*Transparency International - Czech Republic*

# BLACKLISTING IN THE PUBLIC PROCUREMENT SYSTEM | *Prague 2007*

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PART ONE

# BLACKLISTING IN THE PUBLIC PROCUREMENT SYSTEM

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# INTRODUCTION

Transparency International - Czech Republic (TIC) brings to you a new publication dealing with the issue of public procurement. This time, we have concentrated our discussion on one particular anti-corruption instrument, namely that of blacklisting (or the debarment system). In its anti-corruption program for 2006-2011[1], the present Czech government has prescribed introduction of the blacklist as one of the measures, i.e. the introduction of the list of persons convicted of acts of corruption by banning them from participation in public contracts. TIC has been enforcing this idea on a long-term basis, and therefore welcomes the government's political intention to deal with this topic in detail. Our objective in this publication is to analyze the advantages and disadvantages of such a concept, and to support public and professional discussion on the use of blacklisting in public contracts. Our ambition is to answer many detailed questions which are opened by this measure – in particular, what blacklists are, how they may be used in public procurement, whether it is possible to implement them and what must be done to do so. Furthermore, we ask how this instrument can be set up properly so as to be effective, how to set the criteria for registering a competitor into the list and erasing him from it, and, last but not least, how to prevent the list from being misused.

1) Decree of Government of the Czech Republic dated 25 October 2006 No. 1199 (see www.vlada.cz).

# WHAT IS IT ACTUALLY?

Although acts of corruption are prohibited by laws and other regulatory measures all over the world prohibiting manipulation in tenders, they still take place on a massive scale. The Czech Republic is no exception (see TIC research)[2], and corrupt practices strongly affect the assignment of tenders. This is also one of the reasons why, in 2005, Transparency International (TI) published a list of 13 preventive anti-corruption instruments and measures which should be included in every system of public contracts.[3] This list is understood as the recommended minimum of measures leading to maximum transparency based on clear rules; effective inspection mechanisms and protection of the public interest in all stages of public contract assignment (see Frame 1).

As a principle, transparency in democracy may be considered to be in the public's interest, which at the same time, however, bears certain costs on the part of the government and also on the part of private entities. Therefore it is always necessary to apply it to other principles (e.g. effectiveness) as well, and to look for a sensible relation between them. It is obvious that the anti-corruption and control mechanisms no longer make sense if they substantially complicate the public procurement system. From this point of view, the recommendations of TI are considered carefully and set in such a manner so as not to obstruct the disposal of public finances and provision of public services.

2) http://www.transparency.cz/index.php?lan=cz&id=2650
3) http://www.transparency.org/global_priorities/public_contracting/tools_public_contracting/minimum_standards





FRAME 1 **TI MINIMUM STANDARDS ON PUBLIC PROCUREMENT**

The standards focus on the public sector and cover the entire project cycle, including needs assessment, design, preparation and budgeting activities prior to the contracting process; the contracting process itself; and contract implementation. The standards extend to all types of government contracts, including:

- procurement of goods and services
- supply, construction and service contracts (including engineering, financial, economic, legal and other consultancies)
- privatisations, concessions and licensing
- subcontracting processes and the involvement of agents and joint-venture partners

Public procurement authorities should:

1. Implement a code of conduct that commits the contracting authority and its employees to a strict anti-corruption policy. The policy should take into account possible conflicts of interest, provide mechanisms for reporting corruption and protecting whistleblowers.
2. Allow a company to tender only if it has implemented a code of conduct that commits the company and its employees to a strict anti-corruption policy.
3. Maintain a blacklist of companies for which there is sufficient evidence of their involvement in corrupt activities; alternatively, adopt a blacklist prepared by an appropriate international institution. Debar blacklisted companies from tendering for the authority's projects for a specified period of time.
4. Ensure that all contracts between the authority and its contractors, suppliers and service providers require the parties to comply with strict anti-corruption policies. This may best be achieved by requiring the use of a project integrity pact during both tender and project execution, committing the authority and bidding companies to refrain from bribery.
5. Ensure that public contracts above a low threshold are subject to open competitive bidding. Exceptions must be limited and clear justification given.
6. Provide all bidders, and preferably also the general public, with easy access to information about: activities carried out prior to initiating the contracting process; tender opportunities; selection criteria; the

evaluation process; the award decision and its justification; the terms and conditions of the contract and any amendments; the implementation of the contract; the role of intermediaries and agents; dispute-settlement mechanisms and procedures. Confidentiality should be limited to legally protected information. Equivalent information on direct contracting or limited bidding processes should also be made available to the public.

7. Ensure that no bidder is given access to privileged information at any stage of the contracting process, especially information relating to the selection process.
8. Allow bidders sufficient time for bid preparation and for pre-qualification requirements when these apply. Allow a reasonable amount of time between publication of the contract award decision and the signing of the contract, in order to give an aggrieved competitor the opportunity to challenge the award decision.
9. Ensure that contract 'change' orders that alter the price or description of work beyond a cumulative threshold (for example, 15 per cent of contract value) are monitored at a high level, preferably by the decision-making body that awarded the contract.
10. Ensure that internal and external control and auditing bodies are independent and functioning effectively, and that their reports are accessible to the public. Any unreasonable delays in project execution should trigger additional control activities.
11. Separate key functions to ensure that responsibility for demand assessment, preparation, selection, contracting, supervision and control of a project is assigned to separate bodies.
12. Apply standard office safeguards, such as the use of committees at decision-making points and rotation of staff in sensitive positions. Staff responsible for procurement processes should be well trained and adequately remunerated.
13. Promote the participation of civil society organisations as independent monitors of both the tender and execution of projects.

Source: Transparency International: Global Corruption Report 2005, Pluto Press, London 2005.





In essence, blacklisting (recommendation No. 3) is a restrictive measure. It is based on the simple idea that the state (in the broad sense) only admits entities who play fairly to competitions for public funds. The ones who do not play in this manner are disqualified and forced to change their procedures and behavior. In principle, it is a possibility to create lists of untrustworthy companies on the basis of which it would be possible to disqualify unreliable entities from the public procurement process (debarment) for a certain period. These are the registers which prevent participation in tenders by those competitors, with whom sufficient suspicion has been proven (sufficient indicia, evidence) that they participated in acts of corruption in any of the phases of the public procurement cycle.

The main aim of blacklisting is to protect public finances from "raids" by companies using unfair practices. It turns out that, on a long-term basis, it is one of the most effective measures for the fight against supply-side corruption on the part of the companies. Debarment of such players is the important instrument in the purification of the market, which is corrupted by their behavior. It is the administrative (not criminal) measure, which has a strong preventive effect. The aim is to ensure a certain change in the acting of individual players on the public procurement market. This may be an effective method of discouraging the companies (individuals) which are debating on whether or not to begin acting in a corrupt manner. Blacklisting should have such a deterrent effect so that competitors finding themselves in this moral dilemma (e.g. to win a contract through bribery) are fully aware of all of the risks arising from corruption: harm to their reputation, banning from participation in tenders for a certain period of time, increased possibility of being investigated criminally. In particular, companies usually consider their expenses, and the risk of them increasing may be a fundamental argument in their decision making. Although it is

difficult to measure such an effect accurately, the response of entrepreneurs in countries with blacklists has proven it (they are gradually being implemented in some countries, such as Germany and the Netherlands, but they have also been used for a long time in the international institutions – World Bank, International Monetary Fund, Development Banks). It is a generally known fact that corruption investigations last for a long time and their results become known after many months or years (if at all). However, the necessity to protect the public funds is immediate and blacklisting may represent an effective and quick remedy. Not the only one, naturally. The introduction of blacklists should also be combined with other organizational changes of preventive nature (e.g. shifting the officials on decision-making positions, integrity pacts, etc.).

As the following studies show, instruments based on a similar principle are commonly used in other fields. They have different forms, such as bank registers, offence lists of professional chambers, penal register and others. All these lists have a common denominator, which is to ensure that the given activity is operated reliably, blamelessly, effectively and safely.





# GENERAL PRECONDITIONS AND CHARACTERISTICS OF BLACKLISTS

There has not yet been a detailed discussion on the idea of blacklisting in the Czech Republic. Nonetheless, great hostility arose also against formerly proposed registers of administrative punishments[4] and counterarguments were raised (on a certain form of reversing the burden of proof or on the complicatedness and expensive of the legal regulation). The redundancy of the state regulation, when the market may regulate itself was pointed out. These arguments have a certain relevance, but it still does not apply in our business environment that some things should simply not be done and are not tolerated in a decent society. Blacklisting may be a strong anti-corruption instrument in the fulfillment of certain preconditions and characteristics:

- All rules relating to blacklist functioning must be clear, simple and, in particular, public. The playing field on which it is taking place must be known in advance, as well as what penalties threaten if the rules are breached.
- All of the rules must be published proactively, and they should be part of all of the documents in the public contract.
- The blacklist should be kept centrally, and it should be binding for all the public principals regardless of the form and amount of the public contract. The effectiveness of the list should be swift (immediate).
- The system established should be adequate and fair, so as to ensure the equal conditions for registration into and erasure from the blacklist. Registration into the blacklist should be limited time-wise.

4) Proposal of Ministry of Interior – www.korupce.cz

- Penalties arising from the blacklist are administrative and organizational in character (several years could probably pass before the court's final decision is reached). At the same time, each aggrieved competitor should be given the chance to defend himself effectively. The task of deducing possible criminal liability naturally remains to the bodies active in the criminal proceedings.
- The penalties should be reasonable and should correspond to the severity of the offence, size of the competitor and public contract concerned. In any case, however, the penalty must be hard enough and must be of a certain deterrent nature. The aim of the penalty is not to bankrupt the company, but rather to force it to act correctly and reform. For instance, the system should take into account the possible mitigation of the penalty for participants in cartel agreements, which decide to provide the relevant information, documents, proof and evidence on the existence of such an agreement.[5]
- The reasons for the act of corruption, on the basis of which the competitor/supplier will be registered in the blacklist, must be strictly distinguished from other reasons and mistakes – temporal, professional, economic, financial or technical.
- In order to prevent the misuse of blacklists (as business or political weapons), a common standard must be set on what will be considered as "sufficient proof" for inclusion in this list (e.g. breach of the public procurement codes of ethics, breach of integrity pact[6], proof of cartel agreement, initiation of criminal proceedings, etc.). This may help to prevent unnecessary legal disputes.
- With the introduction of blacklisting, the protection of the persons who notify of the act of corruption (so-called whistleblowing protection) should also be strengthened. Proof for the inclusion of a company in the blacklist can often only be obtained thanks to them.

5) More on this way of discovering and breaking of cartel agreements, the so-called leniency program, on the website of the Office for the Protection of Competition http://www.compet.cz/hospodarska-soutez/kartely-a-dominance/leniency-program/

6) TI recommends the Integrity Pacts (IP) for the proactive pursuit of integrity. The IP is a formal agreement between the goverment procurement authority, possible suppliers or tenderers in the tender (one pact = one tender) and monitoring entity. This is the tool by means of which these participants in the process want to avoid non-permitted and unauthorized corrupt practices, which distort free competition and affect the rational decision-making of the public authority. The parties agree to be obligated to openness and disclosure beyond the scope of the duties arising from thelaw. The obligation is not only formal, but it also has a practical effect as the voluntary uredisclosure of all the documents in the process to the third independent entity – the so-called public witness – whose aim is to supervise the observance of the rules, to which the contracting parties bind themselves.

# FINAL SUMMARY

Let's sum up the main advantages which the implementation of blacklisting offers:

- it enables irreproachable competitors to carry on their activities freely, effectively and without the "obligatory" costs of bribes;
- increased transparency of the tender rules;
- the entrepreneurial environment will be cultivated, and competitors' access to the public procurement market will open again once they prove their integrity;
- costs for public contracts will potentially decrease, and the quality of public services provided will increase.

The present regulation valid in the Czech Republic does not contain mechanisms which enable the disqualification of "untrustworthy" entities from the public procurement process. The "white" list was introduced in the form of a list of qualified suppliers (kept in our country by the Ministry for Regional Development), which was shown to be a positive measure for many reasons. However, these lists have one problem. It is easier to "pay to get a benefit" than to "pay to avoid costs". This means that it is easier to buy a certificate of integrity than to arrange to be removed from the blacklist by using unfair practices. All of the amendments aimed at higher transparency of public procurement have been proposed toward the principals (the public sector), but legally established restrictive measures towards the tenderers (companies) are missing. Within this context, blacklisting appears to be an exceptionally effective instrument in the fight against companies using corrupt methods with a strong preventative effect on the whole market. The experience of many principals, suppliers and control institutions only confirms this. Blacklisting should be a part of a more complex strategy of anti-corruption measures in public procurement (observation of the codes of ethics of public contracts, integrity pacts, whistleblowing protection, leniency program and other measures – see Frame 1). In professional and political discussion, it is necessary to take into account that the main purpose of these lists is not to prevent anyone from undertaking free business activities, but to contribute to the protection of public finances and make the public contract assignment more transparent.

