

NATIONAL ANALYSIS REPORT

based on the 28 research questions

LITHUANIA

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

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

In principal, criminal liability of legal entities in the Lithuanian criminal law was established with the amendments of the Criminal Code of the Republic of Lithuania (CC) in 2000 that came into force in 1 May 2003¹.

According to Art. 20 of the CC, a legal entity is held criminally liable for the criminal acts committed by natural persons only when (1) a natural person, operating individually or on behalf of the legal entity, commits a criminal act for the benefit or in the interests of the legal entity and (2) has the right to represent it; or make decisions on behalf of it; or control its activity. The third condition for applying criminal responsibility for legal entities is that the crime in question needs to be committed 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 (Art. 20, para 5).

There are 262 criminal acts defined in the CC of Lithuania in total; 127 from these provide that both natural persons and legal entities may be held criminally liable for committing those acts. The most relevant criminal acts in the context of this study (and somewhat most common) include:

- crimes and misdemeanours against property, property rights and property interests – most of Chapter 28 of CC (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 – near whole Chapter 30 of the CC (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 CC (including smuggling, deceit of the customs, etc.);
- crimes and misdemeanours against the financial system - nearly the whole Chapter 32 of the CC (including fraudulent / negligent management of accounts, production of counterfeit currency or

¹ Criminal Code of the Republic of Lithuania, No. VIII-1968, access online: <https://www.e-tar.lt/portal/lt/legalAct/TAR.2B866DFF7D43/vVrMmyDxLS>

securities, legalisation of property obtained by criminal means, trade in securities by using non-public (insider) information, failure to pay taxes, etc.);

- crimes and misdemeanours against the civil service and public interests – most of Chapter 33 of CC (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 CC, even though it criminalizes criminal acts that are in theory classified as corruption crimes. Separately, corruption related crimes are defined in the Law on Corruption Prevention² 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 CC Art. 216 - ‘legalisation of property obtained by criminal means’ and partly in CC Art. 213 – ‘production, storage or handling of counterfeit currency or securities’.

Fraud is criminalized in CC Art. 182. – “Swindling”.

There is no separate category of **crimes against the financial interests of the EU** in the Lithuanian CC. The only place where it explicitly mentions EU financial interests is Art. 228 – ‘abuse of powers’. Of course, 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 Prosecution³ and, naturally, the Financial Crimes Investigation Service implement the OLAF policy in the field.

According to Art. 43 of the CC, 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 the crimes against financial interest of EU (if they fall in any of the crimes listed in the CC – see above):

- 1) a fine;
- 2) restriction of operation of the legal entity;
- 3) liquidation of the legal entity.

² 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>

³ Access online (in Lithuanian): <http://www.prokuraturos.lt/lt/administracine-informacija/planavimo-dokumentai-ataskaitos/prioritetines-veiklos-kryptys/134>

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

A ban to participate in public procurement or form public contracts is not a criminal sanction.

In addition to this, for some of the above-mentioned crimes, the administrative sanction of exclusion from participating in public procurement may be applied by the purchasing organization following the grounds of exclusion in the Law on Public Procurement⁴ (please see the detailed explanation in the questions below). For this to be applicable, there needs to be a judgement on a crime that the purchasing organization could refer to.

Factual data of legal definition		Clusters sorted out according to national legal framework				Research objective
The offence name ⁵	Legislative source ⁶	Corruption crimes	Money laundering	Fraud	Crimes against the financial interest of EU	Exclusion applicable
Bribery	Criminal Code, Art. 225	X			X	
Trading in influence	Criminal Code, Art. 226	X			X	
Graft	Criminal Code, Art. 227	X			X	
Abuse of Office	Criminal Code, Art. 228	X			X	
Production, Storage or Handling of Counterfeit Currency or Securities	Criminal Code, Art. 213	X	X		X	
Money laundering	Criminal Code, Art. 216	X	X		X	
Unjust enrichment	Criminal Code, Art. 189(1)	X			X	

⁴ Law on Public Procurement of the Republic of Lithuania, No. I-1491, access online (in Lithuanian): <https://www.e-tar.lt/portal/lt/legalAct/TAR.C54AFFAA7622/WhWKoUQVUF>.

⁵ Please use the official translation into English of respective offences' name

⁶ Indicate Law title and reference to article. Mention [if part of directive transposal or national specific legislation]

Swindling	Criminal Code, Art. 182	X		X	X	
Fraudulent management of accounts	Criminal Code, Art. 222				X	
Use of a Credit, Loan or Targeted Support Not in Accordance with Its Purpose or the Established Procedure	Criminal Code, Art. 206				X	

2. Legal framework on exclusion from public procurement assembly in your country, and your comments about its synergy in your country's legal system.

Exclusion from public procurement in Lithuania is not applied like a criminal sanction. Instead, the Law on Public Procurement defines the grounds on excluding or restricting tenderers' participation in public procurement. The purchasing organizations evaluate the tenderers case by case and where these grounds are present, exclude a tenderer from that particular tender, thus making it an administrative decision.

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.⁷ Before this, a different set of grounds have been provided in Art. 33 of the Law on Public Procurement. Since the principles of transparency, equal participation and non-discrimination

⁷Art 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" (access online (in Lithuanian): <https://www.e-tar.lt/portal/lt/legalAct/a0f25f005ca411e79198ffdb108a3753>).

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 access online (in Lithuanian): <https://e-seimas.lrs.lt/portal/legalAct/lt/TAD/f82d89d12fcb11e79f4996496b137f39?jfwid=-wd7z6gj0v>.

are part of the Public Procurement Law as well, no other restrictions that do not fall in the list of Art. 46 are allowed.

