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REPORT ON THE DRAFT BILL OF THE COMPREHENSIVE LAW FOR THE PROMOTION OF THE SOCIAL ECONOMY

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Madrid, 23 May 2023

In view of the request for a report from the Ministry of Labour and Social Economy on the Draft Bill of the Comprehensive Law for the Promotion of the Social Economy (hereinafter, "the Draft Bill"), which was submitted to the Spanish National Markets and Competition Commission (CNMC) on 13 April 2023, in accordance with the powers attributed to it by Article () of Law 3/2013, of 4 June 2013, creating the CNMC (Law 3/), the Plenary agrees to issue the following report.

1. BACKGROUND

According to Article of the 1978 Spanish Constitution: *"The public authorities shall effectively promote the various forms of participation in business and shall encourage cooperative societies by means of appropriate legislation. They shall also establish the means that facilitate workers' access to ownership of the means of production"*.

This constitutional mandate has been implemented through different regulations, including Law 27/1999, of 16 July , on cooperatives, Law 44/2007, of 13 December , regulating work integration social enterprises, and Law 5/2011, of 29 March , on the Social Economy.

According to the latter, the term '**social economy**' refers to *"the set of economic and business activities carried out in the private sphere by undertakings which, in accordance with the principles set out in Article 4 of Law 5/2011 […], pursue either the collective interest of their members, the general economic or social interest, or both"*[1].

These **guiding principles** are: primacy of people and social purpose over profit; reinvestment of the profits obtained from the economic activity mainly according to the work provided and the service or activity carried out by the partners or its members and, where appropriate, to the social purpose of the undertaking; promotion of internal solidarity and solidarity with society, and independence from public authorities[2].

Social economy entities are, among others, cooperatives, mutual benefit societies, foundations and associations that carry out an economic activity, employee-owned companies, work integration social enterprises (WISE), special employment centres, fishermen's guilds and agrarian transformation societies.

In quantitative terms, in the 2021-2022 biennium, more than 43,000 companies of different types have been operating in this sector in Spain. Their turnover accounts for 10% of the national GDP, generating almost 2.2 million direct and indirect jobs[3]. A sample of 1,056 companies shows the following characteristics:

- Type: 774 cooperatives, 115 special employment centres, 54 work integration social enterprises (WISE), 48 employee-owned companies, 25

[1] Article 2 of Law 5/2011.

[2] Article 4 of Law 5/2011.

[3] Information published by the Spanish Confederation of Social Economy Enterprises (CEPES), which provides further statistical information.

mutual benefit societies, 24 foundations and associations, 9 fishermen's guilds and 7 business groups.

- Size by number of workers: 35% are small enterprises (between 10 and 49 workers); 27% are medium-sized (between 50 and 249 workers); 16% are large enterprises (more than 250 workers) and 22% are micro-enterprises (less than 9 workers).

- Sectoral distribution: social economy enterprises are represented in all economic sectors, with 52.7% in the agricultural sector, followed by services (37.12%), industry (7.67%), construction (2.27%) and multi-sectoral (0.19%).

According to the Regulatory Impact Assessment (RIA) Report accompanying the Draft Bill that is the subject of this Report, the transformations in the economy and in our society, which have accelerated unprecedentedly following the health crisis and the current context of uncertainty, make it necessary to adapt and update the national regulatory framework for the social economy. In addition, the RIA argues the need to modify and update the sector's legal ecosystem in order to strengthen the potential of the entities that make it up and to avoid intrusiveness and unfair competition (for instance, through false cooperatives that make working conditions precarious or through false work integration social enterprises created with the expectation of gaining access to public contracts).

The objectives of the Draft Bill are in line with the European Action Plan for the Social Economy, which aims to provide greater support to the social economy not only in terms of job creation, but also by seeking to increase the social impact of these organisations throughout the EU.

In addition, it should be noted that a *Spanish Social Economy Strategy for 2023-2027* has been approved as the main instrument for the promotion and development of the social economy[4].

[4] Although this Strategy is not the subject of this report, for information purposes, it should be noted that it includes the following objectives: Objective 1. To improve the prevention of accidents at work and occupational diseases. Objective 2. To manage the changes arising from new forms of work organisation, demographic evolution and climate change from a preventive perspective. Objective 3. To improve health and safety management in SMEs: a commitment to integration and training in occupational risk prevention. Objective 4. To strengthen the protection of workers in situations of greater risk or vulnerability. Objective 5. To introduce the gender perspective in the field of occupational safety and health; and Objective 6. To strengthen the national health and safety system to successfully deal with future crises.

Finally, it is worth noting that the Spanish competition authority has analysed various public initiatives related to the social economy sector, including the report by the former CNC (National Competition Commission) on the draft bill for the promotion of cooperative and associative integration[5]. Furthermore, a number of reports have been produced on the agri-food sector, including reports concerning projects to promote the association of agri-food production structures[6]. It is also worth mentioning a report on the participation of third-sector entities in public tenders[7].

2. CONTENT

The Draft Bill consists of a preamble and three articles that partially amend the three main laws that make up the legal ecosystem of the social economy referred to above:

Article 1 of the Draft Bill partially amends **Law 27/1999, of 16 July , on Cooperatives (hereinafter, the Cooperatives Act).** The following novelties stand out:

- Chapter I of the Cooperatives Act (Articles 1, 3 and 16): on the concept of cooperative societies, principles and values set out by the International Cooperative Alliance and adjustments to the internal functioning of these undertakings, especially with regard to new forms of communication and participation based on new technologies.

- Chapter III of the Cooperatives Act (Articles 12, 16, 17 and 18): inclusion of equality measures and members' rights, new restrictions on membership withdrawals (to make them effective for periods of up to 5 years) and introduction of rules on social discipline.

- Chapter IV of the Cooperatives Act (articles 19, 24, 25, 27, 29, 32, 33, 36 and 44): on the governing bodies, including the General Assembly

[5] IPN 82/12. Among the recommendations made are those on ensuring the compatibility of the proposed promotion measures with EU State aid rules, as well as certain issues for improvement concerning the subjective and objective scope of application.

[6] Among others, see IPN/CNMC/014/21 PRD regulating the recognition of producer organisations and their associations in certain livestock sectors. At the regional level, see ACCO's report on the Draft Bill for the promotion, development and organisation of the social and solidarity economy in Catalonia (2023).

[7] INF/DP/0006/14 Report on the possibility of including VAT in the price of public procurement procedures when tax-exempt bidders are involved.

(convening of meetings suitable for digital environments), the Governing Council (composition, election and functioning) and the new Equality Commission.

- Chapter V of the Cooperatives Act (Articles 46, 51 and 55): mitigation of members' initial compulsory contributions, reimbursement of contributions and rules for allocation to compulsory social funds (Statutory Reserve Fund and Education and Training Fund).

- Chapter IX of the Cooperatives Act (Article 79): amendment to the forms of economic collaboration between cooperatives, reducing to 50% the obligation to allocate the profits from these operations to the Statutory Reserve Fund.

- Chapter X of the Cooperatives Act (Articles 80, 83, 93): changes to the purpose and general rules of worker cooperatives to prevent fraudulent use of this corporate form[8]. Equality Plans are also regulated in the Draft Bill in order to overcome the difficulties they faced when participating in public tenders in competition with other forms of business[9]. The purpose of agricultural cooperatives has been modified to facilitate generational changeover. The Draft Bill establishes a minimum membership period, which may not exceed 10 years, and provides for additional extensions of 5 years.

- Title II of the Cooperatives Act (Articles 108 and 116): promotion of cooperativism in sectors of special importance (energy and housing); amendment of the grounds for disqualification of cooperatives to avoid false cooperatives.

- Fifth Additional Provision of the Cooperatives Act: classification of cooperatives as non-profit organisations. The Draft Bill includes people who suffer from any kind of vulnerability (not only those at risk of social exclusion).

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[8] These are cooperatives whose purpose is to provide their members with jobs through their personal and direct effort, on a part-time or full-time basis, by jointly organising the production of goods or services for third parties.

[9] From 1 January 2023, in order to participate in a public tender, all companies with more than 50 employees must have an equality plan (Royal Decree-Law 14/2019, of 31 October , and amendment of the Public Procurement Act by the General State Budget Law for 2023).

- Fifth Additional Provision of the Cooperatives Act: abolition of the preferential treatment of worker cooperatives (and second-degree cooperatives grouping them together) in the event of a tie in public tenders.

- Sixth Final Provision: elimination of the application of Social Security provisions for part-time contracts to cooperatives.

