SUMMARY OF THE DECISION ADOPTED BY THE COUNCIL OF THE CNMC ON 12 JULY 2023 IN CASE S/0013/21 AMAZON/APPLE BRANDGATING[1]

On 31 October 2018, Amazon and Apple signed two agreements updating Amazon's terms and conditions as an authorised Apple reseller. The contracts included several anti-competitive clauses affecting the online retail sale of electronic products in Spain.

Brand gating clauses

Both companies agreed that ***only a number of resellers appointed by Apple could sell Apple-branded products on Amazon's website in Spain.***

As a result of the implementation of these clauses:

More than 90% of the resellers that had been using Amazon's website *to sell Apple products* ***were excluded*** *from the main online marketplace in Spain;*

Sellers who were not authorised by Apple to sell its products on Amazon's website lost an important sales channel*, insofar as this website is the main online shopping channel for electronic products in Spain;*

Amazon concentrated most sales of Apple-branded products in its online marketplace*, drastically reducing competition among resellers;*

Sales of Apple products via Amazon's website in Spain by sellers based in other EU countries were reduced, ***thereby limiting trade between Member States****; and*

There was an ***increase in the relative prices paid by consumers for the purchase of Apple products on the online marketplace*** *in Spain.*

This clause particularly affected Apple's non-authorised resellers, which are generally small operators that do not have a direct business relationship with Apple but sell its products. They were the most active resellers on Amazon's website in Spain and, therefore, the ones that exerted the most competitive pressure on prices on that website.

Advertising clauses and marketing limitation clauses

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

By means of the advertising clauses, Amazon and Apple limited the possibility for competing brands to purchase advertising space on Amazon's website in Spain to advertise their products in certain searches for Apple products, as well as during the purchase process of such products.

The marketing limitation clauses state that Amazon may not, without Apple's consent, conduct marketing and advertising campaigns that specifically target customers who have purchased Apple products on Amazon's website in Spain and encourage those consumers to switch from an Apple product to a competitor's product.

The above clauses reduce the competitive pressure on Apple from competitors' advertisements on Amazon's website in Spain and from Amazon's marketing campaigns, which the rest of the brands do have to bear. Furthermore, these limitations are directly detrimental to consumers as they (i) limit their ability to discover new brands and/or alternative products to Apple's; (ii) increase their search costs and (iii) reduce their ability to switch.

Infringement attributed to Apple and Amazon and fines imposed

The CNMC considers that these clauses, which contribute to changing the dynamics of the sale of Apple products on Amazon's website in Spain, restrict intra-brand and inter-brand competition and constitute a single andcontinuous infringement of Article 1 of the Spanish Competition Act (LDC) and Article 101 of the Treaty on the Functioning of the European Union (TFEU), which began when the clauses were introduced in October 2018.

The CNMC ordered Apple and Amazon to cease the infringing conduct and fined the concerned companies of the Apple Group €143,640,000 and the concerned companies of the Amazon Group €50,510,000.

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1. BACKGROUND

(1) On 20 November 2020, the Competition Directorate (**CD**) became aware, through the European Competition Network (**ECN**), of the possible existence of practices contrary to Article 1 of Law 15/2007 of 3 July 2007 on the Defence of Competition (**LDC** or Spanish Competition Act) and Article 101 of the Treaty on the Functioning of the European Union (**TFEU**) consisting of anti-competitive agreements between the AMAZON and APPLE groups that could affect the online retail sale of electronic products and the provision of intermediation services to third-party retailers through online platforms/marketplaces in Spain.

(2) On 30 June 2021, following **preliminary proceedings** initiated on 12 February 2021, it was decided to **formally open** the infringement proceedings.

(3) On 2 August 2022, the **Statement of Objections** (**SO**) was notified to the parties.

(4) On 24 February 2023, the CD agreed to close the preliminary investigation phase, and on the same day, the parties were notified of the **Decision Proposal** , which was submitted to the CNMC's Competition Chamber on 5 April 2023.

(5) On 12 July 2023, after assessing the Decision Proposal together with the arguments of the accused companies, the Competition Chamber adopted the **Decision** summarised herein.

2. THE PARTIES

2.1. AMAZON

(6) AMAZON is a group of companies that sells, through country-specific websites (operating as online marketplaces or e-commerce marketplaces), a wide range of consumer products while providing intermediation services to third-party sellers. It also manufactures and sells an increasingly wide range of its own products.

(7) AMAZON's current roles could be classified (based on sales revenue) as follows: (i) a primary role as a provider of intermediation services; (ii) a secondary role as a retail distributor; and (iii) a tertiary role, more reduced in comparison with the

other two, as a manufacturer and seller of its own-brand products (including consumer electronics products[2]).

(8) The AMAZON group companies fined are:

- AMAZON SERVICES EUROPE S.À.R.L. (**ASE**), which provides intermediation services to third-party sellers, enabling them to sell their products in all Amazon Stores in the EU, including www.amazon.es;
- AMAZON EUROPE CORE S.À.R.L. (**AEC**), which is responsible for operating the Amazon Store websites in the EU;
- AMAZON EU S.À.R.L. (**AEU**), which handles the retail sales in all EU Amazon Stores of the physical goods it purchases from sellers; and
- AMAZON.COM SERVICES, Inc. (**ASI**) (now AMAZON.COM SERVICES LLC).

ASE, AEC, AEU and ASI shall be referred to collectively as **AMAZON**.

2.2. APPLE

(9) APPLE[3] is a group of companies that manufactures and sells a wide range of electronic devices worldwide, including iPhone, iPad, Apple Watch, Apple TV, Mac, Beats and a range of Apple-branded accessories such as charging cables and adapters.

(10) Moreover, APPLE plays a dual role as it is a manufacturer and a distributor, through its own website and through its official physical shops (as well as through its network of distributors).

(11) According to APPLE, with the exception of some products which are not subject to the restrictions analysed, the group uses an open distribution system in which the different resellers are classified as follows:

- APPLE Authorised Distributors or ***AADs***, which operate at the wholesale level.
- APPLE Authorised Resellers or **AARs**, which operate at the retail level.
- APPLE Premium Resellers or **APRs**, which operate at the retail level and offer a premium customer experience.

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[2] Within this category, AMAZON manufactures and sells, for example, the following types of products: (a) Fire TV devices for streaming content to TVs; (b) Fire tablets; (c) headphones and earphones; and (d) accessories.

[3] Two companies are facing sanctions: Apple Inc. and Apple Distribution International Ltd; which are collectively referred to as **APPLE**.

- Big Retailers, which operate at the retail level, but are large retailers, online or offline, and which shall be referred to as "**Retailers**".
- Non-Authorised Resellers or **NARs**, which operate at all levels without having a direct contractual relationship with APPLE.

