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

Director Disqualification and Bidder Exclusion – Note by BIAC

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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: Trend Toward Increased Enforcement Measures

1. Today, there is much consideration being given to alternate or novel sanctions that could assist in improving deterrence. The new focus is on deterring individuals and individual entities engaging in cartel conduct.¹ It has been suggested that financial penalties imposed on corporations are simply not adequate and that responsible individuals and firms found to have engaged in cartel conduct should potentially be excluded from future opportunities, namely via Director Disqualification and Bidder Exclusion, respectively.

2. A thorough understanding of the necessity, effectiveness, and objectivity of these proposed deterrent measures should be considered against the principles of consistency, proportionality, certainty, and fairness, particularly in cases of enforcement of cross-border cartel conduct. Further, emphasis must be placed on the proper use of existing deterrence mechanisms prior to implementing additional far-reaching remedies, as these may have unintended consequences.

3. BIAC is of the view that, while sanctions are of course important, they form only part of several important tools to preclude contraventions of competition laws. Effective detection, investigation, and swift prosecution of respondents are just as important in their deterrent effect. In other words, it is the risk of being caught, as opposed to subsequent prosecution, which influences a party's decision to engage in wrongful conduct.²

4. Accordingly, jurisdictions that cater for an overtly punitive sanction regime but fail to actively enforce their competition law are likely to experience anticompetitive behaviour more so than those that actively enforce competition law, irrespective of whether the consequences (sanctions) are administrative or penal in nature.

5. A further consideration, particularly in relation to cartel conduct, is that cooperation by cartelists is often essential to the detection and swift prosecution of the cartel itself. Importantly, sanctions aimed at personal liability for directors should not disincentivize corporate cooperation in the first instance.

6. Notwithstanding BIAC's support for the expeditious resolution of investigations, the absolute fundamentals of due process, fairness, and principles of legality should not be

¹ See, e.g., Press Release, Austl. Competition & Cons. Comm'n, Charges laid against alleged forex price fixing cartel (Apr. 11, 2019), <https://www.accc.gov.au/media-release/charges-laid-against-alleged-forex-price-fixing-cartel> (Australia's first criminal prosecution of individuals for cartel conduct).

² Edwin Cameron, *Harsh Prison Terms Won't Solve the Crisis of Gender-Based Violence*, NEWS24 (Aug. 9, 2021), <https://www.news24.com/news24/opinions/analysis/edwin-cameron-harsh-prison-terms-wont-solve-the-crisis-of-gender-based-violence-20210809> ("Mandatory minimum sentences and long prison terms don't help in stopping crime. This is a dispiriting truth. What inhibits crime is certainty: certainty of follow up, certainty of detection, certainty of arrest, arraignment, prosecution – and certainty of punishment. In all this, how long the sentence is plays very little role. Put bluntly, whether a transgressor faces 15, 20, 25 years or life matters less than the certainty of the response by the police, the community and the criminal justice system.").

compromised. Allied to this is the need to avoid differing adjudicative bodies assessing different sanctions in respect of the same conduct.³

7. BIAC also notes that while certain competition law violations may be clear – such as engaging in hardcore cartel conduct, many other infringements are less clear. Abuse of dominance cases are for instance inherently complex and, firms – even those with large budgets and many advisors – have difficulty engaging in ex ante measures to ensure their practices are not anticompetitive. It is particularly important, therefore, that the rules and standards against which individuals are to be assessed are clear and objective and that only individuals who can be proven to have been directly, personally, and knowingly involved be sanctioned. Adjudicative bodies should therefore be involved in pronouncing on the culpability of the individual respondents in question to ensure that overly punitive sanctions are not imposed.

8. BIAC notes that many anti-competitive practices occur outside of the jurisdiction investigating the matter. In the context of personal liability vis-à-vis directors, this raises an obvious important jurisdictional issue when it comes to enforcement and creates the risk of disproportionate sanctions on defendants in different jurisdictions.⁴ For example, a jurisdiction seeking to impose director disqualification likely would only have the ability to render such an order for directors over whom they have *in personam* jurisdiction and potentially only for companies organized within their jurisdiction.

