Chapter 12

STRENGTHENING THE EFFECTIVENESS OF EXCLUSION MECHANISM IN PUBLIC PROCUREMENT: A COMPARATIVE LEGAL STUDY BETWEEN INDONESIA AND THE NETHERLANDS

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INTRODUCTION

This chapter analyses whether the exclusion of corrupted economic operators has been implemented effectively in Indonesia and the Netherlands. The strategy to enhance the implementations in both countries is also elaborated upon. To do so, this paper will firstly distinguish between the terms direct exclusion and referred exclusion. The latter refers to exclusion based on a blacklisting system. Furthermore, the existing critiques and responses to the exclusion mechanisms will be discussed. Conclusions are drawn which suggest that Indonesia acknowledges both direct and referred exclusions, whilst the Netherlands only recognises direct exclusion. The direct exclusion has been implemented effectively only in the Netherlands, due to the fact the administration is supplied by information from the administration's intelligence unit; something that Indonesia may consider adopting. Besides, the Netherlands may consider the concept implemented in Indonesia regarding the referred exclusion. Establishing the blacklist system may give certain advantages to the Netherlands.

CORRUPTION IN PUBLIC PROCUREMENT: INDONESIA AND THE NETHERLANDS CONTEXT

As a government activity to purchase goods and services, public procurement has to be carried out effectively; the government is required to purchase the best quality for the best value (UNODC, 2013). This is deemed relevant to the continuing evolution which presses the government to "do more with less" (Thai, 2009). However, corruption undermines this concept by discrimination and favouritism for a particular candidate (Szarek-Mason, 2010).

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Research conducted in more than 170 countries shows that enterprises are keen on bribing the officials in order to be awarded a contract (OECD, 2007; TI, 2012). Therefore, it can be said that corruption in public procurement is a global phenomenon. Presumably, this happens due to the abundance of resources and funds in public procurement. This makes the contract desirable to any candidate. Furthermore, corruption in the public procurement sector exists because of its complex and evolving nature (Manunza, 2012). This gloomy situation can also be observed at a national scale, both in a country which does not work that well in curbing corruption (Indonesia) and in a country that is perceived clean (the Netherlands), as is discussed below.

Indonesia has been suffering from corruption. According to the latest corruption perception index (TI, 2015), Indonesia is currently ranked 88th out of 167 countries. Despite jumping rank from 114th in 2013, Indonesia's current rank still places in it in the top 50 percent of corrupted countries.

It is reported that 70 percent of the corruption cases are in public procurement (CNN Indonesia, 2015). This number is quite coherent with data released by the Commission for the Eradication of Corruption (KPK). Since this commission has been established, KPK has been handling 411 cases in which a third of these occur in the public procurement sector (Wibowo, 2015).

Moving to the discussion about the Netherlands, it is true that this country is perceived as one of the least corrupted countries in the world. According to the latest corruption perception index, the Netherlands holds the 5th position of the least corrupted countries in the world (TI, 2015). This result looks similar to previous research on the EU Anti-Corruption Report which rates the Netherlands as the 4th least corrupted country in Europe (European Commission, 2014a).

Nevertheless, according to the European Barometer, 45 percent of the Dutch population believe that corruption exists in public institutions whilst the majority of the Dutch population believes that the most suffered sector of public administration in terms of corruption is public procurement. About 70 percent of the Dutch population think that corruption is widespread among officials who award public tenders or issue building permits (European Commission, 2014a; European Commission, 2014b).

To cope with corruption in public procurement, both countries have implemented the exclusion mechanism in their public procurement regulations. Therefore, the administration may exclude the economic operator (the natural or legal person which offers the execution of work(s), or the supply of products or the provision of services) whenever they have conducted or been involved in corruption. Pertaining this, two research questions are addressed in this paper: (i) has the exclusion mechanism for corrupted economic operators been implemented effectively in these countries? and (ii) how can these implementations be enhanced in both countries?

THE CONCEPTS OF EXCLUSION

Exclusion and Blacklisting: Two Different Concepts

According to a commentator, the terms exclusion and blacklisting may be used interchangeably depending on the jurisdiction in which they are being used (Williams-Elegbe, 2011). However, this paper regards that exclusion and blacklisting should be seen as two closely related, but differently defined terms.

