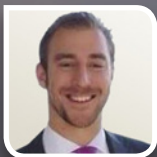


PROHIBITIONS ON CONTRACTING AND THE FUTURE OF PUBLIC PROCUREMENT ANTITRUST ENFORCEMENT IN SPAIN



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CPI Antitrust Chronicle April 2019

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I. INTRODUCTION

The Spanish Competition Authority's ("CNMC") 2016 Annual Plan constituted a landmark for antitrust enforcement in the field of public procurement law in Spain. Together with other measures announced to invigorate antitrust enforcement in Spain, which included the imposition of personal sanctions on directors involved in anticompetitive conduct, the CNMC decided to boost antitrust enforcement by announcing the imposition of prohibitions on contracting, in the context of public procurement, on companies sanctioned as a result of anticompetitive conduct (the *Prohibitions on Contracting*).

Antitrust enforcement in the field of public procurement is already vigorous in Spain. Indeed, up to 18 bid rigging cartels have been sanctioned since the creation of the CNMC in 2013. While some have applauded such vigorous enforcement, others have expressed concerns over the effects of introducing additional regulatory measures, such as the Prohibitions on Contracting, in some markets where there is not a sufficient number of players.

This article analyzes public procurement antitrust enforcement in Spain since the creation of the CNMC, and the absence of Prohibitions on Contracting, with the exception of one precedent dated March 27, 2019, despite their announcement back in 2016. It also seeks to ascertain how enforcement will evolve in the future after the entry into force of the Spanish Public Contracts Law² implementing the latest EU Public Procurement Directive³ (hereinafter referred to as *Spanish Public Contracts Law* and *EU Public Procurement Directive*, respectively).

In addition, this article studies the impact that Prohibitions on Contracting, as implemented under Spanish law, could have on the attractiveness of the CNMC's leniency program. Finally, the article advances the need for the implementation of a comprehensive legal regime that increases antitrust enforcement in the area of public procurement, but not at the expense of the CNMC's leniency program.

II. THE CNMC'S PUBLIC PROCUREMENT ANTITRUST ENFORCEMENT PRIOR TO 2016

Public procurement markets represent approximately 20 percent of Spain's GDP.⁴ Hence, it is not surprising that a significant number of antitrust law infringements have been discovered and heavily sanctioned in these markets since the creation of the CNMC in 2013. In total, 9 of the cartels sanctioned by the CNMC prior to 2016 involved some type of bid rigging practice:

² Law 9/2017, of November 8, 2017, on Public Sector Contracts.

³ Directive 2014/24/EU on public procurement and repealing Directive 2004/18/EC.

⁴ See Page 7 of the CNMC's report IPN/CNMC/010/15 on the draft bill on the Public Sector Contracts Law.

Case File	Total Fine
S/0329/11 Cantabria Asphalt	42,800,370 €
S/0316/10 Paper Envelopes	44,581,559 €
S/0341/11 Correos (Postal Services)	3,319,607 €
S/0385/11 Campezo Constructions	133,696 €
S/0423/12 Munters	638,200 €
S/0415/12 ABH-ISMA	3,684,186 €
S/0453/12 Train Bearings	4,000,000 €
S/0429/12 Waste Management	98,200,000 €
S/0481/13 Modular Construction	21,882,843 €

In addition, the CNMC (and its predecessor, the CNC) also enforced Antitrust law in public procurement markets via “soft law.” Indeed, among other measures, we would highlight the CNC’s 2010 “*Guide to Public Procurement and Competition*” which attracted significant local media and industry attention. This Guide provided contracting authorities with practical guidance to minimize the risk of antitrust infringements, such as the: (i) type of public procurement processes to follow; (ii) access/notice requirements; (iii) award criteria; (iv) contract duration; and (v) prevention and detection of collusion among tenderers.

