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Towards Greater Legal Certainty in Public Enforcement of Competition Law: The CNMC Guidelines on Public Procurement Bans

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The Spanish National Markets and Competition Commission (CNMC) has approved [Communication 1/2023](#) of 13 June, published in Spain's Official State Journal (BOE) on 30 June 2023, (i) establishing that the authority holding sanctioning powers in matters of competition is the competent authority for imposing a public procurement ban, and (ii) setting out the general criteria that the CNMC will take into account to determine in each case what markets a public procurement ban will apply to and how long its duration will be (the **Communication**).

According to the Communication, the CNMC and not the Ministry of the Treasury and Public Functions will now be able to establish from the outset the geographical scope, affected products and duration of a public procurement ban imposed on the undertakings. This is without prejudice to the fact that the effectiveness of the ban may ultimately be suspended in court at a later date.

Finally, according to the Communication, the CNMC aims to bolster compliance programmes and the culture of competition, and undertakings may put in place measures from the outset of their sanctioning proceedings to prevent or to cancel the effectiveness of a procurement ban, which the CNMC will be able to validate.

These criteria will apply to infringement proceedings brought by the Directorate of Competition after the publication of the Communication.

The powers of the competition authorities to announce and establish the scope and the duration of public procurement bans

The CNMC understands that it is the best-placed authority to set the scope and the duration of public procurement bans taking into account the nature of the infringement and the competitive situation of the market in which the ban will apply.

In the past, some regional competition authorities already set the scope and the duration of public procurement bans in their decisions delivered in infringement proceedings. For example, the Catalan Competition Authority (*Autoridad Catalana de la Competencia*, or **ACCO**) did just that in

two Decisions dated 23 December 2019 (*Servicio Meteorológico de Cataluña*). [1]

The Communication points out that competition authorities may now include the scope and the duration of procurement bans in the decisions they deliver in infringement proceedings that are opened after the Communication's publication in the BOE.

The scope of the procurement ban

Subjective scope

Article 71.1.b) of Law 9/2017, of 8 November, on Public Procurement, which transposes into Spanish legislation Directives of the European Parliament and of the Council 2014/23/EU and 2014/24/EU of 26 February 2014 (**LCSP**), establishes that a public procurement ban will be imposed on “*persons*” that have been sanctioned for distorting competition – this sanction is, therefore, a prohibition affecting a person's ability to enter into contracts with the public authorities or other public entities that may be created pursuant to Spanish legislation.^[2]

The provision does not make a distinction as to whether “*persons*” includes both natural persons and legal persons, that have been sanctioned, by final decision, for a serious infringement concerning the distortion of competition. The CNMC now clarifies that issue by pointing out that, as article 63.2 of the Spanish Competition Law 15/2007, of 3 July (**LDC**) makes it possible to impose sanctions on the legal representatives of undertakings or the members of their management boards, natural persons should not be understood as having been excluded from the subjective scope of public procurement bans.

Objective scope

Article 71.1.b) LCSP establishes the criteria required for imposing a procurement ban: that a final decision has been delivered imposing a sanction for a serious infringement concerning the distortion of competition.

The LCSP, therefore, only mentions serious infringements and not very-serious infringements, which initially raised questions as to whether procurement bans could be imposed for very serious infringements. Nevertheless, Article 71.1.b) LCSP should be interpreted as extending procurement bans to both serious and very serious infringements as it would seem reasonable that a procurement ban could be imposed for a very serious infringement concerning the distortion of competition, without that constituting a broad interpretation of a provision that is restrictive of rights. Indeed, it does not seem that the aim of the provision is to allow undertakings that have been sanctioned for very serious infringements of competition law (e.g., for collusion, cartels) to continue entering into procurement arrangements with the public sector while excluding undertakings that have committed less serious infringements from doing so.

This is the interpretation followed from the outset by both the CNMC and the regional competition authorities, stated in Resolutions in *Construcciones Modulares* (S/0481/13) and *Mudanzas Internacionales* (S/DC/0544/14). Moreover, the typical conduct that these measures aim to prevent are precisely cartels organised to take part in public tendering procedures, which are classified by

the LDC as very serious infringements, as pointed out in subsequent Resolutions issued by the CNMC.

