

**GROUNDINGS FOR EXCLUSION IN PUBLIC PROCUREMENT:
MEASURES IN THE FIGHT AGAINST CORRUPTION IN
EUROPEAN UNION**

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ABSTRACT. Corruption is, unfortunately, continually revealed in numerous areas of public affairs, but particularly in the field of public procurement, since few activities create greater temptations or offer more opportunities for corruption than public sector procurement. Civil law makes various provisions to deal with this phenomenon: repressive measures - more proper to criminal law - and preventive measures that aim to deter illegal activities. One preventive measure intended to reduce the opportunities for corrupt conduct is the exclusion from public contract award procedures of an applicant who has previously committed offences connected with corruption. The most recent Community Directives on public procurement make it mandatory to exclude from public procurement any bidder who has been sentenced by a final judgment having the force of *res judicata* for acts of corruption, fraud or participation in the activities of a criminal organisation. This paper assesses these measures and their impact on reducing corruption in public procurement.

I. INTRODUCTION

The phenomenon of corruption has existed over the ages and is well documented in all civilizations ever since ancient times. The first cases of corruption date back to 3000 B.C. that has prompted some authors to qualify it as the second oldest profession in the world (Malem Seña, 2004:35; Noonan, 1984). This permanent presence over time has not led to a common approach, however, when dealing with corruption. Its form has varied according to historical period and culture, although at present a consensus exists surrounding its pernicious influence on the running of public institutions as well as its disruption of markets in the private sector¹. This is because corruption, however much one might play it down, propagates its harmful effects beyond any concrete illegality in the

public or private sectors, as its detrimental effects on society threaten equality and the social contract (TANZI, 2000:184).

The attention currently generated by corruption, above all since the 1990s, is due to its generalized nature that goes beyond isolated cases and is found in developing as much as in developed countries (Tanzi, 1998). The impact in the media of accusations of corruption leveled at important positions in government, including presidents of countries and prime ministers contributes to corruption appearing as one of the problems that causes most concern² to citizens and confirms a weakness in the institutions that can go so far as to destabilize the democratic system of the country itself. We can find examples of this in the *Enron case* in the United States; in South Korea, where President Roh Tae Woo was seen to be implicated in bribery in connection with the purchase of aircraft; and, in Singapore, where several multinational firms and a senior official of the Public Utility Board were involved in a series of payments made to receive confidential information on tenders (Rose-Ackerman, 1998). In Germany, alleged corruption in the city of Frankfurt related to the construction and telecommunications sectors caused social upheaval. In this German city, it was proven that over 30 firms had entered into agreements with airport representatives that assured them preferential treatment in the award of contracts (Eigen, 2004). France also experienced a scandal of similar characteristics in which high-ranking politicians were put on trial in the Elf-Aquitaine affair. This state petrol company had paid bribes for over 25 years to public officials and high-ranking Africans to obtain lucrative contracts siphoning off resources from the petroleum industry (Bjorvatn & Søreide, 2003). In Spain, the *Roldán case* was one of the corruption trials to receive the greatest exposure in the media. This person, as was proven in court, took advantage of his high-ranking position in the Administration to award contracts to those firms that had previously paid him commissions.³

These most recent examples taken from Europe demonstrate that corrupt practices are hardly unknown there and that scandals happen in different Member States. Any assessment of the real level of corruption is a difficult task; nevertheless, since 1995, the Corruption Perceptions Index compiled by Transparency International is a solid measurement tool to that effect. This index ranks countries in terms of the degree to which corruption is perceived to exist among public officials and politicians and is drawn up on the basis of surveys conducted by

TABLE 1
Transparency International Corruption Perceptions Index 2005:
European Union Member States

| Country | Position * | CPI Score ** |
|----------------|------------|--------------|
| Finland | 2 | 9.6 |
| Denmark | 4 | 9.5 |
| Sweden | 6 | 9.2 |
| Austria | 10 | 8.7 |
| Netherlands | 11 | 8.6 |
| United Kingdom | 12 | 8.6 |
| Luxembourg | 13 | 8.5 |
| Germany | 16 | 8.2 |
| France | 18 | 7.5 |
| Belgium | 19 | 7.4 |
| Ireland | 20 | 7.4 |
| Spain | 23 | 7.0 |
| Malta | 25 | 6.6 |
| Portugal | 26 | 6.5 |
| Estonia | 27 | 6.4 |
| Slovenia | 31 | 6.1 |
| Cyprus | 37 | 5.7 |
| Hungary | 40 | 5.0 |
| Italy | 41 | 5.0 |
| Lithuania | 44 | 4.8 |
| Czech Republic | 47 | 4.3 |
| Greece | 48 | 4.3 |
| Slovakia | 50 | 4.3 |
| Latvia | 53 | 4.2 |
| Poland | 74 | 3.4 |

Notes: * Position 1 is perceived as least corrupt.

