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

Director Disqualification and Bidder Exclusion – Note by Latvia

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This document reproduces a written contribution from Latvia 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. This contribution deals with rules of bidder exclusion in the Republic of Latvia. Bidder exclusion is only applied and implemented by procuring entities, as this sanction is regulated by the laws on public procurement, not laws on competition. The Competition Council of Latvia (hereinafter – the Competition Council) supports procuring entities and undertakings by educating them on competition laws and also participates in restoration of credibility of penalized undertakings. However, the upcoming amendments to public procurement laws envisage that the Competition Council will play a greater role in preventing participation in public procurement tenders of those bidders that might have entered into a horizontal cartel agreement.

2. General legal background

2. For violations of competition laws undertakings can face sanctions which are of administrative nature. Criminal liability is not foreseen. In civil cases the injured party can pursue damages.

3. Undertakings that have been found guilty of infringing competition laws by entering into a horizontal cartel agreement are excluded from participating in public procurement tenders for a specific period (one year according to the current version of the law and three years according to the version of the law in force after 31.12.2022). Procuring entities shall exclude a bidder only after a decision of a competent authority or a court judgment, whereby the bidder has been found guilty, has entered into force and has become incontestable and unappealable. This sanction is of administrative nature and is applied additionally. The provisions on exclusion from participating in public procurement tenders are laid down in the Public Procurement Law¹ and Law on the Procurements of Public Service Providers² and are implemented by procuring entities.

4. The infringement of competition laws should be established by a competent authority which can be either the Competition Council or the European Commission, a

¹ According to Article 42 Paragraph One Clause 6) of the Public Procurement Law, a contracting authority shall exclude a candidate or tenderer from participation in a procurement procedure in any of the following cases: (..) a candidate or tenderer, by such a decision of a competent authority or a court judgment which has entered into effect and has become incontestable and unappealable, has been found guilty of infringement of competition law manifested as a horizontal cartel agreement, except for the case when the relevant authority, upon determining infringement of the competition law, has released the candidate or tenderer from a fine or reduced fine for cooperation within the framework of the leniency programme.

² According to Article 48 Paragraph One Clause 6) of the Law on the Procurements of Public Service Providers, a public service provider shall exclude a candidate or tenderer from participation in a procurement procedure in the following cases: (..) a candidate or tenderer, by such a decision of a competent authority or a court judgment which has entered into effect and has become incontestable and unappealable, has been found guilty of infringement of competition law manifested as a horizontal cartel agreement, except for the case when the relevant authority, upon determining infringement of the competition law, has released the candidate or tenderer from a fine or reduced fine for cooperation within the framework of the leniency programme.

national competition authority of other member state, or a court. The Latvian courts are also entitled to apply the Latvian Competition Law and Article 101 of the Treaty on the Functioning of the European Union and can establish the infringement of competition laws.

5. The main objective of bidder exclusion is deterrence. Fines imposed directly on undertakings that have participated in bid-rigging (the most common infringement of competition law) may not be a sufficient deterrent to the infringement. For a significant part of undertakings, participation in public procurement tenders forms their most significant share of revenue, and it is the prohibition to participate in further tenders that may significantly affect the undertaking's refusal to engage in an infringement.

6. Latvian competition laws do not foresee liability of such persons as directors, board members or other natural persons in charge of an undertaking committing an infringement. In line with EU competition law, the Latvian Competition Law is only applied to "undertakings" which are broadly defined as any person that carries out an economic activity. As a result, director disqualification is not foreseen by the Latvian law.

3. Scope and implementation of bidder exclusion

7. Provisions on exclusion of bidders are laid down in Article 42 Paragraph One Clause 6) of the Public Procurement Law and Article 48 Paragraph One Clause 6) of the Law on the Procurements of Public Service Providers. Both articles foresee that a bidder is excluded from a public procurement tender if the bidder, by such a decision of a competent authority or a court judgment which has entered into force and has become incontestable and unappealable, has been found guilty of infringement of competition law manifested as a horizontal cartel agreement. It means that exclusion is applied only in case if an undertaking has been found guilty of participation in a horizontal cartel agreement. There is no mention of specific markets or sectors.

