

THE EXCLUSION OF TENDERERS IN PUBLIC PROCUREMENT AS AN ANTI-CORRUPTION MEAN

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Abstract

Corruption is a serious problem that is detrimental to the social, economic and political development of any country. Its extension across national frontiers is a source of concern for all States. Hence, in addition to specific domestic regulations, international conventions have multiplied in recent years to prevent and to curb corrupt practices. The European Union is also moving down this road and has developed a global policy to combat corruption on various fronts. One of its areas of action is public procurement; since 2004, Community Directives on public procurement have provided for the mandatory exclusion from the tendering process of those tenderers who have been convicted in a final sentence of offences involving corruption. This paper approaches the study of these measures and examines their contribution to the fight against corruption in the context of the European Union and certain Member States.

I. Introduction

Acts of corruption have been with us since time immemorial and are all too familiar throughout civilization since classical antiquity. The first documented cases of bribery date back to the year 3000 B.C. (Noonan, 1984), which provides us with a myriad of situations, contexts and actors. It is a widespread phenomenon whose manifestations have changed over time and in different cultures, nonetheless, it has not allowed us to reach agreement on a single, commonly held definition (Amundsen, 2000). Consensus only exists in relation to its pernicious influence on the proper management of public institutions and the disruption of private markets.

The harmful effects of corruption are evident in economic life (Mauro, 1995; Tanzi and Davoodi, 1997), but they also have an impact at a social and political level (Méndez and Sepúlveda, 2006). In fact, in the Preamble to one of the most important regulatory instruments in the fight against corruption, the United Nations Convention against Corruption refers to the destructive effects of corruption when it points out that it “*is 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*”. As a result, although there are authors who try to water down the effects of corruption, Tanzi (1998) contends that it propagates its own harmful effects beyond the specific illegal acts of public bodies or businesses and damages society as a whole by threatening social equality and the social contract.

The attention that corruption has attracted, above all since the 1990s, is due to its wide-ranging nature that goes beyond a few isolated cases. It emerges in developing countries as much as in developed ones (Tanzi, 1998). The globalization of economic exchange between countries has aided the transmission of corrupt models and the transfer of criminal profits. Similarly, techniques used to extend corruption are also exported, spreading out beyond national frontiers. Media accusations highlighting the corruption of high ranking officials also contribute to increased public interest in this phenomenon and confirm that it is not exclusively a local problem.

Instead, we find ourselves up against a range of corrupt patterns of behavior that replicate themselves in different corners of the world, even though they are at some distance from each other, thereby acquiring a global dimension.

The perception of corruption as having international implications (Rose-Ackerman, 1997; Stessens, 2001) has led to significant changes in the measures applied to combat it. Since the early years of programs and declarations, we have moved on to a more active method of fighting corruption and thus, alongside the specific activities of each State, initiatives to counter corruption have proliferated in different international organizations.¹ A broad range of mechanisms is available for this purpose. Codes of conduct, pacts of integrity and standards of transparency along with covenants, protocols, and recommendations all share one and the same aim: to call attention to the need to foster cooperation between States to put an end to corrupt practices. It is this line of action that the European Union is also following.

¹ The principal international legal instruments in the fight against corruption are: United Nations Convention Against Corruption, adopted by the United Nations General Assembly by Resolution 58/4 of 31 October 2003; OECD Convention on Combating Bribery of Foreign Officials in International Business Transactions, signed on 17 December 1997; African Union Convention on Preventing and Combating Corruption, adopted 11 July 2003; Inter-American Convention Against Corruption, adopted on 29 March 1996; Criminal Law Convention on Corruption of the Council of Europe, adopted on 27 January 1999; Civil Law Convention on Corruption of the Council of Europe, adopted on 4 November 1999.

This paper carries out an in-depth study of one of the measures adopted by the EU as part of its anti-corruption policy. It examines mandatory exclusion from public procurement procedures in those circumstances in which tenderers have been convicted of acts of corruption in a final judicial sentence in the context of Community Directives on public procurement; Directives that make it binding upon the legislator in each Member State to introduce mandatory exclusion from procurement into domestic legislation. Thus, the paper therefore examines the way in which different Member States implement this measure when they transpose the community Directives on public procurement into their national laws, and reveals the problems that arise when the latter exclusion is applied.

II. Corruption in Public Procurement

Aware that the problem of corruption also affects Member States, the EU has developed a comprehensive anticorruption strategy in those sectors that are more prone to corrupt practices.² It has therefore intensified the fight through measures in those areas that, because they jeopardize greater amounts of public resources, might endanger the community objective of ensuring the effective operation of the Internal Market.³

This is one of the reasons why addressing corruption in public procurement is an important component of any effective anticorruption strategy, but it is not the only one; of all government activities, public procurement is one of the most vulnerable to corruption (Pope, 2000), which is evident from the recurrent scandals related to the award of public contracts.⁴ One of the causes of the spread of these practices is found in the turnover of procurement contracts in the public sector: procurement of goods, works and other services by public bodies alone amounts on average to between 15% and 30% of Gross Domestic Product (GDP) (Transparency International, 2006a), and, in the case of the EU, it represents 16.3% of community GDP.⁵

These percentages of total public expenditure earmarked for public procurement constitute an incentive for firms to position themselves more favorably in relation to their competitors through the use of corrupt practices (Stapenhurst and Langseth, 1997). Such that whenever criminal acts are present in the selection of the tenderer, the tender will not presumably be awarded to whoever offers the best conditions for price and quality, but to whoever is more skilled, in a word, at using corrupt channels and corrupt practices.

The result is a loss of competitiveness in the procurement process. In the absence of any real competition, the execution of public works, the procurement of goods, or the delivery of services become more costly for the public purse and bring to light a significant derailment of resources. According to Strombom (1998), the costs added to the contract can even reach 20% or 25%, but in some cases can climb as high as 50% of the total cost of the contract (Evenett and Hoekman, 2005). The reason for this extra cost is evident: the firms recoup from the contract costs the payments made as bribes to the government officials, technicians or politicians who have a hand in the award of the contracts. The corrupt tendencies of these actors do not go unnoticed by European citizens. To the question "In (our country), do you think that the giving and taking of bribes, and abuse of positions of power for personal gain, are widespread among any of the following?", one out of two citizens considers that corruption exists among officials awarding public tenders and among officials issuing building permits; that is, ten points over the average in other sector (Table 1). So, 39 percent of European Union citizens consider that bribes and the abuse of positions of power for personal gain are widespread among people working in the police service, 38 percent in customs service, and 37 percent among officials issuing business permits and inspectors in various services.⁶

² According to the 2007 Corruption Perceptions Index, published by the NGO Transparency International, 7 of the 27 Member States - 26% - receive a score of below 5 points, from a maximum of 10 given to the least corrupt and 0 to the most corrupt countries. These seven countries are as follows: Slovakia (4.9), Latvia (4.8), Lithuania (4.8), Greece (4.6), Poland (4.2), Bulgaria (4.1) and Romania (3.7).

³ Communication to the Council and the European Parliament "*On a Union Policy against Corruption*", COM (97)192, 21.05.97; Communication from the Commission to the Council, the European Parliament and the European Economic and Social Committee "*On a comprehensive EU policy against corruption*", COM (2003) 317 final, 28.05.2003.

⁴ European Parliament: Working Paper Measures to Prevent Corruption in EU Member States (Annex: Combating corruption in public procurement contracts). Legal Affairs Series JURI 101 EN 03-1998. Works by Rose-Ackerman (1999) and Della Porta and Vannucci (1999) provide examples on bribery in public procurement.

⁵ According to data from the European Commission, this would imply 1,500 billion euros in 2002. http://europa.eu/publicprocurement/index_es.htm (accessed April 10, 2008). According to the OECD, the figure for the same year might be as much as \$5.8 trillion (OECD, 2002).

⁶ Special Eurobarometer num. 245, *Opinions on organized, cross-border crime and corruption*, March 2006, p. 16.

