

Unclassified

English - Or. English

25 November 2022

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

**Director Disqualification and Bidder Exclusion – Summaries of Contributions**

28 November 2022

This document reproduces summaries of contributions submitted for Item 4 of the 139th OECD Competition Committee meeting on 29-30 November 2022.

More documentation related to this discussion can be found at:  
<https://www.oecd.org/competition/director-disqualification-and-bidder-exclusion-in-competition-enforcement.htm>

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**JT03508594**

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## *Summaries of contributions*

This document contains summaries of the various written contributions received for the discussion on Director Disqualification and Bidder Exclusion in Competition Enforcement (139th OECD Competition Committee meeting on 29-30 November 2022). When the authors did not submit their own summary, the OECD Competition Division Secretariat summarised the contribution. Summaries by the OECD Secretariat are indicated by an \*.

## *BIAC*

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.<sup>1</sup> 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.

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.

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.<sup>2</sup>

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.

A further consideration, particularly in relation to cartel conduct, is that co-operation 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.

Notwithstanding BIAC's support for the expeditious resolution of investigations, the absolute fundamentals of due process, fairness, and principles of legality should not be compromised. Allied to this is the need to avoid differing adjudicative bodies assessing different sanctions in respect of the same conduct.<sup>3</sup>

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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.").

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.

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.

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.<sup>4</sup> 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.

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.<sup>5</sup>

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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.

## *Brazil*

The Brazilian Competition Law—Law 12529/2011—establishes different types of penalties the Administrative Council for Economic Defense (CADE) imposes for competition infringements. Amongst the administrative sanctions provided for by the law are the debarment sanctions of director disqualification and bidder exclusion. The present work aims to analyse CADE’s experience of the implementation of such penalties, observing some practical issues associated with their imposition and bringing examples of cases in which they were imposed. We noted that, although CADE tends to favour fines to punish antitrust violations, sanctions such as the prohibition to bid in government tenders and to carry out business on one’s behalf or as a representative of a legal person are viewed as efficient means to increase punitive, retributive and dissuasive effects. Moreover, these penalties help to protect the government from repeat offenders and losses to the Treasury. Finally, we observed there seems to be a tendency towards using the bidder exclusion sanction in cases of cartel practices in public procurement. The same does not hold for the trade prohibition, which the Tribunal adopted only on a few occasions.

## *Canada*

In Canada, agreements between competitors to fix prices, allocate markets or restrict output (conspiracies) and bid-rigging are criminal offences under the Competition Act (the “Act”). Penalties include prison sentences and/or fines. In addition, director disqualification could be required under negotiated settlements or Prohibition Orders (this has rarely been done). Some government procurement rules and self-regulating professions also provide for director disqualification and debarment, independently from the Competition Bureau (the “Bureau”).

The debarment of suppliers who have been convicted of conspiracy or bid-rigging from bidding on future tenders can be an effective deterrent. However, we strongly believe that any debarment policies or laws should exempt bidders who have received immunity or leniency pursuant to the Immunity and Leniency Programs. These Programs are among the Bureau’s most effective tools for uncovering and stopping unlawful conduct. This is because the secret nature of cartels makes them difficult to detect and prove.

The threat of debarment can hinder parties from participating in the Bureau’s Immunity and Leniency Programs. We recommend that in some cases, procurement authorities allow companies to continue to bid on government contracts after a bid-rigging or conspiracy conviction. They should consider whether the company:

- Provided full, timely and meaningful cooperation to Canadian law enforcement and the prosecution. This could be through the Immunity or Leniency Programs or other cooperation,
- Pleaded guilty to offences at an early stage,
- Has written confirmation from the enforcement agency regarding its cooperation and guilty plea, which can be provided to the procurement authority,
- Put in place, or enhanced, a credible and effective corporate compliance program,
- Provided evidence to show that the company appropriately disciplined the individuals who were involved in the criminal conduct and
- Has not previously been convicted of any offences outlined in the debarment legislation.

## *Colombia*

This contribution seeks to present the current regulation in Colombia related to the disqualification of administrators and bidder exclusion in cases involving anticompetitive conducts.

Colombia has primarily an administrative regime of competition law where the Superintendence of Industry and Commerce is the National Competition Authority. The SIC has the capacity to impose administrative fines to economic agents who violate the competition regime.