The exclusion grounds set in Art. 46 of the Law on Public Procurement mainly focuses 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, committing a professional misconduct etc. There is a separate list for optional grounds of exclusion that may also be applied by the purchasing organization.⁸

Law on Public Procurement provides details on exclusion as follows⁹:

Art. 46 Tenderers' exclusion grounds

1) The purchasing organization eliminates a tenderer from a tender where the tenderer or its representative (as described in para. 2, subparagraph 2 of this article) is convicted for the following criminal activities:

1) participation in a criminal association, the organizing of it or leading it;

⁸The previous Law on Public Procurement (Art. 33) provided the following grounds on which the contracting authority must reject requests to participate and tenders (1) if the supplier (legal person or its representative) has an unspent or unexpunged conviction OR (2) a judgment of conviction was passed and became effective against the supplier (legal person) within the past five years for participation in a criminal organisation, formation or being in charge thereof, OR (3) for bribery, bribery of an intermediary, graft, fraud, OR (4) the use of credit / loan / targeted financial support not in accordance with its purpose or the established procedure, OR (5) credit fraud, OR (6) tax evasion, OR (7) provision of inaccurate data on income, profit or assets, OR (8) failure to file a tax return or to submit a report or another document, OR (9) acquisition or handling of the property obtained by criminal means, money or property laundering OR (10) there is a judgment of conviction passed and is effective against the suppliers of other countries for the crimes defined in the legal acts of the European Union listed in Article 45(1) of Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts OR (11) the natural person or a shareholder of a legal person owning a majority of votes, has an unspent or unexpunged conviction for criminal bankruptcy OR (12) has not fulfilled tax, including social security payment obligations in either its registration country or the country where the contracting authority is located, if this obligation exceeds 50 EUR. The contracting authority may also provide that tenderers will be eliminated where the tenderer is (1) bankrupt, is being liquidated, has signed a peace agreement with its creditors, has stopped or restricted its activities or its status is similar to this according to the laws, (2) is the subject of restructuring, bankruptcy proceedings or bankruptcy proceedings carried out of court, or forced liquidation or arrangement with creditors or is the subject of an analogous procedure in accordance with the laws and regulations of the country where it is registered; (3) a natural person has an unexpired or not expunged conviction, or a legal person has been convicted for criminal offenses against property, property rights and property interests, intellectual and industrial property, economic and business policy, financial system, public service and public interest over the last five years, with the exception of the above listed offenses; (4) has committed a serious professional offense; (5) has provided fraudulent information on its compliance with the requirements; (6) has been convicted for permitting illegal work over the last one year; (7) has been convicted for hiring citizens of the third countries illegally residing in Lithuania (or has been convicted for that over the past five years in cases where the tenderer is a legal person; (8) has not fulfilled or has improperly fulfilled a public procurement contract and it was an substantial breach of a contract clause as a result of which the contract has been terminated over the past three years or there is a court decision to deem the breach as substantial and compensate losses for the purchasing organization in the past three years.

⁹ Unofficial translation by the authors of the study

2) bribery, trading in influence, graft;

3) swindling ('fraud'), misappropriation of property, squandering of property, misleading declaration about the activities of a legal entity, use of a credit, loan or targeted support not in accordance with its purpose or the established procedure, credit fraud, provision of inaccurate data on income, profit or assets, failure to file a tax return or to submit a report or another document, fraudulent management of accounts or abuse where such actions are threatening EU financial interests as defined in the Convention on the Protection of EU Financial Interests Art. 1;

4) criminal bankruptcy;

5) terrorist or terrorist activity – related crime;

6) laundering of crime-related property;

7) trafficking in human beings, purchase or sale of a child;

8) for a crime committed by a tenderer of another country where that crime is defined in the legal acts of other countries that implement the EU legal acts listed in Directive 2014/24/ES Art. 57 para. 1.

2. A tenderer or its representative is deemed to be convicted for the criminal acts foreseen in para. 1 and para. 3 of this article where:

1) there has been an effective conviction for the tenderer (natural person) over the last 5 years and this person has a non-expired and non-expunged conviction;

2) there has been an effective conviction for the head of the tenderer (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 tenderer, undertake decisions in its name, enter contracts, or the accountant(s) or other person (people) having the right to prepare and sign the accounting documents of the tenderer - and this person has a non-expired and non-expunged conviction;

3) there has been an effective conviction for the tenderer (legal person, another organization or its organizational unit) over the last 5 years or, in cases foreseen in para. 3 of this Article - final administrative decision undertaken following the rules of the legal acts of the country of origin of the tenderer;

3. If the tenderer has not fulfilled tax (including social security) obligations in either its registration country or the country where the contracting authority is located, the tenderer is excluded from the tender where the contracting authority finds out that the tenderer has been convicted for it in the way defined in sub. para. 1 and 3 of para. 2 of this Article, or the contracting authority has other proofs about the failure to fulfil these obligations. This provision is not applied where:

1) the tenderer has committed to pay the taxes, including the social security and is therefore deemed to have already committed the obligations in this paragraph;

2) the debt is not higher than 50 EUR (fifty euros);

3) the tenderer has only been informed about the exact amount of its debt when it was already not possible to pay the taxes (including social security) or sign a tax debt contract or a similar contract or undertake other measures in time for the deadline of submitting proposals. The tenderer is not eliminated from the tender under this ground if under the requirement of the contracting authority, the tenderer is able to prove that it is already deemed to have committed these obligations by submitting relevant documents as provided in Art. 50 para. 6 of this Law.