(12) NARs used to be, prior to their expulsion from AMAZON's online marketplace as a consequence of the conduct in question, the main resellers of APPLE products on AMAZON's websites and also the ones who used to sell at a lower price.

3. MARKETS

3.1. Markets analysed in the decision

(13) As a preliminary point, it should be noted that all the practices under scrutiny have been qualified as restrictions of competition by object. Therefore, a precise definition of the relevant market is not necessary[4].

(14) However, as this is a vertical agreement, the definition of the market in which AMAZON operates is necessary to determine the applicability of the block exemption regulation for vertical agreements[5]. In the case of APPLE, the investigation has considered the broad market (i.e. the market for the manufacture and sale of all electronic products) and included data on the narrow markets in which it operates (i.e. segmented by product category). Nevertheless, defining the markets in which APPLE operates is not necessary because, regardless of whether the relevant market for the analysis is defined broadly or narrowly, the company still exceeds the market share threshold set out in the above-mentioned regulation[6].

(15) **AMAZON** is primarily an online marketplace, i.e. a two-sided platform that acts as an intermediary between consumers (to whom it offers the possibility to find

[4] See, for example, paragraph 176 of the Judgment of the General Court of 28 June 2016 in case T-208/13 - Portugal Telecom/Commission, ECLI:EU:C:2017:941.

[5] As will be explained below, the Block Exemption Regulation is considered not to apply in the present case and, even if it did apply (*quod non*), the conditions for the exemption provided for therein would not be met. One of the reasons given for ruling out the application of the exemption is that the concerned companies exceed the market share threshold set out in the Regulation, which would require a definition of the markets in which the parties are active.

[6] Specifically, in the market for the manufacture and sale of electronic products, which is the relevant market for determining the application of the block exemption regulation, APPLE exceeds the 30% share in the EEA both in the broad market (which would encompass all electronic products) and also in multiple narrow markets (by product categories) such as those for APPLE's most demanded products, i.e. smartphones, tablets and smartwatches.

sellers and their offers and to buy their products) and sellers (to whom it offers, among other services, the possibility to list and sell their products on the marketplace website), thus facilitating the purchase of products over the Internet.

(16) The two sides of an online marketplace are considered to be distinct product markets: the provision of intermediation services in online marketplaces to third-party sellers is distinct from the provision of intermediation services in online marketplaces to consumers.

(17) Given that the conduct under investigation only directly affects the sellers' side of the market, the other side of the market shall not be taken into account.

(18) Given the unique characteristics of the services offered by online marketplaces to third-party resellers and the demand and supply-side substitutability analysis conducted among the alternatives available for third-party resellers to reach consumers, the provision of intermediation services in online marketplaces to third-party sellers constitutes a distinct product market.

(19) Finally, because online marketplaces primarily target local consumers in each of the countries in which they operate, the market for the provision of intermediation services in online marketplaces to third-party sellers is considered to be national in scope.

(20) **APPLE** is a manufacturer and distributor of electronic products.

(21) As has been pointed out in several Spanish precedents, three types of operators can be distinguished [7]in the market for the distribution of electronic products[8]: (i) manufacturers of technology and/or electronic products operating under their own brand; (ii) wholesalers, who buy products from manufacturers and resell them to retail distributors and provide ancillary services to their customers (logistics, storage, credit and marketing services); and (iii) retail distributors, who buy products and services from the manufacturer or wholesale distributor and resell them to end-users.

(22) Therefore, the following markets have been considered (although without a closed definition of the markets):

[7] See C/1120/20 ESPRINET/GTI; C/0762/16 ESPRINET/VINZEO.

[8] These include all IT products, consumer electronics, as well as mobile and telecommunications products (See C/1120/20 ESPRINET/GTI and C/0762/16 ESPRINET/VINZEO).

Product market	Geographic Market
Manufacture and sale of electronic products[9]	EEA
Wholesale distribution of electronic products	EEA or National
Retail distribution of electronic products	National, regional or local

3.2. Market shares

(23) AMAZON[10] stated that it did not have any data in this regard, so the CD requested information from the main online marketplaces in Spain in order to obtain such data[11].

(24) According to the above, AMAZON's shares are considered to be the following:

[9] This takes into consideration the broad market (without sub-segmenting by product type) but also includes data on the shares of narrow markets (sub-segmented by product type).

[10] See reply to question 1 of AMAZON IR II (pages 4671 to 4676).

[11] Specifically, information was requested from the following 17 online marketplaces: ALIBABA; ASOS.COM; EBAY; ETSY; FRUUGO.COM; FNAC; MANOCOLIBRI; PC COMPONENTES; PRIVALIA; WORTEN; ZALANDO; MEDIA MARKT; CARREFOUR; EL CORTE INGLÉS ("**ECI**"); DECATHLON; LEROY MERLIN; PUNTO FA. 4 of these 17 companies did not reply to the request for information (despite several reminders): ETSY, FRUUGO.COM; ZALANDO; PUNTO FA; and two companies did not or will not open their online marketplaces until well into 2022 (and have therefore not been considered in the sample): MEDIA MARKT AND LEROY MERLIN. Therefore, 11 operators in total (plus AMAZON, which would be number 12) have been included in the sample.

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

(25) On the other hand, according to data provided by APPLE, the market shares (by value) of APPLE and its main competitors in the EEA market for the manufacture and sale of electronic products are as follows[12]:

Cuotas en el mercado de la fabricación de productos de consumo electrónicos - dimensión EEE - Todos los productos					
	2017 [1]	2018	2019	2020	2021
	Cuotas	Cuotas	Cuotas	Cuotas	Cuotas
Apple	[30%-40%]	[30%-40%]	[30%-40%]	[30%-40%]	[30%-40%]
Samsung	[20%-30%]	[10%-20%]	[10%-20%]	[10%-20%]	[10%-20%]
Lenovo	[0%-10%]	[0%-10%]	[0%-10%]	[0%-10%]	[10%-20%]
HP	[0%-10%]	[0%-10%]	[0%-10%]	[0%-10%]	[0%-10%]
Dell Technologies	[0%-10%]	[0%-10%]	[0%-10%]	[0%-10%]	[0%-10%]
Xiaomi	[0%-10%]	[0%-10%]	[0%-10%]	[0%-10%]	[0%-10%]
Acer Group	[0%-10%]	[0%-10%]	[0%-10%]	[0%-10%]	[0%-10%]
ASUS	[0%-10%]	[0%-10%]	[0%-10%]	[0%-10%]	[0%-10%]
Huawei	[10%-20%]	[10%-20%]	[10%-20%]	[0%-10%]	[0%-10%]
OPPO	[0%-10%]	[0%-10%]	[0%-10%]	[0%-10%]	[0%-10%]
Microsoft	[0%-10%]	[0%-10%]	[0%-10%]	[0%-10%]	[0%-10%]
Otros	[10%-20%]	[0%-10%]	[0%-10%]	[0%-10%]	[0%-10%]
TOTAL	100,0%	100,0%	100,0%	100,0%	100,0%

[12] This is the market that has been considered, thus taking the most conservative approach, which is to include all electronic products. In any case, as explained above, data from the narrower markets have also been included, segmented by product type, where APPLE also has a share above 30% in the main categories: smartphones, tablets and smartwatches.

