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LATIN AMERICAN AND CARIBBEAN COMPETITION FORUM

Session III: Promoting effective competition in public procurement

-- Contribution from Spain --

12-13 April 2016, Mexico City, Mexico

The attached document from Spain is circulated under Session III of the Latin American and Caribbean Competition Forum at its forthcoming meeting to be held on 12-13 April 2016 in Mexico.

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LATIN AMERICAN AND CARIBBEAN COMPETITION FORUM



14th Latin American and Caribbean Competition Forum 12-13 APRIL 2016, Mexico City, Mexico

Session III: Promoting Effective Competition in Public Procurement

-- CONTRIBUTION FROM SPAIN --

1. Introduction

1. In order to provide adequate services for citizens, public authorities need to increase their procurement of goods and services. This important fact is underlined by estimates that public procurement accounts for between 15% and 20%¹ of global GDP. In the particular case of Spain, public procurement accounts for around 18.5% of GDP², a figure which could be even higher if it included other non-contracting forms of public procurement such as management packages (or in-house provision to subsidiary public authorities) or collaboration agreements.

2. Achieving effective public procurement whereby public resources, which are by definition scarce, are properly used, is therefore fundamental to the healthy economic development of States. This issue, the effectiveness of public procurement, is far from neglected by the Spanish legislature and figures in Article 1³ of Spanish public procurement legislation, which reflects the current 1978⁴ Constitution on the subject of public spending.

¹ [DG Growth](#), European Commission. At European level, public procurement accounts for 14% of GDP (*Public Procurement Indicators 2013, June 2015*) whereas for [OECD](#) countries the level is about 13% of GDP and 29% of the spending of those countries.

² Data from the Spanish Public Procurement Observatory.

³ Article 1, [Consolidated text of the Law on Public Sector Contracts](#) (TRLCSP): “*The purpose of this Law is to regulate public sector procurement in order to ensure that it conforms to the principles of freedom of access to bidding processes, openness and transparency of procedures, and non-discrimination and equal treatment among candidates, and to ensure, in connection with the objective of budget stability and cost control, the efficient use of funds allocated to the carrying out of works, the acquisition of goods and the*

3. However, it is not unusual to have situations which deviate from the rules and which lead to irregular conduct. When competition fails, there is invariably: (i) a loss of economic efficiency⁵; (ii) an unnecessary waste of public funds; (iii) an increased risk of collusion brought about by the lower level of competitive tension between bidders and, in extreme cases, a greater likelihood of creating a breeding ground for associated problems such as corruption.⁶

4. In this public procurement scenario, both the CNMC⁷, as the Spanish competition and regulatory authority, and its predecessors have guided administrations in their search for greater public procurement efficiency. They have also provided the relevant *ex ante* guidelines for avoiding the situations indicated above.

5. This contribution examines the main instruments available to the competition authority in the field of public procurement and the use made of those instruments to date. We examine in greater detail the mechanisms for collaboration between the CNMC and other administrative bodies in the field of public procurement and the fight against anti-competitive practices and, as appropriate, corruption. Lastly, we set out the CNMC recommendations for enhancing relations in the field of public procurement, since this is a priority assigned to the CNMC under its Action Plan.

2. Public procurement and competition: action by and instruments available to the CNMC

6. Public procurement has been an enduring priority for the competition authority, both from the point of view of promoting competition and efficient economic regulation, and from that of enforcement. This has been the case, essentially, since the creation of the National Competition Authority (CNC) in 2007 and with the current CNMC.

7. Accordingly, the competition authority has several instruments at its disposal in relation to competitive and effective public procurement. On the one hand, as far as enforcement is concerned, anti-competitive practices or collusion in public procurement have been investigated and the perpetrators penalised.⁸ In terms of promoting competition or advocacy, the CNMC has even more instruments available to it, depending on the objectives to be achieved. The CNMC is the body which is responsible for

procurement of services by requiring the prior definition of the needs to be met, safeguarding free competition and selecting the offer that is most economically advantageous (...)” (own emphasis).

⁴ Article 31.2, Spanish Constitution: “Public expenditure shall be incurred in such a way that an equitable allocation of public resources may be achieved, and its planning and execution shall comply with criteria of efficiency and economy.”

⁵ The work “*Cartel overcharges and the deterrent effect of EU competition law*” (Smuda, 2013) contains estimates which put overcharging by EU cartels at around 20%.

