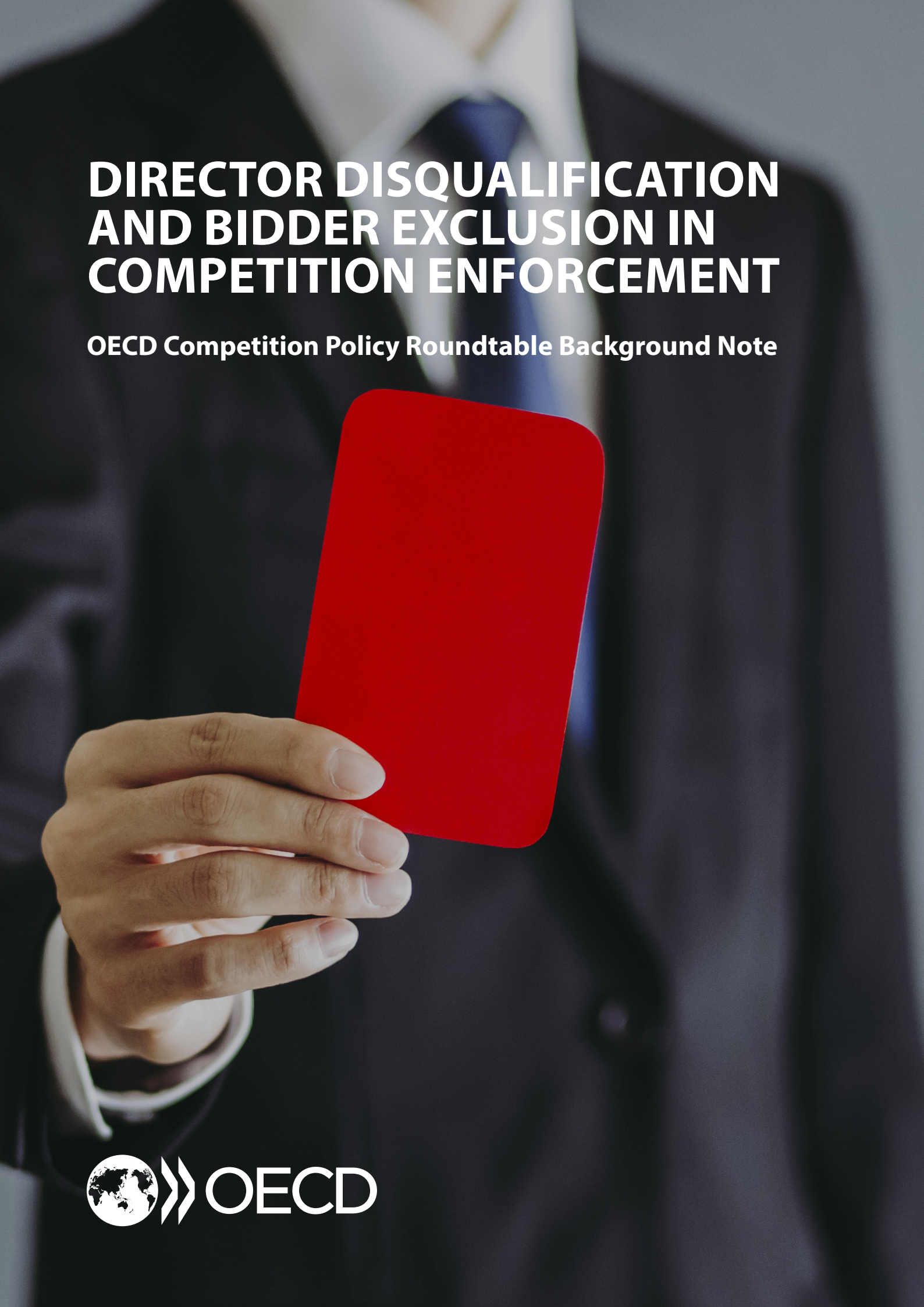
DIRECTOR DISQUALIFICATION AND BIDDER EXCLUSION IN COMPETITION ENFORCEMENT

OECD Competition Policy Roundtable Background Note



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Please cite as: OECD (2022), Director Disqualification and Bidder Exclusion in Competition Enforcement, OECD Competition Policy Roundtable Background Note, http://www.oecd.org/daf/competition/director-disqualification-and-bidder-exclusion-in-competition-enforcement-2022.pdf.

This document was originally released on O.N.E. as an unclassified document under the reference code: DAF/COMP(2022)14.

Foreword

Director disqualification describes a sanction where an individual is not allowed to act as a director, typically in any company, for a specific period following a violation of competition law. Bidder exclusion is the banning of the company from a bidding process or future public procurement tenders, by one or more contracting authority and for a specific amount of time.

In the context of the importance of fighting cartels and bid rigging and of the debate around whether antitrust fines may be too low relative to the gains from the infringement and the difficulties of detection, these forms of sanction may be very effective. Their application, however, raises a few practical challenges relating to the objectives pursued, the scope of application (e.g. which individuals or companies should be subject to it, for how long and in which markets), the standard of proof to be met, and the negative consequences they may bring about.

This paper sets out the objectives and scope of application of debarment sanctions in different jurisdictions; describes the practical issues associated with their application; and suggests ways to maximise their effectiveness.

This note was written by Cristina A. Volpin of the OECD Competition Division and Marina Iskander of the Egyptian Competition Authority. It benefitted from comments by Ori Schwartz and Antonio Capobianco of the OECD Competition Division. It was prepared as a background note for discussions on "Director Disqualification and Bidder Exclusion in Competition Enforcement" taking place at the November 2022 session of the OECD Competition Committee, *https://www.oecd.org/competition/director-disqualification-and-bidder-exclusion-in-competition-enforcement.htm*. The opinions expressed and the arguments employed in the note do not necessarily reflect the official views of the Organisation or of the governments of its Member Countries.

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1. Introduction and Policy Background on Debarment Sanctions

1.1. Cartels and bid rigging as egregious forms of anticompetitive infringements

Cartels are recognised within the competition community as one of the most harmful anticompetitive practices and one of the focus areas of many competition authorities around the world (Ginsburg and Wright, 2010[1]).

Bid rigging and collusive tendering are a particularly serious form of hard-core cartels which taps into public resources, and as such, have a profound impact on society. Inefficient allocation of resources via public procurement means wastage of public money, which could be spent to pursue welfare-increasing objectives, such as health, education, and science. Since public procurement can be particularly prone to collusive schemes, competition enforcement is one of the cornerstones of an efficient public procurement system.

In the context of the recent economic crisis following the Covid-19 pandemic, many governments allocated large stimulus funding to kickstart the recovery (e.g. NextGenerationEU for more than EUR 800 billion,[1] Inflation Reduction Act of 2022 in the US for USD 437 billion[2]). Many governments will have reduced fiscal space for future years, which commands the need to ensure that resources are allocated to business operating in competitive markets. Significant evidence supports the finding that State measures have the highest positive effects when applied to competitive markets (Aghion et al., 2015[2]; OECD, 2020[3]). This means that it is more important than ever to ensure that bid rigging and other collusive practices are duly deterred. Further, much of this public spending will be allocated via procurement tenders and public contracts, which means that judges and competition authorities, alongside contracting authorities, are endowed with a special responsibility to ensure that taxpayers' money is used as effectively as possible.

While estimates vary significantly, studies show that cartels may typically overcharge consumers between 10% and 20% of the cartel price (Boyer and Kotchoni, 2011[4]; De Lima Seixas and De Lucinda, 2019[5]), and some find that bid rigging may push the overcharge higher than other types of cartels (Smuda, 2012[6]). The median cartel overcharge in the EU is measured at one fifth of the cartel price and a little less in the US and Canada (Connor, 2014[7]; Ivaldi, Jenny and Khimich, 2016[8]; Smuda, 2012[6]; De Lima Seixas and De Lucinda, 2019[5]). Further, with public procurement representing over 12% of GDP in OECD countries,[3] bid rigging has the potential to increase procurement prices by up to 60%.[4] This does not include the negative impacts on quality, innovation and range of goods and services offered.

1.2. Debarment sanctions in competition enforcement: a focus on director disqualification and bidder exclusion

Director disqualification and bidder exclusion are two forms of debarment sanctions that have in common the suspension for a limited time of an individual or a company involved in an anticompetitive infringement. With director disqualification, the individual is excluded from any company's operations and managerial

roles, typically in a specific jurisdiction, for a certain amount of time. With the bidder exclusion, the company is usually excluded from bids run by a specific contracting authority or from a specific market for a certain amount of time.

In the context of competition law, director disqualification describes a sanction where an individual is not allowed to act as a director of a company for a specific duration following a violation of competition law. It is typically imposed when the director's conduct led to the competition law infringement, or when the director was aware of the breach but did not do anything to avoid it.

Bidder exclusion is the banning of the company from a bidding process and future public procurement tenders, for a limited period of time.

These debarment sanctions may be imposed, depending on the type of sanction and on the jurisdictions, by competition authorities, judicial bodies, or contracting authorities on the individuals involved in a competition law infringement, who are temporarily banned from the exercise of their corporate functions, or on one or more of the companies involved in bid rigging.

Director disqualification is applied mainly to hard-core cartels, and in some jurisdictions also to abuse of dominance cases and other competition law infringements. Bidder exclusion is associated with bid-rigging in public procurement.

The way in which debarment sanctions are applied and their objectives may vary from jurisdiction to jurisdiction and is different from other types of sanctions in competition law.

First, they may work as a powerful general deterrence mechanism (aimed at preventing infringements among the general population), without recurring to criminalisation. They may add to or substitute the financial and social cost of monetary fines with the opportunity cost of the exclusion from future tenders, or directly affect the individual reputation of the firm or the livelihood of the individual. In the fight against cartels and bid rigging, and in the uncertainty around whether antitrust sanctions have sufficient deterrent power, debarment sanctions may be a very effective component of the toolbox of a competition authority.

Second, debarment sanctions increase specific deterrence (aimed at preventing future infringements by a particular individual). A phenomenon that is observed in practice is that cartels are not only present in different jurisdictions, in specific sectors of the economy, but also periodically recurrent in the same jurisdictions and between the same firms. And while no sector is immune from collusive practices, there seem to be industries where they tend to be more frequent. This often involves industries with high fixed costs and homogeneous and low product costs, such as construction, steel, textile, sugar, and chemicals. This also sometimes affects specifically public procurement industries such as infrastructure industries, school milk, medical and military equipment (OECD, 2015[9]).

This suggests that, in some cases, the benefits of participating in cartel activity may be higher than the risks faced by the company in terms of corporate fines, and that the company is willing to pay such a "tax" to engage in such anticompetitive activity again in the future. Commentators have therefore stressed that, compensation for the financial loss resulting from a cartel is not the most important objective of a competition law system. As noted by Werden (2015[10]),

> *Cartel activity is never efficient or otherwise socially desirable; cartel participants can never gain more than the public loses. Cartel activity, therefore, is not like tortious conduct, which is redressed with a liability rule focusing on the harm to victims and providing the incentive to take due care. Like other property crimes, cartel activity should be prohibited rather than merely taxed.*

The relevance of deterrence points to the power and effectiveness of debarment sanctions. They not only punish the very companies or individuals that engage in the relevant anticompetitive activities (acting therefore on preventing recidivism) but also materially eliminate those specific players from the market for some time. In addition to punishing anticompetitive conduct, they also prevent future one.

This may be of particular significance for those jurisdictions that do not provide for criminal enforcement against anticompetitive conduct or where criminal cases are rarely brought. They ensure that the violating company or involved directors do not carry out such practices in the future.

Clearly, for debarment sanctions to attain their full effectiveness, firms need to be aware of the risks of being caught and of the consistent enforcement activity of the relevant authorities. This not only presumes an effective enforcement system, but also advocacy and publicity efforts on the part of the relevant authorities.

A third distinguishing feature of debarment sanctions is their effectiveness in pursuing the objective of preserving the public interest, by either protecting the integrity of the tender or protecting the public from corporate misconduct. The protection of public interest safeguards, for director disqualification, the standards of corporate management, thus enhancing trust in business, and, for bidder exclusion, the preservation of the good use of public money.

Since these two types of debarment sanctions have very different features and application in different jurisdictions, they will be discussed separately in the following sections. There are, however, several aspects of commonality that emerge from the below analysis. From the discussion of the pros and cons of debarment sanctions and the challenges of their application, it emerges with clarity that:

Debarment sanctions are particularly effective in **attaining at least 3 combined objectives**: general deterrence, specific deterrence and preservation of the relevant public interest. In the pursuance of this combination of goals, they present some advantages over other forms of sanctions or remedies in antitrust.

Debarment sanctions may be valuable not only in themselves but as **complements to other forms of detection and deterrence in a specific jurisdiction**. Depending on its application, disqualification of directors, for instance, can capture anticompetitive conduct in situations that do not satisfy the higher standard of proof typically required in criminal proceedings. Bidder exclusion, if well-targeted, may prove effective in preserving the integrity of tenders and restoring public confidence in good administration and use of public resources in tenders.

The **effectiveness of these sanctions in a specific system depends on their tailoring to the specific anticompetitive conduct and the characteristics of the legal system and the market**. The deterrent power of both director disqualification and bidder exclusion may vary considerably depending on i) how their scope of application and time limit are defined, as well as ii) how the incentives to report cartels and other infringements are preserved by way of co-ordination with existing detection, deterrence and sanctions tools (for instance, criminal sanctions and leniency programmes). In addition, bidder exclusion can have important consequences on the market, potentially eliminating part of the competition for a specific amount of time or creating market distortions that may affects future tender outcomes. These consequences need to be weighed up before considering the application of the sanction.

These forms of debarment may be very effective. Their application, however, may raise a few practical challenges relating to the objectives pursued, the scope of application (e.g., which individuals or companies should be subject to it, for how long and in which markets), the standard of proof to be met, and possible negative consequences they may bring about.

Building on previous Competition Committee discussions on criminalisation of cartels and bid rigging conspiracies (2020[11]); sanctions (2016[12]; 2003[13]) and hard core cartels (2002[14]), and the Recommendation of the OECD Council concerning Effective Action against Hard Core Cartels (2019[15]), this paper focuses on the debarment sanctions of director disqualification and bidder exclusion from public tenders in relation to competition law infringements.

While several jurisdictions may employ these sanctions in areas other than competition law, such as company law, financial regulation or anti-corruption, the paper will focus on their application in the context of competition law violations.

The paper is organised as follows:

- Section 2. focuses on director disqualification in competition enforcement, analysing the different types of disqualification regimes, their scope of application, their effects and the circumstances and the modalities in which they typically apply. It then looks at the practical challenges of applying director disqualification sanctions.
- Section 2.5 follows the same structure in relation to tender banning.
- Section 3. discusses the effectiveness of debarment sanctions and the way they integrate in different legal systems, including noting potentially factors in favour or against of their adoption and use.
- Section 5. concludes.

2. Director Disqualification in Competition Enforcement

Key Points on Director Disqualification in Competition Enforcement across Jurisdictions

- According to the table in Annex A below, director disqualification as a sanction for competition infringements is present in 23 jurisdictions, although only around 10 jurisdictions provide for it specifically in their competition laws. Where it is provided, it has started to be applied relatively recently, and generally only to the most serious violations of competition law, such as cartels, even when its scope of application is larger.
- The sanction is normally imposed by a court upon the request of a competition authority. It is also possible for competition authorities, in some jurisdictions, to accept a self-disqualification commitment by a director.
- The application of the disqualification is normally triggered by at least two elements: the violation of competition law by the company and an element of liability of the involved director.
- The duration period ranges among different jurisdictions, with a popular option being a 5-year cap, but with cases where the sanction can go up until 10 or 15 years and, in rarer cases, be imposed for an indefinite amount of time.

2.1. The objectives of disqualification sanctions

As noted above, this type of sanction may pursue multiple objectives: general and specific deterrence and the protection of the public from corporate misconduct.[5]

2.1.1. Deterrence

As a key enforcement objective, deterrence is typically one of the main purposes of director disqualification. This includes general deterrence and specific deterrence.

Commentators note that disqualification is a powerful deterrence tool in antitrust. While not as severe as jail time, disqualification deprives individuals of their livelihood, hits their reputation and career and cannot be fully and directly indemnified by the company, as might be the case for a fine (Stephan, 2011[16]).

A 2007 survey commissioned by the UK Office of Fair Trading (OFT), which preceded the CMA, showed that disqualification was considered the second most effective deterrent for individuals, after imprisonment.[6] The report noted that

> *the threat of director disqualification is seen as a serious one by both lawyers and companies, and many thought that a greater use of this sanction would improve deterrence.*[7]

The deterrence power of disqualification rests on two main factors: i) the individualisation of the sanction, which eliminates the shield of the company to reach directly those responsible for its management; and ii) depending on the jurisdiction, a swifter and typically easier application compared to criminal sanctions, that normally involve a more burdensome procedure and the higher standard of proof of criminal liability.

With corporate fines taking a long time to be imposed and confirmed on appeals, and the difficulties of bringing criminal cases, where available (characterised as "*costly, time consuming and unpredictable compared to administrative enforcement*"),[8] the effectiveness of disqualification sanctions really depends on the criteria for its application. Without prejudice to a thorough assessment of the responsibility of the individual, the lighter these parameters compared to those of criminal sanctions, the higher the deterrence power of disqualification. This makes them a reliable and appealing complementary tool of deterrence (Stephan, 2011, pp. 530-532[16]).