3.3. Reference to the segment of online retail sale of electronic products in Spain

(26) There are several precedents in which competition authorities have sub-segmented markets according to whether the sales channel used is online or offline[13].

(27) In this case, the investigated practices affect the sale of electronic products (i.e. APPLE branded products[14]) on the AMAZON website in Spain (i.e. online channel[15]), so the affected market is the market for online retail sale of electronic products in Spain.

(28) The following considerations apply to this market: (i) the e-commerce continues to grow in Spain[16]; (ii) within this market, the main online marketplace in Spain is AMAZON[17]; (iii) within e-commerce in Spain, one of the best-selling product categories is electronic products; and (iv) AMAZON is the main operator in the market for online retail sale of electronic products in Spain in 2021 by net sales[18].

(29) By way of summary, AMAZON's estimated market shares in Spain are included here below:

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[13] Decision of the CNMC in case C/1166/21 - MEDIA MARKT SATURN/ACTIVOS WORTEN; decision of the European Commission in case M.9894 - MOBILUX / CONFORAMA FRANCE, paragraph 13; decisions of the UK competition authority in cases Ladbrokes/Coral, Amazon/The Book Depository, Yoox/Net-a-Porter and Mapil Bidco/Chain Reaction Cycle; decision of the Belgian competition authority ABC-2019-C/C-40 in case Boulanger/HTM - Krëfel; and decision of the Czech competition authority in case S0223/2016/KS regarding Netretail Holding B.V./Rockaway Capital SE.

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

[15] www.amazon.es.

[16] According to the report produced by the Ministry of Economic Affairs and Digital Transformation on e-commerce in Spain in 2020 with data relating to 2019, "*B2C e-commerce in Spain in 2019*", which can be found here: https://www.ontsi.es/es/node/15088, sales made over the Internet exceeded 50,000 million euros for the first time (thus, the sector is growing by 21.4% compared to the previous year and by 210% in the last 5 years).

[17] By web traffic (**[50-60]**% share in 2020, with the second largest player AliExpress having a 14% share); by online sales revenue (**[10-20]**% share, far ahead of the second largest player AliExpress, which had a 4.3% share); and by number of shoppers (almost **[90-95]**% of online shoppers used AMAZON, compared to **[55-60]**% who used AliExpress).

[18] AMAZON has a 35-40% share, followed far behind by the second operator, PC Componentes, which has a 5-10% share (as do the third and fourth operators, El Corte Inglés and Apple). Starting with the fifth operator, Media Markt, the shares are all between 0-5%.

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

4. THE FACTS

4.1. Introduction

(30) AMAZON first joined APPLE's authorised reseller programme in April 2014 by signing a standard agreement, also known as the APPLE Authorised Reseller Agreement ('**2014 ARA**').

(31) Under the terms of the 2014 ARA (and subsequent amendments): (i) AMAZON did not have access to the full selection of APPLE products, but was only authorised to resell a limited selection of Apple-branded products; and (ii) such selection was not supplied directly by APPLE.

(32) On 31 October 2018, AMAZON and APPLE entered into two new agreements:

- A Global Tenets Agreement (**GTA**)[19] supplementing the different Authorised Resale Agreements applicable in all geographic areas where APPLE and AMAZON had such an agreement;
- A new APPLE Authorised Reseller Agreement ('**2018 ARA**')[20].

(33) According to AMAZON, the 2018 agreements remedied the above limitations: (i) AMAZON gained access to the full range of APPLE products; and (ii) AMAZON was able to source directly from APPLE.

(34) These agreements, in addition to regulating AMAZON's conditions as an authorised distributor of APPLE, contain a number of clauses that indirectly affect third-party operators in that they limit the number of resellers of APPLE products that can operate on AMAZON's online marketplace (**Brand Gating Clauses**) and the advertising space on AMAZON's website where competing APPLE products

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

[20] Signed between Apple Distribution International Ltd and Amazon EU SARL.

can be advertised (**Advertising Clauses**). The agreements also include a third set of clauses limiting the possibility for AMAZON to target marketing campaigns to customers of APPLE products on its Spanish website to offer them competing products from other brands, even after the expiry of the agreements containing the aforementioned clauses (**Marketing Limitation Clauses**).

4.2. Controversial clauses

4.2.1. Brand Gating Clauses

(35) The 2018 GTA stipulates that APPLE shall identify a number of official resellers who will be the only ones authorised to use AMAZON's websites (including www.amazon.es).

(36) Meanwhile, the ARA contains the list of resellers authorised by APPLE to sell its products on AMAZON's websites. Initially, this list only included APRs.

(37) On 16 November 2021, after the opening of the proceedings and during the course of the investigation, APPLE submitted written pleadings stating that it had unilaterally decided to extend the list of resellers and that, from that moment onwards, the remaining APPLE distributors located in the European Union authorised to sell on www.amazon.es (i.e. the remaining APRs not included in the initial list, AARs and Retailers) would also be admitted.

(38) Below is a summary of the resellers of APPLE products that were authorised to sell on AMAZON Spain's website during the different periods in which the Brand Gating Clauses applied:

Resellers authorised to sell APPLE-branded products on AMAZON's website in Spain		
Type of reseller	**From 31 October 2018 to 16 November 2021**	**From 16 November 2021 to the present day**
APR	YES	YES
AAR	NO	YES
Retailers	NO	YES
NAR	NO	NO

4.2.2. Advertising Clauses

(39) The GTA provides the following in one of its clauses:

- When a search is conducted on AMAZON's website for an APPLE product, AMAZON shall only display ads for APPLE products in the top banner ad and the first two sponsored product slots on the results page (or in any other ad slots in the top ten search results);
- When searching on AMAZON's website for a list of keywords supplied by APPLE (related to APPLE products), AMAZON shall not display ads on the first page of results or on AMAZON's detail pages for products from a number of competing brands specified by APPLE; and
- On Cart and Check Out pages containing APPLE products, advertisers of products of competing brands specified by APPLE are not allowed to bid for advertising space.

(40) In another clause, the GTA sets out similar limitations during the launch of new APPLE products.

4.2.3. Marketing Limitation Clauses

(41) A further clause of the GTA provides that during the term of the agreement as well as for two years after its expiry, AMAZON may not, without APPLE's prior written consent, conduct marketing and advertising campaigns that:

- specifically target customers who have purchased APPLE products from AMAZON; and
- encourage those consumers to switch from an APPLE product to a non-APPLE product; notwithstanding the possibility that AMAZON may run campaigns that may reach those consumers within broader audiences.