8. Bidder exclusion is of mandatory nature which means that a procuring entity is obliged to verify the information whether a bidder has been found guilty of a particular infringement of competition law (horizontal cartel agreement) and exclude the bidder from a public procurement tender if such fact of the infringement has been established. There is no discretion on the part of the procuring entity. The information on the infringement shall be obtained from the state-maintained information systems. The candidate himself shall not provide any information, except if the candidate is an undertaking registered in other country. In this case the candidate shall provide a reference from a competent institution of its country.

9. Exclusion is not applicable if a competent authority, upon determining the infringement of the competition law, has released an undertaking from a fine or reduced a fine for cooperation within the framework of the leniency program. Such exception has been introduced to promote the leniency program.

10. Exclusion from public procurement tenders is valid for a one-year period after the decision establishing the infringement has entered into force.

11. It is worth noting that exclusion also applies to a subcontractor indicated by the bidder if the value of the construction work to be performed or the services to be provided is above certain threshold, to a member of a partnership if the partnership is a bidder and to a person specified by a tenderer on whose capacities the tenderer relies upon to certify that the qualification thereof conforms to requirements specified in a contract notice or procurement procedure documents.

12. Exclusion is not applicable to an undertaking that is controlling or executing decisive influence in the infringing undertaking, i.e., parent company, or an undertaking that has taken over the rights and obligations of the infringing undertaking due to internal reorganization.

13. A procuring entity may allow an undertaking to participate in the public procurement tender, even if the undertaking has been found guilty of infringing competition laws, if the undertaking has carried out necessary actions to restore its credibility (see Section 5 for more detailed information).

14. A tenderer excluded from participation by a procuring entity can submit a complaint to the Latvian Procurement Monitoring Bureau. The decision of the Procurement Monitoring Bureau can be challenged before the court.

4. Legal framework after 31.12.2022.

15. The amendments to the Public Procurement Law and the Law on the Procurements of Public Service Providers entering into force on 01.01.2023 (hereinafter – the Amendments) will introduce several novelties:

16. **Firstly**, as it was concluded in practice, the existing legal framework is not effective enough to prevent the participation in public procurement tenders of those undertakings who might have entered into agreements that disrupt free competition. The existing legal framework allows to exclude a bidder only after the harm has been done, i.e., after a contract has been awarded and usually fully executed. Therefore, there is a strong necessity to solve the problem of agreements disrupting competition when procuring entities are examining bid submissions i.e., before contracts are awarded. This problem is addressed by the Amendments.

17. The Amendments envisage the new exclusion criterion, i.e., a procuring entity may preclude participation in public procurement tenders of undertakings not only in case when a decision of a competent authority has become incontestable and unappealable, but also when the procuring entity itself, upon examining bid submissions, has detected warning signs of bid rigging schemes in a particular tender. In such case exclusion may be applied by the procuring entity only in respect to the particular tender. Procuring entities are the best placed to spot warning signs indicating bid-rigging schemes, such as similar grammar and arithmetical mistakes in tender submissions, tender submissions containing identical documents such as specialists CVs, is such specialists are widely available, tender submissions submitted from the same email address or the same IP address³, etc. If a procuring entity has detected any warning signs of a bid rigging scheme, the procuring entity shall consult the Competition Council and receive its opinion about a possible bid-rigging. The Competition Council shall provide its opinion on the possible bid-rigging scheme within ten business days. If the procuring entity's suspicion about the possible participation of the bidder in the bid rigging scheme is confirmed, the procuring entity may take a decision to exclude the bidder from the particular tender.

