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**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
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Executive Summary 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 Executive Summary by the OECD Secretariat contains the key findings from the discussion of the Roundtable on Director Disqualification and Bidder Exclusion held during the 139th meeting of the Competition Committee on 29 November 2022.

More information 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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Executive Summary of the roundtable on Director Disqualification and Bidder Exclusion

By the Secretariat*

On 29 November 2022, the OECD Competition Committee held a meeting to discuss the objective and scope of application of debarment sanctions in different jurisdictions, their application, and their effectiveness. Based on the background note, the written contributions by experts and delegations and the roundtable discussion with panellists and delegates, the following key points emerged:

1. While the existence and application of debarment measures vary significantly across different jurisdictions, there was consensus that these measures, when sensibly applied, have significant deterrent power.

The discussion focused on two main types of debarment sanctions present, with many differences, in numerous jurisdictions.

First, it discussed director disqualification, which refers to the sanction typically preventing an individual to act as a company director for a specific period of time following a violation of competition law by her company. Second, it tackled bidder exclusion, which refers to the banning of a company from a bidding procedure or from submission of bids in future public procurement tenders, typically in a specific market or sector and for a specific amount of time.

These debarment sanctions may be imposed, depending on the type of sanction and on the jurisdictions, by competition authorities, judicial bodies, or contracting authorities on the individuals involved in a competition law infringement, who are temporarily banned from the exercise of their corporate functions, or on one or more of the companies involved in bid rigging. Director disqualification is applied mainly to hard-core cartels, and in some jurisdictions also to abuse of dominance cases and other competition law infringements. Bidder exclusion is associated with bid-rigging in public procurement.

While, where present, these types of debarment sanctions and their regimes present differences, it was agreed that they are especially well-suited to address three goals in particular: 1) general deterrence, as they add to or substitute the financial and social cost of monetary fines with the opportunity cost of the exclusion from future tenders, or directly affect the individual reputation of the firm or the livelihood of the individual; 2) specific deterrence, aimed at preventing future infringements by a particular individual; and 3) protecting public interest in various forms, such as, for instance, for director disqualification, higher standards of corporate management and, for debarment, the integrity of public tender procedures.

2. Thanks to their versatility, debarment sanctions may be used in a standalone or complementary way to other detection and deterrent competition enforcement tools.

* This Executive Summary does not necessarily represent the consensus view of the Competition Committee. It does, however, encapsulate key points from the discussion, the delegates' written submissions, and the panellists' presentations. For a list of the sources used, please refer to the bibliography included in the OECD Background Note (2022), Director Disqualification and Bidder Exclusion in Competition Enforcement, <https://www.oecd.org/daf/competition/director-disqualification-and-bidder-exclusion-in-competition-enforcement-2022.pdf>.

The discretionary assessment they involve makes them particularly effective in enhancing the strength and assuaging the weaknesses of a particular enforcement system. Since debarment sanctions have common traits with other forms of detection and deterrence and they often exist alongside them, they may be particularly effective when used in combination with other enforcement tools. For instance, it may be appropriate to impose a director disqualification sanction in cases that are particularly serious, but do not meet the higher standard of proof typically required by criminal proceedings. Implementing a well-designed bidder exclusion may succeed in deterring wrongful behaviour, but also preserving good use of public expenditure and enhancing trust in public administration. Bidder exclusion, if well-targeted, may prove effective in preserving the integrity of tenders and restoring public confidence in good administration and use of public resources in tenders.

3. The effectiveness of debarment sanctions depends on and can be preserved by tailoring their design to the distinctive features of a specific legal system or market.

The effectiveness of these sanctions largely hinges on their adaptation to the specific characteristics of the legal framework and market in which they are applied. The deterrent effect of debarment sanctions can significantly change depending on their limits of application (e.g., disqualification for life vs. disqualification for one year) and depending on how they interact with other deterrence and detection tools applied in a jurisdiction.

For example, it may be important to co-ordinate the application of director disqualification with leniency programmes to ensure that the efficacy of one does not stifle the success of the other and vice versa. An important source of concern in relation to the viability of these programmes has been found in their coordination with leniency programmes, in particular regarding two aspects. The first is the negative impact they have on the willingness of individuals to come forward with information and evidence in the context of the investigation of the company, thus softening incentives for directors to make use of immunity and leniency programmes. The second is the systemic inconsistency that may arise in those regimes where there is no individual leniency programme, but only a corporate one, making it so that revealing information may or may not benefit the company (depending on the timing of the application) but does not bring any advantage to the individual.

The co-operation under the leniency programme with a competition authority in relation to bidder exclusion is also crucial from the competition enforcement perspective and therefore, this cooperation should be taken into account when assessing the grounds for bidder exclusion.

Similarly, while bidder exclusion can be a very powerful punitive tool, the elimination of competition from the market may have collateral effects and may need to be carefully considered by competition authorities. One of the biggest challenges relates to the risks of negative consequences on the market in the medium to long-run, particularly as regards the decreased number of market players in the market and the effects on competition for future tenders. This challenge may always present itself, but the problem may be particularly acute in small countries, where some markets are even more likely dominated by a small number of firms. This issue may also likely present itself in conjunction with interlocking directorates. In fact, bidder exclusion may be completely impractical in oligopolistic markets. Markets with few market players, due to the existence of regulatory, strategic, or behavioural barriers to entry, may be significantly harmed from bidder exclusion.

4. The use of these tools entails important challenges that need to be recognised by competition enforcers to ensure their best application in concrete cases.

It is important that competition authorities carefully assess the potential impact of the application of these tools. Several challenges accompany their use in practical cases.

For example, possible aspects to be considered when applying director disqualification in concrete cases may include the fact that it may be particularly complex and burdensome for the competition authority to identify individual liability, or there may be difficulties linked to the fact that the disqualified individual may be close to retirement or may still be able to work abroad, in the lack of international co-operation, which may devoid the sanction of its effectiveness. While the variety of approaches in each jurisdictions makes it difficult to generalise, there are often two fundamental factual elements to be proved in a disqualification case: i) the violation of competition law; and ii) the liability of the director. In both cases, the elements of the investigation to be proven and the burden and standard of proof applied to the assessment may vary.

As regards bidder exclusion in public procurement, one of the main challenges relates to anticipating how the sanction will affect the market, particularly if it eliminates market players for the medium to long-term and thus may have unfavourable effects on competition. For example, in the context of public procurement since the assessment before the exclusion is usually a prospective exercise meant to preserve the good development of a future tender process, its discretionary nature has the advantage to enable the adjudicator to determine the potential risks and the link between the conduct or suspected conduct and the public interest.