

SUMMARY OF THE DECISION ADOPTED BY THE COUNCIL OF THE SPANISH COMMISSION FOR MARKETS AND COMPETITION (CNMC) ON 29 JULY 2024 IN CASE S/0005/21 BOOKING¹

SUMMARY

On 16 April and 18 June 2021, two complaints were lodged before the CNMC from two hotel sector associations against BOOKING.COM for a series of anti-competitive practices that could constitute an infringement of the Spanish Competition Act (LDC) and the Treaty on the Functioning of the European Union (TFEU).

Following the investigative phase of the formal proceedings by the Competition Directorate and the submission of the respective draft decision, the CNMC Board deemed **BOOKING.COM to have committed two single and continuous infringements of Article 2 of the LDC and Article 102 of the TFEU**. These constituted an **abuse of a dominant position of an exploitative nature** and an **abuse of a dominant position of an exclusionary nature** from at least 1 January 2019 to the present day.

Dominant position of BOOKING.COM

BOOKING.COM's market share in the market for online booking intermediation services to hotels by online travel agencies (OTAs) in Spain has ranged between 70-90% during the period 2019-2022 and is currently considered to be similar or even higher than in 2022.

In light of BOOKING.COM's very high market share, the relatively low relevance of existing competitive alternatives, the high barriers to entry and expansion, as well as the lack of countervailing buyer power, **BOOKING.COM is deemed to have had a dominant market position in the provision of hotel intermediation services in Spain by OTAs from at least 2019 to the present.**

Exploitative abuse of a dominant position

On the one hand, BOOKING.COM is considered to have abused its dominant position **by imposing a series of unfair trading conditions on hotels located in Spain**, consisting of:

- The imposition of a narrow parity clause on hotels (preventing them from undercutting the price of their rooms on their own sales channel below the price they set on BOOKING) while BOOKING.COM reserves the right to unilaterally undercut the price that hotels set on the BOOKING.COM website;

¹ This document is for information purposes only and its content has no legal value. The public version of the decision (in Spanish) can be found at the following [link](#).

- *The imposition of general terms and conditions in English as binding and subject to the law of the Netherlands and the jurisdiction of the courts of Amsterdam;*
- *The lack of transparency in the information BOOKING.COM provides to hotels on the impact of the Preferred Partner, Preferred Partner Plus and Genius programme subscriptions on their positions in the default results ranking as provided by BOOKING.COM on its website, and on the resulting additional number of hotel visits and bookings through the BOOKING.COM website.*

Exclusionary abuse of dominant position

*BOOKING.COM is also considered to have abused its dominant position **by restricting competition from other OTAs in offering their own online hotel booking intermediary services**, by means of:*

- *The use of the number of bookings a hotel has had on BOOKING.COM as a sorting criterion in the default results ranking that BOOKING.COM offers on its website, thus encouraging hotels to concentrate their sales/bookings on BOOKING.COM, taking into account the relationship between a better positioning in the results ranking and a higher number of bookings;*
- *The use, as a criterion to access and remain in BOOKING.COM's Preferred Partner and Preferred Partner Plus programmes, of a performance requirement based on the hotel's profitability for BOOKING.COM, encouraging hotels to follow a pricing and room availability policy that prioritises BOOKING.COM's profitability over that of other OTAs.*

Sanctions and behavioural obligations imposed on BOOKING.COM

The CNMC imposed two fines of €206,620,000 on BOOKING.COM for each of the single and continuous infringements of abuse of a dominant position committed by imposing unfair trading conditions on hotels located in Spain and restricting competition from other OTAs in offering online intermediation booking services to hotels located in Spain, respectively. Therefore, the total penalty imposed on BOOKING.COM is €413,240,000.

Furthermore, the CNMC considers it necessary to impose a series of behavioural obligations for BOOKING.COM to be attached to the fines. This aims to ensure that the conduct that gave rise to the infringements, or other conduct which may have an equivalent effect, does not continue in the future.

TABLE OF CONTENTS

1. BACKGROUND	6
2. THE PARTIES	6
2.1. Complainants and stakeholders	6
2.1.1. SPANISH ASSOCIATION OF HOTEL MANAGERS	6
2.1.2. HOTEL BUSINESS ASSOCIATION OF MADRID	7
2.2. Accused: BOOKING.COM B.V.	7
3. MARKETS	7
3.1. Introduction	7
3.2. Relevant markets	11
3.3. Size and shares of relevant markets	12
3.3.1. The market for online booking intermediation services to hotels by OTAs in Spain	12
3.3.2. Online retail market for hotel bookings in Spain	13
4. ESTABLISHED FACTS	14
4.1. Impossibility for a hotel located in Spain to negotiate contracts with BOOKING.COM, with few exceptions	14
4.2. The “parity of prices and conditions” clause that BOOKING.COM establishes in its contracts with hotels located in Spain	15
4.3. The possibility for BOOKING.COM on its website to unilaterally lower the final selling price of a hotel located in Spain through the ‘Booking Sponsored Benefits’ (BSB) programme	16
4.4. Binding version of the GDTs	17
4.5. Legal system applicable to the GDTs and the courts competent in the event of a dispute between the parties concerning the GDTs	17
4.6. Ranking of search results for a hotel located in Spain on BOOKING.COM	17
4.7. Criteria used in the default ranking of hotels located in Spain offered by BOOKING.COM after a search by the end customer	17
4.8. Importance of the position in a result ranking in generating visits to a result	19
4.9. Relationship between the hotel’s position in the default ranking of hotel results on BOOKING.COM and hotel bookings on BOOKING.COM	19

4.10.	BOOKING.COM Preferred Partner Programme	20
4.11.	BOOKING.COM's Preferred Partner Plus Programme.....	21
4.12.	BOOKING.COM's 'Extra Visibility' Tool	21
4.13.	BOOKING.COM Genius Programme	22
5.	LEGAL ASSESSMENT	23
5.1.	Closure of proceedings for distortion of free competition due to unfair practices	23
5.2.	Classification of the practices as abuse of a dominant position.....	24
5.2.1.	Dominant position of BOOKING.COM.....	25
5.2.1.1.	Market shares	25
5.2.1.2.	Barriers to entry and expansion.....	25
5.2.1.2.1.	Indirect network effects.....	25
5.2.1.2.2.	The role of platform-generated data and its interaction with network effects	26
5.2.1.2.3.	High fixed marketing costs to operate in the market and advantages for first-movers	27
5.2.1.2.4.	Limited countervailing power of demand.....	28
5.2.1.3.	Conclusion	28
5.2.2.	Abuse of a dominant position by BOOKING.COM	28
5.2.2.1.	Exploitative abuse based on the imposition of unfair terms of trade	28
5.2.2.1.1.	Applying the narrow price-parity clause asymmetrically	29
5.2.2.1.2.	Binding English version of the GDTs, legal system applicable to the GDTs and jurisdiction in the event of a dispute between the parties concerning the GDTs.....	30
5.2.2.1.3.	Lack of transparency regarding the benefits for a hotel of subscribing to the Preferred Partner, Preferred Partner Plus and Genius programmes	32
5.2.2.2.	Exclusionary abuse through conduct restricting competition from other OTAs	35
5.2.2.2.1.	Criteria used by BOOKING.COM to sort the hotel results in its default ranking	35
5.2.2.2.2.	Requirements to access and remain in the Preferred Partner and Preferred Partner Plus programmes	38
5.2.3.	Conclusion	41
6.	SANCTION IMPOSED.....	42
7.	PERFORMANCE OBLIGATIONS	43

**8. APPLICATION OF THE PROHIBITION ON ENTERING INTO
CONTRACTS 45**

1. BACKGROUND

- (1) On 16 April and 18 June 2021, **complaints** were lodged before the Spanish National Markets and Competition Commission (**CNMC**) from the Spanish Association of Hotel Managers (ASOCIACIÓN ESPAÑOLA DE DIRECTORES DE HOTEL) and the Madrid Hotel Business Association (ASOCIACIÓN EMPRESARIAL HOTELERA DE MADRID), respectively, alleging certain anti-competitive practices carried out by BOOKING.COM B.V. (**BOOKING.COM**) in the Spanish accommodation booking market. It was argued that these practices may constitute an infringement of Act 15/2007 of 3 July 2007 on the Protection of Competition (**LDC**) and of the Treaty on the Functioning of the European Union (**TFEU**).
- (2) On 5 October 2022, on the basis of the **preliminary investigation** initiated on 21 April 2021 following the first complaint filed, the Competition Directorate noted the existence of prima facie evidence of an infringement and opened formal proceedings against BOOKING.COM for restrictive practices prohibited by Articles 2 and 3 of the LDC and 102 of the TFEU.
- (3) On 28 July 2023, the Competition Directorate issued the **Statement of Objections**.
- (4) On 4 January 2024, the Competition Directorate **closed the investigation phase** of the formal proceedings and formulated the **draft decision** of the case, which was submitted to the CNMC's Competition Board on 8 February 2024.
- (5) On 29 July 2024, after assessing the draft decision together with the submissions of BOOKING.COM and the interested parties, the Board of Competition adopted the **decision to impose penalties**, which is the subject of this summary.

2. THE PARTIES

2.1. Complainants and stakeholders

2.1.1. SPANISH ASSOCIATION OF HOTEL MANAGERS

- (6) The SPANISH ASSOCIATION OF HOTEL MANAGERS is a non-profit association, established in 1972, which aims to represent the collective professional interests of Spanish hotel managers and directors. It represents more than 800 hotel management professionals who provide services both in Spain and the rest of the world.

2.1.2. HOTEL BUSINESS ASSOCIATION OF MADRID

- (7) The HOTEL BUSINESS ASSOCIATION OF MADRID is a non-profit association whose main goal is to represent the collective professional interests of hotel establishments in the Community of Madrid. It represents more than 300 establishments of all categories and types (hotels, guesthouses, hostels, flats, etc.).

2.2. ADDRESEE: BOOKING.COM B.V.

- (8) BOOKING.COM B.V. (**BOOKING.COM**) is a company incorporated in the Netherlands, which, through its website www.booking.com (and its regional variants), offers an online booking service for accommodation (hotels, guesthouses, flat rentals, youth hostels, etc.) in which participating establishments offer room bookings and visitors can book them online.
- (9) The BOOKING.COM website (www.booking.com) is the largest hotel booking website in the world. At the end of 2022, the market value of BOOKING.COM was approximately €74 billion.