Table 1. European citizens who consider that officials awarding public tenders are likely to be corrupt

EU Member State	Percentage of Respondents
Denmark	31%
Austria	34%
United Kingdom	34%
Latvia	37%
Ireland	38%
Estonia	39%
Luxembourg	40%
Finland	41%
Spain	41%
Portugal	41%
Hungary	41%
Slovakia	46%
Sweden	47%
EU 25*	50%
Italy	51%
Netherlands	52%
Belgium	54%
Poland	55%
Greece	56%
France	58%
Slovenia	58%
Malta	59%
Lithuania	61%
Germany	63%
Cyprus	69%
Czech Republic	73%

Source: Special Eurobarometer num. 245, March 2006. *Opinions on organized, cross-border crime and corruption* http://ec.europa.eu/public_opinion/archives/ebs/ebs_245_en.pdf (accessed April 10, 2008).

* The accession of Rumania and Bulgaria to the EU took place on 1 January 2007, which is why they are not included in the study.

III. Public Procurement and Measures to Limit Corruption in EU

1. Legal Framework

European regulations on public procurement respond to the dynamic of all-encompassing community policies on community freedoms, and, as pointed out earlier on, come under the First EU Pillar. Harmonization of the respective national legal systems in the field of public procurement forms part of the global EU policy to secure a single market⁷, and for that reason, since the 1970s, European institutions have been carrying forward the work of harmonizing the legislations of the different Member States in this field. This legislative harmonization is brought about through the adoption of different community directives that, among their objectives, seek to assure the free circulation of goods, people, services and capital in the terms set out by the European Community Treaty (EC Treaty).⁸

⁷ The Single European Act (which was signed in February 1986 and came into force on 1 July 1987) incorporated the concept of the Internal Market in the EC Treaty as ‘*an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured*’. The importance of public procurement as a key element in order to achieve a single market was highlighted by the European Commission in the White Paper *Completing the Internal Market* (COM (85) 310 final, 14.06.1985) and it is referred to, on numerous occasions, by the European Court of Justice: “the purpose of coordinating at Community level the procedures for the award of public contracts is to eliminate barriers to the freedom to provide services and goods and therefore to protect the interests of traders established in a Member State who wish to offer goods or services to contracting authorities established in another Member State” (Case C-380/98 University of Cambridge [2000] ECR I-8035, paragraph 16, and Case C-237/99 *Commission vs. France* [2001] ECR I-939, paragraph 41).

⁸ The Treaty of Rome, establishing the European Economic Community (EEC), signed in Rome on 25 March 1957.

To ensure the full availability of these freedoms, the EU Public Procurement Directives seek to guarantee competition across frontiers between European firms. This competition is made possible through the establishment of objective selection procedures for contractors, which ensure the opening of public procurement markets to bidders from other Member States and safeguard the different economic operators from discrimination because of their nationality (Arrowsmith, 2005; Trybus, 2006a). However, these objectives have not always been fully complied with because their application is resisted by some Member States whose criteria are to continue to support their own nationals.⁹ All too frequently, they neither incorporate, nor rigorously apply the regulations on public procurement. This non-compliance on the part of some States when transposing the directive on public procurement into their national legal systems has been an ongoing issue ever since the first Directive on this matter (Directive 70/32/EEC of 17 December 1969)¹⁰ was adopted over more than thirty years ago.

Since the early 1990s up until the year 2004, the legislative package of the EU for the harmonization of public procurement rules has been composed of three Directives referring to the three basic sectors: public service contracts (Directive 92/50/EEC), public supply contracts (Directive 93/36/EEC) and public works contracts (Directive 93/37/EEC), and additionally by Directive 93/38/EEC relating to contracts in the special sectors, which is to say, water, energy, transport and telecommunications.¹¹

However, based on the consultation procedure in its *Green Paper on Public Procurement*¹², the Commission began to question those regulatory instruments. Hence, in its Communication of 11 of March, 1998, entitled '*Public Procurement in the European Union*'¹³, after presenting a diagnosis of the situation regarding public procurement in the European context, it proposed to adapt the Community Directives to the demands of a market in a constant state of flux. It was felt necessary to simplify and to modernize the procurement procedures that required more than a mere adjustment of the Directives in force at that time.

As things stood, the legislative changes were not long in coming. Since 2004, a new regulatory framework on public procurement has existed in the EU whose deadline for transposition into national law ended on 31 January 2006.¹⁴ Current Community regulations on public procurement are enforced through two 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 (Utilities Directive), 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 (Public Sector Directive).¹⁵

The aforementioned Directives, each one having its own sphere of action, seek to ensure the conditions for real competition between European firms in the award of tenders by the contracting authorities, so that these acquire goods and services under the best possible terms – the primary objective – (Arrowsmith, 2005). However, it also pursues the achievement of other objectives – secondary or non-commercial goals – (Schooner, 2002) and the fact is that public procurement does not solely constitute a form of supply. It is also a powerful legal tool at the service of contracting authorities to meet other public ends, among which environmental protection, the promotion of social policies and the fight against corruption are all worth highlighting. With

⁹ The 8% infringement proceedings for incorrect transposition or incorrect application of Internal Market rules relate to public procurement. See, European Commission: *Internal Market Scoreboard: Member States back on track* (IP/08/235, 14.02.2008) http://ec.europa.eu/internal_market/score/docs/score16bis/score16bis_en.pdf (accessed 10 April, 2008).

¹⁰ Directive 70/32/EEC of 17 December 1969 on provision of goods to the State to local authorities and other official bodies (OJ L 13, 19.01.1970).

¹¹ 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, 24.07.1992); Council Directive 93/36/EEC of 14 June 1993 relating to the coordination of procedures for the award of public supply contracts (OJ L 199, 09.08.1993); Council Directive 93/37/EEC of 14 June 1993 concerning the coordination of procedures for the award of public works contracts (OJ L 199, 09.08.1993) and Council Directive 93/38/EEC of 14 June 1993 coordinating the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors (OJ L 199, 09.08.1993).

¹² European Commission: *Green Paper on Public Procurement in the European Union: Exploring the way forward*, 27.11.1996. Green papers are discussion papers published by the Commission on a specific policy area. They are primarily documents addressed to interested parties – organizations and individuals – who are invited to participate in a process of consultation and debate.

¹³ COM (98) 143, 11.03.1988

¹⁴ On 1 February 2006, "the morning after the deadline", only a minority of Member States had formally implemented the new EU Directives (Austria, Denmark, Hungary, Lithuania, Malta, Netherlands, Slovakia and the United Kingdom) (Trybus, 2006b). For a general analysis of the new Directives, see Arrowsmith, 2004.

¹⁵ OJ L 134, 30.04.2004

respect to the fight against corruption, the Community Directives can contribute to the European Union's overall policy in the fight against corruption through two sets of measures: the first are of a general nature and refer to the legal framework; and, the second, which one could say has more of a specific nature, is aimed at promoting probity among those economic operators that wish to become contractors (Bovis, 2006).

2. General and Specific Measures

A clear and comprehensive regulatory framework for the conduct of public procurement is a fundamental prerequisite for curbing corruption in public contracting (ADB/ OECD, 2006). A legal framework that contemplates objective procedures for awards, based on the principles of publicity and transparency, and that provides for subsequent supervisory mechanisms over the awards through the incorporation of effective review procedures will contribute to restricting the space for corrupt practices, as it implies a barrier against corruption and other illicit uses of public resources.

This idea is underlined in Article 9 of the United Nations Convention against Corruption¹⁶. The U.N. Convention requires each State Party to "*take the necessary steps to establish appropriate systems of procurement, based on transparency, competition and objective criteria in decision-making, that are effective, inter alia, in preventing corruption*". Its objective is to reduce the risks of corruption in public procurement through the establishment of the principles of transparency, competition and objective criteria in decision making.

