

THE SPANISH SUPREME COURT INVITES TO REQUEST THE PROVISIONAL SUSPENSION OF PROHIBITIONS TO BID EVEN IF THEY ARE NOT IMMEDIATELY ENFORCEABLE

[Judgment 1115/2021](#), of 14 September 2021 (cassation appeal 6372/2020) (STS) has just been published. In this judgment, the Supreme Court (TS) has for the first time addressed the question of whether the National Court (AN) can suspend the enforcement of sanctioning decisions issued by the Competition Chamber of the Spanish Markets and Competition Commission (CNMC), not just in relation to the payment of the fine imposed, but also in relation to the prohibition to bid.

PROVISIONAL SUSPENSION ORDERED BY THE AN AND QUESTION REFERRED TO THE TS

The decisions of the AN in which it ordered the suspension of the prohibition to bid contained in the CNMC decision under appeal stated that *"even though the sanctioning decision does not establish the scope and duration of the prohibition to bid itself, this does not mean that the CNMC's sanctioning decision does not already contain an immediately effective prohibition to bid because, in that procedure -referring to the subsequent procedure to be held before the Administrative Procurement Consultation Board (JCCA) and the Ministry of Finance in order to determine the duration and scope of the prohibition to bid- it will no longer be possible to discuss the applicability of the prohibition to bid that is predetermined by the sanctioning decision"*. On the basis of the above, the AN concludes that its suspension should be ordered and does so.

In the cassation appeal before the Supreme Court, the State Lawyer appealed the AN's decisions suspending the prohibition to bid, essentially maintaining that, as the prohibition to bid does not take effect until the Ministry of Finance determines its scope and duration at the proposal of the JCCA and the corresponding decision is recorded in the Official Register of Bidders, it is not effective at this moment in time and, therefore, there is no reason to suspend it. From this standpoint, it considers that the mere referral to the corresponding body – the JCCA- so that it initiates the procedure designed to determine the scope and duration of the prohibition to bid, cannot be suspended provisionally because it has no effect whatsoever on the legal position of the sanctioned entity, as it does not prevent it from participating in tender processes for any public contracts that may be called as of the initiation of the procedure.

Key points

- The STS recognises that prohibitions to bid resulting from administrative sanctions are not enforceable until their duration and scope are determined.
- The STS recognises the possibility to suspend the prohibition, even if it is not immediately enforceable.
- The STS finds this suspension "reasonable" when payment of the sanction imposed is suspended.
- The STS assumes that sanctions do not have to be final after the corresponding judicial procedure in order for the prohibition to be enforceable.

The cassation appeal was given leave to proceed in a Ruling of 18 March 2021, which stated that the issue that objectively qualified for cassation for the formation of case law consisted of interpreting article 130 of the Contentious-Administrative Jurisdiction Act (*Ley 29/1998, de 13 de julio, reguladora de la Jurisdicción Contencioso-administrativa*, LJCA), in relation to articles 71.1.b) and 72 (sections 2, 3, 5 y 7) of the Public Sector Procurement Act (*Ley 9/2017, de 8 de noviembre, de Contratos del Sector Público*, LCSP), in order to clarify whether the prohibition to bid included in a sanctioning decision issued by the CNMC should be understood as immediately enforceable in terms of its provisional suspension or whether, on the other hand, the enforceability of the measure takes place later, following the corresponding procedure before the JCCA.

APPLICABLE LEGISLATION

The transposition of the so-called prohibition to bid (or exclusion ground) envisaged in article 57.4 of Directive 2014/24/EU into Spanish law was in the Ninth Final Provision of the Public Sector Legal Regime (*Ley 40/2015, de 1 de octubre, de Régimen Jurídico del Sector Público*) and entered into force on 22 October 2015¹. At present, this prohibition is contained in article 71.1.b) LCSP, according to which: "*1. Persons who are in any of the following situations will not be able to participate in a procurement procedure with the entities envisaged in article 3 of this Act with the effects established in article 73: (...) b) Having been sanctioned with a final decision due to a serious infringement (...), of distortion of competition (...)*".

Meanwhile, article 72 LCSP indicates that: "*2. The prohibition to bid for the reasons indicated in letters a) and b) of section 1 of the foregoing article will be directly considered by the contracting bodies, when the judgment or administrative decision has expressly set the scope and duration of the same, lasting for the term established therein*".

And it adds: "*In the event the judgment or administrative decision does not establish the scope or duration of the prohibition to bid; (...) the scope or duration of the prohibition will be determined by means of a procedure held for that purpose, in accordance with the terms of this article*".

