

THE SPANISH AUTHORITY HINTS AT PROHIBITING CARTEL MEMBERS FROM ENTERING PUBLIC CONTRACTS

Executive Summary

On 14 March 2019, the CNMC imposed fines for a total of EUR 118 million on fifteen undertakings and fourteen individuals for illegally rigging bids in public tenders issued by ADIF related to railway infrastructure.

The CNMC continues targeting individuals. The fourteen individuals allegedly responsible have been imposed fines for a total of EUR 666,000.

The CNMC has referred to the National Consultancy Board for Administrative Contracting (“Junta Consultiva de Contratación Pública del Estado”) for the latter to decide whether to ban the alleged cartelists from entering into public contracts.

Garrido Abogados’s lawyers are available to assist in addressing any questions you may have regarding these developments. To learn more about these issues, please contact the Garrido Abogados lawyer with whom you usually work, any member of the firm’s EU and Competition practice group, or the following lawyers in Madrid:

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I. Introduction

On 14 March 2019, the Spanish Competition Authority (the “*Comisión Nacional de los Mercados y la Competencia*”, “CNMC”) imposed fines on fifteen undertakings (including large international groups such as Alstom – the immunity applicant – and Siemens – also a leniency applicant –) and fourteen individuals for illegally rigging bids in public tenders issued by ADIF related to railway infrastructure (electrification and electromechanical systems) for conventional and high-speed train lines¹. According to the CNMC, these undertakings participated in several cartels in the high-speed train and conventional train tenders for fourteen years. Accordingly, fines for a total of EUR 118 million were imposed on these undertakings. The Spanish authority keeps targeting individuals and fines for a total of EUR 666,000 were imposed on a number of individuals responsible for such conduct².

The CNMC made a reference to the General Public law, existing under Spanish law since 2015 but which is yet to be applied, to ban the cartelists from entering into public contracts. The CNMC did not directly apply such prohibition but rather has referred its decision in this regard to the National Consultancy Board for Administrative Contracting³. The CNMC has thus refrained from fixing the duration and scope of the prohibition on entering into public contracts.

¹ CNMC. (2019). *Resolución Expte. S/DC/0598/2016 Electrificación y Electromecánicas Ferroviarias*. 14 March 2019. Available at: https://www.cnmc.es/sites/default/files/2380080_31.pdf [Accessed 12 April 2019].

² *Ibid.*, pp. 320 – 326.

³ *Ibid.*, pp. 317 – 320 and 326.



According to the CNMC, three cartels to distort competition in public tenders have been in place since the early 2000s⁴:

1. **An alleged cartel to share the tenders for the construction, supply, installation and maintenance of electrification systems for high-speed railway lines:** thirteen undertakings adopted agreements for the sharing of twenty-four tenders from 2008 to 2016. The total value of the contracts awarded to the members of the alleged cartel amounted to EUR 837 million. Among the agreements, there were those called ‘MICRO-MACRO’, in which companies would have allegedly agreed to equally share several public contracts through different joint ventures created by the cartelists.
2. **An alleged cartel to manipulate tenders for the maintenance of electrification systems on conventional train lines,** operated from May 2002 to November 2016. Ten undertakings that created this alleged cartel adopted agreements concerning at least 239 tenders, of which 173 were finally awarded and won by its members, with a total amount distributed among the companies of EUR 134 million.
3. **An alleged cartel to share public and private tenders for the construction, supply, installation and maintenance of electromechanical equipment on high-speed lines,** operated from 2013 to 2015. According to the CNMC, Alstom and Indra would have agreed to participate in tenders in which one of the companies submitted a cover bid. In 2015, Elecnor joined the practices. These undertakings managed at least seven contracts for a total of EUR 84 million.

II. Prohibition from Entering into Public Contracts

The CNMC made a reference to the legal procedure to prohibit alleged cartelists from entering into public contracts provided for under Article 71.1.b) of Law 9/2017, of 8 November, on Public Sector Contracts (“LCSP”)⁵. The CNMC did not directly apply such prohibition but rather has referred its decision in this regard to the National Consultancy Board for Administrative Contracting, the latter to decide whether to ban the alleged cartelists from entering into public contracts⁶. The CNMC has thus refrained from fixing the duration and scope of the prohibition on entering into public contracts.

In this specific case, the CNMC pointed out two aspects⁷:

- A. On the one hand, leniency applicants fall outside the prohibition on entering into public contracts in accordance with the provision contained in Article 72.5 LCSP. Consequently, Alstom, Siemens and the individuals of Alstom will not be affected by the prohibition of contracting in Article 71.1.b) LCSP.
- B. On the other hand, the CNMC’s decision does not indicate the duration and scope of the prohibition. Consequently, these must be determined by means of a procedure

⁴ Ibid., pp. 134 – 155.

⁵ Ibid., p. 320.

⁶ Ibid. p. 326.

⁷ Ibid. pp. 319 – 320.



under Article 72.2 LCSP, following a proposal from the State Public Contracting Advisory Board. To this effect, the CNMC sent a certification of the decision to the aforementioned Board (Article 72.3 LCSP). The CNMC indicated it may be consulted or may issue a report on the concurrent circumstances within the framework of said procedure that allow the duration and scope of the prohibition to be graduated for each of the affected subjects in accordance with their specific participation.

Professor María Pilar Canedo Arrillaga, one of five members of the Competition Board at the CNMC, issued a dissenting opinion to the decision indicating that the competition authority should have taken a decision on the scope and duration of this prohibition⁸ Professor Canedo noted that it is incorrect to leave it to contracting authorities to decide on the prohibition on the basis of their needs or willingness to take risks and not based on linking the rights-limiting measure to the conduct. According to Professor Canedo, this would entail a risk of unequal treatment between undertakings which, in itself, could give rise to discrimination and distortion of competition. Finally, Professor Canedo that it is the Competition authority, and not a procurement body, which is best placed to adequately set out which legal consequences for a given infringement best serve the principles of effectiveness, deterrence and proportionality.

III. Concluding remarks

The Spanish authority continues its relentless quest to bring competition to public procurement in Spain. In doing so, it continues targeting individuals.

However, the hype about this being the first time the Spanish authority has applied a prohibition from entering into public contracts might be unwarranted. It could be argued, and a Member of the Spanish Competition Authority has indicated in a dissenting opinion, that the Spanish Authority has merely suggested that the relevant procurement authorities start proceedings which have been part of the black letter of the law since 2017, but which have never been applied.

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⁸ CNMC. (2019). *Resolución Expte. S/DC/0598/2016 Electrificación y Electromecánicas Ferroviarias, ut supra*, pp. 350 – 370.