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**Enforcing competition law in digital markets and ecosystems:
Policy challenges and options**

Contribution

Spanish National Markets and Competition Commission (CNMC)

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1. Introduction

The irruption of new technologies and digitalization of the last decades has reshaped the dynamics and landscape of markets, presenting both opportunities and challenges from a competition standpoint. Due to specificities of digital markets (economies of scale and scope together with network effects enhanced by the power of data as a valuable input), concerns have arisen regarding the significant concentration of market power. Markets may be prone to tipping towards a small number of dominant platforms with ability to leverage data and network effects to stifle competition and entrench their market positions.

In this context, the dynamic nature of these digital ecosystems requires a proactive approach in terms of enforcement, in order to keep pace with technological developments, while preserving undistorted and effective competition. Moreover, international cooperation and coordination is needed among competition authorities to effectively address cross-border competition issues.

Consequently, enforcers face the challenge of adapting competition law to the digital era, putting some stress on traditional frameworks to address the specificities of these markets. From the Spanish National Competition Authority (CNMC) we have been able to use our policy toolkit to tackle the risks that may emerge, both from the perspectives of merger control and antitrust.

After this introductory section, the second section describes CNMC's approach to competition enforcement in the digital sector, describing the most relevant antitrust cases

¹ This contribution has been prepared by the staff of the CNMC and shall not be regarded as the official position of the CNMC unless it refers to CNMC approved documents.

conducted in this field and to CNMC's practical experience in merger control. Section 3 refers to future challenges in digital markets, with a special reference to artificial intelligence and the interplay of competition policy with digital regulation (the Digital Markets Act, DMA, in the European Union). Section 4 concludes with the main takeaways.

2. CNMC's competition enforcement in digital markets

The CNMC has been very active in the digital sector in recent years, from the perspective of both antitrust and merger control.

2.1. Relevant antitrust cases in the digital sector

To start with, it is worth mentioning that the CNMC is currently conducting investigations concerning Booking.com² and Google³ for possible abuses of dominant position (Article 102 of the Treaty on the Functioning of the European Union and Article 2 of the Spanish Competition Act) and unfair acts (violations of the unfair competition act) that affect the public interest by distorting competition (Article 3 of the Spanish Competition Act).

The case "Booking.com" concerns possible exclusionary and exploitative abuses of a dominant position on the provision of intermediation services to hotels by online travel agencies (OTAs) by imposing unfair trading conditions on hotels and commercial policies that may have exclusionary effects, together with alleged abuses of hotels' economic dependence.

In the case "Google related rights", the CNMC is looking into a possible abuse of Google's alleged dominant position by imposing unfair commercial conditions on press publishers and news agencies regarding copyrighted content, eventually distorting fair competition by infringing the intellectual property act by abusing their counterparties' economic dependence.

² More information on this ongoing case can be found on the CNMC's website: [S/0005/21: BOOKING](#)

³ More information on this ongoing case can be found on the CNMC's website <https://www.cnmc.es/expedientes/s001322>.

The most recent decision (on July 2023) in digital markets concerned Apple and Amazon, including a fine of €194 million (€144 million for Apple and €50 million for Amazon) for engaging in an agreement that restricted competition on Amazon's website in Spain⁴.

In such case, the CNMC considered that several clauses contained in the abovementioned agreement restricted intrabrand and inter-brand competition and constituted a single, continuous infringement of Article 1 of the Spanish Competition Act and Article 101 of the Treaty on the Functioning of the European Union (TFEU).

The anticompetitive clause included in the agreement (since October 2018) was the so-called “brandgating clause”, which severely limited the number of resellers authorized to sell Apple products on Amazon's website in Spain. This clause effectively excluded over 90% of resellers from accessing Amazon.es, the primary platform for online sales of electronic products in Spain.

The agreement imposed two additional restrictions. Firstly, it limited advertising space for Apple's competitors on Amazon.es, when they searched for Apple products. Secondly, it constrained Amazon's ability to target marketing campaigns to customers who had purchased Apple products on Amazon.es, particularly when promoting competing products from other brands.

The agreements were considered restrictive by object, underscoring the gravity of the infringements.

Another relevant decision concerns the anticompetitive use of software in the PropTech case⁵. It included fines of €1.25 million to several firms for entering into brokerage price-fixing and information-sharing agreements in online real estate intermediation. This

⁴ S/0013/21 - AMAZON / APPLE BRANDGATING

⁵ S/0003/20 PROPTech

amounted to an infringement of article 101 of the TFEU and of article 1 of the Spanish Competition Act, consisting in a cartel.

