

A Global View of Debarment: Understanding Exclusion Systems Around the World

Summary of Pilot Survey Results (April 2019)

Over the past decade, countries and international organizations have stepped up their efforts to combat fraud, waste, and abuse in public sector activities. As part of these efforts, governments have increased their use of legal remedies to avoid doing business with suppliers who present a risk to public funds. Many different terms have been used to describe these remedies, such as “debarment,” “disqualification,” “suspension,” “exclusion,” or “blacklisting.” Whatever the label, the intent of these mechanisms is generally to remove a wayward supplier from the procurement system for either a specific procurement process or for a period of time.

Although increasing in use, suspension and debarment is often viewed through the lens of other disciplines. We thus began to undertake a systemic effort to examine debarment as its own discipline by looking for ways to gather knowledge and comparable data on exclusion systems worldwide.

Through the efforts of a Working Group of the International Bar Association’s Anti-Corruption Committee, in cooperation with the World Bank Office of Suspension and Debarment, the Sanctions Officer for the Inter-American Development Bank Group (comprised of the Inter-American Development Bank, IDB Invest and IDB Lab), and Le Bureau de l’inspecteur général de la Ville de Montréal, we launched a global survey designed to compile as much data as possible on suspension and debarment systems across a range of jurisdictions and institutions. Our main objective with this survey is strictly to gather knowledge and comparable data; we will not rank, score, or comment on individual systems. Our hope is that by gathering as much data as possible, we will be able to identify commonalities and differences across jurisdictions and develop a taxonomy of exclusion systems.

We sought to test the survey’s structure and formatting through a pilot program launched between May and October 2018. The pilot obtained a number of responses covering the following eleven jurisdictions: Australia, Brazil, Chile, Germany, Italy, Spain, Tunisia, the United Kingdom (“UK”), the United States (“US”), the European Commission (“EC”), and the World Bank. These responses came from a mix of private practitioners, government officials, and academics with knowledge of exclusions in their jurisdictions. The survey sought information on six key areas relating to an exclusion system’s structure and operation:

- legal and institutional framework
- functioning and enforcement
- substantive grounds for exclusion
- scope and effect of exclusion
- transparency
- sub-national exclusion systems

This article highlights some of the data collected in the pilot study and notes key areas for future research efforts. Part I analyzes the legal basis for exclusion systems and the various types of decision-makers. Part II discusses the grounds for which a supplier may be excluded, and Part III looks at the scope of an exclusion among the different jurisdictions. Part IV examines the rights of a supplier to contest the exclusion decision. The findings presented in this report are based solely on the information collected from the survey responses.

Part I: Government-Wide Exclusion Mechanisms

The survey uses the term “government-wide exclusion mechanism” to refer to an exclusion of suppliers from competing for or receiving contracts at the national (or federal) level, across all government agencies. We recognize that using this term may sometimes result in confusion; for instance, two different respondents provided answers for the UK reflecting different understandings of this term. One respondent stated that the UK does not have a government-wide exclusion mechanism because independent contracting officers make contract-by-contract exclusion decisions. The second respondent noted that while exclusion decisions are not made at the national level, there is national legislation governing exclusion. A few other jurisdictions also follow this pattern: their systems do not have a centralized decision-maker but do have centralized regulations governing various decision-making authorities.

Of the eleven jurisdictions surveyed, ten have some form of government-wide exclusion mechanism (including the UK). Australia was the only jurisdiction surveyed that does not have a government-wide exclusion mechanism. The exclusion mechanisms in nine of the ten jurisdictions are governed by administrative law, although a few respondents noted that criminal and/or civil law convictions could also play a role in their jurisdictions. Only one jurisdiction – Italy – reported having an exclusion mechanism based solely in criminal law.

The survey first addressed the institutional framework for the government-wide exclusion mechanism. Specifically, respondents were asked whether the decision-maker is:

- A single, centralized entity – such as a designated official or office that serves as the decision-maker on behalf of all entities and agencies of the national government.
- An officer at the agency level – there is a designated official or office within each entity or agency of the national government responsible for making exclusion decisions.
- An individual contracting officer – any contracting officer or official responsible for making or overseeing procurement awards could serve as a decision-maker for government-wide exclusion.
- A judicial authority – exclusions are either decided by a judicial authority or are automatic following a criminal conviction and/or civil judgment by a court of law.
- Another decision-maker – not mentioned above.

