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Director Disqualification and Bidder Exclusion – Note by Lithuania

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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

1. 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.

2. 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.

3. 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.

2. Director Disqualification: Legal Framework

4. Personal administrative liability of a director of an undertaking for his or her contribution to the violation of competition law was introduced in Lithuania in 2011. The Law on Competition provides[1] that contribution of a director to an anti-competitive agreement between competitors[2] or to the abuse of a dominant position can lead to the restriction for such an individual of the right to hold the position of either a director or of a member of collegial supervisory or management body in either public or private legal person. Thus, the debarment sanction is not limited to disqualification from holding management positions in the sector where the infringing company was active but instead applies to any legal person operating in any field. The duration of this sanction may not exceed 5 years from the moment of imposition. It also extends to directors who at the moment of imposition of the sanction have terminated their employment relationship with an infringer.

5. Furthermore, a director of an undertaking can be fined up to 14 481 euros for his or her contribution to the violation of competition law; the fine may be imposed either in

[1] Law on Competition of the Republic of Lithuania, Article 40(1).

[2] I.e., disqualification of directors is applicable only with regard to horizontal anti-competitive agreements (between competitors) and not vertical anti-competitive agreements (between undertakings at different levels of supply chain).

combination with the debarment sanction or separately[3]. Director disqualification can also be imposed without imposing the fine upon an individual. Financial sanctions for individuals are not the object of this Note and will not be further discussed.

6. The Law on Competition sets the legal standard for a director to be regarded as having contributed to the infringement committed by an undertaking[4]. The legal test is threefold, and liability may be imposed if either of the three conditions is satisfied: (1) the first possible ground for liability is when the director directly contributed to the violation of competition law; (2) the second ground is when he or she did not directly contribute to the infringement but had reasons to suspect that the undertaking was committing an infringement and did not take steps to prevent it; (3) the third ground is that the director did not know, even though he or she was obliged to know that the undertaking was committing an infringement. Thus, the contribution of the director to the infringement can be either direct or indirect or based on negligent refusal to follow the activities of the undertaking and prevent illegal actions.

7. A debarment sanction can be imposed upon a current or former director of an undertaking only by a decision of the administrative court[5], based on the request of the Competition Council[6]. The right of the Competition Council to request the disqualification of the director arises after the decision of the Competition Council or the court reviewing legality of the competition authority's decision regarding the infringement committed by the undertaking becomes final[7]. In its request, the Competition Council specifies circumstances relevant for the application of the liability and proposes the duration of the disqualification[8]. However, the court is not bound by the request of the competition authority and the final decision in all cases is adopted by the court[9].

8. When the court decides upon the liability of the director, it takes into account principles of justice, reasonableness and fairness and considers the following circumstances[10]:

- gravity of the infringement;
- duration of the infringement;
- nature of the director‘s contribution to the infringement;
- conduct of the director during the Competition Council's investigation into the infringement committed by the undertaking;

[3] To this effect, see the decision of the Supreme Administrative Court of Lithuania, 3 March 2021, case No. eA-383-502/2021, on Competition Council‘s request to impose sanctions upon D.L, Ž.K., L.K, Paragraph 11.

[4] Law on Competition, Article 40(2).

[5] In the first instance, the requests of the Competition Council are considered by the Vilnius Regional Administrative Court which has exclusive competence in this matter and appeals of the decisions of Vilnius Regional Administrative Court are heard by the Supreme Administrative Court of Lithuania.

[6] Law on Competition, Article 41(1).

[7] Law on Competition, Article 41(3).

[8] Law on Competition, Article 41(2).

[9] Law on Competition, Article 41(2).

[10] Law on Competition, Article 41(5).

- other relevant circumstances.

9. The interplay between the disqualification of a director and the effectiveness of the antitrust leniency programme is also dealt with at the legislative level. The Law on Competition provides[11] that disqualification cannot be imposed upon the director of the undertaking when:

- that undertaking has submitted leniency application (either for full immunity or for a reduction of fine), and
- that application contained information required by the law, and
- the director cooperated with the competition authority.

