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**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
COMPETITION COMMITTEE**

Summary of discussion of the Roundtable on Director Disqualification and Bidder Exclusion

Annex to the Summary Record of the 139th meeting of the Competition Committee

29 November 2022

This document prepared by the OECD Secretariat is a detailed summary of the discussion of the Roundtable on Director Disqualification and Bidder Exclusion, held by the Competition Committee on 29 November 2022, is circulated to delegates for approval under written procedure. Delegates are requested to submit any proposed changes by 15 February 2024.

More documents related to this discussion can be found at:
www.oecd.org/competition/director-disqualification-and-bidder-exclusion-in-competition-enforcement.htm

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Summary of the discussion of the Roundtable on Director Disqualification and Bidder Exclusion

On 29 November 2022, the OECD Competition Committee held a roundtable on Director Disqualification and Bidder Exclusion chaired by Frédéric Jenny. He indicated that the discussion would focus on who applies those sanctions – whether the competition authority, sectoral regulators, or procuring agencies -, their scope and effectiveness, their objectives, and the challenges that each one of the instruments faces. The Chair explained that the discussion will be divided as follows:

- Director disqualifications: the scope of application, effectiveness, objective, criteria for application, challenges, and the consistency between this instrument and fundamental rights.
- Bidder exclusion: different types of such a sanction, different mechanisms, criteria for application, the scope of application, challenges, and concerns relating to the effects of bidder exclusion on the market.
- Common challenges that both instruments imply, particularly how the involvement of the judiciary may affect the duration and effectiveness of the instruments and their application, as well as the coordination with immunity and leniency programs. Is there any coherence between director disqualification and bidder exclusions? Are they reinforcing each other or are they working at cross purposes?

The **Chair** presented the three expert panellists:

- **Peter Whelan**, Professor at the University of Leeds.
- **Amanda Athayde**, Professor at the University of Brasilia.
- **Emanuelle Auriol**, Professor of Economics at Toulouse Capitole University.

At this point, the Chair gave the floor to the Secretariat for a brief overview of the Background Paper. The **Secretariat** mentioned that due to the current economic outlook, governments have deployed stimulus packages to cushion the impact of ongoing crises. In this sense, governments will allocate much of the public spending via procurement tenders and public contracts which makes it essential to ensure that they are competitive to make the most of taxpayers' money. However, as state measures have the highest positive effects when they are applied to competitive markets, it is more important than ever that collusive practices are effectively deterred. The Secretariat added that cartels typically overcharge 10% to 20% whilst bid rigging can increase prices by up to 60% and these do not include the negative effects and the long-term effects on quality and innovation. This is why the Secretariat believes this discussion is timely. According to it, debarment measures include two main types of sanctions. The first is director disqualification, which involves excluding an individual typically from managerial roles and from taking decisions on any company's operations and strategy for a specific amount of time. Depending on the jurisdiction, a director may be disqualified when his conduct led to a competition infringement, but also when he was aware or should've been aware of the infringement and did nothing to avoid it. Director disqualification is most often applied to cartels, but some jurisdictions allow imposing it with abuses of dominance and other infringements. Because of its powerful deterrent effect, it has also more recently been considered suitable for application to the digital markets as a response to breaches in digital regulations. The second type of debarment measure is bidder exclusion, which involves the exclusion of a company from a

public procurement tender process or from future tenders. Typically, although not always, by a specific contracting authority and for a limited amount of time. The Secretariat also pointed out that bidder exclusion in competition enforcement is associated with bid rigging but those with other competition infringements that question the professional integrity or credibility of the economic operator. In the context of the debate about the low deterrence of antitrust fines and the declining rate of leniency applications across the world, the Secretariat indicated that these measures can substitute or add to the financial cost of fines and they do so either by directly putting at stake their reputation and livelihood of an individual or by excluding a company from revenue opportunities. In addition, these measures also protect the public interest by preserving the integrity of the tender or protecting the community from corporate misconduct. The decision about their application however raises a few challenges: first, when they are appropriate, either as a standalone or as a complementary measure (for instance, to other individuals or corporate fines); second, how they will affect the company or the market (for instance, if an authority excludes a player in a market with few options); third, what should be the scope and duration (for example, should the bidder be excluded from tenders of a certain value only or from all tenders, and for how long?). The Secretariat identified that these measures entail two extremely delicate trade-offs. With regard to director disqualification, it is about ensuring competition compliance without eliminating incentives to hold managerial positions or to engage in decision-making. Concerning bidder exclusion, it is about preserving the integrity of the tender process without disrupting competitive market dynamics. There are several measures to address these problems, such as self-cleaning mechanisms, reward systems, and the use of advocacy powers. In conclusion, the Secretariat wrapped up by indicating that the savvy use of these measures can achieve deterrence, public integrity, and public confidence in good business administration as they entail significant risks however, the consequences of their application must be assessed extremely carefully. This means that the competition authority's involvement not only in their design but also in the decision-making process about their application in concrete cases may be decisive to avoid debarment coming at the cost of healthy market dynamics.

