

Unclassified

English - Or. English

15 November 2022

**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS  
COMPETITION COMMITTEE**

**Director Disqualification and Bidder Exclusion – Note by Spain**

29 November 2022

This document reproduces a written contribution from Spain submitted for Item 4 of the 139th OECD Competition Committee meeting on 29-30 November 2022.

More documents related to this discussion can be found at  
[www.oecd.org/competition/director-disqualification-and-bidder-exclusion-in-competition-enforcement.htm](http://www.oecd.org/competition/director-disqualification-and-bidder-exclusion-in-competition-enforcement.htm)

Mr Antonio CAPOBIANCO  
[Email: Antonio.CAPOBIANCO@oecd.org]

**JT03507676**

## Spain

### 1. Introduction

1. Under Spanish law, serious and very serious breaches of the Competition Act encompass the ban to bid for public contracts. Therefore, CNMC's cartel decisions do not only impose fines, but also include a reference to the legal declaration on the applicability of the public procurement debarment.

2. So far, unlike some regional competition authorities, the CNMC has referred to the Advisory Board of State Public Procurement (JCCPE)<sup>1</sup> the final decision on the scope and duration of the debarment, instead of making that decision itself. This is an option available to the competition authority.

3. Furthermore, the decision imposing the contracting ban applies from the moment in which the relevant decision becomes final concerning the potential bidder. Therefore, more often than not, the application of such measures is deferred and the competitive situation and relative importance of potential bidders for public contracts may have evolved.

4. The CNMC is currently contemplating defining in its decisions the scope and duration of the bidder's exclusion on account of their participation in serious competition infringements. An internal reflection is ongoing as to the optimal method to do so. However, its application raises some practical challenges due to the tension between a) the goal of protecting the administration from contracting with counterparties who have incurred in competition infringements, which in turn also has a powerful deterrent effect on potential offenders, on the one hand, and b) the effect of reducing the number of potential contractors when the CNMC's core mission is maintaining effective competition between market operators, on the other hand.

5. In this context, this contribution describes the legal and administrative framework of bidder exclusion in Spain, dwelling in the factors to bear in mind when adopting this measure.

### 2. National Legal Framework of Bidder Exclusion

6. The Spanish law on public procurement, 9/2017 of November 8 (hereafter "LCSP") establishes the exclusion of bidders in the competition field<sup>2</sup>: **those whose declaration of responsibility for having committed a serious infringement of competition law has become final shall be banned from contracting with public sector entities.**

7. The debarment decision has both a subjective and an objective scope:

- Subjective scope: it applies to both companies and their directors liable for the infringement.

---

<sup>1</sup> Advisory Board of State Public Procurement is the body for regulation and consultation in matters of public procurement of the State Public Sector.

<sup>2</sup> Article 71.1 b) of the Spanish Public Sector Contracts Law (9/2017, LCSP).

- Objective scope: it concerns **serious and very serious infringements** of competition. The Spanish Defence of Competition Act 15/2007, of July 3 (hereafter “LCD”) distinguishes<sup>3</sup>:
  - Very serious infringements: cartels or other collusive contact infringing Article 1 LCD and Article 101 of the **Treaty on the Functioning of the European Union** (hereafter “TFEU”), abuses of a dominant position under Article 2 LCD and Article 102 TFEU, as well as breaches of decisions adopted by the Spanish National Markets and Competition Commission’s (CNMC), related to either conducts or mergers.
  - Serious infringements: unfair acts distorting competition which affect the public interest infringing Article 3 LCD, mergers gun jumping and obstructions of investigations by the CNMC.

8. This bidder exclusion is directly applicable (it applies *ope legis*). Therefore, it is an automatic consequence of the final infringement decision (or of the final judgment, once the matter becomes *res iudicata*). Nevertheless, **the bidder exclusion is not effective until its scope and duration are determined** (its maximum duration is 3 years<sup>4</sup>).

9. According to our public procurement act, **the scope and duration** of bidder exclusion (Article 72.2 LCSP) can be established: a) directly in the infringement decision of the competition authority, or b) indirectly, by referring the matter to the JCCPE<sup>5</sup>, which would make a proposal to the Finance Ministry. In any case, the exclusion will be effective as from its registration at the tenderers Registry.

10. On the one hand, the legislative framework on public procurement<sup>6</sup> provides that the scope and duration of the bidder exclusion must be ascertained taking into account matters such as **intent, bad faith and the damage caused to the public interest**.