9. In the sections that follow, BIAC highlights various pertinent considerations in respect of both Director Disqualification and Bidder Exclusion as alternative sanctions compared to the more traditional forms of sanctions most often used.⁵

2. Is There a Need for Increased and/or Alternate Deterrence?

10. Effective deterrence is of the utmost importance to ensure the maintenance of competitive market dynamics and consumer benefits.⁶ Competition enforcers typically have a varied range of options available ranging from administrative powers (only) to the authority to seek criminal sanctions or a combination of both.⁷

³ As is discussed below, having one specialist agency consider a competition law violation on a balance of probability compared to another agency considering criminal sanction for the same conduct based on a “beyond reasonable doubt” standard may not be efficient or effective.

⁴ It is generally easier for an agency to impose an administrative penalty on an international company which is found to have engaged in anticompetitive conduct that has an effect in a local jurisdiction if there is an asset (e.g., a subsidiary) in that local jurisdiction.

⁵ There is a clear policy choice in respect of different sanctions and at whom the sanction is directed. For instance, administrative penalties and bidder exclusion are sanctions which would harm the shareholders of a company, as well as potentially the employees across the firm (many of course who would have nothing to do with engaging in the contravention itself). While sanctions such as director liability are aimed at the individuals who caused the company to contravene the relevant competition laws or perpetuated the contravention.

⁶ Peter Whelan, *The Emerging Contribution of Director Disqualification in UK Competition Law*, in *THE UK COMPETITION REGIME: A TWENTY-YEAR RETROSPECTIVE* (B. Rodger, P. Whelan & A. MacCulloch eds. 2021).

⁷ *Id.* at 2.

2.1. Criminal Sanctions

11. The view that the individual, in addition to the business entity, be sanctioned for engaging in unlawful conduct is not necessarily contentious policy in seeking to deter firms from engaging in cartel conduct.⁸ The topic has been addressed recently in a number of OECD fora.⁹ The reasoning is clear: sanctions that directly threaten those individuals who personally cause the firm to engage in cartel conduct will have a more direct impact on them personally than any sanction merely imposed on the disembodied legal person, i.e., the firm itself as opposed to its executives at fault.¹⁰ This, bolstered with the sanction itself (which may include incarceration as opposed to only monetary fines), fulfills the role of an effectively more severe form of sanction.¹¹ These risks are in addition to secondary risks, such as those associated with any adverse publicity that may be attached to criminal investigations and trials.¹²

12. Notwithstanding the above observations, it remains subject to question whether criminal sanctions imposed on natural persons have been successful in reaching adequate levels of deterrence.¹³

13. Generally, under-enforcement of criminal sanctions can be associated with the fact that the pursuit of criminal sanctions is resource-intensive and requires extensive evidence to meet the presumptively higher criminal standard of proof.¹⁴ A particularly important policy question becomes whether the public considers cartel conduct as justifying the extra effort (and associated costs and risks of failure) required to pursue a criminal as opposed to civil prosecution.¹⁵ Accordingly, even in jurisdictions where criminal sanctions are

⁸ OECD, Cartel Sanctions against Individuals, DAF/COMP(2004)39 (Jan. 10, 2005), <https://www.oecd.org/daf/competition/34306028.pdf>.

⁹ See OECD, Sanctions in Antitrust Cases—Background Paper by the Secretariat, DAF/COMP/GF(2016)6 (Oct. 14, 2016), [https://one.oecd.org/document/DAF/COMP/GF\(2016\)6/en/pdf](https://one.oecd.org/document/DAF/COMP/GF(2016)6/en/pdf); OECD, Promoting Compliance with Competition Law, DAF/COMP(2011)20 (Aug. 30, 2012), <https://www.oecd.org/daf/competition/Promotingcompliancewithcompetitionlaw2011.pdf>; OECD, Experience with Direct Settlements in Cartel Cases, DAF/COMP(2008)32 (Oct. 1, 2009), <https://www.oecd.org/daf/competition/cartels/44178372.pdf>.

¹⁰ Wouter P. J. Wils, Is Criminalization of EU Competition Law the Answer? (Apr. 5, 2005), <https://ssrn.com/abstract=684921>.

¹¹ OECD, DAF/COMP(2004)39, *supra* note 8, at 16.

¹² *Id.* at 31.