The Chair thanked the Secretariat for its presentation, in particular for outlining some of the crucial trade-offs when applying such instruments. He moved to the first part of the discussion related to director disqualification and gave the floor to Peter Whelan to share the United Kingdom experience.

1. Director disqualifications: the scope of application, effectiveness, objective, criteria for application, challenges, and the consistency between this instrument and fundamental rights

Peter Whelan believes that the sanction of director disqualification can help to achieve the deterrence of all competition offences, and not only cartels. For him, the UK experience with director disqualification for competition offences can be used to articulate some important lessons related to this instrument. First, however, one must think about what director disqualification actually seeks to achieve in practice. Whelan believes it is not about punishment or retribution as such; rather it is about securing certain future outcomes and conveying a certain message to other directors in order to change their behaviour. This instrumental effect has the objective of protecting the public via deterrence. Whelan thus understands deterrence as the strongest aspect in terms of the measure's objective. He added that director disqualification is an individual and personal sanction that incentivises the director not to engage in any antitrust offending. Moreover, it also incentivises the director to use whatever available powers that the director has to ensure that antitrust

compliance occurs within the company. The latter incentive is crucial as often directors are not directly involved in the antitrust offending in their respective companies. Whelan explained that the need for individual sanctions like this one comes from the fact that corporate fines alone are probably not effective in achieving deterrence. After a slow start, the UK regime has started to develop an impressive enforcement record with respect to director disqualification for competition offences. According to him, there has been one order imposed by a court, but there have been 24 voluntary undertakings, where directors in effect agreed to be to be disqualified for a certain period. These director disqualification undertakings ranged in duration from 1.5 to 12 years, with an average of 5 years. Whelan commented that it is important to choose the correct link between the director's conduct and the breach of competition law at issue. Initially, the UK was too strict on this matter. Now, however, whenever there is a competition violation committed by a company, the Competition and Markets Authority will in all cases examine whether any of the directors should be disqualified. Of course, it does not mean that there will be a disqualification simply because there is an antitrust violation. In fact, the current policy rightly emphasises the need for a link with a director's culpability and largely implements a standard of negligence for director disqualification in the antitrust context. Finally, he argued that there has to be fairness related to the imposition of the sanction, because once a director is disqualified, there will be a stigma associated with the disqualified director.

After thanking Peter Whelan for his exposition, the Chair requested the United Kingdom's delegation to explain what has led the Competition and Markets Authority (CMA) to consider pursuing director disqualification in all cases where competition law has been broken.

The **United Kingdom** (UK) shared it believes that the two instruments that are the object of the discussion are a very important part of the broader drive to deter anticompetitive behaviour in the UK, by being effective and deterrent as possible and changing individual behaviours and corporate attitudes to competition compliance. The delegation indicated that it only started using this tool in 2016, securing a total of 25 disqualifications until now. Currently, the authority is considering whether to pursue competition disqualifications in all cases where competition law has been violated, including anticompetitive agreements and abuse of dominance cases. So far, all cases in which the CMA used this tool were related to anticompetitive, but this is because it only had two decisions on abuse of dominance in which the director disqualification was not appropriate. The UK mentioned that it has a criminal regime for cartels, but this only applies to hard-core cartels. In this sense, the delegation considers the disqualification regime very important, to ensure that there is a personal liability in cartel cases that could not be pursued criminally. In addition, the UK added that the proposed legislation on the digital markets contains an option to impose directors' disqualification for regulatory breaches. Finally, the delegation explained that the leniency regime provides automatic immunity for cooperating current and former directors of a company that is granted leniency in relation to that competition law infringement. However, the CMA is able to withdraw the protection to the directors if they fail to co-operate with the leniency process, and this has already happened.

Ireland replied the Chair about how the delegation knew that the director disqualification was a successful measure of punishment for individual cartel offenders, considering that it also had a criminal statute that can have a deterrence effect as well. The Irish delegation indicated that its criminal enforcement regime and the directors' disqualifications exist since 1996. According to the delegation, all breaches of competition law are subject to criminal prosecution in Ireland, but, in practice, only cartel conducts are subjected to it. Ireland added that if one is personally convicted of a competition cartel offence, there is an automatic director disqualification ordered by the court at the time of sentencing in a criminal case. The delegation considers that this tool has an additional impact on the Irish

competition regime because the fines are suboptimal. In addition, such a sanction can have more impact in larger companies, because in family businesses, if a person is disqualified from acting as a director, typically they can appoint a spouse or an adult child to act as a director and continue to be actively involved in the affairs of the company.

