

NATIONAL ANALYSIS REPORT

based on the 28 research questions

ROMANIA

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 Romania, legal persons may be held liable for criminal offenses 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 offenses perpetrated by a natural person under its authority on behalf of the respective legal person.¹

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.²

Private legal persons may be held liable for criminal offenses 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 the real beneficiary of a business or the 'de facto' administrator/manager.³

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 connected⁴. In this context, causes of impunity,

¹ The 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, *Răspunderea persoanei juridice în dreptul penal român*, Universul Juridic, București, 2010;
- Andra-Roxana TRANDAFIR-ILIE, *Răspunderea penală a persoanei juridice – Jurisprudența rezumată și comentată*, C.H Beck, București, 2013;
- Andra-Roxana TRANDAFIR-ILIE, "Răspunderea penală a persoanei juridice" in Superior Council of Magistracy and National Institute of Magistracy, *Conferințele Noului Cod Penal*, 2015;
- Anca JURMA, *Persoana juridică - subiectiv activ al răspunderii penale*, C.H. Beck, București 2010

² *Ibidem*.

³ *Ibidem*.

⁴ Andra-Roxana TRANDAFIR-ILIE, "Răspunderea penală a persoanei juridice" in Superior Council of Magistracy and National Institute of Magistracy, *Conferințele Noului Cod Penal*, 2015.

justifications or aggravating circumstances will be examined and decided separately of legal persons and natural persons.⁵

The Romanian criminal law principles impose a subjectivity condition for the guilt to perpetuate a crime, therefore in the case of legal persons the subjective element is met either if the criminal offences is 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 at: poor internal organization, insufficient work protection measures, budget constraints) within the legal persons that allowed the perpetuation of the criminal offence.⁶

In the Romanian legal system, legal persons may be held liable for any criminal offence perpetuated 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 or deficiency of supervision or control mechanisms. Having this said, legal persons may be held criminally liable for corruption crimes, money laundering, fraud, and crimes against financial interest of European Union if the above conditions are met.

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 by the Criminal Code – and on the on the total revenue value of the legal person and varies from 3.000 lei (about €650) to 3.000.000 lei (about €650.000).⁷

Several additional sanctions are provided by the Criminal code⁸:

- a) the dissolution of the legal person;
- b) suspension of the activity or one of the activities of the legal person for a period from 3 months to 3 years;
- c) the closure of working places of the legal person for a period from 3 months to 3 years;
- d) prohibition to participate in public procurement procedures for a period from 1 to 3 years;
- e) judicial supervision;
- f) publication of the conviction.

The exact value of the fine, within the limits provided by the law and the application of one or more additional sanctions is decided by the judge in accordance with the nature and gravity of the criminal offence.⁹

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 have been regulated in 2002 and the law have been subsequently changed four times until 2017, the most recent amendments being adopted in May 2017¹⁰. 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, have been adopted in 2000

⁵ Andra-Roxana TRANDAFIR-ILIE, *Răspunderea penală a persoanei juridice – Jurisprudența rezumată și comentată*, C.H Beck, București, 2013.

⁶ *Ibidem*.

⁷ The Criminal Code, art. 136

⁸ *Ibidem*.

⁹ The Criminal Code, art. 137

¹⁰ 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 ammended. Superior Council o Magistracy and National Institute of Magistracy, *Ghid pentru combaterea spălării banilor destinat judecătorilor și procurorilor*, 2015

(Law no. 78/2000) and several laws amending both the provisions on corruption offences and regulations regarding assets and interest declaration have been subsequently approved by the government and the Parliament.¹¹ A new Criminal Code and a new Criminal Procedure Codes have entered into force in 2014, regulating the bribe and the traffic of influence 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 drafting¹² and adopting¹³ 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 instable and unpredictable.

The list of the main criminal offence with impact over the EU budget is presented in the table below.

