

**12th Session of the
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Geneva, 9 to 11 July 2012**

**Round Table
Competition Policy and Public
Procurement**

**Presentation
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Public Procurement and Competition

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- PUBLIC PROCUREMENT IN SPAIN: ECONOMIC IMPORTANCE AND REGULATORY FRAMEWORK.
- CNC ACTIONS IN THIS AREA:
 - SANCTIONING ACTIVITY
 - ADVOCACY
 - JURISDICTIONAL CHALLENGE
- GUIDE ON PUBLIC PROCUREMENT AND COMPETITION
 - INTRODUCTION
 - CONCLUSION, DESIGN, DEVELOPMENT AND PERFORMANCE OF PUBLIC CONTRACTS
 - INDICATORS OF A POSSIBLE COLLUSION
- CONCLUSIONS

PUBLIC PROCUREMENT IN SPAIN: ECONOMIC IMPORTANCE AND REGULATORY FRAMEWORK.

- Public Procurement accounts for 15% of Spanish GDP (European Commission, 2008)
- Competition ensures the best conditions available in terms of price and quality
 - Guiding principle of Public Procurement regulation
 - Benefit to public authorities, taxpayers and consumers
 - Collusion Damage: 20% increase in the contracts costs (OECD). Each percentage point of public rigging collusion means 300 million €
 - ➔ Priority for competition advocacy
 - ➔ Existence of a legal framework that protects and promotes competition

➤ *CNC Guide on Public Procurement and Competition → January 2011*

- Regulatory Framework:
 - Public Sector Contracts Act 30/2007, October 30th
 - Spanish Criminal Code (Article 262 prohibits bid rigging)
 - Competition Act (Article 1 defines these behaviours as very serious offenses)
 - Directive 2004/18/EC of the European Parliament and the Council coordinating procedures for the award of contracts for public works, supply and service
 - Green Paper on the modernization of European public procurement policy in the EU: Towards a more efficient European market for public procurement (January 2011)

CNC ACTIONS IN THIS AREA:

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- **Sectors concerned:** any sector may be affected by collusion among bidders and there is no exception to the sanctioning activity of the CNC.
- **Health sector:**
- **Healthcare waste management.** 2010 CNC resolution. Four companies shared this service in several regions in Spain. Public sector clients were shared from at least 1994 to 2007, by coordinating the presentation of bids in the various tenders either through the creation of temporary joint ventures or through submitting uncompetitive bids or agreeing the terms of the bids that were to be presented or abstaining from participating in certain tenders. The CNC imposed fines on the four companies for a total of €7 million.
- **Ambulances of Orense and Cuenca.** 2006 TDC resolution. Collusion to provide the service in Orense and Cuenca was implemented through temporary joint ventures (TJVs) and economic interest groupings (EIGs). In the case of Orense, an ambulance company sued in 2003 an EIG of the sector for denying access to public and private markets, by sharing the market among its members. Certain clauses of the EIG agreement were considered anti competitive by the TDC. A similar case was the establishment of a joint venture to participate in a tender between 13 ambulance companies of Cuenca. The joint venture included clauses to divide the public and private markets. In both cases, fines were imposed for a total of € 432,000 and € 495,000 respectively, depending on the number of vehicles of each company.

- **Travel Agencies:** 2000 TDC resolution, Viajes Halcón, Barceló, Iberia and Marsans agreed to form an Economic Interest Grouping (EIG) called "Mundosocial" to submit identical bids to tenders for the execution of the holiday program for elderly people managed by the INSERSO and the joint implementation of the program whatever the outcome of the tender. This behaviour, which was known by the INSERSO, is a very serious infringement of Article 1 LDC, and therefore TDC imposed a fine of 150 million pesetas (just under € 1 million) to "Mundosocial".