¹³ This can also be attributed to the under enforcement of criminal sanctions in jurisdictions in which they are available sanctions. See Alison Jones & Rebecca Williams, *The UK Response to the Global Effort Against Cartels: Is Criminalization Really the Solution?*, 2 J. ANTITRUST ENFORCEMENT 100, 100 (2014). Additionally, the Australian Competition and Consumer Commission referred its first case of cartel conduct for criminal prosecution with the protagonists only being sanctioned with a suspended sentence and a fine of AUD 1 million in July 2022. Moreover, the UK has only pursued criminal prosecutions in three instances, despite the almost decade-old inclusion of criminal sanctions in its penalty toolkit as of 2014.

¹⁴ OECD, DAF/COMP(2004)39, *supra* note 8, at 5.

¹⁵ For example, following Australia’s “Cartel Project,” less than 25% of the Australian public believed that cartelists should face imprisonment. See Caron Beaton-Wells et al., *The Cartel Project: Report on a Survey of the Australian Public Regarding Anti-Cartel Law and Enforcement* (Univ. of Melbourne Legal Studies Rsch. Paper No. 519, 2011), <https://ssrn.com/abstract=1743268>.

available in theory, there is a need to question whether other, perhaps less draconian sanctions, might prove more effective in the overall balance.

2.2. Administrative Sanctions

14. Commentators have suggested that, despite increased penalties, cartels remain problematic, and further that increasing the level of fines is unlikely to resolve the problem.¹⁶ In order to achieve optimal deterrence, two principles must be considered:

- Firstly, the sanction should be sufficient to nullify illicit profits (taking away the incentive by making the conduct unprofitable); and
- Secondly, the individuals involved should be penalized to discourage the conduct, resulting in “individual accountability.”¹⁷

15. BIAC recognizes the fundamental proposition that, in order to increase deterrence and the efficacy of administrative sanctions, corporate fines must reflect appropriate levels.¹⁸ In this regard, there has been a global trend towards increased administrative penalties on companies and, from a third-party perspective, increased civil follow-on damages for cartel infringements.¹⁹ In spite of competition authorities imposing record-high fines,²⁰ however, some commentators have observed that anti-competitive conduct appears to continue.²¹

16. BIAC acknowledges that increasing administrative penalties may, therefore, not be the sole nor optimal solution. There is also a risk that increased fines may result in spill-over effects such as leading to increased prices with a concomitant impact on consumer harm. Additionally, increased penalties also risk being disproportionate to the offence committed and may be subject to judicial review, wasting resources and causing unnecessary delay.²²

17. Moreover, over-deterrence frequently has unintended consequences such as reduced efficiency by firms that spend an excess of corporate resources on compliance initiatives, stymying growth; opportunistic ‘victims’ being incentivized to exploit damages awarded for prejudice suffered; or disproportionate fines leading to situations of insolvency

¹⁶ Douglas H. Ginsburg & Joshua D. Wright, *Antitrust Sanctions*, COMPETITION POL’Y INT’L, Vol. 6, at 10 (2010), <https://www.competitionpolicyinternational.com/assets/0d358061e11f2708ad9d62634c6c40ad/GinsburgWright.pdf>; OECD, DAF/COMP/GF(2016)6, *supra* note 9, at 5-6.

¹⁷ In publicly-traded companies, for instance, shareholders are punished for acts that are squarely under the direction and control of their executives – resulting in reduced inclination of directors to prevent the violation as they do not “bear the brunt” of the sanction. *See* Ginsburg & Wright, *supra* note 16, at 10; OECD, DAF/COMP/GF(2016)6, *supra* note 9, at 5,6 and 22.

¹⁸ OECD, DAF/COMP/GF(2016)6, *supra* note 9, at 31.

¹⁹ Ginsburg & Wright, *supra* note 16, at 10; OECD, DAF/COMP/GF(2016)6, *supra* note 9, at 36.

²⁰ *See, e.g.*, Case T-604/18, Google and Alphabet v. Comm’n (Google Android) (Sept. 14, 2022), ECLI:EU:T:2022:541 (fining Google EUR4.125 billion).

²¹ Ginsburg & Wright, *supra* note 16, at 10.

²² OECD, DAF/COMP/GF(2016)6, *supra* note 9, at 31.

for the business subjected to the fine.²³ Accordingly, effective deterrence occurs when the penalty is sufficient to disincentivize the conduct, without resulting in disproportionate unintended consequences.²⁴

18. Some commentators suggest that existing criminal and administrative penalties available to the majority of competition authorities may not have been adequate in achieving optimal levels of deterrence,²⁵ and BIAAC supports the careful consideration of the possibility of adjusting existing penalty toolkits to include Director Disqualification and Bidder Exclusion. However, BIAAC sounds a word of caution that, prior to proceeding down this expansionary path, both the efficacy and unintended consequences of these additional measures of deterrence be well understood.

