Summary of Discussion Points

Presented by the Business and Industry Advisory Committee (BIAC) to the
OECD Competition Committee
Working Party No. 3

“Discussion on Public Procurement/ Bid Rigging Issues:
Leniency and Bidder Disqualification”

June 15, 2010

1. OECD member governments purchase one-seventh of OECD GDP.\(^1\) They often do this by inviting sellers to tender bids for the provision of goods and services. BIAC opposes collusion by sellers to fix the price of the winning bid (“bid-rigging”) and considers bid-rigging to be one of the most damaging forms of anti-competitive conduct, requiring strong, deterrent punishment. Disqualification or debarment from future bidding (hereinafter “debarment”), especially in the case of public procurement, may be an effective form of sanction where the punitive effect on the bid rigger is commensurate with the severity of the offense. At the same time, leniency has now proven its efficiency as a process to fight anti-competitive practices. Therefore, the question of whether leniency applicants should be granted not only a total or partial reduction of fines, but also a waiver of debarment sanctions if applicable, is worth considering. BIAC welcomes this opportunity to present, very briefly, its views on this subject.

2. Regulations on debarment vary greatly from country to country. A quick review of the contributions by national delegations to the OECD’s Roundtable on Collusion and Corruption in Public Procurement at the 9th Global Forum on Competition on February 19, 2010 shows that they are generally a matter of public procurement law and/or general criminal law rather than competition law.\(^2\)


\(^2\) Country contributions available generally at http://www.oecd.org/document/34/0,3343,en_40382599_40393118_44060194_1_1_1_1,00.html.
3. When debarment is provided for by public procurement rules, bid-rigging is not necessarily one of the facts specifically quoted as triggering the sanction. A good example can be found in the European Directive on Public Procurement (2004/18/EC), of which art. 45(1) provides for an obligation to exclude candidates or tenderers who have been the subject of a conviction by a final judgement for certain crimes enumerated in the directive, among which corruption but neither collusion nor bid-rigging appears. However, art. 45(2) further provides that member states may exclude undertakings from participation in a contract where they “have been convicted of an offence concerning their professional conduct” or “have been guilty of grave professional misconduct proven by any means”: this, might encompass bid-rigging.3

4. In practice, public procurement regulations often provide for the temporary or definitive exclusion of tenderers who have been finally convicted of an offence under criminal law in general, or of an offence in a list of specified criminal offences which rarely include collusion.4 In other countries, the local authorities may vary in the application of debarment orders,5 while some jurisdictions have repealed the measure as too difficult to apply.6

5. It may seem surprising that all jurisdictions do not provide debarment as an administrative sanction for companies guilty of criminal offences. But this first implies that there is a form of criminal liability of legal persons, which all countries do not have yet. From a more practical point of view, the relevance of the sanction may be questionable when there is a long period of time between the occurrence of the facts and the final judiciary decision after a lengthy enquiry and a protracted appeal procedure.

6. However, there are cases where the antitrust agency can take advantage, for competition law enforcement purposes, of debarment sanctions that originally were intended for other purposes, especially the punishment of corruption which is often the corollary of collusion.7 Conversely, in some exceptional jurisdictions, such as Brazil, Korea and Peru, competition law provides directly for debarment. In some cases, debarment is a sanction

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4 For instance, art. 43 of the French Code des Marchés Publics refer to a lists of offence defined in the Code Pénal, that include corruption, money laundering, participation in criminal organizations etc. but not collusion or bid-rigging, while art. 131-139 of the Code Pénal itself provides that a legal person may be excluded from public tendering for any serious criminal offence (“crime” or “délit”).


7 For instance, the sanctions inflicted to bid-riggers as a result of the co-operation between the Competition Commission of Singapore and the Corruption Prevention Investigation Bureau (Singapore Contribution, OECD’s Roundtable on Collusion and Corruption in Public Procurement, 9th Global Forum on Competition, Feb. 19, 2010, DAF/COMP/GF/WD(2010)8, ¶¶ 17-20.)
available specifically for competition law enforcement, alongside fines (or individuals’ criminal indictments or director’s disqualification when available). Again, some of the contributions to the February Roundtable on Collusion and Corruption provide examples, like the case reported by CADE in Brazil of the debarment of security services companies, or the provisions of the Korean Decree on public procurement and those of the Peruvian State Procurement Law which provide debarment for violations of competition law.  

7. In the United States, federal procurement law grants the government agency conducting the tender the discretion to debar a bid-rigger for up to three years. A criminal or civil antitrust verdict or any other cause “so serious or compelling . . . that it affects the present responsibility of the contractor” is a ground for debarment. In deciding whether to exercise its discretion, the agency may consider whether the bid-rigger cooperated fully with the Government or implemented remedial measures. Debarments can also encompass the entire company and all of its divisions, unless the decision is limited by its terms to “specific divisions, organizational elements, or commodities.” This can include all business concerns or individuals “affiliated” with the sanctioned contractor. This definition encompasses, in concept, parent corporations. Most importantly, however, the decision by the government to debar a defendant is discretionary and is not required by any statutory provision. This permits the exercise of judgment as to whether debarment is in the best interest of the government in any individual case.

