# PUBLIC CONSULTATION OF THE BASQUE COMPETITION AUTHORITY

# DAMAGES AND COMPETITION - ALTERNATIVE OR COMPLEMENTARY ROUTES TO THE JUDICIAL CLAIM FOR DAMAGES IN THE PUBLIC ADMINISTRATION

## 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, established in March 2020, with the goal of promoting and defending the rights and interests of consumers in the European Union. It is a consumer protection association registered and recognised by the Portuguese Government and by the European Commission as a qualified entity under Directive (EU) 2020/1828, which has filed several class actions in the area of consumer protection.

The Basque Competition Authority (LEA/AVC) has opened a public consultation process on alternative or complementary routes to judicial claims for damages in the Public Administration, arising from the commission of anti-competitive practices. This is a debate of particular importance for the defence of public finances, efficiency in spending, and the consolidation of a culture of integrity in public procurement.

Ius expresses its interest in participating in the consultation, insofar as the subject matter under analysis directly affects the proper functioning of the markets and the protection of the general interest underlying the actions of the Public Administrations. The search for innovative and viable solutions for the compensation of damages is not only a legal obligation linked to the principle of good administration, but also an opportunity to strengthen public confidence in public administration.

It should be noted that on July 31, 2025, Ius responded to the public consultation by the Spanish Competition Authority regarding the challenges and opportunities for the public sector in claims for damages for competition infringements. On that occasion, Ius expressed its concern about the lack of clear protocols, the scarcity of incentives and the need to strengthen transparency and accountability in the management of these claims.

Ius values very positively the opening of this debate by the LEA/AVC, as it allows identifying, contrasting, and enriching the different alternatives that the legal system offers, as well as those that can still be developed, to ensure that the damages caused by competition infringements do not ultimately burden public resources.

To this end, these contributions are organised in two large, complementary blocks:

- Suggestions and mechanisms to be introduced to improve and encourage complaint processes (section II): This section analyses possible improvements that can strengthen the capacity of public administrations to exercise their rights to redress more safely and efficiently. It will address, among other issues, the need for inter-administrative protocols for action following competition decisions, the creation of public registers of affected contracts, and the standardisation of methodologies for the quantification of damages. These measures, of an eminently technical nature, aim to provide the administration with greater legal certainty, reduce the dispersion of criteria, and favour a swift and homogeneous reaction to competition offences.

- Alternative or complementary channels not expressly provided for in the LEA/AVC document (section III): The second block focuses on mechanisms that offer additional channels of action that the public administration could take advantage of.

In short, the aim is to complement the framework proposed by the LEA/AVC, not only with technical improvements, but also with the identification of additional instruments that contribute to a more effective defence of the public interest.

## II. SUGGESTIONS AND MECHANISMS TO BE INTRODUCED TO IMPROVE AND ENCOURAGE COMPLAINTS PROCESSES

### 1. Creation of a public register of contracts affected by anti-competitive practices

One of the main difficulties faced by public administrations in claiming damages arising from anti-competitive practices is the lack of information on which specific contracts have been affected. Currently, the identification largely depends on the initiative of each Public Administration and the information provided by the competition authority in sanctioning decisions. This dispersion generates a risk of inaction and duplication of efforts.

To overcome this situation, it is proposed to create an official public and accessible register at the regional or national level, in which contracts of public administrations that have potentially been affected by competition infringements would be documented. The purpose of such a register would be to identify the contracts affected and, consequently, to facilitate an approximate quantification of the economic damage suffered.

From a practical point of view, this register should contain at least the basic identification of the contract, the reference to the sanctioning decision, a brief description of the damage detected and, where appropriate, the status of the

action taken by the administration. Its management could be entrusted to a specialised unit within the regional or state administration, in close coordination with the competition authority.

The creation of a public procurement register would bring numerous advantages. First, it would increase administrative efficiency by centralising information and providing a common framework for action. Secondly, it would favour a proactive and coordinated reaction of all public administrations. Finally, it would serve as an institutional learning tool by identifying the sectors most exposed to risks of collusion, facilitating the adoption of measures in future tenders.

2. Develop a protocol/model for action in the event of a sanctioning decision

Another measure that could make a decisive contribution to improving the response of public administrations to anti-competitive practices is the development of a protocol that clearly sets out the steps to be taken following the publication of a sanctioning decision. Currently, the lack of criteria means that each administration deals with this situation in a different way, resulting in a high risk of inaction or disparate responses that do not always guarantee the due protection of public resources.