One relevant feature of this case was the crucial role of software (despite its apparent simplicity in this case) in facilitating collusion. It illustrated a relatively basic form of collusion, concerning minimum fees and information sharing enforced by some binding rules and the monitoring and punishment of deviations. This was facilitated by software tools, providing interesting lessons on how IT tools can facilitate forms of traditional collusion. The collusive agreement took place in a very decentralized environment (with thousands of real estate agents or franchisees) where the economic theory would predict the collusive agreement not to thrive.

In this context, the CNMC has set as one of its priorities the improvement of detection capabilities and the analysis of anticompetitive conducts, among other things by using new IT tools. This includes in some cases the analysis of artificial intelligence to gain a better understanding of its potential use in anticompetitive conduct. In line with this approach, in 2018 the Economic Intelligence Unit (EIU) was created, which is a specialized and multidisciplinary team in the Competition Directorate. The staff masters quantitative techniques and forensic IT, while at the same time retains an extensive experience in competition matters. Professional profiles include economic, legal, statistical, mathematical, data protection, IT and engineers' profiles.

2.2. Spanish experience in merger control in digital markets

Merger control is horizontal in nature in Spain and there are no specificities for merger control in digital markets as compared to other sectors. But at the same time the merger control framework is flexible enough to adapt to new realities of digital markets.

One of the main tools to do so is the market share notification threshold, apart from the turnover one. Under such criterion, parties are required to notify a merger if joint market share exceeds 30% in a given relevant market in Spain or within. In the event the turnover of the acquired entity is below €10 million, the market share has to exceed 50% (providing

some bureaucratic relief for smaller acquisitions but ensuring that relevant transactions for specific markets are still captured).

It is important to point out that, among the 30 digital mergers assessed in the past 5 years, 22 out of them were notified exclusively due to the market share threshold, ranging from cybersecurity⁶ to online food delivery⁷, legal software⁸ or wedding planning platforms⁹, among others. Some cases have also been referred to the EC when they had an international reach but lacked Community dimension under the EC Merger Regulation.¹⁰

In terms of market shares, these are typically measured through nominal revenue, but also through other metrics like website visits, clicks or users, that may be more relevant in some digital markets due to special characteristics, especially zero-pricing. Such complexities have been observed across various sectors, including classified ads¹¹, online food delivery¹², ride-hailing¹³ and other digital services.

Some of the issues analysed include the role of multi-sidedness (with factors such as exclusivity clauses and the degree of multi-homing), the importance of ecosystems (regarding tied products, zero pricing and lock-in effects), the innovation theories of harm or the role of data. This has resulted in the implementation of remedies in some cases, trying to address the challenges posed by these theories of harm.

⁶ C/1263/22: NORTON / AVAST

⁷ C/0730/16 JUST EAT/LA NEVERA ROJA, C/1046/19 JUST EAT/CANARY

⁸ C/1295/22 - KARNOV / TR ESPAÑA / WK ESPAÑA

⁹ C/1318/22: WEDDING PLANNER / ZANKYOU VENTURES

¹⁰ For instance, Facebook/Whatspp merger, under art. 4(5) of the Merger Regulation, or Apple/Shazam, under art. 22 of the Merger Regulation, before the Illumina - Grail case law regarding article 22.

¹¹ C/0573/14: SCHIBSTED / MILANUNCIOS

¹² C/0730/16 JUST EAT/LA NEVERA ROJA, C/1046/19 JUST EAT/CANARY

¹³ C/0802/16 DAIMLER/HAILO/MYTAXI

Against this background, the new theories of harm investigated have delved into several key areas, examining competition on dimensions beyond price, particularly emphasizing quality and innovation.

Regarding innovation, we have increased the scrutiny placed on it within digital sectors, as it has become a key parameter of competition. Metrics such as the ratio of R&D budget to total revenue or R&D human resources to total resources are currently employed, (always bearing in mind they may be complex). These metrics are commonly measured against market averages or similar benchmarks. Furthermore, parties are sometimes requested to describe in a detailed way their track record of introducing new products, ongoing projects or the development of product in the pipeline.

Besides, in terms of qualitative evidence, we increasingly rely on internal documents (as they can describe R&D projects, whether the target is viewed as a competitive threat because of its innovation, or pre-existing innovation efforts and possible overlap); granular market tests conducted to actual and potential competitors, suppliers and customers (useful to determine the relevance of innovation in a given market, if the target is viewed as a relevant competitive player and if post transaction incentives to innovate will be affected) and external reports (leveraged as supplementary sources of insights).

As far as potential and nascent competition is concerned, we have analysed innovation theories of harm, for instance in cybersecurity markets¹⁴ or in online food delivery¹⁵. Although it is worth mentioning we have not come across a case responding to the pattern of killer acquisitions (the innovation strategy of firms was very different in these two cases).

