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DEBARMENT IN PUBLIC PROCUREMENT: RATIONALES AND REALIZATION

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1. - INTRODUCTION

As a consequence of being found guilty in corruption, fraud and some other offences, firms and individuals can be debarred from participating in future public tenders. Such consequences will not only reduce governments' risk of entering into contracts with corrupt or in other ways dishonest suppliers, but may also have a preventive impact on players' propensity to be involved in certain offences in the first place. While debarment has gained significant terrain in the last decade, particularly as a device in the fight against corruption, the rules differ across jurisdictions and international organizations.[1] There is significant variation in the specific grounds for debarment, for instance. The World Bank debars suppliers found guilty in collusion, but this is not among the offences listed in the EU legislation. And, while some policy makers prefer lists of firms to be mandatorily debarred, others consider the question of debarment on a case-to-case basis. In lack of a solid theoretical underpinning for these rules, there seems to be uncertainty in policy environments about what optimal solutions should look

[1] For introductions to such rules, see among others E. PISELLI, *The scope for excluding providers who have committed criminal offences under the E.U. Procurement Directives*, in *Public Procurement Law Review*, 2000, 267-286; S. SCHOONER, *The paper tiger stirs: rethinking suspension and debarment*, in *Public Procurement Law Review*, 2004, 211-217; S. WILLIAMS, *The mandatory exclusion for corruption in the new EC Procurement Directives*, in *E. L. Rev*, 2006, 711; T. M. ARNÁIZ, *Grounds for Exclusion in Public Procurement: Measures in the Fight Against Corruption in European Union*, in *International Public Procurement Proceedings*, 2006, 21-23; T. M. ARNÁIZ, *EU Directives as Anticorruption Measures: Excluding Corruption-Convicted Tenderers from Public Procurement Contracts*, in K. V. THAI (ed. by) *International Handbook of Public Procurement*, 2009, London, 105-130; S. WILLIAMS, *Coordinating public procurement to support EU objectives – a first step?* S. Arrowsmith - P. Kunzlik (eds.), *Social and Environmental Policies in EC Procurement Law*, Cambridge, 2009, section 2.4.3 and 4.4.6. Regarding international organizations, see N. SEILER – J. MADIR, *Fight against corruption: sanctions regimes of multilateral development banks*, in *Journal of International Economic Law*, 2012, 5-28; and P. H. DUBOIS – A. E. NOWLAN, *Global administrative law and the legitimacy of sanctions regimes in international law*, in S. Rose-Ackerman & Carrington: *Anti-Corruption Policy: Can International Actors Play a Constructive Role?*, 2013, Carolina Academic Press, Durham NC, 201-214.

like: Who should be debarred, and under what circumstances? For how long should they be debarred, and when should it be possible to deviate from the rules?

Such questions have been the motivation for this chapter, and we will address several of them in an attempt to develop principles for the length of debarment and to describe how debarment should depend on firms' efforts to become more trustworthy, so-called *self-cleaning*. EU law, and more particularly the recently revised Public Procurement Directive (hereinafter PPD),[2] will remain the legal frame of reference, even though several of our points are more generally relevant. Section 3 addresses the consistency between the purpose of the rules and the mechanisms at play. Section 4 discusses criteria for efficient debarment rules with a specific focus on the length of debarment and self-cleaning. The space for policy implications under the PPD is described in Section 5. In particular, we explore the opportunities for framing a coherent system under the new Directive.

2. - EU PROCUREMENT RULES AND SELF-CLEANING

The new EU procurement directive of 2014 is, as its predecessor, based on a combination of mandatory and facultative debarment. The relevant parts of the provision on mandatory debarment reads (Article 57(1) and (3), footnotes omitted):

> *"Contracting authorities shall exclude an economic operator from participation in a procurement procedure where they have established, by verifying in accordance with Articles 59, 60 and 61, or are otherwise aware that that economic operator has been the subject of a conviction by final judgment for one of the following reasons:*
> *(a)participation in a criminal organisation, as defined in Article 2 of Council Framework Decision 2008/841/JHA;*
> *(b)corruption, as defined in Article 3 of the Convention on the fight against corruption involving officials of the European Communities or officials of Member States of the European Union (33) and Article 2(1) of Council Framework Decision 2003/568/JHA as well as corruption as defined in the national law of the contracting authority or the economic operator;*
> *(c)fraud within the meaning of Article 1 of the Convention on the protection of the European Communities' financial interests;*
> *(d)terrorist offences or offences linked to terrorist activities, as defined in Articles 1 and 3 of Council Framework Decision 2002/475/JHA respectively, or inciting or aiding or abetting or attempting to commit an offence, as referred to in Article 4 of that Framework Decision;*
> *(e)money laundering or terrorist financing, as defined in Article 1 of Directive 2005/60/EC of the European Parliament and of the Council;*
> *(f)child labour and other forms of trafficking in human beings as defined in Article 2 of Directive 2011/36/EU of the European Parliament and of the Council.*
> *The obligation to exclude an economic operator shall also apply where the person convicted by final judgment is a member of the administrative, management or supervisory body of that economic operator or has powers of representation, decision or control therein.*
> *…*
> *Member States may provide for a derogation from the mandatory exclusion provided for in paragraphs 1 and 2, on an exceptional basis, for overriding reasons relating to the public interest such as public health or protection of the environment."*

In contrast to the old public procurement directive (2004/18) the issue of self-cleaning is now explicitly addressed in the directive. Article 57(6) and (7) reads:

[2] Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC, OJ 2014 L 94/65.