The existence of an official protocol would make it possible to homogenise administrative action and would provide those concerned with a guide that would avoid the loss of opportunities to claim the damage suffered. Such a protocol could address: (i) contracts affected; (ii) a preliminary analysis of the viability of the claim; (iii) initial quantification; (iv) the most appropriate legal channels for the reparation of the damage, etc.

Likewise, it would be positive to provide for a system of inter-administrative coordination, especially in cases where the same cartel or collusive practice has affected multiple contracting bodies.

In short, providing the public administration with a protocol or model of action is an important tool for avoiding passivity, standardising criteria, and ensuring that damages are claimed.

3. Introduce an ethics and integrity clause in contracts

The responsible declaration required of tenderers, proposed by the LEA/AVC, serves an essential formal function: to prove that they are competing on equal terms, that they are not prohibited from contracting and that their bid has been drawn up independently and in a non-collusive manner. However, there are limits to this instrument, as it has no effect beyond the submission of the bid.

It is therefore proposed to introduce an ethics and integrity clause in the procurement documents, which does not replace the initial declaration of responsibility, but reinforces it. Its added value lies in the fact that it transforms a formal commitment into a continuous obligation for the duration of the contract.

In this way, the public administration is protected against anti-competitive practices and against any conduct that compromises the integrity of public procurement:

- The ethics and integrity clause extends the commitment, obliging the tenderer to maintain integrity throughout the contractual performance and not only at the time of the tender.

- It extends the scope to the whole contractual chain, including subcontractors or suppliers, thus reinforcing the prevention of irregularities.

- It reinforces the duty of information by incorporating an active obligation to report any conflict of interest, occurrence, or irregularity.

The rationale for the proposal to introduce an ethics and integrity clause in public procurement is based on a set of national, European, and international standards and best practices that insist on the need to reinforce transparency, corruption prevention and the protection of the public interest in procurement.[1]

4. Promoting the use of artificial intelligence or data analysis algorithms for early detection of collusion

The prevention of anti-competitive practices in public procurement requires providing administrations with technological tools to anticipate the detection of possible collusive behaviour. Promoting the use of artificial intelligence systems and data analysis algorithms is a way to reinforce traditional control mechanisms.

In this respect, public procurement generates large volumes of information. This information, processed efficiently, can reveal patterns that are difficult to identify through manual monitoring.

The use of algorithms can, for example, detect the existence of systematically similar bids among certain operators, identify a geographical spread, or reveal similarities in the behaviour of certain bidders.

Similarly, it can also be used to develop risk indicators that allow the administration to prioritise certain tenders for more exhaustive control.

It is therefore appropriate that, within the framework of this consultation, the development of artificial intelligence and data analysis projects applied to public procurement should be promoted, as well as cooperation between administrations and competition authorities with a view to sharing data and methodologies. This

[1] At national level, we highlight Order HFP/1030/2021 from September 29 setting up the management system of the Recovery, Transformation and Resilience Plan (article 6); Order HFP/55/2023 from January 24 on the systematic analysis of the risk of conflict of interest in the procedures implementing the Recovery, Transformation and Resilience Plan; "Guide for the application of anti-fraud measures in the implementation of the PRTR", by the National Anti-Fraud Coordination Service of the IGAE (Servicio Nacional de Coordinación Antifraud de la IGAE).
At the EU level, Commission Communication on Guidance on how to avoid and manage conflict of interest situations under the Financial Regulation 2021/C 121/01.

would strengthen the capacity to prevent and control collusion and consolidate a more efficient public procurement model.

5. Mandatory certified training for public procurement managers

A highly relevant measure to reinforce the prevention of anti-competitive behaviour in public procurement is to establish compulsory training for procurement managers.

A high number of collusive practices succeed not only because of the difficulty in detecting them, but also because of a lack of knowledge among those who design and manage tendering procedures. In this respect, the introduction of systematic and regulated training in antitrust and collusion prevention would help to remedy these shortcomings, allowing contracting authorities to anticipate consultations as soon as the tender documents are prepared.

In addition to the preventive dimension, training is also necessary to ensure that contracting authorities recognise that they have been harmed and activate the legal mechanisms for restitution. In this respect, it is not enough for contracting authorities to design tender documents that minimise the risk of collusion, but they must also be able to recognise their own status as injured parties when a competition authority declares the existence of an anti-competitive practice. It is essential that contracting authorities understand that in such cases they are not acting in defence of a private interest, but of the public interest, and that they are entitled to activate the legal mechanisms for the restitution of economic damage.

This dual training dimension will enhance the technical quality of tender specifications, reduce the risk of collusive practices, and ensure a more effective defence of the general interest in the field of public procurement.

6. Raising awareness in the public sector regarding the importance of claiming damages

It is essential to raise awareness among public officials of the importance of actively pursuing mechanisms of compensation for anti-competitive practices.

