight is such that, had the other party known about it at the time of the contract execution, it would not have entered into the contract.

Examples of breaches that are regarded as breaches of substantive requirements in member states:

- (i) in Belgium, exclusion on account of non-performance or improper performance of a prior contract can only take place if deficiencies in the performance of a prior contract are relevant in the context of the contract to which the tender relates (e.g. a similar subject of the contract) and an appropriate period has passed since the non-performance or improper performance of a prior contract,
- (ii) the delivered product is defective to such extent that it cannot be used in accordance with its intended purpose (Italy).

## 6. *A subjectively or objectively substantive requirement?*

**According to the uniform case law of the member states, the fact whether an economic operator has improperly performed a prior procurement contract to a significant extent must be established through an objective analysis.** This standpoint is also expressed in the National Appeals Chamber’s adjudication practice<sup>19</sup>. This means that the given fact must objectively constitute a “substantive requirement”. Croatian case law points out that an economic operator is not subject to exclusion if early termination has been prompted by a failure to meet requirements that were requested by the contracting authority only when the performance of the public procurement contract was already underway, but were not contained in the tender documentation.

It is different in Slovenia and Greece, where the “substantiveness” of a requirement is assessed from the perspective of the contracting authority which decides on exclusion.

A question may arise whether the “substantiveness” of requirements must be known in advance and notified to the economic operator, e.g. by means of appropriately formulated contractual provisions. It seems that the answer to that is negative. One exception is Spain, where, as a condition to applying this ground, the prior contract must explicitly state that the given requirement is substantive or that it constitutes one of the main contractual obligations. Such a requirement also exists in Lithuania, except that, in situations where a contract executed in that state does not distinctively stipulate provisions of substantive nature, the contracting authority is required to request the court’s opinion on the “substantiveness” of the given requirement.

## 7. *Exclusion of an economic operator in the course of pending litigation*

There are no national regulations addressing the question whether the exclusion ground will be applicable in the course of pending litigation proceedings concerning the legitimacy of early contract termination by the contracting authority.

**In most states it is assumed that the fact of being involved in a court dispute concerning the legitimacy of the contracting authority terminating the contract early does not represent an exclusion ground<sup>20</sup>.**

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<sup>19</sup> Cf. National Appeals Chamber’s ruling dated 3 August 2018, KIO 1428/18.

<sup>20</sup> Similarly, in Poland, where the National Appeals Chamber is of the opinion that the existence of a court dispute between the parties does not constitute conclusive evidence that the contract was terminated for reasons attributable solely to the economic operator. Among others, in the ruling of the National Appeals

One can also find a different view – in some states ongoing court proceedings regarding premature termination of contract are not an obstacle to applying the said exclusion grounds to an economic operator (France, Czech Republic, the Netherlands, Belgium, Estonia, Latvia, Italy)<sup>21</sup>.

## 8. ***Termination of a contract by an economic operator***

In principle, termination of a contract by an economic operator is not deemed to be a circumstance which justifies exclusion of the economic operator.

However, there is a known case where the NAC decided in favour of the contracting authority on the issue of the legitimacy of exclusion, in spite of the fact that the economic operator had first withdrawn from the contract, though in a situation in which the contracting authority also withdrew from the contact at a later stage (where the parties continued to perform the contract regardless of the economic operator's withdrawal from it)<sup>22</sup>.

## 9. ***“Other comparable sanctions”***

**In all EU states the main sanction is decidedly termination of the contract or damages,** thus the understanding of the concept of “other comparable sanctions” is of secondary importance.

In some states, contractual penalties are considered to be another comparable sanction (Norway, Slovenia, Bulgaria, Denmark, Italy, Ireland, Estonia, and Spain, where the national law does not however refer to other comparable sanctions – such interpretation is based on the interpretation of the national regulation in a manner favourable to EU law).

In Sweden, however, it is only the imposition of significant liquidated damages that is seen as the occurrence of exclusion grounds. Similarly in Czech Republic, the imposition of liquidated damages is deemed to be “*another comparable sanction*” when the amount of the damages imposed is significant or when they were imposed for a breach of material obligations.

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Chamber of 12 June 2018, KIO 1033/18 and the ruling of the National Appeals Chamber of 19 October 2017, KIO 2095/17.

<sup>21</sup> In this context see the ruling of the CJEU in case C-41/18, *Meca*.

<sup>22</sup> See ruling of the NAC of 13 March 2018, KIO 335/18.

However, there are states, such as Croatia, where the imposition of liquidated damages on an economic operator is not seen to be a circumstance which justifies exclusion.

