

The CNMC fines Booking.com € 413.24 million for abusing its dominant position during the last five years.

In June 2021 the National Commission for Markets and Competition (CNMC) received two complaints from two hotel industry associations against Booking.com B.V. (**Booking.com**) for a series of anti-competitive practices. Following an antitrust investigation, the Council of the CNMC has decided that Booking.com is responsible for two single and continuous infringements consisting of an exploitative and of an exclusionary abuse of a dominant position from, at least, 1 January 2019 to the present, infringing Articles 2 of Law 15/2007, of 3 July, on the Defense of Competition (LDC) and 102 of the Treaty on the Functioning of the European Union (TFEU).

Regarding Booking.com's dominant position, its market share in the market for online booking intermediation services to hotels by Online Travel Agencies (OTAs) in Spain has remained high, ranging between 70/90% in the 2019-2022 period. The CNMC also concludes, based on the absence of substantial competition, high barriers to entry and lack of countervailing buyer power, that Booking.com has enjoyed a dominant position in the abovementioned market since at least 2019.

On the one hand, the CNMC establishes that Booking.com carried out an exploitative abuse by imposing the following unfair trading conditions on hotels located in Spain: (i) a narrow price parity clause (which prevents hotels from lowering the price of their rooms in their own sales channel below the price they set on Booking.com) for its own benefit while reserving the right to unilaterally lower the price offered by the hotel on its website at its own expense; (ii) imposing the English language version of the General Terms and Conditions (T&C) as the binding version and subjection of any disputes to Dutch law and Amsterdam courts; and (iii) lack of transparency regarding the information provided to Spanish hotels on the impact that the subscription to the “Preferente”, “Preferente Plus” and “Genius” programs has on their ranking in the results offered by Booking.com on its website, and on the resulting additional number of hotel visits and bookings on Booking.com.

On the other hand, the CNMC considers that Booking.com has carried out an exclusionary abuse by restricting competition from other OTAs in offering their own online hotel intermediary services as follows: (i) incentivizing hotels to concentrate their sales/bookings on Booking.com by using the number of bookings a hotel has had on Booking.com as a ranking criterion in the pre-determined ranking results that Booking.com offers on its website (which entails a higher number of bookings); and (ii) encouraging hotels to follow a pricing and room availability policy that prioritizes Booking.com's profitability over the rest of the OTAs by using a performance requirement based on the hotel's profitability for Booking.com in order for hotels to access and remain in the “Preferente” and “Preferente Plus” programs.

As a result of these infringements, the CNMC has levied two fines on Booking.com of € 206,620,000 for each of the single and continuous infringements as well as a prohibition to contract with Public Administrations. Moreover, the CNMC includes a number of obligations on Booking.com to ensure that the conduct does not continue in the future in relation to hotels located in Spain, such as (i) ceasing to simultaneously include in its contracts a narrow parity clause and the clause allowing Booking.com to unilaterally lower the price fixed by hotels; (ii) the Spanish language version of the T&Cs and subjection to Spanish law and the forum of Courts located in Spain are to be binding in connection with hotels located in Spain; (iii) providing more transparency to hotels in relation to the benefits they shall expect in terms of visits and bookings obtained by participating in the “Preferente”, “Preferente Plus” and “Genius” programmes; (iv) ceasing to use gross and net bookings as a criterion for the default ranking results; and (v) ceasing to use the hotel's profitability to Booking.com as a criterion to access and remain on the “Preferente” and “Preferente Plus” programmes.