

SUMMARY OF THE COMMITMENTS DECISION TAKEN IN THE MEDIAPRO/OBWAN CASE: WHOLESALE DISTRIBUTION OF FOOTBALL CHANNELS IN THE OTT PAY TV SEGMENT IN SPAIN

The Council of the Spanish National Commission on Markets and Competition (hereinafter named by its Spanish abbreviation, CNMC) approved on February 7th 2018 a commitments decision¹ that ends the antitrust proceedings initiated against Mediaproducción, S.L.U. (MEDIAPRO) for alleged behaviors prohibited by Article 2 of the Spanish Competition Act (abuse of dominant position), in the wholesale market of premium pay TV channels in Spain, in particular, concerning its football channels (beIN Sports² and beIN La Liga³).

The case was initiated on 30 March 2017, following a complaint by Obwan Networks and Services, S.L. (OBWAN), which runs an online pay television platform (*over the top*; OTT) in Spain, specialized in sports content.

The conducts denounced by OBWAN consisted of

- the refusal of MEDIAPRO to allow OBWAN to include in its OTT pay TV services the main football competitions in Spain, Spanish Liga and His Majesty the King's Cup (incorporated in MEDIAPRO's channel beIN La Liga), and
- the remuneration that MEDIAPRO asked OBWAN for the broadcasting of the Champions League and UEFA Europa League matches (incorporated in MEDIAPRO's channel beIN Sports), which could be excessive and exclude OBWAN from the market

Affected Markets

The affected markets related to the complaint are:

- The market for the wholesale distribution of premium channels for pay television in Spain.
- The pay television market in Spain, especially the segment of Internet broadcasting platforms (OTT).

In particular, the wholesale distribution of premium channels significantly affects the competitive dynamics of the pay television market in Spain, as these channels are important inputs for acquiring and retaining subscribers.

The dominant position

In the wholesale distribution market of premium pay TV channels in Spain, MEDIAPRO has a market share of over 80% in terms of revenue in the 2016-2017

¹ Commitments decisions are regulated in article 52 of the LDC and in article 39 of the RDC, and constitute a way of atypical termination of the administrative procedure, specifically in the framework of antitrust proceedings, by means of which the CNMC resolves to end the procedure, making binding the commitments voluntarily offered by the alleged offender, without the need to produce a statement about the accreditation of the infringement or, consequently, to impose a penalty.

² In this channel, created on 1 July 2015, MEDIAPRO broadcasts the Champions League and Europa League football competitions during the 2015-2016 to 2017-2018 seasons.

³ In this channel, created on 1 July 2016, MEDIAPRO broadcasts eight matches per competition day of the first division football league and all matches of the His Majesty the King's Football Cup (with the exception of the semifinals and the final) for the 2016-2017 to 2018-2019 seasons.

season. Therefore, the Council of the CNMC has concluded in its commitments decision that MEDIAPRO would have a dominant position in the wholesale distribution market of premium pay TV channels in Spain, given its independence to determine the wholesale commercialization conditions of its channels to pay TV operators, which are the main distributors of these channels.

Abusive conduct

The behaviors denounced by OBWAN could constitute an abuse of a dominant position, as MEDIAPRO could have set unjustifiably inequitable and discriminatory conditions to OBWAN, vis-à-vis other pay television operators.

The refusal to sell the rights for their exploitation in OTT modality

MEDIAPRO commercialized its beIN La Liga channel (2016-2017 to 2018-2019 seasons) to the following pay television operators in Spain: Grupo TELEFÓNICA, Telecable de Asturias, S.A. (TELECABLE), Vodafone España, S.A.U. (VODAFONE), Orange España S.A. (ORANGE), and Deion Comunicaciones, S.L. (DEION). These operators were allowed to offer the channel via internet (OTT mode) if that access did not have an additional cost for the subscribers of the channel or if it was packaged with other electronic communications services.