Australia explained that this conversation is timely because, on that same day, a federal court in Australia sentenced a businessman to two years and eight months imprisonment, disqualified him from managing a business for five years and fined him \$50,000. The delegation believes that director disqualification is a very effective and proportionate remedy, as it has an impact both as a specific deterrent and, as a general deterrent, it complements other remedies such as fines, imprisonment, adverse publicity orders, compliance program requirements and community service orders. The ACCC can seek disqualification orders not just against individual directors but also against managers of companies. The delegation mentioned that they have witnessed very emotional pleas by business people seeking to avoid disqualification and have fines imposed instead. This is because disqualification prevents them from continuing to work in the same role with the same income and the same status and benefits. And so on many occasions, it is more important to them to continue to be able to work than to pay a fine no matter what size the fine is. As an example, Australia illustrated the case of a person who had no assets, so disqualification was the most proportionate and appropriate remedy. The Australian delegation understands that there are certain circumstances where the disqualification can be less effective: elderly people who have retired from the workforce.

Portugal shared that it does not have a tool for director disqualification. However, the Portuguese financial supervisor already considered that an individual could not become the chairman of a financial company based on the fact that he had been previously found guilty of violating competition law, so he was not fit to manage a such corporation.

Mexico pointed out the criteria that the Mexican competition authority (COFECE) uses to decide whether to impose or not a disqualification through a case example. In a cartel case impacting the medicines market, COFECE concluded that the participation of individuals in such an agreement was an intentional exercise, and not the result of an error or negligence. In this sense, Mexico applied disqualification for all the individuals involved in the cartel for periods ranging from six months to five years, considering that the maximum sanction established in the competition law is 5 years of disqualification. The individual graduation of the duration of the disqualification was determined based on the calendar days of their participation in the cartel conduct.

Israel also shared its criteria for Israeli courts when imposing director disqualifications. The first criterion is to protect the public interest. The court wants to make sure that the director, due to his behaviour, cannot serve as a proper director with the right skills, experience and qualities and will not serve in a key position in public companies. The disqualification protects the public from further future harm that may take place as a result of the convicted individual's actions. The second criterion is the right to freedom of occupation of the convicted person. Those convictions can be disqualified from serving as director for up to five years. Furthermore, both criteria should be considered along with the substance, gravity, and circumstances of the offence. According to the Israeli delegation, the courts also specify the criteria and note that they can also consider the moral fault, the motivation of the offence if the motive was a personal gain or for the good of the company, the harm caused by the offence, the duration of the offence, whether there is a connection between the convictions and the conclusions that the person cannot serve as a proper director (meaning that due to the nature of the conduct, the person does not have the right skills and the ability to supervise as public companies), and lastly, the sophistication of the plan of the offence.

Hungary described the decision issued by the Hungarian Constitutional Court in 2019 that raised questions related to the application of the sanction of director disqualification. First, considering that such a sanction has a criminal feature, the court established that the directors must have rights to a fair trial, the presumption of innocence, and the right of defence during the application of this tool. Second, the competition authority's underlying procedure must also assess the individual liability of the director in order to apply an individual sanction against the director. If this individual liability is not assessed by the competition authority, then the individual sanction cannot be applied. In conclusion, Hungary explained that the Constitutional court did not conclude that the concept of executive disqualification or the individual liability thereof is per se unconstitutional.

The Chair thanked Hungary and moved to the second topic of the roundtable. He asked Colombia to explain its application for the bidder exclusion sanction.

2. Bidder exclusion: different types of such a sanction, different mechanisms, criteria for application, the scope of application, challenges, and concerns relating to the effects of bidder exclusion on the market

Colombia elucidated that its competition regime is administrative, with the competition regulator (SIC) being only capable to impose administrative fines on economic agents. In this sense, SIC does not have the capacity of imposing the bidder exclusion sanction. Nonetheless, the criminal regime opens the possibility for companies and individuals who engage in certain anticompetitive behaviours to be penalised with the exclusion of participating in future public procurement processes and also an exclusion to contract in future public procurement processes with any state in Colombia. However, the sanctions and exclusions to participate in future tenders, including the Criminal Code, would not apply to legal persons or societies. In addition, the Public Procurement and Construction Institute establishes that individuals declared judicially responsible for a crime against the public administration, including restrictive agreements will be permanently disqualified from contracting with state entities in the future. Nonetheless, a law issued in 2022 left intact the exclusion to contract with the state for natural persons who were found criminally guilty of colluding in public tenders. However, it established that said exclusion would no longer be automatically applied to legal persons, but that an administrative procedure should be carried out against them by a State administrative entity (Superintendencies). Finally, Colombia shared that SIC must inform and send all the evidence of anticompetitive conduct to the Colombian General's Attorney's Office, so it can impose the sanctions, including the bidder's exclusion.

