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Self-Cleaning As A Way Towards Reliability

Case Study (C-124/17)

Dr. Anna Blume Huttenlauch, LL.M. (NYU)

Dr. Roland M. Stein, LL.M. Eur.

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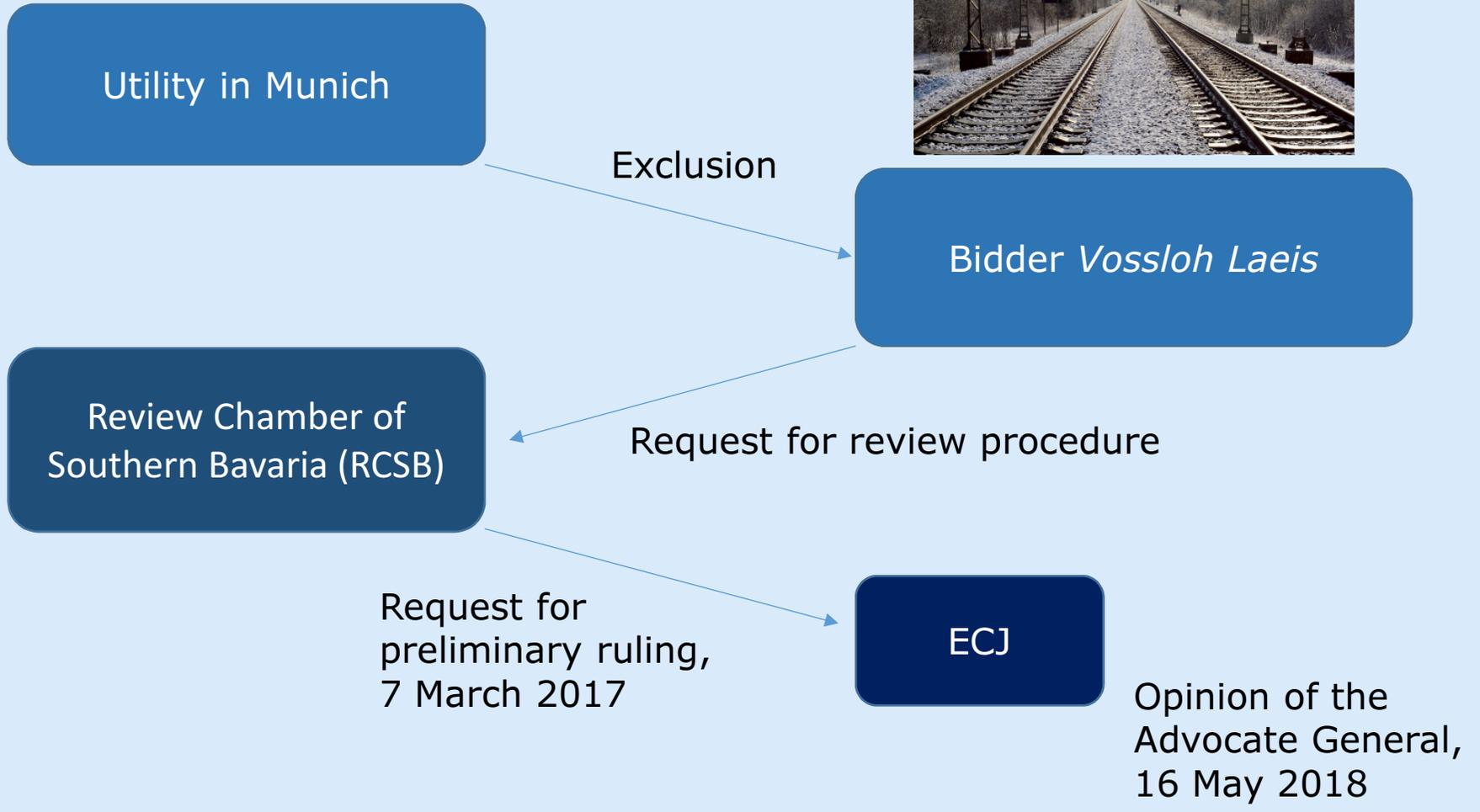
Case Study – Vossloh Laeis, C-124/17

