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

Director Disqualification and Bidder Exclusion – Note by Israel

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This document reproduces a written contribution from Israel 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. Introduction

1. In November 2022, the Competition Committee will hold a Roundtable on "Director Disqualification and Bidder Exclusion". As referenced in the documents preceding the discussion, director disqualification "describes 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 time". In addition it is noted, that "It is typically used when either the director contributed directly to the competition law infringement, or when the director was aware of the breach but took no steps to impede it."¹ Bidder exclusion is referenced as "the banning of the company from a bidding process or future public procurement tenders, typically in a specific market and for a limited period of time."²

2. On this backdrop, this contribution will discuss the legal framework and practical experience surrounding director disqualification and bidder exclusion, within the context of the Israeli competition regime. Regarding director disqualification, it will elaborate on the rational, legal framework and case law; as well as discuss a legislative reform currently under internal consideration at the Israel Competition Authority (the "ICA" or the "Authority"). Regarding bidder exclusion, this contribution will discuss the rational underlying this measure, the legal framework, ICA's advocacy efforts surrounding this issue and relevant case law.³

3. Prior to the above, and since disqualification of directors and bidder exclusion shall be referenced in this contribution under the criminal competition regime in Israel, this paper will put forth the general legal context of the cartel and bid-rigging offences under the Israeli criminal competition regime.

2. Cartels and Bid-Rigging under Israeli Competition Regime – General

4. Cartels constitute criminal offences under Israeli competition law, with violators investigated, indicted and sanctioned with imprisonment, for violations of the Economic Competition Law - 1988⁴ (the "Economic Competition Law").

5. *In terms of a normative framework* – Cartel and bid-rigging offences have constituted criminal offences under Israeli law, from the outset, and the ICA itself, has held criminal enforcement authorities, as early as its establishment in 1994. The basic legal outline of the cartel and bid-rigging offences, is set forth under the Economic Competition Law. Article 2 of the Economic Competition Law, sets forth the definition of a “**restrictive arrangement**”. Subsection (a) states that "A *restrictive arrangement* is an arrangement made between persons conducting business, under which at least one of the parties restricts

¹ Chairman's letter, 02 August 2022, calling for contributions in the context of the roundtable on "Director Disqualification and Bidder Exclusion" (COMP/2022.113).

² Ibid.

³ The scope of this contribution refers only to the Israeli criminal competition regime.

⁴ Previously titled the Restrictive Trade Practices Act-1988. As part of an amendment to the law enacted in 2019, it was re-titled as the Economic Competition Law coinciding with replacing the agency title from the Israel Antitrust Authority to the Israel Competition Authority.

itself in a manner which may prevent or reduce business competition between it and the other parties to the arrangement, or some of them, or between it and a person who is not a party to the arrangement". According to Section 2(b), particular kinds of agreements are presumed to cause competitive harm: Arrangements involving any restraint "that relates to" price or profit-fixing; geographic or customer market allocation; or restraints on output quantity, quality, or type - are irrebuttably presumed to be restrictive (*per-se*).

6. According to section 4 of the Economic Competition Law, being a party to a restrictive arrangement, as defined under section 2, is prohibited unless the arrangement is covered by a block exemption⁵, the parties obtained a specific exemption from the ICA's General Director⁶ or an approval from the Competition Tribunal⁷. An arrangement can be found restrictive if it poses any cognizable prospect of competitive harm. In accordance with Section 2(b) of the Economic Competition Law, as mentioned above, certain *per se* conduct is irrebuttably presumed to have such effect.

7. Under Section 47(a1) arrangements that are not covered by a block exemption, nor protected by a specific exemption or granted the Competition Tribunal's approval, are a criminal offense. Section 47(a1) *inter alia* defines up to a 5 years prison term, and a criminal fine for any violation of article 4.

8. In addition, in recent years, **fraud violations** have become part of competition investigations and indictments reflecting the actual, full story of the violations, occurring during the implementation of an illicit bid rigging arrangement. In cases of bid-rigging, competition violations are often accompanied by other criminal offences. For instance, in addition to the cartel offence, by misrepresenting sincere participation in a tender and hiding the cartel agreement from the issuer - an act of fraud is carried out.

