

SPAIN: THE CNMC CONFIRMS THAT IT WILL DETERMINE THE SCOPE AND DURATION OF THE PROHIBITION TO PARTICIPATE IN PUBLIC TENDERS IN ITS DECISIONS

The Spanish Markets and Competition Commission ("CNMC") has published its Notice on the criteria for determining the prohibition to participate in public tenders.

On Friday 23 June, the CNMC published Notice 1/2023, of 13 June, on the criteria for applying a prohibition to participate in public tenders ("prohibition to bid") due to the distortion of competition (the "Notice").

The Notice confirms the CNMC's change of direction with regard to the position maintained by the CNMC to date¹, which consisted of referring the decision on the scope and duration of the prohibition to bid to the State Public Procurement Advisory Board (the "Advisory Board"). According to the Notice, the CNMC will determine the scope and duration of the prohibition to bid in its sanctioning decisions.

This change of course by the CNMC is in line with the stance adopted by certain regional competition authorities, who have been establishing the scope and duration of the prohibition to bid themselves. This practice has been validated by two judgments of the High Court in Catalonia ("TSJC"),² although they have been the subject of appeals which have been admitted and are currently pending to be solved by the Spanish Supreme Court ("SC").³

The SC has also confirmed the possibility of obtaining an interim suspension of the prohibition to bid (in judgment 1115/2021, of 14 September 2021 (the "STS")⁴), which has meant that the prohibition to bid as a result of an infringement of competition law has not had any practical effect, to date.

It is particularly striking that, with two appeals pending before the SC -precisely in relation to the powers of the competition authorities in Spain (not only of the CNMC, but also of the regional authorities) to determine the scope and duration of the prohibition to bid, the CNMC has decided to publish this Notice. In practice, the Notice will have no effect if the SC decides the CNMC has no power to determine the scope and duration of the prohibition to bid.

Key issues

- The CNMC will determine the scope and duration of the prohibition to bid in its sanctioning decisions for those procedures starting as of 23 June 2023.
- The applicability of the Notice will be subject to the pending Supreme Court decision on the matter.
- The Notice provides for an allegation process prior to the imposition of the prohibition to bid in order to preserve parties' rights of defence.
- Procedural infringements will not entail a prohibition to bid.
- Compliance programmes will make it possible to obtain an exemption from the prohibition to bid or to revise it once it has been imposed.

¹ See, for example, the CNMC decisions in the recent cases [S/0013/20](#), *Audax Renovables*; [S/0012/19](#) *Chatarra y Acero*; [S/0021/20](#) or *Obra Civil*.
² See also, for a more detailed historical tour of the bidding ban in Spain, the last *Client Briefing* in this regard: [La CNMC Cambia De Rumbo Con La Prohibición De Contratar](#), from December 2022.

³ STJC Judgment [3273/2022](#) and [3289/2022](#), both of 28 September 2022.

⁴ See appeals in cassation nos. 20/2023 and 9091/2022.

⁵ See on this regard, the [Monograph](#) of October 2021 "The Supreme Court invites undertakings to request the provisional suspension of the bidding ban even if they are not immediately enforceable".

The Notice introduces limited changes to the Draft Notice (AJ/02/22) (the "**Draft Notice**"), namely, the guarantee of the rights of defence of the parties under investigation; and the infringements of competition law that can lead to the imposition of a prohibition to bid.

THE NOTICE ON THE CRITERIA FOR DETERMINING THE PROHIBITION TO BID

a) A new approach: the CNMC as the competent body

The Notice represents a change of course in the CNMC's practice, which has decided to consider itself competent to set the scope and duration of the prohibition to bid, following the lead of certain regional competition authorities,⁵ which believe that they are, not only competent, but also best placed to establish the scope and duration of the prohibition to bid. This practice has been endorsed by Judgments 3273/2022 and 3289/2022 of the TSJC (the "**TSJC Judgments**").

The CNMC is abandoning its hitherto prudent position and -instead of waiting for the SC's decision in the appeals filed against the TSJC Judgments- it has adopted the TSJC's stance, disregarding the dissenting vote of two TSJC judges (the Chamber is composed of a total of five judges), who allude to the lack of competence of the Spanish Competition Authorities to determine the scope and duration of the prohibition to bid. It must be noted that the CNMC must respect the principle of legality in its actions and that there is nothing in Article 53 of the Spanish Competition Act ("**LDC**") (which sets out the decisions that the CNMC's Council can adopt), or in Articles 71 and 72 of the Public Procurement Act ("**LCSP**"), that allows to firmly conclude that the CNMC is legally authorised to apply the prohibition to bid, as it has not been expressly attributed this power - despite the fact that the CNMC requested it in its report to the drafting process of what became the LCSP.⁶ As such, the issue of the CNMC's competence to set the scope and duration of the prohibition to bid will ultimately have to be resolved by the SC in the appeals currently pending to be solved by it.⁷

b) Entry into Force - when will the CNMC implement the Notice?

