

PUBLIC CONSULTATION BY THE SPANISH COMPETITION AUTHORITY (CNMC)

CHALLENGES AND OPPORTUNITIES FOR THE PUBLIC SECTOR IN CLAIMS FOR DAMAGES FOR INFRINGEMENTS OF COMPETITION LAW



I. IUS OMNIBUS

Ius Omnibus ("Ius"), with registered office at Second Home Lisboa, Mercado da Ribeira, Av. 24 de Julho, 1200-479 Lisbon, Portugal, is a non-profit association created in March 2020 to promote and defend the rights and interests of consumers in the European Union. It is a consumer protection association registered and recognized by the Portuguese Government and by the European Commission as a qualified entity under Directive (EU) 2020/1828, which has filed several collective claims in the field of consumer protection.

Ius' interest in participating in this public consultation stems from its firm commitment to the effective defense of the rights and interests of consumers and taxpayers, as well as its work to promote fair and transparent competition in the markets. Ius considers that the active involvement of the public sector in this type of claim is not only legally feasible but also necessary from the point of view of the general interest.

From this perspective, Ius warmly welcomes the CNMC's promotion of debate and public participation on the challenges and possibilities for the public sector in claiming damages. Ius's experience in collective actions arising from competition law infringements can provide valuable ideas for strengthening the role of the public sector as an active player in the defense of competition and the general economic interest.

GENERAL ASSESSMENT:

a. The scarcity of claims by the public sector for damages caused by competition infringements can be explained by various reasons. Select the challenges faced by

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public sector entities during the process of claiming damages for competition infringements. Mark the applicable answer(s)*:

- Lack of awareness or limited knowledge of the possibility of claiming this type of damage.
- Difficulty in identifying specific competition law infringements that may have affected them.
- Absence of a protocol or lack of clarity regarding internal processes and distribution of responsibilities for deciding whether to initiate a claim for damages.
- Limited incentives, as any compensation awarded, do not necessarily increase the budget available to the entity or department directly affected by the damage.
- Lack of specific resources and technical expertise within the public entity.
- Lack of budgetary availability to contract external services related to legal advice or the preparation of expert reports.
- Consequences that the claim may have on future tenders.

b. Explain what you consider to be the most significant challenges and indicate why:

- **Lack of knowledge about competition law** among public administrations. When they are victims of a cartel, they have every right to claim damages. This liability is non-contractual (ES:TS:2012:5462). It would be desirable for the competition authorities, in addition to publishing their decision, to send specific information to the administrations, identifying the contracts, the cartelized products or services, the scope of the conduct, and the operators involved.
- **The lack of institutional protocols and internal training** for contracting authorities to recognize their status as injured parties and activate the legal mechanisms to obtain compensation for economic damage. In this regard, a means of demanding administrative or disciplinary responsibility could be explored in cases where there has been a failure to act diligently.
- **The absence of institutional incentives** discourages the public sector from claiming damages for anti-competitive practices, as the benefits do not revert directly to the claimant body. It would be advisable to allow compensation to be applied to their own budgets, thus encouraging the effective exercise of these actions without contravening the public spending regime.
- Public entities **face challenges in planning compensation actions**, ranging from quantifying the damage to identifying the most appropriate defendant. On this point, the joint and several liability of infringers, provided for in Article 73 of the LDC, is particularly relevant, as it allows the administration to take action against all members of the cartel, whether several or one of them. This *ius electionis* gives administrations flexibility in choosing the most effective procedural

strategy, taking into account, for example, the solvency of the infringers. It is also essential that public entities are aware of the limitations to this joint liability, such as those provided for beneficiaries of leniency programs or SMEs, which may influence their choice. It would be beneficial to establish support mechanisms, **including a centralized public unit** that provides advice, coordinates strategies, and, if necessary, represents local or regional administrations.

- Creating an **electronic platform for monitoring and analyzing public procurement**, integrating data on awards, risks of collusion, decisions by authorities, and other early warning indicators.
- **Limited inter-administrative cooperation and the absence of coordination mechanisms** hinder an effective response to collusive practices affecting multiple public entities. The promotion of joint actions would optimize resources, strengthen technical and procedural capacity, and maximize the deterrent effect on offenders.

c. In your opinion, assess the level of awareness of the possibility of claiming damages for infringements of competition law by public sector entities:

The level of knowledge among public sector entities regarding the possibility of seeking compensation for damages resulting from competition law infringements is, in general terms, insufficient. Although both national and European legislation expressly recognize and regulate the standing of public administrations to claim damages for anti-competitive practices, in practice, this avenue is underused.