Promoting a culture of non-complacency not only contributes to the compensation and recovery of unduly misappropriated public resources but can also serve as a deterrent for companies considering committing irregularities.

7. Direct budgetary impact

One of the obstacles explaining the limited reaction of public administrations to damages resulting from anti-competitive practices is the lack of clear incentives to initiate complaints. In practice, the eventual compensation obtained does not necessarily result in a higher budget available to the affected entity or to the particular department that incurred the cost overrun.


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This situation generates a disincentive effect as procurement officers may perceive that the budgetary investment, technical or human resources employed, have no return. This may lead to a certain administrative passivity, even though the principle of good administration obliges to react actively to the damage suffered.

One solution could be to establish a mechanism whereby a part of the recovered compensation is earmarked specifically for the entity concerned, strengthening the motivation to initiate claims. Another alternative could be to introduce organisational, or performance awards linked to effectiveness in defending economic interests.

## III. ALTERNATIVE OR COMPLEMENTARY AVENUES NOT EXPRESSLY FORESEEN IN THE LEA/AVC PAPER

### 1. Promoting public class actions

It is proposed to encourage public administrations affected by the same cartel, such as in the procurement of goods or services, to join together to bring a joint or collective action to claim compensation for the damages suffered. This mechanism has a number of advantages such as: (i) **the reduction of costs** given that, by grouping administrations together, they can share the costs of economic expertise and other resources necessary for the claim, avoiding duplication of effort and optimising the use of public funds; (ii) **the strengthening of the negotiating position** as joint negotiation ensures greater bargaining power vis-à-vis infringing companies, who face a larger claim instead of multiple smaller claims, which may guarantee a higher probability of reaching prior agreements and; (iii) **greater deterrent impact** as companies would be threatened by high-cost claims and would choose to comply with competition rules. Thus, companies would not only be threatened by sanctions from the competition authorities, but could also be threatened by significant economic claims, preventing the repetition of such anti-competitive behaviour.

### 2. Mediation

Mediation is proposed as a prioritised alternative means of resolving disputes arising from anti-competitive practices in public procurement, in line with the objectives of Organic Law 1/2025 of January 2 on measures to improve the efficiency of the Public Justice Service.

Although the aforementioned law aims to promote mediation as a step prior to judicial proceedings in civil matters, it is an alternative route among all the others contemplated in the aforementioned law. Therefore, it is proposed that this route be chosen in preference to other routes, such as judicial proceedings or arbitration.

Mediation is an appropriate means of dispute resolution in which two or more parties voluntarily attempt, through a structured procedure, to reach an agreement by themselves with the intervention of the mediator. This approach can yield solutions that are quicker, cheaper, and more satisfactory for both parties.


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The proposal focuses on the importance of using mediation as a preferred method to try to reach an agreement prior to going to court.

To this end, it is proposed:

- The incorporation of mediation clauses in public specifications and contracts.
- Training public officials in mediation and conflict negotiation techniques.
- Define protocols for activating mediation, guaranteeing rapid and priority access to it.

3. Direct negotiation or through lawyers

Direct negotiation between the parties or their lawyers is also proposed in order to reach an agreement prior to going to court.

Like mediation, direct negotiation is provided for in Organic Law 1/2025 of January 2 on measures to improve the efficiency of the Public Justice Service as a priority alternative means of dispute resolution. This mechanism, although less formal than mediation and not requiring the intervention of an impartial third party, enables the public administration and the companies involved to attempt to reach an agreement, thereby avoiding the judicialization of the conflict.

It consists of a bilateral dialogue between the parties to clarify their positions and find common interests that benefit the parties as far as possible.

It is proposed to strengthen negotiation by establishing internal protocols for initiating and managing negotiations, ensuring transparency and legal security in negotiation. It would also be advisable to train those responsible for the administration in these negotiation techniques. Agreements reached should be documented, and compliance with administrative and competition regulations should be guaranteed.

Direct negotiation should be a priority before resorting to civil action, contributing to a more efficient management of public resources.

The inclusion of this mechanism also requires that people performing public service duties fulfil their accountability obligations in the procedures. This involves publicly and periodically reporting on, justifying and taking responsibility for the agreements reached. Consequently, agreements must be properly documented, traceable and subject to controls that allow for verification that they have been diligently managed. This mechanism reinforces the integrity and legitimacy of public management.

4. Private conciliation

It is also proposed to promote private conciliation as an alternative and complementary mechanism for conflict resolution in this context. As proposed in the case of mediation and direct negotiation or negotiation through lawyers, it is

suggested that it be included as a clause in contracts, that training be provided and that the agreements reached be transparent and secure.

