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Self-cleaning in public procurement: operational potentiality and regulation in the European Union

Autossaneamento em contratos públicos: potencialidade operacional e regulação na União Europeia

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Abstract: Public procurement is one of the causes for corruption. In addition to the punitive aspect, it is necessary to study other approaches that address the preventive aspect. These would be the compliance and self-cleaning techniques, originating in English-speaking countries. The European Union has just regulated self-cleaning in its public procurement Directive from 2014, establishing a series of characteristics to be developed by the Member States.

Keywords: Public procurement. Fight against corruption. Comparative Law. Compliance. Self-cleaning.

Resumo: A contratação pública é uma das causas da corrupção. Além do aspecto punitivo, é necessário estudar outras abordagens que abordem o aspecto preventivo. Estas seriam as técnicas de programas de integridade e autolimpeza, originadas em países de língua inglesa. A União Europeia acaba de regulamentar a autolimpeza na sua diretiva relativa aos contratos públicos a partir de 2014, estabelecendo uma série de características a desenvolver pelos Estados-Membros.

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Palavras-chave: Contratação pública. Luta contra a corrupção. Direito Comparado. Programa de integridade. Autossaneamento.

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1 Introduction

Good governance, as a principle of administrative organization, as an inherent obligation for the functioning and activity of the Public powers, or as a fundamental right of citizens, brings with it the need to prevent corruption in public procurement.[1] In 2014, this phenomenon, in the European Union alone, cost, together with urban planning and the financing of political parties, 120 billion Euros, as the Commissioner for Justice and Home Affairs, Cecilia Malmström, highlighted in a report from that year.

The best policy in the fight against corruption is its prevention.[2] Acting efficiently before it happens, by tackling its causes and motivations, will hamper its occurrence. It is, therefore, an *ex ante* and *ex post* strategy. Given the experience of the past few years, when corruption has increased exponentially, it is necessary to work towards its prevention through compliance measures prior to the awarding of contracts. Fostering forceful self-cleaning measures is also applicable in those cases where companies liable for corruption offenses are willing to adopt credible and trustworthy prevention mechanisms. This is the operational framework of the strategy known as self-cleaning, or self-government which has been proliferating in recent times, mainly in the English-speaking world, and that the EU has just confirmed in its latest Directives from 2014.[3]

In this regard, the reality of corruption, which in some countries has taken a dramatic turn,[4] recommends, through dynamic and compatible thinking, that different

1 On that subject, see: AYMERICH CANO, Carlos. Un problema pendiente: la ineficacia de los contratos afectados por actos de corrupción. *Revista Eurolatinoamericana de Derecho Administrativo*, Santa Fe, vol. 2, n. 2, p. 31-41, jul./dic. 2015. DOI: www.dx.doi.org/10.14409/rr.v2i2.5162.

2 BUTELER, Alfonso. La transparencia como política pública contra la corrupción: aportes sobre la regulación de derecho de acceso a la información pública. *A&C — Revista de Direito Administrativo & Constitucional*, Belo Horizonte, ano 14, n. 58, p. 61-106, out./dez. 2014.

3 RODRÍGUEZ-ARANA MUÑOZ, Jaime. La Directiva Europea de Contratación Pública y la lucha contra la corrupción. *Revista de Direito Econômico e Socioambiental*, Curitiba, v. 8, n. 1, p. 24-56, jan./abr. 2017. DOI: 10.7213/rev.dir.econ.soc.v8i1.17646.

4 See OSPINA GARZÓN, Andrés Fernando. Instrumentos de la lucha contra la corrupción en Colombia: de la ultima ratio a la ausencia de razón. *A&C – Revista de Direito Administrativo & Constitucional*, Belo Horizonte, ano 16, n. 63, p. 67-91, jan./mar. 2016; SAID, José Luis. Corrupción administrativa, democracia y derechos humanos. *A&C – Revista de Direito Administrativo & Constitucional*, Belo Horizonte, ano 13, n. 51, p. 15-27, jan./mar. 2013; BUTELER, Alfonso. Corrupción, globalización y Derecho Administrativo. *Revista Eurolatinoamericana de Derecho Administrativo*, Santa Fe, vol. 1, n. 1, p. 39-62, ene./jun. 2014; BUTELER, Alfonso. El control de la corrupción en el Derecho Comparado: los casos de Argentina, Brasil y España. *A&C – Revista de Direito*

strategies that encourage the fulfillment by companies as well as by the Public Administration be explored. The protection of market competitiveness, namely, guaranteeing the best conditions so that citizens are offered the best public services and public improvements available, may advise that, exceptionally, businesses affected by debarment be rehabilitated[5] provided the contracting Administration verifies that the company's compromises are sufficient to prevent corruption in the future. In other words, we are before actions by disqualified contractors prosecuted for corruption and who are subject to a condition which will take place if, in fact, according to Independent Authorities, during an administrative process with all the guarantees and having heard the interested parties, the general interest recommends the granting of the right to rehabilitation that the disqualified contractor is entitled to.

While the anti-corruption Compliance programmes normally operate prior to contracting,[6] even as bidding requirements, self-cleaning operates under assumptions referring to companies found guilty of corruption practices and who are willing to rehabilitate through credible and reliable compliance measures. In the first case it is a general measure for the prevention of corruption, while in the second it involves administrative acts of rehabilitation in favour of the disqualified company to prevent future illegal conduct after a strict evaluation of the measures adopted by the contractor has been carried out by Independent Authorities.

