CNC
COMISIÓN NACIONAL DE LA COMPETENCIA

SUMMARY OF RESOLUTION S/0244/10 *NAVIERAS BALEARES*

On 19 April 2010 the National Competition Commission (Comisión Nacional de la Competencia — CNC) received a letter from the Island Council of Ibiza (Consell Insular de Ibiza) in which it made a complaint against Trasmediterránea and Balearia in relation to alleged practices prohibited by the Spanish Competition Act (LDC), consisting of the adoption of agreements to share markets and fix prices and/or trading conditions, as well as the imposition of unfair prices and commercial conditions in the market for regular maritime transport of passengers and cargo between the Spanish mainland and the Balearic Isles.

Previously, on 22 October 2009, the CNC had received a letter from the Consell Insular de Formentera requesting that an investigation be conducted into the possible existence of prohibited practices in maritime transport on the island of Formentera, specifically, the imposition of prices or other unfair trading conditions by shipping companies operating on the Ibiza-Formentera line.

After conducting inspections in the offices of Trasmediterránea and Balearia in May 2010, in July of that same year the Investigations Division of the CNC decided to open an infringement proceeding against Balearia Eurolíneas Maritimas, S.A. (Balearia), Compañía Trasmediterránea, S.A. (Trasmediterránea) and Isleña Marítima de Contenedores, S.A. (Iscomar). The proceeding was later expanded to include the companies Servicios y Concesiones Marítimas Ibicencas, S.A. (Sercomisa) and Mediterránea Pitiusa, S.L. (Pitiusa), as well as the joint venture Trasmapi-Balearia, CB.

During the proceeding, Balearia provided information. In its resolution of 23 February 2012, the CNC Council levied fines of 54 million euros on the companies Trasmediterránea, Balearia, Iscomar, Sercomisa and Pitiusa for their participation in two different cartels.

According to the Council, the following conducts have been proven:

1) Maritime transport Mainland-Balearic Isles, Mallorca-Menorca and Ibiza-Mallorca

The Council holds there is evidence of participation from 2001 to 2010 of Balearia, Trasmediterránea and Iscomar in a cartel to fix prices and other trading or service conditions, to limit or control output and share markets in the maritime passenger and cargo transport lines between mainland Spain and the Balearic Isles, including the lines between Menorca and Mallorca, and between Ibiza and Mallorca.

The cartel was implemented through bilateral and multilateral agreements, meetings and talks in which the parties had a common objective, namely, to obtain profits in the maritime transport services between the mainland and the Balearic Isles profits higher

than would otherwise be achievable if all of the operators involved respected the market and competed against each other. The practices pursued included joint operation of lines, exchange of spaces, setting diverse commercial parameters such as schedules, promotional offers, discounts, commission and others, the direct fixing of prices, increasing those prices, arrangements on application of the bunker adjustment factor (BAF) used in international trade to adapt to fluctuations in the price of crude oil, both in the maritime and land segment, hands-off policies for certain customers, interchanging of cargo to balance quotas, or fixing of prices for traction units.

The anti-competitive intent and awareness of the unlawful nature of the conducts by the operators involved is clear: in some of the practices they agreed to apply minor price differences and to implement the measures at different times and not to all customers, in an effort to conceal an arrangement that would have aroused the suspicion of customers and/or competition authorities if applied identically in all of its parameters.

The Council regards this as a single continuing offence as it meets the relevant requirements established in the ample case-law on this point. Thus, the acts in question have been shown to have occurred from 2001 to 2011, in larger numbers or more concentrated in certain periods over others, which is customary given their unlawful nature and the perpetrators' awareness of that illegality. This, however, does not preclude the existence of a single continuing offence when the available information allows the authorities to establish consistent, coordinated and complementing elements of a common plan to achieve a common objective. Furthermore, the nature of the conducts distorted competition in the core business of the participants. And, lastly, the intentionally scaled way in which the conducts were implemented, in many instances, makes it more difficult to perceive the unlawfulness of the overall set of actions, further demonstrating the existence of a single common objective.

2) Maritime transport on the Ibiza-Formentera line

The Council finds the evidence shows that from 1995 to 2011 the companies Balearia, Sercomisa and Pitiusa formed a cartel to fix prices and schedules for the maritime passenger transport service between Ibiza and Formentera.

