

SPAIN: SOFTWARE AND DATABASE COMPANIES SHOULD ENSURE THE SERVICES THEY PROVIDE CANNOT BE USED BY THEIR CLIENTS TO VIOLATE ANTITRUST RULES

The Spanish Competition Authority's *Proptech* Resolution not only declares companies active in the real estate brokerage market liable for infringing Articles 1 LDC and 101 TFEU, but also includes certain software and database service providers in the investigation. This Resolution justifies the need for a detailed antitrust compliance analysis, even for companies that are not active in the market to which the anticompetitive agreement relates to.

The *Proptech* Resolution

This Resolution considers liable, for the alleged infringement of Article 1 of the Spanish Defence of Competition Act (*Ley de Defensa de la Competencia*) ("**LDC**") and Article 101 of the Treaty on the Functioning of the EU ("**TFEU**"), a series of companies active in the real estate brokerage market and also includes certain software and database service providers. The Spanish Markets and Competition Commission ("**CNMC**") considers that these companies played a role in the implementation of the practices under investigation. The CNMC's Resolution can be appealed before the Spanish National Court and therefore is not final.

Background of the *Proptech* Resolution

On 25 November 2021, the CNMC sanctioned several companies involved in the market for real estate intermediation services in Spain. In particular, the CNMC concluded that the investigated companies had committed an infringement of Article 101 TFEU.

The CNMC concludes that the conditions agreed for the provision of the so-called Multiple Listing Service ("**MLS**") by the companies investigated were anti-competitive. The MLS system is a real estate intermediation database that allows real estate agents and brokers who are selling properties to find brokers of potential buyers, and *vice versa*. The CNMC finds that agreeing on (i) a common minimum fee for the sale of real estate; or (ii) a minimum one-month rental commission for the rental of real estate (together, the "**Agreement**") constituted an antitrust infringement.

Key issues

- The CNMC concludes that software and database companies provided the necessary technological tools to ensure the implementation of the anticompetitive agreement.
- The CNMC's Resolution sets out that software and database companies need to ensure that the services they provide are not a tool to implement, develop or monitor anticompetitive agreements.
- The CNMC's Resolution is not final and can be appealed before the National Court.

The *Proptech* Resolution distinguishes among the different roles of the players in the infringement:

- (i) Franchisors, which the CNMC considers to be the instigators of the Agreement;
- (ii) Secondly, database providers, which, according to the CNMC, would have allowed the cartel to ensure that only those properties that complied with the Agreement were uploaded into the MLS system; and
- (iii) Software providers, which, again according to the CNMC, allegedly would have provided the necessary technological tools to ensure the implementation of the Agreement.

The *Proptech* Resolution includes in the investigation companies purely providing software or database services

In this Resolution, the CNMC not only fines the companies active in the real estate market (*i.e.*, the franchisors), but also includes those companies merely providing software or database support to enable the Agreement to be put into practice.

The CNMC recognizes that this is not a case where software companies implemented a dynamic price-fixing mechanism through complex algorithms or Artificial Intelligence, but it concludes that the database and software providers allowed the limiting of the real estate properties that could be included in the MLS system only to those who adhered to the Agreement.

The CNMC dismissed the companies' allegations that their role was limited to merely complying with the instructions or needs of their clients, just like any other service provider.

What are the implications of the *Proptech* Resolution?

Both European and Spanish precedents have found operators providing assistance with the implementation of a cartel liable for committing a competition law infringement, even when the operator in question does not have a presence in the market where the members of such cartel are active (see the European Court of Justice ("**ECJ**") judgment in case *C 194/14 Treuhand* and subsequent CNMC cases *S/0482/13 Fabricantes de automóviles* and *S/0471/13 Concesionarios Audi/Seat/VW*, also the judgment of the Spanish Supreme Court in case *3525/2016* of 18 July 2016, and case *531/2020*, of 21 May 2020).