11. On the other hand, according to Article 72.5 LCSP any company or director may **escape bidder exclusions** provided that such company or director provides evidence of: (1) the **payment** or the commitment to pay the fines and compensations determined by the decision or a judgement and (2) the adoption of appropriate technical, organizational and personnel measures to avoid the commission of future administrative infringements (**compliance program**), including taking advantage of the **leniency program** in competition<sup>7</sup>.

12. **Finally, the public procurement act foresees another circumstance in which bidders may be preventively excluded from public procurement:**<sup>8</sup> Article 150.1 LCSP

---

<sup>3</sup> Article 62 LDC

<sup>4</sup> Article 72.6.2° LCSP

<sup>5</sup> According to Article 328.2 LCSP, the CNMC has a voice but not a vote in the JCCPE.

<sup>6</sup> Article 19.4 of the public procurement implementing Regulation, Royal Decree 1098/2001, of 12th of October.

<sup>7</sup> Regarding to the effectiveness of compliance programs, CNMC has published a Guide about this issue “[Guía sobre los programas de cumplimiento normativo en relación con las normas de defensa de la competencia](#)” (Antitrust compliance programmes guidelines) (2020). The objective is to avoid cosmetic programs and differentiate them from those which contribute a real compliance commitment (through effective prevention, detection, and reaction mechanisms).

<sup>8</sup> Article 57.4 d) of Directive 2014/24/EU on public procurement foresees that contracting authorities may exclude any operator from an ongoing procedure if they consider that there are sufficiently plausible indicators to sustain the suspicion that it colludes to distort competition.

includes an expeditious procedure for contracting authorities to communicate early signs of collusion to competition authorities in order to assess whether they may constitute prima facie indicia of collusion. In the meanwhile, the tender procedure would be suspended. The contracting authority would decide in full autonomy, whether the on-going procedure should be discontinued or not<sup>9</sup>.

### 3. CNMC's Experience in Implementing the Bidder Exclusion

13. There are many examples of CNMC's infringement decisions including the application of the debarment decision, which have been referred to the JCCPE for the determination of its scope and duration<sup>10</sup>.

14. In parallel, the CNMC has traditionally assessed effectiveness of the compliance programs in the relevant infringement decisions to decide whether they could qualify as mitigating circumstances to modulate the fine. Recently, the CNMC's Decision [S/DC/0627/18](#), CONSULTANTS, has included for the first time, the assessment of a compliance program as a protection against bidder exclusion<sup>11</sup>.

15. There are some Spanish regional competition authorities which have established in their infringement decisions the scope and duration of bidder exclusion applicable to the addressees of such decisions<sup>12</sup>. Recently, the High Court of Justice of the Spanish region of Catalonia has also confirmed the competence of competition authorities to do so<sup>13</sup>.

### 4. Potential Factors to Determine the Scope and Duration of the Exclusion

16. Bidder exclusion must comply with the principles of legal certainty and proportionality as any measure restricting rights. According to the Spanish Supreme Court<sup>14</sup>: *“mandatory bidder exclusions from the procurement procedures, as any limitation, can't be imposed nor indefinitely nor unfetteredly, as it would, in that case, violate the most basic principles that govern the due process to impose sanctioning or restrictive measures, among them the principles of legal certainty and proportionality, because these principles require that both the sanctioned and third parties know exactly*

---

<sup>9</sup> It is worth mentioning, as well, that on the other hand, article 132 LCSP states the obligation of contracting authorities and JCCPE to communicate to the CNMC (as in the case of regional bodies), any indicator of agreement, concerted practices, decisions or collective recommendations which have as their object, cause or can cause the prevention, restriction or distortion of competition within the procurement procedure.

<sup>10</sup> For example, in cases related to [supply of solid fuels](#); two for [school transport in Navarra](#) and [Murcia](#); [Spanish weather agency radars](#); [Assembly of industrial installations](#); [Radiopharmaceuticals](#); [electrification Spanish railway infrastructure manager](#); [Railway Security and Communications](#); [Consultants](#), [Builders](#), etc. According to a recent resolution from the High court (STS 14th sept 2021 SAMUR) it would have been also possible that the CNMC determined the scope and the duration of the bidder exclusion at their sanctioning resolutions.

