GÓMEZ-ACEBO & POMBO

Brussels GA&P

Gómez-Acebo & Pombo, Brussels

July 2014

— News —

Antitrust

The Spanish competition authority fines several fire extinguishing equipment manufacturers over EUR 2 million for operating a cartel.

The Spanish *Comisión Nacional de los Mercados y la Competencia* (CNMC) has imposed a 2.13 million EUR fine to six companies active in the market for fire extinguishing equipment for entering into price fixing and market sharing agreements from 2010 to 2012.

The investigation was initiated following a leniency application submitted by one of the cartel participants (TODOEXTINTOR S.L.) on 26 July 2012. Subsequently, several dawn raids were carried out in the headquarters of the affected companies, which led to the opening of infringement procedures.

According to the CNMC, the cartel was initiated by three of the companies which then exerted pressure on the remaining three to join in. As a result, the amount of the fine imposed on the first three companies has been increased taking into account their role of leaders or instigators of the cartel as an aggravating circumstance.

The Spanish competition authority opens proceedings against Repsol, Cepsa and BP for breach of a decision adopted by the authority.

On 30 July 2009, the Spanish CNMC declared that Repsol, Cepsa, and BP had indirectly fixed prices for retail sales to independent gas stations owners operating under their brand.

Later, on 20 December 2013, the CNMC declared that Repsol, Cepsa and BP had failed to comply with the CNMC's 2009 decision and has initiated disciplinary procedures in order to evaluate if such a breach constituted an actual infringement of the Spanish Competition Act.

A six-month period is now open for the CNMC to handle and decide on the cases.

A new pay-for-delay episode in the pharma sector: Servier and five generic companies are fined for curbing entry of cheaper versions of cardiovascular medicine.

The European Commission has imposed fines totalling EUR 427.7 million on the French pharmaceutical company Servier and five producers of generic medicines – Niche/Unichem, Matrix (now part of Mylan), Teva, Krka and Lupin – for concluding a series of deals aimed at protecting Servier's bestselling blood pressure medicine, Perindopril, from price competition by generics in the EU. Through a technology acquisition and a series of patent settlements with generic rivals, Servier implemented a strategy aimed at excluding competitors and at delaying the entry of cheaper generic medicines.

Servier's patent for the Perindopril molecule expired, for the most part, in 2003. However, generic competitors continued to face a number of so-called "secondary" patents relating to processes and form. Producers of generic –and thus, cheaper– versions of Perindopril were preparing their market entry, but Servier continued to fight them: in 2004, it acquired the most advanced of the non protected

technology, forcing a number of generic projects to stop and delay their entry into the market. Servier even recognised that this acquisition merely sought to "strengthen the defence mechanism" and the technology was never put to use.

Generic producers challenged Servier's patents before courts, but between 2005 and 2007 all these challenges were settled: the generic companies agreed to refrain from competing in exchange for a share of Servier's rent, which reached an estimated amount of several tens of millions of euros.

In spite of the fact that it is perfectly legitimate to apply for patents -including 'process' patents-, enforce them, transfer technologies and settle litigation, the Commission has concluded that Servier misused such tools by shutting out a competing technology and buying out a number of competitors that had developed cheaper medicines, to avoid competing on their merits. Such behaviours amount to an infringement of both Article 102 of the Treaty on the Functioning of the European Union (TFEU) and Article 101 TFEU.

Mergers

The European Commission subjects to conditions the acquisition of E-Plus by Telefónica Deutschland.

The acquisition by Telefónica Deutschland ("Telefónica") of the Dutch operator KPN's German mobile business E-Plus would bring together the third and fourth largest mobile network operators ("MNO") in Germany. Therefore, the Commission was concerned that the merger, as initially notified, would result in the elimination of close competitors in the German mobile telecommunications market and that it would increase prices and weaken the position of Mobile Virtual Network Operators ("MVNOs") and service providers to the detriment of final customers.

