

TRANSPARENCY INTERNATIONAL'S

Recommendations for the Development and Implementation of an effective Debarment System in the EU

Introduction

On January 23-24, 2006, a Debarment Policy Roundtable jointly organized by OLAF and Transparency International took place at the Borschette Centre in Brussels. The Roundtable was attended by a number of international experts and industry representatives together with EC and Member State officials. Debarment of corrupt economic operators from dealing with the EU or utilizing EU funds, as one of several potential sanctions, is an important and effective deterrent against corruption. For this reason, the objective of the Roundtable was to explore ways to strengthen and expand the EU's debarment system, taking into account the experience gained with this instrument both by international organizations like the World Bank, by Member States and by Transparency International¹.

This meeting aimed at enabling the formulation of recommendations regarding the EU debarment system. Rather than striving for a consensus document, Transparency International has undertaken to develop a set of recommendations which reflect the full and very rich discussions of the two-day Roundtable and the particular challenges facing the EU, but are the sole responsibility of TI.

The focus of these recommendations is a debarment system applicable to the protection of EU budget funds and not those of the individual EU Member States. An additional important underlying principle of these recommendations is the fact that the main value of an effective debarment system lies not in its capacity to sanction, but in its actual contribution to changing behaviour.

Summary of Recommendations

In synthesis, we recommend that the EU debarment system:

- Be implemented with the aim of curbing corruption by promoting trustworthiness among EU funds users, managers and providers, and promoting behaviour change.
- Be consistent in its application; this requires among others:
 - a. The development of implementation guidelines,
 - b. The centralization of the debarment/sanctioning function.
- Be guarded by concrete elements that provide the assurance of due process.
- Be transparent and, in particular, that the relevant mechanisms to actively make the relevant information available to the authorizing officers and the public be put in place.
- Be proportionate, fair, timely and accountable; this requires among other elements that:

¹ The participants in this Roundtable focused on questions such as: What should be the elements of an effective and transparent debarment system? How should one deal with complex issues like information flows, compliance with due process, publicity and coordination among the EC, the member states and other stakeholders? Consideration was given by the participants to both the particularities of the EU (its laws, its structure, its challenges, etc.), and the possible avenues forward.

- a. Due process must guide entry (listing) and exit (de-listing) procedures,
- b. Clear criteria must guide the implementation of discretionary debarment,
- c. Debarment must be automatic in cases of res judicata,
- d. Authorizing officers should be obliged to check entries into a consolidated debarment “register” before contracting,
- e. Mechanisms to facilitate full and timely exchange of information on debarment should be set in place with Member States and international institutions,
- f. Debarment should be applied with proportionality and fairness, and take account of mitigating circumstances.

We also recommend that short and medium term efforts be made to bring consistency into the protection of EU financial interests. In particular, monitoring and control mechanisms should be harmonized and upgraded where they apply to funds distributed through “shared management” schemes that correspond to a substantial portion of the budget and where the current debarment system appears to be inapplicable. Additional efforts should be made to harmonize the transposition of the EU Procurement Directives, particularly with respect to the Member States’ debarment systems.

In the following paragraphs we first explain the relevance of debarment as an effective tool to curb corruption and afterwards elaborate on the recommendations outlined above, providing criteria for their implementation.

I. The relevance of debarment as an effective tool to curb corruption

Despite the existence of laws and regulations forbidding corruption in public contracting and other public fund-related activities, corruption still takes place on a broad scale. Different surveys and studies underscore what economic operators, civil servants and others know as a reality: that corruption in public contracting is still a daily business. In fact, approximately 60% of the respondents to the World Business Environment Survey indicated that a bribe above 5% of the value of the contract is typically needed in doing business with the government.²

In this context, the debarment of corrupt economic operators, as one of several possible tools for preventive action, has become an important tool in containing corruption on its supply side. Although it is a form of administrative (and not criminal) sanction, it has an important preventive effect that is often more effective than other approaches. There are various reasons to explain its impact:

- Debarment creates a proportionate deterrent effect that successfully dissuades people considering wrongdoing. While it is difficult to measure exactly how many cases have been prevented so far, business people have confirmed its effectiveness and impact.
- The power of its dissuasive effect is derived from its direct influence on the economic incentives relating to corrupt activities and the certainty³ of its application. As an

² The World Business Environment Survey (WBES 2000) is a survey of over 10,000 firms in 80 countries that examines a wide range of interactions between firms and the state. It is produced by the World Bank Institute and is based on face-to-face interviews with firm managers and owners in late 1999 and early 2000, the WBES generated measurements in such areas as corruption, judiciary, lobbying, investment climate and the quality of the business environment. In the data analysis, these business climate constraints are related to specific firm characteristics and firm performance

³ In turn, the likelihood of debarment being applied depends on the transparency and effectiveness of the debarment system in place.

administrative sanctioning mechanism, it plays an important role in corruption prevention by persuading those considering wrongdoing to refrain from doing so. Since it places sanctions where their impact is greatest (in the market), it raises the stakes of doing business in ways that are not consistent with the law and public trust.