⁶ Corruption always entails a lack of competition, as this is the most obvious corollary. However, a lack of competition does not always imply that there is corruption. In other words, corruption is a sufficient, but not necessary condition for being able to say that the degree of competition in public procurement is less than required.

⁷ Law 3/2013 of 4 June 2013 establishing the Comisión Nacional de los Mercados y la Competencia (National Authority for Markets and Competition), established the CNMC as from 2013, being a merger between, *inter alia*, the National Competition, Energy and Telecommunications Authorities.

⁸ Without giving an exhaustive list, we would refer to the most recent cases involving: industrial bearings for rolling stock (S/0453/12) in which the CNMC Council imposed a fine of EUR 4 million on three suppliers of railway materials to RENFE for forming a price-fixing and market-sharing cartel; the paper envelopes case (S/0316/10) in which the Council established the existence of various agreements in the sector between 1977 and 2010; and S/0329/11 Asfaltos de Cantabria in which it imposed a fine of almost EUR 16 million in a case of bid rigging for the performance of asphaltting works.

promoting competition in all economic sectors including, due to its quantitative and qualitative significance (18.5% of Spanish GDP), public procurement. At any rate, the wide dissemination of reports and the increased transparency of such measures should make it possible to reduce the number of deviations from the rules. All measures taken in this field can be viewed on the CNMC website (www.cnmc.es).

8. The CNMC has various instruments available to it for exercising its powers in relation to public procurement.

9. First, following a request by the drafting body, the CNMC analyses in its Reports on Proposed Legislation (IPN), from the point of view of effective competition and efficient economic regulation, the possible restrictions present in Spanish legislative or regulatory proposals which are still at the drafting stage. It makes proposals for amendments where there are alternatives which are more favourable to competition. From this point of view, the *ex ante* nature of its intervention enables the CNMC to exert a pre-emptive influence on regulatory policy. On the other hand, such reports facilitate and increase an awareness and assimilation of competition policy and regulation at all levels of the Spanish public administration.

10. Without prejudice to certain specific reports⁹, it is worth noting the reports on the preliminary draft law on public sector contracts¹⁰ and the preliminary draft law on procurement procedures in the water, energy, transport and postal services sectors.¹¹ These rules provide for the transposition into Spanish law of the new European public procurement directives¹² and constitute the legal and economic framework for public procurement in the future. Both reports contain the recommendations of the CNMC to public authorities searching for effectiveness and efficiency in order to avoid non-compliant practices, in the form of corruption and/or collusion.

11. Similarly, the CNMC puts out reports on other, non-legislative, activities in the public sector (INF), for example, public procurement dossiers associated with the centralised procurement process introduced in 2013 in the Spanish public administration. In the past two years, the CNMC has reported on as many as 16 centralised procurement dossiers¹³ for various goods and services in a variety of sectors for an amount in excess of EUR 3 billion. Those reports serve as a guide to the issuing entity for achieving more effective and competitive procurement. Furthermore, because they are publicly available, those recommendations are more readily taken on board by other public procurement entities when seeking supplies. Transparency reduces the risk of corruption.

12. On an *ex post* basis, as part of its consultative remit, the CNMC produces Position Reports (PROs). In those reports, the competition authority analyses competition in a specific sector. Thus, in “PRO/CNMC/001/15: Analysis of Public Procurement in Spain: opportunities for improvement from the perspective of competition”, it examined in depth the strengths and weaknesses of public procurement in Spain and gave recommendations for improvements. That document highlights the need for greater administrative co-operation in public procurement.

⁹ In this connection, see IPN 04/2008, concerning the Royal Decree on the classification of contractors.

¹⁰ [IPN/CNMC/010/2015](http://www.cnmc.es/Documentos/Informes/Informe%20IPN%20010%202015.pdf).

¹¹ [IPN/CNMC/011/2015](http://www.cnmc.es/Documentos/Informes/Informe%20IPN%20011%202015.pdf).

¹² Directive 2014/24/EU of 26 February 2014 on public procurement and repealing Directive 2004/18/EC; Directive 2014/23/EU of 26 February 2014 on the award of concession contracts; Directive 2014/25/EU of 26 February 2014 on procurement by entities operating in the water, energy, transport and postal services sectors.

