

RESOLUTION

AMAZON/APPLE BRANDGATING

S/0013/21

COUNCIL. COMPETITION DIVISION

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In Madrid, on the 12th day of July 2023

The Competition Division of the Council of the National Markets and Competition Commission (**CNMC**), with the composition indicated, has issued the following decision in the above-mentioned proceedings initiated against several companies belonging to the AMAZON and APPLE business groups, for alleged anti-competitive practices prohibited in Article 1 of Law 15/2007, of 3 July, on the Defence of Competition (**LDC**) and 101 of the Treaty on the Functioning of the European Union (**TFEU**).

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1. BACKGROUND

- (1) On 20 November 2020, the Competition Directorate ("**CD**") became aware, through the *European Competition Network* ("**ECN**"), of the possible existence of anti-competitive conduct contrary to the LDC, consisting of potential anti-competitive agreements between the AMAZON and APPLE groups that could affect the sectors of online retailing of electronic products and the provision of intermediation services to third-party retailers through online platforms/marketplaces in Spain.
- (2) On 12 February 2021, in order to determine whether these agreements could constitute indications of an infringement of the LDC and/or the TFEU that could justify, where appropriate, the initiation of disciplinary proceedings, in accordance with the provisions of Article 49.2 of the LDC, the CD agreed to **open ex officio the preliminary investigation proceedings** "DP/008/21 - Brand Gating".
- (3) On 30 June 2021, it was agreed to **formally initiate** disciplinary proceedings (folios 1-3), with reference number S/0013/21, and it was agreed to incorporate all the proceedings carried out in the framework of the preliminary proceedings with reference number DP/008/21.
- (4) On 22 June 2022, an agreement was adopted to **extend the opening of proceedings** to include two companies, APPLE INC and AMAZON.COM SERVICES INC (now Amazon.com Services LLC).
- (5) On 2 August 2022, the **Statement of Facts ("SOF")** was notified (folios 6.405 to 6.626) to which the Apple and Amazon groups submitted submissions on 2 and 14 September 2022 respectively (folios 7.377 to 7.523 and 7.707 to 7.853).
- (6) On 8 August 2022, the Apple Group requested access to a *data room* to access certain information from the Amazon Group that had been used by the CD for the price analysis conducted in the SOF and that had been declared confidential at the request of the Amazon Group (the Apple Group had had access to a non-confidential version of the file in which the prices provided by the Amazon Group had been put in ranges of EUR 100) (folios 7.287 a 7.290).
- (7) On 12 August 2022, the CD adopted an agreement rejecting the Apple Group's request for access to a data room (folios 7.321 to 7.322).
- (8) On 30 August 2022, the CNMC's Competition Division requested a report from the CD on the Article 47 LDC appeal filed by the Apple Group in relation to the refusal of access to a requested data room (folio 7.358). This report was submitted by the CD on 6 September 2022 (folio 7.562).

- (9) On 28 November 2022, the Council of the CNMC sent to the CD the letter, by which the Amazon group (in the context of the appeal under Article 47 LDC filed by the Apple group in relation to the refusal of access to a data room) showed its non-opposition to the establishment of a data room (folios 8.833 and 8.834 to 8.836). The CD sent the Council of the CNMC a letter in which it argued that, in the light of the abovementioned letter from the Amazon group, there could be circumstances that exceptionally justified the creation of a data room (folios 8.841 to 8.842).
- (10) On 30 November 2022, in view of the Council's decision on the appeal lodged by the Apple Group concerning the refusal of access to the requested data room, the parties were notified of the agreement to grant access to the data room, as well as the rules for such access (folios 8.861 to 8.862 and folios 8.863 to 8.865).
- (11) On 13, 14 and 15 December 2022, the Apple group accessed the data room set up by the CD and on the last day produced a report with two annexes that would remain on the premises of the CD in accordance with the rules of access to the data room.
- (12) On 23 December 2022, the Apple Group filed an appeal under article 47 of the LDC in relation to the data room access rules and on 27 December, the Competition Division requested a report from the CD on this appeal (folios 8.975 to 8.976) which was sent to it on 2 January 2023 (folios 9.061 to 9.075).
- (13) On 21 February 2023, the Council of the CNMC decided to reject the Article 47 LDC appeal filed by the Apple group in relation to the data room access rules.
- (14) On 24 February 2023, in accordance with article 33.1 of the CDR, the CD agreed to close the investigation phase of this case, and on the same day the parties were notified of the Proposed Resolution.
- (15) During the aforementioned pre-trial phase, the CD has made, among others, the following requests for information:

Table 1. Responses to the CD's main information requests

Date	Company / organisation	Folios	Folios reply
08/03/2021	Italian Competition Authority	220	31 to 219

Date	Company / organisation	Folios	Folios reply
26/05/2021	Amazon Group	221 to 227 ¹	330 to 645 and 1,020 to 1,066
28/09/2021		1,091 to 1,115 ²	2,308 a 2,583
25/01/2022		3,111 to 3,116 ³	4,520 a 4,540
23/02/2022		4,469 a 4,471 ⁴	5,953 to 5,961
07/06/2022		5,933 to 5,935 ⁵	6,208 to 6,210
14/07/2022		6,312 to 6,314 ⁶	6,385 to 6,404
15/07/2022		6,324 to 6,328 ⁷	7,348 to 7,352
26/05/2021	Apple Group	243 to 248 ⁸	660 to 1012
28/09/2021		1,124 to 1,140 ⁹	2,257 to 2,301

¹ This first information request to AMAZON will be referred to as "IR I" or "AMAZON IR I".

² This second information request to AMAZON will be referred to as "IR II" or "AMAZON IR II".

³ This third information request to AMAZON will be referred to as "IR III" or "AMAZON IR III".

⁴ This fourth information request to AMAZON will be referred to as "IR IV" or "AMAZON IR IV".

⁵ This fifth information request to AMAZON will be referred to as "IR V" or "AMAZON IR V".

⁶ This sixth information request to AMAZON will be referred to as "IR VI" or "AMAZON IR VI".

⁷ This seventh information request to AMAZON will be referred to as "IR VII" or "AMAZON IR VII".

⁸ This first information request to APPLE will be referred to as "IR I" or "APPLE IR I".

⁹ This second request for information to APPLE will be referred to as "RII" or "APPLE IR II".

Date	Company / organisation	Folios	Folios reply
25/01/2022		3,125 to 3,130 ¹⁰	4,226 to 4,238
23/02/2022		4,488 to 4,495 ¹¹	5,305 to 5,317
07/06/2022		5,942 to 5,946 ¹²	6,177 to 6,179
14/07/2022		6,317 to 6,319 ¹³	6,338 to 6,346
15/07/2022		6,331 to 6,335 ¹⁴	7,340 to 7,342
28/09/2021	Apple Resellers [CONFIDENTIAL] and certain online markets	1,180 to 1,190; 1,230 to 1,240; and 1,148 to 1,156	-
22/11/2021 ¹⁵		2,648 to 2,659	-
26/11/2021	Unofficial sellers of Apple products	2681 to 2691	2786 to 2804 and 3849 to 3857
18/01/2022	Additional online markets	3062 to 3064	-

¹⁰ This third request for information to APPLE will be referred to as “**RIII**” or “**APPLE IR III**”.

¹¹ This fourth information request to APPLE will be referred to as “**IR IV**” or “**APPLE IR IV**”.

¹² This fifth request for information to APPLE will be referred to as “**RV**” or “**APPLE IR V**”.

¹³ This sixth request for information to APPLE will be referred to as “**RVI**” or “**APPLE IR VI**”.

¹⁴ This seventh request for information to APPLE will be referred to as “**RVII**” or “**APPLE IR VII**”.

¹⁵ On 22 November 2021, the information request was reiterated to APPLE distributors **[CONFIDENTIAL]** and online marketplaces that had not replied.

- (16) The Apple and Amazon groups submitted submissions to the Proposed Resolution on 30 March and 4 April 2023 respectively (folios 10,309 to 11,292 and 11,296 to 11,963).
- (17) On 5 April 2023, the CD submitted its Report and Proposed Resolution to the CNMC's Competition Division (folios 11,973 to 11,974).
- (18) On 19 April 2023, the transmission of information to the European Commission provided for in Article 11(4) of Regulation 1/2003 was agreed. It was also agreed to suspend the deadline for a decision until the European Commission's response had been given or the 30-day period had elapsed (folios 11,989 to 11,990). The suspension period was lifted by agreement of 19 May 2023 (folios 12,005 to 12,006).
- (19) On 24 May 2023, it was agreed to request the imputed companies of the Apple and Amazon groups to provide their total turnover for the financial year 2022, giving them a period of 10 working days to reply to the request (folios 12,016 to 12,019) and the agreement was made available to the parties on 24 May. Since the requested information is an element of judgment necessary to reach a decision, it was also agreed to suspend the maximum period for reaching a decision until the requested information was provided or, if applicable, the period granted for its provision had elapsed, in accordance with article 37.1 a) of the LDC.
- (20) On 30 May 2023, the CNMC received a letter from the Apple group companies APPLE DISTRIBUTION INTERNATIONAL LTD and APPLE INC. requesting an extension of 5 additional days to the 10-day deadline to reply to the request of 24 May; this extension was granted by agreement of 31 May 2023 (folios 12,039 to 12,040), and was extended to any other interested party requesting it within the deadline.
- (21) On 2 June 2023, a letter was received by the CNMC from the Amazon group companies AMAZON SERVICES EUROPE S.A.R.L., AMAZON EUROPE CORE S.A.R.L., AMAZON EU S.A.R.L. and AMAZON.COM SERVICES LLC, requesting, in turn, an extension of the deadline of 5 additional working days to reply to the information request of 24 May 2023, with the extension of the deadline granted to the companies of the Apple group by agreement of 30 May 2023 being automatically extended to them by virtue of the terms of the aforementioned agreement.
- (22) The information request of 24 May on turnover was answered on 15 June 2023 by the Apple group companies and on 23 June 2023 by the Amazon group companies, the suspension of the deadline being lifted with effect from the latter date by agreement of the Secretary of the Council on 26 June.

2. THE PARTIES

2.1. AMAZON

2.1.1. General description

- (23) On 30 June 2021, disciplinary proceedings were opened against the following 4 companies belonging to the Amazon group:¹⁶
- AMAZON SERVICES EUROPE S.Á.R.L. ("**ASE**"), which provides intermediary services to third-party sellers, enabling them to offer products for sale on all Amazon Stores in the EU, including www.amazon.es¹⁷
 - AMAZON EUROPE CORE S.Á.R.L. ("**AEC**"), which is the entity responsible for operating the Amazon Store websites in the EU¹⁸;
 - AMAZON EU S.Á.R.L. ("**AEU**"), which is responsible for the retail sale of the physical goods it purchases from sellers in all Amazon Stores in the EU¹⁹; and
 - AMAZON ONLINE SPAIN, S.L. ("**AOS**"); which provides online advertising services²⁰.
- (24) On 22 June 2022, an agreement was made to extend the initiation with respect to AMAZON.COM SERVICES, Inc. ("**ASI**") (now AMAZON.COM SERVICES LLC).
- (25) In the SOF, it was decided to close the present proceeding in respect of AOS.
- (26) ASE, AEC, AEU and ASI will be referred to collectively as "**AMAZON**"²¹.

2.1.2. Business model

- (27) In terms of its activities, the AMAZON group is a group of companies which sells, through country-specific websites (which operate such as online market, e-commerce marketplaces, or *marketplaces*)²², a wide range of consumer products, while providing intermediary services to third-party sellers and manufacturing and selling an increasingly wide range of its own products.

¹⁶ Response to the information request dated 26 May 2021 ("**AMAZON RI I**"), paragraph 6 (folio 4599).

¹⁷ Response to the information request dated 26 May 2021 ("**AMAZON RI I**"), paragraph 6 (folio 4599).

¹⁸ Response to AMAZON IR I, paragraph 7 (folio 4600).

¹⁹ Response to AMAZON IR I, paragraph 8 (folio 4600).

²⁰ Response to AMAZON IR I, paragraph 9 (folio 4601).

²¹ For further clarification on the liability of companies see section 5.4.4 of this Resolution.

²² That is to say, that Amazon websites such as, for example, <http://www.amazon.es> are online marketplaces, e-commerce marketplaces or *marketplaces*, so they will be referenced interchangeably in any of these three ways.

- (28) In this regard, the AMAZON group operates specific websites in South and North America, Asia, Australia, and Europe (and, in Europe, in the United Kingdom, Germany, France, Italy, Spain, the Netherlands, Sweden and Poland)²³. In particular, AMAZON's online marketplace in Spain (<https://www.amazon.es/>) was launched in September 2011²⁴.
- (29) Although AMAZON was originally the sole seller on its websites or online marketplaces, where it operated essentially as a retail distributor, it opened its website in the United States to third-party sellers for the first time in 2000, allowing them to sell directly alongside AMAZON on its online marketplace²⁵, a strategy which, given its great success²⁶, it gradually expanded to the other websites it manages²⁷, thus also providing intermediary services to third-party sellers.
- (30) After starting to admit third-party sellers to its US online marketplace in 2000 and expanding that strategy to the rest of its websites, in 2009, the AMAZON group launched its first own-brand products *AmazonBasics* and *Pinzon* (for household products)²⁸, which have grown to an increasingly wide range of own products²⁹ (including categories such as drugstore products, coffee, cleaning and drugstore products, baby products, food, nutrition and sports products, electronic products³⁰, etc.)³¹.

²³ Response to the information request dated 23 February 2022 ("**AMAZON IR IV**"), reply to question 2 (folios 5919-5924).

²⁴ Response to AMAZON IR I, paragraph 2 (folio 4597).

²⁵ Response to AMAZON IR I, paragraph 2 (folio 4597).

²⁶ Response to AMAZON IR I, paragraph 2 (folio 4597).

²⁷ For example, when the Spanish online marketplace was launched in 2011, it was already open directly to third-party sellers from its inauguration (see reply to AMAZON IR I, paragraph 2 (folio 4597)).

²⁸ See <https://pattern.com/blog/all-you-need-to-know-about-amazons-private-label-brands/>.

²⁹ See some of the own brands currently marketed by AMAZON at <https://www.amazon.com/-/es/b?ie=UTF8&node=17602470011>.

³⁰ Within this category, AMAZON manufactures and markets, for example, goods in the following classes: **[CONFIDENTIAL]** (See reply to the information request dated 28 September 2021 ("**AMAZON IR II**"), paragraph 86(b), folio 4695).

³¹ Some of the group's best-known own brands and the products they encompass are listed in the following link: <https://www.adsizone.net/esenciales/amazon/marcas-blancas-amazon/>.

- (31) The importance of each of these three roles (retail distributor -of products from third-party manufacturers and their own brands-, provider of intermediary services to third parties and manufacturer), can be seen in the following tables³².

³² The charts were provided by the company's CEO, Jeff Bezos, during his testimony before the US Congress on 29 July 2019 and have been compiled by Market Place Plus, and can be viewed at the following link: <https://www.marketplacepulse.com/articles/9-of-amazons-sales-in-clothing-are-from-its-private-label-brands>

Table 2. Distribution of AMAZON sales according to product listings

Category	AMAZON listings as a % of total listings	own brand listings as a % of total AMAZON listings	% of listings of third-party resellers
Electronic products	4%	<1%	96%
Beauty products	4%	<1%	96%
Household products	1%	<1%	99%
Clothing	8%	<1%	92%
Books	34%	<1%	66%
Consumables	3%	<1%	97%
Toys	9%	<1%	91%

Source: <https://www.marketplacepulse.com/articles/9-of-amazons-sales-in-clothing-are-from-its-private-label-brands>

Table 3. Distribution of AMAZON sales according to amount

Category	AMAZON's % of total sales	own brand sales as a % of total AMAZON sales	% of sales by third-party resellers
Electronic products	43%	3%	57%
Beauty products	35%	<1%	65%
Household products	33%	4%	67%
Clothing	28%	9%	72%
Books	74%	<1%	26%
Consumables	41%	2%	59%
Toys	42%	<1%	58%

Source: <https://www.marketplacepulse.com/articles/9-of-amazons-sales-in-clothing-are-from-its-private-label-brands>

- (32) The first table refers to product listings and the second to the amount of sales in dollars. In both tables, the rows refer, in this order, to the following products: (i) electronic products; (ii) beauty products; (iii) household products; (iv) clothing; (v) books; (vi) consumables; and (vii) toys. On the other hand, the second and third columns refer to listings and/or sales made by Amazon (the second column would be the total listings - in the first table - and total sales - in the second table - made directly by AMAZON) the third column would be the percentage of listings and/or sales made directly by AMAZON that its own brands would represent out of the total and the fourth and last column refers to sales made by third parties.
- (33) Thus, according to the second table concerning the amount of sales, it can be seen how, with the exception of books, **sales by third-party sellers are around 60% in almost all categories and how the majority of sales are of third-party products** (in fact, of AMAZON's own brands in the categories selected in the table, almost none would account for more than 5% of the direct sales made by the company, with the sole exception of clothing, which reaches almost 10%).
- (34) However, the launch of its own products has intensified over time, from around 30 own brands in 2017 to more than 100 currently marketed³³, so this role is becoming increasingly important for the company.
- (35) Thus, AMAZON currently plays several roles, which could be ordered (by reference to the amount of sales) as follows: (i) primary role of intermediary service provider; (ii) secondary role of retail distributor; and (iii) tertiary role of manufacturer and seller of own-brand products.
- (36) Finally, Amazon websites such as, for example, www.amazon.es, are online *marketplaces* and will therefore be referenced interchangeably in any of the following three ways: "**AMAZON Website(s)**", or "**AMAZON Online Marketplaces**", or "**AMAZON Marketplace(s)**".

2.2. APPLE

2.2.1. General description

- (37) On 30 June 2021, disciplinary proceedings were opened against the following 3 companies belonging to the Apple group:

³³ See <https://pattern.com/blog/all-you-need-to-know-about-amazons-private-label-brands/>.

- APPLE DISTRIBUTION INTERNATIONAL LTD ("**ADI**");
- APPLE RETAIL SPAIN, S.L. ("**ARS**"); and
- APPLE MARKETING IBERIA, S.A. ("**AMI**").

- (38) On 22 June 2022, it was agreed to extend the initiation with respect to APPLE INC. ("**AINC**"), the ultimate parent of the group which holds an indirect [**CONFIDENTIAL**]% stake in ADI³⁴.
- (39) In the SOF, it was decided to close the present proceeding in respect of ARS and AMI.
- (40) ADI and CNIA together will be referred to as "**APPLE**"³⁵.

2.2.2. Business model

- (41) In relation to its activities, APPLE is a group of companies that manufactures and sells a wide variety of electronic devices worldwide, including iPhone, iPad, Apple Watch, Apple TV, Mac, Beats and a range of Apple-branded accessories such as charging cables and adapters³⁶.
- (42) In addition, APPLE is a dual role manufacturer, in that it manufactures and sells the products directly through its own website and through its official physical shops (as well as through its network of distributors).
- (43) According to APPLE³⁷, the organisation of its distribution system³⁸, with the exception of [**CONFIDENTIAL**], distributed through a selective distribution system, is done through an open distribution system, in which the different resellers are classified into:
- Apple Authorised Distributors ("**AADs**"): these players operate at the wholesale level and are appointed by the Apple group on the basis of several criteria: knowledge of consumer electronics products; equipment and sales resources; capacity for distribution, storage and delivery; solvency; territorial coverage; etc.

³⁴ See APPLE's response to the information request dated 14 July 2022 (folio CONFIDENTIAL 6343).

³⁵ For further clarification on the liability of companies see section 5.4.4 of this Resolution.

³⁶ See Apple's response to question 8 of the IR dated 26 May 2021 ("**APPLE IR I**") (folios 4261-4262).

³⁷ Beats products include headphones, speakers and audio software. Apple bought Beats Electronics in May 2014, integrating its product portfolio into Apple's own product portfolio (see official press release on the acquisition here):

<https://www.apple.com/es/newsroom/2014/05/28Apple-to-Acquire-Beats-Music-Beats-Electronics/>.

³⁸ See reply to APPLE IR I (folios 4261-4262).

- APPLE Authorised Resellers (operating at the retail level, "**AAR**").

These resellers are classified into two bands (*Tier 1* or *Tier 2*), depending on their level of investment, which entitle them to different levels of discounts. To obtain AAR *Tier 2* qualification, among other requirements, resellers must: (i) generate a contractually set minimum revenue over a number of consecutive months; (ii) appoint an executive sponsor and management team, share a pipeline of sales opportunities and prepare specific reports; and (iii) comply with either training or company-wide requirements. In order to qualify as AAR *Tier 1*, resellers must invest and demonstrate their knowledge and skills in corporate and/or education area.

- APPLE Premium Resellers (operating at the retail level and offering a premium customer experience, "**APR**").

To qualify as an APR, among other requirements, resellers must (i) adhere to the requirements of the APR Programme (e.g. relating to shop location and design, additional staff training requirements, customer service offerings, etc.); and (ii) generate a contractually established minimum revenue over a number of consecutive months. They are also classified into two bands (*Tier 1* or *Tier 2*), depending on a number of criteria, which entitle them to different levels of discounts.

- Retail Resellers (who operate at retail level, but who are large retailers, large *online* retailers, etc., and who will be referred to as "Retailers").

To qualify as a retailer, among other requirements, resellers must (i) have physical outlets open to walk-in customers and/or offer online sales of consumer electronics products; and (ii) generate a contractually established minimum revenue over a number of consecutive months.

- Non-Authorised Resellers (operating at all levels without having a direct contractual relationship with APPLE, "**NAR**").

- (44) Resellers who sign a distribution agreement with APPLE are offered discounts or rebates which, in addition to allowing direct price competition, incentivise them to reinforce their offer by means of sales force training, logistics or *on-site* consultancy service. These discounts are offered to official resellers who purchase directly from APPLE, as well as to those who purchase APPLE products indirectly through wholesalers. These resellers also have access to APPLE's marketing assets and promotional materials³⁹.
- (45) In this respect, a difference between APRs and AARs lies in the level of discount that can be obtained and the demands/requirements to be fulfilled in order to obtain them, which is higher for APRs than for AARs.
- (46) On the other hand, **wholesalers within the Apple group are continuously encouraged to distribute Apple Products** to AARs and **also to NARs**, including with financial incentives. For example, APPLE gives wholesalers additional discounts to pass on to NARs seeking to close sales of Apple Products with corporate customers⁴⁰.
- (47) As to the importance of APPLE's distributors in relation to the sale of its products:
- First, at the wholesale level, APPLE's direct sales to retail distributors (who are the ones selling to the end consumer) used to be much smaller than APPLE's sales to its wholesale distributors until 2021, although the importance of wholesalers has been decreasing over time, with a similar share now being reached by both ways of reaching retail distributors:

Table 4. APPLE wholesale distribution

Wholesale distribution - Spain - All Apple Products										
	2017		2018		2019		2020		2021	
	Quotas (value)	Quotas (volume)	Quotas (value)	Quotas (volume)	Quotas (value)	Quotas (volume)	Quotas (value)	Quotas (volume)	Quotas (value)	Quotas (volume)
Sold by Apple to retailers	[10%-20%]	[20%-30%]	[10%-20%]	[20%-30%]	[20%-30%]	[30%-40%]	[30%-40%]	[30%-40%]	[40%-50%]	[50%-60%]
Sold by Apple to wholesalers	[80%-90%]	[70%-80%]	[80%-90%]	[70%-80%]	[70%-80%]	[60%-70%]	[60%-70%]	[60%-70%]	[50%-60%]	[40%-50%]
TOTAL	100%	100%	100%	100%	100%	100%	100%	100%	100%	100%

Source: Annex 2 to APPLE's response to the information request dated 28 September 2021 ("RI II APPLE") (folio 4,248)

- Secondly, at the retail level, most sales of APPLE products to end-consumers are made through APPLE's official distributors (APRs, AARs and Retailers), then through APPLE itself and finally through unofficial distributors (NARs):

³⁹ See answer to question 8 of APPLE IR I (folios 4261-4262).

⁴⁰ See answer to question 8 of IR I APPLE (folios 4261-4262).

Table 5. APPLE retail distribution

Retail Distribution - Spain - All Apple Products										
	2017		2018		2019		2020		2021	
	Quotas (value)	Quotas (volume)	Quotas (value)	Quotas (volume)	Quotas (value)	Quotas (volume)	Quotas (value)	Quotas (volume)	Quotas (value)	Quotas (volume)
Sold by Apple	[30%-40%]	[40%-50%]	[30%-40%]	[40%-50%]	[30%-40%]	[30%-40%]	[30%-40%]	[30%-40%]	[20%-30%]	[20%-30%]
Sold by official distributors	[60%-70%]	[40%-50%]	[60%-70%]	[40%-50%]	[60%-70%]	[60%-70%]	[60%-70%]	[60%-70%]	[70%-80%]	[70%-80%]
Sold by unauthorised distributors	[0%-10%]	[0%-10%]	[0%-10%]	[10%-20%]	[0%-10%]	[0%-10%]	[0%-10%]	[0%-10%]	[0%-10%]	[0%-10%]
TOTAL	100%	100%	100%	100%	100%	100%	100%	100%	100%	100%

Source: Annex 2 of the reply to APPLE IR II (folio 4248)

- (48) Finally, as regards the importance of the different sales channels within the distribution of APPLE products, it can be seen that physical shop sales were initially the main sales channel, but, over time, their weight in terms of share has become more or less equal to that of the online channel (own website and *marketplaces*):

Table 6. APPLE retail distribution by channel

APPLE Retail Distribution by Channel - Spain - All Apple Products										
	2017		2018		2019		2020		2021	
	Share (VA)	Share (VOL)	Share (VA)	Share (VOL)	Share (VA)	Share (VOL)	Share (VA)	Share (VOL)	Share (VA)	Share (VOL)
Physical shops	[60%-70%]	[50%-60%]	[70%-80%]	[60%-70%]	[70%-80%]	[70%-80%]	[40%-50%]	[40%-50%]	[50%-60%]	[50%-60%]
Online channel	Own website	[30%-40%]	[40%-50%]	[20%-30%]	[40%-50%]	[20%-30%]	[20%-30%]	[50%-60%]	[50%-60%]	[40%-50%]
	Marketplaces	[0%-10%]	[0%-10%]	[0%-10%]	[0%-10%]	[0%-10%]	[0%-10%]	[0%-10%]	[0%-10%]	[0%-10%]
TOTAL	100%	100%	100%	100%	100%	100%	100%	100%	100%	100%

Source: Annex 3 of the reply to IR II APPLE (folio 4249)

3. MARKETS

3.1. Principles

3.1.1. Product market

- (49) The relevant market definition seeks to determine the limits of competition between undertakings by identifying the immediate competitive constraints they face.
- (50) The concept of a relevant product market implies that there is effective competition between the products or services that are part of that market, because, having regard to the specific use of those products or services, there is a sufficient degree of substitutability between them.

- (51) Such an analysis cannot be limited to examining the objective characteristics of the products and services in question, but must also take into account competitive conditions and the structure of supply and demand.
- (52) In this respect, firms are subject to three main sources of competitive constraints: demand substitutability, supply-side substitutability and potential competition.
- (53) From an economic perspective, for the definition of the relevant market, demand substitutability is the most immediate and effective means of constraining the behaviour of suppliers of a given product⁴¹. Thus, the substitutability of products or services for the purposes of defining the relevant market must be assessed primarily from the perspective of consumer demand.
- (54) From this perspective, factors that may be taken into account are the nature and technical characteristics of the products or services in question, consumer preferences, switching costs and barriers, market developments, the history of the development of such products or services and also the commercial practice of the undertaking⁴². Moreover, the fact that there are independent undertakings on the market specialised in the manufacture and sale of the product or service is an *"important indication"* of the existence of a separate market for that product or service⁴³.
- (55) AMAZON criticises the CD for having carried out an outdated market definition analysis by looking at product characteristics, which would no longer have been done since the European Commission adopted its Market Definition Guidelines in 1997⁴⁴.
- (56) In reply to the above, it should be noted that, in addition to not being the only parameter used by the investigating authority in the definition of the markets, the analysis of the objective characteristics of the products and the aspects that differentiate them from other products is still appropriate for the purpose of defining a market the EGC recalls in a recent judgment of November 2021 that *"it must be possible to distinguish the service or the good in question by virtue of particular characteristics that so differentiate it from other services or other goods that it is only to a small degree interchangeable with those alternatives and affected by competition from them. In that context, the degree of interchangeability between products must be assessed in terms of their objective characteristics, as well as the structure of supply and demand on the market, and competitive conditions"*⁴⁵.

⁴¹ COMMISSION COMMUNICATION on the definition of the relevant market for the purposes of Community competition law (97/C 372/03), paragraph 13 ("**Communication on the definition of the relevant market**").

⁴² Case T-201/04, *Microsoft v Commission*, EU:T:2007:289, para 925. In addition, the Notice on the definition of the relevant market, paragraphs 38 to 43, also notes the following elements: (i) evidence of substitution in the recent past; (ii) quantitative tests specifically designed to delineate markets; (iii) customer and competitor views; (iv) consumer preferences; (v) barriers and costs related to demand shifting to substitute products; and (vi) different categories of customers and price discrimination.

⁴³ Case T-201/04, *Microsoft v Commission*, EU:T:2007:289, para 927.

⁴⁴ See the "Supplementary Brattle Report" provided by AMAZON together with its submissions to the Proposed Resolution.

⁴⁵ See T-612/17 - *Google and Alphabet v Commission (Google Shopping)*; ECLI:EU:T:2021:763; paragraph 471. Own translation of *"it must be possible to distinguish the service or the good in question by virtue of particular characteristics that so differentiate it from other services or other goods that it is only to a small degree interchangeable with those alternatives and affected by competition from them. In that context, the degree of interchangeability between products must be assessed in terms of their objective characteristics, as well as the structure of supply and demand on the market, and competitive conditions"*.

- (57) On the other hand, supply-side substitutability may also be taken into account when defining markets in certain cases (particularly in cases where its effects are equivalent to those of demand-side substitutability in terms of efficiency and immediate response). Supply-side substitutability exists when suppliers are able to switch to production of the relevant products and market them in the short term, without incurring significant additional costs or risks, in response to small relative changes in prices or demand conditions. Where these conditions are met, the additional output to be marketed will have a restrictive effect on the competitive behaviour of the undertakings concerned.
- (58) The third source of competitive constraint, potential competition, is not taken into consideration for market definition, since the conditions under which potential competition will actually represent a competitive constraint depend on the analysis of specific factors and circumstances relating to access conditions. If necessary, this analysis is not carried out until a later stage, once the position of the undertakings participating in the relevant market has been determined and this position raises competition concerns⁴⁶.
- (59) The existence of other indirect competitive constraints may be taken into account in the competitive analysis, but will not form part of the market⁴⁷.

⁴⁶ Communication on the definition of the relevant market, para. 24.

⁴⁷ Thus, as stated in paragraph 13 of the Commission Notice on the definition of the relevant market for the purposes of Community competition law ("**Notice on the definition of the market**") "*for the definition of the relevant market, demand substitutability is the most immediate and effective means of constraining the behaviour of suppliers of a given product*". In turn, paragraph 14 states that "*Pressures arising from supply-side substitutability other than those described in paragraphs 20 to 23 and from potential competition are generally less immediate and, in any event, require the analysis of other factors*".

3.1.2. Geographic market

- (60) The relevant geographic market comprises the area in which the undertakings concerned are involved in the supply of the products and services in question, in which the conditions of competition are sufficiently homogeneous and which can be distinguished from neighbouring geographic areas because, in particular, the conditions of competition there are appreciably different from those prevailing in those areas⁴⁸.

3.2. Application to this case

3.2.1. Market for the provision of intermediation services in online marketplaces

- (61) As explained above, AMAZON is an "online marketplace", while providing intermediary services to third-party sellers, allowing them to offer products for sale in all Amazon Stores in the EU, including www.amazon.es, and it manufactures and sells an increasingly wide range of its own products.
- (62) Online marketplaces are two-sided platforms that serve as intermediaries between consumers (to whom they offer the opportunity to find sellers and their offers and to buy their products) and sellers (to whom they offer, among other services, the opportunity to list and sell their products on the online marketplace website), facilitating the purchase of products over the Internet.
- (63) Different online marketplaces offer different product ranges, degrees of specialisation, size, business models, etc. but have in common that they serve at least two groups of users: consumers and sellers.
- (64) However, the services, prices, and terms and conditions offered differ considerably on each side of the market. For example, in relation to prices, while sellers pay (in most cases) a commission for the services offered to them by the online marketplace, consumers do not pay anything for the intermediation services provided to them by the operator of the online marketplace. Furthermore, the terms and conditions imposed on sellers who want to use the online marketplace also differ considerably from those imposed on consumers (in fact, they tend to be much more demanding in the case of sellers). Thus, there are two different groups of users on each side of the online market with different demands and needs.

*For this reason, these pressures are taken into account in the assessment phase of the competition analysis". In this way, the determination of immediate competitive pressures, which will come from demand-side substitutability, should not be confused with potential competition, which, according to paragraph 214 of this communication, "is not taken into account for the definition of markets, since the conditions under which potential competition will actually represent a constraint depend on the analysis of specific factors and circumstances related to the conditions of access". The relevant draft new Communication on market definition made public on 8 March 2022 ("**Draft new Communication on market definition**") is formulated in similar terms by stating that "the main purpose of market definition is to identify in a systematic way the immediate competitive constraints that the undertakings concerned face when offering certain products in a given area".*

⁴⁸ Communication on the definition of the relevant market, para. 8.

- (65) Moreover, while there are online marketplaces specialised in certain types of products (e.g. clothing, DIY, etc.) - which could be called vertical online marketplaces - others, such as AMAZON, offer a wide range of products - which could be called horizontal online marketplaces.
- (66) In this respect, although there is limited substitutability between online markets specialised in certain product categories from the perspective of consumers and sellers, precisely because of the different products sold, all online markets were considered in the Proposed Resolution to be part of the same market irrespective of the degree of specialisation in one product or another.
- (67) On the basis of the above, and as will be explained in detail below, the two sides of an online market are considered to constitute distinct product markets: the provision of intermediation services in online marketplaces to third-party sellers is distinct from the provision of intermediation services in online marketplaces to consumers.
- (68) Both APPLE and AMAZON indicate that the intermediation market is not relevant. In particular, APPLE argues that the agreements at issue in this case are not capable of producing effects on this market and AMAZON argues that it competes with all distribution channels, both when selling marketplace services to sellers and when selling products to end-customers. AMAZON also argues that a broader market should have been taken into account than the one defined in the Proposed Resolution which would include both *online* and *offline* sales.
- (69) However, in so far as the agreements between AMAZON and APPLE at issue in this case set out the operators who will be authorised to sell APPLE products on amazon.es, as well as limitations on the use of advertising space on AMAZON's online marketplace, it is undisputed that **the market in which AMAZON provides intermediation services to third-party sellers must be analysed in order to determine the restrictive nature of the agreements at issue.**

3.2.1.1. The provision of intermediation services in online marketplaces to third-party sellers

- (70) Sellers have different sales channels at their disposal to reach consumers: (i) open and operate a physical shop; (ii) set up and operate its own website; (iii) use price comparators; and/or (iv) use one or more online marketplaces.
- (71) As will be described below, each of these channels has different opening and maintenance costs, number of visits, short and medium-term profitability prospects, etc. and are therefore not considered substitutes from the sellers' perspective.
- (72) In this section, the services that AMAZON and other online marketplaces provide to sellers will first be described, to be compared and then distinguished from those of the other channels (i.e. physical shops, proprietary websites and price comparators).

3.2.1.1.1. Intermediation services on online marketplaces to third-party sellers

- (73) Online marketplaces act as intermediaries between third-party sellers and consumers, but are not involved in commercial transactions. They do not own the products marketed by the third-party sellers and therefore do not bear the usual costs and risks of sourcing, purchasing, warehousing and logistics of the products, which are usually borne by retailers. Online marketplaces do not determine the selling price and do not enter into direct purchase contracts with consumers. In most online marketplaces, third-party sellers are responsible for delivery and assume liability for defective products.
- (74) On the other hand, they often complement their core function (i.e. matching consumers and sellers) by offering other services as part of their default offer or as additional optional services. Typical default services are payment, product presentation, complaint handling and dispute resolution services. Sometimes, other services such as advertising, returns, legal advice, accounting, etc. may also be included. On the other hand, online marketplaces may also offer additional services for a fee, such as warehousing, packaging and delivery of products.

3.2.1.1.1.1. The services provided by AMAZON

- (75) Third-party sellers who open an account to sell on AMAZON are entitled to operate that account, list products and complete transactions on the AMAZON Websites.
- (76) Third-party sellers also benefit from a wide range of optional services, which are often subject to additional costs/fees, such as delivery services, warehousing, returns, complaint handling, marketing, data integration, pricing software and account support tools, as well as fraud protection.
- (77) Specifically in Spain⁴⁹, AMAZON charges fees for the provision of the following services **[CONFIDENTIAL]**.
- (78) Moreover, in 2019 alone, AMAZON launched 150 new tools and services for third-party sellers, demonstrating the wide range of services AMAZON offers to third-party sellers to reach, interact with and, in some cases, deliver the product to consumers.
- (79) In contrast, sellers using their own website have to purchase such services (which partially overlap in some cases). For example, there are several companies offering web development services, online payment services, etc. whereas online marketplaces offer all these services together and immediately.

3.2.1.1.2. Demand substitutability

3.2.1.1.2.1. Selling on online marketplaces vs operating one's own website

- (80) From a seller's perspective, online marketplaces have properties and characteristics that distinguish them from the use of a proprietary website:
- Online marketplaces provide an immediate reach to a large audience of consumers⁵⁰: compared to a proprietary website, the biggest advantage of selling on an established online marketplace is the immediate reach to a large audience of consumers and therefore the generation of increased traffic for sellers⁵¹. It also generates visibility⁵², which not only affects current sales, but also increases the prospect of future sales.

⁴⁹ See Annex 01 -iii-v of the Response to AMAZON IR II (folio 4563).

⁵⁰ See <https://comercio.acelerapyme.gob.es/eu/node/657> which notes in relation to e-marketplaces that "by advertising your products on such online platforms you can achieve a greater reach in a faster and more effective way, as it has a higher level of traffic". See <https://revistaempresarial.com/marketing/e-commerce/tienda-online-propia-vs-ventas-en-marketplaces/> which, among the advantages of using an online marketplace, points to "Audience reach"; or <https://laesquinacreativa.es/tienda-online-marketplace-comparativa/>, which points out that "Being on Amazon, Ebay or Privalia, means that our products have a potential market of millions of people, among other reasons because of the positioning of the marketplaces in search engines". According to IAB's E-Commerce 2022 study, 60% of online shoppers in Spain turn to online marketplaces as a reference for product information. See <https://iabspain.es/iab-spain-presenta-el-estudio-de-e-commerce-2022/>

⁵¹ See also the "Guide to developing e-commerce" of April 2021 of the Autonomous Community of Navarra which includes among the advantages of selling on an online marketplace the "Possibility of accessing much more traffic than with an own shop," (page 14).

⁵² See <https://ideasparatuempresa.vodafone.es/ventajas-y-desventajas-de-un-marketplace/>

AMAZON points out in its submissions that electronic marketplaces allow access to large audiences and increase traffic, among other reasons because end-customers find it attractive to have access to a wide selection of products. AMAZON itself highlights on its website for potential new sellers⁵³ the fact that AMAZON makes it possible to reach millions of customers and that sellers using its platform can benefit from AMAZON's logistics.

- Online marketplaces give instant access to an already operational and fully functional online selling space⁵⁴: i.e. they offer immediate access to sellers who want to sell online, whereas setting up and operating a website of one's own takes more time (it involves a number of steps such as choosing a domain name, servers, payment processing software, creating content for the website, etc., as well as concluding contracts with various companies such as payment service providers or logistic services).

⁵³ See https://sell.amazon.es/comienza?Id=SEESSOAdGog-Top-Kwds_11244339266_110293515837_kwd-325818021008_e_469337738154_c_sig-Cj0KCQiAyMKbBhD1ARIsANs7rEE9hC4s7bX2rNPcoUm2knJSfHanrH_ksRoG0Rr_o19XiefSfm3kyhUaAkIbEALw_wcB_asret_&id=go_cmp-11244339266_adg-110293515837_ad-469337738154_kwd-325818021008_devc_ext-_prd-&gclid=Cj0KCQiAyMKbBhD1ARIsANs7rEE9hC4s7bX2rNPcoUm2knJSfHanrH_ksRoG0Rr_o19XiefSfm3kyhUaAkIbEALw_wcB

⁵⁴ See <https://revistaempresarial.com/marketing/e-commerce/tienda-online-propia-vs-ventas-en-marketplaces/> which, among the advantages of using an online marketplace, points to "Automation". See also <https://comercio.acelerapyme.gob.es/eu/node/657> which states "Customers buy from the platform where the online marketplace manages the payment methods and the processing of any order, which provides sellers and consumers with security in the management of both the purchase and the payment".

- Selling on online marketplaces has substantially lower initial investment costs⁵⁵: online marketplaces require almost no initial investment beyond the payment of the fees set by the marketplace operator.
- Selling on online marketplaces requires less effort and operating costs⁵⁶: in online marketplaces, the operator is in charge of the technical aspects of the transaction and the payment process⁵⁷; while the activity of third-party sellers consists mainly of adding and modifying product listings and, finally and where appropriate, in deciding on the use and choice of advertising solutions offered by the online marketplace to improve the visibility and prominence of their products within the online marketplace itself. Furthermore, from an operating cost perspective, third-party sellers are in many cases allowed to list products without incurring any fixed costs and even without a commitment to make sales.
- Complementarity between online marketplaces and individual websites⁵⁸: on the one hand, online marketplaces can be effective for (i) starting up a retail business⁵⁹; (ii) testing the suitability of a seller's existing offerings in relation to those of other sellers⁶⁰; (iii) testing new products and/or new product segments⁶¹; (iv) liquidate unsold items⁶²; (v) increase brand visibility and send the message to consumers that the brand is reliable (even with low sales)⁶³; and (vi) reach consumers who initiate their purchases in online marketplaces⁶⁴ (in particular on AMAZON).

⁵⁵ See <https://comercio.acelerapyme.gob.es/eu/node/657> which notes in relation to e-marketplaces that "One of the main advantages of e-marketplaces is the low investment required to put your business on this type of platform. E-commerce, on the other hand, involves a higher investment as you have to build your online business from scratch (...) An online marketplace can help you get started in online commerce without having to invest a big budget". See also <https://outvio.com/es/blog/marketplace-vs-tienda-online/>, which points out that "The initial cost of opening one's own online shop is higher than selling on marketplaces".

⁵⁶ See <https://outvio.com/es/blog/marketplace-vs-tienda-/>, which notes that one of the advantages of resellers choosing to use an online marketplace rather than their own website is "Lower cost".

⁵⁷ See <https://comercio.acelerapyme.gob.es/eu/node/657> "This type of platform offers both companies selling their products as well as consumers, secure payment management."

⁵⁸ See <https://www.synergyweb.es/blog/tienda-online-propia-vs-marketplace-que-interesa-a-negocio-online/>, which states that: "There is no ideal solution, so the most cost-effective approach is to diversify effort and strategy in both channels. It all depends on your investment power and the final product you are going to sell".

⁵⁹ See <https://laesquinacreativa.es/tienda-online-marketplace-comparativa/>, which states that "If you are new to e-commerce, [the online marketplace] is an excellent opportunity to test market your products".

⁶⁰ See <https://laesquinacreativa.es/tienda-online-marketplace-comparativa/>, which states that among the advantages of selling on an online marketplace is the possibility of "testing the interest or popularity of certain products without having to wait to define a full business".

⁶¹ *Ibidem*.

⁶² See <https://laesquinacreativa.es/tienda-online-marketplace-comparativa/>, which states that, among the advantages of selling on an online marketplace, is the possibility to "get rid of stock".

⁶³ See <https://laesquinacreativa.es/tienda-online-marketplace-comparativa/>, which states that, among the advantages of selling in an online marketplace, is the "Rapid generation of trust. We remove the barrier of users' lack of trust, as they will buy our products through a website they know and trust."

⁶⁴ See <https://revistaempresarial.com/marketing/e-commerce/tienda-online-propia-vs-ventas-en-marketplaces/>, where it is noted that: "Half of consumers search for products immediately on aggregators, i.e., marketplaces. They want to compare similar offers and choose the best one."

- (81) On the other hand, selling through one's own website has a number of distinct characteristics. Without prejudice to the differences already described in terms of set-up costs (website creation, servers, payment services, logistics, etc.) and operational risks (generating visibility and traffic to the website, etc.), individual websites offer different medium and long-term prospects to online marketplaces. In this sense, unlike online marketplaces, which reserve for themselves the management of the relationship with the consumer, proprietary websites can help to build a loyal customer base, insofar as, in these cases, it is the seller itself who has direct contact with the consumer⁶⁵ (in fact, repeat consumers on the website reduce the costs of generating traffic).
- (82) On this point, AMAZON itself points out in its economic report on market definition that other ways in which sellers can access end-consumers, such as individual online shops, carry out 'indirect' competition with AMAZON. That is, AMAZON argues in its submissions that, in order to access a wide audience, other alternatives are not substitutes for electronic marketplaces as precisely those operators that had both online and physical shops have seen the need to create an online marketplace to increase their audience.
- (83) Therefore, one channel and another are often used as complementary solutions by third-party sellers rather than as alternative solutions.

⁶⁵ See <https://outvio.com/es/blog/marketplace-vs-tienda-online/>, which points out, among the advantages of using one's own website, the: "*Connection with your customers*".

3.2.1.1.2.2. Selling on online marketplaces versus operating a physical shop

(84) From a seller's perspective, online marketplaces have a number of properties and characteristics that distinguish them from the use of a physical shop (or a network of them)⁶⁶:

- Sellers consider *online* and *offline* sales channels as distinct and use them in a complementary way⁶⁷: the complementarity of both channels is seen in the *omni-channel* model used by many sellers, which refers to efforts made to reach consumers from multiple sales channels.
- *Online* and *offline* sales channels have different geographic scopes: physical shops have a limited geographic reach, usually bounded by lines of time and/or distance⁶⁸, whereas online marketplaces would have a potentially global reach.
- *Online* and *offline* sales channels have different growth rates⁶⁹: according to a recent study⁷⁰ "*in the eight countries under study [including Spain] there is growth in offline (or physical) commerce, but e-commerce is growing at a faster rate*". The same study adds that "*unorganised physical shops selling online show higher growth than their purely offline counterparts*". On the other hand, although growth rates in physical shops are low, according to a study by the European Commission ("**EC**")⁷¹, the number of physical shops that are considering going online within the next 12 months is more than 18%. In this respect, the different rates of growth suggest different market dynamics and different competitive constraints faced by retailers in the online and offline channels.

⁶⁶ These properties and characteristics answer Amazon's claims to the PR, paragraph 40.

⁶⁷ See paragraph 190 of the European Commission E-commerce Staff Working Document, 2017 (<https://eur-lex.europa.eu/legalcontent/EN/TXT/?uri=CELEX%2F03A52017SC0154>).

⁶⁸ See, for example, Case M.3905 - *Tesco / Carrefour* of 22 February 2015. See also Commission decisions M.8710 - *JD / Sonae MC / Balaiko / JDSH / Sport zone* of 17 January 2018, COMP/M.4590 *REWE / Delvita* of 25 April 2007, COMP/M.5047 *REWE / ADEG* of 23 June 2008, COMP/M.4096 *Carrefour/Hyparfo* of 4 March 2006.

⁶⁹ The fact that both markets are growing, although at different rates, indicates that they can hardly be treated as substitutes. For them to be substitutes, it would be logical for the growth of one to be accompanied by a decrease in the other, *ceteris paribus*.

⁷⁰ See "¿Es el e-commerce bueno para Europa?" [Is e-commerce good for Europe?], a 2020 report by the consultancy Oliver Wyman, which can be found here: <https://www.oliverwyman.com/our-expertise/insights/2021/apr/is-e-commerce-good-for-europe.html>

⁷¹ See European Commission, *Consumer Conditions Scoreboard Consumers at home in the Single Market - Confidence in online shopping, November 2019* https://ec.europa.eu/info/sites/info/files/consumers-conditions-scoreboard-2019_en_1.pdf

- The structure of initial investment costs and operating costs, as well as profitability considerations, are fundamentally different: physical shops have significant initial (investment) and operating costs (such as inventory management, personnel, transport of stock from the retailer's warehouse to the physical shop(s), etc.), whereas online stores require less initial investment and have a different cost structure (e.g. transport and delivery costs are higher, insofar as they have to be delivered directly to consumers from the warehouse and the faster the delivery, the higher the associated cost tends to be).

3.2.1.1.2.3. Selling on online marketplaces vs. a price comparator

- (85) In the *Google Shopping* case, the General Court of the European Union ("**EGC**") upheld the EC's conclusion that selling through price comparison websites constitutes a separate market, distinct from selling through online marketplaces⁷². The EC based its conclusion⁷³ on the fact that price comparators tended to include offers from large online resellers who wanted to maintain control over the marketing of their products, while online marketplaces tended to include offers from small and medium-sized resellers, and possibly from non-professional resellers who were unwilling or unable to engage in online selling themselves. Thus, price comparators and online marketplaces have very different customer bases and therefore constitute distinct markets as far as third-party sellers are concerned.

3.2.1.1.2.4. Multi-channel retail behaviour

- (86) AMAZON argues at length that retail distribution in Spain has developed the omnichannel strategy (online and offline) more intensively and earlier than in other Member States, highlighting cases such as EL CORTE INGLÉS, CARREFOUR or WORTEN, which have added to their online and physical shops an online marketplace and have developed mixed strategies of online shopping and in-store collection (known as *click and collect*). In this context, AMAZON indicates that in Spain there has been significant investment in speeding up delivery and in the very creation of online marketplaces by traditional operators, observing "*that they could be more competitive by increasing (...) selection through the creation of marketplaces*", which in turn increases website traffic, customer interaction and the likelihood of attracting customers as they tend to offer more comprehensive product information. AMAZON indicates that pure e-marketplaces are beginning to invest in physical shops and that traditional shops are also expanding their strategies, making for a very dynamic and competitive sector.

⁷² See Case T-612/17 - *Google Shopping*, ECLI:EU:T:2021:763, para 494.

⁷³ See decision AT.39740 - *Google Search (Shopping)*, paras 221-222 and 241.

- (87) AMAZON states that Ali Express is by far AMAZON's strongest competitor in Spain. It adds that there is 'indirect competition' between the different services providing access to end-customers and that in any case barriers to entry to the market for online marketplaces would be low so high market shares in this market would not be indicative of market power.
- (88) It adds that as AMAZON's commissions do not change frequently enough, it is appropriate to resort to surveys of sellers. AMAZON provides the results of a 2020 survey, based on the response of 100-500 sellers in the AMAZON shop in Spain to a series of questions. It divides the results into four groups (based on revenue and the percentage of revenue corresponding to AMAZON sales) and underlines that none of the respondents operated only in the AMAZON online shop as they use many channels to reach the end customer.
- (89) The survey asks whether in the event of an increase in AMAZON's commissions of **[0-10%]** they would shift sales to other channels in whole or in part and to which channels they would shift sales. AMAZON argues that according to the survey if AMAZON were to increase its commissions by **[0-10%]** there would be a partial shift of sales to other channels of **[30-40]-[50-60%]** for low-participation AMAZON sellers and **[10-20]-[20-30%]** for high-participation AMAZON sellers. It indicates that since all sellers pay the same commission, those with a lower propensity to substitute are protected by those with a higher propensity.
- (90) It adds that the majority would at least partially shift sales to other sales channels and that only **[10-20]-[20-30%]** would shift to other online marketplaces, which would be evidence, according to AMAZON, that online shops, physical shops and e-marketplaces are substitutes for the end-customer, with the closest competitors being omni-channel stores which have expanded their product line through online marketplace offerings and have increased shipping convenience. However, AMAZON itself acknowledges that it is not clear in which category respondents include these omni-channel suppliers that also have online marketplaces.
- (91) AMAZON indicates that these results are consistent with the responses of **[CONFIDENTIAL]** who, after ceasing to be authorised to sell APPLE-branded products on the AMAZON website in Spain, resorted to its own online shop and physical shops.

- (92) In addition to the survey results, AMAZON considers that the fact that sellers are present in several channels can also be deduced from the CNMC market test, as well as from the INE survey on ICT and e-commerce usage in companies in 2020-2021 and from the EC Staff Working Document on e-commerce of 2017. AMAZON adds that as long as sellers already have access to other channels, substitution is instantaneous.
- (93) Moreover, AMAZON points out that e-commerce solutions make it easy for sellers to create and maintain their own online shops at low cost and notes that according to EUROSTAT 87% of online sellers have their own online shop. In this sense, it indicates that the difference in costs is not so relevant as the key is the substitution behaviour in the face of relative variations.
- (94) Finally, AMAZON argues that the multi-channel behaviour of retailers also constrains AMAZON as raising its commissions could reduce sales in its online market, particularly given the transparency of these markets.
- (95) However, neither alternatives such as physical and online shops nor social media exert a direct competitive constraint, but rather an indirect one on online markets and therefore these distribution channels are not considered to belong to the same market as claimed by AMAZON in its submissions seeking to define as broad a market as possible in which its share is diluted.
- (96) This is not in conflict with the fact that many sellers use several channels simultaneously to reach the final consumer, but shows that they are complementary⁷⁴, rather than substitutes. In other words, the very fact that several sellers simultaneously use a combination of channels to reach their target customers indicates that the relationship between channels is not one of substitution since, as each channel has a cost, if they were substitutes, the simultaneous presence of the same seller in several channels would not be expected. As far as e-marketplaces are concerned, their objective characteristics (notably their ability to provide immediate access to large audiences and the range of associated services) explain why they are not a substitute for sellers of other channels such as social media, physical shops or online shops.
- (97) As for the INE study that AMAZON cites, according to the results for 2020 and the first quarter of 2021, 26.9% of the surveyed companies (with 10 or more employees) sold online. In 2021 (following a methodological change in the business concept) the figure was 31.6%, of which 15% were sales from e-marketplaces and 84% were sales via individual application or website. This only indicates that the majority of sellers do not yet sell online and that those who do sell online mostly have their own online shop. These data do not call into question the substitutability analysis carried out by the CD.

⁷⁴ Although the economic report provided by AMAZON questions the use of the term "complementary", it is used in accordance with the first meaning of the term in the RAE (which serves to complete or perfect something).

- (98) As regards the survey provided by AMAZON, the following remarks are in order. First, as noted above, market definition is primarily based on a demand-side analysis of substitutability of services or products. To carry out this substitutability analysis, the hypothetical monopolist test (SSNIP) can be used as a conceptual framework. The current notice on relevant market definition explains this test as a concept or mental exercise in paragraphs 15 et seq. and states that it seeks to analyse whether, faced with certain hypothetical price increases for the products under consideration, the degree of substitution is such as to render such price increases unprofitable. In turn, the Draft new Communication on market definition explains it in the following terms:

*"The theoretical test used to determine whether all sufficiently close substitutes have been identified is whether a hypothetical monopolist in the candidate market would be able to exercise market power. This question can be assessed by asking whether a hypothetical monopolist in the candidate market would find it profitable if there were a small, but significant and non-transitory, price increase ("hypothetical monopolist test")"*⁷⁵.

- (99) In any case, as recognised by case law, there is no obligation to carry out an empirical analysis in this respect⁷⁶. Hence, AMAZON's claim that an empirical analysis of effective substitution is necessary cannot be accepted. However, if such an analysis is to be undertaken, it must be done correctly in accordance with the criteria set out in the above-mentioned Communication.
- (100) Firstly, it should be analysed whether a price increase of 5-10% in online marketplaces would cause sellers using online marketplaces to switch to other channels such as shops, etc. AMAZON provides certain results of a survey conducted exclusively with AMAZON customers in which it asks whether a **[0-10]**% increase in AMAZON's prices would partially or fully shift sales to other channels. However, the survey suffers from methodological errors that make it difficult for the results to be accepted as evidence. Given that, CD has not defined the market for the provision of intermediation services to third-party sellers on AMAZON's online marketplace, but the market for intermediation in electronic marketplaces in general, the survey provided does not allow conclusions to be drawn on the market definition considered by the CNMC.

⁷⁵ Reference is missing in the original

⁷⁶ Judgment of 11 January 2017 in Case T-699/14 Topps Europe v Commission, paragraph 82

- (101) Secondly, the results of the economic report from the seller survey show that more than half of the respondents would not move a single unit of sales to other channels if AMAZON were to permanently increase its commissions by 10%. In fact, according to Table 2 of AMAZON's Market Definition Report, the percentage of customers who would completely abandon AMAZON when faced with this price increase is **[CONFIDENTIAL]**. This ability to unilaterally increase prices, particularly in an environment where it is perfectly possible to charge different prices to different types of operators, is evidence of the market power enjoyed by AMAZON; but no conclusions can be drawn for demand-side substitutability purposes between online marketplace services and other channels such as physical or online shops. Moreover, as AMAZON itself acknowledges that it is not clear whether respondents consider operators (such as EL CORTE INGLÉS, WORTEN or CARREFOUR) as online marketplaces, online and/or offline shops, no conclusions can be drawn from these responses.
- (102) Third, AMAZON's argument that **[CONFIDENTIAL]**'s behaviour corroborates substitutability between channels for sellers cannot be accepted, as **[CONFIDENTIAL]** did not react to a significant and non-transitory increase in AMAZON's prices, but ceased to be authorised to sell APPLE branded products on AMAZON's Website in Spain as a result of the agreement reached between APPLE and AMAZON.
- (103) Moreover, AMAZON's claim that barriers to entry to the market for the provision of intermediation services in online marketplaces to third-party sellers are low and that market power cannot be inferred from high market shares cannot be accepted.
- (104) There are very significant economies of network and scale in these two-sided markets which constitute non-transitory barriers to entry, as evidenced by the wide product assortment offered by AMAZON, the logistical warehousing and shipping network it has developed and the large number of consumers using it. Thus, according to a survey published by ICEX, 64% of Spaniards in Spain say they buy "almost everything" from AMAZON⁷⁷. Likewise, according to AMAZON itself⁷⁸ in 2021 more than 13,000 Spanish SMEs sold more than 90 million products on AMAZON, which in turn generated 6 billion euros in gross revenue in Spain.

⁷⁷ See information in the following link: emarketservices.es/emarketservices/es/menu-principal/actualizate/noticias/amazon-shopper-report-new2022916695.html

⁷⁸ <https://www.aboutamazon.es/noticias/inversiones-y-creacion-de-empleo/el-firme-compromiso-de-amazon-con-espana-invirtiendoe-innovando-para-nuestros-clientes-desde-2011>

- (105) It is therefore clear that it would be difficult for another player to surpass, catch up or even come close in the short to medium term to AMAZON's position in the provision of intermediation services in online marketplaces to third-party sellers, given the large volume of sales it currently handles (which allows it to benefit from relatively low operating costs), the scale and scope of its logistics network (replicating such a network would require considerable financial and time investment), brand and reputation (establishing such a recognised and trusted brand takes significant time and resources), as well as its data and technology capital (AMAZON has very advanced technological capabilities which are very costly to develop and deploy).
- (106) AMAZON considers that defining a broad market would be consistent with national precedents tending to define a single market comprising the online and offline channel (C/109/20, C/557/14, C/492/13, S/DC/0631/18) and with German (KARDSTADT/KAUFHOF) and French (FNAC/DARTY) precedents.
- (107) The fact remains, however, that **distinguishing the market for the provision of intermediation services in online markets in the market definition is consistent with the recent practice of other competition authorities:**
- As regards the European Commission, the following cases can be cited:
 - File AT.40462 - *Amazon Marketplace*, in which, according to the press release, AMAZON would have "*a dominant position in the **market for the provision of intermediation services in online marketplaces** in France and Germany*"⁷⁹ (emphasis added and own translation);
 - The case AT.40703 - *Amazon Buy Box*, in which, according to the press release, AMAZON has allegedly abused "*its dominant position in the **market for the provision of intermediation services in online marketplaces in** France, Germany and **Spain***"⁸⁰ (emphasis added and own translation); and

⁷⁹ See press release of 20 December 2022 [here](#): "[...] the Commission adopted a Statement of Objections in which it preliminarily found Amazon dominant on the French and German markets, for the provision of online marketplace services to third-party Sellers". Confirmed also in the commitments decision itself (see paragraph 95).

⁸⁰ See press release of 20 December 2022 [here](#): "In the second investigation, the Commission preliminarily concluded that Amazon abused its dominance on the French, German and Spanish markets for the provision of online marketplace services to third-party sellers". Confirmed also in the commitments decision itself (see paragraph 95).

- In case M.10349 - *AMAZON/MGM*⁸¹, after analysing possible conglomerate effects of the transaction, the European Commission ruled out the possibility that the transaction could affect AMAZON's position as a provider of intermediation services in electronic marketplaces.
- The German competition authority has also found⁸² that AMAZON is dominant in relation to the market for the provision of intermediation services in online marketplaces to third-party sellers.
- In turn, the Italian competition authority has sanctioned AMAZON for abusing its dominant position in the Italian market for the provision of intermediation services in online marketplaces⁸³.

(108) In this respect, AMAZON's arguments to the Proposed Resolution that some of the precedents just invoked would be irrelevant cannot be accepted⁸⁴.

(109) As regards, in particular, the European Commission's decision in the first two cases referred to in the previous paragraph, the fact that these cases ended with the adoption of commitments by AMAZON in no way detracts from the market definition carried out in those cases. While the EC commitment decisions do not, in general, contain a legal analysis of the practices under investigation that can be equated with that of the sanctioning decisions, given that the cases cited concerned abuses of dominance by AMAZON, a precise market definition was an unavoidable prerequisite for identifying the competition concerns that could be addressed by the adoption of commitments. Indeed, it is sufficient to look at the relevant markets section of the decision in cases AT.40462 - *Amazon Marketplace* and AT.40703 - *Amazon Buy Box*⁸⁵ to find that a detailed analysis is carried out before concluding that the market in which AMAZON is dominant is the market for the provision of intermediation services in online marketplaces, a market definition which, moreover, AMAZON has not contested. If it did not agree with this market definition, it could have appealed the decision and it did not do so.

⁸¹ See the following link: https://ec.europa.eu/commission/presscorner/detail/en/IP_22_1762

⁸² Press release dated 6 July 2022 available at the following link:

https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2022/06_07_2022_Amazon.html;jsessionid=0431C1913A304EE05F6DFD5A9DC70AA5.1_cid371?nn=3591568

⁸³ See press release of 9 December 2021 available at the following link:

<https://en.agcm.it/en/media/press-releases/2021/12/A528>

⁸⁴ Paragraphs 403 to 409 of AMAZON's submissions on the Proposed Resolution.

⁸⁵ Paragraphs 49 to 80 of the European Commission's decision in the case can be found in its original English version at the following link: <https://competition-cases.ec.europa.eu/cases/AT.40462>

- (110) As regards Case M.10349 - AMAZON/MGM, AMAZON argues that *"the decision concerns a different sector and does not carry out any market definition analysis on the provision of intermediation services to sellers"*⁸⁶. What is certain, however, is that the decision assesses the effects that the merger may have on this specific market which is referred to more than 60 times throughout the document. In this respect, the decision states that *"the European Commission examines whether the merged entity will have the ability and incentive to take advantage of Amazon's strengthened position in the market for the retail supply of audiovisual content within the **market for the provision of intermediation services in online marketplaces** as a result of the incorporation of MGM's content"*⁸⁷ (own translation and emphasis added).
- (111) As regards the Italian decision cited, AMAZON confuses the case as it complains that reference was made to Case I842 *Vendita Prodotti Apple E Beats Su Amazon Marketplace*⁸⁸ (because this decision was annulled by the Italian courts) when the decision cited by the investigating authority is the decision adopted in the separate proceeding A528 - FBA AMAZON (which has not been annulled). It should be noted, in any event, with regard to Case I-842, in which the market for the provision of intermediation services in online marketplaces is also defined, that the annulment of the decision in question derives from an infringement of the rules of national administrative procedure (a formal and not a substantive issue) without at any time invalidating the market definition carried out by the Italian authority in that second case.
- (112) Nor is it appropriate to accept AMAZON's allegations that the Proposed Resolution would have based its conclusions on the lack of substitutability between channels on *"sources of dubious reliability"*⁸⁹ and that there had been no rebuttal of its arguments that marketplaces, online shops and physical shops are substitutes rather than complementary. The sources used by the investigating body include, as we have seen, data from bodies such as ICEX and public bodies whose reliability cannot be qualified as dubious and which have led both the CD and this Division to reach a conclusion similar to that of the European Commission. As to the substitutability analysis itself, it is sufficient to look at this paragraph of the decision to see that a detailed examination of the issue is carried out and that the defendants' position is taken into account; whether there is agreement with AMAZON's position or not is a different matter.

⁸⁶ Paragraph 408 of AMAZON's submissions to the Proposed Resolution.

⁸⁷ Paragraph 283 of the European Commission decision of 15 March 2022 in case [M.10349 - AMAZON / MGM](#): *"In the present section, the Commission examines whether the merged entity will have the ability and incentive to leverage Amazon's strengthened position in the market for the retail supply of AV content into **the market for the provision of marketplace services** as a result of the addition of MGM's content"* (emphasis added).

⁸⁸ Paragraph 409 of AMAZON's submissions to the Proposed Resolution.

⁸⁹ Paragraphs 387 to 388 of AMAZON's submissions on the Proposed Resolution.

3.2.1.1.2.5. Conclusion on demand substitutability

- (113) In view of the above, it is concluded that, from a demand side perspective (i.e. from the perspective of a third-party seller), there is limited substitutability between selling via an online marketplace and (i) the creation and operation of a website; (ii) the creation and operation of a physical shop; and/or (iii) the use of a price comparator.

3.2.1.1.3. Supply-side substitutability

3.2.1.1.3.1. Physical shops (shopping centres)

- (114) The best equivalent to an online marketplace in an offline environment is a shopping centre, which provides an avenue for retailers to sell products together with other retailers. However, offering online marketplace services and managing shopping centres require different business skills. Compared to an online marketplace, on the one hand, running a shopping centre involves a significant initial investment in renting premises and it is limited in terms of the number of vendors that can be accommodated there; and on the other hand, shopping centres have a limited geographic scope and potential to attract visitors and traffic (only from the immediate area).
- (115) AMAZON considers the above to be wrong as there are examples of operators who have opened successful electronic marketplaces such as WORTEN within a short period of time. It is not disputed that some operators have been able to expand their offerings to include electronic marketplaces. However, in the CD's view, what is relevant for the purposes of assessing supply-side substitutability is whether the bulk of offerors are in a position to undertake the considerable changes and investments that would be required to move to offering intermediation services in online marketplaces to third-party sellers within a short period of time. When only a few operators would be in a position to undertake these changes, supply-side substitutability should not be deemed to exist in accordance with the EGC⁹⁰.

⁹⁰ See Case T-446/05 - *Amann & Sohne and Cousin Filterie v Commission*, ECLI:EU:T:2010:165, paras 79 and 80: "Thus, supply-side substitutability means that most thread producers are able to produce in large quantities a specific and uniform thread for each customer in the automotive industry and to distribute it at short notice throughout the EEA. In the light of the above considerations, such reasoning is also not tenable. Consequently, the Commission has not committed a manifest error of assessment in finding that there were two distinct product and geographic markets on the supply side".

3.2.1.1.3.2. Websites

- (116) Operating an online marketplace requires different investment and expertise than operating one's own website. On the one hand, unlike websites, pure online marketplaces do not have to invest in researching new products and do not bear the costs and risks of trading on the marketplace. On the other hand, while sellers with their own website have to invest in warehousing and logistics, this is not necessary in online marketplaces and, in fact, many of them offer intermediary services to third-party sellers with the warehousing, logistics and transport component.
- (117) Despite these differences, there are examples of large multi-brand sellers, such as AMAZON itself, which started to offer intermediation services to third-party sellers, in order to expand the range of products available on their online marketplaces.
- (118) This demonstrates that some large online sellers with a large audience have been able to enter the market for the provision of intermediation services to third-party sellers mainly because they already attract a sufficient number of consumers, which gives them a head start allowing them to overcome the highest barrier to entry in this market (i.e. attracting a sufficient number of consumers so that third-party sellers have an interest in using such an online marketplace). However, most of these operators that have added intermediation functionalities to their own online retail business remain predominantly retail sellers and their business of providing intermediation services to third-party sellers continues to play a complementary role⁹¹.

⁹¹ See, for example, El Corte Inglés' reply to the request for information carried out (folio 3590): *"El Corte Inglés' Marketplace is purely ancillary to its own catalogue"*.

3.2.1.1.3.3. Product and service comparators

- (119) Intermediation services to third-party sellers and comparison services do not operate in the same way. On the one hand, comparison services obtain and select the information that responds to a user's search by analysing in real time the offer of as many sellers as possible and providing this information to the users⁹². On the other hand, online marketplaces manage the product listings of third-party sellers and allow the direct sale of products on their websites.
- (120) In addition, they are subject to different regulations⁹³ and forms of remuneration. Thus, while comparators are often remunerated on a so-called pay-per-click basis, online marketplaces often charge commissions for their services⁹⁴.

3.2.1.1.3.4. Conclusion on supply-side substitutability

- (121) AMAZON argues that a supply-side substitutability analysis is unnecessary as demand-side substitutability exists. However, while we do not share AMAZON's conclusions on demand-side substitutability, it is considered appropriate to analyse supply-side substitutability.
- (122) In view of the above, from a supply-side perspective, service providers offering alternatives to online marketplaces (such as physical shops, sellers' own websites, or price comparators) cannot start providing intermediation services in an online marketplace quickly and easily enough⁹⁵ in the face of a price change in the electronic products offered by AMAZON (see paragraphs (57) and (58)). It is concluded that there is limited supply-side substitutability between the creation and operation of an online marketplace, on the one hand, and each of the following alternatives (i) the creation and operation of a physical shop (i.e. a shopping centre, which would be the offline equivalent of an online marketplace); (ii) the creation and operation of an individual website; and (iii) the creation and operation of a product and service comparison service.

⁹² See decision AT.39740 - Google Search (Shopping), para. 225.

⁹³ See in particular Article 14 of Regulation (EU) No 524/2013 of the European Parliament and of the Council of 21 May 2013 on resolving consumer disputes online and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC (Regulation on consumer online dispute resolution).

⁹⁴ See decision AT.39740 - Google Search (Shopping), para. 226.

⁹⁵ See, furthermore, paragraph 20 of the Communication on market definition: "[supply-side substitutability] requires suppliers to be able to switch to manufacturing the relevant products and to marketing them in the short term, without incurring significant additional costs or risks, in response to small permanent changes in relative prices".

Therefore, AMAZON's claim that these companies represent an immediate competitive constraint cannot be accepted.

3.2.1.1.4. Geographical scope

- (123) Although online marketplaces allow and facilitate cross-border sales⁹⁶, most online marketplaces focus on consumers located in the same country in which the online marketplace operates.
- (124) As regards AMAZON, the languages of each of its websites in Europe are those of the Member State in which it operates. AMAZON claims that it incorporates technological tools such as instant translation *software*⁹⁷. Despite this, as the following table shows, most of the traffic on its website in Spain is also domestic. The geographical dimension must therefore be considered as national, as the investigating body had concluded.

Table 7. Number of annual visits to the AMAZON Spain website

Number of annual visits to www.amazon.es and their geographical origin					
	2017	2018	2019	2020	2021 (until Sept 21)
	Percentage	Percentage	Percentage	Percentage	Percentage
Visits from Spain	[80-90]%	[70-80]°%	[70-80]%	[60-70]%	[70-80]%
Visits from other countries	[0-10]%	[0-10]%	[0-10]%	[10-20]%	[0-10]%
Visits from unknown countries	[10-20]%	[10-20]%	[20-30]%	[20-30]%	[20-30]%
Total Visits	100%	100%	100%	100%	100%

Source: AMAZON⁹⁸

- (125) The same is true for other online marketplaces (which provided similar data in response to requests for information from the investigating authority). For example, this is also the case for Alibaba⁹⁹ (which is the second most important online marketplace in Spain after AMAZON by revenue and third-party turnover) and Ebay¹⁰⁰ (which is the third largest by revenue and third-party turnover):

⁹⁶ See Amazon's Submissions on the Proposed Resolution, para. 418. The PR considers that online marketplaces do indeed facilitate cross-border sales, however, it does not seem to be a significant incentive for full trade opening, as sales remain concentrated in the geographic area concerned.

⁹⁷ *Idem*.

⁹⁸ Annex 01 -iii-v of the Response to AMAZON IR II (folio 4563 or (i) 5467 - the latter refers to the non-confidential version of this annex submitted in a corrigendum filed by AMAZON dated 21 April 2020, in relation to this same annex, although the corrigendum referred to another part of the document and therefore the non-confidential versions of the data being used are the same in both folios; or (ii) folio 5511 - which refers to another non-confidential version submitted on 9 May 2022 by AMAZON of the same annex at the request of the CD, but which, as in the previous case, does not affect the data being used).

⁹⁹ See Alibaba's response to the information request (folio 2842). They only provided this data for 2020 and 2021.

¹⁰⁰ See eBay's response to the information request (folio 5327).

Table 8. Number of annual visits to the ALIBABA Spain website

Number of annual visits to its website in Spain and their geographical origin*		
	2020	2021
	Percentage	Percentage
Visits from Spain	[80 - 90 %]	[80 - 90 %]
Visits from other countries	[10 - 20 %]	[10 - 20 %]
Total visits	100%	100%

Source: ALIBABA (folio 2842)

Table 9. Number of annual visits to the eBay Spain website

Number of annual visits to its website in Spain and their geographical origin					
	2017	2018	2019	2020	2021
	Percentage	Percentage	Percentage	Percentage	Percentage
Visits from Spain	80% a 90%	80% a 90%	80% a 90%	80% a 90%	80% a 90%
Visits from other countries	10% a 20%	10% a 20%	10% a 20%	10% a 20%	10% a 20%
Total visits	100%	100%	100%	100%	100%

Source: eBay (folio 5327)

- (126) This can be explained by the language preferences of the different countries, by the different needs of each consumer group and by the advertisements targeted at national audiences. In addition, there may also be different legal requirements in different countries.
- (127) Indeed, the national focus of online marketplaces is also reinforced by the fact that many online marketplaces include an obligation to deliver in the country of the online marketplace, but do not include an obligation to deliver to other countries.
- (128) Indeed, sellers from other Member States who want to sell in another Member State need to comply with national legal requirements and operate in the national language (both for the description of their products and for communicating with consumers).
- (129) As regards AMAZON's third-party seller population, while historically the origin might have been predominantly domestic, in recent years there are more and more non-domestic sellers¹⁰¹.

¹⁰¹ According to AMAZON [CONFIDENTIAL] (folio 4673).

- (130) However, the country of origin of the seller is of little relevance to the geographic focus of the online marketplace. Thus, while non-domestic third-party sellers can benefit from the intermediation services offered by domestic online marketplaces, they do so in order to offer their products to consumers in these countries. If a potential seller of non-Spanish origin wishes to reach Spanish consumers, it has to select one or more of the online marketplaces targeted at Spanish consumers and will have to comply with national regulations.
- (131) Therefore, it is concluded that, even if there are online marketplaces that are open to admitting third-party sellers established outside the geographical scope of this online marketplace, the markets for provision of intermediation services to third-party sellers have national scope¹⁰² in view of the strong orientation of most online marketplaces towards consumers located in their respective geographic area (in the case of the Spanish online marketplaces, towards Spanish consumers), given language preferences, the existence of national regulations and the national origin of the traffic.
- (132) Such circumstances are also found in other online and digital markets and have led to the definition of national markets. This argument is consistent with the EC and the EGC in the Google Shopping decision, which confirmed that both the price comparison and general search markets are national, mainly due to factors related to the national partitioning of those markets, such as language and/or the existence of "national" search engines¹⁰³.
- (133) AMAZON argues that the CNMC has erred in considering that the market is **national in scope** as it has not demonstrated that the conditions of competition in Spain can be distinguished from neighbouring areas by failing to carry out a substitution analysis showing that sellers cannot substitute online markets between different geographic areas. AMAZON considers that the location of the customer is wrongly analysed when what is relevant is the location of the sellers. Furthermore, according to AMAZON it is not taken into account that AMAZON has an EU-wide **[CONFIDENTIAL]** and pan-European logistics programme. It also indicates that language barriers can be overcome with instant translators.
- (134) AMAZON has argued that sellers outside Spain are present in several national online marketplaces, at least in several AMAZON shops in Europe and that the seller does not care to which customer it sells as long as the margin it makes is as expected. He adds that sellers in AMAZON's online shop in Spain *"are quite willing to distribute their products in many countries"* if the relative profitability would indicate the need for such a move. For all these reasons, he argues that there is a high degree of substitutability between countries.

¹⁰² Amazon considers that the PR has incorrectly defined a national market for intermediation services to Sellers. Amazon's submissions to the PR, para. 415 et seq.

¹⁰³ See case T-612/17 – *Google Shopping*, ECLI:EU:T:2021:763, paragraph 53.

- (135) As regards the geographic scope¹⁰⁴, it is considered appropriate to analyse the conditions of competition in order to determine whether they are sufficiently homogeneous within an area and whether they can be distinguished from others as being appreciably different. This can be done by analysing the presence of different suppliers, the difference in market shares, barriers, costs and trade flows. Thus, if the conditions of competition are sufficiently homogeneous between different states, it is appropriate to define a supranational market; if, on the other hand, they are not, it is appropriate to define a national market.
- (136) AMAZON has invoked, in order to refute the product market definition, what it considers to be singularities of the Spanish markets: the effort made by certain distributors to develop e-marketplaces as part of an omni-channel strategy, which according to AMAZON would be very characteristic of the Spanish market, or the relative importance of operators such as EL CORTE INGLÉS with a much stronger presence in Spain than in other Member States. These peculiarities of the Spanish intermediation market are precisely the reason why the conditions of competition would not be sufficiently homogeneous with other EEA countries to justify a broader definition.
- (137) Indeed, both operators and market structures vary in different EEA countries¹⁰⁵. Thus, Statista data show that in Germany in 2022¹⁰⁶, based on the number of visits, the market leader was amazon.de ([50-60]%) followed by ebay.de ([20-30]%) and otto.de ([0-10]%). In France,¹⁰⁷ in 2021 it had more than [50-60]% of visits while cdiscount.com was the second online marketplace in number of visits. In Italy¹⁰⁸ in 2022, the leader in terms of unique monthly visitors was amazon, followed by ebay, subito.it and ManoMano.

¹⁰⁴ See paragraphs 40 et seq. of the Draft new Communication on market definition.

¹⁰⁵ In this respect, according to paragraph 28 of the current market definition communication, differences in shares at national level in different Member States can give an initial idea of the size of the geographic market. Furthermore, the communication adds that this analysis needs to be complemented by the study of demand behaviour, such as purchasing habits or consumer preferences.

¹⁰⁶ See: <https://www.statista.com/statistics/1256352/germany-leading-marketplaces-visits/>.

¹⁰⁷ See: <https://www.statista.com/statistics/1256399/france-leading-online-marketplaces-visits/>

¹⁰⁸ See: <https://www.statista.com/statistics/1265117/most-popular-online-marketplaces-italy/>

- (138) It can therefore be seen that the structure of supply varies between Member States as different online markets operate within countries and market shares vary significantly. In addition, the websites of the different online marketplaces are presented in German, French and Italian respectively, which shows that they are targeted at consumers in each country. In the case of Spain, too, the structure of the offer is different and the electronic marketplaces are presented in Spanish. All this indicates that the conditions of competition are not sufficiently homogeneous between Member States, not even between those that have an AMAZON website in their respective languages.
- (139) While AMAZON is certainly an operator with a high market share in Spain in the market for the provision of intermediation services in online marketplaces to third-party sellers, this market comprises other online marketplaces than AMAZON and AMAZON's pan-European logistics policies cannot simply be extrapolated to the market as a whole to make a general claim that it is a supranational market. Thus, it should be recalled that there are online marketplaces both in Spain and in several Member States whose geographic footprint is predominantly national as they primarily target operators and consumers in a particular Member State where their share is most relevant. As noted *above*, the fact that there are sellers in Spain who are interested in selling outside Spain does not in any way determine that a supranational market has to be defined.
- (140) Moreover, cultural, linguistic and consumer preference differences between Member States, as well as regulatory differences, cannot be ignored.
- (141) Finally, as the Draft Communication on market definition shows, price levels are rarely decisive for the purpose of defining the geographic market¹⁰⁹.
- (142) In view of the above, it must be concluded that this is a national market.

3.2.1.2. The provision of intermediation services in online marketplaces to consumers

- (143) Although the relevant product market for the purposes of this file is the market for the provision of intermediation services in online marketplaces to third-party sellers, the other side of the market, i.e. the provision of intermediation services in online marketplaces to consumers, will also be briefly analysed in so far as they are two related sides, where the conditions of competition in one may influence the other.

¹⁰⁹ Paragraph 66 of the draft Commission Communication on the definition of the relevant market for the purposes of EU competition law in 2022, available at the following link:
https://ec.europa.eu/commission/presscorner/detail/es/ip_22_6528

- (144) When a consumer shops on the AMAZON Websites, they can purchase a specific item directly from AMAZON as a direct seller or from a third-party seller. In the event that such an item is purchased from a third-party seller, the consumer has essentially two separate legal relationships, one with the third-party seller from whom the item is purchased and one with AMAZON, the latter covered by the general terms and conditions of use of AMAZON's e-commerce platform¹¹⁰.
- (145) In addition, AMAZON provides a number of services free of charge to consumers using its online marketplace. For example, **[CONFIDENTIAL]**. In addition, AMAZON's so-called A-Z Guarantee protects consumers to some extent when they purchase goods sold and supplied by a third-party seller on its online marketplace¹¹¹. Finally, AMAZON **[CONFIDENTIAL]**.
- (146) According to the 2021 ONTSI (National Technology and Society Observatory) report¹¹² "Compras online en España. Edición 2021"¹¹³, among the most common online shopping sites are still the so-called online marketplaces with 75.6% of use, although, for another year, the percentage of use of online shops of brands and companies increases from 52.3% in 2019 to 65.2% in 2020. Of the 75.6% who shop through online marketplaces, 44.3% do so because of the variety of products, 44% because of better prices and 38.3% say because of reviews and other useful information".
- (147) In this way, it can be seen how online marketplaces (and in particular AMAZON) provide a number of intermediation services on online marketplaces to consumers that are different from the services provided to third-party sellers.

¹¹⁰ See point 12 of the AMAZON Terms of Use and Sale (which can be found [here](#)): "Although Amazon facilitates transactions through Amazon Marketplace, Amazon is neither the buyer nor the seller of products offered by third-party sellers. Amazon simply provides a space where buyers and sellers can negotiate and transact. Consequently, the corresponding contract that is generated once the purchase of any product sold by an external seller has been made, concerns solely and exclusively the buyer and the seller of that product. Amazon is not a party to that contract, does not assume any liability in connection therewith, and does not act as a representative of the seller. The seller is responsible for the sale of its products, as well as for providing assistance with regard to the buyer's claims, or with regard to any matter relating to such a contract between the buyer and seller. However, because Amazon wants to guarantee the buyer a safe place to shop, Amazon offers the Amazon A to Z Guarantee, in addition to any rights the consumer may have by law or contract".

¹¹¹ See conditions in the following web link:
<https://www.amazon.es/qp/help/customer/display.html?nodeId=G59PXSUWUFR92NUQ>

¹¹² <https://www.ontsi.es/es/publicaciones/compras-online-espana-2021>

¹¹³ Page 11

3.2.1.2.1. Purchasing alternatives for consumers

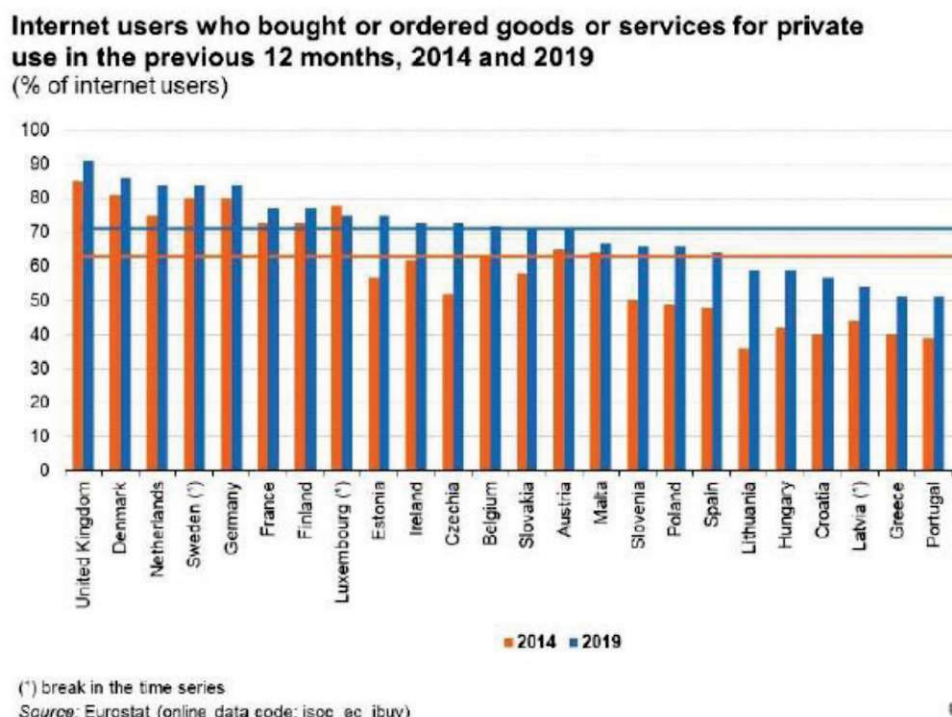
3.2.1.2.1.1. Physical shops versus online shopping

- (148) There are a number of indicators that suggest that online channels (i.e. online marketplaces and websites) compete only to a limited extent with offline channels (i.e. physical shops), as detailed in Section 3.5.
- (149) Firstly, there is a general consumer trend towards online shopping ("*offline (or physical) commerce is growing, but e-commerce is growing at a faster pace*"¹¹⁴). This trend can also be seen in the following graph¹¹⁵ which shows internet users who bought or ordered goods or services for private use in the previous 12 months between 2004 and 2019:

¹¹⁴ See "Is e-commerce good for Europe?", a 2020 report by the consultancy Oliver Wyman, which can be found here: <https://www.oliverwyman.com/our-expertise/insights/2021/apr/is-e-commerce-good-for-europe.html>

¹¹⁵ [https://ec.europa.eu/eurostat/statistics-explained/images/2/2a/Internet_users_who_bought_or_ordered_goods_or_services_for_private_use_in_the_previous_12_months_2014_and_2019_\(%25_of_internet_users\).png](https://ec.europa.eu/eurostat/statistics-explained/images/2/2a/Internet_users_who_bought_or_ordered_goods_or_services_for_private_use_in_the_previous_12_months_2014_and_2019_(%25_of_internet_users).png).

Image 1. Internet users who purchased or ordered goods or services for private use in the previous 12 months between 2004 and 2019

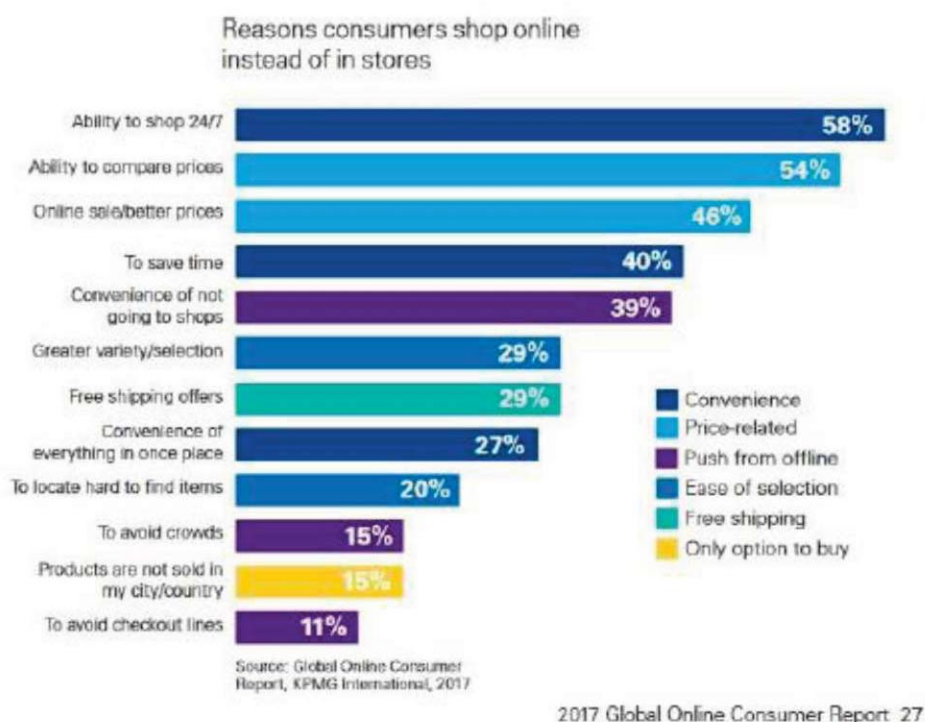


Source: Eurostat

- (150) Secondly, despite the growth of online sales, the most important sales channel in Europe (and Spain) is still the physical shop. Thus, according to a study carried out in eight European countries (including Spain), although it is growing faster than offline commerce in all the countries studied, online commerce accounted for 11% (251 billion euros) of total sales in these eight countries in 2019, compared to 4% (73 billion euros) in 2010¹¹⁶.
- (151) Thirdly, consumers consider that the two sales channels have different characteristics. In this respect, those consumers who prefer online to offline sales do so for reasons such as the possibility of shopping at any time of the day, the possibility of comparing prices and the consideration that better prices can be obtained. Some of them also consider that the range of products is wider and you can save time¹¹⁷. This can be seen in the following graph from a consultancy's 2017 report, which reflects the reasons why consumers shop online rather than in physical shops.

¹¹⁶ See "Is e-commerce good for Europe?", a 2020 report by the consultancy Oliver Wyman, which can be found here: <https://www.oliverwyman.com/our-expertise/insights/2021/apr/is-e-commerce-good-for-europe.html>(page 3 of the executive summary).

¹¹⁷ KPMG study "The Truth about online consumers", 2017 Global Online Consumer Report, <https://assets.kpmg/content/dam/kpmg/xx/pdf/2017/01/the-truth-about-online-consumers.pdf> (page 27).

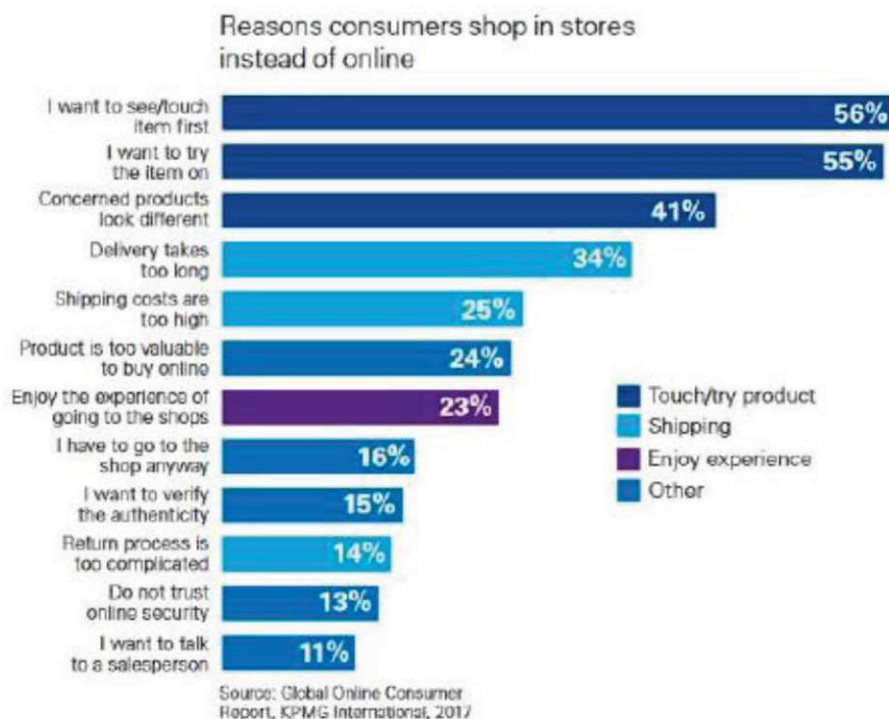
Image 2. Reasons why consumers shop online rather than in physical shops

Source: Consultancy report

- (152) Along these lines, the report "Compras online en España. Edición 2021" by ONTSI¹¹⁸ indicates that "80.7% buy online for convenience, while 49.7% of Internet users who buy online do so for reasons of speed and time saving, 47.3% for price and 44.2% to avoid crowds".
- (153) However, not all consumers want to shop online. Among the main reasons that would lead consumers to prefer offline shopping to online shopping would be the need to see, touch and feel the product in person, trying the products, paying securely, ease of delivery and return of products, more personal attention, etc.¹¹⁹, as reflected in the following graph on the reasons why consumers shop in physical shops rather than online (from the above-mentioned consultancy report).

¹¹⁸ <https://www.ontsi.es/es/publicaciones/compras-online-espana-2021>.

¹¹⁹ See KPMG study "The Truth about online consumers", 2017 Global Online Consumer Report, available at <https://assets.kpmg.com/content/dam/kpmg/xx/pdf/2017/01/the-truth-about-online-consumers.pdf> (page 29); and the 2019 Eurostat Survey https://ec.europa.eu/eurostat/statistics-explained/index.php?title=File:Reasons_for_not_buying_over_the_internet_EU-28_2019.png

Image 3. Reasons why consumers shop online rather than in physical shops

Source: Consultancy report

- (154) Although it is not necessary to reach a definitive conclusion, these differences and the different evolution of in-store and online sales suggest that, at least for a certain proportion of consumers and for certain categories of products, including consumer electronics as in the present case (see section 3.5 for more information in this respect), due to the intrinsically different characteristics of e-commerce and in-store sales, these channels are not full substitutes, but rather complementary.

3.2.1.2.1.2. Websites versus online marketplaces

- (155) No sufficiently strong indicator has been identified to suggest that consumers consider shopping in an online marketplace as substantially different from shopping via a website.
- (156) However, for consumers who want to buy several (especially low-value) items, an online marketplace where they can make all purchases in one transaction may be a more attractive option than visiting different websites of different sellers.
- (157) In any event, it is not necessary to reach a definitive conclusion in this respect, so it can be left open whether from the consumer's perspective online marketplaces are substitutes for sellers' websites.
- (158) AMAZON argues that the AMAZON shop in Spain competes extensively with all types of online and offline retailers for end-customers, as all channels are perceived as substitutes by the end-customer. In support of its claim it submits a survey of purchasers of electronic products who were asked what they would do if the price of the recently purchased product were to increase by [0 to 10]%. It notes that only [0 to 10]-[20 to 30]% would switch from the online marketplace, [20 to 30]-[50 to 60]% would switch to online sales (other online websites) and [0 to 10]-[20 to 30]% to a physical shop. However, he acknowledges that it is not clear in which category they include omni-channel operators that also have an online marketplace.
- (159) Online marketplaces are considered to have their own characteristics that distinguish them from other channels that consumers may use, in particular the breadth of choice that allows comparison of products, as has also been highlighted by AMAZON in the submissions on the other side of the market. Also the fact that AMAZON considers omni-channel retailers with an online marketplace as particularly close competitors would point in this direction.
- (160) On the other hand, the survey submitted by AMAZON also does not allow definitive conclusions to be drawn and there are doubts as to the results regarding omni-channel operators, since as stated above AMAZON itself acknowledges that it cannot be clearly established whether respondents have considered certain operators as online marketplaces, an individual online shop, or an offline shop.
- (161) In any event, as mentioned above, it is not necessary to close this market definition or to come to a definitive conclusion on the possibility of defining broader markets.