MEDIAPRO justified its refusal to sell the above mentioned channel to OBWAN, on the basis that it had reserved for itself the exclusivity of the retail commercialization of beIN La Liga channel in the OTT pay TV segment in Spain. Since OBWAN could only commercialize this channel on its OTT platform, the contract with the complainant would have had to include the OTT modality on a stand-alone basis, something that was not allowed by MEDIAPRO to other pay television operators.

However, the CNMC, in its Decision, considers that MEDIAPRO had not really reserved to itself the exclusivity of the beIN La Liga channel broadcast in the OTT pay TV segment in Spain, since it had allowed other pay television operators to commercialize the channel via the Internet, if this service was provided as a complementary service to others these pay television operators provided.

This could lead to a discrimination against OBWAN in comparison to other traditional pay television operators, who have the possibility of offering the channel on the Internet as a complement to other electronic communications services.

In addition, MEDIAPRO would had de facto agreed (or would not had prevented) TELECABLE from commercializing beIN La Liga channel independently from other services through its OTT "Tedi" platform, at least during the 2016-2017 season.

In any case, the CNMC has considered that there would not be an objective justification for MEDIAPRO to reserve for itself the commercialization of beIN La Liga in the OTT pay TV segment in Spain, taking into account that:

- MEDIAPRO is not a new player in the pay television market in Spain.
- OTT technology is not pending launch and commercial development, it is already consolidated and represents a relevant source of growth and competition in the pay television market in Spain, especially from a consumer perspective.

- MEDIAPRO has transferred all its commercial risk to third parties, insofar as it has guaranteed, with the sale to Grupo TELEFÓNICA, commercial revenues higher than the costs of the rights and production of the channel.

The remuneration required for the exploitation of beIN Sports channel

As regards the beIN Sports channel, MEDIAPRO has sold the broadcasting rights of the channel (2015-2016 to 2017-2018 seasons) to Grupo TELEFÓNICA, VODAFONE, ORANGE, TELECABLE and DEION.

The remuneration that TELEFÓNICA has to pay for the non-exclusive license of the beIN Sports channel is a fixed amount. The rest of the operators have to pay MEDIAPRO a guaranteed minimum (significantly less than the fixed cost paid by TELEFÓNICA), which covers a number of monthly subscriptions to the channel, and an incremental cost once the number of monthly subscriptions is exceeded

In the negotiations for the commercialization of the beIN Sports channel to OBWAN, there was a lack of agreement regarding the price, inasmuch as MEDIAPRO requested a very high guaranteed minimum per season, calculated assuming a considerable number of monthly subscribers to OBWAN's platform, despite the fact that it was a new entrant. This was far removed from the conditions applied to operators such as DEION. Moreover, the incremental cost per subscriber requested by MEDIAPRO could prevent the replicability of MEDIAPRO's retail offer in the OTT segment for this channel.

MEDIADRO's wholesale offer to OBWAN for the beIN Sports channel was not justified, according to the CNMC.

In addition, MEDIAPRO's failure to offer OBWAN the possibility of acquiring the beIN Sports channel for a fixed cost, as MEDIAPRO had agreed with TELEFÓNICA, could be an unjustified discrimination.

Assesment

According to the decision taken by the CNMC, MEDIAPRO's refusal to sell the broadcast rights of its beIN La Liga channel to OBWAN, and the economic conditions that MEDIAPRO requested from OBWAN to access the beIN Sports channel, are actions that could be considered discriminatory and inequitable for OBWAN and for any new internet pay television operator in Spain. This could adversely affect potential competition in the pay television market in Spain, restricting in an unjustifiably manner competition with the MEDIAPRO pure OTT pay TV offer in Spain, which is specialized in sports content.

The CNMC states in its decision that the segment of pure OTT pay TV operators, although it has not yet reached a significant share in the pay television market in Spain, represents a very significant potential source of competition. In particular, this is a result of improved Internet connectivity in homes, increased penetration of devices that allow viewing internet audiovisual content on a television set, and more efficient CDNs (*Content Delivery Networks*) development.

