

Unclassified

English - Or. English

7 November 2022

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

**Director Disqualification and Bidder Exclusion – Note by Indonesia**

29 November 2022

This document reproduces a written contribution from Indonesia 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](http://www.oecd.org/competition/director-disqualification-and-bidder-exclusion-in-competition-enforcement.htm)

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## *Indonesia*

### **1. Legal Background**

1. Explicitly, the legal framework of competition in Indonesia (Law No. 5 of 1999) has indeed covered director disqualification. This is provided for in Article 49 sub-article b of Law No. 5 of 1999 that there is an extra punishment in the form of “prohibition for business actors proven to have violated this law from holding a position of board of directors or commissioners for a minimum period of 2 (two) years and a maximum period of 5 (five) years”, however, this provision has been removed through the partial amendment to Law No. 5 of 1999 (Indonesia’s Competition Law) through the ratification of Law No. 11 of 2020 regarding Job Creation. Therefore, the competition law in Indonesia to day does not include the director disqualification.

2. While with regard to the bidder exclusion sanction, Law No. 5 of 1999 explicitly does not include such sanction, however, in its practice, such sanction was often used by previous Commission Panel in deciding tender cases so as to become a jurisprudence. Such jurisprudence was upheld by virtue of Decision of ICC No. 13/KPPU-I/2018 wherein the Commission Panel handed down a sentence in the form of bidder exclusion against reported parties by way of prohibiting them from participating in tenders in the same field of services the financing sources of which are from the State Revenues and Expenditures Budget (State Budget) and/or Regional Revenues and Expenditures Budget (Regional Budget) for a certain period throughout the territory of Indonesia. This Decision was then upheld by District Court and the Supreme Court of the Republic of Indonesia. Therefore, though Law No. 5 of 1999 has yet to explicitly cover the category of the bidder exclusion, but there is a progressive practice being conducted by the Commission Panel.

### **2. Purpose and Scope of Bidder Exclusion**

3. The purpose of bidder exclusion is to make sure that the procurement of goods or services for public affairs is implemented by the best entities based on the existing requirements (including being the best pursuant to the resources made available by the state). In addition, public institutions and the private sector generally have further put emphasis on competitive bidding processes in order to obtain lower prices and better quality and innovation.

4. In determining a sanction in the form of bidder exclusion, the Commission Panel has the rights to determine the subject, scope, and duration of the sanction on the basis of the principles of proportionalities wherein a sanction in the form of bidder exclusion is usually accompanied by sanction in the form of administrative penalty. A Decision of the Commission Panel can surely be subject to an appeal.

5. At the moment, the mechanism for lodging an objection to decisions of ICC is exercised through a Commercial Court, wherein business actors can lodge an objection to a decision of ICC through a District Court by no later than fourteen days after having received a notification of decision from ICC. The Commercial Court in this regard must examine such objection within fourteen days as from the acceptance of the objection. In the event that business actors still object to a decision of the Commercial Court, then such business actors can file a remedy in the form of cassation to the Supreme Court within fourteen days as from the reading out of the decision of the Commercial Court. However,

in the event that business actors do not lodge an objection within the aforementioned period, then such business actors are deemed to have accepted the decision of ICC.

6. In Indonesia, there is also a specific institution taking care of the procurement of goods and services, that is, the National Public Procurement Agency (NPPA). One of its authorities is to develop business actors through the imposition of sanction in the form of blacklist. The imposition of sanction in the form of blacklist constitutes a sanction imposed on participants in the selection/providers in the shape of prohibition from participating in the procurement of goods/services throughout the Ministries/Institutions/Regional Organs within a certain period. The purpose of the imposition of sanction in the shape of blacklist by NPPA is not to grant a punishment to business actors for their poor behaviors/performance but to stimulate business actors to behave/perform well. Sanction in the form of blacklist by NPPA and sanction in the shape of bidder exclusion by ICC have the following differences:

Remarks	Bidder exclusion (ICC)	Blacklist (NPPA)
Regulations	Jurisprudence	<ul style="list-style-type: none"> <li>• Article 49 of Presidential Regulation Number 12 of 2021</li> <li>• Regulation of the Head of NPPA Number 4 of 2021</li> </ul>
Background of the Imposition of Sanction	Business actors violate Article 22 of Law Number 5 of 1999	<p>Participants in the Selection/ Providers are subject to Sanction in the form of Blacklist in the event that:</p> <ol style="list-style-type: none"> <li>a. participants in the selection submit false/ incorrect documents or remarks to satisfy the requirements as determined in the Selection Documents;</li> <li>b. participants in the selection are indicated to have conspired with other participants to arrange the offer price;</li> <li>c. participants in the selection are indicated to have perpetrated Corruption, Collusion, and/or Nepotism in the selection of the Providers;</li> <li>d. participants in the selection withdraw on the grounds that are unacceptable to the Procurement Official/Selection Working Group/Procurement Agent;</li> <li>e. participants in the selection withdraw or do not sign the catalogue contract;</li> <li>f. winners of the Selection withdraw on the grounds that are unacceptable prior to the signing of the contract;</li> <li>g. Providers do not implement the contract, do not finish the work, or the contract is unilaterally severed by the Commitment Making Official posed by the errors of Goods/Services Providers; or</li> <li>h. Providers do not discharge their obligations during the maintenance period appropriately.</li> </ol>
Coverage of Sanction	Specifically applicable to the type of sector, budget, and certain regions in accordance with the commands of the decision	Prohibition is applicable nationally
Parties that are subject to sanction	Applicable to all types of business	The imposition of Sanction in the form of Blacklist on Participants in the selection/ Providers joining in a consortium/ cooperation in operations/ partnership/ other forms of cooperation refer to the consortium agreement/cooperation in operations/