- **Public works:**
- **Asphalt.** CNC resolution of 26th October 2011, in which the CNC sanctioned a price fixing and market sharing cartel by asphalt producers. The CNC imposed fines totalling 16 million euros on 12 undertakings. The area of influence of the undertakings investigated, determined by the characteristics of the product, made it easier for the agreements and the consequent market-sharing to be negotiated, for practical purposes, at local level. The resolution considered highly likely that this sharing extended to other geographical areas, although there was only proof in relation to the areas under investigation. This case is not strictly a cartel from the Public Administration, since clients are mainly private companies acting as contractors for public works, both for Public Administration and for private entities (estates etc.). However it is a good precedent to show the indirect influence of cartels in upstream markets on Public Administration, and the validity of the methodological framework of the Guide for the public and private procurement.

*Another example in the field of public works: road tender cartel.
(CNC resolution S/0026/10, October 2011)*

- 43 million Euros fine to 46 companies for collusive behaviour from the evidence of 14 tenders for road repair and maintenance of the Ministry of Development and Castilla-Leon (the total amount of the fine is distributed among the 46 companies in proportion to their shares in the cartel and the size of each company)
- Mechanism:
 - Preview coordination in restricted procedures
 - The winner is assigned internally from the losses that is willing to offer in competition conditions
 - The official loss is significantly higher than loss initially intended
 - Coverage offers before tendering Administration
 - Ex post compensation scheme through false invoices
 - Compensation mechanism:
 - [A] Economic difference between the official loss and the true one: tender budget X between percent of 2 losses
 - [B] Sum of % of losses offered by all tenderers
 - The ratio between A and B applies to each percentage point of the losses of the various members

- 15/2007 Act reinforces the task of promoting competition (Advocacy) attributed to the CNC
 - Regulation reports (*ex-ante*)
 - Sectorial studies and reports (*ex ante*)
 - Other *ex ante*: *Guides*
 - Other *ex post*: *Jurisdictional challenge, state aids*

- **Report on State concession tenders for inter-city passengers by bus**
 - First Report (2008). Analyzes the Protocol of the Ministry of Development (2007).
Conclusion: competition is not promoted
 - Preferential right of the current concession holder
 - Requirement of previous experience
 - Little weight of price and service frequency
 - Short path for the improvement of these variables
 - Excessive weight of foreign factors in the service
 - Monitoring Reports (2010), at national and regional level.
Similar conclusions, although improvements are recognized.
 - Inadequate protocol
 - Tenders are not competitive enough
 - Globalia Autocares, S.A. won 5 appeals (Supreme Court) to bid conditions (2011)
 - The Ministry of Development changed the mechanism of bid conditions (it gave more importance to price variable and removed limits to get high scores)
- **Report on the extension of the concessions for intercity transport of passengers by bus that are in hands of Autonomous Communities (2010)**
 - Reason: European Regulation 1370/2007 on passenger transport public services by rail and road
 - Conclusion: Extensions are contrary to the Regulation principles and spirit and harms competition

- Additionally, the CNC Council, proposed by Advocacy Division, is legally authorized to bring actions before the competent jurisdiction against administrative acts and regulations from which obstacles to the maintenance of effective competition in the markets are derived.
- Example: Bus lines in two regions of Spain (Galicia and Valencia)
 - Previous request to reverse contracts that harm free competition
 - The CNC lodged two appeals claiming concessions extensions granted by Galicia and Valencia, some up to 25 years.
 - Deterrent effect.

