

## NATIONAL ANALYSIS REPORT

### *based on the 28 research questions*

#### ITALY

#### PART I – LEGAL FRAMEWORK AND JUDICIAL PRACTICE ANALYSIS - BACKGROUND AND STATISTICAL DATA (DESK RESEARCH)

##### **1. Legal framework and sanctions applied to legal entities for corruption crimes, money laundering, fraud, and crimes against financial interest of European Union.**

The Corporate Responsibility System for the commission of crimes was introduced in 2001 by the Legislative Decree no.231 and subsequent modifications and additions. The issue of liability of legal persons has been at the centre of many debates, especially in the last decade, due to the dramatic situation created by the financial crisis.

Since 1995, the legal framework has started to take a different direction; Italy began signing international conventions to protect the economy, including the European Community Convention signed in Brussels on 26 July 2005, on the protection of financial interests of the same Communities and the Convention of the Organization for Economic Co-operation and Development signed in Paris on 17 December 1997, on the fight against corruption of public officials in international economic transactions.

Legislative Decree 231 provides responsibility for organisations. It provides two criteria for imputation: one is objective and the other is subjective.

As to the first criterion, art. 5 lists the hypothesis that triggers responsibility on the organisation when the offense was committed in the interest or for the benefit of the company itself, by subjects in management position or others subjected to their supervision<sup>1</sup>. The interest must exist and be assessed ex ante (as the offence must have been committed in the pre-existing specific interest of the company), whereas the benefit, being a purely material aspect, must be assessed ex-post (after the commission of the offence<sup>2</sup>).

However, the organisation does not respond to the offenses committed by such persons if these have acted in the interests of their own or a third party.

The relationship between the subjects provided by the art. 5, i.e. persons with functions of representation, administration, or direction, is of an "organic identification" with the body, by which they represent the will of the body in external relations.

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<sup>1</sup> Rossi A., La responsabilità degli enti (D.lgs. 231/2001): I soggetti responsabili, in Rivista231:  
<https://www.rivista231.it/Pagine/Pagina.asp?Id=618>

<sup>2</sup> Pulitanò D., Responsabilità amministrativa per i reati delle persone giuridiche, in Enc. Dir., Milano, vol. IV agg., 2002, 958.  
For more details:  
<http://www.praecipua.it/sites/default/files/D.PULITANO%27,%20La%20responsabilit%C3%A0%20da%20reato%20degli%20enti.pdf>; and <http://www.penalecontemporaneo.it/upload/1351253564De%20Simone%20definitivo.pdf>

As to the second criterion, it refers to the lack of organizational duties of the company and the responsibility for a crime because of an organizational fault. It is necessary to make a distinction between the persons who commit the crime, if they hold an apical position or they are in subordinate positions (regulated respectively by art. 6 and 7 of the decree). When the crime is committed by persons who hold management power, there is a presumption of liability for the organisation that can be overcome by opposing evidence that the company put in place a model to prevent illicit behaviours.

Specifically, in order to be exempt from liability presumed for an organizational fault, the organisation must prove, pursuant to art. 6 paragraph 1, that: (A) the governing body has adopted and effectively implemented, before the commission of the crime, organizational and management models (e.g.: compliance programs) suitable for preventing offenses of the same kind occurring; (B) the task of supervising the operation and the observance of models, their updating has been entrusted to a specific body (i.e. internal audit) with autonomous powers of initiative and control; (C) the persons committed the crime by fraudulently evading the organization and management models; (D) there has been no omission or insufficient vigilance by the body referred to in (B). When the crime is committed by a person holding a subordinate position, the burden of proof is reversed on behalf of the prosecutor. In case the crime is committed by a person not in management position, or without decision powers within the legal person, the prosecutor will need to show that the compliance programs were ineffective to prevent the crime<sup>3</sup>.

This law indirectly requires the organisation to be equipped with appropriate compliance programs, aimed at the prevention of the crimes provided by the law. In this regard, many medium-large dimension companies have adopted a set of policy<sup>4</sup>, governance and control documents, regulating crime-risk activities and processes, setting up new internal bodies (e.g. Overseeing Bodies or Audit) or by giving them new functions and responsibilities, adding or modifying business procedures.

To ensure the validity of the compliance programs, these must comply with the requirements set out in Article 6, paragraph 2 of Legislative Decree 231/2001, such as: (a) identifying the activities in which criminal offenses may be committed; (b) provide for specific protocols to plan training and implementation of the organisation's decisions in relation to the offenses to be prevented; (c) identify ways to manage financial resources to prevent the commission of offenses; (d) provide for information to the body responsible for monitoring the operation and observance of the models; (e) introduce a disciplinary system that is appropriate to sanction the failure to comply with the measures indicated in the organisational model (i.e. compliance programs)<sup>5</sup>.

To sum up, the adoption of organizational models is not a legal obligation, but companies are recommended to adopt it in order not to be held liable when crimes occur.

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<sup>3</sup> VV.AA., La prova nel processo agli enti, Giappichelli, Torino, 2016.

<sup>4</sup> Expert interview: Avv. Fabrizio Sardella (Assistant Professor in Criminal Law at University of Castellanza Carlo Cattaneo – LIUC).

<sup>5</sup> Zannotti R., Il nuovo diritto penale dell'economia: reati societari e reati in materia di mercato finanziario, 2008.

Mucciarelli F., Una progettata modifica al D.Lgs. n. 231/01: la certificazione del modello come causa di esclusione della responsabilità, in Società, 2010, 1247 ss.

For more details see also Mucciarelli F.: [http://www.penalecontemporaneo.it/upload/1473976685COLACURCI\\_2016a.pdf](http://www.penalecontemporaneo.it/upload/1473976685COLACURCI_2016a.pdf)

The other subjective criterion for the attribution of liability is governed by the art. 7 which attributes responsibility to the body when the offense was committed in its interest and to its advantage for failure to comply with the direction and supervision obligations. In this case, the relative presumption of liability acts in favour of the body, since it has the burden on the prosecutor to prove that the body has not had the appropriate organizational models, i.e. proving their ineffectiveness, in order to attribute responsibility to the head of the same body. Responsibility for the body does not arise when, before the commission of the offense, it has been provided with suitable models aimed at the prevention of crimes of the same kind as the one committed.

