

Unclassified

English - Or. English

25 May 2020

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

Working Party No. 3 on Co-operation and Enforcement

Criminalisation of cartels and bid rigging conspiracies – Note by Spain

9 June 2020

This document reproduces a written contribution from Spain submitted for Item 1 of the 131st OECD Working Party 3 meeting on 9 June 2020.
More documents related to this discussion can be found at
<http://www.oecd.org/daf/competition/criminalisation-of-cartels-and-bid-rigging-conspiracies.htm>

Please contact Ms Sabine ZIGELSKI if you have any questions about this document
[Email: Sabine.Zigelski@oecd.org, Tel: +(33-1) 45 24 74 39]

JT03462053

Spain

1. Introduction

1. The introduction of the Leniency Programme under Spanish jurisdiction by Act 15/2007, of 3 July, on the Defence of Competition, was intended to strengthen the effectiveness of the fight against cartels, facilitating their detection and subsequent sanction, especially in cases of cartels that directly affect the general public interest, such as those involving public tenders (bid rigging).
2. Indeed, since its entry into force in February 2008, the Leniency Programme has proved itself to be the most effective tool in the fight against cartels, leading to the detection and sanction of 31 cartels, with total fines amounting to more than one billion euros, which otherwise could not have been sanctioned by the Competition Authority so effectively. Since 2016, some of the managers of the undertakings participating in these cartels have also been sanctioned.
3. Act 15/2007, of 3 July, on Defence of Competition (*Ley de Defensa de la Competencia*, hereinafter LDC)¹ establishes that both natural and legal persons who carry out anticompetitive infringements can be considered offenders, the actions of a company also being attributable to the persons who control it and determine its economic behaviour. The LDC distinguishes minor, serious and very serious offences, establishing maximum penalties for firms in each case: up to 1, 5 or 10% of the total turnover in the financial year previous to that in which the fine is imposed. Cartels are always considered very serious infringements. In addition, the LDC allows fines of up to €60,000 to be imposed on those members of the governing bodies and legal representatives who have been involved in anti-competitive behaviour.
4. Paragraph 2 of the 4th Additional Provision of the LDC establishes the definition of cartel, mirroring the Damages Directive². For the purposes of the LDC, cartel means any agreement or concerted practice between two or more competitors whose objective is to coordinate their competitive behaviour in the market or to influence the parameters of competition through practices such as, among others, the fixing or coordination of purchase or sale prices or other commercial conditions; the allocation of production or sales quotas; the distribution of markets and customers, including collusion in tendering, restrictions on imports or exports; or other anti-competitive measures. This express reference to collusion in tendering was already included in the original wording of 2007, with reference to fraudulent bids.
5. Under Spanish law, competition infringements are exclusively subject to administrative sanction. However, the Criminal Code criminalises certain conducts that bears some similarity to competition offences, in particular, to actions that could fall within the scope of a cartel. In particular, article 262 of the Criminal Code expressly considers the alteration of prices in public tenders and auctions, and articles 281, 282 and 284, refer to hoarding and other ways to distort market functioning to the detriment of consumers and clients.
6. The criminalization of this kind of agreements has not been general practice. To date, administrative authorities are the only ones dealing with cartels. However, the debate

¹ A similar provision was included in the Spanish Competition Law that was previously in force, Law 16/1989, of 17 July 1989, of the Defence of Competition.

² It was transposed into Spanish law by Royal Decree-Law 9/2017, of 27 May.

around the possible criminalisation of cartels is not new and in recent years is becoming more and more relevant.