Exclusion is the procedure by which economic operators are excluded from participating in tendering processes when they are involved (Martini, 2013), or suspected of involvement in wrongdoings. The reasons for exclusion vary depends on the jurisdiction, *inter alia*, conducting tort, manipulating the competition, conducting corruption, participating in or supporting or acting as organised crime, drug offences, money-laundering, fraud and tax offences (Williams-Elegbe, 2011). The function of such exclusion is as a preventive mechanism so that the taxpayers' money will not be wasted by giving the contract to the 'problem makers'.

Exclusion can be based on irrevocable court decisions or based on appropriate suspicion of the administration. Suspicion may be sufficient ground to conduct exclusion because exclusion is an administrative sanction rather than criminal sanction. The administrative sanction has a standard of proof which so-called "more likely than not true" (Schweizer, 2012). To make a decision, the administration may weight various information and under this standard, the decision to exclude should be based on the greater proportion of the weight that to exclude is better than not to exclude. This standard of proof is lower than the "beyond the reasonable

doubt", the standard of proof which is applied in the criminal sanction (Dennis, 2013).

Slightly different to exclusion, blacklisting is the activity of listing the economic operators considered as 'problem makers' by a public body into an open-centralised database system for a certain period. By so doing, the fact that an economic operator has been listed by a certain public body, it can be a warning system to other parties or even grounds to conduct exclusion.

I shall underline the phrase "open centralised database system" in above. The word 'open' in here refers to citizens' accessibility to this list. In some countries such as Indonesia (LKPP, 2016) and South Africa (NTSA, 2016), the blacklists are exposed publicly on the internet. A similar situation can also be found in the World Bank (2016). However, not every country or institution decides to disclose this publicly.

In other words, to conduct exclusion, the administration may, in some cases, rely on the information provided by the blacklisting system. Hence, from the author's view, exclusion can be conceptualised into two folds, namely: *direct exclusion* and *referred exclusion*. *Direct exclusion* is taken by the procuring entity based on certain legal grounds after facing concrete facts. Besides, the *referred exclusion* is conducted by the administration after realising that the operator is listed on the blacklist system.

In reference to a previous paragraph, the conceptual arguments enabling the citizen to access the blacklisted companies may be questioned. Such questions can be answered by a normative framework the "good public procurement approach." It is about the role of principles of good governance, such as the principle of transparency, in enlightening the area of public procurement law. Argumentations for this approach are as follows.

Conceptually speaking, the principle of transparency serves three categories. One of these is that serving the citizen by facilitating the public debate, participation, accountability, and legitimacy of a public institution (Buijze, 2013).

It can be argued that publicly listing the 'trouble makers' will facilitate public awareness, so that the public may determine whether or not to cooperate with such troublemakers. The accessibility of the

blacklist, therefore, will facilitate the public to participate in the fight against social problems (in this paper's context: corruption).

As a blacklist serves the citizen in general, the information should be available in an active manner; it should be publicly available without the necessity to request information (Darbishire, 2011). Moreover, the presented information should be served by adhering to the concept of openness. This is indeed the most advanced concept under the principle of transparency. Openness not only embraces on the right to the access of information and the right to access official decisions and record activities (Birkinshaw, 2006), but also ensuring that the information is using the accessible and understandable language for the sake of the non-specialist reader or listener: the public in general (Commission of European Communities, 2001) (Heald, 2006).

Thus, if the concept of openness is utilised on the matter, this will provide a conceptual foundation from which to request the government to collect the irrevocable court decisions regarding the corrupted economic operators, extract the information, and publish those publicly in laypersons' language under the blacklist system.

However, the approach above may be slightly different with the 'susceptible' corrupted companies. Their names should not (yet) be listed, in order to avoid inhibiting the effectiveness of the criminal investigation.

Critiques on Exclusion and its Replies

There is an intense conceptual debate about exclusion in its role to fight against corruption in public procurement. This section will discuss two main critiques and their responding counter arguments. Afterwards, it will be stressed that exclusion and blacklisting are two promising mechanisms to aid against corruption.