The presumptive offenses are provided for in Legislative Decree 231 at articles 24 to 26. In particular, with reference to the protection of the financial interests of the EU, the organisation is responsible for a number of crimes against the Italian state and against EU interests, including:

- Indebted perception of payments, fraud to the State and the European Union in obtaining public grants and IT fraud to detriment of the State or a public body;
- IT crimes and illegal data processing
- Organised Crime
- Concussion, undue induction to give or promise utility and corruption
- False coins, public credit cards, stamp values, and instruments or marks of recognition
- Crimes against industry and commerce
- Corporate crimes
- Crimes of terrorism or to distort the democratic order
- Market Abuse
- Receiving, recycling and use of money, goods or utilities of illicit origin: money laundering
- Induction not to make statements or to make false statements to the judicial authority.

With regard to penalties, one should note that Italian law, in addition to providing the criminal sanction for the natural person who committed the offense, provides for specific sanctions for the companies as well. In particular, art. 9 provides the following sanctions:

- (A) financial penalties;
- B) bans;
- C) confiscation;
- D) publication of the criminal decision.

Bans include:

- (A) the ban to exercise the activity;
- (B) the suspension or revocation of the authorizations, licenses or concessions;

(C) the prohibition of contracting with the public administration (including public procurement), except for obtaining a public service;

(D) the exclusion from grants, contributions or subsidies and any withdrawal of those already granted;

(E) the prohibition to advertise goods or services.

An illicit activity by companies that causes significant damages to the EU is the invoicing for non-existing operations. Companies use to falsify carrying out entrepreneurial activities that never happened with the purpose of receiving relevant EU funds. Articles 2 and 8 of Legislative Decree n.74/2000 provide sanctions for false invoicing. These offences are of fiscal nature as the crimes are committed with the main target of avoiding the payment of due fees.

These are the main criminal activities against the interest of EU, along with those provided at articles 640 and subsequent of Italian Criminal Code, on fraud, fraud to obtain public funding, IT fraud, fraudulent insolvency, damaging of insured goods, usury, money laundering, etc.

Factual data of legal definition		Clusters sorted out according to national legal framework				Research objective
The offence name <sup>6</sup>	source <sup>7</sup>	Corrupti on crimes	Money laundering	Fraud	Crimes against the financial interest of EU	Exclusion applicable
Embezzlement to the detriment of the State	Art. 316 <i>bis</i> criminal code			✓	✓	
Unlawful obtainment of public grants to the detriment of the State	Art. 316 <i>ter</i> criminal code			✓	✓	
Fraud	Art. 640, paragraph 2, no. 1, of criminal code			✓	✓	
Aggravated fraud for the purpose of obtaining public funds	Art. 640 <i>bis</i> of criminal code		✓	✓	✓	
IT fraud	Art. 640 <i>ter</i> of criminal code			✓		

<sup>6</sup> Please use the official translation into English of respective offences' name

<sup>7</sup> Indicate Law title and reference to article. Mention [if part of directive transposal or national specific legislation]

Extortion in office	Art. 317 of criminal code	✓			✓	✓
Bribery	Arts. 318-320 of criminal code	✓			✓	✓
Bribery relating to official duties	Arts. 318-320 of criminal code	✓			✓	✓
Bribery relating to acts contrary to official duties	Art. 319 of criminal code	✓			✓	✓
Bribery in judicial proceedings	Art. 319 <i>ter</i> of criminal code	✓			✓	✓
Undue induction to give or promise usefulness	Art. 319 <i>quarter</i> of criminal code	✓			✓	✓
Incitement to bribery	Art. 322 of criminal code	✓			✓	✓
Extortion, corruption and incitement to corruption of members of European Community bodies and officials of the European Community and of foreign countries	Art. 322 bis of criminal code	✓			✓	✓
False budget communications	Art. 2621 of civil code		✓	✓		✓
False budget communications damaging shareholders and creditors	Art. 2622 of civil code, paragraphs 1 and 3		✓	✓		✓
False information in documents	Art. 173 bis of Legislative Decree 58 of 24 February 1998 ("TUF/Italian consolidated finance law")			✓		
Obstruction to controls	Art. 2625 of civil code, second paragraph			✓		

Wrongful repayment of contributions	Art. 2626 of civil code			✓		
Illegal distribution of profits and reserves	Art. 2627 of civil code			✓		
Illegal operations in shares or capital share or in parent companies	Art. 2628 of civil code			✓		
Operations damaging the creditors	Art. 2629 of civil code			✓		
Failure to report a conflict of interest	Art. 2629-bis of civil code			✓		
Fictitious creation of capital	Art. 2632 of civil code			✓		
Wrongful distribution of company assets by liquidators	Art. 2633 of civil code			✓		
Private-to-private bribery	Art. 2635 of civil code	✓				✓
Illegal influence over shareholders' meetings	Art. 2636 of civil code			✓		
Manipulation of markets	Art. 2637 of civil code			✓	✓	
Obstructing the duties of public supervisory authorities	Art. 2638, first and second paragraphs of civil code			✓		
Forging money, spending and introducing false money into the State, without agreement	Art. 453 criminal code			✓	✓	
Altering money	Art. 454 criminal code			✓	✓	
Spending and introducing into the State, without agreement, forged money	Art. 455 criminal code			✓	✓	

Spending of forged money received in good faith	Art. 457 criminal code			✓	✓	
Forging of revenue stamps, circulating them in the State, keeping or putting into circulation forged revenue stamps	Art. 459 criminal code			✓	✓	
Forging of watermarked paper used to make public credit notes or revenue stamps	Art. 460 criminal code			✓	✓	
Fabrication or detention of watermarks or instruments used for making money, revenue stamps or watermarked paper	Art. 461 criminal code			✓	✓	
Use of forged or altered revenue stamps	Art. 464 criminal code			✓	✓	
Forging, altering or using distinguishing brands or signs or patents, models and designs	Art. 473 criminal code			✓	✓	
Introduction in the State of products with false brands or signs	Art. 474 criminal code			✓	✓	
Abuse of inside information	Art. 184 of Legislative Decree 58 of 24 February 1998 ("TUF" or Italian consolidated finance law)			✓	✓	
Market manipulation	Art. 185 of Legislative Decree 58 ("TUF") of 24 February 1998			✓	✓	

