RocaJunyent
Informs

EU Law and Competition Law Department

3 December 2024

# The impact of competition infringements on European public procurement according to the General Court

On 2 October 2024, the General Court of the European Union ("GC") delivered its judgment in case T-126/23, *VC/EU-OSHA* . [1]

In this relevant judgment, the GC has ruled on the important effects that any sanction adopted by a national competition authority may have for any undertaking seeking to

[1] Judgment of the General Court of 2 October 2024, *VC v EU-OSHA,* T-126/23, EU:T:2024:666. Available at the following link: https://curia.europa.eu/juris/document/document.jsf?text=&docid=290609&pageIndex=0&doclang=es&mode=lst&dir=&occ=first&part=1&cid=2350067

operate in the field of public procurement at European level, in application of the provisions of the Financial Regulation . [2]

Although the GC's judgment is not final - it can be appealed to the CJEU[3] - the conclusions contained therein have great practical implications.

In the case before the GC, the Comisión Nacional de los Mercados y de la Competencia ("CNMC") sanctioned a certain entity ("VC"[4] ) for an infringement of Spanish and European antitrust law. The aforementioned entity appealed the CNMC's Resolution before the Audiencia Nacional, filing a request for a precautionary suspension of the enforcement of the Resolution (which was granted by the Audiencia Nacional).

At the same time, this entity submitted a financial bid for one of the lots in a call for tenders issued by the EU-OSHA (European Agency for Safety and Health at Work) for the provision of web services and information and communication technologies. However, EU-OSHA considered that the infringement of antitrust rules sanctioned by the CNMC in Spain was to be considered as "grave professional misconduct" under the Financial Regulation. On this basis, it decided to exclude the company from the above-mentioned call for tenders, as well as to exclude it from any call for tenders related to EU funds for a period of two years, with an entry in the database of the early warning and debarment system.

The entity affected by that decision challenged it, alleging an infringement of its right to effective judicial protection, inasmuch as a sanctioning decision that was not final and had been judicially suspended at Spanish level could not entail such serious consequences in the field of European public procurement. Furthermore, the appellant argued that it had adopted a proven competition *compliance* programme which should have been taken into account by the European authorities when imposing that exclusion.

## THE FINDINGS OF THE GENERAL COURT

The findings of the GC have important implications for the application of exclusions from tendering (i.e. debarment) at European level on the basis of national sanctioning procedures, as well as for the design and implementation of competition compliance

[2] Regulation (EU, Euratom) 2018/1046 of the European Parliament and of the Council of 18 July 2018 on the financial rules applicable to the general budget of the Union amending Regulations (EU) No 1296/2013, (EU) No 1301/2013, (EU) No 1303/2013, (EU) No 1304/2013, (EU) No 1309/2013, (EU) No 1309/2013, (EU) No 1316/2013, (EU) No 223/2014 and (EU) No 223/2014 and (EU) No 1316/2013.No 1303/2013, (EU) No 1304/2013, (EU) No 1309/2013, (EU) No 1316/2013, (EU) No 223/2014 and (EU) No 283/2014 and Decision No 541/2014/EU and repealing Regulation (EU, Euratom) No 966/2012 ("the Financial Regulation").

[3] Court of Justice of the European Union

[4] Reference anonymised by the TG

programmes at company level that can be used to avoid debarment of companies in public procurement.

First, the GC considers that the exclusion of VC from the European call for tenders was valid, in so far as the absence of a final decision or decision imposing a penalty does not prevent an exclusion decision from being taken, following a recommendation by the body issuing the call for tenders and a preliminary legal assessment of the improper conduct of the tendering entity, where there are indications that an infringement has been committed. In other words, according to the GC, the existence of a sanctioning decision at national level, even if that decision is not final and has been suspended as a precautionary measure by a court, does not prevent a European contracting authority from preliminarily classifying the profile of the sanctioned entity as inadequate and temporarily excluding it from European public procurement.

