



Reports of Cases

JUDGMENT OF THE COURT (Fourth Chamber)

24 October 2018*

(Reference for a preliminary ruling — Directive 2014/24/EU — Article 57 — Directive 2014/25/EU — Article 80 — Public procurement — Procedure — Exclusion grounds — Maximum duration of the exclusion period — Obligation for the economic operator to collaborate with the contracting authority in order to demonstrate its reliability)

In Case C-124/17,

REQUEST for a preliminary ruling under Article 267 TFEU from the Vergabekammer Südbayern (Public Procurement Board for Southern Bavaria, Germany), made by decision of 7 March 2017, received at the Court on 10 March 2017, in the proceedings

Vossloh Laeis GmbH

v

Stadtwerke München GmbH,

THE COURT (Fourth Chamber),

composed of T. von Danwitz, President of the Seventh Chamber, acting as President of the Fourth Chamber, K. Jürimäe, C. Lycourgos, E. Juhász (Rapporteur) and C. Vajda, Judges,

Advocate General: M. Campos Sánchez-Bordona,

Registrar: K. Malacek, Administrator,

having regard to the written procedure and further to the hearing on 21 February 2018,

after considering the observations submitted on behalf of:

- Vossloh Laeis GmbH, by K. Fischer and H.-J. Hellmann, Rechtsanwälte,
- Stadtwerke München GmbH, by H. Kern and M. Winstel, Rechtsanwälte,
- the German Government, by T. Henze and D. Klebs, acting as Agents,
- the Greek Government, by M. Tassopoulou, A. Magrippi, D. Tsagaraki and K. Georgiadis, acting as Agents,
- the Hungarian Government, by M.Z. Fehér, G. Koós and E. Sebestyén, acting as Agents,

* Language of the case: German.

– the Polish Government, by B. Majczyna, acting as Agent,
– the European Commission, by A.C. Becker and P. Ondrůšek, acting as Agents,
after hearing the Opinion of the Advocate General at the sitting on 16 May 2018,
gives the following

Judgment

- 1 This request for a preliminary ruling concerns the interpretation of Article 80 of Directive 2014/25/EU of the European Parliament and of the Council of 26 February 2014 on procurement by entities operating in the water, energy, transport and postal services sectors and repealing Directive 2004/17/EC (OJ 2014 L 94, p. 243), read in conjunction with Article 57(4), (6) and (7) of 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 2014 L 94, p. 65).
- 2 The request has been made in proceedings between Vossloh Laeis GmbH and Stadtwerke München GmbH concerning the former's exclusion from the qualification system put in place by the latter company, in connection with the award of public procurement contracts in the field of the provision of railway material.

Legal context

European Union law

Directive 2014/24

- 3 Recital 102 of Directive 2014/24 states:

'(102) Allowance should, however, be made for the possibility that economic operators can adopt compliance measures aimed at remedying the consequences of any criminal offences or misconduct and at effectively preventing further occurrences of the misbehaviour. Those measures might consist in particular of personnel and organisational measures such as the severance of all links with persons or organisations involved in the misbehaviour, appropriate staff reorganisation measures, the implementation of reporting and control systems, the creation of an internal audit structure to monitor compliance and the adoption of internal liability and compensation rules. Where such measures offer sufficient guarantees, the economic operator in question should no longer be excluded on those grounds alone. Economic operators should have the possibility to request that compliance measures taken with a view to possible admission to the procurement procedure be examined. However, it should be left to Member States to determine the exact procedural and substantive conditions applicable in such cases. They should, in particular, be free to decide whether to allow the individual contracting authorities to carry out the relevant assessments or to entrust other authorities on a central or decentralised level with that task.'

4 Article 57 of Directive 2014/24, headed 'Exclusion grounds', provides:

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

...

2. An economic operator shall be excluded from participation in a procurement procedure where the contracting authority is aware that the economic operator is in breach of its obligations relating to the payment of taxes or social security contributions and where this has been established by a judicial or administrative decision having final and binding effect in accordance with the legal provisions of the country in which it is established or with those of the Member State of the contracting authority.

