

Unclassified

English - Or. English

4 November 2022

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

**Director Disqualification and Bidder Exclusion – Note by Italy**

29 November 2022

This document reproduces a written contribution from Italy submitted for Item 4 of the 139th OECD Competition Committee meeting on 29-30 November 2022.

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

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## *Italy*

### 1. Introduction

1. The Italian Competition Authority (hereafter, the Authority or the AGCM) welcomes this roundtable as an opportunity to learn about the practical insights on the effectiveness of director disqualification and bidder exclusion in other jurisdictions and how these types of sanctions have so far interacted with other existing competition enforcement mechanisms.

2. The Italian experience is relatively limited and it is therefore still premature to make any assessment of the impact of the bidder exclusion on the Authority's leniency programmes and other competition tools. For this reason, after a description of the existing legal framework (section 2), this contribution focuses on the Italian experience of the Legality Rating System as an alternative or complementary tool which might be considered to better tackle the trade-off between deterrence and competition raised by the use of debarment (section 3). In this regard, the Legality Rating System, administered by the AGCM, uses a reward mechanism rather than a punitive one to incentivize compliance with legal standards and deter anticompetitive behaviour at bidding stage.

### 2. Bidder Exclusion: the Italian framework

3. There is growing concern that bidder exclusion in competition enforcement, while enhancing integrity among actors in public procurement markets and acting as a powerful deterrence mechanism, may not only produce the undesired effect of curbing tender participation in situations with a few bidders but also interfere with other existing competition enforcement mechanisms such as leniency programmes.

4. Mindful of the need to balance between these contrasting effects, the Italian legislator has adopted non-mandatory debarment rules, which leave to public procurers the discretion to decide as to whether to exclude a bidder who has not complied with the relevant law.

5. Pursuant to paragraph 5, letter c of Article 80 of the Italian Public Procurement Code or PPC (legislative decree n. 50/2016), a contracting authority may exclude a bidder from a tender when the company was found guilty of grave professional misconduct.<sup>1</sup> The duration of the bidder exclusion is set at three years pursuant to paragraph 10-bis of Article 80 of the PPC.

6. In its guidelines, among the serious professional misconducts, the Anti-corruption Authority (ANAC), responsible for the enforcement of the PPC, has also included the competition infringements ascertained and sanctioned by the AGCM which occurred in the

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<sup>1</sup> See ANAC guidelines no.6 “Indicazione dei mezzi di prova adeguati e delle carenze nell’esecuzione di un precedente contratto di appalto che possano considerarsi significative per la dimostrazione delle circostanze di esclusione di cui all’articolo 80, comma 5, lettere c), c-bis), c-ter) e c-quater) del codice dei contratti pubblici”, delibera ANAC n. 1293 del 16 novembre 2016, available on ANAC website (<https://www.anticorruzione.it/portal/rest/jcr/repository/collaboration/Digital%20Assets/anacdocs/Attivita/Atti/determinazioni/2017/del.1008.2017.det.linee.guida.n.6.2017agg.pdf>).

same market of the tender procedure in question. The period of exclusion is set at three years from the adoption of the sanctioning decision of the Authority.

7. In general, bidder exclusion provision has not an automatic application and the mere existence of a sanctioning decision of the Authority is therefore not sufficient. Instead, procurement authorities shall evaluate whether market conditions are suitable for excluding a bidder, by considering all the relevant factors including, for instance, how far back in time the infringement is, whether there is any pending judicial review of the AGCM sanctioning decision or any self-cleaning measures suggested by the companies, whether any anticompetitive effect could prevail as a result of the bidder exclusion making this option undesirable for a specific tender. In making such assessments, the contracting authorities shall produce “adequate means of proof in order to demonstrate the circumstances of exclusion” according to Art. 80, paragraph 13 of the PCC.

8. As for director disqualification, this type of sanction is envisaged in the national framework only indirectly: companies may include director disqualification as part of their compliance programmes or self-cleaning measures to be submitted to the procurement authority when the latter is assessing the grounds for bidder exclusion for competition infringement<sup>2</sup>.