On the other hand, the Communication establishes that it cannot be understood that any limitation exists as to the conduct for which a procurement ban can be imposed, provided that the conduct constitutes a serious or very serious infringement of the LDC. However, the Communication makes two important points in this regard:

- A procurement ban should not be imposed when the infringements committed are merely procedural in nature and do not distort competition.
- The application of a procurement ban should not be limited to infringements that exclusively affect public procurement. Thus, a procurement ban may also be imposed: i) for conduct that affects other markets that bear no relation to public tendering procedures; and ii) even for companies that do not take part in public procurement procedures of that kind.

The duration of procurement bans

The legal nature of procurement bans, whether or not they constitute sanctioning measures, is as of yet unclear. Therefore, the CNMC, from the beginning considered, that procurement bans would not apply to infringing conduct that had ended prior to 22 October 2015, the date on which procurement bans due to distortion of competition entered into effect.

However, this does raise a question: what should happen with regard to conducts that infringe the LDC that was triggered before 22 October 2015 but that ended at a later date? The CNMC has pointed out that these conducts are to be classified as continuous infringements. For those conducts lasting for a period of time, a procurement ban may be imposed. However, this circumstance would have to be taken into account when setting the scope and duration of the ban so as not to breach the principle of proportionality.

Criteria for establishing the scope and duration of a procurement ban

Scope

As for the scope of the procurement ban, the Communication states that graduation of the ban is fundamental, *“as it will make it possible to optimise its effect as a deterrent and its proportionality, thus determining precisely the scope thereof in terms of the geographical area, undertakings, public sector and products (goods or services) affected”*.

Thus, the CNMC understands that the structure of the market affected by the infringement and in respect of which the procurement ban will be imposed is a key element that must be taken into account when establishing the scope of the ban. Therefore, when establishing it, the CNMC must, among other aspects, take into consideration the number of economic operators in the affected market, the impact of the procurement ban on competition in the short and medium term, the barriers to entry that prevent the entry of operators other than the undertakings affected by the ban, the undertaking’s degree of involvement in the infringement, etc.

The CNMC must also assess the impact of the procurement ban on the affected market, which will require the competition authorities to strike a balance between protecting competition and other public interests that may be affected. For example, this could happen in the event of a breach of Article 1 LDC (fundamentally, cartels) in which most of the market operators are involved or when the involvement of one of the infringing undertakings in a tendering procedure is especially important to that procedure.

Duration

As for the duration of the procurement ban, the CNMC has established a rule of proportionality between the duration of the infringement that has been committed and the duration of the procurement ban, subject to a maximum duration of 3 years (Article 72.6 LCSP). Thus, conducts that entail more serious infringements will be subject to longer procurement bans within that maximum period established by the LCSP.

Content

The Communication states that the scope and duration of procurement bans may be included in the proposed resolution of the sanction so as to allow the affected persons to make their pleadings. The CNMC has indicated regarding procurement bans that the proposal may contain the following for each infringing person:

- The delimitation of affected entities and geographical scope;
- Classification of the public contracts affected;
- Duration of the ban.

Effectiveness

One of the more controversial and conflictive aspects of procurement bans imposed for infringements of competition law has been establishing when the procurement ban should take effect. The wording of Articles 71 to 73 LCSP is confusing insofar as a procurement ban could take effect at different moments in time depending on whether or not a specific declaration imposing the procurement ban is necessary, depending on the authority that sets its scope and duration – the CNMC, a regional authority or the Ministry of the Treasury and Public Functions – or when it is understood that the resolution imposing the sanction is final, or so it would seem according to the SSC in a judgment dated 14 September 2021.

The Communication points out that the resolution of the competition authority – whether that be the CNMC or the regional authority – that establishes the scope and the duration of the procurement ban **is enforceable from the date of the notification thereof, from which date it shall be effective**. This is without prejudice to a potential challenge being lodged against it before the contentious-administrative courts and the ban being suspended in the context of those proceedings. Therefore, when the scope and the duration of a procurement ban are a result of a competition authority's resolution imposing sanctions, that ban need not be recorded in the State's

Official Register of Tenderers and Qualified Undertakings (*Registro Oficial de Licitadores y Empresas Clasificadas del Estado*, or ROLECE) to be effective and enforceable.

Exemptions from and revisions of procurement bans: self-cleaning measures

Exemptions

Article 72.5 LCSP includes the self-cleaning measures established in Article 57.6 of Directive 2014/24/EU, with the following wording:

“However, imposing a procurement ban will not be applicable when, during the hearing of the corresponding proceeding, the person that is the subject of the proceedings provides evidence of the payment of or the commitment to pay the fines and compensations set by the judgment or administrative resolution delivered in the procurement ban proceedings, provided that those persons have been declared in the judgment or resolution as being liable for the payment thereof and that they have adopted appropriate technical, organisational and personnel-related measures to prevent further administrative infringements in the future, which include being part of a leniency programme concerning the distortion of competition”.

