



*Autorità Garante della
Concorrenza e del Mercato*

THE COMPETITION AND MARKET AUTHORITY

AT ITS MEETING of 16 November 2021;

HEARING the Rapporteur, Professor Michele Ainis;

HAVING REGARD TO Article 101 of the Treaty on the Functioning of the European Union (TFEU);

HAVING REGARD TO Council Regulation No. 1/2003 of 16 December 2002;

HAVING REGARD TO Law No. 287 of 10 October 1990

HAVING REGARD TO Presidential Decree No. 217 of 30 April 1998;

HAVING REGARD TO its resolution No. 28294 of 14 July 2020, by which an investigation pursuant to Article 14 of Law No. 287/90 was opened against Apple Inc., Apple Distribution International Ltd, Apple Sales International, Apple Italia S.r.l., Apple Retail Italia S.r.l., Amazon.com Inc., Amazon Services Europe S.a r.l., Amazon Europe Core S.a r.l., Amazon EU S.a r.l. and Amazon Italia Services S.r.l. in order to ascertain the existence of possible violations of Article 101 of the TFEU;

HAVING REGARD TO its resolution No. 28593 of 23 February 2021 extending the subject matter of the investigation against: Apple Inc., Apple Distribution International Ltd, Apple Sales International, Apple Italia S.r.l., Apple Retail Italia S.r.l., Amazon.com Inc., Amazon Services Europe S.a r.l., Amazon Europe Core S.a r.l., Amazon EU S.a r.l. and Amazon Italia Services S.r.l.;

HAVING REGARD TO the Communication of the Findings of Facts, sent to the parties on 30 July 2021, pursuant to Article 14 of Presidential Decree No. 217 of 30 April 1998;

HAVING CONSIDERED the final pleadings of Apple Inc., Apple Distribution International Ltd, Apple Sales International, Apple Italia S.r.l., Apple Retail

Italia S.r.l., Amazon.com Inc., Amazon Services Europe S.a r.l., Amazon Europe Core S.a r.l., Amazon EU S.a r.l., Amazon Italia Services S.r.l. and IT Store S.r.l. received on 16 September 2021;

HEARING at the final hearing representatives of Apple Inc., Apple Distribution International Ltd, Apple Sales International, Apple Italia S.r.l., Apple Retail Italia S.r.l., Amazon.com Inc., Amazon Services Europe S.a r.l., Amazon Europe Core S.a r.l., Amazon EU S.a r.l., Amazon Italia Services S.r.l. and IT Store S.r.l. on 20 September 2021;

HAVING REGARD TO the records of the proceedings and the documentation acquired during the preliminary investigation;

WHEREAS:

I. THE PARTIES

I.1. The Apple Group

1. Apple Inc. ("Apple Inc.") is a corporation incorporated under the laws of the United States, based in Cupertino, California, and is the parent company of the Apple Inc. group of companies, which designs, manufactures, and markets mobile communication and multimedia devices, *personal computers*, and audio-visual devices under the Apple and Beats brands,¹ as well as the sale of a wide range of related software, services, peripherals and *networking* solutions, and third-party applications and digital content. Apple is a publicly traded company, listed on the New York Stock Exchange, not subject to the control of any company or person. The Apple Inc. group's total revenue for the year ended 26 September 2020 was approximately EUR 226.87 billion.²

2. Apple Distribution International Ltd. ("Apple-DI"), based in Cork, Ireland is an indirect subsidiary of Apple Inc. responsible for sales and distribution in Europe. It operates the Apple Online Store, the Apple Store mobile app and the Apple Contact Centre.³

3. Apple Sales International ("Apple-SI") is an indirect subsidiary of Apple Inc. incorporated in Ireland. Apple Sales International was responsible for sales and distribution in Europe prior to 2012 and currently has no business activity⁴.

¹ See doc. 56. See also European Commission Decision of 25 July 2014, Case M.7290 - Apple/Beats.

² See Annual report pursuant to section 13 or 15(d) of the Securities Exchange act of 1934 of Apple Inc. for the fiscal year ended 26 September 2020. The value of total net sales is \$274.515 billion.

³ See Doc. 56. See, also, Annual report of Apple Inc. for the fiscal year ended 28 September 2019 (Annual report pursuant to section 13 or 15(d) of the Securities Exchange act of 1934 of Apple Inc.); Commission Decision of 30 August 2016, on State aid SA.38373 (2014/C) (ex 2014/NN) (ex 2014/CP) implemented by Ireland to Apple.

⁴ See doc. 56

4. Apple Italia S.r.l. (hereinafter, 'Apple-IT') is a company directly controlled by Apple Inc., incorporated in Italy, which provides sales support and marketing services to Apple Distribution International Ltd. for Italy.
5. Apple Retail Italia S.r.l. (hereinafter, 'Apple-RIT') is a company a direct subsidiary of Apple Inc., incorporated in Italy, which is responsible for managing Apple's retail outlets in Italy.
6. Hereinafter, the company Apple Inc. and its subsidiaries Apple Distribution International Ltd., Apple Sales International, Apple Italia S.r.l. and Apple Retail Italia S.r.l. will be referred to as 'Apple' or 'Apple Group'.

1.2. The Amazon Group

7. Amazon.com Inc. (hereinafter, 'Amazon.com') is an enterprise active in electronic commerce and in the provision of other *information and communication technologies* services, based in Seattle, Washington state. Amazon.com Inc. also operates in Italy through the companies Amazon Services Europe S.a r.l., Amazon Europe Core S.a r.l., Amazon EU S.a r.l and Amazon Italia Services S.r.l. The global turnover of the Amazon.com Inc. group in the financial year 2020 is approximately EUR 319.06 billion.⁵
8. Amazon Services Europe S.a r.l. (hereafter, 'Amazon-SE') is the company under Luxembourg law that is responsible for the operation of the Amazon.com marketplace and the five national *marketplaces* active in Europe, as well as for sales intermediation services on the Amazon *marketplaces*.⁶
9. Amazon Europe Core S.a r.l. (hereinafter, 'Amazon-EC') is the company under Luxembourg law responsible for managing the websites of Amazon's European shops, and is the owner of the Internet domain www.amazon.it.⁷
10. Amazon EU S.a r.l. (hereinafter, 'Amazon-EU') is active in the direct sale of various products, acquired from suppliers, in Amazon *marketplaces* in Europe, including the Italian *marketplace*.⁸
11. Amazon Italia Services S.r.l. (hereafter, 'Amazon-IT') is a company incorporated under Italian law, with its registered office in Milan, whose corporate purpose is the provision of assistance and support services of an administrative, accounting, financial, technical and organisational nature, in support of the marketing and merchandising activities of the Amazon group and, in particular, of Amazon-EU and Amazon-SE⁹.

⁵ See Annual Report of Amazon.com Inc.⁵. For the fiscal year ended 31 December 2020 (Annual report pursuant to section 13 or 15(d) of the Securities Exchange act of 1934 of Amazon.com Inc.). The value of total net sales is \$386.064 billion.

⁶ See doc. 65.

⁷ See doc. 65.

⁸ See doc. 65.

⁹ See doc. 65.

12. Hereinafter, the company Amazon.com Inc. and its subsidiaries Amazon Services Europe S.a r.l., Amazon Europe Core S.a r.l., and Amazon Italia Services S.r.l. will be jointly referred to as the "Amazon group" or "Amazon".

II. INTERVENING THIRD PARTIES

13. Associazione CODICI Onlus - Centro per i diritti del cittadino (hereinafter, 'CODICI') is an association representing at national level the interests and rights of users and consumers, enrolled in the Register pursuant to Article 137 of the Consumer Code¹⁰.

14. Digitech [by G. M. F.]. * (hereinafter, 'Digitech') is a sole proprietorship active in the marketing of electronics products, including through the Amazon.it marketplace. Until January 2019, Digitech sold Apple- branded products on Amazon.it.¹¹

15. I.T. Store S.r.l. ('IT Store') is a company active in the sale, installation and servicing of IT, electronics, telecommunications and office equipment products. As an official Apple reseller, IT Store sold Apple products on the Amazon.it marketplace until January 2019¹².

III. THE INVESTIGATION PROCEDURE

16. In February 2019, a report was received from Digitech concerning the *online* sales system of Apple and Beats branded products, which indicated that, in execution of a commercial agreement allegedly entered into between the Apple and Amazon groups at the end of 2018, the latter had removed from the Italian marketplace all sellers who, although legitimately selling such products, did not belong to the official Apple authorised reseller programme (unofficial resellers). These sellers had until then offered Apple and Beats products via Amazon's marketplace.

17. These investigation proceedings were therefore opened on 14 July 2020¹³ to verify whether the reported conduct - consisting of an agreement commercial relationship between the Amazon and Apple groups, under which the sale of Apple and Beats products on the Amazon marketplace would be entrusted exclusively to Amazon and other official Apple resellers, to the exclusion of other economic operators legitimately selling those products - were liable to constitute a restrictive agreement of competition in violation of Article 101

¹⁰ See doc. 11.

* In this version, some data are omitted, as elements of confidentiality or secrecy of information were deemed to exist.

¹¹ Cf. doc. PI.1, 22.

¹² See doc. 226.

¹³ See AGCM Order No. 28294 of 14/07/2020, Case I842 - *Sale of Apple and Beats products on Amazon marketplace*, in Bulletin No. 30/2020.

TFEU.

18. On 21 July 2020, inspection activities took place at the premises of Apple-IT¹⁴ and Amazon-IT¹⁵. On 13 November 2020, Apple submitted commitments pursuant to Article *14b* of Law No. 287/90¹⁶. On 22 December 2020, the Authority rejected the commitments due to the existence of an interest on the part of the Authority in proceeding with the investigation of the possible infringement in view of the competition profiles under examination, as well as in view of the inability of the commitments to eliminate the anti-competitive profiles *prima facie* identified in the opening of the investigation¹⁷.

19. By resolution of 23 February 2021¹⁸ the proceedings were objectively extended not only to the restrictions on access to the Amazon.it *marketplace* by official and unofficial resellers of Apple and Beats products, but also to the contractual provisions between the Apple groups and Amazon.com concerning the restriction on the use by third-party resellers or manufacturers of advertising services on certain pages of the Amazon.it marketplace.

20. On 7 June 2021, the Amazon and Apple groups submitted undertakings under Article *14b* of Law No. 287/90¹⁹. On 20 July 2021, the Authority rejected the commitments on the grounds of the existence of an interest on the part of the Authority to proceed with the investigation of the possible infringement in consideration of the competition profiles under examination, as well as in consideration of the inability of the commitments to eliminate the anti-competitive profiles *prima facie* identified in the opening of the investigation.

21. In the course of the proceedings, several requests for information were sent to the Amazon and Apple groups²⁰, to third-party sellers on the Amazon.it *marketplace*²¹ as well as to *marketplace* operators²². Apple and Amazon accessed the file during the course of the proceedings²³. In the course of the proceedings, hearings were held with the Amazon Group²⁴, the Apple Group²⁵,

¹⁴ Cf. ISP.2.

¹⁵ Cf. ISP.5.

¹⁶ See doc. 94.

¹⁷ See 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140.

¹⁸ See AGCM Order No. 28593 of 23/02/2021, Case I842 - *Sale of Apple and Beats products on Amazon marketplace*, in Bulletin No. 30/2020.

¹⁹ See doc. 246, 247.

²⁰ See doc. 16, 17, 82, 83, 103, 122, 142, 155, 156, 201, 202, 242, 249, 250, 289.

²¹ See doc. 37, 38, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52.

²² See 158, 159, 160, 161, 162, 188, 189, 190, 220, 221.

²³ Apple carried out access to documents on 18 September 2020, 25 February 2021, 19 April 2021, 29 July 2021, 12 August 2021, 26 August 2021, 27 August 2021, 16 September 2021, 17 September 2021, 4 October 2021 (see 54, 166, 232, 293, 329, 340, 346, 371, 374, 377). Amazon performed access to documents on 5 August 2020, 16 September 2020, 15 December 2020, 25 February 2021, 15 April 2021, 29 July 2021, 12 August 2021, 26 August 2021, 27 August 2021, 16 September 2021, 4 October 2021 (cf. doc. 14 36, 117, 167, 231, 292, 328, 341, 345, 369, 378).

²⁴ Amazon was heard on 18 December 2020 and 11 March 2021 (see doc. 125, 193).

²⁵ Apple was heard on 12 November 2020 and 11 March 2021 (doc. 93, 192).

IT Store²⁶ and the Netcomm consortium²⁷.

22. On 30 July 2021, the Notice of Investigation Findings (CRI) was sent to the Parties and intervening third parties²⁸. The final hearing, originally scheduled for 2 September 2021, was held on 20 September 2021, following the partial acceptance of the Parties' request for an extension of the deadline for the conclusion of the fact-finding phase²⁹.

23. On 8 November 2021, Apple informed that it would voluntarily implement the commitments submitted on 7 June 2021 pursuant to Article 14b of Law No. 287/90³⁰.

IV. THE PRELIMINARY FINDINGS

IV.1. The distribution system for Apple and Beats products

24. The distribution of the Apple Group's products, consisting of the Apple and Beats brands, takes place via a dual distribution system³¹. As regards Italy, in fact, Apple distributes its products both directly, through its physical (Apple Store) and *online* (Apple.it) sales outlets, and indirectly, through a network of distributors and independent resellers. All Apple product lines (including iPhone, iPad, Mac and Apple Watch) and Beats Wired products are distributed through an open distribution system³². Only Beats Wireless products (Beats cordless connector products) are distributed through a selective distribution system based on objective selection criteria uniformly applied throughout the EU.

25. In particular, for Apple and Beats (Wired) products that do not fall under a selective distribution system, "*any retailer has the possibility of resell Apple products (online and/or in physical outlets), without the need for authorisation by Apple*".³³ Apple confirmed that '*this means that, unlike in a selective distribution system, any retailer can purchase and resell Apple products to wholesalers, retailers or consumers*'³⁴.

²⁶ IT Store was heard on 1 March 2021 (see doc. 191).

²⁷ Netcomm was seized on 3 March 2021 (see doc. 178).

²⁸ See doc. 309, 310, 311, 312, 313.

²⁹ See doc. 314, 315, 318, 319, 320.

³⁰ See doc. 382.

³¹ See doc. 56.

³² See doc. 56.

³³ See doc. 56.

³⁴ See doc. 228.

26. In exchange for all resellers being able to sell Apple and Beats Wired products freely in physical and *online* shops, Apple has an official reseller programme. Resellers who enter into a distribution agreement with Apple (hereinafter referred to as 'official resellers') are offered discounts and rebates in order to incentivise them to support their offerings through staff training, logistics services and on-site consulting services. These discounts are offered to both official resellers who purchase Apple products directly from Apple and those who purchase Apple products indirectly through wholesale distributors. These resellers also have access to Apple's *marketing* resources and *merchandising*³⁵.

27. Official resellers are referred to as Apple Authorised Resellers (AAR), a qualification held by Amazon-EU as of May 2012³⁶. Official resellers also include Apple Premium Resellers (APRs), which "constitute a distinct category of AARs characterised by a special commitment to offering a premium *in-store* experience to consumers wishing to purchase Apple products".³⁷ Finally, official resellers are also 'Retailers', to which large organised distribution entities, consumer electronics specialists, wholesalers, large *e-tailers*, etc. belong³⁸. Each category of official reseller is identified according to specific characteristics (Figure 1).

³⁵ Cf. doc. 56, 65.

³⁶ See doc. 56.

³⁷ Cf. doc. 56, 93.

³⁸ See doc. 68.

Figure 1 - Classification of official Apple retailers ³⁹

'Base' Reseller	Tier 1 . Enterprise Part of the Apple Authorized Enterprise Reseller Program	Tier 1 . Education Part of the Apple Authorized Education Specialist Program
	Tier 2 . Enterprise Minimum ^[0.5-2M] in enterprise sales annually, minimum staffing/training, business manager	Tier 2 . Education Minimum ^[0.5-2M] in education sales annually, minimum staffing/training, business manager
Retailer	[2-10M] revenue quarterly or ^[0.5-2M] revenue quarterly just for accessories. Physical POS for consumers or electronic sales to consumers.	
APR	Tier 1 ^[0.5-2M] revenue annually, staffing and training requirements, appointed to the APR program 3+ APR Locations	Tier 2 ^[0.5-2M] revenue annually, staffing and training requirements, appointed to the APR program 1 or 2 APR locations

28. As to the coexistence of an open distribution system - whereby all independent resellers can purchase Apple and Beats Wired products - and an official reseller programme, it is noted that *'under this open distribution system, Apple "appoints" a certain number of Apple Authorized Resellers for all or certain Apple products, which means that all such resellers will have a contract with Apple. The Apple Authorized Reseller Agreement contains a number of obligations that the parties assume [...] Subject to compliance with the terms of the Agreement, resellers may have access to a number of benefits [...] as well as admission to Apple programs.'* ⁴⁰ . Thus, official resellers are granted benefits, such as discounts on supplies and support services, against a commitment to maintain quality.

29. The choice of appointing an official reseller is, however, at the discretion of Apple, which will assess *'what seems most appropriate for the customer, the reseller and Apple itself'*⁴¹ . Thus, as opposed to a selective distribution system, where access to the system should be based on qualitative criteria which, if met, allow access to the programme, access to the Apple *partnership* remains at Apple's absolute discretion.

30. Furthermore, with regard to the contractual relationship between Apple and official resellers, it is noted that the appointment of an *Authorized Reseller* may relate to all or some of Apple's *business* lines, and the appointment of *Authorized Resellers* may also be made in relation to one or more programmes. In general, as to one of the primary obligations of the contractual relationship between Apple and *Authorized Resellers*, *"Apple expects Authorized Resellers*

³⁹ See doc. 56, encl. 3.

⁴⁰ See doc. 228.

⁴¹ See doc. 228.

to inspect and reject counterfeit products under all circumstances" ⁴² i.e. also in areas not directly covered by the contractual relationship with Apple.

31. According to the individual contracts with official dealers, "*the products covered of the open distribution system can be sold in any electronic location (including the reseller's website or other platforms, without any geographical limitation), i.e. there is no limitation, with the only indirect exception - mentioned here for the sake of clarity - relating to sales in Amazon marketplaces, and resulting (not from direct agreements between Authorised Resellers and Apple, but rather) from the GTA between Apple and Amazon*"⁴³.

32. The products subject to selective distribution (Beats Wireless) '*may be sold on any electronic location that meets the criteria set out in the Beats Product Schedule [...] The criteria relate primarily to [omissis]*'⁴⁴. Amazon.it is an electronic *location* that meets these criteria.

33. As for the number of official resellers in Italy, according to data provided by Apple⁴⁵, there are currently 10 *Apple Authorized Resellers* (AAR), 11 *Apple Premium Resellers* (APR) and 7 *Retailers*⁴⁶ among the latter, however, it must be considered that some chains of the large-scale organised electronics distribution group independent economic operators as affiliates, whose consistency as at November 2020 is [100-150]⁴⁷ units. As for *premium resellers* (APRs), their number has decreased over time, from [20-30] operators in 2015⁴⁸ to the current 11 APRs⁴⁹. In the same period 2015-2020, there were [1-5 *finder(s)*]⁵⁰. According to the documentation of an Apple authorised distributor, in fact, '*in recent years, authorised reseller certifications have practically stopped, mainly because the national territory is completely covered*'.⁵¹

34. According to Apple estimates ⁵² unofficial resellers active in Italy appear extremely outnumbered by official operators (Table 1 below).

⁴² See doc. 228.

⁴³ See doc. 228.

⁴⁴ See doc. 228.

⁴⁵ See doc. 56, encl. 7, doc. 98.

⁴⁶ Mediamarket SPA, Unieuro SPA, Euronics Italia SPA, Expert Italy SPA Consortile, G.R.E. SPA, Amazon EU Sarl, Hermes Italie SPA.

⁴⁷ See doc. 98.

⁴⁸ See doc. 98.

⁴⁹ See doc. 56, encl. 7.

⁵⁰ See doc. 98.

⁵¹ Cf. doc. 66, annex. B1.

⁵² Estimates are based on data from authorised distributors in Italy.

Table 1 - Consistency of unofficial resellers of Apple products in Italy⁵³

II Trim. 2018	III Trim. 2018	IV Trim. 2018	I Trim. 2019	II Trim. 2019	III Trim. 2019	IV Trim. 2019		I Trim. 2020	II Trim. 2020	III 2
[1.000- 3.000]	[1.000- 3.000]	[1.000- 3.000]	[1.000- 3.000]	[1.000- 3.000]	[1.000- 3.000]	[1.000- 3.000]		[1.000- 3.000]	[1.000- 3.000]	[1. 3.

35. As for the incidence of the individual categories of retailers (unofficial retailers, official retailers and, within them, APRs, AARs and Retailers), on the sales of Apple and Beats products made through third parties, as shown in Table 2, APRs account for 20-30% and 10-20% of the units of Apple and Beats products sold by third parties in 2017-2019, respectively.

Table 2 - Breakdown of sales by type of third-party reseller (% of volumes in product units sold off-line)⁵⁴

	2017			2018			2019		
	<i>Units sold by APR</i>	<i>Unit sold by other official dealers</i>	<i>Units sold by unofficial resellers</i>	<i>Units sold by APR</i>	<i>Unit sold by other official dealers</i>	<i>Units sold by unofficial resellers</i>	<i>Units sold by APR</i>	<i>Unit sold by other official dealers</i>	<i>Unit sold by unofficial dealers</i>
Apple Products									
PC	[40-50%]	[40-50%]	[1-10%]	[30-40%]	[40-50%]	[10-20%]	[30-40%]	[40-50%]	[20-30%]
Notebook	[30-40%]	[50-60%]	[1-10%]	[20-30%]	[60-70%]	[10-20%]	[10-20%]	[60-70%]	[10-20%]
Tablet	[20-30%]	[50-60%]	[20-30%]	[20-30%]	[50-60%]	[20-30%]	[10-20%]	[50-60%]	[30-40%]
Smartphone	[10-20%]	[40-50%]	[50-60%]	[1-10%]	[50-60%]	[30-40%]	[1-10%]	[50-60%]	[30-40%]
Wearable accessories (wearables)	[40-50%]	[40-50%]	[1-10%]	[30-40%]	[50-60%]	[10-20%]	[20-30%]	[50-60%]	[20-30%]
Decoder/set-top-boxes	[30-40%]	[50-60%]	[1-10%]	[30-40%]	[50-60%]	[10-20%]	[20-30%]	[40-50%]	[20-30%]
Dispositive Audio	[40-50%]	[30-40%]	[10-20%]	[30-40%]	[40-50%]	[10-20%]	[20-30%]	[30-40%]	[30-40%]
More Dispositive	[30-40%]	[50-60%]	[1-10%]	[30-40%]	[50-60%]	[1-10%]	[20-30%]	[50-60%]	[10-20%]
Total Products Apple	[20-30%]	[50-60%]	[20-30%]	[20-30%]	[50-60%]	[20-30%]	[10-20%]	[50-60%]	[20-30%]
Beats Products	[10-20%]	[70-80%]	[10-20%]	[10-20%]	[70-80%]	[10-20%]	[1-10%]	[60-70%]	[20-30%]

IV.2. E-commerce in Italy and marketplace intermediation services

IV.2.a. Foreword

36. The conduct object of the measure concerns access to the Amazon.it *marketplace* by retailers of Apple and Beats branded products and limitations on the provision of ancillary services to the *marketplace*, such as advertising services for certain Apple product pages on Amazon.it.

37. In this measure, *marketplaces* are analysed as a channel distribution channel that allows retailers of electronics products to operate in e-commerce, and thus to reach final consumers who make purchases via the Internet. After

⁵³ See doc. 98.

⁵⁴ Elaboration on doc. 58, annex 12.

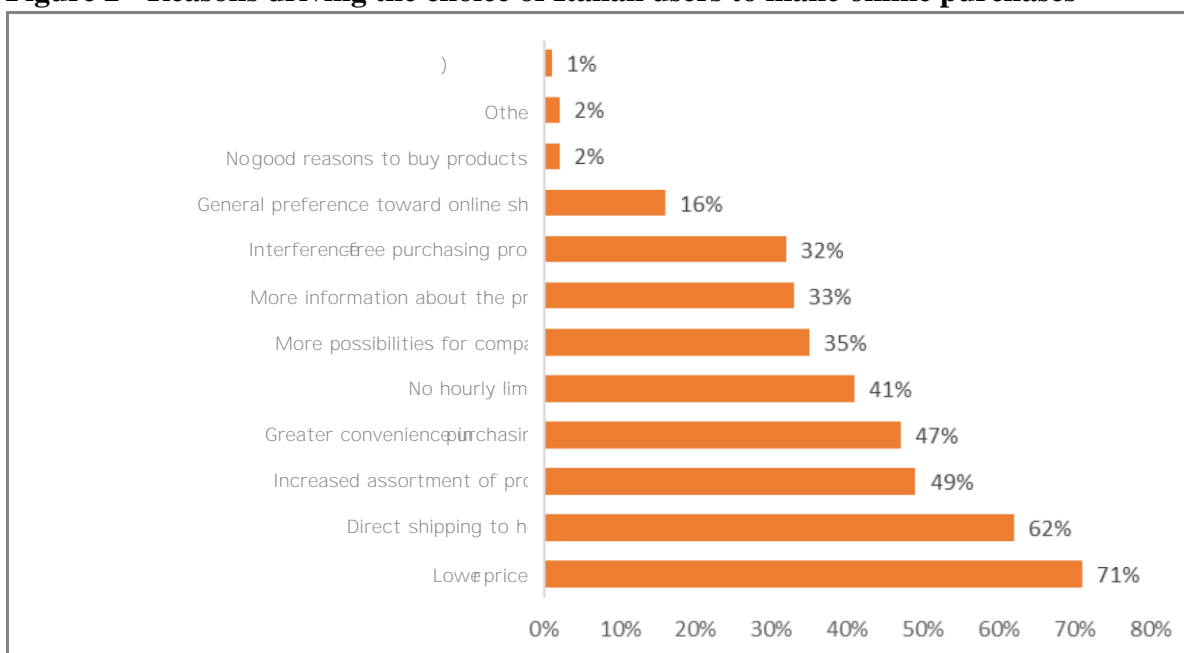
a brief overview of *e-commerce* in Italy, therefore, we will proceed with the description of *marketplace* intermediation services rendered to electronics retailers.

IV.2.b. *E-commerce in Italy*

38. Electronic commerce (*e-commerce*) - in particular *business-to-consumer* (B2C) purchases - is the set of *online* transactions carried out by user-consumers both on sellers' proprietary websites and through intermediary platforms between consumer demand and sellers' supply (*marketplaces*)⁵⁵.

39. The main reasons for consumers to shop *online* are related (Figure 2) to greater convenience (71%), direct delivery to the home of the products (62%), as well as a greater product assortment (49%) and greater shopping comfort (41%).

Figure 2 - Reasons driving the choice of Italian users to make online purchases ⁵⁶

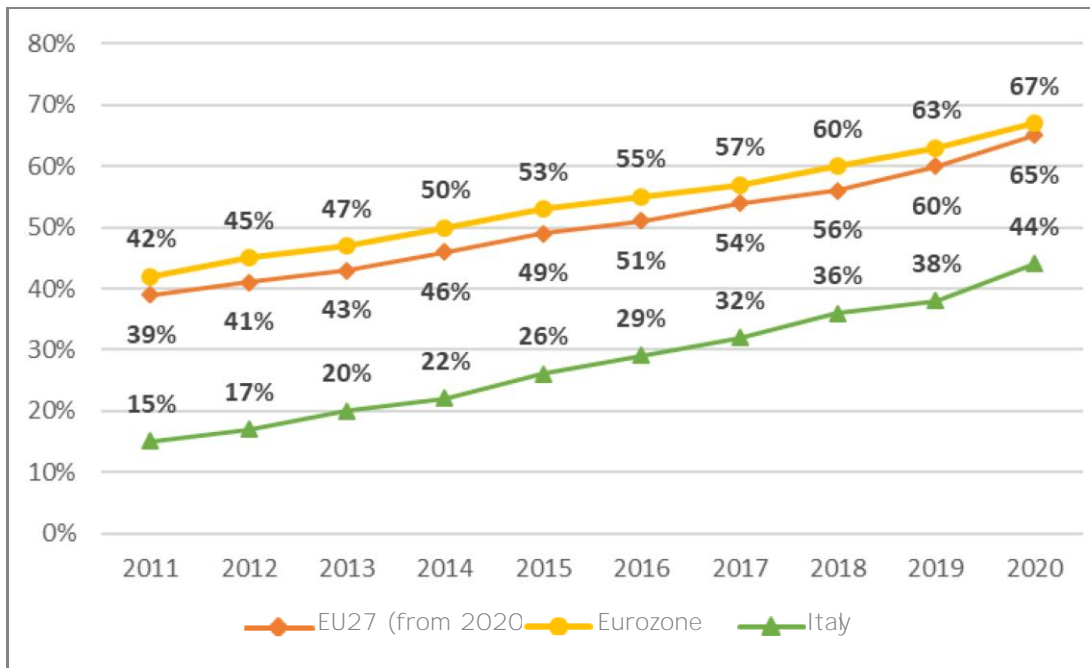


40. In Italy, from 2011 to 2020, the percentage of users who made an *online* purchase in the last 12 months rose from 15% to 44%, an increase of 29 percentage points (Figure 3). Over the same period in the European Union (EU 27 from 2020) and in the euro area, the fraction of users varied from 39% to 65% and from 42% to 67% respectively. Italy therefore has a lower e-commerce penetration rate than the European average.

⁵⁵ On this point, see, e.g., doc. 245, all. 4 e 5.

⁵⁶ Elaborations on Statista data (cf. doc. 245, annex 7).

Figure 3 - Percentage of users who made at least one online purchase in the last 12 months⁵⁷



41. According to Netcomm estimates, the value of online purchases in Italy will amount to 30.56 billion Euro in 2020, of which 23.38 billion Euro will be represented by *online* trade in products and the remaining 7.18 billion Euro by *online* trade in services⁵⁸. As far as e-commerce in products is concerned, there was a 31% increase in the value of transactions from 17.86 billion in 2019 to 23.38 billion in 2020 (Figure 4).

⁵⁷ Elaborated on Eurostat data (see doc. 245, annex 3).

⁵⁸ See doc. 178.

Figure 4 - B2C e-commerce purchasing between products and services⁵⁹



42. The value of e-commerce purchases of household appliances and consumer electronics products will be around EUR 6.16 billion in 2020⁶⁰. In fact, the number of users in Italy purchasing consumer electronics products *online* in 2021 is estimated to be around 18.8 million (Figure 5), while in 2025 around 25 million users are expected to purchase electronics products on the Internet⁶¹.

43. Consumer electronics products, in fact, are one of the best-selling product categories *online*⁶². In September 2020, 55.8% of Italian users said they intended to make purchases of electronics products in the next 6 months⁶³. Electronics is, in fact, the most searched-for category *online*, with 74.9% of users declaring themselves interested in purchasing such products, and 67% of price comparisons made for this category of products⁶⁴.

⁵⁹ See doc. 178.

⁶⁰ See doc. 178.

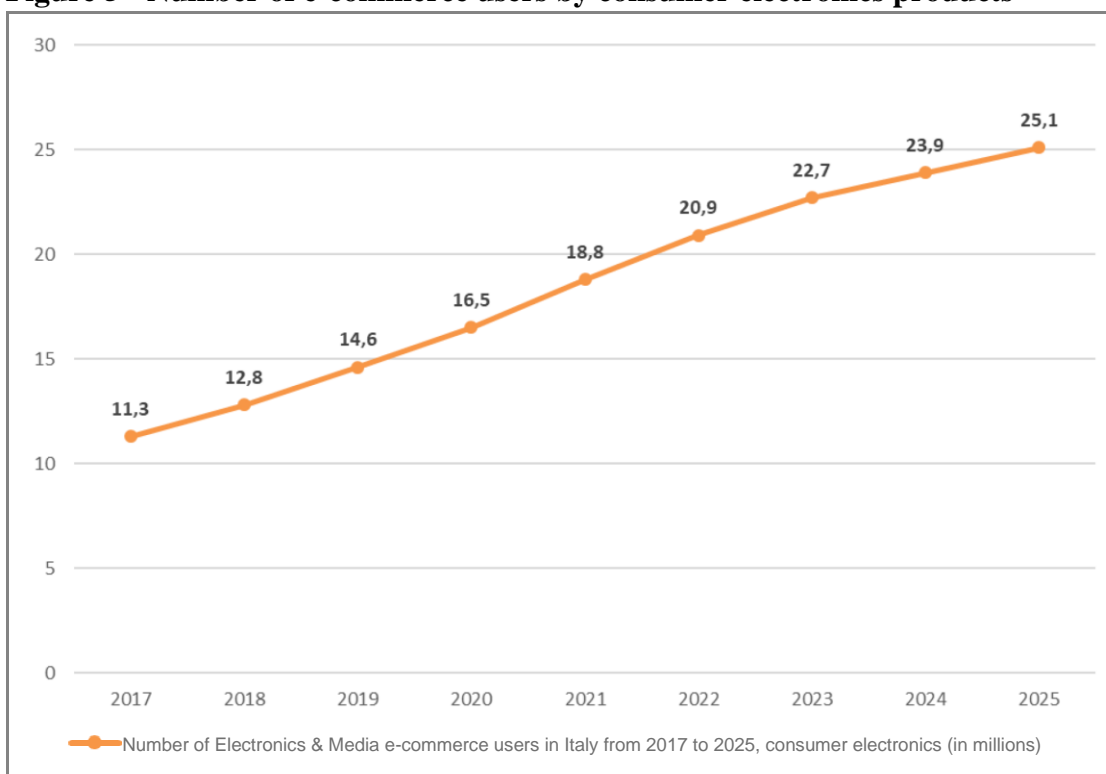
⁶¹ See doc. 245, enclosure 2. See also doc. 245, enclosure 6.

⁶² According to the Commission's sector enquiry on e-commerce, the most popular product categories sold online are: clothing and footwear, consumer electronics, household appliances, video games and software, toys and childcare articles, media (books, CDs, DVDs and Blu-ray discs), cosmetics and health products, sports and leisure equipment and household and garden items. See doc. 245, all. 4. See also doc. PI.3 (all. study_id36659_e-commerce-in-italy-statista-dossier).

⁶³ See doc. 245, enclosure 7.

⁶⁴ According to the study forwarded by eBay, and carried out by Idealo, 74.9 per cent of the users surveyed stated that they were interested in purchasing electronics products on the Internet (see doc. 205, all. eCommerce_2020_Idealo.pdf).

Figure 5 - Number of e-commerce users by consumer electronics products ⁶⁵



IV.2.c. Marketplace brokerage services

44. The term *marketplace* denotes a two-sided platform that provides consumers, on the one hand, and sellers, on the other hand, with a set of services in order to facilitate the bringing together of and between them for the conclusion and execution of transactions.

45. In particular, marketplaces constitute a two-sided platform that intermediates between, on the one hand, retailers and, on the other hand, consumers. Through *marketplaces*, consumers can access the offer of goods belonging to one or more product categories of a plurality of sellers, who can offer their products *online* to consumers⁶⁶.

46. In economic theory, a two-sided platform is characterised by the presence of network effects: its usefulness to users increases as the number of actors using it increases. Network effects can be distinguished direct, when utility is

⁶⁵ Elaborations on Statista data (cf. doc. 245, annex 2).

⁶⁶ The current OECD definition of a platform is: "An online platform is a digital service that facilitates interactions between two or more distinct but interdependent sets of users (whether firms or individuals) who interact through the service via the Internet" (OECD, 2019, *An Introduction to Online Platforms and Their Role in the Digital Transformation*, OECD Publishing). According to eBay, "E-commerce platforms (online marketplaces) are websites/apps where third party sellers (usually, but not always, professional sellers) offer products for sale and on which consumers can directly purchase these products from the sellers. Online marketplaces facilitate and enable online transactions between third party sellers and consumers. Typically, online marketplaces supply a wide range of services that provide the infrastructure which allows third party sellers and consumers to meet and be matched, and for the transaction to take place successfully. (cf. doc. 205).

a function of the number of users belonging to the same group/versant of the platform, and indirect network effects, when utility is a function of the number of users belonging to the other side of the platform.

47. In the present case, an example of indirect network effects consists in the utility of consumers being able to buy from a plurality of sellers, who benefit from positive network effects due to the presence of a potential pool of consumers that can be reached: as the number of consumers increases, the convenience of the platform for sellers increases i.e, the higher the number of sellers, the greater the utility consumers derive from the *marketplace*.

48. An example of direct network effects can be the benefit for consumers to benefit from the shopping experience of other consumers (e.g. publication of user reviews, or questions and answers about products already bought by other consumers on the platform), likewise, more sellers increase the interest and use of the platform by consumers, increasing its value for other sellers.

49. The most important function of a two-sided platform is the internalisation of *network effects* between platform users, who - in the absence of the platform - do not recognise the interdependence of their choices⁶⁷. Due to these network effects, the number of consumers and sellers becomes the key variable for the success of a platform. According to Netcomm, *marketplaces* currently intermediate up to 50% of the products sold in Italy⁶⁸.

50. According to the European Commission⁶⁹ alternative online distribution models, "*such as online marketplaces, have made it easier for retailers to reach customers. With limited investment and effort, small retailers can increase their visibility and sell products to a broad customer base in multiple Member States through third-party platforms*". In eBay's view, retailers use third-party platforms for three types of benefits: (i) access to a pre-existing customer base and increased seller visibility; (ii) access to transaction support services (payments, order management, returns, invoicing, customer service, etc.) and logistics, allowing them to offer an excellent selling experience without the need for investment in developing and maintaining such online selling functions; (iii) the possibility to increase the internationalisation of retailers⁷⁰.

⁶⁷ David S. Evans, 2003, *The Antitrust Economics of Multi-Sided Platform Markets*, 20 Yale J. on Reg. 325.

⁶⁸ See doc. 178.

⁶⁹ See doc. 245, all. 4.

⁷⁰ "*eBay understands that e-retailers make recourse to online market places because of the advantages these provide compared to standard proprietary sites (i.e. the retailer's own online shop): First, online marketplaces can offer access to a pre-existing large base of consumers looking for products and a high level of service. This can increase the visibility of the sellers' products and their chance of making a sale, without the need to invest in their own product/brand specific marketing and brand awareness. Second, online market places typically provide sellers with support for online "shopfront" and on-platform transactions as well as logistical services. More specifically, online marketplaces typically offer sellers the tools and capabilities needed for online retailing, including the processing of online payments on platform, and refund policies and customer*

51. Similarly, Zalando notes that access to a brokerage platform provides access to an already established group of users, and facilitates access to new markets, including geographic markets, ensuring a potential reduction in the investment time required to start the sale⁷¹. Wish agrees that *marketplaces* provide access to an established customer base and a wide range of geographic markets.⁷²

52. Netcomm emphasises the accessibility of demand that is provided by intermediary platforms and the network effects and acquisition of information⁷³.

53. For these reasons, a number of players consider *marketplace* intermediation services to be distinguishable from direct sales through the creation of a *website*. According to eBay, for example, although for some large retailers there may be substitutability between the creation of their own website and the use of *marketplace* services, the latter generally respond to different

(buyer) care (such as pre and after-sales services and the handling of complaints). Certain online marketplaces also offer logistical services through international distribution networks, which sellers can use to deliver their goods. This allows sellers (particularly small and medium enterprises as well as non-professional sellers) to offer a professional online retail experience without the need to invest in developing and maintaining these functions. Third, online marketplaces can improve sellers' international reach. Online marketplaces can make it easier for sellers to reach customers all over the world, including by providing multiple language versions on their platform as well as through offering delivery and payments support as described just above. See doc. 205.

⁷¹ *"the main advantages of being part of a platform - rather than relying on a proprietary website - is the number of customers that a (successful and well established) platform can attract, the entry into new markets (i.e., geographical reach), the potential immediate start of sale, potentially lower costs and lower upfront investment. Number of customers: this is more relevant for small and less known brands that are not likely to be spontaneously searched for by customers; Potential immediate start of sale: the time to start selling on the platform depends on the time needed to integrate to the new platform. This would be typically shorter than building a new website; Potentially lower costs and lower upfront investment: selling on a platform might entail the payment of integration costs, fee to sell on the platform and commission for each sale realised. Whether it is economically more convenient in the long term to sell via a platform vs. own website depends on the volumes, fee charged by the platform, etc." see doc. 227.*

⁷² *"Marketplaces can provide both small, medium, or large-sized merchants globally with a large, already-acquired consumer user-base, in addition to offering services such as localisation, advertising, delivery/logistical services (such as courier delivery, packaging, fulfilment, etc.), as well as customer support, which ultimately helps make the merchants' business operations run more smoothly. Cf. doc. 234.*

⁷³ *"As for platforms, according to Netcomm's estimates, in Italy it is plausible to think that about 50% of the products sold in Italy is intermediated by platforms. Marketplaces, in fact, are an important hinge for the growth of e-commerce. The focal point of platform analysis, in fact, is the concept of scalability and the network effects of digital services. The connection between network elements, in fact, triggers a nonlinear but exponential process, due to the utility that is enabled by the addition of a further network element. In this sense, the platform is a fundamental concept in the network economy. Within this framework, one observes that several operators are attempting to develop and scale their technologies to become an intermediary platform. This is a process that stems from contingent economic circumstances. The web is an environment where there is usually a lower marginality for products sold, prices are transparent, and there is a high degree of comparability. This condition drives operators to search for volume. What counts in the web is therefore the long term value of customer acquisition, which enables repeat purchases in the long term. This circumstance, however, determines that not all players are able to achieve this and platforms allow access to already acquired customers. For instance, one of the mechanisms that allowed the survival of small restaurateurs has been the existence of the order brokering platforms, which have enabled the operators to reach a wide demand. At the same time, platforms can acquire extremely relevant information on supply and demand, for instance by knowing whether there is a shortage of ethnic restaurants in a given municipality. These are therefore extremely relevant and useful network effects for the economy." Cf. doc. 178.*

needs than the creation of a *website* for both sellers and consumers; *marketplaces*, therefore, are often the main and only sales channel for small and medium-sized retailers and constitute an additional sales channel for large retailers.⁷⁴

54. Zalando believes that access to a well-established customer base is the most relevant and critical aspect of e-commerce and, for this reason, although it is abstractly possible to recreate a *website* with the same functions as a *marketplace*, it would be difficult to achieve the same performance in terms of orders and turnover⁷⁵.

55. Netcomm believes that between the creation of one's own *website* and the use of a *marketplace* there is a 'complementary relationship' *between the channels. Brand-owners are also gradually integrating their distribution strategy with marketplaces. For small and medium-sized resellers, the choice of selling via a marketplace or by developing their own website can be summarised as follows. Marketplaces have higher variable costs due to the brokerage commission, lower fixed investments and an immediate return due to the benefit of positioning and reaching demand and markets that would not otherwise be reached. With the marketplace, access is gained to those customers already acquired by the platform, with a view to long-term value, but resellers have no real control over customers. The choice to create one's own site presents difficulties in terms of skills, the need for higher investment costs and longer development and go-to-market times. There is also a marketing and trust-building problem, which is crucial for customer acquisition and demand fulfilment. There are therefore returns that are achieved over a longer period, but at the same time resellers have more control and more information about customers. Usually, therefore, what happens is that if resellers have the technical ability, they put their website alongside sales through the marketplace*⁷⁶. Wish draws attention to the obstacles resellers face in setting up and running their own website⁷⁷.

⁷⁴ "eBay believes that, while they may be interchangeable for some large sellers, online marketplaces (and the brokerage services that they offer) generally provide distinct value propositions and respond to distinct needs for both sellers (whether professional or not) and buyers. Indeed, [...], online marketplaces may constitute the main and sometimes even the sole online sales channel for small and medium retailers and non professional sellers who cannot afford the investment and running costs of constructing, operating and executing sales through their own proprietary website. Large retailers on the other hand may use online marketplaces in addition to their online stores as an additional e-sales channel. See doc. 205.

⁷⁵ "the company would need to create the website and offer the same services offered by the platform (e.g., same delivery and return promise, same payment services, etc). However, assuming the proprietary site would sell only a subset of products and brands, it might be difficult to attract the same amount of customers and generate the same amount of orders/sales. As such, it would be difficult to achieve the same economies of scale. As access to customers is the most critical and difficult part, setting up an ecommerce marketplace is particularly easy for platforms which already have access to a critical mass of users. Cf. doc. 227.

⁷⁶ See doc. 178.

⁷⁷ "There are some hurdles for merchants in setting up, launching, and operating up a single proprietary web store, such as: (a) obtaining end-user consumers via customer acquisition and advertising; (b) back-end

56. IT Store observes how many product searches are increasingly carried out directly on *marketplaces* and not on generalist search engines⁷⁸. This is confirmed by a November 2020 eCommerce Report 2020 study with particular reference to electronics products⁷⁹.

57. Looking at the positioning of *marketplaces* in Italy, it can be seen that Amazon is the leading brokerage platform with 64 million average monthly visits, followed by eBay with 26 million visits (Figure 6) in July 2019. With reference to the choice of retailers, Amazon appears to be the platform most used by 38% of Italian retailers, followed by eBay with 19%.

software for supporting and tracking sales, and other operational activity; (c) getting set up with a variety of payment service providers and logistic courier services to ensure optimal geographic and payment method coverage; (d) localisation and translation; and (e) optimised relationships with network carriers. This said, Wish is aware of certain services offered by companies like Shopify which make proprietary website creation and operations somewhat more efficient, cost-effective, and easier/simpler. See Doc. 234.

⁷⁸ See doc. 191.

⁷⁹ *"The competition focuses on low prices and/or exceptionally good ratings and reviews. Marketplace vendors such as Tmall and Amazon have proven themselves incredibly successful and will keep their competitive advantage due to a huge user base and product variety. Therefore, consumers tend to start direct product searches on large marketplaces like Amazon rather than with a Google product search. Manufacturers and brands protect their market shares by ensuring their availability and visibility not only in their own online shops, but in all relevant online marketplaces. This is supported by the increasing importance of "sponsored" product impressions and search optimisation, which can generate fast growth in sales and visibility. See doc. 245, all. 6.*

Figure 6- Number of visits by major marketplaces (July 2019, thousands)⁸⁰

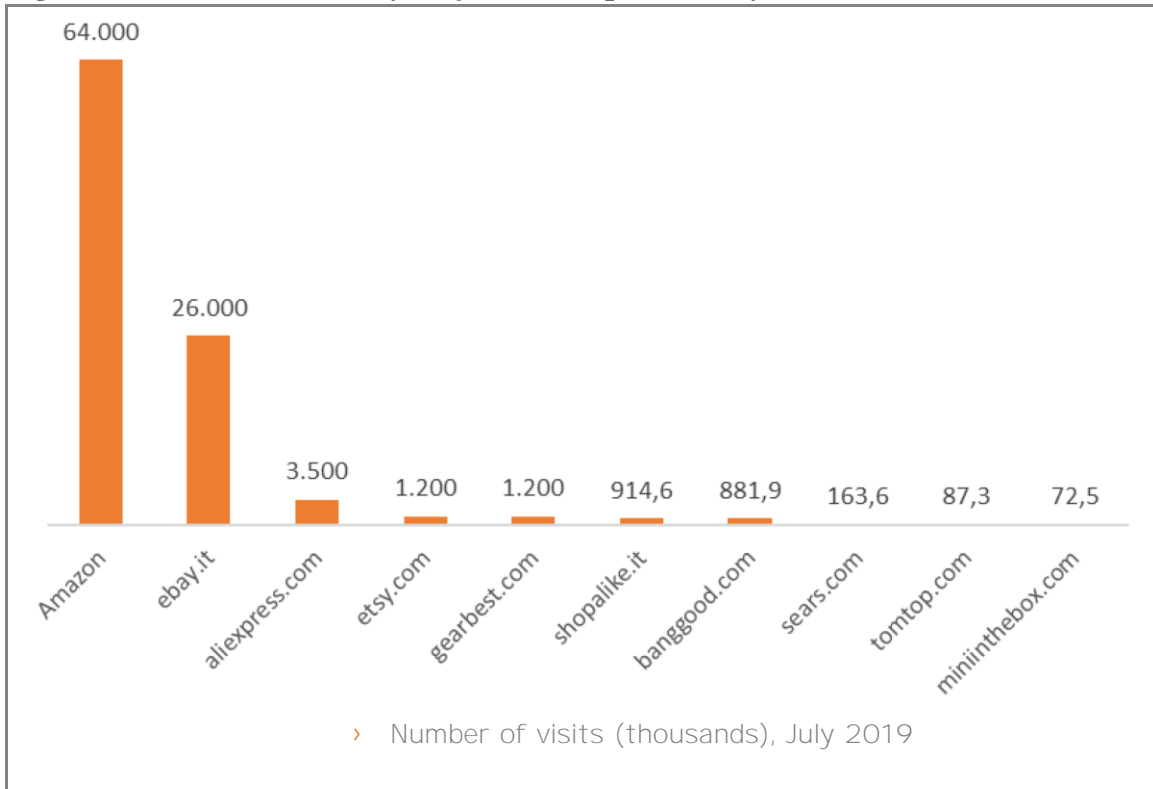
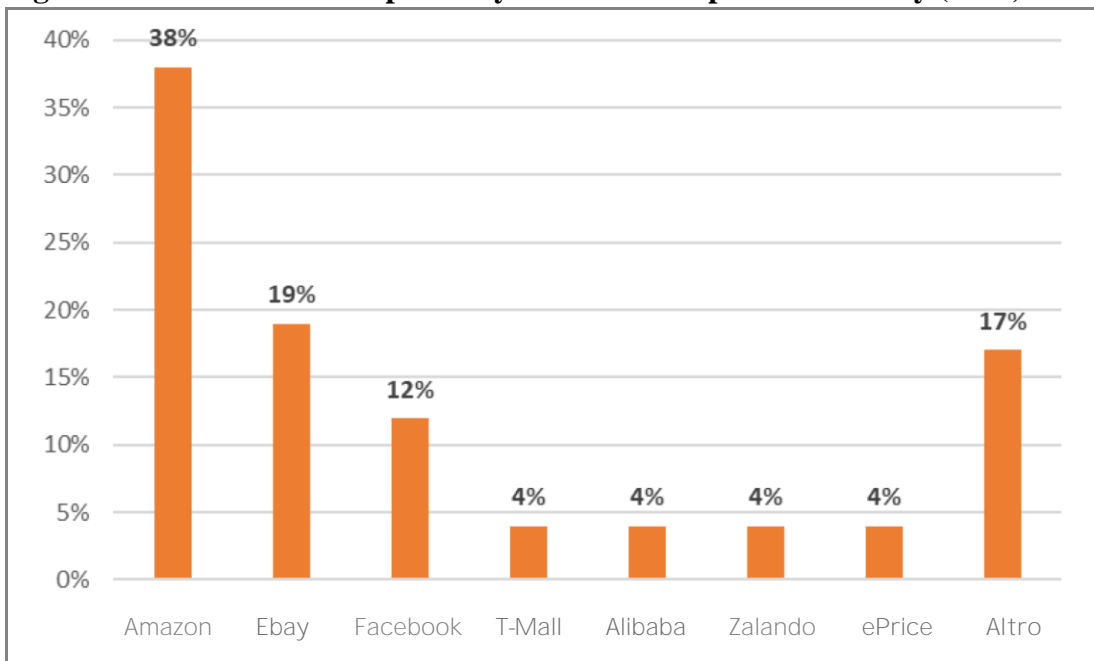


Figure 7- Most used marketplaces by e-commerce operators in Italy (2020)⁸¹



⁸⁰ Elaborations on Statista data (cf. PI.3, all. statistic_id1087219_leading-e-commerce-marketplaces-in-italy-2019-by-number-of-visits). See also doc. 245, annex 1.