However, although competition law in Colombia is applied and sanctioned, in general, by an administrative authority, there are some anti-competitive conducts, such as collusion in public tenders, that law regards as a crime.

For that reason, since 2011, following a judicial process, a judge can determine that an individual is responsible for committing the crime of restrictive practices of competition in the framework of a public tender, and may impose on that natural person the sanction of being disqualified from participating in future selection processes with the State.

In addition, since 2022, it is possible that companies or organizations whose employees are sanctioned by a judge for committing the crime of anticompetitive agreements in a public tender, may find themselves involved in an administrative process in which they may be subject to the sanction of being permanently excluded from participating in future selection processes with the State.

On the other hand, in Colombia there is no rule that explicitly establishes a sanction such as the so-called “Director Disqualification”. Nonetheless, there is the possibility that an administrator of a company may be removed from his position by an administrative authority, or even eventually be disqualified by a judge to exercise his job or profession for a certain period of time, if he is criminally responsible for committing a crime of collusion in public bids.

It is important to mention that, given that the latest reforms have been in force recently, there have been no cases yet in which a company has been sanctioned in the previous terms. Thus, it will be necessary to wait for the development that these reforms may have in the future.

## *Egypt*

Sanctions are an essential tool to achieve more effective law enforcement and deterrence, hence, there are different types of sanctions such as financial sanctions, debarment and imprisonment, which vary from one jurisdiction to another.

Competition law violations are considered criminal offences under the Egyptian law but do not entail imprisonment. The Egyptian Competition Law “ECL” focuses mainly on setting financial sanctions (i.e. fines) to competition law violations such as cartels, vertical restraints and abuse of dominant position. 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.

Director disqualification, on the other hand, is not a sanction according to ECL however it is set forth by the Egyptian Companies Law.

In addition, cooperation between the Egyptian Competition Authority “ECA” and other governmental entities has led to the adoption of debarment sanctions in the Public Procurement law and the Importers Registry law.

Under the Egyptian law, bidder exclusion and bid-rigging are regulated by ECL and the Public Procurement Law. 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.

Additionally, companies or individuals may be banned from importing products into the Egyptian market if they have any criminal records related to infringements to ECL.

## EU

The enforcement system for the application of EU competition rules is set out in Regulation 1/2003, which provides for sanctions against "undertakings" and "associations of undertakings" on infringements of competition rules. When the Commission finds that Article 101 or 102 of the Treaty on the Functioning of the European Union has been infringed, it may impose a fine on undertakings that have acted intentionally or negligently. The legal framework under which the Commission enforces EU competition rules does not provide for sanctions against individuals. Therefore, director disqualification is not a sanction that the Commission can impose for breaches of EU competition law. The possibility of bidder exclusion is foreseen by public procurement rules, more specifically the Public Procurement Directives and the Financial Regulation. According to these instruments, bidders may be excluded from participation in public tenders in the EU for "entering into agreements aimed at distorting competition" (hereinafter also referred to as "collusion").

The Public Procurement Directives concern national tenders in the EU and they list collusion as an optional ground to exclude an economic operator from an award procedure where a contracting authority has sufficiently plausible indications to conclude that the economic operator has entered into agreements with other economic operators aimed at distorting competition. The contracting authority must allow an economic operator to bring forward so called 'self-cleaning' measures and to assess those before any act of exclusion, taking into account any evidence provided by that operator. One important self-cleaning measure for the contracting authority to take into account is whether the economic operator has "clarified the facts and circumstances in a comprehensive manner by actively collaborating with investigating authorities."

The Financial Regulation concerns tenders involving EU financial resources. It is primarily for the authorising officer at the Commission to exclude a person or entity from award procedures or from being selected for implementing Union funds, where it has been established by a final judgment or a final administrative decision that a person or an entity is guilty of grave professional misconduct", which includes "entering into agreement with other persons or entities with the aim of distorting competition". The "self-cleaning" (remedial) measures that a person or entity has undertaken in the context of a competition law investigation are also relevant for the authorising officer's exclusion decision. Successful leniency cooperation would be a clear signal that a party has undertaken in self-cleaning measures. Other additional measures, that could also be relevant in this respect, as in the case of Public Procurement Directives, include for example implementation of reporting and control systems and creation of an internal audit structure to monitor compliance.