Much like leniency programmes (Volpin and Chokesuwattanaskul, 2022[17]), one of the fundamental requirements to ensure the legitimacy and the deterrence effect of director disqualifications is the publicity around their applicability and application. One of the virtuous examples is the UK, which not only consulted with the public in relation to the introduction and application of this sanction, but also widely disseminates the requests for an order to the court, as well as the acceptance of undertakings by the directors. Cases are reported regularly on the CMA's website, and a register[9] of disqualified directors is periodically updated (Whelan, 2021[18]).

2.1.2. Protect the public from corporate misconduct and improve standards of corporate management

Another important objective pursued by director disqualification is the preservation of the trust that consumers have in business and the protection of the public from corporate wrongdoings. This is directly related to the duty of care that characterises management functions and which is aimed at dissuading others in the same function from engaging in analogous misconduct.

Linked to this objective is also the enhancement of corporate management standards in the interest of the broader society. A fundamental element of the public's trust in business is "*the belief that businesses will strive to conduct their operations in ways that comply with the law*" (OECD, 2019, p. 86[19]). This belief rests on two parameters: i) that companies will invest efforts and resources in ensuring compliance; and ii) that if unlawful behaviour occurs, measures will be taken by the business to report, collaborate to the investigation and remedy the behaviour (OECD, 2019, p. 86[19]). An effective director disqualification system may therefore contribute to fostering such trust.

2.2. Types of disqualification regimes

2.2.1. Power to request or accept a disqualification order

Several OECD and non-OECD countries adopt this type of sanctions. A first useful distinction is between the disqualification i) imposed following a request of the competition authority, typically made to a court or judicial body that issues the order (competition disqualification orders or CDO), and ii) accepted by the competition authority following the initiative of the concerned individual, who proposes an undertaking (competition disqualification undertaking or CDU).

For example, according to the 1986 Company Directors Disqualification Act and the 2019 Guidance on Competition Disqualification Orders, the UK Competition and Markets Authority (CMA) *must* ask for a competition disqualification order by the court when two cumulative conditions are met:

- A firm engaged in a competition law infringement; and
- the behaviour of the director qualifies her, according to the court, as "*unfit to be concerned in the management of a company*".[10]

Other competition authorities have discretion on whether to submit the request. For example, the Swedish Competition Authority may request a court to issue a disqualification order against managers of a company engaging in a cartel. In some cases, the application of a disqualification order may be required by reasons of "general interest", for instance if the misconduct has been systematic, caused significant damage or was aimed at reaping financial gains (Section 8 of the Trading Prohibition Act) (Andersson, 2022[20]).

In the US, the FTC may request a court to disqualify individuals for any anticompetitive violation, even for lifetime.[11] In Lithuania, the disqualification request is submitted by the Competition Council to the Vilnius Regional Administrative court, and similarly in Israel, it is for the Antitrust Tribunal to decide whether to impose disqualification from directorial functions. This system, where the competition authority submits a request to the court, is also in place in Hong Kong - China, where the Commission can request an order to the Tribunal under Section 101 of the Competition Ordinance (Kwok, 2014[21]).[12]

Although much rarer, in some jurisdictions it is possible that director disqualification orders may be imposed directly by the competition authority in specific circumstances. For instance, in Poland, the President of the UOKiK may request a company that is part of an otherwise anticompetitive merger leading to the creation of a monopoly to disqualify individuals from the governing or controlling body of the company, either as a remedy in merger control or as a sanction for the provision of misleading information during the merger procedure.[13]

As mentioned above, in addition to the power to request a disqualification order, some competition authorities can also accept a legally binding undertaking by the involved directors that they will not act as directors for an agreed period. In the UK, for instance, this does not require the involvement of the judiciary and the request for a CDU can be accepted also after the application to the court for a disqualification order. The CMA can discontinue the process to obtain the order and accept the undertaking.

In Canada, corporate directors or officers may be disqualified for a period up to ten years under Section 34 of the Federal Competition Act. The order can be issued by a court based on an agreement by the concerned individual with the Attorney General of Canada or the attorney general of the province.

At present, the European Commission does not apply nor accept director disqualification sanctions (Whelan, 2022[22]), although commentators have been invoking its introduction at the EU level as a way to strengthen the enforcement system (Khan, 2012[23]).

2.2.2. Standalone, automatic, discretionary disqualification

One can also identify three types of regimes concerning the application of director disqualification sanctions: i) regimes where disqualification for a competition law infringement is applied as a stand-alone sanction (standalone disqualification); ii) regimes where disqualification for a competition law infringement is associated to criminal liability but it is discretionarily applied (discretionary disqualification following criminal liability); and iii) regimes where disqualification for a competition law infringement is applied automatically contingent on criminal liability, even if a court order may be required and determines the circumstances of its application such as, for instance, duration) (automatic disqualification).[14]

Countries that belong to the first type (standalone disqualification) include Brazil, New Zealand, Hong Kong - China, Sweden and the UK.

The second type (discretionary disqualification following criminal liability) includes, for example, Japan, where the Japan Fair Trade Commission can file a request following a violation of the Antimonopoly Act against a director that was sentenced to imprisonment or stricter sanctions without suspension. Similarly, in Estonia, criminal liability for anticompetitive restrictions or abuse of dominance may bring along disqualification from boards and councils.[15]

The third type of regimes (automatic disqualification) includes, for instance, Chile and Ireland. In Ireland, under Section 839(1) of the Companies Act 2014, individuals convicted for anti-competitive agreements and abuse of a dominant position are automatically disqualified from being appointed or act as directors for 5 years. Upon request by the prosecutor or the defendant, the judge may order a shorter or longer disqualification time.[16]

2.3. Scope of application of director disqualification orders

The scope of application of these orders or undertakings is defined by i) the anticompetitive infringements they are applicable to; ii) the criteria for their applicability; iii) the individuals to which they apply; and iv) their duration. These elements are discussed in detail below.

2.3.1. Which anticompetitive infringements is disqualification applicable to?

In most of the jurisdictions examined (see Annex A below), disqualification orders are applicable in cartel cases. For example, in Sweden, although so far never applied, a disqualification order requires a hardcore cartel, in the form of price-fixing, market sharing or market allocation practices, and it is not provided in principle for abuses of dominant position. The same approach is followed by Chile, which also applies disqualification to directors that conclude, execute, or concoct a cartel.[17] This is also the case in Czech Republic and New Zealand.

While in many regimes the order is applicable *only* in relation to cartel conduct, some jurisdictions extend this sanction to unilateral conduct. This is the case, for instance, in the US, Brazil, France, Hong Kong -China and Ireland. In Ireland, courts have the power to impose a competition director disqualification order for an infringement of Section 4 or 5 of the 2002 Act or of the EU equivalents, i.e., covering both agreements and abuses of dominance. The sanction can, after the Competition Amendment Act of 2012 aimed at increasing effectiveness (Whelan, 2013[24]), be imposed for both summary and indictable competition offences.[18]

Similarly, and as noted above, according to the 2019 UK Competition and Markets Authority (CMA)'s Guidance on Competition Disqualification Orders, a competition disqualification order must be asked when there is a breach of competition law and an evaluation of the individual's unfitness to manage a company. The CMA may apply such sanction for any anticompetitive agreements and abuse of dominant position under UK and EU law (i.e., infringement of Chapter 1 and Chapter 2 Competition Act 98, as well as Article 101 and 102 TFEU).[19]

The choice made by these jurisdictions is of relevance because the application to unilateral conduct, which more typically requires the proof of effects, may risk introducing an element of uncertainty that is less likely to be present in the case of classic "hardcore" cartels.

Research conducted in 2018 by the CMA showed, for example, that the understanding of the do's and don'ts of cartels by firms is still quite low, with 41% of respondents not being aware that attending a price-fixing meeting with rivals constitutes an infringement of competition law, and almost half of them do not characterize bid-rigging as illegal.[20]

While knowledge about cartels may still not be commonplace, it seems more than fair that a director would have to know what a cartel is and would have to be aware that it constitutes a competition law infringement. The stigma around cartel conduct is well documented (see, for an analysis, (Whelan, 2022[25])). It may be

less common that she has knowledge, for instance, of more rarely enforced theories of harm; theories of harm on which there is ongoing debate or that are more novel, such as self-preferencing in digital markets.

Different but related is also the fact that other anticompetitive infringements may not have the negative moral connotation that cartels bear, thus potentially making it more difficult to accept the proportionality and appropriateness of a disqualification sanction. In the words of Werden (2015[10]),

> *Cartel activity is properly viewed as a property crime, like burglary or larceny, although cartel activity inflicts far greater economic harm. Cartel activity robs consumers and other market participants of the tangible blessings of competition.*

This could have some impact on the assessment of the judges (and sometimes the juries)[21] that must decide on the application of a disqualification order. This could thus suggest that the application of disqualification may be more appropriate in by object/*per se* cases rather than effects cases, for reasons of legal certainty.

All these arguments, however, lose some weight in those jurisdictions where competition culture is widespread and competition authorities are committed to spreading awareness and investing in advocacy activities. Even if it can be anticipated that the sanction will not be used in complex cases with novel theories of harm, and that a "warning" to the market (in the form of a widely disseminated first case, for instance) may be given by the relevant competition authorities, a stricter approach encompassing other anticompetitive conduct beyond cartels may be positive in that it creates higher incentives for company's management to have a good understanding of competition law, to train employees as well as to prioritise competition compliance.

It is also of note that, while so far the sanction has never been applied in the UK in an abuse of dominance case, the CMA envisages the possibility that director disqualification may be used for regulatory breaches by the Digital Market Unit (DMU), because of its effectiveness in deterring participation in anticompetitive conduct.[22]

Box.1. Increased use of director disqualification in the UK

Since its introduction, the CMA has extended the possibility to request an order for director disqualification to all competition infringements (agreements and abuses of dominant position). Until now, such sanctions have been applied in the most serious cartel cases.

The CMA has requested and accepted a director disqualification order to 25 directors so far, of which one was by court order. Amongst the orders issued or secured by the CMA are the following:

- December 2016, the first CDU was secured by the CMA against Mr. Daniel Aston, director of Trod Ltd., for price-fixing cartel in the online poster supply industry (5 years).
- April 2018, CDU accepted by the CMA from Mr. Daniel Baker (3 years and 6 months) and Mr. Julian Frost (3 years), directors of Abbott and Frost Estate Agents Ltd., for price-fixing cartel for the provision of residential sales services in the Burnham-on-Sea area with another 5 estate agencies.
- June 2020, CDU accepted by the CMA from Mr. Amit Patel, director of Auden McKenzie and Amilco Limited, for arrangements affecting the supply of nortriptyline (5 years).
- June 2020, CDU accepted by the CMA from Mr. Stephen Jones, director of Richard Worth Holdings Ltd (6.5 years), Mr. Neil Mackenzie, director of Michael Hardy & Co. (6.5 years), for a price-fixing cartel for the provision of residential sales services in the Berkshire area with another 2 estate agencies.

- July 2020, the first CDO secured against Mr. Michael Martin, former director of Gary Berryman Estate Agents, for a cartel between estate agencies in Somerset (7 years).
- March 2021, CDU secured against Mr. Eoin McCann (12 years) and Francis McCann (11 years), former directors of FP McCann Ltd., for a cartel in the supply of pre-cast concrete drainage products.
- March 2021, CDU secured against Mr. Campbell (6.5 years), director of BLM British Lead, and Mr. Hudson (4 years) and Mr. Sherling (3 years), directors of Associated Lead Mills Ltd. for a cartel and exchange of commercially sensitive information in the rolled lead for roofing sector.
- January 2022, CDU secured against Mr. Sonpal, director of Lexon, for an exchange of commercially sensitive information about Nortriptyline Tablets with other two market players (4 years).

Source: Competition law and cartels; CMA, Annual Report and Accounts 2021/22, https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1097032/Annual_Report_CE.pdf.

2.3.2. What are the criteria that determine the applicability of disqualification?

The criteria determining what needs to be proven to determine the applicability of the disqualification also vary significantly from jurisdiction to jurisdiction.

Some countries require a finding of material contribution. Article 62 of the Chilean Competition Act (Law Decree no. 211), for instance, provides that "*[a]nyone who enters into or orders to enter into, executes or plans for an agreement between two or more competitors […] shall be punished with temporary disqualification […] from holding the post of director of the company*." Similarly, Article 80C of New Zealand's Commerce Act 1986 allows the court to prevent any individual that has "*entered into a contract or arrangement, or has arrived at an understanding, that contains a cartel provision; or […] given effect to a contract, arrangement, or understanding that contains a cartel provision*" from being a director or manager of a company.

Other countries, such as Mexico, attribute liability for both direct and indirect contribution to the competition law violation,[23] but do not punish liability by omission.

Some other jurisdictions (e.g., Lithuania, UK and Hong Kong - China) include three situations in which a director may be held liable:

- the director "*contributed*" to the competition law violation with her conduct or was "directly involved" in it; or
- the director took no action to avoid the conduct that she had "*reasonable grounds to suspect*" constituted a competition violation; or
- the director "*did not know but ought to have known*" that the company's behaviour was infringing competition law.[24]

As part of a preliminary assessment to determine whether an investigation is needed and whether to issue a request for a competition disqualification order, the UK CMA will, for instance, take into account "*the facts and circumstances of each individual assessment, the evidence available and the public interest in the disqualification of the director*".[25] And while the authority has full discretion when investigating a director's conduct, the assessment may consider, among others, the factors set out by the Guidance on Competition Disqualification Orders. These include:

- the nature and seriousness of the infringement;
- the duration of the infringement;
- the impact or potential impact of the infringement on consumers;

- the conduct of the undertaking during the CMA's investigation; and
- any previous breaches of competition law committed by the undertaking.[26]

A similar approach is followed by other authorities (see e.g., Lithuania), which may make their request of disqualification to the court based on the gravity and duration of the infringement, the degree of the director's involvement, and the co-operation of the director during the investigation.[27] Recidivism by the director is also considered in some jurisdictions.[28]

It is sometimes possible, for the relevant court, to suspend the application of the disqualification by giving permission to act or the leave of the court to the disqualified individual. In the UK, this request was submitted in Re Fourfront Group, for example, and the test adopted by the judge involved balancing the need of the disqualified director to his livelihood and the need of the company to benefit from his management against the protection of the public interested, the enhancement of corporate integrity standards, the risk of recidivism and the gravity of the behaviour.[29]

2.3.3. Which individuals is disqualification applicable to?

1. The order typically applies to directors, former directors, shadow directors or any individual exercising analogous functions in practice.[30] By shadow director, it is normally meant any individual who is taking strategic decisions at the firm, even if she does not hold the relevant function title.

2. There are divergent approaches as to whether a manager or an adviser of the company may be subject to disqualification. For instance, according to Article 127 of the Federal Economic Competition Law of 2015, Mexico's disqualification can be imposed on any individual directly or indirectly involved in the anticompetitive behaviour, preventing them from acting as "*board member, manager, director, executive, agent, representative or legal representative for a maximum five year period"*.[31] Under UK law, however, consultants hired to give professional advice on the basis of which the director acts are explicitly carved out.[32] In some cases, the law may apply to "*any person*", providing that they cannot be a director or manager of a company for the specified period (see, for instance, Section 80C of the New Zealand Commerce Act 1986).

3. The notion of "director" is typically interpreted according to its meaning under company law, and it typically follows a broad definition of the firm as a legal entity subject to competition law. This can include companies that are not incorporated (Buckley, 2021, p. 637). Under UK law,[33] for example, the notion is considered to include building societies, incorporated friendly societies, charitable incorporated organisations, protected cell companies, and limited liability partnerships (Buckley, 2021, p. 637).

4. Based on the parameters described above, it is also possible that a director may be considered liable for the behaviour of a subsidiary which forms a single economic entity with the parent company for the purposes of competition law.[34]

2.3.4. For how long?

While in most jurisdictions, disqualification is a temporary sanction, the duration of the sanction may vary significantly and may even be permanent (Australia, US) (Frese, 2016, p. 230[27]). This is also often commensurate to the factors considered in the decision to apply for an order, typically including the gravity and the duration of the infringement, any company or individual recidivism as well as the impact of the behaviour on consumers.[35]

While longer or shorter periods are applied, one of the most common scenarios is the provision of a disqualification period of up to five years. Brazil, Israel, Japan, Mexico, Norway and New Zealand opt for this maximum duration. In Ireland and in Hong Kong – China, a director can be disqualified for five years for a competition infringement. In Turkey, the sanction can be applied for a period between three and seven years, and in Sweden, between three and ten years. Under UK law, the maximum period of disqualification

is 15 years, without a minimum period. In the US, there is no set timeframe for disqualification orders, but the order was applied for lifetime in a recent case.[36]

According to commentators and looking at practice so far, a competition law infringement of the kind that calls for a disqualification order will not normally be considered a "*minor or 'technical' wrong*"[37] and will tend to be serious enough to justify a sanction in the median or top range provided by the jurisdiction. Comparing disqualification for competition violations and for other infringements, Judge Baister of the UK Competition Appeals Tribunal noted that:

> *competition disqualification based on cover bidding or the like necessarily involves deception; it involves dishonest behaviour that is almost certain to result in real financial damage to others. That applies whatever the disqualification period may be. In run of the mill disqualification cases a lower bracket period will almost always be imposed for a minor or "technical" wrong. That is not the case here. That indeed requires the court to keep public protection in the forefront of its mind.*[38]

Duration may be shorter in the case, which has been quite frequent so far in the UK (Whelan, 2021[18]), in which the director offers the disqualification undertaking (Buckley, 2021, p. 640[26]). CDUs have been very frequent until now relative to CDOs because they do not require the involvement of the judge and they provide a lighter, less burdensome and quicker alternative to a court's order.[39] To the best of the authors' knowledge, in the UK a CDO was applied following the request of the CMA in only one occasion so far.