9. *In the practical context* – since its establishment, the ICA's Investigations Department initiated dozens of criminal investigations of cartels and bid rigging cases in a broad array of sectors. The

10. The development of criminal enforcement of cartels, is a gradual process. ICA's experience shows, that throughout the years, with increased enforcement, as well as the use and development of relevant legal and practical tools – effective results may be achieved. Measures such as director disqualification and bidder exclusion, where appropriate, are part of this process.

3. Director Disqualification

3.1. Legal Framework and Rational

11. According to Section 226 of Israeli Companies Law 5759-1999 (the "Companies Law"), a person convicted of the offenses specified therein is automatically disqualified from serving as a director of a public company for five years. Among the offenses specifically listed under section 226 are bribery, fraud and the use of insider information.

⁵ Section 15A of the Economic Competition Law, grants the General Director the power to establish block exemptions (the general director has published block exemptions, including, for instance for joint ventures; for research and development agreements; exclusive dealing; exclusive distribution or franchise and more.

⁶ The Economic Competition Law, Section 14.

⁷ *Ibid*, Section 13.

Section 226 does not specify competition-related offenses as offences relevant for automatic disqualification, however the section allows the court to apply disqualification with reference to offences not specifically listed under the section, taking into account the substance, gravity and circumstances of the offence. In either case (automatic disqualification or not), the court has the discretion to apply a shorter period of disqualification, than the one set forth under section 226 of the Companies Law.

12. Disqualification of directors, as specified under section 226, is primarily intended for preventive purposes, i.e. it aims to protect the public from further harm that may occur as a result of the convicted individual's actions. The Israeli Supreme Court (the "ISC") noted this rational in the Nimrodi Case:⁸

"[The] purpose of the provision of the aforementioned law is protection of investors. Meaning, creating a buffer to protect the general public, investors in the capital markets, suppliers and consumers in particular from harm that may be perpetrated by a board of directors leading the public company, in particular, from a director who, due to his behavior, cannot serve as a proper director."

13. In line with this rational and the goal of preventing directors who failed to comply with their supervision duties, or took part in cartels or bid-rigging, from holding similar positions and harming the public, the ICA presented in court an unprecedented argument, according to which Section 226 should also be applied to competition related offenses. The ISC accepted this argument in the Shulstein Case⁹, stating that due to their gravity and substance, conviction in competition offences should result in director disqualification. The ISC also noted, in this case, once again that disqualification is a preventive measure, taking into consideration the public interest. Nevertheless, the disqualification period should also take into account the right to freedom of occupation of the convicted person¹⁰.

3.2. Case Law

3.2.1. The Paint Cartel (The "Shulstein Case")

14. In the Shulstein Case referenced above, also known as the "Paint Cartel", a paint supply company coordinated the prices of its products with the distributors of its products, in order to prevent a "price war" between them. Indeed, in this case, in 2009 for the first time in Israel, the question of whether director disqualification could be applied by the court to an individual convicted under the Economic Competition Law, was addressed by court. Mr. Shulstein was the CEO of the paint company and was convicted of neglecting to supervise the company for a period of 4 years during which the company was a part of anti-competitive agreements. As noted, in the framework of this case, the district court of Jerusalem accepted the ICA's arguments to apply section 226 of the Companies Law and disqualified Shulstein from being a director for the maximum period set forth under the Law (5 years). Shulstein appealed to the ISC. In 2011, the ISC rejected the appeal, accepted ICA's position and stated as follows:

"His conduct provided, at the very least, a favorable environment for the creation and for the existence of the restrictive arrangements. This is an extremely serious negligence and a failure to exercise the powers of supervision, overseeing, control and guidance expected of a person in the position of the appellant and with his

⁸ IsrSc 619/05 Ofer Nimrodi vs. The State of Israel, 14 (the "Nimrodi Case").

⁹ IsrSc 4783/09 Shulstein vs. The Antitrust Authority, 37. (the "Shulstein Case").

¹⁰ Ibid, Paragraph 36.

*experience. Therefore, it was correct to conclude that the appellant should not be permitted to be appointed to a public position that requires the same abilities which he failed to demonstrate, for the time specified in the Companies Law."*¹¹

3.2.2. The Bakeries cartel

15. In the case known as the Bakeries' Cartel¹², prices of bread were fixed by leading bakeries in Israel. The ICA argued in the this case, that due to the substance, gravity and circumstances of the offence, the court should disqualify the CEOs of the bakeries and that the disqualification should be set at the maximum level set forth under law (5 years). The court accepted the ICA's arguments.

