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The CNMC Fines Amazon and Apple with €194 million for Restricting Inter and Intra-Brand Competition in the Sale of Apple Products on the Spanish Amazon Marketplace

Pablo Velasco Sanzo (CNMC) · Tuesday, September 19th, 2023

On 12 July 2023, the Spanish National Markets and Competition Commission (**CNMC**) issued its decision in the case S/0013/21 – *Amazon/Apple Brandgating* (the **Decision**) imposing a fine of €143.6 million on Apple and Amazon for restricting inter and intra-brand competition in the sale of Apple products on the Spanish Amazon marketplace contrary to Articles 1 of the Spanish Competition Law (i.e. Law 15/2007, of July 3, on the Defence of Competition, **LDC**) and Article 101 TFEU.

The CNMC also ordered the companies to cease their conduct and banned them from contracting with public bodies, although the scope and duration of the ban will be determined by the State Public Procurement Advisory Board.

Initiation of the proceedings

The CNMC initiated infringement proceedings against Apple and Amazon on 30 June 2021, after becoming aware, through the European Competition Network, of the possible existence of an infringement of its national competition law regime and the Treaty, consisting of potential anti-competitive agreements between Amazon and Apple that could affect the sectors of the online retail sale of electronic products and of the provision of marketplace services to third-party sellers in Spain (see para. 1 of the Decision).

The parties

Amazon has a triple role in the market: (i) a supplier of marketplace services; (ii) a seller of consumer products; and (iii) a manufacturer of consumer products (see para 35). When it launched its marketplace, Amazon was the only company selling through it. However, since 2000, it began to open the platform to third-party sellers. In 2009, it began to manufacture its own products and private labels including clothes and electronic products. Nowadays, around 60% of the total sales on Amazon's Marketplace are made by third-party sellers and Amazon makes the remaining 40% (of which around 5-10% come from its private labels) (see paras 29, 30 and 33).

Apple is a manufacturer and seller of electronic products. It uses an open distribution system (**ODS**) to distribute almost all its products (only for one category of them it uses a selective distribution system) (see para 43). Within its ODS, there are authorised resellers -that have a direct commercial relationship with Apple- and non-authorised resellers -that have no direct relationship with Apple-. See below the types of resellers within the Apple ODS.

Authorised resellers	Wholesalers Apple Premium Resellers ("**APR**") Apple Authorised Resellers ("**AAR**") Big retailers ("**Retailers**")
Non-authorised resellers ("**NAR**")	

Wholesalers are encouraged by Apple to distribute its products to both authorised and non-authorised resellers (see para 46).

Markets considered and market shares

According to European and national case-law, a prior definition of the relevant market is not required where the agreement at issue has in itself an anti-competitive object (see para 205).

The CNMC considered, for Amazon (see paras. 61 and so on), the market for the provision of marketplace services to third-party sellers in Spain (the question of whether the other side of the market – i.e., the market for the provision of marketplace services to consumers in Spain – constitutes a relevant market was left open as the conducts in question affected the seller side of the market (para 170)). This is in line with recent decisions from other competition authorities (see para 107): (i) from the EC (cases AT.40462 – Amazon Marketplace, para 95; AT.40703 – Amazon Buy Box, paragraph 95; and M.10349 – AMAZON/MGM); (ii) the German Competition Authority (see decision under Section 19a here); and (iii) the Italian Competition Authority (see case A528 here).

Regarding Apple (see paras 172 and so on), the Spanish competition authority additionally took into account: i) a potential market for the manufacture and sale of electronic products of, at least, EEA dimension; ii) a potential market for the wholesale distribution of electronic products of, at least, EEA or national dimension; and iii) a potential market for the retail distribution of electronic products of national, regional, or local dimension. Regarding market definition, the CNMC indicated that in the case of Apple, the specific market definitions were left open as they did not affect the substantive analysis, nor they were necessary to determine the potential application of Regulation 330/2010 ("**VBER**") if the agreements in question were considered vertical as Apple has a market share above 30% in the market for the manufacture of electronic products of at least EEA dimension throughout the whole investigated period (2017-2021) regardless of the sub-segmentation chosen – i.e. encompassing all electronic products or by category of electronic product in categories such as iPhones, iPads, and iWatches – (see paras 180, 188, 193 and 200).