The order is typically applied from the date after it is issued by the relevant court, for the relevant duration, although other timings may be established for disqualification undertakings, and in different jurisdictions.

2.4. Effects of the application of a director disqualification order

A disqualification order or undertaking, if granted or accepted, typically requires not to act as a director (and sometimes as a manager or legal representative) of any company in a specific country. Other effects, and the consequences of their transgression, may vary amongst different jurisdictions.

In Hong Kong - China and in the UK, for instance, during the disqualification period, and without permission to act by the court, the debarred director cannot engage in acting as a director of a company; in acting as a liquidator of a company; in receiving or managing property; in developing, creating, or running any company.[40] In Sweden, such sanction means that the individual cannot, either legally or in practice, operate and manage a company, be an authorised signatory, or hold most of the voting rights in any company for the duration of the order (Andersson, 2022, p. 674[28]).

The disqualified director can typically be sentenced to prison for a maximum of two years for transgression of these requirements or be subject to a fine. Coupling the criminal liability with a financial one, it is also sometimes established that the person involved in the management of a company infringing a competition director disqualification order becomes individually liable for all the relevant debts of the company.[41]

2.5. Practical issues in applying director disqualification sanctions

2.5.1. Investigating and assessing directors' liability

While the variety of approaches in each jurisdictions makes it difficult to generalise, there are often two fundamental factual elements to be proved in a disqualification case: i) the violation of competition law; and ii) the liability of the director. These two elements may be investigated by the competition authority and then assessed by the same court, usually upon the authority's request, or they can be assessed separately (i.e., in two different proceedings).

In both cases, the elements of the investigation to be proven and the burden and standard of proof applied to the assessment may vary. The following paragraphs will focus on the evidentiary questions relating to the assessment and finding of the director liability (burden and standard of proof, causality link and culpability), rather than that of the anticompetitive infringement.

Burden and standard of proof

When looking to apply for a director disqualification order, a key aspect is determining the liability of the directors involved in the anticompetitive conduct. For both criminal and administrative systems, the burden of proof of showing the involvement and the liability of the individual typically lies with the authority requesting the order, whereas the burden of proof of showing that there are the requirements for a leave of court lies with the applicant.

More complex is the question of whether the standard of proof to be satisfied for issuing the order is the traditional civil and administrative one of the "balance of probabilities" or the higher criminal one of "beyond any reasonable doubt" due to the individual responsibility involved, which may vary significantly depending on the type of regime and the wording of the law in each jurisdiction.

Commentators such as Khan (2012[23]) noted that the application of the standard of the "balance of probabilities" normally used in the common law tradition and somewhat analogous to the "intime conviction" of the authority or the judge based on the evidence in the civil law tradition may be more suitable to the application of the disqualification sanction. This is because it makes the application of the sanction easier than that of a criminal sanction (where, traditionally, a "beyond reasonable doubt" standard is adopted). To satisfy this standard the adjudicator typically needs to consider more likely than not that the legal requirements are supported by the evidence and thus proven.[42] It is noted that, if the higher criminal standard were to be adopted, the disqualification sanction would become a less attractive alternative compared to imprisonment, where provided, because this latter is commonly recognised to have a higher degree of deterrence.

The elements of proof for the disqualification

In some regimes (automatic disqualification regimes), as mentioned above, the disqualification order is contingent on criminal liability and the judge may determine the length of the disqualification order. In other regimes, the disqualification is either triggered by criminal liability but is discretionary (discretionary disqualification following criminal liability) or it can also be an entirely standalone sanction. In all these cases, the responsibility of the director is typically contingent on at least two of these three elements:

- First, the company or the group in which the individual is a director committed the breach of competition law that triggers disqualification in the jurisdiction (competition law violation);
- Second, there is a causal link between the competition infringement and the director's conduct or liability (causal link);
- Third, there is a mental element or an element of culpability of the director in relation to the violation (element of culpability).

The causal link and the culpability element

For the establishment of the causal link between the competition infringement and the director's conduct and as regards the element of culpability, different jurisdictions take different approaches. The responsibility of the director may range from nearly strict liability, where the standard of liability derives from the fact itself of holding the position of director, in the absence of any specific intent or fault, to a higher degree of material contribution to the violation, that justifies the imposition of the sanction.

Where required, the element of culpability may be described in different ways. In some of the jurisdictions that provide for this element (for instance, Hong Kong, China and the UK), this is described as:

- a direct or indirect contribution to the competition law violation; or
- a suspicion or knowledge about the competition law violation without any action to prevent it; or
- ignorance about the competition law violation that the director was supposed to have been aware of.

While the distinction between the second (causal link) and the third element (element of culpability) may often be blurred, the third element typically puts the focus on the mental participation to the infringement or culpability of the director. This third element is not required by the law in many jurisdictions, but commentators have noted the importance of assessing a mental element linking the competition law violation and the director's liability, with a view to enhancing compliance without disincentivising the holding of directorial and managerial positions (Whelan, 2021[18]). Individuals aspiring to holding such positions should not be discouraged by the provision of a strict liability mechanisms that may make the access to the position less appealing or make them excessively risk-averse in their decision-making. This requirement seems to be particularly important in those regimes where disqualification can be a standalone sanction, and there is therefore no assessment of the mental element in the parallel criminal proceedings.

According to Whelan (2021[18]),

> *at least some link between the conduct of the director and the breach of competition law – a link over which the director has some control – should be present as a required condition of disqualification. This is where negligence can come in, with disqualification only occurring when the director has at least been remiss with respect to her control activities related to incentivising compliance within the company. A negligence-based rule of liability 'invariably' can also be relied upon to encourage efficient enforcement on the basis that, by taking due care, a director will avoid all liability, with the result that any increase in her effort and resources to meet that level of care will never increase the director's expected liability.*

This also ensures the effectiveness of the sanction in maintaining high corporate management standards, because it eliminates incentives for directors to remain purposefully oblivious to specific decision-making processes to shield themselves from responsibility.

An appropriate link between the anticompetitive infringement and the director's conduct does not only enhance the effectiveness of the sanction but also ensures its legitimacy (Whelan, 2021[18]). To satisfy this condition, in some jurisdictions the director must have contributed to the infringement; in others it may also be responsible for the fact of not having prevented an infringement she suspected; in others it may suffice that she ought to have known that the conduct constituted an infringement even if she did not know of it. Other requirements, such as that the conduct of the director "makes him unfit to be concerned in the management of a company" (UK),[43] or that the disqualification is "justified" (Australia),[44] also seem to function as control system clauses that, allowing the court some margin of appreciation, further guarantee the legitimacy of the sanction.

Box 2. The notion of "unfitness" of the director in the UK case law

In the UK system, Section 9A of the Company Directors Disqualification Act 1986 requires the CMA to satisfy the Court that the conduct of the individual as a director "*makes him unfit to be concerned in the management of a company*".

In Re Property Group Ltd., the UK CMA submitted a disqualification order against Mr. Martin, as a director of Gary Berryman Estate Agents Limited and its parents The Property Group Limited and Warne Investments Limited. The disqualification related to the investigation of cartel activity with regards to the fixation of minimum levels of commission fees for the sale of property by estate and letting agencies in Burnham-on-Sea. On 3 July 2020, the court disqualified Mr. Martin as director for 7 years.

When assessing the individual responsibility of Mr. Martin, the High Court (Insolvency and Companies Court Judge Jones) found that, based on the evidence,

> *Mr. Martin knew the agreement was effective […] his knowledge means his failure to inform the board and/or to prevent the agreement being made and performed amounts to misconduct. He breached his duties […] as a director and his duties as a director of all three companies. Directors with his knowledge should take all reasonable steps possible to ensure a company does not enter into an anti-competitive agreement in breach of the Competition Act 1998. Mr. Martin did not. (para. 98)*

The court also noted that

> *Whilst Mr. Martin was not directly involved in the cartel activity, for example he did not attend any meetings and was not concerned with day-to-day sales, he bears responsibility in his capacity as a director […]. In particular, he allowed [an employee] to attend the […] meeting. That enabled [the company] to reach agreement with the local agents. Next, when informed of that agreement he allowed [the company] to participate in and perform it. Mr. Martin's conduct as a director contributed to the breach of competition law. (para. 100)*

The notion of "unfitness" of the director, which triggers the mandatory application of the disqualification order by the CMA, has been considered by commentators quite difficult to assess, being relatively open to interpretation (Caliskan, 2019[29]; Williams, 2005[30]). Attempts to qualify it refer to "*breaches of commercial morality, recklessness and incompetence*" (Williams, 2005[30]), or "*a minimal level of culpability*" that guarantees the legitimate use of this sanctioning tool (Whelan, 2021[18]).

According to the High Court in Re Property Group Ltd., the conduct of Mr. Martin satisfied the requirement of "unfitness" *since "[it] fell below the standards of probity and competence appropriate for persons fit to be directors of companies*" (para. 99).

Sources: Re Property Group Ltd, CMA v. Michael Christopher Martin, 3 July 2020 [2020] EWHC 1751 (Ch), Case No. CR-2019-001454, https://www.bailii.org/ew/cases/EWHC/Ch/2020/1751.html. See paras. 96 and ss.

2.6. The challenges of director disqualification orders

As mentioned above, in addition to the protection of public integrity, director disqualification typically pursues deterrence, putting at stake, in addition to the monetary sanctions, also the reputation and liberty to work of the individual. An important component is also the punishment of recidivism, by ensuring that the directors liable for the anticompetitive conduct are removed from their functions.

At a moment where the effectiveness of leniency programmes seems to have lost momentum (OECD, 2022, p. 46[31]), particularly in the jurisdictions which have long adopted such programmes (Volpin and Chokesuwattanaskul, 2022[17]), and in the context of a recurring debate about the adequacy of the level of competition fines, debarment sanctions hold the promise of higher deterrence efficacy, by putting on the line the livelihood and reputation of individuals directly.

This would suggest a widespread use, particularly in those jurisdictions where criminal sanctions for the most serious competition law violations are not available or are underused. However, the dissemination of this instrument seems to be so far quite limited. Based on the information collected from countries for the present analysis, a little more than 20 jurisdictions provide for this sanction specifically for competition law infringements, and much fewer than that apply it with regularity.

It is therefore worthwhile understanding the possible reasons of such limited use. Commentators have discussed a few challenges that director disqualification may encounter in its application. The most common ones are explored below.

2.6.1. May not have deterrent effect if individual is close to retirement or if they can work at the same company in another capacity

One of the situations where director disqualification has been said to prove ineffective is where the concerned individual is very close to retirement or can be employed, by the same company, in another capacity (OECD, 2016, p. 6[32]). While there is undoubtedly an impact of personal circumstances on the effectiveness of the sanctions, it should be noted that specific deterrence (aimed at preventing future crimes by a particular individual) and preventing recidivism is not identified as the sole objective of this sanction and other objectives may still justify its application.

If general deterrence (aimed at preventing crime among the general population), as well as the protection of the public interest are preserved, the effectiveness of disqualification may not be undermined by the lack of subjective impact on specific individuals. In those regimes that apply these sanctions, however, competition authorities need to consider that there may be situations where the specific deterrence of this sanction may be less effective, and abuses may be devised to escape liability. The scope of application of the sanction should therefore preferably extend to individuals, for example, acting as directors that do not hold the official function title (so-called *de facto* directors), and can be used in combination with other forms of sanctions.

2.6.2. May have no effects outside the jurisdiction

Jurisdictions that regularly apply criminal sanctions for competition violations, like the United States, may find that, in terms of deterrence, prison terms are much more effective and do not require the costly monitoring that disqualification orders may entail (OECD, 2016, p. 5[33]).

A strong hit to the effectiveness of the sanction comes from the possibility of the debarred individual to work abroad, in the lack of international co-operation on the enforcement of such orders amongst competition authorities and due to the quite dispersed scrutiny that that would require. This difficulty does not compromise the effectiveness of the sanction within the applying jurisdiction, where the economic and reputational damage is fully felt by the individual. The maintenance and regular consultation of public

registers or “naming and shaming” lists of disqualified directors, as well as offering the public the possibility to report a disqualified director that is working or engaged in running a company in breach of a disqualification sanction,[45] may help authorities enforce the imposed sanction fully.

This is an area, however, where further international co-operation between competition authorities may strengthen the effectiveness of the system.

2.6.3. May be difficult to coordinate with leniency programmes (and generally stifle incentives to co-operate in the investigation against the company)

An important source of concern in relation to the viability of these programmes has been found in their coordination with leniency programmes, in particular regarding two aspects. The first is the negative impact they have on the willingness of individuals to come forward with information and evidence in the context of the investigation of the company, thus softening incentives for directors to make use of immunity and leniency programmes. The second is the systemic inconsistency that may arise in those regimes where there is no individual leniency programme, but only a corporate one, making it so that revealing information may or may not benefit the company (depending on the timing of the application) but does not bring any advantage to the individual.

For these reasons, it seems preferable to ensure that the individual reporting the anticompetitive activity to the competition authority or co-operating with the authority in the context of a leniency programme will not be subject to a disqualification order. This is the approach followed by the ECN+ Directive, for instance, now transposed into national legislations by most of the EU Member States.[46] The EU legislator noted that:

> *Legal uncertainty as to whether current and former directors, managers and other members of staff of applicants for immunity are shielded from individual sanctions such as fines, disqualification or imprisonment, could prevent potential applicants from applying for leniency. In light of their contribution to the detection and investigation of secret cartels, those individuals should thus, in principle, be protected from sanctions in relation to their involvement in the secret cartel […].*[47]

According to Article 23 of the ECN+ Directive, the conditions whereby protection from disqualification may be granted to directors, among others, include:

- that the relevant company qualifies for immunity in the context of a leniency programme;
- that the director collaborates in the investigation; and
- that the immunity request is made before the director discovered to be a suspect in the investigation or potentially subject to a disqualification order.[48]

In those cases where the benefits of a leniency programme do not extend to individuals, however, it may be important to consider preserving the incentives of the individual to report the anticompetitive infringement. Whilst immunity under a corporate programme may be sufficiently appealing in some cases (for instance, for family companies), the risks connected to reporting information may have a severe negative impact on the effectiveness of the sanction. For this reason, one pragmatic solution to adopt in the lack of leniency programmes for individuals is to consider the co-operation of the individual to the purposes of determining whether to apply the disqualification, its duration, or the establishment of criminal responsibility (as a mitigating factor), where existing,[49] as well as in the context of negotiation for settlement agreements.

2.6.4. Its legitimacy may be questioned

A recognised aim of director disqualification is the precision with which it targets the individual that has taken the decision to engage in anticompetitive conduct, or at least the one that was supposed to be aware and responsible for the decision. This search for individual accountability, while not going as far as looking for a mental element of intention or conspiracy like criminal enforcement may require (Macculloch,

2012[34]), has the benefit of aligning the responsibility for the decision with the sanction. As noted by Stephan (2011, p. 531[16]), this does not happen with corporate fines, the burden of which is often ultimately borne by shareholders and employees at the time they are imposed, while "*[t]hose who actually instigated the collusive conduct may have moved to another firm or industry, or may even have retired or died.*"

In turn, looking for this alignment between the individual responsible and the one sanctioned may also contribute to creating a sense of legitimacy and fairness of the sanction, which in fact seems to enjoy high popularity with the public in certain jurisdictions. In a survey of British citizens conducted in 2007, for example, disqualification of senior managers was considered an appropriate sanction for price-fixing by nearly 1 out of 2 respondents, against only 11 out of 100 considering jail time as appropriate (Stephan, 2008, p. 133[35]).

For the purposes of preserving this sense of appropriateness of the disqualification, as well as enhancing the probability of compliance, commentators have noted that it may be important to ensure that there remains scope for assessing the actual connection between the infringement and the conduct of the director. A parameter of strict liability for this sanction would likely break this connection (Whelan, 2021[18]).

Additionally, since it is normally also the company and not only the individual director that reaps the gains from the participation into the anticompetitive conduct, the application of this sanction may, according to some commentators, raise concerns relating to the displacement of responsibility from the company to the individual. It needs to be noted, however, that, first, often company performance determines bonuses and career progression for managers, which contributes to aligning the incentives of the shareholders and the leadership of the company (Combe and Monnier, 2020[36]). Second, the same objection relating to the displacement of responsibility could be addressed to the application of all criminal sanctions to individuals, because they entail the identification of personal responsibility for a corporate wrongdoing. Third, it could also be noted that, generally speaking, individual sanctions are much more severe and therefore also endowed with higher deterrent power than corporate ones. Except for possibly tender bans, only in extreme cases an antitrust sanction will drive the business out of the market. Contrariwise, the disqualification may deprive the individual of her means of subsistence.

To address the question of legitimacy, the most important element identified by commentators is the link between the anticompetitive infringement and the director's conduct. A robust connection between the two, even when it is only based on the duty of care of the director who should have known about the infringement of competition law, guarantees and safeguards the legitimacy of the sanction (Whelan, 2021[18]).

In Re Property Group,[50] the court also looked at the question whether the disqualification order was compatible with Article 8 of the European Convention on Human Rights (ECHR). Article 8 ECHR provides the right to respect for private and family life. In its second section, it states that

> *There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.*

The court noted that Article 8 ECHR is a qualified right, allowing to impose restrictions on individuals in accordance with the law if the restriction is necessary and proportionate. It therefore found that the restriction was justified by the aims of protecting the public from misconduct, provide general and specific deterrence, and maintain or improve the standards of corporate management and that its application achieved the fair balance of proportionality.[51]

2.6.5. May be costly and burdensome to identify individual liability

It can be costly and burdensome for the competition authority to assess and collect evidence to prove the individual responsibility of the director or to establish that the director contributed to the competition law violation or should have known about it.

