



**THE PREVENTIVE ROLE  
OF THE JUDICIARY  
IN PROTECTING  
THE FINANCIAL INTEREST  
OF THE EUROPEAN UNION**

A COMPARATIVE ANALYSIS FOR IMPROVED PERFORMANCE

**COMPARATIVE REPORT**

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# THE PREVENTIVE ROLE OF THE JUDICIARY IN PROTECTING THE FINANCIAL INTEREST OF THE EUROPEAN UNION

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**Transparency International Romania (TI-Ro)** is a nongovernmental organization whose primary objective is to prevent and fight corruption on a national and international level, mainly through researching, documenting, informing, educating and raising the awareness level of the public. TI-Ro was founded in 1999. That same year, Transparency International Romania was accredited as a national chapter of the Transparency International movement.

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# I. INTRODUCTION

## 1. PREAMBLE AND PROJECT BACKGROUND

### 1.1. DESCRIPTION OF THE ACTION

The fight against corruption and fraud at the level of the European Union has two dimensions: one is related to the protection of the financial interest of the Union as a whole, the other one focuses on the protection of the interests of European citizens in their capacity as contributors to the European budget, who are entitled to good administration and access to good quality products and services.

In this context, most of the cases that affect the financial interests of the EU are directly linked to procurement procedures within projects and programmes. As such, the public procurement procedures have been of great concern for the various EU and national institutions and a radical reform of the system was initiated at EU level and started its transition to national levels in 2014 after the adoption of Directives 2014/24/EU, 2014/23/EU and 2014/25/EU<sup>1</sup>.

The judiciary plays a crucial role in this context. Despite various efforts of the administrative bodies, often financial interests are protected through sanctioning measures, rather than through preventive ones. While judicial sanctioning is the most efficient option, it is much more expensive and time consuming than prevention, and often can be reached only after several administrative steps have been processed.

However, the judiciary does not have only a sanctioning role. Through its practice and rigorous reasoning of the rulings, it can play an important preventive role when ensuring predictability and consistency. As such, judicial solutions can have a dissuasive effect both regarding those in breach of the law, but also to third parties potentially tempted to break the law, if sanctions are not deterrent.

In most of the European national laws, criminal sanctions applied to legal persons for corruption, fraud or other illegal activities affecting the interest of the Union can range from financial penalties and fines to dissolution. When sanctions are of financial nature, accessory penalties can be applied in order to prevent legal persons' participation to other illegal activities that can cover the costs of the previous sanction. This is the case with the application of debarment from public procurement as accessory criminal penalty. Yet, the use of this instrument is still limited, thus putting pressure on contracting authorities to decide whether to exclude or not an entity based on its statutory declaration which is difficult to verify and prove false.

The present research aims at raising awareness among judicial professionals, European and national policy makers and administrative regulatory bodies regarding the role of the judiciary in protecting the financial interests of the Union, especially by implementing effective preventive tools against the fraudulent legal persons, such as the exclusion, ban or prohibition from public procurement as accessory criminal penalties.

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<sup>1</sup> DIRECTIVE 2014/24/EU OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 26 February 2014 on public procurement and repealing Directive 2004/18/EC; DIRECTIVE 2014/23/EU OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 26 February 2014 on the award of concession contracts; DIRECTIVE 2014/25/EU OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 26 February 2014 on procurement by entities operating in the water, energy, transport and postal services sectors and repealing Directive 2004/17/EC.

## 1.2. AIM AND OBJECTIVES

The project aims at strengthening the preventive role of the judiciary in protecting the financial interests of the Union.

To achieve this goal, a comparative law analysis has been carried out to determine the current contribution of the judiciary to prevent and sanction fraud, corruption, and other illegal activities affecting the financial interests of the Union.

The analysis focuses on the judicial practice as regards the sanctioning of legal persons for corruption, money laundering, fraud or related criminal offences, as well as the current practice in applying accessory penalties such as exclusion from procurement procedures, as a type of specific judicial protection of the financial interests of the Union against fraud. The project is based on the idea that exchange of information in this context is vital to allow for peer learning and cross fertilization.

Building on the comparative analysis of four national case studies: Greece, Italy, Lithuania and Romania and the recommendations proposed by expert researchers based on consultancy of the judiciary and administration professionals, the project advocates for an increased awareness of the judiciary on the importance of its role in protecting the financial interest of the Union.

To this end, the project included 5 main activities, as presented in figure 1.



*Figure 1. Main elements of project design*

## 1.3. EXPECTED IMPACT AND RESULTS

On the short run, the project will provide a comparative perspective on the current sanctioning practice of the courts with respect to offences affecting the financial interests of the Union. This analysis is relevant in the context of the relationship between administrative and criminal approaches to fight fraud and corruption.

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When applying only the main sanctions, it rests on the administrative bodies to verify the accuracy of the statutory declaration regarding the existence or not of a final ruling that disqualifies the bidder in the context of a public procurement. In this context the exclusion remains an administrative sanction. Whereas when the exclusion is used as a criminal sanction, it has a more assertive and dissuasive role. It can also be used to establish public data bases, thus facilitating administrative control.

Also on the short run, the project will generate a set of recommendations in order to improve the actual judicial practice and the application of accessory penalties. As they will be the result of a consultative process with judicial officials they are likely to be easier assumed by the judiciary as a whole, or to generate peer to peer pressure to enhance the protection of the financial interests of the Union through judicial sanctions.

On the medium to long run, consistent application of the criminal sanctions for illegal activities affecting the financial interests of the Union, as well as consistent application of the accessory penalties, which can seriously limit the economic activities and affect the profitability of a business, may bring a real deterrence effect for future criminal activities, both to the convicted ones and third parties. As such the judiciary strengthen its role not only in sanctioning fraud, but also in preventing similar fraud to happen, thus consolidating its role in protecting the financial interests of the Union.

## **2. THE METHODOLOGY OF THE NATIONAL AND COMPARATIVE RESEARCH**

### **2.1. METHODOLOGY OF THE NATIONAL ASSESSMENTS**

**Four national case studies: Greece, Italy, Lithuania and Romania have been conducted in order to support conclusions and recommendations at European level.**

The methodology of the national assessments targeted four main areas of interest:

- a. **The legal framework** based on desk research. The research has focused on the national legal framework on anti-corruption for the private sector, the sanctions applied to these entities for corruption crimes, money laundering, and other related crimes, as well as the national legal framework that provides the option of exclusion from public procurement as accessory sanction, besides the already common financial and criminal sanctions.
- b. **The background statistical data on judicial practice** based on desk research and information gathered using the freedom of information acts in the countries of interest (Greece, Italy, Lithuania and Romania). The national juridical practices on criminal sanctions applied to legal persons for corruption, money laundering, and other related offences have been taken into account, as well as the application rate of the accessory sanction of exclusion from public procurement besides the common financial and criminal sections for the previously mentioned offences.
- c. **The opinions and input from judicial experts and other stakeholders**, based on a small survey or focus groups, regarding the accessibility and adequacy of the exclusion system for administrative or law enforcement agencies responsible for due diligence in protecting the financial interests of the European Union and the exclusion system application in relation to the breach of fair competition and the non-discrimination and presumption of innocence principles.
- d. **Two case studies in each of the countries included in the assessment.**

Based on data collected during the online or face to face questionnaires (interview) and desk research, the researchers drafted conclusions and recommendations for improvement addressed to all categories of stakeholders.

### **2.2. METHODOLOGY OF THE COMPARATIVE RESEARCH**

Based on the national assessments, a comparative research has been drafted on the following criteria/themes:

- The criminal liability of the legal person in the four cases assessed and in the context of the comparative and international law;
- Criminal penalties for legal persons and the exclusion, ban or prohibition from public procurement as (accessory) criminal penalties;
- Comparative statistical data on the judiciary and the practice regarding sanctions in the four European countries;
- The existing grounds for exception from a criminal conviction or sanction for the legal persons in the four cases assessed;
- Administrative sanctions of exclusion, ban or prohibition from public procurement in the European context of Directive 2014/24/UE and in the four countries analysed;

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- The application of sanctions banning the participation to public procurement of different economic operators: bidders, associated bidders, subcontractors, third parties supporting the bidder to meet the procurement selection criteria.
- The synergies between the criminal legal framework and specific administrative regulations in the field of public procurement transposing Directive 2014/24/EU;
- Compliance with the presumption of innocence in the treatment of bidders, when under administrative or criminal investigation;
- Available databases and sources of information for contracting authorities regarding the bidders, their previous performance;
- Implications of the timeframe of sanctions and bans;
- Transnational implications.

### 2.3. STAKEHOLDERS TARGETED BY THE RESEARCH PHASES

The stakeholders involved in the research phase included:

- Judicial officials and experts: judges, prosecutors, lawyers, assessors, academics;
- Representatives of anti-fraud entities and/or public bodies that regulate and/or monitor the national public procurement system;
- Representatives of legal persons subject to application of exclusion from public procurement as an accessory sanction to the one for corruption, money laundering, fraud or related criminal offences;

The number of interviews (online or face to face questionnaires) and focus-groups was not fixed as long as the information was collected from the target groups and it was reliable. The researchers had the responsibility to ensure that all groups have been covered by the research, although the groups have been not evenly represented in the research phases.

## II. FINDINGS

### 3. THE CRIMINAL LIABILITY OF THE LEGAL PERSON

#### 3.1. International law and the criminal liability of the legal person

Several documents in the field of international law emphasize the need to regulate in the national legal framework the criminal or other forms of liability of the legal person for the criminal offences committed. In a chronological order the most important international legal documents on the topic include:

- **Recommendation No. R (88) 18 adopted by the Committee of Ministers of the Council of Europe on 20 October 1988 on the liability of enterprises for offences<sup>2</sup>**, formulated taking into consideration “the increasing number of criminal offences committed in the exercise of the activities of enterprises which cause considerable damage to both individuals and the community” and the need to regulate the liability for these acts “beyond existing regimes of civil liability of enterprises”. The text of the Recommendation is an invitation to the States to regulate in order to retain the criminal liability of enterprises regardless of whether or not the natural person who is the author of the acts or omissions of a criminal nature has been identified; however, it does not recommend exonerating individuals from liability if they are identified. In essence, the recommendation stresses the need to retain a personal responsibility of the legal person, distinct from that of the natural person called to represent it.
- **The Second Protocol of the Convention on the protection of the European Communities' financial interests, Council of the European Union Act of 19 June 1997<sup>3</sup>**, stated in Article 3 that “each Member State shall take the necessary measures to ensure that legal persons can be held liable” for at least three types of criminal offences:
  1. fraud,
  2. active corruption,
  3. money laundering.

The liability of the legal person is engaged provided that the criminal offence is perpetrated to their benefit “by any person, acting either individually or as part of an organ of the legal person, who has a leading position within the legal person, based on:

- a power of representation of the legal person, or
- an authority to make decisions on behalf of the legal person, or
- an authority to exercise control within the legal person.”

The protocol calls for the national regulation of the liability of legal persons for the perpetuation of the aforementioned criminal offences, as well as for its “involvement as accessories or instigators in such fraud, active corruption or money laundering or the attempted commission of such fraud”.

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<sup>2</sup> Official document available online at:

<https://wcd.coe.int/com.instranet.InstraServlet?command=com.instranet.CmdBlobGet&InstranetImage=2732062&SecMode=1&DocId=698704&Usage=2> (last accessed 30/10/2017).

<sup>3</sup> Official document available online at: [http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:31997F0719\(02\)](http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:31997F0719(02)) (last accessed 30/10/2017).

According to Article 3, paragraph 3, the liability of the legal person must not exclude the liability of the natural persons, perpetrators, accessories or instigators to the said facts.

The Protocol doesn't specify or impose the need for criminal sanctions. Instead, it states sanctions have to be proportionate and dissuasive in order to be effective and mentions as examples:

- criminal fines;
  - non-criminal fines;
  - exclusion from entitlement to public benefits or aid;
  - temporary or permanent disqualification from the practice of commercial activities;
  - placing under judicial supervision;
  - a judicial winding-up order.
- **The OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, 1997<sup>4</sup>**, stipulates in Article 2 that “each Party shall take such measures as may be necessary, in accordance with its legal principles, to establish the liability of legal persons for the bribery of a foreign public official”, but it favours the criminal liability of legal persons, by adding in Article 3.2. that “in the event that, under the legal system of a Party, criminal responsibility is not applicable to legal persons, that Party shall ensure that legal persons shall be subject to effective, proportionate and dissuasive noncriminal sanctions, including monetary sanctions, for bribery of foreign public officials”.
  - **The Council of Europe Convention on the Protection of the Environment through Criminal Law, of 4 November 1998, Strasbourg<sup>5</sup>**, builds on the idea that “environmental violations having serious consequences must be established as criminal offences subject to appropriate sanctions” and requires ratifying parties (states) to “impose criminal or administrative sanctions or measures on legal persons on whose behalf an intentional or negligent environmental offence has been committed by their organs or by members thereof or by another representative” (Article 9 on corporate liability).
  - **The Council of Europe Criminal Law Convention on Corruption, of 27 January 1999, Strasbourg<sup>6</sup>**, aiming at the co-ordinated criminalisation of a large number of corrupt practices. According to the convention, legal entities shall also be liable for offences committed to their own benefit, and shall be subject to effective criminal or non-criminal sanctions, including monetary sanctions.
  - **The United Nations Convention against Transnational Organized' Crime, 'adopted by General Assembly resolution 55/25 of 15 November 2000<sup>7</sup>**. States that ratify this instrument commit themselves to taking the necessary measures in accordance with their legal principles to establish the liability of legal persons implicated in committing serious crimes involving an organized criminal group. Regarding the legal nature of the liability of the legal person, the UN Convention states: “subject to the legal principles of the States Parties, the liability of the legal person may be criminal, civil or administrative.”

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<sup>4</sup> Published along with related documents online at: [https://www.oecd.org/daf/anti-bribery/ConvCombatBribery\\_ENG.pdf](https://www.oecd.org/daf/anti-bribery/ConvCombatBribery_ENG.pdf) (last accessed 30/10/2017).

<sup>5</sup> Official document available online at: <https://rm.coe.int/168007f3f4> (last accessed 30/10/2017).

<sup>6</sup> Official document available online at: <https://rm.coe.int/168007f3f5> (last accessed 30/10/2017).

<sup>7</sup> Official document available online at:

<https://www.unodc.org/documents/treaties/UNTOC/Publications/TOC%20Convention/TOCebook-e.pdf> (last accessed 30/10/2017).

- **The UN Convention against Corruption (UNCAC), adopted by General Assembly resolution 58/4 of 31 October 2003<sup>8</sup>** stipulates in Article 26 regulations for the liability of legal persons for participating in the corruption offences established in accordance with the Convention. According to UNCAC, “subject to the legal principles of the State Party, the liability of legal persons may be criminal, civil or administrative”, “without prejudice to the criminal liability of the natural persons”. As the other aforementioned conventions, UNCAC stresses the importance of effective, dissuasive and proportionate sanctions, either criminal or non-criminal, including but not limited to monetary sanctions.

As mentioned, within the framework of these international recommendations for ratifying states, national legislatures can decide on the form of legal liability they impose to legal persons for criminal offences. Criminal liability is the most vigorous of liability forms and recommended with priority. It offers the advantage of the most dissuasive sanctions and it enables the most effective investigative procedures, while also providing better fair trial guarantees for the defendants. But international conventions take into account that not all national constitutions and/or legal doctrines allow, in their criminal law, the idea of criminal liability for legal persons. Therefore, different states accommodated differently the recommendations of the conventions.

### 3.2. Models and characteristics of the criminal liability of the legal person

While corporate criminal liability was first invented in the common law system in the 19<sup>th</sup> century, in different forms in the United States and the United Kingdom, only to become generalised in the common law systems in the 20<sup>th</sup> century, the concept penetrated rather slowly on the continent, being first introduced in the Dutch criminal code in 1950. Until three decades ago, in all jurisdictions the liability of legal entities was first implemented for statutory offences and was later extended to *mens rea* offences as well.