4. The contracting authority excludes the tenderer from the tender if:

1) the tenderer has colluded seeking to distort competition in the current tender and the contracting authority has convincing proof on that;

2) the tenderer found himself in a conflict of interests situation during the tenderer as defined in Article 21 of this Law and it is not possible to so solve the situation. It is deemed that it is not possible to so solve such a situation where the persons in the conflict of interests have determined the decisions of the (Tender) Commission or the contracting authority and changing these decisions would be against the provisions of this law;

3) the competition has been distorted as it is defined in Art. 27, para 3 and 4, and the situation cannot be solved;

4) the tenderer has concealed information or has given fraudulent information about the compliance with the requirements foreseen in Art. 47 of this law during the tender procedures and the contracting authority can prove it by any legal measures, or the tenderer is not able to provide supporting documents required under Art. 50 of this law because of the previously submitted fraudulent information. The tenderer is also excluded from the tender procedure where in previous procedures it had concealed information or had provided fraudulent information or the tenderer had not been able to provide supporting documents required under Art. 50 of this law because of the previously submitted fraudulent information and because of that the tenderer has been excluded from tender procedures over the last year, or over the last year there has been an effective judgment. The tenderer is also excluded from the tender procedure under this ground where under the legal acts of other countries it has concealed information or provided fraudulent information or the has not been able to provide supporting documents required and as a result has been excluded from tender procedures the last year or there has been an effective judgment over the last year, or similar sanctions have been applied;

5) during the tender, the tenderer has employed illegal actions, seeking to influence the decisions of the contracting authority, acquire confidential information that would provide the tenderer with an undue advantage or has provided misleading information that may have essential influence on the decisions of the contracting authority to exclude other tenderers, evaluate their qualifications, select the winner and the contracting authority can prove it by any legal measures;

6) the tenderer had not fulfilled the tender contract, purchasing contract with a purchasing party or a concession contract or has fulfilled it inappropriately and it was an substantial breach of a contract as it is defined in the Civil Code ('substantial contract breach') due to which a purchasing contract has been terminated over the last 3 years or there has been an effective judgment over the last 3 years that has satisfied the request of the purchasing organization, purchasing party or the granting institution to indemnify the losses suffered because

the tenderer has implemented an substantial clause of the tender contract with grand or permanent defects. Under this ground, a tenderer is also excluded from a tender procedure where following the legal acts of other countries it is established that the tenderer had implemented a previous tender contract, purchasing contract with a purchasing subject or a previous concession contract by implementing an substantial contract clause with grand or permanent defects over the last 3 years and because of this the agreement has been prematurely terminated, losses have been indemnified or similar sanctions have been applied. The contracting authority also excluded tenderers under this ground, where the contracting authority has convincing data leading to believe that the tenderer has been established seeking to evade this ground of exclusion.

7) the tenderer has committed a professional misconduct and an administrative penalty or an economical sanction provided in Lithuanian laws or in the legal acts of other countries has been applied for the breach of financial accountability and auditing legal acts where less than 1 year has passed since the day of the decision to apply sanctions or the day when a person has fulfilled an administrative instruction.

5. The contracting authority may decide not to exclude the tenderer from the tender if the grounds set in para. 1, sub, para. 1 and 2 of para. 3, para. 4 exist only in exceptional cases, where it is necessary to ensure the protection of the public interest, including the protection of the community health and environment.

6. A purchasing organization may exclude a tenderer from a purchasing procedure if the tenderer:

1) has breached at least one of the environmental, social or labour law obligations set in Art.17, para. 2, sub. para. 2 of this Law and there has been an administrative fine or economical sanction applied that is foreseen in Lithuanian or foreign laws, where less than a year has passed since the decision came into force;

2) is insolvent, there is an ongoing restructuring or bankruptcy case, the liquidation procedures have been initiated or launched, when its assets are under the control of the court or the bankruptcy administration, when it has signed a peace agreement with the creditors (an agreement between the tenderer and its creditors to continue the activities of the tenderer, where the tenderer undertakes certain obligations and the creditors agree to postpone their claims, reduce or waive these claims), when the operations of the tenderer have been suspended or restricted or the its condition is equal or similar to that based on the legal acts of its registration country. A contracting authority cannot exclude a tenderer from a tender procedure under this ground if the tenderer provides reasonable proves that it will be able to implement the tender contract properly.

3) has committed a serious professional misconduct and it raises doubts on whether it will honestly implement the tender contract. A tenderer may be excluded under this ground, when at least one of these breaches that may be voluntarily foreseen in the tender documents of the contracting authority exists:

a) professional ethics breach, when less than a year has passed since the decision that the tenderer 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 tenderer 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 tenderer (natural person) or the head of a tenderer (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 tenderer, undertake decisions in its name, enter 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;

4) has been convicted for permitting illegal work for the third country citizens, where an administrative punishment or economical sanction foreseen in Lithuanian laws or the legal acts of other countries has been applied for a tenderer and less than a year has passed since the decision to apply that sanction.

7. The contracting authority excludes the tenderer from the tender procedure at any stage of the procedure if it becomes evident that due to the actions or inaction of the tenderer before the tender procedure or during it, the tenderer meets any of the grounds of exclusion set in the tender documents.

8. If the tenderer does not meet the requirements set in para. 1, 4 and 6 in this Article, the contracting authority does not exclude it from the tender procedures where two of these conditions exist together:

1) the tenderer provided the contracting authority with information that the following measures have been taken:

a) the tenderer has voluntarily paid or has committed to pay the compensation for the damages incurred due to the criminal activities or misdemeanours foreseen in para. 1, 4 and 6 of this Article, where applicable;

b) the tenderer has cooperated, actively provided assistance or has taken other measures helping to investigate, uncover criminal activity or misdemeanour it has committed, where applicable;

c) the tenderer has taken technical, organizational, personnel management measures directed towards preventing further criminal activities or misdemeanours;

2) the contracting authority evaluated the information provided by the tenderer following sub. para. 1 of this paragraph and undertook a motivated decision that the measures taken by the tenderer 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. The contracting authority has to provide the tenderer with a motivated written decision no later than in 10 days upon receiving the tenderer's information provided in sub. para. 1 of this paragraph.