18. **Secondly**, procuring entities may exclude a bidder if the bidder, by such a decision of a competent authority which has entered into force, has been found guilty of infringement of competition law manifested as a horizontal cartel agreement. According to the administrative laws of Latvia, a decision enters into force when it is notified to the

³ A detailed description of bid-rigging schemes – so called “signal list” (in Latvian – “*signālsaraksts*”) is available on the Competition Council’s home page.

addressee. It means that the procuring entities will be able to exclude the bidder even when the decision is still under review by the court.

19. **Thirdly**, exclusion from participation in public procurement tenders will last for three years, instead of one year. It is expected that a three years' period will render this sanction even more effective in terms of deterrence.

20. **Fourthly**, the Amendments envisage that bidder exclusion is also applicable to an undertaking responsible for payment of fine, i.e., a parent company, and an undertaking that has taken over the rights and obligations of the infringing undertaking due to internal reorganization. In the Latvian competition law, parent companies may be held responsible for competition law infringements of their subsidiary companies and there is no reason to allow parent companies that have been fined for competition law infringements to participate in public procurement tenders.

5. Restoration of credibility

21. Undertakings that have been fined by the Competition Council and banned by the law from participating in public procurement tenders for participating in a horizontal cartel agreement, can still undergo a "self-cleaning" procedure, whereby the company may show that the exclusion grounds are no longer existing. By fulfilling specific requirements, an undertaking can receive Competition Council's positive opinion and restore its lost credibility after infringement. In its turn, after Competition Council's positive opinion, the procuring entity may decide whether to allow the undertaking to participate in the public procurement tender organized by it. Restoration of credibility is provided for in Article 43 of the Public Procurement Law⁴ and Article 49 of the Law on the Procurements of Public Service Providers⁵.

22. The Competition Council's homepage contains a detailed information on how to restore credibility.⁶ To restore its credibility the penalized undertaking must take several steps:

- cooperate with the Competition Council during the investigation and after the decision has been issued;

⁴ According to Article 43 of the Public Procurement Law, if a candidate or a member of partnership, if the candidate is a partnership, meets the grounds for exclusion referred to in Paragraph one, Clause 1, 3, 4, 5, 6, or 7 or Paragraph two, Clause 1 or 2 of Section 42 of this Law, the candidate shall, together with the tender, submit an explanation and evidence for the compensation of the caused damage or a concluded agreement on the compensation of the caused damage, collaboration with the investigating institutions and technical, organizational or personnel measures taken in order to prove its reliability and prevent the repetition of the same or similar events in the future.

⁵ According to Article 49 of the Law on the Procurements of Public Service Providers, if a candidate or a member of partnership (if the candidate is a partnership) complies with the case for exclusion referred to in Section 48, Paragraph one, Clause 1, 3, 4, 5, 6, or 7 or Paragraph two, Clauses 1 and 2 of this Law, the candidate shall, together with the application, submit an explanation and evidence for the compensation of the damage caused or a concluded agreement on the compensation of the damage caused, collaboration with the investigating institutions and the technical, organizational, or personnel measures taken in order to prove its reliability and to prevent the repetition of the same and similar events in the future.

⁶ Information on how to restore credibility. Available at: <https://www.kp.gov.lv/lv/media/736/download>

- the fine imposed by the Competition Council must be paid into the state budget, and the damage caused by infringement must be compensated, if victims of the infringement have claimed it;
- develop a Competition Compliance Programme, guidelines and appoint a person in the company responsible for the implementation and regular updating of it;
- systematically educate employees about competition law;
- submit a confirmation regarding the implementation of the said activities to the Competition Council and receive the Competition Council's statement.

23. The Competition Council's statement has no binding force. A procuring entity has a discretion to decide whether the measures implemented by an undertaking to restore its credibility are sufficient and can decide on the undertaking's participation in the tender. If the procuring entity deems the measures insufficient, it can exclude the bidder from the further participation in the tender.

24. The penalized undertakings are using the possibility to restore their credibility. In 2021, the Competition Council provided one statement that a company had implemented sufficient measures to prove its credibility and to prevent committing infringements of competition law in future. In 2022, the Competition Council has so far provided two statements in respect to two companies.