7. Several elements are animating this debate. As the leniency program gains momentum, the cartel cases are more notorious and some practices may be prone to gain more attention from the criminal perspective. Besides, as sanctions on managers are becoming more and more frequent in competition cases, the possibility of their criminal prosecution becomes more plausible.
8. The interest on this issue was demonstrated at the last CNMC Annual Competition Day, held on 19th November 2019. One of the sessions discussed precisely the interrelationship between the enforcement procedure in competition matters and criminal law, and the impact on this topic of the transposition of Directive (EU) 2019/1, of 11 December 2018 (known as the ECN+ Directive), in particular its Article 23 on the interaction between requests for exemption from payment of fines and penalties imposed on natural persons, in particular in criminal proceedings.
9. The effective transposition of this article could be done by different alternative measures (one of them could entail a reform of the Spanish Criminal Code), in particular with the aim of protecting applicants for leniency against future penalties in criminal court proceedings, if they cooperate actively with the competent authority responsible for prosecuting the crime.
10. As already indicated, given the very positive assessment of use of the leniency programme in Spain, its effectiveness would be seriously compromised if the facts reported by the applicant for leniency were subsequently presented as charges in criminal proceedings without any protection for the applicant for leniency. It is crucial to maintain the incentives of the leniency programme and to ensure the leniency applicant that, in the event of future and subsequent criminal proceedings as a result of the proceeding for competition at the administrative level, such a request would be taken into account in order to mitigate the penalty that might be imposed in that criminal proceeding.
11. For natural persons, this would thus follow the path already begun with regard to legal persons following the entry into force of Article 31bis of the Penal Code, introduced by Organic Law 1/2015, of 30 March, which allows legal persons to be exempted from criminal liability in cases where they have implemented an 'effective' compliance programme. This was implemented in Public Prosecutor's Circular 1/2016, of 22 January, on the criminal liability of legal persons in accordance with the reform of the Penal Code carried out by Organic Law 1/2015, providing criteria for the evaluation of these programmes for the purposes of Article 31bis of the Penal Code.
12. In any event, the transposition of the ECN+ Directive should bring about an effective interrelationship between criminal law and administrative enforcement in matters of competition, in order to avoid unnecessary procedural costs and investigative efforts, avoiding criminal prosecution of what is pursued by administrative means, especially when sanctioning of cartels by the CNMC, including bid-rigging cases, is a priority, and this is reflected in the CNMC action plans, where clearly one of the priorities is the fight against anti-competitive activities in public tendering.
13. In particular, this prioritisation in the ex officio proceedings of the CNMC has involved, firstly, the creation of systems for the automatic detection of signs of infringement to identify possible fraudulent tenders and, secondly, collaboration with public administrations that are especially active in issuing calls for tenders, training them to detect fraudulent bids.

14. As a result, in recent years, the pursuit and punishment of such practices, which are so harmful to the economy, citizens and the general welfare, has increased, corroborated by the number of sanctioned cartels and the cases currently open and ongoing investigations. To this has also contributed the good results of the leniency programme in Spain, feeding all these tools, since there is no doubt that greater efficiency in the ex officio proceedings of the Competition Authority also results in the submission of requests for leniency. One example of this is Case S/DC/0598/16 Electrificación y electromecánica ferroviarias, discussed below, which originated as a request for leniency and resulted in the sanctioning of three cartels for manipulation of tenders, most of them public.

2. A bid-rigging infringement: Case S/DC/0598/16 Electrificación y electromecánica ferroviarias

15. This case originated as a request for exemption from payment of the fine (leniency application) submitted by ALSTOM to the CNMC, and after subsequent inspections by the CNMC, on 30th January 2017 it was agreed to initiate the aforementioned proceedings for prohibited practices restricting competition, consisting of the dividing up of tenders of public and private clients for the construction and maintenance of electrification systems and electromechanical equipment on high-speed rail and conventional rail lines. SIEMENS subsequently submitted a leniency application to reduce the amount of the fine, providing evidence with significant added value.
16. After analysing all the information contained in the case file and assessing the allegations submitted, three cartels were deemed to have been established to distort competition in public tendering:
 1. One cartel to divide up contracts put out to tender for the construction, supply, installation and maintenance of high-speed rail line electrification systems, from April 2008 to March 2016.
 2. One cartel to divide up contracts put out to tender for the maintenance of electrification systems on conventional rail lines, from May 2002 to November 2016.
 3. One cartel to divide up contracts put out to tender for the construction, supply, installation and maintenance of electromechanical equipment on high-speed rail lines, from March 2012 to December 2015.
17. In the first cartel, for high-speed electrification, 13 undertakings (Cobra, Siemens, Elecnor, Semi, Inabensa, Alstom, Isolux, Cymi, Comsa, Electren, Neopul, Citracc and Eym) agreed to divide up 24 tenders for the construction and maintenance of high-speed electrification over eight years. The total amount of the contracts awarded to the cartel amounted to EUR 837 million. This cartel's agreements evolved over time, from April 2008 to March 2016, depending on the calls for tenders being issued and the undertakings participating in the collusive strategy. Mention should be made of what are known as MICRO-MACRO agreements, under which the undertakings agreed to divide up equal shares of turnover and margin for several tenders by establishing various Unincorporated Temporary joint ventures (Uniones Temporales de Empresas, hereinafter UTEs).
18. The strategy consisted of the UTEs – which the undertakings had previously agreed to form – awarded the contracts transferring some amount of production and profit margin to those not awarded the contract, which would submit non-winning cover or supporting bids to simulate competitive competition in the tender process.