Furthermore, contracting authorities may exclude or may be required by Member States to exclude from participation in a procurement procedure an economic operator where the contracting authority can demonstrate by any appropriate means that the economic operator is in breach of its obligations relating to the payment of taxes or social security contributions.

This paragraph shall no longer apply when the economic operator has fulfilled its obligations by paying or entering into a binding arrangement with a view to paying the taxes or social security contributions due, including, where applicable, any interest accrued or fines.

...

4. 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:

- (a) where the contracting authority can demonstrate by any appropriate means a violation of applicable obligations referred to in Article 18(2);
- (b) where the economic operator is bankrupt or is the subject of insolvency or winding-up proceedings, where its assets are being administered by a liquidator or by the court, where it is in an arrangement with creditors, where its business activities are suspended or it is in any analogous situation arising from a similar procedure under national laws and regulations;
- (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;
- (d) where the contracting authority has sufficiently plausible indications to conclude that the economic operator has entered into agreements with other economic operators aimed at distorting competition;
- (e) where a conflict of interest within the meaning of Article 24 cannot be effectively remedied by other less intrusive measures;
- (f) where a distortion of competition from the prior involvement of the economic operators in the preparation of the procurement procedure, as referred to in Article 41, cannot be remedied by other, less intrusive measures;

- (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;
- (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.

Notwithstanding point (b) of the first subparagraph, Member States may require or may provide for the possibility that the contracting authority does not exclude an economic operator which is in one of the situations referred to in that point, where the contracting authority has established that the economic operator in question will be able to perform the contract, taking into account the applicable national rules and measures on the continuation of business in the case of the situations referred to in point (b).

...

6. Any economic operator that is in one of the situations referred to in paragraphs 1 and 4 may provide evidence to the effect that measures taken by the economic operator are sufficient to demonstrate its reliability despite the existence of a relevant ground for exclusion. If such evidence is considered as sufficient, the economic operator concerned shall not be excluded from the procurement procedure.

For this purpose, the economic operator shall prove that it has paid or undertaken to pay compensation in respect of any damage caused by the criminal offence or misconduct, clarified the facts and circumstances in a comprehensive manner by actively collaborating with the investigating authorities and taken concrete technical, organisational and personnel measures that are appropriate to prevent further criminal offences or misconduct.

The measures taken by the economic operators shall be evaluated taking into account the gravity and particular circumstances of the criminal offence or misconduct. Where the measures are considered to be insufficient, the economic operator shall receive a statement of the reasons for that decision.

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

7. By law, regulation or administrative provision and having regard to Union law, Member States shall specify the implementing conditions for this Article. They shall, in particular, determine the maximum period of exclusion if no measures as specified in paragraph 6 are taken by the economic operator to demonstrate its reliability. Where the period of exclusion has not been set by final judgment, that period shall not exceed five years from the date of the conviction by final judgment in the cases referred to in paragraph 1 and three years from the date of the relevant event in the cases referred to in paragraph 4.'

Directive 2014/25

- 5 Article 77 of Directive 2014/25, which is headed ‘Qualification systems’, provides:

‘1. Contracting entities which so wish may establish and operate a system of qualification of economic operators.

Contracting entities which establish or operate a system of qualification shall ensure that economic operators are at all times able to request qualification.

2. The system under paragraph 1 may involve different qualification stages.

Contracting entities shall establish objective rules and criteria for the exclusion and selection of economic operators requesting qualification and objective criteria and rules for the operation of the qualification system, covering matters such as inscription in the system, periodic updating of the qualifications, if any, and the duration of the system.

Where those criteria and rules include technical specifications, Articles 60 to 62 shall apply. The criteria and rules may be updated as required.

...’