10. In addition, the law further protects former directors of undertakings who provide to the Competition Council information satisfying requirements for leniency (either for full immunity of for a reduction of fine) from the personal liability after his or her employment relationship with the infringer was terminated.

3. Director Disqualification: Experience of Application and Effectiveness

11. During the entire period when the disqualification of directors has been in force as a sanction, the Competition Council has applied to the Vilnius Regional Administrative Court requesting the imposition of disqualification sanction with regard to 40 directors. Up until now[12], the courts have issued final decisions regarding 19 directors: sanctions have been imposed upon 15 directors[13] (with respect to 10 of these directors, debarment sanctions are still in force), while 4 directors avoided being sanctioned because, in the court's assessment, the competition authority missed the deadline to apply to the court. With respect to 21 directors the cases on disqualification are still pending in courts[14].

12. When considering both final decisions of the courts and non-final decisions of the court of first instance which were appealed, in majority of cases, the requests of the Competition Council were satisfied only partially, imposing shorter debarments than were requested. Namely, the courts fully satisfied requests of the Competition Council regarding 14 directors, while with respect to 21 directors, the requests were satisfied in part, on average, disqualifying directors for 3 years.

13. The main reason for which the courts reduced the requested duration of disqualification was that the period which had elapsed between the committed infringement and imposition of debarment was very long. This issue which was pointed out by the courts indicates arguable deficiencies in the system of imposition of debarment sanction upon directors of undertakings. As has been noted in the previous section, the competition authority is entitled to request the disqualification only after its own decision or the decision of the review court becomes final. In most of the antitrust cases the decision of the

[11] Law on Competition, Article 40(3).

[12] Information provided in this section is relevant at least up till 28 October 2022.

[13] Out of them, with respect to 2 directors the duration of disqualification was 6 months, with respect to 6 directors the duration of disqualification was 3 years, with respect to 5 directors the duration of disqualification was 4 years, and with respect to 2 directors the duration of disqualification was 5 years (which is legal maximum).

[14] Regarding 20 of these directors the cases are pending in the second instance after the appeal, while with regard to 1 director the court of the first instance is yet to adopt a decision.

Competition Council on infringement by undertakings is appealed up to the last instance of the court. This means that, normally, the director's disqualification is only requested after investigation of the authority is completed, the decision of the authority is adopted and this decision stands after judicial challenges are over in both instances of the review courts. For example, in one case[15] the imposition of the debarment sanction was considered by the court when six years had passed after the infringement was committed and thus the court held that this was the ground to reduce the director's personal liability.

14. However, there is no simple solution to the above-mentioned problem since it seems disproportionate to impose such a serious restriction of rights of an individual as disqualification, while a decision of the competition authority is still challenged in courts. So, perhaps, the current model is the optimal one overall, even though it is not perfect in terms of effectiveness of deterrence.

4. Bidder Exclusion: Legal Framework

15. The grounds for exclusion from the public procurement tenders in Lithuania are provided by the Law on Public Procurement[16]. The Law stipulates that, where a contracting authority has sufficient evidence that a bidder has concluded an agreement with other bidders aimed at distorting competition in that particular tender, it shall exclude that bidder from the tendering procedure[17]. So, this provision applies regarding tenders which are ongoing at the moment of assessment of the contracting authority on existence of anti-competitive agreements.

16. Another provision deals with situations where a particular bidder participating in the tender concluded an anti-competitive agreement in the past, i.e., not in the ongoing procedure. In such a case the Law states that a contracting authority shall exclude a bidder from the tendering procedure if it has doubts regarding fairness of the bidder due to the anti-competitive agreement concluded in the past, when from the moment of infringement until the participation in the tendering procedure, less than 3 years have passed[18]. In order to make the relevant facts public, the list of suppliers which were found to have committed infringements is made available on the website of the Competition Council[19].

17. These grounds for exclusion of bidders have been amended recently, to bring them more in line with the requirements of EU law. The need for these amendments was expressed by the European Commission which monitors compliance of the laws of EU Member States with provisions of EU legislation.