8. BIAC believes that if debarment is to be included in the toolkit of remedies for anticompetitive conduct then it must be carefully integrated into that kit in terms of (1) scope and (2) leniency policy to ensure that in each case the remedy fits the harm.

9. BIAC believes that debarment can be an effective sanction to bid-rigging and constitute a formidable deterrent. However, debarment should not inflict any greater punishment than the remedy it replaces. For example, in balancing enforcement alternatives to achieve optimal deterrence, a competition authority may prefer to alter the cost of enforcing a fine by pursuing debarment. Debarment has a financial cost to a bid rigger that depends on (1) the length of debarment and the scope of markets to which it applies and (2) the foregone ability of the bid rigger to generate profits by successfully (and legally) competing for contracts during the period of debarment in the restricted markets. The competition authority should choose the duration of debarment and the markets to which it applies so that the value of the debarment reflects the value of the fine, or portion of the fine, for which it substitutes. To use debarment as a supplemental penalty to existing fines, without any “offset,” would both disproportionately

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10 See id. at § 9.406–2.
11 See id. at § 9.406–1(a).
12 See id. at § 9.406–1(b). The affiliate, however, must be provided with written notice and an opportunity to respond.
penalize those offenders participating in government contracts (as compared to non-government contractor offenders), and – assuming that current fining regimes already impose an optimal level of deterrence – result in excessive penalties.

10. Competition authorities must also consider the effect of debarment on competition in post-debarment tenders. This influence should be carefully considered because (1) by definition debarment excludes a competitor from the market and (2) it has a tendency to impact more-efficient competitors in the market as wholly inefficient bidders likely would not be necessary to a bid-rigging scheme. Moreover, debarment even more than excessive fining may hobble or bankrupt its target, reducing competition in the market. Indeed if the restricted activity is a significant part of the business of the company, the enterprise may cease altogether as it is uncertain that the company will be able to re-enter the market at the end of the debarment period. Because of its effect on competition, debarment should be used judiciously, particularly in markets with a small number of competitors. Used too liberally, debarment can have the effect of exacerbating the net harm to competition that results from a big-rigging enterprise.

11. BIAC recognizes that, despite some set-backs, leniency has proved an efficient tool for competition law enforcement and this raises the question of whether leniency applicants should be protected not only from fines, but also from debarment sanctions. While leniency policies are increasingly implemented by competition authorities, criminal law enforcers also increasingly implement tools which achieve similar purposes, like plea-bargaining or mitigating circumstances, including in respect of offences like corruption. Unfortunately, leniency rules generally do not address debarment and enforcers do not always take leniency into account. A failure to clearly delineate a non-debarment policy for leniency applicants could have the effect of limiting the number of leniency applicants in cartel cases involving government procurement.

12. BIAC believes that at a minimum the authority determining debarment should have discretion to reduce its scope or eliminate it in view of the level of cooperation of the target with the competition authority. For example, federal procurement law in the United States provides for debarment for a bid-rigging conviction. But a bid-rigger that obtains leniency under the leniency program of the Antitrust Division of the Department of Justice is not prosecuted for an offense and therefore will not be debarred. A federal agency may still debar the bid rigger if a private party or the government obtains a civil judgment against it (or if the agency believes there is another “serious” or “compelling” cause for debarment). But even so, the agency may forego debarment if it believes that the bid-rigger has “cooperated fully” with the Government or reformed its business practices.

13 See supra note 8 (Brazil).

14 See, the European Commission notice on immunity from fines and reduction of fines in cartel cases of (2002/C 45/03), the European Competition Network’s Model Leniency Programme published in September 2006, and for instance art. L. 464-2 IV of the French Code de Commerce or , in the U.K. the OFT’s Competition Guidelines (§ 3.1) referring to Chapter I of the Competition Act 1998, which in turn provides only for financial penalties.
13. If debarment is an effective deterrent to bid-rigging and leniency an effective tool for competition law enforcement, then leniency programmes must clearly include a form of immunity from debarment as well. For reasons of legal certainty essential in the operation of leniency, this should not be left to the potentiality of mitigating circumstances. This result will often be complex because debarment authority and competition authority are often divided between different agencies. This issue therefore requires careful coordination among agencies.\textsuperscript{15}

14. BIAC considers that if debarment is adopted by member states as a remedy for bid-rigging then it would be essential to ensure that it is properly integrated with the competition rules of the member states. In particular, the use of debarment as a substitute for pre-existing remedies must be carefully delineated and the scope of debarment calibrated accordingly. The above summary review of the legislation applicable to debarment from public procurement contracts shows that there is a great diversity of situations, which as always is damaging to the necessary level playing field in international commerce. BIAC urges OECD competition authorities to extend their advocacy efforts towards a clarification and harmonization of this issue.

\textsuperscript{15} In the words of the Canadian delegation, “Accordingly, while challenging in practice, consistency between a jurisdiction’s competition law immunity policy and public procurement policies pertaining to disqualification from future bidding (because of vendor malfeasance) should be given due consideration.” (Canadian Contribution, OECD’s Roundtable on Collusion and Corruption in Public Procurement, 9th Global Forum on Competition, Feb. 19, 2010, DAF/COMP/GF/WD(2010)61, ¶ 22.)