3.2.1.2.2. Geographical scope

- (162) The main reason for considering that online marketplaces on this side of the market (i.e. provision of intermediation services in online marketplaces to consumers) could have a national dimension is the number of national visits to them as a proportion of the total.
- (163) Thus, focusing on AMAZON, most of its visits in Spain are (as has been shown) of national origin, and the same is true for the rest of the most important online marketplaces operating in Spain.
- (164) This is consistent with the decision-making practice of competition authorities¹²⁰, which in several precedents have consistently defined online markets as national in scope or have pointed to strong indicators to this effect.
- (165) Furthermore, country and language divisions remain important and market shares of different electronic marketplaces vary because of the presence of national electronic marketplaces alongside more local ones¹²¹ (see considerations above for the other side of the market).
- (166) In any case, it is not necessary to definitively close this question for this side of the market, suffice it to point out that there are strong indicators that would lead one to consider a national dimension to this side of the market as well.

3.2.1.3. Conclusion on markets for the provision of intermediation services in online marketplaces

- (167) As explained above, there are major differences between the two groups of users of online markets, i.e. between resellers and consumers using these services.
- (168) The different characteristics between the two user groups (from a demand and supply-side perspective) determine that two distinct product markets can be considered, one for each side/user group of the online markets.
- (169) In the present case, given the unique characteristics of the services offered by online marketplaces to third-party resellers and the supply and demand-side substitutability analysis carried out among the alternatives available for third-party resellers to reach consumers, it is preliminarily concluded that **the provision of intermediation services on online marketplaces to third-party sellers constitutes a distinct product market.**

¹²⁰ See COMP/M.5721 - OTTO/ PRIMONDO ASSETS; COMP/M.8710 - JD / SONAE MC / BALAIKO / JDSH / SPORT ZONE; COMP/M.6543 - AHOLD/ FLEVO; COMP/M.7259 - CARPHONE WAREHOUSE/ DIXONS; COMP/M.4392 - DSGI / FR-INVEST / FGROUPE JV; and COMP/M.5047 REWE / ADEG

¹²¹ <https://www.emarketservices.es/emarketservices/es/menu-principal/actualizate/noticias/once-mercados-lideres-en-europa-new2022908656.html>

- (170) Moreover, given that the conduct under investigation directly affects only this side of the market, the other side of the market (i.e. consumers) will not be taken into account.
- (171) Finally, as explained above, due to the fact that online marketplaces primarily target local consumers in each country in which they operate, the market for the provision of intermediation services in online marketplaces to third-party sellers is considered to be **national in scope**.

3.2.2 Markets related to the sale of electronic products

- (172) As set out above, APPLE is a group of companies that manufactures, distributes and sells a wide variety of electronic devices worldwide, including iPhone, iPad, Apple Watch, Apple TV, Mac, Beats and a range of Apple-branded accessories such as charging cables and adapters.
- (173) As has been pointed out in several national precedents¹²², three types of operators can be distinguished in the market for the distribution of electronic products¹²³: (i) manufacturers of technology and/or electronic products operating under their own brand name; (ii) wholesalers, who buy products from manufacturers and resell them to retail distributors and also provide ancillary services to their customers (logistics, warehousing, credit and marketing services); and (iii) retail distributors, who buy products and services from the manufacturer or wholesale distributor and resell them to end-users¹²⁴.
- (174) In relation to the above, APPLE is active in all three links related to the distribution of electronic products, while AMAZON is present in the first link, albeit with a much less significant degree than APPLE, and in the retail distribution of electronic products.
- (175) Each of these segments is analysed below in terms of product and geographic scope.

¹²² See C/1120/20 ESPRINET/GTI; C/0762/16 ESPRINET/VINZEO.

¹²³ Including all information technology products (IT products), consumer electronics, as well as mobile and telecommunications products (See C/1120/20 ESPRINET/GTI; and C/0762/16 ESPRINET/VINZEO).

¹²⁴ A similar distinction was made by the French competition authority in precedent 20-D-04 of 16 March 2020 in an investigation against Apple.

3.2.2.1. Manufacture and sale of electronic products

3.2.2.1.1. Product scope

- (176) With respect to the market for the manufacture and sale of electronic products, the less recent EC decisions have considered a market without further sub-segmentation¹²⁵, but some more recent decisions have sub-segmented the market by product categories.
- (177) Thus, some decisions have pointed out that there is a separate market for laptops and a separate market for desktops¹²⁶. The potential substitutability between laptops, tablets and smartphones was also considered, but eventually left open¹²⁷.
- (178) In any event, the precise product market definition, i.e. whether it is necessary to segment according to the type of electronic product or whether a broad market for the manufacture and sale of electronic products can be defined, can be left open, as the broadest possible market approach will be adopted, without distinguishing between product categories, without prejudice to the fact that such a distinction may be taken into account in order to make certain clarifications or to analyse the specific effects that the conduct of the undertakings under investigation may have had on any of these product categories.
- (179) APPLE has argued that instead of leaving the market for the manufacture and sale of electronic products open, one should be defined for each product category because of the lack of demand-side substitutability.
- (180) As will be discussed below, in view of the wording of the provisions alleged to have been infringed and the case law, it is not considered necessary in this case to close the market definitions and it is therefore not necessary to define narrower segments on the basis of the different types of electronic products.
- (181) Secondly, it should be noted that defining narrow markets on a product-by-product basis as APPLE argues would affect neither the conclusions on the applicability of the European Vertical Block Exemption Regulation¹²⁸ (**VBER**) nor the analysis of the relevance of the products APPLE offers. Indeed, APPLE itself acknowledges that there is no significant difference in shares on a product-by-product basis and there is disaggregated information in the file (spreadsheet at folio 2.288) showing that APPLE's shares were above 30% in the EEA throughout the entire period under investigation not only in the broad market which would encompass all electronic products but also in multiple narrow markets such as, inter alia, the APPLE products with highest demand, i.e. smartphones, tablets and smart watches¹²⁹.

¹²⁵ C/0096/08 SONAE / BOULANGER

¹²⁶ See M.4979 - Acer/Packard Bell.

¹²⁷ M.7047 - *Microsoft/Nokia*, paras. 14-21.

¹²⁸ Commission Regulation (EU) No 330/2010 of 20 April 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to certain categories of vertical agreements and concerted practices and Commission Regulation (EU) No 2022/720 of 10 May 2022 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to certain categories of vertical agreements and concerted practices to be referred to interchangeably as VBER or specifically as the **VBER 2010** or **VBER 2022**.

¹²⁹ The decision of 17 December 2020 in the case M. 9660 GOOGLE FITBIT which focused on smart wrist devices also includes market shares above this threshold.

- (182) Thirdly, this approach entails a change of approach by APPLE, which in its reply to the second information request issued by the investigating authority requesting disaggregated information at product level stated that it *"respectfully considers that the requested product categories do not constitute relevant markets at the product level, as otherwise competitive constraints exerted by other products of a substitutable nature would be excluded"*.
- (183) Notwithstanding the above, while the market for the manufacture and sale of electronic products in the EEA will be considered in a general way (broad market), information on this market will also be included on a sub-segmented basis by product type (narrow markets).

3.2.2.1.2. Geographical scope

- (184) The EC has considered in several precedents¹³⁰ that the scope of the market is the European Economic Area ("**EEA**") due to the low transport costs in relation to the value of the products, the uniformity of the specific characteristics of this type of products, the geographic coverage of the manufacturers and the uniformity of prices.
- (185) APPLE, for its part, has argued that the geographic scope of this market is national and not EEA-wide given the nature of the agreements and clauses analysed in the file.
- (186) However, no precedents have been identified where it has been established that the geographic scope of the markets for the manufacturing and marketing of consumer electronics products either broadly (encompassing all electronic products) or narrowly (distinguishing by product type: smartphones, laptops etc.) were national. Rather, precedents (including several of those cited by APPLE itself) point to an EEA-wide or even wider scope. Thus, in one of the most recent decisions cited by APPLE, which focused on smart wrist devices, it is stated¹³¹ that, according to the market test, there are no significant differences in demand in different EEA countries, although there are differences between different regions (such as EEA, North America China), concluding that the geographic scope is at least EEA-wide. Furthermore, APPLE does not put forward any argument that the conditions of competition are not sufficiently homogeneous at EEA level and that it is therefore appropriate to define national markets.

¹³⁰ M.2609, HP/Compaq, paragraph 14, Nokia/Trolltech, Nokia/Navteq, Microsoft/Nokia, M.7202, Lenovo/Motorola Mobility paragraphs 27 to 29.

¹³¹ See paragraph 83 of decision M. 9660 - GOOGLE FITBIT.

- (187) Without prejudice to the fact that it is not necessary in this case to close a market definition, it should be recalled that what is relevant for defining a market is the immediate competitive constraints faced by operators, for which it is necessary, as regards the product market, to carry out a demand-side and supply-side substitutability analysis and to analyse whether the conditions of competition are homogeneous in order to determine its geographic scope.
- (188) This Division concludes that it is not necessary to close the product market definition and that it is appropriate to maintain the analysis of the EEA geographic dimension in line with the above-mentioned precedents.

3.2.2.2. Wholesale distribution of electronic products

3.2.2.2.1. Product scope

- (189) There are several national and European precedents¹³² that have pointed to the sub-segmentation of this market into three product categories: (i) the wholesale distribution of IT products (including related services); (ii) the wholesale distribution of consumer electronics products (including related services); and (iii) the wholesale distribution of mobile and telecommunications products (including related services).
- (190) In addition, within these three sub-categories, national and European precedents¹³³ have on some occasions carried out a more segmented analysis. In particular, within the distribution of IT products, some precedents have analysed sub-categories of products, such as, inter alia, the wholesale distribution of software, servers, PCs, tablets and e-books.

¹³² M.6323 Tech Data Corporation/MuM VAD Business of 27/10/2011; M.6713 Tech Data/Specialist Distribution Group/TETC Metrologie/Best Ware France/SDGBV and C/0762/16 ESPRINET/VINZEO.

¹³³ M. 5099 Arrow Electronics/Logix; M.6323 Tech Data Corporation/MuM VAD Business; M.6713 Tech Data/Specialist Distribution Group/TETC Metrologie/Best Ware France/SDGBV; and C/0762/16 ESPRINET/VINZEO.

- (191) Furthermore, if one looks at the sales channel, one can distinguish between¹³⁴: (i) direct sales: those made directly by the manufacturer to the final consumer; and (ii) indirect (wholesale) sales: those in which there is intermediation by one or more distributors, which in turn can be classified into Tier 1 sales, which are those made by the manufacturer directly to the retail distributor, and Tier 2 sales, which are those made by the wholesaler to the retail distributor.
- (192) In various precedents, the EC has considered whether the market for the wholesale distribution of electronic products includes both sales from the manufacturer to the retail distributor (Tier 1) and indirect sales from wholesaler to retail distributor (Tier 2), but it has not reached a definitive conclusion on this issue¹³⁵.
- (193) In any event, as noted in the SOF and the Proposed Resolution, the precise product market definition can be left open, since it does not affect the substantive analysis to be carried out in the legal assessment of the facts in this document, nor is it necessary, as will be seen in the legal assessment, to determine the applicability of the block exemption regulations that might be applicable in this case.

3.2.2.2.2. Geographical scope

- (194) Several national precedents¹³⁶ have considered that it could have an EEA dimension, due to the fact that most of the operators are large undertakings operating throughout the EEA, the products are equivalent between the different EEA countries, the distribution channels are similar and there are no significant differences in prices between countries and no technical barriers to the use of the products in the different EEA States.
- (195) However, the EC¹³⁷ has on several occasions considered that the markets for the wholesale distribution of electronic products are national due to linguistic differences, country-specific organisation of wholesale and retail distribution networks, delivery circuits and modes of delivery and the organisation of after-sales services.

¹³⁴ See C/1120/20 ESPRINET/GTI; and C/0762/16 ESPRINET/VINZEO.

¹³⁵ M.6713 Tech Data/Specialist Distribution Group/TETC Metrologie/Best Ware France/SDGBV; M.6323 - Tech Data Europe/MuM VAD Business; M.5099 - Arrow Electronics/Logix, C/1120/20 ESPRINET/GTI; and C/0762/16 ESPRINET/VINZEO.

¹³⁶ See C/1120/20 ESPRINET/GTI; and C/0762/16 ESPRINET/VINZEO.

¹³⁷ M.5099 - Arrow Electronics/Logix and M.6685, Ingram Micro/BrightPoint.

- (196) In any event, it is not necessary to comment on the exact delineation of the relevant geographic scope of this product market for the purposes of this file, as it does not affect the conclusions of the analysis for the reasons set out above.

3.2.2.3 Distribution of electronic products at the retail level

3.2.2.3.1. Product scope

- (197) Within retail distribution in general, competition authorities' precedents have distinguished several product families: the so-called brown goods (including photographic, audio, TV and gaming products, DVD players, video cameras, etc.); the grey range (computing and communication devices - including computer hardware and software, communications, accessories/peripherals, personal computers, displays, keyboards, printers, software and telephones, etc.); and the white range (large household appliances - such as kitchen appliances, cooker hoods, dishwashers, etc. and small household appliances - such as deep fryers, mini ovens, toasters, sandwich and waffle makers, etc.)¹³⁸.
- (198) Other national precedents make a similar classification, distinguishing between: (i) brown goods; (ii) large household appliances; (iii) small household appliances; and (iv) computing and communication devices¹³⁹.
- (199) In addition to distinguishing by product type, the EC, while leaving the exact definition open, has considered the possibility of segmenting the market according to (i) size and type of shop; (ii) distribution channel (department stores, speciality shops, food retailers) and (iii) whether sales are online or in physical outlets¹⁴⁰.
- (200) In any event, as will be further elaborated below, the precise product market definition can be left open, since it does not affect the substantive analysis to be carried out in the legal assessment of the facts as set out in this decision and is not necessary to determine the applicability of the block exemption regulations which might be applicable in this case.
- (201) However, a specific sub-segment of the retail distribution of electronic products will be taken into account, as will be explained in detail below (i.e. online retailing of electronic products in Spain), to the extent that this sub-segment is the one affected by the conduct under investigation.

¹³⁸ See decision of the French competition authority 20-D-04 of 16 March 2020 in an investigation against Apple, para. 566.

¹³⁹ C/1166/21 MEDIA MARKT SATURN / ACTIVOS WORTEN; and C/0096/08 SONAE / BOULANGER.

¹⁴⁰ M.7997 - Steinhoff International / Darty (see also C/1166/21 MEDIA MARKT SATURN/ACTIVOS WORTEN).

3.2.2.3.2. Geographical scope

- (202) In national¹⁴¹ and European precedents¹⁴², although the definition of the geographical scope has been left open, the possibility of a national, regional or local scope (determined by an “area of influence” around each establishment) has been discussed.
- (203) In any event, it is not necessary to take a position on the exact delineation of the relevant geographic scope of this product market for the purposes of this file, as it does not affect the conclusions of the analysis for the reasons set out above.

3.2.2.4. Conclusion

- (204) Although for the reasons outlined above the precise market definition can be left open, traditionally, within the market for the distribution of electronic products, three sub-markets are distinguished:

Table 10. Sub-markets within the electronics distribution market

Product market	Geographic market
Manufacture and sale of electronic products ¹⁴³	EEA
Wholesale distribution of electronic products	EEA or National
Retail distribution of electronic products	National, regional or local

¹⁴¹ C-0096/08 - Sonae/Boulangier and N-06091 CCIM v GN Electrodomésticos / R. Castilla / Gestesa / UCASA / Condigesas.

¹⁴² M.7997 - Steinhoff International / Darty; M.6226 - Media-Saturn / Redcoon; M.4392 - DSGI / FR-Invest / F- Group JV; M.4226 - DSGI / Fotovista; M.1482 - Kingfisher / Grosslabor; M.1188 Kingfisher / Wegert / Promarkt; and M.1248 - Kingfisher / BUT.

¹⁴³ The broad market (not sub-segmented by product type) will be considered and information on narrow markets (sub-segmented by product type) will also be included.

3.3. Conclusions regarding the markets analysed

- (205) In the case of infringements by object of Article 1 LDC and/or 101 TFEU, according to European¹⁴⁴ and national case law¹⁴⁵ it is not necessary to previously and precisely define the market as it is not an element of the type of sanction, since it is the companies themselves who, with their anti-competitive conduct, determine the area affected by the infringement¹⁴⁶.

¹⁴⁴ Paragraph 132 of the Judgment of the Court of First Instance of 8 July 2004, in case T-44/00 Mannesmannrohren-Werke v Commission which reads as follows: *"It follows that Mannesmann's argument that the Commission did not precisely delineate the relevant market is irrelevant. Indeed, the obligation to delineate the market in a decision adopted on the basis of Article 81 EC is only imposed on the Commission when without such delineation it is not possible to determine if the agreement in question can affect trade between Member States and it has the objective or effect of preventing, restricting, or distorting the role of competition within the common market (also see in this regard the verdicts of the Court of First Instance of 15 September 1998, Joined Cases T-374/94, T-375/94, T-384/94 y T-388/94, Rec. p. II-3141 paragraphs 93 to 95 and 105). In principle, if the very object of an agreement is to restrict competition by means of 'market sharing', it is not necessary to define precisely the geographic markets in question, since actual or potential competition in the territories concerned has necessarily been restricted, whether or not those territories constitute 'markets' in the strict sense".* See also paragraph 214 of the EGC Judgment of 28 June 2016, Telefónica SA v Commission: *"Thus, under Article 101(1) TFEU, prior definition of the relevant market is not required where the agreement at issue has an anti-competitive object in itself, that is to say, where the Commission could validly conclude, without prior market definition, that the agreement in question distorted competition and was capable of appreciably affecting trade between Member States. In particular, these are the most serious agreements, which are expressly prohibited by Article 101(1)(a) to (e) TFEU (Opinion of Advocate General Bot in Joined Cases Erste Group Bank and others/Commission, C-125/07 P, C-133/07 P, C-135/07 P y C-137/07 P, EU:C:2009:192, paragraphs 168 to 175). If the very object of an agreement is to restrict competition by 'market sharing', it is therefore not necessary to define precisely the markets concerned, since actual or potential competition has necessarily been restricted (judgment of 8 July 2004 Mannesmannrohren-Werke / Commission, T-44/00, EU:T:2004:218, paragraph 132).*

¹⁴⁵ For all, see the recent judgment of the Audiencia Nacional of 7 December 2022 (appeal number 232/2018): *"Therefore, when we are dealing with an agreement that is likely to restrict competition, the definition of geographic markets is not precise [...] In such cases, it is sufficient to assess with a certain degree of approximation the geographic area or markets concerned, which does not require a precise definition of the relevant market"*.

¹⁴⁶ See, for example, in this regard, the CNC Council Resolutions of 12 January 2012, Case S/0179/09 Concrete and Related Products; of 23 May 2013, Case S/0303/10 Sanitation distributors and of 30 July 2013, Case S/0380/11 Rental Cars and Resolutions of the Competition Division of the CNMC of 22 September 2014, Case S/0428/12 Pallets; of 5 March 2015, Case S/0486/13 TOYOTA Dealers, S/0489/13 OPEL Dealers, S/0488/13 HYUNDAI Dealers and S/0487/13 LAND ROVER Dealers; of 28 May 2015, Case S/0471/13 AUDI/SEAT/VW dealers; of 26 May 2016, Case S/DC/0504/14 AIO; of 21 November 2017, Case S/DC/0562/15 CABLES BT/MT and of 14 March 2019, Case S/DC/0598/16 Railway electrification and electromechanics

- (206) APPLE argues in its submissions to the Proposed Resolution that it is necessary to close the market definition¹⁴⁷ in order to assess whether the VBER exemption applies¹⁴⁸. It also criticises the fact that the CD cites two national cases dating back almost 20 years and the *Google Shopping* case from six years ago. Furthermore, in APPLE's view, the first two cases would relate to the non-retail distribution of certain products.
- (207) In response to the above, it must be said that the age of some of the precedents invoked does not make it possible to refute their usefulness and that, in any event, and as will be explained in greater detail, the VBER exemption does not apply given that, although the agreements analysed have an eminently vertical dimension, APPLE and AMAZON are competitors (paragraphs (434) to (442))¹⁴⁹.
- (208) Furthermore, while this decision will generally consider the market for the manufacture and sale of electronic products in the EEA, where APPLE's shares were above 30% from 2017 to 2021, even considering the sub-segmentation by product type, as the parties claim to do in order to determine the application of the VBER, APPLE's shares would also be above 30% in the EEA throughout the entire period of investigation for APPLE's products in highest demand, i.e. smartphones, tablets and smartwatches. Therefore, any (both broad and narrow) product market definition of the market for the manufacture and sale of electronic products, even distinguishing by APPLE products, would exceed the 30% market share threshold above which the VBER¹⁵⁰ is not applicable, so that also from that perspective it would not be necessary to close a precise definition of the market for the manufacture and sale of electronic products in which APPLE operates.
- (209) For its part, AMAZON has also criticised the fact that downstream markets for the retail distribution of electronic products are not closed, arguing that it is necessary to close downstream and upstream market definitions in order to analyse indirect substitutability. However, this approach is not apparent from the regulation, the case law or the practice of the competition authorities. It should also be recalled, in this regard, that the exact delineation of the market or the characterisation of all its elements is not essential in order to establish conduct prohibited by Article 1 of the LDC and Article 101 of the TFEU, such as that analysed in this case. This has been stated by the CNMC¹⁵¹ and previously by the TDC and the National Competition

¹⁴⁷ Amazon also disagrees with the premise that market definition is not required in cases where a 'by object' infringement is found. Amazon's submissions to the PR, para. 579.

¹⁴⁸ See paragraphs 125 to 127 of APPLE's submissions on the Proposed Resolution.

¹⁴⁹ See section 6.1.3.2 for a detailed explanation.

¹⁵⁰ See folio 2288: in the broad market (which includes all consumer electronics products), it is exceeded in the EEA. In narrow markets (distinguishing by product type), it exceeds it in both the EEA and Spain in smartwatches, smartphones and tablets. Of the remaining products, both in the EEA and in Spain, it is not exceeded in PCs (desktops and laptops). Both in the EEA and in Spain, for media players (ipods), devices that allow content to be played on TV from another device (Apple TV); headphones (airPods and Beats); and other accessories (chargers, etc.), APPLE has not submitted data.

¹⁵¹ Resolutions of the CNMC of 26 June 2014, File S/0445/12 Fire-fighting equipment; of 22 September 2014, File S/0428/12 Pallets; of 4 December 2014, File S/0453/12, Railway bearing; of 28 May 2015, File S/0471/13 AUDI/SEAT/VW dealers; of 23 July 2015, File S/0482/13 Car manufacturers; of 26 May 2016, File S/DC/0504/14 AIO and of 21 November 2017, File S/DC/0562/15 LV/MV cables.

Committee (CNC)¹⁵², referring to EU case law¹⁵³, as this delineation is not an element of the type of infringement of Article 1 of the LDC or of Article 101 of the TFEU when it is a matter of agreements that, due to their content and purpose, are anti-competitive by object¹⁵⁴. As the CNC Council and the Competition Division of the CNMC Council have pointed out, it is the undertakings that determine the scope of the infringement through their anti-competitive conduct¹⁵⁵.

- (210) Therefore, on the basis of the explanations provided, the definition of the relevant market in which they operate by the CD for the **national market for the provision of intermediation services in online marketplaces to third-party resellers, in which AMAZON operates**, is considered appropriate.

¹⁵² Resolution of the TDC of 22 July 2004, File 565/03, Radioactive Manipulates and CNC Resolutions of 31 July 2010, File S/0120/10 Freight Forwarders; of 2 August 2012, File S/0287/10 Post-tensioning and Geotechnics; of 8 March 2013, File S/0329/11 Asfaltos de Cantabria and of 30 July 2013, File S/0380/11 Hire cars.

¹⁵³ Cases T-44/00 Mannesmannrohren-Werke AG v European Commission and T-61/99, Adristica di Navigazione Spa and Judgment of the CFI of 6 July 2000, Case T-62/98 Volkswagen AG v European Commission.

¹⁵⁴ See paragraph 27 of the Guidelines on the application of Article 81(3) of the Treaty and paragraph 176 of the judgment of the GC of 28 June 2016 (T-208/13, Portugal Telecom v Commission).

¹⁵⁵ Resolutions of the CNC of 12 January 2012, File S/0179/09 Concrete and Related Products; of 23 May 2013, File S/0303/10 Sanitation distributors and of 30 July 2013, File S/0380/11 Rental Cars and Resolutions of the Competition Division of the Council of the CNMC of 22 September 2014, File S/0428/12 Pallets; of 5 March 2015, Files S/0486/13 TOYOTA Dealers, S/0489/13 OPEL Dealers, S/0488/13 HYUNDAI Dealers and S/0487/13 LAND ROVER Dealers; of 28 May 2015, File S/0471/13 AUDI/SEAT/VW dealers; of 26 May 2016, File S/DC/0504/14 AIO; of 21 November 2017, File S/DC/0562/15 CABLES BT/MT and of 14 March 2019, File S/DC/0598/16 Railway electrification and electromechanics.

(211) On the other hand, the following markets will also be taken into account, although in these cases without a precise market definition being closed for the reasons explained *above*:

- National market for the provision of intermediation services in online marketplaces to consumers, on which AMAZON operates.
- The EEA-wide market for the manufacture and sale of electronic products, on which APPLE is active, and, to a lesser extent, AMAZON; and, although it is not necessary to determine whether it is appropriate to define narrower markets on the basis of specific categories of electronic products, information in this respect will be included.
- EEA-wide or national market for the wholesale distribution of electronic products, on which APPLE is active.
- **National market for retail distribution of electronic products, which could be sub-segmented into online and offline markets where both AMAZON and APPLE are present.**

3.4. Market shares

(212) The parties' shares in the relevant markets are as follows:

3.4.1 AMAZON

(213) Market shares in the market for the provision of intermediation services in online marketplaces to third-party sellers in Spain have been calculated using two dimensions (with three derivatives, as explained below):

- Based on the turnover (revenue) from the provision of intermediation services to third-party sellers generated by the main online marketplaces in Spain, from two perspectives:
 - Taking into account only core services, i.e. only the revenues derived from the provision of basic intermediation services to third-party sellers (i.e. the amounts that third parties have to pay for making use of the main service of the online marketplace, i.e. bringing sellers and buyers together), without taking into account optional additional services such as fulfilment services, collection management services, etc.
 - Taking into account the basic and additional services, i.e. a second approximation, including all the services provided (basic or default, and the optional additional services that the said third-party vendors may have wished to contract); and

- Based on the value of sales generated by third-party sellers on the online marketplaces.

- (214) Since AMAZON indicated in response to the information request that it did not have data on the total market or on the operators present in the market, nor could it identify any public data source that would allow it to obtain such data¹⁵⁶, an information request was sent to the main online marketplaces in Spain in order to obtain this data¹⁵⁷.
- (215) This sample is considered to be sufficiently representative because it includes not only the main players in the market (as identified by the parties receiving requests themselves and by AMAZON, who were asked about this in the requests¹⁵⁸); it also includes other players that are far smaller than the rest.
- (216) Thus, each of the requested online marketplaces has provided its turnover (basic services and, where applicable, additional services) and value of sales generated by third parties on its platform - which acts as the numerator in the calculation of the market shares¹⁵⁹ - and the market total has been calculated as the sum of the turnovers (basic and additional services) and sales generated by third parties of all online marketplaces to which requests were sent - which acts as the denominator.
- (217) In view of the above, the estimated market shares of AMAZON and of the main online marketplaces in Spain in the market for the provision of intermediation services in online marketplaces are as follows (first, the information on turnover and sales value in ranges and then the market shares that have been calculated on the basis of these data provided by the companies, also in ranges, will be presented)¹⁶⁰:

¹⁵⁶ See answer to question 1 of AMAZON IR II (folios 4671 to 4676).

¹⁵⁷ In particular, requests were sent to the following 17 online markets: ALIBABA; ASOS.COM; EBAY; ETSY; FRUUGO.COM; FNAC; MANOCOLIBRI; PC COMPONENTES; PRIVALIA; WORTEN; ZALANDO; MEDIA MARKT; CARREFOUR; EL CORTE INGLÉS ("ECI"); DECATHLON; LEROY MERLIN; PUNTO FA. Of these 17, 4 companies did not reply to the request (despite several reiterations): ETSY, FRUUGO.COM; ZALANDO; PUNTO FA; and two companies did not or will not open their online marketplaces until well into 2022 (and have therefore not been considered in the sample): MEDIA MARKT and LEROY MERLIN; therefore, 11 operators in total (and AMAZON, which would be number 12) have been counted for the sample.

¹⁵⁸ All were requested to identify their main competitors in the market.

¹⁵⁹ Data for operators not identified as part of the sample have not been estimated because of the operators with the highest sales volume, Zalando was the only one that did not reply to the information request. However, following the data for this sector in Spain hosted by Statista, it can be observed that it is not identified as one of the top 4 (<https://www.statista.com/statistics/1236867/leading-online-marketplaces-consumers-penetration-spain/>). Therefore, the variability in market share is not shown to be relevant.

¹⁶⁰ For: (i) AMAZON, data from the non-confidential version of Annex 1 (iii)-(v) submitted at the request of the CD on 9 May 2022 have been used (folio 5511); and (ii) for the remaining online marketplaces, data have been used from the non-confidential versions prepared ex officio, and expressly or tacitly accepted by all of them, of the annexes submitted by these companies to the information requests made to them at the time (folios 5421 to 5431, one page for each of the 11 operators considered). On the other hand, the data for 2021 does not refer to the full year, but to the year to August in the case of AMAZON (inclusive), and in the case of all other online marketplaces, to August inclusive, with the exception of some, such as Alibaba, which included up to December. In any case, the inclusion of more months in the case of the other operators is more favourable to AMAZON, insofar as its share is diluted to a greater extent.

Table 11. Market shares-revenues from basic service provision

The content of Table 11 is completely redacted with a large black rectangle.

Source: produced in-house based on the requests made

Table 12. Market shares-revenue from provision of all services (basic and optional)

The table content is completely redacted with a solid black rectangle.

Source: produced in-house based on the requests made

Table 13. Market shares-value of sales generated by third parties



Source: produced in-house based on the requests made

Table 14. Market shares-revenues from basic service provision

Market shares – income from the provision of basic services					
Company	2017	2018	2019	2020	2021
	Share	Share	Share	Share	Share
Amazon	[90-100%]	[80-90%]	[80-90%]	[80-90%]	[70-80%]
Alibaba	0.00%	[5-10%]	[5-10%]	[5-10%]	[10-20%]
ASOS	[0-5%]	[0-5%]	[0-5%]	[0-5%]	[0-5%]
FNAC	[0-5%]	[0-5%]	[0-5%]	[0-5%]	[0-5%]
Manocalibri	[0-5%]	[0-5%]	[0-5%]	[0-5%]	[0-5%]
PC Components	0.00%	[0-5%]	[0-5%]	[0-5%]	[0-5%]
Privalia	[0-5%]	[0-5%]	[0-5%]	[0-5%]	[0-5%]
Wortem	0.00%	0.00%	[0-5%]	[0-5%]	[0-5%]
Carrefour	[0-5%]	[0-5%]	[0-5%]	[0-5%]	[0-5%]
ECI	[0-5%]	[0-5%]	[0-5%]	[0-5%]	[0-5%]
Decathlon	0.00%	0.00%	0.00%	0.00%	[0-5%]
EBAY	[5-10%]	[0-5%]	[0-5%]	[0-5%]	[0-5%]
Total	100.00%	100.00%	100.00%	100.00%	100.00%

Source: produced in-house based on the requests made

Table 15. Market shares-revenues for provision of all services (basic and optional)

Market shares – revenue from provision of all services (core and optional)					
Company	2017	2018	2019	2020	2021
	Share	Share	Share	Share	Share
Amazon	[90-100%]	[90-100%]	[80-90%]	[80-90%]	[80-90%]
Alibaba	0.00%	[0-5%]	[5-10%]	[5-10%]	[10-20%]
ASOS	[0-5%]	[0-5%]	[0-5%]	[0-5%]	[0-5%]
FNAC	[0-5%]	[0-5%]	[0-5%]	[0-5%]	[0-5%]
Manocalibri	[0-5%]	[0-5%]	[0-5%]	[0-5%]	[0-5%]
PC Components	0.00%	[0-5%]	[0-5%]	[0-5%]	[0-5%]
Privalia	[0-5%]	[0-5%]	[0-5%]	[0-5%]	[0-5%]
Wortem	0.00%	0.00%	[0-5%]	[0-5%]	[0-5%]
Carrefour	[0-5%]	[0-5%]	[0-5%]	[0-5%]	[0-5%]
ECI	[0-5%]	[0-5%]	[0-5%]	[0-5%]	[0-5%]
Decathlon	0.00%	0.00%	0.00%	0.00%	[0-5%]
EBAY	[0-5%]	[0-5%]	[0-5%]	[0-5%]	[0-5%]
Total	100.00%	100.00%	100.00%	100.00%	100.00%

Source: produced in-house based on the requests made

Table 16. Market shares-value of sales generated by third parties

Market shares – value of sales generated by third parties					
Company	2017	2018	2019	2020	2021
	Share	Share	Share	Share	Share
Amazon	[80-90%]	[70-80%]	[70-80%]	[70-80%]	[60-70%]
Alibaba	0.00%	[10-20%]	[10-20%]	[10-20%]	[20-30%]
ASOS	[0-5%]	[0-5%]	[0-5%]	[0-5%]	[0-5%]
FNAC	[0-5%]	[0-5%]	[0-5%]	[0-5%]	[0-5%]
Manocalibri	[0-5%]	[0-5%]	[0-5%]	[0-5%]	[0-5%]
PC Components	0.00%	[0-5%]	[0-5%]	[0-5%]	[0-5%]
Privalia	[0-5%]	[0-5%]	[0-5%]	[0-5%]	[0-5%]
Wortem	0.00%	0.00%	[0-5%]	[0-5%]	[0-5%]
Carrefour	[0-5%]	[0-5%]	[0-5%]	[0-5%]	[0-5%]
ECI	[0-5%]	[0-5%]	[0-5%]	[0-5%]	[0-5%]
Decathlon	0.00%	0.00%	0.00%	0.00%	[0-5%]
EBAY	[0-5%]	[5-10%]	[5-10%]	[0-5%]	[0-5%]
Total	100.00%	100.00%	100.00%	100.00%	100.00%

Source: produced in-house based on the requests made

- (218) AMAZON's argument cannot be accepted, that AMAZON's share in the intermediation market should be calculated using AMAZON's shares of sales of APPLE products in the retail market by application of the provisions of the Guidelines on the application of Article 101 of the Treaty on the Functioning of the European Union to technology transfer agreements ('**Technology Transfer Guidelines**'). As the first paragraph of these guidelines indicates, they deal with the licensing of technology rights whereby the licensor authorises the licensee to exploit certain technology rights for the production of goods or services and where such agreements

benefit from an exemption from the prohibition of Article 101(1) TFEU. It is clear that the agreement in question has nothing to do with technology transfer.

- (219) It is also appropriate to reproduce paragraph 25 of the Technology Transfer Guidelines which refers to the exceptional use of *proxies* in the calculation of quotas for the purpose of applying the Technology Transfer Licensing Exemption Regulation (emphasis added):

*"Once the relevant markets have been defined, market shares can be allocated to the various sources of competition in the market, which will serve as an indicator of the relative strength of the market players. In the case of technology markets, market shares can be calculated on the basis of each technology's share of the total amount of revenues generated by the royalties paid by the licensed competing technologies, which represents the market share of each technology on the market comprised by those technologies. But this option is often more theoretical than real given the lack of clear information on royalties. An alternative method, which is used for the calculation of the safe harbour as explained in Article 8(d) of TTBER, is **to calculate market shares on the technology market on the basis of sales of products incorporating the licensed technology on downstream product markets** [for further details see below point (85) et seq.]. In individual cases that do not qualify for the safe harbour of the TTBER it may be necessary, where feasible, to apply both approaches in order to assess more precisely the market position of the licensor, in addition to taking into account other factors that give a good indication of the relative market position of the available technologies [for further factors see points (156) and (158) et seq.] (26)."*

- (220) However, the Guidelines on technology transfer indicate that where there is a lack of clear information on royalties on technology markets an inference from sales of products incorporating the licensed technology may be used as an alternative method. These assumptions are not applicable to the case at hand, as these are neither technology markets as defined in the guidelines themselves, nor is it appropriate to estimate revenues generated by technology royalties, nor is there a lack of information that would lead to the need to use an approximation.
- (221) As far as technology markets are concerned, according to paragraph 22 of these guidelines, "technology markets consist of licensed technology rights and their substitutes, i.e. other technology considered by licensees to be interchangeable with or substitutable for the licensed technology rights, by reason of their characteristics, royalties or intended use'. AMAZON does not license technologies to third parties who incorporate them into their products, but provides services to third-party sellers so that they can sell through their online marketplace. Therefore, the market in which AMAZON operates is not a technology market for the purposes of the Technology Transfer Guidelines.

- (222) Moreover, according to the above-mentioned guidelines, the possibility to calculate royalty rates on the basis of a *proxy* for downstream sales incorporating the licensed technology is only appropriate where "*clear information on royalties is missing*". In this case, there is no relevant royalty for which information is missing, nor does the calculation of AMAZON's market shares in the defined intermediation market present any particular difficulty.
- (223) Finally, paragraph 67(b) of the 2022 Vertical Guidelines¹⁶¹ states that "*for the purposes of applying the market share thresholds set out in Article 3(1) of the Regulation, the market share of the undertaking providing online intermediation services is calculated on the relevant market for the provision of such services*". Therefore, AMAZON's share has to be calculated on the market for the provision of intermediation services in online marketplaces to third-party sellers.

3.4.2. APPLE

- (224) APPLE stated in response to a request for information from the CD that it does not internally produce the information requested in relation to the market for the manufacture and sale of electronic products¹⁶². However, it provided data from an external consultant *International Data Corporation* (IDC), which provides information in relation to sales of consumer electronics products classified by product manufacturer, based on the total purchases made by consumers in a given market.
- (225) According to data provided by APPLE, the market shares (by value) of APPLE and its main competitors in the market for the manufacture and sale of electronic products in the EEA are as follows¹⁶³:

¹⁶¹ Accompanying Commission Regulation (EU) 2022/720 of 10 May 2022 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices.

¹⁶² See paragraph 14 of the Response to APPLE IR II (folio 4374).

¹⁶³ As indicated above, AMAZON's role as a manufacturer is residual and, in any case, its share will be included in the "other" category.

Table 17. Market shares in the consumer electronics market

Market shares in the manufacture of consumer electronic products - EEA - All products					
	2017 [1]	2018	2019	2020	2021
	Share	Share	Share	Share	Share
Apple	[30%-40%]	[30%-40%]	[30%-40%]	[30%-40%]	[30%-40%]
Samsung	[20%-30%]	[10%-20%]	[10%-20%]	[10%-20%]	[10%-20%]
Lenovo	[0%-10%]	[0%-10%]	[0%-10%]	[0%-10%]	[10%-20%]
HP	[0%-10%]	[0%-10%]	[0%-10%]	[0%-10%]	[0%-10%]
Dell Technologies	[0%-10%]	[0%-10%]	[0%-10%]	[0%-10%]	[0%-10%]
Xiaomi	[0%-10%]	[0%-10%]	[0%-10%]	[0%-10%]	[0%-10%]
Acer Group	[0%-10%]	[0%-10%]	[0%-10%]	[0%-10%]	[0%-10%]
ASUS	[0%-10%]	[0%-10%]	[0%-10%]	[0%-10%]	[0%-10%]
Huawei	[10%-20%]	[10%-20%]	[10%-20%]	[0%-10%]	[0%-10%]
OPPO	[0%-10%]	[0%-10%]	[0%-10%]	[0%-10%]	[0%-10%]
Microsoft	[0%-10%]	[0%-10%]	[0%-10%]	[0%-10%]	[0%-10%]
Other	[10%-20%]	[0%-10%]	[0%-10%]	[0%-10%]	[0%-10%]
TOTAL	100.0%	100.0%	100.0%	100.0%	100.0%

Source: Annex 1 to the reply to APPLE IR II (folio 4247)

- (226) Furthermore, APPLE's shares were also above 30% in the EEA not only in the broad market but in multiple narrow markets such as smartphones, tablets, smart watches throughout the entire period under investigation¹⁶⁴ (spreadsheet at folio 2288, non-confidential version at folio 4247):

Table 18. Market shares in the market for the manufacture of consumer electronic products (Smartphones)

Market shares in the manufacture of consumer electronic products - EEA dimension - Smartphones										
	2017		2018		2019		2020		2021	
	Value	Share	Value	Share	Value	Share	Value	Share	Value	Share
Apple	Confidential	[40%-50%]	Confidential	[30%-40%]	Confidential	[40%-50%]	Confidential	[40%-50%]	Confidential	[40%-50%]
Samsung	Confidential	[30%-40%]	Confidential	[30%-40%]	Confidential	[30%-40%]	Confidential	[20%-30%]	Confidential	[20%-30%]
Xiaomi	Confidential	[0%-10%]	Confidential	[0%-10%]	Confidential	[0%-10%]	Confidential	[0%-10%]	Confidential	[10%-20%]
OPPO	Confidential	[0%-10%]	Confidential	[0%-10%]	Confidential	[0%-10%]	Confidential	[0%-10%]	Confidential	[0%-10%]
OnePlus	Confidential	[0%-10%]	Confidential	[0%-10%]	Confidential	[0%-10%]	Confidential	[0%-10%]	Confidential	[0%-10%]
Huawei	Confidential	[10%-20%]	Confidential	[20%-30%]	Confidential	[10%-20%]	Confidential	[0%-10%]	Confidential	[0%-10%]
Lenovo	Confidential	[0%-10%]	Confidential	[0%-10%]	Confidential	[0%-10%]	Confidential	[0%-10%]	Confidential	[0%-10%]
realme	Confidential	[0%-10%]	Confidential	[0%-10%]	Confidential	[0%-10%]	Confidential	[0%-10%]	Confidential	[0%-10%]
TCL	Confidential	[0%-10%]	Confidential	[0%-10%]	Confidential	[0%-10%]	Confidential	[0%-10%]	Confidential	[0%-10%]
Google	Confidential	[0%-10%]	Confidential	[0%-10%]	Confidential	[0%-10%]	Confidential	[0%-10%]	Confidential	[0%-10%]
HMD	Confidential	[0%-10%]	Confidential	[0%-10%]	Confidential	[0%-10%]	Confidential	[0%-10%]	Confidential	[0%-10%]
Other	Confidential	[10%-20%]	Confidential	[0%-10%]	Confidential	[0%-10%]	Confidential	[0%-10%]	Confidential	[0%-10%]
TOTAL	€ 41,201.66	100.0%	€ 45,580.89	100.0%	€ 45,381.40	100.0%	€ 42,223.05	100.0%	€ 20,625.27	100.0%

¹⁶⁴ Of the remaining products, it is not exceeded in the EEA in computers (desktops and laptops). For media players (ipods), devices that allow content to be played on TV from another device (Apple TV); headphones (airPods and Beats); and other accessories (chargers, etc.), APPLE has not submitted data at either the EEA or national level.

Source: Annex 1 to the reply to APPLE IR II (folio 4247)

Table 19. Market shares in the consumer electronics manufacturing market (tablets)

Market shares in the consumer electronics manufacturing market - EEA dimension - Tablets										
	2017		2018		2019		2020		2021	
	Value	Share	Value	Share	Value	Share	Value	Share	Value	Share
Apple	Confidential	[30%-40%]	Confidential	[30%-40%]	Confidential	[40%-50%]	Confidential	[40%-50%]	Confidential	[40%-50%]
Samsung	Confidential	[20%-30%]	Confidential	[20%-30%]	Confidential	[10%-20%]	Confidential	[20%-30%]	Confidential	[20%-30%]
Lenovo	Confidential	[0%-10%]	Confidential	[0%-10%]	Confidential	[0%-10%]	Confidential	[0%-10%]	Confidential	[10%-20%]
Microsoft	Confidential	[0%-10%]	Confidential	[10%-20%]	Confidential	[10%-20%]	Confidential	[10%-20%]	Confidential	[0%-10%]
Huawei	Confidential	[0%-10%]	Confidential	[0%-10%]	Confidential	[0%-10%]	Confidential	[0%-10%]	Confidential	[0%-10%]
TCL	Confidential	[0%-10%]	Confidential	[0%-10%]	Confidential	[0%-10%]	Confidential	[0%-10%]	Confidential	[0%-10%]
Dell Technologies	Confidential	[0%-10%]	Confidential	[0%-10%]	Confidential	[0%-10%]	Confidential	[0%-10%]	Confidential	[0%-10%]
Panasonic	Confidential	[0%-10%]	Confidential	[0%-10%]	Confidential	[0%-10%]	Confidential	[0%-10%]	Confidential	[0%-10%]
Amazon.com	Confidential	[0%-10%]	Confidential	[0%-10%]	Confidential	[0%-10%]	Confidential	[0%-10%]	Confidential	[0%-10%]
HP Inc	Confidential	[0%-10%]	Confidential	[0%-10%]	Confidential	[0%-10%]	Confidential	[0%-10%]	Confidential	[0%-10%]
Archos	Confidential	[0%-10%]	Confidential	[0%-10%]	Confidential	[0%-10%]	Confidential	[0%-10%]	Confidential	[0%-10%]
Other	Confidential	[10%-20%]	Confidential	[0%-10%]	Confidential	[0%-10%]	Confidential	[0%-10%]	Confidential	[0%-10%]
TOTAL	€ 8,202.66	100.0%	€ 7,580.81	100.0%	€ 7,189.88	100.0%	€ 8,074.04	100.0%	€ 3,981.30	100.0%

Source: Annex 1 to the reply to APPLE IR II (folio 4247)

Table 20. Market shares in the market for the manufacture of consumer electronic products (smartwatches)

Market shares in the manufacture of consumer electronics products - EEA dimension - Smart watches										
	2017		2018		2019		2020		2021	
	Value	Share	Value	Share	Value	Share	Value	Share	Value	Share
Apple	Confidential	[50%-60%]	Confidential	[50%-60%]	Confidential	[50%-60%]	Confidential	[50%-60%]	Confidential	[60%-70%]
Garmin	Confidential	[10%-20%]	Confidential	[10%-20%]	Confidential	[10%-20%]	Confidential	[20%-30%]	Confidential	[10%-20%]
Samsung	Confidential	[10%-20%]	Confidential	[10%-20%]	Confidential	[10%-20%]	Confidential	[10%-20%]	Confidential	[10%-20%]
Google	Confidential	[0%-10%]	Confidential	[0%-10%]	Confidential	[0%-10%]	Confidential	[0%-10%]	Confidential	[0%-10%]
Fossil	Confidential	[0%-10%]	Confidential	[0%-10%]	Confidential	[0%-10%]	Confidential	[0%-10%]	Confidential	[0%-10%]
OPPO	Confidential	[0%-10%]	Confidential	[0%-10%]	Confidential	[0%-10%]	Confidential	[0%-10%]	Confidential	[0%-10%]
LVMH	Confidential	[0%-10%]	Confidential	[0%-10%]	Confidential	[0%-10%]	Confidential	[0%-10%]	Confidential	[0%-10%]
Suunto	Confidential	[0%-10%]	Confidential	[0%-10%]	Confidential	[0%-10%]	Confidential	[0%-10%]	Confidential	[0%-10%]
Mobvoi	Confidential	[0%-10%]	Confidential	[0%-10%]	Confidential	[0%-10%]	Confidential	[0%-10%]	Confidential	[0%-10%]
Huawei	Confidential	[0%-10%]	Confidential	[0%-10%]	Confidential	[0%-10%]	Confidential	[0%-10%]	Confidential	[0%-10%]
Lenovo	Confidential	[0%-10%]	Confidential	[0%-10%]	Confidential	[0%-10%]	Confidential	[0%-10%]	Confidential	[0%-10%]
Other	Confidential	[0%-10%]	Confidential	[0%-10%]	Confidential	[0%-10%]	Confidential	[0%-10%]	Confidential	[0%-10%]
TOTAL	€ 1,942.57	100.0%	€ 2,313.66	100.0%	€ 3,087.26	100.0%	€ 2,999.52	100.0%	€ 1,339.67	100.0%

Source: Annex 1 to the reply to APPLE IR II (folio 4247)

- (227) On the other hand, APPLE indicated that it was not possible to obtain information on the wholesale and retail markets for the sale of electronic products from the IDC data, nor was it able to identify any publicly available source of information that would provide such information¹⁶⁵. Furthermore, it argues that it cannot reasonably compile or estimate the requested information¹⁶⁶.
- (228) Notwithstanding the above, the shares of APPLE's main wholesale distributors were identified by the investigating authority in a national precedent¹⁶⁷ (which, although not exact, can give an idea of the size and importance of these APPLE distributors in the wholesale market for the distribution of electronic products). Thus, one of APPLE's

¹⁶⁵ See paragraph 16(i) of the Response to APPLE IR II (folio 4374).

¹⁶⁶ See answers to questions 3-6 of the reply to APPLE IR II (folios 4376 to 4377).

¹⁶⁷ C/1120/20 ESPRINET/GTI.

AARs stated in its reply to an information request¹⁶⁸ that APPLE's four wholesalers in Spain are **[CONFIDENTIAL]**. Three of these companies appear in the above-mentioned precedent and have the following shares in the market for the wholesale distribution of electronic products:

Table 21. National wholesale markets for electronic products

NATIONAL WHOLESALE MARKETS FOR ELECTRONIC PRODUCTS (TIER 1+ 2) (shares by value)						
Operator	Consumer electronics		IT Products		Personal Computers	
	2018	2019	2018	2019	2018	2019
ESPRINET	[10-20]%	[10-20]%	[10-20]%	[10-20]%	[10-20]%	[10-20]%
GTI	[0-10]%	[0-10]%	[0-10]%	[0-10]%	[0-10]%	[0-10]%
ESPRINET+GTI	[10-20]%	[10-20]%	[10-20]%	[10-20] %	[10-20]%	[10-20]%
TECH DATA	[10-20]%	[10-20]%	[10-20]%	[10-20]%	[10-20]%	[10-20]%
INGRAMICRO	[10-20]%	[10-20]%	[0-10]%	[0-10]%	[0-10]%	[0-10]%
ARROW ECS	[0-10]%	[0-10]%	[0-10]%	[0-10]%	[0-10]%	[0-10]%
MCR	[0-10]%	[0-10]%	[0-10]%	[0-10]%	[0-10]%	[0-10]%

Source: Annex 1 to the reply to APPLE IR II (folio 4247)

- (229) No other source of information has been identified which would provide more detailed information on the share of APPLE and its main competitors in the markets for the wholesale and retail distribution of electronic products in Spain, with the exception of the considerations made in the following section for the online retail distribution of electronic products.

3.5. Online retail market for electronic products in Spain

- (230) As explained above, competition authorities' precedents have considered different possibilities to sub-segment retail distribution and, in the present case, although it is not necessary to close the specific market definition, the conduct under investigation is considered to affect a specific sub-segment of retail distribution: that of online sales of electronic products.
- (231) In this respect, it should be noted that some of the above-mentioned precedents have already pointed to the possible existence of a market for the retail sale of electronic products (i.e. computer and communication products)¹⁶⁹.

¹⁶⁸ See ASSECO SPAIN, S.A.'s reply to question 7 of the request (folio 1650).

¹⁶⁹ See C/1166/21 MEDIA MARKT SATURN/ACTIVOS WORTEN.

(232) On the other hand, there are several precedents in which competition authorities around the world have sub-segmented markets according to whether the marketing channel used is *online* or *offline*:

- The CNMC has differentiated between online and offline sales in several decisions, most notably in its decision C/1166/21 - *MEDIA MARKT SATURN/ACTIVOS WORTEN*; it also considered that the provision of taxi-hire services through an intermediary (whether through traditional - radio station - or telematic means) is not part of the same market as the direct hiring of taxis on the street in its decision C/0802/16 DAIMLER/HAILO/MYTAXI/NEGOCIO HAILO; and defined a narrow market for online insurance comparison in its decision C/1147/20 BAUER ACIERTO.
- The UK competition authority has found that online and offline sales markets constituted separate product markets in a number of decisions: (i) *Ladbrokes/Coral*; (ii) *Amazon/The Book Depository*; (iii) *Yoox/Net-a-Porter*, and (iv) *Mapil Bidco/Chain Reaction Cycles*.
- The Belgian competition authority considered in the *Boulanger Group* case¹⁷⁰ that the markets for online retailing of brown, white and grey goods¹⁷¹ constituted a separate market from offline sales.
- The Czech competition authority, in its *Rockaway/Netretail*¹⁷² decision, defined a separate market for the online sale of consumer products which it further sub-segmented according to product types (electronics - and within these into narrower categories such as mobile phones etc., clothes and shoes, toys etc.).

¹⁷⁰ Boulanger/HTM - Kréfel, decision ABC-2019-C/C-40, (2019).

¹⁷¹ In accordance with the precedents mentioned, the products that make up these categories are: brown goods (photographic, audio, TV and gaming products, DVD players, video cameras, etc.); grey goods (computing and communication devices - including computer hardware and software, communications, accessories/peripherals, personal computers, displays, keyboards, printers, software and telephones, etc.); and white goods (large household appliances - such as kitchen appliances, cooker hoods, dishwashers, etc., and small household appliances - such as deep fryers, mini ovens, toasters, sandwich and waffle makers, etc.).

¹⁷² Netretail Holding B.V./Rockaway Capital SE, Case S0223/2016/KS), (2016).

- The EC has differentiated a separate market for online sales on several occasions¹⁷³.

- (233) In this case, the practices under investigation concern the marketing of electronic products (i.e. APPLE branded products¹⁷⁴) on the AMAZON website in Spain (i.e. online channel¹⁷⁵), therefore the affected market is considered to be the market for online retailing of electronic products in Spain.
- (234) In APPLE's view, the CD was wrong to distinguish, within the distribution of consumer electronics products, between the online channel and the offline channel. APPLE considers that this is an arbitrary distinction that is not consistent with the practice of the European Commission in decisions such as M.6226 and M.7259 where the market test indicates that consumers consider online and offline sales to be substitutes. APPLE considers that also the CNMC decision in Case C/1290/22 would point out that online and offline channels for consumer electronics are in all likelihood part of the same relevant market.
- (235) AMAZON also points out that the Proposed Resolution ignores the fact that AMAZON operates in a highly competitive and fragmented sector, like retail distribution. In this respect, the SSNIP test analysis provided in its report would, in its view, determine that the market should cover both online and offline sales as they are substitutes rather than complements for end consumers and that this would be consistent with recent precedents of the French competition authority (FNAC/DARTY).
- (236) Both APPLE and AMAZON argue that the investigating authority allegedly failed to support its conclusion with evidence and that it misinterprets certain precedents or uses precedents that are not applicable due to different product markets. They add that there is no price difference between the two channels and that the competitive constraints exerted by the offline channel on the online channel are relevant. The defendants argue that this delineation is relevant for the purpose of considering the application of the Vertical Regulation because without distinguishing between channels AMAZON's market share would be less than 30%.
- (237) Moreover, the Proposed Resolution indicates that "*the conduct under investigation concerns a specific sub-segment of retail distribution: the online sale of electronic products*". AMAZON claims that the Proposed Resolution delimits too narrowly a national market for the provision of intermediation services in online marketplaces to sellers but nevertheless leaves open the specific market definition of a market for the sale of electronic products¹⁷⁶. In AMAZON's view, the PR contradicts itself in this respect by subsequently identifying a sub-segment of retail distribution. However, the parties do not contest that the conduct under investigation affects this particular segment of electronics retailing, i.e. online sales.

¹⁷³ See, for all, from June 2020, decision M.9894 - MOBILUX/CONFORAMA FRANCE, paragraph 13.

¹⁷⁴ iPod, Mac, APPLE TV, iPhones, iPads; APPLE Watches; APPLE Headphones (AirPods and Beats); and other accessories.

¹⁷⁵ www.amazon.es.

¹⁷⁶ Amazon's submissions to the PR, paras 381, 432, 434 et seq.

(238) With regard to the European precedents invoked by APPLE, certain clarifications should be made:

- On the one hand, the CD gathered contemporaneous evidence to support its analysis. It is reflected from the same (i) that e-commerce grew from €10,917 million in 2011 to €16,259 million in 2014, having reached €50,382 million in 2019 and (ii) that electronic products are one of the most widely sold categories online (paragraph 214 of the SOF). On the other hand, the data included in the Community precedents cited by APPLE are obsolete, as the EC decision in case M. 6226 dates from 2011 and that in case M. 7259 from 2014, and affect e-commerce, which is a sector that has grown exponentially in Spain in recent years both at the aggregate level and in the specific case of electronic products. Changes in consumer behaviour patterns and retailer behaviour in markets as changing as digital markets cannot be extrapolated from precedents in 2011 and 2014.
- On the other hand, the precedent C/1290/22 is not relevant, as it does not deal with electronic products but with pet food and does not address a possible distinction between online and offline channels because it chooses to analyse the narrow market for the retail of dietary food through the veterinary channel. This means, a single, highly specialised distribution channel was analysed, namely the veterinary distribution channel, which was the only one in which the parties were present.

(239) As regards the precedents cited by AMAZON, it is true that several recent decisions of the French competition authority have indicated in relation specifically to the French market that it is not appropriate to distinguish between the online and offline channel in view of the evolution of these markets.

(240) In any case, it should be noted that most precedents of other authorities leave the market definition open and that recent precedents (especially the Resolution of the Competition Division of the Council of the CNMC of 23 February 2021 in case C/1166/21, referring precisely to the Spanish market) leave open the possibility of distinguishing a distinct market for online products and services and analyse national markets.

- (241) As the market definition is not closed, its geographic scope is not defined either, although it is stated that the national market will be analysed, which is in turn consistent with the precedents cited, which have tended to analyse national markets while leaving the definition open.
- (242) **Given that APPLE's products are clearly electronic and that AMAZON only offers products online, it is clear that the analysis of the agreements at issue must focus on the sale of electronic products online in Spain.**
- (243) For the analysis of a case involving an alleged infringement by object relating to an agreement between APPLE and AMAZON on resellers authorised to sell APPLE-branded electronic products on the AMAZON website in Spain and on clauses concerning advertising and marketing in the same channel, it is not necessary to close the definition of this market or to reach a definitive conclusion as to whether or not this market should include offline sales alongside online sales.

3.5.1. The importance of e-commerce or online sales in Spain

- (244) The characteristics of this market, as well as the position of the parties on this market, will be described below.
- (245) The importance of e-commerce in Spain can be seen from the following data¹⁷⁷:
- In 2019, online sales exceeded 50 billion euros for the first time (the sector thus grew by 21.4% compared to the previous year and by 210% in the last 5 years)¹⁷⁸;
 - each shopper spends an average of €2,076 on online shopping, with the figure having doubled since 2015 (€1,016)¹⁷⁹;
 - the number of people shopping on the Internet is also growing, with a further 2.6 million Internet users now shopping online, reaching 24.3 million, an increase of 12.2% over the previous year¹⁸⁰;

¹⁷⁷ See report prepared by the Ministry of Economic Affairs and Digital Transformation on e-commerce in Spain in 2020 with data relating to 2019, "*B2C e-commerce in Spain in 2019*", which can be consulted here: <https://www.ontsi.es/es/node/15088>

¹⁷⁸ Page 7.

¹⁷⁹ *Ibid.*

¹⁸⁰ *Ibidem*

- the percentage of Internet buyers is 76.4% of all Internet users (4.4 percentage points higher than in 2018)¹⁸¹;
- around 17 million consumers shop on online marketplaces on a regular basis¹⁸²;
- 7 out of 10 internet users prefer to shop on multi-seller portals or online marketplaces¹⁸³;
- users choose to buy from online marketplaces because of the variety of products, better prices and the presence of reviews from other shoppers¹⁸⁴;
- the preferred alternative for 40% of online shoppers is to buy directly from manufacturers' or distributors' websites¹⁸⁵; and
- there is still room for growth (74.8% of those who had not shopped in 2019, but had shopped in the past, said they would shop again in the future; and among those Internet users who had never shopped online, 38.3% said they would probably or definitely do so in the future)¹⁸⁶

(246) The size and growth of the e-commerce market can be seen in the graph below:

¹⁸¹ *Ibidem*

¹⁸² Page 9.

¹⁸³ Page 28.

¹⁸⁴ *Ibid.*

¹⁸⁵ Page 9.

¹⁸⁶ Page 10.

Image 4. B2C e-commerce turnover in Spain

FIGURE 3.1. B2C E-COMMERCE TURNOVER IN SPAIN (EVOLUTION 2009-2019)(MILLION €)



Source: panel households, ONTSI (2008-2017), INE survey and online survey of e-commerce, ONTSI (2018-2019).

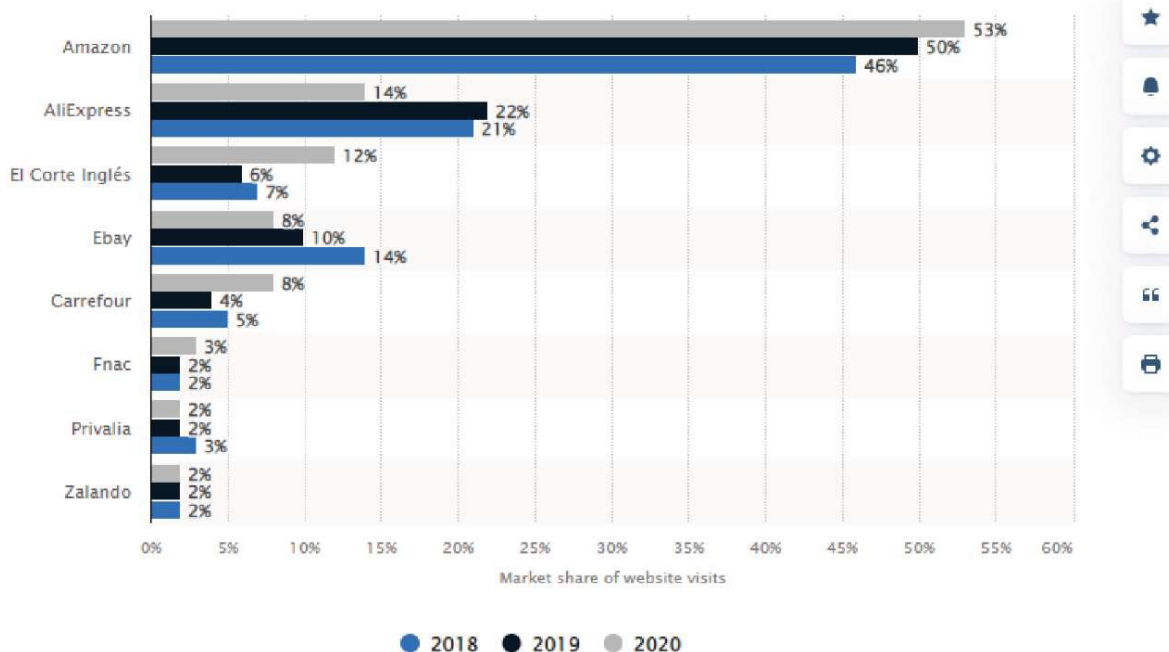
Source: Mineco report "B2C e-commerce in Spain in 2019".

- (247) This trend has continued as shown in the report "*Compras online en España. Edición 2021*" by ONTSI. According to the report, convenience (80.7%), followed by speed of purchase (49.7%), price (47.3%) and avoiding crowds (44.2%) are the main motivations for shopping online. Moreover, the growth trend continues in 2022, where the average online consumer ticket is expected to be €146.32, 25% higher than in 2021¹⁸⁷.

3.5.2. AMAZON's position in e-commerce in Spain

- (248) Having determined the importance of e-commerce in Spain, the market share by web traffic of the main online markets in Spain is shown below (for the years 2018 to 2020, so that their evolution can also be seen):

¹⁸⁷ <https://www.elmundofinanciero.com/noticia/104688/empresas/el-ecommerce-esguiva-la-recesion:-el-ticket-medio-del-consumidor-online-sera-de-146.32--en-2022-un-25-mas-que-en-2021.html>

Image 5. Market share by web traffic of the main online marketplaces in Spain (years 2018 to 2020)Source: Statista¹⁸⁸

© Statista 2022

- (249) As can be seen, from a static point of view, in 2020 (grey line), AMAZON was the main online marketplace by market share in web traffic in Spain (**[50-60]%**), followed by far by the second operator, AliExpress (**[10-20]%**), and the third, El Corte Inglés (**[10-20]%**), with the remaining operators having shares of less than 10%. Moreover, from a dynamic point of view, it can be seen how AMAZON's share has not stopped growing since 2018, while, for example, that of AliExpress has decreased over time.
- (250) On the other hand, based on the sales revenues of the main online marketplaces in Spain in 2019, the ranking would be as follows:

¹⁸⁸ <https://www.statista.com/statistics/1236881/online-marketplaces-market-share-by-websitesvisits-spain/>

Image 6. sales revenue of the main online marketplaces in Spain in 2019



Source: Statista¹⁸⁹

- (251) As can be seen, once again, AMAZON is the main operator in the Spanish e-commerce market in terms of sales revenue, followed far behind by AliExpress and the rest of the companies.
- (252) On the basis of the above, if one takes into account that the volume of e-commerce in Spain was EUR 50,382 million in 2019, and that AMAZON made sales of **[CONFIDENTIAL]** million euros in 2019, AMAZON's market share of the online retail market in Spain in 2019 was **[10-20]%** (far behind the second player, **[CONFIDENTIAL]** which had a share of **[0-10]%**)¹⁹⁰.

¹⁸⁹ <https://www.statista.com/statistics/895293/ranking-from-business-from-ecommerce-by-turnover-in-spain/>

¹⁹⁰ Other studies indicate that, in Spain, between 35% and 40% of online sales are made on Amazon (see the reference to the data from the Amazing agency, which can be found on this website: <https://www.reasonwhy.es/actualidad/inicio-busqueda-compras-online-amazon-google-marketplaces>).

- (253) According to Statista¹⁹¹ in 2022 AMAZON was the leading online marketplace in Spain: almost **[80-90]%** of online shoppers used AMAZON, compared to **[50-60]%** for ALIEXPRESS and **[40-50]%** for EL CORTE INGLÉS. Along the same lines, the report "Amazon Shopper Report 2022" by Remazing¹⁹² points out that AMAZON is the best known online marketplace in Spain (93% know about it compared to 82% who know about AliExpress and 64% who know about El Corte Inglés), 90% of Spaniards have shopped at AMAZON at some point.

3.5.3. Online sales of electronic products in Spain

- (254) Within e-commerce in Spain, one of the most widely sold product categories is electronic products.
- (255) Thus, in Spain, the following product categories are the most widely sold online¹⁹³:

¹⁹¹ <https://www.statista.com/statistics/1236867/leading-online-marketplaces-consumers-penetration-spain/>

¹⁹² <https://remazing.eu/es/2022/08/08/amazon-shopper-report-2022-conclusiones-clave/>. Report cited by ICEX.

¹⁹³ See report prepared by the Ministry of Economic Affairs and Digital Transformation on e-commerce in Spain in 2020 with data relating to 2019, "B2C e-commerce in Spain in 2019", which can be consulted here: <https://www.ontsi.es/es/node/15088>, page 31.

Image 7. Best-selling product categories online

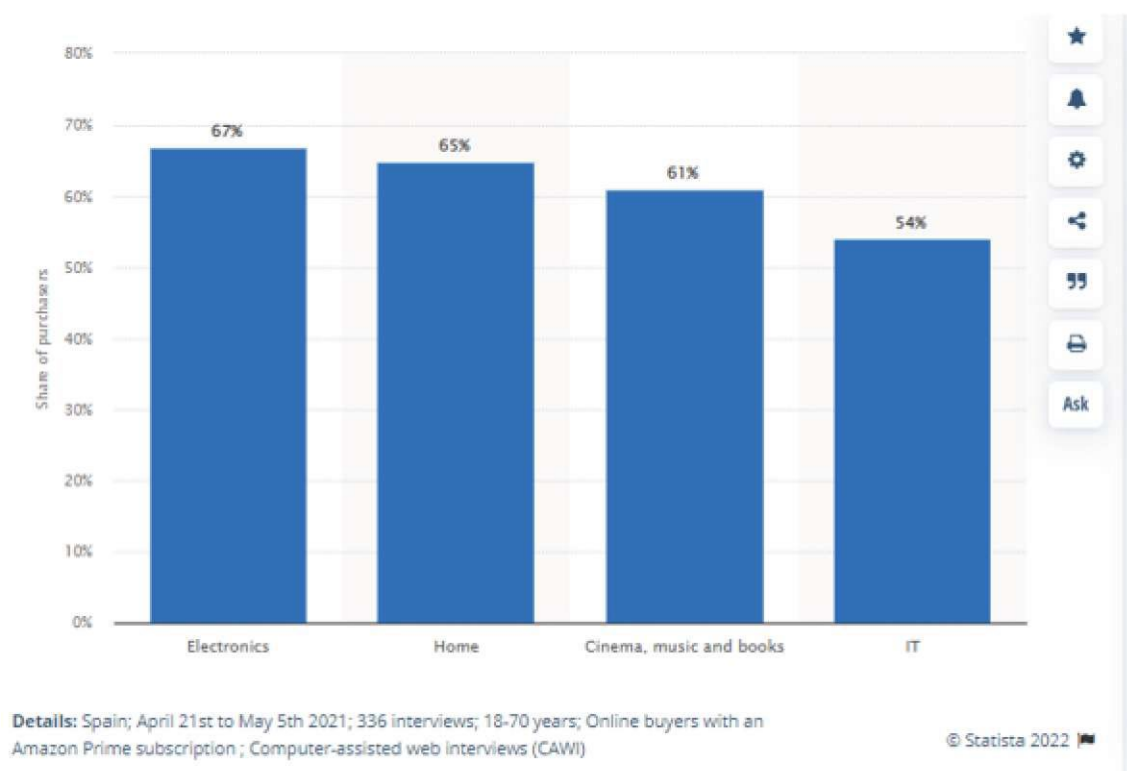
TABLE 4.9. GOODS AND SERVICES PURCHASED ONLINE (% AND ABSOLUTE NO. OF INTERNET USERS PURCHASING)

CATEGORY OF MOST PURCHASED GOODS AND SERVICES	PERCENTAGE OF PURCHASERS	NUMBER OF BUYERS
Clothing, footwear and accessories	59.2	14,364,099
Booking of accommodation and package tours	52.1	12,646,006
Tickets for shows and events (cinema, theatre, art, sports, fairs, etc.)	49.0	11,892,427
Transport tickets (plane, train, bus, boat, taxi, metro...)	45.3	10,995,418
Meals delivered from restaurants	38.5	9,332,617
Leisure, restaurants, personal services and experiences	33.6	8,152,996
Health and personal care (cosmetics, perfumery, pharmacy, parapharmacy, etc.)	32.4	7,873,037
Household appliances, furniture, home DIY and garden	30.5	7,393,735
Mobile phones, smartphones and related accessories	30.3	7,361,930
Sport and fitness (sportswear, accessories and other products)	24.6	5,967,177
Food, beverages and household cleaning products	23.7	5,753,218
Computers, tablets, accessories and other electronic products (sound, photo and video)	22.6	5,477,793
Toys and board games	22.2	5,389,242
Books, comics, magazines and newspapers in physical format	20.4	4,947,679

Source: Mineco report "B2C e-commerce in Spain in 2019"

- (256) Thus, it can be seen how electronic products are one of the best-selling product categories online (with 30% of buyers and with more than 7 million buyers in 2019).
- (257) The above can also be verified by looking at the most sold product categories among Amazon Prime¹⁹⁴ subscribers in Spain in 2021:

¹⁹⁴ AMAZON's subscription service whereby you pay a monthly fee to access additional services (such as video on demand) and additional benefits (such as no shipping costs or shorter delivery times). See here: <https://www.amazon.es/amazonprime>.

Image 8. Top-selling product categories among Amazon Prime subscribersSource: Statista¹⁹⁵

- (258) As can be seen, the most purchased category corresponds to electronic products, closely followed by household products, film products, music and books and, lastly, information technology products.

3.5.4. AMAZON's position in the market for online sales of electronic goods in Spain

- (259) Based on net sales, the ranking of the most important online shops in Spain in 2021 in the electronics segment is as follows¹⁹⁶:

¹⁹⁵ <https://www.statista.com/statistics/1237015/most-purchased-categories-amazon-prime-members-spain/>

¹⁹⁶ The chart only shows the top 5 operators in the market (however, the full list of operators taken into account can be found here: <https://ecommercedb.com/en/ranking/es/consumer-electronics>).

Image 9. ranking of the most important online shops in Spain in 2021 in the electronics segment

eCommerceDB Pricing Stores Markets Marketplaces Reports News

Top Online Stores: Electronics & Media in Spain

IN 2021 ⓘ

#	Online Store	Net Sales	Market Share
1.	amazon.es	> US\$2,500m	35% - 40%
2.	pccomponentes.com	> US\$500m	5% - 10%
3.	elcorteingles.es	> US\$500m	5% - 10%
4.	apple.com	> US\$300m	5% - 10%
5.	mediamarkt.es	> US\$300m	0% - 5%

[See all Stores](#) ⓘ

ⓘ Additional information: [Show sources](#)

Source: eCommerceDB

- (260) As can be seen, the main player in the market for online sales of electronic products in Spain in 2021 by net sales is AMAZON, with a share of 35-40%, followed far behind by the second player, PC Componentes, which would have a share of 5-10% (like the second and third players, El Corte Inglés and Apple). From the fifth operator onwards, Media Markt, the shares are all between 0-5%.
- (261) In this regard, the *"Amazon Shopper Report" 2022* cited by ICEX¹⁹⁷ indicates that **AMAZON is the place of reference when looking for electronics products (67% use AMAZON as their first search option). The report adds that "the category preferred by Spanish shoppers on AMAZON is undoubtedly electronics (53%)".** STATISTA¹⁹⁸ reports that in 2021 the most purchased product category on e-marketplaces was mobile devices and accessories ([50-60]% of respondents reported buying these products on e-marketplaces).

¹⁹⁷ <https://www.emarketsservices.es/emarketsservices/es/menu-principal/actualizate/noticias/amazon-shopper-report-new2022916695.html>

¹⁹⁸ <https://www.statista.com/statistics/777802/products-and-services-bought-in-a-marketplace-spain-by-category/>

- (262) The importance of online sales of consumer electronics is recognised by AMAZON itself, which states on its website that *"Electronics have rapidly become everyday items, and customers love looking online to find the latest deals in tech. Many electronic products are convenient to pack and ship, and are therefore well suited to online selling"*¹⁹⁹.

3.5.5. Conclusion

- (263) The previous sections have noted the growing importance of e-commerce or online sales in Spain and, within this, of the category of electronic products (being one of the main categories of products sold online), as well as the fact that **AMAZON is the main online marketplace in Spain, both in the online sales market in general and in the market for online sales of electronic products in particular.**
- (264) By way of summary and for ease of reference, the estimates of AMAZON's market share in Spain that have been compiled are included below:

Table 22. AMAZON's shares for the provision of intermediation services in online marketplaces to third-party sellers in Spain

Market for the provision of intermediation services in online marketplaces to third parties sellers					
AMAZON	Share 2017	Share 2018	Share 2019	Share 2020	Share 2021
Market shares - revenues from basic service provision	[90-100%]	[80-90%]	[80-90%]	[80-90%]	[70-80%]
Market shares - revenue from provision of all services (basic and optional)	[90-100%]	[90-100%]	[80-90%]	[80-90%]	[80-90%]
Market shares - value of sales generated by third parties	[80-90%]	[70-80%]	[70-80%]	[70-80%]	[60-70%]

Source: produced in-house with data from section 3.4 of the SOF

¹⁹⁹ <https://sell.amazon.com.au/blog/selling-electronics-and-electrical-products-online> (*"Electronics have rapidly become everyday items, and customers love looking online to find the latest deals in tech. Many electronic products are convenient to pack and ship, and are therefore well suited to online selling"*).

Table 23. AMAZON shares in Spain in online sales

AMAZON	
Market share of the overall online retail market (by web traffic, in 2020)	[50-60]%
Market share of the overall online retail market (by sales value, in 2019)	[10-20]%
Market share in the market for online sales of electronic products in particular (by net sales in 2021)	[30-40]%

Source: produced in-house based on the sources mentioned *above*

4. ESTABLISHED FACTS

4.1. The contracts between AMAZON and APPLE

- (265) AMAZON first joined APPLE's authorised reseller programme in April 2014 by entering into a standard contract, also known as the APPLE Authorised Reseller Agreement ('APPLE Authorised Reseller Agreement ' or '2014 ARA') ("**2014 ARA**")²⁰⁰.
- (266) In accordance with the provisions of the ARA 2014 (and its subsequent amendments): (i) **AMAZON did not have access to the full selection of APPLE products, but was only authorised to market a limited selection of the Apple [CONFIDENTIAL] branded product range; and (ii) that selection was not supplied directly to it by APPLE [CONFIDENTIAL]**²⁰¹.
- (267) According to AMAZON, prior to the signature of the agreements referred to below, there were at least **[1,150-1,250]** sellers of APPLE products in Spain²⁰².
- (268) In **2018**²⁰³, AMAZON and APPLE *entered* into **two** new contracts: (i) a *Global Tenets Agreement ("GTA")*²⁰⁴ **[CONFIDENTIAL]** and (ii) a new *APPLE Authorised Reseller Agreement ("2018 ARA")*²⁰⁵.

²⁰⁰ Response to AMAZON IR I, paragraph 11 (folio 4602).

²⁰¹ Response to AMAZON IR I, paragraph 11 (folio 4602) and paragraph 18 (folios 4603-4604).

²⁰² See Annex 17 of the AMAZON IR II Response (folios 5190 to 5204). It says **[CONFIDENTIAL]**.

²⁰³ Response to AMAZON IR I, paragraph 12 (folio 4602) and annexes cited therein.

²⁰⁴ Signed between Apple Inc, Amazon.com Services, Inc (now Amazon.com Services LLC), Apple Distribution International Ltd and Amazon EU SARL.

²⁰⁵ Signed between Apple Distribution International Ltd and Amazon EU SARL.

- (269) According to AMAZON, the 2018 contracts remedied the above limitations: (i) AMAZON gained access to the entire selection of APPLE products ([**CONFIDENTIAL**]); and (ii) AMAZON could source directly from APPLE²⁰⁶.
- (270) After the signing of the above contracts, only APPLE APRs were authorised to sell APPLE branded products on AMAZON (according to APPLE, until November 2021, there were [**10-15**] APRs in Spain²⁰⁷, a number that rises to [**65-70**] if the total number of APRs listed in Annex [**CONFIDENTIAL**] of the 2018 ARA is taken into account).
- (271) As will be explained in detail below, both the GTA and the 2018 ARA entered into force on 31 October 2018.

4.2. Parties involved

- (272) ADI and AINC, on behalf of APPLE, and ASI and AEU, on behalf of AMAZON, are the companies signing the GTA²⁰⁸; whereas, the 2018 ARA is signed between ADI and AEU²⁰⁹.
- (273) On the other hand, on the AMAZON side, although ASI and AEU are the group companies that sign the contracts (in the case of ASI, only the GTA, and, in the case of AEU, both contracts), on the one hand, ASE provides intermediary services in online marketplaces to third-party sellers²¹⁰; and, on the other hand, AEC is the entity responsible for operating the Amazon Store websites in the EU²¹¹.
- (274) Therefore, the legal entities signing, enforcing and implementing the contracts are, on the side of APPLE, ADI and AINC and, on the side of AMAZON, ASI, AEU, ASE, and AEC.
- (275) These legal entities have been involved in the conduct under investigation, which relates only to the AMAZON website in Spain, since the entry into force of the contracts (i.e. from 31 October 2018 until at least the closure of the pre-trial phase).

²⁰⁶ Response to AMAZON IR I, paragraph 12 (folio 4602).

²⁰⁷ See reply to APPLE IR I (page 4272).

²⁰⁸ See GTA signature sheet (folio 6109 or 6081).

²⁰⁹ See ARA signature sheet (folio 3995 and 3998; or 3684 and 3687).

²¹⁰ Response to the information request dated 26 May 2021 ("**AMAZON RI I**"), paragraph 6 (folio 4599).

²¹¹ Response to AMAZON IR I, paragraph 7 (folio 4600).

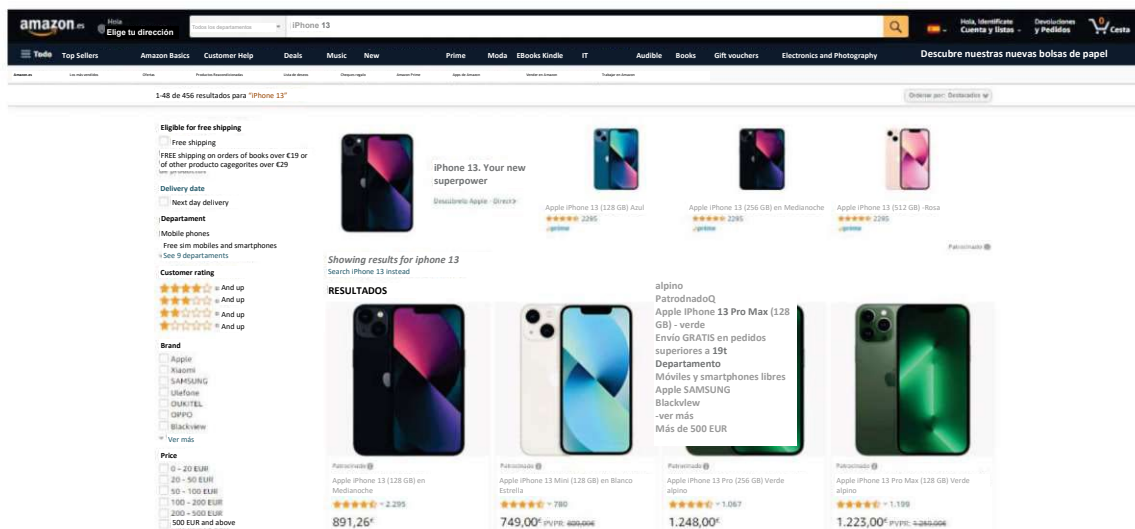
4.3. The different AMAZON pages

- (276) The AMAZON pages referred to by the GTA are explained below (and screenshots of them are included for ease of understanding): (i) the results pages; (ii) the detail pages; (iii) the *Cart and Check Out* pages; and (iv) the APPLE shop page on AMAZON.

4.3.1. The results pages

- (277) Result pages are the pages containing the information in response to a consumer's search:

Image 10. Screenshot of an AMAZON result page



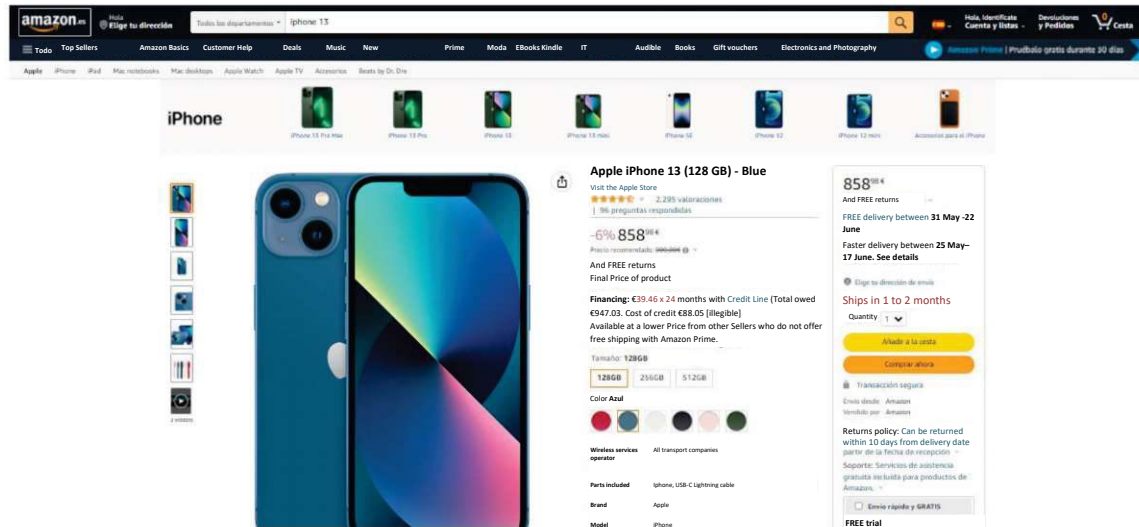
Source: www.amazon.es²¹²

4.3.2. The Product Detail Page (PDP)

- (278) Detail pages are the pages where the information on a particular product is collected (i.e. this would be the page that appears when you click on a product in the list of results on the result page; the following page would appear):

²¹² https://www.amazon.es/s?k=iphone+13&mk_es_ES=%C3%85M%C3%85%C5%BD%C3%95%C3%91&crd=34IKXEYRBAOYE&srefix=iphone+13%2Caps%2C93&ref=nb_sb_noss_2 (accessed 9 May 2020)

Image 11. Screenshot of an AMAZON detail page



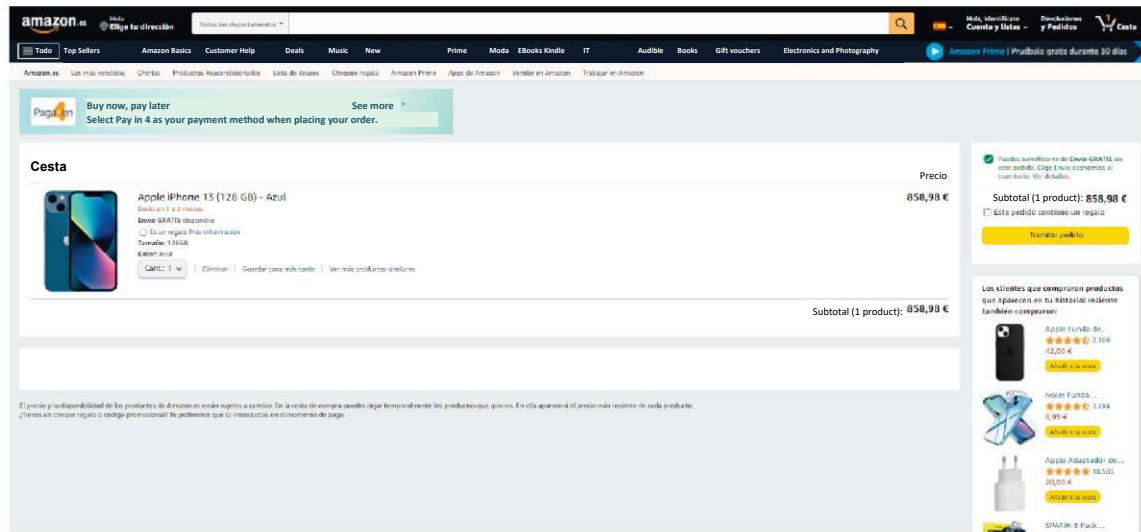
Source: [www.amazon.es](https://www.amazon.es/Apple-iPhone-13-128-GB-Azul/dp/B09G9DMQ7M/ref=sr_1_5?_mk_esES=%C3%85M%C3%85C5%BD%C3%95%C3%91&rid=34IKXEYRBAOYE&keywords=iphone+13&qid=1652086993&srefix=iphone+13%2Caps%2C93&sr=8-5)²¹³

4.3.3. The shopping cart and checkout pages

- (279) As the name suggests, the shopping cart page is the page on which the shopping cart with all the products selected by the consumer during their search is displayed. The order processing page is the next page, where the shipping address and payment method are entered, where an order summary and the payment button appear; after clicking on the latter, the order is placed and the amount is charged:

²¹³https://www.amazon.es/Apple-iPhone-13-128-GB-Azul/dp/B09G9DMQ7M/ref=sr_1_5?_mk_esES=%C3%85M%C3%85C5%BD%C3%95%C3%91&rid=34IKXEYRBAOYE&keywords=iphone+13&qid=1652086993&srefix=iphone+13%2Caps%2C93&sr=8-5 (Accessed 9 May 2020).

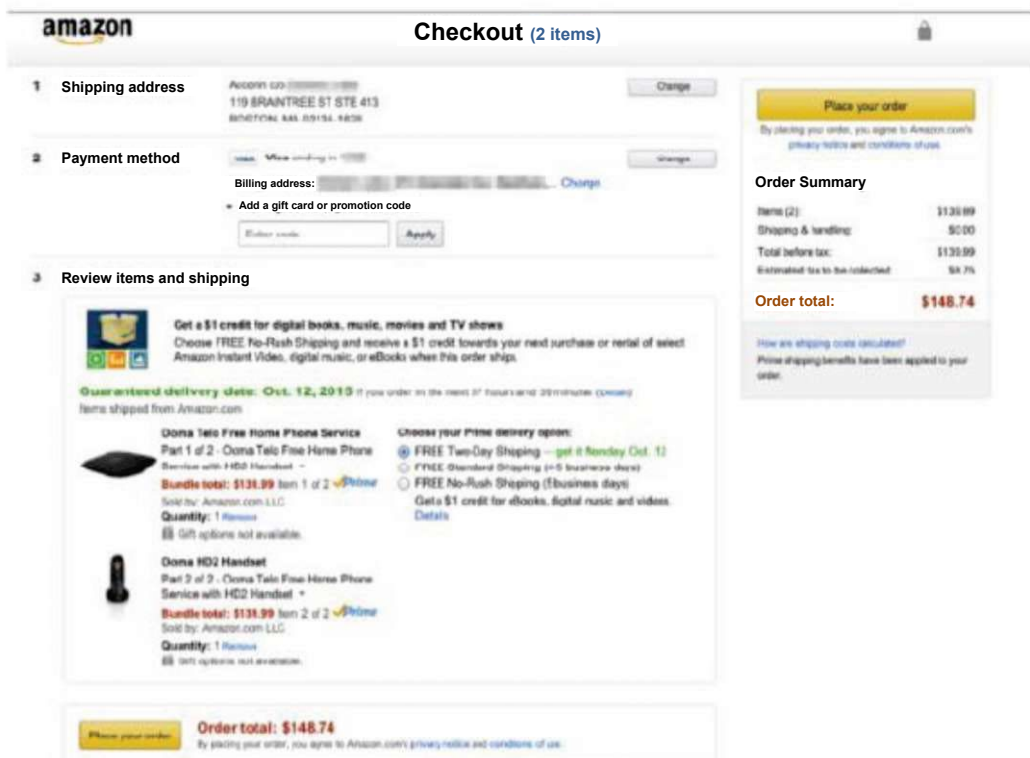
Image 12. Shopping cart screenshot on the AMAZON website



Source: [www.amazon.es](https://www.amazon.es/214)²¹⁴

²¹⁴ https://www.amazon.es/gp/cart/view.html/ref=dp_atrch_dss_cart? (accessed 9 May 2022).

Image 13. Screenshot of order processing page on the AMAZON website



amazon Checkout (2 items)

1 Shipping address Account ID: (000000-0000)
119 BRANTREE ST STE 413
BETHESDA MD 20814-4838 [Change](#)

2 Payment method [View more cards](#) [Change](#)
Billing address: [View more addresses](#) [Change](#)
Add a gift card or promotion code
 [Apply](#)

3 Review items and shipping

Get a \$1 credit for digital books, music, movies and TV shows
Choose FREE No-Rush Shipping and receive a \$1 credit towards your next purchase or rental of select Amazon Instant Video, digital music, or eBooks when this order ships.

Guaranteed delivery date: Oct. 12, 2013 If you order on the next 27 hours and 20 minutes (guaranteed)
Items shipped from Amazon.com

Dona Telo Free Home Phone Service
Part 1 of 2 : Dona Telo Free Home Phone Service with HD2 Handset
Bundle total: \$131.99 Item 1 of 2 [Prime](#)
Sold by Amazon.com LLC
Quantity: 1 [Remove](#)
Gift options not available.

Dona HD2 Handset
Part 2 of 2 : Dona Telo Free Home Phone Service with HD2 Handset
Bundle total: \$131.99 Item 2 of 2 [Prime](#)
Sold by Amazon.com LLC
Quantity: 1 [Remove](#)
Gift options not available.

Choose your Prime delivery option:
☒ **FREE Two-Day Shipping** — get it **Monday Oct. 11**
☐ **FREE Standard Shipping** (4-5 business days)
☐ **FREE No-Rush Shipping** (Business days)
Get a \$1 credit for eBooks, digital music and videos. [Details](#)

Order Summary
Items (2): \$131.99
Shipping & handling: \$0.00
Total before tax: \$131.99
Estimated tax to be collected: \$0.75
Order total: \$148.74

[How are shipping costs calculated?](#)
Prime shipping benefits have been applied to your order.

[Place your order](#) **Order total: \$148.74**
By placing your order, you agree to Amazon.com's [privacy notice](#) and [conditions of use](#).

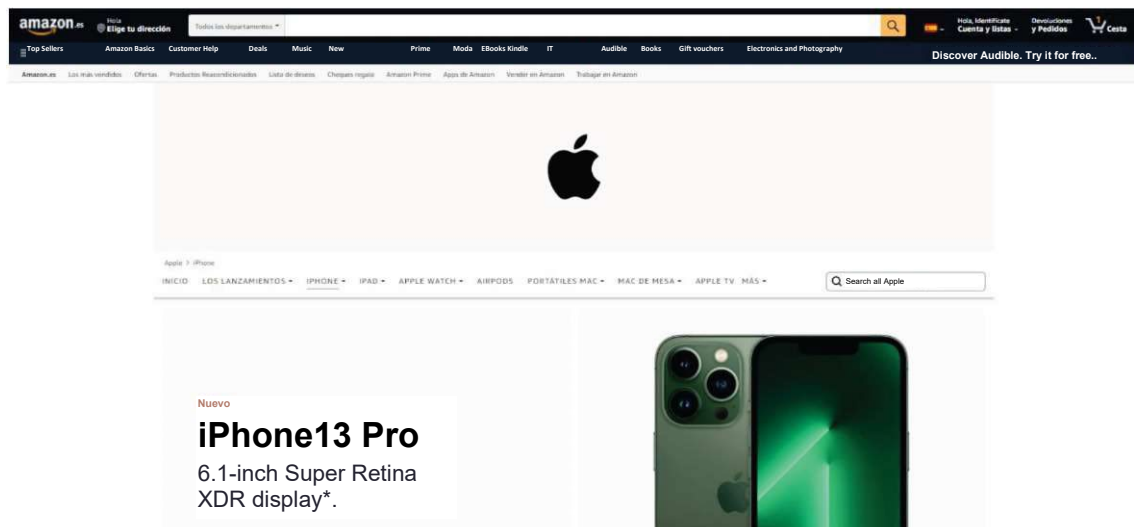
Source: AMAZON IR II Response, page 25

4.3.4. The APPLE Store page on AMAZON:

- (280) It is a specific and thematic page dedicated to APPLE (as if APPLE had a kind of "online shop" within AMAZON)²¹⁵:

²¹⁵ Just type "APPLE AMAZON shop" into Google and that's the first result that comes up.

