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

Director Disqualification and Bidder Exclusion – Note by Egypt

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This document reproduces a written contribution from Egypt 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. Sanctions are an indispensable and instrumental tool for competition authorities worldwide given their strategic benefits in deterrence against anti-competitive practices.
2. Various types of sanctions are enforced in different jurisdictions. The selection of an optimal sanction remains to be a topic of discussion due to various contingencies and the need for circumstantial assessment, specific to each jurisdiction.
3. Therefore, the selection of an appropriate sanction method requires a strategy that takes into consideration different aspects while accounting for several variables. For example, sanctions may vary depending on the strategy aimed at by the sanction such as deterrence, prevention of recidivism, public policy, guaranteeing integrity, and the very nature of the sanction whether civil, administrative, or criminal.
4. It is evident that certain sanctions are more favored in specific situations depending on the jurisdiction and socio-cultural context. For example, imprisonment does not always reflect the moral code of certain nations. Considerable debates are present within European member states as to whether cartels can be perceived as ‘morally incorrect’ to a degree similar to deception, theft, or fraud¹.
5. On the other hand, bidder exclusion and director disqualification may be effective as administrative sanctions under certain conditions. As some jurisdictions perceive fines as insufficiently deterrent in certain cases where illicit gains exceed the fines imposed.
6. According to Article 27 of the Egyptian constitution, protecting free competition and the prohibition and deterrence of anti-competitive practices is a constitutional principle. Therefore, the Egyptian government has embedded competition principles in their strategy.
7. There are many tools of deterrence of anti-competitive practices under the Egyptian law. Anti-competitive practices under ECL are deterred by financial sanctions. In addition, cooperation with other governmental entities has led to the adoption of debarment sanctions in the Public Procurement law and the Importers Registry law.
8. This paper **first** discusses financial sanctions stated by ECL provisions, and **second** debarment sanctions under the Egyptian law.

2. Financial Sanctions

9. When monetary fines are used as sanction, the amount must greatly outweigh the profits gained from the illegal acts. Also, fines must be proportional to the social damage, in order not to lead to foreclosure or exclusion of market players.
10. Infringements to ECL are considered criminal offences. They do not entail imprisonment, yet they can be punishable with considerable fines. The calculation of fines uses the gross revenue of the product subject matter where possible. This is in light of

¹ Peter Whelan “*Cartel criminalization and the challenge of 'moral wrongfulness'*”, Oxford Journal of Legal Studies, Vol. 33, No.3, 29th April 2013

international best practices, considering that the turnover reflects the illegal gains from anticompetitive practices or the presumed damage to consumers².

11. Violations to article 6 of ECL are punishable with fines that are not less than 2 % of the relevant gross product revenue and not exceeding 12 % during the violation period. In case of the inability to calculate the revenues, the fines would be no less than five hundred thousand Egyptian pounds and not exceeding five hundred million Egyptian pounds.

12. Violations to article 7 and 8 of the law are punishable similarly except that the minimum amount would be 1% and the maximum 10%. In case of the inability to calculate the revenues, the fines would be no less than a hundred thousand Egyptian pounds and not exceeding three hundred million Egyptian pounds.

13. In case of recidivism or non-compliance with ECA decisions, the minimum and maximum fines are doubled.

3. Debarment sanctions

14. Debarment sanctions are sanctions that are imposed on natural or legal persons as a result of infringing the law. They may take several forms such as director disqualification and bidder exclusion.

3.1. Director disqualification

15. Director disqualification is the process of banning or suspending a director from managing the company for a certain period of time, as a result of breaching their legal responsibilities.³

16. Once a director is disqualified, they cannot be appointed directly or indirectly as a director of the company or any other company for the specified duration.⁴ This is considered a civil sanction against individuals managing companies involved in illegal practices, including those breaching the competition law⁵.

17. Director disqualification may be applied for several reasons⁶:

- It disciplines violating individuals with a deterrent punishment that will damage their reputation, earnings, and career.

² OECD Global Forum on Competition “Directorate for Financial and Enterprise Affairs” Background Paper by the Secretariat, December 2016, Available at [https://one.oecd.org/document/DAF/COMP/GF\(2016\)6/en/pdf](https://one.oecd.org/document/DAF/COMP/GF(2016)6/en/pdf)

³ Competition and Markets Authority, “*Guidance on Company Directors disqualification Act 1986 and failed companies*”, 21 June 2022. Available at: <https://www.gov.uk/government/publications/company-directors-disqualification-act-1986-and-failed-companies/company-directors-disqualification-act-1986-and-failed-companies>

⁴ Midha, S. (2020). “*An Insight into Section 164, Companies Act: Disqualification of Directors*”. Available at: <https://corpbiz.io/learning/disqualification-of-directors/>

⁵ Stephan, A. (2011). “*Disqualification Orders for Directors Involved in Cartels*” 2(6) *Journal of European Competition Law* 529, 536.

⁶ *Ibid*

- It is less costly than criminal sanctions; since the government may incur economic and social costs when applying criminal sanctions such as prisons, which could be avoided by disqualifying the violating directors.

