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

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

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[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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## *Hungary*

### 1. Bidder Exclusion

1. Fighting cartels is one of the top priorities for competition authorities and even more fighting bid rigging in public procurement because in these cases public money is at stake. In order to ensure violating undertakings do not carry out this conduct, the competition authorities apply several forms of sanctions, among others, debarment.
2. Bidder exclusion is one of the most severe consequences of violating competition law, since it has a significant impact on the turnover on the undertaking and particularly on undertakings having income wholly or mostly from public procurements.

#### 1.1. Legal background

3. Under Directive 2014/24/EU, contracting authorities should be given the possibility to exclude economic operators which have proven unreliable because of grave professional misconduct, such as violating competition rules. Grave professional misconduct can render an economic operator's integrity questionable and thus render it unsuitable to receive the award of a public contract irrespective of whether the economic operator would otherwise have the technical and economical capacity to perform the contract.<sup>1</sup>
4. Under Article 62, Subsection (1) of Act on Public Procurement<sup>2</sup>, any economic operator may be excluded from participation in a contract as a tenderer, candidate tenderer, subcontractor, or from the attestation of competence in the following circumstances.

##### *1.1.1. Exclusion based on a definitive and executable decision of the competition authority*

5. If a tenderer has been guilty and fined within the previous three years based on a definitive and executable decision of the Hungarian Competition Authority (Gazdasági Versenyhivatal, hereinafter GVH) establishing the infringement Article 11 of the Hungarian Competition Act<sup>3</sup> (hereinafter: HCA) or the equivalent provision of EU competition law, Article 101 TFEU, committed in a public award procedure, or by definitive and executable court ruling passed in an administrative action brought against the said decision of the competition authority; or if a tenderer has been condemned, and fined, for a similar offense by definitive decision of another competition authority or by final court decision within the previous three years.<sup>4</sup> In order to apply debarment, no separate decision is required, but it applies as a consequence of the decision establishing the infringement of competition rules. Subsequently, only the decision of the competition authority can be appealed, however, it will not result in the suspension of the application of the sanction, the undertaking sanctioned with fine must submit a motion for urgent legal aid for the suspension to the court.

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<sup>1</sup> Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC, paragraph 101 of the preamble

<sup>2</sup> Act CXLIII of 2015 on Public Procurement

<sup>3</sup> Act LVII of 1996 on the Prohibition of Unfair Trading Practices and Unfair Competition

<sup>4</sup> Article 62, Subsection (1), point n) of Act CXLIII of 2015 on Public Procurement

6. The GVH shall publish in the electronic procurement system information that allows contracting authorities to find out which undertakings might be excluded from public procurement procedures.<sup>5</sup>

***1.1.2. Exclusion based on the decision of the contracting authority in its proceeding***

7. If the contracting authority is able to prove that in the given public procurement procedure the tenderers have entered into agreements aimed at distorting competition, the contracting authority might exclude the particular tenderers.<sup>6</sup> This type of exclusion is not mandatory and is merely an option for contracting authorities and which can be used by them depending on their own considerations. The decision of the contracting authority is subject to remedies.

8. It should be noted that under the Public Procurement Act, where the contracting authority considers that a clear and manifest infringement of Article 11 HCA, or Article 101 TFEU has been committed during a contract award procedure, or if there is reasonable suspicion of such infringement, it must notify the GVH thereof according to the provisions of HCA.<sup>7</sup>

9. As it can be seen from the above, there are two main types of bidder exclusions as a consequence for violating competition rules: 1. based on the decision of a competition authority/court which does not depend on the considerations of the contracting authority and 2. after the adoption by the contracting authority of an act under its own powers which depends solely on the considerations of the contracting authority and is based on the detection thereof.

10. For the application of the first type, there are two requirements: i. there must be a definitive and executable decision of the competition authority establishing the violation of competition rules (article 11 HCA or article 101 TFEU) or there must be a definitive and executable court ruling passed in an administrative action brought against the said decision within the previous three years; ii. there must be fines imposed besides the establishment of the infringement. Accordingly, the starting point of the exclusion for three years starts once the decision establishing the violation of certain competition rules becomes definitive and executable. It applies automatically, while the other type of debarment only applies if the contracting authority can prove in its public procurement procedure the infringement of the competition rules indicated above and takes a decision on the exclusion from the particular public procurement.

11. One might think the second type of exclusion is very rare because the standard of proof is so high, since the contracting authority is required to have the ability to prove the infringement. It should be mentioned, however, that in the practice of the GVH there have been a couple of cases launched on information received from a contracting authority excluding undertakings in their public procurement procedure for entering into agreement with other tenderer aimed at distorting competition. It should be highlighted that the contracting authority is not required to prove the competition law infringement as a competition authority is required to do.