PART TWO

# BLACKLISTING AND PUBLIC PROCUREMENT

ING. PETR VYMĚTAL

# INTRODUCTION

The blacklisting is one of the considered instruments in the fight against the corruption in connection with the public procurement. Although the blacklists are used in various fields of life, they provoke many questions. Is it an effective instrument? What forms it may have? What are the problems concerning the blacklisting? We will try to answer these and many other questions in the text below.

The blacklisting introduction in particular in the field of the public procurement does not have the long history. Some authors (Moran et al. 2004) and also the international institutions (The World Bank, Anticorruption Resource Centre) consider application of the blacklists in particular in the field of the public procurement as the instrument, which may lead to the decrease of the potential corruption risks, but also as the instrument of protection of public means and potentially also the increase of effectiveness of allocation of the limited resources.

## WHAT IS BLACKLISTING?

The so-called blacklisting or debarment lists[1] are the lists of persons or organizations, the activities of which are considered as suspicious and which are boycotted or penalized in another manner.[2] This generally used definition expresses two basic roles, which the blacklisting shall fulfill. Firstly it is the effort to identify the entities, the acting of which is in contradiction with the valid rules of the game, legal order or particularly the manners, morals and ethics. In the case of the perfect identification then, secondly it shall debar the given entities from the competition and prevent them from continuing these – otherwise not usually limited or otherwise specifically not regulated – activities. This other role may have many stages from the soft penalties, which are usually in the form of restriction (e.g. restriction of the access to certain projects, limitation of support from public means, excluding from tender, denunciation etc.), to the strict penalties in the form of bans, high fines and severe punishments (ban on activities, criminal prosecution, revocation of a license, etc.).

The blacklist is thus the register of entities, which do not fulfill in a certain manner or breach the otherwise recognized rules. However it also relates very closely to the issue of certification of entities (see below), to the public procurement, money laundering and corruption. The blacklists are thus the lists of the "deterrent"

1) Translation dictionaries offer many equivalents of both the word debarment (exclusion, prevention, deprivation, preclusion) and blacklisting (to register someone on the blacklist). Although they are usually used as synonyms, e.g. the World Bank uses more often the word debarment. One of the reasons may be also the fact to avoid the word blacklist/-ing, which may give the inconsistent impressions and negative denotations among the entities. In other cases the difference from the old regimes of the blacklists is emphasized and the word debarment is then to emphasize the orientation at processes. Here both the words will be considered as equivalent.

2) Modified definition under Transparency International, www.transparency.org/global_priorities/public_contracting/glossary, [2006-05-24].





examples of the undesirable acting, for which certain sanction is usually imposed – thus they are mainly the instrument of the negative nature. On the other hand they may motivate and force to the desirable conformable acting. Thus they may fulfill both the role of exclusion and punishment and also the prevention and motivation.

However the blacklisting must be included in wider context of registers and lists generally. It serves most often as the instrument of faster orientation and simplifying of access to the given information on the affected entities. Although it might seem at the first sight that it is the new instrument, it has been used for a long time in many fields of the social life, often combined with white lists. These are e.g. the lists as telephone directory, register of entities running a business, penal register, population register, vital statistics, bank registers, lists of dodgers etc.

## HISTORY AND PRESENT PRACTICE OF BLACKLISTING

As already mentioned, the practice of the blacklisting is not a novelty. The blacklists are well observable minimally from the Middle Ages. One of the examples may be the lists of the towns and population affected by the plague, later the lists of evangelic villages and persons in the period of recatolization or lists of the persons allegedly possessed by the Devil and suspected of sorcery. We can find many other examples in the period of proceeding modernization and capitalism and they were applied in many fields, both in public or private sector. Their negative perception is often connected with the purges. Many non-democratic regimes keep the

list of the troublesome persons (often called as dissenters), but at the same time they keep also the lists of the persons cooperating with the regime.[3] Experience of the past years also show, how it is easy to change in some cases the blacklists to the white lists and vice versa.

If we take the blacklists from the point of view of their origin, in total three types of lists may be found. In the public sphere the blacklists are quite common (although they are usually referred to by various names, most often the "lists" or "registers"). In the first place the lists of entities sentenced legitimately by the court for the crime may be included in them ("penal register"), various lists of entities, which have the obligations towards the state (arrears of taxes and social insurance), or possibly the entities, which participated in economic criminality and corruption. However not always the blacklists are concerned, often it is the combination of the blacklists with white lists. Thus it may be e.g. the register of legal entities and self-employed persons, where the common data are registered, as well as the data on declaration of bankruptcy, mergers or property connections.

It applies concerning this type of list that they are usually fully administered by the state. State (or the particular state administration body) has the right not only to find out certain information and at the same time it may dispose of them. From the point of view of finding out the information it is competent not only to order but also to punish. The rights and the duties and competencies of individual entities are mostly regulated by law or minimally by the government order.

Combination of the blacklists and white lists is quite common also in the private sector, which may create both of them (or possibly also other lists). These are e.g. the lists of members of various professional organizations (both regular and excluded members – see the Chamber of Auditors of the Czech Republic, Czech Bar Association, Czech Medical Chamber etc.) or the bank credit registers and register of the non-bank, installment and leasing companies ("register of debtors"). Unlike the public registers the obtained information is not always available to the public and the nature thereof and the manner of the disposal thereof may be different (e.g. limited data sharing only within the participating banks, not the whole banking sector unlike the data, which may be shared in the case of state by the whole state administration). Information, rights and duties, which arise therefrom, may not be exacted so consistently, if they are not bound to the membership. There appears very often also the attempt to introduce the self-regulation on the basis of the ethical or professional codex (doctors, lawyers etc.), for the breach of which the entity is excluded from the chamber and placed on the blacklist.

In the private sphere – in particular in the Anglo-American practice – the similar term is used, which relates to the blacklisting: it is the blackballing. It is the manner, in which some private ("gentlemen's") clubs allow any existing member to reject the application for the membership of the new candidate in such a manner that he throws at voting the black ball into the ballot box among the other (white) balls. This manner, commonly spread in the 19th century and the first half of the 20th century, is sometimes viewed as the manner of maintaining of exclusivity, influence and positions within the certain caste-status system, in which the mass extending of membership would mean threat to the activities or the existence of the private club.

The blacklists in the field of the non-profit sector are relatively new. It rather – quite understandably – relies on its own self-regulating ability of the whole non-profit sector without the act of the state.

3) On the other hand it must be mentioned that the political processes may be found also in the highly developed democratic states. The most known case in this respect is the blacklisting in Hollywood at the turn of the 40-ties and 50-ties during the mccarthism.

The state mostly engages only in the case of the "register of the non-profit sector organizations" or in the case of orders and subsidies coming to the non-profit sector from the state and public budgets.

In the consequence of the increasing complicatedness of the society the important role is played in the public sector by looking for the instruments, which would increase effectiveness and transparency of certain chosen fields of the society. The word "chosen" is quite correct concerning this issue. The practice of the blacklists, although they may be applied widely, may not be simply adapted to any problem or applied as the universal instrument for the whole society. They are usually used as the economic sanction instrument in the form of penalty, excluding from tender, criminal prosecution etc. In some cases the consequences of the entity registering on the blacklist may be considered as liquidation, in particular if the entity relies fully on the financing from one source. However there exist many possible divisions and classifications of the lists.

## DIVISION OF LISTS AND FIELDS OF THEIR USE

There are many various attributes and types connected with the issue of the "-listing". Since the boundary existing between the individual types is very thin, we mention here the basic types of the lists existing at present.

- *Blacklists (blacklisting, debarment)* – As it has been already mentioned above, these are the lists of the entities, to which a certain right/claim/duty, service or mobility is limited for different reasons. The entities on the blacklist are mostly considered as unreliable, they are prevented from their activities or are sanctioned in another manner. One of the examples is e.g. the registers of debtors, lists of unreliable clients not repaying the credits or the entities, which are corrupt.





The blacklists are of different types. One of them is the above-mentioned practice of blackballing, used in private clubs. Another variant was blocklisting, thus the practice of exclusion, rejection ("rejectlist") and discrimination of Afro-American population in the United States, e.g. concerning the issue of higher education.

- *The white lists (whitelisting)* – The white lists are the opposite of the blacklists. These are the lists of the reliable, trustworthy and acceptable entities, which fulfill the given criteria, do not breach the valid rules and act ethically. These entities profit from the goodwill, which increases their reliability and trustworthiness in the wide public. There are many examples from the practice, but it is rarely possible to obtain the compact lists. It may be said in principle that creating of the white lists is connected with the certification policy. This includes e.g. declaration on conformity with EU (CE mark, Conformité Européenne) standards, homologation and ČSN certificates, ISO standards or marks that are to testify the quality (CzechMade, Klasa) etc.
- *Grey lists (greylisting)* – Recently the practice of the so-called grey lists have been expanding. They are the certain transitional type between the blacklists and white lists. The grey lists are the lists of the entities, the rights of which are suspended or limited temporarily for the reason of the suspicion of the breach of rules, possibility of continuing these activities and high probability of their including in the blacklist. "Suspicious" entities, at which the misconduct is not proved, are usually, without any official sanction consequences, included back among other not penalized entities. The arguments in favor of the use of this

type of lists are usually summed up in the term of prevention. Thus it is possible in some fields to prevent the serious failures arising from continuing of the unfair activities of the entity. On the other hand the limitations imposed on the entities are usually very problematic and the incurred losses (whether economic or non-economic) are usually not compensated in the case of not proving of the wrongdoing. The method of greylisting is most often used in information technologies (network computers infected with virus, spam filters or use of illegal or otherwise problematic software etc.).

- *Green lists (greenlisting)* – In the private sector, in particular at the companies producing the industrial goods, the issue of ecological standards and standards considerate to the environment has become important since the eighties. The green lists certify most often the ecologic production or possibly products (observing of ISO standards at the production or particularly biofood, recyclability of products or production from recyclates). Thus it concerns both the products and companies and their production processes, which contribute to the protection and low harming of environment.

The blacklists have been existing, although we do not realize this directly, for a long time and almost everywhere. Some of them have already been mentioned. They are used both by the state, e.g. the security bodies (lists of persons involved in the organized crime, corruption or terrorism), and the private sector. They are used e.g. in medicine and pharmacy (lists of not tested or otherwise not recognized medical practices, list of prohibited medicines, as for example in sport or drugs), but nowadays they are mostly used also in the field of information technologies. It is mostly exclusion of the entities from the system, which might disturb it or cause its serious failures. Most often is used blocking of the addresses, from which





the infection spreads (the so-called spam, RBL, ROKSO or blackholing), or possibly blocking of use of illegal software. They are used as an instrument in the banking (see Frame 1), but also generally in the business. Up to now they have been used in particular in connection with the companies before bankruptcy, in the form of the debtors' registers, lists of persons unsuitable for employment in certain company and in some countries the unions create the lists of the companies, which suppress its activities for various reasons.

At present the most discussed field is use of the blacklisting in connection with public procurement. Only such entities can get on the blacklist, which misuse finances, breach or do not fulfill the contracts or increase the price unreasonably, in other words such entities, which breach the rules. Definition of these rules, including the importance of the degree of the breach thereof is different in various fields. These rules form in principle the set of the "general" requirements suitably amended by the specific criteria that may be applied in the given field. Just the effective definition of the "game rules" immediately at the beginning is critical for the effective functioning of the blacklisting. However this will be dealt with hereinbelow.

FRAME 1 **REGISTER OF DEBTORS**

At the beginning of 2006 the mutual data exchange between the Bank Register of Client Information (BRKI) and Non-bank Register of Client Information (NRKI) started to function. The aim of this connection is building up of the universal register in the Czech Republic, thus the instrument for complex consideration of the applicant's risk and worsening of running over of the not respectable clients among the providers of financial services. Both registers together form the biggest database monitoring the credit relations in the Czech Republic. BRKI and NRKI are the standard credit registers of the European parameters, which contain not only the negative but also the positive information on the payment morale and

credibility of clients of the banks (BRKI) and leasing or installment companies (NRKI). Unlike the negative registers they do not only point out to the historical debts of the applicants for the credit products, but they allow the good clients, by means of the positive history, to reach more quality and faster services also in the case of small historical misconducts.

According to the company CERD, a.s., which shall administer this register under the supervision of the Office for Personal Data Protection (ÚOOÚ), these are the very well secured databases of information on the clients, which repay the credit, leasing or installment product. It is expected that all the member companies of BRKI will participate in the mutual exchange of data among the registers. Member companies of BRKI and NRKI cover already now in total 95% of banking, 90% of leasing and 50% of installment market. Non-banking register negotiate also with the mobile and other telecommunication providers and with energy providing companies on the possibility of their joining NRKI and on reciprocal use of only negative information.

At the exchange of the encoded data between both registers inspection of the credit report of each individual client will be conditioned by its informed and free consent. The data may be used only to the strictly stipulated purpose of consideration of the credibility and payment morale of the particular client and they are secured against misuse or marketing use by the members of the register. Each client will be able to verify the information on its person by means of the client's centers of CBCB (Czech Banking Credit Bureau, a.s., bank register) and LLCB (Leasing and Loan Credit Bureau, z.s.p.o, non-bank register).