> *"Any economic operator that is in one of the situations referred to in paragraphs 1 and 4 may provide evidence to the effect that measures taken by the economic operator are sufficient to demonstrate its reliability despite the existence of a relevant ground for exclusion. If such evidence is considered as sufficient, the economic operator concerned shall not be excluded from the procurement procedure.*
> *For this purpose, the economic operator shall prove that it has paid or undertaken to pay compensation in respect of any damage caused by the criminal offence or misconduct, clarified the facts and circumstances in a comprehensive manner by actively collaborating with the investigating authorities and taken concrete technical, organisational and personnel measures that are appropriate to prevent further criminal offences or misconduct.*
> *The measures taken by the economic operators shall be evaluated taking into account the gravity and particular circumstances of the criminal offence or misconduct. Where the measures are considered to be insufficient, the economic operator shall receive a statement of the reasons for that decision.*
> *An economic operator which has been excluded by final judgment from participating in procurement or concession award procedures shall not be entitled to make use of the possibility provided for under this paragraph during the period of exclusion resulting from that judgment in the Member States where the judgment is effective.*
> *By law, regulation or administrative provision and having regard to Union law, Member States shall specify the implementing conditions for this Article. They shall, in particular, determine the maximum period of exclusion if no measures as specified in paragraph 6 are taken by the economic operator to demonstrate its reliability. Where the period of exclusion has not been set by final judgment, that period shall not exceed five years from the date of the conviction by final judgment in the cases referred to in paragraph 1".*

The PPD thus implies: (1) An obligation to take relevant self-cleaning measures into consideration, and (2) an obligation to establish rules governing the implementation at the national level. In this respect, a considerable degree of flexibility is conferred upon the Member States.

However, whatever national solutions are chosen by the Member States, they have to be consistent with the basic principles of EU-law, as underlined in the Directive's Preamble par. 1:

> *"The award of public contracts by or on behalf of Member States' authorities has to comply with the principles of the Treaty on the Functioning of the European Union (TFEU), and in particular the free movement of goods, freedom of establishment and the freedom to provide services, as well as the principles deriving therefrom, such as equal treatment, non-discrimination, mutual recognition, proportionality and transparency".*

These general principles apply to Member States' implementation of EU-legislation,[3] and clearly, they will influence the implementation of debarment rules. The *principle of equal treatment*, for instance, limits a government's opportunity to deviate from the rules on an ad hoc basis, whereas the principles of freedom of movement of goods and freedom to provide services, respectively, hinder possible inclinations to debar firms on an arbitrary or discretionary basis. The *principle of proportionality* restricts the length of debarment in terms of protecting the rights of individuals, owners and firms, and averts reactions that are "harsher" than they "need" to be, given the purpose of these specific rules. Implicitly, a supplier who has made convincing efforts in becoming trustworthy, for example by introducing control and compliance systems, reorganized and replaced management, or reconsidered its institutional work ethics and visions, should be considered differently than suppliers who have failed to take such steps.

[3] See for instance ECJ, *Hansen & Søn*, Case C-326/88, ECR I-2911, par. 17; ECJ, *Messner*, Case C-265/88, ECR I-4209, par. 11 and 14; ECJ, *Karlsson*, Case C-292/97, ECR I-2737, par. 37 and ECJ, *Baumbast*, Case C-413/99, ECR I-7091, par. 91 and 93. See further A. DASHWOOD - M. DOUGAN - B. RODGER - E. SPAVENTA - D. WYATT, *Wyatt and Dashwood's European Union Law*, 2011, Hart Publishing, 327-28.

The principle of proportionality might actually have been the one that motivated, if not compelled, the inclusion of self-cleaning principles. The explanatory memorandum explains the need for such regulation as follows:

> *"Allowance should, however, be made for the possibility that economic operators may adopt compliance measures aimed at remedying the consequences of any criminal offences or misconduct and at effectively preventing further occurrences of the misbehaviour. These measures may consist in particular in personnel and organisation measures such as the severance of all links with persons or organisations involved in the misbehaviour, appropriate staff reorganisation measures, the implementation of reporting and control systems, the creation of an internal audit structure to monitor compliance and the adoption of internal liability and compensation rules. Where such measures offer sufficient guarantees, the economic operator in question should no longer be excluded on these grounds. Economic operators should have the possibility to request that contracting authorities examine the compliance measures taken with a view to possible admission to the procurement procedure".* [4]

The PPD lists the following four relevant and mandatory actions for self-cleaning to be sufficient for exempting a supplier from debarment[5]:

- Collaborate with investigators and provide information about the offence
- Offer compensation for damage caused
- Remove employees from the given area of responsibility
- Internal organizational and administrative measures to prevent such offences in the future

Although these actions must be read as minimum conditions for exemption, it is far from clear how well they serve to renew trust in a convicted supplier -- which is the ultimate purpose of the debarment (i.e. citizens must be able to trust public procurement). Those who are to judge whether the self-cleaning is 'good enough' will have to consider a range of aspects, including whether the actions are sufficiently comprehensive and credible; whether the efforts should lead to full exemption or a reduction in the debarment period; and whether the graveness of the committed offence should matter in the judgment. These questions are hardly regulated at the national level in any of the Member States and are frequently left to the individual procurement official to decide. Under the current legislation and typical enforcement, there are few reasons to expect that these considerations will be made in an unbiased and predictable way, and the intended trust-generating effects of the debarment rules are far from guaranteed. Principled guidelines on how to nuance these reactions against convicted suppliers should follow logically from the fundamental purpose of not only debarment but also public procurement rules.