5. LEGAL ASSESSMENT

(42) It is common ground that AMAZON and APPLE are undertakings and the GTA and the 2018 ARA are agreements for the purposes of competition law, and it is therefore appropriate to analyse whether the clauses at issue constitute a restriction of competition.

(43) In this case, the GTA and the 2018 ARA have both vertical and horizontal elements:

- On the one hand, the two companies compete at both the manufacturing and distribution levels for certain products (horizontal element)[21];
- On the other hand, the GTA and the 2018 ARA are agreements authorising AMAZON to sell APPLE-branded products and regulating the conditions of sale and the relationship between the two companies (vertical element).

(44) If the vertical element prevails and the GTA and the 2018 ARA are to be considered as vertical agreements, the European Vertical Block Exemption Regulation (**VBER**)[22] may apply. It should be noted that, under the VBER, any conduct would be exempted provided that the following two conditions are met:

- The market shares of the parties in the respective markets for the purchase and sale of the contract goods are below 30% (Art. 3.1);
- There are no 'hardcore restriction' or 'excluded restriction' clauses (Art. 2.1, 4 and 5).

(45) In the present case, given that (i) for the purposes of the agreement, AMAZON and APPLE operate at different levels of the production and distribution chain; and (ii) both the GTA and the 2018 ARA relate, in general, to the conditions under which the parties may purchase, sell or resell certain contract goods or services, both the GTA and the 2018 ARA, taken as a whole, are considered to be vertical agreements.

(46) The following will explain why, despite the eminently vertical nature of these agreements, the VBER does not apply to the controversial clauses and why, even if it did (*quod non*), the exemption provided for therein would not apply either.

- Applicability of the VBER

[21] See paragraph 2 and footnote 2.

[22] Regulation 330/2010. The new 2022 VBER (Regulation (EU) 2022/720) repealed the previous version of the VBER (Regulation (EU) 330/2010), providing for a transitional period of one year to allow vertical agreements in force on 31 May 2022 that complied with the requirements of the 2010 VBER but did not yet meet the criteria of the 2022 VBER to adapt to the new regulation. At the time of the adoption of the decision (12 July 2023), the 2022 VBER was already fully in force as the transitional period had expired on 31 May 2023. In any case, the conclusions reached by the CNMC are the same irrespective of whether Regulation (EU) 2022/720 or Regulation (EU) 330/2010 is considered applicable.

(47) Although the GTA and the 2018 ARA constitute vertical agreements, not all the provisions relate to the conditions under which the parties may purchase, sell or resell certain contract goods or services.

(48) The provision of the VBER concerning "*the terms under which the parties may purchase, sell or resell certain goods or services* ", must be interpreted in the light of Paragraph 26 of the 2010 Guidelines on Vertical Restrictions[23]: " *the Block Exemption Regulation does not cover restrictions or obligations that do not relate to the conditions of purchase, sale and resale, such as an obligation preventing parties from carrying out independent research and development, which the parties may have included in an otherwise vertical agreement"*, so that such restrictions not covered by the regulation must be assessed on a case-by-case basis[24].

(49) In this case, the Brand Gating Clauses, the Advertising Clauses, and the Marketing Limitation Clauses are not related to the conditions of purchase, sale and resale of the goods or services. Therefore, these are clauses contained in a vertical agreement to which the VBER does not apply and which must be analysed on a case-by-case basis to determine whether they constitute an infringement of Article 1 of the LDC and/or Article 101 of the TFEU.

- Exemptions from the VBER

(50) However, even if for the sake of argument it were to be accepted that the VBER applies to the clauses under scrutiny (*quod non*), the exemption provided for in Article 2.1 would not be applicable to the present case for the following reasons:

- AMAZON and APPLE are (actual) competitors in manufacturing and distribution[25].

[23] Guidelines on Vertical Restraints (Text with EEA relevance) (2010/C 130/01).

[24] This same idea is better explained in paragraph 61 of the 2022 Guidelines on Vertical Restraints (they simply clarify what was already established in 2010, using the same example of a research and development clause): "*Regulation […] does not apply to vertical restraints that de not relate to the conditions under which goods or services may be purchased, sold or resold. Such restraints must therefore be assessed individually, namley, it is necessary to determine whether they fall within the scope of Article 101(1) of the Treaty and, if so, whether they fulfil the conditions of Article 101(3) of the Treaty. For example, Regulation […] does not apply to an obligation that prevents the parties from carrying out independent research and development, even though the parties may have included it in their vertical agreement […]*".

[25] According to Article 2(4) of Regulation (EU) 330/2010, the exemption provided for in Article 2(1) *"shall not apply to vertical agreements entered into between competing undertakings*".

- The market shares of AMAZON and APPLE are, in both cases, above 30% in their respective relevant markets (see above market shares).
- The dual distribution exception does not apply[26].

(51) In conclusion, given that, as explained above, the clauses at issue do not fall under the VBER (and, even if for the sake of argument it were accepted that the VBER applies, the clauses would not be covered by the exemption provided for therein), it should be analysed on a case-by-case basis whether the clauses at issue are restrictive of competition[27].

5.1. Brand Gating Clauses

5.1.1. Restriction by object

(52) Based on an analysis of their content, objectives and legal and economic context, the Brand Gating Clauses constitute a restriction by object.

(53) The agreement disallowed hundreds of resellers (which went from more than 1,000 to less than 15, including AMAZON itself) to sell APPLE-branded products on the AMAZON Spain website, which is the main channel for online purchases of electronic products in Spain. Competition between resellers of APPLE products (intra-brand competition) in that channel is therefore restricted.

5.1.1.1. Contents

(54) The Brand Gating clauses result in:

a. discriminatory access to the main e-commerce platform in Spain

(55) Article 1.1.d) of the LDC (Spanish Competition Act) establishes that "*the application, in trading or service relationships, of dissimilar conditions to equivalent transactions, thereby placing some competitors at a disadvantage compared with others*" is prohibited. Similarly, Article 101.d) of the TFEU prohibits "*applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage*".

[26] Article 2(4)(a) of the regulation provides that the exemption *"shall apply where competing undertakings enter into a non-reciprocal vertical agreement and (a) the supplier is a manufacturer and a distributor of goods, while the **buyer** is a distributor and **not a competing undertaking at the manufacturing level**"* (emphasis added).

[27] It should be stressed that the conclusions would be the same if the new rules, i.e. Regulation (EU) 720/2022 and its guidelines, were to be applied.