**The following are given as examples of “other comparable sanctions”:**

- (i) order to make a performance (Cyprus),
- (ii) substitute performance (Belgium, Germany),
- (iii) lowering of remuneration (Estonia),
- (iv) demand to carry out a broad scope of remedial works (Germany),
- (v) withholding the performance bond (Croatia, Italy).

The Croatian legal doctrine points out that the other comparable sanctions must be derived from the Croatian Code of Obligations.

In Italy, it was pointed out that economic operators who submit offers should show all circumstances which could be deemed by the contracting authority to justify exclusion.

In Ireland it is pointed out that minor sanctions imposed on the economic operator will not constitute exclusion grounds.

## **10. *Exclusion period***

**In the majority of the states the economic operator is excluded if 3 years have not lapsed from the date of the event being the basis for the exclusion.** However, there are states in which the exclusion period of economic operators based on that ground lasts 2 years – this is the case in Croatia, Denmark and Malta.

An exceptionally short period within which an economic operator may be excluded from the procedure applies in Latvia – it is 1 year from the contract termination.

In some states (Poland, Sweden, Romania and Greece) it was also indicated that the court may decide upon a different period within which the exclusion grounds would apply and such period starts to run from the date of issuing a court ruling.

**The differences between states also relate to the moment from which the exclusion period is calculated.** In the majority of states such period starts to run from the moment of an improper performance of the contract and not from the moment of occurrence of consequences that may be encountered due to a given status of the contract performance. In some states the period starts from the moment of imposing a sanction, that is, for example, from the termination of a contract or imposing liquidated damages (France, Slovakia, Austria).

In Great Britain the period of 3 years is calculated from the occurrence of an event (or becoming aware thereof), but in the event of rescinding the contract it is 3 years from the rescission. In certain states (for example Italy), if a court ruling has been issued in the matter of a given improper conduct by an economic operator, the exclusion period is 5 years from the issue of the ruling (whereas if there is no ruling concerning a given breach, in Italy and in the majority of EU Member States this period is 3 years).

## 11. *The self-cleaning option*

**In the matter of self-cleaning, national legislation is the same as EU legislation.** As a result, the majority of states point to the methods of self-cleaning given in Directive 2014/24/EU.

It is emphasised above all that there is no closed catalogue of measures that can be undertaken as part of the self-cleaning procedure. The adequateness of these measures is assessed individually on a case-by-case basis. In principle, therefore, economic operators may present such evidence that is relevant in a given case.

**The following are given as examples of the measures used as part of the self-cleaning procedure:**

Croatia:

- (i) confirmations of payment to the entities that have incurred damage;
- (ii) evidence of co-operation with the State Prosecutor's Office of the Republic of Croatia/Croatian Competition Agency;
- (iii) the most common cause of exclusion is liability of a small group of individuals who have committed criminal acts or are guilty of dubious business practices. In such cases evidence is submitted that such persons have been dismissed;
- (iv) in this regard, a declaration alone of the business entity's director - in which he describes the self-cleaning measures taken, which declaration does not contain exhaustive grounds, or if these measures are not described in detail - will not be sufficient.

Germany:

- (i) an outside audit can point to the taking of appropriate steps, as well as to the conduct of permanent controls of the effectiveness of the measures introduced.

Norway:

- (i) dismissal of the persons responsible for the breaches in previous procedures;
- (ii) introduction of good practice codes;
- (iii) introduction of internal control systems;
- (iv) introduction of a system for disclosing breaches;
- (v) conduct of training programmes for employees.

Italy:

- (i) measures aimed at ensuring appropriate skills of the employees, including carrying out specific training tasks;
- (ii) steps aimed at improving the quality of services by way of organisational, structural and/or auxiliary actions;
- (iii) repeated appointment of corporate authorities.

Latvia:

- (i) according to Latvian law, the contracting authority may demand of an economic operator who meets the criterion for exclusion an additional performance bond related to the contract or set down such conditions for performance of a contract so that performance which is not compliant with material conditions of the contract would be economically unprofitable for the economic operator.

## CHAPTER IV

### GROUND SPECIFIED IN ARTICLE 57 SEC. 4 ITEM H AND I OF DIRECTIVE 2014/24/EU

*Wojciech Hartung, Katarzyna Kuźma, Tomasz Michalczyk, Paweł Nowicki, Michał Wojciechowski*

Under Article 57 sec 4 items h) and i) of Directive 2014/24/EU, contracting authorities may exclude or may be required by Member States to exclude from participation in a procurement procedure any economic operator in any of the following situations:

- (i) where the economic operator has been guilty of serious misrepresentation in supplying the information required for the verification of the absence of exclusion grounds or the fulfilment of the selection criteria, has withheld such information or is not able to submit the supporting documents required pursuant to Article 59 of Directive 2014/24/EU;
- (ii) where the economic operator has undertaken steps to unduly influence the decision-making process of the contracting authority, to obtain confidential information that may confer upon it undue advantage in the procurement procedure or to negligently provide misleading information that may have a material influence on decisions concerning exclusion, selection, or contract award.