3. - PURPOSE AND PRINCIPLES

Although debarment from public tenders may have severe consequences for firms and individuals, sometimes even more severe than the sentence placed on them in courts, the

[4] EU Commission, COM(2011) 896 final/2011/0438 (COD), 20 December 2011.
[5] Seemingly inspired by the solutions chosen in Austria, see A. REIDLINGER – S. DENK – H. STEINBACH, *Self-cleaning under National Jurisdictions of EU Member States – Austria*, in H. Pünder – H.-J. Prieβ – S. Arrowsmith (eds. by) *Self-Cleaning in Public Procurement Law*, Carl Heymanns Verlag, 2009, 33-50.

reaction is not intended to be a form of formal punishment.[6] The purpose of these rules is solely the protection of state finances and government legitimacy.[7]

Citizens have the right to be confident that the state enters into contract only with trustworthy entities and never allocates state revenues for criminal purposes. Since public institutions act on behalf of society, however, they also have to respect procurement rules introduced to secure the best price-quality combination of the goods and services acquired, and thus secure value for taxpayers' money. These different goals will easily come in conflict.[8] A national, central government, on one hand, and the representatives for the many procurement entities across a country, on the other hand, may have different views on what is more important and how the different principles and rules should apply for different procurement situations. The current directive implies debarment upon certain criteria but encourages each procurement agent to consider a contractor's trustworthiness. For the individual procurement officials, however, the debarment rules will easily come in conflict with their right to select what they consider to be the best supplier. Undeniably, debarment reduces the number of suppliers available and will sometimes force procuring entities to buy at higher prices or lower quality than what they would otherwise select, or from a supplier whose technology is unknown. Quite clearly, there are situations where debarment decreases the 'value for money' in public procurement. These potentially negative consequences of debarment can only be defended by the potential costs of buying from an untrustworthy contractor and the materialization of longer term benefits.

In a longer perspective, it is easier to see how debarment is an investment needed to secure trust in government procurement. With the exclusion of dishonest suppliers, the market is supposedly reduced to trustworthy players, and it will be more difficult for dishonest players to survive in the market for public contracts. The cost of crime increases significantly for those involved and debarment may thus have preventive impacts. As suppliers' integrity increases, fair competition is better ensured, and in the end, the available price-quality combinations in public tenders will improve *as a result of* the debarment rules. Consequently, the short term disadvantages for procurement entities may be compensated for in the longer run.

Such an outcome depends on the rules and how they are practiced. For many procurement officials it will be tempting to make exemptions, as mentioned, but the debarment rules are not supposed to apply only in situations where the convicted suppliers are easy to replace. They

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[6] According to J. TILLIPSMAN. The Congressional War on Contractors. *George Washington International Law Review*, 2013. 45:. 235-250, the purpose of these rules are often misunderstood and she refers to "many legislators' desire to transform debarment into a tool of punishment by banishing contractors from the procurement system without regard to contractor due process rights and with little consideration of whether such action is needed or fair" (p. 235; with reference to Steven Shaw, Don't Go Overboard Banning Military Contractors, Reuters (Aug. 8, 2012). See also the observations made by S. ARROWSMITH – H.-J. PRIEB – P. FRITON, *Self-Cleaning – An Emerging Concept in EC Public Procurement Law?*, in H. Pünder – H.-J. Prieβ – S. Arrowsmith (eds. by) *Self-Cleaning in Public Procurement Law*, Carl Heymanns Verlag, 2009, 1-31, 24-27, also printed in *Public Procurement Law Review* 2009, 257.

[7] ECJ, 9 February 2006, *La Cascina Soc. coop. arl* and *Zilch Srl* v *Ministero della Difesa et al.*, in joined Cases C-226/04 and C-228/04, ECR I-1347, the ECJ points to "professional honesty, solvency and reliability" and overriding values underlying the corresponding principles in the former Directive 92/50 (par. 21). Along the same lines, ECJ, 13 December 2012, *Forposta SA and ABC Direct Contact sp. z o.o.* v *Poczta Polska SA*, in Case C-465/11, NYR. par. 27, the Court says that "the concept of 'professional misconduct' covers all wrongful conduct which has an impact on the professional credibility of the operator at issue".

[8] These conflicting goals are discussed by R. MAJTAN. The Self-Cleaning Dilemma: Reconciling Competing Objectives of Procurement Processes. *George Washington International Law Review*, 2013. 46(2): 291-347. He calls for more flexible debarment regimes with an opportunity for combining shorter debarment periods with convincing self-cleaning and more frequent use of restitution.

cannot apply only to suppliers in markets where alternatives are available - or to those who sell goods or services of inferior quality. Given the fact that market dominance might be the result of corruption or cartel behaviour over time, we may want to avoid exemption from debarment because of a contractor's market position.

Moreover, since each single deviation from the rules makes them less predictable, a widespread use of exemption implies that it will take longer for the listed (long term) benefits to materialize and weigh up for weakened competition. Given these different perspectives, what are the intuitive criteria for the debarment system to function efficiently in terms of securing trust in government procurement, integrity in the markets, and better price-quality combinations over time?

4. - CRITERIA FOR EFFICIENT DEBARMENT AND SELF-CLEANING

Whether the longer term benefits associated with higher integrity in public procurement markets actually materialize as a result of debarment depends on how the rules are detailed and enforced at the national level. The most obvious condition about predictability, that suppliers actually expect the rules to be applied, will possibly be the most difficult to meet.