** CPI Score relates to perceptions of the degree of corruption as seen by business people and country analysts, and ranges between 10 (highly clean) and 0 (highly corrupt).

Source: *Transparency International*. [On-line].

independent entities in each country among business people, analysts and the general public. According to this Index, in 2005, 6 out of the 25 States that make up the European Union – 24% – received a score that was below 5, out of the maximum of 10 points given to the most transparent countries and 0 to the most corrupt⁴.

Evidence of corruption cases in the European context has meant that for over a decade the fight against corruption has been one of the challenges presented to governments by European organisms. Conscious of the dangers entailed by particular forms of criminality with a transnational dimension, the Treaty of the European Union sets out as one of its objectives for its citizens a high degree of security within an area of liberty, security and justice. Among the measures to be implemented, article 29 of the Treaty stipulates the prevention of and the fight against corruption.

In this context, numerous legal instruments have been adopted in the fight against corruption⁵, which are active in many different sectors⁶. The Communication of the Commission's (2003) report *On a Comprehensive EU Policy against Corruption* arrives at the conclusion that corruption must be attacked on different fronts – political, normative, social – and to do so, alongside instruments of a repressive nature, it includes preventive measures. These measures seek to promote integrity in public bodies of the European Union with the aim of reducing the opportunities for corrupt conduct. In this way, the promotion of transparency and integrity in the public sector becomes the principal driving force in the fight against corruption and one of the areas where it is most clearly evident is in public procurement.

PUBLIC PROCUREMENT AND CORRUPTION

Repeated scandals surrounding the award of public contracts demonstrate the links that exist between the phenomenon of corruption and public procurement and the fact is that few economic activities appear more tempting and provide greater opportunity for corruption than public sector tendering (Pope, 2000; Rivero Ortega, 2004). This dangerous relationship between corruption and public procurement is due, in part, to the impact of procurement as a strategic sector in the development of a country, which has led a great number of studies on corruption to allude to the stimulus it gives to the various economic operators involved in procurement procedures (Azfar, Lee & Swamy,

2001; Bueb, 1995; 1997; Della Porta & Vanucci, 1999; Rose-Ackerman, 1999; Søreide, 2002; 2005; Tanzi & Davoodi, 2002).

The volume of the resources in play is one of the factors that incite corruption (Stapenhurst & Langseth, 1997) and we know that there are many implicit economic interests in public procurement. This is clearly shown by the data collected for a working document of the Commission entitled *A Report On The Functioning Of Public Procurement Markets In The EU: Benefits From The Application Of EU Directives And Challenges For The Future*. In this report, it is pointed out that the total value of public contracts awarded in the European Union was higher than 16% of GDP in 2002, which is estimated at 1,500 billion euros.

This percentage in the volume of public expenditure destined for procurement constitutes an incentive for firms, through bribery, to attempt to impose their own proposals at the expense of their competitors. In this scenario, when corrupt practices intervene in the contractor selection process, the contract will not be awarded to whoever offers the best price for the product or provides better quality in their goods or services, but to whoever is more adept at practising corruption. The end result is a loss of competitiveness in the contractual process. In the absence of any real competition, the execution of public works and the procurement of goods or services are more costly for the public purse and leave it exposed to the risk of significant public resources being redirected to attempt to remedy the excesses of a small minority. According to Strombom (1998), the costs added to the contract can even reach 20 to 25 percent, but in some cases can climb as high as 50 percent (Evenett & Hoekman, 2005). This is principally due to the firms recouping from the contract costs the payments made as bribes to government officials and employees responsible for the award of contracts.

With respect to those types of contract that are potentially more prone to corruption, it is worth stating that contracts awarded for large infrastructural projects, such as the construction of airports, dams and roads, have given rise to the most notorious cases of corruption. However, we cannot overlook contracts on a smaller economic scale, such as those relating to the procurement of goods for everyday use, that are "prime candidates for payoffs" (Rose-Ackerman, 1999, p. 29), which leads us to affirm that corrupt practices in the public management sector

permeate all forms of contracts, even though they are more common in certain categories than in others (Søreide, 2002).