⁸¹ See doc. 245, enclosure 8.

IV.3. The evidence acquired on the agreements and its effects

58. The present proceedings concern the agreements entered into between the Amazon and Apple groups on 31 October 2018 and, in particular, certain specific provisions of the *Global Tenets Agreement*⁸² ("GTA") and the agreement amending the existing distribution agreement in Europe ("*Amendment to the Apple Authorized Reseller Agreement*"⁸³ dated 31 October 2018, hereinafter the "EU Agreement").

59. In what follows, the evidence acquired at the premises of the companies of the Amazon and Apple groups will be analysed by distinguishing four temporal phases: (i) the negotiation of the agreements of 31 October 2018 between Apple and Amazon, replacing the previous contract concluded in 2014; (ii) the execution phase of the agreements, with particular reference to the identification of resellers excluded from selling on Amazon (whether official or unofficial resellers); (iii) the reactions of *resellers* and evidence about the possible effects of the agreements (iv) the proposed changes following the COVID emergency, in order to expand the number of resellers on Amazon.

IV.3.a. The negotiation of the 2018 agreement between Amazon and Apple and the limitations on third-party sellers on Amazon.it

60. Prior to the conclusion of the 2018 agreement, which is the subject of these proceedings, the Amazon and Apple groups - and in particular the Apple-DI and Amazon-EU companies - had entered into the agreement known as the '*Apple Authorized Reseller Agreement*'⁸⁴. According to this agreement, Apple-DI appointed Amazon-EU as an 'Apple Authorised Reseller'⁸⁵, i.e. a reseller with whom Apple has an authorised reseller agreement in the territory of the European Union⁸⁶. As noted above⁸⁷, Amazon-EU, as a *reseller*, receives benefits from Apple (e.g. discounts) in order to encourage sales of Apple products and the fight against counterfeiting⁸⁸ and may obtain its supplies from Apple authorised distributors or directly from Apple.

61. During 2017, Apple and Amazon begin to discuss the renewal of the existing contract⁸⁹. In these negotiations, Apple's request to control access to Amazon's *marketplace* by third-party retailers (so-called '*gating*'); for instance,

⁸² Cf. doc. ISP.85, 58 (Annex 1.pdf).

⁸³ Cf. doc. ISP.81, 58 (Annex 1.4.pdf).

⁸⁴ Cf. doc. ISP.79, 56.

⁸⁵ [Omissis].

⁸⁶ [Omissis].

⁸⁷ See doc. 56.

⁸⁸ [Omissis].

⁸⁹ Cf. ISP.8.

an email dated 19 September 2017 states that '*gating*' of retailers is one of Apple's requests, although as of that date Amazon had not agreed to anything on this point⁹⁰. The *gating* of third- party retailers is, in fact, one of Apple's main demands⁹¹ together with the request to monitor the presence of unauthorised or counterfeit products⁹².

62. Negotiations between Apple and Amazon continue until September 2018, at which time the two groups are set to finalise the details of the contracts and enter into the agreements⁹³. The agreement being negotiated, according to a series of emails exchanged from 18 to 20 September 2018⁹⁴, provides for the conclusion of a *Global Tenants Agreement* (GTA) between Amazon.com Services Inc., Amazon-EU, Apple and Apple-DI, valid in every country where the two groups have an official distribution agreement. As far as Italy is concerned, the 2014 distribution agreement is therefore contextually amended to take into account the provisions of the new *global framework*.

63. A list of sellers who are allowed to sell on the Amazon.it *marketplace* will be included in the GTA. According to the documents in the file, the list of sellers that can access the Amazon.it *marketplace* is the result of a negotiation between the parties⁹⁵. In this context, Amazon initiates a reconnaissance activity of all sellers in its *marketplace* that have previously sold Apple products, distinguishing them into 'authorised' and 'unauthorised'.⁹⁶

⁹⁰ "*Gating* - As some of you may know, gating is one of Apple's requests, however Amazon has not agreed to anything on this issue at this stage. Over the next few days it would be useful to understand the extent to which your region gates Apple products, how this gating is undertaken and the extent to which this commitment is documented in any of your regional agreements with Apple so we know the extent of our Apple gating arrangements worldwide when this issue is next raised by Apple. Please remember this negotiation is highly confidential and Amazon has not committed to anything on this point yet; we do not want to give rise to speculation within the business so please be discreet if you need to make enquiries. Cf. doc. ISP.8.

⁹¹ [Omissis]. See ISP.13 (attached document entitled '20171212 Apple negotiation summary (privileged and confidential)- for business feedback_EU.docx').

⁹² [Omissis]. See ISP.13 (attached document entitled '20171212 Apple negotiation summary (privileged and confidential)- for business feedback_EU.docx').

⁹³ Specifically, an email dated 18 September 2018 reads: "We're meeting with Apple tomorrow to try to finalise the global tenants agreement. If all goes well, we will have an agreement ready to sign." Cf. doc. ISP.9.

⁹⁴ Cf. ISP.9.

⁹⁵ "Authorized resellers: The updated GTA will include an annex of authorised resellers in your country (draft from Apple attached). [Apple was clear that this list is negotiable so our global teams should confirm whether there are other resellers they think should be on the list and engage with Apple over the next 2436 hours to discuss that and settle on a list. Cf. doc. ISP.9.

⁹⁶ In particular, see the following evidence:

Internal Amazon email of 20 September 2018 12.35pm, "we are moving forward with Apple on a global level and we need you support until 6pm today, to vet the Apple resellers for your respective locales. Could you please go through the attached list and recommend key resellers that you need to have included from your locales and feed back to me today." See ISP.9.

Internal Amazon email dated 20 September 2018 4.52pm, "We have aligned [...] on the following actions: 1- [...] Identifying the Apple authorised resellers for EU5. 2- [...] Identifying all the sellers who sold Apple products in EU5 in YTD 2018 [...] 3- Consolidate an EU5 answer [...] - Answer should be an excel file with list of sellers for each locale, a flag on authorised or non authorised". See doc. ISP.9.

Internal Amazon email of 20 September 2018 2.55pm, "Great that we are progressing fast with Apple. [...] can you please go through the attached list and recommend key resellers that we need to have included from

64. The inspection documentation shows that the limitation of the number of dealers is not dictated by qualitative characteristics, but is purely quantitative, amounting to approximately 20 dealers, who will be selected one by one (*handpicked*)⁹⁷. Indeed, the number of 20 sellers is the maximum number proposed by Apple globally, and Amazon proposes to use this quantitative limitation for each country (*Why are we limiting ourselves to 20 sellers? 20 sellers is the maximum currently proposed by Apple globally (i.e. Italy) and we will push to get this for all EU5 locales each.*"⁹⁸; *the list provided will be the final list and will ultimately override all sellers listed by Apple before. Ultimately the idea is to have 20 slots filled.*"⁹⁹). It also appears from the same Amazon document analysed above that the sellers proposed by Apple are of little relevance in terms of sales, whereas Amazon attempts to choose, from among the official sellers, those with the most sales in each country's marketplace¹⁰⁰.

65. The commercial negotiations between the Apple and Amazon groups continue on several points but Apple's refusal to allow non-APR resellers is becoming increasingly clear (in an internal Amazon *email* dated 4 October 2018 7.37pm, it reads *'Sharing the notes from our call with Apple [...] Seller list: Apple is not willing to accept non-APR resellers for the start. They have indicated support to approach sellers jointly though'*.¹⁰¹). In a subsequent email from Amazon dated 5 October 2018 at 11.04 a.m., it emerges that Apple rejected Amazon's proposal to expand the list of authorised sellers to access the marketplace (*List of sellers: Apple does not agree on expanding the list of*

IT. ETA: today 18:00 - sorry for super short notice." See doc. ISP.72.

Internal Amazon email of 20 September 2018 at 17.01, *"let me re-cap - yes this list will go to Apple. The goal of this list is to ensure that Apple supports the key authorised sellers in selling on Amazon - unauthorised sellers should not be included. Specifically we should include those authorised resellers that are already sellers today as prio 1.* See doc. ISP.72.

⁹⁷ Cf. ISP.72. In particular, an email from Amazon dated 21 September 2018, 10.24 a.m. states: *'we have received feedback from US that we will only include "handpicked" sellers here and US is targeting approx. 5 sellers. Could you please curate your top 20 sellers per locale under these criteria:*

1. Existing key authorised sellers (e.g. Gravis in DE)
2. Key authorised reseller leads (e.g. Euronics in DE)
3. Top hold out leads of authorised resellers

[...] FAQs

What about the sellers that are already proposed by Apple? At a first glance these are not highly relevant, so just propose your super stars Will we be able to exchange sellers on the list? A process has not been confirmed yet, but we will demand to have a mutually agreed exchange mechanism

Why are we limiting ourselves to 20 sellers? 20 sellers is the maximum currently proposed by Apple globally (i.e. Italy) and we will push to get this for all EU5 locales each.

What happens, if we have to reduce the list further? We will push back, but to make it easier internally please rank the sellers in your respective lists already by importance" See doc. ISP.72.

⁹⁸ Cf. ISP.72.

⁹⁹ Cf. ISP.72.

¹⁰⁰ See ISP.72.

¹⁰¹ Cf. ISP.31.

authorised sellers to what Amazon sent earlier in the day, and insists on sticking to the ones in the draft agreement'¹⁰²).

66. In fact, according to Apple's internal documentation, the idea emerges that only retailers in a reduced ('self-contained') channel, which 'is easier to control' and which are supplied ('food chain') in a differentiated manner should be authorised to access Amazon.it ('what I would say is that the idea was to stick to one "self-contained" channel that we believe will be easier to control. If 2 CE retailers in Germany would be authorised we'll run into various discussions and issues with other CE retailers in Germany and or other T5 countries. In addition, there is a different food chain for retailers than for APRs. Unless Mark has changed his opinion, we should stick to APR to avoid issues in the channel'¹⁰³). An exception to this rule are only 2 German retailers who do not qualify as APRs, introduced on condition that Amazon accepts all the proposed clauses: "We are ok to add Cyberport and Gravis so long as it is 100% confirmed that Amazon have fully accepted our WE T&Cs."¹⁰⁴.

67. In general, Apple's documentation confirms the presence of a quantitative limitation on the number of operators who can access the Amazon.it marketplace: [omissis]¹⁰⁵.

68. On 23 October 2018, negotiations between the two groups are about to end. According to Amazon's internal documentation, the points of discussion concern the application of the restrictions also to used (refurbished) products and the identity of the retailers to be admitted¹⁰⁶. In an email Amazon's internal of 26 October 2018, 6.21 p.m., it emerges that the agreement reached with Apple foresees the exclusion of the restrictions for used and refurbished products, while the restrictions for resellers will become operative from 1 November 2018 for resellers who have never sold Apple products on Amazon and from 1 January 2019 for resellers of Apple products already active on the

¹⁰² Cf. ISP.31.

¹⁰³ See doc. 58 (all. APL-ITALY_000062.pdf).

¹⁰⁴ See doc. 58 (all. APL-ITALY_000071.pdf).

¹⁰⁵ See [omissis].

¹⁰⁶ Cf. ISP.16. In particular, the email of 23 October 2018, 1.30 p.m. states: 'After some days of silence, it seems we are now close to finalising the negotiation with Apple and are planning to put gating in place from Jan 1st 2019 onwards. [...] See complete list of Sellers attached, this is final for now, but might be subject to further change going forward, especially with regards to adding more/bigger Apple Authorised Resellers. I am still expecting to get an update on Renewed and used products. The WW team is working on the Seller communication, which I will coordinate for EU5, primarily with regards to calling high impact Sellers. We will get a song sheet, FAQ, and a list of Sellers by locale. Can each of you please assign a POC who will own the call down activity in your locale? I don't expect more than 20 Sellers by country, but let's wait for the final list to arrive. Once the communication went out, we should start recruiting all remaining APRs on the list with our DSR teams. I would suggest to establish a central steering for this activity, as we will get questions from [...] regarding our progress, and we should try to make most out of these Sellers (e.g. full selection/100% Prime commitment etc., potentially in exchange for lower fee rates). Let me know if you have a senior person in your team who would want to handle this, otherwise I can also appoint someone from my team. Let me know if you have questions. I'll keep you updated on Renewed/used.'

*marketplace*¹⁰⁷. To this end, Amazon plans communication activities towards excluded resellers¹⁰⁸.

69. On 31 October 2018, Apple and Amazon entered into the *Global Tenets Agreement*¹⁰⁹ (GTA) and the agreement amending the existing distribution agreement in Europe ("*Amendment to the Apple Authorized Reseller Agreement*"¹¹⁰ of 31 October 2018, 'EU Agreement').

70. The GTA is a framework agreement between Amazon.com, Amazon- EU, Apple Inc. and Apple-DI whose provisions apply in the geographic areas where the two groups have a distribution agreement, including Italy. According to the provisions of the GTA, Amazon and Apple aim to establish a strong and lasting business relationship aimed at creating a unique and *premium* shopping experience. To this end, it is stipulated (Art. 1(b))

c)¹¹¹) that Apple will identify for each geographic location a number of official Apple resellers¹¹² who will be able to sell Apple products in the identified Amazon *marketplaces*¹¹³ a minimum number of 2 *resellers* for each Apple product. Any changes to the list of resellers authorized to sell on Amazon.it are subject to Apple's written consent, taking into account the allocation of products made to such *resellers*, sales territories, and other relevant terms¹¹⁴.

71. In addition, as of 1 January 2019, Amazon may not allow sellers other than those identified by Apple to access its local *marketplaces*, including Amazon.it, with both official Apple resellers other than those indicated in the contract and unofficial resellers freely purchasing Apple and Beats products excluded from the selective distribution system being excluded¹¹⁵.

¹⁰⁷ Cf. ISP.16.

¹⁰⁸ Cf. ISP.16.

¹⁰⁹ Cf. doc. ISP.85, 58 (Annex 1.pdf).

¹¹⁰ Cf. doc. ISP.81, 58 (Annex 1.4.pdf).

¹¹¹ "(b) Unless otherwise agreed by Amazon, Apple will identify multiple Apple Authorized Resellers for each region that may sell Apple Products on Amazon's Authorized Electronic Locations. In each region, these resellers will be selected from among Apple Authorized Resellers to provide coverage for all Authorized Products (at least two resellers for each Apple Product) for which Amazon has been authorized in that region. Any additions require Apple's written approval. Apple has the right to modify the list to remove, add, and/or replace a reseller on the list with another Apple Authorized Reseller of similar status, taking into account product allocations by Apple to such resellers, sales territories, and other relevant terms.". See ISP.85, 58 (Annex 1.pdf).

¹¹² "Apple Authorized Reseller" means a reseller of Apple Products with which Apple has an Authorized Reseller Agreement in effect in a Territory, as defined in the local Apple Authorized Reseller Agreement". See ISP.85, 58 (Exhibit 1.pdf).

¹¹³ "Authorized Electronic Location(s)" means: (i) Amazon's website or a website operated by an Amazon affiliate or subsidiary; and (ii) Amazon's mobile application ("App"), in each case through which Amazon is authorized by Apple to resell Authorized Products, as set forth in the Product & Channel Authorization." See ISP.85, 58 (Annex 1.pdf).

¹¹⁴ ("Any additions require Apple's written approval. Apple has the right to modify the list to remove, add, and/or replace a reseller on the list with another Apple Authorized Reseller of similar status, taking into account product allocations by Apple to such resellers, sales territories, and other relevant terms" See ISP.85, 58 (Exhibit 1.pdf).

¹¹⁵ "(c) Amazon will not: (i) offer Authorised Products for sale on electronic marketplaces operated by a third party, even if such third party is an Apple Authorized Reseller; or (ii) beginning after the later of January 1,

72. In particular, the provision of the GTA is supplemented by the EU Agreement¹¹⁶ entered into by Apple-DI and Amazon-EU on 31 October 2018, which regulates in *Exhibit D* the list of retailers authorised to access Amazon.it¹¹⁷. In particular, with reference to Italian retailers, the authorisation as of 31 October 2018 was granted to the operators identified in Figure 8 *below*.

Figure 8 - Elenco operators established in Italy authorised to sell Apple and Beats products on Amazon¹¹⁸

[omissis].

73. This list of Italian operators is amended on 27 February 2019¹¹⁹ through a contractual addendum entered into between Apple-DI and Amazon- EU, resulting in the reduction of 7 operators. Among these, 2 operators ceased their activity (N.P.U. Group S.r.l. in liquidation and Uno K S.r.l. in bankruptcy proceedings), 4 operators were acquired (and in some cases merged by incorporation) by other APRs included in the list. Finally, the operator [omissis] is currently active in the sale of Apple products but is no longer a APR¹²⁰.

74. The operators that can access the Amazon.it marketplace identified in the GTA and the EU Agreement are a subset of Apple's official resellers, which - as indicated *above* - are listed in a list that identifies the company names of the operators that can access the *marketplace*. The list lists *Apple Premium Resellers* (APRs) from 5 EU countries (Italy, Germany, France, the Netherlands, Sweden and Spain¹²¹) and 2 Apple Authorised Resellers qualified as *Retailers* established in Germany¹²².

75. The contractual provisions of the GTA and the EU Agreement, as amended¹²³ therefore, exclude from access to the Amazon.it *marketplace* the

2019 or 60 days after the date on which Apple has identified Authorized Resellers for a particular Amazon country or region, allow any third party, other than those identified under Section 1(b) above (and authorized third party sellers of refurbished products as may be agreed by Apple in localized Apple Authorized Reseller Agreements), to sell Authorized Products on Authorized Electronic Locations in such country or region, even if such third party is an Apple Authorized Reseller ("Prohibited Reseller"). If Apple or Amazon discover any Prohibited Resellers offering Apple Products on Authorized Electronic Locations, Amazon agrees to remove such Prohibited Reseller(s) consistent with Section 2.8 below." See ISP.85, 58 (Annex 1.pdf).

¹¹⁶ Cf. doc. ISP.81, 58 (Annex 1.4.pdf).

¹¹⁷ "List of Authorized Resellers approved to sell on Amazon's Authorized Electronic Locations In accordance with Section 1 (b) of the Global Tenets Agreement, and based on Apple's selection criteria, the following Apple Authorized Resellers are approved to sell Apple Products on Amazon's Authorized Electronic Locations. For the avoidance of doubt, parties agree that cross border sales within the Territory will not be restricted in any event. Cf. doc. ISP.81, 58 (Exhibit 1.4.pdf).

¹¹⁸ See doc. 58 (annex 1.4.pdf).

¹¹⁹ Cf. doc. ISP.74, 58 (Annex 1.5).

¹²⁰ See doc. 56, encl. 7.

¹²¹ See doc. 98. Note that the contracts under review include APRs established in the UK, which is no longer an EU country.

¹²² See Doc. 58 (all. APL-ITALY_000062.pdf, all. APL-ITALY_000071.pdf), ISP.81, 58 (Annex 1.4.pdf).

¹²³ See doc. 58 (Annex 1.pdf, Annex 1.4.pdf, Annex 1.5.pdf)

following operators: (i) all *Apple Premium Resellers* in the EU Member Countries other than those identified *above*; (ii) all official resellers of Apple and Beats products in the AAR category and *Retailers* established in Italy and in the other Member Countries (with the exception of 2 *Retailers* established in Germany); (iii) unofficial operators established in Italy and in the other Member Countries that purchase and resell Apple products in an open distribution system.

Table 3 - Apple's official dealers in the European Union and entities authorised to sell on Amazon.it¹²⁴

Member States of establishment of suppliers	Apple Premium Reseller (APR)		Apple Authorised Resellers (AAR)		Retailer		Grand total	
	Number Total	Number authorised on Amazon.it	Number Total	Number authorised on Amazon.it	Number Total	Number authorised on Amazon.it	Number Total	Number authorised on Amazon.it
Austria	[...]	0	[...]	0	[...]	0	[...]	0
Belgium	[...]	0	[...]	0	[...]	0	[...]	0
Denmark	[...]	0	[...]	0	[...]	0	[...]	0
Finland	[...]	0	[...]	0	[...]	0	[...]	0
France	[...]	[10-20]	[...]	0	[...]	0	[...]	[10-20]
Germany	[...]	[1-10]	[...]	0	[...]	[1-10]	[...]	[10-20]
Ireland	[...]	0	[...]	0	[...]	0	[...]	0
Italy	[...]	[10-20]	[...]	0	[...]	0	[...]	[10-20]
Luxembourg	[...]	0	[...]	0	[...]	0	[...]	0
The Netherlands	[...]	[1-10]	[...]	0	[...]	0	[...]	[1-10]
Poland	[...]	0	[...]	0	[...]	0	[...]	0
Portugal	[...]	0	[...]	0	[...]	0	[...]	0

Member States of establishment of suppliers	Apple Premium Reseller (APR)		Apple Authorised Resellers (AAR)		Retailer		Grand total	
	Number Total	Number authorised on Amazon.it	Number Total	Number authorised on Amazon.it	Number Total	Number authorised on Amazon.it	Number Total	Number authorised on Amazon.it
Czech Republic	[...]	0	[...]	0	[...]	0	[...]	0
Slovakia	[...]	0	[...]	0	[...]	0	[...]	0
Spain	[...]	[10-20]	[...]	0	[...]	0	[...]	[10-20]
Sweden	[...]	[1-10]	[...]	0	[...]	0	[...]	[1-10]
Hungary	[...]	0	[...]	0	[...]	0	[...]	0
Total	[70-80]	[40-50]	[150-200]	0	[50-100]	[1-10]	[300-350]	[40-50]

76. In the face of these restrictions, certain commercial *addenda* between Apple and Amazon regulate the monitoring of Amazon's compliance with the

¹²⁴ See Doc. 98, Doc. 58 (Annex 1.pdf, Annex 1.4.pdf, Annex 1.5.pdf).

contractual provisions, with economic incentives consisting of a discount on the purchase of products by Amazon. For example, from 30 December 2018 to 30 March 2019¹²⁵, upon a compliance of at least [60/100%] of the following three indicators: '1) *Authorised Seller Compliance* 2) *Advertising Compliance* 3) *Detail Page Content Accuracy*'¹²⁶, Amazon would have obtained an additional discount on supplies of [0-10%]. Similar forecasts with an additional discount of [0-10%] are expected for the period from 29 December 2019 to 28 March 2020¹²⁷.

77. The provisions regulating access only to selected retailers active on the Amazon.it *marketplace* are distinct from the provisions aimed at combating counterfeiting, trademark and patent infringement. In fact, on the latter issue, the GTA provides (Art. 2.4¹²⁸) a notification mechanism, verification and removal of products, establishing operational rules and response times.

78. Furthermore, the GTA provides that Apple can decide which products can be placed in the Amazon.it *marketplace* (authorised products) by Amazon- EU and by sellers authorised to sell on Amazon.it, which Amazon will have to remove from the *marketplace*¹²⁹ concerns Article 2.8, although there is no selective distribution system and "*any retailer has the ability to resell Apple products (online and/or in physical shops), without the need for authorisation by Apple.*"¹³⁰.

IV.3.b. The advertising restrictions of the 2018 agreements between Apple and Amazon

79. The GTA provides for limitations with regard to advertising on Amazon's

¹²⁵ Cf. ISP.73.

¹²⁶ Cf. ISP.73.

¹²⁷ See doc. 58 (annex 1.8).

¹²⁸ "2.4 Counterfeit Products. To help prevent the listing and sale of Counterfeit Products through Authorized Electronic Locations: (a) Amazon agrees to implement mechanisms and filters to prevent listings for Counterfeit Products from appearing on Authorized Electronic Locations; and, (b) If Amazon is notified by Apple via Amazon's Brand Registry, or another means if Brand Registry is not available, or if Amazon otherwise determines in its reasonable discretion, that it has Counterfeit Products in inventory and/or available for sale or distribution on Authorized Electronic Locations, Amazon will: (i) Investigate, and within two business days, either remove product listings and suspend sales and distribution of the Counterfeit Products or escalate to the Executive Sponsors identified in Section 3.4 below for resolution. (ii) If a supplier is unable to demonstrate to Amazon's reasonable satisfaction that the products are not Counterfeit Products, Amazon will: a. notify Apple if discovery was made by Amazon; b. provide Apple with the following details from the sale of Counterfeit Products: the quantities of Counterfeit Products sold; the quantities of Counterfeit Products remaining in inventory; and the name, address, and email address(es), if in Amazon's actual knowledge and possession, of the sellers, importers, exporters, and drop-shippers and any other relevant entity involved in supplying, sourcing, and/or shipping the Counterfeit Products; c. recycle or destroy the Counterfeit Products where legally permitted or, upon request from Apple where legally permitted and at Apple's sole cost and expense, make available such Counterfeit Products for Apple's collection." Cf. ISP.85, 58 (Exhibit 1.pdf).

¹²⁹ "[...] Authorized Products" means those Apple Products that Amazon is authorized by Apple to resell, as set forth in the local Apple Authorized Reseller Agreements, which may be updated from time to time by mutual agreement of Amazon and Apple. See doc. ISP.85, 58 (Exhibit 1.pdf).

¹³⁰ See doc. 56.

marketplace. In particular, Article 3.1 of the GTA stipulates that the *top banner* ad spaces and the first two sponsored spaces in search results shall only carry authorised Apple products¹³¹. In addition, on the first page of search results on specific text strings ("*Brand queries*", consisting of approximately *[omissis]* Apple products¹³²) and on Apple's product description pages, sponsored products of other brands competing with Apple, identified in a specific list, shall not be displayed.

80. The mechanism provides for advertising restrictions only on search pages with exact keywords, it is an exhaustive list and therefore the restrictions do not apply to the terms of complex search strings outside this list: for example, if the keyword is 'iPhone 11', the search restrictions do not apply to different searches ('iPhone 11 accessories' or 'iPhone 11 covers' or 'iPhone 11 cable')¹³³. However, Apple-compatible third-party products may not appear in the agreed advertising slots (first two *slots* and *top banners*). In contrast, the advertising provisions of the GTA have no impact on the positioning of non-sponsored results in the search result. For example, if 'Apple Iphone' is searched for on the first page of results *smartphones* cannot be displayed as sponsored products of Samsung, LG, Huawei, etc.¹³⁴.

81. Amazon notes that the agreement is aimed at cooperation between the two groups in order to display only advertisements for Apple products at the top of the search results (i.e., in the *top banner*, in the first two sponsored advertising *slots* and in the other advertising *slots* appearing in the first ten search results) and in order to prevent - on the first page of the search results or on the detail pages of Apple products - advertisements for the products of certain competing brands (identified by Apple and accepted by Amazon) contained in a special list¹³⁵. There are certain advertising *standards* for specific time periods during the launch of new Apple products, which restrict the advertising of competing products.

82. The restricted products *[omissis]*.¹³⁶

83. As to how advertising works on Amazon.it, according to the same, advertising 'is an *integral part of the shopping experience, being aimed at helping customers find the products they are looking for. In fact, Amazon's advertising services draw customers' attention to products they are interested in, in the same way that other retailers position popular products so that customers can easily find and purchase them, for example at the front of an*

¹³¹ Please note that authorised Apple products are part of the original Apple products that can be sold by Amazon and third-party sellers on Amazon.

¹³² See doc. 97, all. 3, 98, all. 1. See also doc. 65.

¹³³ See doc. 56, 228, 237.

¹³⁴ See doc. 56.

¹³⁵ See doc. 65.

¹³⁶ See doc. 97.

*aisle or easily visible at checkout*¹³⁷.

84. The vast majority of advertising space for *Sponsored Products* and *Sponsored Brands* is sold through real-time auctions and advertisers only pay for the service if a customer clicks on the ad. Amazon notes that with the GTA, it has agreed to terms *[omissis]* relating to advertising¹³⁸.

85. With regard to advertising, Amazon tries to ensure that products shown as *Sponsored Products* are relevant and of interest to the customer, with mechanisms defining the positioning of *Sponsored Products* based on the *'quality of the match between the customer's purchase search and the advertisement'*¹³⁹. The ranking of advertisers' bids in the auction process, in fact, is mainly based on the score measuring the quality of the match, which reflects the relevance of the ad with respect to the customer's search, as well as the amount the advertiser is willing to pay for an ad shown in response to a keyword or set of keywords or products¹⁴⁰.

IV.3.c. The execution phase of the agreements by Amazon

86. Coinciding with the conclusion of the contract, Amazon starts its activity of identifying the traders that sold Apple products through the Amazon *marketplace* in the previous periods and of organising the communication to them as impacted by the contractual provisions analysed *above*. As can be observed in Figure 9 below, the number of resellers of Apple products active in the Italian marketplace that sold Apple products through the Amazon.it *marketplace* is *[1,800-1,900]*, of these *[10-29]* resellers hold a value of sales on Amazon (GMS - *Gross Merch Sales*¹⁴¹) in excess of USD 1 million each. These include retailers active in multiple national *marketplaces*.

¹³⁷ See doc. 237.

¹³⁸ See doc. 237.

¹³⁹ See doc. 237.

¹⁴⁰ See doc. 237.

¹⁴¹ Gross Merch Sales refers to the value of sales by third-party operators in a *marketplace*.

Figure 9 - Summary table on the number of unofficial resellers of Apple products excluded from the marketplace¹⁴²

High Level Summary for GMS impact by date Marketplace.

# Merchant id's	US	UK	DE	FR	IT	ES	IN	JP	Total
Non Auth 3P Sellers	1800-1900								
<= 100K	1700-1800								
100K to 500K	60-99								
500K to 1M	10-29								
1M to 2M	<10								
2M to 5M	<10								
5M +	<10								

***Please note the list of Sellers is larger since the start of the week and SMS threshold to avoid email to all bng
For email notifications we will look at Sellers with Official week and SMS threshold to avoid email to all bng*

87. In commenting on these figures, Amazon employees point to the circumstance that the negotiations with Apple were largely a 'black box' for third-party retailers and that Apple did not allow any changes to the list of retailers even though Amazon was pushing for an alternative list; the only exception being Germany, where there was no overlap between Amazon's proposals and Apple's list (*negotiations were largely a blackbox for 3P, even though [...] tried hard to influence. Basically Apple did not accept any changes to their original list of Apple Premium Sellers (I assume that is the complete list of APRs in each locale), they only reluctantly agreed to include two of the DE Sellers from our "alternative" list that we had put together, as for DE there was zero overlap to the Apple list.*¹⁴³).

88. The process of identifying unofficial retailers leads Amazon to focus on retailers who will be *significantly impacted* by the provisions of the agreements¹⁴⁴. In the Italian marketplace (Amazon.it) the number of highly-impacted players is [omissis].¹⁴⁵

89. Amazon also drafts the notice to be sent to retailers who will be prevented from selling Apple products¹⁴⁶ and a series of answers to frequently asked questions¹⁴⁷. The copy of the notice sent to Italian retailers on 9 November

¹⁴² Cf. ISP.10.

¹⁴³ Cf. ISP.10.

¹⁴⁴ Cf. ISP.14.

¹⁴⁵ Cf. doc. ISP.14 (attachment excel 'Highly impacted Apple TTM GMS Seller EU5.xlsx').

¹⁴⁶ Cf. ISP.14, ISP.30, ISP.47.

¹⁴⁷ "REACTIVE FAQ - UNAUTHORISED RESELLERS

1. What is happening? We have notified impacted sellers of Apple and Beats products that they may continue selling these products on Amazon through the holiday season until January 4, 2019. If they have any remaining inventory of these products in Amazon fulfilment centres on January 5, 2019, they will need to create a Removal Order and Amazon will reimburse them for the return or disposal fees through February 4, 2019. Please note, they will not be able to send shipments of these products to Amazon fulfilment centres effective December 1, 2018.

2. Why are you adding listing restrictions to these products? We make assortment decisions all the time,

2018 was filed by the complainant: "*Dear Seller, Amazon is constantly striving to improve the customer shopping experience by, for example, increasing the selection of products that we know are in high demand by customers. As part of a new agreement with Apple, we are working with a select group of authorised retailers to offer a wider range of Apple and Beats products on Amazon, including the latest versions. We are sending you this notice because you are currently selling, or have previously sold, Apple or Beats products. Your existing offers for these products will soon be removed from Amazon's websites in Europe (Italy, Germany, UK, France and Spain). We encourage you to contact Apple if you wish to become an authorised Amazon reseller. To*

based on terms and a large number of other factors.

3. *Do these restrictions apply to all stores? No, only in the United States, United Kingdom, Germany, France, Italy, Spain, Japan and India.*

4. *Why are some stores excluded? Will it be applied to other stores soon? I don't have any further information on this.*

5. *If I can no longer list in [the United States], can I list my inventory in another store that does not have these listing restrictions? Yes, you may sell Apple and Beats products in Amazon online stores not impacted by this assortment decision. However, you are required to follow all applicable laws and compliance restrictions for the store in which you plan to sell. We recommend you conduct thorough research before listing in another store.*

6. *I am a current third party seller of these products through FBA. What will happen to my FBA inventory of these products? To prepare for this change, you may continue selling these products on Amazon through the holiday season until January 4, 2019. If you have any remaining inventory of these products in Amazon fulfilment centres on January 5, 2019, you will need to create a Removal Order and Amazon will reimburse you for the return or disposal fees through February 4, 2019. Please note, you will not be able to send shipments of these products to Amazon fulfilment centres effective December 1, 2018.*

7. *I am a current third party seller of these products. Can I send shipments of these products to Amazon fulfilment centres (FBA)? You may continue to send shipments of these products to Amazon fulfilment centres (FBA) through November 30, 2018. Beginning December 1, 2018, you will no longer be able to send shipments of these products to Amazon fulfilment centres (FBA).*

8. *How can I get added to the list of authorised sellers? Please contact Apple if you would like to apply to become an authorised reseller of Apple and Beats products on Amazon.*

9. *I am not a current third party seller of these products. Can I start selling Apple or Beats products for the holidays and stop at the end of the year? No. Sellers that are not currently selling Apple or Beats products cannot begin selling them.*

10. *How can I appeal Amazon's decision to remove my offers after January 4, 2019? Please contact Apple if you would like to apply to become an authorised reseller of Apple and Beats products on Amazon.*

11. *As a current third party seller, new listing restrictions like these make me feel like I cannot trust Amazon. How do I know you will not add listing restrictions on products or brands I have been selling for years? We understand your concern. We are taking steps to assist you and other affected sellers.*

12. *I sell products that are made to be compatible with Apple products, but they are not Apple brand. Are these products affected by this assortment decision? No, these products are not affected by this assortment decision.*

13. *I sell previous-generation Apple and Beats products, like the iPad 2, in new and used condition. I do not see any offers for these products from Amazon. Can I keep selling these products? No, you may no longer sell these products beginning January 4, 2019. Your offers will be removed on January 5, 2019.*

14. *I sell Apple and Beats products through the 'Amazon Renewed' programme. Can I keep selling these products? Yes, you may continue to sell Apple and Beats products through the Amazon Renewed programme'. Cf. doc. ISP.14 (word attachment "PC Project Eye_Seller Communication Reactive FAQ_11.7.2018_Sellermail and autho only.docx").*

adequately prepare for the change, you will be able to continue selling these products on Amazon throughout the Christmas period until 4 January 2019. If you have some of these products in stock in our logistics centres on 5 January 2019, you will have to create a removal order. Amazon will refund you the amount paid for the removal or disposal fee until 4 February 2019. We also remind you that you will no longer be able to send these products to our logistics centres from 1 December 2018. Thank you for choosing Amazon, Amazon Services Europe"¹⁴⁸.

90. According to Amazon's guidelines on the communication of the agreement, the restrictions under consideration result from common assortment decisions (*'Why are you adding listing restrictions to these products? We make assortment decisions all the time, based on terms and a large number of other factors.'*"¹⁴⁹). Regarding the possibility of being re-included in the *marketplace*, Amazon refers to Apple in order to become an official retailer (*'How can I get added to the list of authorised sellers? Please contact Apple if you would like to apply to become an authorised reseller of Apple and Beats products on Amazon.'*"¹⁵⁰).

91. As for the modes of communication with the outside world, there is a strong recommendation at Amazon to limit communications in writing as much as possible and, in general, to give only information approved by the legal department¹⁵¹.

92. The telephone contact activities of resellers continue and, on 9 November 2018, provides a report of contact activities (Figure 10). Several resellers externally express a desire to contact Apple in order to be authorised to sell Apple products in the Amazon.it *marketplace*.

Figure 10 - Outcome of Amazon's contacting of retailers¹⁵²

¹⁴⁸ Cf. doc. PI.1.

¹⁴⁹ Cf. doc. ISP.30 (word attachment "PC Project Eye_Seller Communication Reactive FAQ_11.7.2018.docx").

¹⁵⁰ Cf. doc. ISP.30 (word attachment "PC Project Eye_Seller Communication Reactive FAQ_11.7.2018.docx").

¹⁵¹ Email dated 9 November 2018: 'Hi all, Thank you for attending the meeting.

Please find attached the Legal-Approved FAQs, which can be used to answer impacted Sellers' enquiries. I also attach the list of top Domestic Apple Sellers TTM, including the ones (in green) that we were able to reach by phone this morning.

Key points:

É *Please try to limit written communication on this topic. If needed, you must limit strictly to what has been officially communicated today and to the Legal-Approved FAQs attached*

É *Starting from December 1st, FBA Sellers will no longer be able to ship Apple and Beats products*

É *Starting from January 5th, 2019, all Apple and Beats offers will be removed. If there is any inventory left in FBA, Sellers will be able to create a removal order for free*

É *New applications to sell Apple and Beats products (un-gating requests) are no longer being accepted*

É *Amazon Renewed products are excluded from the WW deal. All whitelisted 3P Sellers will be able to continue selling refurbished Apple and Beats products in Renewed (if any Seller shows interest, please let me know). Cf. doc. ISP.47.*

¹⁵² Cf. doc. ISP.42 (attachment "Copy of IT_Apple_Calldown_Feedbacks.xlsx"). See also ISP.38.

CID	Seller Name	Called? (Y/N)	Answered? (Y/N)	Feedback
OMISSIS	OMISSIS	Y	Y	how can I become one of the authorized resellers? It is so years we are in the business and there anything we can do about it, are you trying to set rid of us Sellers? if you will do that to other brands like Samsung to be closed
OMISSIS	OMISSIS	Y	Y	I understand, it is the right way of doing it, we are going to lose a lot of sales to EBay and other competitors. Did you consider that?
OMISSIS	OMISSIS	Y	Y	How can I become one of the authorized resellers? the decision, appreciate the fact you called
OMISSIS	OMISSIS	Y	Y	Understood, not an issue at all. We were planning to stop selling Apple products in 2019
OMISSIS	OMISSIS	Y	Y	This is going to have a huge impact on us and our company, we are going to think about the future
OMISSIS	OMISSIS	Y	Y	Understood, thanks for the information, we will try to sell the most of our stock during holiday period.
OMISSIS	OMISSIS	Y	N	Unresponsive
OMISSIS	OMISSIS	Y	Y	Amazon does always what he wants, nothing different from other decisions. Really appreciate this fact. You guys are finishing our stock
OMISSIS	OMISSIS	Y	Y	Thanks for the communication, will delete Apple from my 2019 plan
OMISSIS	OMISSIS	Y	N	Unresponsive
OMISSIS	OMISSIS	Y	Y	Thanks for the communication, will delete Apple from my 2019 plan
OMISSIS	OMISSIS	Y	Y	(Same as OMISSIS this is the old account! I understand, it is the right way of doing it, we are going to adapt. You are going to stop selling Apple and other competitors. Did you consider that?
OMISSIS	OMISSIS	Y	Y	What can we say? Another decision from Amazon! We will sell them on other marketplaces, easy.
OMISSIS	OMISSIS	Y	Y	Understood, we will ship to Fa A ahead of 1st December and apply to become an Apple authorized reseller. Appreciate the call
OMISSIS	OMISSIS	Y	N	Unresponsive
OMISSIS	OMISSIS	Y	N	Unresponsive
OMISSIS	OMISSIS	Y	Y	Thanks for the communication, we were already planning to stop selling Apple
OMISSIS	OMISSIS	Y	N	Unresponsive
OMISSIS	OMISSIS	Y	Y	Thanks, we will apply to become an Apple authorized resellers
OMISSIS	OMISSIS	Y	N	Unresponsive
OMISSIS	OMISSIS	Y	N	Unresponsive, appears to have stopped selling
OMISSIS	OMISSIS	Y	N	Unresponsive, appears to have stopped selling

93. At the same time, there is positive feedback from Apple Premium Resellers on the restrictions introduced with the GTA and the EU Agreement¹⁵³.

IV.3.d. Reseller reactions and internal evidence on the effects of the agreement

94. With reference to the reactions of non-official retailers, it is noted that a German operator, Notebook.de, initiated civil proceedings in January 2019 at the Frankfurt District Court requesting precautionary measures¹⁵⁴. In internal discussions between Amazon employees, it emerges that the selection of retailers was not made on a qualitative basis, as Apple did not intend to include such criteria in the contract, which then refers to generic 'Apple selection criteria' (*To your second question: Separately, does this case potentially implicate the viability of Apple distribution as a valid SDS? We think it does. The seller is arguing that we "arbitrarily" excluded them as a seller, and they're making the point that Apple does not operate a SDS and there are no qualitative criteria for the selection of authorised sellers. As a reminder, we discussed including a reference to such qualitative criteria under the Reseller Agreement but Apple pushed back. Ultimately, they were willing to confirm*

¹⁵³ Email dated 12 Nov 2018: "I reached the 3 Apple Premium Resellers that are existing Sellers in IT (2 launched, 1 pending) to communicate the restriction in selling OOC starting from Jan 5th, 2019. All feedbacks have been positive, I attach the updated file." Cf. doc. ISP.51.

¹⁵⁴ Cf. ISP.37.

that authorised resellers approved to sell on Amazon Marketplace were selected "based on Apple's selection criteria" (Annex D of Amendment to Authorized Reseller Agreement) That being the case, we will argue that Apple's tight distribution system - even if it may not be a "selective distribution system" in the technical sense - justified the removal of sellers who were not authorised based on Apple's selection criteria, emphasising that in the end we improved CX on various metrics (selection to begin with). The claimant is arguing that the removal of sellers will result in an overall price increase, so we will look into the data to see if we can rebut this.)"¹⁵⁵). Also, it appears that Amazon attempts to discredit the retailer ("We looked into the "bad actor" piece but did not find any indication of fraud or counterfeit by this seller."¹⁵⁶), an unsuccessful option with this retailer.

95. As regards Italy, the complainant (Digitech) sent a warning to Amazon on 1 February 2019 in order to be readmitted to the *Amazon.it* marketplace¹⁵⁷. Amazon's response is processed by Amazon-IT following the external communication guidelines discussed above¹⁵⁸ and was signed by Amazon-SE¹⁵⁹. *We acknowledge your communication of 1 February u.s. on behalf of Amazon Service Europe S.ar.l. ("Amazon") as the company providing the Amazon.it Marketplace service. Amazon EU S.a r.l. is in no way involved in the provision of this service. Third-party sellers are of paramount importance to Amazon and our customers. For this reason, we have informed all third-party sellers (including your customer) in good time that as of 5 January it would not be possible to continue selling Apple and Beats products on Amazon. Should your customer wish to become an authorised reseller of such products on Amazon.it, please contact Apple directly. Yours sincerely"*¹⁶⁰.

96. Amazon is also seeking information about the retailer Digitech¹⁶¹ in particular about its turnover and possible sales authorisation, since Digitech claimed to legitimately sell Apple products¹⁶².

97. Digitech replied on 5 February 2018 to Amazon, explaining that it had *"already contacted Apple's contact persons in Italy in order to obtain authorisation to sell the aforesaid products, and the relevant documentation in its possession attesting to the possibility of reselling Apple products has already been sent and submitted to your Department in charge [...] (as indicated by Amazon Sellers Support), but in recent weeks we have only*

¹⁵⁵ Cf. ISP.37.

¹⁵⁶ Cf. ISP.37.

¹⁵⁷ Cf. ISP.59, ISP.60.

¹⁵⁸ Cf. doc. ISP.17. See also ISP.14, ISP.30, ISP.47.

¹⁵⁹ Cf. ISP.17, ISP.62. In particular, it reads *"We do not reply via PEC for Marketplace matters, but from LUX via ASE. @Alice, could you please take care of the sending on letterhead via LUX?"*. ISP.62.

¹⁶⁰ Cf. ISP.62. See also ISP.11, ISP.17, ISP.64.

¹⁶¹ Cf. ISP.61.

¹⁶² Cf. ISP.61, ISP.67.

received in reply messages from your representatives who claim, at times in a contradictory manner, various inconclusive theses regarding the status of the file, which, to date, is still unanswered."¹⁶³. The reference to the authorisation already received from an Apple contact relates to the circumstance that Digitech produced invoices showing the purchase of genuine Apple products from an official wholesaler, which were sent to Amazon's *back office*¹⁶⁴ as well as a letter from the official wholesaler attesting to Digitech's ability to legitimately sell Apple products. Amazon's further response of 11 February 2019 invites Digitech to contact Apple to become an official reseller of Apple products¹⁶⁵.

98. Digitech and other vendors have also published some grievances on the Amazon seller forum (Figure 11), Digitech's comment is removed by Amazon as it bears a telephone number, in violation of the forum rules¹⁶⁶.

Figure 11 - Comments of Apple product retailers on the Amazon forum¹⁶⁷

The screenshot shows three comments on the Amazon seller forum:

- Comment 1:** From user *Digitech_P1* (18gg). The text is partially obscured by a large block of garbled characters. Below it, the text reads: "Sto demandando la questione ad un legale e finora non sembra ci sia inserito nulla del genere".
- Comment 2:** From user *ESSEBI_SHOP* (15gg). The text reads: "Ho chiamato Apple per quanto riguarda l'assistenza dedicata ai venditori. Tutte le nuove aperture di Apple Reseller e Apple Premium Reseller sono bloccate e non concedano nuove autorizzazioni alla vendita. Quindi il cerchio si chiude definitivamente".
- Comment 3:** From user *Digitech_P1* (9gg). The text reads: "er chi è interessato a venire a capo della questione, sto organizzando delle iniziative a riguardo, potete contattarmi al [illegibile]".

99. With reference to other resellers in the Amazon.it marketplace, it is noted that IT Store - from 2011 to 2019 *Apple Authorized Resellers* (AAR) and currently a seller in the official Apple Distribution Partner Programme (DPP)¹⁶⁸ - began its commercial activity on Amazon.it in 2016, at the invitation

¹⁶³ Cf. ISP.66.

¹⁶⁴ Cf. ISP.67.

¹⁶⁵ Cf. ISP.68.

¹⁶⁶ Cf. ISP.26, ISP.69, ISP.70.

¹⁶⁷ Cf. ISP.26.

¹⁶⁸ See doc. 191.

of Amazon itself¹⁶⁹, following the development and integration of the company's IT systems to enable operations on the *marketplace* platforms. The company notes that it received a communication from Amazon saying that it would not be possible to sell Apple products on the *marketplace* as of January 2019¹⁷⁰. On 20 November 2018, IT Store asked Apple Italia for explanations as to why they were closing those channels, and the company requested to be readmitted to the *marketplace* as an official reseller of Apple products, a request that was repeated on several occasions¹⁷¹.

100. Specifically, on 20 November 2018, IT Store wrote to Apple-IT *"we have invested heavily (for our size) in the last two years on the web part, creating an automatic connector between our internal management [...], our e-commerce and Amazon. Everything synchronised with real availability and list prices without dumping. And I must say that it works very well, [...]. Now having been informed by AMAZON that you have finally decided to regularise this channel, I would not like to be ousted from the marketplace like any other person, despite being authorised by Apple and abiding by the rules. So I would like to understand, in order to be able to continue correctly as we have been doing for the past 2 years, who I have to ask in order not to be excluded from the companies that you authorise. Now there's us, C&C and R-store and all lined up. I hope you understand how alarmed I am by this communication, which could nullify the efforts, both in terms of time and money, that have been made up to now."*¹⁷²

101. On 6 January 2019, IT Store solicits a response to Apple-IT: *"Unfortunately, I have had no response to previous emails in reference to the new sales policy on AMAZON applied by you, and as expected we have also been removed from the marketplace. We would like to be able to sell the products again as we are authorised resellers and have invested heavily for our possibilities in our system to be fast and accurate. [...] I repeat, we have never dumped prices, if we have to stick to a different price list, just let us know. Also because I have seen that R-Store and C&C have been allowed to sell again, I hope you will also give us this possibility again."*¹⁷³.

102. On 14 January 2019, Apple-IT sent a response on behalf of Apple- DI which read *"this is to notify you on behalf of ADI that Apple is currently working with AMAZON to improve the customer experience on their ecommerce and give their customers another great opportunity to purchase iPhones, iPads, Apple Watch, Macs and more. However, Apple has no plans*

¹⁶⁹ See doc. 194, annex 1.

¹⁷⁰ See Doc. 191, 194, at 2.

¹⁷¹ See doc. 194, all. 3-15.

¹⁷² See doc. 194, encl. 6.

¹⁷³ See Doc. 194, at 12-13.

to allow any additional resellers at this time, cordially".¹⁷⁴.

103. IT Store, on 14 January 2019, replied to Apple-IT: "*this is not correct because you take away a big opportunity from us, and with AMAZON we have done well. We with AMAZON made 143k in 6 months and only of accessories practically, [...] I kindly ask you to review this position as we have really invested a lot on this channel developing our internal software to be fast and competitive on e-commerce / marketplace. [...] I repeat we have never dumped prices and we have always dispatched the day after the order, as we only work on real stock and not distributor stock. [...] I repeat, you take away a lot of turnover from us at will, generated by following all fair and regular criteria, I challenge you to find in our AMAZON sales are about 800 orders processed in six months of unfair pricing policies, and the feedback is also positive, especially for the speed of processing.*"¹⁷⁵.

IV.3.e. Proposed changes after the COVID emergency

104. In March 2020, at the same time as the COVID-19 health emergency, Amazon and Apple discussed the possibility of expanding the number of authorised operators on the Amazon *marketplace*. Specifically, on 20 March 2020, in an internal Amazon email, an employee reports having spoken with Apple's contact person about expanding - only temporarily - the number of operators¹⁷⁶.

105. Some Amazon employees, however, appear to oppose a temporary extension only, as this would conflict with the argument that selection is based on qualitative criteria. In particular, in an email of 26 March 2020¹⁷⁷ an Amazon employee announces that it is impossible to negotiate a temporary activation of salespeople because it would run counter to the argument that selection is based on objective criteria, thus undermining the entire legal defence on *gating*; the employee takes care to indicate that written communications with Apple should not contain any agreements about the temporary authorisation of sellers (*'we cannot negotiate a temporary activation of sellers; the concept itself of temporary would not be in line with Apple's objective criteria that resellers have to meet to be authorised to sell on Amazon*

¹⁷⁴ See doc. 194, encl. 14.