3. The national criminal framework on application of the additional sanction of exclusion from public procurement¹⁰.

There is no national criminal framework on application of the additional sanction of exclusion from public procurement. However, commission of crimes or misdemeanours may be a ground for excluding tenderers from tender procedures as provided in the Law on Public Procurement (see above).

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

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

The grounds for excluding tenderers from tender procedures are only listed in the Law on Public Procurement and are only applied by the contracting authorities (i.e. – there is no mechanism of providing sanctions by the court, only the administrative mechanism). These grounds comprise both criminal acts, misdemeanours and other breaches of law as listed above.

5. Acts representing cause of exclusion from public procurement in your country, and their implementation regime

Acts	Cause of exclusion	By decision of the court	Provided by public procurement legal framework and enforced by contracting authorities with no need of a court's decision
Corruption crimes	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>
Money laundering	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>
Fraud	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>
Establishment of an organized criminal group	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>
Crimes against financial interests of EU	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>

¹⁰ Emphasize also the complementarity of sanctions under your country specific criminal law and the general regime of additional administrative and civil sanction to criminal sanctions. Please specify if the sanction of exclusion from procurement is included in the interim measures in your criminal legal framework.

Conflict of interest	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>
Unfair competition	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>
False statements in public procurement procedures	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>
Terrorist offences	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>
Human traffic and exploit	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>
Non-payment of taxes or social security contributions	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>
Deficient performance in previous public contracts implementation	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>
Serious professional misconduct	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>
Unlawfully influencing contracting authority's decision in order to obtain advantages during public procurement procedure	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>
Unlawfully obtaining confidential information that provides the bidder with private advantages within the public procurement procedure	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>
Others specified at question no 1	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>

6. Exceptions leading to suspension of the sanction are or when exclusion from public procurement does not particularly apply, both as additional criminal sanction and administrative sanction in your country (maximum 1000 words).

The exceptions when exclusion from public procurement is not applied even if the grounds for excluding a tenderer from a tender procedure exist, are provided in the Law on Public Procurement and differ based on the nature of the ground of exclusion. Below, the exceptions from the Law on Public Procurement are listed based on the ground of exclusion for which they apply:

Ground(s) of exclusion from tender procedure	Exceptions for application
In cases of tenderer's failure to fulfil tax (including social security) obligations	Not applied where: 1) the tenderer has committed to pay the taxes, including the social security and is

	<p>therefore deemed to have already committed the obligations;</p> <p>2) the debt is not higher than 50 EUR;</p> <p>3) the tenderer has only been informed about the exact amount of its debt when it was already not possible to pay the taxes (including social security) or sign a tax debt contract or a similar contract or undertake other measures in time for the deadline of submitting proposals. The tenderer is not eliminated from the tender under this ground if under the requirement of the contracting authority, the tenderer is able to prove that it is already deemed to have committed these obligations by submitting relevant documents as provided by the Law on Public Procurement.</p>
<p>For all grounds of exclusion from public procurement except for one related to tax obligations (Art 46 para 3 sub para 3; for this – see above)</p> <p>In detail, the grounds would include the following:</p> <p><i>(Art. 46 para 1 of Law on Public Procurement)</i></p> <p>In cases of the following criminal activities¹¹) participation in a criminal association, the organizing of it or leading it; 2) bribery, trading in influence, graft; 3) swindling ('fraud'), misappropriation of property, squandering of property,</p>	<p>Purchasing authority <i>may</i> not apply these grounds <i>only in exceptional cases</i>, when it is necessary to ensure the protection of the public interest, including the protection of the community health and environment.¹¹</p>

¹¹ This exception may be applied in truly extraordinary cases. The Explanatory Note of the Law on Public Procurement provides that "Although the principle position not to come into contract with tenderers that have committed wrongdoings is maintained, in cases of epidemic or ecological disasters the societal needs take precedence. If in such cases the urgently needed and necessary services or goods can be provided, for example, by a convicted tenderer, the services or goods may be still purchased from it." The Explanatory Note can be found (in Lithuanian) at <https://e-seimas.lrs.lt/portal/legalAct/lt/TAK/e200b7f0891311e5bca4ce385a9b7048?positionInSearchResults=1&searchModelUUI=D=4028ec97-4f42-4875-84b9-c0bc365cce3b>.

An official commentary obtained by the current researchers from the Public Procurement Office on this exception stressed the truly exceptional nature of it. It also added that the Explanatory Note does not provide a finite list of exceptional causes and the use of this provision would be evaluated on a case-by-case basis.

misleading declaration about the activities of a legal entity, use of a credit, loan or targeted support not in accordance with its purpose or the established procedure, credit fraud, provision of inaccurate data on income, profit or assets, failure to file a tax return or to submit a report or another document, fraudulent management of accounts or abuse where such actions are threatening EU financial interests as defined in the Convention on the Protection of EU Financial Interests Art. 1; 4) criminal bankruptcy; 5) terrorist or terrorist activity – related crime; 6) laundering of crime-related property; 7) trafficking in human beings, purchase or sale of a child; 8) for a crime committed by a tenderer of another country where that crime is defined in the legal acts of other countries that implement the EU legal acts listed in Directive 2014/24/ES Art. 57 para. 1

AND

(Art 46 para 3 sub para 1 and 2)