Article 2 of the Draft Bill modifies **Law 44/2007, of 13 December , regulating the regime of work integration social enterprises (hereinafter, the WISE Act)**. The following novelties stand out:

- Article 1 and 1 bis, Articles 2 and 3: extension of the subjective scope: changes in the definition of the vulnerable groups and persons who can be hired by WISE companies. The Draft Bill introduces changes in the description of *WISE promoters* (non-profit and majority participation by a non-profit entity; sufficient material and human resources to carry out their statutory purpose and at least one year's experience of intervention in the field of vulnerability and/or social exclusion).

- Articles 4, 5, 6 and 7: revision of the concept of work integration social enterprise and the requirements for classifying it as such. The Draft Bill introduces adjustments to their internal functioning and their employment model. They are classified as companies providing services of general economic interest (SGEI).

- Articles 9, 10, 11 and 12: modification of the legal regime and the types of employment contracts and working conditions.

- Article 13: promotion of WISE companies. The measures include the possibility of receiving public aid where their work centres are located, which shall be exempt from notification to the European Commission.

- Seventh Additional Provision: the Draft Bill includes measures regarding public procurement that affect the percentages of restricted tenders (for Special Social Initiative Employment Centres and work integration social enterprises, which shall be governed by the provisions of the fourth additional provision of the LCSP), the award criteria and the special conditions for execution.

Article 3 of the Draft Bill modifies Law 5/2011, of 29 March , on the Social Economy. The following novelties stand out:

- Articles 5 and 6: clarification of the objective and subjective scope (types and catalogue of entities that make up the social economy), with the addition of special social initiative employment centres among the operators listed. The Draft Bill introduces the concept of social enterprise and its consideration as a provider of SGEI (services of general economic interest).

- Article 5 bis: the Draft Bill regulates the minimum content of acts of entrustment of SGEI. The financial compensation received by companies will be considered aid exempt from notification to the European Commission, pursuant to Decision 2012/21/EU of 20 December 2011 on the application of Article 106(2) of the TFEU.

- Article 8: the Draft Bill regulates measures for the promotion and dissemination of the social economy. It also strengthens the introduction of percentages of restricted tenders and social clauses in public procurement procedures.

- Seventh Additional Provision: the Draft Bill regulates the Spanish Social Economy Strategy, which shall generally be updated every four years.

Finally, the Draft Bill contains 4 transitional provisions and 5 final provisions, among which the following stand out:

- The Second Final Provision amends the Fourth Additional Provision of Law 9/2017, of 8 November , on Public Sector Contracts (LCSP as per its acronym in Spanish) with regard to contracts reserved for special social initiative employment centres and WISE companies. It increases the minimum supplementary percentage of reserved or restricted tenders at the state level in the absence of an agreement of the Council of Ministers, setting it at 15% of the volume of contracts in Annex VI of the LCSP for the previous year[10]. As a general rule, it is expected to come into force on the day following publication, except for the requirement to have a website for cooperatives with more than 500 members, among other matters, which comes into force after one year.

[10] These are contracts related to cleaning, laundry, forestry, transport, and catering, among others.

3. ASSESSMENT

3.1. General remarks

The inclusion of measures to support people at risk of social exclusion or with problems of vulnerability in order to facilitate their integration into the labour market is an objective in line with a social and democratic state governed by the rule of law, as proclaimed in Spain's Magna Carta.

From the perspective of competition and the proper functioning of markets, companies that rely on the most vulnerable groups may be under-represented in the markets compared to the solution that would be socially desirable. Moreover, strengthening the ability to compete of a type of economic operators offering goods and services on the market that are in a structurally weak situation can contribute to making the competitive game more dynamic, with benefits for the community as a whole.

However, inadequate support can also lead to distortions of competition and of the proper functioning of markets.

The Regulatory Impact Assessment (RIA) Report notes that "*the Draft Bill does not lead to restrictions on competition as it does not restrict access to new players".*

However, it should be noted that restrictions on competition may arise in other ways, for example by limiting the number or variety of operators in the market, their ability to compete or by reducing the incentives to compete in the market[11].

Measures to support certain types of enterprises may distort competition in markets to the extent that they strengthen the competitive position of certain companies or discourage competition or innovation. They should therefore be examined with caution, assessing their compliance with EU State aid rules and with the principles of sound economic regulation in Spanish law[12].

[11] See the Guide for the drafting of competition reports.

[12] Article 4 of Law 40/2015, on the legal regime of the public sector, Article 129 of Law 39/2015, on the common administrative procedure of public administrations, Article 5 of Law 20/2013, on market unity. In this regard, in accordance with Art. 38 of the Spanish Constitution and the principles of good regulation (necessity, proportionality), public authorities should not limit competition in markets unless justified by a reason of public interest and, in such a case, they should do so in such a way that there are no other means less harmful to competition to protect that interest.

Below are the areas for improvement identified in the articles of the text submitted for review.

3.2. Specific remarks

Given that the Draft Bill amends three laws, the specific remarks will refer to each of them. However, matters relating to State aid (SGEI) and public procurement are analysed together, as they affect several of the laws being amended.

3.2.1. Amendments to the Cooperatives Act (Article 1 of the Draft Bill)

3.2.1.1. Inter-cooperative agreements (Articles 1.1 and 79.3 of the Cooperatives Act)

Article 1.1 of the Draft Bill introduces as a novelty an express mention of the guiding principles of cooperatives, highlighting the principle of cooperation between cooperatives:

> *"Cooperatives are a corporate form made up of persons who associate, under a system of open and voluntary membership and withdrawal, to carry out economic activities, aimed at satisfying their common economic, social and cultural needs and aspirations, through a jointly owned and democratically managed enterprise, with economic participation of the members, autonomy and independence, education, training and information, cooperation among cooperatives and concern for the community, in accordance with the principles formulated by the International Cooperative Alliance".*[13]

On the other hand, the Draft Bill amends Article 79 on other forms of economic collaboration.

> *Cooperatives may enter into inter-cooperative agreements with other cooperatives in order to fulfil their social objectives. Under these agreements, a cooperative and its members may carry out supply operations, deliveries of products or services to another cooperative which is a signatory to such an*

[13] This International Cooperative Alliance (ICA) is an independent non-governmental body whose members are cooperatives. The ICA upholds the Statement on the Cooperative Identity, which includes a definition, 10 values and 7 operating principles: it is the lowest common denominator for all cooperatives in all sectors and all regions. One of the principles is cooperation: *Cooperatives serve their members most effectively and strengthen the cooperative movement by working together through local, national, regional and international structures.*This principle is further explained in a document entitled ***"****Guidance Notes on the Cooperative Principles".* They state that it is a principle that differentiates cooperatives from other forms of business enterprise.

agreement, and such transactions shall be treated in the same way as cooperative operations with the members themselves.

At least 50 per cent of the results of these operations shall be allocated to the Statutory Reserve Fund, in accordance with the provisions of the articles of association.

Specifically, the novelty is that at least 50 per cent of the results of these operations shall be allocated to the Statutory Reserve Fund in accordance with the provisions of the articles of association (as opposed to the current 100 per cent).

According to the RIA Report, the obligation of full allocation acted as a deterrent to the establishment of inter-cooperative agreements. Therefore, this amendment encourages synergies in the sector and fosters the creation of cooperative networks.

Without prejudice to the fact that this principle is included in the International Cooperative Alliance, it should be noted that the agreements entered into between cooperatives are agreements between economic operators and must therefore comply with national and European antitrust regulations, especially with regard to potential anti-competitive agreements (practices falling under Article 1 of Law 15/2007, of 3 July , on the Defence of Competition and Article 101 of the TFEU)[14]. The CNMC therefore recommends including an express mention to this effect[15].

[14] By way of illustration, the CNMC has recently sanctioned the cooperative Radio Taxi of Murcia for a very serious infringement of Article 1 of Law 15/2007, of 3 July , on the Defence of Competition, consisting of the adoption of an agreement with Tele Taxi Murcia that restricts competition in the market for intermediation services of taxi service requests by telephone (SAMUR/02/22: RADIO TAXI MURCIA).