Criminal association	Art. 416 of criminal code				✓	✓
Mafia-style associations	Art. 416 bis of criminal code				✓	✓
Political-mafia electoral collusion	Art. 416 ter of criminal code				✓	✓
Receiving of criminal goods	Art. 648 criminal code		✓	✓	✓	✓
Money laundering	Art. 648-bis criminal code		✓	✓	✓	✓
Use of money, goods or profits from illegal activities	Art. 648 ter criminal code		✓	✓	✓	✓
Self-money laundering	Art. 648 ter.1 criminal code		✓	✓	✓	✓
Illegal access to IT systems	Art. 615 ter criminal code			✓		
Damaging computer information, data or programmes used by the State or by another public body or in any case of public utility	Art. 635 ter criminal code			✓		
IT fraud by an individual who is responsible for certifying computer signatures	Art. 640 quinquies criminal code			✓		
Interference with liberty of industry and trade	Art. 513 criminal code			✓		✓
Unfair competition under threats or violence	Art. 513 bis criminal code			✓		✓
Fraud against national industries	Art. 514 criminal code			✓		✓
Fraudulent interference in trade activities	Art. 515 criminal code			✓		✓



Selling non-genuine food items as they are genuine	Art. 516 criminal code			✓		
Selling industrial products with false signs	Art. 517 criminal code			✓		
Fabricating and trading in goods made through the appropriation of industrial ownership titles	Art. 517 ter criminal code			✓		

**2. List and briefly describe the legal framework on exclusion from public procurement assembly in your country, and your comments about its synergy in your country's legal system. Please include the motives of exclusion from public procurement according to the national legal framework.**

The grounds for exclusion from public procurement are regulated by art. 80 of Legislative Decree no. 50/2016. With this legislative act, Italy has transposed the European Directive on public procurement<sup>8</sup>.

Art. 80 of Legislative Decree no. 50/2016 has four groups of grounds for exclusion from participation in public procurement and concession procedures concerning criminal convictions, included in the Italian Criminal Code (hereafter "C.P."). In particular:

(A) crimes, committed or attempted, related to the participation in a criminal organization (416 C.P., criminal association and 416-bis C.P., Mafia-like, also foreign, associations) or crimes committed by using the conditions provided for by the aforementioned art. 416-bis or in order to facilitate the activities of the associations contemplated by the same article. Moreover are included crimes, committed or attempted, of illicit traffic of narcotics or psychotropic substances (art. 74 of the Presidential Decree 9 October 1990, n. 309); crimes of criminal association for the smuggling of foreign manufactured tobacco (art. 291-quater of the Presidential Decree 23 January 1973, n. 43); crimes related to organized activities for the illicit traffic of waste (and art. 260 of Legislative Decree no. 152/2006);

(B) crimes, committed or attempted under Title II "Crimes against the Public Administration" of Book II of the Criminal Code, and specifically those referred to in Articles 1 and 2; 317 (bribery), 318 (bribery for an act of office), 319 (bribery for an act contrary to office duties), 319-ter (bribery in legal proceedings), 319-quater (undue induction to give or promise utility), 322 (embezzlement to corruption), 322-bis (embezzlement, bribery, corruption and instigation to corruption in European Communities bodies and of officials of the European Communities and of foreign countries), 320 (bribery of a person in charge of a public service), 346-bis (traffic of illicit influences), 353 (disturbed liberty of auctions), 353-bis (disturbed liberty in the choice of contractors), 354

<sup>8</sup> Guccione C., Il nuovo codice dei contratti pubblici – I requisiti degli operatori economici, in Giornale Dir. Amm., 2016, 4, 436: <http://www.unife.it/economia/Im.economia/insegnamenti/diritto-dei-contratti-e-dei-servizi-pubblici/materiale-didattico-a-a-2016-2017/parziale-i/C.%20GUCCIONE-%20I%20requisiti%20degli%20operatori%20economici.pdf>

(abstention from auctions), 355 (non-fulfilment of public contracts) , 356 (fraud in public supplies) and art. 2635 c.c. (Private bribery);

(C) Fraud pursuant to art. 1 of the Convention on the protection of the European Communities' financial interests (Council Act of 26 July 1995);

(D) crimes, committed or attempted, committed for purposes of terrorism, including international affairs, and the overthrow of the constitutional order, terrorist offenses or offenses related to terrorist activities;

(E) crimes referred to in Art. 648-bis C.P. (Money laundering), 648-ter C.P. (Use of money, goods and utilities of illicit origin) and 648-ter C.P. (Confiscation), art. 1 Legislative Decree n. 109/2007 (laundering of proceeds from criminal activities or financing of terrorism);

(F) exploitation of child labor and other forms of trafficking in human beings as defined by Legislative Decree no. 24/2014;

(G) any other offenses where the ban to contracting with the public administration comes as a subsidiary penalty.

Among these relevant hypotheses, concerning the safety at work, the case referred to in art. 437 C.P. 'Removal or omission of caution against accidents at work'.

With reference to the second group of offenses, art. 80, c. 2, provides that the exclusion from public tenders occur in case of limitations, suspensions or prohibitions provided for in art. 67 Legislative Decree n. 159/2011 for violations of the Antimafia code (e.g. people under special surveillance for mafia connection, ban of staying in certain place). Moreover, a preventive exclusion exists in case of mafia-connections, as regulated under Article 84, c. 4 of the same decree.

The third group of grounds for exclusion concerns the breach of tax obligations ("related to the payment of taxes and duties") or social security benefits.

Under art. 80, c. 5, the fourth macro-group of reasons for exclusion includes serious violations of health and safety at work.