These principles are also found in the new EU rules on public procurement. The Community Directives establish five obligations referring to the preparation and the award of public contracts: advertising of the contracts that are above certain economic thresholds, transparency in the awards procedures, equivalence of the technical specifications, approval of the suitability of the contractors and objectivity in the criteria for making the award (Gimeno Felú, 2006). These obligations represent the concrete expression of the aforementioned community freedoms and are interlinked between each other in such a way that the "obligation of transparency which is imposed on the public authority consists in ensuring, for the benefit of any potential tenderer, a degree of advertising sufficient to enable the public contracts market to be opened up to competition and the impartiality of procurement procedures to be reviewed."¹⁷

As a result, fair competition and equal treatment of bidders, which are highlighted in the Directives, are important in the fight against corruption as measures of a general nature. However, although the regulatory aspects implies great progress in this battle, we cannot ignore that, on occasions, the rules are broken by procurement officials and policy makers. Thus, corruption in public procurement is often caused by those officials who disregard existing procurement rules (Søreide, 2002), and whenever this happens, the personal interest of whoever is taking the decisions in the contractual process waives aside the desired objectivity. Countering this requires the implementation of another type of more specific measure.

These more specific measures tend to limit corruption by promoting the probity of the actors involved in public procurement procedures and they include codes of conduct, conflict of interest regulations, incompatibility laws, rules on abstention designed for public officials and politicians, as well others that refer to the integrity of the candidates or tenderers. Among the measures of this type is the obligatory exclusion from tendering procedures of those tenderers who have been convicted of corruption in a final sentence against which no further appeal is possible.

IV. Exclusion from Public Procurement Procedures: General Considerations

The 2004 Directives on public procurement establish the conditions for participation in tendering procedures under the general heading of "criteria for qualitative selection". These criteria regulate the positive requirements to be met by candidates and tenderers in order to become contractors. At the same time, they empower the contracting authorities "to bar from award procedures contractors whose capabilities do not suffice for the execution of the contract" (Mardas and Triantafyllou, 1997). In other words, the contracting authorities decide who can and who can not be a contractor by looking into the personal circumstances of the candidate or the tenderer, their economic and financial capacity, their technical knowledge and their experience, and even their reliability, by laying down the circumstances under which certain actors may be excluded from the award procedures.

Generally speaking, exclusion is a disqualification that restricts an individual or a legal person from exercising certain activities. Applied to the field of public procurement, the exclusions may be configured as limitations of the right to participate freely in the public procurement procedures, in such a way that they can be

¹⁶ Only 18 of the 27 Member States that make up the EU have ratified or accepted this important international instrument in the fight against corruption. See, <http://www.unodc.org/unodc/en/treaties/CAC/signatories.html> (accessed April 12, 2008).

¹⁷ Judgment of the European Court of Justice, Case C- 458/03, *Parking Brixen* [2005] E.C.R. I-8612, paragraph 49.

defined as administrative remedies utilized by governments to disqualify contractors from obtaining public contracts (Schooner, 2004; Williams, 2006; Phoebe, 2006).

These exclusions are laid down in article 45 of Directive 2004/18/EC (Public Sector Directive) and in article 54 (4) of Directive 2004/17/EC (Utilities Directive) “which, by cross-reference, applies the public sector requirement to some utilities” (Arrowsmith, 2005). The above-mentioned article 45 provides for debarment because of various acts that can be grouped into three categories. The first 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 relating to late payment of social security contributions or non-payment of taxes; and the third comprises those circumstances in which the personal situation of the candidate or tenderer is undesirable and is not deemed conducive to further economic relations with them, for reasons such as bankruptcy, insolvency, winding-up, etc. (Piselli, 2000; Bréchon-Moulènes, 2005).

This classification by categories is not, however, an obstacle to finding a common objective shared by all: to prevent the contracting authorities from contracting people who due to their conduct are not held to be trustworthy. This protects the contracting authority from dishonest suppliers¹⁸, at the same time as it dissuades contractors from breaking the law.

1. Exclusions deriving from a Criminal Conviction

Section 1 of Article 45 of Directive 2004/18/EC (Public Sector Directive) 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 organization, 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 organization, 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”*

Likewise, the Financial Regulation applicable to the general budget of the European Communities¹⁹ also contemplate under article 93 (e), the mandatory exclusion from participation in contractual procedures of those candidates or tenderers who have been the subject of a judgment that has the force of *res judicata* for fraud, corruption, involvement in a criminal organization or any other illegal activity detrimental to the Communities' financial interests.

These exclusions arising from a previous criminal conviction are part and parcel of the general preventive nature referred to earlier for all types of exclusions; although they are also of a punitive nature in that they have an impact, aside from the criminal conviction itself²⁰, in terms of a tarnished business reputation, as well as the implicit economic loss of ceasing further business with public authorities (Bourgoin, 1985; Hollard, 1989).

Owing to its combined effects, debarment “potentially represents a major step forward in curbing corruption” (Drew, 2005); however, some fine-tuning is needed before this measure is put into practice.

¹⁸ This is the 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).

¹⁹ In the wording given by Council Regulation No 1995/2006, of 13 December 2006, amending Regulation No 1605/2002 on the Financial Regulation applicable to the general budget of the European Communities (OJ L 390, 30.12.2006).

²⁰ The punitive nature of the exclusion is not due to it being considered a punishment, as the criminal systems of the Member States may not include the exclusion from public tendering procedures as a punishment. In the Spanish legal system, debarment from tendering with the public authority is considered a crime for the criminal act defined in article 262 of the Criminal Code: on the alteration of prices in public competitive tenders and contracts. Similarly, included within the catalogue of additional sanctions for some administrative infringements are matters concerning subsidies, urban development and the environment. Another example is found in the Polish system, where the exclusion from public procurement is expressly provided for in the list of additional sanctions available against legal persons under the Law on Collective Entities (as amended in 2005).

a. Mandatory Rule to Exclude Candidates or Tenderers Convicted of Corruption

The adoption of this measure is not entirely new in the Community Directives on public procurement as, ever since Directive 71/305/EEC,²¹ the possibility of excluding those candidates or tenderers who had been convicted for a crime related to their professional conduct from public procurement procedures was considered.²² Implicit among these types of offences are those related to different types of bribery or trafficking of influence that involve acts of corruption. However, it was not until the drafting Directive 2004/18/EC that the term corruption was included in contractual legislation and the obligation to exclude those economic operators convicted for acts of corruption from contractual procedures.

This duty is the main innovation of article 45 (1) of Directive 2004/18/EC. In this article, a distinction is made 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:

Article 45 (1) “*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 (2) “*Any economic operator may be excluded from participation in a contract where that economic operator: (...)*”

The voluntary nature of the exclusion contained in the second section of article 45 implies, in practice, that its application is left very much in the hands of Member States. They can 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 this voluntary context, the Member States have the power to make the grounds of exclusion less onerous or more flexible. The only limits placed on their freedom of choice are that they cannot include grounds for exclusion that are not foreseen in the Directives or that violate the general principles of transparency and equal treatment²³. However, the obligatory nature of the grounds for exclusion in the first section implies that these disqualifications will have to be incorporated in the domestic legislation of the Member States when the Community Directives are eventually transposed.

The same obligation, with regard to the transposition into domestic law of the grounds for exclusion due to corruption, is laid down in article 54 (4) of Directive 2004/17/EC (Utilities Directive). Nevertheless, it should be pointed out that in this Directive, this latter obligation is restricted because of the actors who have to apply such exclusions. It is only mandatory for the contracting entities that are public contracting authorities.

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.

b. 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. The definition of corruption given in this Directive, on the one hand, is intended to save it from the absence of a single unambiguous description that brings together the various criminal activities that tend to be labeled as corrupt. On the other, it is intended to avoid the lack of authority on the part of the EU to typify these offences. It should not be forgotten that legislative authority in criminal matters has not been transferred to community organs. Criminal law remains the exclusive authority of each State, which means that they are the only ones with the authority both to approve criminal legislation and to impose sanctions of that same nature; nevertheless, the prevention and fight against corruption has a predominant role around the Third Pillar of the EU (the areas of Justice and Home Affairs).