(56) In connection with the above and as previously described, by their conduct, both companies applied:

- Dissimilar conditions (some resellers can access AMAZON and others cannot).
- To equivalent transactions: (i) until November 2021, many official resellers (as well as those that remained authorised), together with other non-official resellers, ceased to be authorised to sell APPLE-branded products on AMAZON's website in Spain; and (ii) since November 2021, NARs (resellers that sell original products without having a direct contractual relationship with APPLE and that boost competition on AMAZON's website the most) remain unauthorised.
- With other trading parties (resellers of APPLE products who have ceased to be authorised to use the AMAZON Spain website and those who are still authorised to do so). [28][29]

  It should be pointed out in this regard that it was APPLE itself that chose an open distribution system, in which NARs operate legitimately as resellers of APPLE. Moreover, there is evidence that APPLE encourages its wholesalers to supply their products to NARs.
- Thereby placing some competitors (i.e. resellers not authorised to use the AMAZON Spain website) at a disadvantage compared to others (i.e. authorised resellers).

(57) In addition, both APPLE and AMAZON have discriminated against some resellers vis-à-vis others by restricting access and thus the number of resellers of APPLE products that could access the AMAZON Spain website. This restriction was not based on objective, transparent, necessary, proportionate and justified grounds.

b. a limitation or control of the distribution of APPLE's products on the market

(58) Article 1.1.b) of the LDC prohibits "*the limitation or control of production, distribution, technical development or investment* ". Similarly, Article 101.b) of the TFEU stipulates that it is prohibited to "*limit or control production, markets, technical development, or investment* ".

(59) The Brand Gating Clauses also entail a limitation of distribution, insofar as they limit, by the mere existence of an agreement between AMAZON and APPLE to

[28] Specifically, APRs established in Member States other than those listed in the 2018 ARA, AARs and Retailers.

[29] APRs listed in the 2018 ARA.

this effect, the number of resellers of APPLE's products that can use AMAZON's online marketplace in Spain.

(60) In this regard, APPLE considers that, by qualifying the limitation derived from the Brand Gating Clauses as a restriction of competition by object, the CNMC ignored the principles established by the Court of Justice of the European Union (**CJEU**) in its judgment of 6 December 2017 on Case C-230/16 - Coty Germany (**COTY judgment**)[30]. According to APPLE, the doctrine laid down by the CJEU in that judgment is that limitations on the use of online marketplaces can never be considered restrictions of competition by object.

(61) However, what the CJEU actually concludes in that judgment is that Article 101 TFEU does not necessarily preclude, in a selective distribution system, a contractual clause between the manufacturer or supplier and its authorised distributors preventing the latter from using third-party platforms for the sale of the luxury goods covered by the distribution contract. This is so long as that prohibition is laid down uniformly, applied in a non-discriminatory manner, and proportionate to the objective pursued[31]. Having clarified the above, the conclusions of the COTY judgment regarding the possibility of limiting the use of online marketplaces are not applicable to the Brand Gating Clauses because of a number of fundamental differences between the two cases, of which the following should be highlighted:

- The Brand Gating Clauses are not part of a selective distribution system. APPLE opted for an open distribution system in which different types of distributors, including "non-authorised resellers" (NARs), operate with APPLE's approval. In fact, as stated above, APPLE encourages its wholesalers to supply APPLE products to these non-authorised resellers, thus benefiting from their activity. Therefore, unlike COTY, APPLE does not seek to ensure that its products are associated exclusively with certain authorised resellers who meet a number of objective requirements, in order

[30] Judgment of the CJEU of 6 December 2017 in case C-230/16, Coty Germany GmbH v Parfümerie Akzente GmbH, ECLI:EU:C:2017:941, (**COTY judgment**).

[31] Paragraph 58 of the Coty Judgment: "*Having regard to the foregoing considerations, the answer to the second question is that Article 101(1) TFEU must be interpreted as not precluding a contractual clause, such as that at issue in the main proceedings, which prohibits authorised distributors in a* ***selective distribution system*** *for* ***luxury goods*** *designed, primarily, topreserve the luxury image of those goods from using, in a discernable manner, third-party platforms for the internet sale of the contract goods, on condition that that clause has the objective of preserving the luxury image of those goods, that it is laid down uniformly and not applied in a discriminatory fashion, and that it is proportionate in the light of the objective pursued, these being matters to be determined by the referring court*". (Emphasis and underlining added).

to protect its brand image. This in fact justifies that the limitation on distribution implied by any selective distribution system is compatible with Article 101 of the TFEU.

- The Brand Gating Clauses are not included in the distribution agreements between APPLE and its resellers, but are inserted in the contractual relationship with a third party — AMAZON — as the operator of its online marketplace. It is one thing for the supplier to limit its resellers' freedom of action within the framework of its distribution relationship with them; it is quite another for the restrictions on the resellers to be imposed on the basis of an agreement with a third party.
- Since, unlike in COTY, APPLE has a direct contractual relationship with AMAZON, it can therefore require the online marketplace operator itself to guarantee certain quality and presentation requirements for its products, without the need to exclude most resellers of APPLE products from AMAZON[32].
- Unlike COTY, APPLE has no objection to its products being sold on a generic online marketplace such as AMAZON, which sells all kinds of products, as APPLE and some of its authorised resellers continue to sell through this platform[33].

(62) Thus, the COTY judgment not only does not support APPLE's argument but also reinforces the conclusions of the CNMC on the qualification of the Brand Gating Clauses as a restriction of competition by object. The same conclusion can be drawn from the new 2022 Guidelines on Vertical Restraints[34], which state in paragraph 338 that:

> *"Restrictions on the use of online marketplaces are often agreed in selective distribution systems. Section 4.6.2 sets out the criteria according to which a selective distribution system may fall outside the scope of Article 101(1) of the Treaty. In instances where the supplier does not enter into an agreement with*

[32] In order to reach the conclusion that the restrictions on the online market could be justified in the case at issue in the COTY judgment, the CJEU states in paragraph 56 that *"In particular, given the absence of any contractual relationship between the supplier and the third-party platforms enabling that supplier to require those platforms to comply with the quality criteria which it has imposed on its authorised distributors, the authorisation given to those distributors to use such platforms subject to their compliance with pre-defined quality conditions cannot be regarded as being as effective as the prohibition at issue in the main proceedings*" (emphasis added).

[33] In this regard, the CJEU states in paragraph 50 of the COTY Judgment that: "*Given that those platforms constitute a sales channel for goods of all kinds, the fact that luxury goods are not sold via such platforms and that their sale online is carried out solely in the online shops of authorised distributors contributes to that luxury image among consumers and thus to the preservation of one of the main characteristics of the goods sought by consumers*".

[34] Guidelines on Vertical Restraints (OJ C 248, 30.6.2022, p. 1-85).