3. MARKETS

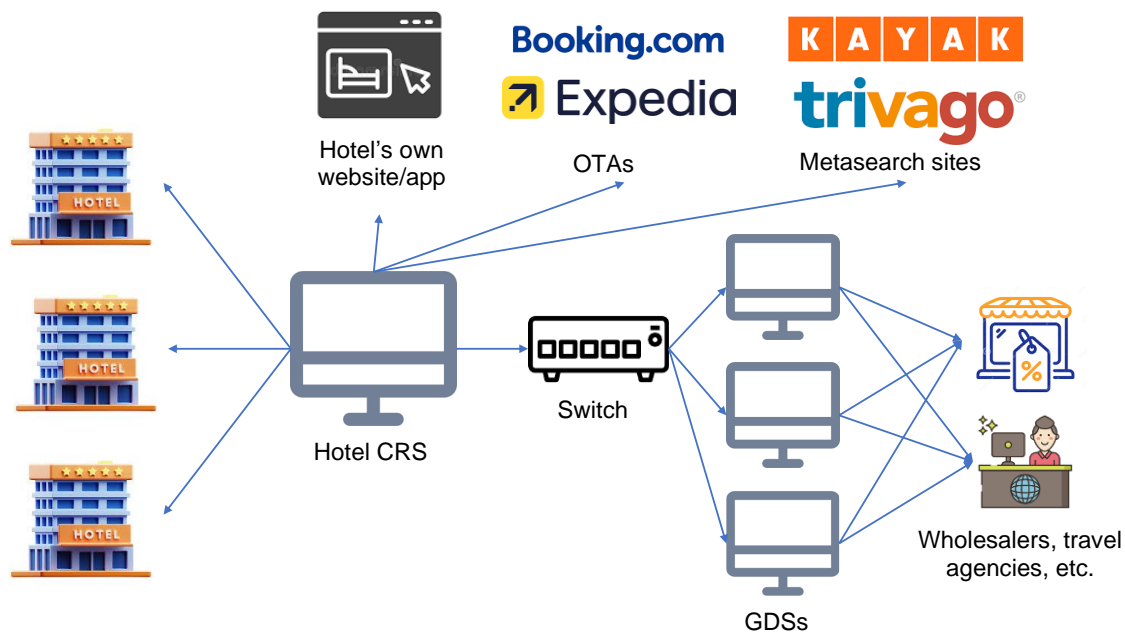
3.1. Introduction

- (10) Given that the practices the Decision concerns deal with bookings in hotel establishments located in Spain, the decision briefly describes the Spanish hotel sector and BOOKING.COM'S role within it. **Therefore**, it provides an introduction before defining the relevant affected markets..
- (11) Within the **travel industry value chain**, different services can be distinguished, which are provided by different economic operators such as:
- Travel Service Providers (TSPs), including airlines (for flight services), hotels, car rental companies and other transport service providers;
 - tour operators, which create tourism products by purchasing individual travel products and combining them into package holidays;
 - physical and online travel agencies, i.e. physical or online retailers selling one or more types of travel services to end customers, services provided by a multiplicity of TSPs or by wholesale agencies; and
 - other travel intermediaries.
- (12) Focusing on **hotel accommodation providers**, given the scope of the complaints, different channels through which a TSP can reach the end customer can be distinguished.

- (13) A first ranking of distribution channels takes into account whether or not there are intermediaries between the end customer and the hotel:
- *direct channel*, where there are no intermediaries between the end customer and the hotel. Here, the hotel itself fulfils the distribution function, such as in the case of bookings made at the hotel establishment itself, by telephone, or through the hotel's own website; and
 - *indirect channel*, in which there is an intermediary between the end customer and the hotel establishment, BOOKING.COM being an example thereof.
- (14) A second ranking of channels refers to the use of electronic means:
- *offline channel*, e.g. when dealing with physical travel agencies; and
 - *online channel*, where electronic means are used to distribute the hotel offer. For example, the hotel's own website would be a direct, online channel.
- (15) Given that BOOKING.COM's activity is confined to the digital domain, **indirect online channels for the marketing of hotel accommodation** will be described in more detail.
- (16) Several Electronic systems for the indirect distribution of hotel accommodation can be distinguished:
- *Global Distribution Systems* (also known as **GDSs**), which consist of a worldwide computer network that allows third parties (such as travel agencies) to access hotel inventory and close deals through large wholesalers;
 - *Internet Distribution Systems* (also known as **IDSs**), which comprise a set of networks that allow hotels to include their offer on third-party websites, in real time, via the Internet,
 - o whether they be **online wholesalers** (including bedbanks); or
 - o operators in the online distribution value chain with direct connectivity with customers. These operators include (i) **online travel agents** (also known as **OTAs**), and (ii) **metasearch sites (MSSs)**, websites that aggregate information relating to one or more types of travel services).
- (17) The **figures for OTAs and MSSs** are developed in more detail below.
- (18) **OTAs** are travel agencies that offer their services online and provide services to two types of users:
- on the one hand, they provide search, comparison and booking services to the *customer*, and
 - on the other hand, they provide marketing services and booking functionality to *TSPs*.

- (19) OTAs can sell a multiplicity of products such as flights, hotels, package tours, cruises, car rentals, etc. and their business model and way of monetising their activity is mainly based on charging a commission on sales intermediated (TSPs).
- (20) In addition, the following types of OTAs can be distinguished according to the source of their hotel inventory:
- OTAs whose hotel inventory is *provided directly by hotels* under partnership contracts. Examples of such OTAs are BOOKING.COM and Expedia Inc. **(EXPEDIA)**;
 - OTAs whose hotel inventory is *provided by another OTA* that does not have its own hotel inventory, within the framework of a commercial partnership agreement. Examples of OTAs whose inventory is provided by another OTA are eDreams and the Lastminute-Bravofly Group. An example of an OTA that provides inventory to other OTAs is BOOKING.COM itself;
 - OTAs whose hotel inventory is *sourced from a wholesaler*, either GDS or online (such as a bedbank). An example of this type of OTA is TRAVELCONCEPT, S.L.U.
- (21) It should be noted that hotel supply from different sources can be found in the same OTA.
- (22) **MSSs** (metasearch sites) are websites that aggregate information relating to one or more types of travel services:
- on the one hand, MSSs provide search and comparison services to *customers* and allow them to compare offers for the same product made by the TSP and/or by one or more OTAs;
 - on the other hand, they provide lead generation services to TSPs and OTAs.
- (23) Examples of metasearch sites are KAYAK, Trivago.es, Tripadvisor and Google Hotels.
- (24) The following graph summarises the main online distribution channels discussed. It should be noted that the term **CRS** in the graph refers to central/computerised booking systems used by certain hotel chains and hotel co-operatives to communicate their availability online and manage their rates.

Diagram 1. Approach to the online distribution of hotel inventory



Source: Created by the CNMC

(25) As noted above, the OTA's revenues generally take the form of a commission calculated on the amount of bookings mediated. In this respect, two types of **business models followed by OTAs** can be distinguished, depending on when and to whom the payment of the booking is made:

- the so-called retail model, whereby the hotel sets its rate on the OTA's platform, which the OTA will use as the retail price. The OTA's profit is the commission calculated on the amount of the booking, which the hotel pays to the OTA once the end consumer has concluded his/her stay. BOOKING.COM is an example of an OTA that has traditionally followed this model, but more recently has moved to offering hotels the possibility of using the other model below (under the so-called 'Facilitated Payment' programme);
- the merchant model, whereby the customer pays the OTA when booking the accommodation and the OTA Pays to the hotel its due once the customer's stay has taken place. In this case, the hotel establishment gives the OTA a net rate, to which a margin is usually applied to determine the retail price. The profit margin for the OTA or commission is determined in the distribution partnership agreement between the hotel and the OTA.

3.2. Relevant markets

For the purposes of these proceedings, the definition of relevant markets has been formulated by taking into account the fact that the practices under scrutiny concern the provision of intermediation services to hotels by OTAs during the period under investigation.

(26) In this respect, it should be noted that OTAs with their own hotel inventory (by virtue of contracts with hotels whereby they provide online booking intermediation services to those hotels) operate what is known in the economic literature as a two-sided platform, as their website connects two groups of users who demand their services:

- On the one hand, the *hotels* demand the booking intermediation services offered by OTAs to reach the end customer. To this end, hotels convey information to OTAs on the content, rates and availability of their rooms and OTAs disseminate and translate this content on their website and on commercial partner websites into various languages. They also offer hotels online advertising services, which ‘make’ the hotel visible on the Internet, and online booking services, allowing hotels access to both domestic and international customers. These services are invoiced through commissions, which are defined as a percentage of the retail price of the stay, payable in case of booking;
- On the other hand, the *end-customers* demand the hotel search, comparison and booking services offered by OTAs, which OTAs offer free of charge.

(27) In view of the above, the **markets which concern** this case are:

- the provision of online booking intermediation services to hotels by nationwide online travel agencies (OTAs), which is considered to constitute a relevant product market differentiated from other channels, whether physical or online, that a hotel may use to reach the end-user, such as the direct channel, MSS, etc.

Note that this market under consideration does not include OTAs that are not directly engaged by hotels, as these OTAs do not compete to attract hotels, as they source their hotel-type inventory from other sources such as:

- wholesale traders who buy rooms in bulk and then resell them (including so-called ‘bedbanks’);
- the hotels’ own directly engaged OTAs, which offer their inventory to other OTAs under the commercial partnership agreements discussed above.

- **the nationwide online retail distribution of hotel bookings**, as the practices analysed have the potential to affect the online retail sale of hotel-type accommodation bookings, irrespective of the channel used for this purpose.

3.3. Size and shares of relevant markets

3.3.1. The market for online booking intermediation services to hotels by OTAs in Spain

- (28) The following is an estimate of the market shares of online hotel booking intermediation services by OTAs in Spain based on the data on file, which is exclusively from OTAs with their own inventory of hotel rooms located in Spain.
- (29) This estimate is provided under the following metrics for the period 2019-2022:

Table 1. Commissions received by OTAs for the intermediation of online bookings to hotels located in Spain

Company	Amount (€) of commissions received in Spain							
	2019	%	2020	%	2021	%	2022	%
Booking.com	CONF	80-90%	CONF	80-90%	CONF	80-90%	CONF	70-80%
Agoda	CONF	0-10%	CONF	0-10%	CONF	0-10%	CONF	0-10%
Priceline	CONF	0-10%	CONF	0-10%	CONF	0-10%	CONF	0-10%
BOOKING.COM Group	CONF	80-90%	CONF	80-90%	CONF	80-90%	CONF	70-80%
Expedia Group	CONF	10-20%	CONF	10-20%	CONF	0-10%	CONF	10-20%
Airbnb Group	CONF	0-10%	CONF	0-10%	CONF	0-10%	CONF	0-10%
Atrápalo	CONF	0-10%	CONF	0-10%	CONF	0-10%	CONF	0-10%
Viajes El Corte Inglés	CONF	0-10%	CONF	0-10%	CONF	0-10%	CONF	0-10%
Destinia Group	CONF	0-10%	CONF	0-10%	CONF	0-10%	CONF	0-10%
HRS	CONF	0-10%	CONF	0-10%	CONF	0-10%	CONF	0-10%
Trip.com	CONF	0-10%	CONF	0-10%	CONF	0-10%	CONF	0-10%
TOTAL	CONF	100%	CONF	100%	CONF	100%	CONF	100%

