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Decision 20-D-04 of 16 March 2020 regarding practices implemented in the Apple products distribution sector

The *Autorité de la concurrence* (section V),

Considering the letter registered on 12 April 2012 under numbers 12/0027 F and 12/0028 M, by which eBizcuss.com referred to the *Autorité de la concurrence* practices employed in the Apple products distribution sector and requested interim measures on the basis of Article L. 464-1 of the French Code of Commercial Law (*Code de commerce*);

Considering Decision 12-C-16 of 23 July 2012 by which the President of the *Autorité de la concurrence* formally acknowledged the withdrawal by eBizcuss.com of its request for interim measures;

Considering the Treaty on the Functioning of the European Union, and particularly the first paragraph of Article 101;

Considering Book IV of the French Code of Commercial Law (*Code de commerce*) and particularly Articles L. 420-1 and L. 420-2;

Considering the decisions on business secrecy 12-DSA-367 of 12 November 2012, 14-DSA-250 of 15 September 2014, 15-DSA-24 of 29 January 2015, 15-DSA-265 of 20 August 2015, 15-DSA-296 of 26 August 2015, 16-DSA-01 of 6 January 2016, 16-DSA-16 of 3 February 2016, 16-DSA-77 of 30 March 2016, 16-DSA-81 of 5 April 2016, 16-DSA-85 of 5 April 2016, 16-DSA-86 of 8 April 2016, 16-DSA-88 of 8 April 2016, 16-DSA-94 of 15 April 2016, 16-DSA-96 of 18 April 2016, 16-DSA-97 of 18 April 2016, 16-DSA-101 of 25 April 2016, 16-DSA-150 of 17 June 2016, 16-DSA-151 of 17 June 2016, 16-DSA-152 of 21 June 2016, 16-DSA-154 of 22 June 2016, 16-DSA-157 of 30 June 2016, 16-DSA-161 of 4 July 2016, 16-DSA-181 of 11 July 2016, 16-DSA-183 of 12 July 2016, 16-DSA-184 of 13 July 2016, 16-DSA-197 of 22 July 2016, 16-DSA-211 of 5 August 2016, 16-DSA-260 of 26 August 2016, 16-DSA-310 of 3 October 2016, 16-DSA-314 of 4 October 2016, 16-DSA-318 of 5 October 2016, 16-DSA-329 of 10 October 2016, 17-DSA-020 of 18 January 2017, 17-DSA-029 of 24 January 2017, 17-DSA-180 of 26 April 2017, 17-DSA-488 of 14 November 2017, 17-DSA-505 of 22 November 2017, 17-DSA-506 of 22 November 2017, 17-DSA-538 of 11 December 2017, 18-DECR-023 of 15 January 2018, 18-DSA-040 of 24 January 2018, 18-DSA-049 of 9 February 2018, 18-DSA-056 of 14 February 2018, 18-DSA-256 of 6 August 2018, 18-DEC-258 of 7 August 2018, 18-DEC-261 of 7 August 2018, 18-DSA-263 of 16 August 2018, 18-DEC-291 of 10 September 2018, 18-DEC-292 of 13 September 2018, 18-DEC-296 of 14 September 2018, 18-DEC-421 of 26 November

2018, 19-DEC-026 of 15 January 2019, 19-DSA-087 of 7 March 2019, 19-DSA-088 of 7 March 2019, 19-DSADEC-091 of 14 March 2019, 19-DEC-223 of 25 June 2019, 19-DEC-224 of 25 June 2019, 19-DEC-228 of 25 June 2019, 19-DEC-271 of 18 July 2019, 19-DSADEC-521 of 24 September 2019, 19-DSA-518 of 24 September 2019, 19-DSA-519 of 24 September 2019, 19-DSA-529 of 25 September 2019;

Considering the observations submitted by the companies eBizcuss.com, Apple France SARL, Apple Sales International, Apple Distribution International, Apple Europe Limited, Apple Inc., Apple Operations Europe, Apple Operations International, Tech Data France SAS, Tech Data France Holding, Tech Data BV, Tech Data Corp., Ingram Micro SAS, Ingram Micro Europe BVBA, Ingram Micro Inc. and the representative of the Minister of the Economy;

Considering the other evidence of the case;

The case officers (*rapporteurs*), the Deputy General Rapporteur, the representatives of the companies eBizcuss.com, Apple France SARL, Apple Sales International, Apple Distribution International, Apple Europe Limited, Apple Inc., Apple Operations Europe, Apple Operations International, Tech Data France SAS, Tech Data France Holding, Tech Data BV, Tech Data Corp., Ingram Micro SAS, Ingram Micro Europe BVBA, Ingram Micro Inc. and the representative of the Minister of the Economy having been heard at the hearing with the *Autorité de la concurrence* on 15 October 2019,

Adopts the following decision:

Summary¹

Having received on 12 April 2012 a request for interim measures and a request for a case on the merits from a distributor with APR (Apple Premium Reseller) status, the company eBizcuss.com, the Autorité de la concurrence has fined the Apple group, consisting of a number of companies, hereinafter Apple, for employing three anticompetitive practices within its distribution network for Apple electronic products, excluding the iPhone, in France. The first of these practices was a restriction of customers implemented with its two approved wholesalers; the second was a vertical agreement on the retail prices of its APR retailers; and the third was an abuse of a state of economic dependence at the expense of these retailers.

This decision to impose fines follows dawn raids at the headquarters of Apple and its wholesalers on 26 and 27 June 2013, the litigation for which ended in December 2017.

The Investigation Services used the thousands of documents seized to carry out a detailed analysis of the specialised distribution system set up by Apple in France.

Since the mid-1990s, Apple had chosen to supply part of the French market through two global electronics wholesalers, the companies Ingram Micro and Tech Data. These two wholesalers sell Apple products to “indirect” specialist distributors (or “resellers”), which can buy Apple products only from them, and to “direct” specialist distributors, which can buy either direct from Apple or from the two wholesalers. The direct distributors have the highest turnover for the brand’s products. These resellers are either Non-Authorized Resellers (NARs), Apple Authorised Resellers (AARs) or Apple Premium Resellers (APRs).

Alongside these specialist distributors, Apple supplies its products direct to major distributors, or “retailers” such as Fnac, Darty and Boulanger, and to large supermarkets such as Carrefour and Casino.

In late 2009, Apple decided to set up its own physical retail outlets, known as Apple Retail Stores (ARSs), in the most important catchment areas. They are also specialist resellers and are supplied direct by Apple. Apple also sells its products direct online to end consumers through its website, the Apple Online Store (AOS).

Although a manufacturer is free to organise its distribution system as it chooses, to define different retail channels, to choose wholesalers to supply some retailers and to supply other retailers direct, in doing so it must still comply with the competition law applicable in its sector. Thus, in law on anticompetitive practices, it is prohibited for a manufacturer that heads a network to undermine competition between its wholesalers by pre-allocating customers to them, or to have an agreement with its distributors on retail prices. Furthermore, if the manufacturer keeps its distributors in a situation of economic dependence on itself, it must ensure it does not abuse that dependence. In particular, it must not restrict their commercial freedom beyond tolerable limits, by placing them at a disadvantage in relation to its own internal distribution network.

Restriction of wholesalers’ clientele

¹ This summary is strictly for information purposes. Only the grounds of the decision listed below are binding.

The Autorité found that, from December 2005 to March 2013, Apple divided its products and customers between its two wholesalers in such a way that the resellers and retailers could no longer make them compete either with each other or with Apple. This was not justified by the need to manage product scarcity, which was the reason given by Apple for these practices. The Autorité considered that these product scarcities and shortages were mostly created by Apple itself. This constitutes an anticompetitive practice by object and it cannot be the subject of a block exemption; the harm it does is explained in the decision. Having examined the particular justifications given, the Autorité also considered that the conditions were not met to be able to grant the wholesalers and Apple an individual exemption.

This agreement, which is contrary to Article 101 of the TFEU and to Article L. 420-1 of the French Code of Commercial Law (Code de commerce), was facilitated by very frequent and detailed exchanges of information between Apple and its wholesalers, which enabled Apple to control and monitor compliance with the allocations it had previously made.

Vertical agreement on retail prices

The Autorité also sanctioned a vertical agreement on prices between Apple and its APR distributors. Apple advertised so-called “recommended” prices on numerous media, especially its website, accessible to end consumers. Moreover, the APRs interviewed during the investigation acknowledged that they strictly adhered to the prices indicated by Apple, and price collections included in the case file also attest to the fact that the distributors’ prices are completely aligned. Although only some said that the prices were fixed, the majority of APRs highlighted their “lack of room for manoeuvre” in setting prices, and the Autorité considered that many pieces of evidence in the case file demonstrated that these so-called “recommended” prices were in fact the prices Apple wanted the distributors to charge and that the distributors knew this, such that there was a joint intention of the parties. This constitutes an agreement on the basis of both Article 101 of the TFEU and Article L. 420-1 of the French Code of Commercial Law (Code de commerce).

The Autorité considered that this practice, which is by nature serious, had had an impact on Apple’s specialist distribution channel, since the prices offered by Apple’s internal network and the APRs were the same, and had led to the alignment of retail prices in at least half of the Apple products retail market; the investigation did not cover the other half of the market, covered by the retailers. The Autorité found that the services offered by the two channels concerned were the same in the eyes of consumers, but different from those offered by multi-brand resellers that do not specialise in Apple products and do not have such a good knowledge of the brand’s products.

Abuse of a state of economic dependence

The particular situation of the APRs in relation to Apple caused the Autorité to characterise them as being in a situation of economic dependence on Apple.

This situation of economic dependence, rarely observed in the decision-making practice of the Conseil de la concurrence or the Autorité de la concurrence, results from a complex web of numerous contractual clauses and practices.

The Autorité found in particular that the APR Agreement required APRs almost exclusively to sell Apple products and prohibited them, during the agreement term and for six months after the end of the agreement, regardless of the reason for its termination, from opening within the contractual territory, namely the whole of Europe, any shop specialising in the sale of a competing brand.

The lack of an alternative to the distribution of Apple products was highlighted by the APRs' statements: they all stressed that their customers were strongly attached to the Apple brand and that leaving Apple would cause the total loss of value of their business, because of irrecoverable investments and significant costs to refurbish stores and train staff, which would be impossible to recoup in the short term for operators already in a fragile situation.

There was found to have been an abuse of a state of dependence in this case because the Autorité noted that Apple had restricted the commercial freedom of the APR distributors by subjecting them to delays or supply shortages, due to the allocation system it had set up, whereas the network of ARSs and the AOS, owned by Apple, was supplied more regularly. These practices, which placed the APRs at a disadvantage in relation to the Apple Stores, which always received the Apple products promptly, constituted in themselves an abuse of a state of economic dependence by Apple. The Autorité also considered as abusive the practice of keeping the APRs in a state of uncertainty regarding prices of supply and commercial conditions, in view of Apple's discount policy towards them. Because they were dependent on Apple regarding the items and quantities that could be delivered to them and were left uncertain about the commercial conditions, they were not in a position to compete compared to the services to the ARSs.

The Autorité therefore found that the APRs had been deprived of the ability to compete with the ARSs for consumers and that the functioning of intrabrand competition, i.e. the competition that should normally exist between different distributors of a particular brand, had been affected. These practices had led to the weakening and even exclusion of certain APRs, such as eBizcuss.com.

Interbrand competition, i.e. the competition between different electronics brands, could also have been affected by these practices, since Apple's violation of the competition rules within its distribution network could have given it an undue and unfair competitive advantage over the networks set up by competing manufacturers. With the APRs, Apple benefited from a network in which the obligations characteristically placed on the distributors were similar to those placed on franchisees, without itself having to meet the obligations of a franchisor, thus depriving the distributors of the consideration attached to this form of distribution. Thanks to the APRs, Apple also had no need to set up ARSs throughout France, enabling it to focus on setting up ARSs in the most profitable areas.

The three practices penalised by the Autorité enabled Apple to control not only the 40% of retail sales of its products in France through its own network (ARSs and AOS) but also the 10% sold through its APRs, while appearing in theory to run a totally free and open distribution system that did not qualify contractually either as exclusive distribution, or as selective or franchise distribution.

The Autorité imposed fines of €1,241,050,609 for all these practices.

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I. Findings

1. The procedure (A), the sector concerned (B), the companies involved (C) and the practices identified (D) will be presented in turn.

A. PROCEDURE

2. By letter registered on 12 April 2012 under number 12/0027 F, the company eBizcuss.com (hereinafter “eBizcuss”) referred to the *Autorité de la concurrence* (hereinafter, “the *Autorité*”) practices employed in the Apple products distribution sector. This referral was accompanied, by means of a letter on the same day, by a request for interim measures, registered under number 12/0028 M.
3. According to the complainant, Apple had abused the state of economic dependence in which eBizcuss found itself in relation to Apple by employing a set of practices destined to exclude it from the market, and had also abused its dominant position by applying a discriminatory policy to its resellers, thereby giving preference to its own distribution network.
4. More specifically, eBizcuss accuses Apple of discriminatory practices in its supply policy, in its prohibition of internet presales, and in the application of the authorisation criteria and the conditions of sale. It also makes an objection against Apple for the practices diverting customers and parasitism, threats of retaliation, active restriction of sales, and finally, “margin squeeze”.
5. By letter of 11 July 2012, eBizcuss withdrew its request for interim measures.
6. On 26 and 27 June 2013, the *Autorité*’s staff carried out dawn raids, in particular at the premises of Apple, Ingram Micro and Tech Data, on the basis of an Ordinance of 17 June 2013 issued by the liberty and custody judge at the General Court of First Instance in Paris in accordance with Article L. 450-4 of the French Code of Commercial Law (*Code de commerce*).
7. The legality of the dawn raids was confirmed by an Ordinance of the First President of the Paris Court of Appeal on 15 April 2016 and none of the appeals lodged by Apple, Tech Data and Ingram Micro was successful².
8. On 19 October 2018, the *Autorité*’s General Rapporteur sent a statement of objections for practices prohibited under Article 101(1) of the Treaty on the Functioning of the European Union (hereinafter “TFEU”) and Articles L. 420-1 and L. 420-2, paragraph 2 of the French Code of Commercial law (*Code de commerce*):
 - to the companies Apple France SARL, Apple Sales International, Apple Distribution International, Apple Europe Limited, Apple Operations Europe, as perpetrators; and to the companies Apple Inc., Apple Operations Europe, Apple Operations International, as parent companies;

² French Supreme Court (*Cour de cassation*), Criminal Chamber, 22 March 2017, F 16-83467; Ibid., 20 December 2017 H 16-83.468; Ibid., 27 January 2017, J 16-83470 N; Ibid., 20 December 2017 G 16-83.469; Ibid., 21 September 2016, N 16-83473 F-N and K 16-83471 F-N.

- to the company Tech Data France SAS (hereinafter “Tech Data”), as perpetrator; and to the companies Tech Data France Holding, Tech Data BV and Tech Data Corp., as parent companies;
- to the company Ingram Micro SAS (hereinafter “Ingram Micro”), as perpetrator; and to the companies Ingram Micro Europe BVBA and Ingram Micro Inc, as parent companies.

B. SECTOR CONCERNED

1. PRODUCTS CONCERNED

9. The sector concerned is the manufacture and distribution of consumer IT and electronics products.
10. According to a study by the Xerfi institute in July 2010, “The consumer electronics industry is widely considered to be one of the most competitive industries. A large number of factors stimulate this competition: the products are highly substitutable and therefore difficult to differentiate, the leaders are large groups capable of withstanding long price wars, innovation is not long-lasting, and the barriers to exit and irrecoverable costs are very high. This is reflected in low margins for the companies analysed in the report”³.
11. Computing products can be split into six major categories: (i) PCs and tablets, (ii) smartphones and connected objects, (iii) components, (iv) peripherals and networking equipment, (v) consumables and (vi) software. In addition to computing hardware, a large number of merchants also offer other consumer electronics products such as mobile phones and audio equipment, video equipment, etc.⁴

2. SECTOR ORGANISATION

12. Upstream, the sector consists of the manufacturers of consumer electronics products and, downstream, it consists of the distributors of those products. Several wholesalers and purchasing offices are also involved at an intermediate stage.
13. There is a relatively large number of manufacturers. The majority are major international groups. The main manufacturers active in France are Apple, Dell and Hewlett-Packard (American), Lenovo (Chinese), Acer and Asus (Taiwanese), Toshiba (Japanese), Samsung (Korean) and Archos (French). According to Xerfi (2014), “The four largest PC manufacturers (Lenovo, HP, Dell, Acer) represented nearly 53% of global sales by volume in 2013”.
14. According to Xerfi (2010), French demand for PCs is mostly met by imports from Asia; little manufacturing takes place in France⁵.
15. The market shares of the main consumer electronics manufacturers in the French market in 2013 for all products were: Samsung (27.2% by volume and 24.7% by value), Apple (16.3%

³ Classification mark 944

⁴ Classification marks 34203 to 34333

⁵ Classification mark 1174

by volume and 24.7% by value), Sony (7.2% by volume and 6.6% by value) and HP (5.9% by volume and 8.5% by value); the positions of these manufacturers differ in the different product categories. In 2013 Apple was in fifth place for PC sales (with a market share of 6.4% by volume and 14.3% by value), behind HP, Acer, Asus and Dell. For sales of tablets, in 2013 Apple was in second place (with a market share of 25.6% by volume and 39.7% by value), behind Samsung. Finally, for sales of digital portable media players, in 2013 Apple was in first place with a market share of 25.2% by volume and 59.5% by value.

16. There are two main types of wholesalers in the consumer computing equipment and electronics sector in France.
17. The first type (in particular like Tech Data, Ingram Micro, SCC and Also France) act as intermediaries between the manufacturers and the retailers, which look after distribution to end users. They are known as high-volume wholesalers because they have logistics systems enabling them to handle large volumes⁶.
18. The second type (like Athena Global Services, Infolution, Infomil and Alliadis) also act as intermediaries between the manufacturers and the end users, but they generally offer a wide range of services associated with the sale of the equipment (training, installation, maintenance, etc.). These wholesalers are known as “value-added distributors”.
19. The commercial subsidiaries of several manufacturers are also active in the wholesale trade. This is the case in particular with HP, Asus, Dell, Acer and Toshiba⁷. It is also the case with Apple.
20. In October 2014, the Xerfi institute counted 3,327 companies active in this sector. But the number of establishments operating in the computing equipment wholesale trade fell by 8.6% between 2010 and 2015 to 2,656⁸.
21. The institute described the computing equipment wholesale sector as “moderately concentrated”⁹ and found that “the four main operators in the sector made less than a third of the turnover of the sample in 2012 [32.8%]. Alongside the leaders, the sector also has a very dense fabric of SMEs (more than 30 companies had sales of more than €50 million that year, and around 15 of those had sales of more than €100 million)”.
22. A study by the Xerfi institute in October 2016 stated: “The French computing equipment wholesale market is dominated by major foreign groups. The American group Tech Data is the leading group (...). In France, Tech Data is ahead of American group Ingram Micro (...). The Germano-Swiss group Also and the American group Arrow Electronics complete the top four. These foreign players are all multi-brand resellers offering hardware, software and associated services (consultancy, integration, finance solutions, pre-sales, etc.)”¹⁰.
23. Between 2009 and 2016, Tech Data’s market share rose from 15% to 18% by value. Ingram Micro’s market share rose from 8% to 10%, whereas the respective shares of the other wholesalers (Also, Arrow, Advéo, etc.) have never exceeded 5%¹¹.

⁶ Classification mark 34223

⁷ Classification marks 14882 and 34253

⁸ Classification marks 14875 and 34243

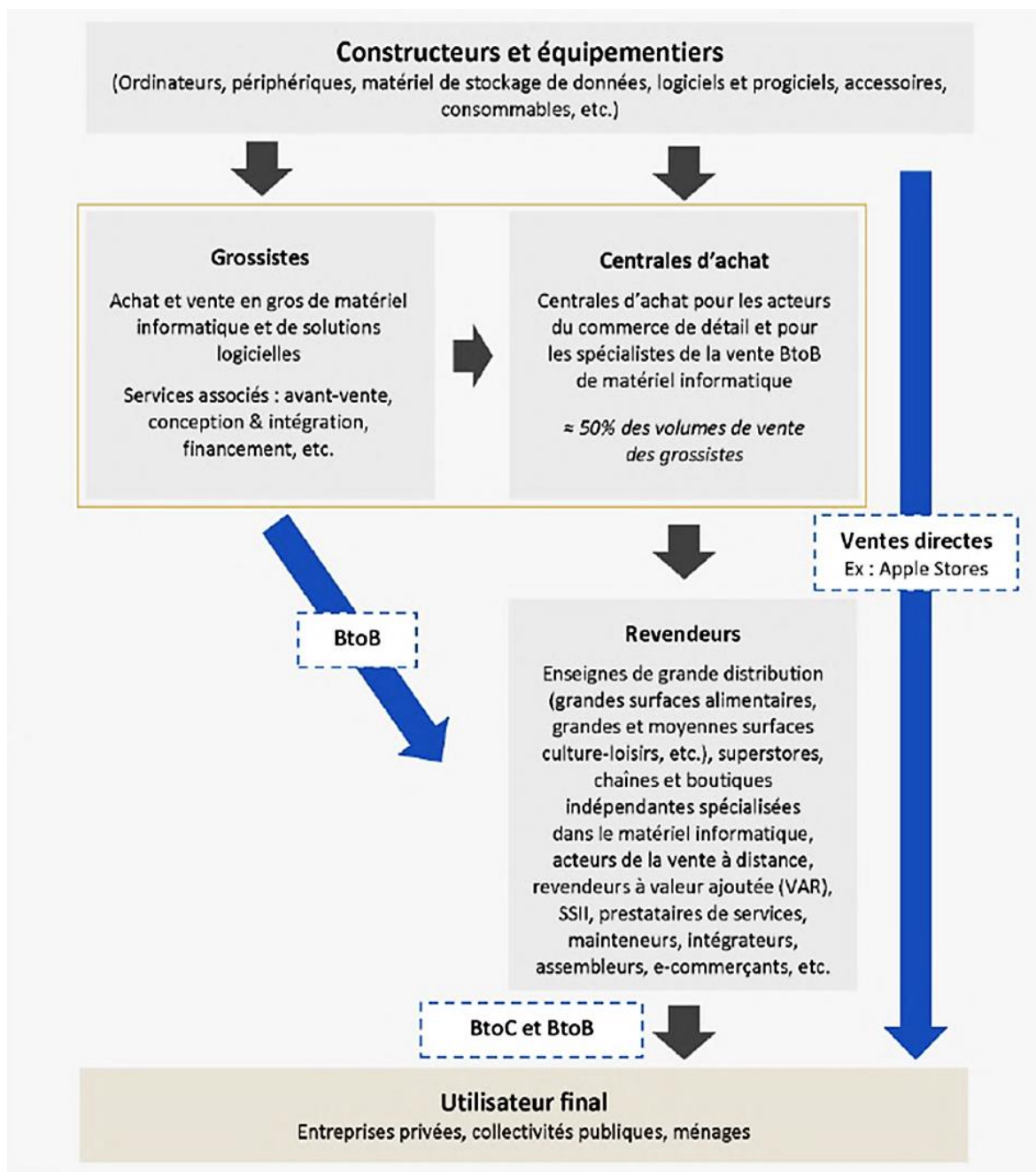
⁹ Classification mark 14872

¹⁰ Classification mark 34251

¹¹ Classification mark 34523

24. Finally, the retailers in the sector have a wide range of profiles. They may be mass-market retailers, independent shops specialising in computer hardware, distance selling companies and e-traders, integrators (which assemble different hardware and software solutions), or software engineering firms. It is therefore difficult to accurately assess the total number of resellers in the sector, but it would be in the thousands.
25. Among the retailers, there are multi-brand distributors (supermarkets and hypermarkets, multi-specialists such as Fnac, Darty, Boulanger, etc.) and specialists (such as the Apple Premium Resellers for the Apple brand¹²). Some manufacturers have also developed their own distribution networks. This is the case in particular with Apple, which markets its products through the Apple Stores and its website.
26. The sector presented above can be represented diagrammatically as follows:

¹² See paragraph 77 below.



Source: Xerfi 700 study, *Le négoce de matériel informatique*, October 2016, classification mark 34222

Constructeurs et équipementiers (Ordinateurs, périphériques, matériel de stockage de données, logiciels et progiciels, accessoires, consommables, etc.)	Manufacturers and OEMs (PCs, peripherals, data storage hardware, software and software packages, accessories, consumables, etc.)
Grossistes Achat et vente en gros de matériel informatique et de solutions logicielles Services associés : avant-vente, conception & intégration, financement, etc.	Wholesalers Bulk purchase and sale of computing equipment and software solutions Associated services: pre-sales, design & integration, finance, etc.

Centrales d'achat Centrales d'achat pour les acteurs du commerce de détail et pour les spécialistes de la vente BtoB de matériel informatique <i>= 50% des volumes de vente des grossistes</i>	Purchasing offices Purchasing offices for retailers and for specialists in BtoB sales of computing equipment <i>= 50% of wholesalers' sales volumes</i>
Ventes directes Ex : Apple Stores	Direct sales e.g. Apple Stores
BtoB	BtoB
Revendeurs Enseignes de grande distribution (grandes surfaces alimentaires, grandes et moyennes surfaces culture-loisirs, etc.), superstores, chaînes et boutiques indépendantes spécialisées dans le matériel informatique, acteurs de la vente à distance, revendeurs à valeur ajoutée (VAR), SSII, prestataires de services, mainteneurs, intégrateurs, assembleurs, e-commerçants, etc.	Resellers Mass-market retailers (major supermarkets, leisure superstores, etc.), superstores, chains and independent shops specialising in computing, distance selling outfits, value-added resellers (VARs), software engineering firms, service providers, maintainers, system integrators, assemblers, e-traders, etc.
BtoC et BtoB	BtoC and BtoB
Utilisateur final Entreprises privées, collectivités publiques, ménages	End user Private companies, public sector bodies, households

C. COMPANIES CONCERNED

1. APPLE GROUP

27. The Apple group (Apple Inc. and its subsidiaries, collectively the "Apple group") designs, manufactures and markets mobile media and communication devices, PCs and portable music players, and sells a range of software, services and peripherals, network solutions, digital content and third party applications related to these products.
28. The Apple group's products and services include in particular the iPod (digital portable media player), the Mac (desktop PC), the MacBook (laptop PC), the iPhone (smartphone), the iPad (digital tablet), and the Apple TV (digital television terminal), as well as a range of accessories, services and media¹³. The Apple group also sells and distributes digital content and applications through the iTunes Store, the App Store, the iBooks Store and the Mac App Store. In addition, Apple sells a range of third-party products compatible with the iPhone, iPad, Mac and iPod, including software apps and miscellaneous accessories through its retail and online shops¹⁴.

¹³ Classification mark 14179

¹⁴ Classification mark 14450

29. The Apple group, which operates worldwide, has a diverse customer base of individuals and businesses (large or small), but also the public sector.
30. The Apple group's organisation is centred around Apple Inc., which as a general rule owns a stake, either directly or indirectly through intermediaries, in every group subsidiary¹⁵.
31. Apple Inc., a Californian company created in 1977, is listed on the NASDAQ Stock Market LLC, with the symbol AAPL. Its headquarters is in Cupertino, California (USA)¹⁶.
32. In addition to the design, manufacture and marketing of products and management of product logistics for the Americas region, Apple Inc. is responsible for strategy, R&D, brand development and internal policy¹⁷.
33. For Europe, the marketing and distribution of Apple products was handled by Apple Sales International until 2012, then by Apple Distribution International, both located in Ireland¹⁸.
34. Apple Sales International (hereinafter "ASI") is a "private unlimited company", governed by Irish law, registered under number 157 192, with its headquarters at Hollyhill Industrial Estate, Hollyhill, Cork, Ireland¹⁹. ASI is, directly or indirectly, wholly owned by Apple Inc.²⁰.
35. Between 2007 and 31 March 2012, ASI's main activity was the sale and marketing of Apple products and services in certain regions of the world, such as Europe. These activities involved the sale of Apple products to third parties: wholesalers, telecom operators, resellers of Apple products and consumers via the Apple Online Store (hereinafter the "AOS"). ASI also sold Apple products to Apple group companies operating Apple Retail Stores, such as the company Apple Retail France. ASI's activity consisted mainly of "the procurement of products from third-party manufacturers". From 1 April 2012 to the end of 2014, ASI's main activity was the procurement of products and services. Since then, ASI's main activity has been holding investments²¹.
36. Apple Distribution International (hereinafter "ADI") is an Irish company registered under number 470672, with its headquarters in Cork, Ireland. ADI was created in 2009 and since 1 April 2012 has managed the distribution of Apple products for the EMEA (Europe, Middle East, India and Africa) markets, including France. It took over ASI's activities described above. Its main responsibilities include in particular, in the regions concerned, procurement, logistics, sales and the operation of the AOS, marketing and after-sales service²².
37. Within the regions concerned in the EMEA zone, there are entities located in several countries whose role is solely to provide sales assistance, marketing support and communication services to ASI/ADI in these markets²³.

¹⁵ Classification mark 14179

¹⁶ Classification mark 14179

¹⁷ Classification mark 14180

¹⁸ Classification mark 29075 (VC) / 29766 (VNC)

¹⁹ Classification mark 28679 (VC) / 29088 (VNC)

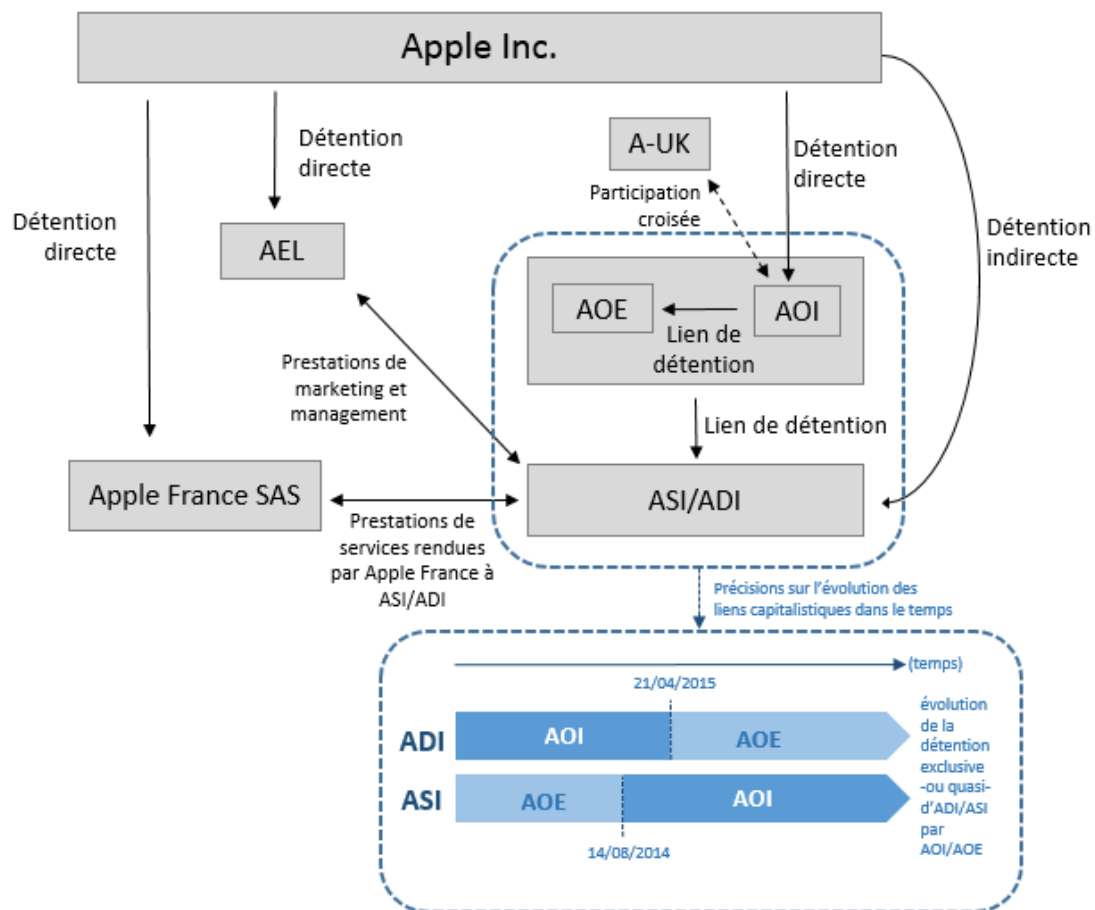
²⁰ Classification mark 29077 (VC) / 29767 (VNC)

²¹ Classification mark 28679 (VC) / 29088 (VNC)

²² Classification mark 28679 (VC) / 29088 (VNC)

²³ Classification mark 14180

38. Furthermore, ASI has not been responsible for procurement of Apple products and services since 27 December 2014. Since 28 December 2014, the company Apple Operations Europe (hereinafter “AOE”) has managed product procurement from third-party manufacturers²⁴.
39. Apple France is a French company with its headquarters in Paris. Apple France does not sell or distribute products in France. Its role is to provide sales assistance, marketing support and communication services in France to ADI²⁵, which makes the sales.
40. Apple Retail France (hereinafter “ARF”), a French company with its headquarters in Paris, owns and operates the Apple Retail Stores (ARSS) in France. ARF buys all the Apple products from ADI, then sells them on to the end customers in its stores in France. ARF does not, however, have any contractual relationship with the third-party resellers of Apple products²⁶.
41. The relationships between companies in the Apple group can be represented diagrammatically as follows (see the section on imputability for information about ownership of equity):



²⁴ Classification marks 29076 (VC) / 29767 (VNC) - 40046 (VNC2)

²⁵ Classification mark 14180

²⁶ Classification mark 14180

Apple Inc.	Apple Inc.
Détention directe	Direct ownership
Apple France SAS	Apple France SAS
Détention directe	Direct ownership
AEL	AEL
Prestations de marketing et management	Marketing and management services
Prestations de services rendues par Apple France à ASI/ADI	Service provision by Apple France to ASI/ADI
A-UK	A-UK
Participation croisée	Mutual holdings
Détention directe	Direct ownership
Détention indirecte	Indirect ownership
AOE	AOE
AOI	AOI
Lien de détention	Ownership link
Lien de détention	Ownership link
ASI/ADI	ASI/ADI
Précisions sur l'évolution des liens capitalistiques dans le temps	Details of changes in ownership over time
(temps)	(time)
ADI	ADI
AOI	AOI
AOE	AOE
évolution de la détention exclusive –ou quasi- d'ADI/ASI par AOI/AOE	change in sole – or almost sole – ownership of ADI/ASI by AOI/AOE
ASI	ASI
AOE	AOE
AOI	AOI

2. INGRAM MICRO

42. Ingram Micro France is a simplified joint stock company (*société par actions simplifiée*), registered in the Lille RCS under number 344 658 117, with its headquarters in Lesquin. Its activity is the purchase, sale and resale of all computing equipment.
43. It belongs to the Ingram Micro group, based in the US, which, according to a Xerfi study in October 2016, "(...) is one of the world's largest wholesalers of technology products."²⁷.
44. According to Ingram Micro, "Since 2009, Ingram Micro has been in second place in the wholesale electronics market behind Tech Data and ahead of Arrow and Also"²⁸.
45. On 16 January 2013, Ingram Micro distributed nearly 150 different brands. According to the Xerfi institute (2014), "HP (15% of turnover in 2013) is Ingram Micro's main supplier, ahead of Apple (10% in 2012, latest available data). The group's other suppliers all account for less than 10% of its sales"²⁹.

²⁷ Classification mark 34255

²⁸ Classification mark 34510

²⁹ Classification mark 14885

46. In 2015, the group's turnover was €38.79 billion and that of the French subsidiary was €1.34 billion³⁰. In 2016, the total pre-tax turnover of Ingram Micro SAS was €1.28 billion³¹.

3. TECH DATA

47. Tech Data, whose parent company is based in the USA, is a simplified joint stock company (*société par actions simplifiées*) registered in the Meaux RCS under number 722 065 638.
48. With a group turnover of €23.91 billion, "Tech Data is one of the world's leading technology wholesalers. Notably, the group is Europe's largest dealer in PCs, printers, software, accessories and consumables. [...] The group stocks more than 200 brands but Apple and HP account for 20% and 18% of sales respectively. Tech Data supplies more than 105,000 value-added resellers, multi-brand resellers and resellers for key clients"³².
49. As far as its French subsidiary is concerned, "Tech Data is France's leading distributor of computing equipment, the core activity of which is handled by the subsidiary Tech Data France. Its eponymous subsidiary, Tech Data France (turnover at 31/01/2015: €2,217.3 million) (...) distributes a wide range of computing equipment (PCs, servers, software, audiovisual products, mobile devices, household appliances, etc.). The company also offers pre-sales consulting, infrastructure design and integration services, finance solutions, etc."³³.
50. Tech Data France's pre-tax turnover was €2.40 billion for the financial year 1 February 2016 to 31 January 2017³⁴.

D. PRACTICES IDENTIFIED

1. GENERAL CONSIDERATIONS ON THE SPECIFIC CHARACTERISTICS OF APPLE PRODUCTS

51. Apple has greater market power than is reflected in its market shares because of the differentiation of its products and its key role in innovation. Apple products are high-end products with greater complementarity than competing products. This explains the brand loyalty of Apple consumers.
52. Firstly, they are innovative, high-end products. Apple products undergo regular technological renewals marked by press conferences (Apple keynotes). This leads consumers to see Apple products as visionary and at the forefront of technology. They are therefore positioned in the high-end segment and in the highest price bands, as is clear in particular from the market shares by value.
53. Secondly, although they are very diversified, Apple products are highly interoperable in the sense that their respective hardware and software functionalities are designed to work best when they are used together. They also have common functionalities and physical characteristics, partly linked to their specific design. Finally, limiting the interoperability of

³⁰ Classification mark 34255

³¹ Classification mark 34510

³² Classification mark 34254

³³ Classification mark 34254

³⁴ Classification mark 34524 (VC), classification mark 34582 (VNC)

Apple products with competing equipment can increase transfer costs for Apple customers wanting to switch from one supplier to another.

54. Lastly, because of the product characteristics explained above, Apple is one of the high-tech companies with the most loyal consumers. A survey of American consumers conducted in 2012 found that, for around 98% of users of Apple products, competing products would have to be at least 10% cheaper for them to change brand; for approximately 85% of them, the price difference would have to be at least 20%; and for 21% no price difference would convince them to change brand³⁵.
55. In this regard, customer loyalty to Apple reflects a certain downstream market power that is also felt further upstream. Any distributor that avoided Apple products or reduced the volumes sold would find it difficult to compensate for the lost revenue by increasing the volumes sold of another product. Similarly, any behaviour that caused an increase in the price of Apple products or enabled such a price increase to occur would only be partially compensated for by competition between those Apple products and the same type of products from another brand. A distributor can therefore more easily pass on a price increase for Apple products on the basis that there is a certain degree of captivity, or at the very least loyalty, among its customer base.

2. GENERAL CONSIDERATIONS ON THE DISTRIBUTION OF APPLE PRODUCTS

a) Distribution system established by Apple

56. For most of its products³⁶, the Apple group has developed the following “multi-channel” distribution strategy.

1. Own-brand distribution by Apple

57. The Apple group markets some of its production direct.
58. On the one hand, Apple products are sold through the online store (the Apple Online Store or AOS) operated by ADI. On the other, Apple products are sold in its physical retail outlets, which it owns itself (the Apple Retail Stores or ARSs) and are operated by ARF³⁷.
59. The stores owned by Apple are supplied on a [at regular intervals] by [...] ³⁸.
60. In 2017 Apple was operating 20 retail outlets in France³⁹, which accounted for around 40% by value and 45% by volume of Apple product sales⁴⁰.

2. Distribution of Apple products by intermediaries

61. The Apple group also markets its products indirectly, on the one hand through authorised wholesalers in the wholesale market, and on the other through authorised resellers in the retail market.

³⁵ Classification mark 390

³⁶ Except for iPhone products, which have their own specific distribution system.

³⁷ Classification mark 14454

³⁸ Classification mark 20537

³⁹ <http://www.apple.com/fr/retail/storelist/> and classification marks 14188 and 14189

⁴⁰ Classification mark 34594 (VC) / 34621 (VNC) – 34977 (VNC2)

62. In the upstream market in France, Apple sells its products to two approved wholesalers (known as “Apple Authorized Distributors” or “Disties”): Tech Data and Ingram Micro, which have been distributing Apple products since 1995 and 1999 respectively⁴¹.
63. Apple said that it uses authorised wholesalers for reasons of logistics costs: “Apple relies on the wholesalers to supply Apple products to a number of independent distributors, particularly small distributors spread throughout the country. (...) it would be relatively expensive for Apple to supply them direct. The wholesalers, on the other hand, represent a cost-effective way of supplying them”⁴².
64. Apple said that, in its view, “there is enough competition between the two [wholesalers]”⁴³ and that it had no intention of using a third wholesaler⁴⁴.
65. Downstream, Apple products are distributed through a network of distributors, consisting of around 2,000 resellers. Apple has not set up a formal selective distribution network⁴⁵ and retailing Apple products is theoretically open to anyone⁴⁶.
66. However, Apple distinguishes between its resellers based on their size or activity, dividing them into “Retailers” and “Resellers”. Apple also makes a distinction between “direct” resellers, which can buy either direct from Apple or from the wholesalers, and “indirect” resellers, which can buy only from the wholesalers, based on the volume of Apple products they purchase⁴⁷.
67. For these distribution channels, the supply circuit differs according to situation. “Direct” resellers are mainly supplied by the company ASI/ADI in Ireland. “Indirect” resellers are supplied by the wholesalers, which in turn are supplied mainly from China⁴⁸.

a. Retailers

68. Apple sells its products through both multi-brand mass-market retailers (Auchan, Carrefour, Casino, Cora, E. Leclerc, Hyper U, Super U, Metro) and specialist retailers (Fnac, Darty, Boulanger, Conforama, Expert, The Phone House). They are known as “Retailers”.
69. To fall into the “Retailer” category, resellers must have several retail outlets, be in a duty-free area, or meet threshold conditions for turnover. They must also meet conditions for the presentation of Apple products⁴⁹.
70. The criteria that determine whether Retailers are supplied directly or indirectly are set out in the “Channel Terms Retailers”⁵⁰.
71. In 2017 the Apple group had around 1,800 “Retailers”, accounting for around 45% by value and by volume of Apple product sales⁵¹.

⁴¹ Classification marks 13705 and 21581

⁴² Classification mark 15304

⁴³ Classification mark 34574 VNC

⁴⁴ Classification marks 11532 and 11533

⁴⁵ Except for the iPhone before 2014.

⁴⁶ Classification marks 16116, 14795 and 34531.

⁴⁷ Classification mark 14924 (VC) / 15289 (VNC) – 34964 (VNC2), classification mark 14464

⁴⁸ Classification mark 15309

⁴⁹ Classification mark 14187 (VC) / 14458 (VNC)

⁵⁰ Classification marks 17539 (VC) / 34971 (VNC2)

⁵¹ Classification mark 34594 (VC) / 34621 (VNC) – 34977 (VNC2)

b. Resellers

72. Apple products are also sold by smaller computer retailers, usually with a small number of traditional retail outlets. They are known as “Resellers”.
73. The “Resellers” distribute electronic equipment such as PCs, tablets, monitors, printers, scanners, hard drives, accessories and software. They also provide associated services (integration, maintenance, repair, etc.)⁵².
74. Most “Resellers” are authorised by Apple. Within this framework, they must purchase a minimum amount by value from ASI/ADI and/or an authorised wholesaler every quarter. There are several different categories of “Reseller”.
75. First, some resellers (known as “Apple Authorized Resellers” or AARs) have signed the basic authorised reseller agreement with Apple and gain certain advantages from this status, such as discounts from Apple⁵³.
76. Next, AARs can enter one or more additional programmes, depending on whether they meet certain specific conditions of authorisation⁵⁴.
77. Since 2006, some authorised resellers (known as “Apple Premium Resellers” or “APRs”) have been able to specialise in the distribution of Apple products by joining an optional programme to promote a selling environment and offer a consumer experience of a very high standard⁵⁵.
78. APR resellers are therefore AARs who, on top of the basic authorisation, have joined a programme involving in particular design of their retail outlet and special marketing. This programme enables them to use a “Premium” logo and to obtain special commercial conditions (special discounts, rebates and refunds), provided that they meet eligibility criteria defined by Apple (related in particular to the retail outlet’s location and presentation, staff qualification, marketing, etc.)⁵⁶.
79. In 2014, Apple had 22 resellers with this status with a total of 47 authorised retail outlets, of which 23 were “direct APRs”⁵⁷. In 2017, this channel had only 17 APR resellers with 51 retail outlets, of which five were “direct APRs”⁵⁸, representing around 8% by value and 5% by volume of Apple product sales⁵⁹.

⁵² Classification marks 3568 to 3584, classification marks 3734 to 3744, classification marks 4127 to 4148, classification marks 3595 to 3605, classification marks 3585 to 3590, classification marks 5140 to 5170, classification marks 13898 to 13917, classification marks 3691 to 3700, classification marks 3094 to 3109, classification marks 3240 to 3261, classification marks 3058 to 3083, classification marks 3134 to 3140, classification marks 4185 to 4209, classification marks 4155 to 4178, classification marks 5895 to 5920, classification marks 5513 to 5528, classification marks 3673 to 3679, classification marks 3703 to 3722, classification marks 4106 to 4124, classification marks 3111 to 3128, classification marks 3264 to 3282 and classification marks 4546 to 4572.

