



DISCUSSION PAPER

UK ANTI-CORRUPTION FORUM

FAIR AND EFFICIENT DEBARMENT PROCEDURES

INTRODUCTION

1. “Debarment” is the procedure under which a company is prevented from participating in a project for a specified reason (e.g. a corruption conviction). It is sometimes referred to as “exclusion” or “blacklisting”.
2. Examples of debarment are where:
 - a) Funders deny project finance, guarantees or insurance to a company or project owner which is found to have been involved in corruption.
 - b) Project owners exclude from the tender list any company which is found to have been involved in corruption.
3. Some forms of debarment are mandatory, and require a purchasing body to exclude from tendering any company which has been convicted of corruption (for example, exclusion under the EU Procurement Directives). Other forms of debarment are discretionary, and do not rely on a conviction (for example, debarment by the World Bank).
4. The wide-spread publicity given to debarment, and the increase in due diligence undertaken by procurement authorities, makes it increasingly likely that debarment by one organisation will lead to debarment by another.
5. For a company, debarment is the equivalent of imprisonment for an individual. It is depriving the company of the freedom to undertake business. Debarment of a company for any significant length of time may result in the economic destruction of that company. It would be unable to obtain work or retain staff, and may as a result have to be wound up, or be broken up and sold. Its pension fund may be placed at risk. Therefore, similar principles of jurisprudence must apply to the debarment of a company as to imprisonment of an individual.
6. The UK Anti-Corruption Forum supports the use of debarment as one of a range of anti-corruption actions provided that debarment is implemented in a fair and efficient manner. This discussion paper recommends certain minimum requirements which are necessary for fair and efficient debarment procedures.

THE OBJECTIVES OF DEBARMENT PROCEDURES

7. Debarment procedures should have four primary objectives:
 - a) To deter companies from committing corrupt acts.

- b) To punish companies which commit corrupt acts.
- c) To encourage companies to implement effective anti-corruption policies.
- d) To encourage companies to deal promptly and openly with any instances of corruption, and to co-operate with the authorities in the investigation and prosecution of corrupt acts.

THE REQUIREMENTS OF DEBARMENT PROCEDURES

8. In order to achieve these objectives, debarment procedures should:
- a) be implemented in accordance with good judicial practice;
 - b) be transparent;
 - c) be uniformly applied;
 - d) provide incentives as well as penalties.
- These requirements are examined in more detail below.

Good judicial practice

9. Debarment is a severe penalty. Both the procedures for determining whether or not there should be a debarment, and the procedures for determining the length of the debarment, should follow good and consistently applied judicial practice.

10. **Determining whether or not there should be a debarment:**

- a) Where debarment is mandatory: If a company has been convicted of corruption, and is facing debarment under a mandatory procedure:
 - i) If the company facing debarment is appealing the conviction, the debarment should not take effect or be publicised unless and until the conviction is upheld by the appeal body.
 - ii) The company facing debarment should be permitted a reasonable time, prior to the debarment becoming effective, to introduce evidence to the debarring authority that the conviction was obtained in a jurisdiction which did not follow due judicial process. If the company can provide satisfactory evidence to this effect, debarment should not be implemented under the mandatory procedure.
- b) Where debarment is discretionary: If a company is accused of a corruption offence, and is facing debarment under a discretionary procedure:
 - i) The debarring authority should provide full disclosure to the company facing debarment of the evidence that it was involved in a corrupt act.
 - ii) The company facing debarment should be permitted a reasonable time to prepare its defence against the allegations.
 - iii) The company facing debarment should be permitted to provide to the debarring authority its documentary and witness evidence, and legal argument.
 - iv) The debarring authority should only debar when it is satisfied beyond all reasonable doubt that the company facing debarment was involved in a corrupt act.
 - v) The company facing debarment should be allowed a reasonable time to appeal the debarment decision to an independent appeal body.
 - vi) If the company facing debarment does appeal the decision, the debarment should not take effect or be publicised unless and until the debarment decision is upheld by the appeal body.
- c) Where a company has been convicted or debarred, and the company is appealing such conviction or debarment, a procuring entity shall be entitled to request the company facing debarment to provide reasonable proof that it has implemented an effective anti-corruption programme as a condition of allowing it to tender during the period prior to the appeal being decided.
- d) In the case of both a) and b) above, debarment should not apply to contracts awarded prior to the debarment coming into effect. However, a procuring entity will retain the right to terminate a contract for corruption to the extent that right is granted under contract or by law.

11. Determining the length of the debarment period:

- a) The length of the debarment should take account of the following factors:
 - i) the severity of the offence;
 - ii) the magnitude of the loss caused by the company's actions;
 - iii) whether it is a first offence or a repeat offence;
 - iv) the seniority of the relevant individuals responsible for the offence;
 - v) whether the board of the company had authorised or acquiesced in the offence;
 - vi) the steps taken by the company to prevent the offence occurring;
 - vii) whether the company itself reported the offence to the authorities;
 - viii) the extent to which the company co-operated with the authorities after the offence had been discovered;
 - ix) whether the relevant individuals responsible for the offence have been dismissed or appropriately disciplined by the company;
 - x) the impact on the company and its non-offending employees of a debarment.
- b) At one end of the spectrum, where all the following factors are present, there should only be a nominal debarment: Where the corrupt payment is of a low value, causing minimal loss, and is committed by an employee of the company against the company's properly embedded policies and training, and in circumstances where the company discovered the offence, reported the offence, dismissed or appropriately disciplined the employee, and co-operated with the authorities.
- c) At the other end of the spectrum, where all the following factors are present, there should be a material debarment. Where the corrupt payment is of a high value, causing significant loss, and is committed by an employee of the company with the authority or acquiescence of the board, and the company concealed the offence, did not report the offence, did not dismiss or appropriately discipline the employee and did not co-operate with the authorities.
- d) A tariff should be developed and published which lists the approximate length of the debarment taking into account the factors listed in paragraph 11 a). The intent should be that the debarment creates a result proportionate to the circumstances of the offence.