The Notice is a soft law tool and, to the extent there is no change in the law, the CNMC could apply it to ongoing procedures. While the Draft Notice did not include any provision in this regard, the Notice clarifies that the CNMC will only apply these new criteria set out in the Notice to proceedings initiated after 23 June 2023.

Therefore, in sanctioning procedures already initiated by the CNMC, the CNMC will continue to refer the determination of the scope and duration of the prohibition to bid to the Advisory Board.

c) Objective scope: what kind of competition law infringements does it apply to?

As for the objective scope of the prohibition to bid, the Notice clarifies that, even though Article 71.1.b) LCSP only refers to serious infringements regarding the distortion of competition, the prohibition to bid applies to both serious and very serious infringements. Otherwise, more serious consequences could be imposed for less grievous conducts.

In addition, in line with the CNMC's decision-making practice, and contrary to cases where regional authorities have applied the prohibition to bid, the Notice states that the prohibition is also applicable to cases that have nothing to do with public procurement or bid rigging (e.g., investigations relating to private sector undertakings). The Communication also considers that the intensity with which companies participate in public tenders is irrelevant since that situation may at any time change, and, in any event, the Administration must be protected.

Finally, while the Draft did not include any clarification in this regard, the Notice makes it clear that purely procedural infringements incapable of distorting competition should fall outside the objective scope of the prohibition to bid. We understand that the CNMC is referring to serious infringements, such as gun jumping infringements.

⁵ Andalusian Competition Board, Case [S/07/2023](#), *Conservación de Carreteras 2*, of 21 April 2023; Autoritat Catalana de la Competència, Case [108/2020](#), *CP Serveis Organització Esdeveniments*, of 21 September 2022; Galician Competition Commission, case [5/2021](#), *Licitación Suministro USC*, of 30 December 2021.

⁶ See the Report on the Draft Public Sector Procurement Bill, of 16 July 2015.

⁷ [ATS 2894/2023](#) and [ATS 2893/2023](#), both of 16 March 2023.

d) Subjective Scope: who does the prohibition to bid apply to?

As for the subjective scope: the Notice states that the prohibition to bid can apply to both natural and legal persons. In this respect, the fact that a natural person can be punished as the perpetrator of a competition law infringement is perfectly plausible (a self-employed entrepreneur, for example). In such a case, the natural person could be punished with a prohibition to bid.

However, whether natural persons can be punished with a prohibition to bid, as directors or legal representatives of a company (in accordance with Art. 63.2 LDC, which the Notice itself cites), is another matter. This is because directors or legal representatives sanctioned under Art. 63.2 LDC are not sanctioned as authors of an infringement of Competition law, since this precept explicitly states that sanctions to natural persons are applicable when the author of the infringement is a legal person. In addition, the National Court has already indicated with regard to the prohibition to bid that the referral to the Advisory Board should only be made with respect to sanctions imposed on companies and not upon the physical persons sanctioned under art. 63.2 LDC.⁸

e) Time frame: when did the infringement have to start in order for the prohibition to apply?

As far as the time frame is concerned, the Notice states that the prohibition to bid does not apply to infringements that ended prior to 22 October 2015.⁹ For infringements that started before but ended after that date, the Notice merely states that the determination of such conduct as a single and continuous infringement will be considered in setting the duration and scope of the prohibition.

In our view, the Notice should have clarified that, in cases of single and continuous infringement where the conduct began before 22 October 2015, only the conduct after that date should be taken into account for the purposes of the prohibition to bid.

Likewise, the Notice fails to resolve an issue that we raised back in 2019¹⁰, and -more recently-, in 2022¹¹: how is the prohibition to bid applied in cases of transfers of undertaking or restructurings? When the sanctioned party leaves the affected market by selling its business, does it carry the prohibition to bid with it to the other markets in which it operates, or is it freed of the prohibition? Is it the acquirer who absorbs the prohibition, or does the prohibition simply cease to apply? In this regard, it would have been advisable for the CNMC to have clarified the interrelation between the Notice and the provisions of article 71.3 LCSP, which appear to refer to situations in which the infringing party conceals its stake in a new company to avoid the prohibition to bid.

f) How does the CNMC determine the scope and duration of the prohibition to bid?

The Notice correctly states that the scope and duration of the prohibition to bid must be defined. Failure to do so would violate basic principles of the legal system, such as legal certainty and the principle of proportionality. Indeed, the legal framework must recognise that the prohibition to bid is not a sanction as such, but, in the words of the SC (SC Judgment 2062/2006), a mere legal prohibition that "*cannot be construed broadly nor omit taking into account who the party/parties responsible for a particular act contrary to the value of integrity were*".