- Corruption thrives in obscurity and spreads with impunity. Unfortunately, investigations of corruption cases (as is true for many other crimes as well) take too long, if they happen at all⁴. Debarment can and should be structured as a timely remedy that can contain damage to, and protect the integrity of, public funds by keeping corrupt business operators away from public contracts.

Debarment alone will, of course, not create clean markets. But it is a highly effective complement to other preventive and repressive actions taken by governments and companies ("economic operators").

The benefits of debarment in curbing corruption will, however, only be realized if the debarment system is in fact effective and transparent. Transparency and effectiveness are concepts that are interconnected as they influence each other. A system that is not transparent will not be effective. Transparency relates to the possibility of letting decision-making processes, their outcomes and the grounds for decisions be known. It is therefore rooted in the active provision of access to information and enables accountability and fairness. Effectiveness is the capacity of the system of producing the desired impact - that is, deterrence of corrupt behaviour and promoting trust among users, managers and providers of funds that are subject to public trust.

There is a baseline within the EU for implementing such a system as well as the experience of similar existing systems. The European Union's Financial Regulation (Council Regulation (EC, Euratom) No 1605/2002 of 25 of June 2002, Article 93,95,96 and 114) stipulates the existence of a debarment system; among the grounds for exclusion from participation in a procurement procedure, they include situations where the candidates or bidders (i) .."[h]ave been the subject of a judgment which has the force of *res judicata* for fraud, corruption, involvement in a criminal organisation"... (ii) ..."[h]ave been guilty of grave professional misconduct proven by any means that the contracting authority can justify". While the EU Financial Regulation regulates EU funds, the so-called EU Procurement Directives⁵ to be transposed by the EU's Member States set guidelines for Member States procurement with their own funds. Their objective is not to protect EU financial interests, but to regulate national procurement open to operators from all EU Member States; these Directives also include some form of debarment. In addition, an exclusion mechanism had previously been operating for some time with regard to the agricultural funds' system, which was subject to evaluation by the European Commission.

II. Transparency International's Recommendations

1. **Overall goal.** The European Commission should strive for the design, implementation, management and operation of an effective and transparent debarment system that aims at curbing corruption in all activities involving EU funds, and thus contributes to protecting the EU's financial interests by promoting trustworthiness among users, managers and providers of funds subject to public trust.

⁴ For example, Transparency International's Progress Report on OECD Anti-Bribery Convention Enforcement indicates the existence of no more than 50 cases of foreign bribery (as of 28 of February 2005) and up to 13 countries where there had been no case at all.

⁵ Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004. as well as the corresponding Directive 17.

2. Consistency in Application. In order to guarantee the transparency, fairness and functionality of the debarment system, it should be designed so as to allow and ensure consistency in its application. This requires addressing the difficulties and challenges that arise from:

- A multiplicity of contracting authorities (authorizing officers) managing debarment processes with different interpretations and following different procedures.
- The need to implement the sanctions under strict due process rules and principles.

In order to achieve consistency and address these challenges, we consider the following actions as appropriate and relevant:

2.1 Develop implementation guidelines that

- establish **due process** along the whole debarment procedure,
- establish a single standard debarment process, which encompasses the process leading to debarment as well as to the lifting of the debarment, and
- provide guidance for the interpretation and application of the rules of the system. Such guidelines should provide clarity, for example, on how to pursue cases of mandatory (*res judicata*) and discretionary debarment (other than *res judicata*), and the quality of evidence needed to start a discretionary debarment process and to debar a company or an individual.

The public availability of such guidelines would be an additional element of transparency and accountability of the process, whereby the rules governing the process can be widely known to all.

2.2 Centralize the debarment/sanctioning function.

The debarment needs to be managed in a central place within the Commission in order to ensure consistency and the highest possible quality. Centralized operation would also contribute to focusing the accountability of the system.

The central body in charge of debarment decisions should be located within the EC hierarchy in a place separate from the contracting authorities⁶.

There are different options as to the institutional arrangement to be used. One option would be to centralize both the investigatory process (preparing debarment) and the debarment⁷ decision-making authority within an existing body in the Commission. In this case, the design should aim at keeping the investigative and the decision-making functions separate. Another option would be to manage the investigatory process in a decentralized manner, but to convey the debarment decision authority into a collegiate body comprising high level representatives of a number of contracting authorities. This would have the additional advantage of keeping the investigation process separate from the decision-making process. Also, in this case, the consistency-keeping function of the Legal Services and DG Budget must play a particularly strong role. A third option would be to create a new organism altogether to manage the investigation process and the sanctioning. While we consider the first

⁶ It could be the college of Commissioners or a sub-group by special delegations.