4.1. - *External decision*

Despite prospective longer term benefits, there are many reasons for procurement officials to deviate from the debarment rules. The supplier supposed to be debarred may for instance deliver unique products or services of high quality, for instance, and might be preferred regardless of the offences committed by employees or a branch of its organization. The conclusion might be similar if the supplier is an important employer in the local community. Under other circumstances, there might be a willingness to debar the given supplier but difficult in practice if for instance the supplier has substantial market dominance and is the only one able to deliver the goods or services within a reasonable price frame. Undeniably, there is a risk that procurement entities will prefer more exemptions than what is optimal given the desired market consequences of the rules on debarment At the local or institutional level, the entities are likely to focus primarily on their procurement needs given their budget constraints and be less concerned about how the rules work for society at large over time. This is not because they don't see the trade-off between short run costs and long term benefits of debarment, but rather due to their mandated focus on their institutional needs; finding alternative suppliers may simply become too expensive or politically costly, as mentioned above. For these reasons, the question of whether self-cleaning is "good enough" or whether deviation from the mandatory debarment can be justified, should not be up to the individual procurement agency to decide. The procurement official should describe the need for exemption or for accepting self-cleaning, but the decision should be made elsewhere – by a separate unit or centrally.

4.2. - *The length of the debarment period*

While predictable enforcement is a necessary condition for debarment to produce longer term integrity effects in the market, it is not necessarily *sufficient* for meeting the objective of renewed trust in public procurement.

Debarment is a serious reaction, and this alone is likely to be seen as a signal of the requirement for absolute integrity. At the same time, it is not necessarily convincing that 2-4 years of debarment from a given market is what it takes for a convicted player to become an

honest supplier. Why should we trust the management simply because the firm has been kept out in the cold for a while? And if so, for how long should it be kept out to become trustworthy; two, four or five years?

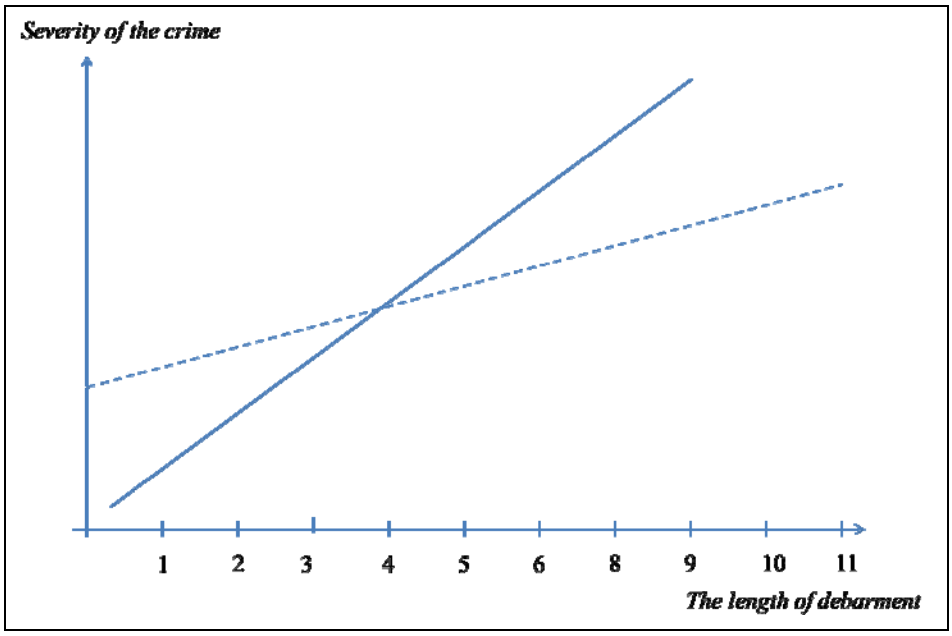
In line with the law and economics of sentencing, it makes sense to let the reaction increase proportionately with the economic benefit of the committed offence, secondarily, with the severity of the acts. Even if debarment is not a form of punishment, the principle seems right, also in this context, if we believe that the more serious offence should imply a longer walk in order to be perceived as honest enough to participate in public tenders. In contrast, it is difficult to defend a system where the debarment period is fixed, regardless of the crime committed, and therefore, the most intuitive option is some proportionality between the grounds for untrustworthiness and the efforts required to regain trustworthiness. Thus, the debarment period could last longer the more the supplier has benefitted from the crime if this is an indicator of untrustworthiness, and if so, more efforts should be invested in self-cleaning to gain reacceptance in public tenders.

However, even if such proportionality makes sense, the debarment itself will not necessarily imply that the convicted supplier or the government that procures goods and services from it can be trusted. Hence, if the goal is not only to react and ensure a certain preventive effect, but actually to be able to start trusting convicted players, the criteria for an efficient system must include something that provides grounds for believing that the supplier has actually altered its business strategies. There has to be an element of self-cleaning for the debarment period to end.

