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01 In a landmark ruling, the Spanish Supreme Court has ordered the payment of a compensation for antitrust damages to several candy manufacturers (Judgment of 7 November 2013).

The sugar "cartel"

In a decision of 15 April 1999, the Spanish Competition Authority declared the existence of a price fixing cartel affecting sugar for industrial use, active from February 1995 to September 1996, thus imposing fines totaling € 87.5 million on a number of sugar manufacturers.

Several companies that had purchased sugar for industrial use from the fined companies decided to bring damages actions, claiming losses as a result of the conduct held illegal by the Competition Authority.

Judgment of 7 November 2013

The Judgment of 7 November 2013 arises from a claim submitted before the Madrid Court of First Instance by a number of sugar purchasers against their provider. The Court partially granted the application. Subsequently on

appeal, the Appeals Court allowed the appeal submitted by the defendant and annulled the damages verdict. Finally, on a subsequent appeal, the Spanish Supreme Court (**TS**) ordered Ebro Foods (a sugar manufacturer) to compensate the fourteen candy manufacturers with € 4.1 million for the anticompetitive effects of a cartel.

"Passing on" defense

In the proceedings the defendant invoked that the candy manufacturers had passed on the increase in sugar prices to their customers ("passing on" defense). The TS recognized in its judgment the possibility of invoking this defense, indicating that the burden of proof remains on the defendant.

Additionally, the TS states that the candy manufacturers may also have been harmed by the decrease of their sales and market shares due to the resulting increases in end prices. This would make candy manufacturers less competitive and prevent them from effectively recovering the damage caused by the price increase of the intermediate product (*i.e.* sugar).

This judgment has been much applauded. It contains principles concurring with those of the EU Directive on antitrust damages and it constitutes an important precedent of damages resulting from a cartel case.

02 The National Markets and Competition Commission ends proceedings against Telefónica, Vodafone and Orange for an alleged abuse of collective dominant position (Decision 6 March 2014, Case *Llamadas Moviles*, file S/0391/11).

In 2012, due to a complaint of British Telecommunications and its Spanish subsidiary (**BT**), the Directorate of Investigation (**DI**) initiated disciplinary proceedings against Telefónica, Vodafone and Orange for an alleged margin squeeze in the market for wholesale voice call origination services.

BT claimed that Telefónica, Vodafone and Orange had consistently narrowed the operating margins for Mobile Virtual Network Operators (**MVNO's**) when setting the prices for (i) wholesale voice call origination services, (ii) call termination services in their national mobile telephone networks, and (iii) retail prices for mobile call services.

According to the DI, in order to determine the existence of margin squeeze, the equally efficient operator test should be applied. The test entails assessing whether a hypothetical competitor with the same costs as Telefónica, Vodafone and Orange and active in the downstream retail market could be profitable, taking into account the retail and wholesale prices applied by Telefónica, Vodafone and Orange. The application of the test resulted in negative margins; therefore, the DI initially concluded that an alleged margin squeeze took place.

However, as evidenced by the accused companies, the equally efficient operator test is not applicable to abuse of collective dominant position cases unless it can be evidenced that, regardless of the wholesale offer adopted by the MVNO, the end result would invariably be price squeeze. In other words, in its assessment, the DI omitted the fact that the MVNO may change their host operator in order to configure a viable offer. That factor needs to be taken into account to determine whether the margin squeeze could or could not have had exclusionary effect.

In the particular facts of the case, the National Markets and Competition Commission Council concluded that there was no evidence regarding the existence of exclusionary effects produced by the margin squeeze.

03 The National Markets and Competition Commission has fined the Regional Association of Travel Agents of Santa Cruz de Tenerife and several taxi driver associations for fixing the prices of pre-booked taxis (Decision 24 March 2014, Case *Taxis Tenerife Sacan*, file S/0018/12).

In its Decision of 24 March 2014, the National Markets and Competition Commission (**NMCC**) Council found that, from 2006 until 2012 the Association of Travel Agents of Santa Cruz de Tenerife(**APAV**) and several taxi driver associations have been fixing prices for specific journeys on the taxi's service.

Although maximum fares of taxi services are fixed by the regional government of the Canary Islands, drivers have some margin to apply discounts over the maximum fares concerning the taxi "a la carte" special service. According to the Council, the associations prevented any competition when it comes to the mentioned special services. The conduct constituted a single and continuous infringement of Article 1 of the Spanish Competition Act.