Anticompetitive Behaviour – The Rail Cartel



Case study – *Vossloh Laeis*, C-124/17

Procurement procedure

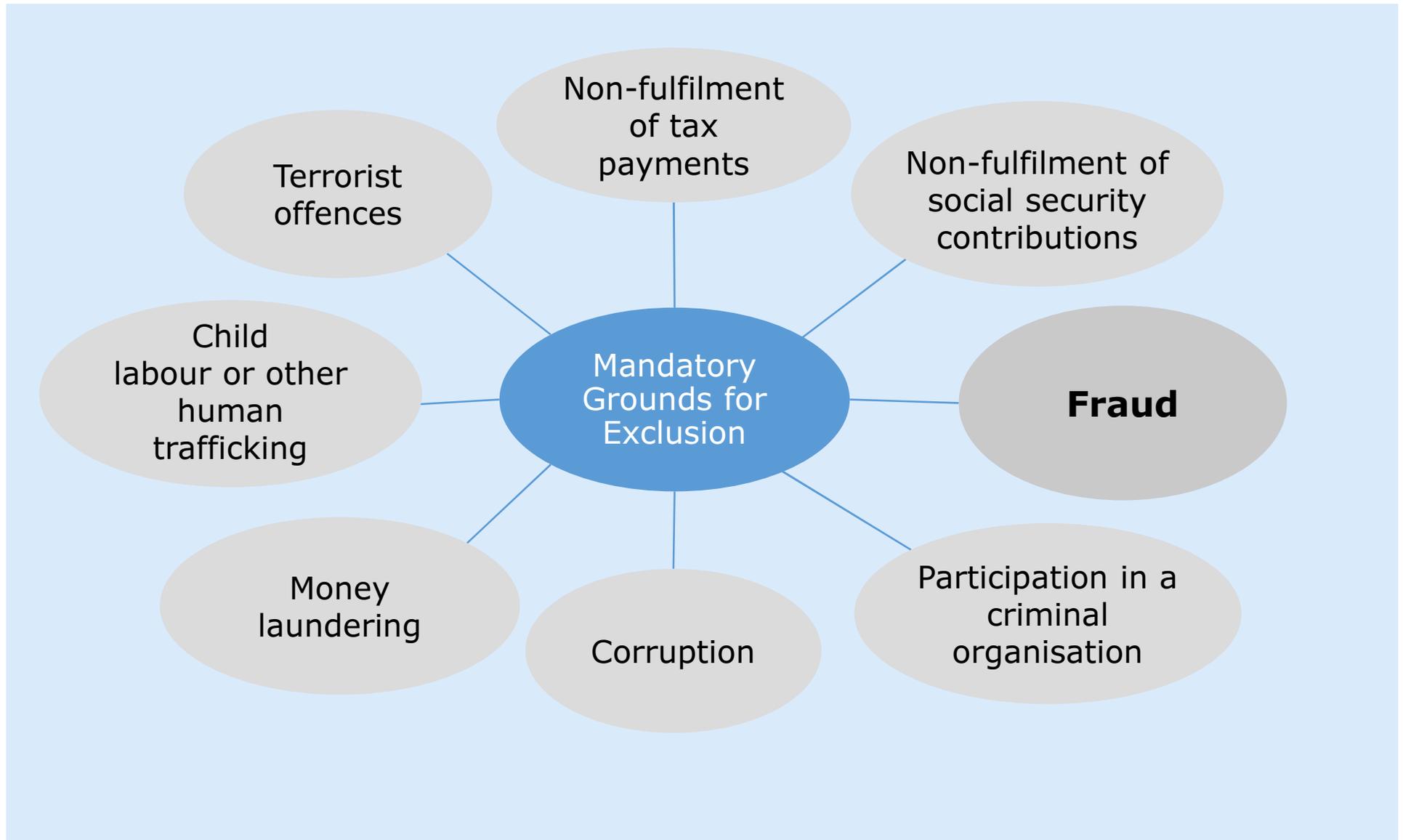


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Exclusion Grounds

- “Bidder Eligibility” as an Interface between Competition and Public Procurement Law

Mandatory Grounds for Exclusion (1)



Mandatory Grounds for Exclusion (2)

