CAPSULAS
Boletín de información jurídica

Number 215 | Faus & Moliner Abogados | March 2021

Competition, public contracts and compliance

Regarding CNMC's Resolution of February 2, 2021 (Radiopharmaceuticals)

Background

The resolution issued by the Spanish Competition Authority (CNMC) in the radiopharmaceuticals case is a long document (+140 pgs) that can be read from different angles and that brings up several interesting considerations. In this CAPSULAS we would like to comment briefly on some of them, while at the same time warning that the complexity of these issues may make it advisable to carry out a more detailed study adapted to each specific case.

Information exchange and transparency

CNMC points out that the sanctioned companies shared public contracts "through the exchange of sensitive commercial information between them, which had an impact on the prices set for customers". The discretion that the CNMC requires from the companies regarding their sensitive information is understandable; those operating in the same market should not share data that are essential to compete.

For this very reason, it would be desirable, indeed very desirable, for the rules governing public contracts to be applied with caution when it comes to making award prices transparent on an individual basis. The law allows contracting bodies not to publish individual prices, something with which the CNMC should agree; but this requires a favourable report from the Transparency Council. It is therefore advisable to clarify this issue and provide contracting authorities with guidelines for action that reconcile transparency and competition.

Business logic

CNMC accuses the sanctioned companies of having excluded themselves from various bidding processes.

Without evaluating the conclusions of the resolution, it is worth highlighting how CNMC seeks to determine whether or not there is a reasonable competitive commercial attitude on the part of the companies operating in the same market. CNMC considers that this is not the case when a company does not participate in a bidding procedure without a logical justification; when it submits non-competitive or hedging bids; or when it presents bids with formal defects that are difficult to explain. These situations, according to CNMC, are indicative of the existence of non-aggression pacts.

The conclusion is clear: whoever decides not to participate in a bidding procedure must work carefully on the justification of its conduct. No one can be forced to compete where it does not want to compete; but when deciding not to compete, it is better to have a strong explanation, based on self interests and supported by a solid business logic reasoning. CNMC, in this case, did not accept the companies' allegations, but in some cases in the past, after having heard solid explanations, it has decided not to intervene.

Sanctions to directors

CNMC, also on this occasion, imposes fines on a personal basis on some managers of the sanctioned companies. In doing so, the CNMC relies on the jurisprudence that supports these sanctions for the deterrent effect they have, as

they are an instrument to achieve greater efficiency in the fight against anti-competitive behavior.

In any case, the resolution devotes very few of its 140 pages to solidly demonstrate the personal involvement of the sanctioned directors in the anti-competitive practice.

The message on this point is also clear: the jurisprudence is supporting fines for managers who have an active role in anti-competitive practices and also for those who passively participate; any evidence of a conversation, even isolated, can lead to personal liability.

Prohibition of contracting with Public Bodies and compliance programs

In Spain, the Law on Public Procurement is clear: companies that have been firmly sanctioned for a serious infringement regarding the distortion of competition are subject to a prohibition on contracting with public sector entities. The CNMC, in this case, refers the matter to the State Public Procurement Advisory Board in order for it to rule on the duration and scope of the prohibition.

The resolution does not mention that the Law on Public Procurement also states that the prohibition can be avoided via the payment or commitment to pay the fines or if the adoption of appropriate technical, organizational and personnel measures to avoid the commission of future administrative infringements is proven.

The relevance of compliance programs in this matter is unquestionable, and it is highly recommendable to rely on CNMC's Guide of June 10, 2020 when designing and implementing them.

Some "tips" in this regard:

- It is advisable to have a Compliance Program in place before being involved in a case in front of the CNMC.

- The management bodies and/or the main directors of the company should be directly involved. A top down approach should be adopted, and ensuring compliance with these rules must be at the core of the company's culture.

- Ad hoc training must be offered, adapted to the reality of the company and the activity of each of its members. A standard training strategy that merely outlines the basics of antitrust rules is not sufficient.

- It is necessary to have an internal, transparent and effective whistleblower channel.

In an environment where enforcement is a priority, a robust compliance program is not only advisable but essential.