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**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
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Director Disqualification and Bidder Exclusion – Note by Japan

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This document reproduces a written contribution from Japan submitted for Item 4 of the 139th OECD Competition Committee meeting on 29-30 November 2022.

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

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1. Introduction

1. In Japan, there are several systems based on laws and other rules regarding disqualification of directors involved in violation of the Antimonopoly Act (hereinafter referred to as the “AMA”) and suspension of participation by violators in public bidding.
2. This paper describes the details of these systems, how incentives for leniency applications are secured, and, as a prerequisite for director disqualification and bidder exclusion, how a violation of the AMA is identified.

2. Director disqualification

2.1. Disqualification based on the Companies Act

3. Article 331, Paragraph 1, Item 4 of the Companies Act stipulates that a person who was sentenced to imprisonment or severer penalty without suspension may not act as a director of a company until the execution of the sentence has been completed. It is said that the reason for such a provision is that it is practically difficult for a person serving a sentence of imprisonment or severer penalty to manage a company. If an incumbent director comes to meet the condition above, he or she naturally loses the position as a director at that moment.
4. Criminal penalties of imprisonment or severer may be imposed for violations of the AMA. Specifically, natural persons involved in a violation of the AMA including cartel and bid rigging are subject to imprisonment for a maximum of five years (Article 89 of the AMA)¹. However, no prosecution may be filed in this regard unless the Japan Fair Trade Commission (hereinafter referred to as the “JFTC”) files an accusation (Article 96 of the AMA).
5. Although there have been a considerable number of cases in which the JFTC has accused a natural person involved in a cartel or bid rigging, there have been no cases of prison sentences without suspension². Therefore, there have been no cases where a company director has been disqualified on the grounds that he or she was sentenced for a violation of the AMA based on the above provisions of the Companies Act.

2.2. Cease-and-desist order

6. The JFTC may issue a cease-and-desist order to an enterprise which committed a violation of the AMA, including a cartel and bid rigging, to the extent necessary to eliminate the violation. Elimination of a violation includes prevention of recurrence, and in some

1 Apart from this, those who engaged in bid rigging on public tenders may be sentenced to a maximum of three years in prison based on Article 96-6, Paragraph 2, of the Penal Code. However, this does not mean that the conduct consists a violation of the AMA because requirements for the crime of bid rigging under the Penal Code are different from those for a violation of the AMA.

2 From 2010 to the end of September 2022, for example, thirty-five natural persons were accused by the JFTC and all of them received suspended convictions. As of this writing, two of the convictions have not been finalized because they are pending before the court of appeals.

cases, the JFTC has ordered the enterprises to relocate natural persons involved in the violation and not to reassign the relevant work for a certain period of time as a part of the remedies³. However, it has not been disclosed whether or not the natural persons subject to the ordered relocation included directors in these cases.

3. Bidder exclusion

3.1. Suspension of nomination for bidding

7. Enterprises that committed a violation of the AMA including a cartel and bid rigging are usually suspended from nomination⁴ for public bidding by ordering parties. Also, enterprises that are under suspension of nomination are generally not allowed to participate in public bidding procedures other than nominated competitive bidding, such as general competitive bidding or open bidding.

8. The purpose of suspension of nomination is to eliminate an unsuitable enterprise as a contract counterparty, but it should also have the effect of preventing a violation including bid rigging.

9. The suspension of nominations is carried out by ordering parties including national ministries and agencies and local governments, and the criteria for suspension of nominations are set by each ordering party. However, the Federation on Central Public Construction Work Contracts (hereinafter referred to as the “Federation”), in which ninety organizations including central ministries and agencies and special corporations participate, has developed and published a model for suspension of nominations (hereinafter referred to as the “Federation Model”), which sets out standard conditions and periods for suspension of nominations, as well as guidelines for its application (hereinafter referred to as the “Federation Guidelines”). Ordering parties participating in the Federation carry out suspension of nomination according to the Federation Model and the Federation Guidelines. The Federation Model have also been notified to local governments throughout Japan.