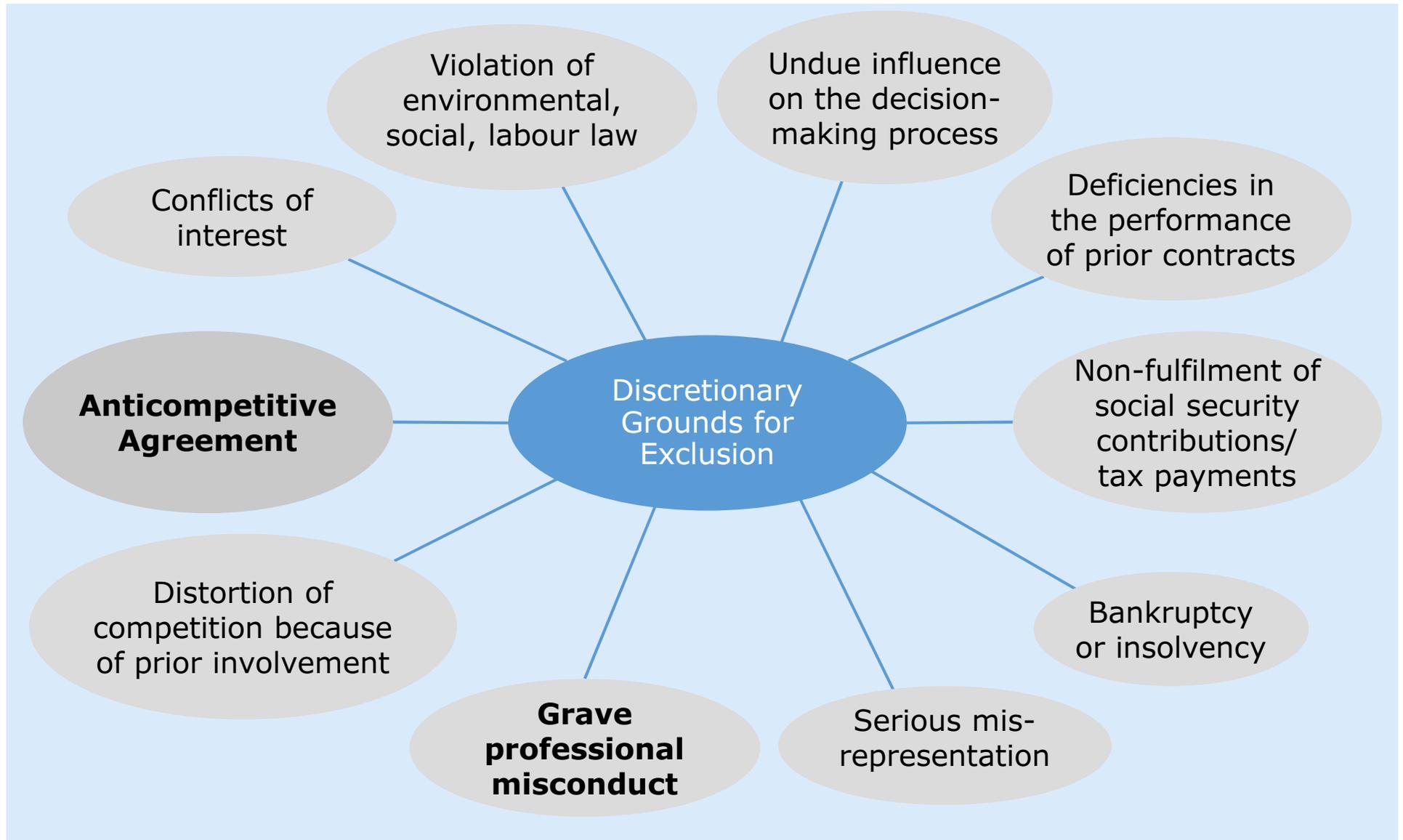
Requirements (Article 57(1) and (2)(1) 2014/24/EU)

- “Conviction by final judgment”
- Maximum period of exclusion: 5 years from the date of judgment

