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

Director Disqualification and Bidder Exclusion – Note by Slovak Republic

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This document reproduces a written contribution from Slovak Republic 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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Slovak Republic

1. Nature of sanctions imposed by the Antimonopoly Office of the Slovak Republic

1. The Antimonopoly Office of the Slovak Republic (hereinafter as “AMO” or as “Office”) is the independent central body of state administration of the Slovak Republic responsible for the protection of competition. The AMO has power to impose sanctions for the infringements of competition law, which are of an administrative nature. As regards infringements of „substantive competition rules“, sanctions may be imposed solely on undertakings - i.e. either on legal or natural persons performing economic activities. In the Slovak Republic, it is also possible to impose criminal sanctions on natural persons, but only in criminal proceedings which are in hands of criminal courts (this is completely separated from administrative proceedings).

2. The power of the AMO to impose fines for infringements of substantive competition rules is subject to conditions contained in provision § 42 of the Act no. 187/2021 Coll. on Protection of Competition (hereinafter referred to as „the Act on Protection of Competition“, or as „the new Act”).¹ The provisions of the Act on Protection of Competition set basic criteria which should be taken into account in the process of setting fines.² Also general legal principles such as proportionality must be taken into consideration in the process of imposing fines. These principles arise from the case law, legal theory, etc. The AMO must take this principle into consideration during the whole process of imposition of fines. Concerning the liability, according to the Slovak legal framework, parents and their subsidiaries can be held jointly and severally liable for the antitrust violation committed by the subsidiary. When imposing the fine, the AMO takes into consideration the fact that companies belong to the same economic entity.

3. As from April 2016, the AMO has the obligation to impose a ban from participation in future public procurements on companies that took part in bid rigging activities. Ban from participating in public procurement is an obligatory part of the decision on the agreement restricting competition in the form of the collusion in public procurement or similar (e.g. private) tender. In 2021 this legal provision was amended in the new Act.

¹ i.e. § 42 (1) *The Office shall impose a fine on the undertaking of up to 10% of the worldwide turnover for the previous accounting period for each* a) breach of the prohibition of an agreement restricting competition, b) breach of the prohibition of the abuse of a dominant position, c) failure to notify the concentration before the rights and obligations arising therefrom have been exercised, d) breach of the prohibition to exercise the rights and obligations arising from the concentration, if the Office has not granted the exemption under Section 10(4), e) non-compliance with the Office's decision; or f) breach of the prohibition of participation in public procurement.

² I.e. § 42 (3) *When imposing a fine under paragraph 1 or paragraph 2, the Office shall assess the severity and duration of the breach. When assessing the severity of the breach, the Office shall take into account its nature or impact on the market and the size of the relevant market. When imposing a fine, in addition to the above criteria, the Office shall, if appropriate, take account of other facts, namely repeated breaches, refusal to cooperate with the Office, position as a leader or an initiator of the breach or non-performance of an agreement restricting competition in practice. When imposing a fine, the Office may also take account, as an attenuating circumstance, of the fact that a compensation for damage had been paid based on a mediation agreement or an out-of-court settlement agreement before the Office issued a decision to impose the penalty.*

4. The main objective of AMO's sanctioning policy is to punish the undertaking for anti-competitive conduct and to deter it and also other undertakings from further anti-competitive conduct.

2. Ban from participating in public procurements

2.1. Legal background

5. According to the new Act:

Prohibition of Participation in Public Procurement

(1) *Unless otherwise stipulated by paragraphs 2 to 4, the Office shall impose a prohibition of participation in public procurement on an undertaking for three years, if the Office has imposed a fine on this undertaking for a breach of the prohibition of an agreement restricting competition consisting in the coordination of undertakings in public procurement, public tender or other similar tender, in connection with public procurement, public tender or other similar tender.*

(2) *The Office shall not impose a prohibition of participating in public procurement on the undertaking in case of reduction in the undertaking's fine under 51(2)³.*

(3) *The Office shall impose a prohibition of participation in public procurement on an undertaking for one year, if the Office has imposed a fine on this undertaking for a breach of the prohibition of an agreement restricting competition consisting in the coordination of undertakings in public procurement, public tender or other similar tender, in connection with public procurement, public tender or other similar tender, in case of reduction in the undertaking's fine under Section 52⁴.*

(4) *In exceptional cases, the Office may also waive the imposition of a prohibition of participation in public procurement, if the imposition of such prohibition would significantly worsen the competitive situation.*