Image 14. APPLE shop page screenshot on AMAZON website



Source: www.amazon.es²¹⁶

4.4. The clauses at issue in the GTA and the 2018 ARA

4.4.1. Exclusion clauses or Brand Gating

- (281) In the industry, brand gating means agreements with certain manufacturers to prevent, restrict, or in any other way limit on the Amazon website (in the case of Spain: <https://www.amazon.es/>): (i) the sale of such manufacturers' products by third-party companies (whether they are companies that purchase such products and resell them online, official distributors, unofficial distributors, etc.); and/or (ii) the number of third-party companies that may sell such manufacturers' products.
- (282) The GTA contains in clause **[CONFIDENTIAL]** a general stipulation which may be applied in each region (and which is the basis of the **[CONFIDENTIAL]** referred to below) stipulating that APPLE will identify a number of official sellers who will be the only ones authorised to use the AMAZON Websites (including, www.amazon.es):

²¹⁶ See the following link: https://www.amazon.es/stores/page/9A6BA2A6-4814-4271-9806-A4FBCD6D1702/?encoding=UTF8&store_ref=SB_A053541824VEQ0VMNA8HF&pd_rd_pl_hdr=t&aaxitk=02bfe29cece1937f4760403afae94588&hsa_cr_id=7347886420802&lp_asins=B00F4RASK6%2CB07L77QVKF&lp_query=store%20apple&lp_slot=auto-sparkle-hsa-tetris&ref=sbx_be_s_sparkle_ssd_page_0_img&pd_rd_w=FlgRi&pf_rd_p=1aa27132-d4d8-4f6a-aba7-0090113354f6&pd_rd_wg=OEkmY&pf_rd_r=D6TTA44P5ABAX9GJDBT6&pd_r_1=df0e889-1e78-4bac-b05f-97a2cbeb9f16 (9 May 2022).

[CONFIDENTIAL] ²¹⁷ (*own translation and emphasis added*).

- (283) For its part, Annex **[CONFIDENTIAL]** to the ARA contains the list of distributors identified by APPLE that are authorised to sell on AMAZON's websites (namely those in Spain, **[CONFIDENTIAL]**):

"[CONFIDENTIAL]" ²¹⁸ (*own translation and emphasis added*).

- (284) As will be explained below, this initial list only included APPLE APRs as sellers that could use the AMAZON Websites²¹⁹.
- (285) Although this list was amended on 27 February 2019²²⁰, only APRs were still authorised to sell APPLE products using the AMAZON Websites (a screenshot of the above-mentioned amended list, where the information relating to Spain has been highlighted in yellow, is included below):

²¹⁷ Clause 1(b) of the GTA: "**[CONFIDENTIAL]**" (folios 4902 and 4903).

²¹⁸ **[CONFIDENTIAL]** of the 2018 ARA: "**[CONFIDENTIAL]**" (folios 4019 and 4020).

²¹⁹ See answer to question 2 of APPLE IR I (folio 4253): "*Apple authorised [the] APRs (including all Spanish APRs) to sell Apple Products on Amazon*".

²²⁰ See Annex 10 of the Response to the AMAZON IR I (folio 4646 to 4649).

Image 15. List of resellers authorised to sell on AMAZON after the entry into force of the agreements
([CONFIDENTIAL])

Company Name	Country	Mac	iPhone	iPad	Watch	Beats Wired & Speaker	Beats Wireless	iPod	Apple TV	HomePod	Accessories

(287) In summary, on the AMAZON Website in Spain (and in all other European jurisdictions where there is a dedicated AMAZON website: UK, Italy, France, Germany, the Netherlands, Sweden, and Poland²²²), since the entry into force of the GTA and the 2018 ARA (i.e. on 31 October 2018)²²³ the following were not authorised to sell APPLE branded products until:

- **at least 16 November 2021**²²⁴, in the case of all official APPLE resellers minus the APRs listed in the **[CONFIDENTIAL]** of the 2018 ARA (i.e. APRs from other Member States than those listed in the aforementioned **[CONFIDENTIAL]**; and AARs and Retailers regardless of the EU Member State in which they were established); and

- **the closure of the pre-trial phase, in the case of all unofficial resellers (NARs) irrespective of the Member State of the European Union in which they are established.**

(288) For ease of reference, the combination of the **[CONFIDENTIAL]** clause of the GTA and the **[CONFIDENTIAL]** of the 2018 ARA will be referred to as the “**Exclusion or Brand Gating Clauses**”.

4.4.2. Advertising clauses

(289) The **[CONFIDENTIAL]** clause of the GTA establishes: (i) that when a search is conducted on AMAZON for an APPLE product, AMAZON will only display ads for APPLE products in the top ad space and in the first two sponsored product spaces on the results page (or in any other ad space that appears or is created in the first ten search results); (ii) that when a search is conducted on AMAZON for a list of APPLE-supplied keywords (related to APPLE products), AMAZON will not display ads on the first page of the search results or on AMAZON's detail pages of products of a number of competing brands identified by APPLE; and (iii) that on *Cart and Check Out* pages containing APPLE products, advertisers of products of competing brands identified by APPLE are not allowed to bid for space:

²²² Response to the information request dated 23 February 2022 (“**AMAZON IR IV**”) (folios 5919-5924).

²²³ See below for more information on this.

²²⁴ This is the date of the communication to the CD of APPLE's policy change. While the release to all other APPLE authorised resellers may have taken place at a later date, in order to take the most conservative approach, the date of the communication will be considered to be the date on which the change became effective.

[CONFIDENTIAL]²²⁵ (*own translation and emphasis added*).

- (290) A number of examples of the three points listed in the first paragraph under this heading were included as Annex 1 of the SOF and are attached as **Annex 1** to this resolution.
- (291) For its part, the **[CONFIDENTIAL]** clause establishes that, during the launch of a new APPLE product²²⁶, AMAZON will not run advertisements for products from a number of competing brands identified by APPLE - those mentioned in the **[CONFIDENTIAL]** clause above - (i) on APPLE's product detail pages; (ii) on the Apple Store pages on the AMAZON Website; and/or (iii) in the search results shown to customers when they search for APPLE products using keywords relating to APPLE branded products as a search term - those referred to in clause 3.1.(a) above:

[CONFIDENTIAL]²²⁷ (*own translation and emphasis added*).

- (292) In relation to the above, a screenshot of part of the list of keywords relating to APPLE products provided by APPLE to AMAZON is included below (**[10-15]** words are included in the example, but the list has **[105-110]** in total in its original version and **[145-150]** in an addendum to it that was made at a later stage)²²⁸:

²²⁵ **[CONFIDENTIAL]** clause of the GTA: **[CONFIDENTIAL]** (folio 4907).

²²⁶ **[CONFIDENTIAL]**.

²²⁷ **[CONFIDENTIAL]** clause GTA: **[CONFIDENTIAL]** (folio 4908).

²²⁸ Only **[105-110]** keywords are included in the original version of the GTA (see Response to AMAZON IR I, Annex 8 (folios 4918-4922)). However, AMAZON provided a more current version of this list, which already included the **[145-150]** terms mentioned as Annex 21 to the reply to the AMAZON IR I (see confidential folios 625-627).

Image 16. screenshot of part of the list of keywords related to APPLE products

Global Tenets Agreement
Schedule 1 - Brand Queries

Apple Brand Search Keywords on Amazon

1. apple airpods
2. apple computer
3. apple ear buds
4. apple earphones
5. apple earpods
6. apple headphones
7. apple imac
8. apple imac pro
9. apple ipad
10. apple ipad mini
11. apple ipad pro
12. apple iphone
13. apple iphone 10
14. apple iphone 6
15. apple iphone 6 plus

Expediente: S/0013/21 ID: 58HOKJ - Folio 4918. Cop.

Source: Response to the AMAZON IR I (folio 519)

- (293) On the other hand, an example of part of the list of competing brands identified by APPLE²²⁹ whose products, according to the stipulations, AMAZON cannot display when searching for certain keywords relating to APPLE products (i.e. the list given as an example above) is also included below [in the first column are the keywords relating to Apple products, and, in the second column are up to 10 competing brands that could not appear in the results - "Brand 1 to 10"]:

²²⁹ Annex 22 to the Response to AMAZON IR I (folios 629-632 in its confidential version except for AMAZON and APPLE, and folios 4928-4929, in its non-confidential version). The table reproduces the confidential version of this reply. In the non-confidential version, the brands in question are anonymised and replaced by "Brand no." and "Competitor no." respectively.

Image 17. List of competing brands identified by APPLE

Apple List	Brand 1	Brand 2	Brand 3	Brand 4	Brand 5	Brand 6	Brand 7	Brand 8	Brand 9	Brand 10
homepod**	[Competitor 1]	[Competitor 2]	[Competitor 3]	[Competitor 4]	[Competitor 5]	[Competitor 6]	[Competitor 7]	[Competitor 8]		
apple iphone	[Competitor 5]	[Competitor 9]	[Competitor 10]	[Competitor 11]	[Competitor 7]	[Competitor 12]	[Competitor 13]	[Competitor 2]	[Competitor 14]	[Competitor 15]
apple iphone 10	[Competitor 5]	[Competitor 9]	[Competitor 10]	[Competitor 11]	[Competitor 7]	[Competitor 12]	[Competitor 13]	[Competitor 2]	[Competitor 14]	[Competitor 15]
apple iphone 6	[Competitor 5]	[Competitor 9]	[Competitor 10]	[Competitor 11]	[Competitor 7]	[Competitor 12]	[Competitor 13]	[Competitor 2]	[Competitor 14]	[Competitor 15]
apple iphone 6 plus	[Competitor 5]	[Competitor 9]	[Competitor 10]	[Competitor 11]	[Competitor 7]	[Competitor 12]	[Competitor 13]	[Competitor 2]	[Competitor 14]	[Competitor 15]
apple iphone 6s	[Competitor 5]	[Competitor 9]	[Competitor 10]	[Competitor 11]	[Competitor 7]	[Competitor 12]	[Competitor 13]	[Competitor 2]	[Competitor 14]	[Competitor 15]
apple iphone 6s plus	[Competitor 5]	[Competitor 9]	[Competitor 10]	[Competitor 11]	[Competitor 7]	[Competitor 12]	[Competitor 13]	[Competitor 2]	[Competitor 14]	[Competitor 15]
apple iphone 7	[Competitor 5]	[Competitor 9]	[Competitor 10]	[Competitor 11]	[Competitor 7]	[Competitor 12]	[Competitor 13]	[Competitor 2]	[Competitor 14]	[Competitor 15]
apple iphone 7 plus	[Competitor 5]	[Competitor 9]	[Competitor 10]	[Competitor 11]	[Competitor 7]	[Competitor 12]	[Competitor 13]	[Competitor 2]	[Competitor 14]	[Competitor 15]
apple iphone 8	[Competitor 5]	[Competitor 9]	[Competitor 10]	[Competitor 11]	[Competitor 7]	[Competitor 12]	[Competitor 13]	[Competitor 2]	[Competitor 14]	[Competitor 15]
apple iphone 8 plus	[Competitor 5]	[Competitor 9]	[Competitor 10]	[Competitor 11]	[Competitor 7]	[Competitor 12]	[Competitor 13]	[Competitor 2]	[Competitor 14]	[Competitor 15]
apple iphone se	[Competitor 5]	[Competitor 9]	[Competitor 10]	[Competitor 11]	[Competitor 7]	[Competitor 12]	[Competitor 13]	[Competitor 2]	[Competitor 14]	[Competitor 15]
apple iphone ten	[Competitor 5]	[Competitor 9]	[Competitor 10]	[Competitor 11]	[Competitor 7]	[Competitor 12]	[Competitor 13]	[Competitor 2]	[Competitor 14]	[Competitor 15]
apple iphone x	[Competitor 5]	[Competitor 9]	[Competitor 10]	[Competitor 11]	[Competitor 7]	[Competitor 12]	[Competitor 13]	[Competitor 2]	[Competitor 14]	[Competitor 15]
apple iphone xr	[Competitor 5]	[Competitor 9]	[Competitor 10]	[Competitor 11]	[Competitor 7]	[Competitor 12]	[Competitor 13]	[Competitor 2]	[Competitor 14]	[Competitor 15]
apple iphone xs	[Competitor 5]	[Competitor 9]	[Competitor 10]	[Competitor 11]	[Competitor 7]	[Competitor 12]	[Competitor 13]	[Competitor 2]	[Competitor 14]	[Competitor 15]
apple iphone xs max	[Competitor 5]	[Competitor 9]	[Competitor 10]	[Competitor 11]	[Competitor 7]	[Competitor 12]	[Competitor 13]	[Competitor 2]	[Competitor 14]	[Competitor 15]
apple phone	[Competitor 5]	[Competitor 9]	[Competitor 10]	[Competitor 11]	[Competitor 7]	[Competitor 12]	[Competitor 13]	[Competitor 2]	[Competitor 14]	[Competitor 15]
iphone	[Competitor 5]	[Competitor 9]	[Competitor 10]	[Competitor 11]	[Competitor 7]	[Competitor 12]	[Competitor 13]	[Competitor 2]	[Competitor 14]	[Competitor 15]
iphone 10	[Competitor 5]	[Competitor 9]	[Competitor 10]	[Competitor 11]	[Competitor 7]	[Competitor 12]	[Competitor 13]	[Competitor 2]	[Competitor 14]	[Competitor 15]
iphone 6	[Competitor 5]	[Competitor 9]	[Competitor 10]	[Competitor 11]	[Competitor 7]	[Competitor 12]	[Competitor 13]	[Competitor 2]	[Competitor 14]	[Competitor 15]
iphone 6 plus	[Competitor 5]	[Competitor 9]	[Competitor 10]	[Competitor 11]	[Competitor 7]	[Competitor 12]	[Competitor 13]	[Competitor 2]	[Competitor 14]	[Competitor 15]

Source: Response to AMAZON IR I (folio 4928)

- (294) AMAZON²³⁰ offers a variety of advertising services including, among others, “Sponsored Products” and “Sponsored Brands” spaces. These advertising spaces on the AMAZON Websites are available for purchase by advertisers (resellers, brands, etc.) for the promotion of products that are sold within the AMAZON Websites, in order to reach customers as they browse and search for products. “Sponsored products” spaces promote products and “sponsored brands” spaces promote brands. Both can appear on the shopping query results page and product detail pages and are distinct and distinguishable from the shopping query results themselves, in that they are clearly labelled as “Sponsored” and are easily identifiable as advertisements by customers.
- (295) On the other hand, according to AMAZON, the percentage of consumers who only visit the first page of results is 20-30% in general and 20-30% in Spain. The percentage of those others who visit the second and subsequent pages is 70-80% in general and 70-80% in Spain²³¹. In terms of the percentage of sales made on the first page of results, this is 90-100% in general and 90-100% in Spain. The percentage of sales from the second and subsequent pages is 0-10% in general and 0-10% in Spain²³².

²³⁰ See Response to AMAZON IR I, paragraph 62-64 (folios 4618-4619).

²³¹ See AMAZON Response to IR II, paragraph 81 (folio 4694).

²³² See AMAZON Response to IR II, paragraph 82 (folio 4694)

- (296) For ease of reference, the **[CONFIDENTIAL]** clauses together with the list of APPLE's product keywords and the list of APPLE's competing brands will be referred to as the **"Advertising Clauses"**.

4.4.3. Marketing limitations clause

- (297) Clause 3.3 of the GTA establishes that during the term of the GTA and for two years thereafter, AMAZON may not, without APPLE's prior written consent, conduct marketing and advertising campaigns that: (i) specifically target customers who have purchased APPLE products from AMAZON; and (ii) encourage such consumers to switch from an APPLE product to a non-APPLE product; notwithstanding that AMAZON may run campaigns that may reach such consumers within broader audiences:

[CONFIDENTIAL]²³³.

- (298) For ease of reference, the **[CONFIDENTIAL]** clause of the GTA will be referred to as the **"Marketing Limitations Clauses"**.

4.5. The genesis of the GTA and the 2018 ARA

4.5.1. The problems identified

- (299) AMAZON indicates that prior to the signing of the GTA and the 2018 ARA, the following problems occurred in relation to the marketing of APPLE branded products on the AMAZON Website:
- Lack of supply of APPLE products in adequate quantities to meet consumer demand: either by AMAZON (for two reasons: it could not be supplied directly from APPLE; and it could only market **[CONFIDENTIAL]**), or by third-party sellers, who were also unable to offer a complete and sufficient supply of the most attractive product selection²³⁴;

²³³ **[CONFIDENTIAL]** clause of the GTA: **[CONFIDENTIAL]** (folio 4909).

²³⁴ See Response to AMAZON IR I, paragraphs 18 and 23 (folios 4603-4604, and 4606): **[CONFIDENTIAL]**.

- Poor presentation of APPLE products: third-party vendors were not able to provide an attractive sales environment with complete and accurate information about APPLE products (third-party vendors' product offerings frequently resulted in poor product presentation; e.g., these offerings often lacked information on the different product versions or used different title structures leading to confusion, without showing product variants under the same product description page)²³⁵; and
- Sale of counterfeit or imitation goods: According to AMAZON, APPLE justified its request [to limit the number of sellers] on the basis that many APPLE-branded products offered by third-party sellers on AMAZON's website were counterfeit²³⁶.

(300) Moreover, APPLE indicates that one of the main objectives of the GTA and the 2018 ARA was to address the large number of misleading, counterfeit or dangerous products present on the AMAZON website²³⁷ (APPLE submitted more than **[CONFIDENTIAL]** product withdrawal notices to Amazon prior to the GTA)²³⁸. Another problem identified by APPLE was the poor presentation of products on the AMAZON website²³⁹.

4.5.2. Negotiations between AMAZON and APPLE

- (301) According to AMAZON, "given the particularities of the successful Apple brand and its strict distribution system, the Apple Contract **[CONFIDENTIAL]**"²⁴⁰.
- (302) At least from **[CONFIDENTIAL]**, meetings took place between representatives of both companies and, although in the **[CONFIDENTIAL]**, it is evident that it was already part of the discussions between the companies. This is what emerges from the **[CONFIDENTIAL]** mail. It expressly states the following: "**[CONFIDENTIAL]**"²⁴¹. Also AMAZON's internal mail of 4 October 2017 refers to "*gating*" and that **[CONFIDENTIAL]**²⁴².

²³⁵ See Response to AMAZON IR I, paragraph 18 (folios 4603-4604).

²³⁶ See Response to AMAZON IR I, paragraph 19 (folio 4604): **[CONFIDENTIAL]**.

²³⁷ See reply to APPLE IR I, answer to question 2 (folio 4253).

²³⁸ See reply to APPLE IR I, answer to question 7 (folio 4260).

²³⁹ See reply to APPLE IR I, answer to question 3 (folio 4254-4259).

²⁴⁰ See Response to AMAZON IR I, paragraph 17 (folio 4603).

²⁴¹ See documents provided by the Italian competition authority: "**[CONFIDENTIAL]**" (folios 4719 and 4720).

²⁴² See documents provided by the Italian competition authority (folio 4720).

(303) In a [CONFIDENTIAL], there is an annexed [CONFIDENTIAL]^{243 244}.

Table 24. Contents of the document dated [CONFIDENTIAL]

Element to be discussed	APPLE Petition	AMAZON Considerations
[CONFIDENTIAL] ²⁴⁵	[CONFIDENTIAL]. ²⁴⁶	[CONFIDENTIAL]. ²⁴⁷
[CONFIDENTIAL] ²⁴⁸	[CONFIDENTIAL] ²⁴⁹ .	[CONFIDENTIAL]. ²⁵⁰
[CONFIDENTIAL] ²⁵¹	[CONFIDENTIAL] ²⁵²	[CONFIDENTIAL] ²⁵³ .

²⁴³ See documents provided by the Italian competition authority. In particular, it is a document collected by the authority during inspections at AMAZON's headquarters. This is a [CONFIDENTIAL].

²⁴⁴ All quotations in the table refer to the internal AMAZON document mentioned in the footnote above which states [CONFIDENTIAL]. These are verbatim quotations (own translation) but have been ordered differently from the way they appear in the document in order to extract only the information relevant to the research and make them easier to read.

²⁴⁵ See documents provided by the Italian competition authority (folio 4736): [CONFIDENTIAL].

²⁴⁶ See documents provided by the Italian competition authority (folio 4736): [CONFIDENTIAL].

²⁴⁷ See documents provided by the Italian competition authority (folio 4736): [CONFIDENTIAL].

²⁴⁸ See documents provided by the Italian competition authority (folio 4736): [CONFIDENTIAL].

²⁴⁹ See documents provided by the Italian competition authority (folio 4736): [CONFIDENTIAL].

²⁵⁰ See documents provided by the Italian competition authority (folio 4737): [CONFIDENTIAL].

²⁵¹ See documents provided by the Italian competition authority (folio 4737): [CONFIDENTIAL].

²⁵² See documents provided by the Italian competition authority (folio 4737): [CONFIDENTIAL].

²⁵³ See documents provided by the Italian competition authority (folio 4737): [CONFIDENTIAL].

[CONFIDENTIAL] ²⁵⁴	[CONFIDENTIAL] ²⁵⁵	[CONFIDENTIAL] ²⁵⁶
[CONFIDENTIAL] ²⁵⁷	[CONFIDENTIAL] ²⁵⁸	[CONFIDENTIAL] ²⁵⁹

Source: Documentation provided by the Italian competition authority

- (304) At the beginning of [CONFIDENTIAL], in several internal e-mails from APPLE emails mention is made of: [CONFIDENTIAL]²⁶⁰.
- (305) According to AMAZON, in response to APPLE's position to admit only APRs to AMAZON, AMAZON attempted to negotiate [CONFIDENTIAL]. In the end, AMAZON indicates that APPLE would only allow a subset of the authorised resellers, selected by APPLE, to continue to sell APPLE products on the AMAZON Website²⁶¹ [the APRs]. Thus, according to AMAZON this was a "*conditio sine qua non*" imposed by APPLE in order to grant AMAZON a full supply of all APPLE products.

²⁵⁴ See documents provided by the Italian competition authority (folio 4738): [CONFIDENTIAL].

²⁵⁵ See documents provided by the Italian competition authority (folio 4738): [CONFIDENTIAL].

²⁵⁶ See documents provided by the Italian competition authority (folio 4738): [CONFIDENTIAL].

²⁵⁷ See documents provided by the Italian competition authority (folio 4739): [CONFIDENTIAL].

²⁵⁸ See documents provided by the Italian competition authority (folio 4739): [CONFIDENTIAL].

²⁵⁹ See documents provided by the Italian competition authority (folio 4740): [CONFIDENTIAL].

²⁶⁰ Documents provided by the Italian competition authority: [CONFIDENTIAL].

²⁶¹ See AMAZON's Response to IR I, paragraph 19 (folio 4604)

- (306) This is also acknowledged by APPLE which argues that **[CONFIDENTIAL]**²⁶².
- (307) Also in **[CONFIDENTIAL]**, a series of internal AMAZON emails reflecting the status of negotiations between APPLE and AMAZON in preparation for a meeting between those companies state that APPLE requests '**[CONFIDENTIAL]**'²⁶³.
- (308) Finally, in **[CONFIDENTIAL]**, in the context of the pandemic, the temporary activation of a larger number of resellers who could make use of the AMAZON Websites (and not only APRs as was the case so far) is discussed with APPLE. In this context, in an internal email one of AMAZON's employees states **[CONFIDENTIAL]**"²⁶⁴ (emphasis added).

4.5.3. Internal analysis of contracts by AMAZON

- (309) According to AMAZON, the negotiation of the GTA was subject to **[CONFIDENTIAL]**²⁶⁵, which are summarised in the internal analysis that was used as the basis for AMAZON's decision to conclude the GTA and the 2018 ARA²⁶⁶.
- (310) This internal analysis **[CONFIDENTIAL]** begins with a comparison of the economic impact of signing the aforementioned contracts with a scenario in which they are not signed, analysing the impact on AMAZON (in its role as a reseller), on third-party sellers, and the consolidated impact. In addition, the analysis covers AMAZON's websites in Germany, the UK, France, Italy, and Spain²⁶⁷. The internal analysis is reproduced below, followed by a translation.

²⁶² See Response to APPLE IR I, paragraph 44 (folio 4381).

²⁶³ See documentation provided by the Italian competition authority. This is an internal AMAZON mail collected during inspections of AMAZON. The phrase is a in-house translation of: **[CONFIDENTIAL]** (folio 4762).

²⁶⁴ See documentation provided by the Italian competition authority. This is an internal AMAZON email in which different email addresses are copied as, inter alia, "**[CONFIDENTIAL]**" (folio 4825).

²⁶⁵ When AMAZON was asked about the objectives of the GTA and 2018 ARA and any evaluation that had been carried out subsequent to the implementation of these agreements on how and to what extent they have contributed to achieving the objectives pursued, only the document described below in this section was provided.

²⁶⁶ See Response to AMAZON IR I, paragraph 27 (folio 4609).

²⁶⁷ See AMAZON's Reply to IR II, paragraph 33 (folio 4681).

Image 18. Anticipated sales by AMAZON as a distributor of APPLE in scenarios with and without agreement (in hundreds of thousands of euros)



Source: AMAZON²⁶⁸

Table 25. Translation of image 18 above



Source: in-house translation of the table above

- (311) The first column of the table ("Retail") refers to AMAZON (and this is indicated in the in-house translation of the table), the second column ("3P") to third-party sellers and the last column to the sum of the two previous columns ("Consolidated"). The columns "2020 (no Deal)" and "2020 (with Deal)" refer to the two scenarios under study, i.e. without and with a deal (i.e. with the signing of the contract), respectively. The row "GMS", on the other hand, refers to the term "*Gross Merchandise Sales*", which refers to the sales of products in value terms²⁶⁹.

²⁶⁸ Annex 12 of the response to the AMAZON IR (folio 4658).

²⁶⁹ See footnote 18 of the Response to AMAZON IR II [CONFIDENTIAL] (folio 4676).

- (312) According to the above graph: (i) in a scenario without agreement (i.e. without signing the contract), AMAZON was expected to have sales of zero euros in 2020, while third-party sellers would have sales of between EUR 600 and 700 million; in contrast, (ii) in a scenario with agreement (i.e. signing the contract), AMAZON's sales were expected to be between EUR **[500 million-1 billion]** and those of third parties between EUR **[0-500]** million.
- (313) The same report indicates that APRs and AARs tend to charge higher prices than NARs, so it is suggested to scrutinise resellers who do not sell on AMAZON's websites to avoid price erosion with these²⁷⁰.
- (314) On the other hand, the analysis examines whether AMAZON could become a Tier 1 distributor of APPLE (a classification that would give it better purchasing conditions), for which it is indicated that one of the following two conditions would have to be met: (i) reaching revenues of between EUR 600 and 700 million; or, alternatively (ii) 10-20% of total revenues coming from the sale of APPLE products. AMAZON considers that the second condition is more difficult to fulfil than the first, and therefore focuses on the first condition and considers that AMAZON will be able to achieve revenues of between EUR 600 and 700 million due, among other reasons: "[...] *to the size of the current third-party vendor market (between **[200 - 600]** million euros, of which 90-100% comes from non-Apple authorised resellers)* [i.e. the NARs]"²⁷¹.
- (315) It is also indicated that AMAZON requested **[CONFIDENTIAL]** to increase the number of authorised resellers that could sell on AMAZON, but that APPLE **[CONFIDENTIAL]**²⁷².

4.5.4. Internal analysis of contracts by APPLE

- (316) APPLE, in an internal presentation discussing the GTA and the 2018 ARA, noted that the principles guiding the contracts were as follows: (i) ensuring that customers purchase authentic APPLE products; (ii) owning product presentation and *merchandising*; (iii) eliminating active switching (e.g., paid advertising of competing products) from the process of purchasing an APPLE product; and (iv) leveraging AMAZON's capabilities to create a bespoke APPLE experience; and (v) avoiding the inclusion of any other AMAZON interest in this agreement²⁷³.

²⁷⁰ See question and answer 7.(iv) of the Response to AMAZON IR II (folio 4682) and Annex 12 of the Response to AMAZON IR I (folio 4658): **[CONFIDENTIAL]**.

²⁷¹ Annex 12 to the AMAZON IR response (folios 4659 and 4660).

²⁷² Annex 12 of the response to the AMAZON IR (folio 4661): **[CONFIDENTIAL]**.

²⁷³ See Annex 2 of the Response to the APPLE IR I **[CONFIDENTIAL]** (folio 4353).

(317) In particular, in relation to the GTA,²⁷⁴ is established:

[CONFIDENTIAL]

[...]

Advertising: clause to avoid approaching customers encouraging them to switch to a non-APPLE product".

(318) It is also noted²⁷⁵ that there would be a shift from 'hundreds of unauthorised resellers' to 'Amazon as the first seller together with a few authorised resellers'.

(319) The report then contains a series of pictures showing the then current situation on the AMAZON website and the situation after the signing of the contract²⁷⁶:

²⁷⁴ See Annex 2 of the response to APPLE IR I: **[CONFIDENTIAL]** "

• *Marketing advertising: Anti-targeting switcher clause [...]*. (page 4355).

²⁷⁵ See Annex 2 of the response to APPLE IR I: *"Hundreds of unauthorized resellers"; "Amazon as 1P along with a few authorized-only resellers [...]"* (page 4356).

²⁷⁶ See Annex 2 of the response to APPLE IR I (folios 4358 to 4362).

Image 19. Comparisons of APPLE product introductions between the situation before the agreements were signed and the situation after their implementation

1. Premium Experience: Gating

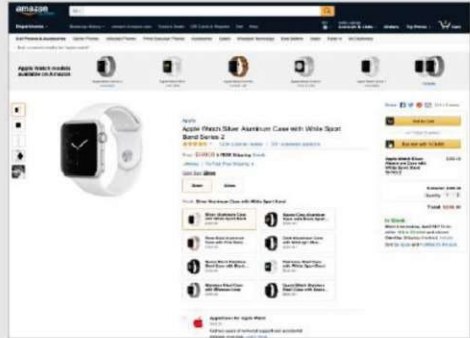
FROM



Current

- Over 1200 unauthorized resellers present and sell Apple products YTD
- Many counterfeits, knock offs

TO



Clean

- Gating unauthorized resellers
- Apple agrees 2 Apple authorized resellers per major LOB, specifically authorized by Apple to sell on Amazon

Privileged — Attorney-Client Communication Apple Confidential — Internal Use Only

2. Product Quality: Counterfeits and Knock offs

Authentic Apple product	Counterfeit	Knock off	Third party product
			
✓ Clean	✗ Proposed terms obligate Amazon to remove within 7 days	✗ Proposed terms obligate Amazon to remove within 7 days	✓ Clean (third party product)

Privileged — Attorney-Client Communication Apple Confidential — Internal Use Only

3. Digital Guidelines: Search Results

FROM

Current

- Paid ads: Top banners, sponsored search results, and additional display ads may contain competing products

TO

Clean

- Apple ownership of top banner and first page sponsored results at all times

Branded — Attorney-Client Confidential Apple Confidential — Internal Use Only

3. Digital Guidelines: Product Detail Page (PDP)

FROM

Current

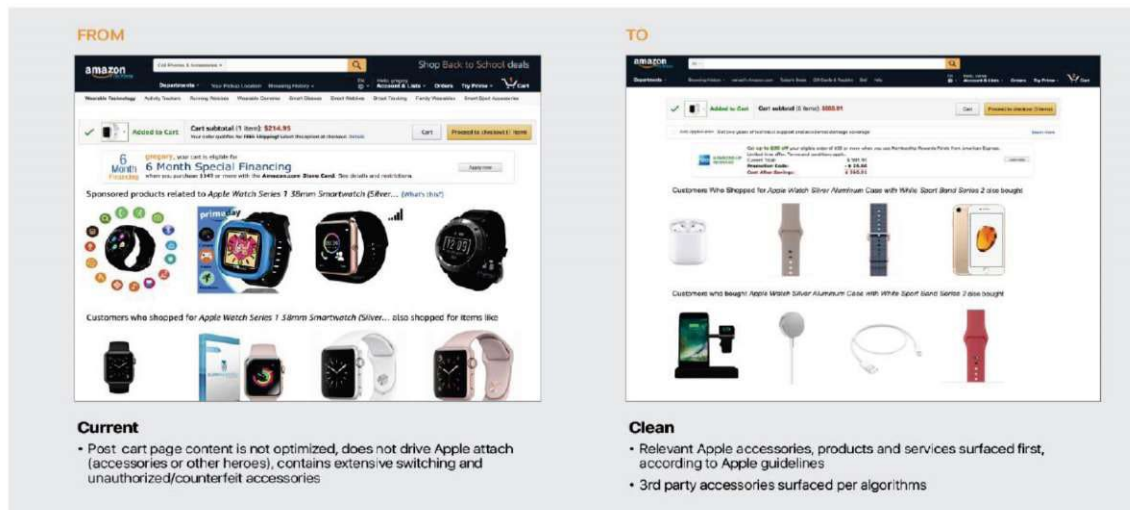
- Product titles, imagery, information and specs are often incorrect and inconsistent with Apple's guidelines

TO

Clean

- Apple PDPs optimized for presentation, product information and conversion
- Deep collaboration with Apple Partner Comms and Interactive Marcom Amazon creating team to focus on Apple

3. Digital Guidelines: Cart/Checkout



Source: Reply to APPLE IR I (folios 4358 to 4362)

4.6. Implementation of the GTA and 2018 ARA

4.6.1. Entry into force of the agreements

- (320) Both the GTA and the 2018 ARA entered into force on the day of signing, 31 October 2018²⁷⁷.
- (321) On the other hand, although, as will be seen in the communication cited in the following paragraph, the denial of access to the AMAZON Website to **APPLE resellers not included in the [CONFIDENTIAL] list of the 2018 ARA took place as of 5 January 2019 (to allow a few months' leeway for resellers who would no longer be authorised to sell on AMAZON to dispose of their stock of products - inventory stored in AMAZON's logistics centres²⁷⁸)**, the agreements already applied from the date of signing (i. e. under the agreements, no new reseller other than an APR from the aforementioned **[CONFIDENTIAL]** 2018 ARA list could have been admitted).
- (322) Therefore, the Exclusion or Brand Gating Clauses, *the* Advertising Clauses, and the Marketing Limitations Clauses came into force on 31 October 2018, regardless of whether, in the case of the first of these, AMAZON decided to unilaterally leave an additional period of time for the sellers who were previously authorised to sell on their website to be able to clear their existing *stock*.

²⁷⁷ See background and stipulation one of the 2018 ARA: **[CONFIDENTIAL]** (in both cases, see folio 3995).

²⁷⁸ See Response to AMAZON IR I, paragraph 40: **[CONFIDENTIAL]** (folio 4612).

4.6.2. Communication to third-party resellers

- (323) In November 2018, AMAZON sent a notification to third-party sellers who had in the past had at least one active offer for at least one of the new APPLE branded products on the AMAZON Website²⁷⁹:

Image 20. Notification to third-party sellers affected by Opt-Out Clauses

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

As part of a new agreement with Apple, [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] We will shortly remove your listings for those products from our European webpages (United Kingdom, German, France, Italy and Spain). Contact Apple if you wish to become an authorised distributor on Amazon.

[REDACTED]

[REDACTED] If, by 5 January 2019, you continue to have stock stored in our logistics centres, you will have to make a stock withdrawal request in order to have your units returned to you, or have us dispose of them. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

Source: Annex 15 of the reply to AMAZON RFI I (folio 4050)

4.6.3. Unauthorised resellers in Spain

- (324) AMAZON provided a list of the third-party sellers to whom the above communication was sent. In particular, the communication was sent and there was a denial of AMAZON access to **[1,150-1,250]** resellers of APPLE products in Spain (including AARs, Retailers and NARs)²⁸⁰.

²⁷⁹ See Response to AMAZON IR I, paragraph 40 (folio 4612).

²⁸⁰ See Response to AMAZON IR I, Annex 17 (List A) (folios 5190-5205).

4.6.4. List of admitted resellers

- (325) As indicated above, APPLE initially only admitted APRs to sell on the AMAZON Website. In Spain, the [CONFIDENTIAL] of the 2018 ARA lists 1 [10-15] APRs²⁸¹, but the modification of this list on 27 February 2019 lists [10-15]²⁸². According to APPLE, the number of Spanish APRs authorised to sell on the AMAZON website in Spain is [10-15]²⁸³.
- (326) In November 2021, APPLE (and in particular ADI) sent a communication to the CD stating that all APPLE authorised resellers would be authorised by APPLE to sell on the Amazon Website. According to APPLE, there are [10-15] AARs in Spain²⁸⁴ (Retailers would also be admitted²⁸⁵).

4.6.5. The views of (unauthorised and authorised) resellers in Spain

- (327) **Concerning APRs** (the only ones authorised to sell APPLE branded products on AMAZON from the entry into force of the GTA and the 2018 ARA until November 2021): (i) they have no interest in selling on AMAZON's website despite being entitled to do so (out of the 13 APRs to which a request for information was sent, the 12 who replied stated that they had no interest²⁸⁶); (ii) different reasons are given for this lack of interest, such as that they could not compete with the prices offered by AMAZON and that therefore they were only selling when AMAZON ran out of *stock*²⁸⁷, that the commissions charged by AMAZON are too high to make sales profitable on the platform²⁸⁸, and/or that the margin between the price charged to them by APPLE and AMAZON's commissions does not make the sale profitable²⁸⁹; (iii) all of them stated that they source from official sources; and (iv) none of them have received complaints from consumers or from AMAZON or APPLE for selling counterfeit or imitation products.

²⁸¹ See Response to AMAZON IR I, Annex 9 which provides the 2018 ARA and, in particular, [CONFIDENTIAL] and folio 4020, which identifies the [CONFIDENTIAL] APRs mentioned and named below for ease of reference: [CONFIDENTIAL]

²⁸² See Annex 10 of the Response to AMAZON IR I (folio 4646 to 4649), which identifies the above [CONFIDENTIAL] APRs and adds two more: [CONFIDENTIAL]

²⁸³ See Response to APPLE IR I, Table 2 (folio 4272), identifying [CONFIDENTIAL] APRs: [CONFIDENTIAL].

²⁸⁴ See Response to APPLE IR I, Table 2 (folio 4272), which identifies the following [CONFIDENTIAL] operators: [CONFIDENTIAL]

²⁸⁵ The total number of Retailers in Spain is, as of November 2021, between [CONFIDENTIAL] (see folio 5587). Therefore, when reference is made to the defined term "Retailers", as far as Spain is concerned, the term refers to these [CONFIDENTIAL] operators.

²⁸⁶ Regarding the number of APRs to whom a request was sent, initially [CONFIDENTIAL] APRs identified in the amended [CONFIDENTIAL] of the 2018 ARA were sent a request. Thus, of the [CONFIDENTIAL] APRs mentioned; [CONFIDENTIAL].

²⁸⁷ See response from [CONFIDENTIAL] (folio 1560).

²⁸⁸ See, inter alia, responses from [CONFIDENTIAL] (folios 1820-1823, 1288-1290, 2738-2741, respectively).

²⁸⁹ See response of [CONFIDENTIAL] (folios 1327-1332).

- (328) **Concerning AARs** (not allowed to sell on AMAZON from the entry into force of the GTA and the 2018 ARA until November 2021): (i) the 14 AARs²⁹⁰ to which an information request was sent stated that they have no interest in selling on AMAZON's website; (ii) some of them indicate as the source of this disinterest that it is not possible to compete on price with AMAZON²⁹¹, and/or that the margin they have left is too small to be commercially interesting²⁹²; (iii) all of them stated that they source from official sources of supply; and (iv) none of them have received complaints from consumers or from AMAZON or APPLE for selling counterfeit or imitation products.
- (329) This data is consistent with the information provided by AMAZON and APPLE in the file.
- (330) According to AMAZON: (i) *"of the [10-15] sellers authorised by Apple after the GTA [the APRs], only [CONFIDENTIAL] authorised resellers registered for the Third-party Seller account on the Spanish Amazon Store. In addition [...] only [CONFIDENTIAL] of those Third-party Sellers have made sales on the Amazon Store in Spain²⁹³", and (i") "for example, the average annual number of units sold by the Authorised Sellers [the APRs] from 2013 to 2018 was [CONFIDENTIAL]"²⁹⁴.*
- (331) According to APPLE there is limited interest from AARs in selling APPLE products on AMAZON (since the date of the GTA and the 2018 ARA, APPLE has received very few requests in this regard)²⁹⁵. Specifically, it indicates that since March 2020 *"only one AAR has been interested in the possibility of selling on Amazon, in relation to a limited quantity of remaining product"*²⁹⁶.

²⁹⁰ The [CONFIDENTIAL] AARs to which a request was sent and the folios of their responses are identified below: [CONFIDENTIAL].

²⁹¹ See reply of [CONFIDENTIAL] (folios 1547-1548).

²⁹² See reply of [CONFIDENTIAL] (folios 2923-2927).

²⁹³ See Response to AMAZON IR I, paragraph 43 (folio 4613).

²⁹⁴ See Response to AMAZON IR II, paragraph 32 (folio 4681).

²⁹⁵ See reply to APPLE IR I, answer to question 4 (folio 4253).

²⁹⁶ See reply to APPLE IR I, answer to question 14 (folio 4265).

- (332) Furthermore, according to APPLE, APRs and AARs are supplied in the same way²⁹⁷ and APPLE itself encourages wholesalers to sell to NARs²⁹⁸. On the other hand, by operating an open distribution system, anyone can buy and resell APPLE products at the wholesale and/or retail level²⁹⁹.
- (333) In contrast to the above authorised distributors/resellers (APR and AAR), in Spain, those interested in the AMAZON Website channel were unauthorised resellers or NARs, which are sellers of genuine and original products that do not have a direct contractual relationship with APPLE (i.e. are not APPLE authorised resellers).
- (334) AMAZON itself acknowledges that the majority of third-party seller sales came, during the years prior to the entry into force of the GTA and 2018 ARA, from the NARs on the AMAZON Websites in Germany, UK, France, Italy and Spain³⁰⁰ *"[...] to the current market size of third-party sellers (between 400 and 500 million euros, of which 90-100% comes from non-authorised Apple resellers [i.e. the NARs]"*³⁰¹.
- (335) The above, for the specific case of Spain, can also be seen in the following table³⁰²: (i) column A contains the product references; (ii) column B, the years; (iii) column C, the total sales in value realised for each product category and year; (iv) column D, the sales realised by AMAZON directly; (v) column E, the sales made by the sellers listed in Annex **[CONFIDENTIAL]**³⁰³, i.e. by all resellers who received notice from AMAZON that they were no longer authorised to use its Website (i.e. all resellers except the APRs listed in **[CONFIDENTIAL]** of the 2018 ARA), almost all of which were NARs, to the extent that, as explained above, the AARs in Spain had no interest in this channel and practically did not use it); (vi) column F, which contains the sales of resellers authorised by APPLE to use the AMAZON Website).

²⁹⁷ See Response to APPLE IR II, paragraph 55: "AARs and APRs in Spain purchase Apple products from Apple Authorised Resellers (AARs) and/or unauthorised third parties" (folio 4384).

²⁹⁸ See answer to question 8 of APPLE IR I: "Apple's wholesalers are continuously encouraged to distribute Apple Products to AARs and also to NARs, including with financial incentives" (folios 4261-4262).

²⁹⁹ See reply to APPLE IR II, paragraph 53 (folio 4384).

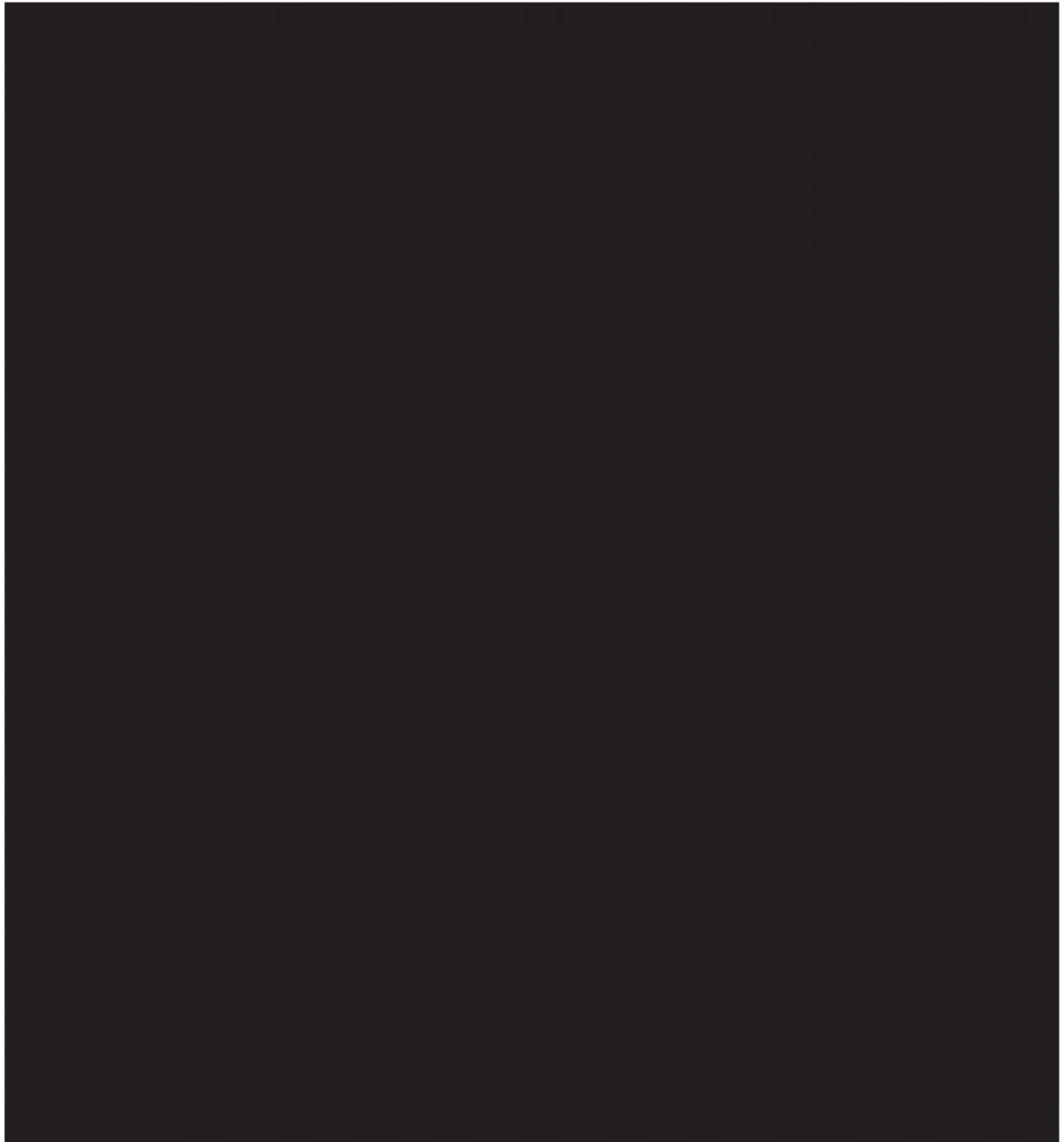
³⁰⁰ See AMAZON's Reply to IR II, paragraph 33 (folio 4681).

³⁰¹ Annex 12 to the response to AMAZON IR (folios 4659 and 4660).

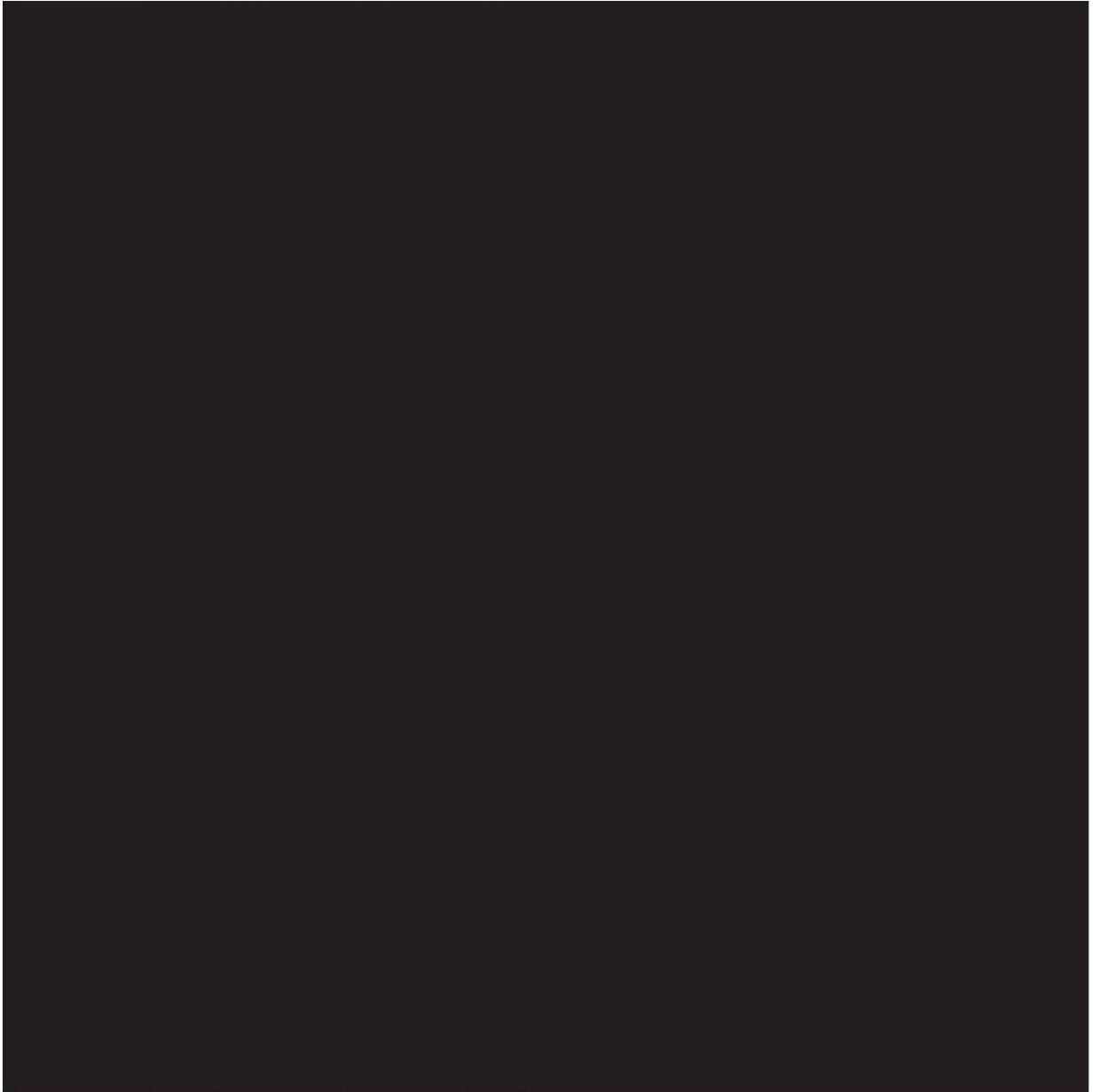
³⁰² See reply to AMAZON IR II, Annex 16 (folios 5512-5513).

³⁰³ See response to AMAZON IR I, Annex 17 (folios 5190-5205).

Image 21. AMAZON sales performance of third-party resellers affected by the Opt-Out Clauses









Source: Reply to AMAZON IR II (folios 5512-5513)

- (336) As can be seen, up to and including 2018, of the **[CONFIDENTIAL]**³⁰⁴, and to which AMAZON did not have direct access, and of the remaining products, **the main sales were made by the NARs (which are the ones that are listed on the [CONFIDENTIAL], while the remaining resellers (column F³⁰⁵) showed very limited interest (they had virtually no sales on the AMAZON Website).**
- (337) **Thus, in relation to the NARs** (which, at present, are still not authorised to sell on AMAZON's website³⁰⁶), requests for information were sent to 9 of them (those which, according to information provided by AMAZON, invoiced more sales of APPLE products in the year prior to the signing of the GTA and the 2018 ARA³⁰⁷), of which 2 Spanish NARs and 2 Italian NARs replied.

³⁰⁴ See reply to AMAZON IR II, paragraphs 20 and 21 (folios 4678 and 4679).

³⁰⁵ Column F lists only resellers authorised by APPLE to use the AMAZON Website in Spain (i.e. APRs), so in principle **[CONFIDENTIAL]** could include other official resellers such as AARs. However, although AARs could in principle also be included in **[CONFIDENTIAL]**, as explained above, they have no interest in this channel, **[CONFIDENTIAL]**.

³⁰⁶ **[CONFIDENTIAL]**.

³⁰⁷ See Annex 18 of the response to AMAZON IR II (folio 5514, which only lists the names of the top 10 resellers by sales amount, the rest of the names were declared confidential).

- (338) Of the Spanish NARs³⁰⁸: (i) one of them is not interested and the other is interested in selling on the AMAZON website; (ii) the one that is not interested is not interested because of the high commissions charged by AMAZON for each sale; and the one that is interested is interested because *"the Amazon Marketplace is the largest e-commerce in Spain with the highest share of customers"*; (iii) one only receives supplies from official sources and the other from anyone who offers the products; and (iv) neither of them has received any complaints from consumers or from AMAZON or APPLE for selling counterfeit or imitation products.
- (339) In particular, **[CONFIDENTIAL]** provides the following data on its sales of APPLE products from before the signature of the GTA and the 2018 ARA until 2021³⁰⁹ (emphasis added):

Table 26. Evolution of reseller sales **[CONFIDENTIAL]**

³⁰⁸ See responses from **[CONFIDENTIAL]** (folios 2789-2792 and 3852-3856, respectively).

³⁰⁹ For the first three tables see the non-confidential version of Annex 1 of the reply (folio 4222) and for the last table, see the later non-confidential version of Annex 1 of the reply (folio 5399).

	Share of total sales (revenue) of consumer electronics products				
	2017	2018	2019	2020	2021
Share of revenue derived from the sale of APPLE branded products		[40-50%]	[10-20%]	[10-20%]	[10-20%]
Share of revenues derived from sales of other brands' consumer electronics products		[50-60%]	[80-90%]	[80-90%]	[80-90%]
Share of total revenue derived from the sale of consumer electronics products	100%	100%	100%	100%	100%

A) All electronic products

Annual share of sales by sales channel (all electronic products)									
		2018		2019		2020		2021	
		Quotas (value)	Quotas (volume)	Quotas (value)	Quotas (volume)	Quotas (value)	Quotas (volume)	Quotas (value)	Quotas (volume)
Physical shops		[0-10%]	[0-10%]	[10-20%]	[0-10%]	[0-10%]	[0-10%]	[0-10%]	[0-10%]
Online channel	Own website	[10-20%]	[10-20%]	[20-30%]	[20-30%]	[20-30%]	[10-20%]	[20-30%]	[10-20%]
	Marketplaces	[80-90%]	[80-90%]	[60-70%]	[60-70%]	[70-80%]	[70-80%]	[70-80%]	[70-80%]
TOTAL		100%	100%	100%	100%	100%	100%	100%	100%

B) Apple products only

Annual share of sales by sales channel (Apple-branded products only)									
		2018		2019		2020		2021	
		Quotas (value)	Quotas (volume)	Quotas (value)	Quotas (volume)	Quotas (value)	Quotas (volume)	Quotas (value)	Quotas (volume)
Physical shops		[10-20%]	[10-20%]	[20-30%]	[20-30%]	[20-30%]	[20-30%]	[20-30%]	[30-40%]
Online channel	Own website	[10-20%]	[10-20%]	[60-70%]	[60-70%]	[70-80%]	[70-80%]	[60-70%]	[60-70%]
	Marketplaces	[70-80%]	[70-80%]	[0-10%]	[0-10%]	[0-10%]	[0-10%]	[0-10%]	[0-10%]
TOTAL		100%	100%	100%	100%	100%	100%	100%	100%

Annual share of sales by sales channel (Apple-branded products only)									
		2018		2019		2020		2021	
		Value	Volume	Value	Volume	Value	Volume	Value	Volume
Physical shops		[€90,000-100,000]	[100-200]	[€100,000-200,000]	[200-300]	[€100,000-200,000]	[200-300]	[€100,000-200,000]	[100-200]
	Own website	[€100,000-200,000]	[100-200]	[€400,000-500,000]	[500-600]	[€400,000-500,000]	[500-600]	[€200,000-300,000]	[300-400]
Online channel	Marketplaces	[€700,000-800,000]	[700-800]	[€20,000-30,000]	[0-100]	[€0-10,000]	[0-100]	[€30,000-40,000]	[0-100]
TOTAL		[€900,000-1 M]	[900-1,000]	[€600,000-700,000]	[800-900]	[€600,000-700,000]	[700-800]	[€400,000-500,000]	[400-500]

Source: Reply to AMAZON IR II (folios 5,512-5,513)

- (340) Of the Italian NARs³¹⁰: (i) both express an interest in selling on the AMAZON website; (ii) the interest lies in the fact that they consider it to be a very important channel in Europe for the sale of APPLE branded products; (iii) both are only sourcing from official sources; and (iv) neither has received complaints from consumers or from AMAZON or APPLE for selling counterfeit or imitation products.

³¹⁰ See responses from [CONFIDENTIAL] (folios 4167-4171 and 4182-4187, respectively)

- (341) In particular, **[CONFIDENTIAL]** indicates that: (i) "In 2017 and 2018, [90-100%] of sales in Spain were made through Amazon.es. Apple products represent [30%-40%] of total sales"³¹¹; (ii) "In 2017 the turnover derived from the commercialisation of APPLE branded products in Spain was around [100,000-200,000] euros (we do not have information by product sub-categories). In 2018 we dropped to about half, [€50,000-100,000]³¹²"; and (iii) "Our turnover in Spain has been zero since 2019"³¹³.
- (342) For its part, **[CONFIDENTIAL]** indicates that: (i) "Our company derived [90-100%] of its turnover from sales through the platform (amazon.co.it, amazon.es, amazon.de, amazon.fr, amazon.uk). The turnover derived from the sale of APPLE branded products in the years 2015 - 2016 - 2017 and 2018 represented approximately [80-90%] of the total sales made through the platform"³¹⁴; (ii) "Our company marketed APPLE branded products through the Amazon.es platform in the years 2015 ([500,000-1,000,000] euros in sales); 2016 ([2,000,000-3,000,000,000] euros in sales); 2017 ([8,000,000-9,000,000] euros in sales) and 2018 ([9,000,000-10,000,000] euros in sales). Over the years, revenues from Apple product sales have increased steadily on average. Unfortunately, in the years 2019-2020-2021, our percentage of revenue from sales of APPLE branded products is zero"³¹⁵; and (iii) "There will [be] a big drop in sales from 2019 onwards, as it is not possible to sell APPLE branded products in the Italian market"³¹⁶.

4.6.6. Preparation of external communication on the effects of AMAZON/APPLE contracts

- (343) Once the GTA and the 2018 ARA were signed, a questionnaire, dated **[CONFIDENTIAL]**, was prepared at AMAZON with possible questions from third-party sellers and the answers to be given to them, in case questions were asked in relation to the aforementioned agreements.
- (344) In particular, some of the questions and answers prepared by AMAZON are the following³¹⁷:

³¹¹ See **[CONFIDENTIAL]**'s answer to question 14 (folio 4170).

³¹² See **[CONFIDENTIAL]**'s answer to question 15 (folio 4170).

³¹³ See **[CONFIDENTIAL]**'s answer to question 18 (folio 4171).

³¹⁴ See **[CONFIDENTIAL]**'s answer to question 14 (folio 4186).

³¹⁵ See **[CONFIDENTIAL]**'s answer to question 11 (folio 4185).

³¹⁶ See **[CONFIDENTIAL]**'s answer to question 18 (folio 4187).

³¹⁷ See documents provided by the Italian competition authority (folios 4799-4802). This is a document collected by the authority during inspections carried out in the following areas

Table 27. Form for answers to possible frequently asked questions from resellers following the implementation of the agreements prepared by AMAZON

Potential question	Prepared response
16. [REDACTED] [REDACTED] [REDACTED] ³¹⁸ 318	[REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] ³¹⁹ 319
18. [REDACTED] [REDACTED] ³²⁰ 320	[REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] ³²¹ 321

AMAZON's headquarters in Italy. Specifically, it is a questionnaire prepared by AMAZON with possible questions from third-party sellers and the answers to be given to them, in case questions related to the agreements signed with APPLE were asked. All quotations in the table refer to the aforementioned document and are verbatim quotations (own translation) but have been ordered differently from the document in order to extract only the information relevant to the research and to make them easier to read.

³¹⁸ See documents provided by the Italian competition authority: [CONFIDENTIAL] (folio 4800).

³¹⁹ See documents provided by the Italian competition authority: [CONFIDENTIAL] (folio 4800).

³²⁰ See documents provided by the Italian competition authority: [CONFIDENTIAL] (folio 4800)

³²¹ See documents provided by the Italian competition authority: [CONFIDENTIAL] (folio 4800).

[illegible]

³²² See documents provided by the Italian competition authority: **[CONFIDENTIAL]** (folio 4801).

³²³ See documents provided by the Italian competition authority: **[CONFIDENTIAL]** (folio 4801).

324 See documents provided by the Italian competition authority: **[CONFIDENTIAL]** (folio 4801).

³²⁵ See documents provided by the Italian competition authority: "[CONFIDENTIAL] (folio 4801).

326 326	327 327
30 328 328	329 329

Source: Italian competition authority (folios 4799-4802)

4.6.7. Sales of APPLE-branded products on the AMAZON website in Spain

- (345) AMAZON, in response to a request, provided graphs showing the evolution of sales of APPLE-branded products on its website in Spain, as well as the operators who make them³²⁶.
- (346) For ease of reference, these graphs are attached as **Annex 2** to this to this resolution.

4.6.8. Cross-border trade

- (347) As stated above, AMAZON, in response to a request, provided graphs showing the evolution of sales of APPLE-branded products on its website in Spain. These graphs also show the country of origin of the operators who carry them out (own underlining)³³¹:

³²⁶ See documents provided by the Italian competition authority: **[CONFIDENTIAL]** (folio 4802).

³²⁷ See documents provided by the Italian competition authority: **"[CONFIDENTIAL]** (folio 4802).

³²⁸ See documents provided by the Italian competition authority: **[CONFIDENTIAL]** (folio 4802).

³²⁹ See documents provided by the Italian competition authority: **[CONFIDENTIAL]** (folio 4802).

³³⁰ See Annex 13 of the response to AMAZON IR II (folios 4698 to 4706) and Annex 15 of the response to AMAZON IR II (folios 4707 to 4715).

³³¹ See Annex 28 of the response to AMAZON RFI II (folio 2562 in its confidential version and folio 5515 in its non-confidential version).

Table 28. Sales on Amazon.es by sellers from other Member States



Source: Response to AMAZON RFI II (folio 2562)

- (348) On the other hand, APPLE submitted tables in response to a request³³² which set out: (i) the total number of official resellers (i.e. of APRs, AARs and Retailers - referred to as "Retailers" in the table) from different jurisdictions (those where AMAZON has a website³³³ and then a general category covering all other EU Member States); and (ii) how many of them were included in the GTA and 2018 ARA, i.e. how many of the total number of each category of resellers were authorised to use AMAZON Websites in the different jurisdictions:

³³² See Annex 1 of APPLE's response to IR IV (folio 5608).

³³³ With the exception of Poland, where it was not known at the time of the request to APPLE that AMAZON had an online shop.

Table 29. Total number of official resellers



Source: APPLE's response to IR IV (folio 5608)

4.6.9. Assessment of contracts by the parties

(349) According to AMAZON, customers have benefited from AMAZON's distribution of APPLE products following the conclusion of the ARA and the GTA as follows:

- A larger selection of Apple products is available on the AMAZON website³³⁴;
- The quality of APPLE product descriptions has improved considerably, for example, with an increase in the quality of data on product description pages, the inclusion of details on product attributes, as well as the elimination of duplicate pages that caused confusion by reflecting only certain configurations³³⁵; and

³³⁴ See Response to AMAZON IR I, paragraph 4 (folios 4598-4599).

³³⁵ See response to AMAZON IR II, paragraphs 28-29 (folio 4680).

- In relation to the sale of counterfeit or imitation goods, AMAZON indicates that less than **[0-1]**% of APPLE products sold through AMAZON's European websites received a counterfeit complaint prior to the signing of the GTA and the ARA 2018³³⁶; but that, following the signing of these agreements, which includes APPLE's commitment to use the *Brand Registry* and the automated brand protections available through it, the rate of customer complaints due to counterfeit Apple products has dropped by almost **[90-100]**% in both Spain and the EU (from before the signing of the agreements until the first quarter of 2021)³³⁷.

(350) According to APPLE, the GTA and the 2018 ARA:

- Have enabled a *premium* shopping experience for customers of APPLE products on the AMAZON platform (both for AMAZON's own sales and for third-party sales through the AMAZON Website)³³⁸; and
- They have enabled the implementation of an improved process to address the sale of non-genuine APPLE products and other deceptive marketing practices³³⁹.

4.7. Role of the parties in the market

- (351) AMAZON is the market leader in Spain both in the market for the provision of intermediation services in online marketplaces to third-party sellers in Spain (with shares consistently above **[50-60]**% throughout the period analysed), and in the market for online retailing of electronic products. In turn, APPLE holds the leading position in the market for the manufacture and sale of electronic products in the EEA, with market shares consistently above 30% in value terms throughout the period under review.
- (352) On the one hand, APPLE acknowledges AMAZON's leading role as an online marketplace in Spain by referring to 'the scale and scope of Amazon's business'³⁴⁰ and 'considering the magnitude of Amazon's business'³⁴¹ (emphasis added in both cases).

³³⁶ See Response to AMAZON IR I, paragraph 35 (folio 4611).

³³⁷ See Response to AMAZON IR I, paragraph 35 (folio 4611).

³³⁸ See reply to APPLE IR I, answer to question 3 (folio 4254-4259).

³³⁹ See reply to APPLE IR I, answer to question 3 (folio 4254-4259).

³⁴⁰ See reply to APPLE IR I (folios 4253 and 4260).

³⁴¹ See reply to APPLE IR I (folio 4256).

- (353) On the other hand, AMAZON itself acknowledges the leadership of APPLE branded products: "Given the particularities of the successful Apple brand"³⁴²; "Amazon customers were looking for products from the world's most desired electronics brand"³⁴³; "the APPLE brand was and still is considered the most valuable and desired brand in the world"³⁴⁴; and "Given the particularities of the successful Apple brand and its strict distribution system, [CONFIDENTIAL]"³⁴⁵.

4.8. The Brand Registry

- (354) According to AMAZON, *"the purpose of the Brand Registry is the identification of all brands and the establishment of protections to ensure that only authentic products are sold on AMAZON. Brand Gating has a different purpose, as it is required by brands that implement strict distribution systems and insist on applying such systems to the sales of their products in the AMAZON Store"*³⁴⁶.
- (355) In particular, AMAZON states that *'manufacturers of branded products who request that only approved Sellers are allowed to offer their products usually operate through strictly controlled distribution systems, and are concerned about "unauthorised" resellers offering their products'*. It adds that their implementation would resemble selective distribution channels, where considerations of high quality brand presentation would be paramount³⁴⁷.
- (356) According to AMAZON itself, precisely because customer trust is hard to gain and easy to lose, counterfeiting and other forms of fraud and abuse pose a substantial risk to the company. That is why *"AMAZON's primary focus is on preventative technology tools designed to proactively combat fraud and abuse on a large scale before it affects the customer or retail partner; these tools include the Brand Registry"*³⁴⁸.
- (357) The Brand Registry *"was launched in 2017 and is a free service open to any brand owner whose brands are sold on AMAZON, irrespective of whether there is a direct economic relationship of the Brand Owner with AMAZON"*³⁴⁹.

³⁴² See Response to AMAZON IR I, paragraph 17 (folio 4603).

³⁴³ See Response to AMAZON IR I, paragraph 18 (folio 4604).

³⁴⁴ See Reply to AMAZON IR I, para. 22 (folio 4605) and e.g., https://www.interbrand.com/wpcontent/uploads/2018/10/Interbrand_Best_Global_Brands_2018.pdf, page 12. For 2019 see <https://www.interbrand.com/best-brands/best-global-brands/2019/ranking/>.

³⁴⁵ See response to AMAZON IR, paragraph 17 (folio 4603).

³⁴⁶ See response to AMAZON IR I, paragraph 29 (folio 4610).

³⁴⁷ See AMAZON's Reply to IR II, paragraph 65 (folio 4689).

³⁴⁸ See response to AMAZON IR I, paragraph 31 (folio 4610).

³⁴⁹ See response to AMAZON IR I, paragraph 32 (folio 4610).

- (358) To register with the Brand Registry, brand owners must provide their brand and company information, including brands registered in a country where the AMAZON Brand Registry is operating³⁵⁰.
- (359) According to AMAZON, the Brand Registry *'provides powerful automated brand protections that detect any infringement and proactively protect a brand's intellectual property, without requiring the brand to report these infringements, all based on specific information that brands provide to the Brand Registry (e.g. word trademarks and images of their logos)'*³⁵¹.
- (360) AMAZON adds that the Brand Registry *"also offers brands a tool called "Report an Infringement", which allows brands to accurately search for and report potentially infringing products using state-of-the-art image and text search technology"*³⁵².
- (361) Brands included in the Brand Registry also receive more control over the photos, videos, text and other information on AMAZON product detail pages associated with their brand, so brands can ensure that their product information is accurate and customers can make safe and informed purchasing decisions³⁵³.
- (362) According to AMAZON prior to the signing of the GTA and the 2018 ARA, 'APPLE did not consistently use the AMAZON Brand Registry to protect its intellectual property on the AMAZON Website and, as a result, APPLE was unable to fully benefit from AMAZON's brand protection tools **[CONFIDENTIAL]**'³⁵⁴.
- (363) For its part, APPLE argues that 'The Brand Registry alone is not sufficient to solve the serious problems of Amazon's marketplace **[CONFIDENTIAL]**'³⁵⁵. In the same vein, APPLE indicates that it *'submitted more than **[CONFIDENTIAL]** product withdrawal notices to Amazon prior to the GTA'*³⁵⁶. In this respect, according to AMAZON, *"less than **[0-1]** % of the APPLE products sold through the European Amazon Store websites received a counterfeit complaint"*³⁵⁷.

³⁵⁰ See response to AMAZON IR I, paragraph 33 (folio 4610).

³⁵¹ See response to AMAZON IR I, paragraph 34 (folio 4611).

³⁵² See response to AMAZON IR I, paragraph 34 (folio 4611).

³⁵³ See response to AMAZON IR I, paragraph 34 (folio 4611).

³⁵⁴ See response to AMAZON IR I, paragraph 35 (folio 4611).

³⁵⁵ See reply to APPLE IR I, answer to question 7 (folio 4260).

³⁵⁶ See reply to APPLE IR I, answer to question 7 (folio 4260).

³⁵⁷ See response to AMAZON IR I, paragraph 35 (folio 4611).

- (364) Furthermore, in relation to withdrawal notices, a breakdown of the figure by year shows that the number of notices sent in 2016 (before the GTA and the 2018 ARA) is very similar to that of 2021 (with the above-mentioned agreements already in force):

Table 30. Withdrawal notices (in hundreds of thousands)



Source: Response to APPLE RFI II, page 14 (folio 4382)

- (365) In addition to APPLE's commitment to use the *Brand Registry* and the automated brand protections available through it, according to AMAZON, the **[CONFIDENTIAL]** mutual commitments have enabled AMAZON to more effectively protect all of APPLE's intellectual property rights on the AMAZON Websites (e.g. as also already indicated, the rate of customer complaints due to counterfeit APPLE products - which was already less than **[0-1]**% - has decreased by almost **[CONFIDENTIAL]**% in both Spain and the EU from before the signing of the agreements until the first quarter of 2021)³⁵⁸.

³⁵⁸ See response to AMAZON IR I, paragraph 35 (folio 4611).

5. THE LEGAL BASIS

5.1. Competence to resolve

- (366) According to article 5.1.c) of Law 3/2013, of 4 June, creating the National Markets and Competition Commission (**LCNMC**), the CNMC is responsible for *"applying the provisions of Law 15/2007, of 3 July, on conduct that prevents, restricts and distorts competition"*³⁵⁹. Article 20.2 of the same law attributes to the Council the function of *"resolving the sanctioning procedures stipulated in Law 15/2007, of 3 July"* and, according to Article 14.1.a) of the Organic Statute of the CNMC, approved by Royal Decree 657/2013 of 30 August, *"the Competition Division shall hear matters related to the application of Law 15/2007 of 3 July"*.
- (367) Consequently, the competence to decide on this proceeding corresponds to the Competition Division of the CNMC Council.

5.2. Purpose of the resolution and applicable law

5.2.1. Purpose of the resolution

- (368) The **purpose** of this resolution is to determine whether the companies charged -APPLE and AMAZON- have engaged in the collusive conduct prohibited by the antitrust legislation attributed to them by the investigating body in the Proposed Resolution.

5.2.2. Applicable law

5.2.2.1. National law

- (369) As regards the applicable national law, the present case concerns a number of practices which took place during the period of validity of the LDC and therefore **Article 1 of the LDC** on collusive conduct is **applicable**.

5.2.2.2. Effect on trade between Member States and application of the TFEU

- (370) In order to determine whether the conduct described falls within the scope of Article 101 TFEU, it is necessary to determine whether it is capable of affecting trade between EU Member States (**MS**).

³⁵⁹ Law 3/2013, of 4 June, on the creation of the National Markets and Competition Commission (LCNMC), BOE no. 134, of 5 June 2013.

- (371) The agreements analysed (i.e. the Exclusion or Brand Gating Clauses, the Advertising Clauses and the Marketing Limitations Clauses) affect the entire national territory, insofar as AMAZON's Website in Spain has a national scope.
- (372) In this respect, it has repeatedly been held that if the conduct under scrutiny is national in scope, as is the case here, it must be understood that it is capable of affecting trade between Member States to an appreciable extent³⁶⁰.
- (373) Additionally, and as noted in the section on substantiated facts, the disputed clauses have affected APPLE resellers from other MSs selling in Spain through Amazon.es. (paragraphs (340) to (342) and (347) to (348)), so that the effect of the conduct under investigation on trade between Member States is obvious.
- (374) Therefore, **Article 101 TFEU also applies.**

5.3. Proposal of the investigating body

- (375) The CD has proposed to this Chamber to declare the existence of a **single and continuous infringement of Articles 1 of the LDC and 101 of the TFEU from October 2018** until at least the closure of the investigation phase, for which the companies of the APPLE group would be liable: ADI and AINC, together with the companies of the AMAZON group: ASE, AEC, AEU and ASI.
- (376) In view of the eminently vertical nature of the agreements under investigation and the wording of the LDC in force at the time the conduct began, the CD considers that the infringement identified should be classified as serious within the meaning of Article 62.2 of the LDC. Therefore, in accordance with Article 63.2 of the LDC, fines of up to 5% of the total worldwide turnover of the sanctioned companies could be imposed.
- (377) Based on the 2021 total turnover of the companies concerned, the Commission proposes to impose the following fines:

Table 31. Fines proposed by CD

Group	Company	Rate (%)	Proposed sanction

³⁶⁰ Among others, Resolutions of the Competition Division of the CNMC Council of 2 January 2014, File S/0404/12 Commercial Services ANEA and of 22 September 2014 File S/0428/12 Pallets.

APPLE	ADI ³⁶¹	4.10%	€128,640,000
	AINC ³⁶²	2.10%	€15,000,000
AMAZON	ASE ³⁶³	2.10%	€2,000,000
	AEC ³⁶⁴	2.10%	€1,000,000
	AEU ³⁶⁵	3.30%	€37,510,000
	ASI ³⁶⁶	2.10%	€10,000,000

(378) The CD also proposes that the proceedings against the companies AOS³⁶⁷, ARS³⁶⁸ and AMI³⁶⁹ should be closed on the grounds that their participation in the conduct under investigation has not been established.

5.4. Assessment of the Competition Division

5.4.1. Classification of conduct

(379) Articles 1 LDC and 101 TFEU prohibit any collective agreement, decision or recommendation, or concerted or conscious parallel practice, which has as its purpose, has or may have the effect of preventing, restricting or distorting competition in all or part of the national market.

(380) For this purpose, once the existence of an agreement between undertakings has been established, the following shall apply: (i) to establish whether it is horizontal or vertical in nature, as this will determine the framework for analysing the restrictions contained therein; and (ii) to analyse the restrictions identified therein to determine whether they constitute restrictions by object or by effect of competition and the reasons leading to one or the other conclusion.

³⁶¹ Apple Distribution International Ltd

³⁶² Apple Inc.

³⁶³ Amazon Services Europe S.A.R.L.

³⁶⁴ Amazon Europe Core S.A.R.L.

³⁶⁵ Amazon EU S.A.R.L.

³⁶⁶ Amazon.com Services, Inc. (now Amazon.com Services LLC)

³⁶⁷ Amazon Online Spain, S.L.

³⁶⁸ Apple Retail Spain, S.L.

³⁶⁹ Apple Marketing Iberia, S.A.

5.4.1.1. Agreement and/or concerted practice

5.4.1.1.1. Principles

- (381) For there to be an infringement of Articles 1 LDC and 101 TFEU, there must be a collective agreement, decision or recommendation, or a concerted or consciously parallel practice between two or more 'undertakings' within the meaning of competition law.
- (382) According to settled case law, the concept of agreement *"is based on the existence of a concordance of wills between at least two parties, the form of manifestation of which is irrelevant so long as it constitutes the faithful expression of those wills"*³⁷⁰.
- (383) Thus, an agreement is deemed to exist where several entities associate in a common plan which limits or may limit their individual commercial policy in determining their mutual patterns of action or abstention on the market³⁷¹, i.e. where there is a concurrence of wills. On the other hand, there is no need for a written record of such an agreement, nor is it required to be in a particular form or to establish contractual sanctions or enforcement measures³⁷².
- (384) Examples of concurrences of wills that have been considered agreements are contracts³⁷³, gentlemen's agreements³⁷⁴, simple understandings³⁷⁵, oral agreements³⁷⁶ or protocols³⁷⁷.
- (385) Moreover, also according to settled case law, what is relevant is not the precise distinction between the different categories set out in Articles 1 LDC and 101 TFEU (i.e. agreement, collective decision or recommendation, or concerted or consciously parallel practice), but the distinction between collusive and non-collusive behaviour³⁷⁸.

³⁷⁰ See, e.g., judgment of the EGC in case T-41/69 - *Bayer v Commission*, ECLI:EU:T:2000:242, para 69, and Judgment of the CJEU in Case C-2/01 P and C-3/01 - *P - BAI and Commission v Bayer*, ECLI:EU:C:2004:2, paras 96-103.

³⁷¹ See S/0644/18 - *RADIOPHARMACOTICS*, page 60.

³⁷² See S/0644/18 - *RADIOPHARMACOTICS*, page 60.

³⁷³ See, for example, C-591/16 P - *Lundbeck v Commission*, ECLI:EU:C:2021:243.

³⁷⁴ See, for example, C-41/69 - *Chemiefarma v Commission*, ECLI:EU:C:1970:71.

³⁷⁵ See Commission Decision of 5 June 1991 relating to a proceeding under Article 85 of the EEC Treaty (Case No IV/32.879 - *Viho/Toshiba*).

³⁷⁶ See Case 28/77 - *Tepea BV v Commission*, ECLI:EU:C:1978:133.

³⁷⁷ See Commission Decision of 29 March 1994 relating to a proceeding under Articles 85 and 86 of the EC Treaty (IV/33.941 HOV-SVZ/MCN).

³⁷⁸ See Judgment of the CJEU in Case C-49/92 P - *Commission v Anic Partecipazioni*, ECLI:EU:C:1999:356, para. 112.

(386) Finally, Articles 1 LDC and 101 TFEU apply to all agreements between undertakings that may distort competition, irrespective of whether the parties to the agreement are competitors or not. Thus, 'it is *settled case-law of the Court of Justice that the wording of Article 81(1) EC refers generally to all agreements and concerted practices which, in horizontal or vertical relationships, distort competition in the common market, irrespective of the market on which the parties are active* and irrespective of whether only one of them is affected by the terms of the agreements in question' (emphasis and underlining added)³⁷⁹.

5.4.1.1.2. Application to this case

(387) **Exclusion or Brand Gating Clauses, Advertising Clauses, and Marketing Limitations Clauses are agreements between companies**, in so far as they constitute a concurrence of the wills of APPLE and AMAZON concerning the authorisation of certain resellers to sell APPLE-branded products on the AMAZON Website, certain restrictions on advertising on the AMAZON Website and certain restrictions on AMAZON's ability to conduct marketing campaigns to customers of APPLE-branded products, as set out in a contract entered into between the two parties (the GTA and 2018 ARA), which has been applied and implemented since 31 October 2018 until at least the close of the investigation phase.

5.4.1.2. Restriction of competition

(388) Article 1 of the LDC and Article 101 TFEU prohibit agreements which have as their purpose or effect the prevention, restriction or distortion of competition on the market.

(389) It is not necessary to examine the restrictive effects of competition arising therefrom where its anti-competitive purpose is established³⁸⁰. However, the disjunctive conjunction "or" is understood in an inclusive sense, so there can be a restriction by object and by effect³⁸¹.

(390) In this respect, the case law of the CJEU and national courts shows that certain types of coordination between undertakings reveal a sufficient degree of harm to competition to be qualified as a restriction by object, since, by their very nature, they are detrimental to the proper functioning of the game of competition³⁸².

³⁷⁹ See CJEU judgment in Case C-194/14 P - *AC-Treuhand v Commission*, ECLI:EU:C:2015:717, para 35.

³⁸⁰ Judgments of the CJEU of 26 November 2015 in Case C 345/14 *Maxima Latvija*, paragraphs 16 and 17, and of 20 January 2016, C 373/14 P in Case C-373/14 *Toshiba Corporation v Commission*, paragraphs 24 and 25.

³⁸¹ Judgment of the CJEU of 2 April 2020 in Case C-228/18 *Budapest Bank*.

³⁸² Judgments of the CJEU of 11 September 2014 in Case C 382/12 P *MasterCard and Others v Commission*, paragraphs 184 and 185 and of 20 January 2016 in Case C 373/14 P *Toshiba Corporation v Commission*, paragraph 26.

- (391) Thus, it has been established that some collusive behaviour, such as horizontal price fixing, can be considered to be so capable of generating negative effects, in particular on prices, quantity or quality of products or services, that it is unnecessary to demonstrate that it has concrete effects on the market. In this regard, experience shows that such behaviour results in output reductions and price increases leading to a misallocation of resources to the detriment of consumers in particular.
- (392) In assessing whether an agreement is *sufficiently harmful* to competition to be considered a restriction of competition by object, regard must be had to: (i) the content of its provisions; (ii) the objectives it seeks to achieve; and (iii) the economic and legal context in which it is set (in assessing this context, consideration should also be given to the nature of the goods or services concerned, as well as the actual conditions of the functioning and structure of the market or markets)³⁸³.
- (393) Moreover, while the intention of the parties is not a necessary factor in determining the restrictive character of an agreement between undertakings, nothing prevents competition authorities or national and Union courts from taking it into account³⁸⁴.
- (394) In line with the abovementioned case-law practice, in order to determine whether there is a restriction of competition by object, in **a first step** the content of the provisions of the agreement and its purpose will be analysed, in order to try to determine whether the agreement in question falls, on the basis of the type of restriction created, within the category of collusive conduct the harmful character of which is commonly accepted on the basis of experience or law.
- (395) As to the content, the list of types of agreements stipulated in Article 101(1) TFEU contains examples of prohibited conduct or restraints, but the list is not exhaustive, so that these and other types of restraints can be qualified as restrictions 'by object' where such qualification is made in accordance with the requirements deriving from the case law³⁸⁵ (i.e. types of coordination between undertakings which reveal a *sufficient* degree of *harm* to competition).

³⁸³ Case C-288/18 - *Budapest Bank*, paragraph 51 and case law cited.

³⁸⁴ Case C-288/18 - *Budapest Bank*, paragraph 53 and case law cited.

³⁸⁵ Case C-288/18 - *Budapest Bank*, paragraphs 54 and 63.

- (396) On the other hand, it is by no means required that the same type of agreements have already been sanctioned by the EC (or by the relevant competition authority) in order to be considered restrictive of competition by object³⁸⁶. The 'body of experience' required for a finding that collusive conduct is by its very nature capable of restricting competition, so that it must be regarded as a restriction of competition by object, relates to the type of restriction created by the agreement and not to the specific form of the agreement by which the restriction in question is created.
- (397) As regards objectives, the CJEU *"has already held that the fact that a measure is regarded as pursuing a legitimate objective does not exclude the possibility that, in view of the existence of another objective pursued by that measure which must be regarded as unlawful, having regard also to the content of the provisions of that measure and the context in which it is framed, the measure may be regarded as having an anti-competitive object"*.³⁸⁷
- (398) **In a second step**, the legal and economic context in which the agreement is implemented will be analysed to determine whether there are legal or factual circumstances that make it possible to conclude whether the conduct is specifically capable of restricting competition. In this regard, according to case law, such an analysis *"may be limited to what is strictly necessary to conclude that there is a restriction of competition by object"*³⁸⁸.
- (399) Therefore, if after analysing the content, the objectives and the legal and economic context it is concluded that the agreement presents a sufficient degree of harm to competition, such an agreement would constitute a restriction of competition by object which makes it unnecessary to investigate its effects on the market in order for it to be sanctioned. Otherwise, it would be necessary to demonstrate the anticompetitive effects of the agreement in order for it to be sanctioned.
- (400) In view of the content, the objectives and the legal and economic context of the agreements, and to the extent that they contain both vertical and horizontal elements and that the relationship between APPLE and AMAZON is complex, it is relevant to establish the vertical or horizontal nature of any restrictions of competition contained in such agreements as this will determine the relevant framework of analysis. Thus, in the case of vertical restraints, the block exemption regulations for certain vertical Restraints (**VBER**)³⁸⁹ and the Vertical Guidelines³⁹⁰ will apply. Therefore, **before** analysing the harmfulness of any restrictions, **it will be necessary to determine whether they are**

³⁸⁶ Case C-591/16 P - *Lundbeck*, paragraph 130.

³⁸⁷ CJEU in Case C-67/13 P - *CB/Commission*, EU:C:2014:2204, para 70; and C-288/18 - *Budapest Bank*, para 52.

³⁸⁸ CJEU in Case C-373/14 P - *Toshiba Corporation v Commission*, EU:C:2016:26, para 29.

³⁸⁹ COMMISSION REGULATION (EU) No 330/2010 of 20 April 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices (**VBER 2010**). Please note that this regulation was replaced by Commission Regulation (EU) 2022/720 of 10 May 2022 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to certain categories of vertical agreements and concerted practices (**VBER 2022**), which entered into force on 1 June 2022, albeit with a transitional period until 31 May 2023 (where reference is made to the Regulation in general terms, without referring to a specific version of the Regulation, the acronym **VBER** will simply be used).

³⁹⁰ See paragraph 6 of the COMMISSION COMMUNICATION on Guidelines on Vertical Restraints (**2010 Vertical Guidelines**). These guidelines have been replaced by new guidelines that entered into force on 1 June 2022 (**Vertical Guidelines 2022**), see paragraph 10 with indications to the same effect.

horizontal or vertical in nature and whether or not the Regulation, which exempts certain vertical restrictions by applying a market share threshold, is applicable.

(401) Thus, if it is determined that the agreement under scrutiny is vertical, it is appropriate to analyse whether the exemptions stipulated in the VBER apply, for which purpose the following assessment is made³⁹¹:

- First, it is analysed whether the provisions of the agreement under scrutiny relate to the conditions under which the parties may purchase, sell or resell certain contract goods or services, since:
 - If they are not, these restrictions contained in a vertical agreement would not be covered by VBER 2010 (or by VBER 2022 if it applied to the conduct in question) and will therefore have to be assessed on an individual basis³⁹².
 - If they are, to the extent that only vertical restraints that fulfil two conditions (that the parties do not exceed a quota threshold and that the restraints in question are not considered to be hardcore) are exempted, the analysis should be continued as follows:

³⁹¹ See especially paragraph 110 of the Vertical Guidelines (and the same is stated in paragraphs 5 to 9 of the 2022 Vertical Guidelines).

³⁹² See paragraph 26 of the Vertical Guidelines: "*The Block Exemption Regulation does not cover restrictions or obligations that do not relate to the conditions of purchase, sale and resale*" (see also paragraph 61 of the 2022 Vertical Guidelines: "*Regulation (EU) 2022/720 does not apply to vertical restraints that do not relate to the conditions of purchase, sale and resale of goods or services. Such restrictions must therefore be assessed on an individual basis [...]*").

- The market shares of the parties in the relevant market where they sell and buy the contract goods and services are calculated³⁹³;
- In the case where neither the market share of the supplier nor that of the buyer exceeds the market share threshold of 30% set out in Article 3 of VBER 2010 (and of VBER 2022 if applicable to the conduct in question), the vertical agreement is covered by the safe harbour set out therein, provided that the agreement does not contain any hardcore restrictions within the meaning of Article 4, or any excluded restrictions within the meaning of Article 5 which cannot be severed from the rest of the agreement, of both regulations;
- If the relevant market share of the supplier or the buyer exceeds the 30% threshold or the agreement contains one or more hardcore restrictions or excluded restrictions which cannot be severed from the rest of the agreement, the vertical agreement must be assessed on a case-by-case basis pursuant to Article 1 LDC and/or 101 TFEU; and
- In the event that the vertical agreement falls within the scope of the aforementioned Articles, if the parties so allege, it will be necessary to examine whether the conditions of paragraphs 3 of the aforementioned articles are fulfilled.

(402) Furthermore, if applicable, VBER 2010 (or VBER 2022) and its Guidelines also provide an appropriate framework for the analysis of whether any restrictions of competition are restrictions of competition by object or by effect. In this regard, according to paragraph 47 of the Vertical Guidelines: *"Article 4 of the Block Exemption Regulation contains a list of hardcore restrictions which lead to the exclusion of the entire vertical agreement from the scope of the Block Exemption Regulation. The inclusion of such a hardcore restriction in an agreement gives rise to a presumption that the agreement falls within the scope of Article 101(1). It also gives rise to the presumption that it is unlikely that the agreement fulfils the conditions of Article 101(3) for the reason that the block exemption does not apply"*³⁹⁴.

³⁹³ In this regard, paragraph 67(b) of the 2022 Vertical Guidelines introduces a clarification for the case of platforms providing intermediation services that *"for the purposes of applying the market share thresholds set out in Article 3(1) of the Regulation, the market share of the undertaking providing the online intermediation services is calculated in the relevant market for the provision of those services [...]"*.

³⁹⁴ The same is true of paragraph 179 of the 2022 Vertical Guidelines: *"Hardcore restrictions within the meaning of Article 4 of Regulation (EU) 2022/720 are in general restrictions of competition by object within the meaning of Article 101(1) of the Treaty. Restrictions of competition by object are types of coordination between undertakings which by their very nature can be regarded as harmful to the proper functioning of the normal competitive process. The Court of Justice of the European Union has ruled that certain types of coordination between undertakings show a sufficient degree of harm to competition to make it unnecessary to assess their effects. A finding of a restriction by object requires an individual assessment of the vertical agreement concerned. Hardcore restrictions, on the other hand, are a category of restrictions set out in Regulation (EU) 2022/720, which are generally presumed to cause*

- (403) However, it is by no means required that the same type of agreements have already been sanctioned by the EC (or by the relevant competition authority) in order to be considered restrictive of competition by object³⁹⁵.

5.4.1.2.1. On the application of block exemption regulations

a. Temporary scope of the exemption regulations

- (404) Should the block exemption regulations on vertical agreements be applicable, the temporal scope of application of the block exemption regulations will have to be taken into account, insofar as, as explained above, the new vertical rules entered into force on 1 June 2022.
- (405) The VBER 2022 entered into force on 1 June 2022 and expires on 31 May 2034.
- (406) Article 10 establishes a transitional period of application: *"The prohibition stipulated in Article 101(1) of the Treaty shall not apply during the period from 1 June 2022 to 31 May 2023 to agreements already in force on 31 May 2022 which do not satisfy the conditions for exemption laid down in this Regulation, but which at that date fulfilled the conditions laid down in Regulation (EU) No 330/2010"*.
- (407) Thus, VBER 2010 continued to apply for the period from 1 June 2022 to 31 May 2023 in respect of those agreements already in force on 31 May 2022 which fulfilled the conditions for exemption set out therein (even if they did not fulfil the conditions for exemption set out in VBER 2022). Although at the time of the adoption of the present decision the regime of the VBER 2022 is already fully in force (as of 1 June 2023), it will be considered, for the sake of legal certainty and the rights of defence of the defendants, that VBER 2010 is applicable to the agreements under investigation, as the defendants have submitted their submissions to the Proposed Resolution during the transitional period and maintain directly or indirectly that the VBER 2010 applies³⁹⁶. It should be noted, in any event, that the conclusions on the legal assessment of the conduct under investigation would be exactly the same irrespective of whether VBER 2010 or VBER 2022 applies and that there is nothing to prevent this Division from looking at the provisions of the latter or the 2022 Vertical Guidelines, by way of interpretation, to determine whether the clauses under investigation fall within the scope of Article 101 of the TFEU.

*clear harm to competition. Therefore, vertical agreements containing such hardcore restrictions cannot benefit from the exemption stipulated in Article 2(1) of Regulation (EU) 2022/720*³⁹⁵.

³⁹⁵ Case C-591/16 P - Lundbeck, paragraph 130.

³⁹⁶ See, for example, paragraph 39 of AMAZON's submissions to the Proposed Resolution or paragraph 23 of APPLE's submissions to the Proposed Resolution.

b. General principles of exemption regulations

- (408) For a vertical agreement to exist, the parties have to operate at different levels of the production/distribution chain and the agreement must relate to the conditions under which the parties may purchase or resell the contract goods and/or services.
- (409) Thus, it is common ground that both paragraph 25.d of the 2010 Vertical Guidelines and VBER 2010 respectively stipulate that only agreements which *'relate to the conditions of purchase, sale or resale of the goods or services supplied by the supplier or which relate to the conditions of sale by the buyer of the goods or services incorporating those goods or services'* (emphasis added) or *'to the conditions under which the parties may purchase, sell or resell certain goods or services' are vertical agreements*.
- (410) In this respect, an agreement will be vertical when these conditions are fulfilled (i.e. there is a direct connection between the agreement and the abovementioned purchase and sale conditions), in addition to the condition that the parties operate at different levels of the production/distribution chain. However, the fact that an agreement is classified as vertical does not mean that each and every clause of the agreement must relate to the conditions of purchase, sale and resale of the goods or services. Thus, paragraph 26 of the 2010 Vertical Guidelines states that *"[i]n more general terms, the Block Exemption Regulation does not cover restrictions or obligations that do not relate to conditions of purchase, sale and resale"*³⁹⁷. In other words, a vertical agreement may exist but some of its clauses, not being related to the conditions of purchase and sale of the contract goods and services, require an individual analysis (separate from the vertical agreement as a whole).