#### **1. *The manner in which the exclusion ground is transposed into national legal regimes***

**The grounds in question, as two separate, autonomous and independent in respect of each other grounds for exclusion of an economic operator, were not implemented in only two states.** The above applies to Spain<sup>23</sup> and Norway<sup>24</sup>, which decided to introduce

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<sup>23</sup> In the case of Spain this issue is regulated by the Public Sector Procurement Act, which rules out the participation in the awarding of a public procurement contract of an economic operator who is guilty of misrepresentation when submitting the required representations or when conveying any information whatsoever concerning the economic operator's capacity, but also of negligence when reporting information about changes in specific data concerning the economic operator.

<sup>24</sup> In the case of Norway this issue is regulated by the Public Procurement Regulation according to which the contracting authority may exclude a provider, unless the exclusion is out of proportion, if the provider

one exclusion ground concerning the provision of a contracting authority with untrue information. In Spain it is a compulsory ground, while in Norway a non-compulsory ground. In the remaining 29 states the two exclusion grounds have been kept separate.

Thus, while as regards the introduction itself of the two exclusion grounds there are no material differences between the examined states, nonetheless certain differences can be seen in the character attributed to these grounds (i.e. compulsory or non-compulsory).

**The dominant solution is the one where both grounds are non-compulsory** (out of 20 from amongst all the examined states, as well as Norway, where there is only one non-compulsory exclusion ground).

In seven cases a totally different solution was introduced, which gives both grounds a compulsory nature (Hungary, Italy, Lithuania, Portugal, Slovakia, Poland,<sup>25</sup> as well as Spain, where there is one compulsory exclusion ground).

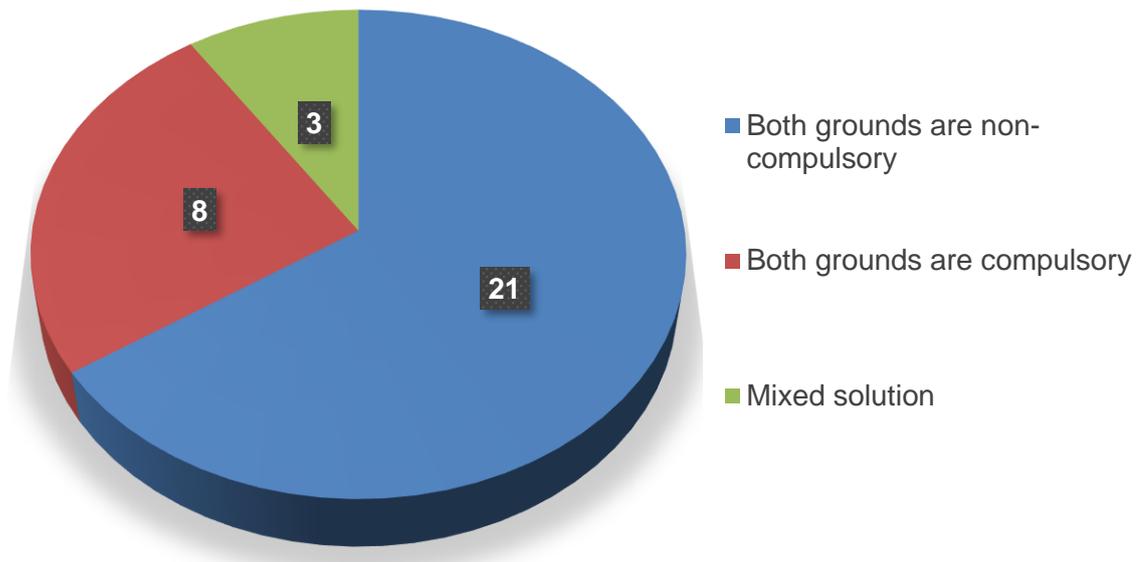
There were also **“mixed” solutions**, e.g. where the exclusion ground for serious misrepresentation (art. 57 section 4 item h) of Directive 2014/24/EU) is compulsory, while under Article 57 section 4 item i) of Directive 2014/24/EU it is non-compulsory (Bulgaria, Czech Republic, Austria).