> *the online marketplace, the supplier may be unable to verify that the online marketplace meets the conditions that its authorised distributors must fulfil for the sale of the contract goods or services. In that case, a restriction or ban on the use of online marketplaces may be appropriate and not go beyond what is necessary to preserve the quality and ensure the proper use of the contract goods or services.* ***However, in cases where a supplier appoints the operator of an online marketplace as a member of its selective distribution system, or where it restricts the use of online marketplaces by some authorised distributors but not others, or where it restricts the use of an online marketplace, but uses that online marketplace itself to sell the contract goods or services, restrictions on the use of those online marketplaces are unlikely to fulfil the conditions of appropriateness and proportionality****".* (Emphasis and underlining added).

(63) It should be noted precisely that in the present case, APPLE has appointed AMAZON as an authorised distributor and restricts the use of that online marketplace to certain resellers, but not to others.

c. a partitioning of the internal market

(64) It is settled case-law of the European Courts that "*agreements which are aimed at partitioning national markets according to national borders or which make the interpenetration of national markets more difficult must be regarded, in principle, as agreements whose object is to restrict competition within the meaning of Article 101(1) TFE1*"[35] (emphasis added).

(65) As a consequence of the Brand Gating Clauses, the following have been deprived of the possibility to use AMAZON's websites in Europe and, specifically, in Spain: (i) some official resellers (on the one hand, APRs established in countries other than the 2018 ARA listings, and, on the other hand, AARs and Retailers regardless of the Member State in which they are established)[36]; and (ii) APPLE's unofficial resellers (NARs), regardless of the Member State in which they are established[37].

(66) Thus, the agreements in question restrict trade between EU Member States, affecting cross-border trade and partitioning the internal market.

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[35] See case C-403/08 and C-429/08 - *Premier League e altri*, EU:C:2011:631, paragraph 139.

[36] From 31 October 2018 to 16 November 2021.

[37] From 31 October 2018 to the present day.

5.1.1.2. Objectives

(67) In the case of APPLE, there are two main objectives:

- to tighten its control over the distribution of its products on AMAZON by applying restrictions which are compatible with competition law only in the framework of a duly justified selective distribution system (despite the fact that, as mentioned above, APPLE products are distributed in an open distribution system);
- to reduce the costs of controlling the sale of its products on AMAZON's website (disallowing all but a few sellers was more convenient and cheaper than investing effort, time and money in implementing other policies, such as Brand Registry, a tool offered by AMAZON to limit counterfeiting).

(68) In the case of AMAZON, the objective behind agreeing to include these clauses was to facilitate negotiations to obtain better conditions as an APPLE reseller through the direct supply of the entire catalogue of APPLE products. Moreover, AMAZON sought to eventually upgrade its reseller status by reaching certain sales thresholds which it expected to achieve by concentrating sales in its own channel as a result of the expulsion of the bulk of APPLE resellers that had been operating there.

5.1.1.3. Legal and economic context

(69) AMAZON's market shares in the markets in which it operates, the fact that APPLE products are the most demanded products in their category — APPLE is the leading manufacturer of electronic products by market share in terms of value — , and the fact that AMAZON acknowledges the leadership of APPLE-branded products and APPLE itself on AMAZON's website, lead to the conclusion that both AMAZON and APPLE are undertakings whose conduct is capable of restricting and/or affecting competition on the market.

5.1.2. Effects on the market

(70) Although for the above reasons the Brand Gating Clauses are considered to constitute a restriction of competition by object, which makes it unnecessary to examine the resulting restrictive effects on the market in order to conclude that

there is an infringement of competition[38], they have also produced effects on the market which are analysed in detail in the decision.

(71) In particular, the following effects are considered to have occurred:

- reduction in the number of sellers;
- NARs lost an important sales channel;
- concentration of sales in AMAZON;
- partitioning of the internal market;
- increase in the relative prices paid by consumers for the purchase of APPLE-branded products on the AMAZON Spain website.

5.2. Advertising Clauses

(72) Based on the analysis of their content, objectives and legal and economic context, the Advertising Clauses constitute a restriction by object.

5.2.1.1. Contents

(73) The Advertising Clauses limit and restrict: (i) in general, the competition that other brands may exercise in relation to paid advertising on the AMAZON Spain website in the top banner ad and in the first two sponsored product slots on the results page when searching for an APPLE-branded product (or in any other advertising space in the top ten search results); and (ii) in particular, the competition that specific brands chosen by APPLE may exercise in relation to paid advertising on the AMAZON Spain website on the first results page[39], on the detail pages and on the cart and checkout pages[40]; both affecting the online retail sale of electronic products in Spain.

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[38] Judgments of the CJEU of 26 November 2015 in case C 345/14 Maxima Latvija, paragraphs 16 and 17, and of 20 January 2016, in case C-373/14 Toshiba Corporation v Commission, paragraphs 24 and 25.

[39] 30% of consumers only see the results on the first page. Therefore, if a product appears on page 3, it is virtually invisible to almost a third of shoppers; see Slide 29 of the Amazon Shopper Report 2022 (available on the ICEX website: emarketservices.es/emarketservices/es/menu-principal/actualizate/noticias/amazon-shopper-report-new2022916695.html)

[40] In the case of a new product launch, the Advertising Clauses limit and restrict the competition that certain brands chosen by APPLE can exercise with regard to paid advertising on the AMAZON Spain website and on the detail pages and the Apple Store pages on AMAZON's

(74) The Advertising Clauses, therefore, result in:

- on the one hand, consumers searching for a particular APPLE product on AMAZON's website are prevented from seeing advertisements for products of competing brands in the cases described above, preventing or hindering their access to information about alternative competing products, thereby limiting their ability to make informed choices;
- on the other hand, a limitation on the ability of other brands to advertise to potential consumers when they are searching for the products concerned. These brands must, in addition, withstand a competitive constraint that APPLE is not exposed to.

(75) The Advertising Clauses therefore, by their very nature, restrict inter-brand competition between the APPLE brand and other competing brands.

5.2.1.2. Objectives

(76) In APPLE's case, the objective was to limit the competition that other brands could exert on the company, whereas AMAZON accepted this clause in order to obtain better supply conditions as APPLE's distributor.

5.2.1.3. Legal and economic context

(77) In addition to what has already been noted about the relevance of APPLE and AMAZON in addressing the context of the Brand Gating Clauses — which is equally applicable to the Advertising Clauses — the role of AMAZON in the online advertising sector in Spain is very significant, and has been steadily increasing in recent years[41].

5.3. Marketing Limitation Clauses

(78) Based on the analysis of their content, objectives and legal and economic context, the Marketing Limitations Clauses also constitute a restriction by object.

website, as well as in the search results shown to customers when they search for APPLE products using keywords relating to APPLE-branded products as a search term.

[41] See the study on online advertising by the CNMC.

