CNC
COMISIÓN NACIONAL DE LA COMPETENCIA

# SUMMARY OF RESOLUTION S/0241/10 *NAVIERAS CEUTA*

In the context of case S/0080/08, relating to the ticket exchange system in the Crossing the Straits Operation, Spain's antitrust regulator, the Comisión Nacional de Competencia (CNC), had access to information which pointed to the possible existence of a price-fixing arrangement for the maritime passenger transport service on the Algeciras-Ceuta line between the Europa Ferrys SA and its parent company Compañía Trasmediterránea SA, Farde Reederei Seetouristik Iberia SL (FRS), Buquebus España SAU and Euromaroc 2000 SL. This led to the opening of infringement proceeding S/0241/10 on 24 March 2010 against said shipping companies, which was expanded on 21 July 2010 to include Balearia Eurolíneas Marítimas SA, parent company of the last two cited above.

In addition, as part of case S/0244/10, various inspections were conducted in the offices of Balearia Eurolíneas Marítimas SA, Trasmediterránea SA and Trasmediterránea Cargo, in the course of which information was obtained on the existence of the said price fixing arrangement for maritime passenger transportation service on the Algeciras-Ceuta line.

Balearia Eurolíneas Marítimas SA and its subsidiaries Euromaroc 2000 SL, Buquebus España SAU and Euromaroc 2000 SL filed an application with the CNC for exemption or, secondarily, a reduction in respect of the payment of the fine that could be imposed owing to its participation in the collusive conducts, and submitted documents and information on the investigated conducts. The CNC rejected the exemption application, holding that the conditions stipulated in article 65.1 of the Spanish Competition Act 15/2007 of 3 July 2007 (LDC) were not met, and eventually resolved to grant a reduction of fifty per cent of the fine levied.

In its 10 November 2011 decision resolving the case, the Council ruled that there was proof of the existence of a cartel contrary to article 1.1 of the LDC in the maritime transportation of passengers and vehicles on the line between Algeciras and Ceuta, carried on through meetings, telephone calls and e-mails between representatives of FRS and the shipping companies in the Acciona and Balearia Groups. The cartel involved adoption of anti-competitive agreements to divide up the market, fix prices and market shares, coordinate timetables, fix commercial conditions for agencies, eliminate and coordinate offers and compensatory schemes in case of deviations from the quotas, and mechanisms to monitor and control compliance with the agreements, between Balearia Eurolíneas Marítimas SA, Buquebus España SAU and Euromaroc 2000 SL, Compañía Trasmediterránea SA and Europa Ferrys SA from at least February 2008 to April 2010, and with FRS from October 2008 to April 2010.

Price fixing and market-sharing arrangements, the Council indicated, are anti-competitive by object, insomuch as they are capable of constraining competition and eliminate the uncertainty and independent behaviour of economic operators. In this sense, the arrangements made by the aforesaid shipping companies were intended to align or, if applicable, coordinate their respective commercial policies with the ultimate

aim of achieving a previously agreed allocation of quotas for all of them and increase the prices charged by each, with the assurance that such measures would be followed by all the others.

Of all collusive conducts, arrangements that directly or indirectly fix prices and commercial conditions have consistently been regarded by the Council as especially serious because they eliminate competition between enterprises in such an essential variable for differentiating supplyside choices as is the price and terms of service, thereby keeping customers from benefiting from the lower prices and better conditions that would result in a competitive supplyside scenario. This gives rise, in short, to the risk that the choice available to end consumers will be narrowed and prices will be higher.

As for the lack of evidence of the alleged infringing conduct, in its resolution the CNC Council held that the facts on record showed there was a continuous series of contacts between the companies in the Balearia Group, Trasmediterránea Group and FRS carried on with the aim of coordinating their commercial policies on the Algeciras-Ceuta maritime line and reaching the aforesaid agreements, and the submissions made by the Trasmediterránea Group and FRS did not serve to disprove this charge.

The CNC Council found that the companies were fully aware of the unlawful nature of the cartel agreements. It is a customary practice not to leave any direct documentary trace of the existence, composition, nature, content and duration of the cartel. Hence the frequent need to rely in antitrust enforcement on an overall assessment of the evidence obtained as well as on the prima facie evidence. Both evidentiary techniques are fully accepted in the relevant case-law provided the conclusion is reasonable and reasoned. Thus, an overall assessment of the facts on record in the case proved beyond all reasonable doubt that the cartel existed as charged.