The decision-maker differs widely across systems. Responses from five jurisdictions noted that exclusion decisions are made by a centralized decision-maker, and five other jurisdictions provide for a decision-maker at the agency level. Four jurisdictions identified an individual contracting officer as

being tasked with exclusion decisions. The UK system fits into this category, as contracting officers are responsible for making case-by-case exclusion decisions based on national regulations. Responses from five jurisdictions selected a judicial authority as a decision-maker, including where exclusions are automatically imposed following a criminal conviction and/or civil judgment. As noted above, this fits systems such as Italy and Chile where the exclusion decision may be based on a judicial finding that a supplier has committed a particular violation.

Respondents were able to select more than one type of decision-maker. Hence, responses from Brazil, the US, Spain, Chile, and the EC indicated that their systems provide for more than one type of decision-maker. Especially where an independent appellate process exists to challenge the debarment decision, the system is likely to have multiple decision-makers. In a few systems, the type of decision-maker depends on the reason for the debarment. In at least three systems, there are different processes that can result in exclusion. In Brazil, for example, the process for excluding a supplier varies depending on the severity of the offense and the consequences of the misconduct.

Jurisdiction	Gov't-Wide Exclusion?	Foundational Legal Basis	Decision-Maker(s)
Brazil	Yes	Administrative	Centralized Agency-Level Ind. Contracting Officer Judicial Authority
Chile	Yes	Administrative, Criminal	Agency-Level Judicial Authority Other
Germany	Yes	Administrative	Agency-Level
Italy	Yes	Criminal	Judicial Authority
Spain	Yes	Administrative	Agency-Level Ind. Contracting Officer Judicial Authority
Tunisia	Yes	Administrative	Centralized
United Kingdom	Yes*	Administrative	Ind. Contracting Officer
United States	Yes	Administrative	Agency-Level Judicial Authority
European Commission	Yes	Administrative	Centralized Ind. Contracting Officer
World Bank	Yes	Administrative	Centralized
Australia	No	n/a	n/a

*One response covering the UK answered "no."

Part II: Grounds for an Exclusion

The survey sought information on the grounds for which a supplier may be excluded. The survey provided a list of fifteen possible grounds, ranging from corruption to terrorism to regulatory infractions. Respondents were asked to indicate which of these grounds could lead to exclusion in their jurisdiction. Respondents were also able to identify additional exclusion grounds beyond the fifteen listed in the survey. For example, the US system has a "catch-all" ground that allows a supplier to be

excluded for any “cause of so serious or compelling a nature” that it affects the supplier’s “present responsibility.”

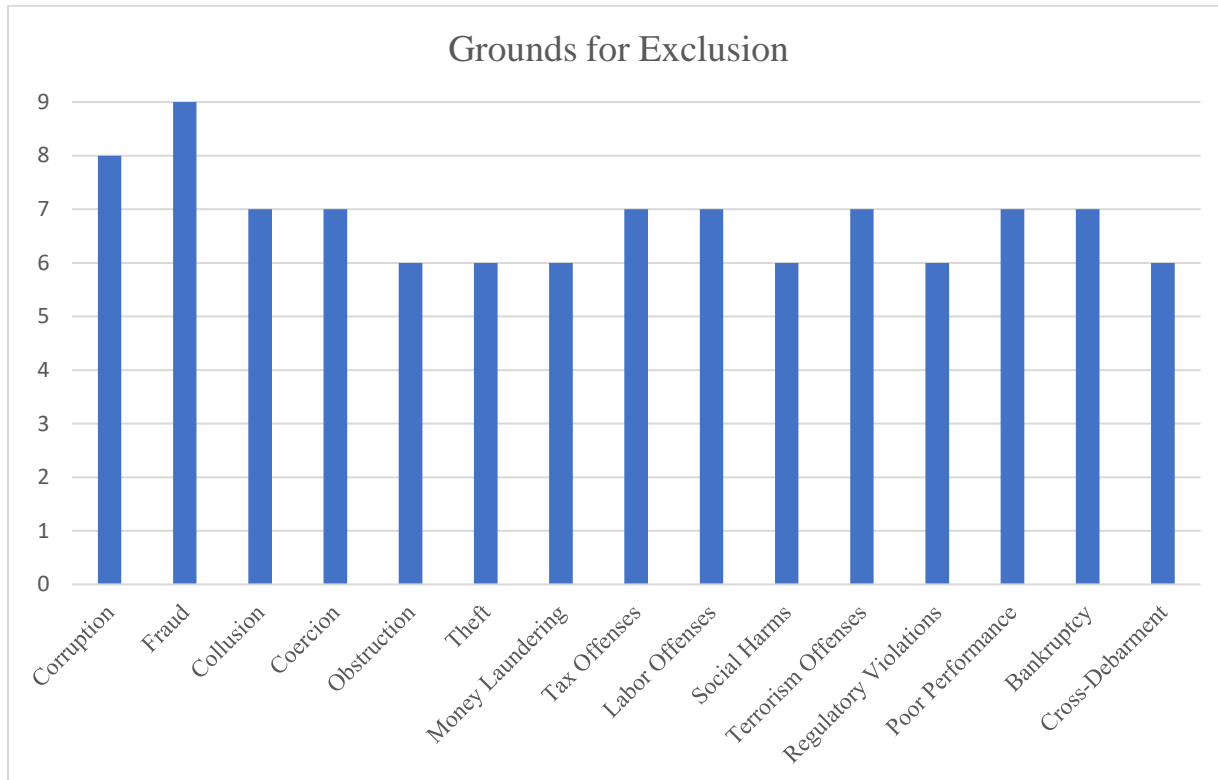
According to the responses, the most common grounds across all jurisdictions are fraud, corruption, collusion (bid rigging), coercion, tax offenses, labor violations, and terrorism. Responses from nine jurisdictions indicated that fraud is an offense for which debarment could be imposed (the responses covering the tenth jurisdiction – Italy – noted that its system is based entirely on criminal law and thus did not list specific grounds). Tunisia is the only jurisdiction that does not explicitly exclude for corruption, at least as this term is described in the survey. That said, Tunisia’s system does allow for excluding suppliers found to have committed acts that compromise professional integrity.