Specifically, contracting authorities exclude competitors from public competitions when:

1. the contracting authority can demonstrate by any means appropriate the presence of serious infringements in relation to health and safety at work, as well as environmental and social obligations;
2. the economic operator is in a state of bankruptcy or wind-up;
3. the contracting authority shall demonstrate by adequate means that the economic operator has been guilty of serious professional misconduct, able to question its integrity or reliability;
4. the participation of the economic operator results in a conflict of interest that cannot be solved otherwise;
5. the distortion of the competition resulting from the former involvement of economic operators in the preparation of the procurement procedure cannot be solved by less intrusive measures;

6. the economic operator was subject to the ban sanction referred to in art. 9, c. 2, lett. C) of Legislative Decree no. 231 or other sanction involving the prohibition to contract with the public administration;
7. the economic operator entered in the computer records kept by the Anticorruption Authority to make false statements or introduce false documentation with the purpose of issuing a qualification certificate;
8. the economic operator has infringed the prohibition of create trusts;
9. the economic operator does not have the certification of work for disabled people;
10. the economic operator who, despite being the victim of the offenses provided by art. 317 and 629 of the Criminal Code, has not reported the facts to the judicial authority;
11. the economic operator is connected to another participant in the same custody procedure, in a control situation referred to in art. 2359 of the c.c. or in any relationship, where the bids from two organisations can be referred to a unique decision centre.

**3. List and briefly describe the national criminal framework on application of the additional sanction of exclusion from public procurement<sup>9</sup>.**

Bans from public procurement are mainly regulated under Art. 80 of the public procurement code (see answer to the previous question). However, the criminal justice system provides for bans sanctions for both natural and legal persons. Art. 19 of the criminal code provides that the natural person may be subjected to sanctions such as the ban on public officials, the ban on the directors, the ban on contracting with the public administration<sup>10</sup> (hereafter PA). The ban on private executives complements decision of imprisonment of six months or more for crimes related to the abuse of power or the violation of office duties. However, the ban on contracting with PA comes along with a conviction for crime against the State's economic interests, public trust and good performance of the administrations. It cannot last less than a year or more than five years (as amended in the 2015, while the former provision provided a three-years limit) and it concerns all the offences committed against the public administration (e.g. bribery, fraud, and embezzlement).

Concerning the legal person, Legislative Decree 231/2001 provides for specific penalties for companies/organisations/legal persons when they have committed crimes against the PA. Specifically, Article 9 of the decree provides that bans sanctions in general are:

- (A) the ban to the exercise of the activity;
- (B) the suspension or revocation of the authorizations, licenses or concessions;
- (C) the prohibition of contracting with the public administration (including public procurement), except for obtaining a public service;

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<sup>9</sup> Emphasize also the complementarity of sanctions under your country specific criminal law and the general regime of additional administrative and civil sanction to criminal sanctions. Please specify if the sanction of exclusion from procurement is included in the interim measures in your criminal legal framework.

<sup>10</sup> De Felice, Natura e funzioni delle pene accessorie, Milano, 1988.

- (D) the exclusion from grants, contributions or subsidies and the withdrawals of those already granted;
- (E) the prohibition of advertising goods or services.

In accordance with Article 13 of Decree 231, ban sanctions apply when at least one of the following conditions occurs:

- the organisation has taken a significant amount of profit from the crime and the offense was committed by persons in the apical position or by persons subjected to their direction. In the last case, it has to be facilitated by serious organizational shortcomings;
- in case of repeated offenses.

Ban sanctions shall last no less than three months and not more than two years.

The judge has a large discretionary power of choice with concern both to the length of the sanction (from three months to two years) and to the specific choice of the sanction<sup>11</sup>.

According to article 14 ban sanctions target the specific activity referred to the illicit activity. The judge selects the type and duration of the proceedings based on criteria set out at article 11, considering the effect of the individual sanctions to prevent the reiteration of offences.

**4. Besides the additional sanction provided by the court, does the law provide any administrative mechanism of exclusion from public procurement for acts that are not of criminal liability?**

- ☐ No, and it does not apply in practice
- ☐ Not specifically, but it applies in practice by contracting authorities
- ☐ Yes, it is provided by law and applies in practice

Art. 80 Legislative Decree n. 50/2016 (Public Contract Law) and the answer to question n.2 (IV group of crimes)

**5. Please identify if the following acts constitute cause of exclusion from public procurement in your country, and their implementation regime**

Acts	Cause of exclusion	By decision of the court	Provided by public procurement legal framework and enforced by contracting authorities with no need of a court's decision
Corruption crimes	✓	✓	

<sup>11</sup> Cerqua L., Luparia L., Canzio G. - Diritto penale delle società. Profili sostanziali e processuali, 2014.

Money laundering	✓	✓	
Fraud	✓	✓	
Establishment of an organized criminal group	✓	✓	
Crimes against financial interests of EU	✓	✓	
Conflict of interest	✓		✓
Unfair competition	✓		✓
False statements in public procurement procedures	✓	✓	
Terrorist offences	✓	✓	
Human traffic and exploit	✓	✓	
Non-payment of taxes or social security contributions	✓	✓	
Deficient performance in previous public contracts implementation	✓		✓
Serious professional misconduct	✓		✓
Unlawfully influencing contracting authority's decision in order to obtain advantages during public procurement procedure	✓	✓	
Unlawfully obtaining confidential information that provides the bidder with private advantages within the public procurement procedure	✓	✓	
<i>Art. 80 d.lgs. 50/2016 (Public Contract Law)</i>			

**6. Briefly describe what the exceptions leading to suspension of the sanction are or when exclusion from public procurement does not particularly apply, both as additional criminal sanction and administrative sanction in your country.**

With reference to the suspension of the sanction, Art. 80 of the Public Procurement Code provides that exclusion should not be made when the offense (a) is no-longer sanctioned as a crime, (b) when a restoration has taken place, (c) when it has been declared terminated after the conviction, or (d) in case of revocation of the sentence. The suspension comes as a consequence of the effects of the main sentence.

In case the final decision for natural person does not explicitly provide for the length of the ban to contract with the public administration, this is fixed in 5 years or it is equal to the length of the main sanction, if the main sanction is shorter than five years. Concerning legal persons, a two-years limit is provided. The crimes are then irrelevant, not only in the case of rehabilitation or extinction but also after a certain period of time.

**7. Have there been any recent changes within legal framework that affected the conditions of exclusion from public procurement in your country? Briefly describe it in comment section.**

☒ YES

☐ NO

The new public procurement code leaves less discretion to the contracting public administration than the former provision. The evaluation of the requirements for the participation to tenders gives a wide margin of discretion as to whether or not a certain economic operator may be excluded.