³ „The Office may, at the request of the undertaking, reduce the fine for a violation of the prohibition of an agreement restricting competition under Section 4(1) or under Article 101 of the Treaty on the Functioning of the European Union, as amended, the parties to which operate at the same level of the production chain or distribution chain, that the Office would impose under Section 42(1), by up to 50% if that undertaking admits its participation in an agreement restricting competition and, on its own initiative, provides the Office with evidence with significant added value to the evidence already available to the Office, which, together with information and evidence already available to the Office, will enable to prove the violation of the prohibition under Section 4(1) or under Article 101 of the Treaty on the Functioning of the European Union, as amended, and if that undertaking fulfils the conditions for participation in the leniency programme.“

⁴ „Settlement - If the established facts sufficiently substantiate the conclusion that there has been a violation of this Act or Article 101 or Article 102 of the Treaty on the Functioning of the European Union, as amended, except for a violation, for which the Office shall impose a fine under Section 44 or Section 45, the Office may, for the purposes of cost-efficiency or to obtain a swift and effective remedy in the market, on its own initiative or at the request of a party to proceedings, hold a settlement negotiation. If the party to proceedings and the Office agree with the conclusions of the settlement negotiations and the party to proceedings admits its participation in this violation and assumes responsibility for such participation, the Office shall reduce the fine that it would otherwise impose under Section 42(1) or (2). There is no legal entitlement to the settlement.“

(5) Periods under paragraphs 1 and 3 shall begin to run on the finality of the final decision; in order to determine the beginning of the period, the final decision shall mean

a) a final decision of the Office imposing the prohibition under paragraph 1 or paragraph 3, against which no action may be brought or against which no action has been brought under the Administrative Procedure Code,

b) a final court decision dismissing an action or discontinuing proceedings for a review of the decision of the Office imposing a prohibition under paragraph 1 or paragraph 3, against which no cassation appeal has been lodged,

c) a final court decision rejecting the cassation appeal or discontinuing the cassation proceedings.

(6) The Office shall immediately deliver the final decision under paragraph 5 to the Office for Public Procurement.

6. Provision § 48 of the Act on Protection of Competition regulates the competence of the AMO to impose a sanction in the form of a ban on participation in public procurement for three years, if the Office has imposed a fine on this undertaking for a breach of the prohibition of an agreement restricting competition consisting in the coordination of undertakings in public procurement, public tender or other similar tender, in connection with public procurement, public tender or other similar tender. This legal regulation follows on from the previous regulation, which was included in Act no. 136/2001 Coll. on Protection of Competition in 2016.

7. Until April 2016, the ban from participation in public procurements for the undertaking involved in bid rigging activities stemmed directly from the Act no. 25/2006 Coll. on Public Procurement (the fact, that the undertaking was not involved in bid rigging activities was one of the conditions for participating in public procurements). The intention of this change was to increase the legal certainty of sanctioned undertakings, as well as of public contracting authorities and contracting authorities, to make clearer at what time and to which undertakings the ban applies. The inspiration for that legislation was a similar setting of relations in the Czech Republic and in other EU countries.

8. The AMO has an obligation to exclude bidder from a bidding process or future public procurement for three years, if it was proven that it was involved in bid rigging practices, with some exceptions.

9. Two of exemptions apply in proceedings, where sanctioned undertaking requests for leniency programme, or settlement procedure:

- the AMO imposes a ban of a shorter duration of one year on the undertaking that decided for settlement procedure
- the AMO does not impose such a ban on the successful leniency applicant.

10. Such legislation supposes the motivation of the participants in the proceedings to apply for the application of the leniency programme and the settlement procedure and thereby contribute to the effective conclusion of the proceedings, the saving of public resources and at the same time ensure the most effective intervention of the Office. If the full leniency is granted, the fact that such an undertaking is not excluded from bidding process follows indirectly from the fact that it is not fined, i.e. not even banned, since bidder exclusion is tied to the imposition of a fine. In the case of partial leniency, the non-imposition of a ban on participation in public procurement follows directly from wording of the Act on Protection of Competition. In the case of application of the settlement

procedure, a ban on participation in public procurement is imposed for one year, which also directly follows from the wording of the Act on Protection of Competition.

11. Third exemption from bidder exclusion was set by the new Act. This legislation introduced new possibility for the AMO to exercise its discretionary power and waive the imposition of a ban on participation in public procurement even in exceptional cases if the imposition of such prohibition would significantly worsen the environment on the relevant markets operated by fined undertakings. The AMO assumes application of this exemption only in exceptional situations, when the imposition of a ban under this provision would lead to a disruption of the competitive environment – for example in the situation where the bidder exclusion would be imposed on the majority of entities operating on the given market and the decision of the AMO would de facto create a dominant position of one entity.

