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Director Disqualification and Bidder Exclusion – Note by Greece

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1. Introduction

1. This Note overviews the current legal framework for director disqualification and bidder exclusion in the context of competition law in Greece and examines practical insights that arise according to existing framework.

2. It further highlights the attempt of the legislator to link two legal fields of different orientation and focus, namely public procurement law and competition law, which, however, both seek to develop competition on a level playing field and prevent anticompetitive practices in public procurement procedures to the detriment of the interests of consumers and state.

3. In this context, the Note primarily describes the national legal framework of sanctions for violation of competition law while it outlines the connection of debarment sanctions with competition law in relation to leniency program and settlement procedure.

4. In the second part it discusses the role of the competition authority in the application of sanctions and interaction with contracting authorities insofar as bidder exclusion is concerned and examines the notion and types of self-cleaning measures along with the conditions that an economic operator has to fulfil in order to prove its credibility to the contracting authority. Finally, the Note outlines the advocacy role of the Greek Competition Authority for the contracting authorities and its main advocacy efforts to provide the contracting authorities with useful tools to detect illegal collusion in tendering procedures and also to raise awareness for reporting such practices, thus enhancing the competition process in competitive procurement procedures.

2. National legal framework- Purpose, scope and effectiveness of debarment sanctions

2.1. Legal sanctions for violation of competition law- The interconnection between the National Competition Act and the National legislation for Public Works, Procurement and Services

5. The National Competition Act (Law 3959/2011 on protection of free competition, as amended and in force) foresees for fines imposed on legal and natural persons and for penal sanctions.

6. More specifically, the Hellenic Competition Commission (HCC) may impose fines on legal persons for breach of competition law, up to ten percent (10%), of the total world turnover of the undertaking in the year preceding the issuance of the decision[1]. In addition, the HCC will include in the basic amount an amount, ranging between 15% and 25% of the undertaking's gross revenue, as deterrent factor for the companies for engaging in horizontal price-fixing, market-sharing, and output-limiting agreements. The HCC may impose on natural persons i.e. managers of civil and commercial companies and joint ventures and all the general partners, especially in public limited companies, the members of the board of directors and the persons responsible for the implementation of the relevant decisions and in listed public limited companies, the executive members of the

[1]Art. 25B par. 1 of the National Competition Act (see further in https://www.epant.gr/en/legislation/protection-of-free-competition.html)

board of directors, while, in associations of undertakings, their supreme governing body, after their prior hearing, a separate fine from two hundred thousand (200,000) to two million (2,000,000) euros, where it is demonstrated that they have been engaged in preparatory actions, in the organisation of or in the illegal behavior of the undertaking. For the calculation of the fine, special account shall be taken of their position in the undertaking and the extent of their participation in the unlawful act [2].

7. In addition to pecuniary fines, penal sanctions may further be imposed by penal courts. In case of collusion a fine between fifteen thousand (15,000) to one hundred fifty thousand (150,000) euros is imposed. In case the collusion pertains to undertakings which are in actual or potential competition with each other, a term of imprisonment of at least two (2) years and a fine of one hundred thousand (100,000) to one million (1,000,000) euros is imposed, whereas in abuse of dominant position cases, the respective fine amounts from thirty thousand (30,000) to three hundred thousand (300,000) euros[3].

8. It should be noted that the HCC has no competence to exclude undertakings, either temporarily or permanently, from participating in public tenders nor to disqualify administrators. The National legislation on Public Works, Procurement and Services (the Public Procurement Act)[4] provides for mandatory and non-mandatory grounds for exclusion of economic operators from a public procurement procedure[5]. "Non mandatory grounds for exclusion" means that it lies upon the discretion of a contracting authority to select and include in the notice of procurement one, some, all or possibly none of the potential grounds for exclusion. If, however, the contracting authority opts to include in the notice any of the non-mandatory grounds referred in the law, then it becomes mandatory, in the sense that the contracting authority must examine whether or not the conditions for its application are met. Exclusion from a public tender procedure by the respective public procurement authority for breach of competition law constitutes a non-mandatory reason for exclusion[6]. The exclusion period lasts three (3) years following the issue of the decision from the competent authority, i.e. the HCC, finding that a specific undertaking has violated competition law[7].