As general interest is the cornerstone of Administrative Law, provided it can be specifically argued from demanding parameters of rationality and justice, its preservation can in certain cases lead to the administrative rehabilitation of the party liable for corruption.

The legal concept of rehabilitation is commonly known in Public Law. It operates to bring back to life legal categories or lift certain operating debarments, normally as a result of the performance of unlawful acts or due to the expiration of periods of validity. In these cases, such as in the rehabilitation of licenses or concessions, an "ad hoc" administrative resolution is called for, following the relevant administrative procedure aimed at verifying that the impact or damage to the general interest has been amended.

Administrativo & Constitucional, Belo Horizonte, ano 13, n. 53, p. 23-43, jul./set. 2013; BITENCOURT, Caroline Müller; RECK, Janriê Rodrigues. Construção pragmático-sistêmica dos conceitos básicos do Direito Corruptivo: observações sobre a possibilidade do tratamento da corrupção como um ramo autônomo do Direito. *A&C – Revista de Direito Administrativo & Constitucional*, Belo Horizonte, ano 15, n. 62, p. 123-140, out./dez. 2015.

5 WILLIAMS ELEGBE, S. *Fighting corruption in public procurement:* A comparative analysis of disqualification or debarment measures. Oxford: Hart Publishing, 2012. pp. 248 and ff. In this author's opinion, a cause for lifting contracting prohibitions can be the existence of a public need to maintain the financing of public companies who are prosecuted for criminal offenses, as was the case of MCI World Com, Boeing and IBM. In this latter case, it is striking that Boeing was suspended from bidding in the U.S.A. and that the prohibition was lifted eight days later when it was verified that the suspension of the penalisation would have long-term negative effects.

6 GABARDO, Emerson; CASTELLA, Gabriel Morettini e. A nova lei anticorrupção e a importância do compliance para as empresas que se relacionam com a administração pública. *A&C – Revista de Direito Administrativo & Constitucional*, Belo Horizonte, ano 15, n. 60, p. 129-147, abr./jun. 2015.

In these cases, the administrative action of verifying the credibility and solvency of the measures adopted by the debarred contractor is directed precisely at declaring that it is compatible with the general interest in the contractor's rehabilitation. WILLIAMS-ELEGBE refers to the rationality of the exceptions to debarment, a rationality that is precisely constitutive of general interest, national security, emergency situations, and the financial consequences of the impact of the lifting of the debarment.[7]

As PEREIRA and WALLBACH SCHWIND point out, in order for these self-cleaning measures to not constitute assumptions of impunity, they need to be subject to a rigorous and comprehensive review by the contracting agents. If this is not the case, if this area is treated in a superficial and frivolous way, the measures would be counterproductive because public opinion would feel deceived, and with good reason. This is why thought should be given to providing the citizenship with publicity and disclosure regarding these measures, with the purpose of working culturally from this standpoint of preventing and demanding anti-corruption.

An in-depth analysis of this issue reveals that in these cases heavy burdens ordinarily befall offenders and result in radical internal alterations to the contractor applying for this right. These cases call for legal contrasting regarding the suitability of continuing with the business activity or opting for its destruction. Self-cleaning measures can be neither credible nor solid without a strict plan to eliminate the causes that produced the criminal offense in order to prevent them from happening again.[8] Therefore, the commitment of contractors towards compliance and their fight against corruption is essential, to the point that the more reliable and credible the commitments made, the more possibilities contractors will have of achieving rehabilitation.

The key to understanding the operative functionality and potentiality of these self-cleaning measures lies, as we have indicated, in a preventive strategy in the fight against corruption. This is a perspective that by no means excludes the punitive aspect. If, in spite of prevention, corruption still occurs, then even the severity of the criminal reaction can be stronger. That is to say, debarment and exclusion, now beyond the punitive connotation,[9] must be understood from a new perspective, which surpasses, and at the same time integrates it.

7 WILLIAMS, S. *Op. Cit.,* p. 258.

8 PEREIRA C.; WALLBACH-SCHWIND, R. Autosaneamento (self-cleaning) e reabilitação de empresas no direito brasileiro anticorrupção. *Informativo Justen, Pereira, Oliveira e Talamini.* Curitiba, no. 102, August 2015, Available at <www.justen.com.br/informativo>.

9 WILLIAMS ELEGBE, S. *Fighting corruption in public procurement:* A comparative analysis of disqualification or debarment measures. Oxford: Hart Publishing, 2012. p. 261.

2 Comparative vision

In this sense, the new guidelines adopted in 2014, especially number 24, exhaustively regulate conflicts of interests and establish rules and principles aimed at promoting and facilitating integrity during all the procurement stages; from the preparation stage to the awarding stage, with special emphasis on implementation.[10] That is to say, good administration in the area requires preventive measures and penalizes the illegal practices that have unfortunately recently been taking place to a greater extent. The United States and the European Union are now working from this perspective. It is a less drastic one, aimed at preventing the damage that the debarment or exclusion of a contractor could cause to the general interest. If, as indicated by PEREIRA and WALLABACH-SCHWIND, it is now (following the new trends in comparative law) a matter of preventing damage, it is preferable to opt for rigorous and demanding self-cleaning measures.[11] This is so because, in addition to strengthening the options of the contracting authority, who in this case would have more bidders to choose from – real competitive market – permanent debarment could be prevented, for the opposite would mean the company's destruction and the loss of many jobs that have nothing to do with the practices that take place in certain company departments and areas.