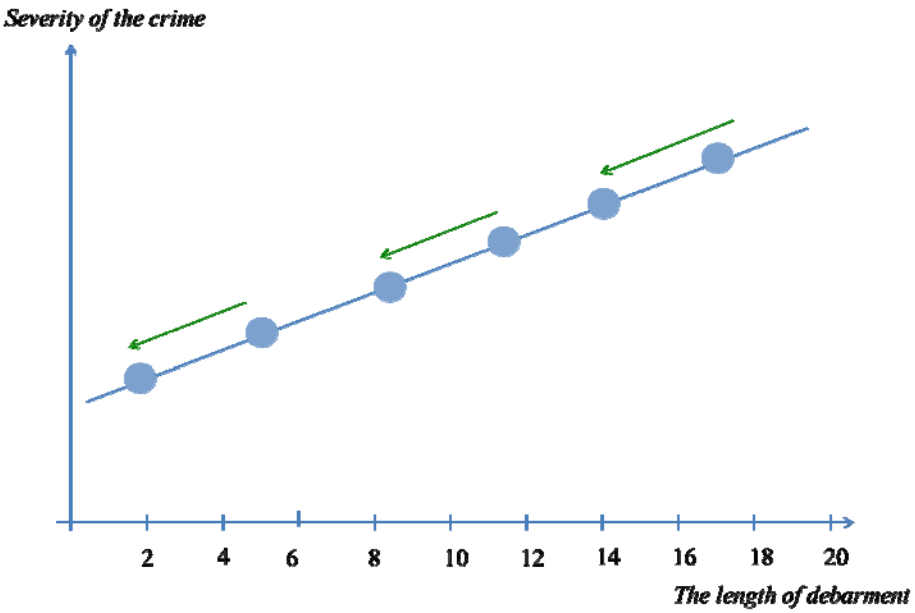
4.3. - *Self-cleaning and the debarment period*

For the reasons listed above, a principle for the debarment period should promote (i) some intuitive consistency between the debarment period and the convicted suppliers' trustworthiness, possibly judging untrustworthiness upon the contractor's benefit of the offence or the graveness of the act); (ii) a reason to expect higher integrity in the debarred player's business strategy; and (iii) a chance to administer a predictable system where it is not too easy to make exemptions. If these objectives are met, the debarment will also serve its purpose of keeping dishonest contractors at distance, preventing dishonest behaviour and ensuring trust in government spending. In other words, the debarment period should depend on the committed offence and the credibility of self-cleaning efforts, while at the same time, the arrangement should be manageable from an administrative perspective – and not a façade system which can easily be manipulated.

So as to contribute to the discussion of what such a principle may look like, we have illustrated in Figure 1 a curve showing a linear relationship between the crime committed (vertical axis) and the debarment period (horizontal axis). Two curves are included to show the importance of the curve's grade. The steeper the curve, the more the debarment period is commensurate with the seriousness of the crime committed.



The importance of self-cleaning is illustrated in Figure 2. If credible self-cleaning reduces the debarment period, the whole debarment arrangement not only serves to keep out dishonest players, but in fact incentivizes change towards more honest business strategies. Such an arrangement is not only more reliable in terms of encouraging suppliers to become trustworthy, it also reduces the short-term cost of leaving out convicted players, and accelerates the process towards obtaining the benefits that have motivated the debarment rules.



What Figure 2 illustrates is how a supplier can "climb down the 'debarment period'-curve" by carrying out credible self-cleaning initiatives. If there is no such option to reduce the debarment period through self-cleaning acts, we fail to exploit the opportunity to encourage improved business behaviour. If we want to strongly incentivize compliance, we can let the initial debarment period be very long, for instance up to 10 years depending on the crime committed, and let the debarred firm "climb down" a steep curve as it carries out convincing self-cleaning initiatives. The shorter the initial debarment period and the lower the slope of the curve, the weaker are the incentives to improve.

Debarment rules with "strong incentives" could possibly be considered rigid and strict by some stakeholders since it basically means that a government *forces* convicted suppliers to change. Such an approach should be totally acceptable, however, if it serves both to promote business integrity and the price-quality combinations in government spending. Besides, it "forces" only those who want to stay in the market for public procurement, on the principle that governments should demand integrity and collaborate only with trustworthy partners. However, the reasonability and efficiency of the system will depend on how the criteria for self-cleaning are specified.

4.4. - *The self-cleaning initiatives*

For suppliers to actually be found trustworthy, the self-cleaning initiatives have to be sufficiently credible and assessable for compliance monitoring. In line with the arguments above, the initiatives should be more profound, the larger the less trustworthy the contractor reflected in the gains obtained from the committed crime or the consequences of the acts – as illustrated in Figure 2. The initiatives listed on page 4 – collaboration with investigators, damage compensated, employees repositioned, and administrative reform – could be specified and graded for the severity of the crime. For example, for the relatively minor acts of crime (near the origin of the coordinates) it might be sufficient for the supplier to introduce codes of conduct, improved internal compliance systems, whistle-blower channels and training for employees. When it comes to more serious offences, from which the firms have profited substantially, the self-cleaning initiatives might also have to involve external actors who monitor the firms' internal and external operations. For the gravest crimes (in the upper right corner of Figure 2), the firm's owners may have to replace the whole management on top of other initiatives for the supplier to become sufficiently trustworthy for participation in public tenders.

These suggestions are merely examples to illustrate the argument. The bullets on the Figure 2 curve can loosely represent different categories of initiatives required for self-cleaning to be found satisfactory. We will not attempt to specify these criteria; the point is simply that the criteria for self-cleaning *should be* specified and graded for the severity of the committed crime.

5. - THE SCOPE FOR DEVELOPMENT OF A COHERENT POLICY

The PPD implies that governments *have to* take self-cleaning initiatives into account when determining a supplier's debarment period, regardless of how they have specified their rules at the national level. In 5.1, we will explain the mandatory nature of self-cleaning principles in light of basic EU-law principles, before we turn to legal reasons for allowing debarment to depend on the severity of the committed acts (5.2 and 5.3). Our understanding of the space for policy improvement is summarized at the end of the section.