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<sup>5</sup> Article 62 (8) of Act CXLIII of 2015 on Public Procurement

<sup>6</sup> Article 62 (1), point o) of Act CXLIII of 2015 on Public Procurement

<sup>7</sup> Article 36 (2) of Act CXLIII of 2015 on Public Procurement

## 1.2. Scope

12. Bidder exclusion only applies in case of infringement of Article 11 HCA or Article 101 TFEU; therefore it is not applicable to any other violation of competition rules (abuse of dominance for example).

13. Under the Hungarian legislation, debarment applies to any kind of participation in a public procurement if it is based on a definitive and executable decision issued by the GVH or based on a definitive and executable court ruling. It should be noted, however, that if the debarment is the result of a definitive decision of another competition authority or by final court decision, then it is limited to the participation as tenderer.

### *1.2.1. Exemption and Self Cleaning*

14. The Public Procurement Act used to provide for the possibility of exemption from debarment made by the government till 2019. According to the former text, debarment based on a definitive and executable decision of the competition authority shall not apply in the procurement procedure if the Government adopted an individual decision on a recommendation by the minister in charge of public contracts made upon the contracting authority's request to grant exemption in order to ensure an adequate level of competition. The contracting authority could request the exemption exclusively before the commencement of the award procedure, if the grounds for exclusion apply to the majority of the economic operators of the market to which the award procedure pertains. This exemption, however, is no longer available.

15. Under Article 188 of the Public Procurement Act, any undertaking may submit a request to the Procurement Authority for establishing that measures taken by the undertaking are sufficient to demonstrate its reliability despite the existence of a relevant ground for exclusion. If the Procurement Authority establishes that the undertaking is reliable, this shall be accepted by the contracting authority without deliberation, exclusion is not applicable.

### *1.2.2. Interaction with Leniency Policy*

16. Debarment from public procurement procedures applies solely to undertakings which, based on a definitive and executable decision, have been found guilty and fined. The first leniency applicant, under certain conditions stipulated in law, is entitled for immunity from fines. Accordingly, a successful leniency applicant granted immunity and thus not fined, is not subject to exclusion.

### *1.2.3. Bidder exclusion in practice, Case-law*

17. The starting point of the exclusion for three years starts once the decision establishing the violation of certain competition rules becomes definitive and executable. There have been claims and it was settled case-law that once an appeal is lodged against the decision of the GVH establishing cartel infringement in relation to a public procurement, the exclusion is not applicable, the appeal automatically suspends its application. However, this practice and interpretation has been changed. In 2020 the Public Procurement Arbitration Board issued its decision<sup>8</sup> in which it elaborated, among others, that once the decision of the GVH establishing the cartel conduct in relation to a public procurement is delivered to the undertaking, the decision becomes definitive and executable, and thus the undertaking found guilty and fined is excluded from public

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<sup>8</sup> D.227/23/2020. Resolution of the Public Procurement Arbitration Board

procurements. Although the decision was annulled by the courts<sup>9</sup>, the interpretation of the Public Procurement Arbitration Board in connection with the application of the rules on exclusion based on a definitive and executable decision of the competition authority was upheld. The Constitutional Court dealt with the issue as well and established<sup>11</sup> that the current practice is not contrary to the law.

18. Therefore, under the recent case-law, once the decision of the GVH is delivered to the undertaking the decision becomes definitive and executable and the debarment applies, an appeal will not suspend the application of this sanction. The undertaking sanctioned with fine must submit a motion for urgent legal aid for the suspension to the court dealing with the claim filed against the decision adopted in order to be protected, although temporarily, from the exclusion as a consequence of the decision of the GVH. It should be underlined that in order to have a successful motion for urgent legal aid for the suspension, the motion shall meet certain requirements, therefore it is not obvious that the undertaking will be able to participate in public procurements irrespective of the submission of its motion.

## 2. Director Disqualification

19. The disqualification of the executive of an undertaking that took part in anti-competitive conducts is currently not present in the Hungarian legal system as a sanction. Nevertheless, it should be noted that pursuant to the Hungarian Criminal Code<sup>12</sup>, participation in a cartel carried out in relation to a public procurement is a criminal offense and the criminal court may impose the criminal penalty of ‘banning the practice of a profession’ on the executive liable for the illegal conducts. In such case, the executive could be disqualified from fulfilling executive positions for the duration specified by the court (one to five years or indefinitely). We will refrain, however, from further discussing this particular criminal sanction and the criminal aspects of cartels in general, since it would exceed the scope of the present contribution which is focusing on the competition law aspects of director disqualification and debarment.