It is by no means a simple issue, because up until now the traditional approach is the punitive one, and it is from this point of view that debarment or exclusions are contemplated. However, it is necessary to approach this problem from an open, plural, dynamic, and complementary way of thinking, bearing in mind the present-day reality and operating with reason and a commitment to justice, without forgetting the bond existing between all the categories and institutions of Administrative Law with general interest in a social and democratic Rule of Law. From these principles it is necessary to make a distinction, as PEREIRA and WALLBACH-SCHWIND point out, between the criminalization of past conducts with the prevention of future damage.[12]

Under current European regulations, the new Directives approved in 2014 establish exclusions for procurement. These are measures that limit the right to freely participate in tenders. They are administrative measures applied by the procurement organs to disqualify from public procurement processes anyone who is affected by a series of circumstances. In fact, they adopt the shape of debarments, and the Spanish Supreme Court jurisprudence has qualified them as general interest

[10] RODRÍGUEZ-ARANA MUÑOZ, Jaime. The principles of the global law of public procurement. *A&C – Revista de Direito Administrativo & Constitucional*, Belo Horizonte, ano 16, n. 65, p. 13-37, jul./set. 2016. DOI: 10.21056/aec.v16i65.260.

[11] PEREIRA C.; WALLBACH-SCHWIND, R. Autosaneamento (self-cleaning) e reabilitação de empresas no direito brasileiro anticorrupção. *Informativo Justen, Pereira, Oliveira e Talamini*. Curitiba, no. 102, August 2015, Available at <www.justen.com.br/informativo>. p. 2.

[12] *Ibid*.

measures, as disqualifications that debar procurement and, this is the important part right now, as they are administrative measures that although they limit rights, are not of a sanctioning nature.[13]

It is worth noting that these debarments are adopted for the sake of general interest so that when it is in jeopardy for obvious reasons of market competitiveness or when the right to employment of people who have little or nothing to do with the cause for exclusion or debarment is seriously at stake, the party affected by exclusion or debarment may be rehabilitated following a severe and strict examination for the prevention of future damage.

3 The question in the European directives (2014)

The recent European Directives from 2014 establish mandatory exclusion from the public procurement processes of those candidates or bidders who have been the subject of a conviction by final judgment in specific cases. In fact, the mandatory exclusion of contractors, of economic operators, of bidders, takes place when the contracting authorities have verified or have some manner of proof that they have been the subject of a conviction by final judgment based on their participation in a criminal organization, for corruption, fraud, terrorism, or crimes linked to terrorist activities, for money laundering or the financing of terrorism, or for child labour, or other forms of trafficking with human beings. This exclusion obligation, which is imperative for the contracting authorities, as specified by article 57.1 of Directive 24 of 2014 on public procurement, and article 38.4 of the Directive on concessions, will also be applicable when the subjects of a conviction by final judgment are members of the administration body, of the management, or are the overseers of the economic operator, or if they have powers of representation, decision, or control.

This mandatory debarment for reasons of corruption is, without doubt, a way of preserving the general principles that govern public procurement,[14] thus ensuring real competition in the concessions. But also, and above all, it is a preventive instrument to fight against corruption.[15]

[13] See among others the Spain Supreme Court rulings from 28 March 2006, 31 May 2007, or 18 May 2011.

[14] On the principle of morality in Public Administration, see: LEAL, Rogério Gesta. Imbricações necessárias entre moralidade administrativa e probidade administrativa. *A&C – Revista de Direito Administrativo & Constitucional*, Belo Horizonte, ano 14, n. 55, p. 87-107, jan./mar. 2014; RODRÍGUEZ-ARANA MUÑOZ, Jaime. Caracterización constitucional de la ética pública (Especial referencia al marco constitucional español). *Revista de Investigações Constitucionais*, Curitiba, vol. 1, n. 1, p. 67-80, jan./abr. 2014. DOI: http://dx.doi.org/10.5380/rinc.v1i1.40248.

[15] The 2011 Green Paper on the modernisation of EU public procurement policy refers to this dual nature obligatory debarment when pointing out that the exclusion of bidders on the grounds of corruption and, in general, due to professional misconduct (disqualification) is an ideal instrument for punishing and preventing illicit professional conduct. Legal charges and the prevention of corruption must always go hand in hand because the fight against this social stigma needs to be carried out though compatible and complementary schemes.

Notwithstanding the criminal charge, which allows no discussion (that's all we need), debarment as per article 57.1 of the Directive on public procurement has a relevant preventive nature[16] and also has obvious distress factor for contractors, causing damage to their reputation and, consequently, economic harm, as they would no longer be in a contract with the Administration.[17]

MEDINA ARNAIZ recognizes that these debarments are a step in the right direction in the fight against corruption, but she warns that their implementation is faced with difficulties that make their application more complex.[18] Specifically, this teacher points out that the effects of debarment lose value in the face of issues as specific as, for example, the lack of a common rating regarding the elements that constitute criminal offenses that lead to exclusions, the lack of knowledge of the ruling resulting from the debarment, the lack of recognition in all the member States of criminal liability, or the lack of a specific procedural system that permits the rulings.[19]

The automatic exclusion of an economic operator or contractor also takes place when the contracting authority has knowledge (paragraph 2 of article 57 of the Directive on public procurement) that the operator or contractor 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 a final and binding effect. In fact, they can be excluded for this cause when the contracting authority can demonstrate by any appropriate means that the operator is in breach of its obligations relating to the payment of taxes, or social security contributions. In the first case, in number 1 of article 57, exclusion is automatic, imperative; in the second case it is discretional for the contracting authority. In these cases debarment is lifted when the economic operator fulfills its payment obligations or there has been a binding agreement in relation to the payment of its taxes.