¹⁷⁵ See doc. 194, enclosure 15.

¹⁷⁶ "*Other topic that came up in my call with [...] was that he offered to eventually relax the Authorized Seller Criteria to expand temporary the number of Apple sellers on our websites in order to ensure product availability during Corona crisis. I think we should look into this in particular as we may face more severe Retail OOS in case we need to restrict inbound in our own network even more. He said they could give us a list of additional sellers that we would then need to approach. Cf. doc. ISP.92. "On the above opportunity, I understand that Apple is going to share an "extended" list of SPs (on top of the original list shared by [...]) for us to temporary expand the number of Apple sellers on our websites. As such, I see three possible actions to conduct: [...]. See doc. ISP.92.*

¹⁷⁷ Cf. ISP.92, ISP.58.

marketplace and may jeopardise our legal defence on gating. [...]. To be precise in the communication, we cannot exchange emails with Apple agreeing to a temporary activation of seller."¹⁷⁸).

106. Amazon reiterates in other internal emails that the expansion of the number of operators should not be temporary and related to contingent situations (such as the Covid-19 pandemic) and ensure that official communications with Apple refer only to objective criteria¹⁷⁹. Amazon begins an activity aimed at identifying possible new sellers of Apple products on the Italian *marketplace*, the *screening* activity confirms the presence of several official resellers of Apple products who are also excluded from selling such products from the *marketplace*¹⁸⁰.

IV.3.f. Evidence of the effects of the clauses under review

107. As to the possible effects of the agreement, Amazon acknowledges in its internal documents that the restriction in question leads to a substantial reduction in third-party sales, with a reduction in the share of sales of Apple products by third-party operators from [60-100%] in FY18 to [029%] in Q1 2019 ("*All 3P locales were impacted by the Apple agreement that came into effect in 15 Q1 (not included in the OP2 plan) and the EU 3P share of Apple AB GMS dropped from [60-100%] in FY18 to [0-29%] in Q1-19 equating to [10-50]MM of AB GMS ([60-100%] of the OP2 miss)*".¹⁸¹).

108. Further effects of the agreement could concern the level of prices offered by third parties on Amazon. In an internal Amazon email dated 7 May 2019, employees discuss the deterioration of price competitiveness on the Amazon *marketplace* compared to competitors (*[omissis]*)¹⁸². According to one employee, the loss of competitiveness of the *marketplace* could also be linked

¹⁷⁸ Cf. ISP.92, ISP.58.

¹⁷⁹ "*I'm of course glad to hear that Apple wants to expand the list of authorised resellers. However, this should not be dependent on contingent situations (like Covid) but rather justified based on Apple's objective selection criteria applied homogeneously across their reseller base. So please make this point clear to [...] when you get back to him and make sure all communications exchanged on this point with Apple follow the same approach. As you know, the addition of new authorised resellers would need to be formalised through a contract amendment (Exhibit D) so would expect Apple to confirm in writing that these new resellers meet the selection criteria for selling on Amazon marketplaces.* Cf. doc. ISP.92.

¹⁸⁰ "*We started from the list of authorised Apple resellers (<https://locate.apple.com/findlocations>) by EU5 locales in the largest cities, excluding established telecommunication companies or larger electronics retailers with their own distribution channels and identified 2 addressable buckets: a. [<10] SPs that (1) have a CID, (2) are not locked by Fraud, (3) are not Premium Resellers and (4) are not selling Apple those already selling on Amazon > action: communicate to these SPs through AMs that they are allowed to sell also Apple listing on existing product pages b. [10-29] SPs that (1) do NOT have a CID and (2) are Premium Seller non included in our original list or(3) have high potential based on operations size - number of Point of Sale, branches, online presence >action: this would require a full onboarding exercise'* See doc. ISP.83. See also ISP.87.

¹⁸¹ Cf. doc. ISP.19 (attached '20190430_Amazon Business EU 3P Q1-19 QBR.pdf').

¹⁸² [*omissis*]. PC stands for Personal Computer, WL Wireless, SIC Super Image Competitors, MFN Merchant Fullfilled Network See doc. 97.

to the Apple agreement, in view of the previous presence of many third-party players ([*omissis*]).¹⁸³

109. With reference to the directly attributable effects of the agreements, a The first effect - already highlighted in the documents acquired during the inspection and discussed above - concerns the drastic drop in the volume and value of Apple and Beats products sold by third-party operators (Table 4 and Table 5 *below*). Comparison of the pre-agreement (years 2017 and 2018) and post-agreement (year 2019) periods shows significantly negative changes in both the number of products sold by third-party operators and the turnover achieved by third-party operators.

110. The only exception concerns the category of set-top-boxes (Apple TV), which, however, was not marketed in Italy in 2017 and was introduced in 2018. The same effect due to the later introduction of the product, but only for 2017, occurs with the category of *wearables* (Apple Watch).

Table 4 - Turnover from the sale of Apple and Beats products by third-party sellers in the Amazon.it marketplace¹⁸⁴

	2017	2018	2019	Change 2017-2019	Change 2018-2019
Apple Products					
audio devices	[...]	[...]	[...]	-[60-80%]	-[80-100%]
decoders/set-top-boxes		[...]	[...]		+[200-300%]
desktop PC	[...]	[...]	[...]	-[40-60%]	-[20-40%]
notebooks	[...]	[...]	[...]	-[60-80%]	-[60-80%]
other devices	[...]	[...]	[...]	-[60-80%]	-[80-100%]
smartphones	[...]	[...]	[...]	-[80-100%]	-[80-100%]
tablets	[...]	[...]	[...]	-[60-80%]	-[80-100%]
wearables	[...]	[...]	[...]	+[60-80%]	-[1-20%]
<i>Total Apple products</i>	[25-50] million	[50-100] million	[5-10] million	-[80-100%]	-[80-100%]
Beats Products					
audio devices	[...]	[...]	[...]	-[60-80%]	-[80-100%]
other devices	[...]	[...]	[...]	-[80-100%]	-[80-100%]
<i>Total Beats products</i>	[25-50] million	[50-100] million	[5-10] million	-[60-80%]	-[80-100%]

¹⁸³ [*omissis*].

¹⁸⁴ Elaboration on data from document 110, annex "Annex_1_-_RFI1 applications_9-19_.xlsx", sheets "D13" and "D14".

Table 5 - Units of Apple and Beats products sold by third-party vendors in the marketplace Amazon.it¹⁸⁵

	2017	2018	2019	Change 2017-2019	Change 2018-2019
Apple Products					
audio devices	[...]	[...]	[...]	-[80-100%]	-[80-100%]
decoders/set-top-boxes		[...]	[...]		+[200-300%]
desktop PC	[...]	[...]	[...]	-[40-60%]	-[40-60%]
notebooks	[...]	[...]	[...]	-[60-80%]	-[60-80%]
other devices	[...]	[...]	[...]	-[80-100%]	-[80-100%]
smartphones	[...]	[...]	[...]	-[80-100%]	-[80-100%]
tablets	[...]	[...]	[...]	-[60-80%]	-[80-100%]
wearables	[...]	[...]	[...]	+[40-60%]	-[20-40%]
Beats Products					
audio devices	[...]	[...]	[...]	-[80-100%]	-[80-100%]
other devices	[...]	[...]	[...]	-[60-80%]	-[80-100%]

111. In general, for each category of Apple products, the number of third-party sellers offering a given Apple product on the Amazon.it marketplace was significantly reduced (Table 6). Specifically, on average, the number of third-party sellers in the Amazon.it marketplace selling major Apple products was above the number of 40 operators in 2018. In 2019, the number is lower at [omissis] operators, excluding the values for January 2019 (as Apple and Beats products were allowed to be sold until 5 January), the average number of sellers is further reduced. In 2019 and 2020, there is thus a reduction in the number of dealers of between 40 and 100 per cent.

¹⁸⁵ Elaboration on data from document 110, annex "Annex_1_-_RFI applications_9-19_.xlsx", sheets "D15" and "D16".

Table 6 - Number of third-party sellers in the Amazon.it marketplace active in the sale of major Apple products ¹⁸⁶

		Apple Iphone	Apple Ipad	Apple Watch	Apple AirPods
Number of average salesmen	2018	[...]	[...]	[...]	[...]
	2019	[...]	[...]	[...]	[...]
	Var. compared to 2018	-[80-100%]	-[80-100%]	-[80-100%]	-[80-100%]
	2019 (excluding January)	[...]	[...]	[...]	[...]
	Var. compared to 2018	-[80-100%]	-[80-100%]	-[80-100%]	-[80-100%]
	Jan-Jun 2020	[...]	[...]	[...]	[...]
	Var. compared to 2018	-[80-100%]	-[80-100%]	-[80-100%]	-[80-100%]
Number of sellers monthly maximum	2018	[...]	[...]	[...]	[...]
	2019	[...]	[...]	[...]	[...]
	Var. compared to 2018	-[40-60%]	-[40-60%]	-[40-60%]	-[80-100%]
	2019 (excluding January)	[...]	[...]	[...]	[...]
	Var. compared to 2018	-[80-100%]	-[80-100%]	-[80-100%]	-[80-100%]
	Jan-Jun 2020	[...]	[...]	[...]	[...]
	Var. compared to 2018	-[80-100%]	-[80-100%]	-[80-100%]	-[80-100%]

112. A further effect of the clauses under review concerns cross-border sales. In fact, the clauses of the GTA and the EU Agreement - in particular the list of resellers authorised to sell on Amazon.it - admit only certain resellers established in Italy, Germany, France, the Netherlands, Sweden and Spain¹⁸⁷ excluding all resellers (official and unofficial) established in Member States other than the above. Thus, all resellers in certain European countries are excluded from Amazon.it and cannot sell to Italian consumers via Amazon.it.

113. It is also noted that after the agreement, retailers on the Exhibit D list of the EU Agreement sold their products exclusively in the marketplace located in their own country. Cross-border sales of Apple and Beats products through Amazon effectively ceased.

114. In particular, prior to the agreement, as can be seen in Table 7, there were numerous operators ([60-99] with a turnover on Amazon.it of more than USD 100,000¹⁸⁸) from Italy and other European and non-European countries. As a result of the agreement, there are no retailers on Amazon.it in 2019 and in January-June 2020 from Member States other than Italy¹⁸⁹ (Table 8 and Table 9 below).

¹⁸⁶ Elaborations on data from Exhibit 187, Annex 'All_1.xlsx', sheet 'D19(v)'. The data concern the sellers active in the sale of 113 of the main Apple branded products. Data are not reported for MacBooks as all models are post-Apple models.

¹⁸⁷ It should be noted that the United Kingdom, following its exit from the European Union, has not been considered a member country.

¹⁸⁸ Cf. ISP.10. See also Figure 9 above.

¹⁸⁹ In 2019 alone, one UK retailer is observed in Amazon.it, with an annual turnover (GMS) of 24.25e2 p _ 0 doc. 146.

Table 7 - Manufacturers with a turnover of at least \$100,000 present on the Italian marketplace Amazon.it before the agreement: distinction of country of origin ¹⁹⁰

Vendor Origin		Sellers on Amazon.it		Sale of Apple and Beats products on Amazon.it	
		Num.	% of Total	Turnover	% of Total
EN	Italy	[30-59]	[60-80%]	[...]	[...]
PT	Portugal	[<10]	[<20%]	[...]	[...]
US	United States	[10-29]	[<20%]	[...]	[...]
GB	United Kingdom	[10-29]	[<20%]	[...]	[...]
ES	Spain	[<10]	[<20%]	[...]	[...]
NL	The Netherlands	[<10]	[<20%]	[...]	[...]
CY	Cyprus	[<10]	[<20%]	[...]	[...]
DE	Germany	[<10]	[<20%]	[...]	[...]
LV	Latvia	[<10]	[<20%]	[...]	[...]
LT	Lithuania	[<10]	[<20%]	[...]	[...]
n.a.	not available	[<10]	[<20%]	[...]	[...]
Grand total		[60-99]	100%	[...]	100%

115. In fact, Table 8 and Table 9, show - in addition to a marked reduction of operators present on Amazon.it - that operators selected in Exhibit D of the EU Agreement tend to be present only in the *marketplace* located in their country of establishment. On this point, it should be noted that Amazon's internal evidence shows an intention to "*avoid companies that are non-compliant, not legitimate, or likely to export*".¹⁹¹.

¹⁹⁰ Elaborated from the parties' data. See ISP.10 (all. excel). Third-party resellers are those who have developed significant turnover (at least USD 100,000) and were grouped by country of origin. For each seller's country of origin, the sellers present on Amazon.it and the turnover of Apple products developed are shown (column "*TOTAL_EYE gross_ordered_sales (USD)*"); the selected sellers are exclusively those whose status was "active/normal".

¹⁹¹ Cf. ISP.27. In particular, Amazon's internal email of 2 October 2018 states: '*P.13 Apple asks for a "Know your (end) customer process" to avoid businesses that are not compliant, not legitimate, or likely to export*' (see doc. ISP.27). *Know-Your-Customer (KYC)* processes consist of strict policies to validate Third Party Vendors (see doc. 97).

Table 8 - Third-party vendors with sales of Apple products on Amazon's European marketplaces: geographical breakdown¹⁹²

	2019				
	Amazon.it (Italy)	Amazon.fr (France)	Amazon.de (Germany)	Amazon.co.uk (United Kingdom)	Amazon.es (Spain)
Italy	[5-10]				
France		[1-5]			
Germany			[1-5]		
United Kingdom	[0-1]	[0-1]	[1-5]	[5-10]	
Spain					[1-5]
	I Sem. 2020				
Country of factory	Amazon.it (Italy)	Amazon.fr (France)	Amazon.de (Germany)	Amazon.co.uk (United Kingdom)	Amazon.es (Spain)
Italy	[5-10]				
France					
Germany			[1-5]		
United Kingdom				[5-10]	
Spain					[1-5]

Table 9 - Third-party sellers that have developed sales for Beats products on Amazon's European marketplaces: geographical breakdown¹⁹³

	2019				
	Amazon.it	Amazon.fr (France)	Amazon.de (Germany)	Amazon.co.uk (UK)	Amazon.es (Spain)
Italy	[1-5]				
France					
Germany			[1-5]		
United Kingdom				[1-5]	
Spain					[1-5]
	I Sem. 2020				
Country of factory	Amazon.it (Italy)	Amazon.fr (France)	Amazon.de (Germany)	Amazon.co.uk (United Kingdom)	Amazon.es (Spain)
Italy	[1-5]				
France					
Germany			[1-5]		
United Kingdom				[1-5]	
Spain					

116. This also seems to be confirmed by the *slides* produced by Apple in its

¹⁹² Elaborations on data from the parties. See doc. 146. It should be noted that Amazon confirmed at the hearing that the UK seller was only one: "there is proven evidence of sellers established in other EU countries continued to sell in Italy, it was only one, but the point is that the fact that the seller continued to sell in Italy showed that there was no restriction on cross-border sales." See doc. 376. It is noted that the seller in question sold less than EUR 2,000 in marketplaces other than the country of origin and only in 2019 (see doc. 146).

¹⁹³ Elaborations on data from the parties. See doc. 146.

final pleadings¹⁹⁴ regarding the identification of resellers, in geographic stratification of the same (Figure 12), preventing access to retailers for their geographical origin other than Italy, France, Spain, the UK and Germany, as well as the aim of only allowing 'local' purchasing (*'will be able to source local flavours only, but ship to anywhere within EU'*)¹⁹⁵.

Figure 12 - Identification of retailers¹⁹⁶

Identified market place sellers to ensure premium CX



Apple Confidential-Internal Use Only

IV.3.g. *Technical solutions to combat counterfeiting*

117. One aspect relevant to this case concerns alternative methodologies for preventing and combating counterfeiting.

118. Amazon stated that its main goal *'is to deploy technology tools designed to proactively prevent large-scale fraud and abuse before it affects a customer or business partner, and this is done through the Brand Registry programme'*¹⁹⁷ working with businesses and government authorities. To this end, Amazon says it deploys enormous resources to constantly innovate and improve ways to intercept counterfeit products and prevent them from reaching Amazon customers: in 2019, Amazon invested more than \$400 million and employed more than 5,000 employees for this purpose¹⁹⁸.

119. Amazon's active prevention tools scan more than [2-10] billion daily product updates that are sent to Amazon's catalogue and weekly customer reviews, blocking in 2019, more than [2-10] million *accounts* of fraudulent

¹⁹⁴ See doc. 360, annex 2.

¹⁹⁵ See doc. 360, annex 2.

¹⁹⁶ See doc. 360, annex 2.

¹⁹⁷ See doc. 97.

¹⁹⁸ See doc. 97.

parties before they were able to offer products for sale on Amazon and blocking offers before they were ever viewed by a customer¹⁹⁹. In 2019, *"Amazon proactively blocked more than [2-10] billion suspicious listings before they were ever published, launched brand protection tools that have become an industry benchmark, and enable intellectual property rights holders to cooperate with Amazon with the goal of zeroing in on counterfeits."*²⁰⁰.

120. The main tool for combating counterfeiting is the *Brand Registry* programme, launched in 2017 and available free of charge to brand owners whose products are sold on Amazon, regardless of the existence of a direct commercial relationship between the brand owner and Amazon²⁰¹.

121. The services of Amazon's *Brand Registry* programme guarantee brand owners: (i) accurate brand representation, providing greater control over Amazon product pages that use identified brands; (ii) search tools (global search, image search, search by ASIN ID number) and reporting tools to identify cases of potential infringement; (iii) support tools from Amazon's²⁰². Brands included in the *Brand Registry* programme are also granted greater control over photos, videos, text and other information included on Amazon product detail pages associated with their brand to ensure that product information is accurate²⁰³. In 2020, more than 500,000 brands have enrolled in the *Brand Registry* programme and *"brands report on average 99% fewer suspicious infringements than before the launch of the Brand Registry programme"*²⁰⁴. These brands include, for example, Huawei, Garmin, Go Pro, Levi's and Whirlpool²⁰⁵.

122. With reference to further instruments to guarantee users- consumers, Amazon has a general policy for items sold by third-party sellers (both when shipping is handled by Amazon's logistics network - Fulfilled by Amazon or FBA - and when it is handled directly by third-party sellers - Merchant Fulfilled Network or MFN) that allows consumers to return the purchased item, without giving any reason, within 30 days after delivery²⁰⁶.

123. Amazon, with reference to its policies to support customers for non-compliant or counterfeit products - has also *'put in place strict policies to validate Third Party Sellers through Know-Your-Customer (KYC) processes and offers refunds to customers where instances of counterfeit product sales are established. Amazon is therefore committed to leading the way in*

¹⁹⁹ See doc. 97.

²⁰⁰ See doc. 146.

²⁰¹ See doc. 97.

²⁰² See doc. 97.

²⁰³ See doc. 146.

²⁰⁴ See doc. 248, enclosure 5.

²⁰⁵ See doc. 248, annex 1.

²⁰⁶ This policy is waived for large products and for specific products for which the right of withdrawal is excluded by law. See doc. 97.

protecting customers, rights holders and Third Party Sellers to ensure authentic product offerings on Amazon."²⁰⁷. Amazon also offers the A-Z Guarantee (adopted voluntarily by Amazon and applicable to all products shipped directly from Third Party Sellers - MFN), which provides that - if a customer reports a defect (including a case of counterfeit) in a product sold and shipped by a Third Party Seller on Amazon.it - Amazon will refund the purchase price if the Third Party Seller refuses to do so.

124. In 2018, Amazon also launched *'an innovative function for serialising individual product units of brands, which can virtually eliminate counterfeiting. This led to the launch of a new service called Transparency ([...]), which is based on assigning unique serial numbers to products, whereby brands can apply a unique 2D code (similar to a QR code) to each unit they produce, thereby enabling Amazon, other retailers, relevant authorities and ultimately customers to determine the authenticity of each product. In 2019, Amazon extended Transparency's operations to Europe and other countries, including Canada and India.*"²⁰⁸. For products that adhere to the Transparency programme, which therefore have a serial number, Amazon is able to verify their authenticity through its unique code, whether the product is handled through its logistics centres or shipped by a third-party seller directly to a customer²⁰⁹.

125. The *Transparency* service also provides a dedicated application that customers can use to verify the authenticity of their products regardless of the retailer from whom they purchased the product²¹⁰. More than 15,000 brands have used *Transparency*, enabling the protection of more than 500 million product units²¹¹. Brands that have adopted *Transparency* include Samsung, Seiko, Black & Decker, Russell Hobbs²¹².

126. A further tool, introduced by Amazon in 2019, is called *'Project Zero'*, which, *"in addition to more automated protections and improved functions for assigning serial numbers to products, also includes a new tool for brands, i.e. the possibility of directly removing counterfeit products from Amazon shops"*²¹³. Project Zero is available to all brands regardless of their economic relationship with Amazon. In 2020, more than 18,000 brands signed up for Project Zero²¹⁴.

127. In addition to these tools, Amazon requires, in some cases, verification

²⁰⁷ See doc. 97.

²⁰⁸ See doc. 146.

²⁰⁹ See doc. 146.

²¹⁰ See doc. 146.

²¹¹ See doc. 248, enclosure 5.

²¹² See doc. 248, annex 2.

²¹³ See doc. 146.

²¹⁴ See doc. 248, enclosure 5.

of product authenticity requirements as a condition of admission to *listing* on the Amazon shop, "*requiring sellers to provide an invoice before they can begin selling a given product on the Amazon shop. This process is intended to establish that products actually come from a reputable supplier*"²¹⁵. This action had also been taken with regard to Apple products, as confirmed by a retailer²¹⁶.

128. With reference to anti-counterfeiting measures introduced by other *marketplace* intermediary service providers, eBay notes that it works with Apple to combat the sale of counterfeit and unsafe products, including in cooperation with public agencies. The actions taken by eBay consist of technologies that seek to identify such products in order to apply filters²¹⁷. Wish informs that it has a system for reporting and requesting the removal of counterfeit products and a programme for brands called '*Wish's Brand Partner Program*', these tools have been used in the past by Apple²¹⁸. Zalando, although it does not market Apple- and Beats-branded products, considers that the risk could be mitigated by tracking IMEI identification codes²¹⁹.

IV.3.h. Technical solutions to improve the consumer experience

129. With regard to the quality of the consumer experience and the detail of the product offering, Amazon states that it provides brands with the means to personalise all offers available in Amazon shops, e.g. with high- quality videos and images, offering '*an optimal shopping experience for even the most discerning brands, including those offering electronics or premium products*'²²⁰. In particular, Amazon grants "*brands the ability to act on a variety of features that are normally fundamental to being able to offer a high-quality shopping experience on Amazon shops*"²²¹ with the creation of individual detail pages and their customisation according to the specific requirements of

²¹⁵ See doc. 146.

²¹⁶ In particular, a reseller of Apple products on Amazon.it stated that "*we were often asked by it to send it the purchase invoices of our Apple products, to verify that they were original and purchased from official resellers*" See doc. 73.

²¹⁷ "*eBay has been engaged with Apple for several years regarding unsafe and counterfeit products. We conduct bi-lateral meetings on a regular basis. We also work directly with agencies, like Trading Standards in the UK, to identify unsafe products, including Apple products, and implement necessary measures on the eBay marketplace. For counterfeits of Apple products, we set up filters to detect such products to the extent technologically possible.*" See doc. 205.

²¹⁸ "*Wish offers brand owners or their representatives several ways to report problematic listings including submitting takedown requests via Wish's online reporting tool (available here), through its participation in Wish's Brand Partner Program ([...]), and through direct outreach to Wish's Brand Protection and Legal teams. Apple has notified Wish through one or more of these reporting methods of certain Apple and Beats products that Apple considers to be counterfeit or otherwise in violation of its intellectual property rights.*" See doc. 234.

²¹⁹ "*This risk may be mitigated by IMEI numbers (i.e., Apple watches have IMEI numbers which simplify the reporting and investigation of theft/fraud as well as the legality of returns).*" See doc. 227.

²²⁰ See doc. 146.

²²¹ See doc. 146.

each product and *brand* (e.g. product descriptions, technical specifications, extended editorials, high-definition images, user reviews, official brand videos, individual pages dedicated to different product sizes and colours)²²².

130. Further services developed by Amazon to improve the customer experience and product presentation are:

i. A+ Product Content Enrichment, which allows the creation of enriched content to be included on the product detail page, e.g. by including larger images (including 360° images), video media, improved comparison *widgets* and more space for content.

ii. Click-to-Call, i.e. a service offering customers pre-sales telephone support for a selection of products, via Amazon's or the manufacturer's *call centre*.

iii. Amazon Vine, which allows a select group of Amazon customers to obtain opinions and reviews on new and not-yet-launched items from manufacturers by sending free samples of products that have been included by brands in the programme.

IV.4. Third-party dealer considerations

IV.4.a. Marketplace services

131. Resellers of Apple products excluded from the *marketplace* agree that: (i) *marketplace* services are distinguishable from setting up one's own website; (ii) geographic location is important to reach consumers in a given country; (iii) Amazon.it represents an outlet tool that cannot be matched by other *marketplaces*.

132. In IT Store's opinion, there is a significant difference between proprietary websites and *online* sales via *marketplaces*, which can be seen firstly in the turnover achievable with *marketplaces*, with a "*ratio of approximately 1:20 between turnover achieved on its own website and that achieved on Amazon (IT Store earned EUR 1 on its own website and EUR 20 through Amazon)*", secondly in the greater visibility and penetration compared to a private website, especially for small and medium-sized companies, and finally in the possibility of faster stock rotation and thus a reduction in costs and stock subject to obsolescence.²²³, in the higher visibility and penetration compared to a private website, especially for small and medium-sized companies, and finally in the possibility of faster stock rotation and thus a

²²² See doc. 146.

²²³ See doc. 191. According to one retailer, '*The product catalogue is very extensive due to the presence on the platform not only of Amazon products but also of third-party sellers from all over the world. This means that by default the consumer is led to go directly to the Amazon platform when looking for something as he knows he will surely find the product. Buying in this way becomes immediate, there is no need to spend time searching on the web, registering on a site, and concluding the order*'. See doc. 75.

reduction in costs and obsolete stock.²²⁴ According to some retailers, in fact, marketplace services are *'essential for small and medium-sized companies to reach a large number of consumers, ergo potential customers; [...] the most important marketplaces (Amazon in primis) offer visibility that could not be equalled by a simple website/e-commerce, unless considerable investments, both technical and financial, are made that very few companies could afford'*.²²⁵

133. Digitech believes that *"the presence of a retailer within the Amazon.it marketplace is the main way to reach the largest possible number of buyers in Italy, by virtue of the growing use of the e-commerce channel for purchases of all kinds of products and in particular the preference of Italian buyers for the Amazon.it marketplace, which acts as a point of reference for operators in every sector. The main alternatives (Ebay.it, Eprice.it) nowadays by no means reach the numbers of the Amazon.it marketplace. At the same time, a marketplace located abroad does not have the same attraction for an Italian buyer, primarily because of the established consumer habits of use the marketplace of the relevant country, and secondly, because of language barriers and different product management costs"*²²⁶.

134. Retailers agree on the need for localisation or linguistic identification of the marketplace²²⁷.

135. With regard to the competitive scenario, in Digitech's opinion for the non-localised marketplaces present on the market - such as Aliexpress and Wish, for example - in addition to the considerations regarding language localisation, there are frictions related to the *"high shipment time of products and the unknown of customs duties, which makes it a rather niche reference for the average Italian consumer, despite the fact that the average prices of the products present there can be an attraction for buyers"*, so although there is a translation of the marketplace, these platforms would represent a scarcely practised alternative linked to products whose perception is of low quality and

²²⁴ Cf. doc. 191. See also Doc. 84, in which a retailer draws attention to the audience that can be reached with a marketplace.

²²⁵ See doc. 73. See also doc. 74.

²²⁶ See doc. 66.

²²⁷ See doc. 66, 73, 74, 75, 84, 89, 191. According to one retailer, *'even with the advent of Regulation (EU) 2018/302, which has effectively put an end to so-called "geo-blocking", we personally, as a company, have not received any orders from foreign customers to date, despite the fact that our offers on amazon.it are accessible by consumers across Europe. We are convinced that this is due to a number of reasons: a. Consumers' ingrained habits towards searching exclusively in their national marketplaces, as these are set up in the customers' mother tongue and therefore offer greater ease in searching for products, and in general greater and better usability (certain understanding of the characteristics of a product on sale, terms and conditions of sale, etc.). b. Higher cost of transport, so that even if the price of a good sold on a foreign national marketplace is lower than on an Italian national marketplace, the higher transport costs often make it ultimately cheaper to buy from the Italian national marketplace, since the sum "price of the product + transport" is lower than on the foreign national marketplace.'* See doc. 73.

value²²⁸.

136. Similarly, IT Store believes that there is a big difference between the pool of demand that Amazon can provide compared to that of its competitors, especially considering the quality levels that consumers expect for Apple-branded products²²⁹. In fact, according to one retailer, it is necessary to consider 'the *primary aspect that may favour the sale, [...], of expensive products such as those of the Apple and Beats brands, other factors being able to reassure purchasers in this respect. It is undisputed that the most famous non-localised marketplace, Aliexpress, is gaining large market shares also in Europe, but it is evident that the majority of sales concern low-value products*²³⁰. Medium- to long-term investments are therefore necessary to enable other operators to obtain the necessary reputation for such products²³¹.

137. On this point, IT Store, in agreeing with the correct identification of the relevant markets, considered to observe that the conduct under examination did not only affect Amazon.it, and therefore the Italian geographic market, but also Amazon's other European sites (Amazon.fr, Amazon.de, Amazon.es, etc.)²³².

IV.4.b. On the exclusion from the Amazon.it marketplace

138. Resellers of Apple products excluded from the *marketplace, whether official resellers*²³³ and *unofficial resellers*²³⁴ of Apple and Beats products, in general, consider that the restrictions at issue have adversely affected the retailers' business by depriving them of an essential distribution channel, namely the Amazon.it *marketplace*.

139. Digitech, in particular, considers it necessary to '*verify the nonregularity of an action aimed at excluding from the main Italian ecommerce market thousands of resellers of Apple and Beats products, such as our company, which was severely affected by the ban suddenly imposed by Amazon.it, since, until the time of the exclusion, it based its sales policy mainly on the sale of Apple smartphones and computers on the Amazon.it marketplace, with*

²²⁸ See doc. 66.

²²⁹ See doc. 191. According to IT Store, '*Eprice does not have the same appeal as Amazon, as it is also a purely Italian reality, and, moreover, the revenues that could be obtained are not such as to justify the investment in information systems necessary to start operations. Ebay is a marketplace whose public perception is not in line with that of a retailer of Apple products. In fact, especially historically, Ebay has been a platform used for selling used products, with a perceived lower level of quality. Aliexpress could be more incisive in the future, especially due to the presence of various industrial products, but the integration into the marketplace, as well as the management itself appears to be complicated and not in line with Apple's quality standards at present.*'

²³⁰ See doc. 73.

²³¹ See doc. 73. According to one retailer, '*the use of marketplaces is essential to reach large audiences of consumers. Amazon is fundamental for our volume of business and cannot be replaced by any mark et place in Italy, the turnover of our site and the traffic generated are irrelevant*' See doc. 89.

²³² See doc. 365, 376.

²³³ See doc. 191, 194.

²³⁴ Cf. doc. 66, 73, 75, 84, 89

*excellent sales volumes and numerous positive feedbacks from buyers*²³⁵.

140. A retailer of Apple products on the Amazon.it marketplace until January 2019, considers that *"it is right and proper that brand manufacturers implement strategies aimed at protecting their intellectual property rights; nevertheless, at the same time, in our opinion what Amazon has implemented in relation to the Apple brand, which is the subject of your proceedings, goes beyond this legitimate requirement, as it represents an absolute restriction of competition"*²³⁶. The company, in fact, considers *"that the agreement signed between Amazon and Apple has unjustifiably eliminated competition in the sale of Apple-branded products, including by sellers who purchased their products from official Apple resellers.[...] our feeling is that the agreement between these two companies is not intended to protect the Apple brand, but simply to completely annihilate legitimate competition between companies, [...] in our opinion this could set a dangerous precedent, since although 'disguised' as a legitimate need to protect Apple's intellectual property rights, it is not disputed that in reality the agreement in question has de facto created a real monopoly for Amazon in the sale of Apple products through its platforms*²³⁷. In particular, the company points out that the price charged by authorised resellers on the Amazon.it marketplace is approximately 20%-25% higher than the price charged by Amazon²³⁸, which in some cases is the only seller of certain models²³⁹ and, in fact, competition between sellers is eliminated²⁴⁰.

141. Digitech notes that the sale of Apple products *"on the marketplace remains the exclusive prerogative of Amazon itself, which currently operates under an exclusivity regime, resulting in the stabilisation of retail prices for Apple products and lost revenue for resellers who, until January 2019, could reach the largest catchment area in Italy, operating on the marketplace most used by buyers in recent years, and who are currently struggling to replicate the same numbers on alternative marketplaces such as Ebay.it, Eprice.it, etc."*²⁴¹. IT Store also noted that *"the ban on marketing Apple and Beats products on Amazon marketplaces has caused a drastic drop in orders in the years since 2018."*²⁴².

142. As to the possibility of becoming an official Apple reseller, according to Digitech, Amazon's communication referred to the circumstance that a direct affiliation with Apple was necessary in order to be able to sell Apple-branded

²³⁵ See doc. 66.

²³⁶ See doc. 73.

²³⁷ See doc. 73.

²³⁸ See doc. 73, encl. 2-4.

²³⁹ See doc. 73, encl. 5.

²⁴⁰ See doc. 73.

²⁴¹ See doc. 66.

²⁴² See doc. 365.

products on the Amazon.it marketplace. However, *'Such an affiliation was in fact impossible to obtain, since there is no dedicated contact channel with Apple to request such a certification; moreover, [...] we tried to e-mail our request for information about the affiliation with Apple in order to obtain the certification to sell on Amazon.it. [...] replied to us indicating the requirements to be met in order to obtain Apple affiliation, but that in any event case they would not have been able to meet our request as, on Italian territory, the certificates had not been issued for several years, given the full coverage of the same'*²⁴³.

143. Of the same opinion is a reseller of Apple products on the Amazon.it marketplace, who states that following the exclusion from the marketplace it has not been indicated *'how to become an authorised reseller, nor is any information available on Apple's site; according to information on the web (sellers' forum) it would appear that a six-month course and the need to reach a certain amount of turnover in Apple products annually are required (it should be emphasised that this information was gathered on the web and not on official channels, given the lack of the same on the relevant sites). [...] after the stop to sales on the Amazon platform, only a small circle of sellers are selling Apple-branded products, which suggests that of all the other sellers present before 04.01.2019, they have not received authorisation.'*²⁴⁴.

144. With reference to the possibility that such restrictions may be determined by the need to ensure the genuineness of the products, it is noted that one retailer stated that, prior to January 2019, Amazon carried out checks on the genuineness of Apple products at retailers: *'we were often asked by it to send it the purchase invoices of our Apple products, to verify that they were genuine and purchased from official retailers'*²⁴⁵.

145. Furthermore, IT Store emphasises the absence of grounds for objectively justifying the introduction of the restrictions at issue, given that it - which was qualified as an official reseller of Apple products and which sells genuine Apple products in the same way as permitted resellers - was unjustifiably excluded by Amazon²⁴⁶.

IV.4.c. On the infringement of Article 101 TFEU

146. According to IT Store²⁴⁷, the agreement between Apple and Amazon prevents parallel trade in the various national marketplaces by preventing retailers from selling Apple and Beats products through Amazon's sites in the

²⁴³ See doc. 66.

²⁴⁴ See doc. 75.

²⁴⁵ See doc. 73.

²⁴⁶ See doc. 365, 376.

²⁴⁷ See doc. 365, 376,

territory of states other than the country of establishment. According to it, what emerges is that the conduct in question has an anti-competitive object. Indeed, according to Community case law, in principle, agreements aimed at preventing or restricting parallel trade are intended to prevent competition, without the existence of an anti-competitive object being made conditional on proof that the agreement entails disadvantages for end consumers, since Article 101 TFEU is not intended to protect only the interests of competitors or consumers, but the structure of the market and thus competition as such²⁴⁸.

147. IT Store considers that, even if the agreement between Apple and Amazon were considered vertical, it could not be exempted because it contains one of the hardcore restrictions listed in Article 4 of Regulation 330/2010, namely a restriction on the customers to whom the buyer may sell the contract goods or services. From a vertical perspective, where Apple is the supplier and Amazon the buyer, the agreement in fact restricts the customers to whom Amazon may sell its *marketplace* brokerage services. The fact that the restriction does not have as its object the supply contract, but other services rendered by the purchaser, in IT Store's opinion, aggravates the restriction in that there is no connection of instrumentality between the restriction and the cause of the contract, thereby infringing not only points (b) and (d) of Article 101 TFEU, but also point (e), which expressly prohibits making the conclusion of contracts subject to the acceptance by the other contracting parties of additional services, which, by their nature, have no connection with the object of the contracts themselves²⁴⁹. IT Store, in fact, considers that Apple has "*exploited the circumstance that Amazon is also the main provider of marketplace services to obtain a result that it would otherwise not have been able to validly obtain in its bargaining with retailers, since a clause prohibiting retailers in an open distribution system from using third-party platforms for online sales would have been a fundamental restriction of competition*"²⁵⁰. In IT Store's opinion, the agreement in question could not even enjoy an individual exemption under Article 101(3) TFEU, because the anticounterfeiting justification put forward by Apple to justify the conduct is unfounded, given that the restriction was applied without any verification of which resellers had actually sold counterfeit goods and concerned operators such as IT Store, which at the time was an official reseller, ensuring the same quality and genuineness of the products. Finally, the assertion that Amazon did not carry out checks on the genuineness of the products would not be true, since Amazon asked IT Store to prove the provenance of some Apple products, and

²⁴⁸ See doc. 365.

²⁴⁹ See doc. 365, 376.

²⁵⁰ See doc. 376.

IT Store responded by showing invoices of provenance²⁵¹.

IV.5. Apple's considerations

148. In the pleadings filed in the course of the proceedings²⁵² in addition to contesting the configuration as a horizontal cartel relating to the agreement with Amazon, formulated in the decision to initiate proceedings on 14 July 2020, Apple argued that the contractual clauses subject to the present assessment were entirely lawful, as well as that they complied with the *antitrust* rules set forth in Article 101 TFEU. The Party also suggested that the agreement could be exempted under Regulation 330/2010²⁵³.

149. With regard to the lawfulness of the contractual provisions in general, Apple emphasised that the restriction of resellers on Amazon.it would pursue legitimate objectives related to improving the distribution of Apple products, such as protecting the consumer shopping experience and addressing fraudulent conduct and counterfeit products that pose security concerns. In addition, the restriction helps to curb *free-riding* by unauthorised resellers (NARs) on the investments made by AARs and Apple in terms of advertising to ensure a *premium* experience for consumers both in physical shops and online (in terms of e.g. images, explanations, etc.). In this context, "*Apple was motivated solely by a desire to achieve the aforementioned objectives, without any further unlawful or improper intent.*"²⁵⁴.

150. In particular, the agreement should be traced back to the de facto context of *online* sales, and the related problem of counterfeiting, as also recognised by several public and international institutions²⁵⁵. Indeed, counterfeiting would represent a serious problem, especially *online* where there is greater difficulty for customers to distinguish genuine products from counterfeit ones and to properly assess the reliability of the seller (e.g. on the basis of the location of his business)²⁵⁶. Thus, '*marketplaces*' in general pose serious counterfeiting problems, security and the customer shopping experience: aspects that are irreconcilable with Apple's prestige, reputation and investment in its brand, and which must therefore be vigorously opposed. Apple/Beats devices are sophisticated premium goods, for which the protection of the product's reputation and image, including by means of an excellent shopping experience,

²⁵¹ See doc. 376.

²⁵² See doc. 56, 93, 108, 109, 360, 368.

²⁵³ See 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.

²⁵⁴ See doc. 368.

²⁵⁵ See doc. 368, 376.

²⁵⁶ See doc. 368.

is an objective requirement"²⁵⁷.

151. The need to protect the consumer shopping experience and *brand* reputation in the *online* segment would be particularly pronounced in the context of *marketplaces*, where the identity of the actual retailer is not clearly evident and where attempts to *free ride* on the reputation of established manufacturers are frequent. This would also be apparent from an internal Apple presentation of 18 November 2018 ²⁵⁸ in which it would become clear that the primary objective of the Apple/Amazon Agreement was to achieve a *premium* consumer shopping experience ("CX"), expressed in terms of an "*enhanced customer journey*" on Amazon's *marketplace*.

152. As early as the 2012 distribution agreement between Apple and Amazon, a number of anti-counterfeiting clauses were introduced obliging Amazon to ensure that no non-genuine Apple products were sold on its *marketplace*. In Apple's opinion, however, these problems would not have been solved by Amazon, as acknowledged not only by Apple but also by various international organisations and journalistic articles²⁵⁹. For years, Apple allegedly attempted to work with Amazon to limit the large number of non-genuine, counterfeit, or unsafe Apple/Beats products on Amazon's *marketplace*, sending thousands of requests for the removal of illicit products for sale on Amazon and which it failed to detect and block²⁶⁰. Therefore, "*in the context of the 2018 Agreements, the provisions in question were specifically designed - as is only natural in the context of vertical agreements - to try to align Apple's and Amazon's incentives in this respect and to create a better shopping experience for Apple consumers, which is what ultimately fosters inter-brand competition.*"²⁶¹.

153. The limitation introduced by the contractual clauses would be reasonable and proportionate with respect to these objectives, and there were not, nor are there currently available, less restrictive realistic instruments that would allow achieve the same goals. This would be evidenced by the succession of agreements between Amazon and Apple. Moreover, Apple does not have a direct contractual relationship with the NARs that would allow it to induce a change in their behaviour and monitor their *compliance*, leading it to agree to restraint directly with Amazon.

154. In particular, *Amazon's 'Brand Registry and Project Zero initiatives, [are] both "ex-post" programmes that require the brand owner to proactively monitor and notify Amazon whenever the latter believes there is a third party*

²⁵⁷ See doc. 368.

²⁵⁸ See doc. 360, annex 2.

²⁵⁹ See doc. 368, 376.

²⁶⁰ See doc. 368.

²⁶¹ See doc. 368.

offering a fake product. [...] this is precisely what Apple was doing before the 2018 Agreements and continues to do: in fact, Apple has sent Amazon thousands of takedown requests (considering Italy alone). Typically Amazon had long lead times - when it did not remain inert - in acknowledging such takedown requests, and this is one reason why Apple had such significant problems on this front prior to the 2018 Agreements."²⁶².

155. Other programmes, such as *Transparency* are expensive and would require Apple to include Amazon's tracking information on every single Apple product sold worldwide and, in Apple's view, it is unclear *'why those same deception-savvy individuals would not find a way to circumvent this tracking system in the same way they circumvent countless other security features on other products, particularly when sold online rather than in a physical shop context'*²⁶³. Moreover, Amazon's solution of requiring *"each retailer to 'prove' that it is selling genuine products by submitting an invoice fails to take into account that Amazon and other marketplaces are not willing to provide this level of diligence; and that retailers selling counterfeit or fake Apple products could simply provide illegitimate 'proof' of an invoice"*²⁶⁴.

156. Therefore, Apple considered that the category of resellers best suited, at least initially, to sell Apple/Beats products on the Amazon marketplace, together with Amazon itself, were *Apple Premium Resellers (APRs)*, *'who represent a superior category of official resellers, particularly dedicated, among authorised third-party resellers, to providing a premium experience to consumers interested in purchasing Apple products. In addition, APRs offer consumers access to reliable, high-quality after-sales services provided by the APRs themselves at their physical locations. [...] From the beginning, Apple's idea was to adopt an 'inverted pyramid' approach for the authorisation of retailers on Amazon's European marketplaces. In other words, in order to ensure the effectiveness of the objectives set, it was essential to proceed initially by authorising only the APRs, and then to evaluate - following checks on the regaining of customer trust and the shopping experience on Amazon's marketplaces - the progressive expansion of the number of authorised resellers'*²⁶⁵.

157. Apple's choice would therefore have been *'to authorise a well- defined category for sale on Amazon's European marketplaces. In fact, there are numerous documents in the investigation file that refer to the negotiation phase and in which reference is always made to APRs as a category and never to*

²⁶² See doc. 368.

²⁶³ See doc. 368.

²⁶⁴ See doc. 368.

²⁶⁵ See doc. 368.

*individual 'handpicked' retailers*²⁶⁶. Apple would therefore have *'made this selection in an objective manner, on the basis of the quality of the authorised retailers, i.e. initially opting for the designation of APRs only, as they were considered the most reliable category and most in line with Apple's interests in enhancing the customer shopping experience and combating counterfeiting on Amazon's marketplaces'*²⁶⁷.

158. In fact, Apple never intended to impose limitations based on a maximum number of dealers per country because *'the number of dealers allowed in each EU country simply corresponds to the number of APRs present in each country'*²⁶⁸. The documents in the file should therefore be contextualised with the nature of commercial negotiations inherent in such interactions, since the fact that there was a negotiation with Amazon on the various points and aspects of the Agreement is an integral and natural part of a process of that type, and therefore Amazon's interpretations of the intentions of the other party (Apple) would lead it to disregard the real intentions of the agreements, which instead would be clearly evident from a reading of the agreement itself²⁶⁹. In those contracts *'it is clearly stated that there are no restrictions whatsoever in relation to the identification of authorised resellers, and that these are essentially all APRs for purely qualitative reasons, not to mention the objective lack of any restrictions on cross-border sales'*²⁷⁰.

159. Moreover, this restriction would also be necessary for the entire supply contract. In fact, in Apple's opinion, the increase in supplies to Amazon would have increased the pool of users buying and searching for Apple products on Amazon.it, and this would only have been commercially possible with the assurance that there would be no counterfeiting problems: *'in other words, increasing sales of Apple/Beats products by Amazon, i.e. in the same marketplace where other retailers can also sell, without introducing effective measures to combat counterfeiting, would not have been commercially possible at all for Apple'*²⁷¹. Therefore, it would not be possible to separate, on the one hand, the conclusion of the 2018 agreements preventing the expansion of the supply of Apple/Beats products to Amazon and, on the other hand, the GTA, as these two elements are closely interconnected and mutually necessary²⁷².

160. According to Apple, in fact, a ban on distinguishable marketplaces could

²⁶⁶ See doc. 368.

²⁶⁷ See doc. 368.

²⁶⁸ See doc. 368.

²⁶⁹ See doc. 368, 376.

²⁷⁰ See doc. 368.

²⁷¹ See doc. 368.

²⁷² See doc. 368, 376.

be well compatible with the legitimate objective of preserving the premium or luxury image of the products concerned under Community case law²⁷³ with regard to both selective distribution systems and free distribution systems.

161. Regarding the proportionality of the clauses, Apple emphasised that it only applies to *online* sales that take place on Amazon's platform and not to other *online* sales or sales that take place in physical shops. It only applies to new products, whereas used or refurbished products may well be sold on the Amazon marketplace by NARs. This is because, for these types of products, the application of clarity and transparency requirements specifically requested of Amazon already constitutes an adequate and proportionate solution to address most of the discrepancies between the expectations of customers buying such devices and the real characteristics of those devices. Finally, it only applies with respect to Apple products, leaving NARs of course free to continue selling other brands' products on the Amazon platform.

162. The restriction of access to Amazon's *marketplace* for unofficial resellers of Apple and Beats products would in any event be incapable of producing any appreciable restrictive effect. As regards inter-brand competition, i.e. competition between Apple and other competing manufacturers, it remains vigorous given that Apple competes with a large number of qualified competitors (Samsung, LG, Huawei, Xiaomi, Acer, HP, Lenovo, Dell, ASUS, Bose, and Fitbit). Even restricting the field to Apple products alone, taking into account the competition between retailers of such products, the restriction of access to Amazon's *marketplace* is not however capable of raising any concerns. On this point, Apple would like to point out that only a very small portion of Apple products are sold by Amazon (as AAR).

163. The limitation of access to Amazon.it could not, according to Apple, have any exclusionary effect in terms of access by retailers to downstream retail markets for the marketing of Apple products. In fact, Apple's product distribution system does not contain any limitations on further retail sales for the entire EU, whether physical or *online* (other than those related to compliance with requirements and measures on communication standards, quality, etc.).

164. The agreements under review have, in Apple's view, had positive effects, leading to a significant increase in the number of Apple/Beats products sold on Amazon's *marketplace* and effectively counteracting the sale of counterfeit and unsafe products on Amazon's *marketplace*, as well as improving the purchasing experience of customers²⁷⁴. Overall, the efficiencies related to the 2018 Agreements resulted in an increase in consumer welfare.

²⁷³ See doc. 368, 376.

²⁷⁴ See doc. 360, all. 1, 368, 371.

165. The full legitimacy of the restriction would also be confirmed by the Community rules and case law, as well as by national antitrust practice, which require that every possible restriction must be assessed taking into account the legal and economic context in which it takes place and not in abstract terms as it cannot be described or considered as a restriction 'by object'. Moreover, given that it only concerns intra-brand dynamics and affects only about 3% of Apple's product sales in Italy, any appreciable impact on competition would also be ruled out.

166. In essence, the restriction on the *marketplace* would not fall within the narrow scope of application of the notion of restriction by object because they do not have a sufficient degree of harm to competition for an examination of their effects to be deemed unnecessary. The restriction of third-party sellers of Apple products in the *marketplace* would not fall within any of the situations that *enforcement* practice has categorised as restraints by object, such as resale price maintenance, restriction of passive sales or absolute bans on online sales²⁷⁵. All of the factual, economic and legal circumstances surrounding the alleged restriction should then be considered, including those that would be capable of justifying the conduct in light of the counterfactual scenario. First, therefore, it would be necessary to examine the entire 2018 agreement between Apple and Amazon and not just the limitation of *marketplace* access in isolation. An analysis of *inter-brand* competition in the context of the assessment of the restrictiveness of the clauses would then be indispensable.

167. In this sense, "*Apple is one of many manufacturers of electronic devices, and faces strong competitive pressures from other manufacturers in markets that are upstream of retail distribution (i.e., markets for the development, production, and sale - typically to wholesalers and retailers - of consumer electronics); moreover, companies compete on price and non-price variables in both the downstream distribution market and the upstream production markets; and the outcomes of downstream competitive dynamics may in turn affect the ability to compete upstream, making all of these markets closely intertwined. In other words, price competition between third-party sellers of Apple products on the Amazon Marketplace is only a small part of the context that needs to be considered in order to assess the possible effects of the GTA on competitive dynamics.*"²⁷⁶. Apple would thus have limited shares in the sale of the various categories of consumer electronics products²⁷⁷.

168. Moreover, the volumes of Apple/Beats products sold on Amazon's *marketplace* - both by Amazon itself and by third-party resellers - have

²⁷⁵ See doc. 368.

²⁷⁶ See doc. 360, annex 1.