The legislator has provided for a strict model of crimes specifically listed by the law, in contrast with the previous “open” discipline (Article 38 (1) (c)); principles of equality (Article 3 Constitution) and of freedom of enterprise (Article 41 of the Constitution) are granted. The new exclusion system aims to expand the requirements that companies must comply with in order to participate in a procurement or concession procedure. There are additions to the previous code: among the causes of exclusion is the conflict of interest when the company is linked to the competition office of the contracting authority. The new law here seems to enforce the stability and transparency of the conditions to participate in tendering procedures.

As to the size of the infringement regarding the payment of taxes and contributions there is an effort to make objective the conditions for the application of the ban penalty. The former art. 38 Legislative Decree n. 163/2006 used the improper word “seriousness” as a leading criterion only.

**8. Have there been any recent changes within criminal framework that affected the conditions of applying the additional sanction of exclusion from public procurement in your country? Briefly describe it in comment section.**

☐ YES

☒ NO

Additional sanctions have been already provided in the Italian Criminal Code since 1930.

**9. Please provide, based on authorities reply to free access to information request, the following statistical data on your country**

Item	2013	2014	2015	2016
Total number of legal entities sanctioned for corruption crimes	2	3	3	6
Total number of legal entities sanctioned of money laundering	0	0	0	0
Total number legal entities sanctioned for fraud (domestically incriminated)	6	6	4	11

Total number of legal entities sectioned for crimes against financial interest of European Union	0	0	0	0
Number of sanctions of exclusion from public procurement applied to legal entities	10	27	8	0
Number of sanctions of exclusion from public procurement applied to legal entities which committed corruption crimes	7	12	0	0
Number of sanctions of exclusion from public procurement applied to legal entities which committed money laundering crimes	0	0	0	0
Number of sanctions of exclusion from public procurement applied to legal entities which committed fraud	3	15	8	0
Number of sanctions of exclusion from public procurement applied to legal entities which committed crimes against financial interest of European Union	0	0	0	0
Statistical data are provided by the Ministry of Justice. Ministry mentioned that data could be incomplete due to the delays in the transmission of data by some courts.				

**10. In which moment of the public procurement procedure does the exclusion may be applied?**

- ☐ Only during the selection phase if there is evidence<sup>12</sup> that the private legal person was liable for conditions of exclusion
- ☒ In any moment of the public procurement procedure if the offences have been committed during the public procurement procedure's progress

Eligibility requirements for economic operators must be hold at all stages of the award procedure until the final stipulation of the contract.

**11. Is the length of the sanction of exclusion from public procurement provided by legal framework? Please present in the comment section the general length of exclusion from public procurement as provided by criminal framework or judicial practice.**

- ☐ The length of exclusion from public procurement is fixed and established by law
- ☒ The length of exclusion from public procurement is decided by the court in respect to the gravity of the offences committed.

With regard to the exclusion from public procurement, the effect of the exclusion refers to the single procurement procedure. As to additional sanctions resulting from criminal liability, the length of the penalty

<sup>12</sup> Please also highlight in the comment section what may represent baseline evidence in order to determine the exclusion from public procurement



(e.g. ban on contracting with P.A.) is fixed by the court within certain limits, otherwise by law (more above answers to questions no. 2 and no. 3).

**12. Do the judges have a level of discretion in ruling the additional sanction of exclusion from public procurement, besides the common financial and criminal sanctions?**

☒ YES

☒ NO

The discretion of the judge is limited because the sanction is only applicable in specific cases provided under law (see above answer to question no. 3).

With reference to natural persons, art. 32-ter of the Criminal Code establishes a ban from one to five years. The court's discretion in the quantification of the duration of the ban must be justified and it will be related to the seriousness of the offense committed.

With regard to penalties provided for legal persons, the ban are regulated under art. 9, second paragraph of Legislative Decree 231/2001. The discretionary power of choice by the court is very important in terms of duration of the sanction (from three months to two years) and regarding which sanction applies between those provided by law. Article 14 states that bans concern the specific activity to which the offense relates to. The judge determines the type and duration of the ban on the basis of the criteria set out in Article 11.

**13. Does the legal framework specifically provide exclusion from public procurement for subcontractors under the same criteria as for the contractors?**

☒ YES

☐ NO

In 2016, Italy decided to regulate also subcontracting (Article 105 of Legislative Decree No. 50/2016).

Art. 80, c. 1, provides that grounds for exclusion (criminal convictions) should also be referred to the subcontractors; accordingly, art. 105, c. 4, Legislative Decree n. 50/2016 states that the subcontracting is allowed where the bidder proves the absence of causes of exclusion on the subcontractors according to art. 80.

20 days before the date of start of the contract execution, the administrator must file the subcontracting contract, the certificate attesting the qualification requirements by the subcontractor, the Statement by the subcontractor attesting the absence of exclusion from the subcontractors.

Similarly, art. 80, c. 5, provides that also the grounds for exclusion of the fourth group of crimes (showed below at the qst n. 2) must be referred to the subcontractor.

There is an uncertainty in the law concerning the possible exclusion of subcontractors. It seems that there is no exclusion for companies sanctioned for attempted mafia infiltration and for tax and social security breaches.



However, this is an interpretation of the new law only (article 80); a clarification will follow the first decisions on the topic by the Supreme Court.

**14. Does the administrative framework provide the possibility for contracting authority to exclude from public procurement legal persons if they are subject of judicial proceedings?**

- ☐ YES
- ☐ Only under specific circumstances
- ☒ NO

Italian Anticorruption Authority (ANAC) within deliberation no. 917 of 31 August 2016 has stated that the existence of a criminal proceeding against an economic operator that is participating in a procurement procedure does not represent a case of exclusion under Article. 80 Legislative Decree n. 50/2016.

**15. What is the maximum period of exclusion provided by the national framework for situations provided by Directive 2014/24/EU of The European Parliament and of the Council on public procurement and repealing Directive 2004/18/EC<sup>13</sup>, at art. 57(7)? Please explain how these lengths have been established if different from the ones in the directive.**

If the final conviction does not expressly provide for the length of the ban to contract with the public administration, the term is 5 years. If the main decision provides for a sanction to less than five years, it is equal to the duration of the main decision (Article 80, C. 10).