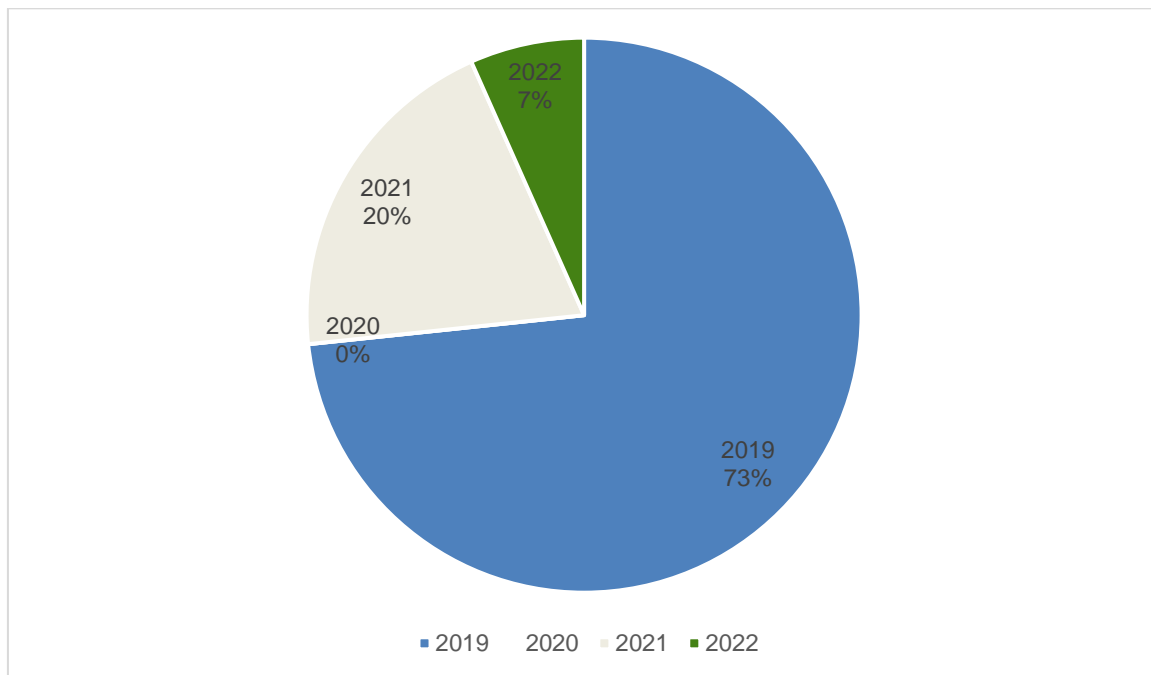
		<p>partnership/ other forms of cooperation</p> <p>Sanction in the form of Blacklist that is subject to the head office of the company/ branch office/ company representative is implemented provided that:</p> <ol style="list-style-type: none"> <li>The Sanction in the form of Blacklist that is subject to the head office of the company is applicable also to all the branch offices/company representatives.</li> <li>The Sanction in the form of Blacklist that is subject to the branch office/ company representatives is applicable also to other branch officers/ representatives and the head office of the company.</li> <li>The Sanction in the form of Blacklist that is subject to the holding company is not applicable to the subsidiaries.</li> <li>The Sanction in the form of Blacklist that is subject to the subsidiaries is not applicable to the holding company.</li> </ol>
Publishment of Sanction	The website of ICC	The E-procurement website
Remedy in the form of Objection	An appeal can be filed to a Decision through a Commercial Court	Business actors can lodge an objection to the proposed stipulation of sanction in the form of blacklist by submitting a notice of objection to Budget User / Proxy of Budget User or Ministries/Institutions/Regional Governments by forwarding carbon copies to the Government Internal Overseeing Apparatus
Standards of Substantiation	At least 2 instruments of proof and the type of instrument of proof	The proposing Parties study the documents and make clarifications by inviting certain parties
Sanction Imposing Party	Commission Panel	<ol style="list-style-type: none"> <li>Budget User/ Proxy of Budget User based on the proposal of the Selection Working Group/ Procurement Official/ Procurement Agent;</li> <li>The Imposition of Sanction in the form of Blacklist on the acts in the catalogue process as determined by the Ministries /Institutions/ Regional Governments based on the proposals of the Selection Working Group/ Procurement Agent</li> </ol>
Provision of the validity period of the sanction	Depending on the decision of the commission, generally is subject to bidder exclusion for 1-2 years as from the decision has had a permanent legal force	The validity period of the sanction is 1-2 years as from the date of the decision is stipulated and is not retroactive.

7. To date, ICC has also made efforts to establish coordination with NPPA to include the register of business actors and the commands of the decision in the form of bidder exclusion in the E-procurement website owned by NPPA, but an agreement has yet to be achieved due to the existence of different criteria of sanction.

