

**PUBLIC SECTOR CONTRACTING PROHIBITIONS ARISING FROM
COMPETITION LAW SANCTIONS: LATEST AND MOST SIGNIFICANT
DEVELOPMENTS**

**Ruling issued by the Spanish National Authority for Markets and
Competition on 'Electrificación y electromecánicas ferroviarias' [Railway
System electrification and electromechanics]**

The Spanish National Authority for Markets and Competition ("**CNMC**" - Comisión Nacional de los Mercados y la Competencia) issued Ruling S/DC/0598/2016, *Railway system electrification and electromechanics* (hereinafter, also, "**CNMC Ruling**") on 14/03/2019. For the first time in CNMC history, and in addition to imposing economic sanctions on certain companies and their executives for conduct the Competition Authority deems actions comprising a cartel, the CNMC has now prohibited sanctioned companies from contracting with the public sector.

This is therefore a *leading case* which not only causes very considerable detriment but which is also, as one gathers from reading the CNMC resolution content and pronouncements, deemed crucial in the fight against collusion in public bids for tenders.

Prohibitions on public sector contracting applied to companies due to "*having been firmly and finally sanctioned for a serious offence (...) of distorting competition*" first entered the Spanish legal system in 2015¹ and are currently implemented under Articles 71. 1 b) to 73 of Law 9/2017, of 8 November, Public Sector Contracts Act ("**LCSP**²").

Quite apart from the cumbersome and questionable legislative technique of using a European mandate (Directive 2014/24/EU, of 26 February 2014) to introduce this figure into the Spanish legal system, it is important to note that the Spanish Public Sector Contracts Act includes dual scenarios:

- (i) Rulings imposing a sanction may declare a prohibition on contracting and may establish the scope and duration of the prohibition, thereby implicitly assuming CNMC authority in that regard, whereas the CNMC was not granted such authority either in the CNMC founding Act or in the Competition Act (Article 72.2, first paragraph, Public Sector Contracts Act).
- (ii) Rulings imposing a sanction may declare a prohibition on contracting, but without establishing either the scope or duration of the prohibition. This

¹ Ninth final provision of Law 40/2015, which 'provides in advance' for transposing the new generation of European Directives on public contracting, especially *Directive 2014/24/EU, of 26 February 2014, on public procurement and repealing Directive 2004/18/EC*.

² Ley de Contratos del Sector Público

option relies on an *ad hoc* administrative procedure for establishing scope and duration that involves bringing the matter before the State Public Contracting Consulting Board³, which hears arguments and draws up a proposal for final decision by the Spanish Minister for Finance (Article 72.2, paragraph 2, Public Sector Contracting Act).

This is the scenario in which the CNMC issued its first ruling prohibiting public sector contracting and, on this occasion, the CNMC went for option (ii). In other words, the CNMC assumes it has authority to issue such ruling while declining jurisdiction to decide the scope and duration (the ruling records a highly critical dissenting vote against the adopted option).

The outcome is that the CNMC *Railway System electrification and electromechanics* ruling “declares” a prohibition on contracting, albeit without defining the scope and duration, in addition to imposing fines on the sanctioned companies and their executives.

Subsequent pronouncements in National Court Orders issued in July and October 2019

The National Court of Spain (“**AN – Audiencia Nacional**”), in response to a petition submitted by one of the sanctioned companies, represented by this Law firm, ordered suspension of the CNMC benchmark ruling as a precautionary measure. This confirms the extremely serious nature of the harm and irreparable damage that immediate enforcement of the aforesaid CNMC ruling would cause to the sanctioned company that brought the appeal.

Judicial pronouncements suspending the legal effects of the CNMC ruling are set out in the Order dated 19/07/2019 issued by the National Court and subsequently ratified in the Order dated 22/10/2019, which dismissed an appeal for reconsideration brought by the Government Attorneys’ Office-CNMC.

The aforesaid Orders issued by the National Court of Spain uphold as proven the argument put forward by the sanctioned company: that irreversible harm would arise from the CNMC Ruling as a result of the implicit “*declaration*” of a prohibition on contracting (even without defining the scope or duration), with an exponential and proven harmful effect on the appellant company, directly attacking the company’s sound business reputation and thereby reducing *de facto* and juridical possibilities of taking part in public, national or EU bids for tender. Additionally, that there would be no means of repairing the damage inflicted in the event that a contentious administrative appeal brought by the same appellant against the CNMC Ruling were upheld.