Article. 80, c. 7 introduces a form of repairmen: economic operators can remedy the consequences of past offenses or violations by providing appropriate measures to demonstrate the continuity of their reliability.

**16. Is there any public database of legal persons convicted for criminal offences available in your country? If something similar is available, please specify.**

- ☐ YES
- ☒ NO

There is no public access database. Each prosecution office of the Italian Republic has a database under the name of "casellario giudiziale" (judicial record), where all proceedings involving natural and legal persons are recorded. P.A. may apply for access to the Register if it has a specific interest such as the control of the eligibility of the participants in the tenders.

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<sup>13</sup> <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32014L0024&from=EN>

**17. Is there any public database of legal persons that are subject of debarring from public procurement?  
If something similar is available, please specify.**

☐ YES

☒ NO

See previous question.

## **PART II –OPINION AND INPUT FROM JUDICIAL EXPERTS AND OTHER STAKEHOLDERS (ONLINE OR FACE TO FACE QUESTIONNAIRES APPLICATION - INTERVIEW AND/ OR FOCUS - GROUPS)**

### **18. Is the legal framework on exclusion from public procurement considered adequate by practitioners?**

- ☒ Perfectly adequate
- ☐ There are spaces for improvement
- ☐ It needs major adjustments
- ☐ Consensus has not been reached on this topic

Public prosecutors and representatives of the PA consider the system of exclusion of economic operators from public tenders to be perfectly adequate. The new procurement code provides for several cases where the company is automatically excluded from public tenders. Article. 80 specifically provides for a wide range of situations, objective (criminal convictions and other legislative failures such as the non-payment of social securities or tax) and subjective (professionalism and reliability of the enterprise); in practice it is difficult for operators to compete if they are not compliant with contractor selection procedures.

### **19. Is the criminal framework on exclusion from public procurement as an additional sanction considered adequate by practitioners?**

- ☐ Perfectly adequate
- ☒ There are spaces for improvement
- ☐ It needs major adjustments
- ☐ Consensus has not been reached on this topic

Current provisions for additional sanctions to criminal penalties is adequate, but experts believe that there are some aspects to improve.

Ban penalties applicable to companies in case an offence occurs may be problematic when judges automatically apply the sanction without assessing the specific case in detail. According to experts interviewed, courts should make a detailed analysis of the cases; it sometimes happens that they issue ban sanctions without making a specific evaluation. In this case, one can suspect a possible breach of the principle of free competition of companies in tenders because of excessive power given to the courts.

Some crimes are not covered by the Leg. Dec. 231/2001, e.g. 346-bis C.P. (Traffic of illicit influences), 353 C.P. (Bid-rigging), 356 C.P. (Fraud in public furniture). The non-inclusion of these crime may consent companies to escape sanctions.

### **20. Do the experts consider the lengths of exclusion from public procurement being adequate?**

- ☐ Perfectly adequate

- ☒ There are spaces for improvement
- ☐ It needs major adjustments
- ☐ Consensus has not been reached on this topic
- ☐ NA

According to the rules set out in the Public Procurement Code, exclusion is automatic only for the specific bidding process. The criminal sanction issued by the court has a statutory length: in the case of natural persons it goes from one year to life-long; in case of legal persons it cannot exceed two years. In general, experts consider the length of the sanction to be adequate but they are not confident about the effects produced. The temporary nature of the ban sanction does not exclude definitive effects: the revocation of concessions, for example, is always definitive as the company cannot recover the previous contract. Company could apply for a new contract but with reliability problems as the PA has just suffered from the sudden termination of the employment relationship.

**21. If there is no length of exclusion being provided by law, do experts consider appropriate to have fixed lengths for the sanctions establish?**

- ☒ YES
- ☐ NO
- ☐ Consensus has not been reached on this topic
- ☐ NA

Academics agree that legal provision works well. Law provides for the accessory sanction (ban) not to be longer than the main sanction; they believe this is a better solution than disconnect the length of main and accessory sanctions.

**22. Do differences in legal framework of exclusion from public procurement among countries make it difficult, in your country, to carry out public procurement that have cross border dimension?**

- ☐ It frequently happens
- ☐ It rarely happens
- ☒ Other

Academic experts think that, in principle, the current framework for exclusion does not rise particular difficulties, because it is a system aimed at reiterating (also - and above all - in the international evidence procedures) the respect of legality, which is crucial in case of larger-scale procurements. However, it may be useful to analyse

with the National Anticorruption Authority (ANAC) a simple system to provide foreign companies with adequate assistance to understand, also through specific guidelines, the current legislation<sup>14</sup>.

**23. Do experts consider appropriate to have national public databases containing companies convicted for criminal offences, including those that make subject of exclusion from public procurement?**

- ☐ YES
- ☒ NO
- ☒ Other

Experts do not consider useful keeping a public register available to all citizens for two main reasons. First, to ensure privacy for companies that have been subject to sanctions or exclusion from public tenders because the publicity of such measures would be a real accessory penalty imposed by the judge. Second, P.A. currently have all the tools to search for the profile of companies participating in public competitions by accessing their criminal records at the prosecution offices of the republic established in the various Courts in Italy. These records have all the available information on the status of the convictions of the participants to tenders. Situation is different with regard to the pending cases that would need a specific request to each Court of Italy: in any case being indicted or under trial does not make a cause for exclusion from procurement procedures.

Academics suggest the implementation of the National Anticorruption Authority (ANAC) Observatory, allowing the publication of some information, especially in cases where the publication of the decision has already been ruled as a complementary sanction<sup>15</sup>.

**24. Do experts consider that exclusion from public procurement as an administrative sanction applied for other offences, that are not criminal, breaks the free competition principle?**

According to expert interviewed, the principle of free competition requires that economic operators act in compliance with the law. Violators cannot legitimately invoke the principle of free competition.

Consider the following helping questions	
Does the situation of exclusion apply in your country?	Yes
What is the legal framework that allows the exclusion and on what grounds?	See answers to questions no. 2 and no. 3
Is there any maximum period of exclusion provided by the legal framework for this kind of situation?	See answer to question no. 20

<sup>14</sup> Interview with Mrs. Gaetana Morgante. Literature reference: Nicotra I.A. (a cura di), l'autorità nazionale anticorruzione. Tra prevenzione e attività regolatoria, Giappichelli, 2016.