Then, depending on the variable used to calculate market shares, the CNMC considered that:

- In the case of Amazon (see paras 213 et seq.), three variables were used to calculate market shares: (i) turnover derived from the provision of marketplace services to third-party sellers

taking into account a) basic services and b) basic and additional services; and (ii) turnover generated by third-party sellers. Throughout requests for information to the main marketplaces in Spain, the CNMC concluded that Amazon had, in the most conservative scenario, a 60-70% market share in the market for the provision of marketplace services to third-party sellers in Spain in 2021 (around 70-80% or even 80-90% in other scenarios) – market shares were similar throughout the whole investigated period-; and

- Apple (see paras 224 et seq.) had a market share of 30-40% in a potential market for the manufacture of electronic products of EEA dimension throughout the whole investigated period (including all product categories, that is, desktop computers, laptops, multimedia players, TV broadcasting devices, headphones, smartphones, tablets, wearables, and accessories). If the market was sub-segmented by product categories, Apple had a market share between 40-50% in smartphones and tablets and between 60-70% in wearables devices during almost the whole investigated period. No information could be identified for the wholesale and retail markets (see footnote 164 of the Decision).

In addition, the CNMC deemed that the conduct affected the commercialisation of electronic products on the Spanish Amazon marketplace (see paras. 201 and 233). Thus, the CNMC considered the market for the online retail sale of electronic products in Spain as the market in which the conducts analysed deployed their effects, quoting several decisions from other competition authorities which have also considered different markets for online and offline sales (see para 232) – this would be a sub-segment within the potential market for the retail distribution of electronic products-.

In the market for the online retail sale of electronic products in Spain, Amazon had a market share by turnover between 35-40% and Apple between 5-10% in 2021 (according to data from ecommerceDB and Statista – see para 259 -, the next competitor being PcComponentes.com with also a 5-10% market share). In addition, in the market for online retail sales in general in Spain (including all product categories), Amazon: (i) had a 50-60% market share by traffic in 2020; and (ii) had a 10-20% market share by turnover in 2019 (see para. 264).

Lastly, the CNMC considered that the leading role of Amazon in this sub-segment of the market for the retail distribution of electronic products was also supported by the fact that Amazon is the main website in Spain when searching for electronic products (67% of consumers in Spain use Amazon as its first searching option for this sort of products, see para 261).

The facts

The CNMC's investigation focused on certain clauses of two agreements entered by the parties on 31 October 2018 that regulated their commercial relations.

First, the agreements established that Apple would identify a number of official resellers that would be the only ones authorised to sell their products on Amazon Marketplace, in this case, in www.amazon.es (the so-called **Brand Gating Clauses**) (see paras 282 and 283). Initially, only APRs were authorized (see para 284). On 16 November 2021, Apple communicated to the CNMC that it would also authorise all official resellers (this is, AAR and Retailers) from that moment onwards to use Amazon Marketplace to sell its products (see para 286).

Additionally, the parties also agreed that when an Apple product was searched on Amazon, the top

banner and the first two sponsored product slots on the search results page would only display advertisements of Apple's products. In addition, when searches were made using a list of keywords chosen by Apple (related to their products, such as "Apple iPad"), Amazon would not display on the first page of search results and in the product detail pages advertisements from a list of competing products identified by Apple. Lastly, for cart and checkout pages containing Apple products, advertisers were not able to bid for placements containing the competing products identified by Apple (the **Advertising Clauses**) (see para 289). Similar restrictions were applied during the launching period of new Apple products (see para 291).

Finally, the agreements imposed that during their terms and for two years after their expiration, Amazon would not implement any marketing campaign or similar targeted ads specifically at customers that had purchased Apple products from Amazon designed to explicitly encourage such customers to switch from Apple to a competing (non-Apple) product. This did not preclude Amazon from implementing any marketing campaign that may reach Apple product customers as part of a broader audience (the **Marketing Limitation Clauses**) (see para 297).

Legal Assessment

The nature of the agreement

The CNMC considered that there were horizontal and vertical elements in the case: (i) on the one hand, both companies compete at the manufacturing and distribution levels of electronic products (horizontal element); and (ii) on the other hand, the agreements regulate, among others, the terms and conditions of a supply and distribution relationship (vertical element) (see para 415).