Hence, the NMCC has fined APAV € 901,550.67 and the taxi driver associations € 180,999.3. The later fine will then be individualized on the basis of the proportional estimated returns of the taxi licences held by each association.

04 The National Markets and Competition Commission publishes its strategic plan.

In late June the National Markets and Competition Commission (**NMCC**) published its definitive strategic plan, which has been approved by the Parliamentary Committee for Economy and Competitiveness. The document was previously subject to public consultation. In summary, the document contains a number of principles, some of them obvious, some of them of rather general or programmatic nature, often general declarations or expressions of intent. The focus on the fight against cartels probably stands out as one of the few meaningful mentions, at a moment where the CNMC is particularly little active in that field (where, until recently, was one of the most active competition authorities in Europe).

The NMCC came into operation on 7 October 2013, as a result of the integration of five regulatory agencies: telecoms, energy, postal, transportation (railways and airport) and the Competition Authority. (We published a paper on this "merger of regulators" with the European Competition Law Review a few months ago – please get it touch with us for more details). The implementation of the NMCC requires major organizational challenges that must be overcome to ensure the efficient functioning of the Institution.

The strategic plan includes a total of sixteen actions which the NMCC is set to implement to safeguard the *"proper functioning of all markets in the interests of citizens and companies*".

The NMCC is a superregulator that concentrates massive regulatory and enforcement powers. Hence, it is rather comforting (the facts will confirm how credible) that the NMCC reminds that it will act in an independent and transparent manner, guided exclusively by the general interest which resides in the optimal functioning of the markets. The document uses the words "reputation" and "credibility", which sound terrific. The NMCC also proclaims that the integration of agencies will enable a more integrated problem solving – this also sounds terrific in principle, although the document does not really explain what it means.

The action plan proposes, amongst others, the following actions:

(1) The NMCC will assess issues in an integrated manner with a view to optimizing competition and efficiency of the regulatory approach. Any action will be backed by a legal and economic report.

(2) The NMCC states that it will at all times separate between investigation and decision. This is, again, comforting in the current state of affairs in view of the most recent case law of the European Court of Human Rights on the issue.

(3) The NMCC will reinforce the prosecution of the most damaging practices, particularly cartels and will establish another action plan in this regard.

(4) The NMCC pursues a policy of excellence in the recruitment and promotion of its staff, and the optimal use of its resources.

(5) The NMCC will review the competitiveness of the markets subject to regulation. It will carry out a policy of sector studies and reports of markets and sectors where it intends to focus its activity. It will also liaise with

the public administrations with a view to promoting efficient economic regulation and prevent market distortions.

(6) The NMCC declares it will give thrust to its *locus standi* to request courts to review regulations which may fragment the market or affect competition (under the Competition Act, the NMCC has this extraordinary *ex lege locus standi*).

(7) The NMCC will increase its participation in the European Union and international fora, with a view to contributing to the improvement of the international regulatory environment. It will also work towards improving the network of competition authorities with the other regional authorities in Spain as well as with the members of the European Competition Network and other agencies internationally.

A review of this plan will be carried out annually.

05 The National Markets and Competition Commission has fined several manufacturers of fire-fighting equipment for being involved in a cartel (Decision of 26 June 2014, Case *Fire-Fighting Equipment* S/0445/12).

The National Markets and Competition Commission (NMCC) imposed fines totaling € 2.13 million on six companies operating in the market of fire-fighting equipment for price-fixing and market-sharing agreements.

The NMCC initiated investigations on the basis of a leniency application by one of the companies involved in the cartel. As a result of the information provided on the framework of the leniency application, some dawn raids were conducted in the offices of several companies involved in the alleged cartel.

According to the NMCC Council, the conduct constituted a single and continuous infringement of Article 1 of the Spanish Competition Act between January 2010 and January 2012. The NMCC has remarked in its decision that not all companies were involved through all the period and played the same role in the offense.

Thus, the NMCC has considered that the cartel was initiated by three of the companies. These three companies have also led the cartel and forced the remaining companies to join the cartel by threatening them to be driven out of the market. Therefore, the NMCC Council has had this fact into account when setting the fines for each of the participating companies.

The NMCC granted TODOEXTINTOR, S.L. immunity from the imposed fine for disclosing its participation in the analysed cartel and being the first company providing evidence for the development of the investigation.