18. The doctrine of self-cleaning which is established in EU law and transposed in Lithuanian law[20] allows a supplier to provide a justification whereby it should not be excluded from the public procurement procedure even when the grounds for exclusion are

[15] Supreme Administrative Court of Lithuania, decision of 18 December 2019, case No. eA-2005-624/2019.

[16] Article 46.

[17] Article 46(4)(1) of the Law on Public Procurement.

[18] Article 46(4)(7)(c) of the Law on Public Procurement.

[19] The list can be accessed here.

[20] Article 46(10) of the Law on Public Procurement.

still valid. Self-cleaning is applicable when the following cumulative conditions are satisfied on the part of the bidder:

- The bidder voluntarily paid or pledged to pay compensation for the damage, caused by the violation;
- The bidder cooperated, actively provided assistance or took other measures to help investigate the violation[21];
- The bidder took technical, organizational, personnel management measures to ensure the prevention of further violations.

19. The contracting authority decides whether undertaken measures of self-cleaning are sufficient given the specific circumstances and gravity of violation.[22]

5. Bidder Exclusion: Experience of Application and Effectiveness

20. Following the EU Directives, in Lithuania contracting authorities are responsible for the assessment whether there are grounds for exclusion of bidders as well as for the actual exclusion of bidders. Neither in case of exclusion due to the suspected cartel in the ongoing procedure, nor in case of exclusion for the anti-competitive agreement concluded in the past, is there a need for a decision of the competition authority or a court as to the existence of the infringement. This is confirmed both by the legislative provisions discussed in the previous section and by the case-law[23].

21. In this context, there are some important clarifications concerning exclusion of bidders provided in the case law of the Supreme Court of Lithuania[24]. According to the court, exclusion of bidder is to be based on objective, verifiable information which is sufficient to support a decision on the exclusion of a bidder. However, the bidder is entitled to provide explanations to the contracting authority regarding information which gave basis to doubts. In addition, a bidder has the right to challenge the decision of the contracting authority to exclude it both at the pre-litigation stage and during judicial proceedings.

22. In one of the cases[25] before the Supreme Court of Lithuania, the importance of the Council‘s opinion on the suspected collusion was explained. According to the information available to the contracting authority, there were indications of coordination between bidders, since all the bids were submitted on the same day at intervals of an average of 30 minutes; in all bids the font and method of writing and sums were the same, contracting authority’s details indicated in the tender form were not amended etc. The contracting authority referred this information to the Competition Council and asked for an opinion if it was sufficient for the exclusion. The Competition Council in its letter noted that the available facts could be attributed to the signs of coordination of bids, which might indicate

[21] According to the case-law of the European Union courts, for the cooperation to be established, it is not sufficient if economic entity simply provides requested information in the course of investigation. So, it is required to show some additional actions by an economic entity which show active cooperation (The judgement of the Court of Justice of the European Union, 24 October 2018 in case *Vossloh Laeis*, C-124/17).

[22] Article 46(10)(2) of the Law on Public Procurement.

[23] The Supreme Court of Lithuania, 31 October 2018, No. e3K-3-397-378/2018.

[24] The Supreme Court of Lithuania, 31 October 2018, No. e3K-3-397-378/2018.

[25] The Supreme Court of Lithuania, 31 October 2018, No. e3K-3-397-378/2018.

the likelihood of an anti-competitive agreement. Although parties to the case raised doubts as to the probative value of the respective letter of the Competition Council, the Supreme Court of Lithuania pointed out that the position of the competition authority is legally relevant for the purposes of assessing whether bidders had entered into a cartel or not. According to the Court, the contracting authority could not disregard the opinion of the competition authority, even though the contracting authority had not had an obligation to ask for the consultation of the competition agency.