Competition Law: Fraud

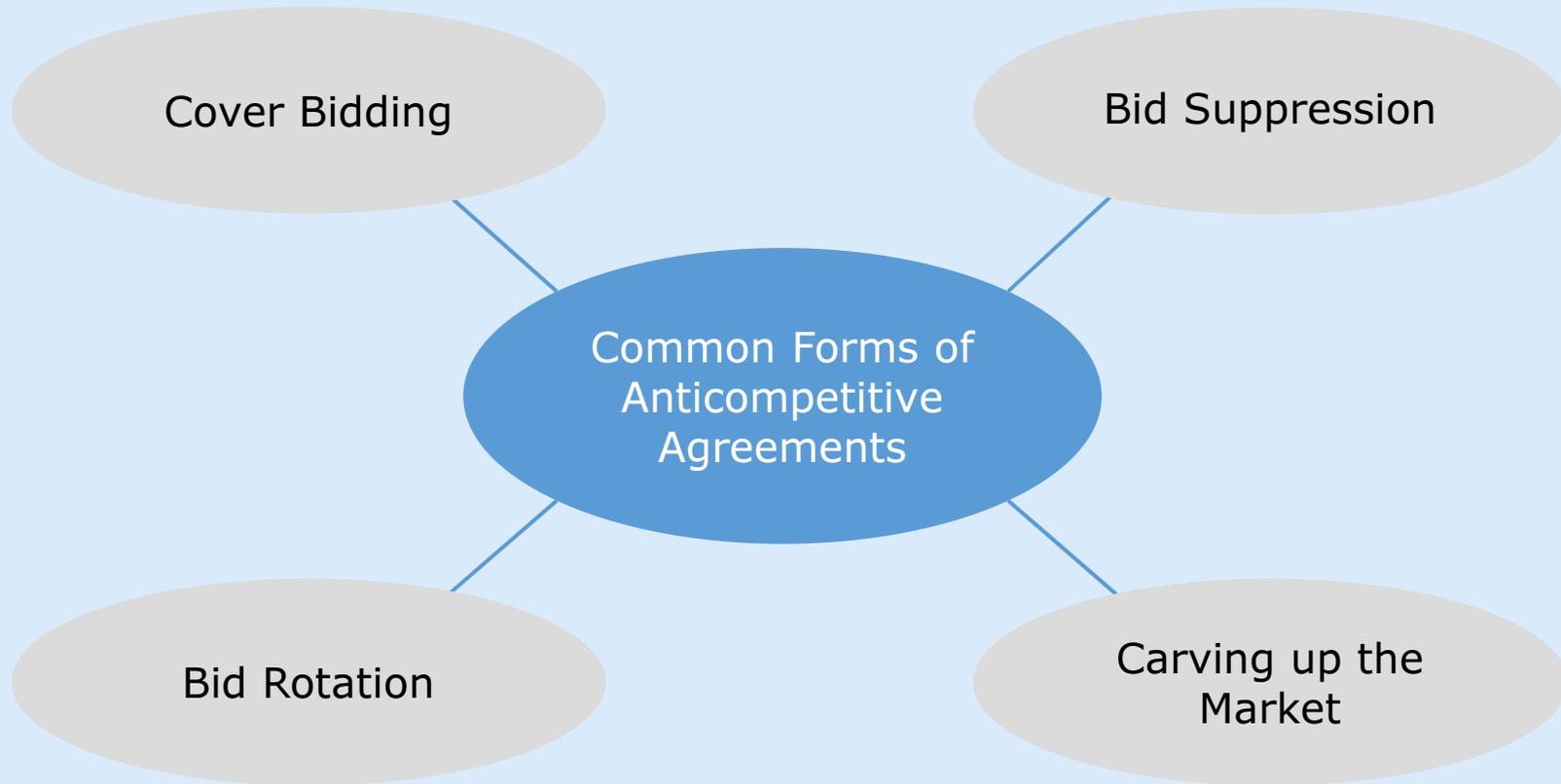
- Protection of the financial interests of the European Communities (Article 57(1)(c) 2014/24/EU)
- Limited relevance in practice

Discretionary Grounds for Exclusion (1)



Discretionary Grounds for Exclusion (2)

Bid-Rigging



Discretionary Grounds for Exclusion (3)

Requirements (Article 57(4) and (2)(2) 2014/24/EU)

- Determination of misconduct, final judgment not necessary
- Maximum period of exclusion: 3 years from the relevant event



Question no. 3 referred to ECJ by RCSB:

Is the moment of the **fulfilment of the discretionary grounds** for exclusion the relevant event?

or

Is the date on which the **contracting entity has certain and reliable knowledge** of the existence of the ground for exclusion the relevant event?