<sup>11</sup> Articles 71.1 and 72.5 LCSP

<sup>12</sup> It is worth noting the following: Catalanian competition authority (ACCO) resolutions regarding to [tenders of the Catalanian weather service](#) (bidder exclusion for 18 months), [Aerobus 2](#) (bidder exclusion of 24 months) and [Event organization services](#) (bidder exclusion of 24 months). [Galician competition resolution regarding to tenders in school transportation](#) (bidder exclusion for 3 months).

<sup>13</sup> SSTSJCAT N.º 3273/2022 and N.º 3289/2022, 28th September 2022.

<sup>14</sup> Previous mentioned Ruling 1115/2021, Supreme Court, 14<sup>th</sup> September 2021, referring to the probe SAMUR/02/2018 (rec. Autobuses Lorca).

*which is the scope of the ban and, furthermore, that the imposed ban may be challenged if it is not proportionate and consistent with the facts that justified the sanction”*

17. As a consequence of being found guilty of competition law infringements, firms and their directors can be debarred from participating in future public tenders for a maximum of 3 years and throughout the Spanish public administration. Nevertheless, the LCSP leaves a margin of discretion in applying this measure, which, together with the above-mentioned factors and principles, allows for some fine-tuning of the optimal use and terms of bidder exclusion.

#### 4.1. Scope of the measure

18. While the JCCPE has applied this bidder exclusion with a general scope throughout the public sector<sup>15</sup>, the CNMC, could determine on each case the most appropriate product and geographical scope as well as the administration level covered by the measure<sup>16</sup>.

19. This approach by the competition authority would be in line with the double nature of the bidder exclusion. The principle of proportionality to the infringement applies to the extent a public contracting ban is perceived by the excluded bidder as a punitive measure. Conversely and arguably, the general public contracting ban with the administration would reflect its preventive purpose (guaranteeing that public administrations enter into contracts only with trustworthy entities).

20. Hence, the CNMC could adjust the measure on a case-by-case basis, so as to comply better with the proportionality principle and maximize its deterrent effect. If this were to be the case, the following aspects should be considered:

- **Geographical scope.** One option could be to consider that the ban should always include as starting point the geographical market wherein the infringement has been committed<sup>17</sup>, while it might extend wider on account of other considerations. For instance, one might take into account for deterrence the degree of liability for the infringement of other legal entities belonging to the same undertaking which are active on a wider geographic area and thus, eventually distinguish between this situation and other. Alternatively, one could follow the JCCPE’s practice of always applying bidder exclusion on a national scale. Such a consideration is also embedded in the preceptive communication of these kind of sanctions to other member States, the EU, and supra-national organizations such as the World Bank, as it boosts the deterrent and sanctioning effects (for companies with supra-national business).
- **Product scope.** Similarly, the product market affected by the competition infringement could serve as a starting point to establish the scope of the contract ban. Indeed, this has been the case of bidder exclusions determined by the regional

---

<sup>15</sup> Based on article 73.1 of the LCSP, in cases in which the competence to impose a bidder exclusion corresponds to the Ministry of Finance, the exclusion will produce effects in the whole public sector.

<sup>16</sup> The article 73.1 LCSP contains a number of assumptions about the scope of the Prohibition to contract regarding different infringements to the case of administrative infringement (included the distortion of competition) stated in article 71.1.b), in which no consideration is made as to the scope of the prohibition to contract, although there are about the date on which the effects of the sanction start (article 73.3 LCSP).

<sup>17</sup> In the case of infringements of the General Taxation Law (Ley General Tributaria), the Ministry of Finance, pursuant to article 73.4 of the LCSP, states that the bidder exclusion shall involve the Public Administration inserted in the area of the law-applier.

competition authority of Catalonia<sup>18</sup>. At the other end, the JCCPE imposes the bidder exclusion for the whole public sector to protect the integrity of participants in public tenders.

21. As for the geographical scope, the product scope could take into account whether the relevant legal entities liable for the infringement provide other products to the public sector, and. Indeed, it could be reasonable that the infringements that comprise bid-rigging are punished with sanctions with a greater scope or duration, if we can understand that there is more harm caused by these actions or the undertakings pose a wider risk.