In cases of tenderer's failure to fulfil tax (including social security) obligations regardless of whether:

- 1) the tenderer has committed to pay the taxes, including the social security and is therefore deemed to have already committed the obligations;
- 2) the debt is not higher than 50 EUR;

AND

(Art 46 para 4)

In cases where

- 1) the tenderer has colluded seeking to distort competition in the current tender and the contracting authority has convincing proof on that;
- 2) the tenderer found himself in a conflict of interests situation during the tenderer as defined in Article 21 of this Law and it is not possible to so solve the situation. It is deemed that it is not possible to so solve such a situation where the persons in the conflict of interests have determined the decisions of the (Tender) Commission or the contracting authority and

changing these decisions would be against the provisions of this law;

3) the competition has been distorted as it is defined in Art. 27, para 3 and 4, and the situation cannot be solved;

4) the tenderer has concealed information or has given fraudulent information about the compliance with the requirements foreseen in Art. 47 of this law during the tender procedures and the contracting authority can prove it by any legal measures, or the tenderer is not able to provide supporting documents required under Art. 50 of this law because of the previously submitted fraudulent information. The tenderer is also excluded from the tender procedure where in previous procedures it had concealed information or had provided fraudulent information or the tenderer had not been able to provide supporting documents required under Art. 50 of this law because of the previously submitted fraudulent information and because of that the tenderer has been excluded from tender procedures over the last year, or over the last year there has been an effective judgment. The tenderer is also excluded from the tender procedure under this ground where under the legal acts of other countries it has concealed information or provided fraudulent information or the has not been able to provide supporting documents required and as a result has been excluded from tender procedures the last year or there has been an effective judgment over the last year, or similar sanctions have been applied;

5) during the tender, the tenderer has employed illegal actions, seeking to influence the decisions of the contracting authority, acquire confidential information that would provide the tenderer with an undue advantage or has provided misleading information that may have essential influence on the decisions of the contracting authority to exclude other tenderers, evaluate their qualifications, select the winner and the contracting authority can prove it by any legal measures;

6) the tenderer had not fulfilled the tender contract, purchasing contract with a purchasing party or a concession contract or has fulfilled it inappropriately and it was an

<p>substantial breach of a contract as it is defined in the Civil Code ('substantial contract breach') due to which a purchasing contract has been terminated over the last 3 years or there has been an effective judgment over the last 3 years that has satisfied the request of the purchasing organization, purchasing party or the granting institution to indemnify the losses suffered because the tenderer has implemented an substantial clause of the tender contract with grand or permanent defects. Under this ground, a tenderer is also excluded from a tender procedure where following the legal acts of other countries it is established that the tenderer had implemented a previous tender contract, purchasing contract with a purchasing subject or a previous concession contract by implementing an substantial contract clause with grand or permanent defects over the last 3 years and because of this the agreement has been prematurely terminated, losses have been indemnified or similar sanctions have been applied. The contracting authority also excluded tenderers under this ground, where the contracting authority has convincing data leading to believe that the tenderer has been established seeking to evade this ground of exclusion.</p> <p>7) the tenderer has committed a professional misconduct and an administrative penalty or an economical sanction provided in Lithuanian laws or in the legal acts of other countries has been applied for the breach of financial accountability and auditing legal acts where less than 1 year has passed since the day of the decision to apply sanctions or the day when a person has fulfilled an administrative instruction.</p>	
<p>For all grounds of exclusion from public procurement except the one related to tax obligations (Art 46 para 3; for this – see above)</p>	<p>Where two of these conditions exist together:</p> <p>1) the tenderer provided the contracting authority with information that the following measures have been taken:</p> <p>a) the tenderer has voluntarily paid or has committed to pay the compensation for the damages incurred due to the criminal activities or misdemeanours where applicable;</p>

	<p>b) the tenderer has cooperated, actively provided assistance or has taken other measures helping to investigate, uncover criminal activity or misdemeanour it has committed, where applicable;</p> <p>c) the tenderer has taken technical, organizational, personnel management measures directed towards preventing further criminal activities or misdemeanours;</p> <p>2) the contracting authority evaluated the information provided by the tenderer following this procedure and undertook a motivated decision that the measures taken by the tenderer 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.</p>
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7. Recent changes within legal framework that affected the conditions of exclusion from public procurement in your country? Briefly describe it in comment section.

YES

NO

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.

8. Recent changes within criminal framework that affected the conditions of applying the additional sanction of exclusion from public procurement in your country? Briefly describe it in comment section.

YES

NO

9. Statistical data

Item	2013	2014	2015	2016
Total number of legal entities sanctioned for corruption crimes ¹²	5	3	0	0
Total number of legal entities sanctioned of money laundering ¹³	0	0	0	0
Total number of legal entities sanctioned for fraud (domestically incriminated) ¹⁴	10	13	10	3
Total number of legal entities sectioned for crimes against financial interest of European Union	N/A	N/A	N/A	N/A
Number of sanctions of exclusion from public procurement applied to legal entities	N/A	N/A	N/A	N/A
Number of sanctions of exclusion from public procurement applied to legal entities which committed corruption crimes	N/A	N/A	N/A	N/A
Number of sanctions of exclusion from public procurement applied to legal entities which committed money laundering crimes	N/A	N/A	N/A	N/A
Number of sanctions of exclusion from public procurement applied to legal entities which committed fraud	N/A	N/A	N/A	N/A
Number of sanctions of exclusion from public procurement applied to legal entities which committed crimes against financial interest of European Union	N/A	N/A	N/A	N/A
Data on number of sanctions of exclusion applied in Lithuania is not available. The closest available data is based on the previous Law on Public Procurement (namely, its Articles 33 and 39) and still does not provide the full picture. In Lithuania, all purchasing organizations must submit final reports to the Public Procurement Office for all tenders. According to the previous Law on Public Procurement within these reports the purchasing organization must provide the information on whether any of the bids have been excluded from a particular tender and, if so, on what grounds (that is, according to which Article).The challenge is that the former Article 33 Section 1 (as noted above) was very extensive and comprised multiple grounds for rendering a particular bidder in non-compliance of qualification requirements ((1) unspent or unexpunged conviction OR (2) a judgment of conviction was passed and became effective against the supplier (legal person) within the past five years for participation in a criminal organisation,				