- 6 Article 80 of Directive 2014/25, entitled ‘Use of exclusion grounds and selection criteria provided for under Directive 2014/24/EU’, provides:

‘1. The objective rules and criteria for the exclusion and selection of economic operators requesting qualification in a qualification system and the objective rules and criteria for the exclusion and selection of candidates and tenderers in open, restricted or negotiated procedures, in competitive dialogues or in innovation partnerships may include the exclusion grounds listed in Article 57 of Directive 2014/24/EU on the terms and conditions set out therein.

Where the contracting entity is a contracting authority, those criteria and rules shall include the exclusion grounds listed in Article 57(1) and (2) of Directive 2014/24/EU on the terms and conditions set out in that Article.

If so required by Member States, those criteria and rules shall, in addition, include the exclusion grounds listed in Article 57(4) of Directive 2014/24/EU on the terms and conditions set out in that Article.

...

3. For the purpose of applying paragraphs 1 and 2 of this Article, Articles 59 to 61 of Directive 2014/24/EU shall apply.’

German law

- 7 Directive 2014/24 was transposed into German law by the Gesetz gegen Wettbewerbsbeschränkungen (Law against restrictions on competition, ‘the GWB’).

8 Paragraph 124 of the GWB provides:

‘(1) Contracting authorities may, acting with due regard for the principle of proportionality, exclude an undertaking from participation in a public procurement procedure at any time during that procedure where:

...

3. the undertaking has, in the course of business, demonstrably engaged in serious misconduct calling into question the undertaking’s integrity; Paragraph 123(3) shall apply by analogy,
4. the contracting authority has sufficient indications to support the conclusion that the undertaking has concluded with other undertakings agreements or arrangements having the object or effect of impeding, restricting or distorting competition.

...’

9 Paragraph 125 of the GWB states:

‘(1) Contracting authorities shall not exclude from the procurement procedure an undertaking caught by a ground for exclusion provided for in Paragraph 123 or Paragraph 124 where that undertaking has proved that it:

1. has paid or undertaken to pay compensation for damage caused by an act constituting a criminal offence or misconduct;
2. has comprehensively clarified the facts and circumstances by actively cooperating with the investigating authorities and the contracting authority; and
3. has adopted specific technical, organisational and personnel measures to prevent further criminal offences or further misconduct.

...’

10 Paragraph 126 of the GWB is worded as follows:

‘Where an undertaking caught by a ground for exclusion has adopted no or insufficient measures to reform itself in the manner laid down in Paragraph 125, it may:

1. if caught by a ground for exclusion provided for in Paragraph 123, be excluded from participation in procurement procedures for no more than five years from the date of the conviction by final judgment;
2. if caught by a ground for exclusion provided for in Paragraph 124, be excluded from participation in procurement procedures for no more than three years from the relevant event.’

The dispute in the main proceedings and the questions referred for a preliminary ruling

11 The dispute in the main proceedings is between Vossloh Laeis and Stadtwerke München, as the contracting authority, regarding the exclusion of that company from the qualification system, within the meaning of Article 77 of Directive 2014/25, put in place in the course of 2011 by that contracting

authority in connection with the award of public procurement contracts in the field of the provision of railway material. Having been extended several times, the latest being on 22 December 2015, that qualification system expired at the end of 2016.