### 3. ICC's Decision with Bidder Exclusion

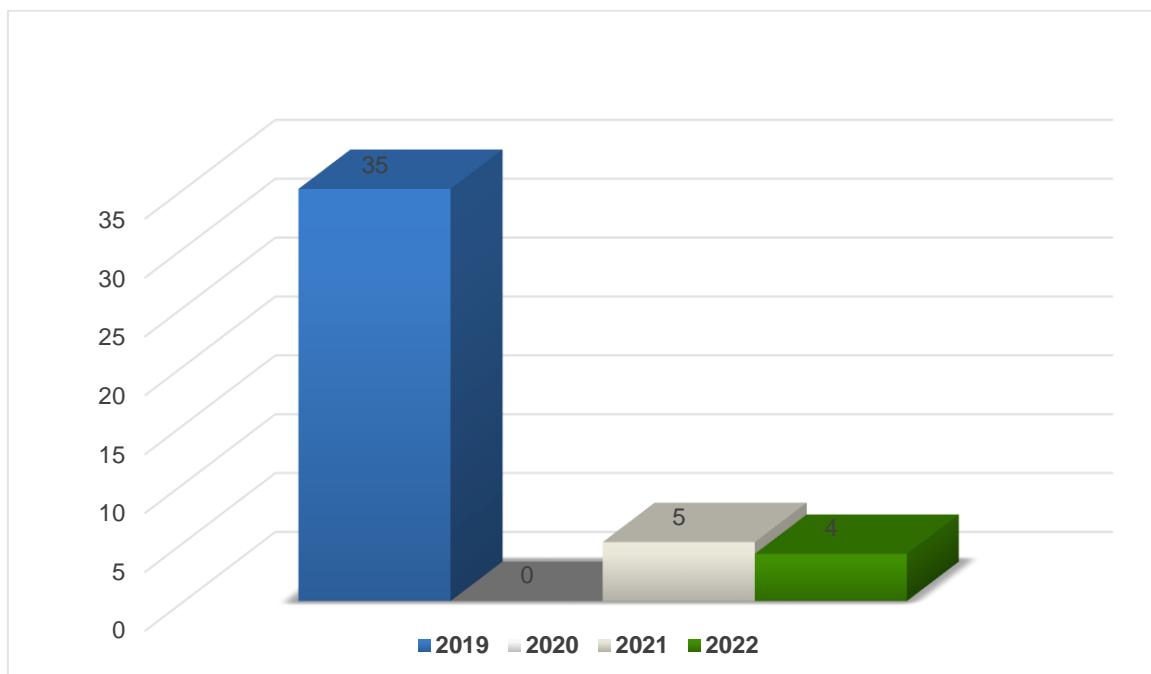
8. For the duration of year 2019 up till now, there are 28 Decisions on tender conspiracies/ bid rigging cases being convicted by ICC. Based on such data, out of the 28 convictions, there are 15 decisions being accompanied by sanctions in the form of bidder exclusion imposed by the Commission Panel on business actors.

Figure 1. Number of decisions with Bidder Exclusion



9. The following is the graph of the number of business actors that are subject to a sanction in the form of bidder exclusion as from 2019-2022.

Figure 2. Number of Business Actors that are subject to Bidder exclusion



#### 4. Conclusion

10. Making reference to the preventive function of the sanction itself, the logically effective imposition of sanction will prevent the same violations/ crime in the future. Therefore, one of the indicators of the effectiveness of sanction can be seen on the basis of the number of the tender conspiracy cases to date. Based on the annual report of ICC in the last 3 years (2021, 2020, and 2019), we can see that there has been a tendency of increased percentage of tender conspiracy reports received by ICC from the public; 62% in 2019, 62% in 2020, and 71% in 2021. Viewed from the aspect of the percentage of the pre-investigations based on the type of the case, 61% of the pre-investigations in 2019 was tender-related cases, 65% of the pre-investigations in 2020 was tender-related cases, and 69.2% of the pre-investigations in 2021 was tender-related cases. This increase can at least be used as the initial basis for suspecting that the imposition of sanction up till now (not only bidder exclusion) has yet to be effective.

11. The study of the existing condition with regard to the tendency of the imposition of sanction in the form of bidder exclusion at practical level constitutes one of the indispensable conditions in order to be able to say that the imposition of sanction in the form of bidder exclusion is effective or not. In addition to the above, there is also a need for monitoring and evaluation of the imposition of the sanction. This monitoring and evaluation aspect has yet to be institutionalized to date, hence, capable of weakening the effectiveness of the sanction due to the absence of obvious track record that can assess the behavioral change in the aftermath of the imposition of a sanction. The intended track record is important indeed for it will present significant data such as: does the behavioral change take place due to the imposition of sanction or other factors; do other business actors not perpetrate the same violation for the punishment of other business actors in the past or not. Currently, the Indonesian competition law has factually granted obligations to business actors to report the execution of the decision to ICC. However, a comprehensive monitoring and evaluation aspect has yet to be developed for that purpose due to the limited resources at ICC to oversee the implementation of sanction in the form of bidder exclusion in a comprehensive manner throughout the territory of the Republic of Indonesia. ICC still counts on the initiatives of the related tender committee to screen tender participating companies if they have been once subject to or are still bound by the sanction in the form of bidder exclusion by ICC.