#### 3.2.1. Models of corporate liability

According to the OECD Anti-Corruption Network for Eastern Europe and Central Asia assessment of the “Liability of Legal Persons for Corruption in Eastern Europe and Central Asia”<sup>9</sup>, one can identify four systems of corporate punitive liability:

- a. **Criminal liability.**
- b. **Quasi-criminal liability**, present in “jurisdictions that only authorize the sanctioning of legal persons, without addressing the question whether a corporation itself can be guilty of committing crime”. Within this system sanctions are stipulated in the criminal law and the ends concerning the liability of legal persons are very similar with the ones of the criminal liability of legal persons. However, there are major theoretical and procedural differences between the systems.

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<sup>8</sup> Official document available online at:

[https://www.unodc.org/documents/brussels/UN\\_Convention\\_Against\\_Corruption.pdf](https://www.unodc.org/documents/brussels/UN_Convention_Against_Corruption.pdf) (last accessed 30/10/2017).

<sup>9</sup> OECD Anti-Corruption Network for Eastern Europe and Central Asia. 2015. Liability of Legal Persons for Corruption in Eastern Europe and Central Asia. Paris: OECD, pp. 12-13. Text available online at: <https://www.oecd.org/corruption/ACN-Liability-of-Legal-Persons-2015.pdf> (last accessed 30/10/2017).

- c. **Administrative punitive liability for criminal offences** perpetrated by the managers (or even employees) of corporations.
- d. **Administrative punitive liability for administrative offences** in jurisdictions that are still following the principle *societas delinquere non potest*, which rejects the idea that a legal person can commit or be held liable for a crime.

The advantages of the criminal liability lies in the existence of mechanisms to ensure the punishment of the culprits and, at the same time, the existence of strong guarantees of fair treatment<sup>10</sup>, including:

- **Existence of procedural guarantees for defendants which are legal entities.** The OECD Anti-Corruption Network for Eastern Europe and Central Asia assessment stresses that “criminal sanctions usually have serious negative impacts on convicted persons, the imposition of criminal sanctions is accompanied by certain procedural guarantees, such as the presumption of innocence, the right to present a defence, the guarantee against self-incrimination, etc. Comparable guarantees are not always present in an administrative proceeding, as its impact is not considered to be as harmful.”
- **Effective and varied investigative tools specific to criminal prosecution.** However, in most jurisdictions where criminal liability of the legal persons is not applicable, all necessary evidence against a legal person can be collected during the criminal proceedings previously conducted against the human perpetrator.
- **Trials taking place before specialised competent courts following criminal proceedings,** as it is reasonable to believe that criminal court judges are most competent to hear cases brought against legal persons.
- **Availability of mutual legal assistance and other international cooperation mechanisms,** while there are a number of international instruments regulating international mutual legal assistance and cooperation in criminal matters, but only few treaties deal with international cooperation in administrative law matters.
- **Longer statute of limitations periods** in the case of criminal offences compared with the administrative offences.
- **Stronger deterrence effect of the criminal liability compared to the administrative one,** as a conviction for a crime is not just a punishment, but also a stigma that may seriously harm a person’s and a business status and relationships in the community, while administrative liability has little, if any similar effect. However, one can argue that in the case of the legal persons and especially of corporations (small, medium or large enterprises) the “nature of the offence makes much more sense for the public at large” than the legal classification of the punishment, the stigma on the business being related to the unlawful act committed, not to the legal mechanisms ensuring its investigation and punishment.

### *3.2.2. Theoretical approaches to the criminal liability of legal persons*

Two main theories have been developed by practice and doctrine concerning corporation’s criminal liability:

- a. **The identification theory,** originated in the United Kingdom, is the most influential doctrine of liability for legal persons around the world, considering that a corporation may be held liable for acts of its

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<sup>10</sup> *Ibid*, pp. 14-17.

employees which would not certainly render liable a human employer in the same situation, because the acts (including the state of mind) of corporation's leaders were identified with the acts of corporation itself

- b. **The *respondeat doctrine***, developed in the United States, based on the civil law principle of *respondeat superior*: an individual is civilly liable for the acts of his agents. Thus, "the Elkins Act (1903) had specifically provided that acts and omissions of an officer functioning within the scope of his employment were to be considered those of the corporation employing him."<sup>11</sup>

However none of these doctrines is fully effective and fair. (a) On the one hand, when corporate crime occurs it is often very difficult to identify the individual wrongdoer, mainly in large and complex corporations, and therefore large legal persons can avoid liability under the identification theory. (b) On the other hand, it is virtually impossible to large legal persons to control the behaviour of all their employees and they cannot effectively avoid liability under the *respondeat superior* doctrine, despite of having done everything in their power to prevent their employees or agents from acting illegally.

As a result the identification theory has been expanded so that the liability of legal persons can also be engaged by the management's failure to supervise its employees. And this approach has been promoted by international organisations. For instance, the OECD Good Practice Guidance, recommends that a **legal person should be held liable when a "person with the highest level of managerial authority fails to prevent a lower level person** from bribing a foreign public official, including through a **failure to supervise** him or her or through a **failure to implement adequate internal controls**, ethics and compliance programmes or measures."

A more revolutionary approach is the one of '**corporate act and fault**', based primarily on the evaluation of the organisations as an independent body. Following this approach, pioneered by the 1976 Dutch Penal Code provisions, the law is not providing persons' acts are the acts of corporation, but lets the matter depend on circumstances and lets the judges decide if the concrete conditions of a case impose the consideration of the liability of a legal person, a natural person, of both or neither. Hence, the Dutch law started to move, "somewhat tentatively and incompletely, to organisational criteria for corporate liability."<sup>12</sup> **This 'objective' (or 'organisational' or 'holistic') approach to the criminal liability of the legal person** became one of the most widespread in the world, together with the '**extended identification model**' promoted by international organisations.

While the objective model offers a solution to the effectiveness vs. fairness dilemma raised by the identification and *respondeat superior* doctrines, "the question is how the corporate culture can be detected in practice. A corporation acting improperly may have two cultures, one on paper to show to state authorities when necessary and another one in real life. The question arises especially in relation to intentional crimes such as bribery. [...] If internal rules and regulations can insulate a company from prosecution, then making them up is just another thing to add to the checklist while planning the crime. Proving that the culture on paper is not the "real" culture of the company can be as difficult as proving the involvement of management in the crime."<sup>13</sup>

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<sup>11</sup> *Ibid*, p. 18

<sup>12</sup> *Ibid*, p. 19

<sup>13</sup> *Ibid*, p. 20.

### *3.2.3. The Relation between the criminal liability of a legal person and that of its agent*

#### *The persons whose acts can engage corporate liability*

Given the different approaches, there are specific differences regarding the persons whose acts can engage corporate liability. Depending on the doctrinal model adopted, national legislators have been relating the liability of the legal person to the liability of:

- **A responsible person**, defined either institutionally, according to their position, or functionally, according to their role, as a person with the right (institutional definition) or power (functional definition) to influence or control the legal person's acts. The category can include directors, managers, administrators, censors, auditors, shareholders with enough power etc.);
- **An employee** of the legal person, when the liability of the legal entity is based on its failure to supervise;
- **A related person**, not necessarily an employee;
- **No specific natural person**, following the idea of the legal person's liability through the concept of corporate fault. In this case the law does not determine the specific persons whose acts can engage the liability of a legal entity, but it requires that their "deeds have to be committed in the form of the guilt provided by the penal law"<sup>14</sup>. The guilt of the legal person is not defined as such in the law, but the doctrine relates it to the instigation, authorisation or tolerance of the criminal behaviour generated by the lack of control or supervision over the employees, lack of proper internal organization or a proper integrity policy.<sup>15</sup> This approach allows in Romania for the criminal sanction of legal persons managed formally by "straw men".

#### *The Relation between the legal person and its agent's misbehaviour*

All the models of corporate liability seek to make a distinction between crimes serving the private goals of the perpetrator and crimes intended to further the company's business. No model makes the legal person responsible for offences committed by responsible persons purely in their private interests. Several connection criteria are used to define the situations where the legal person is liable<sup>16</sup>:

- **The interest criterion**, which means criminal liability is related to acts perpetuated in the interest of the legal person. In this case, in most legal systems the question over the criminal liability for acts in the benefit of an affiliated entity remains opened.
- **The responsibility criterion**, applicable in some countries where corporate liability is based on the 'extended identification model'. According to this approach, only if the responsible person is acting within the limits of its responsibility, is the legal person's liability engaged.
- **"Acting on behalf of..."** the legal person is a widespread criterion for linking the agent's misdeeds with the company's business.
- **Acts "at the legal person's expense"** can engage corporate criminal liability in some jurisdictions, if the legal person bears the legal or material consequences of that act, for example, when the company's money is used for bribery.

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<sup>14</sup> Romanian Criminal Code, Article 16.

<sup>15</sup> Andra-Roxana TRANDAFIR-ILIE. 2015. "Răspunderea penală a persoanei juridice" in Superior Council of Magistracy and National Institute of Magistracy, *Conferințele Noului Cod Penal*. Bucharest.

<sup>16</sup> OECD Anti-Corruption Network for Eastern Europe and Central Asia. 2015. *Op. cit.*, p. 25-26.

### The autonomous criminal liability of legal persons

On the other hand, in all cases of ‘objective’ approach to the criminal liability of the legal person and in most cases when the other doctrines are applied, the criminal liability of the legal person is autonomous from the sanctioning of a natural person. This autonomy is twofold<sup>17</sup>:

- **the personal autonomy**, allowing for the legal person to be prosecuted separately from the natural person. In some cases, the law still requires the identification of the individual perpetrator.
- **the procedural autonomy**, if the legal person can be tried and convicted regardless of what decision has been taken or will be taken with respect to the individual perpetrator

#### *3.2.4. The scope of corporate liability*

##### Covered entities

In most jurisdictions corporate liability applies to legal persons, including for-profit and non-profit organisations, private companies or companies owned by the State or the local government, foreign and domestic corporations. “Legal person” is a term defined by the civil law and does not cover short-term unincorporated partnerships or other unincorporated entity without a legal personality. However, as such entities or associations have the capacity to perform legal actions, they are subject to liability in some countries, as Montenegro or Latvia, according to the OECD Anti-Corruption Network for Eastern Europe and Central Asia assessment<sup>18</sup>

On the other hand, in most jurisdictions the State, municipalities and other public institutions are immune from criminal liability. In some countries private entities with public functions (as notaries or bailiffs) are not criminally liable.

##### Covered offences

The scope of the criminal liability of the legal person should also be analysed from the point of view of the covered offences, two approaches being possible:

- a. The general approach, when legal persons are criminally liable for any crime;**
- b. The specific liability approaches, when the criminal legislation provides a limited list of criminal offences for which a legal person can be sanctioned.**

### 3.3. Corporate punitive liability in Greece, Italy, Lithuania and Romania for fraud, corruption, money laundering and crimes against the EU financial interest

Among the four national case studies undertaken within the project, three countries apply criminal liability of the legal person, in different forms: Lithuania, Italy and Romania. Greece applies administrative punitive liability for criminal offences for legal persons.

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<sup>17</sup> *Ibid*, p. 26-29.

<sup>18</sup> *Ibid*, p. 30.

### *3.3.1. The Greek case*

Within the Greek legal framework, **legal persons may not be held criminally liable**. According to the principle of individual culpability, only natural persons may be held liable for acts they committed and be criminally punished.<sup>19</sup> The lack of criminal sanctions for legal persons in the Greek legal framework does not mean, though, that they cannot be punished effectively. This gap is filled by administrative sanctions and provisions on civil liability, which also apply to corruption related offences.

Greece has ratified the Council of Europe Civil Law Convention on Corruption with Greek Law 2957/2001 (Government Gazette A' 260/12.11.2001), which provides for compensation for damages, in addition to contract annulment. The Greek Civil Code also stipulates a number of general provisions that could serve as the basis for legal persons' civil liability in case of corruption, such as compensation for damages, illicit enrichment and annulment of the legal act.<sup>20</sup>

In respect of legal persons' liability, the Greek administrative law provides for a wide spectrum of sanctions for corruption-related offences.

It is worth mentioning Article 51 of Greek Law 3691/2008 (the main Greek anti-money laundering act), as it covers the administrative liability of legal entities. In particular, the said article (article 51, paragraph 1 of Greek Law 3691/2008, as amended) provides that in case where money laundering offences, as well as predicate offences, such as (a) passive bribery (article 235 of the Greek Penal Code); (b) active bribery (article 236 of the Greek Criminal Code); (c) bribery and corruption of politicians and judges (articles 159, 159A and 237 of the Greek Criminal Code) are committed to the benefit of a legal person by a natural person acting either individually or as part of a body of the legal person and holding a leading position within the legal person based on a power of representation of the legal person or an authority to make decisions on behalf of the legal person or an authority to exercise control within the legal person, the legal person shall be punished.

Although the said article provides in paragraph 4 that the liability of legal persons shall be independent of any criminal, civil or administrative sanction applied to the natural persons involved, in practice, administrative proceedings against corporations commence once the competent authority or the Minister of Justice, if the case involves a non-obligated legal person, is notified by the Public Prosecutor who has initiated proceedings against the natural persons.<sup>21</sup> In fact, Joint Ministerial Decision 1130/2730/04.11.2010 of Ministers of Finance and Justice provides in article 2 that the prosecuting authorities notify the Financial and Economic Crime Unit of the Greek tax authorities (SDOE), once they initiate criminal proceedings against the natural person.<sup>22</sup> According to article 1 of the said Decision, the Financial and Economic Crime Unit of the Greek tax authorities (SDOE) is responsible for imposing and enforcing the aforementioned administrative sanctions.

Concerning the criminal offences that will lead to the administrative sanction of exclusion from public grants, aids, subsidies, awarding of contracts for public works or services, procurement, advertising and tenders of the public sector or of the legal persons belonging to the public sector, the following table summarises the relevant corruption, money laundering, frauds and frauds against EU offences.

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<sup>19</sup> MARGARITIS, Michail and Anta MARGARITI. 2014. *Penal Code, Interpretation – Application*, Dikaio & Oikonomia, P.N. Sakkoulas Publishers, p. 43 (in Greek).

<sup>20</sup> However, according to the UNODC Country Review Report of Greece for the review cycle 2010-2015 para. 126, page 55, there have been no reported cases where legal persons have been found civilly liable for corrupt acts.

<sup>21</sup> UNODC. 2015. *Country Review Report of Greece*, para. 132, page 56.

<sup>22</sup> UNODC. 2015. *Country Report for Greece, Review Cycle 2010-2015*, page 56, para. 132.

### *3.3.2. The Italian case*

In Italy, Legislative Decree no. 231 introduced the **Corporate Responsibility System** for the commission of crimes in 2001. However, since 1995, Italy began signing and ratifying international conventions to protect the economy, including the European Community Convention signed in Brussels on 26 July 2005, on the protection of the 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 for the liability for legal entities following two criteria for imputation: one is objective and the other is subjective. As to the first criterion, article 5 lists the hypotheses that engage the responsibility of the organisation when the offence was committed in the interest of or to the benefit of the corporation itself, by subjects in management position or by others subjected to their supervision<sup>23</sup>. The interest must exist and must 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>24</sup>).

As to the second criterion, it refers to the lack of organisational duties of the company and the liability for a crime caused by of organisational 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.

The other subjective criterion for the attribution of liability is governed by article 7, attributing responsibility to the body when the offence was committed in its interest and to its advantage when failing to comply with the direction and supervision obligations. In this case, the relative presumption of liability acts in favour of the body, since the burden rests with 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 offence, the legal person developed suitable models aimed at the prevention of crimes of the same kind as the one committed.

**The presumptive offences 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 the detriment of the State or of a public body;
- IT crimes and illegal data processing
- Organised Crime

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<sup>23</sup> ROSSI A. 2017. "La responsabilità degli enti (D.lgs. 231/2001): I soggetti responsabili", in *Rivista231*, available online at: <https://www.rivista231.it/Pagine/Pagina.asp?Id=618> (last accessed 30/06/2017).

<sup>24</sup> PULITANÒ D. 2002. "Responsabilità amministrativa per i reati delle persone giuridiche", in *Enc. Dir.*, Milano, vol. IV agg., p. 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> (last accessed 30/06/2017).

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- 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.