Source: Created by the CNMC on the basis of data on file (data in \$ from AGODA, PRICELINE, EXPEDIA and AIRBNB converted into € at official exchange rates)

Table 2. Value of online bookings mediated by OTAs to hotels located in Spain

Company	Value (€) of bookings mediated in Spain							
	2019	%	2020	%	2021	%	2022	%
Booking.com	CONF	70-80%	CONF	80-90%	CONF	80-90%	CONF	70-80%
Agoda	CONF	0-10%	CONF	0-10%	CONF	0-10%	CONF	0-10%
Priceline	CONF	0-10%	CONF	0-10%	CONF	0-10%	CONF	0-10%
BOOKING.COM Group	CONF	70-80%	CONF	80-90%	CONF	80-90%	CONF	70-80%
Expedia Group	CONF	10-20%	CONF	10-20%	CONF	10-20%	CONF	20-30%
Airbnb Group	CONF	0-10%	CONF	0-10%	CONF	0-10%	CONF	0-10%
Atrápalo	CONF	0-10%	CONF	0-10%	CONF	0-10%	CONF	0-10%
Viajes El Corte Inglés	CONF	0-10%	CONF	0-10%	CONF	0-10%	CONF	0-10%
Destinia Group	CONF	0-10%	CONF	0-10%	CONF	0-10%	CONF	0-10%
HRS	CONF	0-10%	CONF	0-10%	CONF	0-10%	CONF	0-10%
Trip.com	CONF	0-10%	CONF	0-10%	CONF	0-10%	CONF	0-10%
TOTAL	CONF	100%	CONF	100%	CONF	100%	CONF	100%

Source: Created by the CNMC on the basis of data on file (data in \$ from AGODA, PRICELINE, EXPEDIA and AIRBNB converted into € at official exchange rates)

Table 3. Number of bookings mediated online by OTAs to hotels located in Spain

Company	Number of bookings mediated in Spain							
	2019	%	2020	%	2021	%	2022	%
Booking.com	CONF	80-90%	CONF	80-90%	CONF	80-90%	CONF	70-80%
Agoda	CONF	0-10%	CONF	0-10%	CONF	0-10%	CONF	0-10%
Priceline	CONF	0-10%	CONF	0-10%	CONF	0-10%	CONF	0-10%
BOOKING.COM Group	CONF	80-90%	CONF	80-90%	CONF	80-90%	CONF	70-80%
Expedia Group	CONF	10-20%	CONF	0-10%	CONF	0-10%	CONF	20-30%
Airbnb Group	CONF	0-10%	CONF	0-10%	CONF	0-10%	CONF	0-10%
Atrápalo	CONF	0-10%	CONF	0-10%	CONF	0-10%	CONF	0-10%
Viajes El Corte Inglés	CONF	0-10%	CONF	0-10%	CONF	0-10%	CONF	0-10%
Destinia Group	CONF	0-10%	CONF	0-10%	CONF	0-10%	CONF	0-10%
HRS	CONF	0-10%	CONF	0-10%	CONF	0-10%	CONF	0-10%
Trip.com	CONF	0-10%	CONF	0-10%	CONF	0-10%	CONF	0-10%
TOTAL	CONF	100%	CONF	100%	CONF	100%	CONF	100%

Source: Created by the CNMC on the basis of data on file

3.3.2. Online retail market for hotel bookings in Spain

- (30) Due to the multiplicity of potential retailers, estimating the size of the market for online retailing of hotel bookings in Spain is more difficult.
- (31) Table 2 provides a rudimentary approximation of this market's size, if it is considered to be made up solely from the **OTA channel**. The data in Table 2 has the advantage of including the sales of OTAs whose hotel inventory is provided by another OTA under a commercial partnership agreement. However, Table 2 also suffers from the following shortcomings in estimating this market size:
- it includes bookings at Spanish hotels by foreign customers, which would have to be excluded for this market; and
 - foreign hotel bookings by domestic customers, which should be taken into account, are not included.
- (32) The **CNMC's e-commerce statistics** shed light on the retail distribution of hotel bookings in Spain. Specifically, the CNMC collects two types of e-commerce data useful for the purposes of this file, categorised under the headings:
- Travel agencies and tour operators (codes 7911 and 7912 according to CNAE and CNPA harmonisation);
 - Hotels and similar accommodation (code 5510 according to CNAE and CNPA harmonisation).
- (33) However, data on 'travel agencies and tour operators' is not usable, as it does not distinguish between the different types of travel services sold (airline tickets, train tickets, hotels, car rentals, etc.) that are included. Therefore, only data from the heading 'hotels and similar accommodation' can be used, which, due to its origin, reflects the direct online channel sales of hotels. Putting together the data 'Within Spain' and 'From Spain to Abroad' gives an approximate picture of the direct online channel sales of hotels to Spanish residents, as shown in **Table 4**.

Table 4. Turnover (euros) for direct online bookings in domestic and foreign hotels in Spain

E-commerce expenditure in hotels and similar accommodations			
	In Spain	From Spain to foreign countries	TOTAL
2014	63,243,555	143,957,071	207,200,626
2015	82,280,468	229,865,809	312,146,278
2016	98,278,602	395,025,316	493,303,918
2017	127,117,566	691,330,262	818,447,828
2018	186,749,010	984,249,378	1,170,998,387
2019	247,549,476	1,552,782,335	1,800,331,811
2020	155,607,488	894,425,537	1,050,033,025
2021	317,705,796	1,066,515,613	1,384,221,409
2022 (Jan.-Sept.)	389,521,591	1,336,712,704	1,726,234,296

Source: CNMC

- (34) The combination of data from Table 2 and Table 4 gives an approximate idea of the retail sales of the two main online distribution channels for hotel bookings in Spain.
- (35) The market information provider **Statista** produces estimates of revenue from retail hotel bookings, both domestic and international, by customers in Spain. These estimates can be found in **Table 5**, below.

Table 5. Amount (billions of dollars) of bookings (online and offline) in domestic and foreign hotels made in Spain, 2019-2022

Revenues (\$ billions)	2019	2020	2021	2022
Hotels	6.17	1.65	2.23	6.71

Source: Statista (as of January 2023)

4. ESTABLISHED FACTS

- (36) On the basis of the documentation gathered during the investigation phase of these proceedings, the following facts are considered to be established:

4.1. Impossibility for a hotel located in Spain to negotiate contracts with BOOKING.COM, with few exceptions

- (37) The contract governing the provision of online booking intermediary services to a hotel by BOOKING.COM has as one of its essential components the so-called **General Delivery Terms** (hereinafter referred to as **GDTs**).
- (38) GDTs are standard-form agreements, as BOOKING.COM does not negotiate with hotels on their terms, except in the case of a few accommodations.

4.2. The “parity of prices and conditions” clause that BOOKING.COM establishes in its contracts with hotels located in Spain

- (39) Section 2 of the GDTs sets out the obligations that a hotel located in Spain enters into with BOOKING.COM by accepting the GDTs. More specifically, clause 2.2 contains the so-called **parity of rates and conditions obligation**, the wording of which is reproduced below:

“2.2 Parity

*2.2.1 The Accommodation shall give Booking.com “**Rate and Conditions Parity**”, meaning the same or better rates for the same Accommodation, room type, dates, bed type, number of guests, same or better amenities and add-ons (e.g. free breakfast, wifi, early/late check-out), and the same or better restrictions and policies such as reservation changes and cancellation policy as are made available by the Accommodation.*

2.2.2 Rate and Conditions Parity does not apply in respect of rates and conditions:

(i) offered through any online reservation service that is not controlled, directly or indirectly, by the Accommodation or the chain (whether integrated or not) to which the Accommodation belongs;

(ii) offered on offline channels that do not involve the use of the internet (such as reservations made in person at the Accommodation’s reception, by telephoning the Accommodation, or at a bricks and mortar travel agency), provided that the Room Prices are not Published Online or Marketed Online; or

(iii) that are Unpublished, provided that these room rates are not Marketed Online.

2.2.3 The Parties acknowledge that the intent of Clauses 2.2.1 and 2.2.2 is to ensure that the rates and conditions posted on the Platform are competitive, so that Guests benefit from lowered search costs, and so as to prevent the Accommodation from ‘free riding’ on the significant investments made by Booking.com.

2.2.4 Booking.com may give an incentive with respect to the Room Price at its own cost. In such case Booking.com shall pay part of the Room Price on behalf of the Guest.

2.2.5 The Accommodation agrees to give, for each calendar date and subject to availability, some availability for all rooms and room types and is encouraged to provide Booking.com with fair access to all rooms and room types (including various applicable policies and restrictions) and rates available during the term of the Agreement, during periods of low and high demand including during fairs, congresses and special events.

2.2.6 Clauses 2.2.1 and 2.2.2 do not apply to Accommodations (meaning properties) located in Wide Parity Countries, in which case the wording of these Clauses is deleted and replaced by the relevant wording in Annex 5. Clauses 2.2.1 and 2.2.2 do not apply to Accommodations (meaning properties) located in No Parity Countries.”

- (40) This obligation is reiterated (in relation to prices) in section 5 of the GDTs on ‘Representations and warranties’. Specifically, clause 5.1(v) of the GDTs states that the hotel represents and warrants that, during the term of the GDTs:

“the prices for the rooms advertised on the Platform are the same or better to the best available price for an equivalent stay as Marketed Online, Published Online or otherwise made available online by the Accommodation on its own website and a better price cannot be obtained by a Guest making a reservation with the Accommodation directly on its website or app”.

- (41) This type of parity clause is known as narrow/limited/restricted parity, as it only covers the hotel’s direct online sales channels, as opposed to the broad parity clause, which covers all online channels employed by the hotel (and not only the hotel’s own online sales channel).
- (42) This narrow price-parity and conditions clause has been included in GDTs with hotels located in Spain since 2015.

4.3. The possibility for BOOKING.COM on its website to unilaterally lower the final selling price of a hotel located in Spain through the ‘Booking Sponsored Benefits’ (BSB) programme

- (43) BOOKING.COM reserves the right to reduce, at its own expense, the final sale price advertised by the hotel on BOOKING.COM (clause 2.2.4):

“2.2.4 Booking.com may give an incentive with respect to the Room Price at its own cost. In such case Booking.com shall pay part of the Room Price on behalf of the Guest.”

- (44) BOOKING.COM exercises this possibility to lower the final room rate set by the hotel under the ‘**Booking Sponsored Benefits**’ (BSB) programme. BOOKING.COM’s way of reducing the final sales price of the hotel under the BSB programme is to waive part of its stipulated commission, so that the hotel receives the same net commission price as it would have done if the final sales price had remained unchanged.

4.4. Binding version of the GDTs

- (45) Under clause 12.6 of the GDTs, the official version of the GDTs is the English language version, which prevails over the courtesy translations of the GDTs provided by BOOKING.COM.