⁵³ Classification mark 14429 and classification marks 14442 and 14443 (VC) / 14689 and 14690 (VNC)

⁵⁴ Classification mark 14187 (VC) / 14458 (VNC)

⁵⁵ Classification marks 3499 to 3543 and classification mark 14458

⁵⁶ Classification marks 133 to 136 and classification marks 14026 to 14028 (VC)

⁵⁷ Classification marks 14747 to 14750

⁵⁸ Classification marks 32048 to 32052

⁵⁹ Classification mark 34594 (VC) / 34621 (VNC) – 34977 (VNC2)

80. The criteria that determine whether APRs are supplied directly or indirectly are set in the “Channel Terms Apple Authorized Reseller” or in the “Channel Terms Apple Premium Reseller”⁶⁰.
81. Apple can also give its authorised resellers further special authorisations.
82. The “Apple Solution Expert” (ASE) authorisation – which can be combined with APR status⁶¹ – is for distributors that have chosen to develop particular expertise in the education market (“ASE Education”) or media market (“ASE Creative”). In 2014 Apple had 29 resellers with ASE authorisation⁶².
83. The “Apple Authorized System Integrators” (AASI) authorisation, which can be combined with APR and AAR status, is for distributors that offer business customers particular technical expertise in installing networks that include Apple products. In 2014 Apple had three resellers with AASI certification that were also ASE certified.
84. Meanwhile, the “authorized service centres” must have technicians certified by Apple with a requirement of annual training in order to keep this certification⁶³.
85. Finally, some distributors (known as “Non Authorized Resellers” or NARs) have not been authorised by Apple. They can therefore only buy from the wholesalers. They represent only a small share of Apple product retail sales (around 6 to 8%⁶⁴).
86. The organisation of the distribution system set up by Apple can be represented diagrammatically as follows:

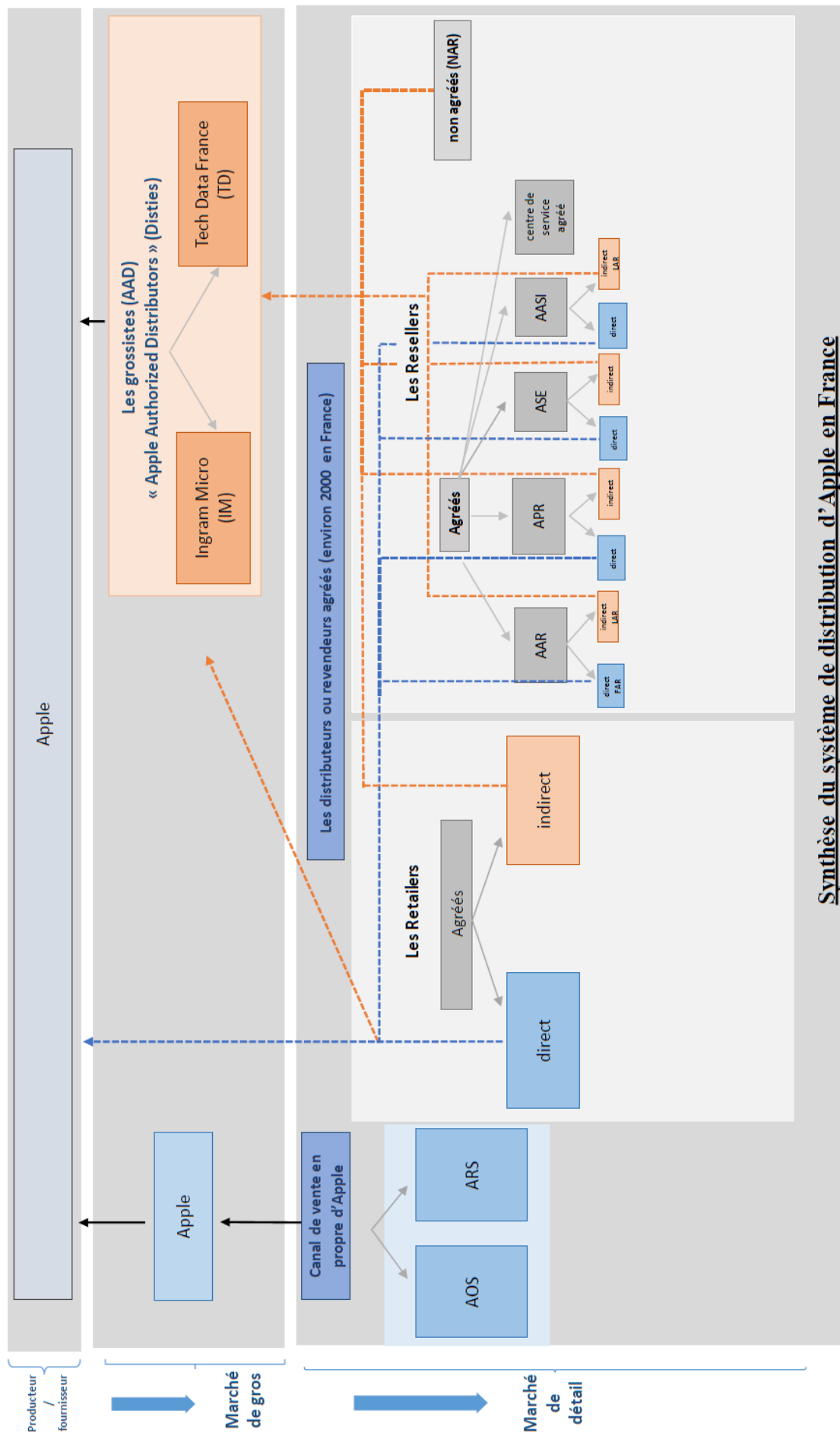
⁶⁰ Classification marks 14031 (VC) / 34953 (VNC2)

⁶¹ Classification mark 10083 (VC) / 23462 (VNC)

⁶² Classification mark 14166

⁶³ Classification mark 3248

⁶⁴ Classification mark 29741



Synthèse du système de distribution d'Apple en France

Producteur / fournisseur	Manufacturer/supplier
Marché de gros	Wholesale market
Marché de détail	Retail market
Apple	Apple
Apple	Apple
Canal de vente en propre d'Apple	Apple's own retail channel
AOS	AOS
ARS	ARS
Les Retailers	Retailers
Agréés	Authorized
direct	direct
indirect	indirect
Les grossistes (AAD) « Apple Authorized Distributors » (Disties)	Wholesalers (AAD) “Apple Authorized Distributors” (Disties)
Ingram Micro (IM)	Ingram Micro (IM)
Tech Data France (TD)	Tech Data France (TD)
Les distributeurs ou revendeurs agréés (environ 2000 en France)	Approved retailers or resellers (around 2,000 in France)
Les Resellers	Resellers
Agréés	Authorized
AAR	AAR
direct FAR	direct FAR
indirect LAR	indirect LAR
APR	APR
direct	direct
indirect	indirect
ASE	ASE
direct	direct
indirect	indirect
AASI	AASI
direct	direct
indirect LAR	indirect LAR
centre de service agréé	authorised service centre
non agréés (NAR)	non authorized (NAR)
Synthèse du système de distribution d'Apple en France	Summary of Apple's distribution system in France

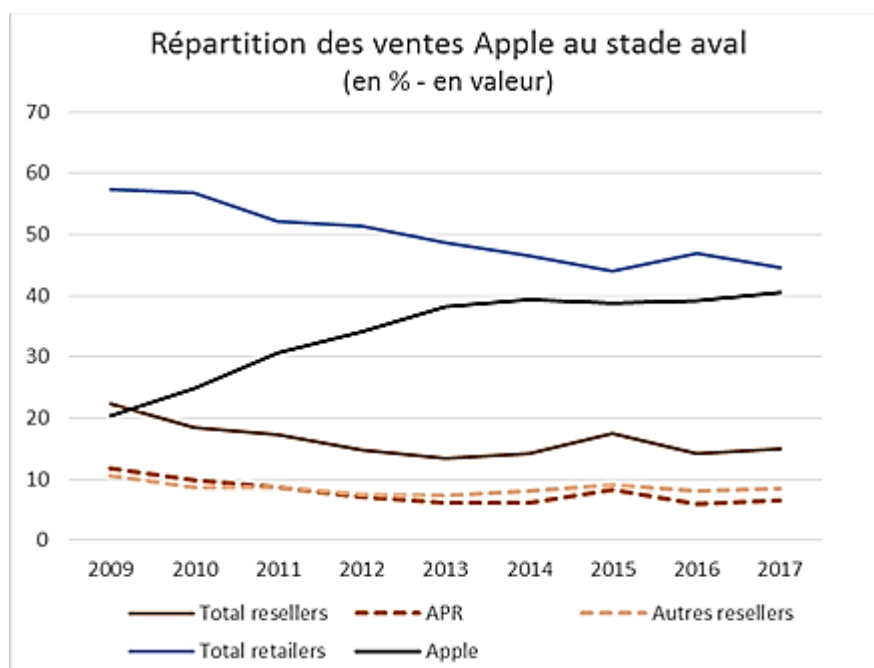
87. As Apple indicates, the use of direct resellers is tending to diminish, because going through wholesalers is more beneficial in that they have more flexible policies as regards credit facilities and payment terms: “Today there are fewer and fewer direct resellers. In particular, we are stricter on payment terms, and delivery lead times are longer. Wholesalers can ship products to multiple retail outlets, whereas we demand only a single retail outlet. [...] In terms of pricing, our conditions are contractual. It is probably easier to negotiate with the

authorised wholesalers. [...] The wholesaler has a very small margin but uses it as it chooses to position its offer”⁶⁵.

88. An Apple France representative also said, in October 2017, that almost all distributors had chosen the indirect supply method⁶⁶.

3. *Breakdown of Apple product sales by distribution channel*

89. Between 2009 and 2017, sales of Apple products through Apple’s own distribution channels (ARS stores and AOS online sales) grew significantly by volume and by value, as shown by the graphs below⁶⁷.
90. The APRs are the distribution channel with the smallest share of Apple product sales. Over time, it can be seen that their market share by value has shrunk more than their market share by volume⁶⁸.



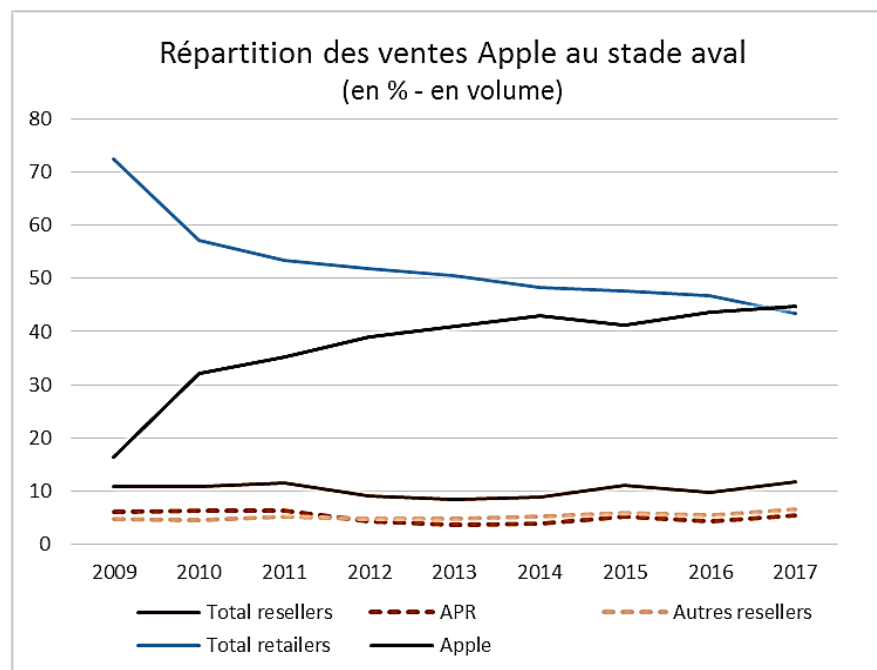
Répartition des ventes Apple au stade aval (en % - en valeur)	Distribution of Apple sales at the downstream stage (as % - by value)
Total resellers	Total resellers
Total retailers	Total retailers
APR	APRs
Apple	Apple
Autres resellers	Other resellers

⁶⁵ Classification mark 16114 and classification mark 15289

⁶⁶ Classification mark 34532 (VC) / 34573 (VNC)

⁶⁷ Graph based on data supplied by Apple: classification mark 34594 (VC) / 34621 (VNC) – 34977 (VNC2)

⁶⁸ Classification mark 34594 (VC) / 34621 (VNC) – 34977 (VNC2)



Répartition des ventes Apple au stade aval (en % - en volume)	Distribution of Apple sales at the downstream stage (as % - by volume)
Total resellers	Total resellers
Total retailers	Total retailers
APR	APRs
Apple	Apple
Autres resellers	Other resellers

b) Specific characteristics of the competitive context for stakeholders involved in the upstream stage of Apple product distribution

1. Factors on which the wholesalers compete

91. The stakeholders involved in the upstream stage of Apple product distribution compete on volumes (**a**) and on quality of service to retailers (**b**). However, they have limited room for manoeuvre as regards competition on price (**c**) and are subject to the competitive pressure exerted by manufacturers' integrated distribution (**d**).

a. A volume-based activity

92. Upstream distribution is characterised primarily by competition on volumes, linked in particular to the supply and availability of products, which depends especially on stock management.

93. The Xerfi France study of October 2016 highlights the fact that “there are two main types of stakeholder in the computing hardware wholesalers sector in France: high-volume wholesalers, focused mainly on product sales, with logistics systems enabling them to handle large volumes; and ‘value-added distributors’ (VADs) which combine equipment sales with a wide range of services (consultancy, training, pre-sales, etc.). They work with ‘value-added resellers’ (VARs)”⁶⁹.
94. Because it is based on volumes, the competition between wholesalers is therefore dependent on the underlying factors of product availability and stocks of available goods⁷⁰.
95. So the key to the wholesalers’ activity is large volumes of sales, given the small margins available to them⁷¹.

b. Quality of service

96. According to the wholesalers’ statements, one of the other main factors of competition is the quality of the services they provide to retailers. This is manifested in particular by the large commercial presence of sales teams.
97. Ingram Micro emphasises that “quality of service” is one of the three main factors of competition⁷². Similarly, Tech Data stated: “We are also guided by the level of customer demand [...] Apple also pays us based on the training of our sales staff”⁷³.
98. According to Apple, the composition of the wholesalers’ sales forces is a competitive factor: “Each wholesaler has a dedicated sales team and the make-up of these teams can be a competitive factor because they both have different numbers of people; with more people in the team, there will be a greater presence among the customers”⁷⁴.

c. Limited room for manoeuvre on price competition

99. Competition between the wholesalers to attract the retailers is mainly based not on ticket price but on other marketing conditions.
100. Although price is necessarily a factor in the wholesalers’ commercial activity, since they can give discounts and rebates, competition is based mainly on indirect financial parameters such as credit facilities, retroactive rebates and carriage costs.
101. Representatives from Ingram Micro and Tech Data said they had little room for manoeuvre on prices. One Ingram Micro representative said that “On prices, we have little room for manoeuvre generally with IT. With Apple, this room for manoeuvre is even smaller”⁷⁵. Similarly, a Tech Data representative pointed out that “the business is more about volumes, we don’t have much room for manoeuvre on prices”⁷⁶.
102. An Ingram Micro manager said about this: “Our aggressive commercial approach enables us to stand out using special conditions: annual retroactive rebate agreements, carriage costs,

⁶⁹ Classification mark 34223

⁷⁰ Classification marks 34543, 34464 and 34446.

⁷¹ Classification marks 34530 (VC) / 34571 (VNC) and 26444

⁷² Classification mark 34464

⁷³ Classification mark 34442 (VC) / 34543 (VNC) and 39963 (VNC 3)

⁷⁴ Classification mark 34541

⁷⁵ Classification mark 34464

⁷⁶ Classification mark 34548

credit facilities, etc.”⁷⁷. Concerning credit facilities in particular, the same manager said that these “remained a factor of competition”, though wholesalers are dependent on negotiations with insurance and finance bodies to determine the level⁷⁸.

103. Apple also pointed out that, to generate competition, wholesalers “try to introduce more advantageous systems than their competitors with (better) retroactive rebate agreements, or, for example, cheaper carriage costs, different credit terms because they use different factoring companies”⁷⁹. Apple explains with respect to this that although “prices may also have a competitive effect”, it was “to a lesser degree because competition is achieved through the financial advantages I have just described (in particular retroactive rebates)”⁸⁰.

d. Competition between manufacturers that have opted for integrated wholesale distribution

104. Finally, as explained above, merchants in the computing equipment sector have for some years had to contend with direct competition from PC and computing equipment manufacturers.
105. According to a Xerfi study (2016), “Manufacturers provide retail and distribution services without intermediaries, making them dangerous competitors for IT wholesalers. Brands such as HP and Dell are particularly well positioned in the business segment”⁸¹.
106. Several manufacturers of computing equipment have trading subsidiaries in France: HP, Asus, Dell, Acer, Lenovo and Toshiba, exerting competitive pressure on high-volume wholesalers like Tech Data and Ingram Micro.
107. More specifically in the case of Apple products, the supplier said, in response to an information request, that it relied on wholesalers to supply Apple products to a number of independent retailers, particularly the smallest retailers spread throughout France. Apple emphasised that, because these retailers “provide relatively limited sales opportunities for Apple, it would be relatively expensive for Apple to supply them direct. The wholesalers, on the other hand, represent a cost-effective way of supplying them with Apple products”⁸².
108. Apple emphasised that its distribution system “is totally open, all flows are possible with one exception: only direct partners can be supplied direct by Apple”⁸³. Apple said that the wholesalers can “compete with Apple for independent retailers that Apple could supply direct”⁸⁴.

⁷⁷ Classification mark 34464

⁷⁸ Classification mark 34468

⁷⁹ Classification mark 34531

⁸⁰ Classification mark 34531

⁸¹ Classification mark 34253

⁸² Classification mark 15304

⁸³ Classification mark 16116

⁸⁴ Classification mark 14933

2. Importance of Apple product distribution for the wholesalers

109. The distribution of Apple products is very important for the wholesalers, economically⁸⁵.
110. Firstly, the fact that a wholesaler can distribute Apple products offers it a competitive advantage, since they are loss leaders⁸⁶, attracting customers to whom competing brands' products can also be sold. Retailers are encouraged to obtain supplies based on a "one-stop shop" model, i.e. buying from wholesalers offering a wide range of competing brands' products.
111. Economically, the distribution of Apple products represents a large share of the commercial activity of the companies authorised by Apple.
112. For Ingram Micro, it represents 15 to 20% of its total turnover (by value)⁸⁷. A manager at Ingram Micro explained that distributing Apple products has a direct impact on the company's volume of activity and turnover⁸⁸. Similarly, a manager at Tech Data confirmed that "the wholesaler's business is based on large volumes (in terms of figures and flows) with very slim margins. Volume is therefore essential to amortise our fixed costs, so we're 'condemned' to grow"⁸⁹.
113. In 2016, Apple was Tech Data's second largest supplier in France⁹⁰ and it could even become its leading supplier, according to one manager at the company⁹¹.
114. Conversely, the other wholesalers in the market, that do not distribute Apple products, have smaller volumes of activity and often specialise in areas such as consumables, with good product expertise or a dedicated organisation, according to one Tech Data manager⁹².

3. EXCHANGE OF INFORMATION ABOUT WHOLESALERS' ACTIVITY THROUGH APPLE

115. The investigation found that Apple, Tech Data and Ingram Micro had exchanged economic and commercial information about the wholesalers' sales of Apple products to retailers.
116. Apple first collected information from the wholesalers about their activity (a), and it then forwarded this information to each wholesaler (b). Both Apple and the wholesalers played an active part in this process of exchanging information (c).

a) Information gathering system set up by Apple

117. In accordance with contractual requirements, the wholesalers regularly send Apple information about their commercial activity (1). In addition to these formal contacts, Apple gathers information about its wholesalers' activity through informal exchanges (2), giving Apple a comprehensive knowledge of its distribution system (3)

⁸⁵ Classification mark 19316 (VNC) / 16555 (VC)

⁸⁶ Classification mark 34465

⁸⁷ Classification mark 34465

⁸⁸ Classification mark 34465

⁸⁹ Classification mark 34543

⁹⁰ Classification mark 16555 (VC) / 19316 (VNC)

⁹¹ Classification mark 34442 (VC) / 34543 (VNC) and 39963 (VNC 3)

⁹² Classification mark 34442 (VC) / 34543 (VNC) and 39963 (VNC 3)

1. Contractual information gathering system

118. Apple regularly collects a certain amount of information about sales of its products, in application of the agreements it has with its wholesalers.
119. Until 2013, these transfers were daily⁹³. Since then, by agreement with Apple, Tech Data has only provided weekly reports: “given the large volumes of transactions (...), it seemed simpler to prepare a report at the end of the week instead of every day”⁹⁴.
120. As one Apple employee said, “all our partners are contractually obliged to report sales (the direct and indirect authorised resellers and the wholesalers send stock and sales reports each week)”⁹⁵. Similarly, the person responsible for wholesaler relations at Apple said: “each week we receive from the wholesalers a report of sales to their customers and the stocks each wholesaler holds (...)”⁹⁶.
121. In response to an Investigation Services questionnaire, Tech Data also confirmed that it gave Apple weekly sales and stock information, in accordance with current contractual requirements: “These reporting obligations come from pages 8 and 9 of the Policies and Practices. Regarding sales, Tech Data France sends Apple data for the sales of Apple products to each reseller (by product reference) specifying the quantities sold. Tech Data France also tells Apple about any product returns. (...) Regarding stocks, for each product reference Tech Data France indicates the number of products in stock and any product returns (...)”⁹⁷.
122. Similarly, in its response to the same questionnaire, Ingram Micro said it sends Apple a report containing in particular the product description, invoice number, unit price and total price, quantity, and the name and address of the recipient⁹⁸.
123. Several documents in the case file attest to the fact that the information transmitted showed the wholesalers’ activity by volume and by value, and they were thus reporting to Apple their turnover per week and per product⁹⁹, or indeed the state of their stocks¹⁰⁰. Through its wholesalers, Apple also knew the name and the number of products sold by an “indirect APR” in the case of a “key account” deal¹⁰¹.
124. A report extract shows the type of information sent to Apple by its wholesalers: product reference, description, invoice number, total declared price and unit price, quantity supplied, quantity returned (where relevant), identity of the company supplied [customer number, company name, address and country where it operates]¹⁰².
125. Clause 1.2 of the Apple Authorized Distributor Policies and Practices agreement also requires wholesalers to send to Apple information about quantities, the name and address of the reseller, etc.¹⁰³.

⁹³ Classification mark 21584 (VNC) / 16480 (VC); classification mark 16841; classification mark 19305 (VNC) / 16544 (VC)

⁹⁴ Classification mark 16841

⁹⁵ Classification mark 16813 (VNC) / 16112 (VC)

⁹⁶ Classification mark 34571 (VNC) / 34530 (VC)

⁹⁷ Classification mark 16554

⁹⁸ Classification mark 16480 VC – 21584 VNC

⁹⁹ Classification mark 16511 (VC) / 21615 (VNC) – 35073 (VNC2); classification marks 33715 and 33725

¹⁰⁰ Classification mark 14766 (VC) / 14797 (VNC) – 34963 (VNC2)

¹⁰¹ Classification mark 27719

¹⁰² Classification mark 16511 (VC) / 21615 (VNC) – 35073 (VNC2)

¹⁰³ Classification marks 9539 (VC) / classification mark 34952 (VNC2)

2. Information gathered informally

126. In addition to the formal reports sent by the wholesalers, Apple collects information during non-written exchanges (e.g. telephone calls or visits by Apple employees to its partners' premises), enabling it to find out more about the wholesalers' needs and their commercial performance.
127. Notably, Apple said with regard to this that certain Apple France employees are sometimes received by the wholesalers on their premises and that, during these meetings, the wholesalers' activity and performance is discussed: "Approximately twice a year, the senior management of Apple France (X..., Y..., Z... and A...) meets the senior management of each of the two wholesalers for an activity review: jointly and in accordance with the guidelines supplied by ADI, they analyse the wholesaler's performance on Apple products, discuss how the activity has evolved, and look at the positives and the points for improvement"¹⁰⁴.
128. Apple and the wholesalers also have weekly meetings "to discuss different aspects of the commercial relationship with ADI" and in particular "to review stocks and find ways to shed overstocks"¹⁰⁵.
129. An Apple employee responsible for wholesaler relations also said: "We've introduced weekly three-way phone calls between the teams in Ireland, the wholesalers and me", during which the wholesalers' "real needs" in terms of the supply of Apple products are discussed and Apple tells them about planned promotions. More specifically, she said: "We try to focus on the wholesalers' real needs. Every week we identify any deals (deals are exceptional prices; they can cover as many as a hundred products). This enables us to refine the overall forecast (the overall forecast is for the upcoming quarter). Sometimes the wholesaler provides a summary of its additional needs by email. But everything else is done verbally during weekly calls. The Cork team uses this information as feedback for production in China. During these calls, we also tell the wholesalers and Cork about any promotions we are planning. Obviously only the quantities are discussed, never the retail price or any other commercial conditions. My focus is on the wholesalers; the wholesalers may sometimes tell me that, for example, they want demo products for an APR that has just opened. For the last year, there have also been 'supply plans': the wholesaler receives details from Cork of the supply it will receive in the next three weeks. We've set up a "Supply" portal on which all this information is held centrally. This portal contains supply forecast information for the next three weeks. The feedback concerning the sales reporting is entered into the system (portal). Cork has access to this information, which gives it an overview of stocks. The portal also includes the backlog status (position of orders placed with Apple), and the sales forecasts"¹⁰⁶.

3. Apple's comprehensive knowledge of its distribution system

130. The above information shows that the information gathering system set up by Apple gives it a comprehensive knowledge of its distribution system.
131. In accordance with the contractual reporting obligation, supplemented by occasional informal meetings between Apple employees and the wholesalers, Apple was kept informed – at first on a daily basis and then, from 2013, once a week – of the sales of Ingram Micro

¹⁰⁴ Classification mark 14191 (VC) / 14462 (VNC) and 34959 (VNC2); classification mark 14192 (VC) / 14463 (VNC)

¹⁰⁵ Classification mark 14192(VC)/14463(VNC)

¹⁰⁶ Classification marks 16114 and 16115

and Tech Data (sales by volume and by value, type of products sold, price of products sold, list of customers, etc.) and about the status of their stocks, enabling it to assess their future needs.

132. One wholesaler underlined that “the exchanges with Apple are constant and Apple is given very precise information about stock status and needs”¹⁰⁷. A manager at Ingram Micro also said that “Apple has a precise picture, it knows the quantities, the invoice date, the customers and the prices”¹⁰⁸.
133. When questioned about this system of exchanges, Apple said that information gathering was set up primarily to meet the need for stock management and to determine production needs: “The sales reports let us know how many products have been delivered and to whom. (...) The reports enable us in particular to make sure stocks are protected as effectively as possible against product depreciation. (...) reporting is the main tool for determining production requirements”¹⁰⁹.
134. An Apple manager responsible for wholesaler relations confirmed that “reporting and the feedback of information by direct partners are used to manage Apple’s stocks (...) and production. (...) This reporting enables us to ensure wholesalers have stock (e.g. 5 weeks for the Mac and 3 for the iPad)”¹¹⁰. However, from the hearing with this manager, it was apparent that stock management and production have a very broad meaning, since this feedback of information is also used “to manage sales of [Apple] products”, in particular in that “this information feedback is used to make sure orders reflect sales. The sales history of a product enables us to check this consistency”¹¹¹.

b) Apple’s transmission of the collected information to each of the wholesalers

135. The documents in the case file showed that some of the information collected from each of the wholesalers was sent, with some degree of regularity and mostly after it had been reprocessed, to Tech Data and Ingram Micro.

1. Content of the information sent to the wholesalers

136. Apple sent each wholesaler, on the one hand, on a weekly or monthly basis, information about their respective commercial performances on past sales of Apple products (a), and, on the other, additional information explaining the scope of the performance data and which could relate to each wholesaler’s commercial strategy (b).

a. Information about the wholesalers’ market share for sales of Apple products

137. Information obtained during the investigation shows that Apple regularly sent its wholesalers their respective market shares for sales of Apple products, until the end of 2013. This could be information about the past week, month or quarter.
138. One Apple manager said during a hearing: “we calculated their respective ‘market shares’, i.e. their respective importance for the sale of the products concerned and by value and by volume for each channel” and: “The market shares that I used to send were by value and by

¹⁰⁷ Classification mark 16554

¹⁰⁸ Classification mark 34464

¹⁰⁹ Classification mark 16115

¹¹⁰ Classification mark 34571 (VNC) / 34530 (VC)

¹¹¹ Classification mark 34571 (VNC) / 34530 (VC)

volume for each channel and product range”¹¹². Similarly, Tech Data said in a hearing: “We received information fairly regularly from Apple about our wholesaler market share, i.e. what our market share was of the wholesaler market”¹¹³. A manager at Ingram Micro also said that he regularly received information from Apple: “there could have been discussions with Apple in which we were given performance information about our market share and our overall performance (...) I think it was market share by value and by volume”¹¹⁴.

139. Two types of email can be identified.
140. Firstly, Apple was sending each of its wholesalers information about their respective market shares during the past week, by value for each product range (CPU, iPod, etc.), and more detailed information by volume, for each product type (Mac Mini, Mac Pro, etc.) and each customer type (APR, ASE, etc.).
141. As an illustration, in an email sent to Ingram Micro on 14 March 2008, an Apple manager said: “here are the Apple market shares in terms of turnover from 3 to 7 March (...) => CPU: Tech Data 61% / Ingram Micro 39%; => iPod: Tech Data 68% / Ingram Micro 32% (...)”. This email also contains more detailed information about the market shares by volume for each product type: “=> Mac Mini: Tech Data 76% / Ingram Micro 24%; => iMac: Tech Data 59% / Ingram Micro 41%; => Mac Pro: Tech Data 69% / Ingram Micro 31% (...)” and for each customer type: “here are the market shares for each Apple customer type: => APR: Tech Data 59% / Ingram Micro 41%; => ASE: Tech Data 74% / Ingram Micro 26%; (...)”¹¹⁵. Similar emails in which Apple sent Ingram Micro information about the market shares of each wholesaler in the past week are included in the case file¹¹⁶.
142. Every week Apple also sent Tech Data the updated competitive situation of the two wholesalers for the past quarter. For example, in an email on 30 November 2008, Apple said: “as every week, please find attached a few figures for the weekly change in Apple business at Tech Data, in France”, attaching diagrams showing the respective performances, by value and by volume¹¹⁷. Similarly, in an email sent to Tech Data on 15 December 2008, Apple said “as in previous weeks, please find attached in PDF format some information about your performance on Apple in the quarter (...)”; attached to this email are some diagrams showing the respective performances, by value (in € thousands), of Ingram Micro and Tech Data. This email also contains more detailed information about the market shares by volume for each customer type (APR, ASE, etc.)¹¹⁸.
143. Secondly, Apple was sending each of its wholesalers information about their respective market shares during the past month and quarter, by value for each product range (CPU, iPod, etc.), and more detailed information by volume, for each product type (Mac Mini, Mac Pro, etc.) and each customer type (APR, ASE, etc.).
144. As an illustration, in an email sent to Ingram Micro on 23 December 2009, Apple said: “Please find below: > Apple market share in terms of turnover for December W12”, giving a breakdown for each product range: “CPU: IM 50% / TD 50%; iPod: IM 48% / TD

¹¹² Classification mark 34573 (VNC) / 34532 (VC)

¹¹³ Classification marks 34444 and 34445

¹¹⁴ Classification marks 34467 and 34468

¹¹⁵ Classification marks 30543, 30544 and 30545

¹¹⁶ Letter of 13 June 2008, classification marks 34167 to 34169; email of 23 April 2008, classification marks 34158 to 34160.

¹¹⁷ Classification marks 34697 to 34712

¹¹⁸ Classification marks 34713 to 34727

(...) 52%”. This email also contains more detailed information about the market shares in the past quarter (October, November, December 2009¹¹⁹), by volume for each product type: “Apple market share by volume in Q1FY10 =>W12=> Mac Mini: Tech Data 47% / Ingram Micro 53%; => iMac: Tech Data 47% / Ingram Micro 53%; => Mac Pro: Tech Data 47% / Ingram Micro 53% (...)” and diagrams showing the Apple market shares by customer type “Disties’ Prosumer market share IM 41% / TD 59%; Disties’ Retail market share IM 72% / TD 28%”¹²⁰. Similarly, in an email sent to Ingram Micro on 10 June 2013, Apple said: “please find below: > Apple market share in terms of turnover for May: 56% for Ingram”, by product range (CPU, iPod, etc.). This email also contains more detailed information about the market shares in the past quarter (April, May, June 2013) by volume for each product type (Mac Mini, iMac, etc.): “Apple market share by volume in Q3FY13”¹²¹. Similar emails, in which Apple sent Ingram Micro information about each wholesaler’s market shares in the past month and quarter, are included in the case file¹²².

145. Every month Apple also sent Tech Data the updated competitive situation of the two wholesalers for the past month and quarter. In an email sent to Tech Data on 24 May 2013, Apple said: “Please find below: > Apple market share in terms of turnover for April: 55% for TD”, giving a breakdown “for each product range: “CPU: IM 40% / TD 60%; iPod: IM 47% / TD 53% (...)”¹²³. Similarly, in an email sent to Tech Data on 8 October 2012, Apple said: “please find below: > Apple market share in terms of turnover for September: 57% for Tech Data”, for each product range (CPU, iPod, etc.). The email also stated: “we ended our quarter Q4FY12 on 28/09. Please find below the market share for the quarter (July/August/whole of September)”, giving the market shares, by value, for each product range (CPU, iPod, etc.), and by volume, for each product type (iMac, MacBook Air, MacBook Pro, etc.)¹²⁴.
146. It is clear from the above that Apple sent information to Ingram Micro and Tech Data on a weekly or monthly basis about their respective market shares, i.e. the sales of Apple products for the past week, month or quarter, by value, for each product range (CPU, iPod, etc.), and more detailed information by volume for each product type (Mac Mini, Mac Pro, etc.) and for each customer type (APR, ASE, etc.).

b. Additional information

147. In addition to the aforementioned information regularly sent to the wholesalers about their respective market shares, Apple also gave them its analysis of their commercial performance, where relevant with suggestions for improvement. Apple also sent the wholesalers more specific information about each other’s stocks, sales force composition, and commercial strategy.

¹¹⁹ Apple closes its accounts on 30 September of each year.

¹²⁰ Classification marks 27405 and 27406

¹²¹ Classification marks 27862 to 27864

¹²² Classification mark 11298; classification mark 11280; classification mark 11371; classification mark 11268 (VC) / 25855 VNC; classification mark 11241 and classification mark 11242 (VC) / 25835 VNC; classification mark 11234 and classification mark 11235 (VC) – 25831 (VNC); classification mark 11503 (VC) / 26014 (VNC); classification mark 27862 and 27863

¹²³ Classification marks 27844 and 27845

¹²⁴ Classification marks 11745 to 11751

❖ Apple's comments on the wholesalers' respective performances

148. Several exchanges between Ingram Micro and Apple reveal the forwarding of various pieces of information about Tech Data's performance.
149. In the aforementioned email to Ingram Micro on 14 March 2008, Apple said: "a good week for iPods has pushed the figures up again but watch out for the CPUs, you're down on last year for the Mac Mini, the iMac and the Mac Pro with -45% (...)"¹²⁵.
150. Similarly, in an exchange of emails with Ingram Micro on 22 April 2008, Apple commented on differences in market share compared to its competitor Tech Data: "the difference in volumes should not be in your colleague's favour, bearing in mind that you cover far more retail accounts than they do"¹²⁶. This information was passed on internally, pointing out that it was sent by Apple "to draw attention to our loss of ground to Tech Data on the Prosumer side (mainly APRs)"¹²⁷.
151. In the same way as for Ingram Micro, Apple commented to Tech Data on the information forwarded about their respective performances.
152. In the email sent to Tech Data on 15 December 2008, Apple said "Can I draw your attention to the fact that your share of unit sales to APRs and ASEs has dropped significantly and is now smaller than your colleague's"¹²⁸.
153. Similarly, in an email on 15 May 2009, Tech Data asked Apple to explain the change in market share: "Can you explain. I get the sense that we're losing market share. Has Ingram struck lucky?", to which Apple replied: "IM introduced the promotions much more quickly than you did. Hence last week's sales".
154. In March 2010, after Apple had sent information about its wholesalers' market shares, Tech Data asked for and obtained from Apple explanations for its competitor's good fortune¹²⁹.

❖ Information shared about each wholesaler's commercial strategy

155. Firstly, Apple sent its wholesalers information focusing on their stock status.
156. Several documents in the case file attest to the fact that Apple was giving Ingram Micro information about Tech Data's supplies.
157. In an Ingram Micro internal email in July 2007, the wholesaler said: "(...) Tech Data opted for a more risky supply mode, so its order volume is higher than ours. It therefore now has more stock than us"¹³⁰. Similarly, in an email on 2 August 2012, Apple told Ingram Micro about the quantities supplied to Tech Data: "For info, TD had the same quantity as you, or maybe slightly more"¹³¹.
158. Conversely, several documents in the case file show that Apple was giving Tech Data information about supplies to Ingram Micro.

¹²⁵ Classification marks 30543, 30544 and 30545

¹²⁶ Classification mark 30548

¹²⁷ Classification mark 34158

¹²⁸ Classification marks 34713 to 34727

¹²⁹ Classification marks 32276 and 32277

¹³⁰ Ingram Micro internal email, classification mark 30551

¹³¹ Classification mark 34175

159. In an email on 15 September 2009, Apple told Tech Data the stock status of its competitor Ingram Micro: “This morning, IM’s stock consisted of less than 150 units of Leopard on the ZOFP/MB985 / very few MB986 and MB Air”¹³². In an email in April 2009, Apple told Tech Data which stock references were not available at Ingram Micro for a customer¹³³. An email exchange on 5 January 2010 also shows that Tech Data asked for and obtained information from Apple about the number of units sold by Ingram Micro to a customer¹³⁴. Finally, in an email on 24 February 2011, Apple told Tech Data what stock was allocated to Ingram Micro compared to its own stock¹³⁵.
160. Secondly, Apple was able to give its wholesalers information about the composition of each other’s sales forces.
161. In an email in July 2009, Apple told Ingram Micro about Tech Data’s commercial strategy and the composition of its sales forces to explain the differences in market share between the two companies with respect to APR customers: “The second reason is a combination of several factors => TD introduced a policy of counter-attack when it saw its market share drop: - TD’s sales representatives aim to contact the main resellers or APRs on a daily basis. This daily contact makes the resellers more loyal to them. Because they have six dedicated Apple sales staff, they can do this fairly easily. - They have increased the number of in-person visits to win back certain accounts they had lost (e.g. iConcept) and are trying to start again on new commercial terms with some other resellers (...)”¹³⁶.
162. On the same subject, an extract from a notebook seized from Tech Data’s premises reveals that, as a result of an exchange with an Apple employee on 24 May 2011, the wholesaler knew specific details about its competitor’s sales team, consisting of four sales staff and characterised by “high turnover”¹³⁷.
163. Lastly, Apple forwarded information to its wholesalers, particularly about each other’s promotional policies, commercial approaches to a customer, or credit facilities.
164. In Ingram Micro’s case first of all, in an email on 27 July 2012, Apple informed Ingram Micro of a product promotion launched by Tech Data, forwarding Tech Data’s internal email “for info” and asking Ingram Micro what they were doing about it¹³⁸.
165. Similarly, in an exchange of emails in December 2012, Apple confirmed to Ingram Micro that Tech Data was doing a promotion on a range of products: “yes, there’s not much stock and they’re doing a 1% promotion for one week”¹³⁹.
166. In another email on 21 December 2012, Apple informed Ingram Micro of the progress of commercial negotiations between its competitor Tech Data and a customer¹⁴⁰.
167. In an Ingram Micro internal email on 17 April 2008, written following a meeting with Apple, the wholesaler distributed a table comparing its credit facilities for each customer with those

¹³² Classification mark 32256

¹³³ Classification mark 32273

¹³⁴ Classification mark 34433

¹³⁵ Classification marks 44867 to 44870.

¹³⁶ Classification marks 11273 and 11274 (VC) / 25859 to 25860 (VNC)

¹³⁷ Classification mark 12742 (VC) / 25110 (VNC)

¹³⁸ Classification mark 34189

¹³⁹ Classification mark 29418

¹⁴⁰ Classification mark 27171

of its competitor Tech Data, calculating the difference between the two wholesalers and noting that Tech Data was “much more flexible than us” on some accounts¹⁴¹.

168. In Tech Data’s case, during email exchanges on 15 May 2009, Apple expressed doubts about the increase in promotions being considered by Tech Data and explained the promotional strategy of its competitor Ingram Micro, to encourage it to adopt a similar approach: “Aren’t you afraid you’re doing too many promotions? (...) For info, IM has chosen to reduce the number of promotions and is banking on a MacBook+digital camera bundle”, which Tech Data also agreed to do¹⁴².
169. Similarly, in a Tech Data internal email in December 2011, reference was made to information gathered as a result of a discussion with Apple revealing the credit facility granted to a customer by its competitor Ingram Micro: “Off the record, Ingram is only giving a €1 million facility”¹⁴³.
170. At the time of confirming an order to be delivered to Fnac, Apple sent Tech Data an email on 8 July 2011 that included “a summary of the iMac deal at the disties and the info to be sent to Fnac”, stating on the one hand that “generally, orders can be placed by EDI both with IM and with TD” and on the other that “the EAN [European Article Number¹⁴⁴] codes are the same at IM and TD and will be applied to the CTO [Configure to Order¹⁴⁵] iMacs”. As well as listing the products sold by Ingram Micro, the summary also included the name and contact details of the Ingram Micro customer account manager for Fnac and Ingram Micro’s stock list for Fnac for all products¹⁴⁶.
171. Finally, a Tech Data manager stated, during a hearing with the Investigation Services, that because of the information provided by Apple, each wholesaler had a detailed knowledge of the precise, complete list of the other’s “Retailer” customers: “We might have to ask Apple (directly or through a customer) for a list of the IM accounts and their quotation to attack them because, at the end of each quarter, retailers have the option of changing wholesaler”¹⁴⁷.
172. It is clear from this that Apple occasionally sent more individualised information to Ingram Micro and Tech Data, about their competitor’s stocks or sales force composition, or about a promotion one of them was running or the credit facilities their competitor was giving.

2. Usefulness of the information exchanged

173. The information sent to the wholesalers by Apple enabled them to compare their own performance with their competitor’s performance.
174. One Tech Data manager said: “Concerning the usefulness of the information within the wholesaler market, it can be used to gauge TD’s performance, so it’s a valuable performance indicator at management level. If it fell, we would keep working hard and improving things

¹⁴¹ Classification marks 30553 and 30554

¹⁴² Classification marks 44899 to 44905.

¹⁴³ Classification mark 32216

¹⁴⁴ The EAN code is a standardised code, generally associated with a barcode, for the unique identification of items.

¹⁴⁵ In the AAR agreement, “CTO” products are defined as follows “‘CTO products’ are non-standard products configured to order”, classification mark 119.

¹⁴⁶ Classification marks 44873 to 44878.

¹⁴⁷ Classification mark 34445.

with our customers to try to achieve growth”¹⁴⁸. This highlights the usefulness of the information about market share for each customer type¹⁴⁹.

175. Similarly, an Ingram Micro manager said in a hearing that the market share data sent by Apple was “an indicator as regards Apple enabling us to ‘benchmark’ ourselves against the market and if necessary to brief our teams accordingly and assess performance in more detail”¹⁵⁰, which also highlights the usefulness of having a breakdown by product¹⁵¹. He also confirmed that the feedback from the field and the information sent by Apple enabled him to meet his targets¹⁵².
176. Similarly, Apple said that the information it forwarded meant that the wholesalers knew “their respective importance for the sale of the products concerned and for each channel by value and by volume” and “knew how to improve (e.g. is it a stock issue, poor communication by sales staff, etc.) and to react in response to the competitor’s performance”. In Apple’s view, “it enabled them to compete with one another and to win back customers and do better than each other”¹⁵³.
177. More specifically, the person responsible for wholesaler relations at Apple pointed out that, if there was an imbalance between the performance of its wholesalers, sending this information could “push” the one in difficulty, “in particular to go and find new customers not authorised by Apple”¹⁵⁴.
178. With regard to this, in the aforementioned email of July 2009, when Apple gave Ingram Micro information about the composition of its competitor Tech Data’s sales forces (see paragraph 161 above), Apple recommended that its wholesaler should increase its commercial presence, in particular by expanding its dedicated Apple sales team, in order to regain market share¹⁵⁵: “TD introduced a policy of counter-attack when it saw its market share drop (...) Ingram absolutely must increase its presence among the APRs if you want to regain market share”.
179. Similarly, in an email of 18 September 2009 giving Ingram Micro very precise information about its standing with many customers (an Excel table was attached to the email) compared to that of Tech Data, Apple encouraged Ingram Micro to reorientate its commercial policy in the light of the forwarded information¹⁵⁶: “APR focus. Your market share in this channel needs to increase (...) AAR focus (including the ASEs, the LARs) => there are accounts that TD doesn’t know about! You have to groom them if you want to keep them”.
180. In an email on 17 June 2011, Apple told Ingram Micro about a promotion by its competitor Tech Data and recommended it to follow suit, which Ingram Micro immediately did¹⁵⁷.

¹⁴⁸ Classification mark 34444.

¹⁴⁹ Classification mark 34445.

¹⁵⁰ Classification mark 34467

¹⁵¹ Classification mark 34468

¹⁵² Classification mark 34467

¹⁵³ Classification mark 34573 (VNC) / 34532 (VC)

¹⁵⁴ Classification mark 34532 (VC) / 34573 (VNC)

¹⁵⁵ Classification marks 11273 and 11274 (VC) / 25859 to 25860 (VNC)

¹⁵⁶ Classification mark 26793

¹⁵⁷ Classification mark 34171

181. An internal email exchange within Ingram Micro in December 2012 also shows that, having received confirmation from Apple about a promotion launched by Tech Data on a range of products, the wholesaler decided to align itself with its competitor's promotional strategy¹⁵⁸.
182. This observation is confirmed by other documents in the case file¹⁵⁹.
183. Similarly, Apple explained that it intervened in the same way with Tech Data: "We push the best performing wholesaler in the same way"¹⁶⁰. The aforementioned documents in the case file thus show that Apple was giving Tech Data explanations for its competitor's good fortune¹⁶¹, its competitor's stock of certain products¹⁶² and its standing with certain customers¹⁶³.

c) Methods of exchange

1. Frequency of the exchanges

184. As shown above, the information from the wholesalers was collected by Apple on a regular basis, initially every day, and then weekly (see paragraphs 118 to 125 above).
185. Similarly, Apple gave the wholesalers market share information, with comments where appropriate, on a weekly or monthly basis (see paragraphs 137 to 172 above). On this point, although Tech Data said in the hearing that "the information was sent fairly regularly but I can't remember if it was weekly or monthly"¹⁶⁴, an email on 3 December 2008 sent by Tech Data to Apple specifies that this information was sent "on a weekly basis"¹⁶⁵. Ingram Micro said that it could not remember how often the information was sent, but described it as "regularly"¹⁶⁶.
186. The last examples in the case file of information being sent by Apple to its wholesalers date from June 2013. Apple explained on this point that "from the end of 2013 (when forecasting was introduced) these transmissions stopped"¹⁶⁷. The wholesalers could not remember exactly when they stopped receiving this information from their supplier¹⁶⁸.

