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BID RIGGING CONSPIRACY IN RAILROAD ELECTRIFICATION WORKS: A VERY SPANISH "SAINETE"

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A case of bid rigging in works contracts for high-speed and conventional railroad electrification in Spain evidences a number of shortcomings in the domestic transposition of the 2014 rules on discretionary exclusion of competition law offenders from public procurement tenders, as well as some dysfunctionalities of their interpretation by the Court of Justice of the European Union (CJEU) in its Judgment of 24 October 2018 in *Vossloh Laeis*, C-124/17, EU:C:2018:855. The unilateral price adjustment of live contracts sought by the main victim of the cartel, the Spanish rail network administrator ADIF comes to raise very significant issues on the limits to the 'self-protection' (or private justice) for contracting authorities that are victims of bid rigging. In this post, I point to the main issues that puzzle me in this very Spanish *sainete*. I am sure there will be plenty debate in Spanish legal circles after the holidays…

Legal background: EU level, art 57(4)(c) and (d) of Directive 2014/24/EU

As is well known, Article 57(4) of Directive 2014/24/EU establishes discretionary grounds for the exclusion of economic operators from public procurement tenders. In relation to economic operators that have breached competition law, there are two relevant grounds.

First, Art 57(4)(c) foresees the possibility of exclusion '*where the contracting authority can demonstrate by appropriate means that the economic operator is guilty of grave professional misconduct, which renders its integrity questionable*'. This was interpreted by the CJEU as covering entities that had been sanctioned for breaches of competition law in relation to the earlier rules of Directive 2004/18/EC (Art 45(2)(d)) as an instance of their being '*guilty of grave professional misconduct proven by any means which the contracting authorities can demonstrate*'. The CJEU established in unambiguous terms that '*the commission of an infringement of the competition rules, in particular where that infringement was penalised by a fine, constitutes a cause for exclusion under Article 45(2)(d) of Directive 2004/18*' in its Judgment of 18 December 2014 in *Generali-Providencia Biztosító*, C-470/13, EU:C:2014:2469 (para 35).

Second, Art 57(4)(d) allows for the exclusion '*where the contracting authority has sufficiently plausible indications to conclude that the economic operator has entered into agreements with other economic operators aimed at distorting competition*'. The relationship between both exclusion grounds relating to competition law infringements is somewhat debated. I have argued elsewhere that Art 57(4)(c) should still be used as the legal basis for the exclusion of economic operators that have already been sanctioned for previous bid rigging offences, whereas Art 57(4)(d) creates an additional ground for exclusion based on indicia of contemporary collusion. For details, see A Sanchez-Graells, *Public Procurement and the EU Competition Rules* (2nd ed, Hart, 2015) 296-301.

Of course, discretionary exclusion on grounds of infringements of competition law can be modulated by the rules on self-cleaning in Art 57(6) Directive 2014/24/EU. It is also important to add that these discretionary exclusion grounds can be applied for a period not exceeding three years from the date of the relevant event, as per Art 57(7) Directive 2014/24/EU. The CJEU has interpreted the 'relevant event' in this context,

and clarified that '*where an economic operator has been engaged in conduct falling within the ground for exclusion referred to in Article 57(4)(d) of that directive, which has been penalised by a competent authority, the maximum period of exclusion is calculated from the date of the decision of that authority*' (*Vossloh Laeis*, above, para 42).

Legal Background: Domestic level, the transposition by Law 9/2017

The transposition into Spanish law of these provisions has introduced some important modifications.

First, these exclusion grounds have been made mandatory under Article 71 of Law 9/2017 on Public Sector Procurement, as discussed by P Valcarcel, 'Transposition of Directive 2014/24/EU in Spain: between EU demands and national peculiarities' in S Treumer & M Comba (eds), *Modernising Public Procurement: The Member States Approach*, vol. 8 European Procurement Law Series (Edward Elgar, 2018) 236-237. For a broader description of the Spanish system of mandatory exclusion (ie through 'prohibiciones de contratar,' or prohibitions on contracting), see A Sanchez-Graells, 'Qualification, Selection and Exclusion of Economic Operators under Spanish Public Procurement Law' in M Burgi, S Treumer & M Trybus (eds), *Qualification, Selection and Exclusion in EU Procurement*, vol. 7 European Procurement Law Series (Copenhagen, DJØF, 2016) 159-188.

Second, the grounds in Art 57(4)(c) and (d) of Directive 2014/24/EU have been transposed in a seemingly defective manner. Art 57(4)(d) has been omitted and Art 57(4)(d) is reflected in Art 71(1)(b) of Law 9/2017, according to which there is a prohibition to enter into a contract with an '*economic operator … guilty of grave professional misconduct, which renders its integrity questionable, in matters such as market discipline, distortion of competition … in accordance with current regulations*' (own translation from Spanish).