3. Should a Deterrence Regime Include Director Disqualification?

19. Director Disqualification is justified on two primary grounds. Firstly, Director Disqualification protects the public from individuals who are involved in anti-competitive conduct²⁶ and, secondly, acts as a deterrent against other directors engaging in such misconduct, due to the likelihood of their own disqualification that may follow.²⁷

20. BIAAC submits that Director Disqualification may be an appropriate sanction for misconduct where individual directors have been directly, personally, and knowingly involved in the illegal conduct that warrants greater levels of sanction, especially where traditional sanctions (such as administrative corporate penalties or criminal sanctions for individuals) are unavailable and do not provide adequate deterrence.²⁸

21. BIAAC submits that Director Disqualification may be effective in achieving possible deterrence without the uncertainty, resources, and time associated with criminal prosecution.²⁹ In this respect, and similar to the case of criminal sanctions, Director Disqualification may result in a direct and substantial opportunity cost upon individuals

²³ Ioannis Lianos, et al, An Optimal and Just Financial Penalties System for Infringements of Competition Law: A Comparative Analysis 37 (CLES Rsch. Paper No. 3/2014, 2014), <https://ssrn.com/abstract=2542991>.

²⁴ *Id.* at 39.

²⁵ See also Ginsburg & Wright, *supra* note 16, at 14.

²⁶ See Michael Grenfell, UK Competition Law Enforcement: the Post-Brexit Future, Address Before the City & Financial Global ‘Future of UK Competition Law’ Summit (June 11, 2019), <https://www.gov.uk/government/speeches/uk-competition-law-enforcement-the-post-brexit-future> (“[director disqualification] protect[s] the public from individuals who, in their business activities, are involved in anti-competitive practices – and [sends] a clear message about the personal responsibility that business people have for ensuring compliance with competition laws”).

²⁷ *Re Morija plc.; Kluk v. Secretary of State for Business and Regulatory Reform* [2008] 2 BCLC 313, [33].

²⁸ For example, Director Disqualification may be effective in circumstances where the fines which are imposed on key cartel protagonists are not sufficient to deter the making of illicit profits, which illicit profits may be in excess of the administrative penalty imposed (thus making the administrative sanction insufficient to deter the violation). See Lianos et al., *supra* note 23.

²⁹ OECD, DAF/COMP(2004)39 *supra* note 8, at 5.

who bear direct and not merely ultimate responsibility for the occurrence of the infraction in the first place.³⁰

22. Moreover, as a result of the reputational career injury that any infringing director is bound to experience, Director Disqualification would serve to ensure that directors will seek to remain employable within the job market and thus not contravene the law – hence, increasing deterrence.³¹ In emphasis thereof, a 2017 study by Deloitte found that, alongside criminal sanctions, Director Disqualification ranked highly in deterrence value.³² Additionally, BIAC acknowledges that Director Disqualification may have the concomitant effect of increasing corporate compliance.³³

3.1. Caveats To Imposing Director Disqualification Liability: Concerns from a Business Perspective

23. When considering the interplay between Director Disqualification and leniency regimes, BIAC submits that leniency regimes that do not extend leniency to directors may dissuade directors from disclosing the relevant conduct. In contrast, where directors are afforded immunity, the regime may enhance and incentivize individuals to disclose the conduct. Unless directors are also afforded immunity from criminal prosecution, the imposition of Director Disqualification is unlikely to have any meaningful practical impact on directors coming forward for immunity.³⁴

24. In many jurisdictions to this day, competition-law infringements are treated as administrative and not criminal infractions. BIAC, however, submits that due to the far-reaching consequence of imposing Director Disqualification, the burden of proof needs careful consideration. In this regard, BIAC stresses that: culpability should only attach to the relevant director who is proven to be directly impugned in the conduct; and should only be considered where the director was knowingly engaged in wrongdoing.³⁵

25. Importantly, it would be prudent to have a single specialist adjudicative body within each jurisdiction tasked with adjudicating matters so as to avoid the risk of different outcomes and ensure consistency (in the application of standard of proof and application of evidence) as well as reduce the resources spent in engaging in separate trials.