Factual data of legal definition		Clusters sorted out according to national legal framework				Research objective
The offence name ¹⁴	Legislative source ¹⁵	Corruption crimes	Money laundering	Fraud	Crimes against the financial interest of EU	Exclusion applicable
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			✓		✓
Fraud in public auction	Criminal Code, Art. 246			✓		✓
Computer fraud	Criminal Code, Art. 249			✓		✓

¹¹ 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

¹² 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: Stop the Codes was initiated in 2009 against these procedures, but, despite civil society opposition, the codes drafted in this manner have been adopted.

¹³ The Criminal Code was adopted through a special Parliamentary procedure of Government Assumed Responsibility (art. 114), a procedure that doesn't allow 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.

¹⁴ Please use the official translation into English of respective offences' name

¹⁵ Indicate Law title and reference to article. Mention [if part of directive transposal or national specific legislation]

Factual data of legal definition		Clusters sorted out according to national legal framework				Research objective
The offence name ¹⁴	Legislative source ¹⁵	Corruption crimes	Money laundering	Fraud	Crimes against the financial interest of EU	Exclusion applicable
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. 31, ref. to art. 25, para. (2)		✓			✓
Frauds in privatisation	Law no. 78/2000 on preventing, discovering and sanctioning corruption	✓		✓		✓

Factual data of legal definition		Clusters sorted out according to national legal framework				Research objective
The offence name ¹⁴	Legislative source ¹⁵	Corruption crimes	Money laundering	Fraud	Crimes against the financial interest of EU	Exclusion applicable
	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 ¹ para. (1)			✓	✓	✓
Illegal access to European funds	Law no. 78/2000 on preventing, discovering and sanctioning corruption offence, Art. 18 ¹ para. (2)			✓	✓	✓

Factual data of legal definition		Clusters sorted out according to national legal framework				Research objective
The offence name ¹⁴	Legislative source ¹⁵	Corruption crimes	Money laundering	Fraud	Crimes against the financial interest of EU	Exclusion applicable
Misappropriation of European funds	Law no. 78/2000 on preventing, discovering and sanctioning corruption offence, Art. 18 ²			✓	✓	✓
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 ³ 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 ³ para. (2)			✓	✓	✓

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

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 respective Directives provisions.

The Law 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 he has been convicted by a final Court judgement for one of the following criminal offenses: the establishment of an organized criminal group, corruption offences, crimes against the

financial interests of the EU, terrorism, money laundering, human traffic or fraud.¹⁶ The contacting authority will determine the reason for exclusion based on the information and documents submitted by the bidder or if the contacting authority became “otherwise aware”. As provided by Directive 2014/24 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. 98¹⁷ provides that the contracting authority excludes from the award procedure any economic operator which breached its obligations regarding the payment of taxes, debts or contributions to the consolidated general budget. The exclusion criteria operates in two situations: when there is a judicial or an administrative 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 extinguishing in any other legal way (e.g. by compensation with other payments to the state budget) or if the economic operator benefits of financial rescheduling or other facilities from the tax authorities. The contracting authority can make 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 Directive 2014/24, article 167 of Law no. 98¹⁸ provides that the contracting authority excludes any economic operator which:

- a. has breached its obligation of indicating in the tender that they have taken into account the relevant obligations in the environmental, social and labour relations fields. This can be proved by any appropriate means by the contracting authority;
- b. is under a process of insolvency or under winding-up proceedings, under judicial supervision of assets or in the situation of cessation of business;
- c. has proven a 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 interest 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 false statements regarding the content of the information submitted at the request of the contracting authority for the purpose of verifying the absence of grounds for exclusion or the

¹⁶ See also the art. 177 of Law 99/2016 on sectorial procurement; art. 79 Law no. 100/2016 on works concessions and service concessions

¹⁷ See also art. 178 of Law 99/2016 on sectorial procurement; art. 80 of Law 100/2016 on works concessions and service concessions

¹⁸ See also the art. 180 of Law 99/2016 on sectorial procurement; art. 81 of Law 100/2016 on works concessions and service concessions.

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 illegal 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 authority contracting regarding the exclusion from the award procedure of that economic operator, its selection or the award of the public procurement.

According to article 169 of Law 98/2016¹⁹ 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.

