

Bidder exclusion and antitrust enforcement

Article by Silos Economics

2 October 2025

Introduction

Bidder exclusion temporarily bans firms that have breached competition law from participating in public procurement. It exists in many countries and is typically governed by procurement or criminal law, rather than competition law. In some jurisdictions, competition authorities can apply bidder exclusion to enforce competition law, with some becoming increasingly active in this area.

While well-intended and aimed at fighting harmful anti-competitive conduct, this article argues that using bidder exclusion as an antitrust sanction raises serious concerns. First, it can have an adverse effect on competition and efficiency. By acting as an entry barrier and reducing the number of competitors, it can facilitate collusion and weaken competition in public procurement. Second, compared to corporate fines, it reduces the ability to tailor the (implicit) fine to the seriousness of the infringement. This is because ascertaining the actual cost the exclusion will have on the infringing firm is subject to a high degree of uncertainty and risk of error. As a result, it increases the risk of over-deterrence or under-deterrence compared to corporate fines. Third, it can restrict the use or the deterrence effect of alternative types of antitrust sanctions which are arguably superior to enhance deterrence and efficiency, such as corporate fines or individual sanctions. As a consequence, the sanctions regime may become less effective and less efficient.

Our recommendation is to avoid using bidder exclusion to sanction firms that have breached competition law. Antitrust has a rich set of sanctions – both corporate and individual – which are sufficient and far better suited than bidder exclusion to fight harmful anti-competitive conduct.

The rest of the paper is structured as follows. First, we discuss what bidder exclusion is and how it works. Second, we explore the key concerns it raises as an antitrust sanction. Third, we suggest some policy recommendations. Fourth, we conclude. References are included at the end.

Bidder exclusion as a sanction for antitrust infringements

Bidder exclusion temporarily bans firms that have breached competition law from participating in public procurement. It exists in many countries and is

typically governed by procurement or criminal law, rather than competition law. OECD (2022) provides an overview of key differences across jurisdictions. Bidder exclusion is present in more than 25 jurisdictions. While there are different entities that may be responsible for applying this sanction, such as contracting authorities, courts or competition authorities, the former are by far the most common. Exclusion can be automatic or discretionary. The scope and duration of the exclusion vary across jurisdictions. In many cases the bidder is excluded from all tenders by the same contracting authority, yet in others exclusion applies to all public procurement. The duration can vary: exclusions of 3 or 5 years are quite common, although in some cases they can last up to 8 or 10 years. Most jurisdictions allow firms to offer 'self-cleaning' and risk management measures to avoid exclusion. In some cases, the regulatory framework explicitly exempts leniency applicants from bidder exclusion, in order to ensure that exclusion does not undermine the effectiveness of leniency programmes.

Below we review more up-to-date information on two jurisdictions – the United Kingdom and Spain - to explain the key features of their bidder exclusion regimes.

In the United Kingdom, bidder exclusion is regulated in the Procurement Act 2023. CMA (2025) provides guidance on exclusion and debarment in cases involving competition law. The Procurement Act 2023 distinguishes between exclusion and debarment. Exclusion refers to a firm not being permitted to participate in a tender, or to be awarded a public contract, following an assessment of exclusion grounds by a contracting authority. A firm may also be debarred, that is, placed on a central debarment list by a Minister of the Crown. This will prevent the firm from participating in any covered procurements or being awarded public contracts for a period up to 5 years, depending on the circumstances. Hence, it is always either the contracting authority or the Minister who determines whether an exclusion or debarment applies.

Exclusion can be mandatory or discretionary. Mandatory exclusion (e.g. contracting authorities *must* exclude the firm) applies when a firm has been found to have broken the law by taking part in cartel activity, and the circumstances giving rise to the exclusion ground are continuing or likely to occur again. Discretionary exclusion (e.g. contracting authorities *may* exclude the firm) applies when a contracting authority or Minister consider that the firm has engaged in a cartel or other type of competition law infringement, and the circumstances giving rise to the exclusion ground are continuing or likely to occur again.

Firms are not excluded if they are an immunity recipient. This applies to leniency recipients that benefit from 100% reduction in a fine. Firms can avoid exclusion if they effectively 'self-clean'.

In Spain, bidder exclusion is regulated in the Public Procurement Act 2017. The Act bans firms and individuals that have been found to breach competition law from entering into contracts with public bodies. While exclusion is mandatory, the authority applying it has discretion over its scope and duration, subject to a maximum legal limit of 3 years.

In principle, both the competition authority (national or regional) and the Minister of Finance and Public Administration may determine the exclusion's scope and duration. However, recent guidance published by the national competition authority (CNMC), as well as recent case law, suggest that going forward it will be the CNMC imposing the scope and duration in its decisions. CNMC (2023) outlines the criteria the CNMC will use to assess the exclusion's scope and duration.

Firms can avoid exclusion if they commit to paying the fine imposed in the infringement decision and they 'self-clean'. Leniency recipients are exempted from bidder exclusion, either automatically or after consideration, depending on the circumstances.