[15] The current Law 27/1999 on cooperatives does not contain any mention of antitrust regulations, nor does Law 5/2011 on the social economy. However, Law 44/2007 on work integration social enterprises does contain the following mention:

Art. 16. 6. *"In order to defend the interests of work integrtion social enterprises, as well as to organise advisory training, legal or technical assistance services and any other services that may be appropriate to the interests of their members, work integration social enterprises, while respecting antitrust rules, may organise themselves into specific associations or groups, both at the regional and state levels. These associative structures representing work integration social enterprises may receive financial aid from the public authorities to cover their promotion and operating costs.*

3.2.1.2. Obligation to have a registered office in Spain and a corporate website (Article 3 and Article 3 bis of the Cooperatives Act)

The Draft Bill amends Article 3 of the Cooperatives Act by stating that:

> *Cooperatives shall establish their registered office within Spanish territory, in the place where they mainly carry out their activity or centralise their management and administration.*
> *2. Cooperatives, if their articles of association so provide, may have a corporate website which allows members to access information online and, where appropriate, the company's electronic office. The corporate website must contain the registered office and the cooperative's identification and registration details, in the terms set out in Article 3 bis of this Act".*

Although the first section remains identical to the current wording, a new second section is introduced, stipulating that they may have a corporate website allowing members access to information and, where appropriate, the company's electronic office.

On the other hand, the new Article 3 bis once again states the possibility of having a website, which must be registered in the Cooperatives Register in order for the entries made therein to have legal effect (Article 3 bis 5). Any modification affecting the website must also be registered. It also provides for the obligation for cooperatives with more than 500 members to have such a corporate website (Article 3 bis (1)).

As regards the **requirement for the registered office to be located in Spanish territory**, it should be noted that this requirement is similar, but not identical, to the requirement under Spanish corporate law[16].

This territorial requirement may constitute an obstacle to competition in that it limits the organisational capacity of economic operators. In this regard, if the concern is the application of the law to cooperatives offering goods or services in the Spanish market, an indication to this effect is sufficient, as the requirement of a registered office in the territory is not strictly necessary in order to achieve this. This is without prejudice to other tax considerations which are not the subject of this report.

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[16] Article 9 of Legislative Royal Decree 1/2010 of 2 July , approving the consolidated text of the Corporate Enterprises Act. Registered office."1. *Corporate Enterprises shall establish their registered office within Spanish territory at the place where the centre of their effective administration and management is located, or where their main place of business or operation is located.2. Corporate enterprises whose main place of business or operation is in Spanish territory must have their registered office in Spain".*

It should also be noted that Article 3 of Law 5/2011 on the Social Economy (which is not subject to modification by this Draft Bill) does not use the registered office of social economy entities as a criterion for determining its territorial scope of application, but only conditions it on the fact that these entities operate within the Spanish territory:

> *"Article 3. Scope of application. Without prejudice to the powers that may correspond to the autonomous communities, the scope of application of this Act extends to all social economy entities operating within the national territory".*

Additionally, given that the Draft Bill identifies among the market intervention measures the possible granting of State aid, it should be noted that the EU State aid rules state the following with regard to aid exempted from prior notification regulated by Regulation (EU) 651/2014, of 17 June 2014, declaring certain categories of aid compatible with the internal market in application of Articles 107 and 108 of the Treaty:

> *This Regulation shall not apply to State aid measures which entail, by themselves, by the conditions attached to them or by their financing method, a non-severable violation of Union law, in particular:*
>
> *(a) aid measures where the grant of aid is subject to the obligation for the beneficiary to have its headquarters in the relevant Member State or to be predominantly established in that Member State; However, the requirement to have an establishment or branch in the aid granting Member State at the moment of payment of the aid is allowed […]"*[17]

It should be noted that the CNMC, in its Recommendations to the public authorities on measures to promote market competition and inclusive economic recovery (2021), already stated that:

> *"Unless necessary due to an overriding reason of general interest, State aid should not be granted preferentially or predominantly to operators having a registered office in the geographic area where the agency granting the aid is located. When it is essential to establish a territorial condition for receiving aid, it is preferable to use, if possible, criteria based on the operator's economic activity rather than on its place of establishment".*

Article 18 of Law 20/2013 should also be taken into account insofar as it states that requirements for access to or exercise of economic activity or for the award of public contracts that are based directly or indirectly on the place of residence

[17] It should be noted that WISE Act also uses a territorial criterion by stating that: *"Work integration social enterprises or promoters that provide support services for socio-professional integration may receive aid for the execution of these services from the relevant public authorities in the place where their work centres are located".*

or establishment of the operator are considered discriminatory. Such requirements include, in particular, that the place of establishment or registered office be in the territory of the competent authority.

The CNMC therefore recommends that Article 3 of the Cooperatives Act be amended to simply state that the regulatory text shall apply to cooperatives exercising their economic activity in Spanish territory.

As far as the **corporate website** is concerned, without prejudice to the positive assessment of the adaptation of cooperatives to the digital environment and the use of new technologies, not only in terms of the corporate website but also by allowing electronic communications and online participation of members (new Article 3 *ter*), given that the RIA report does not provide any further information in this respect, the CNMC offers two considerations.

On the one hand, the Commission requests justification for the obligation for the corporate website to be subject to prior registration in the Cooperatives Register as a prerequisite for its operation. It should be noted that registration in a register that is not carried out ex officio by the competent authority entails an authorisation regime which, in accordance with Article 17 of Law 20/2013 on market unity, must be sufficiently justified in the law that establishes it.

On the other hand, the CNMC recommends justifying the appropriateness and proportionality of the established threshold of 500 members to impose the obligation to have a corporate website.

3.2.1.3. Minimum length of membership (amendments to Articles 17.3 and 93.5 of the Cooperatives Act)

On the one hand, the Draft Bill amends Article 17 as follows:

> *The articles of association may require members to undertake not to withdraw voluntarily, without just cause, until the end of the financial year in which they wish to withdraw, or until the period of time established in the articles of association, which shall not exceed five years, has elapsed since their admission, except as provided for in this Act for agri-food and community land cooperatives*".

On the other hand, the Draft Bill adds the following paragraph to Article 93 on agricultural cooperatives:

> *The articles of association shall lay down the minimum length of membership of cooperatives, which may not exceed 10 years. When duly justified business circumstances require members to remain or participate in the cooperative*

activity for new or longer periods than those required by law or by the articles of association, the General Assembly may agree on and determine the duration of specific and additional membership commitments, which may not exceed 5 years. Members who disagree with such agreements may withdraw from the cooperative, which shall be classified as justified, following the procedure laid down in Article 17.4.

It should be noted that, in general, the current cooperative legislation already provided that the articles of association could require members to undertake not to voluntarily withdraw from the cooperative for a period of no more than five years[18]. The novelty therefore centres on the fact that a special, more extensive membership regime (of up to 10 years) is now recognised for agricultural cooperatives, as a special membership regime (of up to 15 years) was already provided for in the case of community land cooperatives.

However, it should be borne in mind that Article 1 of the Cooperatives Act states that a cooperative "*is a corporate form made up of persons who join and leave voluntarily* […]" and that the establishment of barriers to exit, such as mandatory membership, entails restrictions on the freedom of enterprise recognised in the Spanish Constitution (in terms of the capacity for self-organisation).

Given that this measure is not justified in the Regulatory Impact Assessment (RIA) Report, the CNMC recommends a reconsideration of the extension of the membership periods for members of agricultural cooperatives, unless reasons of public interest and their compliance with the principles of necessity and proportionality are sufficiently proven. Similarly, although not subject to amendment in this Draft Bill, the CNMC proposes a review of the extent to which the reasons that led to the extension of the membership regime for members of community land cooperatives still exist.

3.2.2. Amendments to the Law for the regulation of Work Integration Social Enterprises or WISE Act (Article 2 of the Draft Bill)

3.2.2.1. *Entities promoting work integration social enterprises* (Article 6 of the WISE Act).

According to Article 4 of the WISE Act, work integration social enterprises (WISE) are companies whose main objective is to promote the social and work integration

[18] See Article 17 of Law 27/1999.

of persons with special difficulties in accessing the labour market.[19] They are characterized by a duality in their corporate purpose since, on the one hand, they carry out an economic activity within the market and, on the other, they socially and professionally integrate people and groups in a situation or risk of social exclusion.

One of the requirements that WISE companies must meet is that they must be promoted and owned by one or more promoters (Article 5 of the WISE Act). Promoters are defined in Article 6 as follows:

> "*Non-profit organisations, including public law entities, non-profit associations, foundations, non-profit cooperatives or other social economy entities listed in Article 5 of Law 5/2011, of 29 March , on the Social Economy, whose statutory purpose or aim is to pursue social and work integration and promote the creation of WISE companies in which they will participate under the terms set out in letter (a) of the previous article, will be considered as promoters.*
>
> *Promoters must prove, before the competent Administrative Registry, that they have sufficient material and human resources to carry out their statutory object or purpose and with a minimum experience of one year in the field of social vulnerability and/or exclusion* […]".