With respect to the corrupt practices that are most commonly employed in procurement, on the majority of occasions these coincide with the different criminal forms of bribery and influence peddling. Bribery in this field usually consists in the receipt of “commissions” (a term used in this paper) in exchange for the award of a contract. These commissions can be in many different forms: a briefcase or envelope full of money, and gifts that do not involve money. Nonetheless, whatever terms we use, what remains clear with these sorts of actions is that the personal interest of those who take the decisions in the contractual process substitutes a much-desired objectivity, since they take advantage of their position to obtain some sort of benefit for themselves or for a third party, without taking the general interest of the public into account.

EU PUBLIC PROCUREMENT DIRECTIVES AND THE FIGHT AGAINST CORRUPTION

Current regulation of public procurement procedures in the European Union is implemented through two EU Directives: Directive 2004/17/EC of the European Parliament and of the Council of 31 March 2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors; and 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.

In these Directives, the fight against corruption does not appear as an objective; nonetheless, they contribute to the European Union’s overall policy to fight corruption as is made clear by the Commission in its *Public Procurement in the European Union*.⁷ The Directives can assist in reducing the risk of corruption through two types of measures: General nature, which refers to the composition of the contractual system itself; and specific nature, which refers to the personal situation of those who wish to be contractors (Directive 2004/18/EC, *The Award Of Public Contracts To Economic Operators Who Have Participated In A Criminal Organisation Or Who Have Been Found Guilty Of Corruption Should Be Avoided*).

Focusing on these types of measures, the leeway for corrupt practices to occur is lessened by the establishment of a legal framework that

contemplates objective procedures in the award of contracts and that enables subsequent supervision of the awards through the establishment of an efficient appeals system.⁸ The aforementioned Directives, each acting within its own sphere, are intended to assure the conditions for real competition between firms in the award of contracts put out to tender by the contracting authorities. To that end, they incorporate in their articles selection procedures for the contractor based on participation and governed by the prior publication of the contracts, although it is true that the principles of advertising and participation may be attenuated under particular circumstances that are fixed by the Directives. Likewise, and in order to avoid the risk of favoritism on the part of the contracting authorities, these Directives establish a number of criteria for commonly held standards in the award of contracts for all Member States seeking to guarantee respect for the principles of equal treatment and non-discrimination on the grounds of nationality⁹ (Arrowsmith, 2004). The observance of these principles is achieved by opening up the public contract to the widest possible competition through the application of objective and commercial criteria for participation in tendering and award procedures (Bovis, 2002).

If we solely attend to the principles of objectivity, advertising and participation that are expressed in these Directives, we would have to affirm that, in theory, they leave no room for corruption. However, despite the important progress implied by the normative aspect in this battle, we cannot but recognize that, on occasions, the spirit of the law is vulnerated by those who implement laws and regulations and who seek through their provisions a way of eluding its observance. For this reason, so as to provide an effective response to the different forms of corruption in public procurement, it is necessary to institute measures of a specific nature that seek to dissuade those on the brink of corruption. One such instrument is found in the following section entitled 'criteria for qualitative selection'.

Criteria for Qualitative Selection

The principle of competition applied to public procurement assumes that the contracting authority will be in receipt of multiple offers so as to select that which best meets its needs; nevertheless, this participation is not open to any economic operator. The Directives on public procurement establish requirements for participation in procurement procedures and these are specified through the establishment of criteria

for qualitative selection based on the suitability, capability and experience of the contractor.¹⁰ These criteria are intended to determine the requirements that must be satisfied by the tenderer who submits a tender or the candidate who has sought an invitation to take part in a restricted or negotiated procedure or a competitive dialogue.¹¹ In other words, they refer to who may and who may not be a contractor having regard for the personal situation of the candidate or tenderer, the economic and financial capability, and even the technical knowledge, efficiency, experience and the reliability of the candidate or tenderer.

These requirements ensure the selection of the contractor from among those economic operators who have specific financial, technical, professional and moral capabilities, but, in addition, they authorize the contracting authorities “to bar from award procedures contractors whose capabilities do not suffice for the execution of the contract, at a stage prior to the evaluation and comparison of the tenders themselves” (Triantafyllou & Mardas, 1995). To this end, the Directives require minimum economic and technical conditions to be met by the tenderers or candidates; regulate the registration of companies on certain lists and, what is most noteworthy in my view; and establish the circumstances in which certain subjects may be excluded from award procedures. This latter possibility constitutes one of the principal novelties in the Directives on procurement relating to the eradication of corrupt practices.