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furnished seriously erroneous or misleading information which could have a material impact on decisions concerning exclusion, selection or award of contract or if the provider decided to not furnish this information.

<sup>25</sup> This will change in the Public Procurement Act of 11 September 2019, once this Act enters into force.

## The nature of the exclusion grounds concerning untrue information in national legal regimes



### 2. Selected examples of application of both grounds in Member States

While the exclusion ground due to serious misrepresentation (Article 57 section 4 item h) of Directive 2014/24/EU) originated from the repealed Directive 2004/18/EC (i.e. Article 45 section 2 item g) of Directive 2014/24/EU), the ground stipulated in item i) did not have its equivalent and has not been analysed yet in detail in the case law.

Unfortunately, due to the very short period of time from (i) the entry into force of the provisions of Directive 2014/24/EU, (ii) implementation of its provisions into the individual legal regimes of the examined states, over half of such states continue to lack any national case law that would clarify the meaning, scope of application or the mutual relation of the discussed exclusion grounds.

**It is indicated in the existing case law of the Member States that:**

- (i) in each case before taking a decision on excluding an economic operator one must examine in detail all factual circumstances (the degree of the economic operator's fault, the consequences of providing false information, recidivism, if any). **It is also**

**necessary to consider the principle of proportionality in this examination** and the decision on the exclusion should be a last resort (Greece, Lithuania, Slovakia, Sweden, Germany, and Norway).

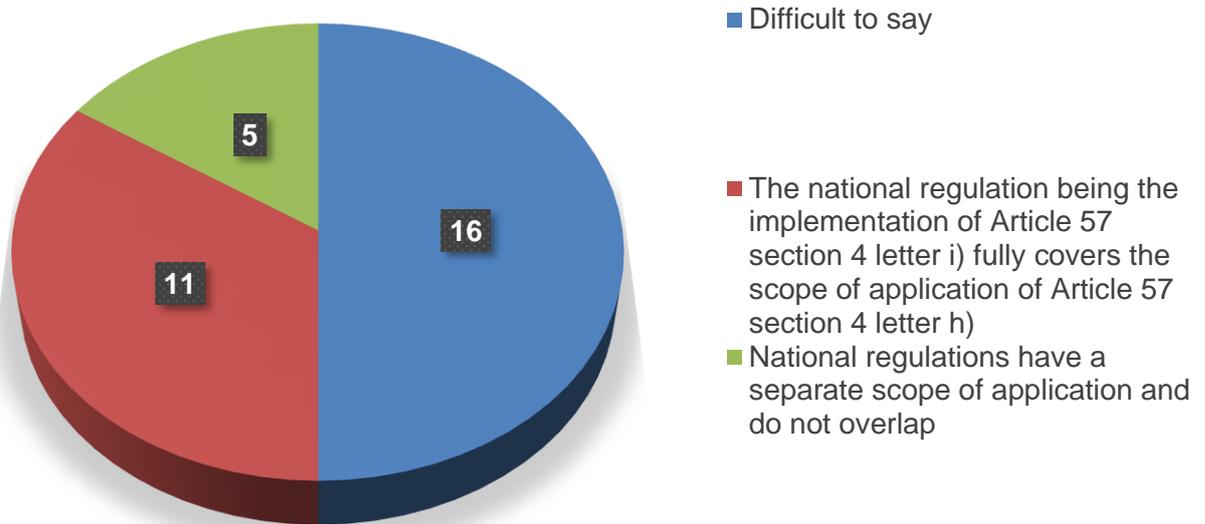
- (ii) cases of exclusion should be determined in a manner that does not raise any doubts. In this context one can not refer to false representation which, by its nature, is related to a future and uncertain state of affairs (Croatia, and Poland). In France the contracting authorities have been obliged to notify the relevant enforcement authorities in such case.
- (iii) certain acts may at times meet the prerequisites of more than one exclusion ground, e.g. an act consisting in a serious misrepresentation with respect to the contracting authority when providing information may at the same time constitute grave professional misconduct referred to in Article 57 section 4 item c) of Directive 2014/24/EU (Belgium, and the Netherlands).

### **3. *Scope of application of both grounds and their mutual relationship***

The two grounds are very similar. However, in view of the lack of established case law, **in the majority of states it is difficult to clearly indicate the scope of application of the two grounds in the national legal regimes or their mutual relationship.**

In certain states (Belgium, Denmark, France, Portugal) **the scope of application of the two exclusion grounds is different** (e.g. intentional and unintentional misrepresentation).