With respect to the current law, this amendment to Article 6 adds as promoters *"non-profit cooperatives or other social economy entities listed in Article 5 of the Social Economy Act (…)".*It also establishes that they must prove they have sufficient means to carry out their corporate or statutory purpose and at least one year's experience in the field of social vulnerability and/or exclusion.

The RIA report justifies the requirement for experience in the field of social vulnerability on two grounds: to avoid the possible intrusion of undertakings that might wish to take advantage of the benefits without sharing the fundamental purpose of the projects and to guarantee the viability of the business projects by ensuring the necessary means and knowledge, as well as to "*guarantee in a more*

[19] The Draft Bill also modifies the concept of work integration social enterprise, stating that "*any legally established commercial, labour or cooperative company which, having been duly qualified by the relevant authorities, carries out any economic activity involving the production of goods and services, and whose statutory objective or purpose is the integration into the ordinary labour market of workers exposed to vulnerability and/or social exclusion factors or included in any of the groups referred to in Article 2"* will be considered as such. It also adds that WISE companies must implement professional integration programmes, it specifies the minimum and maximum duration of these programmes and the necessary intervention and support measures.

solvent way the general interests served by the particularities of the regulation of work integration social enterprises."

However, the inclusion of this restriction raises the following considerations: it does not explain why the minimum period of experience is set at one year (and not a longer or shorter period), nor does it define with sufficient precision how experience "*in the field of social vulnerability and/or exclusion*" can be demonstrated, which could create legal uncertainty among the different operators.

In addition, establishing this barrier to entry for the status of WISE promoter, when a similar requirement does not even apply to WISE companies, seems incongruent with the objective pursued by the regulation and could have negative consequences in terms of incentivising new operators.

Furthermore, the CNMC considers that there may be less restrictive options to guarantee the general interest, such as including in the calls for subsidies to WISE companies and promoters additional requirements of sector knowledge and minimum experience, where considered appropriate and justified on a case-by-case basis.

For all these reasons, the Commission recommends rethinking the requirement of at least one year's experience in order to qualify as a WISE promoter.

3.2.2.2. *Qualification as a Work Integration Social Enterprise* (amendment of Articles 7.1 and 8.3 of the WISE Act).

The Draft Bill amends Article 7.1 of the WISE Act, which is worded as follows:

> *"The qualification as work integration social enterprise granted by the competent authority shall be fully effective throughout Spain, without the need for the work integration social enterprise to carry out any additional formalities or meet new requirements, except as provided for in Article 8.2"*[20].

This amendment is relevant because the law currently in force requires WISE companies to prove their qualification before the different autonomous communities where they operate. This requirement for accreditation in each autonomous community places an unnecessary burden on these companies.

[20] The provision of Article 8.2 refers to the obligation to notify the relevant authority of the change of registered office.

As stated by this Commission in numerous reports, regional authorisations should have national scope by default, except for overriding reasons relating to the public interest, in application of Article 10() of Directive 2006/EC/123 of the European Parliament and of the Council of 12 December 2006 on services in the internal market[21]. Therefore, the CNMC welcomes the fact that the qualification as a work integration social enterprise is now fully effective throughout the national territory.

However, the amendment to the third paragraph of Article 8 of the WISE Act introduced by the Draft Bill does not allow the national validity of the qualification to be fully effective, as it establishes that:

> *"If a work integration social enterprise opens work centres in an autonomous community other than the one in which it is registered, it must provide proof of its qualification to the corresponding administrative registry and notify the start of operations, without prejudice to compliance with any other requirement that may be established by the autonomous community regulations in relation to the opening of work centres".*

Notwithstanding the fact that there may be conditions linked to the establishment of such work centres in an autonomous community, requiring the entity to prove its qualification before the corresponding administrative registry does not seem justified, given that this process has already been verified before another authority and its effects are perfectly valid.

The CNMC therefore considers that the wording should be modified so that the opening of work centres in an autonomous community other than the one in which the WISE company is registered does not require the entity's accreditation before the corresponding administrative registry.

Instead, this information could be consulted in the registry of the ministry responsible for matters of social economy, established by Royal Decree 49/2010 of 22 January , creating the Administrative Registry of Work Integration Social Enterprises of the Ministry of Labour and Immigration, for the purposes of

[21] Art. 10(4): *"The authorisation shall enable the provider to have access to the service activity or to exercise that activity throughout the national territory, including by setting up agencies, subsidiaries, branches or offices, except where there is an overriding reason relating to the public interest which justifies an individual authorisation for each establishment or an authorisation restricted to a specific part of the territory".* In this respect, see CNMC report PRO/CNMC/001/21 on the principle of national efficiency in collective waste management systems.

coordinating and exchanging any necessary information between public authorities.

3.2.3. State Aid and Economic Services of General Interest (Articles 7 and 13 of the WISE Act and Article 5.5 and the new Article 5.*bis* of the Social Economy Act).

The Draft Bill amends Article 7 of the WISE Act, stating that:

> *Work integration social enterprises, once qualified as such, shall be declared entities providing Services of General Economic Interest, in accordance with the provisions of Articles 5(5) and 5. bis of Law /2011, of 29 March , on the Social Economy".*

Meanwhile, Article 13 of the WISE Act, on the promotion of this type of company, specifies that all public administrations shall approve aid programmes aimed at the creation, promotion and maintenance of WISE companies. It identifies a series of subsidies from which they can benefit: among others, aid for their constitution and start-up, for fixed investments, for R+D+i, for the maintenance of jobs for work integration, rebates on Social Security contributions, etc[22]. The sixth paragraph is of particular interest:

> *Without prejudice to the successive acts of entrustment that may be required, the aid received by work integration social enterprises shall be compatible with the internal market and shall be exempt from the notification obligation established in Article () of the Treaty on the Functioning of the European Union, given that such aid compensates for the provision of services aimed at facilitating employability and access to reintegration into the labour market or promoting the social inclusion of vulnerable persons".*

On the other hand, the Draft Bill modifies Article 5 of the Social Economy Act. Specifically, paragraph 5 states:

> "5. *Special Social Initiative Employment Centres and Work Integration Social Enterprises, established and classified as such according to their governing regulations, are declared to be providers of Services of General Economic Interest. Likewise, this declaration may be extended to any other social economy entities whose purpose is also the work integration of groups at risk of exclusion, as established by regulation".*

[22] There could be a mistake in the Draft Bill because the current Article 13 is about working conditions. The article referring to aid is Article 16 https://www.boe.es/buscar/act.php?id=BOE-A-2007-21492#a13.

In this way, special social initiative employment centres and WISE companies are recognised as providers of SGEI, with the possibility of extending this status to other entities in the social economy sector.

It should be borne in mind that **the Draft Bill eliminates the recognition of 'entrepreneurial' Special Employment Centers as social economy entities and, therefore, as providers of SGEI (new wording of Art. 5 of the Social Economy Act).**As a result, they will be deprived of access to aid, subsidies and public funds and of entering into contracts as entities providing activities of general economic interest. Given that no justification is provided in the RIA report for this change and in view of its potential implications for vulnerable groups (sheltered employment), the CNMC recommends justifying it from the point of view of the principles of good regulation[23].

Moreover, the Draft Bill adds a new Article 5 bis to the Social Economy Act:

> *"Article 5 bis. Acts of entrustment of Services of General Economic Interest.*
>
> *1.An undertaking shall be deemed to be fully and completely entrusted with the operation of public services of general economic interest if there are sufficient acts of entrustment indicating:*
>
> *a) The content and duration of the public service obligations;*
>
> *b) The undertakings concerned and, where appropriate, the territory concerned;*
>
> *c) The nature of any exclusive or special rights granted to the undertaking by the entrusting authority;*
>
> *d) A description of the compensation mechanism and the parameters applied to the calculation, control and review of the compensation;*
>
> *e) The modalities for avoiding and recovering possible overcompensation; and*
>
> *f) A reference to Decision 2012/21/EU of 20 December 2011 on the application of Article 106(2) of the Treaty on the Functioning of the European Union to State aid in the form of public service compensation granted to certain undertakings entrusted with the operation of services of general economic interest.*
>
> *2. State aid in the form of compensation for the provision of public services granted to the social economy entities listed in Article 5 of this Act shall be*

[23] It should be noted that European initiatives (e.g. the 2021 action plan for the social economy) have evolved towards a broader concept of social economy enterprises while the Draft Bill apparently goes in the opposite direction (a more restrictive definition).

compatible with the internal market and shall be exempt from the notification obligation established in Article 108.3 of the Treaty on the Functioning of the European Union.