EXCLUSION FROM PUBLIC PROCUREMENT PROCEDURES: GENERAL CONSIDERATIONS

Section 1 of Article 45 of Directive 2004/18/EC provides, in certain circumstances, for the mandatory exclusion from participation in a public contract of any candidate or tenderer who has been the subject of a conviction by final judgment for participation in a criminal organisation, corruption, fraud to the detriment of the financial interests of the Communities or money laundering:

Any candidate or tenderer who has been the subject of a conviction by final judgment of which the contracting authority is aware for one or more of the reasons listed below shall be excluded from participation in a public contract:

(a) participation in a criminal organisation, as defined in article 2(1) of Council Joint Action 98/733/JHA.

(b) corruption, as defined in article 3 of the Council Act of 26 May 1997 and article 3 of Council Joint Action 98/742/JHA, respectively;

(c) fraud within the meaning of article 1 of the Convention relating to the protection of the financial interests of the European Communities.

(d) money laundering, as defined in article 1 of Council Directive 91/308/EEC of 10 June 1991 on prevention of the use of the financial system for the purpose of money laundering.

In general terms, the exclusions from public procurement covered by Article 45 of Directive 2004/18/EC take the form of restrictions on the right to participate freely in the public contracts procurement market. These restrictions are based on acts of a diverse nature which may be grouped into three categories: the first of these categories comprises those exclusions deriving from the commission of specific acts that constitute a crime; the second comprises the prohibitions deriving from the breach of certain legal obligations such as those obligations that relate to late payment of social security contributions or non-payment of taxes, and the third category comprises those circumstances in which the personal situation of the candidate or tenderer is undesirable and not conducive to the undertaking economic relations with them, for reasons such as bankruptcy, insolvency, winding-up, etc (Bréchon-Moulènes, 2005; Piselli, 2000).

Despite this classification by categories, the same objective is pursued in all cases: to prevent the contracting authorities from contracting persons whose conduct indicates that they are not trustworthy. They therefore both respond to the need to safeguard the general interest and simultaneously protect the contracting authority from dishonest suppliers.¹² Nevertheless, beyond this common denominator, the reasons for denial of access to tender procedures are manifold, given that it is not possible to cite one single legal basis for all the causes in Article 45 of Directive 2004/18/EC. Debarment, exclusion or denial of access may be considered as a deterrent to corruption, as a penalty or as a disincentive for dishonest activity in future contracts (Ehlermann-Cache, 2005).

Exclusion deriving from a criminal conviction, as in the case of exclusion arising from acts of corruption, is a disqualification that restricts an individual or a legal person from exercising certain activities.

These are preventive measures the aim of which is primarily to prevent him or her from re-offending¹³; nevertheless, because of their practical consequences on events that have already taken place, and which are deserving of social reproach, they also evidently have a repressive nature quite apart from the criminal conviction that may or may not stipulate exclusion as a penalty. (Bourgoin, 1985:27; Hollard, 1989). This disqualification therefore acts as an additional sanction to encourage compliance with the legislation (Arrowsmith, 1996). By combining these effects, the measures constitute a fundamental instrument in the fight against corruption (Drew, 2005).

The adoption of these measures is nothing new in public procurement Directives, nor is it exclusive of contractual regulation. Article 23 of Directive 71/305/EEC of 26 July 1971, concerning the coordination of procedures for the award of public works contracts,¹⁴ had already made provision for the possibility of excluding from public contracts any tenderers or candidates who failed to provide sufficient guarantees of their ability to execute the contract or who would have been in breach of the legislation in force at that time.

“Any contractor may be excluded from participation in the contract who: (...)”.

Likewise, Article 93 of the Financial Regulation applicable to the general budget of the European Communities¹⁵ also provides a mechanism for the exclusion from European tenders and grants of natural or legal persons who have committed certain offences:

Candidates or tenderers shall be excluded from participation in a procurement procedure if:

- b) they have been convicted of an offence concerning their professional conduct by a judgment which has the force of res judicata;
- e) they have been the subject of a judgment which has the force of res judicata for fraud, corruption, involvement in a criminal organisation or any other illegal activity detrimental to the Communities' financial interests.

The adoption in 2004 of the latest EU Directives on public procurement provides the same normative approach, which does not mean that Article 45 is completely unoriginal as it incorporates elements

that did not appear in previous Directives. An interest in these new elements leads me on to the following sections.

Concept of Corruption As Defined By The Directives on Public Procurement

As has already been highlighted in previous sections, an ill-fated relationship exists between corruption and public procurement; however, the inclusion of the term corruption in Directives on public procurement had to wait until the approval of Directive 2004/18/EC. These Directives began with a clear principle regarding the motives for exclusion: those economic operators who have been convicted by a final judgement (*res judicata*) for particular crimes amongst which figures that of corruption.