Article 171 of Law 98/2016²⁰ provides that the economic operator can provide evidence of taken measures sufficient to demonstrate its credibility. Therefore, the economic operator cannot be excluded if the contracting authority considers the evidence sufficient and relevant. According to article 168 of Law 98/2016 (art.181 of Law 99/2016 / art.82 of Law 100/2016), the contracting authority has to do so if proofs such as any document considered to be edifying from this point of view in the country of origin or in the country where the tenderer / candidate is established, such as certificates, criminal records or other equivalent documents issued by the competent authorities of that country are provided.

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 the Law no. 98/2016 applies to each and every procedure, depending on the Contracting Authority thoroughness in verifying all the exclusion grounds for each of the bidders.

Moreover, the same reasons for exclusion from public procurement procedures applies to economic operators participating to sectoral procurements and procedures for concession contracts, as provided by the Law no. 99/2016 and the Law no. 100/2016, but the criminal sanctions refers only to the prohibition to participate 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.

3. List and briefly describe the national criminal framework on application of the additional sanction of exclusion from public procurement²¹.

According to the Criminal Code, the additional criminal sanctions applicable to the legal persons can only be applied when the principal sanction, the fine, have been decided by the Court. The exact value of the fine, within the limits provided by the law and the application of one or more additional sanctions is decided by the judge

¹⁹See also art.182 of Law 99/2016 on sectorial procurement, art.83 of Law 100/2016 on works concessions and service concessions

²⁰See also art. 184 of Law 99/2016 on sectorial procurement; art.84 of Law 100/2016 on works concessions and service concessions

²¹ 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.

in accordance with the nature and gravity of the criminal offence. The Criminal Code allows the judge to decide the application of several of the additional sanctions, proportionally with the nature and seriousness of the criminal offence perpetrated by the legal person and if the additional sanctions are needed in the concrete context of the offence and the legal persons operations²². The Criminal Codes provides that ruling on an additional sanction is mandatory when the law is explicitly providing the sanction²³, which happens rarely. None of the offences presented in section 1 above is regulated providing a mandatory additional section.

As an additional sanction, the exclusion from 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. The length of the exclusion is from one to 3 years.

The criminal conviction including the additional sanction of prohibition to participate in public procurement procedures for a 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 is subsequently operating a ban for participating to procedures for the convicted legal persons.

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 Romanian legal framework provides administrative mechanisms of exclusion from public procurement. The Law provides some administrative mechanism of exclusion that do not necessarily have to be based on a judicial ruling for the issues below:

- in art. 165 of the Law no. 98/2016 on public procurement on the breach of obligations to pay taxes, duties or contributions to the consolidated general budget;
- in art. 167 para. (c-i) of the Law no. 98/2016 on public procurement regarding the exclusion of the economic operators on grounds of their conduct, if they have been:
 - o proven a serious professional misconduct. This can be proved by any appropriate mean by the contracting authority;
 - o concluded agreements with other economic operators aimed at distorting competition within or in connection to the procedure of public procurement;
 - o in a situation of conflict of interest within or in connection with the procedure in question and this situation cannot be effectively remedied by other less stringent measures;
 - o participated in a previous preparation of the award procedure, leading to a distortion of competition;
 - o proven deficient performance in a previous public contracts implementation;

²² The Criminal Code, art. 137. Andra-Roxana TRANDAFIR-ILIE, *op. cit.*, 2015 și *op. cit.*, 2013.

²³ The Criminal Code, art. 138.

- guilty of false statements regarding the content of the information submitted at 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;
- attempted to illegal 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 authority contracting regarding the exclusion from the award procedure of that economic operator, its selection or the award of the public procurement.