The exclusion frameworks under the public procurement rules pursue their own policy objectives. In the context of the Public Procurement Directives, the bidder exclusion serves as means to ensure compliance with the principles of equal treatment and competition in the award procedure, as well as to ensure the integrity, reliability and suitability of the future contractor to perform the contract. Under the Financial Regulation, in addition to protecting the Union's financial interests, the objective of a collusion-related exclusion ground is to ensure a deterrent effect.

However, both exclusion frameworks also reinforce the objectives beyond Commission's fining policy in its fight against cartels. Excluding cartel participants from public tenders or EU funded grants is an additional element of deterrence to the imposition of the fine.

Furthermore, the exclusion frameworks are also designed and implemented in a manner that is compatible with and can even foster voluntary investigation and case-resolution tools in the competition field. Active cooperation with the competition authority during the investigation, either within the leniency programme and/or in the context of a settlement procedure, can be considered to be measures taken to restore the reliability of the economic operator. The active and voluntary cooperation of the leniency applicant in particular, plays a crucial role from the competition enforcement perspective. This is due to the fact that the leniency applicant voluntarily comes forward to the competition authority (the Commission or a national competition authority), discloses its participation in the collusion and hands over all relevant information, thereby contributing to proving the competition infringement. Such a level of cooperation, in combination with other remedial actions mentioned in the Financial Regulation such as compliance efforts, will demonstrate the reliability of the economic operator.

## *Germany*

The possibility of bidder exclusion protects the integrity of the procurement process and ensures that public contracts and concessions are awarded only to those undertakings which have not committed any serious offences and have acted fairly in competition. With its function to provide contracting authorities with information in public procurement procedures, the German Competition Register for Public Procurement helps to strengthen compliance measures in companies and the prevention of economic crime. By making it possible for undertakings to achieve self-cleaning by a national central body, the Competition Register also offers undertakings a useful new possibility to dispense with past mistakes and thus continue to participate in public procurement procedures.

## Greece

This Note overviews the current legal framework for director disqualification and bidder exclusion in the context of competition law in Greece and examines practical insights that arise according to existing framework. It also discusses the role of the competition authority in the application of sanctions and interaction with contracting authorities insofar as bidder exclusion is concerned, as well as the main advocacy efforts of the Greek Competition Authority to provide the contracting authorities with useful tools to detect illegal collusion in tendering procedures and to further enhance the competition process in competitive procurement procedures.

### Legal Background

#### *Legal sanctions for violation of competition law*

The Greek Competition Act (Law 3959/2011 as amended and in force) foresees for the imposition of fines on legal and natural persons and for the imposition of penal sanctions. Hellenic Competition Commission (HCC) may impose administrative fines on legal persons for competition law breaches as well as on natural persons if they are found to be engaged in preparatory actions, in the organization of, or in the illegal conduct of undertakings. Further, the Greek Competition Act foresees penal sanctions imposed by penal courts. The HCC has no competence to exclude undertakings, temporarily or permanently, from participating in public tenders nor to disqualify administrators.

The National legislation on Public Works, Procurement and Services (the Public Procurement Act)<sup>6</sup> provides for mandatory and non-mandatory grounds for exclusion of economic operators from a public procurement procedure<sup>7</sup>. A public contracting authority may exclude an economic operator from a public tender procedure if sufficiently plausible indications exist for the public authority to conclude that the specific economic operator has entered into agreements with other economic operators aimed at distorting competition, without prejudice to the provisions of the national Competition Act on penal and other administrative sanctions<sup>8</sup>. The national legal framework does not foresee for director disqualification; however, adoption of self-cleaning measures by an economic operator is provided under certain conditions, which, if considered as sufficient by the public contracting authority, the economic operator concerned shall not be excluded from the procurement procedure<sup>9</sup>.

Exclusion of a bidder imposed by a public contracting authority is a sanction of administrative nature, with the purpose of repression and prevention. The fines imposed on natural and legal persons by the HCC are administrative sanctions, within the aim of effectiveness, proportionality, and deterrence.