## The mutual relationship between the exclusion grounds concerning giving untrue information in the national legal regimes



#### 4. *Possibility of replacing untrue information with true information in the course of the procedure*

In view of the lack of established national case law in cases involving exclusion grounds concerning provision of untrue information, **it is often difficult to determine the possibility (or impossibility) of replacing information which proved, objectively, to be contrary to the actual facts.**

In practice, replacing untrue information with true information will most often occur with regard to the technical or professional capabilities of the economic operator (e.g. experience).

In principle, there are two extreme options. The dominant option seems to be the one which favours excluding an economic operator without the possibility of replacing untrue information with true information, of course when the necessary exclusion grounds have been unequivocally established on the basis of the facts of the case (e.g. Czech Republic, Estonia, Spain, Germany, Norway, Romania, Italy, Poland). Less frequently are there cases which confirm the possibility of replacing untrue information with true information (e.g. Bulgaria, Lithuania, Malta, Sweden).

In some states (a small group of states which favour a middle option, e.g. Croatia and Finland) the ultimate decision on imposing a sanction (or not) in the form of exclusion lies with the contracting authority, with account taken of the principle of proportionality.

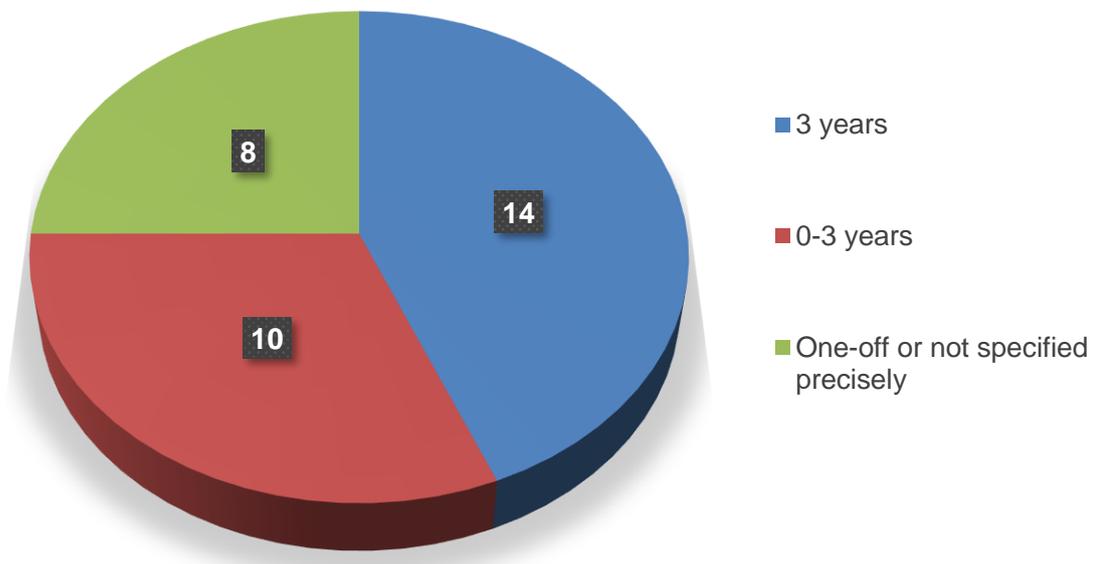
## 5. **Exclusion period**

The differences between the states appear with regard to: (i) the length of the exclusion period, and (ii) the moment from when this period should be counted.

**Exclusion period is usually three years.** Sometimes this period is shorter (Croatia – 2 years, Denmark, Portugal – up to 2 years, Lithuania – 1 year).

**There are certain examples (e.g. Czech Republic, Poland, Norway) in which there is no precise exclusion period or no period at all with regard to the discussed grounds,** while the act itself of excluding an economic operator is therefore of a one-off nature, i.e. it has legal effect only in a given, specific procedure in which untrue information was furnished.

### Exclusion period in the case of existence of grounds related to untrue information



In Denmark the contracting authority decides each time about the exclusion period in the decision on excluding the economic operator. In this case (once again in connection with

the principle of proportionality) the contracting authority decides on the length of the period which can be a maximum of 2 years.

In Malta, in turn, the existence itself of the ground causes the economic operator to be entered into a black list, and the self-cleaning procedure (if any) may be conducted only upon the entry (for the purpose of defence against the entry). Thus, it is only a legally final entry into the list (not appealed by the economic operator by invoking the self-cleaning procedure) which gives rise to legal effects in the form of exclusion from subsequent public procurement procedures.

**The approach differs as to the moment from which the exclusion period should be calculated.** This is because Directive 2014/24/EU uses here the imprecise term “relevant event”.

