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

Director Disqualification and Bidder Exclusion – Note by Ukraine

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This document reproduces a written contribution from Ukraine 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

Mr Antonio CAPOBIANCO
[Email: Antonio.CAPOBIANCO@oecd.org]

JT03507679

Ukraine

1. General overview.

1. Public procurement markets are quite an important channel for companies to promote their products. Therefore, it is important to ensure effective competition between bidders, to create conditions under which the negative consequences of participation in bid rigging outweigh the benefits that such participants will receive. And in this case, the combination of penalties for bid rigging with the exclusion of such participants from future tenders is an effective preventive tool to deter violations of competition law.

2. Legal sanctions for violation of competition law in the form of a bid rigging

2. The issue of proving the violation of competition law in the form of bid rigging and application of penalties is stipulated by the Law of Ukraine "On Protection of Economic Competition".

3. Thus, a separate clause 4 of part two of Article 6 of the Law stipulates that anticompetitive concerted actions are concerted actions related to the distortion of the results of auctions, contests, tenders.

4. In accordance with part four of Article 6 of the Law of Ukraine "On Protection of Economic Competition", the commission of anticompetitive concerted actions is prohibited and entails liability under the law.

5. In accordance with part two of Article 52 of the Law of Ukraine "On Protection of Economic Competition", a fine of up to ten percent of the income (proceeds) of an economic entity from the sale of products (goods, work, services) for the last reporting year preceding the year in which the fine is imposed for committing anticompetitive concerted actions. In case of illegally obtained profit exceeding ten percent of the said income (revenue), the fine shall be imposed in the amount not exceeding triple the amount of illegally obtained profit.

6. Thus, for violation of the legislation on protection of economic competition in the form of anticompetitive concerted actions related to distortion of the results of auctions, contests, tenders, sanctions in the form of fines are provided.

3. Trends in law enforcement in terms of stopping violations of competition law in the form of bid rigging

7. In its law enforcement activities, the AMCU pays special attention to the detection of bid riggings. Thus, only last year there were 917 violations in the form of anticompetitive concerted actions of economic entities at tenders. The trend of detected violations is only growing from year to year.

8. And this is despite the fact that the decisions of the AMCU are public and unfair bidders have the opportunity to analyze the decisions of the Committee's bodies and take into account the information received to commit conspiracies to avoid responsibility. Although in this case, an effective method of combating such violators is the interaction of the Committee's bodies with law enforcement authorities during investigations.

9. Of course, significant fines were imposed on such companies. However, it should be recognized that fines alone are not enough.

4. Legal framework for the exclusion of a bidder in connection with violation of competition law.

4.1. Legal framework

10. The legislation of Ukraine in the field of public procurement provides for such sanctions as exclusion of a bidder due to bringing to responsibility for conspiracy in previous tenders. In addition, it should be noted that disqualification of the director in connection with violation of competition law is not provided.

11. The issue of exclusion of the bidder is regulated by a separate law, namely the Law of Ukraine "On Public Procurement", according to which "the contracting authority shall decide to refuse the bidder to participate in the procurement procedure and shall be obliged to reject the bid of the bidder if the economic entity (bidder) has been held liable for violations under clause 4 of part two of Article 6, clause 1 of Article 50 of the Law of Ukraine "On Protection of Economic Competition" in the form of committing anticompetitive concerted actions concerning distortion of tender results within the last three years".

12. Thus, the existence of a decision of the AMCU to bring a bidder to justice for bid rigging is the basis for the contracting authority to refuse such a bidder to participate in the procurement procedure and is obliged to reject its tender offer.

13. It is also important to emphasize that it is the contracting authority that must decide to reject the bidder's proposal. At the same time, **electronic public procurement system Prozorro¹ has integrated such a tool as information about the bidder's prosecution for bid rigging.** In fact, this is a kind of auxiliary "red flag" for the contracting authority, which helps the contracting authority to check the information provided by the bidder whether such a participant was brought to responsibility for bid rigging.

4.2. Consolidated information on companies that committed bid rigging at the tender

14. In order to provide information support for the implementation of the provisions of Article 17 of the Law of Ukraine "On Public Procurement", to facilitate the search for relevant decisions by contracting authorities, the web-portal of the Antimonopoly Committee of Ukraine contains consolidated information on the decisions of the Antimonopoly Committee of Ukraine on the recognition of violations of the legislation on protection of economic competition in the form of bid rigging by economic entities, provided for in clause 4 of part two of Article 6, clause 1 of Article 50 of the Law of Ukraine "On Protection of Economic Competition".

15. In accordance with the Law of Ukraine "On Access to Public Information", the Cabinet of Ministers of Ukraine approved, in particular, the Provisions on data sets to be disclosed in the form of open data.

¹ Prozorro is an online platform where state and municipal contracting authorities announce tenders for the procurement of goods, work and services, and business representatives compete for the opportunity to supply them to the state.

16. Therefore, according to the List of data sets to be disclosed in the form of open data, the Committee publishes, inter alia, consolidated information on the decisions of the Committee's bodies on recognition of violations of the legislation on protection of economic competition in the form of distortion of bidding (tender) results and imposition of a fine.

17. Additionally, it should be noted that in accordance with the first part of Article 56 of the Law of Ukraine "On Protection of Economic Competition", the decision of the Antimonopoly Committee of Ukraine, heads of its territorial offices is provided for execution by sending or delivering against receipt or bringing to the attention in another way.

