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**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
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Director Disqualification and Bidder Exclusion – Note by Colombia

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This document reproduces a written contribution from Colombia 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

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1. This contribution seeks to present the current regulation in Colombia related to the disqualification of administrators and bidder exclusion in cases involving anticompetitive conducts.
2. Colombia has primarily an administrative regime of competition law, with the Superintendence of Industry and Commerce as the National Competition Authority. This entity has the capacity to impose administrative fines to economic agents who violate the competition regime.
3. However, since 2011 (Art. 27 of Law 1474/11) anticompetitive conducts related with bid rigging have been considered felonies according to the Colombian criminal law. This situation has a relevant implication regarding the subject of this contribution, given the variety of sanctions to which are subject from now on the agents incurring in bid rigging conducts, including the possibility of being excluded of future tenders or being obliged to remove its administrators.
4. It is worth mentioning that, as will be explained later, in Colombia there is no rule that explicitly establishes the possibility of imposing a sanction such as the so-called Director Disqualification. The latter is a sanction where an individual is not allowed to act as a director of a company following a violation of competition law for a specific period of time¹.
5. However, as will be presented in this document, mechanisms have been created so that the administrative authorities can remove from their position whoever is convicted by a judge of having carried out an anti-competitive practice in a public tender. Similarly, national criminal code establishes that a judge has the power to disqualify a convicted person for a certain period of time from the exercise of his functions. However, it is important to note that this rule has not been applied in cases of anticompetitive practices to date.
6. In this sense, this document will be divided into four parts. In the first, a brief mention will be made of the administrative capacities of the Superintendence of Industry and Commerce as the sole authority for the protection of free competition and the amount of the administrative sanctions that it can impose.
7. Second, we will make reference to the changes made since 2011, when collusion in public tenders began being considered a crime, which can be sanctioned by a judge. As will be seen, this situation implied that those involved in this type of anticompetitive practices are now subject to sanctions other than the imposition of an administrative fine, including prison time and the exclusion of bidding processes.
8. Third, mention will be made of the reforms made as of January 2022, where the sanctions to which companies may be subject when its administrators are found responsible for the crime of collusion in public tenders were reformed, including Director removal and Bidder Exclusion.
9. Finally, a brief mention will be made in relation to the figure of Director Disqualification. It will be seen that although it does not exist explicitly in Colombia, there are some figures in the national system that could fulfill similar functions.

¹ Ginsburg D. and Wright, J. "Antitrust Sanctions". 2010. Competition Policy International. Vol 6/2. Available: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1705701

1. Colombian Free Competition Regime-Administrative enforcement

10. In Colombia, the Superintendence de Industry and Commerce is designated by law (Art. 6 of Law 1340/09) as Colombia's "National Competition Authority". It is a technical entity with its own legal personality, lodged in the Ministry of Commerce, Industry and Tourism. The Superintendence exercises some administrative functions which entails surveillance and enforcement of compliance with competition law².

11. The functions of the Superintendence with respect to the protection of competition are to investigate and sanction violations of the law, resolve applications for the approval of mergers and acquisitions, issue opinions on the competitive implications of proposed government regulations, and advise the government on competition policy generally³.

12. If the Superintendent finds an offense to the competition law, he can impose administrative fines. The maximum fine under current law⁴ is the greater of (i) the operating income of the undertaking for the fiscal year immediately preceding the one in which the penalty is being imposed, with a maximum penalty cap of 20% of such value; (ii) the assets of the undertaking for the fiscal year immediately preceding the one in which the penalty is being imposed, with a maximum penalty cap of 20% of such value; (iii) an amount set in minimum monthly wages, with a cap of 100.000, the equivalent of COP 100.000 million or about USD 21 million; and (iv) the value of the public contract in cases of conduct that affected or may affect public procurement processes, with a maximum penalty cap of 30% of such value. Notwithstanding the foregoing, if the Superintendence can quantify the profits directly received by the offender from the conduct, it may impose as a penalty fines for up to 300% of such profits, as long as said percentage is higher than the previously established caps.