CERD shall thus administer the total overview on the debtors and their payment history. It gathers the information on the not credible entities in several stages: firstly not verified receivables – receivables are not controlled by CERD employees, they shall serve to the user only for information and in the case of doubts it may ask directly the debtor, whether such debt exists. In the case of the fundamental interest in the information to the debt of the given debtor the client may ask the CERD operator to verify the receivable, which will then become the verified receivable; secondly verified receivables, which are assigned directly by the member companies of CERD system. They bear certain guarantee, since the user, which inserts them, is registered and bound contractually to enter the correct and true data. The inserted receivables are controlled by CERD operator, so that they would not be misused.





This system of register will bring according to the administrator several advantages: (1) for easier providing of loans and credits; (2) at invoicing and contractual fulfillments; (3) for selection procedures and public incentives (in particular for villages and towns); (4) in real estate activities (non-payers of rent); (5) at selection of the employee (deliberately caused damages by the employee).

Source: Czech Banking Credit Bureau (http://www.creditbureau.cz/Tisk/reference.aspx?grID=4&aktID=20), Central Register of Debtors of the Czech Republic (http://www.crdcr.cz/funk.htm)

# BLACKLISTING AND PUBLIC PROCUREMENT

Application of the blacklists or particularly white lists has appeared recently as one of the instruments, which might potentially help to reduce the corruption acting. Although the blacklists are not generally applicable to any field of the social life, experts and the concerned public will relatively agree in this respect – blacklists, if function correctly, may prevent even higher losses and costs, which are connected with corruption in the field of the public procurement. However it is not possible to consider them as the only and self-redeeming instrument, which will decrease corruption. Its big advantage is its proactive, preventive effect to future.

What does debarment/blacklisting actually means in connection with the public procurement? Moran et al. (2004) offer relatively complex definition, which is based on the international experience. The entity is debarred by the government or by the multilateral agency, when it is (or possibly other entities, in which its directors operate) formally prohibited to enter the procurement proceedings to the projects, which are financed by certain agency (or it supports

financing thereof), in the case that it was investigated by the agency in connection with its corruption activities (both in the past and at present), by which it was to secure the participation in the project announced by the agency or by other agencies, which carry out similar policies and to which the debarment process may be applied. Obviously there is a clear connection here with the corruption, public procurement and also the attempt for the definition of basic criteria, which must be fulfilled for the proceedings on placement of the entity on the blacklist. It is also obvious that the authors identify with the so-called offer competitive definition of corruption, i.e. the fact that the corruption is initiated by the competing participants in the tender (offering parties) and it is created directly by the private sector regardless the fact, whether it is accepted on the part of the demand (i.e. by the officers, authority etc.) or not.[4] This approach contrasts with looking for and growth of corruption only among the officers and to the contrary it shows that the strong corruption opportunities may exist also "on the other side" and that the corruption is the "bilateral matter".

The Transparency International (TI) states on its website that introduction of blacklisting runs up against two big problems: firstly the unwillingness to debar the entities without the court order on the basis of the so-called strong evidence and secondly the opposition of the public approach to the blacklisting. Despite these problems the practice of the blacklists in connection with the public procurement is surprisingly rich. Although it is the relatively new instrument, one of the oldest is the debarment system in the USA, where it is possible to include the entity in the blacklist in the consequence of the breach of the antitrust legislation, tax

4) Demanding party may be in this respect in the situation innocently – the bribe or other advantage does not have to be offered to it, however the finances may be misused in another manner, frauds may be made (material saving, intentional unrealistic undercutting by the price, which will prove in the practice as unfulfillable) etc.





evasions, wrong reporting and all this in connection with the bribery at the public procurement. But it is not only the penalization on the national level. Very often there exist the procedures both on the level of regions and branches and in particular on the international level (World Bank, newly also European Commission). And just the activities of the World Bank, which introduced the practice of the blacklisting as the instrument of the anticorruption nature in the public procurement as early as in 1998, appear as one of the possible clue of the implementation thereof also in many other national programs of fight against the corruption (see Frame 2).

FRAME 2 **WORLD BANK AND BLACKLISTING**

The World Bank, (hereinafter referred to as the Bank) was forced, for the purpose of narrowing the space for the misuse of the money from the projects financed by the bank and in the effort to eliminate the corruption acting, to introduce in the practice the blacklisting (debarment). If the suspicion on the deceptive or corruption acting occurs, the Bank will initiate the proceedings before the so-called Sanction Committee (hereinafter referred to as the Committee). The Committee has minimally 5 members – two representatives of the Managing Director, representative of the General Council and the other two managers of the Bank – appointed by the president of the Bank for the period of two years. This Committee judges and evaluates, whether the principals, applicants, suppliers, consultants or individuals acted fraudulently or carried out corruption activities in connection with the projects financed by the Bank or with the activities performed by the Bank.

This procedure mostly applies in relation of the Bank to the external entities. As for the suspicion or the corruption acting inside the Bank and the projects announced by the Bank, the matter falls within the competence of the Department of Institutional Integrity, hereinafter referred to as the Department), which has approximately 20 employees. If the Department director supposes after the investigation that there exists sufficient evidence on committing the fraud or corruption acting, it will hand over to the Committee secretary the draft notice of the debarment proceedings. The notice is then sent to the entity, which is the subject of the

proceedings (hereinafter referred to as the respondent). Respondent has the period of 60 days for expressing in writing to the notice and the Department must answer to the respondent within the period of 20 days. Then the informal hearing lasting approximately for an hour is held, in which the chief investigator (either the representative of the Department or the person outside the Bank) presents the set of findings, respondent or its representative has the possibility to mention any evidence, which would support its opinion and also the witnesses may be called. If the Committee comes to the conclusion that there exist the sufficient evidence on committing the fraud or corruption, it recommends to the president of the Bank the adequate sanction and he will decide thereon within 10 days. The sanction is: (1) admonition, (2) decision on debarment, i.e. the decision that the entity is not entitled to gain the project financed by the Bank, (3) other sanctions at the discretion. The Committee may also recommend to sanction the individual or the company, which controls the respondent directly or indirectly or which is controlled by it. Decision of the president is final, immediately effective and it is published.

Source: World Bank Report Concerning the Debarment Processes of the World Bank.

Similarly as the World Bank also the European Commission started in March 2006 to intensify the works on the process of debarment of the entities connected with the corruption in connection with the public procurement, which started already in 2003. Misuse of the public funds and potential corruption risk is perceived by EU as the serious problem, despite the fact that the member states – except for most of the new member countries – have relatively good standing in the world chart of comparison of corruption extent. The Council of EU Ministers introduced on 13 December 2006[5] financial regulation, which contained also the revised debarment system relating to all organizations, companies and suppliers, which were found guilty of EU funds misusing.

5) Council Regulation (ES, Euratom) No. 1995/2006 dated 13 December 2006, which modifies Council Regulation (ES, Euratom) No. 1605/2002, which stipulates financial regulation on the total budget of the European Communities. Official Journal of the European Union.





Within this system the database of the entities was introduced, which is available only for the institutions administering the budgets. At the same time the system is based on the optionality – before awarding of the contract the institutions are not obliged to inspect the database. Implementation of the debarment system should have been completed by the European Commission and member states until the end of April 2007 (Jannett, 2006). In the period of this essay writing the implementation was not completed.

As it arises from TI recommendation, EU system should (TI 2006):

- be introduced with the aim to suppress the corruption, support reliability of the users, managers and providers of EU funds and also to support the change of the behavior;
- be consistent, which requires among others: creating of implementation recommendations; unified rules for functioning of
- debarment/sanctions;
- be guaranteed by the particular elements, which will provide a certainty of due process;
- be transparent and in particular to secure such mechanism, which will provide the authorized officers and public with the relevant information;
- be adequate, just, timely and accountable, which requires among others the following conditions: the due process must contain both the listing procedures and de-listing procedures; clear criteria must handle adoption of the discretion debarment; debarment must be automatic in res judicata cases; authorized officers should be obliged to control the registers before the contract awarding; mechanisms of the full and timely exchange of information on debarment should be adopted both by the member states and also by the international institutions; debarment should be applied reasonably and justly and it should take into account the attenuating circumstances (TI, 2006).

Discussion over the blacklisting introduction thus does not end, to the contrary it may be stated that now it intensifies in Europe. There exist many reasons for this: from the protection of public means and more effective expending thereof in the consequence of pressure of Maastricht criteria and neoliberal concept of economic policy, through the effort to fight against the corruption as such, calling for transparency to the ethical arguments.

Although it might seem at first sight that the debarment theme is relatively young issue for Europe, it is necessary to realize that not always it is possible to separate functioning of the blacklisting from the whitelisting or particularly to separate debarment from the certification. In the past the attempts were made to start the discussion on certification by the Czech branch of TI[6] however this initiative did not find the positive response (for more details see TI, 2005).

In connection with the above-mentioned facts we may say that besides other instruments as for example the transparent public procurement processes, publicly available lists of awarded contracts (www.centralniadresa.cz) etc., there exist two possibilities, which might be and sometimes also are applied in the filed of the public procurement: blacklists (i.e. negative instrument of sanction nature – debarment) and white lists (i.e. positive instrument, of motivating nature – certification). The practice shows that the blacklists are applied more often than certification, at least in the case of the public procurement and there is a simple reason for this. If the entity is to be put on the grey or blacklist in the consequence of suspicion of the corruption and misuse of public means, the costs for avoiding this (pay to avoid costs), and thus also the necessity to corrupt the debarment process are much higher than in the case of the white lists. In that case the costs for including in the white list

6) Concretely it was the certification of the non-profit sector.





and also the possibility to manipulate the certification process in its favor are lower (pay to get a benefit).[7] However in the practice we may find the parallel symbiotical functioning of both lists. In some fields they function more or less informally, however recently the pressure for their formalization has been growing. Before we deal with the weak spots of the blacklists and white lists and the possibility of their overcoming, let's mention several concrete examples from other countries, which relate to the public procurement.

Blacklisting in connection with the public procurement may be find as relatively well integrated practice in Great Britain, Federal Republic of Germany and the Netherlands, which differ by their scope of activities.

In the Netherlands there exists no state authority keeping the blacklists. Probably the only one is the Screening and Audit Bureau of the City of Amsterdam, which was established in connection with preparation of the subway building in the city in 1998. The reason for the establishment thereof was the need to prevent the misuse of the public means by the building companies (tax frauds, illegal employment, not-payment of social insurance). The municipal council formed the independent body, which has been functioning fully since 2000 and the content thereof is to control the procurement procedures and the procedures at the information providing to the third parties. At the authority establishment the stress was put on its independence, high qualification demands and control of information. Information is obtained from the publicly available sources and from the questionnaire, which is submitted to the applicants or possibly also the non-public sources are added (police and court records). The result is elaborating of the report on

7) Distinguishing to the costs avoiding and benefit obtaining see Governance and Economy in Africa: Tool for Analysis and Reform Corruption (1996) and Rose-Ackerman, Susan: The Political Economy of Corruption, p. 34-38, in Elliot, K. A. (1997), Chapter 2, http://www.iie.com/publications/files/chapters_preview/12/2iie2334.pdf, [cit. 2002-01-25].

consideration of the risk level of the given entity. The authority is financed by its "customer", i.e. the competent body or department. For the first three years of its activities it carried out approximately four hundred of screenings, of which only about thirty was led to the detailed investigation stage. In 80% of the cases the authority found mistakes, in 20% of the cases the reasons were found for exclusion of the companies from the procurement process.[8] At first the response of the companies to the establishment of this authority was very irritated, in particular concerning the issue of information providing (van der Wielen, 2003).

Also in Germany there does not exist the regulation of the debarment process at the federal level. It is estimated that approximately 1-5% of public procurement shows the corrupt activities (EUR 3-15 milliard), these are most often the price machinations, machinations in the selection procedure, frauds, misappropriation, altering or counterfeiting of documents. As well as in the Czech Republic there exists no criminal law liability of the legal entities. General reviews and investigating principle exist on the federal level (Federal Auditing Office), but it intervenes in cooperation with the Economic Chamber only in the case of breach of the procurement regulations and if the rise of damage is proved or presumed. However the lists of unreliable persons exist only in the half of 16 federal countries, the oldest ones come from 1995. The basic criterion of including in the list is the preceding exclusion of the entity from the tender and the rules are more or less the same in all the federal countries. They differ only by the period of placing of entities on the blacklist (6 to 36 months) and in the amount of the public procurement, when it is obligatory to use the information from this list (EUR 25 to 50 thousand). However the voices requiring the federal regulation of the blacklisting begin to be heard more often. The blacklists are created on the basis of internal regulations and the main argument for the introduction thereof is increasing of the effectiveness and fight against corruption. The lists are kept by the state ministry, which usually does not have the power of decision in the public procurement process (mostly it is the state ministry of finances or any of its divisions). This authority only keeps the lists and adds the information, which is sent to it. The entity is placed on the list, if its unreliability was proved in the unchallenged manner. The body, which announced the public contract suggests its placement on the list.

