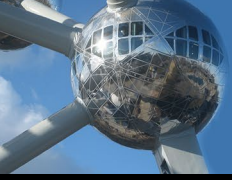


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Content

News	2
— Antitrust	2
▶ Spain: record fines to motor vehicle manufacturers, distributors and consultancies for operating a cartel	2
▶ European Commission opens formal investigation against Amazon's for its e-book distribution arrangements.	2
▶ Entry into force of the Interchange Regulation	2
▶ Commission fines producers and distributors of retail food packaging €115 million	3
Case-Law & Analysis	3
▶ Spanish Supreme Court annuls the €48 million fines imposed to Transmediterranea	3
▶ The Court of Justice of the European Union gives guidance on SEPs and abuse of dominance	3
Currently at GA&P Brussels	4



News

Antitrust

Spain: record fines to motor vehicle manufacturers, distributors and consultancies for operating a cartel

The Spanish Competition Authority (*Comisión Nacional de los Mercados y la Competencia* or CNMC) has imposed fines totalling €171 million to twenty-one companies active in the market of distribution and sale of motor vehicles and after sale services, together with two consultancy firms, for a single and continuous infringement contrary to Articles 1 of the Spanish Competition Act and 101 of the Treaty on the Functioning of the EU. The fined companies represented a combined market share of around 90% of the market for distribution of motor vehicles in Spain.

The CNMC has considered that these companies systematically exchanged highly commercially sensitive information covering all their activities, from sale of new vehicles to second hand sale, repair & maintenance services and sale of spare parts. The information was exchanged –depending on the company– between February 2006 and August 2013 in secrecy with the assistance of two consultancy firms, Urban Science and Snap-On, which have been fined €70,039 and €52,785 respectively, as facilitators of the cartel.

More concretely, the exchanges of information were operated through three types of fora for exchanging data, i.e.:

1. "Business management area", where companies part of the so-called "Brands Club" exchanged data concerning distribution and sale of vehicles in Spain.
2. "After sale", where some of the members of the Brands Club exchanged with other companies information on after sale services.
3. "Marketing", where some of the fined companies exchanged confidential information at meetings of after sale marketing managers.

The group SEAT S.A. (including Volkswagen Audi España, S.A. and Porsche Ibérica, S.A) has been exempted from the payment of a €39.44 million fine as a result of a leniency application that helped to uncover the cartel. General Motors España, S.L.U. (€22.827 million), Ford España, S.L. (€ 20.234 million) and Renault España Comercial, S.A. (€ 18,203 million) have received the highest fines.

In addition, it is to be noted that earlier this year the CNMC imposed fines totalling €41.13 million to 99

operators, among which 95 car dealers, two associations and two consultancy firms for colluding to fix maximum discounts and commercial conditions and for sharing sensitive information.

The car dealers were either authorised or independent and sold vehicles from Audi, Volkswagen and Seat. The associations fined (i.e. ACEVAS, *Asociación de concesionarios independientes de Volkswagen and ANCOAT, Asociación de concesionarios de Seat*) and the two consultancy firms (ANT Servicalidad and Horwath) were fined as facilitators of the cartel since they were considered a key instrument for the exchange of information. The earliest infringements that have been proven date from 2006.

SEAT S.A. and 11 of its subsidiaries were also exempted from the fine following a leniency application.

European Commission opens formal investigation against Amazon's for its e-book distribution arrangements

The European Commission aims to assess whether the clauses included in Amazon's contracts with publishing houses could amount to restrictions of competition. Based on these clauses, publishers are required to communicate to Amazon whether more favourable or alternative terms are offered to Amazon's competitors and/or to offer similar terms and conditions so as to ensure that Amazon is in a position as good as its competitors.

The Commission fears that such conditions imposed on publishers could limit competition between e-book distributors and ultimately reduce the choice for consumers. The Commission's investigation will initially focus in the English and German market.

This is second inquiry into e-books follows the investigation of Apple's deals with five publishers (Penguin Random House, Hachette Livres, Simon & Schuster, HarperCollins and Georg von Holtzbrinck Verlagsgruppe). This case was closed after the parties involved offered commitments which were made legally binding at the end of 2012.

Entry into force of the Interchange Regulation

Regulation 2015/751 on interchange fees for card-based payment transactions was published in the Official



Journal of the EU on 19 May 2015 and came into force on 8 June 2015.

Interchange fees are paid by the retailer's bank to the cardholder's bank for all individual transactions. This new Regulation caps interchange fees on consumer credit and debit card transactions at 0.3% and 0.2% respectively. These figures equal the commitments offered by Visa and MasterCard in the framework of the antitrust cases handled by the Commission. The caps shall apply per transaction and not on the basis of a weighted average and to cross-border transactions in a first stage. This provision will start to be applicable on 9 December 2015.

Member States may either define a lower percentage fee cap per transaction or allow payment service providers to apply a per-transaction charge of up to €0.05 in combination with the interchange fee, provided always that the sum of interchange fees of the relevant payment card scheme does not exceed 0.2% of the aggregate transaction value of all the domestic payments processed.

Commission fines producers and distributors of retail food packaging €115 million

The European Commission has imposed fines totalling €115.86 million to eight manufacturers (Huhtamäki, Nespak, Vitembal, Silver Plastics, Coopbox, Magic Pack, Sirap-Gema and Linpac) and two distributors (Ovarpack and Propack) of retail food packaging trays for participating in at least one of five cartels.