This is relevant, in particular, in two scenarios. First, when the authority does not normally focus on individual responsibility (criminal or otherwise) and may be relatively unequipped to collect such evidence. When that is the case, it may feel like a double effort to instruct the case against the company as well as the relevant individuals, although many powers of the authority will be of use for both investigations (for instance, the power to search the private computers or mobile phones of directors and managers).

Second, it may be more burdensome to have to identify the individual responsibility of the director in those cases where it is the agency requesting an order to the court and the standard of proof that is needed to convince the court is particularly high or the evidence is scarce.

To the extent that the standard of proof for the collection of such evidence is the civil standard of the balance of probabilities, however, the authority is allowed to rely on circumstantial evidence when it can unequivocally be interpreted as linking the anticompetitive conduct to the individual responsibility. Further, in jurisdictions where the application of this sanction has been more frequent, such as the UK and Hong Kong, China, the condition for the application of the sanction include responsibility by omission (the director "*took no steps to prevent*" the infringement) or even automatically by duty of care (the director "*ought to have known"* that the conduct constituted an infringement even if he did not know about it).

While it has been a source of concern in some jurisdictions at the time of reforms considering the introduction of this sanction (see Box 3 below), the ability to provide evidence of one of such conditions seems relatively high and should not be a hindrance to the applicability of this sanction in those systems where the standard is not too high. It is also typically a much lighter burden than a criminal investigation.

Further, sometimes the disqualification is offered as an undertaking directly by the concerned individual to negotiate a shorter term. When this is the case, or when it is part of a negotiation with the authority in the context of a leniency application, the challenges of proving individual liability are clearly less sharp (although those of identifying individual liability remain).

Box 3. Potential reasons for non-use or non-adoption of director disqualification

After a few years of its introduction in 2003, the predecessor of the CMA, the Office of Fair Trading (OFT) had not made much use of the tool of director disqualification in practice. In 2010, at the occasion of a public consultation, the OFT noted that it had not made use of its powers to apply competition disqualification orders (CDOs)

> *[…] for a number of reasons – for example because the conduct in question pre-dated the CDO power, because the relevant individuals benefited from immunity from CDOs under the leniency regime, or because of a lack of evidence.*

In 2010, a review of the penalty system in Switzerland was considered, including the introduction of individual sanctions for natural persons responsible for anticompetitive infringement. These encompassed administrative measures, such as partial or total bans on practising a specific professional activity for a set duration in the company involved in the cartel and confiscation of the cartel gains, or criminal measures, including prison sentences.

The Swiss Parliament ultimately rejected the proposal. According to the OECD Contribution by Switzerland in the Roundtable on Sanctions in Antitrust Cases (2016), possible reasons included:

- Lack of deterrent effect, due to the complexity, costly and long investigation required to identify personal responsibility and potential lack of evidence;
- Difficulty of coordination with leniency programmes;
- Risks of jeopardising the investigation against the company, if the investigation is conducted in parallel against the individual, as this could dissuade individuals from coming forward with evidence and information;
- Risk of displacement of responsibility, given that it is typically also the company and not only or not necessarily the individual employee, which benefits from the material gains of the cartel activity;
- Strain on resources, due to the need for additional staff to pursue such investigations.

In Latvia, the possibility of granting the Competition Council the right to impose liability on company officials was also assessed. However, the Ministry of Justice rejected the proposal on grounds that such power would not comply with the national legal system.

Sources: Survey answers from the countries; P. Whelan, The Emerging Contribution of Director Disqualification in UK Competition Law, in B. Rodger, P. Whelan and A. MacCulloch (eds.), The UK Competition Regime: A Twenty-Year Retrospective, Oxford University Press (2021); OECD, Contribution by Switzerland (2016), Sanctions in Antitrust Cases, Global Forum on Competition, https://one.oecd.org/document/DAF/COMP/GF/WD(2016)48/en/pdf.

2.7. The effectiveness and use of competition disqualification

Noting that many of the challenges described in the previous section do not appear to be insurmountable, this section will focus on solutions to the practical issues associated with the application of director disqualification sanctions and on how competition authorities can best make use of them to maximise their effectiveness.

It is apparent from the analysed jurisdictions that, so far, competition disqualification has been used often as an alternative, milder and swifter sanction than criminal sanctions and as a complement to other corporate sanctions.

With general deterrence, the minimization of the risk of recidivism and the protection of the public interest as its main objectives, it has become more widespread in those jurisdictions where criminal sanctions are either not available or difficult to apply, in order to enhance the effectiveness of the competition enforcement system.

The power to request a disqualification order and to accept a disqualification undertaking has been given to the CMA in 2003, but it was not used until 2016. Since then, the UK competition authority has been one of the most active users of such power, making use of it with at least 25 directors to date.[52] It is to be noted that the vast majority of those disqualifications were obtained in the form of binding undertakings, rather than application for an order, allowing individuals to benefit from typically shorter disqualification periods.

Another jurisdiction quite active in making use of this instrument is Hong Kong, China, which places a strong focus on individual sanctions for effectiveness purposes. The Commission has already asked the Tribunal to grant disqualification orders in several occasions (Pollard and Gooi, 2020[37]).

This also suggests that, amongst their many functions, disqualification orders may also boost the effects of leniency programmes, strengthening their deterrent effect, when well-coordinated with them in a given jurisdiction. They may in practice incentivise the instigators of an anticompetitive conduct to bring evidence and co-operate with the authority during the investigation in exchange for a shorter disqualification, thus

making them "compete" with the company and other directors in the race through the authority's door for the negotiation of a favourable treatment.

Another reason why the use of disqualification may be particularly helpful in fostering a good competition environment is the important role that it plays in making companies invest resources in compliance, and ensure they have compliance programmes in place to prevent the risks of individual responsibility of the managers for the respect of competition law (Khan, 2012, p. 99[23]). This may involve, for instance, risk assessment, prioritisation, mitigation, transparency, monitoring, training and reporting (see for a fuller analysis of compliance programmes (OECD, 2021[38]).

2.7.1. Interlocking directorates and disqualification

As the main feature of disqualifications is their efficiency in eliminating a specific individual from the market's operation for a certain duration, another interesting and largely under-explored aspect is their suitability to deal with cases where the anticompetitive conduct resulted from interlocking directorates between competitors.

This is even more important, given the fact that, in many jurisdictions, competing companies are not prevented under competition law from having common board members, with the exception of conflicts of interest and limitations in the number of seats that can be held by the same individual (usually under company law). This is typically the case in the EU and in European Member States (Thépot, 2022[39]).

A notable exception is Section 8 of the US Clayton Act, which prohibits individuals from serving simultaneously as directors or officers in two competing companies with capital above a certain threshold.[53]

Earlier this year (September 2022), the US Department of Justice issued in fact several letters to companies and individuals, announcing actions under Section 8 of the US Clayton Act,[54] and seven directors already quit their functions in boards of market intelligence, software and tech companies to assuage antitrust concerns.[55] This comes after Assistant Attorney General Kanter announced in a speech in April 2022 the intention to scrutinize interlocking directorates more thoroughly, also outside of merger review:

> *"I want to say clearly that we are committed to litigating cases using the whole legislative toolbox that Congress has given us to promote competition. One tool that I think we can use more is Section 8 of the Clayton Act. Section 8 helps prevent collusion before it can occur by imposing a bright-line rule against interlocking directorates. For too long, our Section 8 enforcement has essentially been limited to our merger review process. We are ramping up efforts to identify violations across the broader economy, and we will not hesitate to bring Section 8 cases to break up interlocking directorates."*[56]

The anti-competitive effects of interlocks may stem both from the increased ability to collude enabled by such connections, as well as the reduced incentive to compete on markets characterised with numerous social and corporate links. They can be direct or indirect (for instance, when different directors are appointed to sit on the board of competitors by the same firm) and they can facilitate coordination between competing companies, as well as the exchange of competitively sensitive information. In very concentrated economies and in smaller countries, the power of the networks and connection of some individuals may well pervade entire sectors. They are also particularly likely to arise in digital and tech companies, because of the speed at which these firms change business models, commercial strategies, and production.[57]

As they centre on the role of the individual, director disqualification may be particularly valuable in addressing such practices and eliminating further risks for the duration of the disqualification. For these reasons, their application may be seen with favour by those competition authorities that operate in economies that are smaller or more vulnerable to interlocks, even when they do not enforce a prohibition of interlocking directorates, as a way not only to capture *ex post* these practices, but also to prevent risks of recidivism for the future.

2.8. Preliminary conclusions

While their actual impact on deterrence is very hard to measure, it seems possible to preliminary conclude that disqualification sanction may function particularly well for general and specific deterrence, as well as the preservation of public corporate integrity, in those cases where the following conditions are met:

The 7 conditions of the effectiveness of director disqualification

- Disqualification is applied to the most severe forms of competition infringements or those with higher negative impact (albeit not limited to cartels);
- Its application is considered as a standalone sanction, but also as a complement to criminal sanctions and other forms of sanctions;
- The standard of proof to show a link between the anticompetitive infringement and the director's conduct is not too difficult to meet (civil standard of proof);
- The decision-maker (authority or court) has some margin of appreciation as regards the element of culpability of the director;
- They are well-coordinated with leniency programmes (providing immunity to the director of the first-through-the-door company) so as to boost their effectiveness;
- They are used to foster an environment of competition culture and compliance, where companies are incentivized to prevent risks and promptly address mistakes, and the authority can invest advocacy resources to disseminate information about individual and corporate sanctions;
- Authorities make the most of their preventative nature, in addition to their punitive one, by fully exploiting their effectiveness in eliminating a specific individual from the company's market operations for a certain period (for example, when anticompetitive conduct arises from interlocking directorates between competitors, thus addressing the future risk of collusion in addition to addressing it *ex post*).

3. Bidder Exclusion in Competition Enforcement

The second type of debarment sanctions discussed in this paper is bidder exclusion, which is, as explained above, applied to firms that are found to have participated in collusive practices relating to procurement, or bid-rigging. Bid-rigging is generally seen as one of the most harmful competition violations, in that it distorts competition and inflates the price of products, thus wasting public money and delivering lower quality and choice to citizens.

Key Points on Bidder Exclusion in Competition Enforcement across Jurisdictions

- Over 25 jurisdictions apply this sanction, as can be seen in Annex B. The sanction is also used by international organisations, such as the World Bank and the UNCHR.
- The table clarifies that the sanction is typically applied for bid rigging practices and that the decision about the exclusion is more often in the hands of the procurement or contracting authority, rather than the competition authority.
- A very popular option is the exclusion of the bidder from all tenders by the same contracting authority, but in some jurisdictions the bid rigging companies is excluded from public procurement altogether for a certain period of time.
- The length of the exclusion varies considerably, with lengths of 3 or 5 years being particularly common but going up to 8 or 10 years in some cases.
- The possibility to offer self-cleaning and risk-management measures is also relatively widespread.

As also evident from the table in the Annex, the scope and the purpose of the sanction, as well as how it is applied, differ from one jurisdiction to another. These elements are explained in turn below, followed by a discussion of the advantages and disadvantages of bidder exclusion compared to other types of sanctions, and some practical issues in implementing bidder exclusion.

3.1. The objective of bidder exclusion as a sanction

In general, debarment sanctions aim to attain the maximum deterrent objective as well as the maximum public interest benefits, whilst minimizing the costs of law enforcement and the cost to society of the imposition of the sanction. There are different takes, and a lack of homogeneity, as regards the definition of the objective of the debarment sanction in public procurement.

Some commentators note that the objective of this sanction is a combination of preventive and repressive (Maillo, 2022[40]; Dixon, 2020[41]). Others consider that, while there is some degree of divergence between

different jurisdictions, recurrent objectives include general and specific deterrence (preventing recidivism), as well as preserving the integrity of public tenders or pursuing certain public policy objectives.

In the US, for example, the debarment of the bid rigging contractor has been considered to protect public spending from reputation, performance and fiduciary risks (Yukins and Kania, 2019[42]). Firms that are blacklisted may face an important loss of reputation, as well as loss in shareholder value. This may in turn lead to the "shareholder activism" effect, where major shareholders and the board of directors of a firm push for compliance with competition law (OECD, 2011, p. 149[43]). This would result in the benefits associated with self-cleaning, discussed below.

Further, a jurisdiction may employ bidder exclusion to send a general message to investors (whether current or potential) and consumers that procurement processes are free of any practices that are contrary to the public interest.

Similarly, bidder exclusion may be employed to simply ensure that firms that are eligible to bid for future public procurement contracts are not engaged or suspected to be engaged in cartel activity. This preserves the integrity of public procurement contracts, the development of the procurement process and, more simply, the quality of the goods chosen. Where provided, the "public integrity" objective is interpreted "*as a means to ensure compliance with the principles of equal treatment and competition in the award procedure, as well as ensuring the integrity, reliability and suitability of the future contractor to perform the contract".*[58]

3.2. Different types of bidder exclusion

The application of bidder exclusion as a sanction can take multiple forms.

3.2.1. The entity proposing or applying the bidder exclusion

A first element of great significance is the legal framework in the context of which the sanction is provided and the power that the competition authority has in the procedure. Most jurisdictions include bidder exclusion as a sanction in their public procurement laws rather than their competition laws. For these reasons, different entities or authorities may apply the sanction: the competition agency, the public procurement authority, the contracting agency, or the courts.

For instance, in Italy, the public procurement authority is responsible for imposing debarment for bid-rigging. In the United States, only the contracting agency can impose a suspension or debarment sanction, while the Procurement Collusion Strike Force (PCSF), composed of the Antitrust Division of the Department of Justice, Attorneys' Offices and other federal agencies, can only advise and cooperate with the contracting agency.[59] In other jurisdictions, only the court can issue a debarment order, while a state agency, such as the competition authority or the public procurement authority, will monitor its implementation. In other jurisdictions, the competition authority can trigger the procedure via another competent authority, typically a public procurement contracting board. In some jurisdictions, like Portugal and Brazil, the procedure is in the hands of the competition authority. The extent of co-operation between different government agencies in this matter can also have implications on the effectiveness of bidder exclusion and will be discussed below.

3.2.2. Automatic and discretionary application

A second important element is whether bidder exclusion is applied as an automatic sanction or is discretionary. In the former case, it is automatically applied by the responsible authority regardless of the specifics of the case or the market. In the latter case, there is typically an assessment by the responsible authority about whether the grounds for debarment are met and if the debarment is in the public interest.

For instance, the Hungarian Public Procurement Authority can choose to ban a firm from participating in future bids only if they are convicted and fined for the same practice. In Germany, according to Section 6 of the Competition Register Act, contracting agencies offering contracts with a value of EUR 30,000 or above must check the register of black-listed companies kept by the Federal Cartel Office to ensure that the provider of the best offer is not on the list. If they are, the contracting agency "*shall on its own responsibility and in accordance with the provisions under procurement law decide on the exclusion of an undertaking from participating in the procurement procedure*".[60]

In other cases, the discretion of the applying entity is more limited. The Anti-Monopoly Office of the Slovak Republic applies this sanction automatically for a maximum of three years. In South Korea, firms that receive five "penalty points" for bid-rigging over five years are automatically disqualified from participating in bids.

Box 4. Debarment and the World Bank Group (WBG)

Under the WBG Sanctions System, the WBG can ban private firms and individuals from procurement processes held for its operational lending and development activities. The WBG Sanctions System allows for the discretionary exclusion of individuals or firms found guilty of collusion, following a two-tier adjudicative system. This system has been applied since 1999 to the WBG and its institutions: the International Bank for Reconstruction and Development (IBRD), the International Development Association (IDA), the International Finance Corporation (IFC), the International Centre for Settlement of Investment Disputes (ICSID), and the Multilateral Investment Guarantee Agency (MIGA). The purpose of this sanction is to ensure that the WBG upholds its duty to ensure that the funds entrusted are used for the purposes intended.

If a firm is suspected to have carried out collusive behaviour, or other behaviour sanctionable through bidder exclusion, the WBG's Integrity Vice Presidency will refer the case to initiate the process. In the first tier, the Chief Suspension Officer decides on sanctions relating to the activities of the IBRD and the IDA, while institution-specific Evaluation and Suspension Officers review cases related to the activities of the IFC, MIGA, and the WBG's private sector activities. In the second tier, the WBG Sanctions Board decides on cases appealed from the first tier. During the decision process, the potentially violating firms are automatically suspended until proceedings are completed.

The debarment period can last for three years (but may vary depending on aggravating and mitigating factors) and covers all contracts with any WBG institution and any organization whose activities are financed by the WBG. However, it may be limited to certain activities within the firm rather than all the firms' activities. It also may apply to affiliates of the firm and may extend to the individuals who own or operate the firm.

The WBG hosts a public list of excluded suppliers. Since 1999, more than 1 000 firms and individuals have been debarred by the WBG (this figure includes debarment for bid-rigging and for other sanctionable offences, such as corruption).

Other international organisations, such as the United Nationals High Commissioner for Refugees (UNHCR), also employ analogous systems of exclusion of suppliers. The UNHCR may, for example, exclude suppliers for three to five years, following a breach of the UN Supplier Code of Conduct.

Source: WBG, Global Suspension and Debarment Directory, 2021. Available at: https://www.worldbank.org/content/dam/documents/sanctions/office-of-suspension-and-debarment/other-documents/Global%20Suspension%20and%20Debarment%20Directory.pdf.