³⁰ Ginsburg & Wright, *supra* note 16, at 20.

³¹ *Id.*

³² Competition & Mkts. Auth., The Deterrence Effect Of Competition Authorities' Work: Literature Review (Sept. 7, 2017), https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/642801/deterrent-effect-of-competition-authorities-work-lit-review.pdf.

³³ Ginsburg & Wright, *supra* note 16, at 20.

³⁴ Where directors face liability, without certainty that they will qualify for immunity should they cooperate (file for leniency), this decreases the incentives of directors who may be involved in the contraventions from coming forward. Accordingly, sanctions that are too punitive or too unpredictable will likely result in directors of companies electing to rather litigate and defend proceedings than cooperate and resolve cases timeously.

³⁵ In other words, only if the nature of the conduct and the evidence justifies imposing such liability, particularly in circumstances where conduct found to have been a contravention might not have been an apparent violation, to the director.

26. While it appears that a number of jurisdictions³⁶ permit Director Disqualification in the enforcement of their respective competition laws, deference should be given to other statutes and governance policies, which themselves may allow Director Disqualification (following non-compliance with the respective competition laws).³⁷ This will not only enable consistency in the adjudication of matters involving Director Disqualification, but also permit a single agency or authority to adjudicate the respective matters. In South Africa, for example, Director Disqualification is dealt with by the Companies and Intellectual Property Commission. Accordingly, enabling the deterrent mechanism to be housed within the competition authorities is superfluous.³⁸

27. In instances where Director Disqualification is imposed by competition authorities³⁹, BIAC submits that there should be a clear framework and standard against which an affected director's conduct is assessed.⁴⁰ In this regard, guidance can be taken from Director Disqualification in the United Kingdom's Companies Act 1928 and Company Disqualification Act 1986 which provides that before a director can be disqualified for a competition law violation, there are various factors to be considered by the Competition Market Authority, including, a finding of a breach of competition law, the nature of the infringement (serious enough), granting of leniency, degree of the director's responsibility in the conduct and consideration of aggravating or mitigating factors.

³⁶ See OECD, Table 1 Director Disqualification in Competition Enforcement across jurisdictions (2022) (on file with author). We note that a number of the reference to the imposition of Director Disqualification do not appear to relate only to competition law statutes but include company law and labor law statutes across the jurisdictions.

³⁷ See, e.g., the King Code on Corporate Governance. Director suspension under Sarbanes-Oxley, disqualification under various companies Acts for, *inter alia*, theft, fraud, forgery, perjury or other offences involving fraud, misrepresentation or dishonest.

³⁸ See section 69(8) of the Companies Act 71 of 2008 which states that: 8) A person is disqualified to be a director of a company if— (a) a court has prohibited that person to be a director, or declared the person to be delinquent in terms of section 162, or in terms of section 47 of the Close Corporations Act, 1984 (Act No. 69 of 1984); or (b) subject to subsections (9) to (12), the person— (i) is an unrehabilitated insolvent; (ii) is prohibited in terms of any public regulation to be a director of the company; (iii) has been removed from an office of trust, on the grounds of misconduct involving dishonesty; or (iv) has been convicted, in the Republic or elsewhere, and imprisoned without the option of a fine, or fined more than the prescribed amount, for theft, fraud, forgery, perjury or an offence— (aa) involving fraud, misrepresentation or dishonesty; (bb) in connection with the promotion, formation or management of a company, or in connection with any act contemplated in subsection (2) or (5); or (cc) under this Act, the Insolvency Act, 1936 (Act No. 24 of 1936), the Close Corporations Act, 1984, the Competition Act, the Financial Intelligence Centre Act, 2001 (Act No. 38 of 2001), the Securities Services Act, 2004 (Act No. 36 of 2004), or Chapter 2 of the Prevention and Combating of Corruption Activities Act, 2004 (Act No. 12 of 2004). Further see Section 69(13) which provides that the Commission must establish and maintain in the prescribed manner a public register of persons who are disqualified from serving as a director, or who are subject to an order of probation as a director, in terms of an order of a court pursuant to this Act or any other law.

³⁹ See OECD, Table 1, *supra* note 36.