The local administration does not use the lists very often in the consequence of the high autonomy, since the information in the list is not really public, is not sufficient or effective. Therefore the voices for federal regulation are rising (Rhode-Liebenau, 2003).

Experience with use of blacklisting in the field of public procurement in the Great Britain has been lasting for approximately a quarter of century, although the first case of auditing controlling offices comes from the half of the 19th century, when the district controlling service was established, which was to check the accounts of local governments in England and Wales. Some sources look for the roots even in the 14th century, concretely as early as in 1314 it is possible to find the reference to the auditor of the ministry of finance.[9] There are two institutions operating here at present.

The first of them, the Audit Commission, established in 1983, has been auditing the local governments and district offices and it employs about 2, 500 employees. Thus it is the important controlling mechanism, which covers the whole territory, but it is, in the consequence of delegation of authorities, divided into the relatively

8) In the fist year the authority rejected 45% of all the applications, at present the number stabilized approximately to 10%.

9) For more details see the website of the Audit Commission – www.audit-commission.gov.uk and the National Audit Office – http://www.nao.org.uk.

independent regional auditing offices of England, Scotland, Wales and Northern Ireland. The main commission of this independent authority is the liability to secure, so that the public means were expended economically, purposefully and effectively and thus to reach higher quality of local and national services for citizens/ public. Annually about 11,000 entities are checked in England, which manage 180 milliard pounds a year. The control covers the local governments, health care, housing, local security, fire protection and safety bodies. The authority functions at the same time as the guard of information on the public services quality – it makes recommendations and offers best examples (see the website of the Audit Commission).

Another institution is the National Audit Office, which has approximately 800 employees and it was established on the basis of law also in 1983. The office carries out the audit of statements only at the central bodies of the state administration. Since it is authorized by the Parliament, it is independent of the government and it presents its reports only to the Parliament. The office carries out the financial audit and also the findings and it informs on the so-called value of money, i.e. the economy, efficiency and effectiveness (see the website of the National Audit Office).

Both the entities form the biggest public auditing structure in the world. The auditors have relatively strong competences and the whole state is covered by means of the regional offices. They may for example check all the employees of the public sector and the entities, which compete for the public contracts. If they come to the concrete suspicion, they may investigate, with the assistance of the police, also wide groups of persons and entities. Still this check (whether being of preventive or "probative" nature) is not only the privilege of the office proper. Approximately 30 % of its activities is implemented on the basis of the contracts with the private sector (with the companies KPMG, Deloitte, PWC, Baker Tilly and others).





The office is also financed on the "market basis" – each of the checked entities (clients both from the public and private sector) pays the annual fixed sum. The rule is applied that the fair entities without misconducts and discrepancies pay less. The offices thus create parallely the blacklist in combination with the white list.

In the public procurement process the main illegal acting is bribery, corruption, conspiracy and forming of cartels and collusions. The possible punishment at the physical entities is penalty, ban on activities, property confiscation or imprisonment, at legal entities withdrawal from contract, penalties and compensation for damage or exclusion from the white lists.

In spite of the above-mentioned facts there exist several problems in the system of the Great Britain. The first of them relates to the disunited procurement process and non-existence of the central assignment office, as well as the control authority does not exist on the central level. Sharing of information and difficulties at proving the corrupt activities are also very problematic (Elliot, 2003).

## CERTIFICATION – POSSIBILITY ALSO IN FIELD OF PUBLIC PROCUREMENT?

The issue of the whitelisting is most often connected in the literature with the certification. The main sense of the certification is to grant the mark of quality to such products or entities, which fulfill the criteria fixed in advance. However it is not only securing of the certain standardized activities or results and it is not the mere accreditation, which would decide on the existence of the entity. The certification is closely connected with the issue of transparency, quality and trustworthiness. The certification is a common phenomenon in many fields (for illustration the following may be mentioned: ČSN, hygienic standards, certification and attestation standards etc.).

Certifications may be generally divided into two approaches: to the system based on performance and to the system oriented approach. Both of them co-exist mutually but from the point of view of the public procurement the first approach shows as the primary, on which the other approach may be based. Generally all the systems are based on three pillars: standards determination, evaluation and accreditation.

The issue of certification appears also in the field of public procurement. In this sense the certification is deemed to be guarantee of quality of the given product or process or company in relation to the public procurement. In the practice the whitelisting mostly exists concurrently with the blacklisting, as we have seen on the example of the Great Britain. Besides this there exist the certification agencies, as e.g. the Universal Public Purchasing Certification Council (UPPCC) in the United States, which is an independent





organization, which was established in 1978[10] for the purpose of administration of the programs of the Certified Public Purchasing Office (CPPO) and the Certified Professional Public Buyer (CPPB). Both these programs are highly valued and respected by the experts in the public procurement and employees of the public sector. At present the agency certified about 10,000 experts in particular in the United States and Canada and also in many other world countries.

It is of the interest, who is certified in the British and American system. One of the possibilities is to limit certifications or possibly putting on the blacklist only to the parties interested in the public procurement. British and American approach however took another direction – they both certify both the interested parties and the principals of the public contracts. It seems that this system is more suitable (double transparency) and it leaves smaller corruption risk than the unilateral certification systems. Their effectiveness may be supported by the blacklisting both in the public and private sector.

Relatively widespread example of the certification in the field of the public procurement is the program of the sustainable management in the field of forestry used by several EU member states. There exist in total 5 certification programs in the world, of which some have been developed already from the 70-ties.[11] Also the Czech Republic engaged in one of the certification systems in the field of forestry. Similar certification systems are in many other fields – ISO standards, successful applicants for licenses, permits, etc. In the field of the public procurement these are most often the lists of the companies, which fulfill the contracts, meet the standards, etc.

10) Although the agency was established as late as in 1978, CPPO program arose on the instigation of the National Institute of Governmental Purchasing, established in 1944, already in 1964. The other program (CPPB) arose as late as in 1991.
11) For more details concerning the issue of certification in forestry see Mechel et al., 2006.

## WHAT SYSTEM FOR PUBLIC PROCUREMENT AND FIGHT AGAINST CORRUPTION?

Although the blacklisting is mainly criticized and rejected, we will show here that in the case of the public procurement and corruption it may – let's stress may – under certain circumstances lead more to the positive results. There exist no unified rules or recommendations, how this can be reached. Still on the basis of the experience with the international debarment and also on the basis of the practice and experience of certain national states, certain recommendations may be formulated, which should help to avoid the weak spots. The author will deal here in particular with the process proposal and basic setting of the system.

It was mentioned above that the blacklisting and whitelisting relate to each other and they are usually, whether formally or informally, applied concurrently. In the considerations on the possibility of introduction thereof however the tendency to establish the blacklists lasts. More suitable is introduction of the combined German and British model – the duty to get the contracts exceeding certain sum checked and publish the cases of the entities, which probably committed any of the misconducts defined in advance (blacklisting), possibly completed by the list of trustworthy and trouble-free entities (whitelisting).

The related question is, to whom the lists will relate. Every public procurement, as well as the corrupt acting, is minimally the bilateral relation between the offering party (seller) and demanding party (purchaser). Then the lists may relate either only to the tenderers, which is the most frequent approach, or to the principals of the public contracts. Combining and publishing of these two





types of blacklisting (possibly with the whitelisting) will lead to greater transparency of both private and public sector and it will make the space for frauds and corrupt acting more difficult.

Great discussions also relate to the relevant group of entities, which shall be investigated, or possibly put on the lists. It is also often discussed, whether it is enough to impose sanctions only on the tenderers or also on all other entities, with which the affected person/company is connected by capital, personnel or in other manner. For example the World Bank calls for this regulation.

Thus in principle two procedures may be suggested from the point of view of the public procurement and corruption – "minimalist" and "maximalist" version. In the minimal form the blacklists of both the principals and tenderers are concerned. Maximal version is administratively more complicated, since it includes also the white lists and certification process, which – in the consequence of independence securing – should be kept by another entity.

This provokes another question, who will be authorized to keep and fill in the information or possibly to investigate. Will it be a special agency functioning on the private basis or will a certain entity of the public sector be authorized to keep the lists? In practice it is possible to consider also functioning of certain self-regulating mechanisms, when the entities participating in the procurement proceedings keep on the blacklist the entities of their own branch, which commit the misuse of means and corruption acting. However not always it is possible to establish the self-regulation, in particular if it is the strongly corrupt field or branch. However there exists no unambiguous recommendation in this field as we have shown on the example of Germany, Great Britain or the USA.

Will a completely new body or office be established consisting only of the members of organization or will also several experts "from the outside" be included therein? Including of external experts may on one hand strengthen reliability and transparency,

however on the other hand it may bring many complications (higher administrative demands etc.). For higher transparency also the committee is usually appointed, which carries out the investigation and submits the sanction proposals from the body, which has the power of decision and strength to enforce its decision. The independent issue is also the composition of the committee and of the investigating body. Here the field being investigated will be very important. However mostly it is recommended so that the experts in the given field sat here.

One of the most important questions is defining of the basic criteria, which will relate to the field of the public procurement. The most accurate concretization of the criteria, which must be met by the entities or particularly the list of the ones, which will be the reason for initiating of the process on exclusion of the entity from the competition and its putting on the blacklist, are the main tool for establishment of the "rules of the game" in future. And it is not only the organizational but also procedural securing.

Critical role is played by the suggested procedures for the recourse in the form of the blacklist. If the investigating committee finds out that the binding rules were probably breached and continuation of the unfair activities threatens, there should exist the effective procedure, how to limit them, including the sanctions. In practice the following are considered as such breach: initiation of the bankruptcy proceedings, corruption, cartel agreement, non-payment of social benefits or taxes, price machinations, counterfeiting of documents, money laundering, unjustified or unauthorized increasing of the price of the contract or altering of the technical documentation and technical parameters of the contract etc. On one hand these are in many cases the independent crimes, which may be solved within the criminal law, but the effort of the blacklisting is to prevent this acting as soon as possible. On the other hand these may be – and it shows quite clearly in practice – many





administrative offences, which are not monitored in detail and may represent a serious problem. Not only the lawyers but also the offices and business entities have been calling for establishment of the register of administrative offences in our country for several years, but still everything is in the stage of discussion.

If the suspicion arises of the breach of rules, it should be investigated by the investigating body. If the investigation finds out that there exist the reasons for initiating of the debarment process, the primary role is to gather materials and documents. The affected entity should be informed on initiating of the proceedings as soon as possible and it should be provided with the period for response and delivery of the documents for the proceedings. It is also possible to hold the informal hearing before the proceedings proper. The possibility should be given to the affected entity to defend itself and deliver as much evidence as possible, which would rebut the suspicion. However the question is, what period retroactively should be the effective period for finding the evidence. Should there exist any period for the "retroactive" effectiveness at all? What should be the period of limitation? What will be possible to consider as the extenuating circumstances?

Form of the applied sanctions may be very rich. The clear definition of the so-called material and less material misconducts and the adequate sanctions assigned thereto may facilitate the whole procedure considerably. As for the period of the applied sanction, it may be permanent or temporary (usually 3 or 5 years). Temporary including of the entity in the "grey list" is also possible. However any time periods should not be in contradiction with the Civil or Commercial Code, on the other hand the risk of the intentional extension of the proceedings by the affected entity should be limited. The time periods should be such to be able to prevent effectively continuation of committing the act. From the point of view of the strength it may be in the form of the mere admonition with

the preventive effect in future or the permanent punishment with the possible recourse within the criminal legislation.

If the entity is put on the grey list, some rights may be restricted for the period of investigation. Some organizations argue that it should be so, since the risk of continuing in the misuse of the financial means, corruption and other acts decreases and they argue by the "preventive temporary intervention". Others consider this as discriminating (see the ambiguous attitude of the World Bank, where the voices begin to rise for introduction of temporary limitations). At least the possibility of the fast appeal should exist, when the affected entity would mention the reasons, why it should not be affected by the temporary restriction. Also the issue of the impact on the entity should be solved clearly, if the harmful acting is not proved, i.e. certain "rehabilitation".

In practice it is possible to hold the whole debarment process publicly or the public is provided only with the resulting information on putting of the entity on the blacklist and investigation is published retrospectively. The latter from the mentioned procedures simplifies the "rehabilitation" of the entity, but besides this also the defense mechanisms must exist against the unjustified investigation of entities, for compensation of the lost profit, reputation harming etc. The important means of defense are also the appeals against the decision.

Another issue closely connected with the sanctions is also the erasure from the blacklist. The entity is usually removed from the blacklist after expiring of 3 to 5 years. The question is, whether the entity itself may ask for review also before expiring of the given period in the case that the circumstances, which caused its placement on the blacklist, passed away.

Critical role in the debarment process is played by the provided and shared information. Its obtaining and also its sharing with other entities may be problematic. In particular the manner





of data protection is not simple, as we have shown on the German example.