*3.3.3. The Lithuanian case*

In principle criminal liability of legal entities in the Lithuanian criminal law was established with the amendments of the Criminal Code of the Republic of Lithuania in 2000 and came into force in 1 May 2003<sup>25</sup>. According to article 20 of the Criminal Code, a legal entity is held criminally liable for the criminal offences committed by natural persons only when:

- a. a natural person, operating individually or on behalf of the legal entity, commits a criminal act to the benefit or in the interest of the legal entity;
- b. has the right to represent the given legal person; or make decisions on behalf of it; or control its activity.
- c. crime in question has been perpetuated as a result of directions from or due to insufficient supervision or control by the persons mentioned above.

Legal entities may also be held liable for criminal acts committed by another legal entity that is under its control and that acts as its representative, if such acts are committed for the benefit of the former legal entity under its instruction or permission or due to insufficient supervision. Criminal liability of a legal entity does not eliminate criminal liability of a natural person.

Out of the 262 criminal offences defined in the Lithuanian Criminal Code in total, for 127 both natural persons and legal entities may be held criminally liable. The most relevant criminal acts in the context of this study include:

- crimes and misdemeanours against property, property rights and property interests – most of Chapter 28 of Criminal Code (including swindling, match fixing, misappropriation of property, squandering of property, acquisition or handling of property obtained by criminal means, illicit enrichment, etc.);
- crimes against the security of electronic data and information systems – most of Chapter 30 of the Criminal Code (illegal data or information system interference, unlawful disposal of electronic data and devices);
- crimes and misdemeanours against the economy and business order – most of Chapter 31 of the Criminal Code (including smuggling, deceit of the customs, etc.);
- crimes and misdemeanours against the financial system - nearly the entire Chapter 32 of the Criminal Code (including fraudulent / negligent management of accounts, production of counterfeit currency or securities, legalisation of property obtained by criminal means, trade in securities by using non-public (insider) information, failure to pay taxes, etc.);

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<sup>25</sup> Criminal Code of the Republic of Lithuania, No. VIII-1968, access online: <https://www.e-tar.lt/portal/lt/legalAct/TAR.2B866DFF7D43/vVrMmyDxLS> (last accessed 30/06/2017).

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- crimes and misdemeanours against the civil service and public interests – most of Chapter 33 of the Criminal Code (usually referred to in practice as ‘corruption offences’ - bribery, trading of influence, graft, abuse of powers);

There is no definition of **corruption** crimes in the Lithuanian Criminal Code, even though it criminalizes offences that are in theory classified as corruption crimes. Separately, corruption related crimes are defined in the Law on Corruption Prevention<sup>26</sup> as follows: “*Corruption-related criminal acts shall mean taking bribes, receiving bribes via an intermediary, offering bribes, and other criminal acts committed in the pursuit of private or other persons’ advantage in the public administration sector or by providing public services, namely the abuse of office or exceeding one’s authority, abuse of one’s authority, tampering with official records and measuring devices, fraud, misappropriation or embezzlement of property, disclosure of an official secret, disclosure of a commercial secret, misrepresentation of information about income, profit or property, legitimization of the proceeds of crime, interference with the activities of a public servant or a person discharging public administration functions, or other criminal acts, if these acts are committed with the aim of seeking or demanding a bribe, offering a bribe, or concealing or covering up the act of taking or offering a bribe.*”

**Money laundering** is criminalized in Criminal Code art. 216 - ‘legalisation of property obtained by criminal means’ and partly in Criminal Code art. 213 – ‘production, storage or handling of counterfeit currency or securities’. **Fraud** is criminalized in Criminal Code art. 182. – “Swindling”.

There is no separate category of **crimes against the financial interests of the EU** in the Lithuanian Criminal Code. However, in practice, this does not preclude the Prosecution or the Financial Crimes Investigation Service (the local OLAF focal point) from investigating any crime that is related either to the financial interests of Lithuania – or the EU. This is also highlighted in the 2017 – 2020 strategy of the Prosecution<sup>27</sup> and, naturally, the Financial Crimes Investigation Service implements the OLAF policy in the field.

#### *3.3.4. The Romanian case*

In Romania, legal persons may be held liable for criminal offences committed by any person acting either individually on their behalf or as a member of a management body (board) of the legal person, by managers, decision makers within the legal person or by any person with control over the decisions of the legal person. Moreover, a legal person may be held liable where the lack of supervision or control has been the cause or the condition of offences perpetrated by a natural person under its authority on behalf of the given legal person.<sup>28</sup>

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<sup>26</sup> Law on Corruption Prevention of the Republic of Lithuania, No. IX-904, access online (in Lithuanian): <https://www.e-tar.lt/portal/lt/legalAct/TAR.4DBDE27621A2/AeGwNWRfhl> (last accessed 30/06/2017).

<sup>27</sup> Access online (in Lithuanian): <http://www.prokuraturos.lt/lt/administracine-informacija/planavimo-dokumentai-ataskaitos/prioritetines-veiklos-kryptys/134> (last accessed 30/06/2017).

<sup>28</sup> The Romanian Criminal Code, art. 135. The assessment made in this country report is based on the literature review of publications on the criminal liability of legal persons as follows:

- Maria D. COSTIN. 2010. *Răspunderea persoanei juridice în dreptul penal român*, Bucharest: Universul Juridic;
- Andra-Roxana TRANDAFIR-ILIE. 2013. *Răspunderea penală a persoanei juridice – Jurisprudența rezumată și comentată*, Bucharest: C.H Beck;
- Andra-Roxana TRANDAFIR-ILIE. 2015. “Răspunderea penală a persoanei juridice” in Superior Council of Magistracy and National Institute of Magistracy, *Conferințele Noului Cod Penal*. Bucharest;
- Anca JURMA. 2010. *Persoana juridică - subiectiv activ al răspunderii penale*, Bucharest: C.H. Beck.

The state and public authorities, at central and local level, cannot be held criminally liable. Public institutions can be held criminally liable, but not for any activities that are exclusively the responsibility of public bodies and cannot be carried out legally by private bodies.<sup>29</sup>

Private legal persons may be held liable for criminal offences committed:

- for their core business activities (like the criminal breaches of the competition law, or of environment laws)
- in their interest (the offences bringing direct advantages to the legal person)
- on their behalf (during business activities by any natural person acting on behalf of the legal persons)

For crimes perpetrated in the interest or on behalf of the legal person, it may be held liable even if the natural person committing the crimes is not officially and/or legally a representative or employee of the legal person, like in the case of the real beneficiary of a business or the 'de facto' administrator/manager.<sup>30</sup>

The criminal liability of legal persons in the Romanian legal system is direct, different and autonomous from the criminal liability of natural persons that are physically committing criminal acts, acting on behalf of the legal person or who have neglected to act, although the two are connected<sup>31</sup>. In this context, causes of impunity, justifications or aggravating circumstances will be examined and decided separately for legal persons and natural persons.<sup>32</sup>

The Romanian criminal law principles impose a subjectivity condition for the guilt of perpetrating a crime, therefore in the case of legal persons the subjective element is met regardless of whether the criminal offences are the result of an intentional decision of the responsible persons or bodies or the result of the lack of supervision or control mechanisms (including, but not limited to: poor internal organization, insufficient work protection measures, budget constraints) within the legal persons that allowed the perpetration of the criminal offence.<sup>33</sup>

In the Romanian legal system, legal persons may be held liable for any criminal offence perpetrated for their core business activities, in their interest or on their behalf as a result of an intentional decision of management or control bodies or as a result of the lack of or deficiency in the supervision or control mechanisms. Having said this, legal persons may be held criminally liable for corruption crimes, money laundering, fraud, and crimes against the financial interest of European Union if the above conditions are met. Moreover, in article 151, the Criminal Code provides clear rules on the criminal liability of legal successors of a legal person who perpetuated a criminal offence and limits to the reorganisation of a legal person prosecuted for a criminal offence.

**Concerning criminal provisions tackling corruption, money laundering, fraud and crimes against the financial interest of the European Union, several laws have been adopted in order to strengthen the fight against corruption in Romania.** Money laundering was regulated on in 2002 and the law has been

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<sup>29</sup> *Ibidem.*

<sup>30</sup> *Ibidem.*

<sup>31</sup> Andra-Roxana TRANDAFIR-ILIE. 2015. "Răspunderea penală a persoanei juridice" in Superior Council of Magistracy and National Institute of Magistracy, *Conferințele Noului Cod Penal*. Bucharest.

<sup>32</sup> Andra-Roxana TRANDAFIR-ILIE. 2013. *Răspunderea penală a persoanei juridice – Jurisprudența rezumată și comentată*, Bucharest: C.H Beck.

<sup>33</sup> *Ibidem.*

subsequently changed four times until 2017, the most recent amendments being adopted in May 2017<sup>34</sup>. In the field of anticorruption, a special law on corruption offences and crimes against the financial interest of the European Union, which complements and circumscribes the provisions of the Criminal Code, was adopted in 2000 (Law no. 78/2000) and several laws amending both the provisions on corruption offences and regulations regarding declarations of assets and declarations of interest have been subsequently approved by the government and the Parliament.<sup>35</sup> A new Criminal Code and a new Criminal Procedure Code entered into force in 2014, regulating the bribe and the influence peddling as corruption offences and other fraud offences under titles referring to the abuse of trust, electronic (IT) frauds and office offences. As a consequence of the 'fast-forward' procedure used for drafting<sup>36</sup> and adopting<sup>37</sup> the codes, several provisions of both codes have been declared unconstitutional by the Constitutional Court.

Taking all these into account, the Romanian legal framework concerning the criminal prosecution of corruption, money laundering, fraud and crimes against the financial interest of the European Union have been constantly improving since the beginning of the 2000. But one can also find the same legal framework as being unstable and unpredictable.

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<sup>34</sup> Law no. 656/2002 on preventing and sanctioning Money Laundering as well as for the introduction of measures to prevent and combat terrorist financing, subsequently amended. Superior Council of Magistracy and National Institute of Magistracy. 2015. *Ghid pentru combaterea spălării banilor destinat judecătorilor și procurorilor*, available online: [http://www.inm-lex.ro/fisiere/d\\_1443/Ghid%20combatere%20spalare%20bani\\_judecatori%20si%20procurori.pdf](http://www.inm-lex.ro/fisiere/d_1443/Ghid%20combatere%20spalare%20bani_judecatori%20si%20procurori.pdf) (last accessed: 30/10/2017).

<sup>35</sup> For more comprehensive assessments of the *National report on corruption* of Transparency International Romania: 2004-2011, available online at: [https://www.transparency.org.ro/politici\\_si\\_studii/studii/national\\_coruptie/index.html](https://www.transparency.org.ro/politici_si_studii/studii/national_coruptie/index.html) (last accessed: 30/10/2017).

<sup>36</sup> Drafting the Criminal Code and the Criminal Procedure Code did not comply with the provisions of the law on decisional transparency no. 52/2003, open debates being avoided by the government in order to speed up the law making process. A civil society initiative: *Stope the Codes* was initiated in 2009 against these procedures, but, despite civil society opposition, the codes drafted in this manner were adopted.

<sup>37</sup> The Criminal Code was adopted through a special Parliamentary procedure of Government Assumed Responsibility (art. 114), a procedure that doesn't allow for any debate on the legislation proposed by the government. The proposed legislation can be either adopted or rejected, and if rejected, the Government is also dismissed.

## **4. PENALTIES FOR LEGAL PERSONS FOR FRAUD, CORRUPTION, MONEY LAUNDERING AND CRIMES AGAINST THE FINANCIAL INTERESTS OF THE EU**

### **4.1. Principal and accessory criminal sanctions for legal persons in Europe**

A short list of international conventions mentions concrete criminal sanctions for legal persons, when criminal liability of legal entities is required. These international conventions are: (1) the OECD Convention, (2) the Council of Europe Criminal Law Convention and (3) the UNCAC, all of them recommending fines and confiscation of the proceeds of crime (or a monetary sanction with comparable effect). However, all international conventions ask for effective, proportionate and dissuasive sanctions.

Several sanctions are common within the punitive framework for legal persons including<sup>38</sup>:

- Fines;
- Confiscation of the proceeds derived from or obtained via the crime or extended confiscations;
- Dissolution, generally as an exceptional penalty that can only be applied under certain circumstances;
- Restrictions to corporate rights, including:
  - A temporary or permanent prohibition on conducting certain activity;
  - Prohibitions/restrictions to operate for a period of time / in a determined place / using a subsidiary or branch etc.;
  - Revocations of a permit, license, concession, authorisation etc.;
  - Restrictions to permits, licenses, concessions, authorisations etc.;
  - **Prohibition on participating in public bidding procedures, public procurement, agreements for public-private partnerships etc.;**
- The obligation to develop and implement a programme of effective, necessary and reasonable measures;
- The publication of the ruling.

While fines are always present in all systems of punitive corporate liability, including the criminal liability system, the quasi-criminal liability system, the system of administrative punitive liability for criminal offences or for administrative offences, the level, system and practical enforcement of fines vary so much that it is difficult to identify a unifying criterion of proportionality and deterrence. Moreover, OECD stresses that in most states monetary sanctions are not sufficiently severe to have a deterrence effect on large multinational corporations.<sup>39</sup>

Moreover, other sanctions vary greatly from one legal system to another and “the same sanction, e.g. disbarment from public procurement, may be considered a punishment in one country (Romania), a security measure in another (Croatia) and an administrative sanction in a third country (Estonia).”<sup>40</sup>

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<sup>38</sup> OECD Anti-Corruption Network for Eastern Europe and Central Asia. 2015. *Op. cit.*, pp. 35-45.

<sup>39</sup> OECD Working Group on Bribery in International Business Transactions. 2013. Phase 2 Report on Implementing the OECD Anti-Bribery Convention, p. 65.

<sup>40</sup> *Ibid*, p. 35.

#### 4.2. Principal and accessory criminal sanctions for legal persons committing fraud, corruption, money laundering and crimes against the EU financial interest

As presented, the four cases studied have very different characteristics of corporate liability, and as a consequence different sanctioning models.

##### 4.2.1. *The Greek case*

The administrative sanctions imposed on legal persons when they are liable together with a natural person for fraud, corruption, money laundering or other similar criminal offences depend on whether the legal person is an “obligated legal person” or not. “Obligated legal persons” are provided in article 5 of Greek Law 3691/2008 and include among others credit institutions, financial institutions, venture capital companies, companies providing business capital etc.

Hence, according to article 51, paragraph 1, section a’ of Greek Law 3691/2008, as amended, obligated legal persons may be punished cumulatively or alternatively with:

- An administrative fine of EUR 50.000 up to EUR 5.000.000; the administrative fine shall always apply regardless of the imposition of other sanctions.
- Final or provisional (1 month up to 2 years period) withdrawal or suspension of the permit for the operation of the legal person or prohibition of carrying out its business.
- Prohibition of carrying out specific business activities or of establishing branches or of capital increase for the same period of time.
- **Final or provisional exclusion from public grants, aids, subsidies, awarding of contracts for public works or services, procurement, advertising and tenders of the public sector or of the legal persons belonging to the public sector.**

According to article 51 paragraph 1, section b’ of Greek Law 3691/2008 (as amended), non-obligated legal persons may be punished cumulatively or alternatively with:

- An administrative fine of EUR 20.000 up to EUR 2.000.000.
- Final or provisional (1 month up to 2 years period) withdrawal or suspension of the permit for the operation of the legal person or prohibition of carrying out its business.
- Prohibition of carrying out specific business activities or of establishing branches or of capital increase for the same period of time.
- **Final or provisional exclusion from public grants, aids, subsidies, awarding of contracts for public works or services, procurement, advertising and tenders of the public sector or of the legal persons belonging to the public sector.**

Moreover, it should be noted that according to paragraph 2 of article 51 of Greek Law 3691/2008, when the commission of the crime by a natural person for the benefit of a legal person was made possible due to the lack of supervision or control, the following sanctions apply, cumulatively or alternatively: an administrative fine of EUR 10.000 up to EUR 1.000.000 for obligated legal persons and an administrative fine of EUR 5.000 up to EUR 500.000 for non-obligated legal persons.

In addition, the legal person may be subject to:

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- Withdrawal or suspension of the permit for the operation of the legal person or prohibition of carrying out its business.
- Prohibition of carrying out specific business activities or of establishing branches or of capital increase for the same period of time.
- **Exclusion from public grants, aids, subsidies, awarding of contracts for public works or services, procurement, advertising and tenders of the public sector or of the legal persons belonging to the public sector.**

All the above sanctions can be decided for a period of up to six months.

