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New fine imposed by the Spanish competition authority on national collecting societies

Pablo Hernández · Friday, May 6th, 2016

On 26 November 2015, the [Spanish competition authority](#) imposed a new fine on Spanish collecting societies. This time two organisations were affected, namely, the society that represents record companies (AGEDI) and the society representing music performers (AIE), who operate in their respective sectors without competition.

In the opinion of the Spanish Markets and Competition Commission (CNMC), the two societies were abusing their dominant position by disproportionately increasing fees for remuneration rights charged to radio companies and unjustifiably discriminating against broadcasting organisations competing in the market.

The doctrine deployed by the Commission in this case echoes previous findings on collecting fees, but its interest lies in the way in which the Commission tackles the case –taking on the role of supervisory body- and in the nuances that it adds to past findings, which are no doubt due to the recent reform of the Spanish Copyright Act and its new collecting society fees system.

In this case, as is customary in matters concerning tariffs for broadcasting organisations, AGEDI's/AIE's general fees oblige radio stations to pay a percentage of their operating income but with a series of minimum amounts in the event that the result of applying the percentage is lower than those thresholds.

These are the conditions that AGEDI/AIE applied to private radio stations by virtue of an agreement signed with the Spanish Commercial Radio Broadcasting Association (AERC) in 2006. The agreement was subject to a complaint by AGEDI/AIE in 2009, in which the collecting societies clearly sought to increase their licence fees. To that end, the collecting societies had commissioned a study entitled “*El valor de la música en la radio en España*” (The Value of Music on the Radio in Spain) from a financial consultancy firm, which attempted to demonstrate that music contributed a value that by far exceeded the sums paid by the radio stations. As explained in the decision, the study reproduced the economic model applied in Canada by professors Paul Audley and Marcel Boyer, commissioned by the Neighbouring Rights Collective of Canada (NRCC). The study furthermore contained a comparative analysis of similar European tariffs for the purpose of explaining that the price paid in Spain was among the lowest paid by radio stations in a great many EU countries.

AGEDI's/AIE's claim obviously met with firm opposition by the private radio stations, who saw

no reason for a price increase if the services that they received remained the same.

This failure to reach an agreement with the private radio stations was not, however, repeated in the negotiations between AGEDI/AIE and the public radio stations. In fact, those stations, grouped together into the association known as “FORTA”, signed an agreement in 2012, effective as of 2009, although it seems that the fees increase was not genuine.

The agreement entailed a considerable increase in the percentages that public radio stations had to pay on their revenue compared with previous tariffs. It should nevertheless be pointed out that the considerable increase in percentage was substantially balanced out by the introduction of a public service deduction which meant that 35% of all subsidies received by the radio stations and 10% of advertising revenue did not form part of the calculation basis. The agreement also provided for additional bonuses potentially amounting to 21%, with the most significant being 13%, for being part of the FORTA association.

What increase did this new fees system imply for private radio stations?

The competition authority analysed the change in tariffs and deduced from it that the application of the same to the private radio stations would result in increases ranging from 57.69% for the stations that played the least music to 194% for those which were essentially music-based.

The Directorate-General for Competition considered that AGEDI’s/AIE’s conduct constituted abuse of its dominant position due to the fact that it fixed inequitable tariffs and also because it was discriminatory with respect to radio stations.

In the competition authority’s view, the unlawful conduct was two-fold.

The first infringing act derived from the implementation of a discriminatory fees policy in respect of two groups: (i) independent radio stations; and (ii) private radio stations forming part of the AERC.

(i) The first act of discrimination derives from the establishment of worse conditions for independent broadcasters compared with those established for associated broadcasters. The general tariff charged by collecting societies, applicable to broadcasters that cannot claim the fees agreed with an association, is considerably less favourable: for example, the calculation basis is higher, there is no scale of fees for levels of music use, the broadcasters do not have the option of enjoying discounts and the minimum rates are considerably higher. All of this reveals clear discrimination towards broadcasters that do not belong to associations.

(ii) The second discriminatory act arises from the different treatment applied to the public radio stations associated with FORTA and the private stations grouped together in AERC. The Commission observed that the final result of the tariff applied to public radio stations, which has a higher rate but a base containing deductions, leads, in practice, to payment of a lower percentage by the public radio stations. In this regard, the CNMC takes its previous line, concerned by the final outcome and inattentive to formal finesse.

The second form of conduct denounced by the competition authority derives from abuse of a dominant market position by the imposition of inequitable tariffs, and consists of attempting to impose a considerable price increase that was not economically justified. The CNMC’s analysis is also in keeping with its doctrine in previous cases concerning fee increases by collecting societies.

The first one dates back to 1987 (Case 230/87) when the largest of those societies raised its fees for large retail establishments, but there have been numerous similar cases. Nevertheless, even though the doctrine is uniform, it is striking that in this case the Commission makes its findings on the basis of the increase introduced in the agreement signed by the collecting societies and a broadcasters association (FORTA) which, in principle, was executed voluntarily. Perhaps it would have been easier to explain if the same conclusion had been reached but on the subject matter of the complaint, the attempt to apply fee increases to private broadcasters regardless of their presence in an agreement with the other association.

With respect to the abuse carried out on account of the fee increase, the decision anchors its doctrine, as on other occasions, in the Court of Justice's findings, which require companies holding a dominant position to charge prices that have a "reasonable relation to the economic value of the product or service supplied" (General Motors, [C-26/75](#), and United Brands, [C-27/76](#)).

The doctrine on fee increases is nothing new, and it had already been established by the former Spanish Competition Tribunal when the largest collecting society, in a case very similar to this one, increased both the base payment and its percentage rate (Decision of 7 July 1991).

What is new in this case is the fact that the collecting societies concerned here are basing their arguments on an economic model drawn up by a reputed consultancy firm and an analysis of international tariffs that, according to them, demonstrate that the Spanish tariff was among the lowest in Europe.

A [full summary](#) of this case has been published on [Kluwer IP Law](#)

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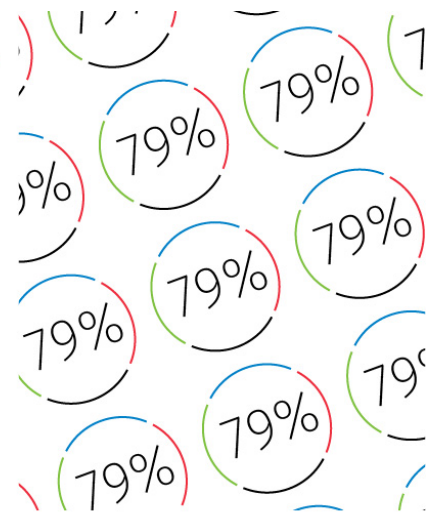
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