The categorisation as horizontal or vertical was important because, if considered vertical, VBER could be applicable (and the conducts be exempted if the conditions foreseen in the regulation were met). In this regard, Regulation 2022/720 was approved during the investigation phase but due to its transitional period, the CNMC applied Regulation 330/2010 in its analysis, although it also indicated that the result of the legal analysis would be identical irrespective of the applicable regulation. In addition, it also indicated that clarifications (rather than substantive changes) in the new rules – regulation and guidelines – would be applicable in any case (see para 407).

Then, given that for the purposes of the agreements, Amazon and Apple operate at different levels of the production or distribution chain and both agreements, in general, relate to the conditions under which the parties may purchase, sell or resell certain goods or services, the CNMC considered that the agreements were vertical agreements (see paras 418 and 419).

However, the CNMC explained that VBER was not applicable and that, even if it would have been, the exemption foreseen under Article 2 would not be applicable to the case.

The VBER does not apply

Paragraph 26 of the Vertical Guidelines states that VBER does not cover restrictions or obligations that do not relate to the conditions of purchase, sale and resale. It provides an example of an obligation preventing parties from carrying out independent research and development which the

parties may have included in an otherwise vertical agreement, which would not be covered by the VBER and must be assessed individually (likewise in para 61 of the Vertical Guidelines approved in 2022). Therefore, given that the clauses in question were not related to these conditions, the CNMC considered that they were not covered by the regulation and must be assessed individually (see paras 410 and 429).

The exemption does not apply

After that, the CNMC considered that even if the VBER would have applied (*quod non*), the exemption foreseen under Article 2 would not apply, for the following reasons:

- Amazon and Apple compete in the manufacturing and distribution of electronic products – Amazon manufactures and distributes its own private labels including some products that are also commercialised by Apple – (see paras 434 et seq.).
- Lack of application of the dual distribution exception, as both companies compete at the upstream market – i.e. manufacturing level – (see para 463).
- Amazon's market share in the market for the provision of marketplace services to third-party sellers in Spain and Apple's market share in a potential market for the manufacture of electronic products of at least EEA dimension were above 30% in both cases (see paras 443 et seq.).

Thus, the CNMC concluded that the VBER was not applicable and, even if it would have been applicable, the three clauses in question would not have been covered by the exemption and should be analysed individually.

The Brand Gating clauses

The CNMC considered that these clauses constituted a restriction of competition by object after analysing their content, objectives and the legal and economic context that restricted intra-brand competition, notwithstanding its contribution to the achievement of an overall plan pursuing a common objective (see para 634).

Regarding its content, the CNMC considered that the Brand Gating clauses entailed: (i) discriminatory access to the main marketplace in Spain (leader at a notable distance from the next operator in terms of traffic and revenues in the market for the online retail sale of electronic products) between Apple's resellers placing some competitors (i.e., those not authorized to use the marketplace to sell Apple products) at a disadvantage compared to others (i.e., those authorized); (ii) a limitation or control of the distribution of Apple's products on the market; and (iii) a partitioning of the internal market. Hence, the conduct as a whole reduced intra-brand competition (see para 474).

After Apple's communication of 16 November 2021, the NARs were the only non-authorised resellers to use Amazon's Marketplace to sell Apple products. In this regard, the CNMC proved that these kinds of resellers were the main ones selling Apple products on Amazon's Marketplace in Spain and, thus, the main competitive force within the marketplace (the role of APR, AAR and Retailers being residual) (see paras 661 et seq).

Regarding its objectives, the CNMC considered that Apple wanted to monitor easily its distribution channel and reduce its monitoring costs over the resellers of its products -while Apple alleged that the Brand Gating clauses had as their main objective the reduction of counterfeit products on Amazon- and Amazon wanted to achieve a complete supply of Apple products -before signing the 2018 agreements and since 2014 Amazon was only an authorised reseller of the less demanded products of Apple and did not have direct access to buy products from Apple itself- as well as better purchasing conditions (see para 576).