Thirdly, Art 72(2) of Law 9/2017 foresees two ways in which the mandatory exclusion ground based on a prior firm sanction for competition infringements can operate. On the one hand, the prohibition to enter into a contract with competition law infringers '*will be directly appreciated by the*

contracting bodies when the judgment or administrative resolution had expressly established its scope and duration, and will be in force during the term indicated therein' (own translation from Spanish). On the other hand—and logically, as a subsidiary rule—it is also foreseen that '*In the event that the judgment or administrative resolution does not contain a ruling on the scope or duration of the prohibition to contract … the scope and duration of the prohibition shall be determined by means of a procedure instructed for this purpose, in accordance with the provisions of this article*' (own translation from Spanish). Such procedure is rather convoluted and involves a decision of the Minister of Finance on the advice of the State Consultative Board on Public Procurement.

Fourthly, and in an extreme pro-leniency fashion, Art 72(5)II of Law 9/2017 has established that the prohibition to enter into contracts will not apply to economic operators that have self-cleaned and, in particular, to those that have obtained leniency in the context of competition enforcement procedures. That is, there is an exemption from the otherwise applicable exclusion ground based on infringements of competition law for undertakings that demonstrate the '*adoption of appropriate technical, organisational and personnel measures to avoid the commission of future administrative infractions, which include participating in the clemency program in the field of competition law*' (own translation from Spanish).

It is also odd that the provision does not require economic operators to have 'clarified the facts and circumstances in a comprehensive manner by actively collaborating with the investigating authorities', which was the main issue at stake in the Vossloh Laeis litigation.

A controversial decision by the Spanish national commission on markets and competition (CNMC)

On 14 March 2019, the CNMC adopted a decision against 15 construction companies finding them responsible for a long-lasting bid rigging scheme to manipulate the tenders for public contracts works relating to different aspects of high-speed and conventional railroad electrification. One of the novel aspects of the decision is that the CNMC explicitly activated the prohibition to enter into contracts against the competition infringers.

However, the CNMC did so in very peculiar manner.
The oddity of the decision mainly lies on the fact that CNMC decided not to establish the scope and duration of the prohibition to contract, but simply to refer the case to the State Consultative Board on Public Procurement (see pages 317-320). This was the object of criticism in a dissenting vote by Councillor María Pilar Canedo, who stressed that the CNMC should have set the scope and duration of the prohibition to contract in its decision (pages 366-370). The position of the CNMC is certainly difficult to understand.
On the one hand, the CNMC stressed that '*regardless of the time limits within which the duration and scope must be set … it is possible to identify an automatism in the prohibition of contracting derived from competition law infringements, which derives ope legis or as a mere consequence of the adoption of a decision that declares said infraction, as established in the mentioned Article 71.1.b) of* ' (page 319). On the other hand, however, the CNMC decided to (potentially) kick the effectiveness of such prohibition into the long grass by not establishing its scope and duration in its decision—and explicitly saying so (unnecessarily…). No wonder, contracting authorities will have some difficulty applying the automaticity of a prohibition which time and scope are yet to be determined.
Moreover, the CNMC was aware of the CJEU decision in *Vossloh Laeis* (above), to which it referred to in its own decision (in a strange manner, though). In that regard, the CNMC knew or should have known that, as a matter of directly applicable EU law, *de facto* the maximum exclusion period can run for three years, up to 14 March 2022. Therefore, by referring the file to the Minister of Finance via the State Consultative Board on Public Procurement and creating legal uncertainty as to the *interim effects* of a seemingly prohibition to contract with a yet to be specified scope and duration, the CNMC actually bought the competition infringers time and created a situation where any finally imposed prohibition to contract is likely to last for much less than the maximum three years.

The (for now) final twist: ADIF takes justice in its own hands

As if this was not enough, according to the Spanish press (see the main story in El Pais), the main victim of the cartel—the Spanish rail network administrator, ADIF—has now decided to take justice in its own hands.
According to the report, ADIF has written to the relevant companies announcing claims for damages—which is the ordinary reaction that could be expected. However, it has also taken the decision of demanding an anticipation of the compensation from those companies with which it has 'live' contracts, to which it has demanded a 10% price reduction. What is more, ADIF has decided to withhold 10% of the contractual price and to deposit in an escrow account before a notary, as a sort of sui generis self-created interim measure to ensure some compensation for the damages suffered from the cartel. The legal issues that this unilateral act generates are too many to list here. And these will surely be the object of future litigation.
What I find particularly difficult to understand is that, in contrast with this decisively aggressive approach to withholding payment, ADIF has awarded contracts to some of the competition infringers after the publication of the CNMC decision. And not a small number of contracts or for little amounts. In fact, ADIF has awarded over 280 contracts for a total value close to €300 million.
Thus, ADIF has largely carried out its business as usual in the award of public works contracts, both ignoring the rather straightforward argument of automaticity of the prohibition to contract hinted at by the CNMC—though based on a convoluted and rather strained interpretation of domestic law (Art 72(2) Law 9/2017)—and, more importantly, the discretionary ground for exclusion in Art 57(4)(d) of Directive 2014/24/EU.
There will certainly be some more scenes in this *sainete*...