Ukraine indicated that the bidder exclusion sanction was introduced 10 years ago in the public procurement regulation. According to these rules, the contracting authority shall refuse the bidder to participate in the procurement procedure and shall be obliged to reject the bid of the bidder if the economic entity has been held liable for the violation. Ukraine explained that it is the contracting authority that makes the decision to reject the bidder's offer. Therefore, on the one hand, it is like an automatic exclusion. There is no option for the contracting authority other than to decide to refuse such a bidder to participate in the tender. On the other hand, an unfair bidder can hide from the contracting authority, information, about bringing it to legal responsibility for collusion in previous tenders. The Ukrainian delegation also shared that there is a website in which the name of the companies who violated competition law is made public.

The Chair thanked Ukraine and also highlighted the Ukrainian written contribution, in particular related difficulties that sometimes the authority faces when a sanctioned

company disappears and is replaced by another company, which is not subject to the sanctions. The Chair concluded that an alternative for that would be the disqualification of natural persons.

The **United States Department of Justice (DOJ)** pointed out that it does not have the authority to seek or impose disbarment or bidder exclusion directly, but it can work across the federal government, with the Federal Trade Commission, the Securities and Exchange Commission, and the Commodities Future Trading Commission, to ensure that such sanctions are applied. The DOJ highlighted two points. First, the rationale of these sanctions is very similar to individual criminal liability, that is, the fact that it is the individuals and not corporations that commit crimes. Hence, a penalty should be imposed on those individual wrongdoers and felt by those wrongdoers rather than shareholders. Second, the prospect of individual accountability is the best deterrent for corporate crimes. The DOJ commented that, for the general public, seeing individual accountability is a basic expectation of the rule of law. Finally, the delegation added that the Clayton Antitrust Act brings a prohibition on interlocking directorates, which basically tries to prevent a person from sitting on the board of more than one competing company. While this provision has not been applied for many years, the DOJ has recently started to enforce this prohibition.

The **United States Federal Trade Commission (FTC)** commented about a monopolisation case against Vyera and its two leaders, for raising the price of a life-saving drug by more than 4000%. The court included in its ruling a lifetime ban on one of the leaders for egregious, deliberate, repetitive, long-running and ultimately, dangerous illegal conduct, and it further found that given the serious risk of recurrence and the inadequacy of a more narrowly tailored injunction, the ban was necessary to protect the public from being subjected to further any competitive schemes in the pharmaceutical area.

Spain shared that there is a declaration of a serious infringement of competition law directly implies is translated into a prohibition of contracting with the administration. But this prohibition needs two additional procedures: first, the determination of its duration and scope; second, the inclusion of the prohibition in the public register. According to the Spanish competition authority (CMNC), it does not have the authority to determine the scope and duration of the fine. But, currently, there is an initiative for transferring this competence to CMNC. The competition authority seeks to set the geographic scope of the sanction as the geographical scope of the infringement, but considering also the conditions of the market and the conditions of the situation. With regards to the substantial scope, CMNC seeks to set it as the infringement itself as well as its duration but would like to take into consideration the market conditions observing principles of proportionality, general interest and deterrence. CMNC concluded that it also takes into account special situations, such as bids that are not repeated for certain periods. So if the authority would impose a prohibition in this period, it would not have an effect.

Peru illustrated the discussion with a special situation that occurred during the COVID-19 pandemic. The Peruvian competition authority (Indecopi) sanctioned three medicinal oxygen companies for anticompetitive agreement in the bidding. Indecopi could apply the bidder exclusion in this case, but it did not because, during the COVID-19 pandemic, there was not enough medicinal oxygen in the market because the demand in Peru increased significantly. So, in this case, Indecopi had to not apply the sanction automatically but will evaluate it when the pandemic ends.

The Chair thanked the Peruvian delegation. He also highlighted that, in Indonesia, the competition law does not give the possibility for the competition authority to impose this kind of sanction. But, by jurisprudence, the authority decide to impose such a sanction. Between 2019 and 2022, the Competition Commission has issued 28 decisions related to

bid rigging, 15 of which have led to bidder exclusion and excluding a total of 44 undertakings.

Brazil commented that for the past 10 years, there were 103 cartel convictions and, in 45 of those, there were 45 cases with alternative sanctions. In 17 investigations, there were bidder exclusion sanctions. Brazil shared that it does not apply bidder exclusions if the cartels are not related to public procurement, ensuring proportionality. The delegation also illustrated that it had a case in which seven out of eight companies in the laundry of hospital clothes were colluding, so the authority decided not to impose bidder exclusions, otherwise, it could disrupt the market. In this sense, the authority just applied this sanction to the cartel's leader to set an example.

The **Slovak Republic** explained that its Competition Act establishes an automatic bidder exclusion is automatically applied where the fine for bidding in a cartel was imposed if leniency was not successfully applied. However, there has been an amendment in the Competition Act giving the competition officer the discretion to impose such a sanction or not.