5.1. - *The legal status of self-cleaning*

Directive 2004/18 did not provide a clear legal basis for the recognition of self-cleaning as a way out of debarment. However, clarifications on how self-cleaning should affect debarment were demanded already in the preparatory phases of that directive.[9] The relevance of self-cleaning was even mentioned explicitly in drafts but removed in the final version of the directive, most likely because of the clear opportunity to make exemptions based on overriding requirements in the general interest.[10] Hence, under the old directive an opportunity to allow undertakings having demonstrated that sufficient self-cleaning measures had been taken could be formally based on the exception for overriding requirements in the general interest. This is so because preventing public procurement from criminal contractors represents an objective which may justify restrictions on the free movement.[11]

However, the principle of proportionality also mandates such a solution, because the debarment of trustworthy undertakings (or rather, undertakings having restored trustworthiness), would fall foul to both the principle of proportionality and the principle of equal treatment. According to Arrowsmith et al.:

> *"contracting authorities are required to accept the existence of self-cleaning measures as a limitation on the mandatory exclusion rules, and hence to admit contractors that have undertaken effective self-cleaning measures".*[12]

This view was confirmed in the 2011 Green Paper on public procurement:

> *"An important issue on which the current EU public procurement Directives remain silent is what are referred to as the "self-cleaning" measures, i.e. measures taken by the interested economic operator to remedy a negative situation affecting his/her eligibility. Their effectiveness depends on their acceptance by Member States. The issue of "self-cleaning measures" stems from the need to strike a balance between the implementation of the grounds for exclusion and respect for proportionality and equality of treatment. The consideration of self-cleaning measures may help contracting authorities in carrying out an objective and fuller assessment of the individual situation of the candidate or tenderer in order to decide its exclusion from a procurement procedure.*
> *Article 45 allows Member States to take into account self-cleaning measures as far as such measures show that the concerns about professional honesty, solvency and reliability of the candidate or tenderer have been eliminated. However, there are no uniform rules on "selfcleaning", even though measures taken by the economic operator to remedy the situation of exclusion are taken into account anyway by the contracting authorities in some Member States".*[13]

On this background, the introduction of specific principles governing self-cleaning in the 2014-directive was most welcome. The text of the directive also makes clear that Member States are prevented from excluding undertakings which have implemented relevant measures; *"the economic operator concerned shall not be excluded from the procurement procedure".*

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[9] The issue was first raised in the Opinion of the Committee of the Regions, 2001, OJ C 144/23, par. 2.5.2.
[10] S. ARROWSMITH et al., cit. supra note 7, p. 8. That provision has also been included in the 2014-directive, see Article 57(3), cited above.
[11], see ECJ, 24 March 1994, *Schindler*, in Case C-275/92, ECR I-1039, par. 57-60, and ECJ, 16 December 2008, *Michaniki AE* v *Ethniko Symvoulio Radiotileorasis and Ypourgos Epikrateias*, in Case C-213/07, ECR I-9999, par. 59.
[12] S. ARROWSMITH et al., cit. supra note 7, 25.
[13] EU Commission, *Green Paper on the modernisation of EU public procurement policy*, COM(2011) 15 final, 27 January 2011, 52.

Keeping apparently honest suppliers debarred will easily come in conflict with the formal purpose of the debarment rules, namely to ensure citizens' trust in public procurement. Debarment, at least not formally, is not meant to function as an added penalty.[14] If convicted suppliers have become significantly more trustworthy because they have made substantial and credible steps to get out of the situation that caused the crime (as listed in sections above), it will not make much sense to keep them excluded from tenders. Given such steps, the supplier may even have become *more honest* than other players in the market.

Allowing "cleaned" suppliers to take part in tenders promotes competition, which is a clear benefit for the citizens' whose trust is wanted, and assuming that conditions of self-cleaning hold, it will not imply a higher risk of crime. The preventive impacts are nevertheless ensured by a debarment system that takes self-cleaning into account – since the convicted suppliers are in fact excluded, undue business practices are clearly not accepted, and costly and comprehensive steps are required for these suppliers to regain access to the market.

As well, lack of convincing and mandatory self-cleaning principles may induce courts to render judgments interfering with the functioning of criminal law. For example, in the Norconsult case, the Norwegian Supreme Court refused to impose penal sanctions on one of Norway's major consulting engineering companies in view of the self-cleaning measures undertaken by it and the potential financial consequences of the sentence.[15] Had a penal sanction been imposed, the undertaking would have been debarred from future public contracts with no guarantee that the cleaning measures would have been considered sufficient by contracting authorities. The case arose from corruption involving three low-level employees on a project in Tanzania.

Allowing the costly consequences of debarment to become more severe than necessary will easily violate Treaty principles, and thus, given our interpretation of these different legislative sources, principles and arguments, it cannot be the Member States' right to exclude a supplier that has taken sufficiently credible self-cleaning steps. Accordingly, sufficient self-cleaning steps should serve to limit a government's opportunity to debar a convicted supplier from public tenders, and legally it is possible to apply a self-cleaning principle consistent with the suggestion of 'climbing down the debarment-curve' as described in Section 4.[16]

5.2. - *The graveness of the offence*

Also when it comes to our suggestion of letting the severity of the crime decide the (starting) period for debarment (i.e. the longer, the graver), several sources support such a view. In particular, the proportionality principle makes it difficult to operate with a fixed length of debarment, and suggests a more nuanced relationship between crime committed and reaction.[17]

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[14] The debarment rules are vulnerable to populist interpretation by those who see a need for more repressive criminal law sanctions. Tillipsman (2013), see footnote 9, lists several examples of what she calls "inflammatory anti-contractor rhetoric" applied by legislators to defend mandatory debarment.