<sup>15</sup> Interview with Prosecutor Mr. Walter Mapelli (Court of Bergamo).

Have there been any exceptions of unconstitutionality/ lack of legality raised in respect these provisions?	No
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**25. Do experts consider that exclusion from public procurement as an administrative sanction applied to a legal person, who is under judicial proceedings in respect to criminal acts, breaks the innocent presumption principle? (maximum 1000 words)**

There is no exclusion from procurement in case of ongoing proceedings. In case of exclusion for such reason, it is possible to appeal to the administrative court requesting the admission to participation in the tender. However, experts consider the exclusion for these reasons as a violation of the principle of presumption of innocence. Nevertheless, it is useful to activate the tools provided in paragraph 5 of Article 80, with the limits set out by ANAC Guidelines adopted with resolution n. 1293/2016. Under this provision are listed the appropriate means of proof that the PA consider as are grounds for exclusion.

Consider the following helping questions	
Does the situation of exclusion apply in your country?	Yes
What is the legal framework that allows the exclusion and on what grounds?	Art. 80 Legislative Decree n. 50/2016 (Public Procurement Law)
Is there any maximum period of exclusion provided by the legal framework for this kind of situation?	See answers to questions no. 2 and no. 3
Have there been any exceptions of unconstitutionality/ lack of legality raised in respect these provisions?	No

### PART III – CASE STUDIES ANALYSIS (DESK RESEARCH AND/OR INTERVIEW)

- 26. Please provide two case studies where private legal persons were convicted for corruption, money laundering, fraud or crimes against the interest of European Union, and additional sanction of exclusion from public procurement were applied by the court. If no such cases are available, please provide any 2 case studies where additional sanction of excluding from public procurement would have been necessary but not applied or where it has a major role.**

**A. CASE STUDY 1 - *GOLDEN CITRUS*<sup>16</sup>**

This case concerns a fraud against the EU on financial contributions for the agricultural sector.

Tax Police of the Guardia di Finanza in Messina (Sicily) found out the fraud during a police operation called "Agrumi d'Oro (Golden Citrus)". Italian financial police discovered a complex system of continuous frauds against the European Union carried out through a specific consortium of companies operating in the fruit-processing sector.

Thorough investigations found out a relevant number of false invoices filed from 2011 to 2015, reaching over 67 million Euros; these invoices regarded the sale of agricultural products, specifically lemons, which were never produced or purchased. False invoices were issued circularly between the aforementioned consortium and two different companies based in Sicily but referable to the same group. The aim was to virtually raise the volume of the production of citrus and to reach the requirements to access to European aid for agriculture.

Investigations found out that extended lands supposed to be used for the farming of citrus were not used for this purpose and the actual cultivated areas were considerably smaller (62% less). Most of these lands were not used for farming at all. Controls also found out that several machines for selling and marketing the products have never been working.

An additional illicit system to unduly pay 2,5 million Euros of public contributions was found out. Among the seized documents, several falsified bank checks submitted to get European funding were found by the authorities, also through the cross-examination of documents submitted to obtain Community contributions.

Financial police reported five people to the Court for aggravated state damage, a crime punished up to 6-year imprisonment and for tax evasion, as regulated by articles 2 and 8 of Legislative Decree n.74/2000. Charges have been brought for issuing invoices for non-existing operations. Corporate liability for the consortium, pursuant to Legislative Decree n.231/2001, came at stake, too.

Public Prosecutor requested and obtained the seizure of the equivalent of the proceeds of crime in movable and immovable property, totalling a value of 1.900.000 Euros. The investigation stopped the consortium from obtaining an additional funding of 600.000 Euros, which were being reimbursed to the Consortium by the EU.

This is a typical example of a criminal strategy to commit a EU fraud, which is difficult to track as structured companies or group of companies can implement sophisticated ways to hack or divert transactions. Financial

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<sup>16</sup> Source: <http://www.gdf.gov.it/stampa/ultime-notizie/anno-2017/febbraio/operazione-agrumi-doro-giro-di-fatture-false-per-oltre-67-milioni>

police, specialised in State fraud and tax evasion, seems to have adequate resources and skills to track down and prosecute this kind of activities.

## **B. CASE STUDY 2 - EXPO 2015<sup>17</sup>**

EXPO 2015 case, also called the "Procurement Dome", regards a large number of illegal activities involving political figures, public officials and entrepreneurs. It is a perfect example of poor management of public funds allocated for the realization of large works, along with a dense network of political and business relations, which can affect all the procurement proceeding, from the assignment to the execution of works.

The main alleged offences were corruption, fraud, bribery, criminal association, false statement, bid-rigging, illicit intrusion into computer systems and other minor offences committed by entrepreneurs to help their businesses, public officials to enrich their own revenue and intermediaries. Corruption was mainly characterized by the illegal payment by entrepreneurs of several million euros.

The main subject of speculation was the construction of the ground ("Plate"), where all the exhibition structures covering an area of more than 110 hectares lay. The monetary value for the realization of the plate started from an auction base of 272 million Euros. The contract was awarded to companies that were found to be associated with the Sicilian mafia that helped to reach a downturn near the minimum threshold for a price of about 165 million Euros.

Top executives within the EXPO organization (a public corporation) were involved, as well as executives from other public bodies working on infrastructure and city transport. On the private side, some company directors, had been previously convicted for corruption-related offenses.

Differently from the previous existing procurement law, if the new procurement code had been in place, the exclusion of suspected companies would have been more successful. A conviction for corruption is now a good cause for excluding companies from participating to tenders (Article 80 (1) (b) and paragraph 3 of the new procurement code). Moreover, some companies had been targeted with an "anti-mafia ban" as they had close connections with suspected criminal organisations (exclusion would have operated in accordance with the provisions of Art. 80, paragraphs 2 and 3). Luckily, 106 anti-mafia bans issued by several prefectures in Italy have avoided an additional 219 million euros from going to illicit organisations.