10. The Federation Model provides the following standards for suspension of nomination: an enterprise which committed a violation of the AMA, including a cartel and bid rigging, is suspended for a period of two to nine months in principle, if the violation is committed in the area under the jurisdiction of the ordering department⁵ or if the violation is committed with respect to work ordered by the ordering organization⁶; and the period is

3 In a case of bid rigging on steel bridge construction projects ordered by the Ministry of Land, Infrastructure and Transport (November 2005), a case of bid rigging on steel bridge construction projects ordered by the Japan Highway Public Corporation (November 2005), and a case of price-fixing by manufacturers of asphalt mixture (July 2019).

4 Suspension of nomination is a measure to exclude from nomination in the procedure of nominated competitive bidding for a certain period of time. Nominated competitive bidding is a procedure in which the ordering party nominates, for each bidding round, enterprises which are considered capable of performing the contract and invites them to participate in the bidding procedures.

5 Ordering department refers to an ordering party that is the head office, a local branch office or other department of a central government agency or other organization.

6 Ordering organization refers to an ordering party that is an organization such as a central government ministry or agency.

extended to three to twelve months if the violating act is committed with respect to work ordered by the ordering department itself.

11. In addition, according to the Federation Model, if an executive officer or employee of a firm is criminally accused of a violation of the AMA, including a cartel and bid rigging, with respect to work ordered by the ordering organization, the firm shall, in principle, be suspended from nomination for a period of 6 to 36 months.

12. Besides, according to the Federation Guidelines, suspension of nomination shall be imposed promptly after the ordering party becomes aware of the cease-and-desist order, “surcharge” payment order or criminal accusation by the JFTC, or arrest of the suspect, for an AMA violation including a cartel and bid rigging.

3.2. Suspension of business

13. If a construction firm violates the AMA and its executive officers or employees are sentenced to prison, or the firm receives a cease-and-desist order or “surcharge” payment order from the JFTC, the firm is subject to suspension of business based on Article 28, Paragraph 1, Item 3 of the Construction Business Act. During the period of the suspension, the suspended enterprise may not engage in any business activities including bidding, or conclude any construction contract, regardless of the client or region.

14. The purpose of the suspension of business is to strictly address injustice, thereby contributing to public confidence in the construction industry and prevent injustice from occurring.

15. Specific conditions for business suspension are stipulated in the standards developed and published by the Ministry of Land, Infrastructure, Transport and Tourism as follows.

	Conditions	Suspension period
a	An executive officer with the right of representation is sentenced to a criminal penalty	One year
b	An executive officer without the right of representation, branch manager, sales manager, etc. is sentenced to a criminal penalty	120 days or longer
c	A person other than those above is sentenced to a criminal penalty	60 days or longer
d	A cease-and-desist order or “surcharge” payment order by the JFTC becomes final and binding	30 days or longer

4. Balancing with incentives for leniency application

16. Director disqualification and bidder exclusion may reduce the incentive to apply for leniency because they disadvantage an enterprise which violated the AMA and a director who was involved in the violation. However, the followings have deterred decrease in incentives to apply for leniency.

17. First, with regard to director disqualification based on the Companies Act, it applies to cases where a criminal penalty of imprisonment or severer is imposed, and criminal proceedings for violation of the AMA are not initiated without accusation by the JFTC (see 2.1. above). In addition, with regard to criminal accusation, the JFTC has developed and publicized a policy that criminal accusation will not be filed against executive officers, employees, etc. of an enterprise that first filed a leniency application before the

commencement of the investigation by the JFTC. Therefore, director disqualification based on the Companies Act does not prevent the JFTC from obtaining a clue to an unknown violation through a leniency application.

18. This is also true for suspensions of business which are subject to criminal penalties (a through c in 3.2. above).

19. Regarding suspension of nomination, the Federation Guidelines (3.1. above) states that the period of the suspension should be reduced to one-half for those enterprises to which the leniency program is applied and the fact is publicly announced.

5. Identifying a violation

20. In general, when decisions on director disqualification or bidder exclusion are made by entities other than competition authorities, a problem may arise of how to find and prove the violation of competition laws. In Japan, however, director disqualification under the Companies Act occurs immediately without any special procedures, and suspension of nomination and suspension of business are conditional upon procedures by the competition or judicial authority, such as a cease-and-desist order or accusation by the JFTC and judgment of a court in a criminal case. Therefore, it is not necessary for an entity making the decision on director disqualification or bidder exclusion to find and prove the AMA violation by itself.