- 12 Vossloh Laeis manufactures railway material, particularly rails and other steel construction material, necessary for railway installations. In March 2016, the Bundeskartellamt (Federal Cartel Office, Germany) imposed on it a fine for having participated, until 2011, in agreements falling within the law on cartels, which concerned switches ('the rail cartel'), while at the same time applying to it a leniency rule to take account of the cooperation which it had displayed in order to help that office to clarify its collusive conduct. Stadtwerke München, which is a body that is likely to have suffered harm because of the rail cartel, brought a civil action for damages against Vossloh Laeis.
- 13 Following the submission of a tender by Vossloh Laeis in connection with another tendering procedure, Stadtwerke München expressed, by letter of 15 June 2016, doubts about the reliability of that tendering undertaking, based on its participation in the rail cartel. In response to that letter, Vossloh Laeis set out, on 16 June 2016, the organisational and personnel 'measures to reform itself' which it had taken in order to prevent the repetition of unlawful cartels and unfair competitive conduct. Moreover, Vossloh Laeis expressed its willingness to make good the damage caused to Stadtwerke München owing to its unlawful conduct.
- 14 However, Vossloh Laeis refused to forward to Stadtwerke München the decision of the Federal Cartel Office imposing on it a fine, which it had been asked to disclose by that contracting authority, so that it could examine it and, by that collaboration, clarify the infringement of antitrust law by that company. In that regard, Vossloh Laeis asserted that, in its view, collaboration with the Federal Cartel Office was sufficient for the purposes of voluntary remediation.
- 15 Considering that the explanations provided by Vossloh Laeis did not establish that that undertaking had taken sufficient measures, for the purpose of Paragraph 125 of the GWB, Stadtwerke München informed Vossloh Laeis, on 4 November 2016, that it was permanently excluded with immediate effect from the qualification procedure concerned, pursuant to points 3 and 4 of Paragraph 124(1) of the GWB.
- 16 On 17 November 2016, Vossloh Laeis brought an action against the decision pronouncing that exclusion before the Vergabekammer Südbayern (Public Procurement Board for Southern Bavaria, Germany). It takes the view that the contracting authority erroneously interpreted points 1 and 2 of Paragraph 125(1) of the GWB and that it did not state sufficient reasons for that decision, based on the fact that Article 57(6) of Directive 2014/24 requires only collaboration with the investigating authorities and not with the contracting authority. Moreover, according to point 2 of Paragraph 126 of the GWB, exclusion from the public procurement procedure is possible only in the three years following the facts which constitute a ground for exclusion. However, in this case, those facts occurred more than three years before that exclusion.
- 17 In those circumstances, the Vergabekammer Südbayern (Public Procurement Board for Southern Bavaria) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

'(1) Is legislation of a Member State that makes successful voluntary remedial measures (Selbstreinigung) by an economic operator subject to the condition that it clarifies the facts and circumstances relating to the criminal offence or the misconduct and the damage caused by it in a comprehensive manner by actively cooperating not only with the investigating authorities, but also with the contracting authority, compatible with the provisions of Article 80 of Directive [2014/25] in conjunction with the second subparagraph of Article 57(6) of Directive [2014/24]?

- (2) If Question (1) is answered in the negative: Must the second subparagraph of Article 57(6) of Directive [2014/24] be interpreted, in that context, as meaning that the relevant economic operator is, for there to be successful voluntary remedial measures, in any event required to clarify the facts for the contracting authority to such an extent that the latter may assess whether the measures taken (technical, organisational and personnel measures and compensation for damage) are appropriate and sufficient?
- (3) For the optional grounds for exclusion laid down in Article 57(4) of Directive [2014/24], the maximum period or time limit of exclusion is, pursuant to Article 57(7) of Directive [2014/24], three years from the date of the relevant event. Is the fulfilment of the optional grounds for exclusion laid down in Article 57(4) of Directive [2014/24] to be understood as the relevant event or is the relevant date that on which the contracting entity has certain and reliable knowledge of the existence of the ground for exclusion?
- (4) Accordingly, for the fulfilment of the conditions for exclusion under Article 57(4)(d) of Directive [2014/24] through participation of an economic operator in a cartel, is the relevant event within the meaning of Article 57(7) of Directive [2014/24] the termination of participation in the cartel or the contracting entity's acquisition of certain and reliable knowledge of the participation in the cartel?'