¹²The statistics in this section covers convictions in criminal cases that have entered into effect but exclude (I) the verdicts that might have been adopted at the cassation instance by the Supreme Court of Lithuania and (II) cases in which a court of first instance has rendered a conviction but an appeal is still pending.

¹³Ibid.

¹⁴Ibid.

formation or being in charge thereof, OR (3) for bribery, bribery of an intermediary, graft, fraud, OR (4) the use of credit / loan / targeted financial support not in accordance with its purpose or the established procedure, OR (5) credit fraud, OR (6) tax evasion and etc.¹⁵). The final reports would refer to Article 33 Section 1 as the ground for excluding a bidder but would not provide the specific ground within.

Furthermore, there is another methodological challenge – when a tender is parted into several bids some purchasing organisations within the final reports they provide the Public Procurement Office with signify an exclusion of a bidder as a single exclusion, whereas in other cases the purchasing organisation will signify each separate bid separately (e.g. if a purchase is parted into 5 bids and a particular bidder has been excluded from the whole purchase on the same grounds, some purchasing organisations in their final reports will signify a single exclusion, whereas other signify 5 exclusions; the Public Procurement Office noted that there is no way of measuring the scope of this variable.

Taking all the mentioned disclaimers into account, the available data has still been obtained through a FOIA: 2013 – 896 bidders; 2014 – 772 bidders; 2015 – 765 bidders; 2016 – 778 bidders.

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

- Only during the selection phase if there is evidence¹⁶ that the private legal person was liable for conditions of exclusion
- In any moment of the public procurement procedure if the offences have been committed during the public procurement procedure's progress

The contracting authority excludes the tenderer from the tender procedure at any stage of the procedure if it becomes evident that due to the actions or inaction of the tenderer before the tender procedure or during it, the tenderer meets any of the grounds of exclusion set in the tender documents (Article 46, para. 7, Law on Public Procurement)

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

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

¹⁵For an exhaustive list please see footnote No. 9.

¹⁶ Please also highlight in the comment section what may represent baseline evidence in order to determine the exclusion from public procurement

Exclusion from public procurement is not applied as a sanction – the contracting authority excludes a tenderer from the tender procedures upon evaluating whether any of the exclusion grounds set in the Law on Public Procurement exist. It is an administrative decision, thus only applicable for that tender.

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

YES

NO

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

YES

NO

In principle - yes, although there are two different standards of application of these criteria, both provided for in the Law on Public Procurement:

- (I) Art 49 para 4 - the purchasing authority is under obligation to apply the same grounds of exclusion for subcontractors only if the tenderer 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 the tenderer to substitute this subcontractor;
- (II) Art 88 para 5 – the purchasing authority may apply the same grounds of exclusion for subcontractors if the tenderer 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.

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

YES

Only under specific circumstances

NO

In all cases, the grounds for exclusion from public procurement are related to enforced judgments (not on going judicial procedures)

15. What is the maximum period of exclusion provided by the national framework for situations provided by Directive 2014/24/EU of The European Parliament and of the Council on public procurement and repealing Directive 2004/18/EC¹⁷, at art. 57(7)? Please explain how these lengths have been established if different from the ones in the directive. (maximum 1000 words)

According to the Law on Public Procurement, exclusion from a tender is applied by the contracting authority for a specific tender where the grounds listed in this law exist. Therefore, there is no period of exclusion set in law – instead, contracting authorities undertake ad hoc decisions for each tender.

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

YES

NO

*There is no public database of legal persons convicted for criminal offences. There is a privately managed online platform *rekvizitai.lt* where information on each legal person 'legal history' is published based on the publicly accessible courts decisions, however it is not an official source of information.*

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

YES

NO

Only partly – and to a very small extent. There is no single database in Lithuania that would allow one to find all legal persons that have been debarred from tenders. As described above, the debarring procedure in Lithuania is one of an ad hoc nature. As a matter of principle, this data should be obtainable through a FOIA from the Public Procurement Office as it is part of the final reports that purchasing organisations must submit for each tender.¹⁸

However, a similar list exists for tenderers that are subject to debarring on one ground – a substantial breach of a previous tender contract. The Public Procurement Office manages a list of unreliable tenderers ('the black list of tenderers')¹⁹ – a list of tenderers 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 tenderer and the contracting authority). First, the purchasing organization

¹⁷<http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32014L0024&from=EN>

¹⁸The question remains whether the data is stored and processed in a manner that would allow to extract this piece of tender information in an orderly fashion and in its entirety.

¹⁹ (in Lithuanian) <https://vpt.lrv.lt/lt/konsultacine-medziaga/nepatikimu-tiekeju-sarasas-1>

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 from the supplier's side, the purchasing organization may in 10 days add the supplier to the "List of Unreliable Suppliers". An official request to that end must be sent by the purchasing organization to the Public Procurement Office. The Public Procurement Office is responsible for administering the list and making it public. Suppliers remain on the list for 3 years.