19. The second cartel, for the electrification of conventional rail, operated for 14 years (from May 2002 to November 2016). The substantiated facts indicate that ten undertakings (Elecnor, Cobra, Semi, Inabensa, Cymi, Alstom, Electren, Siemens, Telice and Eym) entered into agreements in relation to at least 239 tenders, of which 173 were ultimately awarded to cartel companies, with a total of EUR 134 million distributed among the companies. The earliest events demonstrating the existence of a collusive strategy in procurement contracts for conventional rail lines date back to 2002: the main companies in the sector reached an agreement to divide up all contracts put out to tender for the maintenance of electrical substations on conventional rail lines. The agreement, among other matters, provided for a method of dividing up tenders by drawing lots to establish the order in which contracts would be awarded, which the companies referred to as the 'ranking'. The companies also provided for compensation mechanisms among themselves. In this way, companies that were not awarded contracts were ensured 6% of the contract value, to be distributed equally. The agreements remained stable over time as a result of, among other things, how easy it was for companies to adapt to the circumstances and changes in contracts put out to tender.
20. In the third cartel created to divide up public procurement contracts and a private contract for the construction, supply, installation and maintenance of electromechanical equipment on high-speed lines for three years (2013 to 2015), Alstom and Indra, despite having complementary technology which justified setting up UTEs between them for tenders related to the construction and/or maintenance of electromechanical systems in rail tunnels on high-speed lines, occasionally agreed to divide up tenders involving lesser amounts or complexity for which such complementarity was not necessary. Both submitted bids, although one of them was a supporting or cover bid, agreeing that the eventual successful bidder would subcontract to the non-contracting one. Elecnor joined in 2015. These companies adopted agreements to divide up of at least seven contracts with a tender budget of EUR 84 million.
21. On 14th March 2019, the CNMC Council issued a prohibition decision imposing fines for a total amount of EUR 118 million on the 15 infringing companies (Cobra, Elecnor, Siemens, Semi, Inabensa, Alstom, Cymi, Isolux, Electren, Comsa, Indra, Neopul, Telice, Eym and Citracc), plus fines totalling €666,000 for the 14 managers also penalised. Under the leniency programme, ALSTOM and its managers were exempted from paying fines (8.8 million for Alstom, plus €155,700 for its directors), and SIEMENS received a 45% reduction in the amount of the fine (leaving EUR 9.24 million), but not its managers, because they did not cooperate as part of the leniency submitted.
22. As mentioned above, in recent years, in addition to sanctioning undertakings participating in cartels, natural persons have also been penalised, as will be discussed below.

3. Penalties imposed on natural persons for infringements of competition law

23. Penalising natural persons is not a novelty of the current Defence of Competition Act. Article 10.3 of Act 16/1989 already provided for the possibility of penalising managers with fines of up to €30,000. Now, Article 63.2 of the LDC also provides for such a penalty, although it increases the fines on natural persons to €60,000. Based on this article, in addition to the sanction applicable to offending undertakings, it is possible to impose additional individual penalties on the legal or managerial representative who played a particularly significant role in committing the violation.