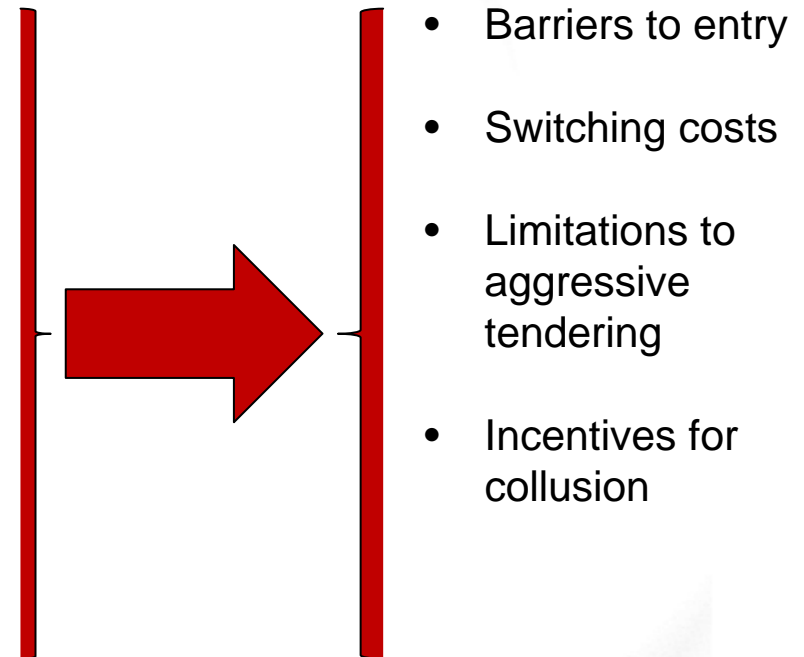
GUIDE ON PUBLIC PROCUREMENT AND COMPETITION:

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- It does not seek to make policy proposals or set legal interpretations. It has a practical approach.
- It is intended to influence the incentives granted by Public Administrations to give the importance it deserves the promotion of appropriate conditions of competition in these processes.
- **New element: Two ways to promote competition by the government (contracting authorities):**
 - Decisions on conclusion, design, development and performance of public contracts
 - Monitoring of possible collusion among bidders: indicators

ELEMENTS OF ADMINISTRATIVE DECISION THAT MAY INFLUENCE ON COMPETITION

- Decision to hold a contract
- Procurement procedure chosen
- Design of the tender conditions
 - *Access to bidding*
 - *Evaluation of tenders*
- Contracts duration
- Decisions during the procedure
- Decisions after the award



¿HOW CAN BE DETECTED COLLUSION BETWEEN BIDDERS? INDICATORS

In tenders

- Unexpected withdrawals
- Lower number than usual
- Always losers or winners offers
- Subcontracting with other companies

In prices

- Similarities in prices
- Different prices
- Reductions to a new supplier
- Unjustified increases

In behaviour

- Traits in documentation
- Questions, comments, calculation errors

¿WHICH PREVENTIVE MEASURES CAN TAKE PUBLIC ADMINISTRATION?

AVOID PREDICTABILITY

- **Vary the tenders design.**
- Have **individual meetings.**
- Care about the **information provided.**
- Safeguard **anonymity.**

DESIGN THE LOTS

- **Fractionate into different size.**
- **Difference** between the number of batches and the number of bidders.
- Consider the **addition** of contracts.

PUBLIC PROCUREMENT AND COMPETITION: CONCLUSIONS

- Importance of the application of competition rules in the public procurement field, especially in the current economic climate:
 - Important source of cost savings for Public Administration (fiscal consolidation) and citizens
 - Favors the more efficient operators: reallocation of resources in markets
- Double effort for the CNC to monitor this area:
 - Disciplinary proceedings: against those who violate the competition rules
 - Intense advocacy activity to achieve a regulatory framework that promotes competition (Regulation Reports (IPN); Guide on Public Procurement and Competition and Jurisdictional Challenge)

The logo for CNC (Comisión Nacional de Contratación) is located in the top left corner. It consists of three white, curved lines of varying lengths that sweep from the top left towards the center, creating a sense of motion or a stylized 'C'. To the right of these lines, the letters 'CNC' are written in a bold, white, sans-serif font.

CNC

CONTRATACIÓN PÚBLICA Y COMPETENCIA

A large, faint, light gray graphic of a stylized 'C' or a thick curved line is centered on the white background of the slide. It is a large-scale version of the 'C' shape seen in the CNC logo, with a soft, blurred appearance.

THANK YOU