On the basis of the aforementioned Directive, a number of guidelines are established that set out the basic elements to be considered in order to qualify the legal typology. Aware of the difficulty of finding a univocal definition of corruption, it becomes necessary to establish a concept that may be readily applied by all Member States. If we look at national legislation, it may be seen that the harmonization of criminal law in the European framework still has many shortcomings. In fact, not all areas of crime are covered, and offences are often defined in minimalist terms or with possibilities for derogation. Furthermore, certain forms of conduct that are potentially criminal have yet to be defined in the instruments and are perceived differently by Member States.¹⁶

These differences oblige the Community Legislator to look for common elements with respect to those forms of conduct that are qualified as crimes in the various national legislations. Thus, for reference to other texts, corruption is defined as set out under articles 3 of the Council Act of 26 May 1997¹⁷ and 3(1) of the Council Joint Action 98/742/JHA¹⁸, respectively, although it should be noted that this latter regulation has since been repealed:¹⁹

- For the purposes of this Convention, the deliberate action of whosoever promises or gives, directly or through an intermediary, an advantage of any kind whatsoever to an official for himself or for a third party for him to act or refrain from acting in accordance with his duty or in the exercise of his functions in breach of his official duties shall constitute active corruption.

- For the purposes of this Joint Action, the deliberate action of whosoever promises, offers or gives, directly or through an intermediary, an undue advantage of any kind whatsoever to a person, for himself or for a third party, in the course of the business activities of that person in order that the person should perform or refrain from performing an act, in breach of his duties, shall constitute active corruption in the private sector.

Mandatory Exclusion of Economic Operators

Article 45 (1) of Directive 2004/18/EC makes it mandatory for the contracting authorities to exclude bidders who have been convicted of acts of corruption. This mandatory nature is novel with respect to articles 29.1.c) of Directive 92/50/EEC²⁰, 24.1.c) of Directive 93/37/EEC²¹ and 20.1.c) of Directive 93/36/EEC²², in which exclusion for this and other offences was optional. The latter regulations left it in the hands of each Member State to decide on the application of exclusion as is shown by the different phrasing at the start of each article:

- Any service provider may be excluded from participation in a contract who: (c) has been convicted of an offence concerning his professional conduct by a judgement which has the force of *res judicata*.
- Any contractor may be excluded from participation in the contract who: c) has been convicted of an offence concerning his professional conduct by a judgment which has the force of *res judicata*.
- Any supplier may be excluded from participation in the contract who: c) has been convicted of an offence concerning his professional conduct by a judgment which has the force of *res judicata*.

As a consequence, uniform application of the causes of exclusion at a community level was not considered in the above Directives. The Member States were able to choose not to apply those grounds of exclusion at all and opt for the widest possible participation in procedures for the award of public contracts or to incorporate them into national law with varying degrees of rigor according to legal, economic or social considerations prevailing at national level. In that context, the Member States had the power to make the grounds of exclusion less onerous or more flexible.²³ The only restrictions consisted in not being

able to establish causes for exclusion that were not covered under the provisions of the Directives, or which did not fulfil the general principles of transparency and equality of treatment.

As things stand at present, any freedom to regulate the grounds of exclusion is circumscribed by Section 2 of Article 45. In effect, Directive 2004/18/EC differentiates between exclusion criteria on the basis of their severity, such that those viewed as grave, which are those contained in Article 45 (1), have to be written into national legislation in order to progress towards legislative harmonization in the fight against certain sorts of criminal conduct, whereas greater flexibility is allowed in relation to the provisions contained in the second section.

Any candidate or tenderer who has been the subject of a conviction by final judgment of which the contracting authority is aware for one or more of the reasons listed below shall be excluded from participation in a public contract(Article 45 (1)).

Any economic operator may be excluded from participation in a contract where that economic operator... (Article 45 (1)).

In relation to this same approach, article 54(4) of Directive 2004/17/EC ('Utilities Directive') also meets the requirement of stipulating the criteria for mandatory exclusion contained in article 45 (1) of Directive 2004/18/EC, but the obligation to apply such exclusions is restricted to certain subjects. It is only mandatory for the contracting entities that are public contracting authorities, since the fight against corruption involves all public authorities regardless of the sector in which they are active.