³⁹⁷ This is also stated in paragraph 61 of the 2022 Vertical Guidelines, which rules out the application of the block exemption regulation "to vertical restraints which do not relate to the conditions of purchase, sale and resale of the goods or services [...]", and which further clarifies that these "must be assessed on an individual basis".

- (411) Thus, the definition in Article 1(1)(a) of VBER 2010 concerning *"the terms on which the parties may purchase, sell or resell certain goods or services"* should be interpreted in the light of paragraph 26 of the 2010 Vertical Guidelines: *"the Block Exemption Regulation does not cover restrictions or obligations that do not relate to the conditions of purchase, sale and resale, such as the obligation preventing the parties from engaging in independent research and development, which the parties may have included in an otherwise vertical agreement"*, so that such restrictions not covered by the regulation must be analysed on an individual basis³⁹⁸.
- (412) Moreover, according to Article 2(4) of the VBER 2010 (as well as of VBER 2022), the exemption stipulated in Article 2(1) of VBER 2010 *'shall not apply to vertical agreements entered into between competing undertakings'*. Article 1(1)(c) of the VBER 2010 defines a competing undertaking as *'an actual or potential competitor'* (as does VBER 2022) and, according to the Vertical Guidelines, *'two undertakings are treated as actual competitors if they are active in the same relevant market'*³⁹⁹.
- (413) Finally, according to Article 3(1) of VBER 2010 (which has the same wording in VBER 2022): *"The exemption stipulated in Article 2 shall apply provided that the supplier's share of the market does not exceed 30% of the relevant market on which it sells the contract goods or services and the buyer's share of the market does not exceed 30% of the relevant market on which it purchases the contract goods or services"*.
- (414) In relation to the above, the Vertical Guidelines at paragraph 93 (emphasis added): ***"The calculation of market share should in principle be based on market value figures. If these are not available, estimates may be made based on other reliable market information, such as sales volume figures (see Article 7(a) of the Block Exemption Regulation).***

³⁹⁸ This same idea is included in paragraph 61 of the 2022 Vertical Guidelines, which clarifies what was already established in 2010 by adding that these restrictions included in a vertical agreement and not related to the conditions of purchase and sale should be analysed on a case-by-case basis, using, in fact, the same example of a research and development clause: *"The Regulation [...] does not apply to vertical restrictions that do not relate to the conditions of purchase, sale and resale of goods or services. Such restrictions must therefore be assessed on a case-by-case basis, i.e. it is necessary to determine whether they fall within the scope of Article 101(1) of the Treaty and, if so, whether they fulfil the conditions of Article 101(3) of the Treaty. For example, the Regulation [...] does not apply to a clause that prevents the parties from carrying out independent research and development, even if the parties have included it in their vertical agreement[...]"*.

³⁹⁹ See paragraph 27.

c. Application to this case

(415) The GTA and 2018 ARA agreements have both vertical and horizontal elements:

- On the one hand, both companies compete both at the manufacturing level and at the distribution level of the same products (horizontal element), since APPLE manufactures and distributes electronic products; whereas AMAZON, in addition to providing intermediation services in online marketplaces to third-party sellers, also distributes products on AMAZON's website and manufactures and sells its own brands in Spain, among which are electronic products which compete directly with APPLE's products⁴⁰⁰.
- On the other hand, the GTA and the 2018 ARA are contracts authorising AMAZON to sell APPLE branded products and regulating the conditions of sale and relations between the two companies (vertical element).

(416) If the vertical element prevails and agreements are considered to be vertical, VBER could apply and it should be noted that under the vertical agreements any conduct would be exempted provided that two conditions are fulfilled⁴⁰¹: (i) that the market shares of the parties in the respective markets for the purchase and sale of the contract goods were less than 30% (art. 3.1 of the aforementioned regulations); and (ii) that there were no black clauses as stipulated in articles 4 and 5 of the aforementioned regulations⁴⁰² (arts. 2.1, 4 and 5)⁴⁰³.

(417) Article 1(a) of VBER 2010⁴⁰⁴ defines vertical agreements as: "*agreements or concerted practices entered into between two or more undertakings which operate, for the purposes of the agreement or concerted practice, at different levels of the production or distribution chain and which relate to the conditions under which the parties may purchase, sell or resell certain goods or services*" (emphasis added). Therefore, in order for an agreement to qualify as vertical it has to fulfil two cumulative conditions: (i) it must be concluded between undertakings which, for the purposes of the agreement, operate at different levels of the production or distribution chain; and (ii) it must relate to the conditions under which the parties may purchase, sell or resell certain goods or services.

⁴⁰⁰ [CONFIDENTIAL] [See Response to AMAZON IR II, paragraph 86(b), folio 4695].

⁴⁰¹ See paragraphs 23 and 47 of the Vertical Guidelines (and 7 of the 2022 Vertical Guidelines).

⁴⁰² Those in Article 4 cause the entire agreement to lose the benefit of the exemption (see paragraph 47 of the Vertical Guidelines), while those in Article 5 only withdraw the benefit of the exemption from the clause in question (see paragraph 65 of the Vertical Guidelines) (and that interpretation remains unchanged in the 2022 Vertical Guidelines, see paragraphs 179 and 246 respectively).

⁴⁰³ The articles cited are the same in Regulation 330/2010 and Regulation 2022/720.

⁴⁰⁴ And also Regulation 2022/720, which contains the same definition in Article 1(a).

(418) It is considered that the above conditions are fulfilled in the present case for the following reasons:

- First, for the purposes of the agreement, AMAZON and APPLE operate at different levels of the production and distribution chain since, if one looks at the GTA and the 2018 ARA, APPLE is a supplier of products and AMAZON is the purchaser of those products for resale on its online marketplace; and
- Second, both the GTA and the 2018 ARA generally concern the conditions under which the parties may purchase, sell or resell certain contract goods or services (in particular, the 2018 ARA is a contract authorising AMAZON to sell APPLE-branded products and regulating the products it may sell, the discounts to which it is entitled on its purchases, etc.).

(419) In conclusion, both the GTA and the 2018 ARA constitute vertical agreements for the purposes of VBER 2010 and the Vertical Guidelines⁴⁰⁵.

(420) The qualification of the GTA and the 2018 ARA as vertical agreements has not been challenged by the parties⁴⁰⁶.

(421) In the following, a preliminary explanation will be given regarding the temporal scope of application of VBER 2010 and 2022; this document will then explain why they are not applicable and why, even if they were (*quod non*), the exemption stipulated therein.

⁴⁰⁵ As well as Regulation 2022/720 and the 2022 Vertical Guidelines if applicable to the conduct in question.

⁴⁰⁶ See paragraph 47 of the non-confidential version of AMAZON's submissions to the SOF (folio 8357) and paragraph 285 of the non-confidential version of APPLE's submissions to the SOF (folio 8616).

5.4.1.2.1.1. Temporal scope of application of the regulations

(422) As set out in paragraph (407), it is appropriate to analyse the provisions of the GTA and the 2018 ARA in the light of VBER 2010 without prejudice to the fact that certain explanations or clarifications contained in VBER 2022 the 2022 Vertical Guidelines which do not entail substantive changes or new rules (other than those which are more favourable to the parties) may be brought forward. It is stressed, in any case, that, as will be explained, the conclusions reached by applying VBER 2010 are the same as those that would be reached by applying VBER 2022 and the accompanying Guidelines.

a. Applicability of VBER 2010

(423) Although the GTA and the 2018 ARA constitute vertical agreements, not all of their provisions relate to the conditions under which the parties may purchase, sell or resell certain contract goods or services. As explained in paragraphs (408) to (411) above, restrictions included in a vertical agreement and not related to the conditions of sale and purchase must be analysed on a case-by-case basis.

(424) In this case, as is clear from the facts (see paragraphs (281) to (298)) and will be discussed below, the Exclusion or Brand Gating Clauses, the Advertising Clauses, and the Marketing Limitations Clauses - which are the subject of the investigation in this case - do not relate to the conditions for the purchase, sale and resale of the contract goods or services (i.e. the products which APPLE sells to the AMAZON as a distributor thereof), therefore, they are clauses contained in a vertical agreement to which the VBER does not apply (whether in its 2010 or 2002 version) and which must be analysed individually in order to determine whether they infringe Articles 1 LDC and 101 TFEU.

(425) APPLE has argued that the three clauses relate to the conditions under which the contract goods are purchased, sold and resold for the following reasons⁴⁰⁷: (i) although the SOF states that it will examine this point in more detail below, it does not provide any justification as to why it considers that the above clauses do not relate to the conditions under which goods are purchased, sold or resold; (ii) the Exclusion or Brand Gating Clauses stipulate that only certain resellers may resell on AMAZON and that the 2022 Vertical Guidelines recognise that the prohibition of an online marketplace can benefit from the exemption⁴⁰⁸; and (iii) Advertising Clauses and Marketing Limitations Clauses are a natural function of sales (and resale) activities and that the 2022 Vertical Guidelines recognise that restrictions on online advertising can benefit from the exemption⁴⁰⁹.

⁴⁰⁷ Paragraphs 288 and 289 of the non-confidential version of APPLE's submissions to the SOF (folios 8616 to 8618). Also paragraph 22 of the PR submissions.

⁴⁰⁸ Paragraph 208 'Restrictions on the use of certain online sales channels, such as online marketplaces, or the imposition of quality standards for online sales may, in general, benefit from the exemption stipulated in article 2(1) of Regulation (EU) 2022/720, irrespective of the type of distribution system, provided that they are not aimed at indirectly preventing the effective use of the internet by the buyer to sell the contract goods or services to certain territories or customers'.

⁴⁰⁹ Paragraph 21: "Restrictions relating to online advertising may benefit from the exemption stipulated in Article 2(1) of Regulation (EU) 2022/720, provided that they are not aimed at preventing the use of a complete advertising channel by the buyer'.

(426) However:

- The SOF devotes a section to each of the clauses in which it explains in detail their content and why they have nothing to do with the conditions under which the parties may purchase the contract goods or services, but rather relate to limits on the commercial freedom of the parties and third parties outside the GTA and 2018 ARA.
- More specifically, the Brand Gating Clauses do not affect the conditions under which the parties to the agreement may purchase or resell the contract goods or products, but whether or not third-party resellers of APPLE branded products may use AMAZON's online marketplace.

While the 2022 Vertical Guidelines (cited by APPLE) recognise that the ban of an online marketplace can benefit from the exemption: (i) this case does not concern a ban on the use of an online marketplace imposed by a manufacturer on its distributors, but a direct agreement between a manufacturer and an online marketplace (acting in its role as owner and operator of the online marketplace, and not as a distributor), so these provisions do not apply (see in this respect paragraph (555)); and (ii) even if these provisions were to apply (quod non), paragraph 338 of the same guidelines states that *"(h)owever, in cases where a supplier designates an operator of an online marketplace as a member of its selective distribution system or where it restricts the use of online marketplaces to certain authorised dealers but not to others⁴¹⁰, or where it restricts the use of an online marketplace, but this supplier uses such an online marketplace to sell the contract goods or services, restrictions on the use of such online marketplaces are unlikely to meet the conditions of appropriateness and proportionality"* (emphasis added).

⁴¹⁰ As in the present case where AMAZON is an authorised reseller, and, initially, APRs and other authorised resellers are not.

APPLE operates an open distribution system and, as indicated in the section on proven facts (see paragraph (287)), the following were not authorised to sell APPLE branded products on the AMAZON website in Spain:

- until at least 16 November 2021⁴¹¹, all official APPLE resellers minus the APRs listed in the **[CONFIDENTIAL]** of the 2018 ARA (i.e. APRs from other Member States than those included in the aforementioned **[CONFIDENTIAL]**; and AARs and Retailers regardless of the EU Member State in which they were established); and
- until at least the closure of the investigation phase, all unofficial resellers (NARs) regardless of the Member State of the European Union in which they are established.

APPLE has therefore designated AMAZON as a reseller that can sell APPLE branded products on its online marketplace, as well as initially and until November 2021, only a group of authorised resellers (the APRs), leaving out other authorised resellers such as AARs and retailers⁴¹². For these reasons, the conditions of appropriateness and proportionality are not fulfilled, in so far as certain authorised resellers and even the online marketplace itself (AMAZON) have been allowed to use the AMAZON online marketplace in Spain, while another group of resellers who were also authorised distributors (some of whom were in an equivalent situation to the APRs) have been prohibited from using it.

- The Advertising Clauses and the Marketing Limitations Clauses (as explained in the discussion of their content) do not govern the conditions under which the parties may purchase the contract goods or services, but relate to limitations on advertisements in certain spaces and on certain brands that may not appear when a search is carried out for certain terms related to APPLE's brands, and to prohibitions imposed on AMAZON not to actively approach customers who have purchased APPLE-branded products in order to offer them those of other competitors.

⁴¹¹ **[CONFIDENTIAL]**.

⁴¹² From 16 November 2021, the only ones who would not be allowed to sell on AMAZON's online marketplace are NARs.

According to the 2022 Vertical Guidelines (cited by APPLE), the "*obligation on the distributor not to use suppliers' trademarks or brand names to rank in search engines*"⁴¹³ is a hardcore restriction that excludes the benefit of the exemption, and such a provision operates similarly to the restrictions discussed above (see the explanation given in the discussion of the content of these clauses in paragraphs (810) to (826)).

- (427) For its part, AMAZON argues that the clauses in question should not be analysed separately and that, in any event, they relate to the purchase, sale or resale of goods or services for three reasons⁴¹⁴.
- (428) First, AMAZON argues that considering the vertical clauses in isolation is artificial and arbitrary, and '*the Gating Clauses, the Advertising Clauses and the Marketing Clause*' must be analysed in the context of the vertical agreement. Thus, the purpose of VBER would favour a broad interpretation of what is defined by a vertical agreement, not requiring a direct connection between the restriction agreed between the parties and the goods or services exchanged between them (paragraph 25.d of the Vertical Guidelines).
- (429) However, as explained in paragraphs (408) to (411), paragraph 26 of the Vertical Guidelines states that "[...] *the Block Exemption Regulation does not cover restrictions or obligations that do not relate to conditions of purchase, sale and resale*"⁴¹⁵. Accordingly, the existence of a vertical agreement would not prevent some of its clauses from requiring individual analysis (separately from the vertical agreement as a whole) if they did not relate to the conditions of purchase and sale of the contract goods and services. Indeed, the same paragraph 26 of the Vertical Guidelines contains an example in this regard and states that this would be the case of an "*obligation that prevents the parties from engaging in independent research and development activities, which the parties may have included in a vertical agreement of another type*"⁴¹⁶.

⁴¹³ Paragraph 206.g) of the 2022 Vertical Guidelines.

⁴¹⁴ Paragraphs 49 to 55 of the non-confidential version of AMAZON's submissions to the SOF (folios 8357-8360). Para. 78, 80, 173, 349 to 352 of the non-confidential version of the PR submissions.

⁴¹⁵ This is also stated in paragraph 61 of the 2022 Vertical Guidelines, which rules out the application of the block exemption regulation "to *vertical restraints which do not relate to the conditions of purchase, sale and resale of the goods or services* [...]", and which further clarifies that these "*must be assessed on an individual basis*".

⁴¹⁶ Similarly, the 2022 Vertical Guidelines contain two examples in this regard (see the aforementioned paragraph 61 of the same): "For example, Regulation (EU) 2022/720 does not apply to a clause that prevents the parties from carrying out independent research and development, even if the parties have included it in their vertical agreement" (emphasis added); and "[a]nother example concerns leasing and financial leasing agreements. Although Regulation (EU) 2022/720 applies to agreements for the sale and purchase of goods for the purpose of renting them to third parties, rental and leasing contracts as such are not covered by the Regulation, as in that case there is neither sale nor purchase of goods".

- (430) Second, AMAZON argues that the clauses form an intrinsic part of the distribution agreement, insofar as *"the 'Gating Clauses' are a vertical provision relating to the conditions of sale of certain products in the context of a vertical relationship; the Advertising Clauses are directly linked to the products concerned by the distribution relationship governed by the vertical agreement; and the 'Marketing Clause' relates to customers who have purchased the Apple Products covered by the vertical agreement.* However, as reflected in the section on proven facts (see paragraphs (281) to (298)) the specific content of each of the clauses in question does not relate to *"the conditions under which the parties may purchase, sell or resell certain goods or services"*. Thus, the content of these clauses affects how third-party sellers may market APPLE-branded products on the AMAZON Website in Spain, advertising on the AMAZON Website and AMAZON's ability to conduct *marketing* campaigns to customers buying APPLE-branded products, but not the conditions under which AMAZON may purchase and/or sell such products.
- (431) Thirdly, AMAZON argues that there would have been no vertical agreement without the clauses in question (APPLE would not have accepted the vertical agreement without the vertical clauses) and that the CD itself would have acknowledged in the SOF that it is a vertical agreement, so the investigating authority contradicts itself in considering that VBER would not be applicable to it. However, whether or not APPLE would have accepted the vertical agreement (i.e. GTA and 2018 ARA) without the clauses in question relates to the parties' negotiation process and not to whether or not the clauses in question regulate the conditions of acquisition, sale and resale of the services concerned. On the other hand, the SOF simply states that, if it were a vertical agreement, the clauses could have been exempted if two conditions had been met (in short, party shares of less than 30% and no black clauses). It cannot be concluded from the above, except by decontextualising the quotation from the SOF⁴¹⁷, to which AMAZON refers, that the CD would have recognised that the VBER exemption was applicable to the disputed clauses.

⁴¹⁷ See paragraph 55, second point, of the non-confidential version of AMAZON's submissions to the SOF (folio 8360): *"Secondly, despite stating that 'if the vertical element prevails and they are considered to be vertical agreements, Regulation 330/2010, and Regulation 2022/720, could apply, and it would have to be borne in mind that, under these, any conduct would be exempted', and acknowledging that the agreement in question is 'vertical', the SOF reaches the contradictory conclusion that the VBER does not apply".* However, the CD held in the SOF that *"If the vertical element prevails and agreements are deemed to be vertical, Regulation 330/2010 and Regulation 2022/720 could apply, and it should be noted that, under these, any conduct would be exempted **provided that two conditions are fulfilled:** (i) the market shares of the parties in the respective markets for the purchase and sale of the contract goods were less than 30% (art. 3.1 of the aforementioned regulations); and (ii) there are no black clauses as set out in articles 4 and 5 of the aforementioned regulations (arts. 2.1, 4 and 5 of the regulations)"* (emphasis added).

- (432) In the light of the foregoing, this Division considers that VBER 2010 **does not** apply to the clauses at issue, without the parties' submissions allowing the conclusion reached in this respect by the CD (which would be exactly the same if VBER 2022 had been applied) to be called into question.

b. Exemptions from the vertical regulation

- (433) However, even if one were to accept for dialectical purposes that the VBER 2010 would apply to the clauses analysed (*quod non*), the exemption set down in Article 2.1 thereof would not be applicable to the present case and the same conclusions follow from the analysis of the applicability of the VBER 2022 Regulation for what was not covered by the transitional provision:

- AMAZON and APPLE are (real) competitors in manufacturing and distribution

- (434) As explained in paragraph (412), according to Article 2(4) of VBER 2010 the exemption stipulated in Article 2(1) thereof does not apply to vertical agreements entered into between competing undertakings and, as anticipated, both AMAZON and APPLE manufacture and distribute electronic products and are therefore competitors at both levels.
- (435) If, as indicated in the above-mentioned paragraph (412), the definition of a competing undertaking includes even potential competition and the case law has taken into account potential competition in determining the application of Article 101 TFEU⁴¹⁸, a fortiori account should be taken of a situation such as the present one, in which: (i) AMAZON is not only a potential competitor, but already competes at the manufacturing and distribution level with APPLE; and (ii) although AMAZON's manufacturing role is currently smaller compared to its other two roles, it is nevertheless true that it has been gaining weight over time (with the launch of new products and a steady increase in sales of own-brand products).

⁴¹⁸ See, for example, C-591/16 P - Lundbeck / Commission, ECLI:EU:C:2021:243; and C-307/18 - Generics (UK) and Others, ECLI:EU:C:2020:52.

- (436) In relation to the above, APPLE argues that AMAZON's manufacturing activities are very small and that overlaps are doubtful and would in any case be de minimis in nature⁴¹⁹.
- (437) However, there is no doubt about the overlaps, given that AMAZON manufactures and sells its own products in Spain, including electronic products in some categories which compete directly with APPLE's products⁴²⁰. In addition to being uncontroversial, in a context where even potential competition is relevant to the analysis, the overlaps identify the parties as actual competitors, as AMAZON already manufactures and sells products that compete with APPLE. This is not undermined by the fact that AMAZON's activities are minimal, as alleged by APPLE, in so far as the regulation not only does not stipulate a minimum degree or level of production for the application or non-application of Article 2.4 of the regulations, but on the contrary, even potential competition is included, which by definition refers to undertakings which are not yet even competing in the relevant market, but which could move on to manufacture the products in question within a short period of time.
- (438) AMAZON also argues that:⁴²¹ (i) the parties are not competitors, to the extent that the SOF classifies AMAZON's own branded products as products manufactured by AMAZON, when this approach would not be reflected in the regulation and, according to paragraph 27 of the Vertical Guidelines "*a distributor that gives specifications to a manufacturer to produce particular goods under the distributor's trade name should not be considered a manufacturer of own branded products*", and (ii) in any event, even if they were competitors, there is no overlap in respect of a significant part of APPLE's products.
- (439) This reading of paragraph 27 of the Vertical Guidelines ignores the fact that it refers to cases where a company purchases part of its production from a manufacturer/producer and then resells it under its own brand name. The typical example would be a supermarket that buys part or all of the production from a manufacturer/producer of a certain product in order to sell it under its own brand name afterwards. In such cases, the supermarket will not be considered as a manufacturer for the purposes of VBER.
- (440) This is not the case for AMAZON, which designs its own products⁴²² and outsources their production to a third-party manufacturer who merely assembles the products and produces the goods they order. Otherwise, if the interpretation suggested by AMAZON were accepted, companies such as APPLE, which design their products and outsource their production (provide specifications to a manufacturer to produce particular goods under the distributor's brand name) would never be considered manufacturers for the purposes of VBER, nor would other companies such as Nike, Sanrio, Guess⁴²³, Inditex etc., which also design their products, but outsource their production at least in part, by providing specifications in third-party factories.

⁴¹⁹ Paragraphs 290 to 292 of the non-confidential version of APPLE's submissions to the SOF (folios 8618 to 8619).

⁴²⁰ In particular, AMAZON manufactures and markets, for example, goods in the following classes:
[CONFIDENTIAL] ('AMAZON IR II'), paragraph 86(b), folio 4695)

⁴²¹ Paragraphs 353 to 355 of AMAZON's submissions on the Proposed Resolution.

⁴²² See, for example, the web page on the product design team: <https://www.amazon.jobs/en/teams/ddg>

⁴²³ In this regard, it should be noted that these companies have been subject to EC investigations, which are cited in this SOF, and have been considered to be manufacturers of goods.

(441) Finally, as regards the claim that there are no overlaps for a significant part of APPLE's products, reference is made to what was stated in response to APPLE's identical claim in paragraph (437) above.

(442) Therefore, even if it were to apply, the exemption under VBER 2010 would also not apply to the clauses in question entered into between AMAZON and APPLE as actual competitors (and the same conclusion would be reached if VBER 2022 were to apply).

- *The market shares of AMAZON and APPLE are both above 30% of the relevant market*

(443) As explained in paragraph (413) above, according to Article 3(1) of the VBER 2010 it would be sufficient for the share of one of the parties to the agreement to exceed 30% for the benefit of the exemption to be lost.

(444) In the present case, the shares of both parties exceed 30%, which determines that the condition set out in the aforementioned Article 3(1) is not fulfilled and the benefit of the exemption stipulated in Article 2(1) is lost. Thus:

- In the case of AMAZON, whatever the unit used (volume of revenue from the provision of basic or basic and ancillary services or revenue generated by third parties), its share of the market for the provision of intermediation services in online marketplaces to third-party sellers in Spain is, over the whole period under investigation, more than [50-60]% in the most conservative scenario (exceeding [60-70]% in the other two scenarios), i.e. in any event well above the threshold of 30%⁴²⁴.

⁴²⁴ In this regard, paragraph 67(b) of the 2022 Vertical Guidelines states that '*for the purposes of applying the market share thresholds set out in Article 3(1) of the Regulation, the market share of the undertaking providing online intermediation services is calculated on the relevant market for the provision of such services [...]*'.

- In the case of APPLE, according to data provided by the company itself, its share of the market for the manufacture and sale of electronic products in the EEA is more than 30% during the whole period under investigation. Moreover, even when looking at narrower markets on a product-by-product basis, it exceeds the market share threshold in, inter alia, the product categories in highest demand such as smartphones, tablets and smart watches (see paragraphs (225) and (226)).

- (445) In relation to the above, APPLE claims⁴²⁵: (i) that AMAZON's shares should not be calculated on the market for the purchase of online marketplace services for the purpose of determining whether or not the regulation applies (but on the market for the wholesale purchase of consumer electronic products in Spain); (ii) that if this argumentation of the CD were accepted *"then /Regulation 330/2010//⁴²⁶ would never apply to online marketplace bans; this is because, by definition, an online marketplace ban prevents all resellers from using any online marketplace, which means that an online marketplace ban affects 100% of that intermediation market' when 'online marketplace bans have been found to qualify for exemption [as] recognised in the 2022 Vertical Guidelines"*; and (iii) that APPLE has an average market share in Spain of less than 30% in all its product categories sold through AMAZON; and, in any event, it must reasonably be understood that APPLE's market share in the EEA is well below 30% as shares have to be estimated in volume and not in value as it considers that in the case of heterogeneous goods, brand penetration is best captured by volume shares and these shares will also reflect the popularity of a brand for software developers⁴²⁷.
- (446) APPLE's arguments cannot succeed:
- (447) In relation to the first claim, it should be borne in mind that the 2022 Vertical Guidelines which APPLE itself cites (in relation to the prohibition of online marketplaces in support of its following argument) state in paragraph 67.(b) that *'the market share of the undertaking providing online intermediation services is calculated on the relevant market for the provision of such services'*. If this market is taken into account, AMAZON's shares would exceed 30%.
- (448) As to the second claim, APPLE confuses the market share affected by a ban (i.e. the market coverage affected by the ban: *"an online market ban **affects** 100% of that intermediation market"* (emphasis added)), with the market share that a given online marketplace has in that market. For example, if a manufacturer prevents its resellers from using any online marketplace, the resellers are affected in 100% of their market share in the market for intermediation of online marketplaces, but this will be independent of the market share of any online marketplace (AMAZON, Alibaba, eBay, etc.) in the market for the provision of intermediation services in online marketplaces.

⁴²⁵ See paragraphs 293 to 299 of APPLE's submissions to the SOF.

⁴²⁶ APPLE refers in this quote to VBER, which in this case is Regulation 330/2010.

⁴²⁷ See page 14 of the Economic Report submitted by APPLE together with its submissions to the SOF (folio 8736): *"[...] market shares calculated on sales volume (as opposed to value) would more accurately capture the market penetration of a given brand."*

- (449) As regards the third claim, Article 3 of the VBER 2010 (and Regulation 2022/720) stipulates that *'(t)he exemption stipulated in Article 2 shall apply provided that the supplier's share of the market does not exceed 30% of the relevant market on which it sells the contract goods or services [...]'* and, in this case, APPLE's relevant market on which it sells the contract products is the market for the manufacture and sale of electronic products which, as indicated in section 3.2.2.1, is EEA-wide. Thus, as stated in that section, the geographic dimension of the market is not national as indicated by APPLE. On the other hand, according to data provided by the company itself, APPLE's share of the electronics manufacturing and sales market in the EEA is more than 30% in value terms.
- (450) On the other hand, APPLE's claim that quotas have to be analysed in volume and not in value cannot be accepted. The practice of national and European competition authorities⁴²⁸ is consistent in stating that, as a general rule, value shares should be calculated. Indeed, this is what the Vertical Guidelines state in paragraph 93 (emphasis added): ***"The calculation of market share should in principle be based on market value figures. If these are not available, estimates can be made on the basis of other reliable market information, such as sales volume figures (see Article 7(a) of the Block Exemption Regulation)"***⁴²⁹.
- (451) Contrary to APPLE's submission, according to the Market definition communication, it is precisely the value shares that are relevant, in particular when it comes to differentiated product markets. Specifically, paragraph 55 of the Notice states that *"in the case of differentiated products, the value of sales and the corresponding market share are generally considered to better reflect the relative position and strength of each supplier"*.

⁴²⁸ See for example the decisions of the European Commission of 22 July 1992 in Case IV/M. 190 - Nestlé/Perrier, para 40 or 30 September 1992 in Case No IV/M214 - Du Pont/ICI, para 30.

⁴²⁹ This is also stated in paragraph 54 of the relevant Market communication: *"while market share is usually calculated on the basis of sales, there are also other indicators, depending on the product or sector, which can provide useful information, such as capacity, number of bidders, fleet units in the aerospace industry, or existing reserves in sectors such as mining."*

(452) The CNMC has been able to access value shares and APPLE does not provide any valid justification as to why, in the markets where APPLE operates as a manufacturer, volume shares would be appropriate:

- First, APPLE in its submissions repeatedly stresses the importance of its brand image and the shopping experience as a differentiating element. APPLE's price positioning across multiple consumer electronics products and its closed ecosystem strategy are also well known. In this context, the value shares provide a more accurate picture of APPLE's relative position, as they reflect the greater willingness to pay that would result from a brand perceived as more prestigious. As far as app developers are concerned, to the extent that APPLE customers are generally more likely to spend⁴³⁰, access to these customers, even if they are fewer in number than those using other ecosystems, is more interesting from a business point of view. This dimension would not be adequately captured by mere volume quotas.
- Indeed, in relation to the value market share estimates provided, which are based on IDC data, APPLE itself argued that, notwithstanding the limitations that such data may have, *'[...] the IDC data are based on what Apple considers to be reasonable estimates of the market for the manufacture and sale of consumer electronics products at both the EEA and national level'*⁴³¹.

(453) In relation to market shares, AMAZON argues that the SOF and the Proposed Resolution misidentify product markets, in the case of APPLE, by indicating that the SOF takes market shares from unreliable sources and, in the case of AMAZON, by pointing out that the market should not be the market for the provision of intermediation services (as suggested by the 2022 Vertical Guidelines in para. 67.b), but the market for the purchase of electronic products (i.e. the wholesale purchasing market). In this respect, the company argues that as it is difficult to collect data on its wholesale purchases, the market for retail distribution of electronic products, covering both online and offline channels, where its share is less than 30%, can be used as a proxy for the wholesale purchasing market. In making this approximation, it relies on the Technology Transfer Guidelines which indicate that *'an appropriate way of calculating market shares for the upstream market is to use the share of sales that is generated in the downstream market'*. AMAZON also claims that the SOF misidentifies the geographic scope in which AMAZON operates, which should not be national but EEA.

⁴³⁰ According to a report by Finbold, "During 2021, iOS users spent almost twice as much on apps as Android users" (<https://finbold.com/consumers-spent-40-billion-on-app-store-in-h1-2021/>)

⁴³¹ See Response to APPLE IR II, paragraph 17 (folio 4375).

- (454) In relation to the use of unreliable sources for the calculation of APPLE's share, it is recalled that this information was provided by the company itself which, moreover, considered that they were "reasonable estimates"⁴³² (emphasis added).
- (455) As regards AMAZON's product market, Article 67.b of the 2022 Vertical Guidelines does not entail a substantive change; rather, it is an interpretation or clarification of Article 3 of the regulations⁴³³ (the wording of which is exactly the same in both VBER 2010 and 2022) in the light of recent developments in the e-commerce market and its use is therefore fully valid.
- (456) In this sense, if changes of interpretation supplementing the wording of a previously existing article do not constitute a breach of the principle of non-retroactivity of penalising rules, this is all the more true of interpretative guidelines. In this regard, the Supreme Court⁴³⁴ already indicated that a legislative change in the definition of cartel contained in additional provision 4.2 LDC⁴³⁵, was limited to "*clarifying, facilitating understanding and perfecting the definition of the original wording of the law, without modifying its meaning*", and even more so when the conducts fit "*within the same type of infringement with the same literal content*" (i. e. Article 1 LDC); it therefore rejected the arguments of the parties that the principle of non-retroactivity had been breached when the CNMC made an "*expansive interpretation of the concept of cartel with respect to the content of additional provision 4.2 LDC in its original wording*".
- (457) In any event, even if it were admitted (*quod non*) that the relevant market for calculating the shares is the market for the wholesale purchase of electronic products, there is no justification for using as a proxy for its calculation the market for the retail distribution of electronic products including all channels as *suggested by* AMAZON, precisely because they are distinct markets and the share in one does not necessarily have to be equivalent in the other. In this respect, the citation to the Technology Transfer Guidelines, as explained in detail in paragraphs (218) et seq. is not appropriate. On the other hand, with regard to the wholesale purchasing market, AMAZON does not provide any data, merely indicating that it is difficult to collect data on its wholesale purchases.

⁴³² See Response to APPLE IR II, paragraph 17 (folio 4375).

⁴³³ "*The exemption stipulated in Article 2 shall apply on condition that the market share of the supplier does not exceed 30% of the relevant market on which it sells the contract goods or services and the market share of the buyer does not exceed 30% of the relevant market on which it purchases the contract goods or services*".

⁴³⁴ Judgment of the SC of 17 May 2021 in case S/0482/13 - *FABRICANTES AUTOMÓVILES*, appeal 2218/2020, ECLI:EN:TS:2021:2021. FD Five.

⁴³⁵ Which ceased to contain the word "secret" in the definition of cartel (in force at the time of the sanctioned facts) as of Royal Decree-Law 9/2017, and was applied by the authority in its decision.

- (458) In any event, irrespective of which market is considered to be the market in which AMAZON operates, it is sufficient for one of the parties to exceed the 30% threshold for the exemption not to apply, and APPLE's share exceeds 30% according to APPLE's own data.
- (459) As regards the geographic scope in which AMAZON operates, it has been explained in detail in section 3.2.1.1.4 that it is national in the case of the provision of intermediation services and, in case of considering, as suggested by AMAZON, the market for the retail distribution of electronic products, this would also be national as explained in section 3.2.2.3.2. This Division therefore refers in its entirety to paragraph 3 of this decision.
- (460) AMAZON contradicts itself by suggesting that, in the case of the product market, it can use the retail distribution of electronic products as a proxy for the wholesale purchasing market (arguing that it is difficult to collect data) but, when it comes to defining the geographic market, it again suggests the wholesale purchasing market, which according to AMAZON has a wider geographic scope than the retail distribution of electronic products.
- (461) Finally, it should be noted that AMAZON in no case provides any estimates of market shares of the company and its main competitors in any of the alternative dimensions it suggests, merely making generic statements such as "*significantly below the 30% range*"⁴³⁶ or "*the relevant market shares are well below the 30% thresholds*"⁴³⁷.
- (462) In conclusion, in the event that VBER 2010 (or VBER 2022) were to apply (*quod non*), this Division considers that, in the present case, the 30% market share threshold stipulated therein is exceeded and therefore the exemption stipulated in Article 2(1) of VBER would not be applicable. Furthermore, as explained in the previous point, irrespective of market shares, APPLE and AMAZON are considered to be competing undertakings in the manufacture of certain products which, by virtue of Article 2(4) of the VBER 2010 (and 2022), excludes the application of the exemption stipulated in Article 2(1) thereof.

⁴³⁶ See paragraph 66 of the non-confidential version of AMAZON's submissions to the SOF (folio 8363).

⁴³⁷ See paragraph 68 of the non-confidential version of AMAZON's submissions to the SOF (folio 8364).

- Non-application of the dual distribution exception

- (463) Moreover, even if the shares of both undertakings were below 30% (*quod non*) and given that they are competitors in terms of distribution and manufacturing, the dual distribution exemption stipulated in Article 2(4)(a) of the VBER 2010 (and VBER 2022) would not apply to them, which set out that the exemption '*shall apply where competing undertakings enter into a non-reciprocal vertical agreement and (a) the supplier is a manufacturer and a distributor of goods and the buyer is a distributor and not a competing undertaking at the area of manufacturing*' (emphasis added).

- Conclusion on the implementation of the VBER 2010 exemption

- (464) In view of the above, even if one were to accept for dialectical purposes that Regulation 330/2010 applies to the clauses in question, it is concluded that the clauses in question would not be covered by the exemption set out in the Regulation by reason of the parties' competing status, their market shares, and AMAZON's status as a manufacturer (and the conclusions reached would be the same if VBER 2022 were applicable).

c. Arguments on the temporal application of VBER and assessment of the Division

- (465) AMAZON argues that: (i) the vertical agreement must be analysed in accordance with VBER 2010 and the Vertical Guidelines; (ii) the SOF makes confusing references to both the 2010 and the 2022 standards; and (iii) despite the fact that the 2022 standards are not applicable, the SOF '...refers exclusively to paragraph 61 of the 2022 Vertical Guidelines for the purpose of assessing the vertical clauses separately from the rest of the Vertical Agreement' and 'refers to paragraph 67.(b) of the 2022 Vertical Guidelines as the basis on which to calculate Amazon's market shares'.
- (466) With respect to the first two claims, it has been explained in the preceding paragraphs that the rules applied are those of 2010, with the result that VBER 2010 does not apply and that, even if it did apply (*quod non*), the exemption stipulated therein would not be applicable because: (i) APPLE and AMAZON are competitors at the area of manufacturing; (ii) the 30% threshold is exceeded; and (iii) the dual distribution exception does not apply. In any event, the application of the rules adopted in 2022 would lead to the same result: the clauses in question would not be covered by VBER 2022 because they do not relate to the conditions of purchase and/or sale of the contract goods.
- (467) Furthermore, in relation to AMAZON's claim that confusing references are made to the 2010 and 2022 rules, it has already been clarified that the 2010 rules apply and that the result would be the same applying the 2022 rules. Indeed, it is the company itself that refers to the 2022 rules when it deems it necessary to defend its interests, for example in relation to parity clauses and prohibitions on the use of online marketplaces.

(468) In relation to the third claim, this Division does not share AMAZON's arguments for the following reasons:

- First, paragraph 61⁴³⁸ of the 2022 Vertical Guidelines states that, if a clause is not related to the conditions of sale and purchase, it should be analysed outside the regulation on a case-by-case basis, and gives an example of a clause not related to the conditions of sale and purchase as an R&D clause. However, it is not correct that this paragraph is cited exclusively for the purpose of assessing vertical clauses separately from the rest of the agreement. The reference to paragraph 61 of the 2022 Vertical Guidelines follows and complements paragraph 26 of the 2010 Vertical Guidelines: *"The Block Exemption Regulation does not cover restrictions or obligations that do not relate to the conditions of purchase, sale and resale, such as an obligation preventing the parties from engaging in independent research and development, which the parties may have included in an otherwise vertical agreement.* In other words, paragraph 61 of the 2022 Vertical Guidelines only clarifies what was already stipulated in the 2010 rules (including, using the same example of a research and development clause).

Thus, paragraph 61 is not new, but this was already the interpretation of Article 1.1.a of VBER 2010 (see paragraph 26 of the Vertical Guidelines). This interpretation is simply clarified in a straightforward manner in the 2022 Vertical Guidelines to make the rules clearer and more workable (which was in fact one of the objectives of the reform⁴³⁹).

In this regard, already before the 2022 reform, in 2015, a Düsseldorf Court considered that a broad parity clause imposed by an undertaking (HRS) on hotels might not be related to the conditions of purchase or sale and might therefore not constitute a vertical agreement covered by VBER, although the Commission finally did not close the issue because the investigated company had a share above 30% and therefore VBER 2010 did not apply to it in any case⁴⁴⁰. Precisely in order to avoid possible doubts (such as the one mentioned above), the 2022 reform clarifies the above (by adding that they must be analysed separately), but this does not mean that this was not already the case before the reform as AMAZON seems to maintain.

⁴³⁸ "Regulation (EU) 2022/720 does not apply to vertical restraints that do not relate to the conditions of purchase, sale and resale of goods or services. Such restrictions must therefore be assessed on a case-by-case basis, i.e. it is necessary to determine whether they fall within the scope of Article 101(1) of the Treaty and, if so, whether they fulfil the conditions of Article 101(3) of the Treaty. For example, Regulation (EU) 2022/720 does not apply to a clause that prevents the parties from carrying out independent research and development, even if the parties have included it in their vertical agreement."

⁴³⁹ See the 'INCEPTION IMPACT ASSESSMENT' of the reform here: <https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12636-Revision-of-the-Vertical-Block-Exemption-Regulation>

⁴⁴⁰ Judgment of the Court of Düsseldorf (2015), in Case VI - Kart. 1/14 (V). See here: <https://openjur.de/u/759111.html> (paras 171-173), in the HRS case (the company did not appeal the judgment and it is therefore final). Now, with the new rules, this debate is closed and it is considered that such clauses do relate to the conditions of sale and purchase, insofar as they are covered by the regulation in certain cases.

- Second, although paragraph 67.(b) of the 2022 Vertical Guidelines has no equivalent in the 2010 Vertical Guidelines, it is not a substantive change, but an interpretation or clarification of Article 3 of the regulations⁴⁴¹ (the wording of which is identical in both versions) in the light of recent developments in the e-commerce market (see explanations in paragraphs (455) to (456)). In other words, the new paragraph completes the interpretation of Article 3, to make it clear that the market where the 30% shares are calculated, in the case of platforms, has to be in the market for the provision of intermediation services.

5.4.1.2.1.2. Conclusion on the implementation of VBER 2010

- (469) In conclusion, the clauses under investigation are not covered by VBER 2010 and, even if for dialectical purposes it were accepted that they are covered by it, they would not be covered by the exemption provided for therein (and the conclusions would be the same if VBER 2022 were applied).
- (470) It is therefore necessary to examine individually whether the said clauses are restrictive of competition.

5.4.1.2.2. Exclusion or Brand Gating Clauses

5.4.1.2.2.1. Restriction by object

a. The content

- (471) The **content** of the agreement has both horizontal and vertical elements (although it is considered that, for the purposes of the agreement, the vertical element prevails), as set out in the established facts (see section 4.4.1, paragraphs (281) to (288)). Exclusion or Brand Gating Clauses are agreements between AMAZON and APPLE restricting the number of sellers (including official APPLE resellers) who can sell APPLE products on AMAZON's Websites.

⁴⁴¹ "The exemption stipulated in Article 2 shall apply on condition that the market share of the supplier does not exceed 30% of the relevant market on which it sells the contract goods or services and the market share of the buyer does not exceed 30% of the relevant market on which it purchases the contract goods or services".

- (472) In particular, in Spain (and in the other jurisdictions where there is a dedicated AMAZON website in Europe: UK, Italy, Spain, France, Germany, Netherlands, Sweden and Poland⁴⁴²), until 16 November 2021, only APPLE APRs identified in the **[CONFIDENTIAL]** of the 2018 ARA were authorised to sell on AMAZON Websites.
- (473) Since the entry into force of the GTA and the 2018 ARA (i.e. on 31 October 2018), the following APPLE resellers became unauthorised to sell APPLE-branded products on the AMAZON Website in Spain:
- all official APPLE resellers minus the APRs listed in the **[CONFIDENTIAL]** of the 2018 ARA (i.e. APRs from other Member States than those listed in the aforementioned **[CONFIDENTIAL]**; and AARs and Retailers regardless of the EU Member State in which they were established) at least on 16 November 2021⁴⁴³; and
 - all unofficial resellers (NARs) irrespective of the Member State of the European Union in which they are established until at least the closure of the investigation phase.
- (474) The two companies have thus signed an **agreement, the object of which involves:** (i) a **discrimination of access to the main e-commerce platform in Spain** (leader by a considerable distance from the next operator in terms of traffic and revenue) between resellers of APPLE products not based on objective, transparent, necessary, proportionate and justified criteria⁴⁴⁴, placing some competitors (i.e. those not authorised to sell APPLE-branded products on AMAZON's websites, who have been denied access to this platform) at a disadvantage compared to others (i.e. those that are authorised); (ii) a **limitation or control of the distribution of APPLE products on the market**; and (iii) an **internal market partitioning**; in all three cases **reducing intra-brand competition**⁴⁴⁵ between APPLE-branded products on the main e-commerce platform in Spain, which is the AMAZON website.

⁴⁴² In the **[CONFIDENTIAL]** (see answer to AMAZON IR IV, questions 2 and 3 - folios 59195924).

⁴⁴³ As indicated above, this is the date of the communication made by APPLE. While the enabling may have taken place at a later date, taking the most conservative approach, the date of the communication will be considered to be the date on which the change became effective.

⁴⁴⁴ It will be explained in more detail below.

⁴⁴⁵ Intra-brand competition refers, in general, to competition between products of the same brand.

(475) Each of the above points will be examined in detail below:

- **Discrimination**

(476) Article 1(1)(d) LDC prohibits 'the application of dissimilar conditions for equivalent transactions in commercial or service relations which place competitors at a disadvantage compared with other competitors'; and, similarly, Article 101(d) TFEU prohibits 'the application to trading parties of dissimilar conditions for equivalent transactions, thereby placing them at a competitive disadvantage'.

(477) In relation to the above, as described above, by their conduct, both undertakings would have applied:

- To trading parties (resellers of APPLE products who are no longer authorised to use the AMAZON Website in Spain and those who not ceased to be authorised).
- Unequal conditions (some can sell through AMAZON, others cannot)
- For equivalent transactions (the resale of APPLE products by resellers that are legitimately integrated into its open distribution system).
- That they would have placed some competitors (resellers not authorised to use the AMAZON Website in Spain) at a disadvantage compared to others (resellers authorised to use the AMAZON Website in Spain).

(478) This discrimination is furthermore carried out without being based on objective, transparent, necessary, proportionate and justified grounds (as discussed in detail in paragraphs (576) to (602)).

(479) As regards national precedents which have held that discrimination between operators amounts to a restriction by object of competition law, one can cite **File 475/99 - Vizcaya Press**. In that case, the now defunct Tribunal de Defensa de la Competencia ("TDC") sanctioned for an infringement of Article 1(1)(d) LDC against the Asociación Provincial de Editores y Distribuidores de Prensa y Publicaciones de Vizcaya for, among other conduct, discriminating against some resellers as opposed to others by imposing unequal conditions (i.e. different minimum sales requirements) on some of them for equivalent transactions (as a condition for supplying them with copies for sale), which had the purpose (i.e. the object) and effect of reducing competition in the daily press distribution sector for sale in the territory of the province of Vizcaya⁴⁴⁶.

⁴⁴⁶ Decision confirmed by the Supreme Court (see Supreme Court Judgment of 12 January 2011, appeal 2245/008).

- (480) Similar circumstances are present in this case to those that led the TDC to conclude that those conditions were restrictive of competition. The Exclusion or Brand Gating Clauses entail the application of different conditions to resellers (by excluding all resellers of APPLE products, except APRs from the list of **[CONFIDENTIAL]** of the ARA, 2018 until November 2021 and maintaining the exclusion of NARs until today), placing at a disadvantage those resellers who cannot access the online sales channel that drives most of the e-commerce web traffic in Spain and net sales of electronic products online in Spain.
- (481) The **agreements in question are considered to fall within the scope of 1.1.d) LDC and 101.1.d) TFEU as they discriminate against some operators compared to others**, applying dissimilar conditions to equivalent transactions and, as a consequence, placing some operators at a competitive disadvantage compared to others.

- Submissions of the businesses

- (482) In relation to the above, APPLE has argued during the investigation, as well as in its reply to the Proposed Resolution, that it is *prima facie* entitled to determine the distribution strategy it considers most appropriate to achieve its legitimate objectives, based on its rights of freedom to conduct a business and freedom of contract, so that it is not possible to consider that there are any limitations applicable to a supplier in selecting resellers of its products in the context of an open distribution system (**ODS**)⁴⁴⁷.
- (483) APPLE argues that it selected the **[60-70]** resellers to operate AMAZON's online marketplace on the basis of objective and qualitative criteria, without applying any discrimination. It argues that APR distributors were selected because they are the first line of resellers, they are committed to higher investments and offer a great customer shopping experience thanks, among other things, to high quality pre-sales and after-sales services⁴⁴⁸. APPLE also argues in this respect, in order to deny discrimination between distributors, that APRs are totally different sellers, both from other resellers and especially from NARs, which by definition have not made commitments and therefore cannot guarantee the same level of quality and service as APRs⁴⁴⁹.

⁴⁴⁷ See paragraph 20 of APPLE's submissions on the Proposed Resolution and paragraphs 148 to 159 of APPLE's submissions to the SOF.

⁴⁴⁸ Paragraph 69 of APPLE's submissions on the Proposed Resolution and paragraph 151 of APPLE's submissions to the SOF.

⁴⁴⁹ Paragraph 55 of APPLE's submissions on the Proposed Resolution.

- (484) The selection of these resellers on the basis of objective criteria would be accredited, according to APPLE, on the basis of "*very eloquent*" evidence in the file, such as the APPLE emails contained in folios 4389 and 166 to 169⁴⁵⁰. APPLE also submits, together with its submissions on the Proposed Resolution, as additional alleged evidence of the above, an internal presentation dated 18 November 2018 in which the APRs are referred to as the **[CONFIDENTIAL]**⁴⁵¹.
- (485) APPLE also submits that, from the outset, it had a plan to start with the category of its main premium resellers and then expand the possibility of selling through AMAZON to other categories of resellers⁴⁵². In particular, APPLE maintains that it planned to expand the number of resellers authorised to sell on AMAZON once the counterfeiting and branding issues were resolved⁴⁵³ so that this expansion would be done in a progressive manner following an inverted pyramid approach⁴⁵⁴. Proof of this is that the extension was carried out in November 2021, as APPLE had announced to the CD in May 2021 already before the opening of the Case. The latter in turn is evidence of the objectivity and proportionality of APPLE's approach in devising the Brand Gating Clauses⁴⁵⁵.
- (486) APPLE further argues that the discussions with AMAZON to which the CD refers in the Proposed Resolution on the temporary extension of the list of resellers that could use AMAZON during the COVID-19 pandemic would only demonstrate that APPLE authorised the use of this online marketplace to its resellers on the basis of objective and non-discriminatory criteria.

⁴⁵⁰ Paragraph 60 of APPLE's submissions on the Proposed Resolution.

⁴⁵¹ Paragraph 60 and Appendix 2 of APPLE's submissions on the Proposed Resolution.

⁴⁵² Paragraph 21 of APPLE's submissions on the Proposed Resolution.

⁴⁵³ Paragraph 69 of APPLE's submissions on the Proposed Resolution and paragraph 153 of APPLE's submissions to the SOF.

⁴⁵⁴ Paragraph 59 of APPLE's submissions on the Proposed Resolution.

⁴⁵⁵ Paragraph 21 of APPLE's submissions on the Proposed Resolution.

(487) Moreover, APPLE argues that the PRENSA VIZCAYA precedent cited by the CD is irrelevant to the present case for the following reasons:

(i) because a horizontal agreement between direct competitors was analysed (whereas in the present case we are dealing with a vertical agreement); (ii) because in the PRENSA DE VIZCAYA case the cartel covered 95% of the wholesale newspaper market without leaving any alternative to retailers, whereas in the present case NARs are still able to buy and resell products of brands other than APPLE through AMAZON; (iii) because in PRENSA DE VIZCAYA the retailers had no other channels to market their products than kiosks whereas in this case, the APPLE resellers expelled from AMAZON have more channels available to them); and (iv) because in PRESNA DE VIZCAYA, the retailers concerned had an interest in selling and sent hundreds of requests, whereas, in the present case, neither APPLE nor AMAZON would have received a flood of requests from APPLE resellers to be granted access to AMAZON's online marketplace⁴⁵⁶.

(488) AMAZON, on the other hand, rejects that the Exclusion or Brand Gating Clauses can be equated to a restriction by object resulting from discrimination because this would not be supported by the case law⁴⁵⁷. Its argument focuses on rejecting the relevance of the PRENSA DE VIZCAYA precedent invoked by the CD with arguments similar to those of APPLE. In addition to highlighting the differences with the present case, it criticises the fact that the CD has cited that decision as the only national precedent for holding that the Brand Gating Clauses give rise to restrictive discrimination by reason of their object, when, in addition, according to AMAZON, that decision did not even classify the conduct sanctioned as restrictive of competition by reason of its object⁴⁵⁸.

(489) This Division cannot agree with these submissions for the following reasons.

(490) It should be stressed, first of all, that APPLE's right to determine the distribution model it considers to be in its best interests is not contested. The reproach for the penalty does not derive from APPLE having opted for one distribution system or another, but from its having reached an agreement with AMAZON that only some of its distributors who legitimately form part of the open distribution system chosen by APPLE itself were authorised to use its online marketplace, unduly discriminating against the rest, to the detriment of intra-brand competition, in a particularly relevant marketing channel such as AMAZON's online marketplace.

⁴⁵⁶ Paragraph 65 of APPLE's submissions on the Proposed Resolution and paragraphs 157 and 158 of APPLE's submissions to the SOF.

⁴⁵⁷ Paragraphs 135 to 139 of AMAZON's submissions on the Proposed Resolution.

⁴⁵⁸ Paragraph 136 of AMAZON's submissions on the Proposed Resolution.

- (491) Furthermore, this Division does not agree that the initial selection of APRs authorised to sell on AMAZON was aimed at mitigating the degradation of their brand as a result of a pressing problem of counterfeiting and poor presentation of their products that was specific to AMAZON's online marketplace. APPLE claims that it selected the initially appointed resellers as the only entities able to use AMAZON's online marketplace because of the level of investment and support offered to them by APPLE itself. However, the level of investment is not related to whether or not counterfeit products are sold, and the same is true for the support. None of these criteria relate to the reseller's mode of supply, nor do they make it more or less likely that counterfeit products will be introduced into the online marketplace.
- (492) Indeed, a large part of the resellers not authorised to use AMAZON's online marketplace until November 2021 (the AARs and the Retailers) are supplied from the same sources as the resellers that were authorised to use this channel (the APRs). APRs cannot therefore be considered to be in a different situation from AARs and Retailers from the point of view of the risk of counterfeiting. The differences between this type of resellers and APRs and Retailers lie primarily in the requirements APPLE imposes on APRs as regards their physical shops as inferred from their own allegations, which has no impact on online sales⁴⁵⁹.
- (493) With regard to whether the exclusion of NARs would be justified, it must be stressed that it is APPLE itself which has opted for an open distribution system in which this type of reseller can operate, whose commercial activity benefits, as the defendant itself acknowledged in reply to a request for information from the CD, APPLE encourages its wholesalers to supply APPLE products to NARs (paragraph (332)). If APPLE considered it crucial to disassociate its products from such resellers in order to protect its brand image, it would have to opt for a selective distribution system in which only its authorised resellers could lawfully market APPLE products.
- (494) Indeed, as explained below when analysing the COTY judgment - which APPLE repeatedly invokes in its defence (paragraphs (546) to (563)), it is the consistency with the desire to tie products exclusively to distributors meeting certain standards which justifies that limitations on the use of online marketplaces (by the supplier to the distributors and not as a result of an agreement between the supplier and a third party) may, under certain conditions, be introduced in selective distribution systems (which is not the case here as neither the supplier nor a third party can be found in the COTY judgment).

⁴⁵⁹ Paragraph 59 of APPLE's submissions on the Proposed Resolution.

- (495) In addition, it should be noted that, between 31 October 2018 and 16 November 2021, only a few APRs were authorised to sell through AMAZON, which leads to a discrimination between the APRs themselves, which contradicts APPLE's assertions that this would be the only type of distributor that could guarantee the proper marketing of APPLE products through AMAZON due to their "homogeneous nature"⁴⁶⁰. The above reflects that what APPLE essentially claimed was a quantitative limitation on the number of resellers of APPLE products on AMAZON.
- (496) With regard to the allegedly "*very eloquent*" evidence in the file to which APPLE refers to try to claim that the selection of the resellers authorised to sell on AMAZON was made on the basis of objective criteria, it should be noted that the pages cited in its submissions on the Proposed Resolution (4389 and 166 to 169) correspond to the same email in which the only "objective criteria" attributed to the APRs is that they are easier to control, **[CONFIDENTIAL]**⁴⁶¹. The focus is therefore on facilitating APPLE's management of its distribution channel, without this constituting a legitimate aim to justify discrimination between resellers in agreeing with the online trading platform which resellers could use the platform to sell their products and which could not.
- (497) With regard to the presentation attached to its submissions on the Proposed Resolution, entitled "**[CONFIDENTIAL]**", this is a document dated **[CONFIDENTIAL]**. It post-dates the adoption of the GTA and the 2018 ARA and therefore does not allow it to be established that the disputed clauses were designed to combat counterfeiting. On the other hand, this submission merely describes certain expected effects of the agreements and does not even set out the reasons that could subsequently have been identified to conclude why some resellers should be allowed to use the AMAZON Marketplace and others should not.
- (498) On the other hand, this Division considers that APPLE's claim that the expansion of the number of resellers was done as planned, once experience showed that it could be done, is not supported. This extension was not made until 16 November 2021, after the opening of this case. Note also that the extension affected AARs and Retailers without any objective change in APPLE's contractual relationship with these resellers that would justify such a change of approach (in fact, in relation to counterfeiting, these resellers are still supplied from official sources on a contractual basis, which was already the case at the origin of the agreements).

⁴⁶⁰ Paragraph 59 of APPLE's submissions on the Proposed Resolution.

⁴⁶¹ APPLE internal mail dated 8 October 2018: **[CONFIDENTIAL]** (folio 166).

- (499) As regards APPLE's argument that it had already announced the extension to the CD in May 2021, before the opening of the Case, it should be noted firstly that, at that time, the preliminary proceedings which preceded the opening of the case were already at a very advanced stage and that it had already been almost a year since the Italian competition authority had formally opened an infringement procedure concerning the very Exclusion or Brand Gating clauses which were the subject of the infringement clauses in question⁴⁶².
- (500) As regards the alleged announcement, it is in fact a reply to a request from the CD that APPLE sent in June, which cannot be understood as reflecting a pre-conceived plan to progressively expand the number of resellers authorised to sell on AMAZON in the terms described by APPLE, nor can it be considered as a preview of the November 2021 communication. In that response, APPLE merely states that it is "willing to authorise new AARs to sell APPLE Products on the AMAZON marketplace" in Europe if certain conditions are met⁴⁶³ (being willing to authorise is very different from proceeding to authorise according to a preconceived plan of progressively expanding the number of resellers authorised to use AMAZON).
- (501) Moreover, it is striking that APPLE makes the authorisation of new AARs conditional on selling on AMAZON when these types of resellers have a direct contractual relationship with AMAZON that prevents them from selling counterfeits and APPLE itself acknowledges that it is aware of the limited interest of these types of resellers in selling through AMAZON. AARs could therefore not be the source of the problem invoked by APPLE for the application of the Brand Gating clauses and there is no objective explanation for why they were not allowed to make use of AMAZON beyond APPLE's intention to reduce the number of resellers active on this platform.
- (502) As regards the discussion on the temporary activation of additional resellers during the pandemic, it is surprising that APPLE has cited internal AMAZON emails (in which APPLE is neither listed as the sender nor receiver of the message), taking credit for what is said in them, in order to justify that the choice of APRs was made on the basis of objective criteria (*"Apple indicates that"*, followed by what is said in AMAZON's internal email chain)⁴⁶⁴. This is contradicted by APPLE's position when it argues, in relation to another internal AMAZON email chain concerning exports, that *"the CD cannot use as evidence against Apple internal representations provided by another party (i.e., Amazon), attributing them to Apple"*⁴⁶⁵ or when it states that *"AMAZON's statements cannot be considered sufficient to dismiss Apple's defence arguments"*⁴⁶⁶.

⁴⁶² The initiation of the infringement proceedings in Italy was agreed on 14 July 2020.

⁴⁶³ In particular, it is stated in this reply to the IR of the CD that [CONFIDENTIAL]

⁴⁶⁴ This is an internal AMAZON email provided by the Italian competition authority: "[CONFIDENTIAL]" (folio 4825).

⁴⁶⁵ Paragraph 123 of APPLE's submissions to the SOF.

⁴⁶⁶ Paragraph 107 of APPLE's submissions on the Proposed Resolution.

- (503) The statements made in the abovementioned letter do not prove that the criteria were objective, but only that they reduced the number of resellers within their official resellers (i.e., the APRs). Moreover, what is further discussed in precisely the same chain of mails is that any temporary activation could call into question the justification of the legal defence of the Brand Gating policy⁴⁶⁷ and is understood to be due to the fact that it would render null the argument that only APRs are authorised to sell on the online market.
- (504) Finally, in relation to the PRENSA DE VIZCAYA precedent, this Chamber considers that, without prejudice to the fact that the restrictions analysed are not totally analogous to the Exclusion or Brand Gating Clauses, this decision is relevant when analysing the restrictive nature of the latter, for the following reasons:
- As regards APPLE's approaches in relation to the PRENSA DE VIZCAYA precedent: (i) as explained above, although the agreement analysed in the present case has been considered vertical, it also has horizontal elements, in so far as the parties are competitors in the markets for the manufacture and distribution of electronic products (paragraphs (434) to (442)). at the same time, although in PRENSA DE VIZCAYA an agreement between competitors was at issue, the restriction concerned a vertical relationship (i.e., the supply of newspapers to the presses); (ii) with regard to APPLE's assertion that in the PRENSA DE VIZCAYA case *"the sanctioned cartel covered 95% of the press market, leaving no alternative for newspaper retailers"*⁴⁶⁸, this assertion is not true with regard to the part that has been underlined, since, as the CDC clearly states in its decision, there remained *'the possibility for sellers who do not accept the Association's conditions to go to the headquarters of the member companies to collect and pay directly for the copies they need'*; on the other hand, in the present case we are not analysing a refusal to supply that would require an indispensability requirement to be met, and without prejudice to the fact that APPLE's resellers have other sales channels at their disposal, the restriction affects the main sales channel for electronic products; (iv) with regard to the allegation that PRENSA DE VIZCAYA registered "hundreds of requests" to use the channel which had been restricted, which was not the case here, this is because in that case the infringing association decided one by one, after receiving the relevant application for authorisation, which reseller to include in its distribution channel and which not to, hence the large volume of applications which it is therefore fallacious to compare, as APPLE does⁴⁶⁹, with the number of responses from the NARs to the CD's requests regarding their interest in selling on AMAZON or, in general, with the number of applications APPLE resellers to sell on this online marketplace, since APPLE determined, *ex ante*, a closed list of resellers authorised to use AMAZON and automatically expelled the rest; it was not therefore, as in PRENSA DE VIZCAYA, a system of individual authorisation; (iv) finally, irrespective of the interest expressed by APPLE resellers in selling through AMAZON (an interest which according to APPLE is reflected in the number of applications for authorisation to sell on AMAZON), it is a fact that the main resellers of APPLE

⁴⁶⁷ This is an internal AMAZON email provided by the Italian competition authority: "[CONFIDENTIAL]" (folio 4825).

⁴⁶⁸ Paragraph 65 of APPLE's submissions on the Proposed Resolution.

⁴⁶⁹ Paragraph 65 of APPLE's submissions on the Proposed Resolution.

products on the AMAZON website in Spain were the NARs, which to date are still unable to make use of this online marketplace. In short, it can be concluded that, without being analogous cases, the PRENSA DE VIZCAYA precedent illustrates an example of discrimination that was considered a restriction of competition by object contrary to Article 1.1.d) LDC and/or 101.1.d) TFEU with sufficient parallels to be considered relevant for the legal assessment of the Exclusion or Brand Gating Clauses and which supports the classification of the latter as restrictions by object within the meaning of the aforementioned provisions of the LDC and the TFEU.

- With regard to AMAZON's claim that the PRENSA DE VIZCAYA decision would not even qualify the discrimination under scrutiny as a restriction by object, this claim cannot be accepted either as it is incorrect. The CD qualified the agreement as a "*press distribution cartel*" which implies that it necessarily analysed the conduct as restrictive of competition by object.

(505) In any event, even if one were to admit, for purely dialectical purposes, that this precedent has no relevance for the present case, this would not be an obstacle to classify the conduct under investigation as a restriction of competition by object on the basis that, to date, no agreements analogous to the Brand Gating Clauses have been sanctioned as such. Contrary to what the defendants claim, it is settled doctrine, in the words of the CJEU itself, that *"it is in no way necessary for the same type of agreements to have already been sanctioned by the Commission for them to be considered restrictive of competition by object"*⁴⁷⁰.

(506) The "body of experience" required to consider that collusive conduct is by its very nature capable of restricting competition so as to qualify as a restriction by object does not relate to the specific form of the agreement in question, but to the type of restriction of competition that results from it. In this respect, such is the body of experience that the application of dissimilar conditions for equivalent benefits that place some competitors at a disadvantage compared to others is anti-competitive, that it is included as one of the 4 examples of the non-exhaustive list of anti-competitive conduct in Article 101 TFEU.

(507) The defendants' arguments referred to in this paragraph cannot therefore be accepted.

- **Limiting or controlling the distribution of APPLE products in the marketplace**

(508) Article 1(1)(b) LDC provides that *"limiting or controlling production, distribution, technical development or investment"* is prohibited; and, similarly, 101.(b) TFEU establishes *"limiting or controlling production, markets, technical development or investment"*.

(509) In this respect, the Exclusion or Brand Gating Clauses agreed between AMAZON and APPLE entail a limitation of distribution by restricting the number of resellers of APPLE's products that can use AMAZON's online marketplace in Spain.

(510) European case law has confirmed, in this respect, that agreements limiting the number of distributors necessarily restrict competition. This is the case, for instance, for agreements limiting the number of sellers of a given manufacturer's products in a selective distribution system. The CJEU has held in this regard that *"it is held that agreements constituting a selective distribution system necessarily affect competition within the common market"*⁴⁷¹ or that *"[t]he Court of Justice has already held that agreements constituting a selective distribution system necessarily affect competition within the common market"*⁴⁷².

⁴⁷⁰ Case C-591/16 P - Lundbeck, paragraph 130.

⁴⁷¹ See Case 107/82 - AEG-Telefunken AG, ECLI:EU:C:1983:293, para. 33.

⁴⁷² See Case C-439/09 - Pierre Fabre, ECLI:EU:C:2011:649, para 39.

- (511) While selective distribution agreements may, despite their restrictive dimension of competition, be considered compatible with Article 1 LDC and Article 101 TFEU when certain conditions are fulfilled, this exemption does not apply to the exclusion or brand gating clauses affecting APPLE's open distribution system, as will be set out in detail below when assessing the parties' submissions (paragraphs (515) to (524)).

In the same vein, there are national precedents that have held that limitation and/or control of distribution amounts to a restriction by object of competition law.

- (512) Thus, in Case 569/03 - BEET SEEDS, the now defunct CDC held that an interprofessional agreement signed between several associations with a stipulation determining and regulating the distribution points for beet seed (which were decided by the signatories to the agreement), thus excluding independent distributors and those of associations other than the signatories, was strongly restrictive of competition, insofar as it had the object or could have the effect of restricting competition on the market for the sale of beet seed by determining the points of sale for that product, thus limiting its distribution, a case expressly referred to in point b) of Article 1.1(b) LDC. Among other issues, in assessing the agreement's potential to affect competition, the importance of the signatories to the agreement was taken into account. However, as the agreement was replaced by another agreement without restrictive clauses before the seeding period, the CDC stressed that no effect of the agreement had been proven as it was replaced by another agreement before the seeding period and simply declared the existence of a prohibited practice, ordering the signatories not to engage in similar conduct again, and without imposing a financial penalty.
- (513) Several of the circumstances that were present in that case, such as the restriction of the number of resellers and the ability to restrict competition in the downstream retail market, are present in this Case. In this case, the agreement restricts the number of resellers that can offer APPLE products on AMAZON's online marketplace. As AMAZON's website in Spain is the online sales channel that carries the largest share of e-commerce web traffic in Spain and of net online sales of electronic products in Spain, and APPLE's products are in strong demand and have good brand positioning, the conduct is liable to restrict competition in the market for online retailing of electronic products.

(514) In view of the foregoing considerations, **this Court understands that the Exclusion or Brand Gating Clauses fall within the scope of Article 1.1.b) of the LDC and 101.1.b) of the TFEU by limiting and/or controlling the distribution of APPLE brand products on the market** and, specifically, on the main e-commerce platform in Spain.

- Submissions of the undertakings

(515) In relation to the above, APPLE argues that having opted for an open distribution system, it is not subject to any limitation as regards the selection of its resellers⁴⁷³. APPLE and AMAZON argue, in this respect, that a limitation of the number of resellers cannot be considered as an unlawful restriction of competition in the light of the MAXIMA LATVIJA and COTY cases⁴⁷⁴ as well as the VBER⁴⁷⁵. APPLE insists that the selection of resellers authorised to sell on AMAZON (the APRs) would have been done objectively on a qualitative basis with the *“ultimate goal of addressing and protecting the brand and customer shopping experience on AMAZON”*⁴⁷⁶.

(516) This Division does not agree with APPLE and AMAZON's aforementioned statements for the following reasons.

(517) It should be stressed that **APPLE's freedom to choose the distribution model it deems most appropriate for its products is not in question. What is found to be contrary to competition law in this case is the existence of an agreement between two businesses to prevent certain resellers, who are already part of APPLE's distribution system, by decision of the business itself, from using a particular sales channel, such as AMAZON's online marketplace**, without such a limitation of distribution being proportionate to achieve the alleged legitimate objectives invoked (see paragraphs (576) to (602)).

(518) APPLE's position that, having opted for an open distribution system, it would no longer be constrained in imposing restrictions on its distributors is not acceptable. The limitation of the number of distributors necessarily implies a limitation of intra-brand competition which is only acceptable in certain cases.

⁴⁷³ Paragraph 67 of APPLE's submissions on the Proposed Resolution.

⁴⁷⁴ Paragraph 67 of APPLE's submissions on the Proposed Resolution and paragraphs 143 to 150 of AMAZON's submissions on the Proposed Resolution.

⁴⁷⁵ Paragraphs 151 to 155 of AMAZON's submissions on the Proposed Resolution.

⁴⁷⁶ Paragraph 67 of APPLE's submissions on the Proposed Resolution.

Indeed, it is considered that selective distribution - whereby distribution is limited by restricting the number of resellers - may be compatible with antitrust law when certain conditions are met, which in no way leads to the conclusion that any limitation of the number of resellers is allowed in an open distribution system.

- (519) Indeed, the following principles can be drawn from the case law of the CJEU⁴⁷⁷: (i) selective distribution systems affect competition; (ii) according to the precedent C-439/09 *Pierre Fabre*, selective distribution systems constitute "in principle" restrictions by object (i.e., systems limiting the number of resellers); and (iii) if certain conditions are met, selective distribution systems are not considered unlawful. These conditions have been developed in case law and are as follows: (a) the characteristics of the product require a selective distribution system (e.g. luxury products); (b) the selection criteria are applied in an objective and non-discriminatory manner; and (c) they are proportionate (i.e. do not go beyond what is necessary).
- (520) In this respect, the Brand Gating Clauses are an agreement which, like selective distribution agreements, limit the number of resellers. If distribution systems which limit the number of resellers such as selective distribution systems may constitute restrictions by object, unless certain conditions are fulfilled, a limitation on the number of resellers is all the more appropriate if, as in the present case, an open distribution system is operated (with the exception of [CONFIDENTIAL]), where, by definition, the nature of the products sold is not considered to require that they are associated exclusively with a certain type of resellers.
- (521) On the rejection of the defendants' allegations that the Exclusion or Brand Gating Clauses cannot be considered as restrictions of competition by object in the light of the COTY and MAXIMA LATVIJA judgments, as well as the VBER, we refer respectively to paragraphs (546) to (575) and (404) to (470) of the present decision.
- (522) With regard to the BEET SEEDS precedent both APPLE and AMAZON argue that it has no relevance in the present case. APPLE points out that unlike the Brand Gating Clauses, the restriction analysed by the CDC in the BEET SEEDS case derived from a purely horizontal agreement and no alternative was left to dealers⁴⁷⁸. AMAZON, for its part, adds, as it did in PRENSA DE VICAYA, that in BEET SEEDS, the CDC would not even have considered the limitation of distribution as a restriction by object⁴⁷⁹.

⁴⁷⁷ See also para 39 of C-439/09 - *Pierre Fabre Dermo-Cosmétique*, ECLI:EU:C:2011:649: "*The Court of Justice has already pointed out that agreements constituting a selective distribution system necessarily affect competition within the common market (Case 107/82 AEG-Telefunken v Commission [1983] ECR 3151, paragraph 33) and must therefore in principle be regarded as "restrictions by object"* (our emphasis).

⁴⁷⁸ Paragraph 70 of APPLE's submissions on the Proposed Resolution.

⁴⁷⁹ Paragraph 141 of AMAZON's submissions on the Proposed Resolution.

- (523) With regard to the considerations on the alleged irrelevance of the CDC's decision in the BEET SEEDS case, it should be noted, on the one hand, that this case also has horizontal elements (in so far as the parties are competitors in the markets for the manufacture and distribution of electronic products) and, on the other hand, that in BEET SEEDS, the restriction between competitors concerned a vertical relationship (i.e., the distribution of seeds), as APPLE itself acknowledged in its submissions to the SOF⁴⁸⁰. Another clear coincidence is that, in the present case, as was the case in BEET SEEDS, resellers are also selected without any objective criteria and deprived of a highly relevant sales channel (it has already been seen in section 3.5.2 that the AMAZON online marketplace channels most of the e-commerce web traffic in Spain and of the net sales of electronic products online in Spain).
- (524) With regard to AMAZON's claim that the BEET SEEDS case is irrelevant because a restriction by object was not sanctioned, it should be noted that a prohibited practice was found to exist without the CDC considering it necessary to carry out a verification of the effects, which demonstrates the nature of the infringement by object of this behaviour⁴⁸¹. Therefore, despite the differences between the two cases, this precedent is an example of a restriction of 1.1.b) LDC and 101.1.b) TFEU that is relevant when analysing the conducts investigated in the present case and that contributes to support the qualification of the Exclusion or Brand Gating clauses as restrictions of competition by object.

- **Internal market partitioning**

- (525) It is settled case-law of the European Courts that "contracts which have as their object the partitioning of national markets along national lines or which make the interpenetration of national markets more difficult must in principle be regarded as agreements whose object is to restrict competition within the meaning of Article 101(1) TFEU"⁴⁸² (our emphasis).

⁴⁸⁰ See paragraph 165 of APPLE's submissions to the SOF: "*That is, it was a horizontal agreement, which subsequently limited the distribution of beet seed*" (folio 8569).

⁴⁸¹ *Just before declaring the existence of the prohibited practice, the CDC states that "no effect of the agreement has been proven" (FD 6).*

⁴⁸² See Case C-403/08 and C-429/08 - *Premier League and Others*, EU:C:2011:631, paragraph 139.

- (526) This has also been applied specifically to distribution contracts, as can be seen from the following pronouncement of the TFEU: *"In the context of the application of Article 85 of the EEC Treaty (later Article 85 of the EC Treaty, now Article 81 EC), the Court of Justice has held that an agreement between producer and distributor concluded in order to re-establish national divisions in trade between Member States may be contrary to the Treaty objective of achieving the integration of national markets through the establishment of a single market. The Court of Justice has on numerous occasions qualified agreements which have as their object the partitioning of national markets along national borders or which make the interpenetration of national markets more difficult - in particular those which seek to prohibit or limit parallel exports - as agreements which have as their object the restriction of competition within the meaning of the abovementioned Article of the Treaty"*⁴⁸³ (our emphasis).
- (527) Similarly, the Vertical Guidelines state in paragraph 7 that: *"The assessment of vertical restrictions is also important in the context of the broader objective of achieving an integrated internal market. [...] Companies should not be allowed to re-establish private barriers between Member States now that state barriers have been successfully removed"*; and the 2022 Vertical Guidelines, in the same vein, state in paragraph 5 *"[...] Article 101 of the Treaty also pursues the wider objective of achieving an integrated internal market, which enhances competition in the Union. Companies cannot use vertical agreements to re-establish private barriers between Member States now that state barriers have been successfully removed.*
- (528) In this respect, there are a number of recent EC precedents in which the restriction of cross-border sales in vertical agreements has been held to constitute a restriction by object of competition law.
- (529) For example, in the NIKE case⁴⁸⁴, the EC fined Nike €12.5 million for implementing a series of measures directly and indirectly aimed at restricting cross-border sales by resellers to whom it had licensed its products (which, according to the EC, is conduct that, by its very nature, has the object of restricting competition). According to the authority, through these measures, Nike managed to restore the divisions between national markets and ensured compartmentalisation of the internal market, frustrating one of the objectives of the TFEU, which is the integration of national markets through the establishment of a single internal market⁴⁸⁵.

⁴⁸³ See Case C-468/06 Sot. Lélos kai Sia, ECLI:EU:C:2008:504, para. 65.

⁴⁸⁴ See AT - ANCILLARY SPORTS MERCHANDISE available at the following link:
https://ec.europa.eu/competition/antitrust/cases/dec_docs/40436/40436_949_5.pdf

⁴⁸⁵ See paragraphs 108-111 of the decision.

- (530) Another very similar case is the SANRIO case⁴⁸⁶, in which the EC fined Sanrio €6.2 million for implementing a series of direct and indirect measures that prevented resellers to whom it had licensed its products from making cross-border sales (which, according to the EC, is conduct that, by its very nature, has the object of restricting competition). According to the authority, through these measures, Sanrio managed to restore the divisions between national markets and ensured compartmentalisation of the domestic market⁴⁸⁷.
- (531) In the present case, the content of the Exclusion or Brand Gating Clauses excludes the possibility of being able to sell APPLE products on the AMAZON Website in Spain by resellers established in other Member States from the entry into force of the GTA and the 2018 ARA (i.e. on 31 October 2018):
- until at least 16 November 2021⁴⁸⁸, to all official APPLE resellers minus the APRs listed in the **[CONFIDENTIAL]** of the 2018 ARA (i.e. APRs from other Member States than those listed in the aforementioned **[CONFIDENTIAL]**; and AARs and Retailers regardless of the EU Member State in which they were established); and
 - until the close of the pre-trial phase, to all unofficial resellers (NARs).
- (532) They would have been deprived of the possibility to use the AMAZON Websites in Europe to make cross-border sales to other Member States and in particular to Spain: (i) certain official resellers (on the one hand, APRs established in countries other than those listed in Appendix D, and, on the other hand, AARs and Retailers irrespective of the Member State in which they are established)⁴⁸⁹; and (ii) APPLE's unofficial resellers (the NARs), irrespective of the Member State in which they are established⁴⁹⁰.

⁴⁸⁶ See CASE AT. [40432](#) - *Character merchandise*.

⁴⁸⁷ See paragraphs 80-83 of the SANRIO decision.

⁴⁸⁸ This is the date of the communication. While the authorisation may have taken place at a later date, in order to take the most conservative approach, the date of the communication will be considered to be the date on which the change became effective.

⁴⁸⁹ From 31 October 2018 until 16 November 2021.

⁴⁹⁰ From 31 October 2018 until at least the closure of the pre-trial phase.

- (533) Given that AMAZON is one of the main sales channels for electronic products in Spain (paragraphs (259) to (262)), even if these resellers had the possibility to continue selling to other Member States through other sales channels (other online marketplaces, own websites, etc.), the relevance of AMAZON as a channel, in any event, makes the restriction of cross-border trade significant. The Exclusion or Brand Gating clauses are therefore likely to hinder the penetration of the Spanish market insofar as the majority of online sales of electronic products take place in Spain through amazon.es (by net sales) and all resellers that are not listed in the [CONFIDENTIAL] of the 2018 ARA are consequently hindered from accessing the Spanish market for online retail sales of electronic products (and, since APPLE's November 2021 communication, only NARs).
- (534) An example of this is the information provided by the Italian NARs that were affected by the Exclusion or Brand Gating Clauses in Spain. According to them, the only sales channel they used for the marketing of their products in Spain was AMAZON, so their expulsion from that online marketplace meant that they stopped selling in Spain⁴⁹¹. Note, additionally, that APPLE itself pointed out that the Brand Gating clauses sought to [CONFIDENTIAL] (paragraph (307)).
- (535) Ultimately, the Exclusion or Brand Gating clauses **provide for limitations on cross-border trade between Member States by APPLE's distributors.**

- Submissions of the businesses

- (536) In relation to the above, APPLE argues, first, that the CD did not provide evidence to support that there was an agreement to directly or indirectly limit cross-border sales and that this would be refuted by the contractual provisions of the analysed agreements themselves, with the [CONFIDENTIAL] of the 2018 ARA expressly stating that *"the parties agree that cross-border sales within the Territory will not be restricted in any event"*⁴⁹².
- (537) APPLE also argues that the limitation of cross-border sales would not make sense from a factual and commercial policy point of view since, as far as NARs are concerned, it has no contractual relationship with them and therefore cannot impose any restriction on them and, with regard to their authorised resellers (including APRs authorised to sell on AMAZON and AARs and Authorised Retailers thereafter) APPLE acknowledges in all agreements with them that they are free to trade in any EU country which would make it impossible to consider the limitation to APPLE's online marketplace as having a restrictive geographic object⁴⁹³. As regards the cross-border effects established by the CD, APPLE argues that this is not sufficient to conclude that the restriction by object qualifies and that, in any event, these effects would be similar to the prohibition of active and passive sales or the use of online marketplaces in the context of selective distribution systems that have already been validated by the case law⁴⁹⁴.

⁴⁹¹ [CONFIDENTIAL] indicates that *"In 2017 and 2018, [90-100%] of sales in Spain were made through Amazon.es"* (folio 4170); and [CONFIDENTIAL] indicates that *"Our company obtained [90-100%] of its turnover from sales through the platform (amazon.co.it, amazon.es, amazon.de, amazon.fr, amazon.uk)"* (folio 4186).

⁴⁹² Paragraph 71 of APPLE's submissions on the Proposed Resolution.

⁴⁹³ Paragraphs 72 to 75 of APPLE's submissions on the Proposed Resolution.

⁴⁹⁴ Paragraph 76 of APPLE's submissions on the Proposed Resolution.

- (538) AMAZON makes similar claims to APPLE on this issue⁴⁹⁵. In particular, it maintains a position very similar to that of APPLE, in that resellers authorised by APPLE to sell their products on AMAZON can do so on any Amazon Store in the EU, which would rule out the cross-border restriction. On the other hand, AMAZON argues that the CD misinterpreted its internal mailing cited in paragraphs 387 and 633 of the Proposed Resolution⁴⁹⁶ to conclude that APPLE intended to limit imports from certain distributors. Finally, AMAZON rejects that the SANRIO and NIKE precedents are relevant since, in the present case, unlike in those cases, the Brand Gating Clauses do not directly prohibit cross-border sales and are not directly designed to prevent them.
- (539) This Chamber considers that the above arguments cannot be accepted.
- (540) With regard to the provisions of the 2018 ARA and the contracts between APPLE and its authorised distributors expressly recognising the latter's freedom to engage in cross-border sales, this is of strictly formal value. The CJEU has expressly denied that this type of mention makes it possible to rule out the restrictive nature of an agreement, and that it is necessary to take into account the rest of its content or its *de facto* application in order to conclude on its anti-competitive nature⁴⁹⁷. In the present case, the fact is that, as soon as those distributors are prevented from operating on AMAZON's online marketplace, they are no longer able to use that marketing channel to sell their APPLE products in other Member States. They are in fact those same contractual provisions which, by limiting the use of AMAZON only to resellers included in the **[CONFIDENTIAL]** of the 2018 ARA (which is only a selection of APRs located in Member States [0-1]), restrict the use of AMAZON as a cross-border sales channel to APRs located in Member States other than the 5 included in the list, as well as to all AARs and **[CONFIDENTIAL]** Retailers and NARs.

⁴⁹⁵ See paragraphs 156 to 170 of AMAZON's submissions on the Proposed Resolution

⁴⁹⁶ Folio 4762.

⁴⁹⁷ CJEU of 13 December 2017 in Case C-487/16 P Telefónica v Commission, ECLI:EU:C:2017:961, para 63. The CJEU ruled that the phrase "to the extent permitted by law" in the contract under review did not rule out the anti-competitive nature of a non-competition clause.

- (541) With regard to the fact that APPLE cannot prevent cross-border sales to its non-authorised distributors, as it does not have a direct contractual relationship with them, the fact is that, precisely through the Brand Gating Clauses, it succeeds in restricting their commercial capacity by indirectly preventing them from making use of this online market which constitutes a fundamental means of being able to offer its products in other Member States.
- (542) In relation to the allegation that the CD misinterpreted an internal AMAZON email to infer that the objectives of the agreements at issue included limiting exports by certain resellers, the fact is that the wording of the email in question leaves little room for interpretation as it states verbatim that APPLE requested AMAZON **[CONFIDENTIAL]**⁴⁹⁸. AMAZON's alternative interpretation that it intended to avoid **[CONFIDENTIAL]**⁴⁹⁹ is not convincing. No other elements expressly reflecting this intention have been provided, nor has APPLE itself made any statements to that effect. In any event, the CD does not invoke the mail in question as evidence in support of the charge, but only as additional evidence that the Brand Gating Clauses had an anti-competition object. This follows from the very ability of these clauses to restrict trade between Member States according to their configuration and the typology of the excluded distributors (see paragraphs (287) and (531) to (533)). In turn, this specific ability to restrict competition by its very nature by limiting trade between APPLE distributors and final customers located in other Member States is confirmed by the actual materialisation of this cross-border effect as reflected in the established facts (paragraph 4.6.8) and set out in the effects analysis (paragraphs (705) to (723)).
- (543) On the allegation that the precedents cited by the CD are not applicable to the present case, notwithstanding the differences between the factual scenarios in those cases and in this file, they ultimately illustrate the same thing, i.e., a restriction on cross-border trade.

⁴⁹⁸ See documentation provided by the Italian competition authority. This is an internal AMAZON mail collected during inspections at AMAZON. The sentence is an own translation of: **[CONFIDENTIAL]** (folio 4762).

⁴⁹⁹ Paragraph 163 of AMAZON's submissions on the Proposed Resolution.

(544) There is, on the other hand, no element of the kind contained in Article 101 TFEU that requires measures restricting trade between Member States to be direct. In fact, it is very common in the rules on vertical restrictions that both direct and indirect measures are included (see the many examples in the Vertical Guidelines; and in the 2022 Vertical Guidelines).

(545) Finally, the claim that the restrictions analysed are similar to other limitations validated by case law is also not admissible. As is analysed in detail below, the restrictions compatible with competition law to which the objections referred can only be justified, on the basis of EU case-law, where they are imposed by the manufacturer/supplier on its authorised distributors in the context of a selective distribution system, precisely on the basis of the coherence between the objectives pursued by those restrictions and the objectives pursued in opting for a selective distribution model. In this case, however, APPLE operates an open distribution system and we are not dealing with a ban on the use of online marketplaces imposed by a manufacturer on its authorised distributors, so these arguments cannot justify the limitation to cross-border trade that occurs.

- **Other submissions of the parties relating to the content of the Exclusion or Brand Gating Agreements**

- **On the application of the COTY Judgment of the CJEU to the present case⁵⁰⁰**

(546) APPLE refers on numerous occasions to the COTY Judgment in its response to the Proposed Resolution⁵⁰¹. It concludes, in fact, the first claim in that brief - devoted to defending the legality of the Exclusion or Brand Gating Clauses - by stating that *“the CD has failed to meet its burden of proof and has failed to demonstrate that the Marketplace limitation can be considered a restriction of competition by object, especially in light of the principles set out in the Coty case”*⁵⁰².

(547) Both APPLE and AMAZON consider that the conclusions of the CJEU in the COTY Judgment, as regards the compatibility of the clause analysed in that case with Article 101 TFEU, are transferable to the present case, pointing out that the clause validated by the CJEU would be even more restrictive than the Brand Gating clauses entered into by AMAZON and APPLE (as they refer to all distributors and affect all online marketplaces) and that, in any case, according to the interpretation that both defendants make of the COTY Judgment, the limitations on the use of online marketplaces could never be considered as restrictions of competition because of their object⁵⁰³.

⁵⁰⁰ Judgment of the CJEU of 6 December 2017 Case C-230/16, Coty Germany GmbH v Parfümerie Akzente GmbH; [ECLI:EU:C:2017:941](#) (COTY Judgment).

⁵⁰¹ A word search for the term “Coty” in APPLE’s written pleading to the Proposed Resolution returns a total of 49 results.

⁵⁰² Paragraph 112 of APPLE’s submissions on the Proposed Resolution.

⁵⁰³ Paragraphs 42 to 56 of the submissions on APPLE’s Proposed Resolution and paragraphs 143 to 146 of the submissions on AMAZON’s Proposed Resolution.

- (548) In order to assess the relevance of these approaches, it is necessary to look briefly at the CJEU's judgment in the COTY judgment with regard to those issues that are relevant to the present case. In response to the second question referred for a preliminary ruling, the CJEU answered that Article 101 TFEU does not necessarily preclude a contractual clause between the manufacturer or supplier and its authorised distributors in a selective distribution system, which prevents the latter from making use of third party platforms (such as AMAZON) for the sale of the luxury goods which are the subject of the distribution contract. This is subject to the cumulative fulfilment of the following conditions: (i) the clause must seek to preserve the luxury image of the products in question; (ii) it must be established uniformly and applied between different distributors in a non-discriminatory manner; and (iii) it must be proportionate to the objective pursued⁵⁰⁴.
- (549) In order to determine the lawfulness of this type of clause, the CJEU thus establishes an analysis that requires: (i) to determine whether the objective of the clause at issue is indeed to preserve the image of luxury and prestige of the products concerned; (ii) to verify whether the clause is objective and uniform and applies without discrimination to all distributors in the distribution system concerned; and (iii) to establish whether, having regard to the content of the clause and the context, the restriction imposed is proportionate to the objective pursued, which in turn involves verifying (a) whether the restriction is appropriate to preserve the image of luxury and prestige of the contract products (appropriateness test) and (b) whether it does not go beyond what is necessary to achieve that objective (proportionality test in the strict sense).
- (550) The clause at issue in the main proceedings was included in the contracts between the supplier of Coty luxury cosmetic products and all the authorised distributors in the context of its selective distribution system, and the dispute arose from the refusal of one of those suppliers to accept the clause because it carried out a large part of the sales of the products supplied by Coty through AMAZON.
- (551) Despite the fact that both cases concerned a restriction on the use of online marketplaces, this Division considers that, **contrary to the defendants' submissions, the findings of the Coty judgment are not only inapplicable to the present case to defend the lawfulness of the Exclusion or Brand Gating clauses, but supports that they are restrictions of competition by object**. This is due to a **series of circumstances that were decisive in the CJEU's analysis and are not present in this case**: (1) the Brand Gating clauses are not part of a selective distribution system and unlike Coty APPLE does not seek to have its products associated exclusively with its authorised distributors; (2) APPLE has a direct contractual relationship with AMAZON; (3) APPLE itself has no objection to its products being sold on a generalist marketplace such as AMAZON where all types of products are marketed as APPLE itself and some of its authorised distributors would continue to sell through this platform.

⁵⁰⁴ Paragraph 58 of the Coty Judgment.

- (552) With regard to the **first difference**, the Coty judgment itself notes that the CJEU's analysis is limited to selective distribution systems:

“This question concerns the lawfulness under Article 101(1) TFEU of a particular clause of a selective distribution system for luxury and prestige goods”⁵⁰⁵.

- (553) In this regard, the CJEU points out that one of the objectives pursued when a selective distribution system is used is precisely that the products covered by the contract are tied exclusively to authorised distributors. Therefore, the prohibition of authorised distributors from using third party online platforms, in order to avoid breaking this link, was consistent with Coty, unlike APPLE, having chosen to implement a selective distribution system:

*“With regard, firstly, to whether the prohibition at issue in the main proceedings is appropriate in the light of the objective pursued, it must be stated, first of all, that **the obligation imposed on authorised distributors to sell the contract goods on the Internet only through their own online shops and the prohibition on them from using any other trade name and from making obvious use of third-party platforms guarantee to the supplier from the outset that, in the context of electronic commerce in those goods, the goods are exclusively binding on the authorised dealers.***

Indeed, since it is precisely such a link which is one of the objectives pursued when such a system is used, it follows that the prohibition at issue in the main proceedings constitutes a coherent restriction, given the specific characteristics of the selective distribution system”⁵⁰⁶. (Our emphasis).

⁵⁰⁵ Paragraph 38 of the Coty Judgment.

⁵⁰⁶ Paragraphs 44 and 45 of the Coty Judgment.

- (554) It is clear that **this “coherence” between the limitation analysed and the distribution system chosen by APPLE is not present in this case, since APPLE has chosen to implement an open distribution system** in which unauthorised distributors legitimately operate. It cannot therefore claim that the Exclusion or Brand Gating clauses are justified in order to ensure that consumers associate APPLE products exclusively with their authorised distributors. As has been seen, although APPLE does not supply NARs directly, it encourages its wholesalers to supply APPLE products to unauthorised distributors (paragraph (332)), which reflects APPLE's interest in such operators marketing its products despite the alleged reputational risk that these could pose to its brand. This reputational risk cannot therefore be invoked as an efficiency which would justify the discrimination of the NARs in the form of their exclusion from AMAZON's online market, which is also referred to by AMAZON's economic advisers as the alleged efficiency of the Brand Rating Clauses, which would make it possible to rule out their classification as a restriction of competition by object⁵⁰⁷.
- (555) The **second fundamental difference** is that, contrary to the COTY case, **the contractual relationship in which the limitation at issue is included is not between APPLE and its distributors, but between APPLE and AMAZON as an online marketplace**. Despite APPLE's claim in its response to the Proposed Resolution that this distinction is only formal⁵⁰⁸, the reality is that it is a key difference. On the one hand, a restriction on the resellers' freedom of action within the framework of the manufacturer/distributor relationship cannot be compared with a restriction resulting from an agreement with a third party to which the resellers are not even a party. On the other hand, in assessing the appropriateness of the restriction analysed in the COTY case, the CJEU attached particular importance to the fact that there was no relationship between Coty and the third-party platforms. The CJEU underlines in this respect, when analysing the adequacy of the clause at issue, that the absence of a contractual relationship between the supplier and the third-party platforms prevented Coty from requiring those platforms to comply with the quality conditions which it had imposed on its authorised distributors⁵⁰⁹. This problem does not arise in the present case since **APPLE has a direct contractual relationship with AMAZON and can therefore require it to comply with certain conditions in the sale of its products on AMAZON's online marketplace** even when this is carried out by third party resellers.

⁵⁰⁷ The economic model set out in the Compass Report on Brand Gating to justify the efficiencies that can be derived from Opt-Out Clauses is largely based on parameters of the reputational risk to the brand that may be generated by excluded resellers.

⁵⁰⁸ Paragraph 50 of APPLE's submissions on the Proposed Resolution.

⁵⁰⁹ Paragraphs 47 to 49 of the Coty Judgment.

- (556) The CJEU refers again to this circumstance in the analysis of proportionality in the strict sense (i.e., analysis that the restriction does not go beyond what is necessary to achieve the legitimate objectives pursued):

“In particular, in view of the absence of any contractual relationship between the supplier and the third-party platforms enabling it to require them to comply with the quality conditions imposed on its authorised distributors, the authorisation granted to those distributors to have recourse to such platforms on condition that they meet the predefined quality requirements cannot be regarded as being as effective as the prohibition at issue in the main proceedings”⁵¹⁰.