²⁷⁷ See doc. 360, all. 1, 368, 376.

increased significantly, which would also positively affect the other *brands* of electronic devices offered on Amazon, which are not affected by the agreement. It should also be taken into account that this restriction would affect, 'among the sales of Apple/Beats products (i.e. intra-brand), only those online and on a single marketplace (Amazon), without affecting in any way possible sales of Apple/Beats products through (a) other marketplaces, (b) the websites of authorised resellers and RNAs, (c) the Apple website, as well as (d) obviously sales made in any physical shop'²⁷⁸. In Apple's view, the relevance of retail sales in physical shops would have been completely overlooked, even though it is a prevalent mode of sales of Apple and Beats products²⁷⁹, due to an incorrect definition of the relevant market for retail sales of consumer electronics in Italy as limited to *online* sales only²⁸⁰. The absence of an analysis and in-depth investigation into sales in physical shops would, in itself, constitute an irredeemable defect in the proceedings.

169. Considering therefore also sales in physical shops of Apple/Beats products sold in Italy, Apple estimates that *online* sales by third-party retailers through Amazon.it account for less than 1%, in each of the various markets/product categories²⁸¹. This would therefore demonstrate the irrelevance of the restriction investigated.

170. The impact on quality and non-price effects of the agreement, which is a functional aspect of Apple's business model, should also be considered. At the same time, the Authority's analysis of prices (discounts) would be flawed in several respects, as it consists of a simple comparison of averages in the pre-agreement and post-agreement periods; it would ignore that a significant amount of Apple's products sold prior to the 2018 Agreements were in fact non-original; it would not include Amazon's sales²⁸².

171. In addition, the vertical nature of the contractual relationship between Apple and Amazon should be noted, as Apple is not present in the direct sales segment of Apple/Beats products on Amazon. Article 2(4) of the Vertical Block Exemption Regulation No 330/2010 would also be relevant, as Apple is not a competitor of Amazon in the provision of *marketplace* services and there is no significant overlap between Apple and Amazon at the manufacturing level, which would in any event be irrelevant²⁸³. The reduction in the number of resellers of Apple and Beats products on Amazon.it would also not qualify as a restrictive effect on competition within the meaning of Article 101(1)

²⁷⁸ See doc. 368. See also doc. 360, all 1, and doc. 376.

²⁷⁹ See doc. 360, annex 1.

²⁸⁰ See doc. 368.

²⁸¹ See doc. 360, all. 1, 368, 376.

²⁸² See doc. 360, all. 1, 368, 376.

²⁸³ See doc. 368.

TFEU, since such a reduction is merely the content of the clause in the agreement at issue.

172. With reference to the possibility that the agreement could lead to a partitioning of European markets, Apple points out that the agreement expressly provides that resellers are allowed to sell Apple products throughout the European Union²⁸⁴ therefore there would be no restriction on intra-EU trade. There would be no intention to restrict parallel trade for Apple, the choice to make it possible to sell only to APRs from France, the United Kingdom, Italy, Spain and Germany, and not from the other Member States would be entirely natural: *'it was considered that they were experienced and interested parties to operate on Amazon marketplaces, and therefore best able to meet the expectations of both Apple (in relation to the known quality targets that were set in the 2018 Agreements), and consumers (who would benefit from a better shopping experience, including after-sales)*²⁸⁵. In this regard, Amazon's *emails* would have been misinterpreted and there would be no internal evidence from Apple. Moreover, the country-of-origin discrimination would not have any market partitioning effect as these retailers could still use their own *websites* to sell in Italy.

173. Accordingly, Apple considers that the restriction is fully compliant with Article 101(1) TFEU and that it is further confirmed by the judgment of the Court of Justice of the European Union (CJEU) in the *Coty* case²⁸⁶ on selective distribution, since Apple devices would objectively be sophisticated and *premium* products: they would be complex goods and would undoubtedly be positioned at the highest end of their respective markets, in terms of both average price and reputation. Therefore, the rationale shared by the CJEU in *Coty* would be considered fully applicable to both Beats and Apple products, as well as to their respective distribution systems.

174. The recognition of *marketplace bans* as lawful agreements under EU competition law would apply to both selective and open distribution systems, according to EU case law, and this would also have greater significance with regard to the fact that the restriction consists in the prohibition to use only Amazon's *marketplace*, while it is possible to sell on the other *marketplaces*²⁸⁷.

175. In addition, intra-brand restrictions on the manner in which (*premium*) products are sold would be recognised as legitimate in cases where they are intended to remedy unlawful or fraudulent conduct on the part of distributors, i.e. such a prohibition may be capable of preserving the product's guarantees

²⁸⁴ Cf. doc. 368, 376.

²⁸⁵ See doc. 368.

²⁸⁶ European Court of Justice, 6 December 2017, Case C-230/16 *Coty Germany GmbH v. Parfumerie Azkente GmbH*.

²⁸⁷ See doc. 368.

of quality, safety and identification of origin by obliging retail distributors to provide a certain level of service during the sale of the contract products. Such a prohibition would also make it possible to maintain the protection and positioning of brands against the phenomena of counterfeiting and free-riding, which are capable of producing restrictive effects on competition.

176. The *rationale* underpinning the legal principles expressed in *Coty* would also be found in the case at hand. Indeed, from one counterfactual perspective, the open distribution system adopted by Apple would by definition be less restrictive than an ordinary selective distribution system. Therefore, *Coty's* rationale would be all the more applicable in this case, since an open distribution system cannot be subject to stricter treatment by an *antitrust* authority than an ordinary selective distribution system would be.

177. One would also have to consider the counterfactual scenario, i.e. one in which the distribution agreement between Apple and Amazon prior to 2018 would have been maintained, with sub-optimal product distribution. Furthermore, a further counterfactual scenario would be that of the introduction of a selective distribution system, i.e. a more restrictive scenario in which there would be no unofficial retailers²⁸⁸.

178. Finally, the agreement between Amazon and Apple, including the restraint, would fall within the scope of Vertical Agreement Block Exemption Regulation 330/2010, since the market share held by each party would not exceed 30% (Article 3) in any of the affected markets and the agreement between Apple and Amazon would not contain any hardcore restrictions (Article 4)²⁸⁹.

179. For the purposes of the applicability of Regulation 330/2021, Apple emphasises the circumstance that the nature of Amazon's relationship would be purely vertical, both with regard to the products and services covered by the agreement, and with regard to the fact that Amazon's products, and their competitive relationship with Apple's, are in any event objectively and completely irrelevant for the purposes of the Apple/Amazon Agreement. The Agreement would not be reciprocal, because "*the notion of 'reciprocal agreements' within the meaning of the VBER is entirely different from that represented in the IRC, since it refers to potential reciprocal supply/distribution relationships relating to competing products or services, and not to the mere existence of any consideration or quid pro quo contained in the Agreement*"²⁹⁰. This would imply that any contract would be reciprocal, as it would present as an expectation an exchange of benefits.

²⁸⁸ See doc. 368.

²⁸⁹ See doc. 56, 93, 368, 376.

²⁹⁰ See doc. 368, 376.

180. It would also be incorrect, according to Apple, to use Amazon's market share in the provision of *marketplace* services to assess the applicability of the BER. First, because this would mean that the assessment would then not have to concern the market for the sale of electronics products *online*, but the *market for marketplaces* in which Apple is not active. Second, Apple would not purchase such services by Amazon and the contract would in no way concern the acquisition of *marketplace* services. Third, because if in an assessment of the *marketplace ban*, as in the *Coty* jurisprudence, the *marketplace* market would be observed, then the exemption regulation would never apply by definition²⁹¹.

181. In any event, it could benefit from the exception under Article 101(3) TFEU since it pursues a legitimate objective in a reasonable and efficient manner for the reasons set out above. Indeed, (i) it constitutes an objective improvement to the distribution of Apple's products, in terms of quality and safety; (ii) it is indispensable to the attainment of the objective pursued; (iii) the improvements referred to directly benefit consumers who, *inter alia*, incur a reduced risk of purchasing counterfeit products; (iv) no reduction in competition can result from the restriction²⁹². The Apple/Amazon Agreement would in fact lead to an improvement in the distribution of Apple and Beats products, which would operate for the exclusive benefit of customers. The restrictions would be reasonable and proportionate means to achieve the objectives pursued in terms of consumer shopping experience, security and anti-counterfeiting, resulting in an increase in Amazon's offer for the benefit of consumers²⁹³, concretely leading to increased sales of Apple products.

182. With respect to the limitations on advertising on Amazon.it, Apple believes that they are marginal in nature and do not alter Amazon's ability to sell advertising space on search pages that appear when consumers search on Amazon using Apple-branded product names (e.g., iPhone, iPad, Apple Watch), as well as when they view product-specific pages for Apple devices, to companies offering products that compete with Apple devices²⁹⁴. According to Apple, '*when a consumer searches on Amazon for an Apple product using the name of an Apple-branded product, e.g. iPhone, they should not be shown a Samsung Galaxy advertisement in a prominent position. Similarly, if a consumer is viewing the iPhone page on Amazon, it should not contain a Google Pixel advertisement*'²⁹⁵ as, otherwise, they would be *free-riding* on Apple's considerable investments in building its *brand*, and consumers would

²⁹¹ See doc. 368, 376.

²⁹² Cf. doc. 56, 93.

²⁹³ See doc. 368, 376.

²⁹⁴ See doc. 56.

²⁹⁵ See doc. 56

get an inferior shopping experience by being actively encouraged not to buy an Apple device they have explicitly sought.

183. Apple considers these limitations to be limited in scope, with the possibility of selling advertising space on Amazon.it remaining free, as long as it is not placed in the first two sponsored *slots* or if a search is made with keywords other than Apple product names²⁹⁶. In Apple's view, its competitors remain completely free to advertise their products either directly or through Amazon by advertising on the countless pages that are not affected by the contractual provisions²⁹⁷. Ultimately, according to Apple, the advertising restrictions would, firstly, have a very limited scope and, secondly, would improve the '*user experience*' of users wishing to purchase Apple products on Amazon.it.²⁹⁸ It would be '*no different from the way in which a retail chain (such as, for example, Euronics or Mediaworld) would organise in its various shops the commercial display of the products it sells, for example through 'product islands' dedicated to the various suppliers concerned*'²⁹⁹.

184. Ultimately, according to Apple, the restriction on advertising would not only have a very limited scope but also a lawful object, as it is aimed, on the one hand, at ensuring an alignment between Apple's and Amazon's incentives to work together in order to optimise the sales of Apple products through the *marketplace* in question and, on the other hand, at attempting to reduce opportunistic behaviour by third-party competitors, who - instead of investing in their brand and reputation through healthy competition on the merits - intend to exploit the considerable investments made by Apple and the strength of its brand³⁰⁰.

185. As to the gravity of the infringement, Apple considers that the limitation on the *marketplace* cannot be treated as a 'serious' infringement because: (i) they would be essentially vertical and of a genuinely commercial nature; (ii) they would have a modest impact in relation to intra-brand sales and the sales channel; (iii) there would be no relationship competition with Amazon and no impact on inter-brand competition; (iv) there would be no intention to restrict competition for Apple; (v) it would not be a secret agreement; (vi) the restriction would not be among the most serious restrictions under national and EU practice.

186. Apple³⁰¹ therefore considers that the minimum percentage of the sales value of 15 per cent for the calculation of a possible penalty, as well as the

²⁹⁶ See doc. 125.

²⁹⁷ See doc. 228.

²⁹⁸ Cf. doc. 56, 93.

²⁹⁹ See doc. 228.

³⁰⁰ See doc. 368, 376.

³⁰¹ See doc. 368, 376.

application of an *entry fee*, would be unreasonable and no penalty should be imposed even if an infringement is found. Furthermore, the turnover value of 2020 should not be taken as a reference, since it is significantly higher than in previous years. In any case, take-back sales at Apple Stores should be subtracted and, in general, only sales to Amazon should be taken into account. It would also not be appropriate to impose an aggravating factor due to the increased incidence of restrictions during the Covid-19 crisis, since the increased demand for *online* products would have exacerbated the problems of counterfeiting in *marketplaces*, and indeed a mitigating factor should be applied due to the cooperative attitude and the submission of two undertaking forms. There would also be no need to apply an increase on account of the size of the Apple group, since any penalty would already be proportionate.

187. On 8 November 2021, Apple then informed that it intended to voluntarily implement the commitments submitted on 7 June 2021 pursuant to Article 14b of Law No. 287/90 and considered that this should be assessed favourably pursuant to Article 11 of Law No. 689/1981 and Paragraph 23 of the Authority's Guidelines on the Quantification of Penalties³⁰².

188. Finally, with regard to specific obligations that could be imposed on the Parties, Apple considers that such an order would be disproportionate and arbitrary, as it would go beyond the role of the Authority and would be excessively restrictive of Apple's freedom to conduct its business, in violation of the principle of freedom of economic initiative enshrined in Article 41 of the Constitution. In addition, Apple notes that the proposed commitments would have achieved satisfactory results with regard to the objectives pursued by the order.

IV.6. Amazon's considerations

189. Amazon notes that products on Amazon.it may be sold by Amazon (Amazon-EU) acting as a direct *retailer* or by third-party sellers, who are called *sellers*, to whom Amazon (Amazon-SE) provides *marketplace* services³⁰³. The Amazon.it *marketplace*, in its view, rests its foundation on the development and maintenance of customer trust, as well as on offering a wide selection of products, competitive prices, and a convenient and fast shopping and delivery experience, and is focused on maximising customer-consumer satisfaction³⁰⁴.

190. In Amazon's view, the genesis of the contract with Apple and its competitive benefits are to be assessed with regard to the *business* model of Amazon, which '*started its business by operating as a retailer and*

³⁰² See doc. 382.

³⁰³ See doc. 125

³⁰⁴ See doc. 65, 125

subsequently opened its Store to Sellers, in order to increase its attractiveness to other retailers and to offer customers a wide selection of products, at competitive prices and with convenient delivery options' ³⁰⁵ Amazon's goal is therefore to maximise customer satisfaction by offering a high-quality shopping experience, providing customers with a wide range of products at low prices, and in a convenient manner, through user-friendly service, fast and reliable shipping, and responsive customer support. This ensures that customers return for repeat purchases on Amazon³⁰⁶.

191. Sellers, in Amazon's view, '*play a key role in satisfying customer needs, as they help to expand the product selection*'³⁰⁷. Amazon emphasises, therefore, that it has an interest in a large number of quality Third Party Sellers being present on Amazon.it, as this ensures the availability of a wide selection of products, as evidenced by the circumstance that a very large part of Amazon's turnover in the last year is related to sales made by Third Party Sellers on the marketplace: '*Amazon has the economic and commercial incentives to increase reliable Third Party Sellers, which is a means to increase competition and competitiveness in the marketplace*'³⁰⁸.

192. In contrast, Amazon argues that it has no interest in limiting the number of *sellers* selling Apple products because its profitability depends not only on direct sales but also on sales commissions for intermediate sales, thus having "*a financial incentive to supporting and promoting the Vendors*"³⁰⁹. The assortment of products, especially those with the greatest public appeal such as Apple products, is therefore an essential element of Amazon.it's success, both with regard to direct sales and intermediate sales³¹⁰.

193. With regard to the selection and availability of Apple products and

³⁰⁵ See doc. 364. See also doc. 376

³⁰⁶ See doc. 364, 376.

³⁰⁷ See doc. 364.

³⁰⁸ See doc. 125.

³⁰⁹ See doc. 364.

³¹⁰ "*Lack of sufficient availability not only leads the customer to buy that specific product elsewhere, but impacts the customer's confidence in the Amazon Store as a whole, and is therefore likely to drive the customer away from the Store. [...] prior to signing the Agreement, Amazon did not have sufficient product selection available even with respect to Apple [...]. Well-known brands influence customers' choice and product loyalty. Brands shape perceptions and thus purchasing behaviour. This is even more evident for a premium brand such as Apple, which is not only one of the most iconic brands in the world, but also the most valued and desired. Indeed, it is recognised that one of the keys to Apple's success is customer loyalty. In particular, customers who already use an iPhones are less likely to switch than users of smartphones of other brands. According to a recent US survey, brand loyalty for Apple's iPhones reached an all-time high of nearly 92 per cent in 2021, meaning that nearly 92 per cent of iPhone users intend to buy another iPhone when they next switch smartphones, up 1.4 percentage points from the 90.5 per cent recorded in the 2019 survey. According to marketing studies, brand loyalty translates into a surplus that Apple is able to obtain from customers, thus confirming the premium nature of Apple's products.[...] It is clear from the above that the lack of availability of the world's most desired brand selection experienced in Amazon Stores prior to the Contract made the Amazon Store a far less attractive shopping destination than competing alternatives available to customers. This situation was not only detrimental to Amazon's interests, but also to those of all Sellers active in the Amazon Shop, who account for a very substantial share of sales in the Amazon Shop.*" see doc. 364.

Beats, as well as the overall shopping experience for these products, prior to the entry into force of the Agreement, Amazon was faced with a wholly unsatisfactory situation³¹¹.

194. In fact, due to Apple's distribution system, only certain resellers have access to direct supplies from Apple and logistical discounts. In particular, Amazon claims that only those resellers admitted to Apple's official reseller programme obtain certain benefits, including inventory allocation, Apple's training and technical support, after-sales support, *marketing* materials and content, product discounts, and support for promotional activities³¹².

195. Prior to the agreement, Amazon was not authorised to sell the most popular and sought-after Apple Products, was not entitled to obtain direct supplies from Apple, and was not able to source some of the most popular products on an ongoing basis. Amazon wanted to have a certain and direct supply channel for the most iconic and desired Apple-branded products, especially around the time of their release and at Christmas time³¹³. In fact, Amazon did not receive support in the allocation of other models and was unable to obtain competitive terms and conditions of supply. In addition to the supply problems for the most popular models, *the* other products - purchased from its authorised distributors - also resulted in "*sub-optimal terms*"³¹⁴.

196. This lack of an adequate product assortment was not even remedied by the presence of third-party vendors, who often sold Apple Products sporadically. Moreover, the third-party sellers *'were also unsatisfactory in displaying and describing the Apple Products they were trying to sell. [...] most of the individual detail pages of the Apple Products would not have been able to provide an attractive sales context with complete and accurate product information.'*³¹⁵. In addition, sporadic third-party sellers could not demonstrate shipping reliability. Overall, the shopping experience was deeply unsatisfactory and undermined their trust in Amazon.it.³¹⁶.

197. The GTA, therefore, would express the shared intent to make a much larger selection of Apple products available in Amazon shops globally, creating a new collaborative mechanism for jointly addressing Apple's IPR infringement concerns and creating a more engaging customer experience in Amazon shops, with safe, authentic and readily available products³¹⁷.

198. Amazon reports that, since the beginning of the negotiations, Apple has always made it a condition for the conclusion of the agreement that the number

³¹¹ See doc. 125, 364, 376.

³¹² Cf. doc. 65, 125.

³¹³ See doc. 125, 364, 376.

³¹⁴ See doc. 65. See also doc. 125.

³¹⁵ See doc. 364.

³¹⁶ See doc. 364, 376.

³¹⁷ See doc. 65.

of resellers be limited; at the same time, Amazon has from the outset sought to expand the number of players as much as possible, trying to propose to Apple 'at least two alternatives, consisting of either admitting all Third Party Sellers who could demonstrate that they sell genuine products or admitting the entire pool of authorised resellers and not only certain APRs. These proposals were rejected by Apple, which mandated that only a subset of its authorised resellers be allowed to sell on Amazon, based on criteria chosen by Apple, over which Amazon has no visibility or control. As an illustration of this, Amazon only succeeded in excluding the restrictions for refurbished products. Apple justified this with the alleged perception that there had been cases of counterfeit products being sold on Amazon before the contract. On the other hand, there are other possible solutions to the problem of counterfeit products, a problem that Amazon counteracts proactively on a daily basis using numerous tools (e.g. Brand Registry) to prevent suspicious offers and to allow brands to report them. In fact, Amazon believes that restricting retailers is not a tool that Amazon uses for the purpose of combating counterfeiting'³¹⁸.

199. The deal would have unlocked the ability for Amazon to obtain a wider selection of Apple products by sourcing directly from Apple and gaining significant improvements 'in terms of inventory allocation, aftersales support, product information, merchandising content (marketing and sales), better business and technical support from Apple, as well as better sourcing terms (in terms of discounting) and access to promotional investments to support sales (which are granted discretionary by Apple and defined for each model on a quarterly basis)³¹⁹.

200. Amazon would thus have been confronted with Apple's willingness to condition the sourcing agreement on the presence of a selection of Third Party Sellers on the *marketplace* and ancillary restrictions on advertising³²⁰. These restrictions would have been imposed by Apple, and Amazon would have been faced with the fork in the road between giving up the distribution agreement or acquiring a secure supply of Apple products.

201. However, Amazon considers that, in the balance of costs and benefits, the agreement has a pro-competitive effect, in terms of higher quantities and wider variety of Apple and Beats products sold directly by Amazon, better prices and faster shipping of Apple and Beats products sold by Amazon³²¹.

202. The Agreement would in fact have '*increased intrabrand competition (intrabrand) and interbrand competition (interbrand): whereas, prior to the*

³¹⁸ See doc. 125.

³¹⁹ See doc. 65.

³²⁰ See doc. 125, 364, 376.

³²¹ See doc. 65, 125, 192, 193, 237, 364, esp. ante 1, 376.

*Agreement, the amazon.it was not considered an attractive shopping destination for Apple Products, the Agreement makes it a viable alternative for customers interested in purchasing Apple Products in terms of choice and quality, as evidenced by the increase in sales of these products and complementary products to Apple Products (i.e., accessories), with the resulting increase in competition from the Amazon Store against other shops selling Apple Products as well as competing brands"*³²².

203. Specifically, the benefits of the agreement would be³²³:

- a significant increase in the availability and range of the selection of all Apple and Beats products on Amazon.it, which is evidenced by a substantial increase in sales after the agreement as compared to the preexisting situation, both with respect to the timing of product launches and over time;
- a significant increase in the availability of various Apple products and Beats, which were previously only available in very limited quantities on Amazon.it, as well as access to the *premium* selection of Apple and Beats products;
- an increase in the average discount for Apple and Beats products, especially in the second year of the agreement;
- a significant improvement in the quality of delivery services provided to customers in relation to Apple and Beats products, in terms of both increased service reliability and speed;
- a reduction in counterfeiting problems and significant improvements in terms of access to quality content in offers, through the publication of high-quality product detail pages;
- a significant increase in sales by third-party sellers of compatible accessories for Apple and Beats products.

204. In order to assess the beneficial effects of the agreement, Amazon considers that the counterfactual scenario to be considered is one of continuity with the previous situation, in light of Apple's refusal to enter into the agreement without the restrictions under consideration. According to Amazon, moreover, economic assessments should not only focus on the prices charged by third-party sellers, but also consider intra-brand and interbrand competition. According to Amazon's alternative analysis, on average, customers benefit from greater discounts compared to Apple's list price; which would be greater for the newer, i.e. '*vintage*', generations of iPhones. For the older '*vintage*', on the other hand, the average discounts would be slightly lower, but still at an already very high level³²⁴. According to Amazon, the analysis carried out by

³²² See doc. 364.

³²³ See doc. 364, 376.

³²⁴ See doc. 364.

the Authority would not be correct, as the list price at the time of the product's release - and not the price charged by Apple on its own site - as well as the product generations would have to be taken into account. In addition to the benefits in terms of price, Amazon considers that there are several indicators that would demonstrate the qualitative improvement of the Apple and Beats product offering on Amazon.it.

205. With reference to counterfeiting problems, Amazon noted that *"a very important element of the GTA is to convince Apple to join the brand registry, which immediately led to a drastic reduction in counterfeit complaints. Amazon tried for many years to convince Apple to join the brand registry, but it was only after the GTA was signed that Apple agreed to join"*³²⁵. This *"represents an important achievement in light of Apple's persistent refusal to join the Brand Registry prior to the conclusion of the Agreement, despite Amazon's numerous encouragements to do so"*³²⁶.

206. Amazon therefore considers that the agreement at issue is not in breach of Article 101 TFEU. Also, even in a hypothetical infringement, Amazon argues that it cannot be held liable for accepting the restriction of third-party sellers on Amazon.it ³²⁷. First, Amazon argues that it had no alternative but to accept the limitation in order to conclude the agreement with Apple: *"the limitation of the number of Authorised Sellers was a firm and non-negotiable conditio sine qua non imposed by Apple"*³²⁸.

207. The limitation of sellers would also have been detrimental to Amazon, which would prefer to have a wide range of reputable and reliable sellers operating in its marketplace: *'Amazon has repeatedly tried - during negotiations, and sometimes even afterwards - to increase the number of Authorised Sellers as much as possible and to add to the list of authorised sellers at least those that are most important from the point of view of the customer shopping experience. These attempts, however, led to only one undoubtedly positive but nevertheless limited result, namely that refurbished Apple Products were excluded from the scope of Apple's restrictions. [...] In addition, as Apple's global cap was 20 Sellers per Store, Amazon insisted on seeking the same cap for each of the five European Amazon Stores, and, in the event that it received indications from Apple to further reduce the list, Amazon stated its intention to 'push back' on this request'*³²⁹.

208. Amazon considers that it has no incentive to exclude third-party sellers because of the economic contribution due to commissions on sales by retailers

³²⁵ See doc. 376.

³²⁶ See doc. 364.

³²⁷ See doc. 364, 376.

³²⁸ See doc. 364.

³²⁹ See doc. 364.

on Amazon.it³³⁰. However, considering the contract as a whole, Amazon considered entering into the contract on the ground that the alternative would have been the absence of a distribution contract³³¹.

209. According to Amazon, the reconstruction that the agreement also aimed at restricting cross-border sales is erroneous. First, in fact, there would be a misreading of the internal documents, which would refer to Amazon's customers, and not to third-party retailers, and companies exporting to non-EU and embargoed countries. Second, Exhibit D of the EU Agreement expressly provides for the possibility of exporting within the EU, so that all retailers authorised to sell on Amazon are authorised to do so throughout the EU. Third, *"the mere fact that, in 2020, only Sellers based in Italy sold Apple Products in the Amazon.it Store is irrelevant [...], even after the Agreement an Authorised Seller based in the United Kingdom continued to sell in Italy, which demonstrates that there were no restrictions whatsoever and that foreign Sellers were free to sell in the Amazon.it Store."*³³².

210. Fourthly, the decision on which Apple retailers are allowed in the marketplace would be Apple's own choice: *'whatever the reason for this choice, Amazon was never informed by Apple of the reasons for this limitation'*³³³. Therefore, in light of the circumstance that Apple was the only one in control of the list of retailers to be admitted, even if it were to be concluded that *'the selective criteria are not objective, but rather that Authorised Sellers were identified by hand-picking by Apple and that, therefore, some retailers would be discriminated against; that Apple did not in fact accept any request from the Sellers to be authorised to be part of its distribution network; and that there may have been a de facto limitation, through the selection process, of cross-border sales because the list of Authorised Sellers is limited to a few resellers established in Italy, Germany, France, the Netherlands, Sweden and Spain [...]* in any event, Amazon could not be held liable in connection therewith, because, for the reasons stated above, Amazon was never made aware of any of the allegedly unlawful purposes pursued by Apple, nor was it involved in the pursuit of those allegedly unlawful purposes, and, a fortiori, it never consented to any unlawful conduct."³³⁴. Fifth, Amazon would not have received any substantial benefit from the implementation of the restriction.

211. Finally, Amazon considers that it cannot be held liable in the light of national and Community case law and decision-making practice on vertical

³³⁰ See doc. 364, 376.

³³¹ See doc. 364, 376.

³³² See doc. 364.

³³³ See doc. 364.

³³⁴ See doc. 364.

restraints, which do not hold distributors (as opposed to suppliers) liable, despite the fact that they are clearly party to the agreement containing the alleged vertical restraints. Considering the Community Guidelines, then, prohibitions on sales in marketplaces, even outside a selective distribution system, would not have as their object to prevent buyers or their customers from actually using the internet and should therefore be exempted under the draft Vertical Agreements Exemption Regulation, and in this context, no liability could legitimately be attributed to *'Amazon for accepting, ex hypothesi, a restriction on sales which, by comparison with what would be permitted, is only partial'*³³⁵.

212. Ultimately, Amazon considers that it cannot be shown that the restriction infringes Article 101 TFEU. Indeed, the restriction on the number of resellers had as its sole purpose the protection of customers. Thus, a mere limitation affecting a few resellers could clearly not automatically result in a restriction by object, without proof of harm to competition and without an assessment of the content, objective and economic context of the agreement under consideration³³⁶. In particular, the restriction would be irrelevant in view of the size of the sales affected, there would be no impact on inter-brand competition (the effect of which would even be positive), and there would also be a minimal impact on intrabrand competition. The restriction in no way prevents any seller of Apple and Beats products active in Italy or abroad from continuing to sell in Italy through all other available distribution channels (other e-commerce sites, marketplaces and/or their own proprietary websites, and physical shops).

213. The lack of restrictiveness would also be evident in view of the counterfactual scenarios, i.e. the absence of the contract, or the establishment of a selective distribution system, which is a more restrictive option than the current situation³³⁷. According to Amazon, moreover, *'a situation in which Amazon could have entered into the Contract, thereby achieving all the pro-competitive benefits for customers highlighted above, and at the same time all Sellers could have continued to sell in the Amazon Store, does not represent an alternative counterfactual scenario, since, as CRI points out, Apple would never have entered into the Agreement without the clause limiting the number of Authorised Resellers'*³³⁸.

214. With regard to the relevant market, Amazon considers that the definition of (i) the market for intermediation services for marketplace sales and (ii) the market for retail sales of consumer electronics products on the Internet is incorrect. According to Amazon, all sellers, irrespective of their business

³³⁵ See doc. 364.

³³⁶ See doc. 364, 376.

³³⁷ See doc. 364, 376.

³³⁸ See doc. 364.

models, and whether they sell online or offline (or both), face many constraints resulting from the different purchasing options available to customers in the highly competitive retail landscape. In fact, Amazon considers that these definitions are not supported by a quantitative analysis of the substitutability of other retail channels with marketplace services, the analysis of which - also with reference to the study conducted by the Authority itself in the dominant position abuse case A528 - *Fulfilled By Amazon* ('FBA') - would lead to the assumption of strong competition and substitutability between marketplaces and other retail channels. Moreover, it would not take due account of how competition for consumers constrains the interaction of a marketplace with sellers, the *marketplace* being a two-sided platform, as well as the fact that a seller has the ability to sell both on its *website* and in its physical shop³³⁹. This would also be supported by certain precedents of the Authority in terms of mergers³⁴⁰. Sellers could therefore switch to alternative online channels quickly and cheaply, and, in addition, some large *online* retailers have reportedly started offering *marketplace* services. From a consumer perspective, several studies would confirm that consumers search for products on multiple channels, compare prices and check reviews before buying and are very price and selection sensitive, both online and offline. The constraint on the consumer side would therefore imply that marketplaces must remain competitive in terms of breadth of offerings and prices. Therefore, in Amazon's view, the correct definition of the relevant product market should encompass the retail sector as a whole (including online and physical shops of retailers)³⁴¹.

215. In a market comprising all product sales, or at any rate all online product sales, Amazon's market share would be less than 30%³⁴². In addition, in Amazon's view, the geographic scope of the markets is wider than national. Finally, Amazon considers that the data on the total consumer electronics retail market on the Internet are incorrect and inconsistent and that in any event Amazon cannot be attributed the share of third-party sales on Amazon³⁴³.

216. The agreement would also not have led to an anti-competitive effect. The reduced impact of a potential restriction on competition relating only to marketplaces would have already been recognised by the Court of Justice of the EU, "*which has observed that marketplaces represent only a limited component of online sales, since the 'main distribution channel, within Internet distribution, is [...] represented by distributor-owned online shops, which are*

³³⁹ See doc. 364, 376.

³⁴⁰ See AGCM Order No. 28336 of 30 September 2020, Case C12323 - *Unieuro/Venti Rami di Azienda di Iper Montebello*; AGCM Order No. 27561 of 13 February 2019 in Proceeding C12217 - *Unieuro/Ramo di Azienda di Pistone*.

³⁴¹ See doc. 364, 376.

³⁴² See doc. 364.

³⁴³ See doc. 364, 376.

used by more than 90% of the distributors surveyed'³⁴⁴. The Authority's assessments would be flawed by the circumstance that the correct counterfactual scenario is not taken into account: in light of Apple's refusal to conclude the agreement without such a clause, the counterfactual scenario would be the absence of the entire distribution agreement and not the individual clause, or the adoption of a pure selective system, with a reduction of retailers. The analysis of the effects should consider the whole market as a whole and not only the impact on excluded retailers, including Amazon's direct sales, which have increased. The Authority's evidence would be deficient, would relate to a small number of retailers, would not show that Amazon hindered sales in other channels and would lead to the conclusion that the turnover lost by third party retailers would not be a consequence of the contract but of autonomous decisions by each of those retailers. Moreover, the circumstance that authorised resellers did not actually sell in countries other than their country of establishment *'has nothing to do with the Agreement or the parties to it. This situation arose solely from the autonomous commercial decisions of the individual Sellers. The absence of a causal link is also confirmed by the fact that, in 2019 (i.e. after the implementation of the Contract), cross-border sales did occur, albeit to a limited extent.'*³⁴⁵.

217. From the point of view of effects, there would be no reduction of discounts (price increase). In particular, the Authority's analysis would be flawed because: (i) it is calculated only with respect to the Sellers' sales and, thus, does not take into account all sales made on Amazon.it directly by Amazon; (ii) fails to consider different models of Apple products both before and after the GTA; (iii) fails to consider that, precisely because of the GTA, new iPhone models are now available much earlier than they were previously, and are sold in much larger quantities; (iv) does not include the price of Apple Products applied in the second year of the GTA; (v) calculates the "discounts" on Amazon.it based on the difference between the price of a given product on Apple.it and the average price of the same product on Amazon.it, and this would be incorrect because it would underestimate later discounts; (vi) would not properly take into account quality effects (e.g. order fulfilment times). Amazon, according to its own alternative analysis, considers that average discounts have increased, especially for the most iconic products, and claims that internal documentation would not show any price deterioration³⁴⁶.

218. There would also be no limitation of cross-border sales, which are expressly permitted by the GTA, and whose theory of harm would not be

³⁴⁴ See doc. 364, 376.

³⁴⁵ See doc. 364.

³⁴⁶ See doc. 364, 376.

supported by evidence showing the presence of a will of the parties to limit parallel trade. It would also be irrelevant that retailers established in Member States other than Italy, Germany, France, the Netherlands, Sweden and Spain are excluded from access to the Amazon.it marketplace, since retailers authorised to sell on Amazon can still sell throughout the European Union.

219. In Amazon's view³⁴⁷, the agreement at issue would fall within the scope of Regulation 330/2010. Amazon's market share would not be excluded from the application of the Regulation, as it would not be proven that the supplier's share does not exceed 30% of the relevant market in which it sells the contract goods or services, and the buyer's share does not exceed 30% of the relevant market in which it purchases the contract goods or services, as it would not be proven that Amazon's or Apple's shares exceed 30%. The market for the procurement of electronics products would have to consider both products sold on-line and off-line, resulting in extremely small shares for Amazon and Apple. Moreover, the vertical agreement exemption regulation also applies to services and not only to goods. The contract between Apple and Amazon could not be called reciprocal and in any case the competitive link between the two companies would be undisputed and in any case irrelevant in light of the limited overlaps. The GTA would also not present, hardcore restrictions of competition within the meaning of Article 4(b) and (c) of Regulation No 330/2010.

220. The agreement would also benefit from an exemption under Article 101(3) TFEU by contributing to the improvement of the distribution of goods and technological progress (increase in the availability and variety of products, qualitative improvement of shipping and product presentation, indirect advantages to other sellers on Amazon.it). The requirement of indispensability would be found, given that Apple "*would not have provided a greater selection of products to Amazon if Amazon had not agreed to implement the contested restriction on Authorised Sellers*".³⁴⁸ Finally, due to the many ways in which Apple and Beats products are sold, as well as inter-brand competition, the agreement cannot restrict competition.

221. With regard to the advertising restrictions, Amazon considers³⁴⁹ first, that the advertising restrictions are limited in scope, in the number of advertising *slots* and in the number of identified Apple product keywords. Secondly, advertising on Amazon.it would be only one of many ways to discover products in the Amazon.it shop, as customers find products by multiple means, e.g. by searching on the Internet (e.g. Google) or through

³⁴⁷ See doc. 364, 376.

³⁴⁸ See doc. 364.

³⁴⁹ See doc. 65, 237, 364, 376.

social media.

222. In general, Amazon reiterates that acceptance of the GTA would be part of its effort to ensure that its customers have access to Apple's entire product assortment on Amazon.it. Therefore, Amazon would have agreed to apply the limitations imposed by Apple in the GTA in order to obtain a wider selection from Apple, as it had no alternative to obtain the best possible shopping experience for its customers³⁵⁰. Amazon therefore took the view *'that accepting these terms was necessary to remedy the limited presence and limited availability of Apple and Beats products in the Amazon Store'*³⁵¹. Even with respect to such conduct, therefore, Amazon could not be held liable and, in any event, the presence of an anticompetitive object or effect would be entirely undisputed³⁵². Indeed, Amazon considers that (i) the advertising restriction would apply to a very narrow and highly specific set of keywords, not capable of harming competitors; (ii) the advertising restriction would still allow advertising and display results in the search pages of the Apple products and for Apple keywords of a generic (non-exact) type; (iii) there would be no impact on sales of others' products in light of the high specificity of the keywords; (iv) for these specific terms there was no advertising of competing brands even before the introduction of the restriction. Finally, these restrictions would in any event be covered by the Vertical Agreements Exemption Regulation.

223. With regard to the procedural aspects, Amazon considers that the Authority did not comply with the terms set out in Article 14 of Law No. 689/90: since the report from which the proceedings originated was received on 22 February 2019, *"the Authority should have initiated the proceedings no later than 23 May 2019 or and not, as instead occurred, on 21 July 2020 [...]. Nor can it be argued that the delay in opening the proceedings was due to the conduct of significant investigative activity by AGCM."*³⁵³.

224. Amazon also complains of a breach of its rights of defence and of the principles of due process and sound administration. Amazon, following the objective extension of the proceedings, submitted commitments on 5 June 2021, the rejection of the commitments and the almost simultaneous sending of the notice of the preliminary findings would have unduly compressed Amazon's right of defence in that the Authority, *"despite knowing in advance that it would have rejected the commitments (otherwise it would not have started working on the CRI), decided to communicate its decision to Amazon at the last moment, unduly reducing the time available to Amazon to start*

³⁵⁰ See doc. 237

³⁵¹ See doc. 237

³⁵² See doc. 364, 376.

³⁵³ See doc. 364.

preparing its defence". A further violation of the right of defence in setting an unreasonable deadline for the submission of final pleadings.

225. Amazon also complains of an unjustified refusal of its request for access to the data room and the investigation file. Amazon, in particular, complains of the lack of access via data room to the data of its *marketplace* competitors and third-party sellers, arguing that the data forks used are insufficient. Amazon also complains of the lack of access to the calculations of the economic appendix, which were instead made accessible to Apple via data room.

226. Finally, with regard to the possible sanction, Amazon considers that it cannot be subject to any sanction. Indeed, this conclusion would derive from the circumstance that (i) Amazon would have been restricted by Apple and would have attempted to expand the number of authorised resellers on its *marketplace*; (ii) the circumstance that distributors are not deemed responsible in decision-making practice and are usually not even parties to the proceedings.

227. Amazon is also of the opinion that Amazon-IT (Amazon Italia Services S.r.l.) cannot be held liable, although one of its employees took part in the drafting of the contract with Apple there would be no evidence of the company's involvement in its implementation. Amazon-EC (Amazon Europe Core S.a r.l.), likewise, although owner of the Amazon.it *marketplace*, would not be a party to the contract³⁵⁴.

228. In the case of the imposition, in any event, Amazon considers that the amount of the sanction should be limited and should not include "*the value of direct online sales of Apple Products by Amazon in Italy and the value of sales of intermediation services on marketplaces for the sale of Apple Products in the amazon.it Shop*"³⁵⁵ only the brokerage fees should be considered in light of the sales affected by the infringement.

229. The conduct could also not be considered serious because of (i) the vertical nature of the agreements; (ii) the circumstance that no anticompetitive effects would be produced; (iii) the restriction would be consistent with the jurisprudential principles of the Court of Justice of the EU; (iv) the passive role of Amazon. The application of a low percentage for the calculation of the penalty would also be justified in light of the Authority's Guidelines and, specifically, the economic context of the market and the impact of the restriction on the same³⁵⁶. The extrinsically vertical nature of the infringement would also not allow the application of an *entry fee*.

230. As for the duration, Amazon points out that - although the contract was

³⁵⁴ See doc. 364.

³⁵⁵ See doc. 364.

³⁵⁶ See doc. 364.

concluded on 31 October 2018 - the exclusion of retailers took place on 4 January 2019.

231. Amazon does not consider that there are grounds for additional penalty amounts to take account of aggravating circumstances but, rather, that a mitigating circumstance should be granted: *'Amazon played a merely marginal role in the alleged infringement, and its position (and responsibility) is clearly different (i.e., less serious) from that of Apple'*³⁵⁷. In light of the novelty and complexity of the issues, Amazon is of the opinion that the Authority should not apply any sanction or apply a token sanction.

232. Finally, on the possibility of applying remedies against the parties set out in the notice of preliminary findings, Amazon considers that Law No 287 of 1990 does not allow *"the AGCM to impose behavioural and/or structural remedies on the companies concerned. Therefore, the Authority could not exercise powers that it does not have, especially considering the lasting effects that such a decision may have on Amazon's business and customers in general"*³⁵⁸. Amazon considers that such a remedy entails significant risks, since Apple could decide to implement a selective distribution system also for Apple and Beats Wired products, and subsequently impose a total ban on sales on third-party marketplaces or decide not to renew the contract with Amazon, which expires on 31 October 2021, with great prejudice for consumers.

V. EVALUATIONS

V.1. Procedural Aspects

V.1.a. *The tardiness of the commencement of proceedings*

233. First of all, Amazon's argument must be rejected³⁵⁹ according to which the Authority initiated the procedure beyond the ninety-day period provided for by Article 14 of Law No. 689/81.

234. In this regard, it should be noted that administrative jurisprudence³⁶⁰ has already had occasion to clarify that Article 14 does not find direct application in *antitrust proceedings*, inasmuch as such proceedings are subject to special legislation, and therefore derogatory to Law No. 689/81 (referred to as applicable by Article 31 Law No. 287/90). From a systematic standpoint, in fact, there is no doubt that, in the context of exercising its functions of investigating "competition" offences, the Authority is required to act and exercise its powers in the forms provided for by Article 14 of Law No. 287/90

³⁵⁷ See doc. 364.

³⁵⁸ See doc. 364.

³⁵⁹ See doc. 364.

³⁶⁰ See TAR nos. 7708-7709-7714-7710-7795/21; Council of State, Sec. VI, 8 March 2010, no. 1307.

and Presidential Decree No. 217/98.

235. In this last respect, it should be noted that neither Article 14 of Law No. 287/1990 nor Presidential Decree No. 217/98, containing the Authority's Regulation on the subject of preliminary investigation procedures, identifies a maximum term for the duration of the pre-investigation and preliminary investigation phase³⁶¹. This means that the Authority is not required to commence the preliminary investigation within a predetermined time limit, nor can this be arbitrarily set to run from the date of submission of a complaint, as this is preparatory to the initiation of the different phase of pre-investigation activity aimed at verifying the existence of a *fumus of* infringement of *antitrust* rules.

236. In any case, even if one were to accept the thesis that *antitrust* proceedings are subject to time limits, according to established case law ³⁶²the ninety-day time limit provided for by Article 14 of Law No. 689/1981 cannot run from the commission of the infringement, but from the ascertainment of the infringement. In fact, the initiating act of the Authority is not the act that ascertains the infringement, but rather the act that opens the preliminary investigation phase at the end of which only the ascertainment (positive or negative) can be reached. Moreover, in the present case, the conduct under investigation has not at present ceased, so that in the context of an ongoing infringement an interpretation such as that put forward by Amazon would prevent the establishment of current unlawful conduct, with a risk of consolidating the negative effects of anticompetitive conduct in the future³⁶²
363.

237. On this point, it is worth recalling the principles expressed by the Court of Justice, according to which, in relation to the application of the competition rules, failure to respect the reasonable time limit for the duration of the proceedings - including the phase preceding the statement of objections - may lead to the annulment of decisions finding an infringement where it is established that such a breach has adversely affected the exercise of the rights of defence of the undertakings concerned, which must demonstrate in a sufficiently precise manner the harm suffered. Outside this specific hypothesis, failure to comply with the obligation to give a ruling within a reasonable time does not affect the validity of the administrative procedure³⁶⁴.

³⁶¹ See Council of State, Sec. VI, no. 1307/2010; Council of State, 25.6.2019, no. 4357; and 12.2.2020, no. 1046.

³⁶² See *ex multis* Council of State No 8893 of 2019.

³⁶³ V. Cass. 3693/2021: '*the ninety-day period for notifying the report of investigation runs from the date of cessation of the stay or, when there is no proof of such cessation, from the date on which the infringement was ascertained*'.

³⁶⁴ See, to that effect, Court of Justice judgment of 21 September 2006, C-105/04 P - *Nederlandse Federatieve Vereniging voor de Groothandel op Elektrotechnisch Gebied v Commission*; C-113/04P - *Technische Unie v*

238. In conclusion, the application of the ninety-day time limit to *antitrust* proceedings, in addition to being contrary to the principles expressed by European Union case law, would lead to the differentiated application of European Union law in Italy compared to other Member States, as the time limits applicable in Italy would be extremely stricter than those applicable to the EU Commission and other national competition authorities. In the present case, in light of the initiation of the same proceedings by the national competition authorities of Germany³⁶⁵ and Spain³⁶⁶ on dates (even almost a year) after the opening of the Italian proceedings, the application of a more restrictive time limit for the Authority would result in a disparity in the application of EU law, to the detriment of the Italian Authority, which was the first to initiate proceedings concerning the conduct of Apple and Amazon.

239. This is also in clear contrast to the principles expressed by the Court of Justice of the European Union in a recent judgment³⁶⁷ on the subject of limitation periods, which may be recalled by analogy, according to which it is for each Member State to adopt the measures necessary to confer on the national competition authorities the power to apply Articles 101 and 102 TFEU in accordance with a principle of effectiveness³⁶⁸.

V.1.b. The alleged lack of access by Amazon and Apple

240. With regard to the alleged denial of access, by means of *data room*, to

Commission; as well as of 9 June 2016, C-608/13 P - CEPSA v Commission, paragraph 61; of 9 June 2016, C-616/13 P - PROAS v Commission; of 27 January 2021, C-466/19P - *Qualcomm, Inc. and Qualcomm Europe, Inc. v European Commission*; Judgment of the General Court of the European Union of 16 December 2020, Case T- 515/18 - *Fakro sp z o.o. v European Commission*.

³⁶⁵ "In a second proceeding it is examining to what extent agreements between Amazon and brand manufacturers, including Apple, which exclude third-party sellers from selling brand products on Amazon Marketplace constitute a violation of competition rules." See Press Release of 18 May 2021 of the Bundeskartellamt.

https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2021/18_05_2021_Amazon_19a.html?nn=3591568

³⁶⁶ "The CNMC initiates disciplinary proceedings against Apple and Amazon for possible restrictive competition practices - Both groups could have agreed to trade restrictions on the Amazon website in Spain. É " V j g { " y q w r t q f l \$ a l e o f A p p l e p r o d u c t s b y t h i r d p a r t i e s a n d t h e a d v e r t i s i n g o f c o m p e t i n g A p p l e p r o d u c t s . - T h e b e h a v i o u r s c o u l d r e d u c e c o m p e t i t i o n i n t h e I n t e r n e t r e t a i l m a r k e t f o r e l e c t r o n i c p r o d u c t s . - I n a d d i t i o n , t h e y c o u l d s t r e n g t h e n A m a z o n ' s p o s i t i o n i n t h e s e c t o r o f p r o v i d i n g m a r k e t i n g s e r v i c e s t o t h i r d - p a r t y r e t a i l e r s t h r o u g h o n l i n e p l a t f o r m s (M a r k e t p l a c e) i n S p a i n ' . S e e p r e s s r e l e a s e o f 1 J u l y 2 0 2 1 o f t h e C o m i s i o n N a c i o n a l d e l o s M e r c a d o s y l a C o m p e t e n c i a .

https://www.cnmc.es/sites/default/files/editor_contenidos/Notas%20de%20prensa/2021/20210701_NP_Inc oaci%C3%B3n_Apple_Amazon_en_GB.pdf

³⁶⁷ Judgment of the Court of Justice of the European Union of 21 January 2021, Case C-308/19 - *Consiliul Concurenței v Whiteland Import Export SRL*.

³⁶⁸ Judgment of the Court of Justice of the European Union of 21 January 2021, Case C-308/19, cited above, according to which the Member States 'must not make it practically impossible or excessively difficult to implement European Union law and, as regards in particular the field of competition law, they must ensure that the rules which they adopt or apply do not prejudice the effective application of Articles 101 and 102 TFEU. [...] A national limitation system which, for reasons inherent in it, systematically impedes the imposition of effective and dissuasive sanctions for infringements of European Union competition law is liable to make it virtually impossible or excessively difficult to apply that law.

the documents of third parties (retailers, Apple and marketplace)³⁶⁹ it is noted that Amazon had access to such data through the use of value forks. These methods of access to the data are suitable to guarantee the right of defence of the said companies and at the same time do not completely prejudice the data privacy rights of third-party operators and Apple.

241. The balancing of opposing rights was deemed appropriate in light of several factors, such as the breadth of the value ranges used to reserve Amazon's data in Apple's access to similar data, as well as the suitability of the value ranges to protect Amazon's rights of defence, where it was only after a lengthy discussion with Amazon as to the existence of confidentiality grounds that similar access arrangements were adopted for Apple.

242. Contrary to Amazon's assertions, the value ranges allow for a full evaluation of the factual elements used in the disclosure of the preliminary findings and in the present decision. For example, having access to the full data of Amazon's competitors in the marketplace for intermediary services (e.g. Ebay, Wish, etc.) was not necessary to verify the sales flows between *marketplaces*, which can also be verified by means of access through the use of value forks, in fact, according to Table 15 *above* the value forks are sufficient to establish the presence of a negative variance (albeit expressed with the value forks:

-[1-5.000.000]; -[50.000.000-100.000.000]). This is sufficient to verify that, following the inability to sell on Amazon.it, retailers did not migrate entirely to other *marketplaces*, so that there was a negative trend in sales of Apple and Beats products on all *marketplaces*.

243. As for the substitutability between *marketplaces* and physical and *online* channels for retailers, the latter's documents allow for this information to be understood even with the use of forks, as they are adequately dimensioned to include information about the different sales channels, as for example shown in the following document (Figure 13).