6. Advocacy initiatives by the Competition Council

25. In order to help procuring entities to spot bid-rigging schemes, the Competition Council has developed comprehensive and informative materials on how to identify them, addressed to procuring entities⁷. These materials include:

- a detailed description of bid-rigging schemes – so called the “signal list” (in Latvian – “*signālsaraksts*”);
- translated into Latvian and Russian OECD guidelines for fighting bid rigging in public procurement;
- a declaration of independence form for bidders in a public procurement tender - a document developed by the Competition Council for the use by procuring entities. Any bidder submitting its offer in a public procurement tender is invited to sign this declaration form certifying that its offer was prepared independently and has not been coordinated in any way with competitors.

26. To raise awareness of competition policy and legal issues and stimulate interest in promoting fair and effective competition, the Competition Council organizes seminars and other events for undertakings and their associations, public administrative bodies (which usually are procuring entities), students, inter-institutional cooperation partners, lawyers and other interest groups on competition law and its practical application. These events are led by the employees of the Competition Council (mostly by the Cartel Unit) – experienced competition law specialists. In these events, the Competition Council educates its audience on competition law and policy. Also, the Competition Council educates its cooperation partners, such as police units dealing with investigation of economic and financial crimes,

⁷ These materials are available at: <https://www.kp.gov.lv/lv/iepirkumu-rikotajiem>

the Corruption Prevention and Combating Bureau, the Procurement Monitoring Bureau, the State Revenue Service, and the European Public Prosecutor's Office.

27. In 2022, so far the Competition Council has held 15 seminars for different public and private bodies operating in various sectors, such as provision of central heating, managing postal services and managing roads. Also, a representative of the Competition Council participated in various conferences on public procurement. The Competition Council also held and participated in seminars for employees of authorities that investigates economic crimes and supervises implementation of EU funding and other financial instrument projects. During these events, the Competition Council employees educated investigators and experts, whose duties often involve verification of tender submissions and tender documentation for possible irregularities, including bid rigging, about bid-rigging schemes and usual warning signs.

28. When holding an event for companies and other market participants, the Competition Council invites companies and their representative associations to promptly develop the Competition Compliance Programme, not only in cases where a company has already been caught in an infringement. It is an effective tool for protecting oneself from irregularities, as it is a self-created document to which the responsible person can take specific actions to prevent undesirable activity.

29. The Competition Council promotes compliance with competition law not only through seminars and events, but also indirectly raises the issue in other ways. In 2020, the Competition Council prepared a self-assessment tool for undertakings, so that they could verify in an easy manner, whether they have not engaged in cartel agreements with their competitors due to their negligence or lack of knowledge⁸.

30. In a situation where, after using the self-assessment tool, the undertaking has concerns about their actions or the undertaking's employees, it offers the opportunity to contact the Competition Council anonymously or apply for the leniency program. Also, by performing the test and identifying the cartel risks that the undertaking faces daily, the undertaking has already done some of the homework required to implement the Compliance Programme.

31. The Competition Council also uses an alternative method for prevention of infringements without a formal initiation of investigation, i.e., a prevention procedure. Such procedure has been introduced since 2015 in the framework of the Competition Council's prioritization strategy whose purpose is to allocate the Competition Council's limited resources to tasks that allow to promote competition and protect the interests of society in the most effective way. Prevention procedure is used when the Competition Council finds that there are signs of a competition law infringement, however, the possible infringement is a single event, i.e., has not been repeated by involved undertakings, and it has not influenced a large part of the market. In the framework of this procedure, the Competition Council holds a meeting with representatives of infringing undertakings, explains to them the meaning and consequences of the competition law infringement and ask them to sign a confirmation that such infringement will not be repeated in the future. If any of the warned undertakings commits an infringement again, a formal investigation of the case is initiated.

⁸ The self-assessment tool for mitigation of cartel risks is available both in a printed format to be distributed to undertakings in seminars and electronically: <https://ej.uz/parbaudiuznemumu>