24. However, the effective use of this article of the LDC had been very limited up to 2015, with natural persons being punished only on few occasions³.
25. It was following the ruling by the Supreme Court (Tribunal Supremo, hereinafter TS) on 29th January 2015,⁴ which urged the active application of Article 63.2 of the LDC as a mechanism to increase the dissuasive power of public competition enforcement, that the CNMC considered penalising natural persons in applying said article.
26. In particular, the Court stated in the aforementioned ruling that ‘the dissuasive effect of fines should be predicated on competition policy as a whole, within which, in addition to financial penalties on the offending undertakings themselves, there is no doubt that penalties may be imposed on natural persons which are members of the governing bodies of the offending undertakings, pursuant to article 63.2 of the LDC’.
27. Following this 2015 TS ruling, the CNMC resumed applying Article 63.2 of the LDC, imposing penalties on natural persons in seven decisions since 2016⁵.
28. These fines imposed on directors of entities –undertakings and association of undertakings– violating competition law pursuant to Article 63.2 of the LDC have, in general, been upheld by several rulings of the Spanish National Court (Audiencia Nacional, hereinafter AN)⁶. Specifically, in its ruling of 20 April 2017, the AN delimited the scope of representation indicated in Article 63.2 of the LDC, which allows penalties to be imposed on any natural person who acted on behalf of the sanctioned legal person, for example, when attending a meeting in which an anticompetitive agreement was adopted⁷.
29. And in its ruling of 14 March 2018, the AN endorsed imposing penalties on natural persons simultaneously with the undertakings that have been members of a cartel, since the rule makes it possible to punish both the company responsible for the conduct and its legal representatives or directors⁸.
30. It is clear that the provision provided for in Article 62.3 of the LDC is not intended to extend to the worker who, without independent decision-making capacity, is limited to carrying out instructions from a superior, but rather to a natural person with the capacity recognised by the legal person they represent to design, adopt, carry out and/or oversee the effective implementation over time of anti-competitive agreements entered into.

³ Under the Competition Act of 1989: Decisions of 25 May 1993, Case 322/92 FACONAUTO; of 13 September 1993, Case 320/92 Boutiques Pan Asturias; of 8 January 1996, Case 359/95 Lencería Gijón; of 21 November 1996, Case 378/96 Asentadores de pescado; of 12 December 1996, Case 364/95 Ortopédicos Castilla-León; of 24 October 2001, Case 503/00 Feriantes Huesca; of 3 April 2007, Case 611/06 Excursions Port of Sóller. Under the current Competition Act of 2007: Decision of 26 September 2012, Case S/0335/11 CEOE.

⁴ Supreme Court Ruling 112/2015 of 29 January 2015, issued in connection with Case S/0269/10 Transitarios 2.

⁵ CNMC Decisions of 26 May 2016, Case S/0504/14 AIO; of 30 June 2016, Case S/DC/0519/14 Infraestructuras Ferroviarias; of November 10, 2016, Case S/0555/15 Prosegur-Loomis; of 23 February 2017, Case S/DC/0545/15 Hormingones of Asturias; of 3 May 2018, Case S/0584/16 Agencias de Medios; of 14 March 2019, Case S/DC/0598/16 Electrificación y Electromecánica ferroviarias; and 1 October 2019, Case S/DC/0612/17 Montaje y mantenimiento industrial.

⁶ Spanish National Court rulings of 20 April and 14 September 2017 within the scope of Case S/DC/0519/14 Infraestructuras Ferroviarias; and 27 February, 14 March and 13 June 2018 within the scope of Case S/0504/14 AIO.

⁷ Spanish National Court ruling of 20 April 2017, within the scope of Case S/DC/0519/16 Infraestructuras Ferroviarias.

⁸ Spanish National Court ruling of 14 March 2018 within the scope of Case S/0504/14 AIO, rec. 352/16.