The main critique is the accusation that the concept of exclusion breaches the doctrine of separation of powers. The punishment for legal violations should be left to the criminal justice system (under the judiciary power) (Williams, 2006). Another critique is that exclusion can hamper the quality of competition among the bidders, and even it can stimulate bid rigging. This can happen particularly if the nature of a public tender is complex and complicated. It is

believed that “the fewer the number of sellers, the easier it is for them to reach an agreement on how to rig bids” (OECD, 2009).

Regarding the first critic, it is believed that its argument is inappropriate and perhaps out of date. The doctrine of separation powers has been considered leftover (Ackerman, 2010). At the opening of the twenty-first century, executives (governments) “have become the most powerful organs of nation-states” (Craig & Tomkins, 2006, p. 1). One of its main duties is to set priorities and to implement these. One example of this is the scenario in which a certain government has a stronger desire to control crime levels. To do so, the government may utilise its administrative law power to support the criminal law. The following are two concrete examples.

Facing the situation that the courts were overloaded by criminal cases, the UK government introduced the Anti-Social Behaviour Act (ASB Act, 2003) (Huismen & Koemans, 2008). Those who behaved in an anti-social manner were sanctioned with an anti-social behaviour order (ASBO). This functions as an administrative measure which restrains the offender to act in a certain way. Whenever the ASBO is breached, then this will be considered a criminal offence. In the Netherlands for instance, before and during the 1980s, the country was characterised by an attitude of supporting criminal law sanctions against corruption and organised crime (Widdershoven, 2002). Since the end of the 1980s, however, this attitude has been changed to one which promotes administrative sanctions with a punitive character (Addink & ten Berge, 2007) (Widdershoven, 2002).

Pertaining the second critique, it may be true that exclusion may reduce the quality of competition, in turn forcing the procuring entities to buy at higher prices or lower quality than what they would otherwise expect (Hjelmeng and Søreide, 2014). However, this concern may only be relevant for a particular strict condition where there are only limited economic operators that may be interested in participating tender or capable of handling the required supply, work or service. After all, the administration may, or even should, be equipped by the discretion not to perform exclusion whenever the above situation applies. So that, exclusion can be still considered as a promising tool in the ordinary tender situation.

Besides the above responses, it is also worth highlighting a research result from Humboldt - Viadrina School. This explains that

restricting business opportunities and operations, such as exclusion, is considered to be the most effective mechanisms to motivate businesses to counter corruption (Schöberlein, Biermann, and Wegner, 2012).

Hence, in general, the above arguments and examples give robust rationalisation to advocate the role of administrative law to control crime. Consequently, this also gives conceptual justification for conducting exclusion to prevent the corrupted economic operator from participating in the public tender.

IMPLEMENTATION OF EXCLUSION MECHANISM IN BOTH COUNTRIES

In Indonesia

This section will begin with some explanation on the legal foundations necessary for conducting an exclusion mechanism in Indonesia. Stemming from the rules, the Indonesian perspective on the exclusion mechanism will be conceptualised. Following this, it will be elaborated whether or not these rules have been implemented effectively in Indonesia. The rationalisations about the implementation result will also be provided.

The regulations on exclusion and blacklisting can be seen in the Article 118 (1) of the Presidential Regulation ('PR') 70/2012 on Public Procurement. It is promulgated that there are numerous reasons to sanction an economic operator, such as: (i) trying to influence any officer in the procuring entity to breach the laws; (ii) distorting the competition; (iii) misrepresenting information. Other reasons include (iv) the operator pulls out the bidding proposal without unreasonable reason; (v) the operator cannot finalise its contract (tort).

Referring to Article 118 (6) of the above regulation, whenever the officer at procuring entity finds the above situation(s), he may conduct the exclusion. This action shall be followed by listing the company into the blacklist system.

The system is managed by National Public Procurement Agency (NPPA). In order to put the company on the list, certain procedures embodied in Article 6 of the NPPA Regulation 08/2014 apply, as below.

First of all, the procurement committee recommends the head of the public body to blacklist certain operators by mentioning the reasons. The carbon copy of that recommendation should also be sent to the operator. The head of public body will then follow up the recommendation only when the inspectorate is also satisfied with the committee's recommendation. In this case, the head of public body will issue an administrative decision to blacklist the operator, and afterwards, ask the NPPA to put the operator on the blacklist system.