The appellant company, which performs a significant volume of public sector contracts just as other sanctioned companies, was able to provide evidence of the harm and damage that would be caused if the effects of the CNMC Ruling were not suspended. The arguments put forward were based on the operation of harmonised public contracting regulations applicable to Spain (European Single Procurement Document – ESPD) and especially in bids for tender subject to European oversight (European Institutions bids for tender and those committing European funds).

³ Junta Consultiva de Contratación Pública del Estado

The appellant was specifically able to show that the parameters of the standardised Responsibility Statement format used in Spanish public sector contracting, on the one hand, and especially the sound business requirements implicit in bids for tender subject to European oversight, involve the certain risk of exclusion for companies sanctioned for distorting competition, and even for companies simply '*suspected*' of having distorted competition (Article 57.4 Directive 2014 and Articles 106 et seq. of the so-called "EU financial rules Regulation"⁴).

CNMC Counsel did not at any point in the proceedings refute that the harm would occur; rather it relied on the following arguments to argue against suspension:

- (i) that the CNMC prohibition on contracting operates by tacit *ope legis* efficacy
- (ii) that prohibitions on contracting declared by the CNMC have no juridical effect unless they establish scope and duration
- (iii) and it alleged failure to acknowledge Ministry of Finance competencies, despite the Ministry not having appeared in and not being a party to the litigation

The National Court flatly dismissed all the aforesaid arguments.

The National Court Rulings dismissed the argument that a CNMC ruling imposing a sanction containing a declaration of prohibition on contracting but no pronouncement as to scope and duration, is not effective in law and of no current juridical effect. Quite the contrary, the Orders established that such declarations do indeed have a legal effect, furthermore restricting the reach of Administration/Ministry of Finance authority to subsequently decide the scope and duration of such measures.

Future panorama

The clear conclusion that must be drawn from the above description of legislative and litigation developments is that legislation and Public Bodies have started to regulate ambiguity and doubts that arise, applying prohibitions on contracting only recently included in the Spanish legal system in relation to competition distortion practices.

The cost of such declarations calculated in terms of the direct financial risk (impossibility of bidding in the national market public sector and for a period of up to three years), taken together with the risk to good repute (difficulties when seeking to enter into alliances with companies, especially foreign companies, and ability to take part in European community bids for tender) is very high indeed.

Whilst one must abide by the most recent judicial pronouncements in that regard (and also allow for subsequent Rulings by the Courts) it is nevertheless obvious that companies need to take preventive measures and prepare for such risks given the uncertainty that exists in relation to sanctions, as described above.

⁴ Regulation (EU, Euratom) 2018/1046 of the European Parliament and of the Council of 18 July 2018 on the financial rules applicable to the general budget of the Union, amending [multiple] Regulations

The preventive measures and remedies already included in and provided for in the Public Sector Contracts Act are especially important in that regard.

One must bear in mind that, from now on, all companies with a rigorous and effective competition compliance model aimed at preventing, eradicating, avoiding and even penalising collusive behaviour occurring within their organisation, with proper risk identification in place, as well as control and reaction protocols, will have a clear option of counteracting any declaration of prohibition on contracting, and even of reversing such a prohibition.

Article 72.5 Public Sector Contracts Act, as was already the case in criminal jurisdiction (i.e. the model on criminal liability of legal entities sanctioned under the 2010 Criminal Code and amended in 2015, as well as the criminal compliance figure set out therein), configures this type of technical, organisational and individual measures as a self-cleaning mechanism which, if the need arises, can act to exonerate or remove a prohibition on contracting imposed for breaches of Competition Law.

The reality is that the CNMC to date has avoided setting out guidelines or adopting a stance on the compliance model. Nevertheless, in view of the very serious nature of consequences described above, it is absolutely necessary for companies and professionals to design and apply such guidelines.

Only by doing so can any certainty be attained in the face of the situation brought about by institutional developments regarding prohibitions on contracting with the public sector, arising in application of Competition Law.