31. In this regard, the aforementioned AN ruling of 14 March 2018, referring to the also cited ruling of 20 April 2017, reiterates that the governing body of a legal person is understood to mean any of its members who may adopt decisions that ultimately guide, influence or direct its actions.
32. Therefore, the managers, in order to be considered by Article 63.2 of the LDC, must have a major and not merely token role in the unlawful acts under investigation, playing a proactive part and driving the agreements and, in any case, with the power to make the major decisions in the conduct analysed, according to the evidence contained in the case file.
33. Where such actions correspond to the operational management of the unlawful acts carried out by the accused legal person, and it is established that the natural person has represented the legal person in the design and/or execution of such acts, the provision of Article 63.2 of the LDC extends to that manager.
34. Subsequent AN rulings have confirmed and supported the penalties imposed on natural persons by the CNMC decisions, with the nuances of the first rulings cited. However, TS rulings 1287/2019 and 1288/2019, of 1 October 2019, as well as the recent 95/2020, of 28 January 2020, clarify some of the opinions set out in the previous rulings. Thus, TS Ruling 1288/2019, of 1 October, when analysing the position of the two appellants belonging to an association of undertakings, considers that the requirement to be a governing body of the association of undertakings was not proved with the rigour required, as there was no evidence, supporting documents or other proof that would allow the position to be classified as an executive position, with the characteristics of executive functions and autonomy.
35. As regards the determination of the administrative penalty to be imposed on the accused natural persons, objective criteria, such as the seriousness and other characteristic features of the offence, which are reflected in the rate of the penalty imposed on the entities of which they are managers, must be taken into account. In addition, subjective criteria are determined, such as the duration of each natural person's participation, their hierarchical level within the organisation and the proven conduct.
36. Subsequently, account is taken of the maximum amount of €60,000 provided for in Article 63.2 of the LDC – unless the maximum of €30,000 provided for in Article 10.3 of Act 16/1989 is applicable, if they participated in a continuing violation, as Act 16/1989 is most favourable to the natural persons in this case. Therefore, it will be based on the penalty rate estimated for the entity of which they are a manager, adjusted based on the professional category of that manager and the duration of their participation in the unlawful act.
37. The dissuasive effect that penalties may have on natural persons pursuant to Article 63.2 of the LDC is reinforced by the obligation to publicise said sanctions, indicating the amount of the penalties, the names of the offenders and the violation committed, pursuant to Article 69 of the LDC. This is confirmed by two particularly important TS rulings: 430/2019, of 28 March, and 483/2019, of 9 April. Both confirm that the right to personal privacy guaranteed by Article 18 of the Spanish Constitution is not at stake, since the conduct of the offending natural person does not take place in the sphere of private life; the penalty imposed pursuant to Article 63.2 of the LDC is imposed as a result of their professional conduct voluntarily carried out at a company that has violated Defence of Competition regulations.
38. In addition to penalties on natural persons, other dissuasive measures have already been established in Spanish law, such as the possibility that those who consider themselves harmed by a collusive practice may claim damages in civil proceedings, which has been envisaged for years in our legal system. The amendments introduced in the LDC during the transposition of the Damages Directive facilitated the lodging of such claims.

4. Bans from contracting with the public sector, collaboration mailbox and compliance programmes

39. The LDC does not include the ban from contracting with the public sector within its catalogue of sanctions. However, Act 9/2017 of 8 November, on Public Sector Contracts (hereinafter LCSP, 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), states in Article 71.1.b.iii that persons who are duly punished for falsifying competition, i.e. for serious violations of Act 15/2007, may not contract with public sector entities.
40. Article 72 of the LCSP regulates the jurisdiction and procedure for assessing the ban from contracting by stating that:
1. It shall be assessed directly by the contracting authorities, where the administrative decision has expressly decided on its scope and duration.
 2. Otherwise, it shall be determined by the Minister of Finance, subject to the proposal of the State Advisory Board on Public Procurement.
41. This may have a particularly significant deterrence effect for bid-rigging cases, because it would entail the loss of eligibility to be awarded contracts in proceedings for the provision of goods and services transacted by public administrations. However, given that the LDC does not expressly empower the CNMC to determine the scope and duration of the contracting ban, it refers decisions to the State Advisory Board on Public Procurement of the Ministry of Finance.
42. According to article 72.5 of the LCSP, the ban from contracting does not apply to those who make use of the leniency programme, whether they are seeking exemption from payment of the fine or reduction of the amount of the fine.
43. To date, the CNMC has declared the applicability of a ban from contracting with public administrations in the following three decisions, all sanctioning cartels:
- Case S/DC/0598/2016 Electrificación y electromecánicas ferroviarias, 14 March 2019 Decision.
 - Case S/DC/0612/17 Montaje y mantenimiento industrial, 1 October 2019 Decision.
 - Case S/DC/0626/18 Radares Meteorológicos, 13 February 2020 Decision.
44. Case S/DC/0598/16 Electrificación y electromecánica ferroviarias was the first in which the applicability of a ban from contracting with public administrations was declared, and penalties were imposed on 14 managers. The CNMC activated the procedure for a ban from government contracting for the first time. Therefore, the 14 March 2019 decision of the CNMC was referred to the State Advisory Board on Public Procurement of the Ministry of Finance, in relation to the sanctioned companies.
45. Additionally, it originated as a leniency application (immunity), followed by a leniency application for a reduction in the amount of the fine, resulting in the two companies -Alstom and Siemens- being granted not only the exemption and a reduction in the fines imposed, respectively, along with the managers of the company requesting the exemption (not so those requesting the reduction), but also exemption from the applicability of the ban from contracting declared for the other sanctioned companies.
46. To this exemption to the applicability of the ban from contracting with public administrations should be added the future transposition of Directive 2019/1937 of the European Parliament and of the Council, of 23 October 2019, on the protection of persons