In the EU system, for example, Article 57 of Directive 2014/24 on public procurement states that contracting authorities may exclude firms that have entered into agreements with other economic operators aimed at

distorting competition. The Bid Rigging Exclusion Notice by the European Commission of March 2021 clarifies that "*sufficiently plausible indications*" that contractors have entered into agreements to distort competition may include "*all facts it is aware of that could call into question the reliability of that tenderer as a potential future contractor*".[61] Details about these factors will be provided below.

When suspicion of a lack of reliability of the tenderer is sufficient to lead to its debarment, like in the EU, or when the process for debarment is discretionary, like in the US, the deciding entity typically has a significant amount of discretion, although this discretion is delimited by the grounds for debarment, the factors to be considered in the assessment, and the procedural safeguards of the debarment process. As noted by Yukins and Kania (2019[42]),

> *A suspension and debarment official (especially in the larger customer agencies) is frequently a senior, respected official (and often an attorney) with substantial experience in procurement. Furthermore, because of the complicated nature of these proceedings, which may involve complex misconduct, an extended investigation and layers of remedial measures, these suspension and debarment officials (depending on the agency) may be supported by a dedicated staff of subordinate officials, themselves often with training in procurement and the law. The suspension and debarment officials can exercise enormous authority, and the function is treated quite seriously in the US federal procurement community.*

3.2.3. Duration and sectors covered by the ban

A third important element is the way in which the sanction will be applied, whether the firm will be banned from future tenders of the same entity or the entire market, what types of contracts it will no longer be able to bid for, and for how long.

For instance, in Chile, companies participating in horizontal agreements, including bid-rigging, can be banned from contracting "*with bodies of the State's centralized or decentralized administration, with autonomous bodies or with institutions, bodies, companies or services to which the State provides contributions, with Congress and the Judicial Branch, as well as [from] being awarded any concession granted by the State*".[62] Other jurisdictions, such as Austria and Sweden, employ the sanction in a narrower fashion, by barring the firm from contracting with the entity they were found to commit bid-rigging with.

The duration of the debarment sanction also varies significantly, as seen in the Table in the Annex B, ranging from months (like it is the case for suspension in the United States) to a maximum of a decade (like in Canada and Costa Rica).

The above factors have important implications for both the effectiveness of debarment as a sanction and its effects on the market (see, further, below).

3.3. Scope of application of bidder exclusion and its effectiveness

Bidder exclusion as a sanction is only deterrent if firms find the risk of being caught and barred from participating in future bids costly, and specifically more costly than the gains of winning the rigged bid. A number of factors affect this cost-benefit analysis, not least the effectiveness of enforcement in a specific jurisdiction. The severity of the sanction, however, is an important component of its deterrence. This may depend on several elements that have to do with the scope of application of the bidder exclusion:

3.3.1. Which companies is debarment applicable to?

This relates to the scope of the ban in terms of which market operators it applies to. The ban may cover the violating firm only but may also extend to cover its parent or subsidiaries. It could also be limited to one line of business of the firm, or to all its business activities.

The scope of the ban is also defined in terms of the role of the market operator involved: the ban may cover all firms involved in the bid rigging cartel, or it may be limited to the ringleader or recidivist.

3.3.2. Which tenders is debarment applicable to?

If the firm is banned from participating in tenders only with the contracting agency the offence occurred or is suspected with, rather than all contracting agencies, the sanction is less costly. The scope of the ban may be therefore defined in terms of procuring entities it applies to, as well as in terms of value of contract: the exclusion may be applied to all contracts, or to those above a certain value.

3.3.3. For how long?

The shorter the duration of the ban, the smaller the disruptive impact on the market, but the less opportunities the firm would potentially lose. The timing may also be, however, of particular relevance to the impact of the sanction, particularly in those industries where bans are opened rarely or following very long cycles (see also below).

3.3.4. What type of product and market?

The effectiveness of the debarment may depend on the investment cycle of the product and how often bids are held in the sector in question. If bids are not held often, or future bids are reasonably predicted to be worth more than the rigged one, then the possibility of winning the one in question would be a relatively significant gain, without much cost incurred in the future.

The impact is also dependent on the number of competitors in the market. If there are many close competitors, the firm is less likely to win future bids, and hence more willing to miss out on the opportunity to participate in them to guarantee winning the current bid.

The extra-jurisdictional operation of the company and effects of the ban are also important. If the effects of the ban are limited to one jurisdiction only, as it is typically the case, but the company operates abroad, the effects may not be as severe for the company. This can also depend on the good or service the firm offers. If it is something the firm can offer in countries where they do not operate, such as if they provide digital software, for example, and if they are only banned from bids in the jurisdiction in which they were sanctioned, then the sanction may not be very costly, as they can enter other bids in different geographical areas. Similarly, for multi-product companies, the sanction may be less severe than for a mono-product one.

The level of competition and well-functioning of the market must also be considered. For instance, sanctions will be less deterrent if there are interlaced issues of corruption, which make bidders also less likely to get caught (Auriol and Søreide, 2017[44]).

These set of factors must be kept in mind in the introduction or implementation of the bidder exclusion sanction (Athayde and Cruvinel, 2022[45]). As with any other sanction, there may be no “optimal” penalty to deter conduct and the effectiveness will also hinge on the effectiveness of general enforcement. Therefore, firms may find bidder exclusion, even if long in duration and wide in scope, not sufficiently deterrent if they believe that they are unlikely to get caught, or if other factors play a role in lessening the harm resulting from the sanction. Moreover, longer and wider bans may lead to an undesirable reduction of market players, as will be addressed below.

Of course, bidder exclusion can be combined with other sanctions, such as fines, imprisonment, or director disqualification. The combination of bidder exclusion with any of these sanctions may mean greater likelihood of the effectiveness of the sanction for the pursued objective. For instance, if a shorter ban is unlikely to be sufficiently deterrent, or if it is unlikely that there will be other bids in the near future, the combination of fines with bidder exclusion should be a greater deterrent for potential violators than bidder exclusion alone.

3.4. Self-cleaning or risk-management mechanisms

In many jurisdictions, such as the EU and its Member States, an economic operator subject to exclusion may be re-admitted to the market if it implements specific remedial measures, called "self-cleaning measures". These measures are aimed at proving the "reliability" of the market player to allow it to access the market again. Because of the important consequences it may have on the bidding landscape, exclusion needs to be used in a targeted and proportional way which minimises distortive effects on the market. For these reasons, contracting authorities in the EU are requested to weigh up whether there is enough evidence of collusion to exclude the tenderer, but also to consider proposals to avoid exclusion or rectify its wrongdoing. This includes:

- Compensating any damages related to the infringement;
- Sufficiently co-operating in the investigation;
- Taking concrete measures to prevent further infringements.[63]

Measures may concern "technical, organisational and personnel" aspect that are needed to ensure compliance in the future by the firm.[64]

While self-cleaning measures are not necessarily formulated to limit *ex ante* the application of bidder exclusion as a sanction, they may provide a mechanism in which the sanction is used with minimal impact on market distortion and without reducing the number of competitors. The threat of being excluded, or its application for a short duration, is maintained, while the firm also changes their behaviour in order to be more compliant with competition law.

In some jurisdictions, like in the US, rather than remedying a specific conduct to the purposes of avoiding or shortening exclusion, like in the EU, companies are required to engage in a holistic effort to address the risks for the government of contracting with an unfit partner. In the US, the tenderer will not propose new remedies in the context of the specific violation, but rather offer a tailoring and improvement of an existing system of controls. This tailoring and improvement activity is typically largely guided by government officials, in the context of the investigation and negotiation that follows the finding of infringement by the tenderer (Yukins and Kania, 2019[42]).

In other jurisdictions, such as Italy, Greece and Germany, companies may include director disqualification as part of their compliance programmes or self-cleaning measures submitted to the procurement authority in the context of an assessment of the grounds for bidder exclusion for a competition infringement.

Not only should these measures theoretically lower the likelihood of the firm to participate in bid-rigging in the future, but it may also reduce the probability of the firm partaking in any antitrust violation. They may help achieving the deterrent goals of the bidder exclusion sanction, as well as those relating to public policy and preserving integrity. This is also why "*debarment can facilitate a culture of compliance by encouraging companies to take control of their own risk management and remediation*" (Dixon, 2020[41]).

Self-cleaning and risk-management measures can play an integral role in achieving the objective of the bidder exclusion, as well as its effectiveness as a sanction.

4. The effectiveness of bidder exclusion in public procurement

There are a few practical challenges that emerge in relation to the application of bidder exclusion in public procurement. Some have to do with the procedure and the assessment by the applying authority to exclude a player, others with its effects on the market.

4.1. Challenges relating to the assessment in a bidder exclusion procedure

It is recognised that, like for director disqualification, the standard of proof traditionally applied to the assessment in a bidder exclusion is the "more likely than not", "preponderance of evidence" standard. It is for the administration in charge of the application of the exclusion to typically prove the existence of grounds for exclusion (Dixon, 2020[41]).

Since the assessment before the exclusion is usually a prospective exercise meant to preserve the good development of a future tender process, its discretionary nature has the advantage to enable the adjudicator to determine the potential risks and the link between the conduct or suspected conduct and the public interest. This, of course, does not mean unbridled arbitrariness, since

> *Broad discretion vested in agency officials without accompanying comprehensive guidelines can lead to ad hoc decision-making, resulting in perceived illegitimacy of the regime […]. To avoid overreach, any discretionary debarment regime therefore needs to include a combination of rules and guidelines which incorporate appropriate due process considerations, mitigation factors based on satisfactory evidence of 'self-cleaning' and reporting requirements mandating agencies to submit a written rationale justifying any decision not to impose a proposed debarment (Dixon, 2020[41])*

As noted above, in the EU system, contracting authorities may exclude firms from tenders based on 'sufficiently plausible indications' that they have entered into agreements to distort competition. While discretionary, the analysis is delimited by a series of criteria that the contracting authority may consider when deciding whether to exclude a tenderer pending an award. The contracting authority has a right to look at any elements that could shed doubts on the "reliability" of the player. These may include the following:

- the tenderer acts as if it had knowledge that its bid was the winning one (for instance, by concluding a relevant subcontracting agreement or placing orders that would help execute the tender once awarded);
- the behaviour of the tenderers;
- similar typos or clerical errors in the bids;
- any anomaly in the price of the bids (such as too high or too low);
- any commonality among the bids (similar handwriting, or same legal representatives, etc.)

4.2. Challenges relating to the market impact of the debarment decision

One of the biggest challenges relates to the risks of negative consequences on the market in the medium to long-run, particularly as regards the decreased number of market players in the market and the effects on competition for future tenders. This challenge may always present itself, but the problem may be particularly acute in small countries, where some markets are even more likely dominated by a small number of firms. This issue may also likely present itself in conjunction with interlocking directorates (see more details above).

In fact, bidder exclusion may be completely impractical in oligopolistic markets. Markets with few market players, due to the existence of regulatory, strategic, or behavioral barriers to entry, may be significantly harmed from bidder exclusion. Reduced competition, may, depending on market structures and dynamics, lead to higher prices and lower quality products (OECD, 2016, p. 4[45]).

According to empirical evidence, many sectors of the economy where public procurement is commonplace, such in water supply, sewerage, road construction, electricity, and other utility supply, are characterised by low average number of bidders, sometimes as low as two or three. While this is, of course, by itself no indication that low levels of competition for the contracts are present, it may represent an issue if one of the relevant players is excluded from bidding for a long period of time.

It should also be noted that the paradox of bidder exclusion is that it has significant effects on the markets and the tender processes where the intensity of competition is presumably lower (because otherwise the collusive practice would have been highly unstable, or the companies would have had difficulties reaching a bid rigging agreement). This means that, once applied, it may risk contributing to lowering competition further or increasing concentration further in the market.

Due to the nature of this sanction, judicial review on the exclusion decision also have important effects on the market. Overturning a decision to exclude a player from the market may be very difficult to undo and have lasting effects on market players and consumers, especially if the court overrules the decision towards the end or after the expiration of the debarment period.

For all these reasons, some jurisdictions may choose to apply reward systems rather than debarment to deal with the infringement (see, for instance, Italy) or to use individual sanctions to punish the involved individuals, including director disqualification. In the words of (Auriol and Søreide, 2017[44]),

> *With few bidders, governments may find that they cannot afford to exclude a supplier for the sake of promoting integrity in markets. Such difficulties have led to calls for more flexible rules. Instead of strictly excluding (needed) suppliers, it has become common to reach an (administrative) settlement agreement, an option that gives procurement agencies discretion to list far-reaching demands. In exchange for a shorter debarment period or even complete leniency, a supplier might agree to dismiss managers, accept external monitoring, or make some form or restitution payment.*

Since bidder exclusion can significantly alter the outcome of future bidding processes, one important way to minimise this risk may be to exclude only the ringleader or the instigator of the bid rigging conspiracy, rather than all the participants (see Box X below),[65] or alternatively punish the management, rather than the firm, for example with director disqualification (Auriol and Søreide, 2017[44]). A shorter debarment period may also be considered, although some evidence suggests that debarment sanctions of a quick duration may be linked to tacit collusion among the residual players (Cerrone, Hermstrüwer and Robalo, 2021[46]).

Box 5. Bidder exclusion in Brazil

Brazil's Administrative Council for Economic Defence (CADE) has the power to investigate and punish bid-rigging practices, according to Federal Law No. 12.529/2011 (the Competition Act) and to debar colluding firms. However, some difficulties associated with employing this sanction have naturally arisen.

In two big bid-rigging cases, the Metro cartel case (Administrative Proceeding No. 08700.004617/2013-41) and the Hospital Laundry Services case (Administrative Proceedings No. 08012.008850/2008-94), debarment sanctions were considered by CADE.

In the Metro case, it was found that excluding the majority or all the firms involved would result in the opposite of the intended effect of the sanction: the likely outcome would be that consumers, and the state, would get less value for money in future contracts. As such, only the ringleader, which was also a recidivist, was debarred. In the Hospital Laundry Services case, the Council again found that debarring all firms would cause a shortage of supply, disrupting the market. It considered not applying the sanction at all in that case, but that would have been unsuitable for an extremely serious offence such as bid rigging. In the end, the decision was to debar only the ringleader (Brasil Sul) for five years.

Source: OECD, Fighting Bid Rigging in Brazil: A review of federal public procurement, 2021; Casagrande, The New Brazilian Competition Law – Two Years On, 2014.

When this is a power that it is not in their hands, competition authorities may be very well-suited to advise the decision-maker on the effects on the market of a bidder exclusion.

4.3. Challenges related to the coordination of bidder exclusion with other detection and sanctioning tools

It is possible that the existence of a bidder exclusion ground relating to competition infringements may reduce the incentives of firms or individuals to come forward with information and evidence in the context of a leniency programme. If the company or the relevant individual fear that the consequences of debarment will still be applied to them, as immunity from the exclusion sanction will not be guaranteed, the enforcement benefits associated with leniency are undermined.

The effectiveness of the bidder exclusion sanction may thus depend on the extent of cooperation between different state entities involved in its application (competition authority, public procurement authority, contracting authority or judiciary). In the United States, for example, while only the contracting federal authority can issue a debarment or suspension sanction, the competition authority can report firms qualifying for debarment to the former, and it can advise federal contracting authorities regarding plea deals it has reached with violating firms (OECD, 2016, p. 5[47]). The Procurement Collusion Strike Force (PCSF), which brings together the Department of Justice (DoJ), the FBI, Attorneys' Offices and other federal agencies, is an example of co-operation between governmental entities to fight collusion in public procurement.[66]

Stricter forms of co-operation across jurisdictions could also increase the effectiveness of the bidder exclusion sanctions. This would, however, require, in addition to high levels of international co-operation and mutual recognition of sanctions, also that jurisdictions applied bidder exclusion sanctions in a similar manner and with the same level of respect of procedural safeguards. It would also require similar market conditions. For instance, if a bidder exclusion is employed in one jurisdiction because it is mandatory,

another jurisdiction may not be willing to apply it if it is discretionary there and if the same market in that jurisdiction is significantly more concentrated.

Bidder exclusion is a powerful sanction in promoting competition and integrity in public contracts. However, its effectiveness can be undermined by some factors, which should thus be taken into consideration by authorities applying or monitoring the sanction. The main disadvantage of bidder exclusion is that it reduces the number of market players competing for procurement contracts, thus limiting competition.

The risk can be averted by carefully designing the bidder exclusion sanction in terms of duration and scope, as well as by attentively tailoring its application to the market circumstances, preferably with the help of competition authorities, and by paying attention to the factors below.

Box 6. Checklist for the assessment of the suitability of bidder exclusion

The following checklist may be adopted by contracting authorities, public procurement agency, or other entities when deciding to apply a bidder exclusion to minimise harm to competition:

- Are there any alternative sanctions to bidder exclusion that may be equally or more effective? These may include:
  - Criminal sanctions
  - Corporate or individual fines
  - Director disqualification
- If not, is the market oligopolistic? Is this market characterised by any following factors?
  - Small number of suppliers
  - High barriers to entry (regulatory, strategic, behavioural) or high network effects
  - Homogeneous products
  - Closeness of competition
  - Parallel or interdependent behaviour by players (intelligent adaptation to the commercial strategy of competitors)
  - Presence of economic, contractual, and structural links which enable parallel behaviour (including cross-shareholding and interlocking directorates)
  - High transparency on prices
- If the market is oligopolistic, is any of the following a viable option:
  - can only one of the participants (ringleader or instigator) to the bid rigging scheme be excluded?
  - is it possible and effective to limit the disqualification to a company subsidiary, a specific division or branch?
  - is it possible and effective to limit the disqualification to only a specific contract value, specific market or specific contracting authority?
  - is it possible and effective to shorten the duration of the disqualification?
  - what self-cleaning or other risk-management measures would make it possible to safely allow the relevant operator to access future bids?
  - is it possible and effective to use alternative tools to address the infringement (e.g. reward systems)?