Most often the initial moment is the date on which the event occurred, that is the moment when untrue information was conveyed to the contracting authority or the date on which the economic operator was excluded. Less frequently are other moments indicated (e.g. the date on which the deadline for submitting offers lapsed – Germany, the date of completion of the public procurement procedure – Hungary).

## **6. *The self-cleaning option***

**In the vast majority of the examined states there is a possibility of applying the self-cleaning procedure with respect to both exclusion grounds.**

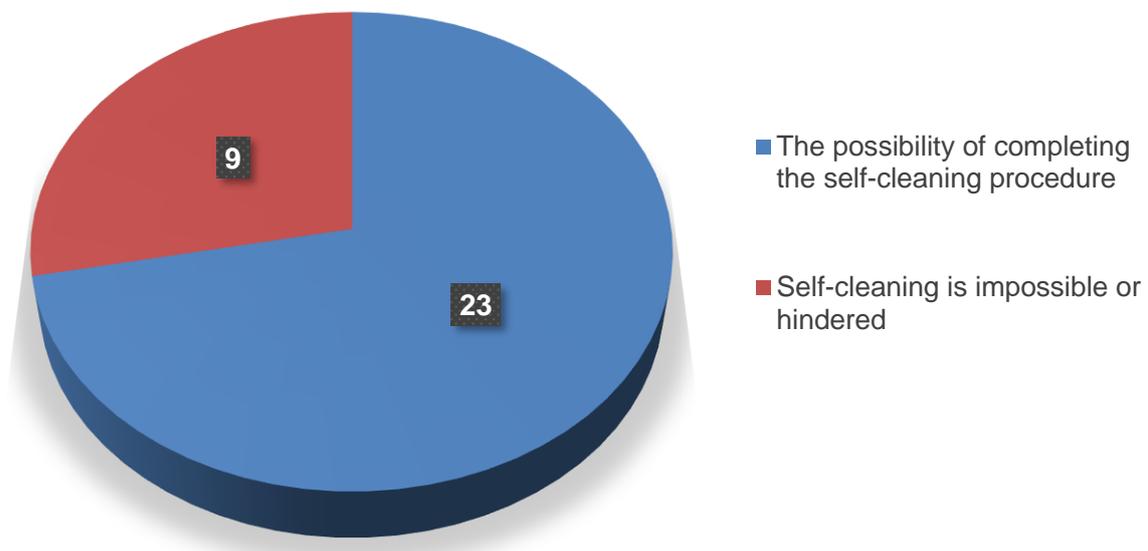
However, there are states (Latvia, Portugal), in which the above is possible only in relation to the ground contained in item i). In other states the application of the self-cleaning procedure may be in practice hindered (e.g. Malta, Hungary).

The above hindrance predominantly concerns the need to obtain a court/quasi-court body ruling in order to prove the effectiveness of the self-cleaning procedure (Malta and Hungary).

The hindrance may also pertain to the moment until which it is possible to prove that indispensable measures have been undertaken. In Poland, Greece, and Estonia completion of the self-cleaning procedure may be proven only at the stage of submitting a tender offer / application to be admitted to participate in the tender procedure or within ESPD. If it is

determined at a later stage that a given economic operator is subject to exclusion on the basis of the discussed grounds, it will not be able to resort to the self-cleaning procedure<sup>26</sup>.

## The possibility of applying the self-cleaning procedure in view of the occurrence of the exclusion grounds concerning untrue information



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<sup>26</sup> The above line of reasoning was supported by the Polish National Appeals Chamber in its ruling of 14 June 2018, file no. KIO 1102/18: “the self-cleaning procedure is undertaken upon the initiative of the mere economic operator if it is aware and knows that it is subject to exclusion. The self-cleaning procedure should be completed no later than along with the submission of the ESPD document, i.e. along with the lapse of the deadline for confirming the satisfaction of conditions of participation in the procedure. Completing the self-cleaning procedure at a later stage, that would be an effect of the contracting authority’s summons or that would take place after it made a decision on exclusion, would make the self-cleaning procedure pointless.” In another ruling it was directly pointed out that specifying in more detail the possibility of applying the self-cleaning procedure was necessary (cf. ruling of the National Appeals Chamber of 10 August 2018, file no. KIO 1470/18).

## DRAFT QUESTIONNAIRE CONCERNING THE METHOD OF IMPLEMENTATION AND INTERPRETATION OF SELECTED GROUNDS FOR EXCLUSION FROM PUBLIC PROCUREMENT PROCEDURES IN EU AND EFTA STATES

### 1. Art. 57 sec. 4(c) of Directive 2014/24/EU

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

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

1. Is this exclusion ground implemented in your jurisdiction?
2. Method of implementation: Is there any difference in relation to the utility vs. classic procurement? Non-compulsory/compulsory?
3. Please cite the relevant regulations in their original language version and English translation.