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

Acts	Cause of exclusion	By decision of the Court	Provided by public legal framework and enforced by contracting authorities with no need of a Court's decision
Corruption crimes	✓	✓	✓
Money laundering	✓	✓	✓
Fraud	✓	✓	✓
Establishment of an organized criminal group	✓	✓	✓
Crimes against financial interests of EU	✓	✓	✓
Conflict of interest	✓		✓
Unfair competition	✓		✓
False statements in public procurement procedures	✓		✓
Terrorist offences	✓	✓	✓
Human traffic and exploit	✓	✓	✓
Non-payment of taxes or social security contributions	✓		✓
Deficient performance in previous public contracts implementation	✓		✓
Serious professional misconduct	✓		✓
Unlawfully influencing contracting authority's decision in order to obtain advantages during public procurement procedure	✓		✓

Unlawfully obtaining confidential information that provides the bidder with private advantages within the public procurement procedure	✓		✓
<p>The above mentioned exclusion grounds cover all the exclusion grounds provided by the procurement legal framework.</p> <p>Considering the grounds for the criminal conviction of prohibition to participate in public procurement procedures for a period from 1 to 3 years, it can be theoretically applied in addition to any conviction of a legal person for a criminal offence.</p>			

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

At administrative level, the contracting authority can make exception from exclusion in case of debts to the public budget, 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.

Moreover, art. 171 of Law 98/2016²⁴ provides that any economic operator may provide evidence to show that it took sufficient measures to demonstrate its real credibility related to the grounds for its exclusion, if it is in any of the exclusion situations presented above, regulated by art. 164 (on criminal convictions as grounds for exclusions) and 167 (administrative and professional conduct reasons as grounds for exclusion) of the procurement law. Measures refers to payment of all damages, active cooperation with prosecution and investigation institutions, reorganisation or any other internal/management decision that could eliminate risks for perpetuation of criminal offences or professional misconduct, including dismissal of persons guilty of these offences in the first place.

However, if the criminal conviction of prohibition to participate in public procurement procedures for a period from 1 to 3 years has been ruled by a Court of justice with effects in Romania, the exceptions provided by the procurement law cannot be applied.²⁵

On the other hand, if the criminal Court did not applied the sanction of prohibition to participate in public procurement procedures, the exclusion situations provided in art.164 and art.167 of the Law no. 98/2016 on public procurement do not apply if more than 5 years have passed from the criminal conviction representing an exclusion criteria (provided by art. 164) or more than 3 years have passed from the professional misconduct representing an exclusion criteria (provided by art. 167).

In criminal law there are a limited number of situation in which criminal liability is not applicable: the amnesty for a criminal offence, the status of limitation, the absence or withdrawal of the injured party's complaint if the

²⁴ See also art.184 of Law 99/2016 on sectorial procurement, art. 84 of Law 100/2016 on works concessions and service concessions.

²⁵ Art. 171 of Law 98/2016. See also art.184 of Law 99/2016 on sectorial procurement, art. 84 of Law 100/2016 on works concessions and service concessions.

complaint generates the criminal action, the reconciliation of parties, if possible. These conditions are equally applicable to natural and legal persons.²⁶

The Criminal Codes also provides 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 several situations where the guilty person is not punished, as far as his/hers/its deed can be justified or the guilty person took actions to stop and repair the damages. The latter situation is also applicable to legal persons and, as a result, the legal person, although find guilty, will not be sanctioned.

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

☒ YES

☐ NO

The legal framework in the field of public procurement have been adopted in May 2016, transposing the European Directives in the field. The four laws adopted: regulation public procurements, sectoral procurements, works and services concessions and remedies, are implemented based on four government decisions adopted in June 2016.

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

☐ YES

☒ NO

A new Criminal Code and a new Criminal Procedure Codes have entered into force in 2014 providing the legal framework presented by the present report, including all the provisions related to the additional sanction of exclusion from public procurement.

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

Item	2013	2014	2015	2016
Total number of legal entities sanctioned for corruption crimes	6	4	14	13
Total number of legal entities sanctioned of money laundering	0	0	0	0

²⁶ Florin STRETEANU, „Cauzele care înlătură răspunderea penală și cauzele care înlătură sau modifică executarea pedepsei” in in Superior Council o Magistracy and National Institute of Magistracy, *Conferințele Noului Cod Penal*, 2015.