According to that provision, the Communication points out that two kinds of exemptions apply:

- Those applied previously: where the proposed resolution indicates that the procurement ban is not appropriate. These may be of two kinds:
 1. Automatic: in the case of beneficiaries of leniency exemptions.
 2. Discretionary: for beneficiaries of a reduction in the sanction as a result of a leniency petition.
- Those applied subsequently: during the hearing, it will be necessary to provide technical, organisational and personnel-related measures to prevent further competition infringements in the future (compliance programmes).

Revisions of the procurement ban

On the other hand, Article 72.5 LCSP provides for the possibility of revising a procurement ban, indicating that:

“The procurement ban, after it has been imposed, may be revised at any time while it is effective when the person on which it has been imposed provides evidence that it fulfils the conditions referred to in the preceding paragraph. The same body that issued the resolution imposing the procurement ban will have jurisdiction for revising it”.

The Communication states in this regard that the power to revise a procurement ban could be *“important in certain contexts, such as in dynamic, immature or unconsolidated markets as well as in other cases when the effective application of the procurement ban is lengthy over time”.*

Final remarks

In general terms, it can be affirmed that the CNMC guidelines on public procurement bans contribute decisively to clarifying and providing legal certainty to the various economic operators who may be prohibited from contracting with the public administrations due to infringements in competition law.

The practical application of the criteria that are enunciated in the CNMC guidelines will have to ensure the necessary balance between the principles of deterrence, effectiveness and proportionality, also attending to the adequate examination of the impact of the measures adopted in the markets affected by the conduct. The principle of proportionality advises that the CNMC should not conceive the prohibition of contracting with the public administrations indiscriminately. We should not forget that the public procurement ban due to a distortion of competition can reduce, or even eliminate in the most extreme cases, market competition.

Finally, some gaps in the CNMC guidelines can be pointed out. Thus, for example, the problem of parent-subsidiary business relations is not addressed in relation to the possible extension of the public procurement ban between them; or for instance, aspects related to the degree of participation of the company in the infringement in defining the scope and duration of the ban have also been omitted from the guidelines.

[1] Those Decisions issued by the ACCO were confirmed by judgments delivered by the High Court of Justice of Catalonia, nos. 3273/2022 and 3289/2022, both dated 28 September 2022, finding that the competition authority could set the scope and the duration of the procurement ban, as it is the best-positioned authority to make a global assessment of the disciplinary measures and sanctions that may be imposed given the facts of the case and to weigh up the impact that the infringing conduct has had on the market.

Nevertheless, the Spanish Supreme Court (SSC) has, in procedural decisions dated 16 March 2023 (appeals 20/2023 and 9091/2023) allowed two appeals against those judgments, which will establish Supreme Court case law on which authority has jurisdiction to establish the scope and duration of a procurement ban.

[2] Article 57 of [Directive 2014/24/EU](#) of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC uses broader terms than the LCSP. That provision establishes that contracting authorities may exclude “*economic operators*” when the contracting authority has sufficiently plausible indications to conclude that the economic operator has entered into agreements with other “*economic operators*” aimed at distorting competition, while the content of article 71 LCSP is more restrictive: “... *persons* will be excluded from participation in a procurement procedure (...) when they have been sanctioned by final decision for a serious infringement concerning the distortion of competition.

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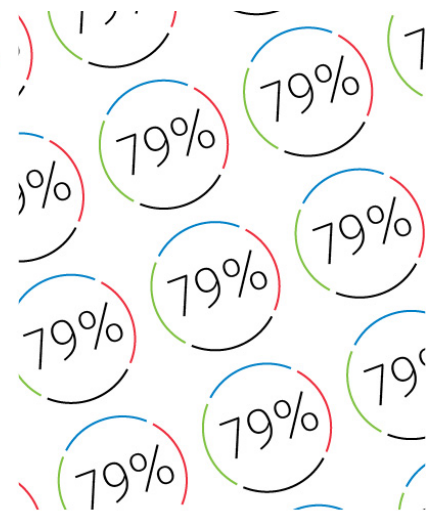
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