Referring to Article 4 (1) of that NPPA Regulation, the listed duration is indeed two years. Also, article 19 (1) PR 54/2010 promulgates that, during listed, the operator will not be able to meet the general requirements to participate in any local or national public tender. If that operator insists on applying, the procuring entity will consequently exclude its participation.

According to above discussions, it can be deducted that Indonesia has a mechanism to exclude corrupted economic operators. In addition, Indonesia recognises both *direct* exclusion and *referred* exclusion based on the blacklist system.

The blacklisted economic operators can be accessed online in NPPA ('LKPP') website. When this paper was prepared, there were 472 economic operators listed in the system. Nevertheless, none of these are listed under corruption.

The majority of the companies in the blacklist have been listed because of breaching public procurement contracts or due to their low performance in public procurement, whereas the rest of the companies in the system are listed because of other reasons such as drawback after the awarded contract. The same situation examined two years ago also finds the same result.[1]

It is even more surprising that certain companies which have been affiliated to corruption are also not listed on the system. The followings are two examples.

On *Universitas Sultan Ageng Tirtayasa,* the court found that the winning company had manipulated the competition and bribed some officers at the procuring entity. Despite this, neither this winning company nor the companies which have been participating in bid rigging are listed on the blacklisting system.[2]

A similarly dismal situation can be seen on *Simulator for Driving Licence.* A company (MAS) got the contract at a Directorate of Traffic Affairs of the National Police. However, MAS is a sister company of CMMA. These two are led by the same director. This director has been found guilty of bribery in public procurement. Ironically, this corruption case had happened at the same directorate a year before MAS awarded the contract (Berita Satu, 2014).

Consequently, this is a strong indication that the implementation of the exclusion mechanism for corrupted companies does not work well. There are two possibilities which may cause this occurrence as discussed below.

First of all, the regulation is less clear regarding the power of the procuring entity in conducting exclusion. The author has conducted a personal discussion with two heads of procurement service units at two different procuring entities. They realise that there is an exclusion mechanism for corrupted economic operators incorporated in the regulation.[3] However, they do not realise that they may conduct exclusion directly on the grounds of corruption, for instance if certain economic operators attempt to bribe them. They are under the impression that exclusion and blacklisting system pertaining corruption has to be based on the final court decision.[4]

It is also relevant to highlight that the Indonesian judges rarely sanction the company for corruption. This is because the legal enforcers have been too focused on convicting the guilty of the 'natural person'. Consequently, these court decisions are rarely compatible with the nature of blacklisting and exclusion which also embraces the sanction to the 'legal person': companies.[5] Possible solutions to such an issue will be explored. Firstly, the particularities of exclusion mechanisms currently in existence in the Netherlands will be explained.

In the Netherlands

As one of the EU Member States, the Netherlands is subject to the EU legal framework for public procurement (Directive 2004/18/EC). This Directive is indeed repealed by Directive 2014/24/EC with effect from 18 April 2016. There is no significant change pertaining the exclusion on corrupted economic operators (Priess, 2014). However, Article 57 of the new Directive embraces

"the obligation to exclude an economic operator where the person convicted by final judgement is a member of the administrative, management or supervisory body of that economic operator or has powers of representation, decision or control therein". This new promulgation is based on the consideration that not all jurisdictions allow for a conviction of legal entities (Priess, 2014).

This revision influences the Netherlands. The current Dutch Public Procurement Act (DPPA) 2012 will also be revised by the DPPA 2016 which is currently being discussed in the Dutch Parliament. It is predicted that the new Act will be ready to enforce in the 1st of July 2016 (Pianoo, 2016a). Similar to above, the revision will not employ significant change on the issue of the exclusion on corrupted economic operators. The following discussion will use the combination of the current law and the future law.

Article 2.86 of the DPPA 2012 enables a contracting authority to exclude a candidate or a tenderer from a public contract. This happens when the authority has information that the candidate or the tenderer is subject to an irrevocable court decision or conviction for corruption. According to the explanatory memorandum for the DPPA 2016, this provision will be kept, but this will be added to the additional provision of the Article 57 of the new Directive as articulated above (Pianoo, 2016b).

