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## **Submission to the European Ombudsman's Own Initiative Inquiry on the European Commission's Early Warning System ("EWS").**

### **About Transparency International (TI)**

Transparency International (TI) is the global civil society organisation leading the fight against corruption. Through more than 90 chapters worldwide (i.e. in almost every EU Member State) and an International Secretariat in Berlin, Germany, TI raises awareness of the damaging effects of corruption and works with partners in government, business and civil society to develop and implement effective measures to tackle it. TI is been working on alerting public administrations, the business community and civil society worldwide about the importance of curbing corruption in public contracting and on developing a number of anti-corruption tools.

### **Focus of this contribution**

Within the scope of this contribution to the Ombudsman's consultation, TI will firstly outline the importance of the fight against corruption in the contracting of public funds. Then, the instrument of debarment – and TI's position towards it – as a tool to contain corruption will be presented. This will be followed by comments on the EWS, its complementary character to and its differences from a formal debarment system like the European Commission's Central Exclusion Database (CED).<sup>1</sup>

### **Public contracting – an area prone to 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. An avoidable misuse and abuse of public funds results from corruption. In the EU, corruption in public contracting leads to a distortion of fair competition, thus to the distortion of the Internal Market, and it constitutes a waste of scarce public resources.

If corruption in public contracting is not contained, it will grow. 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.<sup>2</sup> Corruption frequently results in inferior quality goods and services and unnecessary purchases.

<sup>1</sup> Commission Regulation (EC, Euratom) No 1302/2008

<sup>2</sup> 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

As an estimated 15% of the EU's GDP (i.e. 1.7€ trillion in 2008) is procured annually in the EU<sup>3</sup>, it is essential that these public funds need to be shielded against risks arising from corrupt behavior from market operators and those that apply for EU funds.

### Debarment as an effective tool to curb corruption

In the context of the above-mentioned, 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 certainty of its application. As an 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 all. 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 European Commission's Central Exclusion Database (CED)<sup>4</sup> constitutes such a debarment system.

### Requirements for debarment to be effective<sup>5</sup>

The goal of a debarment system at EU level 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. Particularly, the following elements should be reflected in such a system:

<sup>3</sup> [http://ec.europa.eu/internal\\_market/publicprocurement/index\\_en.htm](http://ec.europa.eu/internal_market/publicprocurement/index_en.htm)

<sup>4</sup> Commission Regulation (EC, Euratom) No 1302/2008

<sup>5</sup> The following section is part of a detailed set of recommendations for the establishment and functionin of an EU debarment system that TI formulated in 2006. These recommendations can be found at: [http://www.transparency.org/content/download/5661/32802/file/TI\\_EU\\_Debarment\\_Recommendations\\_06-03-28.pdf](http://www.transparency.org/content/download/5661/32802/file/TI_EU_Debarment_Recommendations_06-03-28.pdf)

1. Due process must guide the entry and exit procedures for companies and individual concerned so that they:
  - Are given the opportunity to deny, correct or clarify the facts that underlie the accusation.
  - Have the right to an independent review mechanism where the decision to debar could be contested.
2. Regarding transparency in its application, debarment needs to have a mechanism whereby the information in the debarment lists (including the name and address of the debarred company or individual, the ground for sanctioning and the date and period of debarment) can be monitored, and officials held accountable by providing public access to the list.
3. It should make discretionary debarment – when certain criteria are met - possible: the EU Financial Regulation<sup>6</sup> e.g. contemplates two types of debarment:
  - Mandatory debarment in cases where there is a final criminal conviction (res judicata) as a result of illegal behavior.
  - 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.

4. Clear entry (listing) and exit (de-listing) conditions.

With regard to discretionary debarment:

- Grounds and criteria for debarment should be clear, and established and published in advance, by drawing-up implementation guidelines that set criteria to assess the situations identified by the Regulations as causes for debarment.
- In particular, these guidelines 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 nonmember country.

With regard to both mandatory and discretionary debarment:

- Debarment should extend to parent or subsidiary companies when their participation or governance structure implies their involvement and responsibility.
- Debarment should be lifted for companies and individuals who have effectively corrected the structures and behavior that led to their sanction, repaired the damage caused, have given assurances of correct behavior for the future and have not been involved in similar cases before.

### Remarks on the Early Warning System (EWS)

- While the European Commission's Central Exclusion Database (CED) is a tool that is accessible by all operators implementing the EU's budget to check whether an entity is excluded from EU funding, the Early Warning System (EU) functions as internal information tool of the European Commission and only applies within the framework of funds under direct management of the Commission. The main objective of the EWS is to assist EC staff in identifying entities representing potential risks to the EU's financial interests.
- Being listed in the EWS does not – except in W5 cases – lead to a situation of exclusion. Thus, warnings in the EWS that come under categories W1 to W4 constitute only pre-stages of potential future debarment.
- These pre-stages are nonetheless important as they enable the Commission services to take the necessary precautionary measures, alerting EC operational and financial managers so that they can pay particular attention and apply reinforced monitoring to grant and tender procedures that involve operators that are listed in the EWS due to e.g. suspected corruption.
- In TI's view, the EWS offers a timely remedy that can contain damage to, and protect the integrity of, EU funds by warning EC officials that there exists doubt about the integrity of applicants for EU funding. This allows EC staff to operate carefully when dealing with entities for which judicial proceedings are pending or for which fraud or corruption is suspected.
- The principle of transparency with regard to the listed entities is also to be applied in the EWS. This should happen via the notification to the entities that they have been included in the EWS. This notification should clearly state the reasons for that inclusion as well as the requirements that they should fulfil to be excluded from the list.
- It is, however, not sufficient for the current EWS to be only applicable to economic operators or similar entities that benefit from funds under centralized management. As around 80% of the EU funds – particularly agricultural and regional funds – are spent via national authorities at Member State level (shared-management), it should be looked into ways of making the EWS a tool that is used for all modes under which EU funds are disbursed. Otherwise, the EWS' usefulness remains limited.

## Operational aspects of the EWS

The following elements should apply to the EWS on the operational level:

- Due process must guide the entry and exit procedures for companies and individuals. This implies the need to establish and follow due process procedures which guarantee that the entry into the EWS will not infringe individuals' rights.
- The consultation of the EWS must be a mandatory requirement for all EC officials responsible for expenditure to consult and take into consideration the according information when managing their projects. If the EWS were expanded to EU Member States in the area of 'shared-management', their staff should have this obligation, too. Further, both EU and Member State officials should report on the use they have made of the system.
- Grounds and criteria for listing in the EWS should be clear and, if necessary, a further development of the Commission Decision C 2008/969 is suggested by establishing implementation guidelines that set criteria to assess the situations identified by C 2008/969 as causes for listing in the EWS.
- In particular, these guidelines would determine the criteria by which the EC can justify entries at the stages W1 to W4 on the grounds of "sufficient reasons to believe that findings of serious administrative errors and fraud are likely". These could include for example a confession by someone involved in the corruptive activities, reliable information by third parties, circumstantial evidence, etc.
- As a result of the mentioned transparency principle (see above), clear and timely information to the companies about their listing should be a "must".

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