9. Whilst this flexible approach brings the benefit of taking into account market conditions, the Italian experience also shows that a discretionary application of the bidder exclusion provision risks of becoming very facts-specific and unpredictable, raising the likelihood of follow-on litigation.<sup>3</sup> Moreover, the Italian experience is still relatively limited to be able to make any assessment of the impact of the bidder exclusion provision on other competition tools administered by the Authority's, in particular leniency programmes. However, alternative or complementary tools might be considered to better tackle the trade-off between deterrence and competition raised by the use of debarment. In this regard, the Italian experience of the Legality Rating System may offer some interesting insights as described the section below.

### 3. Complementary tools: Italy's reward mechanism of the Legality Rating System

10. The Italian Legality Rating System, introduced by the legislator in 2012, uses a reward mechanism rather than a punitive one to incentivize compliance with legal standards and deter anticompetitive behaviour at bidding stage. Reward systems are mirror images of punitive ones and therefore in many settings equivalent. However, as recent social theories have highlighted, they may help promoting a positive mindset and generate long term changes in companies' behaviour, thus sometimes resulting as more effective in fostering

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<sup>2</sup> This is in line with the AGCM recommendations to ANAC, see the AGCM opinion no. [AS1474](#) LINEE GUIDA N. 6 DELL'AUTORITÀ NAZIONALE ANTICORRUZIONE – CONTRATTUALISTICA PUBBLICA (2018).

<sup>3</sup> Italy's anti-corruption authority ANAC has recently asked for a number of changes to the national debarment regime, which grants significant discretion to contracting authorities and has led to numerous and complex litigation (<https://www.anticorruzione.it/-/gravi-illeciti-professionali-il-codice-appalti-va-modificato-troppi-contenziosi-e-criticit%C3%A0-sull-articolo-80>).

legality than punishment systems.<sup>4</sup> Transaction costs and the need to reduce costly litigation may also favour reward systems.

11. The Legality Rating System is managed by the AGCM. Companies can make an application to the Authority with a description of their compliance efforts in different legal fields, including anti-bribery, antitrust and data protection legislations.<sup>5</sup> The AGCM verifies the information and scores the application from one to three stars: no rating is granted if the company's executives have been convicted for a number of criminal offences (such as, corruption, fraud and bankruptcy) in the past 5 years or if the company has committed serious administrative infringements (such as, tax offences or offences related to health and safety). Companies that have committed serious antitrust infringements are also not eligible for the rating, when the infringement decision issued by the European Commission, or the Authority has been upheld by an administrative judge within the two years prior to the application.<sup>6</sup>

12. When the applicant fulfils all the basic requirements, it obtains the basic rating of one star (★), which can be increased by up to two pluses (++) if a number of additional criteria are met, which are listed in an implementing regulation set forth by the AGCM. A third plus triggers the application of an extra star, until a maximum score of three stars (★★★). To achieve the top three-star rating, a company must meet most of the criteria listed in the implementing regulation, which include complying with a protocol issued by the Ministry of Interior to prevent criminal and mafia infiltration, using a payment tracing system and adopting a compliance programme and corporate social responsibility guarantees. The rating is valid for two years and can be renewed upon request.

13. Notably, the system produces no negative effects on leniency applications: antitrust infringers can obtain the rating if the antitrust decision stems from a leniency application that they have submitted, as immunity or subsequent applicants.

14. This compliance rating system can be used by the rated company to access better credit from banks and public funding and, most of all, can be taken into account by contracting authorities when designing public tenders. Public authorities may indeed attribute additional points to a bidder's offer if the bidder is a company holding the legality rating certification; more points may be given to rated firms with higher rating score.<sup>7</sup>

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<sup>4</sup> See the recent experimental paper: Bigoni, M., Spagnolo, G., & Valbonesi, P. (2014). Sticks and Carrots in Procurement: an experimental exploration. *The BE Journal of Economic Analysis & Policy*, 14(3), 893-936.

<sup>5</sup> Companies can submit their application for free by completing a form available on the Italian competition authority's website, when they meet the following criteria: (i) a minimum turnover of two million euros in the last financial year; (ii) registration in the Italian companies' register for a minimum of two years; and, (iii) the company must be established in Italy.