The DPPA 2012 also requires the contracting authorities to ask the participant to fill in a 'self-declaration' (Art. 2.84). In the self-declaration, the candidate indicates, *inter alia*, whether or not the grounds for exclusion apply. Furthermore, according to Article 2.89, any candidate or tender participant may seek a 'Declaration of Conduct' (*Verklaring Omtrent het Gedrag*) in public procurement. This is a declaration, valid for two years, indicating the integrity clearance of the holder as the tender participants as issued by the Dutch Ministry of Security and Justice. Regarding these articles, the explanatory memorandum of the DPPA 2016 explains that the provision of Article 2.84 will remain unchanged. In addition, the Article 2.89 will also embrace the issue of 'self-cleaning'; explaining that a candidate or tenderer may submit data to prove that the grounds for referred exclusion are not applicable to him based on evidence from another EU Member State, or from the country of origin or residence of the economic operator (Pianoo, 2016b).

It is noteworthy also to discuss the possibility of the Dutch administration to evaluate the integrity of a candidate using the screening instrument of the so-called BIBOB. This stems from the Act for the Promotion of Integrity in Public Administration's Decision Making or *Bevordering Integere Besluitvorming Overheids Beslissingen* ('BIBOB') Act in 2002. This Act introduces the preventive measure undertaken by the Dutch administrative authorities to encounter organised crime and criminal activities such as corruption in particular Dutch industrial sectors which are considered as vulnerable, such as the hotel and catering industry, brothels, construction, transport, and waste management (Huisman and Koemans, 2008).

To do so, public bodies may refuse an individual (or company) when applying for a permit, subsidy, or license, if there is a risk that this will be used to facilitate a criminal activity or utilise benefits with substantial financial value that have been gained via criminal acts (Nelen and Huisman, 2008). To detect the involvement on criminal activities, the administrative authorities may request information from the BIBOB bureau which is under the Ministry of Justice. This bureau may then collect confidential information from sources which are scarcely accessible to the regular administrative authorities such as the confidential information stemming from judicial, financial and law enforcement institutions in the Netherlands, i.e. police departments or intelligence offices.

Two BIBOB officers who were met by the author provided a good illustration, as follows; "If a drug trafficker submits a license to open a restaurant, then his license will not be granted. By doing so, it helps the work of legal enforcers as they will not need to deal with the money laundering, and may focus on fighting the drug".[6] Furthermore, they also explained that this may be implemented for a corruptor or corrupted companies which apply for a permit, subsidy, or license. However, as corruption rarely happens, they have not yet used BIBOB for this.[7]

The European Court of Human rights in *Bingol v. The Netherlands* indeed confirmed the substantive and procedural, administrative character of the BIBOB Act. According to the Court, investigating the integrity of an applicant for a permit or applying administrative sanctions does not constitute as a 'criminal charge'. Thus, "the

refusal of a licence under the BIBOB Act was neither punitive nor deterrent, but merely preventive."[8]

Although a commentator suggested that BIBOB Act should be applied for public procurement (Manunza, 2001), the Dutch legislators decided not to provide rules for contracting authorities to refuse a contract to economic operators in public procurement, as explicitly seen on Article 5 and 9 of the Act). This is the reason why these BIBOB officers never suggested that procuring entities exclude economic operators in public procurement.[9] Nonetheless, these officers do believe that the exclusion mechanism in the Netherlands has worked well, particularly because some contracting authorities have established the (internal) "screening unit."

They explained that the screening unit examines the structure of companies, particularly holding international companies which are very complex. This also assesses the relation among companies to understand who actually holds the control. The unit will deliver internal advice to the contracting authority to ensure that the government works with healthy companies. The screening unit works closely with the BIBOB bureau, as this bureau holds the data from the legal enforcers.

The above discussions have shown that the Netherlands only recognises 'direct exclusion', and does not recognise 'referred exclusion' empowered by the blacklist system. It is believed that the exclusion mechanism has been well implemented. To conduct (direct) exclusion, the procuring entities may obtain or request information from, which may be called, the administrative intelligence unit: BIBOB bureau and the screening unit. In addition, the Netherlands will soon have a provision to exclude an economic operator based on the final judgement of the (natural) person convicted of (in this paper context) corruption. This can apply as long as that person is a member of the administrative, management or supervisory body or has powers of representation, decision or control of that economic operator. This provision is based on the new EU Directive 2004/18/EC.