As in the case of negotiations, accountability must be upheld in these procedures.

5. Adherence to procedures already initiated

It is proposed to incorporate and take advantage of the regime provided for in Article 13 of the Civil Procedure Act (LEC) on the intervention of parties who are not originally plaintiffs as a complementary mechanism in proceedings arising from anti-competitive practices in public procurement.

This legal provision allows third parties with a legitimate and direct interest, such as Public Administrations, to intervene in legal proceedings brought by affected third parties to claim for damages suffered.

The proposed application, in this context, consists of:

- Facilitating the recognition of legitimate interest: given the public interest in compliance with competition and transparency rules in the field of public procurement, legitimate interest should be presumed in favour of public administrations when the dispute may have an impact on their contractual management.
- Guarantee participation without procedural delay: it is proposed to regulate that the participation of the public administration does not constitute an obstacle or generate delays in the main procedure. The administration must comply with the formalities of allegations, evidence, and appeals within the required deadlines, in an agile manner, so as not to hinder the procedures. Likewise, the administration of justice and the other parties should ensure that the public administration has access to the procedure with all procedural guarantees and powers.
- Incorporate warning clauses of this power of the administration in its specifications and regulations, in order to warn other operators of this possibility.

6. Witness procedure

It is proposed to incorporate and adapt the witness procedure provided for in Article 438 bis of the LEC to optimise the processing of civil claims arising from anti-competitive practices in public procurement, taking advantage of the efficiency and procedural economy that this mechanism offers.

This mechanism consists of the possibility that, if a number of substantially identical claims are brought before a court, the court may process one of the proceedings on a preferential basis, leaving the others in abeyance until a ruling is handed down, and then apply the ruling to the other suspended cases. The aim is to avoid duplication of effort, to promote efficiency, and to establish a uniform jurisprudence.


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Although this article is foreseen for general contract terms and conditions, it is proposed that a similar procedure be established for competition proceedings involving multiple parties, as it can be a very valuable tool for cases with multiple related litigants.

The legal basis of the witness lawsuit in the contentious-administrative order is found in Article 37.2 of Law 29/1998, of July 13, regulating Contentious-Administrative Jurisdiction (LRJCA), which states that:

> *"When a judge or court has pending before it a plurality of appeals with the same object, the court, if they have not been accumulated, will process one or several appeals on a preferential basis after hearing the parties for a common period of five days, suspending the course of the others, in the state in which they are, until a ruling is handed down in the first ones.*
>
> *In the event that this plurality of appeals with the same object could, in turn, be grouped by categories or groups that raise a substantially analogous controversy, the court, if they have not been accumulated, shall process one or more of each group or category on a preferential basis, after hearing the parties for a common period of five days, suspending the course of the others in the state in which they are in until the judgement is handed down in those processed preferentially for each group or category".*

As well as in Article 111 of the LRJCA, which states:

> *"When it has been agreed upon to suspend the processing of one or more appeals in accordance with the provisions of Article 37.2, once the finality of the judgement handed down in the preferentially processed lawsuit has been declared, the judicial secretary shall summon the appellants affected by the suspension so that they may, within five days, request the extension of the effects of the judgement or the continuation of the suspended lawsuit, or state whether they withdraw their appeal.*
>
> *If the extension of the effects of the ruling is requested, the judge or court shall grant it, unless the circumstance provided for in Article 110.5.b) or any of the grounds for inadmissibility of the appeal provided for in Article 69 of this Law apply.*

It is proposed to draw inspiration from this type of procedure in order to devise similar mechanisms in this context.

The purpose of this procedure is to streamline and optimise the processing of similar cases, avoiding delay and duplication of effort. Therefore, the claims formulated in the witness proceedings must be the same in the proceedings that are subsequently stayed, i.e., they must have a common content that can be subject to the same validity control.


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It should be borne in mind that it applies when appeals have not previously been joined. It is therefore an alternative to the joinder of proceedings, which can also be a viable option to take into account.

In order for the effects of the judgment to be extended from the witness proceedings to another case, the parties must apply for its extension. However, they can also continue with their own proceedings or withdraw their claim.

Thus, this type of procedure can be very useful in mass or repetitive litigation where multiple parties are affected. Therefore, its implementation and adaptation in this context is proposed.

For Ius Omnibus,

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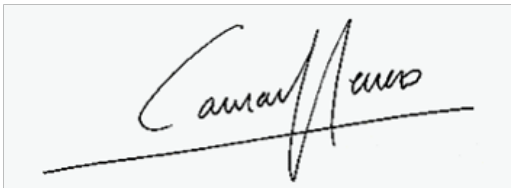

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