CNC
COMISIÓN NACIONAL DE LA COMPETENCIA

SUMMARY OF RESOLUTION S/0060/08 *SINTRABI*

On 26 October 2011 the Council of the National Competition Commission (CNC) issued the resolution in case S/0069/09 SINTRABI by which it fined the union of independent hauliers of Bizkaia (Sindicato de Transportistas Autónomos de Bizkaia — SINTRABI) and three companies connected with land transport in the facilities of the port of Bilbao: Bidetrans S.L. (Bidetrans), C.B. Bilbao S. L. (C.B. Bilbao) and Transmeta S.L. (Transmeta) for a breach of article 1 of Spanish Competition Act 16/1989 of 18 July 1989 and article 101 of the Treaty on the Functioning of the European Union (TFEU) between 2002 and 2006. The beach consisted of the creation of a cartel in the port of Bilbao for the services of transporting goods by road within a radius of 200 kilometres by means of agreements to limit access to the port facilities, the imposition of a fee for the services and market-sharing arrangements between the participants in the cartel.

The Council decided to impose a fine of 4.6 million euros on SINTRABI, 1.4 million euros on Bidetrans, 1 million euros on CB Bilbao and 332,000 euros on Transmeta. It also decided that the proceedings in relation to offences committed by a further 20 companies connected with land transport in the facilities of the port of Bilbao had lapsed.

It is important to highlight that in 2001 the former Competition Court (TDC) had already fined SINTRABI, the Association of Shipping and Stevedore Agents (Asociación de Consignatarios de Buques y Estibadores) of the port of Bilbao and various haulage businesses (including Bidetrans, C.B. Bilbao and Transmeta) for price-fixing agreements and commercial practices relating to operations connected with container transport, general cargo and tippers in the port of Bilbao. This fine was ratified in March 2008 by the Spanish Supreme Court.

The present case arose out of both the evidence produced by Central Court Number 6 of the National Appeal Court (Audiencia Nacional) and out of the documentation provided to the CNC by the Basque Competition Service:

- In 2005 the Examining Magistrate's Court number 1 of Baracaldo (Vizcaya) dealt with a complaint from the Basque government about actions and practices in the port of Bilbao by people allegedly connected with SINTRABI which could be giving rise to a series of events that would point to the existence of an agreement between the distributors and SINTRABI. Pursuant to that agreement all the work was being divided up, preventing hauliers that were not part of the union from entering the port in order to load, and by fixing the prices and terms of transport, using violence against anyone who did not accept this. The case was passed on to the National Appeal Court. On 27 August 2008 the Central Court Number 6 of the National Appeal Court made an order in relation to those preliminary matters by which it ruled that the case should be dismissed in part and indicated that once that decision had become binding, copies of the reports prepared by Ertzainza (the Basque independent police force) should be sent to the CNC for the appropriate purposes, given the fact that, as stated in the order itself: "*after a*

lengthy investigation the only thing that is proved is that the union SINTRABI and others, as the Competition Court has already decided in its resolution of 19 December 2001, have actively participated in restrictive practices which they have continued to pursue following the resolution issued by the aforementioned Court and the judgment handed down by the National Appeal Court when deciding the appeal that was filed against the aforementioned resolution".

- On 12 December 2007 the CNC received documentation from the Basque Competition Service in relation to two alleged actions of SINTRABI: a draw for 10 "licences" with no legal cover in order to be able to provide goods transport services in the port of Bilbao and a recommendation for a price increase directed to its members as a result of the increase in the price of petrol. During the investigation of the case, practices carried out from 2002 onwards were analysed and the following facts were proved:

The practices which the Council has found to have been proved are the following:

Period 2002-2006

- Constitution of specific committees or commissions by type of cargo

SINTRABI organised the transport of goods in the port of Bilbao through various sector committees or commissions, according to the products transported (container committee, general cargo committee, tipper committee, hazardous goods (or tankers) committee and aggregates committee). These committees, made up of SINTRABI and representatives of the distributors, with no customers represented, met periodically at SINTRABI's premises.

- Quota system

In each of the months the number of lorries that could access the port of Bilbao was limited (quota system). This meant that, although legally there is no additional requirement to be able to operate in the container area and no licence is required, in practice only people who had been authorised by the union could gain access.