18. Thus, such information is directly available to the economic entities (participants) that were brought to responsibility.

19. After the expiration of three years from the date of the relevant decision, information about the economic entity in respect of which it was made is removed from the consolidated information.

4.3. The issue of applying a sanction as an exclusion of a bidder

20. As of today, according to the legal regulation, an economic entity found to have committed a violation of competition law in the form of bid rigging is actually automatically deprived of the opportunity to participate in future tenders for a period of three years. Such prohibition is valid even during the entire period of court appeal against the AMCU decision on bringing to responsibility for bid rigging. It is worth noting that some lawsuits last for several years.

21. This situation is caused, inter alia, by the wording in the Law "On Public Procurement", which binds the contracting authority to reject the bidder's proposal based on the legal fact - the adoption of the AMCU decision on the recognition of the fact of participation of the bidder in the tender.

4.4. Court practice of appealing against inclusion of information in the Consolidated Information of the AMCU

22. Taking into account the requirements of clause 4 of part one of Article 17 of the Law of Ukraine "On Public Procurement", the availability of information about the company in the AMCU's Consolidated Information is actually the basis for the contracting authority to decide to refuse the participant in the procurement procedure and to reject the participant's tender offer, because contracting authorities use the Consolidated Information during procurement procedures and do not allow economic entities in respect of which the AMCU has made a decision to participate in procurement.

23. Although we would like to emphasize once again that the relevant register maintained by the AMCU has more informational nature (the very legal fact of violation - bid rigging is recorded directly in the AMCU's decision), some companies have started to apply to the court with a request to oblige the AMCU to exclude information about such companies for the period of court appeal of the AMCU's decision on the merits (on the fact of bid rigging).

24. As of today, the court proceedings are ongoing, and accordingly, the court practice regarding the assessment of the legality of keeping the consolidated information on the decisions of the Committee's bodies has not yet been formed.

25. Thus, the decision of the Economic Court of Kyiv dated 19.10.2020, which was upheld by the decision of the Northern Economic Court of Appeal dated 24.02.2021 and the decision of the Supreme Court dated 25.08.2021 in case No. 910/10407/20, recognized the actions of the Committee to include the economic entity in the consolidated information of decisions of the Committee's bodies as violating the rights of the plaintiff and leading to losses and obliged the Committee to exclude information from the consolidated information of decisions of the Committee's bodies. The Supreme Court, leaving such decision of the courts of previous instances unchanged, stated that the availability of consolidated information of decisions of the Committee's bodies with the inclusion of economic entities is not clearly provided for by the current legislation.

26. However, already on 20.01.2022, the Supreme Court adopted a decision in case No. 910/14429/21 to satisfy the Committee's cassation appeal against the cancellation of decisions of the courts of previous instances, which prohibited the Committee from taking actions to publish (include) information about the economic entity in the consolidated information of decisions of the Committee's bodies.

27. The Supreme Court actually changed its previous position, noting that the adoption of the contested court decisions in this case in part of the prohibition of the Committee to take actions to disclose (include) information about the economic entity to the consolidated information leads to a restriction of the right of access to information of a certain circle of persons - information requesters.

28. After the adoption of the resolution of the Supreme Court dated 20.01.2022 in case No. 910/14429/21, the courts of first and appellate instance also changed their approaches to the legality of the implementation of consolidated information, in particular, by the decision of the Kyiv Economic Court dated 07.07. 2022 in case No. 910/1457/22 dismissed the claim for recognition of the Committee's actions to include a economic entity in the consolidated information of decisions of the Committee's bodies as violating the plaintiff's rights and leading to losses and the Committee's obligation to exclude information from the consolidated information of decisions of the Committee's bodies.

29. Currently, the AMCU's position on this issue is as follows: The Committee shall exclude information on economic entities from the Consolidated List only if: i) the court has declared the actions of the Committee's body to include the company in the Consolidated List unlawful or ii) the decision of the Committee's body has been substantially cancelled in court.

30. Thus, the judicial practice is only at the stage of formation, which is connected with the need to overcome the existing differences in legal positions in similar cases and to express a unified and well-established approach to assessing the legality of inclusion of economic entities in the consolidated information.

5. General conclusions

31. Analyzing the experience of applying such an additional sanction to the fine as the exclusion of a bidder for bid rigging, we can state the positive consequences for the public procurement sector.

32. In our opinion, such a sanction has a more preventive than punitive orientation (function). In the framework of investigations into cases of bid rigging, companies were more frightened by the prospect of not being able to participate in tenders for three years than by the amount of the fine imposed.

33. Of course, large companies also protect their reputation as a reliable supplier and therefore any risk for them to be held liable for violation of competition law is unacceptable. At the same time, the issue of participation in tenders of "one-day" companies remains, which, after the AMCU's decision to recognize the bid rigging, can create a new company and continue to participate in tenders. In this situation, of course, a great role is assigned to the contracting authority, which must establish in the tender documentation such conditions of participation that minimize the risk of participation of "one-day" companies.

34. The AMCU also pays great attention to advocacy in the field of public procurement, participates in seminars for contracting authorities, provides clarifications to bidders on the consequences of bid rigging, especially on the impossibility of participating in tenders for three years.

35. And in this case, the AMCU received positive feedback from contracting authorities on the practice of publishing on the AMCU's web portal summary information on the decisions of the Antimonopoly Committee of Ukraine regarding economic entities that were brought to responsibility for bid rigging.