Total number legal entities sanctioned for fraud (domestically incriminated)	0	0	0	0
Total number of legal entities sectioned for crimes against financial interest of European Union	<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	<i>No statistical data available.</i>			
Number of sanctions of exclusion from public procurement applied to legal entities which committed corruption crimes	<i>No statistical data available.</i>			
Number of sanctions of exclusion from public procurement applied to legal entities which committed money laundering crimes	<i>No statistical data available.</i>			
Number of sanctions of exclusion from public procurement applied to legal entities which committed fraud	<i>No statistical data available.</i>			
Number of sanctions of exclusion from public procurement applied to legal entities which committed crimes against financial interest of European Union	<i>No statistical data available.</i>			
The number of legal persons that are actually convicted for criminal offences is relatively low. In 2016 most of the convictions for legal persons have been ruled for tax evasion (41 legal persons convicted). The second most frequent criminal offense among legal entities is corruption (as regulated by Law no. 78/2000), with 12 legal persons convicted.				
No statistical data are available related to the sanction of prohibition to participate in public procurement procedures.				

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

- ☐ Only during the selection phase if there is evidence²⁷ 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

As provided by the EU Directive 2014/24, the exclusion from public procurement procedures can occur in any moment of the procedure or during the contract implementation, if the offences have been committed during the public procurement procedure or during contract implementation.

²⁷ Please also highlight in the comment section what may represent baseline evidence in order to determine the exclusion from 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.

The length of exclusion from the public procurement is provided by the Criminal Code, art. 136, para. (2), from 1 to 3 years. The exact length is decided by the Court in respect to the gravity of the offences committed.

The procurement laws provides, in accordance with Directive 24/2014 provisions, that the Contracting Authority can apply the administrative sanction of exclusion from a particular procurement procedure, for a maximum of 5 years after a criminal conviction of the legal person/economic operator (bidder) or its management and for a maximum of 3 years after a professional misconduct of the legal person/economic operator (bidder) or its management.

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

According to the Criminal Code, the additional criminal sanctions applicable to the legal persons can only be applied when the principal sanction, the fine, have been decided by the Court. The exact value of the fine, within the limits provided by the law and the application of one or more additional sanctions is decided by the judge in accordance with the nature and gravity of the criminal offence. The Criminal Code allows the judge to decide the application of several of the additional sanctions, proportionally with the nature and seriousness of the criminal offence perpetuated by the legal person and if the additional sanctions are needed in the concrete context of the offence and the legal persons operations. The Criminal Codes provides that ruling on an additional sanction is mandatory when the law is explicitly providing the sanction.

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

- ☒ YES
- ☐ NO

The prohibition from public procurement as an additional criminal sanction prevents the legal person from participation to public procurement processes in any quality: as a bidder, subcontractor or supporting third party (supporting bidder)

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

The administrative framework regulating public procurement provide the possibility for contracting authority to exclude from public procurement legal persons if they are subject of judicial proceedings, as the contracting authority can exclude from the procedures a bidder on grounds of several professional misconduct²⁸ (regulated by art. 176 para. (1) of the Law no. 98/2016 on public procurement). In all the situations provided by art. 176 para. (1) of the Law no. 98/2016 the contracting authority can exclude the bidder even if there is no final Court decision in the respective matter. Explicitly, para. (4) of the same article provides that exclusion for serious professional misconduct can be done during a judicial investigation, therefore before a final conviction.

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/EC²⁹, at art. 57(7)? Please explain how these lengths have been established if different from the ones in the directive.

The length of exclusion from the public procurement is provided by the Criminal Code, art. 136, para. (2), from 1 to 3 years. The exact length is decided by the Court in respect to the gravity of the offences committed.

The procurement laws provides, in accordance with Directive 24/2014 provisions, that the Contracting Authority can apply the administrative sanction of exclusion from a particular procurement procedure, for a maximum of

²⁸ Grounds of exclusion for professional misconduct are regulated if the bidder:

- a. has breached its obligation of indicating in the tender that they have taken into account the relevant obligations in the environmental, social and labour relations fields. This can be proved by any appropriate mean by the contracting authority;
- b. is under a process of insolvency or under winding-up proceedings, under judicial supervision of activates or in the situation of cessation of business;
- c. has proven a serious professional misconduct. This can be proved by any appropriate mean 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 interest within or in connection with the procedure in question and this situation cannot be effectively readied 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 false statements regarding the content of the information submitted at 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 illegal 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 authority contracting regarding the exclusion from the award procedure of that economic operator, its selection or the award of the public procurement.