2. Respective roles of Apple and its wholesalers

187. The evidence in the case file shows that the information was sent separately to each wholesaler.
188. Apple said that "both the reporting and the dissemination of this information were done separately to each wholesaler"¹⁶⁹. Tech Data also confirmed that: "IM was not in the loop with this type of email; I would have remembered if it had been"¹⁷⁰.

¹⁵⁸ Classification mark 29418

¹⁵⁹ Classification mark 30551, classification marks 34158 and 34159, classification marks 30553 and 30554, classification mark 32176

¹⁶⁰ Classification mark 34573 (VNC) / 34532 (VC)

¹⁶¹ Classification marks 32276 and 32277

¹⁶² Classification mark 32256

¹⁶³ Classification mark 34433, classification mark 32273

¹⁶⁴ Classification marks 34444 and 34445

¹⁶⁵ Classification mark 44936 (VC) / 44981 (VNC)

¹⁶⁶ Classification marks 34467 and 34468

¹⁶⁷ Classification marks 34573(VNC)/34532 (VC)

¹⁶⁸ Classification marks 34444, 34467 and 34468

¹⁶⁹ Classification mark 34533 (VC) / 34574 (VNC) – 34974 (VNC2)

¹⁷⁰ Classification mark 34444

189. The wholesalers nevertheless asked for communication of this information about their competitor. They also knew that Apple was sending their competitor information about them.
190. The person responsible for wholesaler relations at Apple said in the hearing that he used to send the wholesalers information about their respective market shares “at the request of the wholesalers themselves, who wanted to know how they stood in relation to one another” and he emphasised that “these market shares were expected and requested by the wholesalers”¹⁷¹.
191. On this point, an Apple internal email of 24 February 2013 shows that if there was a delay in sending the market share information, the wholesalers would request it from Apple¹⁷².
192. The additional information sent with the market shares was sent either on Apple’s initiative or in response to questions from the wholesalers.
193. The person responsible for wholesaler relations at Apple France stated: “I added comments and explanations where necessary on any changes in these market shares (for example if a customer changed wholesaler, which might explain the change)”¹⁷³.
194. Conversely, many documents in the case file show that the wholesalers were asking for explanations or further information about their competitor.
195. On this point, it was in response to a question from Ingram Micro that, in an exchange of emails in July 2009, Apple explained to the wholesaler that its competitor Tech Data had a larger sales force and Ingram Micro should expand its own¹⁷⁴.
196. Similarly, in an email on 3 December 2008, Tech Data asked to be sent “the TD/IM market shares”¹⁷⁵. In an exchange of emails in September 2009, Tech Data asked Apple for information about the stocks held by its competitor Ingram Micro¹⁷⁶. In March 2010, Tech Data also asked for and obtained from Apple, details of its competitor’s performance¹⁷⁷. In an exchange of emails on 20 March 2013, in response to a question from Tech Data on its competitor Ingram Micro’s price positioning, Apple disclosed Ingram Micro’s current and future discount levels: “They will change to 9% from 01/04. However, IM has confirmed to me that it is not giving a discount of 8% to FS [France Systèmes] at the moment”¹⁷⁸.
197. In addition, a Tech Data internal email in November 2011 shows that the wholesaler was told the dates and content of meetings held between Apple and its competitor Ingram Micro: “Ingram’s retail team has a meeting with Apple’s retail team (...). Off the record, it’s to discuss and work on Tech Data’s accounts and not their own accounts (...) Ingram wants to take the Apple retail accounts back from Tech Data (...)”¹⁷⁹.
198. Similarly, it is apparent from email exchanges between 30 September and 1 October 2010 that, after discussing Ingram Micro’s prices internally, Tech Data asked Apple for details. Having obtained the information from Ingram Micro, Apple explained to Tech Data its competitor’s prices, also forwarding the reply email sent by Ingram Micro¹⁸⁰.

¹⁷¹ Classification mark 34573 (VNC) / 34532 (VC)

¹⁷² Classification mark 27242

¹⁷³ Classification mark 34573 (VNC) / 34532 (VC)

¹⁷⁴ In an email of July 2009, classification mark 11274 (VC) / 25860 (VNC)

¹⁷⁵ Classification mark 44936 (VC) / 44981 (VNC)

¹⁷⁶ Classification mark 32257

¹⁷⁷ Classification marks 32276 and 32277

¹⁷⁸ Classification marks 33705 and 33706/ 44979 and 44980.

¹⁷⁹ Classification mark 32338

¹⁸⁰ Classification marks 44879 to 44885.

4. PRODUCT AND CUSTOMER ALLOCATION SYSTEM USED BY APPLE AND ITS WHOLESALERS

199. The information in the case file shows that, based on a system of information gathering from the APRs (a), Apple set up a system for allocating products to its wholesalers, which followed certain guiding principles (b). The product allocation system was used both for the authorised wholesalers (c) and for the APRs that were their customers (d). In March 2013, Apple set up a new allocation system, the “forecast” system (e).

a) Information gathering system set up by Apple

200. As explained earlier, Apple had a precise knowledge of its partners’ activity in the wholesale market (see paragraphs 117 et seq. above).
201. Apple also set up a system for reporting information on the retail market, complementing the information sent by the wholesalers on purchases from them by the resellers. This reporting was required by contractual stipulations between Apple and the APRs. In practice, the investigation shows that the resellers regularly sent Apple very detailed information.

1. Contractual stipulations

202. The APR Agreement and the document drawn up by Apple entitled “APR Addendum”¹⁸¹ stipulate that the APRs must prepare a weekly report on their sales and their stocks for each authorised retail outlet, as indicated in the “Sales and Inventory Reporting Practice and Procedure”. The reporting obligation in particular is presented in the “APR Addendum”¹⁸² and in appendix A “Exhibit A Sales and Inventory Reporting” of the “Channel Terms”¹⁸³.
203. As Apple pointed out during the hearing: “All our partners are contractually obliged to report sales (direct and indirect authorised resellers and wholesalers produce stock and sales reports each week). We collect these reports via the GBI [Global Business Intelligence¹⁸⁴] portal and they include all sales in the previous week”¹⁸⁵.
204. A team at Apple is in charge in particular of analysing the APRs’ sales and stock inventories each week¹⁸⁶.
205. Apple set up an incentive mechanism to encourage the APRs to submit information in particular about their financial health. The benefits, rebates and refunds outlined in the “Channel Terms APR” agreement are contingent upon them doing this (report on sales and stocks, as well as a detailed business plan for sales and marketing of Apple products in the APR’s catchment area; see paragraphs 419 et seq. below).

¹⁸¹ Classification mark 14430 (list of agreements)

¹⁸² Classification mark 5334 (VC) / classification mark 34949 (VNC2).

¹⁸³ Classification mark 14035.

¹⁸⁴ The GBI portal is an Apple online tool containing the sales data of the Apple product resellers (sales, invoices, etc.), see classification mark 28952

¹⁸⁵ Classification mark 16813 (VNC) / 16112 (VC)

¹⁸⁶ Classification mark 10150 (VC) / 23528 (VNC)

206. Similarly, the ability to benefit from certain pricing advantages, such as “Price Protection”¹⁸⁷, “velocity” refunds and “attach rate refunds”¹⁸⁸ depends on them meeting this obligation.
207. On this point, an Apple France internal email of 2 May 2012 stated: “As you know, the cardinal rule for a partner to be eligible for price protection is weekly reporting (because it is this reporting that is used by Central to calculate and define the budgets)”¹⁸⁹.
208. Submitting a fraudulent report can also lead to the withdrawal of a financial advantage from an APR by Apple¹⁹⁰.

¹⁸⁷ Classification marks 14033 (VC) / 34955 (VNC2).

¹⁸⁸ Classification marks 14689 to 14696) and classification mark 14439 (VC) / classification marks 14691 to 14693 (VNC) and 34961 (VNC2).

¹⁸⁹ Classification mark 28842

¹⁹⁰ Classification mark 598 (VC) / classification mark 34947 (VNC 2).

2. *Transmission of information by the APRs*

209. Several APRs interviewed during the investigation confirmed that they sent very detailed information to their supplier.
210. On this point, the company GDA said: “We report all our sales every week (on Tuesdays) with a breakdown for each retail outlet”¹⁹¹ and “[...] during meetings [with Apple] we discuss verbally all the management points of our company, margin, personnel training, cash flow, stock management, future investment, finance applications”¹⁹².
211. Similarly, the company Alis Informatique said in the hearing: “Every week (on a Monday or Tuesday), for every item reference, we report the quantities sold and the quantities in stock (no distinction is made between products bought from Apple and products bought from Ingram). Apple only gives us credit notes for what was bought from Apple. This enables them to produce volume forecasts but also to offer price protection when new products are launched, which means that if we have ten of the old version of a product in stock, and Apple does a price reduction, they can check how much they are going to give us (i.e. the amount of the price reduction). We also give Apple full information for sales in the education sector: the customer’s full contact details, the invoice, and proof that the purchaser is in education. A similar mechanism is in place for key accounts (for which there are also buy-back mechanisms)”¹⁹³.
212. The statements by the resellers Youcast¹⁹⁴, LDK2¹⁹⁵, Arcan IDF¹⁹⁶, Easy Computer¹⁹⁷, GDA Mac Tribu¹⁹⁸ are along the same lines.
213. Also along the same lines, several documents seized from Apple contain detailed information about the resellers: lists of addresses and GPS coordinates of retail outlets, with information about local population, the geographical characteristics of the site, the retail outlet’s surface area, the size of the windows, the footfall¹⁹⁹, a list of the trained staff in each branch²⁰⁰, a breakdown of sales for the retail outlets that do not report information to Apple²⁰¹, the forecast income statement with a table of discounts²⁰², weekly monitoring of retail outlets, or even a study of the impact of discount changes by the reseller²⁰³.

¹⁹¹ Classification mark 4203

¹⁹² Classification mark 4204

¹⁹³ Classification mark 5549

¹⁹⁴ Classification mark 3741.

¹⁹⁵ Classification mark 13911.

¹⁹⁶ Classification mark 4119.

¹⁹⁷ Classification mark 5917.

¹⁹⁸ Classification mark 4204.

¹⁹⁹ See the extraction from computer seizures “scellé 27 / PJ 21.02.10 – FRENC PIPELIN”. See also the extraction from computer seizures “scellé 28 / 268208.emlx + PJ” and the extraction from computer seizures “scellé 28 / 226482.emlx + PJ” (VC) / 39941 (VNC).

²⁰⁰ See the extraction from computer seizures “scellé 27 / PJ 2012_05_21_APR_EU_New-iPad-Training-Progress=Twice_Weekly=”.

²⁰¹ See the APR PoS Reports: for an example, classification marks 30740 to 30746

²⁰² See the BP – or BP- New files: as an example, classification mark 28135 and the extraction from computer seizures “scellé 32 / PJ de 48680.emlx”.

²⁰³ Classification marks 9917 and 9925 (VC) / classification marks 23318 and 23326 (VNC)

b) Guiding principles of the system for allocating products between Apple and its wholesalers

214. The product allocation system implemented by Apple is designed to optimise production and meet demand as efficiently as possible, in both “constraint” periods and “non-constraint” periods. It also has the particular characteristic of being governed by the “fair share” principle, meaning that products are shared fairly between the authorised wholesalers.

1. A supply system set up by Apple to optimise production

215. For distribution of its products, Apple set up a system giving it an exact knowledge of demand. This system enables it to check the stock levels of its wholesalers and distributors so that it can optimise production.
216. Apple said at the hearing that the reason its supply system exists is to adapt production to demand²⁰⁴. Similarly, in a slide entitled “Apple’s supply chain”, given by Apple representatives to the Investigation Services during a hearing, Apple emphasises that its goal “is to maximise product availability while avoiding overproduction”²⁰⁵.
217. Apple can thus optimise its management by keeping both wholesalers’ and retailers’ stocks at the lowest possible level. The average storage time of Apple products by the wholesalers varies between around 15 to around 20 days, whereas according to Tech Data’s statements “the average storage time of other suppliers’ products is [...]”²⁰⁶.
218. Globally, Apple said at the hearing that “At all times, we try to operate on the basis of sales forecasts, assigning a number of units to a geographical region”²⁰⁷. Apple’s representatives explained the following: “Apple products are allocated by ADI’s Operations teams in the following way. First, ADI allocates the available products to each of the countries in the EMEA zone, based on the sales forecasts for those countries. Then, the volume allocated to each country is shared out among the different distribution channels”²⁰⁸.
219. Regarding the sharing out of volumes and deliveries between the two wholesalers in France, Apple explained: “[...] ADI shares the volumes between its authorised wholesalers (IM and TD) and its various direct partners (e.g. the direct APRs (...)) In practice, at the end of the week, each of the two wholesalers receives from ADI a table listing, for each product reference, the number of units ADI plans to deliver to them based on their target number of weeks of available stock and their forecast sales”²⁰⁹.
220. This allocation may be changed on the basis of feedback. In 2011, in response to excessively large orders by the company eBizcuss²¹⁰, Apple changed the allocation.

²⁰⁴ Classification mark 14765 (VC) / 14796 (VNC) and 34962 (VNC2)

²⁰⁵ Classification mark 14780 (VC) / 14812 (VNC)

²⁰⁶ Classification mark 16550 (VC) / 19311 (VNC) - 34970 (VNC 2)

²⁰⁷ Classification mark 14765 (VC) / 14796 (VNC) - 34962 (VNC2) and classification mark 14766 (VC) / 14797 (VNC) - 34963 (VNC2)

²⁰⁸ Classification mark 14190 (VC) / 14461 (VNC)

²⁰⁹ Classification mark 14190 (VC) / 14461 (VNC)

²¹⁰ Classification marks 26981 and 26982

221. ADI also helped Apple France with allocating products to the indirect partners²¹¹. In an email on 25 April 2012, an ADI employee wrote to an Apple France manager: “Let’s agree how would be the best to help you to get this kind of info going forward that will help you in the indirect split”²¹².
222. Finally, the investigation found that Apple France’s activity was also supervised by the company AEL.
223. According to Apple’s statements, “Apple Europe Limited provides marketing and management services to other Apple group entities, in particular ADI (for example, legal, human resources management and accounting services)”²¹³. Apple emphasised that “in practice, and to the extent that ADI’s responsibilities include the distribution of Apple products in France, AEL’s employees may often be in contact with employees of Apple France on various issues to do with the French market”²¹⁴.
224. It also appears from several emails that AEL partially supervises Apple France’s activity²¹⁵, as illustrated by the email of 7 September 2010 sent by an AEL employee to an Apple France employee: “Attached is an iPad velocity report updated for week 10 actuals. It is key that we ensure any allocations coming into the countries are put in the right place to ensure those with inventory are not building more and those who are short are getting their share to maximise the sell through”²¹⁶. When told about this exchange, an Apple France employee forwarded the email to other Apple France employees on 9 September 2010, stating: “Guys, see Mark’s email and the content of the attached file. We have big differences between Prosumer partners on the rotation of iPad stock... We need to review the forecasts for each reseller so that they are aligned with their actual potential, we avoid creating overstocks, and we send the iPads to the right places so we optimise our ST. Thanks for your support”²¹⁷.

2. “Fair share” principle for authorised wholesalers

225. The information in the case file shows that, for each product sold on the French market, Apple was involved in its distribution by sharing out the volumes between, on the one hand, its two authorised wholesalers, Ingram Micro and Tech Data, and on the other, various direct partners such as the direct APRs²¹⁸.
226. More specifically as regards the sharing of production between the two authorised wholesalers, Apple allocates its product volumes in accordance with a “fair share” principle. This principle has been strictly followed for many years²¹⁹.
227. This is evident in particular from an email that Apple France sent to an APR in 2008, in which Apple said: “as a general rule, the stock volumes held by the two wholesalers are more or less the same. You should therefore split your purchases not just on the basis of availability but on the basis of credit facilities”²²⁰.

²¹¹ Classification mark 26894

²¹² Classification mark 26894

²¹³ Classification mark 34666 (VC) / classification marks 34875 and 34876 (VNC) – 34979 (VNC2)

²¹⁴ Classification mark 34684 (VC) / 34873 (VNC) – 34980 (VNC2)

²¹⁵ In particular see classification marks 26986 to 26988 or classification marks 26721 to 26722

²¹⁶ Classification marks 26721 to 26722

²¹⁷ Classification marks 26721 to 26722

²¹⁸ Classification mark 14190 (VC) / 14461 (VNC)

²¹⁹ Classification mark 11501

²²⁰ Classification mark 795

228. Similarly, in 2010, in an exchange of internal emails, Apple France representatives were wondering whether purchases by this same APR were now equally balanced between Tech Data and Ingram Micro²²¹. It was noted that the wholesalers themselves knew about the fair share principle.
229. As part of its allocation policy, Apple did not just make sure the quantities delivered to its two French wholesalers were shared out fairly. In some cases, it went further, sharing out customers fairly between its two wholesalers. To do this, Apple sometimes intervened directly among the resellers, as shown by an internal email from September 2010, in which Tech Data observed that “Apple is doing all it can to ensure Tech Data’s market share for Apple is 50/50 with IM’s. Apple is intervening in big customer orders, especially from APR customers that were loyal to us”, “Apple has advised it to place half of the order with each wholesaler. As a reminder, when its second APR opened, Apple did everything it could to ensure its initial stock order went to the competition” (i.e. Ingram Micro)²²².
230. Furthermore, in June 2011, a Tech Data internal email indicated that “thanks to valuable help from Apple (off the record, non-confidential info), Cora chose Tech Data for the quotation opened at the start of July for a quarter. [...] Cora was very happy with Ingram as regards logistics for iPods; it was Apple that pushed for the transfer”²²³.
231. Finally, it is apparent from an email sent by an Apple manager to Ingram Micro on 18 September 2009, when Ingram Micro had a significantly smaller market share than its competitor Tech Data, that Apple gave it the following commercial guidance regarding its competitor to enable it to win back its market shares: “Everyone, Please keep this analysis to yourselves. It is essential that you NEVER tell the resellers what happens at TD. This analysis is to show you the potential that the competition makes of the main resellers. I’ve only included the main accounts 1) APR focus: Your market share of this channel must increase. This is where most of the volume can be found =>**Existing APR account** =>(minimum target market share 35% to start with...) dig to find out why the APR is not ordering from you any more (credit problem, something else?) Credit lines must be used in full at IM =>**Non-existent APR account**=> make contact with them. 2) AAR focus (including the ASEs, the LARs) => there are accounts that TD doesn’t know about! You have to groom them if you want to keep them => there are accounts that don’t order anything from you (take the biggest ones to start with and make contact with them) =>there are accounts that you don’t have details of, make contact with them too. I’m counting on you for your discretion and action”²²⁴.
232. To determine the exact quantities that the wholesalers had to allocate to each customer, the fair share mechanism introduced by Apple used each wholesaler’s past performance for each distribution channel (Prosumer or Retail) and for each Apple product. As Apple emphasises in its written statements, “the fair share mechanism aims to reflect the state of the market, not to change it, by distributing the available quantities on the basis of the sales made within each channel (Prosumer vs Retail)”. Apple explains that the fair share is “calculated for each product” and that it “also varies depending on the product”²²⁵.

²²¹ Classification mark 27625

²²² Classification mark 32281

²²³ Classification mark 34129

²²⁴ Classification mark 26793 and extraction from computer seizures “scellé 28 / PJ 209007.emlx” (“reseller comparison” Excel table).

²²⁵ Classification mark 16813 (VNC) / 16112 (VC) quoted in paragraph 349 of the statement of objections.

3. “Constraint” and “non-constraint” periods

233. The investigation found that, as regards the distribution of its products, Apple makes a distinction between “constraint” and “non-constraint” periods.
234. The “constraint” concept, as used by Apple, covers product launch periods and periods where there are shortages attributable to various causes (for example, but not limited to, holiday periods or the back-to-school period, shortages of monitors or certain components, situations where a subcontractor lacks sufficient capacity or a manufacturer’s productivity is too low to produce enough, floods at factories, difficulties manufacturing a housing with an innovative design, etc.)²²⁶, when demand exceeds the capacity to produce the products²²⁷.
235. Apple explained this concept in the hearing: “We consider that there is a constraint when there is very high demand (demand outstrips ability to supply products). The delivery time can also have an impact. This constraint generally appears during a new product introduction (NPI). There is another situation that can lead to a constraint: all the products are made from various components supplied by third parties. If one of them has a supply shortage, this can lead to a constraint period. There is no proper alert system when we are in a constraint period. [...] The duration of constraint periods can be very variable, depending, for example on Apple’s ability to produce the product. When the constraint period ends, we know immediately because sales will then take off [...]”²²⁸.
236. Apple also said during the investigation that it could not give a precise and exhaustive list of all the constraint periods from 2010 to 2014, since it had no indicators for monitoring episodes of constraint²²⁹.
237. Constraint periods concern a large number of a products and are very frequent, as Apple said in the hearing: “Our constraint periods happen fairly often and can affect a wide range of products [...]”²³⁰.
238. This is confirmed by the wholesalers. Ingram Micro said in the hearing that: “The difficulties are recurrent. The products particularly affected are the iPhone, iPad and iPod. Sometimes the MacBook and iMac. These difficulties mainly arise when new products are launched, in holiday periods and in the back-to-school period (September). They are too variable in length to be able to give you a precise statistic”²³¹.
239. Tech Data said in the hearing: “Since 2009, Tech Data France has experienced difficulties obtaining supplies of Apple products on a number of occasions, particularly during new product launch periods. (...) Supply difficulties arise particularly when certain products are launched. How long they last depends on how successful the product is: generally less than three months, but sometimes up to five months if it’s a big commercial success. Supply difficulties were experienced particularly when the iPad was launched in May 2010, which generated high demand for several months. The same situation occurred when new versions of the iPad were released, particularly the iPad 2 in March 2011 and the iPad 3 in March 2012. Tech Data France has also experienced supply difficulties during the launch of new

²²⁶ Classification mark 21583 (VNC) / 16479 (VC)

²²⁷ Classification mark 14190 (VC) / 14461 (VNC)

²²⁸ Classification mark 16817

²²⁹ Classification mark 42059

²³⁰ Classification mark 16817

²³¹ Classification mark 21583 (VNC) / 16479 VC

versions/products, particularly the MacBook Air and the iPad Air. These lasted for between two and five months. [...]”²³².

c) Apple’s sharing of its products between the authorised wholesalers

240. Apple’s sharing of its products between the authorised wholesalers is governed by a number of contractual stipulations (1). A difference in treatment is also observed in Apple’s allocation of the products, based on whether the reseller belongs to its direct or indirect channel (2).

1. Allocation system stipulated by the agreements between Apple and its wholesalers

241. There are two types of stipulation in the agreements between Apple and its wholesalers on product allocation between them. The stipulations are either general, concerning deliveries of all Apple products (a), or specific, concerning the special “fast ship program” delivery system for new products (b).

a. General contractual stipulations

242. The system for allocating Apple products to the wholesalers is governed by the stipulations in several agreements between Apple and Tech Data or Ingram Micro.
243. On the one hand, Clause 5.4 of the “Apple Sales International” annual framework agreement explicitly states that, if product orders exceed available stocks, Apple reserves the right to allocate and deliver those products as it deems fair. One clause stipulates that Apple cannot be held liable by the wholesalers for the allocation strategy it has chosen or the application of that strategy²³³.
244. On the other hand, as explained in more detail below, Clauses 4.3.1 and 4.3.2 of the “Channel Terms for Apple Authorized Distributors”, applicable to wholesalers from 2012 make the granting of discounts to the wholesalers by Apple dependent on compliance with the allocations decided by Apple for its products²³⁴. More specifically, these stipulations state that “The Distributor must put in place procedures to enable the allocation of stock to maximize the sell-through of Apple Products. Allocation of Apple Products purely on a FIFO (first in, first out) basis would not support this process. This process should, where possible be automated and supported by Distributor's Inventory management systems.”²³⁵.

b. Specific contractual stipulations: “fast ship program”

245. Between 2011 and 2013, Apple introduced the “fast ship program”, a special system for supplying new products. The program aim was to enable all direct and indirect retail outlets to be supplied with a minimum number of product references on their release date²³⁶. Apple’s representatives said during a hearing with the Investigation Services that the program was a marketing mechanism with no connection to the “constraint” concept²³⁷.

²³² Classification mark 16551 (VC) / 19312 (VNC)

²³³ Classification marks 11051 and 10986

²³⁴ See, for example, classification mark 16581

²³⁵ Classification mark 16581

²³⁶ Classification mark 14798 (VNC) / 14767 (VC)

²³⁷ Classification mark 34534

246. The program was provided for contractually in the “Apple Fast Ship Program Addendum to the Apple Authorized Distributor Agreement” and the “Apple Fast Ship Program Addendum to the Apple Authorized Distributor Agreement for iPhone”²³⁸.
247. In practice, the wholesalers placed a “blank” order with Apple, i.e. an order that did not specify either the nature or the price of the new product or the quantities that would be supplied. On this point, Apple said in the hearing that “NPIs are highly strategic and confidential”²³⁹.
248. Once the order had been placed, Apple then decided for each wholesaler the volume of products to be allocated in that single delivery, based mainly on the historical data that it held for past orders. An invoice was immediately sent to the wholesaler concerned²⁴⁰. Apple also asked the wholesalers to abide strictly by a number of confidentiality rules.
249. In a product launch period, the wholesaler therefore received the product several days ahead. For example, on 10 June 2013 Apple introduced a new generation MacBook Air at its WWDC conference. On the same day, it told one of the wholesalers that it would receive the products on 11 June.

2. Different treatment for different resellers

250. The documents in the case file show that Apple treated different resellers differently depending on whether they were supplied through its direct channel (i.e. the Apple Retail Stores, the Apple Online Store and the Apple Premium Resellers and direct Retailers) or indirectly (i.e. the indirect APRs and the indirect Retailers).
251. This different treatment primarily concerned information about new product introductions, in the context of the “fast ship program”. The Apple Stores received more information than the APRs.
252. One APR said: “We never know when a new product is going to be introduced; generally there are rumours. The announcement generally comes at around 3 pm, then in the next 24 to 48 hours we receive a fast ship, a special store demo product and some products so we can make the first sales.
At Apple, everything is ready for sale. By comparison, we need a “network COM” to enable selling to start. We have to wait to find out the price before we can make any sales.
Apart from for iPads and iPhones, product introductions are not announced. For other products there’s no announcement, we usually find out from the press, or we can work out that there’s going to be a product announcement when some Apple Stores announce a new product introduction.
For iPads, the time scales are one to three weeks between the launch being announced and the moment we receive the products.
With the iPad 1, we were absolutely banned from taking any pre-orders. We received an email about this.
With the iPad 2, we were not allowed to take any pre-orders but we could reserve products. We couldn’t take any advance payments from customers though.
With the iPad 3, Apple announced the iPad 3. B... contacted me as president of the APRs and suggested a launch at midnight by the APRs (whereas the ARSs were to start selling

²³⁸ See list of agreements, Classification mark 32111

²³⁹ Classification mark 14798 (VNC) / 14767 (VC)

²⁴⁰ Classification mark 1711 (VC) / classification mark 34948 (VNC2) and classification mark 14037 (VC) / classification mark 34957 (VNC2) for the Resellers.

later). Later on, Apple told the APRs that we weren't allowed to tell customers that we were opening at midnight, so only one APR opened early for the pre-launch. For the iPad, we're not allowed to advertise the launch"²⁴¹.

253. The different treatment also concerns the way Apple shares its products between its direct channel and its indirect channel during constraint and non-constraint periods.
254. Firstly, in an email in September 2005, sent to Apple by the reseller iConcept about an iBook delivery²⁴², iConcept explained to Apple that it was still waiting for its wholesaler to supply the items ordered even though the products were not considered to be affected by a constraint and they were available within three days from the Apple Store and within 24 hours on the Fnac website. The reseller then asked Apple for an emergency delivery.
255. Later on, Apple mentioned this difference in treatment itself in an internal email exchange on 29 November 2011, as follows: "Waiting period to get backlog shipped leads to a kind of discrimination between prosumers and apple direct business (Apple Retail Shops and Apple on line store). The situation is critical, in terms of possible legal consequences for Apple. Besides, this situation is getting trickier and trickier as apple is opening new Apple Retail Shops. Action: escalating this to Lilian so that Apple Worldwide will take into account this, in order to possibly review their supply strategy"²⁴³.
256. Similarly, Tech Data said internally in an email on 28 November 2011: "Products subject to constraints: MacBook Air, MacBook Pro, iMac, monitors and accessories. Increasingly difficult procedure for sales representatives: buffer stock, allocation, CO06, no visibility. Strong competition from the Apple Stores which have availability of the products subject to constraints" (underlining added)²⁴⁴.
257. In response to a questionnaire from the Investigation Services, one APR also mentioned that it could happen that a "product is available in the Apple Online Store but it's impossible for us to obtain it from our wholesalers"²⁴⁵, whereas another said: "Since the ARSs came on the scene, we get the clear impression that their [Apple's] supply priority remains their own 100% Apple distribution channel"²⁴⁶.

d) Apple's allocation of its products between the authorised wholesalers' customers

258. Although Apple describes a non-binding mechanism of customer and product allocations (1), information in the case file shows that, regardless of product and period, Apple made detailed allocations of its products to the resellers through its authorised wholesalers (2).

1. System of allocating products among the wholesalers' customers, described by Apple

a. In constraint periods

259. In constraint periods, Apple said in the hearing that the allocation system differed for different products (except the iPhone).

²⁴¹ Classification mark 613

²⁴² Classification marks 26162 and 26163.

²⁴³ Classification marks 30886 and 30887

²⁴⁴ Classification marks 29641 to 29642

²⁴⁵ Classification mark 5918

²⁴⁶ Classification mark 3108

260. With the iPad, Apple’s representatives said during a hearing with the Investigation Services that the company gave a very detailed product allocation to its wholesalers, telling them which customers to supply products to and the quantity of products to supply: “For the iPad, when it was launched in 2010, the wholesaler, customer and product allocation table [...] is for the trained APRs. Marketing of the product was restricted at first to the APRs, for seven or eight months (as I remember it), then was gradually extended to the other partners. During this initial period, we remained in a constraint period because of the gradual increase in partners. Allocation based on the allocation table was therefore maintained during this period. I don’t remember the exact duration of the initial constraint period”²⁴⁷.
261. Apple continued: “We worked with the wholesalers to manage the allocation of these products, by customer and by product, to be sure that the products would be in stock with the APRs [...]. The allocation was done on the basis of the products received by the disties [wholesalers]. It was essential that the products we were receiving went to the APRs”²⁴⁸.
262. With the other products sold by Apple (apart from the iPhone), Apple said it only gave its wholesalers recommended, non-binding allocations: “We give recommendations to wholesalers for the Retail/Pro split. The wholesalers can then distribute as they wish between the channels”²⁴⁹.
263. According to the Apple representatives interviewed, “Allocation therefore did not go as far as choosing the customer”²⁵⁰.
264. Finally, Apple said that: “When products reach the wholesaler, because of the fair share work done upstream, the wholesaler can deviate from the retail/pro recommendations made by Apple. As far as we’re concerned, the recommendations are designed to ensure maximum visibility and extensive sales”²⁵¹.
265. These recommendations were based on a split in accordance with the “fair share” principle, and were determined using information obtained by Apple from its distributors (wholesalers and resellers). In this regard, Apple said in the hearing: “The fair share is determined unilaterally by Apple based on the information collected from the partners (it is the prosumer and retail France bosses who determine the fair share). The ‘fair share’ is a split that reflects the weight of each channel. Retail/Prosumer (particularly in terms of turnover). We adopt the fair share approximately once a week. In the Prosumer channel there was also a split based on the wholesaler’s actual weight. The weights of Retail and Prosumer at Ingram and Tech Data are very different. The fair share also varies with different products”²⁵².
266. Several pieces of evidence in the case file confirm AOE’s role in the allocations decided by Apple for the wholesalers. For example, it was AOE that sent the “NPI Pro/retail” table enabling Apple France to allocate products to the direct and indirect resellers²⁵³. In an email on 12 April 2012, an AOE representative wrote to some Apple France employees: “Hi Team, Please find attached detail of the Wk3 New iPad allocation as per your desired split respecting RTM fair share. <New iPad Alloc Model TOS Wk3.xlsx> Unfortunately I am

²⁴⁷ Classification mark 34533 (VC) / 34574 (VNC) – 34974 (VNC2)

²⁴⁸ Classification mark 16812 (VNC) / 16111 (VC)

²⁴⁹ Classification mark 16813 (VNC) and 16112 (VC)

²⁵⁰ Classification mark 34533 (VC) / 34574 (VNC) – 34974 (VNC2) and classification mark 34534

²⁵¹ Classification mark 34534

²⁵²

Classification mark 16813 (VNC) 16112 (VC)

²⁵³ For example, classification marks 27057, 27705 and 27708

unable to furnish the Allocation file for review at this stage as SAT issues have been evident during the course of the day. Currently being resolved. I have however attached the iPad allocation download from SAT to accompany your file. <Allocation Quick Fix Download.xls>. Donal will endeavor to get you details of the allocation as early as possible tomorrow (time is depending on availability of SAT)”²⁵⁴.

267. AOE also asked to be kept regularly informed about allocations and the priorities given to deliveries²⁵⁵. In an email of 6 September 2011, an AOE employee wrote to an Apple France employee: “Could you please give us the references and the quantities required.”²⁵⁶, to which the Apple France employee replied: “We are talking about 9 x MC914ZM/A and 5 x MC913ZM/A. The Partner, Corse Informatique Développement, is an APR LAR. Order through Ingram (Distie).”²⁵⁷.
268. Similarly, in an email on 24 April 2012, an Apple France employee wrote to several AOE employees: “As agreed, please find attached the raw backlog [status of the position of orders placed with Apple] for IM and TD on the PRO positioning with the breakdown of resellers”, with two tables attached, one concerning Tech Data, the other Ingram Micro²⁵⁸.

b. In non-constraint periods

269. In non-constraint periods, Apple said that the wholesalers were supplied using the “ship to backlog” or “S2B” system, a delivery system based on the order book, and that no allocation recommendations were given²⁵⁹. Apple said that “the wholesaler sees that it has, for example, an order book of 300 items in its system. If it is supplied up to or beyond that quantity of products, the system manages everything and will allocate the products, and the wholesaler does not have to do any sharing out of products”²⁶⁰, and specified that “The wholesalers’ IT systems operate on a first in-first out (FIFO) basis; no manual operations are necessary”²⁶¹.

c. The “fast ship program”

270. The “fast ship program” described in paragraphs 245 to 249 of this decision concerned not only allocations between the wholesalers but also the allocations to retailers described above.
271. This programme required the retailers to sign the “Apple Fast Ship Program Addendum to the Apple Authorized Reseller Agreement”²⁶².
272. In practice, like the system described above for the wholesalers, the direct resellers placed a “blank” order with Apple.

²⁵⁴ Classification mark 27706

²⁵⁵ For example, classification marks 25908 to 25912 (VNC) / 11354 to 11358 (VC), classification mark 10178 (VC) / 23554 (VNC), see also classification marks 26289, 26298, 26356, 26806 to 26807 (“**c/ Deliveries on credit blocked - 440 units** blocked as we speak for Alis Informatique, Ephesus, GDA, O2I – N..., can you please review and advise when can you release those deliveries?”).

²⁵⁶ Classification mark 11356 (VC), original version: “Could you please advise re availability of Thunderbolt displays and cables ?”

²⁵⁷ Classification mark 11356 (VC)

²⁵⁸ For example, classification mark 27077

²⁵⁹ Classification marks 16813 (VNC) / 16112 (VC), classification mark 34534, classification mark 34533 (VC) / 34574 (VNC) / 34974 (VNC2)

²⁶⁰ Classification mark 16813 (VNC) / classification mark 16112 (VC)

²⁶¹ Classification mark 34534

²⁶² Classification marks 14036 (VC) / classification mark 34956 (VNC2)

273. Once the order had been placed, Apple then decided for each wholesaler and direct reseller the volume of products to be allocated in that single delivery, based mainly on the historical data that it held for past orders. An invoice was immediately sent to them²⁶³.
274. The indirect distributors had to designate the wholesaler of their choice to keep logistical constraints to a minimum and obtain products in time for the launch. Apple then told the chosen wholesaler the number of units to deliver to its members in this single delivery. The wholesaler invoiced them direct for the products delivered²⁶⁴.

2. System actually used to allocate products to the wholesalers' customers

a. iPad distribution

❖ iPad allocations during constraint periods

275. Several documents in the case file show that Apple implemented very detailed allocations of its products in each phase of the market introduction of a new iPad range, considered to be a constraint period²⁶⁵ according to Apple's definition of the concept. This allocation policy continued for several months.

TD : livraison iPad	TD: iPad delivery
IM : livraison iPad	IM: iPad delivery
Total	Total
Total	Total

1. iPad 1 (May 2010 product launch)

276. The documents in the case file and Apple's statements show that, when the iPad 1 was launched in May 2010, Apple gave very detailed product allocations to its wholesalers.
277. Several Apple France internal emails from July 2010 show that initially Apple drew up a list for each wholesaler of indirect APRs to which each should deliver its products²⁶⁶, before giving them permission a few weeks later to allocate products to indirect APRs that were not originally within their sales perimeter, as well as to direct APRs²⁶⁷.
278. However, the wholesalers were not entirely free to share out products among the direct and indirect APRs. An email on 9 July 2010 from an Apple representative to Tech Data and Ingram Micro said: "From today we authorise you to deliver to the direct APRs, as well as to indirect APRs that you have not so far been looking after. You can include them in your list of iPad resellers. However, there are two rules that you must still strictly follow: - you must allocate to the indirect APRs as a priority from the orders placed with us. Then you can allocate the balance of the products to the other direct accounts. Remember that the direct accounts will continue to be supplied by Apple so... prioritise the indirect ones"²⁶⁸.

²⁶³ Classification mark 1711 (VC) / classification mark 34948 (VNC2) and classification mark 14037 (VC) / classification mark 34957 (VNC2) for the Resellers.

²⁶⁴ Classification marks 14927 (VC) / 15292 (VNC) – 34966 (VNC2)

²⁶⁵ Classification mark 34534

²⁶⁶ Classification mark 26660, classification mark 26696, classification mark 26193 (VC) / 35347 (VNC)

²⁶⁷ Classification mark 27363, classification mark 26873

²⁶⁸ Classification mark 26873

TD :livraison iPad												
corsicev	easy	Mac&Co	esp conseil/r	infor&prev	IP store	interactif	lithaque	Mile	ordide	tryo	oprema	maillot media
65	195	63	60	67	66	135	68	68	66	71	63	3
Total												990

IM :livraison iPad						
iformatik	Andromac	FBX	iSwitch	KRYSTENA	Symbiose In	YOU CAST
76	57	57	113	20	71	144
Total						536

279. In an internal email following up this exchange, the Apple France representative gave as the email subject: “iPad allocation - change of process”, and in the email body text “below is an email sent to our two wholesalers about the change of process for iPad allocation, in brief: - there are no longer any dedicated TD and IM lists for the indirect APRs - we are now giving the direct APRs the option of obtaining supplies from our disties. Rest assured that I will check this process is working properly”²⁶⁹.
280. As an illustration, in an internal email on 9 June 2010, Apple France explained the distribution between Ingram Micro and Tech Data, including “a photo of what has been allocated by our disties to our indirect APRs since the launch”²⁷⁰.
281. Similarly, in an email on 20 July 2010, Apple France told Ingram Micro: “Be careful, the rule has not changed => indirect APRs first!!!! then direct APRs”²⁷¹.
282. The wholesalers were also obliged to tell Apple how they planned to allocate the products entering their stock. In the aforementioned email of 9 July 2010 from an Apple representative to Tech Data and Ingram Micro, Apple France told them: “=>You must give me clear information about how you allocate the iPads when they come back into stock (essential). To do this, I... please could you fill in an Excel table like the one I’m sending you, by reseller and by ref”²⁷².
283. In several internal emails from July 2010, Apple France representatives explained that this allocation had to be taken into account by the wholesalers and that Apple would check its implementation²⁷³. As an illustration, an email on 9 July 2010 from an Apple France representative to Tech Data and Ingram Micro said: “Rest assured that I will check this process is working properly”²⁷⁴. Similarly, in the aforementioned email on 20 July 2010, an Apple France representative told Ingram Micro, regarding the iPad: “Please tell me after the allocation, what’s left in stock, if we need to give any to MS or not. “Be careful, the rule has not changed => indirect APRs first!!!! then direct APRs” and “Please take account of the following allocation and give me the qty based on the breakdown of accounts for the APRs”²⁷⁵.
284. An Apple France representative also explained internally the procedure to be followed if a direct APR did not comply with the agreed allocation: “The allocations must be managed at the disties. Each allocation must be reviewed upstream on its split. eBizcuss must not grab all the models it wants and cause difficulties for the APRs. If eBizcuss doesn’t take the iPads supplied direct, we must ensure the disties don’t let it have the products allocated to the

²⁶⁹ Classification mark 27363

²⁷⁰ Classification mark 26660

²⁷¹ Classification mark 11368 (VC) / 25915 (VNC)

²⁷² Classification mark 26873

²⁷³ Classification mark 11368 (VC) / 25915 (VNC); Classification mark 27363

²⁷⁴ Classification mark 27363

²⁷⁵ Classification mark 11368 (VC) / 25915 (VNC)

others”²⁷⁶. Another Apple France representative replied in an email: “below is a photo of the deliveries made by the two disties since the start of Q4FY10 (i.e. 3 weeks)”²⁷⁷.

2. iPad 2 (March 2011 product launch)

285. When the iPad 2 was launched in March 2011, Apple continued its very detailed allocations policy for several months, splitting the quantities of its products between its indirect resellers through the wholesalers.
286. Several internal emails had Excel tables attached allocating precise quantities of iPad 2s to Apple’s different partners (Retailers, Resellers – direct APRs, indirect APRs)²⁷⁸.
287. Furthermore, several emails sent by Apple to the wholesalers show that there was a precise breakdown of quantities that the wholesalers had to allocate to each customer account²⁷⁹, for example the email of 16 April 2011 which included the following tables:

>chez IM : reste a recevoir de la wave 4 : 449 units pour le Retail et 105 pour le Pro (détail ci dessous dans le tableau compilé ensemble)

	iPad WIFI							iPad 3G							Total
	16Gb Black MC769	16Gb White MC979	32Gb Black MC770	32Gb White MC980	64Gb Black MC916	64Gb White MC981	Demo Black MC963	Demo White MD002	16Gb Black MC773	16Gb White MC982	32Gb Black MC774	32Gb White MC983	64Gb Black MC775	64Gb White MC984	
Media Saturn	139	115	27	36	45	39			1	14	33	22	6	61	657
Virgin	59	54	11	20	27	21			0	10	18	13	3	29	327
Aelia	30	31	5	7	8	10			0		6	7	1	14	140
Leclerc	42	34	33	25	38	24									197
	270	234	76	89	118	94			2	25	56	42	10	104	1120
ALLOC RETAIL	270	234	76	89	118	94	0	0	2	25	56	42	10	104	1120
RAL RETAIL	270	234	76	89	118	94	61	94	11	25	56	42	18	104	
New RAL RETAIL	51	64	26	22	8	2	61	94	11	4	11	9	18	49	449
	337	293	95	111	148	118	0	0	2	31	71	52	12	130	1401
ALLOC PRO	67	59	19	22	30	24	0	0	0	6	13	9	2	25	277
New RAL PRO	28	30	14	0	26	4	0	0	0	0	0	0	2	0	105

chez IM : reste à recevoir de la wave 4 : **449 units pour le Retail et 105 pour le Pro** (détail ci-dessous dans le tableau compilé ensemble)

at IM: wave 4 yet to be received: **449 units for Retail and 105 for Pro** (breakdown below in the table compiled together)

Total

Total

288. Also, in April 2011, in the context of an email exchange, one indirect APR expressed surprise to Apple that it had not received the products in the requested quantities from the wholesaler with which it had placed an order: “why did we receive 11 iPads from Ingram and only 3 from Tech?”, to which Apple France replied: “you’re going to receive another 10 today from TD. It’s me who does the allocations based on the products arriving at IM or TD”. The indirect APR then replied: “ok, but we ordered everything from Tech”, to which Apple France replied: “yes but... you have to adapt if you want any. Our dispatching is not great”²⁸⁰.

²⁷⁶ Classification mark 26715

²⁷⁷ Classification mark 26714

²⁷⁸ Classification mark 26771, classification mark 26769, classification mark 10193 (VC) / 23569 (VNC), classification mark 10199 (VC) / classification mark 23575 (VNC)

²⁷⁹ Classification marks 11762 and 11763 (VC) / (VNC 24682), classification mark 34147, classification mark 27623

²⁸⁰ Classification mark 26448

289. Similarly, in April 2011, following the cancellation of an order placed by an APR with Tech Data, Apple France, which was informed of it, gave the wholesaler the name of the APR to which the remaining units should be sent²⁸¹.
290. Also, in October 2011, in an internal email, Apple France was surprised that a Retailer had sold off a large quantity of iPad 2s following a delivery from Ingram: “I’ve just found out that Leclerc has just grabbed the entire stock of two iPad references at INGRAM, MC769 and MC979, that’s 1300 units! without anyone telling us. To optimise the iPad delivery process, I had asked Ingram and TD since July to remove the reservations from all refs and keep us informed of any Pro deals or large retail orders. Ingram has clearly messed up. I’ll review the process with them at once”²⁸².
291. Finally, in December 2011, in an internal email exchange, Apple France managers noticed that the Retailers had bought too many products from Tech Data. They wanted the wholesaler to allocate the remaining quantity to a particular type of reseller: “could you make sure the remaining units go to prosumer (...) the prosumer needs to be protected at IM too, particularly because Leclerc goes straight in with huge price reductions”²⁸³. One of the Apple managers also wanted this information to be given to the wholesaler but not in writing: “could you tell them but not in writing in case of a legal challenge”²⁸⁴.