#### *4.2.2. The Italian case*

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

- financial penalties;
- confiscation;
- publication of the criminal decision;
- bans;

Bans include:

- the ban to exercise the activity;
- the suspension or revocation of the authorizations, licenses or concessions;
- **the prohibition of contracting with the public administration (including public procurement), except for obtaining a public service;**
- the exclusion from grants, contributions or subsidies and any withdrawal of those already granted;
- the prohibition to advertise goods or services.

Ban sanctions may 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>41</sup>.

#### *4.2.3. The Lithuanian case*

According to Art. 43 of the Criminal Code, there are three types of penalties for the legal entities for all crimes where such type of criminal responsibility is applied – including corruption crimes, money laundering, fraud and crimes against the financial interest of EU (if they fall in any of the crimes listed in the CC – see above):

- a fine;
- restriction of operation of the legal entity;
- dissolution of the legal entity.

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<sup>41</sup> CERQUA L., LUPARIA L., CANZIO G.. 2014. Diritto penale delle società. Profili sostanziali e processuali.

Having imposed a penalty upon a legal entity, a court may also decide to announce this ruling in the media.

#### *4.2.4. The Romanian case*

The primary criminal punishment for legal persons is the fine. The fine value is dependent on the sanction in fine or prison applicable for natural persons – a table of correspondence between the prison punishments for natural persons and the fines for legal persons being presented in the Criminal Code – and on the total revenue value of the legal person and varies from 3.000 lei (about EUR 650) to 3.000.000 lei (about EUR 650.000).<sup>42</sup>

Several accessory sanctions are provided by the Criminal code<sup>43</sup>:

- the dissolution of the legal person;
- suspension of the activity or one of the activities of the legal person for a period from 3 months to 3 years;
- the closure of working places of the legal person for a period from 3 months to 3 years;
- **ban from participating in public procurement procedures for a period from 1 to 3 years;**
- judicial supervision;
- publication of the conviction ruling.

The exact value of the fine, within the limits provided by the law and the application of one or more accessory sanctions is decided by the judge in accordance with the nature and gravity of the criminal offence.<sup>44</sup> The Criminal Code allows the judge to decide to apply several of the accessory sanctions, proportionally with the nature and seriousness of the criminal offence perpetrated by the legal person and accessory sanctions, whenever they are needed in the concrete context of the offence and the legal persons operations,<sup>45</sup>.

In case the final decision for a 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-year limit is provided.

#### *4.3. The ban from participation to public procurement as a punishment for criminal offences*

Among the national cases analysed, Lithuania doesn't ban convicted legal person from participating to public procurement as a sanction.

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

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<sup>42</sup> The Romanian Criminal Code, art. 136

<sup>43</sup> *Ibidem*.

<sup>44</sup> The Romanian Criminal Code, art. 137

<sup>45</sup> The Romanian Criminal Code, art. 137. Andra-Roxana TRANDAFIR-ILIE. 2013. *Op. cit.*, 2015 and Andra-Roxana TRANDAFIR-ILIE. 2015. *Op. cit.*

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

Ban sanctions may last no less than three months and no more than two years, and, 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.

**In Romania**, according to the Criminal Code, the accessory criminal sanctions applicable to the legal persons, including the ban from participation to public procurement, can only be applied when the principal sanction, the fine, has been decided by the Court. The Criminal Code provides that deciding on an accessory sanction is mandatory when the law explicitly provides for the sanction<sup>46</sup>, which happens rarely. The corruption criminal offences, frauds, money laundering offences or crimes against the financial interest of the EU are not provided for as mandatory accessory sanctions.

Moreover, according to Law no. 253/2013 on the execution of criminal punishments, the criminal conviction including the accessory sanction of prohibition to participate in public procurement procedures for a limited period from 1 to 3 years is communicated to the administrator of the electronic system for public procurement (The Agency for the Digital Agenda of Romania, administrating the SEAP/SICAP system). The Agency subsequently operates a ban on participating to procedures for the convicted legal persons. The length of the exclusion is from one to 3 years, according to the judge's decision.

**Both in Romania and Italy, the ban from participating in public procurement refers to the direct and indirect participation to public procurement procedures, including thus the participation as a bidder, a subcontractor, a supporting third party.**

**In Romania, expert consultation through interviews has revealed** two main critiques regarding the criminal liability of legal persons:

1. The prohibition of participating to public procurement is not a mandatory sanction for none of the corruption offences or for frauds, including frauds against the financial interest of the European Union. As a result, the exclusion from public procurement is not provided in all cases where needed.
2. On the other hand, the Courts practices extended the liability too much, to acts that are specific to natural persons, as an artificial way to generate civil reparations for the victims of the offences. And in this context the exclusion from public procurement as an accessory criminal sanction can be decided against legal persons that are not a threat to the correctness of public procurement, affecting competition.

On the other hand, **in Greece**, where legal persons are not criminally liable, but can receive administrative punishments if involved in the criminal offence of a natural person, the exclusion from public grants, aids, subsidies, awarding of contracts for public works or services, procurement, advertising and tenders of the public sector or of the legal persons belonging to the public sector may be imposed:

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<sup>46</sup> The Romanian Criminal Code, art. 138.

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- as an administrative sanction by the Financial and Economic Unit of the Greek tax authorities (SDOE) in accordance with the Greek anti-money laundering legislation,
- by a common Ministerial decision of the Ministers of (a) Finance and Growth, (b) Tourism, (c) Justice, Transparency and Human Rights and (d) Infrastructure, Transportation and Networks in public procurement procedures, in accordance with Greek Law 4412/2016 (article 74 paragraph 3).

#### 4.4. Sanctioning in practice

The deterrent effect of criminal sanctions can be achieved if two conditions are met: wise legislative provisions and actual implementation of the rules. However, both the level of fines and the number of convictions of legal persons in the studied national cases are low and don't have sufficient dissuasive effect.

Comparing the number of legal entities sanctioned by criminal courts for corruption crimes, frauds, money laundering, crimes against the financial interest of the European Union (*as presented in Annex 1*), in the three cases analysed where legal persons are criminally liable: Italy, Lithuania and Romania, one can see only a handful of legal persons have been punished in the last four years.

*Table 1. Statistical data on sanctions applied to legal persons in Italy, Lithuania and Romania*

	Italy				Lithuania				Romania			
	2013	2014	2015	2016	2013	2014	2015	2016	2013	2014	2015	2016
Total number of legal entities sanctioned for corruption crimes	2	3	3	6	5	3	0	0	6	4	14	13
Total number of legal entities sanctioned for money laundering	0	0	0	0	0	0	0	0	0	0	0	0
Total number legal entities sanctioned for fraud (domestically incriminated)	6	6	4	11	10	13	10	3	0	0	0	0
Total number of legal entities sectioned for crimes against financial interest of European Union	0	0	0	0	na	na	na	na	<i>The statistics available cover all criminal offences regulated by Law no. 78/2000 (see the first line of the table).</i>			
Number of sanctions of exclusion from public procurement applied to legal entities	10	27	8	0	na	na	na	na	<i>No statistical data available.</i>			
Number of sanctions of exclusion from public procurement applied to legal entities which committed corruption crimes	7	12	0	0	na	na	na	na	<i>No statistical data available.</i>			
Number of sanctions of exclusion from public procurement applied to legal entities which committed money laundering crimes	0	0	0	0	na	na	na	na	<i>No statistical data available.</i>			
Number of sanctions of exclusion from public procurement applied to legal entities which committed fraud	3	15	8	0	na	na	na	na	<i>No statistical data available.</i>			

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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	na	na	na	na	No statistical data available.
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*Source: Answers of responsible authorities to requests based on the freedom of information.*

Moreover, in Romania, although the accessory criminal sanction of prohibition to participate in public procurement procedures is communicated to the authority in charge of executing the ban, the judicial statistics dose not register systematically the sentences included in this sanction.

#### 4.5. Grounds for exemption from liability or punishment

One of the most effective ways in which corporate liability regimes are made effective not only from a punitive point of view, but also with an important prevention component against corporate crimes are the grounds for exemption from liability or punishment based on ‘due diligences’ and compliance programmes. The existence of a solid compliance programme or the other organisational efforts to ensure the correctness of a legal person and its agents (managers, employees, contractors etc.) will diminish the risk of perpetrating a crime and therefore the risk of liability.<sup>47</sup> It is only fair to allow the legal person to defend itself by proving these compliance mechanisms and tools are solid and normally effective and that in the case of a criminal offence being committed, it is the result of a reckless agent, not an organisational failure. Most countries following the organisational approach to criminal corporate liability, like the Netherlands, Australia and Switzerland, offer a ‘due diligence defence’.<sup>48</sup>

The problem rises however regarding who and how will prove and decide the compliance programmes or other due diligences are solid and genuinely designed to limit liability risk and not only to ensure defence if a guilty legal person is prosecuted.<sup>49</sup> Therefore the challenge is to ensure that a legal person’s operations have not been designed as criminal offences with the shield of a formal compliance programmed and that the occurrence of the criminal offence is an organizational accident.

**For example, in Italy, in order to be exempt from liability presumed for an organisational fault, the organisation must prove, pursuant to article 6 paragraph 1, Legislative Decree 231/2001, that:**

- A. the governing body has adopted and effectively implemented, before the commission of the crime, organisational and management models** (e.g.: compliance programs) suitable for preventing offences 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;

<sup>47</sup> Allens Arthur ROBINSON. 2008. “‘Corporate Culture’ as a Basis for the Criminal Liability of Corporations”. A report prepared for the U.N. Special Representative of the Secretary-General on Human Rights and Business, p. 69.

<sup>48</sup> *Ibid*, pp. 68-71. PIETH, M., LOW, L.A. and BONUCCI, N. (eds.). 2014, The OECD Convention on Bribery: A Commentary (2d ed). Cambridge, UK: Cambridge University Press, p. 223.

<sup>49</sup> *Ibid*, p. 69.

C. **the persons committed the crime by fraudulently evading the organisation and management models;**

D. **there has been no omission or insufficient vigilance on the part of 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 holding a 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>50</sup>.

Thus, the law indirectly requires the organisation to be equipped with appropriate compliance programs, aimed at the prevention of crimes provided by the law. In this regard, many medium and large sized companies have adopted a set of policies<sup>51</sup>, governance and control documents, regulating crime-risk activities and processes, setting up new internal bodies (e.g. Overseeing Bodies or Audit) or 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 offences may be committed; (b) providing for specific protocols to plan training and implementation of the organisation's decisions in relation to the offences to be prevented; (c) identifying ways to manage financial resources to prevent the commission of offences; (d) providing information to the body responsible for monitoring the operation and observance of the models; (e) introducing 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>52</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.

**In Romania**, on the other hand, the criminal law provides for a limited number of situations in which criminal liability is not applicable: the amnesty for a criminal offence, the statute of limitations, the absence or withdrawal of the injured party's complaint if the complaint generates the criminal action, the reconciliation of parties, if possible. These conditions are equally applicable to natural and legal persons.<sup>53</sup> The Criminal Codes also provides for a number of situations where a deed is not considered a criminal offence, like the self-defence, the state of necessity etc. However, most of these situations are only suitable for natural persons. On the other hand, the Criminal Codes also provides for several situations where the guilty person is not punished, to the extent to which their deed can be justified or the guilty person took actions to stop and repair the damages<sup>54</sup>. The latter situation is also applicable to legal persons and, as a result, the legal person, although found guilty, will not be sanctioned. However, the

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<sup>50</sup> VV.AA. 2016. *La prova nel processo agli enti*, Giappichelli, Torino.

<sup>51</sup> Expert interview: Avv. Fabrizio Sardella (Assistant Professor in Criminal Law at University of Castellanza Carlo Cattaneo – LIUC).

<sup>52</sup> ZANNOTTI R. 2008. *Il nuovo diritto penale dell'economia: reati societari e reati in materia di mercato finanziario*. MUCCIARELLI F. 2010. *Una progettata modifica al D.Lgs. n. 231/01: la certificazione del modello come causa di esclusione della responsabilità*, in *Società*, 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) (last accessed 30/06/2017).

<sup>53</sup> Florin STRETEANU. 2015. „Cauzele care înlătură răspunderea penală și cauzele care înlătură sau modifică executarea pedepsei” in the Superior Council of Magistracy and the National Institute of Magistracy, *Conferințele Noului Cod Penal*.

<sup>54</sup> *Ibidem*.

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Romanian Criminal Code doesn't offer the 'due diligences defence' to legal persons, making the criminal liability provisions more vigorous, but also less effective in preventing crimes.

## 5. ADMINISTRATIVE EXCLUSIONS FROM PUBLIC PROCUREMENT PROCEDURES

### 5.1. General framework under Directive 2014/24/UE

Economic operators that are not trustworthy and reliable to receive public funds or to enter in contractual relations with the public institutions are excluded from public procurement procedures<sup>55</sup>, based on a strictly regulated set of criteria. The public institutions and budgets are to be protected in this way from corruption and professional misconduct of contractors.<sup>56</sup>

Directive 2014/24/EU introduced new exclusion rules regarding public procurement at EU and Member State level, “both in their substantive aspects (creating new mandatory and discretionary grounds for exclusion, and requiring rules creating a possibility for self-cleaning), and through the imposition of minimum procedural requirements (notably, requiring Member States to adopt explicit procedures and regulating maximum durations for situations of exclusion beyond the specific procurement tender).”<sup>57</sup>

Directive 2014/24/EU imposes both mandatory and facultative exclusion criteria, the use of the facultative exclusion criteria being directly related to compliance with the principle of equal treatment, principle of proportionality and the free movement of goods, freedom of establishment and the freedom to provide services of the TFUE. Article 57 of the Directive regulates both the mandatory and facultative exclusion criteria, as presented in *Annex 2* and stipulates that the exclusion can be imposed at any moment during the procedure, when the contracting authority becomes aware of the situation engaging exclusion.

As regards the debarment criteria imposed by the Directive 2014/24, these can be organised as follows:

- Mandatory debarment based on the conviction by final ruling of the legal person or its administrator, manager or supervisor for a criminal offence from a limited list including:
  - organized crime
  - corruption
  - fraud
  - money laundering
  - terrorism
  - child labour and other forms of trafficking in human beings
- Mandatory debarment based on the breach of the obligation to pay taxes and social security contributions

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<sup>55</sup> See S ARROWSMITH, J LINARELLI & D WALLACE Jr (eds). 2010. *Regulating Public Procurement. National and International Perspectives*. The Hague, Kluwer Law International, pp. 41-49. See also DI GORDON & GM RACCA. 2014. “Integrity challenges in the EU and U.S. procurement systems”, in GM RACCA & CR YUKINS (eds), *Integrity and Efficiency in Sustainable Public Contracts*. Brussels, Bruylant, pp.117, 124-133.

<sup>56</sup> S WILLIAMS-ELEGBE. 2012. *Fighting Corruption in Public Procurement. A Comparative Analysis of Disqualification or Debarment Measures*. Oxford, Hart-Bloomsbury. See also T Medina ARNAIZ. 2006. “Grounds for exclusion in Public Procurement: Measures in the fight against corruption in the European Union”, in KV THAI (ed) *Advancing Public Procurement: Experiences, Innovation and Knowledge Sharing*. Boca Raton, FL, Pracademics Press, pp. 329-352. See also EUROPEAN COMMISSION. 2011. *Green Paper on the modernisation of EU public procurement policy Towards a more efficient European Procurement Market*, COM(2011), pp. 51-53.

<sup>57</sup> Albert SANCHEZ-GRAELLS. 2016. “Exclusion of Economic Operators from Public Procurement Procedures. A Comparative View on Selected Jurisdictions”. In M BURGI & M TRYBUS (eds), *Qualification, Exclusion and Selection in EU Procurements*, Copenhagen: European Procurement Law Series, vol. 7.