"The criteria set out in paragraphs 1 and 2 may include the exclusion criteria listed in Article 45 of Directive 2004/18/EC on the terms and conditions set out therein...Where the contracting entity is a contracting authority within the meaning of Article 2(1)(a), the criteria and rules referred to in paragraphs 1 and 2 of this Article shall include the exclusion criteria listed in Article 45(1) of Directive 2004/18/EC."

The reason for this restriction is to be found in the area in which this Directive is applied. Directive 2004/17/EC applies to contracting authorities as well as to public undertakings and private firms that operate in the water, energy, transport and postal services sectors on the basis of special or exclusive rights. These contracting entities are not

obliged to apply the criteria for exclusion, given that such an obligation would necessarily presuppose that such entities would have to access information held on judicial records, which would pose serious problems concerning data protection. Furthermore, it is necessary to bear in mind that such information might refer to companies competing in the same sector, who would see their data disclosed and perhaps, unduly used.

Connection with a Judicial Conviction

The obligation established by the Directive is that of barring from public contract procedures those convicted of acts of corruption, but the conditions under which it is implemented are freely regulated by the legislation of the various Member States: “Member States shall specify, in accordance with their national law and having regard for Community law, the implementing conditions for this paragraph.”

We therefore find ourselves faced with the privation of a right as a consequence of a criminal conviction, but one that does not have to be implemented in a consistent manner throughout the European Union, since the Directive is only compulsory with regard to its outcome. The ways in which this mandate is executed may vary from Member State to Member State. As a result, exclusion may occur for various reasons, in accordance with the different national laws:

- It can be a penalty ordered by the court, either as an addition to the principal penalty or as an alternative penalty if it is ordered in place of one or more principal penalties;
- It can be an additional penalty, automatically imposed as a consequence of the principal penalty, even if it is not ordered by the court;
- It can be ordered in administrative or disciplinary proceedings arising as a result of a criminal conviction.

For all of these reasons, it is necessary to distinguish the cases in which sentences are pronounced on the disqualification and its duration from those cases in which they are not pronounced. In the former, the court's assessment of the situation and the sentence are automatically imposed on the contracting authorities, and in the latter, in which such final

sentences do not pronounce on this situation, the contracting authorities have a margin of discretion to decide the exclusion.

Requirements of Judgment Having the Force of *Res Judicata*

Directive 2004/18/EC has restricted exclusion from award procedures for acts of corruption to conviction by final judgment. A judgment becomes final when it has not been appealed against in due time and manner, or because the appeals process has been exhausted. In some Member States, appeals procedures against a judgment delivered by a court of first instance may have to pass through two other levels of the judicial system (appeals court and cassation court), and that a judgment is not considered final until all the possibilities of appeal have been exhausted. In these cases, in order to speak of a legally valid situation for exclusion, it is necessary to await the end of the lengthy period of time between the two stages; this certainly constrains efficiency, but there is no doubt that it guarantees the presumption of innocence that is enshrined in the constitutional principles of a majority of Member States.

Area of Application With Respect to Legal Persons

The connection between exclusion and a judicial sentence leads us to question the effectiveness of such a binding link with respect to legal persons because their criminal liability is not recognized in all the Member States.²⁴ The doubt that immediately arises relates to the situation that is brought about whenever the exclusion cannot be applied. If the contractor candidate is an individual businessman, or woman, the application of this exclusion does not cause excessive difficulties; however, if the candidates are legal persons we are confronted with the recognition of their criminal liability.

In those Member States in which the criminal liability of legal persons is not recognized – as is the case of Spain – it is argued that criminal guilt cannot be imputed to legal persons because they have no legal animus. They argue that when a criminal act is committed within a legal person then those who are in effect responsible for those criminal acts are the physical persons within it (Gosálbez Pequeño, 2000; Muñoz Conde, 2004). This does not mean that legal persons are not accountable for their acts: they are accountable under both civil and administrative law; nevertheless, the traditional principle of *societas delinquere non*

potest is still fully in force in the criminal law of certain Member States, and this means accepting that legal persons will not be held liable under criminal law, and that physical persons will therefore be answerable for the criminal acts that they commit within these legal persons. In this way, it is possible to get around the impunity that would otherwise be associated with criminal actions perpetrated under the veil of a legal person by its members who are clearly identifiable as individuals.