3. *iPad 3 (March 2012 product launch)*

292. When the iPad 3 was launched in March 2012, Apple once again used a policy of detailed allocations of its products to its partners.
293. Evidence in the case file shows that Apple decided how the products would be split between the two wholesalers, and at an even finer scale, between the Resellers and the Retailers, based on their needs during the period, between March and May 2012²⁸⁵. The wholesalers were informed in an email, with an Excel table attached setting out in great detail how the products should be allocated to their customers.
294. As an illustration, an Apple France internal email on 31 July 2012 with the subject “iPad Allocation File” included the following table²⁸⁶:

²⁸¹ Classification marks 29704 to 29706

²⁸² Classification mark 26960

²⁸³ Classification mark 26451

²⁸⁴ Classification mark 26452

²⁸⁵ Classification marks 27415, 26875, 28285, 28286, 27496, 11417, 27064, 26340, 11416, 11417

²⁸⁶ Classification marks 34429 to 34430

APID	Revendeur	Ville	Direct	SAP	Indirect	N° disties	MC963NF/A - iPad 2 wifi 16Go Noir	MD002NF/A - iPad 2 wifi 16Go Blanc
456865	Actimag	Le Havre	OUI	121438	-	-	2	2
542127	Arcan Store	Thionville	-	705135	Tech Data - 100099	620002	2	2
554952	DXM	St.Gregoire,Rennes	OUI	111796	Direct	-	2	2
362643	Easy Store	Nancy	-	124052	Tech Data - 100099	477943	2	2
210323	Ephesus	Lyon	OUI	113350	Direct	-	2	2
304554	FBX Store	Clermont-Ferrand	-	124056	Ingram - 100234	508090	2	2
251970	Hype Store	Blois	-	565025	Tech Data - 100099	480481	2	2
609109	iConcept	Bayonne	OUI	104709	Direct	-	2	2
112175	iConcept	Bordeaux	OUI	104709	Direct	-	2	2
405104	iCorsu	Bastia	-	677932	Tech Data - 100099	487287	1	1
529907	Inter-Actif	Reims	-	125251	Tech Data - 100099	484023	2	2
451363	IP Store	Poitiers	-	565027	Tech Data - 100099	486344	2	2
410296	IP-Store	La Rochelle	-	565027	Tech Data - 100099	486344	1	1
588626	iSwitch	Arras	-	633793	Tech Data - 100099	566119	2	2
549029	iTribu	Perpignan	OUI	115055	Direct	-	2	2
91728	iTribu	Mauguio	OUI	115055	Direct	-	2	2
53886	MCS	Nice	OUI	100272	Direct	-	2	2
273853	MCS	Cannes	OUI	100272	Direct	-	2	2
404029	Symbiose-Informati	Lorient	-	535697	Ingram - 100234	232730	1	1
456985	Symbiose-Informati	Saint Brieuc	-	535697	Ingram - 100235	232731	2	2
456858	Wave Store	Compiègne	-	692623	Ingram - 100234	529144	2	2

APID	APID
Revendeur	Reseller
Ville	City
Direct	Direct
OUI	YES
SAP	SAP
Indirect	Indirect
N° disties	Disties no.
MC963NF/A - iPad 2 wifi 16Go Noir	MC963NF/A - iPad 2 wifi 16GB Black
MD002NF/A – iPad 2 wifi 16Go Blanc	MD002NF/A - iPad 2 wifi 16GB White

295. In April 2012, changes were made by Apple to the allocation originally planned, to meet the urgent needs of indirect Retailers buying from the wholesalers²⁸⁷.
296. Internal exchanges bear witness to Apple's desire not to make too many changes to the original allocations: "Here's the allocation modified last week, W3: There are changes for both IM and TD. It's difficult taking account of the changes from one week to the next because the goods don't arrive regularly so... It's easy to get in a muddle! The less we fiddle around with the %, the better"²⁸⁸.

4. iPad 4 and iPad mini (November 2012 product launch)

297. As in the case of the iPad 1, 2 and 3, Apple continued to use its allocation policy when the iPad 4 and the iPad mini were launched in November 2012.
298. The evidence in the case file shows that, at the time, Ingram Micro and Tech Data had several email exchanges with Apple to obtain information about the product allocations for their own customers²⁸⁹.

²⁸⁷ Classification mark 27057

²⁸⁸ Classification mark 27057

²⁸⁹ Classification marks 30628 and 30629, classification mark 34635, classification mark 10396

299. In particular, an email exchange between Tech Data and Apple in October 2012 shows that the wholesaler considered the allocations decided by Apple to be mandatory. Indeed, Apple France said to Tech Data: “You can therefore make the iPads visible in your system. The most important thing is that you deliver the iPads to the resellers on the list in your possession, while respecting the launch date of 02/11”²⁹⁰, to which Tech Data replied: “Ok, I’ll consider our obligation to be lifted by your email”²⁹¹.
300. Several email exchanges within Apple France itself also bear witness to the strategy of very detailed allocations used by Apple to assign its products to its wholesalers and their customers. For example, in an email in December 2012, one employee wrote to another: “There are still 470 units of MC979 coming tomorrow (all being well). I’ve just told Ingram: 150 PRO, 320 RETAIL. Please include it in your dispatch for your accounts. Everything must go out before the weekend”. The colleague replied: “Noted. Thanks. I’ll contact Ingram”²⁹².
301. In other internal emails, managers at Apple France commented forcefully on the stock management of certain APRs. One of the managers said: “Some APRs clearly have too many iPad minis because they’re offering them to Leclerc stores”²⁹³. I went against the fair share policy this morning to give more to the pro business via the wholesalers, mainly at the expense of my indirect accounts”. Another manager replied to him on the same day: “I’m going to try and find out which APR(s) are doing that. It’s stupid for partners that complain about small margins and product shortages to do that”²⁹⁴. A third Apple employee, keen to know which APR had sold on the products, wrote to the others: “Incomprehensible - I haven’t found out yet!! But it’s surprising because, given the volumes requested, there are not many APRs capable of offering that (...) Let’s look at the MCS backlog [status of the position of orders placed with Apple] on this SKU and we’re bound to find out”²⁹⁵.

❖ *iPad allocations outside the constraint periods*

302. Apple said during the hearing that, regarding the marketing of the iPad, although constraint periods were recorded during the launches of each of the different versions, there were nevertheless some non-constraint periods when Apple applied the “ship to backlog” (S2B) mechanism to allocate products to the wholesalers. It then merely responded to its partners’ orders without trying to allocate products itself²⁹⁶.
303. However, the documents in the case file show that on several occasions, even outside constraint periods, Apple did not use the “ship to backlog” system but continued its policy of allocating products to the wholesalers on the one hand, and to the wholesalers’ customers on the other.
304. This is clear in particular from an email on 27 June 2010, sent in the context of iPad 1 marketing. In it, an Apple manager stated internally the exact volume of products that the wholesalers could deliver to their customers, particularly the indirect APRs: “Concerning

²⁹⁰ Classification mark 34635

²⁹¹ Classification mark 34634

²⁹² Classification mark 26362

²⁹³ In 2013, the Leclerc stores authorised via IM bought some 16 GB iPad Minis from other resellers

²⁹⁴ Classification marks 28051 and 28052

²⁹⁵ Classification mark 28053

²⁹⁶ Classification mark 34533

the disties for the indirect APRs, in a non-constraint situation, I think we should not send more than 30 iPads per shop”²⁹⁷.

b. Distribution of other products

305. The documents in the case file show that Apple implemented a policy of allocating its products – except the iPad and iPhone – to its wholesalers’ customers during both constraint periods and non-constraint periods, and that the recommendations it sent to the wholesalers for sharing the products among their own customers were not merely indicative, but binding.
306. In an initial exchange of emails on 2 December 2005, an Apple France representative wrote to an Apple representative:
- “General problem:
= >Allocation problem: the process is too cumbersome and unreliable. More and more sorting out of our ACs for the wholesalers!!!! It’s impossible to allocate products to accounts (iPods for Acropom/actimac - Powerbooks for France syst)
Priority system doesn’t really work (Quad =>alloc to wholesalers despite AC priorities)
= > ACTA /BEMAC/ICONCEPT/GDA credit problem
= >Best of micro programme (reminder issued to certain partners)
 - Main AC stock update:
Good backlog situation for our main directs”. The email continues: “Main AC stock update:
Good backlog situation for our main directs”.

²⁹⁷ Classification mark 26208

FS	stock	transit	backlog ASAP	commentaire	runrate	croissance
I Mac	3	2	8,8		60	43%
Mac mini	1,8	3,4	5		15	
Powermac	2,2	1	3		35	
Powerbook	0,5	1	4,4	forecast trop faible ! Il faut doubler ...Réappro urgent	60	
Ibook	2,8		6,8		35	
Iconcept	stock	transit	backlog ASAP	commentaire	runrate	
I Mac	0,7	1	5		35	42%
Mac mini	1,8	0,3		promo bundle grossistes	20	
Powermac	0,8	0,4	4,4	dépannage grossiste	10	
Powerbook	0,6		2	0,5 en shedule -réappro grossiste	27	
Ibook	0,5		2	2s en shedule sur dec	21	
BIMP	stock	transit	backlog ASAP	commentaire	runrate	
I Mac	3	1	4		45	5%
Mac mini	3	1,2	2,2	positionnement bundle important grossistes	10	
Powermac	9			TROP DE STOCK demande autorisation pour reprise	7	
Powerbook	3,9		1	forecast trop haut	20	
Ibook	1,2	1	2,5	forecast trop faible	20	
MCS	stock	transit	backlog ASAP	commentaire	runrate	
I Mac	3,6	1,2	3	rajout 2s supplémentaire en backlog	17	3%
Mac mini	1,0			promo grossiste	7	
Powermac	5,5			Urgence sur les Quad !!!!!	4	
Powerbook	2,4		3,1		12	
Ibook	2,2	3,3	1,3		15	
BEMAC	stock	transit	backlog ASAP	commentaire	runrate	
I Mac	1,3	1,7	2,2		18	26%
Mac mini	4,6	0,5		augmenter forecast	10	
Powermac	3,2	1	3		4	
Powerbook	1,9		2		10	
Ibook	2	0,5	4			
GDA	stock	transit	backlog ASAP	commentaire	runrate	
I Mac	2,3	3	6		10	8%
Mac mini				promo grossistes a fond		
Powermac	3,2	3,2	6		5	
Powerbook	1,5	0,5	3,6		9	
Ibook	4	1,5	5,3		10	
CD SYST	stock	transit	backlog ASAP	commentaire	runrate	
I Mac	1	1,4			10	
Mac mini	3				2	
Powermac	1,8	0,6	1,3		8	
Powerbook	2,6					
Ibook	5	4				

stock	stock
transit	transit
backlog ASAP	backlog ASAP
commentaire	comments
runrate	runrate
croissance	growth
forecast trop faible ! Il faut doubler... Réappro urgent	forecast too low! Needs to be doubled... Resupply urgently
promo bundle grossistes	wholesalers bundle promo
dépannage grossiste	sorting out supply issue for wholesaler
0,5 en schedule – réappro grossiste	0.5 on schedule – wholesaler resupply
2s en schedule sur dec	2s on schedule on dec
positionnement bundle important grossistes	wholesalers large bundle position
TROP DE STOCK demande autorisation pour reprise	OVERSTOCK request authorisation for return
forecast trop haut	forecast too high
forecast trop faible	forecast too low
rajout 2s supplémentaire en backlog	add 2s extra as backlog
promo grossiste	wholesaler promo
Urgence sur les Quad !!!	Quads urgently needed!!!
augmenter forecast	increase forecast
promo grossistes à fond	extensive wholesaler promo

307. In an email on 10 September 2009, an Apple France representative wrote to one of its wholesalers to seek confirmation that certain customers of the wholesaler had received the products allocated to them. The wholesaler confirmed that they had²⁹⁸.
308. In an email of 2 December 2009, Ingram Micro said to Apple: “I am also VERY surprised (in truth, not pleasantly) to find you are putting a target rate on iPods and access to them, when this business is COMPLETELY managed by Apple. We don’t have any control over it. Apple decides on the product allocations to be delivered and which customers they are delivered to. We merely execute this (...)”²⁹⁹.
309. During an internal exchange on 19 November 2010 via iChat, an Apple France manager said about Ingram Micro: “anyway, IM is not allowed to place Apple orders any more without management authorisation”³⁰⁰.
310. In an email in October 2010, ADI said that Ingram Micro had been very insistent about having a certain quantity of iPods delivered. In the same internal email, an ADI representative wondered whether Ingram Micro could actually receive new products, and said that, in any case, the decision to change the quantities of products allocated to each of the wholesalers depended on Apple and not on the wholesalers: “(...) Never forget that the decisions made about iPod allocation are made by Apple, not IM. So if there is a catalogue in progress, Axel has had to do the necessary... Unless other accounts have been given priority (there... it’s the retail decision that takes precedence! not mine, not Ingram’s”³⁰¹.
311. In several internal emails, Apple representatives mentioned the product allocation that the wholesalers had to apply to their customers. In an email on 23 July 2010³⁰², an Apple France representative wrote: “Allocation as revised this morning in sls meeting – below is the split established for the 485 EOL MB white (MC207F/A): FNAC: 288 units (orders already placed) – EBIZCUSS: 100 units – NON MANAGED (via disties): 97 units. Please sort out with your customers and OM about placing manual orders”.
312. In an email on 28 March 2011³⁰³, Apple France wrote to Ingram Micro about the MacBook Pro allocations: “alloc MBP [MacBook Pro] (...) retail has broadly speaking had its fair share of deliveries, for the next arrival of MBPs (ref MC725, 723), pro should be given priority! be careful”.
313. In an internal email on 23 January 2012, Apple France recalled the need for more careful and precise management of the product allocation to be applied by wholesalers to indirect retailers³⁰⁴.
314. In February 2012, in response to requests for a certain quantity of iPod Touch Goldways from several indirect APRs supplied by Tech Data, when the product was in a constraint situation, Apple France said it did not want deliveries to be made to these resellers so as not to penalise others³⁰⁵.

²⁹⁸ Classification marks 34730 to 34738

²⁹⁹ Classification mark 32246

³⁰⁰ Classification mark 27662

³⁰¹ Classification mark 26956

³⁰² Classification mark 26713

³⁰³ Classification mark 30598

³⁰⁴ Classification mark 26528

³⁰⁵ Classification mark 27039

315. In April 2012, following a problem allocating products to an indirect APR, Apple mentioned in an internal email exchange between ADI and Apple France representatives, ADI's micro-management of Ingram Micro to ensure it was delivering to its customers the quantities ADI had decided. One ADI representative wrote: "The APR below, iTake is indirect and serviced via Distribution in France specifically by Ingram France. We are expediting 5 units to Ingram so they can support the 2 units needed by iTake. We will micro manage to ensure Ingram allocate to iTake and will track through to physical delivery. We are shipping a further 23 units next week to Ingram. We already shipped 28 units to Ingram France, we will follow up with them to understand how they allocated those units we already shipped to them"³⁰⁶. The Apple Europe representative who was the recipient of this email replied: "This is a very interesting case because it demonstrates the difficulty of meeting demand through the disties. It's important that we find a way of making sure this doesn't happen again, possibly by filtering all pending orders and ranking them by age for critical partners like the APRs" (free translation)³⁰⁷.
316. In October 2012, following an email exchange between Apple and Tech Data, Tech Data told Apple that Ingram was contacting the customers of both wholesalers to offer them iPods. Apple replied that the APRs had priority when it came to the allocation of products subject to constraints, regardless of the product. Apple also warned Tech Data that "The allocations made to you during the week must leave your stock by Thursday evening at the latest. Otherwise I... can take them back and allocate them to retail so there is no stock left by Friday evening"³⁰⁸.
317. In December 2012, an indirect APR wrote an email to an Apple France representative to report the following incident: "I placed an order for iPods so that I was okay for Christmas with Tech Data and Ingram, in advance, as you advised. I received the iPods from Ingram, but not in all the colours. However, the order was for around 260 iPods, but I only received 11!! Today I'm selling iPods I bought on Black Friday! Tomorrow we hit the most important weekend of the year without any stocks of iPad 2s or 16 GB iPad 4s. It's almost as if the APRs are here to flog off what sells least and that the bestsellers, i.e. all the lower cost versions of the different models are reserved for you! [...] yesterday was the last straw: I ordered several products from the Apple Store at full price and yesterday someone called me to cancel an order for 10 x MC573F/A, telling me that these products were reserved for end customers and they had been told to monitor orders from resellers like us so we couldn't sell these products! I should have recorded the conversation! What is it to you if we're buying these products full price! [...] I know you do what you have to when you can but I really think Apple is stabbing us in the back.". Having been told about this email, an Apple France manager then wrote to an Apple France employee: "keep this email to yourself... but please see what you can find for him"³⁰⁹.
318. An internal email exchange within Apple later on, on 7 December 2012, illustrates how the wholesalers' orders were processed by Apple during the constraint periods: "The Touch was declared to be subject to constraint until the end of the quarter. There are none, or very few. And it's worse this week with the Nano, including the Shuffle. Before asking for the backlog [status of the position of orders placed with Apple] of the 2 disties, could you confirm that we're not in the same situation as with Leclerc last week. As a reminder, iPod orders for

³⁰⁶ Classification mark 26329

³⁰⁷ Classification mark 26329

³⁰⁸ Classification mark 34629

³⁰⁹ Classification marks 30726 to 30729

retail must be approved by J... or me via K... and L... and not by M... via his Ingram sales rep" (underlining added)³¹⁰.

319. On 23 January 2013, an exchange of emails between Tech Data and a reseller highlighted the difference in operation between orders placed with Apple and orders placed with other suppliers. During this exchange, the reseller's purchasing manager asked a Tech Data sales representative for the Apple order number. The sales representative said: "It doesn't work in the same way as for other suppliers, order numbers don't do anything. With Apple you have to ask the sales rep who deals with you to do you a product allocation"³¹¹. In response to the purchasing manager's indignation, the TD sales representative added "I'm not refusing to give you the information, I'm just telling you the procedure, which is that you have to contact your Apple sales representative who has to contact the person responsible for allocations at Apple (...). Please don't twist my words. This procedure applies to all APRs, and it works very well"³¹².
320. On 24 January 2013, Ingram Micro received an email from Apple France telling it that the iMac 21.5" had arrived. Apple said "we have to give some to retail, please let me know when they reach you"³¹³. On the same day, an Ingram Micro internal email to its Apple products team explained: "Warning! As soon as we receive iMacs, we must call (...) to tell her the quantities and she will decide. The iMacs are still subject to constraint, that's why we have to prioritise the non-managed APRs because they don't receive any from Apple. Here's the list to exclude: Actimac, ALIS, DXM, GDA, ICONCEPT, MCS, Olys"³¹⁴. On 27 January, Ingram Micro sent the following email to Apple: "Can you confirm that Tech Data has to play the game because I'm finding out that items have been given to non-APRs"³¹⁵.
321. In an exchange of emails between Ingram Micro and Apple in February 2013, the wholesaler complained that Apple was failing to comply with the allocations originally agreed. The wholesaler had been told that a certain quantity of products had just been shipped to its competitor, "despite the rules in the contract of sale and the allocation rules which both of our companies have strictly adhered to for many years"³¹⁶. The wholesaler concerned said that it was considering whether to claim compensation from Apple for the imbalance created by this new product allocation³¹⁷.
322. In an email to Ingram Micro on 11 June 2013, Apple France issued a reminder that the product allocations it decided should as far as possible remain confidential: "I must remind you that when I give you information, you don't have to pass it on to partners that it doesn't relate to. Can I ask you again to maintain a minimum level of confidentiality (e.g. today: no need to tell an APR that there are lots of new MBAs but they're reserved for retail!!!) [...]"³¹⁸.
323. In a preparatory document written by Apple France, seized during a raid, in which it presents its activity, an Apple employee responsible for wholesaler relations stated: "My relationships

³¹⁰ Classification mark 27509

³¹¹ Classification mark 26368

³¹² Classification mark 26375

³¹³ Classification mark 30528

³¹⁴ Classification mark 30527

³¹⁵ Classification mark 30527

³¹⁶ Classification mark 11501

³¹⁷ Classification marks 34344 to 34346

³¹⁸ Classification mark 11440

with the disties are well established but can never be completely relied on. They do listen to my recommendations for many stocks”³¹⁹.

c. The “fast ship program”

324. As described by Apple in the hearing, for the “fast ship program”, the indirect distributors had to designate the wholesaler of their choice to keep logistical constraints to a minimum and obtain products in time for launch.
325. It became clear from the investigation that Apple automatically assigned a wholesaler to an indirect distributor and at the same time told the competing wholesaler that the distributor concerned had not chosen it. This is what one APR said in an iChat: “they assigned us to Ingram; we didn’t decide anything; but Tech Data was told it was us who decided, which is not great”³²⁰.
326. The “fast ship program” was also viewed differently by different Apple partners. One APR said that, since the programme did not involve any consultation or prior agreement concerning the quantities to be delivered and the product families, it sometimes resulted in large stocks to be sold off and a high invoice to be paid to Apple³²¹. Conversely, another APR said that, although products were shipped automatically and the quantities received had not been approved, the deliveries were always welcome³²².
327. In conclusion, it is clear from the above that, even outside periods described as constraint periods, Apple allocated to particular customers the Apple products supplied to its wholesalers.

e) “Forecast” mechanism introduced in March 2013

328. Apple said in the hearing that it had introduced a new allocation mechanism, known as the “forecast” mechanism, in March 2013. This mechanism was designed to limit constraint periods and consequently reduce situations where allocations were given to its wholesalers.
329. The forecast system applies to all Apple products, including the iPad³²³. According to Apple, the system aims to assess the needs of its partners as accurately as possible and adapt the production of its products.
330. Apple said in the hearing that this system is different from the previous one in that it is based on greater involvement of the wholesalers and other partners in assessing their needs³²⁴. Apple gives each of the wholesalers a certain quantity of products based on their respective sales forecasts, to enable them to assemble a basic stock to meet forthcoming demand for each product³²⁵.
331. Despite the introduction of this system, Apple explained that constraint situations were still possible and that situations could occur in which the wholesalers could not meet their

³¹⁹ Classification mark 9426 (VC) / classification mark 22881 (VNC) and 34951 (VNC2)

³²⁰ Classification mark 26446

³²¹ Classification mark 3676

³²² Classification mark 4161

³²³ Classification mark 16812 VNC / 16111 (VC).

³²⁴ Classification mark 34534

³²⁵ Classification mark 16814 VNC

customers' actual needs. In this case, Apple said that the wholesaler dealt with the problem direct with the customer.

332. According to Apple, setting up this allocation mechanism has brought allocations to the wholesalers' customers, used up to now, to an end. In its observations in response to the statement of objections, Apple said that it recognised that "the introduction of the 'forecast' mechanism in March 2013 improved the management of constraint periods, without intervention on its part in terms of allocations to the reseller"³²⁶, whereas in its observations in response to the report, Apple said that "from 2013, it was experience gained in forecasting demand that enabled it to implement the forecast mechanism, which meant that it could bring an end to the allocations"³²⁷.

5. PRICING FREEDOM OF APRS

333. It has been observed that APRs apply the prices recommended by Apple (a). Restricted by a lack of room for manoeuvre in terms of pricing (b), and by the unpredictability of their remuneration (c), APRs are also subject to the monitoring of their retail prices (d) and the supervision of their promotions by Apple (e).

a) Uniformity of APR retail pricing

1. Communication by Apple of recommended prices to its wholesalers and resellers

334. During the investigation, Apple indicated: "Apple's prices are very transparent. Apple sets its pricing policy and publishes its public prices as applied in its own retail channels"³²⁸.
335. Apple – more specifically its subsidiary ADI – regularly communicates its public resale prices to its wholesalers and resellers (APRs or others) through Apple France, in lists referred to as "Apple Price Lists"³²⁹. These lists feature, for each product: the product reference, its EAN code, the product description, its "ALP ex VAT" (Apple List Price excluding VAT)³³⁰, its "ALP inc VAT" (Apple List Price including VAT) and the corresponding "DAC" ("Dealer Acquisition Cost"), i.e. the wholesale price (see paragraphs 351 onwards below).
336. The Apple List Price or "ALP" featured on this list corresponds to the prices applied by Apple in its own stores (Apple Store or online). The term "ALP" is also used in Apple contracts.
337. Apple also communicates the prices of its products – and any variations that affect them – to its resellers, via email, in the form of a "network communication"³³¹. The same information is also available on the Apple website dedicated to its wholesalers and resellers,

³²⁶ Classification mark 42100

³²⁷ Classification mark 46114

³²⁸ Classification mark 14768 (VC)/14799 (VNC).

³²⁹ See, for example, classification marks 4477 to 4480, 11573 to 11584 and 16518 to 16525.

³³⁰ For examples of the Apple Price List 2012, see classification marks 364 to 370 and classification marks 5698 to 5703 and 11382 (VC)/25928 (VNC), classification mark 11378 (VC)/25924 (VNC), classification mark 29499 (VC)/40110 (VNC) and classification mark 29632 (VC)/40051 (VNC). For 2013, classification mark 11389 (VC)/25943 (VNC), classification mark 29569 (VC)/40111 (VNC), classification mark 29629 (VC)/40050 (VNC). For 2015, classification mark 16518 (VC)/21622 (VNC).

³³¹ See, for example, classification marks 5062 to 5066.

the “Apple Sales Web” (or “ASW”)³³². For all resellers, the public price is also communicated by Apple through pricing schedules, product catalogues or emails.

338. APRs have also confirmed that they regularly receive price lists drafted by Apple (see, for example, the Easy Computer³³³ and MCS³³⁴ questionnaire responses).
339. The character of “reference price” or “recommended price” of the prices communicated by Apple to wholesalers and resellers has been confirmed by several APRs. In this respect, the company Acti Mac & PC indicated that “the prices of Apple products are all listed on the Apple website. These public prices serve as a reference”³³⁵, and it specified that “the selling prices are published and distributed by Apple, hence imposed”³³⁶.
340. On this same point, the company iSwitch stated that “the “Apple Store” selling price [...] is a kind of “Official” price”³³⁷.
341. Similarly, the company Informatique et prévention stated that “for Apple products, our price reference is the Apple product catalogue with the associated price list”³³⁸.
342. The company GDA Mac Tribu specified that “the prices of Apple products are determined by Apple. After a new product is launched, we receive an email in the form of a “network communication” indicating the recommended retail price. It is therefore strongly recommended to “comply” with this price, which is communicated by the manufacturer across all its distribution channels”³³⁹.

2. Alignment of APR retail prices with public “Apple Store” price

343. The Investigation Services observed that there was an alignment between APR retail prices and the public “Apple Store” price.
344. Alignment with the public “Apple Store” price is firstly demonstrated by the APR statements in response to the questionnaire by the Investigation Services dated 4 October 2012, summarised in the table below (underlining added).

³³² The DAC for each product was originally featured on the Apple Sales Web. Since 2011, it has been communicated by Apple on the request of its resellers (in this respect, see the statements made by the company Alis – which has the status of direct APR – in classification mark 5545).

³³³ Classification mark 5919.

³³⁴ Classification marks 5166 to 5167.

³³⁵ Classification mark 4569.

³³⁶ Classification mark 4569.

³³⁷ Classification mark 3700.

³³⁸ Classification mark 3260.

³³⁹ Classification mark 4207.

APR	Q. 45. <i>In your company, how are the selling prices of Apple products determined? Please specify, in particular, the different costs and qualitative elements that are taken into account when determining these prices.</i>	Q. 46. <i>Are there recommended prices for Apple products? If yes, how much room for manoeuvre do you have in relation to these recommended prices?</i>	Classification mark
IFormatik Partner	"[By] matching the public price recommended by the brand."	"Very little, due to the proximity of the ARSs and online Apple Store."	3583
Acti Mac & PC	<p>"The selling prices are published and distributed by Apple, <u>hence imposed</u>. As well as the website, <u>the official posters that we have to put in the shop show the public prices</u>. Volume discounts may be granted in the context of commercial negotiations with companies on a case-by-case basis, or in the context of a call for tender, in which we find ourselves systematically competing against specialist resellers benefiting from specific conditions of purchase (Corporate reseller [<i>sic</i>] contract), and which apply an extreme discount policy (beyond what an APR can apply without making a loss), with the ultimate aim of winning the account.</p> <p>[The] purchase prices are not reduced according to volume, so it is not possible for us to pass on a reduced price. In very rare cases, one alternative is to obtain a specific quotation."</p>	<p>"The prices of Apple products are all listed on the Apple website. These public prices serve as a reference. It is not possible to sell above this price, although it is not officially forbidden.</p> <p><u>The sales tools that we have to display in the store feature the prices of the various devices.</u></p> <p>Given the margin that Apple gives its resellers, <u>there is very little room for manoeuvre in terms of discounts.</u></p> <p>The only possible cases are specific discounts authorised by Apple (the CRT Education scheme, for example), which are partly covered by Apple (much less than those applied in ARSs, or for the Apple Store or Apple on Campus obviously).</p> <p><u>More and more products are being sold without a margin!</u></p> <p>The margin on iPad minis was cut by 2% on its release on 2 November."</p>	4569
Alis informatique	"We base ourselves on the Apple official public price in the Apple Store."	"We base ourselves in practice on the Apple public price in the Apple Store (indicated by the "ALP" price). In practice, we cannot be more expensive <u>and we are even less able to be cheaper, given the erosion of our margins over the past few years.</u> "	3281

Andromac	“We do not calculate any selling prices for Apple products, we base ourselves on the public prices set by Apple.”	“Yes, but we have no room for manoeuvre.”	3127
Arcan IDF	“The base is the ALP (Apple List Price), and the qualitative elements (installation, repair and training) are identified and invoiced separately.”	“The ALP, and in a highly competitive market it is impossible to stand out by selling more expensively, <u>if there is room for manoeuvre, it is only to the detriment of the margin, which is already very low and set by a very cumbersome, subjective system.</u> ”	4122
Corsidev	“The prices <u>are set by Apple.</u> ”	“There’s really no room for manoeuvre. They wouldn’t stop us from lowering prices, but the margins are so low that it would be suicidal to do so.”	3721
Easy Computer	“The selling prices of Apple products are set by Apple, we are on the public price recommended by the manufacturer.”	<p>“Yes, these are the prices indicated on the Apple website and we regularly receive pricing schedules as well as a product catalogue.</p> <p>We don’t have any views on this pricing policy, it is difficult to sell more expensively as the competition is tough.”</p>	5919
Ephesus	“Our selling prices are identical to the Apple recommended prices.”	“ <u>Yes, freedom regarding the prices applied.</u> ”	5527
FBX Système	“We apply the public Apple Store prices. But we cannot align ourselves with the education price for students, or the prices given to companies.”	<p>“Apple Store.</p> <p>If we wanted to sell more expensively, we wouldn’t sell anything at all!”</p>	4176
GDA Mac Tribu	“ <u>The prices of Apple products are set by Apple.</u> After a new product is launched, we receive an email in the form of a “network communication” indicating the recommended retail price. It is therefore strongly recommended to “comply” with this price, which is communicated by the manufacturer across all its distribution channels.”	“Same as response to question 45.”	4207

I-Artificielle	<p>“We base ourselves on the public selling prices (set by Apple), which we find on the Apple Store and which are also communicated to us by Apple. <u>Given our clientele and our low margins, we do not have a choice about setting the selling prices we apply.</u>”</p>	<p>“The recommended prices are those of the Apple Retail Stores.</p> <p>We set the prices as we wish, but as seen above, we cannot sell more expensively than Apple, and we also avoid selling any cheaper (given that our margins are minimal). However, from time to time we apply discounts in the shop and all the time for the resellers we work with.”</p>	3140
iConcept	<p>“Our selling prices are <u>modelled on the Apple Store prices.</u>”</p>	<p>“The recommended prices are modelled on the Apple Store prices.”</p>	3082
Informatique et prévention	<p>“For Apple products, our price guideline is the Apple product catalogue with the associated price list.”</p>	<p>“For Apple products, our price guideline is the Apple product catalogue with the associated price list: <u>it is up to us to apply a discount depending on the competitive context. It is nevertheless complicated and dangerous to discount our sales</u> given our low margin (RET).”</p>	3260
Inter-Actif	<p>“Compliance with manufacturer public price excluding VAT.”</p>	<p>“None.”</p>	3109
iSwitch	<p>“We use the “Apple Store” selling price, which is a kind of “Official” price, to be competitive. We determine the fixed costs (rent, consumption, employees and charges, etc.) that determine the minimum margin to make, and therefore the sales volume to be achieved as a minimum.”</p>	<p>“No, there is no recommended price, but the “Apple Store” price serves as a reference for the clientele. We can determine the selling prices freely, <u>but the level of margin we have leaves us very little room for manoeuvre.</u> We therefore have to draw up very tight expenditure budgets, and make sure they are kept.”</p>	3700
LDK2	<p>“Compliance with recommended price.”</p>	<p>“The recommended price is the Apple Store price. <u>“We have no room for manoeuvre.”</u>”</p>	13915
MCS	<p>“- Apple publishes a list of recommended public prices, known as ALPs (Apple List Prices), which features on their website, in their shops and on the marketing information website for resellers, known as ASW (Apple Sales Web).</p>	<p>“YES, see question 45.</p> <p>Very limited given the current margin (see the iPad mini, which lost another 2% on its margin in relation to that of the iPad, which</p>	5166-5167

	<p>- For many years, this displayed price, the ALP, was the reference price for the Apple market. Today, it has become the maximum price, as everyone – except the APRs, which no longer have the means – seems to merrily apply increasingly crazy discounts.</p> <p>Today, it is therefore those in retail and mass retail distribution that set the market prices and Apple that systematically aligns itself.</p> <p><u>We cannot offer significant discounts under our current conditions.</u></p> <p>Our aim is not to offer discounts, as we promote the quality of our service and our knowledge of the Apple environment, but in a period of crisis where price has become THE factor of choice among customers, we would like at least to be able to align ourselves when a customer arrives with a written proposal from a competitor.</p> <p>All we want is to be a valid alternative and for customers to have real freedom of choice. If they have decided to buy from MCS, they should be able to do so under normal conditions, which is not the case currently.”</p>	<p>was already more than 3% lower than that of other products).”</p>	
MLife	<p><u>“All the prices are set by Apple. We align ourselves with the Apple prices. (Which are the same as on the Apple Store online).”</u></p>	<p>“Yes. None, in any case Apple customers are perfectly informed of the “official” Apple prices for each product, and increasing them would be bad for us, both in relation to Apple and our customers. <u>As for reducing them, our low margin does not allow this.</u> (We are, however, sometimes obliged to do so, as is currently the case with the release of the iPad 4, which has nullified the prices of the iPad 3 – which we have in stock in large numbers.)”</p>	3590

Olys	“With the Apple Store, the prices of Apple products are known by all audiences, so <u>we apply them to the penny.</u> ”	“The recommended prices are the prices shown on the Apple Store. <u>“We have no room for manoeuvre.”</u> ”	3604
Symbiose informatique	“We apply the Apple Store prices, as otherwise we wouldn’t sell anything, it is becoming more common for customers to look and compare.”	“We apply the Apple List Prices, as otherwise we wouldn’t ever sell anything again, it is becoming more common for customers to look and compare.”	4146
You Cast	“We apply the Apple Store prices. If we applied discounts too systematically and the salesman in our sector knew about it, <u>our competitors could be privileged in their deliveries.</u> ”	“Answered above.”	3743

345. It emerges from these elements that the APRs apply, with very few exceptions, retail prices that are identical to those applied by Apple in its own stores.
346. During its interview on 12 December 2012, the company Alis Informatique also stated: “To set our selling prices, our prices displayed in the shop, we simply use the Apple List Price”.
347. In March 2016, the Investigation Services also collected the online prices applied by a sample of APRs³⁴⁰, which show that the resellers apply the prices recommended by Apple, right down to the euro³⁴¹.

	Andro mac	Apple	DX M	iCon cept	Inter Actif	IP Store	iSwitc h	MCS	Sym biose
Apple Watch - 38 mm stainless steel case		649			649	649	649	649	
Watch		649			649	649	649	649	
Apple Watch - Steel case, black classic buckle band (38 mm)	749								
Watch	749								
1 TB storage - 2.6 GHz	799	799	799	799	799	799	799	799	799
Mac mini	799	799	799	799	799	799	799	799	799
128 GB - Space grey		489							
iPod touch		489							
128 GB flash storage - 1.6 GHz - 11 inches	999	999	999	999	999	999	999	999	999
MacBook Air	999	999	999	999	999	999	999	999	999
128 GB flash storage - 1.6 GHz - 13 inches	1099	1099	1099	1099	1099	1099	1099	1099	1099
MacBook Air	1099	1099	1099	1099	1099	1099	1099	1099	1099

³⁴⁰ Exhaustive price collection from APR websites (for APRs with such a site).

³⁴¹ See classification marks 29765 to 30507.

	Andro mac	Apple	DX M	iCon cept	Inter Actif	IP Store	iSwitc h	MCS	Sym biose
128 GB flash storage - 2.7 GHz - 13-inch Retina display	1449	1449	1449	1449	1449	1449	1449	1449	1449
MacBook Pro	1449	1449	1449	1449	1449	1449	1449	1449	1449
16 GB - Space grey	239	239	239	239	239	239	239	239	239
iPod touch	239	239	239	239	239	239	239	239	239
16 GB - WiFi - Space grey	399	399	399	399	399	399	399	399	399
iPad Air	399	399	399	399	399	399	399	399	399
iPad Air 2	499	499	499	499	499	499	499	499	499
iPad mini 2	299	299	299	299	299	299	299	299	299
iPad mini 4	399	399	399	399	399	399	399	399	399
1 TB SATA storage - 2.8 GHz - 21.5 inches	1499	1499	1499	1499	1499	1499	1499	1499	1499
iMac	1499	1499	1499	1499	1499	1499	1499	1499	1499
1 TB SATA storage - 3.1 GHz - 21.5-inch Retina screen	1649	1649	1649	1649	1649	1649	1649	1649	1649
iMac	1649	1649	1649	1649	1649	1649	1649	1649	1649
256 GB flash storage - 1.1 GHz - 8 GB memory	1449	1449	1499	1449		1449	1449	1449	1449
MacBook	1449	1449	1499	1449		1449	1449	1449	1449
256 GB flash storage - 1.2 GHz - 8 GB memory					1449				
MacBook					1449				
256 GB flash storage - 1.6 GHz - 11 inches	1249	1249	1249	1249	1249	1249	1249	1249	1249
MacBook Air	1249	1249	1249	1249	1249	1249	1249	1249	1249
256 GB flash storage - 1.6 GHz - 13 inches	1349	1349	1349	1349	1349	1349	1349	1349	1349
MacBook Air	1349	1349	1349	1349	1349	1349	1349	1349	1349
256 GB flash storage - 2.2 GHz - 15-inch Retina display	2249	2249	2249	2249	2249	2249	2249	2249	2249
MacBook Pro	2249	2249	2249	2249	2249	2249	2249	2249	2249
256 GB flash storage - 2.7 GHz - 13 inch retina display	1649	1649	1649	1649	1649	1649	1649	1649	1649
MacBook Pro	1649	1649	1649	1649	1649	1649	1649	1649	1649
32 GB - Space grey		289	289	289	289	289	289	289	289
iPod touch		289	289	289	289	289	289	289	289
32 GB - Gold	289								
iPod touch	289								
32 GB - WiFi - Space grey	919	919	919	919	919	919	919	919	919
iPad Pro	919	919	919	919	919	919	919	919	919
4-inch screen - 16 GB	509	509	509	509	509	509	509	509	509
iPhone 5S	509	509	509	509	509	509	509	509	509
4.7-inch screen - 16 GB	694	694	694	694	694	694	694	694	694
iPhone 6	639	639	639	639	639	639	639	639	639
iPhone 6S	749	749	749	749	749	749	749	749	749
500 GB storage - 1.4 GHz	549	549	549	549	549	549	549	549	549
Mac mini	549	549	549	549	549	549	549	549	549
512 GB flash storage - 1.2 GHz - 8 GB memory	1799	1799	1799	1799		1799	1799	1799	1799

	Andro mac	Apple	DX M	iCon cept	Inter Actif	IP Store	iSwitc h	MCS	Sym biose
MacBook	1799	1799	1799	1799		1799	1799	1799	1799
512 GB flash storage - 1.3 GHz - 8 GB memory					1799				
MacBook					1799				
64 GB - Space grey		369	369	369	369	369	369	369	369
iPod touch		369	369	369	369	369	369	369	369
64 GB - Gold	369								
iPod touch	369								
Apple Watch - 38 mm stainless steel case			649						
Watch			649						
Apple Watch - 38 mm stainless steel case				749					
Watch				749					
Space grey	124	124	124	124	124	124	124	124	124
iPod nano		189	189	189	189	189	189	189	189
iPod shuffle	59	59	59	59	59	59	59	59	59
Pink	189								
iPod nano	189								
6-core	4599	4599	4599	4599	4599	4599	4599	4599	4599
Mac Pro	4599	4599	4599	4599	4599	4599	4599	4599	4599
Quad-core	3399	3399	3399	3399	3399	3399	3399	3399	3399
Mac Pro	3399	3399	3399	3399	3399	3399	3399	3399	3399

348. Another price collection by the case officers (*rapporteurs*) in March and April 2017 confirms this alignment, with just a few rare exceptions³⁴²:

	Apple	Andro mac	Actimac Actimag	Corsi dev iCorsi u	DX M	Easy Computer Easy Store	iCon cept	IP Store	Inter-A ctif	iSwitc h	Ldk2 Bemac	MC S	Symbio se
IPOD TOUCH													
iPod Touch 16 GB - Silver	239	239	Not sold	239	239	239	239	239	239	239	239	239	239
iPod Touch 32 GB - Silver	289	289	Not sold	289	289	289	Not sold	289	289	289	289	289	289
iPAD WiFi - Silver													
iPad Pro 12.9 inches - 32 GB	909	909	No price	919	919	909	884	919	919	909	909	919	909
iPad Air 2 - 32 GB	439	439	No price	Not sold	Not sold	439	424	Not sold	439	Not sold	439	Not sold	Not sold
iPad Air 2 - 128 GB	549	549	No price	623.88	623.88	549	Not sold	623	No price	549	549	639	549
iPad mini 2 - 32 GB	299	299	Not sold	Not sold	Not sold	299	284	Not sold	299	Not sold	299	Not sold	Not sold
iPad mini 4 - 32 GB	439	439	Not sold	Not sold	Not sold	439	424	Not sold	Not sold	Not sold	439	Not sold	Not sold
iPad mini 4 - 128 GB	549	549	Not sold	605	605	549	Not sold	605	605	605	549	605	549

³⁴² Classification marks 30893 to 30894. Downward deviations were only observed at the APR iConcept for certain products: 32 GB iPad mini 2, 32 GB iPad mini 4, 256 GB MacBook, 512 GB MacBook, SSD MacBook, 128 GB MacBook Air and 1TB MacBook Air.

	Apple	Andromac	Actimac	Corsidev iCorsu	DXM	Easy Computer Easy Store	iConcept	IP Store	Inter-Actif	iSwitch	Ldk2 Bemac	MC S	Symbiose
MAC													
MACBOOK 12 inches - Silver													
256 GB flash storage - 1.1 GHz - 8 GB memory	1449	1449	1449	1449	1449	1449	1349	1449	1449	1449	1449	1499	1449
512 GB flash storage - 1.3 GHz - 8 GB memory	1799	1799	1799	1799	1799	1799	1699	1799	1799	1799	1799	1799	1799
MACBOOK PRO - 13 inches													
8 GB - 256 GB SSD - Space grey	1699	1699	1699	1699	1699	1699	1599	1699	No price	1699	1699	1699	1699
MACBOOK AIR													
128 GB – 13 inches	1099	1099	1099	1099	1099	1099	999	1099	1099	1099	1099	1099	1099
iMAC													
1.6 GHz, 8 GB, 1 TB hard drive – 21.5 inches	1249	1249	1249	1249	1249	1249	1149	1249	1249	1249	1249	1249	1249
iPhone													
iPhone 7 Plus, 32 GB black	909	909	No price	909	909	909	894	909	No price	No price	909	909	909

b) Restrictions arising due to lack of room for manoeuvre for APRs in terms of pricing

349. While faced with almost zero price differential between wholesale prices and retail prices, APRs are contractually required to undertake investments that erode their margins, and they are also penalised by strict regulations regarding the opening of new retail outlets.

1. Low profit margins for APRs

350. Although margins vary depending on the APR, the calculations performed by the Investigation Services based on the case data regarding margins (summarised in the tables below) show that the profit margins (i.e. the net profits³⁴³) of resellers with at least one APR in the period 2012–2017 are, in the majority, below 1% (line showing “Share of net profits below 1%” in table entitled “Total for retailers with at least 1 APR”). The observation is similar for resellers with APRs only (line showing “Share of net profits below 1%” in table entitled “100% APR retailers”).

³⁴³ According to the usual accounting definition, i.e. the difference between income and expenses.

Total for retailers with at least 1 APR	2007	2008	2009	2010	2011	2012	2013	2014	2015	2016	2017
Share of retailers with at least 1 APR for which accounts are available	79%	64%	70%	77%	70%	69%	67%	71%	83%	72%	56%
Arithmetic mean of net profits	1.8%	0.7%	0.9%	1.6%	1.3%	0.4%	0.6%	0.9%	1.0%	-2.3%	-2.2%
Min. net profits	-0.7%	-14.7%	-2.4%	-1.2%	-4.3%	-10.0%	-4.7%	-1.1%	-3.5%	-44.0%	-36.1%
Max. net profits	8.2%	6.5%	4.3%	7.1%	6.1%	5.4%	4.7%	3.4%	4.4%	3.6%	3.9%
Share of net profits below 1%	36.4%	42.9%	52.6%	39.1%	52.4%	55.0%	61.1%	60.0%	60.0%	53.8%	50.0%
Share of net profits greater than or equal to 3%	9.1%	21.4%	21.1%	17.4%	9.5%	10.0%	11.1%	13.3%	13.3%	7.7%	30.0%

Source: File "Diane_export_revendeurs.xlsx" classification mark 44003; file "Annexe05a_Question12_Points de vente agréés_Hrs_retailers_2005_2014.xlsx" classification mark 43997; file "Revendeurs agréés 2015.xlsx" classification marks 44008–44012; file "Revendeurs agréés 2016-2017.xlsx" classification marks 44013–44016.

100% APR retailers	2007	2008	2009	2010	2011	2012	2013	2014	2015	2016	2017
Share of 100% APR retailers for which accounts are available	78%	67%	67%	65%	61%	55%	47%	50%	70%	57%	66.7%
Arithmetic mean of net profits	2.4%	0.2%	0.6%	2.2%	1.4%	0.0%	0.7%	1.2%	1.3%	-10.6%	-8.3%
Min. net profits	0.6%	-14.7%	-2.1%	0.0%	-0.6%	-10.0%	-4.7%	0.1%	0.1%	-44.0%	-36.1%
Max. net profits	8.2%	6.5%	4.3%	7.1%	6.1%	5.4%	4.7%	3.4%	4.4%	1.1%	3.6%
Share of net profits below 1%	28.6%	37.5%	62.5%	18.2%	54.5%	54.5%	66.7%	60.0%	42.9%	75.0%	75.0%
Share of net profits greater than or equal to 3%	14.3%	12.5%	12.5%	27.3%	9.1%	9.1%	22.2%	20.0%	14.3%	0.0%	25.0%

Source: File "Diane_export_revendeurs.xlsx" classification mark 44003; file "Annexe05a_Question12_Points de vente agréés_Hrs_retailers_2005_2014.xlsx" classification mark 43997; file "Revendeurs agréés 2015.xlsx" classification marks 44008–44012; file "Revendeurs agréés 2016-2017.xlsx" classification marks 44013–44016.