- (557) Such is the relevance of this circumstance, relating to the absence of a relationship between the manufacturer/supplier and the online marketplace, for the purposes of accepting the compatibility with Article 101 TFEU of the clauses limiting the use by distributors of online marketplaces, that the above-mentioned reasoning of the CJEU in the COTY judgment is set out in paragraph 338 of the new Guidelines on Vertical Restrictions of 2022.

“In cases where the supplier does not enter into an agreement with the online marketplace, the supplier may not be in a position to verify that the online marketplace fulfils the conditions that its authorised distributors must fulfil for the sale of the contractual goods or services. In such a case, a restriction or prohibition on the use of online marketplaces may be appropriate and may not go beyond what is necessary to preserve the quality and ensure the proper use of the contract goods or services”.

- (558) It follows, however, that in principle, **where, like in the present case, there is a relationship between the supplier and the online marketplace, the restriction is not justified and must be regarded as contrary to Article 101 TFEU**. Indeed, since APPLE has a commercial relationship with AMAZON, it can verify that the latter enforces certain conditions when marketing APPLE products, especially since, according to AMAZON itself, APPLE would have significant bargaining power over AMAZON when imposing conditions on it, either as an authorised distributor of APPLE or as an operator of its online marketplace.

- (559) The **third difference** which cannot be overlooked in the analysis of the appropriateness of the restriction under consideration is that, in the COTY case, the CJEU takes the view that the restriction analysed on that occasion was intended to prevent the marketing of the products on general third-party platforms where all types of goods were sold in order to preserve the luxury image of Coty's brands:

⁵¹⁰ Paragraph 56 of the Coty Judgment.

“Given that such platforms constitute a sales channel for all types of products, the fact that luxury products are not sold through such platforms and that they are sold online only through the online shops of authorised distributors contributes to the luxury image offered to consumers and thus to the maintenance of one of the main characteristics of these products sought by consumers”⁵¹¹.

(560) In the present case, however, APPLE has not objected to its products being marketed through a generalist platform such as AMAZON where all kinds of products are sold, since APPLE itself and other authorised distributors sell APPLE products through this channel. It simply discriminates against part of its distributors by preventing them from making use of this platform. A contrary interpretation of the CJEU's position in the COTY case should therefore lead to the conclusion that the Exclusion or Brand Gating Clauses are not justified.

(561) The new 2022 Guidelines on Vertical Restrictions in paragraph 338 of the abovementioned paragraph 338 are in fact along the same lines:

*“However, in cases where a supplier designates an operator of an online marketplace as a member of its selective distribution system or where **it restricts the use of online marketplaces by certain authorised distributors, but not others, or where it restricts the use of an online marketplace, but this supplier uses that online marketplace to sell the contract goods or services, the restrictions on the use of such online marketplaces are unlikely to meet the conditions of appropriateness and proportionality.**”* (Our emphasis).

(562) In the present case, the conditions set out at the end of that paragraph concerning the absence of adequacy and proportionality are fulfilled, given that APPLE authorises and encourages certain distributors, including the online marketplace operator itself, to sell APPLE products through this channel.

(563) In short, and contrary to what APPLE and AMAZON argue, the findings of the COTY Judgment in no way support the proposition that the Exclusion or Brand Gating clauses are compatible with Article 101 TFEU. On the contrary, the CJEU's reasoning in the COTY case points precisely to the restrictive nature of these clauses by object. On the other hand, the fact that such reasoning has been included in the new 2022 Guidelines on Vertical Restrictions, which aim precisely at facilitating the interpretation of the VBER, contradicts the Compass Report's thesis on the Brand Gating⁵¹² in that by concluding that the Exclusion Clauses amount to a restriction of competition by object, the Proposed Resolution contradicts that regulation⁵¹³.

⁵¹¹ Paragraph 50 of the Coty Judgment.

⁵¹² Report submitted by AMAZON as Document number 3 together with its submissions on the Proposed Resolution entitled "Economic Analysis of the PR's conclusion that Brand Gating is a restriction of competition by object" (**Compass Report on Brand Gating**).

⁵¹³ Page 8 of the Compass Report on Brand Gating.

- On the application of the MAXIMA LATVIJA Judgment of the CJEU to the case

- (564) As with the COTY case, the defendants invoke the CJEU Judgment of 26 November in case C-345/14 Maxima Latvija (**MAXIMA LATVIJA Judgment**)⁵¹⁴ to argue that Exclusion or Brand Gating clauses cannot be considered as restrictions of competition by object⁵¹⁵. In particular, APPLE *“considers that the factual elements in the present case are very similar to those examined by the CJEU in the Maxima Latvija case”*⁵¹⁶ and that the same conclusions should therefore be reached as to the compatibility of the opt-out clauses with Article 101 TFEU.
- (565) In order to assess these approaches, it is again necessary to briefly summarise the factual background and the CJEU's assessment in the MAXIMA LATVIJA case. The question referred for a preliminary ruling concerned the possible anti-competitive nature of clauses which the Latvian company Maxima Latvija, which is engaged in retail trade through the operation of department stores, had negotiated with its lessors to include in certain leases of shopping centres in Latvia.
- (566) The clauses in question, contained in **12 of the 119 leases concluded between the parties**, stipulated that Maxima Latvija as the “anchor tenant” (large retail space which, within a shopping centre, usually occupies the largest or main part of the floor space of that centre) had the right to refuse or consent to the lessor renting the retail premises not leased to Maxima Latvija to third party lessees.
- (567) The Latvian competition authority considered that these clauses constituted a restriction of competition by object and infringed the national provision equivalent to Article 101 TFEU. In the judicial review procedure in a challenge to the Latvian penalty decision, the national court referred a question to the CJEU for a preliminary ruling. The European High Court concluded that, in the circumstances of the case, clauses such as those at issue did not necessarily infringe Article 101(1) TFEU. The CJEU considers, in order to reach such a conclusion, that, having regard to the economic context in which those agreements were applied:

⁵¹⁴ Judgment of the CJEU of 26 November in case C-345/14 SIA “Maxima Latvija” v. Konkurences padome; [ECLI:EU:C:2015:784](https://eur-lex.europa.eu/eli/eur_jur/2015/784).

⁵¹⁵ Paragraphs 35 to 38 of APPLE's submissions on the Proposed Resolution and paragraphs 31, 129 and 201 of AMAZON's submissions on the Proposed Resolution.

⁵¹⁶ Paragraph 35 of APPLE's submissions on the Proposed Resolution.

*“Even if the clause at issue in the main proceedings were to have the possible effect of restricting the access of Maxima Latvija's competitors **to some of the shopping centres in which that company operates a department store**, such a circumstance, assuming it to be established, does not manifestly imply that the contracts containing that clause, by their very nature, prevent, restrict or distort competition on the relevant market, that is to say, the local food retail market”⁵¹⁷. (Our emphasis).*

- (568) APPLE submits that, in both cases, the agreements at issue seek to ensure that the use of a particular retail channel by third parties (the shopping mall space in MAXIMA LATVIJA and the AMAZON online marketplace in the present case) is subject to prior consent, which would have been validated in general terms by the CJEU in MAXIMA LATVIJA⁵¹⁸.
- (569) This Division cannot share the position of the defendants. First of all, it should be clarified that the MAXIMA LATVIJA judgment does not make a general pronouncement on whether an agreement between two companies to prohibit certain resellers from accessing a sales channel is or is not restrictive of competition by object, but refers only to the possibility of a lessee's opposition to a third party renting premises in a specific shopping centre.
- (570) On the other hand, in order to reach the conclusion that this opposition agreement is not a restriction by object, and in line with established case-law, the judgment analyses whether, given the content, the objective and the legal and economic context, the clause at issue is so harmful to competition as to be considered restrictive by object. Having clarified the above, it is appropriate to highlight the differences between the MAXIMA LATVIJA case and the present case, since, both with regard to the content of the restrictions and the legal and economic context, there are major differences that prevent the conclusions of the MAXIMA LATVIJA judgment from being applied to the present case in order to determine the lawfulness of the Exclusion or Brand Gating Clauses.

⁵¹⁷ Paragraph 22 of the Maxima Latvija Judgment.

⁵¹⁸ Paragraph 36 of AMAZON's submissions on the Proposed Resolution.

- (571) As regards the **differences concerning the content of the agreements**, it should be noted, firstly, that in the MAXIMA LATVIJA case, these were **not absolute restrictions**, but Maxima Latvija's consent was required to rent space to third parties in certain shopping centres. On the contrary, in the present case, the Brand Gating Clauses establish, at the outset, an absolute restriction of access to amazon.es to all resellers of APPLE products who are not on the list of **[10-15]** eligible resellers (the APRs identified in the **[CONFIDENTIAL]** of the 2018 ARA)⁵¹⁹.
- (572) Secondly, the limitation in the Latvian case was found in **only 12 of the 119 contracts concluded between the parties** and concerned only the rental of space in physical shopping centres to third parties, hence the specific ability of 12 clauses to restrict competition between retail distributors of food products (i.e., possible limitations of access to only 12 shopping centres in the whole country) was therefore analysed. By contrast, in the present case, the limitation originally applied **to all official and unofficial resellers who were not on the [CONFIDENTIAL] 2018 ARA admissible list** (which meant that all but **[10-15]** resellers of APPLE products were not authorised to use the AMAZON online marketplace).
- (573) As regards the **differences relating to the legal and economic context**, it should be noted, firstly, as mentioned above, that in the Latvian case the restriction concerned **12 out of 119 contracts** concluded between the parties **in relation to all shopping centres in the country** (i.e., it had a very limited impact). However, in the present case, the restriction affects: (i) the **AMAZON website in Spain, which is the online channel through which 35-40%** of consumer electronics products are sold in Spain; and (ii) **a brand (APPLE) which accounts for more than 30% of sales in value terms in the EEA** (and very similar in Spain), far ahead of the next competitor (Samsung), and with uniquely high shares in certain product categories.
- (574) Thirdly, although in the present case the agreement has been considered vertical because its centre of gravity lies in the supply-distribution relationship, it cannot be ignored that, **unlike in the Latvian case, both AMAZON and APPLE, i.e., the two parties to the agreement are active in the manufacture and retail distribution of consumer electronic products** (i.e., they are competitors at both the manufacturing and distribution level, which was not the case in Latvia).

⁵¹⁹ See response to APPLE IR I, Table 2 (folio 4272), where it identifies **[10-15]** APRs.

(575) In short, compared to the limitations on access to 12 shopping centres in Latvia as analysed in the MAXIMA LATVIJA judgment (out of 119 contracts and in respect of all the shopping centres existing in the country), the Exclusion or Brand Gating Clauses, included in the agreements between APPLE and AMAZON, have a clear and concrete aptitude to restrict competition insofar as they entail an absolute restriction on AMAZON's use of the online market in Spain to sell APPLE-branded products to the bulk of APPLE's resellers (all resellers except [10-15][CONFIDENTIAL] until November 2021 and all NARs from then until at least the close of the pre-trial phase). These resellers are thus prevented from accessing (i) a well-known and increasingly successful channel that reaches the whole of Spain and is the vehicle for most online sales of consumer electronics products in Spain; and (ii) the most popular brand of consumer electronics products.

For all these reasons, this Division considers that the conclusions of the CJEU in the MAXIMA LATVIJA Judgment do not support the arguments of the defendants that the restrictive nature of the Exclusion or Brand Gating Clauses due to their purpose should be ruled out.

b. The objectives

(576) With regard to the **objectives** ultimately pursued by the agreement under analysis, the facts and documents prior to and contemporaneous with the signing of the agreement lead to the conclusion that:

- In the case of APPLE, at least two objectives can be distinguished:
 - **Control its distribution channel better:** this is inferred from both APPLE's internal documentation and AMAZON's responses to the information requests made by the CD.

Thus, according to APPLE: [CONFIDENTIAL]⁵²⁰.

In relation to the above, it is worth mentioning some considerations from AMAZON that allow a better contextualisation of APPLE's aforementioned objectives. AMAZON considers that the limitation to the use of its online marketplace exclusively to authorised dealers implied by the Brand Gating clauses has a different purpose than the Brand Registry. While the Brand Registry is a tool for all types of brands to use in order to limit sales of counterfeits, the Brand Gating type of restriction has a different nature and purpose. Brands requesting the application of this limitation normally operate through strictly controlled distribution systems in which high quality brand presentation considerations would be paramount and which can only be achieved by exclusively reserving the distribution of their products to a number of pre-selected distributors⁵²¹ (i.e., selective distribution systems, as opposed to APPLE which operates an open distribution system with different categories of distributors.

⁵²⁰ See documents provided by the Italian competition authority, corresponding to internal APPLE emails: [CONFIDENTIAL](folio 4389).

⁵²¹ See replies to AMAZON IR I paragraph 29 (folio 4610) and to AMAZON IR II, paragraph 65 (folio 4689).

In other words, despite operating an open distribution system ([CONFIDENTIAL]), APPLE used a manufacturer's own policy of pursuing objectives that can only be achieved by implementing a selective distribution system.

- **Reduce its costs of control over the AMAZON website:** by reducing the number of resellers (official and unofficial) that could sell on the AMAZON website, APPLE reduced its costs of control over the AMAZON website.

As noted above, according to APPLE, many counterfeits were being sold on AMAZON⁵²² and, instead of investing in the policy of the Brand Registry (which, according to AMAZON, is the right tool to tackle this problem⁵²³), it preferred to go down the drastic route of Brand Gating. This was because it was more convenient and cheaper than investing effort, time and money in implementing such a policy, which, although in most cases it operates automatically⁵²⁴, in others requires a monitoring effort on the part of the company to detect cases that are missed by the tool⁵²⁵.

⁵²² APPLE argues that *"the Brand Registry alone is not sufficient to address the serious problems with Amazon's marketplace because [CONFIDENTIAL]"* (See response to APPLE IR I, answer to question 7 (folio 4260)).

⁵²³ According to AMAZON, the purpose of the Brand Registry is the identification of all brands and the establishment of protections to ensure that only authentic goods are sold on AMAZON (See response to AMAZON IR I, paragraph 29 (folio 4610)).

⁵²⁴ According to AMAZON, the Brand Registry provides powerful automated brand protections that detect any infringement and proactively protect a brand's intellectual property, without requiring the brand to report these infringements (See response to AMAZON IR I, paragraph 34 (folio 4611)).

⁵²⁵ According to AMAZON, the Brand Registry also offers brands a tool called "Report an Infringement", which allows brands to search for and accurately report potentially infringing products (see reply to AMAZON IR I, paragraph 34 (folio 4611)).

In fact, according to AMAZON itself: (i) APPLE did not consistently use the AMAZON Brand Registry to protect its intellectual property; and (ii) infringement notices filed on behalf of APPLE (by its agent) outside the Brand Registry were often inaccurate or invalid; which likely increased APPLE's perception that there was a counterfeiting problem on the AMAZON Websites⁵²⁶.

AMAZON has also argued during the investigation that: "[...] *the Vertical Agreement allowed Amazon to secure Apple's participation in its Brand Registry, something that Apple had previously opposed. This allowed Amazon to identify all brands in the Amazon Store, and to ensure that only authentic products were sold there*"⁵²⁷ (our emphasis).

It should also be noted that APPLE also benefited from a substantial increase in wholesale sales of its products to AMAZON for subsequent marketing on AMAZON's platform.

- **AMAZON**, for its part, had the objective in reaching the agreement to **achieve a complete supply of all APPLE products**⁵²⁸ (including APPLE's most popular products, i.e. [CONFIDENTIAL]) and that such supply would be directly from APPLE itself⁵²⁹.

In addition, the fact that the main resellers selling APPLE products on the AMAZON website in Spain were no longer authorised to use this channel meant a **concentration of sales of these products on AMAZON itself and, therefore, an increase in its income from its activity as a retail distributor of APPLE products, as AMAZON itself had foreseen** (see paragraphs (309) to (315) of the section on the facts).

⁵²⁶ See response to AMAZON IR I, paragraph 35 (folio 4611).

⁵²⁷ See paragraph 188 of AMAZON's submissions to the SOF.

⁵²⁸ See response to AMAZON IR II, paragraphs 20 and 21 (folios 4678, and 4679) and paragraph 66 of APPLE's submissions on the Proposed Resolution: [CONFIDENTIAL].

⁵²⁹ Faced with APPLE's position to admit only APRs to AMAZON, AMAZON tried to negotiate that [CONFIDENTIAL] (folio 4604)).

(577) In order to achieve these objectives APPLE and AMAZON pursued, or at least assumed, when negotiating the Brand Gating clauses, the severe restrictions of intra-brand competition referred to above, resulting from the limitation of the use of AMAZON's online marketplace to a few APPLE resellers and the consequent expulsion of the remaining resellers who had been using this platform. Such restrictions consist, as seen above, of (i) discrimination between APPLE distributors which has placed many of them at a clear competitive disadvantage; (ii) limitation of the distribution of APPLE products on the market and (iii) limitation of cross-border sales between Member States (paragraphs (474) to (545)).

- Submissions of the businesses

(578) Both APPLE and AMAZON argue that their legitimate objectives have not been taken into account when entering into the agreements and that these objectives would justify the restrictions set out above.

(579) APPLE argues, on the one hand, that the agreements at issue pursued the legitimate objectives of *"combating counterfeiting, as well as improving the shopping experience and consumer safety"*, issues which would not have been properly assessed by the investigating authority and which would justify the restrictions arising from the Exclusion or Brand Gating Clauses⁵³⁰.

(580) AMAZON, on the other hand, argues that by entering into the clauses at issue in this file it pursued the legitimate objective of gaining direct access to the full selection of APPLE products in order to enhance the attractiveness of its online marketplace⁵³¹.

- On the objective of the fight against counterfeiting

(581) Despite maintaining that the objective of ending the counterfeiting problem was at the origin of the Exclusion Clauses, APPLE has not provided any conclusive evidence to that effect. It is reasonable to consider that if this problem had been as relevant as APPLE claims (to the extent that the disputed agreements were specifically designed with the *"main objective"* of addressing *"very serious counterfeiting and security issues"* of APPLE products on AMAZON's online marketplace⁵³²), APPLE would have been in a position to provide previous reports or studies on this issue, identifying the specific problems and assessing alternatives that would lead it to conclude that the only effective solution was to close the door of AMAZON to the bulk of its resellers operating in that channel.

⁵³⁰ Paragraphs 78 to 100 of APPLE's submissions on the Proposed Resolution.

⁵³¹ Paragraphs 171 to 176 of AMAZON's submissions on the Proposed Resolution.

⁵³² Paragraph 3 of AMAZON's submissions on the Proposed Resolution.

- (582) APPLE asserts, in its submissions on the Proposed Resolution, that at an early stage of the proceedings, it provided the CD with contemporaneous evidence about the large problem of counterfeit Apple products on AMAZON prior to the GTA and the 2018 ARA⁵³³.
- (583) This alleged evidence would correspond, firstly, to a series of reports, not generated internally but produced by public and private institutions and which do not relate specifically to APPLE but, in general, to the issue of counterfeiting in online shopping⁵³⁴ as well as a series of press articles on counterfeit APPLE accessories⁵³⁵.
- (584) APPLE also invokes folio 669 of the response to IR I⁵³⁶. However, in that response, APPLE merely refers to two third-party documents not produced specifically for APPLE: a report on counterfeit Apple chargers in the UK, which does not even mention AMAZON⁵³⁷, and a mainstream press article from August 2020 - thus prior to the signing of the agreements - on the sale of counterfeit electronic products on AMAZON that does not focus on the Apple brand⁵³⁸.
- (585) Another alleged “contemporaneous evidence” of the counterfeiting problem allegedly provided by APPLE during an early stage of the procedure relates to an internal email referring to two product samples not exceeding **[CONFIDENTIAL]** items⁵³⁹.

⁵³³ Paragraph 81 of APPLE's submissions on the Proposed Resolution.

⁵³⁴ Paragraph 80 and footnote 80 of APPLE's submissions on the Proposed Resolution.

⁵³⁵ Paragraph 80 and footnote 81 of APPLE's submissions on the Proposed Resolution.

⁵³⁶ Paragraph 81 of APPLE's submissions on the Proposed Resolution

⁵³⁷ <https://www.electricalsafetyfirst.org.uk/media/11119/counterfeit-and-imitation-apple-chargers.pdf>

⁵³⁸ <https://www.washingtonpost.com/technology/2020/08/29/amazon-product-liability-losses/>

⁵³⁹ Folio 2296.

- (586) APPLE refers, on the other hand, to “approximately” **[CONFIDENTIAL]** takedown notices to AMAZON that allegedly took place between 2013 and 2018⁵⁴⁰, a figure which, as explained by the CD in the Proposed Resolution⁵⁴¹, is limited considering that it covers 5 years and all AMAZON Websites worldwide (i.e., less than **[CONFIDENTIAL]** claims per year for the whole world). Note, moreover, that as APPLE acknowledges in its submissions on the Proposed Resolution, of these “approximately **[CONFIDENTIAL]**” takedown notices, only **[CONFIDENTIAL]** relate to Spain⁵⁴². APPLE points out that, in any case, these figures would underestimate the problem as they reflect only a small portion of counterfeit products: those that have been detected and have received a takedown notice due to counterfeit⁵⁴³. In response to the above, the fact that consumers do not perceive that they have purchased a counterfeit product or do not complain may be to be expected in the case of accessories of low value (such as chargers or standard cable headphones), but not, with some exceptions, for other products of higher value and technical complexity such as iPhones, iPads, iPods, Apple Watches, airpods, etc.
- (587) The foregoing merely confirms the findings of the investigating authority concerning the lack of specific internal reports, or reports commissioned by APPLE from third parties, on the problem of the sale of counterfeit APPLE products on the AMAZON website which would have led to the conclusion that the solution to that problem was the adoption of the Exclusion or Brand Gating Clauses.
- (588) In an attempt to address this lack of evidence, APPLE includes, together with its submissions on the Proposed Resolution, a number of documents submitted for the first time in the present case which, according to the defendant, would reflect the magnitude of the problem of the sale of counterfeits through AMAZON. These are (i) an internal APPLE presentation (Appendix 2); (ii) a set of internal reports that would be based on tests of purchases of APPLE products on AMAZON (Appendices 3 to 7)⁵⁴⁴; (iii) a series of emails that would reflect **[CONFIDENTIAL]** (Appendices 8.1 to 8.8)⁵⁴⁵; (iv) internal APPLE correspondence on this issue (Appendix 8.9)⁵⁴⁶; (v) **[CONFIDENTIAL]** (Appendix 9)⁵⁴⁷ and (vi) another internal email about purchase tests conducted in 2022 (Appendix 10)⁵⁴⁸.
- (589) With regard to Appendix 2 to APPLE's submissions on the Proposed Resolution, this is an internal submission entitled “**[CONFIDENTIAL]**”⁵⁴⁹. This document is dated **[CONFIDENTIAL]**, hence after the signing of the agreements (which had taken place in October of the same year) and therefore does not reflect the fact that the problem of forgeries was at the genesis of the disputed clauses.

⁵⁴⁰ Paragraph 86 of APPLE's submissions on the Proposed Resolution.

⁵⁴¹ Paragraph 645 of the Proposed Resolution.

⁵⁴² Footnote 86 of APPLE's observations on the Proposed Resolution.

⁵⁴³ Paragraph 86 of APPLE's submissions on the Proposed Resolution.

⁵⁴⁴ Paragraph 82 of APPLE's submissions on the Proposed Resolution.

⁵⁴⁵ Paragraph 83 and 84 of APPLE's submissions on the Proposed Resolution.

⁵⁴⁶ Paragraph 85 of APPLE's submissions on the Proposed Resolution.

⁵⁴⁷ Paragraph 87 of APPLE's submissions on the Proposed Resolution.

⁵⁴⁸ Paragraph 96 of APPLE's submissions on the Proposed Resolution.

⁵⁴⁹ Folios 10.483 to 10.489.

- (590) As regards the submissions in Appendices 3 to 7⁵⁵⁰, these are scattered documents which mainly concern counterfeits of low-value accessories such as **[CONFIDENTIAL]**, without in any case restricting the use of AMAZON's online marketplace being analysed as a solution to the problem.
- (591) As to the submissions provided in Appendices 8.1 to 8.9 and 9, although they might reflect, in certain cases, **[CONFIDENTIAL]**⁵⁵¹, no concrete remedies are analysed and APPLE could have used the bargaining power conferred on it by the direct supply and the extension of the product catalogue as leverage, not only to incite AMAZON to accept the Exclusion clauses, but also to strengthen anti-counterfeiting measures and cooperation with APPLE on this issue.
- (592) With regard to Appendix 10⁵⁵², this is a communication between APPLE and AMAZON concerning a counterfeit purchase test on a small sample of **[CONFIDENTIAL]** products corresponding to **[CONFIDENTIAL]** on AMAZON's website, no longer in Spain or even in the European market, but in **[CONFIDENTIAL]** (**[CONFIDENTIAL]**)⁵⁵³.
- (593) Thus, **the most specific piece of information by which the counterfeiting issue has been put into context remains that provided by AMAZON during the investigation, that less than [0-1]% of APPLE products sold on AMAZON were reported as counterfeit.** APPLE rejects this information as "*statements*" made by a third party which should not be used against APPLE according to the case law on the use of third party documents as evidence against a defendant⁵⁵⁴. The fact remains, however, that this information does not constitute "*hearsay*" or mere "*statements*" of the kind referred to in the case-law cited by APPLE, but is objective data relating to the number of complaints received in relation to the total number of APPLE products sold through AMAZON's online marketplace. This indicator therefore allows a better grasp of the problem from an overall perspective than figures relating to scattered checks such as those provided by APPLE.

⁵⁵⁰ Folios 10.490 to 10.686.

⁵⁵¹ For example, the email included in Appendix 8.9, which is reproduced in paragraph 85 of the allegations to the Proposed Resolution, reads as follows: **[CONFIDENTIAL]**.

⁵⁵² Folios 11.101 to 11.102.

⁵⁵³ **"[CONFIDENTIAL]". (Our emphasis and underlining).**

⁵⁵⁴ Paragraph 90 of APPPLE's submissions on the Proposed Resolution.

- (594) It should be underlined that the existence of **a problem of counterfeit APPLE products on the AMAZON online marketplace is neither ignored nor denied. However, in the light of the foregoing considerations, this Court considers that it is not possible to conclude, as APPLE claims, that the Brand Gating Clauses were designed exclusively or principally as a necessary remedy.** Moreover, the new documents submitted by APPLE with its submissions on the Proposed Resolution, in order to try to prove that a counterfeiting problem had been identified prior to the contested agreements, the most appropriate solution to which was to limit the use of AMAZON's online marketplace to a few resellers, merely reflect the opposite. These documents do not disprove that the counterfeiting problem, while not irrelevant, was not as critical as APPLE would like to portray it (given that less than **[0-1]**% of APPLE products sold on AMAZON were reported as counterfeit) and further confirm that the counterfeiting problem affected almost exclusively lower-value accessories **[CONFIDENTIAL]**.
- (595) The conclusion from the above is that APPLE has failed to disprove that the main purpose of the Exclusion Clauses was to be able to better control its open distribution channel, by applying intra-brand competition restrictions which are only justified in the context of a selective distribution channel such as limiting the use of an online market to its resellers (see, inter alia, paragraphs (517) to (521)). While the fight against counterfeiting could be perceived as a secondary or incidental objective, it could have been achieved by much less anti-competitive means such as increased pressure on AMAZON to increase the effectiveness of the Brand Registry or similar tools (rather than pressuring it to accept the inclusion of Brand Gating Clauses) or other restrictions focused on the type of product that was almost exclusively the problem of counterfeiting: accessories.
- (596) This is not contradicted by APPLE's claim that takedown notices would have decreased significantly after the introduction of the Brand Gating clauses⁵⁵⁵, which is perfectly logical given that the number of resellers was reduced by about **[90-100]**% and sales were massively concentrated in one distributor (AMAZON). It is not the effectiveness of the measure that is in question but its real objectives and its appropriateness and proportionality to the alleged aim of combating the problem of counterfeiting.

⁵⁵⁵ Paragraph 116 of APPLE's submissions on the Proposed Resolution.

- On the objective of improving product presentation and shopping experience

- (597) In relation to the objective of better product presentation and shopping experience invoked by APPLE, the documentation in the file shows that the clauses in question were also not necessary to achieve the intended objective and that there were other measures to achieve this end without recourse to Brand Gating whereas: (i) that the enhanced product presentation deployed for APPLE following the agreements could be available to any operator, even if AMAZON reserved it for the "most strategic sellers" without the need to link it to any policy of expelling sellers from its platform⁵⁵⁶; and (ii) the new stipulations set out in the GTA on product presentation which are in no way linked to Brand Gating⁵⁵⁷; and (iii) APPLE's own statements in which it has maintained: *"In other words, in the Agreement, and generally in any ARA, even leaving aside the Limitations (the Exclusion Clauses), there are many provisions and mechanisms clearly inspired by the purpose of preserving the quality, brand/image and protection of the consumer experience of Apple products"*⁵⁵⁸ (our emphasis).
- (598) AMAZON argues, for its part, that the Proposed Resolution would not have taken into account AMAZON's *"legitimate objective"* in entering into the agreements to gain access to the full selection of products and to obtain direct supply from APPLE in order to *"remedy the unsatisfactory situation existing prior to the Vertical Agreement"* and *"improve the competitiveness and attractiveness of the Amazon Store"*⁵⁵⁹. AMAZON underlines, in this respect, that at no time did it have as its objectives to discriminate against APPLE resellers or to control the distribution of APPLE products⁵⁶⁰. In this regard, AMAZON argues that *"the legal test required to identify a restriction 'by object' cannot be satisfied if even one of its fundamental elements - the objectives of the parties in concluding the agreement - is not established"*⁵⁶¹.
- (599) In response to the foregoing, it should be noted, first, that the objectives of the parties in concluding the agreements at issue have been extensively discussed with a view to assessing their anti-competitive character, both in the Proposed Resolution and this Decision; the fact that AMAZON does not share the CNMC's conclusions in this respect is a different matter. It should also be noted that AMAZON assumes that proof of anti-competitive intent is a necessary element of the test to establish the anti-competitive object of an agreement. However, it is settled case law that, while it may be taken into account, the intention of the parties is not a necessary factor in determining the restrictive nature of an agreement⁵⁶². In this case, it is clear that the immediate objective of the Brand Gating Clauses is clearly and objectively to limit the number of APPLE distributors in AMAZON's online marketplace (which constitutes an

⁵⁵⁶ See documents provided by the Italian competition authority and, in particular, the question and answer document prepared by AMAZON on the agreements (folio 4800): **[CONFIDENTIAL]** (folio 4800).

⁵⁵⁷ See paragraph 188 of the non-confidential version of AMAZON's submissions to the SOF (folio 8392): **[CONFIDENTIAL]**. (our emphasis).

⁵⁵⁸ See paragraph 71 of the non-confidential version of APPLE's submissions to the SOF.

⁵⁵⁹ Paragraphs 171 to 176 of AMAZON's observations on the Proposed Resolution.

⁵⁶⁰ Paragraph 174 of AMAZON's submissions on the Proposed Resolution.

⁵⁶¹ Paragraph 172 of AMAZON's submissions on the Proposed Resolution.

⁵⁶² See, among many others, the judgments of the CJEU in cases C-228/18 Budapest Bank (ECLI:EU:C:2020:265) para 53; C-8/08, T-Mobile Netherlands and others (EU:C:2009:343), paras 31, 39 and 43, or C-501/06 P GlaxoSmithKline Services and others v Commission and others (EU:C:2009:610), para 58.

anti-competitive objective), notwithstanding APPLE's ultimate intentionality in entering into the Brand Gating Clauses.

- (600) In any event, and as discussed below (see section 5.4.2 on the application of Articles 1.3 of the LDC and 101.3 of the TFEU), it is not considered that in order to obtain direct supply by APPLE and its complete catalogue of products to AMAZON in order to “*remedy the unsatisfactory situation existing prior to the Vertical Agreement*” and “*improve the competitiveness and attractiveness of the Amazon Store*” it was necessary to enter into the disputed clauses.

- **Conclusion on the defendants' allegations regarding the objectives of the Brand Gating Clauses**

- (601) In short, the defendants' allegations that the investigating authority wrongly concluded that the object of the exclusion clauses is restrictive of competition because it did not take into account the alleged legitimate objectives pursued by their implementation cannot be accepted.
- (602) It should be recalled in this regard that, according to settled case-law, “***the fact that a measure is regarded as pursuing a legitimate aim does not mean that, in view of the existence of another objective pursued by that measure which must be regarded as unlawful, having regard also to the content of the provisions of that measure and the context in which it is framed, it cannot be regarded as having an anti-competitive object***”⁵⁶³ (our emphasis).

⁵⁶³ CJEU in Case C 67/13 P - CB v Commission, EU:C:2014:2204, para 70; and C-288/18 - Budapest Bank, para 52.

c. The legal and economic context

(603) A number of **circumstances have been identified which have an impact on the harmfulness of the agreement and its ability to restrict competition** in the online retail market for electronic products in Spain (where the conduct under investigation has its effects):

- The following data demonstrate **AMAZON's market power** in the market for the provision of intermediation services in Spain **and its relevance as a sales channel in Spain**:
 - If we look at its market shares in the provision of intermediation services in online marketplaces to third party sellers, in 2021, AMAZON had a share in Spain of **[70-80%]** (by revenue generated by the provision of basic services); **[80-90%]** (by revenue generated by the provision of basic and ancillary services); and **[60-70%]** (by sales generated by third party sellers). In all cases these are high shares which indicate that **AMAZON is the leading provider of intermediation services in online marketplaces between sellers and consumers in Spain**;
 - If we look at its share of the overall online retail market, AMAZON had a share in Spain of **[50-60%]** (by web traffic in 2020) or **[10-20%]** (by net sales value in 2019), in both cases a long way behind the next player; and
 - If we look at its share of the national market for online sales of electronic products in particular, AMAZON (by net sales in 2021) had a share of **[30-40%]** (and again, a long way behind the next operators).
- APPLE itself acknowledges that AMAZON's online market in Spain is decisive when talking about "the scale and scope of Amazon 's business"⁵⁶⁴ and "considering the magnitude of Amazon's business"⁵⁶⁵ (our emphasis in both cases).
- For its part, **APPLE's products are the most demanded products in their category** (as a manufacturer, it has market shares of over 30% by value in the market for the manufacture and sale of electronic products in the EEA, being the leading manufacturer by market share).

⁵⁶⁴ See response to APPLE IR I (folios 4253-4260).

⁵⁶⁵ See response to APPLE IR I (page 4256).

- AMAZON itself recognises the leadership of APPLE branded products: *“Given the particularities of the successful Apple brand”⁵⁶⁶; “Amazon’s customers were looking for products from the world’s most desired electronics brand”⁵⁶⁷; “the APPLE brand was and still is considered to be the most valuable and desired brand in the world”⁵⁶⁸; and “[g]iven the particularities of the successful Apple brand and its tight distribution system [CONFIDENTIAL]⁵⁶⁹”.*

(604) The above data (AMAZON’s shares in the markets in which it operates, the fact that APPLE products are the most demanded products in their category on the market - it is the leading manufacturer of electronic products by market share in value) and the fact that AMAZON itself recognises the leadership of APPLE branded products and APPLE itself on the AMAZON Website) lead to the conclusion that **both AMAZON and APPLE are businesses whose conduct is capable of restricting and/or affecting competition in view of their high level of market power.**

(605) Moreover, as explained above, the legal and economic context is analysed in order to determine whether the conduct in question is specifically capable of restricting competition. In relation to the above, the 2022 Vertical Guidelines state that:

- *“Vertical agreements relating to the provision of online brokering services concluded by online brokering service providers with this hybrid function [...] may raise competition concerns in general on the relevant markets for the sale of the intermediated goods or services”⁵⁷⁰ (our emphasis) and that*
- *“appreciable anti-competitive effects are unlikely to arise where the provider of online intermediation services does not enjoy market power in the relevant market for online intermediation services”⁵⁷¹.*

(606) In this respect, as explained above, AMAZON has market shares in the provision of intermediation services in online marketplaces to third party sellers above **[60-70%]** irrespective of the variable chosen to calculate them (in some cases reaching **[80-90%]**), so that it has sufficient market power for its conduct to be capable of producing anti-competitive effects in the market.

⁵⁶⁶ See response to AMAZON IR I, paragraph 17 (folio 4603).

⁵⁶⁷ See response to AMAZON IR I, paragraph 18 (folio 4604).

⁵⁶⁸ See response to AMAZON IR I, para. 22 (folio 4605) and e.g., https://www.interbrand.com/wpcontent/uploads/2018/10/Interbrand_Best_Global_Brands_2018.pdf, page 12. For 2019 see <https://www.interbrand.com/best-brands/best-global-brands/2019/ranking/>.

⁵⁶⁹ See response to AMAZON IR, paragraph 17 (folio 4603).

⁵⁷⁰ See paragraph 105.

⁵⁷¹ See paragraph 108.

- (607) Moreover, while the intention of the parties is not a necessary factor in determining the restrictive character of an agreement between businesses, nothing prevents competition authorities or national and EU courts from taking it into account⁵⁷².
- (608) In this case, as evidenced by the questionnaire of possible questions AMAZON could face after the signature of the GTA and the 2018 ARA and especially by the answers prepared by the company in relation to the Exclusion or Brand Gating Clauses, AMAZON justifies the restriction to the public with an explanation that does not correspond to reality (see paragraph (344)).
- (609) AMAZON considers that the explanation should be conveyed to the public that this is a product selection decision⁵⁷³ and that it is not taken because of counterfeiting issues⁵⁷⁴ (see paragraph (344)), **[CONFIDENTIAL]**.
- (610) There is therefore an intention, at least on the part of AMAZON, to conceal the real reasons behind the signing of the agreement from third parties, which has been taken into account in assessing its anti-competitive character. Indeed, if the parties had had legitimate intentions, one would expect that there would have been no problem with the explanations passed on to third parties being the real reasons behind the agreement. This is not contradicted by AMAZON's allegations that the answers prepared in connection with such questionnaires are intended to be simple or that no explanation of the company's commercial policy is to be expected⁵⁷⁵, because if the real reason for the Brand Gating clauses had been to combat counterfeiting, answers could have been given with the same simplicity with which it denies that this is the purpose of the clauses without the need to go into detail about the company's commercial policy.
- (611) Furthermore, the internal study conducted by AMAZON for all its websites in Europe on the impact of Brand Gating also shows that AMAZON was aware that the sales of third party sellers would be absorbed by AMAZON itself and that this could favour AMAZON in order to improve its status as an APPLE reseller by moving from **[CONFIDENTIAL]**:

⁵⁷² Case C-288/18 - *Budapest Bank*, paragraph 53 and case law cited.

⁵⁷³ *We make selection decisions all the time, based on terms and conditions and a number of other factors.*

⁵⁷⁴ **[CONFIDENTIAL]**.

⁵⁷⁵ Paragraphs 197 to 199 of AMAZON's submissions on the Proposed Resolution.

- According to the following graph: (i) in a no deal scenario, AMAZON was expected to have sales of zero euros in 2020, while third party sellers were expected to have sales of between **[CONFIDENTIAL]** million euros; whereas, (ii) in a deal scenario, AMAZON's sales were expected to be **[CONFIDENTIAL]** million euros and third party sales were expected to be between 0 and 100 million euros.

Image 22. Expected sales by AMAZON as an APPLE distributor in the scenarios with and without agreement in hundreds of thousands of euros



Source: AMAZON⁵⁷⁶

Table 32. Translation of the previous image



⁵⁷⁶ Appendix 12 of the AMAZON IR response (folio 4658 in its non-confidential version, and folios 566-578 in its confidential version).

Source: own translation of the table above

- **This analysis examines whether AMAZON could become a [CONFIDENTIAL] APPLE distributor (a classification that would give it better purchasing conditions),** for which it is indicated that one of the following two conditions would have to be met: (i) achieving revenues of between [CONFIDENTIAL] million euros; or, alternatively (ii) [CONFIDENTIAL]% of total revenues coming from the sale of APPLE products. AMAZON considers that the second condition is more complicated to fulfil than the first, and therefore focuses on the first condition and considers that AMAZON will be able to achieve a revenue of between [CONFIDENTIAL]⁵⁷⁷. In other words, AMAZON assumed that such sales would continue to take place, but this time by AMAZON itself, which would absorb the turnover of unauthorised resellers.

- Submissions of the businesses

- (612) In relation to the above, APPLE argues that the CD failed to adequately consider the counterfeiting problem that APPLE sought to address by entering into the Exclusion Clauses, as a fundamental aspect of the legal and economic context⁵⁷⁸.
- (613) This approach cannot be accepted, for the reasons set out above in paragraphs (581) to (596).
- (614) Moreover, APPLE argues that when analysing the context of the agreements, the Authority wrongly disregarded the need to take into account inter-brand competition (i.e., between APPLE's products and those of other consumer electronics manufacturers) which would have been favoured by the Brand Gating Clauses by limiting the problem of counterfeiting, increasing the supply of APPLE products on AMAZON and improving the shopping experience of those products⁵⁷⁹.
- (615) To the above, it should be replied, firstly, that neither Articles 1 LDC and/or 101 TFEU nor national or European case law provide that the prohibitions of these articles exclusively affect inter-brand competition. In this sense, as the CJEU has held, *"in principle, no distinction should be drawn where the Treaty does not distinguish"*⁵⁸⁰.

⁵⁷⁷ Appendix 12 to the AMAZON IR response (folios 4659 and 4660).

⁵⁷⁸ Paragraphs 78 to 100 of APPLE's submissions on the Proposed Resolution.

⁵⁷⁹ Paragraphs 101 to 104 of APPLE's submissions on the Proposed Resolution.

⁵⁸⁰ C-56/64 - Consten and Grundig v Commission of the EEC, ECLI:EU:C:1966:41, p. 423.

- (616) Indeed, the very fact that a vertical restriction such as resale price fixing, irrespective of the market share of the manufacturer and the distributor, is considered as a black clause (i.e., a particularly serious restriction) by the 2010 and 2022 VBER and the widespread practice of considering these restrictions of competition by object, is indicative of the fact that intra-brand restrictions of competition are unambiguously covered by the prohibition.
- (617) Thus, for example, in the GUESS case⁵⁸¹ the EC considered that the restrictions only affected intra-brand competition, without making any considerations on inter-brand competition, and the clauses analysed in the manufacturer's relations with its distributors were considered restrictions by object, in a market such as clothing retailing where, following APPLE's arguments, inter-brand competition is also very intense (which according to them would rule out any negative effects on consumers).
- (618) According to that decision: *"The primary objective of Guess was [...] and to limit intra-brand competition by authorised retailers"⁵⁸²; "By means of the contractual provisions and the practices referred to [...] Guess Europe effectively restricted intra-brand competition and partitioned national markets for its products, contrary to Article 101(1) of the Treaty"⁵⁸³; and "the restrictions described in Section 5.2 formed part of the same strategy and served the same aim, namely restricting intra-brand competition and partitioning national markets"⁵⁸⁴.*
- (619) The same can be said of the NIKE case, cited above, where the EC found that the restrictions imposed by the manufacturer on its distributors were restrictions by object affecting intra-brand competition: *"the restrictions implemented by Nike throughout its distribution network resulted in reduced competition between licensees and distributors of Nike's products, reducing the possibility of wider choice and lower prices for consumers"*⁵⁸⁵.

⁵⁸¹ AT.40428 - Guess; available here: https://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=1_40428.

⁵⁸² Paragraph 55 of the decision. Free translation of *"The primary objective of this part of Guess Europe's e-commerce strategy was [...] and to limit intra-brand competition by authorised retailers [...]"*.

⁵⁸³ Paragraph 138 of the decision. Free translation of *"By means of the contractual provisions and practices referred to in Section 5.2, Guess Europe effectively restricted intra-brand competition and partitioned national markets for its products contrary to Article 101(1) of the Treaty"*.

⁵⁸⁴ Paragraph 141 of the decision. Free translation of *"[...] the restrictions described in Section 5.2 formed part of the same strategy and served the same aim, namely restricting intra-brand competition and partitioning national markets"*.

⁵⁸⁵ See paragraph 132 of the decision. Free translation of *"[...] the restrictions implemented by Nike throughout its distribution network resulted in reduced competition between licensees and distributors of Nike's products, reducing the possibility of wider choice and lower prices for consumers"*.

- (620) With regard to APPLE's argument that the Exclusion or Brand Gating Clauses would have led to a **wider range** of APPLE products on AMAZON's website by intensifying **inter-brand competition** for electronic products on AMAZON's online marketplace, it should be stressed that neither the case-law nor the decision-making practice of the competition authorities have taken the view that where a given conduct is likely to enhance inter-brand competition this automatically offsets the restrictions on intra-brand competition resulting from that measure, making it possible to rule out its classification as a restriction of competition by object.
- (621) In this regard, even if it were accepted that the Brand Gating clauses would have increased inter-brand competition by extending the range of APPLE products in the AMAZON channel, the mere finding of this would not be sufficient to exclude their restrictive nature by object resulting from the massive expulsion of APPLE distributors from that channel and the consequent limitation of intra-brand competition.
- (622) In addition, APPLE itself invokes a doctrinal article⁵⁸⁶ which argues that setting the effects of a reduction in intra-brand competition against increases in inter-brand competition attributable to the restriction requires an analysis of unmanageable complexity and is an often unnecessary enquiry⁵⁸⁷.
- (623) In any event, as discussed in section 5.4.2 concerning the application of Articles 101(3) TFEU and 1.3 of the LDC (paragraphs (936) to (1001)), APPLE could perfectly well have extended the supply of its products to AMAZON, without the limitation deriving from the exclusion clauses, achieving the same or even a much larger increase in supply, as a large number of alternative resellers (mainly the NARs) expelled from this online market as a result of the agreement under scrutiny would have continued to operate on AMAZON.
- (624) AMAZON argues, for its part, that the Proposed Resolution fails to examine the actual conditions of the functioning and structure of the market given that it would have (i) ignored that APPLE is ultimately solely responsible for its distribution system⁵⁸⁸; (ii) attributed excessive importance to AMAZON's size⁵⁸⁹, and (iii) ignored the numerous alternatives available to sellers, holding AMAZON responsible for unilateral business decisions taken by sellers⁵⁹⁰.

⁵⁸⁶ See Lear Report, page 29. The study is "The Rule of Reason And The Economic Approach: Reflections on the Sylvania Decision".

⁵⁸⁷ Summary of the following free translation of "*The first, loosely suggested by the Chicago Board of Trade formulation, is to require the trier of fact to balance the reduction in intrabrand competition against the increase in interbrand competition attributable to the restriction [...] Besides requiring a trial of unmanageable complexity to quantify these impacts, this approach calls for an inquiry that is often unnecessary*" (our emphasis); pages 16 and 17 of the study.

⁵⁸⁸ Paragraphs 177 to 179 of AMAZON's submissions on the Proposed Resolution

⁵⁸⁹ Paragraphs 180 to 182 of AMAZON's submissions on the Proposed Resolution

⁵⁹⁰ Paragraphs 183 to 187 of AMAZON's submissions on the Proposed Resolution.

- (625) In response to the foregoing, it must first of all be held that, although APPLE is responsible for its distribution system, AMAZON accepted and implemented the Brand Gating clauses without APPLE's alleged bargaining power making it possible to consider them to be the result of unilateral conduct imposed by the latter (see in this respect paragraphs (1023) to (1064) on fault and attribution of liability to AMAZON).
- (626) As to whether the continuous references to the size of AMAZON would have distorted the conclusions on the restrictive character by object of the Exclusion or Brand Gating Clauses, it should be replied that, contrary to the company's contention, an extensive analysis has been made of the gravity of the conduct itself, which does not preclude taking into account the size of AMAZON and its importance as an online retail distribution channel as a fundamental contextual element of the agreement. If the size of the operators involved were not relevant in establishing a restriction of competition, the so-called "*de minimis rules*" would not exist, nor would European block exemption regulations be inapplicable above certain market share thresholds.
- (627) In relation to the above, the existence of alternatives to AMAZON's online marketplace for distributors of APPLE products also does not preclude the conclusion that the Brand Gating clauses give rise to a restriction of competition by object resulting from the foreclosure or impossibility to make use of a highly relevant distribution channel which can hardly be effectively replaced.
- (628) Finally, AMAZON claims that the investigating authority wrongly attempted to use AMAZON's documentation as evidence of the existence of a restriction by object, without taking into account its context⁵⁹¹. It refers in particular to (i) the internal study **[CONFIDENTIAL]** referred to in paragraphs (309) to (315) and (611); and (ii) the document containing a set of frequently asked questions and answers referred to in paragraphs (343) to (344).
- (629) With regard to the first of these documents, which compares the sales of APPLE products on AMAZON in a counterfactual scenario without the agreements versus a foreseeable scenario with the agreements in place, it should be recalled that it is provided by AMAZON together with the answer to a question included in an information request stating that: "*The negotiation of the GTA was the subject of several internal discussions and evaluations, which are summarised in the **internal analysis that was used as the basis for Amazon's decision to conclude the Agreement***"⁵⁹². It is therefore a document relevant to the context of the agreement. The fact that AMAZON is now trying to give it a pro-competitive veneer, including in its name a reference to the "*improvement of the customer experience*"⁵⁹³, when it had previously referred to it as "*Apple EU Deal Status October 8, 2018*", does not detract from the validity of the use made of this document by the CNMC, since it has done no more than provide an objective statement of the data contained therein, and without speaking of decontextualisation.

⁵⁹¹ Paragraphs 188 to 199 of AMAZON's submissions on the Proposed Resolution

⁵⁹² Response to AMAZON IR (folio 4609).

⁵⁹³ Paragraph 188 of AMAZON's submissions on the Proposed Resolution

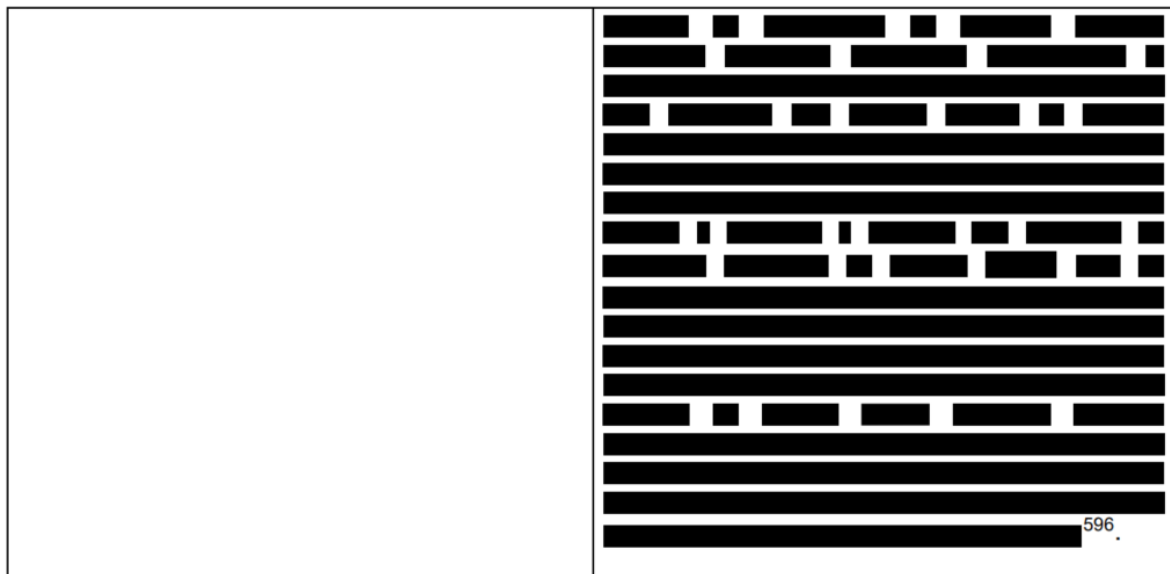
- (630) With regard to the questionnaire with frequently asked questions and answers, AMAZON argues that it is not reasonable to use it as evidence of the parties' true intentions or the objectives of the agreement as it is designed to provide easily understood answers and not exhaustive explanations on complex issues, nor can it be intended to provide details on its contractual relationship with APPLE⁵⁹⁴. However, at no point has it been criticised for not providing exhaustive answers or not explaining details of the business relationship between AMAZON and APPLE. What has become apparent is the complete contradiction between the explanations given to customers in this document and the explanations given to the CNMC in the context of this case.
- (631) Thus, in the case of the question of whether the measures taken were related to the fight against counterfeiting, instead of giving a short answer in the affirmative (as would have been expected if this had been the purpose of the Exclusion Clauses), the answer is that this is not the case.

Table 33. Extract from the form of answers to possible questions from third party sellers regarding agreements prepared by AMAZON in November 2018

24. [REDACTED] [REDACTED] [REDACTED]⁵⁹⁵	[REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED]

⁵⁹⁴ Paragraph 198 of AMAZON's submissions on the Proposed Resolution

⁵⁹⁵ See documents provided by the Italian competition authority: "[CONFIDENTIAL]" (folios 4719 and 4720).



- (632) In any event, the analysis leading to the conclusion that the Brand Gating Clauses constitute a restriction of competition by object does not rely exclusively or even predominantly on these documents, but is merely taken into account as an additional element thereof.
- (633) The parties' arguments that the investigating authority incorrectly assessed the legal and economic context when analysing the disputed clauses cannot therefore be accepted.

d. Conclusion on the restriction by object

- (634) Having regard to the analysis of the content of the agreement, its objectives and the economic and legal context, this Division considers that the Exclusion or Brand Gating Clauses are sufficiently harmful to competition to qualify as a restriction by object. This is without prejudice to the considerations below on the existence of a single and continuous infringement and the contribution of this conduct to the pursuit of a plan seeking a common objective (section 5.4.3.1).
- (635) It should be stressed that, without losing sight of the fact that the concept of restriction of competition by object must be interpreted restrictively, it can in no way be claimed that the qualification as such of the Exclusion or Brand Gating Clauses is not in line with case law as it "*creates a new form of restriction by object*"⁵⁹⁷ as AMAZON claims. The "body of experience" to which the case law refers in order to be able to consider that a collusive practice gives rise to a restriction of competition by object does not refer to the specific form of the agreement under scrutiny but to the type of restriction of competition resulting from it.

⁵⁹⁶ See documents provided by the Italian competition authority: "[CONFIDENTIAL]" (folio 4801).

⁵⁹⁷ Paragraph 130 of AMAZON's submissions on the Proposed Resolution

In this case, as we have seen, the Exclusion or Brand Gating Clauses give rise to a series of anti-competitive limitations that are so archetypal that several of them are expressly included in the non-exhaustive list of anti-competitive practices included in Articles 101 of the TFEU and 1 of the LDC, such as the application of discriminatory conditions that place third party contractors at a competitive disadvantage (section 5.4.1.2.2.2.1) or the limitation of distribution (section 5.4.1.2.2.2.1). Given that, as has been analysed, the economic context of the Exclusion Clauses not only does not allow the anti-competitive nature of their content to be ruled out, but actually reinforces it (paragraphs (603) to (633)), it is not appropriate to try to negate the anti-competitive object of this agreement by means of an additional economic analysis, as AMAZON seeks to do with the Compass Report on Brand Gating⁵⁹⁸. This is without prejudice to the possibility of invoking efficiencies arising from the agreement in question to try to defend the application of the exemption provided for in Articles 101.3 of the TFEU and 1.3 of the LDC. It should be recalled in this respect that, contrary to what is stated in the aforementioned report⁵⁹⁹, the fact that a restriction of competition can generate efficiencies that can be assessed for the possible application of the aforementioned exemption of articles 1.3 of the LDC and 101.3 of the TFEU in no way prevents it from being classified as a restriction by object⁶⁰⁰. In any event, in addition to being by their very nature capable of restricting competition, the Brand Gating Clauses have generated concrete anti-competitive effects in the market, as set out below.

⁵⁹⁸ See, for example, in this respect, paragraphs 40 to 51 of the Opinion of Advocate General Bobek in Case C-228/18 - Budapest Bank from which, in view of its relevance to the present case, the following extract is reproduced: “47. *On a similar observation, in the Toshiba case the Court of Justice held that, in relation to agreements alleged to be anti-competitive by object, “the analysis of the economic and legal context in which the practice arises may be limited to what is strictly necessary in order to conclude that there is a restriction of competition by object”.* What does this mean in practice? In my view, it means that **the competition authority applying Article 101(1) TFEU must verify, in the light of the evidence in the file, that there are no specific circumstances which could cast any doubt on the alleged harmful nature of the agreement. If experience tells us that the agreement in question belongs to a category of agreements which, more often than not, are harmful to competition, a detailed analysis of the impact of such an agreement on the affected markets seems unnecessary.** It is sufficient for the authority to verify that these markets and the agreement do not present special characteristics that could make the case an exception to the rule based on experience. However infrequent it may be, the possibility that an agreement may actually present such characteristics should not be disregarded, unless the actual environment in which the agreement is developed is taken into account. For example, if competition in a given market is not possible and does not exist, there is no competition that can be restricted.” [...] Put simply and metaphorically: if it looks like a fish and smells like a fish, it can be presumed to be a fish. Unless, at first glance, one detects something strange about this particular fish, such as that it has no fins, it floats in the air or it smells of lilies, it does not need to be dissected in detail to qualify it as a fish. On the other hand, if the fish is unusual, it may still qualify as a fish, but not before a detailed examination of the creature has been carried out.” (Our emphasis).

⁵⁹⁹ Page 4 of the Compass Report on Brand Gating.

⁶⁰⁰ See, for example, paragraph 34 of the Opinion of Advocate General Bobek in Case C-228/18 - Budapest Bank: “Nor does the qualification of an agreement as restrictive by object or effect affect the applicability of an exemption under Article 101(3) TFEU. Nothing in the wording of this provision suggests that exemptions can only apply to restrictions of competition by effect. Moreover, such a limitation would also be difficult to reconcile with the fact that, as I have set out in paragraph 24 of these conclusions, there is no conceptual difference between the two types of agreement.

5.4.1.2.2.2. Market effects

5.4.1.2.2.2.1. Principles

- (636) Case law has already indicated that, even if there is a restriction by object, there is nothing to prevent a competition authority from also analysing its effects on the market⁶⁰¹, and there may be cases where the same conduct constitutes both a restriction by object and by effect on competition⁶⁰². The Advocate General of the CJEU has emphasised in this regard that *"insofar as the two types of agreements [by object and effect] are not intrinsically different, the authority may well choose, in a particular case, to examine the agreement from both points of view at the same time, in a single decision"*⁶⁰³.
- (637) Furthermore, according to settled case law⁶⁰⁴, restrictive effects on competition may be both actual and potential, and in order to assess the effects of a cartel in relation to Article 101 TFEU, it is necessary to examine how competition plays out in the actual context in which it would have developed in the absence of the agreement at issue⁶⁰⁵, i.e., to analyse the so-called counterfactual or contrary scenario, which aims at *"examining the competitive situation in the actual context in which it would have developed in the absence of the agreement at issue"*⁶⁰⁶.

⁶⁰¹ Case C-288/18 - *Budapest Bank*, paragraph 40 "[...] the fact that a finding of the existence of a restriction of competition "by object" relieves the competent authority or court of the need to examine its effects does not in any way imply that that authority or court may not carry out such an examination when it considers it appropriate".

⁶⁰² Case C-288/18 - *Budapest Bank*, paragraph 44 "Article 101(1) TFEU must be interpreted as not precluding the same anti-competitive conduct from being regarded as having both the object and the effect of restricting competition".

⁶⁰³ Opinion of Advocate General Bobek in Case C-228/18 - *Budapest Bank*, paragraph 24.

⁶⁰⁴ See C 306/20 - *Visma Enterprise*, EU:C:2021:935, paragraph 73; and C-307/18 - *Generics (UK) and Others*, ECLI:EU:C:2020:52, paragraph 117.

⁶⁰⁵ See C 306/20 - *Visma Enterprise*, EU:C:2021:935, paragraph 74; and C-307/18 - *Generics (UK) and Others*, ECLI:EU:C:2020:52, paragraph 118.

⁶⁰⁶ See C 306/20 - *Visma Enterprise*, EU:C:2021:935, paragraph 74; and similarly, C-307/18 - *Generics (UK) and Others*, ECLI:EU:C:2020:52, paragraph 120.

5.4.1.2.2.2. Application to this case

- (638) Although for the reasons set out above the Brand Gating Clauses are considered to constitute a restriction of competition by object, which makes it unnecessary to examine the restrictive effects on competition arising therefrom on the market for a restriction of competition to be deemed to exist⁶⁰⁷, they have also produced effects on the market. As will be seen below, these effects include (i) a drastic reduction in the number of resellers of APPLE products on AMAZON's online marketplace; (ii) the loss of a highly relevant marketing channel for NARs; (iii) the concentration of sales of APPLE products on AMAZON as a distributor; (iv) a compartmentalisation of the internal market; and (v) a general increase in the relative prices of APPLE products in AMAZON's online market.

a. Reducing the number of vendors

- (639) According to AMAZON, prior to the signing of the GTA and the 2018 ARA, there were at least **[1,150-1,250]** sellers of APPLE products on the AMAZON website in Spain⁶⁰⁸. Given that from the adoption of the agreements until November 2021, only **[CONFIDENTIAL]** APR⁶⁰⁹ (the only APPLE resellers authorised to sell on AMAZON from the implementation of the clauses until that date) operated in Spain, this means that, from the time of the adoption of the GTA and the 2018 ARA until November 2021, **[95-100]% of the resellers that used AMAZON to sell APPLE-branded products were no longer authorised** to sell such products on the AMAZON website in Spain as a result of the Exclusion or Brand Gating Clauses. And even if all the APRs included in the **[CONFIDENTIAL]** D list of the 2018 ARA are considered (this list includes **[CONFIDENTIAL]** APRs in total), the percentage of sellers who ceased to be eligible to sell APPLE products in Spain through AMAZON would be very similar: **[90-95]%**.

⁶⁰⁷ Judgments of the ECJ of 26 November 2015 in Case C 345/14 Maxima Latvija, paragraphs 16 and 17, and of 20 January 2016, C 373/14 P in Case C-373/14 Toshiba Corporation v Commission, paragraphs 24 and 25.

⁶⁰⁸ See Appendix 17 of the AMAZON IR II Response (folios 5190 to 5204). Stating "at least", because these are the sellers who received a communication from AMAZON announcing that they would no longer be authorised to sell on their website in Spain).

⁶⁰⁹ See response to APPLE IR I (page 4272).

- (640) While, after November 2021, APPLE allowed AARs ([CONFIDENTIAL] in total in Spain)⁶¹⁰ and Retailers⁶¹¹ to also use AMAZON, [95-100]%⁶¹² of resellers who used AMAZON to sell APPLE-branded products prior to the signature of the agreements remained ineligible to sell such products on the AMAZON Website in Spain as a result of the Brand Gating Clauses.
- (641) In the same vein, even with the most conservative estimates, which would lead to consider that all APPLE APRs, AARs, and Retailers in EU jurisdictions are authorised to sell on AMAZON after November 2021, the percentage of sellers that would have ceased to be eligible to sell on AMAZON Spain after the signing of the agreements from November 2021 remains very high, at [60-65%]⁶¹³.
- (642) **In addition, the main group of operators that are no longer authorised to sell APPLE branded products on AMAZON are the NARs** which, as has been established⁶¹⁴, were the main resellers of APPLE products on the AMAZON websites and, in particular, also on the Spanish website. In the same vein, NARs were the **group of resellers that introduced the most competition and dynamism in the channel**, which is acknowledged by AMAZON itself in an internal document by stating that "*APRs and AARs tend to price higher than NARs [...]*"⁶¹⁵. This is not contradicted by AMAZON's claim that most of the sellers operating on its online marketplace prior to the implementation of the Exclusion Clauses could sell non-significant quantities of APPLE products individually⁶¹⁶, as the NARs as a whole were the highest volume resellers and the only ones that posed a competitive threat to AMAZON as a distributor of APPLE products (paragraphs (314) and (334) to (336)).

⁶¹⁰ See response to APPLE IR I (page 4272).

⁶¹¹ As explained above, the number of Retailers in Spain is between 5 and 10.

⁶¹² As the number of retail distributors has been declared confidential, it has not been included in these calculations. However, the number is not large, as explained above, they are between [CONFIDENTIAL], so the above figure would not be greatly affected if they were included in the calculations.

⁶¹³ See Appendix 1 of the response to APPLE IR IV (folio 5608). In scenario 3, APPLE collects the number of APRs, AARs, and Retailers it has in all EU countries. The information has been provided in the non-confidential version in ranges. The minimum and maximum ranges have been summed up and APPLE has a network of between [300-400] and [400-500] official resellers in Europe. In order to make the calculations more conservative, the maximum range, i.e. [400-500] resellers, has been taken into account for the calculation of the above [60-65%].

⁶¹⁴ See detailed explanations in section 4.5.3. of the Established Facts.

⁶¹⁵ See question and answer 7.(iv) of the response to AMAZON IR II (folio 4682) and Appendix 12 of the response to AMAZON IR I (folio 4658): " "[CONFIDENTIAL] [...]" .

⁶¹⁶ Paragraph 6 of AMAZON's submissions on the Proposed Resolution.

- (643) Therefore, one of the effects of the Exclusion or Brand Gating Clauses on the market has been that **almost all of the resellers that used the AMAZON website in Spain to sell APPLE products until the signature of the contested agreements in October 2018 have ceased to do so.**
- (644) Thus, in a counterfactual scenario without Brand Gating Clauses, there would not have been the expulsion of more than **[90-100]**% of the sellers who were authorised to sell on AMAZON's Website in Spain before the conclusion of the agreements, which would have allowed a much higher level of intra-brand competition to be maintained in that channel than occurred after the agreement.

- **Submissions of the businesses**

- (645) In relation to the above, APPLE argues that the reduction in the number of third party resellers is not an effect, but the very content of the Brand Gating Clauses. It adds that, in any event, this cannot be considered in the abstract to have a negative impact on competition as it would mean misapplying antitrust law to protect certain competitors when its objective is to protect competition as such. APPLE also argues that a proper analysis would have led the CD to conclude that the reduction in the number of resellers is not capable of generating anti-competitive effects by taking into account: (i) to the increase in volumes of APPLE products sold on AMAZON since October 2018; (ii) improvements in terms of quality and safety for the benefit of consumers; (iii) the absence of evidence by the CD of a causal link between the Brand Gating Clauses and the increase in the relative price of APPLE products sold on AMAZON's online marketplace; and (iv) the intra-brand competitive pressure in channels other than AMAZON's online marketplace from APPLE's own distributors as well as from inter-brand competition from competing manufacturers⁶¹⁷.
- (646) In response to these allegations, it should be noted, firstly, that the fact that an agreement has an anti-competitive content or object - as in this case the limitation of the number of distributors - does not prevent the practical implementation of that content from being qualified as an anti-competitive effect.

⁶¹⁷ Paragraphs 128 to 133 of APPLE's submissions on the Proposed Resolution.

- (647) On the other hand, it is also not true that the CD's complaint regarding the reduction in the number of resellers of APPLE's products at AMAZON resulting from the Brand Gating Clauses is the result of an incorrect application of antitrust law that sought to protect certain competitors and not the competitive process itself. The CD does not analyse the impact of the agreement on a few specific retailers, but finds, in general terms, that the agreement has driven a very high percentage of the sellers who were marketing APPLE products through this online marketplace out of AMAZON (90-100% in terms of sales volume). According to basic economic logic, this necessarily affects the competitive dynamics within this distribution channel, which carries most of the traffic in sales of electronic products in Spain, especially if account is taken of the fact that the group of sellers affected corresponds to those distributors which introduced the most competition and dynamism into this channel (see, inter alia, paragraphs (314), (334) to (336) and (642)). As to the specific impact this has had on prices, this is a separate but related effect, which is specifically discussed below (paragraphs (724) to (779)).
- (648) Nor can it be accepted that the alleged pro-competitive effects consisting in the increase in the volumes of APPLE products sold on AMAZON and the material improvement in terms of quality and safety for the benefit of consumers, which according to APPLE would have occurred after the signature of the agreements, allow the conclusion that *"such a reduction in the number of resellers is not capable of generating anti-competitive effects"*⁶¹⁸.
- (649) In order to conclude that the specific pro-competitive effects of an agreement outweigh its anti-competitive object or effects, in such a way that it is compatible with antitrust law, it is necessary for the undertakings charged to demonstrate that the requirements of the exemption provided for in Articles 101.3 of the TFEU and 1.3 of the LDC, an issue that is analysed in detail in section 5.4.2 of this resolution.
- (650) In any event, the alleged pro-competitive effects mentioned above are not inherent to Brand Gating clauses. In particular, the increase in the volume of APPLE products sold on AMAZON is a consequence of APPLE's switch to supplying AMAZON directly with its entire product catalogue and not the expulsion of the bulk of APPLE resellers of APPLE products operating on AMAZON's online marketplace. Indeed, had such resellers remained active on AMAZON's website, the volume of APPLE products on that online marketplace would have increased even more significantly.

⁶¹⁸ Paragraph 131 of APPLE's submissions on the Proposed Resolution.

- (651) It should be further noted that, in addition to the absence of a causal link between the expulsion of resellers under the Brand Gating Clauses and the increase in sales volume referred to above, we are at different levels of the relationship between AMAZON and APPLE. While the increase in the volume of APPLE products on AMAZON derives from the relationship in which AMAZON operates as an authorised APPLE distributor, the Brand Gating Clauses are entered into by AMAZON as the operator of its online branding and no longer as a distributor.
- (652) As to the alleged improvement of the shopping experience resulting from the reduction of counterfeits, this could have been achieved by other less anti-competitive means as discussed in paragraphs (581) to (596) and (979) to (989).
- (653) AMAZON, on the other hand, argues that the Proposed Resolution does not satisfy the legal test for establishing the existence of a restriction of competition by effects⁶¹⁹. It argues, like APPLE, that it cannot be concluded that a reduction in the number of vendors is, in itself, anti-competitive and that it is not possible to conclude that the NARs would boost competition by offering better prices because higher prices can also reinforce competition if they reflect a better service.
- (654) AMAZON also argues that the analysis in the Proposed Resolution would have ignored the principle that a reduction of intra-brand competition cannot have a negative impact on competition if there is significant inter-brand competition, such as that faced by APPLE products from other manufacturers of consumer electronics products, and that in any event the impact on inter-brand competition at the level of Spain as a whole would have been minimal given that the sales of the retailers expelled from AMAZON's online marking represented a small percentage of the total sales of AMAZON's products in the country as a whole.
- (655) To the above, it must first be answered that the Exclusion or Brand Gating Clauses have necessarily led to a limitation of the intra-brand competitive pressure faced by AMAZON as a distributor of APPLE. This is to the extent that, prior to the agreements, there were more than **[1,150-1,250]** resellers of APPLE products competing with AMAZON in its online market, in fact making up the bulk of sales of APPLE products in that channel and, after the expulsion of the NARs, those sales were massively concentrated on AMAZON itself (see, inter alia, paragraphs (576), (596) and (682) to (704)). In fact, that intra-brand restriction of competition resulted in consumers who purchased APPLE-branded products on the AMAZON website after the agreement paid higher relative prices than would have prevailed in the absence of the agreement (paragraphs (724) to (779)).

⁶¹⁹ Paragraphs 200 to 261 of AMAZON's submissions on the Proposed Resolution.

- (656) As to the fact that any competition on quality that may be associated with higher prices should not be denigrated, this Division does not argue the contrary. However, in order to allow for such alleged competition in terms of quality, it was not necessary to drive out APPLE's distributors who sold cheaper. Different types of resellers competing on quality and price respectively could very well coexist in AMAZON's online marketplace, leaving consumers to choose which of the two competitive factors is more attractive to them according to their specific preferences and needs.
- (657) Nor can the approach that a reduction of intra-brand competition could not be considered to have a negative impact in a context of high inter-brand competition be accepted for the reasons already mentioned in paragraphs (614) to (622) in response to similar arguments put forward by APPLE in relation to the economic context of the agreements.
- (658) The claims that the conclusions of the effects analysis in the Proposed Resolution are invalid because they focus on competition within AMAZON's online market, which would represent only a small proportion of sales of electronic products in Spain as a whole, must also be rejected. On the one hand, AMAZON is the leading online marketplace for electronic products, far ahead of all other operators, both in terms of web traffic and market share in the online sale of electronic products⁶²⁰. On the other hand, APPLE is the leading manufacturer of electronic products, far behind other manufacturers⁶²¹. Therefore, the competitive constraints exerted by other retailers (on AMAZON) and other manufacturers (on APPLE) cannot lead to the conclusion that the diminution of competitive pressure within AMAZON's online market is irrelevant.

⁶²⁰ As indicated in section 3.5, AMAZON had a **[50-60]%** market share by web traffic in 2020, followed by Alibaba with **[10-20]%** and El Corte Inglés with **[10-20]%**. Indeed, other strong competitors it cites are Carrefour and FNAC which have shares of **[0 to 10]%** and **[0 to 10]%**, respectively. On the other hand, if we consider the 2021 shares in the market for online sales of electronic products, AMAZON had a share of **[30-40]%**, followed by others such as PC Componentes, El Corte Inglés, and APPLE itself, with shares of **[0-10]%**.

⁶²¹ As indicated in section 3.4.2, APPLE had a 30-40% value share of the EEA dimension electronics manufacturing market in 2021, while that of the next player, Samsung, was 10-20%.

- (659) With regard to the weighting of the NARs, as can be seen from both AMAZON's internal study⁶²² and the graphs provided by AMAZON itself (see paragraphs (682) to (692)), between **[90-100]%** of the **[CONFIDENTIAL]** million in sales of APPLE products in AMAZON's online marketplaces before the agreements came from this type of reseller, so that although on an individual basis, most of them may have been small in size, it is not true that as a whole, they represented a marginal competitive constraint.
- (660) Therefore, AMAZON's claims regarding the absence of an anti-competitive effect consisting in the foreclosure of the bulk of APPLE's resellers in AMAZON's online marketplace as a result of the Brand Gating clauses cannot be accepted either.

b. Unauthorised sellers lose an important sales channel

- (661) As has been established, until the signature of the agreements, the NARs were the resellers who were the main users of APPLE's online marketplace to sell AMAZON products, and therefore the ones who were driving this channel (in terms of supply and prices) in direct competition with AMAZON in its role as distributor of APPLE products. The NARs were ultimately the resellers of APPLE products who introduced the most intra-brand competition in this online marketplace (paragraphs (314), (334) to (336) and (642)).
- (662) This is demonstrated by: (i) data from an internal AMAZON study carried out for all AMAZON websites in Europe (including Spain), which indicates that: "[the] *size of the current third-party seller market (between [CONFIDENTIAL] million euros, of which 90-100% comes from non-authorised Apple resellers [i.e. the NARs]*"⁶²³; as well as by (ii) the sales data included in paragraphs (335) and following.
- (663) In addition, to enrich its analysis, the CD sent requests for information to some of these NARs to obtain their views on AMAZON as a retail marketing channel. Two Spanish NARs (**[CONFIDENTIAL]** and **[CONFIDENTIAL]**) and two Italian NARs (**[CONFIDENTIAL]** and **[CONFIDENTIAL]**) selling APPLE products in Spain responded to the CD's requests.

⁶²² Where AMAZON argues: "*the size of the current market of third party sellers (between [CONFIDENTIAL], of which 90-100% comes from non-authorised Apple resellers [i.e. the NARs]*" (Appendix 12 to the response to the AMAZON IR (folios 4659 and 4660).

⁶²³ Appendix 12 to the AMAZON IR response (folios 4659 and 4660).

- (664) With regard to the **Spanish NARs that responded to the information request**⁶²⁴: (i) **[CONFIDENTIAL]** said it was not interested in selling on AMAZON because of the high commissions, while (ii) **[CONFIDENTIAL]** said it was interested because *"it is the largest e-commerce in Spain with the largest share of customers"*.
- (665) As reflected below, the main effects for **[CONFIDENTIAL]** of its expulsion from AMAZON as a result of the Brand Gating clauses were: (i) the drastic and immediate reduction in its revenue from the marketing of APPLE products and (ii) a change in the way it sells via the internet which proves to be much less effective than selling via AMAZON's website, so that it shifts from marketing the bulk of its APPLE products from AMAZON's online marketplace to its own website, but without managing over the years to come anywhere near the same level of turnover that it achieved by selling through AMAZON. This corroborates that AMAZON was a key sales channel for this NAR's APPLE products and that this distributor has failed to find a viable alternative either through its own website or through other substitute online marketplaces.

Table 34. Change in the sales pattern of **[CONFIDENTIAL]** as a result of the Exclusion Clauses

	Share of total sales (revenue) of consumer electronic products				
	2017	2018	2019	2020	2021
Share of revenue derived from the sale of APPLE branded products		[40-50%]	[10-20%]	[10-20%]	[10-20%]
Share of revenues derived from sales of other brands' consumer electronics products		[50-60%]	[80-90%]	[80-90%]	[80-90%]
Share of total revenue derived from the sale of consumer electronics products	100%	100%	100%	100%	100%

Source: response to the request of **[CONFIDENTIAL]** (folios 3852-3856 and 4222 in its non-confidential version, folio 3857 in its confidential version)

- (666) It can be seen how in 2018, the year before the entry into force of the GTA and 2018 ARA, the proportion of sales of electronic products was almost **[40-50%]** for APPLE branded products and almost **[40-50%]** for other brands' products. However, since the entry into force of these (31 October 2018, in the table from 2019), the percentage of sales of APPLE products is drastically reduced (to below **[10-20%]**).
- (667) These data corroborate that the AMAZON website in Spain, which is the online sales channel that carries most of the web traffic for electronic retail in Spain and net sales of electronic products online in Spain, could not easily be effectively replaced by other comparable traffic sources for selling APPLE branded products online. Had this not been the case, it would have been expected that other means of online sales (such as other online marketplaces or proprietary websites) could have been used as a substitute for the AMAZON website and, consequently, there would not have been such a drastic reduction in the sale of these products, as the sales made on AMAZON could have been diverted to such other means, **[CONFIDENTIAL]**. In other words, **the reseller in question did not find any other similar online sales mode for the APPLE branded products it had been selling until the end of 2018 on the AMAZON website.**

⁶²⁴ See responses from **[CONFIDENTIAL]** (folios 2789-2792 and 3852-3856, respectively).

Table 35. Change in the primary electronic medium for selling APPLE-branded products from
[CONFIDENTIAL]

A) All electronic products

Annual share of sales by sales channel (all electronic products)									
		2018		2019		2020		2021	
		Quotas (value)	Quotas (volume)	Quotas (value)	Quotas (volume)	Quotas (value)	Quotas (volume)	Quotas (value)	Quotas (volume)
Physical shops		[0-10%]	[0-10%]	[10-20%]	[0-10%]	[0-10%]	[0-10%]	[0-10%]	[0-10%]
Online channel	Own website	[10-20%]	[10-20%]	[20-30%]	[20-30%]	[20-30%]	[10-20%]	[20-30%]	[10-20%]
	Marketplaces	[80-90%]	[80-90%]	[60-70%]	[60-70%]	[70-80%]	[70-80%]	[70-80%]	[70-80%]
TOTAL		100%	100%	100%	100%	100%	100%	100%	100%

B) Apple products only

Annual share of sales by sales channel (Apple-branded products only)									
		2018		2019		2020		2021	
		Quotas (value)	Quotas (volume)	Quotas (value)	Quotas (volume)	Quotas (value)	Quotas (volume)	Quotas (value)	Quotas (volume)
Physical shops		[10-20%]	[10-20%]	[20-30%]	[20-30%]	[20-30%]	[20-30%]	[20-30%]	[30-40%]
Online channel	Own website	[10-20%]	[10-20%]	[60-70%]	[60-70%]	[70-80%]	[70-80%]	[60-70%]	[60-70%]
	Marketplaces	[70-80%]	[70-80%]	[0-10%]	[0-10%]	[0-10%]	[0-10%]	[0-10%]	[0-10%]
TOTAL		100%	100%	100%	100%	100%	100%	100%	100%

Annual share of sales by sales channel (Apple-branded products only)									
		2018		2019		2020		2021	
		Value	Volume	Value	Volume	Value	Volume	Value	Volume
Physical shops		[€90,000-100,000]	[100-200]	[€100,000-200,000]	[200-300]	[€100,000-200,000]	[200-300]	[€100,000-200,000]	[100-200]
Online channel	Own website	[€100,000-200,000]	[100-200]	[€400,000-500,000]	[500-600]	[€400,000-500,000]	[500-600]	[€200,000-300,000]	[300-400]
	Marketplaces	[€700,000-800,000]	[700-800]	[€20,000-30,000]	[0-100]	[€0-10,000]	[0-100]	[€30,000-40,000]	[0-100]
TOTAL		[€900,000-1 M]	[900-1,000]	[€600,000-700,000]	[800-900]	[€600,000-700,000]	[700-800]	[€400,000-500,000]	[400-500]

Source: response to the request by [CONFIDENTIAL] (response at folios 3852-3856 and, for the tables, see folio 3857 for the confidential version and, for the non-confidential version, see folio 4222 for the first and second table and folio 5399 for the third and last table)

- (668) In the first table it can be seen how the main sales channel (taking into account online and offline channels and all electronic products, i.e., without differentiating by brand) is online marketplaces, such as AMAZON.
- (669) In the second and third tables, relating only to APPLE branded products, it can be seen how the main sales channel in 2018 (prior to the entry into force of the GTA and 2018 ARA) was the online marketplace. **After the entry into force of the Brand Gating Clauses, there is a diversion to the seller's own website which, in any case, sees its turnover from APPLE-branded products decrease year after year⁶²⁵, i.e., it does not recover what it has lost due to its expulsion from AMAZON to sell APPLE-branded products in other channels.** Had the AMAZON website not been a relevant channel, the reseller would have been able to successfully redirect the sales it made on AMAZON to other channels, such as its own website, without any loss of revenue from the sale of these products.

⁶²⁵ See the third table, which clearly shows this effect in the "total" row (from a turnover of between [500,000-1,000,000] euros in 2018 to a turnover of between [0-500,000] euros in 2021, i.e., approximately half.

(670) In relation to the Italian NARs who responded to the injunction:

- **[CONFIDENTIAL] indicates that: (i) "In 2017 and 2018, [90-100%] of sales in Spain were made through Amazon.es.** Apple products represent [30%-40%] of total sales"⁶²⁶; (ii) "In 2017 the turnover derived from the marketing of APPLE branded products in Spain was around [100,000-200,000] euros (we do not have information by product sub-categories). In 2018 we dropped to about half, [€50,000-100,000]⁶²⁷"; and (iii) **"Our turnover in Spain has been zero since 2019"**⁶²⁸.
- For its part, **[CONFIDENTIAL] indicates that: (i) "Our company derived [90-100%] of its turnover from sales through the platform (amazon.co.it, amazon.es, amazon.de, amazon.fr, amazon.uk).** The turnover derived from the sale of APPLE branded products in the years 2015 - 2016 - 2017 and 2018 represented approximately [80-90%] of the total sales made through the platform"⁶²⁹; (ii) "Our company marketed APPLE branded products through the Amazon.es platform in the years 2015 ([500,000-1,000,000,000] euros in sales); 2016 ([2,000,000-3,000,000,000] euros in sales); 2017 ([8,000,000-9,000,000,000] euros in sales) and 2018 ([9,000,000,000-10,000,000,000] euros in sales). Over the years, revenues from Apple product sales have increased steadily on average. Unfortunately, **in the years 2019-2020-2021, our percentage of revenue inherent in sales of APPLE branded products is zero**⁶³⁰"; and (iii) "There will [be] a big drop in sales from 2019 onwards, as it is not possible to sell APPLE branded products on the Italian market"⁶³¹.

⁶²⁶ See response of **[CONFIDENTIAL]** to question 14 (folio 4170).

⁶²⁷ See response of **[CONFIDENTIAL]** to question 15 (folio 4170).

⁶²⁸ See response of **[CONFIDENTIAL]** to question 19 (folio 4171).

⁶²⁹ See response of **[CONFIDENTIAL]** to question 14 (folio 4186).

⁶³⁰ See response of **[CONFIDENTIAL]** to question 11 (folio 4185).

⁶³¹ See response of **[CONFIDENTIAL]** to question 19 (folio 4187).

- (671) In both cases, **all their sales in Spain were made through the Amazon.es website and, since the entry into force of the Exclusion or Brand Gating Clauses, which led to their expulsion from AMAZON, the companies' turnover in Spain has been zero.** Had the AMAZON website not been a relevant channel, it would have been expected, on the contrary, that these companies could have diverted their sales to other channels and that they could have generated revenue from the sale of APPLE branded products in Spain, but this has not been the case.
- (672) The above corroborates that **AMAZON's Website in Spain could not easily be effectively replaced by other sources of traffic for the sale of consumer electronics products online and, in particular, for the sale of APPLE branded products, in particular for resellers located in other EU Member States.**

- **Submissions of the businesses**

- (673) Both APPLE⁶³² and AMAZON⁶³³ make submissions denying that the Brand Gating Clauses have had the effect of causing APPLE's unauthorised distributors to lose an important sales channel. Both defendants argue that the sample of NAR resellers whose opinion has been requested in this respect would be too small to be considered representative and lacks probative value for the purpose of proving this effect.
- (674) In response to the above, it should be noted that the investigating authority approached the 10 most representative NARs **[CONFIDENTIAL]**, in any event, the opinions and information gathered from the **[CONFIDENTIAL]** NARs which replied to the requests for information are not used as evidence on which the effect of the loss of an important sales channel for this type of distributors would be based. This effect is clear from the above objective data (largely provided by the defendants themselves) that the NARs made the bulk of sales of APPLE products on AMAZON⁶³⁴ and that it is the leading online marketplace for electronic products, far behind the rest of the operators by both web traffic and market share in the market for online sales of electronic products (paragraphs (248) to (264)). The responses of the NARs requested by the CD are provided merely to illustrate those conclusions which are the result of a logical deduction reached from the observation of uncontested facts and figures, irrespective of the specific geographic scope or segmentation of the markets analysed which APPLE and AMAZON also contest in their submissions.

⁶³² Paragraphs 134 to 147 of APPLE's submissions on the Proposed Resolution.

⁶³³ Paragraphs 228 to 233 of AMAZON's submissions on the Proposed Resolution.

⁶³⁴ As previously mentioned, according to AMAZON's own information: "[the] size of the current market of third party sellers (between [0-500] and [500-1000], of which 90-100% comes from non-authorised Apple resellers [i.e. the NARs])" (Appendix 12 to the response to the AMAZON IR (folios 4659 and 4660).

- (675) APPLE further argues in its submissions on the Proposed Resolution that it has carried out a purchase test by which it would have been able to verify that **[CONFIDENTIAL]** and one of the two Italian NARs sought **[CONFIDENTIAL]** sell counterfeit APPLE products which would discredit its answers and demonstrate the counterfeit problem invoked by APPLE to justify the Brand Gating Clauses⁶³⁵.
- (676) In the light of the latter, it should be noted, firstly, that the fact that APPLE carried out a purchase test in August 2022 does not discredit the data provided by these NARs relating to their expulsion from AMAZON four years earlier. Furthermore, the fact that APPLE is now making efforts to carry out a study on counterfeiting for use as evidence in the present case corroborates the CD's findings that the absence of specific reports and studies to analyse and evaluate the issue of sales of counterfeit products on AMAZON prior to the signature of the contracts indicates that the fight against counterfeiting was not the main objective of the Brand Gating Clauses, despite APPLE's allegations (paragraphs (581) to (596)). It is also reaffirmed that APPLE does not consider sales of counterfeits to be a critical problem eroding its brand image, otherwise it would opt for a system of selective distribution and if it has not done so and encourages its wholesalers to supply unauthorised sellers (paragraphs (46) and (332), it is because it is in their interest to continue to distribute its products, even though they may sometimes sell non-genuine products as well.
- (677) Moreover, the fact that the only type of counterfeit APPLE products identified in this purchase test are low-value accessories⁶³⁶, also reflects that the counterfeiting problem does not significantly affect APPLE's higher-value flagship products, **[CONFIDENTIAL]** (paragraphs (586) and (587)) which, in turn, corroborates that there were less anti-competitive means of intra-brand competition than a total expulsion of unauthorised resellers from AMAZON's online marketplace, such as increased controls or, alternatively, simply preventing the sale through AMAZON of only such accessories.

⁶³⁵ Paragraphs 141 to 144 of APPLE's submissions on the Proposed Resolution.

⁶³⁶ The counterfeit products that would have been identified from the test purchase referred to by APPLE in its submissions on the Proposed Resolution are **[CONFIDENTIAL]**.

- (678) APPLE concludes its submissions by which it seeks to refute the existence of the effect of the loss of an important sales channel for NARs by pointing out that AMAZON would be irrelevant for the vast majority of resellers. This is evidenced by the absence of requests to APPLE's sales team to sell products on Amazon.co.uk. In the same vein, another fact that, according to APPLE, refutes the importance of AMAZON as a sales channel for NARs is that, **[CONFIDENTIAL]**⁶³⁷.
- (679) This Division considers that such statements merely support the position maintained by the investigating body in the Proposed Resolution. The limited impact of the announcement by which APPLE allowed AARs and Retailers to sell on AMAZON reflects precisely the lack of interest of authorised resellers in using this online marketplace, as opposed to NARs, which until the date of their expulsion under the Brand Gating Clauses accounted for more than **[90-100]**% of the sales of APPLE products on AMAZON, and are the only resellers who until at least the close of the investigation phase are still prohibited from using this channel. As for the alleged absence of applications to APPLE by resellers to sell on Amazon.es, this is explained, as has already been seen above, by the fact that we are not dealing with a system of prior authorisation (paragraph (504)) but with a default exclusion of all resellers not expressly authorised by APPLE to sell on AMAZON.
- (680) AMAZON, for its part, insists that the importance of its online market as a sales channel has been exaggerated on the grounds that "it is not possible to analyse competition within a single shop in isolation"⁶³⁸ taking into account the existence of multiple alternatives such as distributors' own websites or physical shops, as well as other online marketplaces. It also argues that further evidence of the irrelevance of its online marketplace as a marketing channel is APPLE's ubiquity and commercial success prior to the disputed agreements⁶³⁹.
- (681) Nor does this Division agree with such approaches. The conclusions as to the relevance of AMAZON's online market - which can by no means be considered as just another "one-stop shop" - have been reached through empirical observation of objective data taking into account other marketing channels. While the share information on web traffic only includes information on online marketplaces, the shares on net sales do include own websites and give AMAZON a share of **[30-40]**%, far behind other online marketplaces and websites (see section 3.5.4). With regard to the reasons for focusing on the effects of the analysed behaviours on the online marketplace (not including the offline market) these have already been explained in detail in section 3.2 of this resolution. The importance of AMAZON as a sales channel has also been acknowledged by APPLE itself⁶⁴⁰. The fact that AMAZON had already achieved significant notoriety prior to the inclusion of the agreements does not disprove this.

⁶³⁷ Paragraphs 146 and 147 of APPLE's submissions on the Proposed Resolution.

⁶³⁸ Paragraph 229 of AMAZON's submissions on the Proposed Resolution

⁶³⁹ Paragraph 230 of AMAZON's submissions on the Proposed Resolution

⁶⁴⁰ See paragraphs 688 to 690 of the Proposed Resolution where reference is made, for instance, to the Economic Report provided by APPLE together with its submissions to the SOF (folio 8726) and page 30 (folio 8752): "**sales on Amazon grew much more than overall sales in Spain**" (our emphasis) or to Appendix 2 of the response to APPLE IR I (folio 4352), referring to an internal APPLE presentation in which it is noted that **[40-50%] of all product searches in the US are already initiated on AMAZON**.

c. Concentration of sales of APPLE-branded products on AMAZON itself

- (682) The following graphs show how, following the entry into force of the Brand Gating Clauses, there is a concentration of the sale of APPLE branded products through AMAZON's website in Spain in AMAZON itself as a reseller of APPLE⁶⁴¹ products, going from being a marginal distributor to the main distributor of APPLE products on its own online marketplace:

⁶⁴¹ For ease of reference, the folio of each of the graphs appears on the side of the copied image. For a full version of the graphs, see Appendix 13 of the the response to AMAZON IR II (folios 4698 to 4706) or Appendix 2 of the SOF.

Image 23. Distribution of monthly sales of APPLE products **[CONFIDENTIAL]** between third-party resellers and AMAZON itself as an APPLE distributor from 2013 to 2021





Source: response to AMAZON IR II (folios 4698 to 4706)

- (683) The vertical bars in the charts above show the monthly unit sales of **[CONFIDENTIAL]**, respectively, on the AMAZON Website in Spain from January 2013 to July 2021. The dark blue colour represents AMAZON sales and the light blue colour represents third party sellers. The first pink stripe indicates the date of the signing of the agreement (October 2018) and the second, the date on which third party sellers no longer authorised to operate on the AMAZON Website were allowed to dispose of their stock (January 2019).

- (684) Thus, according to AMAZON, the charts refer to APPLE's most demanded products, which AMAZON was only authorised to sell and for which it only had access to direct supply by APPLE since the signature of the Brand Gating Clauses.
- (685) As can be seen, in the case of **[CONFIDENTIAL]**⁶⁴², **until the signature of the Exclusion or Brand Gating Clauses, sales were mainly made by the third party sellers, with some isolated sales by AMAZON** (which until that time had no access to direct supply by APPLE); whereas, **after the signing of the agreements, it is clear that after the expulsion of the bulk of AMAZON resellers operating on APPLE's website, all sales are concentrated on AMAZON**, which benefits from a double effect: (i) it can sell more by having direct access to APPLE's supply; and (ii) it eliminates almost all potential competitors by driving out all resellers except the APRs listed in the **[CONFIDENTIAL]** of the 2018 ARA.
- (686) The above is also observed if instead of monthly sales of APPLE products, annual sales are taken into account⁶⁴³:

Image 24. Distribution of annual sales of products of **[CONFIDENTIAL]** between third-party resellers and AMAZON itself as an APPLE distributor from 2013 to 2021

⁶⁴² The case of the **[CONFIDENTIAL]** is different because, according to the graphs, since their launch they were practically not sold by third party sellers on the AMAZON Website.

⁶⁴³ For ease of reference, the folio of each of the graphs appears on the side of the copied image. For a full version of the graphs, see Appendix 15 of the the response to AMAZON IR II (folios 4707 to 4715) or Appendix 2 of the SOF.