16. In a decision granted in February 2018, the court reiterated the considerations presented in the Shulstein Case judgment and applied them to the case of the CEO in the Bakeries Cartel Yaron Angel:

*"The application of the standards established by law, as interpreted in the Shulstein case, leads to the conclusion that in the present case the maximum period of disqualification established by law must be applied. The offense in question was serious. It brought about a price increase which caused damage, in practice and force, which affected a large public, whose socioeconomic level is low. It lasted for several months. It involved real planning and sophistication. This is a violation of the antitrust laws, the purpose of which is to ensure free and fair competition. Such competition is the basis for the proper operation of the market. **Committing the offense, under the circumstances described, clearly indicates an incapacity to serve as a director.** Indeed, the role of a company's board of directors, among other things, is to prevent exactly this type of offense by any of the company's managers. The picture becomes more evident when considering the fact that Mr. Angel provided regular instructions to his subordinates within the framework of the implementation of the arrangement. It is difficult to reconcile this conduct with the desire to serve as a director, who is supposed to supervise the corporation and its employees, and to project integrity. On top of the above it should be noted that Mr. Angel served as the company's director at the relevant times, in addition to serving as its CEO. Given these considerations, it is difficult to perceive an actual violation of Mr. Angel's freedom of occupation. Mr. Angel is one of the owners of the company. **He serves as its CEO. Consequently, it is difficult to argue that his disqualification from serving on the board of directors of public companies constitutes an infringement of his property rights. The resulting balance leads to the conclusion that in this case the maximum period of disqualification, of 5 years, as established by law, must be applied.**"¹³*

3.3. Looking Forward – Legislative Reform - Disqualification Following Conviction in Competition Offenses

17. As mentioned above, Section 226 of the Companies Law does not specify competition-related offences as offences that cause automatic disqualification. Looking forward, one of the possibilities currently considered by the ICA, is proposing a legislative

¹¹ Ibid Paragraph 39.

¹² IsrDc (Jerusalem) 28192-08-12 The state of Israel vs. Yaron Angel and others (the "Bakeries Cartel")

¹³ Ibid, Paragraph 36-37.

reform, under which a person convicted of a cartel offence will be debarred from certain positions automatically - for a period of 5 years beginning on the date of their conviction.

18. In addition, Section 226 disqualifies directors of public companies only. The contemplated legislative reform may also suggest a broader scope of application, *inter alia* including private company directors.

19. The ICA believes that the legal disqualification mechanism currently in place under section 226, is well designed. I.e., to the extent that the accused was convicted of offences established under law, the default is that their term will be limited, unless the court determines otherwise. This mode of operation enables, on the one hand, saving resources on the part of both the ICA and the judicial authority and, on the other hand, provides the court with full discretion with respect to a reduction in the disqualification period, and even cancelling this disqualification altogether, if necessary.

4. Bidder Exclusion

4.1. Rational

20. The criminal process tends to extend over a long period of time. In many cases the investigated entities remain a part of the relevant market, and at times the most significant firms in that relevant market. Thus, if the allegations are justified, the procurement process may remain subject to the same misconduct. Cartels, clearly, do not need to be re-affirmed every day to remain effective and bid-rigging schemes can last after dawn-raids, even without any further communication. Bidder exclusion may become relevant during two different stages of the criminal procedure; First, bidder exclusion as an *interim measures*, whereas its main objective would be preventing anti-competitive harm that may occur before a decision on the merits. Second, bidder exclusion applied at the *end of the criminal procedure as part of the final sentence*. The objective at this stage is deterrence. Regardless of the stage, ICA's efforts with reference to bidder exclusion, focus on assisting the tender's issuer.

21. More broadly, with reference to the rational of exclusion as an *interim measures*, we will note the following:

22. Indeed, experience shows that an investigation of a cartel cases with a large number of suspects takes 1-3 years, and the prosecution of it takes 5-8 years. Such prolonged timetable, has undesired implications.

23. First, **lowering deterrence**. Clearly, the criminal penalty becomes less deterring than desired, whereas the process of the investigation, prosecution as well as final verdict, take years. Moreover, together with the low chances of "getting caught", agency experience shows that typical cartel offenders tend not to take into consideration an immediate and certain penalty. Rather, they consider the potentially significant timeframe until a final verdict is granted, which they expect may work in their favor. Under these circumstances, bidder exclusion do increase deterrence.