3. In all matters relating to public service compensation granted to undertakings providing services of general economic interest referred to in Article 106(2) of the Treaty on the Functioning of the European Union, Decision 2012/21/EU of 20 December 2011 on the application of Article 106(2) of the Treaty on the Functioning of the European Union to State aid in the form of public service compensation granted to certain undertakings entrusted with the operation of services of general economic interest shall apply".

Despite the fact that the declaration of these undertakings as SGEI providers is already included in the current regulatory text, the CNMC offers the following remarks:

Firstly, it should be noted that, according to the EU, the concept of SGEI changes from one Member State to another, depending, inter alia, on citizens' needs, technological and market developments, and social and political preferences[24].

In the absence of EU rules defining the scope of an SGEI, Member States have a wide margin of discretion in defining a given service as such and in granting compensation to the service provider. The European Commission's powers in this regard are limited to verifying whether the Member State has made a manifest error in defining a service as an SGEI and in assessing the State aid contained in the compensation.

Where there are specific EU rules, Member States' discretion is further linked to those rules, without prejudice to the European Commission's duty to carry out an assessment of whether the SGEI has been correctly defined for the purposes of State aid control.

In any case, the definition must be an objective delimitation of the services to be considered as SGEI and not a subjective delimitation of the profile of operators that could provide such services. In fact, whenever the Spanish legislator has used the classification of SGEI in other economic sectors, it has done so from

[24] In this regard, see the Communication from the European Commission on the application of EU State aid rules to compensation granted for the provision of services of general economic interest (2012/C 8/02).

this objective perspective, identifying specifically the public service obligations that this entails for the operators[25].

This Commission therefore recommends an objective delimitation of the aspects of service provision that may be carried out by social economy entities and which should be classified as such, identifying the related public service obligations where appropriate.

Secondly, although Article 5 bis includes a list of the main aspects required to carry out acts of entrustment of SGEI, it should be noted that compensation granted to undertakings for the provision of such services may be considered State aid. Given the lack of precision of the paragraphs contained in this provision, account should be taken of the Altmark judgment of the CJEU, which stated that the granting of an advantage may be excluded if four cumulative conditions are met[26]:

- The recipient undertaking must actually have public service obligations to discharge, and the obligations must be clearly defined;
- The parameters for calculating the compensation must be established in advance in an objective and transparent manner;
- The compensation may not exceed what is necessary to cover all or part of the costs incurred in the discharge of the public service obligations, taking into account the relevant receipts and a reasonable profit; and
- Where the undertaking that is to discharge public service obligations is not chosen pursuant to a public procurement procedure which would allow for the selection of a tenderer capable of providing those services at the least cost to the community, the level of compensation needed must be determined on the basis of an analysis of the costs that a typical undertaking, well-run and adequately provided with the relevant means to meet the necessary public service requirements, would have incurred in discharging the obligations, taking into account the relevant receipts and a reasonable profit.

Furthermore, Article 5 bis refers exclusively to **Decision 2012/21/EU of 20 December 2011** on the application of Article 106(2) TFEU to State aid in the form

[25] In this regard, see Article 2 of **General Law 11/2022, of 28 June , on telecommunications**: *Telecommunications are services of general interest provided under free competition. 2. Only the services regulated in Article 4 and Title III, respectively, are considered public services or are subject to public service obligations*". See also Article 2 of **Law 24/2013, of 26 December , on the electricity sector**: *"[…] 2. The supply of electricity constitutes a service of general economic interest."*

[26] Judgment of the Court of Justice of 24 July 2003, Altmark Trans, C-280/00.

of public service compensation granted to certain undertakings entrusted with the operation of SGEIs.

Nothing should stand in the way of the possibility of using this instrument which, in Article ()(c) (scope), provides for "*compensation for the provision of services of general economic interest meeting social needs as regards health and long-term care, childcare, access to and reintegration into the labour market, social housing and the care and social inclusion of vulnerable groups".*

However, given that in order to benefit from the exemption from notification to the EC, a series of requirements must be met (Article 4 of Decision 2012/21/EU), and that Article 5 bis of Law 5/2011 only mentions them, it should be noted that their effective development must be ensured in the Draft Bill itself or in another regulatory instrument.

Until this happens (e.g. in terms of ensuring that the amount of compensation does not exceed what is necessary to cover the net cost of discharging the public service obligations, including a reasonable profit), the possibility of exemption from the notification obligation cannot be made effective.

The CNMC therefore recommends ensuring full and effective compliance with all the requirements set out in Decision 2012/21/EU and, until such time as this happens, taking into account that the general declaration of compatibility and exemption from notification to the EC cannot be invoked.

Thirdly, this Commission points out that there are alternative means of compliance with EU SGEI rules, namely the possibility of invoking Regulation EC 360/2012 of 25 April 2012 on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to ***de minimis*** aid granted to undertakings providing services of general economic interest. This possibility is not mentioned in the Draft Bill, not even in the RIA report to assess other alternatives.

This possibility would be triggered if the aid does not exceed EUR 500,000 over any period of three fiscal years, among other requirements[27]. If these requirements are met, this would also result in the exemption from notifying the compensation to the companies, given that it is not considered as State aid.

Finally, the CNMC recommends adding to the articles that, without prejudice to the provisions relating to State aid rules, social economy entities, pursuant to the

[27] Article 2 sets out all the conditions that SGEI compensation must meet in order to be considered *de minimis*. EC Regulation 360/2012 is valid until 31/12/2023 and is currently under review by the European Commission.

aforementioned Article () TFEU, must comply with the rest of the EU provisions in the field of competition, in particular Articles 101 and 102 of the Treaty, as well as those laid down in national legislation, Law 15/2007, of 3 July , on the Defence of Competition.

3.2.4. Modifications in the field of public procurement (Articles 2, 3 and 1st Final Provision of the Draft Bill): encouraging the introduction of social clauses linked to the object of the contract and the reservation of the right to participate in public procurement procedures (1st Additional Provision of the WISE Act and Article 8(k) of the Social Economy Act).

In order to guarantee the competitiveness of WISE companies, which are considered on an equal footing with other business formulas, the Draft Bill strengthens the minimum percentages of the reservation of the right to participate in public procurement award procedures and the introduction of social clauses in the award criteria and special conditions for the execution of public contracts.

Specifically, the Draft Bill refers to Law 9/2017, of 8 November, on Public Sector Contracts (hereinafter, the Public Sector Contracts Act), transposing into Spanish law Directives 2014/23/EU and 2014/24/EU of the European Parliament and of the Council, of 26 February 2014, in three areas:

Firstly, the 2nd Final Provision of the Draft Bill modifies the 4th Additional Provision of the Public Sector Contracts Act, on reserved contracts, which is worded as follows: relating to reserved contracts and which is worded as follows:

> "Fourth Additional Provision. Reserved contracts.
>
> *1. By Agreement of the Council of Ministers or the competent body at the level of the autonomous communities and local authorities, minimum percentages shall be set to reserve the right to participate in the procedures for awarding certain contracts or certain lots thereof to special social initiative employment centres and work integration social enterprises — regulated, respectively, in the consolidated text of the General Law on the rights of persons with disabilities and their social inclusion, approved by Royal Legislative Decree 1/2013, of 29 November , and in Law 44/2007, of 13 December , regulating the regime of work integration social enterprises — as long as they meet the requirements established in said regulations to be considered as such. Alternatively, a minimum percentage can be reserved for the execution of these contracts within the framework of sheltered employment programmes, provided that the percentage of workers with disabilities or in a situation of social exclusion in the special employment centres, work integration social enterprises or programmes*

is the percentage established in their respective regulations —in any case, at least 30 per cent.

The aforementioned Agreement of the Council of Ministers or the competent body at the level of the autonomous communities and local authorities shall establish the minimum conditions to guarantee compliance with the provisions of the previous paragraph.

The Agreement of the Council of Ministers referred to in this paragraph must be adopted within a maximum period of one year from the entry into force of this Act. If the Agreement of the Council of Ministers has not been adopted once this period has elapsed, the national public sector contracting bodies shall reserve a minimum percentage of 15 per cent of the overall amount of the awarding procedures for supplies and services included in the CPV (Common Procurement Vocabulary) codes listed in Annex VI for the previous financial year, in the terms set out in the first paragraph of this section[28]*.*

2. Reference to this provision must be made in the tender notice.

3. In procurement procedures in which the reservation of contracts established in this additional provision is applied, the definitive guarantee referred to in Article 107 of this Act shall not be required, except in those cases in which the contracting body, for exceptional reasons, considers it necessary and justifies this in the file. Likewise, the tender specifications must provide that, in the event that no suitable bid is submitted, the contracting body, after declaring the contract void, shall publish a new tender notice and a new period shall be opened for the submission of bids of the same duration as the initial period, in which it shall not be necessary to be a special social initiative employment centre or a work integration social enterprise in order to participate. When the tender specifications include several lots, the new tender notice shall specify the reserved lots that will be affected by the new deadline for submission of bids due to the absence of a suitable bid. The contracting body may award the remaining lots under the terms established in Article 99.7 of this Act".