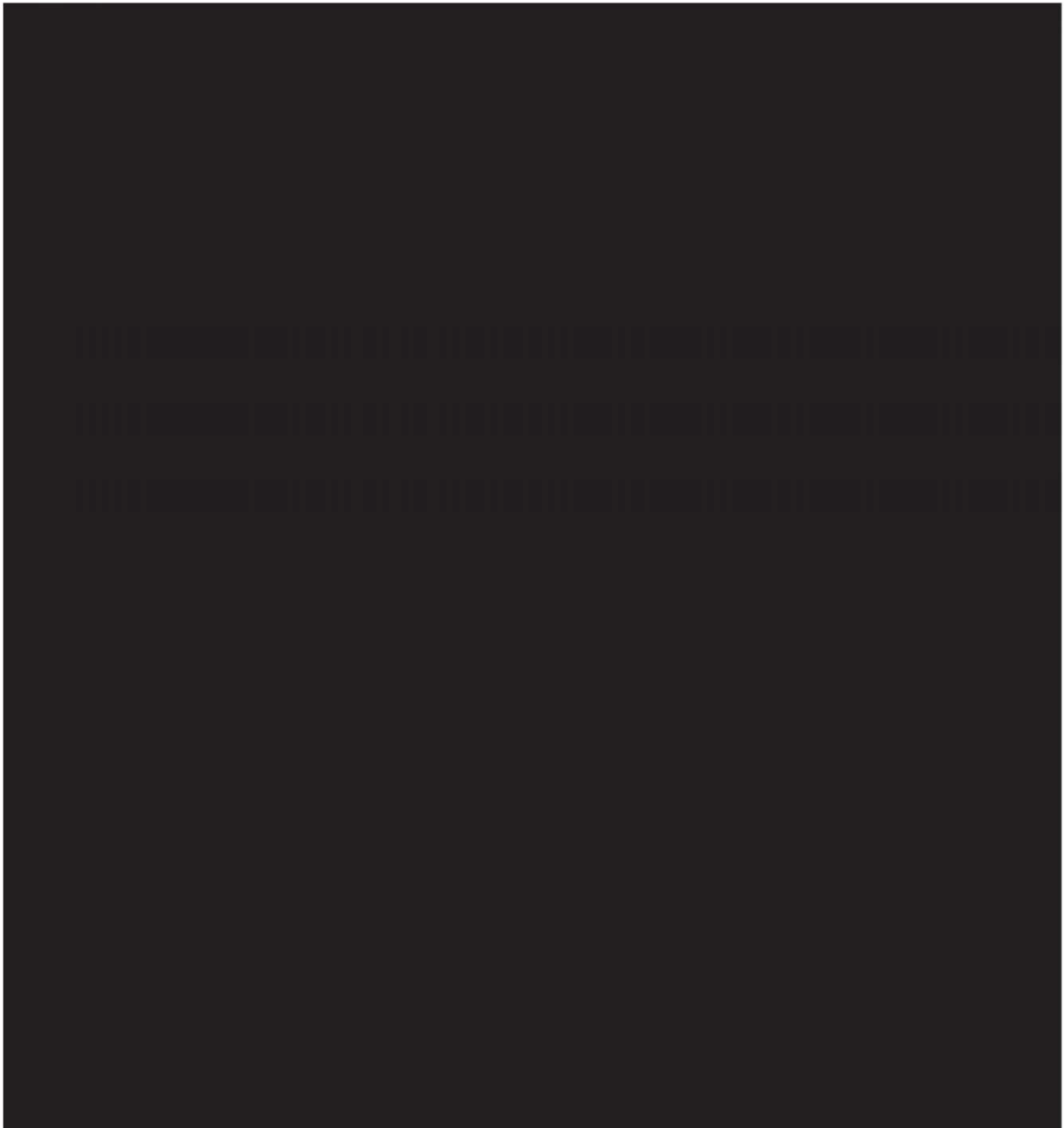


Source: Response to AMAZON IR II (folios 4698 to 4715)

- (687) In a counterfactual (or contrary) scenario, it would have been expected that, had the third party sellers not been expelled (i.e., still authorised to sell APPLE branded products on the AMAZON Website in Spain), sales of APPLE products would not have been concentrated in such a way at AMAZON, but would have been more evenly spread between AMAZON and the third party sellers, which would have competed with AMAZON by increasing intra-brand competition within the AMAZON Website in Spain.

- (688) Indeed, this situation is where it is observed in respect of some of APPLE's products that AMAZON was authorised to sell (even if, as alleged by AMAZON, that there was no direct supply by APPLE to AMAZON for any product prior to the GTA and 2018 ARA) before the Brand Gating Clauses, such as the **[CONFIDENTIAL]**:

Image 25. Distribution of monthly sales of products of **[CONFIDENTIAL]** products on the Amazon.es website between third-party resellers and AMAZON itself as an APPLE distributor from 2013 to 2021



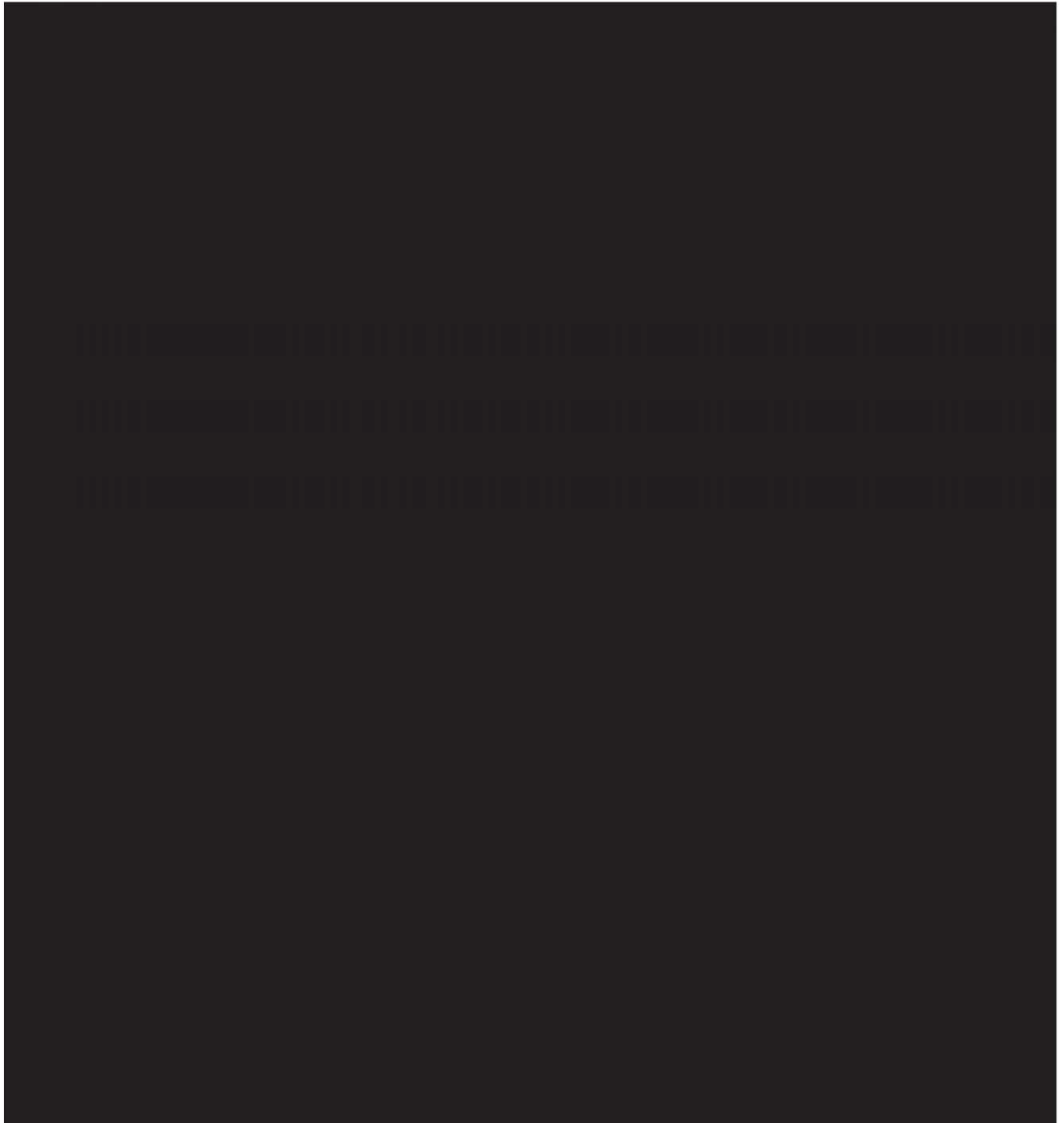
Source: Response to AMAZON IR II (folios 4698 to 4715)

- (689) As can be seen, the sales behaviour for these products from January 2013 until the date of signature of the Brand Gating Clauses is totally different: sales of **[CONFIDENTIAL]** are split between the third party sellers and AMAZON. They only return to focus on AMAZON after the signing of the agreements, as third party sellers are no longer authorised to sell APPLE branded products on the online marketplace

- (690) The above is also observed if annual sales of APPLE products are taken into account instead of monthly sales⁶⁴⁴:

Image 26. Distribution of annual sales of products of APPLE **[CONFIDENTIAL]** products on the Amazon.es website between third-party resellers and AMAZON itself as an APPLE distributor from 2013 to 2021

⁶⁴⁴ In the **[CONFIDENTIAL]** case AMAZON has provided for the annual sales a joint chart in which it does not differentiate by these two products as in the annual sales, but the change can also be seen.



Source: Source: Response to AMAZON IR II (folios 4707 to 4715)

- (691) The following is a comparison of the **[CONFIDENTIAL]** products, which clearly shows the above: the contrast between the two scenarios.

Table 36. Comparison between the distribution of annual and monthly sales of products of **[CONFIDENTIAL]** between third-party resellers and AMAZON itself as an APPLE distributor from 2013 to 2021



Source: Response to AMAZON IR II (folios 4707 to 4715)

(692) The above is highly relevant for the purpose of analysing the concentration of sales of APPLE products in AMAZON itself as APPLE's distributor. Thus, even if as alleged by AMAZON there was no direct supply by APPLE to AMAZON for any products prior to GTA and 2018 ARA:

- From 2014 to 2018, there is still a difference with the period from 2018 onwards, which is that AMAZON was only authorised to sell the least sought after products, even if it did not have direct access to them (i.e., in this period it was not authorised to sell the most sought after products, **[CONFIDENTIAL]**)
- Even taking into account the absence of direct supply in the 2014-2018 period for the least sought after products, it is clear that, after the signing of the agreements, there is a concentration of sales at AMAZON in all product categories, assuming both for the products that it was authorised to sell in 2014-2018 (the least sought after, such as **[CONFIDENTIAL]**), as for those that became authorised to sell after 2018 (the most sought after, such as **[CONFIDENTIAL]**), all sales by third party resellers who cease to be authorised to use the AMAZON Website in Spain to sell APPLE branded products.

- Thus, if the third parties had not ceased to be authorised, a more equal distribution of sales would have been expected, although AMAZON's sales would also have increased more as a result of the direct supply that it did not have before 2018, as can be seen in the graphs prior to 2018 and the signing of the agreements.
- It follows therefore that the cause of the increase in sales of APPLE branded products on the AMAZON online marketplace is the direct supply to AMAZON, but not the Brand Gating Clauses, which have the effect, inter alia, of concentrating sales on AMAZON **[CONFIDENTIAL]**.

(693) AMAZON itself was aware that this effect was going to occur (i.e., that the sales of the third party resellers would be drastically reduced, as a result of its expulsion and its ability to absorb them directly) and that it could benefit from this by becoming a **[CONFIDENTIAL]** distributor for APPLE, as is evident from the internal study which was carried out before signing the Brand Gating Clauses referred to above (paragraphs (309) to (315) and (611)). This is without prejudice to the fact that AMAZON **[CONFIDENTIAL]**⁶⁴⁵.

- Submissions of the businesses

(694) In their submissions on the Proposed Resolution APPLE⁶⁴⁶ and AMAZON⁶⁴⁷ reject the idea that this concentration of sales of APPLE products in AMAZON can be considered as an anti-competitive effect.

(695) Both defendants argue, on the one hand, that antitrust law is not designed to protect competitors and that there is no reason to consider, as an anti-competitive effect, the change from a scenario in which sales are atomised among a number of distributors to a situation in which sales are concentrated in the hands of a single distributor. According to the defendants, the only relevant factor in assessing this circumstance, derived from the Brand Gating Clauses, from the point of view of competition is the overall increase in sales on AMAZON's online marketplace is a pro-competitive outcome⁶⁴⁸.

⁶⁴⁵ Report submitted by AMAZON as Document 5 together with its submissions on the Proposed Resolution entitled "Economic Analysis of Amazon's Interest in the Adoption of the Advertising, Marketing Limitations and Brand Gating Clauses" (**Compass Report on Amazon's Interest in the Vertical Agreement**).

⁶⁴⁶ Paragraphs 148 to 150 of APPLE's submissions on the Proposed Resolution

⁶⁴⁷ Paragraphs 242 to 250 of AMAZON's submissions on the Proposed Resolution.

⁶⁴⁸ Paragraph 148 of APPLE's submissions on the Proposed Resolution and paragraph 236 of AMAZON's submissions on the Proposed Resolution and paragraph 93 of Brattle's Supplementary Report.

- (696) In relation to these statements, according to basic economic theory, a shift from a situation of dispersed supply to a scenario of supply concentration constitutes a priori an anti-competitive effect by necessarily implying a decrease in the competitive constraints faced by the operator on which supply is concentrated. This is further accentuated in the present case, given the characteristics of the NARs and their role in stimulating intra-brand competition on AMAZON's online marketplace by offering better prices (paragraphs (314), (334), (334), (611) or (642)).
- (697) The defendants also argue that the investigating body carried out its analysis on the basis of an erroneous counterfactual scenario. APPLE argues in this respect that in the absence of the agreement it would not have been able to increase sales because of the persistence of the problems of poor product presentation and mistrust due to counterfeiting⁶⁴⁹. AMAZON for its part insists that in the absence of the agreement there was no such increase in sales of APPLE products on its online marketplace as it would not have gained access, as a distributor, to the full catalogue of products and their direct supply by APPLE⁶⁵⁰.
- (698) Contrary to these allegations, it should be noted, firstly, that the increase in sales of APPLE products on AMAZON does not derive from the Brand Gating clauses but from the direct supply of the complete catalogue of APPLE products to AMAZON.
- (699) With regard to the fact that there would not have been such an increase had the counterfeiting and misrepresentation problems not been addressed, as discussed above, the counterfeiting problems were limited and concerned almost exclusively accessories, not APPLE's flagship products, and could in any event have been dealt with by measures less harmful to intra-brand competition than the Exclusion Clauses (paragraphs (581) to (596)).
- (700) AMAZON argues, on the other hand, that the conclusions of the Proposed Resolution as to the concentration of the sale of products on AMAZON as a result of the agreements is erroneous as, in its analysis, the CD ignored what happened to **[CONFIDENTIAL]** products within its own online marketplace prior to the signing of the disputed agreements⁶⁵¹.

⁶⁴⁹ Paragraph 149 of APPLE's submissions on the Proposed Resolution.

⁶⁵⁰ Paragraph 236 of APPLE's submissions on the Proposed Resolution.

⁶⁵¹ Paragraphs 86 to 90 of AMAZON's submissions on the Proposed Resolution.

- (701) The above in no way invalidates the analysis of the investigating body. The fact that sales of **[CONFIDENTIAL]** products were already concentrated on AMAZON as APPLE's distributor within its online market could be due to multiple factors (more limited access to them by other resellers; that AMAZON had obtained advantageous sourcing in terms of discounts from some of APPLE's wholesalers, etc.) and is irrelevant to the counterfactual analysis of what would have happened in the absence of the agreements.
- (702) What is significant is what happens with respect to those products for which there is a change in the pattern of sales concentration in correlation to the application of the Exclusion Clauses (iPhones, iPads, AirPods). It should be noted, in addition, that, as already discussed above, AMAZON itself internally conducted a forward-looking counterfactual study dated August 2018, comparing the situation prior to the signing of the agreements with the respective variations in sales of APPLE products by third-party resellers and AMAZON itself on its online marketplace (paragraphs (309) to (315)). That study clearly concluded this effect of the concentration of sales at AMAZON as a consequence of the expulsion of the third party resellers affected by the Exclusion Clause, which the data have confirmed and which AMAZON now seeks to deny.
- (703) Furthermore, AMAZON again insists that its core business comes from the revenue it derives from third party resellers and that the Exclusion clauses were not its decision, but an imposition by APPLE.
- (704) In response, regardless of whether or not AMAZON participated in their design, the fact remains that AMAZON accepted the Brand Gating Clauses - despite having significant bargaining power - and was responsible for their application. With regard to the fact that this would be against its interests considering the nature of its business and without prejudice to the fact that anti-competitive intent does not constitute an element of the type of sanction under Articles 1 of the CCA and 101 of the TFEU (paragraph (599)) the facts reflect that AMAZON preferred to act as it did because it was the course of action that was in its best economic interest. It is not logical to think that, if not disallowing third party resellers would have brought it more profit, it would not have done so. In any event, in a scenario without the disputed clauses, AMAZON would have had both revenue streams, those derived from third party sales and its own sales as APPLE's distributor.

d. Internal market partitioning

- (705) The Brand Gating Clauses have also contributed to the partitioning of the internal market, limiting cross-border sales of APPLE products from other Member States, as shown in the following table extracted from information provided by AMAZON itself:

Table 37. Sales on Amazon.es by sellers from other Member States



Source: Appendix 28 of the response to AMAZON IR II⁶⁵² (yellow highlighting added)

- (706) The first group of columns lists the total number of sellers who made sales of APPLE products through AMAZON in Spain (not including sellers from Spain or other non-EU States). The second group of columns includes sellers from EU countries other than Germany, France, Italy, Spain and the United Kingdom⁶⁵³ (countries from which the only APPLE distributors initially included in the [CONFIDENTIAL] of the 2018 ARA and therefore authorised to sell on Amazon.es come from). Finally, the third group of columns includes sellers from Germany, France, Italy, Spain and the United Kingdom included in the Exclusion or Brand Gating Clauses.
- (707) It can be seen how, **since 2019** (with some remaining in some years), **sellers from other EU countries have practically disappeared from the AMAZON website in Spain, whereas, before the agreements, they were strongly present.**
- (708) For example, in the year of signature of the agreements, 2018, total sales of APPLE branded products on AMAZON were made between [CONFIDENTIAL]. In other words, **in addition to showing how most of the sales were made by sellers who ceased to be authorised to sell on the AMAZON website in Spain after the signing of the agreements, it can be seen how, of the €[CONFIDENTIAL] million in total sales of APPLE branded products on the AMAZON Website in Spain in 2018, between [CONFIDENTIAL] million⁶⁵⁴ were made by sellers from EU countries other than Spain.**

⁶⁵² Folio 2562 in its confidential version and 5515 in its non-confidential version.

⁶⁵³ Before the UK's exit from the EU.

⁶⁵⁴ Among [CONFIDENTIAL] million made by the vendors previously identified in the paragraph.

- (709) Moreover, the partitioning of the internal market is also apparent with respect to APPLE's authorised distributors (APRs, AARs and Retailers). This can be seen by comparing the total number of authorised APPLE resellers and the number of authorised APPLE resellers that were authorised to use the AMAZON Websites in different jurisdictions:

Table 38. APPLE Authorised Resellers listed in the [CONFIDENTIAL] of the ARA



- (710) As observed, to look at the category “Rest of EU Member States”, which brings together jurisdictions where AMAZON did not have its own website at the time of the signature of the GTA and 2018 ARA⁶⁵⁵, **APPLE has a total number of between [20-30] APRs, [70-80] AARs, and [40-50+ Retailers, none of which would be authorised to use the AMAZON Websites.**

⁶⁵⁵ That is, all EU countries except France, Germany, Italy, Spain and the United Kingdom, with the addition of the Netherlands and Sweden.

- (711) Although APPLE has argued during the investigation that APRs from the “Rest of EU Member States” would have been authorised to sell on AMAZON had they made a request, the reality is that none of them were authorised to sell on AMAZON at the time the agreements were signed and, moreover, if one takes into account the wording of the GTA and the 2018 ARA, they would not be authorised to use the AMAZON Websites as they are not among the resellers included in the **[CONFIDENTIAL]** of the 2018 ARA.
- (712) In addition, the APRs (which are the largest group) and Retailers from the "Rest of EU Member States", would have been deprived of the possibility to use AMAZON's Websites (as reflected by the example of **[CONFIDENTIAL]**, the Italian operators consulted), which clearly affected their ability to sell in other jurisdictions and thus cross-border trade.
- (713) Thus, in the **absence of the agreements, sellers from other EU countries⁶⁵⁶, which have now disappeared from the AMAZON website in Spain, would not have been driven out of the channel** (i.e., no longer authorised to sell APPLE branded products on AMAZON) and would consequently have continued to exert competitive pressure on the Amazon.es website from other Member States.

- Submissions of the businesses

- (714) In their submissions on the Proposed Resolution, both APPLE⁶⁵⁷ and AMAZON⁶⁵⁸ reject that the Exclusion or Brand Gating Clauses have generated the aforementioned internal market partitioning.
- (715) APPLE argues that the Brand Gating Clauses have limited the number of resellers allowed to sell on AMAZON irrespective of their country of establishment⁶⁵⁹ and that resellers were not restricted in their ability to conduct cross-border sales of their APPLE products through alternative online or offline channels⁶⁶⁰. It concludes from the above that the impact on trade between Member States would be merely associated with a reduction in the number of resellers⁶⁶¹.

⁶⁵⁶ All official APPLE resellers minus the APRs listed in the **[CONFIDENTIAL]** of the 2018 ARA (i.e. APRs from other Member States than those listed in the aforementioned **[CONFIDENTIAL]**; and AARs and Retailers regardless of the EU Member State in which they were established); and since then, only the NARs.

⁶⁵⁷ Paragraphs 151 to 154 of APPLE's submissions on the Proposed Resolution.

⁶⁵⁸ Paragraphs 242 to 250 of AMAZON's submissions on the Proposed Resolution.

⁶⁵⁹ Paragraph 151 of AMAZON's submissions on the Proposed Resolution.

⁶⁶⁰ Paragraph 152 of APPLE's submissions on the Proposed Resolution.

⁶⁶¹ Paragraph 154 of APPLE's submissions on the Proposed Resolution.

- (716) This Division cannot accept APPLE's above-mentioned claims as there is clearly a limitation to the use of AMAZON's online marketplace depending on the resellers' Member State of origin. This is insofar as, **by signing the agreements, only certain distributors from a limited list of Member States (Germany, France, Italy, Spain and the United Kingdom) were authorised to use AMAZON's websites. Those retailers present in the rest of the 22 EU Member States before Brexit, even if they were APRs, could not make use of the AMAZON online marketplace because they were based in one EU country and not in another.**
- (717) Nor can other channels, whether online or offline, be considered as a viable alternative to AMAZON for cross-border sales for the reasons already set out above (see for example paragraphs (96), (122), (148) to (161), (665) to (676) or (680), especially in the case of smaller distributors without physical facilities or representation in Spain. The latter is in fact reflected in the responses of the Italian NARs **[CONFIDENTIAL]** which stopped selling in Spain after the agreements. Moreover, the consequences of this limitation of cross-border sales have a significant impact in Spain since, as seen from table 38 above, most of the sales of APPLE products on the AMAZON Website in Spain came from sellers located in other Member States who ceased to be authorised to use this channel since the agreements.
- (718) APPLE also insists on its argument that the sample of APPLE dealers' opinions on which the CD would have based its conclusions is too small to be representative in an attempt to discredit the responses of the aforementioned Italian NARs **[CONFIDENTIAL]**⁶⁶². We must respond, once again, that the responses of the NARs to the CD's requests have been used only as a supporting element to illustrate conclusions reached on the basis of objective data provided largely by the imputed companies themselves.
- (719) For its part, AMAZON alleges that the CD confused the effect on trade between Member States - the jurisdictional criterion for the application of Article 101 TFEU - with the internal market partitioning as an effect contrary to Article 101 TFEU⁶⁶³. AMAZON also argues that the mere partitioning of trade within the internal market cannot be considered to have a restrictive effect on competition if it is not shown that this has had a concrete impact on a competition parameter such as price, quantity or quality. In particular, according to AMAZON's economic experts, the internal market partitioning as a restrictive effect would imply that *"price differentials between Member States change systematically as a result of behaviour. If there was a given price difference before the restriction was imposed, then we should see that the price difference changes after the restriction is imposed"*. AMAZON has demonstrated, in this respect, that no such effects occurred⁶⁶⁴.

⁶⁶² Paragraph 153 of APPLE's submissions on the Proposed Resolution.

⁶⁶³ Paragraph 242 to 244 of AMAZON's submissions on the Proposed Resolution

⁶⁶⁴ Paragraphs 245 to 250 of AMAZON's submissions on the Proposed Resolution.

- (720) Nor can this Division accept these arguments. Although the actual or potential "effect" on trade between Member States, considered in the abstract, is a requirement for the application of Articles 101 and 102 TFEU - an issue that is analysed separately in this decision (paragraph 5.2.2.2), it is no less true that when that effect takes the form of a restriction on cross-border trade, it is a form of infringement of Article 101 TFEU that goes beyond the mere jurisdictional criterion of its possible application to the case.
- (721) Contrary to what AMAZON claims, the very limitation of cross-border trade must be qualified as a restrictive effect on competition within the meaning of Article 101 TFEU without being required to further demonstrate its concrete consequences on prices or other parameters. The CJEU has clearly stated, in this regard: *"**contracts** whose purpose is to partition markets along national lines or **which make the interpenetration of national markets more difficult may**, having regard both to the objectives which they are intended to achieve and the economic and legal context in which they operate, **be regarded as** agreements which have as their object the restriction of competition within the meaning of Article 101(1) TFEU."*⁶⁶⁵ (our emphasis).
- (722) In the present case it has been found that most of the sales of APPLE products on the AMAZON website in Spain came from sellers located in other Member States which ceased to be authorised to use this channel since the agreements, so that the agreements have necessarily hindered the interpenetration of national markets (paragraphs (283) to (287) and (532) to (545)).
- (723) The defendants' arguments denying that the Brand Gating Clauses have had the restrictive effect of partitioning the internal market must therefore be rejected.

⁶⁶⁵ See paragraph 84 of C-132/19 P - *Groupe Canal + v Commission*, ECLI:EU:C:2020:1007

e. Effects on the RRP's of APPLE products on the AMAZON Website in Spain

- (724) The impact of the Brand Gating Clauses between AMAZON and APPLE on the prices of APPLE-branded products sold on the AMAZON Website in Spain can be approximated by analysing the Relative Price Indicator ("**RPI**") (see **Appendix 3** of the Resolution⁶⁶⁶ for a detailed explanation on its elaboration and use and the response later in this section to the submissions by AMAZON and APPLE to the proposed methodology).
- (725) This indicator is defined as the quotient between: (i) the weighted average price of an APPLE-branded product on the AMAZON website in Spain⁶⁶⁷; and (ii) the weighted average price of the same product in the APPLE online shop; and shows whether the relative price of a given APPLE-branded product or product category has increased or decreased on the AMAZON website.
- (726) Thus, if the RPI of an APPLE branded product is calculated for two different time periods and an increase in value is observed between these time periods, it can be said that the product has become more expensive on the AMAZON Website in relative terms.
- (727) According to the above definition, as demonstrated below, in general, the APPLE branded products marketed on the platform would have become more expensive in relative terms as a result of the Brand Gating Clauses.
- (728) As mentioned above, the analysis carried out consists in the comparison of the level of the RPI before and after 5 January 2019⁶⁶⁸ and has been conducted taking into account three different levels of aggregation of APPLE branded products: (i) general level (i.e., including all APPLE branded products sold on the AMAZON website in Spain before and after the agreement⁶⁶⁹); (ii) product category level (i.e. distinguishing between [**CONFIDENTIAL**] etc.); and (iii) individual product level (e.g. [**CONFIDENTIAL**] etc.).

⁶⁶⁶ Corresponding to Appendix 3 to the Proposed Resolution.

⁶⁶⁷ Specifically, it is an average price weighted by the turnover on the AMAZON website in Spain, i.e., it is an average of the prices applied both directly by AMAZON and by third-party sellers on the AMAZON website in Spain for a given product of the APPLE brand, weighted by the turnover derived from the sales of that product obtained by each of them.

⁶⁶⁸ The date on which the grace period granted by AMAZON to third party resellers no longer authorised to sell on its Website in Spain to release their stock stored by AMAZON since the signing of the GTA and 2018 ARA ends on 31 October 2018.

⁶⁶⁹ Products include: iPhone, iPad, MacBook, Mac, Mac, Apple Watch and AirPods (accessories have therefore been excluded).

- (729) In turn, this analysis has been conducted taking into account four different time windows taking 5 January 2019 as a reference, covering: (i) all available information for the two years before and after that date (i.e., 2017 and 2018 versus 2019 and 2020); (ii) all available information in the year before and after that date (i.e., in 2018 versus 2019); (iii) all available information between the second half of 2018 and the first half of 2019; and (iv) all available information from the last quarter of 2018 and the first quarter of 2019.
- (730) In all the above cases only products available before and after 5 January 2019 have been taken into account. The sample therefore covers a maximum of **[80-90]** APPLE branded products in the case of the widest time window and a minimum of **[70-80]** in the case of the narrowest (for more information on the methodology and data used, see Appendix 3 to this resolution).
- (731) **Apple argues that the CD has failed to properly prove the anti-competitive effects of the Marketplace limitation.** The effects analysis is flawed because it ignores the effects of counterfeiting, does not take into account the relevant markets in which APPLE competes and incorrectly defines the relevant market as it only takes into account online sales when, in its view, no distinction should be made between online and offline channels.
- (732) It considers that the reduction in the number of resellers on the Amazon Marketplace should not lead to anti-competitive effects as volumes of APPLE products increased since 2018, there has been an improvement in quality and safety, and intra- and inter-brand competition have continued to exert a competitive constraint excluding any possible anti-competitive effects stemming from the Marketplace limitation.
- (733) In its view there is no loss of an important sales channel by the NARs, nor a concentration of sales on AMAZON. The CD has attempted to prove the existence of anti-competitive effects on the basis of only 4 of the **[1,150-1,250]** resellers active on AMAZON, i.e., less than **[0-5]**% of the total. It also criticises that the graphs in the Proposed Resolution only refer to one NAR out of a total of more than **[1,150-1,250]**.
- (734) In short, it considers that a single marketplace which is of no interest to the vast majority of resellers cannot qualify as a major sales channel and that there has been an overall increase in volumes sold on Amazon.

- (735) It also considers that there was no impact on intra-Community trade as the limitation imposed on AMAZON's online marketplace is independent of whether the resellers were established in Spain or elsewhere. Furthermore, it criticises that the CD's conclusion is biased because it is only based on responses from two Italian NARs as opposed to the thousands that are active on AMAZON's online marketplace.
- (736) It considers that the CD's report based on the RPI is not apt to demonstrate any anti-competitive effect given that the methodology adopted by the CD is flawed. APPLE criticises the conclusion with regard to the overall price increase, based on the LEAR report which stated that there were differences in samples before and after the marketplace cap and criticised the failure to monitor the presence of counterfeit APPLE products and their reduction after the cap. It also considers that the CD has not adequately monitored the life of the product and has made no attempt to identify the causal effect of the Agreement on the prices of APPLE products.
- (737) Finally, it considers that the CD has not made a proper counterfactual analysis in terms of volume of sales of APPLE products and reduction of counterfeiting problems and poor customer shopping experience. In its view, no account has been taken of the Posner test conducted⁶⁷⁰ which shows that any reduction in competition caused by the marketplace constraint has been outweighed by its pro-competitive effects.
- (738) APPLE considers, contrary to what is stated in the Proposed Resolution, that there is no loss of an important sales channel by the NARs, nor a concentration of sales in AMAZON. However, in paragraph 6.1.3.3.2.3.2.4.2. *Change in the main electronic medium for selling APPLE-branded products* in the Proposed Resolution (pages 216 and 217) show tables in which it can be seen that the main sales channel is the online marketplace until 2018, whereas after the entry into force of the Marketplace limitations, there is a diversion towards the sellers' own website, which also sees how the turnover derived from APPLE products decreases year after year, i.e., they do not recover what they have lost due to their expulsion from the Amazon marketplace by selling APPLE-branded products in other channels. Had the AMAZON marketplace not been a relevant channel, it would have been expected, on the contrary, that the reseller could have successfully directed the sales it made on AMAZON to other channels, such as its own website, without the revenues derived from the sale of these products suffering, but, as explained above, this has not been the case.

⁶⁷⁰ According to which a vertical agreement that increases market output results in an increase in consumer surplus, which would be evidence of pro-competitive effects of the agreement.

- (739) The claims against market definition are not acceptable. The segmentation carried out is justified in paragraph 4 of the Proposed Resolution (pages 22 to 85 of the RP).
- (740) On the other hand, in the case of the Italian NARs which responded to the information request, all of their sales in Spain were made through the AMAZON Website in Spain and, since the entry into force of the Exclusion or Brand Gating Clauses, which led to their expulsion from AMAZON, the turnover of the companies in Spain has been zero. Had the AMAZON website not been a relevant channel, it would have been expected, on the contrary, that these companies could have diverted their sales to other channels and that they could have generated revenue from the sale of APPLE branded products in Spain, but this has not been the case.
- (741) APPLE considers that the sample of NARs is too small and therefore not representative of the **[1,150-1,250]** NARs of APPLE products and therefore allegedly no conclusions could be drawn. This claim was already answered in paragraph 727 of the SO, where it was indicated that, on the one hand, these NARs were precisely the 10 most representative NARs by sales volume (because, according to AMAZON itself, they were the top sellers by sales amount). Moreover, it should be noted that APPLE tries with this allegation to dilute the importance of these resellers by taking into consideration all sales channels of APPLE products, both online and offline, which is not acceptable because the effects of the conduct only affect the online market.
- (742) APPLE also contests the arguments used by the PR to defend AMAZON as an important sales channel for NARs and to demonstrate the existence of anti-competitive effects, since they rely on one NAR only and because AMAZON represents a very small percentage of APPLE's total sales. But this cannot be accepted: the graphs (see paragraph 742 et seq. of the PR) clearly show that the sales behaviour for these products from January 2013 until the date of signature of the Brand Gating Clauses is totally different, as sales of **i[CONFIDENTIAL]** are split between the third party sellers and AMAZON. They only return to focus on AMAZON after the signing of the agreements, as third party sellers are no longer authorised to sell APPLE branded products on the online marketplace. The aforementioned graphs corroborate that after the signing of the agreements, there is a concentration of sales in AMAZON in all product categories, which assumes for itself - both for the products that it was authorised to sell in 2014-2018 (the least sought after, such as **[CONFIDENTIAL]**), and for those that it becomes authorised to sell after 2018 (the most demanded, such as **[CONFIDENTIAL]**), all sales by third party resellers who cease to be authorised to use the AMAZON Website in Spain to sell APPLE branded products.

- (743) The company itself acknowledges - as can be seen in the internal documents analysed in paragraphs 746 to 757 of the Proposed Resolution - the sales concentration effect in AMAZON. In other words, it shows how AMAZON was aware that the sales of third party resellers were going to be drastically reduced (as a consequence of their expulsion) and of its capacity to absorb and service them directly. In fact, AMAZON's own calculations for being **[CONFIDENTIAL]** show how it is counting on taking over the turnover generated by the third parties which were to cease to be authorised to sell APPLE-branded products on their Websites (some €**[0-500]-[500-1000]** million, generated almost entirely by the NARs, which, as has been repeatedly stated, are the most dynamic of all the competition in the channel in Spain and the only ones that, at present, are still not authorised to sell APPLE-branded products on AMAZON).
- (744) On the other hand, APPLE considers that there has been no loss of price competition at intra-brand level, that the methodology used by the CD to demonstrate this is highly flawed and does not allow for a finding that the Marketplace Limitation resulted in higher relative prices of Apple products in the marketplace after the agreement. In doing so, it relies on the LEAR report, which argues that the samples of resellers before and after would be divergent, that the effect of the presence of counterfeit products and the economic life of the product would not have been controlled, and that no attempt would have been made to identify the causal effect of the agreement on the prices of APPLE products in the marketplace, concluding that a simple comparison of the relative prices before and after demonstrates nothing.
- (745) However, the Proposed Resolution devotes its paragraph 6.1.3.3.2.3.2.7. *Effects on the RRP's of APPLE products on the AMAZON Website in Spain* (pages 242 to 253) to justify it as well as an Appendix 3 document⁶⁷¹ with a more detailed explanation on its elaboration and use. As explained in detail in the Proposed Resolution, the analysis has been carried out taking into account three different levels of aggregation, as well as four time windows, and only products available before and after 5 January 2019 have been taken into account⁶⁷². The justification for this analysis appears in paragraph 782 of the Proposed Resolution: *"The approach followed by the CD starts from an indicator that reflects the main competitive dynamics influencing the pricing of APPLE products sold on the AMAZON Website; it restricts the sample of products to those that were available before and after the agreement, thus ensuring that it captures the differential effect of the agreement and avoids possible biases that would be introduced if the set of products sold varied; and compares several points in time to identify price variations"*.

⁶⁷¹ Appendix 3 to the Proposed Resolution, which also corresponds to Appendix 3 to this resolution.

⁶⁷² The date on which the grace period granted by AMAZON to third party resellers no longer authorised to sell on its Website in Spain to release their stock stored by AMAZON since the signing of the GTA and 2018 ARA ends on 31 October 2018.

- (746) APPLE's alternative approach (presented in the economic report) relies on the definition of control groups allegedly unaffected by the conduct to estimate the causal effect of the settlement, but this approach is not valid because in reality all APPLE branded products marketed on the AMAZON website, as well as all sellers of APPLE branded products⁶⁷³, were affected by the conduct.
- (747) Contrary to the claim that the CD analysis does not take into account the effect of the economic life of the product, the Proposed Resolution (para. 788) explains that the particularities introduced by the life cycle in the price evolution of each product precisely motivate the design of the RPI, which incorporates the prices applied by APPLE (and their variations) in each period of time. Even if one were to accept AMAZON's assertion about the need to take into account the different age ("vintage") of APPLE's products in order to approximate the product life cycle, the results obtained by the CD in its analysis remain valid. To demonstrate this point, the definition of age or "vintage" used by AMAZON in its submissions to the SOF (which are in substance what it now repeats before the Proposed Resolution) was incorporated into the RPI analysis and the products were coded, for each time period, into their respective "vintage" following the technical appendix of the report attached by AMAZON on effects⁶⁷⁴. Once this new variable was introduced, the comparison between affected periods was made using the four time windows used in the initial CD analysis. As can be seen in the table on page 248 of the Proposed Resolution, the RPI of iPhone products continues to show increases for almost all antiques ("vintage") and temporary windows.
- (748) The analysis in the Proposed Resolution has also taken into account the possibility that increases in the RPI of the products concerned may have occurred prior to the exclusion of the third party sellers. In particular, for this reason, the additional analysis contained in Table 5 of Appendix 3 (already contained in the SOF) is carried out, comparing the value of the RPI in the fourth quarter of 2018 with its value at different points of the period affected by AMAZON and APPLE's anti-competitive agreement. This exercise differs from the one presented in tables 2, 3, and 4 (as well as table 6 in Appendix 3) because it does not use different time windows to assess the value of the RPI between the different periods, but instead makes direct comparisons of the value of the RPI in different periods. According to this analysis (already contained in the SOF), in the two years following the agreement between AMAZON and APPLE the average RPI of APPLE's products increased by **[0-10]%**.

⁶⁷³ Even sellers who were not excluded from the AMAZON shop felt spill-over effects from the settlement, as they enjoyed less competitive pressure in the marketing of APPLE's electronic products.

⁶⁷⁴ Note that the coding suggested in the effects report attached by AMAZON does not include iPhone SE2 products. In order to avoid introducing differences between the two codifications, these products have been excluded from the sample and thus the analysis. The impact of the exclusion of these products on the RPI of the iPhone category is minimal

(749) In conclusion, it is established on the basis of the analysis of the prices of the APPLE-branded products marketed on the AMAZON SPAIN website and the prices of those products in APPLE's online shop that the Exclusion or Brand Gating Clauses have had the effect of increasing, in general, the relative prices paid by consumers for the purchase of APPLE-branded products on AMAZON's Website in Spain in comparison with the situation that existed prior to them.

(750) APPLE also argues that a proper counterfactual analysis has not been carried out in the light of the Posner test. However, the Proposed Resolution already explains in paragraph 1027 that:

"Firstly, APPLE cites Posner's 1977 article entitled "The Rule of Reason And The Economic Approach: Reflections on the Sylvania Decision". This article refers to a US Supreme Court ruling on the application of the rule of reason to certain vertical restrictions on non-price parameters. It is appropriate to begin by recalling that European competition law is not based on the "rule of reason" and that certain vertical restrictions such as resale price fixing and other restrictions on non-price parameters (restrictions on passive sales etc.) are, unlike in the US, regarded as particularly serious under the vertical rules. In this regard, the doctrine has repeatedly pointed out that there are substantial differences in the application of competition policy in Europe compared to the US. There is also consistent EU case law holding that vertical restrictions may infringe Art. 101 TFEU⁶⁷⁵ and many decisions have considered vertical restrictions as restrictions of competition by object."⁶⁷⁶

(751) It is therefore not applicable to this case; but Posner himself furthermore argues that setting the effects of a reduction in intra-brand competition against the increases in inter-brand competition attributable to the restriction is unmanageable because of its complexity and is generally unnecessary. In fact, what the author proposes is to focus only on whether the purpose of the restrictions is to cartelise distribution, disregarding the remaining vertical restrictions as infringements⁶⁷⁷.

⁶⁷⁵ Judgment of the Court of Justice of 13 July 1966 in Joined Cases 56/64 and 58/64 - Consten and Grundig v Commission of the EEC, ECLI:EU:C:1966:41.

⁶⁷⁶ EC decisions dated 17 December 2018 in case AT.40428 -GUESS, dated 9 July 2019 in case AT.40432 - Character merchandise and dated 25 March 2019 in the AT case. 40436 - ANCILLARY SPORTS MERCHANDISE.

⁶⁷⁷ See pages 17 and 20 of the article cited by the complainant.

- (752) Therefore, as the Proposed Resolution indicates, the aforementioned article neither establishes the test indicated in the report submitted by APPLE nor is it relevant for the purposes of assessing the practices that are the subject of this case under national and European competition law, which are applicable to the present case.
- (753) Furthermore, although APPLE attached an economic report to its submissions, the report does not include any empirical analysis seeking to apply the alleged Posner test to the case at hand.
- (754) **AMAZON again insists that the vertical agreement has given rise to pro-competitive effects.** As already stated in its submissions to the SOF, it considers that the agreement resulted in (i) an improvement in the quality of the services provided by the Amazon Store in Spain, (ii) a reduction in prices and increased choice, (iii) positive effects on the volume of purchases of Apple products, (iv) positive effects for other sellers, which increased their sales of Apple compatible accessories. It criticises that the Proposed Resolution defends that these effects derived from the agreement, but not from the vertical clauses, according to AMAZON ignoring that the agreement would not have taken place in the absence of such clauses.
- (755) These arguments must again be rejected. With regard to the improvement of the quality of the services provided by the Amazon Store, the Proposed Resolution has already argued that, although shorter delivery times and more detailed product information were beneficial to consumers, it cannot be argued that the only way to achieve these improvements is to exclude almost all third party sellers from the Amazon Store. For example, AMAZON could have intensified competition by offering its own logistics service to the other sellers of APPLE products, thereby also achieving an improvement in service without the need to implement anti-competitive clauses.
- (756) With regard to the alleged price reduction, the Proposed Resolution disagreed with AMAZON's proposed price analysis⁶⁷⁸. The CD explained that the "discount" indicator used by AMAZON - defined as the quotient of (i) the difference between the launch price of a product on APPLE's website and its price on AMAZON's website in each period and (ii) the launch price of the product on APPLE's website - has a number of shortcomings which render it invalid for AMAZON's analysis. First, the evolution of this indicator is inherently biased by the price dynamics specific to the electronic products in which the launch of new products reduces the prices of previous models. Secondly, AMAZON includes in its analysis items additional to the price of APPLE products such as shipping costs or possible applicable discounts, which are not necessarily related to the seller's pricing policy. Finally, the affected period defined by AMAZON overstates the estimated positive impact associated with the agreement.

⁶⁷⁸ Paragraphs 791 to 802 of the PR.

- (757) As to the positive effects on the volume of purchases of APPLE products, the CD already stated in the Proposed Resolution that it did not dispute that after the arrangements the volume of retail sales of APPLE products on Amazon.es would increase. However, this does not justify entering into anti-competitive agreements whose purpose and effect is to suppress competition in the marketing of APPLE's branded products by excluding third party sellers from its marketplace. The fact that an agreement results in an increase in sales volume does not necessarily make it pro-competitive. The analysis of the relative price of APPLE's products on AMAZON carried out by the CD in this case leads to the conclusion that consumers purchase APPLE's products at a comparatively higher relative price than before the implementation of the agreement. Therefore, even if the increase in production volume would have contributed to an increase in the volume of APPLE's products sold on AMAZON, the increase in relative prices would have had an adverse effect on consumer welfare.
- (758) In any event, even if this Division were to accept that the increase in sales volume is pro-competitive in itself (*quod non*), it must be stressed that there were alternative ways of increasing sales of APPLE products on AMAZON which did not involve entering into agreements with anti-competitive clauses by their very object. AMAZON is one of the leading providers of intermediary services to sellers, so its activity consists largely of promoting the use of its platform among sellers. In this way, while facilitating transactions between third party sellers and consumers AMAZON generates revenue through commissions. However, in this case, the incentive to become the main seller of APPLE products on its own website with the resulting revenue incentivised AMAZON to ignore one of its core business activities - the operation of an online marketplace - by excluding virtually all third party sellers of APPLE products on AMAZON from the market.
- (759) Finally, as regards the increase in sales of accessories compatible with APPLE products by third party sellers, it should again be stressed that, while this may be a positive effect, it cannot be argued that the exclusion of all other sellers was a necessary condition to achieve such an effect. In addition, the increase in the sale of accessories compatible with APPLE products would also have occurred in the face of the increase in sales of APPLE products irrespective of who the seller of these products was. In no case does the fact that AMAZON is practically the only seller generate more positive effects.

- (760) AMAZON argues that the position of the Proposed Resolution rejecting all arguments raised on the price analysis does not hold, since AMAZON submitted strong economic evidence showing that there was an increase in the average discount, such that consumers would enjoy lower prices after the settlement. Brattle's Supplementary Report asserts that the DC takes a defensive position in the Proposed Resolution to defend its RPI analysis without presenting any additional analysis that challenges the pricing analysis provided by AMAZON.
- (761) Under this premise, AMAZON again claims that **[CONFIDENTIAL]**. However, according to AMAZON, the majority of sales made during the period of the vertical agreement were of models that were **[CONFIDENTIAL]**, the prices of which dropped after the vertical agreement. In short, AMAZON considers that the Proposed Resolution has ignored what it calls "the vintage effect", referring to the effect of the age of the models on their prices, by not taking into account that APPLE's discounting policy leads to systematic patterns of relative prices over time that should not be interpreted as effects of the agreement on prices.
- (762) The allegations submitted by AMAZON with respect to the pricing analysis conducted by the CD were already raised as allegations to the SOF and answered in detail by the CD in the PR⁶⁷⁹.
- (763) The DC assessed AMAZON's claims and repeated its analysis based on the RPI taking into account the age of APPLE's products (their "vintage"), following the definition used by the Brattle Report on Effects. However, the results of this analysis did not change the conclusions of the CD's RPI analysis⁶⁸⁰. The results showed that the RPI of iPhone products continued to show increases for almost all of the vintages and time windows analysed⁶⁸¹.
- (764) Therefore, the allegation that the Proposed Resolution has ignored AMAZON's previous submissions cannot be accepted.
- (765) **In conclusion**, the arguments put forward by AMAZON and APPLE do not invalidate the methodology followed by the CD to assess the effects that the third-party seller exclusion agreement had on the prices paid by customers for APPLE branded products on the AMAZON Website in Spain.

⁶⁷⁹ Paragraphs 791 to 808 of the PR.

⁶⁸⁰ Paragraph 788 of the PR.

⁶⁸¹ See table included in paragraph 788 of the PR.

- **Results of the economic analysis**
 - **All APPLE branded products in general**

(766) The results of this analysis for the highest level of aggregation (i.e., the general level, which includes all APPLE branded products sold on the AMAZON Website in Spain) and the different time windows mentioned are presented in the following table:

Table. Impact of AMAZON and APPLE behaviours on RPI for different time windows.

Time window	Before	After	Variation	Result
Two years before and after ⁶⁸²	[80-85]%	[85-90]%	[0-5]%	Increase
Year before and after	[80-85]%	[85-90]%	[0-5]%	Increase
Half-year before and after	[85-90]%	[85-90]%	[0-5]%	Increase
Quarter before and after	[85-90]%	[85-90]%	[-5-0]%	Decrease

Source: Compilation based on information contained in AMAZON's and APPLE's responses to the request for information of 23 February and 18 May 2022. Folios 5960 (AMAZON's confidential version), 6179 (corresponding non-confidential version of the previous file), 5317 (APPLE's confidential version) and 5588 (corresponding non-confidential version of the previous file).

- (767) As can be observed, if all data pertaining to the two years before and after 5 January 2019 are taken into account, after the signature of the agreements in question, the average RPI of APPLE branded products sold on the AMAZON website rose from **[80-85]** to **[85-90]**. The above, in percentage terms, is equivalent to saying that the relative price of all APPLE branded products sold on the AMAZON Website in Spain increased, in general terms, by **[0-6]%** in the 2019-2020 period compared to the period prior to the signing of the aforementioned agreements (i.e., 2017 and 2018).
- (768) This result holds for all but the shortest time windows, covering only the quarter before and after 5 January 2019, where a reduction in the RPI is observed. However, in this case, the reduction in absolute terms is smaller than the increases in absolute terms that occur in analyses with longer time windows.
- (769) Therefore, the arrangements under scrutiny have generally had the effect of increasing the relative prices of APPLE branded products sold on the AMAZON Website (in the three time windows analysed, with the sole exception of using a quarterly time window, which is the smallest).

⁶⁸² From 5 January 2019, which, as explained above, is taken as the cut-off point for the analysis.

- APPLE brand product categories

(770) The results of the analysis for the next level of disaggregation, i.e., taking into account the different product categories of the APPLE brand, are presented in the table below:

Table 39. Impact of AMAZON and APPLE behaviours on RPI for different time windows, by product category.

Period	Category	RPI before	RPI after	Variation (%)	Effect on the RPI
Two years before and after ⁶⁸³	AirPods	[90-95]	[90-95]	[0-5]%	Increase
	Apple TV	[95-100]	[95-100]	[0-5]%	Increase
	Apple Watch	[85-95]	[90-95]	[0-5]%	Increase
	Beats	[75-80]	[80-85]	[5-10]%	Increase
	iPad	[90-95]	[90-95]	[-5-0]%	Decrease
	iPhone	[80-85]	[85-90]	[5-10]%	Increase
Year before and after	AirPods	[85-90]	[90-95]	[0-5]%	Increase
	Apple TV	[95-100]	[95-100]	[0-5]%	Increase
	Apple Watch	[95-100]	[90-95]	[-5-0]%	Decrease
	Beats	[75-80]	[85-90]	[10-15]%	Increase
	iPad	[90-95]	[90-95]	[-5-0]%	Decrease
	iPhone	[80-85]	[85-90]	[5-10]%	Increase
Half-year before and after	AirPods	[85-90]	[90-95]	[0-5]%	Increase
	Apple TV	[95-100]	[95-100]	[-5-0]%	Decrease
	Apple Watch	[95-100]	[95-100]	[-5-0]%	Decrease
	Beats	[75-80]	[80-85]	[5-10]%	Increase
	iPad	[90-95]	[90-95]	[-5-0]%	Decrease
	iPhone	[80-85]	[85-90]	[0-5]%	Increase
Quarter before and after	AirPods	[90-95]	[90-95]	[0-5]%	Increase
	Apple TV	[95-100]	[90-95]	[-5-0]%	Decrease
	Apple Watch	[95-100]	[95-100]	[-5-0]%	Decrease
	Beats	[70-75]	[80-85]	[5-10]%	Increase
	iPad	[90-95]	[90-95]	[0-5]%	Increase

⁶⁸³ From 5 January 2019, which, as explained above, is taken as the cut-off point for the analysis.

Period	Category	RPI before	RPI after	Variation (%)	Effect on the RPI
	iPhone	[85-90]	[85-90]	[-5-0]%	Decrease

Source: Compilation based on information contained in AMAZON's and APPLE's responses to the request for information of 23 February and 18 May 2022. Folios 5960 (AMAZON's confidential version), 6179 (corresponding non-confidential version of the previous file), 5317 (APPLE's confidential version) and 5588 (corresponding non-confidential version of the previous file).

- (771) As can be observed, if all data for the two years before and after 5 January 2019 are taken into account, after the signature of the agreements in question, the average RPI of APPLE branded products sold on the AMAZON Website rose in 5 of the 6 product categories in question. The above, in percentage terms, is equivalent to saying that the relative prices of 5 of the 6 categories of APPLE branded products sold on the AMAZON Website in Spain increased in the 2019-2020 period compared to the period prior to the signing of the aforementioned agreements (i.e., 2017 and 2018). In particular, the largest increase was in the Beats product category (where relative prices as measured by the RPI increased on average by [5-10]%), followed by the iPhone product category (by [5-10]%), Apple Watch (by [0-5]%), Apple TV (by [0-5]%) and AirPods (by [0-5]%). The category whose RPI decreased was iPad products (whose relative prices decreased on average by [0-5]%).
- (772) As the time window narrows, the number of APPLE branded product categories suffering RPI increases reduces. Thus, the results for the year before and after show that prices increased overall in 4 out of 6 product categories, while for the six months before and after and for the quarter before and after 5 January 2019 relative prices increased in 3 out of 6 categories. Again, it is worth noting that the absolute value of the changes in the categories whose RPI decreased is lower than that of most of the calculated increases.
- (773) Therefore, even when considering categories of APPLE-branded products and not all APPLE-branded products in general, it can be seen how the agreements under scrutiny have had the effect of increasing the relative price of APPLE-branded products sold on AMAZON's Website, irrespective of the time window considered, in at least 3 out of 6 product categories, rising to 5 out of 6 categories when comparing the data for the two years before and after 5 January 2019.

- **APPLE branded products on an individual level**

(774) The results of the analysis at individual product level are summarised in the following table⁶⁸⁴, showing for each Apple brand product category the number of individual products analysed that saw their RPIs increase or decrease:

Table 40. Summary of the results of the RPI analysis for different time windows and for each APPLE product.

	Categories	Increase	Decrease
Two years before and after ⁶⁸⁵	Airpods	[0-5]	[0-5]
	Apple TV	[0-5]	[0-5]
	Apple Watch	[0-5]	[5-10]
	Beats	[5-10]	[0-5]
	iPad	[5-10]	[20-25]
	iPhone	[10-15]	[15-20]
	Total	[35-40]	[50-55]
Year before and after	Airpods	[0-5]	[0-5]
	Apple TV	[0-5]	[0-5]
	Apple Watch	[0-5]	[5-10]
	Beats	[5-10]	[0-5]
	iPad	[5-10]	[20-25]
	iPhone	[10-15]	[15-20]
	Total	[35-40]	[45-50]
Half-year before and after	Airpods	[0-5]	[0-5]
	Apple TV	[0-5]	[0-5]
	Apple Watch	[0-5]	[5-10]
	Beats	[5-10]	[0-5]
	iPad	[10-15]	[15-20]
	iPhone	[10-15]	[10-15]
	Total	[35-40]	[45-50]
Quarter before and after	Airpods	[0-5]	[0-5]
	Apple TV	[0-5]	[0-5]
	Apple Watch	[0-5]	[5-10]
	Beats	[5-10]	[0-5]
	iPad	[10-15]	[10-15]
	iPhone	[5-10]	[15-20]
	Total	[30-35]	[40-45]

⁶⁸⁴ For a more detailed analysis, see Appendix 3 of the SOF and its appendices.

⁶⁸⁵ From 5 January 2019, which, as explained above, is taken as the cut-off point for the analysis.

Source: Compilation based on information contained in AMAZON's and APPLE's responses to the request for information of 23 February and 18 May 2022. Folios 5960 (AMAZON's confidential version), 6179 (corresponding non-confidential version of the previous file), 5317 (APPLE's confidential version) and 5588 (corresponding non-confidential version of the previous file).

- (775) In the case of the wider time window, which includes the analysis of **[85-90]** individual products, for **[35-40]** APPLE-branded products the RPI increased, i.e., those products became more expensive on the AMAZON Website in Spain compared to the same products in APPLE's online store after 5 January 2019 (i.e., after the exclusion of third party sellers).
- (776) By contrast, for **[50-55]** products the RPI would have been reduced (and thus become cheaper compared to APPLE's online shop). As the length of the time window decreases, fewer products with decreasing RPI are observed, while the number of products with increasing RPI remains relatively constant between **[30-35]** and **[35-40]**⁶⁸⁶.
- (777) Focusing the analysis on the wider time window (i.e., the two years before and after 5 January 2019), the number of products with decreasing RPI is higher than the number of products with increasing RPI. This result could be in contrast to the above figure from the aggregate analysis according to which, if all APPLE branded products available before and after 5 January 2019 are taken into account, the RPI of APPLE branded products increased overall by **[5-10]%** in the 2019-2020 period compared to the period before the signing of the above agreements (i.e., 2017 and 2018) on the AMAZON website.
- (778) However, it should be noted that the direct comparison of the number of individual products with or without increases disregards two circumstances relevant for the calculation and interpretation of the RPI: (i) firstly, it ignores the fact that not all individual products receive the same weighting in its calculation, since turnover varies significantly between the different products sold under the APPLE brand; and (ii) secondly, it also ignores the size of the variations in the RPI, which are also heterogeneous between products. In this sense, it is observed in the results of the detailed analysis included in **Appendix 3** of this resolution⁶⁸⁷ and its appendices, that the products whose RPI increases present variations of the RPI with greater absolute value and, in general terms, have a greater weighting.

⁶⁸⁶ The number of total products analysed in each time window (e.g. the **[85-90]** products analysed in the entire 2017-2020 period) is different because the number of APPLE branded products that exist in each time window varies.

⁶⁸⁷ It also corresponds to Appendix 3 of the SOF and of the Proposed Resolution

- **Conclusions on price effects**

(779) In conclusion, it is established on the basis of the analysis of the prices of the APPLE-branded products marketed on the AMAZON SPAIN website and the prices of those products in APPLE's online shop that the Exclusion or Brand Gating Clauses have had the effect of increasing, in general, the relative prices paid by consumers for the purchase of APPLE-branded products on AMAZON's Website in Spain in comparison with the situation that existed prior to them.

• **APPLE's allegations regarding its rights of defence on access to the "data room"**

(780) APPLE claims a violation of its rights of defence for not having been able to effectively access the confidential AMAZON data used by the investigating authority in its price analysis⁶⁸⁸.

(781) It should be recalled in this respect that, as set out in the factual background (paragraphs (8) to (13)), on 8 August 2022 APPLE submitted a request for access to a data room⁶⁸⁹ containing all the confidential information used by the CD to conclude the existence of anti-competitive effects (in particular those contained in Appendix 3).

(782) The investigating authority initially refused access to the data room⁶⁹⁰ (on 12 August), stating that APPLE had not provided a reasoned and detailed justification as to why it needed access to this information and that the range data provided to it was not sufficient.

(783) APPLE lodged an appeal against the data room refusal agreement⁶⁹¹. In the context of that appeal, this Division forwarded to the CD⁶⁹² AMAZON's submission in which AMAZON stated that it *"does not object to access by Apple's External Counsel to Amazon's Confidential Information through the Data Room provided that (i) the Data Room is located within the CNMC's premises with all the necessary safeguards in accordance with the European Commission's Best Practices on the disclosure of information in data rooms in proceedings under Articles 101 and 102 TFEU and under the EU Merger Regulation; and (ii) Amazon's Confidential Information continues to be treated as confidential in file S/0013/21"*.

⁶⁸⁸ Paragraphs 407 to 410 of APPLE's submissions on the Proposed Resolution

⁶⁸⁹ Folios 7287-7294

⁶⁹⁰ Folios 7319-7322

⁶⁹¹ Folios 7358-7366

⁶⁹² Folios 8833-8836

- (784) In view of the above, the CD informed the Secretariat of the Council⁶⁹³ that there could be circumstances in which, on an exceptional basis, the request for the creation of a data room for APPLE's external advisors to access the information requested from the AMAZON group could be granted.
- (785) In the light of these considerations, this Division decided to annul the decision of the CD of 12 August 2022 and to order the investigating authority to grant APPLE a single period of ten days to access the data room, in the manner and under the conditions determined by the CD.
- (786) As a consequence of the above, on 30 November the CD agreed to grant APPLE access to the data room (**Access Agreement**)⁶⁹⁴. Thus, the external consultants appointed by APPLE had access, for 10 days, to a data room set up for this purpose by the CD containing the confidential data used by the CD to prepare its price analysis, which the external consultants used for only three days (13, 14 and 15 December 2022)⁶⁹⁵.
- (787) Subsequently, on 22 December 2022, APPLE brought an appeal under Article 47 of the LDC against the CD's Access Agreement of 30 November before this Division on the grounds that the rules for the use of the data room were excessively restrictive and thus in violation of its fundamental right to present evidence on its behalf. That appeal was dismissed by this Court, by decision of 21 February 2023⁶⁹⁶, on the grounds that there had been no defencelessness or irreparable harm to APPLE's legitimate rights or interests.
- (788) In reaching this conclusion, the Division took into account, inter alia, the following circumstances: that, contrary to APPLE's contention, the introduction of material in electronic form into a data room is not a right of the parties; that despite the submissions that the time allowed for access to the data room was insufficient; that APPLE did not make use of more than a limited portion of it (two and a half days out of ten); or that at no time were more than three external advisers of APPLE present at the same time so that it could not be criticised that only one computer had been made available for five external advisers.

⁶⁹³ Folios 8840 to 8842.

⁶⁹⁴ Folios 8859 to 8865.

⁶⁹⁵ See access documents (folios 8930 to 8935).

⁶⁹⁶ Resolution of the Council of the CNMC of 21 February 2023 in Case R/AJ/146/22 APPLE DISTRIBUTION INTERNATIONAL LTD

- (789) In its submissions on the Proposed Resolution, APPLE insists on invoking such arguments to argue that the CD violated its rights of defence by not granting it effective access to AMAZON's confidential data used in its price analysis, in view of the conditions of access to the data room. It claims in particular, in that regard, that access to the data room with additional information on any medium other than paper was not allowed, that access time was limited and that the number of computers made available to it was insufficient.

Since no new arguments are put forward in relation to those already raised by APPLE in its appeal of 22 December, these arguments must be rejected. For this purpose, we refer to the Council Resolution of 21 February 2023 rejecting the above-mentioned appeal.

- **Supplementary allegations and economic report submitted by APPLE after access to the data room**

- (790) Despite the fact that APPLE does not provide additional arguments on this point, this Division considers that, given the particular relevance of the issues that were raised during the preliminary investigation, in relation to the effects analysis, it is appropriate to recall the CD's position with regard to APPLE's main arguments.
- (791) According to APPLE⁶⁹⁷, the main conclusions of Lear's Supplementary Report are as follows: (i) the presence of outliers in the analysis carried out by the CNMC, in many cases with discounts on the sales price of more than **[80-90]%**; (ii) it cannot be excluded that these outliers represent counterfeit products and, in any event, should have been excluded from the database; (iii) the observed increase in the RPI took place before the agreement and, after its entry into force, there has been no increase in the RPI but it has remained stable; and (iv) the CD has not identified the causal effect between the agreement and the increase in the RPI and, in fact, the increase in the RPI is caused by a reduction in APPLE's prices, not by an increase in prices on the AMAZON website.
- (792) Firstly, with regard to the claim concerning the presence of outliers, the CD has already shown that their removal has no significant impact on the results obtained. The results of the CD analysis without these outliers were presented in Appendix 4 of the PR (which is included as **Appendix 4** to this resolution), where it can be seen how the exclusion of the outliers alters the value of the calculated RPIs, but the differences are minimal and do not alter the conclusions reached.

⁶⁹⁷ See APPLE's supplementary submissions after the data room (folios 9026-9030).

- (793) Secondly, APPLE claimed that the outliers may be due to the fact that they are counterfeit products, although it acknowledged that it could be due to other reasons: (i) an error in recording the selling price; (ii) an error in recording the item sold (e.g., the product registered as an iPhone 7 may have actually been a protective case for the device); and/or (iii) that these products were refurbished or used⁶⁹⁸. In any case, the CD has already pointed out that its removal does not alter the conclusions of the analysis.
- (794) In relation to the claim that the RPI increases before the agreements, but then remains stable⁶⁹⁹, this possibility was already taken into account in the CD analysis and for this reason the analysis of the RPI over four different time windows was carried out, as well as the analysis of the cumulative percentage change in RPI between the end of 2018 and different periods after the exclusion of third-party sellers from AMAZON's marketplace, which showed that the average RPI increased after the implementation of the agreement.
- (795) With regard to APPLE's argument that the entire increase in the RPI would have occurred prior to the exclusion of the third party sellers, the CD has already shown that prior to the exclusion of the third party sellers, RPI values were mostly in the 80s and 90s. The CD analysis shows that during this period, the evolution of the time series was characterised by an almost cyclical behaviour: coinciding with the launch of new products, September saw the RPI increase compared to the previous month's value followed by successive decreases until the next September. In addition, it is noted that the level of the average RPI observed in September is comparable in 2017 and 2018.
- (796) After the conclusion of the settlement and the exclusion of the third party sellers, the evolution of the RPI of APPLE's products underwent two major changes: firstly, the average value of the RPI of APPLE's products started to show higher values than previously observed; secondly, the cyclical movements disappeared and, consequently, the RPI no longer experienced the above-mentioned decreases and remained around these higher values.
- (797) Thus, the observed development of the RPI of APPLE's products disproves APPLE's assertion that the increase in RPI occurred prior to the exclusion of the third party sellers.

Image 27. Evolution of RPI of products traded before and after the implementation of the limitation to third-party sellers in the AMAZON shop (2017-2020)

⁶⁹⁸ Lear Supplementary Report, page 9 (folios 9046-9060).

⁶⁹⁹ Lear Supplementary Report, pages 10 to 12 (folios 9046-9060).



Note: The graph shows the RPI of the more than [70-80] thousand observations that make up the database after excluding products marketed only before or after the exclusion of third party sellers and removing statistical anomalies in accordance with APPLE's approach. The red line marks the exclusion of third-party sellers; the blue lines mark the month of September in each period. The circles represent the weighted averages of the RPI (based on sales) in each month. It should be noted that this representation (i) includes products from all assessed categories and (ii) excludes the remaining outliers to facilitate the visualisation of the graph.

- (798) Finally, in relation to the claim that the increase of the RPI is due to a further reduction of the prices set by APPLE as compared to those set in the AMAZON store⁷⁰⁰, the CD already stated that in any event what APPLE described is a relative increase in the price of APPLE's products sold in the AMAZON store. This relative mark-up implies that the price reductions applied by APPLE to its products in its own web shop were not being passed on to AMAZON's consumer users, which would have allowed AMAZON not only to maintain its margin, but to increase it. This is consistent with the reduction of intra-brand competition that would have occurred on the AMAZON store after disallowing certain third party sellers to sell APPLE branded products on the AMAZON Website since, if such competition had existed, it would be expected for the AMAZON Website to have passed on all or part of this alleged price reduction to the consumer.

⁷⁰⁰ Lear Supplementary Report, pages 12 to 14 (folios 9046-9060).

- (799) This Division agrees with the CD that, in any event, analyses of the impact of the agreement between AMAZON and APPLE that are based on nominal price developments, as suggested by APPLE in its report, should be treated with caution. Nominal price variations may be due to changes in inter-brand or intra-brand competitive conditions or simply to the particular dynamics that characterise electronic products. The impossibility of distinguishing between these causes prevents the identification of the effect of the agreement - or the lack thereof - on the basis of nominal price data.

5.4.1.2.2.3. On the CD relying on an erroneous counterfactual scenario in which AMAZON had no alternative but to accept the disputed clauses

- (800) As one of the pillars of its arguments to the Proposed Resolution, AMAZON argues that the CD began from an error of approach in considering that the GTA and the 2018 ARA could have been signed in the absence of the disputed clauses⁷⁰¹.
- (801) As repeated throughout its submissions, the acceptance of these clauses was a condition *sine qua non* imposed by APPLE on AMAZON in order to grant it the full and direct supply of its products as an authorised APPLE distributor from which the pro-competitive effects arising after the signature of the GTA and the 2018 ARA essentially derive.
- (802) It would therefore not be possible, according to AMAZON, to assess the effects of the clauses under investigation in a counterfactual scenario in which, in the absence of such clauses, the positive effects resulting from the GTA and the 2018 ARA would occur.
- (803) In response to the above, it should be noted, firstly, that AMAZON's arguments regarding the asymmetry with APPLE, which placed it in a position of negotiating inferiority from which it could only bow to its counterpart's demands, are not convincing.
- (804) As discussed in more detail in the section on the defendants' individual culpability and liability (section 5.4.4) and without denying APPLE's pre-eminent position as a manufacturer and supplier of electronic products attained prior to the agreements, AMAZON does not negotiate the terms of supply with APPLE as just another distributor, but from its position as the operator of the main online market in Europe and in Spain where it leads the market in both web traffic and sales, with figures double those of its main direct competitor AliExpress (paragraphs (248) to (264)).

⁷⁰¹ Paragraphs 35-36 and 81-93 of AMAZON's submissions on the Proposed Resolution, page 4 of the Compass Report on Brand Gating and page 6 of the Compass Report on Amazon's interest in the Vertical Agreement

- (805) It is also not contested that **[CONFIDENTIAL]** is trying, for instance, to limit the number of resellers excluded under the Brand Gating Clauses. What is certain, however, is that AMAZON ended up accepting such conditions because it was the option that best suited it from an economic rationality point of view, even though it now argues that **[CONFIDENTIAL]**⁷⁰². Otherwise it would not have taken such a decision. It should also be noted that, as has been established on the basis of AMAZON's own internal documents, AMAZON had calculated the revenue which it would obtain by taking over the sales of the resellers who had been expelled in application of the Brand Gating Clauses, with a view, moreover, to being able thereby to further improve its supply conditions by attaining the status of **[CONFIDENTIAL]** APPLE distributor (paragraphs (314), (611) and (693)).
- (806) AMAZON cannot therefore rely on its allegedly inferior negotiating position and alleged lack of interest in signing the clauses to argue that it was forced to accept them.
- (807) In any event, regardless of the likelihood that AMAZON would have succeeded in rejecting the inclusion of the disputed clauses in the framework of the negotiations with APPLE, it is perfectly appropriate to carry out a counterfactual analysis in a scenario in which the GTA and the 2018 ARA would have been signed in the absence of those clauses. This is because these clauses are severable from the rest of the agreements and the positive externalities arising from the GTA and the 2018 ARA derive primarily from the direct and complete supply of APPLE products to AMAZON and not from the Exclusion, Advertising or Marketing Limitation Clauses. Evidence of the collateral nature of these clauses with respect to the rest of the contractual relationship in which they are inserted is that the GTA and the 2018 ARA regulate the relationship between AMAZON and APPLE and in particular the conditions of supply of APPLE to AMAZON as a reseller of APPLE (relationship between APPLE and AMAZON) while the Exclusion Clauses concern the possibility for third party resellers of APPLE products to make use of AMAZON's online marketplace (relationship between AMAZON and third party resellers).

5.4.1.2.2.2.4. Conclusion on effects

- (808) Overall, given the provisions of the Exclusion or Brand Gating Clauses, the context and their implementation, it is concluded that they have had the following foreseeable and appreciable effects and that they are restrictive of competition:

⁷⁰² Thesis upheld in the Compass Report on Amazon's interest in the Vertical Agreement

- **Reduction of more than [90-100]% of the number of sellers** that were authorised to sell APPLE-branded products on the AMAZON Website in Spain (or, after November 2021, 63% as explained in paragraph (641)).
- Sellers who cease to be authorised to sell APPLE-branded products on the AMAZON Website in Spain **lose a sales channel that could not be effectively replaced** by other comparable traffic sources for selling APPLE-branded products online.
- **Concentration of the sale of APPLE-branded products through the AMAZON Website in Spain on AMAZON itself** in its role of reseller.
- Significant **reduction in the number of resellers from other EU countries** on the AMAZON Website in Spain⁷⁰³.
- **Increase, in general, in the relative prices** paid by consumers for the purchase of APPLE branded products on the AMAZON Website in Spain.

(809) The foregoing shows how **the Exclusion or Brand Gating Clauses, in addition to having an anti-competitive object, have had the effect of reducing intra-brand competition between resellers of APPLE-branded products on the AMAZON Website in Spain**, which is the online sales channel that carries most of the e-commerce web traffic in Spain and net sales of electronic products online in Spain.

5.4.1.2.3. The Advertising Clauses

5.4.1.2.3.1. Restriction by object

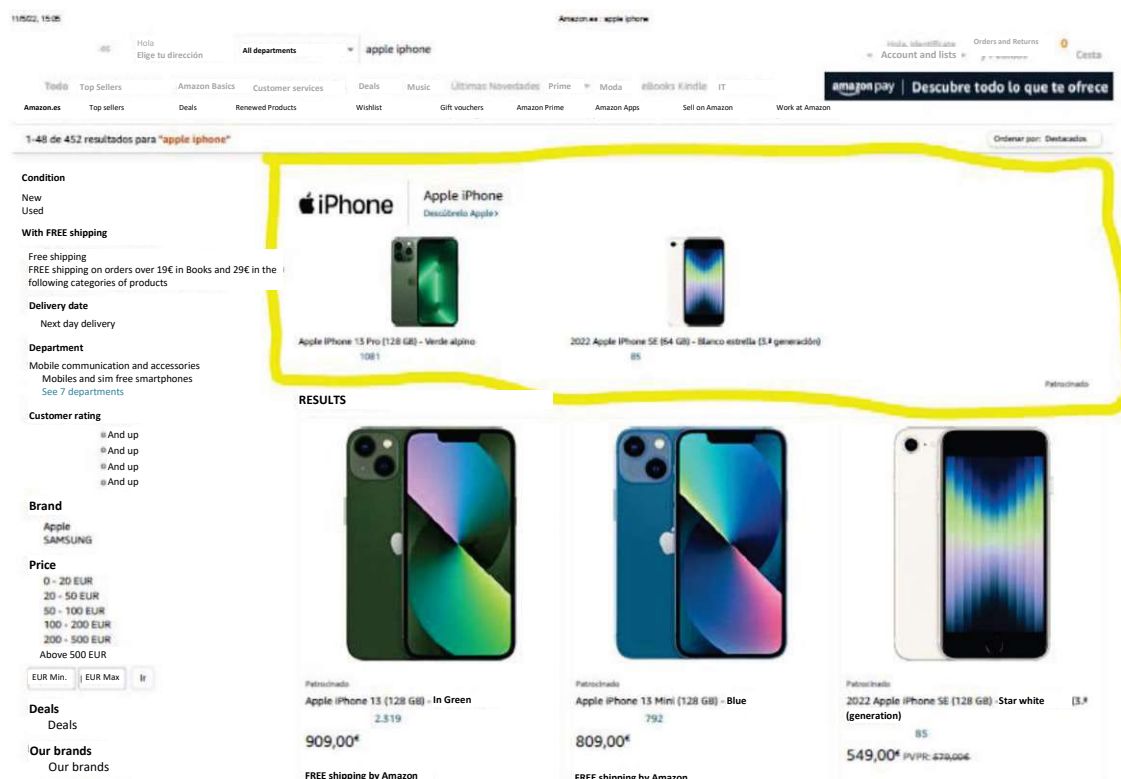
a. Content

(810) With regard to the content of the agreement, as described in detail in the section on proven facts (see paragraphs (289) to (296)), the Advertising Clauses are agreements between AMAZON and APPLE by which both companies agree:

⁷⁰³ All official APPLE resellers minus the APRs listed in the **[CONFIDENTIAL]** of the 2018 ARA (i.e. APRs from other Member States than those listed in the aforementioned **[CONFIDENTIAL]**; and AARs and Retailers regardless of the EU Member State in which they were established); and since then, only the NARs.

- That when a search is performed on AMAZON for an APPLE product, AMAZON will only display ads for APPLE products in the top ad space and in the first two sponsored product spaces on the results page (or any other ad space that appears or is created in the first ten search results), as shown in the following example⁷⁰⁴:
 - Upon searching for "apple iphone", the results on the results page are as follows (our emphasis)⁷⁰⁵:

Image 28. Example of application of the Advertising Clauses searching for the term: "apple iphone"

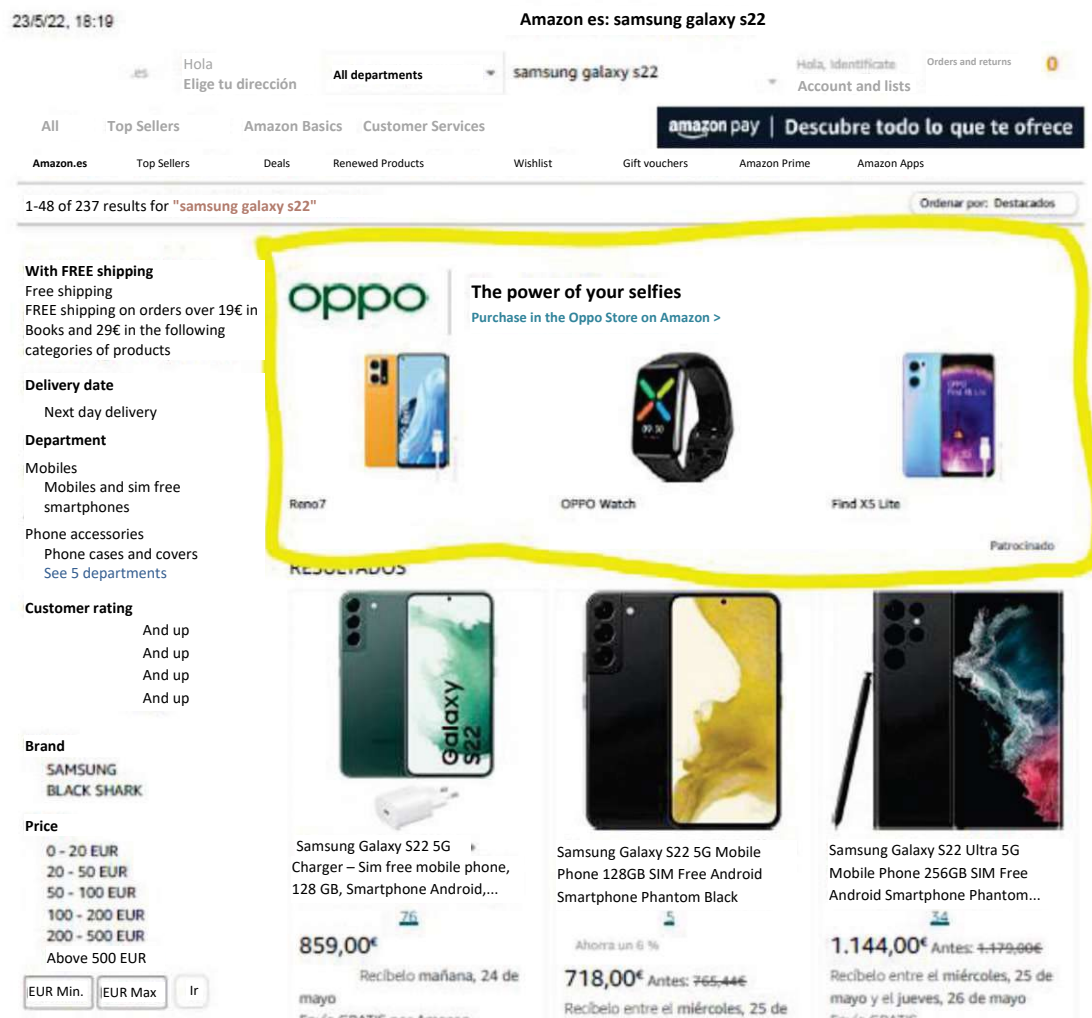


- On the other hand, upon searching for "Samsung Galaxy s22", the results on the results page are as follows (our emphasis)⁷⁰⁶:

⁷⁰⁴ For a full list of examples, see Appendix 1.

⁷⁰⁵ See folios 5611 -5623 and Appendix 1.

⁷⁰⁶ See folios 5684-5692 and Appendix 1

Image 29. Search result for the term "Samsung Galaxy s22".

- It is therefore clear that this agreement has been put into practice since, in the case of a search for a product of the APPLE brand, such as "iphone"⁷⁰⁷, the top advertising space is reserved for that brand, whereas, in the case of searches for other competing products, such as the "Samsung Galaxy s22"⁷⁰⁸, that brand does have to withstand competition from other products in the top space (in the screenshot used as an example, from the "OPPO" brand).

⁷⁰⁷ Other searches were also carried out for the following terms, which produced identical results: "Apple imac"; "Apple ipad"; "Apple iphone 12 pro max"; and "ipad air" (see Appendix 1).

⁷⁰⁸ Other searches were also carried out for the following terms, which produced identical results: "Sony Xperia 1"; "Huawei P50"; "Lenovo mobiles"; "lenovo tap p 11"; "Xiaomi 11t" and "Xiaomi pad 5" (see Appendix 1).

- That **when searching on AMAZON for a list of keywords supplied by APPLE** (related to APPLE products), **AMAZON will not display ads on the first page of results or on AMAZON's detail pages for products from a number of competing brands identified by APPLE**, as can be seen in the following example:
 - Upon searching for the term “apple iphone”, the results on the results page⁷⁰⁹ do not offer any competing brands (in general, and thus also not from the list of competing brands chosen by APPLE - see paragraph (293)); and upon selecting from the results, for example, the “Apple iPhone 12 (128 GB) - Mauve” is selected from the results, the product detail page⁷¹⁰ does not offer any advertising for other brands either; all spaces are reserved for Apple.
 - On the other hand, upon searching for “Samsung Galaxy s22”, the results on the results page⁷¹¹ offer products from competing brands (in the example, “OPPO A74”, “Black Shark 4 [5G]”, and “Blackview A80S”, among others); and upon selecting from the results, for example, the “Samsung Galaxy S22 Ultra 5G Mobile Phone 128GB SIM Free Android Smartphone Phantom White”, the detail page⁷¹² also offers advertisements for other brands (in the example, in the space above, for “OPPO”, and in similar products section, for “Google Pixel” and “OPPO”, and in the related products section, for “OUKITEL”, among others).
 - It is therefore established that this agreement has been put into practice since, in the case of a search for a product of the APPLE brand, such as “apple iphone”, no advertisements appear for any competing brand in general, either for the list of competing brands chosen by APPLE in particular, or on the first results page⁷¹³ or the detail page⁷¹⁴, whereas, in the case of searches for other competing products, such as the “Samsung Galaxy s22”, Samsung's brand does face competition from advertisements for other competing products, both on the first results page⁷¹⁵ and on the detail page⁷¹⁶. This is not invalidated by the fact that, by way of exception, this general pattern agreed by the companies may not be complied with, as AMAZON intends to demonstrate by means of Document 7 included with its submissions on the Proposed Resolution⁷¹⁷.

⁷⁰⁹ See folios 5611 -5623 and Appendix 1

⁷¹⁰ See folios 5739-5758 and Appendix 1.

⁷¹¹ See folios 5684-5692 and Appendix 1

⁷¹² See folios 5839-5845 and Appendix 1.

⁷¹³ Other searches were also carried out for the following terms, which produced identical results: “Apple imac”; “Apple ipad”; “Apple iphone 12 pro max”; and “ipad air” (see Appendix 1 of the SOF).

⁷¹⁴ The following products have also been selected and their detail pages have yielded identical results: “Apple iMac (27-inch)”; “2022 Apple iPad Air”; “2021 Apple MacBook Pro” (see Appendix 1 of the SOF).

⁷¹⁵ Other searches were also carried out for the following terms, which produced identical results: “Sony Xperia 1”; “Huawei P50”; “Lenovo mobiles”; “lenovo tap p 11”; “Xiaomi 11t” and “Xiaomi pad 5” (see Appendix 1 of the SOF).

⁷¹⁶ The following products have also been selected and their detail pages have yielded identical results: “Huawei P50 Pro”; “Lenovo Tab P11”; “Sony Xperia 1 - 6.5” Smartphone”; and “Xiaomi 11T Smartphone” (see Appendix 1 of the SOF).

⁷¹⁷ Document 7 provided by AMAZON together with its submissions on the Proposed Resolution entitled “Graph 11, showing the first page of results after searching for an Apple Keyword in the Amazon Store in Spain”.

- That **on Cart and Check Out pages containing APPLE products, advertisers of products of competing brands identified by APPLE are not allowed to bid for space**; as can be seen in the following example:
 - First of all, there is a general consideration: no advertising space has been identified on the order processing pages analysed, either when processing orders for Apple branded products or for competing brands⁷¹⁸, so the following considerations will refer only to the basket page;
 - If the "Apple iPhone 13 Pro (128 GB) - in Alpine Blue" is selected from the results, no competing brand (in general, and therefore none from the list of competing brands chosen by APPLE - see paragraph(293)) appears on the Cart page⁷¹⁹.

⁷¹⁸ See folios 5908-5909 for APPLE and folios 5910-5913 for competing brands, as well as Appendix 1 of the SOF.

⁷¹⁹ See folios 5884-5887 and Appendix 1.

- On the other hand, if a "Samsung Galaxy S22" is selected from the results, competing brands (for example, the "Xiaomi Smartphone REDMI Note 10 Pro 6", "Xiaomi K11R" and "OPPO A74") appear on the Cart page⁷²⁰.
- It is therefore clear that this agreement has been put into practice since, in the case of a search for an APPLE brand product, such as "Apple iPhone 13 Pro (128 GB) - in Alpine Blue", no advertisement for competing brands in general, nor for the list of competing brands chosen by APPLE in particular, appears on the Cart page⁷²¹, whereas, in the case of searches for other competing products, such as the "Samsung Galaxy S22", that brand does have to withstand competition from advertisements for other products on the Cart page⁷²².

- (811) In addition, in accordance with the content of the Advertising Clauses, **during the launch of a new APPLE product⁷²³, AMAZON will not run advertisements for products of a number of competing brands identified by APPLE** on: (i) APPLE product detail pages, (ii) Apple Store pages on the AMAZON Website; and/or (iii) the search results shown to customers when they search for APPLE products using keywords relating to APPLE branded products as a search term.
- (812) Thus, the Publicity Clauses limit: (i) in general, the competition that other brands may exercise in relation to paid advertising on the AMAZON Spain Website in the top advertising space and in the first two sponsored product spaces on the search results page when searching for an APPLE-branded product (or in any other advertising space that appears or is created in the top ten search results); and (iii) in particular, the competition that certain brands chosen by APPLE may exercise in relation to paid advertising on the AMAZON UK Website in relation to paid advertising on the AMAZON Website in Spain on the first results page⁷²⁴, on the detail pages and on the cart and checkout pages⁷²⁵. In both cases the restriction affects online retailing of electronic products in Spain. Ultimately, by means of these clauses, the competitive pressure that other manufacturers can exert on APPLE's products on the AMAZON Website is restricted by limiting the visibility of offers from other competing brands. Those brands, for their part, have to withstand the competitive pressure exerted by the advertising of other brands from which APPLE escapes by virtue of the clauses at issue.

⁷²⁰ See folios 5896-5898 and Appendix 1.

⁷²¹ The following products have also been selected and their Cart pages have yielded identical results: "Apple Ipad Air"; "Iphone 12 Mini"; and "Apple iPhone SE (64 GB) - (Product) Red" (see Appendix 1 of the SOF).

⁷²² The following products have also been selected and their Cart pages have yielded identical results: "Huawei P50 Pro 256GB Golden Black EU"; "Sony Xperia 1 - 6.5" smartphone"; and "Xiaomi 11T 5G" (see Appendix 1 of the SOF).

⁷²³ From the date of announcement of a new product to whichever is earlier: (i) two weeks from the date of its launch; or (ii) four and a half weeks from the date of the announcement.

⁷²⁴ 30% of consumers only see results on the first page, so if a product appears on page 3, it is virtually invisible to almost a third of shoppers; see Slide 29 of the Amazon Shopper Report [Amazon Shopper Report 2022](https://www.icex.es/emarketservices/es/menu-principal/actualizate/noticias/amazon-shopper-report-new2022916695.html) (available on the ICEX website: [emarketservices.es/menu-principal/actualizate/noticias/amazon-shopper-report-new2022916695.html](https://www.icex.es/emarketservices/es/menu-principal/actualizate/noticias/amazon-shopper-report-new2022916695.html))

⁷²⁵ In the case of a new product launch, the Advertising Clauses would limit and restrict the competition that certain brands chosen by APPLE may exercise in relation to paid advertising on the AMAZON Website in Spain on the detail pages and the Apple Store pages on the AMAZON Website, as well as in the search results shown to customers when they search for APPLE products using as a search term the keywords relating to APPLE-branded products as a search term.

- (813) Such limitations on 'competitive advertising' (whereby the businesses pay to appear in the results when a competitor is searched for) imply, in effect, that: (i) on the one hand, consumers searching for a particular APPLE product on AMAZON are unable to see advertisements for competing brands' products in the cases described above, preventing or hindering their access to information about alternative competing products, thereby reducing their ability to make informed choices; and (ii) on the other hand, they reduce the ability of other brands to show their ads to potential consumers when they are searching for the products in question (brands that, moreover, would be paying for their ads without knowing that these limitations exist, i.e., without knowing that there are circumstances in which their ads cannot reach the consumer).
- (814) It can therefore be concluded that, on the basis of their content, advertising clauses are by their very nature capable of restricting competition and can therefore be qualified as restrictive of competition by object. This is without prejudice to taking into account its objectives and legal and economic context, which we will examine in more detail below to confirm this point.
- (815) There are, in fact, several precedents from different competition authorities in which restrictions on advertising on trademarks or keywords have been found to be restrictive of competition by object.

- ASICS case (2015)⁷²⁶, in which the German competition authority (the *Bundeskartellamt*) found that the ban imposed by Asics on its authorised distributors to use its trademarks in web search engines as a claim constituted a restriction of competition by object and that there were no efficiencies arising from its use that would outweigh its negative effects. According to the *Bundeskartellamt*, such bans diminish the search capacity of end consumers, preventing them from having access to a wider choice and thus hindering price competition, which is precisely one of the major benefits of online sales.
- GUESS case (2018)⁷²⁷, in which the EC fined this textile manufacturer for, among other conducts, prohibiting its distributors from using its brands and trade names as keywords for bidding on Google AdWords, considering that such conduct constituted a restriction of competition by object and that there were no efficiencies arising from its use that would outweigh its negative effects.

Specifically, the EC states in its decision in the GUESS case in order to reach the conclusion that the limitation in question was restrictive of competition by object that: "*Assessed in its context, the online search advertising restriction had as its object to reduce the ability of authorised retailers to advertise and ultimately to sell the contract products to customers*" (our emphasis)⁷²⁸.

- (816) The above conclusions also apply to restrictions on advertising during the launch of a new product. In this sense, although the restriction is limited in time⁷²⁹, it is sufficiently harmful, insofar as the duration envisaged is precisely that which is necessary for the objective pursued, given that the moment when a new product is announced and launched is the period in which it can have the greatest impact on the advertising of competing brands, and it is precisely for this reason that a specific and particular provision is included for the launch of new products.

⁷²⁶ Confirmed by the courts (see [here](#)).

⁷²⁷ Case AT.40428 - Guess (see [here](#)).

⁷²⁸ Paragraph 125 of the EC decision in case AT.40428 - GUESS: "*Assessed in its context, the online search advertising restriction had as its object to reduce the ability of authorised retailers to advertise and ultimately to sell the contract products to customers*".

⁷²⁹ [CONFIDENTIAL].

- Submissions of the businesses

- (817) APPLE argues, on the one hand, that the GUESS and ASICS cases, cited above, are irrelevant to the present case due to a number of differences between the two cases⁷³⁰. APPLE points out, as a first difference, that in the GUESS and ASICS cases the advertising restrictions were imposed by the manufacturers on their authorised resellers whereas, in the present case, APPLE contracted directly with the seller of the advertising space (AMAZON in this case) without affecting its authorised resellers other than positively, by enhancing their ability to sell APPLE products.
- (818) APPLE also argues that in the GUESS and ASICS cases, the clauses at issue would have been found to be restrictive of competition by object as hardcore restrictions within the meaning of Article 4(c) of the VBER. APPLE further submits that, in the present case, the restrictions occur in relation to very specific scenarios resulting from keyword searches identifying APPLE products and do not apply to general search engines but exclusively to AMAZON's online marketplace so that there are other alternatives to advertise such as other online marketplaces or any other online advertising platform (e.g. Google Ads) or offline.
- (819) This Division does not share APPLE's conclusions on the irrelevance of the ASICS and GUESS cases to the present case.
- (820) What is at issue in this case is an agreement between two companies to limit advertising in the sales channel that channels most of the e-commerce web traffic in Spain, most of the net sales of electronic products online in Spain and for the most demanded electronic products, as APPLE itself acknowledges. In that regard, if in the abovementioned cases a restriction by object imposed by a manufacturer on its distributors was penalised on the ground that it constitutes a particularly serious clause of the VBER, cases where that restriction is the result of a direct agreement between a manufacturer and an online marketplace (in its role as owner and manager of the online marketplace and not as a distributor) affecting third parties will be sanctioned all the more.
- (821) Moreover, APPLE is clearly contradicting itself by arguing that these precedents do not apply because they are restrictions imposed by manufacturers on their distributors, whereas the present case concerns a direct agreement between APPLE and AMAZON in its role as a seller of advertising space (and not as a distributor), while invoking the COTY precedent in an attempt to justify that restrictions such as those in the Exclusion or Brand Gating Clauses would not be prohibited, in so far as that precedent also concerns restrictions imposed by Coty (the manufacturer) on its distributors and, as APPLE itself acknowledges, this is not such a case (i.e., manufacturer-distributor impositions). Thus, if according to APPLE the Guess and Asics precedents are not applicable to this case because this is a direct agreement between APPLE and AMAZON in its role as a seller of advertising space (and not as a distributor) when those precedents deal with restrictions imposed by a manufacturer on its distributors, it is not clear why APPLE considers that COTY does apply.

⁷³⁰ Paragraphs 165 to 170 of APPLE's submissions on the Proposed Resolution.

- (822) It should also be noted that in both GUESS and ASICS there were also other means of advertising (the restrictions only concerned Google paid results) and the restrictions were limited because they only concerned a group of words (related to the brands in question), and this did not preclude those restrictions from being considered restrictions by object.
- (823) AMAZON, for its part, also denies the relevance of the GUESS and ASICS cases in the present case. It underlines the idea that the restriction analysed in the GUESS case would be much broader than that contained in the Advertising Clauses in the present case, as it was an absolute and systematic prohibition for distributors to participate in any Google AdWords bid for relevant keywords. AMAZON also argues that according to the GUESS case, the assessment of the restrictive nature of online advertising limitations requires a thorough analysis, in particular of their context, which the CD did not carry out with regard to the Advertising Clauses⁷³¹.
- (824) AMAZON also points out, referring to the ASICS case and more particularly to the GUESS case, that there are very few precedents in which limitations on online search advertising have been found to be infringements by object and that those cases concerned restrictions affecting an advertiser's ability to appear in Google search results (by far the most recognised key search engine through which most search advertising is conducted) or other generalist search engines. According to AMAZON, none of these restrictions could be compared to the Advertising Clauses given the "countless alternatives" available in this case to advertisers of AMAZON's competing products such as generalist search engines themselves, comparison platforms (such as Idealo or Kayak), proprietary websites, other online marketplaces, etc.⁷³².
- (825) Nor can this Division share such opinions. Contrary to what AMAZON claims, a thorough analysis of the economic context in which the Advertising Clauses were stipulated has been carried out in the context of this case. In particular, among other issues, there has been an analysis of the growing importance of online marketplaces and in particular the AMAZON marketplace as a gateway to the purchase of electronic goods, which has even overtaken Google as the website where the purchasing process starts⁷³³. This makes the platform a prime advertising window, which makes restrictions limiting the ability to use it particularly harmful to competition (see for example paragraphs (248) to (264) or (681)). This is to the extent that there are marketing agencies specialised in AMAZON advertising such as "*Amazing*"⁷³⁴. Furthermore, in this case, in addition to the restriction imposed on third parties to advertise when searching for certain words related to APPLE, there is an agreed list of competing manufacturers that may not appear in any case (going even further than that analysed in the precedents cited above). Moreover, it has already been explained that there is no legitimate justification and that, in the precedents cited, other means

⁷³¹ Paragraphs 279 and 280 of AMAZON's submissions on the Proposed Resolution.