Section 3 of article 72 LCSP establishes that "*3. The responsibility for setting the scope or duration of the prohibition to bid in the case of letters a) and b) of section 1 of the foregoing article, in the cases in which they are not established in the corresponding judgment or decision (...) will fall to the Minister for Finance, acting on a proposal from the Administrative Procurement Consultation Board*".

With a view to being able to fulfil the terms of the foregoing paragraph, the judicial or administrative body issuing the judgment or administrative decision will send a record or copy of the same ex officio to the Administrative Procurement Consultation Board, (...)".

And, finally, article 73.3 LCSP states that: "*The prohibitions to bid envisaged in letters a) and b) of the first section of article 71 will take effect as of the date the judgment or administrative decision becomes final in those cases in which they have established the scope and duration of the prohibition*".

¹ For further details on the characteristics of the prohibition to bid regulated in Spanish procurement regulations, we refer you to an earlier publication (in Spanish) on this issue, available at:

<https://www.cliffordchance.com/content/dam/cliffordchance/briefings/2019/04/antitrust-update-monografico-sobre-prohibicion-de-contratar.pdf>

In all other cases, they will take effect as of the date of recording at the corresponding register".

DOCTRINE ESTABLISHED BY THE TS

As the STS states, the State Lawyer challenged the decision from the AN suspending the prohibition to bid on two grounds: on the one hand, it disputes the executive effect of the prohibition to bid when its scope and duration have not yet been determined, meaning that the prohibition has no effect whatsoever in these circumstances; on the other hand, it considers that the mere referral to the corresponding body so that it initiates the procedure, designed to determine the scope and duration of the prohibition to bid, cannot be provisionally suspended as it has no effect whatsoever on the legal position of the sanctioned party.

The case-law doctrine established in reply to the questions raised in the ruling granting the cassation appeal leave to proceed are set out in the Fifth Ground of the STS, according to which:

"The matter of cassation interest raised consists of determining whether the prohibition to bid declared in the sanctioning decision issued by the CNMC must be considered immediately enforceable for the purposes of a potential provisional suspension or, on the contrary, the enforceability of the measure takes effect at a later time, following the corresponding procedure before the Administrative Procurement Consultation Board.

To that end, it should be asserted that the prohibition to bid issued by the CNMC under article 71.1.b) LCSP is a restriction that is tied to the imposition of a final sanction due to serious infringement of certain matters.

The effects of the prohibition to bid are only felt, and the limitation is enforceable, as of the moment the scope and duration of the prohibition are specified, either by the sanctioning decision itself or via the corresponding procedure and, in the latter case, once recorded at the register.

This does not prevent the judicial body, on an interim basis, suspending the referral to the Administrative Procurement Consultation Board when, among other scenarios, it has been deemed necessary to provisionally suspend the sanction to which it is linked".

Essentially, with regard to the first issue, the enforceability of the prohibition to bid when the CNMC has not set its scope or duration, the TS concludes that the prohibition to bid is a restriction linked to the imposition of a final sanction due to a serious infringement in certain areas² and that the restriction is only enforceable as of the moment the scope and duration of the prohibition are specified, whether in the sanctioning decision itself, or in an autonomous procedure and following its recording at the Register³. The STS seems to take it for granted that when the LCSP refers to a final decision, it refers to "final" from an administrative - and not judicial – point of view.

As for the issue of whether the judicial body can order the provisional suspension of an administrative decision that adopts the prohibition to bid and

² *"The prohibition to bid is contingent on the existence of a final administrative sanction, meaning that the prohibition appears to be linked to the sanction imposed so that, with the sanction cancelled, the condition on which it was based disappears".*

³ *"The prohibition to bid is not enforceable until its scope and duration is determined. The different moment at which the scope and duration of the prohibition to bid are specified is of decisive importance for determining the start of the effects of such restriction and, as a result, for establishing its enforceability".*

resolves to refer a record of its decision so that, after the corresponding procedure has been completed, the scope and duration of the prohibition to bid be set, the TS -without assessing the specific weighting of interests in dispute- finds that the judicial body can oversee the legality not just of the fine imposed but also of the prohibition to bid, analysing whether the conditions envisaged in the rules for its adoption are met (the condition in this case is the imposition of a final sanction due to a serious infringement of competition rules. Therefore, on an interim level, and after weighing up the corresponding interests, the judicial body will be able to order the suspension both of the sanction and of the prohibition to bid, if the conditions are met.