Regarding the legal and economic context, the CNMC considered that given Amazon's market shares, the fact that Apple products were the most demanded products of their category in the market -it is the first manufacturer of electronic products by market share in value-, and the fact that from internal evidence Amazon itself recognized Apple's leadership of branded products on the Amazon Marketplace, it could be concluded that both Amazon and Apple were companies whose behaviours were apt to restrict and/or affect competition in the market (see paras 603 et seq.).

In relation to these clauses, the main allegation of the parties was that, according to the ECJ in Coty (see here), the limitations to use marketplaces can never be qualified as a restriction of competition by object (see paras 546 and 547). However, the CNMC considered that Coty was not applicable to the case at hand based on the following reasons (see paras 548 et seq.):

- First, Apple did not seek that its products were exclusively associated with its authorised distributors. In Coty, the ECJ considered that since this association is precisely one of the objectives sought when a selective distribution system is used, the limitation introduced by Coty was coherent with this system (see paras 44 and 45 of the judgment). However, contrary to that case, Apple used an ODS in which there are non-authorised distributors by definition and Apple itself encouraged its wholesalers to distribute its products to them (see paras 552 to 554).
- Second, contrary to Coty, the Brand Gating clauses were not introduced in the commercial relationship between Apple and its distributors but in the relation between Apple and Amazon as a provider of intermediation services in its marketplace. In addition, the ECJ considered that the prohibition at issue enabled Coty to check that the goods would be sold online in an environment that corresponded to the qualitative conditions that it had agreed with its authorised distributors (see paras 47 to 49 of the judgement), but this problem did not exist in the Apple case, as it had a direct relation with Amazon and, thus, could demand from it compliance with certain sale conditions even when the sale was made by third parties (see paras 555 to 558).
- Third, in Coty, the ECJ considered that the prohibition contributed to maintaining the luxury image of Coty's products, whereas Amazon Marketplace constituted a sales channel for goods of all kinds (see para 50 of the judgement). However, this was not the case here, as Apple itself and some of its distributors were authorised to use Amazon to sell Apple products (see paras 559 to 563).

In addition, the CNMC considered that the Brand Gating Clauses produced the following effects in the market:

- More than 90% of the resellers that had been using Amazon Marketplace in Spain for selling Apple products became non-authorised to continue selling these products in the main online marketplace in Spain (35-40% market share in the online sale of electronic products as indicated and well above the next competitor with a 5-10% market share) (see paras 639 et seq.);
- Resellers not authorized by Apple lost an important sales channel via Amazon Marketplace in

Spain, given that most online sales of electronic products in Spain take place on this marketplace (see paras 661 et seq.);

- The sales of Apple products in Amazon Marketplace were concentrated in Amazon itself, drastically reducing intra-brand competition on this platform (see paras 682 et seq.);
- There had been a reduction of sales of Apple products through Amazon Marketplace in Spain by resellers located in other EU countries, thus limiting trade between Member States and making the interpenetration of national markets more difficult (see paras 705 et seq.); and
- There had been an increase in the relative prices paid by consumers for the purchase of Apple products on Amazon Marketplace in Spain (see paras 724 et seq).

The Advertising Clauses

Once again, the CNMC considered that these clauses constituted a restriction of competition by object after analysing their content, objectives and the legal and economic context that restricted inter-brand competition, notwithstanding its contribution to the achievement of an overall plan pursuing a common objective (see para 882).

Regarding their content, the CNMC considered that: (i) when searching for Apple products, consumers could see advertisements from competing products in the scenarios described, which impeded or made it more difficult for them to make informed purchasing decisions; and (ii) they reduced the ability of competing brands of showing advertisements to potential consumers (see paras 813 and 814).

Regarding their objectives, the CNMC relied on internal evidence from the parties to conclude that Apple's objective was to limit competition that competing brands could exert over it and Amazon's objective was, again, to achieve a complete and direct supply of Apple products (see para 827).

Regarding their legal and economic context, in addition to what was already mentioned before, the CNMC relied on its "Study on the competition conditions in the online advertising sector in Spain" to conclude that although Amazon's role was smaller compared to Google's and Facebook's, it could turn into a competitive force in this field based on the strong growth of its advertising revenues derived from its own inventory, alongside the e-commerce boom accelerated by the pandemic (see paras 843 et seq.).