⁷³² Paragraph 293 of AMAZON's submissions on the Proposed Resolution.

⁷³³ <https://www.puromarketing.com/76/34593/donde-empiezan-busquedas-onlineantes-comprar-producto-amazon-arrebata-poder-buscadores.html#:~:text=El%2053%25%20de%20los%20consumidores,el%208%25%20de%20otros%20marketplaces> or <https://www.reasonwhy.es/actualidad/inicio-busqueda-compras-online-amazon-google-marketplaces> in which it can be read that "*approximately 60% of people who search for products online do so directly on Amazon*".

⁷³⁴ <https://www.amazingagency.io/>

of advertising also existed and this did not prevent such restrictions from being considered restrictions by object.

- (826) Therefore, the GUESS and ASICS precedents remain relevant for the analysis of the Advertising Clauses. Contrary to what APPLE does when it seeks to apply the conclusions of the COTY or MAXIMA LATVIJA judgments in their entirety on the grounds that they deal with analogous factual circumstances, the CNMC accepts the existing differences and only invokes GUESS and ASICS by way of interpretation to support an analysis adapted to the specific circumstances of the present case. It should in any event be stressed that for a given collusive conduct to qualify as restrictive of competition by object, it is not necessary for a similar agreement to have previously been sanctioned. What is relevant is whether the restriction deriving from the content of the agreement (having regard to the legal and economic context in which it is embedded and its objectives) can by its very nature be regarded as capable of restricting competition in the light of precedent and/or economic logic and experience (paragraphs (505) and (506)).

b. The objectives

- (827) As regards the objectives of the agreement, the following can be inferred from the established facts:

- In the case of APPLE, it is clearly distinguishable that it was to **limit the competition that other brands could exert on APPLE**, as evidenced by APPLE's internal discussions with AMAZON during the negotiation of the GTA:
 - o APPLE requested that "[CONFIDENTIAL]"⁷³⁵; and
 - o APPLE requested that "[CONFIDENTIAL]"⁷³⁶.

In addition, an internal APPLE presentation also emphasises that [CONFIDENTIAL]^{737 738 739}.

- In the case of AMAZON: [CONFIDENTIAL]: (i) in relation to APPLE's first request on advertising, AMAZON internally considered [CONFIDENTIAL]⁷⁴⁰; and (ii) in relation to APPLE's second request on the same subject, AMAZON internally considered "[CONFIDENTIAL]"⁷⁴¹. However, AMAZON accepted these restrictions on paid advertising on its Website in Spain with the objective, as acknowledged by the company itself on several occasions⁷⁴², of achieving a complete and direct supply of all APPLE's products, insofar as they were part of the conditions imposed by APPLE to grant AMAZON such supply.

(828) In this case, as evidenced by the aforementioned questionnaire of possible questions it could face after the signature of the GTA and the 2018 ARA and especially by the answers prepared by the business in relation to the Advertising Clauses, **AMAZON justifies the restriction to the public with an explanation that does not correspond to reality** (see paragraph (344)).

⁷³⁵ See documents provided by the Italian competition authority (folio 4736): "[CONFIDENTIAL]".

⁷³⁶ See documents provided by the Italian competition authority (folio 4736): "[CONFIDENTIAL]"

⁷³⁷ See Appendix 2 of the response to the APPLE IR I "[...] [CONFIDENTIAL] [...]" (page 4353).

⁷³⁸ See Appendix 2 of the response to APPLE IR I: "[CONFIDENTIAL]" (folio 4355).

⁷³⁹ See Appendix 2 of the response to the APPLE IR I: "[...] [CONFIDENTIAL]; [...]" (page 4353).

⁷⁴⁰ See documents provided by the Italian competition authority (folio 4736): [CONFIDENTIAL].

⁷⁴¹ See documents provided by the Italian competition authority (folio 4737): [CONFIDENTIAL].

⁷⁴² See response to AMAZON IR II, paragraphs 20 and 21 (folios 4678, and 4679).

(829) Thus, faced with the following possible questions: [CONFIDENTIAL]⁷⁴³; (ii) [CONFIDENTIAL]⁷⁴⁴; and (iii) "[CONFIDENTIAL]⁷⁴⁵; [CONFIDENTIAL]⁷⁴⁶, when the reality is that advertisements for other brands do not appear as a result of the Advertising Clauses with APPLE.

(830) That means, there is an intention, at least on the **part of AMAZON, to conceal the real reasons behind the signing of the agreement from third parties**. If the parties had had legitimate intentions, one would expect that there would have been no problem with the explanations passed on to third parties being the real reasons behind the agreement. It should be recalled in this regard that, while the intention of the parties is not a necessary factor in determining the restrictive character of an agreement between businesses, nothing prevents competition authorities or national and EU courts from taking it into account.

- Submissions of the businesses

(831) APPLE claims that the investigating authority has not carried out a proper analysis of the legitimate and pro-competitive objectives of the Advertising Clauses⁷⁴⁷. On the one hand, those clauses would not tend to restrict the competition which other manufacturers or suppliers could exercise on its own brand, but rather APPLE would merely purchase or reserve certain advertising space on that platform in order to provide its customers with a superior shopping experience, similar to that of a 'product island' or 'shop-in-shop' in a physical store⁷⁴⁸ without such practices, which are commonplace in retail outlets, ever having been classified as restrictions of competition by object⁷⁴⁹. AMAZON also makes similar claims in this respect⁷⁵⁰.

(832) In relation to the above, APPLE argues that the shopping experience would be impaired and confusion would arise if a customer who is determined to purchase a particular product from APPLE is offered shopping alternatives because they perform a specific search for the name of that product, precisely for that reason, in the AMAZON search engine⁷⁵¹. According to APPLE, in the absence of a clear decision on which product to purchase, the customer would conducted a generic search with terms such as 'mobile phone' instead of, for example, 'iPhone 14 Pro'. APPLE compares this situation to the scenario where a consumer enters a retail shop clearly stating their intention to consider purchasing a particular APPLE branded product. APPLE argues that in such a scenario *"the shop assistant will only show you that product (instead of showing you the full range of competing devices)"*⁷⁵².

⁷⁴³ See documents provided by the Italian competition authority: [CONFIDENTIAL] (folio 4800).

⁷⁴⁴ See documents provided by the Italian competition authority: "[CONFIDENTIAL] (folio 4802).

⁷⁴⁵ See documents provided by the Italian competition authority: [CONFIDENTIAL] (folio 4802).

⁷⁴⁶ See documents provided by the Italian competition authority: [CONFIDENTIAL] (folio 4800).

⁷⁴⁷ Paragraphs 182 to 202 of APPLE's submissions on the Proposed Resolution.

⁷⁴⁸ Paragraph 188 of APPLE's submissions on the Proposed Resolution.

⁷⁴⁹ Paragraph 190 of APPLE's submissions on the Proposed Resolution,

⁷⁵⁰ Paragraphs 273 to 275 of AMAZON's submissions on the Proposed Resolution,

⁷⁵¹ Paragraphs 184 to 188 of APPLE's submissions on the Proposed Resolution.

⁷⁵² Paragraph 186 of APPLE's submissions on the Proposed Resolution.

- (833) In response to the above, firstly, the fact that consumers are shown alternatives similar to the product they are looking for (irrespective of whether or not they may at the time be more or less determined to purchase the particular product in question) does not diminish the shopping experience, but rather, if anything, enriches it.
- (834) On the other hand, the fact that AMAZON makes advertising space available on the results pages when searching for specific products does not appear to be consistent with the consumer necessarily having made up their mind and the presence of advertisements for other products detracting from their shopping experience, which would imply that they are not welcomed by consumers. If this were the case, competitors would not be interested in acquiring such slots and the Advertising Clauses would have no reason to exist. As the investigating authority points out, AMAZON itself refers to these advertising spaces on its website on the advertising products/services it offers to third parties (Amazon Ads)⁷⁵³ as an *"(a)ssistance to customers in finding your products by quickly creating ads that appear in shopping results and on related product pages"*. According to the company, the Amazon Ads product allows you to create ads without the need for expertise, allows you to control your costs (the advertiser chooses how much they want to bid per click and their own budget) and allows you to track your success (using metrics that measure the direct impact of the ad). Thus, according to AMAZON's own information provided on the AMAZON Ads website, ads on its Website can be so relevant that they could provide the following benefits to those who contract this type of service⁷⁵⁴ (i) 40% increase in units ordered; (ii) 54% increase in views; (iii) 55 times more impressions; and (iv) 93 times more unit sales. The effectiveness of these ads is so relevant that the Amazon Ads website has a section dedicated to success stories in which the stories of different manufacturers, sellers or brands that have seen their businesses grow, specifically thanks to ads on AMAZON Websites.

⁷⁵³ See the Amazon Ads website at the following link: https://advertising.amazon.com/es-es/solutions/products/sponsored-products?ref=amt_sm_ln_eupadg_es_expandbrand2_01_112&=&li_fat_id=94201346-2025-4cb4-93c0-6ebcff965691

⁷⁵⁴ See the Amazon Ads website at the following link: https://advertising.amazon.com/es-es/solutions/products/sponsored-products?ref=amt_sm_ln_eupadg_es_expandbrand2_01_112&=&li_fat_id=94201346-2025-4cb4-93c0-6ebcff965691

- (835) APPLE itself acknowledges in its submissions on the Proposed Resolution that advertisements of other brands' products on AMAZON may exert competitive pressure on APPLE's products as it argues in defence of the harmless effect of the reduction in the number of resellers in the online marketplace as a result of Brand Gating clauses that "[i]f prices of Apple products were to increase on Amazon's marketplace, what would happen using simple economic logic is that there would be fewer sales of Apple products on Amazon's marketplace, as some consumers would choose to switch their purchasing decisions to other channels and/or rival products (Samsung, Xiaomi, etc.)"⁷⁵⁵. This corroborates, moreover, that the advertisements covered by the Advertising Clauses stimulate inter-brand competition and that their limitation is therefore restrictive of competition.
- (836) This Division also disagrees with the comparison made by both AMAZON and APPLE with the behaviour of vendors and so-called "product islands" or "shop-in-shops" in offline retail outlets.
- (837) Firstly, contrary to the defendants' contention, in an offline environment it is perfectly possible that the salesperson or shop assistant may provide information on alternative products to that requested by the customer. One of the advantages of going to a physical shop is, in fact, the possibility of obtaining an expert opinion on the characteristics of the products and their comparison with similar items, even if the consumer has a preference for a particular product. On the other hand, online and offline shopping processes are different and in an online environment it is very frequent and common for a consumer, when searching for a product, to be faced with advertisements for competing products in the advertising spaces provided for this purpose during the shopping process. This is without prejudice to the fact that this may not always be the case and that situations similar to those arising from Advertising Clauses may occur in AMAZON itself with other brands or in other online search engines, as APPLE points out on the basis of a series of examples included in its submissions on the Proposed Resolution⁷⁵⁶.
- (838) On the other hand, APPLE's product stand or so-called product islands in the offline environment differ substantially from the word search engine of an online marketplace. There are in fact other options when the customer is clear that they only want to find out about a certain type of product or brand. For example, AMAZON's own website has a virtual stand or island for APPLE products on which there is no advertising⁷⁵⁷.

⁷⁵⁵ Paragraph 132 of APPLE's submissions on the Proposed Resolution.

⁷⁵⁶ Paragraph 189 of APPLE's submissions on the Proposed Resolution.

⁷⁵⁷ <https://www.amazon.es/stores/Apple/P%C3%A1ginaPrincipal/page/4E95FF48-A39F-40ED-9FE3-3E769342863B>. Also, simply type "APPLE AMAZON shop" into Google and it is the first result that comes up.

- (839) APPLE argues that another legitimate objective of the Advertising Clauses is to combat parasitism by other manufacturers who might try to gain notoriety for their own brands by taking undue advantage of APPLE's investments in advertising and APPLE's back margin (understood as the fees received by AMAZON to support promotions or ensure the placement of its products in its online marketplace, again using as an example the "shop-in shops" in physical shops) which would in turn help to safeguard APPLE's incentive to work together with AMAZON in a cooperative manner⁷⁵⁸.
- (840) Such arguments cannot be accepted as this would mean accepting that all advertising of competing brands can be restricted when a consumer searches for a particular brand (whatever the medium used: search engine, banners on websites, comparison sites, etc.) on the basis that it involves a form of parasitism. This cannot be accepted in view of the dynamics of online shopping itself, the importance of online advertising as a driver of competition in this environment⁷⁵⁹ (paragraphs (843) to (851)) and the importance of AMAZON as a retail channel (paragraphs (248) to (264)). This is without prejudice to the allegedly limited scope - in terms of the limited list of keywords and spaces subject to exclusion - which, according to APPLE and AMAZON, the restrictions on online advertising under scrutiny would have in this case. Note, in this respect, how in the GUESS and ASICS precedents cited above, the restrictions applied upon the introduction of a brand term (which is in fact what the restriction itself consists of), and were still considered restrictions of competition by object.
- (841) In view of the foregoing, this Division considers that the defendants did not seek to achieve pro-competitive objectives that would make it possible, in the analysis of their content, objectives and context, to rule out the anti-competitive object of the Advertising Clauses (without prejudice to the analysis of the agreements in relation to Articles 101.3 of the TFEU and 1.3 of the LDC in paragraphs (936) to (1001)).

⁷⁵⁸ Paragraphs 193 to 196 of APPLE's submissions on the Proposed Resolution.

⁷⁵⁹ See the Study on the conditions of competition in the online advertising sector in Spain (pages 62 and 63).

- (842) In any event, it should be stressed that it is settled case-law that *"the fact that a measure is regarded as pursuing a legitimate aim does not mean that, in view of the existence of another aim pursued by it and which must be regarded as unlawful, [...] it may be regarded as having an object restrictive of competition"*⁷⁶⁰. Therefore, even if the Advertising Clauses were intended, as APPLE argues, to improve shopping experience and combat parasitism (*quod non*), this would not exclude the existence of another objective which, in this case, is considered restrictive of competition, namely that of limiting inter-brand competition between APPLE branded products and the products of competing brands in the spaces devoted to paid advertising on the AMAZON Website, an e-commerce platform which accounts for more than half of the web traffic in Spain in the e-commerce sector in general and net sales in the online market for the sale of electronic products in particular, the market share of which in the market for the provision of intermediation services in online marketplaces to third party sellers is more than **[60-70]%** (in some cases reaching **[80-90%]**).

c. The legal and economic context

- (843) As regards the legal and economic context, **there are a number of circumstances which have a bearing on the harmfulness of the agreement and its ability to limit or reduce competition in paid advertising** on AMAZON's Website and, consequently, on the market for online retailing of electronic products in Spain (the segment affected by the conduct under investigation).
- (844) First, the legal and economic context is analysed to determine whether the conduct in question is specifically capable of restricting competition and, as explained in detail in the analysis of the legal and economic context of the Exclusion or Brand Gating Clauses (paragraphs (603) to (633)): (i) AMAZON is a sales channel with a very high market share in Spain; (ii) APPLE products are highly demanded products - it is the leading manufacturer of electronic products by market share in value -; and (iii) AMAZON itself recognises the leadership of APPLE branded products and APPLE itself of the AMAZON Website, which leads to the conclusion that both AMAZON and APPLE are undertakings whose conduct is capable of restricting and/or affecting competition therein.

⁷⁶⁰ CJEU in Case C 67/13 P - CB v Commission, EU:C:2014:2204, para 70; and C-288/18 - Budapest Bank, para 52.

(845) Secondly, specifically with regard to online advertising in Spain and AMAZON's role therein⁷⁶¹:

- In Spain, the volume of online advertising revenue exceeds that of other traditional media with data from 2019 (such as television, radio or press)⁷⁶².
- Display advertising⁷⁶³ is growing above the average of other forms of online advertising, heavily reliant on video formats, mobile devices and cross-platform inventory⁷⁶⁴.
- Within the inventory of platforms, Google, Facebook or the Amazon group stand out, which market their own offerings directly⁷⁶⁵.
- Google and Facebook may account for more than 70% of the market considering the total search and display⁷⁶⁶ (with data from 2019).
- However, although the weight of the Amazon group is still much lower (with 2019 data) compared to that of Google and Facebook, the strong growth of its advertising revenue on its own inventory, coupled with the e-commerce boom boosted by the pandemic, may make it a very competitive company in this area⁷⁶⁷.
- In fact, Facebook's declining weight in total platforms (but not in social networks) is evidence of the recent strength of the Amazon group, as the latter is not included in social networks, but is included in total platforms⁷⁶⁸.
- Some of the most important digital platforms are increasingly (such as the Amazon group) and even almost exclusively (such as Google or Facebook) financed by online advertising⁷⁶⁹.

⁷⁶¹ See "Study on competition conditions in the online advertising sector in Spain", E/CNMC/002/2019, 7 July 2021 (**CNMC Online Advertising Study**) available at the following link: <https://www.cnmc.es/prensa/estudio-publicidad-online-espana-cnmc-20210726>.

⁷⁶² Page 7 of the CNMC Online Advertising Study.

⁷⁶³ Display advertising is the result of advertisements that can appear in different formats (video, banners, etc.) while browsing websites and mobile applications (apps).

⁷⁶⁴ Page 8 of the CNMC Online Advertising Study.

⁷⁶⁵ Page 8 of the CNMC Online Advertising Study.

⁷⁶⁶ Page 85 of the CNMC Online Advertising Study.

⁷⁶⁷ Page 86 of the CNMC Online Advertising Study.

⁷⁶⁸ Page 89 of the CNMC Online Advertising Study.

⁷⁶⁹ Page 15 of the CNMC Online Advertising Study.

- Large global audience platforms that sell their own inventory (such as Google, Facebook or the Amazon group) are tending to grow above average in the online advertising market⁷⁷⁰.
- Platforms such as Facebook or the Amazon group, because of their huge audience and configuration, are able to estimate consumer interests very well, such that their display advertising is also competitive for direct "conversion" actions (i.e. the ad leads to purchases, clicks, registrations on the website, etc.)⁷⁷¹.
- Their proximity to consumers and their capillarity in data collection (particularly companies such as Google, but also others such as Facebook or the Amazon group) allows them to enrich their offer of advertising space with useful data to personalise and analyse campaigns and inventory⁷⁷².
- Companies (notably Google, but also Facebook or the Amazon group) with a large ecosystem have a difficult position in terms of access to users⁷⁷³.
- According to a study carried out in the US in 2020, 51% of the advertising market had been taken over by online advertising, which three years earlier accounted for only 1/3 of advertising investment. The study concludes that of the total US digital advertising market, Google accounted for 30%, Facebook 20% and AMAZON 10%⁷⁷⁴.

- Submissions of the businesses

- (846) Both APPLE⁷⁷⁵ and AMAZON⁷⁷⁶ argue that the importance of AMAZON's advertising business has been overstated, on the basis of a 'speculative analysis', without such business being comparable to that of Facebook or Google.
- (847) In response to the above, it should be noted that although AMAZON's importance in the online advertising market is currently smaller than that of Google and Facebook, it is in any event very significant, as has just been shown on the basis of objective data.

⁷⁷⁰ Page 16 of the CNMC Online Advertising Study.

⁷⁷¹ Footnote 72 of the CNMC Online Advertising Study.

⁷⁷² Page 49 of the CNMC Online Advertising Study.

⁷⁷³ Page 122 of the CNMC Online Advertising Study.

⁷⁷⁴ Article from the digital magazine Puro Marketing entitled: "Facebook, Google y Amazon, grandes vencedores del año y reyes de la publicidad on line" [Facebook, Google and Amazon, big winners of the year and kings of online advertising] available at the following link: <https://www.puromarketing.com/66/34585/facebook-google-amazongrandes-vencedores- ano-reyes-publicidad-online.html> (last consulted on 30 May 2023).

⁷⁷⁵ Paragraphs 203 to 208 of APPLE's submissions on the Proposed Resolution.

⁷⁷⁶ Paragraphs 286 to 300 of AMAZON's submissions on the Proposed Resolution.

- (848) The foregoing is reinforced by the importance of AMAZON as a gateway or search engine for shopping information (paragraphs (248) to (264) and in particular paragraph (261)) which, moreover, has been increasing in recent years, which has a direct impact on its role as a seller of advertising space, without prejudice to the fact that, as AMAZON argues in its submissions on the Proposed Resolution, this activity may be ancillary to its retail operations. Note that the alleged irrelevance attributed by AMAZON to its advertising business in the context of the present case is contradicted by the data that AMAZON itself invokes to advertise these services referred to above (paragraph (834)).
- (849) **[CONFIDENTIAL]**⁷⁷⁷. This implies that around **[CONFIDENTIAL]**% of the products sold in 2021 on AMAZON corresponded to products advertised on that online marketplace, which, far from detracting from the importance of its advertising business, is evidence of its relevance. Considering only the sales of electronic products on Amazon.es in Spain - **[CONFIDENTIAL]** million dollars (see paragraph (259)) - the sales of sponsored products would amount to **[CONFIDENTIAL]** dollars.
- (850) The answers prepared by AMAZON to possible frequently asked questions also demonstrate that AMAZON was aware that advertisers might ask questions related to the application of the Advertising Clauses, if they were affected⁷⁷⁸. Had it been an irrelevant advertising channel, the company itself would not have been expected to be prepared to answer questions of this kind. Again, AMAZON's argument that this document is irrelevant because companies would not be expected to provide third parties with detailed information about their commercial arrangements in such responses must be dismissed. As explained above, it is one thing not to provide detailed or strategic information and another to provide explanations that contradict the real reasons behind the agreement.
- (851) AMAZON also argues that advertisers have multiple online advertising alternatives outside its online marketplace and that advertising is just one more way for customers to find products within the Amazon Store. In response to the above, the fact that advertisers have other online advertising channels does not mean that the Advertising Clauses do not impact on a highly relevant channel, such as AMAZON's online marketplace, limiting inter-brand competition within it. Note that in cases such as GUESS and ASICS, the sellers concerned by the agreements analysed also had alternative ways to advertise (their own websites and platforms, third party platforms, online comparison platforms, generalist search services etc.) and were still considered to be restrictions by object.

⁷⁷⁷ Paragraph 294 of AMAZON's submissions on the Proposed Resolution.

⁷⁷⁸ In particular, AMAZON prepared answers to this possible question: "**[CONFIDENTIAL]**."

■ **Other arguments of the parties concerning the restrictive purpose of the Advertising Clauses**

- **On the alleged contradiction with the CNMC's previous practice in the ADIDAS case**

(852) AMAZON argues that the classification of Advertising Clauses as restriction by object is contrary to the CNMC's previous practice as the CNMC would have accepted clauses of similar scope in case S/0631/18 - ADIDAS SPAIN (**ADIDAS**)⁷⁷⁹. AMAZON submits in particular that the Advertising Clauses analysed in the present case would operate in exactly the same way as those validated by the CNMC in the ADIDAS case given that advertising for APPLE products is prioritised when the search includes the exact brand name term (for example, 'Apple' or 'iPhone 10') but the limitation does not apply when the search includes a brand name term plus other generic terms (e.g. "APPLE phone")⁷⁸⁰.

(853) However, this Division agrees with the investigating authority that AMAZON cannot claim to use this precedent to justify the Advertising Clauses cumulatively taking into account the following considerations:

- Firstly, the ADIDAS case concerned restrictions imposed by a manufacturer on its distributors, whereas the present case concerns a direct agreement between a manufacturer and an online marketplace (acting in its role as owner and operator of the online marketplace, and not as a distributor).

⁷⁷⁹ Paragraphs 281 to 285 of AMAZON's submissions on the Proposed Resolution.

⁷⁸⁰ Specifically, AMAZON argues in paragraph 281 of the submissions on the Proposed Resolution: "*It is relevant to highlight that, in the Adidas case, the CNMC analysed clauses related to online advertising similar to the Advertising Clauses, however, reaching very different conclusions. The restriction that the CNMC analysed in the Adidas case operated in such a way that, if a search was conducted with any of the Adidas brand terms combined with other generic terms (e.g. "Adidas running shoes"), Adidas products were to be prioritised in the results. Following the negotiation of compromises, the CNMC accepted the conditions applied by Adidas provided that they were modified so that only Adidas products would be prioritised in searches made using Adidas brand terms, without other generic terms (e.g. "Adidas"). This also extended to Adidas sub-brands. According to the CNMC's decision, a restriction which applies to a search for the Adidas brand term combined with other generic terms (for example, "Adidas running shoes") would not be admissible, whereas a restriction applying to a search using exclusively Adidas keywords would be admissible. The PR seems to tacitly accept the summary of the issue provided by Amazon, by citing it in its footnote 713, but does not provide any response to it.*"

- Secondly, this file was the subject of a conventional termination, i.e., it does not contain an in-depth analysis of the clauses in question and therefore does not have the same value as a declaration of infringement. Indeed, as the parties are aware, one of the main features of the conventional termination procedure is that it closes the investigation subject to a series of undertakings without requiring a final conclusion on the merits.
- Thirdly, irrespective of whether the investigation was finally closed by way of undertakings, the investigation establishes that the fact that distributors must seek ADIDAS' authorisation to advertise online could amount to a restriction of sales considered to be particularly serious pursuant to Article 4(c) of CESC 2010 (i.e., a restriction by object)⁷⁸¹.
- Fourthly, in the ADIDAS case, the restriction is intended to benefit the manufacturer in respect of its distributors (intra-brand competition), whereas in the present case it is APPLE that benefits in respect of other competing manufacturers (inter-brand competition).
- Finally, it is striking that AMAZON argues that the clauses in question are not analogous to a restriction applied to general search engines (thereby ruling out the possibility of referring for interpretative purposes to the GUESS and ASICS precedents) and, at the same time, invokes the ADIDAS case involving search engines.

- On the alleged contradiction with the decision of the Italian authority

- (854) APPLE⁷⁸² and AMAZON⁷⁸³ argue in their submissions on the Proposed Resolution that the Advertising Clauses could not be considered as restrictions of competition by object on the grounds that the Italian competition authority ruled out such qualification in its decision of 16 November 2021.
- (855) This Division cannot accept such an approach, for a number of reasons.

⁷⁸¹ See page 26, penultimate paragraph, of decision S/DC/0631/18 - *Adidas*: "[I]f that requirement is so broad, as is apparent from the facts as established, as to leave it to ADIDAS whether or not to authorise, in general terms, the use of the Internet or the possibility to advertise online, the result could amount to a restriction of sales considered to be particularly serious pursuant to Article 4(c) of the REC'.

⁷⁸² Paragraphs 22 and 179 to 181 of APPLE's submissions on the Proposed Resolution.

⁷⁸³ Paragraph 280 of AMAZON's submissions on the Proposed Resolution.

- (856) First, because the decisions of the Italian authority do not have binding effect on the CNMC's decisions.
- (857) National competition authorities are independent authorities that analyse conduct in the context of their respective jurisdictions. The Italian authority analysed the Advertising Clauses with regard to their specific application in AMAZON's online market in Italy and the Italian economic context in terms of retailing and the weight of online advertising. The CNMC, for its part, must assess the restrictive nature of these practices in the light of their specific application and context in Spain. In this respect, the findings and tests carried out by the CD during the preliminary investigation to establish the application of the Advertising Clauses on the Amazon.es website (paragraphs (289) to (296) and (810)) do not necessarily coincide with those analysed by the Italian authority.
- (858) Moreover, as a national competition authority, the CNMC may have different criteria than the competition authorities of other Member States. The CNMC's obligations under Article 16.2 of Regulation 1/2003 end with the non-adoption of resolutions incompatible with decisions adopted by the European Commission. It is the latter authority that has responsibility for safeguarding consistency in the application of competition law at the European Union level, and could have used the powers granted to it by Article 11.6 of Regulation 1/2003 in this case if it had identified a risk to the consistency and uniform application of Union law. It is in any event for the CJEU to interpret Article 101 TFEU and to determine whether an agreement affecting intra-Community trade restricts competition.
- (859) It follows from the foregoing that this Division is not required to explain to the parties a difference of view with the Italian competition authority on the qualification of a particular clause of an agreement which it considers to be anti-competitive under Article 101 TFEU.

- On the alleged lack of effect of advertising clauses

- (860) APPLE⁷⁸⁴ and AMAZON⁷⁸⁵ complain that the CD did not carry out an analysis of the effects of the Advertising Clauses and deny that the Advertising Clauses have had any effect on the market.
- (861) To the foregoing, it should be replied, firstly, that, according to established case law, **when a competition authority considers that a given conduct is restrictive of competition by object within the meaning of Articles 101 of the TFEU and 1 of the LDC, as is the case here in relation to the Advertising Clauses, it is unnecessary to examine its specific effects on the market in order to conclude that such conduct infringes the aforementioned articles**⁷⁸⁶. However, the main allegations made in this respect by the defendants will be analysed in more detail below.

⁷⁸⁴ Paragraphs 211 to 214 of APPLE's submissions on the Proposed Resolution.

⁷⁸⁵ Paragraphs 312 to 318 of AMAZON's submissions on the Proposed Resolution.

⁷⁸⁶ See inter alia para 24 of the European Commission's Guidelines on the applicability of Article 101 of the CJEU and the CJEU Cases C-501/06 P and others, GlaxoSmithKline, para 55; C-209/07, BIDS, para 16; C 8/08, T-Mobile Netherlands, paras 29 et seq. para 55; C-209/07, BIDS, para 16; C 8/08, T-Mobile Netherlands, paras 29 et seq or C-7/95 P, John Deere, para 77.

- (862) APPLE argues that the investigating authority did not analyse the impact on inter-brand competition and did not establish the existence of foreclosure effects. It argues in this regard that *“the Advertising Limitation could only be anticompetitive if it deprived competitors of an input that is essential to compete”* in the *“market for online retailing of consumer electronics products”*⁷⁸⁷.
- (863) This approach cannot be accepted since APPLE seeks to apply the analytical framework of Articles 102 TFEU and 2 CDL - relating to abuse of a dominant position - in order to rule out that the Advertising Clauses fall within the scope of Articles 101 TFEU and 1 LDC - relating to collusive practices - the applicability of which is at issue in the present case. Contrary to what APPLE claims, in order to establish that Advertising Clauses are restrictive of competition by object within the meaning of Article 101 TFEU and Article 1 LDC, it is sufficient to establish that they are at least potentially capable, by their very nature, of restricting competition (which has been done in paragraphs (810) to (851)). It is not required to prove that access to an essential input has been deprived resulting in the exclusion of the affected operators from the market, as could be the case when analysing the existence of an abuse of a dominant position by applying the doctrine of “essential facilities”.
- (864) APPLE also argues that this conduct has a very limited effect because it only comes into play when searching for a particular name related to APPLE and therefore does not affect organic search results, and that third parties have other means to advertise.
- (865) With regard to the submission that this conduct has a very limited effect because it only comes into play when searching for a particular name related to APPLE and does not affect organic search results, and that third parties have other means to advertise, it cannot be accepted either, for the reasons already indicated in paragraphs (846) to (851).
- (866) Similarly, the argument that the impact on competition of the Advertising Clauses is necessarily be limited because the sellers concerned have other means of advertising was rejected in the abovementioned GUESS and ASICS cases, where different authorities concluded that this was not an obstacle for online advertising limitations to be considered restrictive of competition by object, which implies assuming that such limitations have had at least the potential to produce non-negligible effects.

⁷⁸⁷ Paragraph 212 of APPLE's submissions on the Proposed Resolution.

- (867) APPLE also insists on what it has already argued during the preliminary investigation that APPLE's competitors have a multitude of spaces not affected by the Advertising Clauses to promote their products on the Amazon.es website, even in relation to generic formulations containing an APPLE name (such as, for example, 'ipads', 'macbooks', 'iphone products', 'products like iphone' etc.). However, it is sufficient to check the list of keywords provided by APPLE to see that it contains terms that lead to the application of the "Exclusivity Clauses" when using generic expressions containing terms such as "ipad" and "iphone"⁷⁸⁸:

Image 30. Excerpt from the list of keywords provided by APPLE



72. ipad
73. ipad air
74. ipad mini
75. ipad pro
76. iphone

- (868) Again, in order to rule out the possibility of an anti-competitive effect of the Advertising Clauses, APPLE refers to their allegedly minor role in the advertising markets. In response, it should be noted that AMAZON is a relevant sales channel for electronic products, not only for third party sellers but also for the manufacturers themselves. In view of this circumstance, the advertising limitation - which prevents competing electronics manufacturers of brands other than APPLE from advertising in certain areas of AMAZON's website - is likely to reduce the competitive pressure exerted by the products of other electronics manufacturers on APPLE-branded products and, consequently, to distort the functioning of inter-brand competition of these rival manufacturers.
- (869) It should be recalled in this respect, as indicated above, that APPLE itself at least indirectly acknowledges the importance of advertising in AMAZON's online marketplace (paragraph (835)). APPLE also directly acknowledges that one of the objectives of these clauses was to prevent investments in its brand (and sales) from being diverted, in whole or in part, to other companies by taking advantage of APPLE's reputation and its investment in AMAZON (paragraph (827)).

⁷⁸⁸ See Appendix 1 of the GTA.

- (870) AMAZON, on the other hand, insists on maintaining that the Advertising Clauses are not likely to affect competition because **[CONFIDENTIAL]**.
- (871) This approach should be discarded for a number of reasons.
- (872) First, as set out in detail by the CD in paragraph 907 of the Proposed Resolution, the Brattle Report on Advertising suffers from several methodological errors that invalidate its conclusions.
- (873) On the one hand, the two comparison periods considered in the said Report were affected by the Advertising Clauses, therefore, there is no valid counterfactual comparing a scenario without application of the disputed clauses with a scenario where the disputed clauses apply. Specifically, and as already indicated in the Proposed Resolution, the Brattle Report starts from a fundamental error, by considering that during the periods considered in November and December 2018⁷⁸⁹ the Advertising Clauses were not in force, despite the fact that the GTA and the 2018 ARA were signed on 31 October 2018. It should be noted in this regard that, while AMAZON could have chosen a period of time prior to October 2018 (in respect of which there was no dispute as to whether or not the clauses under investigation were in force), the accused business selected two periods of time after the point at which, consistent with the date on which the agreements were signed, the CD had considered that the Advertising Clauses were already in force, an assessment with which this Division agrees.
- (874) Likewise, according to the position maintained by the defendants themselves throughout the file, before the agreements, **[CONFIDENTIAL]**. In this way, a comparison is being made between the situation prior to the agreements (in which this situation allegedly existed) and the situation after the agreements, which presents an improved purchasing environment (it should be stressed in this respect that, as highlighted throughout this decision, this improvement does not derive from the disputed clauses, but from other provisions of the GTA and the 2018 ARA). It is therefore uncertain what the effects of the absence of the Advertising Clauses would have been if, in the situation prior to the agreements, there had also been an improved purchasing environment. Indeed, AMAZON itself tries to justify that the change in customer behaviour can be explained by the increased attractiveness of the online market in Spain as a result of the agreements. In this regard, AMAZON states on its website about the advertising products/services it offers that *"Adding A+ content to your product details page [enhanced display] and advertising with Sponsored Products can help you generate up to 93 times more unit sales"*⁷⁹⁰, i.e., the enhanced display would have had a clear impact on sales (and this enhanced display environment did not exist for APPLE products prior to the agreements in question).

⁷⁸⁹ The weeks of 5-11 November and 10-16 December 2018 were taken into account.

⁷⁹⁰ See the Amazon Ads website at the following link: https://advertising.amazon.com/es-es/solutions/products/sponsored-products?ref=amt_sm_in_eupadg_es_expandbrand2_01_112&=&li_fat_id=94201346-2025-4cb4-93c0-6ebcff965691

- (875) The report's analysis therefore fails to take into account that the improved presentation of the products after the agreement may justify a change in consumer behaviour, although the improved presentation could equally well have been achieved in the absence of anti-competitive clauses.
- (876) Regarding the analysis of the percentage of competitors' ads among the search results for APPLE affected words provided by AMAZON⁷⁹¹, it should be noted that the results are driven by the construction of the chosen indicator - i.e., the relative weight of ads (per operator) out of the total number of results on the first page. First, it should be noted that the number of sponsored (i.e., non-organic) results is **[CONFIDENTIAL]** than the total number of results that appear and that, in addition, **[CONFIDENTIAL]**. **[CONFIDENTIAL]**⁷⁹² but only a subset of these. The consequence of taking the total number of results as a reference (and not just sponsored or paid results) is that the percentage of competitor ads is necessarily **[CONFIDENTIAL]**, as observed for the words affected by **[CONFIDENTIAL]**. Therefore, the chosen indicator does not provide and does not represent an adequate measure of the effects of the Advertising Clauses.
- (877) It is logical that **[CONFIDENTIAL]** accounted for a higher percentage of queries than **[CONFIDENTIAL]**, as they include very broad terms and very general searches⁷⁹³ which, precisely for that reason, are not as specific and therefore attractive to the advertiser. On the other hand, that **[CONFIDENTIAL]** overwhelmingly leads to the purchase of accessories and products of other brands before the agreement is also logical, insofar as it is common that, for accessories, consumers would not mostly opt for the brand's original accessories, but rather for other options from other brands which are often cheaper.
- (878) In this respect, it is also to be expected that the percentage of results sponsored by other smartphone manufacturers in searches of unallocated words is reduced⁷⁹⁴: these searches, by definition, relate mostly to iPhone accessories (taking the example used by AMAZON, they would correspond to searches such as "iPhone case"). In the marketing of iPhone accessories, APPLE products mainly face competition from other manufacturers of iPhone-compatible accessories. Much of the accessories marketed by **[CONFIDENTIAL]** or another rival manufacturer are aimed at its own smartphones and therefore it would make no sense to advertise them among search results so closely linked to APPLE products. The use of the words concerned as search terms by consumers is relevant, as many consumers use keywords related to the brands they want to buy in their searches⁷⁹⁵.

⁷⁹¹ See paragraphs 50 et seq. of the Brattle Economic Report on Advertising submitted by AMAZON.

⁷⁹² If so, the usefulness of AMAZON's internal search engine would be undermined.

⁷⁹³ See footnote 6 of the Brattle Economic Report on Advertising submitted by AMAZON: **"[CONFIDENTIAL]"**.

⁷⁹⁴ See paragraph 54 of the Brattle Economic Report on Advertising submitted by AMAZON.

⁷⁹⁵ See slide 29 of the [Amazon Shopper Report 2022](#) (available on the ICEX website: emarketservices.es/emarketservices/es/menu-principal/actualizate/noticias/amazon-shopper-report-new2022916695.html): "Spanish buyers [...] 33% already have a specific branded product in mind when they search and therefore tend to use branded keywords. Young people aged 16-24 and adults aged 45-54 show a particularly high brand awareness. In both cases, around 38% enter specific branded products as search terms on Amazon".

- (879) The comparisons **[CONFIDENTIAL]** are also not considered valid because it cannot be known, and the report does not demonstrate, what the effects of the clauses would have been if there had been an improved presentation of APPLE branded products prior to the agreements. Furthermore, comparisons of APPLE with other non-comparable brands are inconclusive, insofar as APPLE sells a high priced product compared to other brands, aimed at a target audience with a high ability to pay, so advertisers may be much more interested in displaying ads in that case. However, this would not be the case the other way around because it would be rare for those looking for a cheaper product to be impacted by advertising for other products (such as the more expensive APPLE brand in general).
- (880) In any event, and without prejudice to the foregoing, even if the conclusions of the Brattle Report on Advertising are accepted for purely dialectical purposes, **it is undisputed that, whatever the reasons for which the competing products allegedly did not appear in any significant way in the advertising spaces affected by the Advertising Clauses, those competitors can no longer have access to them in any event, and no longer by their own choice, but as a result of an agreement between APPLE and AMAZON which prevents such a possibility.**
- (881) This Division considers, therefore, in line with what was maintained by the CD, that the Advertising Clauses are, by their very nature, sufficiently apt to restrict competition to be classified as restrictions by object within the meaning of Articles 101 of the TFEU and 1 of the LDC, without the arguments invoked by AMAZON and its economic advisors being able to refute this conclusion.

5.4.1.2.3.2. Conclusion

- (882) In view of the content of the agreement, its objectives, and the economic and legal context in which it was entered into and applied, this Division considers that the Advertising Clauses present a sufficient degree of harmfulness to competition to be classified as a restriction by object, without the submissions presented by the defendants to the contrary having made it possible to refute the conclusions reached in this respect by the investigating body. This is without prejudice to the considerations below on the existence of a single and continuous infringement and the contribution of this conduct to the pursuit of a plan seeking a common objective (section 5.4.3.1).

5.4.1.2.4. Marketing Limitation Clauses

5.4.1.2.4.1. Restriction by object

a. The content

- (883) As to the content of the agreement, as described in detail in the facts (see section 4.4.3, paragraphs (297) to (298)), the Marketing Limitation Clauses provide that during the term of the GTA and for two years thereafter, AMAZON may not, without APPLE's prior written consent, conduct marketing and advertising campaigns that: (i) specifically target customers who have purchased APPLE products from AMAZON; and (ii) encourage such consumers to switch from an APPLE product to a non-APPLE product; notwithstanding that AMAZON may run campaigns that may reach such consumers within broader audiences.
- (884) The above agreements, therefore, operate similarly to a non-compete clause⁷⁹⁶ by limiting and restricting AMAZON's ability to approach its own customers who have purchased APPLE branded products for marketing and advertising campaigns with competing branded products, while at the same time limiting and restricting inter-brand competition between APPLE branded products and competing branded products that could be introduced in the market for online sales of electronic products (where the conduct under investigation has its effects) in the main online market in Spain which is AMAZON.

⁷⁹⁶ Article (d) of Regulation 330/2010 defines non-competition clauses as: *"any direct or indirect obligation causing the buyer not to manufacture, purchase, sell or resell goods or services which compete with the contract goods or services, or any direct or indirect obligation requiring the buyer to purchase from the supplier or from another business designated by the supplier more than 80% of its total purchases of the contract goods or services and their substitutes on the relevant market, calculated on the basis of the value or, where it is standard industry practice, the volume of its purchases in the preceding year"* (as in Article 1.1.(f) of Regulation 2022/720).

- (885) In other words, the competitive pressure which other brands can exert on APPLE's products in a channel with as high a market share in Spain as the AMAZON Website is reduced, reducing AMAZON's ability to carry out advertising and/or marketing campaigns which may have an impact on past purchasers of APPLE-branded products with competing products of other brands, when those other competing brands could, on the other hand, have to withstand such pressure from other brands (including APPLE itself), without there being any legitimate aim which could justify that restriction on AMAZON's ability to manage its advertising and marketing.
- (886) In this respect, the clause could in principle be justified for the duration of the GTA, but in any event not for two years thereafter.
- (887) Indeed, although the 2010 VBER does not provide coverage for the agreement at issue in this case (paragraph 5.4.1.2.1), by analogy it is useful to note that it excludes from the scope of the block exemption non-compete clauses of more than five years or of indefinite duration (Article 5.1.(a)), as well as post-contractual non-compete clauses of more than one year (Article 5(1)(b)). The 2022 VBER also excludes from the scope of application of the exemption provided for therein non-compete clauses with a maximum duration of 5 years (although tacitly renewable clauses may be included provided that, among other conditions, the agreement can be terminated within a reasonable period and at a reasonable cost) (Article 5.1.(a)), and post-contractual non-compete agreements with a duration of more than one year (Article 5(1)(b) and 5(3)).
- (888) And in the same vein, the Vertical Guidelines also contain useful indications in this respect:
- In relation to non-compete clauses of more than 5 years or indefinite duration: there is an exception and longer durations are allowed where the contract goods or services are sold by the buyer from premises and land owned or leased by the supplier, as it is generally unreasonable to expect a supplier to allow competing products to be sold from premises and land owned by the supplier without its permission (paragraph 67 of the Vertical Guidelines⁷⁹⁷).

⁷⁹⁷ See also paragraph 249 of the 2022 Vertical Guidelines.

- In relation to post-contractual non-compete clauses: they are permitted, but in any event limited to one year after the termination of the agreement, where they are indispensable to protect the know-how transferred by the supplier to the buyer; are limited to the premises and land from which the buyer has operated during the contractual period; and relate to goods or services that compete with the contract goods or services (paragraph 68 of the Vertical Guidelines⁷⁹⁸).

- (889) In this case, the duration of the GTA and the 2018 ARA is in principle **[CONFIDENTIAL]**⁷⁹⁹, so that during the duration of the GTA, the clause in question does not exceed the 5-year limit and as such, if the ECATN 2010 (*quod non*) were to apply, it would in principle be covered by the exemption provided for therein⁸⁰⁰.
- (890) However, there appears to be no argument to justify the post-contractual non-compete clause, even during the first year after the termination of the GTA and the 2018 ARA, insofar as, inter alia, no know-how is transferred. In other words, in this second case, the non-competition obligation would not be covered by the aforementioned regulation if it were applicable (*quod non*), which does not mean that it is immediately contrary to Article 1 LDC and/or 101 TFEU, but rather that an individual analysis of it is necessary.
- (891) In this regard, firstly, restricting AMAZON's ability to pit APPLE-branded products against products of other competing brands by sending advertising or marketing campaigns to its own customers who have purchased APPLE-branded products during the two years following the termination of the GTA and the 2018 ARA constitutes a restriction which, by its very nature, is restrictive of competition.
- (892) Thus, while this provision does not prevent AMAZON from targeting such campaigns to wider audiences that may include customers who have purchased APPLE products⁸⁰¹, this is so long as the intention of the campaign is not to proactively and specifically encourage a switch from an APPLE branded product to a product of a competing brand⁸⁰².
- (893) Thus, both undertakings are artificially limiting competition in an online sales channel for electronic products with a very high market share in Spain, such as the AMAZON website Spain, such as AMAZON's website, by limiting AMAZON's ability to behave autonomously and freely on the market in this respect for a period of two years after the expiry of the agreement.

⁷⁹⁸ See also paragraphs 250 and 251 of the 2022 Vertical Guidelines.

⁷⁹⁹ According to the first paragraph of the GTA "**[CONFIDENTIAL]**" (own translation) (folio 4902).

⁸⁰⁰ See recital 47 of the ECN+ Directive.

⁸⁰¹ See response to AMAZON IR I, paragraph 71 (folio 4621).

⁸⁰² See response to APPLE IR I, pages 16 and 17 (folios 4265-4266).

- (894) The very nature of the agreement, its purpose and its intention are none other than to limit competition, as APPLE itself acknowledges by stating that in relation to advertising [it introduces a] **"clause to avoid approaching customers by encouraging them to switch to a non-APPLE product"**⁸⁰³, and no reasonable justification can be found for such behaviour, especially in a case such as the present one where the agreement is between one of the most desirable brands of electronic products, in AMAZON's own words⁸⁰⁴, and with the largest market share by value as explained in the section on market shares (section 3.4 above), and the leading e-commerce platform in Spain for the sale of this type of electronic products, as also explained in the section on the market where the conduct under investigation has its effects (section 3.5), and, therefore, with a great capacity to affect the market for the online sale of electronic products in Spain.
- (895) On the other hand, there are several precedents in which non-competition clauses have been held to be, in general, restrictive by object:
- Case AT.39.839 - *Telefónica/Portugal Telecom*⁸⁰⁵: in 2013, the EC fined Telefónica and Portugal Telecom for including in a sale and purchase agreement (related to Telefónica's acquisition of sole control over ViVo, a joint venture jointly controlled by both companies operating in Brazil) a clause in which both companies refrained from competing with each other in the Iberian market (Spain and Portugal where they operated), which this was found to be an infringement by object of competition law⁸⁰⁶.
 - Case 200.276.384_01 before the *Gerechtshof 's Hertogenbosch*⁸⁰⁷ (2022): a Dutch court concluded that a non-competition clause in contracts signed between a hospital and its employees constituted a restriction of competition by object.

⁸⁰³ See Appendix 2 of the response to the APPLE IR I **"Marketing advertising: Anti-targeting switcher clause [...]"**. (page 4355).

⁸⁰⁴ See response to AMAZON IR I, paragraph 22 (folio 4605): *"the APPLE brand was and still is considered to be the most valuable and desired brand in the world"*.

⁸⁰⁵ Case AT.39.839 - *Telefónica/Portugal Telecom* (available [here](#))

⁸⁰⁶ The case was upheld by the EGC (see [here](#)), although the amount of the fines was ordered to be recalculated.

⁸⁰⁷ Case 200.276.384_01 before the *Gerechtshof 's Hertogenbosch*, ECLI:NL:GHSHE:2022:303 (available in Dutch [here](#)).

- (896) In other words, both cases concern non-competition clauses which were considered to be restrictions by object, in so far as they were by their very nature sufficiently harmful to competition on the market. In particular, in the first case, it was considered restrictive that each company could not compete in the territory of the other and, in the second case, that a worker could not compete with his employer.
- (897) In the present case, a limitation similar to a non-compete clause between competitors is introduced in so far as AMAZON is prohibited from sending advertising to its customers who have purchased APPLE-branded products proactively encouraging them to switch to products of competing brands, which limits its possibilities to compete in the market (and that of other brands sold through AMAZON to compete with APPLE), and more so in the case of a company such as AMAZON, for which advertising is one of its most important means of competing in the market.
- (898) Therefore, although in the present case general advertising campaigns could be carried out, there are two businesses which, as in the cases cited above, agree that one of them (AMAZON) cannot compete directly with the other (APPLE), in so far as it is prohibited from using active and direct advertising directed at its own customers who have purchased APPLE branded products by inciting them to switch to another competing product. In other words, the objective is to prevent AMAZON from approaching customers of APPLE products by enticing them to switch products or, in other words, to restrict AMAZON's ability to compete with APPLE, which is precisely what is being sanctioned in the cases cited above.

b. The objective

- (899) As to the objectives of the agreement, from the facts it can be considered that:
- In APPLE's case, it is clearly distinguishable that it was to prevent AMAZON from being able to approach its own customers by incentivising competition that other brands could exercise over APPLE, resulting in a reduction in inter-brand competition and reducing AMAZON's ability to make autonomous and independent in-market decisions about how to conduct its advertising and marketing campaigns, as evidenced by an internal APPLE presentation which demonstrates that the purpose of the Marketing Limitation Clauses is precisely this, by stating that in relation to advertising [introducing a] "*clause to avoid approaching customers by encouraging them to switch to a non-APPLE product*"⁸⁰⁸.

⁸⁰⁸ See Appendix 2 of the response to the APPLE IR I "Marketing advertising; Anti-targeting switcher clause [...]". (page 4355).

- In the case of AMAZON: it accepted these restrictions on its ability to make autonomous and independent decisions in the market with the objective, as AMAZON itself has acknowledged on several occasions, of achieving a full supply of all APPLE's products, insofar as they were part of the conditions imposed by APPLE in order to grant AMAZON such a supply. While the purpose of gaining access to such supply may, in the abstract, constitute a legitimate aim, it can in no way be considered an objective justification for concluding a competition-restrictive agreement such as the Advertising Clauses.

(900) In relation to the foregoing, this Division cannot uphold APPLE's submissions that the allegedly legitimate and pro-competitive objectives of the Marketing Limitation Clauses were not taken into account, which, as in the case of the Advertising Clauses, would be to prevent parasitism by competitors on their advertising investments, as well as to protect APPLE's investments in AMAZON as a reseller⁸⁰⁹. We refer to what has already been said in this respect in paragraphs (827) to (842), adding that APPLE still does not convincingly justify why these investments would not have been carried out without the post-contract marketing limitation.

(901) Moreover, as stated in the case law cited above, *"the fact that a measure is regarded as pursuing a legitimate aim does not mean that, in view of the existence of another aim pursued by it and which must be regarded as unlawful, [...] it may be regarded as having an object restrictive of competition"*⁸¹⁰.

c. The legal and economic context

(902) As regards the legal and economic context, there are a number of circumstances which have a bearing on the harmfulness of the agreement and its ability to limit or reduce inter-brand competition on AMAZON's Website and, consequently, on the market for online retailing of electronic products in Spain (where the conduct under investigation has its effects).

(903) As such, the legal and economic context is analysed in order to determine whether the conduct in question is specifically capable of restricting, and as was explained in the discussion of the legal and economic context of Brand Gating Clauses (paragraphs (603) to (633) for a more detailed explanation): (i) AMAZON is a sales channel with a very high market share in Spain; (ii) APPLE products are highly demanded products - it is the leading manufacturer of electronic products by market share in value -; and (iii) AMAZON itself recognises the leadership of APPLE branded products and APPLE itself of the AMAZON Website.

⁸⁰⁹ Paragraphs 243 to 247 of APPLE's submissions on the Proposed Resolution.

⁸¹⁰ CJEU in Case C-67/13 P - CB v Commission, EU:C:2014:2204, para 70; and C-288/18 - *Budapest Bank*, para 52.

- (904) It can be concluded, on the basis of these data, that AMAZON's targeting of customers who have purchased an APPLE device, by informing them of the existence of alternative products, will sometimes be likely to induce such customers to at the very least consider switching to the device of a different brand by boosting competition within AMAZON's website and even outside that channel if the customer finds a better offer for the product about which they have been informed by AMAZON outside this online marketplace.
- (905) This can simply be inferred from the previously described microeconomic data reflecting the weight of both companies in the online retailing of electronic products (paragraphs (224) to (264)), without it being necessary to assess the restriction in the specific advertising market as APPLE intends⁸¹¹.
- (906) Potentially, each sale of an APPLE product on AMAZON could give rise, if any, to a "conquest" marketing campaign, which is not at all trivial in view of the sales figures of APPLE products on AMAZON⁸¹². This possibility is cancelled for two years after the GTA and the 2018 ARA as a result of an agreement between the two companies that limits AMAZON's commercial freedom. On the basis of the above, it can be concluded that, considering the context of the agreements, the Marketing Limitation Clauses are capable of restricting competition to an appreciable extent.
- (907) This is without prejudice to the fact that competing products have other ways of reaching the public and that access to the online advertising market is not prevented, as APPLE points out in its submissions⁸¹³, once again attempting to apply the analytical framework of abuse of a dominant position under Articles 102 TFEU and 2 of the LDC in a case in which what is being analysed is the concurrence of the type of articles 101 of the TFEU and 1 of the LDC on collusive practices⁸¹⁴.

⁸¹¹ Paragraphs 248 to 253 of APPLE's submissions on the Proposed Resolution.

⁸¹² According to the figures provided by AMAZON in Appendix 2 to the response to AMAZON IR II (folio 2526), more than 120,000 units of APPLE products were sold through AMAZON in 2021 taking into account iPhones, iPads and Apple Watches only.

⁸¹³ Paragraphs 248 to 253 of APPLE's submissions on the Proposed Resolution.

⁸¹⁴ Specifically, APPLE states in paragraph 253 of its submissions on the Proposed Resolution that Marketing Limitation *"does not have the capacity to prevent access to the online advertising market and, therefore, cannot be considered anti-competitive"*.

■ **Further submissions by undertakings on Marketing Limitation Clauses**

(908) AMAZON⁸¹⁵ and APPLE⁸¹⁶ reject that the Marketing Limitation Clauses can be qualified as a restriction of competition by object or effect.

- **On the comparison of the Marketing Limitation Clauses with a non-competition clause**

(909) AMAZON argues that Marketing Restrictions Clauses cannot be assimilated to a non-competition clause and that it is inconsistent to argue that a certain clause is not restrictive of competition during the duration of the contract but is so after the term of the contract⁸¹⁷.

(910) APPLE also argues along the same lines, stressing as a fundamental distinguishing criterion that Marketing Limitation Clauses are part of a vertical relationship whereas non-competition clauses necessarily have a horizontal dimension, the precedents cited above (paragraph (895)) also not being relevant for this reason⁸¹⁸.

(911) In response to the above, it should be noted that the CD does not claim that the Marketing Limitation Clauses are analogous to a non-compete clause. It was simply highlighted in the Proposed Resolution that there are clear similarities in the way both types of clauses operate insofar as Advertising Clauses, by their very nature, limit and restrict AMAZON's ability to approach customers who have purchased APPLE branded products.

(912) This is without prejudice to the fact that non-compete clauses may be more serious in that they entail a total prohibition to sell to the customer of the other party to the agreement, whereas the Marketing Limitation Clauses concern sales where there is an active marketing campaign directed at the customers of the other party to the agreement. The latter, however, does not preclude taking into account the analytical framework of non-competition clauses in order to conclude that, as with the latter, the Marketing Limitation Clauses may be incompatible with Articles 101 of the TFEU and 1 of the LDC depending on their duration and whether they apply during or after the term of the contractual relationship in which they are included. In fact, AMAZON itself, during the negotiation process of the GTA and the 2018 ARA, considered that **[CONFIDENTIAL]**.

⁸¹⁵ Paragraphs 320 to 344 of AMAZON's submissions on the Proposed Resolution.

⁸¹⁶ Paragraphs 216 to 263 of APPLE's submissions on the Proposed Resolution.

⁸¹⁷ Paragraphs 327 to 334 of AMAZON's submissions on the Proposed Resolution.

⁸¹⁸ Paragraphs 219 to 227 of APPLE's submissions on the Proposed Resolution.

- (913) Nor can APPLE's argument be accepted that Marketing Limitation Clauses can in any way be compared to a non-compete clause since the former have a vertical dimension, whereas the latter are necessarily horizontal in nature. While, taken as a whole, the agreements in which they are contained (GTA and 2018 ARA) have an eminently vertical character, the Marketing Limitation Clauses operate on a horizontal level as they prevent AMAZON from selling to APPLE's customers (either directly or through third parties) products (its own or those of other brands) that compete with APPLE's products. This also dismisses the arguments of AMAZON⁸¹⁹ and APPLE⁸²⁰ on the applicability of the VBER to the Marketing Limitation Clauses, together with the rest of the grounds already set out in this respect (section 5.4.1.2.1).
- (914) AMAZON itself refers to these clauses in its submissions on the Proposed Resolution as a vertical restriction by defining them as **[CONFIDENTIAL]**⁸²¹ (i.e. a limitation agreed between the two companies that limits AMAZON's ability to sell APPLE's competing products to APPLE's customers).
- (915) As to the claim made by both defendants that a non-compete or similar clause, not covered by the VBER exemption, cannot automatically be considered to be a restriction by object⁸²², it can be replied that, precisely for this reason, an analysis of the content, objectives and context of the Marketing Limitation Clauses has been carried out before reaching such a conclusion.
- **On the allegedly limited scope of Marketing Limitation Clauses and their lack of effect**
- (916) In an attempt to refute their anti-competitive nature, both defendants invoke the allegedly limited nature of the clauses at issue⁸²³ in view of their limited scope, the fact that they are not applied (as the agreements in which they are inserted are still in force and their post-contractual duration of two years, which is considered anti-competitive, has not been implemented) and that AMAZON would not carry out the **[CONFIDENTIAL]**.

⁸¹⁹ Paragraphs 342 to 343 of AMAZON's submissions on the Proposed Resolution.

⁸²⁰ Paragraph 222 of APPLE's submissions on the Proposed Resolution.

⁸²¹ Paragraph 329 of AMAZON's submissions on the Proposed Resolution.

⁸²² Paragraph 334 of AMAZON's submissions on the Proposed Resolution and paragraph 235 of APPLE's submissions on the Proposed Resolution.

⁸²³ Paragraphs 321 to 326 of AMAZON's submissions on the Proposed Resolution

- (917) In response to the foregoing, the consolidated doctrine should be recalled, which rules that both in the decision-making practice of the competition authorities and in case law, it is not necessary for agreements of an anti-competitive nature to have been effectively implemented in order for them to be sanctioned⁸²⁴. The decisive factor in establishing the existence of a restriction of competition within the meaning of Articles 101 TFEU and 1 of the LDC is that there is a concurrence of wills that limits the commercial freedom of the parties and their ability to behave independently in the market, whether currently, potentially or for the future⁸²⁵.
- (918) In this case, regardless of whether the clause has less or more impact on **[CONFIDENTIAL]**, what determines its anti-competitive character is that AMAZON limits its autonomy of action in the market when competing with APPLE by means of such campaigns as a result of an agreement between both companies. Reference may be made in this respect to the Telefónica/Portugal Telecom case (cited in paragraph (895) above) concerning a restrictive agreement which had not yet entered into force.
- (919) With regard to the alleged lack of ability of the Marketing Limitation Clauses to limit competition in the market once the post-contractual period comes into force, **[CONFIDENTIAL]** ^{826 827 828}.
- (920) In addition, in view of the defendants' argument on the alleged irrelevance of the Marketing Limitation Clauses, where lies APPLE's interest in signing them in the first place? If one were to accept this argument, it would be difficult to understand, from an economic rationale, that APPLE would have spent time and resources discussing such a clause and, moreover, as explained above, if AMAZON stated during the negotiations that **[CONFIDENTIAL]**.

⁸²⁴ See EC decision in Case CÜMP/C.37.750/B2 - *Brasseries Kronenbourg, Brasseries Heineken*, para. 64: "The fact that [...] (ii) 'The fact that [...] (ii) the agreement was never implemented [...] do not in any way affect the existence of an agreement'. See also judgment of the TFEU in Case T-240/07 - *Heineken Nederland BV* (ECLI:EU:T:2011:284), paragraph 45: "An agreement within the meaning of Article 81(1) EC may be found to exist where there is an agreement of wills on the very principle of the restriction of competition and even if the actual elements of the planned restriction are still under negotiation".

⁸²⁵ See, for example, Judgment of the CJEU in Case C-7/95 P - *John Deere Ltd* (ECLI:EU:C:1998:256), para. 86: "[...] every economic operator must autonomously determine the policy it intends to pursue in the common market and the conditions it intends to reserve to its customers".

⁸²⁶ Paragraph 315 of AMAZON's submissions to the SOF: "[...] **[CONFIDENTIAL]**."

⁸²⁷ Paragraphs 320 and 326 of AMAZON's submissions on the Proposed Resolution.

⁸²⁸ Paragraph 320 of AMAZON's submissions on the Proposed Resolution.

- (921) With regard to the defendants' complaint that an effects analysis was not carried out, we refer to what has already been said that this is not required when a practice is classified as restrictive of competition by object (paragraph (861)). It should be made clear that, contrary to what APPLE argues⁸²⁹, this principle is not only applicable to practices classified as "cartels" but to any restriction by object within the meaning of Articles 1 of the LDC and 101 of the TFEU.
- (922) It should also be noted that, although this Division considers that the three types of clauses are sufficiently anti-competitive for each of them to be considered an individual restriction contrary to Articles 101 TFEU and 1 of the LDC, they are analysed in the present case as a single and continuous infringement (section 5.4.3.1). The cumulative anti-competitive unfairness of such clauses must therefore be taken into account. In particular, the Marketing Limitation Clauses contribute to the restriction of inter-brand competition already generated by Advertising Clauses during the life of the contracts.
- (923) This Division cannot, therefore, in view of the foregoing considerations, accept the defendants' allegations whereby they seek to refute that the Marketing Limitation Clauses can be qualified as a restriction of competition by object within the meaning of Articles 101 TFEU and 1 of the LDC.

- On whether the term of the post-contractual application of the Marketing Limitation Clauses is objectively justified

- (924) APPLE argues that the two-year period of application of the disputed clauses after the expiry of the contracts is justified in view, in particular, of the nature of the APPLE products⁸³⁰. It argues in this regard that this period is significantly shorter than what could be estimated as the average holding period for these products and should therefore be considered proportionate.
- (925) This Division does not share these arguments and concurs with the position of the investigating authority that there is no justification for linking the post-contractual limitation to the useful life of the products. Neither the VBER nor the Vertical Guidelines provide for exemptions in this regard, nor is there any precedent to support this. In addition, even if this argument were accepted, the agreements in which the Marketing Limitation Clauses are inserted were signed in 2018, so it is very likely that the useful life of the products which were purchased around the time the agreements were signed will have expired (without taking into account possible extensions), and the consumers who purchased them will not be able to benefit from AMAZON's advertising campaigns which are specifically targeted at meeting their specific needs with non-APPLE branded products.

⁸²⁹ Paragraph 260 of APPLE's submissions on the Proposed Resolution.

⁸³⁰ Paragraphs 230 to 236 of APPLE's submissions on the Proposed Resolution.

- (926) APPLE also argues, in an attempt to refute the restrictive nature of the Marketing Restrictions Clauses, that the CNMC has never qualified as an infringement by object the period exceeding the two (or three) years provided for in an ancillary restriction in the framework of merger control⁸³¹.
- (927) This argument cannot succeed either. The analytical framework in merger control and sanctioning proceedings is very different. In the case of economic concentrations, non-competition clauses are *a priori* considered to be *"justified for a maximum of three years when the transfer of the business includes the transfer of loyal customers such as goodwill and know-how. When only goodwill is included, they are justified for periods of up to two years"*⁸³². By contrast, the 2010 VBER provides that non-competition clauses embedded in a non-concentrative agreement are only compatible with Article 101 TFEU in certain cases and limited to one year.
- (928) The explanation as to why such clauses may be considered justified for a longer period in economic merger cases and qualify as "ancillary" to the operation is to ensure the value of the acquired company. Hence, the acceptance of a longer term is linked to the transfer of customers, goodwill and know-how (i.e., even in the context of a merger, a longer term of two or three years is not accepted if the above conditions are not met).
- (929) In relation to the above, APPLE's own submission that the CNMC has never qualified an "ancillary restriction" consisting of a non-compete obligation exceeding two or three years as an infringement by object is inoperative as it refers to an impossible scenario. When such a clause is entered into in the context of a transaction subject to CNMC merger control, the CNMC declares that the clause in question cannot be considered an "ancillary restriction" covered by the merger authorisation. This implies that the clause in question will be susceptible to analysis and, where appropriate, sanction as part of a case other than the merger control case, and no longer as an "ancillary restriction" to the merger, but, where appropriate, as an autonomous non-competition agreement contrary to Articles 1 of the LDC and 101 of the TFEU.

⁸³¹ Paragraphs 237 to 240 of APPLE's submissions on the Proposed Resolution.

⁸³² See Commission Notice on restrictions directly related and necessary to the implementation of a concentration, paragraph 20.

- (930) APPLE argues that it is entitled to protect its investments, without explaining, quantifying or justifying which investments it has made specifically in this channel, nor demonstrating why these investments would not have been made without the restriction on post-contract marketing; nor does it explain why this limitation harmonises its efforts with AMAZON. In other words, APPLE simply does not substantiate or support these submissions.
- (931) With regard to APPLE's claim that the Marketing Limitation Clauses cannot be considered as a restriction of competition since the Italian competition authority would not have considered it⁸³³ we refer to the explanations given in paragraphs (854) to (859) to reject a similar argument in relation to the Advertising Clauses

5.4.1.2.4.2. Conclusion

- (932) Therefore, having regard to the content of the agreement, its objectives, and the economic and legal context, this Division considers that the Marketing Limitation Clauses, as regards the restriction during the two years following the expiry of the agreement, present a sufficient degree of harm to competition to qualify as a restriction of competition by object within the meaning of Articles 1 of the LDC and 101 of the TFEU. This is without prejudice to the considerations below on the existence of a single and continuous infringement and the contribution of this conduct to the pursuit of a plan seeking a common objective (section 5.4.3.1).

5.4.1.2.5. Conclusions regarding restrictions of competition

- (933) As set out in the preceding paragraphs, APPLE and AMAZON took advantage of the contracts which essentially regulate AMAZON's status as an authorised distributor of APPLE and its supply conditions (GTA and 2018 ARA) to introduce three restrictions, not inherent to that relationship, which restrict AMAZON's freedom of action, not as a distributor of APPLE, but as an operator of its online marketplace, affecting third parties outside the aforementioned agreements.

⁸³³ Paragraph 242 of APPLE's submissions on the Proposed Resolution.

- (934) On the one hand, the Exclusion or Brand Gating Clauses limit intra-brand competition by driving the vast majority of resellers who used this online marketplace for marketing APPLE products off AMAZON's website. In addition, the Advertising and Marketing Limitation Clauses restrict the ability of other brands to reach consumers, either in certain advertising spaces in AMAZON's online marketplace or through the conduct of targeted marketing campaigns by AMAZON to APPLE customers.
- (935) As observed, each of these limitations constitutes a restriction of competition by object (and also in the case of Brand Gating Clauses by effect), within the meaning of Articles 1 of the LDC and 101 of the TFEU. It is nevertheless appropriate to assess them together as the clauses at issue were negotiated on the same occasion, in order to satisfy a number of objectives forming a joint plan aimed at anti-competitively altering the dynamics of the sale of APPLE products on AMAZON's marketplace (see paragraphs (1008) to (1016)).

5.4.2. Application of Articles 1.3 of the LDC and 101.3 of the TFEU and the doctrine of ancillary restrictions

5.4.2.1. Principles of Articles 1(3) of the LDC and 101(3) of the TFEU

- (936) According to Articles 1(3) CDL and 101(3) TFEU, in order for the prohibitions of Articles 1(1) CDL and 101.1 TFEU do not apply if the agreements in question contribute to improving the production or marketing and distribution of goods and services or to promoting technical or economic progress, three additional cumulative conditions must be fulfilled:
- a) allowing consumers or users to share equally in its benefits;
 - b) not imposing restrictions which are not indispensable to the attainment of those objectives; and
 - c) not eliminating competition in respect of a substantial part of the products or services covered.

- (937) As regards the indispensability condition, European case law⁸³⁴ indicates that it has to be analysed whether, given the legal and economic context, the claimed efficiency can be achieved without the restriction of competition⁸³⁵.
- (938) According to national and Community legislation and case law, **it is for the business invoking Articles 1(3) LDC and 101(3) TFEU to prove both efficiencies and compliance with the cumulative conditions**. Thus, according to Article 2 of Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, *"a business or association of businesses invoking the provisions of Article 81(3) of the Treaty must prove that the conditions laid down in Article 81(3) are satisfied"*. In turn, the LDC establishes in article 50.2 that *"the business or association of businesses that invokes the protection of the provisions of article 1.3 of this Law must provide proof that the conditions set out in that section are met"*.

⁸³⁴ Paragraphs 93 and 94 of the Judgment of the Court of Justice of 11 September 2014 (Case C-382/12 P - Mastercard):

"In this regard, it is sufficient to recall that those two rules pursue different objectives and that the latter criterion concerns the question whether a form of coordination between businesses which has appreciable negative effects on parameters of competition on the market, such as price, quantity and quality of products or services, and which therefore falls within the principle of prohibition laid down in Article 81(1) EC, may nevertheless be regarded in the context of Article 81(3) EC as indispensable to the improvement of production or distribution or the promotion of technical or economic progress, and reserves to users a fair share of the resulting benefit. On the contrary, as is clear from paragraphs 89 and 90 of that judgment, the criterion of objective necessity within the meaning of those paragraphs concerns the question whether, in the absence of a particular restriction on commercial autonomy, a transaction or a main activity which does not fall within the prohibition in Article 81(1) EC and in respect of which that restriction is secondary, could not be carried out or continued.

Therefore, in finding, in paragraph 89 of the judgment under appeal, that "only those restrictions which are necessary for the main transaction to operate, as an absolute requirement, can be regarded as falling within the scope of the theory of ancillary restrictions" and in concluding, in paragraph 90 of the judgment under appeal, that "the fact that the absence of TMIs may have a negative impact on the functioning of the MasterCard system does not in itself imply that TMIs are to be regarded as objectively necessary, if it follows from an examination of the MasterCard system in its economic and legal context that it can continue to function without them", the Court did not err in law."

⁸³⁵ Paragraph 719 of the judgment of the EGC in case T-472/13 confirmed by the judgment of the Court of Justice in case C-591/16 P: *"In any event, even supposing that the agreements in question would have made it possible to avoid certain costs linked to potential litigation before different courts, the applicants have not demonstrated why the restrictions of competition arising from those agreements were indispensable to achieve that objective, whereas it was possible to conclude other types of amicable settlements which were not anti-competitive in nature (see paragraphs 350 and 529 above)" (our emphasis).*

- (939) Likewise, the Court of Justice in its judgment of 7 February 2013 (Case C-68/12) indicates that the party must provide "*convincing arguments and evidence*" that "*the conditions for exemption are met*"⁸³⁶.
- (940) Moreover, Articles 1(3) LDC and 101(3) TFEU do not distinguish between agreements which have as their object or effect the restriction of competition on the market and therefore apply to all agreements which fulfil the four conditions mentioned above⁸³⁷.

5.4.2.2. Arguments of the defendants and the Chamber's assessment in relation to Articles 1(3) of the LDC and 101(3) of the TFEU

5.4.2.2.1. Submissions by AMAZON and APPLE

- (941) Both AMAZON⁸³⁸ and APPLE⁸³⁹ argue that the requirements of Articles 1(3) of the LDC and 101(3) TFEU are fulfilled, so that the disputed clauses should be exempted from the prohibition of Articles 1(1) of the LDC and 101(1) TFEU.
- (942) According to AMAZON the agreement generated the following efficiencies in the Amazon store in Spain: (i) a substantial improvement in the quality of service provided to customers in relation to APPLE products, reflected in faster and more reliable delivery options; (ii) an improvement in the presentation of the products; (iii) a reduction in prices resulting from an increase in discounts; (iv) a significant increase in the range and availability of Apple products; (v) an increase in retail sales volumes; and (vi) positive effects for third party sellers who would have benefited from increased sales of Apple compatible accessories and the improved reputation of the Amazon Store⁸⁴⁰.
- (943) The restrictions created by the agreements were, according to AMAZON, indispensable to the achievement of those efficiencies as they resulted from the direct supply of the full catalogue of APPLE products which AMAZON could only have achieved by agreeing to the contested clauses. AMAZON argues, in this respect, that the CD started from a basic error in its analysis of the concurrence of the requirements of Articles 1.3 LDC and 101.3 TFEU when considering that such efficiencies could have been achieved in a counterfactual scenario in which the above-mentioned clauses were not signed⁸⁴¹.

⁸³⁶ Paragraph 32 of the Judgment of the Court of Justice in Case C-68/12 *Protimonopolny úrad Slovenskej republiky v Slovenská sporiteľňa a.s.* ECLI:EU:C:2013:71.

⁸³⁷ See Case T-17/93 - *Matra Hachette*, ECLI:EU:T:1994:89, paragraph 85.

⁸³⁸ Paragraphs 362 to 374 of AMAZON's submissions on the Proposed Resolution.

⁸³⁹ APPLE reiterates in full its allegations to the SOF and refers to the Lear Reports provided together with its allegations to the SOF and the Proposed Resolution.

⁸⁴⁰ Paragraph 364 of AMAZON's submissions on the Proposed Resolution.

⁸⁴¹ Paragraphs 365 to 370 of AMAZON's submissions on the Proposed Resolution.

- (944) AMAZON also argues that it cannot be concluded that the contested clauses do not meet the criterion of non-elimination of competition in respect of a substantial part of the products or services covered given that the vertical agreements are clearly incapable of eliminating competition and that the sellers affected by the contested clauses *“have an infinite number of alternatives to continue selling APPLE products in Spain through any other distribution channel”*⁸⁴².
- (945) AMAZON furthermore criticises the investigating authority for having analysed the restrictive clauses separately and not the objectives and effects of the agreement as a whole⁸⁴³.
- (946) APPLE, for its part, refers to the “Lear Reports”, which it attaches together with its submissions to the SOF and the Proposed Resolution, in which it defends the applicability of Articles 1.3 of the LDC and 101.3 of the TFEU and, in particular, the alleged indispensability of the restrictions derived from the disputed clauses in order to achieve the pro-competitive efficiencies that these allegedly generate⁸⁴⁴.
- (947) Specifically, the Lear Report to the Proposed Resolution states that the Exclusion clauses constituted **[CONFIDENTIAL]**⁸⁴⁵.
- (948) The economic analysis included in the above-mentioned report on the justification of the efficiencies of the agreements is limited to stating, in this respect, (i) that the CD erred in considering that the proportionality test was not satisfied, given that the alternatives to achieve such efficiencies would have been economically more costly and would have required more time to implement and (ii) that the investigating authority misinterpreted an article dated 1977 by the American antitrust law expert Richard Posner⁸⁴⁶, which defends a test according to which if the result of the restriction is to increase output (i.e., sales volume), so it cannot be considered unlawful because it increases welfare.

⁸⁴² Paragraphs 371 to 373 of AMAZON's submissions on the Proposed Resolution.

⁸⁴³ Paragraph 173 of AMAZON's submissions on the Proposed Resolution.

⁸⁴⁴ Paragraph 24 of APPLE's submissions on the Proposed Resolution.

⁸⁴⁵ Page 12 of the Lear Report submitted by APPLE together with its allegations to the Proposed Resolution: **[CONFIDENTIAL]**.

⁸⁴⁶ Richard A. Posner, "The Rule of Reason And The Economic Approach: Reflections on the Sylvania Decision" 5 U. C. L. Rev. 1, 14 (1977).

5.4.2.2.2. Assessment of submissions on efficiency and indispensability of restrictions

- On the increased range, availability and speed of delivery of APPLE products on AMAZON

- (949) It is not disputed that once the agreements containing the contested clauses were entered into, the supply of APPLE products to AMAZON (as an authorised distributor of APPLE) was increased and that this may have resulted in an increase in the range, availability and speed of APPLE products through AMAZON's online marketplace in Spain.
- (950) However, in order to increase the supply of APPLE products to AMAZON, it was not indispensable to drive all but **[10-20]**⁸⁴⁷ of APPLE's resellers, including AMAZON itself, out of AMAZON's online marketplace.
- (951) There is in no way an intrinsic link between, on the one hand, (i) the conditions of supply of APPLE products to AMAZON as a distributor of this brand, the variation of which is what has determined an increase in the range, availability and speed of delivery of APPLE products on Amazon.es and (ii) the number of resellers of APPLE products that can operate AMAZON's online marketplace. Both parameters are, in fact, inscribed in different relational planes: (i) the relationship between APPLE as manufacturer/supplier and AMAZON as distributor with regard to the supply of APPLE products to AMAZON and (ii) the relationship between AMAZON, as marketplace and online operator, and third party resellers with regard to the latter's exclusion from selling APPLE products through AMAZON's online marketplace.
- (952) Therefore, the **full and direct supply of APPLE products to AMAZON could have been granted and thus achieved that improvement in the variety and availability of APPLE products without the need to drive out of AMAZON's online market more than [90-100]% of the resellers** who were selling APPLE products prior to the signing of the agreements⁸⁴⁸. Although APPLE required it, there are no reasons to justify such a link, apart from the abovementioned interests of APPLE to better control its distribution system and reduce control costs (paragraphs (576) to (602)) and, where appropriate, the other externalities claimed by the defendants in their defence, which, as analysed below, did not require the contested clauses in order to be achieved either.
- (953) The same applies to the "better discounts" which according to AMAZON itself⁸⁴⁹ also derive from APPLE's new supply conditions and between which there is therefore also no direct causal link with the disputed clauses. It should additionally be recalled in this respect that, as previously explained (paragraphs (724) to (779)), the limitation of intra-brand competition on the AMAZON online marketplace did directly result in an increase in relative prices in that marketing channel.

⁸⁴⁷ See response to APPLE IR I, Table 2 (folio 4272), where it identifies **[10-20]** APRs.

⁸⁴⁸ See response to APPLE IR I, Table 2 (folio 4272), where it identifies **[10-20]** APRs.

⁸⁴⁹ Paragraph 68 of the Brattle Supplementary Report.

- **On the increase in sales of APPLE products on the AMAZON website in Spain**

- (954) It is also not disputed that the arrangements under scrutiny may have led to an increase in the volumes of APPLE's products sold through Amazon.es. However, it cannot be considered that the contested clauses, included in those agreements, were necessary to achieve that result, given that, again, there is no direct causality between that increase and the restrictions analysed.
- (955) The increase in sales in question, as was the case with the externality previously analysed (increase in the range of APPLE products and their availability) is due, in turn, to the direct supply to AMAZON by APPLE of its complete catalogue of products which, as has just been shown, did not require for its implementation the expulsion from AMAZON's online marketplace of most of the resellers who had until then been selling APPLE products through this channel.
- (956) In relation to the argument that the agreements as a whole should have been assessed, rather than an individual analysis of the individual restrictive clauses, it should be recalled at this point that, as expressly stated in the Guidelines on the application of Article 101(3) TFEU (**Article 101 Guidelines.3**), in order to satisfy the indispensability test, *"each restriction of competition resulting from the agreement must at the same time be reasonably necessary for the realisation of the efficiencies"*⁸⁵⁰.
- (957) On the other hand, and, even admitting for purely dialectical purposes that the increase in sales of APPLE products on AMAZON's website in Spain was the cause of the restrictions at issue, *quod non*, APPLE's argument that vertical restrictions could not be considered restrictive of competition if they lead to an increase in sales is also inadmissible. There is no national or European case law on which to base this doctrine, simply because it has no place in European antitrust law.

⁸⁵⁰ Paragraph 73 of the Guidelines on the application of Article 81(3) of the Treaty, OJEU No C 101, 27.4.2004, p. 1. 97 (**Article 101(3) Guidelines**).

- (958) In support of the application of the above “output test” doctrine to the present case , APPLE invokes a 1977 article by Richard Posner entitled “The Rule of Reason And The Economic Approach: *Reflections on the Sylvania Decision*’. This article refers to a US Supreme Court ruling on the application of the “rule of reason” to certain vertical restrictions on non-price parameters.
- (959) It should be recalled that, in European Union competition law, the analysis as to whether the efficiencies of an anti-competitive agreement make it possible to rule out that it is contrary to Article 101 TFEU is not based on a mere general weighing of the pro-competitive and restrictive effects of the agreement or “rule of reason”, as is the case in American competition or antitrust law.
- (960) The European legislator has opted for a weighting or more demanding analysis, provided for in Article 101.3 of the TFEU, which is precisely that dealt with in this section and which is also included in Article 1.3 of the LDC. The CJEU has repeatedly recalled this issue in the face of arguments similar to those raised by the defendants, as can be seen, for example, from the following extract from its judgment of 30 January 2020 in the *GENERICS* case: ***“Union competition law does not recognise any rule of reason, according to which a comparison should be made between the pro- and anti-competitive effects of an agreement on the occasion of its qualification as a “restriction of competition” within the meaning of Article 101(1) TFEU.”***⁸⁵¹ (our emphasis).
- (961) Another fundamental distinction between US antitrust law and EU competition law, which is also related to the rule of reason, is the different severity that the two bodies of law attach to vertical restrictions. While in the United States the focus is mainly on horizontal restrictions, in the European Union it is established doctrine that vertical restrictions may violate Article 101 TFEU⁸⁵² and decisions sanctioning vertical agreements as restrictions of competition by object⁸⁵³ are commonplace.
- (962) APPLE refers in its defence to an article by Richard Posner on the “rule of reason” from the 1970s; however, neither the doctrine nor the approach used in American law with regard to vertical restrictions is applicable in the European Union.

⁸⁵¹ Judgment of the CJEU of 30 January 2020 in Case C-307/18, *Generics (UK) and others*, [ECLI:EU:C:2020:52](#), para. 104.

⁸⁵² Since the judgment of the CJEU of 13 July 1966 in Joined Cases 56/64 and 58/64 - *Consten and Grunig v Commission of the EEC*, [ECLI:EU:C:1966:41](#).

⁸⁵³ EC decisions dated 17 December 2018 in case AT.40428 - *GUESS*, dated 9 July 2019 in case AT.40432 - *Character merchandise* and dated 25 March 2019 in the AT case. 40436 - *ANCILLARY SPORTS MERCHANDISE*.

- (963) For the sake of completeness, it should be noted that in weighing the effects of the reduction of intra-brand competition and the increases in inter-brand competition attributable to the restriction in question, Richard Posner states in the article invoked by APPLE: *"To illustrate, the judge would try to figure out how much money or welfare Sylvania's customer lost because its dealers were not able to compete with each other and how much they gained because the location clause increased the presale services provided by the dealers. Besides requiring a trial of unmanageable complexity to quantify these impacts, this approach calls for an enquiry that is often unnecessary"*⁸⁵⁴ (our emphasis).
- (964) Therefore, the author himself argues that setting the effects of a reduction in intra-brand competition against increases in inter-brand competition attributable to the agreement is too complex and generally unnecessary. In fact, as the investigating authority explained, without APPLE's submissions allowing such explanations to be refuted, what the author proposes is to focus solely on whether the purpose of the restrictions is to cartelise distribution and to rule out the remaining vertical restrictions as infringements⁸⁵⁵.
- (965) Thus, in addition to the fact that, in any event, the Article relied on by APPLE is irrelevant to the present case, since it is based on the doctrine of "rule of reason", which has been expressly rejected in European Union competition law, it does not even reflect the conclusions attributed to it by APPLE and its economic advisers that Posner's "output test" would mean that any vertical restriction is automatically exempted if it leads to an increase in production or distribution and cannot be sanctioned on the basis of competition law⁸⁵⁶.
- (966) In support of its thesis APPLE also cites a 1997 article (Denekere et al.) entitled *"Demand Uncertainty and Price Maintenance: Markdowns as Destructive Competition"*. According to its executive summary, the article offers a new theory of destructive competition based on the comparison between the setting of minimum resale prices and a flexible pricing model in which there is an upstream monopoly and a competitive downstream resale market⁸⁵⁷.

⁸⁵⁴ Original in English: *"To illustrate, the judge would try to figure out how much money or welfare Sylvania's customer lost because its dealers were not able to compete with each other and how much they gained because the location clause increased the presale services provided by the dealers. Besides requiring a trial of unmanageable complexity to quantify these impacts, this approach calls for an enquiry that is often unnecessary."*

⁸⁵⁵ See pages 17 and 20 of the article cited by the complainant.

⁸⁵⁶ See, for example, paragraph 160 of APPLE's submissions on the Proposed Resolution.

⁸⁵⁷ "This article offers a new theory of destructive competition. We compare minimum resale prices with equilibrium retail price results in a model with a monopoly manufacturer selling to competitive retailers. In both resale pricing and flexible pricing games retailers have to place their orders under uncertainty about demand. We find that manufacturers' profits and equilibrium inventories are higher under price fixing than under equilibrium prices. Surprisingly, consumer surplus may also be higher in which case unfettered retail competition can legitimately be considered destructive. Original in English: *"This paper offers a new theory of destructive competition. We compare minimum resale price maintenance (RPM) to retail market-clearing in a model with a monopolistic manufacturer selling to competitive retailers. In both the RPM and flexible-price games, retailers must order inventories before the realization of demand uncertainty. We find that manufacturer profits and equilibrium inventories are higher under RPM than under market-clearing. Surprisingly, consumer surplus can also be higher, in which case unfettered retail competition can legitimately be called "destructive."*

- (967) This is an article arguing that vertical resale price-fixing can, under certain assumptions, be welfare-enhancing. It should be noted first of all that this result would be obtained in a scenario of monopoly in the manufacturing market and intense competition in the distribution market, which does not reflect the structure of the markets affected by the conduct under investigation in this case. Moreover, the resale price fixing referred to in this second Article is considered by European competition law as a restriction of competition by object and is in fact included as one of the hardcore restrictions of the VBER.
- (968) It should in any event be stressed that, even if it were accepted for purely dialectical purposes that the Exclusion Clauses were the real cause of the increase in the volume of sales of APPLE products on AMAZON's online marketplace, it would still not be possible to accept that it was indispensable to expel resellers from that marketplace in order to achieve such an increase. **This same increase could have been achieved with the direct supply of the full catalogue of APPLE products to AMAZON without the need for the Exclusion Clauses.** In fact, the increased availability of APPLE branded products on the AMAZON Website in Spain is so closely linked to direct supply and not to the disputed clauses that, **if the Exclusion Clauses had been entered into without full direct supply to AMAZON, the alternative would be that, as of today, sales of APPLE products on the AMAZON Website in Spain would be very limited.** This is to the extent that the main sellers in this channel prior to the agreements would still not be able to sell on Amazon.es as a result of the Exclusion Clauses and AMAZON would still not benefit from the direct supply of the full range of APPLE products.

(969) The same conclusions can be extrapolated to the pro-competitive effect claimed by AMAZON consisting in the increase of APPLE compatible accessories, given that the defendant itself links this effect to the increased availability of APPLE products on its online marketplace⁸⁵⁸.

- On improving the presentation of APPLE products on AMAZON

(970) It is also not disputed that APPLE attaches importance to its brand image and that improvements in the presentation of products and the shopping experience (e.g. via reduced delivery times) may result in improvements in terms of quality.

(971) However, the protection of brand image cannot, in itself, be regarded as a valid justification for restricting competition, as the case law of the European Union has clearly established⁸⁵⁹.

(972) In any event, the improvement in the presentation of the products, which would have occurred after the entry into force of the agreements containing the disputed clauses, in no way required the expulsion from the AMAZON Website of the bulk of the resellers who used it to sell APPLE products. **AMAZON owns its online marketplace, which it also manages from both a commercial and technical point of view, so it could well have facilitated or even imposed improved conditions for the presentation of APPLE products to resellers operating in its channel.**

(973) This is reflected, for example, (i) in the answers prepared by AMAZON to potential frequently asked questions from third parties after the signature of the agreements. Specifically, and as reflected in the established facts in response to question **[CONFIDENTIAL]**⁸⁶⁰.

(974) The above shows, on the one hand, that AMAZON anticipated that there would be interest from resellers in an enhanced display and, on the other hand, that **the enhanced display of the products could be available to any operator [CONFIDENTIAL]**. The latter is not contradicted by AMAZON's claim whereby it attempts to dilute the relevance of this document by stating that **[CONFIDENTIAL]**⁸⁶¹.

⁸⁵⁸ Paragraph 32 of AMAZON's submissions on the Proposed Resolution.

⁸⁵⁹ The Court of Justice has also stated in its judgment of 13 October 2011 (Case C-439/09, Pierre Fabre Dermo-Cosmétique SAS) that *'the objective of protecting the image of prestige cannot constitute a legitimate aim in restricting competition and cannot therefore justify a contractual term which pursues such an objective as falling outside the scope of Article 101(1) TFEU (paragraph 46)'*.

⁸⁶⁰ See documents provided by the Italian competition authority: **[CONFIDENTIAL]** (folio 4800).

⁸⁶¹ Paragraph 198 of AMAZON's submissions on the Proposed Resolution.

- (975) They also reflect the fact that there were other alternatives to achieve the same effects without resorting to the expulsion of resellers: (ii) the new stipulations set out in the GTA on product presentation which are in no way linked to the Brand Gating⁸⁶²; and (iii) APPLE's own statements in which it argues: *"In other words, in the Agreement, and generally in any ARA, even leaving aside the Limitations, there are many provisions and mechanisms clearly inspired by the purpose of preserving the quality, brand/image and protection of the consumer experience of Apple products"*⁸⁶³ (our emphasis).
- (976) In the end, the restriction was in no way indispensable to improve the shopping experience for APPLE products on the online marketplace of AMAZON which, as the owner of the marketplace, could have enforced the standards desired by APPLE instead of imposing the expulsion of resellers as requested by APPLE because it was in the interest of the latter to negotiate better supply conditions for its distributor.
- (977) In relation to the latter, it should be stressed that, as seen above, **one of the fundamental differences with the COTY case, which prevents limitations on the use of the online marketplace by APPLE's resellers from being considered objectively justifiable in this case, is that there is a contractual relationship between the online marketplace operator (AMAZON) and the manufacturer/supplier (APPLE), so that the latter can require the other to comply with the quality requirements sought for its products** (paragraphs (546) to (563)).
- (978) On the other hand, the improved presentation of APPLE products on AMAZON did not require the Advertising Clauses either, for the reasons already stated, because the possibility of being informed about alternative products to those being sought, in advertising spaces which do not hinder browsing, does not worsen the shopping experience, but improves it (paragraphs (831) to (842)).

- On the alleged reduction of counterfeit APPLE products on AMAZON

- (979) It is not disputed that counterfeiting is a problem for manufacturers, liable to erode a brand image and harm consumers. However, in view of what has already been set out in the section on the objectives of the Exclusion Clauses (paragraphs (827) to (842)) and the additional explanations below, this Chamber considers that the expulsion of the bulk of APPLE's resellers active on AMAZON goes beyond what is necessary to achieve the supposedly legitimate objective of combating counterfeiting.

⁸⁶² Paragraph 188 of AMAZON's submissions to the SOF: **[CONFIDENTIAL]**. (our emphasis).

⁸⁶³ Paragraph 71 of the non-confidential version of APPLE's submissions to the SOF.

- (980) As regards the scale of the problem and the use of the Exclusion Clauses to mitigate it, it is recalled that the defendants - who bear the burden of proving that the requirements for exemption under Articles 1(3) of the LDC and 101.3 of the TFEU - have not been able to produce reports or other documents prior to the adoption of the contested clauses in which the problem of counterfeiting of APPLE products in the AMAZON online marketplace was dealt with as a whole, let alone address the expulsion of APPLE resellers from that channel as an optimal solution (see, in that regard, paragraphs (581) to (596) of this decision).
- (981) AMAZON itself prepared the following response to the frequently asked question of whether Brand Gating Agreements are related to addressing the problem of counterfeiting: **[CONFIDENTIAL]**. For their part, the scattered documents provided by APPLE with its submissions on the Proposed Resolution as purported evidence of the *"very serious counterfeiting and security problems"* of APPLE products on the AMAZON⁸⁶⁴ online marketplace only reflect that this problem is not so critical, as discussed in detail in paragraphs (581) to (582) above.
- (982) These documents confirm, moreover, that the counterfeiting problem concerned almost exclusively APPLE accessories and not the brand's flagship and higher-value devices such as iPads, iPhones or Apple Watches, so that, where appropriate, the restrictions could have been focused on accessories without the need to articulate a massive expulsion of APPLE resellers from AMAZON's online marketplace (paragraph (594)).
- (983) The existence of less harmful alternatives to combat the problem of counterfeiting can also be corroborated on the basis of the following elements: (i) the discussions around the temporary activation of certain resellers other than APRs during the pandemic (paragraphs (308) and (502)); (ii) APPLE's communication of 16 November 2021 authorising all other resellers not included in the **[CONFIDENTIAL]** list of the ARA to sell on AMAZON as well (paragraph (286)); (iii) the fact that, following this communication, AARs and Retailers will eventually be admitted; (iv) the new provisions of the GTA on this issue; or (v) AMAZON's statements on the Brand Registry as a useful and appropriate policy to fight counterfeiting (paragraphs (303) and (354) to (365)).
- (984) AMAZON explains, in relation to the latter point, that the possible reduction of counterfeit products resulting from the signature of the GTA, would be due to APPLE's commitment to use the Brand Registry and automated trademark protections, rather than the expulsion of third-party sellers from its platform, which allowed for a **[90-95]%** drop in complaints in both Spain and the EU (from before the agreements were signed until the first quarter of 2021)⁸⁶⁵, compared to an already limited **[0-5]%**⁸⁶⁶ (paragraph (363)). Note that, although the Trade Mark Register system was available since 2017, APPLE did not use it correctly and systematically (paragraph (362)).

