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The Spanish competition authority imposes fines on Apple and Amazon for restricting competition on Amazon's website in Spain

In July 2023 the Spanish Competition Authority ('*Comisión Nacional de los Mercados y la Competencia'* or 'CNMC') imposed fines on Apple (EUR 143.6 million) and Amazon (EUR 50.51 million). Pursuant to the CNMC the two companies had restricted competition on Amazon's website in Spain. This is the highest individual fine ever imposed by the CNMC for a vertical agreement.

Background

On 31 October 2018 Amazon and Apple signed two agreements updating Amazon's terms and conditions as an authorised Apple reseller. Pursuant to the CNMC these arrangements included several anti-competitive clauses affecting the online retailing of electronic products in Spain.

CNMC's decision

According to the CNMC's decision (S/0013/21: *AMAZON / APPLE BRANDGATING*), both companies:

i. agreed to include a series of clauses in the agreements regulating Amazon's conditions as an Apple reseller that affected the sale of Apple products and other brands on Amazon's website in Spain;
ii. unreasonably restricted the number of resellers of Apple products on Amazon's website in Spain;
iii. limited the advertising space for products competing with Apple on Amazon's website in Spain; and
iv. limited the possibility for Amazon to target marketing campaigns to customers who had bought Apple products on its website in Spain with competing products from other brands.

The so-called "*Brand-gating*" clauses

By means of these clauses both companies agreed that only a number of Apple-appointed resellers could sell Apple-branded products through Amazon's website in Spain. Their implementation had several consequences on the market:

i. more than 90% of the resellers that had been using Amazon's website to sell Apple products were excluded from the main online marketplace in Spain;
ii. sellers who were not authorised by Apple to sell its products on Amazon's website lost an important sales channel;
iii. sales of Apple products via Amazon's website in Spain by sellers based in other EU countries were reduced, limiting trade between Member States; and
iv. there was an increase in the relative prices paid by consumers for the purchase of Apple products on the online marketplace in Spain.

Advertising clauses and marketing limitation clauses

According to the CNMC, through the advertising clauses, Amazon and Apple limited the possibility that brands competing with Apple could acquire advertising space on the Amazon website in Spain to advertise their products when certain searches for Apple products are carried out, as well as during the purchase process.

The marketing limitation clauses established that Amazon may not carry out, without the consent of Apple, marketing and advertising campaigns that are specifically aimed at customers who have purchased Apple products on the Amazon website in Spain and encourage these consumers to change from an Apple product to a competitive one.

According to the CNMC, following the implementation of these clauses, Apple sees the competitive pressure generated by the advertisements of the competition on the Amazon website in Spain reduced. Likewise, these limitations directly harm consumers since (i) they limit their ability to discover new brands and/or alternative products to those of Apple; (ii) they increase their search costs and (iii) they reduce their switching capacity.

Commentary

In relation to Apple, this fine is similar to the one imposed in Italy in 2020 by the Italian competition authorities. However, in that case the fine was eventually annulled by an Italian administrative court.

This decision highlights the reinvigoration of the enforcement of the CNMC since the appointment of Cani Fernández as the President in 2020 and the appointment of Marisa Tierno Centella as Director of Competition. Cani's tenure has been characterized by an attempt to get the priorities of the CNMC in line with those of other sophisticated antitrust regulators. Consequently, these high fines strike us as more linked to the attempt of Cani / Marisa to get "scalps" in the domain of digital than of a renewed interest of the Spanish authorities in verticals /

distribution.

The CNMC applied Article 101 TFEU and its Spanish equivalent (Article 1 Spanish Competition Act). Presumably, Apple and Amazon were attributed high market shares but do not appear to have been treated as dominant.

The text of the decision is not yet publicly available. We would tend to assume the “brand gating clauses” will receive the most attention from commentators.

Apple and Amazon have two months to file an appeal.