⁴⁰ For instance, bright line per se prohibitions may be overly prejudicial, and there should be a clear "characterization" defense available. Likewise, before directors are disqualified, there should be an assessment of culpability, harm and both mitigatory and aggravating factors (e.g., such as the individual's cooperation with the investigation).

Thereafter, the Competition Markets Authority must apply to the United Kingdom High Court to argue for the director's disqualification.⁴¹

28. Director Disqualification also has certain limitations, which may hinder its successful enforcement. These include: the socio-economic climates of certain jurisdictions⁴², directors being hired in another role within the company,⁴³ company compensation through severance packages, and difficulty in establishing the proportionality of the deterrence weighed with the risk that professionals may not want to take on the role of a director. If the standard is set too low, potentially innocent directors may suffer disqualification and significant reputational damages which may serve to deter qualified individuals from serving as directors.

4. Is Bidder Exclusion an Appropriate Solution?

29. Ensuring redress against the contravening party, by wholly removing them from a market, should only be considered in situations of the most egregious offences. While it appears that Bidder Exclusion has found application in a number of jurisdictions,⁴⁴ Bidder Exclusion is a severe remedy which, BIAC submits, may in many instances be disproportionate to the contravention resulting in an overtly prejudicial impact on the company, its employees, and the market as a whole. Bidder exclusion should be used sparingly, and only before the same procurement agency that suffered from the offenders' proven bid-rigging offence that triggered the whole event.

30. What is more, exclusion of a bidder may, particularly in nascent, smaller markets, have a negative economic impact in that it decreases the competitor pool (i.e., those competing for contracts) and, as a result, increases the prevalence of bid rigging.⁴⁵ Exclusion may also risk company foreclosure where firms are unable to generate significant income for the exclusion period.⁴⁶ In addition, efficient firms may not be allowed to participate due to their prior bid-rigging violations; thereby, leaving only inefficient firms participating in the given bid and unwittingly drive up prices. Many instances of cartel cases arise in markets where there is already likely to only be a small number of players.⁴⁷ The removal of a bidder may have a greater impact on the competitiveness of future tenders. To the extent that bidder exclusion is contemplated, BIAC submits that only the firm that

⁴¹ See Samet Caliskan, *Individual Behaviour, Regulatory Liability, and a Company's Exposure to Risk: The Deterrent Effect of Individuals Sanctions in UK Competition Law*, 10 J. EUR. COMPETITION L. & PRAC. 386 (2019).

⁴² See OECD, DAF/COMP/GF(2016)6, *supra* note 9, at 32; Ginsburg & Wright, *supra* note 16, at 20.

⁴³ See OECD, Table 1, *supra* note 36.

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ OECD, DAF/COMP/GF(2016)6, *supra* note 9, at 36 ("the duration of debarment and the market to which it applies can be difficult to determine. The length of debarment period and the market to which it applies should be commensurate with the seriousness of the infringements because eliminating a competitor means reduced competition. This in turn may lead to higher prices or lower quality, a counter-productive result which is quite the opposite of what the debarment instrument is intended to deliver").

⁴⁷ See OECD, Table 1, *supra* note 36.

benefits from the cartel conduct (as opposed to all cartelists) be excluded.⁴⁸ While acknowledging that this can be a difficult practical standard to enforce, if the nature of the conduct results in more than one cartelist benefitting (which is of course usually the case), cognizance must be taken of this. We submit that regulators consider imposing exclusion sanctions on the initiating cartelist.

31. Should Bidder Exclusion sanctions be applied in jurisdictions that already provide for liability of the individuals concerned in the wrongful conduct (i.e., criminal sanctions or Director Disqualification), this would be an example of cumulative enforcement and likely result in counter-productive outcomes. It is crucial that any period of exclusion be proportionate to the seriousness of the infringement.⁴⁹ In jurisdictions permitting bidder exclusion, there is significant risk of cumulative impact of deterrence mechanisms.⁵⁰

32. To ensure that leniency programs remain effective in their detection of cartel conduct, the potential negative effects of exclusion on self-reporting by companies must also be considered. Bidder Exclusion risks prejudicing the success of leniency regimes. If immunity from debarment is not offered to infringing firms, this would naturally disincentivize firms from self-reporting conduct.⁵¹

33. Finally, it should be noted that the greater the risks to both a company and the individuals involved, the greater the likelihood of respondents opposing complaints and using all procedural, litigious steps to avoid liability, contributing to resource constraints of enforcement agencies.⁵²