The first and second questions

- 18 By its first and second questions, which it is appropriate to consider together, the referring court asks, in essence, whether Article 80 of Directive 2014/25, read in conjunction with Article 57(6) of Directive 2014/24, must be interpreted as precluding a provision of national law which requires an economic operator wishing to demonstrate its reliability despite the existence of a relevant ground for exclusion to clarify the facts and circumstances relating to the criminal offence or the misconduct in a comprehensive manner by actively cooperating not only with the investigating authority, but also with the contracting authority, in order to provide it with proof of the re-establishment of its reliability.
- 19 Article 57 of Directive 2014/24, to which Article 80 of Directive 2014/25 refers, imposes or gives the contracting authority the power to exclude an economic operator from participation in a public procurement procedure in the event that there is one of the exclusion grounds listed in paragraphs 1, 2 and 4 of that article.
- 20 According to the wording of the second subparagraph of Article 57(6) of Directive 2014/24, an economic operator wishing to establish its reliability despite the existence of a relevant ground for exclusion referred to in paragraphs 1 and 4 of that article is to prove that it has paid or undertaken to pay compensation in respect of any damage caused by the criminal offence or misconduct, clarified the facts and circumstances in a comprehensive manner by actively collaborating with the investigating authorities and taken concrete technical, organisational and personnel measures that are appropriate to prevent further criminal offences or misconduct.
- 21 So far as concerns the context of that provision, it should, in the first place, be observed that, according to the first subparagraph of Article 57(6) of Directive 2014/24, if the evidence submitted by the economic operator is considered as sufficient in the light of the relevant rules of national law for that purpose, the economic operator is not to be excluded from the procurement procedure. By contrast, pursuant to the third subparagraph of Article 57(6) of that directive, where the measures taken are considered to be insufficient, the economic operator is to receive a statement of the reasons for that decision.

- 22 In the second place, it is apparent from recital 102 of Directive 2014/24 that, where an economic operator has adopted compliance measures aimed at remedying the consequences of any criminal offences or misconduct and at effectively preventing further occurrences of the misbehaviour, offering sufficient guarantees, that operator should no longer be excluded on that ground alone. According to that recital, economic operators should have the possibility to request that compliance measures taken with a view to possible admission to the procurement procedure be examined. In addition, that recital states that it is for the Member States to determine the exact procedural and substantive conditions applicable in such cases and that they should, in particular, be free to decide whether to allow the individual contracting authorities to carry out the relevant assessments or to entrust other authorities on a central or decentralised level with that task.
- 23 Evidence that measures referred to in the second subparagraph of Article 57(6) of Directive 2014/24 have been adopted, including, in particular, collaboration with the investigating authorities, must therefore be adduced, on the basis of the national regulations, in the context of the relationship with the same contracting authority which decides on the exclusion under Article 57 of that directive. Thus, where the Member States authorise the contracting authority to carry out the relevant evaluations, it is for the contracting authority to assess not only whether there exists a ground for exclusion of an economic operator, but also whether, as the case may be, that economic operator has actually re-established its reliability.
- 24 In order to verify the existence of certain grounds for exclusion, the contracting authorities may, in given circumstances, be led to carrying out searches and verifications. Thus, pursuant to Article 57(4)(a) of Directive 2014/24, a contracting authority can demonstrate 'by any appropriate means' that an economic operator has failed to fulfil its obligations applicable in the fields of environmental, social and labour law, established by Union law, national law, collective agreements or by the international environmental, social and labour law provisions. Likewise, according to Article 57(4)(c) of Directive 2014/24, the contracting authority can demonstrate 'by appropriate means' that an economic operator is guilty of grave professional misconduct, which renders its integrity questionable. The carrying out of a verification by the contracting authority may also be necessary, for example, in order to establish the existence of one of the exclusion situations set out in Article 57(4)(g) and (i) of that directive.
- 25 Nonetheless, in situations such as that at issue in the main proceedings, in which there is a specific procedure regulated by Union law or by national law for pursuing certain offences and in which specific bodies are entrusted with carrying out investigations in this connection, the contracting authority must, within the context of the assessment of the evidence provided, rely in principle on the outcome of such a procedure.
- 26 In that context, it is important to take account of the respective duties of the contracting authorities and the investigating authorities. Whereas the latter have the task of determining the responsibility of certain actors in the commission of a breach of a rule of law, by establishing, with impartiality, the truth of facts capable of constituting such a breach, and of penalising the past wrongful conduct of those actors, the contracting authorities must assess the risks which they could face by awarding a contract to a tenderer the integrity or reliability of which is subject to doubt.
- 27 It follows, as the European Commission has observed, that the clarification of the facts and circumstances by the investigating authorities, as provided for in Article 57(6) of Directive 2014/24, does not relate to the same objective as that pursued by the examination of the reliability of the economic operator which adopted measures provided for in that provision and which must provide the contracting authority with evidence demonstrating that they are sufficient for the purpose of its admission to the procurement procedure. Thus, in so far as the respective duties of the contracting authority and of the investigating authorities so require, and to that extent, the economic operator