13. For individuals, the maximum fine is⁵ 2,000 minimum monthly wages, the equivalent of COP 2.000 million or about USD 417.000.

14. However, as can be seen, although the Superintendence of Industry and Commerce has a high sanctioning capacity and a large number of powers to investigate cases of possible violations of the free competition regime, it does not have the capacity to disqualify administrators or exclude undertakings, temporarily or permanently, from participating in public tenders.

15. As will be seen in the following chapters, these powers were subsequently granted to criminal judges and other administrative entities, within the framework of the criminalization of some anti-competitive practices, such as collusion in public bids, considering them acts of corruption and contrary to the public administration.

2. Criminalization of some anticompetitive conducts-Bidder exclusion sanctions

16. Law 1474 of 2011 modified the Colombian criminal code, including a new felony called Restrictive Agreements of Competition. In its description, this new norm establishes that any participant in an agreement that had the purpose of illicitly altering the contractual process within the framework of a public tender, will incur in prison from six (6) to twelve

² "Colombia: Assessment of Competition Law and Policy". OECD, 2016.

³ *Ibidem*.

⁴ Art. 67 of Law 2195/22.

⁵ Art. 68 of Law 2195/22.

(12) years and will be imposed a fine equivalent to 1,000 minimum legal monthly wages, equivalent to COP 1.000 million and approximately USD 208.000. Likewise, it established an exclusion to contract with state entities for a period of eight (8) years.

17. In this way, Colombian legislation opened the door for a specific type of anticompetitive agreements, those related to collusion in public tenders, to be treated as a crime that may result in prison time and in the exclusion from future bidding processes with the State.

18. However, it should be noted that in Colombia, only natural persons can be held criminally responsible for committing a crime. In this sense, the sanctions and exclusions to participate in future tenders included in the criminal code and that were previously ruled out would not apply to undertakings that are constituted as legal persons.

19. Nonetheless, other regulations in the national system extended the abovementioned sanction of exclusion to legal persons whose administrators⁶ were involved in an act of collusion in public tenders.

20. On that sense, article 8 literal j of Law 80 of 1993, which was modified by Law 2014 of 2019, establishes that the individuals who have been declared judicially responsible for the commission of a crime against the public administration, which includes the crime of Restrictive Agreements of Competition, will be permanently disqualified from contracting with State entities (bidder exclusion).

21. However, it is worth mentioning that the aforementioned article 8 literal j of Law 80 of 1993 also established that when an individual is found criminally responsible for the commission of a crime such as collusion in public tenders, not only he will be unable to contract with the State permanently, but also such exclusion will be transferred automatically to the companies of which said person is a part as administrator (legal representative or member of board of directors), and to the branches and subordinates of said company.

22. In this way, the Colombian legislation extended the bidder exclusion sanction for the commission of restrictive practices of competition related to collusion in public tenders to undertakings whose administrators have been sanctioned by a criminal judge for the commission of the anticompetitive practice. But what is even more striking is that said extension was extended likewise to its parent and subordinated companies.

23. In other words, in the event that a judge found a natural person guilty of committing the crime of collusion in public tenders, that person, the company where he/she worked and their parent and subsidiary companies, were permanently excluded from being able to contract with entities of the state in the future.

24. Now, as will be seen below, in 2022 a new law was issued that modified the extension of the exclusion to contract with the State to legal persons.

3. Latest Reforms-Law 2195 of 2022

25. Through Law 2195 of 2022, certain adjustments were made to the exclusion to which companies whose administrators had been declared criminally responsible for the

⁶ It is important to take into account that, according to the Colombian Law, “administrator” of a company include its legal representative, the liquidator, members of Board of Director, and those who, in accordance with By-Laws, hold those functions (Article 22 of Law 222 of 1995).

commission of an anticompetitive agreement in the framework of a selection process with the State would be subject.

26. Thus, Law 2195 of 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 applicable to legal persons, but that an administrative procedure should be carried out against them by a State administrative entity (Superintendencies).