5.3.1.1. Contents

(79) The Marketing Limitation Clauses provide that during the term of the GTA and for two years thereafter, AMAZON may not, without APPLE's prior written consent, conduct marketing and advertising campaigns that:

- specifically target customers who have purchased APPLE products from AMAZON; and
- encourage those consumers to switch from an APPLE product to a non-APPLE product; notwithstanding the possibility that AMAZON may run campaigns that may reach those consumers within broader audiences.

(80) Therefore, the above agreements operate similarly to a non-compete clause[42] which might be justified during the term of the GTA, but in no case for two years after its expiry.

(81) While this provision does not prevent AMAZON from targeting such campaigns to wider audiences that may include customers who have purchased APPLE products, this is so long as the intention of the campaign is not to proactively and specifically encourage a switch from an APPLE-branded product to a product from a competing brand.

(82) Thus, both companies artificially restrict competition in an online sales channel for electronic products with a very high market share in Spain such as AMAZON's website, by limiting AMAZON's ability to act autonomously and freely in the market, as it actively offers APPLE products to APPLE customers for a period of two years after the expiry of the agreement.

5.3.1.2. Objectives

(83) APPLE's objective was to limit the competition that other brands could exercise on its products, whereas AMAZON accepted this clause in order to negotiate better supply conditions as APPLE's distributor.

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[42] Article 1.1.(d) of Regulation 330/2010 defines non-compete clauses as: " *any direct or indirect obligation causing the buyer not to manufacture, purchase, sell or resell goods or services which compete with the contract goods or services, or any direct or indirect obligation on the buyer to purchase from the supplier or from another undertaking designated by the supplier more than 80% of the buyer's total purchases of the contract goods or services and their substitutes on the relevant market, calculated on the basis of the value or, where such is standard industry practice, the volume of its purchases in the preceding calendar year*" (as well as article 1.1.(f) of Regulation 2022/720).

5.3.1.3. Legal and economic context

(84) See the context of the Brand Gating and Advertising Clauses, which is equally applicable to the Marketing Limitation Clauses.

5.4. Conclusion of the legal assessment

(85) For all the above reasons, the Brand Gating Clauses, the Advertising Clauses and the Marketing Restrictions Clauses are considered to constitute a single and continuous infringement[43] of Article 1 LDC and Article 101 TFEU, with the object (and in the case of the Brand Gating Clauses, also the effect) of reducing, restricting and/or limiting intra-brand and inter-brand competition of APPLE-branded products on the AMAZON Spain website.

6. OTHER CONSIDERATIONS

6.1. Impact on the national territory and on trade between Member States

(86) The concerned agreements (i.e. the Brand Gating Clauses, the Advertising Clauses and the Marketing Limitation Clauses) affect Spain's entire national territory — insofar as AMAZON's website in Spain has a national scope — and cross-border trade.

6.2. Alleged efficiencies and legitimate objectives justifying the restrictions

(87) On the one hand, AMAZON claims, inter alia, that the agreement has generated efficiencies that have benefited end-customers and sellers by: (i) increasing the availability of APPLE products on www.amazon.es by improving supply conditions; (ii) increasing sales and improving AMAZON's reputation; and (iii) improving the presentation of APPLE's products on AMAZON's website.

(88) APPLE, for its part, argues that the agreement is pro-competitive as it addresses 'very serious counterfeiting and security issues' regarding APPLE products on AMAZON's online marketplace as well as improving the presentation and shopping experience of these products on AMAZON's online marketplace and fighting free-riding by other brands that may seek to take advantage of the efforts and investments made by APPLE to build its brand image.

[43] See next section for explanation on this point.

(89) **However, in relation to the improvement of the conditions of supply of APPLE products to AMAZON** (direct supply of the full product catalogue), the CNMC considers that it was by no means indispensable to expel the vast majority of APPLE resellers from AMAZON's online marketplace. It should be noted that, initially, all but **[10-15]** and AMAZON itself were expelled and that NARs, which before the entry into force of the restrictions at issue accounted for more than 90% of the sales of APPLE products on AMAZON, are still not allowed to operate on AMAZON. This is evidenced by AMAZON's initial attempts to include more resellers, or by the temporary activations of resellers that were discussed by the parties during the pandemic.

(90) Advertising restrictions or the limitation of AMAZON's ability to run active campaigns for products from other brands as alternatives to APPLE's products were also not necessary to produce this effect. In this respect, there is no intrinsic causal link between the Exclusion Clauses, the Advertising Clauses or the Marketing Restrictions Clauses and the increased and improved conditions for the supply of APPLE products to AMAZON as an authorised distributor of this brand.

(91) As regards **the increase in sales of APPLE products on AMAZON's website in Spain, that effect derives from the direct supply of the full catalogue of APPLE products to AMAZON, to which reference has just been made, and not from the restrictions at issue.** This is to the extent that if the Brand Gating Clauses had been agreed upon without the aforementioned direct supply of the full catalogue of APPLE products to AMAZON, as of today, there would be hardly any sales of APPLE-branded products on the AMAZON Spain website. The above is because the main sellers in this channel were NARs, which were expelled from the online market as a result of the Brand Gating Clauses. Therefore, AMAZON would have remained a minority distributor of APPLE.

(92) In relation to **the improvement of the presentation and shopping experience of APPLE products on AMAZON**, the clauses in question were also not necessary to achieve these objectives. On the one hand, there were different measures available to achieve this effect without the need to resort to the Brand Gating Clauses, as can be inferred from the following examples:

- According to internal AMAZON documents, the improved product presentation deployed for APPLE following the agreements could be made available to any operator without the need for any policy expelling sellers from its platform;

- The GTA included new stipulations on product presentation which are in no way linked to the Brand Gating Clauses[44];
- APPLE itself stated that the agreement, and generally any ARA, contains several provisions and mechanisms aimed at preserving the quality, the brand image and the consumer experience of APPLE products other than the limitations at issue[45] (emphasis added).

(93) As regards the limitations arising from the Advertising Clauses, the CNMC considers that not only do they not improve the shopping experience of end customers to such an extent that they can be considered objectively justified, but rather they worsen it in that they deprive such customers of information on alternative products that could better satisfy their preferences without hindering their browsing.

(94) Regarding the **fight against counterfeit** APPLE products on AMAZON, the CNMC considers that it does not justify the adoption of the Brand Gating Clauses for a number of reasons.

(95) On the one hand, APPLE has not been able to prove that excluding the majority of resellers of its products on AMAZON was primarily for this purpose. On the other hand, the CNMC has obtained an internal AMAZON document containing answers to potential questions from third-party sellers concerning the adoption of the Brand Gating Clauses. This document denies that the exclusion of resellers was motivated by the problem of counterfeiting.

(96) Furthermore, according to information provided by AMAZON itself, the amount of APPLE counterfeit products was very low. Only **[0-1]**% of APPLE products sold on AMAZON were reported as counterfeit and the problem almost exclusively concerned low-value accessories. The CNMC considers that there were also other less harmful measures to combat counterfeiting such as the use of certain tools offered by AMAZON (the so-called “Brand Registry”) which APPLE had decided not to use appropriately or the adoption of solutions focused on the products most affected by this issue: accessories.

