

SPAIN: CNMC CHANGES COURSE WITH THE PROHIBITION TO PARTICIPATE IN PUBLIC TENDERS

The CNMC's draft notice, which is subject to public consultation, represents a radical change in the application of the prohibition to participate in public tenders by the CNMC.

The CNMC has submitted to public consultation the draft notice (AJ/02/22), regarding the criteria for the determination of the prohibition to participate in public tenders ("**prohibition to bid**") due to a competition infringement, published by the Spanish Markets and Competition Commission (CNMC) (the "**Draft Notice**").

According to the Draft Notice, the CNMC, in a break from its position to date, intends to determine the scope and duration of the prohibition to bid in its own decisions. This marks a change of course from its decision-making practice to date. The draft will be revised following the comments the CNMC receives during the public consultation.

The potential provisional suspension of the prohibition to bid (confirmed by Supreme Court ("**SC**") in Judgment 1115/2021, of 14 September 2021¹) may be behind the change in direction proposed in the Draft Notice. In spite of this change, it will still be possible to appeal against the prohibition to bid before the National Court, which may suspend it, though with the scope and duration already set.

HOW HAVE THE CNMC AND THE REGIONAL COMPETITION AUTHORITIES APPLIED THE PROHIBITION TO BID TO DATE?

The determination of the scope of the prohibition to bid has led to a great deal of debate. There are two possibilities. On the one hand, the administrative decision could include an express pronouncement on the scope and duration of the prohibition to bid. On the other hand, the administrative decision could refer the setting of the scope and duration of the prohibition to bid to an *ad hoc* procedure, for which the Minister of Finance and Public Service is responsible, after receiving a proposal from the State Procurement Advisory Board (the "**Advisory Board**").

To date, the CNMC's approach has been to refer the determination of the scope and duration of the prohibition to bid to the Advisory Board. However, regional competition authorities – such as the Catalan and Galician authorities – have, in fact, determined themselves the scope and duration of the prohibition to bid in their decisions. This

Key issues

- The CNMC has submitted to public consultation a draft notice on the criteria for applying the prohibition to participate in public tenders for distorting competition.
- The CNMC intends to determine the scope and duration of the prohibition to participate in public tenders in its decisions, despite the fact that the Supreme Court has not confirmed its authority to do so.
- The prohibition to participate in public tenders could affect markets other than the market affected by the conduct sanctioned by the CNMC.
- The CNMC confirms that the prohibition to participate in public tenders will be applicable for any competition infringement (serious or very serious), even if unrelated to public tenders.

¹ As detailed in the [October 2021 briefing](#), "*The Spanish Supreme Court invites to request the provisional suspension of prohibitions to bid even if they are not immediately enforceable*".

position was endorsed very recently by the Catalonia High Court of Justice (the "TSJC", in Spanish)², although the SC is yet to pronounce on the matter.

1) CNMC

The prohibition to bid as a consequence of competition infringements was imposed for the first time in Spain in the CNMC's decision in Case [S/DC/0598/16](#), *Electrificación y electromecánica ferroviarias*, of 14 March 2019.

In that first decision, the CNMC already indicated that the prohibition to bid applies automatically when there is a serious infringement of competition law. It did not, however, determine its scope and duration, simply referring the sanctioning decision to the Advisory Board, as the CNMC understood that it lacked the competence to decide on this subject matter. This position was maintained in the CNMC's decisions in Cases [S/DC/0612/17](#), *Montaje y Mantenimiento Industrial*³, and [SAMUR/02/18](#), *Transporte Escolar Murcia*, both from 2019, as well as in its decisions in several cases in 2020⁴ and 2021⁵. However, in her dissenting vote on the *Montaje y Mantenimiento Industrial* case, Pilar Canedo, member of the CNMC's Council, argued that article 53 of the LDC⁶ could confer competence to the CNMC's Council to decide on the scope and duration of the prohibition to bid, as it allows it to impose "*certain conditions and obligations*".

In the most recent decisions this year, we have seen how the CNMC's initial stance has begun to shift. In this regard, in Case [S/0026/19](#) *Merck Sharp Dohme, S.A.*, dated October 2022, the Council explained that, given the significance of a supplier like Merck Sharp & Dohme to the Spanish pharmaceutical industry, the scope of the prohibition to bid had to be limited to the market affected by the infringement. Since the CNMC did not make a pronouncement on its scope, such decision falls on the Ministry of Finance and Public Service. Lastly, the decision establishes that undertakings with a compliance programme can avoid the prohibition to bid if they also pay the relevant fines or compensation^{7 8}. Moreover, in the recent decision in Case [S/0028/20](#), *Leadiant*, dated November 2022, the CNMC established that the prohibition to bid could not be applied as the market in question was a market with a single supplier of a medicinal product. Consequently, the CNMC weighed the need for early administration of this medication and the health of patients when considering the effective implementation of the self-cleaning measures by the undertaking concerned.