In this regard, the Notice holds that, in theory, the market affected by the infringement in question and the structure of that market (number of operators, product homogeneity, barriers to entry, and transparency) are the key elements to determine the scope and duration of the prohibition to bid.

The Notice sets out a number of parameters that involve a series of problems:

How is the geographic scope of the prohibition to bid established?

The Notice establishes that the main point of reference must be the geographical market where the infringement occurred. However, it also introduces a great deal of legal uncertainty by considering the possibility of extending the prohibition to bid to other markets in which the infringing parent companies operate.

⁸ Ruling of the National Court of 16 March 2022, appeal 2010/2017, ECLI:ES:AN:2022:2122A.

⁹ Date of entry into force of the bidding ban due to distortion of competition, introduced in Spanish public procurement regulations by the ninth final provision of Public Sector Legal Regime Act 40/2015, of 1 October.

¹⁰ See [Antitrust Update: Monográfico sobre prohibición de contratar – Nº 1/2019](#), of 2019.

¹¹ See [La CNMC Cambia De Rumbo Con La Prohibición De Contratar](#), of 2022.

Regardless of whether responsibility for the infringement can be extended to the parent company, the decision regarding that conduct is limited to a particular geographic market, not to all its business activity.

Consequently, the possibility of extending the prohibition to other areas in which the parent company operates could be disproportionate and discriminatory towards undertakings present in various markets, which may end up suffering greater harm.

How is the scope of the product market affected by the prohibition to bid determined?

The Notice initially indicates that the relevant factor is the product market affected by the infringement, as set forth in the TSJC Judgments and as the CNMC decided in its decision in Case [S/0026/19](#), *Merck Sharp Dohme, S.A.* However, it also adds that the prohibition may be extended to other markets where the undertakings are actively involved, including the parent companies. Likewise, it introduces the possibility of extending the prohibition to bid to other markets as in the case of a facilitator operating in a different market from the market affected by the infringement, for example.

The CNMC's position is not only questionable, but once again generates legal uncertainty. For one thing, it would have been useful to have greater clarity on the circumstances in which the prohibition to bid can be extended to parent companies or undertakings not considered responsible for the infringement; and to markets not affected by the unlawful conduct. Given the current wording, it would appear impossible for a company to foresee whether a certain action could affect its parent company or result in the imposition of a prohibition to bid in a market other than the one affected by the unlawful behaviour.

This approach may be disproportionate and discriminatory toward multi-product undertakings, which may face a prohibition to bid that extends to product markets not affected by the infringement. It also does not appear to be covered by Article 71 of the LCSP, that identifies the infringing undertaking, or undertaking whose directors and representatives, *de facto* or *de jure*, have committed the infringement; as subject to the prohibition to bid. What is more, its third paragraph only provides for an extension of the prohibition to bid to other undertakings when, due to the persons who manage them or other circumstances, it can be presumed that they are a continuation of, or derive from, the undertakings that have committed the infringement.

Moreover, if the reason given by the CNMC to consider itself authorised to determine the scope and the duration of the prohibition to bid is precisely its knowledge of the market concerned, it is surprising that at the same time it also considers that it can impose sanctions on markets not affected by the infringement. Can the CNMC realistically impose a prohibition to bid in a market not affected by the infringement without thoroughly considering the impact that such a prohibition will have on that particular market? We will have to pay close attention to the decision-making practice of the CNMC in this respect and see how it applies the necessary balance between competition law defence and the exclusion of competitors as a result of the imposition of a prohibition to bid.¹²

How is the duration of the prohibition to bid determined?

The duration of the prohibition to bid is capped at three years (art. 72.6 LCSP). The Notice establishes that the length of the prohibition should be determined on the basis of: (i) the duration of the infringement based on a proportionality analysis (to avoid losing the deterrent effect); (ii) the seriousness of the infringement (the greater the severity of the infringement, the longer the duration); (iii) the economic impact of the infringement in terms of the market volume concerned; (iv) the nature of the infringement; and (v) the frequency of public tenders.

The Notice states that the prohibition to bid must be consistent with the author's role in the infringement and that the existence of aggravating and mitigating circumstances should be considered.

The CNMC does include a series of objective and measurable parameters in this regard. Essentially, these parameters comprise the criteria that the CNMC takes into consideration when determining the sanction in cases dealing with market sharing in relation to public tenders:¹³ seriousness of the infringement; turnover in the affected market; the nature of the infringement; and the frequency of public tenders. However, precisely due

¹² The Notice itself acknowledges that "It should not be forgotten that the bidding ban by distorting competition may reduce, or even eliminate, in the most extreme cases, competition in the market".

