11 December 2006: Renewal of public service delegation contract for the servicing of Corsica by water transport from Marseilles harbour

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Conseil de la concurrence orders SNCM to allow the division of its global offer

>Version française

Following a referral by the companies Compagnie Méridionale de Navigation (CMN) and Corsica Ferries (CF), the Conseil de la concurrence has published its decision today and has pronounced injunctions on an interim basis, before reaching a decision on the merits.

The facts denounced by the plaintiffs

The distrainers denounced at the same time practices of agreement and abuse of dominant position.
As regards the anticompetitive agreement, the Conseil de la concurrence considered that the alleged behaviours of Corsica public authority and OTC - which would have tried to favour the SNCM via an anticompetitive agreement with this company setting up a bidding procedure designed especially for the SCNM and examining the other offers on a discriminatory basis, even "boycotting" them - cannot be separated from public authorities' actions - bidding procedure and procedure for the selection of the delegated authority – the legality of which can be examined exclusively by the administrative judge. The case has besides been referred to the latter and the Conseil d'Etat (highest administrative court) is expected to examine on December 15th the appeal lodged against the ruling issued by the judge in chambers of Bastia administrative court.

As regards however, the abuse of dominant position practices which are charged against the SNCM, the Conseil de la concurrence considered that they could be
separated from public authorities actions and therefore could be examined by the Conseil.

The Conseil considers that the deposit of a global and indivisible offer by the SNCM as part of the bid launched by Corsica public authority is likely to cause an anticompetitive impact in evicting - in an abusive manner - the competitors' offers on each line

The deposit of a global offer, be it authorised – even favoured – or not by the company
or the local authority organising the bid, cannot be considered as an abuse by nature as soon as it comes from a company in a dominant position. Indeed, the existence of a dominant position must not prevent the dominant operators from having its offer examined for its own qualities.

However, in the case in point, the Conseil considered that the SNCM, which may hold a dominant position on the markets for freight and passenger transport on the lines between Marseilles and Corsica, is likely to have abused its dominant position.

Indeed, the eviction effect of the offer, presented by the SNCM cannot be denied insofar as:

- on the one hand, the resort - at least partial- to the company cannot be avoided by the public authority, the other competitors failing to propose global offers for all the lines;
- on the other hand, the refusal by SNCM to engage firmly on the requested amount of the subsidy for each line, prevents the office from the possibility to compare the results of the bid.

The combination of these two factors may leave the authority with no other choice than the SNCM to provide the delegated public service, or not cover all the service.

In this context, the signature of the public service delegation contract in such conditions may cause a direct prejudice to the consumers' interests and to the sector's economy

The current public service contract falls due on December 31st 2006 and the signature of the renewal contract is pending.
The act of allocating a public service delegation for six years at the term of a distorted bid for tender, which would not guarantee an appropriate economic choice to the delegating authority and thus to Corsica taxpayers, who pay for the subsidy, constitutes a serious and immediate infringement. This results from the hardly reversible nature of the delegation contract, which could be signed and thus would hinder the useful effect of opening the delegation to competition.

That is the reason why, in order to guarantee the actual bidding conditions within the time allowed by the current bidding programme, the Conseil de la concurrence pronounced two interim measures against the SNCM

The Conseil de la concurrence charged the SNCM to :

- · "within 48 hours following the notification of the decision :
  - firstly, indicate the OTC (Corsica transports office) the exact amount of the subsidy, on which it commits itself for each line in its proposed offer;
  - secondly, accept, within the same 48 hours, any request from the office enabling the latter to evaluate the requested amount, for bulk offers, which it wishes to examine;
  - thirdly, indicate explicitly to the office that it is neither opposed to an examination by the office, under conditions ensuring the actual respect of an equal treatment between the various bidders, of its global offer or by line, according to criteria, which the office intends to use, nor to the possibility of partially allocating the delegation at the end of the examination;

- · "refrain from signing any contract project which would be proposed to it by a new public service delegation relative to Corsica shipping service from Marseilles as long as it has not proved, by letter sent to the Conseil de la concurrence's procedural office, that it has executed the injunction

pronounced [...] above."

> Decision 06-MC-03 of 11 December 2006, relative to requests for interim measures in the sectors of shipping transport Corsica and the continent



> See decision of the Paris Court of Appeal (6th February 2007)