On the other hand many recommendations show that it is suitable so that the process of placing on the blacklist was the administrative process, although the part of the problems with introduction of blacklisting is of the legal nature. Introduction of the blacklisting must be preceded by the strong confirmation and clear proposing of rules based on the valid legal order. Formalization of clear procedures, periods and individual procedures will contribute to the openness and transparency of the whole debarment. It is necessary to realize that the main sense of the blacklist and other lists is not only creating of the lists of unreliable or particularly reliable entities, but in particular the fastness, with which they may work really. In an ideal case they should work faster than in the event of the protracted court disputes. Also the so much praised preventive effect may not be omitted. The faster the proceedings and substantiation are, the more effective the process will be.

In the case of forming the lists and registers there is not agreement, whether it is more suitable to build up one system, one accessible register (whether publicly or with limited access for the defined group of entities), or more lists, which will amend one another and will be accessible only for the limited group of entities. In particular the latter variant is more demanding as for the communication among the individual entities.

The important question is financing of the whole system of keeping, administration of the blacklists and arising recourses, which will depend to the considerable extent on the amount and accessibility of the register – thus whether it will be financed from the public means or operated on the "private" basis. The latter possibility may be applied to the limited extent in particular within the certification mechanisms.

# RECOMMENDATIONS IN FIELD OF BLACKLISTING

To minimize the risks and for the effective functioning of the lists in the field of the public procurement in connection with the corruption it is necessary to take into consideration some weak spots already at the basic setting of rules of the system functioning. Here we summarize some questions, which might arise in the consequence of the practice and experience with functioning of the blacklists.

FRAME 3 **ISSUES OF BLACKLISTING AND WHITELISTING**

The blacklists and white lists bring, despite their positive contributions, some weaknesses as is shown in the below-mentioned list. Just because the blacklists try to debar the problematic entities, they are connected with several ambiguities:

- vagueness of criteria for including the entity in the list
- possibility of other recourse for the crime
- it is not clear, who should be debarred – company or management
- should only the legal entities or also physical entities be concerned
- low degree of standardization of sufficient proofs for sanction
- question how and when to remove the entity from the blacklist
- mostly also the practice of the whitelisting is necessary
- if the company is put on the blacklist, will it still exist?
- small extent of blacklists
- list will never be complete
- almost no increase in efficiency of public procurement
- high costs
- problem with human rights or natural law
- increase of regulation in society
- potential space for corruption
- blacklisting does not have to be transparent
- very small experience





Whitelisting is usually valued for the support of honest behavior, openness and also transparency. Still there appear some difficulties concerning the white lists:

- necessity of permanent maintaining of the white list and regular updating
- high expensiveness
- relatively great extent
- necessity of clear rules for “erasure“

Source: Elliot, 2003.

Moran et al. (2004) points out to the basic questions and spots that are critical for the effective functioning of the debarment process. It considers fastness and effectiveness as the most important – slow and ineffective process will subvert the purpose and sense not only of the public contracts, but also of the public policy. Another question is the several times mentioned criteria, on which the debarment process will be based. The more concrete the list of criteria, which will be the basic indicators, which must be or must not be fulfilled, will be, the better. The content and composition of individual criteria may be distinguished according to the field, to which the public procurement relates – from the economic, through legal, ecological, social or other criteria. Also the extent of the importance thereof must be stipulated. Another point is difference between the administrative and legal (court) approach to the debarment. The court approach, unless the very material breach of the legal order is concerned, may lead to the serious delays. In particular in the field of corruption it turns out that the best manner how to cope with it, is not adopting and drafting of new acts and legal procedures, but the flexible administrative and organizational approach (Moran et al., 2004, 23). Introduction of standards (both internals and externals), best examples and recommendations is not only often sufficient, but also cheaper and

more complex. Administrative procedure may have a certain nature of call. Lack of information, obtaining thereof may be problematic for the debarment process but also for the decision-making on the public procurement. One of the most important moments is also defining of sufficient evidence in the debarment process.

In the other place Moran also offers the basic elements, which the debarment process should contain and which may simplify the whole procedure and introduction thereof considerably. The following belongs to the main recommendations:

- process should be mainly of the administrative nature, rather than legal (court),
- administrative process should be of a certain nature of call and appellate review,
- investigation of potential breaching should be well secured and managed,
- if the breach is proved, the severe punishment should follow,
- possible process on indemnification should be credible,
- criteria for length and extent of debarment should relate to the offences, offenders and importance,
- also the extenuating circumstances should be defined,
- any debarment policy should be clearly defined and incorporated in all public documents relating to the public procurement,
- all the policies leading to the debarment must be duly secured.

Of course the above-mentioned list is not final and it may be completed.





# CONCLUSION

May thus the blacklisting or whitelisting function effectively? The practice, at least in the issue of the public procurement and corruption, shows that this instrument may be instrumental to a certain extent not only from the point of view of making the corrupt acting more difficult, but in particular from the point of view of the public procurement, transparency and effectiveness thereof. Although the blacklisting and whitelisting is relatively widespread and function both on formal and informal basis, the public does not response to the open introduction thereof positively. Still they may be effective at least in some fields.

Several possibilities of introduction and combining of blacklisting and whitelisting is offered. In the minimum version it is possible to introduce only the blacklist of the tenderers or possibly completed by the white list. This approach may be problematic, since the public procurement, as well as the corrupt acting is the bilateral relation. More difficult approach is thus introduction of not only the blacklists of the tenderers, but also of the principals (possibly completed by the white list), including e.g. the internal audit of the public sector. It is surely more demanding procedure, however the well proposed procedures in the field of debarment as the instrument preventing the misuse of public means may increase its effectiveness, transparency and functionality.

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The National Audit Office: *www.nao.org.uk*
The Universal Public Purchasing Certification Council: *www.uppcc.org*
Transparency International:
*www.transparency.cz, www.transparency.org*

## DICTIONARIES

heslo blacklist: *www.answers.com/topic/blacklist*
*http://en.wikipedia.org/wiki/Blacklist*

PART THREE

# BLACKLISTING AS EFFECTIVE INSTRUMENT OF FIGHT AGAINST CORRUPTION IN FIELD OF PUBLIC PROCUREMENT?

JUDR. ING. RADEK JURČÍK, PH.D.

# OBJECTIVE AND METHODOLOGY OF STUDY ELABORATION

Corruption in the field of public procurement is a current topic, often discussed by politicians, citizens and entrepreneurs. In this context, experts speak of saving public funds on the assumption of limiting corruption in the field of public procurement. If we concentrate on this field and look for the answer how to minimize the corruption, we must not omit one of the anti-corruption instruments, which is the so-called blacklist. The blacklisting of entrepreneurs may be defined as the registration or listing of the suppliers undertaking their business activities in the field of public procurement, who are registered in it because they committed a unfair act defined by legal regulation (breach of public-law duty), e.g. bribery, and as a consequence of this, such suppliers may not be considered to be reliable. These suppliers will be entered in the register (blacklist) with the consequence that they may not participate in tenders in the field of public procurement for a determined period.

The objective of this study is to analyze blacklists as an instrument in the fight against corruption, to point out experience with this anti-corruption instrument in selected countries, and to relate experience with lists existing in the Czech Republic, which have the character of so-called blacklists or particularly to analyze the historical experience with applying of blacklists in the Czech Republic.

The legal order of the Czech Republic presently contains lists or registers of the suppliers (parallel to blacklists), which are:

- *legally regulated* – thus it is the instrument created by the legislator. Such lists exist, although they are not concentrated upon and created primarily for the field of public procurement (e.g. penal register), see below.

- *legally unregulated* – these are blacklists created by individual principals in consequence of their response to the unfair practices of some suppliers. This practice at some principals is not directly supported by legal regulations regulating public procurement, however it is not an illegal practice, rather an unregulated practice. Reference to this practice will be also mentioned within answering the key question of this study, whether it would be suitable de lege ferenda to introduce for the field of public procurement the register of suppliers in the form of the blacklist of entrepreneurs, who will be, in consequence of proving of certain acts, entered in such register and disqualified for a determined period from the public procurement market.

Blacklists may be divided on the criterion of whether they are kept specifically for the field of public procurement or not. The study will deal with both types of blacklists and, will concentrate on the need of the establishment of the blacklist (list of suppliers) specifically for the field of public procurement, which de lege lata does not exist.





## EXISTING BLACKLISTS

Lists (registers) already exist in the Czech Republic which disqualify particular physical entities from the economic activities in the commission of the material act. These are the following registers:

- *Penal Register.* This is a register of penalties for crimes committed. Thus, if a physical entity commits a crime, a penalty may be imposed on it, under the conditions stipulated by law, likewise of a ban on activities in a certain branch (e.g. in the field of public procurement or auctions etc.). If the physical entity in question has not respected its punishment, it would be committing a crime. The fact that the given person is irreproachable in the field of public procurement, and is thus not registered in the penal register (which is a list of physical entities where the information on the type of the crime and punishment imposed on the physical entity is kept for a fixed period of time), is usually proved by an extract from the penal register not older than 90 days within the basic qualification presumptions or by a statutory declaration in the case of public contracts of smaller quantity.
- *Register of Offences and other Administrative and Disciplinary Offences* – at present such a register does not exist on the central level. Offences are kept in lists of individual bodies, which are authorized to judge such offences. The punishment for the offence may be the suspension from performance of certain activities. The incomplete list of offences is mentioned in the Misdemeanors Act, where the punishment of banning on activities is also contained. Also, the other legal regulations which give the competence to the self-governing chambers to administer the matters of its members (professional association)

may impose for disciplinary offences of their members, the suspension of activities or removal from the chamber, which leads to the complete ban on the performance of the respective free profession. More self-governing professional chambers (e.g. Czech Bar Association, Notarial Chamber, Chamber of Tax Advisers, Chamber of Authorized Engineers, etc.) exist in the Czech Republic which are authorized by law to execute self-governing matters of their members. Each chamber keeps a list of offences of its members, including imposed punishments, and if the punishment was imposed in the form of ban on the performance of activities for a certain period of time, it is the chamber's matter to monitor this.

- *Bank Register* – groups of the Czech banks and branches of foreign banks participate together in the operation of the Bank Register of Client Information (the so-called Bank Register or BRKI). The personal data of the bank "credit" clients – physical entities (both entrepreneurs and non-entrepreneurs)- is processed in this register. Beside the Bank Register of Client Information in the Czech Republic, the creditors are interested, for the purpose of decrease of risks and increase of quality of offered products, in obtaining data on the credibility and reliability of its clients in the future, also from the Non-banking Register of Client Information in the Czech Republic (NRKI), which is a common database of data created on the basis of information which the non-banking creditor entities provide one another (in particular leasing companies and companies providing consumer credits) on contractual relations between the creditor entities and their clients. These registers function effectively.

The principals and other physical and legal persons do not have access to the registers mentioned (penal register and offence register). These lists are usually not publicly accessible.





Blacklists are presently a topical and heavily discussed issue which is also confirmed by the fact that the present government set the task for itself to introduce such a register of suppliers within the scope of the fight against corruption.

Blacklists also exist in some business sectors, e.g. a blacklist of air carriers exists in the EU (www.accka.cz). This list will be always updated in case of changes. Everyone may inspect the list anytime and thus find out which airline companies do not fulfill the safety standards of the EU and which are even prohibited to fly to EU countries. The client thus has the possibility to avoid these airline companies.

## TENDENCY TO INTRODUCE BLACKLISTS IN SELECTED COUNTRIES

### RUSSIA

News in the press (Hospodářské noviny dated March 30, 2007) has appeared on corruption in Russia, stating that a "register of shame" is being introduced in Russia in which physical entities will be mentioned which have been caught for theft or corruption, or which have otherwise seriously breached the rules of their profession. After the introduction of the register (expected date of introduction: April 2007) the persons registered in it should be at a disadvantage in seeking a job. On the new "shame list," the names of the persons will be stated who were convicted of corruption and economic offences and who may not occupy managerial positions in the state as well as private sector for a period stipulated by

the court. The blacklist will not only be limited to corrupt officers and entrepreneurs. It will also include people whom the court has prohibited from performing their profession – doctors, teachers, salespeople, or also policemen. They are then not allowed to work not only in their field in the state sector, but also in private institutions. Their management is obligated to verify in the register that "disqualified" employees do not work in their companies.

Both Russians and foreigners may ask for the data from the list, which was being prepared for almost a year. Similar databases have already been functioning in the United States and in Western Europe, yet the Czech Republic does not have them. Russian laws previously required employers to check the background of those they employed with the police. In fact, however, there was nothing to refer to without the register. The register is to be kept by the Ministry of Interior, which will modify it according to the information from the court. This concerns the response to a relatively widespread practice: when people convicted of corruption establish their own companies after leaving the prison or get the well-paid jobs in other companies for not exposing their accomplices. The general prosecution office states that the volume of bribes is on the level of the Russian state budget – it is estimated at 240 billion dollars each year.

The recent screening of federal structures and entrepreneurial projects allegedly detected almost 50 thousand cases of corruption in the civil service. According to the Minister of Interior, Rašid Nurgalijev, about ten thousand officers were brought to trial last year.

In an index of corruption perception issued last year by the organization Transparency International, Russia took 127th place, thirty places worse than it was in 2004.