06 The National Markets and Competition Commission has fined Endesa Distribución Eléctrica S.A. for abuse of dominant position (Decision of 21 July 2014).

The National Markets and Competition Commission (NMCC) has fined Endesa Distribución Eléctrica S.A. (ENDESA) (€ 1.18 million) for abusing its dominant position on the electric installations market reserved to distributors, between 2009 and 2012.

In particular, the abuse has consisted on an undue collection from the implementation of installations for extension of the network. This practice took place in cases where there was a regulatory obligation upon the distribution company to assume the implementation of the installations charging only the extension rights in force. However, the investigation showed that over a specific period the distributor charged customers for this work, which has been considered by the CNC Council as an exploitative abuse.

The investigation was initiated as a result of various claims against ENDESA in relation with the applicable regulation in force for certain installations of new extension network, in particular Balearic Islands and Andalucía. According to the NMCC, ENDESA is considered a monopolistic distributor and, benefitting from its privileged position, it has arbitrarily applied the sectorial regulation to pursue its own interest.

The company has already been fined in two previous proceedings for an abuse of dominant position on the electrical installations market (Expt. 606/05 and S/0211/09). Therefore, the NMCC has applied an additional 10% of the affected turnover when setting the fine (recividism).

This is not the first time that the Spanish Competition Authority has imposed fines for conduct of this kind. In 2011, the distributors in E.On, Gas Natural Fenosa and Hidrocantánbrico groups were fined for similar conduct, as was ENDESA itself for similar conduct.

07 The National Markets and Competition Commission obliges the Spanish Football Federation to comply with the principles of transparency, objectivity and non-discrimination in the bidding for the broadcasting rights concerning the final of the King's Cup Final and the Spanish Super Cup (Decision of 30 July 2014).

According to the CNMC, the acquisition of the exclusive rights of the regular Spanish football competitions must be the most extensive and transparent possible. In particular, Article 21 of the Media Act states that the acquisition procedure of the broadcasting football rights must be carried out through an open, transparent and non-discriminatory procedure in order to ensure equal conditions to all potential acquirers.

Therefore, the CNMC has compelled the Spanish Football Federation to comply with these principles for the acquisition of broadcasting rights related to the King's Cup Final and the Spanish Super Cup. This is without prejudice of the action that the NMCC may exercises to ensure the effective compliance of the mentioned regulations.

Moreover, this is not the first time that the NMCC is dealing with the acquisition of broadcasting rights in football competitions. In particular, in December 2013, the NMCC imposed fines totalling € 15 million on Mediapro and several football clubs including Real Madrid and Barcelona, for failing to comply with the decision of 14 April 2010 on the acquisition of broadcasting rights in football competitions. On its 2010 Decision, the NMCC prohibited the signature of different contracts for the acquisition of broadcasting rights in football competitions with a duration of more than three seasons.

08 The General Court of the European Union confirms the Commission's 2009 Decision against Intel (Judgment 12 June 2014, Case T-286/09).

The General Court of the European Union (**GC**) judgment of 12 June 2014 has confirmed the record € 1.06 billion fine imposed on Intel by the Commission Decision in 2009. According to the Commission, Intel had abused its dominant position in the x86 CPUs market (*i.e.* essentially, the market for computer chips) in order to drive competitors out of the market, in particular AMD.

The Commission stated that Intel was engaged in two types of abusive measures:

(i) Granting "exclusivity rebates" to four computer manufacturers (HP, Dell, Lenovo, NEC) with the condition to purchase all (or almost all) of their x86 CPUs from Intel, and the payments to Media Markt (downstream computer retailer), which were conditional on those manufacturers selling only computers with Intel's x86 CPUs, and

(ii) "Naked restrictions", *i.e.* direct payments made to three computer manufacturers (Acer, HP and Lenovo) to cancel, delay or limit the commercial launch of specific products incorporating chips with AMD CPUs.

Regarding exclusivity rebates, the GC held that this kind of practices, granted by a dominant undertaking, may restrict competition by their nature since the aim is to remove the purchaser's opportunity to choose its source of supply and to prevent other manufacturers from accessing the market.

The GC found that it is not necessary to examine, by means of the "as efficient competitor test", whether the Commission correctly assessed the ability of the rebates to foreclose a competitor as efficient as Intel.