4.5. Law governing the GDTs and the courts competent in the event of a dispute between the parties concerning the GDTs

- (46) Pursuant to clause 10.1 of the GDTs, unless otherwise stipulated, the execution and interpretation of the GDTs shall be governed exclusively by Dutch law, and any disputes arising out of or in connection to the GDTs shall be referred exclusively to the competent courts in Amsterdam, the Netherlands.

4.6. Ranking of search results for a hotel located in Spain on BOOKING.COM

- (47) As BOOKING.COM notes, the main interaction of an end-customer with the BOOKING.COM website lies in the search for a stay in accommodation for specific dates.
- (48) The initial (or default) results ranking in response to a query offered by BOOKING.COM is called '**default ranking**'.
- (49) Although the first ranking of the results that BOOKING.COM offers to an end user is the default ranking, the end user has the possibility of changing the default ranking in two ways at a later stage:
- applying **filters** to the ranking results to adjust them, e.g. according to budget requirements, type of accommodation or room rate; and
 - using **alternative ranking methods**, which allow the results provided by the default ranking to be sorted according to other criteria such as price, rating, stars, distance from the centre, etc.
- (50) On the basis of the data provided by BOOKING.COM, it can be stated that a high percentage of customers in Spain who booked on the BOOKING.COM website during the period under consideration booked from the results sorting offered by default by BOOKING.COM.

4.7. Criteria used in the default ranking of hotels located in Spain offered by BOOKING.COM after a search by the end customer

- (51) As stated in clause 4.1.1 of the GDTs:

“ Booking.com aims to display search results relevant to each specific Guest, by providing a personalised default ranking of Accommodations on the Platform”.

- (52) Based on BOOKING.COM’s **public information**, the following conclusions can be drawn as to how BOOKING.COM compiles its default ranking:
- it employs several algorithms that take into account various factors/parameters;
 - the ranking is personalised based on the customer’s search history on BOOKING.COM (if available);
 - the main parameters that BOOKING.COM prioritises in its algorithms are:
 - o the click-through rate from the search page to the hotel page;
 - o the conversion rate of the hotel on BOOKING.COM, i.e. the number of bookings related to the number of visits to the hotel’s page on BOOKING.COM²;
 - o the gross (including cancellations) and net (excluding cancellations) bookings a hotel has had on BOOKING.COM.
 - The following can also influence the default ranking:
 - o the commission percentage paid by the hotel or other benefits for BOOKING.COM (e.g. through commercial agreements with the hotel or strategic partners);
 - o the hotel’s track record in terms of prompt payment.
- (53) In particular, the hotel can influence the default ranking by participating in:
- o the Preferred Partner and Preferred Partner Plus programmes;
 - o the Visibility Booster tool;
 - o the Genius programme; and
 - o uploading offers on BOOKING.COM.

² In turn, conversion rate and click-through rate can be affected by a number of (independent) factors, including:

- o scoring of comments (both components and aggregate scores);
- o availability;
- o conditions;
- o (competitive) prices;
- o quality of the content; and
- o certain features of the hotel.

- (54) It should be noted that the hotel can consult some of the factors that influence its position in the default ranking on the BOOKING.COM Extranet.
- (55) In addition to the public information, BOOKING.COM has provided more detailed internal **confidential information** on how the criteria determining the default ranking operate.

4.8. Importance of the position in a result ranking in generating visits to a result

- (56) Internet usage experience shows that users tend to stay almost overwhelmingly on the first page of a results ranking after a search and tend to click overwhelmingly on the first results³.
- (57) According to BOOKING.COM, for a search conducted in June 2023 for properties in Spain, with no filters or orders applied, the first five results of the default ranking account for a significant percentage of clicks.
- (58) BOOKING.COM advertises the Genius, Preferred Partner and Preferred Partner Plus programmes as ways to drive more traffic to a hotel's website.

4.9. Relationship between the hotel's position in the default ranking of hotel results on BOOKING.COM and hotel bookings on BOOKING.COM

- (59) In established fact 4.8, it has been shown how a hotel's higher position in the ranking results in a higher number of visits to a result. This higher number of visits, in turn, leads to a higher number of bookings than in the case of a hotel with a lower position in the BOOKING.COM results ranking.
- (60) In particular, BOOKING.COM emphasises in its public documentation that the higher visibility of the hotel in the default results ranking that comes with participation in certain optional programmes leads to more bookings for the hotel:
- on average, by 20% more in the case of the Preferred Partner Programme;
 - 30% more in the case of the Preferred Partner Plus Programme;

³ BOOKING.COM's own computer engineers acknowledge this fact in an academic article, where they refer to it as "position bias," defining it in the following terms: "*Customers tend to click on and book accommodation that is ranked higher in search results, as there is an inherent bias that items closer to the top are "better."*"

- in the case of the 'Visibility Booster' tool, BOOKING.COM provides an estimate of the increase in bookings the hotel would get depending on the level of additional commission you chooses; and
- 45% more, on average, in the case of the Genius Programme.

4.10. BOOKING.COM Preferred Partner Programme

- (61) A hotel located in Spain has the option of voluntarily participating in the so-called Preferred Partner programme offered by BOOKING.COM.
- (62) In exchange for offering BOOKING.COM an **additional commission on top of BOOKING.COM's basic commission** per booking, the hotel participating in the programme receives:
- an improvement of its visibility in the default ranking provided by BOOKING.COM when a user enters a search for a hotel in Spain on its website; and
 - a special "thumbs up" icon that acts as BOOKING.COM's seal of approval when the hotel appears in the results.
- (63) In order to participate in this programme, a hotel located in Spain must first meet three **requirements**:
- Achieving a certain performance score for the hotel on the BOOKING.COM website, based on calculations made by BOOKING.COM itself;
Specifically, the hotel must be in the top 30% of suppliers that report the highest profitability for BOOKING.COM in the geographic area defined by BOOKING.COM in which the hotel is located, with respect to the conversion rate on BOOKING.COM;
 - Reaching a certain hotel room price score on the BOOKING.COM website, which means that the hotel qualifies as 'competitive' on the 'external prices' indicator calculated by BOOKING.COM itself;
 - Meeting a certain review score on BOOKING.COM's website, namely at least 7 (on a scale of 1 to 10).
- (64) In terms of the benefits of the programme for participating hotels, BOOKING.COM claims that member hotels see an average increase of 20-35% in bookings.

4.11. BOOKING.COM's Preferred Partner Plus Programme

- (65) A hotel located in Spain that is part of the Preferred Partner Programme has the option of voluntarily participating in the so-called Preferred Partner Plus Programme offered by BOOKING.COM.
- (66) This programme was introduced for hotels located in Spain on 20 April 2021.
- (67) In exchange for offering BOOKING.COM a **supplementary commission on top of the Preferred Partner Programme commission**, BOOKING.COM offers hotels:
- a greater improvement in visibility in the default ranking than under the Preferred Partner Programme;
 - travel credit for people who book at the participating hotel, which increases the attractiveness of the hotel, according to BOOKING.COM, as potential customers can use the earned credit for future bookings on BOOKING.COM.
- (68) In order to participate in the Preferred Partner Plus Programme, the hotel must first meet certain **requirements** that have not been modified since the launch of the Programme in Spain:
- Being part of the Preferred Partner Programme, as mentioned above;
 - Achieving a certain hotel performance score on the BOOKING.COM website. Specifically, according to BOOKING.COM, the hotel must be in the top 20% of the most profitable suppliers for BOOKING.COM in the geographic area defined by BOOKING.COM in which the hotel is located, with respect to the conversion rate on BOOKING.COM;
 - Meeting a certain review score on the BOOKING.COM website, namely at least 8 (on a scale of 1 to 10).
- (69) In terms of the benefits of the programme for participating hotels, BOOKING.COM claims that hotels that join the programme experience an increase in visibility of up to 60%, which could mean 30% more bookings than hotels in the Preferred Partner Programme.

4.12. BOOKING.COM's 'Visibility Booster' Tool

- (70) A hotel located in Spain has the option of using BOOKING.COM's 'Visibility Booster' tool.
- (71) To use it, the hotel must simply choose an **additional commission** to be paid to BOOKING.COM **for the mediated booking**. There are no quality criteria for the

use of this tool, unlike the Preferred Partner and Preferred Partner Plus programmes.

- (72) Depending on the additional commission that the hotel chooses to pay BOOKING.COM for a mediated booking, **BOOKING.COM offers the hotel a greater or lesser potential visibility improvement** in the default results ranking on the BOOKING.COM website. Specifically, according to BOOKING.COM, the Programme grants an increase in the ranking score of one of the algorithms, potentially leading to a higher-ranking result.
- (73) According to BOOKING.COM, hotels using this tool are indicated as “sponsored” in the search results.
- (74) In terms of the benefits of this tool for hotels wishing to use it, BOOKING.COM indicates that it provides the hotel with an estimated increase in visits to the hotel’s web page on the BOOKING.COM website and bookings it would receive based on the level of additional commission it chooses under ‘Visibility Booster’, based on its intelligence on customer behaviour, booking trends and demand.

4.13. BOOKING.COM Genius Programme

- (75) A hotel located in Spain has the option of voluntarily participating in **BOOKING.COM’s customer loyalty programme**, known as Genius.
- (76) In this programme, participating hotels must offer a closed group of BOOKING.COM users (Genius members) a 10% discount on the rate of the best-selling room and also on the cheapest room of the hotel they have on BOOKING.COM (if the cheapest room coincides with the best-selling room, the discount will only be applied to this room). In addition to this compulsory discount for participation in the programme, the hotel can optionally offer other extras (further discount of 15%, free breakfast, free room upgrade, etc.).
- (77) With its participation in the programme, **BOOKING.COM offers the hotel:**
- increased visibility in BOOKING.COM’s default ranking; and
 - a special ‘Genius’ tag next to the hotel name when it appears in search results on the BOOKING.COM website and apps.
- (78) In order to participate in this programme, the hotel must first meet certain **requirements:**
- have room availability on BOOKING.COM;
 - have received at least three reviews from people who have stayed there on the BOOKING.COM website;

- have a review rating of at least 7.5 on the BOOKING.COM website (BOOKING.COM may waive this requirement if the average rating for the area/city of the hotel is below 7.5 and the hotel in question has a higher-than-average rating); and
 - be rated as 'competitive' in the 'External Prices' indicator calculated by BOOKING.COM for the hotel.
- (79) In terms of the benefits of the programme for member hotels, BOOKING.COM reports that member hotels see an average 70% increase in visits to the hotel's website on BOOKING.COM, 45% increase in bookings and 40% increase in revenue (including the cost of the discount).

