



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

A COMPARATIVE ANALYSIS FOR IMPROVED PERFORMANCE

POLICY REFLECTION PAPER

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

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

THE ISSUE

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

THE INTERNATIONAL RECOMMENDATIONS

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

- Recommendation No. R (88) 18 adopted by the Committee of Ministers of the Council of Europe on 20 October 1988 on the liability of enterprises for offences¹.
- OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, 1997².
- The Council of Europe Convention on the Protection of the Environment through Criminal Law, of 4 November 1998, Strasbourg³.
- The Council of Europe Criminal Law Convention on Corruption, of 27 January 1999, Strasbourg⁴.
- The United Nations Convention against Transnational Organized Crime, adopted by General Assembly resolution 55/25 of 15 November 2000⁵.
- The UN Convention against Corruption (UNCAC), adopted by General Assembly resolution 58/4 of 31 October 2003⁶.

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

THE EUROPEAN APPROACH

In the European Union, **the Second Protocol of the Convention on the protection of the European Communities' financial interests, Council of the European Union Act of 19 June 1997⁷, stipulates in Article 3** that “each Member State shall take the necessary measures to ensure that legal persons can be held liable” for at least three types of criminal offences: (1) fraud, (2) active corruption and (3) money laundering. The condition for the legal person liability is the perpetration of the criminal offence to their own benefit “by any person, acting either individually or as part of an organ of the legal person, who has a leading position within the legal person, based on: (i) a power of

¹ Official document available online at:

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

² Published together with related documents online at: https://www.oecd.org/daf/anti-bribery/ConvCombatBribery_ENG.pdf (last accessed 30/10/2017).

³ Official document available online at: <https://rm.coe.int/168007f3f4> (last accessed 30/10/2017).

⁴ Official document available online at: <https://rm.coe.int/168007f3f5> (last accessed 30/10/2017).

⁵ Official document available online at:

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

⁶ Official document available online at:

https://www.unodc.org/documents/brussels/UN_Convention_Against_Corruption.pdf (last accessed 30/10/2017).

⁷ Official document available online at: [http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:31997F0719\(02\)](http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:31997F0719(02)) (last accessed 30/10/2017).

representation of the legal person, or (ii) an authority to take decisions on behalf of the legal person, or (iii) an authority to exercise control within the legal person.

On the other hand, most of the criminal cases that affect the financial interests of the EU are directly linked to procurement procedures within projects and programmes and to tax evasion. As such, the public procurement processes have been of great concern for the various EU and national institutions and a radical reform of the system has been initiated at EU level and started its transition to national levels in 2014 after the adoption of Directives 2014/24/EU, 2014/23/EU and 2014/25/EU⁸.

NATIONAL APPROACHES

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

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

EXISTING PROBLEMS

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

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

⁸ DIRECTIVE 2014/24/EU OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 26 February 2014 on public procurement and repealing Directive 2004/18/EC; DIRECTIVE 2014/23/EU OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 26 February 2014 on the award of concession contracts; DIRECTIVE 2014/25/EU OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 26 February 2014 on procurement by entities operating in the water, energy, transport and postal services sectors and repealing Directive 2004/17/EC

RECOMMENDATIONS

Policy Recommendations at European level

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

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

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

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

- 1) If a Member State's constitution and/or legal doctrine allows for it, **criminal liability should be recommended** as the preferred instrument to use, as it has the greatest deterrent effect, provides fair trial guarantees and effective investigative procedures.
- 2) If a Member State's constitution and/or legal doctrine doesn't allow for the regulation of the criminal liability of legal persons, **special administrative punitive liability or quasi-criminal liability should be recommended and enforced with similar provisions as the criminal liability**, in order to ensure similar deterrent effect, fair trial guarantees and investigative procedures as in the case of the criminal liability.
- 3) Irrespective of the legal solutions preferred (criminal, administrative or quasi-criminal liability), several situations should be covered:
 - 3.1) **The legal person should be held liable for offences that were committed on its behalf and/or to its benefit;**
 - 3.2) Liability should **cover actions of lower level agents of the legal person in order to be effective**, combining this approach with the possibility of a due diligence defence. This will eliminate the risk to evade liability in the case of big and complex corporations, motivating legal persons, on the other hand, to develop proper compliance rules and corruption prevention mechanisms.
 - 3.3) **The legal person shall be held liable for offences that its relevant agents committed in the interest of another entity that is associated or related to the legal person;**
 - 3.4) **Legal successors of the legal persons**, or the reorganised body or bodies, after a division, a merge, a consolidation etc. **should bear the liability of the guilty legal person, in order to avoid impunity;**