- Facultative debarment based on elements that constitute a risk for the contracting authorities, such as:
  - breach of legal obligations related to environment protection, labour conditions or
  - bankruptcy or insolvency of the economic operator
  - previous professional misconduct of the economic operator
  - grounded suspicions of breach of competition rules
  - a conflict of interest
  - a distortion of competition from the prior involvement of the economic operators in the preparation of the procurement procedure
  - prior deficiencies to deliver in contracts
  - misrepresentation in supplying the information required
  - undue influence on the decision-making process of the contracting authority

Analysing its text, one can observe that Directive 2014/24/EU thus implies: “(1) An obligation to take relevant self-cleaning measures into consideration, and (2) an obligation to establish rules governing the implementation at the national level. In this respect, a considerable degree of flexibility is conferred upon the Member States”<sup>58</sup> provided they:

- respect the TFUE principles,
- apply the mandatory exclusion criteria at any time during the procedure (article 57, paragraph 5 of Directive 2014/24)
- limit the time of exclusion to a maximum of 5 years as the situation generating the reason for exclusion for mandatory criteria and 3 years for the facultative criteria, if the period of exclusion has not been set by final ruling (article 57, paragraph 7 of Directive 2014/24).

## 5.2. Rules for administrative exclusions from public procurement processes at national level

In all of the four national cases analysed the legal provisions on public procurement were adopted in 2016 and in Romania and Lithuania the laws were subsequently modified in 2016 and 2017. As a large degree of flexibility is conferred upon Member States, presenting the situation in each of the four cases for comparison is worthwhile.

However, in general the four Member States are true to the Directive provisions, introducing all the facultative grounds for exclusion in the law, with the following individual characteristics:

- the Lithuanian law and to some extent the Romanian law introduce clear explanations on how the grounds for exclusion can be applied. For example, the Lithuanian law gives concrete definitions of concepts such as “professional misconduct” and the Romanian law provides example of clues for agreements between economic operators distorting competition within or in connection to the procedure of public procurement;
- the Italian law provides for association to mafia as a specific ground for exclusion, as a specific national risk, within the provision of the Directive 2014/24/EU stipulating the exclusion of bidders involved in organized crime;

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<sup>58</sup> E HJELMENG & T SØREIDE. 2014. “Debarment in public procurement: rationales and realization”, in GM RACCA & CR YUKINS (eds), *Integrity and Efficiency in Sustainable Public Contracts*. Brussels: Bruylant, p. 215.

- the Romanian law provides only for mandatory grounds for exclusion, as the state decided to impose on contracting authorities the facultative grounds provided by the Directive 2014/24/EU, as it stipulates that “contracting authorities may exclude or may be required by Member States to exclude from participation in a procurement procedure any economic operator in any of the” mentioned grounds in article 57 paragraph 4.

#### *5.2.1. The Greek case*

Greek Law 4412/2016 on Public Procurement of Works, Supplies and Services (Government Gazette A' 147/08.08.2016), which transposed into the national legal framework Directive 2014/24/EU on Public Procurement and Directive 2014/25/EU on Procurement by Entities Operating in the Water, Energy, Transport and Postal Services Sectors, also provides for the exclusion of economic operators from procurement procedures, if they are involved in corrupt practices. In particular, article 73 of Greek Law 4412/2016 stipulates the various grounds for exclusion from public procurement and distinguishes between mandatory and optional grounds for exclusion.

More specifically, according to paragraph 1, article 73, of Greek Law 4412/2016, contracting authorities exclude economic operators from public procurement procedures, once they prove, with the relevant verification process provided in the law, or once they become aware that the economic operator has been the subject of a conviction by final ruling for one of the criminal offences listed in the European Directive: organized crime, corruption, fraud, money laundering, terrorism, child labour and other forms of trafficking in human beings. It should be noted that when the economic operator is a natural person, the contracting authority shall examine whether the aforementioned grounds for exclusion are met regarding the given natural person. If the economic operator is a legal person, the contracting authority shall examine whether the aforementioned grounds for exclusion are met in the natural person against whom the final judgment was rendered, when this person is a member of the administrative, management or supervisory body of the economic operator or has powers of representation, decision or control therein, given that the Greek law does not provide for the criminal liability of legal persons.<sup>59</sup>

Also, concerning the exclusion of economic operators on grounds of breach of obligations to pay taxes and social security and the optional grounds of exclusion, the Greek regulations are also true to the Directive provisions.

For the optional grounds, in case the contracting authority wishes to include any of the non-mandatory grounds for exclusion in its declaration, then this ground becomes mandatory in the sense that the contracting authority must examine whether such ground is present or not.<sup>60</sup>

According to article 305 of Greek Law 4412/2016, which transposes article 80 of Directive 2014/25/EU, the pre-selection and qualitative selection of economic operators may include the grounds for exclusion listed in article 73. Finally, it should be noted that Greek Law 4413/2016 (Government Gazette A' 148/08.08.2016) on the Award of Concession Contracts, which transposes Directive 2014/23/EU on the award of concession contracts, provides in article 39 paragraph 4, similar grounds for exclusion.

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<sup>59</sup> Hellenic Single Public Procurement Authority, *Guideline 20 - Grounds for Exclusion from Participation in Public Procurement Procedures*, Athens, 14.06.2017, page 5.

<sup>60</sup> Hellenic Single Public Procurement Authority, *Guideline 20 - Grounds for Exclusion from Participation in Public Procurement Procedures*, Athens, 14.06.2017, page 8.

### *5.2.2. The Italian case*

In Italy, 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>61</sup>.

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 in 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 interests 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.

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 provided for in the same article. Moreover, the following 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; Art. 317 (bribery), Art. 318 (bribery for an act of office), Art. 319 (bribery for an act contrary to office duties), Art. 319-ter (bribery in legal proceedings), Art. 319-quater (undue induction to give or promise utility), Art. 322 (embezzlement for corruption purposes), Art. 322-bis (embezzlement, bribery, corruption and instigation to corruption in European Communities bodies and of officials of the European Communities and of foreign countries), Art. 320 (bribery of a person in charge of a public service), Art. 346-bis (traffic of illicit influences), Art. 353 (concerning the liberty of auctions), Art. 353-bis (disturbed liberty in the choice of contractors), Art. 354 (abstention from auctions), Art. 355 (non-fulfilment of public contracts), Art. 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);

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<sup>61</sup> GUCCIONE C. 2016. Il nuovo codice dei contratti pubblici – I requisiti degli operatori economici, in *Giornale Dir. Amm.*, 4, p. 436. Available online at: <http://www.unife.it/economia/lm.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> (last accessed 30/06/2017).

(D) crimes, committed or attempted, committed for purposes of terrorism, including international affairs, and the overthrow of the constitutional order, terrorist offences or offences 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 labour and other forms of trafficking in human beings as defined by Legislative Decree no. 24/2014;

(G) any other offences where the ban on 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 offences, art. 80, c. 2, provides that the exclusion from public tenders occurs 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 on 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:

- a) 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;
- b) the economic operator is in a state of bankruptcy or wind-up;
- c) 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;
- d) the participation of the economic operator results in a conflict of interests that cannot be solved otherwise;
- e) 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;
- f) 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;
- g) 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;
- h) the economic operator has infringed the prohibition of creating trusts;
- i) the economic operator does not have the certification of work for disabled people;
- j) the economic operator who, despite being the victim of the offences provided by art. 317 and 629 of the Criminal Code, has not reported the facts to the judicial authority;

- k) 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 as a unique decision centre.

### 5.2.3. *The Lithuanian case*

In Lithuania, article 46 of the Law on Public Procurement was changed transposing the new EU Public Procurement Directive, the new amendments coming into force on 1 July 2017. The grounds for exclusion from tender procedure have been clarified and the list has been supplemented.

These grounds are listed in Art. 46 of the Law on Public Procurement (amended on 2 May 2017 to transpose the new EU Public Procurement Directive; came into force on 1 July 2017). These grounds in principle are not applicable for small-scale tenders and tenders by purchasing subjects within the sectors of water management, energy, transport and postal services.<sup>62</sup>

The exclusion grounds mainly focus on corruption crimes, crimes threatening Lithuanian and/or EU financial interests, failure to fulfil tax obligations, certain specific crimes (terrorist or terrorist activity – related crimes, trafficking in human beings, etc.), laundering of crime-related property, competition crimes, failure to fulfil tender contracts in the past, professional misconduct etc. There is a separate list for optional grounds of exclusion that may also be applied by the purchasing organization.

Law on Public Procurement provides details on exclusion as follows. The grounds follow closely the ones in Directive 2014/24, but with clear explanation on how these apply. For example, the Lithuanian law provides the definition of professional misconduct as an exclusion ground (article 46, paragraph 4, point (7)):

- a. *“professional ethics breach, when less than a year has passed since the decision that the bidder does not follow the professional ethics norms;*
- b. *a breach of competition, occupational safety and health, information protection, intellectual property protection, where an administrative punishment or economical sanction provided in Lithuanian or foreign laws has been applied for the bidder or its head and less than a year has passed since the decision or the day when the person has fulfilled the administrative obligation;*
- c. *a breach of a prohibition to collude provided in the Lithuanian competition law or similar legal act of another country, where less than 3 years have passed since the decision to apply an economical sanction set in the Competition Law or a legal act of another country came into force;*
- d. *a bidder (natural person) or the head of a bidder (legal person, another organization or its organizational unit) or another member of its management or supervisory body or another person having the right to represent or control the bidder, undertake decisions in its name, enter*

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<sup>62</sup>Art 25 para 2 of the Law on Public Procurement provides a list of articles that are applicable for small-scale tenders and Art 46 is not among them. The purchasing authorities may apply the grounds for exclusion and the procedure therein is provided by a Public Procurement Office Director’s Decree “On the Procedure for Small-Scale Tenders”. Available online (in Lithuanian): <https://www.e-tar.lt/portal/lt/legalAct/a0f25f005ca411e79198ffdb108a3753> (last accessed: 30/06/2017).

Art 59 of the Law on Procurements by Purchasing Subjects within the Sectors of Water Management, Energy, Transport and Postal Services provides the following: “*The requirements for the absence of grounds for exclusion and verification of qualification are set and confirmation measures therein are applicable mutatis mutandis as provided for in Art 46, 47, 50, 51 of the Law on Public Procurement, however Art 46 Paras 1, 3 and 4 are not obligatory for purchasing subjects that are not purchasing authorities*”. The Law on Procurements by Purchasing Subjects within the Sectors of Water Management, Energy, Transport and Postal Services, No. XIII-328. Available online (in Lithuanian): <https://e-seimas.lrs.lt/portal/legalAct/lt/TAD/f82d89d12fcb11e79f4996496b137f39?jfwid=-wd7z6gj0v> (last accessed: 30/06/2017).

*contracts, or a member holding a voting majority in the members meeting of the legal person, is convicted for a fraudulent bankruptcy as it is defined in the Lithuanian Enterprise Bankruptcy Law or similar legal acts of other countries where there has been less than 3 years since the judgment became effective.”*

#### *5.2.4. The Romanian case*

Romania transposed the new EU Directives in the field of public procurement in 2016, four laws being adopted by the Parliament in May 2016: Law no. 98/2016 on public procurement, Law no. 99/2016 on sectorial procurement, Law no. 100/2016 on works and services concessions contracts and Law no. 101/2016 on remedies. The motives for exclusion from public procurement are set by Law 98/2016 and recalled by Law 99/2016 on sectorial procurement and Law 100/2016 on constructions concessions and concessions of services, according to the provisions of the given Directives.

Law no. 98/2016 on public procurement provides reasons for excluding the candidate/bidder from a public procurement procedure. Thus, according to the art. 164, the contracting authority excludes from the award procedure any economic operator that has been convicted by a final Court ruling for one of the criminal offences mentioned under article 57 of the Directive 2014/24: the establishment of an organized criminal group, corruption offences, crimes against the financial interests of the EU, terrorism, money laundering, human traffic or fraud.<sup>63</sup> The contracting authority will determine the reason for exclusion based on the information and documents submitted by the bidder or if the contracting authority becomes “otherwise aware”. As provided by Directive 2014/24/EU the contracting authority shall exclude an economic operator if “the person convicted by final judgment is a member of the administrative, management or supervisory body of that economic operator or has powers of representation, decision or control therein.”

Article 165 of Law no. 98<sup>64</sup> provides for the exclusion grounds based on the breach of the obligation regarding the payment of taxes, debts or contributions to the consolidated general budget. The exclusion ground operates in two situations: when there is a judicial or an administration decision that established the breach of obligations or when the contracting authority can prove by any appropriate means the breach of obligations. However, the economic operator is not excluded if, prior to the exclusion decision, it pays the taxes, debts or contributions or these are extinguished in any other legal way (e.g. by compensation with other payments to the state budget) or if the economic operator benefits from financial rescheduling or other facilities from the tax authorities. According to the Directive, the contracting authority can make an exception from this exclusion criteria on grounds of national interest, public health or environment protection and it has to make exceptions if debts to the consolidated general budget are under 4.000 lei (about €870) and under 5% of the total due taxes and contributions of the economic operator.

Following the provisions of article 57, paragraph 4 of the Directive 2014/24, article 167 of Law no. 98<sup>65</sup> provides that the contracting authority excludes any economic operator which:

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<sup>63</sup> See also the art. 177 of Law 99/2016 on sectorial procurement; art. 79 Law no. 100/2016 on works concessions and service concessions.

<sup>64</sup> See also art. 178 of Law 99/2016 on sectorial procurement; art.80 of Law 100/2016 on works concessions and service concessions

<sup>65</sup> See also the art. 180 of Law 99/2016 on sectorial procurement; art.81 of Law 100/2016 on works concessions and service concessions.

- a. has breached its obligation of indicating in the tender that they have taken into account the relevant obligations in the environment, social and labour relations fields. This can be proved by any appropriate means by the contracting authority;
- b. is in a procedure of insolvency or under winding-up proceedings, under judicial supervision of activities or in the situation of cessation of business;
- c. has proven serious professional misconduct. This can be proved by any appropriate means by the contracting authority;
- d. has concluded agreements with other economic operators aimed at distorting competition within or in connection to the procedure of public procurement;
- e. is in a situation of conflict of interests within or in connection with the procedure in question and this situation cannot be effectively remedied by other less stringent measures;
- f. has participated in a previous preparation of the award procedure, leading to a distortion of competition;
- g. has proven deficient performance in a previous public contracts implementation;
- h. has been guilty of forgery in official statements as to the content of the information submitted upon the request of the contracting authority for the purpose of verifying the absence of grounds for exclusion or the fulfilment of the qualification and selection criteria, has failed to submit such information or is unable to provide the required supporting documents;
- i. attempted to illegally influence the decision-making process of the contracting authority, to obtain confidential information which could give him unjustified advantages in the award procedure, or has provided, through negligence, misinformation which may have a significant influence on the decisions of the contracting authority regarding the exclusion from the award procedure of that economic operator, its selection or the award of the public procurement.

**Therefore, the Romanian legislature decided that the grounds for exclusion where the Member States had flexibility will be mandatory for the Romanian contracting authorities.**

**Only the situation when the economic operator concluded agreements with other economic operators aimed at distorting competition within or in connection to the procedure of public procurement is further defined by the law based on examples that will provide the contracting authority with sufficient information to proceed to debarment.**

According to article 169 of Law 98/2016<sup>66</sup> an economic operator can be excluded from the award procedure at any time, for reasons of action or inaction related to the motives for exclusion committed before or during the procedure.

While the sanction of exclusion from public procurement procedures (the legal provisions refers literally to: prohibition to participate in public procurement procedures for a period from 1 to 3 years) provided under the Criminal Codes applies to legal persons for any participation to the procurement procedures, the exclusion reasons provided by Law no. 98/2016 apply to each and every procedure, depending on the thoroughness of the Contracting Authority in verifying all the exclusion grounds for each of the bidders.

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<sup>66</sup>See also art.182 of Law 99/2016 on sectorial procurement, art.83 of Law 100/2016 on works concessions and service concessions.

Moreover, the same reasons for exclusion from public procurement procedures apply to economic operators participating to sectoral procurements and procedures for concession contracts, as provided by Law no. 99/2016 and Law no. 100/2016, but the criminal sanctions refer only to the prohibition of participating in public procurement procedures, regulated by the Law 98/2016. From this point of view public procurement procedures are more vigorously protected by the criminal law against contractors with a criminal record, while the sectoral procurements and works and services contracts are only protected by administrative means against the bidders with criminal records.

**Expert consultation has revealed** that, while the existence of the criminal sanction of prohibition of participating to tenders is a guarantee of exclusion of unfair participants, experts mentioned that generally, the Contracting Authorities are only asking for a statutory declaration from bidders stating they are in none of the exclusion cases. While using an statutory declaration is simplifying the bid, which is much appreciated, the majority opinion is that Contracting Authorities would need a collaborative information data basis on the execution of previous contracts by bidders, in order to check if the bidder has not been found guilty of serious professional misconduct in previous contracts.

