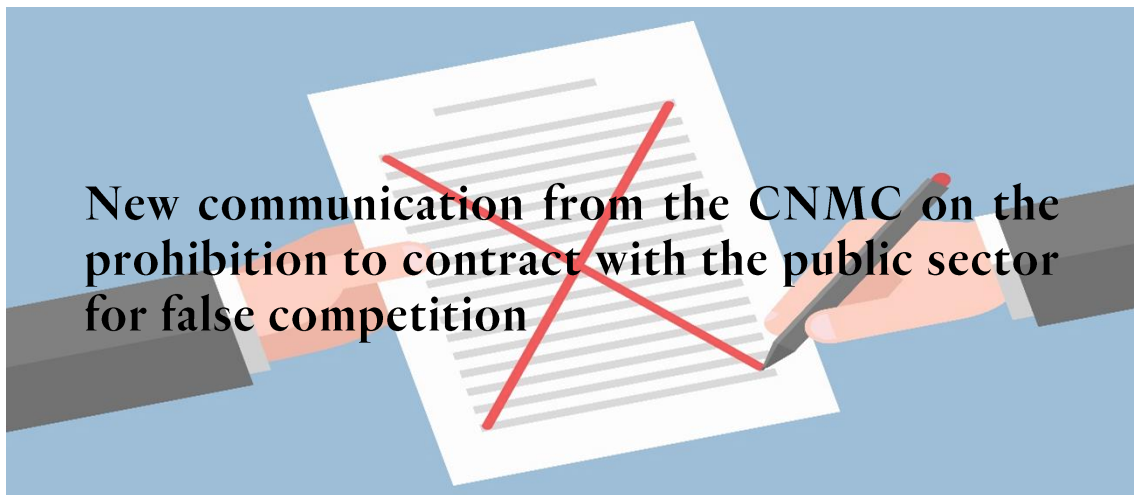


RocaJunyent Informs

Department EU and Competition Law

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New communication from the CNMC on the prohibition to contract with the public sector for false competition

On **30th June 2023**, **CNMC Communication 1/2023 of 13th June** was published in the **Official State Gazette (BOE)**, which allows all interested parties to know the general criteria that this authority will take into account to determine, in each case, the specific scope and duration of the prohibition to contract with the public sector derived from infringements of the antitrust regulations ("the Communication").

The **Public Sector Contracts Law 9/2017 ("LCSP")** establishes in its **article 71.1.b)** that those persons sanctioned for serious (or very serious, it should be understood) infringements in matters of false competition may not contract with public sector entities.

Until now, the CNMC limited itself to transferring its sanctioning resolutions to the State Public Procurement Advisory Board so that it could determine, where appropriate, the specific scope and duration of the prohibition in a separate procedure. To this date, the aforementioned body has not specified the conditions of the said prohibition to contract,

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while awaiting the judicial firmness of several sanctioning resolutions that have been transferred to it by the CNMC in recent years.

However, the CNMC has decided to take a step forward with its latest Communication and announces that it will begin to expressly state in its own decisions the specific scope and duration of the prohibition to enter into contracts derived from infringements of Law 15/2007 on the Defence of Competition ("LDC"), as it considers itself to be the best positioned authority in this respect. In this way, the measures adopted in the CNMC's resolutions in this matter will take effect as soon as they become firm and will not have to wait for the scope and specific duration of the prohibition to contract to be determined by means of a procedure carried out by any other public body.

Specifically, the CNMC's sanctioning resolutions - and previously, the proposed resolutions - will detail the scope of the prohibition in terms of delimitation of the entities affected and their geographic scope, the type of contracts affected and their duration. In this respect, the Communication provides initial guidelines, but also warns that in each specific case it will take into account the particular circumstances of the case (such as the seriousness of the case, the activities of the offender and of the group of companies to which it belongs, the number of bidders that may exist in each market, etc.).

Beyond the various points of the Communication that may deserve a critical analysis, it is surprising that natural persons are not excluded from the subjective scope of application of the prohibition to contract. In other words, the CNMC does not rule out the possibility that this measure could also affect "legal representatives or individuals who are members of the management bodies of the companies sanctioned" for serious infringements of competition law. It remains to be seen what this possibility means in practice.

Moreover, the CNMC points out that the criteria published on the application of this measure are mainly focused on increasing legal certainty for the public and promoting the implementation of compliance programmes and a culture of free competition in companies. Moreover, the Communication recalls that the implementation of a compliance programme may serve to prevent a company sanctioned by the CNMC from being excluded from contracting with the Administration. This compliance programme will have to comply with the requirements set out in the CNMC Guide on compliance programmes, published in 2020.

In any case, it should be noted that the CNMC does not intend to apply this important change immediately, as it expressly announces that the Communication will only apply to sanctioning proceedings initiated after its publication. In other words, it can only be expected that the decisions and proposed decisions will be modified in the sense indicated in the Communication in those cases that are formally initiated after June 30th 2023 (the date of official publication of the Communication).

In view of the above, and following the latest reform of the LDC, which extends to 24 months the maximum time limit for the resolution of sanctioning proceedings, we may

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have to wait more than one or two years before we start to see how the CNMC applies the criteria announced in this Communication.

Finally, and in relation to the subject of this Communication, it is worth noting that the Catalan Competition Authority (ACCO) has already assumed the power to determine in its own resolutions the scope and duration of the prohibition to contract with the Administration, something it did for the first time in its file 94/2018 - *Meteorological Service of Catalonia Tenders*.

In response to the sanctioning decision issued in this case, dated 23 December 2019, the affected entities filed an administrative appeal with the Supreme Court of Catalonia for possible lack of competence of the ACCO to impose and detail the prohibition on contracting in its own decision. The aforementioned appeal before the SCJ was dismissed, which led to the subsequent appeal in cassation before the Supreme Court, which is still pending.

Therefore, the legal debate on the power of the Spanish competition authorities to impose a specific prohibition to contract with the public sector in their own decisions will not be definitively resolved until the Supreme Court pronounces definitively on this matter. Another option is that the LDC may eventually be amended to include an express empowerment in favour of the competition authorities in this respect, something that has not been done so far.

In the event that the Supreme Court were to declare that a Spanish competition authority - state or regional - is not competent to rule on the determination of the scope and duration of the prohibition to contract provided for by the LCSP, the CNMC would obviously be obliged to modify the recently published Communication in order to comply with the Supreme Court's ruling.

For more details, please consult the communication published by the CNMC [here](#).