The Marketing Limitation Clauses

The CNMC considered that these clauses constituted a restriction of competition by object after analysing their content, objectives and the legal and economic context that restricted inter-brand competition, notwithstanding its contribution to the achievement of an overall plan pursuing a common objective (see para 932).

Regarding their content, the CNMC considered that these clauses had a similar effect to a non-compete clause in the sense that they limited Amazon's ability to approach its own clients to implement a marketing campaign encouraging them to switch to a competing (non-Apple) product (see para 884). Although this could be justified based on the VBER (if applicable) during the term of the contract, it was not during the two years after its expiration (see paras 889 and 890).

Regarding their objectives, the CNMC relied on internal evidence from the parties to conclude that Apple's objective was to avoid Amazon's ability to approach its own clients to implement a marketing campaign encouraging them to switch to a competing (non-Apple) product and the objective of Amazon was again to achieve a complete and direct supply of Apple products (see para 899).

Regarding their legal and economic context, the CNMC considered that each sale of an Apple product on Amazon could lead to a marketing campaign, but that this possibility was annulled due to the agreement between the parties (see para 902 et seq.).

The character of the conduct as a single and continuous infringement

Although the CNMC considered that each of these clauses constituted a restriction of competition by object (and in the Brand Gating Clauses case, also by effect), it assessed them as a single and continuous infringement, as they were negotiated together in order to achieve an overall plan pursuing a common objective, i.e., modifying in an anti-competitive way the sale of Apple products on Amazon's Marketplace in Spain (see paras 935 and 1002 et seq.).

Efficiencies

Amazon's main allegation was that the agreements had significantly increased the portfolio and availability of Apple products on its marketplace, together with improvements in the delivery and the presentation of the products on the website and a reduction of prices derived from higher discounts achieved from Apple (see para 942). On the other hand, Apple alleged that the agreements had contributed to the fight against the sale of counterfeit Apple products on Amazon (see paras 979 et seq.). However, the CNMC considered that the conditions of article 1.3 LDC and 101(3) TFEU were not met in the present case, especially the indispensability criteria.

The CNMC explained that there was no causal link between the alleged efficiencies and the clauses in question (see para 954). The increase in the portfolio and availability of Apple products was derived from the direct supply by Apple to Amazon, which could have been achieved without including the clauses in the agreements (see para 968). The same rationale applied to the rest of the allegations presented by the company.

Regarding the fight against counterfeit products, the CNMC considered that if Apple considered that some resellers were selling counterfeit products, it should have adopted corrective measures or filed a complaint before the competent authorities (see para 989). There were several indicators that more proportionate ways of dealing with the problem existed. For instance, Apple's decision in November 2021 (after the initiation of the investigation) to authorise all official resellers to sell on Amazon (see para 983). Lastly, according to Amazon's own data, less than 0-5% of the Apple products sold on Amazon received a counterfeit claim (see para 984).

Conclusion

The CNMC considered that the Brand Gating Clauses, the Advertising Clauses and the Marketing Limitation Clauses constituted a single and continuous infringement of Articles 1 LDC and 101 TFEU having as their object (and, in the first case, also the effect) the prevention, restriction and/or distortion of inter and intra-brand competition in the sale of Apple products on the Spanish Amazon marketplace, which benefited both companies (see para 1076).

On the one hand, Apple: (i) through the Brand Gating Clauses would have achieved a significant increase of its wholesale sales to Amazon and better control of its distribution channel leading, as a result, to a reduction of intra-brand competition on Amazon's Marketplace in Spain, i.e., between authorised and non-authorised resellers to sell its products in this marketplace); and (ii) through the Advertising Clauses and the Marketing Limitation Clauses reduced inter-brand competition on Amazon's Marketplace in Spain, i.e., between Apple and competing brands).

On the other hand, Amazon, by agreeing with these clauses, ensured for itself the supply of the complete portfolio of Apple products, gaining access to its most demanded products such as iPhones, iPads, and iWatches to which it did not have access until then, and increased its incomes derived from the sale of Apple products, due to the concentration of sales of Apple products in itself after the non-authorisation of most resellers to use this marketplace to sell Apple products.

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This summary has been prepared for the purposes of this publication. Only the CNMC's decision and press release contain the official position regarding this case.

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