5. Conclusions

It emerges from the present analysis that the described debarment sanctions (director disqualification and bidder exclusion) differ substantially in both their functioning and their consequences. They present, however, significant commonalities as regards:

1. **Their objectives**. They are specific forms of sanctions that find their rationale in general and specific deterrence, but also in safeguarding public interest. This latter objective is an important distinguishing feature compared to other sanctions. It allows the decision-maker to transcend the specific circumstances of the case to look for an ulterior motive for their application, and it endows their use with particular public policy significance, which makes them particularly well-suited for the promotion of competition awareness and other advocacy activities.
2. **Their complementarity**. Having some overlapping but also some distinguishing features compared to other individual and corporate sanctions, debarment sanctions function well to fill the gaps and combine forces with other tools present in a specific jurisdiction and magnify both sanctioning and deterrent effects.
3. **Their flexibility**. The discretionary assessment they involve makes them particularly effective in enhancing the strength and assuaging the weaknesses of a particular enforcement system. They are therefore best used when they are tailored to the consequences of a specific anticompetitive conduct. This means not only carefully adapting their scope of application and duration to the specific case, but also considering the personal circumstances of the individual (e.g., proximity to retirement, role in the conduct, eventual interlocks for director disqualification), and the way in which they will affect the market (e.g. chances that the excluded company will win future tenders, elimination of significant competition in the market for bidder exclusion). These consequences need to be assessed with care before deciding whether and how to apply these sanctions, preferably under input or consultation with the relevant competition authority.

Endnotes

[1] See more details at https://ec.europa.eu/info/strategy/recovery-plan-europe_en.

[2] See more details at https://www.democrats.senate.gov/imo/media/doc/inflation_reduction_act_one_page_summary.pdf.

[3] OECD, Government at a Glance 2021: "*Public procurement expenditure as a percentage of GDP increased slightly across the OECD over the last decade, from 11.8% of GDP in 2008 to 12.6% of GDP in 2019*".

[4] European Commission Notice on tools to fight collusion in public procurement and on guidance on how to apply the related exclusion ground (2021/C 91/01): *"[collusion] is estimated to increase the costs that public buyers pay compared to what they would pay under normal market conditions by up to 60%".*

[5] Some of these objectives are identified, for instance, by Re Property Group Ltd, CMA v. Michael Christopher Martin, 3 July 2020 [2020] EWHC 1751 (Ch), Case No. CR-2019-001454, https://www.bailii.org/ew/cases/EWHC/Ch/2020/1751.html, para. 110.

[6] UK Office of Fair Trading, The Deterrent Effect of Competition Enforcement by the OFT, 2007.

[7] UK Office of Fair Trading, The Deterrent Effect of Competition Enforcement by the OFT, 2007, also quoted by (Stephan, 2011, p. 532[16]).

[8] See (Stephan, 2011, p. 531[16]).

[9] The register of disqualified directors can be consulted at this link: https://find-and-update.company-information.service.gov.uk/register-of-disqualifications/A.

[10] UK CMA, Guidance on Competition Disqualification Orders, 6 February 2019, CMA102, https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/910485/CMA102_Guidance_on_Competition_Disqualification_Orders__FINAL__PDF_A-.pdf, para. 2.1.

[11] FTC v. Shkreli, 581 F. Supp. 3d 579, 637 (S.D.N.Y. 2022).

[12] Hong Kong, China Competition Ordinance (Cap 619) to prohibit conduct that prevents, restricts or distorts competition in Hong Kong, China; to prohibit mergers that substantially lessen competition in Hong Kong, China; to establish a Competition Commission and a Competition Tribunal; and to provide for incidental and connected matters, 18 January 2013, available at https://www.elegislation.gov.hk/hk/cap619!en@2018-04-20T00:00:00.

[13] Agnieszka Lisiecka, Katarzyna Wójcik, Tomasz Wardynski/ Krzysztof Filinski, National Report to the European Commission, https://ec.europa.eu/competition/antitrust/actionsdamages/national_reports/poland_en.pdf, p. 6.

[14] Norton Rose Fulbright, What are the risks for directors of being disqualified for competition law breaches, July 2017, https://www.nortonrosefulbright.com/en-gb/knowledge/publications/32b8b414/what-are-the-risks-for-directors-of-being-disqualified-for-competition-law-breaches.

[15] https://ec.europa.eu/competition/antitrust/actionsdamages/national_reports/estonia_en.pdf, p. 5.

[16] A&L Goodbody, Competition law offence - disqualification from acting as a director of an Irish company, https://www.algoodbody.com/insights-publications/competition-law-offence-disqualification-from-acting-as-a-director-of-an-ir.

[17] See Article 62 of the Competition Act (Law Decree no. 211).

[18] In the Irish regime, a summary offence is typically dealt with by a single judge without a jury. They are typically less serious offences. An indictable offence is one that can or must be dealt with by a judge and a jury and is typically more serious.

[19] UK CMA, Guidance on Competition Disqualification Orders, 6 February 2019, CMA102, https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/910485/CMA102_Guidance_on_Competition_Disqualification_Orders__FINAL__PDF_A-.pdf, para. 2.5. Due to Brexit, the possibility to rely on the UK and EU competition law remains available for conduct that has taken place before 1 January 2021. See, for more details, Joanna Christoforou, Frances Murphy, Michael Zymler, The Impact of Brexit on UK Competition Law Cases, Morgan Lewis, 18 March 2021, https://www.morganlewis.com/pubs/2021/03/the-impact-of-brexit-on-uk-competition-law-cases.

[20] ICM, Competition law research 2018, A report by ICM on behalf of the Competition and Markets Authority, https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/750149/icm_unlimited_cma_competition_law_research_2018.pdf, p. 28.

[21] As noted by (Whelan, 2013, p. 179[24]) with respect to custodial sentences for cartel participation, however, "*It seems from experience in Ireland that, in appropriate cases, juries are prepared to convict cartelists and to subject them to the possibility of a custodial sentence*".

[22] https://hsfnotes.com/crt/2022/05/10/uk-government-publishes-its-proposals-for-a-new-pro-competition-regime-for-digital-markets/; https://www.techuk.org/resource/dcms-sets-out-its-plans-for-a-new-pro-competition-regime-for-digital-markets-how-will-it-impact-the-tech-sector.html.

[23] See Article 127(X) of the Federal Economic Competition Law of 2015.

[24] See, for instance, Section 103(2) of the Competition Ordinance of Hong Kong, China, https://www.elegislation.gov.hk/hk/cap619?xpid=ID_1438403534955_001; UK CMA, Guidance on Competition Disqualification Orders, 6 February 2019, CMA102, https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/910485/CMA102_Guidance_on_Competition_Disqualification_Orders__FINAL__PDF_A-.pdf, para. 4.5; Article 40 of the Lithuanian Law on Competition 23 March 1999 No. VIII-1099, https://e-seimas.lrs.lt/portal/legalAct/lt/TAD/49e68d00103711e5b0d3e1beb7dd5516?jfwid=bkaxmycc.

[25] UK CMA, Guidance on Competition Disqualification Orders, 6 February 2019, CMA102, https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/910485/CMA102_Guidance_on_Competition_Disqualification_Orders__FINAL__PDF_A-.pdf, paras. 4.3.

[26] UK CMA, Guidance on Competition Disqualification Orders, 6 February 2019, CMA102, https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/910485/CMA102_Guidance_on_Competition_Disqualification_Orders__FINAL__PDF_A-.pdf, para. 4.4.

[27] Article 40 of the Lithuanian Law on Competition 23 March 1999 No. VIII-1099, https://e-seimas.lrs.lt/portal/legalAct/lt/TAD/49e68d00103711e5b0d3e1beb7dd5516?jfwid=bkaxmycc.

[28] UK CMA, Guidance on Competition Disqualification Orders, 6 February 2019, CMA102, https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/910485/CMA102_Guidance_on_Competition_Disqualification_Orders__FINAL__PDF_A-.pdf, para. 4.6.

[29] Re Fourfront Group, Stamatis and Davies v. CMA [2019] EWHC 3318 (Ch), para. 13, quoting the judgment of Sir Andrew Park in Re Morija plc; Kluk v Secretary of State for Business and Regulatory Reform [2008] 2 BCLC 313, and paras. 18 and 19.

[30] See, for instance, UK CMA, Guidance on Competition Disqualification Orders, 6 February 2019, CMA102, https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/910485/CMA102_Guidance_on_Competition_Disqualification_Orders__FINAL__PDF_A-.pdf, para. 2.3.

[31] See Article 127(X) of the Federal Economic Competition Law of 2015 which provides that: "*The Commission may impose the following sanctions: […] X. Ineligibility to act as an undertaking's board member, manager, director, executive, agent,*

representative or legal representative for a maximum five year period and a maximum fine equivalent to two hundred thousand times the current daily general minimum wage in the Federal District, to those persons who directly or indirectly participate in monopolistic practices or unlawful concentrations, on behalf or on account and order of undertakings". The English version of the law is available here https://www.cofece.mx/wp-content/uploads/2018/03/Federal_Economic_Competition_Law.pdf.

[32] UK CMA, Guidance on Competition Disqualification Orders, 6 February 2019, CMA102, https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/910485/CMA102_Guidance_on_Competition_Disqualification_Orders__FINAL__PDF_A-.pdf, p. 3 fn. 6.

[33] Article 22(2), 1986 UK Company Directors Disqualification Act.

[34] UK CMA, Guidance on Competition Disqualification Orders, 6 February 2019, CMA102, https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/910485/CMA102_Guidance_on_Competition_Disqualification_Orders__FINAL__PDF_A-.pdf, para. 4.10.

[35] See, for instance, UK CMA, Guidance on Competition Disqualification Orders, 6 February 2019, CMA102, https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/910485/CMA102_Guidance_on_Competition_Disqualification_Orders__FINAL__PDF_A-.pdf, para. 4.4.

[36] FTC v. Shkreli, 581 F. Supp. 3d 579, 637 (S.D.N.Y. 2022).

[37] Re Fourfront Group, Stamatis and Davies v. CMA [2019] EWHC 3318 (Ch), para. 44.

[38] Re Fourfront Group, Stamatis and Davies v. CMA [2019] EWHC 3318 (Ch), para. 44.

[39] Linklaters LLP Response to CMA Consultation "Revised Guidance on Competition Disqualification Orders" of 19 September 2018, https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/776636/180919_CDO_Consultation_Linklaters_Response.pdf.

[40] UK CMA, Guidance on Competition Disqualification Orders, 6 February 2019, CMA102, https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/910485/CMA102_Guidance_on_Competition_Disqualification_Orders__FINAL__PDF_A-.pdf, paras. 2.11 and 2.12.

[41] UK CMA, Guidance on Competition Disqualification Orders, 6 February 2019, CMA102, https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/910485/CMA102_Guidance_on_Competition_Disqualification_Orders__FINAL__PDF_A-.pdf, para. 2.14.

[42] This is confirmed, for example, in the UK, where, in the only case where a CDO was granted, Re Property Group Ltd., the judge adopted the civil balance of probability standard. See Re Property Group Ltd, CMA v. Michael Christopher Martin, 3 July 2020 [2020] EWHC 1751 (Ch), Case No. CR-2019-001454, https://www.bailii.org/ew/cases/EWHC/Ch/2020/1751.html, paras. 96 and ss., where the judge stated: "I make the following findings of fact on the balance of probability in the light of the matters above including my assessment of the witnesses […]"; "I am particularly influenced by the fact that on the balance of probability [Mr. Martin] would have wanted to read [the email] to know what the meeting arranged by Ms Darby would cover and why it was needed."; "On the balance of probability, […]"; "I approach mitigation on the basis that subject to the facts not meeting the balance of probability, I should accept those relied upon by Mr Martin unless challenged by the CMA when there would potentially be a need for determination."

[43] Section 9A of the UK Company Directors Disqualification Act 1986.

[44] Section 86E, Part VI of the Competition and Consumer Act 2010 (CCA).

[45] See, for instance, in the UK at this link: https://www.gov.uk/report-a-disqualified-director. In Lithuania, the list of disqualified directors is required by Article 40(6) of the Lithuanian Law on Competition 23 March 1999 No. VIII-1099, https://e-seimas.lrs.lt/portal/legalAct/lt/TAD/49e68d00103711e5b0d3e1beb7dd5516?jfwid=bkaxmycc.

[46] An updated account of the transposition process is available at https://eur-lex.europa.eu/legal-content/EN/NIM/?uri=uriserv:OJ.L_.2019.011.01.0003.01.ENG.

[47] Directive (EU) 2019/1 of the European Parliament and of the Council of 11 December 2018 to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market, OJ L 11, 14 January 2019, p. 3–33, recital 64.

[48] Directive (EU) 2019/1 of the European Parliament and of the Council of 11 December 2018 to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market, OJ L 11, 14 January 2019, p. 3–33, Article 23(1).

[49] Directive (EU) 2019/1 of the European Parliament and of the Council of 11 December 2018 to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market, OJ L 11, 14 January 2019, p. 3–33, Article 23(2).

[50] Re Property Group Ltd, CMA v. Michael Christopher Martin, 3 July 2020 [2020] EWHC 1751 (Ch), Case No. CR-2019-001454, https://www.bailii.org/ew/cases/EWHC/Ch/2020/1751.html.

[51] Re Property Group Ltd, CMA v. Michael Christopher Martin, 3 July 2020 [2020] EWHC 1751 (Ch), Case No. CR-2019-001454, https://www.bailii.org/ew/cases/EWHC/Ch/2020/1751.html, para. 110.

[52] Clifford Chance, At a Glance: Sanctions for Cartel Activity in United Kingdom, Lexology, 26 November 2021, https://www.lexology.com/library/detail.aspx?g=38b9fc7c-d0d3-425b-be47-27bc710558dd; GCR, From the enforcer: Competition and Markets Authority, 27 November 2021, https://globalcompetitionreview.com/insight/enforcer-hub/2021/article/the-enforcer-uk-competition-and-markets-authority.

[53] See the full text at this link https://www.govinfo.gov/content/pkg/USCODE-2020-title15/pdf/USCODE-2020-title15-chap1-sec19.pdf. It must be noted that while Section 8 focuses on corporations and provides for an exception for the banking sector, the interpretation of the US agencies seems in the sense that Section 5 of the FTC Act can reach interlocks that are strictly speaking not covered by Section 8. For this interpretation, see https://www.velaw.com/insights/doj-threatens-more-enforcement-of-the-ban-on-interlocks-under-section-8-of-the-clayton-act/.

[54] Wilson Sonsini, DOJ Launches Enforcement Initiative Against “Interlocking Directorates”, 22 September 2022, https://www.wsgr.com/en/insights/doj-launches-enforcement-initiative-against-interlocking-directorates.html.

[55] Press release of the US Department of Justice, Office of Public Affairs, Directors Resign from the Boards of Five Companies in Response to Justice Department Concerns about Potentially Illegal Interlocking Directorates, 19 October 2022, https://www.justice.gov/opa/pr/directors-resign-boards-five-companies-response-justice-department-concerns-about-potentially; Francesca M. Pisano, DOJ Requires Directors to Resign from Boards to Mitigate Antitrust Concerns Advisory, 28 October 2022, https://www.arnoldporter.com/en/perspectives/advisories/2022/10/doj-requires-directors-to-resign-from-boards.

[56] Assistant Attorney General Jonathan Kanter Delivers Opening Remarks at 2022 Spring Enforcers Summit, Washington, DC, 4 April 2022, https://www.justice.gov/opa/speech/assistant-attorney-general-jonathan-kanter-delivers-opening-remarks-2022-spring-enforcers.

[57] Maria Raptis, David P. Wales, Interlocking Boards: The Antitrust Risk You May Never Have Heard Of, 16 June 2021, https://www.skadden.com/insights/publications/2021/06/the-informed-board/interlocking-boards.

[58] See European Commission, Notice on tools to fight collusion in public procurement and on guidance on how to apply the related exclusion ground (2021/C 91/01), https://op.europa.eu/en/publication-detail/-/publication/6a2458e1-878c-11eb-ac4c-01aa75ed71a1/language-en, p. 12.

[59] https://www.justice.gov/procurement-collusion-strike-force

[60] Section 6 paragraph 5 of the Competition Register Act of 18 July 2017 (Federal Law Gazette I p. 2739) as amended by Article 10 of the Act of 18 January 2021 (Federal Law Gazette I p. 2).

[61] See European Commission, Notice on tools to fight collusion in public procurement and on guidance on how to apply the related exclusion ground (2021/C 91/01), https://op.europa.eu/en/publication-detail/-/publication/6a2458e1-878c-11eb-ac4c-01aa75ed71a1/language-en, p. 14.

[61] See European Commission, Notice on tools to fight collusion in public procurement and on guidance on how to apply the related exclusion ground (2021/C 91/01), https://op.europa.eu/en/publication-detail/-/publication/6a2458e1-878c-11eb-ac4c-01aa75ed71a1/language-en, p. 19.

[62] Article 26(d) of Law Decree No. 211 of 1973 establishing Rules for the Defence of Free Competition.

[63]Article 57(6), Directive 2014/24/EU and European Commission, Notice on tools to fight collusion in public procurement and on guidance on how to apply the related exclusion ground (2021/C 91/01), https://op.europa.eu/en/publication-detail/-/publication/6a2458e1-878c-11eb-ac4c-01aa75ed71a1/language-en, p. 11.