BIAC believes that, when looking to expand the deterrence regime, agencies should approach this with prudence. In this regard, the delegation provided some insights. First, such a sanction should be only imposed against the most egregious antitrust violations. BIAC cautioned that even applying this tool against companies found guilty of anticompetitive conduct related to public procurement could lead to adverse effects on the market and on end-consumers. Specifically, companies that are unable to generate sufficient income during the exclusion period are at risk of foreclosure. In addition, BIAC mentioned that in a market with few competitors, one firm's exit as a result of further exclusion would decrease the number of competitors within the market and may have the effect of increasing the prevalence of bid rigging and other cartel conduct. BIAC also stressed that the implementation of an exclusion regime necessitates certainty as to how and on which parties had applied, and the delegation believes that consideration must be given to the size of the market and the number of alternative competitors before utilising this mechanism. In addition, BIAC mentioned that the deterrence effect presented by bidder exclusion has to be balanced with the potential prejudice to the success of a leniency regime. If immunity from debarment is not offered to infringing firms, this will disincentivize firms from self-reporting. Finally, BIAC pointed out that agencies should also permit opportunities for entities to provide proof of self-cleaning in relation to future tenders. Firms should be able to provide evidence of the corrective measures adopted as well as their intended compliance mechanism since having a bidder exclusion sanction imposed against it.

Emmanuelle Auriol presented the economic analysis of debarment, which she assessed in a paper written in conjunction with Tina Søreide (head of the Norwegian competition authority). The question addressed in the paper is whether the debarment of a dishonest supplier is a good strategy for protecting the market against corruption and collusion. Coming with an assumption that this sanction is properly enforced, the paper asked if this type of procedure can help to clean market and public purchases. Auriol mentioned that before their paper, there was no literature in economics analysis about that, so the fact that it is a proven tool to be effective was not very clear. Auriol concluded that debarment can deter corruption if the firms value future sales enough, if the number of firms is not too large and if the probability of corruption detection is high enough. Otherwise, it will fail to curb corporate crime. In addition, she stressed that if corruption occurs and firms are debarred then the number of firms qualified to compete is reduced. In other words, if it does not discourage corporate crime, and yet works as intended, debarment has an anticompetitive effect. In this case, a cartel is a new threat because if a market has a limited

number of firms, they can collude more easily. Auriol showed that debarment will deter collusion if and only if the probability of detecting a cartel is above a threshold, which decreases with the firms' discount factor. This threshold can even be negative if the firm is very patient. Again, this means that if these firms care about their future sales and the detection of the offense is not too low, they might be deterred by the prospect of debarment. In this case, there is no collusion in equilibrium, so the debarment works as intended. But if firms are not patient enough, or if they can reinvent themselves under another name when they are debarred, collusion will not be deterred. Auriol recognized that debarment has therefore drawbacks in this context. First, it could increase concentration. Second, in some cases, if the probability of detection is positive but below the threshold for deterrence, exclusion creates competitive costs without generating benefits. This means that companies will be debarred and at the same time corruption and collusion will continue unabated. She summed up by saying that there is a deterrent impact that is possible under certain conditions and certainly it's a useful tool, but there are some problems because the cases where this debarment procedure is useful are precisely where enforcement failure might appear to be the worst because it is when the number of firms is limited and this is where the public authority wants to protect competition in the market. Auriol pointed out that, in practice, the debarment is not often used, which suggests that the problems and limitations she highlighted are serious. There were only 2 debarments out of 427 foreign bribery cases according to the OECD. She drew two conclusions: (1) debarment is not a comprehensive anticorruption solution, but it is a relevant tool for international organisations, as it helps discipline international firms; and (2) debarment seems a poor instrument to fight collusion as it has an anticompetitive effect. It also weakens the leniency program because exclusionary sanctions are not coordinated with sanctions implemented by antitrust authorities. It is therefore necessary to harmonize procedures and sanctions.

The Chair thanked **Emmanuelle Auriol**, noting how the relationship between corruption in public procurement and debarment, albeit not the core of the discussion, formed an important part of it. If the authority excludes bidders, the remaining bidders will have an easier time colluding, and that includes the possibility of tacit collusion. Unless the agency has a system where there is a high probability of detection of explicit or tacit collusions, the remedy might be problematic. Hence, the necessity to tailor the use of the instrument to the environment, but also maybe to the ability of the competition authority to detect collusion. Moving to the subtopic of self-cleaning measures to avoid exclusion, the Chair invited the European Union to share its experiences.