³⁶⁹ See ex multis doc. 364,

Figure 13 - Turnover of a retailer of Apple and Beats products broken down by sales channels³⁷⁰

	2017	2018	2019	Gen-Giu 2020
Fatturato per la vendita di prodotti Apple tramite negozio fisico	0	0	0	0
Fatturato per la vendita di prodotti Apple tramite marketplace Amazon.It	0	100.000 150.000	0	0
Fatturato per la vendita di prodotti Apple tramite marketplace Amazon esteri	0-50.000	150.000 300000	0	0
Fatturato per la vendita di prodotti Apple tramite altri marketplace (Eprice, Ebay Aliexpress etc.)	0	0	0	0
Fatturato per la vendita di prodotti Apple tramite proprio sito web	0	0	0	0

244. Moreover, such value ranges are also sufficient due to the stability of Amazon's - almost totalitarian - market shares over time, to understand the individual positions of competing players³⁷¹. Such brackets are therefore suitable for understanding the positioning of competitors, which is moreover stable over time, without completely undermining the confidentiality of their data and avoiding their complete acquisition by Amazon.

245. The use of data forks, e.g. with regard to Apple's data, appears to have been an appropriate method of balancing right to defence and right to privacy. For example, Amazon writes that *'The fact that the Agreement had no negative impact on intra-brand competition is also confirmed by Table 2 of the IRC: based on the available data (recall that the Offices refused to allow Amazon access to the underlying figures through a data- room), the shares of unauthorised resellers and authorised resellers other than APRs - i.e. the two categories of resellers hypothetically impacted by the Contract - in terms of units of Apple Products sold online and offline remained the same in each of the years 2017-2019, i.e. before and after the Contract.'*³⁷² . Now, in an extremely contradictory manner, Amazon comments on the stability of sales shares between Apple and Beats product distribution channels, only to then complain of a denial of access to the full data, which, however, would have been beyond the scope of what is necessary to protect its rights of defence. Indeed, Amazon's own allegations demonstrate that the use of forks allowed them to evaluate the factual elements in the file and to use them in their

³⁷⁰ See doc. 73

³⁷¹ For example, compared to a total turnover of Amazon's competitors in the market for brokering services of 100-250 million in 2019 and Amazon's turnover of more than 600 million for the same period (Table 12), Ebay has a turnover of 100-250 million (see doc. 205), Eprice has a turnover of 0-5 million (see doc. 263), Alibaba has a turnover of 10-20 million (see doc. 291), etc.

³⁷² See doc. 364.

defence.

246. The same considerations must be made with regard to Apple's grievances concerning the lack of full access to Amazon's economic data and that of third-party operators³⁷³. In particular, Apple was given access to the turnover data through the use of special value ranges that appear sufficient to protect the party's right of defence³⁷⁴. Likewise, for the disaggregated economic data required for economic calculations, Apple had access through the *data room* tool³⁷⁵ so that it could actually carry out its own analysis.

247. Finally, Amazon complains of a different treatment to Apple in that it did not have access to the *data room* held on 25 August 2019³⁷⁶ concerning the economic calculations carried out in the appendix to the notice of preliminary findings.

248. Amazon's complaints appear specious. In fact, they were conducted on Amazon's data³⁷⁷ and on Apple's data³⁷⁸, which are fully accessible to Amazon itself. The *data room* is only set up in cases where the data to be processed are not accessible, so that the parties' economic advisors are allowed to carry out the economic processing in a 'protected' environment to enable them to carry out their assessments without unduly prejudicing the confidentiality of the data (by limiting the number of parties with access to the economic data).

249. Apple gained access by *data room* because Amazon's data was confidential³⁷⁹, whereas Amazon always had full access to all data and could carry out any processing it deemed useful. This was indeed the case. In fact, not only did Amazon perform elaborations on the data in the file, but it also performed further economic elaborations on the sales data that were not in the investigation file. In particular, Amazon's economic analyses were carried out on the data in its *databases* of sales of Apple products as of 2015³⁸⁰. This would already be sufficient to understand that the Amazon's claims are completely unfounded.

250. Amazon then argued that it considered it necessary to have access to the instructions of the economic elaborations (the '*do-file*') in order to replicate the elaborations. On this point, it should be noted that the elaborations in the appendix to the notice of preliminary findings consist of a simple average of

³⁷³ See doc. 368.

³⁷⁴ Please refer to what has just been discussed regarding the sufficiency of such forks to perform their defences.

³⁷⁵ See doc. 339.

³⁷⁶ See doc. 339.

³⁷⁷ See doc. 187.

³⁷⁸ See doc. 141, 171.

³⁷⁹ See doc. 187.

³⁸⁰ See Doc. 364, at 1. On this point, Apple states that '*Apple has had limited opportunity to conduct empirical analysis because Amazon has access to its own databases and sales data, and in fact, in the own pleadings, Amazon produced a thorough economic analysis showing that prices did not increase at all but decreased.*' See doc. 376.

prices (the result of the sum of the prices of each model over the relevant period - i.e. the pre-agreement and post-agreement period - divided by the number of observations, and then weighted by the invoiced sales). These calculations were explained in the methodological appendix, and the instructions for the calculations ("*do-file*") are not necessary to replicate the result of the methodological appendix³⁸¹. Furthermore, the averaging instruction was present in the *data room* report accessed by Amazon on 26 August 2021, so that in fact Amazon was able to see the '*do-file*' code³⁸².

251. Finally, it should be noted that the alleged impossibility of replicating the economic calculations of the methodological appendix to the notice of findings is also belied by the facts, so much so that the results of the analysis carried out by Amazon are identical to those of the notice of findings for some products (e.g. AirPods) or differ by a few tenths of a percent for other products³⁸³. Not only, therefore, does Amazon's claim that it could not replicate the analysis data appear specious but, in fact, the calculations that were replicated resulted in the same conclusions as those reached by the Authority in the Notice of Investigation Findings. The findings in Table 6 of Amazon's economic memorandum³⁸⁴ in no way change the evidentiary picture, which is characterised by decreasing discounts following the implementation of the agreement³⁸⁵.

252. In conclusion, it is considered that Amazon's grievances are not admissible due to the circumstance that Amazon had full access to the

³⁸¹ On this point, it should be noted that, as is evident from the record of access through Apple's data room, the '*do-file*' was made available, only with reference to one processing, in order to speed up Apple's processing and to minimise access to Amazon's confidential data. Apple, although it was given access to only one instruction for the elaboration of an average, it was nevertheless able to replicate the calculation of the other averages as well ("*In order to make the work of Parten's consultants quicker and easier in the framework of the data room procedure - although these are files that the Authority was not obliged to make available as they were not indispensable to replicate the results presented in the Notice of Investigative Findings and in any case already illustrated in the appendix to the same CRI - the file of the instructions ("*do-file*") for the calculation of the average discounts was made available to the Party's consultants file") of Stata for the calculation of the average discounts. It should be noted that, in consideration of the circumstance that the calculations carried out consist of the average discounts practiced by third-party sellers on Amazon.it, there are no files containing intermediate calculations and, moreover, that the instructions concern only one example processing among those illustrated in the appendix to the CRI (Table no. 16 in the appendix to the CRI)". See doc. 339.).*

³⁸² On this point, it is noted that "*the code lines shown to Apple for Table No. 16 were integrated in the report of Apple's consultants (those relating to Table No. 16), sent to this Company on 26 August 2021 (doc. 341 of the preliminary file, Annex A2), so that your Company had the opportunity, also substantively, to verify the code for the calculation of the discount ("g disc=100*(p_list- p_av)/p_list") in the period indicated in Table No. 16 ("drop if time>26 g agreement=0 replace agreement=1 if time>13"). As indicated in the minutes, moreover, the do-files for the other processing (Tables 17 et seq.) were not available and Apple's consultants arrived at the processing of these elements independently (e.g. for Table No. 17: "g disc=100*(p_list- p_av)/p_list drop if time>24 g agreement=0 replace agreement=1 if time>12")". See doc. 363.*

³⁸³ See doc. 364, annex 1 (Table 6).

³⁸⁴ See doc. 364, annex 1 (Table 6).

³⁸⁵ On this point, see Figure 22 in the methodological appendix, which shows that, based on Amazon's calculations, it is confirmed that average discounts decreased after the agreement.

documents on file, in some cases through the use of methodologies that guaranteed the right of defence, safeguarding the right of confidentiality of third parties.

V.1.c. The alleged violation of the rights of defence with regard to the timing of the filing of final pleadings

253. The arguments of Apple³⁸⁶ and Amazon³⁸⁷ that there was a breach of the rights of the defence due to the short deadline for filing final pleadings. It must be noted, in fact, that the notice of findings was sent to the parties on 30 July 2021 and the deadline for the conclusion of the pre-trial phase, originally set for 2 September 2021, was then extended to 20 September 2021³⁸⁸. Between the communication of the preliminary findings and the deadline for the conclusion of the preparatory phase, therefore, a period of time well in excess of the 30-day term identified by Article 14, paragraph 2, of Presidential Decree No. 217/98 elapsed. The time limit is also congruous to carry out the parties' defence, as demonstrated by the legal and economic pleadings of the Parties³⁸⁹ and by the circumstance that Amazon was able to carry out several market researches on retailers and consumers.

254. Moreover, the parties' argument that there was a legitimate expectation that there would be no further development of the proceedings while the commitments were being assessed cannot be accepted. Firstly, the Authority had already rejected Apple's commitments on 22 December 2020, due to the existence of an interest on the part of the Authority in investigating the possible infringement in view of the competition aspects at stake. Secondly, the Authority's Offices continued to carry out investigative activities, by means of hearings, requests for information, and access to documents. Lastly, it is not considered that the submission of commitments by the parties, especially in a period subsequent to the initial stages of the proceedings, may inhibit the Authority from pursuing the activities of a possible finding of an infringement, as this would lead to an instrumental use of the institution of commitments to delay the establishment and conclusion of the proceedings.

V.2. Foreword

255. The restraints of competition that are the subject of this Order concern the contractual clauses contained in the agreements entered into by Amazon and Apple on 31 October 2018: namely, (i) the Framework Agreement (GTA)

³⁸⁶ See doc. 360, 368, 376.

³⁸⁷ See doc. 364, 376.

³⁸⁸ See 309, 310, 311, 312, 313, 318, 319, 320, 321, 322.

³⁸⁹ See doc. 360, 368, 364.

entered into between Amazon.com, Amazon-EU, Apple Inc and Apple-DI; and (ii) the *EU Agreement* between Apple-DI and Amazon-EU dated 31 October 2018, as amended³⁹⁰.

256. In particular, the clauses of the GTA and the EU Agreement that preclude access to the intermediation services of the Amazon.it *marketplace* by parties other than those indicated in the list annexed to the *EU Agreement* (i.e. Amazon-EU and a list of certain identified retailers) are relevant.

257. In this respect, it is necessary to clear up any doubts as to the scope of the investigation, which does not concern Amazon's conduct as a distributor of Apple products, nor the rules of the Apple and Beats distribution system per se, under which Apple and Beats products can be sold on the Internet and *marketplaces*.

258. Instead, the subject of the investigation is the provisions of the agreement precluding outlets to the intermediation services of the Amazon.it *marketplace*, which prevents certain legitimate resellers of Apple and Beats products - discriminating against them on a geographical and subjective basis - from operating in the national *marketplace*. In particular, Apple and Amazon have agreed on the entities that can access the Amazon.it *marketplace*, excluding from that platform resellers (official and unofficial) that legitimately resell genuine products in a manner that discriminates against Amazon itself and a list of specifically designated resellers.

259. The analysis under examination, therefore, concerns the ability of the cartel under examination - by means of the exclusivity in the use of *marketplace* services agreed upon between Apple and Amazon - to result in anticompetitive foreclosure of outlets, due to the impossibility for retailers other than Amazon itself and those specified in the list to use the Amazon.it sales channel, which is the most important, and almost totalitarian, *marketplace* in Italy, as well as the most relevant and widespread tool for Italian consumers to purchase consumer electronics products *online*.

260. This concerns conduct relating to agreements that affect Amazon's operation as a provider of intermediation services on platforms for *online* sales and influence that operation vis-a-vis third parties. Therefore, they concern clauses that operate outside the rules of the distribution relationship between Apple and its retailers (including Amazon), as these distribution rules allow the use of *marketplace* services.

261. Those clauses constitute an infringement of Article 101 TFEU, in that they preclude persons legitimately engaged in the business of buying and selling consumer electronics products under the Apple and Beats brands from

³⁹⁰ Cf. doc. ISP.74, 58 (Annex 1.5).

having access to the intermediation services provided by the main operator of services for the sale on *marketplaces* in Italy, which, moreover, are in conflict with the rules laid down for the distribution system adopted by Apple.

262. In fact, Article 101(1)(*b*) and (*d*) TFEU provides that all agreements which restrict or control production, markets, technical development or investment and which apply dissimilar conditions to equivalent transactions with other trading parties so as to place them at a competitive disadvantage are prohibited.

263. In other words, the agreement between Amazon and Apple - which has as its object the exclusion of third-party economic operators, external to the contractual distribution relationship between the two corporate groups, from the *marketplace* services provided by Amazon-SE and Amazon-EC - prevents a substantial number of resellers of Apple- and Beats- branded products from accessing a qualified distribution channel, which constitutes an indispensable outlet for *online* sales, especially for small and medium-sized operators, with significant effects on competition.

V.3. Relevant markets

264. In cartel cases, the definition of the relevant market is aimed at identifying the characteristics of the economic and legal context in which the agreement between undertakings takes place. For the purposes of assessing a cartel, in fact, the identification of the relevant market, although useful to precisely circumscribe and focus the analysis of the conduct of the undertakings involved, is functional to the identification of the product and territorial sphere in which coordination between undertakings is manifested and the effects resulting from the unlawful competition are realised.

V.3.a. Markets affected by the agreement

265. This agreement concerns the rules of access to the Amazon.it *marketplace* for *online* retailers of a set of Apple- and Beats-branded ancillary products and services falling into different product categories of consumer electronics products, such as *smartphones* (iPhone), *tablets* (iPad), fixed and portable computers (Mac, Macbook, etc.), set-top-boxes (Apple TV, iPod, etc.), audio playback devices (EarPods, AirPods, Beats devices, etc.) and other ancillary electronic devices (cables, connectors, etc.), set-top-boxes (Apple TV), audio playback devices (iPod), audio accessories (EarPods, AirPods, Beats devices, etc.) and other electronic accessory devices (cables, connectors, chargers, etc.).

266. The restriction under scrutiny, as mentioned above, concerns the

blocking of access to Amazon.it for certain resellers, in a discriminatory manner with respect to Amazon itself and to a list of authorised resellers, contrary to the distribution rules for Apple and Beats products, which do not provide for restrictions on the use of *marketplaces* either for products that are freely distributed or with respect to products sold in a selective distribution system.

267. In response to what Apple³⁹¹ and Amazon³⁹² with regard to the erroneous identification of the relevant markets, it must be observed that the rules of the distribution system for Apple and Beats products (whether free or with selective criteria) are not challenged in the measure under review, simply because that system - as confirmed by Apple³⁹³ - allows the sale of Apple and Beats products on the Internet and, more specifically, on *marketplaces*. *On the contrary*, the analysis carried out concerns the discriminatory foreclosure of the Amazon.it *marketplace* introduced in the contract between the Parties, applied in favour of Amazon itself and of certain parties, and such as to exclude other legitimate resellers of Apple and Beats products: it is therefore a typical analysis of foreclosure effects that can be determined by unilateral conduct or, as in the present case, by an agreement between undertakings.

268. It is therefore firstly a question of analysing, from the retailers' point of view, *marketplace* brokerage services, their substitutability for retailers with other alternatives (e.g. their own websites), as well as establishing Amazon's positioning in the provision of such services, its incidence in the market and the presence of alternative suppliers. This tests the foreclosing incidence of conduct by Amazon, its level of market power, and whether or not other suppliers may constitute a competitive constraint on Amazon in the provision of intermediary services (inter-supplier, interbrand competition).

269. Secondly, it is necessary to analyse, from the point of view of *online consumer* purchasers, how many purchases of consumer electronics products take place on Amazon.it. Where a large part of Italian consumers' purchases of such products takes place on Amazon.it, a blocking of access by retailers would constitute a significant barrier to outlets, as it removes an instrument capable of reaching a significant and almost total part of the demand for consumer electronics products.

³⁹¹ See doc. 360. 368. 376.

³⁹² See doc. 364, 376.

³⁹³ According to the individual contracts with official resellers, *'the products under the open distribution system can be sold in any electronic location (including the reseller's website or other platforms, without any geographic limitation), i.e. there is no limitation, with the only indirect exception - mentioned here for clarity - relating to sales in the Amazon marketplace, and resulting (not from direct agreements between Authorised Resellers and Apple, but) from the GTA between Apple and Amazon'*³⁹³. See doc. 228.

V.3.b. *Marketplace sales brokerage services*

270. The first market affected by the agreement under examination - which affects the possibility for certain resellers of Apple and Beats products to use the distribution channel constituted by the Amazon.it *marketplace* - is the market *for intermediation services for marketplace sales* provided to resellers. This market corresponds to the set of services provided by the operator of an *online* e-commerce platform for the benefit of economic operators who wish to sell their products *online* outside of their own *website* but retaining ownership of the relationship with the consumer. In fact, the *marketplace* operator acts as an intermediary between retailers and final consumers. The platform, through the provision of such services, enables the meeting between the seller and the end consumer and the conclusion of the transaction between the two groups. It is therefore a 'two-sided' market. In fact, from the *retailer's* perspective, *marketplaces* provide a whole range of services - the basic sales service and complementary services to it - which enable sellers to access a 'shop window' and sell *online* without the need to incur the associated investment. From this point of view, the *marketplace* represents an 'off- the-shelf' mode of access to *e-commerce*.

271. From the perspective of retailers, the evidence on file confirms that there is a distinction between intermediary services for *marketplace* sales and the sale of products *online* via a proprietary *website*, because of the following considerations³⁹⁴. In a nutshell, the intermediation services provided by an *online* platform guarantee retailers the possibility of starting an *e-commerce* business by reaching a large number of consumers, quickly and with extremely limited *set-up* costs, making *marketplaces* a different and immediately usable *e-commerce* access solution, for the following reasons

272. Firstly, it was found that *marketplaces* allow immediate access to a very large pre-existing customer base and increase the visibility of sellers. This circumstance is linked to the network effects of intermediary platforms, which allows smaller sellers in particular to benefit from the platform's notoriety among consumers. The visibility obtainable through a presence on an *e-commerce* platform is far greater than that which the individual *retailer* could obtain on its *website*, at least in the short term, thanks to the platform's notoriety but also to the function it performs as a place of aggregation of various offers belonging to different product categories; the variety of choice and the pervasiveness of the offers available make *marketplaces* true *online* supermarkets, with a capacity to attract a very high number of consumers. The data reported in Table 10 show that the two most popular *marketplaces* in Italy

³⁹⁴ On this point, please refer to section IV.2.c Marketplace Brokerage Services, page 16 ff.

have an incomparably higher number of monthly visits than any other proprietary *website*, even of very popular brands³⁹⁵.

Table 10 - Number of visits: Differences between Amazon and major own websites (April 2020)³⁹⁶

Name	Total number of visits	Average visit duration	Number of average pages visited in each session	Rate of abandonment within seconds (<i>bouncerate</i>)
<i>Marketplaces</i>				
Amazon.it	180.41 mln	00:07:23	10,08	31,12%
eBay.it	76.90 mln	00:07:08	8,19	30,62%
<i>Electronics online shops</i>				
Mediaworld.it	11.25 mln	00:03:53	4,59	43,38%
Unieuro.it	10.38 mln	00:04:32	5,30	43.67%

273. The reasons outlined above as to the absence of substitutability between the two channels from a seller's perspective are corroborated by the results of the *Survey* conducted by the Authority in Case A528 - FBA Amazon³⁹⁷, filed by Amazon together with the final submission³⁹⁸, in which it emerges that *marketplaces* make up for the consumer's lack of knowledge of the retailer and increase the degree of market "penetration": 62% of respondents to the *survey* believe that *e-commerce* platforms guarantee visibility and a higher number of visits than their own *website*. 44% of respondents see *marketplaces* as the 'starting point' for consumers' search for a product³⁹⁹.

274. For many respondents, *marketplaces* allow a lowering of the level of specific investment required to carry out *online* sales activities, since they allow them to delegate to the platform the management of certain activities - including *marketing*, *target advertising*, shipping and logistics, and returns management - and to deal exclusively with the upstream stages of selection and assortment of their offer. Similarly, the security guaranteed by *marketplaces* in the management of personal data and payments and, more

³⁹⁵ On this point, it should be noted that other online tools, such as social media and comparison sites, do not can be deemed substituted since no transaction (sale) takes place on such platforms. This has already been found, for example, by the European Commission in its decision pursuant to Article 102 TFEU of 27 June 2017, Case AT.39740 Google Search (Shopping), in which it was observed that comparator sites and search engines (such as Google Shopping or Idealo) belong to a relevant market distinct from that of trading platforms (such as Amazon and eBay). Although comparator sites allow consumers, like marketplaces, to compare online offers of the same good from multiple sellers, such sites lack e-commerce functionality and, consequently, do not offer any of the additional services that marketplaces offer to consumers and sellers.

³⁹⁶ Cf. doc. PI.3 (all. similarweb_Amazon_en.pdf, similarweb_Mediaworld_en.pdf, Similarweb_Unieuro_en.pdf, Similarweb_Ebay_en.pdf)

³⁹⁷ See AGCM Order No. 27623 of 10 April 2019, A528 - FBA Amazon.

³⁹⁸ See doc. 364, annex 2.

³⁹⁹ On this point, IT Store stated that "an increasingly significant phenomenon should be observed in consumer behaviour, which *tends to search for products to purchase directly on Amazon.it, rather than on a search engine. This implies that, if an entity is not present on Amazon.it, it cannot access part of the demand directly on the main intermediary platform in Italy*". See doc. 191.

generally, the reputation of the platform operator, which increase the degree of trustworthiness of the *online* transaction in the eyes of consumers, are important.

275. *Marketplaces* also provide access to transaction support services (payments, order management, returns, invoicing, customer service, etc.) and logistics, allowing for a complete sales experience without the need for investment in the development and maintenance of such *online* sales functions, especially with regard to small and medium-sized retailers.

276. Finally, *marketplaces make it* easier for sellers to penetrate new geographic markets and internationalise retailers, thanks to support services (invoicing, shipping and returns management) that would otherwise require specific investments.

277. It is therefore considered to confirm that *marketplace* and proprietary website constitute two distinct channels of access to ecommerce. In this sense, it should be noted that the two distribution types appear to be non-substitutable for small and medium-sized sellers, whereas they are complementary in the case of large, established sellers; Amazon's internal evidence appears to confirm these considerations.

278. In particular, the difference between *marketplaces* and proprietary websites, especially for small and medium-sized retailers, can be seen in the difference in turnover realised through the two sales channels. IT Store notes that there is a '*ratio of approximately 1 to 20 between turnover realised on its own website versus turnover realised on Amazon (IT Store earned EUR 1 on its own site and EUR 20 through Amazon)*'⁴⁰⁰. Bacom's data show that, compared to a turnover of between EUR 100 and 150 thousand on Amazon.it and between EUR 10 and 15 thousand in other *marketplaces* in Italy, the turnover on its own website is less than EUR 5 thousand in 2018⁴⁰¹. The same considerations can be derived from the turnover data of Onyx Trade⁴⁰² and retailers' evaluations⁴⁰³.

279. The fact that, according to the study cited by Amazon⁴⁰⁴ small and medium-sized retailers have 72% their own site and 67% also use a *marketplace* does not contradict the conclusion that there is a separate market for *marketplace* brokerage services. On the contrary, the fact that almost all retailers who have their own site also use a *marketplace* shows that the two instruments are not perceived as substitutes, but rather as complementary sales channels.

⁴⁰⁰ See doc. 191.

⁴⁰¹ See doc. 89.

⁴⁰² See doc. 73. See also Figure 13 below.

⁴⁰³ See section IV.4.a Marketplace Services, page 62 et seq.

⁴⁰⁴ See doc. 364. Studio Casaleggio Associati

280. In fact, internal evidence was found concerning the possibility of providing Amazon.it's *marketplace* services to [omissis], a leading electronics e-commerce operator with its own *online website*⁴⁰⁵. This shows that *marketplaces* are in a complementary relationship, and not substitutability, with the main operators' own *websites*.

281. With regard to Amazon's contention⁴⁰⁶ that the results would be vitiated by the selection of the sellers to whom the requests for information were addressed, it should be noted that the recipients of the requests for information were selected precisely with regard to Amazon's documentation of the most relevant sellers⁴⁰⁷. Certain retailers did not reply to these requests for information because they ceased their activities following the introduction of the restriction at issue⁴⁰⁸.

282. Similarly unsupportable is Amazon's remark⁴⁰⁹ that the investigation in the parallel case A528 - FBA Amazon⁴¹⁰ would lead to the conclusion that there is no separate market for *marketplace* brokerage services. That assertion not only disregards the fact that the subject-matter of those proceedings is the ascertainment of an abuse of a dominant position on the part of Amazon in the market for *marketplace* brokerage services in Italy; it also disregards the fact that the European Commission is currently conducting two proceedings to ascertain whether Amazon's conduct constitutes an abuse of a dominant position in the same market for *marketplace* brokerage services, in the different national markets in the European Union except Italy⁴¹¹.

283. In particular, it should be noted that the presentation of the study carried out by the Authority in case A528 submitted by Amazon⁴¹², presents numerical observations that are not weighted on turnovers. It is clear from the data illustrated above that - although retailers may use different channels for sales - *marketplaces* differ both in terms of the pool of users and the revenue attainable compared to physical channels and sales on their own website, and in terms of the investment required to achieve these results in terms of potential demand. Although some of the retailers surveyed use more than one sales channel, it emerged that *marketplaces* - and especially Amazon.it - make it possible to reach a much larger pool of users and a much larger level of revenue⁴¹³.

⁴⁰⁵ See ISP.44. In particular, Amazon.it's email reads: [omissis].

⁴⁰⁶ See doc. 364.

⁴⁰⁷ Cf. ISP.42, ISP.38. See, for example, Figure 10 *above*.

⁴⁰⁸ For example, see doc. 43, 44, 47,

⁴⁰⁹ See doc. 364, 376.

⁴¹⁰ See AGCM Order No. 27623 of 10 April 2019, A528 - FBA Amazon.

⁴¹¹ See European Commission, cases AT.40462 - *Amazon marketplace* and AT.40703 - *Amazon - Buy Box*.

⁴¹² See doc. 364, annex 2.

⁴¹³ See doc. 191, IT Store. According to another retailer, 'The product catalogue is very extensive due to the presence on the platform not only of Amazon products but also of third-party sellers from all over the world. This means that, by default, the consumer is led to go directly to the Amazon platform when looking for something because he knows he will definitely find the product. Buying in this way becomes immediate, there

284. This is the result of the network effects that characterise a *marketplace*, i.e. the possibility of selling to a potential pool of users who are already registered with the *marketplace*, who have already purchased products in the *marketplace* (even of different product categories), who are familiar with the customer service and the guarantees of shipping, purchase protection, return policies⁴¹⁴. It should be noted that Amazon's own data confirm that for a 10% increase in *marketplace* sales commissions, only [omissis] of sellers would shift all sales to other channels, while [omissis] would shift some sales to other channels⁴¹⁵. Thus, Amazon's data also confirm that the majority of sellers ([omissis]) would not choose another sales channel as a result of a significant increase in sales commissions, and another significant proportion of sellers would only shift some sales. It follows that a significant increase in sales commissions on Amazon would mean that only [omissis] would leave the *marketplace*, while almost all retailers would remain on Amazon.it.⁴¹⁶

285. Ultimately, the data on the co-presence on other channels of a retailer should be contextualised with the potential sales that each channel is able to generate. The network effects of a *marketplace* make it possible to offer an already established pool of users, which would not be reachable with a proprietary *website*, even by the largest operators (Table 10 above): what can

is no need to spend time searching the web, registering on a site and concluding the order." See doc. 75. Also, another retailer notes that "*the most important marketplaces (Amazon in primis) offer a visibility that could not be matched by a simple website/e-commerce, unless considerable investments, both technical and financial, were made, which very few companies could afford*" (cf. doc. 73). See also doc. 84, where a retailer draws attention to the audience that can be reached with a *marketplace*.

⁴¹⁴ On this point, for example, Netcomm notes that "*The focal point of platform analysis, in fact, is the concept of scalability and the network effects of digital services. The connection between network elements, in fact, triggers a non-linear but exponential process, due to the utility that is enabled by the addition of one more network element. In this sense, the platform is a fundamental concept in the network economy. [...] in e-commerce there is a dynamic and evolving theme in which a multi-channel strategy is emerging, with direct distribution also flanked by sales through marketplaces, so there is a complementarity between channels. Brand-owners are also gradually integrating their distribution strategy with marketplaces. For small and medium-sized resellers, the choice of selling via a marketplace or by developing their own website can be summarised as follows. Marketplaces have higher variable costs due to the brokerage commission, lower fixed investments and an immediate return due to the benefit of positioning and reaching demand and markets that would not otherwise be reached. With the marketplace, access is gained to those customers already acquired by the platform, with a view to long-term value, but resellers have no real control over customers. The choice to create one's own site presents difficulties in terms of expertise, requires higher investment costs and longer development and go-to-market times. There is also a marketing and trust-building problem, which is fundamental to customer acquisition and demand. There are therefore returns that are achieved over a longer period, but at the same time resellers have more control and more information about customers. Typically, therefore, what happens is that if resellers have the technical ability, they put their website alongside sales through the marketplace"*. See doc. 178.

⁴¹⁵ See doc. 364, encl. 4.

⁴¹⁶ In addition, the conclusions reached by Amazon based on the *Critical-Loss Analysis* (CLA, see doc. 364, at 4) appear to be based on unproven and inadequately substantiated assumptions and, in particular, when choosing a key element of the analysis - i.e. the contribution margin - Amazon does not attribute direct costs (this implies that the gross margin is actually equal to its gross revenue) and this results in margins that are much different from those recorded on average. The results of the analysis are therefore influenced by this assumption. Thus, a reduction in the contribution margin due to the allocation of direct costs would lead to very different results

be observed is that *marketplaces* succeed in attracting an extremely larger number of visitors, who visit the site for longer, with a higher number of page views and a lower abandonment rate.

286. The argument of Apple⁴¹⁷ and Amazon⁴¹⁸ that the physical (*offline*) shop sales channel should also be included in the market under consideration. In fact, there are substantial differences between the two sales methods, both in terms of the advantages and disadvantages of *online* versus *offline*, and in terms of the structure and magnitude of the costs necessary to set up one's own sales activity in the two different modes. Regardless of the purchasing behaviour of consumers (who may buy the same product both *online* and *offline*)⁴¹⁹, from the retailer's perspective, the decision to sell *online* has peculiarities that clearly distinguish it from the choice to operate through the physical channel.

287. Compared to the physical channel, virtual shops and *marketplaces* allow the seller to: (i) reach a wider audience of consumers and serve a greater number of markets, virtually without geographical (at least within national borders) and time (24/7) limitations; (ii) generally, reduce transaction costs, *market intelligence costs*, for gathering information on consumers, new *trends* and opportunities, as well as research and negotiation costs (iii) shorten the supply chain, e.g. by reducing the degree of outsourcing of product distribution activities; (v) provide consumers with a broader and more user-friendly set of information than is possible in a physical shop, including the opinions of other consumers and, in some cases, expert reviews.

288. E-commerce requires specific investments necessary to build one's reputation in the eyes of consumers and to gain their trust, such as the introduction of tools and processes that guarantee secure transactions and customer support at every stage of the purchasing process. Trade via physical shops, on the other hand, entails a different *set* of costs, requiring *set-up* processes and management of very different activities: search costs for business premises and business start-up, sales personnel, different *marketing* activities and market analyses, etc.

289. From the point of view of geographic definition, this marketplace is considered to have a national geographic scope in view of - inter alia - language barriers and non-negligible costs applied to cross-border shipments. In particular, the national location of the *marketplace* is important for consumers. Therefore, where a retailer wants to reach a certain geographic scope - in the present case Italian consumers - it will have to use a *marketplace* localised in

⁴¹⁷ See doc. 360. 368. 376.

⁴¹⁸ See doc. 364, 376.

⁴¹⁹ Amazon refers to data and surveys based on consumer habits, which show that more than a majority of consumers worldwide shop both *online* and in physical shops (see doc. 364).

Italy or in the Italian language.

290. This is confirmed by the analysis of *Internet* traffic of *websites* (Table 11), which shows that location and language are of crucial importance to consumers. The *Internet* traffic figure is also confirmed by the analysis of Amazon's internal data on user origin and turnover in each national *marketplace*, which shows that almost all purchases in each of Amazon's geographic sites are made by users from the same geographic area and/or language⁴²⁰. The same data can be observed with reference to other *marketplaces*⁴²¹.

Table 11 - Provenience of Internet traffic of the main marketplaces⁴²²

Site name	Localisation	First country by traffic	% First Country Traffic
Amazon.it	Italy	Italy	92.60%
Amazon.fr	France	France	85.34%
Amazon.de	Germany	Germany	80.31%
Amazon.es	Spain	Spain	81.96%
Amazon.co.uk	United Kingdom	United Kingdom	82.08%
eBay.it	Italy	Italy	92.23%
eBay.fr	France	France	89.02%
eBay.de	Germany	Germany	91.21%
eBay.es	Spain	Spain	84.87%
ePrice.it	Italy	Italy	95.09%
Zalando.it	Italy	Italy	96.10%
Zalando.fr	France	France	95.59%
Zalando.de	Germany	Germany	95.73%
en.Aliexpress.com	Italian Translation	Italy	89.06%

291. On this point, in response to comments by Apple⁴²³ and Amazon⁴²⁴ it should be pointed out that geographical location is important for consumers Italians, who almost exclusively buy from *marketplaces* 'localised' in Italy (i.e. in the Italian language). This does not mean that there are no European retailers selling in Italy, but rather that in order to reach an Italian consumer, it is necessary to use a *marketplace* localised in Italy (e.g. Amazon.it, Ebay.it, ePrice.it, etc.).

292. At the same time, *marketplaces* are an important tool to improve trade between Member States as they make it easier for foreign retailers to reach Italian consumers. The need to localise one's own *website* would, in fact, entail the need to make specific investments (e.g. set-up of the website, customer service in Italian, set-up of the logistics system and returns management,

⁴²⁰ See document 110 (Annexes_9-15_-_RFI2.xlsx, D9-D13).

⁴²¹ See doc. 205, 234, 241.

⁴²² Elaborations on doc. PI.3

⁴²³ See doc. 360, 368, 376.

⁴²⁴ See doc. 364, 376.

investments to make the website known to Italian customers) for the localisation of a website in Italian. On the contrary, the use of an Italian marketplace would allow the retailer to rely on a logistics system already established and consolidated in Italy, to use a customer relationship management system already existing and established, to use a purchasing location already known and consolidated for Italian customers.

293. In this sense, one does not consider correct - as claimed by Amazon - the thesis according to which "*the fact that marketplaces manage several national domains would represent a barrier to cross-border trade*"⁴²⁵, but, on the contrary, the management of a national domain or a site located nationally testifies to the need to preside over a specific national geographic market (in the present case, Italy). Thus, the management of national domains is not the cause of geographical differentiations in online trade, but rather the result of the presence of geographically segmented markets on a national basis, in order to reach the demand of a specific national geographical area.

294. The geographic dimension of the market also makes it possible to confirm that the physical shop channel cannot be included in the product definition of the relevant market. In fact, it must be noted that with a physical shop, from the perspective of the resellers, it is possible to reach an exclusively local demand, which in the Authority's established guidelines coincides with an isochronous travel time of approximately 30 minutes to reach the point of sale⁴²⁶. Contrary to their assertions, in fact, the Authority has never defined in its merger precedents between enterprises a single market between physical and online sales channels for consumer electronics products⁴²⁷.

295. *Marketplace* services are thus an intermediate *input* enabling retailers to operate in online commerce. *Marketplaces*, from the retailers' point of view, appear to be a separate market from proprietary *websites* and physical shops,

⁴²⁵ See doc. 364.

⁴²⁶ See AGCM Order No. 27561 of 13 February 2019, case C12217 - *Unieuro/Business Unit of Pistone*; AGCM Order No. 28366 of 30 September 2020, case C12323 - *Unieuro/Business Unit of Iper Montebello*.

⁴²⁷ In fact, the Authority, in its precedents, has not considered including online sales in a single market with physical channels, confirming the definition of the markets of local physical shops, of local geographical dimension, and leaving open the considerations regarding online sales. See AGCM Order No. 27561 of 13 February 2019, case C12217 - *Unieuro/Business Branch of Pistone*; AGCM Order No. 28366 of 30 September 2020, case C12323 - *Unieuro/Business Branch of Iper Montebello*. In addition, previous decisions in cases I801A - *Taxi/Roma transport booking service*; I801B - I832 - *Booking services for transport by taxi/Milan*; I832 - *Booking services for transport by taxi/Naples* and A523 - *Ticketone/excluding conduct in the sale of tickets* are completely irrelevant, since (i) they relate to the purchase of services and not of products and (ii) they are based on the analysis of the specific elements of the conduct under examination. In the *Ticketone* case, for example, it is stated that "*even though box office sales play an entirely marginal role and do not fall within the scope of the exclusive contracts, they are in fact affected by the competitive foreclosure*"; therefore, the inclusion of the physical channel and the online channel within the same relevant market depended on the effect of the abusive conduct complained of. (cf. AGCM Order No. 27244 of 27 June 2018, case I801A - *Booking service for transport by taxi/Rome*; AGCM Order No. 27245 of 27 June 2018, case I801B - *Booking service for transport by taxi/Milan*, AGCM Order No. 28495 of 22 December 2020, case A523 - *Ticketone/exclusionary conduct in the sale of tickets*).

as they are non-substitutable for small retailers and complementary for large retailers.

296. With reference to the *Italian market for intermediation services for sales on marketplaces*, Amazon.it is the main player, with a significant position, and holds a market share in terms of turnover from intermediation services to retailers of between 70% and 80% in 2018 and 2019 (Table 12)⁴²⁸ and a share in terms of intermediated turnover for consumer electronics products averaging over 75% (Table 13 below). Amazon is also the leading *marketplace* operator in terms of number of monthly visits (Figure 6 and Figure 14).

Table 12 - Turnover of intermediation services on marketplaces (Italy, 2018 and 2019)⁴²⁹

	2018		2019	
Amazon	[250.000.000-500.000.000]	[70-80%]	[500.000.000-1.000.000.000]	[70-80%]
Other operators	[100.000.000-250.000.000]	[20-30%]	[100.000.000-250.000.000]	[20-30%]
Total	[500.000.000-1.000.000.000]	100%	[500.000.000-1.000.000.000]	100%

Table 13- Turnover values of consumer electronics products sold by third parties intermediated on marketplaces (Italy, 2018 and 2019)⁴³⁰

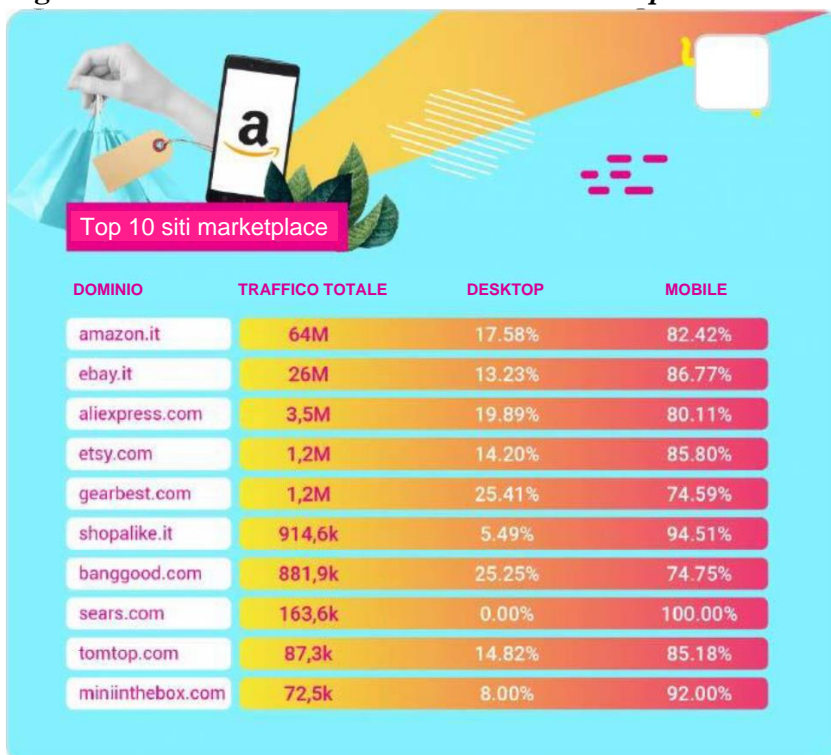
	2018				2019			
	Amazon		Other marketplaces		Amazon		Other marketplaces	
Desktop PC	[0-50.0000.000]	[45-50%]	[0-50.0000.000]	[50-55%]	[0-50.0000.000]	[55-60%]	[0-50.0000.000]	[40-45%]
Notebook	[50.0000.000-150.000.000]	[75-80%]	[0-50.0000.000]	[20-25%]	[0-50.0000.000]	[70-75%]	[0-50.0000.000]	[25-30%]
T ablet	[0-50.0000.000]	[75-80%]	[0-50.0000.000]	[20-25%]	[0-50.0000.000]	[80-85%]	[0-50.0000.000]	[15-20%]
Smartphones and mobile telephony	[150.000.000-300.000.000]	[60-65%]	[50.0000.000-150.000.000]	[35-40%]	[150.000.000-300.000.000]	[65-70%]	[50.0000.000-150.000.000]	[30-35%]
Decoder/set-top-boxes	[0-50.0000.000]	[40-45%]	[0-50.0000.000]	[55-60%]	[0-50.0000.000]	[50-55%]	[0-50.0000.000]	[45-50%]
Audio Devices	[0-50.0000.000]	[70-75%]	[0-50.0000.000]	[25-30%]	[0-50.0000.000]	[75-80%]	[0-50.0000.000]	[20-25%]
Other devices electronic	[750.000.000-900.000.000]	[80-85%]	[50.0000.000-150.000.000]	[15-20%]	[750.000.000-900.000.000]	[85-90%]	[50.0000.000-150.000.000]	[10-15%]
Total electronics of consumption	[1.000.000.000-2.000.000.000]	[75-80%]	[300.000.000-450.000.000]	[20-25%]	[1.000.000.000-2.000.000.000]	[80-85%]	[150.000.000-300.000.000]	[15-20%]

⁴²⁸ With reference to the market share based on the turnover of intermediary services (Table 12), it should be noted that the estimates are extremely cautious for Amazon, as for the latter only part of the realised turnover was used, excluding turnovers for ancillary services (e.g. advertising, logistics), whereas for the other players the total turnovers realised for the *marketplace* services as a whole and for ancillary services were included.

⁴²⁹ Cf. doc. 268 (Amazon), 195 (Ventis), 205 (eBay), 206 (Yoox), 227 (Zalando), 234 (Wish), 241 and 291 (Alibaba). The turnovers for eBay and Wish, expressed in US dollars, were converted into euros using a conversion rate of one euro for one US dollar; this assumption is extremely conservative for the parties as it overestimates the turnovers of third-party marketplaces. See Doc. 248, at 6.

⁴³⁰ See 110 (Amazon), 195 (Ventis), 205 (eBay), 206 (Yoox), 227 (Zalando), 234 (Wish), 241 (Alibaba).

Figure 14 - Number of visits of the main *marketplaces*⁴³¹



297. Therefore, in the Italian market for *intermediation services for marketplace sales*, Amazon is the leading player with at least 70 per cent of the market share in terms of intermediation service fees charged to retailers and at least 75 per cent of the turnover of consumer electronics products intermediated in total on *marketplaces*.

V.3.c. *Retail market for consumer electronics products on the Internet*

298. From a consumer perspective, the consumer electronics *retail* market on *the internet* is commodity identified as the *online* demand for consumer electronics products by consumer-customers and includes all players active in e-commerce of such products. The *retail* market for *consumer electronics products on the Internet* appears to have a national geographic dimension, due to the circumstance that Italian consumers appear to constitute almost the entirety of the demand active in Italy, while on the contrary they do not constitute a significant demand of the sites active in other countries, as well as to linguistic characteristics. In fact, like what has been observed with reference to *marketplaces* (Table 11 above), the analysis of the traffic of the sites of the main consumer electronics operators also shows the same results in terms of significance for consumers of the geographic location and the translation of the website⁴³². In particular, almost all traffic follows the geographic location of

⁴³¹ See doc. 245, annex 1.

⁴³² See, on this point, doc. PI.3. In particular, the traffic of the Italian sites of the retailers Unieuro and

consumers. As a result, almost all Italian consumers tend to buy on websites 'localised' in Italy (in Italian or having an Italian domain).

299. In the market for the *retail of consumer electronics products on the Internet*, Amazon and Apple are direct competitors. In fact, both companies sell Apple and Beats products to the public (Amazon also sells its own and other brands of consumer electronics products); in addition, Amazon produces some devices in competition with Apple, such as tablets and audio devices that it sells on the Internet. Third-party sellers using the marketplace are also active in the sale of Apple and Beats products. In this sense, Apple is not merely a manufacturer of electronic devices, but is also a retailer via its online shop (Apple.it, in addition to its own physical shops). Likewise, Amazon, in addition to being the provider of marketplace services (with Amazon-SE and Amazon-EC) to third-party sellers, sells (with Amazon-EU) Apple and Beats devices, as well as Amazon devices, on its own account.

300. Amazon is the leading *player in the consumer electronics retail market on the Internet*: in Italy, direct marketing by Amazon accounts for more than 30% of the total online marketplace sales of electronics products, moreover, Amazon intermediates more than 40% of *online* sales of consumer electronics products. Thus, in 2019, at least 70% of the total consumer electronics products sold *online* in Italy were distributed on Amazon.it, either directly by Amazon or by a third-party retailer in the *marketplace* (Table 14). Apple sells about [1-5%] of the total marketplace directly via its own site. Apple and Amazon jointly sell directly online at least 30% by value of all consumer electronics goods.

Table 14 - Incidence of direct sales and resellers of consumer electronics products on Amazon.it on total *online* consumer electronics sales ⁴³³

	2019	
	Value (mln of Euro)	%
Amazon (direct sales of Amazon products by consumer electronics online)	[500-1.000]	[30-40%]
Amazon (intermediate sales of retailers third parties on Amazon.it of consumer electronics products online)	[1.000-2.000]	[40-50%]
Apple (direct sales on Apple.it)	[50-250]	[1-5%]
More	[500-1.000]	[20-25%]
Estimated market total	3.007,4	100,0%

Mediaworld is generated purely by Italian consumers (at least 94% of the traffic comes from Italy), whereas the foreign sites (Spain and Germany) are used purely by consumers in the respective countries.

⁴³³ Elaborations on data from Amazon (cf. doc. 110, Annexes_9-15_-_RFI2.XLSX, sheets D14 and D15), Apple (doc. 56, annex 10) and public (cf. doc. 248, annex 6). The total purchase of consumer electronics estimated by Statista is USD 3.639 billion for the year 2019. The conversion rate applied is 1 Euro per 1.21 Dollars. See doc. 248, annex 6.

301. On this point, Amazon's claim that the estimated market total (and thus market share) is incorrect must be refuted. According to Amazon, for the market total, '*Statista was used as a source for the size of the online consumer electronics market, without realising that Statista's figure includes both online and offline sales*'⁴³⁴. Based on this erroneous consideration, Amazon claims that the total market value "*should not be the reported EUR 3,007.4 million, but rather EUR 571.4 million (i.e. 19% of the total figure)*".⁴³⁵ as online sales are 19% of the total *online* and physical sales and therefore considers all market shares to be erroneous (because Amazon would have had higher sales than the total) and concludes that these calculations are unreliable.

302. This statement is without foundation: how is it possible observe from the document from which the data are taken⁴³⁶, but also from the documents cited by Amazon⁴³⁷, the value of the market total refers only to purchases of consumer electronics on the Internet (online) - as this is an eCommerce study - and includes consumer electronics, electronic communication devices, peripherals and accessories, while it excludes household appliances⁴³⁸. Thus, the calculations demonstrating the unreliability of market shares (calculating 19% of the total market and then saying that Amazon's market share is incompatible with this figure) are based on an erroneous and misleading assumption. Furthermore, the description of the data also refutes the claim that the '*numerator of Amazon's share is most likely based on a larger product group*'⁴³⁹ as it confirms the inclusion of all consumer electronics products in the market total.

303. The correctness of the estimates made is also confirmed by Netcomm, according to which '*in Italy it is plausible to think that about 50% of the products sold in Italy are intermediated by platforms. Marketplaces, in fact, are an important hinge for the growth of ecommerce*'⁴⁴⁰ as well as further studies on the main places of purchase of electronics and media products on the Internet (Figure 15 below), according to which the absolute pre-eminence

⁴³⁴ See doc. 364, encl. 4.

⁴³⁵ See doc. 364, encl. 4.

⁴³⁶ See doc. 248, encl. 6.

⁴³⁷ See doc. 364, encl. 4. See Doc. 376, at 1.

⁴³⁸ "*The eCommerce market segment Consumer electronics includes the online sale of consumer electronics, for example, radios, TV sets, MP3 players, stereo systems and DVD players. Furthermore, the segment also includes hardware derived from the field of communications electronics, e.g. desktop computers, laptops, tablets and smartphones. Well-known and important online shops that focus on these types of equipment are bestbuy.com and amazon.com. All monetary figures refer to the annual gross revenue and do not factor in shipping costs. See doc. 376, all. 1. "IN-SCOPE: Consumer electronics (e.g. radios, TV sets, hi-fi, audio equipment and DVD players), Communications electronics (e.g. desktop computers, laptops, tablets and smartphones), Other electronic devices, Peripheral and accessories. OUT-OF-SCOPE: Electronic household appliances (e.g. washing machines, dishwashers and coffee machines)*". See doc. 376, annex 1.

⁴³⁹ See doc. 364, encl. 4.

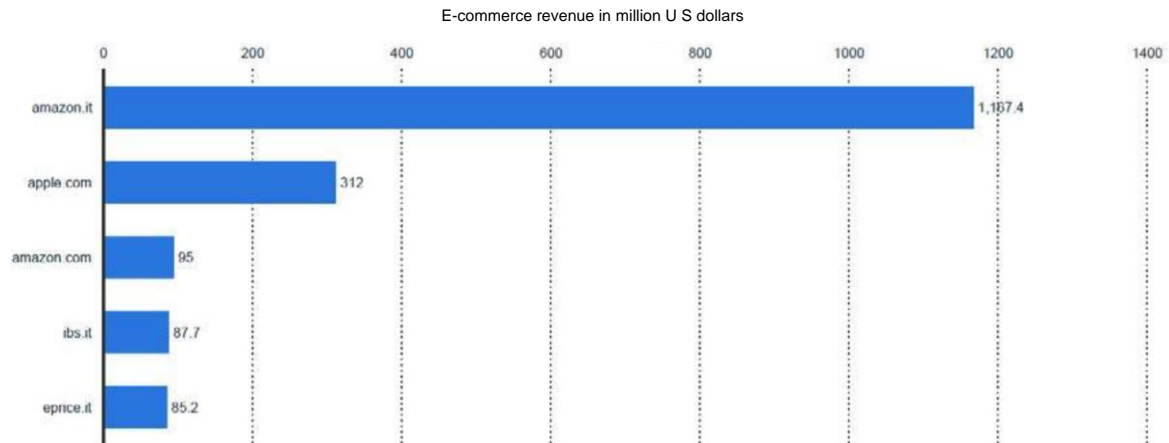
⁴⁴⁰ See doc. 178,

of Amazon as the main place of purchase for Italian consumers is confirmed⁴⁴¹.