18. In Egypt, director disqualification is not a sanction according to the ECL. However, in the Egyptian Companies Law Article 89 prohibits that any person who had been subject to a sanction for a crime related to theft, abuse of trust, forgery or bankruptcy to be a member of the Board of Directors of a shareholding company. Article 98 also states that there can be director disqualification in a specific company whenever a member of the Board of Directors engages in any business for his own account or for a third party's account in any sphere of business being carried on by the company or whenever he discloses confidential information.

3.2. Bidder exclusion

19. Bidder exclusion is a sanction where an undertaking is excluded from future bidding processes for a certain period of time.

20. The relevant contracting authority, a competition authority, or a judicial body may impose this sanction against businesses and individuals in order to ban their participation in any procurement offer. It may be governed by administrative law, criminal law, or both⁷.

21. The purpose of excluding violating bidders from the market is usually to protect the integrity of the contracting entity's procurement contracts and to combat corruption, collusion, fraud and fund misappropriation. Therefore, blacklisting infringers for a period of time or for a certain procurement process has been used as a tool for limiting anti-competitive practices around the world⁸.

22. Under the Egyptian law, bidder exclusion and bid-rigging are regulated by ECL and the Public Procurement Law. This was due to the cooperation between ECA and Ministry of Finance, in order to ensure the effectiveness of the Public Procurement law and to increase the deterrence of anti-competitive practices.

23. Bid rigging is prohibited by Article 6 ECL which states:

“Agreements or contracts between competing Persons, in any relevant market, are prohibited, if they should cause any of the following: ...

Coordinating with regard to proceeding or refraining from participating in tenders, auctions, negotiations and other calls for procurement. (...)”

24. The new Public Procurement Law, which came into force in 2018, explicitly states that one of its objectives is free competition, fairness, and equal opportunity. According to Article 33 of the Public Procurement Law, it is prohibited for the bidder and its related parties (i.e. a single economic entity) to submit more than one bid in the same process. In

⁷ World Bank, IDB, Bureau de l'inspecteur General, International Bar Association (2019). “A Global View of Debarment: Understanding Exclusion Systems around the World”. Available at: [https://www.worldbank.org/content/dam/documents/sanctions/office-of-suspension-and-debarment/2019/may/SD_Survey_Results_\(April_2019\).pdf](https://www.worldbank.org/content/dam/documents/sanctions/office-of-suspension-and-debarment/2019/may/SD_Survey_Results_(April_2019).pdf)

⁸ *Ibid*

addition, the relevant public entities are obliged to notify ECA if any anti-competitive practices prohibited by ECL, including bid rigging, occur⁹.

25. According to Article 50 of the Public Procurement Law and Article 100 of its Executive Regulations, a bidder may be excluded from the contractors' register if it has been established that they provided false information, colluded with other competitors, or committed fraud.

26. When ECA is notified by a contracting authority, according to Article 33 of the Egyptian Public Procurement Law, that a bidder is committing fraud, corruption, or colluding with competitors, it starts to investigate the case and then addresses its decision to the contracting authority. Following the finding of a violation, the contracting authority should notify the State Council in order to approve the exclusion decision that must notify the General Authority for Government Services (GAGS) in order for the latter to circulate the exclusion decision to the different authorities, and publish it through the Public Procurement Portal.

27. For example, in 2020, an administrative authority sent a request to ECA for their opinion on a bidding process; where there was suspicion of two related parties submitting more than one bid for the same process. Based on the analysis of the relevant documents, ECA confirmed that the two bidders are related parties, and accordingly have infringed Article 33 of the Public Procurement Law. The administrative authority has referred the case to the State Council, where they were excluded from the contractors' register.

3.3. Importer Exclusion

28. In order to increase the deterrence of anti-competitive practices, ECA cooperated with the relevant entity to include importer exclusion in the amendments of the importer registry law of 2017.

29. In order for a company to import products into the Egyptian market, they have to be registered in the Egyptian importer registry. Companies or individuals registered may be excluded from this registry if they have any criminal records regarding infringements including those related to ECL¹⁰.

30. This sanction would be applied for an indefinite period, unless they settle, where they would be re-registered in the importer registry.

4. Conclusion

31. ECA's mandate is to enforce competition law in the Egyptian market. ECL provides efficient tools including financial sanctions. Fines may be complemented with debarment sanctions, such as bidder exclusion in the case of bid-rigging, according to the Public Procurement Law. Bidder exclusion has already been applied in some instances following anti-competitive practices. In addition, importer exclusion may also be used as a deterrence tool, under the Egyptian law.

32. The use of director disqualification, jail time, or publication of infringements may prove useful in isolating the damage to individuals behind certain anti-competitive

⁹ OECD, Criminalisation of cartels and bid rigging conspiracies (Contribution of Egypt), Policy roundtables, 9 June 2020, p. 6-7.

¹⁰ Article 6 of Law no. 121/1982 regarding importer registry

decisions meanwhile not risking foreclosure and exit of the business due to hefty fines. However, this sanction is not applicable for anti-competitive practices under the Egyptian Law.