The **European Union** (EU) indicated that the European Commission may impose fines on undertakings that have violated competition rules, but it does not have a tool related to bidder exclusion. However, such a measure is foreseen by public procurement rules, and more specifically, the public procurement directives and Financial Regulation. The public procurement directives concern national tenders in the EU, while the Financial Regulation concerns tenders involving EU financial resources. According to these instruments, bidders may be excluded from participation in public tenders in the EU for entering into agreements aimed at distorting competition. In the EU, the exclusion is implemented by the contracting authority and the contracting authority must allow an economic operator to bring forward remedial measures. These are also called self-cleaning measures and they have to be assessed before a decision is taken to exclude an economic operator from public procurement, and this is the case both for the public procurement directives and the Financial Regulation. The EU delegation mentioned that the self-cleaning concept consists of evidence provided by the economic operator that the remedial measures that it has taken prove that it is reliable. So, if the contracting authority considered these measures to be sufficient, the operator will then not be excluded from the procurement procedure, but if the measures are not sufficient, then the economic operators shall receive a decision

explaining why these measures were not sufficient. The self-cleaning measures are not exhaustive, but one interesting measure is whether the economic operator has comprehensively clarified the facts and circumstances by actively collaborating with investigating authorities. Other measures that could be relevant are the implementation of reporting and control system, and the creation of an internal audit structure to monitor compliance. Finally, the EU delegation concluded there are precedents ruled by the European Court of Justice indicating that a competition authority decision showing the cooperation of the economic operators - where a decision that grants leniency - can constitute sufficient evidentiary proof of cooperation in this context.

Germany shared its system which has some similarities with the EU system. The delegation explained that, in Germany, contracting authorities may exclude bidders who concluded anticompetitive agreements or engaged in concerted practices. Bidder exclusion requires the contracting authority to have sufficient indications of an infringement, so that could be a decision imposing a fine by the German competition authority (Bundeskartellamt), the undertaking may be excluded from procurement procedures for up to three years. Similarly to the EU system, the contracting authority must allow a bidder to bring forward self-cleaning measures and the authority has to assess those before excluding the bidder from the process. The delegation pointed out that this situation posed certain challenges for the individual contracting authority, and that was making an informed decision when assessing whether grounds for exclusion exist, and assessing self-cleaning requirements in each case. In lieu of this, a new competition register for public procurement was put into operation at the Bundeskartellamt last year. The register aims at preserving the integrity of tenders by ensuring that public contracts are awarded only to those who have not committed any serious offences and have acted fairly in competition. Now, there is a central access point to information on possible grounds for excluding and undertaking public prosecuting authorities and authorities imposing administrative fines are obliged to communicate certain decisions imposing sanctions on undertakings to this register. The public contracting entities, in turn, are obliged to consult the register on whether there are any entries relating to the bidder whose bid is to be accepted. According to the German delegation, what is important is that the contracting authority decides its responsibility on whether or not to exclude an undertaking from the procedure. Then, the register opens up the possibility for undertakings to have their self-cleaning measures checked by the Bundeskartellamt as a central body. If the Bundeskartellamt deems that the requirements for self-cleaning have been fulfilled, the undertakings entry is deleted prematurely, so before the usual deadline from the register, and this decision is binding on all contracting authorities in Germany. On the other side, if the rejection of a self-cleaning application by the registry authority has been expressed, this is not binding on contracting authorities. The German delegation also indicated that the Bundeskartellamt has published guidelines regarding the application of the self-cleaning provisions and also a practical guide on applying the premature deletion from this register due to self-cleaning.

Latvia illustrated its self-cleaning procedure. In Latvia, undertakings that have been fined by the Competition Council for a horizontal cartel agreement can still undergo a self-cleaning procedure. The company still has the right to prove that the exclusion grounds no longer exist by fulfilling specific requirements. After a positive opinion from the competition authority, the procurement entity may decide whether to allow the undertaking to participate in the public procurement tender organised by it. To restore its credibility, the penalised undertaking must take several steps. First, to cooperate with the Competition Council during the investigation and after a decision has been issued. Second, the fine imposed by the Competition Council must be paid into the state budget and the damage caused by infringement must be compensated if victims of the infringement have claimed it. Third, develop a competition compliance programme guidelines and appoint a person in

the company responsible for the implementation and regular updating of it. Fourth, to systematically educate employees about competition law and, fifth; submit a confirmation regarding the implementation of said activities to the Competition Council and receive the Competition Council statement. The Latvian delegation mentioned that the Competition Council statement has no binding force. Procuring entity has the discretion to decide whether the measures implemented by an undertaking to restore its credibility are sufficient, and can decide on the undertaking's participation in the tender. If the procuring entity deems the measures insufficient, it still can exclude the bidder from further participation in the tender. Finally, Latvia concluded that the Competition Council has prepared detailed materials for companies to familiarise themselves with activities that are not allowed and that can be deemed as a sign of an agreement infringing competition law, including a self-assessment tool for mitigation of cartel risks.

Italy explained that the Italian system include a non-automatic debarment. The delegation believes that their system is an interesting experience of a reward system rather than a punitive one, which is more effective than punitive systems according to behavioural social theory. The Italian system allows firms to apply to the Italian authority requesting to be rated from 1 to 3 stars, and the companies are assessed in terms of their compliance efforts and whether they have respected in the past three or five years, antitrust law, anti bribery law, data protection law, and whether they have in place systems that help to ensure sustainability goals and work safety regulations. The Italian delegation considers its system interesting because compared to the debarment is not an 'all or nothing' system. Instead, within the Italian system, if a firm commits an antitrust infringement, it loses rating, but it still can participate in a tender. But, the procuring authority can award additional points to a firm that has higher rating, so the companies have additional incentives to comply with the legislation. In addition, the Italian delegation mentioned that firms need to keep applying to have the rating renewed and the fact that they are seeing that the majority of firms reapply is definitely a sign that such rating is important for their reputation. Also, the delegation indicated that the average rating given to the firms applying is also going up, which may be a sign that the system is also incentivising legality.