⁷ The decision to debar includes the decision to lift the debarment as well

option to be optimal, we also acknowledge the difficulties of putting it into practice within the EU system, and therefore remain open to the second suggested option.

3. Assurance of Due Process.

The process by which debarment is prepared, decided and applied should provide guarantees for the parties involved so that they:

- Are given the opportunity to deny, correct or clarify the facts that underlie the accusation.
- Are notified about the initiation of the process, the grounds for it and also about its conclusion and the reasoning.
- Have the right to resort to an independent review mechanism where the decision to debar could be contested. In the EU context, the case would have to be brought to the Tribunal of First Instance at the Court in Luxembourg.
- If the review mechanism is invoked, the decision to debar can remain in place (precautionary measure) until the review process is finalized, or can be suspended in cases falling into pre-established criteria and where the integrity of EU funds is not considered to be at risk.

4. Transparency.

Access to information is a key element for the transparency and effectiveness of the debarment system. In general, access to information encompasses the implementation of a policy of pro-active disclosure of information by means of its publication by the authorities. It also includes ease of access by the public to relevant though unpublished relevant information.

For a debarment system, this implies:

- The need for mechanisms that facilitate and operationalize the exchange of information among the institutions of the EU.
- The need for mechanisms that facilitate the exchange of information between the EU institutions and the Member States.
 - Of particular relevance is the need to guarantee mechanisms for easy mutual access to information for both Member States and EU Officials in cases of “shared management” funds.
 - In the exchange of information with Member States, it would be useful to learn from the experience of Regulation 1469/95 as analysed in COM (2005)520. Attention should not least be given to the Member States’ difficulties of interpreting the law (in particular the concept of “serious negligence”) and the disadvantages of the rather strict conditions limiting the scope of the regulation. The ‘Avenues to be explored’-section in the COM (2005)520 does however raise these and other issues which we find useful to pursue.
- The need for mechanisms that facilitate the exchange of information between the EU institutions and third parties (such as the International Financial Institutions), in particular those that receive EU funding.
- The need for mechanisms whereby the information in the debarment lists (including the name and address of the debarred company or individual, the

grounds for sanctioning and the date and period of debarment) can be monitored, and officials held accountable, by providing public access to the list. The need to establish and follow due process procedures which guarantee that both the entry into the list and public access to this information will not infringe on individuals' rights. However, care must be taken so as not to allow individuals' personal data protection rights to override the public interest vested in the publicity of the debarment list.

- The need to provide information to the public on how the existing “Early Warning System” operates, and therefore facilitating trust building and accountability and avoiding the negative impact the absence of such information could have on an open debarment system.

5. Operations.

The goal of a debarment system is to contribute to the protection of the EU's financial interests by promoting trustworthiness among users, managers and providers of funds subject to public trust. It is therefore necessary that the system be proportionate, fair, timely and accountable. The following elements contribute to this purpose:

5.1 Entry (listing) and Exit (de-listing) Conditions

5.1.1 Due process must guide the entry and exit procedures for companies and individuals.

5.1.2 The EU Financial Regulation contemplates two types of debarment: (1) Mandatory debarment in cases where there is a final criminal conviction (*res judicata*) and (2) Discretionary debarment in cases of “grave professional misconduct”. While both mechanisms are necessary, they vary in their degree of effectiveness. Waiting for a final criminal judgment (“*res judicata*”) would make debarment ineffective, as court cases are rare and decisions often come only years after the criminal act. Instead, the discretionary debarment of both individual persons and companies, when based on ‘sufficient evidence’, allows a much more timely and effective intervention.

5.1.3 With regard to discretionary debarment:

- i. Grounds and criteria for debarment should be clear, and established and published in advance. If necessary, further development of the Financial Regulation is suggested by establishing implementation guidelines that set criteria to assess the situations identified by the Regulations as causes for debarment.
- ii. In particular, these guidelines would determine the criteria by which the contracting authority can justify the debarment on the grounds of “grave professional misconduct”. These could include a confession by someone involved in the corruptive activities, reliable information by third parties, circumstantial evidence as well as evidence and convictions emerging in a court of law of a member and/or non-member country.

- iii. In cases of debarment by an international institution (World Bank, other International Financial Institutions, UN etc), agreements should be in place to facilitate the full and timely exchange of relevant information.

5.1.4 With regard to mandatory debarment:

- iv. Debarment should be automatic in cases of a final criminal conviction ("res judicata") by a court of law in any Member State of the EU, and in any non-member state with a functioning legal system based on the rule of law.