23. As concerns the exclusion of bidders from the ongoing procedure due to their suspected cartel in the given procedure, the current model seems to be effective. Since the threshold for exclusion in such cases is lower ("sufficient evidence" that a bidder has colluded, as opposed to the establishment of an infringement), it is easier for contracting authorities (especially more experienced ones) to meet it – they may have specific knowledge about the indications of bid-rigging sufficient to spot possible conspiracies. In case of doubts, they are also encouraged to consult the Competition Council. The Competition Council is not able to give a definitive answer without a thorough investigation but it always gives its opinion on the basis of available facts which is also authority's obligation pursuant to the Law on Public Procurement[26]. On two occasions, after receiving requests for a consultation, the Competition Council subsequently launched two investigations into suspected bid rigging arrangements and eventually found infringements in both cases[27].

24. The main challenge here is to effectively educate contracting authorities and to explain what behaviour of bidders may indicate a cartel (for that purpose, OECD Guidelines on Fighting Bid Rigging are particularly useful). As an example of this activity, on 19 October 2022, the Competition Council in cooperation with the Public Procurement Office of the Republic of Lithuania organised an event for contracting authorities where, among other topics, it was discussed how the officials of the contracting authorities may recognise the signs of bid-rigging. This event attracted more than 200 participants.

25. Exclusion of a bidder due to the anti-competitive agreements concluded in the past is more problematic. First of all, as has been mentioned in the previous section, a contracting authority shall exclude a bidder due to the anti-competitive agreement committed in the past, when less than 3 years have passed from the moment of infringement. 3-year period is rather short if a contracting authority intends to exclude a bidder only after the decision of the competition authority regarding infringement is adopted (investigations into anti-competitive agreements in Lithuania usually take more than one year). On the other hand, it is not likely that the contracting authority on its own will gather sufficient evidence to establish anti-competitive agreements which were not subject to the investigation of the competition authority. As a result, this makes this sanction difficult to apply in practice, because once the cartel is established, the maximum period of exclusion may have already expired or remained in force only for a short duration.

26. It seems that in some respects, the previous version of the legislative provision on exclusion of bidders for the past infringements was more effective. Until 2022, the law

[26] See Article 92(4).

[27] In 2017 Vilnius municipality reported suspected bid rigging case in the ongoing tender for Vilnius city cemetery maintenance services which resulted in fines of 360 000 Eur (Press Releases in English are available here and here); in 2019 Vilnius and Kaunas municipalities reported suspected bid rigging in the ongoing tenders for food products organised by or for the benefit of educational institutions and social service providers. Investigation revelaed 101 rigged tenders and resulted in fines of almost 13 mln. EUR (Press Release in English is available here).

provided[28] that a contracting authority might have excluded a bidder from the procedure when less than 3 years had passed since the imposition of a financial sanction for an anti-competitive agreement upon that bidder. Thus, the period of exclusion was related to the imposition of the sanction rather than to the commitment of an infringement. This meant that even though a decision of the competition authority[29] was required, the timeframe when the exclusion could be actually applied was longer and corresponded to the 3-year period provided in the law. Nevertheless, amendments of the law were unavoidable because the previous version of the provision was not compliant with EU law[30].

27. Perhaps, in the future reviews of EU legislation on public procurement, it may be discussed if the system should be changed in this regard, e.g., by providing for a longer period of exclusion (4 or 5 years after the commitment of an infringement).

[28] This provision was in force until 1 January 2022, in Article 46(6)(3)(c) of the Law on Public Procurement.

[29] An infringement of competition law may also be found by courts in the private enforcement cases.

[30] Article 57(4)(c) of the 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 (OJ 2014 L 94, p. 65) provides that contracting authorities may exclude or may be required by Member States to exclude from participation in a procurement procedure any economic operator where the contracting authority can demonstrate by appropriate means that the economic operator is guilty of grave professional misconduct, which renders its integrity questionable (in Lithuania an anti-competitive agreement is considered by the Law on Public Procurement to be grave professional misconduct). Article 57(7) of the same Directive provides that the period of exclusion shall not exceed three years from the date of the relevant event (the relevant event here is a professional misconduct itself rather than a decision of the authority finding an infringement).