Furthermore, while finding a case of exclusion, despite the statutory declaration, leads to the exclusion of the bidder, or the contractor (if the contract has been signed), the perjury is rarely investigated and punished, so there is no discouraging effect of an exclusion if caught with the lie.

Once the Prevent tool is developed and used in public procurement, there is a hope the conflict of interest situations will be spotted and sanctioned with exclusion, as until 2017 the Court of Accounts and Audit Authority audits and controls and investigations from other institutions have proven that the statutory declaration of some bidders stating they are not in a conflict of interests have been false.

Moreover, experts notice there is a lack of transparency on the side of Contracting Authorities regarding the consultations or involvement of potential bidders in developing tender documents, as this would lead to the exclusion of the respective bidder.

### 5.3. Grounds for exemption from exclusions: the self-cleaning measures

Self-cleaning measures for bidders to “save” themselves from exclusion are provided in all the four analysed national cases.

First, true to the Directive 2014/24, derogation from the mandatory exclusion grounds can be made in all the analysed countries on an exceptional basis, for overriding reasons relating to the public interest, such as public health or protection of the environment.

Second, according to the Directive, exemptions are regulated in all four countries related to payment of taxes and social security contributions, if the bidders pay their debts, or the debt is under a fixed threshold, and if other justifications (lack of information) or administrative decisions (if the economic operator benefits of financial rescheduling or other facilities from the tax authorities) are provided by the bidders.

Third, an economic operator that is bankrupt or is the subject of insolvency or winding-up proceedings, or where its assets are being administered by a liquidator or by the court, or where it is in an arrangement with creditors, or where its business activities are suspended or it is in any analogous situation arising from a similar procedure under national laws, can be accepted by contracting authorities if the latter can

establish that the economic operator is able to perform the contract taking into consideration the relevant provisions and the measures on the continuation of its business activities.

Forth, in all the countries, even in Romania, were the facultative grounds became mandatory, the grounds for exclusion provided by Article 57 paragraph 4 of Directive 2014/24/EU will not be applied when:

1. the bidder provided the contracting authority with information that the following measures have been taken:
  - a. the bidder has voluntarily paid or has committed to pay the compensation for the damages incurred due to the criminal activities or misdemeanours where applicable;
  - b. the bidder has cooperated, actively provided assistance or has taken other measures helping to investigate, uncover the criminal activity or misdemeanour it has committed, where applicable;
  - c. the bidder has taken technical, organisational, personnel management measures directed towards preventing further criminal activities or misdemeanours;
2. the contracting authority evaluated the information provided by the bidder following this procedure and took a motivated decision that the measures taken by the bidder to prove its reliability are sufficient. The sufficiency of these measures is evaluated based on how serious the criminal act or misdemeanour was and what were the circumstances.

With reference to the suspension of the sanction, exclusion should not occur when the offence (a) is no longer sanctioned as a crime, (b) when a restoration has taken place, or (c) in case of revocation of the sentence.

**In the context of the present research, it is important to stress that the breach of tax and social security obligations and most of the facultative grounds for exclusion provided by the Directive 2014/24/EU are not necessarily criminal offences**

## **6. RULES ON BANS AND EXCLUSIONS FROM PUBLIC PROCUREMENT PROCEDURES APPLICABLE TO DIFFERENT TYPES OF PARTICIPANTS TO PROCUREMENT PROCEDURES**

### **6.1. Administrative exclusion of third parties, including subcontractors, based on the public procurement legal framework**

According to Directive 2014/24/EU, there are at least four types of economic operators participating to public procurement procedures:

1. The bidders,
2. The associated bidders,
3. The subcontractors,
4. A third party supporting the bidder in meeting the selection criteria.

Article 63 of the Directive permits an economic operator to rely on the economic and financial standing as well as the technical and professional ability of another entity, a supporting third party in order to satisfy selection stage requirements. This reliance on the capacities of other entities is allowed, regardless of the legal nature of the arrangements between the economic operator wishing to participate in a procurement process and the third parties on which it relies.

On the other hand, Article 71 allows for the subcontracting of the contract execution to a third party, named subcontractor.

Article 63(2) of the Directive includes a specific limitation on using the capacity of a third party entity to meet the selection requirements and on the help of subcontractors. In the case of “works contracts, service contracts and siting or installation operations in the context of a supply contract, contracting authorities may require that certain critical tasks be performed directly by the bidder itself or, where the tender is submitted by a group of economic operators [...] by a participant in that group”. In this case, the contractor must perform those tasks directly. It is not allowed to subcontract them or to otherwise entrust the tasks to third parties.

The supporting third party and the subcontractor can be the same operator / legal person, or different persons.

The Directive is clear regarding the exclusion criteria for the bidders and associated bidders, i.e. the economic operators presenting an offer on their own behalf, as these criteria are provided by Article 57. The third party supporting the bidders in meeting the economic, financial, technical and professional criteria is also subject of the exclusion criteria provided by Article 57.

On the other hand, there is no specific mention on exclusion criteria regarding subcontractors. According to Article 71(2) of the Directive, the contracting authority is permitted, but not obliged to ask an economic operator to indicate in its tender “any share of the contract it may intend to subcontract to third parties and any proposed subcontractors”. National provisions may oblige contracting authorities to request this information from economic operators. Therefore, the regulations regarding the exclusion criteria applicable to subcontracts can vary from a country to another.

In the **Greek** case, under article 131 paragraph 5 of Law 4412/2016, contracting authorities may verify whether there are grounds for exclusion for subcontractors according to articles 73 and 74. If the

economic operator declares a subcontractor in accordance with article 58 of Law 4412/2016 and the share of the contract it intends to sub-contract does not exceed the 30% of the total amount of contract, the contracting authority has the discretion to verify whether there are any grounds for exclusion. If the share of the contract it intends to sub-contract exceeds 30%, then the contracting authority has the obligation to verify whether any exclusion grounds are present.<sup>67</sup> In the case a subcontractor is in one of the exclusion criteria, the contracting authority i) may require that the economic operator replaces a subcontractor in respect of which the verification has shown that there are compulsory grounds for exclusion, ii) may require that the economic operator replaces a subcontractor in respect of which the verification has shown that there are non-compulsory grounds for exclusion.

In **Italy**, art. 80, c. 1 of the Public Procurement Code provides that grounds for exclusion (criminal convictions) should also apply 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. To prove that they meet the criteria, the bidder must file the subcontracting contract 20 days before the date of commencement of the contract execution, along with the certificate attesting that qualification requirements are met by the subcontractor and the Statement of the subcontractor attesting the absence of exclusion grounds for the subcontractors. According to interviewed experts, it is still unclear whether the law provides for 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 (article 80) and a clarification will follow the first decisions of the Supreme Court on the topic.

In the **case of Lithuania**, Art. 49 para. 4 of the law on public procurement provides that the contracting authority is under obligation to apply the same grounds of exclusion for subcontractors only if the bidder relies on the subcontractor(s) to meet the qualification requirements. If a subcontractor is found to satisfy any of the exclusion grounds as provided for in Art. 46 the purchasing authority must request that the bidder substitute this subcontractor. On the other hand, art. 88 para. 5 of the same law stipulates that the contracting authority may apply the same grounds of exclusion for subcontractors if the bidder does not rely on the subcontractor(s) to meet the qualification requirements. If the purchasing authority decides to apply the grounds of exclusion, it must apply all the grounds of exclusion as provided for in Art 46.

In the **Romanian case**, the law states clearly that the subcontractors are subject to the same exclusion criteria as the bidders, the associated bidders and the supporting third party for the selection criteria. If a subcontractor is in one of the exclusion cases, the contacting authority will request only once the replacement of the subcontractor by the bidder.<sup>68</sup>

## 6.2. Bans for subcontractors as criminal sanctions or security measures

In the two national cases assessed where bans form public procurements are a separate criminal sanction: in Italy and in Romania, the ban as a criminal sanction prevents the legal person from

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<sup>67</sup> Hellenic Single Public Procurement Authority, *Guideline 20 - Grounds for Exclusion from Participation in Public Procurement Procedures*, Athens, 14.06.2017, p. 32

<sup>68</sup> Art. 170 of Law no. 98/2016 on Public Procurement

participating to public procurement procedures in any quality: as a bidder, subcontractor or supporting third party (supporting bidder).

However, while in Italy the law provides for the prohibition of contracting with the public administration (including public procurement), except for obtaining a public service, the Romanian Criminal Code stipulates only the ban from public procurement as an accessory criminal sanction. As a result, a convicted legal person can participate to concession procedures, sectorial procurements or competitions for public grants.

## **7. APPLICATION OF BANS AND EXCLUSIONS FROM PUBLIC PROCUREMENT PROCEDURES**

### **7.1. Existing databases of legal persons banned from public procurement processes**

There is no unified opinion on the benefits and utility of databases on legal persons banned from public procurements, i.e. blacklists for public procurement. A research conducted in 2012 shows the opinion of companies, or more exactly businessmen, 32% of the respondent agreed that the reputational risk of appearing on a blacklist is a key motivation for businesses to engage in fighting corruption, while 60% thought negative publicity, such as “naming and shaming” approaches, offers a strong incentive for compliance programmes. Therefore, restrictions on business operations and opportunities and other effects of blacklisting are among the most effective incentives for businesses to fight corruption both within their very organisation and in the business environment in general.<sup>69</sup>

Moreover, according to the same research, 88% of the respondents considered that business representatives with a history of corruption should be excluded from contracting with the public administration, expressing thus the agreement of the business environment for the existence and utility of blacklists.<sup>70</sup>

On the other hand, there is not enough information and research done in countries where debarment from public procurement is applied and databases are built on their effects and specifically on their effects in changing corporate behaviour and culture towards a more compliant one, based on integrity<sup>71</sup>.

Experts' opinion also varies according to the legal culture of their country of origin. In **Germany**<sup>72</sup>, in **Romania, Lithuania and Greece** (according to interviews conducted during the data collection phase for this research), practitioners in the fields of the judiciary, public administration and public procurement generally agree that debarment from public procurement, accompanied by a national electronic list of debarred economic operators, represents an instrumental tool for information-sharing and for a uniform and coherent application of existing rules. The mechanism is a real support for the contracting authorities, ensuring transparency and building trust in the efficiency of the procurement procedures, at national and international level (ensuring the possibility to check foreign suppliers as well).

However, in **Italy**, experts do not favour a blacklist, stressing the importance 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 to the one imposed by the judge. Italian practitioners show that the prosecution office already has all the necessary information and tools to inform the contracting authorities when they need to check a bidder. As a third way, academics suggest the implementation of the National Anticorruption Authority (ANAC) Observatory, allowing the publication

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<sup>69</sup> SCHÖBERLEIN, J., BIERMANN, S. and WEGNER, S. 2012. *Motivating Business to Counter Corruption: A Global Survey on Anti-Corruption Incentives and Sanctions*. Berlin, Germany: Humboldt-Viadrina School of Governance.

<sup>70</sup> *Ibidem*.

<sup>71</sup> Maíra MARTINI, 2013. *Blacklisting in Public Procurement*. Anti-Corruption Resource Centre Expert Answer. Berlin, Germany: Transparency International. Available online at: [https://www.transparency.org/files/content/corruptionqas/Blacklisting\\_in\\_public\\_procurement.pdf](https://www.transparency.org/files/content/corruptionqas/Blacklisting_in_public_procurement.pdf) (last accessed: 30/10/2017).

<sup>72</sup> *Ibidem*.

of some information, especially in cases where the publication of the decision has already been ruled as a complementary sanction<sup>73</sup>.

In practice, the situations are very different for the four cases analysed as part of this research:

- **Lithuania** implements two types of black lists based on economic operators' previous behaviour in participating to public procurement procedures and implementing public contracts. Moreover, there is a privately managed online platform: [www.rekvizitai.lt](http://www.rekvizitai.lt), where information on each legal person 'legal history' is published based on the publicly accessible court decisions, however it is not an official source of information.
- **Romania** implements a public, yet not easily accessible, record of convictions of legal persons and a mechanism ensuring the impossibility to bid alone to public procurement of an entity criminally convicted and sanctioned with the ban from public procurement;
- in **Greece**, although no criminal sanction can be decided against legal persons, bans from public procurement can be applied as administrative sanctions. In this context, article 74 paragraph 6 of Law 4412/2016 provides for the establishment of a National Database of Public Contracts which shall maintain a list of economic operators which have been debarred and shall include their data and the period of exclusion. However, such Database remains to be established via a relevant ministerial decision.
- **In Italy**, 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. Public authorities 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.

In the **Lithuanian case**, the Public Procurement Office manages a database of unreliable suppliers ('**the black list of suppliers**')<sup>74</sup> – a list of suppliers that have implemented the tender contract inappropriately or failed to implement it, where such a failure is an substantial breach of a contract (for cases after 1 January, 2016; a substantial breach of contract is interpreted both following the Civil Code norms on substantial contracts clauses, and the contract clauses between the bidder and the contracting authority). For this database, the contracting authority must terminate the contract with the supplier and if (a) the supplier does not dispute this in court; or (b) the court upholds that the contract has been terminated lawfully and due to a substantive breach of contract on the part of the supplier, the contracting authority may add the supplier to the "**List of Unreliable Suppliers**", with a maximum delay of 10 days. An official request regarding this operation must be sent by the contracting authority to the Public Procurement Office. The Public Procurement Office is responsible for administering the list and making it public. Economic operators remain on the list for 3 years. The economic operators (both legal and natural persons) that are on this list are excluded from the tender at the bidding stage as each contracting authority in Lithuania must note among the qualification requirements of each procurement procedure that all bidders that are on the "List of Unreliable Suppliers" are not eligible (regardless of the type of contract that lead to them being added to the list).

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<sup>73</sup> Interview with Prosecutor Mr. Walter Mapelli (Court of Bergamo).

<sup>74</sup> Available online, in Lithuanian: <https://vpt.lrv.lt/lt/konsultacine-medziaga/nepatikimu-tiekeju-sarasas-1> (last accessed: 30/06/2017).

The Public Procurement Office also administers the “**List of Suppliers that have Submitted Fraudulent Information**”.<sup>75</sup> It provides the suppliers that have concealed information or have given fraudulent information about the compliance with the qualification requirements or grounds for exclusion during the tender procedures and the contracting authority can prove it by any legal means. First, the contracting authority must conclude that the fraudulent information has been submitted and exclude the supplier from the tender and if (a) the supplier does not dispute this in court; or (b) the court upholds the fact that fraudulent information indeed has been submitted, the contracting authority may add the supplier to the “**List of Suppliers that have Submitted Fraudulent Information**”, with a maximum delay of 10 days. Suppliers remain on the list for 1 year and the presence on this list is a mandatory ground for exclusion from the public procurement procedures.

Regarding **the Romanian case**, according to Article 34 of the Law no. 253/2013 on the execution of criminal punishments, the conviction of a legal person is communicated by the Court to the register where the legal person is enrolled: the Trade Register, the Register of Associations and Foundations etc. According to the same law the institutions operating the respective registries have to make notes regarding the registration of the legal person in the respective database. The Trade Register publishes the notes regarding the accessory criminal sanction of prohibition to participate in public procurement. Moreover, the Court will also communicate the sentence to the administrator of the electronic system for public procurement (The Agency for the Digital Agenda of Romania, administrating the SEAP/SICAP system)<sup>76</sup>. The Agency subsequently operates a ban on participating to procedures for the convicted legal persons. This mechanism does not ensure 100% that public procurement contracts under the threshold values used for procurements carried out using the electronic system are not concluded with convicted legal persons. However, even under the threshold for direct procurement, the Romanian legal framework<sup>77</sup> provides a mechanism of orders using the electronic system for procurement, so that contracting authorities can see the criminal records of contractors.

## 7.2. International implications

### 7.2.1. *The maximum periods of exclusion regulated in different jurisdictions and implications of differences*

Article 57, paragraph 7 of the Directive 2014/24/UE provides that: “Where the period of exclusion has not been set by final judgment, that period shall not exceed five years from the date of the conviction by final judgment in the cases referred to in paragraph 1 [for mandatory exclusion grounds] and three years from the date of the relevant event in the cases referred to in paragraph 4 [for optional exclusion grounds].” The national legal frameworks transposing the regulations are generally providing the same periods when grounds for exclusion are found for a bidder during a procurement procedure. However, the criminal legal framework and other regulations, like the regulation of the ‘blacklists’ in Lithuania can change dramatically the situation, as presented in the table below.