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<sup>6</sup> National Law 4412/2016, transposing Directives 2014/24/EU and 2014/25 /EU into Greek legal order.

<sup>7</sup> Several amendments have been introduced as regards disqualification grounds. More precisely, further to certain criminal offenses prescribed under EU legislation, an entity (economic operator) shall be disqualified if it commits the respective crimes provided under Greek penal legislation.

<sup>8</sup> Art. 73 par. 4c of the Public Procurement Act.

<sup>9</sup> Art. 73 par. 7 of the national law on Public Works, Procurement and Services.

### ***Purpose, scope and effectiveness of debarment sanctions***

Competition law and the public procurement law are interrelated. The debarment sanctions imposed by a contracting authority may apply in parallel with the sanctions imposed by the HCC for breach of competition law.

According to the national Competition Act<sup>10</sup>, the consequences of submission of the economic operator in a leniency program or a settlement procedure are 1) the non-exclusion for the economic operator from public procurement procedures and 2) the total immunity for the natural persons<sup>11</sup>.

### **Advocacy**

HCC has issued in 2014 a Guide for Public Contracting Authorities which was updated in 2022 aiming at providing the contracting authorities with certain useful tools to detect illegal collusion in tendering procedures and assisting public sector officials to understand the anticompetitive behavior of a cartel.

Further, in its attempt to raise the public's awareness with regards to the social benefits competition offers to the economy and to effectively convey, competition issues, HCC has developed new communication strategies within the set of its targeted advocacy initiatives. In this regard, HCC has launched a dedicated Anonymous Information Platform (Whistleblowing system). Through the dedicated anonymous information platform, employees of contracting authorities and other entities may share valuable information regarding tender and bid rigging practices, while ensuring their anonymity. The establishment of a whistleblowing system has been re-enforced by a media campaign by HCC to this end.

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<sup>10</sup> Art. 44 par. 3a and 3c of the National Competition Act.

<sup>11</sup> Art. 44 par. 3a and 3c of the National Competition Act. If an application for a leniency program providing for total immunity from fine or reduction of fine or/and an application for settlement is approved and fully paid or facilitated by partial payment of fine, the undertaking(s) concerned shall be relieved from any administrative penalty, except for those foreseen under competition law.

## *Hungary*

Fighting cartels is one of the top priorities for competition authorities. In particular, fighting bid rigging in public procurement is of significant importance, since in these cases public money is at stake. In order to ensure violating undertakings do not carry out this conduct, the competition authorities apply several forms of sanctions, including the legal measures of debarment and executive disqualification.

Debarment is one of the most severe consequences of violating competition law since it has a significant impact on the turnover on the undertaking and particularly on undertakings having income wholly or mostly from public procurements.

Pursuant to the Hungarian legislation, there are two main types of bidder exclusions as a consequence for violating competition rules: 1. based on the decision of a competition authority/court establishing competition law infringement which does not depend on the considerations of the contracting authority and 2. after the adoption by the contracting authority of an act under its own powers which depends solely on the considerations of the contracting authority and is based on the detection thereof.

Bidder exclusion only applies in case of infringement of Article 11 of the Hungarian Competition Act or Article 101 of the Treaty on the Functioning of the European Union, therefore it is not applicable to any other violation of competition rules (abuse of dominance for example).

Under the Hungarian legislation, debarment applies to any kind of participation in a public procurement if it is based on a definitive and executable decision issued by the Hungarian Competition Authority or based on a definitive and executable court ruling. It should be noted, however, that if the debarment is the result of a definitive decision of another competition authority or by final court decision, then it is limited to the participation as tenderer.

Debarment from public procurement procedures applies solely to undertakings which, based on a definitive and executable decision, have been found liable and were also fined for their participation in a cartel. Since the first leniency applicant is entitled for immunity from fines, a leniency applicant granted immunity is not subject to debarment.

The disqualification of the executive of an undertaking that took part in anti-competitive conducts is currently not present in the Hungarian legal system as a sanction of competition law, although the Hungarian Constitutional Court reviewed the question in great detail in one of its significant decisions. Nevertheless, executive disqualification can also have an important deterrent effect as well and it would be an effective incentive for undertakings to cooperate and apply for leniency in order to get immunity from this legal consequence of cartel conducts.