Egypt contributed to the discussion by presenting its specific tool to ensure that companies importing into the Egyptian market do not have records of violating competition law. For a company to import products into the Egyptian market, they have to be registered in the Egyptian importer registry. Companies or individuals registered may be excluded from this registry if they have any criminal records regarding infringements including those related to competition law. In addition, Egypt explained that it has two mechanisms related to bidder exclusion. The first one relates to the enhancement of guidelines and the training of public procurers themselves. The second is that as soon as there is an infringement of the competition law of bid rigging, the bidders are excluded from all other bids in the country. In addition, the Egyptian delegation also added that if bidders apply with what would the concept of related parties, the authority may also prohibit them from participating in other bids.

Greece pointed out that it has another solution in which its competition authority ensures that the consequences of excluding a bidder do not negatively affect the tender process, and preserve the competition dynamics in the procurement procedure. The Hellenic Competition Authority (HCC) uses well-tailored advocacy powers. First, it published a guide for public contracting authorities to enable them to detect illegal collusion in tendering procedures and assist public sector officials to understand the anti-competitive behaviour of a cartel. The guide, published in 2014 and updated in 2022, aims to help public sectors officials to understand the techniques companies may use to collude during a tender process, to help public officials to understand the responsibilities of the HCC to deal with the cartels and also to understand the responsibilities of the contracting authorities in

dealing with the cartels, and avoid potential liability in the event of facilitation, even unintentionally, or failure to inform the HCC promptly. Second, the HCC has launched a dedicated anonymous information platform and whistleblowing system, especially for the contracting authority. In its attempt to raise public awareness concerning the social benefits the competition offers to the economy and to effectively convey competition issues, the HCC has developed new communication strategies within the set of its targeted advocacy initiatives. The internal information available to them, to the public authorities in their role as a contractor working the tender launching bodies allows them to receive information and complaints about the participation of companies in such procedures. HCC believes that contracting authorities can help it in uncovering cartel practices and behaviours so that the investigations can proceed swiftly and effectively, thus directly benefiting the Greek economy consumers and taxpayers.

The Chair thanked the Greek delegation and moved the discussion to the third and last pre-established point, related to the common challenges that individual debarment and exclusion for bid rigging can cause. He mentioned that there are two issues: (1) timeliness; and (2) issue of articulation, with the leniency programmes. To illustrate these two concerns, the Chair asked Amanda Athayde to provide her insights on this topic.

3. Common challenges that both instruments imply, particularly how the involvement of the judiciary may affect the duration and effectiveness of the instruments and their application, as well as the coordination with immunity and leniency programs. Is there any coherence between director disqualification and bidder exclusions? Are they reinforcing each other or are they working at cross purposes?

Amanda Athayde observed that ultimately antitrust fines and criminal sanctions may not have achieved their ultimate goals to punish current or previous practices and to deter future antitrust violations. So, she wrote a book with the hypothesis of whether non-monetary sanctions contribute effectively to the antitrust practice in this sense. Athayde mentioned that, in Brazil, there are different groups of arguments that may be used for the applicability of non-monetary sanctions. The first one is the fear of underdeterrence of antitrust penalties, leading to the intention to have other non-monetary sanctions as support to fines. The second perspective is that, in some specific cases, there could be an overdeterrence issue, because companies could not have the ability to pay. The third argument is that the use of those non-monetary sanctions may have a huge impact on the structure of the market on the competition dynamics, and maybe lead us to the deterrence of future wrongdoings. Athayde shared some insights about the bidder's exclusion. First, the proportionality of the sanctions assessing not only the markets directly affected but also the indirect effect in the value chain would be important before the application of such a tool. It could be an option not to apply the sanction to all companies involved, but only to some or one of the most and mostly involved in that, which could be referred to as leaders, although there may be some level of discretionary and discussions about these concepts. Second, the duration of the measure is also important, considering the specificities of the cases and the evidence. Third, the extension of the tool, whether it would be applied only to the company directly involved in the infringement, or also to its economic group or other firms created after the sanction. Amanda Athayde also divided her vision about penalties applied to individuals. She understands that the analysis of the degree of participation of each of the individuals and their position is relevant for the proportionality issues, possibly assessing the probability of recidivism. Athayde pointed out that life penalties for individuals need special attention due to the disproportionality analysis in those cases. In her conclusion,

Athayde observed that there is a need to advance proportionality, and also to advance the reasoning of the decisions so as not to be questioned in court.