## 4.2. Duration

22. The maximum legal duration of the bidder exclusion for final administrative sanctions is 3 years<sup>19</sup>. If the CNMC were to make the exercise of defining the optimal duration, possible criteria to be factored in could be:

- **The length of the infringement.** Inevitably, as the infringement length is unlimited whereas the sanction duration is legally limited to 3 years, the room for proportionality adjustments is limited.
- **Seriousness.** This criterion opens the possibility of fine-tuning the duration according to whether the infringement of the Competition Act was serious or very serious and to the degree of individual participation of the undertaking in the infringement: aggravating circumstances (instigator, recidivist...) and mitigating circumstances. For example, one could envisage that recidivism could lead to the maximum duration of the bidder exclusion.
- **The market structure.** The frequency of public tenders is a relevant factor to determine duration, for the less often a public tender is, the longer the ban should apply in order to be an effective deterrent.

23. Generally speaking, other market structure features may affect the realistic enforcement of the contract ban and its scope. In a market characterized by considerable barriers to entry, few operators and a high degree of transparency, the effect of removing bidders as contenders for public tenders may have an impact that can be taken into account by the competition authority to fine tune the scope of the contract ban.

## 5. Application of the Bidder Exclusion: Effect on the Market and Feasibility

24. The main mission of the CNMC is to guarantee effective competition on the market. From this perspective, the CNMC should assess the effects of this measure on the markets.

25. Indeed, although all the serious and very serious infringements of the LDC fall within the scope of the bidder exclusion, some cases may pose great challenges for its

---

<sup>18</sup> As it has been mentioned, resolution of the Catalan authority of competition, of December 23rd 2019, file number 94/2018 Licitaciones Servicio Meteorológico de Cataluña, that decided «to impose, in accordance with the legal ground number eleven of this resolution and the article 53.2.b) of the LDC, the prohibition to contract to the undertakings MCV S.A. and ADASA SISTEMAS SAU in the tenders issued by the Meteorological Service of Catalonia, that comprise the installation of radars and/or meteorological stations and the maintenance and/or meteorological network of radars in Catalonia (XRAD) spare parts supply or replacement parts and of the network of meteorological stations in Catalonia (XEMA), for 18 months »

<sup>19</sup> As stated in article 72.6 of the LCSP.

application, or even could make it unfeasible. The paradigmatic example is a monopolist that abuses its position of market dominance. This could also be the case of an infringement of article 1 LDC in which most of the market operators were involved<sup>20</sup>.

26. However, the system already provides a solution as any legal or natural person may be exempted of the ban subject to the fine payment and presentation of an effective compliance program.

27. Hence, even if there is ground for discussion and there are theoretical obstacles to the application of the bidder exclusion in certain scenarios, the fact is that the CNMC, as a competition authority, should protect and reinforce the incentives to comply with competition legislation. Then, it is for the offenders to react as they hold the key to compliance. The competition authority should just fulfil its task and enforce the competition rules with certainty and proportionality.

28. In the same vein, the specific time at which the exclusion is executed might prove determinant as well. As markets evolve over time, if the competition dynamics deteriorates, the effects of a bidder exclusion might be exacerbated.

29. Nevertheless, the fact is that the bidder exclusion, so declared, could be reviewed at any moment during its validity, when the undertaking or director that had been excluded from contracting with the public sector proves compliance with the requirements for exemption. So, the regulatory system is also providing flexibility to offset any potential drawback in the execution of the bidder exclusion.

## 6. Conclusions

30. The CNMC has up to now included in its decisions the legal provision of bidder exclusion and has not determined its scope and duration. Instead, it has been referring that decision to the Advisory Board of State Public Procurement.

31. The CNMC is currently reflecting on the most appropriate way to establish its scope and duration, combining the principle of proportionality, the protection of public finances, and efficient competition.

32. Indeed, a more active approach of the CNMC when applying the bidder exclusion seems plausible as the recent judgments by the Courts confirm that competition authorities are well placed to determine the duration and scope of this kind of measures and scrutinise its effectivity throughout its validity time. This option allows the companies to directly comply with the requirements for self-cleaning determined by the law and avoid the ban without needing to wait for any other administrative decision. That could imply a benefit both for private and public interest.

33. Fine tuning the scope and duration of the measure based on principles of proportionality and effectiveness reasons could contribute to deterrence and protection of general interest. Furthermore, the contract ban and the possibility of its exemption has an implicit incentive for firms to renew trust. In the long run, as suppliers, compliance increases and competition is better ensured.

---

<sup>20</sup> Example : S/0644/18 – RADIOFÁRMACOS.