¹³ All available at: www.cnmc.es.

13. The Competition Authority also carries out studies and produces reports¹⁴ covering a broader spectrum, such as guidance manuals, which deal with the safeguarding and promotion of competition from a more practical angle. An example of this is the “Guide to public procurement and competition” which advises procurement entities on public procurement procedures with the dual objective of promoting the competitiveness of those processes and reducing the likelihood of collusion.

14. Lastly, the CNMC possesses a powerful and novel instrument: **active legal capacity**.¹⁵ It is empowered to contest before the courts acts of the public administrations and general provisions ranking lower than laws which create barriers to effective competition in the markets because they conflict with the principles of economically effective and pro-competitive regulation. This binding instrument is a last resort in the face of instances which are particularly damaging for competition and which, in the view of the CNMC, should be removed from the legal system, and for this reason it is used only where other measures have failed.

15. Similarly, the CNMC possesses another active legal capacity instrument whereby it may, of its own motion or at the request of an economic operator, contest acts and rules which are inconsistent with effective economic regulation and the principles of need and proportionality, especially those which fragment the market.¹⁶

16. In terms of procurement, it is worth noting the challenges to concessions for passenger road transport services. The competition authority instituted proceedings against the conditions laid down by some public authorities in their bidding procedures for concessions and concession extensions, which tended to perpetuate the monopoly enjoyed by the incumbents.

17. More recently, in 2014, the CNMC instituted proceedings against the specific Procurement Guide for Catalonia¹⁷ because of the preference given in that Guide to undertakings located in geographic proximity to the contracting entity. That restriction hindered market entry thereby constituting a barrier to competition.

3. Need for greater administrative co-operation

18. The considerable entry barriers, both in terms of obtaining information and in terms of understanding the complex legal framework, the multiplicity of contracting entities with a heterogeneous mix of procedures, and the problems of conflicting information attending these activities, make public procurement a field which is particularly vulnerable to non-compliance, all of which has a huge negative impact on the productivity and external competitiveness of Spanish undertakings, on innovation and, in general terms, on consumer benefits.

¹⁴ In this connection, reference can be made to the [“Application of the Guide to Public Procurement and Competition to bidding processes for the provision of public healthcare in Spain”](#) (2013) or the [“Report on the use of government’s own resources and in-house providing: Implications of their use from the point of view of promoting competition”](#) (2013) which examines in detail, using a quantitative analysis for a chosen sample, the implications for competition of resorting to “*in-house providing*”.

¹⁵ Under Article 5.4 of Law 3/2013.

¹⁶ Under Article 27 of Law 20/2013 of 9 December 2013 guaranteeing the single market.

¹⁷ Specifically, Case LA/04/2014, Procurement Guidelines of the Director of the Public Procurement Monitoring and Evaluation Office of the Generalitat de Catalunya for increasing the transparency of public procurement and improving aspects of the relevant procedures.

19. In accordance with the above-mentioned legal mandate to use public funds effectively, the pursuance, safeguarding and promotion of competition is a task which needs to be shared among all public authorities¹⁸, and in line with that objective, the CNMC tries to establish and foster communication channels with other government bodies. Accordingly, there are numerous references to this objective in the 2015 Strategic Plan and the Action Plan of the CNMC¹⁹, as the instruments which inform the action of that authority.

20. In addition to producing the *ex ante* Reports on Proposed Legislation described above at the request of the drafting entity, as well as the other reports, studies and potential legal challenges, the CNMC is tasked with maintaining a proactive stance in relation to public procurement. Thus, without prejudice to the above activities, the competition authority has emphasised on numerous occasions the need for genuine inter- and intra-administrative co-operation both in vertical terms, between different levels of public administrations, and in horizontal terms within a given administration, with a view to eliminating or, in any event, limiting opportunities for irregular practices, such as collusion or corruption in public procurement.

21. Below we provide a brief description of some of the existing channels for contact and co-operation between the competition authority and other government bodies in the field, along with the recommendations made by the authority in its various reports aimed at improving those relations.

22. First, it should be noted how relations have improved in recent months between the CNMC and other bodies involved in public procurement such as the Junta Consultiva de Contratación Administrativa del Estado (Consultative Council on Public Procurement) and the Plataforma de Contratación del Sector Público (State Contracting Platform) over the use of public procurement databases in order to improve the procurement process *ex ante* and *ex post*.