To this end the so-called "numbers, spaces or licences" (created by the committees themselves) were used. They gave the "right" to access the port of Bilbao in order to transport goods and remove them within a distance of less than 200 kilometres.

These numbers were awarded either to independent hauliers that worked for a particular distributor or directly to the distributor, and they were transferred following the payment of an economic consideration, but under the supervision and authorisation of the corresponding committee and of senior SINTRABI officials. In some cases the distributors participated in the purchase and sale of spaces, giving their authorisation for the purchases of spaces connected with other distributors.

- Monitoring, control of access to the port facilities

In order to guarantee that only lorries with a space gained access, such lorries carried an identification number in their cab which authorised them to carry out the transport. Each committee had its own "watchmen", who were SINTRABI members. These watchmen checked the lorries entering the port so that if a lorry "without a number" wanted to enter the port it would be stopped.

In order to keep these "numbers", distributors had to pay a fee to the relevant committee, in addition to the union membership fee, which was used to pay the watchmen. In many cases it was the distributor itself that undertook responsibility for giving the haulier the discount for the payment of that fee.

- Sharing of customers

The aforementioned transport committees in which SINTRABI and the distributors participated made the system more sophisticated by fixing the percentage of the cargo of each customer that corresponded to each distributor and imposing on each customer the distributor with which it had to work by means of "agreements" that were reflected in a document which was referred to in telephone conversations as the "port book". These agreements, once they had been approved in the relevant committee, were imposed on customers (both agents and end customers) and they had no freedom to contract the transport service with the distributor of their choice.

If customers did not respect the agreements for division of cargo imposed by the transport committees they were penalised and left with no service. It has also been seen that if a distributor did not apply the agreements reached by the committees or failed to comply with the rules established by them, it would receive threats or penalties, either by being stopped or by the blocking of the spaces that it held.

- Fixing of prices and other commercial terms

The transport committees or commissions also controlled the prices that the hauliers or distributors had to apply to their end customers. The prices agreed, always under the ultimate supervision of SINTRABI, were published by SINTRABI in the so-called price scales, which set out all the prices by type of transport, customer, destination or origin and distances and which laid down certain "clauses regarding allowances, extras and application of fees". In addition these price scales also fixed other terms of trading such as maximum discounts, invoice payment deadlines and charges for vehicles that were unable to operate due to delays in loading or unloading.

SINTRABI also intervened if a distributor that was not part of the union applied prices that were below the agreed prices, demanding that it pay the price difference to the independent hauliers contracted.

<u>From 2007 onwards</u>

The investigation only produced prima facie evidence that the situation in the port of Bilbao may have continued in the way that has been explained for the period 2002-2006. However, there was no concrete evidence to prove that such practices continued after 2006.

With respect to the duration of the practice, the facts show that it existed in January 2002, after the Competition Court had handed down its resolution of 19 December 2001 imposing the fine, and that it lasted at least up to and including 2006, although there is prima facie evidence to suggest that it could have extended beyond 2006.

The Council has found that there is sufficient evidence in the case file to be able to say that SINTRABI was the instigator of this cartel: (i) the sector committees were organised by SINTRABI; (ii) each of the various meetings of these committees took place at

SINTRABI's head offices; (iii) the monitoring of compliance with the agreements was undertaken by SINTRABI members; (iv) the payments for this monitoring were made into SINTRABI's accounts and (v) the fee scales were prepared by SINTRABI, as it itself has recognised. This particular responsibility of SINTRABI has already been upheld by the Supreme Court in its judgment of 19 March 2008 which ratified the position that the conduct penalised by the Competition Court in its resolution of 19 December 2001 to which we have already referred was unlawful.

As regards the allegation of Bidetrans and CB Bilbao that the evidence used by the Investigations Division comes from criminal proceedings and that its use in administrative enforcement proceedings represents a grave distortion of our legal system, the Council considers that the said evidence was in fact obtained in an inspection that was authorised by the court and undertaken with all the necessary guarantees and that, as there was no defect in the way that the evidence was obtained, its use in a criminal case or in administrative enforcement proceedings depends on the type of unlawful act in question, and its examination in either type of proceeding does not imply a breach of any legal provision, nor does it imply an infringement of rights, provided that, as is this case here, the proceedings have been handled with all the safeguards that the legal system gives to people accused of an offence.