These exclusions, which are reasonable and logical for guaranteeing market integrity, equity and rationality, can be exempt by the European Union member States, according to paragraph 3 of this precept for the cases set forward above (corruption, fraud, violation of tax or labour obligations) overriding reasons relating to the public interest such as public health or the protection of the environment. We are before powers belonging to the contracting authorities who can legally, if they consider there are overriding reasons relating to public interest, or to general

[16] See DREW, K. The Challenges Facing Debarment and the European Union Public Procurement Directive. In: *Fighting Corruption and Promoting Integrity in Public Procurement.* Paris: Organization for Economic Co-operation and Development (OECD), 2005, p. 267-276.

[17] See HOLLARD, V. *L'exclusion des marchés publics (Annexe au rapport sur le projet de réforme du Code penal).* Paris: Chambre de Commerce et d'Industrie de Paris, 1989.

[18] MEDINA ARNAIZ, T. Instrumentos jurídicos frente a la corrupción en la contratación pública: perspectiva europea y su incidencia en la legislación española. In: *La contratación pública a debate:* presente y futuro: Cizur Menor, Civitas, 2014. p. 324.

[19] *Ibid*.

interest, lift the debarment. The precept "ad exemplum" refers to public health or to the protection of the environment, but it could be considered reasonable that, for example, the exclusion is exempt when there is a serious threat to publicity and participation that is intrinsic to a market system that is worthy of its name. In these cases, the decision of the contracting authority must be sufficiently based on specific reasons of public interest, for this concept is compatible with Rule of Law when it is expressed on specific grounds and in a firmly reasoned manner. Let us think, for example, of an out of proportion restriction of offers that questions the capacity of the contracting power to make a choice in accordance with good services at fair prices. Or similarly, we could consider the exclusion of a contractor with thousands of workers whose debarment is solely and exclusively based on the illegal actions of the sales area or of the chairmanship or of the general management.

The contracting authorities within the European Union can, independently, or at the request of the member States, exclude bidders under the cases referred to in paragraph 4 of article 57 of the Directive. In other words, when the contracting authority is able to prove, by whatever appropriate means, that the obligations in environmental, social, or labour matters have been breached; when the economic operator is bankrupt or is subject to insolvency or winding-up proceedings, if its assets are being administered by a liquidator or by a court, if it is in an arrangement with creditors, if its business activities have been suspended or if it is in a similar situation resulting from a procedure of the same nature (in this case the exclusion can be lifted per the initiative of a Member State if the contracting authority verifies that the economic operator will be able to execute the contract); when the contracting authority can demonstrate by appropriate means that the economic operator has committed a serious professional breach that brings into question its integrity; when the contracting authority has sufficiently plausible evidence that the economic operator has reached agreements with other economic operators intended to distort competition; when a conflict of interest cannot be resolved with less restrictive means; when a distortion of competition resulting from the previous participation of economic operators in the preparation of the procurement procedure cannot remedied by less restrictive means; when the economic operator has shown significant or persistent weaknesses in the fulfillment of a basic requirement within the framework of a previous public contract, of a previous contract with a contracting authority or of a previous concession contract which have given rise to the early termination of that previous contract, to compensation for loss or damage or to other comparable penalties; when the economic operator has been found guilty of serious misrepresentation in the disclosure of the information required to verify the absence of grounds for exclusion or of compliance with the selection criteria, has withheld information or is not be able to submit the supporting documents required; when the economic operator has tried to unduly influence the decision-making process of the contracting authority,

obtain sensitive information that can confer undue advantages in the procurement procedure, or provide negligently misleading information that may have a determining influence on decisions relating to exclusion, selection and award.

In the cases set forth in the first paragraph of article 57 of the Directive, exclusions are imperative, while in the cases set forth in paragraph 4 of the mentioned precept of the Directive on public procurement, the exclusions are optional for the contracting authorities, who to apply them must support them adequately. This is indicated, to do away with any doubts, in the same paragraph 5 of the precept referred to.

The fight against corruption, also in procurement matters is not, however, an end in itself; it is a means so that citizens can enjoy public works and public services that provide them with better living conditions, that enable them from out of various options to choose the one that best adapts to their needs, that by doing so makes publicity and participation possible and real so that the contracting authorities choose the best offers. The fight against corruption cannot remain statically blocked in the criminalization of former behavior. Instead, it must, in addition to reasonably punishing crime, at the very least, also prevent future damage.

The European Union assumes the existence of a market that is open, plural, and competitive. For this reason, the Directive on procurement puts an end to the system of debarment by recognizing the so-called self-cleaning techniques, the commitments of integrity or uprightness that could be necessary when, in fact, the most elementary rules that must characterize the market system in economies presided, as is the case of the European Union, by the principles of social and democratic Rule of Law, are questioned.