23. Access to that data, whose content is heterogeneous but of mutual interest, will allow in-depth assessments to be made which can help with detecting potential restrictions of effective competition and with formulating possible recommendations for improvement, as appropriate, in terms of the series of decisions taken by public entities in their procurement processes.

24. On the other hand, co-operation between the administrative and competition bodies has been laid down in Spanish public procurement legislation. The 23rd Additional Provision of the TRLCSP establishes the need for procurement entities, the Junta Consultiva de Contratación Administrativa del Estado and the bodies responsible for settling public procurement disputes to notify the CNMC of any incidents known to them which could constitute a violation of pro-competition legislation, laying particular emphasis on the communication of any indications, agreements, decisions or recommendations between bidders which pursue the aim of distorting or restricting competition in relation to public procurement.

¹⁸ Accordingly, the legislature took into account this desire to improve public procurement when it recently established the National Evaluation Office, under [Law 40/2015](#) of 1 October 2015 on the Legal Regime governing the Public Sector, with a view to analysing the financial sustainability of public works and public services concession contracts.

¹⁹ The [Strategic Plan of the CNMC](#) was approved by the plenary session of the Council of 8 May 2014, setting out the CNMC's mission and organisational vision and laying down the guiding principles for its action. The first [CNMC Action Plan](#), approved on 17 December 2014, set out 148 specific actions to be undertaken by the competition and regulation authority in 2015. Under that Plan, in addition to horizontal actions which could be related to public procurement, such as actions 4.10, 6.2, 8.1, 10.4 or 14.1, the following actions are specifically aimed at public procurement: 3.1, 5.4, 5.5, 5.6, 8.2, 8.6, 10.5 and 12.1. The particular emphasis on co-operation with other public entities is highlighted in the six actions included under "Strategic action 9: Strengthened co-operation with other public bodies so that their actions have an effective impact on markets".

25. Although the importance of that provision for safeguarding competition and fighting corruption through the exchange of information between administrations is well recognised, the CNMC has noted a reduction in the effectiveness of that measure which is little used by and, in some cases, totally unfamiliar to the entities that are required to use it.

26. In order to ensure the full effectiveness of the measure and in view of the forthcoming promulgation of new public procurement legislation, greater emphasis on that requirement in the Law itself has been recommended, as well as its extension to other procurement rules.²⁰

27. In support of this co-operation between administrative bodies, the CNMC has also suggested the idea that the new legal text on public procurement due to be approved should include the possibility of competition authorities collaborating, both of their own motion and at the request of another party, through any procurement roundtables they consider appropriate, either due to the sum of the goods or services bid for or due to the special sensitivity of the sector in view of previous instances of anti-competitive practices or corruption. At the present time, this possibility is not ruled out, but it is not being used. Specific mention of this option would, besides facilitating action on the part of the CNMC in the case of own motion approaches, make procurement entities aware of that option, thereby encouraging requests for collaboration from interested parties.

28. Another method of co-operation between anti-corruption and competition bodies is the potential information exchanges to be effected between the two entities where, during the course of a competition inspection, and always on the basis of a court order, discoveries are made which could be punishable not only under competition law but also under criminal law. In such situations, the CNMC would make its suspicions known to the relevant body so that the latter could act as it considers appropriate, and the same should happen in reverse.

29. In addition to these existing mechanisms, the CNMC has on several occasions, as indicated above, highlighted the need to reinforce this co-operation, among other things by following the recommendations below.

30. First, owing in part to the broad margin of discretion allowed to contracting public authorities under public procurement legislation, contracting bodies have been reminded of the possibility of seeking advice from the CNMC when about to take procurement decisions, in particular by asking the CNMC to produce an *ad hoc* report. Such reports would be based on effective economic regulation and minimum restriction of competition. The 15 or so reports on central purchasing procurement dossiers drafted at the request of the government department responsible for implementing them is a good example of this, and the practical results are, in our opinion, highly significant.