Therefore, MEDIAPRO's behaviours could be limiting the development and implementation of a new pay TV technology in Spain, with high potential future prospects, by seeking to reserve for itself the field of sports content, which is very important for a significant part of the demand for pay television in Spain.

The commitments

MEDIAPRO presented a commitments' proposal aimed at eliminating the detected competition concerns.

In particular, the commitments include:

- MEDIAPRO's obligation to give access to beIN La Liga and beIN Sports channels to all pay television operators in Spain that request it (including pure OTTs) and, in particular, to OBWAN.

MEDIAPRO's commitment avoids the possible exclusion effects of new entrants, which could be derived from MEDIAPRO's refusal to give access to these channels, in particular, to the beIN LaLiga channel, to pure OTT pay television operators with OBWAN's characteristics.

- The establishment of equitable and non-discriminatory economic and commercial conditions for OBWAN's access to these channels.

The remuneration system proposed in the commitments for the beIN LaLiga channel establishes that in the 2017-2018 season, OBWAN would have to make a minimum payment equal to the minimum amount established in previous contracts with pay television operators that acquired the broadcasting rights in Spain for this channel. For the 2018-2019 season, if the number of subscribers of OBWAN is high enough, this operator would be subject to the same formula used to calculate the costs other operators pay to acquire the channel.

The remuneration system proposed in the commitments is, in the opinion of the Council, equitable and non-discriminatory, as it is equal to the one established for other pay television operators. It also ensures MEDIAPRO a certain revenue that exceeds the cost of acquisition of rights. Moreover, it incorporates the formula used to calculate the cost of the channel if the guaranteed minimum is exceeded and the date that must be taken as a reference in order to calculate the number of subscribers, thus facilitating the transparency and efficient implementation of the commitments.

In the case of the beIN Sports channel, for the 2017-2018 season, the commitments establish a minimum payment for new Internet pay television operators (pure OTT operators). This amount represents a percentage of less than 0.1% of the amount paid by TELEFÓNICA for the three seasons. This percentage is calculated taking into account the minimum fixed cost established voluntarily by MEDIAPRO for the beIN La Liga channel.

By establishing a fixed minimum amount lower than the one initially offered to OBWAN, the commitments not only avoid discrimination with respect to other operators, but also reduce the risk of lack of replicability of MEDIAPRO's retail offers. In particular, by establishing a reduced fixed amount, it allows to reach competitive unit costs with a customer base that is not excessively high, given the reality of the Spanish pay television market.

In addition, MEDIAPRO offers to all pay television operators that have acquired the channel the option to take advantage of the formula established to calculate

the OBWAN remuneration if it decides to commercialize the channel in combination with other services (packaged). In this case, the commitments detail the formula used and the date of reference for the determination of the number of subscribers. In this way, fair conditions are offered to all operators, notwithstanding that said operators may choose to maintain the conditions contained in the signed contracts.

Other issues common to both channels

The commitments also include important details to avoid discrimination in other matters (method of payment, audits, packaging and change of control).

Conclusion

The Council of the CNMC has considered, in its Decision of 7 February 2018, that the commitments presented by MEDIAPRO on 4 October 2017 are adequate to resolve MEDIAPRO's possible anti-competitive behavior, by offering fair conditions that are not discriminatory to OBWAN and other pure OTT pay television operators compared with the conditions applied to other traditional pay TV operators that have acquired the beIN La Liga and beIN Sports channels in Spain. Moreover, the commitments establish fixed minimum amounts per season for each channel, that are viable for a new entrant in the pay television market in Spain.

The commitments also reduce the risk of not being able to replicate the MEDIAPRO retail offers of the beIN Sports channel, by establishing a fixed amount whose quantity is not disproportionate and which would allow to reach relatively small unitary costs with customer levels that are not very high.

Likewise, these commitments are easy to implement, and could be easily included in a contract between MEDIAPRO and OBWAN to make possible the latter's access to the beIN La Liga and beIN Sports channels. Therefore, their effectiveness and monitoring by the CNMC could take place immediately.

Madrid, 20 February of 2018