

Kluwer Competition Law Blog

Criminal Liability for Bid Rigging and Leniency in Criminal Proceedings: a Milestone Judgment in Spanish Case Law

Marina Novo (Suderow Fernández Abogadas) · Wednesday, February 26th, 2025

Europe is not alien to Criminal liability for bid rigging. There are even have national criminal codes that consider cartels and bid rigging practices as a criminal offence (see [Criminalisation of Cartels and Bid Rigging Conspiracies: A Focus on Custodial Sentences | OECD](#)). Notwithstanding this, cases are rare, and judgments addressing this topic are scarce. However, a recent example from Spain shows the path to finish criminal underenforcement.

On 5 February 2025, the Criminal Division of the Spanish National Audience (hereinafter “**National Audience**”) handed down a judgement in the so-called “Fire Cartel” case, condemning twelve defendants to prison terms ranging from six months to two and a half years for their participation in a long-lasting cartel in the air navigation market for firefighting.

Facts and infringements

Between 1999 and 2018, a group of businessmen from the firefighting air navigation sector shared several public tenders of the Spanish Administration. The cartel was orchestrated through an association.

The National Audience lists a series of conducts such as: (i) sharing offers in in pre-agreed tenders; (ii) price-fixing of tenders; (iii) the use of kick-out mechanisms; or (iv) the application of fraudulent techniques to raise procurement costs. All these conducts coincide with the usual bid rigging schemes.

In some cases, as in the classical [Kansei Dango](#) from Japan, the collusion was carried out in collaboration with authorities or public officials in exchange for gifts, hospitalities and other attentions.

The National Audience has declared the commission of the following continuous offences over nineteen years:

- **Concerted agreement to alter prices in public tenders** (article 262 of Organic Law 10/1995, of 23 November 1995, of the Spanish Criminal Code (hereinafter, “CC”)) through the sharing of tenders from the year 1999 up to 2018.
- **Corrupt practices** (article 404 CC), insofar as it has been proven that public officials awarded

various contracts to companies that had infringed the procedure set in procurement regulations, such as, breaching technical requirements.

- **Misappropriation** (article 432.1 and 2 CC), following the appropriation of public funds, with the undue and arbitrary payment of invoices authorised by public officials, without any contractual support and whose processing did not reflect the real services rendered, and was therefore improper.
- **Forgery of official documents** (article 390 CC) in relation to the payment of undue and arbitrary invoices for unjustified services.
- **Bribery**, both passive (article 419 CC) and active (article 424.1.3 CC): in this case, the offence of active bribery has been proven, as the bribes were given with the aim of obtaining better contracts for the benefit of the companies, and the offence of passive bribery by requesting and receiving compensation in exchange for adopting decisions to award, modify and extend contracts.

Leniency in criminal proceedings as a defence to criminal liability

The National Audience pointed out that the managing director of one of the convicted companies once he had been disconnected from the conduct, reported to the Anti-Corruption Prosecutor's Office in Valencia, the events and offences in which he had participated and those in which he had well-founded knowledge. Likewise, he actively cooperated in the transmission of all the information to the judicial authority and the police force, providing valuable documentation key to clarifying the conducts carried out.

In this regard, the mentioned director requested the exoneration or criminal leniency provided for in article 262.3 CC.

Similar to the administrative leniency established in articles 65 and 66 of the Spanish Competition Act 15/2007, article 262 .3 CC establishes an exemption from criminal liability for the offence of altering the prices of public tenders for natural persons who, acting on behalf of and representing a company, have participated in anti-competitive practices if certain conditions are met:

- a) active cooperation with the competition authority handling the case;
- b) the companies or natural persons have submitted an application for exemption from payment of the fine;
- c) such application was submitted before the companies or natural persons were informed that they were under investigation;
- d) active cooperation with the judicial authority or the Public Prosecutor's Office.

The abovementioned article was introduced by the Organic Law 14/2022, completing the transposition into national law of the ECN+ Directive 2019/1, aimed at providing the Member States' competition authorities with the means to enforce competition rules more effectively and ensure the internal market's proper functioning.

In this regard, the National Audience clarifies that, even though this amendment entered into force on 22 January 2023, and the acts being prosecuted were committed between 1999 and 2018, its

retroactive application as a favourable criminal law does not raise an issue, indicating, moreover, that there is no doubt that conditions c) and d), cited in the previous paragraph, are met. However, the problem arises regarding conditions a) and b) and whether filing a complaint with the Public Prosecutor's Office is equivalent to a notification and request for exemption from payment of a fine to the CNMC (Spain's National Competition Authority).

To this end, the National Audience describes the leniency programme or exemption from the payment of administrative fines. This system provides for exemption from payment of the fine for the company or natural person who is the first to provide evidence of the existence of collusive practices. In this regard, the National Audience confirms that the aim of the European Union and the national legislator is the same, namely, to protect those who report the existence of cartels, also in the criminal jurisdiction. The Court therefore considers that the requirements for the application of the criminal exoneration have been met.

The imposition of a ban on contracting with public administrations

The Public Prosecutor's Office and the State Attorney's Office requested the imposition on the companies, considered to be vicariously liable for the continuous offence of price-fixing in public tenders, of a one-year ban on contracting with the Public Administrations.

The debate focuses on the temporal extension of the prohibition, as there is a consensus that the criminal conduct prosecuted took place in the firefighting aircraft sector.

The National Audience considers that for the criminal consequence of special disqualification from contracting with Public Administrations to have a preventive and deterrent effect, it is necessary to impose it with a minimum duration, highlighting that even when the companies have adopted ex post compliance programmes, the criminal activity lasted for almost twenty years, causing serious harm to free competition in the firefighting aircraft sector.

The Court first weighs the effects on the workers and the economic consequences for the companies concerned and the public sector. Secondly, the Court positively assesses the adoption by the companies of compliance programmes, thus setting the imposition of the ban on contracting with the public administration at nine months instead of one year. This is the first time that a criminal court imposes this prohibition in Spain for a bid rigging offence.

Other examples in Spain

This is not the first time in Spain that the Public Prosecutor's Office of the National Audience has filed a complaint for the commission of alleged market and consumer-related offences.

In this regard, the Public Prosecutor's Office initiated proceedings accusing a main energy company and four of its executives of the commission of a crime against the market and consumers provided for in articles 281 and 288.1 and 2 CC, for allegedly devising a system that caused an unusual price increase of the electricity at the end of 2013.

However, the National Audience, in its judgement dated 4 January 2024 (appeal number 11/2022,

ECLI:ES:AN:2024:52) acquitted the defendants insofar as the ceiling price was already set and given that, since in the period under investigation, that maximum price was not reached, the assessment of the existence of a criminal offence was not possible.

More recently, in a case still pending before the National Audience, in June 2024, the Public Prosecutor's Office joined the popular accusation of a consumers' association against a major energy provider, for an alleged offence for the abusive increase in energy production prices in its offers presented on the wholesale electricity market during the COVID-19 pandemic.

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