As for the role of data in digital markets, they increase the multi-sided dimension of digital markets. Economies of scale and of scope and learning and network effects

¹⁴ C/1263/22: NORTON / AVAST

¹⁵ C/1046/19 JUST EAT/CANARY

become more disruptive as well. But the CNMC has not assessed a pure data driven merger.

Regarding other novel theories of harm in the digital sphere, our legal framework is flexible enough to allow the assessment of not only horizontal and vertical effects but also conglomeral issues and ecosystem theories of harm¹⁶. The CNMC has encountered relatively few cases of this nature, although an analysis has been made in the markets of legal databases and publications¹⁷. In this case the CNMC analysed issues such as ability and incentives of the firms to enter into bundling, tying or similar strategies. The operation was cleared with commitments to refrain from bundling products and services or from entering into exclusivity agreements.

Therefore, in terms of commitments and remedies, even if a case-by-case approach is needed, the CNMC has opted in general for using light-touch behavioural remedies in digital markets. The removal of exclusivity clauses or tying/bundling provisions is aimed at fostering multi-homing and facilitating the leverage of network/scale/learning economies by both new entrants and competitors.

Behavioural remedies are said to be more difficult to monitor. In order to tackle this challenge, the CNMC's Competition Directorate includes a monitoring unit, responsible for verifying the fulfilment of the remedies and conditions, as set forth in a CNMC's Board decision. It is worth mentioning that non-compliance is considered under national competition law as a serious breach that can result in fines being levied of up to 10% on an offending company's turnover.

3. Future challenges in digital markets

¹⁶ Article 10 of the Spanish Competition Act (Article 10) mandates us to factor in aspects such as the relative financial or economic strength of merging firms (letter b); actual or potential competition (letter c); the alternatives available to suppliers and consumers (letter d), entry barriers (letter e), supply and demand trends (letter f) and countervailing negotiating power (letter g)

¹⁷ C/1295/22 - KARNOV / TR ESPAÑA / WK ESPAÑA

3.1. Artificial intelligence

As previously mentioned, the CNMC has introduced digitalization as a priority, leading to different initiatives in its annual Action Plans. On the one hand, by implementing an active analysis and monitoring of digital business models and sectors. On the other hand, through the creation of the Economic Intelligence Unit.

In this context, the authority is aware of the challenges driven by algorithms and artificial intelligence. Firstly, there may be an increased risk of potential concerted practices (such as algorithmic collusion) or increased incentives for anticompetitive conduct (e.g. labour mobility limitations by the implementation of non-compete clauses regarding the hiring of skilled workers). Secondly, the context of concentration may lead to potential abuses of a dominant position (e.g. leveraging or expansion of market power to other markets through self-preferencing or tying and bundling, refusal or restrictions to access computer power or data, or exclusive dealings with foreclosure effects, among others). Finally, incentives for reaching higher market power may lead to killer acquisitions or data-driven mergers.

3.2. Interplay with digital regulation

Lack of fairness and contestability in digital markets has led the European Union to adopt a scheme of sectoral digital regulation as complement to competition policy: the Digital Markets Act (DMA).

The CNMC has backed this ex-ante regulation since its very beginning, endorsing it as complementary tool for competition policy, praising two features. On the one hand, the fact that the DMA is without prejudice to the application of competition policy, so it is essential that competition policy goes on being applied vigorously to digital markets and gatekeepers affected by the DMA, both by the DGCOMP of the European Commission and the National Competition Authorities (NCAs). On the other hand, the fact that NCAs are to play a role in the DMA's implementation, even if the European Commission is its "sole enforcer".

That is the reason why coordination and cooperation between NCAs and the European Commission is key in order to ensure that the two tools (competition policy and digital regulation) are used in a consistent and coherent fashion, maximizing synergies, complementarities and the efficiency of resources, leveraging to the maximum extent the capabilities of NCAs for the challenges of digital markets.

4. Conclusion

During the recent years, digitalization has reshaped the dynamics and landscape of markets, especially due to the special features that characterize the digital sector, notably the disruptive impact of scale, learning, scope, and network economies.

Consequently, digitalization is a priority for the Spanish National Competition Authority, leading to different enforcement actions in digital markets and also to the creation of an Economic Intelligence Unit (EIU) to gain detection capabilities.

At the same time, the fact that this disruption is specific to digital sectors does not imply that the horizontal application of competition policy is not fit for purpose.

Besides, it is worth noting that in the European Union, competition policy has been complemented by digital regulation through the DMA.