"Bribery proliferates mainly on the regional and municipal level," says chief of the Federal Security Service Nikolaj Patrušev.





"Subversives try to penetrate the governmental system, seize the companies and banks and seize influence over the whole fields." This phenomenon harms the investment climate in Russia and will probably become one of the main subjects before the December elections of the State Duma.

## GERMANY

A draft of the Act on Economic Competition is being discussed (BMWA) in Germany. In accordance with Section 126a, List on Inadmissible Enterprises (entrepreneurs), at the Federal Office of Economics and Export Control the central register may be established on inadmissible enterprises which were disqualified by the public principals due to breach of the Public Procurement Act. The register also includes the disqualification of the enterprises in connection with public procurement, which, under the legal order of Section 127 paragraph 1 No. 1, do not reach the stipulated value.

The public principals disqualify enterprises that have committed serious violations, such as bribery or fraud, from public contracts regardless of the monetary value of the public contract. The establishment of the central register on inadmissible enterprises is allowed at the stated office so that all the principals are informed of the disqualification.

## THE NETHERLANDS

No central register exists in the Netherlands, although inspectional bodies of the auditing type on the local level are established which can inspect the reliability of the principal. The procedures mentioned on the local level or on the level of professional cham-

bers also exist in Germany. It is not precluded that principals in the Czech Republic also proceeded in such a way, since the law allows them to inspect the documents presented by the tenderers in the bids and, in the case of mentioning the date, which results in the failure to fulfill qualification, to disqualify the respective tenderer from his further participation in the tender.

## BLACKLISTS IN LEGAL REGULATIONS ON PUBLIC PROCUREMENT IN THE CZECH REPUBLIC

### ACT NO. 199/1994 COLL.

The blacklisting of suppliers was included in Act No. 199/1994 Coll., on Public Procurement. This list was introduced by an amendment to this Act, which was carried out by Act No. 28/2000 Coll. effective as of 1 June 2000. This blacklist was valid until the end of the effectiveness of Act No. 199/1994 Coll., that is, until our entry into the EU on 30 April 2004, when Act No. 40/2004 Coll. annulled Act No. 199/1994 Coll.

The blacklist was included in Section 2b paragraph 1 letter g) and Section 63 Act No. 199/1994 Coll. The concrete manner of proving the qualification precondition mentioned in Section 2b paragraph 1 letter g) of the Act was not stipulated in the Act. The tenderer might declare the fact that he was not debarred from the participation in public procurement under Section 63 of the Act, in his bid in the form of the statutory declaration. If, however, he did not do so, it was not the reason for his debarment from the





participation in the public contract. The principal had the possibility to check, whether any of the tenderers were disqualified from the participation in public procurement under Section 63 of the Act, on the website of the Office for the Protection of Competition (www.compet.cz), where the special site was established for this purpose.[1]

The tenderer is barred from participating in public procurement and entered in the Internet list under the conditions defined below:

- if the tenderer's employee or
- tenderer, if the entrepreneur commits the below-mentioned crime as a physical entity,
- partner of the business company or
- member of the statutory, control or supervisory body of the tenderer

is legitimately sentenced for a crime related to public procurement or for another intentional crime and there are misgivings in consideration of the nature of the contract that he will commit the same or similar crime, the supervision body shall disqualify the respective tenderer from the participation in public procurement for the period, which it stipulates in its decision, however not longer than for the period of five years.

As the website of the Office for the Protection of Competition mentions, under Section 63 of the Act, no tenderer has been debarred so far. The legislator failed to stipulate in this case the form of proving the reasons for the debarment. There exists either the possibility for the principal to check this fact on the website mentioned or to require in the assignment of the public contract

1) According to the standpoint of the Office for the Protection of Competition dated 3 May 2000 (1002/2000-150-Hm) the manner of proving of the qualification precondition stipulated in Section 2b paragraph 1 letter g) Public The Procurement Act was not stipulated by law. Up to now however, no tenderer has been debarred from its participation in the public procurement under Section 63 of the Act. Also it was not possible to preclude that the principal expressly stipulates in what manner the tenderers are to prove this qualification precondition (probably the most suitable manner is the statutory declaration) in the assignment of the public contract.

proof of fulfillment of this precondition in the form of the statutory declaration; at the absence of this requirement the tenderers would not make a mistake, if they prove fulfillment thereof by statutory declaration.

Exclusion of the tenderer for the above-mentioned reason is for the time being only the dead provision and it is the question, whether any tenderer will ever be debarred, also since proving the criminal activities in question is difficult and the effectiveness of the detecting thereof by the bodies active in the criminal proceedings is very dismal.

To provide the complete information it may be noted that if no tenderer was disqualified from the participation in public procurement under Section 63 of the Act for almost five years of the existence of the blacklist, it may not be imputed only to the difficulty of this institute, but rather to the non-effective detecting of the corruption practices in particular by the bodies active in the criminal proceedings.

## ACT NO. 40/2004 COLL., ON PUBLIC PROCUREMENT

This Act valid until 2006 did not contain the legal regulation of blacklists, however it did contain the legal regulation of qualification, the fulfillment of which was a condition of the supplier's participation in the procurement proceedings for the subject of the public contract. Qualification was deemed to be the capability of the supplier to fulfill the subject of public procurement.[2] Act No.

2) Only those tenderers or bidders are qualified who fulfill all the basic qualification criteria stipulated in Section 30 and all other qualification criteria stipulated by the principal for the concrete public contract. The tenderers or bidders must also prove the authorization to undertake business activities, if stipulated by the special legal regulations for the fulfillment of the respective contract, and in justified cases to prove professional qualification or membership in a certain professional organization.





40/2004 Coll. required the fulfillment of four kinds of qualification criteria:

- fulfillment of basic qualification criteria – proof of the supplier's reliability, that he did not commit a crime (or members of the statutory body in the case of a legal entity), that he does not have any debts to the public health insurance and social insurance systems, etc.,
- fulfillment of other qualification criteria which prove the level of financial, economic and technical capability of the supplier and quality security under the type, extent and complexity of the assigned public contract. Requirements for fulfillment and proof of other qualification criteria are stipulated by the principal under a concrete public contract. It is up to the principal to which extent and in what manner other preconditions for qualification will required.
- proof of authorization to undertake business activities, including presentation of the Certificate of Incorporation or extract from other register not older than 90 days, if the tenderer or bidder shall be registered in it under special legal regulations; authorization to carry on the business activities may be documented by the tenderer or bidder in the original or in the officially verified copy,
- proof of professional qualification or membership in a specific professional organization, if required for the fulfillment of the public contract under special legal regulations.

As for the qualification of the suppliers, it must be emphasized that this Act stipulated the irrefutable legal presumption that, if the tenderer in the bid, or possibly the bidder, who applied for participation in closer proceedings or in the proceedings with publishing, does not prove fulfillment of qualification (e.g. he is not authorized to undertake business activities in relation to the

subject of the fulfillment of the public contract), then he is not capable of fulfilling the subject of fulfillment of the public contract professionally. Logically, such supplier is then disqualified from further participation in the public contract.

As has already been suggested, the trustworthiness of the supplier was proved above all by the fulfillment of the basic qualification criteria. According to this Act, the basic qualification criteria are fulfilled by the tenderer or bidder,

- who is not in liquidation,
- against whom bankruptcy has not been declared, or bankruptcy was not cancelled for lack of property in the past 3 years,
- who does not have arrears of taxes in the tax register,
- who was not legitimately sentenced for a crime, or the sentence of the crime was overturned, the factual basis of which relates to the subject of business activities, if a physical entity is concerned; if it is a legal entity, this condition must be fulfilled by the statutory body or each member of the statutory body, head of the organizational unit of the foreign legal entity or the representative authorized by the statutory body,
- who does not have arrears of insurance premium and of penalty on public health insurance and contribution to the state unemployment policy, with the exception of cases where repayment in installments was permitted and there was no delay in the payment of installments.

The tenderer or the bidder proved the fulfillment of the basic qualification criteria in the following manners:

In the case of public contracts over the limit:

- by statutory declaration,
- by an extract from the Penal Register or by other corresponding document not older than 6 months,





- by statutory declaration or possibly by the confirmation of the respective chamber (it was up to the principal, what form it required and whether it required it at all), whether the supplier was punished disciplinarily in last three years (for more details see the comment to paragraph 3).

In the case of public contracts under the limit: only by statutory declaration; with these contracts it was possible to fulfill the proof of all the qualification by statutory declaration.

Unlike blacklists, proof of the necessary qualification was on the part of the supplier, and the principal was entitled to inspect the correctness and truthfulness of the data proved by the supplier (or it might authorize the third party to do so).

### ACT NO. 137/2006 COLL. AND ACT NO. 139/2006 COLL. AND AD HOC ESTABLISHED BLACKLISTS BY PARTICULAR PRINCIPALS

The legal regulation of public procurement de lege lata is formed by Act No. 137/2006 on Public Procurement (hereinafter referred to as ZVZ), which has been in effect since July 1, 2006 and which also annulled Act No. 40/2004, and by Act No. 139/2006 Coll., on Concession Procedures and Concession Contracts (Concessions Act), which, however, refers in the field of qualification to the Public Procurement Act. The Public Procurement Act pays special attention to qualification, but it does not contain (as well as the previous Act No. 40/2004 Coll.) any legal regulation concerning blacklists. With qualification, however, the Act enables the principal to find out whether the bid was legally and economically founded, and thus whether the supplier is capable of fulfilling the subject of the public contract and is a trustworthy supplier. Qualification is interpreted here in similar manner as in Act No. 40/2004 Coll. Fulfillment

of the qualification is then the precondition for:

- the supplier's participation in closer proceedings, in proceedings with publishing and in the competition dialogue,
- the evaluation of bids in the open proceedings and in the simplified sublimit of the proceedings.

Arrowsmith fittingly defines the qualification in such a manner that it is necessary in all public contracts to prove that the supplier has the legal capacity to implement the public contract and the physical entity concluding and undertaking the acts in the procurement proceedings is entitled to act in the contract on behalf of the supplier.[3]

In accordance with the European procurement directive, the Act distinguishes between four basic types of the preconditions for qualification for the public principals:

- basic preconditions for qualification,
- professional preconditions for qualification,
- economic and financial preconditions for qualification,
- technical preconditions for qualification.

Of these four types of preconditions for qualification, the basic preconditions for qualification relate to the trustworthiness of the supplier. One of the conditions which such supplier must fulfill is the fact that he has not committed improper acts in the form of criminal offences, tax offences, offences consisting of debts to health and social insurance, etc. However, the Public Procurement Act or the Concessions Act does not include any list (register) which would contain a list of suppliers which are not allowed to participate in the procurement proceedings. The institute of qualification of the suppliers is based on another construction – the supplier proves fulfillment of the qualification in his bid. He is not a priori debarred from participating in the procurement proceedings on the subject of public contracts in accordance with the Public Procurement Act, if he proves fulfillment of the qualification.

3) See Arrowsmith, S. The Law of Public and Utilities Procurement, second edition. Thomson Sweet & Maxwell. England & Wales, European Union, 2005, p. 40.





The basic preconditions for qualification must be fulfilled in all public contracts, and they must be fulfilled by each supplier who participates in the procurement proceedings in the position of the bidder or tenderer, on the contrary the sub-contractor does not have the duty to fulfill the basic preconditions for qualification. The basic preconditions for qualification are parallel to the basic preconditions for qualification regulated in the previous regulation of Act No. 40/2004 Coll., though with small exceptions arising in particular from the transposition of the European Procurement Directive (e.g. a more strict definition of criminal acts).

The very basic preconditions for qualification are fulfilled by the supplier:

- who has not lawfully been sentenced for a crime committed on behalf of a criminal conspiracy, a crime of participation in a criminal conspiracy, laundering of proceeds from criminal activities, co-partnership, accepting a bribe, bribery, indirect bribery, fraud, credit fraud, including the cases concerning preparation, attempt or participation in such crime, or the sentence for committing such crime was overturned; should it be a legal person, this precondition must be fulfilled by a statutory body or by each member of the statutory body, and if the legal entity is a statutory body of the supplier or a member of the statutory body of the supplier, this precondition must be fulfilled by the statutory body or each member of the statutory body of this legal entity; if the bid or application for participation is filed by a foreign legal entity by means of its organizational unit, the precondition under this letter must be fulfilled besides the

mentioned persons as well as by the head of this organizational unit; this basic qualification precondition must be fulfilled by the supplier both in relation to the territory of the Czech Republic and to the country of its registered office, place of business activities or residence,

- who has not lawfully been sentenced for a crime, the state of facts of which relates to the subject of the business activities of the supplier according to special legal regulations or the sentence for committing such crime was obliterated; if it is the legal person, this condition must be fulfilled by the statutory body or by each member of the statutory body and if the legal entity is the statutory body of the supplier or the member of the statutory body of the supplier, this precondition must be fulfilled by the statutory body or each member of the statutory body of this legal entity; if the bid or application for participation is filed by a foreign legal entity by means of its organizational unit, besides the mentioned persons, the precondition under this letter must also be fulfilled by the head of this organizational unit; this basic qualification precondition must be fulfilled by the supplier both in relation to the territory of the Czech Republic and to the country of his registered office, place of business activities or residence,
- who has not fulfilled the factual basis of acts of unfair competition by bribery,
- for whose property bankruptcy has not been declared, or a proposal for declaration of bankruptcy has not been refused for the lack of property of the supplier or towards which the settlement is not permitted or the forced administration established,
- who is not in liquidation,
- who does not have tax arrears in the tax register , both in the Czech Republic and in the country of the registered office, place of business activities or residence of the supplier,





- who does not have arrears in insurance premiums and penalties for public heath insurance, both in the Czech Republic and in the country of the registered office, place of business activities or residence of the supplier,
- who does not have arrears in insurance premiums and penalties for social security and contribution to the state employment policy, both in the Czech Republic and in the country of the registered office, place of business activities or residence of the supplier, and
- who has not been lawfully punished disciplinarily in last 3 years, or upon whom disciplinary measures have not been imposed lawfully under special legal regulations, if proof of professional qualification under special legal regulations is required under Section 54 letter d); if the supplier carries out these activities by means of a responsible representative or another person responsible for the activities of the supplier, then this precondition relates to these persons.