### 2.1. Decision No. 19/2009 of the Hungarian Constitutional Court

20. In 2008, the Hungarian legislator modified the HCA by introducing a new sanction aimed at disqualifying the executives of a company who was found liable for certain anti-competitive conducts.

21. Pursuant to the modified legislation, if (i) a final and executable decision of the GVH establishes that an undertaking is liable for price-fixing or illegal practices aimed at dividing the market and (ii) fine was imposed on the undertaking for the participation in the cartel, then the executives of the undertaking would be subject to further individual sanctions, based on their role as decision-makers in the company concerned.

22. Following its final and executable decision, the GVH would name in a separate decision (first decision) the persons that were registered in the official Company Register as executives of the company concerned during the period of the cartel, and in a subsequent decision (second decision) the authority would order that such persons are to be disqualified

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<sup>9</sup> Fővárosi Törvényszék 104.K.704.511/2021/4.

<sup>10</sup> Kúria Kfv.IV.37.264/2022/6.

<sup>11</sup> Decision 3291/2021. (VII. 22.) of the Constitutional Court

<sup>12</sup> Article 420 (1) of Act C of 2012 on the Criminal Code

from fulfilling executive positions in any undertaking for two years. The person (executive) concerned could appeal both the first and second decisions in non-contentious judicial procedures. It is important to note, however, that in such procedures oral hearings cannot be held and only written evidence is allowed to be submitted.

23. Within the limits of the appeal against the second decision, the executive concerned may prove that s/he did not partake in the decisions that led to the anti-competitive conducts of the undertaking, or that s/he opposed such decisions (in essence, the burden of proof would be reversed). If the executive is successful in proving either of the above circumstances, s/he shall be exempted from the sanction of two-year disqualification.

24. Before the modifications came into effect, the newly adopted legislation was referred to the Hungarian Constitutional Court by the President of Hungary for a prior-constitutional review.

25. Above all, the Constitutional Court established that the legal consequences introduced by the legislator – in terms of their characteristics and seriousness - are very similar to the *banning the practice of a profession*, an already existing sanction in Hungarian criminal law. Therefore, the principle of *fair trial* must be observed in relation to the newly introduced sanction, as its characteristics resemble that of a criminal legal institution.

26. Although the Constitutional Court noted that the decisions of the GVH could be challenged in a judicial proceeding, according to the Constitutional Court's well-established case law, the formal declaration of judicial review of an administrative decision in itself does not provide adequate constitutional safeguards. The court must have effective powers to assess the appellant's rights and obligations derived from the matter at hand and the relevant aspects of the underlying administrative decision.

27. The Constitutional Court highlighted that the scope of the authority's procedure does not extend to the assessment of the *individual liability* of the executives within the given undertaking. The authority's procedure is focused on the *undertaking's* liability for anti-competitive conducts. Against this background, the body of evidence that might exempt the executive from the negative legal consequences is not necessarily obtained by the GVH during the administrative procedure and such facts and circumstances are not assessed by the authority either. Although the facts related to the executive's individual liability may be assessed during the judicial phase, since the authority's procedure beforehand does not assess the individual liability of the executive, the court will not have adequate information and means to carry out an effective review of the authority's decision. Furthermore, the body of evidence related to the executive's individual liability cannot be obtained during the judicial phase due to the limitations of non-contentious judicial procedures (lack of oral hearings, witness testimonies etc.).

28. The Constitutional Court however highlighted that the concept of the executive's individual liability and disqualification for an undertaking's anti-competitive conducts is not *per definitionem* unconstitutional, but the principle of *fair trial* must be observed.

29. The Constitutional Court found the modifications of the HCA in question to be in breach of the Hungarian Constitution, especially of the principle of *fair trial*, *the presumption of innocence* and the *right of defense*. As a consequence of the Constitutional Court's decision, the modifications did not enter into force. The Hungarian legislator has not attempted to introduce the sanction of executive disqualification for anti-competitive conducts of the undertaking ever since.

### 3. Conclusions

30. Undoubtedly debarment is a significant sanction for undertakings taking part in cartel conduct because if an undertaking is excluded from future public procurements it might result in much higher costs for it than a fine imposed in the decision of the competition authority. Therefore, this measure can have a real deterrent effect. This effect, however, can be reduced by the submission of a motion for urgent legal aid for its, at least temporary, suspension.

31. Director disqualification could have a deterrent effect as well and it would be an effective incentive for undertakings to cooperate and apply for leniency in order to get immunity from this legal consequence of cartel conducts. Accordingly, it would be useful to have it in the Hungarian legal system.