2. Price differential almost zero between wholesale prices and public retail prices

a. Wholesale prices applied by Apple and its wholesalers

351. As shown in paragraph 66 above, depending on the purchase volume of Apple products, resellers either buy directly from Apple ("direct" resellers) or from wholesalers ("indirect" sellers).
352. "Direct" resellers are chiefly supplied by the company ASI (ADI from April 2012). As for "indirect" resellers, they are supplied by Tech Data and Ingram Micro. In 2017, just five APRs out of 17 were directly supplied by Apple (see paragraph 79 above).
353. Apple sends its wholesalers and direct resellers a wholesale price referred to as the "Dealer Acquisition Cost" or "DAC". The DAC is not sent to indirect resellers, who receive their purchase prices directly from the wholesalers³⁴⁴.
354. Ingram Micro and Tech Data determine themselves the wholesale price that they apply for indirect APRs. However, in practice, they have very little room for manoeuvre, as the wholesale price they pay for the products is almost identical to the public price applied by Apple in its own stores.

³⁴⁴ Classification mark 10918 (VC)/24127 (VNC): "Matters requiring close attention: – Prices: the DACs (Dealer Acquisition Costs) must only be communicated to direct resellers/retailers and wholesalers, never to indirect resellers and indirect retailers".

355. On this point, Tech Data, in response to a questionnaire by the Investigation Services, stated: “Tech Data France freely sets its business policy according to market constraints, including in relation to Apple products. Nevertheless, Tech Data France has less flexibility regarding Apple products than in relation to products from other suppliers, due to the limited difference between the wholesale purchase price and recommended public price (less than 3% on average for Apple products, in comparison to [5–10%] on average for products from other suppliers) and supply difficulties, which notably arise during periods in which new products are being launched [...]”³⁴⁵.
356. Ingram Micro also underlined, in response to the same questionnaire, the unusually low wholesale margins on Apple products: “There is strong competition in distribution in general, and specifically for Apple products, which means that retailers’ margins are generally low”³⁴⁶.
357. Tech Data also explained that the main factor determining its wholesale price is “the cost of purchasing the products from Apple, namely the DAC reduced by the functional discount and other marketing discounts that Apple grants to Tech Data France [...]”³⁴⁷.
358. Ingram Micro and Tech Data highlighted the limited room for manoeuvre they have regarding the pricing of Apple products³⁴⁸. In practice, it depends on the public price recommended by Apple (see paragraphs 334 onwards above). On this point, Tech Data further clarified: “In practice, the Apple List Price acts like a maximum resale price for wholesalers, which must necessarily resell at a lower price than the Apple Store. Tech Data France’s maximum margin is therefore the difference between the Apple List Price and the purchase price from Apple (i.e. the DAC reduced by the discounts granted by Apple). The Apple List Price is generally not much above the DAC (less than 3% difference on average), and can even be equal to the DAC (which has long been the case for the iPad)”³⁴⁹.
359. Similarly, in a presentation dating from 2010 prepared by its employees and seized during the raids, Ingram Micro, in relation to iPad distribution, referred to: “Very poor conditions of purchase (purchase price = public price). We purchase the iPad at the recommended public price: very poor impact on our overall Apple profitability. We sell to authorised resellers with a functional discount, which has a negative impact on our overall margin (recovery of funds from Apple around 60 days later). The back margin of 2.5% is not sufficient to cover our costs. We urgently need to review our conditions for the iPad. See study below. Our gross margin without the iPads would be 4.45%, we have lost 0.15% gross margin on Apple overall”³⁵⁰.
360. Apple holds particularly detailed information regarding the business policy of its wholesalers, including the prices at which they sell products to resellers (see paragraphs 117 onwards above). On this point, Ingram Micro explained, in its response to the questionnaire by the Investigation Services, that “our European division communicates the following information: supplier product reference; product description; invoice number and date; total price and unit price; quantity sent; quantity returned; customer identity – the report is done

³⁴⁵ Classification mark 16553 (VC)/39962 (VNC).

³⁴⁶ Classification mark 16480 (VC)/21584 (VNC).

³⁴⁷ Classification mark 16555 (VC)/19316 (VNC).

³⁴⁸ See in this respect the internal Ingram Micro memo, classification mark 30520 (VC)/40112 (VNC) and the internal Tech Data emails, classification marks 32229 (VC)/40052 (VNC) and 32261 (VC)/40053 (VNC).

³⁴⁹ Classification marks 16555 (VC)/19316 (VNC).

³⁵⁰ Classification mark 11226 (VC)/25823 (VNC).

daily via EDI (Electronic Data Interchange) – [...]”³⁵¹. Indeed, the table provided by Ingram Micro to illustrate its response on this point shows this information, product reference by product reference, including the unit price and total price³⁵².

361. On the same point, Tech Data indicated: “Regarding sales, Tech Data France sends Apple the sales of Apple products to each reseller (by product reference), specifying the quantities sold. Tech Data France also informs Apple about any product returns”³⁵³.

b. Erosion of differential between wholesale prices and retail prices

362. During the investigation, several APRs highlighted that the price differential between Apple’s wholesale price (like that applied by its wholesalers³⁵⁴) and the recommended retail price has continued to decrease, thereby eroding their profit margins.
363. In a document summarising demands made by APRs to Apple in June 2011, the Managing Director of MCS (future President of the APR Association) indicated, on this point, that although the differential between Apple’s public prices and the DAC had previously been around 5% for all products, it had been reduced to around 3% for most computers in the range, or even 0% in the case of iPads³⁵⁵. He notably explained that this change had reduced APR margins by around 3.5%, with the APRs bearing this reduction in full.
364. During a meeting in May 2012, the APRs once again shared their concerns with Apple³⁵⁶.
365. The APRs notice the erosion of margins at each iteration of Apple’s “New Deals” (see APR feedback to Apple³⁵⁷).
366. Certain parts of the case demonstrate Apple’s view of the impact on APRs of the changes in price differential between wholesale prices and public prices. On this point, from an exchange of internal emails between Apple representatives on the liquidation proceedings affecting an APR, it emerges that: “[...] We must maintain the current margin. It is clear that any additional reduction will only aggravate the situation. Most partners do not have the investment capacities we require of them, and suffer from cash flow problems. As they are linked to increased capital, efforts to secure investments must be based on a sustainable and profitable model. We have systematically had feedback that Dutch APRs have good profitability – is this due to much better velocity or a different cost structure? We had talked about comparing the cost structure of a French APR versus a Belgian or Dutch APR”³⁵⁸.

³⁵¹ Classification mark 16480 (VC)/21584 (VNC).

³⁵² Classification mark 16509 (VC)/21613 (VNC).

³⁵³ Classification mark 16554.

³⁵⁴ The low level of wholesalers’ margins – or even the absence of any difference between the wholesale price and retail price for the iPad – is reported by the wholesalers in various internal documents (see in this respect the internal Ingram Micro memo, classification mark 30520 (VC)/40112 (VNC) and the internal Tech Data emails, classification marks 32229 (VC)/40052 (VNC) and 32261 (VC)/40053 (VNC).

³⁵⁵ Classification marks 623 to 692.

³⁵⁶ Classification mark 3413.

³⁵⁷ Classification mark 27642 (VC)/39886 (VNC) and classification mark 34752 (VC)/39930 (VNC).

³⁵⁸ NB: The email text is truncated in the case printout, classification mark 28760 (VC)/39896 (VNC).

3. Erosion of APR margins due to investment in retail outlet layout and personnel training

a. Requirements regarding layout of retail outlets

367. Store layout and shelving, the way in which equipment is arranged on display units, product demonstration and sales scenarios are strictly regulated by Apple in various contractual documents, such as the “Premium Reseller Identity Guidelines” and “Merchandising Guidelines”³⁵⁹, and the “APR Addendum” in the “Apple Authorized Reseller Agreement”³⁶⁰ in particular.
368. The Apple guidelines regarding retail outlet layout set out the exact way in which logotypes and brands must be used, their size, etc. so that the appearance of APR retail outlets is as close as possible to that of the Apple Stores³⁶¹.
369. The Apple instructions also lead to regular inspections of the APR business, notably in the form of audits referred to as “merchandising audits” and visits from mystery shoppers (see paragraphs 427 onwards below).
370. Certain APRs believe that Apple’s instructions on this subject constitute real interference in their business. They highlight the strict demands made by Apple, and the lack of flexibility in the “Merchandising Guidelines”.
371. On this point, the APR GDA Mac Tribu emphasised, during the investigation, that: “Although we are independent, we must apply to the letter (down to the centimetre) the Design Kit supplied and regularly updated by Apple. To increase our margins, we wish to showcase complementary products, but Apple does not permit any advertising elements for these products. We distribute Bose products, which involves specific presentation equipment that we are not therefore permitted to use. The Apple visuals are sent regularly and their positioning is strictly indicated on a plan sent by the merchandising team. The strict requirements and attention to detail required by Apple make it stand out from other manufacturers. They are also part of the manufacturer's success. The devices are positioned on the tables according to a plan drawn up to the millimetre. They are stuck down so they can’t be moved and have a linear position in relation to the other products”³⁶².
372. In the same vein, the APR Alis Informatique observed: “[...] the marketing and merchandising methods differ in practice from those of other manufacturers due to the existence and opening of ARSs, and due to the extremely rigid merchandising guidelines. Discussion is not an option. If you are notified that a particular product must be in a particular place, it must go there. If the list says that there must be five, against all business logic for that retail outlet, there must be five, otherwise we don’t get our back margins. Likewise for communications/marketing, we are forced to respect the charters and submit our communications plan, even without any financial contribution from Apple”³⁶³.
373. Another APR, You Cast, underscored that: “The “Design Kit” specifies the type of furniture to use, as well as requirements for floors and ceilings – everything affecting store outfitting. The price of the furniture was imposed by Apple. These prices were fairly high, although in some cases we could have bought comparable models at better prices – I had submitted to

³⁵⁹ Classification marks 129 to 131 (VC)/39874 (VNC). See also classification marks 19875 onwards.

³⁶⁰ Classification mark 14023 and 14207 (VC).

³⁶¹ Classification marks 140 to 156 (VC)/39875 (VNC).

³⁶² Classification mark 4200.

³⁶³ Classification mark 3277.

Apple a quotation for certain items of furniture that would have been produced identically, with the same dimensions and materials as the furniture required by Apple. Apple refused and said that the plan I had proposed had not been approved. But if we didn't buy the furniture, we didn't get our delivery. Apple was particularly demanding in relation to the choice we had regarding the suppliers of our furniture. I am sending you emails exchanged with Apple illustrating this"³⁶⁴.

374. In 2012, Apple's update of the "Merchandising Guidelines" for APR V2 stores notably covered the presentation of demonstration products. Apple decided to increase the number of iPads used for demonstration, to the detriment of the Mac minis and Mac Pros, specifying that the merchandising audits would take into account this modification, which led one APR to report: "In the next email, Apple informed us that, from now on, the space dedicated to the iPad – a product for which our margin is 3% lower in relation to the rest of the range (no ALP/DAC) and which does not benefit from Apple's marketing budgets (MDF) – had to occupy almost half of our showroom, to the detriment of two products that were selling well and with a normal margin (the Mac mini and Mac Pro). Note the veiled threat at the end of the message, where we are told that the merchandising audits will check whether we have obeyed these instructions, with non-compliance incurring financial penalties"³⁶⁵.
375. Similarly, another APR, Alis Informatique, adds: "In practice, we know that everything in our business that does not match the Apple look and feel will affect the discounts in our business terms and conditions."³⁶⁶.
376. In the marketing instructions for iPads, dating from March 2013, it can be seen that the fact of positioning iPads alongside competing tablets is forbidden by Apple and, as such, can reduce the amount of certain discounts.
377. In particular, the questionnaire produced by Apple for use by its merchandising auditors and mystery shoppers specifies: "An APR store must not display the products of other brands whose products are in competition with those of Apple. Such products include, for example: computers, any type of music player (CD or MP3 players), mobile phones, PC tablets (HP Slate, Samsung Galaxy, etc.), games consoles (Wii, PlayStation, Xbox), ebook readers (Amazon Kindle, Sony Reader), or films pre-recorded on DVD or music pre-recorded on CD (blank CDs and DVDs are permitted)"³⁶⁷.
378. The mystery shopper report seized during the raids highlights, for example, the prominent positioning of products manufactured by brands other than Apple – whether or not they are in competition with Apple products – in the retail outlets of certain APRs visited³⁶⁸.
379. Several APRs have highlighted that Apple's requirements regarding the presentation of products and sales outlets are similar to those of a franchise (see, for example, the responses to the questionnaire by the Investigation Services from iConcept³⁶⁹, I-Artificial³⁷⁰ and MCS³⁷¹). On this point, in response to a questionnaire by the Investigation Services, the APR LDK2 noted that "Apple's requirements are similar to franchise requirements, except that

³⁶⁴ Classification mark 727; for an example of the Design Kit, classification marks 742 to 757.

³⁶⁵ Classification mark 5385.

³⁶⁶ Classification mark 5546.

³⁶⁷ Classification mark 5008.

³⁶⁸ See extraction from computer seizures: "scellé 32 / 147645.emlx + pj" (VC)/classification mark 39940 (VNC).

³⁶⁹ Classification mark 3073.

³⁷⁰ Classification mark 3138.

³⁷¹ Classification mark 5177.

we are not franchisees! But they act like we are. We are in our own company, but we are not allowed to do what we think best!”.

b. Requirements regarding seller training

380. All APR sellers are required to complete compulsory training, which governs the length of the APR contract that the retail outlet signs with Apple, as well as the discounts that the APR can claim. Indeed, the functional discount that Apple grants resellers notably depends on the assessment – performed by the manufacturer – of personnel skills and expertise.
381. There are two aspects to the training requirements for APRs: “Apple Sales Training Online (ASTO)” (an online course leading to a certificate) and “Apple Sales Training Academy (ASTA)” (four compulsory face-to-face training sessions per year)³⁷².
382. On this point, in response to the questionnaire by the Investigation Services, the APR GDA Mac Tribu explained: “Our margin is calculated according to the training level of our sellers. At least three salespeople in each store must be up to date with the online training (ASTO) and the in-person courses (ASTA). This involves one or two trips to Paris per quarter, at our own expense. The training can take several days (for a new recruit), so there are also accommodation costs. With three stores, the quarterly training costs can be more than €1000. If we are not compliant regarding the courses completed, we lose points on the RET calculation. So we can lose 0.5% of our margin on all purchases of Apple products for the following quarter”³⁷³.
383. The impact of Apple’s training requirements on discounts is immediate, as shown by the email sent by a representative of Apple France to an APR on 13 February 2012 after one of the latter’s employees missed an iPad training session: “For information. This will create a real problem for the ND5 scoring [for your score in the context of the assessment tool set up for the New Deal 5 contract]”³⁷⁴.
384. The training constraints are a burden on APRs as they have limited investment capacity. On this point, during the transfer to the “New Deal 6” conditions, representatives of Apple France themselves recognised, in an internal email: “The problem is that profitability will not improve, especially as the lack of products accentuates the deterioration of their P&L [profits and losses] and a loss in value creation, so there is no capacity to reinvest”³⁷⁵.

4. Supervision of opening of new retail outlets

385. The opening of new APR retail outlets requires prior approval from Apple, and gives rise to a series of specific inspections.
386. The rules governing the opening of new retail outlets for APRs are based on a prior approval mechanism for the opening of new stores or the relocation of existing stores³⁷⁶. On this point, Article 1 of the 2009 APR contract stipulates that: “Reseller also confirms that it’s [sic] appointment to this Program and the associated benefits it may receive under this program apply only to the Authorized Location(s) expressly appointed by Apple in writing and identified in Appendix 3”³⁷⁷.

³⁷² Classification mark 3254.

³⁷³ Classification mark 4201.

³⁷⁴ Classification mark 4877.

³⁷⁵ Classification marks 29042 and 29043 (VC)/39906 (VNC).

³⁷⁶ Classification mark 28930 (VC)/39900 (VNC).

³⁷⁷ Classification mark 129 (VC)/39874 (VNC).

387. The opening of new stores results in additional discounts referred to as “New Store Incentives”. In this respect, the provisions of Article 2.3 of the APR contract state that: “[...] Article 2.3. Reseller shall qualify for incentive funds for a new store or store development (depending on the case), as well as other reductions presented in detail in the applicable Conditions of Sale and/or in the Program Conditions, provided that Reseller complies with the requirements of this Program, solely uses approved Apple suppliers, and applies all elements of the final design recommendations for Apple Stores [...]”³⁷⁸.
388. In its document entitled “Sales Policies Apple Premium Resellers New Store Incentive”, Apple specifies that: “[The New Store Incentive] is calculated as 4% of the Revenue Purchase for each Qualifying Location and is paid quarterly [...] Payments are made before the end of the month following the close of the quarter, on previous quarter Revenue Purchase. They will appear as a rebate on APR’s account with Apple for FARs and as a pass through rebate on APRs account with their distributor for LARs”³⁷⁹.
389. After approving the reseller location, Apple regularly assesses the quality of the retail outlet location by applying criteria regarding the size of the shop window, the location (in the town centre or its positioning in a shopping centre), the number of customers who go in (counters) or pass the shop window (footfall), etc.³⁸⁰ These different parameters are entered into a table submitted to the APR so that it can see whether it will retain its functional discount (see the developments regarding the merchandising audit and mystery shoppers below, paragraphs 427 onwards).
390. The stipulations regarding the organisation of the APR network also allow Apple to set up direct retail outlets – “Apple Retail Stores” – near the APR retail outlet, or to refuse approval for certain retail outlets.
391. On this point, Article 5.2 of the standard AAR contract issued by ADI specifies: “[...] authorised resellers recognise and accept that Apple may, at any time and at its sole discretion: (i) open an Apple Retail Store in any location, including locations close to authorised retail outlets; (ii) sell products directly to consumers from a retail outlet held by Apple or an Apple subsidiary, which may or may not be close to an authorised retail outlet; (iii) sell products to consumers from a sales website; (iv) approve additional resellers in any location, including locations close to authorised retail outlets; and/or (v) authorise others to implement the preceding steps. Authorised resellers that experience the arrival of an ARS in the same area as their retail outlet are not obliged to relocate outside the area in which the ARS is located. If an authorised reseller wishes to open an authorised retail outlet in an area in which an ARS is already located or likely to be located, the proximity of an ARS does not prevent ADI from granting its approval. However, if a reseller is planning to open an APR retail outlet in such an area, ADI will generally be reluctant to grant it APR approval. Indeed, unlike the case of other types of reseller, the opening of APR retail outlets involves significant financial investment by ADI. ADI considers it counter-productive to finance the opening of two stores (one ARS and one APR) with premium status dedicated to the Apple brand image in the same geographical area”³⁸¹.

³⁷⁸ Classification mark 129 (VC)/39874 (VNC).

³⁷⁹ Classification mark 158 (VC)/39876 (VNC).

³⁸⁰ As an example for the New Deal 5, classification mark 4911 (VC)/39880 (VNC).

³⁸¹ Classification marks 14192 (VC)/14463 (VNC) and classification marks 14193(VC)/14464 (VNC) and 34960 (VNC2).

392. On this point, the complainant informed the Investigation Services that the opening of new retail outlets as part of the APR programme notably took place on the basis of zones defined by Apple, and that it had had several authorisation requests for the opening of a new store rejected³⁸²: “We must, to be able to open a new retail outlet in a geographical area, know whether it is a zone that Apple considers to be “open” or “restricted”. This obligation arises from the contract itself, specifically Article 1 of the APR contract. It should be noted that it is very difficult to obtain Apple’s approval for the opening of new retail outlets, and that the approval decisions depend on the Apple parent company in the United States. When we have made requests to open new retail outlets over the past 18 months, these have been rejected. For certain towns, we even had a rejection when the opening process was almost complete. The local teams informed us that they had received a veto from the American teams. For example, in Enghien, Apple France [...] suggested a new development location. We opened discussions with these local teams, but in the end the request to open the retail outlet was rejected by Apple US on the basis that a post was located in the retail outlet. Apple France would never have thought that such an element would prevent the opening of an APR, which is why they had suggested that retail outlet. In Lyon, we had also issued a request to open a new retail outlet, which was rejected on the basis that this area was considered to be a “restricted zone” by Apple US (“restricted zone” is the term used by Apple to refer to a zone defined by Apple US as a geographical area that Apple US wishes to see reserved for Apple, and in which Apple US does not wish to see the development of any competing retail outlets)”³⁸³.
393. According to eBizcuss, “Refusals to open retail outlets were most often given verbally and nothing was sent in writing [...]”³⁸⁴.
394. The allegations of the complainant on this point are corroborated by those of several APRs in their responses to the questionnaire by the Investigation Services.
395. The company ALIS stated in its response: “The future is gloomy. As Apple refused our upgrade to APR V2 without accepting a completely new relocation in Paris, which is in the “reserved zone” for ARSs, as they say (which is a bit rich for a reseller established in 1992, so 17 years before the ARSs), the non-renewal of our contract will result in a drop in margin points of more than 4%! In other words, planned destruction...”³⁸⁵.
396. As the representatives of the company Andromac explained for their part: “We were not able to relocate to Aix-en-Provence, as Aix-en-Provence has been in the “reserved zone” since around 2008, for the establishment of a potential Apple Store. [...] To date, Apple has already asked us to open two other retail outlets under the APR label (knowing that Aix[-en-Provence] will no longer be APR from the start of 2013), otherwise... Given the difficulty of getting premises approved by Apple and the geographical problems that this represents, knowing that all the large cities in France are reserved for the potential opening of an Apple Store and given the current fragile economic state of France, we are finding it difficult to plan two or three years ahead. What is more, New Deal VI is likely to arrive soon...”³⁸⁶.
397. From the preceding points, it is clear that the opening of new APR retail outlets is subject to the approval of Apple, which may, without having to solicit the reseller(s) concerned, open an “Apple Store”-type outlet near an existing APR retail outlet.

³⁸² Classification mark 39.

³⁸³ Classification marks 421 and 422.

³⁸⁴ Classification mark 19596.

³⁸⁵ Classification mark 3274.

³⁸⁶ Classification mark 3118.

c) Constraints arising from the unpredictability of remuneration for APRs maintained by Apple

1. The profitability of APRs depends primarily on the granting of discounts and rebates, the benefits of which cannot be anticipated

398. Given the small differential between the wholesale prices and retail prices applied by Apple (see paragraphs 362 onward above), APRs have limited room for manoeuvre in terms of pricing. As a result, they are particularly dependent for their profitability on the trade discounts granted by the manufacturer.

a. Architecture of mechanism for discounts and rebates granted to APRs by Apple and its distributors

399. The discounts and rebates applicable to APRs are granted to them either directly by Apple in the case of direct resellers, or through wholesalers. Indeed, the latter are obliged to pass on to the reseller the discounts granted by ADI as they appear in the reseller contract signed with ADI. This mechanism, referred to as a “pass through” in Article 6.20 of the wholesaler contract (“Channel Terms Distributors”) thereby allows partner resellers to receive the discounts arranged with Apple.

400. The discounts applicable to APRs are detailed in various contractual documents: the “Channel Terms Apple Authorized Resellers” for resellers; the “Channel Terms Retailers” for retailers; the “Channel Incentive Scoring Exhibit”; and the “Standard letters”³⁸⁷.

401. Depending on the status of the reseller and/or the type of end customer (consumer, education customers, B2B), different discounts and rebates are likely to apply.

402. The discounts are proportional to either the purchase price of the products from Apple (percentage of the “DAC”) or the net total amount of the purchases made per quarter (percentage of net total purchase amount). Subject to fulfilling the eligibility criteria, resellers can combine the various discounts and rebates.

403. The levels and conditions under which these discounts and rebates are granted are described in contracts known as “New Deals”, which are periodically signed by Apple and its resellers³⁸⁸. On the date of the statement of objections, discounts and rebates were governed by “New Deal 6”, which had been in force since 2013. They are detailed below.

❖ Functional discount

404. The “Channel Terms APR” contracts, in their 2013 version, describe the functional discount mechanism as follows: “(i) Functional Discount applies to Authorized Products purchased by Direct APRs from Apple and to Authorized Products purchased by Direct APRs and indirect APRs from a Distributor. Direct APRs, however, may only, on an exceptional basis, receive its [*sic*] Functional Discount (as defined below) on Authorized Products purchased from a Distributor with prior approval from Apple, in any one (1) Apple fiscal quarter. (ii) Functional discount is calculated by applying the Reseller Evaluation Tool (“RET”) score as described below (“Functional Discount”). The RET score is assessed by reference to the following criteria per Authorized Location: location quality; staff competence/expertise; software and solutions availability; end user offering; and/or such other criteria as Apple may set from time to time. Each criterion is assessed independently in accordance with the

³⁸⁷ See list of contracts in classification marks 14429 to 14430.

³⁸⁸ For example, classification mark 27760 (VC)/39888 (VNC).

Reseller Evaluation Tool. Assessments will be carried out every six (6) months on the basis of each Authorized location. Apple may at its discretion carry out assessments more frequently”³⁸⁹.

405. All resellers can benefit from a functional discount of 4%, which may go up to a maximum of 13% if the reseller has the status of APR and has special expertise (ASE certification or B2B expertise)³⁹⁰.
406. This discount is calculated thanks to a tool for evaluating resellers developed by ADI (the “Reseller Evaluation Tool”, hereafter “RET”). For each APR retail outlet, the discount obtained by applying the RET is calculated based on the following criteria:
- retail outlet location quality,
 - staff competence and expertise,
 - availability of Apple software and solutions,
 - end user offering,
 - such other criteria as Apple may set from time to time, etc.³⁹¹.
407. The reseller retail outlet is assessed at least every six months. When certain authorised resellers have several retail outlets and/or have accumulated several statuses, the discounts and rebates are calculated taking into account the sales made at each retail outlet³⁹². This means that the discount level can vary slightly from one retail outlet to the next.

❖ “Marketing Development Fund” or “MDF”

408. APRs may also benefit from an additional discount (0.80%) each quarter based on the marketing and sales development actions they have implemented for Macs, iPods and Apple TV.

³⁸⁹ Classification mark 14033 (VC)/34955 (VNC2).

³⁹⁰ For a table breaking down the functional discount, see classification mark 14201 (VC)/14472 (VNC) and the Channel Incentive Scoring Exhibits, March 2014 (see list of contracts in classification marks 32110 to 32116).

³⁹¹ Classification mark 14201 (VC)/14472 (VNC).

³⁹² Apple’s response, classification mark 14201 (VC)/14472 (VNC).

409. Article 4.3(b) of the “Channel Terms APR” stipulates that “At Apple’s discretion, a discount may be provided for Authorized Products purchased from Apple or Distributor by APR in each Apple fiscal quarter and in respect of which APR performed the market targeted activities as set by Apple in the previous Apple fiscal quarter” (underlining added)³⁹³.
410. Several APRs heard during the investigation explained that, in practice, discounts linked to marketing development were being significantly reduced. On this point, Corsidev specified that “the discounts linked to marketing budgets were halved a year ago without any valid reason”³⁹⁴. Similarly, FBX Système stated that “before, we had an MDF (marketing discount) of 1%, now it is 0.8%”³⁹⁵. In the same vein, MCS observed that this discount “[...] was an integral part of the margin before 2005, and [...] has become a co-marketing budget, 50% of which is paid by Apple as long as we meet 100% of their requirements”³⁹⁶.

❖ *APR quality rebate or performance rebate (“Perf rebate”)*

411. APRs can also take advantage of an additional discount (of up to 2%) for their performance in the sale of Mac computers, iPods and Apple TV. This performance is assessed according to a quarterly target set by Apple during the previous quarter. It uses the sales volumes of the products concerned, as well as a process for assessing the quality of the retail outlet, which is based on a visit from a mystery shopper³⁹⁷.
412. This discount is granted at Apple’s discretion. Indeed, Article 4.4 of the “Channel Terms APR” stipulates that “At Apple’s discretion, a rebate may be provided in recognition of APR’s performance during the Apple fiscal quarter. Such a rebate shall be determined in relation to a target that will be set by Apple each Apple fiscal quarter. This target may include, but will not be restricted to, a combination of growth rates, attach rates for key Authorized Products or the quality of an Authorized location as measured by the results of mystery shopping conducted on behalf of Apple” (underlining added)³⁹⁸.
413. In relation to the APRs more specifically, the rebate is granted on the basis of the mystery shopping results (an assessment of the service quality at the retail outlet by a mystery shopper on behalf of Apple, see paragraphs 427 onwards below), on the one hand, as well as other performance criteria defined by Apple, on the other – such as, for example, the “APP [Apple Protection Plan] attach rate”, which is the number of after-sales and guarantee contracts signed in relation to total sales.
414. One of the documents seized from Apple premises during the raids provides information on the “Perf Rebate parameter details” for the company Actimac (APR). From this document, it emerges that the reseller’s performance for the purposes of applying the discount is measured on the basis of two criteria, one referred to as “beyond the box” (in the form of a score) and the other known as “App attach” (in the form of a rate)³⁹⁹.

³⁹³ Classification mark 14033 (VC)/34955 (VNC2).

³⁹⁴ Classification mark 3719.

³⁹⁵ Classification mark 4173.

³⁹⁶ Classification mark 5161.

³⁹⁷ Classification mark 14202 (VC)/classification mark 14473 (VNC).

³⁹⁸ Classification mark 14033 (VC)/34955 (VNC2).

³⁹⁹ Classification mark 10081 (VC)/23460 (VNC).

❖ Geographical coverage rebate

415. In addition to the 2% discount granted to APRs that have more than three retail outlets, the APRs that have more than six authorised retail outlets are eligible for an additional rebate of 1.5%, calculated based on the total amount of Mac, iPad and Apple TV product purchases.

❖ Payment conditions and outstanding balances

416. On top of any discounts in the strict sense, the stipulations regarding credit and invoicing in the reseller contract make provision for Apple to grant its resellers a discount of up to 0.5% if orders are settled within 15 days.

b. Management of discount and rebate levels by Apple

417. From several elements seized during the raids, it emerges that Apple manages the levels of discounts and rebates for each APR, in full knowledge of the effect that such adjustments have on their margins⁴⁰⁰.

❖ Collection of information regarding the financial health of APRs

418. Several stipulations in the contractual framework that APRs are required to apply make provision for obligations related to the reporting of information on the financial health of resellers; the benefits, discounts and rebates provided for in the “Channel Terms APR” contract are conditional on this information.
419. In this respect, the provisions of Article 3.2 of the “Channel Terms APR” contract state that: “APR agrees to comply with the sales and inventory reporting requirements set out in Exhibit A. APR acknowledges and agrees that failure to comply with the reporting requirements will immediately disentitle APR to any of the benefits, discounts and rebates set out in these Channel Terms”⁴⁰¹.
420. Article 3.4 of the same contract specifies the type of information that must be sent by the APR. It stipulates: “Prior to the start of each Apple fiscal quarter, APR will provide a detailed plan for developing and communicating sales and marketing demand generation activities that feature Authorized Products in local markets. The plan must include communicating and conducting at least one Apple focused seminar or other demand generation activity per quarter by APR for prospects and Customers. APR must provide quarterly progress updates to Apple”⁴⁰².
421. Article 10 of section A of the “Channel Terms APR” stipulates: “Authorized Location must participate in a performance review and provide a business plan to Apple every six (6) months”⁴⁰³.
422. In an email to APRs dated 13 February 2012, a representative of Apple indicated: “In the context of the Channel Incentive Program, we are regularly reassessing our partner criteria. In order to obtain the most detailed information possible, we would be grateful if you could complete the following questionnaire. Please understand that the information you provide in

⁴⁰⁰ For a non-exhaustive list of examples, see classification marks 30520 to 30524 (VC)/40112 to 40115 (VNC), 30525 (VC)/40117 (VNC), classification marks 28312 to 28316 (VC)/39893 (VNC), classification mark 28760 (VC)/39896 (VNC), classification mark 28374 (VC)/39894 (VNC).

⁴⁰¹ Classification mark 14033 (VC)/34955 (VNC).

⁴⁰² Classification marks 14033 (VC)/34955 (VNC).

⁴⁰³ Classification mark 14026.

your detailed responses to the attached questionnaire is absolutely essential. It gives us a full overview of the activities of your retail outlets and enables us to accurately calculate the discounts to which you are entitled. It is a chance to ensure that your company is correctly assessed for the next six months. If we do not receive a response from you, Apple will have to use the data it currently has available, which could lead to calculation of a lower functional discount. Until the next evaluation in six months' time, there will be no possibility of reassessing your functional discount between two half-yearly assessment campaigns. It should also be noted that the data provided may be audited and checked. Any inaccuracies discovered that artificially inflate your functional discount may have a prejudicial effect on your relations with Apple”⁴⁰⁴.

423. In relation to the development of APR business activity, an internal Apple presentation entitled “Account Executive Playbook” from August 2011⁴⁰⁵ – described as a guide to managing and developing resellers or determining a “prosumer” strategy for managers – details the various APR development steps. In particular, it specifies that resellers must send sales feedback once a week and provide a “benchmark POS [Point of Sale] performance on a bi-weekly basis to understand trends and areas needing attention. Share POS performance with Store managers and agree development plan for each POS to address any areas of concern”⁴⁰⁶.
424. It is therefore clear from the stipulations in the contracts that Apple signs with its APRs that the manufacturer regularly assesses its resellers' business activity, and that the discounts granted to APRs depend on this assessment. Although the contracts state that data must be sent every six months, an email sent to an APR on 20 August 2012 by an Apple manager shows that more recent elements may be requested. In this email, the Apple manager asks the reseller for its financial statements, including a complete set of tax forms or, failing that, an indication of the “initial results trends”. In the same email, Apple asks for “intermediate statements (including a balance sheet of assets and liabilities, and a profit and loss statement), practically compulsory every six months and ideally every three months [...]”⁴⁰⁷.
425. The data collected by Apple is used to draw up highly detailed tables, in Excel format, which include quarterly and projected financial monitoring and analysis data for each APR (both direct and indirect APRs), as well as precise details on the volumes sold. Examples of such files were seized during the inspections and raids⁴⁰⁸. These files notably report – for each APR – details regarding expenses, the salaries paid and even the future investments and capital increases required. These business plans also give expected revenues for the next three years.
426. The data in these files are both confidential and strategic, and cannot be deduced from public information such as that provided in annual accounts.

⁴⁰⁴ Classification mark 4509.

⁴⁰⁵ Classification marks 28933 to 28969 (VC)/39901 (VNC).

⁴⁰⁶ Classification mark 28933 (VC)/39901 (VNC).

⁴⁰⁷ « benchmark POS [Point of Sale] performance on a bi weekly basis to understand trends and areas needing attention. Share POS performance with Store managers and agree development plan for each POS to address any areas of concern» Classification mark 28933 (VC) / 39901 (VNC).

⁴⁰⁸ See in this respect extraction from computer seizures: “scellé 28 / 268208.emlx + PJ” (VC)/classification mark 39941 (VNC) and extraction from computer seizures: “scellé 32 / 268255.emlx.PJ” (VC)/classification mark 39938 (VNC).

❖ Process for assessing APR retail outlets

427. APRs are inspected and assessed through audits and mystery shoppers. The discounts they are granted depend on these assessments⁴⁰⁹.

1. *Merchandising audit*

428. The merchandising audit is intended to check the compliance and good performance of APR retail outlets as described above⁴¹⁰. It covers the external appearance of the store, its layout, the general appearance of the showroom, the store personnel and product displays, as well as the services offered. In particular, the audit also considers the cleanliness of the store, the content of demonstrations, point-of-sale advertising – which must be exclusively for Apple products – and store opening six days a week⁴¹¹. This audit is used to score the APR and takes place every six months as a minimum. A score of less than 80% leads to a reduction of the functional discount⁴¹².
429. The process followed by the auditor is based on in-store checks (using photos where necessary⁴¹³)⁴¹⁴ and a questionnaire with 109 questions on the presentation of the stores, the products and services offered, etc.⁴¹⁵.
430. The merchandising audit is taken into account when calculating the RET of each store and may have an influence on the level of functional discount. Indeed, it emerges from the information email sent by Apple to APRs in 2011 that the latter, in order to claim the highest discount, had to achieve a score of at least 80% in the audit, or face a reduced discount or no discount at all⁴¹⁶.
431. Audits are strictly monitored by Apple, as shown by an internal company email on 19 April 2013, which states: “As you know, the merchandising audits are coming up. We received important information today during a final preparatory call. This concerns the shop windows and the cash desk.

1 Shop windows: As you know, stickers or posters/flyers other than AO [Apple Online] are not permitted in the shop window. If credit card-type stickers are required, they must be properly positioned according to the attached guidelines.

2 Cash desk: It was confirmed again during the call that there is no leeway on flyers or other elements not provided by Apple that are displayed on the cash desks. They may be distributed to customers but must be kept in drawers and not visible at the cash desk [...]⁴¹⁷.

⁴⁰⁹ Classification mark 26512.

⁴¹⁰ Classification mark 3123.

⁴¹¹ Classification marks 34791 to 34840 (VC)/39932 (VNC).

⁴¹² Classification mark 28934 (VC)/39901 (VNC).

⁴¹³ During this audit, the auditor takes photos, particularly if “... the fascia of the store has unauthorised signs or notices” (classification mark 3293). The following is also specified: “Comment for auditor: you must take a photo of all benches, round tables, podiums and desks, as well as all the shelves and all the storage boxes in the store” (classification mark 3295).

⁴¹⁴ Classification mark 3292.

⁴¹⁵ Classification mark 10363 (VC)/23735 (VNC): “9 – Please take a photo of the layout of products on each display table (including the price tags, descriptive signs on the counters and the cable layout)”.

⁴¹⁶ Classification marks 5695 and 5696.

⁴¹⁷ Classification mark 28671 (VC)/39895 (VNC) and extraction from computer seizures: “scellé 32 / PJ de 309843.emlx” (VC)/classification mark 39936 (VNC).

2. Mystery shopper

432. This assessment is based on a visit by a mystery shopper, who scores the retail outlets of authorised resellers “anonymously” (i.e. without indicating that they work on behalf of Apple). Like the audit, it takes place every six months as a minimum, and is used to determine the discounts granted to APRs (“APR’s performance rebate”)⁴¹⁸.
433. During the mystery shopper visit, the retail outlet is scored out of 100 according to the following parameters: staff greeting, establishing needs, recommendation/meeting needs, demonstration, product knowledge, overcoming objections, accessories/upsell, conclusion and impressions⁴¹⁹.
434. Although criticised both by APRs⁴²⁰ and internally by certain Apple representatives⁴²¹, the audit is a determining factor for the back margins of APRs⁴²². On this point, the French Directorate General for Competition Policy, Consumer Affairs and Fraud Control (*Direction générale de la concurrence, de la consommation et de la répression des fraudes*) had noted, during an inspection under another procedure at an APR in 2013, that “Apple France is therefore able to unilaterally decide the back margin rate to pay. The company arranges the visit of a mystery shopper, who checks compliance with “Apple” sales requirements. Almost the whole rate (in this case 1.20% of the ultimate 1.35%) depends on this visit. The guarantee extension sales performance, depending on the establishment, is therefore a minor part in the remuneration amount”⁴²³.
435. The mystery shopping mechanism also enables Apple to obtain information on any promotional offers made by its resellers, in addition to the photos taken of the price tags. One of the tables produced by a mystery shopper, dating from April 2010, contains comments regarding all the APRs. The following is stated regarding the company Alis: “The external appearance of the shop was sober and austere; it was dark with an automatic door that opened into a shop. It was uncluttered, with computers installed all along the walls. There was space in the middle for customers to wait before the desk. There were Alis brochures with computers description and offering assistance at home for 49.50 euros. There was a green bonus discount amounting to 100 euros if you purchased a Mac and brought your old computer to them”⁴²⁴ (underlining added).

⁴¹⁸ Classification mark 28935 (VC)/39901 (VNC), but according to certain APRs, a mystery shopper generally visits every quarter.

⁴¹⁹ Classification mark 3326, in English in the document. Example of ALIS score for audit (classification marks 3291 to 3333) and mystery shopper (classification marks 3326 to 3331).

⁴²⁰ Classification mark 4524.

⁴²¹ Classification marks 34353 and 34354 (VC)/39928 (VNC).

⁴²² Classification mark 13955.

⁴²³ Classification mark 13955.

⁴²⁴ See extraction from computer seizures: “scellé 32 / 147645.emlx + pj” (VC)/classification mark 39940 (VNC).

❖ Squeezing of APR margins

436. An internal email from an Apple France sales manager dated 28 November 2010 demonstrates the very precise knowledge that Apple has of the impact that changes in discount amounts are likely to have on the profit margins of APRs:

“1. Functional Discount:

- I have changed the format of the consolidated table so that it can be used as a database.
- I have incorporated a key piece of financial data for our review, which is the Q4 [fourth quarter] billing (direct + indirect) in euros. This will enable us to review the real impact and cost it both by partner and for all APRs in France. Micro Alpha Soft seems to be missing from your list, I don't remember who this partner is.
- All the 0.75 discounts need to be rounded, don't they, but how will this be done? To 0.50 or 1.00?

Lastly, the results are already “interesting”, we will increase the COS by 0.19% due to Eb [eBizcuss]: representing 30% of the APR total, it alone has the impact of a 1.5-point increase in the COS of APRs of 0.45%, or another way of looking at it is that it will bring €180,000 more to Eb by Q... something to come up with a good development plan.

We will have to review the eBizcuss case from all angles to be ready for any questions.

The biggest loser in absolute value is iConcept, with an impact of €45,000 on the basis of Q4.

Out of 29 partners, seven have an increase in COS, five remain the same and 17 lose – to be confirmed once the rounding has been finalised”⁴²⁵.

437. Several internal email exchanges at Apple France during 2011 (supplemented where relevant by files for the Excel spreadsheet) show that the impact that the shift to the “New Deal 5” conditions would have on each APR was known in detail⁴²⁶.

438. On this point, the “APR margin analysis” file, seized during the raids, reveals that Apple knows the supply needs of retail outlets in a sufficiently detailed and certain manner to be able to maintain their profit margin according to the units sold⁴²⁷. In this way, it appears that Apple is able to manage the profit margins of APRs by adjusting the quantities delivered, quantities that it also controls (see paragraphs 214 onwards above).

439. Similarly, during the changeover to the “New Deal 6”, a manager at the Apple France APR department analysed, in an internal email dated 28 January 2013, the impact of the new discount conditions on the margins of APRs (front margin and back margin). In the same email, he indicated that Apple was able, in any case, to exercise control over the margins themselves⁴²⁸: “On the other hand, BM drops in absolute value as we are going from 2.5% to 2% – but if we have a handle on each country on the performance grid, we might be able to compensate.”

⁴²⁵ Classification mark 28238 (VC)/39892 (VNC).

⁴²⁶ Classification mark 28238 (VC)/39892 (VNC), and classification marks 34774 and 34775 (VC)/39931 (VNC) and extraction from computer seizures: “scellé 32 / 214854.emlx.pj » (VC)/classification mark 39937 (VNC), in particular APR margin analysis and “simu” file.

⁴²⁷ See tab entitled “additional units to maintain margin”.

⁴²⁸ Classification mark 29042 (VC)/39906 (VNC).

440. A manager from the APR department of Apple France, in an internal email reporting on a meeting with the President of the APR Association held on 14 May 2012 on the subject of: “Analysis of the various financial elements of APRs”, seized during the raids, observed the following⁴²⁹:
- “Summary: location of POS associated with investment cost;
 - Optimal numbers of staff to respond to level of demand;
 - Development of APR engagement in B2B;
 - Marketing investments
 - What are the associated investments and quality requirements – break down the profit margins on the catalogue, ND5 and restructure it to get consistent VA [value added];
 - Define format to rank and prioritise events”.
441. An email dated 8 October 2010 from a manager in Apple’s European division makes it possible to deduce that the control exerted by Apple over the discount amounts is notably intended to prevent pricing differences arising between the two wholesale supply channels: “Dear All, Please be advised of the following changes that will impact the end user pricing on ipad with immediate effect: C... and D... have approved a pricing of 2% to the following direct business customers via WWW online and WW ARS [...]. The following volume grid will be used to manage the growing interest in bulk purchase [...] in addition, the Online Team and ARS will have the possibility to price match against reseller bids. We have been requested to align the same practices and therefore the following changes will be made effective oct 11th: Direct major account pricing model will be aligned to a 2% up front discount on this product line. [...] CRT for MA will be dropped from the 3% communicated below to a 2% back Margin claim. This is necessary to avoid any pricing differentials between direct or indirect customers as well global partner [*sic*]. [...] In order to maintain some record around this business, we are asking that all SEA requests [occasional supplementary discount that can be applied by Apple] include the below summary describing the nature of the deal and that any deals around promotion or gifting be confirmed with E... from the online team to make sure we are not in a bidding match [...]”⁴³⁰ (underlining added).

2. Information asymmetry maintained between Apple and APRs

442. While Apple has very precise knowledge of the financial and economic health of APRs, the latter are not able to anticipate elements relating to their remuneration due to frequent, unpredictable changes to the business terms and conditions governing the resale of their products.
- a. Modifications affecting the general contractual framework applicable to APRs*
443. For all authorised resellers in France, Apple has set up a standard authorised reseller contract (“Apple Authorized Reseller Agreement” or “AAR Contract”)⁴³¹. This general distribution authorisation agreement governs the sale of Apple products (authorisations, approval, applicable business terms and conditions, participation in programmes, etc.). Appendices for products must also be signed by the resellers.
444. In relation to APRs more specifically, the terms of the contract and its amendments can be modified by Apple at any time, subject to one month’s notice. Article 5 of the APR Contract

⁴²⁹ Classification marks 34788 to 34790 (VC)/39932 (VNC).

⁴³⁰ Classification marks 28229 to 28232 (VC)/39891 to 35361 and 39891 (VNC).

⁴³¹ See contract list, classification marks 14429 and 14430.

(2009 version) specifies in this respect: “Apple may, at any moment and at its sole discretion, make changes to the current Program, including to the Contract stipulations, to the eligibility criteria (Appendix 1), to the guidelines concerning the identification of Premium Resellers (Appendix 2) and to the Program Logo, with notice given in writing thirty (30) days beforehand” (underlining added)⁴³².