Moreover, regarding the naked restrictions, the GC found that Intel was seeking an anticompetitive object with these practices. In particular, the GC considered that the only interest that a dominant undertaking may have in preventing, in a targeted manner, the marketing of products equipped with a product of a specific competitor is to harm that competitor. Therefore, the GC found that such practices clearly fall outside the scope of competition on the merits, resulting in an abuse of a dominant position, since the objective was to hinder AMD access to the market.

Finally, the GC considered that none of the arguments raised by Intel supported the conclusion that the fine imposed is disproportionate. On the contrary, the GC found that the amount of the fine is appropriate in the light of the facts of the case. The General Court states, inter alia, that the Commission set the proportion of the value of sales, determined on the basis of the gravity of the infringement, at 5%, which is at the lower end of the scale which can go up to 30%. Moreover, the fine is equivalent to 4.15% of Intel's annual turnover, which is well below the 10% ceiling provided for.

09 The Court of Justice confirms the general principle that "umbrella pricing" victims may obtain compensation from the members of a cartel even if there is no contractual relationship with them (Judgment 5 June 2014, Case C-557/12).

Facts of the case before the Austrian civil courts

In 2007, both the Commission and the Austrian Competition Authority imposed fines upon several companies (including Kone, Otis and Schindler) for cartels related to the installation and maintenance of elevators and escalators in Belgium, Germany, Luxembourg, Netherlands and Austria. The cartel sought to guarantee for its members a price higher than that which they could have expected under normal competitive conditions.

ÖBB-Infrastruktur AG (**ÖBB**), a subsidiary of Austrian Federal Railways in charge of the construction and maintenance of railway stations, bought elevators and escalators from the cartelists and also from undertakings that were not party to the cartel mentioned above. In addition to the damages related to the contractual relationship with the members of the cartel, ÖBB also claims from them a €1.8 million compensation for the alleged loss sustained as a result of ÖBB's non-cartelist suppliers setting a price higher than that which would have been achievable, had the cartel not existed (*i.e.* "umbrella pricing"). The term "umbrella pricing" refers to the situation where companies that are not members of a cartel use the cartel as an umbrella to set their own prices higher than they would have been able to under effective competition, intentionally or unintentionally.

The Austrian first instance civil court that heard the case rejected any compensation on the basis that under Austrian law, compensation is not possible since the loss was caused by an independent decision of a supplier that was not party to the cartel and was acting lawfully. Therefore, Austrian law categorically excludes a right to compensation in cases of umbrella pricing since the causal link between the loss sustained and the cartel in question is considered to have been broken by autonomous decision of the third party to set its umbrella prices. However, the appellate court upheld ÖBB's claim.

In the last instance, the Oberster Gerichtshof (Supreme Court) referred the following question to the Court of Justice for a preliminary ruling: *"Is Article 101 TFUE (Article 81 EC, Article 85 of the EC Treaty) to be interpreted as meaning that any person may claim from members of a cartel damages also for the loss which he has been caused by a person not party to the cartel who, benefiting from the protection of the increased market prices, raises his own prices for his products more than he would have done without the cartel (umbrella pricing), so that the principle of effectiveness laid down by the Court requires the grant of a claim under national law?"*[1]

[1] Judgment of the European Court of Justice of 5 June 2014, Case C-557/12 *Kone AG and others v ÖBB-Infrastruktur AG*.Para. 17.

Findings of the Court

The Court has found that the effectiveness of Article 101 TFEU would be in jeopardy if the right of any individual to claim damages related to an antitrust infringement were categorically subject by domestic law to the existence of a direct causal link. Therefore, according to the Court of Justice, the absence of a contractual link with the members of the cartel should not bar claiming damages from them.

On the umbrella pricing, the Court pointed out that: *"market price is one of the main factors taken in consideration by an undertaking when it determines the price at which it will offer its goods or services. Where a cartel manages to maintain artificially high prices for particular goods and certain conditions are met, relating, in particular, to the nature of the goods or the size of the market covered by that cartel, it cannot be ruled out that a competing undertaking, outside the cartel in question, might choose to set the price of its offer at an amount higher than it would have chosen under normal conditions of competition, that is in the absence of a cartel."*[2]

Consequently, the Court of Justice concludes that the victim of umbrella pricing may obtain compensation for the loss caused by the members of the cartel, even if it did not have contractual links with them where two conditions are met, in particular that (a) it is established that the cartel at issue was liable to have the effect of umbrella pricing being applied by third parties acting independently, and (b) that those circumstances and specific aspects could not be ignored by the members of that cartel. The Court of Justice concluded that it is for the domestic courts to establish whether those conditions are satisfied.[3]

Comment

Cartelists must now be prepared for claimants in follow on damage actions seeking not only compensation for the damages suffered from the cartelists but also for such loss suffered due to price setting of third parties, which might have followed the price initiative taken by the cartel.