Opinion of the Advocate General of 16 May 2018

Neither nor
Maximum period of exclusion beginning with the **date of the (sanction) decision legally establishing the existence of the misbehaviour**

Discretionary Grounds for Exclusion (4)

Competition Law: Anticompetitive Agreements (Article 57(4) lit. d 2014/24/EU)

- “Contracting authority has sufficiently plausible indications to conclude”
- E.g.: Decision by European Commission or National Competition Authority, Settlement



Question no. 3 referred to ECJ by RCSB:

Is the **termination of participation in the cartel** the relevant event?

or

Is the **contracting entity's acquisition of certain and reliable knowledge** of the participation in the cartel the relevant event?

Opinion of the Advocate General of 16 May 2018

Neither nor
Maximum period of exclusion beginning with the **date of the (sanction) decision legally establishing the existence of the cartel**

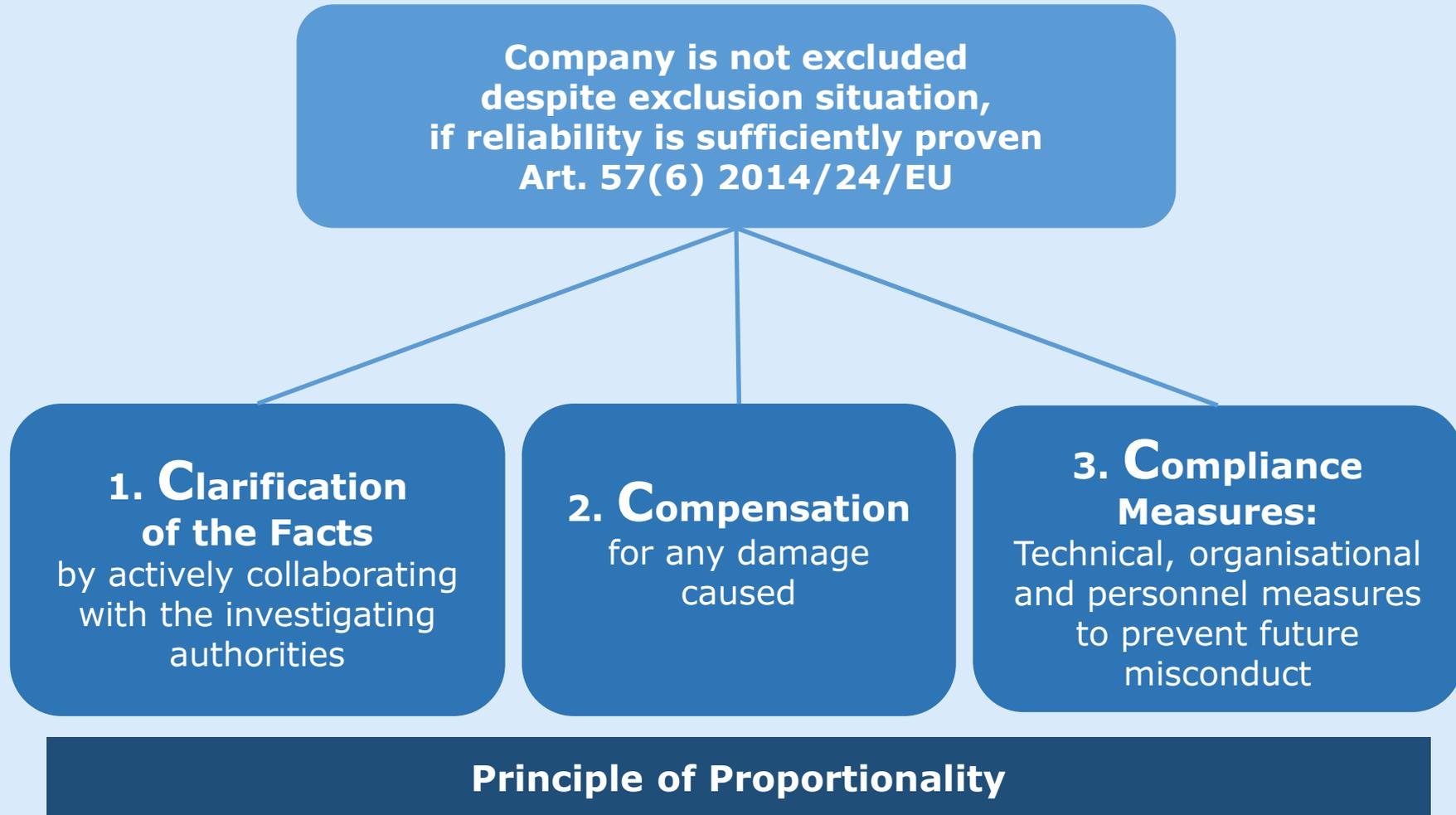
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Self-Cleaning