4) Debarment from the public procurement procedures should be a harmonised sanction at European level for legal persons found guilty of criminal offences, in order to protect the financial interests of the contracting and financing authorities. In this respect:

4.1) Debarment from the public procurement procedures should be a mandatory sanction, additional to fines or other economic punishments and included in the judiciary ruling (not only applicable in a case by case manner as provided by Directive 2014/24/EU), in the case of criminal offences with effects over the European and national budget, the use of European and public national funds and functioning of the European and national public administration.

5) Mandatory sanctions limiting the access of or excluding legal persons convicted for criminal offences from contracting with public authorities for grants, concessions etc. should also be recommended, at least in the case of legal persons convicted for corruption offences, fraud, money laundering and crimes against the financial interest of the European Union and of the Member States.

6) The minimum and maximum period of debarment from public procurement as a sanction for criminal offences perpetuated by legal persons should be unified, in order to allow effective verifications and conclusion of public procurement contracts across Europe.

7) The “due diligence defence” shall be recommended and promoted, as it has a great preventive effect. The regulation of the “due diligence defence” shall include the possibility of the court to evaluate the seriousness and practical implementation of compliance mechanisms before sentencing.

B. A public online register/database of debarred economic operators should be available at European level, for contracting authorities at least, if not for the general public. It should be built with the European Commission coordination, based on the cooperation of member states.

Further debates should be organised in order to determine if the publication of such database for the general public doesn't represent a real accessory penalty to the one imposed by the judge, seriously affecting the businesses beyond the conviction sentence received, taking into account also that publishing the sentence is an accessory penalty by itself.

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

- **Legal persons convicted for organized crime, corruption, fraud, money laundering, terrorism, child labour and other forms of trafficking in human beings** (grounds for exclusions stipulated by Article 57 paragraph 1 of Directive 2014/24/UE) and the exact moment of the final court decision.

- **Legal persons convicted** for a criminal offence in their country and punished **with debarring (a ban from participation to public procurement procedures) and the exact period of the ban.**
 - **The ‘unreliable’ economic operators, on the model of the Lithuanian “List of Unreliable Suppliers”,** including economic operators proposed by the contracting authorities after a substantial breach of a contract causing the untimely termination of a contract or the legitimate refusal of the contracting authority to pay the prices, if:
 - a) the economic operator does not dispute in court the contract termination or the refusal of payment; or
 - b) the court upholds that the contracting authority decision has been lawful and due to a substantive breach of contract on the part of the economic operator;
and always
 - c) **the court agrees the breach of contractual obligations is serious enough to result in the blacklisting of the economic operator.**
 - **The ‘untrustworthy’ economic operators, on the model of the Lithuanian “List of Suppliers that have Submitted Fraudulent Information”,** including economic operators proposed by the contracting authorities when they have concealed information or have given fraudulent information about compliance with the qualification requirements or grounds for exclusion during the tender procedures, the contracting authority can prove it by any legal measures and (a) the economic operator does not dispute this in court; or (b) the court upholds the decision of the contracting authority and (c) **the court agrees the breach of legal requirements is serious enough to result in the blacklisting of the economic operator.**
- C. Alternatively, and temporarily (until the creation of the abovementioned database), **the European Commission should analyse the possibility to:**
- **Consolidate the ECRIS⁹ database, introducing data on the accessory penalties of debarment form public procurement procedures;**
 - **Create the possibility to obtain criminal record extracts from ECRIS if requested by a contracting authority during a tender, not only for the purposes of criminal proceedings against a person, recruitment procedures, naturalisation procedures, asylum procedures, firearm licence procedures, child adoption procedures.**
- D. **The European Commission should analyse the possibility to amend Directive 2014/24/UE in order to provide for mandatory grounds for exclusion of subcontractors as well as bidders, at least when they have been convicted for organized crime, corruption, fraud, money laundering, terrorism, child labour and other forms of trafficking in human beings, in order to protect the interest of contracting authorities, the national and the European budgets.**

