

Argentina's Antitrust Authority fines SADAIC for discriminatory and excessive licensing fees

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In a decision released in July 2018, the Secretary of Commerce –following the recommendations of the Argentinean Antitrust Commission (CNDC) – imposed a fine worth AR\$42.7 million (approximately US\$1.5 million) to the Argentinean Society of Music Authors and Composers (SADAIC) for abusing its dominant position in breach of the Antitrust Law No. 27,442 (the “Antitrust Law”) by charging excessive and discriminatory fees to certain hotels for the secondary reproduction of music.^[fn]The decision is available at https://www.argentina.gob.ar/sites/default/files/resolucion_371-2018_0.pdf#fn

1. Background of the decision

SADAIC is a collecting society comprising Argentinean music authors and composers, which enjoys a legal monopoly with respect to the collective management and distribution of the revenue stemming from the use of musical works. Although the legislation that created SADAIC provides caps on the fees it can charge to certain users, said legislation fails to regulate the fees that can be charged to hotels, therefore, SADAIC enjoys wide discretion in that respect.

Due to a complaint lodged by the Argentinean Hotel and Gastronomy Business Federation (FEGHRA), an entity gathering hotel and gastronomic businesses in Argentina, the CNDC ascertained that during the investigated period (comprised between April 2009 and October 2014) SADAIC had abused its dominant position by fixing fees which were excessively high for all types of hotels, discriminatory between different hotels, and unreasonable in connection with the reproduction of music in hotels.

2. The abuse of dominance

The CNDC concluded that the fees charged by SADAIC to approximately 4,500 hotels in Argentina implied an abuse of its dominant position since they were: (a) discriminatory as different fees were charged for the provision of exactly the same service without any plausible justification; and (b) excessive, when compared with both the fees charged to hotels in other countries and those charged to hotels by other collecting societies in Argentina.

(a) Discriminatory pricing

The CNDC's investigation concluded that SADAIC established its licensing fees for hotels on a discriminatory basis.

SADAIC entered into preferential agreements with certain hotels or associations of hotels in certain regions of Argentina, in which the occupancy and seasonality factors were taken into consideration to the purpose of setting fees, thus charging these hotels up to 75% less than to those not included in such agreements. Therefore, SADAIC's fee policy was considered to amount to a third degree price discrimination since hotels comprised in the agreements paid a preferential fee whereas hotels not comprised in any agreement paid a general fee that did not consider the seasonality and occupancy factors.

Likewise, the CNDC understood that SADAIC had engaged in first degree price discrimination by fixing its fees in accordance with the economic capacity of the licensees by setting them on the basis of the price of the hotel's end-product (i.e. the room's price). In other words, fees were fixed according to the hotels' presumed income and not their real income. Hence, fees failed to reflect the value of the economic use of the music managed by SADAIC, and the intention was to extract, to the maximum extent possible, the hotels' surplus without regard for the value of the service being provided.

In this case, the higher income was obtained from captive licensees, i.e., three, four and five star hotels which are legally required to provide music to guests. All in all, the captive character of certain customers, added to the legal nature of SADAIC's monopoly, clearly created an environment that favored an abuse of dominance.

(b) Excessive pricing

The fees were also deemed abusive by the CNDC since they were excessively high (even in those cases in which a preferential agreement was in place). To that end, the CNDC compared the fees charged by SADAIC to hotels in Argentina with regard to those charged to hotels by music collecting societies in other countries such as Chile, Mexico, Paraguay, Colombia, Venezuela and Spain. The CNDC concluded that SADAIC charged fees which were between 7 and 10 times higher than the fees charged by its peers in other countries.

Likewise, the CNDC compared the fees charged by SADAIC with those charged by other collecting societies of other intellectual property rights entities that operate in Argentina (such as ARGENTORES and AADI). In this respect, the CNDC concluded that SADAIC's fees were, depending on the type of the hotel, between 5 and 25 times higher.

The CNDC considered that the fees set by SADAIC were also unreasonable as they were fixed with regard to the presumed income and not the real income of hotels. As a result, SADAIC's fees resembled a tax. The CNDC therefore established that fees must reflect the economic value of the use that hotels make of the repertoire managed by SADAIC.

3. Recommendation to the Executive Power

The CNDC, which has no powers to either regulate or determine the fees to be charged by SADAIC, recommended the Executive Power to issue a new regulation setting hotel fees on the basis of the following criteria: (i) non-discrimination, entailing that similar fees must be charged for equivalent services so that if preferential or special conditions are offered to a certain group of users, the same conditions must be available for all other users that are in similar conditions; (ii) reasonableness, meaning that fees must reflect the economic use of the repertoire provided by SADAIC; (iii) transparency, meaning that the methodology to determine applicable fees must be simple, clear and accessible for users and should there specific preferential agreements be in place, these must be publicly available; and (iv) limited scope, meaning that fees must solely be collected in relation to the intellectual property rights managed by the collecting society.

4. Damages actions

The fine imposed to SADAIC, like any infringement to the Antitrust Law, shall be collected by the Ministry of Production. Nevertheless, any victim of the infringement (in particular, the hotels affected by the abusive fees) may bring actions seeking compensation of the damages that may have been caused by SADAIC's behavior as provided for in Chapter IX of the Antitrust Law.

The Antitrust Law provides that decisions issued by the National Competition Authority shall have binding or *res judicata* effects on judges hearing follow-on damages actions.

The deadline to initiate follow-on damages actions is two years as from the time the National Competition Authority's infringement decision becomes final.

5. Concluding remarks

The commented decision evidences a renewed CNDC's interest in investigating and sanctioning dominance cases in Argentina (regardless of whether parties, as in the case of SADAIC, have a legal monopoly) and reminds dominant companies of their special responsibility not to restrict competition.

Likewise, the decision in SADAIC can be seen as part of the strengthening process of antitrust policy which has taken place in the recent years in Argentina, resulting, among many other things, in an increased interest of the Antitrust Law's enforcement authority in unilateral conducts of dominant companies.

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