Figure 15 - Top 5 online shopping venues in Italy for electronic and media products (2018)⁴⁴²

Most popular online stores in the electronics and media segment in Italy in 2018, by e-commerce net sales (in million U.S. dollars)

Electronics & media: top 5 online stores in Italy in 2018, by net sales



304. In addition, Amazon's argument appears unsupportable⁴⁴³ to include in the relevant market (and in the turnovers used for market share calculation), players such as Ikea, Esselunga, Decathlon, Coin, which do not sell consumer electronics products. First, it should be noted that consumers looking for a consumer electronics product will not be able to find it in the shops of these players. Secondly, the analysis of turnover for the different product categories confirms a different degree of competition for the different product categories (Figure 16 *below*): in several product categories there are several operators, some of which have higher sales than Amazon.

⁴⁴¹ Turnover figures of other operators confirm this, e.g. Unieuro - the leading operator in Italy - has an estimated turnover of USD 184 million in 2018 for online sales (Cf. PI.3, annex study_id57591_ecommercedb-top-online-stores-worldwide. The figure is also confirmed by Amazon, see doc. 364, encl. 4).

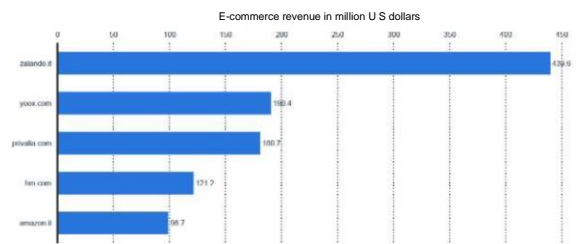
⁴⁴² Cf. doc. PI.3 (Annex study_id57591_ecommercedb-top-online-stores-worldwide).

⁴⁴³ See doc. 364, encl. 4.

Figure 16 - Top 5 online shopping locations in Italy for fashion, food, toys, furniture and appliances (2018)⁴⁴⁴

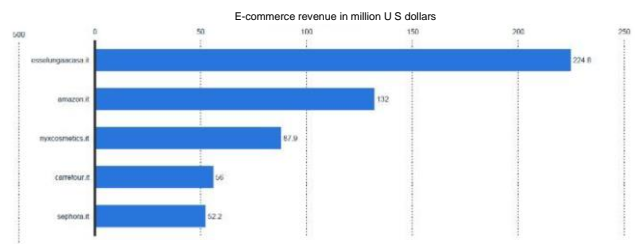
Most popular online stores in the fashion segment in Italy in 2018, by e-commerce net sales (in million U.S. dollars)

Fashion: top 5 online stores in Italy in 2018, by net sales



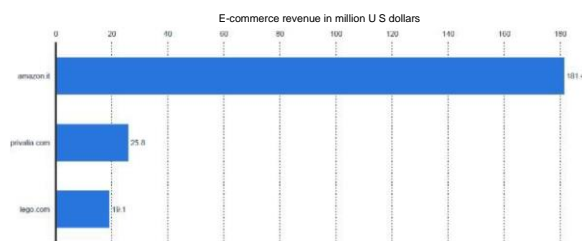
Most popular online stores in the food and personal care segment in Italy in 2018, by e-commerce net sales (in million U.S. dollars)

Food & personal care: top 5 online stores in Italy in 2018, by net sales



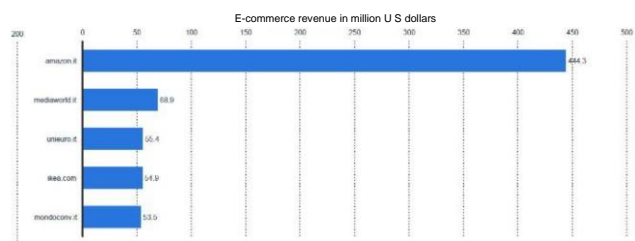
Most popular online stores in the toys and baby segment in Italy in 2018, by e-commerce net sales (in million U.S. dollars)

Toys & baby: top 3 online stores in Italy in 2018, by net sales



Most popular online stores in the furniture and appliances segment in Italy in 2018, by e-commerce net sales (in million U.S. dollars)

Furniture & appliances: top 5 online stores in Italy in 2018, by net sales



305. Regarding the inclusion of third-party sales on Amazon.it, it is noted that at least 30% of sales of consumer electronics products on the Internet are made by Amazon directly; at least 40% of total online sales are made by third-party retailers on Amazon.it (Table 14 *above*). It is therefore clear that - contrary to Amazon's claim⁴⁴⁵ - the figure does not erroneously attribute Amazon's market share to the turnover of third-party retailers, but on the contrary defines the incidence of Amazon.it (both direct and intermediated sales) on total online sales of consumer products. Indeed, it is noted that at least 70% of online purchases of consumer electronics products by Italian consumers take place on Amazon.it, so that this platform is the main purchasing channel for consumer electronics products by Italian consumers.

V.4. Violations of Article 101 of the Treaty on the Functioning of the European Union

V.4.a. Legal framework

306. As mentioned in the preamble, the restrictions of competition that are the subject of the present injunction concern the agreements between Apple and Amazon that foreclose access to the intermediation services of the Amazon.it *marketplace* to resellers (official and unofficial), other than those specifically mentioned, that legitimately sell Apple and Beats products, discriminating against them on the basis of geographical and subjective.

⁴⁴⁴ Cf. doc. PI.3 (Annex study_id57591_ecommercedb-top-online-stores-worldwide).

⁴⁴⁵ See doc. 364, 376.

307. Such clauses - which operate outside the rules of the distribution relationship between Apple and its retailers (including Amazon) - constitute an infringement of Article 101 TFEU, in that they unjustifiably and discriminatorily preclude third-party economic operators, outside the contractual distribution relationship between the two corporate groups, from access to a qualified distribution channel, which constitutes an indispensable outlet for *online* sales, especially for small and medium-sized operators, with significant effects on competition.

308. Article 101(1) TFEU states that all agreements between undertakings which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market are incompatible with the internal market and prohibited. 1(b) and (d) states that all agreements which limit or control production, markets, technical development or investment and which apply dissimilar conditions to equivalent transactions with other trading parties so as to place them at a competitive disadvantage are prohibited.

309. In addition, the European Courts have repeatedly held that agreements or concerted practices which aim to share markets on the basis of national borders or which make the integration of national markets more difficult, in particular agreements and practices aimed at prohibiting or restricting parallel exports, have as their object the restriction of competition within the meaning of Article 101(1) TFEU⁴⁴⁶.

310. In order to fully respond to the parties' comments, it appears useful to recall below the provisions contained in the Vertical Block Exemption Regulation No 330/2010⁴⁴⁷ and the related Commission Guidelines on Vertical Restraints (hereinafter also 'Guidelines')⁴⁴⁸. In particular, for the reasons expressed below, it is considered that the cartel at issue does not fall within the scope of application of the said Regulation, also in light of the principles expressed by the Court of Justice of the European Union⁴⁴⁹. These conclusions are also confirmed by the Commission's proposal for Guidelines on Vertical Restraints, recently submitted for public consultation⁴⁵⁰

⁴⁴⁶ See, e.g., *Etablissements Consten S.a.R.L. and Grundig-Verkaufs-GmbH v Commission of the European Economic Community*, 56/64 and 58/64, and *Football Association Premier League and Others*, C-403/08 and C-429/08, EU:C:2011:631, paragraph 139.

⁴⁴⁷ 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.

⁴⁴⁸ Commission Communication 'Guidelines on Vertical Restraints' of 10 May 2010 (2010/C 130/01).

⁴⁴⁹ See Court of Justice of the EU, judgment of 6 December 2017, Case C-230/16 *Coty Germany GmbH v Parfumerie Azkente GmbH*; Court of Justice of the EU, judgment of 13 October 2011, *Case C-439/09 Pierre Fabre Dermo-Cosmetique*.

⁴⁵⁰ See Annex to the Communication from the Commission, *Approval of the content of the draft Commission Notice - Guidelines on Vertical Restraints*, 9 July 2021, C(2021) 5038 final, points 313 et seq. https://ec.europa.eu/competition-policy/document/download/bff24773-e2b9-4788-8e42-0b10e0f6b28b_en

V.4.b. *The inapplicability of EU Regulation 330/2010 in light of the nature of competition relations and the restrictiveness of access restriction clauses on Amazon.it*

311. First of all, it should be noted that the agreement between Apple and Amazon which is the subject of the measure, which precludes access to the *marketplace* services provided by the main operator in Italy, namely Amazon, to persons legitimately engaged in the business of buying and selling consumer electronics products under the Apple and Beats brands, thereby hindering their market entry, is not susceptible to being covered by the exemption under Article 2 of Regulation (EU) No. 330/2010, nor to enjoy an individual exemption under Article 101(3) TFEU.

(a) *Inapplicability of the exemption*

312. Regulation (EU) No 330/2010 appears to be inapplicable in the present case due to the circumstance that the restrictions at issue relate to *marketplace* services that are provided by Amazon, i.e. the largest player in the market for *marketplace* sales intermediation services, with a market share of more than 70-75% (Table 12 and Table 13 *above*).

313. In this regard, it should be noted that, pursuant to Article 1(1)(a) of Regulation (EU) No 330/2010, agreements that '*relate to the conditions under which the parties may purchase, sell or resell certain goods or services*' are covered by the Block Exemption. According to the current Guidelines on Vertical Restraints, the definition of the scope covers '*the conditions under which the parties to the agreement, the supplier and the buyer, "may purchase, sell or resell certain goods or services"*'. This translates the objective of the Block Exemption Regulation to cover purchase and distribution agreements. *These are agreements concerning the conditions relating to the purchase, sale or resale of the goods or services supplied by the supplier and/or the conditions relating to the sale by the buyer of the goods or services incorporating those goods or services. [...] More generally, the Block Exemption Regulation does not exempt restrictions and obligations that do not relate to the conditions of purchase, sale and resale.*"⁴⁵¹.

314. It is common ground that the restriction under examination (limitation of access to the Amazon.it *marketplace* by third-party resellers) does not relate to the conditions under which Amazon may purchase, sell or resell the goods supplied by Apple. Indeed, the clauses relating to access by third parties to the Amazon.it *marketplace* do not relate to the conditions under which Amazon

⁴⁵¹ See Commission Communication 'Guidelines on Vertical Restraints' of 10 May 2010 (2010/C 130/01).

may purchase, sell or resell those goods, so that the clauses at issue are outside the scope of the Exemption Regulation as regards the distribution relationship between Apple and Amazon.

315. In any event, even if it were considered, as Apple and Amazon claim, that the object of the agreement concerned the supply by Apple of Apple and Beats products to Amazon, the regulation would still not apply.

316. In fact, sales of consumer electronics products made directly from Amazon appear to be significantly higher than 30% of the total sales of the consumer electronics retail market on the Internet (see Table 14 *above*).

(b) *Inapplicability of the exemption for lack of the requirements of Article 2(4) of the Regulation*

317. If that were not enough, secondly, Article 2(4) of Regulation (EU) No 330/2010 provides that the exemption does not apply to vertical agreements entered into between competing undertakings, unless those undertakings enter into a non-reciprocal vertical agreement and at least one of the two conditions set out in points (a) and (b) of that provision is fulfilled (i.e.: (a) the supplier is a manufacturer and a distributor and not a competing undertaking at the manufacturing level; or (b) the supplier is a service provider at different levels of trade, while the buyer provides its goods or services at the retail level and is not a competitor at the level of the chain where it purchases the contract services).

318. These provisions identify two exceptions to the general exclusion of vertical agreements between competitors, which concern non-reciprocal agreements. These exceptions mean that dual distribution situations, i.e. situations where the manufacturer of a good also acts as a distributor, in competition with independent distributors of the same good (or similar situations concerning services) are covered by the Regulation, as "*the potential impact on the competitive relationship between the manufacturer and the retailer at the retail level is generally considered to be of less importance than the potential impact of the vertical supply agreement on competition in general at the manufacturing or retail level*"⁴⁵².

319. In the present case, it is clear that none of the above-mentioned conditions is fulfilled. Indeed, not only are the restrictions at issue in the proceedings part of an agreement of a reciprocal nature - on the one hand, Apple grants Amazon the official distribution of Apple products and, on the other hand, Amazon grants Apple and Apple's (few) sole official resellers the exclusive right to *marketplace* services, including Amazon itself) - but

⁴⁵² See Commission Notice 'Guidelines on Vertical Restraints' of 10 May 2010 (2010/C 130/01), para. 28.

moreover, Apple and Amazon are also competitors in the production and, above all, in the distribution of electronics products, where Amazon and Apple are online retailers of consumer electronics products.

320. The present case, in fact, does not fall under the exemption of the Dual Distribution Regulation - the scope of which must be interpreted restrictively due to the exceptional nature of that provision⁴⁵³ - because of Amazon's role as a provider of intermediary services for *marketplace* sales and the restrictions placed on such services.

321. In response to the Parties' arguments⁴⁵⁴ that the agreement under scrutiny is not reciprocal in nature, it should be noted that, as mentioned above, under the agreements under scrutiny Apple grants Amazon the right to distribute its products (Apple acts as a supplier of Apple and Beats branded devices) and Amazon introduces certain restrictions on *marketplace* services in favour of entities identified by Apple (Amazon acts as a supplier of intermediary services).

322. The restrictions on the Amazon.it *marketplace* are therefore not a normal counter-performance of the distribution agreement for Apple and Beats products (such as, for example, payment for the products by money or exchange of goods) but determine rights and obligations that do not relate to the '*terms of purchase, sale and resale*'⁴⁵⁵ of Apple products by Amazon. In fact, it is precisely the total and blatant absence of such conditions governing Amazon's distribution of Apple and Beats products that points to the presence of a reciprocal relationship between the two groups.

323. Restrictions act and affect the ability of sellers competitors of Apple and Amazon in the *online* retail of consumer electronics products to use a sales channel of primary importance and extremely relevant for Italian consumers⁴⁵⁶.

324. These are, therefore, agreements whereby two *online* sellers (Apple and Amazon) agree to foreclose the market to a group of competing online sellers of the same. In this sense, the Exemption Regulation itself excludes its applicability in the case of reciprocal contracts in which two companies are competitors (in this case at the level of the sale of consumer electronics products *online*) because there is a significant impact on a horizontal competition profile that goes beyond the vertical supply relationship between Apple and Amazon.

325. In this regard, the draft Commission Regulation on the application of

⁴⁵³ On this point, see the Draft Annex to the Communication from the Commission - Guidelines on Vertical Restraints of 9 July 2021, para. 87.

⁴⁵⁴ See 364, 368, 376.

⁴⁵⁵ See 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.

⁴⁵⁶ Amazon.it accounted for at least 70% of the value purchases in Italy. See Table 14 above.

Article 101(3) TFEU to categories of vertical agreements and concerted practices as well as the above-mentioned Commission proposal for Guidelines on Vertical Restraints also confirm that the present case could not fall within the scope of the Regulation. Indeed, online intermediary service providers '*that perform a hybrid function, i.e. that provide online intermediary services and sell goods or services in competition with the undertakings to which they provide such services, cannot benefit from the dual distribution exemptions. As they generally raise non-negligible horizontal issues, the retail activities of online brokering service providers performing this hybrid function do not satisfy the underlying rationale of the dual distribution exception, which in any event must be interpreted restrictively. For the same reasons, the VBER does not regulate restrictions on the extent or conditions under which online brokering services may be provided to third parties. This applies not only to restrictions that are set out in an agreement with a buyer of online brokering services, but also to agreements concerning the purchase of goods or services sold by the provider of online intermediation that performs a hybrid function*'⁴⁵⁷.

326. In conclusion, both in the current Vertical Agreements Exemption Regulation (EU Regulation No 330/2010) and in the draft new exemption regulation under consultation, the case at hand could not be covered by the Article 2 exemption, as it could not be ascribed to a notion of dual distribution due to the restrictions of competition of a horizontal nature it presents.

(c) *Absence of the requirements of Coty jurisprudence*

327. With reference to the reference to the *Coty* judgment⁴⁵⁸ in the present case, the following is noted. As is well known, in the aforementioned judgment, the Court of Justice held that a negotiation clause prohibiting the members of a selective distribution system from using third-party platforms in a recognisable manner for the online sale of the contract products did not constitute a restriction of competition within the meaning of Article 101 TFEU and did not fall within the hardcore restrictions referred to in Article 4(b) and (c) of Regulation EU 330/2010 because it was aimed at safeguarding the particular image of the products, established indiscriminately and applied in a non-discriminatory and proportionate manner in relation to the objective pursued⁴⁵⁹.

⁴⁵⁷ See Annex to the Communication from the Commission - Guidelines on Vertical Restraints of 9 July 2021, cited above, para. 91.

⁴⁵⁸ See Court of Justice of the EU, judgment of 6 December 2017, Case C-230/16 *Coty Germany GmbH v. Parfumerie Azkente GmbH*.

⁴⁵⁹ According to the Court of Justice of the EU, judgment of 6 December 2017, Case C-230/16 *Coty Germany GmbH v. Parfumerie Azkente GmbH*: "Article 101(1) TFEU must be interpreted as meaning that it does not

328. In particular, the Court stated that *'the organisation of a selective distribution network does not fall within the prohibition of Article 101(1) TFEU, provided that the choice of dealers is made in accordance with objective criteria of a qualitative nature, established indiscriminately for all potential dealers and applied in a non-discriminatory manner, that the characteristics of the product in question require, in order to preserve its quality and ensure its proper use, such a distribution network and, finally, that the criteria defined do not go beyond what is necessary'* and *'in the absence of an objective, qualitative criterion, the choice of dealers is made in accordance with objective criteria of a qualitative nature, established indiscriminately for all potential dealers and applied in a non-discriminatory manner, that the characteristics of the product in question require, in order to preserve its quality and ensure its proper use, such a distribution network and, finally, that the criteria defined do not go beyond what is necessary'*⁴⁶⁰, and *'in the absence of an objective justification, they must be considered 'restrictions by object'*⁴⁶¹. And therefore, according to the Court of Justice, a system of selective distribution of luxury goods aimed at safeguarding the image of the product would be compatible with Article 101(1) TFEU, provided that the abovementioned conditions are met.

329. The Court of Justice therefore concluded that, in those circumstances (that is to say, finding that the choice of resellers was made in accordance with objective criteria of a qualitative nature, established indiscriminately for all potential resellers and applied in a non-discriminatory manner), the prohibition imposed on members of a selective distribution system for luxury goods operating as distributors on the market, to use third undertakings in a recognisable manner for sales by means of the internet, does not constitute a restriction on customers within the meaning of Article 4(b) of that regulation, nor a restriction on passive sales to end users within the meaning of Article 4(c) of that regulation.

330. In the present case, the agreement between Apple and Amazon cannot be reconciled with the principles set out in the case-law just cited in view of the fact that, as stated, the cartel under assessment differs entirely from the case

preclude a contractual clause, such as the one at issue in the main proceedings, which prohibits authorised distributors of a selective distribution system for luxury goods aimed, primarily, at safeguarding the luxury image of those goods from using, in a recognisable manner, platforms for the sale of the contractual products via the internet, where that clause is aimed at safeguarding the luxury image of those products, is established indiscriminately and applied in a non-discriminatory manner, and is proportionate in relation to the objective pursued, which is a matter for the referring court to verify."

⁴⁶⁰ See Court of Justice of the EU, judgment of 6 December 2017, *Case C-230/16 Coty Germany GmbH v. Parfumerie Azkente GmbH*, paragraphs 36, 40, 58. See also Court of Justice of the EU, judgment of 13 October 2011, *Case C-439/09 Pierre Fabre Dermo-Cosmetique*, para. 41.

⁴⁶¹ See Court of Justice of the EU, judgment of 13 October 2011, *Case C-439/09 Pierre Fabre Dermo-Cosmetique*, paragraph 39.

examined by the Court, in view of the fact that, as stated, the cartel does not concern the rules laid down in the distribution relationship between Apple and its retailers (including Amazon), which generally permit the use of *marketplaces*.

331. In any event, it should be noted that the conditions indicated by the case law of the Court of Justice for considering the restriction on access to the Amazon.it *marketplace* as legitimate do not exist. The case under examination, in fact, differs significantly from a so-called '*marketplace ban*', i.e. a restriction that integrates the case law examined by the EU Court of Justice⁴⁶².

332. In particular, the four requirements identified by the Court of Justice for the above-mentioned restrictions to be in conformity with Article 101(1) TFEU are not present: (a) choice according to objective qualitative criteria; (b) criteria applied indiscriminately to all potential resellers; (c) non-discriminatory application of those criteria; (d) proportionality of the criteria applied.

333. As will be seen below, in the present case, none of the above conditions are fulfilled, both with respect to the Apple and Beats Wired products - distributed under a free system - and with respect to the Beats Wireless products - which follow a selective distribution system. Therefore, the clauses in examined cannot be held to be in conformity with Article 101(1) TFEU.

334. Firstly, it should be noted that, for Apple and Beats Wired products (sold in a free distribution system), there is no a priori definition of objective qualitative criteria for the selection of dealers⁴⁶³. Moreover, only the Amazon.it *marketplace* is subject to access restrictions, whereas similar restrictions are not present in the other *marketplaces*, *online* sites and the physical channel. Similar restrictions are also not present on Amazon.it with regard to refurbished products.

335. The absence of such an assessment leads to the conclusion that there are no objective qualitative criteria and no legitimate objectives to be pursued, as the restrictions under scrutiny contradict the organisation of the entire distribution system for Apple products (both free and selective).

336. On the other hand, it is unclear how the alleged quality objectives of the product presentation and anti-counterfeiting measures only take place on Amazon.it, whereas in physical and *online* shops there is no quality requirement for retailers to sell Apple and Beats Wired products (which can be sold by any retailer), and for other *marketplaces* no such restrictions are

⁴⁶² See Court of Justice of the EU, judgment of 6 December 2017, *Case C-230/16 Coty Germany GmbH v. Parfumerie Azkente GmbH*.

⁴⁶³ As confirmed by Apple itself, such a free distribution system allows '*any reseller [...] to resell Apple products (online and/or in physical shops), without the need for Apple's authorisation*' (see doc. 56); this implies that '*unlike in a selective distribution system, any reseller can purchase and resell Apple products to wholesalers, retailers or consumers*' (see doc. 228).

envisaged.

337. In contrast, the parties' internal documents, illustrated above, showed that the objectives pursued consisted in the mere quantitative restriction of the number of players on Amazon.it⁴⁶⁴, as well as on the desire to reduce intra-European trade by limiting access to Amazon.it to those allegedly exporting⁴⁶⁵.

338. Indeed, in the present case, with reference to all Apple and Beats products (regardless of the distribution system), the evidence in the file⁴⁶⁶ it has emerged that the objectives pursued are divergent from those of safeguarding the image of the products, since the main objective is the definition of a mere quantitative restriction and limitation of cross-border sales.

339. Secondly, the selection of resellers admitted to the *marketplace* is not made according to criteria applied indiscriminately and in a non-discriminatory manner. In particular, the choice of official resellers for Apple and Beats Wired products (which are sold under a free distribution system) is, however, left to the discretion of Apple, which has stated that it assesses '*what seems most appropriate for the customer, the reseller and Apple itself*'⁴⁶⁷.

340. This does not mean, despite Apple's assertions⁴⁶⁸ that the Authority considers the principles expressed by the Court of Justice to be inapplicable in all cases where there is a free distribution system. On the contrary, what is relevant in the present case is that official resellers of Apple and Beats products are not selected on the basis of objective criteria of a qualitative nature, established indiscriminately for all potential resellers and applied in a non-discriminatory manner. In fact, the agreement reserves the selection of official resellers to Apple's total discretion and excludes in a discriminatory manner

⁴⁶⁴ Amazon's internal email reads: "Why are we limiting ourselves to 20 sellers? 20 sellers is the maximum currently proposed by Apple globally (i.e. Italy) and we will push to get this for all EU5 locales each." Cf. doc. ISP.72; "the list provided will be the final list and will ultimately override all sellers listed by Apple before. Ultimately the idea is to have 20 slots filled." Cf. doc. ISP.72.

⁴⁶⁵ In particular, Amazon's internal email of 2 October 2018 states: "P.13 Apple asks for a "Know your (end) customer process' to avoid businesses that are not compliant, not legitimate, or likely to export" (see ISP.27).

⁴⁶⁶ See section IV THE INSTRUCTORY RESULTS, page 6 et seq.

⁴⁶⁷ See doc. 228. On this point, it should be noted that in discussions between Amazon employees, the absence of a selective distribution system and of any qualitative criteria - which Apple refused to include in the contract by referring to generic selection criteria on Apple's part - appears to be a critical point in the analysis of the restrictions under scrutiny: "To your second question: Separately, does this case potentially implicate the viability of Apple distribution as a valid SDS? We think it does. The seller is arguing that we "arbitrarily" excluded them as a seller, and they're making the point that Apple does not operate a SDS and there are no qualitative criteria for the selection of authorised sellers. As a reminder, we discussed including a reference to such qualitative criteria under the Reseller Agreement but Apple pushed back. Ultimately, they were willing to confirm that authorised resellers approved to sell on Amazon Marketplace were selected "based on Apple's selection criteria" (Annex D of Amendment to Authorized Reseller Agreement) That being the case, we will argue that Apple's tight distribution system - even if it may not be a "selective distribution system" in the technical sense - justified the removal of sellers who were not authorised based on Apple's selection criteria, emphasising that in the end we improved CX on various metrics (selection to begin with). The claimant is arguing that the removal of sellers will result in an overall price increase, so we will look into the data to see if we can rebut this.)" Cf. doc. ISP.37.

⁴⁶⁸ See doc. 368, 376.

entities that could sell genuine Apple and Beats products with the same level of quality as Amazon and the admitted resellers on Amazon.it.

341. In addition to this, the entities that can sell on the Amazon.it *marketplace* are only a subset of the official Apple and Beats Wired product retailers and the retailers participating in the Beats Wireless selective distribution system.

342. Indeed, those authorised to access Amazon.it are the APRs established in Italy, Germany, France, the Netherlands, Sweden and Spain, 2 *resellers* established in Germany and Amazon itself as AAR. This list excludes access to Amazon.it by APRs from other Member States, and all AARs and *resellers* in Europe except Amazon itself and the two German operators. The excluded parties, which are official Apple resellers with the same qualifications of the admitted parties (APR, AAR or *reseller*) are therefore discriminated against as compared to those identified in *Exhibit D* of the EU Agreement⁴⁶⁹.

343. It is clear, therefore, that the restriction was applied in a discriminatory manner without the indiscriminate application of objective criteria: with the same type of operators, certain retailers were excluded solely on the basis of their geographical origin and, in general, there was no assessment of the operator's ability to ensure the alleged efficiency objectives (fight against counterfeiting, quality of service).

344. Thirdly, the restrictions are not proportionate: certain excluded operators - as official resellers (APR, AAR, *reseller*) on a par with those admitted on Amazon.it - are certainly able to meet the same quality standards as those admitted on Amazon.it. In fact, on the occasion of the Covid emergency, Apple and Amazon discussed the admission of additional resellers⁴⁷⁰ - even if only on a temporary basis - thus demonstrating that there were less restrictive alternatives to the limitation under scrutiny, which thus proves to be disproportionate.

345. These considerations are also confirmed by the Commission's abovementioned draft Guidelines on Vertical Restraints, which note that *'in cases where a supplier includes the operator of an online marketplace as an authorised distributor in its selective distribution system, restricts the use of online marketplaces by some authorised distributors but not others, or restricts the use of an online marketplace which is nevertheless used to distribute the*

⁴⁶⁹ Cf. doc. ISP.81, 58 (Annex 1.4.pdf).

⁴⁷⁰ "Other topic that came up in my call with [...] was that he offered to eventually relax the Authorized Seller Criteria to expand temporary the number of Apple sellers on our websites in order to ensure product availability during Corona crisis. I think we should look into this in particular as we may face more severe Retail OOS in case we need to restrict inbound in our own network even more. He said they could give us a list of additional sellers that we would then need to approach. Cf. doc. ISP.92. "On the above opportunity, I understand that Apple is going to share an "extended" list of SPs (on top of the original list shared by [...]) for us to temporary expand the number of Apple sellers on our websites. As such, I see three possible actions to conduct: [...]. See doc. ISP.92.

*contract goods or services, restrictions on the use of such online marketplaces are unlikely to satisfy the requirements of adequacy and necessity*⁴⁷¹.

346. In conclusion, the clauses at issue do not appear to benefit from the exemption under Article 2 of Regulation (EU) No 330/2010 and do not appear justified in light of a selective distribution system (for Apple and Beats Wired products) and, more generally (also for products covered by a selective distribution system) of the objectives pursued (of a purely quantitative nature and limiting cross-border sales).

V.4.c. The restriction of access to official and unofficial retailers on the Amazon.it marketplace and their competitive restrictiveness

(a) *Foreword*

347. Article 1(b) and (c) of the GTA and Exhibit D of the EU Agreement have as their object the foreclosure of access to the *marketplace* services provided by the main operator in Italy, namely Amazon, to persons legitimately engaged in the business of buying and selling consumer electronics products under the Apple and Beats brands, thereby hindering their market entry.

348. In particular, for Apple and Beats products that are not covered by the selective distribution system (Beats Wired), the clauses under review prevent access to the Amazon.it *marketplace* by a significant set of official and unofficial resellers. They are in fact excluded from the Amazon.it *marketplace* (see Table 3 and Figure 9 above):

- i.* all official resellers other than those identified in Exhibit D of the EU Agreement and all unofficial resellers of Apple and Beats products established in Italy, Germany, France, the Netherlands, Sweden and Spain;
- ii.* all official and unofficial dealers established in Member States other than Italy, Germany, France, the Netherlands, Sweden and Spain.

349. For Beats products that are part of a selective distribution system (Beats Wireless), the clauses at issue allow only certain resellers belonging to the selective distribution system, identified in Exhibit D of the EU Agreement, access to the Amazon.it *marketplace*, excluding part of the resellers of the selective distribution system established in Italy, Germany, France, the Netherlands, Sweden and Spain and all resellers belonging to the selective distribution system established in the remaining Member States.

350. Compared to approximately [1,800-1,900] resellers of Apple products active in the Italian *marketplace* who sold Apple products through the

⁴⁷¹ See Annex to the Communication from the Commission - Guidelines on Vertical Restraints of 9 July 2021, para. 319, cit.

Amazon.it marketplace⁴⁷² of which [10-29] with an individual sales value realised on Amazon (GMS) of more than USD 1 million, to date the number of resellers present on Amazon.it is less than [omissis].

351. On this point, in response to Amazon⁴⁷³, it should be noted that a significant number of players were selling Apple and Beats products on Amazon.it: as can be seen from Amazon's internal documents (Figure 9 above), at least [100-200] retailers had a turnover of more than \$100,000 and, therefore, there were a significant number of non-specialised sellers who sold Apple and Beats products. This size (considering only the most relevant resellers) was reduced by [90-100%] after the agreement. Moreover, as can be seen in Table 4 above, after the agreement, the turnover of third-party sellers decreased by more than 80 per cent between 2018 and 2019, from around [50-100] million euros in 2018 to around [5-10] million euros in 2019. These are therefore not sporadic or unreliable sellers, but entities with relevant sales on the Amazon.it marketplace.

(b) *The desire to restrict the number of dealers*

352. The evidence in the file, described above, has made it possible to ascertain that these restrictions are purely quantitative in nature and were not the result of a qualitative assessment. In fact, internal documentation shows that the intention was to introduce a purely quantitative restriction on the number of dealers.

353. Specifically, it is noted that the restrictions originate from Apple's desire to set a numerical limit of approximately 20 sellers ("*Why are we limiting ourselves to 20 sellers? 20 sellers is the maximum currently proposed by Apple globally (i.e. Italy) and we will push to get this for all EU5 locales each.*"⁴⁷⁴) selected one by one ("*handpicked*")⁴⁷⁵ in a nonuniform manner, to retailers who can access the marketplace. In fact, the negotiations between Apple and

⁴⁷² Cf. ISP.10. See Figure 9 above.

⁴⁷³ See doc. 364, 376.

⁴⁷⁴ Cf. ISP.72.

⁴⁷⁵ Cf. ISP.72. In particular, an Amazon email of 21 September 2018, 10.24 a.m. states: '*we have received feedback from US that we will only include "handpicked" sellers here and US is targeting approx. 5 sellers. Could you please curate your top 20 sellers per locale under these criteria:*

1. Existing key authorised sellers (e.g. Gravis in DE)
2. Key authorised reseller leads (e.g. Euronics in DE)
3. Top hold out leads of authorised reseller

[...] FAQs

What about the sellers that are already proposed by Apple? At a first glance these are not highly relevant, so just propose your super stars Will we be able to exchange sellers on the list? A process has not been confirmed yet, but we will demand to have a mutually agreed exchange mechanism

Why are we limiting ourselves to 20 sellers? 20 sellers is the maximum currently proposed by Apple globally (i.e. Italy) and we will push to get this for all EU5 locales each.

What happens, if we have to reduce the list further? We will push back, but to make it easier internally please rank the sellers in your respective lists already by importance" See doc. ISP.72.

Amazon did not concern the qualitative characteristics of the retailers but always took into account elements of an exquisitely quantitative nature (*[omissis]*).⁴⁷⁶

354. Amazon confirmed Apple's willingness to place a numerical limit on the number of retailers: *'the maximum limit set by Apple globally was 20 sellers per shop, Amazon insisted that the same limit be applied to each of the 5 European Amazon Stores and, in the event that it received indications from Apple to further reduce the list, Amazon stated its intention to 'push back' against such a request'*.⁴⁷⁷

355. Apple's choice of retailers was then made in order to better control the retailers (*'what I would say is that the idea was to stick to one "self-contained" channel that we believe will be easier to control. If 2 CE retailers in Germany would be authorised we'll run into various discussions and issues with other CE retailers in Germany and or other T5 countries. In addition, there is a different food chain for retailers than for APRs. Unless Mark has changes his opinion, we should stick to APR to avoid issues in the channel'*).⁴⁷⁸

356. On this point, it should be noted that the argument of Apple⁴⁷⁹ and Amazon⁴⁸⁰ regarding the genesis of the limitation at issue being the need to introduce a remedy to the counterfeiting problem, appears specious and in contradiction with the factual elements in the file.

357. As extensively argued, official resellers of Apple products have been excluded from the Amazon.it *marketplace*. These entities, being official resellers of Apple and Beats products, guarantee the same quality and security with respect to the counterfeiting problem. The absence of a connection between quality objectives and the restriction under examination is apparent from a reading of the internal documentation.

358. The presence of a willingness to determine the quantity of sellers present on the Amazon.it *marketplace* also emerges from Apple's subsequent discussions regarding its proposal to temporarily extend the list of sellers present on Amazon.it, following the Covid-19 emergency (*'we cannot negotiate a temporary activation of sellers; the concept itself of temporary would not be in line with Apple's objective criteria that resellers have to meet to be authorised to sell on Amazon marketplace and may jeopardise our legal defence on gating. [...]. To be precise in the communication, we cannot exchange emails with Apple agreeing to a temporary activation of seller.'*)⁴⁸¹.

⁴⁷⁶ See *[omissis]*.

⁴⁷⁷ See doc. 364.

⁴⁷⁸ See doc. 58 (all. APL-ITALY_000062.pdf).

⁴⁷⁹ See doc. 360, 368, 376.

⁴⁸⁰ See doc. 364, 376.

⁴⁸¹ Cf. ISP.92, ISP.58.

359. Apple states that it cannot handle more than twenty resellers and, in fact, it appears in other internal Apple communications that the idea of a closed list is linked to the desire to control resellers (*'what I would say is that the idea was to stick to one 'self-contained' channel that we believe will be easier to control.'*⁴⁸²).

360. The observations of Apple must also be rejected⁴⁸³ that no account should be taken of internal documents but only of the contractual data, in which there is no mention of purely quantitative limitations. This is a specious argument. Given that the competitive restrictions at issue in the present action derive directly from the contractual agreements between Apple and Amazon, it must be considered that it is clear that the parties, in the knowledge of the dubious legitimacy of the same agreements, took care not to indicate in the official documentation the actual intentions to limit the number of retailers. The desire to control the number of entities admitted to the Amazon.it marketplace, however, clearly emerges from the cited documentation.

361. Thus, in the face of a willingness to expand the number of resellers, Amazon requested not to exchange communications agreeing to a temporary increase in the number of resellers (*"To be precise in the communication, we cannot exchange emails with Apple agreeing to a temporary activation of seller."*⁴⁸⁴), because this could jeopardise the legal defence of the restriction under scrutiny (*'the concept itself of temporary would not be in line with Apple's objective criteria that resellers have to meet to be authorised to sell on Amazon marketplace and may jeopardise our legal defence on gating'*⁴⁸⁵).

362. Thus, it is clear that, in the face of a clear intention to limit the number of dealers, the parties took great care in drafting the documents and official correspondence in order to be able to justify themselves in the event of allegations about the legality of the clause restricting the number of dealers (*'gating'*)⁴⁸⁶.

363. The documents in the file also refute Amazon's claim⁴⁸⁷ that it was unaware of the objectives pursued by Apple. As is evident from the inspection documentation cited above⁴⁸⁸, Amazon was aware from the outset of Apple's intention to introduce a purely quantitative restriction. This is also confirmed

⁴⁸² See doc. 58 (all. APL-ITALY_000062.pdf). Apple's documentation confirms a comparison between the parties for a list of 20 units for each country: [omissis].

⁴⁸³ See doc. 360, 368, 376.

⁴⁸⁴ Cf. ISP.92, ISP.58.

⁴⁸⁵ Cf. ISP.92, ISP.58.

⁴⁸⁶ On this point, Apple's internal documentation also shows that the decision to include the two retailers proposed by Amazon could lead to problems regarding the lack of justification for the choice of retailers, resulting in discussions with other excluded retailers in Europe: *'If 2 CE retailers in Germany would be authorised we'll run into various discussions and issues with other CE retailers in Germany and or other T5 countries.* See doc. 58 (all. APL-ITALY_000062.pdf).

⁴⁸⁷ See doc. 364, 376.

⁴⁸⁸ Cf. ISP.72, ISP.31, ISP.9.

by the statements in the final pleadings of Amazon⁴⁸⁹ in which the discussion about the introduction of a quantitative limit (20 sellers) is confirmed.

364. Finally, contrary to what Apple⁴⁹⁰ and Amazon⁴⁹¹, that retailers are chosen by name ('*handpicked*') and are the result of negotiation. First, the facts refute the thesis that Apple made a choice as to the quality of the resellers, choosing only APRs: on the one hand, there are in fact numerous APRs excluded from the Amazon.it *marketplace* (out of [70-80] APRs in Europe, only [40-50] APRs have been authorised, see Table 3 above), on the other hand, Amazon and two other German resellers have been authorised, which do not have the status of APRs. Apple's total discretion thus emerges, confirming the absence of any application of quality criteria indiscriminately for all potential retailers. Secondly, the very introduction of German resellers, requested by Amazon, confirms the negotiated nature of the list: Apple agrees to this request in order to reach a rapid conclusion of the contract, before the promotional period. This appears to be further confirmed by Amazon's statements in the final pleadings, in which it is reiterated that the expansion of the number of operators should not be temporary and related to contingent situations (such as the Covid-19 pandemic) and that it must be ensured that official communications with Apple refer only to objective criteria⁴⁹². Amazon begins an activity aimed at identifying possible new sellers of Apple products on the Italian *marketplace*, the *screening* activity confirms the presence of several official resellers of Apple products who are also excluded from selling such products from the *marketplace*⁴⁹³.

⁴⁸⁹ *the maximum limit set by Apple a global level was 20 Sellers per Store, Amazon insisted on seeking the application of the same limit for each of the 5 European Amazon Stores, and, in the event that it received indications from Apple to further reduce the list, Amazon stated its intention to 'push back' against this request.*" See doc. 364.

⁴⁹⁰ See doc. 360, 368, 376.

⁴⁹¹ See doc. 364, 376.

⁴⁹² *"I'm of course glad to hear that Apple wants to expand the list of authorised resellers. However, this should not be dependent on contingent situations (like Covid) but rather justified based on Apple's objective selection criteria applied homogeneously across their reseller base. So please make this point clear to [...] when you get back to him and make sure all communications exchanged on this point with Apple follow the same approach. As you know, the addition of new authorised resellers would need to be formalised through a contract amendment (Exhibit D) so would expect Apple to confirm in writing that these new resellers meet the selection criteria for selling on Amazon marketplaces. Cf. doc. ISP.92.*

⁴⁹³ *"We started from the list of authorised Apple resellers (<https://locate.apple.com/findlocations>) by EU5 locales in the largest cities, excluding established telecommunication companies or larger electronics retailers with their own distribution channels and identified 2 addressable buckets: a. [<10] SPs that (1) have a CID, (2) are not locked by Fraud, (3) are not Premium Resellers and (4) are not selling Apple those already selling on Amazon > action: communicate to these SPs through AMs that they are allowed to sell also Apple listing on existing product pages b. [10-29] SPs that (1) do NOT have a CID and (2) are Premium Seller not included in our original list or(3) have high potential based on operations size - number of Point of Sale, branches, online presence >action: this would require a full onboarding exercise' See doc. ISP.83. See also ISP.87.*

(c) *The introduction of geographical limitations*

365. As noted above⁴⁹⁴, from the consumers' point of view, the geographical location of *websites* and *marketplaces* are an important element in attracting the demand of Italian consumers, who almost all visit shopping sites in Italian language or with an Italian domain. *Marketplaces*, from the point of view of retailers, are a very important tool for the internationalisation of businesses: without the need for specific investments (investments to set up the organisation of distribution and returns, investments to make the retailer known to the public), a foreign retailer can easily reach an Italian consumer through the use of the *marketplace*⁴⁹⁵.

366. The agreement makes the integration of national markets more difficult by compartmentalising them and limiting parallel sales. In fact, the agreement in question excludes certain retailers from access to Amazon.it if only because of their geographical origin: although there are official retailers with APR status established in Member States other than Italy, Germany, France, the Netherlands, Sweden and Spain⁴⁹⁶ these are excluded only because of their geographical origin.

367. Furthermore, the selection of retailers meant that, following the agreement, the retailers listed in Exhibit D of the EU Agreement sold their products exclusively in the *marketplace* located in their country of establishment. Therefore, in Amazon.it in 2019 and in the period January-June 2020 there are no resellers from Member States other than Italy⁴⁹⁷ (Table 8 and Table 9 *above*), in contrast to the situation prior to the agreement with numerous operators with significant turnover (Table 7 *above*).

⁴⁹⁴ See Section V.3 The Relevant Markets, pages 105 et seq.

⁴⁹⁵ On this point, see for instance eBay's document: *'eBay understands that e-retailers make recourse to online marketplaces because of the advantages these provide compared to standard proprietary sites (i.e. the retailer's own online shop): First, online marketplaces can offer access to a pre-existing large base of consumers looking for products and a high level of service. This can increase the visibility of the sellers' products and their chance of making a sale, without the need to invest in their own product / brand specific marketing and brand awareness. Second, online marketplaces typically provide sellers with support for online "shopfront" and on-platform transactions as well as logistical services. More specifically, online marketplaces typically offer sellers the tools and capabilities needed for online retailing, including the processing of online payments on platform, and refund policies and customer (buyer) care (such as pre and after-sales services and the handling of complaints). Certain online marketplaces also offer logistical services through international distribution networks, which sellers can use to deliver their goods. This permits sellers (particularly small and medium enterprises as well as non-professional sellers) to offer a professional online retail experience without the need to invest in developing and maintaining these functions. Third, online marketplaces can improve sellers' international reach. Online marketplaces can make it easier for sellers to reach customers all over the world, including by providing multiple language versions on their platform as well as through offering delivery and payments support as described just above. See doc. 205.*

⁴⁹⁶ It should be noted that the United Kingdom, following its exit from the European Union, has not been considered a member country.

⁴⁹⁷ In 2019 alone, one UK retailer is observed in Amazon.it, with an annual turnover (GMS) of £ 24.25bn. See doc. 146.

368. On this point, in response to comments by Apple⁴⁹⁸ and Amazon⁴⁹⁹, it is necessary clarify that, although Exhibit D of the EU Agreement provides that crossborder sales are permitted, the evidence on record shows that: (i) resellers were selected on a geographical basis, according to a logic of partitioning national markets; (ii) only operators who do not in fact export were selected.

369. Preliminary versions of Exhibit D of the EU Agreement⁵⁰⁰ presented the list of dealers broken down by country of origin (i.e. Italian dealers were included in the list for Italy, German dealers in that of Germany, etc.). This organisation of the list was maintained in the final version of Exhibit D of the EU Agreement⁵⁰¹, although the indication of the country of origin was removed for each group of dealers).

370. Amazon's internal documentation also shows that the lists being formed excluded retailers that were not established in 5 Member States ("*Here is a file with a data extract of Top Apple Sellers EU5. I filtered out those that are non EU5 based.*"⁵⁰²).

371. This also seems to be confirmed by the *slides* produced by Apple in its final pleadings⁵⁰³ with regard to the identification of retailers, in which a geographical stratification of retailers emerges (Figure 17 *below*), preventing access to retailers solely on the basis of their geographical origin other than Italy, France, Spain, the United Kingdom and Germany (EU5), as well as the objective of only allowing 'local' purchases ('*will be able to source local flavours only, but ship to anywhere within EU*')⁵⁰⁴.

⁴⁹⁸ See doc. 360, 368, 376.

⁴⁹⁹ See doc. 364, 376.

⁵⁰⁰ See, e.g., doc. doc. 58 (all. APL-ITALY_00020660.pdf) consisting of the draft EU Agreement attached to email doc. doc. 58 (all. APL-ITALY_00020650.pdf) of 17 October 2018.

⁵⁰¹ Cf. doc. ISP.81, 58 (Annex 1.4.pdf).

⁵⁰² Cf. ISP.9

⁵⁰³ See doc. 360, annex 2.

⁵⁰⁴ See doc. 360, annex 2.

Figure 17 - Identification of retailers⁵⁰⁵

Identified market place sellers to ensure premium CX



Apple Confidential-Internal Use Only

372. It therefore emerges that the decision to restrict the number of operators admitted to Amazon.it is not only not based on qualitative, uniform and non-discriminatory criteria, but has been taken by discriminating against retailers on the basis of their European country of establishment, leading to a partitioning of access to the *marketplace* on a national basis.

373. Moreover, not only were operators from certain Member States excluded, but the discriminatory choice of operators resulted in the inclusion of operators who do not actually export.

374. On this last point, the comments of Apple⁵⁰⁶ and Amazon⁵⁰⁷ regarding the presence of a UK operator that continued to sell on Amazon.it (Table 8 and Table 9 *above*). In fact, the only foreign operator that sold on Amazon.it, as can be seen from the documentation in the file, is a UK operator. This retailer sold on Amazon.it in the year 2019 alone, for a sales value of less than EUR 2,000⁵⁰⁸ and then ceased selling on Amazon.it. Similar behaviour of the retailer occurred in all other Amazon *marketplaces* in Europe with the exception of the United Kingdom, where it continued to sell products.

375. This circumstance, therefore, confirms and does not deny that, as a result of the agreement under review, operators were selected who in fact did not export to countries other than the country of establishment, which significantly

⁵⁰⁵ See doc. 360, annex 2.

⁵⁰⁶ See doc. 360, 368, 376. According to Amazon, "there is evidence that sellers established in other EU countries continued to sell in Italy, it was only one, but the point is that the fact that the seller continued to sell in Italy showed that there was no restriction on cross-border sales." See doc. 376.

⁵⁰⁷ See doc. 364, 376.

⁵⁰⁸ See doc. 376, 146.

limits parallel trade.

(d) *The restrictiveness of conduct by object and effect*

376. Article 1(b) and (c) of the GTA and *Exhibit D* of the *EU Agreement* have as their object an infringement of Article 101(1) TFEU and also lead to anti-competitive effects.

377. In particular, the clauses under consideration pursue the objective of reducing the number of third-party resellers present in a sales channel of significant importance without the application of a selection system based on quality and non-discriminatory criteria.

378. The clauses in question affect the possibility for operators to use the Amazon.it marketplace, which is the electronic place where at least 70% of purchases of consumer electronics products by Italian consumers are made (see Table 14 *above*), and thus has as its object the foreclosure of an extremely significant sales channel for Apple and Beats product retailers. There is therefore a significant foreclosure of outlets, in breach of Article 101(1)(b) TFEU.

379. The clauses under consideration are discriminatory, as they favour Amazon and certain official resellers, while excluding resellers with the same qualification as those admitted (official AAR, APR and Reseller) or unofficial resellers able to guarantee the same security in terms of product authenticity.

380. The arguments of Apple⁵⁰⁹ and Amazon⁵¹⁰ according to which the restriction on the number of dealers is only the tenor of the clause and could not constitute the anticompetitive object by its intrinsic characteristics. In fact, the infringement under scrutiny appears to constitute a restriction by object because the restrictions alone contain a significant degree of harm to competition based on experience in the application of antitrust law.

381. This significant degree of harm arises, firstly, from the blatant absence of legitimate selection criteria, established indiscriminately and in a non-discriminatory manner, which therefore differ from legitimate and proportionate efficiency objectives⁵¹¹. In this sense, the Court of Justice has ruled that agreements that limit the quantity of resellers, such as selective distribution agreements, '*necessarily affect competition in the common market*

⁵⁰⁹ See doc. 360, 368, 376.

⁵¹⁰ See doc. 364, 376.

⁵¹¹ On this point, the Commission's Guidelines on Vertical Restraints, which were put out for consultation, also state that "in cases where a supplier includes the operator of an online marketplace as a distributor authorised in its selective distribution system, restricts the use of online marketplaces by some authorised distributors but not by others, or restricts the use of an online marketplace that is nevertheless used to distribute the contract goods or services, restrictions on the use of such online marketplaces are unlikely to meet the requirements of adequacy and necessity. See Draft Annex to the Commission Notice - Guidelines on Vertical Restraints of 9 July 2021, para. 319.

[...]. *Such agreements, in the absence of objective justification, must be regarded as 'restrictions by object'*"⁵¹². Second, the degree of harm is to be assessed by reference to Amazon's positioning as a supplier to retailers of intermediation services for *marketplace* sales and of Amazon.it as a place of purchase by Italian consumers of consumer electronics products on the Internet.

382. Thirdly, it should be noted that the clauses at issue lead to a more difficult integration of national markets, reducing parallel exports, and these types of restrictions have been held to have the object of restricting competition within the meaning of Article 101(1) TFEU⁵¹³.

383. The conduct under scrutiny, by preventing access to an extremely important distribution platform (Amazon.it), also led to the following effects:

- i.* a reduction in the number of third-party retailers and the amount of Apple and Beats products sold on Amazon.it by them;
- ii.* a price increase (decrease in discounts) of Apple and Beats products sold by third-party retailers on Amazon.it;
- iii.* the de facto cessation of cross-border sales of Apple and Beats products on Amazon.it.