[64] Article 57(6), Directive 2014/24/EU and European Commission, Notice on tools to fight collusion in public procurement and on guidance on how to apply the related exclusion ground (2021/C 91/01), https://op.europa.eu/en/publication-detail/-/publication/6a2458e1-878c-11eb-ac4c-01aa75ed71a1/language-en, p. 11.

[65] This is in line with the OECD's recommendations regarding bid-rigging sanctions in several countries, such as Brazil (2021) and Mexico (2016).

[66] https://www.justice.gov/procurement-collusion-strike-force

Annex A. Table on Director Disqualification

Jurisdiction	Legal reference to director disqualification sanction for a competition infringement	Type of infringement	Disqualification period	Additional information
Australia	Under section 86E, Part VI of the Competition and Consumer Act 2010 (CCA), the Court can make an order disqualifying a person from managing corporations (disqualification order).	The Court can make a disqualification order under s 86E if it is satisfied that: (a) the person has contravened (among other provisions) Part IV of the CCA; and (b) the disqualification is justified. Part IV includes civil prohibitions against cartel conduct, anti-competitive agreements and misuse of market power, as well as criminal offences for cartel conduct.	For a period that the Court considers appropriate, which can range from a short period (such as 1 year) to disqualification 'for life'.	Disqualification orders can be made by the Court on application by the Australian Competition and Consumer Commission (ACCC) for contraventions of Part IV, or by the Commonwealth Director of Public Prosecutions (CDPP) for criminal cartel conduct. If the Court makes a disqualification order under s 86E, the ACCC or CDPP (as relevant) must notify the Australian Investment and Securities Commission (ASIC). There are then various consequences under the *Corporations Act 2001* (Cth) for the person subject to the disqualification order.
Brazil	Article 38, Item VI, of Law 12529/2011.	Anticompetitive agreements or unilateral conduct.	Up to 5 years.	
Canada	Section 34 of the federal *Competition Act*	Offences under Part VI of the federal *Competition Act* (including cartels)	Up to 10 years.	Under subsection 34 (2.1) of the *Competition Act*, a Prohibition Order may require any person "to take such steps as the court considers necessary to prevent the commission, continuation or repetition of the offence" or "to take any steps agreed to by that person and the Attorney General of Canada or the

Jurisdiction	Legal reference to director disqualification sanction for a competition infringement	Type of infringement	Disqualification period	Additional information
				attorney general of the province." This can include terms to prohibit individuals from serving as corporate directors or officers. Director Disqualification can also be part of a negotiated settlement or sentence in a contested proceeding. The Bureau has rarely sought director disqualification in cartel cases. When it has done so, it sought to remove key personnel involved in the offence from their positions *within* the company (rather than prohibiting them from working as a director at *any* company). It is considering creating a Director Disqualification policy.
Chile	Article 62 of the Competition Act (Law Decree no. 211)	Cartels	7 to 10 years.	The sanction is imposed by a criminal court.
Czech Republic	Article 248(2) of the Czech Criminal Code (Act no. 40/2009)	Cartels	According to Article 63(1) of the Act no. 90/2012 up to 3 years.	
Estonia	Article 49 of the Penal Code (Karistusseadustik)	Anticompetitive agreements and abuse of dominant position (abuse of professional or official status or violation of official duties)	Up to 3 years	May be imposed as supplementary punishment
Germany	Under Section 2(1) of the Competition Register Act collusive tendering pursuant to Section 298 of the German Criminal Code shall be entered into the competition register. Collusive tendering can also constitute an infringement of Section 1 of the German	Bid rigging	3 years. But option of central or decentralised self-cleaning exist.	Self-cleaning measures by the firm in the context of bidder exclusion may lead to the disqualification of a director.

Jurisdiction	Legal reference to director disqualification sanction for a competition infringement	Type of infringement	Disqualification period	Additional information
	Competition Act or Article 101 TFEU which shall also be entered into the competition register pursuant to Section 2(2) of the Competition Register Act.			
Hong Kong	Under Section 101 of the Competition Ordinance, the Hong Kong Competition Tribunal may, upon request by the Competition Commission, impose a disqualification order.	Anticompetitive agreements or abuse of dominant position.	Up to 5 years.	
Hungary	If found guilty in a criminal proceeding (e.g., for the participation in an anti-competitive agreement in a public procurement or concession procedure according to Article 420 of the Criminal Code), disqualification from employment / executive positions may be imposed as an additional penalty.			
Ireland	Pursuant to section 839(1) of the Companies Act 2014, read with the Companies Act 2014 (Section 839) Regulations 2016, individuals convicted on indictment of certain competition law offences are deemed automatically disqualified from being appointed or acting as a director, officer or being in any way concerned in company management for a period of 5 years (or for such other period as the Court may order).	Competition law offences pursuant to sections 4 and 6 (entering into anti-competitive agreements, decisions and concerted practices) and sections 5 and 7 (abuse of dominant position) of the Competition Act 2002 (as amended).	5 years (or for such other period as the court may order).	
Israel	Section 226 of the Israeli Companies Law enables the court to disqualify directors that were convicted of a breach of the competition law. This disqualification is alongside the criminal conviction and punishment.	Violations of competition law, according to the language of Section 226.	Up to 5 years (court can apply shorter period)	

Jurisdiction	Legal reference to director disqualification sanction for a competition infringement	Type of infringement	Disqualification period	Additional information
	The ICA is currently considering proposing a legislative reform, under which a person that is convicted of a cartel offence will be debarred automatically from working in any of the other firms that were part of the cartel.			
Japan	Article 331, Paragraph 1, Item 4 of the Companies Act stipulates that a person who was sentenced to imprisonment or more severe penalty without suspension may not act as a director of a company. Such criminal penalties may be imposed for violations of the Antimonopoly Act, only if the Japan Fair Trade Commission files an accusation.	Cartels including bid-rigging and private monopolization	Up to 5 years (until the execution of the sentence has been completed)	
Lithuania	Article 40 of the Law on Competition of the Republic of Lithuania	For a contribution of an undertaking to the prohibited agreement concluded between competitors or abuse of a dominant position.	3-5 years	
Mexico	Article 127, clause X. of the Federal Economic Competition Law (LFCE)	Disqualification from acting as a director, administrator, director, manager, officer, executive, agent, representative or proxy of a legal person to those who participate directly or indirectly in anticompetitive practices or unlawful mergers in representation or by orders of legal persons up to 5 years (plus a fine up to two hundred thousand times the current minimum salary in Mexico City, and provisions for repeat offenders)	Up to 5 years.	COFECE File IO-001-2016: in 2021, The Mexican Federal Economic Competition Commission (COFECE) fined companies and natural persons for collusion in the market for medicine distribution. Ten persons who acted on behalf of the sanctioned companies were disqualified from serving as advisors, administrators, directors, managers, executives, agents, representatives or proxies of said companies, in terms that range from 6 months to 4 years. More information at: https://www.cofece.mx/wp-content/uploads/2021/08/COFECE-022-2021ENG.pdf

Jurisdiction	Legal reference to director disqualification sanction for a competition infringement	Type of infringement	Disqualification period	Additional information
New Zealand	Under section 80C of the Commerce Act 1986, an individual can be prohibited from being a director or managing a company for committing a cartel offence.	Cartels.	Up to 5 years.	The Commerce Commission or Solicitor-General (as applicable) can suggest that an individual be prohibited from being a director or being involved in the management of a company, and the court can apply this sanction.
Norway	Article 56 of the penal code ('straffeloven') on the loss of right to a position or to exercise a certain activity.	Criminal conduct.	Up to 5 years.	
Peru	In 2020, the Peruvian Criminal Code was amended to incorporate as a crime the participation in abuse of dominant position, restrictive practices and agreements of competition, and sanctioned with imprisonment from 2 to 6 years. In addition, the person responsible could be disqualified to be appointed in a public designation or to exercise a profession.	Anticompetitive agreements and abuse of dominant position.	Not specified.	The amendment of the Peruvian Criminal Code was in 2020, but the Law has not been applied yet.
Poland	Providing false information in relation to a competition investigation, for example a merger notified to the Polish Authority, can lead to disqualification.	Concentration creating a monopoly. Providing false information regarding a competition investigation.		
South Africa	The Competition Act No. 98 of 1998 (as amended) does not contain any provision for the disqualification of directors for a competition law infringement. However, it is theoretically possible, following a finding of a competition law infringement, for the South African competition authorities or any interested party, to approach the courts and seek the disqualification of a director under section 69 of the Companies Act 71 of 2008.			

Jurisdiction	Legal reference to director disqualification sanction for a competition infringement	Type of infringement	Disqualification period	Additional information
Sweden	According to the Competition Act (Section 3, article 24) and the Trading Prohibition Act (articles 2, 3, 7-9 and 17), the Swedish Competition Authority can make an application to court for a trading prohibition for persons managing a company involved in cartel activity.	Cartels	3 to 10 years.	
Turkey	According to the Article 235 of Turkish Criminal Code "Any person who acts fraudulently on behalf of a public institution or corporation, in the course of a tender that relates to construction, rent, purchase or sale of goods or services, shall be sentenced to a penalty of imprisonment for a term of three to seven years. Sub article 2 of the Article provides that concluding an open, or secret, agreement with others, in order to influence the conditions of a tender, particularly the price, for those who are willing to participate in the tender or those who have already participated in the tender.is presumed to constitute a fraudulent act.	Cartels	3 to 7 years	
United Kingdom	Under section 9A of the Company Directors Disqualification Act 1986 a court must make a disqualification order against a person if they are a director of a company which breaches competition law and the court considers that their conduct makes them unfit to be concerned in the management of a company. An application for a disqualification order may be made by the Competition and Markets Authority or a specified regulator. A person may	A breach of competition law includes infringement of either the Chapter 1 prohibition (prohibition on agreements, etc. preventing, restricting or distorting competition) or the Chapter 2 prohibition (prohibition on abuse of a dominant position), within the meaning of the Competition Act 1998.	Up to 15 years.	

Jurisdiction	Legal reference to director disqualification sanction for a competition infringement	Type of infringement	Disqualification period	Additional information
	offer a disqualification undertaking to either the Competition and Markets Authority or other specified regulator, which may be accepted in place of applying to the court for a disqualification order.			
United States	Pursuant to Section 13(b) of the FTC Act, the FTC may seek to impose personal responsibility on individuals who controlled, directed, or participated in illegal conduct.	Any competition violation.	Unlimited.	A court recently found an individual liable for illegal monopolization under the FTC Act and state law and banned him from the pharmaceutical industry for life. The court determined that the individual's "egregious, deliberate, repetitive, long-running, and ultimately dangerous illegal conduct" warranted the lifetime ban. FTC v. Shkreli, 581 F. Supp. 3d 579, 637 (S.D.N.Y. 2022).

Note: The present analysis focuses on the provision and application of the disqualification sanction as part of the competition law system in a specific jurisdiction. As a result, the table does not include situations where infringement of the law can be a valid ground for dismissal of directors under company, criminal or labour law (e.g. Austria, Finland, France, Italy, Spain), with the exception of those
(a) where the rules on director disqualification have an explicit link with competition law; or
(b) where the competition authority has a requesting role to initiate a director disqualification procedure.
Sources: The information contained in the table were mainly collected through survey responses by the countries. They are indicative only and not necessarily aimed at being exhaustive. Complementary sources included: Rowan McMonnies, Global Compliance News, December 2014, https://www.globalcompliancenews.com/2014/12/03/how-much-do-you-value-your-job-disqualification-orders-find-their-way-to-australian-competition-enforcement/; (Tóth, 2022[48]).

Annex B. Table on Bidder Exclusion

Jurisdiction	Bidder exclusion sanction (competition infringement)	Liability	Debarment period	Additional information
Austria	The Public Procurement law states that contracting authorities can ban a collusive undertaking from participating in public procurement. A criminal conviction or court ruling is not necessary.	"Sufficiently plausible indications" for anti-competitive agreements are required.	3-5 years	
Brazil	Corporations involved in anticompetitive conducts can be disqualified from participating in public procurement for a minimum period of 5 years, as provided for in Art. 38(II) of Law 12529/2011.	The competition authority, CADE, issues the debarment decision.	Minimum of 5 years	It is at the discretion of the antitrust authority to debar the ringleader or all collusive participants from participating in procurements. Also worth noting that the debarment period can be discussed and adjusted according to proportionality and reasonableness criteria.
Bulgaria	Art. 55 (1), p.3 of the Public Procurement Law states that the contracting authority may exclude from a particular bid undertakings that have entered into agreements with other economic operators aimed at distorting competition, if the infringement had been established with a decision of the competent authority (the competition authority).	The contracting authority issues the decision for the exclusion of the bidder/s from the particular bid.	For the particular public procurement procedure (bid).	The Art. 55 (1), p.3 of the Public Procurement Law transpose into Bulgarian national law Art. 57 of EU Directive 2014/24 on public procurement. The exclusion is possible only for the specific bid and only provided that the contracting authority had included in the public procurement notice this infringement as legal grounds for exclusion.
Canada	Under the Integrity Regime, a supplier is barred from contracting with the Canadian government if it has been convicted of bid-rigging or any other offence under the *Competition Act* in the	Public Services and Procurement Canada (PSPC) administers the federal Integrity Regime and follows the	5-10 years	A contracting authority may enter into a contract with an ineligible or suspended supplier if it is in the public interest. The reasons for invoking a Public Interest Exception include: -there is an emergency; -there is no other supplier capable of performing the contract; -the contract is essential to maintain sufficient emergency stocks; and

Jurisdiction	Bidder exclusion sanction (competition infringement)	Liability	Debarment period	Additional information
	past 3 years. The Period of ineligibility is 10 years, which can be reduced by up to 5 years pursuant to an administrative agreement. A supplier *may* be barred for a conviction under similar foreign legislation. This is a policy rather than a law. See https://www.tpsgc-pwgsc.gc.ca/ci-if/ci-if-eng.html. Some provincial governments also have debarment policies.	*Ineligibility and Suspension Policy* to make ineligibility and suspension determinations. See https://www.tpsgc-pwgsc.gc.ca/ci-if/politique-policy-eng.html.		-not entering into the contract with the supplier would have a significant adverse impact on the health, national security, safety, public security or economic or financial well-being of the people of Canada or the functioning the federal public administration. See: https://www.tpsgc-pwgsc.gc.ca/ci-if/politique-policy-eng.html. In addition to debarment policies, parties may be prohibited from bidding on government contracts as part of a negotiated settlement or sentence in a contested proceeding.
Chile	Under the Competition Act, firms participating in horizontal agreements, including bid-rigging, can be banned from contracting "with bodies of the State's centralized or decentralized administration, with autonomous bodies or with institutions, bodies, companies or services to which the State provides contributions, with Congress and the Judicial Branch, as well as the prohibition of being awarded any concession granted by the State".	The relevant court must issue a ruling.	Up to 5 years	
Colombia	A natural person who is found guilty within the framework of a criminal process for committing bid rigging, can be excluded by the judge to contract with any state entity for a period of 8 years (Article 410A Criminal Code). Firms whose administrators are found guilty by a criminal judge for committing bid rigging, may face an administrative action from which it may derive a sanction corresponding to being permanently excluded from contracting with public entities in the future (Article 2 Law 2195 of 2022).	Criminal Judge and other Administrative Entities.	8 years for natural persons found guilty within a criminal process for committing bid rigging. Permanently for firms whose administrators are found guilty by a criminal judge for committing bid rigging.	Superintendence of Industry and Commerce, as the National Competition Authority, does not have the power to impose a sanction corresponding to the exclusion from participating in public procurement processes to those who commit bid rigging. This type of sanctions can be imposed by other authorities.

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Costa Rica	Under Costa Rican Competition Law, firms involved in bid-rigging can be banned from participating in public procurement and may also be fined.	The competition authority issues the debarment decision.	2-10 years.	The first applicant to the leniency programme may be exempt from the bidder exclusion sanction.
Czech Republic	Firms that were involved in bid rigging can be excluded from public procurement, in addition to fines.	The competition authority issues the decision.	Up to 3 years.	
Denmark	Section 135, (1), 1) of the Danish Public Procurement Act states that the contracting authority shall exclude a candidate or a tenderer from participation in a procurement procedure, when the candidate or tenderer has been convicted or fined by final judgement for actions committed as part of a criminal organization as defined in Article 2 of Council Framework Decision 2008/841/JHA of 24 October 2008. Section 137, (1), 3) of the Danish Pubic Procurement Act states that the contracting authority can exclude a candidate or tenderer from participation in a procurement procedure, when the contracting authority has sufficient plausible indications to conclude that the candidate or tenderer has concluded agreements with other economic operators for the purpose of distorting competition.	The relevant court must issue a final judgement, or "sufficiently plausible indications" are required.	3-5 years.	Sections 135 and sections 137 of the Danish Public Procurement Act implements article 57 of the Directive 2014/24 on public procurement.
Egypt	According to Article 50 of the Public Procurement Law No. 182 of 2018 and the Egyptian Competition Authority's Public Procurement Guidelines (2021), firms found guilty of bid-rigging are removed from the register of firms eligible to contract with the state.	The General Authority for Government Services removes the name of the firm from the list, after asking for the opinion of the State Council.	The debarment period is indefinite. The firm must apply to be re-added to the register, after proving that the public prosecution or the relevant court has acquitted them of the offence.	