31. Second, we consider that there is insufficient awareness of the approach taken by the CNMC, from the point of view of competition advocacy and detection of suspected collusion, when examining public procurement legislation, so emphasis has been placed on the need to develop a strategy for improving training in this respect. In this connection, a competition and public procurement training initiative has been under way since 2015, aimed at public employees in various procurement entities and other supervisory bodies or bodies directly involved in monitoring public procurement, and it is envisaged that this training will also be offered to personnel working for anti-corruption bodies. These measures are

²⁰ Currently, the 23rd Additional Provision of the TRLCSP would appear to be reproduced verbatim in the eighth Additional Provision of [Law 24/2011](#) of 1 August 2011 on public sector contracts in the fields of defence and security, although it does not appear in other procurement legislation such as [Law 31/2007](#) of 30 October 2007 on procurement procedures in the water, energy, transport and postal services sectors, and a consistent treatment of the issue is therefore recommended.

seen as facilitating information exchange and good public procurement practices between the various administrative entities.

32. Also on this issue, the CNMC has recommended that procurement documents should contain a paragraph setting out the practices regarded as anti-competitive in relation to public procurement, the applicable legislation and the consequences of non-compliance, both legal and economic as well as penal.²¹

33. In connection with the above, in cases brought before the courts relating to corruption in public procurement, irrespective of their consequences under criminal law, the CNMC has recommended reinforcing the possibility of instituting separate proceedings in connection with administrative liability for infringements of competition law through the appropriate co-operation channel with the judiciary.

34. Last, in addition to this lack of awareness, we have noticed that, on many occasions, the failure on the part of other administrations to report or make known these non-compliant situations to the competition authority stems from the reticence of those bodies in the face of the possible consequences or implications of doing so and/or more particularly from the fear of delaying the procurement of necessary goods or services. In order to mitigate both circumstances, and given that it is regarded as essential to encourage a proactive stance on the part of those involved in procurement, the CNMC has, on the one hand, created an electronic mailbox by means of which members of the contracting body or any member of the public can inform it of circumstances which, in their opinion, might be indicative of anti-competitive practices, whether or not corruption is potentially involved. On the other hand, it has recommended the introduction of a very rapid procedure whereby, for a brief period of time, the award of contracts is suspended while the CNMC assesses whether such offences exist.

4. Conclusions

35. The irrefutable link between the effective use of economic resources in public procurement and competition, and reported incidences of deviation from the rules by dint of anti-competitive practices or corruption have made the public procurement field a key focal point for the CNMC and Spanish legislation.

36. From this perspective, the legal instruments available to the CNMC, particularly in terms of advocacy, are numerous, and it has made considerable use of them in recent years. In addition to having enforcement powers, it is felt that suitable efforts on the part of the CNMC to promote competition in public procurement has undeniable benefits for procurement in particular, and for the economic health of the country in general, by encouraging a competition culture in the public procurement field, highlighting the risks of non-compliance and increasing the awareness of contracting bodies about such irregularities. The CNMC has devoted a large part of its activities to pointing out the weaknesses and potential strengths of the current public procurement system in Spain.

37. However, we consider that the safeguarding of effective, competitive and non-discriminatory public procurement is not just the responsibility of that authority and that all the State administrative entities should strive for and promote the same objective.

38. In this context, collaboration and co-operation between the competition authority, within the scope of its competences, and other State entities is not just desirable but absolutely essential for improving the functioning of the system.

²¹ Under Article 262 of the Penal Code.

39. Therefore, in addition to the measures already undertaken by the competition authority such as the agreements reached with the Junta de Contratación Administrativa del Estado and the Plataforma de Contratación, and the existing statutory duties of co-operation between entities, the CNMC considered that it was necessary to reinforce those actions by a series of activities and recommendations which are set out in various reports that have been forwarded to the relevant government bodies.

40. Of the activities already under way, it is worth noting the roll-out of a public procurement and competition training plan among the various contracting entities and administrative bodies, a plan which explains the link between those two concepts and encourages co-operation with the authority in relation to those issues, in addition to opening up a fast channel for information and consultation purposes.

41. Among the recommendations which we consider would lead to improvements in those areas, it is worth highlighting, by way of example, the possible presence of members of the competition authority at procurement roundtables in those sectors or cases which might be regarded as particularly sensitive, the bringing of separate actions for failure to comply with competition legislation in the case of corruption offences relating to public procurement and, with the aim of reducing the reticence of contracting authorities to report irregularities and increasing their commitment, the implementation of a rapid procedure whereby the competition authority could take a decision on the possible existence of non-compliant conduct, without unduly delaying the purchasing process.