Moreover, the CNMC also increased its advocacy activity in relation to public procurement by organizing a series of seminars on “Pro-competitive application of Public Contract Law.”⁵ In these seminars, the Authority highlighted the importance of competition in public procurement markets, and informed stakeholders of the deficiencies detected in the regime and the measures proposed by the Authority to remedy them. Among other measures, the CNMC announced in these seminars the creation of a “Special Economic Intelligence Unit,” which, operating within the CNMC, would supervise the efficient functioning of markets, including public procurement markets, by using advanced software screening tools. According to recent statements by the CNMC, the Special Unit has already discovered the existence of three cartels to date.⁶

2016 was a landmark year in antitrust enforcement in the area of public procurement in Spain. Indeed, this was the year when the CNMC announced in its Annual Plan that, in addition to hefty fines, it would start imposing Prohibitions on Contracting.⁷ The CNMC subsequently announced that the first Prohibitions on Contracting would be imposed as early as 2017.⁸

Given the importance of public procurement in several sectors of the Spanish economy, the CNMC’s announcement immediately caught media and industry attention but, to date, no economic operator has ever been excluded from a tender process in Spain on Antitrust law grounds.⁹ While some applauded the CNMC’s plans, others questioned the proportionality and pro-competitive effects of the proposed measure. Indeed, some criticism was raised arguing that the CNMC’s announcement was a questionable response from the Authority to the Spanish Supreme Court’s Judgment of January 29, 2015. This judgment had annulled the CNMC’s Fining Guidelines, triggering the recalculation of dozens of fines and seriously impacting the CNMC’s enforcement credibility.

III. THE CNMC’S PUBLIC PROCUREMENT ANTITRUST ENFORCEMENT AFTER 2016

Despite the CNMC’s announcement, and the existence of a number of cases in which Prohibitions on Contracting could have been imposed, no economic operator was subjected to such a prohibition by the Authority until March 27, 2019. Indeed, since 2016, among other decisions, the CNMC sanctioned another 8 cartels which involved some type of bid rigging practice.

⁵ Among others, the CNMC held a seminar on this topic on March 23, 2017.

⁶ These statements were made by the CNMC in the Annual Conference of the Spanish Association for the Defense of Competition on November 26, 2018.

⁷ See Page 20 of the CNMC’s 2016 Annual Plan.

⁸ See Europapress news of March 31, 2017: “*The first sanctions by the CNMC with the prohibition on contracting with the Public Administration will be imposed in 2017.*”

⁹ Indeed, no records of any such measure currently exist in the Spanish Official Registry of Tenderers and Classified Companies.

Case File	Total Fine
S/0504/14 Adult Diapers	128,800,000 €
S/0519/14 Rail Infrastructure	5,584,933 €
S/0544/14 International Removal	4,090,000 €
S/0555/15 Cash Management	46,448,416 €
S/0545/15 Asturias Ready-Mix Concrete	6,120,000 €
S/0512/14 Balearic Ferries	9,170,452 €
S/0584/16 Media Agencies	7,231,890 €
S/0565/15 Software Licencing Procurement	29,900,000 €

The non-imposition of Prohibitions on Contracting contrasted with the enforcement of personal fines for directors involved in anticompetitive conduct. Indeed, both measures were announced at the same time but the CNMC has applied only the latter, never the former.

There were a number of legal and policy reasons which may explain why the CNMC was reluctant to impose Prohibitions on Contracting despite their announcement. Regarding legal reasons, the CNMC may have come up against jurisdictional, limitational and procedural issues. Indeed, it is not clear whether, within its powers, the CNMC has competency to impose Prohibitions on Contracting.¹⁰ In addition, Prohibitions on Contracting came into force in Spain on October 22, 2015.¹¹ Accordingly, the CNMC may have considered that applying such prohibitions to Antitrust law infringements which occurred prior to that date would effectively run contrary to the principle of non-retroactivity.

Furthermore, under Spanish law Prohibitions on Contracting can only be enforced when sanctioning decisions become final. Accordingly, even if the CNMC could theoretically have imposed them, economic operators could have delayed their effective application by appealing the CNMC's decisions, thereby burdening the authority with further workload.

To steer around the jurisdictional obstacles, the CNMC could have sought the imposition of Prohibitions on Contracting through the Ministry of the Treasury and the Public Sector. According to Spanish law, when an administrative decision on the basis of which an economic operator may be excluded from participating in a tender process has not established the scope and duration of such exclusion, this Ministry, at the request of an interested party, may do so.¹² Nevertheless, the CNMC would have confronted the same non-retroactivity issue as referred to above.