12. We suppose that such a situation could arise when a small number of undertakings operate on the relevant market affected by the agreement, most of them are excluded from bidding procedure and thus the remaining entity would be the only participant in public procurement, or the number of possible participants would be significantly reduced precisely due to the fact that other competitors were involved in bid rigging with the subsequent ban on participation in public procurement. At the same time, it would have to be a relevant market where participation in public procurement is a significant factor. The AMO does not have practical experience with this type of exemption so far, but as it was mentioned above, the application of the Office's discretionary authority not to impose a ban on participation in public procurement according to this type of exemption will occur in a minimum number of cases, since the very essence of the reason for the exception implies that it is not a standard situation and even in such a case it is up to the AMO to decide whether to apply the exemption or not. From the previous decision-making practice of the AMO we identified only one case, where such exemption could be considered.

13. Compared to the previous legislation by Act no. 136/2001 Coll., the new Act also established more detailed regulation of the moment when the period of the ban begins to run. This moment is bound to the so-called final decision. A final decision means either a decision of the AMO against which an action (appeal) is not brought or cannot be made or a decision against which an action is brought and this is subsequently rejected or the legal proceedings in the subjected matter is stopped, which, in terms of this regulation, starts from the so-called final decision. It follows from the above that the law recognizes a kind of automatic suspensive effect of the beginning of the prohibition period, when this beginning is tied to the final decision.

14. The AMO is obliged to deliver the final decision to the Public Procurement Office immediately. The reason for such an adjustment is that the Public Procurement Office keeps a register of persons who have been banned from participating in public procurement.

3. Purpose, scope and effectiveness of debarment sanctions

15. Under this legal framework, the prohibition applies automatically in any decision (unless an exception to the prohibition applies) imposing a penalty for bid rigging practices, regardless of the sector concerned. The standard of proof is bound to prove breaching the law by participating in the bid rigging cartel, there are not any specific requirements in case of bidder exclusion sanction.

16. In general, the ban to participate in public procurements contributes in terms of deterrence, since it is able to deter the undertakings from engaging in illegal activities. A

number of companies in certain sectors sell products mainly through the process of public procurement, thus the ban could therefore significantly influence their economic activity.

17. The practice of the AMO indicates that the benefit in the form of an exception to the bidder exclusion is motivation for undertakings that participated in bid rigging cartel for considering application of the leniency programme and settlement procedure.

18. Decisions of the AMO including bidder exclusion can be reviewed in appeal procedures. The AMO decides on cases within the two-instance system. The Cartel Division as an executive division of the AMO decides on the bidder exclusion in the first instance. This decision may be reviewed by the Council of the AMO upon an appeal. When the appeal is lodged, the decision of the first instance cannot become valid before the second instance decision is adopted.

19. The Council of the AMO is independent and it has full jurisdiction – it is obliged to review first instance decision based on the appeal in extenso that is not only the legality of the decision but matter of facts as well. The Council of the AMO can complete probation but in such a way that the principle of two-instance proceedings is not breached. The party to the proceedings has to have the possibility to appeal so the Council of the AMO cannot decide on a matter that has not been subject matter of the first-instance proceedings.

20. Filing of an appeal by one of the parties to the proceedings automatically brings the postponement of the validity and enforceability of the decision until the second instance decision. After the second instance decision is taken, the decision of the AMO becomes valid (decisions issued by the Council of the AMO become legally valid after they are delivered to the parties to the proceedings). The decision of the Council of the AMO is, in accordance with Slovak legal framework, directly reviewable by an administrative court on the basis of an administrative legal action. In the process of judicial review, the first-instance court has full jurisdiction. There could be lodged cassation complaint against a first-instance court decision.

21. The AMO considers the combination of sanctions that may be imposed for infringements of competition rules in the Slovak Republic to be effective enough. The most important and primary issue to increase the effectiveness and deterrence of sanctions remains, however, the consistent decision-making process of the AMO that is upheld by courts.

22. Since 2016, AMO imposed bidder exclusion in eight cases. In three cases, no appeal was filed, so the decision was final and the Office sent information to the Public Procurement Office. Of these cases, a leniency programme was successfully applied in one, and a settlement institute was applied in two.

23. In six cases the final decision was not yet been taken, thus they are in the review process.