[15] Norwegian Supreme Court judgment of 28 June 2013 in case 2012/2114 (HR-2013-01394-A).

[16] Many countries, like the Nordic, have implemented the 2004-directive without spelling out the effects of self-cleaning measures in detail. For examples of more specific regulation, see the Austrian Bundesvergabegesetz 2006, § 73 and the German Vergabe- und Vertragsordning für Bauleistungen. Abschnitt 2 - Vergabebestimmungen im Anwendungsbereich der Richtlinie 2004/18/EG (VOB/A - EG) § 6(4) 3 reads: "Von einem Ausschluss nach Nummer 1 kann nur abgesehen werden, wenn zwingende Gründe des Allgemeininteresses vorliegen und andere die Leistung nicht angemessen erbringen können *oder wenn auf Grund besonderer Umstände des Einzelfalls der Verstoß die Zuverlässigkeit des Unternehmens nicht in Frage stellt.*"

[17] ECJ, 21 June 1979, *Atalanta Amsterdam BV* v *Produktschap voor Vee en Vlees*, in Case C-240/78, ECR 3127, par. 15.

Under Directive 2004/18, some countries have linked the debarment period to the length of time a supplier is listed in the national crime register.[18] There is variation across countries on this matter. While Denmark[19] applies the judicial record, Germany[20] considers that period too long and the rule too rigid, whereas Sweden finds it *disproportionate* to operate with a 'too long' fixed period.[21]

The 2014-directive introduced a fixed five-year maximum debarment period, in that it imposes an obligation upon the Member States to

> *"determine the maximum period of exclusion if no measures as specified in paragraph 6 [self-cleaning measures] are taken by the economic operator to demonstrate its reliability. Where the period of exclusion has not been set by final judgment, that period shall not exceed five years from the date of the conviction by final judgment in the cases referred to in paragraph 1".*

This five years limitation is in line with earlier suggestions. It should be noted, however, that the real maximum time of debarment may be considerably longer than five years because the starting point for the time-limit is set to the time of conviction.[22]

The important message here is, however, that although the maximum period is fixed, there is still flexibility for the Member States to enact rules differentiating the debarment period depending on the graveness of the crime. As well, the fact that the maximum period is five years from a final conviction does not prevent the Member States from introducing rules in line with the principles set out in Section 4 counting from the date the crime was committed.

5.3. - *The policy space for improving the debarment legislation in light of self-cleaning*

Despite the many debates about debarment and self-cleaning in public procurement in recent years, the legislation is still highly ambiguous. When it comes to the question of how self-cleaning should matter in terms of the length of debarment, there is significant flexibility for Member States to find their own solutions, particularly since the literature offers little guidance. This chapter has attempted to contribute arguments for debate, and we have made four specific suggestions based on the purpose of the rules, the opportunity to incentivize compliance with the law, the importance of keeping the harmful consequences of debarment at a minimum, as well as our interpretations of the legal landscape – explained in Section 4:

(A) "administrative principles" to facilitate process, enforcement and predictability – including

(i) *external ruling* on debarment and self-cleaning decisions (decisions not to be made by procurement entity); and

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[18] EU Commission, *Communication from the Commission to the Council and the European Parliament: Disqualifications arising from criminal convictions in the European Union*, COM(2006) 73 final, par. 19-20.

[19] The Danish Competition and Consumer Authority Guidelines to the Procurement Directives, 2006, 149, (in Danish only), accessible on *http://www.kfst.dk/udbudsomraadet/udbudsregler-og-vejledninger-mm/vejledninger/*.

[20] See H.-J. PRIEB – H. PÜNDER – M. STEIN, *Self-cleaning under National Jurisdictions of EU Member States – Germany*, in H. Pünder – H.-J. Prieβ – S. Arrowsmith (eds. by) *Self-Cleaning in Public Procurement Law*, Carl Heymanns Verlag, 2009, 51-100 and 60-61.

[21] See the decision from the Swedish Administrative Appeal Court (Kammarrätten), Stockholm in case 3767-09, accessible on *http://www.kkv.se/beslut/_0707114847_001.pdf*, and from the Stockholm Administrative Court (Förvaltningsdomstolen), Stockholm in case 25630-10*, http://www.kkv.se/beslut/_0712145833_001.pdf*. (In Swedish only).

[22] It is submitted that the solution chosen is not optimal in that the real time limit will depend on the effectiveness of national criminal law procedures. As well, in certain cases it may create disincentives to appeal a judgment to a higher court (because the debarment period will *de facto* be increased in case of a negative judgment).

(ii) clearly formulated *self-cleaning criteria* (which are possible for outsiders to monitor);

(B) "mechanisms" – relating to how compliance with the law can be enhanced while the benefits of competition in public procurement are protected – including

(iii) *incentivized compliance* which means to let suppliers climb further down the debarment period curve the more (credible) self-cleaning initiatives they carry out; and

(iv) *proportionality* in terms of letting the (initial) debarment period depend on the severity of the committed acts.