The accused argued that the decision infringed the principle of prior legal definition insofar as penalties were proposed for an alleged anti-competitive intent that had not materialised in an agreement or concerted practice or consciously parallel behaviour, in an unjustified extension of the infringement defined in article 1.1 LDC. The Council rejected this position. First, because it held that the facts on record demonstrate that the companies, in addition to attempting it, did reach agreements regarding several competitive variables, some of which were carried out while others were not. Second, because mere attendance at meetings with competitors —in which there were discussed such antitrust-sensitive issues as fixing and coordinating prices, timetables and agency commissions— constitutes per se an anti-competitive conduct and runs afoul of article 1.1 of the LDC. The end result of those meetings and contacts between competitors, in the sense of whether agreements were reached or, if affirmative, whether those arrangements were then put into practice by the companies, does not release them from liability, but rather forms part of the administrative law infringement referred to by article 1.1 of the LDC, which penalises contacts between competitors insofar as they are objectively capable of artificially altering the competitive behaviour of those enterprises. The fact that attempts to reach an anti-competitive agreement did not succeed was not because the intent of the shipping companies was to safeguard free competition but rather, as seen in the documents in the case record, due to the divergent interests of the companies and to breaches of those very agreements.

Nevertheless, the Council does believe that the failure to implement the agreements or the lack of actual effects, where such is the case, is an element to be taken into account when determining the amount of the fine.[1]

The Council concluded that FRS's participation in the cartel had been fully proven, not just because the documents submitted by its competitor Balearia and obtained during the inspections thereof and of its other competitor Acciona identified it as a participant in the agreement, but also, and specifically, because its presence in at least six meetings was demonstrated.

As for the Trasmediterránea Group's participation in the investigated cartel, in the opinion of the Council there is abundant direct and indirect documentary evidence, obtained in the inspection of its offices, in the inspection of Balearia and voluntarily submitted by the latter in its application for a reduction of the fine. Those documents notably indicate that Trasmediterránea executives attended at least eleven meetings.

In relation to the information submitted by the Balearia Group, the Council indicated that not only did it allow corroboration and confirmation of the documentation previously obtained in the inspections of Balearia itself and of Acciona, but, most especially, it has had a qualitatively significant importance for obtaining a better understanding of the content and scope of the agreements adopted and the attempts to adopt agreements by the three shipping companies charged in the proceeding.

When setting the fine, the Council considered as aggravating circumstance that the former Competition Tribunal and the CNC Council itself have on numerous occasions analysed the passenger transport business on the Algeciras-Ceuta line.[2] It likewise took into account the effects in the market, given that between them Balearia, Trasmediterránea and FRS controlled the entire market for transporting passengers and vehicles on the Algeciras-Ceuta line, with a combined market share of 100%. In relation to Trasmediterránea, the Council also considered as aggravating circumstance the recidivism referred to by article 64.2.a) of the LDC, in view of the resolution handed down by the former Competition Tribunal in case 543/02.

The shipping companies argued that the CNC cannot fine them without violating the *non bis in idem* (double jeopardy) principle, because they were already sanctioned for the same conduct in case S/0080/08. This basic legal principle would preclude the CNC from levying new penalties if the actors, facts and legal foundation of the two cases were the same. But the Council held that said triple identity does not hold in this case because the facts are different, that is, the conduct sanctioned in the previous case and the one held to be unlawful in the present one are different.

On 10 November 2011 the Council resolved the case by levying a fine of 2,351,689 euros on Balearia Eurolíneas Marítimas SA and its subsidiaries Buquebus España SAU and Euromaroc 2000 SL., of 12,102,969 euros on Compañía Trasmediterránea SA and Europa Ferrys SA. and of 1,884,600 euros on FRS Iberia, SL.

---

[1] Judgments of CJEU of 7-1-2004 Aalborg; judgment of 28-6-2005, *Dansk Rorindustri* and judgment of 19-3-2009, *Archer Daniels Midland Co.*

[2] CNC Council resolution of 8-9- 2010 in case S/0080/08; resolution of 11-12-1991 authorising the Agreement to regulate the maritime service on the Algeciras-Ceuta line; resolution of 13-6-2003 in case 543/02; resolution of 30-5- 2006 in case A 354/05,