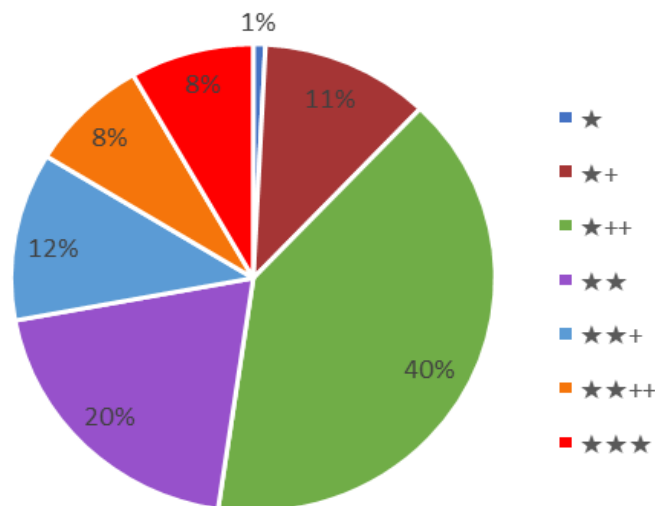
<sup>6</sup> Article 2 of the Authority's legality rating implementing regulation provides a list of criminal offences (committed by the company's executives) and administrative offences which exclude access to the rating: in a nutshell, on the company's side, the list comprises tax offenses (legislative decree n. 74/2000), offences related to breaches of regulations on the health and safety of working places (legislative decree n. 81/2008), and various other offences related to mafia, corruption and money laundering (legislative decree n. 231/2001). Criminal offences by the companies' representatives which have an impact on the company's eligibility for the rating are essentially bid rigging, public procurement fraud, extortion, usury and bankruptcy.

<sup>7</sup> Article 5-ter of decree-law n. 1/2002, as amended by law n. 62/2012; the Italian Competition Authority has adopted an implementing regulation on November 12, 2012, which is available on the authority's website (<https://www.agcm.it/competenze/rating-di-legalita/dettaglio?id=268c1269->

15. Rewarding legality at tender stage by assigning additional points to bids by rated firms constitute an instrument different than debarment to tackle the trade-off between the need to punish companies' illegal behaviour and the need to preserve competition at tender stage. Whilst debarment constitutes an all-or-nothing approach - either the firm is excluded, or it is allowed to compete with other firms on equal foot - the Legality Rating System offers an intermediate, less extreme solution. A company that has infringed the law may still participate to the tender, but it will see its rating revoked if it has infringed the law. The company will thus be at a disadvantage vis-à-vis competitive bidders holding the rating because of their higher legal standards.

16. Currently, approximately 10.000 companies possess the rating; Figure 1 shows that most applicants are awarded a score comprised between ★++ and ★★.

Figure 1 – Scores attributed to companies rated at the date of September 30, 2022