5. LEGAL ASSESSMENT

5.1. Dismissal of charges for a possible distortion of competition due to unfair practices

- (80) The investigative body Proposed to the Council that BOOKING.COM should be sanctioned for two single and continuous infringements of abuse of a dominant position of Art. 2 of the LDC and 102 of the TFEU, and for **a single and continuous infringement of Article 3 of the LDC**, consisting of three acts of unfair competition corresponding to different modes of exploitation of the economic dependence that the hotels located in Spain have with respect to BOOKING.COM, resulting in a distortion of free competition through the imposition of unfair trading conditions **from at least 1 January 2017 to the present day.**
- (81) However, the assessment of the acts as an infringement of Article 3 of the LDC in the terms set out in the draft decision requires that the infringement be proven independently, sufficiently and on the basis of the minimum evidence requirements set out by Spanish law.
- (82) Therefore, having analysed the established facts contained in the case file and BOOKING.COM's submissions, it is deemed that there is insufficient evidence to uphold the charge of distortion of free competition through unfair practices.
- (83) Considering the above, the CNMC Council dismissed the charge against BOOKING.COM related to a single, continuous violation of Article 3 of the LDC from at least January 1, 2017, to the present.

5.2. Abuse of a dominant position

- (84) Article 2 of the LDC⁴ prohibits “*the abusive exploitation by one or more undertakings of their dominant position in all or part of the national market.*” Under the provisions of this article and established national and EU jurisprudence, in order for practices to be classified as abuse of a dominant position, two cumulative conditions must be met: (i) that the infringer holds a dominant position in the relevant market in which the practices under investigation take place, and (ii) that these practices constitute abuse of this position.
- (85) In light of national and EU law, and as possible infringements of Article 2 of the LDC and 102 of the TFEU, this section assesses the following practices carried out by BOOKING.COM, in the following order:
- **applying the narrow price-parity clause asymmetrically** (see section 4.2 and 4.3):
 - o while BOOKING.COM imposes a narrow price-parity clause on hotels (see section 4.2), i.e. it prevents them from lowering their prices on their own online sales channel (compared to the price offered on BOOKING.COM);
 - o BOOKING.COM reserves the right to unilaterally lower the prices offered by the hotel on BOOKING.COM, at its own expense, in certain cases (see section 4.3).
 - **imposing the following terms in the GDTs on hotels located in Spain** (see section 4.4 and 4.5):
 - o **the binding version of the GDTs is the one drafted in English** (see section 4.4);
 - o **the GDTs are governed by and should be construed in accordance with the Dutch law, and in the event of a dispute** in relation to the GDTs, hotels located in Spain must **bring their claims before the competent courts in Amsterdam, the Netherlands** (see section 4.5);
 - the lack of transparency in the information provided by BOOKING.COM to hotels located in Spain on the impact of the Preferred Partner, Preferred Partner Plus and Genius programme subscriptions on their position in the default results ranking provided on the BOOKING.COM website (see section 4.10, 4.11 and 4.13) and the resulting additional number of hotel visits and bookings on BOOKING.COM (see section 4.6, 4.8 and 4.9);

⁴ Article 102 of the TFEU establishes the same rule.

- the use of the bookings a hotel has had on BOOKING.COM as a criterion for the ranking of hotels in the default ranking results provided by BOOKING.COM on its website (see section 4.7); and
- the use of the performance criterion for a hotel to qualify for and remain in the Preferred Partner and Preferred Partner Plus programmes (see section 4.10 and 4.11).

5.2.1. Dominant position of BOOKING.COM

5.2.1.1. Market shares

- (86) According to Table 1, Table 2 and Table 3, **BOOKING.COM's market share in the market for online booking intermediation services to hotels by OTAs in Spain ranged between 70-90% during the period 2019-2022**, based on the amount of commissions charged to hotels (the figures are similar in terms of the amount of bookings and the number of bookings channelled)⁵.
- (87) It should be noted that market shares are relevant from both static (current situation) and dynamic points of view. Thus, the evolution of these shares in recent years (their maintenance or reinforcement regardless of changes in market conditions) shows that these shares have remained at a very high level for a considerable period.
- (88) Finally, in light of (i) the observed trends of stable and high market shares and (ii) the lack of indications that these trends will be reversed in 2023, it is expected that BOOKING.COM's market shares will currently be similar or even higher than in 2022 (without any reason to justify a substantial change in market shares).

5.2.1.2. Barriers to entry and expansion

- (89) The main characteristics of the market for online booking intermediation services to hotels by OTAs, which determine the existence of significant barriers to entry and expansion in the market, are set out below.

5.2.1.2.1. Indirect network effects

- (90) When operating a platform, market players are influenced by indirect network effects:

⁵ In addition, these tables show that: (i) BOOKING.COM's market share actually strengthened during the COVID-19 pandemic, and (ii) the entry of a company with financial muscle such as AIRBNB has not appreciably eroded BOOKING.COM's market position.

- a greater number of hotels on the platform makes it more attractive for customers to use;
- while the platform becomes more attractive for hotels when a greater number of customers consult it.

(91) This characteristic means that markets where network effects occur tend to be more concentrated than in the absence of network effects. Therefore, an entrant must reach a certain market share (critical mass) for network effects to come into play and for an operator to gain a foothold in the market by attracting hotels and customers.

(92) As BOOKING.COM is the company with the largest market share, it clearly benefits the most from these network effects, strengthening its pre-eminence in the market for online booking intermediation services to hotels *ceteris paribus*.

(93) In this respect, BOOKING.COM's shares, both in terms of the amount of mediated transactions and the number of mediated hotel bookings (see Table 2 and Table 3), clearly show that it is the OTA that attracts by far the largest number of customers in Spain. Therefore, BOOKING.COM is the most attractive platform for hotels (as it is where they will receive the most visits and potential bookings). BOOKING.COM's market share confirms this, measured by the amount of commissions received from OTAs, paid by hotels located in Spain (see Table 1), which is still by far the highest of all the OTAs (it is the platform that obtains the most revenue from hotels). This reinforces the attractiveness of the BOOKING.COM platform for customers, as it is where they will be able to find the widest choice of hotels. Both elements feed back on each other, consolidating BOOKING.COM's market position and making it difficult for other operators to enter or expand (as demonstrated by the dynamic market share analysis).

5.2.1.2.2. The role of platform-generated data and its interaction with network effects

(94) Network effects in digital markets are amplified by the role of data.

(95) The use and analysis of the data generated by hotels and above all customers on the platform allows it to offer better services to both. Specifically, by increasing its user base, the platform increases its knowledge of its users, allowing it to improve recommendation algorithms and transaction matching. This makes the platform more attractive to hotels and increases loyalty among users, as it becomes familiar with and adapts to them. This also generates more complete market information, allowing it to exploit business opportunities better than an operator with less data traffic (e.g. by detecting unmet destination demand that requires a response).

(96) The broad customer base and the digital nature of OTAs, with the availability of data, means that OTAs have a very good understanding of the industry and customers. Within the OTAs, BOOKING.COM is the clear leader in data and knowledge of user preferences, accumulating far more data and transactions each year than its competitors. Given the static economies of scale and economies of learning (dynamic economies of scale) associated with big data, this creates a feedback effect and BOOKING.COM's position becomes less contestable.

5.2.1.2.3. High fixed marketing costs to operate in the market and advantages for first-movers

(97) The main market players spend large sums on marketing, mainly on two types of advertising:

- advertising related to the development of a brand image, which gives greater visibility to customers and hotels; and
- Online Internet search-related advertising (primarily Google), which acts as a powerful booking generator.

(98) Thus, according to market estimates, BOOKING.COM spent 43% of its revenue (and EXPEDIA 60%) on this item in 2021. BOOKING.COM's annual marketing spending has increased from \$5 billion in 2019 to \$6 billion in 2022 (in 2020 and 2021, it totalled respectively \$2.2 billion and \$3.8 billion, probably affected by the pandemic).

(99) Therefore, a market entrant would have to incur high advertising costs to gain visibility in the market and to counterbalance the advertising of the two main players in the market.

(100) This investment in advertising costs is in the nature of fixed costs that cannot be recovered in case the entrant wants to exit the market.

(101) Fixed marketing costs are a very relevant barrier to entry because advertising investment has flow characteristics, while brand image (visibility, customer awareness, etc.) has stock characteristics. Therefore, a company like BOOKING.COM, which is the market leader in recognition, needs to invest relatively less in annual advertising flow to maintain that same level of recognition than a company starting from a lower level would have to invest to reach that same level.

5.2.1.2.4. Limited countervailing power of demand

- (102) There is no countervailing buyer power limiting BOOKING.COM's dominant position, given the atomised nature of the demand which consists of hotels located in Spain:
- according to the Spanish National Statistics Institute (INE), in June 2023, the estimated number of active establishments was 16,193;
 - in the case of Spain, small and independent hotels are more widespread (unlike other countries, such as the USA, where large hotel chains such as Hilton or Marriott are more established);
 - the use of OTAs as a distribution channel is more prevalent among independent hotels, according to data from the *Oxford Economics* study entitled *The Economic Impact of Online Travel Agencies in Europe, 2019-2021*⁶. This study shows that in 2021, 72% of all bookings through OTAs (by value) took place in independent accommodation, while independent hotels only accounted for 57% of bookings in the market as a whole.

5.2.1.3. Conclusion

- (103) In light of BOOKING.COM's very high market share, the relatively low relevance of existing competitive alternatives, the high barriers to entry and expansion and the lack of countervailing buyer power, it can be concluded that **BOOKING.COM has had a dominant position on the market for hotel intermediation services in Spain by OTAs from at least 2019 to the present.**

5.2.2. Abuse of a dominant position by BOOKING.COM

5.2.2.1. Exploitative abuse based on the imposition of unfair terms of trade

- (104) BOOKING.COM **abusively exploits** its dominant position (a position of economic power that enables it to behave with an appreciable degree of independence vis-à-vis its competitors, its customers and ultimately consumers without fearing the consequences for its position on the market of applying unfair terms directly to hotels) through:
- **asymmetry in the application of the narrow price-parity clause to its own benefit** (see section 4.2 and 4.3): BOOKING.COM imposes a narrow price-parity clause on hotels (see section 4.2), i.e. it prevents them from lowering

⁶ This study is available at [https://resources.oxfordeconomics.com/hubfs/OTA%20Impact%20in%20Europe%20-%20FINAL%20\(4\).pdf](https://resources.oxfordeconomics.com/hubfs/OTA%20Impact%20in%20Europe%20-%20FINAL%20(4).pdf)

their prices on their own online sales channels (compared to the prices offered on BOOKING.COM), while BOOKING.COM reserves the right to unilaterally lower the prices offered by hotels on BOOKING.COM, at its own expense, in certain cases (see section 4.3);

- hotels located in Spain must accept the English version of the GDTs as binding, (section 4.4), the Dutch legal system as the law governing the GDTs, and the jurisdiction of the courts of Amsterdam, the Netherlands, in case of disputes arising in connection with the GDTs (section 4.5);
- there is a lack of transparency in the information provided by BOOKING.COM to hotels located in Spain on the impact of the Preferred Partner, Preferred Partner Plus and Genius subscriptions on their position in the default results ranking provided by BOOKING.COM on its website (see section 4.10, 4.11 and 4.13), and on the resulting additional number of hotel visits and bookings on BOOKING.COM (see section 4.6, 4.8 and 4.9).