*Table 2. Length of bans and the application of exclusion grounds in a comparative perspective*

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<sup>75</sup> Available online, in Lithuanian: <http://vpt.lrv.lt/melaginga-informacija-pateikusi-tiekeju-sarasas-1> (last accessed: 30/06/2017).

<sup>76</sup> Law no. 253/2013 on the execution of criminal punishments, art. 38, para (1)

<sup>77</sup> The Government Decision on rules for the implementation of Law no. 98/2016

*The preventive role of the judiciary in protecting the financial interest of the European Union.  
A comparative analysis for improved performance*

	Greece	Italy	Lithuania	Romania
<b>Grounds for exclusion from a tender according to the procurement regulations</b>	Max. 5 years in the case of mandatory exclusion grounds (convictions for crimes)	Max. 5 years in the case of mandatory exclusion grounds (convictions for crimes)	Max. 5 years in the case of mandatory exclusion grounds (convictions for crimes)	Max. 5 years in the case of exclusion grounds including conviction for crimes
<b>Length of the ban from public procurement as a criminal sanction</b>	NA	A maximum of 2 years (for legal persons)	NA	From 1 year to 3 years
<b>Administrative bans form public procurement</b>	Maximum of 6 month	NA	3 year for economic operators on the "List of Unreliable Suppliers"  1 year for economic operators on the "List of Suppliers that have Submitted Fraudulent Information"	NA

Most of the experts and practitioners interviewed for the present research haven't identified major risks in the differences between the periods of exclusions stipulated by different regulations at national and European level; a more focused analysis is needed. The differences in length and regulation can raise problems on applying rules on exclusions and bans in international contexts, when economic operators convicted in one county participate to a tender in another state, within the EU or not.

### 7.3. Compliance with the presumption of innocence

While the exclusion form public procurement cannot happen on grounds of unfinished judicial proceedings in respect of criminal acts, in none of the cases analysed, can such proceedings provide information to the contracting authorities regarding a serious breach of professional conduct or another reason for exclusion not requiring a criminal conviction. Therefore, although the blamed deed is not proved to be a criminal offence and it will not generate a conviction, it can determine an exclusion from a tender. This is not considered discriminatory, as it is a protection measure for the contracting authorities and public funds. The problem lies in the lack of a clear definition of a "serious breach of professional conduct".

Experts recognise this is a challenging situation from the point of view of the presumption of innocence principle. However, they underlined that in these situations, until a final conviction, bidders have the possibility to prove they took remedial measures within their organisations and be allowed to participate in the tender. On the other hand, self-cleaning regulations and defences available are also vague and open to interpretation and subjectivity, and, therefore, the contracting authorities can be unfair, failing to observe the principle of transparency and equal treatment, and clear provisions are needed.

### III. CONCLUSIONS AND RECOMMENDATIONS

#### 8. CONCLUSIONS

Legal frameworks on the criminal liability of legal persons are not unified at European level. There systems are not even similar, and there are great differences regarding sanctions in general, the bans from public procurement procedures as a sanction in particular, the length of such sanctions when existing or the existence of publicly available information on these sanctions.

On the other hand, in the European Member States, the new legal frameworks on public procurement, transposing Directive 2014/24/EU, have clarified, detailed and unified to a great extent the approach with regards to the grounds of exclusion and most experts and practitioners agree that unless major loopholes are brought out during implementation, the regulation on grounds for exclusion seems sufficient in all the four cases analysed.

Differences in the framework of exclusion from public procurement among countries may cause difficulties for contracting authorities when evaluating bidders from different countries. The difficulties in the contracting authorities' understanding whether a foreign bidder is in an exclusion situation or not can appear due to:

- the lack of available public online databases of debarred economic operators;
- the lack of linguistic accessibility to data (e.g. in order to check whether an Italian bidder has been convicted for a crime representing an exclusion ground, a Greek, Lithuanian or Romanian contracting authority should address the Italian Prosecution office in Italian);
- differences in the grounds for criminal convictions of legal persons in different countries, resulting in a difference in the treatment of bidders;
- different provisions concerning the length of bans from public procurement procedures in different countries can raise problems to contracting authorities when deciding if a bidder has to be excluded or not.

**The adoption of Directive 2017/1371/EU<sup>78</sup> is an important step ahead** in ensuring punitive corporate liability for frauds affecting the Union's financial interests. The Directive stipulates that „Member States shall take the necessary measures to ensure that legal persons can be held liable for any of the criminal offences referred to in Articles 3, 4 and 5 [frauds affecting the Union's financial interests, incitement, aiding and abetting, and attempt to such frauds] committed for their benefit by any person, acting either individually or as part of an organ of the legal person, and having a leading position within the legal person” (Art. 6, Paragraph 1). The Directive also provides that “Member States shall also take the necessary measures to ensure that legal persons can be held liable where the lack of supervision or control by a person” with power of representation, authority to take decisions on behalf of the legal

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<sup>78</sup> Directive (EU) 2017/1371 of the European Parliament and of the Council of 5 July 2017 on the fight against fraud to the Union's financial interests by means of criminal law. Official document available online at: <http://eur-lex.europa.eu/eli/dir/2017/1371/oj> (last accessed 15/11/2017).

person or to exercise control within the legal person, without excluding the criminal liability of the natural persons who are perpetrators of the criminal offences (Art. 6, Paragraph 2 and 3). However, the **Directive 2017/1371/EU is not recommending the criminal liability of legal persons as the preferred solution and does not provide rules or recommendations for a harmonised regime of corporate liability at EU level. A larger debate shall be opened in order to ensure such harmonised regime of corporate liability at EU level can be achieved in the framework of the fundamental treaties.**

## **9. RECOMMENDATIONS**

### **9.1. Recommendations for policy at European level**

- A. Establishing a set of recommendations concerning the effective national regulation of the liability of legal persons for criminal offences with effects over the European and national budget, the use of European and national public funds and the functioning of the European and national public administration.**

Liability of legal persons should include corruption offences, frauds, money laundering and crimes against the financial interest of the European Union and of the Member States.

Moreover, the liability of legal persons should be autonomous from the liability of the natural person perpetuating the deed, both in substantive and procedural law. The identification, investigation, prosecution or conviction of the legal and natural persons together should not be a requirement, as it may allow a legal person to escape unpunished in cases where the fault is found to be anonymous or collective or where the individual perpetrator could not be held liable for other reasons.

**While criminal policy is the competence of the Member States, according to the Lisbon Treaty and the Communication Towards an EU Criminal Policy: Ensuring the effective implementation of EU policies through criminal law<sup>79</sup>, “EU can tackle gaps and shortcomings wherever EU action adds value. In view of the cross-border dimension of many crimes, the adoption of EU criminal law measures can help ensuring that criminals can neither hide behind borders nor abuse differences between national legal systems for criminal purposes.” In this context the form of a recommendation will probably be the best first step.**

Only a unified or similar liability system for the legal persons may allow fair competition and equal treatment of legal persons across the European Union in the context of free movement of goods, capital, services, and labour. **In this respect:**

- 1) If a Member State’s constitution and/or legal doctrine allows for it, **criminal liability should be recommended** as the preferred instrument to use, as it has the greatest deterrent effect, provides fair trial guarantees and effective investigative procedures.
- 2) If a Member State’s constitution and/or legal doctrine doesn’t allow for the regulation of the criminal liability of legal persons, **special administrative punitive liability or quasi-criminal liability should be recommended and enforced with similar provisions as the criminal liability**, in order to ensure

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<sup>79</sup> COMMUNICATION FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT, THE COUNCIL, THE EUROPEAN ECONOMIC AND SOCIAL COMMITTEE AND THE COMMITTEE OF THE REGIONS Towards an EU Criminal Policy: Ensuring the effective implementation of EU policies through criminal law /\* COM/2011/0573 final \* Official document available online at: <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52011DC0573&from=RO> (last accessed 08/12/2017).

similar deterrent effect, fair trial guarantees and investigative procedures as in the case of the criminal liability.

- 3) Irrespective of the legal solutions preferred (criminal, administrative or quasi-criminal liability), several situations should be covered:
    - 3.1) **The legal person should be held liable for offences that were committed on its behalf and/or to its benefit;**
    - 3.2) Liability should **cover actions of lower level agents of the legal person in order to be effective**, combining this approach with the possibility of a due diligence defence. This will eliminate the risk to evade liability in the case of big and complex corporations, motivating legal persons, on the other hand, to develop proper compliance rules and corruption prevention mechanisms.
    - 3.3) **The legal person shall be held liable for offences that its relevant agents committed in the interest of another entity that is associated or related to the legal person;**
    - 3.4) **Legal successors of the legal persons**, or the reorganised body or bodies, after a division, a merge, a consolidation etc. **should bear the liability of the guilty legal person, in order to avoid impunity;**
  - 4) **Debarment from the public procurement procedures should be a harmonised sanction at European level for legal persons found guilty of criminal offences, in order to protect the financial interests of the contracting and financing authorities.** In this respect:
    - 4.1) **Debarment from the public procurement procedures should be a mandatory sanction, additional to fines or other economic punishments and included in the judiciary ruling** (not only applicable in a case by case manner as provided by Directive 2014/24/EU), **in the case of criminal offences with effects over the European and national budget, the use of European and public national funds and functioning of the European and national public administration.**
  - 5) **Mandatory sanctions limiting the access of or excluding legal persons convicted for criminal offences from contracting with public authorities for grants, concessions etc. should also be recommended**, at least in the case of legal persons convicted for corruption offences, fraud, money laundering and crimes against the financial interest of the European Union and of the Member States.
  - 6) **The minimum and maximum period of debarment from public procurement as a sanction for criminal offences perpetrated by legal persons should be unified**, in order to allow effective verifications and conclusion of public procurement contracts across Europe.
  - 7) **The “due diligence defence” shall be recommended and promoted, as it has a great preventive effect.** The regulation of the “due diligence defence” shall include the possibility of the court to evaluate the seriousness and practical implementation of compliance mechanisms before sentencing.
- B. A public online database of debarred economic operators should be available at European level**, for contracting authorities at least, if not for the general public. It should be built with the European Commission coordination, based on the cooperation of member states.

Further debates should be organised in order to determine if the publication of such database for the general public doesn't represent a real accessory penalty to the one imposed by the judge, seriously

affecting the businesses beyond the conviction sentence received, taking into account also that publishing the sentence is an accessory penalty by itself.

However, **the database should allow contracting authorities to check in a simple way if the exclusion grounds stipulated by the Directive 2014/24/UE and to some extent by the national legislation are applicable to economic operators participating to tenders** (bidders, associated bidders, subcontractors, third parties supporting the bidder to meet the selection criteria). Therefore, **the database should include:**

- **Legal persons convicted for organized crime, corruption, fraud, money laundering, terrorism, child labour and other forms of trafficking in human beings** (grounds for exclusions stipulated by Article 57 paragraph 1 of Directive 2014/24/UE) and the exact moment of the final court decision.
- **Legal persons convicted** for a criminal offence in their country and punished **with debarring (a ban from participation to public procurement procedures) and the exact period of the ban.**
- **The ‘unreliable’ economic operators, on the model of the Lithuanian “List of Unreliable Suppliers”,** including economic operators proposed by the contracting authorities after a substantial breach of a contract causing the untimely termination of a contract or the legitimate refusal of the contracting authority to pay the prices, if:
  - the economic operator does not dispute in court the contract termination or the refusal of payment; or
  - the court upholds that the contracting authority decision has been lawful and due to a substantive breach of contract on the part of the economic operator;

**and always**

  - **the court agrees the breach of contractual obligations is serious enough to result in the blacklisting of the economic operator.**
- **The ‘untrustworthy’ economic operators, on the model of the Lithuanian “List of Suppliers that have Submitted Fraudulent Information”,** including economic operators proposed by the contracting authorities when they have concealed information or have given fraudulent information about compliance with the qualification requirements or grounds for exclusion during the tender procedures, the contracting authority can prove it by any legal measures and (a) the economic operator does not dispute this in court; or (b) the court upholds the decision of the contracting authority and (c) **the court agrees the breach of legal requirements is serious enough to result in the blacklisting of the economic operator.**

**The recommended blacklist(s) should be based on the registration of economic operators convicted for crimes and only after their conviction on a system of criminal liability, quasi-criminal liability or administrative punitive liability for criminal offences. Therefore the recommendation is putting much more weight on the role played by the judiciary.**

- C. Alternatively, and temporarily (until the creation of the abovementioned database), **the European Commission should analyse the possibility to:**

- **Consolidate the ECRIS<sup>80</sup> database, introducing data on the accessory penalties of debarment from public procurement procedures;**
  - **Create the possibility to obtain criminal record extracts from ECRIS if requested by a contracting authority during a tender,** not only for the purposes of criminal proceedings against a person, recruitment procedures, naturalisation procedures, asylum procedures, firearm licence procedures, child adoption procedures.
- D. The European Commission should analyse the possibility to amend Directive 2014/24/UE in order to provide for mandatory grounds for exclusion of subcontractors (in the same way as the exclusion grounds work for bidders), at least when they have been convicted for organized crime, corruption, fraud, money laundering, terrorism, child labour and other forms of trafficking in human beings, in order to protect the interest of contracting authorities, the national and the European budgets.**

## 9.2. Recommendations for policy at national level

- E. Even though a unified set of recommendations concerning the effective national regulation of the liability of legal persons for criminal offences is not proposed at European level, Member States should take into account all the recommendations proposed above concerning:**
- 1. Regulating the liability of legal persons for criminal offences as criminal liability** (if possible) or as a special administrative punitive liability or quasi-criminal liability (only of criminal liability is not permitted by the constitutional framework) *(see above recommendations A.1 and A.3).*
  - 2. The rules on the liability of legal persons for criminal offences should be designed in order to avoid impunity,** taking into account players' involvement, the liability of associated or related entities, and the liability of successors or reorganised legal persons etc. *(see above recommendations under A.3).*
  3. If the national legal framework provides for a limited number of criminal offences engaging the criminal or quasi-criminal liability of legal persons, Member States shall analyse if all criminal offences related to the use of public funds and public procurement are covered.
  - 4. In order to protect public budgets, debarment from the public procurement procedures, and other prohibitions to conclude contracts with public authorities, like grant agreements or concessions, should be a mandatory sanction,** additional to fines or other economic punishments, at least in the case of legal persons found guilty for criminal offences with effects over the European and national budget, the use of European and public national funds and functioning of the European and national public administration *(see above recommendations A.4 and A5).*
  - 5. The maximum period of debarment from public procurement in national legislation should be aligned with the maximum period of effectiveness for the exclusion grounds provided by Directive 2014/24/EU, namely 5 years,** in order to allow effective verifications and conclusion of public procurement contracts across Europe *(see above recommendation A.6).*

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<sup>80</sup> [http://ec.europa.eu/justice/criminal/european-e-justice/ecris/index\\_en.htm](http://ec.europa.eu/justice/criminal/european-e-justice/ecris/index_en.htm).

6. **Subcontractors should be excluded if they are in one of the mandatory exclusion grounds, namely if they have been convicted for organized crime, corruption, fraud, money laundering, terrorism, child labour and other forms of trafficking in human beings**, even if Directive 2014/24/UE doesn't stipulate an obligation for Member States to regulate this issue (*see above recommendation D*).
7. Clear rules have to be developed at national level, in each of the Member States' legal framework, to support judges in applying proportionate sanctions to each legal person.
8. **The "due diligence defence" should be offered to legal persons**, considering its preventive effect (*see above recommendation A.7*).
9. **Public online registers/databases of debarred economic operators should be available at national level at least for the contracting authorities** (*see above recommendation B*), in order to allow for the exclusion of bidders from public procurement for a certain period once the grounds for exclusion are established and to ensure the appropriate means are in place for monitoring the applicability of grounds for exclusion. Such a database should include:
  - legal persons convicted for criminal offences, including the crime and the sanction specified in the ruling;
  - economic operators debarred from public procurement, including the period of debarment;
  - economic operators found guilty of providing false documents or information to contracting authorities, *subsequent to the regulation of the database in the national legislation and in cases wherein a judicial ruling on the publication of the economic operator's debarment was issued*;
  - economic operators found guilty of a serious breach of their public procurement contracts, *subsequent to the regulation of the database in the national legislation and in cases wherein a judicial ruling on the publication of the economic operator's debarment was issued*.
10. Moreover, **Member States should analyse the introduction of the obligation to develop a compliance programme and/or an anti-corruption policy within the legal person**, as:
  - a sanction, or
  - a security measure.
11. **The dialogue between national authorities and the private sector should be strengthened** in order to eliminate all the interpretative issues regarding legal standards and to ensure simplicity and transparency in the participation to public procurement.

