August 2022

Public Law Department

THE SIGNIFICANCE OF REGULATORY COMPLIANCE PROGRAMMES IN COMPETITION MATTERS, REGARDING THE RESOLUTION ON CONSTRUCTION COMPANIES

The Spanish National Markets and Competition Commission's (CNMC's) Resolution of 5 July 2022, *Obra Civil* [Civil Works] 2, widely known as the "Construction Companies Resolution" is an endless source of bafflement: from the file's origin, based on an "accidental find" during the course of an investigation on another matter, to the fact that it refrains from classifying the conduct sanctioned as a cartel.

A strategic analysis of a perusal of the defence of the businesses involved encourages some reflection.

None of the sanctioned companies, which are the main construction companies in the country, seems to have, to date, a set of technical, organisational and personnel measures for the purpose of controlling and preventing collusion and, ultimately, protecting themselves, as permitted, since 2017, by the Law on Public Sector Contracts (art. 72.5 LCSP), against the imposition of the prohibition on contracting as a result of anti-competitive conduct that may be carried out by employees or managers.

Specifically, none of the companies sanctioned had adopted *ex ante* compliance programmes, i.e. prior to the initiation of proceedings into or detection of the infringement. And that, even given that there was a first agreement to open proceedings in 2018, which expired, and it was not until 21 July 2020 that the above-mentioned file was formally opened.

Furthermore, of the seven companies sanctioned, it appears that only four sought to invoke the legal effects of the compliance programmes they had begun to implement. Unsuccessfully.

Apart from the different degrees of evolution and development, there is a common pattern in the Commission's assessment of these programmes: these are measures of an informative nature, they do not include a systematic sanctions model and disciplinary measures for non-compliance, they have not been translated into specific or internal investigation measures, etc.

In none of the cases mentioned could the measures implemented by the companies be used to show a mitigation of active collaboration, nor could they exempt them from the ban on contracting with the public sector.

The National Markets and Competition Commission's rigour when assessing the seriousness of the regulatory compliance models in Competition Law remains, therefore, intact, reaffirming the parameter set out in the Commission's Resolution on *Consultants*, of 11 May 2021, in which, for the first time, the legal effect of a prevention model and the existence of a genuine commitment to regulatory compliance, on that occasion to INDRA, were assessed.

The problem is exacerbated if we take into account that (a) these companies have business with high - sometimes critical - contracting volumes with public bodies and (b) some of the companies mentioned have a record of being sanctioned (bans on

contracting with the public sector declared by the National Markets and Competition Commission and provisionally suspended by the National Court).

The Construction Companies Resolution, in short, once again underlines the desirability of companies, especially those that contract with public bodies, arming themselves with adequate regulatory compliance competition law programmes.