The new Directives of 2014 recognize the possibility of exempting the application of the mandatory exclusions through self-cleaning measures. However, this must always be done from the point of view of the principle of proportionality that demands that the debarments do not exceed whatever is appropriate or adequate to achieve the aims established in the Directives. By virtue of which, as ARROWSMITH, PRIESS and FRITON point out, its application can be exempted through self-correction measures when it is proven that the candidates or bidders excluded from participating in the bidding when there is reason for exclusion have adopted efficient measures to amend the consequences of the illegal conduct and effectively prevent it from happening again.[20]

The aims of the Directives make reference, as is logical, to the principles on which the actual European Union is based on. That is to say, to the principles of

[20] ARROWSMITH S.; PRIESS H.J.; FRITON, P. Self-Cleaning as a Defence to Exclusions for Misconduct-An Emerging Concept in EC Public Procurement Law? *PPLR,* vol. 18 (6), p. 257-282, 2009. In Germany and Austria, self-cleaning measures are accepted, while in France and Greece, on the other hand, the competent Authorities in procurement matters do not consider these self-correcting or self-cleaning measures to be acceptable.

free movement of goods and services, of transparency, of equality and prohibition of discrimination, or proportionality. Well, the principle of proportionality is the one that best explains and justifies the adoption, in specific cases, of these self-cleaning measures.

Admittedly, debarment cannot exceed that which is adequate and necessary to fulfil the aims of the Directives. If there is effective verification that the cause for the exclusion or prohibition no longer makes sense because it has been eliminated through the implementation of certain internal measures taken within the company, and the contracting authority sees this as so after a strict and demanding analysis and evaluation, because these debarments or exclusions are not of a punitive nature, then an exception could be made to lift the ban.

Through these Directives, the European Union is therefore in favor of recovering the credibility and reliability lost by a contractor who is affected by a cause for prohibition or debarment, if the contracting authority irrefutably verifies that the economic operator has implemented the adequate self-cleaning measures to once again be legally eligible to enter into a contract with the Public Administration. Therefore, European Community Law recognizes that economic operators that have been convicted because they are affected by debarment can once again exercise their right to participate in tenders provided they have adopted the appropriate measures to repair the damages caused and to prevent them from incurring in new illegal actions.

The authorization of self-correcting measures implies exemption from the rule that prohibits entering into contracts with contractors affected by debarment, provided that the contracting authority or, preferably, an Independent Authority, exercising its discretionary powers, considers that they have adopted efficient and effective measures to correct the consequences of the misconduct so that it does not presumably happen again.

4 Final reflexion

The key, in our opinion, lies in the proportionality ruling that the contracting authority or the Independent Authority will carry out regarding the decision to lift the prohibition. The administrative rehabilitation act that self-cleaning technically consists of represents the lifting of a prohibition for reasons of general interest. It is the removal of an obstacle that hinders the exercise of a pre-existing right that cannot be carried out due to the existence of a specific cause. Once it has disappeared, always in accordance with general interest, which must be specific and motivated, then the prohibition loses its raison d'être.

The principle of proportionality, as we know, originates with the purpose of limiting arbitrariness. As arbitrariness can be defined as the exercise of irrational power, executed against the rules of straightline thinking, it turns out that proportionality

moves in the field of rationality and demands that the Administration power be adequate to the aim set forth in the standard that attributed the capacity to act to the Public Administration itself. Proportionality calls for the suitability between means and ends; coherence and congruency between means and ends. Therefore, a disproportionate exercise of power means that the specific action exceeds its purpose. That is to say, the proportionality ruling refers to the extent to which an action is necessary and adequate to guarantee the established aim.

In matters of government *Ius Puniendi*, Criminal Law and Punitive Law, the principle of proportionality, together with the legal reservation for types of infringements, and "*favor libertatis*", constitute some of the main elements for the resolution of the problems that could arise in this matter. Therefore, for this assessment and weighting that the proportionality test usually involves, the aim sought with the measure (eliminate the cause for prohibition and prevent it from happening again) needs to be taken into account; the measure is ideal for achieving the aim (if self-cleaning favours market publicity, participation, equality, transparency, and competitiveness and basically that the contracting authority can choose form among a range of offers that contribute to improving citizens' living conditions) and whether there is a less burdensome measure for achieving the desired aim (if self-correction is the least harmful measure, in these cases, for ensuring the aims of public procurement).

In matters of proportionality, it is necessary to clearly bear in mind another consideration that is relevant to the matter we are dealing with. What this means is that this principle acts in the context of the Administration's legal actions, for it guarantees that public action is in harmony with general interest. Therefore, the self-cleaning measures have to be sufficiently justified, which will happen, if applicable, after the evaluation by the contracting authority of the compromise of the contractor affected by prohibition, and provided that the conditions that the Directive establishes for the viability of these self-cleaning measures are met. In addition to there being sufficient grounds, it is necessary to follow high standards for the area of discretion is powerful and wide. There must be guarantees that the authorized measures do not unduly harm the rights of other contractors, which is not the case, because what they cause is a strengthening of participation. In other words: the more powerful and wider the power of discretion, the more powerful and wider the reasoning behind its application.

A proportional action is, from another perspective, a manifestation of good public governance. Number 16 of the *Iberoamerican Charter* of *Rights* and *Duties* of the *Citizen* approved within the CLAD by the ministers of the region's Public Administration, points out that one of the principles on which good public governance is based on is that of proportionality, by virtue of which the administrative decisions must conform to the aim provided by the Legal System, enacted within a context of

fair equilibrium between the different interests involved, trying not to limit the rights of citizens through the imposition of burdens or liens that are irrational or incoherent regarding the established aim.