## ANNEXES

### Annex 1

The list of the main criminal offence with impact over the EU budget and the possible application of a ban or exclusion of legal persons from public procurement process in Greece, Italy, Lithuania and Romania

Factual data of legal definition		Clusters sorted out according to national legal framework				Research objective
The offence name <sup>81</sup>	Legislative source <sup>82</sup>	Corruption crimes	Money laundering	Fraud	Crimes against the financial interest of EU	Ban or exclusion from public procurement applicable
<b>GREECE</b>						
Bribery of an official	Article 236 Penal Code	✓			✓	✓
Venality of an official	Article 235 Penal Code	✓			✓	✓
Venality and bribery of judges	Article 237 Penal Code	✓			✓	✓
Venality of political functionaries	Article 159 Penal Code	✓			✓	✓
Bribery of political functionaries	Article 159A Penal Code	✓			✓	✓
Venality and bribery in the private sector	Article 237B Penal Code	✓			✓	✓
Infidelity in the discharge of public service	Article 256 Penal Code	✓			✓	
Infidelity	Article 390 Penal Code	✓			✓	
Embezzlement in the discharge of public service	Article 258 Penal Code	✓			✓	
Embezzlement	Article 375 Penal Code	✓			✓	
Exploitation of entrusted assets	Article 257 Penal Code	✓			✓	
Trading in influence - Intermediaries	Article 237A Penal Code	✓			✓	

<sup>81</sup>Please use the official translation into English of respective offences' name

<sup>82</sup>Indicate Law title and reference to article. Mention [if part of directive transposal or national specific legislation]

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Factual data of legal definition		Clusters sorted out according to national legal framework				Research objective
The offence name <sup>81</sup>	Legislative source <sup>82</sup>	Corruption crimes	Money laundering	Fraud	Crimes against the financial interest of EU	Ban or exclusion from public procurement applicable
Breach of duty	Article 259 Penal Code	√			√	
Fraud	Article 386 Penal Code			√	√	
Fraud affecting EU financial interests	Law 2803/2000 ratifying the EU PIF Convention				√	√
Money laundering	Law 3691/2008		√		√	√
<b>ITALY</b>						
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			√		
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	√			√	√

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Factual data of legal definition		Clusters sorted out according to national legal framework				Research objective
The offence name <sup>81</sup>	Legislative source <sup>82</sup>	Corruption crimes	Money laundering	Fraud	Crimes against the financial interest of EU	Ban or exclusion from public procurement applicable
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			✓		

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Factual data of legal definition		Clusters sorted out according to national legal framework				Research objective
The offence name <sup>81</sup>	Legislative source <sup>82</sup>	Corruption crimes	Money laundering	Fraud	Crimes against the financial interest of EU	Ban or exclusion from public procurement applicable
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			√	√	

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Factual data of legal definition		Clusters sorted out according to national legal framework				Research objective
The offence name <sup>81</sup>	Legislative source <sup>82</sup>	Corruption crimes	Money laundering	Fraud	Crimes against the financial interest of EU	Ban or exclusion from public procurement applicable
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	Art. 648 ter criminal code		✓	✓	✓	✓

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Factual data of legal definition		Clusters sorted out according to national legal framework				Research objective
The offence name <sup>81</sup>	Legislative source <sup>82</sup>	Corruption crimes	Money laundering	Fraud	Crimes against the financial interest of EU	Ban or exclusion from public procurement applicable
from illegal activities						
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			✓		

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Factual data of legal definition			Clusters sorted out according to national legal framework				Research objective
The offence name <sup>81</sup>	Legislative source <sup>82</sup>		Corruption crimes	Money laundering	Fraud	Crimes against the financial interest of EU	Ban or exclusion from public procurement applicable
<b>LITHUANIA</b>							
Bribery	Criminal Code, Art. 225		√			√	
Trading in influence	Criminal Code, Art. 226		√			√	
Graft	Criminal Code, Art. 227		√			√	
Abuse of Office	Criminal Code, Art. 228		√			√	
Production, Storage or Handling of Counterfeit Currency or Securities	Criminal Code, Art. 213		√	√		√	
Money laundering	Criminal Code, Art. 216		√	√		√	
Unjust enrichment	Criminal Code, Art. 189(1)		√			√	
Swindling	Criminal Code, Art. 182		√		√	√	
Fraudulent management of accounts	Criminal Code, Art. 222					√	
Use of a Credit, Loan or Targeted Support Not in Accordance with Its Purpose or the Established Procedure	Criminal Code, Art. 206			√		√	
<b>ROMANIA</b>							
Taking a bribe	Criminal Code, Art. 289		√				√
Giving a bribe	Criminal Code, Art. 290		√				√
Traffic of influence	Criminal Code, Art. 291		√				√
Buying influence	Criminal Code, Art. 292		√				√
Fraud in the context of bankruptcy	Criminal Code, Art. 241				√		√
Fraudulent management	Criminal Code, Art. 242				√		√

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Factual data of legal definition		Clusters sorted out according to national legal framework				Research objective
The offence name <sup>81</sup>	Legislative source <sup>82</sup>	Corruption crimes	Money laundering	Fraud	Crimes against the financial interest of EU	Ban or exclusion from public procurement applicable
Fraud in public auction	Criminal Code, Art. 246			✓		✓
Computer fraud	Criminal Code, Art. 249			✓		✓
Performing fraudulent financial operations	Criminal Code, Art. 250			✓		✓
Accepting fraudulent financial operations	Criminal Code, Art. 251			✓		✓
Embezzlement	Criminal Code, Art. 295			✓		✓
Obtaining funds illegally	Criminal Code, Art. 306			✓		✓
Misappropriation of funds	Criminal Code, Art. 307			✓		✓
Money Laundering	Law no. 656/2002 on the prevention and sanctioning of money laundering and on setting up certain measures for the prevention and fighting against terrorism financing, Art. 29		✓			✓
Unduly informing on money laundering notifications	Law no. 656/2002 on the prevention and sanctioning of money laundering and on setting up certain measures for the prevention and fighting against terrorism financing, Art.		✓			✓

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Factual data of legal definition		Clusters sorted out according to national legal framework				Research objective
The offence name <sup>81</sup>	Legislative source <sup>82</sup>	Corruption crimes	Money laundering	Fraud	Crimes against the financial interest of EU	Ban or exclusion from public procurement applicable
	31, ref. to art. 25, para. (2)					
Frauds in privatisation	Law no. 78/2000 on preventing, discovering and sanctioning corruption offence, Art. 10, para. (1) lit. a	√		√		√
Frauds with subventions	Law no. 78/2000 on preventing, discovering and sanctioning corruption offence, Art. 10, para. (1) lit. b and c	√		√		√
Frauds during companies liquidation	Law no. 78/2000 on preventing, discovering and sanctioning corruption offence, Art. 11			√		√
Incompatibility and use of privileged information as a corruption offence	Law no. 78/2000 on preventing, discovering and sanctioning corruption offence, Art. 12, lit. (a)			√		√
Use of privileged information as a corruption offence	Law no. 78/2000 on preventing, discovering and sanctioning corruption offence, Art. 12, lit. (b)			√		√
Illegal access to funds	Law no. 78/2000 on preventing, discovering and sanctioning corruption offence, Art. 18 <sup>1</sup> para. (1)			√	√	√

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Factual data of legal definition		Clusters sorted out according to national legal framework				Research objective
The offence name <sup>81</sup>	Legislative source <sup>82</sup>	Corruption crimes	Money laundering	Fraud	Crimes against the financial interest of EU	Ban or exclusion from public procurement applicable
Illegal access to European funds	Law no. 78/2000 on preventing, discovering and sanctioning corruption offence, Art. 18 <sup>1</sup> para. (2)			√	√	√
Misappropriation of European funds	Law no. 78/2000 on preventing, discovering and sanctioning corruption offence, Art. 18 <sup>2</sup>			√	√	√
Use of false, inaccurate or incomplete documents or statements with impact over the general budget of the European Union	Law no. 78/2000 on preventing, discovering and sanctioning corruption offence, Art. 18 <sup>3</sup> para. (1)			√	√	√
Refuse to provide documents with impact over the general budget of the European Union	Law no. 78/2000 on preventing, discovering and sanctioning corruption offence, Art. 18 <sup>3</sup> para. (2)			√	√	√

## Annex 2

Mandatory and facultative grounds for exclusion from public procurement according to Directive 2014/24/EU (article 57, footnotes omitted)

<b>Paragraph</b>	<b>Type of ground</b>
<p>1. Contracting authorities shall exclude an economic operator from participation in a procurement procedure where they have established, by verifying in accordance with Articles 59, 60 and 61, or are otherwise aware that that economic operator has been the subject of a conviction by final judgment for one of the following reasons:</p> <ul style="list-style-type: none"> <li>a) participation in a criminal organisation, as defined in Article 2 of Council Framework Decision 2008/841/JHA;</li> <li>b) corruption, as defined in Article 3 of the Convention on the fight against corruption involving officials of the European Communities or officials of Member States of the European Union and Article 2(1) of Council Framework Decision 2003/568/JHA as well as corruption as defined in the national law of the contracting authority or the economic operator;</li> <li>c) fraud within the meaning of Article 1 of the Convention on the protection of the European Communities' financial interests;</li> <li>d) terrorist offences or offences linked to terrorist activities, as defined in Articles 1 and 3 of Council Framework Decision 2002/475/JHA respectively, or inciting or aiding or abetting or attempting to commit an offence, as referred to in Article 4 of that Framework Decision;</li> <li>e) money laundering or terrorist financing, as defined in Article 1 of Directive 2005/60/EC of the European Parliament and of the Council;</li> <li>f) child labour and other forms of trafficking in human beings as defined in Article 2 of Directive 2011/36/EU of the European Parliament and of the Council.</li> </ul> <p>The obligation to exclude an economic operator shall also apply where the person convicted by final judgment is a member of the administrative, management or supervisory body of that economic operator or has powers of representation, decision or control therein.</p>	<p><i>Mandatory and substantive</i></p>
<p>2. An economic operator shall be excluded from participation in a procurement procedure where the contracting authority is aware that the economic operator is in breach of its obligations relating to the payment of taxes or social security contributions and where this has been established by a judicial or administrative decision having final and binding effect in accordance with the legal provisions of the country in which it is established or with those of the Member State of the contracting authority.</p> <p>Furthermore, contracting authorities may exclude or may be required by Member States to exclude from participation in a procurement procedure an economic operator where the contracting authority can demonstrate by any appropriate means that the economic operator is in breach of its obligations relating to the payment of taxes or social security contributions.</p> <p>This paragraph shall no longer apply when the economic operator has fulfilled its obligations by paying or entering into a binding arrangement with a view to paying the taxes or social security contributions due, including, where applicable, any interest accrued or fines.</p>	<p><i>Mandatory and substantive</i></p>

<p>3. Member States may provide for a derogation from the mandatory exclusion provided for in paragraphs 1 and 2, on an exceptional basis, for overriding reasons relating to the public interest such as public health or protection of the environment. Member States may also provide for a derogation from the mandatory exclusion provided in paragraph 2, where an exclusion would be clearly disproportionate, in particular where only minor amounts of taxes or social security contributions are unpaid or where the economic operator was informed of the exact amount due following its breach of its obligations relating to the payment of taxes or social security contributions at such time that it did not have the possibility of taking measures as provided for in the third subparagraph of paragraph 2 before expiration of the deadline for requesting participation or, in open procedures, the deadline for submitting its tender.</p>	<p><i>Facultative and substantive</i></p>
<p>4. Contracting authorities may exclude or may be required by Member States to exclude from participation in a procurement procedure any economic operator in any of the following situations:</p> <ul style="list-style-type: none"> <li>a) where the contracting authority can demonstrate by any appropriate means a violation of applicable obligations referred to in Article 18(2);</li> <li>b) where the economic operator is bankrupt or is the subject of insolvency or winding-up proceedings, where its assets are being administered by a liquidator or by the court, where it is in an arrangement with creditors, where its business activities are suspended or it is in any analogous situation arising from a similar procedure under national laws and regulations;</li> <li>c) where the contracting authority can demonstrate by appropriate means that the economic operator is guilty of grave professional misconduct, which renders its integrity questionable;</li> <li>d) where the contracting authority has sufficiently plausible indications to conclude that the economic operator has entered into agreements with other economic operators aimed at distorting competition;</li> <li>e) where a conflict of interest within the meaning of Article 24 cannot be effectively remedied by other less intrusive measures;</li> <li>f) where a distortion of competition from the prior involvement of the economic operators in the preparation of the procurement procedure, as referred to in Article 41, cannot be remedied by other, less intrusive measures;</li> <li>g) where the economic operator has shown significant or persistent deficiencies in the performance of a substantive requirement under a prior public contract, a prior contract with a contracting entity or a prior concession contract which led to early termination of that prior contract, damages or other comparable sanctions;</li> <li>h) where the economic operator has been guilty of serious misrepresentation in supplying the information required for the verification of the absence of grounds for exclusion or the fulfilment of the selection criteria, has withheld such information or is not able to submit the supporting documents required pursuant to Article 59; or</li> <li>i) where the economic operator has undertaken to unduly influence the decision-making process of the contracting authority, to obtain confidential information that may confer upon it undue advantages in the procurement procedure or to negligently provide misleading information that may have a material influence on decisions concerning exclusion, selection or award.</li> </ul> <p>Notwithstanding point (b) of the first subparagraph, Member States may require or may provide for the possibility that the contracting authority does not exclude an economic operator which is in one of the situations referred to in that point, where the contracting authority has established that the economic operator in question will</p>	<p><i>Facultative and substantive</i></p>

*The preventive role of the judiciary in protecting the financial interest of the European Union.  
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<p>be able to perform the contract, taking into account the applicable national rules and measures on the continuation of business in the case of the situations referred to in point (b).</p>	
<p>5. Contracting authorities shall at any time during the procedure exclude an economic operator where it turns out that the economic operator is, in view of acts committed or omitted either before or during the procedure, in one of the situations referred to in paragraphs 1 and 2.</p>	<p><i>Mandatory and substantive</i></p>
<p>At any time during the procedure, contracting authorities may exclude or may be required by Member States to exclude an economic operator where it turns out that the economic operator is, in view of acts committed or omitted either before or during the procedure, in one of the situations referred to in paragraph 4.</p>	<p><i>Facultative and substantive</i></p>
<p>6. Any economic operator that is in one of the situations referred to in paragraphs 1 and 4 may provide evidence to the effect that measures taken by the economic operator are sufficient to demonstrate its reliability despite the existence of a relevant ground for exclusion. If such evidence is considered as sufficient, the economic operator concerned shall not be excluded from the procurement procedure.</p> <p>For this purpose, the economic operator shall prove that it has paid or undertaken to pay compensation in respect of any damage caused by the criminal offence or misconduct, clarified the facts and circumstances in a comprehensive manner by actively collaborating with the investigating authorities and taken concrete technical, organisational and personnel measures that are appropriate to prevent further criminal offences or misconduct.</p> <p>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.</p> <p>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.</p>	<p><i>Self-cleaning condition</i></p>
<p>7. By law, regulation or administrative provision and having regard to Union law, Member States shall specify the implementing conditions for this Article. They shall, in particular, determine the maximum period of exclusion if no measures as specified in paragraph 6 are taken by the economic operator to demonstrate its reliability. Where the period of exclusion has not been set by final judgment, that period shall not exceed five years from the date of the conviction by final judgment in the cases referred to in paragraph 1 and three years from the date of the relevant event in the cases referred to in paragraph 4.</p>	<p><i>Mandatory and procedural</i></p>