²⁹ <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32014L0024&from=EN>

5 years after a criminal conviction of the legal person/economic operator (bidder) or its management and for a maximum of 3 years after a professional misconduct of the legal person/economic operator (bidder) or its management.

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

According to the Law no. 253/2013 on the execution of criminal punishments, art. 34, the conviction of a legal person is communicated by the ruling 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 data basis.

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

The Trade Register is publishing the notes regarding the additional criminal sanction of prohibition to participate to 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)³⁰. The Agency is subsequently operating a ban for participating to procedures for the convicted legal persons.

This mechanism is not ensuring 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, event under the threshold the Romanian legal framework (the Government Decision on rules for the implementation of Law no. 98/2016) provides a mechanism of orders using the electronic system, so that contracting authorities can see the criminal records of contractors.

³⁰ Law no. 253/2013 on the execution of criminal punishments, art. 38, para (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 the existing of the criminal sanction of prohibition from participating to tenders is a guarantee of exclusion of unfair participants, experts mentioned that generally, the Contracting Authorities are only asking for an affidavit from bidders stating they are in none of the exclusion cases. While using an affidavit 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 is not guilty of a serious professional misconduct in previous contracts.

Even more, while finding a case of exclusion, despite the affidavit, 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 not a discouraging effect of an exclusion if caught with the lie once.

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 affidavit of some bidders stating they are not in a conflict of interest 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.

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

There are two main critiques regarding the criminal liability of legal persons:

- 1. The prohibition from 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 offences victims. And in this context

the exclusion from public procurement as an additional criminal sanction can be ruled against legal persons that are not a threat to the correctness of public procurement, affecting competition.

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

Experts find that the length of the exclusion from public procurement is not perfectly adequate. While for some businesses, as some services, it is harmful to be left out of contracts for a year, for other fields, like constructions or other services that have a long period of implementation can be almost unaffected by the sanction, if already involved in a contract.

However, this inequality can be solved, as the public contracts are terminated if the contractor is condemned for an offence that would generate its exclusion for the procedure if known at the moment of the bidding phase of the procurement.

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

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

While the case rarely happens, differences in the framework of exclusion from public procurement among countries can put problems for Contracting Authorities. Moreover, the lack of public online available registers/data basis and the lack of linguistically accessibility to some data can rise problems for contracting authorities in understanding if a foreign bidder is or not in an exclusion situation.

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

While the data on convicted companies are available, they are not easily accessible and the data are not easy to find. In this context, experts will appreciate a public database including all relevant information: existing and past convictions and additional criminal sanctions applied.

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)

Consider the following helping questions	
Does the situation of exclusion apply in your country?	Yes. See above.
What is the legal framework that allows the exclusion and on what grounds?	The legal framework allowing the exclusion from public procurement on administrative grounds is the Law on public procurement (no. 98/2016) transposing Directive 2014/24.
Is there any maximum period of exclusion provided by the legal framework for this kind of situation?	Transposing the Directive 2014/24, the Law on public procurement (no. 98/2016) provides the same maximum periods of exclusions on administrative grounds as provided by the Directive.
Have there been any exceptions of unconstitutionality/ lack of legality raised in respect these provisions?	No constitutional exception has been raised in this respects

Experts don't consider that exclusion from public procurement as an administrative sanction applied for other offences, that are not criminal, breaks the free competition principle as the rules apply equally to all participants.

Moreover, experts agree there is a need to protect public contracts from contractors that are not playing by the rules, even if the breach is not a criminal offence, but an administrative one.