Dia's (Antimafia Authority) and Guardia di Finanza (Tax police) recorded over two thousand phone tapes and meetings; these files show a dangerous framework of organisations trying to drive Expo's contracts.

Among the several cases related to the EXPO, we focused on one of the main issues; the charge involves a public official for having leaked classified information to some companies that went on to win the bid. He collected

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<sup>17</sup> Source: <http://espresso.repubblica.it/plus/articoli/2014/05/14/news/expo-cronaca-di-uno-scandalo-annunciato-1.165444?preview=true>  
<http://espresso.repubblica.it/inchieste/2016/11/17/news/grandi-opere-corruzione-in-corso-cosi-gli-appalti-diventano-il-regno-delle-tangenti-1.288717?preview=true>



classified information through an illegal intrusion into computer systems: the companies could also adapt their offers based in information about the offers made by other companies.

Specifically, among other conducts, the public official got a bribe of € 30,000 through a simulated professional performance. Such conduct would have been cause of exclusion of the company in accordance with the provisions of art. 80, paragraph 5, letter c) of the new procurement code. This provision allows the contracting authority to exclude the company if it finds out an "attempt to unduly influence the decision-making process of the contracting authority or to obtain confidential information for its own benefit".

The discovery of this offence triggered all the investigations on EXPO, with arrests and interrogatories to follow. An arrested entrepreneur disclosed relevant information showing the connections between political, administrative and private subjects. He mentioned the involvement of government officials, too, which were not directly involved in the proceedings but had a role in influencing processes.

Court of Milan found out that also the appointment of commissioners for procurements was forged to facilitate people with connections to specific companies. Following investigations and arrests, EXPO2015 construction works were delayed and suspended repeatedly, so to make urgent procedures necessary to complete the works on schedule. These additional, urgent procedures cost to the State additional 100 million Euros on the main contract (thus cancelling the original downturn of the tender).

Most of illicit behaviours started in 2012 and continued until their discovery. Public Prosecutor of Milan then ordered the companies to complete the works to fulfil delivery within the useful terms of the event. The Anticorruption Authority (ANAC) had a crucial role in allowing the works being completed despite of the delays and the criminal activities conditioning the works. ANAC monitored and supervised the process, selecting public commissioners, appointing new managers and monitoring the execution of works. It also sanctioned activities contrary to legal provisions.

Some of the criminal proceedings reached a final conviction while others are ongoing; the quantification of total sanctions is still difficult to estimate. Unfortunately, the regime of statutes of limitations in Italy still creates damages to the judicial system, with trials unable to reach their conclusion, leaving possible perpetrators unpunished.

EXPO2015 case exposed how complex was to prevent possible corruption crimes in events of such a scale but also showed how the country dealt with difficulties.

One negative result is that Italy is still afflicted by criminal interference in large public works despite the repeated scandals in past had taught a hard lesson. However, article 353 of Criminal Code on bid-rigging should strengthen the capacity of the State in reinforcing the framework.

The case also proved that the former laws on procurement were absolutely unsatisfactory, because it did not explain accurately the grounds for exclusion but only mentioned general, imprecise criteria.

Contracting authorities could discretionary decide on many aspects of the proceeding, including whether to take an occurrence into consideration or not, to exclude a company or not. Companies exploited this situation, participating and adjudicating contracts despite possible conflict of interest and resumes full of convictions for

crime against the public administration (in one case a company had been hit by a mafia-related ban and had its president convicted six times for corruption-related offences).

New procurement code introduced obstacles for such companies to participate in public tender. If applicable at the time of EXPO case, exclusion would have activated immediately when the contracting authority had carried out ordinary checks on companies' requirements.

EXPO 2015 case was an expression of the virtuous activity by the Italian Administrative Authorities (eg ANAC) to correct the emergence of corrupt scandals.

Moreover, the problem of corruption was exposed again as a pervasive illness of the country, pushing the decision-makers to further review legal provisions, also with reference to the interest of European Union.

## PART IV – CONCLUSION AND RECOMMENDATIONS

### 27. Conclusion

In general, Italian legislative framework referred to the protection of European Union's financial interests seems to be solid for crime prevention, controls and investigations of offenses.

A specific law was introduced in 2001, providing corporate liability for crimes committed in their interest or benefit; this law started a process of raising awareness towards legality within companies.

Recent reforms on corruption and anti-money laundering have tightened the framework. Code on public procurement has been extensively amended by the Legislative Decree no. 50/2016, implementing the European Public Procurement Directive.

The main differences with the previous code is the specific and broad outline of the causes of exclusion from public procurement. Moreover, one should notice that the Italian law provided for further hypotheses not directly covered by the European directive (e.g. a ban for mafia connection).

As to sanctions, Italy has always had a homogeneous system since the introduction of the criminal code in 1930. In particular, there is a broad scenario of complementary sanctions to the main imprisonment term: the most important is the ban on contracting with public administration, which peaks the unlimited interdiction for natural persons, and a two-year limit for legal persons.

Overall, the Italian also complied to the standards imposed by the European Union. Some features still need further improvement but the general approach in terms of prevention and culture of business has definitely made a step forward.

### **28. Recommendations on how to improve national legal framework and practice in the matter of the application of exclusion from public procurement as an additional sanction to the one for corruption, money laundering, fraud or related criminal offenses (maximum 2000 words)**

Prosecutors: establish more specific and immediate criteria for the application of the additional sanctions to companies (art. 9 LD 231/2001); Provide the PA with the opportunity to make further requests to have an early knowledge of the requirements by companies in order to be able to take part to a tender.

- a- Within corporate responsibility law (LD 231/2001), extend the number of crimes directly related to of public procurement, such as the offenses provided by the Criminal Code at the Articles 346-bis (*Traffic of illicit influences*), 353 (*Bid-rigging*), 356 (*Fraud in public furniture*);
- b- Increase the dialogue between ANAC and the private sector to eliminate all the interpretative problems on the legal standards and to ensure simplicity and transparency for participation to public procurement;
- c- Extending the “side effects” of the ban measure, currently limited by Article 80, paragraph 14, to subcontracting contracts. For example, by introducing a further prohibition, equal to the duration of the suspension, to receive funding or benefits of any kind from the Public Administration or the European Union. This would prevent anyone involved from benefiting money public through alternative channels.