However, in practice umbrella pricing victims may face, in our view, overwhelming hurdles when it comes to proving before the relevant national civil courts that the stringent test established by the Court of Justice is met.

In any event, the ruling is conceptually a clear development for the private application of competition rules in cartel cases.

10 The European Commission adopts a revamped *De Minimis* Notice and an accompanying Staff Working Paper providing guidance on restrictions of competition by object.

On 25 June 2014 the Commission has published a new *De Minimis* Notice (**2014Notice**),[4] which includes a revised set of rules for evaluating whether or not minor agreements between undertakings are caught by the general prohibition of anticompetitive agreements.

Agreements below the market share thresholds established in the2014 Notice will not be investigated by the Commission. Also, where an agreement exceeds the thresholds and an investigation has been triggered, the Commission will not impose fines if the undertakings involved are able to show that they have assumed in good faith that the thresholds were not met.

Two main reasons have been brought up by the Commission to revise the now superseded 2001 Notice. First, the Notice reflects the findings of the Court of Justice in its ruling in the *Expedia* case:[5] the Court clarified that

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2 Cited.Para.29.

3 Cited.Para.34.

4 Communication from the Commission. Notice on agreements of minor importance which do not appreciably restrict competition under Article 101(1) of the Treaty on the Functioning of the European Union.

anticompetitive agreements by object cannot be considered as minor, since they have by definition an appreciable impact on competition. Second, the Commission found it necessary to ensure full consistency with other EU antitrust rules and guidelines adopted after 2001 (in particular the 2010 Vertical and Horizontal Block Exemption Regulations), which are cross referenced in the 2014 Notice.

The 2014 Notice introduces a few novelties when compared with the 2001 Notice, which principles have been largely preserved.

The market share thresholds, which remain unchanged, are as follows:[6]

(i) Agreements between actual or potential competitors benefit from the safe harbor provided that the aggregate market share held by the parties to the agreement does not exceed 10 % on any of the markets affected by the particular agreement.

(ii) Regarding agreements between undertakings that operate at different levels of the supply chain (like most distribution agreements) the market share for benefitting from the safe harbor is 15 %.

The Commission now clarifies that any agreement having an anticompetitive object is disqualified from benefiting of the Notice's safe harbors (in line with the opinion of the Court of Justice in *Expedia*, as mentioned above). On that regard, the Commission has also published a Staff Working Document setting out which restrictions of competition have been considered restrictions by object by the Commission and EU Courts to date. The Working Paper does not introduce any novelties, but constitutes a useful document for quick reference.

(i) With regard to restrictions by object commonly encountered in agreements between competitors, the Commission obviously lists price fixing, market sharing, output restrictions or bid rigging as restrictions by object. Other, perhaps less evident for the general public, restrictions are also mentioned (collective boycotts, information sharing, restrictions on R&D and restraints from using own technology).

(ii) Regarding common restrictions by object in agreements between non competing companies, the Commission mentions resale price maintenance as well as sales restrictions on buyers or licensees, and sales restrictions upon the buyer.

Although the 2014 Notice is not binding upon national competition authorities and national courts, it is intended to provide guidance to those authorities and courts on the application of EU competition rules.

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[5] Judgment of the European Court of Justice of 13 December 2012, Case C-226/11, *Expedia Inc. v Autorité de la concurrence and Others*.

[6] Two considerations should be taken into account: (a) if in a relevant market competition is restricted by the cumulative effect of agreements entered into by different suppliers or distributors, the market share thresholds are reduced to 5% (both for agreements between competitors and for agreements between non-competitors); (b) an agreement is still to be considered *de minimis* if the market shares of the parties to the agreement do not exceed the thresholds during two successive calendar years by more than 2 %.

**The information contained in this bulletin must not be applied to particular cases without prior legal advice.*