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)

Consider the following helping questions

Does the situation of exclusion apply in your country?	Yes. See above
What is the legal framework that allows the exclusion and on what grounds?	The legal framework allowing the exclusion from public procurement on administrative grounds is the Law on public procurement (no. 98/2016) transposing Directive 2014/24.
Is there any maximum period of exclusion provided by the legal framework for this kind of situation?	Transposing the Directive 2014/24, the Law on public procurement (no. 98/2016) provides the same maximum periods of exclusions on administrative grounds as provided by the Directive.
Have there been any exceptions of unconstitutionality/ lack of legality raised in respect these provisions?	No constitutional exception has been raised in this respects

The exclusion from public procurement cannot happen on grounds of unfinished judicial proceedings in respect to criminal acts, but such proceedings can provide information to the contracting authorities regarding a serious breach of professional conduct and a reason for exclusion. This is not considered discriminatory, as it is a protection measure for the contracting authorities and public funds.

Experts recognise this is a challenging situation from the point of view of the innocent presumption principle. However, they underlined that in this situations, until a final conviction, bidders have to possibility to prove they took remedial measures within their organisations and be allowed to participate to the tender.

Experts agree the interpretation the regulations on the measures took by bidders to correct their organisational conduct are vague and opened to interpretation and subjectivity and therefore the contract authorities can be unfair, failing to observe principle of transparency and equal treatment.

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

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

A. CASE STUDY 1

The Bacau Court sentenced Aurel Varga, the former Mayor of Luizi Calugara, to a three-year and six-month imprisonment, for instigating to abuse of office against public interests, incitement to intellectual false and false in private signed papers and conflict of interest in the continuing form. During 2010-2011, when he was a local councilor, he would have convinced the mayor of that time, Mihai Funaru, the director of the School no. 1 Luizi Calugara, Petru Ciurea, as well as other local councilors to conclude works contracts with two companies, at overpriced prices and without observing the law on the awarding of public procurement contracts.

There are several tennis and minifotbal playgrounds, but also works at the school, which were contracted and payed, although they were not executed, and the amounts paid from the local budget entered the accounts of companies where the manager was his wife Aurel Varga. According to the investigators, when Aurel Varga was mayor of the commune, in the period 2012 - 2013, he continued the same contracts and continued to conclude contracts without public procurement proceedings and to pay unfinished works. In all cases the contracts and payments have been made to the company of the ex-mayors's wife and another firm.

The two companies have been criminally investigated and punished as well with fines of 30,000 lei (over Euro 6,500) and 50,000 lei (over Euro 11,000) and the accessor punishment of interdiction to participate in public procurements for 2 years. The rulling is final since 2016.

B. CASE STUDY 2 (maximum 500 words)

Four firms (.C. Romagrafeed 2009 S.R.L; S.C. Romagra Otis S.R.L.; S.C. CasiopeiaSpaco S.R.L.; AndraselSpaco 2011 S.R.L.) controlled by two persons: Dudu Gheorghe and Macovei Florin have been acused of illigaly optaining European funds for agriculture by using false documents as follows:

- Using false statements concerning the mony available for cofinancing the projects
- Have been contracting overprice works for the modernization of farms
- Have been artificially deviding the same project in several smaller projects implemented by diferent companies with the same stakeholders, in order to cheat the maximum limit of funds/project (Euro 800,000)

The two natural persons involved in the case: Dudu Gheorghe and Macovei Florin are also acused of paying briberies to civil servants employed by the Ministry of Agriculture, in order to escape monitoring and controls.

The natural persons were sentenced to prison, while the 4 companies have been sentanced to fines between 220,000 lei and 240,000 lei (Euro 48,000-Euro 53,000) and to the interdiction to participate to public procurement proceedings for 2 years. The rulling is final since 2014.