B) Regional authorities

The Catalan Competition Authority (the "ACCO") imposed – for the first time at regional level – a prohibition to bid in its decision in Case [94/2018](#), *Catalonia Meteorological Service Tenders*, of 23 December 2019, i.e. six months after the first application of the prohibition to bid by the CNMC. Unlike the CNMC, however, the ACCO did determine the scope and duration of the prohibition to bid in its decision. In doing so, it took into account the volume of business that the undertakings obtained in the affected market, the proportion that such volume represented in respect of their entire income, and the fact that the prohibition was limited both in terms of its objective and temporal scope.

This is the procedure that subsequently led to the TSJC judgments mentioned by the CNMC in section 3 of the Draft Notice. Those judgments are not yet final, nor have they been confirmed by the SC.

Since 2020, the ACCO has issued five sanctioning decisions⁹. In all of them, it determined the scope and duration of the prohibition to bid in the decision itself. The circumstances assessed in those decisions in order to determine the scope and duration of the prohibition are varied. In addition to the criteria that may have inspired those considered in

² CHCJ Judgments [3273/2022](#) and [3289/2022](#), both of 28 September 2022.

³ Decision of 1 October 2019. It gave rise to the subsequent [SC Judgment 146/2022](#), concerning the provisional suspension of the ban on bidding.

⁴ Procedures [S/DC/0626/18](#), *Radars Meteorológicos*, of 13 February 2020; and [S/DC/0620/17](#), *Combustibles Sólidos*, of 22 December 2020.

⁵ Procedures [S/0644/18](#), *Radiofármacos*, of 2 February 2021; [S/DC/0627/18](#), *Consultoras*, of 11 May 2021; [S/0011/19](#), *Transporte Cántabro de Viajeros*, of 16 June 2021; [S/0013/19](#), *Conservación Carreteras*, of 17 August 2021; [S/0025/19](#), *Gestión de Archivos*, of 14 September 2021; [S/DC/0614/17](#), *Seguridad y Comunicaciones Ferroviarias* of 29 September 2021; and [S/DC/0614/17](#), *Proptech*, of 29 September 2021.

⁶ Spanish Competition Act 15/2007, of 3 July (*Ley de Defensa de la Competencia*).

⁷ By virtue of article 72.5 of Act 9/2017, of 8 November, on Public Sector Procurement, transposing into Spanish law Directives of the European Parliament and of the Council 2014/23/EU and 2014/24/EU of 26 February 2014 (*Ley de Contratos del Sector Público*, "LCSP").

⁸ See also procedure [S/DC/0627/18](#), *Consultoras*.

⁹ Procedure [100/2018](#), *Aerobús*, of 21 July 2020; procedures [103/2019](#), *Servicios Visitas Médicas*, and [105/2019](#), *Playas de Sant Andreu de Llavaneres*, both of 5 May 2021; procedure [102/2019](#), *Aerobús 2*, of 21 July 2021; and procedure [108/2020](#), *CP Servicios Organización Eventos*, of 21 September 2022.

the Draft Notice¹⁰, the ACCO took into account the principles of efficacy, deterrence and proportionality required by European legislation; the effect on the market in which bidding is prohibited; and the effects and circumstances of the infringing conduct. Moreover, in relation to the possibility of self-cleaning, it is worth highlighting decision [V-100/2018](#) in the *Aerobús* Case. This decision reviews the prohibition to bid on the basis of the implementation of a compliance programme, although it ultimately denies such request on the basis of numerous shortcomings in the compliance programme relating to the actual implementation of the programme and its limited scope.

As for the other regional competition authorities, the Valencian and Basque authorities have only applied the prohibition to bid in one decision each¹¹. The former followed the CNMC's lead and referred the procedure to the Advisory Board to determine the scope and duration of the prohibition to bid. The Basque authority, however, decided not to impose the prohibition after an analysis of the circumstances of the case.