12. Reduction in debarment period:

- a) Once debarment of a company has been implemented, the company should be entitled to a significant reduction in the debarment period if it can provide satisfactory and plausible independent proof to the debarring authority that it has implemented an effective anti-corruption corporate programme.
- b) Prior to the implementation of the OECD Convention on the Bribery of Foreign Public Officials and United Nations Convention against Corruption, business was conducted in many countries in a manifestly different international ethical and legal environment. To take account of this fact, in relation to offences committed by a company prior to 14th December 2005 (the date the UN Convention came into force), the debarment period should be terminated as soon as the company can provide satisfactory and plausible independent proof to the debarring authority that it has implemented an effective anti-corruption corporate programme.

Transparency

13. Debarment procedures should be transparent. It must be quite clear to a company, and to the general public, what offences will lead to debarment, what procedures will be adopted to determine the debarment, the range of debarment periods applicable, and the procedures for appealing or lifting the debarment. The decision and reasons of the debarring authority should be publicly available.
14. A register should be maintained which contains details of all debarred companies, and the relevant offence, the length of the debarment, and the reasons for the debarment. This information should be

publicly available, and be easily accessible. Many organisations, as part of their due diligence, require to know whether or not a company has been debarred. This register will assist this purpose. Ideally, one international register should contain details of all debarments, so that information can be obtained from a single source.

15. Procedures should be implemented which enable a company to procure correction of incorrect entries on the register.
16. Many organisations require disclosure by bidding companies of previous debarments. Criminal convictions are treated as “spent”, and do not require disclosure after a certain period. Similarly, a debarment should be treated as “spent”, and should not require disclosure, and should be deleted from the register, an agreed period of time after the debarment has ceased.

Uniformity

17. Debarring authorities should as far as possible co-ordinate their systems, so that debarment procedures and penalties are applied uniformly.
18. Exceptions to debarment rules should not be granted to companies with special political influence or a material share of the market.

Incentives

19. Of the four objectives listed in paragraph 7 above, objective a) is to deter and b) is to punish. The threat of debarment must be real and serious, which therefore acts as a deterrent. However, deterrence and punishment only form part of the objectives. As recognised by objectives c) and d), companies must be encouraged to:
 - a) implement effective anti-corruption policies; and
 - b) deal promptly and openly with any instances of corruption, and co-operate with the authorities in the investigation and prosecution of corrupt acts.
20. These aims are best achieved by rewarding companies for acting in this way. If a company knows that it will receive the same debarment penalty whether or not it itself uncovers and reports the offence, it will have no incentive to undertake internal audit and co-operate with the authorities. On the contrary, it may be encouraged to conceal the offence, as it will be aware that reporting will alert the authorities and result in no benefit. As a result, corruption will be driven underground, when preventing corruption is best achieved by bringing it out into the open.
21. The recommendations in this paper contain significant incentives for companies to implement anti-corruption policies, and to deal openly and actively with corruption. In particular, the recommendations that:
 - a) the length of debarment takes account of mitigatory circumstances, reducing to a nominal period in the best case (paragraph 11 b) above);
 - b) the introduction of anti-corruption systems can lead to a reduction in the debarment period (paragraph 12 a) above).

LIABILITY FOR THE ACTIONS OF OTHER COMPANIES

22. One of the most difficult issues in relation to debarment is the extent to which a company should be debarred for the actions of another company. The deterrent and punitive objectives of debarment would be neutered if an organisation could set up a series of single project companies, deliberately pay bribes to win work, and then, if one company is debarred, continue trading corruptly through the other companies. At the other extreme, however, it would be unfair and wrong for a company to be debarred for the actions of another company over which it had no control, and in circumstances where it had no complicity in the corruption.

23. The following general principles are suggested for further discussion with a view to achieving a fair and transparent system of dealing with this issue.
- a) If Company A is debarred for a corrupt act, and Company B authorised or was complicit in the corrupt act, Company B should also be debarred. This would include circumstance where Company A is the parent or subsidiary company, or agent, joint venture or consortium partner, or sub-contractor of Company B.
 - b) The lengths of debarment of Company A and Company B should take account of the factors listed in paragraph 11. The debarment period for Company A could be different from that of Company B to take account of differences in the level of their involvement.

GUIDELINES

24. The complexity of the issue, and the need for certainty and uniformity, requires that international guidelines on debarment are drawn up and agreed. The UK Anti-Corruption Forum would welcome the opportunity to participate in this exercise.

CONCLUSION

25. Debarment of a company can be an effective method of deterring and punishing corruption. It forms an important part of an overall anti-corruption strategy. However, debarment is a potentially devastating penalty. It is therefore vital that debarment procedures are implemented in accordance with good judicial practice, are transparent, are uniformly applied, and provide incentives as well as penalties.

UK Anti-Corruption Forum

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The UK Anti-Corruption Forum is an alliance of UK business associations, professional institutions, civil society organisations and companies with interests in the domestic and international infrastructure, construction and engineering sectors. The purpose of the Forum is to promote industry-led actions which can help to eliminate corruption. The members of the Forum believe that corruption can only be eliminated if governments, banks, business and professional associations, and companies working in these sectors co-operate in the development and implementation of effective anti-corruption actions.

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