The suppliers (both legal and natural persons) that are on this list are barred from bidding at procurements of the same type (e.g. a supplier that has caused a substantive breach of contract within a service contract will not be able to bid for procurements of services). Next to that, each purchasing organization in Lithuania can indicate within the qualification requirements of each procurement that all persons 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).

The Public Procurement Office also administers the "List of Suppliers that have Submitted Fraudulent Information".²⁰ 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 measures. First, the purchasing organization must conclude that the fraudulent information has been submitted and exclude the supplier from the tender. If (a) the supplier does not dispute this in court; or (b) the court upholds that the fact that fraudulent information indeed has been submitted, the purchasing organization in 10 days adds the supplier to the "List of Suppliers that have Submitted Fraudulent Information". Suppliers remain on the list for 1 year. Each purchasing organization must include the inclusion on this list as a ground for exclusion from public procurement.

²⁰(in Lithuanian) <http://vpt.lrv.lt/melaginga-informacija-pateikusu-tiekeju-sarasas-1>.

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

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

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

While most practitioners agree that the current legal framework on exclusion from public procurement is considered adequate, a big part of them outline that there is still place for improvements. The practitioners outline that, naturally, it is a bit too early to evaluate how the new public procurement law that transposes the public procurement directive will be applied in practice and they base their opinion partly on the previous regulation.

There are some grounds for exclusion that seem a bit ambiguous to the practitioners, for example, the “re-emerging category of dishonest vendors”, but no issues have been raised. Therefore, it seems that generally some of the practitioners feel that there may be space for improvements because of lack of clarity towards the application of the grounds of exclusion from public procurement, rather than concrete issues, at least at this point.

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

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

There is no criminal framework on exclusion from public procurement in Lithuania. Moreover, nearly all the interviewed practitioners agree that it would not be beneficial to have such a criminal sanction in the national legal framework. Some of them claimed that if there was such a sanction in the Criminal Code, it would simply duplicate the provisions of the Law on Public Procurement.

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

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

There are no fixed lengths of exclusion from public procurement in Lithuania. Instead, the purchasing organizations apply exclusion case by case during the evaluation of the tenders' proposals where the grounds for exclusion listed in the Law on Public Procurement exist. At the same time, however, there are certain terms listed in the Law on Public Procurement, providing for how long each of the ground of exclusion is applicable.

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

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

Most practitioners agree that it would be useful to somehow have a unified system to exclude the tenderers from public procurement for a certain period once the grounds for exclusion are established. However, they also stress that it is important to have a differentiation between different grounds of exclusions to ensure that the terms are still different based on the nature of those grounds.

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

- It frequently happens
- It rarely happens
- Other

Most practitioners agree that it happens rarely. It seems that a couple of businesspeople may have had problems interpreting different national regulations on this, nevertheless. Also, it is important to note that while most practitioners agree that the regulations on exclusion from public procurement are very similar in the EU due to

the Public Procurement directives, there may be problems in the third countries, for example, where different definitions of criminal activity / misdemeanour exist.

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

YES

NO

Other

An overwhelming majority of practitioners agree that making such a list available publicly would be beneficial. Although some do raise a couple of points for open discussion, namely the fact that the purchasing organisations can already obtain such information through state registries available to them²¹ and that in practice the contestant bidders act as supervisors of one another, hence the extent to which such public list would bring about change is uncertain.

24. Do experts consider that exclusion from public procurement as an administrative sanction applied for other offences, that are not criminal, breaks the free competition principle? (maximum 1000 words)

Most practitioners lean towards the position that such exclusion would not break the free competition principle. The main reasons provided in support of this position assert that the exclusion itself stands as a token of free competition as only the law-abiding bidders can compete and in doing so assures a level field for all competitors. The claim is made here that exclusions are not applied without a legal ground for it.

On the other hand, the opposing practitioners highlighted the importance of striking a proportional balance between the committed offence and the sanction; moreover, the practitioners followed this thought by claiming that exclusion in principle should act as ultima ratio when all other means of 'cleaning up' have failed (the new legislation provides for opportunities to correct oneself).

25. Do experts consider that exclusion from public procurement as an administrative sanction applied to a legal person, who is under judicial proceedings in respect to criminal acts, breaks the innocent presumption principle? (maximum 1000 words)

An overwhelming majority of practitioners claim exclusion prior a judicial verdict to breach the presumption of innocence (if there are no other grounds to apply the exclusion, of course). The reasons for this are that at the stage of judicial proceedings nothing is an established fact yet and the judicial proceedings might be used to

²¹Note: the researchers are not certain that a single and unified database of this sort is available even to the purchasing organisations which in practice creates an obstacle in identifying the companies that have indeed been convicted for criminal offences.



eliminate bidders from competition. Moreover, if such exclusion would be applied and the legal person in question would afterwards be proved innocent there would be no legal possibilities to properly remedy the potential to bid and win a tender.

A few borderline moments have been raised nevertheless. A claim was made that the proceedings might lead to the discovery of other grounds for exclusion that may be applied regardless of the judicial proceedings. Another notion raised was that obvious and clear-cut wrongdoings should serve as a proper ground for exclusion even during the proceedings stage.

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

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

** As described above, exclusion from public procurement in Lithuania are applied ad hoc by the purchasing authorities. Also, the numbers of private legal persons convicted for corruption or fraud are very low. To the best of the current researchers' knowledge, there is no case where a single legal person would be involved in both scenarios. Hence, below we provide the cases where the exclusion from public procurement has played a major role or raised most questions to the public and are insightful with regards legal applicability. **

A. CASE STUDY 1 (maximum 500 words)

On 14th March 2017 the Lithuanian Military added²² a company called “Nota Bene” into the Unreliable tenderers list that is administered by the Public Procurement Office.²³ This tender involved “Nota Bene” providing the Lithuanian Military with male and female leather gloves but it failed to do so within the agreed term. According to the Law on Public Procurement this means “Nota Bene” must be dismissed from all tenders it bids for 3 years from 14th March 2017. The story has been covered wildly by the media also because “Nota Bene” was involved in another story where it is accused of fraud.