24. Second, since the criminal process tends to extend over a long period of time, if the allegations are justified and to the extent that the investigated entities remain a part of the relevant market (which is often the case), the **procurement process may be harmed**. Thus, bidder exclusion serves the purpose of protecting the public procurement process from ongoing bid rigging schemes and from the participation of corrupt undertakings in bids conducted by the government. In some cases, the very same tender which was subject to the bid-rigging investigated continues after a dawn-raid, which makes the need for taking

immediate action, even clearer. In such cases (see examples below), ICAs position is that it is necessary to publish a new tender, including stipulations enabling the exclusion of the suspect parties, according to the issuer's judgment.

25. With reference to bidder exclusions *at the end of the criminal process*, as mentioned above, the main objective would be deterrence. Despite the prolonged process, and its impact of lowering deterrence, excluding bidders from public tenders at the end of the criminal procedure, has the effect of increasing deterrence.

26. Lastly, on this backdrop, imposing such measure serves a **justice objective** as well: exclusion from public tenders, is the just governmental response to corruption. When an undertaking fixes prices or allocates the market with its competitors, the natural consequence should be that the government, as a trustee of the people, will refrain from engaging in business with it. This logic becomes even clearer when the undertaking was part of public bid rigging, and as such was misrepresenting sincere participation in a tender; even more so, in cases when the exclusion is from the same tender that was subject to the bid-rigging investigated.

27. Though serving various rational, in the form of stopping competition harm, protecting the public procurement process, increasing deterrence and justice objectives, imposing bidder exclusion is not a simple task. Some of the challenges are discussed below.

4.2. Legal Framework

28. Bidder exclusion, is not specifically regulated under the language of Israeli laws. In terms of case law, ISC established that the contracting agency (the public tender issuer), has a broad scope of consideration with reference to the question whether to exclude bidders - mainly focusing on due process issues rather than on the merits¹⁴. Lower courts have granted a few decisions regarding exclusion of bidders *after* filing an indictment. As an example, in the *Contractors Cartel Case*¹⁵, a bidder charged with taking part in a group boycott of a tender in the construction industry, was excluded from participating in a government bid. The bidder appealed to the district court against its exclusion. The Court, dismissed the appeal and upheld the issuer's decision to exclude the bidder, stating as follows:

"Though in this case it is an antitrust suspicion, not a felony of a morality type... it is a criminal offence directly related to a public tender, an offence that undermines the public tender's main objectives – free competition and equality between bidders".¹⁶

29. In the same case, the Court also stated that with reference to the above, the contracting agency may exclude participants, during the investigation phase, and there is no need to wait until the end of the proceeding. An appeal on this decision to the ISC, was withdrawn.

4.3. ICA's Advocacy efforts

30. This sub-chapter will outline some of ICA's advocacy outcomes in this regard, more specifically, what is referenced as the "sincere bid declaration" ("SBD"). Prior to that, we will address the general challenges involved in advocacy relating to bidder exclusion.

¹⁴ IsrSc 3190/02 Kal Binyan Ltd. vs. Ramat Livnum - Wastewater Treatment Company Ltd 58(1) 590.

¹⁵ IsrDc (Central) 4190-02-16 Ken Hator Engineering and Building vs. Israel Police (the "Contractors Cartel Case").

¹⁶ Ibid.

4.3.1. *Background and challenges*

31. *The presumption of innocence* – exclusion of a bidders raises questions regarding the presumption of innocence, since it may limit one's right to property only on the basis of suspicion. The same applies, accordingly, to the freedom of occupation. Even though relevant case law specifically states that, to this end, there is no significant difference between a post-conviction phase and the investigation phase, it may be a challenge for an issuer to exclude a bidder. The more advanced the case is (investigation phase; hearing before indictment; indictment; conviction; forfeited conviction; etc.) the greater the ability to convince the issuer, through advocacy.

32. *Litigation costs* – the process of excluding, can involve massive litigation costs. Before taking such actions, the issuer must grant the bidder a proper hearing. In addition to the actual costs invested in the hearing itself, this can cause a long delay of the tender. In many cases, the issuer cannot bear the delay since it requires the goods or services urgently. That makes the decision to exclude a bidder even harder.

33. *The significance of the particular bidders to the tender* – in many cases, participants in a bid-rigging scheme are the more significant competitors in the relevant field of activity. In some cases, the issuer of the public tender is concerned that excluding all entities that took part in the bid-rigging, will render the issuer without enough experienced potential bidders. Notably, such concern may itself raise competition questions, when the issuer wishes to refrain from reducing the number of potential bidders.