⁸⁶⁴ Paragraph 3 of AMAZON's submissions on the Proposed Resolution.

⁸⁶⁵ See response to AMAZON IR I, paragraph 35 (folio 4611).

⁸⁶⁶ See response to AMAZON IR I, paragraph 35 (folio 4611).

- (985) In addition, it should be recalled that **[CONFIDENTIAL]** (date prior to the agreement).
- (986) It should be stressed, in any event, that even accepting that a drastic limitation of the number of resellers and the subsequent concentration of sales in a single distributor (AMAZON) may be an "effective" measure to better control the sale of counterfeit products in a given channel (AMAZON's online marketplace), the indispensability test of Articles 101.3 TFEU and 1.3 of the LDC requires weighing the "effectiveness" of such a measure against the seriousness of the resulting restrictions on competition in order to determine whether it is proportionate. This is the case even if the restriction in question is aimed at repelling inappropriate or even unlawful conduct by third parties.
- (987) We recall, in this regard, what the CJEU stated in its judgment of 7 February 2013 in the *Slovenská sporiteľňa* case:

"In its observations, Slovenská sporiteľňa argues that the fact that an anti-competitive agreement has the object of preventing another competitor from acting unlawfully on the market in the absence of the requisite authorisation should justify the application of the exception provided for in Article 101(3) TFEU, since, according to that company, such an agreement protects the conditions of healthy competition and is therefore more generally aimed at promoting progress within the meaning of that provision.

It should be noted that Slovenská sporiteľňa invokes only one of the four cumulative conditions referred to in Article 101(3) TFEU.

*Even if such a condition were fulfilled, it does not appear that the collusive agreement in question fulfils the other three conditions and, more particularly, the third condition, which provides that the businesses concerned must not be subject to restrictions which **are not indispensable to the attainment of the objectives pursued** by the first condition laid down in **Article 101(3) TFEU**. Indeed, **even if the reason relied on by the parties to that collusive agreement had been to oblige Akcenta to comply with the Slovak legislation, they should, as has been pointed out in paragraph 20 of this judgment, have lodged a complaint with the competent authorities, instead of driving the competitor out of the market themselves**"⁸⁶⁷.*

⁸⁶⁷ CJEU, C-68/12, ECLI:EU:C:2013:71, paras 33-35.

- (988) The CNMC's Guide to Associations states, in the same vein, that "*the defence against unlawful [anti-competitive] conduct is the reporting and prosecution of the infringement and not the commission of another infringement [of competition law]*"⁸⁶⁸.
- (989) Thus, even if APPLE's real objective with the Exclusion Clauses was to limit the problem of counterfeiting and if it considered that the banned resellers, or some of them, were acting improperly, the appropriate course of action would have been to take corrective action (which it could easily have done in view of the existence of a direct contractual relationship with the online marketplace operator) or, as the case may be, to lodge a complaint with the competent authorities without the need to proceed with the mass banning of APPLE resellers on the AMAZON website in Spain with the sole exception of **[10-15]** resellers⁸⁶⁹ (including AMAZON itself).

5.4.2.3. On the doctrine of ancillary restrictions and its application to the present case

- (990) This Division considers it appropriate to briefly refer to the so-called ancillary restrictions doctrine in order to establish why the disputed clauses cannot be considered to be "ancillary restrictions" to the distribution relationship between AMAZON and APPLE provided for in the GTA and the 2018 ARA. It should be noted at the outset that, although reference is made to this doctrine in the Guidelines of Article 101(3)⁸⁷⁰, paragraph 30 of these guidelines itself states that "*the application of the concept of ancillary restrictions must be distinguished from the application of the exception provided for in Article 81(3) [now Article 101.3 TFEU], which concerns certain economic benefits produced by restrictive agreements and which counterbalance their restrictive effects on competition*".
- (991) With regard in particular to the doctrine of ancillary restrictions, paragraph 29 of the Guidelines of Article 101(3) states that, in EU law, "*the concept of ancillary restrictions covers any alleged restriction of competition which is directly related to the performance of a non-restrictive main transaction and is necessary and proportionate to it*". Thus, where a (for example, distribution) agreement does not (by its nature) have as its object or effect the restriction of competition, restrictions which are directly related and indispensable to the implementation of the main transaction are excluded from the scope of Article 101(1) TFEU. Paragraph 29 of the Guidelines of Article 101.3 then goes on to state that in order for a restriction of competition to be considered an "ancillary restriction" to a main transaction, the restriction in question must be "*subordinate to and inextricably linked with it*" (our emphasis).

⁸⁶⁸ Page 13 of the *CNC Guide for Associations*, in which reference is made to the precedents 503/00 - Feriantes de Huesca and 472/99 Colegio de Farmacéuticos de Valencia, available at the following link: <https://www.cnmc.es/quia-asociaciones-empresariales>

⁸⁶⁹ See response to APPLE IR I, Table 2 (folio 4272), where it identifies **[10-15]** APRs.

⁸⁷⁰ Paragraphs 28 to 31 of the Guidelines of Article 101(3).

- (992) It is important to underline, in this respect, that, as the Audiencia Nacional has recently recalled: “*The criterion of necessity is interpreted by the CJEU in a strict sense since, **in order for a restriction to be considered ancillary, it is not sufficient that in its absence the main transaction would be more difficult or generate fewer benefits. It is required that it is impossible to carry out the main transaction without the restriction in question***”⁸⁷¹ (our emphasis).
- (993) Thus, in order to determine whether the Exclusion, Advertising and Marketing Limitation Clauses can be regarded as lawful ancillary restrictions to the contractual distribution relationship between APPLE and AMAZON in which they are inserted - governed by the GTA and the 2018 ARA - the question must be asked whether that distribution relationship would be impossible without the disputed clauses. It is clear that the answer to this question is in the negative, as APPLE and AMAZON would have been perfectly able to enter into the distribution relationship they currently have, following the signature of the GTA and the 2018 ARA, without the need to: (i) agree to limit the number of APPLE resellers that can operate on AMAZON's online marketplace, (ii) restrict the possibilities of sellers marketing competing products of AMAZON to purchase advertising space on that online marketplace, or (iii) prevent AMAZON, after the termination of the agreements, from directing marketing campaigns on competing products to customers who have purchased APPLE products.
- (994) It should be stressed that, in answering that question, the issue is not whether the parties, in their particular situation, would not have agreed to conclude the main agreement, but whether, given the nature of the agreement, it could objectively have been concluded without the disputed clauses. We emphasise in this respect, using the *terminology* of paragraph 29 of the Guidelines of Article 101(3), that the restrictions in question, which relate mainly to the freedom of third party resellers to operate on AMAZON's online marketplace, can in no way be objectively considered to be “inextricably linked” to the distribution relationship between AMAZON and APPLE or even to the specific conditions of supply of APPLE products to AMAZON. The defence put forward by AMAZON that it had no choice but to agree to the inclusion of the disputed clauses in order to get APPLE to accept the supply conditions provided for by the GTA and the 2018 ARA is therefore not admissible.

⁸⁷¹ Judgment of the Audiencia Nacional of 5 December 2022 (appeal number 236/2018, FD 8°).

- (995) In relation to the above, paragraph 29 of the Guidelines on Article 101(3) itself states that *'the necessity test implies that the restriction must be objectively necessary for the implementation of the main transaction and proportionate to it'* and that *'the examination of ancillary restrictions is therefore similar to the test set out in paragraph 18(2)'*. Paragraph 18(2) of the Guidelines further states that *'this exclusion from the application of Article 81(1) can only be made on the basis of objective factors external to the persons concerned themselves, and not according to their subjective views and characteristics'* (our emphasis). Neither AMAZON's alleged perception that the acceptance of the restrictive clauses was a *sine qua non* condition for achieving better supply conditions from APPLE, nor the alleged lack of interest in subscribing to such clauses defended in the Compass Report on Amazon's interest in the Vertical Agreement are therefore decisive.
- (996) There are a number of precedents where competition authorities have found restrictions of competition by object that took place in the context of broader (and lawful) business cooperation agreements⁸⁷². Even the fact that a particular restriction has been considered ancillary does not prevent it from being qualified as a restriction by its object if it exceeds this consideration (whether by duration, geographic scope, or range of products, services or customers).
- (997) In short, in the light of the foregoing, it cannot be considered that the Brand Gating Clauses, the Advertising Clauses and the Marketing Limitation Clauses may qualify as "ancillary clauses" to *the* main lawful distribution relationship between APPLE and AMAZON governed by the GTA and the 2018 ARA.

⁸⁷² See, for example, Judgment of the CJEU of 6 October 2009, in Case C-501/06 P, GlaxoSmithKline; Judgment of the TCEU of 29 June 2012, in Case T-360/09, E.ON Ruhrgas; Judgment of the GC of 28 June 2016, Case T-208/13, Portugal Telecom; Judgment of the GC of 8 September 2016, Case T-472/13, Lundbeck; Commission Decision of 5 March 2014 in Case 39952, Epex Spot v Nord Pool Spot AS; Commission Decision of 18 June 2012 in Case 39736, Areva SA v Siemens AG. See also other cases of European competition authorities, such as the Decision of the NMa of the Netherlands of 8 December 2011, in case 6855 Wasserijen; and Decision of the CMA of the United Kingdom of 14 December 2017, in case 50283, Cleaning Services; and decisions of our country's competition authority, such as the CNMC's Resolution of 26 December 2013, in case S/0423/12, Munters, confirmed by NA Judgments of 21 March 2017, rec. no. 78/2014 and of 22 February 2017, rec. no. 99/201; CNMC Resolution of 16 July 2015, in case S/0490/13, Telefónica/Yoigo Agreements

5.4.2.4. Conclusion

- (998) In the light of the above, it must be concluded that the defendants have not fulfilled their burden of proving the cumulative requirements set out in Articles 1(3) CDL and 101(3) TFEU.
- (999) It has been established that, even if the claimed efficiencies were admitted to exist and were actually derived from the restrictions analysed, *quod non*, the requirement as to the indispensability of the contested clauses to achieve such efficiencies would in any event not be fulfilled.
- (1000) It cannot therefore be understood that the clauses analysed can benefit from the individual exemption provided for by the aforementioned articles, and must therefore be considered contrary to Articles 101(1) TFEU and 1(1) of the LDC.
- (1001) Furthermore, the restrictions at issue cannot be considered to be exempted from the application of these Articles under the doctrine of ancillary restrictions because the clauses at issue do not constitute 'ancillary restrictions' to the distribution relationship between APPLE and AMAZON which is regulated in the GTA and the 2018 ARA.

5.4.3. Single and continuous infringement and duration

5.4.3.1. Single and continuous infringement

5.4.3.1.1. Principles

- (1002) The figure of the single and continuous infringement is admitted in the legal system through the provision contemplated in Article 29.6 of Law 40/2015, which establishes that *"The carrying out of a plurality of actions or omissions that infringe the same or similar administrative precepts, in execution of a preconceived plan or taking advantage of an identical occasion, shall be punishable as a continuous infringement"*.
- (1003) According to this provision, the assessment of a continuous infringement requires the following conditions to be fulfilled: (i) plurality of actions or omissions; (ii) the actions infringe the same or similar administrative precepts; and (iii) the actions have been carried out in execution of a preconceived plan or taking advantage of the same occasion.

- (1004) Moreover, according to settled national⁸⁷³ and European case-law⁸⁷⁴, "three conditions must be satisfied in order to establish participation in a single and continuous infringement, namely: the existence of an overall plan in pursuit of a common objective, the intentional contribution to that plan and the fact that it had knowledge (proven or presumed) of the infringing conduct of the other participants"⁸⁷⁵.
- (1005) The need for the conduct to be complementary has also been pointed out on other occasions, but the CJEU has already clarified (correcting the TCEU⁸⁷⁶) that complementarity is not a necessary condition for establishing the existence of a single and continuous infringement⁸⁷⁷.
- (1006) On the other hand, the case-law has established that *"the concept of a 'single and continuous infringement' implies a set of conduct which may also constitute, in itself, an infringement of Article 101(1) TFEU. Although a set of behaviours may be qualified [...] as a single and continuous infringement, it does not follow that each of those conducts must necessarily be qualified, in itself and in isolation, as a separate infringement of that provision"*⁸⁷⁸. In other words, not every single behaviour has to constitute an infringement in itself for there to be a single and continuous infringement.
- (1007) In summary, therefore, the parties are liable for a single and/or single and continuous infringement where it is shown that there is:
- A plurality of actions or omissions infringing the same or a similar precept;

⁸⁷³ For all, see judgment of the Supreme Court (appeal number 5409/2020; ECLI:ES:TS:2021:3476, FD 4°).

⁸⁷⁴ ECJ C-105/04, paras 109-115; Judgment of the Court of Justice of 6 December 2012, Case C-441/11, para 41; and Judgment of the CJEU of 7 January 2004 (Joined Cases C-204/00 P, C-211/00 P, C-213/00 P, C-217/00 P and C-219/00 P), para 258.

⁸⁷⁵ See CJEU, Case C-444/11, ECLI:EU:C:2013:464, para. 53, upholding Case T-204/08 - *Team Relocations and Others v Commission*, ECLI:EU:T:2011:286, para. 37 - from which the above quotation is taken.

⁸⁷⁶ The EGC, in Case T-101/05 - *BASF and UCB v Commission*, ECLI:EU:T:2007:380, paragraph 181 stated that *"It must therefore be ascertained whether the two sets of agreements and concerted practices sanctioned by the Commission in the Decision as a single and continuous infringement had a complementary link within the meaning of paragraph 179"* (our emphasis).

⁸⁷⁷ See, for example, judgment of the CJEU following the TCEU cited above, Case C-626/13 P - *Villeroy & Boch Austria v Commission*, ECLI:EU:C:2017:54, para. 69: *"[...] without it being necessary to demonstrate the existence of a complementary relationship between the practices complained of [...]"* (our emphasis).

⁸⁷⁸ See Judgment of the CJEU in Case C-699/19 - *Quanta Storage Inc* (ECLI:EU:C:2022:483), para. 59.

- That respond to a preconceived plan or are carried out on the same occasion (i.e., the existence of an overall plan that pursues a common objective);
- To which each company intentionally contributes⁸⁷⁹; and
- Each company is responsible for its own behaviour and for the behaviour of other offenders to the extent that it knew or should have known about it and was prepared to take its consequences⁸⁸⁰.

5.4.3.1.2. Application to this case

(1008) In the present case, it is considered that the conditions set out above are fulfilled for the three clauses analysed to be qualified as a single and continuous infringement in so far as:

- There is a plurality of actions or omissions that infringe Articles 1 CDL and 101 TFEU: in this case, the Exclusion or Brand Gating Clauses, the Advertising Clauses and the Marketing Limitation Clauses.
- there is a plan in pursuit of a common objective: in the present case, APPLE's objective was, on the one hand, to better control its distribution channel and lower its costs of controlling the AMAZON website, and, on the other hand, to restrict the competition that other competing brands could exert on its branded products on the AMAZON Website in Spain; whereas AMAZON's objective was to obtain direct supply from APPLE (aware that this, together with the expulsion of resellers, would lead to an increase in its sales⁸⁸¹), which was not the case before the GTA and the 2018 ARA⁸⁸². To achieve these objectives, the parties implemented the Brand Gating Clauses, the Advertising Clauses and the Marketing Restrictions Clauses (i.e., the overall plan). The aim of the Brand Gating Clauses are to reduce, restrict and/or limit intra-brand competition (in order for APPLE to achieve its objective of better controlling its distribution channel and lowering its costs of controlling AMAZON) and the second and third aims to reduce, restrict and/or limit inter-brand competition (in order for APPLE to achieve its objective of reducing the competitive pressure that other competing brands could exert on its products on the AMAZON Website). Finally, the acceptance and implementation of the three clauses contributed to AMAZON achieving its goal of securing direct supply from APPLE. In this way, the three clauses are integrated into an overall plan that contributes to common objectives (albeit different for each part of the agreement) and from which both companies benefited.

⁸⁷⁹ According to settled case law, it is sufficient to show that the business concerned has participated in meetings at which anti-competitive agreements were concluded without having expressly objected in order to prove in a satisfactory manner the participation of that business in the infringement (See ECJ Judgments of 8 July 1999 *Commission v Anic Partecipazioni*, and ECJ Judgment of 7 January 2004 in joined cases C-204/00 P, C- 211/00 P, C-213/00 P, C-217/00 P and C-219/00 P).

⁸⁸⁰ C-49/92 P - *Commission v Anic Partecipazioni*, ECLI:EU:C:1999:356, para 83, and C-441/11 P - *Commission v Verhuizingen Coppens NV*, ECLI:EU:C:2012:778 paras 42 and 43.

⁸⁸¹ See sections "5.5.3. AMAZON's internal analysis of contracts" and paragraphs (682) to (704) on the concentration of sales of APPLE branded products in AMAZON itself for a more detailed explanation.

⁸⁸² According to AMAZON's latest explanations, [CONFIDENTIAL].

- Intentional contribution of the undertakings to the scheme: in this case, both APPLE and AMAZON have entered into anti-competitive agreements so that their participation in the agreements is, in both cases, intentional and the knowledge of the infringing behaviour of the other participants is in this case precise, given that the competition restrictions are in writing in the contracts signed by AMAZON and APPLE (the GTA and the 2018 ARA).

(1009) The infringement is continuous as there are no lapses or interruptions in the duration and implementation of the agreements or the participation of the undertakings. The agreements (and thus the infringement) are in force uninterruptedly from their signature until at least the closure of the pre-trial phase.

(1010) In relation to the above, AMAZON denies the existence of an overall plan that would allow a finding of a single infringement, as well as its intention to contribute to such an infringement.⁸⁸³ AMAZON's approach to rejecting the notion of an overall scheme is based on the argument that *"as in any vertical relationship between manufacturer and distributor, AMAZON and APPLE had different objectives"*⁸⁸⁴ and that their sole objective in entering into the disputed clauses was to secure access to the full supply of APPLE products to enhance the end consumer experience in their online marketplace online marketplace⁸⁸⁵.

(1011) These claims cannot be accepted. As noted in paragraph (935), the defendants took advantage of the same occasion - the negotiation of the GTA and the 2018 ARA - to agree on the disputed clauses, the overall objective of which (at least accepted by AMAZON) was to alter the dynamics of the sale of APPLE products on AMAZON in an anti-competitive manner. It is clear that, in contrast to what is generally the case with restrictive horizontal agreements reached between competitors, the parties to a vertical agreement have, *a priori*, different and often conflicting interests because of their different positions in the production or distribution chain. To accept AMAZON's argument that this precludes a finding of an overall or common plan would be to deny, as a matter of principle, the possibility that any agreement restricting competition of a vertical nature could qualify as a single infringement, since the requirement of a common plan was never or hardly ever present.

⁸⁸³ Paragraphs 456 to 467 of AMAZON's submissions on the Proposed Resolution.

⁸⁸⁴ Paragraph 456 of AMAZON's submissions on the Proposed Resolution.

⁸⁸⁵ Paragraphs 464 to 467 of AMAZON's submissions on the Proposed Resolution.

- (1012) What is relevant here is not that the parties to the agreement pursue the same shared interests, but that they carry out the set of practices which form part of the single infringement in the awareness and acceptance that these practices contribute to the realisation of their respective objectives and are not or should not be unaware of the restrictive nature of these practices.
- (1013) It is sufficient in this respect that one of the parties accepts the introduction of a particular contractual provision restricting competition, even if it does not directly benefit it, in particular if it makes it easier for it to achieve compensation that it was pursuing. This is precisely the situation in the present case, since, as AMAZON itself acknowledges, it accepted the disputed clauses as compensation in order to achieve its objective of obtaining direct supply of the entire catalogue of APPLE products. On the other hand, and without prejudice to the foregoing (which is sufficient to conclude AMAZON's contribution to the overall plan of the single infringement), it should be noted that AMAZON also benefited directly from the Brand Gating Clauses as the expulsion of the NARs enabled it to establish itself as the leading reseller of APPLE products on its own online marketplace by which it hoped to improve its qualification as an authorised APPLE distributor in order to achieve even better supply conditions (paragraphs (314) and (611)).

5.4.3.1.3. Conclusion on the existence of a single and continuous infringement

- (1014) As just shown, the three clauses at issue, in addition to forming part of the same contractual relationship (the GTA and the 2018 ARA signed between AMAZON and APPLE), are complementary to each other, in the sense that each of them contributes to the execution of all the anti-competitive effects directly sought or, at the very least, accepted by the other parties in order to indirectly achieve other purposes which, moreover, are the same subjects in the same temporal scope in which the investigated conducts extend.
- (1015) In this regard, the Exclusion or Brand Gating Clauses restrict intra-brand competition on the AMAZON Website in Spain, by expelling most of the sellers of APPLE products on its online marketplace and the Advertising Clauses and Marketing Limitations Clauses restrict inter-brand competition between APPLE-branded products and products of competing brands by limiting the ability of competing brands to advertise in certain areas of the AMAZON Website in Spain when a consumer searches for an APPLE-branded product or to benefit, in the future, from conquest campaigns carried out by AMAZON targeting APPLE's customers.

(1016) This Division therefore considers that **the three clauses at issue, taken as a whole, constitute a single and continuous infringement of Article 101 TFEU and Article 1 LDC**. This is irrespective of the fact that each of the three abovementioned clauses, taken in isolation, could constitute an autonomous infringement of the abovementioned provisions as specified in paragraph (935).

5.4.3.2. Term

(1017) Both the GTA and the 2018 ARA entered into force on the day of signature, 31 October 2018, and thus so also did the Brand Gating Clauses, the Advertising Clauses and the Marketing Limitations Clauses, and were initially foreseen for a minimum term **[CONFIDENTIAL]**⁸⁸⁶. At the time of the closure of the proceedings, the agreements were still in force.

(1018) **Therefore, the single and continuous infringement found extends from 31 October 2018 until at least the closure of the pre-trial phase.**

5.4.4. Culpability and individualised liability

5.4.4.1. Corporate responsibility

5.4.4.1.1. Principles

(1019) Article 61 of the LDC establishes that offenders are natural or legal persons who carry out the actions or omissions typified as infringements in the LDC, with the actions of a business also being imputable to the businesses or persons that control it, except when its economic behaviour is not determined by any of them.

(1020) On the other hand, in the sphere of Spanish administrative sanctioning law, there is no room for strict liability in the commission of an offence and the volitional element is essential. This implies that the imposition of the sanction requires that the typical and unlawful conduct be imputable, at least through fault, to the perpetrator⁸⁸⁷.

⁸⁸⁶ See first paragraph of the GTA (folio 4902).

⁸⁸⁷ For all of them, the Judgment of the SC of 22 November 2004 and article 130.1 of Law 30/1992, of 26 November, on the Legal Regime of the Public Administrations and Common Administrative Procedure (LRJPAC) and 28 of Law 40/2015, of 1 October, on the Legal Regime of the Public Sector.

(1021) Therefore, Article 63.1 of the LDC makes the exercise of the competition authority's power to impose penalties conditional on the offender's fraudulent or negligent conduct.

(1022) In this sense, the Supreme Court has established that culpability within the scope of application of the LDC must take into account the logical particularities implied by the concept of legal person⁸⁸⁸:

"In the case of administrative offences committed by legal persons, the subjective element of fault is not abolished, but it must be applied differently than in the case of natural persons. [...] this different construction of the imputability of the perpetration of the offence to the legal person arises from the very nature of the legal fiction to which legal persons are answerable. They lack the volitional element in the strict sense, but not the capacity to infringe the rules to which they are subject. [...] this principle [of culpability] must necessarily be applied differently from the way it is applied to natural persons ...".

5.4.4.1.2. Application to this case

5.4.4.1.2.1. AMAZON

5.4.4.1.2.1.1. Liability of the directly participating legal entity

(1023) Taking into account the facts established during the investigation and the provisions of Articles 61 and 62.3.a) of the LDC⁸⁸⁹, it is considered that the anti-competitive conducts described in section 4 of this Decision are imputable to AMAZON from at least 31 October 2018 until the closure of the investigation phase, due to its active participation as a perpetrator in a single and continuous infringement consisting of the adoption and implementation of the Exclusion or Brand Gating Clauses, the Advertising Clauses and the Marketing Limitation Clauses, which have as their object the restriction of competition in the retail market, and in the market for online retailing of electronic products in Spain.

⁸⁸⁸ Judgment of the SC of 22 May 2015 in France Telecom (Orange) case no. rec 95/2014.

⁸⁸⁹ In accordance with the wording prior to the amendment introduced into the LDC by Royal Decree-Law 7/2021, of 27 April, on the transposition of European Union directives in the areas of competition, prevention of money laundering, credit institutions, telecommunications, tax measures, prevention and repair of environmental damage, posting of workers in the provision of transnational services and consumer protection.

(1024) In this respect:

- The LDC provided, before its last amendment⁸⁹⁰:
 - o Article 62.3.a), which states that serious infringements are "The development of collusive conduct in the terms set out in Article 1 of the Law, when they consist of collective agreements, decisions or recommendations, concerted or consciously parallel practices between businesses that are not true or potential competitors" (our emphasis).
 - o Article 62.4.a), which states that very serious infringements are "The development of collusive conduct typified in Article 1 of the Law, which consist of cartels or other agreements, decisions or recommendations, concerted or consciously parallel practices between businesses that are true or potential competitors" (our emphasis).
- The LDC establishes (after its latest amendment that came into force on 29 April 2021), in its article 62.4.a), that very serious infringements are "The development of conduct typified in article 1 of this law and in article 101 of the Treaty on the Functioning of the European Union:
- As explained above, for the purposes of the GTA and 2018 ARA signed in October 2018, AMAZON and APPLE are companies operating at different levels of the production chain, whereas, if one takes into account a general perspective not linked to the aforementioned agreements, AMAZON and APPLE also compete at the manufacturing level for certain categories of electronic products (as they both manufacture them, as explained above) and at the distribution level (as they both distribute electronic products).
- Accordingly: it shall be understood, as the most favourable position for the defendants in determining the gravity of the infringement (i) that, for the purposes of the agreements, AMAZON and APPLE are not competitors; and (ii) that the LDC as amended prior to the latest amendment applies.

⁸⁹⁰ As introduced in Royal Decree-Law 7/2021, of 27 April, on the transposition of European Union directives in the areas of competition, prevention of money laundering, credit institutions, telecommunications, tax measures, prevention and repair of environmental damage, posting of workers in the provision of transnational services and consumer protection, in force since 29 April 2021.

- The above makes it possible to classify the infringements committed as serious rather than very serious, hence, as explained at the beginning, Article 62(3)(a) applies in its wording prior to the latest amendment introduced in the LDC.

(1025) Moreover, the case was initially opened against four legal entities of the AMAZON group: (i) Amazon Services Europe S.Á.R.L. (ASE); (ii) Amazon Europe Core S.Á.R.L. (AEC); (iii) Amazon EU S.Á.R.L. (AEU); and (iv) Amazon Online Spain, S.L. (AOS) and, on 22 June 2022, the initiation was extended to (v) Amazon.com Services, Inc (ASI) (now Amazon.com Services LLC having changed its corporate name)⁸⁹¹.

(1026) According to AMAZON, the activities carried out by these legal entities are as follows:

- Amazon Services Europe S.A.R.L. (or ASE), which provides intermediary services to third party sellers, enabling them to offer products for sale on all Amazon Stores in the EU, including www.amazon.es⁸⁹²;
- Amazon Europe Core S.Á.R.L. (or AEC), which is the entity responsible for operating the Amazon Store websites in the EU⁸⁹³;
- Amazon EU S.Á.R.L. (or EUA), which is responsible for the retail sale of the physical goods it purchases from sellers in all Amazon Stores in the EU⁸⁹⁴; and
- Amazon Online Spain, S.L. (or AOS); which provides online advertising services⁸⁹⁵.

(1027) As explained above, **ASI and AEU**, on AMAZON's side, **are the legal entities signing the GTA**; while **the 2018 ARA is signed by AEU**.

(1028) While ASI and AEU are the legal entities of the group that sign the contracts (in the case of ASI, only the GTA, and, in the case of AEU, both contracts), on the one hand, **ASE provides intermediary services to third party sellers**⁸⁹⁶; and, on the other hand, **AEC is the entity responsible for operating Amazon Store websites in the EU**⁸⁹⁷, so ASE and AEC collaborated on the implementation of the contracts.

⁸⁹¹ Response to AMAZON IR I, paragraph 6 (folio 4599).

⁸⁹² Response to AMAZON IR I, paragraph 6 (folio 4599).

⁸⁹³ Response to AMAZON IR I, paragraph 7 (folio 4600).

⁸⁹⁴ Response to AMAZON IR I, paragraph 8 (folio 4600).

⁸⁹⁵ Response to AMAZON IR I, paragraph 9 (folio 4601).

⁸⁹⁶ Response to AMAZON IR I, paragraph 6 (folio 4599).

⁸⁹⁷ Response to AMAZON IR I, paragraph 7 (folio 4600).

- (1029) In particular, ASE ceased to provide intermediation services to third party resellers who were no longer authorised to sell APPLE products on the AMAZON website in Spain as a result of the Brand Gating Clauses. ASE is, in fact, the entity that signed the communication sent to APPLE resellers that they were no longer authorised to sell on AMAZON announcing the withdrawal of its products referred to in paragraph (323) of the section on established facts. For its part, AEC, which manages the AMAZON Website in Spain, had to make the necessary changes to the website as a result of the Brand Gating and Advertising Clauses.
- (1030) In addition, the conduct under investigation affects the market for online retailing of electronic products in Spain, in which ASE, AEC and AEU are active.
- (1031) Moreover, according to settled case-law, the fact that a business has not participated in all the constituent elements of collusory practice or has played only a minor role does not preclude it from being held liable for an infringement of the antitrust rules⁸⁹⁸.
- (1032) In this respect, the fact that ASI, AEU, ASE, and AEC have not participated in all elements of the conduct under investigation in the same way would not affect the imputability to them of the infringement in question. Even if some of these legal entities did not directly participate in each and every one of the conducts constituting the infringement, they all actively contributed to the infringement, either by entering into the alleged agreements or by facilitating the adoption of the restrictions under investigation and can therefore be held liable for the infringement.
- (1033) Therefore, **the legal entities, part of AMAZON, which are held liable as perpetrators of the single and continuous infringement under scrutiny are ASI, AEU, ASE, and AEC.**
- (1034) These legal entities have been involved in the conduct under investigation, which relates only to the AMAZON website in Spain, from the entry into force of the contracts (i.e., 31 October 2018) until at least the closure of the pre-trial phase.

⁸⁹⁸ For all, see CJEU Cases C-204/00 P, C-205/00 P, C-211/00 P, C-213/00 P, C-217/00 P and C-219/00 P, ECLI:EU:C:2004:6, para 86.

- (1035) As regards AOS, according to the information provided by AMAZON, it does not provide any services to AEU, ASE or AEC, in relation to online advertising and/or marketing, or services related to the implementation/enforcement (either directly or indirectly) of the **[CONFIDENTIAL]** clauses of the GTA⁸⁹⁹, nor is there any other evidence of its involvement in the infringement.
- (1036) Thus, given that, in view of the information in the file, the direct participation of AOS in the conduct cannot be accredited with the rigour required under sanctioning law, the proceedings in the present procedure are closed with respect to AOS, maintaining the rest of the companies mentioned (ASE, AEC, AEU and ASI) as the authors of the agreements under investigation.

5.4.4.1.2.1.2. AMAZON's submissions and the assessment of the Division

- **Alleged lack of culpability given its status as the distributor on whom the disputed clauses were allegedly imposed**

- (1037) AMAZON argues that it cannot be held liable for the practices under investigation⁹⁰⁰.
- (1038) It submits, first, that APPLE is solely responsible for its distribution system and that AMAZON could not, therefore, be held liable for terms which it was forced to accept. It argues that this would be contrary to the case law, since in matters of vertical restrictions, distributors are not usually investigated or sanctioned, but rather manufacturers or suppliers are, as they impose their conditions.
- (1039) This would be particularly true, according to AMAZON, in the context of "*take it or leave it*" situations such as that which AMAZON would have faced in order to gain access to the full catalogue of APPLE products and their direct supply by the manufacturer. AMAZON argues in this regard that, although it tried to negotiate for **[CONFIDENTIAL]** which would reflect its **[CONFIDENTIAL]**. It further submits, in relation to the above, that AMAZON's size is irrelevant for the purposes of assessing its liability and that it would never have been a criterion taken into account, neither by the CNMC nor at EU level to determine the liability of distributors⁹⁰¹.
- (1040) This Division cannot accept such claims.
- (1041) The fact that APPLE decides how it articulates its distribution system does not negate AMAZON's responsibility for accepting and implementing the anticompetitive restrictions that are integrated into the distribution system and which are the result of an agreement between the two.

⁸⁹⁹ See response to AMAZON IR III (folios 4532-4538).

⁹⁰⁰ Paragraphs 468 to 508 of AMAZON's submissions on the Proposed Resolution.

⁹⁰¹ Paragraphs 468 to 485 of AMAZON's submissions on the Proposed Resolution.

- (1042) On the other hand, there is no case law or legal requirement to exclude, in cases of vertical restrictions such as this one, the liability of distributors who conclude agreements contrary to antitrust law. Where sometimes only manufacturers or suppliers are fined and not distributors, it is either because the latter are small and medium-sized enterprises which, as AMAZON is well aware, are excluded from the scope of the vertical restriction rules⁹⁰² or because there is a clear asymmetry between the parties, which also belies the fact that size is not an element to be taken into account.
- (1043) Particularly illustrative of this is the comparison between two national cases concerning vertical restrictions which were decided close to each other.
- (1044) In Case 647/08, DISTRIBUCIONES DAMM⁹⁰³, the CNC found an infringement of Article 1 of the LDC consisting of a vertical resale price fixing agreement between the brewery DAMM and its distributors. On that occasion, only DAMM was sanctioned, as the CNC considered that the price-fixing clauses were imposed by the brewer, which was in a clear position of bargaining strength in respect of the small distributors on whom the clause had been imposed and who were, in fact, those who reported the conduct to the CNC.
- (1045) By contrast, in Case 612/06, ACEITES 2⁹⁰⁴, decided only one year earlier and finding a similar infringement, both the manufacturer/supplier and the distributors involved were sanctioned. This was an agreement between the manufacturer SOS-CUETARA Group and a number of large distribution chains fixing a minimum retail price for certain oil products of the SOS-CUETARA Group's brands. The TDC considered that on this occasion the distributors could not be considered to lack liability because they were in a situation of asymmetry of negotiating power. Specifically, faced with allegations by the sanctioned distributors, similar to those invoked by AMAZON to try to deny their liability, the TDC replied that:

*"The existence of an individual interest in the adoption and effects of the imputed agreements for each of the parties involved in them is reinforced in this case, **in assessing the shared responsibility of all of them**, with the fact that **the SOS CUETARA Group and the distribution companies charged have very balanced market power and negotiating strength, in that the former is the main supplier of edible oils in the national territory and the owner of the most important brands on the market, Carbonell 0,4° for olive oil and Koipesol for seed oil, which are in great demand by consumers, so that none of the large retail outlets is, in principle, prepared to go without them, while the second are large retail distribution companies, through which most edible oil is marketed in Spain, which obliges the supplier to have their approval in order to fix minimum retail prices***^{905". (Our emphasis).}

⁹⁰² See paragraphs 11 of the Vertical Guidelines and 28 of the 2022 Vertical Guidelines: "[...] *vertical agreements between SMEs are generally excluded from the scope of Article 101(1) of the Treaty.*

⁹⁰³ Resolution of the CNC of 19 February 2008 in Case 647/08, DISTRIBUCIONES DAMM.

⁹⁰⁴ Resolution of the TDC of 21 June 2007 in Case 612/06, ACEITES 2.

⁹⁰⁵ Pages 14 and 15 of the decision of the TDC of 21 June 2007 in Case 612/06, ACEITES 2.

- (1046) It is clear from the characteristics of APPLE and AMAZON that the present case has more parallels with this second precedent, 612/06, ACEITES 2, where all parties to the agreement (the supplier, but also the distributors) were sanctioned, than with case 647/08, DISTRIBUTIONS DAMM where only the supplier was sanctioned.
- (1047) In this respect, an analysis carried out by the consultancy PaRR was cited in the Proposed Resolution, which found that distributors are also regularly sanctioned in competition proceedings concerning vertical agreements, but that according to AMAZON this could not be validly invoked against them because it was not publicly available. It should be noted in this regard that the CD merely reproduced the following extract for illustrative purposes:

"In principle the upstream company is the one penalised in vertical investigations, but in 29 cases downstream retailers, wholesalers or other distributors were also found liable for breaking the rules and had to pay up"⁹⁰⁶.

It should be noted, moreover, that AMAZON did not negotiate the contracts at issue merely as a distributor for APPLE, but also as an operator on the online marketplace which channels most of the e-commerce web traffic in Spain and net sales of online electronic products in Spain, and which also provides intermediary services to APPLE itself as a distributor of its own products on AMAZON. AMAZON cannot therefore claim to be treated in the same way as small distributors in some vertical restrictions cases where there is a total asymmetry of negotiating power between the parties to the agreement.

⁹⁰⁶ Free translation Article available by subscription at the following link: <https://app.parr-global.com/intelligence/view/prime-3011981>

(1048) AMAZON also argues that the 2022 Vertical Guidelines support the conclusion that AMAZON cannot be held liable for the conduct under investigation⁹⁰⁷ having incorporated the principles of the COTY Judgment in its paragraph 338. The fact remains, however, that, as explained above, the findings in COTY are not applicable to the present case in order to validate the contested clauses, given that APPLE does not operate a selective distribution system (as COTY did) and that there are a number of circumstances which are present in the present case and which were not present in COTY (paragraphs (546) to (563)). Indeed, the 2022 Vertical Guidelines themselves note in paragraph 338 that such circumstances imply, in principle, that restricting the use of online marketplaces should be considered a breach of Article 101 TFEU:

"In selective distribution systems restrictions on the use of online marketplaces are often agreed (as explained above (paragraphs (552) to (554)), such restrictions are permissible because they are consistent with the very objective of selective distribution: i.e., that the products covered by the contract are associated exclusively with distributors who meet certain qualitative requirements, which is not the case where, as in the present case, the manufacturer/supplier chooses to have its products distributed through an open distribution system]. Section 4.6.2 sets out the criteria according to which a selective distribution system may fall outside the scope of Article 101(1) of the Treaty(174) . In cases where the supplier does not enter into an agreement with the online marketplace, the supplier may not be in a position to verify that the online marketplace fulfils the conditions that its authorised distributors must fulfil for the sale of the contractual goods or services. In such a case, a restriction or prohibition on the use of online marketplaces may be appropriate and may not go beyond what is necessary to preserve the quality and ensure the proper use of the contract goods or services [in addition to the fact that we are not in the context of a selective distribution system, APPLE and AMAZON have a direct contractual relationship]. However, in cases where a supplier designates an operator of an online marketplace as a member of its selective distribution system or where it restricts the use of online marketplaces by certain authorised distributors, but not others, or where it restricts the use of an online marketplace, but this supplier uses that online marketplace to sell the contract goods or services, the restrictions on the use of such online marketplaces are unlikely to meet the conditions of appropriateness and proportionality [exactly what is happening in the present case]".

(1049) AMAZON insists, on the other hand, that it was not interested in entering into the disputed clauses, which is the focus of the Compass Report on Amazon's Interest in the Vertical Agreement. However, as has already been explained, this Division considers it proven, and the company itself has repeatedly stated, that it had an interest in obtaining a complete and direct supply of products from APPLE itself and, in order to facilitate this, it was prepared to agree with APPLE on a series of restrictions affecting third party operators. The fact that some of these restrictions may not have been to its liking initially only shows that what it hoped to gain was more economically and strategically interesting for AMAZON than what it was losing, otherwise it would not have accepted them.

⁹⁰⁷ Paragraphs 486 to 490 of AMAZON's submissions on the Proposed Resolution.

(1050) In any event, regardless of AMAZON's interest, it expressly consented to accept the aforementioned clauses and also complied with them, so that the volitional element of fault or negligence of Article 63.1 of the LDC is present and no legal cause of justification can be invoked that would exempt its liability at the time

(1051) This Division therefore considers that AMAZON is liable for the conduct under investigation.

- On ASI's alleged lack of responsibility

(1052) AMAZON argues that the file should be closed as far as ASI is concerned because **[CONFIDENTIAL]**⁹⁰⁸. In particular, it argues that **[CONFIDENTIAL]**.

(1053) AMAZON claims that it **[CONFIDENTIAL]**.

(1054) However, the Division considers that with its submissions, AMAZON has not consistently contested the explanations provided by the investigating authority on this issue.

(1055) Faced with a first submission to the SOF of this type, whereby AMAZON argued that the signature of **[CONFIDENTIAL]**, so that if AMAZON's argument were accepted, it would have to be accepted that the GTA would only have been signed for **[CONFIDENTIAL]**. This would mean that this agreement would not apply in the EU, which does not hold. It has been amply demonstrated from the established facts and the defendants' own explanations that this agreement was also concluded for the EU and applied in that territory.

(1056) In an attempt to refute the above, AMAZON provides, together with its submissions on the Proposed Resolution, what is allegedly **[CONFIDENTIAL]**⁹⁰⁹. This would support AMAZON's position that **[CONFIDENTIAL]**⁹¹⁰.

⁹⁰⁸ Paragraphs 491 to 496 of AMAZON's submissions on the Proposed Resolution.

⁹⁰⁹ Document number 9 submitted together with AMAZON's submissions on the Proposed Resolution (folios 11791 to 11789).

⁹¹⁰ "Counterpart signature for US Region"

Image 31. Extract from the document submitted by AMAZON together with its submissions on the Proposed Resolution "GTA for Western Europe

Counterpart signature page for US Region:

Amazon.com Services, Inc.
SIGNATURE:

PRINT NAME:

PRINT EMAIL:

DATE:

Apple Inc.
SIGNATURE:

PRINT NAME:

PRINT EMAIL: VP Americas and Northeast Asia

EFFECTIVE DATE: 10/31/2018

Amazon EU SARL

By:

Name:

Manager

Title:

Date: October 31, 2018 Signed in Luxembourg

Apple Distribution International

By:

Name:

Director

Title:

Effective Date: 10/31/2018

Source: AMAZON (folio 11786)

(1057) Nor does the document entitled **[CONFIDENTIAL]**⁹¹¹. In this version of the GTA **[CONFIDENTIAL]**⁹¹² **[CONFIDENTIAL]**.

(1058) **[CONFIDENTIAL]**. Specifically, the wording of the GTA, in any of the versions provided by AMAZON, begins by stipulating the following:

[CONFIDENTIAL]⁹¹³ (own translation of the original English version; our emphasis and underlining).

(1059) Therefore, this Division considers that **ASI did sign the GTA**, which, together with the 2018 ARA, also signed by AEU, form the agreements containing the restrictions analysed in the present case and which have produced and continue to produce effects in Spain, **ASI is therefore liable for the misconduct**. This is not undermined by AMAZON's allegation that the Proposed Resolution did not demonstrate ASI's material participation in the implementation of the disputed agreements in Spain⁹¹⁴. Its involvement as a signatory to the GTA in which the disputed clauses are inserted is sufficient to establish its liability.

⁹¹¹ Document number 11 submitted together with AMAZON's observations on the Proposed Resolution (folios 11.791 to 11.807).

⁹¹² **[CONFIDENTIAL]**.

⁹¹³ Version of the GTA provided by AMAZON in response to to R I (folios 502 to 523) and version of the GTA provided by AMAZON together with its submissions on the Proposed Resolution (folios 11791 to 11807): **[CONFIDENTIAL]**.

⁹¹⁴ Paragraphs 497 to 504 of AMAZON's submissions on the Proposed Resolution.

- **On the alleged lack of participation in the infringement by AEC and ASE**

(1060) AMAZON argues that AEC and ASE are not signatories to the contracts, nor would they have materially participated in the infringement, as they are not active in the online retail segment, therefore they should therefore not be fined individually, but should at most be held jointly and severally liable for the fine imposed on AEU⁹¹⁵.

(1061) This Division does not share these views for the following reasons.

(1062) Although AEC and ASE are not listed as signatories to the contracts, the implementation necessarily required the involvement of these companies, according to AMAZON itself. ASE is the company that provides intermediary services to third party sellers⁹¹⁶, which is why it ceased to provide intermediary services to the APPLE resellers expelled from the AMAZON website in Spain as a result of the Brand Gating Clauses. In fact, it was ASE that signed the communication informing the resellers affected by the Exclusion Clauses of the withdrawal from its APPLE product catalogue (see paragraph (1029) above). AEC, on the other hand, is the company responsible for operating the Amazon Store websites in the EU⁹¹⁷, so it had to make the necessary changes to the Amazon.es website in order to enforce the Brand Gating and Advertising Clauses. Note in this regard that, although AEC and ASE do not operate as sellers in the segment of online retailing of electronic products, they do have the ability to affect this market with their conduct referred to above.

(1063) On the other hand, as explained and according to settled case-law, neither the fact that an entity has not participated in all the constituent elements of collusive practice nor the fact that it has played only a minor role precludes it from being held liable for an infringement of the antitrust rules⁹¹⁸ which include the conduct of which it was the perpetrator. Thus, the fact that ASE and AEC did not participate in all the elements of the conduct under investigation does not prevent the infringement which is the subject of the present proceedings from being imputable to them as a whole.

⁹¹⁵ Paragraphs 505 to 508 of AMAZON's submissions on the Proposed Resolution.

⁹¹⁶ Response to AMAZON IR I, paragraph 6 (folio 4599).

⁹¹⁷ Response to AMAZON IR I, paragraph 7 (folio 4600).

⁹¹⁸ For all, see CJEU Cases C-204/00 P, C-205/00 P, C-211/00 P, C-213/00 P, C-217/00 P and C-219/00 P, ECLI:EU:C:2004:6, para 86.

(1064) Finally, it should be noted that it is common to find cases in which different companies of the business or economic unit committing an antitrust infringement are sanctioned (AMAZON in this case)⁹¹⁹.

5.4.4.1.2.2. APPLE

5.4.4.1.2.2.1. Liability of the directly participating legal entity

- (1065) Taking into account the established facts and the provisions of Articles 61 and 62.3.a) of the LDC⁹²⁰, it is considered that the anti-competitive conducts described in section 4 of this Decision are imputable to APPLE from at least 31 October 2018 at least until the closure of the investigation phase of these proceedings, due to its participation in a single and continuous infringement consisting of the adoption and implementation of the Exclusion or Brand Gating Clauses, the Advertising Clauses and the Marketing Limitation Clauses, which have as their object the restriction of competition in the retail market, and in the market for online retailing of electronic products in Spain.
- (1066) With regard to the seriousness of the conduct, for the same reasons as explained with respect to AMAZON, the infringements imputed to APPLE are considered to be of a serious nature in accordance with Article 62.3.a) of the LDC in its wording prior to the latest amendment introduced in that law (paragraph (1024)).
- (1067) The case was initially opened against three legal entities of the APPLE group: (i) Apple Distribution International Ltd (or ADI); (ii) Apple Retail Spain, S.L. (or ARS); and (iii) Apple Marketing Iberia, S.A. (or AMI); and on 22 June 2022, the opening was extended with respect to (iv) Apple, Inc (or AINC).

⁹¹⁹ See inter alia cases S/0013/20 AUDAX RENOVABLES and S/DC/0598/15 ELECTRIFICACIÓN Y ELECTROMECÁNICA FERROVIARIAS.

⁹²⁰ In accordance with the wording prior to the amendment introduced into the LDC by Royal Decree-Law 7/2021, of 27 April, on the transposition of European Union directives in the areas of competition, prevention of money laundering, credit institutions, telecommunications, tax measures, prevention and repair of environmental damage, posting of workers in the provision of transnational services and consumer protection.

- (1068) As explained above, ADI and AINC are the legal entities signing the GTA on behalf of APPLE; whereas, the 2018 ARA is signed only by ADI.
- (1069) It is furthermore stressed that, according to settled case-law, the fact that a business has not participated in all the constituent elements of collusory practice or has played only a minor role does not affect the finding of an infringement against it⁹²¹.
- (1070) In this respect, the fact that ADI and AINC have not participated in all elements of the conduct under investigation does not prevent the imputability to them of the infringement in question. What is relevant for this charge to apply is that both legal entities actively contributed to the implementation of the conduct under investigation, which it is proven that they did. ADI and AINC must therefore be held liable for the infringement.
- (1071) Therefore, the legal entities signing the contracts on behalf of APPLE and, consequently, held liable as perpetrators of the single and continuous infringement analysed in this Decision are: ADI and AINC. The participation by these entities in the conduct under investigation, which relates only to the AMAZON Website in Spain, should be understood to have occurred from the entry into force of the contracts (i.e., 31 October 2018) until at least the closure of the pre-trial phase.
- (1072) With regard to ARS and AMI, APPLE stated that: (i) they do not provide services related to the Amazon shop in Spain, www.amazon.es; (ii) they do not provide advertising services on Amazon's shop in Spain, www.amazon.es; and (iii) they do not provide services in connection with the implementation or enforcement of the **[CONFIDENTIAL]** of the GTA, nor has any direct evidence of ARS' and AMI's involvement in the conduct been identified in the information on the case⁹²².
- (1073) This Division agrees with the CD that the direct participation of ARS and AMI in the conduct cannot, therefore, be proven with the rigour required under penalty law, and the proceedings in the present case should be closed with regard to ARS and AMI, and ADI and AINC should be declared to be the signatories of the agreements investigated by APPLE.

⁹²¹ For all, see CJEU Cases C-204/00 P, C-205/00 P, C-211/00 P, C-213/00 P, C-217/00 P and C-219/00 P, ECLI:EU:C:2004:6, para 86.

⁹²² See response to APPLE IR III (folios 4463-4465).

5.4.4.1.2.2.2. Joint and several liability of the parent company

- (1074) EU case law⁹²³ has consistently held that in cases where a parent company holds 100% of the share capital of its subsidiary, there is a “*iuris tantum*” presumption that the parent company exercises decisive influence over the conduct of its subsidiary.
- (1075) According to the information in the file, AINC is the ultimate parent company of the APPLE group and has an indirect shareholding of **[CONFIDENTIAL]**% in ADI⁹²⁴. Consequently, the above presumption applies and AINC is held jointly and severally liable for the conduct imputed to ADI in accordance with article 61.2 of the LDC.

5.4.5. Conclusion of the legal assessment

- (1076) For all the foregoing reasons, the Exclusion or Brand Gating Clauses, the Advertising Clauses and the Marketing Limitation Clauses are considered to constitute a single and continuous infringement of Articles 1 CDL and 101 TFEU, which have the object (and in the case of the former, also the effect) of reducing, restricting and/or limiting intra-brand and inter-brand competition of the APPLE branded products on the AMAZON website in Spain, from which they would have benefited:

- On the one hand, for **APPLE**:
 - i. The Exclusion or Brand Gating Clauses would have resulted in a substantial increase in wholesale sales of its products to AMAZON, a greater control of its distribution chain, without the need to change its agreements with the distributors concerned, which, in turn, would have resulted in a reduction of intra-brand competition (i.e., between authorised and unauthorised distributors) on AMAZON's Websites and specifically in Spain, by creating discrimination between them, limiting or controlling the distribution of their products on the market, and partitioning the internal market; and

⁹²³ Judgments of the CFI of 15 June 2005 in Case T-71/03 Tokai Carbon and Others v Commission; in Case T-30/05 Prym Consumer v Commission of 12 September 2007; of 12 December 2007 in Case T-112/05 Akzo Nobel and Others v Commission; of 18 December 2008 in Case T-85/06 General Química v Commission; of the CJEU in Case C-97/08P Akzo Nobel NV and Others v Commission; Opinion of Advocate General Kokott of 23 April 2009; of the ECJ of 10 September 2009, Case C-97/08, (Case T-112/05); of 30 September 2009 of the CFI in Cases C-520/09 P Arkema SA v Commission and C-521/09 P Elf Aquitaine v Commission; of the EGC of 16 June 2011 in Case T-196/06 and of the ECJ of 29 September 2011, C-521/09 P.

⁹²⁴ See APPLE's response to IR VI (folio CONFIDENTIAL 6343).

- ii. The Advertising Clauses and the Marketing Limitation Clauses succeeded in reducing inter-brand competition (i.e., that which other competing brands exercise on their products) on AMAZON's Website in Spain.
- On the other hand, in exchange for accepting the Brand Gating Clauses, the Advertising Clauses and the Marketing Limitations Clauses demanded by APPLE, and at the expense of giving up having a larger number of resellers of APPLE branded products on its Website in Spain, **AMAZON** secured for itself:
 - i. A wider range of APPLE products **[CONFIDENTIAL]**;
 - ii. An increase in its revenues (due to the concentration of sales of APPLE branded products within AMAZON itself as a result of the resellers affected by the aforementioned agreements no longer being authorised to sell APPLE branded products on the AMAZON website).

5.5. Other allegations

5.5.1. On the alleged failure to observe the principles and guarantees of the sanctioning procedure

- (1077) AMAZON argues in its submissions on the Proposed Resolution that the CD has committed various violations of the guarantees and principles that should govern the handling of disciplinary proceedings, which should lead to the closure of the proceedings against it as part of the case⁹²⁵.
- (1078) AMAZON argues, firstly, that the CD would have initiated the procedure several months later than other national competition authorities despite admitting having become aware of the practices under investigation through the European Competition Network or ECN. In particular, AMAZON complains that the CD would have become aware of the disputed practices through the ECN prior to the initiation of the procedure by the Italian competition authority (i.e., before 14 July 2020) and that it would therefore have taken at least seven months to initiate its preliminary investigation (on 12 February 2021) and almost a year to formally initiate the procedure without any explanation of the reasons for this delay.

⁹²⁵ Paragraphs 567 to 590 of AMAZON's submissions on the Proposed Resolution.

(1079) In reply to the above, firstly, AMAZON's speculative calculations that it would have taken the CD at least seven months to initiate the investigation are incorrect. The investigating body only became aware of the existence of the agreements through the ECN network on 20 November 2020, so that only a little more than two months would have elapsed until the opening of the preliminary proceedings on 12 February 2021 and not seven as AMAZON claims. In any case, there is no legally established time limit between knowledge of the *notitia criminis* and the formal initiation of preliminary proceedings, nor do the CNMC's actions have to comply with the time limits used by other national competition authorities whose material and human resources, as well as their respective internal protocols, differ from those of the CNMC.

(1080) With regard to the period between the opening of preliminary proceedings on 12 February 2021 and the formal opening of proceedings on 30 June 2021, not even five months elapsed, which cannot be considered excessive. In any case, it is recalled that, as recognised by case law, the pre-trial period is not subject to a specific time limit either. The Supreme Court has stated in this regard that:

"However, it cannot be accepted that the duration of the preliminary phase to the initiation of proceedings can be cumulated with the maximum periods applicable to the sanctioning procedure itself, which is the only one subject to the expiry requirements deriving from the provisions of Article 56 of Law 16/1989 on the Defence of Competition. Insofar as those preliminary or preparatory measures serve the purpose that really justifies them, i.e., to gather the initial data and evidence that serve to judge whether it is appropriate to proceed to disciplinary proceedings, and are not distorted by becoming a surreptitious alternative to the latter, no rule subjects them to a specific time limit and, therefore, they are not subject to the statute of limitations"⁹²⁶ (our emphasis and underlining).

(1081) Nor can it be considered, in any way, in accordance with the aforementioned jurisprudential doctrine, that there has been a denaturalisation of the phase of reserved information, taking into account that, during the aforementioned period of barely 5 months, the CD carried out a series of actions aimed at gathering the necessary elements of judgment to decide on the relevance of the initiation. These actions include the sending of information requests to the Italian competition authority⁹²⁷ and to the defendants⁹²⁸ on 8 March and 26 May, as well as the analysis of the replies received on 27 April from the Italian authority⁹²⁹ and on 16 June from APPLE⁹³⁰ and AMAZON⁹³¹.

⁹²⁶ STS of 26 December 2007, rec. 1907/2005, ECLI:EN:TS:2016:1962, FD° 6°.

⁹²⁷ Folio 220.

⁹²⁸ Folios 221 to 227 and 243 to 248 to the AMAZON group and the APPLE group respectively.

⁹²⁹ Folios 31 to 219.

⁹³⁰ Folios 660 to 1012.

⁹³¹ Folios 330 to 645 and 1020 to 1066.

- (1082) After criticising in its submissions the allegedly excessive nature of the period between the initiation of the pre-trial proceedings and the formal initiation, AMAZON then complains that the period between the receipt of its reply of 16 June to an information request (to which reference has just been made) and the formal initiation of the procedure on 30 June 2021 would be too short⁹³². In response to the above, once again, it should be pointed out that there are no legally established deadlines for this purpose. On the other hand, and for the sake of completeness, AMAZON's assessment that, within 10 working days, the CNMC could not process, analyse and draw legal conclusions from the response to the information request in question is purely speculative, which would be indicative of the fact that the CD processed the information request as part of a preliminary investigation despite the fact that it had already decided to initiate disciplinary proceedings⁹³³.
- (1083) AMAZON also argues that its rights of defence have been violated in that the exact markets were not defined despite the fact that the CD based its theory of harm on AMAZON's size⁹³⁴. Those arguments are also irrelevant for the reasons already stated in paragraph 3 (in particular in paragraphs (155) to (164), (176) to (221) and (230) to (243)). It should be noted that the market for the provision of intermediation services on online marketplaces to third party sellers, in which the conduct under investigation takes place, has been defined, as well as the segment of the online sale of electronic products where takes place, without prejudice to the fact that it is not considered necessary to close the exact definition of this second market. Even if AMAZON disagrees⁹³⁵, this is in accordance with the settled case law of both the CJEU and the national courts that *"in the context of Article 101(1) TFEU, no prior definition of the relevant market is required where the agreement at issue has an anti-competitive object in itself"*⁹³⁶.

⁹³² Paragraphs 572 to 577 of AMAZON's submissions on the Proposed Resolution.

⁹³³ Paragraph 576 of AMAZON's submissions on the Proposed Resolution.

⁹³⁴ Paragraphs 578 and 581 of AMAZON's submissions on the Proposed Resolution.

⁹³⁵ Paragraph 579 of AMAZON's submissions on the Proposed Resolution.

⁹³⁶ Judgment of the General Court of 28 June 2016 in Case T-208/13 - Portugal Telecom v Commission, paragraph 176.

- (1084) Nor can AMAZON's arguments concerning the alleged failure to state reasons for the proposed fine and the application of the prohibition on contracting with the public administration be accepted⁹³⁷. On the one hand, the Proposed Resolution provides exhaustive reasons for the application to the case of the criteria for the quantification of fines provided for in the LDC⁹³⁸. On the other hand, with regard to the prohibition to contract, as explained in section 5.7, in the words of the Supreme Court it is "*a limitation tied to the imposition of a firm sanction for a serious infringement in certain matters*"⁹³⁹ which includes distortion of competition. Once this requirement has been met, i.e., the imposition of a serious sanction under antitrust law, as is the case here, it is not necessary to provide additional elements of motivation to declare the applicability of the prohibition provided for in article 71.1 b) of Law 9/2017, on Public Sector Contracts. This is without prejudice to giving reasons, at a later stage, for the specific extent and duration of the prohibition, taking into account the circumstances of each individual case.
- (1085) AMAZON argues, on the other hand, that the Draft Resolution would have included new "factual allegations" in addition to those included in the SOF⁹⁴⁰. The truth, however, is that the only thing that the investigating body does in the Proposed Resolution is make use of certain data to respond to submissions to the SOF made by the defendants (in particular by AMAZON itself) in relation to the market in which the conduct under investigation took place and the sector in which it had its effects, as well as AMAZON's position therein. The defendants have had the opportunity to refute this information in their allegations to the Proposed Resolution without, in any case, the facts subject to legal assessment and reproach for penalties contained in the SOF having been altered.
- (1086) Finally, the argument that the Proposed Resolution changed its approach to AMAZON's contention that acceptance of the Exclusion Clauses would constitute a *conditio sine qua non* for access to the full catalogue of APPLE products cannot be accepted either⁹⁴¹, because it lacks bargaining power in respect of APPLE. Contrary to the defendant's claim, the CD does not endorse such an approach in the SOF, but expressly states that this is AMAZON's position⁹⁴².

⁹³⁷ Paragraphs 582 to 583 of AMAZON's submissions on the Proposed Resolution.

⁹³⁸ Paragraphs 1133 to 1150 of the Proposed Resolution.

⁹³⁹ STS of 14 September 2021, rec. 6372/2020, FD°3°.

⁹⁴⁰ Paragraphs 584 to 587 of AMAZON's submissions on the Proposed Resolution.

⁹⁴¹ Paragraphs 589 to 590 of AMAZON's submissions on the Proposed Resolution.

⁹⁴² Paragraph 260 of the SOF: "*Thus, according to AMAZON this was a "conditio sine qua non" imposed by APPLE in order to grant AMAZON a full supply of all APPLE's products*" (our emphasis). Paragraph 410 of the SOF: "*[...] had to accept the manufacturer's proposal because it was, in the company's own words, a 'conditio sine qua non' imposed by APPLE in order to grant AMAZON a full supply of all APPLE products 357 (and, among them, APPLE's most demanded products, i.e. [CONFIDENTIAL])*" (our emphasis).

5.5.2. On the request for a hearing

- (1087) Both AMAZON and APPLE have requested an oral hearing.
- (1088) In this respect, it should be pointed out that the oral hearing before the Council Chamber, provided for in Article 51.3 of the LDC, is a discretionary power of the Council, which may agree to it *"when it considers it appropriate for the analysis and trial of the subject matter of the case"* (art. 19.1 RDC).
- (1089) This Division, taking into account the optional nature of the oral hearing and the resounding burden of proof in the case file, has decided not to grant the request for a hearing as it does not consider it necessary for the assessment of the case, without this refusal giving rise to any kind of defencelessness.

5.5.3. On the request for the taking of evidence

- (1090) Article 51.1 of the LDC provides that the Council of the CNMC may, on its own initiative or at the request of an interested party, order the taking of evidence other than that already taken in the preliminary investigation phase before the CD, as well as the carrying out of complementary actions in order to clarify matters necessary for the formation of its judgment when making a decision.
- (1091) This Division considers it appropriate to include in the file all the new documents provided by AMAZON and APPLE together with their respective written submissions on the Proposed Resolution, although these documents do not add value to the information already in the file and on the basis of which the facts set out in this settlement have been considered to be proven and have been assessed.
- (1092) As regards APPLE's request for information requests to be addressed to AMAZON in relation to a number of AARs and Retailers and to subsequently require some of them to find out why they are not selling APPLE products on Amazon.es, this Division considers it unnecessary. As indicated in relation to the request for a hearing, this Division considers that the necessary elements are present in the case file to consider the facts accredited and to conclude on their legal assessment, without the need to proceed with the aforementioned requests.

5.5.4. On the request for confidentiality

- (1093) APPLE and AMAZON have expressly requested the confidentiality of their written submissions on the Proposed Resolution and certain documents appended thereto on the grounds that they contain commercially sensitive information the disclosure of which could cause them irreparable harm. Both companies have provided non-confidential versions of their respective submissions and appendices which they consider confidential.
- (1094) This Division, having analysed the submissions and the documents attached thereto, considers that they contain commercial and strategic data of the companies concerned which merit the consideration of confidential information. The submissions and appendices cited by the companies are therefore declared confidential and the non-confidential versions of them provided by the defendants are included in the file. It is recalled, however, that the CJEU has held that a period of five years is sufficient for commercial information, in principle, to lose its confidential status⁹⁴³. Therefore, data dating prior to July 2018 will generally not be considered confidential.
- (1095) APPLE and AMAZON also request that the information provided in response to the request for information of the Competition Division on turnover of 24 May 2023 be declared confidential, both as regards the turnover figures of the contested companies in the market affected by the conduct under investigation and their total turnover in the financial year 2022.
- (1096) With regard to the latter data on the total turnover of the companies concerned, this Division considers that the aforementioned information, in addition to being of a public nature, given that it is information which is or will be recorded in the relevant public registers, is information which is necessary for the calculation of the sanction and reflects compliance with the provisions of Article 63 of the LDC, which makes its calculation conditional on the percentage of the total turnover of the business in the previous year, and it is therefore not appropriate to declare its confidentiality. Market turnover data are also not considered confidential when they relate to the total duration of the infringement as, given their aggregated nature, they do not allow the determination of the specific figures per year which are considered confidential.

⁹⁴³ See e.g. Judgment of the GC of 28 January 2015 in Case T-341/12 Evonik v. Commission (ECLI:EU:T:2015:51) and the case law cited in paragraph 84 thereof. See also in this regard the [Guide on the treatment of confidential information and personal data in antitrust proceedings of Law 15/2007 published by the CNMC on 4 June 2020](#).

5.6. Determination of the Sanction

5.6.1. Criteria for the imposition of a fine

(1097) It has been established that there has been a serious infringement of Articles 1 LDC and 101 TFEU, consisting in the adoption of the Exclusion or Brand Gating Clauses, the Advertising Clauses and the Marketing Limitation Clauses, which is punishable by a fine of up to 5% of the total worldwide turnover of the infringing businesses in the financial year immediately preceding the year in which the fine is imposed, i.e., 2022 (art. 63.1.c of the LDC).

(1098) According to the information collected, the turnover of the infringing companies in the year 2022 is as follows:

Table 41. Total turnover

Infringing entities	Total turnover in 2022 (€)
Apple Distribution International, Ltd.	90,686,299,724
Apple, Inc.	362,545,163,200
Amazon Services Europe S.Á.R.L.	23,531,148,726
Amazon Europe Core S.Á.R.L.	12,929,686,368
Amazon EU S.Á.R.L;	50,896,531,935
Amazon.com Services, Inc. ⁹⁴⁴	240,111,000,000

(1099) In the Spanish legal system, the determination of sanctions should be made on the basis of the criteria of Article 64 of the LDC⁹⁴⁵. It should be applied in accordance with the jurisprudential doctrine established by our Supreme Court⁹⁴⁶.

(1100) Where there is a need for joint application of national and European Union rules, antitrust sanctions should be determined in such a way as to ensure effective and uniform application of European competition law⁹⁴⁷. As provided for in the ECN+ Directive, national competition authorities *"should have the power to impose effective, proportionate and dissuasive sanctions for businesses and associations of businesses"*⁹⁴⁸.

⁹⁴⁴ Now Amazon.com Services LLC

⁹⁴⁵ Pursuant to Article 5 of Regulation 1/2003, the imposition of sanctions shall be carried out by the competition authorities of the Member States in accordance with *'their national law'*.

⁹⁴⁶ In particular, Judgment of the SC of 29 January 2015, appeal 2872/2013 (ECLI:ES:TS:2015:112).

⁹⁴⁷ See the assessment in this respect in Recital 1 of Regulation 1/2003.

⁹⁴⁸ See recital 40 of Directive (EU) 2019/1 of the European Parliament and of the Council of 11 December 2018 (OJ L 11, 14.1.2019, p. 3/33). This indication has also been taken up by the case law of the Supreme Court: for example, see the judgment of 24 February 2017, appeal 2872/2013 (ECLI:ES:TS:2015:112).

- (1101) Sanctions should be determined on the basis of "the duration and gravity of the infringement". In assessing the gravity of the conduct, consideration may be given to *"the nature of the infringement, the combined market share of all the businesses involved, the geographic scope of the infringement, the fact that the infringement has been implemented, the value of the sales of goods and services of the business to which the infringement directly or indirectly relates, and the size and market power of the business involved"*⁹⁴⁹.
- (1102) In this process of setting penalties, the Council of the CNMC *"fulfils its obligation to state reasons when it indicates in its decision the elements of assessment which enabled it to determine the gravity of the infringement and its duration, without being obliged to indicate the numerical data relating to the method of calculating the fine"*⁹⁵⁰.
- (1103) In this particular case, the CNMC's Competition Division has to start by determining what the penalty rate applicable to the turnover of the previous year should be within the range up to a maximum of 5%.
- (1104) First, as regards the characteristics of the relevant market (Art. 64.1.a), the infringement has taken place on the Spanish market for the online retail sale of electronic goods in Spain, with particular incidence on the marketing of APPLE branded products in the online shop operated on the AMAZON website.
- (1105) With regard to the size of the affected market (Art. 64(1)(a)), the parties' turnover in the affected market for APPLE electronics online retail during the period covered by the infringement is as follows:

⁹⁴⁹ See recital 47 of the ECN+ Directive.

⁹⁵⁰ Judgment of the CJEU of 22 October 2015, Case C-194/14 P *AC-Treuhand AG v European Commission*, (ECLI:EU:C:2015:717), cited, among many others, by the Judgment of the SC of 7 June 2021, appeal 5428/2020 (ECLI:ES:TS:2021:2439).

Table 42. Turnover in the affected market

Infringing entities	Turnover in the affected market
Apple Distribution International, Ltd.	894,137,254
Apple, Inc.	-
Amazon Services Europe S.Á.R.L.	-
Amazon Europe Core S.Á.R.L.	-
Amazon EU S.Á.R.L;	535,719,266
Amazon.com Services, Inc.	-

- (1106) The market share of the businesses concerned (Art. 64(1)(b)) on the market for online retail sales of electronic products in Spain, taking into account the information in the file, is between **[35-40]%** and **[35-40]%** for the AMAZON store and between **[5-10]%** and **[5-10]%** for the APPLE online store.
- (1107) As regards the geographic market affected by the infringement (art. 64.1.c), the conduct has taken place in the Spanish market, affecting intra-Community trade.
- (1108) The duration of the conduct (Art. 64.1.d) runs from 31 October 2018, with the conclusion and entry into force of the GTA and the 2018 ARA, until at least the closure of the pre-trial phase, which took place on 24 February 2023.
- (1109) The conduct, as discussed in section 5.4.1.1.2.2.2 (paragraphs (636) to (809)), has had effects on the affected market (Art. 64.1.e).
- (1110) No aggravating or mitigating circumstances provided for in Articles 64(2) and 64(3) have been found to exist.
- (1111) Considering all these factors, this Division must determine the appropriate sanction in this case.

5.6.2. Fine imposed

- (1112) The set of factors set out above - gravity of the infringement, characteristics and size of the market concerned, duration, geographic scope of the conduct, participation of the infringing entities in the conduct, effects, absence of mitigating and aggravating factors - enables the Division to determine the type of sanction to be applied to the offending entities and the penalties corresponding to those types of sanction:

Table 43. Type of penalty

Business	Type of penalty (%)
Apple Distribution International, Ltd.	4.1%
Apple, Inc.	2.1%
Amazon Services Europe S.Á.R.L.	2.1%
Amazon Europe Core S.Á.R.L.	2.1%
Amazon EU S.Á.R.L.	3.3%
Amazon.com Services, Inc.	2.1%

(1113) These types of sanctions are appropriate to the gravity and characteristics of the infringement. However, the case law requires verification that the sanction imposed is not disproportionate in relation to the actual scale of the offending business's conduct and the other factors that are relevant in each individual case.

(1114) For any assessment of the proportionality of the sanction it is necessary to use as a benchmark a percentage of turnover in the relevant market during the infringement which reflects the potential benefit derived from the conduct and to apply to that figure an incremental factor to ensure deterrence. This estimate is used as a reference value, above which the fine is considered likely to be disproportionate. In this case, this check shows that the fines that would be imposed on APPLE and AMAZON for the infringement, resulting from applying the penalty rate to the total turnover of each infringing business in 2022, the risk being disproportionate to the actual size of the infringement, and should therefore be adjusted to ensure their proportionality.

(1115) In the case of businesses which have no turnover in the affected market but whose participation in the infringement has been established, a flat-rate penalty is defined to reflect their necessary contribution to the commission of the infringement, the different characteristics of that participation in the conduct, the multi-product and/or multi-service nature of these business, and the difference in total turnover of each of them. In any case, the amounts set for these businesses are far from disproportionate in relation to the application of the penalty rate set on the total turnover of the offenders, with none of them exceeding 0.01% of their turnover.

(1116) Following this final proportionality check, the Division concludes that the proportionate and dissuasive sanctions to be imposed on the offending entities are as follows:

Table 44. Final fine

Business	Fine
Apple Distribution International, Ltd.	128,640,000
Apple, Inc.	15,000,000
Amazon Services Europe S.Á.R.L.	2,000,000
Amazon Europe Core S.Á.R.L.	1,000,000
Amazon EU S.Á.R.L.	37,510,000
Amazon.com Services, Inc.	10,000,000

5.6.3. Arguments against the sanction imposed

(1117) AMAZON argues that the Proposed Resolution has not duly justified the fines imposed on its businesses, limiting itself to citing the criteria of Article 64 of the LDC. This would, according to AMAZON, preclude its ability to discern the CD's reasons for setting the proposed fines and to defend itself adequately. In the same line of argument, APPLE considers that the sanctions proposed in the Proposed Resolution are completely arbitrary and lack any reasoning and that the CD has not followed the Provisional Indications of the CNMC (**Provisional Indications**)⁹⁵¹ for their determination.

(1118) The submissions concerning the alleged lack of reasoning and opacity of the determination of the penalty should be rejected. The Proposed Resolution devotes its paragraph 7 to detailing the determination of the sanctions that the CD proposes to impose. This section explains the assessment of each of the criteria of article 64.1 of the LDC, specifying the seriousness and characteristics of the infringement and the participation of each company in it. Each business can therefore know what assessment the CD has made of its conduct and what elements lead it to propose a particular sanction. In this regard, it should be stressed that the lack of detail on the quantification of the valuations of the different criteria used does not in any way imply a lack of reasoning, as the case-law has indicated. See in this regard the Judgment of the Court of Justice of the European Union of 22 October 2015 (Case AC-Treuhand v Commission), which reads as follows:

⁹⁵¹ Provisional indications of the National Markets and Competition Commission (Comisión Nacional de los Mercados y la Competencia) on the determination of sanctions derived from infringements of articles 1, 2 and 3 of Law 15/2007, of 3 July, on the Defence of Competition, and articles 101 and 102 of the Treaty on the Functioning of the European Union, available at the following link: <https://www.cnmc.es/node/372212>

"In setting the amount of the fine in the event of an infringement of the competition rules, the Commission fulfils its obligation to state reasons when it indicates in its decision the elements of assessment which enabled it to determine the gravity of the infringement and its duration, without being obliged to indicate the numerical data relating to the method of calculating the fine." In the light of the foregoing, the Division considers that the arguments relating to the failure to state reasons for the proposed penalty are inadmissible. [...]"

- (1119) Nor is APPLE correct when it states that the Provisional Indications have not been followed, since the Proposed Resolution follows this guide in determining the types of penalties based on the criteria of Article 64.1 of the LDC - taking into account both the gravity and general characteristics of the conduct and the individual role of each company in it - and then carrying out a proportionality check to ensure that the fines resulting from the application of the sanctioning rates set are not excessive.
- (1120) Both AMAZON and APPLE argue that the conduct could in any event not be considered as a very serious infringement, but that it is a serious infringement and therefore a penalty of up to 5% of the total turnover may be imposed.
- (1121) With regard to the allegation that this is a serious and not a very serious infringement, it is not appropriate to make any assessment since at no time does the Proposed Resolution state that it is a very serious infringement, nor do any of the types of sanction exceed 5%.
- (1122) AMAZON agrees with the affected market as defined in the Proposed Resolution, but believes that there is a numerical error since AEU's turnover in the affected market during the infringement would have been €363,224,740 rather than the €375,580,522 reported. APPLE also considers that the turnover in the affected market reported in the Proposed Resolution is not correct, since the company did not only sell Apple products online, but also products manufactured by third parties (such as peripheral devices or other accessories). It provides the percentage that third-party products represent of its total online sales for each year. Despite the fact that these percentages are very small, ranging from [0-5]% to [0-5]% depending on the year, APPLE believes that by deducting them from the turnover in the affected market, the fine should be reduced by 20%. However, APPLE believes that the turnover in the electronics retail market - not limited to Apple products - should have been used for AMAZON, so that AMAZON's market volume would be much higher and APPLE's relative position in the conduct would be diminished.

- (1123) With regard to AMAZON's claims on the affected market turnover data, the figure that AMAZON considers should be used is not acceptable. That figure corresponds to the years 2019 to 2021, but AMAZON ignores the fact that it was asked for the data from 2018, but did not provide it. Therefore, the CD made an estimate of the affected market turnover for 2018, which results in the total figure used in the Proposed Resolution.
- (1124) As regards the figures provided by APPLE on its sales of third party products, the claim should be accepted and its affected market turnover figure during the infringement should be amended accordingly. The figure used as the affected market turnover for the determination of the penalty in this decision corresponds to the figure provided by APPLE in its response to the last information request, which excludes sales of products from third party manufacturers.
- (1125) APPLE's claim on the appropriateness of using the turnover in the relevant market of all online sales of electronic products for AMAZON cannot be accepted. AMAZON sells all kinds of electronic products from a large number of manufacturers, so using its turnover in this segment would overstate AMAZON's weight in the events, leading to an individualisation of the sanction that would not reflect the reality of the infringement at all.
- (1126) AMAZON also argues that its conduct is very limited in scope since the offline market should have been included and AMAZON's position should have been analysed by assessing intra-brand competition, also taking into account that before the Agreement, Apple's sales on Amazon.es represented around 3% of the sales of Apple products in Spain.
- (1127) However, with this claim, which argues for the need to include the offline market in the affected market, AMAZON contradicts itself. In previous submissions, the company agrees that the relevant market used for the sanction is the online retailing of Apple products, whereas in the submission in the previous paragraph⁹⁵² it argues that the offline market should have been included. AMAZON cannot claim that the affected market is one for billing in the affected market and another for the determination of its market share or the relevance of the conduct, depending on its interests in each case. This argument is therefore inadmissible.

⁹⁵² Folio 11436.

- (1128) With regard to the duration of the conduct, both AMAZON and APPLE argue that its beginning should be set at 4 January 2019, the date from which the disqualified sellers had to stop selling on the Amazon Store. Furthermore, the defendants argue that the end of the conduct should be set in November 2021, when APPLE decided to allow all of its EU Authorised Resellers to resume selling on the Amazon Store.
- (1129) The CD has already rejected this claim, explaining that the agreements were signed and became effective on 31 October 2018, as of which date no new reseller could be admitted to the Amazon Store. This Division agrees with the position of the Proposed Resolution. Similarly, it is considered that the conduct has not ended since the disputed clauses have remained in force, at least until the end of the investigation phase of the present proceedings. In particular, NARs were still prevented from selling APPLE products through AMAZON as a result of the Brand Gating Clauses and third party sellers marketing competing APPLE products were still restricted from bidding for certain advertising space on this online marketplace as a result of the Advertising Clauses.
- (1130) Furthermore, AMAZON considers that the absence of anti-competitive effects must be taken into account and APPLE adds that they would in any event have been very limited.
- (1131) However, the conduct had an effect. In the course of the investigation, it has been demonstrated that the Exclusion Clauses led to at least the following anti-competitive effects: i) a significant reduction in the number of resellers of APPLE products on AMAZON's online market; ii) the loss of an important sales channel for NARs; iii) the concentration of sales of APPLE-branded products on AMAZON itself within its online market; iv) a reduction in the number of resellers from other EU countries on the AMAZON Website in Spain; and (iv) an increase in the relative prices paid by consumers for APPLE products on the AMAZON Website in Spain.

- (1132) Moreover, AMAZON argues that the Proposed Resolution did not take into account the existing attenuating circumstances, which would justify the non-imposition of a fine or, at most, a very limited fine, and which according to the business charged, would correspond to: i) the novelty of the infringement and the lack of precedents that would conclude that the vertical agreement could be considered anti-competitive; ii) the legitimate aim of the vertical agreement and the resulting pro-competitive effects; iii) **[CONFIDENTIAL]** and iv) the actions carried out to put an end to the alleged infringements. For its part, APPLE agrees that the CD erred in failing to assess the existence of attenuating circumstances such as: i) the performance of actions to bring the infringement to an end; ii) the non-enforcement of the conduct; iii) that the alleged infringement would have been committed through negligence; iv) the novelty of the infringement; and v) the concern for APPLE's brand and reputation. Furthermore, APPLE also argues that a penalty should not be imposed in this case because there has been no negligent or wilful misconduct, or at least such misconduct has not been established by the Proposed Resolution.
- (1133) Contrary to what the parties have argued, this Division considers that there are no circumstances in this case that should be taken into account as mitigating circumstances, with a view to quantifying the penalties, within the meaning of Article 64.3 of the LDC.
- (1134) Neither the law nor the case-law establishes that the alleged novelty of the infringement should be taken into account as a mitigating factor and, in any event, it has already been explained that what is decisive is not the specific form of an anti-competitive agreement, but the type of restriction resulting from it, similar restrictions having been penalised in the past (paragraphs (474), (479), (504), (504), (512), (522 to (524), (529) to (530), (815) or (895)). Nor do the alleged legitimate aims of the conduct under investigation constitute a mitigating circumstance provided for by the LDC or by decisional or jurisprudential practice, especially in view of the fact that, as has also been amply explained, the restrictions agreed went beyond what was necessary to achieve the alleged legitimate aims and that the defendants were pursuing their own benefit with the inclusion or acceptance of such clauses.
- (1135) With regard to the alleged pro-competitive effects, it has already been stated that these stem primarily, if at all, from the direct supply of the APPLE product catalogue to AMAZON and not from the clauses considered to be anti-competitive. With regard to the **[CONFIDENTIAL]**, this does not constitute a mitigating circumstance either, without prejudice to this being taken into account when assessing the specific gravity of the conduct of which it is accused. **[CONFIDENTIAL]** (paragraph (308)), they furthermore show that the parties were aware of the anti-competitive nature of the same and that they did not act out of mere negligence, and this circumstance does not constitute a mitigating circumstance for the purposes of the LDC either. Finally, it cannot be considered that the attenuating circumstance referred to in Article 64(3)(c) consisting of "*actions which bring the infringement to an end*" should be applied, given that APPLE and AMAZON had not yet brought the infringement sanctioned to an end at the time when the investigation phase of the present proceedings was closed.

- (1136) APPLE also considers that this Division cannot impose the highest fine on a business under competition law in the history of Spain, when it has imposed lower penalties on companies which committed more serious infringements (such as price-fixing cartels or the sharing of public tenders), over significantly longer periods of time and affecting much larger volumes of business. It gives as examples the sanctions in the Civil Works 2 and AIO cases.
- (1137) In reply to the above, it should be noted, first, that APPLE's comparison of fines by reference to the absolute amounts in Euros of the respective fines is inappropriate. The penalties provided for in Article 63 of the LDC correspond to percentages of the companies' total turnover, this being the relevant parameter when comparing the fines imposed in different cases. AMAZON and APPLE have much higher total turnovers than the companies involved in the cases mentioned by APPLE in its submissions, so it is not surprising that the penalties imposed on them are higher when comparing absolute amounts in Euros. However, this does not mean that the fines are stricter.
- (1138) In addition, sanctions were not declared for any of the sanctioned companies in Euros resulting from applying the penalty rates determined by the CD to their respective turnovers, since in all cases a proportionality adjustment was made due to the fact that the actual dimension of the conduct - online retail sales of Apple products in Spain - represented a limited segment of the total activity of the two companies. The proposed penalties following the proportionality adjustment, considered by the CD to be sufficiently dissuasive and proportionate, do not for any of the businesses reach 1% of their total turnover in 2021 in the case of the proposed penalty and in 2022 in the case of the fine ultimately imposed. Therefore, regardless of the amount of the fines in Euros, it is not possible to consider these sanctions as the strictest in the history of competition in Spain.

- (1139) Furthermore, APPLE argues that the CD did not correctly assess the characteristics, size and market shares. With regard to the characteristics of the market, it argues (i) that it should have been taken into account that Apple products are premium and not staple products, (ii) that there are dozens of competitors of APPLE in the sale of electronic products, (iii) that the volume of online sales of Apple products is very limited in the Spanish economy, (iv) that the market is fully liberalised and (v) that the infringement would not have affected any public tender. With regard to market shares, it argues that they are very limited in APPLE's case, so that consumers would have had many possibilities to avoid the infringement, by purchasing products from other manufacturers or from APPLE, but through online shops other than the Amazon Store or in physical shops.
- (1140) The issues raised by APPLE have been duly assessed by the CD in applying the criteria of Article 64(1) of the LDC. The fact that the products are basic necessities could lead to a higher penalty rate, but in no case should the fact that they are not basic necessities act as a kind of mitigating circumstance. The same is true for the impact of public tenders or regulated markets. As far as the businesses' market shares and turnover are concerned, these are specifically reflected and assessed in the Proposed Resolution, and therefore the above allegations cannot be accepted.
- (1141) Finally, APPLE argues that the CD assessed the proportionality of the fine erroneously. It interprets that a limit of proportionality was estimated which would have consisted in applying a ceiling of 20% to ADI and 10% to AEU on their turnover in the relevant market. It considers that, if the CD has estimated these amounts on the basis of the gross margins of these companies, they could never be considered as unlawful profit. Similarly, AMAZON argues that the absence of unlawful profit should be assessed according to the company, since the PR indicates that the proposed fines have been adjusted taking into account an estimate of the unlawful profit, but, given the nature of the conduct, AMAZON considers that it cannot be said that such unlawful profit was obtained. It therefore requests that no fine be imposed or, in the alternative, that the proposed fine be adjusted downwards.
- (1142) Firstly, the estimation of the proportionality threshold does not consist in the simple application of a certain percentage to the turnover in the relevant market of each company. In accordance with the CNMC's standard practice, the proportionality threshold is the result of estimating the profit potentially obtained by the undertaking and multiplying it by a deterrence factor. The objective is to estimate a reference value that will ensure the proportionality and the dissuasiveness of the sanction in relation to turnover in the market affected by the infringement. In this case, there is no doubt that this objective has been achieved, since this adjustment results in a penalty in Euros representing less than 1% of the company's total net sales.

- (1143) Continuing its argument on the erroneous assessment of proportionality, APPLE criticises that the CD did not take into account that most of ADI's turnover in 2021 was achieved outside Spain, so that if the penalty rate had been applied on turnover achieved in Spain, the amount of the fine would be significantly lower.
- (1144) Both the LDC and the case-law are clear in stating that the turnover on which the penalty rate is to be applied is the total worldwide turnover in the year preceding the year in which the fine is imposed. That is, the total volume without distinguishing between geographical areas or segments of activity. Therefore, for the purposes of Article 63 of the CDL, Apple's turnover in Spain is irrelevant.
- (1145) However, as explained above, the proportionality adjustment is based on the turnover in the market concerned, which in this case is limited to online retail sales of Apple products in Spain. Therefore, the fact that the conduct is limited to Spain and to a certain market is taken into account for the purposes of the proportionality of the sanctions.
- (1146) Finally, in the Compass Report on Amazon's interest in the Vertical Agreement, the company insists that it did not derive any illicit benefit from the implementation of the anti-competitive clauses investigated by the CNMC. In this respect, it should be noted that neither the CD nor this Division has sought to quantify the possible benefit to the companies. The mention contained in the proposed fine in the Proposed Resolution refers to an estimate made only in the framework of the determination of the fine in order to ensure its proportionality - only to adjust the fine downwards and never to increase it.

5.7. Prohibition to contract

- (1147) The Ninth Final Provision of Law 40/2015, of 1 October, on the Legal Regime of the Public Sector, which amends Article 60 of the then current Consolidated Text of the Public Sector Contracts Law and whose entry into force took place on 22 October 2015⁹⁵³ establishes a specific prohibition to contract for those sanctioned for a serious infringement in the field of distortion of competition, as follows:

⁹⁵³ Eighteenth final provision of Law 40/2015, of 1 October.

"Persons in any of the following circumstances may not contract with the entities provided for in Article 3 of this Law with the effects established in Article 61 bis: [...] (b) Having been definitively sanctioned for a serious professional offence of distortion of competition [...]".

(1148) This provision is included, with identical wording, in Article 71.1.b) of Law 9/2017, on Public Sector Contracts:

"1. Persons in any of the following circumstances may not contract with the entities provided for in Article 3 of this Law with the effects established in Article 73:

b) Having been definitively sanctioned for a serious professional offence [...] of distortion of competition".

(1149) Thus, **persons who have been definitively sanctioned for a serious infringement relating to distortion of competition are subject to a prohibition on contracting with entities forming part of the public sector.**

(1150) In this respect, APPLE denies that **the CNMC has the power to impose a prohibition to contract**, while AMAZON restricts this alleged lack of competence to the ability to **determine its scope and duration.**

(1151) However, a simple reading of Article 72 of the LCSP leads to the conclusion that, from a procedural perspective, the determination of the prohibition to contract for distortion of competition can be assessed in two ways: i) directly by the contracting bodies, when the administrative sanctioning resolution expressly pronounces on its scope and duration; or ii) in the event that the judgment or the administrative resolution does not contain an express pronouncement on the scope or duration of the prohibition to contract, these terms shall be established by means of a procedure instructed for this purpose, the competence of which shall correspond to the Minister of Finance and Public Function following a proposal by the State Public Procurement Advisory Division.

(1152) On this point, the judgments of the Cataluña Supreme Court of Justice Nos. 3273/2022 and 3289/2022, both of 28 September 2022, have concluded that the competition authority is competent to define, in respect of each infringement, the set of legal consequences that serve the principles of effectiveness, deterrence and proportionality required by European and domestic law, including the prohibition to contract, a power that implicitly includes the power to rule on its scope and duration. This is without prejudice to the specific duration and scope of the prohibition being left to the State Procurement Advisory Board.

- (1153) AMAZON also argues that the prohibition to contract does not apply since **the conduct under investigation is not related to public procurement**. Without however, this Division has already pointed out on several occasions that the LCSP at no time refers to the prohibition of contracting for distortion of competition being restricted to the fact that the anti-competitive conduct must be related to public procurement⁹⁵⁴. There is simply no legal basis to defend this position.
- (1154) For its part, APPLE points out that the imposition of a **prohibition to contract does not apply ipso iure** and that in the present case **it would be disproportionate to** impose it in view of the amount of the fines. In this respect, this Division has pointed out in numerous decisions that, from the moment the prohibition on contracting for distortion of competition came into force, this is a legal consequence that derives directly from the Law in the case of parties sanctioned for infringements of competition law⁹⁵⁵. Also, Supreme Court Rulings no. 1115/2021, of 14 September (RC 6372/2020) and no. 1419/2021, of 1 December (RC 7659/2020), recalling the procedural alternative for the concretion of the same, indicate that: *"the prohibition to contract agreed by the CNMC under art. 71.1. b) of the LCSP is a limitation tied to the imposition of a final sanction for a serious infringement in certain matters"*. This does not mean that the CNMC should impose the prohibition of contracting in an indiscriminate manner, but rather that the necessary balance between the principles of deterrence, effectiveness and proportionality must be ensured, also taking into account the appropriate examination of the impact of the measures adopted on the markets affected by the conduct.

⁹⁵⁴ Case S/0028/20 *Leadiant*, Resolution of 10 November 2022; Case S/DC/0612/17 *Industrial Assembly and Maintenance*, CNMC Resolution of 1 October 2019; and File S/DC/260/17. Solid Fuels. CNMC Resolution of 12 January 2021.

⁹⁵⁵ See for example Resolution of case S/DC/0598/16, Resolution of 14 March 2019, *Electrification and Railway Electromechanics*. The resolution also stated: *"Although the legal nature of prohibitions to contract has been debated and has given rise to a line of jurisprudence that has not always been pacific, it can be admitted that these, not being sanctions in the strict sense, have the character of acts restricting rights, which makes it necessary to take into account certain aspects or principles specific to the sanctioning regime, which have been respected in this procedure. In addition to the limiting or restricting of the rights of the potential contractor, there is also the legal requirement of a singular condition or honour to contract with the public sector, which should allow the entities that make up the public sector to exclude from their contractual relations those subjects that do not comply with this level of requirement"*.

- (1155) Finally, AMAZON also argues that, **from a subjective perspective, the prohibition to contract should be limited to AEU**, being the sole signatory to the GTA on behalf of the EU, as the only company that could be held liable for the alleged conduct. However, as set out in section 5.4.4.1.2.1 (paragraphs (1023) to (1064)) of this Decision, ASI, AEC and ASE are held equally liable for the infringement, either as signatories to the GTA and the 2018 ARA (this is the case of ASI and AEU) or as the companies in charge of implementing those agreements (the case of AEC and ASE)
- (1156) In view of the foregoing, and given that this decision penalises ADI, AINC, ASE, AEC, AEU and ASI for a serious infringement in the area of distortion of competition, this Division considers that it is appropriate to declare the prohibition to contract by application of Article 71.1.b) of the LCSP, without prejudice to the possible exemption from its application foreseen in Article 72.5 of this same law. However, given that this resolution does not establish the duration and scope of the prohibition to contract, these extremes must be determined by means of a procedure processed in accordance with Article 72.2 of the LCSP. To this effect, it is agreed to send a certification of this resolution to the State Public Procurement Advisory Board.

6. RESOLVES

One. To declare that in the present case the existence of a serious infringement of Articles 1 LDC and 101.1 TFEU, consisting of the adoption and implementation of the Exclusion or Brand Gating Clauses, the Advertising Clauses and the Marketing Restrictions Clauses, from October 2018 until at least the end of the investigation phase of these proceedings.

Two. In accordance with ground 5.4.4, to declare the following entities liable for those infringements:

AMAZON Group companies:

- Amazon Services Europe S.Á.R.L.:
- Amazon Europe Core S.Á.R.L.:
- Amazon EU S.Á.R.L.:
- Amazon.com Services, Inc. (now Amazon.com Services LLC):

APPLE Group companies:

- Apple Distribution International Ltd.

- Apple, Inc. which, as the parent company of Apple Distribution International Ltd., also declares that it is jointly and severally liable for payment of the fine imposed on the latter.

Three. In accordance with the responsibility of each business for the infringements, the following penalties should be imposed:

AMAZON Group companies:

- Amazon Services Europe S.Á.R.L.: **€2,000,000**
- Amazon Europe Core S.Á.R.L.: **€1,000,000**
- Amazon EU S.Á.R.L.: **€37,510,000**
- Amazon.com Services, Inc. (now Amazon.com Services LLC): **€10,000,000**

APPLE Group companies:

- Apple Distribution International Ltd.: **€128,640,000**
- Apple, Inc: **€15,000,000**

Four. To dismiss the proceedings against Amazon Online Spain, SL, Apple Retail Spain, SL and Apple Marketing Iberia, SA.

Five. To order Amazon Services Europe S.A.R.L.; Amazon Europe Core S.A.R.L.; Amazon EU S.A.R.L.; and Amazon.com Services, Inc. (now Amazon.com Services LLC), on the one hand, and Apple Distribution International Ltd. and Apple, Inc. on the other hand, to take the necessary measures to cease the conduct referred to in point 1 and to refrain from engaging in similar conduct in the future.

Six. To urge the Competition Division to monitor full compliance with this resolution.

Seven. To refer this resolution to the State Public Procurement Advisory Board in accordance with the provisions of point 5.7 above.

Eight. To decide on the confidentiality of the documentation provided by the companies in accordance with point 5.5.4 above.

To communicate this Resolution to the Competition Division of the National Markets and Competition Commission and notify the interested parties, informing them that no administrative appeal may be lodged against it, and that they may lodge a contentious-administrative appeal with the Audiencia Nacional within two months of the day following the date of notification.

The President
Cani Fernández Vicién

The Secretary of the Council
María Ángeles Rodríguez Paraja
(p.s. art. 93 of the Organic Statute of the CNMC)