Regarding policy reasons, the CNMC may have considered that the sanctions imposed on economic operators and directors were sufficiently deterrent considering the circumstances of the cases sanctioned since 2016. Indeed, while some commentators expected the amounts of the CNMC's fines to be significantly reduced following the 2015 Supreme Court judgment, they actually did not. In fact, in a recent report published by the CNMC the Authority has concluded that, under the new quantification method, single-product firms will generally face lower sanctions than under the old regime, but multi-product firms will actually face higher amounts.¹³

In addition, the CNMC may have felt that the imposition of such sanctions could compromise the attractiveness of its leniency program. Indeed, at the time Spanish law did not exempt, as it expressly does now to some extent, leniency applicants from Prohibitions on Contracting.

The CNMC's decision in case S/DC/0598/16 *Rail electrification and electromechanical infrastructure* issued on March 27, 2019 confirms some of these suspicions. The decision imposed fines totaling €118 million on 15 companies and €0.6 million on 14 directors for rigging bids in public procurement processes conducted by ADIF, the Spanish public railway infrastructure company. Regarding Prohibitions on Contracting, the CNMC stated that: (i) the CNMC, itself, was not imposing such sanction but that Prohibitions on Contracting arose automatically by virtue of the law; and (ii) the reason why such sanction was applicable in this case was because the conduct took place before, but also after the entry into

¹⁰ See Law 15/2007, of July 3, 2007 for the Defence of Competition which does not expressly confer such power on the CNMC.

¹¹ See Law 40/2015, of October 1, 2015, on the Public Sector Legal Regime (which partially implemented the EU Public Procurement Directive in Spain).

¹² After doing so, the exclusion is then recorded in the Spanish Official Registry of Tenderers and Classified Companies. Generally, the way in which economic operators prove that they are not under a Prohibition on Contracting is by requesting a certificate from this Registry which they subsequently file, together with the rest of the tender documentation, before contracting authorities. See also *supra* note 9.

¹³ See Document AE-003/18(0704) "Analysis of the CNMC's recalculation decisions applying the new Supreme Court jurisprudence on Competition law fines" (analyzing 71 recalculations of fines carried out by the CNMC following the Spanish Supreme Court judgment and finding that, under the new quantification method, 62 percent of the fines were lower than the original but 38 percent would have actually been higher).

force of Prohibitions on Contracting in Spain on October 22, 2015.

That is, the CNMC indirectly recognized that it confronted jurisdictional and limitational issues which had precluded the CNMC from imposing Prohibitions on Contracting in previous decisions. As previously discussed, to overcome the jurisdictional issue, the CNMC decided not to impose the sanction itself, but merely acknowledge its existence and refer the case to the Ministry of the Treasury and the Public Sector to determine its scope and duration.¹⁴

Having said all the above, the CNMC has a significant number of cases in the pipeline and there are even more pending appeal before administrative courts before becoming final. Hence, while the CNMC has only acknowledged the existence of such measures and referred the case to the competent Ministry in one occasion so far, nobody can rule out what the CNMC may decide to do in the future and if it will only limit itself to acknowledge the existence of such Prohibitions in post-October 22, 2015 infringements. In addition, the absence of the CNMC's enforcement in other decisions does not necessarily mean that economic operators may escape exclusion on Antitrust law grounds from tender proceedings. Indeed, contracting authorities themselves and/or competing tenderers may also be considered interested parties who could seek the exclusion of infringing operators before the Ministry, as set out above.

IV. IMPACT OF THE IMPLEMENTATION OF THE EU PUBLIC PROCUREMENT DIRECTIVE

By April 18, 2016, EU Member States had to implement the EU Public Procurement Directive into national law. However, Spain implemented the EU Procurement Directive two years later through the Spanish Public Contracts Law. This legislation entered into force on March 9, 2018.¹⁵

Regarding Prohibitions on Contracting, it is important to highlight that the Spanish legislator decided to:

- i. implement all grounds for exclusion, including Antitrust law grounds, as mandatory. That is, while the EU Public Procurement Directive provides that contracting authorities *may* exclude economic operators from participating in tender proceedings, the Spanish Public Contracts Law mandates such exclusion.
- ii. require that antitrust fines imposed upon economic operators be final before they can be excluded from tender proceedings. That is, while on the basis of the EU Public Procurement Directive contracting authorities may exclude economic operators which have infringed Antitrust law, under the Spanish Public Contracts Law they shall do so, but only after the decision which found that the operator breached Antitrust law has become final.
- iii. to a certain extent, exempt leniency applicants from such exclusions. The EU Public Procurement Directive provides that, to be allowed to participate in tender proceedings, economic operators that have infringed Antitrust law may prove to contracting authorities that they have adopted internal measures to prevent future violations, assist authorities in clarifying the facts of the infringement, and pay for the damages caused as a result. The Spanish Public Contracts law, on the other hand, states that economic operators shall not be excluded if they can demonstrate that they have paid the fines or compensations *established in the decision on the basis of which the prohibition to contract was imposed* and have adopted internal measures to prevent future violations, *with such internal measures including applications for leniency*.

¹⁴ Please note that the CNMC's decision contains a dissenting opinion issued by one of the members of the CNMC's board who, despite acknowledging that the law does not expressly grant the CNMC the power to impose Prohibitions on Contracting, considers that the CNMC could actually have such power if Prohibitions on Contracting are characterized as negative behavioral remedies, which the CNMC has express powers to adopt.

¹⁵ But see *supra* note 11.

It is important to clarify in this respect that, on the basis of the EU Public Procurement Directive, Spain has opted for a centralized system of exclusion assessments.¹⁶ That is, instead of leaving each contracting authority to assess whether an economic operator may be excluded on Antitrust grounds or not, in Spain the CNMC will be the entity responsible for such assessment.¹⁷ This is the case where the CNMC has itself already unveiled and sanctioned the anticompetitive conduct at stake (as it did with the 18 cartels referred to above) or, equally, where the contracting authority expressly requests it in the context of a tender proceeding. Indeed, under the Spanish Public Contracts law, contracting authorities that have reasonable grounds to suspect that their bidders may be colluding shall stay the proceedings and refer the matter to the CNMC so that the authority may issue a decision in this respect following a “expedited” proceeding.

As the foregoing demonstrates, the Spanish legislator has opted not to follow closely the wording of the Directive on Prohibitions on Contracting. Although the direct mention of leniency applications as means to prove that economic operators have adopted internal compliance measures to prevent future violations is welcome, other aspects could cause unintended consequences. Among others:

- i. establishing that an Antitrust law infringement triggers mandatory exclusion may result in the exclusion of all potential bidders in certain markets. Indeed, by their very nature, cartels require high combined market shares to be successful. On several occasions, it has been found that the entire market was cartelized. In these instances, if all tenderers must be excluded according to Spanish law, who would be able to bid for the public contract? Alternatively, if most, but not all, tenderers are excluded (e.g. the leniency applicant is allowed to participate) who would prevent non-excluded tenderers from charging supra-competitive prices to contracting authorities?
- ii. requiring antitrust decisions to be final prior to imposing the above-mentioned prohibition may lead economic operators to file unmeritorious, or strategic, appeals to challenge the CNMC’s cartel decisions. Indeed, under Spanish law, Prohibitions on Contracting can take up to three years from the date on which an infringing decision becomes final. As a result, if an economic operator knows, or foresees, that major public buyers will be conducting tender proceedings in the short term, they will have a great incentive to file appeals to delay their effective exclusion from those tender proceedings. Conversely, if public buyers have conducted tender proceedings recently, infringers will have a great incentive not to appeal CNMC’s decisions with a view to their exclusion immediately beginning to run its course towards the tender’s lapse in the future.

Although the questionable effectiveness of adopting Prohibitions on Contracting in terms of a given period of time, as opposed to the prohibition from participating in a given number of future tender processes, is not a Spanish-specific issue (indeed, this is provided by the EU Public Procurement Directive), the Spanish finality requirement in respect of sanctioning decisions potentially exacerbates this issue.

- iii. providing that leniency applications are just one potential means of proving the adoption of compliance measures to prevent future violations, but not establishing a *per se* Prohibitions on Contracting exemption, may not be sufficient to preserve the effectiveness of the CNMC’s leniency program. Indeed, economic operators confronted with the decision of whether or not to blow the whistle may be discouraged from doing so if faced with any uncertainty concerning the potential imposition of Prohibitions on Contracting.