384. With reference to the number of resellers of Apple and Beats products, compared to more than 40 resellers selling major Apple products in 2018 on Amazon.it, in 2019 the average number was reduced to less than *[omissis]* operators, with a reduction in the number of resellers of between 40 and 100% (Table 6 *above*). Sales of Apple and Amazon products by third-party operators also declined significantly, both in terms of units sold and in terms of sales (GMS), with the average number of operators reducing significantly by more than 40-60% (see Table 4 and Table 5 *above*)⁵¹⁴.

385. In the face of this foreclosure of access by retailers of Apple and Beats products in the Amazon.it *marketplace*, it was observed that such retailers did not find different outlets. In fact, in addition to what some retailers have directly indicated about the importance of Amazon.it as a distribution platform⁵¹⁵, it can be observed that, while there was a reduction in turnover

⁵¹² See Court of Justice of the EU, judgment of 13 October 2011, *Case C-439/09 Pierre Fabre Dermo-Cosmetique*, paragraph 39.

⁵¹³ See, e.g., *Etablissements Consten S.a.R.L. and Grundig-Verkaufs-GmbH v Commission of the European Economic Community*, 56/64 and 58/64, and *Football Association Premier League and Others*, C-403/08 and C-429/08, EU:C:2011:631, paragraph 139.

⁵¹⁴ Amazon acknowledges in its internal documents that this restriction results in a substantial reduction in third-party sales, with a reduction in the third-party operator's share of sales of Apple products from [60-100%] in FY18 to [0-29%] in Q1 2019 ("*All 3P locales were impacted by the Apple agreement that came into effect in 15 Q1 (not included in the OP2 plan) and the EU 3P share of Apple AB GMS dropped from [60-100%] in FY18 to [0-29%] in Q1-19 equating to [10- 50]MM of AB GMS ([60-100%] of the OP2 miss)*"). Cf. ISP.19 (attachment "20190430_Amazon Business EU 3P Q1-19 QBR.pdf").

⁵¹⁵ See doc. 66, 73, 74, 75, 84, 89, 191.

(GMS) of third-party retailers of Apple and Beats products on Amazon.it, there was no increase in turnover of third-party players in other *marketplaces* targeting Italy such as to compensate for what was lost on Amazon (Table 15 *below*). With the exception of the set-top box category, the turnover of third-party sellers on Italian *marketplaces* decreased as a result of the agreement, as the reduction in third-party resellers' sales on Amazon.it was not absorbed by the increase in turnover on other *marketplaces*, there is therefore a restriction on more than EUR 50 million of turnover of Apple and Beats products from third-party sellers, which were not sold on other *marketplaces* in Italy. As a result, a significant part of the Apple and Beats product offering was blocked as a result of the foreclosure on the Amazon.it *marketplace*. On this point, in response to Amazon's comments, we reiterate the correctness of the calculations based on Amazon's own data, which states that the sum of the values it provided are different⁵¹⁶.

⁵¹⁶ On this point, Amazon's assertion that it "*attempted to replicate the relevant calculation made by the CRI in Table 15 (on the basis of document 110 used by the Offices) and found that the total reduction in turnover for Apple Products was exactly [1-25] million euros less than that reported by the CRI (i.e. approximately [25-50] million euros as opposed to the [50-100] million indicated by the CRI)*" (see doc. 364) cannot be accepted. Indeed, in finding that the data in the first column belonged to Amazon (see doc. 110, attachment "Allegato_1_-_RFI1 domande_9-19_.xlsx", sheet "D13" and "D14") and are therefore fully accessible to it, it is noted that the difference between intermediated turnover in 2018 and 2019 is equal to: a) for Apple products (sheet "D13" of the aforementioned document) to -[50-100 million] Euro ([50-100 million in 2018 and [1-25] million in 2019); b) for Beats products (sheet "D14" of the aforementioned document) to -[1-25] million Euro ([1-25] million in 2018 and [0-1] million in 2019). The reduction in sales of Apple and Beats products is therefore equal to that shown in the above table.

Table 15 - Lack of alternative outlets to Amazon.it and dry loss of Apple and Beats product offerings from third-party retailers⁵¹⁷

	Change in turnover of third-party sellers on Amazon.it between 2019 and 2018	Change in turnover of third-party sellers on other <i>marketplaces</i> Italians between 2019 and the year 2018	Net effect of overall change in sales of Apple and Beats products on the Italian <i>marketplaces</i>
Apple-branded desktop PC	[...]	[...]	-[1-5.000.000]
Apple-branded notebooks	[...]	[...]	-[1-5.000.000]
Apple-branded tablets	[...]	[...]	-[5.000.000-50.000.000]
Smartphones and mobile telephony at Apple brand	[...]	[...]	-[5.000.000-50.000.000]
Apple-branded wearable accessories	[...]	[...]	-[1-5.000.000]
Branded decoders/set-top-boxes Apple	[...]	[...]	[1-5.000.000]
Apple-branded audio devices	[...]	[...]	-[5.000.000-50.000.000]
Other electronic devices at Apple brand	[...]	[...]	-[1-5.000.000]
Beats brand products	[...]	[...]	-[1-5.000.000]
Total Apple and Beats products	[...]	[...]	-[50.000.000-100.000.000]

386. With respect to the prices of Apple products charged by third-party sellers on Amazon.it, the analysis of the parties' data⁵¹⁸ showed that third-party sellers' discounts on Amazon for Apple products (compared to the price charged on Apple.it) decreased for more than [70-100%] of product models after the introduction of the access restriction on Amazon.it. Also, the average discount decreases in the *post-restriction* period for all product categories except the iWatch. There is thus a generalised loss of price advantage for Apple products sold by third parties on the Amazon.it *marketplace*: this is a typical 'horizontal' effect due to the circumstance that only those retailers were admitted to the Amazon.it *marketplace that had the least competitive impact on the online sale of consumer electronics products*: a direct competitive constraint on sales on Apple.it was thus reduced.⁵¹⁹ In the face of the exclusion of third parties, Amazon saw its profits increase significantly, increasing its

⁵¹⁷ Elaborations on data from document 110, annex "Annex_1_-_RFI applications_9-19_.xlsx", sheets "D13" and "D14", as well as excel annexes (sheets "D8" and "D10") to documents No. 205, 227, 234, 241, 263.

⁵¹⁸ Please refer to the Appendix - , page 189 et seq. for a discussion of the elaborations economic pricing dynamics of third-party sellers of Apple products on Amazon.it.

⁵¹⁹ Just in an internal Amazon email of 7 May 2019, employees discuss the deterioration of price competitiveness on the Amazon marketplace compared to competitors ([*omissis*]). According to one employee, the loss of competitiveness of the marketplace could also be partly related to the Apple deal, in view of the former presence of many third-party players ([*omissis*]).

turnover from direct sales of Apple and Beats products of [omissis] from 2017 to 2018 and of [omissis] from 2017 to 2019⁵²⁰.

387. In fact, the agreement between Amazon and Apple concerns the exclusion of third-party economic operators outside the vertical distribution relationship between the two corporate groups. The clauses in question, in fact, preclude the use of Amazon.it by certain official and unofficial resellers of Apple and Beats products. The clauses of the agreement, therefore, hinder the outlet for Apple's and Amazon-EU's direct competitors in the sale of consumer electronics products *online*, through a restriction of the *marketplace* services provided by Amazon- SE and Amazon-EC (responsible, respectively, for the Amazon group's *marketplaces* and *websites*). This has the effect of reducing competition from third-party retailers through the agreed raising of barriers to the marketing of goods.

388. In general, with regard to the effects of quantity and price, it must be noted that the evidence in the file shows that the choice of retailers was not based on qualitative criteria ('*handpicked*')⁵²¹ and that Amazon itself considered these retailers to be insignificant⁵²². In fact, it was intended to exclude the most incisive retailers of Apple and Beats products that were present, prior to 2019, in the Amazon.it *marketplace*.

389. Such selection, characterised by discriminatory elements, moreover, may reduce the incentives to compete on the part of retailers, who may be led to commercially non-autonomous choices in order not to be arbitrarily excluded from Amazon.it. On this point, it should be noted that IT Store, in order to apply to be readmitted to Amazon.it, repeatedly reassured Apple that it would not apply downward prices⁵²³.

⁵²⁰ Elaboration on data from document 110, annex "Annex_1_-_RFI1 applications_9-19_.xlsx", sheets "D9" and "D10".

⁵²¹ Cf. ISP.72. In particular, an Amazon email dated 21 September 2018, 10.24 a.m., states: '*we have received feedback from US that we will only include "handpicked" sellers here and US is targeting approx. 5 sellers. Could you please curate your top 20 sellers per venue under these criteria:*

1. Existing key authorised sellers (e.g. Gravis in DE)
2. Key authorised reseller leads (e.g. Euronics in DE)
3. Top hold out leads of authorised resellers

[...] FAQs

What about the sellers that are already proposed by Apple? At a first glance these are not highly relevant, so just propose your super stars Will we be able to exchange sellers on the list? A process has not been confirmed yet, but we will demand to have a mutually agreed exchange mechanism

Why are we limiting ourselves to 20 sellers? 20 sellers is the maximum currently proposed by Apple globally (i.e. Italy) and we will push to get this for all EU5 locales each.

What happens, if we have to reduce the list further? We will push back, but to make it easier internally please rank the sellers in your respective lists already by importance" See doc. ISP.72.

⁵²² Cf. ISP.72.

⁵²³ "*Unfortunately, I have had no response to previous emails regarding the new sales policy on AMAZON applied by you, and as expected we have also been removed from the marketplace. We would like to be able to sell the products again as we are authorised dealers and have invested a lot in our possibilities on our system to be fast and accurate. [Thank you and excuse the disturbance, but I really find myself in an embarrassing situation, to say the least, considering the effort and the results it was bringing, I repeat, we have never applied price dumping, if we then have to adhere to a different price list, just let us know', see*

390. Moreover, Amazon itself has acknowledged that the increase in third-party sellers on Amazon.it is '*a means of increasing competition and competitiveness in the marketplace*'.⁵²⁴ so that its reduction creates a competitive *flaw* in Apple's product offering on the *marketplace*.

391. The effects under examination were presumably accentuated as a result of the Covid-19 health emergency, where *online* sales have become an indispensable selling mode in this context. On this point, the activities of Apple and Amazon to negotiate an increase in the number of retailers, albeit on a temporary basis, seems to confirm these considerations⁵²⁵.

(e) *The theory of damage*

392. According to Apple⁵²⁶ and Amazon⁵²⁷ there is no clear and consistent theory of harm. *In* particular, the effects of *intra-brand* and *inter-brand competition*, competition based on qualitative elements, as well as the incentives of the individual parties would have been completely overlooked.

393. As for the analysis of the market context, it should be noted that the procedure under consideration is extremely different from those relating to selective distribution and the introduction of limitations on the use of *marketplaces* according to objective and non-discriminatory criteria. In such cases, the analysis of the inter- and intra-brand competition context allows for an accurate assessment of the benefits (in terms of efficiencies) and drawbacks (in terms of restrictions of competition) of a limitation based on qualitative criteria.

394. These circumstances are quite different from those in the present case, in which the restriction applies in a discriminatory manner, without criteria linked to quality objectives (e.g. the restriction applies differently to operators with the same status as official dealers). In the present case, the restriction arises from the (discriminatory) foreclosure of a sales channel that is essential to achieve the end-consumers (the Amazon.it *marketplace*) and, in this sense, the significance of such foreclosure must be assessed. In this sense, Amazon's market power has been assessed, i.e. its importance as (i) a provider of *marketplace* intermediation services for retailers and (ii) the place where *online* purchases are made for Italian consumers of consumer electronics products on

document 194, appendix 10-14. [...] *Excuse me for insisting but I do not find it a correct decision, as I repeat we have never dumped prices and we have always delivered the day after the order [...]*" see doc. 194, all. 15. "*So I would like to understand, in order to be able to continue correctly as we have been doing for 2 years already, who I have to ask in order not to be excluded from the companies that you authorise. Now there is us, C&C and R-Store and all lined up*" Cf. doc. 194, all. 8.

⁵²⁴ See doc. 125.

⁵²⁵ See section IV.3.e The Proposed Changes after the COVID Emergency, pages 45 ff.

⁵²⁶ See doc. 360, 368, 376.

⁵²⁷ See doc. 364, 376.

the Internet. In both markets, Amazon is the primary player, which provides almost all *marketplace* services (Table 12 and Table 13 *above*) and where more than 70% of consumer electronics purchases are made on the Internet (Table 14 *above*).

395. The parties' arguments also appear to be extremely contradictory in considering Apple irrelevant in the market context: on the one hand, the parties downplay the impact of the restriction on competition (which would only affect certain channels and leave competition with other manufacturers of electronic devices untouched), on the other hand, they refer to the uniqueness of Apple's products and their essentiality.

396. According to Amazon, for example, *'Renowned brands influence customer choice and product loyalty. Brands shape perceptions and thus purchase behaviour. This is even more evident for a premium brand such as Apple, which is not only one of the most iconic brands in the world, but also the most valued and desired. Indeed, it is recognised that one of the keys to Apple's success is customer loyalty. [...] According to marketing studies, brand loyalty translates into a surplus that Apple is able to obtain from customers, thus confirming the premium nature of Apple's products.[...] It is clear from the foregoing that the lack of availability of the selection regarding the world's most desired brand, experienced in Amazon Stores prior to the Agreement, made the Amazon Store a much less attractive shopping destination than competing alternatives available to customers. This situation was not only detrimental to Amazon's interests, but also to those of all Sellers active in the Amazon Shop, who account for a very substantial share of sales in the Amazon Shop.'*⁵²⁸. Well, precisely these evaluations confirm that the restriction significantly affects competition by affecting a type of product with high public appeal.

397. This is demonstrated by the economic analysis performed *above*, where it was found that prices of third parties on Amazon.it increased compared to prices on Apple.it. Well, this analysis already takes into account the market context (and thus competition between sales channels and competition between Apple products and products of other brands). In fact, the price charged on Apple.it is a price that changes over time and necessarily takes these elements into account (as it takes into account consumers' willingness to pay, the possible success or failure of a model, the presence of competing products and their competitive constraint on Apple products, etc.).

398. The economic analysis carried out therefore compares the prices charged by third-party retailers on Amazon.it and the price charged over time by Apple

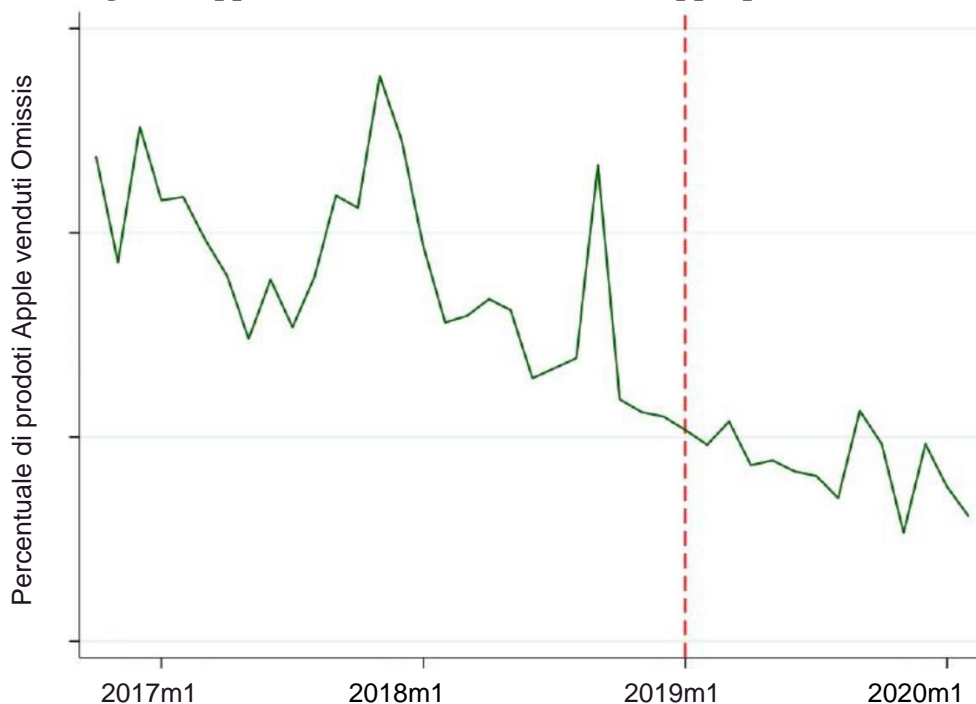
⁵²⁸ See doc. 364.

and, implicitly, also introduces the market context (i.e. inter-brand and intra-brand competition, as well as the qualitative comparison of Apple products against other products) into the analysis of the effects of the conduct.

399. On this point, according to Apple, the absence of an impact on competition and the absence of reasons to reduce resellers' competition with Apple.it would be demonstrated by the fact that the weight of sales made on Apple.it in the total sales of Apple products decreased after the agreement (Figure 18 below).

400. However, it should be noted that this metric in no way demonstrates the absence of anticompetitive effects having regard to the market context: in fact, although the weight of sales on Apple.it decreased as a percentage of total sales, the turnover realised on Apple.it increased after the agreement: in 2020 the turnover realised on Apple.it is approximately [250-500] million dollars, whereas in 2018 it was approximately [100-250] million dollars⁵²⁹200-300%, an increase of [200-300%].

Figure 18 - Weight of Apple .it sales out of total sales of Apple products ⁵³⁰



401. It should also be reiterated that the analysis carried out only on third-

⁵²⁹ See doc. 271. On this point, it should be noted that the turnover between 2017 and 2018 decreased by approximately EUR [25-50] million (from approximately EUR [100-250] million to approximately EUR [100-250] million), this decrease occurred at a time when there was no agreement. In contrast, between 2018 and 2020 there was an increase in turnover and between 2018 and 2019 turnover was almost stable (as it decreased by approximately EUR [0-5] million (from approximately EUR [100-250] million to approximately EUR [100-250] million). Thus, the agreement does not appear to have led to a reduction in Apple.it sales turnover, indeed as a result of the agreement, the reduction in Apple.it online sales turnover experienced prior to the agreement almost disappeared in 2019 and totally disappeared in 2020.

⁵³⁰ See doc. 376, encl. 3.

party resellers is the most correct one in this case. Indeed, as will be explained below⁵³¹, Amazon's distribution agreement could have been entered into without introducing a restriction on the access of third-party sellers, as it was not a technically indispensable restriction⁵³².

402. Therefore, it is not possible to accept the party's arguments and consider as positive effects of the restriction the fact that the number of products seen by Amazon increased. Nor is it possible to attribute to the restriction the increase in shipping quality levels achieved by Amazon⁵³³ as this increase is substantially due to the fact that the almost all of the Apple and Beats products sold on Amazon.it were sold by Amazon (Table 16 *below*) after the agreement, so the improvement in shipping is not due to the restriction, but to the fact that Amazon is in fact the only entity selling Apple and Beats products on Amazon.it.

Table 16 - Distribution of sales of Apple and Beats products on Amazon.it before and after the agreement ⁵³⁴

	2018		2019	
Amazon Direct Sales	[0-10] million	[10-20%]	[100-250] million	[90-100%]
Third-party reseller sales on Amazon.it	[50-100] million	[80-90%]	[0-10] million	[1-10%]
Total sales of products Apple and Beats on Amazon.it	[50-100] million	100%	[100-250] million	100%

403. In this sense, the considerations of Apple ⁵³⁵ and Amazon⁵³⁶ about the absence of a real theory of harm. On the contrary, it is clear that the analysis of the conduct under examination focuses on the restrictiveness of Article 1(b) and (c) of the GTA and Exhibit D of the EU Agreement, i.e. the clause restricting access to Amazon.it, in a discriminatory manner, to certain retailers. Thus, it appears clear that the competitive harm is assessed with reference to the specific clauses restricting the number of retailers on Amazon.it (without the application of objective criteria, applied indiscriminately and in a non-

⁵³¹ See section V.4.d The inapplicability of an exemption under Article 101(3) TFEU in the light of the restrictions at issue, pp. 167 et seq.

⁵³² In this sense, the requirement of indispensability does not concern the willingness of the parties to come to an agreement in the presence of the restriction, but consists in examining whether the efficiencies can be attained even without the restriction: 'the question is *not whether in the absence of the restriction the agreement would not have been concluded, but whether greater efficiencies are realised with the agreement or restriction than without it*'⁵³². See Commission Notice on *Guidelines on the application of Article 81(3) of the Treaty (2004/C 101/08)*.

⁵³³ On this point, Amazon states that "*Before the GTA, the number of Apple products that had a promise of 2-day delivery, which is what customers expect from Amazon, was only 25%. After the GTA, this percentage rose to 75%, so service improved significantly before the GTA, with peaks reaching 90% of Apple products sold and delivered in 2 days or less.*" (see doc. 376). However, it should be noted that he "dwells on the increased speed of shipments, as more than

⁵³⁴ Elaboration on data from document 110, annex "Annex_1_-_RFI1 applications_9-19_.xlsx", sheets "D13" and "D14".

⁵³⁵ See doc. 360, 368, 376.

⁵³⁶ See doc. 364, 376.

discriminatory manner), the absence of which would have allowed a greater quantity available to consumers, greater competition between Apple, Amazon and third-party online retailers and, finally, would have safeguarded the quality and authenticity of the products.

(f) *Criticism of the Authority's economic analysis*

404. In this section, a number of considerations will be made in order to respond to the party's arguments regarding the inadequacy of the economic analysis carried out in the disclosure of the preliminary findings. As will be seen below, these criticisms are mostly based on erroneous factual elements or partial reconstructions which, if introduced in a correct manner, make it possible to confirm the correctness of the economic analysis carried out *supra*, effectively contradicting the parties' assertions.

405. First, according to Amazon⁵³⁷ the economic analysis carried out would exclude a significant part of the data, including only the period in which Amazon allegedly experienced significant adjustment problems, up to January 2020. What Amazon claims does not correspond to the reality of the facts: the economic analysis carried out, in fact, includes the entire time period of the data in the file, which extends to June 2020 (Table 25 *below*).

406. Secondly, according to Amazon, the reduction of the 'discount' calculated with respect to Apple's price in the years following the agreement would be mechanically caused by the decreasing willingness to pay a *premium* as the age of the *vintage* on Apple's shop increases compared to Amazon's *marketplace*. According to Amazon, therefore, it would be necessary to adapt the analysis model: (i) by calculating the discount not with respect to the price on Apple.it which changes over time, but on the basis of the product's launch price (which always remains constant) and (ii) by considering the discount differentiated by product age (the discount for each *vintage*).

407. Amazon's hypothesis is not only not accompanied by adequate supporting empirical evidence, but is also refuted by the evidence. In fact, if prices (or discounts) on Apple's site and on Amazon behaved in the manner indicated by Amazon, one should observe, regardless of the agreement, a decrease in the price difference between the two shops as the age of the product increases (as *vintage* increases). In other words, newer *vintage* should show a difference between Apple's discounts on its own site (relative to the release price) and third-party discounts on Amazon (relative to the release price) higher than older *vintage* and vice versa.

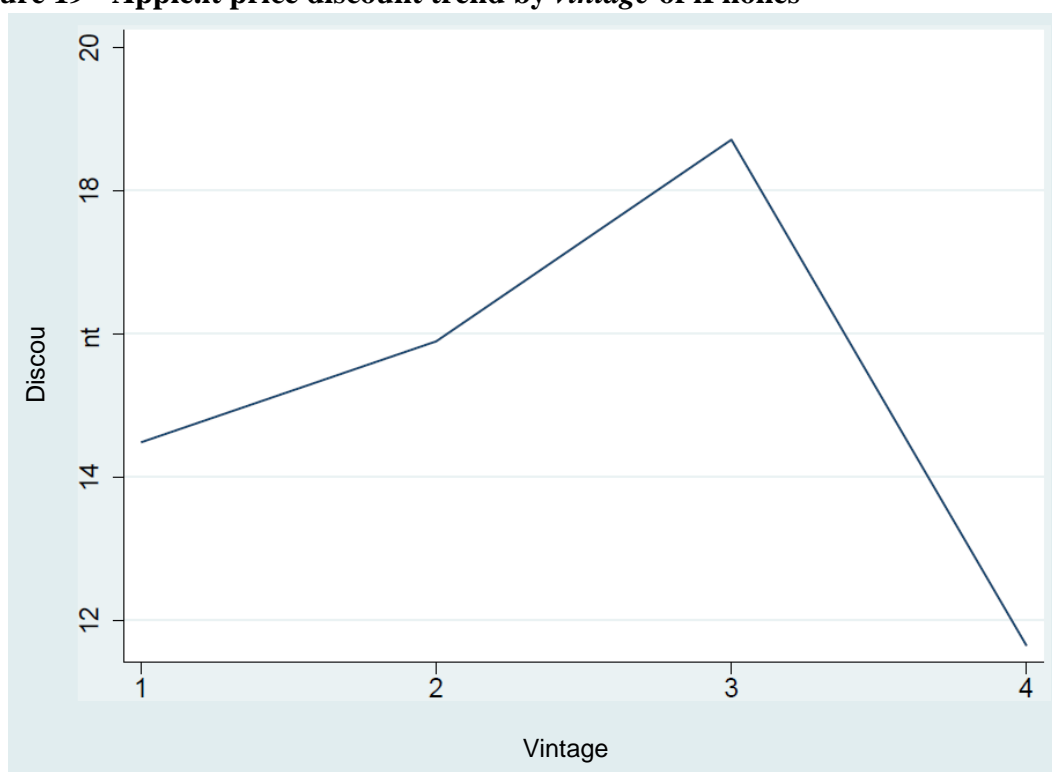
408. This argument is clearly contradicted by both Apple's observations and

⁵³⁷ See doc. 364, annex 1.

the data provided by Amazon. Indeed, according to Apple, the conclusion that the discount between the price charged by third-party retailers to customers compared to the price charged over time by Apple is not constant over the economic life of the product, but tends, all things being equal, to increase with the age of the product is "a conclusion that cannot be generalised: as shown in the data room report, and in the figures below, comparisons between other product pairings [...] revealed that in some cases (such as for the iPhone 8 and AirPods I) the discount decreased over time (even before the GTA)"⁵³⁸.

409. Amazon's argument is also belied by the data. In fact, with reference to 2018 (in the pre-agreement situation and thus not affected by the agreement itself), the figure below shows the difference between the discount charged on Amazon's marketplace and the discount charged on Apple's site for iPhones, and clearly shows how - contrary to Amazon's suggestion - this difference even increases with increasing *vintage* (decreasing only for the oldest *vintage*, four years old).

Figure 19 - Apple.it price discount trend by *vintage* of iPhones ⁵³⁹



410. Moreover, the approach proposed by Amazon - consisting in calculating the discount on the basis of the price at the time of the product launch - does not adequately take into account the competitive dynamics affecting the price of Apple's products, stemming from both *interbrand* competition and

⁵³⁸ See doc. 364, annex 1.

⁵³⁹ See doc. 141, 171, 364, annex 1. Note: the vintage variable is the same as that used by Amazon in its own calculations.

intra-brand competition, which are instead taken into account in the approach adopted by the Authority, to the extent that they are also reflected in Apple's *pricing* policy, which adjusts over time with changes in the list price of Apple's products.

411. In fact, both Apple⁵⁴⁰ and Amazon⁵⁴¹ have criticised the Authority's economic analysis on the grounds that it does not take into account the economic context of the market at all (other brands, other channels). However, this is not true since the economic analysis has taken these elements into account: the product's release price at the time of launch is fixed over time, whereas the price charged by Apple on its site varies over time to adapt to the competitive context in which the products under investigation are sold. This context changes continuously over time for a variety of reasons, chief among which are the product offering (and *pricing*) by Apple's competitors (Samsung, Huawei, Xiaomi, etc.) as well as the evolution of Apple's own offering⁵⁴².

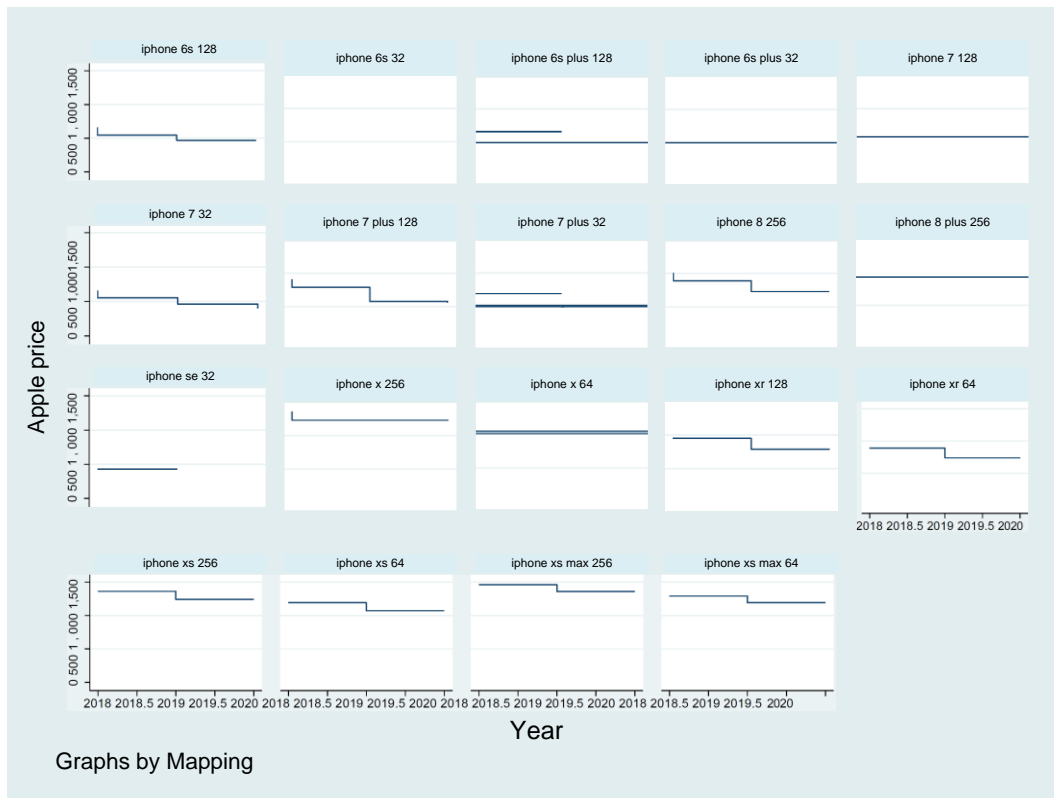
412. The dynamics of innovation in the marketplace mean that Apple must revise (continuously) their product offering and *pricing* (Figure 20 *below*), and these are also reflected in the price of Apple products offered by third-party vendors.

⁵⁴⁰ See doc. 360, 368, 376.

⁵⁴¹ See doc. 364, 376.

⁵⁴² Consider, for example, the expansion over time of the range of new iPhones launched by Apple: for the iPhone 6 generation there were two models (iPhone 6 and iPhone 6 Plus), the iPhone 7 had no different versions, while the iPhone 12 had four versions (iPhone 12 mini, iPhone 12, iPhone 12 Pro, iPhone 12 Pro Max).

Figure 20 - Variation of prices on the Apple .it website of certain iPhone fashions over time ⁵⁴³



413. In any case, taking into account, as Amazon proposes, the prices set by Apple at the time of product launch and a differentiation of discounts per product generation (*vintage*), a reduction in the discount for the products under consideration of the different *vintage* after the agreement is nevertheless observed⁵⁴⁴ (Table 17, Table 18, Table 19 and Table 20).

Table 17 - Percentual discounts for iPhones before and after the agreement (pre-agreement period 01/01/2018-31/01/2019 and post-agreement period 01/02/2019-28/02/2020)⁵⁴⁵

	<i>Vintage</i>				
	0-1	1-2	2-3	3-4	4+
Pre-agreement discount	[...]	[...]	[...]	[...]	[...]
Post-agreement discount	[...]	[...]	[...]	[...]	[...]
Difference between post-agreement discount and discount pre-agreement (if negative, the discount is reduced)	[-5-10]	[-5-10]	[-5-10]	[0-1]	[-5-10]

Table 18 - Percentual discounts of iPhones before and after the agreement

⁵⁴³ See doc. 141, 171.

⁵⁴⁴ Amazon's methodologies therefore confirm that after the agreement, average discounts on iPhones would be lower. The only exception is vintage 3-4, where the discount is almost identical between the two periods.

⁵⁴⁵ See doc. 364, at annex 1. The calculations are those carried out by Amazon in Table 7 of doc. 364, annex 1, distinguishing the *vintage* of iPhones.

(preagreement period 01/01/2018-31/01/2019 and post-agreement period 01/02/2019-30/06/2020)⁵⁴⁶

	<i>Vintage</i>				
	0-1	1-2	2-3	3-4	4+
Pre-agreement discount	[...]	[...]	[...]	[...]	[...]
Post-agreement discount	[...]	[...]	[...]	[...]	[...]
Difference between post-agreement discount and discount pre-agreement (if negative, the discount is reduced)	[-5-10]	[-1-5]	[-5-10]	[0-1]	[-10-15]

Table 19 - Percentual discounts for iPhones before and after the agreement (preagreement period 01/01/2018-31/12/2018 and post-agreement period 01/01/2019-31/12/2019)⁵⁴⁷

	<i>Vintage</i>				
	0-1	1-2	2-3	3-4	4+
Pre-agreement discount	[...]	[...]	[...]	[...]	[...]
Post-agreement discount	[...]	[...]	[...]	[...]	[...]
Difference between post-agreement discount and discount pre-agreement (if negative, the discount is reduced)	[-5-10]	[-5-10]	[-5-10]	[0-1]	[-5-10]

Table 20 - Percentual discounts for iPhones before and after the agreement (preagreement period 01/01/2018-31/12/2018 and post-agreement period 01/01/2019-30/06/2020)⁵⁴⁸

	<i>Vintage</i>				
	0-1	1-2	2-3	3-4	4+
Pre-agreement discount	[...]	[...]	[...]	[...]	[...]
Post-agreement discount	[...]	[...]	[...]	[...]	[...]
Difference between post-agreement discount and discount pre-agreement (if negative, the discount is reduced)	[-5-10]	[-1-5]	[-5-10]	[1-5]	[-10-15]

414. In contrast, it is the econometric analysis presented by Amazon⁵⁴⁹ - that would show how the agreement had the effect of increasing discounts for the purchase of the iPhone from third-party sellers on Amazon's platform with an increase in average discounts already in the first two months after the agreement in 2018, continuing in 2019 and 2020 - to have obvious limitations.

⁵⁴⁶ See doc. 364, at annex 1. The calculations are those carried out by Amazon in Table 7 of doc. 364, annex 1, distinguishing the *vintage* of iPhones.

⁵⁴⁷ See doc. 364, at annex 1. The calculations are those carried out by Amazon in Table 7 of doc. 364, annex 1, distinguishing the *vintage* of iPhones.

⁵⁴⁸ See doc. 364, annex 1. The calculations are those carried out by Amazon in Table 7 of doc. 364, annex 1, distinguishing *vintage* iPhones.

⁵⁴⁹ See doc. 364, annex 1.

Firstly, the analyses performed by Amazon are flawed in that they use a definition of discount that does not allow the impact of the agreement to be clearly identified by distinguishing it from price changes due to exogenous variations in the competitive environment (*intra-brand competition* and *inter-brand competition*), which are reflected in the prices set by Apple not only at the time of product launch, but also subsequently over time. For example, following the methodology proposed by Amazon runs the real risk of misrepresenting an increase in competitive pressure on *vintage* products over time (which tends to reduce sustainable discounts for sellers of Apple products active on Amazon, as well as for Apple itself) with alleged 'virtuous' effects of the agreement. These factors, contrary to what Apple⁵⁵⁰ and Amazon⁵⁵¹ are taken into account in the approach adopted by the Authority, insofar as they are (also) reflected in Apple's *pricing* policy that is adapted over time on the Apple.it website.

415. Second, the analysis follows an inaccurate identification of the time frame over which the agreement would have produced its effects. Specifically, according to Amazon, the agreement would have begun to produce effects as of 1 November 2018, as it was entered into on 31 October 2018. However, although the contract was entered into on 31 October 2018, the exclusion of retailers began on 4 January 2019 (and not 1 November 2021)⁵⁵². Therefore, Amazon considers a period in which third-party sellers were still free to sell products on Amazon.it as a post-agreement period.

416. It is sufficient to shift the starting date of the effects of the agreement to the correct period (i.e. January 2019 as opposed to November 2018) to totally contradict the results of Amazon's economic analysis and arrive at results of the opposite sign. For example, as can be seen in Table 21, by entering the correct definition of the agreement in Amazon's model 2, Amazon's own preferred specification, the model shows how in fact iPhone discounts have decreased due to the agreement in the 2019 and increased in 2020. However, overall, the increase in rebates in 2020 does not compensate for the estimated decrease in 2019, causing the overall rebates to decrease due to the agreement. Furthermore, by entering Amazon's model 5, i.e. the most comprehensive model as it also considers seasonal effects⁵⁵³, the correct starting date of the

⁵⁵⁰ See doc. 360, 368, 376.

⁵⁵¹ See doc. 364, 376.

⁵⁵² On this point, please note that Amazon's communication to retailers of 9 November 2021 indicated that *'Your existing offers for these products will soon be removed from Amazon's websites in Europe (Italy, Germany, UK, France and Spain). We encourage you to contact Apple if you wish to become an authorised Amazon reseller. To adequately prepare for the change, you may continue to sell these products on Amazon throughout the Christmas period until 4 January 2019.'* (see doc. PI.1).

⁵⁵³ Taking seasonal effects into account means recognising that discounts may vary from season to season, such as over the Christmas period, regardless of the agreement. The Model 5 proposed by Amazon is the only specification that has the advantage of including a set of variables (monthly fixed effects) that capture

effects of the agreement (January 2019), we obtain that the agreement reduced the iPhone discount on average by [1-5%] in 2019 and by [1-5%] in 2020.

Table 21 - Economic analysis of Amazon with the correct temporal definition (start of Amazon.it access block in January 2019, not November 2018)⁵⁵⁴

	Model 2	Model 5
Amazon analysis with incorrect period of the agreement	2018: [...] 2019: [...] 2020: [...] Sum: [5-10].	2018: [...] 2019: [...] 2020: [...] Sum: [1-5].
Amazon analysis with correct period of the agreement	2018: [...] 2019: [...] 2020: [...] Sum: -[1-5].	2018: [...] 2019: [...] 2020: [...] Sum: -[1-5].

417. Ultimately, the correctness of the economic analysis carried out on the third-party vendor discounts is confirmed, both with regard to the assessment of the economic context and with regard to the party's arguments that alternative models of economic analysis should be adopted.

418. Finally, it should be noted that the negative effects on competition are also to be seen in comparison with other economic assessments made by the parties. In particular, Amazon noted that compatible iPhone *cases* sold by third-party sellers on Amazon.it increased as Amazon's sales of iPhones increased⁵⁵⁵. But this is an illustration of how the third-party sellers' exclusionary clause is certainly restrictive of competition: indeed, where sales by third-party sellers on Amazon were not restricted, this evidence suggests that there would be was a significant increase in the quantities of Apple products sold by third-party sellers, which would follow Amazon's sales.

(g) *The Amazon advantage*

419. In return for this exclusion, Amazon obtained better technical and economic conditions for the acquisition of Apple and Beats products, and additional discounts related to the verification of the application of the clauses at issue.

420. On this point, it should also be noted that Amazon agreed to introduce a

the influence of seasonality on discounts. This model shows that including seasonality in the model significantly reduces the (positive) effect of the agreement on discounts in 2019 and 2020 estimated by Amazon. This shows that the effects estimated by Amazon are also capturing, at least partially, the effect of seasonal factors on prices (or discounts).

⁵⁵⁴ See doc. 364, annex 1. The calculations are those carried out by Amazon in Table 8 of doc. 364, annex 1, with the effective date of the agreement set for January 2019.

⁵⁵⁵ See doc. 364, annex 1.

restriction on Amazon.it *marketplace* services in order to obtain an individual advantage in terms of better purchasing conditions for Apple and Beats products.

421. Amazon's arguments that it did not gain any advantage from entering into the agreement cannot be accepted⁵⁵⁶. As mentioned above and already noted in the notice of preliminary findings, in the face of the exclusion of third parties, Amazon saw its profits increase significantly, increasing its turnover from direct sales of Apple and Beats products by *[omissis]* from 2017 to 2019⁵⁵⁷.

422. As can be seen in Table 22 *below*, Amazon's direct sales revenues for Apple and Beats products increased enormously, much more than the reduction in brokerage revenues for third-party retailer sales of Apple and Beats products on Amazon.it. Thus, overall there was an extremely large increase in revenue for Amazon.

Table 22 - Amazon's direct and intermediation revenues from Apple and Beats products⁵⁵⁸

	2018	2019	Difference 2018-2019
Revenues from Amazon's direct sales of Apple and Beats products	[5-10] million	[100-250] million	[50-100] million
Revenues from third-party reseller sales of Apple products and Beats on Amazon.it	[0-5] million	[0-5] million	-[0-5] million

423. It is, in essence, a meeting of interests between the parties. Amazon's remarks about wanting to increase the number of third-party players in the *marketplace* are, in fact, contradicted by the facts and, above all, not consider a fundamental element of Amazon's nature. The latter is not only a *marketplace* but also a direct seller and therefore its interests do not depend exclusively on how many third-party sellers are present on Amazon.it, but also on direct sales. Given Amazon's hybrid nature, therefore, what Amazon earns overall comes into play and, in the present case, Amazon preferred to exclude third-party sellers in order to be able to see increased revenues from the sale of Apple and Beats products.

424. On the other hand, Amazon's argument that no benefit to Amazon can be demonstrated contradicts other assessments of how important it is for the *marketplace* to have sufficient availability of Apple and Beats products. In its own pleadings⁵⁵⁹ in fact, Amazon repeatedly states that the availability of Apple

⁵⁵⁶ See doc. 364, 376.

⁵⁵⁷ Elaboration on data from document 110, annex "Annex_1_-_RFI1 applications_9-19_.xlsx", sheets "D9" and "D10".

⁵⁵⁸ Elaborations on data from document 110, annex "Annex_1_-_RFI1 questions_9-19_.xlsx", sheets "D9" and "D10" for direct sales data. For revenues from intermediation see doc. 268.

⁵⁵⁹ See doc. 364, 376.

products was important to attract customers to Amazon.it, to increase their loyalty, and to make them make repeat purchases. But this is, in fact, a substantial gain in terms of strengthening Amazon.it as a *marketplace* and as a seller.

425. In conclusion, Amazon's behaviour is not motivated by genuine consumer interest but rather represents a way to increase sales of Apple and other products on Amazon.it, even to the detriment of third-party sellers. In this sense, it is not, as alleged by Amazon⁵⁶⁰ a *consumer first approach*, but an approach of purely increasing Amazon's economic value.

426. In addition, it should be confirmed that Amazon also obtained additional discounts linked to the targets of limiting access to Amazon.it⁵⁶¹. In particular, a number of commercial *addenda* between Apple and Amazon regulate the monitoring of Amazon's compliance with the contractual provisions, with economic incentives consisting of discounts on Amazon's purchase of products. For example, from 30 December 2018 to 30 March 2019⁵⁶², against a compliance of at least [60/100%] of the following three indicators: '1) *Authorised Seller Compliance* 2) *Advertising Compliance* 3) *Detail Page Content Accuracy*'⁵⁶³ Amazon would receive an additional discount on supplies of [0-10%]. Similar forecasts with an additional discount of [0-10%] are expected for the period from 29 December 2019 to 28 March 2020⁵⁶⁴.

427. Contrary to Amazon's claim - which notes that no discount was applied between November 2018 and December 2018 - the discount is linked to the exclusion of third-party sellers, which, as mentioned, took place as of 4 January 2019. Therefore, the circumstance that no discount was provided for until January 2018 is consistent with the evidence in the file and, indeed, confirms the link between the discount and the third-party vendor exclusion mechanism.

428. Finally, the argument that the discount was not knowable by Amazon at the time of contract conclusion. First, as mentioned, the rebate is not Amazon's only benefit. Secondly, the contract provided for the verification of adherence to Amazon's forecasts and the determination of an additional discount in the event that the targets were met, so it cannot be argued that a main aspect, such as the exclusion of third-party resellers, which was a focal point of the entire formation of the contract, was not considered in the verification of adherence to the contractual forecasts. Ultimately, the argument concerning Amazon's passive role and the lack of an economic incentive to carry out the conduct

⁵⁶⁰ See doc, 376.

⁵⁶¹ Cf. ISP.73, 58 (Annex 1.8)

⁵⁶² Cf. ISP.73.

⁵⁶³ Cf. ISP.73.

⁵⁶⁴ See doc. 58 (annex 1.8).

under scrutiny must be rejected.

V.4.d. The inapplicability of an exemption under Article 101(3) TFEU in light of the restrictions under examination

429. With reference to the possibility that the clauses at issue may benefit from a specific exemption under Article 101(3) TFEU, it should *first* be recalled that the restriction on the access of third-party sellers stems from the desire to limit the number of retailers on Amazon⁵⁶⁵ so as to have greater control over them and to avoid trade between Member States⁵⁶⁶. The internal evidence of Amazon and Apple therefore makes it possible to exclude a priori that the restrictions under scrutiny pursue an efficiency goal.

430. Contrary to the claims of Amazon⁵⁶⁷ and Apple⁵⁶⁸ groups, the agreement as a whole cannot be considered to give rise to efficiencies capable of being justified under Article 101(3) TFEU. It is necessary, here, to identify two sources of efficiencies that the parties consider to have been achieved: the first consisting in the improved distribution agreement between Apple and Amazon, which allowed the latter to offer a greater variety of products with improved technical-economic conditions; the second relating to the efficiencies in terms of counterfeiting.

431. With reference to the best distribution agreement between Amazon and Apple, it should be noted that the restriction under scrutiny consists of Art. 1, para. (b) and (c) of the GTA and Exhibit D of the EU Agreement, which implemented a limitation of access to *marketplace* services rendered on Amazon.it to persons legitimately engaged in the business of buying and selling Apple- and Beats-branded consumer electronics products, thereby hindering their market outlet. The conduct under analysis, in fact, does not concern the distribution agreement between Amazon and Apple but, on the contrary, the restriction to third-party resellers of access to the Amazon.it platform.

432. Those clauses, therefore, not only concern subjects and services unrelated to the direct distribution relationship between Amazon and Apple, but do not appear indispensable to achieve the benefits of the distribution agreement itself. Indeed, it is not possible to attribute the positive effects of an improved distribution agreement between Apple and Amazon to the clauses

⁵⁶⁵ "20 sellers is the maximum currently proposed by Apple globally (i.e. Italy) and we will push to get this for all EU5 locales each." (cf. doc. ISP.72). "what I would say is that the idea was to stick to one "self-contained" channel that we believe will be easier to control." (cf. doc. 58, all. APL-ITALY_000062.pdf).

⁵⁶⁶ In particular, Amazon's internal email of 2 October 2018 states: 'P.13 Apple asks for a "Know your (end) customer process" to avoid businesses that are not compliant, not legitimate, or likely to export' See doc. ISP.27.

⁵⁶⁷ See doc. 65, 125, 192, 193, 237.

⁵⁶⁸ See doc. 56, 108, 109, 192, 193.

contained in Article 1(1).

(b) and (c) of the GTA and Exhibit D of the EU Agreement.

433. In summary, the positive effects of the agreement between the Amazon and Apple groups - consisting of an improvement in Amazon's procurement of Apple and Beats products - are independent of the restrictive clauses, which are not indispensable and necessary for Amazon's improved procurement.

434. According to the Commission's guidelines⁵⁶⁹ the agreement must not impose restrictions that are not indispensable to achieve the efficiencies it would bring about. This condition implies a twofold test. First, the restrictive agreement must, as such, be reasonably necessary to achieve the efficiencies. Secondly, the individual restrictions of competition brought about by the agreement must also be reasonably necessary for the attainment of the efficiencies.

435. In this sense, 'the question is *not whether in the absence of the restriction the agreement would not have been concluded, but whether greater efficiencies are realised as a result of the agreement or restriction than would be the case in their absence*'⁵⁷⁰. Indeed, the distribution agreement could have been concluded even without Section 1(b) and (c) of the GTA and Exhibit D of the EU Agreement, thus having a prospective scenario in which Amazon would have enjoyed a better supply of Apple products and, at the same time, more retailers of Apple and Beats products than today would have been admitted to Amazon.it.

436. It must therefore be assumed that the restriction of access to Amazon.it does not is necessary for the conclusion of the distribution agreement between Apple and Amazon, and therefore Amazon's argument cannot be accepted⁵⁷¹ about the alleged technical and economic benefits of such distribution by Amazon. Those benefits in terms of variety and availability, in fact, derive from Amazon's direct ability to sell Apple and Beats products, which would not be affected by the absence of the clauses at issue, an absence which, therefore, could presumably have generated a greater variety of retailers and products than would have been achieved by the restrictions at issue.

437. Apple's desire not to enter into the contract without a restriction for resellers, therefore, cannot be regarded as a sufficient requirement for the restrictive clauses to be necessary, as it is not objective but dictated solely by the interest of one of the parties.

438. On this point, Amazon's own statements confirm that the restriction at

⁵⁶⁹ See Commission Notice on *Guidelines on the application of Article 81(3) of the Treaty* (2004/C 101/08).

⁵⁷⁰ See Commission Notice on *Guidelines on the application of Article 81, paragraph 3 of the Treaty* (2004/C 101/08).

⁵⁷¹ See doc. 125, 192, 193, 237.

issue was not necessary because there were '*at least two alternatives, consisting of admitting all Third Party Sellers who could demonstrate that they sell genuine products or admitting the entire pool of authorised resellers and not only certain APRs. These proposals were rejected by Apple, which mandated that only a subset of its authorised resellers be allowed to sell on Amazon, based on criteria chosen by Apple, over which Amazon has no visibility or control. As an illustration of this, Amazon only succeeded in excluding the restrictions for refurbished products. Apple justified this with the alleged perception that there had been cases of counterfeit products being sold on Amazon before the contract. On the other hand, there are other possible solutions to the problem of counterfeit products, a problem that Amazon proactively counteracts on a daily basis by means of numerous tools (e.g. Brand Registry) to prevent suspicious offers and to allow brands to report them. In fact, Amazon believes that restricting retailers is not a tool that Amazon uses for the purpose of combating counterfeiting.*'⁵⁷².

439. With regard to the efficiency objectives relating to the fight against counterfeiting, it must also be noted that the requirements of Art. 101(3) TFEU. The efficiencies that the Parties claim to want to achieve could be pursued with different methodologies and instruments that are less restrictive and more proportionate, since *gating* is not indispensable to the pursuit of those ends, and such as not to eliminate competition for a substantial part of the market under consideration.

