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

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Introduction

By 9 July 2013 the investigation of an antitrust case concerning Spain's National Commission for Markets and Competition (CNMC) versus a Spanish collecting society (SGAE) on the grounds of alleged abuse of market power (by SGAE) responsible for managing music rights. The proceedings represented a considerable step by several competitors regarding the measures that the society had adopted in order to reduce the international work that television channels were making of the repertoire published by the channels themselves. This primary objective of the investigation was then undermined by an assessment of the society's activities with respect to treatment, 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 undue discounts to some television channels to the detriment of others.

Despite that initial assessment, the competition authority agreed to consider the case by means of a settlement agreement, applicable in prohibited practices cases where the infringer proposes undertakings that would not only cease any anti-competitive effects deriving from the illegal conduct, but would also rectify the situation during the period of time in which the effects derived from the conduct were ongoing.

The case states numerous issues, but one of particular concern is of the Competition Act itself. The second refers to the administrative body's discretionary power to decide when to proceed and whether to settle for a settlement.

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

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

The investigation into SGAE's agreements with broadcasting organizations was aimed at verifying whether dissent, abuse of market power and anticompetitive practices were being applied in the context of their collective management of music rights. The proceedings examined a complaint made by various television operators, both public and private.

The average or availability-based price consists of payment of a percentage of the gross operating income, regardless of revenue or availability. Its wording grants a huge amount of flexibility to the parties and calls for an interpretation of the contractual terms and conditions.

However, following initial analysis, the investigation looked into whether those tariffs were accompanied by discriminatory treatment. In that regard, it conducted an analysis of the tariffs charged to SGAE's television operators and the undertakings entered into by SGAE.

Lastly, the Commission noticed that the clause referring to the right of licensees to claim the best conditions was not included in the settlement agreement. This was in anticipation of future claims to settle future claims.

Settlement undertakings for non-television services, by means of an objective system based on an auditor's report for sums exceeding three million euros; and

(a) Promising to negotiate special treatment to all operators able to justify different objective circumstances.