Article 29 of the Treaty of the European Union converts the fight against corruption into one of the conditions for the establishment of an area of liberty, security and justice. One of the proposed mechanisms to achieve it is the “*approximation, where necessary, of rules on criminal matters in the Member States.*” This

²¹ Directive 71/305/EEC of 26 July 1971 concerning the coordination of procedures for the award of public works contracts (OJ L 185, 16.08.1971).

²² This possibility was mentioned in the derogated articles 29.1.c) of Directive 92/50/EEC (public services contracts), 20.1.c) of Directive 93/36/EEC (public supply contracts) and 24.1.c) of Directive 93/37/EEC (public works contracts).

²³ See, Judgment of the European Court of Justice Joined Cases C-226/04 and C-228/04, *La Cascina and Zilch* [2006] E.C.R. I-I-1347, paragraphs 22 and 23.

approximation of criminal legislation has already been initiated through specific legal instruments of the Third Pillar such as the Framework Decisions, Common Actions and Agreements in the field of JHA.

It is for this reason that description of corruption established in Directive 2004/18/EC is expressed in reference to two European legal instruments that are incorporated in this area of inter-governmental cooperation; thus, corruption is defined as is, respectively, set forth in article 3 of the Council Act of 26 May 1997²⁴ and in article 3(1) of Council Joint Action 98/742/JHA²⁵, although it should be noted that this latter regulation was derogated prior to the publication of Directive 2004/18/EC. It was derogated by article 8 of the Council Framework Decision 2003/568/JHA of 22 July 2003 on combating corruption in the private sector²⁶.

Article 3 of Council Act of 26 May 1997: the 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 define *active corruption* as:

“(...) 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 (...).”

Article 3 (1) of Council Joint Action 98/742/JHA of 22 December 1998 on corruption in the private sector, defines active corruption as:

“(...) 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.”

Once Directive 2004/18/EC made it obligatory to exclude from the tender procedures those tenderers or candidates convicted of active corruption, whether in the public or the private sector, national legislation must include those same grounds for disqualification in its legislation, given that “a directive shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods.” (article 249 EC Treaty). On that basis, article 45 (1) of this Directive should have been implemented by all EU Member States before 31 January 2006, that was the deadline for its transposition into national law; however not all the Member States have met that obligation.²⁷

An examination of Member States legislations that have already transposed article 45 (1) of Directive 2004/18/EC into national law offers us, the following panorama, with regard to the description of corruption (see Table 2): EU Member States can be divided into three groups. A first group of countries (Cyprus, Denmark, Finland, Greece, Hungary, Italy, Lithuania, Malta, Portugal and Sweden) refer to the same European legal instruments as the Community Directive to give us their definition of corruption, although in the case of Finland, this reference is also made to Council Framework Decision 2003/568/JHA; a second group (Austria, Bulgaria, France, Germany, Netherlands, Slovenia, Spain and United Kingdom) is made up of those Member States that refer us back to their own criminal regulations for the legal description of offences that are included under the heading of corruption and which, for the most part, coincide with the different types of bribery, trafficking of influence and fraud. In the third group of Member States (Belgium, Czech Republic, Estonia, Ireland, Latvia, Poland, Romania and Slovakia) no reference is made to any regulations and the word corruption is used without offering us a working definition. Nevertheless, regardless of whether the definition of corruption is in reference to European regulations or national legislation, it remains clear that in this type of criminal act, the personal interest of whoever take the decisions in the contractual procedure replaces a desirable objectivity, as they are taking advantage of their position to obtain some kind of benefit, for themselves or for a third part, in breach of their own duties and in disregard of the public interest.

²⁴ OJ C 195, 25.06.1997

²⁵ OJ L 358, 31.12.1998

²⁶ OJ L 192, 31.07.2003

²⁷ On February 1, 2006, only a minority of Member States had formally implemented the Directive 2004/18/EC (Austria, Denmark, Hungary, Lithuania, Malta, Netherlands, Slovak Republic and the United Kingdom). On March 1, 2007, Bulgaria, Cyprus, Czech Republic, France, Germany, Ireland, Italy, Latvia, Poland, Romania and Slovenia were added to the list of Member States that had implemented the Directive (Trybus and Medina, 2007). On May 1, 2007, the new Public Procurement Act entered into effect in Estonia and the new Finnish public procurement legislation came into force on June 1, 2007. On January 1, 2008, Directive 2004/18/EC had been implemented in 23 of the 27 Member States. The only exceptions are Luxembourg, which has not yet approved its new Public Procurement Law, and Belgium, Portugal and Spain where the national legislation that will incorporate the EU Directives has not yet entered into force even though it has been approved and published (Medina and Trybus, 2008).

Table 2. Conditions for exclusion on the grounds of corruption in Member States legislations that have transposed Directive 2004/18/EC (31.03.2008)

Legislation	Persons subject to exclusion	Certificates/information to be submitted
EUROPE Article 45.1 Directive 2004/18/EC	Any candidate or tenderer who has been the subject of a conviction in a final judgment of which the contracting authority is aware for (...) (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;	- Extract from the judicial record - Equivalent document - Declaration under oath - Solemn statement
EUROPE Article 93.1.(e) Regulation No 1605/2002 (amended by Council Regulation No. 1995/2006) Financial Regulation applicable to the general budget of the EC	Candidates or tenderers that have been the subject of a judgment which has the force of <i>res judicata</i> for corruption	Candidates or tenderers shall certify that they are not in one of these situations. However, the contracting authority may refrain from requiring such certification for very low value contracts.
AUSTRIA Paragraph 68 (1) BVerfGG 2006 Nr. 17/2006	The contracting authority will exclude those business managers from participation in tendering procedures if it is aware of a final judgment against them or – in the case of legal persons, companies subject to mercantile law, registered for-profit companies or partnerships – against the physical persons in charge of the business of the latter entities and those affected by one of the following acts: bribery, fraud, unfair management, accepting gifts, abuse of subsidies (StGB [Penal Code]).	Natural persons - Extract from the judicial record (Criminal record certificate)
BELGIUM Article 20 (Classical Sector) Article 63 (Utilities Sector) Law of 15 June 2006	Any candidate or tenderer who has been the subject of a judgment for corruption that has the force of <i>res judicata</i> of which the contracting authority is aware.	- Declaration of honor (Circular of 10 February 1998, on qualitative selection of entrepreneurs, suppliers and service providers)
Article 11.2° Royal Decree of 23 November 2007 amending the Law on Public procurement 1993 and article 17 Royal Decree of 8 January 1996	Any candidate or tenderer of which the contracting authority is aware who has been convicted by a final sentence with the force of <i>res judicata</i> for: 2° corruption, as defined in article 246 of the Penal Code	
BULGARIA Articles 47, 48 and 49 Public Procurement Law amended SG No 79 of 26 September 2006	The contracting authority shall exclude from participation in a public procurement award procedure a candidate or tenderer who: 1. has been convicted by an effective sentence, unless rehabilitated, for: b) Bribery under article 301-307 of the Penal Code	- Extract from a court register - Equivalent document by a judicial or administrative authority - Declaration on oath - Solemn declaration made before a judicial or administrative authority, a notary or a competent professional or trade body
CYPRUS Article 51.1 Law No. 12 (I)/2006 of 17 February 2006	Any candidate or tenderer who has been the subject of a conviction by final judgment of which the contracting authority is aware for (...) (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	Natural persons - Equivalent document (Criminal Record Certificate) Legal persons - Equivalent document (Letter issued by Cyprus Police)
CZECH REPUBLIC Article 53.1.(a) Act No.137/2006 of 14 March 2006	Suppliers convicted in a final sentence of accepting bribes, bribery, indirect bribery, fraud, loan fraud including cases of preparation for and attempts of or conspiracy to commit such a crime, or if such sentences pronounced for such crimes have been expunged	Natural persons - Extract from the judicial record (Extract from the Criminal Register)
DENMARK Governmental Order No. 937 of 16 September 2004	Any candidate or tenderer who has been the subject of a conviction by final judgment of which the contracting authority is aware for (b) corruption, as defined in Article 3 of the Council Act of 26 May	- Extract from the judicial record - Equivalent document (Certificate of criminal record)

