

Booking fined for abuse of dominant position: CNMC action in digital markets

On 29 July 2024¹, the Comisión Nacional de los Mercados y de la Competencia ("CNMC") fined Booking 413,240,000 euros - the highest fine in the history of the Spanish competition authority to date - for having abused its dominant position in Spain over the past five years.

Booking acts primarily in the market as an online travel agency, intermediating between hotels and customers seeking to make a reservation. According to the CNMC, Booking allegedly imposed a number of unfair commercial conditions on hotels located in Spain that used its booking intermediation services, also restricting competition from other online travel agencies providing similar services:

- The unfair conditions imposed on hotels in Spain would be, in particular: (i) a pricing clause that would prevent hotels from offering rooms on their own websites at a lower price than the one offered on Booking (at the same time, Booking reserved the right to unilaterally lower the price of the hotels displayed on that platform), and (ii) the lack of transparency in the information provided on subscriptions to specific programmes that allowed hotels to improve their positions in Booking's results ranking.

A number of clauses considered abusive (e.g. the exclusive validity of general terms and conditions in English, the applicable law of the Netherlands, and the competent courts in Amsterdam in case of conflict) would also have been imposed.

- In addition, Booking would have restricted competition from other online travel agencies by using certain formulas imposed on customers, such as the use of the total number of bookings of a hotel as a criterion for positioning in Booking's results list, or the use of a hotel's performance for Booking as a criterion for accessing and remaining in specific programmes. These formulas would seek to concentrate hotel activity on Booking, excluding other competing agencies.

In addition to the financial penalty, the CNMC has imposed a number of behavioural obligations on Booking to prevent the platform from desisting from such or similar conduct in the future.

The contentious-administrative jurisdiction will have to clarify, following the appeal announced by Booking against the aforementioned Resolution, to what extent the aforementioned practices can be considered anti-competitive. The case law on abusive conduct has so far focused on whether or not there is reasonable economic justification for conduct that may have exclusionary effects on the market.

¹ CNMC Resolution available here: <https://www.cnmc.es/sites/default/files/5464623.pdf>.

At the same time, it will be necessary to be alert to other consequences of this decision for Booking in the form of possible legal claims for damages by injured customers and/or competitors, for example.

THE CNMC INTENSIFIES ITS ACTION IN DIGITAL MARKETS

Coinciding with the recent adoption at European level of the *Digital Markets Act* (DMA)² and the *Digital Services Act* (DSA)³, the CNMC has focused its action on several of the so-called "technology giants" (Amazon, Apple, Google, ...) and other companies active in digital markets.

For example, in July 2023, the CNMC sanctioned Amazon and Apple⁴, for anti-competitive agreements between the two operators. In this case, Amazon and Apple allegedly signed two contracts, relating to Amazon's conditions as official distributor of Apple products, which included an exclusion or "*brand gating*" clause, whereby only a number of distributors selected by Apple could sell their products through Amazon in Spain. According to the CNMC, these clauses led to the exclusion of most distributors and the loss of a very important sales channel. The aforementioned agreements also allegedly include a series of clauses relating to advertising and marketing restrictions, which, according to the Spanish authority, seek to reduce competitive pressure on Amazon Spain.

On the other hand, the CNMC has opened another case against Apple on July 2024, for possible imposition of unfair commercial conditions on developers using its App Store, with possible abuse of dominant position⁵.

In the digital world, the CNMC is also acting in other areas, such as the market for business information database services. Thus, in July 2023, the CNMC fined two companies - Bureau Van Dijk Publicaciones Electrónicas, S.A. and Informa D&B, S.A.U. - 3,558,135 euros for having formed a cartel to agree on the distribution of clients and the fixing of prices for the commercialisation of several business information databases. In addition, the CNMC initiated a study on competition in the *cloud services* market⁶, especially in view of the fact that more and more companies in the market use these services to store and manage data and information relating to their activity, and therefore, that their use has become essential for digital transformation.

These recent actions by the CNMC in digital markets illustrate how its activity in this area is only intensifying, especially as the digital transformation of the different sectors of the Spanish and international economy progresses. Madrid, 5 August 2024.

² The Digital Markets Regulation is available at the following link: <https://eur-lex.europa.eu/legal-content/ES/TXT/PDF/?uri=CELEX:32022R1925>

³ The Digital Services Regulation is available at the following link: <https://eur-lex.europa.eu/legal-content/ES/TXT/PDF/?uri=CELEX:32022R2065>

⁴ CNMC Resolution of 12 July 2023, in case S/0013/21 AMAZON / APPLE BRANDGATING.

⁵ <https://www.cnmc.es/prensa/incoacion-apple-20240724>

⁶ <https://www.cnmc.es/prensa/estudio-cloud-20231123>