

Communication 1/2023, of 13 June 2023, of the Spanish National Markets and Competition Commission, on the criteria for the determination by the National Markets and Competition Commission of the ban on public procurement on grounds of distortion of competition

1. Approach.

- (1) Article 71.1 b) of the Spanish Law 9/2017 on public sector contracts (LCSP in Spanish) establishes that persons who have been definitively sanctioned for a serious infringement relating to distortion of competition may be excluded from public procurement. From a procedural perspective, Article 72 of the Spanish Law establishes that certain bans on public procurement, among which are those relating to distortion of competition, shall be directly assessed by the contracting authorities, when a judgment or administrative decision has expressly ruled on their scope and duration, and shall remain in force for the period of time specified therein. In the event that the judgment or the administrative decision does not lay down the scope or duration of the ban on public procurement, these shall be determined by the Minister of Finance and Civil Service by means of a specific procedure, following an envisaged decision by the State Public Procurement Advisory Board. The law therefore provides for two ways of specifying the prohibition: either the administrative decision imposing the sanction lays down the scope and duration or by means of a specific procedure for that purpose by the aforementioned Minister.
- (2) As the CNMC has pointed out in numerous decisions, since the entry into force of the ban on public procurement on grounds of distortion of competition¹, this is a legal consequence that derives directly from the aforementioned Law in the case of undertakings sanctioned for infringements of competition law.² Also, Supreme Court Rulings no. 1115/2021, of 14 September 2021 (RC 6372/2020), and no. 1419/2021, of 1st December 2021 (RC 7659/2020), recalling the procedural alternative for the specification of the scope and duration of such

¹The prohibition was included by the ninth final provision of Law 40/2015, of 1 October 2015, which amended Articles 60 and 61 of the consolidated Law on Contracts of the Public Sector (approved by Royal Legislative Decree 3/2011, of 14 November 2011).

²See for all Decision of 14 March 2019 on case S/DC/0598/16 (Electrificación y Electromecánicas Ferroviarias). The aforementioned decision stated: *“Although the legal nature of ban on public procurement has caused controversy and has given rise to a line of case law at times conflicting, it must be acknowledged that these bans on public procurement, while not being sanctions in the strict sense, are restrictive of rights, which makes it necessary to take into account certain aspects or principles of the sanctions regime, which have been respected in these proceedings. Aside from the limitation or restriction of the potential contractor’s rights, there is also a legal requirement of reliability in order to enter into contracts with the public sector, which should allow the entities that make up the public sector to exclude from their contractual relations those persons who do not comply with this degree of reliability”*.

- exclusions, state that: “the ban on public procurement agreed by the CNMC under Article 71.1. b) of the LCSP is a limitation tied to the imposition of a final sanction for a serious infringement in certain matters”.
- (3) The rulings of the High Court of Justice of Catalonia nos. 3273/2022 and 3289/2022, both of 28 September 2022, among others, concluded that competition authorities are entitled to define, for each infringement, the set of legal consequences that meet the principles of effectiveness, deterrence and proportionality required by European Union and national law, including the ban on public procurement, which implicitly enable the authority to rule on the scope and duration thereof. Thus, the High Court considers that competition authorities are best placed to assess, as a whole, the severity of the penalties and sanctions that may be adopted in light of the facts established, and to weigh up the consequences of the infringing conduct on the market.
 - (4) In view of the above and in light of the experience acquired, The National Markets and Competition Commission considers it appropriate to publish the criteria that shall guide the determination of the duration and scope of the ban on public procurement in those infringement proceedings that impose such a legal consequence, thus providing necessary legal certainty to operators and guaranteeing transparency in its enforcement.
 - (5) These criteria combine the general provisions contained in public procurement law with the specific provisions on sanctions existing in competition law. The practical application of the criteria set out herein shall ensure the necessary balance between the principles of deterrence, effectiveness and proportionality, as well as an appropriate assessment of the impact of the adopted measures on the markets affected by the conduct. The aforementioned principle of proportionality advises the CNMC not to consider the ban on public procurement indiscriminately. It should not be forgotten that the ban on public procurement on grounds of distortion of competition may reduce, or even eliminate in the most extreme cases, competition in the market.