9. A public contracting authority may exclude an economic operator from a public tender procedure if **sufficiently plausible indications exist** for the public authority to conclude that the specific economic operator has entered into agreements with other economic operators **aimed at distorting competition**, without prejudice to the provisions of the national Competition Act on penal and other administrative sanctions[8]. The economic operator is excluded by the contracting authority **only from the specific procurement procedure** in question. The national legal framework does not foresee director disqualification; however, reference is made under section for self-cleaning measures.

10. Without prejudice to the abovementioned specific exclusion of an economic operator from a public tender imposed by the contracting authority, the Public Procurement Act provides for an exclusion from future public procurement procedures (**horizontal**

[2] Art. 25B par. 5 of the National Competition Act.

[3] Art. 44 par. 1 and 2 of the National Competition Act.

[4] National Law 4412/2016 "Public Works, Procurement and Services", transposing Directives 2014/24/EU and 2014/25 /EU.

[5] Several amendments have been introduced as regards disqualification grounds. More precisely, further to certain criminal offenses prescribed under EU legislation, an entity (economic operator) shall be disqualified if it commits the respective crimes provided under Greek penal legislation.

[6] Art. 73 par. 4 of the Public Procurement Act.

[7] Art. 73 par. 10 of the Public Procurement Act.

[8] Art. 73 par. 4c of the Public Procurement Act.

exclusion). In the event of grounds for exclusion which question the credibility and integrity of an economic operator under Art. 73 par. 4, and where the economic operator does not take the necessary measures to prove its credibility (*self-cleaning measures*), the economic operator may be excluded from participation in future public procurement procedures and from participation in concessions for a reasonable period of time[9].

11. Regarding the **nature** of the sanctions described above, the exclusion of a bidder imposed by a public contracting authority, if such bidder has been engaged into anti-competitive practices is an **administrative sanction,** since it is imposed by an administrative authority on a person due to an alleged breach of a rule of law, which serves the **purposes** of repression and prevention, i.e. enabling contracting authorities to exclude unreliable economic operators , and which adversely affects their legal status. Respectively, fines imposed on natural and legal persons by the HCC are administrative sanctions, within the aim of effectiveness, proportionality, and deterrence, whereas the pecuniary sanctions and imprisonment imposed by penal courts are **penal sanctions.**

2.2. Scope and effectiveness of debarment sanctions -An interaction between competition and public procurement law

12. All prohibited collusions under Article 1 of the national Competition Act and 101 TFEU, i.e., bidding/pricing, bid suppression, bid rotation, fall under the scope of debarment sanctions and cover all economic sectors. Each public contracting authority has the power to make an assessment if there are sufficiently plausible indications to conclude that an economic operator has entered into anticompetitive agreements with other economic operators on a case-by-case basis, i.e., for each public procurement. The debarment sanctions imposed by a contracting authority may apply in parallel with the sanctions imposed by the HCC for breach of competition law. However, they are distinct sanctions imposed by different bodies.

13. As noted above, exclusion from public tenders can be specific or horizontal. A public contracting authority can exclude an economic operator **only from the specific procurement procedure** taking into consideration past and present indications, i.e., past behavior of an economic operator entered into an anticompetitive agreement, whereas horizontal exclusion **from all procurement procedures for a specific period** requires the prior issue of a Presidential Decree ("P.D.") defining the competent body and all relevant conditions for its application. Such P.D. has not yet been issued.

14. Regarding the standard of proof for the exclusion of an economic operator from a tender procedure, the law requires **only the existence** of **sufficiently plausible (i.e., reasonable) indications** in order for a public contracting authority to conclude that the economic operator has entered into agreements with other economic operators **aimed at distorting competition[10] and not the issuance of a previous judicial or administrative decision** with final and binding effect. Such indications shall consist of facts from which the contracting authority is able to presume that a particular economic operator has engaged into anticompetitive practices. In practice, most contracting authorities examine whether there is a previous HCC's decision that a specific economic operator was found to have distorted competition. In this framework, contracting authorities request the HCC whether there is a pending investigation for an economic operator or a pending decision, concluding that such economic operator has entered into anticompetitive agreements. A decision of the contracting authority imposing the exclusion of an economic operator from a specific

[9] Art. 74 of the Public Procurement Act.

[10] Art. 73 par. 4c of the Public Procurement Act.

public procurement for breach of the relevant legislation is an administrative decision which is subject to appeal before the Authority for the Examination of Preliminary Appeals, such decision falling under appeal before the Administrative Court of Appeals of Athens or the Council of State.