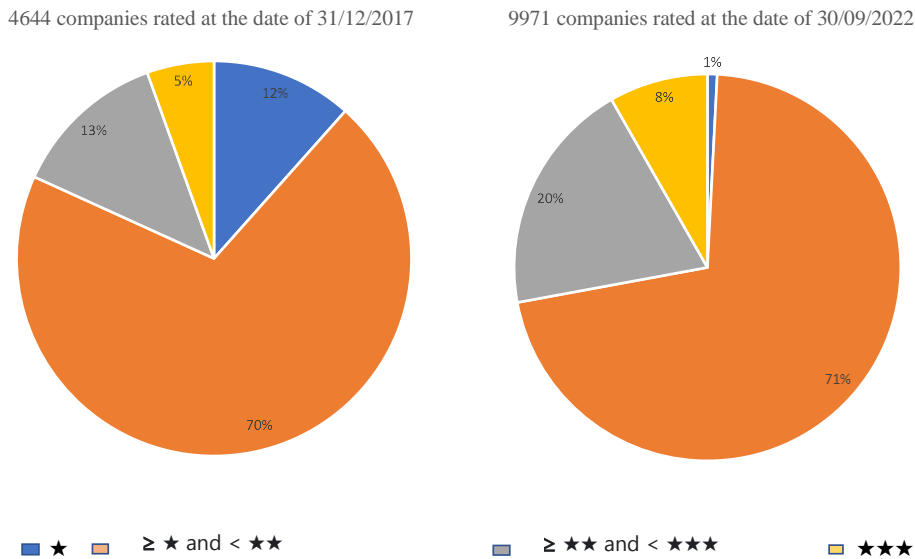


17. Figure 2 illustrates how scores have evolved over time. It shows that companies – which to a large extent remain the same over time considering that 50% of the applicants keep on applying for rating renewal every two years – have been awarded additional points over time, which in turn means that they have progressively increased their compliance efforts. The Italian Legality System is therefore fostering compliance with the law and promoting higher legal standards.

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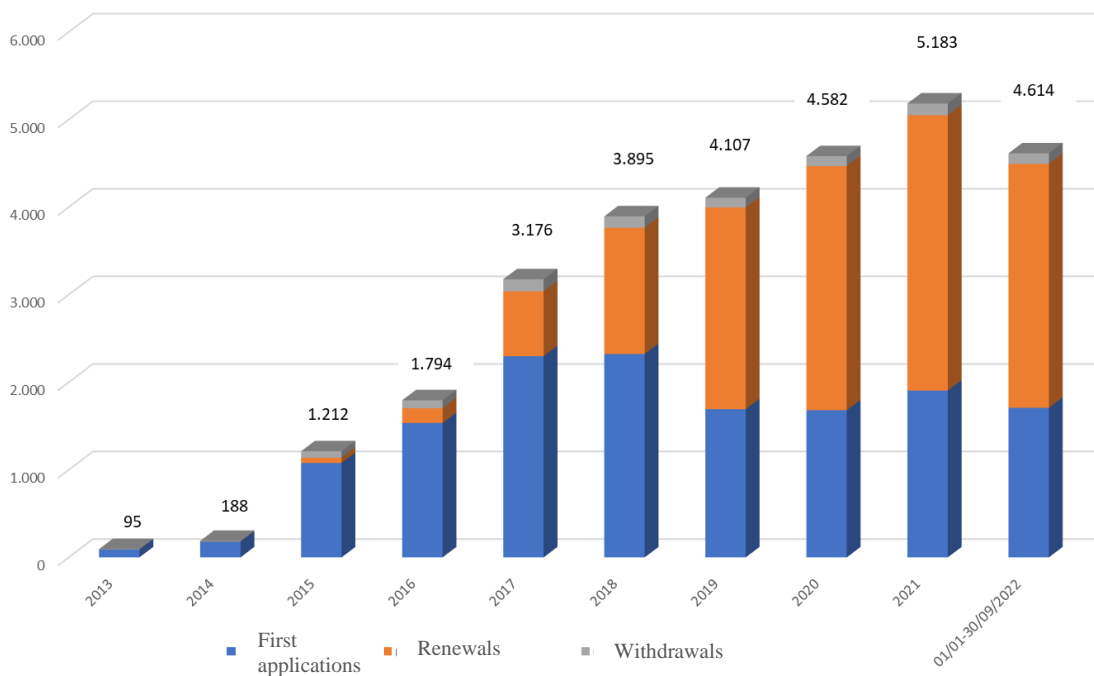
[d85d-4259-bce1-0ffa53414b23&parent=Normativa&parentUrl=/competenze/rating-di-legalita/normativa](#)). Articles 93 and 95 of the Italian public procurement code provides that contracting authorities can decide, at their own discretion, to attribute additional points to bidders in possession of the rating. The conditions to access better credit from banks and public administrations when issuing public funding are set in a decree issued by the Ministry of Economy (n. 57/2014).

**Figure 2 – Score trends: comparison between scores attributed to companies rated on December 31, 2022 vs. companies rated on September 30, 2022**



18. Companies are showing a growing interest for the rating, and applications have increased by approximately 13% in 2021.