## IMPUNITY IN THE FIELDS OF PROPERTY AND ECONOMY

"Impunity" of the supplier must already be proven in the period when it is decided on the selection. Impunity is a relative legal term which must always be interpreted in relation to the respective activities which are qualified by this feature.[4] In this decision of the Supreme Court, impunity is defined in detail for the purposes of this Act (or particularly the crimes which the respective persons must not commit). According to this decision, the term of impunity must always be interpreted in accordance with the provision of the

4) In this context, it may be referred to the decision of the Supreme Court of the Czech Republic (published in Collection of Decisions under No. 34/94).

Act for which the impunity of the person should be considered, thus usually as a precondition (condition) to perform certain activities. Suppliers in the field of public procurement are legal and physical entities, and in consideration of the fact that in our country, unlike some foreign regulations, it is not possible to impose a penalty on the legal persons, this condition must be fulfilled at legal persons by the statutory body or by each member of the statutory body, head of an organizational unit of the foreign legal entity or the representative authorized by the statutory body. With the organizational units of the enterprise incorporated in the Commercial Register, fulfillment of this condition will be required only at the leading organizational unit of the enterprise which files the bid. This condition relates to persons serving the office of the statutory body or all members of the statutory body.

It is expressly stated that if the bid or application for participation is filed by a foreign legal entity by means of its organizational unit, then the impunity must be also proven by the head of this organizational unit, in addition to all members of statutory bodies.[5]

Furthermore, it is stipulated that this basic precondition for qualification must be fulfilled by the foreign supplier, and this significantly impedes the possibility of participation of foreign entities:

- both in relation to the territory of the Czech Republic,
- and also in the country of its registered office, place of business activities or residence.

5) The organizational unit is registered as such into the Commercial Register, and the head thereof may independently undertake acts related to the given organizational unit, meaning that the head of organizational unit – in consideration of his (to a certain extent) independent action in legal relations – is also obligated to prove his impunity.





Definition of the foreign supplier see Section 17 letter o) ZVZ. If a foreign supplier is interested in a public contract procured in the Czech Republic which has already commenced, he will probably not manage to obtain the extract from the Penal Register in time (if he is aware of the contract at all). Such foreign supplier may be recommended to register himself in the Czech List of Qualified Suppliers and submit both the extract from the Czech Penal Register and an extract from a similar register in his country of origin. The recommendation mentioned applies if the foreign supplier (e.g. Slovak) participates regularly in procurement proceedings in the Czech Republic.

Members of a statutory body with permanent residence abroad should prove impunity by means of both a Czech extract from the Penal Register and also an extract from the country of the supplier's registered office. However, the supplier does not submit a similar extract from the country where the members of the statutory bodies have their permanent residence or citizenship.

### ABSENCE OF DISCIPLINARY OFFENCE

A disciplinary offence may be committed by tenderers in the cases where the subject of public procurement is directly connected with the activities of the entrepreneur, for which he may be punished under special regulations. Thus only persons practicing certain special professions may commit it. That is, it may be a breach of professional regulations under Act No. 85/1996 Coll. on Legal Profession, as amended by subsequent regulations, under Act No. 360/1992, on the Professional Practice of Certified Architects and on the Professional Practice of Certified Engineers and Technicians Active in Construction, as amended by subsequent regulations. It furthermore pertains to tax advisers, auditors, etc. If the subject

of public procurement required activities in which the suppliers cannot commit a disciplinary offence, the supplier does not have to declare this in the statutory declaration.[6] Even though the tenderer cannot objectively commit a disciplinary offence, it is necessary to recommend the tenderer to declare this fact in the statutory declaration.

## METHOD OF PROVING BASIC PRECONDITIONS FOR QUALIFICATION

The supplier shall prove the fulfillment of the basic preconditions for qualification by presenting:

- an extract from the Penal Register on impunity (see paragraph 1 letter a) and b)). The extract from the Penal Register is under Section 15 paragraph 2 Act No. 269/1994 Coll., on Penal Register, the public deed by which the respective state authority confirms the data mentioned therein,
- confirmation of the applicable financial authority, and, in relation to the excise duty by submission of the statutory declaration (paragraph 1 letter f)). The new Administrative Procedure Code applies to the issuing of this confirmation – financial authority is obliged to issue it for the supplier without undue delay,

6) This is expressed in the judgment of the High Court in Olomouc dated 12 December 1996 (2A 7/96). It must be emphasized that fulfillment of this precondition for qualification is required only if the subject of the public contract is directly involved with the activities of a competitor for which he may be punished disciplinarily under special regulations regulating the performance of professional activities. If it is not so, it is not possible to derive from the diction of the cited provision the compulsory duty to always file the statutory declaration, thus also when the subject of the public contract evidently is not involved in such activities. In the case considered, a public contract for information systems which rest on the implementation of the computer network. Individual competitors carry on their business activities on the basis of their trade license, and they are not united obligatorily in any organization in which disciplinary competence would be applied under special regulations. In this situation, the defendant made an error if he considered the lack of proof of the precondition for qualification in question to be the non-fulfillment of the proof of the basic preconditions for qualification.





- confirmation of the competent body or institution (paragraph 1 letter h)),
- statutory declaration (paragraph 1 letter c) to e) a g) and i)). This is a question of whether the (statutory) declaration must be made only by the tenderer, or particularly by his statutory representative authorized to act on behalf of the tenderer. In accordance with Act No. 199/1994 Coll., it might not be made by the attorney or representative on the basis of the power of attorney. In this context, it is possible to refer to the decision-making practice of the Office for the Protection of Competition under effectiveness of Act No. 199/1994 Coll. This stating applies also for this Act. In my opinion, a person authorized to act for the supplier may make the statutory declaration on behalf of the legal entity, that is, any of the executives of the public-limited company (if he acts independently on behalf of the company), for instance, or also the confidential clerk, who is (under Section 14 Commercial Code) entitled to perform all legal acts which occur at in the operation of the enterprise on behalf of the entrepreneur. This procedure is in accordance with the applicable provisions of the Commercial and Civil Code on the acting of the legal entity.

The following may be further mentioned to the basic preconditions for qualification:

- the statutory declaration is a non-substitutable legal act, and thus may not be made on behalf of the supplier by his representative on the basis of power of attorney,
- the statutory declaration must be duly signed, thus e.g. at the person incorporated in the Companies Register in the manner mentioned therein, e.g. also by the confidential clerk,
- in the statutory declaration it is sufficient to refer to the provisions of Section 53 ZVZ, or to mention the accurate legal wording of this provision,

- it is necessary to make certain that the extracts from the Penal Register have been submitted, in particular of all members of the statutory body in the case of legal entities.





## DO LEGAL REGULATIONS IN THE EU ENABLE THE CREATION OF BLACKLISTS IN PUBLIC PROCUREMENT?

The principal has the possibility of inspecting the fulfillment of qualification and assignment conditions. Even the vetting of the suppliers by means of external (specialized) entities is not ruled out.

Blacklists are not legally regulated on the EU level. However, it is also not prohibited by EU law. It is necessary to take into account that legal regulation in the EU is based on procurement directives, which regulate the goal to be reached by means of the internal law. Criteria for the qualitative selection are contained in Article 4 paragraph 1 of the European Parliament and Council Directive 2004/18/ES dated 31 March 2004 on coordination of procedures at public procurement concerning construction work, deliveries and services (personal situation of bidder or tenderer). In accordance with this Article, such a bidder or tenderer who has been convicted by a final judgment of which the public principal is aware shall be disqualified from participation in the public contract for one or more of the following reasons:

- participation in criminal conspiracy, as defined in Article 2 paragraph 1 joint Council act 98/773/SVV;
- corruption as defined in Article 3 Council act dated 26 May 1997 and in Article 3 paragraph 1 joint Council act 98/742/SVV in the stated order;
- fraud in the meaning of Article 1 Convention on the protection of the European Communities' interests;
- money laundering as defined in Article 1 Council Directive 91/308/EHS dated 10 June 1991, on preventing the misuse of financial system for money laundering.

Member states shall specify the conditions of implementation of this paragraph in accordance with their internal law and in consideration of the Community law. They may regulate the requirement mentioned in the first subparagraph differently for the reason of prevailing needs of general interests. For the purposes of this paragraph, the public principals shall ask the bidders or tenderers, if appropriate, to submit the documents mentioned in this paragraph and if bearing any doubts on the personal situation of these bidders or tenderers, may turn to the respective authorities to obtain any information on these bidders or tenderers which they deem necessary. If the information relates to a bidder or tenderer residing in a state other than the state of the public principal, the public principal may ask the competent bodies to cooperate. Taking into account the internal legal regulations of the member state in which the bidders or tenderers reside, these applications relate to the legal or physical entities, including, if appropriate, the leading representatives of the company or any person with competence to represent, decide or control the bidders or tenderers.

Keeping internal blacklists for the above-mentioned reasons is not prohibited or ruled out, be it on the central level. Keeping the blacklist for reasons other than those mentioned would be disputable. However, if we compare the above-mentioned reasons as they are summed up, it is obvious that the concept of the introduction of blacklists in the scope of the Czech government's determination to fight corruption is not beyond the scope of these reasons and also the German proposal is within its intentions.





## AD HOC ESTABLISHED BLACKLISTS AT SOME PARTICULAR PRINCIPALS

In the procurement practice in the Czech Republic, procedures applying to certain principals which are parallel to the creation of blacklists on the part of the particular principals. In particular in small-scale public contracts which are not affected by law, which however are the most frequent, and public contracts assigned by simplified sublimit proceedings, it is only possible to directly address the "reliable" suppliers to file a bid. The principal will not call the suppliers with whom he has had bad experience (and who are included in the blacklist) due to poor quality of work performed, for example, to file a bid. Other reasons for inclusion in the blacklist may also be filing the proposals to the Office for the Protection of Competition, etc. It is necessary to realize that the Public Procurement Act assumes that the principals will keep the lists of suppliers, that is something on the order of white lists. These will include such suppliers who might potentially be called to submit a bid in cases where the principal assigns within the demand procedure a small-scale public contract or within the scope of the simplified submit proceedings under Section 38 Public Procurement Act. The sublimit public contract for the deliveries or services or sublimit public contract for construction work is deemed to be a contract with the anticipated value of not more than CZK 20 mil. In these cases, the principal directly addresses the stipulated number of the suppliers and it is only up to those who are addressed. It is known that if the principal has good experience with a particular supplier, or if he has a certain interest in the respective supplier, he may address him, and it shall apply under Section 38 paragraph ZVZ that the public principal must not repeatedly call the same group of tenderers, unless it is justified by the subject of fulfillment of the public contract or other special circumstances. Thus, if the

principal may choose whom he shall address, he shall not address a person with whom he is in litigation damage compensation, for instance, who supplied poor-quality goods or performed poor-quality work. This business-law aspect of the suggested extent may also be projected into public contracts.

Also, the practice is applied that the principal stipulates in the form of the procurement conditions that a supplier who has incurred debts is disqualified from the procurement proceedings at this principal (thus a specific blacklist of suppliers with a history of non-payment is created). The practice mentioned has not been resolved from the legal regulation point of view (and whether it ever will be at all is also a question).

## SO-CALLED "WHITE LISTS"

Legal regulation exists de lege lata on an opposite sort of list to the so-called blacklists, the so-called white lists. The white list is a list of qualified suppliers and a system of certified suppliers to which the precondition applies that those who are registered in the list and who submit an extract therefrom are reliable; at the same time fulfillment of other preconditions for qualification may also be proven by this extract.

The List of the Qualified Suppliers (SKD) is part of the information system of the public administration under Section 157 ZVZ and is kept by the Ministry for Regional Development (MMR). Suppliers are entered therein who fulfilled the qualification under Section 53 and Section 54 ZVZ and documented the fulfillment of the qualification to the MMR with the respective documents.