Following the enactment of the Public Procurement Act 2017, the CNMC considered bidder exclusion applicable in certain infringement decisions. However, until recently, it had not specified the scope and duration of the exclusion. This was potentially due to evolving case law around the authorities that could apply bidder exclusion. In a recent abuse of dominance decision, the CNMC has specified the exclusion's scope and duration for the first time (CNMC, 2025). Some Spanish regional competition authorities have also applied bidder exclusion in recent years.

Key concerns with bidder exclusion

While well-intended and aimed at fighting harmful anti-competitive conduct, we consider that using bidder exclusion as a sanction for antitrust infringements raises serious concerns. We set out our reasoning below.

First, bidder exclusion can have an adverse effect on competition and efficiency. By acting as an entry barrier and reducing the number of competitors, it can facilitate collusion and weaken competition in public procurement, leading to a deadweight loss. The anti-competitive nature of bidder exclusion has been highlighted previously (OECD, 2022; OECD, 2016). Some competition authorities responsible for applying this sanction also highlight this risk (see, for instance, CNMC, 2023).

The economic literature on this topic is quite limited but it also flags this competition risk. Auriol and Søreide (2017) find that bidder exclusion will have a minimal deterrent effect in markets where competition is high. In markets where competition is low it can have a deterrent effect, yet it will also facilitate collusion and reduce competition. They argue that disqualifying the individuals involved in the infringement can be a more proportionate deterrent. Cerrone, Hermstrüwer and Robalo (2021) provide experimental evidence on how bidder exclusion can facilitate collusion, also underscoring the anti-competitive potential of bidder exclusion.

Some authorities responsible for applying bidder exclusion have explicitly acknowledged that it may adversely affect competition and indicated that they will assess its potential impact on competition in public procurement markets when applying it. For instance, the Spanish national competition authority explicitly states this in its guidance (CNMC, 2023). There are two main concerns with this approach. First, the exclusion may end up being applied only in situations where competition is high, precisely where its deterrent effect is likely to be low (Auriol and Søreide, 2017). This would call into question its purpose, and would still give rise to some unintended consequences that we discuss below. Second, it risks producing an asymmetric effect on competition by favouring incumbents and hindering entry by potential entrants. If the assessment hinges on the actual or potential role of an infringing firm in procurement markets, there is a risk that the exclusion is applied only to small firms or potential entrants - which may have no or low presence in public procurement markets - while incumbents or large players are exempted from it - due to their relevance in public procurement markets.

We note that corporate fines do not have the anti-competitive effect of bidder exclusion. While both types of sanctions can deter, bidder exclusion restricts competition in a way that fines do not. Hence, fines are arguably more efficient than bidder exclusion. The empirical literature also supports this. Cerrone *et al.* (2021) suggest that fines are a superior tool to sanction antitrust infringements because they do not exclude competitors. They recommend relying on fines only as a first-best option when both options might be available.

Second, compared to corporate fines, bidder exclusion reduces the ability to tailor the (implicit) fine to the seriousness of the infringement (e.g., the likely harm arising from the infringement). This is because ascertaining the actual cost the exclusion will have on the infringing firm is subject to a high degree of uncertainty and risk of error. As a result, bidder exclusion increases the risk of over-deterrence or under-deterrence compared to corporate fines. Hence, corporate fines are better suited for deterrence.

Third, bidder exclusion can restrict the use or the deterrence effect of alternative types of sanctions which arguably seem superior from an efficiency and deterrence side, such as corporate fines or individual sanctions. For instance, a competition authority may decide to impose a lower corporate fine in the expectation that the infringer will also be excluded from bidding in public procurement. As a result, the penalty regime may become less effective and less efficient.

In short, bidder exclusion raises many concerns: it weakens competition, reduces the ability to tailor the (implicit) fine to the seriousness of the infringement, and can restrict the use or the deterrence effect of alternative types of sanctions which are better suited to fight anti-competitive conduct.

We do not see any clear benefit from including bidder exclusion in the antitrust sanction toolkit. Bidder exclusion is akin to a corporate fine in that it imposes a monetary cost on firms for breaching competition law. However, this deterrence effect can equally be achieved with a corporate fine, with the added benefits, as we argue above, of better protecting competition and fine-tuning the fine to the severity of the infringement.

It could be argued that bidder exclusion helps to tackle recidivism. Yet, this point is problematic, since bidder exclusion can facilitate collusion and hence may contribute to recidivism. Moreover, corporate fines can factor this in, as they do in many jurisdictions. Further, it could be argued that corporate fines have legal limits that reduce their deterrence effect and that bidder exclusion can help increase the cost imposed on infringing firms. But then, the efficient solution would be to increase the legal limits of corporate fines rather than resort to bidder exclusion.