27. Article 2 of Law 2195 of 2022 establishes that legal persons domiciled in Colombia may be administratively investigated by State Entities when the following assumptions arise: **(i)** that any of their administrators or officials are declared criminally responsible for the commission of a crime against the public administration, including the crime of Restrictive Agreements of Competition in the selection processes; **(ii)** when the legal person has benefited or has sought to benefit, directly or indirectly, from the commission of the anti-competitive conduct by its employees; and **(iii)** when the legal person has tolerated, by action or omission, the commission of the anticompetitive conduct.

28. In these cases, the undertaking may be investigated by an administrative authority in Colombia, and may be subject to the following sanctions: **(i)** a fine of up to 200.000 minimum legal monthly wages, equivalent to COP 200.000 million and approximately USD 41 million; **(ii)** be permanently excluded from contracting with the State; **(iii)** prohibition to receive any type of state-aid from the Government for a period of ten (10) years; **(iv)** Removal of administrators or employees who have been criminally convicted of committing an anticompetitive agreement in a public bidding process; **(v)** Removal of administrators or employees who have tolerated the commission of the anticompetitive agreement in the public bidding process.

29. Note that in this way, the sanction of being excluded from contracting with the State for legal entities was not eliminated, but an administrative procedure was established according to which it is a State Entity that must impose said sanction. But, additionally, it is important to mention that the law included a new type of sanction corresponding to the removal of the administrator who had been found guilty of committing the crime of collusion in public bidding.

30. In this way, it is possible to conclude that, although the national competition authority (Superintendence of Industry and Commerce) does not have the power to impose a sanction corresponding to the exclusion from participating in public bidding processes to those who commit acts of collusion, this type of sanctions can be imposed by other authorities by virtue of the criminalization of the anticompetitive practice of collusion in public bidding.

4. Director Disqualification

31. As stated at the beginning of this contribution, in Colombia there is no explicit sanction as the one that has been called Director Disqualification.

32. Colombian law, as seen in the previous chapter, has included in recent years a type of sanction corresponding to the removal of directors from a company when they are found criminally responsible for the commission of a collusion in public tender.

33. However, it is worth mentioning that there is a specific norm in the Criminal Code that grants the power to criminal judges to disqualify a natural person from exercising their job or profession for a certain time. Nonetheless, this power has never been used in cases

of collusion in public tenders before, which leaves the debate open on its possible application.

34. Now, note that the doctrine has understood that the figure of the Disqualification Director has the function of eliminating the incentives for administrators to commit anti-competitive conduct and, on the contrary, encourage them to comply with the rules of free competition⁷.

35. In this way, the sanctions established in the Colombian legal system, such as the removal of administrators which can be imposed by an administrative entity, or the disqualification that may be imposed by a criminal judge, would fulfill the same purpose of eliminating the incentives to commit behaviors that could lead to this type of sanctions.

5. Conclusions

36. Based on what has been seen above, it is possible to conclude that, although competition law in Colombia is applied and sanctioned, in general, by an administrative authority, there are some anti-competitive conducts, such as collusion in public tenders, that law regards it as a crime.

37. In this sense, through a judicial process, a judge can determine that an individual is responsible for committing the crime of restrictive practices of competition in the framework of a selection process, and may impose on that natural person the sanction of being disqualified from participating in future selection processes with the State.

38. In addition, since 2022, it is possible that undertakings whose employees are sanctioned by a criminal judge for committing the crime of anticompetitive agreements in a public tender, may find themselves involved in an administrative process in which they may be impose the sanction of being permanently excluded from participating in future selection processes with the State.

39. Likewise, there is the possibility that an administrator of a company that has been found criminally responsible for committing a crime of collusion in public bids, may be removed from his position by an administrative entity or even eventually be disqualified by a criminal judge to exercise his job or profession for a certain period of time.

40. However, it is important to mention that, given that the recent reforms have been in force for very little in the national legal system, there have been no cases yet in which a company has been sanctioned in the previous terms. Thus, it will be necessary to wait for the development that these reforms may have in the future.

⁷ Whelan, P. “The emerging contribution of Director Disqualification in UK Competition Law”. Chapter 11 in *The UK Competition Regime: A Twenty-Year Retrospective*. Oxford University Press. 2021.