The inaction of Spanish public entities, as evidenced by data provided by the OECD and the CNMC, contrasts with the magnitude of the damage suffered by these administrations as a result of collusive conduct or abuse of dominant position, particularly in the area of public procurement. However, in recent years, there has been a significant push by legislators, both at the European and state levels, which is progressively contributing to the articulation and practical consolidation of this type of compensation action in the public sector. In particular, the adoption of Directive 2014/104/EU marked a turning point by harmonizing the conditions for the exercise of damages actions and strengthening the position of injured parties, including public administrations. The transposition of this Directive into Spanish law by means of Royal Decree-Law 9/2017 brought with it a more precise and protective body of law concerning essential aspects such as access to evidence, the presumption of damage in cartel cases, the limitation period, and the joint and several liability of infringers.

This regulatory development has begun to translate, albeit in an incipient form, into certain practical advances by public entities that have decided to bring actions for damages resulting from infringements of competition law (e.g., the Railway Infrastructure Administration (ADIF) in the context of case S/DC/0598/2016 ELECTRIFICATION AND ELECTROMECHANICAL RAILWAYS or the Catalan Health Service in the context of case S/DC/0504/14 - AIO).

In short, although the level of awareness and effective implementation of this type of action by the public sector remains open to improvement, progress is already being

made which, if consolidated and reinforced, could position public administrations not only as legitimate claimants for compensation, but also as proactive players in the defense of competition and in ensuring a more efficient, transparent, and competitive use of public resources.

d. Based on your experience, what do you consider to be the main ways for public sector entities to become aware of (potentially) anti-competitive conduct? Please tick the applicable box(es):

- Contact with a competition authority in connection with an investigation into anti-competitive conduct.
- Through a decision by the competition authority or a court ruling confirming the decision.
- General press

Please explain briefly:

- Information derived from administrative decisions
- Analysis of evidence of collusion in public procurement
- Reports and alerts from external control bodies
- Communication protocols between competition authorities and contracting administrations
- Internal and external reporting channels
- Ongoing technical training for public officials
- Cooperation with observatories, study centers, or universities

MECHANISMS TO IMPROVE COMPLAINT PROCESSES

a. Select, in your opinion, those measures that you consider helpful in encouraging claims for damages by the public sector:

- Systematically monitor decisions by competition authorities and court rulings in this area.
- Introduce or strengthen mechanisms for identifying possible collusive behavior in public tenders within contracting bodies.
- Establish a protocol for analyzing potential claims for damages for competition law infringements and clarify the decision-making process.
- Introduce contractual mechanisms for resolution and compensation for damages in cases of competition law infringements in future contracts.
- Carry out dissemination and training activities for public personnel on competition law and complaint procedures.

- Encourage the grouping or coordination of complaints by different public sector bodies.
- Other

Please briefly explain the measures selected and whether any of them have already been adopted in your organization:

At Ius Omnibus, we propose different solutions for the joint and coordinated application of **the following mechanisms**:

- **Creation of a specialized public unit to** centralize the analysis, decision-making, and management of actions for damages arising from infringements of competition law by public entities, thus overcoming the current fragmentation. This unit could identify infringing conduct, assess the feasibility of taking action, and advise the public entities that have been harmed.

Alternatively, this body could be integrated into the CNMC and other regional competition authorities, without the need to create an independent body for this purpose.

- **Develop an automatic alert system on public procurement portals, using technologies such as artificial intelligence or *big data* analysis.** These systems would enable the automatic detection of potential claims even before the competition authority imposes a sanction.
- **Promote access to documents in regulatory authorities' files** to avoid unnecessary procedures for requesting access to the non-confidential version of the sanctioning files, thereby assessing the viability of a possible complaint.
- **Establish mandatory protocols for institutional collaboration** between competition authorities, entities specializing in litigation, and public bodies that have suffered harm. These protocols should provide for the distribution of responsibilities, the allocation of compensation, and the preparation of executive summaries on risk and economic impact.
- **Create an internal digital repository**, accessible to all public entities, containing case law, rulings, claim templates, and other reference materials to facilitate the preparation and processing of compensation claims. This could help a public administration, in light of the background, to be aware of the anti-competitive risks posed by a specific tender, which, ultimately, can help not only in the effective claiming of damages, but also in the prevention of such infringements as a result of the correct drafting of tender specifications.
- **Facilitate participation in the procedure.** Encourage competition authorities to invite potentially affected administrations to be interested parties in the procedure.



- **Strengthen the mechanism for exclusion from the procurement process under Article 150.1** (third paragraph) of the LCSP in the event of well-founded indications of collusive conduct.
- **Include specific contractual clauses allowing for the review or termination of the award contract** when a company is declared an offender by a final decision. This measure does not seek compensation for damage, but rather its prevention.

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