In the European Union it is fundamental that through an objective and competitive market, the contracting authorities can, within a framework of participation, choose the best offers in order to provide citizens with the best works and services. For this reason, the administrative decision on the applications for self-cleaning by contractors must be based on this basic aim, for which it is very important to seek a balance between the interests involved and, above all, to not limit the rights of citizens in an irrational and incoherent manner.

In these cases, the contracting authority must carry out a weighting decision taking into consideration the special intensity of the general interest in that specific case and, after examining the contractor's application, to try to issue the best, pertinent, and adequate measure to achieve the expected aim.

The EU has recognized this exception to debarment, conforming it, as we will see, as a right of the contractor who is subject to a review by the contracting authority, who may authorize it if it considers that it meets the requirements that we will now refer to, or reject it, in which case the decision has to be sufficiently grounded.

The regulation of self-cleaning measures is nothing new nowadays. The Committee of the Regions already referred to them in the year 2000, when some EU states such as Germany, Austria and Italy, to name a few, had already included them in their legislation. The Financial Regulations[21] referred explicitly to these self-cleaning measures and, today, article 57.6 of the Directive on public procurement (2014/24/EU) and article 38.9 of the Directive on (2014/23/UE) specifically address these self-correcting measures.

In fact, paragraph 6 of article 57 of the EU community Directive provides that all economic operators who are in any of the situations established under paragraphs 1 or 4 of the precept "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 Directive continues reading in paragraph 6, "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, organizational and personnel measures that are appropriate to prevent further criminal offences or misconduct.

[21] Regulation (EU, Euratom) 966/2012, of 25 October, article 106 1 in fine.

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".

Thus, the European Union foresees a system of exemption from the obligations based on reasons that are serious, overriding, of general interest, economic, by virtue of proportionality ruling, for tax regulation reasons and through self-cleaning measures.

The decision of the contracting authority or of the Independent Authority is a prudential decision based on proportionality and takes into account the pre-eminence of general interest in the specific case. Undoubtedly, if the application by the contractor is serious, rigorous and provides the contracting authority with certainty that the cause for the prohibition has disappeared, and that it is quite probable that the illegal, criminal, or administrative behavior will not be repeated, it stands to reason that the contractor's rehabilitation will be authorized. Clearly this is an exception to the general rule of debarment that the contractor is affected by, whereby the contracting authority must be particularly strict and severe in the consideration of the reasons presented by the company applying for rehabilitation.

As per the EU procurement Directives, in order for the rehabilitation of the contractor affected by prohibition or debarment to take place, to regain its lost trust and credibility, payment or compromise with regard to the damage caused will be necessary, as well as collaboration to clarify the events and to adopt the technical, organizational or personnel-related measures that are deemed convenient.

That is to say, that the operator affected by any of the causes under paragraphs 1 or 4 of article 57 of the Directive, can apply to the contracting authority for rehabilitation through a compromise that irrefutably certifies that it is a trustworthy operator. Then, if the proof is considered sufficient by the contracting authority to certify the reliability of the operator, he will not be excluded.

Therefore, legitimacy is given to the operator's will to redress if it repents of its conduct and firmly promises, through irrefutable proof, that it has adopted the adequate measures to be considered reliable by the contracting authority. The operator, therefore, pleads guilty and formulates its intention to redress by providing proof that must convince the contracting authority to want to recognize its reliability from that moment onward.

Let us take a look at the elements that allow the deployment of the contractor's rehabilitation. These conditions or requirements must all take place jointly, for they are essential to certify the contractor's reliability, especially with a view to there being no illegal actions taking place in the future.

In the first place the collaboration of the contractor is necessary to clarify the events leading to the debarment. Without the clarification of the facts, the self-cleaning measures would not be based on reality and, therefore, it would be very complicated for the contracting authority to evaluate their appropriateness and coherence for the prevention of future misconduct.

The contractor's entire collaboration is necessary to provide knowledge of the circumstances regarding the illegal actions and the accountability of all the people and individuals involved directly or indirectly in the events. Obviously, the sooner the facts are known, and the more light and information is cast on the events, the more likely it will be for the rehabilitation to be granted. In this regard, if the facts can be fully elucidated, it will be easier for the contracting authority to adequately evaluate the most pertinent self-cleaning measures.[22] Clearly, an unwillingness to elucidate the facts, or hiding or manipulating them, are determining causes for not granting rehabilitation.

Once the facts have been clarified, effectively repairing the damage caused is easier, as is committing to their repair. To specify the damage, the rules of legal proceedings for compensation of damage, as established by the legislation of each EU country, must be followed.

As far as the implementation of technical, organizational and personnel measures are concerned, it is necessary to know the nature of the events in order to propose the internal measures that will enable the debarred contractor to recover its reliability and encourage the contracting authority. After the implementation of the measures to amend the misconduct, it will presumably and reasonably be quite difficult for them to take place again, for the causes will have disappeared.

These are forward-looking measures, taken to prevent the events from happening again. In fact, once the causes of the illegal acts committed in the past have been identified, it is necessary to find the way of inviting the individuals, shareholders, directors or staff members involved in the events that led to the illegal actions to immediately leave the company. In the case of shareholders, the necessary measures must be adopted so that their exit is real and without them influencing their successors in the company.[23] Obviously, the degree of disconnection from the company of the

[22] PEREIRA C.; WALLBACH-SCHWIND, R. Autosaneamento (self-cleaning) e reabilitação de empresas no direito brasileiro anticorrupção. *Informativo Justen, Pereira, Oliveira e Talamini*. Curitiba, no. 102, August 2015, Available at <www.justen.com.br/informativo>. p. 4.