5.2.2.1.1. Applying the narrow price-parity clause asymmetrically

- (105) As stated in established fact 4.1, the vast majority of hotels located in Spain that use BOOKING.COM's online booking intermediation services sign a take-it-or-leave-it contract for this purpose, with BOOKING.COM being a dominant player and without this penalising BOOKING.COM in its market position.
- (106) As reflected in established fact 4.2, a hotel located in Spain may not set a cheaper rate on its online sales channels than on BOOKING.COM's website, pursuant to clauses 2.2 and 5.1(v) of the GDTs it has entered into with BOOKING.COM. This contractual clause has been in force since at least 2015.
- (107) Therefore, there is an asymmetry in price competition between the hotel and BOOKING.COM:
- on the one hand, BOOKING.COM does not allow the hotel to have a cheaper rate on its direct online channel than the one advertised on BOOKING.COM (because of the narrow parity clause);
 - on the other hand, BOOKING.COM may reduce the rate the hotel has advertised on BOOKING.COM (under clause 2.2.4 of the GDT, which covers the BSB programme).
- (108) As regards the BSB programme, it should be noted that it is offered only to specific customers on the basis of the search criteria they have entered (see established fact 4.3). No further details on the criteria guiding the actual implementation of the BSB programme have emerged from BOOKING.COM's submissions. Given the limited information available, it cannot be ascertained whether the BSB programme actually benefits the customer compared to the

other booking options that exist in the online channels (especially since, by definition, the BSB programme is implemented when BOOKING.COM detects hotel prices that are cheaper outside BOOKING.COM).

- (109) Note that, faced with a cheaper hotel price on other channels, BOOKING.COM could choose to lower the commission it sets for the hotel so that the hotel can then decide whether to pass on the lower cost of the intermediation carried out by BOOKING.COM (which is, after all, one of the main parameters for making its platform more attractive to hotels) to the final price on BOOKING.COM. However, with the BSB programme, BOOKING.COM chooses to change the final room rate selectively, without prior subscription to the BSB programme by the hotel concerned.
- (110) In light of the above, **the CNMC deems that BOOKING.COM**, which, because of its dominant position, bears a special responsibility not to harm effective and undistorted competition by its conduct, **has implemented in a generalised policy whereby it can unilaterally change the final hotel price downwards, while imposing a narrow price-parity clause thereon and an exemption from liability in the relationship with the mediated hotel booking** (in so far as it is defined as a mere agent or intermediary). In doing so, **it has imposed unfair conditions on hotels located in Spain, constituting an exploitative abuse of a dominant position**, which has taken place from at least 30 April 2019 (given that the BSB programme was introduced in Spain in that month, with the narrow price-parity clause for hotels already in force) until, in principle, July 2024⁷.

5.2.2.1.2. Binding English version of the GDTs, legal system applicable to the GDTs and jurisdiction in the event of a dispute between the parties concerning the GDTs

- (111) As stated in established fact 4.1, the vast majority of hotels located in Spain that use BOOKING.COM's online booking intermediary services sign a take-it-or-leave-it contract for this purpose, BOOKING.COM being a dominant operator.
- (112) In the so-called GDTs, part of the standard-form agreement between BOOKING.COM and hotels located in Spain, there are two clauses that constitute an abuse of an exploitative dominant position by BOOKING.COM, consisting of the imposition of unfair conditions. These clauses are:
- the imposition on hotels located in Spain of the English version of the GDTs as the official, binding, prevailing, conclusive, sole, internally and externally

⁷ In this respect, on 23 May 2024, BOOKING.COM submitted a letter in which it undertook to remove *'the narrow parity requirements from the agreements with all accommodations located in Spain'*.

legally enforceable version (clause 12.6 of the GDTs, detailed in established fact 4.4), thus prevailing over the courtesy translations of the GDTs provided by BOOKING.COM and excluding them as a source of rights; and

- the imposition of the law of the Netherlands the law governing the GDTs, as well as the jurisdiction of the courts of the Netherlands in the event of disputes between hotels located in Spain and BOOKING.COM (clause 10.1 of the GDTs detailed in established fact 4.5), thus excluding the possibility of hotels located in Spain invoking the application of Spanish law or submitting their disputes to Spanish courts.

(113) The imposition of the two contractual clauses mentioned above severely restricts the possibility of hotels located in Spain of enforcing their rights against BOOKING.COM, since:

- a hotel located in Spain has to have a good knowledge of the English language, as this is the language in which:
 - o its binding contractual documentation is drawn up; and
 - o legal procedures such as, for example, the internal complaints mechanism and mediation, pursuant to the aforementioned clause 12.6 of the GDTs, will be processed.
- in case of dispute and conflict between the parties, the law of the Netherlands is applicable, and, in addition, the hotel must bring its claim in the Netherlands, taking into account that:
 - o a hotel located in Spain has to incur relatively higher costs for this than BOOKING.COM, which is based in the Netherlands;
 - o on the other hand, BOOKING.COM has offices and staff, whereas a hotel located in Spain does not usually have a presence in the Netherlands.

(114) It should also be noted that BOOKING.COM treats hotels located in Spain asymmetrically. BOOKING.COM provides commercial services in Spanish to hotels located in Spain by teams also located in Spain, where it has a considerable number of employees, but it imposes:

- English as the language of the binding version of the GDTs and of the legal proceedings arising therefrom;
- the law of the Netherlands and the jurisdiction of the Dutch courts in the event of a dispute in relation to the GDTs.

(115) Two additional elements support the unfair nature of the above clauses:

- the relative position of the parties to the transaction:

- the vast majority of hotels in Spain using BOOKING.COM services are independent (i.e. they have only one establishment, see paragraph (102)), and this makes them more dependent than hotel chains on BOOKING.COM; and
 - BOOKING.COM's strong dominant position in intermediated booking services as regards hotels located in Spain.
- as regards the above, the volume of BOOKING.COM's revenue derived from booking intermediation services to hotels located in Spain (Table 1) gives BOOKING.COM much higher financial resources than hotels located in Spain.
- (116) The clauses described are not necessary to achieve a legitimate goal (such as BOOKING.COM's own legal protection) and are disproportionate in that they go beyond what is strictly necessary.
- (117) While the three clauses — unfair and unjustified — are abusive in and of themselves, the fact that they are repeated and combined in the same agreements aggravates the asymmetry and unfairness of the whole. Together, the clauses reinforce three aspects that objectively serve to dissuade BOOKING.COM's hotel counterparties in Spain from asserting their rights in a neutral forum, different from BOOKING.COM's internal complaint management system, wherein the dominant company is both judge and party. In light of the above, it is considered that the clauses described in this section amount to the imposition of unfair conditions on hotels located in Spain by BOOKING.COM, constituting an exploitative abuse of a dominant position. As regards the duration of the conduct, it took place at least from 1 January 2019 (the date from which BOOKING.COM's dominant position on the market was established, and the conduct began) until, in principle, July 2024⁸.

5.2.2.1.3. Lack of transparency regarding the benefits for a hotel of subscribing to the Preferred Partner, Preferred Partner Plus and Genius programmes

- (118) As reflected in established facts 4.10 to 4.13, BOOKING.COM offers an improved ranking in its default results ranking to hotels located in Spain that participate in certain programmes. Although these programmes are optional, the requirements to access and remain therein are imposed by BOOKING.COM, as is the case for

⁸ In this regard, on 23 May 2024, BOOKING.COM submitted a letter in which it undertook to amend "*the General Delivery Terms (GDTs) applicable to accommodation located in Spain so that (i) they are subject to the jurisdiction of the Spanish courts; (ii) they are subject to Spanish law; and (iii) the Spanish version of the GDTs is binding on accommodation located in Spain.*"

the GDTs. These BOOKING.COM programmes are Preferred Partner, Preferred Partner Plus, Visibility Booster and Genius.

- (119) Such programmes are highly relevant for hotels in terms of improving visibility in the default results ranking, which leads to hotels obtaining significantly more visits and bookings (as evidenced by established facts 4.6, 4.8 and 4.9), which are important competition parameters.
- (120) Likewise, established facts 4.10 to 4.13 include the prior information that BOOKING.COM provides to the hotels participating in these programmes in relation to the expected increase in visits to the hotel's website on BOOKING.COM and the bookings that they will obtain as a result of the improvement in their position in the BOOKING.COM default results ranking reported by these programmes:

Table 6. Information provided by BOOKING.COM to hotels located in Spain on the expected impact of the Preferred Partner, Preferred Partner Plus, Visibility Booster and Genius programmes

	Preferred Partner	Preferred Partner Plus	Visibility Booster	Genius
increase in visits	up to 65% more or 65% more on average	up to 60%	specific estimate	70%
increase in bookings	20% or 35% (average)	30%	specific estimate	45% (average)

Source: BOOKING.COM

- (121) Regarding the ex-post performance of the hotel's participation in the programmes, BOOKING.COM only provides information to the hotels in the case of the Preferred Partner Programme and exclusively in relation to an estimate of the additional bookings that their participation in the Programme has brought them over the last 30 days, which can be consulted on the Extranet. However, it should be noted that BOOKING.COM has been providing this information to hotels relatively recently, as BOOKING.COM has only indicated its existence to the investigative body as of March 2023 (established fact 4.10).
- (122) In view of the information provided by BOOKING.COM to hotels located in Spain, the CNMC deems that BOOKING.COM does not specify in sufficient detail how a hotel's participation in the Preferred Partner, Preferred Partner Plus and Genius programmes impacts on visits to the hotel's website on BOOKING.COM and bookings as a result of the hotel's improved ranking in BOOKING.COM's default results ranking, both prior to its participation in these programmes and after participation in the programmes. This failure to provide information available to BOOKING.COM to hotels participating in these programmes or considering

participating therein signals a lack of transparency in the relationship with the hotels located in Spain, which favours BOOKING.COM, constituting an infringement of Article 2 of the LDC and Article 102 of the TFEU.

(123) Specifically, the following elements lead to the conclusion that **BOOKING.COM has more information than it provides to hotels located in Spain**, in relation to the impact of their participation in the Preferred Partner, Preferred Partner Plus and Genius programmes in terms of visits to the hotel's website on BOOKING.COM and bookings, both before and after their participation:

- In the framework of the 'Visibility Booster' tool, BOOKING.COM has provided the hotel, prior to its use, with an individualised estimate of the increase in visits to the hotel's webpage on the BOOKING.COM website and bookings it would obtain based on the level of additional commission it chooses under 'Visibility Booster', based on its intelligence on customer behaviour, booking trends and demand (see established fact 4.12 and in particular paragraph (74) (74));
- As part of the Preferred Partner Programme, BOOKING.COM has, at least from March 2023, started to provide an individual estimate for each hotel of the number of additional bookings it has received as a result of its participation in the Preferred Partner Programme over the last 30 days (see paragraph (121)).
- BOOKING.COM, as a purely digital company, collects a large amount of data, which, as BOOKING.COM itself acknowledges, it uses to improve its default ranking⁹.