The illegal conduct consisted in operating five separate cartels in five different areas (North-West Europe, Central-East Europe, the Iberian Peninsula, Italy and France) where the companies fixed prices and allocated customers of polystyrene foam or polypropylene rigid trays.

Among the manufacturers, the British Linpac benefited from full immunity under the Commission's 2006 Leniency Guidelines for revealing the existence of the cartels. The Italian Sirap-Gema, active in three of the five cartels received the highest fine (€35.88 million).

Case-Law & Analysis

Spanish Supreme Court annuls the €48 million fines imposed to Transmediterranea (*Judgments n.874/2014 and n.1994/2014 of 1 June 2015 of the Spanish Supreme Court*)

In May 2012, the Spanish Competition Authority carried out dawn raids in the premises of the shipping company Transmediterranea in Madrid and Mallorca. These inspections led the authority to declare the existence of a price-fixing and market-sharing cartel in the sector of maritime transport of goods and passengers between the Iberian Peninsula and the Balearic islands and between Algeciras and Ceuta. As a result, Transmediterranea received two fines totalling €48 million imposed in November 2011 and February 2012.

Transmediterranea challenged the legality of the dawn raids conducted by the authority. This appeal was upheld by the Supreme Court in February 2015. In this judgment, the court indicated that the inspection orders were too generic and lacked the minimum information necessary to identify the object and the scope of the investigation.

Now the Supreme Court has decided to annul both fines imposed to Transmediterranea on the basis of the 2012 inspections, since the data obtained have no value and therefore there is no sufficient proof to sanction the company.

The Court of Justice of the European Union gives guidance on SEPs and abuse of dominance (*Judgment of the CJEU of 16 July 2015 in Case C-170/13 Huawei Technologies Co. Ltd v ZTE Corp., ZTE Deutschland GmbH*)

ZTE commercialise products in Germany that operate on the basis of the standard called "Long Term Evolution" (LTE). Both Huawei and ZTE are holders of a number of standard essential patents (SEPs) related to LTE. With regard to these patents, both companies had committed themselves to grant licences to third parties on Fair, Reasonable, and Non-Discriminatory (FRAND) terms.

Concerning Huawei's SEPs related to LTE, both Huawei and ZTE tried to negotiate a licence on FRAND terms without success. In this sense, Huawei proposed a specific royalty it considered to be a reasonable one, but ZTE sought instead a cross-licensing agreement, while it continued to sell LTE devices without paying a royalty or exhaustively rendering an account to Huawei in respect of past acts of use.

This situation led to a legal dispute in April 2011 when Huawei brought an action for infringement before the Regional Court of Düsseldorf (Germany) against ZTE seeking an injunction prohibiting the infringement of SEPs, the rendering of accounts, the recall of products and an award of damages. The German Court decided to refer the Court of Justice of the EU five questions for a preliminary ruling in order



to clarify under which conditions an undertaking holding a dominant position –i.e. Huawei in respect of its LTE’s SPEs– would incur in an infringement of Article 102 TFEU by bringing an action such as the one in the underlying case. The EU Court has indicated that the owner of an SEP established by a standardisation body, which has committed to grant a licence to third parties on FRAND terms would not abuse its dominant position by bringing an action seeking an injunction prohibiting the infringement of its patent or seeking the recall of products as long as the following conditions are met:

1. prior to bringing that action, the SEP owner, shall warn the company allegedly infringing the patent and, if the latter agrees to negotiate a licensing agreement on FRAND terms, submit a particular, written offer for a licence, specifying the royalty and how it will be calculated; and
2. the potential infringer continues to use the patent and does not diligently respond to the offer, based on recognised commercial practices in the field and in good faith, this being a matter which must be established in accordance to objective factors and which implies that there are no delaying tactics.

In the scenario where the alleged infringer is not willing to accept the offer, it has to submit a specific

written counter offer promptly and based on FRAND terms. If this counter offer is rejected, but the alleged infringer is still using the teaching of the SEP, the alleged infringer has to provide appropriate security in accordance with recognized commercial practices such as a bank guarantee. In addition, if the negotiation is not successful, the parties may agree to request that the royalty is determined by an independent third party.

The Court of Justice has also reminded that the alleged infringer shall still have the right, independently from the negotiation, to challenge the validity of the patent or its standard essentiality given that the standardisation body does not evaluate these features.

Finally, as for the other two claims of Huawei, the Court has held that Article 102 TFEU does not prevent a dominant undertaking holding an SEP and committed to grant licences on FRAND terms, from bringing an action for infringement with a view to obtaining the rendering of accounts in relation to past acts of use of that patent or an award of damages, since such actions do not have a direct impact on products complying with the standard in question manufactured by competitors appearing or remaining on the market.

Currently at GA&P

Rubén Ferrer, managing director of Gómez-Acebo & Pombo’s New York, has been awarded with the 40 Under 40 Emerging Leaders Award according to The M&A Advisor. The winners of the 40 Under 40 Emerging

Leaders Awards were announced in July 2015 during a black tie Awards Gala at the Roosevelt Hotel in Manhattan. Rubén Ferrer was named a winner for the legal advisory category.

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