[23] *Ibid*.

people involved in the illegal actions will be proportional to the intensity of their accountability for the events that took place.

Technical and organizational measures refer specifically to the implementation of actions that prevent the illegal actions committed from being repeated. They are forward-looking measures and can only be implemented once the events have been elucidated, once the damages have been compensated for and once the staff accountable for the illegal conduct has been separated from the company. As of the moment that the problems have been irrefutably identified it is possible to design a specific strategy referring to the technical, structural, and organizational measures.

As these self-cleaning measures are mainly of a preventive nature, the prudential judgment that the contracting authority or the Independent Authority will carry out will be to an extent influenced by the highly preventive nature of the technical and organizational measures presented by the contractor in the rehabilitation file that the self-cleaning is based on. Among the measures that could be contemplated we find ethics training plans focused especially on preventing past illegal actions, the creation of organizational units in charge of supervising specific sales policies, the strengthening of internal controls, the establishing of ethics committees consisting of independent individuals, and the regularity of the review of the measures to be adopted. The existence of internal disciplinary organs with sanctioning procedures managed by external personnel must also be taken into consideration. That is to say, the entire panoply of actions from the Compliance programmes analyzed above, but applied specifically to the prevention of previous misconduct.

These self-cleaning measures originate, as we have already mentioned, from a preventive culture in the fight against corruption that fosters its compliance, overcoming a single and exclusive punitive vision that has been valid so far in many regions. This business and also administrative culture that is in favor of the fulfillment of obligations contributes decisively to avoiding distortions of competition in contracting proceedings. Moreover, the self-cleaning culture also encourages a more open procurement process, for it does not limit participation and it also guarantees the effective execution of the principle of proportionality, making it possible to take into account the corrective measures implemented by the economic operators affected by debarment, proving, as stated by MEDINA ARNAIZ, their reliability.[24]

The economic operator who is affected by a prohibition or debarment is entitled to the examination of the compliance measures it has adopted with the purpose of possibly being readmitted to the awarding process.[25] Therefore, if the contracting

[24] MEDINA ARNAIZ, T.. Las medidas de self-cleaning en la Unión Europea. In: *International Public Procurement Congress.* Cuenca: Universidad de Castilla-La Mancha, 21 January 2016.

[25] On the compliance mesure in Brazilian Administrative Law, see: GABARDO, Emerson; CASTELLA Gabriel Morettini e. La nueva ley anticorrupción brasileña: aspectos controvertidos y los mecanismos de responsabilización de las personas jurídicas. *Revista Eurolatinoamericana de Derecho Administrativo*, Santa Fe, vol. 2, n. 1, p. 71-88,

authorities verify the sufficiency and proportionality of the measures proposed, the obstacle that prevents the exercise of a pre-existing right, which is that of freely participating in public tenders, is removed. It is a right of the contractor subject to the decision by the contracting authority through a contradictory administrative proceeding that will resolve on the reliability and credibility of the offer presented by the contractor. The administrative proceeding could end with a rehabilitation agreement or not, in which case the rejection has to be conveniently reasoned.

Admittedly, the Community Directive understands it is a right of the economic operators to be able to present proof of the measures adopted to prevent further illegal actions or faults to lift the procurement prohibition that affects them, and it does this in a quite clear, precise and unreserved manner.[26] This is a right on whose operability the ruling of an administrative body, normally the contracting authority is dependent on. The Directive does not really specify its identity, so it is the Member States in the transposition of the Directive who have the capacity to determine the nature of these public bodies called on to evaluate the operability of the self-cleaning measures.

The issue of the identity of the public bodies that will eventually have to pronounce themselves following the pertinent administrative proceeding will depend on the legislation of each Member State. It could be done by private contracting authorities, and this would be the most logical option, or different bodies that can either be central or decentralised. An analysis of existing regulations (Austria, Germany, United Kingdom, France, or Hungary) so far leads us to think that it is the specific contracting bodies in each case who will evaluate the measures proposed by the economic operators affected by debarment. In the case of Spain, as MEDINA ARNAIZ points out, even when the problem has not been presented *ratione temporis* because we are in a period of *vacatio* until April 2016, a certain complexity could arise when we verify that our contracting regulations are not enough to fulfil the obligation of result imposed by the Directive and the direct effect of the precepts referring to self-cleaning measures is questioned.[27]

The Commission Implementing Regulation (EU) 2016/7 of 5 January 2016, which establishes the standard form for the European Single Procurement Document, demands a formal statement where the economic operator declares it is affected by debarment and that it meets all the applicable selection criteria. This statement,

ene./jun. 2015; RIBEIRO, Marcia Carla Pereira; DINIZ, Patrícia Dittrich Ferreira. Compliance: una perspectiva desde la Ley Brasileña nº 12.846/2013. *Revista Eurolatinoamericana de Derecho Administrativo*, Santa Fe, vol. 2, n. 1, p. 257-281, ene./jun. 2015.

[26] BERNAL BLAY, Miguel Ángel. Los efectos de los programas de Compliance en la contratación pública. In: GIMENO FELIÚ, José María (Dir.); BERNAL BLAY, Miguel Ángel (Coord.). *Observatorio de los Contratos Públicos*. Navarra: Aranzadi, 2015. p. 417.