Nonetheless, the first CNMC’s decision that has acknowledged the existence of this sanction has expressly, and almost automatically, declared that the leniency applicants (in the case, SIEMENS and ALSTOM and their respective directors) shall not have Prohibitions on Contracting imposed. However, following the CNMC’s own reasoning, if the CNMC has indirectly acknowledged that it lacks powers to impose Prohibitions on Contracting (and determine their scope and duration) it then must follow that the CNMC does not have the power to exempt leniency applicants from such sanctions either. In other words, the Ministry of the Treasury and the Public Sector may well decide to follow the CNMC’s proposed exemption, but it is arguable whether the Ministry will in fact be legally bound by it.

- iv. centralizing the exclusion assessment with the CNMC may delay tender proceedings. Even if centralization does generally bring greater clarity and uniformity, in this case it could potentially be at the expense of delaying tender proceedings. Although the Spanish

¹⁶ See recital 102 of the EU Public Procurement Directive: “[I]t should be left to Member States to determine the exact procedural and substantive conditions applicable in such cases. They should, in particular, be free to decide whether to allow the individual contracting authorities to carry out the relevant assessments or to entrust other authorities on a central or decentralised level with that task.”

¹⁷ This may be the reason why Spanish law has decided not to require economic operators to assist in clarifying the facts and circumstances in which the Antitrust law infringement may have occurred.

Public Contracts Law requires that the CNMC's proceedings must be "expedited," it has completely delegated to secondary legislation how these proceedings should be conducted.¹⁸ Furthermore, sanctioning proceedings before the CNMC generally take 24 months. Hence, even if "expedited," it is likely that the process will potentially delay the award of public contracts, at least for a number of months. Otherwise, it is questionable whether the expedited proceedings would be able to respect the tenderers' rights of defense.

Thus, the EU Public Procurement Directive is likely going to result in greater enforcement of antitrust rules in the field of public procurement and in an even greater involvement of the CNMC in this field. However, the implementation of the Directive has failed to address the jurisdiction, limitation and finality issues referred to above. In addition, it remains to be seen whether any of the unintended consequences anticipated in this article materialize, and what the reaction will be from legislators, regulators, contracting authorities and tenderers in order to overcome the legal and policy difficulties that they may face unless this situation is remedied.

V. CONCLUSION

The CNMC's 2016 Annual Plan constituted an antitrust enforcement landmark in the field of public procurement. However, despite the local media and industry attention awakened by the Prohibitions on Contracting, the CNMC did not adopt, or rather, recognized the existence of, any such measure until March 27, 2019.

The possibility that the CNMC will not limit itself to acknowledge the existence of such Prohibitions in post-October 22, 2015 infringements and refer the cases to the Ministry of the Treasury and the Public Sector cannot be completely ruled out. In addition, the possibility of alternative ways to publicly (via contracting authorities) or privately (via competing tenders) enforce such prohibitions is still currently alive.

Legal (and potential policy reasons) have discouraged the CNMC from adopting Prohibitions on Contracting until March 27, 2019, despite their announcement in 2016. The implementation of the EU Procurement Directive has not remedied this situation. Quite the contrary, by not closely following the wording of the Procurement Directive, Spanish law could well have created greater uncertainties for the CNMC and other unintended consequences. These consequences could have a negative impact on the attractiveness of the CNMC's leniency program if not remedied.

As for economic operators, the legal uncertainties in relation to all these issues are unfortunate. Indeed, in some sectors of the Spanish economy the submission of tenders in a public procurement context is the means by which economic operators compete in the market (or a large extent of it). Hence, the impossibility of clearly foreseeing any potential antitrust liability, or the after-effects thereof, may not be conducive to promoting competition in this field.

In any case, if economic operators have not done so yet, now is a key time for them to consider getting robust compliance programs in place or updating those already implemented in order to eliminate, or at least minimize, potential fines and Prohibitions on Contracting exposure. In addition, and again if they have not yet done so, it is also a key time for them to seriously consider the business opportunities that lawfully excluding rivals from tender process on Antitrust law grounds may create for them in the future.

¹⁸ A delegation which could potentially be contrary to the Spanish Constitution as the CNMC's proceedings would be administrative sanctioning proceedings which could have an effect on economic operators' fundamental rights. Furthermore, after almost a year since the Spanish Public Contracts Law was passed, this secondary legislation has not been enacted yet.

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