The Galician Competition Commission, meanwhile, has changed its position on several occasions. In its decision in Case [4/2020](#), *School Transport Tenders*, of 15 December 2020, the Galician authority followed the ACCO's lead and established the scope and duration of the prohibition to bid. However, only a year later, in Case [3/2020](#), *University of Vigo Tenders*, of 11 November 2021, the authority deviated from its previous practice and instead of determining the scope and duration in its own decision, it referred it to the Public Procurement Advisory Board of the Autonomous Community of Galicia. The authority does not give any reasoning for this change in stance, although it cited numerous precedents from the CNMC in which it referred the decision to the Advisory Board. Nevertheless, just two months later, in its decision in Case [5/2021](#), *University of Santiago de Compostela Tenders*, of 30 December 2021, the Galician Competition Commission returned to its initial position and determined the scope and duration of the prohibition to bid in the decision itself. What is even more striking is that, in this case, the scope of the prohibition to bid was related to "*any supply agreement tendered by any public administration of Galicia*", a scope that goes beyond the market affected by the infringement in question (which, as explained below, is the starting point of the Draft Notice).

WHAT'S NEW IN THE DRAFT NOTICE

a) A new approach: the CNMC as competent body

The Draft Notice represents a change in the CNMC's approach to the prohibition to bid. In it, the CNMC decides to consider itself competent to set the scope and duration of the prohibition to bid, following the conclusions of the TSJC in its Judgments 3273/2022 and 3289/2022, in which it argues that the competition authority is not only competent, but also best placed to establish the scope and duration of the prohibition.

Surprisingly, the CNMC abandons its – to date – cautious position and, instead of waiting for the inevitable SC pronouncement on the matter, adopts the TSJC's position. It is perhaps even more striking that it ignores the vote of two TSJC judges who allude to the lack of competence of competition authorities to determine the scope and duration of a prohibition to bid. Given that the CNMC must respect the principle of legality in its actions, these judges are, in our view, right to emphasise that nothing in article 53 LDC (which details the decisions that the CNMC's Council may adopt), nor in articles 71 and 72 LCSP, allows for concluding with certainty that the CNMC is legally authorised to apply the prohibition to bid, as it has not been expressly attributed such competences, despite the CNMC having requested it in its report relating to the LCSP¹². We therefore anticipate that the issue of the CNMC's competence to set the scope and duration of the prohibition to bid will be subject to litigation and will – ultimately – be resolved by the SC.

b) The scope of application of the prohibition to bid

Regarding the scope of the prohibition to bid, the Draft Notice distinguishes between:

¹⁰ In paragraph 4.2 of the Draft Notice, the circumstances are the geographical and product scope, the duration and severity of the infringement, the degree of the infringing party's involvement and the existence of aggravating and mitigating circumstances; except for the latter, all these circumstances were considered by the Catalan authority.

¹¹ Valencian Competition Commission, procedure [SAN 1/2019](#), *Audiovisual Media Procurement*, of 24 November 2020; Basque Competition Authority, procedure [516-SAN-2021](#), *Bilbao City Council Publicity*, of 23 November 2022.

¹² See Report IPN/CNMC/010/15, on the Public Sector Procurement Draft Bill, of 16 July 2015, available at https://www.cnmc.es/sites/default/files/709299_7.pdf.

- **Objective scope:** the Draft Notice clarifies that the prohibition to bid applies both to serious infringements (pursuant to article 71.1.b) LCSP) and very serious infringements, since otherwise more serious consequences could be imposed for a less grievous conduct. In addition, in line with the CNMC's decision-making practice, and in contrast to cases where the regional authorities have applied the prohibition to bid, the Draft Notice states that the prohibition is also applicable in cases that have nothing to do with public procurement or bid rigging (e.g., investigations relating to private sector companies). The Draft Notice also states that the extent of a company's participation in public tenders is irrelevant because that situation can change and the administration needs to be protected regardless.
- **Subjective scope:** the Draft Notice states that the prohibition to bid can be applied to both individuals and legal persons.
- **Temporal scope:** the Draft Notice states that the prohibition to bid does not apply to infringements that ended prior to 22 October 2015. For infringements initiated before but ending after that date, the Draft Notice merely states that the determination of such conduct as a single and continuous infringement will be taken into account in setting the duration and scope of the prohibition.

In our view, this delimitation of the scope of application is insufficient. First, it is questionable to impose a prohibition on public tendering for competition infringements that have nothing to do with public tenders, though it is possible in other areas envisaged in the LCSP. Second, the Draft Notice does not resolve an issue that we already raised in 2019¹³: how is the prohibition to bid applied in cases of transfer or restructuring of an undertaking. 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 be advisable after the public consultation to seek greater clarity from the CNMC pursuant to the provisions of article 71.3 LCSP, which appears to refer to situations in which the infringing party conceals its stake in a new company in order to avoid the prohibition to bid.

c) Scope and duration of the prohibition to bid

The Draft Notice correctly states that the scope and duration of the prohibition to bid must be defined, as failure to do so would violate the 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*".