[27] MEDINA ARNAIZ, T.. Las medidas de self-cleaning en la Unión Europea. In: *International Public Procurement Congress*. Cuenca: Universidad de Castilla-La Mancha, 21 January 2016.

as is logical, must serve as preliminary proof, substituting the certificates issued by public Authorities or third parties. Specifically, the document we are referring to establishes as criteria for exclusion: criminal convictions, payment of taxes or social security contributions, insolvency, conflicts of interest or professional misconduct, or other causes for exclusion that could be present in the national legislation.

In such a document, in the event of criminal conviction, the economic operators are asked: have you adopted measures to prove your credibility in spite of there being a pertinent motive for exclusion ("self-correction")? If the answer is yes, they are asked to describe the measures adopted. In the event that the contractor has been declared guilty of a serious professional breach, the operator is asked if this is true and if it is, to specify the self-corrective measures adopted. The same applies if the economic operator has entered into agreements with other companies with the purpose of distorting competition. If the operator acknowledges it, he is asked whether he has adopted self-cleaning measures, and if so, to specify them.

Ultimately, the fact that here, in Spain, as BERNAL BLAY points out, self-regulation is as yet not regulated, constitutes a serious obstacle for self-cleaning to become a reality.[28] That is to say, it is imperious for the national transposition rules to urgently undertake the substantial and procedural development of article 57.6 of Directive 24 of 2014, specifying what the criteria consist of and what the requirements are *ex ante* to the Compliance programmes to achieve their effectiveness *ex post*.[29] However, in spite of the uncertainty of the legal system, Recitals 71, 102 and 107 of the Directive establish certain guidelines to be taken into account by the member States in the transposition of the Directive, for they refer to measures that affect personnel or the organisation, such as the breaking of all bonds with the people or organisations that participated in the illegal actions, adopting adequate measures for personnel reorganisation, the implementation of information and control systems, the creation of an internal audit unit to oversee the fulfillment and adoption of internal regulations for accountability and compensation.

These provisions established in the Recitals of the Directive should be understood within a context of good governance, in such a way that, for example, if the internal audit office for supervising the Compliance programme is not in the hands of an independent college or person, would not be worth much. That is to say, the self-cleaning measures have to be reliable, credible and, above all, suitable to prevent new illegal actions.

In this regard, we must underline, as BERNAL BLAY does, that the Directive refers to the adoption of suitable measures – in Spanish *apropiadas*, in French

[28] BERNAL BLAY, Miguel Ángel. Los efectos de los programas de Compliance en la contratación pública. In: GIMENO FELIÚ, José María (Dir.); BERNAL BLAY, Miguel Ángel (Coord.). *Observatorio de los Contratos Públicos*. Navarra: Aranzadi, 2015. p. 417.

[29] *Ibid*.

propres à, in Italian *idonei* – to avoid further criminal infringements or offenses, an expression different from the mitigating circumstance used in Spain's Criminal Code, article 31 bis, that specifies that such measures have to be effective.[30] In the case of self-cleaning measures, their suitability is evaluated *ex ante* by the competent public body, while in the case of the Criminal Code, the efficiency of such measures can only be evaluated *ex post*, once they have been adopted, when new crimes have been committed, when by then it makes no sense to try to evaluate the alleviating effects.[31]

In Spain, in March 2015 the Criminal Code was reformed with the enactment of an Organic Law and article 31 bis of the Code was rewritten such that it exempts, not only alleviates, the legal person from criminal liability "the crime prevention model must have been adopted and effectively executed prior to the commission of the crime, including monitoring and control measures fit for preventing crimes of the sort in question or for reducing significantly the risk of such crimes".

In reference to the public bodies that have to evaluate the measures proposed by the contractors affected by debarment, I agree with the thesis by BERNAL BLAY when he points out that rather than leaving these decisions in the hands of specific contracting authorities or to the procurement bodies of each contract, it is necessary to lay this responsibility on an entity specialized in penal and administrative matters who can standardize criteria. This would prevent the competency from being awarded to each contractual public manager, which could lead to a feeling of insecurity.[32]

If it were true that the causes for exclusion or debarment were often not verified by the contracting bodies, these Compliance measures would have a very limited efficiency with regard to accessing a public contract. However, should the causes for exclusion or debarment also be applicable to the contracts under execution, then, as BERNAL BLAY points out, in the context of the option of the termination of a contract because the contractor was affected by debarment at the time of the contract awarding, self-cleaning would make more sense.[33] Admittedly, the legislation regarding contract matters should inform of the claims for debarment in reference to those contracts that the company currently has in force. Consequently, this declaration would turn into a prohibition to continue the contract, incurring in a cause for contract termination that would have to be included in the legislation. Thus, these self-cleaning programmes would serve as a stimulus for companies in the event that the debarment could be lifted when it is considered that the Compliance programme envisages appropriate measures to prevent further criminal and administrative infringements.[34]

30 BERNAL BLAY, Miguel Ángel. *Op. Cit.,* p. 419.
31 *Ibid.*
32 BERNAL BLAY, Miguel Ángel. *Op. Cit.,* p. 420.
33 BERNAL BLAY, Miguel Ángel. *Op. Cit.,* p. 421.
34 BERNAL BLAY, Miguel Ángel. *Op. cit.,* p. 422.

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