Secondly, the GC considered that the compliance programme implemented by the VC entity, in the form of *self-clearing* measures to avoid the prohibition to contract, was not sufficiently adequate to demonstrate its effectiveness, so that the exclusion from contracting adopted by EU-OSHA did not have to be modulated. In this respect, the following conclusions can be drawn from the GC's assessment of the compliance plan implemented by the institution in question:

- An internal investigation that merely identifies the existence of a potential regulatory infringement (which ultimately led to exclusion from contracting) would not be sufficient without evidence of subsequent measures to address and correct such behaviour;
- The termination of the persons involved in the infringement is not sufficient as long as it cannot be clearly established that the act of termination is a direct and indisputable consequence of the commission of the anti-competitive conduct by the employee in question;
- The mere elaboration of a Compliance Plan is not sufficient, unless it can be proven - for example with additional documentation - that the measures contained in the Compliance Plan have been subsequently implemented.
- It must be possible to verify that the complaint procedures foreseen in the Compliance Plans are effectively applied: a mere reference to the number of complaints received or outcomes is not sufficient, without further details on how these complaints have been managed and resolved.
- In addition, it must be possible to verify the effective application of other elements, such as ethical codes or generic employee training: the mere elaboration or verification of their content is not enough; it should be possible to prove concrete

actions, to prove attendance and content in each case, and to verify the level of assimilation of the same.

Moreover, with regard to these compliance plans (which the GC calls "corrective measures"), it is concluded that they cannot, in any case, serve to reduce the duration of the exclusion from employment: if so, they could have the opposite effect to that desired and encourage the commission of serious professional misconduct, as it would be possible to reduce the possible sanction with a subsequent modification of the company's behaviour.

**THE IMPLICATIONS OF THE JUDGMENT**

The conclusions of this judgment of the GC - pending a possible cassation by the CJEU - are particularly relevant.

Firstly, it is clear from the judgment that any infringement of competition law, both at Spanish and European level, can be considered as "serious professional misconduct" and, therefore, can be considered grounds for exclusion from European public procurement in accordance with the Financial Regulation. This can happen regardless of whether the national sanctioning decision has not been declared final, or even in those cases where the sanction has been appealed and its enforcement has been suspended as a precautionary measure.

In cases where the sanction is not yet final (nor can it be enforced at national level), the National Competition Authority's assessment of the sanction can serve as a basis for the preliminary legal qualification provided for by the Financial Regulation, and lead to the exclusion of a company not only from public tenders at European level, but also from the possibility of receiving subsidies and other similar instruments from European funds. Let us consider the importance of the instruments that are nowadays managed under these funds.

In contrast to the GC's decision on European procurement, it should be noted that on a purely internal level (tenders with Spanish public funds) this exclusion is not applied in the same way by our contracting bodies, who for the moment do take into account the judicial decisions to suspend the CNMC's resolutions and the prohibition to contract that any infringement of competition law entails. We shall see, in any case, how the Spanish administration's position on these issues evolves.

In addition, however, the GC's ruling raises the standard of requirement and proof of the competition law compliance programmes adopted by companies enormously. The main function of these *compliance* programmes is obviously to prevent infringements, but they can also be presented - on the basis of the public procurement regulations themselves[5] - as appropriate corrective measures to avoid the possible enforcement of procurement prohibitions arising from this type of infringement.

In this respect, the GC's ruling reminds us that the bidding company must be able to prove, with the appropriate documentation, that the *compliance* measures have been implemented in an indisputably effective manner. This obliges companies to go beyond the theoretical level in the design and execution of their compliance plans, while at the same time increasing the burden of proof that they must face in relation to these compliance plans, in the event that they are subject to exclusion proceedings for contracting with public administrations.

Gerard Pérez Olmo / Elena Galán Burgos

---

[5] See Article 72.5, second paragraph, of Law 9/2017, of 8 November, on Public Sector Agreements.