	1997 and Article 3 of Council Joint Action 98/742/JHA	
ESTONIA § 38 (1) Public Procurement Act 2007 (RTI, 21.02.2007)	Exclusion of the tenderer (...) 1) which is or which legal representative has been penalized for organizing the criminal group or belonging thereto or violation of the requirements of public procurement, commission of offences related to office and money laundering (...)	- Punishment Register notice - Declaration on oath - Autographic confirmation
FINLAND §53 Public Procurement Act 348/2007, of 30 March 2007	Exclusion of candidates and tenderers that have received sentences for certain crimes. The crimes that involve obligatory exclusion are: (...) (b) corruption, as defined in Article 3 of the Convention of 26 May 1997, (...) on the fight against corruption involving officials of the European Communities or officials of Member States of the European Union and Article 2.1 a) Council Framework Decision 2003/568/JHA on combating corruption in the private sector.	Natural persons - Extract from the criminal record - Extract from business prohibition register - Solemn statement Legal persons - Extract from the criminal record
FRANCE Article 43 Public Procurement Code 2006 Article 8(1) Ordinance 2005-649, June 6 th 2005	Persons convicted in the last five years in a final judgment of: swindling, active corruption, trafficking of influence, active corruption of civil servants of the European Community, civil servants of Member states of the European Union, members of the institutions of the European Community; forgery (articles 433-1 and 435-2 Penal Code).	- Declaration of honor
GERMANY § 8a Nr. 1 Public Procurement Order for Works Contracts VOB/A 2006 § 7a Nr. 2 Public Procurement Order for Supply and Services Contracts VOL/A 2006 § 11 Abs. 1 Public Procurement Order for Professional Services VOF 2006	Any candidate/tenderer will be excluded from participation in procurement procedures when the contracting authority has knowledge that a person, whose conduct has to be attributed to the firm, has been condemned in a final sentence for: e) § 334 of the Penal Code (bribery/corruption) (...) also in connection with article 2, section 1 of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (...)	- Extract from the Central Federal Registry - Equivalent document issued by an authorized jurisdictional or administrative body in the country of origin. - Declaration on oath made before an authorized jurisdictional or administrative body
GREECE Article 43.1.b) Presidential Decree 60/2007, March 2007 (amended Presidential Decree 118/2007)	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 following reasons: b) corruption, as defined in Article 3 of the Council Act of 26 May 1997 and Article 3 (1) of Council Joint Action 98/742/JHA	- Extract of the judicial record - Equivalent document issued by the competent judicial or administrative authority
HUNGARY Articles 60.1.(h) and 60.3 Act CXXIX of 2003 on Public Procurement (amended by Act 172/2005) [PP Act-2008.01.01]	Tenderers and subcontractors who commit crimes of bribery, bribery in international relations, provided they are the subject of a Court judgment which has the force of <i>res judicata</i> In the case of tenderers established in other Member State of the European Union (...) corruption, as defined in Article 3 of the Council Act of 26 May 1997, and Article 3 (1) of Council Joint Action 742/98/JHA, respectively	Natural persons - Equivalent document issued by competent judicial or administrative authorities (Certificate of Clean Criminal Record) Legal persons - Extract from the judicial record - Solemn statement
IRELAND Article 53.1 (b) Public Sector Procurement Regulations - SI 329 of 2006	Any person who, to the knowledge of the authority, has been convicted of an offence involving corruption	- Declaration on oath - Solemn statement - A contracting authority shall accept as sufficient evidence a copy of the relevant judicial record, or equivalent document

ITALY Article 38 Legislative Decree No. 163 of 12 April 2006 (Code) and special anti-mafia provisions (Law 575/1965 of 31 May)	Subjects that have been convicted in a final sentence on counts of corruption as defined by the community actions contained in article 45 of Directive 2004/18/EC. Exclusion and disqualification will be effective if the sentence has been pronounced against the: a) Owner or manager if it is an individual firm b) Partner or manager if it is a collective firm c) Limited partner or manager if it is a limited partnership d) Administrators empowered to represent the company or the manager if it is another type of company or consortium.	- Extract from the judicial record - Equivalent document - Solemn statement
	Persons subject to criminal proceedings related to the mafia.	- Declaration under oath that their company is not involved in any mafia activity.
LATVIA Article 39 (1) and (3) Law on Public Procurement of 6 April 2006	Any candidate or bidder who has been found guilty in a court ruling of participating in corruption. Requirements (...) may apply to the candidate or bidder, as well as to natural and legal persons, including persons with the right of representation and persons who have decision-making and supervisory rights with respect to the relevant candidate or bidder.	- Extract from the judicial record - Equivalent document (Certificate on conviction) - Declaration on oath
LITHUANIA Article 33 (1) Law on Public Procurement (version 22 December 2005)	Supplier has a spent or unexpunged conviction for the following criminal acts defined in Directive 2004/18/EC: 2) corruption	- Extract from the judicial record - Equivalent document (Certificate on conviction)
MALTA Article 49.4.b) Legal Notice 177/2005, S.L.174.04 (amended by Legal Notice 130/2006)	Any candidate or tenderer who has been the subject of a conviction by final judgment of which the contracting authority is aware for (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	Natural persons - Extract from the judicial record
		Legal persons - Declaration on oath - Solemn declaration
NETHERLANDS Article 45 (1) Decree on Procurement Rules for Government Tender (BAO) 2005/408	Any candidate or tenderer convicted by an irrevocable judgment for bribery, fraud, accepting gifts, forgery [Penal Code]	- Equivalent document Certificate of good conduct for legal persons (VOG RP)
POLAND Article 24.1 Public Procurement Law 2004 (amendment approved on 7 April 2006)	4) Natural persons, who have been validly sentenced for bribery. 5) Registered partnerships whose partner has been validly sentenced for bribery. 6) Professional partnership whose partner or member of the management board has been validly sentenced for bribery. 7) Limited partnership and limited joint-stock partnership whose general partner has been validly sentenced for bribery. 8) Legal persons whose active member of the managing body has been validly sentenced for bribery.	- Extract from the judicial record (Regulation of the Prime Minister of 19 May 2006 on the types of documents which may be requested by the awarding authority)
PORTUGAL Article 55.i) Decree-Law 18/2008 of January 29, 2008 (Code of Public Procurement)	In the case of natural persons, candidates, tenderers or groups that have been convicted by a final judgment for any of the following crimes, if in the meantime they have not been rehabilitated, or, in the case of legal persons, the members of administrative bodies, directorships, or management of the latter that have been convicted of the same crimes in the effective exercise of their functions, if in the meantime they have not been rehabilitated (ii) corruption, as defined in Article 3 of the Council Act of 26 May 1997 and Article 3 (1) of Council Joint Action 98/742/JHA	- Declaration of honor