Therefore, the novelty lies in setting the minimum percentage for the reservation of contracts at 15% (as opposed to 10% in current regulations). This percentage would apply subsidiarily if no other percentage has been agreed upon by the Council of Ministers. The Draft Bill also includes a

[28] Annex VI of the Public Procurement Act includes a list of CPV codes of the services and supplies referred to in the transcribed provision. These include, among others: cleaning services, collection and recycling services, forestry services, laundry services, hospitality and catering services, transport services, printing services, social services, storage and delivery services, accommodation and rural tourism services, administrative work services, management and auxiliary work services, mail and advertising services, maintenance and repair services, production and sale of seasonal plants and production and sale of carpentry furniture.

provision for a new tender without reserving those lots that were initially reserved but were declared void.

Secondly, the Draft Bill modifies the 1st Additional Provision of the WISE Act regarding the application of the Public Procurement Act as follows:

> *"In relation to the minimum percentages for reserving the right to participate in the procedures for awarding certain contracts or certain lots thereof to special social initiative employment centres and work integration social enterprises, the Fourth Additional Provision of Law 9/2017, of 8 November , on Public Sector Contracts, transposing into Spanish law the Directives of the European Parliament and of the Council 2014/23/EU and 2014/24/EU, of 26 February 2014, shall apply.*
>
> *Likewise, the contracting bodies shall establish in the specific administrative clause specifications both specific award criteria and special execution conditions linked to the subject matter of the contract that encourage the recruitment of people who participate in work integration programmes of work integration social enterprises and the subcontracting of the latter, in accordance with the provisions of Articles 147 and 202 of Law 9/2017, of 8 November, on Public Sector Contracts*".

Therefore, the novelty lies in the reference to the 4th Additional Provision of the Public Procurement Act, while at the same time imposing the inclusion of specific social clauses for persons participating in work integration programmes both in the award criteria and in the special execution conditions.

Thirdly, in a similar vein, the Draft Bill provides for the addition in Article 8.2 of the Social Economy Act, among the measures for the promotion and dissemination of the social economy, of a paragraph (k) devoted to public procurement:

> *"The public authorities, within the scope of their respective powers, shall have the following, among others, as objectives of their policies for the promotion of the social economy:(...)*
>
> *(k) To support the introduction of social clauses in public procurement procedures and compliance with the voluntary reservation of contracts in favour of social economy entities established in the Public Sector Contracts Act, ensuring that the percentage of such reservation is at least 0.5% of the previous year's tender value for each type of reservation.*

Likewise, public sector entities shall comply with the mandatory percentage of reserved contracts established for work integration social enterprises and special social initiative employment centres".

Thus, this Commission urges, on the one hand, the introduction of social clauses in the specifications for public contracts and, on the other hand, the consideration of a voluntary reservation of contracts of at least 0.5% in general for social economy entities. At the same time, the CNMC calls for compliance with the obligatory reservation of contracts, which by reference to the 4th Additional Provision of the Public Procurement Act should be at least 15% (according to the wording proposed in the modification made by the Draft Bill due to changes in the 1st Additional Provision of the WISE Act, referred to above) for work integration social enterprises and special social initiative employment centres.

In view of all the above-mentioned novelties introduced by the Draft Bill in the field of public procurement, **the CNMC**, bearing in mind that European public procurement regulations allow Member States to pursue employment and social policy objectives by means of public procurement instruments, makes the **following considerations**[29]:

Firstly, **with regard to the promotion of the inclusion of social criteria in tender specifications**, whether as award criteria or special contract conditions, it should be noted that this is already expressly provided for across all areas in the Public Procurement Act itself. In this regard, paragraph 3 of Article 1 of the Public Procurement Act, expressly provides that:

"[…] *In all public procurement, social and environmental criteria shall be incorporated systematically and mandatorily whenever they are related to the subject matter of the contract, with the conviction that their inclusion provides better value for money in the contractual service, as well as greater and better efficiency in the use of public funds. Access to public procurement shall also be facilitated for small and medium-sized enterprises and social economy enterprises."*

Furthermore, contracting authorities must respect the principles of freedom of access, equal treatment, non-discrimination, proportionality, safeguarding free

[29] The European Directives on public procurement identify strategic procurement as one of the objectives to be met by Member States' national legislation in order to enable contracting authorities to make better use of public procurement in support of common environmental, social, employment and innovation objectives. Those provisions and their implementation should comply with EU law.

competition and the selection of the most economically advantageous tender, proclaimed in Article 1(1) of the same Act.

Therefore, the introduction of social and environmental criteria in a procurement procedure must be subject to certain limits, as the CJEU has pointed out: it must be indicated in the tender notice and in the tender specifications, it must not grant an unlimited freedom of choice to the contracting authority and must be linked to the subject matter of the contract and respect the fundamental principles of EU law, especially the right to non-discrimination.

In this regard, this Commission points out that, in addition to the guiding principles of Article 1.1 of the Public Procurement Act (non-discrimination, transparency, equality of treatment, safeguarding free competition), Article 132 of the Public Procurement Act states that contracting authorities shall give equal and non-discriminatory treatment to bidders and candidates and shall adjust their actions to the principles of transparency and proportionality[30], in a similar vein to Article 18 of Directive (EU) 2014/24[31].

The CNMC, in its Recommendations to the public authorities on measures to promote competition in the markets and inclusive economic recovery (2021), pointed out that the different possibilities offered by public procurement regulations to introduce social and environmental considerations in public tender specifications represent a window of opportunity, with positive aspects as well as certain risks for competition, which may be counterproductive to achieving the objectives pursued.

This Commission therefore insists that social and environmental criteria must be related to the subject matter of the contract, objective and respectful of the guiding principles of public procurement (including the safeguarding of free competition, transparency and non-discrimination). To minimise the risks of subjectivity in design, it recommends using objectification mechanisms[32].

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[30] Similarly, Art. 132 of the Public Procurement Act provides that: *In no case may participation be limited by legal form or profit motive in contracting, except in contracts reserved for entities listed in the Fourth Additional Provision.*

[31] Article 18 of Directive (EU) 2014/24 on procurement principles states that:*Contracting authorities shall treat economic operators equally and without discrimination and shall act in a transparent and proportionate manner. Procurement shall not be designed with the intention of excluding it from the scope of this Directive or of artificially restricting competition. Competition shall be considered to be artificially restricted where a contract is designed with the intention of unduly favouring or disadvantaging certain economic operators.*

[32] A good example of this is the existing EU-wide common taxonomy, which indicates whether each of the activities concerned can be qualified as sustainable on the basis of objective

In addition, the CNMC encourages proper planning of public procurement that allows for a truly strategic approach, balancing the achievement of efficiency objectives with other public interests, such as environmental and social objectives. The integration of these other objectives cannot be carried out without a prior assessment of the scenarios that present a greater risk or potential for compliance/non-compliance and a greater impact on the achievement of these objectives, so that effective competition in tenders is always ensured[33].

In short, the aim is to achieve social objectives through the promotion of competition and not at the expense of competition among potential bidders.

On the other hand, the National Public Procurement Strategy 2023-2026 has highlighted potential practical difficulties in introducing social and environmental criteria in tender specifications. Both the State Public Procurement Advisory Board and the regional advisory bodies and the Central Administrative Court for Contractual Appeals have had the opportunity to rule on many occasions and cases on the legal correctness of the clauses referring to strategic procurement included in the specific administrative clause specifications. On different occasions, they detected clauses that did not comply with the requirements set out in the Public Procurement Act and the Directives, especially concerning the connection to the subject matter of the contract and the respect for the principle of equal treatment of bidders. Therefore, the National Public Procurement Strategy includes the following among its strategic objectives:

> *F. To promote the use of the different instruments provided for in public procurement regulations to support environmental, social and innovation policies (strategic procurement), ensuring their compatibility with the other principles set out in the Public Procurement Act: equal treatment, non-discrimination, free competition and efficiency in procurement.*

Among the related actions, the following is mentioned:

> *F.3.d) To seek, when necessary, the collaboration and guidance of competition authorities so that the integration of strategic procurement objectives is carried out consistently with competition advocacy.*

In summary, the CNMC insists on the need to comply with the requirements set out in the Public Procurement Act and the case law of the CJEU in relation to the

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requirements and parameters (level of recycling, level of emissions, use and management of water, etc.).

