

CALLOL LAW

The E-Books case

A few (outsider) reflections

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Overview

- Amazon
- Resale price maintenance in the sale of books

EU
Commission
case

European Commission's preliminary view is that

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- The objective of the concerted practice between and amongst the four publishers was to **raise the retail prices of e-books** or prevent the emergence of lower retail prices for e-books in the EEA
- In order to achieve the above objective on a global basis, including the EEA, the four publishers and Apple **jointly converted the sale of e-books from a wholesale model to an agency model with the same key terms**

Apple first considered entering into a worldwide cartel with Amazon to split up the e-books market

**A few
additional
facts**

02

- Amazon filed claim against Apple and Four Publishers in the US
- Amazon cares about selling kindle and reinforcing its position in the E-books (and indeed, books) market
- The fight is about controlling the main elements of the publishing industry and, ultimately, its pricing
- In January 2010 Amazon met with prominent authors in NY to explain its plans to become a digital publisher
- **31 percent of Amazon e-book sales are Amazon published books**
- **40 percent of newly published books in the US** are through Amazon
- **60 percent of e-book sales in the US** are currently taking place through Amazon
- **50 percent of book sales** (not e-Books, but books) in the US are carried out through Amazon

**A few
additional
facts (ii)**

02

- Amazon's US\$9.99 price for new releases and best sellers is apparently not a money maker. **Amazon does not care to sell at a loss.** Amazon's concerns appear to be more strategic
- All of the above has formed the basis for suggestions in the US that Amazon is incurring in predatory pricing strategies
- It seems very **difficult** to make a case of predatory pricing in this case
 - Promotional discounts argument: **however** e-readers have been around for a while, moreover Amazon's low pricing seems "permanent"
 - Difficulty of proving below variable cost sales also taking into account that Amazon is multiproduct company
 - Recoupment: can be **through other products**, even if Amazon keeps losing money in e-books, it can recover any losses by selling other products to e-books consumers it has attracted

**A few
additional
facts (iii)**

02

- Predatory pricing should be treated as harmful to the economy when it forces profitable firms that could otherwise discipline the dominant operator, to exit the market
- In a case like this, even an **appearance of predatory pricing may have a deterrent effect on new entry**. Apple contended that under Amazon's US\$ 9.99 pricing regime it would not enter ibooks market
- The attack of the Authorities on the publishing cartel has been considered to be one-sided by some commentators

**Agency/RPM
related
defenses**

03

- Agency as a business model which has **facilitated entry**:
 - Apple contended on the first place that the agency model was procompetitive because it was a driver of entry: Apple would have never got into the e-book market on the first place because of Amazon's very low pricing strategy
 - Amazon: 90 percent share of the ibooks market prior to Apple's entry
 - If evidenced, this would be a powerful argument under competition law because the model would make it possible to break Amazon's monopoly
- Clearly the issue is that of concerted practice and neither the US nor the EU cases explore any objective justifications, rule or reason or Article 101.3 related defences
- However, DOJ settlements in the US:
 - In two of the settlements, DOJ agrees that purely bilaterally negotiated agency agreements will not be challenged (although the two year restriction to enter into any restrictions on retailers to discounting)
 - Publishers can enter into agreements with Amazon providing that Amazon can sell individual titles at a loss if Amazon can show a profit for all of the e-books it sells from that particular publisher's catalogue

**Agency/RPM
related
defenses (ii)**

- In the US, therefore, agency and possibly resale price maintenance look like a possibility provided they are not the result of a concerted practice

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- Under US law RPM is a possibility at least under some circumstances under the *Leegin Creative Leather Products Inc., v. PSKS, Inc.* case where the US Supreme Court overturned the *Dr. Miles* case law
 - RPM may have negative implications
 - Facilitate cartels at the manufacturer and retail level
 - Forestall competition from innovative dealers
 - RPM may also
 - Provide incentives at distribution level
 - Promote non-price competition
 - Avoid free-riding
- RPM to be judged under the **rule of reason**