Proof Supplied By The Tenderers And Candidates Of Having No Convictions For Acts Of Corruption

Few novelties are provided by Directive 2004/18/EC as far as proof is concerned. The only noteworthy point that it includes is the need for the awarding authority to know of the existence of convictions by final sentences, for which reason the success of article 45 depends on contracting authorities being aware of corruption convictions (DREW, 2005:271). Now, in order for them to gain this knowledge, the Directive provides for the possibility of accessing criminal record certificates or any other documents issued by a competent authority that allows the honesty of their conduct to be confirmed²⁵; however, Article 45 does not make any provisions with regard to questions of such importance for the implementation of these exclusions as cooperation with the competent authorities in other Member States for the exchange of information on convictions, or the publication of lists of companies excluded from contracts – blacklists – (Ehlermann-Cache, 2005; Jacobs & Anechiarico, 1992; White, 2005).

Sole Exception To Exclusion

There is one exception to the general rule on the mandatory nature of the implementation of exclusion, on the part of the Member States, in cases of criminal convictions relating to cases of corruption. This exception is contained once again in Article 45.1 of Directive 2004/18/EC: “They may provide for a derogation from the requirement referred to in the first subparagraph for overriding requirements in the general interest.”

By virtue of this exception, the Member States reserve the right to abrogate the exclusion of the candidate or tenderer when the needs of the awarding authorities cannot be satisfied through any other economic operator. Although it is certain that this situation will not occur

frequently, the legislator has deemed it appropriate to provide for this possibility which was already raised by the Committee of the Regions in its Opinion on Directive Proposals²⁶, when it asked: “*What happens in a case where only a supplier who has been convicted of corruption can deliver certain goods?*”; for example in case of public health problems or serious illnesses for which the only available medicines are provided by an economic operator who is to be excluded for one of the reasons foreseen in Paragraph 1. The purpose of this exception is to strike a balance between the fight against corruption and a pragmatic view of the general interest but, like all exceptions, it must be justified and proportionate to the objective pursued.

CONCLUSIONS

With these Directives, the sphere of action of the Member States has been significantly demarcated. As has been seen, the current regulatory framework binds the national legislator with respect to the mandatory inclusion of crimes of corruption as the cause of exclusion from contracts. This is in clear contrast to the previous situation in which the general rule allowed each Member State to consider such conduct as liable to lead to exclusion. Legal security is strengthened, in this way, with more guarantees not only due to the legislative harmonisation that the Directive entails, but also because it is an efficient instrument in the fight against corruption. Nevertheless, and despite all the very best intentions behind the measure, its impact will depend on the strength of implementation by the Member States.

NOTES

¹ In the Preamble to The United Nations Convention against Corruption reference is made to the destructive effects of corruption: ‘*concerned about the seriousness of problems and threats posed by corruption to the stability and security of societies, undermining the institutions and values of democracy, ethical values and justice and jeopardizing sustainable development and the rule of law*’.

² In Spain, the cases of corruption that shook the country in the 90s were reflected in the public opinion polls published by the government statistics agency, the *Centro de Investigaciones Científicas* (CIS), as corruption and fraud ranked among the principal problems of the country. At present, the Barometer for February 2006 shows that only 0.4% of interviewees think that

the problem of corruption ranks among those of greatest concern to Spanish society. Available: <http://www.cis.es/cis/opencms/ES/index.html> [April 2006]

³ Sentence of the Spanish Supreme Court of 21st December 1999.

⁴ http://www.transparency.org/policy_research/surveys_indices/cpi/2005 [April 2006]

⁵ Concerning EU instruments, the following should be noted: the Twenty Guiding Principles for the Fight against Corruption adopted by the Committee of Ministers of the Council of Europe on 6 November 1997; Agreement Establishing the Group of States against Corruption adopted by the Committee of Ministers of the Council of Europe on 1 May 1999,¹² and the Criminal Law Convention on Corruption adopted by the Committee of Ministers of the Council of Europe on 4 November 1998; Joint Action on corruption in the private sector adopted by the Council of the European Union on 22 December 1998; Civil Law Convention on Corruption adopted by the Committee of Ministers of the Council of Europe on 9 September 1999; the EU Convention on the protection of the European Communities' financial interests (PIF-Convention) and its first protocol; the second protocol to the PIF-Convention and the EU Convention on the fight against corruption involving officials of the European Communities or officials of the EU Member States.

⁶ The European Parliament, in its Resolution of 15 December 1995, urged the Commission to initiate actions in a wide range of sectors. The Commission responded with a Communication entitled '*On a Union Policy against corruption*' that pointed to particular areas of risk in which a common approach regarding the application of anticorruption measures was necessary. Among these measures, figure the establishment of black lists and supervisory controls for public procurement procedures. COM (1997) 192 final, 21 May 1997.

⁷ COM (98) 143, 11 March 1998.