(97) This is not refuted by APPLE's claims that recall notifications decreased significantly after the introduction of the Brand Gating Clauses. This is perfectly

[44] See paragraph 188 of the non-confidential version of AMAZON's submissions to the SO (page 8392): “*On the other hand, the Vertical Agreement […]* ***also stipulated mutual commitments*** *regarding the quality of the products, including a* ***better presentation of product descriptions on detail pages***”. (emphasis added).

[45] See paragraph 71 of the non-confidential version of APPLE's submissions to the SO.

logical in view of the fact that the number of APPLE resellers on AMAZON was reduced by about [90-100]% and sales were massively concentrated on a single reseller, namely AMAZON, as an authorised distributor of APPLE. The effectiveness of the measure is not in question, but rather its real objectives and its appropriateness and proportionality to the alleged purpose of combating counterfeiting.

(98) With regard to the alleged **fight against free-riding by other brands,** the CNMC does not agree with APPLE's position either, as this would mean, among other things, agreeing that all advertising of competing brands can be restricted when a consumer searches for a particular brand (whatever the means used: a search engine, banners on websites, comparison sites, etc.) on the basis that it involves a form of free riding**.**

(99) All these considerations also prevent the restrictions analysed from being considered to meet the requirements of the individual exemption provided for in Article 101.3 TFEU and Article 1.3 of the Spanish Competition Act, since the condition of indispensability is not satisfied. Similarly, it must be ruled out that the Brand Gating, Advertising and Marketing Limitation Clauses could be classified as “ancillary restrictions” to the main lawful distribution relationship between APPLE and AMAZON regulated by the GTA and the 2018 ARA.

6.3. A single and continuous infringement and its duration

(100) In this case, the conditions set out in the case-law to qualify the clauses under investigation as a single and continuous infringement are fulfilled:

- a plurality of actions or omissions infringing Article 1 LDC and Article 101 TFEU (the Brand Gating, Advertising and Marketing Limitation Clauses), which were adopted on the same occasion (the signature of the GTA and the 2018 ARA);
- an overall plan, consisting of altering the dynamics of the sale of APPLE products on AMAZON by limiting intra-brand competition (between resellers of APPLE products) and inter-brand competition (between APPLE products and those of other brands);
- the companies' intentional contribution to that plan;
- awareness of the infringing behaviour of the other participants

(101) In this respect, the fact that the companies might have diverging interests (as is usually the case in vertical relationships) and that the anti-competitive objectives were pursued mainly by APPLE or at APPLE's initiative does not preclude ruling

out AMAZON's participation in the single infringement, as the latter was aware of the agreed restrictions and intentionally contributed to them in order to satisfy its own interests.

(102) Therefore, the CNMC considers that the three clauses concerned must be classified, as a whole, as a single and continuous infringement which, in view of their content, objectives and economic and legal context, is aimed at restricting competition in the market for the online retail sale of electronic products in Spain. This is regardless of the fact that each of the three clauses mentioned, considered individually, may constitute an autonomous infringement of Article 1 LDC and/or Article 101 TFEU[46] (i.e. they are complementary to each other in the sense that each of them contributes to or assists, through their interaction, in the overall anti-competitive effects sought by the perpetrators and that, moreover, the subjects are the same and during the same period of time).

(103) As regards the duration of the infringement, both the GTA and the 2018 ARA entered into force on the day they were signed — 31 October 2018 — and were still in force at the end of the investigation.

6.4. Culpability and individual liability

(104) The anti-competitive conduct described above is considered to be attributable to the different AMAZON and APPLE companies fined since at least 31 October 2018, for their active participation as perpetrators of a single and continuous infringement consisting in the adoption and implementation of the Brand Gating Clauses, the Advertising Clauses and the Marketing Limitation Clauses. These companies actively participated as signatories to the agreements containing the clauses at issue and/or in their implementation.

(105) In this regard, AMAZON's arguments aimed at excluding its liability for the infringement on the grounds that APPLE is solely responsible for its distribution system and that in matters of vertical restraints, distributors are not usually investigated or sanctioned, but only manufacturers or suppliers, as they are the

[46] See Judgment of the CJEU in case C-699/19 - Quanta Storage Inc (ECLI:EU:C:2022:483), paragraph 59: "*The concept of a 'single and continuous infringement' presupposes a complex of practices that may also constitute, in themselves, an infringement of Article 101(1) TFEU. While a complex of practices may be legally characterised [...] as a single and continuous infringement, it cannot be deduced therefrom that each of those practices must, in itself and taken in isolation, necessarily be characterised as a separate infringement of that provision. In order to do so, the Commission must go on to identify and legally characterise as such each of these practices and, next, adduce proof of the involvement of the undertaking concerned to which these practices are imputed*".

ones who impose their terms and conditions, cannot be accepted. This is only true where the participants are small or medium-sized undertakings or where there is a clear asymmetry between the parties such that one of them lacks any bargaining power, which is not the case here. Moreover, AMAZON is not involved in the contractual relationship at issue merely as a distributor for APPLE, but also as the operator of its online marketplace, and the agreed restrictions affect other undertakings.

6.5. Fines imposed

(106) The CNMC has concluded that the conduct in question constitutes a serious infringement of competition law, which means that the infringing companies may be fined up to 5% of their total worldwide turnover in the financial year immediately preceding the year in which the fine is imposed. In view of the gravity of the infringement and the specific participation of the different undertakings concerned, the CNMC has decided to impose the following fines:

Company	Fine
Apple Distribution International, Ltd.	128,640,000
Apple, Inc.	15,000,000
TOTAL APPLE	**143,640,000**
Amazon Services Europe S.À.R.L.	2,000,000
Amazon Europe Core S.À.R.L.	1,000,000
Amazon EU S.À.R.L;	37,510,000
Amazon.com Services, Inc.	10,000,000
TOTAL AMAZON	**50,510,000**
TOTAL APPLE + AMAZON	**194,150,000**

6.6. Application of the ban on contracting with the public sector

(107) Having established the existence of a serious infringement in terms of distortion of competition, the CNMC considers that it is appropriate to declare the ban on contracting pursuant to Article 71.1.b) of Law 9/2017, of 8 November 2017, on Public Sector Contracts (LCSP as per its acronym in Spanish), without prejudice to the possible exemption from its enforcement provided for in Article 72.5 of the same law. Given that the resolution does not establish the duration and scope of the ban on contracting, these must be determined by means of a procedure carried out in accordance with Article 72.2 of the LCSP. To this end, it was agreed to send a copy of the decision to the State Public Procurement Advisory Board.