wishing to establish its reliability despite the existence of a relevant ground for exclusion must collaborate effectively with the authorities to which those respective duties have been entrusted, regardless of whether this is the contracting authority or the investigating authority.

- 28 However, that collaboration with the contracting authority must be limited to the measures which are strictly necessary for the effective pursuit of the objective of the examination of the reliability of the economic operator, mentioned in Article 57(6) of Directive 2014/24.
- 29 In particular, in a situation such as that at issue in the main proceedings, the tenderer is required, *inter alia*, to prove that it clarified, in a comprehensive manner, the facts and circumstances of the cartel in which it participated by actively collaborating with the competition authority entrusted with investigating such facts.
- 30 In that regard, it should be noted that the contracting authority must be able to ask an economic operator which has been held responsible for a breach of competition law to provide the decision of the competition authority concerning it. The fact that the transmission of such a document might facilitate the introduction of a civil liability action by the contracting authority against that economic operator is not such as to call that finding into question. It must be borne in mind that, among the measures which an economic operator must take in order to establish its reliability is the provision of evidence that it has paid or undertaken to pay compensation in respect of any damage caused by the criminal offence or misconduct which it committed.
- 31 In addition, it should be noted that, in principle, the transmission to the contracting authority of the decision establishing the infringement of the competition rules by the tenderer, but applying a leniency rule to the tenderer on the ground that it collaborated with the competition authority, should be sufficient to prove to the contracting authority that that economic operator clarified, in a comprehensive manner, the facts and circumstances by collaborating with that authority, this, however, being a matter for the referring court to ascertain.
- 32 Moreover, in so far as the contracting authority may also ask the economic operator to provide evidence of the measures which it adopted and which are such as to prevent the infringements found from being repeated, it should be observed that the contracting authority may require that economic operator to provide elements of a factual nature making it possible to show that the measures on which it relies are indeed appropriate to avoid a repetition of the conduct complained of, having regard to the specific circumstances in which those infringements were committed. The fact that the evidence to be provided, in that regard, by the economic operator has already been requested by the competition authority in the course of its investigation does not, by itself, justify that economic operator being exempted from providing that evidence to the contracting authority, unless the facts or circumstances in respect of which evidence is thereby requested follow sufficiently clearly from other documents provided by the economic operator, in particular from the decision establishing the infringement of the competition rules.
- 33 In the light of the foregoing considerations, the answer to the first and second questions is that Article 80 of Directive 2014/25, read in conjunction with Article 57(6) of Directive 2014/24, must be interpreted as not precluding a provision of national law which requires an economic operator wishing to demonstrate its reliability despite the existence of a relevant ground for exclusion to clarify the facts and circumstances relating to the criminal offence or the misconduct committed in a comprehensive manner by actively cooperating not only with the investigating authority, but also with the contracting authority, in the context of the latter's specific role, in order to provide it with proof of the re-establishment of its reliability, to the extent that that cooperation is limited to the measures strictly necessary for that examination.