## *Indonesia*

The legal framework of competition in Indonesia (Law No. 5 of 1999) has indeed covered director disqualification, however, this provision has been 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. While with regard to the bidder exclusion, Law No. 5 of 1999 does not explicitly 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. 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.

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.

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.

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.

## *Ireland\**

The CCPC views director disqualification as an important part of the battle against cartel conduct, especially hard-core cartels, which currently constitutes a criminal offence within the Irish State.

Hard-core cartel conduct is both a serious offence and an arrestable offence and as such, where people conspire to commit a serious offence, they can be arrested and detained (max 1-week detention) and a suspect arrested for an arrestable offence, being able to be detained under Sec 4 of the Criminal Justice Act 1984, as amended. Once detained such suspect can be interviewed under caution, inferences can be invoked and samples can be taken. There is also the power to re-arrest and detain, if new evidence comes to light after the initial release from detention (for both). It also means that once an arrestable offence is being investigated, orders can be sought from the Courts to uplift bank accounts, phone records can be sought and requests for data as per Sec 41b of the Data Protection Act 2018 can be made to data holders.

Court sentences have however been rather lenient in the form of suspended prison sentences and relatively low fines and automatic director disqualification places another important consideration upon individuals involved (or considering getting involved) in criminal cartel conduct, the same as an automatic criminal record resulting from a conviction, with a subsequent inability to travel to certain Countries, such as the United States of America for instance.

Director disqualification therefore acts as a strong deterrent and as recent experience has shown, enforcement of such disqualification plays an important part in the success of the overall measures of punishment for individual cartel offenders.

The CCPC (and its predecessor TCA) has always shared the view expressed by a number of Judges that prison sentences are appropriate for hard-core cartel conduct. As such the CCPC welcomes an increase in penalties in section 8 of the Competition Act for criminal cartel convictions on indictment, by the Competition (Amendment) Act 2022, to fines not exceeding the greater of €50,000,000 or 20% of turnover in the financial year ending 12 months prior to the conviction and/or imprisonment for a term not exceeding 10 years.

The CCPC will continue to treat hard-core cartel conduct as extremely serious and will continue to battle (investigate and prosecute with the assistance of the DPP) such conduct to the full letter of the law, including automatic director disqualification.

## Israel

In November 2022, the Competition Committee will hold a Roundtable on "*Director Disqualification and Bidder Exclusion*". As referenced in the documents preceding the discussion, director disqualification "*describes a sanction where an individual is not allowed to act as a director of a company following a violation of competition law for a specific period of time*". In addition it is noted, that "*It is typically used when either the director contributed directly to the competition law infringement, or when the director was aware of the breach but took no steps to impede it.*"<sup>12</sup> Bidder exclusion is referenced as "*the banning of the company from a bidding process or future public procurement tenders, typically in a specific market and for a limited period of time.*"<sup>13</sup>

On this backdrop, this contribution will discuss the legal framework and practical experience surrounding director disqualification and bidder exclusion, within the context of the Israeli competition regime. Regarding director disqualification, it will elaborate on the rational, legal framework and case law; as well as discuss a legislative reform currently under internal consideration at the Israel Competition Authority (the "ICA" or the "Authority"). Regarding bidder exclusion, this contribution will discuss the rational underlying this measure, the legal framework, ICA's advocacy efforts surrounding this issue and relevant case law.<sup>14</sup>

Prior to the above, and since disqualification of directors and bidder exclusion shall be referenced in this contribution under the criminal competition regime in Israel, this paper will put forth the general legal context of the cartel and bid-rigging offences under the Israeli criminal competition regime.

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<sup>12</sup> Chairman's letter, 02 August 2022, calling for contributions in the context of the roundtable on "Director Disqualification and Bidder Exclusion" (COMP/2022.113).

<sup>13</sup> Ibid.

<sup>14</sup> The scope of this contribution refers only to the Israeli criminal competition regime.

## *Italy*

The Italian legislator has adopted non-mandatory debarment rules, which leave to public procurers the discretion to decide as to whether to exclude a bidder who has not complied with the relevant law, including competition. This choice is consistent with the consideration that bidder exclusion may also produce the undesired effect of curbing tender participation in situations with a few bidders and interfere with other existing competition enforcement mechanisms such as leniency programmes.