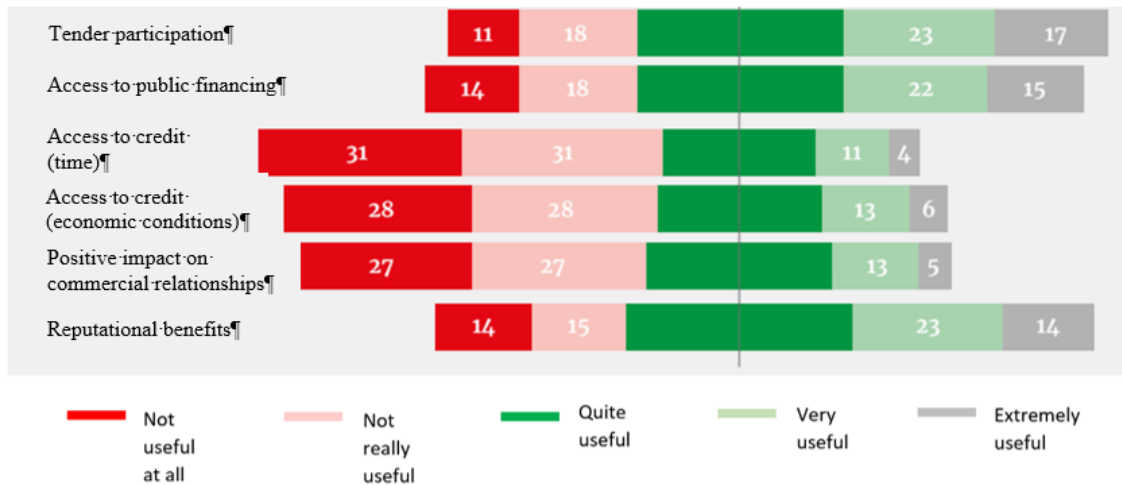
**Figure 3 – Number of companies that have received/renewed/lost the rating per year (2013-present)**



19. In 2021, the AGCM also launched a survey asking approximately 8,000 companies if and why they took advantage of the rating’s benefits, in terms of tender participation,

access to public funding, access to credit and reputational benefits. The results of the survey are described in Figure 4.

**Figure 4 – Results of the survey on the benefits of the rating programme**



20. Figure 4 shows that most firms consider the rating as being from quite to extremely useful in the context of public procurement: this result largely confirms what the AGCM has observed in the award process, with approximately 50% of the applications declaring that the companies requesting the rating will take part in public tenders.

21. A good proportion of the companies being interviewed consider that the Italian legality rating scheme generates reputational benefits, in the sense that it has a positive impact on the company's perception and visibility on the market, which respondents consider to be greater when the applicant is top-rated (★★★). Since a firm's reputation is positively affected by the possession of the rating, it follows that the rating is perceived as a good indicator of the actual level of a company's legality standards. The information collected during the survey also shows that benefits are perceived as greater by small and medium-sized companies and by businesses located in the south of Italy.

22. The AGCM believes that the rating programme has been successful and will likely become of utmost relevance in the next few years. As the public funds from the Italian National Recovery and Resilience Plan are allocated through tenders, public contracting authorities might increasingly take companies' rating into account when designing their tenders, thus, granting additional points to the offers of rated bidders. This, in turn, will trigger more applications from rated firms. The Legality Rating System may also become an instrument to promote efficient procurement if it is shown that there is a positive correlation between a company's legality standards and the efficiency of its management and operations. Further, as every firm has the possibility to apply for rating and criteria are verifiable, a limited level of litigation is likely to emerge. Lastly, as Italy's rating scheme preserves competition at tender stage and the incentives for cartelists to apply for leniency, as mentioned, the AGCM expects numbers and support for the system to grow further in the coming years.

23. To conclude, Italy's experience suggests that there might be alternative or complementary solutions to debarment and that, at least in some circumstances, rewarding compliance rather than punishing misconduct might be more effective at fostering

compliance with (amongst other things) antitrust law, without harming competition at tender stage or inducing excessive litigation.