The third and fourth questions

- 34 By its third and fourth questions, which it is appropriate to examine together, the referring court essentially asks whether Article 57(7) of Directive 2014/24 must be interpreted as meaning that, where an economic operator has been engaged in conduct falling within the ground for exclusion referred to in Article 57(4)(d) of that directive, which has been penalised by a competent authority, the maximum period of exclusion must be calculated from the date of the decision of that authority.
- 35 According to the information set out in the request for a preliminary ruling, the Federal Cartel Office imposed on Vossloh Laeis a penalty for its participation, until 2011, in agreements with the aim of distorting competition, in connection with the rail cartel. That undertaking asserts that the ‘relevant event’ within the meaning of Article 57(7) of that directive, from which the maximum period of exclusion is calculated, is constituted by the end of participation in the cartel. The referring court observes that the considerations of the GWB in relation to Paragraph 126 of that law, which seeks to transpose Article 57(7) of Directive 2014/24, could support the view that that event is constituted by the decision of the competent competition authority.
- 36 First of all, in the words of Article 57(7) of Directive 2014/24, Member States are to determine the maximum period of exclusion if no measures as specified in Article 57(6) of that directive have been taken by the economic operator to demonstrate its reliability, and, where the period of exclusion has not been set by final judgment, that period is not to exceed three years from the date of the relevant event in the exclusion situations referred to in Article 57(4) of that directive.
- 37 Although Article 57(7) of Directive 2014/24 does not specify the nature of the ‘relevant event’ or, in particular, the time at which it occurs, it should be observed that that provision provides, for the obligatory grounds for exclusion referred to in paragraph 1 of that article and where the period of exclusion has not been set by final judgment, that the duration of five years must be calculated from the date of the conviction by that final judgment, without taking into account the date on which the facts giving rise to that conviction occurred. Thus, for those grounds for exclusion, that duration is calculated from a date which, in certain cases, occurs well after the commission of the facts which constitute the infringement.
- 38 In the present case, the conduct falling within the relevant ground for exclusion was penalised by a decision of the competent authority, delivered within the context of a procedure regulated by Union law or by national law and resulting in the finding of conduct which infringes a rule of law. In that situation, for reasons of consistency with the detailed rules for calculating the time limit laid down for the obligatory grounds for exclusion, but also for reasons of foreseeability and legal certainty, it must be held that the duration of three years referred to in Article 57(7) of Directive 2014/24 is calculated from the date of that decision.
- 39 That solution appears to be all the more justified where, as observed by the Advocate General in points 83 to 85 of his Opinion, the existence of conduct restrictive of competition may be regarded as proved only after the adoption of such a decision, which legally classifies the facts to that effect.
- 40 Moreover, as noted by the Commission, the interested economic operator retains the power, during that period, to adopt measures referred to in Article 57(6) of Directive 2014/24 with a view to demonstrating its reliability, if it nevertheless wishes to participate in a public procurement procedure.
- 41 As a consequence, the period of exclusion must be calculated not as from the participation in the cartel, but from the date on which the conduct was the subject of a finding of infringement by the competent authority.

- 42 It follows that the answer to the third and fourth questions is that Article 57(7) of Directive 2014/24 must be interpreted as meaning that, where an economic operator has been engaged in conduct falling within the ground for exclusion referred to in Article 57(4)(d) of that directive, which has been penalised by a competent authority, the maximum period of exclusion is calculated from the date of the decision of that authority.

Costs

- 43 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Fourth Chamber) hereby rules:

1. **Article 80 of Directive 2014/25/EU of the European Parliament and of the Council of 26 February 2014 on procurement by entities operating in the water, energy, transport and postal services sectors and repealing Directive 2004/17/EC, read in conjunction with Article 57(6) of 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, must be interpreted as not precluding a provision of national law which requires an economic operator wishing to demonstrate its reliability despite the existence of a relevant ground for exclusion to clarify the facts and circumstances relating to the criminal offence or the misconduct committed in a comprehensive manner by actively cooperating not only with the investigating authority, but also with the contracting authority, in the context of the latter's specific role, in order to provide it with proof of the re-establishment of its reliability, to the extent that that cooperation is limited to the measures strictly necessary for that examination.**
2. **Article 57(7) of Directive 2014/24 must be interpreted as meaning that, where an economic operator has been engaged in conduct falling within the ground for exclusion referred to in Article 57(4)(d) of that directive, which has been penalised by a competent authority, the maximum period of exclusion is calculated from the date of the decision of that authority.**

[Signatures]