¹³ See, for example, cases [S/DC/0565/15](#), *Licitaciones de Aplicaciones Informáticas*; [S/DC/0598/2016](#), *Electrificación y Electromecánicas Ferroviarias*; or [S/DC/0614/17](#), *Seguridad y Comunicaciones Ferroviarias*.

to the similarity between these criteria and those relating to the calculation of the fine, the CNMC should be transparent in its decision-making with regard to the calculations used and the weighting of the various parameters in order to ensure a correct jurisdictional review of the application of the criteria of proportionality and non-discrimination.

Moreover, while the Notice does not include it, the CNMC should in our view consider in its analysis not only the frequency of public tenders, but also their volume (which will not necessarily match the turnover in the affected market, which is considered in the Notice) and the way they are set up (with one or more lots). This may be necessary to better capture the functioning of the market in question, especially in markets where public tenders are normally of a limited volume and exceptionally face large-volume tenders, which can be crucial for the survival of certain undertakings and the adequate provision of the public services being tendered.

Another relevant factor concerns those cases in which the Administration collaborates in the creation or maintenance of an anti-competitive agreement. The Notice does not cover the aforementioned scenario, which we believe should be taken into account to avoid applying the prohibition to bid or, at the very least, to reduce the scope and duration of the prohibition imposed, as has been done by the CNMC with regard to sanctioning procedures.¹⁴

g) When will I know if the CNMC intends to apply the prohibition to bid to me and how will I be able to exercise my rights of defence?

The Notice introduces a change to the Draft Notice in establishing that it will be the Second Statement of Objections ("**Second SO**") which will include, when considered appropriate, the CNMC's proposal to apply the prohibition to bid. It will indicate: (i) the definition of the entities covered and the geographical scope; (ii) the type of contracts affected; and (iii) the duration of the prohibition to bid.

This will safeguard the parties' rights of defence, who will have a period of one month (extendable by half of the initial period, *i.e.*, a total of one and a half months)¹⁵ to make allegations. In practice, however, this means that natural and legal persons must also defend themselves from the prohibition to bid, within the same time frame in which undertakings had to submit allegations against the Second SO - which already entailed rebutting the proven facts, the legal bases, and the proposed sanction. In short, these deadlines, even if they have been extended following the recent change in the LDC, remain limited given the very serious legal consequences that may arise from these proceedings.

h) How can I get an exemption to the prohibition to bid?

The Notice refers to two types of exemptions from the prohibition to bid established by Art. 72.5 of the Public Procurement Act:

- Prior determination, which may be: (i) automatic, for the party benefiting from the exemption; or (ii) optional, for the party benefiting from a reduction in the amount of the fine.
- Subsequent determination, which is carried out at the hearing stage with respect to measures taken to prevent future infringements from being committed. These include: the adoption of compliance programmes that guarantee behaviour parameters, to implement organisational measures and to establish compliance commitments.

¹⁴ See case [S/DC/0565/15](#), *Licitaciones de aplicaciones informáticas*, from 26 July 2018.

¹⁵ Article 219. Four. of Royal Decree-Law 5/2023, of 28 June, adopting and extending certain measures to respond to the socio-economic consequences of the war in Ukraine, to support the reconstruction of the island of La Palma, and to respond to other situations of vulnerability; transposing European Union Directives on structural amendments to businesses the work-life balance of parents and carers; and enforcement of and compliance with European Union law. This article amends the wording of article 50 LDC, which granted the deadline of 15 business days to respond to the PSD. The provisions of Title VI, Chapter I of measures to strengthen the functions of the CNMC, of the same Royal Decree, entered into force on 29 June 2023, *i.e.* the day following its publication in the Official State Gazette.

i) Can the prohibition to bid be reviewed once it has been applied by the CNMC?

Yes, the Notice recognises the possibility of reviewing the application of the prohibition to bid already established by the CNMC. This review is possible at any time while in force and can be carried out both *ex officio* or at a party's request - provided that the prerequisites established in Article 72.5 LCSP are met.

The consideration of the review of the prohibition to bid will follow the same criteria as for the exemption, based on allegations against the Second Statement of Objections. In other words, compliance programmes are essential to obtaining such a review. The handbook on compliance programmes in relation to competition rules, published by the CNMC in 2020¹⁶, thus, takes on greater importance.

The possibility of reviewing the prohibition to bid is especially relevant in the case of dynamic markets, or immature markets, or consolidated markets, as well as in cases where the effective application of the prohibition is delayed.

j) When does the prohibition to bid take effect?

The Notice confirms, in line with the Case Law (see STS Judgment 1115/2021), that the decision is final as from its adoption, whilst taking into account that the prohibition is only effective once it has been listed in the Official State Registry of Bidders and Qualified Companies. The latter without prejudice to the possibility of the prohibition to bid being suspended as a result of an appeal before the administrative courts, in which case such interim measure can be granted.

¹⁶ See the 2020 [Guide](#) for more detail.

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