[33] In this regard, see the Recommendations to the public authorities on measures to promote competition in the markets and inclusive economic recovery (2021) and the Guide on Public Procurement Planning (2021).

inclusion of social conditions in tender specifications. In this respect, it should be noted that social objectives must be obtained through effective competition and not at the expense of it.

Secondly, with regard to **the reservation of contracts linked to the right to participate in tenders**, a distinction must be made between the reservation of contracts provided for in the 4th Additional Provision of the Public Procurement Act for WISE companies and special social initiative employment centres and another type of reservation of contracts that is regulated in the 48th Additional Provision of the Public Procurement Act and which the Draft Bill extends to all entities in the social economy sector.

European regulations cover the reservation of lots or contracts to sheltered workshops and other social enterprises whose main objective is to support the social and professional integration or reintegration of disabled or disadvantaged persons, such as the unemployed, members of disadvantaged communities or other groups that are in some way socially marginalised (Recital 36[34] and Article 20[35]). This reservation of contracts should be considered as an exception to the general regime for public procurement procedures in Directive 2014/24[36].

The motivation behind it is that a protected procurement environment can be created where operators (whose main objective is the social and professional integration of disabled or disadvantaged persons) compete only with other operators in similar circumstances since they cannot be expected to be able to

[34] *Employment and occupation contribute to integration into society and are key elements in ensuring equal opportunities for the benefit of all. In this context, sheltered workshops can play an important role. The same applies to other social enterprises whose main objective is to support the social and professional integration or reintegration of disabled or disadvantaged persons, such as the unemployed, members of disadvantaged communities or other groups who are in some way socially marginalised. However, under normal conditions of competition, such workshops or enterprises may find it difficult to obtain contracts. It is therefore appropriate to provide that Member States may reserve to such workshops or firms the right to participate in the procedures for the award of public contracts or of certain lots thereof or to reserve their execution within the framework of sheltered employment programmes.*

[35] *Member States may reserve the right to participate in procurement procedures to sheltered workshops and economic operators whose main objective is the social and professional integration of disabled or disadvantaged persons or provide for the execution of contracts in the context of sheltered employment programmes, provided that at least 30% of the employees of the workshops, economic operators or programmes are disabled or disadvantaged workers. 2. The call for tender shall refer to this article.*

[36] AG's opinion in case C-598/19, paragraph 45.

compete under normal market conditions due to their significant social contribution[37].

In view of the above, the following **remarks** should be made:

In relation to the reservation of contracts already provided for in the 4th Additional Disposition of the Public Procurement Act, it should be noted that the aforementioned National Public Procurement Strategy 2023-[38] and the recent Special Oversight Report on Strategic Procurement issued in 2021 by the OIRESCON (Independent Office for Procurement Regulation and Oversight) have shown that the minimum percentage of reserved contracts at the national level has not yet been determined, applying subsidiarily the percentage established in the 4th Additional Disposition, which the Draft Bill proposes to extend from 10% to 15%.

As regards the autonomous communities, not all have agreed on a minimum percentage and there is great disparity in the methodology adopted by those that have done so; for example, in terms of the indicator chosen (the base tender price, with or without VAT, the award price, etc.), the type of contracts (tendered or awarded), and the subject matter (limited to certain CPVs or not). OIRESCON also notes a great asymmetry with regard to the metric used to consider the percentages set to have been met.

This Commission considers that, without calling into question the free autonomy of each of the autonomous governments and local authorities, **the fundamental rules of the methodology to be used should be adopted by consensus between all the public authorities involved, so that the decisions taken and the results obtained in each of them are comparable.**

In addition, with regard to the fact that the Spanish legislator has decided that the reservation of contracts can only apply to a certain profile of entities that carry out social economy activities (special social iniciative employment centres and regulated work integration social enterprises), it should be noted that the CJEU,

[37] AG's opinion in case C-598/19, paragraphs 48-49.

[38] Its objectives include *F.4.To promote IT developments and, where appropriate, the necessary regulatory reforms and developments that allow for the promotion of strategic procurement in accordance with the principles of public procurement, particularly in the area of reserved contracts*. F *.4.a) To study the situation with respect to the implementation of the reservation of contracts foreseen in the 4th Additional Provision of the Public Procurement Act, and to propose the appropriate regulatory changes or developments for the proper functioning of the reservation of contracts provided for therein, as well as to promote the approval of agreements or developments in the case of those autonomous communities or cities that have not yet established the percentage of reserved contracts.*

in its Judgment of 6 October 2021 (C-598/19), following a preliminary question referred by a Spanish court, stated that the Member States' power to transpose Article 20 of Directive 2014/24 in order to reserve participation in public tenders must respect the fundamental rules of the TFEU, in particular those relating to the free movement of goods, the freedom of establishment and the freedom to provide services, as well as the principles deriving therefrom, such as the principles of equal treatment and proportionality which, are also reflected in Article 18 of Directive 2014/24[39].

Ultimately, the CJEU concluded that Article 20(1) of Directive 2014/24/EU "*must be interpreted as not precluding a Member State from imposing additional criteria beyond those laid down by that provision, thereby excluding from reserved public procurement procedures certain economic operators which satisfy the criteria laid down in that provision, provided that that Member State complies with the principles of equal treatment and proportionality*"[40].

In view of the above, the following considerations should be made regarding the main measures adopted:

- Delimitation of the beneficiaries of the reservation of contracts: insofar as only a certain profile of operators (special social initiative employment centres and work integration social enterprises) within the range of entities that undertake the integration of vulnerable people can benefit from reserved public tenders, there is a restriction on competition which, in addition to its implications from the point of view of its compliance with EU public procurement regulations (detailed above), also has implications from an internal point of view.

[39] See Sections 32-33 of the Judgment. The Advocate General's Opinion follows the same vein: *(40) As I will explain, in my view, it is more accurate to understand the requirements of Article 20 of Directive 2014/24 as minimum requirements which leave Member States free to impose additional limits restricting the subjective scope of the participants authorised to tender in their reserved procedures of Article 20, provided that the limits set out in other provisions of Directive 2014/24 and other applicable provisions of EU public procurement law are observed. Therefore, it is not Article 20 of Directive 2014/24 that may limit the ability of Member States to impose additional requirements in relation to authorised participants, but Article 18 thereof and the principles of equal treatment and proportionality, as well as the prohibition of artificially restricting competition.* See also, in this regard, Judgment of 3 October 2019, Irgita, C-285/18, EU:C:2019:829, paragraph 48 and the case law cited therein.

[40] This has led some Spanish courts to interpret that these principles were not respected (High Court of Justice the Basque Country) while others did not interpret it in the same way (High Court of Justice of Catalonia). An appeal was lodged with the Supreme Court on this issue, but it has not yet been resolved.

In this regard, it is essential to analyse the degree of effective competition achieved in practice with this limitation in the different tenders launched, verifying whether it allows for an efficient allocation (good value for money) of the public funds invested.

If not, in the interests of the principle of equal treatment and proportionality outlined by the case law of the CJEU, it seems reasonable to broaden the spectrum of potential bidders, always within those entities that meet the social integration objectives pursued by the relevant regulations.

- Measures to promote participation: without prejudice to the above, the CNMC recommends including measures that encourage the participation of social economy entities in public procurement. Specifically, training actions on public procurement should be included to encourage the participation of the sector's operators in public tenders, in line with Art. () of the Public Procurement Act, which seeks to facilitate access to public procurement by SMEs and companies in the social economy sector[41]. Insofar as the Draft Bill contemplates numerous support instruments for these entities, generally in the form of public aid, if there is little or no effective participation in reserved tenders, it could be reasonable to bind part of this aid to participation in the reserved public tenders that are called within their own sphere of activity.

  Likewise, with regard to the design of tenders, the division into lots in the terms determined by Article 99 of the Public Procurement Act appears beneficial as this measure facilitates the participation of SMEs (according to the RIA report, 84% of the entities in the sector are SMEs). Therefore, it can have a positive effect on special employment centres, WISE companies and other entities in the social economy sector, and thus prevent these entities from experiencing difficulties in accessing large contracts due to the solvency and means required to carry them out[42]. All

[41] The CNMC, in Report INF/DP/0014/14 on the Specific Administrative Clauses and Technical Specifications governing the centralised procurement of comprehensive cleaning services for buildings, premises and facilities of the General State Administration located in the Community of Madrid, recommended that the specifications expressly include that despite the reservation of lots for special employment centres, this should not imply a limitation for these entities, as long as they meet the capacity and solvency requirements set out in the specifications, to bid for the remaining lots.