⁹ http://ec.europa.eu/justice/criminal/european-e-justice/ecris/index_en.htm.

Recommendations for policy at national level

- E. Even though a unified set of recommendations concerning the effective national regulation of the liability of legal persons for criminal offences is not proposed at European level, **Member States should take into account all the recommendations proposed above concerning:**
- 1. Regulating the liability of legal persons for criminal offences as criminal liability** (if possible) or as a special administrative punitive liability or quasi-criminal liability (only of criminal liability is not permitted by the constitutional framework) (*see above recommendations A.1 and A.3*).
 - 2. The rules on the liability of legal persons for criminal offences should be designed in order to avoid impunity**, taking into account players' involvement, the liability of associated or related entities, and the liability of successors or reorganised legal persons etc. (*see above recommendations under A.3*).
 3. If the national legal framework provides for a limited number of criminal offences engaging the criminal or quasi-criminal liability of legal persons, Member States shall analyse if all criminal offences related to the use of public funds and public procurement are covered.
 - 4. In order to protect public budgets, debarment from the public procurement procedures, and other prohibitions to conclude contracts with public authorities, like grant agreements or concessions, should be a mandatory sanction**, additional to fines or other economic punishments, at least in the case of legal persons found guilty for criminal offences with effects over the European and national budget, the use of European and public national funds and functioning of the European and national public administration (*see above recommendations A.4 and A5*).
 - 5. The maximum period of debarment from public procurement in national legislation should be aligned with the maximum period of effectiveness for the exclusion grounds provided by Directive 2014/24/EU, namely 5 years**, in order to allow effective verifications and conclusion of public procurement contracts across Europe (*see above recommendation A.6*).
 - 6. Subcontractors should be excluded if they are in one of the mandatory exclusion grounds, namely if they have been convicted for organized crime, corruption, fraud, money laundering, terrorism, child labour and other forms of trafficking in human beings**, even if Directive 2014/24/UE doesn't stipulate an obligation for Member States to regulate this issue (*see above recommendation D*).
 7. Clear rules have to be developed at national level, in each of the Member States' legal framework, to support judges in applying proportionate sanctions to each legal person.
 - 8. The "due diligence defence" should be offered to legal persons**, considering its preventive effect (*see above recommendation A.7*).
 - 9. Public online registers/databases of debarred economic operators should be available at national level at least for the contracting authorities** (*see above recommendation B*), in order to allow for the exclusion of tenderers from public procurement for a certain period once the

grounds for exclusion are established and to ensure the appropriate means are in place for monitoring the applicability of grounds for exclusion. Such a database should include:

- legal persons convicted for criminal offences, including the crime and the sanction specified in the ruling;
 - economic operators debarred from public procurement, including the period of debarment;
 - economic operators found guilty of providing false documents or information to contracting authorities, *subsequent to the regulation of the database in the national legislation and in cases wherein a judicial ruling on the publication of the economic operator's debarment was issued*;
 - economic operators found guilty of a serious breach of their public procurement contracts, *subsequent to the regulation of the database in the national legislation and in cases wherein a judicial ruling on the publication of the economic operator's debarment was issued*.
10. Moreover, **Member States should analyse the introduction of the obligation to develop a compliance programme and/or an anti-corruption policy within the legal person**, as:
- a sanction, or
 - a security measure.
11. **The dialogue between national authorities and the private sector should be strengthened** in order to eliminate all the interpretative issues regarding legal standards and to ensure simplicity and transparency in the participation to public procurement.