2. Purpose.

- (6) The purpose of this Communication is to set out the criteria that shall guide the National Markets and Competition Commission when setting the duration and scope of the ban on public procurement provided for in Article

71.1 b) of the Spanish Law on Contracts of the Public Sector in the sanctioning decisions it adopts pursuant to Law 15/2007 on the protection of competition (LDC in Spanish). These criteria shall apply to infringement proceedings initiated by the Competition Directorate after the publication of this Communication.

- (7) These criteria are not exhaustive and their application will depend on the particular circumstances of each case.

3. General aspects of the scope of the ban on public procurement.

- (8) This section deals with aspects relating to the objective, subjective and temporal scope of the prohibition.

3.1. Objective scope of application: infringements concerned

- (9) As already mentioned, the ban on public procurement on grounds of distortion of competition is foreseen in Article 71.1 b), together with other bans on public procurement on grounds of a very diverse nature. Some of them have to do with economic regulation, such as the serious infringement of “*market discipline*” or “*professional misconduct endangering integrity*”. However, the article also provides for other grounds that are not related to economic regulation, such as infringements for non-compliance with regulations on labour market integration and equal opportunities and non-discrimination of people with disabilities, or infringements of foreigners' rights, which have other purposes.
- (10) The aforementioned provision refers to *serious infringements* relating to distortion of competition. Nevertheless, it is undeniable that very serious infringements pursuant to Article 62 of the Law on the protection of competition also entail a ban on public procurement. From the outset, the CNMC's understanding has been that the ban on public procurement applies to very serious infringements pursuant to the Law on protection of competition.³
- (11) A literal interpretation of the principle of legality would lead to absurdity since less serious infringements from the point of view of competition law would be exposed to one of the most severe rights-restricting measures,

³See for all Decision of 14 March 2019 on case S/DC/0598/16 (Electrificación y Electromecánicas Ferroviarias).

whilst the most harmful anti-competitive infringements would fall outside the scope of the ban on public procurement.

- (12) Therefore, there is no limitation on the type of anti-competitive conduct that can be subject to a ban on public procurement, provided that it is serious or very serious under the Law on protection of competition.
- (13) Thus this includes the very serious infringements pursuant to Article 62.4 LDC and the serious infringements pursuant to Article 62.3 LDC.
- (14) Notwithstanding, purely procedural infringements that are not capable of distorting competition should fall outside the objective scope of the ban on public procurement on grounds of distortion of competition.
- (15) Another question that may arise is whether competition infringements must necessarily be related or linked to public procurement (bid-rigging) for the ban on public procurement to apply. In this regard, it should be pointed out — and this has been the CNMC's position in a number of infringement proceedings — that at no point does the Law on Public Sector Contracts require the ban on public procurement on grounds of distortion of competition to be related to public procurement⁴. Nor is it relevant for these purposes that the infringing party does not participate regularly in public tenders. The impact of the ban on an undertaking that does not regularly enter into contracts with the public administration, and its deterrent effect, is a different matter altogether. However, that situation may change and public administrations should not be left unprotected, which is why the imposition of the ban may still be relevant.

3.2. *Subjective scope of application: natural and legal persons.*

- (16) Article 71.1 b) states that “*persons*”, without distinguishing whether they are natural or legal persons, who have been definitively sanctioned for a “*serious*” competition infringement may not enter into contracts with the entities provided for in Article 3 of the Law on Public Sector Contracts. In view of the above, and taking into consideration that, in accordance with Article 63.2 of the Law on protection of competition, the legal representatives of undertakings or persons who are members of their boards or management bodies may be sanctioned, natural persons should not be excluded from the subjective scope of the ban on public procurement.

⁴ Case S/DC/0612/17 (*Montaje y Mantenimiento Industrial*), Decision of the CNMC of 1 October 2019. Case S/DC/260/17. *Combustibles Sólidos*. Decision of the CNMC of 12 May 2021

3.3. *Temporal scope.*

- (17) The CNMC acknowledges the application of certain principles of the sanctions regime to the ban on public procurement. Therefore, it considers that the ban on public procurement on grounds of distortion of competition is not in force for those infringements that terminated before 22 October 2015, the date of entry into force of the ban on public procurement on grounds of distortion of competition.⁵
- (18) In this regard, the question arises as to what happens to conduct that started before 22 October 2015 and terminated after that date. Anti-competitive practices are usually single and continuous infringements, with the duration of the infringement extending over a specific period of time. This circumstance may be taken into account when setting the duration and scope of the ban on public procurement, as part of the proportionality assessment referred below.