The Chair thanked Amanda Athayde for her contribution. In addition, he draw attention to the complex challenge related to the timeliness of the instruments. He called on Lithuania to expand on the situations faced by the jurisdiction with respect to timing, and Canada with respect to the co-ordination with the leniency program.

Lithuania disclosed that, in the case of director disqualification, the Competition Council can ask the courts to apply the director disqualification for up to five years. The Lithuanian Competition Council can do this once it becomes final, either because it was not appealed or because the litigation process was over. The delegation mentioned that, in practice, courts tend to shorten the debarment periods that were originally proposed by the Competition Council. The main arguments from the courts are that the period which had elapsed between the moment the infringement was committed and the moment when the actual sanctions have to be applied is quite long. Concerning the bidder's exclusion, the main difficulty is that the three-year debarment period starts to run from the day when the anti-competitive agreement has ended. So the three-year period can be quite short, especially if the contracting authorities, which consider the exclusion, want to rely on the decision of the Competition Council, which establishes the infringement. In this sense, the Lithuanian delegation indicated that the main issue is that by the time the competition council establishes the infringement, the maximum period of exclusion might be already expired or a very short period might be left when the debarment can be applied.

Canada pointed out that its procuring authorities may exclude bidders who have immunity or leniency derived from immunity or leniency programs. In Canada, full immunity from prosecution may be provided to those who are first to disclose a *Competition Act* offence that the Competition Bureau has not yet detected, or provide evidence leading to a case referral to the Public Prosecution Service of Canada. "Leniency" refers to lenient treatment upon sentencing for applicants who qualify later. They are required to plead guilty under the Leniency Program. It is uncertain whether bidders who have obtained immunity would meet the procuring authorities' criteria to be excluded from bidding. The Canadian delegation indicated that it received feedback from lawyers that explained that such a consequence can make undertakings more reluctant to participate in immunity and leniency programs.

Japan shared that its Companies Act stipulates that a director will automatically lose the qualification as the director after he or she is sentenced to imprisonment without suspension until the imprisonment is finished. The Japanese competition authority indicated in its guidelines that it will not accuse the first applicant of leniency to lose his or her director's qualification. In addition, the Japanese delegation explained that there is a set of criteria for the bidder exclusion mechanism, which was created by the central government procurement body. This model stipulates that if a company applies to the competition leniency program, the period of exclusion will be reduced in half. Japan added that such a rule works as a balance between the incentives for leniency and the necessity for sanctions.

The Chair reinforced that such a rule in Japan gives an advantage to the firms that use the leniency program. Reaching the roundtable's end of the discussion, the Chair requested the experts to present their final thoughts after hearing the countries' contributions.

Peter Whelan raised the issue of the efficiency of director disqualification. He questioned whether one should advocate for the creation of a policy of director disqualification on an effectiveness basis alone, noting that antitrust offences are economic offences that have a cost to the economy (and thus securing efficiency in deterring such offences is vital). So, Whelan believes the authorities in any given jurisdiction should consider whether imposing

director disqualification would be an efficient response to the problem because they bring with them costs (particularly when courts are involved). He understands that a possible way to keep these enforcement costs reasonable could be the use of a lower standard of proof than that used in the criminal setting, such as the balance of probabilities. Another mechanism would be the use of director disqualification undertakings (where directors voluntarily agree to be disqualified when faced with proof of their wrongdoing), as opposed to director disqualification orders (which need to be imposed by a court).

Amanda Athayde concluded her exposition by saying that the best way to advance in this discussion would be to have a structured and organised manner of application for these non-monetary sanctions. She also mentioned that it is crucial to have very transparent reasoning whenever there is the application of these tools to assess the proportionality of the measure. Based on this, the jurisdiction could also have applications of those sanctions alongside some incentives, rewards, and self-cleaning, which would make the best combo of what the antitrust tools would be, so an ex-ante incentive, as well as the ex-post application, whenever those incentives are not met.

Emmanuelle Auriol wrapped up articulating how useful it would be if the OECD could collect data on how often debarment is implemented, as well as to explain the drawbacks of such procedures since it is hard to access information about it.

Ending the discussion, the Chair highlighted a few points. The central point was how to add deterrence in relation to competition violations. Second, both discussed instruments are powerful in terms of deterrence, which may lead to overdeterrence. Third, the proportionality and possibly the progressivity should be respected in using this instrument if they are used on the effectiveness. The Chair emphasised that there are diverse types of mechanisms that could lower the cost in fact of some of those instruments. Indeed, he believes that it is important for co-operation between the competition authority and the public procurement agencies to reinforce the actions of each other. Fourth, the Chair added that it is relevant to make those instruments consistent with the general system of law in order to make an effective tool. Finally, he mentioned that there were several interesting instruments in which a competition authority can give the incentive to the firm to try to clean up their act without getting into very heavy and complex monitoring systems.