**Proposed table for questions 1-3**

	Type of procurement		
	Classic (2014/24/EU)	Utilities (2014/25/EU)	
<b>Is this exclusion ground implemented in your jurisdiction?</b>	yes / no	yes	no
<b>Is the exclusion ground for utilities contracts formulated differently?</b>		as in 2014/24/EU	differently
<b>Non-compulsory ground / compulsory ground</b>	non-compulsory/compulsory	non-compulsory / compulsory	
<b>Citation of provisions from national law</b>	[...]	[...]	

4. Please provide examples (case law/doctrine) of how "grave professional misconduct" is understood in the application of national law? (If there are rules defining this term, please cite them).
5. Can "grave professional misconduct" also be non-performance or improper performance of another public procurement contract (or other contract concluded with an entity not obliged to use public procurements)?
6. Can "grave professional misconduct" provide the contracting authority with false information in the context of another public procurement procedure?
7. What degree/type of guilt is required in case-law of national appeal bodies when applying this condition? (e.g. intentional, unintentional, negligence)
8. Please provide examples (case law/doctrine) of how "appropriate means" that must be available to the contracting authority to demonstrate the circumstances referred to in art. 57 par. 4 c) Directive 2014/24/EU are understood in practice?
9. What is the exclusion period entailed by the aforesaid ground in national law? From when and for how long?
10. Is self-cleaning possible if the exclusion grounds based on the aforesaid are confirmed? And if so, what does it involve (means of proof/types of activities, etc.)?

## 2. Art. 57 sec. 4(g) of Directive 2014/24/EU

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

***g) where the economic operator has shown significant or persistent deficiencies in the performance of a substantive requirement under a prior public contract, a prior contract with a contracting entity or a prior concession contract which led to early termination of that prior contract, damages or other comparable sanctions;***

1. Is this exclusion ground implemented in your jurisdiction?
2. Method of implementation: any difference in relation to the utility vs. classic procurement? Non-compulsory/compulsory.
3. Please cite the relevant regulations in their original language version and English translation.

Proposed table for questions 1-3

	Type of procurement		
	Classic (2014/24/EU)	Utilities (2014/25/EU)	
<b>Is this exclusion ground implemented in your jurisdiction</b>	yes / no	yes	no
<b>Is the exclusion ground for utilities contracts formulated differently?</b>		as in 2014/24/EU	differently
<b>Non-compulsory ground / compulsory ground</b>	non-compulsory/compulsory	non-compulsory/compulsory	
<b>Citation of provisions from national law</b>	[...]	[...]	

4. Please provide examples (case law/doctrine) of how "significant or persistent deficiencies" is understood in the application of national law in the context of the subject provision? (If there are rules defining this term, please cite them). Should "persistent" simply be interpreted as repeatedly (or will two instances suffice?).
5. Please provide examples (case law/doctrine) of how "a substantive requirement" is understood in the application of national law? Does this involve objective requirements relevant for an independent observer, or might it involve essentially subjective requirements from the contracting authority's point of view? Must the "substantiveness" of the requirements be known in advance and notified to the economic operator, e.g. by these being encumbered with contractual penalties in the public procurement contract.
6. Will this ground also apply when the parties to the contract are in litigation regarding the legitimacy of early termination of a public procurement contract and/or in a situation where the contract has been terminated by the economic operator?
7. Please provide examples (case law/doctrine) of how the concept of "other comparable sanctions" is understood in national law?
8. In order to apply this ground, is it necessary for the violation to have been confirmed by a legally valid judgment of the relevant authority/court in your jurisdiction?
9. What is the exclusion period entailed by the aforesaid ground in national law? From when and for how long?

10. Is self-cleaning possible if the exclusion grounds based on the aforesaid are confirmed? And if so, what does it involve (means of proof/types of activities, etc.)?

### 3. Art. 57 sec. 4(h) and (i) of Directive 2014/24/EU

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

***h) where the economic operator has been guilty of serious misrepresentation in supplying the information required for the verification of the absence of grounds for exclusion or the fulfilment of the selection criteria, has withheld such information or is not able to submit the supporting documents required pursuant to Article 59; or  
i) where the economic operator has undertaken to unduly influence the decision-making process of the contracting authority, to obtain confidential information that may confer upon it undue advantages in the procurement procedure or to negligently provide misleading information that may have a material influence on decisions concerning exclusion, selection or award.***

1. Is this exclusion ground implemented in your jurisdiction?
2. Method of implementation: any difference in relation to the utility vs. classic procurement?; non-compulsory/compulsory.
3. Please cite the relevant regulations in their original language version and English translation.