**Resale price
maintenance
of books in
the EU**

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- The agency model (or at least RPM) has been the dominant form of book marketing in Europe under two modalities, national laws and trade agreements
- National legislation ordering or allowing RPM (Judgment of 10 Jan. 1985, *Leclerc*, C-229/83)
- The Commission has challenged *agreements* as long as they could affect inter-State trade:
 - ECJ Judgment of 17 January 1984, *VBVB/VBBB*, C-43/82
 - 2002: the Commission accepted a German system between publishers and dealers to fix prices, provided books for export were not included in the deal. Reimportation could be on RPM terms only if it could be proved that it was a device to circumvent the fixed price. Cross-border sales of any kind: no RPM
 - Traditional justifications for RPM include the protection of diversity (with RPM it is arguably possible to market both best sellers and minority books – cross-subsidisation argument)

PEDRO CALLOL

Qualified English Solicitor (currently non-practising) and **Abogado** admitted to the Madrid Bar; he has twenty years of antitrust, trade regulation and specialist litigation experience and he regularly advises some of his clients on commercial law matters. Previously (2009-2014) a corporate partner leading the **EU & competition practice of one of Spain's larger law firms**. Before that (2002-2009) he created and led the **EU & competition practice of a London 'magic circle'** law firm in Spain. Prior to that he worked with **Arnold & Porter** in Washington, D.C. and London (1999-2002), and before that he trained with some of Spain's best practitioners in Madrid and Brussels. Law Degree **Universidad Complutense** and Business degree **San Pablo University** (Madrid). Law graduate, **University of Chicago Law School (Fulbright – Banco Santander scholar)**. Master in European law, **College of Europe, Bruges** (sponsored by the Spanish Ministry of Foreign Affairs).

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Pedro has premier **administrative and antitrust litigation experience** on behalf of Spanish and multinational companies in various sectors (including antitrust investigations and litigation for companies such as first division **football clubs, television broadcasters, various Hollywood majors, heavy industry companies and various airlines**), cartel investigations in consumer goods, cosmetics, automobile, chemical or recycling sectors. He has successfully advised in the **Barcelona harbor and food (FIAB and food associations)** cartels in Spain. He has experience in **licensing issues and mergers with a key regulatory component** (e.g., (i) acquisition of the **VoIP business of JaJah.com by Telefonica/O2**; (ii) acquisition of **Spanair**, Spain's number 2 airline); (iii) **Endesa** takeover offer). He has led one of the very first leniency related proceedings in Spain and has had a leading role in the successful result in the **ONO v. Sogecable and Hollywood majors** case. He has specific experience in **antitrust damages litigation** – cases include: (i) **Sogecable** football rights excessive pricing case, advising on the successful claim brought by a large cable operator, ONO; (ii) advising **Telenium**, an IP TV services company in a successful claim against outsourcing multinational companies; (iii) advising a **well-known gaming company** on an antitrust damages claim; (iv) advising on a damages claim coming out of a European Commission Decision in the chemical sector (acting for the defendant).

He was (twice) acknowledged at the time as one of the **"top 40 under 40"** by Iberian Lawyer and he is a specialist currently recognized by **Global Competition Review, Chambers, plc Which Lawyer, Best Lawyers, Legal 500** and one of the top **communications and media lawyers** according to **Who is Who Legal** in the last two editions. He is author of several specialist publications and is the **Spanish correspondent of the European Competition Law Review**. Board Member of the **Fulbright Alumni Association in Spain** and Secretary of the Board of **University of the Chicago Alumni Association of Spain**. Member of the **Advisory Board of the American Antitrust Institute** in Washington, DC. He reads specialist seminars in the **Carlos III and San Pablo Law Schools** and regularly speaks on other academic and business venues including the ABA, IBA and UIA.

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Questions?

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