In order to remove these concerns, the Commission's approval of the acquisition has been submitted, subject to the fulfillment of the following commitments: (i) Telefónica will sell, before the completion of the acquisition , up to 30% of the merged company's network capacity to up to three MVNOs in Germany at fixed payments; (ii) Telefónica will divest radio wave spectrum and certain assets either to a new MNO entrant or to the MVNOs that will have taken up the network capacity by way of the first commitment; and (iii) Telefónica will extend existing wholesale agreements with Telefónica's and E-Plus' partners and will offer wholesale 4G services to all interested players in the future.

Commission approves the acquisition of ONO by Vodafone.

Both ONO and Vodafone provide fixed and mobile telecommunication services in Spain. The European Commission has concluded that the merger would not raise competition concerns, as the activities of both parties are largely complementary, i.e. while Vodafone deals mostly with mobile telecommunications, ONO focuses on fixed ones.

In addition, the Commission found the impact of the transaction to be limited since the combined entity would still face significant competition from other market players, such as Telefónica, Orange or Jazztel.

The transaction gave also rise to a number of vertical and conglomerate relationships in the fixed and mobile telecommunication markets in Spain, particularly in relation to the provision of bundled multiple play services. However, the Commission considered that the merged entity will not be able to exclude fixed or mobile operators from these markets, because there are alternative operators and because of the regulatory provisions applying to wholesale access for mobile and fixed services.

— *Case-law & Analysis* —

Spanish Supreme Court orders reimbursement to Mercadona of a fine already paid on the basis of a prior decision addresed to another company.

The Spanish family owned supermarket chain Mercadona was fined 413.800 EUR for an alleged infringement of Article 1 of the Spanish Competition Act by the Spanish CNMC. The

infringement in question consisted on establishing minimum retail prices together with certain olive oil manufacturers.

Mercadona did not challenge the authority's decision and paid the fine.

However, SOS CUÉTARA, one of the olive oil manufacturers having allegedly also infringed competition rules, successfully appealed the CNMC's decision. SOS CUÉTARA alleged that its rights of defence had been infringed, since the authority did not allow certain essential pieces of evidence to be presented. The *Audiencia Nacional* (Spanish Administrative Court of Appeals) dismissed the action, but the *Tribunal Supremo* (Spanish Supreme Court) held SOS's arguments as valid since the rejected evidence was considered decisive in terms of defense due to its potential exonerating value.

Following the Supreme Court's judgment, Mercadona decided to request the *Audiencia Nacional* the enforcement of the Supreme Court's decision and ask for the reimbursement of the fine it had paid. This action was dismissed on the grounds that Mercadona had not challenged the CNMC's decision and had paid the fine; hence it was presumed that Mercadona agreed with the CNMC's decision. In addition, the *Audiencia* considered that Mercadona could not request the enforcement of a decision delivered in a proceeding in which it was not a party.

Mercadona appealed the *Audiencia's* decision to the Supreme Court and argued that (i) based on previous case-law, the annulment of the CNMC's decision should have an effect on all the parties of the CNMC's procedure and not only on the company which challenged such decision before the Courts; and (ii) clear lack of motivation of the *Audiencia's* decision.

The Supreme Court upheld the first of Mercadona's allegations and declared that even when a company is not a party in judicial proceedings, it might be entitled to request the enforcement of a decision handed down in such proceedings.

The Supreme Court considered that the violation of the fundamental right to submit evidence did not only affect SOS CUÉTARA, but also all the other companies involved in the CNMC's procedure, including Mercadona.

Considering the aforementioned reasons, the Supreme Court has estimated the appeal of Mercadona as has ordered the reimbursement of the EUR 413,800 already paid.

— *Currently at GA&P* —

With regards to the aforementioned case-law, Gómez-Acebo & Pombo's Competition team advised successfully SOS CUÉTARA throughout the whole of the proceedings up until the annulment of the CNMC's decision by the Supreme Court.

For further information please visit our website at www.gomezacebo-pombo.com or send us an email to: info@gomezacebo-pombo.com

Barcelona | Bilbao | Madrid | Valencia | Vigo | Brussels | Lisbon | London | New York