Most jurisdictions also exclude in cases of obstruction, theft, social harms, money laundering, and regulatory violations. Failure to perform on a previous public contract is another ground for exclusion in seven of the nine jurisdictions; responses indicated that the World Bank and Tunisia are the only jurisdictions for which poor performance is not a ground for exclusion. Bankruptcy is also a common exclusion ground, as it exists in seven of the jurisdictions surveyed. Responses further indicated that six jurisdictions may allow for the exclusion of a supplier that had been previously excluded by another jurisdiction or international organization, making “cross-debarment” one of the least common exclusion grounds across the jurisdictions surveyed. Responses from these six jurisdictions all indicated that cross-debarment is a discretionary decision.

The survey also asked respondents to indicate which of these grounds, if proven, automatically lead to the supplier’s exclusion and which grounds could, but need not, result in exclusion. The survey defines “mandatory exclusion” as an exclusion that must be imposed, without any discretion on the part of the decision-maker, when one or more grounds have been established (this is also sometimes referred to as “automatic” or “statutory” exclusion). Alternatively, the survey defines “discretionary exclusion” as an exclusion that, even if a ground is established, is imposed only at the discretion of the decision-maker. The survey found varying treatment of each ground across jurisdictions, including several responses indicating that an exclusion based on a particular ground could be both mandatory and discretionary, depending on the decision-maker and/or how the ground is established (*e.g.*, judicial decision versus administrative inquiry).

The survey also asked respondents to identify the reasons why a decision-maker may decide not to exclude a supplier notwithstanding the existence of a discretionary exclusion ground. Almost all respondents indicated remedial measures (*e.g.*, acts by the supplier that address prior acts or otherwise demonstrate that it will not, in its current condition, pose a risk to the government) could lead to a decision to forgo exclusion, although the frequency with which suppliers are able to avoid exclusion likely varies across jurisdictions. Under the EC system, for example, remedial measures may eliminate the need for an exclusion based only on certain grounds; a supplier cannot use remedial measures to avoid an exclusion based on fraud or similar offenses. Other ways in which a supplier may be able to avoid exclusion include settlement or other agreement, government interest, or applicability of another sanction. For instance, under the Spanish system, payment of fines and assurances that measures have

been taken to avoid future wrongdoing would allow a supplier to avoid exclusion under certain circumstances. Only Chile indicated that there are no discretionary grounds for exclusion.



Part III. Scope of an Exclusion

Type and Length of Exclusion

The survey also sought information on the type and duration of the exclusions that may be imposed. In most jurisdictions, the decision-maker must make its reasoning available to the supplier, but in four jurisdictions, the decision-maker also makes its reasoning available to the public. Seven jurisdictions maintain a publicly available list of excluded suppliers, six of which provide information on the grounds for the supplier’s exclusion. In 2020, Germany will be instituting a non-public list of excluded suppliers. Responses from Australia and the UK indicated that these jurisdictions do not have a list of excluded suppliers, either public or internal.