Finally, beyond deterrence, it could be argued that the intended goal of bidder exclusion is to protect trust or integrity in public procurement. But again, this argument is problematic: if bidder exclusion fosters collusion in public procurement, it will undermine integrity in public procurement. The best way to protect integrity in public procurement is to incentivize competitive behaviour, rather than collusion. Moreover, punishing the individuals responsible for the infringement — via director disqualification, already foreseen in some antitrust regimes — would be a much more proportionate and efficient response than excluding entire firms from bidding.

Recommendations

We recommend against using bidder exclusion to sanction firms that have breached competition law. Antitrust has a rich set of sanctions which are sufficient and far better suited than bidder exclusion to fight anti-competitive conduct. First, corporate monetary fines. Second, individual

sanctions, both monetary and non-monetary, such as director disqualification and imprisonment for cartel cases.

We note that there is room for improving how these sanctions are used. Part of the literature has suggested that corporate fines may be too low for optimal deterrence (Smuda, 2013). Hence, we advocate exploring whether corporate fines should be increased to effectively deter harmful anti-competitive conduct.

Individual sanctions are also essential for deterrence. They are complementary to corporate monetary fines in the sense that they help mitigate agency problems between owners and managers within firms which may give rise to anti-competitive conduct but cannot be tackled through corporate fines (Ginsburg and Wright, 2010; OFT, 2009). Individual sanctions also impose reputational costs. Despite their unique and significant benefits, individual sanctions are much less widespread than corporate fines. For instance, while in many jurisdictions it is possible to impose monetary sanctions on individuals, director disqualification or imprisonment for cartel cases are much less present (see OECD, 2022; OECD, 2020). We consider that there is room to expand the individual antitrust sanctions toolkit – namely director disqualification and imprisonment for cartel cases – across jurisdictions and use them ambitiously.

Conclusion

Bidder exclusion temporarily bans firms that have breached competition law from participating in public procurement. It exists in many countries and is typically governed by procurement or criminal law, rather than competition law. In some jurisdictions, competition authorities can apply bidder exclusion to enforce competition law, with some becoming increasingly active in this area.

While well-intended and aimed at fighting harmful anti-competitive conduct, we argue that using bidder exclusion as a sanction for antitrust infringements raises serious concerns. It weakens competition, reduces the ability to tailor the (implicit) fine to the seriousness of the infringement, and can restrict the use or the deterrence effect of alternative types of sanctions.

We recommend against using bidder exclusion to sanction firms that have breached competition law. Antitrust has a rich set of sanctions – both corporate and individual – which are sufficient and far better suited than bidder exclusion to deter anti-competitive conduct. We advocate using these tools effectively and ambitiously across jurisdictions.

References

- Auriol, E. and Søreide, T. (2017), "An economic analysis of debarment", *International Review of Law and Economics*, Vol. 50, Issue C, 2017, pp. 36-49.
- Cerrone, C., Hermstrüwer, Y. and Robalo P. (2021), "Debarment and collusion in procurement auctions", *Games and Economic Behavior*, Vol. 129, 2021, pp. 114-143.
- CMA – Competition and Markets Authority (2025), *Exclusion and debarment on competition grounds - what suppliers and contractors need to know*, February 2025.
- CNMC – Comisión Nacional de los Mercados y la Competencia (2025), *Resolución Eólica de Alfoz S/0011/23*, Julio 2025 [Infringement Decision, Eólica de Alfoz, S/0011/23, July 2025].
- CNMC – Comisión Nacional de los Mercados y la Competencia (2023), *Comunicación 1/2023, de 13 de junio, de la Comisión Nacional de los Mercados y la Competencia, sobre criterios para la determinación de la prohibición de contratar por falseamiento de la competencia por la Comisión Nacional de los Mercados y la Competencia* [Communication 1/2023, published 13 June, on the criteria that will guide the application of the prohibition to contract following breaches of competition law], June 2023.
- Ginsburg, D. H and Wright, J. D. (2010), "Antitrust Sanctions", *Competition Policy International*, Vol. 6, No. 2, pp. 3-39, Autumn 2010.
- OECD - Organisation for Economic Co-operation and Development (2022), *Director Disqualification and Bidder Exclusion in Competition Enforcement*, OECD Competition Policy Roundtable Background Note, December 2022.
- OECD - Organisation for Economic Co-operation and Development (2020), *Criminalisation of cartels and bid rigging conspiracies: a focus on custodial sentences*, Background note by the Secretariat, June 2020.
- OECD - Organisation for Economic Co-operation and Development (2016), *Sanctions in Antitrust Cases*, Background paper by the Secretariat, December 2016.
- OFT – Office of Fair Trading (2009), *An assessment of discretionary penalties regimes. Final Report*, A report prepared for the Office of Fair Trading by London Economics, October 2009.
- Smuda, F. (2013), "Cartel Overcharges and the Deterrent Effect of EU Competition Law", *Journal of Competition Law & Economics*, Vol. 10, Issue 1, 2014, pp. 63–86.