STRATEGY TO ENHANCE THE EXCLUSION MECHANISM IN BOTH COUNTRIES

Indonesia

Indonesia should consider the new promulgation of the DPPA 2016 stemmed from the EU Directive as discussed previously. The

administration should be enabled to conduct exclusion of a legal person, or their affiliated company, based on conviction of final judgement of a natural person.

It is relevant to explain that Indonesia has been coping with a problem on the transparency of the court decisions. Previously, during the dictatorship regime, the court decision could not be accessed. Since this regime fell down in 1998, Indonesian judiciary has indeed become more transparent by uploading the court decision to the internet (Pompe, 2005). However, the abundance of thousands of court decisions, the delay of uploading, and the lack of search engine mean the court decisions remain largely inaccessible to many.

To cope with this, the law should give additional power to the National Public Procurement Agency (LKPP) to receive carbon copies and to analyse the court's decisions. Following this, the LKPP should have the ability to list the supposed 'trouble makers' into the blacklist system.

The LKPP's 'analysis' of such decisions is understood as the right for the LKPP to make their own judgement of interpretation of the irrevocable court decision. If the decision determines a natural person guilty of corruption while he is a member of the administrative, management or supervisory body or has powers of representation, decision or control of a legal person (company), then the company may be blacklisted and excluded.

Besides the comparative law argument, the conceptual argument which may be used to embody this provision is that the blacklisting and exclusion is an administrative decision aimed at a preventive measure. It is based on "more likely than not" standard of proof – as explained in the conceptual argument above.

The LKPP is considered to be the most appropriate body to bear this power due to the fact that complexity will be minimised so long as the judiciary has only one partner to inform the carbon copy of the court decisions pertaining corruption. Also, this duty is coherent with one of the LKPP's current duties: uploading and maintaining the blacklist publication.

In addition, Indonesia may consider the practices employed in the Netherlands where the administration can request and utilise information from the government intelligence unit. Indonesia indeed

has an independent administrative intelligence body, namely *Pusat Penelitian Analisis Transaksi Keuangan* (PPATK). As explained in Article 1 (2) Preventing and Eradicating Money Laundering Act 2010, this body is focused on preventing and eradicating money laundering. However, the regulations only allow this body to supply the information to legal enforcers and certain institutions which have authorities to supervise banking and financial transactions (vide: Article 26 (g) Money Laundering Act 2003 and Article 90 (1) Preventing and Eradication Money Laundering Act 2010). Consequently, if Indonesia is willing to transplant the practices in the Netherlands, the government should consider revising regulations on public procurement and *PPATK*.

The Netherlands

As the Netherlands currently only utilises the direct exclusion mechanism, the Dutch government may consider applying the *referred exclusion* by establishing a blacklist system which can be accessed publicly as seen in Indonesia. This will create a central and publicly available information-sharing mechanism which effectively traces the corrupted actors, and that can be used broadly by all levels of public administration (Ware et al, 2011).

To apply so, the Dutch administration should analyse the irrecoverable court decisions pertaining corruption, and then list the companies on the blacklist. It may be true that corruption cases in the Netherlands are few. It may also be true that the accessibility of court decisions is not an issue in the Netherlands. However, applying an accessible blacklist mechanism is still important, as argued below.

By implementing the accessible blacklist mechanism, the Netherlands respects the concept of openness which has been discussed in the conceptual discussion. Furthermore, this will give a greater opportunity for Dutch citizens to participate in the anti-corruption policy. It is believed that the business sectors would be in support of utilising the blacklist system as a reliable lesson learned source because they also want to undertake business only with reliable partners. Pertaining this, it is noteworthy to consider the subsequent practices in international organisations; once an economic operator has been blacklisted by a certain institution, other institutions can also refer to the blacklist system (by conducting

cross-blacklisted). Thus, the deterring effect will be boosted (Nesti, 2014).

Lastly, the blacklist system can provide data for the contracting authorities not only in the Netherlands but also in other EU member states. A commentator explained that the obstacle to implement exclusion mechanism is the lack of information or data (Arnaiz, 2009). Hence, this should be seen as an alternative solution.