445. The vast majority of APRs solicited by the Investigation Services underscored that they had almost no room for negotiation with Apple⁴³³, as they received the various amendments in English from the manufacturer and were required to sign without being able to discuss them⁴³⁴.

b. Modifications affecting system for obtaining discounts and rebates

446. Apple – which may, on a discretionary basis, exclude any product from discounting⁴³⁵ – unilaterally modifies, on a regular basis, the systems for obtaining discounts and rebates, through contracts known as “New Deals”⁴³⁶. The different iterations of the “New Deals” have led to noticeable modifications in the levels of discount likely to be granted to APRs.
447. Since 2005, four different versions of the “New Deals” have been issued to resellers: “New Deal 3” (ND3) from April 2005 to June 2008, “New Deal 4” (ND4) from July 2008 to March 2011, “New Deal 5” (ND5) from April 2011 to March 2013, and “New Deal 6” (which entered into force from April 2013⁴³⁷).
448. In addition to setting the criteria for granting discounts, Apple is in charge of assessing, sometimes on a strictly discretionary basis, whether or not the contract conditions have been met. In this way, the criterion of “channel incentive scoring” – which is crucial for assessing the retail outlet and granting certain discounts, such as the development discount or quality discount – is evaluated, according to the contract terms themselves, “at Apple’s discretion”.
449. Lastly, certain discounts and rebates seem, by their very nature, to show purely subjective judgement, with the level of discount applied likely to vary according to the results of an assessment performed by Apple using criteria that are not transparent, such as the quality of the “consumer experience in store”, or even criteria that are not defined when the APR signs the contract, and which may be subsequently introduced at Apple’s discretion (see, in relation to the criteria taken into account to calculate the RET, paragraph 406 above). This is notably the case in relation to the assessment criteria for retail outlets used to set the functional discount⁴³⁸.
450. Uncertainties linked to the discretionary nature of the conditions according to which discounts are granted, similarly to the actual granting of these discounts, have been

⁴³² Classification mark 130 (VC)/39874 (VNC).

⁴³³ See in this respect the responses from APRs to the request for information dated 4 October 2012, questions 30 and 33, for example classification marks 3255 to 3257, classification marks 5524 and 5525, and classification mark 3107.

⁴³⁴ Classification mark 4203.

⁴³⁵ See Article 4.1 (d) of the “Channel Terms Apple Premium Reseller from Apple, classification mark 14032 (VC).

⁴³⁶ ND6 was launched in February 2013: classification mark 29150 (VC)/39907 (VNC), classification mark 27760 (VC)/39888 (VNC), and classification mark 28998 (VC)/39904 (VNC). See change in programmes from ND1 to ND6: classification mark 32976 (VC)/39919 (VNC), classification marks 27757 (VC)/39887 (VNC), and classification mark 28865 VC/39898 (VNC).

⁴³⁷ Classification mark 14200 (VC)/14471 (VNC).

⁴³⁸ Classification mark 4509.

confirmed by several APRs, which highlight the negative impact of this contractual policy on the predictability of their profit margins.

451. On this point, the APR Alis Informatique refers to a “contract attachment setting the basic business terms and conditions that we are unable to negotiate. We are then told what % discount we are eligible for. These conditions may be modified without notice”⁴³⁹.
452. Similarly, the APR ActiMac informed the case officers (*rapporteurs*) that: “The calculation of discounts is getting more and more complex over time, with the appearance of new criteria that oblige us to react to Apple’s demands in order to avoid losing points on the margin. Some criteria are impossible to achieve – such as the maximum opening hours, which require staff to be hired – or outside our power, such as footfall”⁴⁴⁰.
453. Similarly, the APR Andromac notes: “The margin is calculated at different levels. It is extremely complex, and calculated by Apple using a table like the one shown below [...]”⁴⁴¹. In response to the question “Have you noticed a change in the amount or calculation of discounts? If yes, how do you explain this?” Andromac replies “Yes, but it cannot be explained, it depends on Apple’s goodwill”⁴⁴².
454. The APR Easy Computer explains that: “Apple demands more and more criteria to maintain our margin and transfers certain margin points that we had before to completely random items, as that depends on the results of the mystery shopper. Two visits each quarter with a questionnaire attached to be completed by the mystery shopper [...]”⁴⁴³.
455. The APR LDK2 told the Investigation Services: “We see a regular drop in our discounts, decided unilaterally by Apple and without any explanation on their part”⁴⁴⁴.
456. The APR MCS, after detailing the mechanism for calculating discounts and its developments, shares the impact they have on reseller margins: “Our discounts are calculated using a fairly complex system, which constantly changes each time the Apple contracts (New Deals) are updated.

Firstly, there is the front margin, known as the ALP/DAC.

Then there is the back margin, the RET, which depends on the criteria selected by Apple.

Then there is a kind of target-related bonus, the “Performance Rebate”, which has also changed a lot. Finally, there is the MDF, which was an integral part of the margin before 2005, and which has become a co-marketing budget, 50% of which is paid by Apple as long as we meet 100% of their requirements.

The discount on the ALP/DAC selling price was 10%, then 5%, then 3% and now 0% on half the range (iOS).

The overall RET for MCS is currently 9% (8% in Nice and 10% in Cannes). It is recalculated every six months based on the footfall, the completion of training courses selected by Apple and their assessment of the zone in which the stores are located (Zone A, B or C).

Performance Rebate: This has changed a lot and has gradually become unobtainable, as the mystery shopping is completely arbitrary and several legitimate objections made by MCS were rejected without explanation (see appendices). The merchandising audit has changed from a tool to improve product presentation to a real interference in the running of our stores (see appendices). The AppleCare attach rate has become almost impossible to achieve.

⁴³⁹ Classification mark 3279.

⁴⁴⁰ Classification mark 4567.

⁴⁴¹ Classification mark 3124.

⁴⁴² Classification mark 3125.

⁴⁴³ Classification mark 5917.

⁴⁴⁴ Classification mark 13911.

The MDF has gone from 4% to 2%, then down to 1%, then 0.8%, and now only applies to part of the range, excluding all iPad and Apple TV products.

Apple decided that communications regarding the brand had to be managed by the Corp, and they have therefore reduced our MDF share.

While the APRs were spearheading Apple distribution and while MCS was the only Apple representative in the region, this policy made sense.

With the arrival of the ARSs, these communications no longer benefit the APRs and MCS due to the dominant position of the Apple channels and the multi-competition that Apple currently encourages.

We have informed Apple of our urgent need to communicate at our retail outlets to become visible once again and increase footfall in our stores, but to date we have not received a response.

Conclusion: Apple controls our margins and our communications” (underlining added)⁴⁴⁵.

d) Monitoring of APR retail pricing by Apple

457. Apple has implemented various inspection systems – some of which are unannounced – in the context of the APR contracts. These make it possible, in practice, to monitor the prices applied by APRs.
458. On this point, one APR gave the following account during the investigation: “Apple does not require us to send them a catalogue for editing, or the price tags used in our retail outlets. However, the merchandising audit takes our price catalogue. They take documents or photos, including photos of the price tags”⁴⁴⁶.
459. Taking photos of price tags is one of the elements that makes up Apple’s inspection framework, as indicated by the document seized from Apple France premises entitled: “Store audit – Questions – Apple confidential”⁴⁴⁷. This indicates the procedure to be followed by the auditor. In particular, the auditor must include the price tags in the photos of the display units sent to Apple⁴⁴⁸.

⁴⁴⁵ Classification marks 5160 and 5161.

⁴⁴⁶ Classification mark 5549.

⁴⁴⁷ The questionnaire used for the purposes of the merchandising audit contains 109 questions regarding the presentation of the stores, their services, the products offered, etc. Classification marks 10362 to 10374 (VC)/23734 to 23746 (VNC). Certain questions are marked “*Question not scored”.

⁴⁴⁸ Classification marks 10363 (VC)/23735 (VNC), and 10363 and 10364 (VC)/23735 and 23736 (VNC). For the rules applicable under ND6, see classification marks 5204 to 5218 and 5186 to 5196.

460. In the same way, it has been observed that Apple has been asking the APRs themselves to send it photos of the store and the display units or the tag proofs. These requirements are clear from the stipulations of the various contracts signed by Apple with the APRs (graphic charters, rules regarding Apple’s visual identity), the mystery shopper reports and audits⁴⁴⁹. In particular, they state that APRs must not use posters other than those provided by Apple, at the risk of losing points on the discount calculation (see in particular the “Apple Premium Reseller addendum”, which only applies to APRs⁴⁵⁰).
461. In the “Merchandising Guidelines” and the “Design Kit”, the communication elements provided by Apple include price labels⁴⁵¹. The price is not generally pre-printed, certain tags being sent in the form of a template⁴⁵². However, the APR ActiMac et PC stated, in its response to the questionnaire by the Investigation Services, that “as well the website, the official posters that we have to put in the shop show the public prices”⁴⁵³. In addition, it has been observed that APRs cannot modify the format of the poster or add items, or therefore, for example, show price cuts nearby⁴⁵⁴.
462. The compliance of the visuals, once the elements are fully installed in retail outlets – including the price tags – is checked by Apple. In this respect, in an email sent by a representative of Apple France following a meeting on product placement, this representative invites the store manager to take photos of the store demonstrating that all the elements are in place, including the price tags⁴⁵⁵.
463. Failure to comply with the “Design Kit” and “Merchandising Guidelines” can be used to justify immediate termination of the APR contract without notice. On this point, Article 7.1 of the “APR Addendum” contract stipulates: “[...] Apple may terminate this Addendum or one or more Authorized Locations immediately and without any period to remedy if:
- (a) Reseller fails to fully perform any obligation under the Addendum or breaches the terms of this Addendum;
 - (b) Reseller fails to comply with the Apple Premium Reseller Identity Guidelines or the Merchandising Guidelines [...]”⁴⁵⁶.

⁴⁴⁹ Example of Easy Computer audit: classification marks 5951 to 5987, see also classification mark 33953 (VC)/39925 (VNC): “Are all posters supplied by Apple?”.

⁴⁵⁰ Classification mark 4396 (VC)/39879 (VNC) for the 2009 and 2010 versions; classification mark 4225 (VC)/39878 (VNC) for 2012. “Merchandising: Reseller must comply with (i) the Apple Premium Reseller Merchandising Guidelines, in Appendix 4 (attached), and any later update or modification published on Apple Sales Web or communicated in another way by Apple and (ii) any additional requirements that may be communicated by Apple from time to time. Reseller acknowledges and accepts not to install any 3rd party logos within the store or on the fascia without prior approval from Apple. Reseller may not install any 3rd party fixtures or other fixtures not depicted in the Design Kit within the customer facing showroom, without prior approval from Apple.”

⁴⁵¹ Classification mark 32341 (VC)/39918 (VNC).

⁴⁵² Classification marks 34024 and 34025 (VC)/39926 (VNC).

⁴⁵³ Classification mark 4569.

⁴⁵⁴ For example, classification marks 4563 to 4564, and for an example of the “visual identity rules” 2007, classification marks 33428 to 33555 (VC)/39920 (VNC). For an example from 2015 by product, classification marks 20112 to 20489, for an example of the “design kit”, classification marks 741 onwards or 5388 onwards.

⁴⁵⁵ Classification marks 34371 to 34372 (VC)/39929 (VNC).

⁴⁵⁶ Classification mark 14024.

464. The inclusion of price tags in the elements required by Apple is also demonstrated by an email dated 26 November 2010, in which an APR sends Apple five photos presenting the store, including one photo showing a poster with prices⁴⁵⁷.
465. Similarly, in an email dated 25 May 2010⁴⁵⁸, the manager of an APR sent the proofs of advertising leaflets for the iPad to Apple for approval; these featured product prices⁴⁵⁹. In 2012, the same APR was reproved by Apple for offering a 10% discount on the iPad⁴⁶⁰.
466. During the launch of the iPad 2, Apple France sent APRs an email to prepare for marketing, notably informing them of the need to use price tags in a particular format⁴⁶¹. This demand was based on the contractual stipulations in the “APR iPad addendum”, according to which no posters are permitted and communications must be exclusively created using Apple’s resource kits. It expressly states: “No press inserts or posters”, and again: “Only visuals personally approved by us shall be authorised for publication or distribution”⁴⁶².
467. On this point, Alis Informatique informed the Investigation Services of its attempt to put up a sign in its shop (see below, paragraph 473). According to its representatives, six hours after putting up the sign, they were contacted by an Apple employee, who told them to remove the sign or face the suspension of deliveries⁴⁶³. This APR adds that there is a termination clause in the addendum in the event that the conditions set out by Apple are not met.
468. Evidence regarding the attention paid by Apple to monitoring the prices applied by APRs and the actual action it takes to influence the behaviour of APRs that deviate from the instructions can notably be seen in an internal Apple email from 2012, in which the managers of Apple France – although they do not admit to having any coercive powers in this respect – indicate the following in relation to an APR that has displayed a visual showing a 10% discount on the iPad: “[The APR manager] will give us an explanation, and we will ask him to remove it ASAP”⁴⁶⁴.

e) Supervision of promotions

469. Promotional operations by wholesalers⁴⁶⁵ and certain resellers⁴⁶⁶ are almost exclusively developed and proposed by Apple, with the communications and support methods often imposed, as demonstrated by the reports of almost all APRs on this point.

⁴⁵⁷ For Easy Store Nancy, classification marks 33917 to 33924 (VC)/39924 (VNC), likewise for Easy Computer Metz, classification marks 33925 to 33932 (VC)/39924 (VNC).

⁴⁵⁸ Classification mark 34927 (VC)/39933 (VNC).

⁴⁵⁹ Classification marks 34928 to 34930 (VC)/39933 (VNC), see also, for example, classification marks 34933 and 34934 (VC)/39934 (VNC): “Price tags: New price tags are available for download from ASW [...] The iPad tags are included in the list. We invite you to download them, complete them, affix your logo and send them to Arona for approval: fouiro a@apple.com.”

⁴⁶⁰ Classification marks 34937 to 34939: “As I feared, its communications agency forgot to add “iPad excluded from 10% discount terms and conditions” on the visuals used for the poster. However, I’m told that the iPad is definitely excluded from the discount on the flyers”.

⁴⁶¹ Classification marks 34023 to 34025 (VC)/39926 (VNC).

⁴⁶² Classification mark 4502.

⁴⁶³ Classification mark 5544.

⁴⁶⁴ Classification marks 34937 to 34939: “As I feared, its communications agency forgot to add “iPad excluded from 10% discount terms and conditions” on the visuals used for the poster. However, I’m told that the iPad is definitely excluded from the discount on the flyers”.

⁴⁶⁵ For a non-exhaustive list of examples, see classification marks 9553 (VC)/22985 (VNC), 23769, 11362 to 11364, 11462 to 11465, 12348, 22847, 27799 (VC)/39889 (VNC).

⁴⁶⁶ For a non-exhaustive list of examples, see classification marks 10332 (VC)/23707 (VNC), and classification marks 33794 to 33795 (VC)/39921 (VNC).

470. Indeed, APRs gave the Investigation Services the following information in response to the question “Have you ever carried out promotional operations for Apple products? If yes, please report whether such operations take place frequently, and please support your answer by referring to practical examples (type of product concerned, period concerned, effective selling price”:

Reseller	Response	Classification mark
IFormatik Partner	“Promotions led by the brand: recycling bonus, zero-cost financing, hard-drive bundle.”	3583
Acti Mac & PC	<p>“The promotional operations we run are exclusively offers packaged and proposed by Apple. (Eco bonus part-exchange offer, payment in 10 instalments at zero cost, Epson or HP device or Apple accessory for €1 extra, etc.) These offers are very difficult, even impossible, to set up outside this context due to the lack of available means and margin. The communications and support methods are imposed (see example of marketing plan in the appendix). Apple pays half the costs, both on the promotion itself as well as on the communications part based on documentary evidence and up to the limit of previously agreed budgets. Reporting is required throughout these promotions.</p> <p>When the range changes, it is common (and essential) to run promotions on equipment in the old range in order to get rid of stock. These promotions are exclusively relayed at retail outlets or through the company website. These changes of range concern iPods, iPads, computers and displays.”</p>	4570
Alis informatique	“Before the arrival of the [Apple] Stores, there was a really dynamic approach to marketing and promotions by Apple SEE “WHY APR” FILE. For two years now, the well has run dry, with feeble offers with no impact and no more efforts to “get [customers] in” and identify APRs. However, we are still strictly required to have our own communications plans approved. You only have to go to the www.apple.fr website to realise that there is no more visibility for APRs.”	3281
Andromac	<p>“- Promotional operations never directly affect the price of Apple products. They are always on accessories, which are for example given away with the purchase of an Apple product. In any case, Apple retains control over the length of the promotion, the product concerned and the effective selling price.</p> <ul style="list-style-type: none"> - We also have financing offers such as payment in 10 instalments at zero cost, which are proposed to us by Apple. - We have also had a recycling offer: €100 off when returning a Mac or PC CPU. This type of offer is 50% financed by Apple. - Offer upon opening of new retail outlet (10% discount on all Apple products, except iPads. Limited to 50 Apple products). Offer also 50% financed by Apple.” 	3127
Arcan IDF	“Yes, various promotions have been carried out: Back-to-school Eco bonus	4122

Reseller	Response	Classification mark
	<p>We have to give the discount or gift to the customer, then we have to provide documentary evidence within a very short deadline (10 days on average).</p> <p>After this is checked by Apple, we receive a wholesaler credit note for 50% of the agreed discount.”</p>	
Corsidev	<p>“Example: Official opening of retail outlet: on that day, 10% discount on the whole store. Apple pays 5% of the discount and we pay 5%.</p> <p>Apple always partially contributes to all promotions (which are incidentally becoming less common), except for financing promotions such as five or 10 instalments at zero cost, which Apple can sometimes cover in full. Appel [<i>sic</i>] systematically covers the 3% discount that we MUST apply to the whole educational market (students and staff from schools and universities, etc.).”</p>	3721
Easy Computer	<p>“The promotional operations run are done through Apple, always with a contribution of 50% from the APR. For example, when Easy Store reopened after refurbishment to comply with APR V2, we had a 10% day, with 5% covered by Apple and the rest by the APR, with the offer limited by Apple to 50 devices.</p> <p>We do not have enough of a functional discount to be able to run promotions on Apple products.</p> <p>Our supplier refuses to help us at all with this type of operation.”</p>	5919
Ephesus	“Yes, promotional operations recommended by Apple.”	5527
FBX Système	“Yes, with Apple, which contributes financially to the discounts and promotions.”	4177
GDA Mac Tribu	<p>“We can only run promotional offers if Apple contributes to the financing. The problem is that Apple generally offers to contribute half the amount of the discount, which therefore affects our margin.</p> <p>For example: Spring 2012: Recycling bonus offer. We take back your old PC (€100) when you purchase a new Mac. So we have to comply with Apple’s merchandising guidelines on this offer, and above all dig into our own pockets.</p> <p>This means that, of that €100 discount, we have to pay €50. The result is that, as our sales personnel are remunerated on the margin, they tend not to push the promotional offer.</p> <p>Some offers, such as payment in 10 instalments at zero cost (generally twice a year), have a really positive effect on our sales. As Apple pays all the financial costs, our margin is maintained and we can therefore offer our customers a specific service.</p> <p>Additional offers with an external hard drive for €1 are offered to our wholesalers, and thereby allow us to differentiate on our promotions.</p> <p>But the main point is that we are financially dependent on Apple for the application of promotional offers. Without this assistance, we can’t do anything as we don’t have sufficient margin.”</p>	4207

Reseller	Response	Classification mark
I-Artificielle	When the retail outlet opened, for two days customers got a 10% discount on all brand products (excluding iPads/iPods), with 5% covered by Apple and 5% by us, the reseller. From time to time, we run promotional operations at our own cost, and from time to time Apple contributes half the amount to operations it implements itself.”	3140
Informatique et prévention	“We work according to a quarterly communications/marketing plan. For example, the student promotion: 1 Mac purchased with student discount + €1 = €70 of free accessories in store on the same day.”	3260
Inter-Actif	“During a stock clearout... the end of life of a product often pushes us to sell it at cost price so that it doesn’t become an unsellable dead loss!”	3109
iSwitch	“Yes we do run promotional operations for Apple products, but most of the time, they consist of an offer grouping an Apple product with a non-Apple product. As the margins are higher on non-Apple products, this allows us to offer a discount to the end customer.”	3700
LDK2	“On 23 and 24 November 2012, in order to boost cash flow and counter Apple’s Black Friday (day of discounts on the online and physical Apple Stores), we decided to put discounts on Apple products. This type of communication is not taken into account by Apple, so we financed the press, email, Facebook and radio communications to attract potential customers (see appendix 7) [...]”	13916
MCS	“YES, but nowadays only when Apple lets us. The type of promotions are “recycling old products” or payment in 10 instalments at zero cost. Apple finances 50% of these promotions. The “educational pricing” is partially financed by Apple, but not to the same level as the prices applied in the online Apple Store for Education and “AOC” (Apple on Campus) stores.”	516
MLife	“The promotional operations are most often advantageous financing. Except for the store opening, for which Apple asks us to run an inaugural promotion with a 10% discount, 5% financed by Apple and 5% financed by us.”	3590
Olys	“The promotional operations involving Apple products are defined by Apple, for example: Sofinco offer: payment in 10 instalments at zero cost. These offers are aimed at the general public.”	3604
Symbiose informatique	“Yes, from time to time but very rarely, they are wholesaler offers, for example for the purchase of a particular Mac model, they offer us a 500 GB hard drive for €1 extra.”	4146
You Cast	“Addition of 3% to the 3% student discount granted by Apple. So 6%, to counter a direct offer from Apple on campus of 12 to 15% that can be obtained without too many checks.”	4743

471. Given the low reseller margins, the majority of promotions are partially financed by Apple (which generally pays up to 50% of the discount⁴⁶⁷). In return, Apple requires prior approval and monitors the promotion in detail throughout⁴⁶⁸.
472. In relation to the iPad, the “marketing kit” available to companies from March 2013 forbade any marketing action for the product: “[...] never place a promotional banner on the image of an Apple product [...] Promotions: Marketing actions are not permitted for iPads. Do not use iPads to promote or sell other products or services. Do not feature iPads in grouped promotional offers [...]”⁴⁶⁹ and “Apple takes responsibility for all publicity, notably for television, the press and external advertisements. Publicity in partnership is strictly limited to the reseller’s own support materials, such as publications and catalogues distributed in the store, which must be checked and approved by Apple”⁴⁷⁰.
473. Several reports from APRs demonstrate the effective implementation and monitoring of this policy by Apple. The company Alis notably stated on this point: “In principle, we are free to carry out promotional operations, but regarding communications we have to refer to a graphic charter and submit these documents to Apple. If we strictly follow the Apple guidelines with the required logos, we cannot add images as that would fall outside the graphic charter – promotional stamps are not allowed either. Apple’s graphic charters de facto exclude any possibility of presenting a price reduction or promotional operation, whether on the price tags or in the store. 8. We could run promotional operations at our own cost, but that would get us into trouble from Apple. If a merchandising audit was performed, they would notice that we are not compliant and that would affect our margin. [...] Some actions are undertaken by our company but Apple does not want these prices to be discounted. When there are promotions, they are bundle sales operations, for example a particular mobile phone with (recently a hard drive), which goes via a wholesaler – it is a wholesaler offer”⁴⁷¹.
474. Alis representatives also related an incident in which an Apple manager intervened just a few hours after an “unauthorised” sign had been put up in the retail outlet: “For the launch of a product (the iPad), we knew that Apple was not going to send us a sign, we were not allowed to communicate about the iPad product. So we were not communicating about the release of the iPad, but on the release of a new product that we had not specifically identified (although everyone knew that it was the iPad): we had produced a chalk sign with a curtain showing a product shaped like a rectangle, but which did not specifically identify the iPad (we will send you this sign). We published it and displayed it in the afternoon, then six hours later someone from Apple contacted us to ask us to remove this sign (Ms [...], threatening not to deliver the products concerned). We had outstanding orders, so we could not run the risk of not receiving a delivery”⁴⁷².
475. Retailers do not appear to be subject to the same restrictions as APRs when putting on promotions. On this point, representatives of Fnac informed the Investigation Service that: “We do what we like when setting the prices of Apple products (in the context of the loss-leader threshold), the range cannot be shifted very much due to the low discounts. We have

⁴⁶⁷ Classification marks 4207, 4122 and 5919.

⁴⁶⁸ For a non-exhaustive list of examples, see classification marks 5028, 26866 (VC)/39885(VNC).

⁴⁶⁹ Classification mark 10438.

⁴⁷⁰ Classification mark 10438.

⁴⁷¹ Classification mark 5544.

⁴⁷² Classification mark 5544.

rebates for Fnac members and we also have regular reductions on Apple products. So we do have price cuts”⁴⁷³.

476. In an internal Apple France email, a manager highlights in this respect: “I think that in order to counterbalance the aggressiveness in retail we need to take a closer look at the allocations, notably in restricted periods [...] The request from [...] also concerns a proposal by us to counter the Fnac offer, but as you know, aggressive price discounting financed by Apple will never be accepted [...]”⁴⁷⁴.
477. Lastly, Article 1.3 of the “Trademark License Agreement” section of the contract applicable to all Apple Authorized Resellers (including APRs) expressly states that resellers must, upon request from Apple and within five days, send Apple representatives samples of advertisements, brochures, webpages and any other promotional or marketing support materials on which the manufacturer brand will appear. It also specifies that Apple may, at its sole discretion, if it considers that the support materials in question violate the stipulations of the “Reseller Agreement”, “Trademark License Agreement”, “Trademark Guidelines” or “Identity Guidelines”, ask the reseller to correct them or stop using the Apple brands, or even recall and destroy the disputed support materials⁴⁷⁵.
478. All the preceding elements show that APRs, between October 2012 and April 2017, applied prices identical to those communicated by Apple, with these APRs seeing their pricing freedom fettered by the unpredictability of their compensation, the monitoring of their retail prices and the supervision of their promotions by Apple.

6. THE ECONOMIC RELATIONSHIP BETWEEN APPLE AND APRS

a) Creation of APR network

479. The APR programme was launched in 2006 to replace the “Apple Center” programme.
480. In a letter dated 19 May 2006, Apple informed its resellers that the “Premium Reseller” programme would be replacing the “Apple Center” programme and that, in this context, an “Apple salesperson [would] contact them soon to provide support during this transition”. In this letter, Apple stated: “The Apple Center program will close on 30 October 2006, which leaves us enough time for a smooth transition”⁴⁷⁶.
481. Certain “Apple Center” resellers, such as the company eBizcuss, initially refused to join the APR programme but later accepted this status.

⁴⁷³ Classification mark 2629 (VC)/1518 (VNC).

⁴⁷⁴ Classification mark 30763.

⁴⁷⁵ Classification mark 14021.

⁴⁷⁶ Classification mark 3544.

482. On this point, eBizcuss explained in an interview that it had joined the programme in 2008 following pressure from Apple: “We experienced a lot of pressure during this period. The Apple France teams had a target of transforming a certain number of AAR retail outlets into APRs”.
483. The company gave the following reasons for joining the APR programme: “The pressure exerted by the Apple teams”, “the serious risk [...] of experiencing future disadvantages in terms of pricing” and the fact that “during this period, exiting the Apple environment was totally impossible [...]” given the proportion of its turnover that the sale of Apple products represented. In particular, eBizcuss highlighted “the special treatment given to retail outlets that became APRs in 2007 (discounts, marketing and delivery)”, which is confirmed by a letter from Apple dated 23 October 2006, in which Apple makes it clear that failure to join this programme could be accompanied by a deterioration in the business terms and conditions applied; when asked whether the discounts would continue to be granted, Apple responded: “the ‘Authorized Reseller’ and ‘Premium Reseller’ business policies evolve separately”⁴⁷⁷, which suggests a negative response.

b) Importance of Apple brand for APR business activities

484. Apple products or software, or “Apple environment” products (i.e. products from another brand that are specifically intended for use with Apple products) represent almost all business activity for authorised resellers with the status of APR.
485. Indeed, in 2011, the APR Association estimated that the sale of Apple products (equipment or software) accounted for 80% of APR business⁴⁷⁸. Similarly, the analysis of the Investigation Services shows— based on the responses of the 22 APRs questioned – that on average in 2012, the share of Apple products in the turnover of APRs was around 78%⁴⁷⁹; this share was estimated at 90% by Apple in an internal document reproduced below⁴⁸⁰:

⁴⁷⁷ Classification marks 406 to 448, and 221.

⁴⁷⁸ Classification mark 632.

⁴⁷⁹ Classification marks 731, 3068, 3103, 3115, 3136, 3250, 3273, 3557, 3587, 3597, 3694, 3719, 4114, 4137, 4194, 4557, 5143, 5536, 5910 and 13904; see statement of objections, page 198, paragraph 739.

⁴⁸⁰ Classification marks 13264 to 13266 (VC)/25522 to 25524 (VNC).

CA global et CA APPLE 2012 comptes APR

XC	Nom client	CA global	CA APPLE	Poids Apple
480481	MAC & CO	10 063 124,33 €	9 683 355,39 €	96,23%
490816	O2I	7 243 189,28 €	6 248 833,73 €	86,27%
479398	I CONCEPT SARL	2 811 472,19 €	2 598 179,59 €	92,41%
620002	ARCAN IDF SAS	2 801 563,17 €	2 413 166,87 €	86,14%
482949	LDK2 SARL	2 234 507,99 €	2 009 976,25 €	89,95%
480813	GDA SARL	2 056 295,80 €	1 871 124,10 €	90,99%
486344	INFORMATIQUE ET PREVENTION	1 893 749,85 €	1 778 606,07 €	93,92%
566119	ISWITCH	1 789 721,01 €	1 737 768,74 €	97,10%
475804	BIMP - OLYS SA	1 728 402,52 €	1 286 378,29 €	74,43%
477790	EPHESUS SARL	1 601 497,91 €	1 352 806,60 €	84,47%
477184	SYMBIOSE INFORMATIQUE SARL	1 589 551,81 €	1 500 952,33 €	94,43%
484023	INTER-ACTIF SARL	1 450 210,09 €	1 326 494,89 €	91,47%
488033	ANDROMAC	1 387 350,38 €	1 321 632,19 €	95,26%
502307	IFORMATIK PARTNERS	1 324 449,05 €	1 272 741,80 €	96,10%
487287	CORSIDEV	1 315 360,49 €	1 188 486,67 €	90,35%
475792	M.C.S.	1 248 500,74 €	1 168 849,15 €	93,62%
484451	FBX SYSTEME SARL	1 242 665,86 €	1 117 763,58 €	89,95%
478628	TRYO	1 227 729,32 €	1 172 455,29 €	95,50%
477943	EASY COMPUTER	1 174 144,52 €	1 027 381,54 €	87,50%
514729	EASY COMPUTER METZ	1 093 642,42 €	1 017 885,11 €	93,07%
479157	DXM SAS	1 011 006,67 €	467 446,09 €	46,24%
606811	I-ARTIFICIELLE SAS	624 034,42 €	613 347,78 €	98,29%
582434	EASY COMPUTER CENTRAL	622 069,32 €	608 442,63 €	97,81%
522790	MLIFE	529 672,06 €	503 162,68 €	95,00%
477545	ACTI MAC	347 278,22 €	266 972,83 €	76,88%
586994	ITHAQUE SARL	328 601,81 €	301 110,11 €	91,63%
476897	ALIS INFORMATIQUE SARL.	145 300,22 €	135 400,01 €	93,19%
475809	MICRO ALPHASOFT	28 201,86 €	13 328,90 €	47,26%
Total général		50 913 293,31 €	46 004 049,21 €	90,36%

CA global et CA APPLE 2012 comptes APR	Overall turnover and Apple turnover 2012 for APR accounts
XC	XC
Nom client	Customer name
CA global	Overall turnover
CA APPLE	Apple turnover
Poids Apple	Apple share
Total général	Overall total

486. Indeed, Apple contractually requires its resellers to create an “Apple environment”, which prevents these resellers from selling competing products or, at the very least, heavily limits the conditions for marketing other products.

487. These conditions are given in Appendix 1 of the APR contract, which details the criteria governing retail outlets' eligibility for the APR programme. Article 11 of this appendix states that: "Apple Central Processing Units must account for at least 75% of all CPUs sold through the Authorized Location at all times. Additionally, Reseller must not display CPUs from manufacturers other than Apple"⁴⁸¹.
488. In addition, Article 3.4 of the "European Premium Reseller Agreement" states that APRs must not promote the brand or products of another supplier without prior approval from Apple: "Reseller acknowledges and accepts not to install any 3rd party logos within the store or on the fascia without prior approval from Apple. Reseller may not install any 3rd party fixtures within the store without prior approval from Apple [...]"⁴⁸².
489. On this last point, an APR stated that: "Contractually, we [the APRs] can only sell competing products on the computer, tablet, MP3 player and phone ranges. The display of third-party products such as accessories is restricted to a few shelves and they cannot be displayed on the counters"⁴⁸³. Similarly, another APR said that Apple "forbids us from displaying third-party products on tables that contain Apple products. The areas where we can display third-party products have been significantly reduced [...] and so the sales of products such as speakers and other accessories have fallen sharply"⁴⁸⁴.
490. In addition, Article 2.3 of the "APR Agreement" regarding the store design also shows the heavy involvement of Apple in the design and organisation of retail outlets. Indeed, the presentation of APR retail outlets is highly characteristic of the brand and, furthermore, very close to that of the stores actually owned by Apple (the "Apple Stores"). The "Premium Reseller Identity Guidelines" also set out how logos must be displayed (size, etc.) in an extremely detailed manner⁴⁸⁵ (see paragraphs 367 onwards above).
491. In this context, Apple has introduced assessment and scoring systems for APRs: the merchandising audit and APR mystery shopping scoring (see paragraphs 428 onwards above). These assessments notably cover the cleanliness of the shop window, the overall appearance of the showroom, the advice given by staff and the presence of products other than Apple products⁴⁸⁶.
492. Given the conditions detailed above, APRs have built up a customer base with a direct link to Apple products.
493. Indeed, APRs are presented by Apple as resellers dedicated to the Apple brand, as shown by the way they are presented on its website: "Everything Apple. At an Apple Premium Reseller, we live and breathe Apple", which is repeated on the websites of various authorised resellers⁴⁸⁷. Certain APRs have even selected a business logo that itself expresses the link to the Apple brand and contains a reference to either the brand or the brand products ("Mac", "i", etc.).

⁴⁸¹ Classification mark 134.

⁴⁸² Classification mark 130 (VC)/39874 (VNC).

⁴⁸³ Classification mark 4559.

⁴⁸⁴ Classification marks 5143 and 5144.

⁴⁸⁵ Classification marks 129 to 131 (VC)/39874 (VNC). See also classification marks 19875 onwards.

⁴⁸⁶ Classification mark 10375 (VC)/23747 (VNC).

⁴⁸⁷ Classification mark 6512.

494. Loyalty to the Apple brand means that if an APR changed supplier, it would be unable to avoid losing almost its entire customer base.
495. Indeed, Apple is one of the technology companies with the most loyal consumers. According to a study performed in 2012 in the United States, which surveyed 1000 American users of Apple products (therefore excluding purchasers of competing products), approximately 98% of Apple product users would only switch brand if the price difference in favour of competing products was at least 10% (around 85% would require this price difference to be at least 20%). Around 21% of those questioned said that no price difference could convince them to change brand⁴⁸⁸ (see paragraph 54 above).
496. There are also contractual obstacles to changing brand, both during and after a contract.
497. Indeed, the addendum to the APR contract makes it impossible for APRs, during the period of validity of the contract, to open shops in their sales zone (i.e. Europe) that would exclusively sell products competing with those of Apple: “6.1 The reseller shall not for the term of this Addendum enter into an agreement with any supplier of products which compete with the Authorized Products with the purpose of operating a retail location in any country within the Territory in which reseller conducts commercial retail business, through which it will sell exclusively products which compete with the Authorized Products. For the avoidance of doubt, the reseller is free to enter into an agreement with any supplier of products which compete with the Authorized Products with the purpose of reselling products which compete with the Authorized Products at its general reseller locations, including locations through which it is also authorized to resell (non exclusively) Apple products.”
498. When the contract expires, APRs are also subject to a six-month ban on opening a retail outlet in Europe that exclusively sells competing products: “6.2 In order to protect Apple’s significant know how transferred during the term of the operation of this Addendum, the Reseller shall not for a period of six (6) months following the expiry or termination of this Addendum enter into an agreement with any supplier of products which compete with the Authorized Products with the purpose of operating a retail location in any country within the Territory in which Reseller conducts commercial retail business, through which it will sell exclusively products which compete with the Authorized Products”.
499. Some APRs questioned during the investigation indicated that it was impossible for them to diversify their business by orienting themselves towards products of brands other than Apple, notably due to Apple’s requirements regarding the presentation of its products in retail outlets, the training of their resellers or the attachment of their customer base to the Apple brand⁴⁸⁹.
500. For illustration, one distributor stated: “It is impossible to envisage diversification, as the APR contract bans other brands in the store. What is displayed in the showroom is imposed upon us, including the documentation, and we have to follow very detailed guidelines”⁴⁹⁰. Similarly, another distributor reported the following: “We also try to develop our PC sales, but this diversification is very difficult as we cannot allocate part of our shops to this family of products”⁴⁹¹. Meanwhile, the company eBizcuss said: “[...] we tried to set up a Sony Vaio

⁴⁸⁸ Classification marks 387 to 390.

⁴⁸⁹ See in particular classification marks 4559, 3274, 3117, 4115, 3678, 5910 and 5145.

⁴⁹⁰ Classification mark 3274.

⁴⁹¹ Classification mark 5910.

stand in 2006–2007, we didn’t manage to sell Sony products”⁴⁹². Several similar reports feature in the case⁴⁹³.

501. In effect, it appears that none of the resellers concerned have managed to reorient their business outside the world of Apple.

c) Constraints faced by APRs in running their businesses

502. The elements in the case indicate that APRs have repeatedly faced constraints in terms of supply (1), a lack of transparency and visibility regarding the business terms and conditions granted by Apple (2) and differences in treatment in comparison with the other distribution channels (3).

1. Supply constraints

503. As shown in paragraphs 288 and 317 above, APRs regularly encounter delivery issues, while their contracts prevent them from selling competing products.
504. These supply issues are the consequence of the allocation policy applied by Apple, according to which Apple determines the APRs that will be supplied by each of the two wholesalers.
505. In this context, indirect APRs cannot choose their wholesaler from among the two authorised wholesalers in order to place them in competition, and direct APRs are sometimes deterred from obtaining supplies from the wholesalers (see paragraph 284 above). All of them experience delivery delays and errors by Apple – either directly or via the wholesalers, which act as intermediaries – both during and outside restricted periods, and during product launch periods, known as “fast ship” periods.
506. In addition, although the APR network is in theory an open network, APRs cannot sell products to other resellers (see paragraph 301 above), or can only receive supplies with difficulty from other resellers – such as retailers or Apple Stores (see paragraph 317 above).
507. Numerous APRs have reported problems with deliveries. On this point, one APR stated: “Yes, we regularly encounter problems with deliveries. Certain products are unavailable, but we are not given any information or explanation. Communication regarding delivery problems is very poor”⁴⁹⁴. In the same way, another APR affirmed that it had “[...] a lot of problems with the Time Capsule, MacBook Air, iMac, iPad and iPod, while all those products were fully available in the Apple Stores”⁴⁹⁵. Many similar testimonies feature in the case, with resellers highlighting the existence of delivery problems more specifically during the launch of new products or over the Christmas/New Year holiday period⁴⁹⁶.

2. Lack of transparency in business terms and conditions set by Apple

508. As presented in paragraphs 443 onwards, Apple also applies a business policy that is devoid of transparency for APRs, particularly given the subjective basis for granting and calculating their price discounts.

⁴⁹² Classification mark 423.

⁴⁹³ See in particular classification marks 4559, 3117, 4115 and 4138.

⁴⁹⁴ Classification mark 4205.

⁴⁹⁵ Classification mark 3589.

⁴⁹⁶ Classification marks 5918, 3699, 4145, 3258, 4121 or 5912.

509. Indeed, under Article 5 of the APR contract (2009 version), the terms of the contract and its amendments can be modified by Apple at any time, subject to one month's notice: "Apple may, at any moment and at its sole discretion, make changes to the current Program, including to the Contract stipulations, to the eligibility criteria (Appendix 1), to the guidelines concerning the identification of Premium Resellers (Appendix 2) and to the Program Logo, with notice given in writing thirty (30) days beforehand"⁴⁹⁷. Apple is therefore effectively able to unilaterally modify, during the year, the conditions of sale and thus, more specifically, the discount and rebate mechanisms.
510. When questioned about changes in price discounts, one APR stated: "The calculation of discounts is getting more and more complex over time, with the appearance of new criteria that oblige us to react to Apple's demands in order to avoid losing points on the margin. Some criteria are impossible to achieve – such as the maximum opening hours, which require staff to be hired – or outside our power, such as footfall"⁴⁹⁸.
511. This unpredictability is combined with a lack of room for manoeuvre for APRs in terms of pricing (see paragraphs 349 onwards above), which makes them all the more dependent on the discounts.

3. Different treatment for different distribution channels

512. As described in paragraphs 258 onwards of this Decision, Apple has set up a mechanism for allocating products to its resellers. Yet it appears that APRs have regularly experienced shortages since the end of 2009, while the retailers (such as Fnac) and Apple Stores receive deliveries and compete with them (see paragraphs 250 to 257 above).
513. In its referral, eBizcuss explains the difference in treatment between channels as follows: "This practice of failing to deliver products to eBizcuss at key moments was apparently introduced in an exploratory way during the launch of the online Apple platform, which opened up a direct retail channel in competition with eBizcuss, but became systematic just after the opening of the first Apple Store in Paris, and has become more common as Apple has increased its distribution subsidiary sites [...]"⁴⁹⁹.
514. An APR also reported: "The delivery process has only deteriorated since the arrival of the ARSs in France, notably during the launch of new products, where we [the APRs] are the last to be served"⁵⁰⁰. Similarly, another APR stated: "Before, when there were problems with the delivery of a product, all the distribution channels were affected in the same way. As the Apple channels have been developed, along with Apple's desire to prioritise other channels such as the retailers (Fnac), the imbalances have increased with greater and greater inequality in deliveries at certain times. [...] when we report a problem with deliveries [Apple] tells us that that's just the way it is, and that they can prioritise delivery for such and such a channel at their sole discretion"⁵⁰¹.
515. Another direct APR added that: "Product releases have become a complete masquerade. Although the demonstration products are delivered in time for the release, the deliveries of product stock are very limited or even zero (ref. release of iPad mini on 2 November 2012, Caen: 5 iPad minis, Rouen: 5 iPad minis, Le Havre: 0 iPad minis). Complete ban on communications about the product and on offering pre-orders: all our customers received an

⁴⁹⁷ Classification mark 130 (VC)/39874 (VNC).

⁴⁹⁸ Classification mark 4567.

⁴⁹⁹ Classification mark 23.

⁵⁰⁰ Classification mark 4121.

⁵⁰¹ Classification mark 5164.

email offering pre-ordering from the Apple Store. See email attached. Complete ban on selling products before 2 November: all the Auchan, Darty and Boulanger shops open on Thursday 1 sold their iPad minis (see widespread testimonies on the dedicated websites). The promises to ensure fair treatment of the distribution channels were completely flouted, in particular with the ARSs and Apple Stores, which apply unjustifiable and unfair pricing conditions that APRs cannot respond to. Products are regularly abundantly available in ARSs or on the Store, while the APRs are not receiving deliveries, or only limited deliveries (MacBook, displays, iPads, etc.). Products listed and available on the Store or in ARSs, and which are not listed several weeks later in the APR network (mains adapters and other accessories, etc.). Products that we are not authorised to sell at APRs: unlocked iPhones, red iPods, branded iPods and iPads. Products that we can no longer sell are only sold directly: software sold on the AppStore”⁵⁰².

516. Another APR states that: “With new products, we always have a lot of problems trying to get them in sufficient quantities to meet demand. Apple always seems to prioritise its Apple Retail Store own-brand network, the online Store and certain retail networks such as the specialist authorised retailers (Fnac, etc.)”⁵⁰³.
517. The supply difficulties encountered by APRs, despite the fact that the products are available through Apple’s own retail channel, are confirmed by several elements in the case, which show that delivery priority is given to Apple’s own channel, especially since the opening of the first Apple Stores in France. These difficulties are also recognised by Apple itself (see paragraph 255 above).
518. Through a court bailiff, a distributor reported these supply problems, highlighting “that orders for Apple products from resellers, such as [...], and the Apple Store (Apple’s direct sales website: www.apple.com/fr) were treated differently”⁵⁰⁴. Similarly, in an iChat conversation dated 19 November 2010, Apple France indicated that it was necessary to “privilege the ARSs [Apple Stores]”⁵⁰⁵.
519. Indeed, APRs knew that excessively long delivery times were a repeated occurrence, even though the products were available in the ARSs or on the Apple Online Store. As an illustration, in September 2011, eBizcuss was able to use the Apple Online Store to order a product that Apple had said it was “unable to deliver”, and noted that the same product was also available in the Apple Store in Lyon⁵⁰⁶. On 13 September 2011, eBizcuss was also able to order this product from Darty, with a stated delivery time of two working days⁵⁰⁷. Several similar examples feature in the case⁵⁰⁸.
520. Complaints from APRs regarding this different treatment or supply difficulties are also mentioned by Apple France in an internal email dated 26 September 2011⁵⁰⁹:
“Dear [...],

Please find below details of several allocation problems between the APR channel and that of the other resellers:

[...]

⁵⁰² Classification mark 4571.

⁵⁰³ Classification mark 3719.

⁵⁰⁴ Classification marks 3613 and 3614.

⁵⁰⁵ Classification mark 27662.

⁵⁰⁶ Classification marks 30762 to 30768.

⁵⁰⁷ Classification mark 265.

⁵⁰⁸ Classification marks 26869, 3610 and 3611, classification mark 29746 (VC)/40054 (VNC).

⁵⁰⁹ Classification mark 26250.