Balearia and Sercomisa acted on a concerted basis through a joint venture organised as a "Comunidad de Bienes" (CB) formed in 1995 by the companies Sercomisa and Fletamientos de Balearic Isles S.A. (Flebasa) for the purpose of joint operation of the Ibiza-Formentera line. The CB, initially called CB Flebasa-Trasmapi, changed its name in 1999 to CB Balearia-Trasmapi, after Balearia's acquisition of Flebasa in 1998, and was eventually wound up effective 1 June 2011.

The Council finds that Balearia, on acquiring Flebasa, likewise acquired its liability. This attribution of liability, contrary to the pleadings submitted by Sercomisa, is based on EU case-law precedents that, pursuant to the principle of effectiveness and enforceability of

articles 101 and 102 of the TFEU, determine the applicability of the principle of economic continuity, whereby liability for the infringement must be, subject to fulfilment of certain conditions, attributed to the acquirer of the assets and economic successor of the company wound up.

The Council furthermore holds that, contrary to the arguments put forth by the parties to that joint venture, the CB is not a full-function joint venture for a number of reasons. First, due to its duration. The joint venture was formed for a term of one year, which makes it difficult to regard it as having a vocation of permanence, despite the annual extensions. Second, the CB did not own the administrative concessions for the routes, which were instead held by its partners as the parties that participated in the public tenders in which the concessions were awarded. In addition, there is only one vessel owned by the CB. The other ships operating the Ibiza-Formentera line belong to the CB partners. Furthermore, each of the partners has its own delegates in the CB with one of them acting as manager. For all of these reasons, the Council finds that the CB does not have sufficient own assets to be able to carry on its activity independently of its partners, and, moreover, issues of prices and schedules were supervised directly by the chairman of Balearia. The Council believes that even if the CB could be considered a full-function joint venture, it would not be a concentrative joint venture.

The Council therefore concludes that the CB is the product of an agreement between two independent operators that falls under the general prohibition of article 1 of the LDC, given that it leads to the joint fixing of prices and distribution of the revenues generated by the joint operation of the line and by the supplyside restriction it entailed. And it furthermore holds that the arrangement does not qualify for any exemption from application of the LDC, and must therefore be declared an infringement of the LDC due to the joint operating agreement. What is more, the Council rules that this agreement qualifies as a cartel, given that it involves an arrangement regarding commercial prices and schedules and the parties concealed its existence from the authorities.
In this context, the Council finds the evidence shows that Pitiusa participated in the cartel as from 2004 in the form of meetings and contacts with Balearia and Sercomisa in which prices were fixed and schedules were agreed so as to avoid overlap on the Ibiza-Formentera route. This was an arrangement with its only competitors on that line to agree the basic commercial parameters and replace the uncertainty inherent in the pursuit of its commercial activity with the certainty provided by the agreement.

With respect to the leniency programme, the Council believes that Balearia has provided significant added value in its declarations under that programme that have contributed to lengthening the charged duration of the infringement in the traffic between the mainland and the Balearic Isles and to broaden the knowledge of the infringing parties in the maritime passenger transportation service between Ibiza and Formentera. But the Council does not find that Balearia's cooperation can be

considered full, continuous and diligent as required by article 65.2.a) of the LDC and holds that Balearia has not met all of the requirements established in the LDC to benefit from a reduction in the amount of the sanction. The Council does find, however, that the collaboration provided can be regarded as a mitigating circumstance, as it has involved the submission of evidence that has allowed, in particular, a lengthening of the charged duration of the infringement in maritime transport between the mainland and the Balearic Isles and expansion of the accusation to include Pitiusa in the Ibiza-Formentera line.

The Council has resolved to levy the maximum fine provided for in the LDC, applying a reduction of 15% to Balearia in view of the mitigation owing to its collaboration. The fines are thus:

€36,110,800 on COMPAÑÍA TRASMEDITERRÁNEA, S.A.

€15,214,402 on BALEARIA EUROLÍNEAS MARÍTIMAS, S.A.

€495,826 on ISLEÑA MARÍTIMA DE CONTENEDORES, S.A.

€731,081 on BALEARIA EUROLÍNEAS MARÍTIMAS, S.A.

€1,155,205 on SERVICIOS Y CONCESIONES MARÍTIMAS IBICENCAS, S.A.

€402,453 on MEDITERRÁNEA PITIUSA, S.L.