CONCLUSION

This paper has argued that exclusion can be conceptually classified into two folds: *direct exclusion* and *referred exclusion*. The former refers to exclusion which is straightly taken by the procuring entity based on certain legal grounds after facing concrete facts. The latter refers to exclusion conducted by the administration after realising that the operator is listed on -centralised and publicly accessible- blacklist system. Therefore, exclusion and blacklisting should be seen as two different concepts, although these are closely related.

Indonesia acknowledges both direct exclusion and referred exclusion whereas the Netherlands only acknowledges direct exclusion. These two countries have various grounds for exclusion, including to exclude corrupted economic operators.

It has also been explained that exclusion and blacklisting are an administrative decision based on 'more likely than not' standard of proof. Therefore, it should not be seen as a punitive criminal sanction, but as a preventive measure of corruption.

Answering the first research question, the implementation of the direct exclusion and referred exclusion mechanism for corrupted economic operators has not been effectively implemented in Indonesia. This may be due to the fact that the judiciary hardly punishes the company. The Indonesian legal enforcers tend to focus merely on convicting legal liability of the natural person. As a result, the administration is in doubt whether that court decision can be used to blacklist and exclude the legal entity affiliated with that person. As a consequence, none of the corrupted companies have ever been listed, and therefore, these are not excluded from the public tender.

It is believed that the direct exclusion mechanism has been implemented effectively in the Netherlands despite no similar blacklisting system like that of Indonesia. However, some Dutch procuring entities have established the screening unit to ensure that the procuring entity only deals with the healthy companies. In practice, this unit works hand in hand with BIBOB bureau. It is a bureau which has access to confidential information from sources which are hardly accessible to the ordinary administrative authorities.

Relating to the second research question regarding the strategy to enhance the effectiveness of the exclusion mechanism, both countries may learn each other. On the one hand, Indonesia may learn from the Netherlands about the role of administration to collect data for conducting exclusion. Indonesia may also consider the new provision which will be embodied in the DPPA 2016 (stemmed from the EU Directive 2004/18); to interpret the court decision which sanctions the natural person as the ground to exclude company. It has been argued that this power should be given to the National Public Procurement Agency (LKPP).

On the other hand, the Netherlands may consider creating the blacklisting mechanism which can be accessed by public as exercised in Indonesia. By so doing, the Dutch government respects the legal concept of openness. This concept not only embraces on the right to the access of information and documents; but also immerses on the right to obtain information in accessible and understandable language. Moreover, attainable blacklists allow a greater opportunity for the public, and particularly the business sectors, to participate in the anti-corruption policy. Furthermore, an accessible blacklist system can be an effective solution to the problem of the supply of data for the contracting authorities across EU member states.

Finally, it may be true that this paper discusses problems and solutions of public procurement in two selected countries. Nevertheless, the conceptual frameworks and lesson learned derived from this paper may also relevant for other countries.

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NOTES

1. Based on the author's previous research, by mid 2014, there are 792 suppliers/contractors listed in the system. None of these were listed under corruption.
2. Banten High Court Decision Number 5. Pid.Sus/2013/PT.BTN and Supreme Court Decision Number 1292/K/Pid.Sus/2013.
3. Based on interview with the head of procurement service unit in an anonymous procuring entity in East Java, 20 December 2013. Similar substance has also been confirmed by another head of procurement service unit in an anonymous Ministry, February 18, 2014.
4. Based on interview with the head of procurement service unit in an anonymous Ministry, February 18, 2014.
5. The statement of a Supreme Court Judge, Prof. Komariah, in 6 March 2013. He said that he never heard of any company charged with corruption, as usually the director of the company is the one who is charged for the corrupt action. Skalanews, "Korporasi Dipidana Korupsi." [Online]. Available at http://skalanews.com/berita/detail/139833/Korporasi-Dipidana-Korupsi. (Accessed May 15, 2014). His statement seems to be the general opinion of the legal enforcer's perspective in Indonesia. This old fashioned practice is about to change.
6. Based on the author's communication with two BIBOB advisors at Municipality of Amsterdam, April 16, 2014.
7. Based on the author's communication with two BIBOB advisors at Municipality of Amsterdam, 16 April 2014.

8. European Court of Human Rights, *Bingol v. The Netherlands*, Application no. 18450/07, para. 28.

9. Based on the author's communication with two BIBOB advisors at Municipality of Amsterdam, 16 April 2014.

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