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Estonia	According to the Public Procurement Act, the contracting authority may exclude from the procurement procedure a tenderer due to an agreement distorting competition. The exclusion is not automatic.	The authority must be able to prove by any method that grounds for exclusion of the tenderer are present.	3 years	
European Union	Article 57 of Directive 2014/24 on public procurement states that contracting authorities may exclude firms that have entered into agreements with other economic operators aimed at distorting competition. The optional collusion-related exclusion ground is also mirrored in Article 38(7)(e) of Directive 2014/23/EU on concessions and may apply to procurement covered by Directive 2014/25/EU on utilities by virtue of its Article 80(1)28. Article 136(1)(c)(ii) of the Financial Regulation states that the authorising officer responsible shall exclude the entity from participating in EU award procedures or from being selected for implementing Union funds where it has been established by a final judgment or final administrative decision that an entity is guilty of grave professional misconduct, which includes entering into agreement with other entities with the aim of distorting competition. In the absence of a final judgment or, where applicable, a final administrative decision, the authorising officer responsible shall exclude the entity on the basis of a preliminary classification	"Sufficiently plausible indications" are required. The authorising officer responsible decides on an exclusion of the entity from participating in EU award procedures or from being selected for implementing Union funds.	Up to 3 years. Set by the final judgment/administrative decision, or in case of its absence: up to 3 years. The limitation period for excluding the entity is 5 years calculated from any of the following: (a) the date of the conduct giving rise to exclusion or, in the case of continued or repeated acts, the date on which the conduct ceases, or (b) the date of the final judgment of a national	A 2018 preliminary judgement ruling by the CJEU indicates that "the period of exclusion must be calculated not as from the participation in the cartel, but from the date on which the conduct was the subject of a finding of infringement by the competent authority" (Case C-124/17). If the debarment is issued by the CJEU, the Directive dictates that the period of exclusion starts from the date of the final court judgement.

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	in law of a conduct as referred to in those points, having regard to established facts or other findings contained in the recommendation of the panel referred to in Article 143 of the Financial Regulation.		jurisdiction or of the final administrative decision.	
Finland	Under the Act on Public Procurement and Concession Contracts the contracting authority has the discretion to exclude a firm (supplier, bidder) if this firm has participated for instance in bid-rigging.	In the absence of a (legally binding) final decision or judgement on an infringement, the contracting authority must consider on a case-by-case basis whether there is "sufficient evidence" of the competition infringement. The authority must take account of the principle of proportionality and the equality principle. For example, in case of a minor infringement, a bidder can be excluded only in exceptional circumstances. Equally, bidder exclusion should not be an automatic sanction for an undertaking which has participated in a cartel. Exclusion can mainly be applied when the authority considers that the infringement will affect the optimal outcome of the procurement, or that the	A candidate or tenderer may not be excluded from competitive tendering if more than 3 years have elapsed since the event.	

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		anticompetitive behaviour has jeopardized the integrity of an undertaking so that the contracting entity cannot choose it as a contracting partner.		
Germany	Section 124(1) of the German Competition Act states that contracting authorities may exclude firms that have entered into agreements with other firms or engaged in concerted practices which have as their object or effect, the prevention, restriction or distortion of competition.	"Sufficient indications" are required.	3 years.	According to Section 2(1) Competition Register Act firms involved in bid-rigging are to be placed on a register of companies excluded from tender procedures.
Greece	Art. 73 par. 4 c of National Law on "Public Works, Procurement and Services foresees bidder exclusion of an economic operator by a public contracting authority from the specific tender, if it is engaged into anticompetitive practices (a non-mandatory ground for exclusion), unless the economic operator has adopted self-cleaning measures to prove its credibility. Art. 74 of the abovementioned national Law also foresees for a horizontal exclusion of an economic operator from future public procurements.	Sufficient plausible indications to conclude that the economic operator has entered into agreements with other economic operators aimed at distorting competition, i.e. not necessary the issuance of a previous judicial or administrative decision with final and binding effect.	3 years after the issue of the decision from the competent authority.	If an economic operator is submitted in a leniency programme or/and a settlement procedure then, according to Art. 44 of the Greek Competition Act, the economic operator is not excluded from public procurements and the natural persons have total immunity. It is in the discretionary power of an economic operator to adopt a director disqualification as a self-cleaning measure in order to prove its credibility to a public contracting authority.
Hungary	The Public Procurement Act states that an undertaking involved in bid-rigging is excluded from future public procurement, given that they are also being fined for the same conduct. It is important to note the "self-	The Court or the GVH must find the undertaking guilty, as well as impose a fine.	Up to 3 years.	Bidder exclusion can only be applied in combination with a fine. Also, if the contracting authority is able to prove that in a given public procurement procedure the tenderers have entered into agreements aimed at distorting competition, the contracting authority might exclude the particular tenderers *from the given public procurement procedure*.

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	cleaning" procedure in which case if an undertaking has been able to submit a request to the Public Procurement Authority to prove its reliability, it may not be excluded from a public procurement procedure.			
India	Prospective bidders for public procurement contracts sign an "Integrity Pact" with the Ministry of External Affairs. The Pact lays out that bid rigging can result in debarment from participating in future bidding processes with the government for a minimum period of 5 years, which can be extended at the discretion of the contracting authority.	Violation of the integrity pact	A minimum of 5 years.	
Italy	Pursuant to Art. 80, paragraph 5, letter c, of the Public Contracts Code (PCC), contracting authorities shall exclude from participation in a tender procedure an economic operator when the latter has been liable of serious professional misconducts that could compromise its integrity or reliability (emphasis added). In its guidelines, among the serious professional misconducts, the Anti-corruption Authority (responsible for the enforcement of the PCC) has included the competition infringements ascertained and sanctioned by the Competition Authority which occurred in the same market of the tender procedure in question.	In general, the exclusion is not automatic: the contracting authorities shall produce "adequate means of proof in order to demonstrate the circumstances of exclusion" according to Art. 80, paragraph 13 of the PCC. Therefore, they shall make an assessment by considering all the relevant factors (e.g., how far back in time the infringement is, any pending judicial review of the sanctioning decision, any self-cleaning measures) as the mere existence of a	3 years from the adoption of the sanctioning decision of the Competition Authority	The Anti-corruption Authority's guidelines on this provision of the PCC is under revision (as of October 2022).

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		sanctioning decision of the Competition Authority is not sufficient.		
Israel	According to the Israeli case law, a contracting authority has the discretion to exclude a firm if they have participated in bid-rigging.	The power to determine liability is on the contracting authority. The ICA usually helps the contracting authority with data and, if possible, with evidence.The bidder may be excluded while the criminal process is ongoing.	Since there is no specific law or regulation, the debarment period is under the discretion of the contracting authority.	The ICA took an initiative and convinced the Ministry of Finance to impose a "sincere bid declaration" (SBD) in every public tender. The SBD helps the contracting authority to use their discretion and debar firms that were part of a bid-rigging scheme.
Japan	Firms that committed a violation of the Antimonopoly Act including a cartel and bid rigging are usually suspended from participating in public bidding.	Ordering parties (e.g. contracting authorities) decide it after the Japan Fair Trade Commission find the violation and issue an order or file an accusation, or the suspect is arrested.	From 2 months to 3 years.	
Korea	Firms with more than 5 penalty points for bid-rigging over 5 years will be disqualified from participating in bids.	The Korean Fair Trade Commission must find multiple convictions of bid-rigging for the firm.	From 1 month to 2 years.	The amendments to the bid rigging guidelines expanded the scope of debarment in 2020. Before the amendments, those subject to debarment were firms that were convicted of bid-rigging and imposed with remedies in addition to more than 5 penalty points they had already received. According to the amendments, however, firms are debarred from bidding process from the moment their penalty points exceed 5.
Lithuania	Article 46(4) of the Law on Public Procurement of the Republic of Lithuania provides that the contracting authority shall exclude a supplier from the procurement procedure if the contracting authority can prove that the supplier has committed a serious professional misconduct, which also includes infringements of competition law.		The 3-year period of debarment starts to run from the day the anti-competitive agreement has ended.	

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Luxembourg	Under the Public Procurement law, contracting authorities can ban an undertaking which has concluded agreements with other economic operators with a view to distorting competition (Art. 29 (3), d).	The contracting authority must have "sufficiently plausible evidence" of the infringement.	Up to 3 years, if the period of exclusion has not been provided for by final judgment.	Public Procurement Law : Loi du 8 avril 2018 sur les marchés publics: https://legilux.public.lu/eli/etat/leg/loi/2018/04/08/a243/jo.
Mexico	The Ministry of Public Administration can ban an economic entity from participating in public procurement in certain circumstances (see additional information).		From 3 months to 5 years.	Article 53, clause IV. of the Federal Economic Competition Law (LFCE) prohibits the establishment, arrangement, or coordination of positions in bids, tenders or auctions. Article 127, clause IV. Provides for a sanction of up to 10% of the Economic Agent's revenue, regardless of the civil and criminal liability incurred. Also, in accordance with the Federal Criminal Code, individuals can be sanctioned with prison for up to 10 years for this breach to the LFCE. The Mexican Federal Economic Competition Commission (COFECE) has signed a cooperation agreement with the Ministry of Public Administration (SFP) which establishes the commitment to inform the counterpart when, within any of its investigations, elements that could be subject to investigation or sanction by the other authority are identified. The SFP has already disqualified a company in this context. In the resolution of file DE-011-2016, in 2020 COFECE fined companies and natural persons for colluding in tenders for services for laboratory tests and blood banks convened by the two main social security institutions (IMSS and ISSSTE). However, according to the procurement law in force, COFECE is not empowered to limit or disqualify the participation of any company who has been sanctioned or is currently under investigation by this authority in public procurement processes. In this case, given that the resolution proved the participation of the companies in the anticompetitive practice, COFECE's Board ordered to notify this matter, for the corresponding legal effects, to the SFP, as well as to both IMSS and ISSSTE. In August 2022, the SFP published in the Federal Official Gazette that the companies were disqualified for seven years, during which they may not participate directly or indirectly in contracting procedures, nor enter into contracts with any contracting public institution; according to section VII of article 3 of the Federal Anticorruption Law in Public Procurement. More information on COFECE's resolution at: https://www.cofece.mx/wp-content/uploads/2020/08/COFECE-031-2020_ENG.pdf More information on the SPF's administrative sanction at: https://www.dof.gob.mx/index.php?year=2022&month=08&day=25&edicion=MAT#gsc.tab=0

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New Zealand	According to the Government Procurement Rules, a contracting agency may exclude a supplier if there is evidence that they participated in bid-rigging.		Not specified.	
Norway	Regulation 2016-08-12 no. 974 ("anskaffelsesforskriften") article 24-2 (3) e) concerns "rejection due to circumstances on the part of the supplier" and states that the procurer may reject a supplier on the basis of evidence clarifying that the supplier has entered into agreements with the intention of distorting competition.	Before exclusion, the supplier should be given the opportunity to justify that participation in the agreements not distorted competition. For self-cleaning measures, see additional information.	Not specified.	Further, the supplier may undertake certain self-cleaning measures in order to prevent such rejection. This follows from article 24-5, which states that the procurer may not reject a supplier if the supplier can prove the implementation of the following measures: (a) paid compensation for any losses related to the violation or given commitment to provide such payment; b) cooperated actively with the responsible authorities in order to clarify the facts and circumstances of the case; and (c) taken appropriate technical, organizational and personnel measures to prevent recidivism.
Peru	According to the Peruvian Competition Act, bid rigging is sanctioned with fines and disqualification to participate in public tenders for a period of one year.	INDECOPI has first to declare an infringement in a public tender. After that, the Peruvian Public Procurement Authority will proceed to register the corresponding disqualification to the companies.	1 year.	The amendment was introduced in 2018, but this rule has not been applied yet.
Portugal	Under the Portuguese Competition Act (Law no. 19/2012), in tandem with the fine imposed, the party who committed the infringement may be subject to a ban on the right to take part in procurement procedures for public works contracts, public works concessions, public service concessions, leasing or purchase of goods or services or procedures involving the award of licenses or authorizations.	The Competition Authority issues the debarment decision. The sanction may be applied: - in cases where the competition infringement has occurred during or because of procurement procedures; and - when the seriousness of the infringement and the fault of the party concerned so justifies.	Up to 2 years.	

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Slovak Republic	Firms that partake in bid-rigging (whether in relation to public or private tenders) are automatically banned from participating in future public procurement activities. The main aim of this sanction is deterrence.		Up to 3 years (or less than 1 year in the case of settlement with the Anti-Monopoly Office).	Self-cleaning measures are not accepted.
Slovenia	A contracting authority can exclude a supplier if they partake in bid-rigging activities. The exclusion is not automatic. The contracting authority has the right of discretion (Article 75 Public Procurement Act).	The contracting agency should have "sufficiently plausible indications" that the undertaking has participated in bid-rigging.	Not specified.	
Spain	The Law 9/2017, of 8th November, on Public Sector Contracts applies to procurement proceedings and envisages the application of a prohibition to contract with the public sector as a sanction to any person with a final sanction resulting from an infringement of competition (articles 71 to 73). The Royal-Decree 1098/2001, of 12th October, on the approval of the General regulation of the law on the contracts of the public sector (art 19) specifies the factors to bear in mind when determining the scope and duration of bidder exclusion. Additionally, contracting authorities may contact CNMC in order to evaluate plausible indications of competition infringements in an on-going tender procedure (art. 150 Law 9/2017).	Serious or very serious infringements of competition law. The sanctions are issued by the CNMC but so far it is the administrative body governing the public procurement processes (JCCPE) the one defining the duration and scope of the bidder exclusion. Bidder exclusion only becomes executive when the sanction is final. Leniency applicants would be exempted of the bidder exclusion sanction.	Maximum 3 years.	The bidder exclusion is applicable to both natural and legal persons. The CNMC, by contrast with two regional competition authorities, has not determined, so far, the scope and duration of bidder exclusion. When defined by the JCCPE its scope is the whole Public sector.

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Sweden	A contracting agency can exclude a supplier if they partake in bid-rigging activities. The exclusion is not automatic.	The contracting agency should have "sufficiently plausible indications" that the firm has participated in bid-rigging.	Up to 3 years.	
Switzerland	According to public procurement law, contracting authorities may exclude bidders from future public contracts if there are sufficient indications that the bidder entered into unlawful agreements affecting competition law.	The bidder is excluded from contracts awarded by the contracting authority concerned only.	Up to 5 years	
Turkey	According to the Article 58 Public Procurement Law No 4734 regulating prohibition from participation in tenders – "Those who are established to be involved in acts and conducts set forth in Article 17, shall be prohibited from participation in any tender carried out by all public institutions and authorities for at least one year and up to two years depending on the nature of the said acts and conducts; and those who do not sign a contract in accordance with the procedures, except for force majeure, although the tender has been awarded to them, shall be prohibited likewise from participation in any tender for at least six months and up to one year… In case legal persons who are subject to prohibition are sole proprietorships, the prohibition decisions shall apply to all of the partners, and in case of companies with shared capital, the prohibition decisions shall apply for partners that are real or legal persons	Ministry implementing the contract or by the Ministry which the contracting authority is subordinate to or associated with, by contracting officers of contracting authorities which are not considered as subordinate to or associated with any Ministry, and by the Ministry of Internal Affairs in special provincial administrations and in municipalities and in their affiliated associations, institutions and undertakings.	1 to 2 years	

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	who own more than half of the capital in accordance with the provisions of paragraph 1. Art 17 provides that the following acts or conducts are prohibited in tender proceedings: a) to conduct or attempt to conduct procurement fraud by means of fraudulent and corrupt acts, promises, threats, unlawful influence, undue interest, agreement, malversation, bribery or other actions, b) to cause confusion among tenderers, to prevent participation, to offer agreement to tenderers or to encourage tenderers to accept such offers, to conduct actions which may influence competition or tender decision.			
Ukraine	In accordance with clause 4 of the first part of Article 17 of the Law of Ukraine "On Public Procurement", the contracting authority may refuse to participate in the procurement procedure and is obliged to reject the tender offer of the tenderer or refuse to participate in the negotiation procedure in the following case: the undertaking (participant) within the last three years has been held liable for a violation 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", in the form of committing anticompetitive concerted actions related to the distortion of tender results.	Liability in the form of a fine and exclusion of the possibility to participate in further tenders.	3 years.	Along with the exclusion of the possibility to participate in further tenders, mentioned violation entails the imposition of a fine of up to 10 percent of the income (revenue) of the undertaking from the sale of products (goods, works, services) for the last reporting year preceding the year in which the fine is imposed.

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United Kingdom	According to regulation 57 of The Public Contracts Regulations 2015, a contracting authority has the discretion to exclude an firm from future tenders if they have participated in bid-rigging.	The contracting authority should have "sufficiently plausible indications" that the firm has entered into agreements aimed at 'distorting competition' (for example, price fixing, collusive tendering or market sharing).	Up to 3 years.	Before excluding a supplier, a contracting authority must consider whether the supplier has provided sufficient evidence of "self-cleaning" (if so they will not be excluded). In 2022 a proposed new UK law includes a new mandatory exclusion for up to 5 years for participants in cartel activity (including suppliers and 'connected persons'), and the introduction of a central debarment register.
United States	Firms involved in wrongdoing, including violating antitrust laws, can be suspended or debarred. The former is more temporary and is usually used pending the completion of an investigation, while the latter can be based on conviction for an antitrust crime, among other things. The aim of suspension or debarment is not punitive, nor are they backward looking. Rather, suspension and debarment are concerned with present and future risks, and are imposed to protect the government from waste, fraud, and abuse.	Contracting agencies, and not antitrust enforcers, are responsible for suspension and debarment.	Suspension can last up to 12 months; debarment up to 3 years.	

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