(124) BOOKING.COM has the capacity to provide a greater level of detail on the improved positioning that comes with participation in the Preferred Partner, Preferred Partner Plus and Genius programmes, as, in the case of the 'Visibility Booster' tool, it has provided information with a greater level of detail. As stated by BOOKING.COM:

"By using this tool and setting up your commission, you will be able to see the increase in the number of visits and bookings predicted by the research we do on how customers book, trends and demand for bookings"

⁹ In particular, one of the key uses of this data for BOOKING.COM is to estimate the hotel's future conversion rate, which will be used as a criterion in the default results ranking. Given that BOOKING.COM forecasts a hotel's bookings (in order to estimate its future conversion rate), it follows that BOOKING.COM has been able to provide estimates of the impact of the programmes (through a better position in the default results ranking) on the increase in the number of bookings.

- (125) The above leads the CNMC to conclude that BOOKING.COM is able to provide more accurate data on the impact of such programmes (e.g. in the case of the Preferred Partner and Preferred Partner Plus programmes, data beyond the estimated additional bookings that a hotel's participation in the Preferred Partner Programme has yielded over the last 30 days).
- (126) In light of the above, the CNMC consider that the practice described in this section involves imposing unfair conditions on hotels located in Spain by BOOKING.COM, constituting an exploitative abuse of BOOKING.COM's dominant position that has taken place from at least 1 January 2019 (the date at which BOOKING.COM's dominant position in the market began) until today (given that the conduct continues).

5.2.2.2. **Exclusionary abuse through conduct restricting competition from other OTAs**

- (127) The second alleged infringement is based on the fact that BOOKING.COM restricts competition from other OTAs in the provision of online hotel booking intermediation services in two ways:
- through the criteria it uses in its default results ranking; and
 - through the access and permanence requirements that hotels have to meet in order to participate in the Preferred Partner and Preferred Partner Plus programmes.
- (128) As set out in more detail below, this behaviour of BOOKING.COM constitutes an **abuse of a dominant position that excludes** other competing OTAs from the market by inducing hotels not to offer more favourable commercial conditions (in terms of prices and room availability) on other competing OTAs than on BOOKING.COM, as they otherwise risk being demoted in BOOKING.COM's default results ranking and losing bookings on BOOKING.COM.

5.2.2.2.1. **Criteria used by BOOKING.COM to sort the hotel results in its default ranking**

- (129) Established fact 4.7 provides a summary of the criteria used by BOOKING.COM to sort the results it offers in its default ranking following an end-user's query. In particular, Annex 4 of the GDTs indicates to hotels that one of the four main parameters that BOOKING.COM uses in its default results ranking is "*gross (including cancellations) and net (excluding cancellations) bookings for an accommodation*"
- (130) On the one hand, the use of the based on gross and net bookings of an accommodation is evidence that BOOKING.COM's default results ranking is

largely based on the profits that BOOKING.COM expects to obtain by taking into account the historical bookings data that a hotel has had. This contrasts with the main purpose of the default ranking stated by BOOKING.COM, which is set to “*show the best matches between a specific customer and an accommodation*” (clause 4.1.1 of the GDTs).

- (131) On the other hand, the use of the aforementioned ranking criterion encourages the hotel to favour sales on BOOKING.COM over other OTAs, given that this will afford it a better position in BOOKING.COM’s default results ranking. This is because the aforementioned effect is direct: the more bookings the hotel has on BOOKING.COM, the better position it will have in the default results ranking (a criterion, moreover, that favours larger hotels — i.e. those with more rooms — over smaller hotels *ceteris paribus*);
- (132) In turn, the two main ways for a hotel to favour sales on BOOKING.COM over other OTAs (and thus influence the default ranking) are the price and the number of rooms it includes on the different OTAs:
- as regards the price of the room, not setting a cheaper price on competing OTAs than on BOOKING.COM, in order to obtain more sales on BOOKING.COM; and
 - as regards the number of rooms, not putting a higher number of rooms on competing OTAs than on BOOKING.COM (or concentrating the highest number of rooms on BOOKING.COM), so as to obtain more sales on BOOKING.COM.

Even when a hotel sets the same price and room availability (quantity) on BOOKING.COM and its competing OTAs (only a specific example of the general practice of inducing hotels not to set more favourable commercial conditions on BOOKING.COM than on competing OTAs using the two default ranking criteria outlined above), BOOKING.COM benefits, in comparative terms, vis-à-vis its competitors, as it will attract more sales in view of its very strong dominant position and the barriers to entry that ensure such a position continues.

- (133) In short, the criterion of ordering the results of the default ranking with the above-mentioned characteristics causes harm to competition. It indirectly encourages hotels to follow a pricing and room availability policy based on offering the cheapest prices for their rooms on BOOKING.COM to the detriment of other competing OTAs, thereby causing restrictive effects on competition.
- (134) The default results ranking is also the user’s gateway to the BOOKING.COM hotel catalogue, which is why hotels attach great importance to this very important feature:

- online bookings are on the rise, as is the importance of BOOKING.COM for hotels; and
 - the lower a hotel's position in the ranking, the less likely it is to attract bookings (as evidenced by established fact 4.9).
- (135) It can be stated that a significant percentage of customers in Spain who booked on the BOOKING.COM website during the period under review booked from the default results sorting offered by BOOKING.COM.
- (136) Furthermore, the CNMC consider that there is no justification for BOOKING.COM to use the number of bookings a hotel has had on BOOKING.COM's website to rank hotels, since the fact that a hotel accumulates a higher number of bookings on BOOKING.COM's website does not necessarily make it more relevant for a user searching for a hotel, even if BOOKING.COM claims that this is just another input in a 'complex algorithm'.
- (137) Ordering results based on the number of bookings (without correcting for the number of visits the hotel has received on BOOKING.COM, as for example the conversion rate does) has no relevance for the customer, since in this case the absolute number of rooms the hotel has on BOOKING.COM comes into play, favouring the concentration of bookings on a single platform and hotels with more rooms available on BOOKING.COM.
- (138) In light of the above, the CNMC consider that using a ranking criterion based on the number of bookings reduces competition between OTAs that provide booking intermediation services to hotels, as it encourages hotels to use two methods to concentrate their sales/bookings on BOOKING.COM, to the detriment of other OTAs:
- setting prices on BOOKING.COM that are at least as cheap as on its competitors (i.e. discouraging hotels from having cheaper prices outside BOOKING.COM and, as a consequence, having more sales outside BOOKING.COM); and
 - setting room availability on BOOKING.COM at least as high as on its competitors (i.e. discouraging hotels from offering a higher number of rooms outside BOOKING.COM and, as a consequence, from obtaining more sales outside BOOKING.COM).

This, which does not constitute merit-based competition, indirectly induces hotels to follow a pricing and room availability policy based on offering the cheapest prices for their rooms on BOOKING.COM to the detriment of other competing OTAs. Ultimately, it leads to an anti-competitive diversion of bookings from other OTAs to BOOKING.COM, thereby limiting the ability of OTAs providing booking

intermediary services (much smaller than BOOKING.COM) to compete with BOOKING.COM (which has a very strong dominant position).

- (139) Therefore, the CNMC conclude that the use of a ranking criterion based on the number of bookings in BOOKING.COM's default results ranking constitutes an abuse of a dominant position from at least 1 January 2019 (the date from which BOOKING.COM's dominant position on the market was established, and the conduct began) until today (given that the conduct continues).

5.2.2.2.2. Requirements to access and remain in the Preferred Partner and Preferred Partner Plus programmes

- (140) For the purposes of the decision, one of the requirements to access and remain in the Preferred Partner and Preferred Partner Plus programmes should be examined particularly closely due to its effects on competition, based on the information gathered in established facts 4.10 and 4.11: the so-called "performance" requirement for hotels on BOOKING.COM.
- (141) This analysis is exemplified by the Preferred Partner Programme, as the Preferred Partner Plus Programme is simply a higher tier of the Preferred Partner Programme, which (i) has higher performance criteria requirements than the Preferred Partner Programme and, therefore, (ii) offers higher visibility for the hotel within the default performance ranking than under the Preferred Partner Programme (established facts 4.10 and 4.11). It should be recalled that both programmes allow participating hotels to influence their position in the default ranking results in exchange for an additional commission on top of the standard one.
- (142) Established fact 4.10 shows how, throughout the period under investigation, the Preferred Partner Programme performance requirement allowed BOOKING.COM to attract to the Preferred Partner Programme hotels that were among the 30% most profitable for BOOKING.COM in the relevant geographic area (as defined by BOOKING.COM itself). In addition, a hotel participating in the Preferred Partner Programme could only continue in the Preferred Partner Programme if it remained in the top 30% of the most profitable hotels for BOOKING.COM.
- (143) The main benefit of participating in the programme was that hotels obtained a better position in the default performance ranking and, as a result, a higher number of bookings (see established fact 4.9).
- (144) BOOKING.COM, on the other hand, benefits from a higher commission.
- (145) For a hotel to be more profitable on BOOKING.COM, it must have more sales than its competitors in the relevant geographic area defined by BOOKING.COM,

which leads to hotels trying to concentrate their sales on BOOKING.COM to the detriment of other OTAs. This is largely achieved by the hotel not having cheaper prices on other OTAs than on BOOKING.COM and not having a higher availability of rooms on other OTAs than on BOOKING.COM.

- (146) Thus, with the Preferred Programme performance requirement, BOOKING.COM was able to commit participating hotels, indirectly, not to underprice or have greater room availability outside of BOOKING.COM, depriving BOOKING.COM's competing OTAs from being able to compete on price or room availability with BOOKING.COM¹⁰.
- (147) The foregoing demonstrates that the requirement to access and remain in the Preferred Partner Programme, based on the hotel's profitability for BOOKING.COM, is not an example of merit-based competition. BOOKING.COM, which has a dominant position as a OTA, offers to improve the visibility of hotels in the default ranking results, allowing it to extract commitments from them in terms of sales, room availability and prices vis-à-vis other OTAs. It thereby undermines the importance of the key competition variable with other OTAs in attracting hotels: the level of commission for mediating bookings.
- (148) In relation to the performance requirement, it produces a similar effect to the default ranking order criterion already analysed (which encourages a hotel to privilege sales on BOOKING.COM to the detriment of other competing OTAs). By requiring that the hotel be among the 30% of hotels with the highest number of bookings on BOOKING.COM within a geographic area (established fact 4.10), the performance requirement encourages competition among hotels to be among this 30%. This induces hotels to favour bookings through BOOKING.COM over other OTAs by fixing a price and room availability (number of rooms on the platform) at least as (if not more) attractive on BOOKING.COM as on its competitors' platforms.
- (149) In this regard, it should not be forgotten that, even if a hotel does not manage to be among the 30% of hotels with the highest number of bookings on BOOKING.COM (within a geographical area), the fact that the hotel has sought to comply with this requirement will have had an effect, as it will have

¹⁰ In particular, hotels participating in the Preferred Partner Programme were discouraged from setting lower prices or having a higher availability of rooms on other OTAs than on BOOKING.COM, even if the commission of these other OTAs was more attractive than that set by BOOKING.COM. Otherwise, they risked losing profitability on BOOKING.COM and being expelled from the Preferred Partner Programme, thereby losing the bookings resulting from the higher visibility in the default ranking associated with this Programme (as regards the relationship between the position in a performance ranking and the bookings received. See established fact 4.9).

concentrated its bookings on BOOKING.COM to the detriment of competing OTAs. In other words, even if the Preferred Partner Programme only covers 30% of the hotels in an area, it should be borne in mind that it has an effect on prices and room availability, both for hotels that are in the Preferred Partner Programme (and wish to remain therein) and for those aspiring to be part thereof, but that do not succeed, with the additional effect that the requirement uses historical hotel booking data for its calculations.