<p>ROMANIA Article 180 Government Emergency Ordinance no. 34/2006 regarding the award of the public procurement contracts, public works concession contracts and services concession contracts, approved by Law 337/06</p>	<p>Any tenderer/candidate whereof it has information that, in the last 5 years, it was convicted by definitive court judgement, for participation in a criminal organization, for corruption, for fraud and/or for money laundering</p>	<ul style="list-style-type: none"> - Extract from the judicial record - Equivalent document - Declaration on oath - Solemn declaration made by the person concerned before a competent judicial or administrative authority, a notary or a competent professional or trade body
<p>SLOVAKIA Article 26.1 a) Act No. 25/2006 Coll. on Public Procurement of 14 December 2005</p>	<p>A person may only participate in tendering for the public award of contracts if his personal status satisfies the conditions for participation: a) neither that person nor his statutory body nor any member of the statutory body has been lawfully convicted for the offence of corruption</p>	<ul style="list-style-type: none"> - Extract from the judicial record not older than three months
<p>SLOVENIA Article 42 (1) Public Procurement Act of 23 November 2006</p>	<p>Candidates or tenderers and all their legal representatives who have been convicted of committing any of the following crimes specified in Criminal law: accepting bribes in elections (applicable to physical persons), accepting non-authorized gifts, accepting bribes (applicable to physical persons), attempted bribery, accepting gifts through illegal intermediation</p>	<ul style="list-style-type: none"> - Extract from the judicial record (Certificate) - Solemn declaration - Affidavit
<p>SPAIN Article 49.1 Public Sector Procurement Law 30/2007, of 30 October</p>	<p>Persons to whom any of the following circumstances may be applicable may not contract in the public sector: a) Having been convicted by a final judgment for crimes of corruption in international economic transactions, trafficking of influence, bribery, fraud and extortion (...) The prohibition on contracting applies to legal persons whose directors or representatives, in the effective exercise of their positions or representative capacities, are found to be in any of the aforesaid situations because of actions taken on behalf of or to the benefit of the latter legal persons.</p>	<ul style="list-style-type: none"> - Testimony judicial or administrative certification - Declaration on oath - Solemn statement before a competent judicial or administrative authority, a notary or a competent professional or trade body
<p>SWEDEN Chapter 10 1 §2 Public Procurement Act (2007:1091)</p>	<p>Any supplier who has been convicted by a final judgment with the force of res judicata for crimes that include: § 2. corruption as defined in Article 3 of the Council Act of 26 May 1997, 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 and, respectively Article 3(1) of Council Joint Action 98/742/JHA 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</p>	<ul style="list-style-type: none"> - Extract of the judicial record (legal person not applicable) - Equivalent documents - Declaration on oath
<p>UNITED KINGDOM Article 23 (1) Public Contract Regulations 2006 (SI 2006/5)</p>	<p>An economic operator in accordance with these Regulations if the contracting authority has actual knowledge that the economic operator or its directors or any other person who has powers of representation, decision or control of the economic operator has been convicted of any of the following offences: (b) corruption within the meaning of section 1 of the Public Bodies Corrupt Practices Act 1889 or section 1 of the Prevention of Corruption Act 1906; (c) the offence of bribery; (f) any other offence within the meaning of Article 45(1) of the Public Sector Directive as defined by the national law of any relevant State.</p>	<ul style="list-style-type: none"> - Extract from the judicial record; or (ii) in a relevant State which does not maintain such a judicial record, a document issued by the relevant judicial or administrative authority; - Declaration on oath made by the economic operator before the relevant judicial, administrative or competent authority or a relevant notary public or Commissioner for oaths.

Sources: National legislations and data taken from the European Commission. http://ec.europa.eu/internal_market/publicprocurement/2004_18/index_en.htm (accessed 14 April, 2008)

c. Connection with a Judicial Conviction

The obligation laid down in Directive 2004/18/EC is that of prohibiting access to public contracts of those people convicted of corruption, but Member States remain free to decide the conditions under which it is applied and its time limit.²⁸ Thus, we find ourselves up against the deprivation of a right that is tied to a criminal conviction, but one which does not have to receive equal treatment in all Member States, as Directives are legal instruments whose only concern is the end result and not the means. It is for this reason that the exclusion might be due to a criminal conviction on various counts:

- a) 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.²⁹
- b) It can be an additional penalty, automatically imposed as a consequence of the principal penalty, even if it is not ordered by the court.³⁰
- c) It can be ordered in administrative or disciplinary proceedings arising as a result of a criminal conviction.

Because of these differences in nature, the exclusions pose specific problems with regard to their appreciation and application, not so much in relation to the citizens of each Member State, but with regard to the exchange of effective information between the Member States on the sentences handed down by their own courts.

Information relating to exclusions is not always included in national criminal records. Moreover, where information is available, it is not always of any legal consequence outside the territory of the Member State in which the exclusion was enforced, as the lack of harmonization between national legislations constitutes a real obstacle to mutual recognition of these grounds for exclusion³¹. Nevertheless, if these “inconveniences” are overcome, Article 45(1) of Directive 2004/18/EC, according to the European Commission, “is an instrument which entails the partial mutual recognition of convictions since it results in a conviction handed down in one Member State normally having as a consequence the exclusion from public procurement on a Union-wide basis.”³²

d. Requirements of Final Judgment

The Directive 2004/18/EC has restricted exclusion from award procedures for 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 final court of appeal), and that a judgment is not considered final until all the avenues for appeal have been exhausted.

In these cases, if we wish to speak of a legally valid situation for exclusion, it is necessary to await the end of the lengthy appeals process; certainly the wait impinges on the effectiveness of the exclusion, but there is no doubt that it guarantees the presumption of innocence, and has regard for one of the fundamental right laid down in the European Convention for the Protection of Human Rights and Fundamental Freedoms and the Charter of Fundamental Rights of the European Union.

²⁸ In article 46 (1) of the original proposal for a Council Directive, it was foreseen that the exclusion would be applicable to “*convictions secured in the five years prior to contract award procedure*”. COM (2000) 275 final/2, 30.08.2000 (OJ C 29 E, 30.01.2001). This draft provision has disappeared from the wording of article 45 (1), but is contemplated in national laws, such as in the French case. Article 38 of Ordinance 2005-649, of 6 of June 2005, foresees the exclusion from contractual procedures of those people that have been the subject, over the last five years, of a definitive sentence for active corruption.

²⁹ For example, article 131-39 of the French Criminal Code and article 262 of the Spanish Criminal Code. Article 131-39 of the French Criminal Code states that: “Where a statute so provides against a legal person, a felony or misdemeanor may be punished by one or more of the following penalties: 5° disqualification from public tenders, either permanently or for a maximum period of five years”. Article 262 of the Spanish Criminal Code: On the alteration of prices in competitive tenders and “(...) If it concerns competitive tendering or bidding called by the Public Authorities or public bodies, a special penalty of disqualification will be imposed on the agent and the legal person or firm that he represents that will apply, in all cases, to the right to enter into contractual relations with the Public Authorities for a period of three to five years.”

³⁰ For example, article 314-10 of the French Criminal Code “*Natural persons convicted of any of the offences provided for under articles 314-1, 314-2 and 314-3 also incur the following additional penalties: 4° disqualification from public tenders for a maximum period of five years.*”

³¹ White Paper on exchanges of information on convictions and the effect of such convictions in the European Union COM (2005) 10 final, 25.01.2005, p. 6.

³² 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, p. 6.

Having said as much, in Italy, article 38 of Legislative Decree No. 163 of 12 April 2006³³ which transposes article 45 of Directive 2004/18/EC into Italian law, provides for exclusion as a preventive measure applicable in procedures pending judicial decisions in cases related to the mafia, and therefore in the absence, therefore, of a final sentence (Law no. 1423 of 27 December, 1956 and Law no. 575 of 31 of May, 1965).

e. Eligibility of Candidates and Tenderers: Proof of no Convictions for Corruption

Another of the questions foreseen in article 45 of Directive 2004/18/EC relates to the proof submitted by tenderers and candidates of no convictions for corruption. Likewise, the proof needed to apply the exclusion is directly related to the information required by the contracting authorities. The fact is that the success of article 45 depends on contracting authorities being aware of corruption convictions (Drew, 2005).

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 them to verify the eligibility of tenderers³⁴. However, article 45 does not make any provisions with regard to questions of such importance for setting up these mechanisms for exclusion, such as the creation of a computerized system for the exchange of information on criminal convictions between Member States or the publication of lists of companies excluded from contracts – blacklists – (Jacobs and Anechiarico, 1992; Schooner, 2004; Moran, Pope, and Doig, 2004; White, 2005; Olaya, 2005; Schultz and Søreide, 2006).

The Financial Regulation applicable to the general budget of the European Communities³⁵ attempts to overcome the absence of a system for exchanging information on the exclusions enforced by other Member States through the creation of a community database which lists candidates or tenderers named as litigants in one or more of the categories for exclusion included in the regulations:

Article 95 (1) “A central database shall be set up and operated by the Commission in compliance with Community rules on the protection of personal data. The database shall contain details of candidates and tenderers which are in one of the situations referred to in article 93 (...).”