Moreover, the TS considers that insofar as the prohibition to bid is a restriction established *ex lege* that is tied to and contingent on the existence of a final sanction for a serious infringement of competition rules, when the enforceability of the sanction is suspended it is "even reasonable", to suspend the actions aimed at setting the scope of the prohibition to bid that are tied to the very existence of the sanction that has been suspended.

ASSESSMENT

In essence, the TS finds, as the AN did originally, that the prohibition to bid derived from a serious infringement of competition rules declared in the sanctioning decision can be provisionally suspended (whether or not the prohibition is enforceable, that is, even in the event it is not immediately enforceable because the sanctioning decision has not set the duration and scope of the prohibition).

Nevertheless, unlike the AN, the TS finds that the ground for that suspension is not that the prohibition has "*certain effects*" or a relative enforceability (which the parties affected tend to argue on the basis of the legislative disparity existing between the different EU countries in terms of the capacity of the contracting bodies to ascertain the existence of a prohibition to bid or of the broad terms in which the ESPD is drafted and that must be completed in order to participate in tender processes at an EU level), but that it derives from the possibility of discussing the applicability of the prohibition declared as part of the contentious-administrative appeal (indispensably linked to the existence of a sanction due to a serious infringement of competition law), a possibility that no longer exists later in the procedure designed to determine the duration and scope of the prohibition. This is why the TS considers the suspension to be "reasonable" provided the enforceability of the fine imposed is suspended.

Nevertheless -beyond the novelty represented by the recognition of the possibility to suspend decisions that lack immediate enforceability and the difficulties that could in theory arise in showing that *periculum in mora* exists- this decision does not resolve the problems faced by sanctioned companies in practice, with regard to those for whom the prohibition to bid lacks immediate enforceability, because the duration and scope of the restriction derived from the declaration of infringement was not determined and they (i) either do not request (ii) or are not granted the provisional suspension of the enforceability of the sanction or fine imposed.

There can be no doubt that the TS believes that provisional suspension can be ordered in these cases too, but it does not go on to decide when it believes the interests that would justify such a suspension would exist, meaning that it will have to be the AN that weighs up the *periculum in mora* derived from a failure to grant a suspension. And in relation to this, the AN seems clear on

the fact that, insofar as any contracting body can decide to exclude the company in question from a certain tender process -in the absence of the judicial decision declaring the suspension- the adoption of the interim measure is justified, which is ultimately a recognition that a prohibition to bid declared in this way does have "*certain effects*".

Meanwhile, although it was not subject of the question raised, another important point from the STS is that it seems to assume that the sanction, without which the prohibition to bid cannot be imposed, is final from an administrative point of view, because the entire approach is based on that premise; it would make no sense otherwise. This presumption is also very telling, because CNMC sanctions are always final via the administrative route, by definition, and as such the addition of "final" would make no sense with regard to the prohibitions to bid related to competition matters set out in the LSCP.

Other cassation appeals on this same subject-matter are still pending a decision so we will have to wait and see whether the TS confirms, qualifies or somehow alters this first decision on the matter.

CONTACTS



Jaime Almenar
Partner

T +34 91 590 4148
E jaime.almenar@cliffordchance.com



Clara Alcaraz
Associate

T +34 91 590 9498
E clara.alcaraz@cliffordchance.com



Belén Irissarry
Associate

T +34 91 590 7519
E belen.irissarry@cliffordchance.com

This publication does not necessarily deal with every important topic or cover every aspect of the topics with which it deals. It is not designed to provide legal or other advice.

www.cliffordchance.com

Clifford Chance, Paseo de la Castellana, 110
28046 Madrid, Spain

© Clifford Chance 2021

Clifford Chance S.L.P.

Abu Dhabi • Amsterdam • Bangkok •
Barcelona • Beijing • Brussels • Bucharest •
Casablanca • Doha • Dubai • Düsseldorf •
Frankfurt • Hong Kong • Istanbul • Jakarta* •
London • Luxembourg • Madrid • Milan •
Moscow • Munich • New York • Paris • Perth •
Prague • Rome • São Paulo • Seoul •
Shanghai • Singapore • Sydney • Tokyo •
Warsaw • Washington, D.C.

*Linda Widyati & Partners in association with
Clifford Chance.

Clifford Chance has a co-operation agreement
with Abuhimed Alsheikh Alhagbani Law Firm
in Riyadh.

Clifford Chance has a best friends relationship
with Redcliffe Partners in Ukraine.