As the Italian experience is relatively limited, it is still premature to make any assessment of the impact of the bidder exclusion provision on other competition tools administered by the Authority's, in particular leniency programmes. Therefore, this contribution focuses on alternative or complementary tools which might be considered to better tackle the trade-off between deterrence and competition raised by the use of debarment. In this regard, the Italian experience of the Legality Rating System may offer some interesting insights.

The Legality Rating System, administered by the AGCM, uses a reward mechanism rather than a punitive one to incentivize compliance with legal standards and deter anticompetitive behaviour at bidding stage. According to a recent survey, the Legality Rating System has had a positive impact on companies' perception and visibility on the market and their participation to public tenders. Therefore, at least in some circumstances, rewarding compliance rather than punishing misconduct might be more effective at fostering compliance with, amongst other things, antitrust law, avoiding the potential undesired effects of bidder exclusion, that is, harming competition at tender stage or inducing excessive litigation in the bidding process.

## *Japan*

In Japan, there are several systems based on laws and other rules regarding disqualification of directors involved in violation of the Antimonopoly Act (AMA) and suspension of participation by violators of the AMA in public bidding.

The Companies Act stipulates that a person who was sentenced to imprisonment or severer penalty without suspension may not act as a director of a company. Criminal penalties may be imposed for violations of the AMA including cartels and bid-riggings, based on an accusation by the Japan Fair Trade Commission (JFTC). Also, the JFTC has ordered the violators of the AMA to relocate natural persons involved in the violation and not to reassign the relevant work for a certain period of time as a part of the remedies.

Regarding bidder exclusion, enterprises that committed a violation of the AMA including a cartel and bid-rigging are usually suspended from nomination for public bidding by contracting authorities. In addition, if a construction firm violates the AMA and receives a cease-and-desist order from the JFTC, the firm is subject to suspension of business based on the Construction Business Act.

Disincentive to apply for leniency which may be caused by director disqualification and bidder exclusion is deterred as follows. Director disqualification based on the Companies Act applies to cases where a criminal penalty is imposed, and criminal proceedings for violation of the AMA are not initiated without accusation by the JFTC, and the JFTC has developed and publicized a policy that criminal accusation will not be filed against executive officers, employees, etc. of an enterprise which first filed a leniency application before the commencement of the investigation by the JFTC. Also, the period of the suspension of nomination is usually reduced to one-half for those enterprises to which the leniency program is applied and the fact is publicly announced.

All of the measures or effects mentioned above are conditional upon procedures by the competition or judicial authorities, such as an order by the JFTC and judgment of a court. Therefore, it is not necessary for an entity making the decision on director disqualification or bidder exclusion to find and prove the AMA violation by itself.

## *Latvia*

This contribution deals with rules of bidder exclusion in the Republic of Latvia. Bidder exclusion is only applied and implemented by procuring entities, as this sanction is regulated by the laws on public procurement, not laws on competition.

Public procurement laws foresee that a bidder is excluded from a public procurement tender if the bidder, by such a decision of a competent authority or a court judgment which has entered into force and has become incontestable and unappealable, has been found guilty of infringement of competition law manifested as a horizontal cartel agreement. There is no mention of specific markets or sectors. Exclusion is in force for one year according to the current version of the law and three years according to the version of the law in force after 31.12.2022.

The main objective of bidder exclusion is deterrence. Fines imposed directly on undertakings that have participated in bid-rigging (the most common infringement of competition law) may not be a sufficient deterrent to the infringement. For a significant part of undertakings, participation in procurement procedures forms their most significant share of revenue, and it is the prohibition to participate in further tenders that may significantly affect the undertaking's refusal to engage in an infringement.

The Competition Council of Latvia supports procuring entities and undertakings by educating them on competition laws and participates in restoration of credibility of penalized undertakings. The upcoming amendments to public procurement laws envisage that the Competition Council of Latvia will play a greater role in preventing participation in public procurement tenders of those bidders that might have entered into a horizontal cartel agreement. In particular, the Competition Council of Latvia will assist procuring entities with its opinion when, upon examination of tender submissions, procuring entities spot warning signs indicating bid-rigging schemes.