4.3.2. *The Sincere Bid Declaration*

34. *Inter alia* on the backdrop of these challenges, the ICA advocated to include a "sincere bid declaration" ("SBD") in every public tender on the grounds that including such declaration can prevent bid-rigging in advance. A signed SBD includes agreed compensation, without proof of damage that is applied if a member of the bid-rigging conspiracy, is convicted. These advocacy efforts took form in numerous lectures executed by the ICA to hundreds of public procurement officers.

35. Following these actions, approximately four years ago, the Israeli Accountant General directed that *every* public tender must include an SBD. The fact that a member of the bid-rigging conspiracy signed an SBD, helps the contracting agency to exclude that bidder, as no *bona fide* claims can be raised.

4.4. Case law

4.4.1. *The Bus Transportation Cartel*

36. In May 2018, after an extensive covert investigation, the ICA opened an overt investigation regarding suspicions of restrictive arrangements between bus transportation companies. The suspicions related *inter alia* to the companies dividing the market between them and bid rigging. After the investigation became public, a few issuers contacted the ICA to inquire whether their tenders were subject to the bid rigging investigated.

37. In the early stage of the investigation, and taking into consideration on the one hand, the need not to disrupt the investigation, and on the other hand the importance of imposing an interim measures in order to stop the bid that was rigged by the suspects, the ICA agreed to disclose some evidence to an a contracting agency who wanted to consider the disqualification of an undertaking that was allegedly part of the conspiracy investigated. Following this, the contracting agency summoned the bidder for a hearing, in which it was confronted with the evidence gathered by the ICA. Following the hearing, the issuer

decided to terminate the contract at the first exit point and did not exercise an option to renew the agreement with the bidders involved in the conspiracy.

4.4.2. The Cartel of Organizers of Youth Delegations to Poland

38. The Israeli Ministry of Education (MOE) organizes youth delegations to memorial sites and concentrations camps in Poland as part of the Holocaust memorial studies. In 2016 ICA initiated an investigation, suspecting a few main travel agencies for a cartel in the context of handling these delegations. Since the indictment was filed, several public offices have disqualified the agencies indicted, from Poland delegations tenders.

39. One of those, and certainly the most significant of them, was MOE itself. Since the indictment was filed, MOE has made efforts, bearing massive litigation costs, in order to exclude the defendants from participating in the bids for executing the delegations. With the assistance of ICA, providing factual and legal basis for those efforts, MOE added a stipulation in the tender, which enabled – according to contracting agency's judgement – the disqualification of the indicted parties.

40. Following that, in March 2022, MOE temporarily disqualified those agencies from the next two years' Youth Delegations to Poland. Three of these agencies challenged the decision in Court, the petition of two was withdrawn; the third is pending.

4.4.3. The Tree Pruning Cartel

41. The Tree Pruning Cartel illustrates some of the obstacles, which a public tender issuer can encounter, concerning exclusion from public tenders of suspects or indicted parties to a bid rigging conspiracy. The case involved contractors who handle clearing trees, obstructing power lines and pruning trees for forest-fire control.

42. From the initial stages of the investigation, the Israel Electric Corporation (IEC) (the cartel victim) has invested efforts to exclude the cartel members from upcoming tenders. At first, IEC added a precondition, excluding suspects or indicted parties of the cartel, while lowering other precondition, in order to enable new entrants to the tree pruning market. Despite IEC's efforts, no fitting bid was submitted. In a new attempt, IEC added a criterion to the tender, giving weight to the fact a bidder is a suspect or was indicted for being party to a cartel. In parallel, IEC noticed that several "new" players entered the market: the same pruning contractors involved in the cartel - in a new corporate suit. IEC revealed the actual identity of the "new" parties, weighing in their participation in the cartel nonetheless. One of such parties, challenged this decision in Court, however the petition was withdrawn. Notably, to this date, every IEC public tender includes a precondition, disqualifying convicted parties in a cartel for 5 years after a conviction.

5. Conclusion

43. ICA's experience shows, that with the use and development of relevant legal and practical enforcement tools – effective results may be achieved. The incorporation of measures such as director disqualification and bidder exclusion as described above enables to achieve a more comprehensive, relevant and fitting enforcement process as well as increased deterrence. The contemplated legislative reform concerning disqualification as discussed above, also reflects this.