4. **Scope and duration of the ban on public procurement**

4.1. *General principles*

- (19) When establishing the factors to be taken into consideration to determine the duration and scope of the ban, many questions arise. The above determination requires weighing up all the relevant elements to ensure compliance with the principles of proportionality and legal certainty, as well as the protection of public administrations. The correct quantification of the fine is as important as the appropriate determination of the scope and duration of the ban on public procurement. At this point, it should essentially be established with which contracting authorities the infringing party will not be able to enter into a contract, in which territories and areas, and for how long.
- (20) First, it should be noted that Article 73.1 of the Law on Public Sector Contracts provides that: *“In cases where the Minister of Finance and Civil Service has the power to declare a ban on public procurement, the ban*

⁵ Case S/DC/554/14 (Mudanzas Internacionales), Decision of the CNMC of 6 September 2016 and Case S/481/13 (Construcciones modulares), Decision of the CNMC of 3 December 2015.

shall be enforceable across the public sector". This provision is applicable in cases where the Minister is entitled to set the scope and duration of the ban.

- (21) On the other hand, pursuant to Article 19.4 of the General Regulation of the Law on Public Administration Contracts approved by Royal Decree 1098/2001, of 12 October 2001, in order to determine the scope and duration of the ban on public procurement, the existence of wilful misconduct or evident bad faith on the part of the infringing person and the extent of the damage caused to public interests must be taken into account.
- (22) In this particularly complex context, the Supreme Court⁶ has pointed out that *"bans on public procurement, like all limitations, cannot be either indefinite or unlimited, as this would be contrary to the most basic principles governing punitive or restrictive measures, including the principle of legal certainty and the principle of proportionality, insofar as they require that both the sanctioned party and third parties know the extent of the ban and can question and review whether the limitation established is appropriate and in line with the sanction imposed and the facts on which it is based"*.
- (23) The modulation of the scope of the ban on public procurement is essential, given that it allows its deterrence and proportionality to be optimised, so that the scope is determined in terms of geographical scope, legal and public sector entities and products (goods or services).
- (24) A key element is the structure of the relevant market in which the ban will possibly apply. The aspects to be considered are, among others: the number of active operators, which will determine the viability of its application and its effect on competition in the short and medium term, the homogeneity of the product, transparency, the existence of barriers to entry, including regulatory barriers, which prevent access by alternative operators to those affected by the ban on public procurement, etc.
- (25) In line with the above, assessing the effects of the ban on public procurement is precisely the reason that justifies, as Spanish Courts have pointed out, the active participation of competition authorities in the delimitation of the scope and duration of the ban on public procurement since, when establishing such a ban, the authority will also have to

⁶Ruling 1115/2021, of the Supreme Court, of 14 September 2021, in relation to case SAMUR/02/2018 (rec. Autobuses Lorca).

consider how the exclusion of competitors resulting from the ban on public procurement affects competition in and for the market.

- (26) This will entail a particularly complex exercise to strike the necessary balance between the protection of competition as the ultimate good to be protected and the exclusion of competitors from certain public tenders as a proposed measure as well as, where appropriate, the other public interests that may be affected. Achieving this balance requires consideration of the baseline scenario (market distorted by the infringement) and the benefits of the long-term deterrent effect.
- (27) In any event, when determining the duration and scope of the ban on public procurement, it is necessary to take into account that, although all serious and very serious anti-competitive infringements of the Law on protection of competition fall within the scope of the prohibition, as noted above, some cases pose great difficulties for its application. This is the case of an infringement of Article 1 of the Law on protection of competition in which the majority of the market have participated or when the bid of one of the infringing undertakings pursuant to Article 1 of the Act is necessary due to its special relevance (because it has special experience or assets). It is also the case of an abuse of a dominant position by a monopolist or an abuse of a collective dominant position⁷.

4.2. *Factors for determining the “scope” and “duration” of the ban.*

- (28) In addition to the general guidelines and principles set out above, the particular circumstances outlined in the following paragraphs may be subject to analysis when assessing the issue.