440. On closer inspection, the restriction on the number of retailers is totally unrelated to the anti-counterfeiting objectives. In fact, Amazon has stated that the reduction in counterfeiting problems does not stem from restricting the access of third-party retailers but from convincing Apple to adopt the Brand Registry tool: '*a very important element of the GTA is convincing Apple to join the brand registry, which immediately led to a drastic reduction in counterfeit complaints. Amazon tried for many years to convince Apple to join the brand registry programme, but it was only after the GTA was signed that Apple agreed to join.*'⁵⁷³. On this point, the contractual data confirms this assertion. In fact, the contractual provisions regulating access only to selected retailers active on the Amazon.it marketplace are distinct from the provisions aimed at combating counterfeiting, trademark and patent infringement. In fact, on the latter issue, the GTA provides (Article 2.4⁵⁷⁴) a mechanism for notification,

⁵⁷² See doc. 125.

⁵⁷³ See doc. 376.

⁵⁷⁴ "2.4 Counterfeit Products. To help prevent the listing and sale of Counterfeit Products through Authorized Electronic Locations: (a) Amazon agrees to implement mechanisms and filters to prevent listings for Counterfeit Products from appearing on Authorized Electronic Locations; and, (b) If Amazon is notified by Apple via Amazon's Brand Registry, or another means if Brand Registry is not available, or if Amazon otherwise determines in its reasonable discretion, that it has Counterfeit Products in inventory and/or

verification and removal of products, establishing operational rules and response times.

441. The fight against counterfeiting is thus applied using an instrument (the *Brand Registry*) that does not require the introduction of a restriction on the access of third-party resellers. This would be sufficient to establish that the restriction at issue (on reseller access) cannot be exempted under Article 101(3) TFEU.

442. It should also be noted that Apple's lengthy defences⁵⁷⁵ come up against a clear and simple factual fact: a large proportion of the excluded parties are official resellers (AAR, Reseller, APR) from Italy or Europe who, like Amazon or other admitted parties, can ensure the genuineness of the products. It is confirmed that, as seen above, the fight against counterfeiting is only a pretext to achieve a purely quantitative restriction of the number of resellers, which has been the objective since the beginning of the contractual negotiations between the two groups.

443. Confirmation of these conclusions derives from the circumstance that Apple has informed that it will voluntarily extend the number of traders available on the Amazon.it⁵⁷⁶ marketplace, in fact demonstrating the absence of the element of indispensability, as well as the speciousness of the party's arguments about the positive effects of the contract (in terms of greater quantities for Amazon and less counterfeiting), which do not depend on the introduction of a restriction on the number of operators on Amazon.it.

444. With regard to the proportionality of the restriction, according to Apple's statement, the company did not carry out '*specific internal studies or similar materials concerning sales of counterfeit Apple and Beats products on the Amazon.it marketplace. This was in light of the fact that the scope of the issue, both quantitatively and qualitatively, was already clear.*'⁵⁷⁷. Apple then sent documents consisting of a study by the European Union Intellectual Property Office (EUIPO) dated March 2019⁵⁷⁸, subsequent to the conclusion of the

available for sale or distribution on Authorized Electronic Locations, Amazon will: (i) Investigate, and within two business days, either remove product listings and suspend sales and distribution of the Counterfeit Products or escalate to the Executive Sponsors identified in Section 3.4 below for resolution. (ii) If a supplier is unable to demonstrate to Amazon's reasonable satisfaction that the products are not Counterfeit Products, Amazon will: a. notify Apple if discovery was made by Amazon; b. provide Apple with the following details from the sale of Counterfeit Products: the quantities of Counterfeit Products sold; the quantities of Counterfeit Products remaining in inventory; and the name, address, and email address(es), if in Amazon's actual knowledge and possession, of the sellers, importers, exporters, and drop-shippers and any other relevant entity involved in supplying, sourcing, and/or shipping the Counterfeit Products; c. recycle or destroy the Counterfeit Products where legally permitted or, upon request from Apple where legally permitted and at Apple's sole cost and expense, make such Counterfeit Products available for Apple's collection." Cf. ISP.85, 58 (Exhibit 1.pdf).

⁵⁷⁵ See doc. 368.

⁵⁷⁶ See doc. 382.

⁵⁷⁷ See doc. 108.

⁵⁷⁸ See doc. 109, annex 1.

contracts at issue and which does not identify any specific problems relating to Apple products and/or the Amazon *marketplace*, a dissertation, also subsequent to the conclusion of the contract, some newspaper articles⁵⁷⁹ and an internal *email* concerning a retailer on the Amazon.com marketplace - Mobilestar - accused of selling counterfeit chargers in the United States⁵⁸⁰.

445. Apple has therefore not identified a priori the areas of greatest incidence of the counterfeiting problem, such as countries with a higher rate of risk⁵⁸¹ (e.g. non-EU countries), or the type of products most affected by counterfeiting (e.g. accessories), or the characteristics of retailers. Apple has excluded all dealers, including official ones and those who had not been reported. Also in the final pleadings⁵⁸², Apple relies on newspaper articles, general studies on counterfeiting, and policy statements, without bringing evidence of counterfeiting of Apple products on Amazon.it.

446. In the face of the total absence of such an analysis, it was applied a very far-reaching restriction, consisting in allowing only a reduced list of resellers to sell Apple and Beats products on Amazon.it. This list excludes multiple official resellers (APRs, AARs and resellers) of Apple and Beats products, established in Italy and in other Member States, who can certainly ensure the same quality and genuineness of the products as those included in the list of operators admitted to the Amazon.it *marketplace*. An extension of the list of admitted retailers would therefore be a less restrictive measure capable of achieving the same benefits.

447. Furthermore, the list of retailers admitted to the Amazon.it *marketplace* could also have been extended to those retailers able to prove that they sell genuine products, e.g. by means of checks on their procurement⁵⁸³. This is certainly the case with the increase in the number of retailers admitted to the Amazon.it *marketplace*, which will take place in the voluntary implementation of commitments by Apple⁵⁸⁴.

448. Indeed, it should be noted - as to the indispensability of the restrictions on access to the Amazon.it *marketplace* - that Amazon has developed alternative, less restrictive solutions that make it possible to adequately combat

⁵⁷⁹ Cf. doc. 93, 109, annex 2.

⁵⁸⁰ See doc. 109, annex 2.

⁵⁸¹ According to the European Union Intellectual Property Office (EUIPO) study produced by Apple, the countries with the highest risk are China, Hong Kong and other non-EU countries. See doc. 109, annex 1.

⁵⁸² See doc. 364.

⁵⁸³ On this point, it should be noted that Digitech produced invoices attesting to the purchase of genuine Apple products from an official wholesaler, which were sent to Amazon's back office, as well as a letter from the official wholesaler attesting to Digitech's ability to legitimately sell Apple products (see doc. ISP.67). A reseller of Apple products on Amazon.it stated that "*we were often asked by it to send it the purchase invoices of our Apple products, to verify that they were original and purchased from official resellers*" See doc. 73.

⁵⁸⁴ See doc. 382.

counterfeiting. Among these solutions, described analytically *above*⁵⁸⁵, include (i) the Brand Registry; (ii) the Transparency service; (iii) the Project Zero service.

449. On this point, Amazon notes that it is the *brand registry* programme that has actually led to a reduction in counterfeiting of Apple products: '*Amazon has obtained Apple's membership of Amazon Brand Registry, which has led, in combination with mutual commitments under the GTA's Product Quality Programme, to a reduction in customer complaints about counterfeit Apple products. This situation represents an important achievement in light of Apple's persistent refusal to join the Brand Registry prior to the conclusion of the Agreement, despite Amazon's numerous encouragements to do so*'.⁵⁸⁶

450. It thus emerges that, not only is *gating* not necessary to reduce counterfeiting, but Amazon believes that the benefits in terms of reducing counterfeiting are to be attributed to the *Brand Registry*, which is a programme that can be carried out without the exclusion of third-party retailers selling genuine products. Moreover, according to Amazon's statements, Apple had been invited to participate in the anti-counterfeiting programme, but refused, essentially demonstrating that it had not carried out any real investigation and activity on the phenomenon, using the counterfeiting issue as an *ex post* justification for the agreement.

451. According to the documentation on file, in 2020, more than 500,000 brands have enrolled in Amazon's Brand Registry programme and '*brands report on average 99% fewer suspicious infringements than before the launch of the Brand Registry programme*'⁵⁸⁷.

452. On closer inspection, as stated by Amazon, Apple joined the *brand registry* with the agreement, and it is to this programme that we owe the results in the fight against counterfeiting ("*a very important element of the GTA is convincing Apple to join the brand registry, which immediately led to a drastic reduction in counterfeit complaints. Amazon tried for many years to convince Apple to join the brand registry programme, but it was only after the GTA was signed that Apple agreed to join.*"⁵⁸⁸). Furthermore, these statements by Amazon contradict Apple's assertion that Apple had done its best to avert the counterfeiting problem prior to the agreement.

453. The *Transparency* service also allows each product unit to be identified with a unique identification code that can be verified by the manufacturer, Amazon or the consumer, who will be able to verify its genuineness⁵⁸⁹. In

⁵⁸⁵ See section IV.3.g Technical Solutions to Combat Counterfeiting, pages 57 ff.

⁵⁸⁶ See doc. 364.

⁵⁸⁷ See doc. 248, enclosure 5.

⁵⁸⁸ See doc. 376.

⁵⁸⁹ See doc. 146, 248.

addition, Project Zero allows brands to directly remove non-genuine products.

454. Therefore, there are a number of methods that allow for less restrictive and more proportionate solutions to combat counterfeiting, the extent and characteristics of which have not been studied and analysed by Apple.

455. Moreover, the restrictions under examination have the effect of eliminating competition for a significant part of the markets under examination because: (i) they have led to a reduction in the number of players present in the Amazon.it *marketplace* legitimately selling genuine Apple and Beats products, (ii) they appear to have led in all likelihood to an increase in the average price charged by third-party retailers in the Amazon.it *marketplace*, and (iii) they have significantly affected intra-EU trade by reducing the possibility for retailers from certain Member States to access the Amazon.it *marketplace*.

456. In conclusion, in light of the evidence relating to the desire to restrict access to the Amazon.it *marketplace* by introducing a purely quantitative restriction, as well as the presence of various less restrictive solutions suitable for effectively combating counterfeiting, it is considered that the restrictions on access to the Amazon.it *marketplace* do not appear necessary for the purpose of achieving efficiencies relating to the combating of counterfeiting, and are in any case capable of causing significant restrictions on competition.

V.4.e. The conduct restricting the advertising of brands competing with Apple and Beats

457. With reference to Apple and Beats' restriction of competing brand advertising on Amazon's search pages obtained in response to certain keywords ('Brand Queries'), the investigation indicated (cf. Apple⁵⁹⁰ and Amazon⁵⁹¹): (i) the narrowness of the restriction, which affects only a subset of the *slots* in the first page of results and only for certain exact text searches; (ii) the lack of impact on the ordering of the search; (iii) the very small presence of listings of competing products in similar exact product searches even in the absence of the restriction. It is therefore considered that the grounds for intervention under Article 101 TFEU in respect of such conduct have ceased to exist.

V.5. Imputability of the contested conduct and related conduct

458. From the preliminary findings, it appears that the conduct under examination is attributable to Apple Inc., Apple-DI and Apple-IT. In particular, Apple Inc. and Apple-DI entered into the contracts at issue in the decision (GTA and EU Agreement), while Apple-IT provided support services that

⁵⁹⁰ See doc. 368, 376.

⁵⁹¹ See doc. 364, 376.

facilitated the monitoring of agreements and the notification of the rejection of *marketplace* applications, as in the case of IT Store.

459. With reference to the Amazon Group, the GTA and the EU Agreement were entered into by Amazon.com Services Inc. and Amazon-EU. The evidence on record shows the involvement of Amazon.com and Amazon-IT in the negotiation with Apple of the contracts at issue, as well as in their drafting⁵⁹². In addition, the companies Amazon-SE and Amazon-EC, which are responsible for the provision of *marketplace* services and the *web* pages of the Amazon.com *marketplace*, have implemented the clauses subject to the proceedings by excluding resellers of Apple products from the *marketplace*, an action also carried out with the assistance of Amazon- IT, which communicated the decision to the resellers and responded to their requests to be readmitted. Therefore, the companies Amazon.com, Amazon-EU, Amazon-SE, Amazon-EC and Amazon-IT are held liable for the conduct relating to the exclusion of resellers of Apple products from the Amazon.it *marketplace*.

460. On this point, it must be confirmed that Amazon-IT is fully liable for the infringement because its employees actively contributed to the conclusion of the agreements at issue with Apple. It is irrelevant that Amazon-IT did not undertake any further enforcement roles beyond the drafting of the agreement, that it does not sell products directly or that it has no relationship with sellers, as it is already sufficient to have contributed to the conclusion of the agreement. Furthermore, the assertion that Amazon- IT has no relationship with retailers is also contradicted by the evidence in the file: Amazon-IT prepared the reply letters to the excluded sellers which it then had Amazon-SE sign⁵⁹³ and monitored the activities of those complaining about the restriction on Apple and Beats products⁵⁹⁴.

461. The argument that Amazon-EC, which has no contract with Apple and does not sell products directly, is not even liable must also be rejected. Amazon-EC is the owner of Amazon.it, i.e. the domain of the *marketplace* where the restriction took place. The fact that Amazon-EC does not sell any products is irrelevant. As stated several times *above*, the restriction does not concern Amazon as a retailer, but Amazon's role as operator of the Amazon.it *marketplace*.

462. With reference to Amazon's argument that the conduct could not be attributed to it because of its decision-making practice regarding distribution agreements, the pressure exerted by Apple, and the absence of any real

⁵⁹² See, e.g., doc. ISP.72.

⁵⁹³ See e.g. the drafting of the letter to Digitech by employees of Amazon-IT, a letter later sent by Amazon-SE (see ISP.62, ISP.64).

⁵⁹⁴ Cf. ISP.26.

economic return for Amazon itself⁵⁹⁵ the following is noted.

463. The conduct under scrutiny does not concern Amazon's role as a distributor of Apple and Beats products, but rather the restrictions introduced on the Amazon.it *marketplace* that prevent retailers from using brokerage services to sell electronics products. These restrictions involve Amazon as a provider of *marketplace* services.

464. Amazon in this market has a position of absolute pre-eminence, being the *marketplace* with a total market share. Amazon.it also represents a primary purchasing channel for consumer electronics products by Italian consumers (at least 70% of consumer electronics products purchased online are sold on Amazon.it, by Amazon or by third-party sellers on the Amazon.it *marketplace*, see Table 14).

465. Although Amazon initially tried to increase the number of players allowed in the *marketplace*, it then decided to go ahead anyway because of the gains in terms of increased direct sales of Apple and Beats products⁵⁹⁶. This is an effect resulting from Amazon's hybrid nature as *marketplace* and seller, whereby the interests of third-party sellers are only taken into account where these are compatible with Amazon's profit goals, which do not only take into account the *marketplace's sales* commissions for third-party sales, but also the profits from direct sales, as well as the indirect returns due to the increased attractiveness of Amazon as a place to buy and as a *marketplace*.

VI. IMPAIRMENT OF TRADE BETWEEN MEMBER STATES

466. According to Commission Notice 2004/C 101/07 - Guidelines on the effect on trade concept contained in Articles 81 and 82 of the Treaty, OJEC C 101/81 of 27 April 2004 (now Articles 101 and 102 TFEU), the concept of effect on trade between Member States must be interpreted by taking into account the direct or indirect, actual or potential influence on trade flows between Member States.

467. The cartel in question covers the entire national territory and involves the largest players in the relevant markets operating throughout the country, belonging to major multinational groups. The cartel also affects crossborder trade. Therefore, the conduct described above is capable of affecting trade within the Union and constitutes an infringement of Article 101 TFEU.

VII. SERIOUSNESS AND DURATION OF THE UNDERSTANDING

468. According to well-established European and national case law, the

⁵⁹⁵ See doc. 364, 376.

⁵⁹⁶ On this point, see section V.4.c(g) Amazon's Advantage, pages 164 et seq.

assessment of the gravity of an infringement must take into account a multitude of factors, the character and importance of which vary according to the type of infringement and the particular circumstances of the case. These factors include primarily the nature of the restriction of competition and the role and representativeness on the market of the undertakings involved, as well as the context in which the infringements took place.

469. As to the nature of the restriction, on the basis of the preliminary findings, the parties to the proceedings are deemed to have put in place an arrangement constituting a restriction under Article 101(1)(b) and (d) TFEU, in that it had as its object the restriction of outlets for certain undertakings and the application of discriminatory conditions between retailers of Apple and Beats products. The effect of this cartel was to reduce the supply by retailers of Apple and Beats products, to reduce cross-border sales and to increase the prices charged by third-party retailers on the Amazon.it *marketplace* for Apple and Beats products.

470. With reference to the role and representativeness of the companies involved, the undisputed size and notoriety of the Amazon and Apple groups among companies and consumers, both in the relevant markets and, more generally, in the various markets in which the companies belonging to the two groups operate, should be noted. Moreover, Amazon is an indispensable counterpart for access to the Amazon.it *marketplace* and thus to a fundamental distribution channel.

471. In addition, the restrictions at issue in the proceedings, as is apparent from the documents in the file, were, on the one hand, explicitly requested by Apple, deemed to be conditions for entering into the distribution agreement with Amazon, and originated from Apple's stated desire to limit the number of resellers of Apple and Beats products and competing advertising on Amazon's *marketplace*; on the other hand, Amazon has limited access to its *marketplace*, to the detriment of third parties, in order to obtain considerable individual benefits in terms of better conditions of supply of products to be sold directly, including greater discounts on the purchase of Apple and Beats products, obtained at of the exclusion of third-party resellers and for the constant monitoring of the platform⁵⁹⁷.

472. In relation to the present case, also relevant are: (i) the quantity and price effects of Apple and Beats products sold by third-party resellers on the Amazon.it *marketplace*; and (ii) the partitioning effects on European markets.

473. In terms of duration, the agreement starts on 31 October 2018 date of the conclusion of the GTA and the EU Agreement⁵⁹⁸ and is still ongoing today,

⁵⁹⁷

⁵⁹⁸ Cf. doc. ISP.85, ISP.8158 (Annex 1.pdf, Annex 1.4.pdf).

due to the fact that the contractual clauses are still in force and fully implemented by Apple and Amazon.

474. On this point, we reject Amazon's argument⁵⁹⁹ that the start of the infringement should be on 4 January 2019, the date on which the exclusion of third-party resellers began. It is noted, in fact, that the contract between Apple and Amazon was entered into on 31 October 2018 and the exclusion of third-party retailers was agreed on that date, and since that time the preparatory activities for that exclusion have commenced, such as the notice of the exclusion to retailers of 8 November 2018⁶⁰⁰. Therefore, it must be confirmed that the understanding began on 31 October 2018.

VIII. CRITERIA FOR THE QUANTIFICATION OF PENALTIES

475. Article 15(1) of Law No. 287/1990 provides that the Authority, in cases of serious infringements, taking into account their gravity and duration, shall order the application of a pecuniary administrative sanction of up to 10% of the turnover achieved by each undertaking or association in the last financial year closed prior to the notification of the warning adopted at the end of an investigation procedure.

476. In order to quantify the penalties, it is necessary to bear in mind the provisions of Article 11 of Law No. 689/1981, as recalled by Article 31 of Law No. 287/1990, as well as the interpretative criteria set out in the aforementioned Guidelines on the application of the criteria for quantifying administrative pecuniary penalties, resolved by the Authority on 22 October 2014 (hereinafter, Guidelines).

477. According to points 7 et seq. of the Guidelines, the basic amount of the sanctions is obtained by multiplying a percentage of the value of sales, determined according to the level of seriousness of the infringement to the duration of the participation of each undertaking in the infringement.

478. In order to calculate the basic amount of the sanctions, the value of direct *online* sales of Apple and Beats branded products in Italy in the last full year of participation in the infringement, i.e. the year 2020, net of VAT and other taxes, will be taken as a reference for Apple. For Amazon, the value of direct *online* sales of Apple- and Beats-branded products in Italy and the value of *marketplace* brokerage sales of Apple- and Beats- branded products sold on Amazon.it in the year 2020, net of VAT and other taxes, will be taken as a reference.

479. In particular, the value taken as a reference for Amazon is appropriate

⁵⁹⁹ See doc. 364.

⁶⁰⁰ Cf. doc. PI.1.

in light of its hybrid nature and the circumstance that, in order to obtain a better supply of Apple and Beats products and thus increase its revenues from direct sales, it agreed to restrict access to its *marketplace* Amazon.it. Thus, Amazon gave up part of its brokerage revenues (due to the reduction of third-party sellers) in order to significantly increase its revenues from direct sales.

480. To consider, as Amazon suggests⁶⁰¹, only the intermediation revenues would in fact result in the effect of the foreclosure effect (i.e. lower third-party sales on Amazon) leading to a reduction of the base value on which to calculate the penalty. Thus, the greater the foreclosure effect (i.e. fewer third-party sales on Amazon.it), the lower the penalty would be. This would be completely contradictory to the purpose of antitrust sanctions, as it would, in fact, reward those conducts with greater foreclosure effect⁶⁰².

481. As far as Apple is concerned, we do not accept the party's arguments⁶⁰³ regarding the circumstance that the sales turnover on the Apple.it website should not be taken as a reference. In fact, it is considered more appropriate to use that sales value both because of the relevant markets affected by the conduct (in particular, from the consumer's point of view, the market for the sale of consumer electronics products on the Internet), and because of the circumstance that the restrictions under examination appear to have led to a reduction in the discount between the price proposed on Apple.it and the price of third-party retailers on Amazon.

482. Furthermore, it is also not considered to exclude from the relevant sales value the part of Apple.it purchases delivered by pick-up in shop. Indeed, the delivery method (delivery by pick-up point) does not affect the nature of the online purchase. Even Amazon allows delivery by pick-up point (e.g. Italian Post Office points, Amazon Locker) and therefore it is entirely undisputed that Apple customers' choice of delivery by pick-up point is due to the *premium* experience reserved in the physical Apple Store. Moreover, it should be noted that the circumstance that a consumer decides to purchase a product online and to pick it up in shop appears to confirm the presence of an intrinsic difference between online and offline sales: consumers could directly purchase a product at the physical *Apple store* and instead decide to purchase it online (although they will then have to go to the physical *Apple store*), this happens because of the specific differences between online and offline (e.g. 24/7 availability, more information, etc.).

483. Furthermore, it is confirmed that the most correct reference year is 2020

⁶⁰¹ See doc. 364.

⁶⁰² In the present case, if there had been a total exclusion of third-party retailers and only Amazon was left to sell the products directly, according to Amazon's argument, the value on which to calculate the penalty would be zero.

⁶⁰³ See doc. 368.

as it is the last full year of participation in the infringement. Indeed, the fact that the turnover in 2019 is significantly lower than in 2020 is not relevant as a reason for using a different turnover. On the contrary, the significant increase in online sales turnovers for the year 2020 only shows that the conduct was particularly offensive to competition, as it deprived many of the retailers of Apple and Beats products from the Amazon.it *marketplace*, at a time when online trade had increased extremely significantly, given the health restrictions.

484. Therefore, the specific turnover for the Amazon group is Euro [omissis]⁶⁰⁴ while the specific turnover for the Apple group is Euro [omissis]⁶⁰⁵.

485. For the purpose of determining the basic amount of the sanction, a specific proportion identified according to the gravity of the breach may be applied to the basic amount as determined above. According to the Guidelines, in particular, the proportion considered must be set at a level of up to 30% of the value of sales, "*depending on the degree of seriousness of the breach*" (point 11).

486. In relation to the present case, reference is made to the considerations expressed *above* regarding the gravity of Apple's and Amazon's conduct, with reference to: (i) the impact of the restriction, which has as its object the foreclosure of the largest *marketplace* in Italy; (ii) the quantity and price effects of Apple and Beats products sold by third-party sellers on the Amazon.it *marketplace*; (iii) the partitioning effects of the European markets; (iv) the contractual genesis (with Apple's request to make the conclusion of the contract conditional upon the introduction of the restrictions at issue) and the individual economic benefits (of Amazon) in terms of increased discounts in the procurement of Apple products. Moreover, it should be noted that, in the present case, the Parties - even though it emerged from Amazon's and Apple's own internal documentation that an increase in the number of retailers of Apple and Beats products on Amazon would have been beneficial as a result of the Covid emergency - maintained the restrictions on access to Amazon.it, preventing third-party retailers from reaching a substantial portion of consumers at a time when the importance of the *online* channel was growing.

487. In light of these elements, for the purpose of calculating the basic amount of the penalty, it is deemed appropriate to apply 7% of the identified sales value. Moreover, as mentioned above, the cartel commenced on 31

⁶⁰⁴ The turnover from direct sales of Apple and Beats products in 2020 amounts to EUR [omissis], while the turnover from the intermediation of third-party sales on Amazon.it of Apple and Beats products in 2020 amounts to EUR [omissis]. See doc. 269, 386.

⁶⁰⁵ See doc. 271. Note that the value in the document has been converted into Euro using a conversion rate of 1 Euro for 1.15 US Dollars.

October 2018 and is still ongoing. Therefore, in view of the deadline of 20 September 2021 for the conclusion of the evidence, it is deemed to calculate a duration of 2 years, 10 months, 20 days.

488. With reference to Amazon's argument that the conducts could not result in any sanction against it due to its decision-making practice regarding distribution agreements, the pressure exerted by Apple and the absence of any real economic return for Amazon itself⁶⁰⁶ it should be noted that - as explained above - the conduct under scrutiny does not concern Amazon's role as a distributor of Apple and Beats products, but the restrictions introduced on the Amazon.it *marketplace* preventing retailers from using intermediary services to sell electronics products. These restrictions involve Amazon as a provider of *marketplace* services, which has a position of absolute pre-eminence, being the *marketplace* with a total market share. Amazon.it also represents a primary purchasing channel for consumer electronics products by Italian consumers.

489. Although Amazon initially tried to increase the number of players allowed in the *marketplace*, it then decided to go ahead anyway because of the gains in terms of increased direct sales of Apple and Beats products⁶⁰⁷. This is an effect of Amazon's hybrid nature as a *marketplace* and seller, whereby the interests of third-party sellers are held in account only where these are compatible with Amazon's profit goals, which does not only take into account *marketplace sales* commissions for third-party sales, but also profits from direct sales, as well as indirect returns due to the increased attractiveness of Amazon as a purchasing location and as a *marketplace*.

490. Pursuant to paragraphs 19 and 21 of the Guidelines, the basic amount of the sanction, determined as described in the preceding paragraphs, may be increased to take into account specific circumstances that aggravate (aggravating circumstances) or mitigate (mitigating circumstances) the liability of the infringer, with particular reference to the role played by the undertaking in the infringement, its conduct during the investigation as well as the work performed by the agent to eliminate or mitigate the consequences of the infringement and the personality of the same, also in the light of the provisions of Art. 11 of Law No. 689/1981.

491. With respect to Apple's submission of 8 November 2021⁶⁰⁸ in which it informed that it intended to voluntarily implement the commitments submitted on 7 June 2021 pursuant to Article 14b of Law No. 287/90 and requested a favourable assessment pursuant to Article 11 of Law No. 689/1981 and Paragraph 23 of the Authority's Guidelines on the quantification of sanctions,

⁶⁰⁶ See doc. 364, 376.

⁶⁰⁷ On this point, see section V.4.c(g) Amazon's Advantage, pages 164 et seq.

⁶⁰⁸ See doc. 382.

it is considered that no mitigating circumstances should be granted due to the timing of the voluntary implementation of the commitments. In particular, the increase in the number of operators that will be able to sell on Amazon.it will take place more than one year after the opening of the proceedings, after the end of the deadline for the acquisition of the elements of the investigation and a few days after the conclusion of the proceedings. This mitigation activity cannot therefore be said to be timely.⁶⁰⁹ Moreover, such intervention does not allow the restoration of access to the Amazon.it *marketplace* to certain excluded retailers selling genuine products, thus only partially addressing the competition problems under investigation. In fact, it is recalled that the sale of Apple and Beats Wired products is based on a free distribution system, in which the choice of official resellers is left to Apple's discretion, so that it is not ensured that such selection is based exclusively on objective criteria, which such objective criteria are applied indiscriminately and in a non-discriminatory manner.

492. Therefore, the basic value of the penalty resulting from the application of the 7% percentage of the identified sales value, of a duration of 2 years, 10 months, 20 days, is Euro [10-50] million for the Amazon group and Euro [50-100] million for the Apple group.

493. Pursuant to point 25 of the Guidelines, the Authority may increase the final penalty of up to 50 % of the fine where the undertaking responsible for the infringement had in the last business year ending before the notification of the letter of formal notice a total worldwide turnover which was particularly high in relation to the value of sales of the goods or services to which the infringement relates, or where it belongs to a group of significant economic size.

494. That requirement is deemed to be met in the present case by reason of the consolidated turnover achieved by the Apple and Amazon groups. In fact, the overall turnover achieved by the Apple group, in the financial year ending 26 September 2020, is approximately EUR 226.87 billion⁶¹⁰. The global turnover realised by the Amazon.com Inc. group in the financial year 2020 is approximately EUR 319.06 billion⁶¹¹. The penalties would thus represent less

⁶⁰⁹ In this sense, "*In adherence to the provisions of point 23, first indent, of its Guidelines, according to which, in order for an 'active repentance' to lead to a reduction of the penalty, the company must have promptly taken appropriate initiatives to mitigate the effects of the infringement, re-establishing the conditions of competition preceding the infringement or implementing compensatory measures in favour of the persons harmed by the unlawful act, since the mere interruption, as in the case in point, of the unlawful conduct, even if it occurred at a date prior to the commencement of the investigation, is not relevant*". See Council of State, VI, 16 March 2020, nos. 1844, 1845, 1838, 1772 - Friuli Venezia Giulia Concrete Market.

⁶¹⁰ See Annual report pursuant to section 13 or 15(d) of the Securities Exchange act of 1934 of Apple Inc. for the fiscal year ended 26 September 2020. The value of total net sales is \$274.515 billion.

⁶¹¹ See Annual Report of Amazon.com Inc⁶¹¹ . for the fiscal year ended 31 December 2020 (Annual report pursuant to section 13 or 15(d) of the Securities Exchange act of 1934 of Amazon.com Inc.). The value of total

than 0.4 per cent of the global turnover of the two groups.

495. Therefore, it is deemed appropriate to increase the basic amount of the sanctions by 50% in order to give them an adequate deterrent character. In

e q p e n w u k q p . " v j g " h k p g u " c r r n k e c d n g " v q " v j q u g " c r r n k e c d n g " v q " v j g " C o c | q p " i t q w r "

496. The total turnover realised by the Amazon group in Italy in 2020 is EUR [5-8] billion in 2020⁶¹² while the total turnover realised by the Apple group in Italy in 2020 is EUR [2-5] billion⁶¹³. Therefore, the penalties do not exceed the 10% maximum fine set forth in Article 15 of Law No. 287/1990.

IX. IMPOSING OBLIGATIONS ON AMAZON AND APPLE

497. At the outset, Amazon's argument must be rejected⁶¹⁴ that the Authority does not have the powers to impose behavioural or structural measures in its warnings. According to administrative case law⁶¹⁵, in fact, the Authority may impose on undertakings detailed measures, both behavioural and structural, aimed at eliminating in the immediate future the effects of the past infringements, according to the principle of the so-called 'useful effect', which consists in obtaining that in the affected market conditions similar to those that would have existed in the absence of the infringement are restored, in as specific a form as possible.

498. On the merits, it is noted that, in the present case, in order to ensure the effectiveness of the *antitrust* action, it appears necessary to prevent the conduct complained of by Apple and Amazon from continuing to produce the anti-competitive effects identified, it may be necessary to impose on Amazon and Apple obligations to implement specific activities aimed at promptly eliminating the restrictions on access to Amazon.it.

499. With regard to the content of the obligations to be imposed on the Apple and Amazon groups, it should be considered that Apple proposed through commitments the extension of the number of entities admitted to the Amazon.it *marketplace*, while Amazon itself stated that it wanted to expand the number of retailers present on the platform as much as possible. Moreover, on 8 November 2021, Apple informed that it would voluntarily implement the commitments submitted on 7 June 2021 pursuant to Article 14b of Law No. 287/90⁶¹⁶, which were rejected by the Authority.

500. Therefore, it is considered that the obligations to be imposed on Apple

net sales was \$386.064 billion.

⁶¹² See doc. 270. The dollar value was converted at an exchange rate of 1 Euro for 1.15 US dollars.

⁶¹³ See doc. 271. The dollar value was converted at an exchange rate of 1 Euro for 1.15 US dollars.

⁶¹⁴ See doc. 364.

⁶¹⁵ Council of State, VI, 8 April 2014, No 1673, A437 - Coop Estense.

⁶¹⁶ See doc. 382.

and Amazon should concern the inclusion in the Amazon.it *marketplace*: (i) for Apple and Beats products that do not fall under a selective distribution system, of all retailers legitimately reselling genuine products, whether official or unofficial retailers; (ii) for Beats products that fall under a selective distribution system, of retailers who are members of the selective distribution system in a non-discriminatory manner with respect to those currently admitted to Amazon.it.

501. Where changes are made to the distribution system for Apple products, it is considered that Apple and Amazon must allow access to the *marketplace* according to the criteria objectively established by the distribution, indiscriminately among all potential resellers and in a non-discriminatory manner. Thus, where the Amazon.it marketplace remains compatible - as is the case today - with the distribution system for Apple and Beats products, sales must be permitted in it in a non-discriminatory manner with respect to those admitted to the *marketplace*.

502. The above-mentioned obligations appear, as a whole, necessary and proportionate with respect to the objective of the timely restoration of competition, allowing the opening up of outlet markets by retailers and removing restrictions to intra-EU trade due to the exclusion of all operators established in certain Member States.

503. The obligations appear necessary in light of the growing importance of online sales, in order to remove the anti-competitive restrictions introduced by the clauses under review.

504. From the point of view of proportionality, the obligations imposed consist in the mere application of the access rules established by Apple and Amazon in a non-discriminatory manner and indiscriminately for all operators legitimately distributing Apple and Beats products. The measures serve the same purpose as Apple's proposed commitments to expand the number of operators on Amazon.it and are compatible with Amazon's stated desire to expand the number of retailers on Amazon.it as much as possible.

CONSIDERING, therefore, that, on the basis of the foregoing considerations, the companies Apple Inc., Apple Distribution International Ltd, Apple Italia S.r.l., Amazon.com Inc., Amazon Services Europe S.a r.l., Amazon Europe Core S.a r.l., Amazon EU S.a r.l., Amazon Italia Services S.r.l. have put in place an agreement restricting competition contrary to Article 101 of the Treaty on the Functioning of the European Union

DELIBERATION

a) that the companies Apple Inc., Apple Distribution International Ltd, Apple Italia S.r.l., Amazon.com Inc., Amazon Services Europe S.a r.l., Amazon Europe Core S.a r.l., Amazon EU S.a r.l., Amazon Italia Services S.r.l. have implemented an agreement restricting competition in breach of Article 101 of the Treaty on the Functioning of the European Union consisting in agreeing and implementing contractual clauses that prevent resellers who legitimately engage in the activity of reselling products Apple and Beats genuine access to the *marketplace* Amazon.it;

b) that the companies Apple Inc., Apple Distribution International Ltd, Apple Italia S.r.l., Amazon.com Inc., Amazon Services Europe S.a r.l., Amazon Europe Core S.a r.l., Amazon EU S.a r.l., Amazon Italia Services S.r.l. to immediately put an end to the conduct distorting competition referred to in paragraph a) above, to refrain in the future from engaging in conduct similar to that which is the subject of the infringement found in the preceding paragraphs and, specifically, that the aforementioned companies remove and/or amend such contractual clauses, identifying forms of distribution that allow operators who legitimately engage in the activity of marketing genuine Apple and Beats branded products to access the Amazon.it marketplace and to use the intermediation services of such *marketplace* in a non-discriminatory manner vis-a-vis Amazon and the other sellers of Apple and Beats products admitted to Amazon.it, in accordance with the objective criteria of a qualitative nature, applied indiscriminately and non-discriminatorily, at the time established for the sales of Apple and Beats products;

c) that, on the basis of what is stated in the grounds, the administrative fine of ~~four million five hundred and thirty-three thousand four hundred and fifty-five euros~~ ~~four million five hundred and thirty-three thousand four hundred and fifty-five euros~~ (three thousand four hundred and fifty-five euros) be imposed jointly and severally on Apple Inc., Apple Distribution International Ltd and Apple Italia S.r.l.

d) that, on the basis of what is stated in the grounds, the administrative fine ~~eight million seven hundred and thirty-three thousand eight hundred and seven euros~~ ~~eight million seven hundred and thirty-three thousand eight hundred and seven euros~~ (eight million seven hundred and thirty-three thousand eight hundred and seven euros) be imposed jointly and severally on Amazon.com Inc., Amazon Services Europe S.a r.l., Amazon Europe Core S.a r.l., Amazon EU S.a r.l. and Amazon Italia Services S.r.l.

The administrative penalties referred to in letters c) and d) above must be paid within the term of thirty days from the notification of this measure, using the tax codes indicated in the attached F24 form with identification elements,

pursuant to Legislative Decree No. 241 of 9 July 1997. Payment must be made telematically by debiting one's bank or postal current account, through the *home-banking* and CBI services made available by banks or by Poste Italiane S.p.A., or by using the telematic services of the Revenue Agency, available on the *website* www.agenziaentrate.gov.it.

After the aforementioned deadline, for the period of delay of less than six months, default interest must be paid at the legal rate from the day following the deadline for payment until the date of payment. In the event of further delay in compliance, pursuant to Article 27(6) of Law No 689/81, the sum due for the penalty imposed shall be increased by one tenth for each six-month period starting from the day following the expiry of the deadline for payment and up to the day on which the role is forwarded to the collecting agent; in this case the increase shall absorb the interest on arrears accrued in the same period. The Authority must be immediately notified of any payment, by sending a copy of the form certifying the payment made.

Pursuant to Article 26 of the same law, undertakings in a difficult economic situation may apply for payment of the penalty in instalments.

This measure will be notified to the parties concerned and published in the Bulletin of the Antitrust Authority.

An appeal against this provision may be filed with the Regional Administrative Court of Lazio, pursuant to Article 135, paragraph 1, letter b), of the Administrative Procedure Code (Legislative Decree no. 104 of 2 July 2010), within sixty days from the date of notification of the provision itself, without prejudice to the longer terms set forth in Article 41, paragraph 5, of the Administrative Procedure Code. 104 of 2 July 2010), within sixty days from the date of notification of the measure itself, without prejudice to the longer terms set forth in Article 41, paragraph 5, of the Administrative Procedure Code, or an extraordinary appeal may be lodged with the President of the Republic, pursuant to Article 8 of Presidential Decree No. 1199 of 24 November 1971, within one hundred and twenty days from the date of notification of the measure itself.

THE SECRETARY
GENERAL
Filippo Arena

THE PRESIDENT
Roberto Rustichelli

X. Appendix - Analysis of discount trends of Apple products sold on Amazon by third-party sellers

505. This section contains an analysis of the trend of discounts on Apple products sold by third-party sellers on the Amazon platform. Specifically, it covers [20-50] models of Apple products in the iPhone, iPad, AirPods and iWatch categories that were marketed in the period from January 2018 to June 2020, i.e. both before the restriction on the number of sellers of Apple products on Amazon.it was introduced on 5 January 2019.

506. A first effect of this agreement is the drastic drop in the number of third-party sellers active on the Amazon platform selling Apple products. Figure 21 shows the development over time of the (average) number of third-party sellers on Amazon.it from January 2018 to June 2020 who were selling Apple products. It is straightforward to see how this number decreased in the period following the introduction of the access restriction on Amazon.it.

Figure 21 - Trend in the number of third-party vendors of Apple products on Amazon.it⁶¹⁷

[omissis].

507. In order to show whether and to what extent the Apple-Amazon agreement had any impact on the prices of Apple products sold by third parties on Amazon.it, the average discount per Apple product category before and after the agreement was estimated. The discount is calculated as the difference between the price charged by third-party sellers on Amazon.it⁶¹⁸ and the price charged by Apple on its *online shop* Apple.it.⁶¹⁹

508. The choice of estimating average discounts instead of average prices lies in the circumstance that the dynamics of discounts, unlike that of prices, also take into account possible price variations due to changes in list prices. The analysis of average discounts was carried out on the same products on the market before and after the agreement, in order to avoid possible distortions resulting from composition effects⁶²⁰ such as, for example, the launch of new versions of the products or by the discontinuation of obsolete products⁶²¹. Apple's product models in the database before and after the agreement are [20-50] if January 2019 is included in the period after the agreement or [50-80] if

⁶¹⁷ See elaborations on data from document 187, annex "All._1.xlsx".

⁶¹⁸ See doc. 187, annex "All._1.xlsx".

⁶¹⁹ See doc. 141, 171.

⁶²⁰ On this point, it should be noted that this analysis succeeds in solving the problem of comparability over time (*composition effect*) that has been highlighted by Amazon (see doc. 80), as it includes only "continuous" products, i.e. those that are present both before and after the introduction of the restriction.

⁶²¹ Not all products are in the database at the same time as some were introduced more recently and others, older, are no longer marketed or are towards the end of their cycle. This means that the composition of the product set under analysis varies over time.

in the period before the agreement⁶²².

509. Table 23 shows the average discount levels per category of Apple products marketed by third parties on Amazon, before and after the agreement came into force. The data in the table show how, in the period following the implementation of the restriction on the number of resellers of Apple products on Amazon.it, which took place on 5 January 2019, the average discount on Apple products marketed by third-party sellers decreased, with reductions of even [10-20] percentage points, as in the case of AirPods. It can also be seen from the table that, since the implementation of the restriction, discounts have decreased for more than [70-100%] of Apple products sold by third parties in terms of sales.

510. Table 24 shows how these results remain largely unchanged considering 12-month time windows before and after the entry into force of the agreement, but, unlike Table 23, including January 2019 as the period after the entry into force of the agreement⁶²³. The average discount decreases in the post restriction period for all product categories except the iWatch. The percentage of products for which the average discount decreases also increases: discounts decreased for more than [70-100%] of Apple products sold by third parties in terms of sales.

Table 23 - Level of average discounts on Apple products marketed by third-party vendors before and after the agreement (January 2019 excluding agreement period)⁶²⁴

	Average discount on period January ó January (%)	Average discount on period February ó January (%)	Difference between the discounts over the two periods (percentage points)	Third-party sales for which discounts decreased over the period of the agreement (%)
iPhone	[...]	[...]	-[5-10]	[70-90]
iPad	[...]	[...]	-[5-10]	
AirPods	[...]	[...]	-[10-20]	
iWatch	[...]	[...]	-[0-5]	

⁶²² The different number of products analysed in the two time windows considered is due to the circumstance that some products were sold by third-party sellers on the platform until the end of January 2019, but not thereafter. These are iPad 5 (2017) Wifi 32 GB All colours, iPad 5 (2017) Wifi+cell 128 GB All colours, iPad Pro II gen. 12.9 Wifi 256 GB All colours, iPhone SE 32 GB Sidereal Grey+Silver, iPhone SE 32 GB All colours, iPhone X 256 GB Sidereal Grey+Silver and iPhone X 256 GB All colours.

⁶²³ Since the restriction of access for retailers to Amazon.it began on 5 January 2019, the month of January 2019 has some days characterised by the absence of restrictions. Table 23 and Table 24 attribute January 2019 as a pre-restriction month and a post-restriction month, respectively.

⁶²⁴ Elaborations on data of the parties, see Doc. 187, Annex "All_1.xlsx", 141, 171. Values are expressed as discounts, the higher the value the greater the discount from the reference price (price on Apple.it). The discounts of each product are weighted by the relative turnover. The analysis is carried out on [20-50] Apple product models.

Table 24- Live level of average discounts applied to Apple products marketed by third-party vendors before and after the agreement (January 2019 inclusive from the period of the agreement) ⁶²⁵

	Average discount over the period January 2018 - December 2018 (%)	Average discount over the period January 2019 - December 2019 (%)	Difference between discounts on two periods (percentage points)	Third-party sales for which discounts decreased over the period of the agreement (%)
iPhone	[...]	[...]	-[10-20]	[70-90]
iPad	[...]	[...]	-[5-10]	
AirPods	[...]	[...]	-[10-20]	
iWatch	[...]	[...]	[0-5]	

511. Table 25, on the other hand, considers longer periods of the agreement, using the entire time span of the data for the period after the restriction was introduced, with a post-agreement time window of 18 months (second column of the table) or 17 months (third column of the table). Again, the average discount decreases in the post-agreement period for all product categories except the iWatch. It is also confirmed that for almost all product models (more than [70-100%]) there was a reduction in the discount by third-party sellers on Amazon.it.

Table 25: Differences between average discounts on Apple products marketed by third-party suppliers before and after the agreement. The discounts for each product are calculated based on the relevant turnover. ⁶²⁶

	Period January 2018-December 2018 (no agreement) and the period January 2019-June 2020 (agreement)		Period January 2018-January 2019 (no agreement) and the period February 2019-June 2020 (agreement)	
	Difference between discounts (percentage points)	Sales of third parties for which the discounts are decreased (%)	Difference between percentage discounts	Sales of third parties for which the discounts are decreased (%)
iPhone	-[5-10]	[70-100]	-[5-10]	[70-100]
iPad	-[5-10]		-[5-10]	
AirPods	-[10-20]		-[10-20]	
iWatch	[0-5]		[0-5]	

512. The same results are obtained from Amazon's own calculations, which show that the average discount charged by third-party retailers on Amazon.it

⁶²⁵ Elaborations on data of the parties, see Doc. 187, Annex "All_1.xlsx", 141, 171. Values are expressed as discounts, the higher the value the greater the discount from the reference price (price on Apple.it). The discounts of each product are weighted by the relative turnover. The analysis is carried out on [50-80] product models.

⁶²⁶ Elaborations on data of the parties, see Doc. 187, Annex "All_1.xlsx", 141, 171. Values are expressed as discounts, the higher the value the greater the discount from the reference price (price on Apple.it). The discounts of each product are weighted by the relative turnover. The analysis is performed on [50-80] product models for the period "January 2018-December 2018 (no agreement) and the period January 2019-June 2020 (agreement)" and on [20-50] Apple product models for the "period January 2018-January 2019 (no agreement) and the period February 2019-June 2020 (agreement)".

decreased after the agreement (Figure 22).

Figure 22 - Amazon's discount me di calculation⁶²⁷

[omissis].

513. Considering that the analysis was carried out over a sufficiently long time span and that the (only) products marketed over the whole of the time span considered were analysed, it will be seen that average discounts on products sold towards the end of the period under analysis (when the effects of the agreement are felt) tend to be 'naturally' higher than those in earlier periods due to normal market dynamics (and regardless of the agreement). The consequence of this is that the comparison of average discounts on Apple products before and after the agreement tends to underestimate the possible reduction in discounting attributable to the agreement, thus being favourable to the parties.

514. Furthermore, it is noted that the analysis carried out on products marketed at the turn of the agreement does not capture the possible effects (of the agreement) on the prices of products launched after 5 January 2019 (excluded from the sample analysed as they were not sold before and after the agreement). However - in light of the results of the analysis carried out, which show that discounts on Apple products marketed by third-party sellers on the Amazon platform decreased significantly in the post-agreement period - it is reasonable to assume that in the absence of the agreement, products launched after 5 January 2019 could also have been sold by third parties at a lower price, i.e. at a larger discount, than observed.

515. It is therefore considered that the results shown in Table 23-Table 25 underestimate the extent of the possible anticompetitive effects of the Apple/Amazon agreement on the discounting of Apple products, but only a subset of them.

⁶²⁷ See doc. 364, annex 1 (Table 6).

Summary

I.	THE PARTIES.....	3
I.1.	The Apple Group	3
I.2.	The Amazon Group	4
II.	INTERVENING THIRD PARTIES	5
III.	THE INVESTIGATION PROCEDURE	5
IV.	THE PRELIMINARY FINDINGS.....	7
IV.1.	The distribution system for Apple and Beats products.....	7
IV.2.	E-commerce in Italy and marketplace intermediation services	11
IV.2.a.	Foreword.....	11
IV.2.b.	E-commerce in Italy	12
IV.2.c.	Marketplace brokerage services	15
IV.3.	The evidence acquired on the agreements and its effects	21
IV.3.a.	The negotiation of the 2018 agreement between Amazon and Apple and the limitations on third-party sellers on Amazon.it.....	21
IV.3.b.	The advertising restrictions of the 2018 agreements between Apple and Amazon	28
IV.3.c.	The execution phase of the agreements by Amazon	30
IV.3.d.	Reseller reactions and internal evidence on the effects of the agreement	34
IV.3.e.	Proposed changes after the COVID emergency	38
IV.3.f.	Evidence of the effects of the clauses under review.....	39
IV.3.g.	Technical solutions to combat counterfeiting.....	45
IV.3.h.	Technical solutions to improve the consumer experience.....	48
IV.4.	Third-party dealer considerations	49
IV.4.a.	Marketplace services	49
IV.4.b.	On the exclusion from the Amazon.it marketplace	51
IV.4.c.	On the infringement of Article 101 TFEU	53
IV.5.	Apple's considerations	55
IV.6.	Amazon's considerations.....	66
V.	EVALUATIONS	79
V.1.	Procedural Aspects	79
V.1.a.	The tardiness of the commencement of proceedings.....	79
V.1.b.	The alleged lack of access by Amazon and Apple	81
V.1.c.	The alleged violation of the rights of defence with regard to the timing of the filing of final pleadings	86
V.2.	Foreword	86
V.3.	Relevant markets	88

V.3.a.	Markets affected by the agreement.....	88
V.3.b.	Marketplace sales brokerage services.....	90
V.3.c.	Retail market for consumer electronics products on the Internet.....	99
V.4.	Violations of Article 101 of the Treaty on the Functioning of the European Union	103
V.4.a.	Legal framework.....	103
V.4.b.	The inapplicability of EU Regulation 330/2010 in light of the nature of competition relations and the restrictiveness of access restriction clauses on Amazon.it 105	
(a)	Inapplicability of the exemption	105
(b)	Inapplicability of the exemption for lack of the requirements of Article 2(4) of the Regulation	106
(c)	Absence of the requirements of Coty jurisprudence	108
V.4.c.	The restriction of access to official and unofficial retailers on the Amazon.it marketplace and their competitive restrictiveness.....	113
(a)	Foreword	113
(b)	The desire to restrict the number of dealers	114
(c)	The introduction of geographical limitations	118
(d)	The restrictiveness of conduct by object and effect	121
(e)	The theory of damage.....	126
(f)	Criticism of the Authority's economic analysis.....	130
(g)	The Amazon advantage	136
V.4.d.	The inapplicability of an exemption under Article 101(3) TFEU in light of the restrictions under examination	139
V.4.e.	The conduct restricting the advertising of brands competing with Apple and Beats 145	
V.5.	Imputability of the contested conduct and related conduct.....	145
VI.	IMPAIRMENT OF TRADE BETWEEN MEMBER STATES.....	147
VII.	SERIOUSNESS AND DURATION OF THE UNDERSTANDING	147
VIII.	CRITERIA FOR THE QUANTIFICATION OF PENALTIES	149
IX.	IMPOSING OBLIGATIONS ON AMAZON AND APPLE	154
X.	Appendix - Analysis of discount trends of Apple products sold on Amazon by third- party sellers	158