CNC
COMISIÓN NACIONAL DE LA COMPETENCIA

SUMMARY OF RESOLUTION S/0269/10 *TRANSITARIOS 2*

1. BACKGROUND

This case originated with a decision handed down by the CNC Council in relation to its resolution of S/0120/08 Transitarios (Forwarding Agents) in which it declared proven the existence of a collusive conduct prohibited by article 1 of the Spanish Competition act (LDC) and article 101 of the Treaty on the Functioning of the European Union (TFEU), and declared that liability for the infringement rested with ABX LOGISTICS ESPAÑA, S.A. (now DSV AIR & SEA, S.A.), DHL EXPRESS BARCELONA SPAIN, S.A. and its parent company DEUTSCHE POST AB, RHNUS LOGISTICS, S.A., SALVAT LOGÍSTICA, S.A., SPAIN-TIR TRANSPORTES INTERNACIONALES, S.A., TRANSNATUR, S.A. and TRANSPORTES INTERNACIONALES INTER-TIR, S.L.

In addition to the above companies, the investigation had been initiated by the Investigations Division (DI) against BOFFIL ARNÁN, S.A., a corporate group composed of the undertakings BCN ADUANAS Y TRANSPORTES, S.A. and BOFILL & ARNÁN LOGÍSTICA INTERNACIONAL, with the DI imputing the wrongful conduct to BCN ADUANAS Y TRANSPORTES, S.A. (BCN), given that it operated in the market for ground transport forwarding agent activities.

However, in its decision of 19 May 2010 the CNC Council resolved to instruct the DI to bring an administrative sanctioning procedure against BCN and BOFILL ARNÁN, S.A. (B&A), although recognising the obvious relation between the shareholders and directors of both companies. The Council considered that this involved two different legal persons whose administrative liability for the presumed infringements should be determined in a proceeding in which they would be able to exercise all their rights of defence and due process. Consequently, on 25 May 2010 the DI opened infringement proceeding S/0269/10 Transitarios 2, against BCN and B&A.

On 1 December 2011 the CNC Council issued its resolution on case S/0269/10 Transitarios 2.

2. CONTENT OF THE RESOLUTION

The resolution indicates that B&A and BCN have the same shareholders, head office, management bodies and General Manager, and mentions the official website they share and on which it is expressly stated that BCN forms part of the BOFILL & ARNAN group, and that B&A and BCN share the same Customs and Logistics departments irrespective of the type of business carried on: air, maritime or land.

The resolution states that the purpose of the proceeding was to determine if B&A and BCN had taken part in the collusive conducts carried on from 2000 to 2008 by a number of companies active in the land transport forwarding agents business and which were sanctioned by the CNC Council in its resolution of 31 July 2010 (S/0120/08).

Of special interest in this regard is Foundation in Law Six on the "*Liability of the infringing parties*". B&A denied its participation in the conducts because its activity is not ground transport, and asserted there are contradictions in the accusation, as the DI based its arguments in case S/0120/08 on the view that B&A and BCN are part of one and the same group and the CNC Council regards them as independent undertakings.

The parties do not understand how the same sanction could be levied on companies that do not form part of a group and which do not have the same business, and, moreover, no sanction can be imposed on B&A because it no longer generates any sales in the ground transport forwarding agents business.

For the CNC Council there is no inconsistency between what is said by the DI and by the CNC Council in its decision of 19 May 2010, as the latter is confined to pointing out that despite the obvious relation between the shareholders and directors of BCN and B&A, they are two distinct legal persons whose respective administrative liability for the conducts examined, if such exists, must be determined having regard to the role played by each of them in the alleged conducts. It is true that authoritative Spanish and EU legal doctrine holds that where there is an ownership relation of clear control between two companies, it may be presumed, in the absence of evidence to the contrary, that there is unity of action and that the controlling company is responsible for the conduct of the subsidiary.

But that same body of doctrine also understands that even where one company in a group does not hold ownership control of another, there may nevertheless be economic unity or unity of action between undertakings that have certain shareholder relations, such as the case of "*sister companies*"; that is, "*those that have the same shareholder base without the existence of clear control over on another*", in which "*there may exist unity of economic action, whether by de facto control or close coordination, which requires that they must be considered as a group at least for the purposes of competition law*". The CNC Council incorporates into its resolution paragraph 66 of the European Court of First Instance's judgment of 20 March 2002 in the case T-9/99 HFB and others v the Commission.

However, the CNC Council in its decision continued to say, in the absence of hierarchical shareholder control, an economic unit cannot be presumed for purposes of imputing responsibility. That is why the CJEU's case-law holds that for sister companies to be imputed the same degree of responsibility it is not sufficient that they be owned by the same persons (CJEU judgment of 2 October 2002, case C-196/99 P Aristrain/Commission); there must be further elements that demonstrate that unity and those elements will depend on the circumstances of the case.

The CNC Council thus indicates that the case-law has repeatedly considered such elements can include "*the performance of management functions by the same natural person, that said person represents the sister companies in the cartel meetings and that the cartel regards both companies as the same participant (see, inter alia, the CJEU judgment of 28 June 2005 on the joined cases C-198/02 P, C-202/02; C-205/02 P to C-208/02 P and C-213/02 P Dansk Rørindustri/Commission)*".

This is the case of B&A and BCN, which have the same General Manager, who participated in the conducts in the name of both.

Furthermore, the Council takes as proven that the General Manager *"attended the meetings and participated in the agreements in representation of the interests of both companies, more precisely, of what referred to itself as the BOFILL ARNAN Group*". For, in fact, contrary to what is alleged by the parties, B&A and BCN tried to project to others an image of a corporate group with unity of action.

This follows from their website, from their calling themselves a group that offers an integrated service to customers, which they maintain in their letters announcing price increases and always sign as "BCN/Grupo BOFILL ARNAN". This is likewise the impression of the rest of the companies in the cartel, which at no time in their letters and dealings with the General Manager in question suggest that his participation is confined to BCN, but rather that it is the BOFILL ARNAN Group that is taking part in that coordination.

Therefore, there having been established the existence of a violation of article 1 of the LDC and article 101 of the TFEU for which BCN and B&A are jointly and severally responsible, consisting in directly or indirectly fixing purchase or selling prices or other trading conditions, the CNC Council levies a joint and several fine upon them of 1,184,000 euros.