[42] Further recommendations for a competitive design of public tenders can be found in the Guide on Public Procurement and Competition and in the reports published on the CNMC's website.

of this is without prejudice to the possibility of reserving specific lots pursuant to Art. 99 (5) of the Public Procurement Act[43].

- Increase in the minimum percentage of reserved contracts: this Commission recommends justifying the increase in the minimum percentage of reserved contracts provided for in the 4th Additional Provision of the Draft Bill due to its impact on the conditions of competition in public tenders. When establishing a minimum percentage of reserved contracts for each administration, the CNMC recommends prior planning and analysis of demand (needs covered by tenders) and supply (WISE companies and special social initiative employment centres that could potentially participate in tenders whose contracts or lots are subject to reservation). In addition, it should be noted that, although the reservation of contracts is protected by the regulations, the conditions of this reservation must respect the principles of equal treatment and proportionality, and must not unjustifiably restrict competition. This impact analysis with respect to the percentage decided upon should be included in the Regulatory Impact Assessment Report.

- Other reservations of contracts (48th Additional Provision of the Public Procurement Act): with regard to the other category of reservation of contracts or lots applicable to entities in the social economy sector**,** the CNMC recommends express reference to the 48th Additional Provision of the Public Procurement Act, which regulates the possibility of reserving contracts on an exceptional basis subject to a series of objective (certain social, cultural and health services and specific CPV), subjective (cumulative conditions), temporary (maximum three years) and formal (express mention in the call for tenders) requirements[44]. The

[43] *One or some of the lots may be reserved for special employment centres or work integration social enterprises, or a minimum percentage of the execution of these contracts may be reserved within the framework of sheltered employment programmes, in accordance with the provisions of the Fourth Additional Provision. Lots may also be reserved for the entities referred to in the Forty-eighth Additional Provision, under the conditions established in the aforementioned provision.*

[44] In the same vein as Art. 77 of Directive 2014/24, the 48th Additional Provision of the Public Procurement Act stipulates: *1. Without prejudice to the provisions of the Fourth Additional Provision, the contracting authorities may reserve to certain organisations the right to participate in tendering procedures for contracts relating to social, cultural and health services listed in Annex IV under CPV codes 75121000-0, 75122000-7, 75123000-4, 79622000-0, 79624000-4, 79625000-1, 80110000-8, 80300000-7, 80420000-4, -7, 80511000-9, 80520000 -5, 80590000-6, from 85000000-9 to 85323000-9, 92500000-6, 92600000-7, 98133000-4 and 98133110-8.*

2. The organisations referred to in paragraph 1 must fulfil each of the following conditions: a) Their objective must be the fulfilment of a public service mission linked to the provision of the

aforementioned 48th Additional Provision, unlike the 4th Additional Provision, does not expressly refer to certain types of entities. Therefore, this Commission recommends ensuring that the novelty introduced by the Draft Bill in the Social Economy Act (Article ()(k)) is respectful of this wording of the Public Procurement Act, given that this provision is not modified. Likewise, in line with the previous recommendation, the CNMC suggests justifying the established reservation limit (at least 0.5%) due to its impact on the principle of equal treatment and free competition, especially bearing in mind that this provision is optional and the criteria of each administration must be respected.

- Monitoring measures: this Commission recommends strengthening the measures for monitoring and ensuring compliance with the established percentages of reserved contracts, as well as the special social performance conditions that are included in the contracting specifications.

- Review of the wording due to possible inconsistency with the intended purpose: the CNMC recommends reviewing the wording of the 2nd Final Provision of the Draft Bill, which provides for a new tendering of the contract or lots that were reserved by virtue of paragraph 3 of the 4th Additional Provision of the Public Procurement Act but that were declared void because no suitable bids were submitted[45]. This measure should be viewed positively but, in order to serve its purpose, this Commission suggests eliminating the reference to "reserved" lots in the new call for tenders:

> *"When the specifications include several lots, the new tender notice must specify the ~~reserved~~ lots that will be affected by the new deadline for submission of bids due to the absence of a suitable bid. The contracting*

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services referred to in paragraph ; b) Profits must be reinvested for the purpose of achieving the organisation's objective; or where profits are distributed or redistributed, such distribution or redistribution must be on the basis of participation criteria; c) The management or ownership structures of the organisation performing the contract must be based on employee ownership, or on principles of participation, or require the active participation of employees, users or other stakeholders; and d) The contracting authority concerned must not have awarded the organisation a contract for the services at issue under this Article within the preceding three years.

3. The maximum duration of the contract to be awarded in accordance with this Additional Provision shall not exceed three years.

4. Reference to this Additional Provision shall be made in the notice serving as a call for tender.

[45] This is in line with Article 150 (3) of the Public Procurement Act: *A tender may not be declared void when there is a bid or proposal that is admissible under the criteria that appear in the specifications.*

authority may award the remaining lots under the terms established in Article 99.7 of this Act".

4. CONCLUSIONS AND RECOMMENDATIONS

In general terms, the inclusion of measures to support people at risk of social exclusion or vulnerable persons in order to facilitate their integration into the labour market is an objective in line with a social and democratic State governed by the rule of law, as proclaimed in Spain's Magna Carta.

From the perspective of competition and the proper functioning of markets, companies that rely on the most vulnerable groups may be under-represented in the markets compared to the solution that would be socially desirable. Moreover, strengthening the ability to compete of a type of economic operators offering goods and services on the market that are in a structurally weak situation can contribute to making the competitive game more dynamic, with benefits for the community as a whole.

However, inadequate support can also lead to distortions of competition and of the proper functioning of markets. In addition to measures that limit new entrants, measures that limit the number or variety of players in the market and their ability or incentive to compete are also detrimental. Likewise, measures to support certain types of companies may distort competition in the markets to the extent that they strengthen the competitive position of certain companies or discourage competition or innovation, and should therefore be examined with caution, assessing their compliance with EU State aid rules and with the principles of good economic regulation enshrined in national law.

The following aspects have been identified for improvement in the articles of the text submitted for report:

- Proposed amendments to the Cooperatives Act: This Commission recommends making inter-cooperative agreements subject to competition law; replacing the obligation to establish a registered office in Spain with proof of economic activity; further justifying the obligation to have a corporate website; reconsidering the extension of the minimum period of membership of agricultural cooperatives, and reviewing the system established for community land cooperatives.

- Proposed amendments to the WISE Act: The CNMC recommends rethinking the requirement of a minimum of one year's experience to qualify as a WISE promoter and considers that the wording should be

modified so that the opening of work centres in an autonomous community other than the one in which the WISE company is registered does not require accreditation of the entity before the corresponding administrative register.

- Common issues in the three laws on State aid and SGEIs: This Commission recommends adopting an objective and not a subjective perspective in their definition, by specifically identifying the public service obligations for operators when the services they provide are classified as SGEIs. Furthermore, the CNMC recommends adapting the Draft Bill to the requirements set out in EU regulations on SGEIs and State aid so that the automatic exemption from notifying the measure to the EC as possible State aid can work. This is without prejudice to the existence of other channels, such as the regulations on *de minimis* aid, which have not been included in the regulatory text.

- Common issues in the three laws on public procurement: This Commission points out the need to comply with the requirements set out in the Public Procurement Act and the case law of the CJEU in relation to the inclusion of social conditions in the specifications (in award criteria or in special performance conditions). In this respect, it should be noted that social objectives must be achieved through the promotion of effective competition and not at the expense of it. With regard to the reservation of tenders to certain operators, the CNMC recommends improvements in the methodology applied for their implementation, so that the decisions taken and the results obtained in each of the public authorities can be comparable.

  In addition, this Commission recommends assessing whether the level of effective competition and efficient allocation of public funds achieved with the limitations on the beneficiary profiles of reserved contracts is adequate and advises taking measures to make it more flexible if this is not the case. It also recommends measures, such as training programmes, to encourage participation in public tenders. Lastly, this Commission requests justification for the increases in the minimum percentages of reserved contracts established, together with a due analysis of the impact on the market that the measure may entail.

The President
Cani Fernández Vicién

The Secretary of the Council
Miguel Bordiu García-Ovies