15. It should be noted that a parent company which participates in a tender procedure, cannot be excluded from it for a prior anticompetitive behaviour of its subsidiary. The issue has been addressed and resolved by the Council of State. During a tender procedure, an applicant alleged the indirect participation of a company in the conclusion of anticompetitive agreements in its capacity as parent company of a subsidiary, which was fined by HCC for entering into anticompetitive agreements with other economic operators (bid rigging) and requested the exclusion of the parent company from the tender as indirect participant (through its subsidiary) into anticompetitive practices. The Council of State rejected the argument and decided that such sanction cannot be imposed to the parent company since the HCC, by its decision, neither found the parent company to have committed an infringement nor imposed a fine on it[11].

16. As mentioned above, the competition law and the public procurement law are interrelated. Cooperation within the leniency regime and in the context of the settlement, can be considered to play a crucial role to restore the reliability of the economic operator. Leniency programs, when well administered, may increase the probability of detection, by undermining trust among members of the cartel and rewarding whistle-blowers, in view of the fact that usually the best source of information on secret cartel activity are companies and individuals involved in the commitment of the antitrust violation themselves[12].

17. According to Article 44 of the national Competition Act, the consequences of submission in a leniency program or a settlement procedure are 1) **the non-exclusion** for the economic operator **from public procurement procedures** and 2) the **total immunity** for the natural persons[13].

18. More specifically, if an application for a leniency program providing for total immunity from fine or reduction of fine or/and an application for settlement is approved and fully paid or facilitated by partial payment of fine, the undertaking(s) concerned shall be relieved from any administrative penalty, except for those foreseen under competition law. Under this framework, finding of the relevant infringement shall not establish grounds for exclusion of the undertaking from public procurement procedures or concessions, unless a repetitive breach takes place, i.e., issue of a relevant decision within six years from the issue of a former decision. The provision of non-exclusion also applies where there is a decision of infringement of competition law and a three-year period from its issuance has not yet elapsed.

19. Until today, the HCC has issued nine (9) decisions on bid rigging under the settlement procedure, two of them also under the leniency program.

20. Due to the above interrelation of the competition and public procurement law, the **contracting authorities may face some difficulties in the application of bidding exclusion**, such as for instance, when economic operators declare in the European Single Procurement Document (ESPD) that they have entered into an anti-competitive agreement

[11] Council of State, Grand Chamber 1819/2020, par. 32.

[12] See Lianos, I., Jenny, F., Wagner von Papp, F., Motchenkova, E.David, E. et al (2014) *An Optimal and Just Financial Penalties System for Infringements of Competition Law: a Comparative Analysis* (CLES Research paper series 3/2014, UCL Faculty of Laws: London).

[13] Art. 44 par. 3a and 3c of the National Competition Act.

and have been subject to the settlement procedure but have not paid/not settled the fine due to the non-completion of the procedure and the non-issuance of a decision by the HCC.

21. In order to overcome such difficulties, the contracting authorities should take into consideration the following:

1. The exemption from other administrative sanctions, including the exclusion of an undertaking from public tenders, as a consequence of an economic operator being subject to the settlement procedure is only applicable if the fine has been fully paid or paid in instalments.
2. In any other case, the economic operator may have to invoke the adoption of (additional) self-cleaning measures, as explained below.
3. In any case, the inclusion of the economic operator in the dispute settlement procedure without the conclusion of the procedure and without a HCC's decision, shall be assessed by the contracting authority in the above-mentioned context, under the principle of proportionality and the principle of equal treatment.
4. The HCC has no competence to assess or give an opinion on remedies of undertakings.

3. The self-cleaning measures- Restoring the reliability of an economic operator

3.1. Conditions and content

22. Any economic operator may provide evidence to the effect that measures taken by it are sufficient to demonstrate its reliability despite the existence of a relevant ground for exclusion. If such evidence is considered sufficient by the contracting authority, the economic operator concerned shall not be excluded from the procurement procedure.

23. For this purpose, the economic operator shall prove (cumulatively) that:

1. it has paid or undertaken to pay compensation in respect of any damage caused by the criminal offence or misconduct,
2. it has clarified the facts and circumstances in a comprehensive manner by actively collaborating with the investigating authorities and
3. it has adopted concrete technical, organizational and personnel measures that are appropriate to prevent further criminal offences or misconduct (*self-cleaning measures*).

24. The measures adopted by the economic operators shall be evaluated by the public contracting authority, on a case-by-case basis, considering the **gravity** and **particular circumstances** of the offence or misconduct. In this framework, the contracting authority has the discretionary power to decide that the measures adopted by an economic operator are sufficient to restore its credibility.