As explained above, Member States have significant policy space for improving their legislation in terms of reaching the goals behind debarment specifically and public procurement rules in general. The policy space is quite clear when it comes to suggestions (ii), (iii) and (iv), as discussed in part 5.1 and 5.2. When it comes to point (i) on external decision, the EU Commission seems to assume that decisions are made by the «contracting authority», that is, the procuring entity, thus in conflict with our suggestion about independent decision and oversight. The EU perspective is confirmed in the EU's own procurement Regulation, in which it is stated:[23]

> *"In order to determine duration of exclusion and to ensure compliance with the principle of proportionality, the institution responsible shall take into account in particular the seriousness of the facts, including their impact on the Communities' financial interests and image and the time which has elapsed, the duration and recurrence of the offence, the intention or degree of negligence of the entity concerned and the measures taken by the entity concerned to remedy the situation".*[24]

However, the assumed decision-making process is a matter of administrative organization. The reference to contracting authorities is merely an assumption that these are the units that will end up making the judgments in practice, while in practice it will also be up to each country to let these decision-making procedures function as efficiently as possible. The checks-and-balances aspect of external ruling, combined with the obvious risk of narrow interests or collusion between procurement agent and supplier, in particular in long term business relationships or in geographically limited areas, suggests that it would be difficult for the EU Commission to insist on a system where the procuring entities consider the debarment question. We therefore also assume a certain policy space for better solutions when it comes to this administrative aspect.

5.4. - *Coordinated solutions preferred*

Even if there is policy space for each member state to optimize these rules, a coordinated approach should be much preferred for the region as a whole. There is a risk that the policy flexibility embedded in the PPD will not only create a patchwork of rules and suppliers who are debarred in one EU country and not in the next, but also that many countries will fail to exploit the beneficial mechanisms described in Section 4 (and listed in keywords in 5.3). Throughout the region, countries have the opportunity to incentivize compliance and reduce the potentially harmful short-run consequences of debarment for competition. Reaping the full benefits will

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[23] Council Regulation No 1605/02/EC on the Financial Regulation applicable to the general budget of the European Communities, art. 93(1).

[24] Art. 133a was introduced by Commission Regulation (EC, Euratom) No 478/2007 of 23 April 2007 amending Regulation (EC, Euratom) No 2342/2002 laying down detailed rules for the implementation of Council Regulation (EC, Euratom) No 1605/2002 on the Financial Regulation applicable to the general budget of the European Communities.

require a coordinated approach. Ideally, there should be one common approach, one list of debarred suppliers, and one set of criteria on how convicted firms can regain their position as sufficiently trustworthy suppliers, at least for countries with a similar legislation, such as the EU

Coordination across countries and institutions will imply a much clearer signal-effect against convicted suppliers, that inclination to criminal acts will not be tolerated, particularly if debarment in one country or by one organization implies debarment by others, regardless of where (or by which branch of the company) the crime was committed.[25] What we should keep in mind, however, is that the trustworthiness of different parts of a large international corporation may differ; the trustworthiness in one context and country may be different than in another. A further concern is debarment of *suspected* offenders. If trusted public procurement is the goal, why not debar a firm under investigation, which is now quite common -- regardless of where in the world the investigation takes place? It is important to be aware of how coordination in debarment may have its own side-effects. It may, for instance, have to imply a reduced debarment period -- since indeed, the reaction will strike harder. If, by trying to force suppliers to act with integrity, we eliminate them from the market place, we truly throw out the baby with the bathwater. Coordinated and globalized solutions on debarment will call for coordinated protection of markets as well.

International collaboration on regulatory nuances in debarment requires joint reasoning and learning. Debarment in public procurement is now applied across the globe – by governments, international organizations and the procurement units of firms – with many different administrative solutions and debarment criteria. A knowledge bank of lessons learned would help us draw on the experiences elsewhere and eventually strengthen our confidence in the solutions we end up choosing.[26]

6. - CONCLUSION

Debarment from public procurement has become an important weapon in the fight against corruption and other forms of business-related crime. While EU Member States are obliged to implement such rules, it is up to each state to consider nuances, enforcement, and how to avoid "unnecessary" harmful consequences.

While debarment is supposed to promote trust in public procurement, there are trade-offs associated with this trust. Our initiatives to fight crime must match our attempts to protect competition. Governments are not only trusted to react against crime, but also to secure 'value for money' in their allocations.

Even suppliers that have been found guilty in the listed offences are market players, often large employers too, and they should not be excluded from public procurement longer than what is deemed "necessary" for them to regain trust. For these reasons, we have to develop clearer ideas of what is required for these players to regain trustworthiness. The most important suppliers are organizations with owners, a management and administration; rarely individuals

[25] Consider for instance the «cross-debarment» by development banks. On April 10 2010, several Multilateral Development Banks (MDBs) signed the "Agreement on Mutual Enforcement of Debarment Decisions" on 9 April 2010, see *http://lnadbg4.adb.org/oai001p.nsf/*.

[26] During fall 2013 the World Bank conducted a comprehensive review process of its sanctions system and experiences where the views of governments, the private sector, civil society and research were brought in; see their law, justice and development websites at *www.worldbank.org*. Such exercises might benefit the process towards a well-functioning and harmonized system within the EU region and internationally.

with uncorrectable integrity flaws. Under external monitoring, these organizations can make convincing and monitored steps which force them to act honestly and responsibly.

The revised PPD addresses firms' opportunity to avoid or reduce debarment through self-cleaning initiatives. However, there are no official policy principles for the relationship between such initiatives and the debarment period, and hardly any literature exists on how these rules can incentivize compliance with the law.

In an attempt to get us somewhat further along the path to addressing these challenges, this chapter has discussed how we can align different goals behind procurement rules in the use of debarment and self-cleaning. We have sketchily suggested principles and mechanisms and outlined the policy space for legal improvements.

In this chapter we call for international collaboration and coordinated solutions. If this is not politically achievable, it is at least possible for governments to improve their rules.