- (150) Therefore, the CNMC considers that the performance requirement associated with the Preferred Partner Programme encourages both the hotels participating in the Preferred Partner Programme and those aspiring to join it to indirectly follow a pricing and room availability policy based on offering the cheapest room prices on BOOKING.COM to the detriment of other competing OTAs, this having restrictive effects on competition.
- (151) There are other criteria that may allow a small number of hotels to be selected (e.g., with special customer ratings), without creating an exclusionary effect. For a hotel, it is technically and financially possible to be rated positively by the customer on all OTAs (and in fact, it is likely that the rating of a hotel is similar on all OTAs). But it is difficult or virtually impossible for a hotel to achieve similar levels of profitability for the OTA across all OTAs. With capacity restrictions (a hotel cannot increase its number of rooms in the short term), a hotel has to compete more strongly on price in order to generate more bookings on BOOKING.COM (bookings that drain supply on other OTAs) and increase its profitability for this OTA. As BOOKING.COM is the dominant OTA, hotels have a clear incentive to give BOOKING.COM a premium over other OTAs in terms of profitability.
- (152) In summary, the combination of BOOKING.COM's popularity (brand awareness and image, the focal point for customers and hotels) and the requirement to enter and stay in BOOKING.COM's Preferred Partner and Preferred Partner Plus programmes — based on hotel performance — lead to other OTAs being unable to compete on price and room availability to attract customers for hotels that are part of these Preferred Partner and Preferred Partner Plus programmes (or those striving to meet the programmes' criteria). This situation limits the growth of BOOKING.COM's competitors in a market where network effects are very important.
- (153) Given BOOKING.COM's dominant position and, in particular, its very high market share, such conduct by BOOKING.COM has the effect of inducing hotels to favour BOOKING.COM over other competing OTAs. This is because:
- BOOKING.COM is the main OTA and an indispensable operator;

- it brings an improvement to the default ranking and, ultimately, to attracting higher numbers of bookings.

(154) In conclusion, the practices described in this section involve commercial policies with exclusionary effects on other OTAs and, therefore, constitute an abuse of a dominant position that has taken place from at least 1 January 2019 (the date from which BOOKING.COM's dominant position in the market has been proven, the conduct then being in force) until the present (given that the conduct continues).

5.2.3. Conclusion

(155) BOOKING.COM is found to have committed two single and continuous infringements of Article 2 of the LDC, as well as of Article 102 of the TFEU:

- first, a single and continuous infringement of **abuse of an exploitative dominant position**, consisting in the **imposition of unfair trading conditions on hotels located in Spain** as a result of the following anti-competitive conduct:
 - o the asymmetry in the application of the narrow price-parity clause by BOOKING.COM existing from at least 30 April 2019 until, in principle, July 2024¹¹:
 - while BOOKING.COM imposes a narrow price-parity clause on hotels, i.e. it prevents them from lowering their prices (compared to those offered on BOOKING.COM) on their own online sales channel;
 - BOOKING.COM reserves the right to unilaterally lower the prices offered by the hotel on BOOKING.COM, charging this reduction to its own commission, in certain cases;
 - o the imposition on hotels located in Spain of the following terms in the GDTs from at least 1 January 2019 until, in principle, July 2024¹²:
 - the binding version of the GDTs is the one drafted in English;
 - the GDTs are governed by and should be construed in accordance with the Dutch law, and in the event of a dispute in relation to the

¹¹ In this respect, on 23 May 2024, BOOKING.COM submitted a letter in which it undertook to remove 'the narrow parity requirements from the agreements with all accommodations located in Spain'.

¹² In this regard, on 23 May 2024, BOOKING.COM submitted a letter in which it undertook to amend "the General Delivery Terms (GDTs) applicable to accommodation located in Spain so that (i) they are subject to the jurisdiction of the Spanish courts; (ii) they are subject to Spanish law; and (iii) the Spanish version of the GDTs is binding on accommodation located in Spain."

GDTs, hotels located in Spain must bring their claims before the competent courts in Amsterdam, the Netherlands;

- the lack of transparency in the information provided by BOOKING.COM to hotels located in Spain, from at least 1 January 2019 to the present day, on the impact of the Preferred Partner, Preferred Partner Plus and Genius programme subscriptions on their position in the default results ranking provided by BOOKING.COM on its website and the resulting additional number of hotel visits and bookings on BOOKING.COM;
- second, a single and continuous infringement consisting of abuse of an exclusionary dominant position, restricting competition from other OTAs in offering online booking intermediation services to hotels located in Spain, as a result of the following anti-competitive conduct:
 - the use of the number of bookings that a hotel located in Spain has had on BOOKING.COM as a criterion for the ranking of hotels in the default results provided by BOOKING.COM from at least 1 January 2019 to the present; and
 - the use of the performance criterion for a hotel located in Spain to qualify for and remain in BOOKING.COM's Preferred Partner and Preferred Partner Plus programmes from at least 1 January 2019 to the present day.

BOOKING.COM is found guilty of both infringements

6. FINE IMPOSED

- (156) The CNMC conclude that the proportionate and dissuasive fines to be imposed on BOOKING.COM are as follows:
- **€206,620,000** for the first **infringement of abuse of an exploitative dominant position**, consisting of the imposition by BOOKING.COM of a series of unfair trading conditions on hotels located in Spain;
 - **€206,620,000** for the **second infringement of abuse of an exclusionary dominant position**, consisting of restricting competition from other OTAs that offer online booking intermediation services for hotels located in Spain.
- (157) Therefore, the total amount of the penalty imposed on BOOKING.COM is **€413,240,000**.

7. BEHAVIORAL OBLIGATIONS

(158) The CNMC also consider it necessary to impose a series of performance obligations on the part of BOOKING.COM to the fines imposed, thereby ensuring that the conduct that gave rise to the infringements, or other conduct that may have an equivalent effect, does not continue in the future. The performance obligations imposed on BOOKING.COM are as follows:

1. BOOKING.COM shall cease to include simultaneously the following two types of clauses in its present and future contracts with hotels located in Spain:
 - clauses whereby the hotel must maintain a narrow price parity with BOOKING.COM, in accordance with the content of this clause as set out in established fact 4.2 of this resolution; and
 - clauses whereby BOOKING.COM may, at its discretion, lower the price that the hotel establishes for its rooms on the BOOKING.COM website, in accordance with the content of this clause as set out in established fact 4.3 of this resolution.

This does not include the voluntary subscription, by the hotel, of optional programmes whereby the hotel enables BOOKING.COM to do so, provided that (i) subscribing to such programmes is not linked to the signing of the general contract conditions that a hotel must accept in order to use BOOKING.COM's booking intermediation services, and (ii) BOOKING.COM never includes the hotel by default in this type of voluntary programme.

In order to comply with this obligation, BOOKING.COM must abandon one of the two types of clauses indicated, to its own discretion.

2. BOOKING.COM shall include in its present and future contracts with hotels located in Spain that:
 - The Spanish language version of the GDTs and of any general terms and conditions between BOOKING.COM and a hotel located in Spain is binding for legal purposes and is not dependent on the version in another language.
 - The Spanish legal system is applicable to the GDTs and to any general contract conditions between BOOKING.COM and a hotel located in Spain.
 - The courts of Spain shall have jurisdiction to rule on any disputes arising in connection with the GDTs or any general terms and conditions between BOOKING.COM and a hotel located in Spain.

3. BOOKING.COM shall provide hotels located in Spain, on a case-by-case basis, with its best estimate regarding the following information in relation to their participation in the Genius, Preferred Partner and Preferred Partner Plus programmes:

- its best estimate of the expected number of visits to the hotel's website on BOOKING.COM, as well as additional bookings, that each programme will entail during the following calendar month, on a differentiated basis; and
- its best estimate of the number of additional room nights that participation in the Preferred Partner Plus and Genius programmes has yielded over the past 30 days, on a differentiated basis.

In line with the information provided by BOOKING.COM:

- in the 'Visibility Booster' programme, on the estimated increase in visits to the hotel's web page on the BOOKING.COM website and bookings to be obtained; and
- in the Preferred Partner Programme, on the estimated additional room nights brought by their participation in the Preferred Partner Programme during the last 30 days.

In addition, BOOKING.COM shall offer hotels located in Spain the possibility of consulting a history with all the information it has offered in relation to this obligation, so that the hotel can consult it afterwards.

4. BOOKING.COM shall not use with hotels located in Spain, as a criterion for ranking the results of its default ranking, the gross bookings (including cancellations) and net bookings (excluding cancellations) of the hotel on the BOOKING.COM website (and third party pages displaying the default ranking results produced by BOOKING.COM) or any measure with equivalent effect (such as, but not limited to the level of revenue the hotel has reported to BOOKING.COM).

5. BOOKING.COM shall not use, with hotels located in Spain, any measure related to the profitability of the hotel for BOOKING.COM as a criterion for accessing and remaining in the Preferred Partner and Preferred Partner Plus programmes.

(159) A series of **implementation deadlines** and **communication obligations** shall accompany the behavioural obligations to ensure that hotels located in Spain that use BOOKING.COM's booking intermediation services are aware of the changes introduced by the aforementioned behavioural obligations and that the CNMC can monitor BOOKING.COM's effective compliance with the behavioural obligations.

8. APPLICATION OF BIDDER EXCLUSION WITH THE PUBLIC SECTOR

- (160) Since the prohibition of bidding into contracts with the Public Sector due to distortion of competition came into force, the CNMC has pointed out in numerous decisions that this is a legal consequence that derives directly from the Act in the case of parties sanctioned for infringements of competition rules.
- (161) This case reveals the liability of BOOKING.COM for two single and continuous infringements of Articles 2 of the LDC and 102 of the TFEU, which must be classified as **infringements of distortion of competition for the purposes of Article 71.1(b) of Act 9/2017, on Public Sector Contracts (LCSP)**.
- (162) **The decision does not determine the duration and scope** of bidding into contracts with the Public Sector. Therefore, these aspects must be determined by means of the procedure established in Article 72.2 of the LCSP. To this end, **a certification of the decision shall be sent to the State Public Procurement Advisory Board (*Junta Consultiva de Contratación Pública del Estado*)**.