Under this system, authorities are not obliged to consult the database before awarding a contract and regulation depends on a voluntary system. Nonetheless, despite its voluntary nature, this database should be just the first stage of an effective debarment system for the EU³⁶ (Transparency International, 2006b).

f. Criminal Liability of Legal Persons

Tenderers may be natural persons or legal entities and the exclusions can apply to both legal and natural persons. The connection between exclusion and a judicial sentence leads us to question the effectiveness of this measure with respect to legal persons, because their criminal liability is not recognized in all the Member States.³⁷

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 (Gosálbez, 2000). When a criminal act is committed within a legal person or entity then those who are in effect responsible for the criminal acts in question are the physical persons within it. 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. This makes it 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.

For example, in Poland article 24 of the Public Procurement Law automatically excludes legal persons from contractual procedures, in circumstances where a partner or manager of the entity has been convicted for bribery in connection with an awards procedure, although the legal persons have not been themselves punished for bribery. The same situation occurs in Hungary, according to whose national criminal law crimes can be

³³ *Codice dei contratti pubblici relativi a lavori, servizi e forniture*, published in the Official Gazette of the Italian Republic No. 100, of 2nd May 2006.

³⁴ http://ec.europa.eu/internal_market/publicprocurement/2004_18/index_en.htm (accessed April 14, 2008).

³⁵ Council Regulation No 1995/2006 of 13 December 2006 amending Regulation No 1605/2002 on the Financial Regulation applicable to the general budget of the European Communities (OJ L 390, 30.12.2006).

³⁶ Many EU Member States also have their own debarment systems. In Spain, for example, a list may be found of those firms prohibited by the Ministry from participation in tendering procedures is posted on the web site of the Ministry of Economy and Finance.

<http://documentacion.meh.es/doc/C6/C3/Junta%20Consultiva/Prohibicion%20de%20contratar.pdf> (accessed 14 April, 2008)

³⁷ Belgium, France, Ireland, the Netherlands and the United Kingdom recognize the criminal liability of legal persons; on the other hand, Spain, Greece, Germany and Hungary do not consider legal persons to be the active subjects of crimes.

committed only by physical persons; however, if for instance the director of a company is found guilty of bribery, the court may restrict the business activity of this company by virtue of Act 104/2001 on punitive actions applicable against legal persons.

g. Exceptions to Exclusion

Despite exclusion being obligatory in nature, Member States will be able to decide on a derogation due to "*overriding requirements in the general interest*"³⁸ (Article 45 (1) Directive 2004/18/EC); however, this article does not offer a definition of what is to be understood as "the general interest", which complicates its practical application.

The contracting authorities enjoy a great deal of discretion when assessing the grounds for exception due to the inexistence of any list of cases. Nevertheless, such cases must be limited to those that are justified and proportionate to the pursued objectives, since, like all exceptions, they are subject to a restrictive interpretation so that exceptions do not arise so frequently as to render this debarment ineffective at fighting corruption.³⁹

Based on this restrictive interpretation, among the cases that give rise to exclusion it would appear that those referring to the protection of public health are highlighted.⁴⁰ The Committee of the Regions, in its Opinion on Directive Proposals⁴¹ proposed the hypothetical situation of the provision of a unique, life-saving medicine that could not be supplied by any other supplier than one that had been convicted of corruption, and posed the following question: "What happens in a case where only a supplier who has been convicted of corruption can deliver certain goods?". Faced with the existence of one single contractor with the capacity to respond to that supply, Member States reserve the right not to exclude the candidate or tenderer convicted of corruption from the tender procedures given that the needs of the contracting authorities cannot be satisfied through any other economic operator. By doing so, they seek to strike a balance between the fight against corruption and a pragmatic vision of the general interest.

The possible scenarios do not end there. In line with Williams (2006) and Kramer (2005), others that could be included in this exception are: national security and pressing needs for the supply of certain goods. In these cases it also seems clear that we are up against a case of the general interest that justifies the facultative nature of the way that the exclusion is applied in view of the values that it seeks to guarantee.

V. CONCLUSIONS

The fight against corruption is a priority of the European Union's political action in the context of building an Area of Freedom, Security and Justice. This is the reason why, ever since 1995, European institutions have been developing a comprehensive anti-corruption strategy that involves activities in different public sectors. One of these sectors is that of public procurement, given that the volume of economic resources allocated to public sector contracts makes it a very tempting area for corrupt practices.

Directives 2004/17/EC and 2004/18/EC set out the criteria as defined by Community Law that regulate the selection of contractors in matters relating to public procurement. Since 2004, these Directives, in addition to standardizing the procedures for awarding public contracts in all Member States, seek to achieve other objectives among which may be found the fight against corruption. Obligatory exclusion from the tendering procedures of those tenderers or candidates that have been convicted of corruption in a judicial sentence with the force of *res judicata* may be found in this framework. This mandatory exclusion is binding on legislators from the different Member States with respect to the obligation to include crimes of corruption in their legislation on contract law as a cause of disqualification from the tendering process; nevertheless, putting this measure into practice comes up against two obstacles.

The first refers to the difficulties of regulatory precision, insofar as there is no consensus to determine what activities we are to understand as conduct that is likely to be qualified as corrupt conduct. Member States that have transposed the Directives into their domestic legal systems have set out definitions of corruption of different scope; thus, while a first group of countries (Cyprus, Denmark, Finland, Greece, Hungary, Italy, Lithuania, Malta, Portugal and Sweden) refer to the same European instruments as Directive 2004/18/EC; others (Austria, Bulgaria, France, Germany, Netherlands, Slovenia, Spain and United Kingdom) refer back to their own criminal laws, and a third group (Belgium, Czech Republic, Estonia, Ireland, Latvia, Poland, Romania and

³⁸ This exception is set forth in the Austrian legislation (paragraph 68 (1) *BVergG* 2006) and Dutch (article 45.2 Decree on Procurement Rules for Government Tender, *BAO*) in which it says: "the contracting authority can deviate from [this] obligation...for compelling reasons in the public interest".

³⁹ On the principle of the restrictive interpretation of exceptions to the principles of procurement law, see Case C-84/03 *Commission v Spain* [2005] ECR I-139, paragraph 48; Case C-26/03 *Stadt Halle and RPL Lochau* [2005] ECR I-1, paragraph 46 and Case C-410/04 *ANAV* [2006] ECR I-3303, paragraph 26.

⁴⁰ This exception on the basis of cases related to public health is also expressed in North-American legislation, in particular, the Department of Health and Human Services. Acquisition Regulation 309.405(a)(1)(i).

⁴¹ (OJ C 144, 16.05.01, p. 26).

Slovakia), without reference to any regulations at all, use the word corruption without providing it with an operative concept.

The second obstacle is its actual working practice, its effectiveness at preventing and curbing such conduct. The aim of obligatory exclusion, which is to become an effective instrument in the fight against corruption, disappears when faced with such specific aspects as the contracting authorities' lack of information on sentences that involve convictions for corruption. This shortcoming complicates the practical application of the measure not only between Member States, but also within the frontiers of each State.

A solution is sought to all these difficulties to which reference has been made through the creation of a community-wide database in which those candidates or tenderers appear who have been condemned for corruption in different Member States. Despite its voluntary nature, as use of the system is not yet compulsory for the contracting authorities, this database should be just the first stage of an effective exclusion system for the EU.