In such precedents, the companies involved not only played a decisive role in the infringement, its implementation and control, but even reacted in case of breach of the anticompetitive agreement (*e.g.*, by notifying the infringement and the sanctions applicable, if any, to the companies concerned).

However, the *Proptech* Resolution raises specific questions, given that software and database systems operate automatically. This automation implies that companies offering those systems cannot be deemed responsible for how their clients use them. There can be a very fine line between when companies play a role or not in the infringement, when these companies are software and database providers. In the present case, we will have to wait and see what, in due course, the National Court concludes, should the companies under investigation decide to appeal the CNMC's Resolution, which is currently not final.

Recommendations and reminders for software and database companies

1. Software/database companies should ensure, when assisting their respective clients, that the services they provide cannot be used to implement, develop or monitor anticompetitive practices.
2. It is irrelevant whether the infringement takes place in a market separate from that of the software/database provider, as long as the IT services are necessary to implement such anticompetitive practices.
3. To the extent possible, software and database services should be provided to each company separately and subject to the necessary confidentiality undertaking.
4. Any service jointly provided to more than one company active in the same sector should be carefully supervised by its legal department, in particular if the services relate to prices or other commercial conditions.
5. The objectives or purposes for which the software will be provided should be clearly stated when entering a contractual relationship.
6. Software and database providers should clearly show their opposition to using their software for anticompetitive objectives, either in the context of a meeting with their clients or by any other means that leaves a record of it. A passive role, coupled with the automation of software and databases, could be interpreted by the Spanish Competition Authority as a "contribution" to the purpose of an anticompetitive agreement.

CONTACTS



Miguel Odriozola
Partner

T +34 91 590 9460
E miguel.odriozola
@cliffordchance.com



Belén Irissarry
Senior Associate

T +91 590 7519
E belen.irissarry
@cliffordchance.com



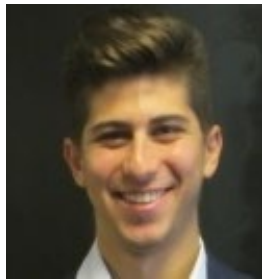
Diego Doménech
Senior Associate

T +34 91 590 4103
E diego.domenech
@cliffordchance.com



Sara Selma
Junior Lawyer

T +34 91 590 7559
E sara.selma
@cliffordchance.com



Óscar Barracchini
Trainee Lawyer

T +34 91 590 7548
E oscar.barracchini
@cliffordchance.com



Begoña Albeñiz
Trainee Lawyer

T +34 91 590 9442
E begona.albeniz
@cliffordchance.com

This publication does not necessarily deal with every important topic or cover every aspect of the topics with which it deals. It is not designed to provide legal or other advice.

www.cliffordchance.com

Clifford Chance, Paseo de la Castellana 110,
28046 Madrid, Spain

© Clifford Chance 2021

Clifford Chance, S.L.P.

We use the word 'partner' to refer to a member of Clifford Chance LLP, or an employee or consultant with equivalent standing and qualifications

If you do not wish to receive further information from Clifford Chance about events or legal developments which we believe may be of interest to you, please either send an email to nomorecontact@cliffordchance.com or by post at Clifford Chance LLP, 10 Upper Bank Street, Canary Wharf, London E14 5JJ.

Abu Dhabi o Amsterdam o Bangkok o Barcelona o Beijing o Brussels o Bucharest o Casablanca o Doha o Dubai o Düsseldorf o Frankfurt o Hong Kong o Istanbul o Jakarta* o London o Luxembourg o Madrid o Milan o Moscow o Munich o New York o Paris o Perth o Prague o Rome o São Paulo o Seoul o Shanghai o Singapore o Sydney o Tokyo o Warsaw o Washington, D.C.

*Linda Widyati & Partners in association with Clifford Chance.

Clifford Chance has a co-operation agreement with Abuhimed Alsheikh Alhagbani Law Firm in Riyadh.

Clifford Chance has a best friends relationship with Redcliffe Partners in Ukraine.