⁷The particularities of certain sectors may also be taken into account, e.g. the pharmaceutical sector in the case of medicinal products with exclusive rights. See Decision of 10 November 2022 issued in case S/0028/20: “However, as regards the scope and duration of the ban on public procurement, it should be taken into account the fact that it may be in conflict with the necessary supply of the orphan drug CDCA-Leadiant® to CTX patients in Spain, as this is a serious disease which requires early and chronic administration of the medication in question in order to limit the decline in the patients' health and even to ensure their survival. Consequently, this Chamber considers that, in the present case, it is necessary to assess in particular the implementation of effective self-correction measures, given that there is only one company capable of supplying the medicinal product CDCA to the national market”.

- (29) These indicative parameters are listed together for “scope” and “duration”, without prejudice to the fact that, given their nature, they may be more specifically applicable to one element or the other.
- (30) First, it should be noted that, in accordance with Article 72.6 of the Law on public sector contracts , the maximum duration of the ban on public procurement with the public sector for final administrative infringements is 3 years. Therefore, this three-year period shall not be exceeded.
- (31) **Geographic scope:** the geographic market where the infringement occurred shall be taken as the main reference when defining the geographic scope of the prohibition. However, consideration shall be given to the specific circumstances of each case, which may justify the definition of a narrower or wider scope. Indeed, it cannot be ruled out that the scope could exceed such a market, given the degree of involvement and active ties of other entities of the same corporate group in the sanctioned practices, including the parent companies responsible for the infringement. This could lead to the geographic scope being greater than that of the specific conduct, because it affects entities of a wider scope or because the conduct originates in the decision-making bodies of those other entities.
- (32) **Product (good or service) scope:** the product (good or service) market affected by the infringement shall be taken as the main reference for defining the scope of the prohibition.⁸ However, this may be wider or narrower if there are circumstances in the case ⁹which demonstrate the need for a different scope. While the products concerned by the infringement should in principle be covered by the ban on public procurement, it should not be excluded that, in certain cases, other products may also be procured by the administration with the legal entities of the same group actively involved in the infraction, including the parent companies.

⁸ For example: Decision of the ACCO, of 23 December 2019, Case 94/2018 (Licitaciones Servicio Meteorológico de Cataluña) ruled “To impose, in accordance with the eleventh ground of law of this Decision and Article 53.2.b) of the LDC, the ban on public procurement with the companies MCV S. A. and ADASA SISTEMAS SAU in tenders issued by the Catalan Meteorological Service for the installation of radars and/or meteorological stations and the maintenance and/or supply of parts or spare parts for the network of meteorological radars in Catalonia (XRAD) and the network of meteorological stations in Catalonia (XEMA), for a period of 18 months”. The decision of the Catalan Competition Authority (ACCO) matches the scope of the ban on public procurement with the product market of the infringement.

⁹Consider, for example, the case of the facilitator, who operates in a market other than the one affected by the infringement. In this case, the determination of the scope of the prohibition could consider the market where he operates and not the market affected by the infringement.

- (33) **Duration of the infringement:** this is an **objective circumstance** which should guide the determination of the duration of the prohibition. It is possible to establish a rule of proportionality between the duration of the infringement committed and the duration of the ban on public procurement. However, inevitably, if the infringement lasted for more than 3 years, the duration of the prohibition would be at its maximum and therefore, from that point onwards, proportionality would be breached.
- (34) **Seriousness of the infringement:** it should be considered here whether the infringement of the Law on protection of competition was serious or very serious. The more serious the infringement, the longer should be the duration. Similarly, the greater the economic impact of the infringement in terms of the volume of the market affected by it, the longer should be the duration. Another relevant factor here is the nature of the infringement. Thus, for example, in the context of collusion in periodical tenders by the administration, it is important to consider the frequency of the tenders, so that the lower the frequency of the tenders, the longer the duration of the ban, to be deterrent. The participation of each undertaking in the infringement may also be taken as a reference, in the event that the infringement is implemented through bidding consortia (UTE).
- (35) **Degree of participation** of the undertaking in the infringement (position of perpetrator, instigator, active participation, residual participation, etc.) and the existence of aggravating or mitigating circumstances in the conduct of the infringer in accordance with the provisions of Article 64 of the LDC. Depending on the circumstances of each case, the appropriate individualisation may be established.