Responses across most jurisdictions indicated that exclusions are generally between one and five years in length. However, several systems allow for longer exclusions, even if the generally imposed sanction is between one and five years. For example, Tunisia allows for exclusions of up to ten years. Since the Tunisian system was instituted in 2016, seven entities have been excluded for periods ranging from six months to three years. In most systems, the duration of the exclusion varies

depending on the applicable exclusion ground. Only in the World Bank's system is the baseline length of the exclusion the same for all exclusion grounds, although the length can be increased or decreased depending on the presence of mitigating or aggravating factors.

Effect on Current and Future Contracts

Several questions in the survey relate to the extent to which an exclusion affects the supplier's current and future contracts. In every jurisdiction surveyed, the exclusion decision does not automatically terminate ongoing contracts; however, jurisdictions were split on whether subsequent modifications to those contracts were allowed. In seven jurisdictions, an exclusion decision prevents the supplier from receiving not only prime contracts but also subcontracts.

Application of the Exclusion to Affiliates

The survey also asked whether an exclusion could extend to the supplier's affiliates, including parent and subsidiary companies, lines of business, and individuals affiliated with the supplier. Six jurisdictions allow for an exclusion to extend to the supplier's corporate affiliates depending on the circumstances, although no jurisdiction requires that an exclusion automatically extend to affiliated companies. The World Bank's system presumptively extends an exclusion to all affiliates controlled by the supplier, but this extension can be rebutted. The UK, Brazil, and Chile are the only jurisdictions that do not allow an exclusion to extend to a supplier's corporate affiliates. Exclusions in the US, Spain, and the World Bank could be limited to certain divisions or operating units within a company, but no jurisdiction required that such a limitation be applied.

Respondents were also asked whether the exclusion of the corporate supplier could extend to a related individual (e.g., officer, manager, employee). In seven jurisdictions, an exclusion could extend to individuals affiliated with the supplier; of those seven, Spain and Chile are the only jurisdictions that require such an extension. In Spain, exclusions of a corporate supplier must extend to those individuals who own or control the supplier, and Chile requires extending exclusions to the supplier's managers. Most jurisdictions that allow for extending an exclusion to affiliated individuals also allow for the exclusion to further extend to other companies controlled by those individuals.

Exceptions to Exclusion

Finally, responses indicated that several jurisdictions have a legal mechanism that allows a supplier to be awarded a contract even after it has been excluded. In the US, this can occur where there are "urgent and compelling circumstances." In Germany, an excluded supplier can still receive a contract in "emergency situations." However, in five jurisdictions, there is no waiver; an excluded supplier cannot be awarded a contract under any circumstances.

Jurisdiction	Public Exclusion List?	Effect on Current and Future Contracts	Affiliates Covered	Exclusion Exception?
Brazil	Yes	Modifications allowed Subcontracting allowed	No extension to individuals or corporate affiliates	No
Chile	Yes	Modifications allowed Subcontracting prohibited	Must extend to individual managers; does not extend to corporate affiliates	No
Germany	No*	Modifications prohibited Subcontracting allowed	Can extend to corporate and individual affiliates	Yes (emergency situations)
Italy	n/a**	n/a	n/a	n/a
Spain	Yes	Modifications prohibited Subcontracting prohibited	Must extend to individual owners; can extend to corporate affiliates	No
Tunisia	Yes	Modifications prohibited Subcontracting prohibited	Can extend to corporate affiliates only***	No
United Kingdom	No	Modifications allowed Subcontracting prohibited	Can extend to affiliated individuals only	Yes (public interest or disproportionate burden)
United States	Yes	Modifications prohibited Subcontracting prohibited	Can extend to corporate affiliates and individuals	Yes (urgent and compelling circumstances)
European Commission	Yes	Modifications prohibited Subcontracting prohibited	Must extend to controlled corporations; can extend to individuals	Yes
World Bank	Yes	Modifications allowed**** Subcontracting prohibited	Can extend to corporate affiliates and individuals	No
Australia	n/a	n/a	n/a	n/a

*Germany will be instituting a non-public list in 2020.

**Not answered. Exclusions in Italy are based entirely in the criminal justice system.

***Tunisia's system applies only to companies, not individuals.

****The World Bank's system prohibits "material" modifications.

Part IV: Rights of the Supplier

Suppliers subject to exclusion proceedings can face severe repercussions, including lengthy exclusions from public contracting, bad publicity, and even fines or additional penalties. Because of the severity of these consequences, suppliers often have significant rights to present their case and seek an appeal during an exclusion proceeding.