PART IV – CONCLUSION AND RECOMMENDATIONS

27. Conclusion (maximum 500 words)

The criminal liability of corporate entities is a relatively new concept in Romanian criminal law. It was only in 2006 (Law 278 of 4 July) that the Criminal Code of 1968 (the "Criminal Code of 1968") was modified to include provisions in this respect. The Romanian legislator has adopted a new criminal code in 2019 (the "Criminal Code") to replace the existing one from 1968, keeping the notion and the main features of the criminal liability of legal persons from the regulation in 2006. The criminal liability of legal persons, according to the Criminal Code applies to all legal entities, except for the state, public authorities and public institutions which carry out activities in the public domain. Generally, corporate entities may be held criminally liable for offences committed in relation to their statutory scope of activity, in their interest or on their behalf. The rules for distinguishing between holding liable only the corporate entity's directors and officers and holding liable both the directors/officers and the corporate itself are not currently clearly regulated. However, a corporate entity may be held criminally liable if, through its individual or collective management body, it was aware of, encouraged or consented to the commission of an offence by an individual in relation to the corporate entity's statutory scope of activity. If the offence is one of negligence, the corporate entity is only liable if the commission of the offence is due to the latter's lack of supervision or control. Holding a corporate entity criminally liable does not preclude its civil or administrative liability. Besides the fine, courts may apply one or several of the auxiliary penalties, although their application is mandatory if provided by the law for specific offences. Auxiliary penalties include the dissolution of the corporate entity, suspension of the corporate entity's activity (or of one of its activities) for a period ranging from three months to three years, closing down some of the corporate entities' working units for a period ranging from three months to three years, **debarment from public procurement for a period ranging from three months to three years and/or publicising the conviction.**

On the other hand, in 2016 Romania transposed Directive EU 2014/24, making all the exclusion criteria in article 57 mandatory for the contracting authorities, imposing therefore a more restrictive regime of exclusion/debarment from public procurement than most of the EU Member States.

Moreover, there is a **public database: the Trade Registry, publishing criminal sentences against the economic operators registered and the operator** of the electronic procurement platform is imposing the debarment if it was ruled as an accessory criminal punishment for the lead bidders, there are some loopholes in the regulation that have to be filled in by both public policy decisions and judiciary practice:

- Only economic operators registered in the Trade Registry can be checked in a data basis. There is no blacklist available as such and foreign bidders, or bidders organised in forms that are not registered in the Trade Registry, like NGOs, cannot be checked;
- There is no obligation, or even a good practice among contracting authorities to check the data in the Trade Registry concerning previous convictions of the bidders;
- There is no possibility to ban an economic operator from participating as an associated bidder or subcontractors to a tender if he submits false declarations. The electronic system is only banning automatically the lead bidders;
- There is no criminal offence to which the accessory penalty of debarment from public procurement is mandatory, although the public procurement law is actually imposing the debarment for corruption, money laundering, fraude, terrorism, organised crime, child labour and other forms of trafficking in human beings and frauds against the EU budget. Having such a mandatory application of the accessory penalty of debarment from public procurement will make a lot easier for contracting authorities to

check if the bidders are providing true information when declaring they have no conviction that leads to exclusion.

- The legal framework does not allow for a due diligence or compliance programme defence

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)

I. For judicial officials, judiciary and anti-fraud entities:

- Taking into account the regulation on public procurement, and ruling the accessory penalty of debarment from public procurement every time a legal person is found guilty for corruption, money laundering, fraud, terrorism, organised crime, child labour and other forms of trafficking in human beings and frauds against the EU budget.

II. For legal persons:

- The development of compliance programmes having in mind the particularities of the criminal liability of legal persons.

III. For other stakeholders that may be interested or targeted by the application of exclusion from public procurement as an additional sanction to the one for corruption, money laundering, fraud or related criminal offenses.

→ **For decision makers:**

- Modification of the maximum fine applicable as criminal punishment for the legal person
- Supplementing the legislative framework on safety measures, in order to introduce the implementation of compliance programs as a safety measure to the legal person
- The regulation of a legal mitigating circumstance specific to the legal person consisting in the existence of a compliance program prior to the commission of the criminal offense
- Making the accessory penalty of debarment from public procurement a mandatory one at least in the case of corruption, money laundering, fraud, terrorism, organised crime, child labour and other forms of trafficking in human beings and frauds against the EU budget.
- Regulating a blacklist including all data communicated to the Trade Registry, but for all legal persons convicted by a judge and making the verification of the blacklist mandatory for contracting authorities.