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A remarkable case of the Spanish competition authority vs. the collecting society SGAE, settled without penalty.

Pablo Hernández · Thursday, October 8th, 2015

Introduction

9 July 2015 saw the resolution of the umpteenth case involving Spain's National Commission for Markets and Competition (CNMC) versus a Spanish collecting society (judgment here). On this occasion, the society was SGAE, responsible for managing music copyright. The proceedings examined a complaint made by various composers regarding the measures that the society had adopted in order to reduce the dominant use that television channels were making of the repertoire published by the channels themselves. This primary objective of the investigation was then overshadowed by an assessment of the society's agreements with all television operators, both public and private.

During the investigation stage, the competition authority considered that two potential infringements could be perceived, namely, the application of discriminatory tariffs and discounts, and the imposition of abusive conditions by granting certain discounts if the television channels limited use of their own repertoire.

Despite that initial assessment, the competition authority agreed to conclude the case by means of a settlement agreement, applicable in prohibited practices cases where the infringers propose undertakings that settle any competition issues deriving from their conduct, and where public interest is sufficiently guaranteed, as provided in Article 52 of the Spanish Competition Act.

This case raises numerous issues, but two are particularly deserving of comment. The first is linked to the tensions between competition and the duty of collecting societies to avoid unfair, preferential use of users' works, as set out in Article 153.2 of the Spanish Copyright Act. The second refers to the administrative body's discretionary power to decide when to penalise and when to opt for a settlement.

In this article, we will exclusively discuss the settlement aspect, leaving the other aspect for a future article.

Examination of SGAE's conduct with television operators and the undertakings entered into by SGAE

The investigation into SGAE's agreements with broadcasting organisations was aimed at verifying whether discriminatory practices were being applied to users. To that end, the competition authority focused its analysis on two points, namely, uniformity in the terms and conditions of the licences granted and the double-tariff regime offered by the society.

With respect to the first objective of the study, the Commission detected that there were several differences in the wording of the contracts used by the society, specifically three.

First of all, there were differences affecting the definition of concepts such as the television channels' revenue base which the society takes into account for the payment of licensing fees, and which was described with a varying degree of precision or with special features in the different contracts.

The Commission also observed that the contractual provisions enabling the contract to be revised in the event that the society were to suffer a marked drop in the repertoire that it managed were not absolutely uniform.

Lastly, the Commission noticed that the clause referring to the right of licensees to claim the best conditions granted to another user was not worded in the same way in all contracts.

However, those differences in wording did not demonstrably go hand in hand with discriminatory pricing. In fact, the decision itself does not attribute the differences to substantive issues, but rather to the evolution of concepts or wording occurring over the space of more than a decade.

With respect to the tariffs applied by SGAE, the investigation also sought to ascertain whether there had been any discrimination. In that regard, it prepared a summary of the tariff systems applied by SGAE to television channels in the past, drawing a distinction between two types of systems, i.e., the so-called average or availability-based price, and the so-called price for actual use.

The average or availability-based price consists of payment of a percentage of the gross operating income, regardless of how prevalent music is in the television channel's schedule. This system, according to the decision, had been applied for general-interest channels.

Since these tariffs were public and had been offered to all the television channels, the competition authority did not seem to have any problem with this dual tariff system either.

However, following that initial analysis, the investigation looked into whether those tariffs were accompanied by discount policies that led to discriminatory treatment. In that regard, it conducted an analysis of the discounts applied by SGAE and the competition authority presented concerns in relation to two discounts.

Under these circumstances, the collecting society filed a proposal to end the proceedings by entering into the following undertakings:

1. Preparing and publishing a standardised contractual framework document setting out all the conditions applied to television operators;

2. Extending the discounts that SGAE could grant to any television channel to all equivalent operators;

3. Promising to negotiate special treatment to all operators able to justify different objective circumstances. This undertaking goes hand in hand with the obligation to publish all the special conditions agreed upon, as well as the grounds for those conditions;

4. Determining the deduction of the subsidy to be applied by public operators, on the basis that it is intended for non-television services, by means of an objective system based on an auditor's report for sums exceeding three million euros; and

5. Establishing a kind of one-stop shop for examining complaints from those who believe that they have suffered a competitive disadvantage, in respect of which compensation would be awarded, where appropriate. The most noteworthy aspect of this point, and one which merits separate discussion, is the submission of any discrepancies to the CNMC, which would issue a decision in their regard.

In view of these undertakings, the Spanish competition authority decided to accept the collecting society's proposal and terminate the proceedings.

When and why a settlement agreement terminating competition proceedings?

Article 52 of the Spanish Competition Act is the only provision that regulates the process of terminating competition proceedings by means of a settlement agreement. Its wording grants a huge amount of discretion to the competition authority, given that it merely reserves this method for proceedings concerning agreements and prohibited practices, where undertakings remedy the effects on competition generated by the examined conduct, and where the public interest is sufficiently guaranteed.

Despite the risk involved in establishing a guideline in such cases, we can indicate that experience in settlement agreements in the sector of collective rights management points to the fact that the competition authority leans in favour of settlement in all cases that do not present sufficient solidity or conviction for a categorical decision to be issued, as might have occurred in this case. The same favourable tendency occurs where the competition authority finds that the undertakings generate a pro-competition framework that is more interesting than that which would derive from the mere resolution of a particular case.

In any event, the undertakings must obviously provide a solution to the competition problems that have been detected, and they must sufficiently guarantee public interest. In this case, it is easy to see that any effects deriving from SGAE's conduct are resolved, given that SGAE has agreed to comply with some very clear demands regarding the transparency of its contractual terms and conditions, and that it even takes on the responsibility of compensating those who have suffered a disadvantage.

Gauging the general interest is trickier. On occasion, the Spanish authority has identified this with swiftness in finalising a case and with quickly implementing remedies in a situation where competition is restricted. However, in its assessment, it has paid close attention to the fact that the deterrent effect deriving from exercising sanctioning powers should not be damaged, and this has led to it being more adverse to the settlement method the closer it gets to the termination of the case and demonstration of the infringing conduct. In fact, the Competition Act itself prohibits this form of solution once the Commission's investigation body has made its resolution proposal.

It is nevertheless curious that although the recent reform of the Spanish Copyright Act has reinforced the scope of the Copyright Commission, to which the law attributes the power to settle disputes between societies and users, the competition authority has in this case reserved for itself such an important role in order to monitor the society's conduct. Is it acting through jealousy or merely on its duty to keep a close eye on these cases?

A full summary of this case has been published on Kluwer IP Law.

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