3.2. Types of self-cleaning measures

25. To ensure that the misconduct will not be repeated, an economic operator should adopt efficient and cost-effective self-cleaning measures. According to the Guidelines 20/2017 issued by the Hellenic Single Public Procurement Authority, the technical, organizational and personnel measures which could be considered appropriate to prevent further offences or misconduct include:

- severance of all links with persons or organizations involved in the misbehavior,
- appropriate staff reorganization measures,
- implementation of reporting and control systems,
- the creation of an internal audit structure to monitor compliance and the adoption of internal liability and compensation rules.

26. Based on Public Contracting Authorities' practice such measures include:

- adoption of a Code of Business Conduct,
- adoption of a Board resolution for establishing guidelines,
- adoption of a binding competition policy and a Code of Competition Law Compliance,
- provision of a position of a Competition Law Compliance Officer,
- provision of seminars for staff by external consultants,
- conduct of a random internal audit to determine the compliance of the company's executives with competition rules,
- restructuring of the Commercial Division and the Tenders Division with the departure of executives from these Directorates
- creation of an Internal Audit.

4. The Advocacy Role of the HCC vis-à-vis the Public Contracting Authorities

27. To enhance its advocacy role and to help public contracting authorities to detect illegal behaviors in tender procedures the HCC published in 2014 a **Guide for Public Contracting Authorities** which was updated in 2022[14] with the aim:

- to provide useful tools to the contracting authorities to detect illegal collusion in tendering procedures,
- to help public sector officials to understand the anticompetitive behavior of a cartel, as well as the techniques used when targeting competitive bidding processes,
- to help them understand the responsibilities of the HCC to deal with cartels and the responsibilities of the contracting authorities in dealing with cartels so as to avoid potential liability in the event of facilitation even unintentionally or failure to inform the HCC timely,
- to inform the officials of the framework of sanctions that may be imposed for participation in a cartel,
- to highlight the specific procedures and technological tools that may be used for better detection of cartels.

28. Additionally, in its attempt to raise the public's awareness with regard to the social benefits competition offers to the economy and to effectively convey, competition issues, the HCC has developed new communication strategies within the set of its targeted

[14]See further in https://www.epant.gr/enimerosi/dimosieyseis/odigoi/item/570-odigos-gia-anathetouses-arxes.html

advocacy initiatives. Under this scope, the HCC has launched a dedicated **Anonymous Information Platform (*Whistleblowing system)*** specifically designed for use by contracting authorities[15].

29. The internal information available to contracting authorities in their role as contract-awarding / tender-launching bodies enables them to receive information and complaints about the participation of companies in such procedures. Contracting authorities can assist the HCC's work in uncovering cartel practices and / or behaviors, so that investigations can proceed swiftly and effectively, thus directly benefiting the Greek economy, consumers, and taxpayers. Through the dedicated anonymous information platform, employees of contracting authorities and other entities may share valuable information regarding tender and bid rigging practices, while ensuring their anonymity. The establishment of a whistleblowing system has been considered as a key step to counterbalance the fear factor and strengthen competition policy and implementation thereof has been re-enforced by a media campaign[16].

5. Conclusions

30. The adoption of the grounds for exclusion of an economic operator from public tenders for breach of competition law aims to make the application of competition law more effective. Bidder exclusion is not a sanction for infringements of competition law, but rather is the adverse consequence of the limited credibility of economic operators vis-à-vis the contracting authorities and serves as a means to ensure compliance with the principles of equal treatment and competition in the award procedure, thus safeguarding the contracting authorities and the public interest at large.

31. In this regard, through the imposition of fines for competition law infringements, which have as their objective the punishment, but also aim at deterring infringers from infringing competition rules in the future, as well as through its advocacy initiatives, HCC may assist in the most effective way the contracting authorities in their effort to safeguard the integrity of the tendering procedures by ensuring the reliability and suitability of the future contractor and thus achieving higher quality of public goods/services to the most competitive prices, whereas the contracting authorities, through cooperation with the competition authority and use of whistleblowing mechanisms, may reinforce the objectives beyond the HCC's policies and become an important contributor to the HCC's efforts to detect and fight anticompetitive practices.

[15] See further https://www.epant.gr/en/bidrigalert.html

[16] See further https://www.epant.gr/en/enimerosi/publications/media/item/2216-whistleblowing-system-for-contracting-authorities.html