who report breaches of Union law, known as the Whistleblowing Directive. In any event, the CNMC's collaboration mailbox has been operational since 2014⁹.

47. This is where any company or citizen with reliable information about anti-competitive practices by a company can provide such information without the need to make a formal complaint. It should be noted that this action does not entail a formal complaint and that, as it is an anonymous mailbox, the identity of the person who provides the information is in no case registered, unless the latter so requests using the corresponding boxes on the form.
48. Finally, it should also be noted that on 20th February 2020 the CNMC presented for public consultation a draft guide for compliance programmes in relation to competition law¹⁰.
49. The CNMC has already had the opportunity to issue an opinion on compliance programmes, both those implemented prior to the detection of the infringement (ex ante compliance programmes), and those implemented or modified for improvement once the company has already been charged (ex post compliance programmes)¹¹.
50. In those cases in which companies have informed the CNMC of a compliance programme, the CNMC has maintained a positive assessment, as indicated in fining decisions in recent years¹². Although, according to the CNMC, the mere introduction of a compliance programme cannot be considered more than a mitigating circumstance, it may formally reflect the company's willingness to comply, which has been considered, in certain cases, an element in reducing the penalty.
51. The aim of publishing this guide is to make transparent the basic criteria that the CNMC considers relevant for a specific compliance programme to be effective, allowing economic operators to prevent and detect their participation in unlawful conduct, which can result in not only administrative liability because it goes against the rules of defence of competition, but also criminal liability, as discussed above.
52. The CNMC thus continues to deepen the complementarity between the necessary deterrence in competition enforcement and preventive measures in the business environment, which it has been exploring for the past four years through conferences on public-private collaboration and compliance policies on a monthly basis. In addition, compliance programmes could encourage and strengthen the collaboration of companies with the CNMC under the leniency programme provided for in articles 65 and 66 of the LDC.

⁹ Information available at <https://sede.cnmc.gob.es/tramites/competencia/colaboracion-para-la-deteccion-de-carteles>.

¹⁰ Information available at <https://www.cnmc.es/prensa/cnmc-consulta-p%C3%BAblica-compliance-20200203>.

¹¹ Decisions of the CNMC of 23 July 2015, Case S/0482/13, Fabricantes de Automóviles; of 17 September 2015, Case SNC/0036/15, Mediaset; of 12 January 2016, Case S/DC/0522/14, Thyssenkrupp; of 26 May 2016, Case S/DC/0504/14, AIO; of 6 September 2016, Case S/DC/0544/15, Mudanzas Internacionales; of 8 June 2017, Case S/DC/0557/15, Nokia; of 26 July 2018, Case S/DC/0565/15, Licitaciones informáticas; and of 1 October 2019, Case S/DC/0612/17, Montaje y Mantenimiento Industrial.

¹² Decisions of the CNMC of 17 September 2015, Case SNC/0036/15, Mediaset; of 12 January 2016, Case S/DC/0522/14, Thyssenkrupp; of 6 September 2016, Case S/DC/0544/15, Mudanzas Internacionales and 1 October 2019, Case S/DC/0612/17, Montaje y Mantenimiento Industrial.