5. Procedure.

- (36) The Competition Directorate's envisaged decision, issued pursuant to Article 50 of the Law on protection of competition, may include a proposed sanction together with a proposed duration and scope of the ban on public procurement in accordance with the criteria set out above, in order to allow for the parties' arguments to be heard.
- (37) As a general rule, the envisaged decision may contain for each undertaking:
- Delimitation of the entities concerned and the geographic scope.
 - Types of contracts affected.
 - Duration.

(38) This envisaged decision, together with the arguments put forward, shall be submitted to the Council for its final decision.

6. Exemption from the ban on public procurement

(39) In accordance with Article 72.5 of the Law on public sector contracts , the ban on public procurement shall not be declared when, in exercise of its right to be heard, the person involved in the conduct proves the following circumstances cumulatively:

- the payment or commitment to pay the fine established in the administrative decision leading to the ban on public procurement, provided that the aforementioned persons have been declared liable for the payment of the fine in said decision;
- the adoption of appropriate technical, organisational and personnel measures to prevent future administrative infringements, including by benefiting from the leniency programme for distortion of competition.

(40) In the light of the above-mentioned legal provision, it can be concluded that the following types of exemptions exist:

- Prior assessment: in cases in which the draft decision already indicates that the ban on public procurement is not applicable, without the need to wait for the undertaking to be heard . This prior assessment may be:
 - automatic, for beneficiaries of leniency exemption in accordance with the provisions of Article 65.1 and 65.4 of the LDC; or
 - optional, for beneficiaries of a reduction of fines through the leniency programme in accordance with the provisions of Article 66.5 of the LDC.
- Subsequent assessment:
 - Upon providing evidence, by the infringer during the administrative proceeding, of appropriate technical, organisational and personnel measures to prevent future administrative infringements.

(41) On this point, compliance programmes are particularly relevant, and the CNMC has published a “Antitrust Compliance Programmes Guidelines” (2020) as a mechanism to promote these policies in companies and contribute to this objective by providing transparency on the basic criteria

that the CNMC considers relevant for a compliance programme to be considered effective.¹⁰

- (42) In order to be truly effective, compliance programmes must guarantee, through the establishment of conduct guidelines and the implementation of organisational measures for their development, the existence of a real commitment to compliance that is transferred to the daily decision-making process, both of the natural persons who, on behalf of the company, participate in the activity and of all the firm's employees, allowing them, within the scope of their duties, to detect or prevent anti-competitive practices.
- (43) To this end, the Guidelines contain clear and comprehensive guidelines for the assessment of compliance programmes and the consideration of their effectiveness. From this perspective, the CNMC will assess compliance programmes for the purposes of determining the applicability of the exemption in this area¹¹.
- (44) Finally, consideration should be given to the effects that the future regulation of settlement procedures may have in this area.

7. Review of the ban on public procurement.

- (45) The review of the ban on public procurement is a power and possibility provided for in the applicable general and sectorial legislation.
- (46) Article 72.5 of the Law on public sector contracts expressly includes the possibility of reviewing the ban on public procurement when the person concerned proves compliance with the points referred to in section 6 above.
- (47) Likewise, the power of review could be particularly relevant in certain contexts such as those arising from dynamic, immature or poorly consolidated markets and also in those cases in which the effective application of the prohibition is delayed in time.
- (48) The ban on public procurement may be reviewed at any time when in force and the procedure may be initiated ex officio or upon request of one of the parties.

¹⁰ <https://www.cnmc.es/novedad/cnmc-guia-compliance-competencia-20200610>.

¹¹In Decision S/DC/0627/18 (CONSULTORAS), of 11 May 2021, the CNMC considered for the first time the effectiveness of a compliance programme for the purposes of the ban on public procurement, stating that the undertaking concerned should be exempted from the ban on public procurement.

8. Effectiveness of the ban on public procurement.

(49) The CNMC's decision establishing the duration and scope of the ban on public procurement is final from the time of its approval, without prejudice to its possible appeal before the competent court and its possible suspension by the aforementioned court.

9. Communication of bans on public procurement for registration

(50) Bans on public procurement, once the corresponding decision has been adopted, shall be communicated without delay for registration in the State Official Register of Tenderers and Classified Companies or the equivalent register in the different autonomous communities, depending on the scope of the ban on public procurement and the authority that declared it.

Madrid, 13 June 2023. Cani Fernández Vicién, President of the National Markets and Competition Commission.