REFERENCES

- Asian Development Bank/OECD. 2006. *Curbing corruption in public procurement in Asia and the Pacific*. Manila: Asian Development Bank <http://www.adb.org/Documents/Books/Public-Procurement-Asia-Pacific/default.asp> (accessed April 14, 2008).
- Amundsen, Inge. 2000. *Corruption. Definitions and Concepts*. Bergen: Chr. Michelsen Institute.
- Arrowsmith, Sue. 2004. An Assessment of the New Legislative Package on Public Procurement. *Common Market Law Review* 41 (5):1277-1325.
- Arrowsmith, Sue. 2005. *The Law of Public and Utilities Procurement*. 2nd ed. London: Sweet & Maxwell.
- Bourgoin, Pierre. 1985. Les exclusions de marchés publics. *Revue Marchés Publics* (208):27-31.
- Bovis, Christopher. 2006. *EC Public Procurement: Case Law and Regulation*. Oxford: Oxford University Press.
- Bolton, Phoebe. 2006. The Exclusion of Contractors from Government Contract Awards. *Law Democracy & Development* 10 (1):25- 35.
- Bréchon-Moulènes, Christine. 2005. Conditions d'accès à la commande publique. In *Droit des marchés publics*. Paris: Le Moniteur.
- Della Porta, Donatella, and Alberto Vannucci. 1999. *Corrupt exchanges: actors, resources, and mechanisms of political corruption*. New York: Aldine de Gruyter.
- Drew, Kirstine. 2005. The Challenges Facing Debarment and the European Union Public Procurement Directive. In *Fighting Corruption and Promoting Integrity in Public Procurement*. Paris: Organisation for Economic Co-operation and Development (OECD).
- Evenett, Simon J., and Bernard M. Hoekman. 2005. Government procurement: market access, transparency, and multilateral trade rules. *European Journal of Political Economy* 21 (1):163-183.
- Gimeno Feliú, José María. 2006. *La nueva contratación pública europea y su incidencia en la legislación española: la necesaria adopción de una nueva ley de contratos públicos y propuestas de reforma*. Cizur Menor (Navarra): Thomson-Civitas.
- Gosálbez Pequeño, Humberto. 2000. *El contratista de la Administración Pública*. Madrid: Marcial Pons - Cámara de Cuentas de Andalucía.
- Hollard, Vincent. 1989. *L'exclusion des marchés publics (Annexe au rapport sur le projet de réforme du Code penal)*. Paris: Chambre de Commerce et d'Industrie de Paris.
- Jacobs, James B., and Frank Anechiarico. 1992. Blacklisting of Public Contractors as an Anti-Corruption and Racketeering Strategy. *Criminal Justice Ethics* 11 (2):64-76.
- Kramer, Rachel E. 2005. Awarding Contracts to Suspended and Debarred Firms: Are Stricter Rules Necessary? *Public Contract Law Journal* 34 (3):539-552.
- Mardas, Dimitri, and Dimitri Triantafyllou. 1997. Selection criteria and the award procedure in public procurement. *International Advances in Economic Research* 3 (1):91-112.
- Mauro, Paolo. 1995. Corruption and Growth. *Quarterly Journal of Economics* 110 (3):681-712.
- Medina, Teresa, and Martin Trybus. 2008. La transposición de las Directivas comunitarias sobre contratación pública en los distintos Estados miembros (febrero 2008). *Noticias de la Unión Europea*, mayo 2008.
- Méndez, Fabio, and Facundo Sepúlveda. 2006. Corruption, growth and political regimes: Cross country evidence. *European Journal of Political Economy* 22 (1):82-98.
- Moran, Jon, Jeremy Pope, and Alan Doig. 2004. *Debarment as an Anti-Corruption Means - a review report - U4 Anti-Corruption Resource Centre*. <http://www.u4.no/themes/debarment/debarmentreport.pdf> (accessed July 28, 2007)
- Noonan, John Thomas. 1984. *Bribes*. New York: Macmillan.
- OCDE. 2005. *Fighting corruption and promoting integrity in public procurement*. Paris: Organisation for Economic Co-operation and Development.

- OCDE. 2007. *Bribery in Public Procurement: Methods, Actors and Counter-Measures*. Paris: Organisation for Economic Co-operation and Development.
- Olaya, Juanita. 2005. Blacklisting corrupt companies In *Global Corruption Report 2005* Berlin: Transparency International.
- Piselli, Elisabetta. 2000. The scope for excluding providers who have committed criminal offences under the EU Public Procurement Directives. *Public Procurement Law Review* 6:267-286.
- Pope, Jeremy. 2000. Public Procurement: Where the Public and Private Sectors Do Business. In *TI Sourcebook 2000. Confronting Corruption: The Elements of a National Integrity System*. Washington: Transparency International.
- Rose-Ackerman, Susan. 1997. Corruption as an international policy problem: overview and recommendations. In *Corruption and the global economy*, edited by K. A. Elliott. Washington: Institute for International Economics.
- Rose-Ackerman, Susan. 1999. *Corruption and Government: causes, consequences and reform*. Cambridge: Cambridge University Press.
- Schooner, Steven L. 2002. Desiderata: Objectives for a System of Government Contract Law. *Public Procurement Law Review* 11(2):103 - 110.
- Schooner, Steven. 2004. The Paper Tiger Stirs: Rethinking Suspension and Debarment. *Public Procurement Law Review* 13 (5):211-217.
- Schultz, Jessica, and Tina Søreide. 2006. *Corruption in emergency procurement*. Vol. Issue 7:2006. Bergen: U4 Anti-Corruption Resource Centre. Chr. Michelsen Institute.
http://www.u4.no/themes/ces/documents/U4_issue_7_2006_corruption_emergency_procurement.pdf
 (accessed April 14, 2008).
- Søreide, Tina. 2002. *Corruption in public procurement: causes, consequences and cures*. Bergen: Chr. Michelsen Institute.
- Stapenhurst, Frederick, and Petter Langseth. 1997. The role of the public administration in fighting corruption. *The International Journal of Public Sector Management* 10 (5):311-330.
- Stessens, Guy. 2001. The International Fight Against Corruption. *International Review of Penal Law* 72 (3-4):891-937.
- Strombom, Donald. 1998. Corruption in Procurement. *Economic Perspectives* 3 (5):22-26.
- Tanzi, Vito. 1998. *Corruption around the world: Causes, consequences, scope, and cures*. International Monetary Fund. Staff Papers 45 (4):559-594.
- Tanzi, Vito, and Hamid R. Davoodi. 1997. *Corruption, Public Investment, and Growth*. International Monetary Fund. Working Papers No 97/139.
- Transparency International 2006a. *Handbook for Curbing Corruption in Public Procurement*. Berlin: Transparency International.
- Transparency International 2006b. *Recommendations for the Development and Implementation of an effective Debarment System in the EU*. Berlin: Transparency International
http://www.transparency.org/content/download/5661/32802/file/TI_EU_Debarment_Recommendations_06-03-28.pdf (accessed April 14, 2008).
- Treisman, Daniel. 2000. The causes of corruption: a cross-national study. *Journal of Public Economics* 76 (3):399-457.
- Trepte, Peter-Armin. 2007. *Public Procurement in the EU: A Practitioner's Guide*. 2^a ed. New York: Oxford University Press.
- Trybus, Martin. 2006a. Improving the Efficiency of Public Procurement Systems in the Context of the European Union Enlargement Process. *Public Contract Law Journal* 35 (3):409-425.
- Trybus, Martin. 2006b. The Morning after the Deadline: the State of Implementation of the New EC Public Procurement Directives in the Member States on February 1, 2006. *Public Procurement Law Review* 15 (3):NA82-NA90.
- Trybus, Martin and Teresa Medina. 2007. Unfinished Business: The State of Implementation of the New EC Public Procurement Directives in the Member States on February 1, 2007. *Public Procurement Law Review* 16 (4):NA89-NA97.
- White, Simone. 2000. *Procurement and organised crime: an EU wide study*. London: Institute of Advanced Legal Studies.
- White, Simone. 2005. Exclusion of Tenderers in the European Union: The Only Way Forward Against Procurement Fraud? In *Fighting Corruption and Promoting Integrity in Public Procurement*. Paris: Organisation for Economic Co-operation and Development OECD.
- Williams, Sope. 2006. The mandatory exclusions for corruption in the new EC Procurement Directives. *European Law Review* 31 (5):711-734.
- Williams, Sope. 2007. The Risks of Corruption and the Risks of Fighting Corruption in EC Public Procurement, *European Current Law*, (2) XI-XIV.