1) iPad 2 (Q2/Q3 2011):

- March: several emails from our partners regarding the [availability] limitations in relation to the iPad 2 for APRs. They have not said anything about availability at other resellers.
- April: a few concerns regarding the difference in allocations between the launch of the iPad 1 and that of the iPad2. iConcept [stated] on 14 April 2011: received 1130 iPad 1s in the three weeks following the launch of the iPad 1, in comparison to 795 iPad 2s when that was launched. iConcept estimates its needs at 350 iPad 2s per week to meet demand, but generally only receives about 100 per week.
- April: O2i informed us of a problem of unfair competition (on 21 April) in relation to ARSs, which benefit from higher discounts, better delivery times and a dedicated workforce for the deployment of their apps.
- May: iConcept threatens Apple with speaking to a transport company that will confirm that iPads are available in the Bordeaux ARS (iConcept on 18 May 2011). P. R [...] obtained 30 iPads from Tech Data, while he estimates that there are 600 in stock at the Bordeaux ARS. In the same email, P. R [...] recalls the delivery problems with the iPad 1 at the end of December, just before the iPad2 was announced. As of 18 May, iConcept has 70 iPad 1s in stock.
- May: iCorsu reports that they have lost two sales and will lose several more (on 7 May) due to the large numbers of products available at Boulanger.
- May: iConcept (on 19 May and 1 June) and eBizcuss (on 20 May) complain about differences between the OM allocation files and the quantities effectively delivered [thereby mentioning the] problems that these differences have caused regarding their customers.
- June: eBizcuss ordered two iPad 2s on the AOS on 3 June. The estimated delivery was 16 June, i.e. two weeks later, while it takes six weeks when [eBizcuss] orders an iPad.
- July: iConcept complains that it has not yet received its orders from May and June, while the AOS has estimated delivery dates of one or two weeks after purchase.

2) MacBook Air (Q4 2011):

- 1 September: iConcept contacted a transport company to confirm that iConcept and the ARSs/AOS were receiving “different treatment”. iConcept ordered MacBook Airs with ref. MC965F/A and MC966FA six weeks ago and they have only received part of the order. In order to illustrate this [alleged] different treatment, P. R [...] has ordered MacBook Airs via the AOS.
- 5 September: P. R [...] received the MacBook Airs ordered from the AOS four days after ordering them.
- 7 September: eBizcuss observes that customers have to wait two days to get a MacBook Air when they order on the AOS, in comparison to around five weeks if they order via eBizcuss. eBizcuss ordered a MacBook Air on the AOS and has obtained proof of delivery from the transport company. At the same time, eBizcuss notes that Snow Leopard [the Apple operating system] is not available for sale for APRs, as that version is too old, although it is still available on the AOS.
- 9 September: eBizcuss indicates that their last delivery of MacBook Airs took place on 3 August. While eBizcuss highlights that a customer can obtain a MacBook Air is two days via the AOS, and that it is immediately available from the Lyon or Carré Sénart ARSs... as well as from the retailers (Fnac, Darty and Boulanger). eBizcuss therefore ordered a MacBook Air from Fnac, Boulanger and Darty, and got proof of delivery from the transport company.

- 15 September: Actimac threatens to contact a transport company if they do not receive their iPad within three days, which is the delivery time applied by the AOS.
 - 20 September: a customer cancels an order with iCoursu as he had not received any information regarding the date on which his MacBook Air, ordered on 29 July, would be delivered.
 - 23 September: eBizcuss emails the transport company report regarding the delivery of the orders from the AOS and Darty, Fnac and Boulanger. The reports will be sent to us.
- 3) Thunderbolt displays (Q4 2011)
- 22 September: the Thunderbolt displays were announced in July. iConcept has not received any since then. iConcept decided to order six displays from the AOS [...] two days later they received the six displays [...]”⁵¹⁰ (underlining added).

521. On this point, in an email addressed to Apple France on 2 November 2012, the manager of the company Actimac reported supply problems, as well as the fact that it was impossible for APRs to pre-order products being launched (“fast ship program”), while Apple was using its customer data to offer those customers pre-orders online via the Apple website: “To follow up on your visit last week, I would like to share with you the situation in which we currently find ourselves. To date, we have received: 5 iPad minis at Caen, 5 iPad minis at Rouen and 0 at Le Havre. We are prevented from taking pre-orders, while our customers (including us) are flooded with emails from Apple telling us to pre-order online! The demonstration models arrived without the equipment for presenting and securing them. So much for excellence! We don’t have iPods to sell, we don’t have iMacs to sell, I’ll spare you the old story about the iPhones... Tell me how we are going to generate the margin that will enable us to pay our employees, first of all, and invest in new retail outlets. Tell me how, after all the effort we ask of our teams and all the pressure we put on them to achieve the level of excellence demanded by Apple, we can motivate them and keep them in our company, when they see that as an APR we do not even have the privilege of having products for sale when they come out, and when they cannot make ends meet because we don’t have any products, while other distribution channels are properly stocked? (Auchan, Carrefour, Boulanger, Darty, etc.) [...]”⁵¹¹.
522. Similarly, in an email dated 12 January 2012, an APR confirmed that they had been awaiting orders since October 2011, and stated: “It is 12 January 2012, and our customers think we are complete cowboys. In addition, as the Odysseum Apple Store is 4 km away from us, and they have the products in stock, it isn’t right that we don’t get deliveries as quickly as they do”.
523. On 21 March 2012, for a “fast ship” iPad, an APR told F... (Apple France): “Thursday evening we received 20 iPads. By Friday evening they had all been sold. 30 customers who had pre-reserved could not be served that day. On Saturday, with no iPads to sell, we took 30 additional reservations, so 60 customers were awaiting products on Saturday evening. Today we received 45 iPads, so we called our customers. Results of calls: 45 had gone to buy them at the Parly 2 Apple Store, almost all of them old I. customers. It goes without saying that despite all our efforts to build loyalty, we cannot fight on an equal footing with a privileged competitor. It’s annoying”. On this point, Apple France stated in an internal email: “I. has very low morale... For the next fast ships, we should consider the APRs close

⁵¹⁰ Classification mark 26250 (VC).

⁵¹¹ Classification mark 5097.

to the ARSs to increase the base allocation. Similarly, it would have been necessary for the disties to receive iPads before the launch to ship them on launch day to complete the fast ship. F...”⁵¹².

524. In an email to Apple (APR France, copied to G..., Apple France) dated 8 August 2012, another APR expressed surprise that it could not find a FireWire Thunderbolt adapter, while the ARSs had them: “Sirs, Following on from the issue of fairness among distribution channels... no news of the Apple FireWire/Thunderbolt adapter ref. MD464RM/A at Tech Data or the Apple Resellerstore, in short none of our wholesalers have even seen what colour it is, let alone listed it! However, I amused myself by ordering one on the Apple Online Store, and received it this morning, within 48 hours. The Montpellier Apple Store is full of them too!”⁵¹³
525. In addition, in an email dated 18 February 2013, the subject line of which was “IMAC27”, the manager of an APR stated: “It is becoming disastrous, I had to go and buy two IMAC27 in your stores to resolve Channel Terms in order to complete an order in which you had agreed to send us 10 iMac27s. It is intolerable to see this unfair competition from the Apple Stores [...]”⁵¹⁴.
526. Lastly, the wholesaler Tech Data confirms, in a set of internal emails sent between October 2010 and February 2012, the concern of APRs regarding Apple’s policy:
- Email dated 29 November 2010: “Apple Black Friday, this Friday 26, 10% discount in Apple Stores, which hinders the sales by our resellers”⁵¹⁵.
 - Email dated 1 July 2011: “Attached to this email, there is an article on Orditice, which gives a bit of an insight into the feelings of many APRs, which are worried about their future given Apple’s policy (ARSs, Mac App Stores, etc.)”⁵¹⁶.
 - Email dated 28 November 2011, “Restricted products: MacBook Air, MacBook Pro, iMac, displays and accessories. Procedure increasingly restricted for sales personnel: buffer stock, allocation, CO06, lack of visibility. Heavy competition from Apple Stores, which have availability on restricted products”⁵¹⁷.
 - Email dated 29 December 2011: “The products are still restricted: MacBook Air, MacBook Pro, Thunderbolt display, Time Capsule, iPod and accessories (although the products are available from the Apple Store)”⁵¹⁸.

d) Financial difficulties encountered by APRs

527. Based on the elements in the case, it appears that several APRs have faced serious financial difficulties over the years being reviewed.
528. In particular, the financial difficulties of the company eBizcuss, which managed eight APR retail outlets (four in Paris, one in Lyon, one in Marseille, one in Nantes and one in Toulouse) led to its compulsory liquidation.

⁵¹² Classification mark 27048.

⁵¹³ Classification mark 4481.

⁵¹⁴ Classification marks 27265 to 27267.

⁵¹⁵ Classification marks 29649 and 29650.

⁵¹⁶ Classification marks 29646 and 29647.

⁵¹⁷ Classification marks 29641 and 29642.

⁵¹⁸ Classification marks 29640 and 29641.

529. The report entitled “Projet Pomme” [Project Apple] produced by Eight Advisory for eBizcuss maintains that the company’s difficulties began in 2009 with the deployment of the ARSs. The purpose of this report was to cost the theoretical loss in value associated with the difficulties encountered since 2009⁵¹⁹.
530. According to the report, between 2008 and 2010 eBizcuss did settle almost all its long-term financial debts – from €1.1 million in 2008 to €8000 in 2010 – but over the same period it increased its short-term debts (those payable within a year). Its short-term financial liabilities – chiefly comprising overdrafts and factoring fees – grew from €2.7 million to €4 million. This change in structure of its financial debts weakened the liquidity situation of the group by reducing the financial debt repayment terms. In addition, it promoted the development of an imbalance between available assets and current liabilities⁵²⁰. Between 2008 and 2010, the current liabilities of the group grew more rapidly than the available assets (from €14 million to €15.9 million, against €11.4 million to €12 million), exposing it to growing liquidity risk. In practice, supplier debts rose to 50/60 days of turnover between 2008 and 2010.
531. On 31 December 2010, eBizcuss was economically and financially vulnerable to the potential deterioration of its relations with Apple. Indeed, the group had indicated in its 2010 report⁵²¹ that Apple products represented 72% of its turnover at the time, and that Apple was its second-largest supplier (32% of supplies), behind Tech Data (43%) and ahead of Ingram (13%).
532. In its 2010 report, the group also stated⁵²² that the settlement period for suppliers was 60 days on average. During his interview⁵²³, O... explained that “Previously, with Apple, we had a settlement period of 30 days from the invoice date (with the invoice issued when the goods were shipped). With our wholesalers, we had longer settlement periods”.

⁵¹⁹ Classification marks 9300 to 9349 (VC)/22694 to 22828 (VNC).

⁵²⁰ Current liabilities and available assets refer to the debts and loans payable within one year, as well as the available funds. If the available assets (comprising short-term loans and available funds) do not cover the current liabilities, there is a liquidity risk, which may be realised by the suspension of payments.

⁵²¹ 2010 report, p. 10.

⁵²² 2010 report, p. 23.

⁵²³ Classification mark 410.

533. On 16 December 2011, according to eBizcuss, Apple announced its decision to “reduce the outstanding balance of eBizcuss from \$2.5 million to \$1.5 million, on a temporary basis until March 2012, on which date the outstanding balance would be cancelled. This decision was motivated by the drop in turnover announced in the third quarter of 2011, causing Apple to have concerns about liquidation”⁵²⁴. This decision came a few days after the announcement by trade credit insurance company Euler Hermes⁵²⁵ that it would be reducing the credit facility for wholesalers Tech Data and Ingram Micro, and was followed by another reduction of the credit facility by Euler Hermes.
534. Other APRs also encountered financial difficulties.
535. In this respect, representatives of the APR Association stated: “The current [APR] contract weakens our companies and has stopped us investing”⁵²⁶.
536. Indeed, many APRs have gone bankrupt during the past few years under consideration. At least five underwent insolvency proceedings between 2013 and 2015 (Arcan Idf, eBizcuss, Mac & Co, Hype Idf, Mlife and You Cast) and six were struck from the trade register (Acta on 6 April 2012; Ephesus on 20 February 2015; Ithaque on 11 January 2013; Krystena in 2011; Micro Alpha Soft on 31 January 2015; and Oritice on 11 January 2013)⁵²⁷.

E. STATEMENT OF OBJECTIONS

537. On 19 October 2018, the Investigation Services made the following statement of objections:

“Objection 1

An objection is made:

- *against the following companies in the Apple group:*
 - *Apple France SARL (RCS: 322120916), for the period from July 2007 to June 2013 in its capacity as perpetrator;*
 - *Apple Sales International (registered in Ireland under number 157 192), for the period from July 2007 to 31 March 2012 in its capacity as perpetrator;*
 - *Apple Distribution International (registered in Ireland under number 470 672), for the period from April 2012 to June 2013 in its capacity as perpetrator;*
 - *Apple Inc. (company incorporated under United States law under number US942404110), for the period from July 2007 to June 2013 in its capacity as parent company with direct or indirect full ownership of Apple France, Apple Sales International and Apple Distribution International;*
 - *Apple Operations Europe (registered in Ireland under number 76927), for the period from July 2007 to 31 March 2012 in its capacity as parent company of Apple Sales International;*
 - *Apple Operations International (registered in Ireland under number 7694), for the period from April 2012 to June 2013 in its capacity as parent company of Apple Distribution International;*

⁵²⁴ Classification mark 43.

⁵²⁵ At the time, the trade credit insurance company Euler Hermes was called Euler SFAC.

⁵²⁶ Classification mark 624.

⁵²⁷ Classification marks 40432 and 40433.

- against the company Tech Data France SAS (RCS: 722065638), for the period from July 2007 to June 2013 in its capacity as perpetrator, and the companies Tech Data France Holding Sarl (registered in the Meaux trade register under number 420694127), Tech Data BV (registered in the Dutch register under number 33296107) and Tech Data Corp. (American company registered under number US591578329), for the period from July 2007 to June 2013 in their capacity as parent companies of Tech Data France;
- against the company Ingram Micro SAS (RCS: 344 658 117), for the period from July 2007 to June 2013 in its capacity as perpetrator, and the companies Ingram Micro Europe BVBA (registered in Belgium under number BE0478524952) and Ingram Micro Inc. (company incorporated under United States law under number US621644402), for the period from July 2007 to June 2013 in their capacity as parent companies of Ingram Micro SAS;

of having engaged, on the French wholesale market for the distribution of computer and electronic products to the general public, in concerted practices comprising the regular, long-term exchange of detailed, personalised and disaggregated confidential strategic information regarding the upstream distribution of Apple products. This exchange of confidential information between the two wholesalers took place via Apple, which, like its wholesalers, actively participated in the concerted practices. This had the effect of directing the business policies and strategies of the wholesalers distributing Apple products, thereby limiting their business autonomy on the market concerned.

This practice constitutes an anticompetitive agreement as prohibited by Article L. 420-1 of the French Commercial Code (Code de commerce) and Article 101, paragraph 1 of the TFEU.

538. **Objection 2**

An objection is made:

- against the following companies in the Apple group:
 - Apple France SARL (RCS: 322120916), for the period from December 2005 to March 2013 in its capacity as perpetrator;
 - Apple Sales International (registered in Ireland under number 157 192), for the period from December 2005 to 31 March 2012 in its capacity as perpetrator;
 - Apple Distribution International (registered in Ireland under number 470 672), for the period from April 2012 to March 2013 in its capacity as perpetrator;
 - Apple Operations Europe (registered in Ireland under number 76927),
 - for the period from December 2005 to March 2013 in its capacity as perpetrator;
 - for the period from December 2005 to 31 March 2012 in its capacity as parent company of Apple Sales International;
 - Apple Europe Limited (registered in the United Kingdom under number 5051046), for the period from December 2005 to March 2013 in its capacity as perpetrator;
 - Apple Inc. (company incorporated under United States law under number US942404110), for the period from December 2005 to March 2013 in its capacity as parent company with direct or indirect full ownership of Apple France, Apple Sales International, Apple Distribution International, Apple Operations Europe and Apple Europe Limited;

- *Apple Operations International (registered in Ireland under number 7694):*
 - *for the period from December 2005 to March 2013 in its capacity as parent company of Apple Operations Europe;*
 - *for the period from April 2012 to March 2013 in its capacity as parent company of Apple Distribution International;*
- *against the company Tech Data France SAS (RCS: 722065638), for the period from December 2005 to March 2013 in its capacity as perpetrator, and the companies Tech Data France Holding (registered in the Meaux trade register under number 420694127), Tech Data BV (registered in the Dutch register under number 33296107) and Tech Data Corp. (American company registered under number US591578329), for the period from December 2005 to March 2013 in their capacity as parent companies of Tech Data France;*
- *against the company Ingram Micro SAS (RCS: 344 658 117), for the period from December 2005 to March 2013 in its capacity as perpetrator, and the companies Ingram Micro Europe BVBA (registered in Belgium under number BE0478524952) and Ingram Micro Inc. (company incorporated under United States law under number US621644402), for the period from December 2005 to March 2013 in their capacity as parent companies of Ingram Micro SAS;*

of having agreed, on the French wholesale market for the distribution of computer and electronic products to the general public, to restrict, through the introduction of allocation mechanisms, the customers to whom wholesalers can sell Apple products.

This practice, the object and effect of which was to distort or restrict intrabrand and interbrand competition, is prohibited by the provisions of Article L. 420-1 of the French Commercial Code (Code de commerce) and Article 101, paragraph 1 of the TFEU.

Objection 3

An objection is made against the following companies in the Apple group:

- *Apple France SARL (RCS: 322120916), for the period from 9 March 2009 to the present date in its capacity as perpetrator;*
- *Apple Sales International (registered in Ireland under number 157 192), for the period from 9 March 2009 to 31 March 2012 in its capacity as perpetrator;*
- *Apple Distribution International (registered in Ireland under number 470 672), for the period from April 2012 to the present date in its capacity as perpetrator;*
- *Apple Operations International (registered in Ireland under number 7694), for the period from April 2012 to April 2015 in its capacity as parent company of Apple Distribution International;*
- *Apple Operations Europe (registered in Ireland under number 76927),*
 - *for the period from 9 March 2009 to 31 March 2012 in its capacity as parent company of Apple Sales International;*
 - *for the period from April 2015 to the present date in its capacity as parent company of Apple Distribution International;*
- *Apple Europe Limited (registered in the United Kingdom under number 5051046), for the period from 9 March 2009 to the present date in its capacity as perpetrator;*
- *Apple Inc. (company incorporated under United States law under number US942404110), for the period from 9 March 2009 to the present date in its capacity as parent company with direct or indirect full ownership of Apple France, Apple Sales International, Apple Distribution International and Apple Europe Limited;*

of having engaged in a practice aiming to restrict the pricing freedom of APRs by directly or indirectly fixing the consumer prices of Apple products, which has the object and effect of preventing price setting by the free play of market forces.

This practice is prohibited by the provisions of Article L. 420-1 of the French Commercial Code (Code de Commerce) and Article 101, paragraph 1 of the TFEU (ex Article 81, paragraph 1, EC).

Objection 4

An objection is made against the following companies in the Apple group:

- *Apple France SARL (RCS: 322120916), for the period from November 2009 to the present date in its capacity as perpetrator;*
- *Apple Sales International (registered in Ireland under number 157 192), for the period from November 2009 to 31 March 2012 in its capacity as perpetrator;*
- *Apple Distribution International (registered in Ireland under number 470 672), for the period from April 2012 to the present date in its capacity as perpetrator;*
- *Apple Operations Europe (registered in Ireland under number 76927),*
 - *for the period from November 2009 to the present date in its capacity as perpetrator;*
 - *for the period from November 2009 to 31 March 2012 in its capacity as parent company of Apple Sales International;*
 - *for the period from April 2015 to the present date in its capacity as parent company of Apple Distribution International;*
- *Apple Europe Limited (registered in the United Kingdom under number 5051046), for the period from November 2009 to the present date in its capacity as perpetrator;*
- *Apple Operations International (registered in Ireland under number 7694):*
 - *for the period from November 2009 to the present date in its capacity as parent company of Apple Operations Europe;*
 - *for the period from April 2012 to April 2015 in its capacity as parent company of Apple Distribution International;*
- *Apple Inc. (company incorporated under United States law under number US942404110), for the period from November 2009 to the present date in its capacity as parent company with direct or indirect full ownership of Apple France, Apple Sales International, Apple Distribution International, Apple Operations Europe and Apple Europe Limited;*

of having engaged in a practice aiming to abuse the situation of economic dependency in which Apple Premium Resellers (APRs) found themselves, by applying a set of rules or behaviours that restricted their activity in an abnormal manner. This practice affects, at least potentially, the functioning and structure of the competition.

This practice is prohibited in application of paragraph 2 of Article L. 420-2 of the French Commercial Code (Code de commerce)."

II. Discussion

539. The procedure (**A**), the applicability of European Union law (**B**), the relevant market (**C**), the merit of the stated objections (**D**), the imputability (**E**) and the sanctions (**F**) will be examined in the order given.

A. PROCEDURE

540. The company Tech Data argues that the *Autorité* has improperly extended the scope of the referral of the company eBizcuss, by notifying an objection of indirect exchange of information between wholesalers, via Apple, where the complainant company was reporting practices of abuse of a state of economic dependence with respect to the retailers.
541. However, the Paris Court of Appeal has found that "the Conseil [de la concurrence, now the *Autorité*], which is referred to in rem (...) may, without having to start proceedings ex officio, record the practices revealed by the investigations which it has conducted following the referral which, although not expressly targeted in the referral, have the same purpose or the same effect as those that have been reported to it"⁵²⁸. More recently, the Court of Appeal has stressed that "the fact that practices are different in no way constitutes an obstacle to their forming a nexus when, as in this instance, they pursue a given purpose"⁵²⁹. The *Autorité* has thus been able to examine, without having to start proceedings ex officio, practices concerning the same markets or related markets⁵³⁰.
542. In this instance, the practices concerned by the first objection and those reported in the initial referral take on a nexus character, given their objective and the markets concerned. On the one hand, the practices at issue concern the whole of the distribution system of Apple brand products: the 'first objection' practices targeting the upstream wholesale distribution market for Apple products, in which the wholesalers and Apple are active, and the 'initial referral' practices the downstream retail distribution market of Apple products, in which the retailers and resellers are trading. On the other hand, they form part of a given global strategy pursued by Apple aiming to ensure close control of the distribution network for its products, at all the distribution levels, with the object of restricting intrabrand competition.
543. It follows from the above, contrary to what is argued, the *Autorité* could investigate the implemented practices on the grounds of objection no. 1, without exceeding the scope of its referral.

⁵²⁸ Ruling of the Paris Court of Appeal of 22 February 2005, *JC Decaux*, n° 2004/13460. See also the rulings of 30 January 2007, *SA Le Foll TP*, n° 06/00566, page 8, and of 26 January 2012, *Beauté Prestige International*, n° 2010/23945, page 16.

⁵²⁹ Ruling of the Paris Court of Appeal of 26 March 2015, *Reckitt Benckiser Plc*, n° 2014/03330, page 6.

⁵³⁰ See in particular the decision n° 07-D-44 of 11 December 2007 on practices implemented by the Ciné Alpes Economic Interest Group, paragraphs 69 to 73.

B. APPLICABILITY OF EUROPEAN UNION LAW

544. Article 101, paragraph 1, of the TFEU prohibits agreements which have as their object or effect harm to competition and which may affect trade between Member States. In its notice no. 2004/C 101/07 of 27 April 2004, Guidelines on the effect on trade concept contained in Articles 81 and 82 of the Treaty (subsequently articles 101 and 102 of the TFEU), the European Commission states that "Articles 81 and 82 of the Treaty are applicable to horizontal and vertical agreements and practices on the part of undertakings which 'may affect trade between Member States'" (paragraph 1) and that this actual or potential affect must be appreciable (JO C 291 p. 1, paragraphs 44 et seq.).
545. In order that a decision, an agreement or a concerted practice may affect trade between Member States, "it must be possible to foresee with a sufficient degree of probability on the basis of a set of objective factors of law or fact that the agreement or practice may have an influence, direct or indirect, actual or potential, on the pattern of trade between Member States"⁵³¹. The French Supreme Court (*Cour de cassation*), reproducing the terms expressed by the Court of Justice in the ruling cited above, specified that this demonstration does not require "la constatation d'un effet réalisé sur le commerce intracommunautaire [the observation of an effect on intracommunity trade]"⁵³².
546. In the case of agreements covering the entire or the vast majority of the territory of a Member State, the Court of First Instance, in a judgement of 14 December 2006, *Raiffeisen Zentralbank Österreich and Others v Commission* (T-259/02 to T-264/02 and T-271/02, Rec. p. II-5169, paragraph 181) ruled "that there is, at least, a strong presumption that a practice restrictive of competition applied throughout the territory of a Member State is liable to contribute to compartmentalisation of the markets and to affect intra-Community trade.". On appeal, the Court of Justice ruled in that connection, in a judgement of 24 September 2009, *Erste Group Bank and Others v Commission* (C-125/07 P, C-133/07 P, C-135/07 P and C-137/07 P, Rec. p. I-8681, paragraph 38), that: "(...) the fact that a cartel relates only to the marketing of products in a single Member State is not sufficient to preclude the possibility that trade between Member States might be affected. A cartel extending over the whole of the territory of a Member State has, by its very nature, the effect of reinforcing the partitioning of markets on a national basis, thus impeding the economic interpenetration which the EC Treaty is designed to bring about".
547. The practices examined in this case consist in particular of vertical agreements on the freedom of wholesalers in delivery to their clientele and the freedom of pricing of the APR resellers. These practices have been implemented by leading international groups in the consumer IT and electronic equipment sector and cover the whole of France. They are consequently likely to affect trade between Member States.

⁵³¹ Judgement of the Court of Justice of 21 January 1999, *Bagnasco and Others*, C-215/96 and C-216/96, Rec. p. I-135, paragraph 47.

⁵³² Ruling of the French Supreme Court (*Cour de cassation*) of 31 January 2012, *France Télécom*, appeals no. 10-25772, 10-25775 and 10-2588, p. 6

548. With regard to the question of knowing whether this affect can be qualified as appreciable, it will be stressed that Apple's share of the French consumer IT and electronic products market is greater than 20% and that its total annual sales generated in the European Union by the products concerned by the vertical agreements in question very substantially exceed the threshold of 40 million euros referred to in the guidelines on vertical restraints⁵³³.
549. It follows from the above that the practices at issue in this case are likely to affect trade between Member States appreciably and consequently must be analysed with regard to both French and European Union competition rules, which is moreover not contested by the parties.

C. RELEVANT MARKET

1. APPLICABLE PRINCIPLES

550. In its Notice on the definition of relevant market, the Commission gives the following definition: "a relevant product market comprises all those products and/or services which are regarded as interchangeable or substitutable by the consumer, by reason of the products' characteristics, their prices and their intended use"⁵³⁴.
551. In France, the *Autorité* considers that "the market, within the meaning of competition law, is defined as the meeting place of supply and demand for a specific product or service. [...]. Perfect substitutability between products and services is rarely seen; the Conseil regards as substitutable and on a given market products or services for which it could reasonably be thought that those on the demand side view them as alternatives to choose between in order to meet a given demand"⁵³⁵ [translated from the French].
552. Nevertheless, it follows from European Union case law that "(...) there is an obligation on the Commission to define the relevant market in a decision applying Article 81 EC only where it is impossible, without such a definition, to determine whether the agreement, decision by an association of undertakings or concerted practice at issue is liable to affect trade between Member States and has as its object or effect the prevention, restriction or distortion of competition within the common market"⁵³⁶.

⁵³³ Guidelines on the effect on trade concept contained in Articles 81 and 82 of the Treaty, cited above, paragraph 52.

⁵³⁴ Commission Notice on the definition of relevant market for the purposes of Community competition law (97/C 372/03), paragraph 7.

⁵³⁵ Decision 10-D-19 of the *Autorité de la concurrence* of 24 June 2010 relative à des pratiques mises en œuvre sur les marchés de la fourniture de gaz, des installations de chauffage et de la gestion de réseaux de chaleur et de chaufferies collectives [on practices implemented on the markets for gas supply, heating systems, and management of district heating systems and collective heating], paragraphs 158 and 159.

⁵³⁶ Judgement of the Court of First Instance of 19 March 2003, CMA CGM and Others v Commission (FETTCSA), T-213/00, paragraph 206.

553. This assessment is shared by the Conseil de la concurrence then by the *Autorité*, for which, when "(...) the practices (...) are sought in the context of prohibition of agreements (...)", "(...) it is not necessary to define the market precisely, as in the case of abuse of a dominant position, once the sector and the markets have been sufficiently identified to be able to qualify the practices observed therein and to impute them to the operators that have implemented them"⁵³⁷.
554. The same applies to the prohibition of abuse of a state of economic dependence. Although, in the context of application of Article 102 of the TFEU and of Article L.420-2, paragraph 1, of the French Code of commercial law (Code de commerce), determination of the relevant market is, in principle, a prerequisite for appreciation of the possible existence of a dominant position of the undertaking concerned⁵³⁸, such is not the case for abuse of a state of economic dependence, prohibited by paragraph 2 of Article L. 420-2 of the French Code of commercial law (Code de commerce) In fact, the purpose of delimitation of the relevant market, in the context of prohibition of abuse of a dominant position, is to define the scope within which must be appreciated the question of knowing whether the undertaking is in a position to behave to an appreciable extent independently of its competitors, its customers and the consumers⁵³⁹. In contrast, the situation of economic dependency is not appreciated with respect to the position of an undertaking in a given market, but rather with regard to the specific aspects of the commercial relations it maintains with its upstream or downstream partners.

2. APPLICATION IN THIS CASE

555. The practices observed concern the consumer IT and electronic products distribution sector, and more particularly Apple brand products (including computers, tablets and portable media players).
556. Consequently, it is useful to review the three levels of the manufacturing and distribution chain for these products.

a) Manufacturing of consumer IT and electronic products

557. With regard to the product market for computers, decision practice in both European Union law and French law has noted that there is a laptop computer market distinct from the desktop computer market. The possibility of additional segmentation between personal computers and professional computers has been left open⁵⁴⁰. Similarly, with regard to tablets, the issue

⁵³⁷ Decision 05-D-27 of 15 June 2005 on practices observed in the white tuna sector, paragraph 28; Decision 10-D-13 of 15 April 2010 on practices implemented in the handling sector for the transport of containers in the harbour of Le Havre, paragraph 221; Decision of the *Autorité de la concurrence* 11-D-02 of 26 January 2011 on practices implemented in the sector of the restoration of historic monuments, paragraph 364.

⁵³⁸ See, in this meaning, the Judgement of 21 February 1973, *Europemballage and Continental Can/Commission*, 6/72, EU:C:1973:22, paragraph 32.

⁵³⁹ See, in this meaning, the Judgement of 9 November 1983, *Nederlandsche Banden Industrie Michelin v Commission*, 322/81, EU:C:1983:313, paragraph 37.

⁵⁴⁰ Decision M.4979 (*Acer/Packard Bell*).

of competition pressure exerted by laptop computers or by smartphones and consequently of potential substitutability between these different product categories has been left open⁵⁴¹.

558. With regard to geographical scope, the decisions of the European Commission handed down in the area of consumer electronic products and computers in particular – which constitute a useful analysis guide for the national competition authorities – consider a relevant market that is at least EEA-wide, particularly because of the low transport costs as a proportion of the value of the products, the uniformity of the specific features of these products according to the countries in which they are marketed, the geographical coverage of the activity of the manufacturers and the uniformity of the pricing⁵⁴².
559. In any case, as reviewed above, when the practices at issue are examined with regard to the prohibition of agreements, as in this case, the sector just needs to be defined with sufficient precision to be able to appreciate the incidence of the practices at issue on competition.

b) Wholesale distribution of consumer IT and electronic products

560. With regard to the products market, the European Commission has defined a relevant market of wholesale distribution of IT products⁵⁴³ – including after-sales, training and financial services – distinct from the market of sale of telecommunication products⁵⁴⁴.
561. In this case, such a distinction can be made between telecommunications products (such as smartphones), on one hand, and consumer IT and electronic products (such as computers and tablets, but also portable media players which, in the case of Apple products, are distributed in the same way as the computers and tablets), on the other hand.
562. Moreover, the Commission has observed that the direct sales by the manufacturers to the distributors applied a degree of competition pressure on the sales of the wholesalers, including in pricing terms. The Commission has nevertheless left open the issue of the inclusion of direct sales by the suppliers in the wholesale distribution market, stressing that the channels of direct sales and of sales through wholesalers were not entirely substitutable⁵⁴⁵.
563. In this case, the reality of the competition pressure applied by manufacturer direct sales on wholesaler sales should be noted.

⁵⁴¹ Decision of the European Commission of 4 December 2013, M.7047, *Microsoft/Nokia*, paragraphs 14 to 21.

⁵⁴² Commission decisions of 31 January 2002, M.2609, *HP/Compaq*, paragraph 14, *Nokia/Trolltech* of 4 June 2008, *Nokia/Navteq* of 2 July 2008, *Microsoft/Nokia*, of 26 June 2014, M.7202, *Lenovo/Motorola Mobility* paragraphs 27 to 29.

⁵⁴³ Commission decision of 24 March 2003 in Case COMP/M.3107 – *Tech Data Corporation/Azlan Group plc*; Commission decision of 5 October 2007 in Case COMP M.4868 – *Avnet/Magirus EID*; Commission decision of 28 April 2008 in Case COMP/M.5091 – *Tech Data/Scribona*; Commission decision of 19 May 2008 in Case COMP/M.5099 – *Arrow Electronics/Logix*; Commission decision of 2 July 2010 in Case COMP/M.5864 – *Avnet/Bell Micro*.

⁵⁴⁴ Commission decision of 22 September 2010 in Case COMP/M.5903 – *Tech Data/Brightstar Europe/Triade Holdings*.

⁵⁴⁵ Commission decision of 27 October 2011 in Case No COMP/M.6323 – *Tech Data Europe/MuM VAD Business*, Commission decision of 19 May 2008 in Case No COMP/M.5099 – *Arrow Electronics/Logix*, Commission decision of 5 October 2007 in Case No COMP M.4868 – *Avnet/Magirus EID*. Commission decision of 11 October 2012, M.6685, *Ingram Micro/BrightPoint*.

564. With regard to the geographical scope of these wholesale markets, while leaving the issue open, the European Commission has on several occasions stressed that the relevant geographical markets of the wholesale distribution of household electrical products could be national, because of differences of languages, country-specific organisation of wholesale and retail distribution networks, delivery circuits and modes, and organisation of after-sales services⁵⁴⁶.
565. In consequence, a relevant market for wholesale distribution of consumer IT and electronic products at national level should be considered.

c) Retail distribution of consumer IT and electronic products

566. With regard to the product market, the competition authorities have identified several product families within the household electrical products category at the retail stage⁵⁴⁷: (i) "white products", which include cooking tops, cookers, ovens, built-in appliances, hoods, washing machines, tumble dryers, dishwashers, refrigerators, freezers, small electrical food preparation appliances, coffee makers, food processors, irons and vacuum cleaners; (ii) "brown products", which include televisions, video cameras, hi-fi and other audio equipment, digital devices and DVD players; (iii) "grey products", which include personal computers, screens, peripheral devices (printers, scanners, etc.), keyboards, accessories or modular spare parts (additional memory boards or hard discs), software and telephones.
567. According to the decision practice, the following outlets are in competition for the sale of these products: large specialist stores ("GSS" in French) for household electrical products (such as FNAC, Darty and Boulanger), large multi-specialist stores selling furnishing and decoration products as well as household electrical products (such as Conforama), groupings of independent operators (Euronic/Gitem, Connexion, Expert), neighbourhood stores "with an area of more than 300 m² [...] able to offer a diversified range of white, brown or grey products"⁵⁴⁸, supermarkets/hypermarkets ("GSA" in French), and hard discount stores specialising in retail of household electrical products (Electro Dépôt)⁵⁴⁹. The competition pressure applied by each of these types of outlet depends to an extent on the proportion of their area devoted to grey and/or brown products⁵⁵⁰.
568. Lastly, in decision no. 16-DCC-111 on the exclusive takeover of Darty by Fnac, the *Autorité de la concurrence* took into account the competition pressure applied mutually between in-store sales and on-line sales.
569. In this case, the products at issue were tablets and computers (grey products) and portable media players (brown products).
570. They are marketed by the multi-brand retail distribution operators, both general (Auchan, Carrefour, Casino, Cora, E. Leclerc, Hyper U, Super U, Metro) and specialist (FNAC, Darty, Boulanger, Conforama, Expert, The Phone House), as well as smaller IT resellers, most with websites for on-line sale of the said products.

⁵⁴⁶ Refer in particular to the decisions of 19 May 2008, no. COMP/M.5099 - *Arrow Electronics/Logix* and of 11 October 2012, M.6685, *Ingram Micro/BrightPoint*.

⁵⁴⁷ See in particular decision no. [15-DCC-101](#) of the *Autorité de la concurrence* on the exclusive takeover of GrosBill SA by Mutares AG (paragraphs 10 et seq.).

⁵⁴⁸ See in particular opinion no. 07-A-06 cited above.

⁵⁴⁹ See in particular decision no. 11-DCC-87 cited above.

⁵⁵⁰ See in particular decision no. 11-DCC-87 cited above.

571. Given these characteristics, a relevant market of retail distribution of consumer IT and electronic products, including on-line sales, could be identified.
572. Such a market would be national in scale, given that the suppliers, such as Apple, define their distribution network by designating resellers over the whole territory of France, on the basis of determined criteria.
573. In consequence, the practices will be examined on the French market for retail distribution of consumer IT and electronic products.

D. WELL-FOUNDEDNESS OF THE STATED OBJECTIONS

1. WITH REGARD TO INFORMATION EXCHANGE PRACTICE (OBJECTION NO. 1)

574. It is apparent from the findings that the companies Apple, Tech Data and Ingram Micro have exchanged economic and commercial data concerning the sales of Apple products by the wholesalers to the retailers.
575. It should first be determined whether the exchange of information at issue falls within the framework of a concertation (a), and then whether this concertation was likely to restrict or distort competition (b).

a) Concertation between Apple and its two wholesalers

1. Applicable principles

576. The first paragraph of Article 101 of the TFEU and Article L. 420-1 of the French Code of commercial law (Code de commerce) prohibit agreements and concerted practices between companies with the object or effect of restricting or distorting competition.

a. Concept of concerted practice

577. The concept of concerted practice is "a form of coordination between undertakings by which, without it having been taken to the stage where an agreement properly so-called has been concluded, practical cooperation between them is knowingly substituted for the risks of competition"⁵⁵¹.
578. The Court of Justice states that concerted practice does not require "the working out of an actual plan," but must be "understood in the light of the concept inherent in the provisions of the treaty relating to competition that each economic operator must determine independently the policy which he [sic] intends to adopt on the common market"⁵⁵².

⁵⁵¹ Judgement of the Court of Justice of 4 June 2009, *T-mobile Netherlands*, C-8/08, paragraph 26.

⁵⁵² Judgement of the Court of Justice of 16 December 1975, *Suiker Unie v Commission*, 40/73, paragraph 173.

579. It is apparent from settled case law that "Although it is correct to say that this requirement of independence does not deprive economic operators of the right to adapt themselves intelligently to the existing and anticipated conduct of their competitors, it does however strictly preclude any direct or indirect contact between such operators, the object or effect whereof is either to influence the conduct on the market of an actual or potential competitor or to disclose to such a competitor the course of conduct which they themselves have decided to adopt or contemplate adopting on the market"⁵⁵³.
580. A conduct may thus be covered by Article 101(1) of the TFEU as concerted practice, even if the parties have not agreed previously on a joint plan defining their action on the market, but nevertheless adopt or join collusion mechanisms which facilitate the coordination of their commercial policies⁵⁵⁴.

b. Proof of concerted practices

581. The existence of a concerted practice can be demonstrated by documents from which it is evident that contacts took place between a number of undertakings and that they in fact pursued the aim of removing in advance any uncertainty as to the future conduct of their competitors on the market⁵⁵⁵.
582. Demonstration of the existence of a concerted practice requires not only a concertation between the undertakings but also a conduct on the market resulting from the concertation and having a direct link of causality with it. In this regard, it follows from the case law of the Court of Justice that "subject to proof to the contrary, which it is for the economic operators concerned to adduce, there must be a presumption that the undertakings participating in concerting arrangements and remaining active on the market take account of the information exchanged with their competitors when determining their conduct on that market"⁵⁵⁶. That is all the more true where the undertakings concert together on a regular basis over a long period.
583. Thus, even unilateral communication of confidential information from an undertaking to a competitor and consequently its passive reception can constitute a concerted practice. Similarly, when an undertaking receives strategic data from a competitor, it will be assumed to have accepted that information and to have adapted its conduct on the market in consequence, unless it responded with a clear declaration that it did not wish to receive such information⁵⁵⁷.
584. Moreover, the Commission points out in its guidelines that information exchange between competitors can be assessed by competition law, whether it is direct or indirect⁵⁵⁸.

⁵⁵³ Judgement of the Court of Justice of 16 December 1975, *Suiker Unie v Commission*, 40/73, paragraph 174.

⁵⁵⁴ Judgement of the Court of Justice of 16 December 1975, *Suiker Unie* cited hereinabove, paragraphs 175 and 179; Judgements of the General Court of 12 July 2011, *Fuji Electric Co. Ltd v Commission*, T-132/07, Rec. 2011 II-04091, paragraph 88, and the Court of First Instance of 15 March 2000, *Cimenteries CBR and Others v Commission*, cases T-25/95 and others, paragraph 19.

⁵⁵⁵ Judgement of the Court of Justice of 16 December 1975, *Suiker Unie* cited hereinabove, paragraphs 175 and 179; Judgements of the General Court of 12 July 2011, *Fuji Electric Co. Ltd v Commission*, T-132/07, Rec. 2011 II-04091, paragraph 88, and the Court of First Instance of 15 March 2000, *Cimenteries CBR and Others v Commission*, cases T-25/95 and others, paragraph 19.

⁵⁵⁶ Judgement of the Court of Justice of 8 July 1999, *Commission v Anic Partecipazioni*, C-49/92 P, Rec. 1999 p.I-04125, paragraph 121.

⁵⁵⁷ Arrêt de la Cour de justice, case C-199/92, *Huls*, paragraph 162 and case C-49/92 P, *Anic Partecipazioni*, paragraph 121.

⁵⁵⁸ Commission guidelines, cited hereinabove, paragraphs 55 and 61.

585. A concerted practice is notably likely to be characterised in the context of indirect exchanges via one or more undertakings located upstream or downstream, but it is made clear that information reporting by a distributor to its supplier may be necessary and constitute de facto a legitimate commercial practice⁵⁵⁹.
586. A concerted practice will thus be likely to be characterised if it is demonstrated that the exchange of information between a distributor and its supplier goes beyond the legitimate scope of any vertical distribution relations, giving rise to information exchange of horizontal character. Such an appreciation must be deduced from the circumstances of the case.
587. In this regard, it follows from settled case-law that an undertaking can be held responsible for anticompetitive agreements and concerted practices when it intended to contribute by its own conduct to the common objectives pursued by all the participants and that it was aware of the actual conduct planned or put into effect by other undertakings in pursuit of the same objectives, or that it could reasonably have foreseen it and that it was prepared to take the risk.⁵⁶⁰
588. The Court of Justice has thus ruled that a concerted practice could be imputed to an undertaking if it "intended, through the intermediary of its service provider, to disclose commercially sensitive information to its competitors, or when it expressly or tacitly consented to the provider sharing that commercially sensitive information with them (see, by analogy, judgments of 7 January 2004 in *Aalborg Portland and Others v Commission*, C-204/00 P, C-205/00 P, C-211/00 P, C-213/00 P, C-217/00 P and C-219/00 P, EU:C:2004:6, paragraphs 82 to 84, and 21 January 2016 in *Eturas and Others*, C-74/14, EU:C:2016:42, paragraph 28)" or further "if [it] could reasonably have foreseen that the service provider retained by it would share its commercial information with its competitors and if it was prepared to accept the risk which that entailed"⁵⁶¹.
589. Lastly, the Paris Court of Appeal and the French Supreme Court (*Cour de cassation*) have confirmed the probative value of a firm, precise and consistent (concurring) body of evidence for demonstrating the existence of such practices⁵⁶². In the absence of direct evidence of an anticompetitive practice, the probative value of a body of evidence is not excluded if, after crosschecking, it constitutes a set of firm, precise and consistent (concurring) presumptions, even if each piece of evidence on its own would not have a sufficiently probative character⁵⁶³.

2. Application in this case

590. As a preliminary point, it should be stressed that there is no evidence in the case file establishing the existence of direct contacts between the companies Ingram Micro and Tech

⁵⁵⁹ See in particular decisions no. 05-D-32 of 22 June 2005 on practices implemented by the company Royal Canin and its distribution network, paragraph 199, and no. 06-D-22 of 21 July 2006 on practices implemented by the company NGK Spark Plugs France on the spark plug market for motorcycles and scooters, paragraphs 58 and 59. See also the conclusions of the Advocate General Mr Maciej Szpunar on 16 July 2015, *Eturas and others*, case C-74/14, paragraph 65.

⁵⁶⁰ See, to this end, the Judgement of the Court of Justice of 8 July 1999, *Commission v Anic Partecipazioni*, C-49/92 P, paragraph 87.

⁵⁶¹ Judgement of the Court of Justice of 21 July 2016, *SIA 'VM Remonts' and Others v Konkurences padome*, C-542/14, paragraphs 30 et seq.

⁵⁶² French Supreme Court (*Cour de cassation*), 7 April 2010, *Société puériculture de France SAS*, no. 09-11853; Paris Court of Appeal, 19 January 1999, *Gerland Routes SA and Others*

⁵⁶³ See in particular decision no. 18-D-19 of 24 September 2018 on the practices implemented in the public lighting works sector in Ardèche and the judgement of the Court of Appeal of 16 September 2010, *company Raffalli & Cie, SARL*, no. 2009/24813, p. 7.

Data. On the other hand, it appears that information has been exchanged between the two wholesalers via Apple.

591. Both Ingram Micro and Tech Data regularly transmitted information on their activity to Apple. Apple thus gathered information on the commercial data of its wholesalers, in particular on completed sales and products in stock, through regular written reports supplemented by informal meetings (paragraphs 118 to 134 of this decision). Apple thus had precise and updated knowledge of the commercial performance and the needs of its wholesalers.
592. However, this information was subsequently retransmitted by Apple to each of the wholesalers, aggregated to varying extents depending on the case. Ingram Micro and Tech Data thus received information on the activity of their competitor from Apple. On one hand, Apple regularly transmitted by e-mail, to each of its wholesalers, information on their respective commercial performance over the past week, month or quarter, after reprocessing the information received under the wholesalers' reporting obligation (refer to paragraphs 137 to 146 of this decision). On the other hand, Apple occasionally transmitted to each wholesaler more individualised information on the activity of its competitor (refer to paragraphs 147 to 172 of this decision).
593. It follows from the foregoing that Apple has played an active role as intermediary between Tech Data and Ingram Micro, on one hand by gathering information on their activity and, on the other hand, by retransmitting this information to them in raw form or after reprocessing it.
594. Although it is correct to say that this information was transmitted separately by Apple to Tech Data and Ingram Micro, this exchange system – which must be appreciated as a whole – nevertheless cannot be considered to be a unilateral practice of Apple, as claimed by the two companies involved.