It is, however, striking that the Draft Notice does not clarify the many procedural issues that arise with this change in course by the CNMC, the main ones being: when allegations are to be filed; within what time frames; the possibility of a hearing before the CNMC's Council to discuss the prohibition to bid; and whether there will be a prior consultation referred to the potentially affected administrations.

In addition, the Draft Notice would benefit from greater clarity and the determination of objective criteria to serve as real parameters for the delimitation of the scope and duration of the prohibition to bid, in order to ensure legal certainty, which, as the CNMC itself acknowledges, the courts demand (see in this regard SC Judgment 1115/2021, mentioned in the Draft Notice, and SC Judgment 377/2022).

In principle, the Draft Notice holds that 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. However, a more detailed analysis gives rise to doubts that this is really the case:

- **Geographical scope:** although the main point of reference must be the geographical market where the infringement occurred, the Draft Notice introduces a great deal of legal uncertainty to the system by considering the possibility of extending the prohibition to bid to other markets where the parent companies, considered liable for the infringement, operate. Regardless of whether liability 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 of its business activity.

¹³ See [Antitrust Update: Monograph on ban on bidding – No. 1/2019](#), from 2019 (only available in Spanish).

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

- **Product scope:** again, the Draft 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 recent decision in Case [S/0026/19](#), *MERCK*. However, it also adds that the prohibition may be extended to other markets where the undertakings are actively involved, including the parent companies, are active on. Likewise, it introduces the possibility of extending the prohibition to bid to other markets as, for example, in the case of a facilitator operating in a different market from the market affected by the infringement.

This CNMC position is not only questionable, but also generates legal uncertainty. For one thing, more precise clarification seems necessary as to the circumstances that must be met for the prohibition to bid to be extended to parent companies or undertakings not considered liable 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 particular act 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.

In addition, as indicated above, 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 the LCSP, article 71 of which 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.

Moreover, if the reason given by the CNMC to consider itself authorised to determine the scope and 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?

- **Duration of the ban:** the Draft Notice establishes that the length of the prohibition should be determined by: (i) the duration of the infringement based on a proportionality analysis (the prohibitions should be neither too long nor too short 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. In addition, the extent of the undertaking's involvement in the infringement and 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 the CNMC takes into consideration when determining the sanction in cases dealing with market sharing in relation to public tenders¹⁴. However, precisely due to the similarity between such criteria and those relating to the calculation of the fine, the CNMC should be transparent in its decision-making as regards 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.

In addition, we would suggest adding another parameter to the analysis because we understand that consideration should be given, not only to the frequency of public tenders, but also to their volume and how they are configured (in 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 limited volume and, unusually, there are large-volume tenders that are very relevant to the survival of certain undertakings and the correct functioning 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 Draft Notice does not cover the aforementioned

¹⁴ See, for example, procedures [S/DC/0565/15](#), *Software Tenders*; [S/DC/0598/2016](#), *Railway Electrification and Electromechanics*; and [S/DC/0614/17](#), *Rail Safety and Connections*.

scenarios, which we believe should be taken into account to avoid applying the prohibition to bid or, at least, should lead to the determination of a shorter scope and duration of the prohibition.

d) Exemption, review and effect

The last sections of the Draft Notice refer specifically to the exemption, review and effects of the prohibition to bid:

- **Exemption:** the Draft Communication distinguishes between two types of exemptions:
 - o Prior determination, which may be: (i) automatic, for the party benefiting from the exemption; and (ii) optional, for the party benefiting from a reduction in the amount of the fine.
 - o Subsequent determination, which is carried out at the hearing stage with respect to measures taken to prevent future infringements being committed. These include: the adoption of compliance programmes that guarantee behaviour parameters, to implement organisational measures and to establish compliance commitments. Although the Draft Notice does not provide clarification on this point, we understand that this procedure will take place within the framework of a procedure to review the prohibition on public tendering.
- **Review:** the Draft Notice merely recognises the authority to review the application of the prohibition to bid, carried out *ex officio* or at the request of a party, provided that the prerequisites established in article 72.5 LCSP are met. It might be necessary to clarify the procedure, competent bodies and details of the process.
- **Effect:** the Draft Notice confirms, in line with case law – for example SC Judgment 1115/2021 –, that the decision is final as from its adoption, without prejudice to the fact that the prohibition is only effective once it has been entered in the Official State Registry of Bidders and Qualified Companies, and without prejudice to the possibility of appealing before the contentious-administrative courts.

NEXT STEPS

The deadline for submitting comments on the Draft Notice expires on 23 December 2022. After reviewing the allegations received, the CNMC will publish the final version of the notice.

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