⁸ COM (2006) 195, 04.05.2006, Proposal for a Directive of the European Parliament and of the Council amending Council Directives 89/665/EEC and 92/13/EEC CEE with regard to improving the effectiveness of review procedures concerning the award of public contracts.

⁹ Considering Article 2 of Directive 2004/18/CE of the European Parliament and of the Council, of 31 March 2004, on coordination of the procedures for adjudication of the public contracts for works, supplies and services. On the principles underlying the selection of a contractor, see the Opinion of Attorney General Sr. Dámaso Ruiz-Jarabo Colomer on case C-285/99 and C-286/99 *Lombardini SpA* – [2001] E.C.R. I-9233

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- ¹⁰ The Court of Justice of the European Communities has been concerned to distinguish between verification of the aptitude of the tenderers and the adjudication of the contracts when affirming that '[e]ven though the directive does not rule out the possibility that examination of the tenderer's suitability and the award of the contract may take place simultaneously, the two procedures are governed by different rules'. Case C-31/87, *Gebroeders Beentjes* [1998] E.C.R. I-4635; Case C-19/00, *SIAC Construction Ltd* [2001] E.C.R. I- 7725; Case C-513/99, *Concordia Bus Finland* [2002] E.C.R. I-7213; Case C-315/01, *GAT* [2003] E.C.R. I- 6351; Case C-331/04, *ATI EAC* [2005] and Joined Cases C-226/04 and C-228/04, *La Cascina and Zilch* [2005].
- ¹¹ Judgment of the Court Case C-176/98, *Host Italia* [1999] E.C.R I-8607, paragraph. 25
- ¹² In an expression used by the Committee of the Regions in its Opinion on the Proposal for a Directive of the European Parliament and of the Council on the coordination of procedures for the award of public supply contracts, public service contracts and public works contracts, (OJ C 144, 16.05.2001, p. 26).
- ¹³ Communication from the Commission to the Council and the European Parliament "*Disqualifications arising from criminal convictions in the European Union*". COM (2006) 73 final, 21.02.2006.
- ¹⁴ OJ L 185, 16.8.1971, p. 15
- ¹⁵ Council Regulation (EC, Euratom) No 1605/2002 of 25 June 2002 on the Financial Regulation applicable to the general budget of the European Communities (OJ L 248, 16.9.2002).
- ¹⁶ Green Paper on the approximation, mutual recognition and enforcement of criminal sanctions in the European Union ('Green Paper on sanctions'), COM (2004) 334 final, 30 April 2004.
- ¹⁷ Convention drawn up on the basis of Article K.3 (2) (c) of the Treaty on European Union on the fight against corruption involving officials of the European Communities or officials of Member States of the European Union (OJ C 195, 25 June 1997).
- ¹⁸ Joint Action of 22 December 1998 adopted by the Council on the basis of Article K.3 of the Treaty on European Union, on corruption in the private sector (OJ L 358, 31 December 1998)
- ¹⁹ Council Framework Decision 2003/568/JHA of 22 July 2003 on combating corruption in the private sector (OJ L 192, 31 July 2003).
- ²⁰ Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts (OJ L 209, 24 July 1992).

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- ²¹ Council Directive 93/37/EEC of 14 June 1993 concerning the coordination of procedures for the award of public works contracts (OJ L 199, 9 August 1993).
- ²² Council Directive 93/36/EEC of 14 June 1993 relating to the coordination of procedures for the award of public service contracts (OJ L 199, 24 July 1992).
- ²³ See, Judgment of the Court Joined Cases C-226/04 and C-228/04, *La Cascina and Zilch* [2005]
- ²⁴ Belgium, France, Ireland, the Netherlands and the United Kingdom recognise the criminal liability of legal persons; on the other hand, Spain, Greece, Germany and Italy do not consider legal persons to be active subjects of crimes.
- ²⁵ Pursuant to Article 45, a candidate or tenderer having to prove his eligibility has to submit relevant certificates or, if no such certificates are issued, a declaration on oath or a solemn declaration made before a competent body. See, http://ec.europa.eu/internal_market/publicprocurement/2004_18/index_en.htm [April 2006].
- ²⁶ Opinion of the Committee of the Regions on the "Proposal for a Directive of the European Parliament and of the Council on the coordination of procedures for the award of public supply contracts, public service contracts and public works contracts", and- the "Proposal for a Directive of the European Parliament and of the Council coordinating the procurement procedures of entities operating in the water, energy and transport sectors (OJ C 144, 16.05.01, p. 26).

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