It is known by public sources²⁴ that “Nota Bene” together with its executive director are shareholders of a company called „Progear LT“ which also specializes in military accessories. „Progear LT“ has already made bids for a number of tenders with the Lithuanian Military, the Lithuanian Police and others.²⁵

It is true that the purchasing organizations currently have no legal grounds to exclude bidders that are in their totality comprised and/or controlled by the same legal persons or individuals that are on the Unreliable

²²The original statement of the Lithuanian Military that inform “Nota Bene” about termination of the preliminary purchase of goods contract can be found here (in Lithuanian):

<http://vpt.lrv.lt/uploads/vpt/documents/files/Lietuvos%20kariuomen%C4%97.pdf>.

²³“Nota Bene” has been first added into the Unreliable tenderers list in August 2016 by the State Service for Protected Areas but until 1st July 2017 (when the new Law on Public Procurement came into force) the purchasing organizations had the discretion to choose whether to dismiss a tenderer that is on this list. The Lithuanian Military did not have such a clause on the tender that is discussed here and that is why this case came about still.

²⁴Article by „15min“ (in Lithuanian): <https://www.15min.lt/naujiena/aktualu/lietuva/i-skandala-isivelusi-nota-bene-sukure-nauja-imone-ir-toliau-dalyvauja-lietuvos-kariuomenes-pirkimuose-56-719220>.

²⁵A list of bids by “Progear LT” can be found at <http://www.freedata.lt/vpt/listByParticipant?q=progear+LT>.

tenderers list and thus must be dismissed from all tenders. This enables the operation of the so-called ‘Fenix companies’ and can be highlighted as an additional risk.²⁶

B. CASE STUDY 2 (maximum 500 words)

On 28th February 2017 the Supreme Court of Lithuania rendered a verdict in a civil case²⁷ in which a company called “Vilungė” claimed that another company – “Aukštaitijos ranga” – provided fraudulent information to justify its conformity with the qualification requirements of the tender. The purchasing organization was the Prison Department under the Ministry of Justice. “Aukštaitijos ranga” was announced the winner of the tender.

The Supreme Court expanded its practice on the notion of fraudulent information by explaining that inaccurate, factually contradictive information may be considered as fraudulent information when the person providing such information realizes or is not capable of not realizing said information to conflict with the facts.

It went on to say that the concept of fraudulent information does not encompass the possible errors of legal interpretations by the tenderer. In such cases it is the obligation of the purchasing authority not to dismiss the bid on grounds of fraudulent information but rather to note such errors and decide on whether the qualification requirements have been met.

When considering on whether a particular set of information is fraudulent, the Supreme Court highlighted that the information provider has the right to (I) argue that the provided information is in accordance with the facts; and if that is found not to be the case (II) to argue that it was not aware of the said contradictions and that it did not have the aim to mislead the addressee.

²⁶Moreover, a small-scale tender where “Nota Bene” and “Progear LT” have submitted a joint bid has already taken place (assess online http://mw.eviesiejipirkimai.lt/vpm/vpt_pub_n5_vppa_print_forma_1_3_new.asp?DOK_ID=2003507587) with neither of them being excluded. This raises further query towards the effect of the Unreliable tenderers list.

²⁷Case No. 3K-3-106-690/2017, assess online (in Lithuanian) at <http://eteismai.lt/byla/92896748949937/e3K-3-106-690/2017#>.

PART IV – CONCLUSION AND RECOMMENDATIONS

27. Conclusion (maximum 500 words)

The Lithuanian Parliament transposed the EU Directive 2014/24 and it resulted in the most substantial change of the public procurement processes within the country throughout the past years. It is difficult to draw definite conclusions on the impact it will bring about as the current Law on Public Procurement came into force only on 1st July 2017. The law now provides for a more detailed 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. The actual effect of this legislative change in great deal depends on the purchasing authorities' determination to strictly follow through the grounds of exclusion for each tender and the ability to gather all the necessary information on every single tenderer.

While exclusion from tendering is applied by the purchasing organizations where grounds listed in the Law on Public Procurement exist and is not applied like a sanction, the experts and practitioners agree that such regulation is also sufficient and there is no need to also apply it as a sanction.

There is no publicly available database of the legal persons for which any of the grounds for exclusion should apply which makes it harder to control the process.

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

→ For judicial officials, judiciary and anti-fraud entities

As the judicial officials and judiciary does not really play a direct role on the application of exclusion from public procurement, here are the recommendations for anti-fraud entities:

1. Ensure that the purchasing authorities are able to easily assess the necessary data in order to apply the grounds for exclusion;
2. Ensure the appropriate means are in place for monitoring the applicability of grounds for exclusion;
3. Further analysis on the feasibility of a unified system that would allow for exclusion of tenderers from public procurement for a certain period once the grounds for exclusion are established;
4. Consider the feasibility and prepare necessary legislative amendments in order to have a publicly accessible database of convicted legal persons (especially for criminal offences);
5. Further analyse the obligatory application of grounds for exclusion for small-scale tenders.

→ **For legal persons**

1. Establish appropriate measures of compliance, especially with regards to reporting possible wrongdoings internally;
2. Make sure the employed subcontractors do not meet any of the grounds for exclusion;
3. Inform the purchasing authorities about instances where a competing tenderer may meet any of the grounds for exclusion;
4. Keep updated with and follow the good practices guidelines provided by the Public Procurement Office.