- Regaining the Status of an Eligible Economic Operator

Self-Cleaning (1)

Requirements



Self-Cleaning (2)

1. Compensation

Extent

- “Any damage caused” – no other guidance in Directive
- Our view: Not all claims for damages have to be compensated, but only those that are **substantiated** and **proven**, or **uncontested, admitted** or **determined by court**

Conduct of Economic Operator

- May economic operator take **legal action** against compensation claims?
- Is economic operator required to **make statements** that may impair its situation in trial?

RCSB:



Self-Cleaning (3)

2. Clarification of the Facts

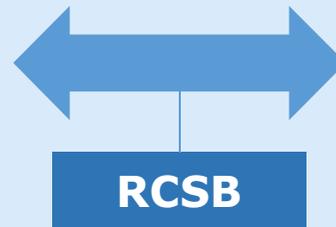
- “By actively collaborating with the investigating authorities”

EU Law

“For this purpose, the economic operator shall prove that it has [...] clarified the facts and circumstances in a comprehensive manner by actively collaborating with **the investigating authorities** [...].”

German Transposition

1. Law enforcement authorities
- and**
2. Contracting authority



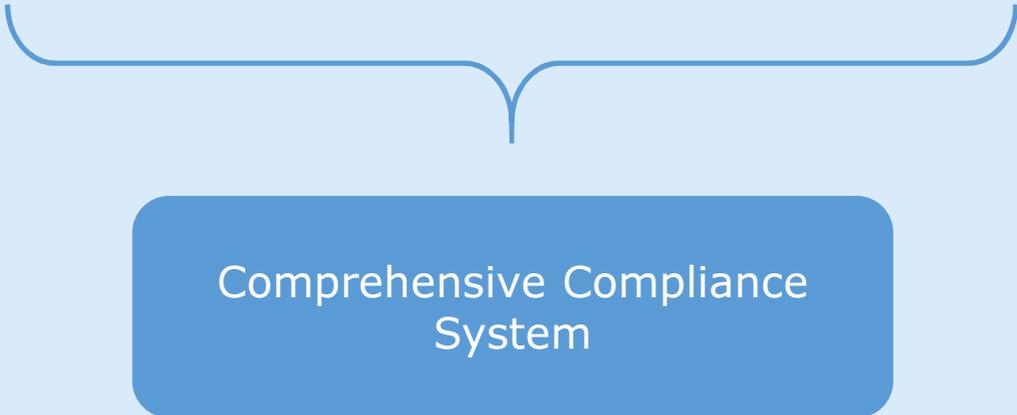
Opinion of the Advocate General of 16 May 2018

- The Directive opposes national legislation requiring active collaboration not only with investigating authorities but also the contracting authority in order to clarify the facts regarding the involvement in an agreement to distort competition
- The Directive does not oppose the requirement to such collaboration with the contracting authority if the latter has to establish the facts in question itself

Self-Cleaning (4)

3. Compliance Measures: Technical and Organisational Measures

- Personnel reorganisation
- Reporting and control system
- Internal audit structure
- Internal liability and compensation regime



Comprehensive Compliance System

Self-Cleaning (5)

3. Compliance Measures: Personnel Measures

Employee

| Accusation | Consequence |
|-----------------------------------|---------------------------------------|
| Serious involvement in misconduct | Extraordinary dismissal |
| Less serious involvement | Ordinary dismissal/ warning letter |

Shareholder

Exclusion from involvement in operating parts of the company (in a legally binding way)



Conflict with obligation to clarify the facts
→ case-by-case analysis

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Dr. Anna Blume Huttenlauch, LL.M. (NYU)
Dr. Roland M. Stein, LL.M. Eur.

Oranienburger Str. 66
10117 Berlin
www.blomstein.com
Tel: +49 30 2148027 00

anna.huttenlauch@blomstein.com
roland.stein@blomstein.com

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