34. Due to the above-mentioned impact of Bidder Exclusion, BIAC submits that where Bidder Exclusion is imposed in a jurisdiction, it should be done so under clearly articulated caveats. It is noteworthy that, in Canada for example, exceptions to the Bidder Exclusion can be made based on the public interest. In this regard, the following exceptions to Bidder Exclusion can be applied where “*there is no other supplier is capable of performing the contract, there is an emergency, it is a matter of national security; or health and safety,*

⁴⁸ Emmanuelle Auriol & Tina Søreide, An Economic Analysis of Debarment 25-26 (Sept. 2015), <https://ssrn.com/abstract=2662374>.

⁴⁹ OECD, DAF/COMP/GF(2016)6, *supra* note 9, at 36.

⁵⁰ For example, in Korea, bidder exclusion (or suspension) is really “triple jeopardy” because there is first a large administrative fine imposed by the Korea Fair Trade Commission, second, follow-on criminal sanctions typically involving criminal fines, and then third, suspension by the relevant public procurement agency. Korea, does however, ensure that long term market distortions are avoided by ensuring that the suspension period is not disproportionately long (the suspension period is often 3 months, 6 months and 1 year).

⁵¹ OECD, DAF/COMP/GF(2016)6, *supra* note 9, at 36 (“Although proponents of debarment may argue that debarment is an effective sanction to achieve specific and general deterrence, there are several obstacles to the efficacy of debarment. The first is how leniency programme work with debarment. Despite the coordination between competition authorities and relevant agencies, leniency programme may not provide any protection to leniency applicants with respect to debarment rules. If competition authorities want leniency programmes to remain effective tools for detecting competition law infringements, it is important to ensure that the possibility of debarment does not deter companies from self-reporting cartel activity to the competition agency with information on cartel activity. However, although competition authorities are confident of the benefits of leniency programmes, preventing administrative agencies such as procurement agencies from applying debarment rules to leniency applicants may be challenging.”).

⁵² BIAC submits that consideration be given to firms who have engaged in wrongful conduct being provided an option to settle matters as opposed to expending major resources on litigation. This naturally requires an appropriate balance between the sanctions imposed.

economic harm will result to the financial interests of the government of Canada and not of a particular supplier".⁵³In this regard, BIAC recommends that competition authorities adopt a similar approach taken by the European Union⁵⁴, which provides for a mechanism of "self-cleaning" for a company to provide proof in a tender of the corrective measures that have been adopted since an infringement and future compliance by the company, by demonstrating the compliance mechanisms that have been adopted.⁵⁵ In addition to the tender-by-tender approach, BIAC further recommends that regulators should allow for the prior, and once-off, termination of bidder exclusion sanctions where companies can demonstrate their compliance measures since the imposition of the sanction.

35. It is also noteworthy that all of the employees of the company subject to the prospect of bidder exclusion will be impacted by the possible exit of the company from the market. Accordingly, due to the ultimate effect on all employees, there should be additional safeguards and higher burdens of proof placed on appropriate adjudicative bodies who can provide judicial oversight that will allow the employees to exhaust all appeals and subsequent proceedings until the company is finally barred. Disbarment may, in extreme cases, result in foreclosure and/or operational retrenchments to the detriment of all employees, who were not all involved in the infringing conduct.

5. Conclusion

36. While BIAC acknowledges that both Bidder Exclusion and Director Disqualification should be considered as additional deterrence measures, neither is without risk and neither necessarily ensures heightened levels of deterrence. These alternative forms of sanction must be considered together with the levels of detection and efficacy of investigations and prosecutions. Alternate forms of sanctions should not incentivize cooperation and disclosure of wrongdoing by respondents and any form of sanction must ensure due process is followed and is certain, predictable, proportional, and fair.

⁵³ See OECD, Bidder Exclusion in Competition Enforcement Table (2022) (on file with author).

⁵⁴ Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC, 2014 O.J. (L 94) 65, art. 57(6).

⁵⁵ Janneke Kohlen, *Competition Law And Public Procurement – One Cannot Do Without The Other Or Potentially Diverging Rules*, BIRD & BIRD (Oct. 12, 2021), <https://www.twobirds.com/en/insights/2021/global/antitrust-and-anticorruption-never-the-twain-shall-meet>.