Notice

In all jurisdictions except Chile, some form of notice must be given to a supplier facing exclusion. The timing of this notice depends on the jurisdiction, with responses indicating that notice is provided

when exclusion proceedings are commenced in five jurisdictions and when the exclusion becomes effective in another five jurisdictions. In several jurisdictions, the timing of the notice is at the discretion of the decision-maker. For example, in Brazil, the process differs depending on the agency. In the US, the decision-maker has the discretion to provide notice before the exclusion becomes effective but is not required to do so. Five jurisdictions also provide for some form of provisional exclusion (like a temporary suspension) while an investigation or an exclusion proceeding is ongoing.

In most jurisdictions, the notice is required to contain information about the grounds for exclusion. In the UK, although the notice is not required to contain the grounds for exclusion, the supplier is entitled to a “debrief” during which many contracting authorities include information as to the reasons for exclusion.

Contestation Procedures

In all jurisdictions, the supplier is entitled to the opportunity to present its defense to the decision-maker or otherwise contest the grounds for exclusion. Similarly, in all jurisdictions that allow an exclusion to extend to a supplier’s affiliates, those affiliates also have the right to contest the exclusion decision. In all jurisdictions, the supplier is entitled to make a written submission to the decision-maker. Most jurisdictions also allow the supplier to obtain a copy of the evidentiary record and request an in-person hearing. In a few jurisdictions, the supplier is entitled to call witnesses to appear on its behalf. In all jurisdictions, the supplier is entitled to be represented by counsel during the contestation process, including the appeal (discussed below). But only in Italy, where the exclusion process is based in criminal law, is the supplier provided defense counsel throughout the process.

Appeal

In all jurisdictions, the supplier has the right to seek an appeal (*i.e.*, a review of the exclusion decision by an independent authority). In seven jurisdictions, the appeal is largely a judicial process, although excluded suppliers in Chile can also bring an administrative complaint. Judicial appeal in three of these jurisdictions is possible only after the excluded supplier exhausts its administrative remedies. In three other jurisdictions, the appeal process is only administrative (*i.e.*, appeal to a higher administrative body, above the decision-maker).

All jurisdictions allow the supplier to once again obtain the evidentiary record and make a written submission during the appeal process. Most jurisdictions also allow an in-person hearing to be requested on appeal. In Brazil, the appellate procedure is not specified in the law, but suppliers are still entitled to appeal, and the procedure is determined by each government entity engaged in exclusion. As noted above, all jurisdictions allow a supplier to be represented by counsel during the process, but only Italy provides counsel when the supplier cannot afford one on its own.

Jurisdiction	When Must Notice be Given?	Provisional Exclusion?	Contestation Procedures	Appeal Rights
Brazil	Exclusion is imposed	No	Written submission In-person hearing	Administrative Process
Chile	None required	No	Written submission Obtain evidence In-person hearing Call witnesses	Admin. Complaint Judicial Challenge
Germany	Start of investigation	No	Written submission Obtain evidence In-person hearing	Judicial Challenge (after exhaust admin. remedies)
Italy	Start of investigation	Yes	Written submission Obtain evidence In-person hearing Call witnesses	Judicial Appeal*
Spain	Start of investigation Decision-maker finds grounds exist	Yes	Written submission Obtain evidence In-person hearing Call witnesses	Judicial Challenge (after exhaust admin. remedies)
Tunisia	Start of investigation Exclusion is imposed	Yes	Written submission Obtain evidence In-person hearing	Administrative Process
United Kingdom	Start of investigation	No	Written submission	Judicial Challenge
United States	Exclusion is imposed**	Yes	Written submission Obtain evidence In-person hearing Call witnesses	Judicial Challenge (after exhaust admin. remedies)
European Commission	Decision-maker finds grounds exist	No	Written submission	Judicial Challenge
World Bank	Decision-maker finds grounds exist Exclusion is imposed	Yes	Written submission Obtain evidence In-person hearing***	Administrative Process
Australia	n/a	n/a	n/a	n/a

*Initial decisions are made by courts of law.

**Prior notice is at the discretion of the decision-maker. Notice is also given if supplier is suspended/proposed for debarment.

***In-person hearing allowed only upon appeal.



Conclusion

This survey is intended to be the first systematic study of exclusion systems across the globe. To this end, the survey pilot has provided an opportunity to collect a small amount of data to analyze the survey's viability. Hopefully the results of this survey will help establish a firmer understanding of the methodology of exclusion mechanisms and eventually lead to the development of best practices.

As the survey formally launches, we will incorporate some of the lessons learned from the pilot. If you have comments or questions regarding the survey or any of the data discussed above, please feel free to reach out to us at sdsurvey@worldbank.org.

In the meantime, we are always looking to expand our understanding of exclusion systems. If you would like to participate in the survey, please [click here](#) to download a PDF-fillable copy. You can return the completed version to sdsurvey@worldbank.org.

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