Latvian competition laws do not foresee liability of such persons as directors, board members or other natural persons in charge of an undertaking committing an infringement. As a result, director disqualification is not foreseen by the Latvian law.

## *Lithuania*

This Note overviews the legal framework for director disqualification and bidder exclusion in the context of competition law in Lithuania and then discusses how these sanctions are applied in practice. The Note also touches upon practical difficulties that arise according to existing framework. It discusses the role of the competition authority in the application of both sanctions and its relations with other public authorities involved, i.e., courts in the context of director disqualification and contracting authorities insofar as bidder exclusion is concerned.

The main challenge in the context of director disqualification in Lithuania is that under the current legal regime, relatively long period elapses between director's contribution to the infringement of competition law and imposition of disqualification sanction by the court. As a result, the courts often reduce sanctions requested by the competition authority.

As concerns bidder exclusion, the main difficulty is that the 3-year period of debarment starts to run from the day the anti-competitive agreement has ended. Therefore, if contracting authorities exclude bidders only after a decision of the competition authority finding an infringement is adopted, this makes the actual effects of debarment upon entities relatively short-term (not more than two years, given that an investigation of the Lithuanian Competition Council into an anti-competitive agreement takes at least one year), if at all possible.

## *Mexico*

The Federal Economic Competition Law (LFCE) empowers the Mexican Federal Economic Competition Commission (COFECE) to disqualify anyone who has directly or indirectly participated in a monopolistic practice or unlawful concentration, from serving as director or executive of a company for up to 5 years. COFECE imposed this sanction for the first time in 2021, on directors that participated in a collusion in the market for the distribution of medicines. In the case of bidder exclusion, COFECE cannot apply this sanction but has implemented the appropriate mechanisms to notify about its resolutions on bid rigging to the authority responsible for overseeing public procurement in Mexico, the Ministry of Public Administration (SFP), which has acted accordingly, banning economic agents from tendering processes.

## *Slovak Republic*

As from April 2016, the Antimonopoly Office of the Slovak Republic (hereinafter as „AMO“) has the obligation to impose a ban from participation in future public procurements on companies that took part in bid rigging activities. In 2021 this legal provision was amended in the new Act. 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 AMO 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.

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 Act on Protection of Competition regulates three exceptions to the ban. Two of exemptions apply in proceedings, where sanctioned undertaking requests for leniency programme, or settlement procedure. 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.

## *Spain*

The Spanish regulatory framework foresees that operators who have been declared responsible with a final decision related to a serious infringement of competition law shall be banned from contracting with public sector entities for a certain period up to three years. So far, CNMC's experience in applying this measure is limited. This contribution aims to describe the legal framework and the challenges that its application raises due to the tension between the preventive dimension of the measure, to protect the legitimate use of public spending, the deterrent effect it implies and its effect on competition in the market. In order to find the right balance, the regulatory framework provides for exemptions that apply when the offender complies with some specific requirements to rebuild its trustworthiness.

## *Ukraine*

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". 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.

In its law enforcement activities, the AMCU pays special attention to the detection of bid riggings. Therefore, 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.

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".

It is also important to emphasize that it is the contracting authority that must decide to reject the bidder's proposal. 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".

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.

At the same time the judicial practice on the possibility of the AMCU to include the economic entity in the consolidated information of decisions of the AMCU 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.

Furthermore, the AMCU 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.

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.

## *United Kingdom*

This note sets out two developments in UK competition law enforcement that increase the risks for those involved in cartel activity in the UK.

First, we describe the UK director disqualification regime that the CMA has been applying in recent years. This regime protects the public from company directors who engage in illegal anti-competitive practices and places accountability for competition law compliance firmly with individuals at the top of businesses. This is in addition to our powers to investigate, and prosecute, individuals under the criminal offence for cartels.

Second, we explain the UK Government's legislative proposals to include a new exclusion from public procurement and debarment regime for cartelists, and how this increases the downsides of getting caught while enhancing the incentives to apply for leniency.

These two developments are part of a broader drive by the CMA to deter anti-competitive behaviour by increasing and enhancing the tools available to the CMA to deter anti-competitive activity, increasing the risks that unlawful conduct is detected and, once detected, is properly sanctioned.