#### Proposed table for questions 1-3

	Type of procurement		
	Classic (2014/24/EU)	Utilities (2014/25/EU)	
<b>Is this exclusion ground implemented in your jurisdiction</b>	yes / no	yes / no	
<b>Is the exclusion ground for utilities contracts formulated differently?</b>		as in 2014/24/EU	differently
<b>Non-compulsory ground / compulsory ground</b>	non- compulsory / compulsory	non- compulsory / compulsory	

Citation of provisions from national law	[...]	[...]	
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4. Please provide examples (case law/doctrine) in what situations is it acknowledged that the economic operator is guilty of seriously misleading the contracting authority?
5. Is the exclusion referred to in art. 57 par. 4 i) in the part concerning supplying misleading information by the economic operator to the contracting party as a result of **negligence** interpreted in such a way that its demonstration makes it unnecessary to demonstrate **guilt** of the economic operator as referred to in art. 57 par. 4 h)? In other words, in the practice of applying the exclusion referred to above, is the condition in h) considered unnecessary, because it is encompassed by the ground from i)?
6. Please provide examples (case law/doctrine) of how negligence referred to in art. 57 par. 4 point i) is understood in practice)?
7. Are the "decisions on exclusion, qualification or public contract awarding" referred to in art. 57 par. 4 i) interpreted in such a way that, in principle, any act of the contracting authority may have a potential impact on a decision concerning exclusion, selection or award and, consequently, any incorrect/untrue information provided by the economic operator in connection with the proceedings may result in an economic operator being excluded from proceedings?
8. What is the exclusion period entailed by the aforesaid ground in national law? From when and for how long?
9. Is self-cleaning possible if the exclusion grounds based on the aforesaid are confirmed? And if so, what does it involve (means of proof/types of activities, etc.)?

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According to the jurisprudence of appeal bodies adjudicating in your country in matters relating to public procurement or doctrine, would an economic operator be subject to exclusion, on the basis of one of the above conditions if:

*In the ESPD document, for the purpose of demonstrating the experience required under the terms of participation in the procedure, it stated that from 1 January 2017 to 31 December 2017 it performed a specific service. The contracting authority required demonstration of 12 months of experience in providing services. From the references provided by the economic operator at a later stage of the proceedings, it appears that the service was performed from 1 January 2017 to 24 December 2017.*

- a) The economic operator may demonstrate the implementation of another, analogous service for the required period (own experience).
- b) The economic operator may not demonstrate the implementation of another, analogous service for the required period. However, it can make use of a third party, which it did not indicate in ESPD, but which has the required experience.
- c) The economic operator in ESPD declares fulfilment of conditions for participating in the proceedings through the assistance of a third party. The third party is unable to confirm by references the declaration made in ESPD with regard to the required experience. In such case, does one of the abovementioned grounds for exclusion apply (point h - i)?
- d) In this situation, does the national rule implementing art. 63 par. 1 of Directive 2014/24/EU apply? ("The contracting authority shall require that the economic operator replaces an entity which does not meet a relevant selection criterion, or in respect of which there are compulsory grounds for exclusion. The contracting authority may require or may be required by the Member State to require that the economic operator substitutes an entity in respect of which there are non-compulsory grounds for exclusion.") That is to say: Can the economic operator replace the third party originally declared, i) at the request of the contracting authority, ii) of its own will?

## LIST OF LAWYERS AND LAW FIRMS THAT RESPONDED TO THE ASSOCIATIONS' SURVEY

The authors thank the following lawyers and law firms for their assistance in preparation of the report:

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Croatia	<b>Jasminka Čorda Truhar</b> (HANŽEKOVIĆ & PARTNERI d.o.o.)
Cyprus	<b>Alexandros Efstathiou</b> (Chrysostomides Dr. K. Chrysostomides & Co. LLC Advocates and Legal Consultants)
Czech Republic	<b>David Dvorak</b> (MT Legal)
Denmark	<b>Mikala Berg Dueholm</b> (DLA Piper Denmark)
Estonia	<b>Matteus Kadri</b> (Cobalt)
Finland	<b>Katia Duncker</b> (Bird & Bird)
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Lithuania	<b>Deividas Soloveičik, Karolina Keršytė</b> (Cobalt)
Luxemburg	<b>Nathalie Prum-Carre</b> (Elvinger Hoss Prussen)
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<sup>27</sup> Schindhelm Rechtsanwaltsgesellschaft mbH, at the time when the response tot he survey was given.



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