5.1.5 With regard to both mandatory and discretionary debarment:

- v. Debarment should extend to parent or subsidiary companies when their participation or governance structures imply their involvement and responsibility.
- vi. The "debarment register" should be consolidated in one place. All contracting authorities should be obligated to check this register before entering into any contract and to record when and with what result this checking took place.
- vii. A transparent and well-grounded process for de-listing (referred to in Commission Regulation 2342/2002) should be established to allow any registered person or company to produce evidence of change or other grounds for lifting the debarment. Debarment should be lifted for companies and individuals who have effectively corrected the structures and behaviour that led to their sanction, repaired the damage caused, have given assurances of correct behaviour for the future and have not been involved in similar cases before.

5.2 Sanctioning – proportionality and fairness

5.2.1 Debarment can be combined with a pre-debarment stage⁸ that is part of the debarment process and therefore should also fulfil its same basic requirements in terms of transparency, accountability and due process. This pre-debarment stage would consist of a form of "call to order" whereby companies or individuals are warned of likely debarment if appropriate change is not addressed. This "notice" would be given on the grounds of proportionality and in order to leave debarment as a last resort in cases where, for example, the alleged behaviour is real but negligible.

5.2.2 The debarment period should be proportionate to the type and severity of the conduct that led to the process in the first place. The period could be shorter in cases of a first time offence, where the company took reasonable steps to prevent the offence, or where the company has itself reported the offence and co-operated with the authorities in investigating it, or where the company has responded to the accusation credibly and effectively by changing structures, processes and personnel that led to the misconduct, or when the amount of the affected funds is small. The

⁸ This is not to be confused with an "early warning system" like the existing one.

longest periods of debarment should be reserved for the most severe cases. The fact that these mitigating circumstances are taken into account would promote behavioural change and encourage cases of corruption to be brought out into the open rather than be concealed. The Financial Regulation already allows for such proportionality.

6. “Shared management”: The role of EU Member States

The above recommendations refer to the EU budget funds which are **centrally managed** by the Commission and also to funds managed on a **decentralized** basis by beneficiary third countries or **jointly** with international organizations, where the debarment rules contained in the EU Financial Regulations apply⁹.

However, there is concern for a substantial portion of the EU budget funds, mainly agricultural and structural funds which represent some 80% of the budget. This portion is implemented under “shared management” schemes and therefore subject to different (Member States) parameters of monitoring and control, while still under the EU financial responsibility. Under such schemes the basic structure for debarment contemplated in the EU Financial Regulation would not be applicable rendering it impossible to subject a substantial portion of the budget to the same guidelines as the rest.

In order to address this concern and to ensure consistency in the protection of EU financial interests, TI recommends that the following short and medium term actions be implemented to overcome the problem with regard to the “shared management” funds:

- In the short term, Member States and their contracting authorities should:
 - Be required to consult the information on debarred persons and companies (the "register") before contracting.
 - Exclude economic operators who have been debarred at the EU level on the basis of mandatory or discretionary debarment.
 - Be required to signal to the EU cases where there is evidence that would call for debarment according to the EU regulations and submit to the EU authorities the relevant information and evidence.
 - Provide explanations for decisions to contract with a registered (debarred) individual or company.
- The European Commission should implement the appropriate mechanisms to exclude operators who have been debarred at the national level and should monitor carefully cases where Member States have signalled suspicions or elements of evidence.
- In the medium term, avenues to amend the regulation gap should be considered and necessary reform processes be developed.

⁹ These recommendations also apply, *mutatis mutandis*, to the European Development Fund which is run outside the budget under a special Financial Regulation, but with similar rules.

7. Member States' own debarment systems¹⁰.

The EU Directives 17 and 18¹¹ that establish general procurement guidelines to be transposed by Member States into national legislation include a debarment system. The existence of debarment systems at the national level brings to the EU level various challenges and special considerations, such as:

- The debarment mechanism described in the Procurement Guidelines is somewhat different from the one included in the Financial Regulations: it only includes debarment in situations of *res judicata*, does not establish parameters of minimum or maximum debarment time, nor mentions a centralized registry. Member States should be encouraged to introduce rules allowing for discretionary debarment (similar to the rules in the EU Financial Regulation) and to have such decisions centrally registered.
- There are concerns about the consistency in the implementation of this system across Member States as different standards are likely to be applied. In the short term, an effort should also be made to harmonize ways in which the procurement guidelines are transposed into national law, perhaps by developing implementation guidelines for the Procurement Directives.
- It is important to ensure the flow of information between the EU and its Member States as well as among Member States. Ideally, for this purpose, debarment criteria, processes and applications should be harmonized at all levels.

TI is aware that some of the recommendations in this document may require legal changes, but we are also convinced that the process to undertake them and their completion can be easily tackled if sufficient political will exists.

Berlin, March 28, 2006

¹⁰ To avoid additional complexity, in this document and the recommendations that it contains, we are not covering the issues concerning the Member States' debarment systems included in the Procurement Regulations but only as far as it has an impact on the EU wide debarment system.

¹¹ As indicated above