A qualified supplier (KD) is a supplier who fulfilled the qualification under Section 53 and Section 54 ZVZ and documented the fulfillment of the qualification by the respective documents, registered in the list. The supplier becomes a qualified supplier at the moment, when the decision on the entry of the supplier in the list comes into legal force.

The list of qualified suppliers is accessible at the website http://www2.mmr.cz/iszvz/default.aspx.

The List of Qualified Suppliers is an instrument for simplifying the process of proving of qualification fulfillment in the procurement proceedings. The simplification lies in the fact that suppliers registered in the list may replace many documents required by Public Procurement Act for the purpose of proving fulfillment of qualification with an extract from the SKD. The extract from the SKD may only be used to prove the fulfillment of the basic preconditions for qualification and professional preconditions for qualification. The principals are obligated to accept the extract from the SKD as proof of qualification They do not have to inspect the correctness of the data which is included in the extract, rather they must only verify that more than 3 months did not expire as of the day the extract was issued.

Suppliers registered in the SKD are not privileged within the procurement proceedings in any manner. The meaning of the SKD is not to register the "verified" suppliers who have already taken in part in public contracts in the past and received positive references from the principals.

The Public Procurement Act is regulated by a further institute, the purpose of which is to simplify proof of fulfillment of qualification, a part thereof, as the case may be, by the supplier in the procurement proceedings. This institute is the System of Certified Suppliers (SCD) under Section 133 et seq. ZVZ. Unlike the List of Qualified Suppliers, the SCD allows proving of fulfillment of wide

scope of qualification, since it allows also proving of the fulfillment of economic and financial preconditions for qualification and technical preconditions for qualification to the extent stipulated in the SCD rules. However, the SCD always relates only to a certain type[7] or category of public contracts, and thus a certificate from the SCD may be only used for the purpose of proving the fulfillment of qualification for the public contracts, the subject of which belongs in this type or category.

The ES procurement directives do not stipulate the duty to administer the List of Qualified Suppliers or equivalent thereof. Should an ES member state administer such list, it shall also be necessary to enable the suppliers from other ES states to be entered into it under the same conditions stipulated for local suppliers.

The list of the qualified (recognized) suppliers should eliminate the excessive formalization of proving preconditions for qualification, provided that this list is available to all suppliers fulfilling the stipulated conditions.

The supplier may always prove qualification to the fullest extent through participation in every new public contract, or he may prove qualification in another (equivalent alternative) manner, either with an extract from the List of Qualified Suppliers not older than 3 months and at the same time by the fulfillment of other required preconditions for qualification, which relate to the particular public contract (financial, economical and technical qualification). The extract from the List of Qualified Suppliers may be presented at sublimit and overlimit public contracts.

If the legal regulation of an ES member state allows lump sum proof for the predominant part of the qualification by an extract from an official list, it must, according to the legal regulation in the

7) The type of public contract is, in accordance with the provision of Section 7 paragraph 2 ZVZ, deemed to be supplies, services and construction works. List of qualified suppliers may relate to one or more types of public contract.





ES, enable all the entities (potential suppliers) from all the member states to be entered in such a list under the same (equal) conditions. The Certified Registration in the official lists of service providers at the competent bodies establishes the assumption with principals from other member states that the suppliers are qualified to the extent of the verified qualification. Information which may be deduced from the entry in the official lists may not be questioned. The extract from the List of Qualified Suppliers may be used not only in proving fulfillment of qualification for public procurement in the territory of the Czech Republic, but also in the territory of other ES member states (see Section 143 ZVZ).

The information mentioned in this list may not be questioned unless information to the contrary has been proven. The presumption of correctness of the extract from the list of qualified suppliers shall thus apply.

The List of Qualified Suppliers is similar to the Land Register, RES (register of economic entities), ADIS information system of public administration, which is:

- public,
- also kept in a manner enabling remote access.

Its characteristic is that:

- everyone may inspect it and make extracts from it. With registered suppliers, the extract from the list is a written confirmation (in paper or electronic form) that the supplier has fulfilled qualification (basic and professional qualification criteria) and documented fulfillment of the qualification by the respective documents, issued by the ministry and containing the data registered in the list. With unregistered suppliers, the extract contains information on the fact that the supplier is not registered in the list.
- documents other than those required from the domestic supplier are not required from the supplier from other member state of the European Union.

- the Ministry for Regional Development will inform the other member states of the European Union on the address of the place, where it is possible to file the application for the registration in the list.

Regulation of possibility of registration in the list of suppliers, which proved fulfillment of the certain part of qualification, is newly divided into two basic groups. The List of Qualified Suppliers, in which the persons are registered, which proved the fulfillment of the basic preconditions for qualification and professional preconditions for qualification, is kept by the Ministry or possibly the person authorized thereby.

To ensure higher flexibility and professionalism at consideration of fulfillment of economic and financial preconditions for qualification and technical preconditions for qualification the new legal regulation was adopted for the field of proving of these preconditions for qualification. Systems of certified suppliers (see Section 133 et seq.) allow proving of qualification to the whole extent, i.e. issuing of the certificate to the persons, which proved fulfillment of basic preconditions for qualification, professional preconditions for qualification and economic and financial preconditions for qualification or technical preconditions for qualification. Certificates are issued by the specialized persons (certification body for qualification) within the concrete System of Certified Suppliers.

Registration in the List of Qualified Suppliers may be recommended to every supplier, which participates in the public contracts several times a year.

In connection with the List of Qualified Suppliers the Ministry for Regional Development ensures by means of the information system of public procurement the following functions:

- administration of the List of Qualified Suppliers,





- provision of information on registered suppliers in the form of issuing of the extracts from the list,
- provision of information on registered suppliers with the possibility of retrieval according to the criteria,
- provision of methodical support in the registration, alteration of registration and deletion from the list in the form of templates and methodical procedures.

Part of the information system is also the methodical procedure for the List of Qualified Suppliers and templates of the documents for the registration in the list and alteration in administration the List of Qualified Suppliers and issuing the extracts from this list.

The Ministry for Regional Development shall register those suppliers who have fulfilled the qualification under Section 53 ZVZ (basic qualification criteria) and Section 54 ZVZ (professional qualification criteria) in the list; fulfillment of qualification shall be documented to the Ministry by the respective documents and the supplies shall pay an administration fee.

In accordance with Act No. 138/2006 Coll., which modifies certain Acts in connection with the adoption of the Public Procurement Act, Act No. 634/2004 Coll. on Administration Fees, is modified in such a manner so that the rate book of administration fees mentioned in the annex to Act No. 634/2004 Coll., on Administration Fees, item 64, including the footnote No. 41, shall read:

- Acceptance of application for registration in the List of Qualified Suppliers: CZK 3,000
- Acceptance of application for alteration of registration in the List of Qualified Suppliers: CZK 1,000
- Acceptance of application for approving of the System of Certified Suppliers: CZK 20, 000
- Acceptance of application for approving of alteration in the System of Certified Suppliers: CZK 5,000

However, Act No. 138/2006 Coll. does not stipulate that the administration fees should be paid for the issuance of the extract from the List of Qualified Suppliers, thus these are still free of charge.

The list is also publicly available in a manner enabling the distant access on the website of the information system. In accordance with Section 157 ZVZ, remote access shall be free of charge to the list on the information system where the templates of the applications are stored, which the supplier may use in subsequent proceedings of SKD matters. The following application templates are available:

- registration of the supplier in the list,
- registration of alteration in the data mentioned in the List of Qualified Suppliers,
- issuing an extract from the List of Qualified Suppliers,
- deletion of the supplier from the List of Qualified Suppliers,
- notice of the fact that the data registered in the list has not been changed, and submission of the documents proving the fulfillment of the basic preconditions for qualification under Section 53 paragraph 1 letter f) to h) ZVZ,
- waiver of right to remonstrance.

The Ministry for Regional Development shall inform the European Commission and other member states of the European Union on the address of the place where the application for registration in the list can be filed. The facts mentioned relate to the fact that it is possible in other member states at the participation of the Czech supplier to present a translated Czech extract from the List of Qualified Suppliers. In accordance with Section 143 ZVZ, a foreign supplier may use the translated extract from a foreign List of Qualified Suppliers, if it is a state which is the part of the European Economic Area, and the supplier has his registered office or place





of business in this state. Provision of the above-mentioned information to the European Commission is thus significant and makes practical sense.

The Systems of Certified Suppliers (SCD) enable the registered suppliers to replace proof of fulfillment of qualification (or part thereof, as the case may be) in the given field of activities with a certificate issued by an accredited person. The basic regulation of the system of the certified suppliers is mentioned in a provision of Section 133 et seq. Act No. 137/2006 Coll. on Public Procurement.

Individual systems of certified suppliers are operated by the administrators, which stipulate the rules of this system, conditions of registration, conditions for issuing certificates, etc. The Ministry for Regional Development shall approve individual systems and their rules on the basis of the application filed by the administrator, and shall administer a list of these systems.

Instead of proof of qualification fulfillment, the supplier may submit a certificate issued by the certification body to the principal as qualification. The certificate verifies that the supplier proved fulfillment of the basic preconditions for qualification, professional preconditions for qualification and economic and financial preconditions for qualification or technical preconditions for qualification mentioned in this certificate.

The System of Certified Suppliers is kept by the system administrator and the number of systems of certified suppliers (thus also administrators thereof) is not generally limited. Certification bodies for qualification operate within the System of Certified Suppliers, who, on the basis of the granted accreditation, serve as professional persons and guarantors in their respective fields. The Ministry supervises the System of Certified Suppliers.

The Ministry for Regional Development is obligated to inform the European Commission and other member states of the European Union of the names and identification data of the adminis-

trators of the approved Systems of Certified Suppliers. A certificate from the approved System of Certified Suppliers may be used by a Czech supplier in the procurement proceedings in other EU member countries. In the Czech Republic, on the other hand, a foreign supplier from an EU member state can use the certificate in the country where he is headquartered or has a place of business. Certificates must always be translated into the appropriate language, meaning that a foreign certificate may be submitted in the Czech Republic with an officially verified signature, with the exception of the Slovak Republic.

## CONSIDERATIONS DE LEGE FERENDA

In connection to the anti-corruption tool being analyzed, the "blacklist," it is necessary to answer the following questions:

- Which entity will be responsible for its administration?
- For what period would be the suppliers kept on the list?
- What should the reasons for including the supplier in the list be?
- How to increase the effectiveness of the bodies active in criminal proceedings at the same time?

If the blacklist (register) of serious offences is to be established, it will have to take place by law. The law would not only have to establish such a register, but also stipulate other requisites, in particular who shall administer such a register (that such an entity could be the Office for the Protection of Competition it may be discussed), what data will be recorded in it, what deeds and other





documents will form its basis, whether they will record only data arising from the activities of Czech authorities or foreign authorities as well, and under what conditions. Furthermore, it would have to stipulate the duty of the respective bodies to send legally effective decisions on the relevant facts and inform of other necessary data, including data on alterations to crucial facts, and determine who may use the data mentioned in it, and for what purposes, in what form and to what extent the information included in the register may be provided (e.g. copy form, extract, etc.), how the protection of the data gathered will be ensured and how the data will be kept and documents archived.

I assume that the introduction of the blacklist would be a progressive step, although the author is aware that the register under Act No. 199/1994 Coll. is not effective. This, however may not be ascribed a priori to the inefficacy of the register, but to the inefficacy of the bodies active in criminal proceedings, in particular in the disclosure of acts of corruption, for instance (e.g. the institution of the agent provocateur has not yet been established, without which it is a real question what can be uncovered in the area of corruption).

The introduction of the so-called blacklist in the Czech Republic on the central level would be rather proclamatory in character under the current conditions. The introduction of the blacklist in the field of public procurement would make practical sense in the event that this institution would be the part of the complex system of the battle against the corruption, within which it would be necessary to introduce more effective institutions of an anti-corruption nature in the financial and criminal field. In the criminal field, it appears necessary to introduce the institution of the "agent provocateur," that is, an equivalent to that which is effective in the work of investigative journalists in the Czech Republic, and which works in the fight against corruption in other countries (USA, Great Britain). In the given context, it must be pointed out

that de lege lata policemen may not offer or solicit the offering of a bribe for the purpose of verifying whether bribes in the given field exist, since the policemen, who are the part of the bodies active in criminal proceedings, may not initiate acts designated as crimes in criminal law by themselves. Policemen may enter into such a matter in situations where a certain person has offered a bribe or asked for a bribe. Such contrivance impedes the possibility of convicting someone of corruption.

Another institution which would have to function is that anyone who does not credibly prove the origin of his property, still has to pay taxes on the property at a certain rate (e.g. 40% or 50%) regardless of whether an act of criminal or punishable nature has been established against him. This applies all the more if it pertains to public officials.

The implementation and consistent use of the instruments mentioned is probably not politically acceptable (and it is a question whether it ever will be).

In conclusion, I would like to add that the introduction of the blacklist would at least strengthen awareness of the fight against corruption, even if it was not connected with any other instruments. If the register was administrated by the Office for the Protection of Competition on its website, it would not even require any further expenditure from the state budget.

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