595. Firstly, the wholesalers knew, or at least could reasonably foresee, that the information they communicated to Apple would subsequently be retransmitted to their competitor. This proposition is supported by the observations of Ingram Micro in response to the statement of objections, stressing that it "knew that these data risked being communicated immediately by Apple to Tech Data"⁵⁶⁴. This is confirmed by several documents in the case file, including the e-mail of 27 July 2012, in which Apple forwarded to Ingram Micro an e-mail received from Tech Data on the setting up by Tech Data of a promotion on a product (refer to paragraph 164 of this decision) or, reciprocally, the e-mail of 1 October 2010, in which Apple forwarded to Tech Data an e-mail received from Ingram Micro indicating the level of functional discount granted to a customer by Ingram Micro (refer to paragraph 198 of this decision).
596. It thus follows from the exchange procedures implemented by Apple and its wholesalers that Tech Data and Ingram Micro could reasonably foresee that the information which they communicated to Apple would subsequently be retransmitted to their competitor, in particular given that they were themselves receiving such information on their competitor from Apple.
597. Secondly, it does not appear that Tech Data or Ingram Micro expressed to Apple that they did not wish to receive such information concerning their competitor. On the contrary, the case file documents show that such information was expected by the wholesalers, and indeed requested by them when it was not spontaneously communicated to them by Apple. To this effect, Apple stressed in a hearing that the information relating to the commercial performance of the wholesalers was transmitted at their request (refer to paragraph 190 of this decision). Similarly, several case file documents provide evidence that the information transmitted by Apple to the wholesalers on the activity of their competitor (stocks, promotions, outstanding balance, etc.) was generally given in responses to queries or requests for further details formulated by the wholesalers (refer to paragraph 194 of this decision).
598. The exchange procedures thus show that by accepting to receive such information on their competitor from Apple, and by even requesting it, the wholesalers were prepared to accept the risk associated with such information sharing between competitors, with Apple as intermediary.
599. It follows from the foregoing that Tech Data and Ingram Micro took part in a concertation within the framework of which they exchanged information on their respective activities, in which Apple participated actively.

⁵⁶⁴ Classification mark 42410

b) Anticompetitive effect of the exchange of information

1. Applicable principles

600. In its horizontal cooperation agreements, the Commission stated that "information exchange can constitute a concerted practice if it reduces strategic uncertainty in the market thereby facilitating collusion, that is to say, if the data exchanged is strategic. Consequently, sharing of strategic data between competitors amounts to concertation, because it reduces the independence of competitors' conduct on the market and diminishes their incentives to compete"⁵⁶⁵.
601. The European courts have defined the conditions in which exchange of information is likely to increase transparency on the market, remove uncertainty on the conduct of competitors and affect existing competition between operators.
602. In this respect, the Court of First Instance of the European Union has stated, in a judgement John Deere of 27 October 1994, that "(...) general use, as between main suppliers, (...) of exchanges of precise information at short intervals, identifying registered vehicles and the place of their registration is, on a highly concentrated oligopolistic market such as the market in question (refer to paragraph 52 below), and on which competition is as a result already greatly reduced and exchange of information facilitated, likely to impair substantially the competition which exists between traders. In such circumstances, the sharing, on a regular and frequent basis, of information concerning the operation of the market has the effect of periodically revealing to all the competitors the market positions and strategies of the various individual competitors"⁵⁶⁶.
603. In the same case, the Court of Justice validated the reasoning of the European Commission and the Court of First Instance by stating that "In making that assessment, the Court of First Instance took account of the nature of the information exchanged, the frequency with which it was disseminated and of the persons to whom it was disclosed. As regards, first, the nature of the information exchanged, particularly that relating to sales made in the territory of each of the dealerships in the distribution network, the Court of First Instance found, at paragraphs 51 and 81, that those were business secrets and allowed the undertakings which were parties to the agreement to know the sales made by their dealers within and beyond their allocated territory, and also the sales made by the other competing undertakings and their dealers who were parties to the agreement. Second, the Court of First Instance held, again at paragraphs 51 and 81, that the information on sales was disseminated systematically and at short intervals. Last, at paragraph 51, the Court of First Instance found that the information was shared between the main suppliers, for their sole benefit, to the exclusion of other suppliers and of consumers"⁵⁶⁷.
604. The French courts adopt a similar approach.
605. For example, in a case concerning practices of exchange of information between luxury hotels in Paris, the Paris Court of Appeal ruled that "although transparency between

⁵⁶⁵ Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements, 2011/C 11/01, paragraph 61.

⁵⁶⁶ Judgement of the Court of First Instance of 27 October 1994, John Deere Ltd v Commission of the European Communities, T-35/92.

⁵⁶⁷ Judgement of the Court of Justice of 28 May 1998, John Deere Ltd v Commission of the European Communities, C-7/95.

economic operators on a competitive market is not likely to restrict autonomy of decision-making and consequently competition between suppliers in the meaning of Article L. 420-1 of the French Code of commercial law (Code de commerce) given the fragmented character of the supply and the remaining uncertainty for each economic operator with regard to the predictability of the behaviour of its competitors, the situation is different on a highly concentrated oligopolistic market where regular systematic exchange of named, precise and non-public information at short intervals between operators providing the majority or even the entirety of the supply on the market is likely to significantly impair the remaining competition between the economic operators when the regular and frequent sharing of that information has the effect of periodically revealing to all the competitors the positions on the market and the strategies of each one of them" [translated from the French]⁵⁶⁸.

606. The same principles were applied by the Conseil de la concurrence to appreciate the anticompetitive character of the monthly exchanges of data on the number of new subscriptions and the number of cancellations recorded by the three operators on the French mobile telephony market between 1997 and 2003. With regard to the structure of the market, the Conseil had noted in its decision that "the criteria underlying the analysis of the European community judge are thus those of a closed oligopoly, maintained by substantial barriers to entry, within which the positions of the undertakings are relatively stabilised" [translated from the French]⁵⁶⁹.
607. With regard to the strategic character of the exchanged information, the Conseil restated that "what is important, according to the John Deere case law, is not the precision of the exchanged information, measured in abstract terms, but rather the link between the nature of that information and the possibility for the operators to monitor the impact of their commercial policy and those of their competitors on their sales"⁵⁷⁰[translated from the French].
608. In a judgement of 27 June 2007 in the mobile telephony case cited above, the French Supreme Court (*Cour de cassation*) ruled that, to establish the objections, the court of appeal should have determined "in practice (...) whether the regular exchange from 1997 to 2003 of retrospective information between the three undertakings operating on the market (...) had the object or the actual or potential effect, given the characteristics of the market, its functioning, and the nature and level of aggregation of the exchanged data (...), of enabling each of the operators to adapt to the foreseeable conduct of its competitors and thus significantly distort or restrict competition on the market concerned" [translated from the French]⁵⁷¹.
609. Thus the characterisation of a breach having anticompetitive effects must be the object of a practical demonstration according to the circumstances of the case.

2. Application in this case

610. As is apparent from paragraphs 115 et seq. of this decision, the companies Tech Data and Ingram Micro have exchanged information on their respective activities via Apple.
611. The exchanges concerned, on one hand, the respective commercial performance of each wholesaler over the past week, month or quarter, containing data relating to their respective

⁵⁶⁸ Judgement of the Paris Court of Appeal of 26 September 2006, Hôtel le Bristol SA, no. 2005/24285.

⁵⁶⁹ Decision 05-D-65 of 30 November 2005 on practices identified in the mobile phone sector.

⁵⁷⁰ Decision 05-D-65 of 30 November 2005, cited above.

⁵⁷¹ Judgement of the French Supreme Court (*Cour de cassation*) of 27 June 2007, Bouygues Télécom, no. 07-10.303.

market shares for the sale of Apple products by value, by product range and by volume, by product type and/or by customer category (paragraphs 137 to 146 of this decision). On the other hand, they occasionally concerned more individualised information on the past or current activity of each wholesaler, containing data relating to supplies or concerning their commercial or financial policy (paragraphs 147 to 172 of this decision).

612. To determine whether the exchanges of information established between Ingram Micro and Tech Data via Apple have an anticompetitive effect and lead to diminished strategic uncertainty on the market and reduced autonomy of conduct of the undertakings and their incentive for competing with each other, the structure of the market concerned should be examined, followed by the strategic character of the exchanged information.
613. With regard to the structure of the market, although the exchange of information at issue took place between the only two wholesalers authorised to distribute Apple products, nevertheless the analysis, as part of the examination of a horizontal practice as in this case, cannot be restricted solely to the market segment of the wholesale distribution of Apple brand products, independently of the "brand effect" (refer to paragraphs 51 et seq. hereinabove) from which the latter benefit. In fact, the consumer IT and electronic products wholesale distribution market is characterised by inter-brand competition. The wholesalers are multi-brand, and compete with each other mainly on volumes: they purchase a very wide range of products from the various manufacturers in order to meet the demand of their customers, who are interested by commercial partners offering a varied range of products from a broad spectrum of manufacturers, as well as possible. The Apple products are effectively an attractive product for the wholesalers' customers, offering Ingram Micro and Tech Data a competitive advantage over their competitors, but the brands of competing suppliers distributed by other wholesalers nevertheless compete with the Apple brand products.
614. But, as emphasised in paragraphs 21 et seq. of this decision, the wholesale market for IT products is only moderately concentrated. Although Tech Data and Ingram Micro dominate the market, holding market shares by value of 15% and 8%, respectively, in 2009 (increasing to 16% and 9% in 2013), the market is nevertheless characterised by high competition intensity. The two companies face competition from other major operators (such as Arrow Electronics, Also, SCC and Computacenter), from a very high density of smaller undertakings⁵⁷², and from direct sales by the manufacturers, including Apple.
615. With regard to the nature of the exchanged information, although certain data transmitted by Apple to the wholesalers, such as information on current promotions or on the composition of the sales forces of their competitor, are confidential and not available on the market, this finding is not in itself sufficient to demonstrate the strategic character of the exchanged information.
616. According to European or French case law cited hereinabove, an exchange of information may be anticompetitive when it reduces the strategic uncertainty on the market and thereby facilitates tacit collusion by reducing the autonomy of conduct of the undertakings and their incentive to compete with each other. The term 'strategic' here means the capacity of the undertakings to adapt their competitive conduct on the market as a function of the information received. It is thus not deduced solely from the nature of the exchanged information, but rather assessed with regard to the practical functioning of the market and the circumstances specific to the case.

⁵⁷² Classification marks 14872, 14877 and 14881

617. However, in this case, as is apparent from paragraphs 664 et seq. of this decision, given the allocation system established by Apple, the wholesalers had no margin of manoeuvre in determining the quantities of Apple brand products and the customers to which they were likely to sell them.
618. In these circumstances, the data exchanged between the wholesalers were not in themselves likely to reduce their autonomy of conduct and their incentive to compete with each other, since the wholesalers were not in a position to freely determine their commercial policy, instead merely following Apple recommendations. Moreover, it will be made clear that the exchange of information at issue ended with the introduction of the "forecast" in 2013 (refer to paragraph 186 of this decision), which also ended the allocation system examined under objection no. 2 (refer to paragraph 802 of this decision).
619. Consequently, given the specific circumstances of the case, it is not established that the exchange of information at issue was in itself likely to restrict competition on the consumer IT and electronic products wholesale distribution market.

3. Conclusion

620. Given the foregoing, it is not established that the exchange of information implemented between the wholesalers, with Apple as intermediary, constitutes a restrictive competitive practice contrary to Articles 101 of the TFEU and L. 420-1 of the French Code of commercial law (Code de commerce).

2. WITH REGARD TO THE PRACTICE OF ALLOCATION OF PRODUCTS AND CLIENTELE IMPLEMENTED BY APPLE AND ITS WHOLESALERS (OBJECTION NO. 2)

621. The investigations have put together evidence demonstrating that the parties involved agreed on a system of allocation of Apple brand products (other than iPhone) and of clienteles, initiated by Apple.
622. To assess the effectiveness and the lawfulness of the system of allocation of products and customers between the wholesalers implemented by Apple with Ingram Micro and Tech Data, concerned by the second notified objection, first the existence of a joint intention of the parties on this point between Apple and its two approved wholesalers will be discussed **(a)**, then the anticompetitive object of the relevant practices **(b)**. The examination will then determine whether the conditions for granting a block exemption **(c)** or an individual exemption are fulfilled **(d)**. Lastly the duration of the practices at issue **(e)** and the identification of the Apple Group entities initiating the practices **(f)** will be discussed.

a) Demonstration of the joint intention of the parties

1. In law

623. It follows from decision practice and settled case law in both European Union law and French law that proof of a vertical agreement requires demonstration of the joint intention

of the parties to the agreement expressing their joint intention to conduct themselves on the market in a specific way⁵⁷³.

624. According to the Court of First Instance of the European Union, proof of such an agreement "must be founded upon the direct or indirect finding of the existence of the subjective element that characterises the very concept of an agreement, that is to say a concurrence of wills between economic operators on the implementation of a policy, the pursuit of an objective, or the adoption of a given line of conduct on the market, irrespective of the manner in which the parties' intention to behave on the market in accordance with the terms of that agreement is expressed"⁵⁷⁴.
625. Any means may be used to demonstrate the joint intention of the parties, given that the Court of Justice of the European Union considers that it is not necessary, if documentary or contractual evidence has been obtained, to proceed with the examination of additional conduct-related evidence⁵⁷⁵.
626. In its judgement of 7 January 2004, *Aalborg Portland and Others v Commission* (case C-204/00), the Court of Justice of the European Union qualifies sufficiently explicit documents such as internal memos, statements, meeting minutes, draft agendas or notes taken during meetings as "direct documentary evidence". The evidence has been qualified in this way because of its sufficiently explicit character.
627. In other cases, the direct evidence was a contract⁵⁷⁶.
628. In France, the Paris Court of Appeal has aligned itself with the European case law by finding, in a judgement of 26 January 2012, that any means may be used to demonstrate the joint intention of the parties, and considering that "proof of a [vertical] agreement may be constituted by direct evidence (such as a written document) or indirect evidence (such as a conduct) and that it is not necessary, if documentary or contractual evidence has been obtained, to proceed with the examination of additional conduct-related evidence" [translated from the French]⁵⁷⁷.

2. Application in this case

629. The companies Apple, Tech Data and Ingram Micro argue in their written submissions that nothing in the case file supports a conclusion of express or tacit assent by the wholesalers to the product and clientele allocation policy implemented by Apple. According to the companies, Apple merely formulated recommendations, which would not have been complied with and applied by the approved wholesalers. In any case, Tech Data and Ingram

⁵⁷³ Judgements of the Court of Justice of 15 July 1970, *ACF Chemiefarma v Commission*, 41/69, Rec. p. 661, paragraph 112, of the Court of First Instance of 26 October 2000, *Bayer v Commission*, case T-41/96, Rec. p. II-3383, paragraph 67, and of the Paris Court of Appeal of 28 January 2009, *Epsé Joué Club*, no. 2008/00255, p. 9, rendered definitive by the dismissal rulings of the French Supreme Court (*Cour de cassation*) of 7 April 2010.

⁵⁷⁴ Judgment of the Court of First Instance of 26 October 2000, *Bayer v Commission*, T-41/96, paragraph 173

⁵⁷⁵ In this meaning, refer to the Judgement of 6 October 2009, *GlaxoSmithKline Services v Commission*.

⁵⁷⁶ Decisions 07-D-06 of 28 February 2007 relative à des pratiques mises en œuvre dans le secteur des consoles de jeux et des jeux vidéo [on practices implemented in the sector of games consoles and video games], paragraphs 104 and 105, and 07-D-50 of 20 December 2007 on practices implemented in the sector of toy distribution, paragraph 517.

⁵⁷⁷ Judgement of the Paris Court of Appeal of 16 May 2013, *Kontiki*, no. 2012/01227, confirmed by the French Supreme Court (*Cour de cassation*) in its judgement no. 13-19.476 of 7 October 2014, and *Beauté Prestige International*, no. 2010/23945, p. 44 and 45. Application in this case

Micro suggest that any choice they made to follow such recommendations would be rational unilateral conduct.

630. The wholesalers also explain that the clauses in the contracts signed with Apple could not constitute explicit assent to the overall strategy of Apple to allocate a certain number of products to certain customers, insofar as such clauses concern only allocations of products between the wholesalers (refer to paragraphs 240 et seq. hereinabove) made only in "constraint" periods.
631. However, as shown in paragraphs 250 to 323 hereinabove, the joint intention of the parties between Apple and each of its wholesalers on the clientele and product allocation mechanism is established by a substantial body of explicit conduct-related evidence.
632. In fact, with regard to the allocations of products and clientele as described in paragraph 258 hereinabove, it follows from several exchanges of e-mails between Apple and its approved wholesalers, cited in paragraphs 275 to 323 hereinabove, that the wholesalers, by their conduct, manifested their assent to the allocations policy initiated by Apple. The wholesalers distributed the volumes of Apple brand products between their reseller customers, in compliance with the instructions of Apple.
633. With regard to Ingram Micro, this assent is indicated in particular by an exchange of e-mails on 24 January 2013, during which an Apple France representative informs the wholesaler: "we must give some [iMac 21.5s] to retail, please let me know when you receive them"⁵⁷⁸. The same day, in an internal e-mail, an Ingram Micro manager informs his team: "Attention: when we receive iMacs it is essential that we call the [the Apple representative] (...) to give her the quantities and she will decide"⁵⁷⁹ (refer also to paragraph 321 hereinabove).
634. In a yet more explicit way, the product and clientele allocations mechanism is cited in an e-mail sent by an Ingram Micro manager to Apple France on 2 December 2009 in which the manager writes: "I am also VERY surprised (and not pleasantly, to tell the truth) to see that you set us a target rate on the ipods and their accessories when that business is COMPLETELY managed by Apple. We don't have control. Apple decides the product allocations to deliver and the customers to be delivered to. We do what we're told (...)"⁵⁸⁰.

⁵⁷⁸ Classification mark 30528

⁵⁷⁹ Classification mark 30527

⁵⁸⁰ Classification mark 32246

635. In its written submissions, Ingram Micro contests the existence of a joint intention of the parties, arguing in particular that two e-mails sent internally by Apple state clearly that it has not complied with the allocations decided by Apple. However, far from enabling an absence of joint intention of the parties between Apple and its wholesaler to be deduced, on the contrary these e-mails make it obvious that there is a clearly established system of product and customer breakdown, in which Apple decides the quantities and identifies the customers to which the wholesalers must deliver, which they do as instructed. For example, in an Apple internal e-mail on 13 October 2011, an Apple manager writes to other Apple managers: "Clearly Ingram has messed up"⁵⁸¹, which shows that normally Ingram Micro tends to comply with the allocations decided by Apple, and that in that case, exceptionally, they were not complied with.
636. With regard to Tech Data, assent to the agreement is first inferred from an exchange of e-mails with Apple (refer to paragraph 299 hereinabove) in October 2012 in which an Apple representative writes: "The prices are visible on the Apple store. (...) You can consequently make the iPads visible in your system. What is important above all is to deliver the iPads to the resellers on the list in your possession while complying with the 02/11 launch"⁵⁸², to which a Tech Data manager replies: "Ok, I consider that our obligation [not to render certain iPads visible in the system] is lifted by your mail (...)".
637. Second, acceptance by Tech Data of the allocation policy established by Apple follows unambiguously from an exchange of e-mails with a reseller in January 2013. In that exchange, the wholesaler explains to the reseller the procedure to follow for Apple to allocate a certain number of products to it, thus recognising that it does not itself control the allocation of its products between its customers: "It does not work in the same way as with the other suppliers, the order numbers are not going to be any use. On [the] Apple [website] you must ask the salesperson who deals with you to generate a product allocation for you"⁵⁸³. Reacting to the indignation of the reseller, the Tech Data manager adds: "I am not refusing to give you the information, I have just given you the procedure, which is to contact your Apple salesperson who must in turn contact the person in charge of the allocations at Apple (...). This procedure applies to all the APRs, and it works very well"⁵⁸⁴.
638. In its observations in response to the report, although Tech Data supplies several invoices⁵⁸⁵ intended to demonstrate that it did not comply with the product and clientele allocations decided by Apple and that it allocated to its customers the quantities that it chose⁵⁸⁶, there is no choice but to accept that these documents are ineffective for reaching such a conclusion. In practice, Tech Data does not supply any evidence that would enable assessment of the agreement between the order dates, the delivery dates and the billing dates, so that it is impossible to verify whether the numbers taken from the invoices supplied by Tech Data correspond to the allocations actually decided by Apple. Variations of a few days in the counting system could result in totally different numbers for the quantities of products sold.
639. Tech Data also argues that the fact that it has allocated larger quantities to direct APRs (with invoices in support⁵⁸⁷), whereas Apple asked it to give preference to the indirect APRs in an

⁵⁸¹ Classification mark 26960

⁵⁸² Classification mark 34635

⁵⁸³ Classification mark 26368

⁵⁸⁴ Classification mark 26375

⁵⁸⁵ Classification marks 42817 to 42955

⁵⁸⁶ Classification mark 26660

⁵⁸⁷ Classification marks 42956 to 43180

e-mail on 9 July 2010⁵⁸⁸, would constitute clear evidence of non-compliance with the allocations wanted by Apple. However, that argument is not pertinent, when it leads to comparing a priority in the order of delivery on the one hand with a quantity of products sold on the other. Tech Data thus could have given preference to the indirect APRs, complying with the Apple recommendations, by allocating them the products available in priority, while also in parallel delivered the remaining products to the direct APRs, in a larger proportion than that delivered to the indirect APRs.

640. It follows from the foregoing that the criticisms put forward by the undertakings involved do not call into question the existence of a joint intention of the parties between Apple and its wholesalers, as demonstrated previously.

b) Anticompetitive object of the practices

1. In law

a. Prohibition of clientele restrictions

641. Article 101 of the TFEU stipulates that: "1. The following shall be prohibited as incompatible with the internal market: all agreements between undertakings, decisions by associations of undertakings and concerted practices 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, and in particular those which (...) c) share markets or sources of supply" (underlining added).
642. Similarly, Article L. 420-1 of the French Code of commercial law (Code de commerce) provides that "The following, even if implemented by a company of the group located outside France as the direct or indirect intermediary, are prohibited when they have the object or may have the effect of preventing, restricting or distorting competition on a market: concerted actions, conventions, express or tacit agreements or coalitions, in particular when they tend to: (...) 4 Share markets or sources of supply" (translated from the French; underlining added).
643. The question of the existence of a restriction of clientele is distinct from the principle of free organisation of a distribution network.
644. The competition authorities and the courts consider that a supplier is "free to modify the structure of its distribution network as it wishes without its co-contractors benefiting from an acquired right of maintenance of their situation"⁵⁸⁹ (translated from the French).

⁵⁸⁸ Classification mark 26873

⁵⁸⁹ Decision 02-D-56 of 17 September 2002 *relative à des pratiques mises en œuvre par la société Apple dans le réseau de distribution de ses produits et des produits associés* (on the practices implemented by the company Apple in the distribution network of its products and associated products). Refer also to Opinion 04-A-14 of the *Autorité* of 23 July 2004 on a referral by the Syndicat national de l'équipement de bureau et de l'informatique (SEBI), paragraph 12

645. In Decision 99-D-32 of 20 May 1997, the Conseil de la concurrence thus stressed "that it is permissible for a company to freely determine the conditions of distribution of its products and to have several categories of distributors coexist within its distribution network according to the type of commercial relationship that it has with them, when such a practice does not show any anticompetitive discrimination on its part" (translated from the French)⁵⁹⁰. A supplier can thus "decide to use wholesalers to canvass certain points of sale while itself supplying other distributors, when such task sharing has neither the object nor the effect of restricting competition on the market" (translated from the French)⁵⁹¹.
646. On the other hand, the Court of First Instance of the European Union has stated that "Although a producer is free to choose his [sic] own marketing policy, Article 85(1) of the Treaty [of Rome] [now Article 101(1) of the TFEU] must be taken into account where implementation of that policy results in agreements which impose on other independent economic operators obligations capable of restricting their freedom to compete to an extent that appreciably affects intra-Community trade. Accordingly, the mere fact that a producer has made significant efforts to promote his [sic] products does not in itself constitute an objective justification capable of rendering Article 85(1) inapplicable to a distribution network which limits the freedom to compete of participating undertakings and third parties"⁵⁹².
647. A supplier that shares the markets by allocating specific clienteles to its wholesalers, either directly through contractual clauses, or indirectly through incentive mechanisms, limits the options of the buyer to choose the customers to which it resells a specific product or service. That conduct may be anticompetitive in certain circumstances.
648. The same applies in French law. The *Autorité de la concurrence* has penalised clientele restriction agreements which had the object and the effect of restricting intra-brand competition on the market⁵⁹³.
649. For example, although the organisation of a distribution network may justify certain restrictions, reaching an agreement to limit and control the production and resale of products, share market shares and customers or, more generally, reduce the commercial freedom of an operator may be against both French and European Union competition law and be covered by the prohibitions stipulated in Article 101(1) of the TFEU and Article L. 420-1 of the French Code of commercial law (Code de commerce).

b. Anticompetitive practice character by object of clientele restriction

650. Articles 101(1) of the TFEU and L. 420-1 of the French Code of commercial law (Code de commerce) both make a distinction between practices contrary to the competition rules because of their object or because of their restrictive effects.

⁵⁹⁰ Conseil de la concurrence, Decision 97-D-31 of 20 May 1997 relative à des pratiques relevées dans le secteur de la distribution de produits d'entretien professionnels, - Conseil de la concurrence, Decision 00-D-72 of 16 January 2001 on a referral submitted by the Time and Diamond company.

⁵⁹¹ Conseil de la concurrence, Decision 99-D-32 of 25 May 1999 relative à des pratiques mises en œuvre dans le secteur de la distribution de certains articles de papeterie.

⁵⁹² Court of First Instance, 12 December 1996, Givenchy, T-88/92

⁵⁹³ Decision 05-D-32 of 22 June 2005 on practices implemented by the Royal Canin company and its distribution network, Decision 07-D-24 of 24 July 2007 relative à des pratiques mises en œuvre par le réseau Léonidas, Decision 12-D-10 of 20 March 2012 on practices in the cat and dog food sector.

651. In this regard, it follows from the case law of the Court of Justice of the European Union that certain types of coordination between undertakings intrinsically show a sufficient degree of harm with regard to competition for it to be considered that no examination of their effects is necessary⁵⁹⁴.
652. Assessment of the existence of a sufficient degree of harm necessitates practical and cumulative examination of the content and the objectives of the anticompetitive provision, and the economic and legal context of which it forms part. When determining that context, it is necessary to take into consideration the nature of the goods or services affected, as well as the real conditions of the functioning and structure of the market or markets in question⁵⁹⁵.
653. Case law and decision practice consider that sharing of clientele **between competitors** is an anticompetition breach by object.
654. The European Commission, in two decisions, thus considered⁵⁹⁶ that such practices prevented the undertakings party to the agreement determining freely and independently the amount and the destination of their production, attracting buyers by lower prices and more favourable terms and, in the end, deprived them of the possibility of choosing between several different proposals.
655. Similarly, with regard to agreements between undertakings operating at different levels of the production or distribution chain (**between non-competitors**), allocation of clientele by a network head with its wholesalers also constitutes a restriction of competition by object, as emphasised by the Conseil de la concurrence, in its decision 07-D-24 of 24 July 2007 on practices implemented by the Léonidas network. In that case, the Conseil considered that the reservation of a clientele of retailers allocated exclusively to each reseller constituted a restriction of customers practice, in the meaning of Article 4 b) of European Commission regulation 2790/1999, having the object of harming intra-brand competition, that is to say, the competition that there could be between different points of sale for a given brand. It was also emphasised that the practice prevented importations between European Union countries.
656. Regulation (EC) 2790/99 of the Commission of 22 December 1999 (applicable to such practices prior to 1 June 2010) succeeded by regulation 330/2010 of the Commission of 20 April 2010 (applicable for such practices after 1 June 2010, and the principles of which, on the problems at issue in this case, are identical) provides for exemption from application of Article 101(1), to distribution agreements, so-called "vertical agreements", between distributors and a supplier, where in particular the supplier's share of the relevant market on which it sells its goods and services does not exceed 30%, with exemption subject to such agreements not including any of the hardcore restrictions listed in Article 4.

⁵⁹⁴ See, in this meaning, in particular, the Judgements of the Court of Justice of the European Union of 30 January 2020, Generics UK Ltd, C-307/18, paragraphs 64 to 67; of 11 September 2014, Groupement des cartes bancaires, C-67/13, paragraphs 49 and 50; of 30 June 1966, LTM, 56/65, pages 359 and 360; of 20 November 2008, BIDS, C-209/07, paragraph 15, and of 14 March 2013, Allianz Hungária Biztosító and Others, C-32/11, paragraphs 34 and 35.

⁵⁹⁵ See, in this meaning, the Judgements of the Court of Justice of the European Union of 30 January 2020, Generics UK Ltd, C-307/18, paragraph 68; of 11 September 2014, Groupements des cartes bancaires, C-67/13, paragraph 53; and of 14 March 2013, Allianz Hungária Biztosító and Others, paragraph 36.

⁵⁹⁶ Decision 72/68/CEE of the European Commission of 23 December 1971 and Commission Decision 80/182/EEC of 28 November 1979 relating to a proceeding under Article 85 of the EEC treaty (IV/29.672 – Floral).

657. One of the hardcore restrictions defined by Article 4 b) of the said regulation consists of vertical agreements which, directly or indirectly, in isolation or in combination with other factors under the control of the parties, have as their object the restriction of "the customers to whom the buyer may sell the contract goods or services, except:
- the restriction of active sales into the exclusive territory or to an exclusive customer group reserved to the supplier or allocated by the supplier to another buyer, where such a restriction does not limit sales by the customers of the buyer,
 - the restriction of sales to end users by a buyer operating at the wholesale level of trade,
 - the restriction of sales to unauthorised distributors by the members of a selective distribution system, and
 - the restriction of the buyer's ability to sell components, supplied for the purposes of incorporation, to customers who would use them to manufacture the same type of goods as those produced by the supplier" (underlining added).
658. According to paragraph 49 of the Guidelines of 13 October 2000 applicable to the exemption regulation 2790/1999, succeeded by paragraph 50 of the guidelines applicable to regulation 330/2010 on vertical agreements, "The hardcore restriction set out in Article 4(b) of the Block Exemption Regulation concerns agreements or concerted practices that have as their direct or indirect object the restriction of sales by the buyer, in as far as those restrictions relate to (...) the customers to whom the buyer may sell the contract goods or services." (underlining added).
659. The Commission states, on one hand, that "That hardcore restriction relates to market partitioning (...) by customer". On the other hand, the Commission states that that restriction "may be the result of direct obligations, such as the obligation not to sell to certain customers (...) or the obligation to refer orders from these customers to other distributors. It may also result from indirect measures aimed at inducing the distributor not to sell to such customers, such as refusal or reduction of bonuses or discounts, refusal to supply, reduction of supplied volumes or limitation of supplied volumes to the demand within the allocated (...) customer group, threat of contract termination or profit pass-over obligations. (...)" (underlining added).
660. Last, again according to these guidelines, "These practices are even more likely to be viewed as a restriction of the buyer's sales when used in conjunction with the implementation by the supplier of a monitoring system aimed at verifying the effective destination of the supplied goods, e.g. the use of differentiated labels or serial numbers".
661. It follows from these provisions that the restrictions concerned by "the obligation not to sell to certain customers" or "the obligation to refer orders from these customers to other distributors" are hardcore restrictions, which cannot benefit from automatic exemption from the regulation.
662. In any event, and contrary to what Apple argues in its written submissions, the *Autorité* restates that the case law does not oblige the competition authorities to provide proof of active implementation of an anticompetitive agreement policy. In particular, the Court of Justice has restated that an agreement prohibited by Article 101(1) of the TFEU does not necessarily assume that there is a system of subsequent monitoring and penalties⁵⁹⁷.

⁵⁹⁷Refer to the Judgement of the Court of Justice of 6 January 2004, Bayer, C-2/01 P, paragraph 84.

663. The circumstance that the breach comprises a policy mechanism or reprisal measures is thus not necessary for establishing the existence of a vertical agreement. However, it may be taken into account by the *Autorité* in its assessment of the seriousness of the actions⁵⁹⁸.

2. Application in this case

664. It follows from the findings summarised in paragraph 327 hereinabove that Apple has proceeded with the allocation by customer of its products delivered to its wholesalers, even outside the periods it itself qualifies as "constraint". The nature of the practices at issue **(a)**, their contents and purposes **(b)** will be discussed below, followed by the economic and legal context in which they are implemented **(c)**.

a. Nature of the practices at issue

665. As set out in paragraphs 214 to 325 hereinabove, it follows from the case file documents that both in the so-called "constraint" periods and outside them, whatever the product considered, Apple proceeded with detailed allocation of its products to the retailers with its wholesalers as intermediaries, specifying regularly to the latter the exact quantities to allocate per retailer.

666. With regard first of all to iPad sales, the Apple representatives themselves admitted in oral hearing that they proceeded with very precise allocation of product delivery starting from the progressive launch of the iPad, breaking down the quantities of tablet per wholesaler and, in greater detail, per retailer (paragraphs 259 and 260 hereinabove). Several tables and e-mail exchanges between Apple and its wholesalers illustrate these allocations decided by Apple and applied by the wholesalers (refer to paragraphs 275 to 304 hereinabove).

667. As already set out in paragraphs 274 to 303 of this decision, this product and clientele allocations system was not limited to the first months of the launch of the first version of the iPad, but also concerned, over long durations, the launch of each successive version of the product, Apple thereby intervening regularly in the commercial policy of its wholesalers near-continuously over several years.

668. With regard secondly to Apple products other than iPad and iPhone, the case file documents show that Apple also implemented a system of detailed allocation of its products to the retailers with its wholesalers as intermediaries, in both "constraint" and "non-constraint" periods, and that the allocations decided were applied by the wholesalers (paragraphs 305 to 323 hereinabove).

669. It follows from the investigation that these allocations could involve not only the initial product allocations to the resellers, but also reallocations in the case of unsold stocks, as revealed by an exchange of e-mails between Apple and Tech Data in October 2012: "The allocs that you are given in the week must be removed from your stock no later than Thursday evening. Otherwise I... can retrieve them and allocate them to retail so there is no more stock as of Friday evening"⁵⁹⁹.

⁵⁹⁸Refer to the press release of 16 May 2011 on the setting of financial penalties, paragraph 26

⁵⁹⁹ Classification mark 34629

670. Similarly, according to the declarations of Apple recorded at hearings, once a week an Apple manager "visits the wholesalers to discuss various aspects of the commercial relationship with ADI. Depending on the agenda, it may cover: [...] reviewing the stocks and finding solutions for selling the overstocked products"⁶⁰⁰.
671. The product allocation strategy decided by Apple also changed day by day, as illustrated by an e-mail on 9 July 2010, sent by an Apple representative to Tech Data and Ingram Micro, authorising the wholesalers from now on to deliver to new customers: "With effect from today we authorise you to deliver to the direct APRs, and to the indirect APRs that you were not addressing to date. You can include them in your list of ipad resellers".
672. The 'open' distribution system implemented by Apple reserved for its two wholesalers the supplying of the indirect APRs and retailers, the smaller ones, and enabled them to compete with Apple in supplying the direct APRs and retailers. Apple reserved for itself only the supplying of its own distribution channel, comprising the Apple Resale Stores and its online sales site, the Apple Online Store. Nevertheless, as autonomous economic operators on the market, the wholesalers should have had the possibility of freely determining their commercial policy. Insofar as they acquired ownership of the products involved and bore the economic and financial risks of their activity, the wholesalers should have been in a position to deliver freely to their direct or indirect APR or retailer customers, without interference from Apple. However, it has been found that it was Apple who selected which resellers the wholesalers had to supply and decided the products and the quantities to deliver to them, without the deliveries having any link with the real needs of the wholesalers in order to satisfy their customers (refer to paragraphs 275 et seq. hereinabove).
673. In consequence, the wholesalers occupied the position of simple logistic intermediaries between Apple and the retailers, merely executing the instructions of Apple. This is revealed in particular by an exchange of e-mails in January 2013 between Tech Data and a reseller, to whom the wholesaler explains: "It does not work in the same way as with the other suppliers, the order numbers are not going to be any use. On [the] Apple [website] you must ask the salesperson who deals with you [at Apple] to generate a product allocation for you"⁶⁰¹ (paragraph 319 hereinabove).
674. The lack of commercial freedom of the wholesalers from Apple was such that an APR could receive quantities of goods from a wholesaler from which it had not ordered anything. That is shown by an e-mail in April 2011 sent by an indirect APR to Apple: "why have we had 11 ipads from ingram and only 3 from Tech?", to which Apple replies: "and you are going to receive 10 more today from TD its me who allocates them [allocations] according to the products arriving either at IM or at Td". The indirect APR then replies: "ok but we had ordered all of them from Tech", to which Apple replies: "yes but that means you must get used to it if you want them we're not good in dispatching"⁶⁰².
675. By proceeding with these specific allocations to its wholesalers, Apple treated them as if they were integrated entities.

⁶⁰⁰ Classification mark 14192 (VC) / 14463 (VNC)

⁶⁰¹ Classification mark 26368

⁶⁰² Classification mark 26448

676. The purpose of the product and clientele allocations decided by Apple and implemented by the wholesalers was to restrict "the customers to whom the buyer may sell the contract goods or services" and thus constitute restrictions of clientele and products in the meaning of 4 b) of the regulation and of the guidelines cited hereinabove. Moreover, insofar as they consisted in directly allocating the clientele of the wholesalers, the practices implemented by Apple and its wholesalers constituted a restriction of both the active and passive sales of these distributors.
677. In its defence, Tech Data contests the binding character of such customer allocations. The undertaking considers that when it applied them it was the result solely of its own unilateral and rational choice, dictated by the objective of supplying its own customers optimally and avoiding overstock and shortage situations.
678. However, those arguments are devoid of pertinence given the preceding developments, which attest to the imperative character of the allocations by Apple (refer to paragraphs 316 and 319 hereinabove). Moreover, the Tech Data representatives have themselves admitted in hearings that they are subject to the Apple strategy⁶⁰³ in these terms: "Apple is an indispensable, unavoidable supplier. We are subject to their strategy and the relationship with them" (underlining added).
679. For their part, Ingram Micro and Apple argue that Apple has only established an order of priority in deliveries in "constraint" periods, but has never prevented the resellers obtaining supplies from their chosen wholesalers.
680. However, as set out hereinabove, what Apple presents as simple non-binding recommendations or suggestions on the order of priority of the deliveries between the wholesalers' customers during "constraint" periods, in reality turn out to have been binding instructions that were accepted and executed by the wholesalers, including in "non-constraint" periods. The e-mail on 2 December 2009 sent by an Ingram Micro manager to Apple illustrates this situation: "Apple decides the product allocations to deliver and the customers to be delivered to. We do as we are told"⁶⁰⁴ (refer to paragraphs 275 to 327 for other examples).
681. This allocations policy has been identified by the investigation services. It is confirmed, based on the documents in the case file, up to March 2013 (when Apple introduced the forecast mechanism, as stated in paragraphs 328 to 332 hereinabove, and concerned all the products of the brand, other than iPhone).

b. Content and scope of the practices implemented

682. The customer restriction practice was associated with the implementation by Apple of a monitoring system intended to enable it to verify the actual destination of the delivered goods. However, according to Apple, the practice was justified by the need to supply each distributor in constraint periods and by the "fair share" objective.

⁶⁰³ Classification mark 34447 (VC) / 34548 (VNC)

⁶⁰⁴ Classification mark 32246

❖ Monitoring measures and reprisals implemented by Apple

683. The clientele and product restriction at issue appears in this case to be confirmed all the more in that it gave rise to a very precise control and monitoring system set up not only by Apple with regard to its wholesalers, using its system for gathering information on the economic activity of its commercial partners, but also by the wholesalers themselves.
684. Evidence for the checks made by Apple to make sure that its allocation instructions to the wholesalers had been followed is provided by several e-mails.
685. As shown by paragraphs 282 et seq. hereinabove, and in particular an e-mail on 9 July 2010, on several occasions Apple obliged its wholesalers to provide "clear visibility of what [they are doing] in allocation when the iPads enter stock (mandatory)"⁶⁰⁵.
686. Apple also on some occasions implemented a system of micro-management with its wholesalers to make sure that they delivered to the APRs of its choice the product quantities that it had itself decided. In an internal exchange of e-mails, Apple representatives stated: "We are expediting 5 units to Ingram so they can support the 2 units needed by iTake [APR]. We will micro manage to ensure Ingram allocate to iTake and will track through to physical delivery"⁶⁰⁶. Also, wanting to make sure that the iPad allocations to certain APRs had been complied with by one of its wholesalers, an Apple representative wrote to it in an e-mail on 10 September 2009: "I don't see IConcept in Pau neither iSwitch a Amiens, in the attached below list, I do assume this is due to the fact that you've managed it manually? I'm sure they have received the new iPod"⁶⁰⁷. The wholesaler confirmed to Apple that it had followed its instructions: "They are in the scope, P... will provide detail. Below is the official list- we did your requests under the radar but it is done"⁶⁰⁸.
687. In its observations, Tech Data argues that although information on sales volumes has effectively been communicated to Apple, there is nothing to suggest that Apple wanted to check whether the products sold had effectively been delivered to a given reseller. In view of the preceding developments, that argumentation is unfounded.
688. It also follows from the case file documents that the product and clientele allocations decided by Apple are sometimes accompanied by retaliatory measures when the wholesalers or retailers did not comply with them.
689. For example, with regard to the wholesalers, following poor management of its stocks in November 2010, Ingram Micro no longer had the right to place orders with Apple "without management authorisation"⁶⁰⁹.

⁶⁰⁵ Classification mark 26873

⁶⁰⁶ Classification mark 26329, original version: "The APR below, iTake is **indirect** and serviced via Distribution in France specifically by Ingram France. We are expediting 5 units to Ingram so they can support the 2 units needed by iTake. We will micro manage to ensure Ingram allocate to iTake and will track through to physical delivery. We are shipping a further 23 units next week to Ingram. We already shipped 28 units to Ingram France, we will follow up with them to understand how they allocated those units we already shipped to them"

⁶⁰⁷ Classification mark 34730 to 34738, original version: " I don't see IConcept in Pau either iSwitch a Amiens, in the attached below list, I do assume this is due to the fact that you've managed it manually? I'm sure they have received the new Ipod"⁶⁰⁷. The wholesaler replies as follows: "They are in the scope, P... will provide detail. Below is the official list- we did your requests under the radar but it is done"

⁶⁰⁸ Classification mark 34730 to 34738, free translation "Ils sont dans le champ, P... fournira des détails. Voici la liste officielle - nous avons fait vos demandes sous le radar, mais il est fait".

⁶⁰⁹ Classification mark 27662

690. The argument of Ingram Micro, whereby the case file documents would not demonstrate the existence of retaliatory measures, is thus not founded. With regard to the argument by Tech Data that it continued to receive the logistic rebate granted by Apple even when it deviated from the recommended allocations, it fails to convince, insofar as the rebate was intended to reward the wholesalers for implementing stock management tools maximising the reselling of Apple products, and not for compliance with the allocations.
691. The monitoring was also implemented on the retailers themselves. For example, an e-mail in December 2012, sent by an indirect APR to Apple France, shows that the latter penalised it because, having not received sufficient stock from Apple, it obtained supplies directly from the Apple Store to fulfil the orders of its customers. Apple consequently cancelled its order immediately: "finally the last straw yesterday: I order several products on the Apple Store which I buy at full price and yesterday [Apple] called me to cancel my order for 10 MC573F/A saying that those products were reserved for the end customers and that they had been ordered to monitor the orders of resellers such as us so that we cannot sell those products!"⁶¹⁰.
692. In its response to that e-mail, an Apple France manager, not denying the facts, asks an Apple France employee to remedy the problem discreetly: "keep this mail to yourself ... but please see what you can find for him"⁶¹¹.
693. Lastly, an e-mail on 27 January 2013 establishes that the wholesalers made sure of compliance with the allocations decided by Apple. As Ingram Micro wrote to Apple: "Can you confirm to me that tech data must play the game because I learn that parts have been given to non-APRs"⁶¹². The fact that the wholesalers are anxious that the practice be complied with by each of them demonstrates not only their interest in taking part in it but also the central role played by Apple as guarantor of its correct implementation.
694. Contrary to the arguments by the parties involved, Apple effectively implemented a mechanism for monitoring its wholesalers and retailers to ensure effective compliance with its allocation policy.

❖ Need for the mechanism in order to supply each distributor during "constraint" periods

695. Apple considers that the product and clientele allocation policy that it implemented through the wholesalers, covering their customers and the products to deliver, was intended to enable each distributor to be supplied with products not readily available during "constraint" periods. In particular, the practice had, in such periods, avoided the immediately available volumes being taken up by one or two major distributors (such as the supermarkets/hypermarkets or retailers), and meant that the APRs, shop windows of the Apple brand, could have products available as quickly as possible throughout.
696. Nevertheless, the pertinence of that argument is called into question by certain documents in the case file, which demonstrate that the product and clientele allocations were also applied outside the "constraint" periods, as discussed in paragraphs 302 et seq. concerning the iPad and 305 et seq. concerning the other products). The application of this mechanism thus did not have the sole objective of protecting the small distributors in "constraint" periods, contradicting Apple's argument.

⁶¹⁰ Classification marks 30726 to 30729

⁶¹¹ Classification marks 30726 to 30729

⁶¹² Classification mark 30527

697. Moreover, when Apple, in its observations in response to the statement of objections, defines the concept of "constraint" as a period where "the demand exceeds the supply", "whether because of industrial or transport problems, or when Apple has underestimated the demand (any future prediction being uncertain by nature)", it appears that it was capable of generating such a situation itself, by underestimating the demand for certain of its products at the production stage.
698. Consequently, given the essentially subjective character of the concept, Apple was in a position to control the outlets of its wholesalers by invoking a "constraint" situation that it could itself generate artificially. In an internal document, Tech Data commented that "Apple is an atypical supplier whose strategy is based on shortage"⁶¹³.
699. The lack of objectivity of the "constraint" concept as used by Apple is emphasised by the fact that nothing in the case file demonstrates that Apple attempted to diminish the impact of such periods, on one hand by logging all the "constraint" periods with their duration and their causes and, on the other hand, by setting up an alert system, and lastly by attempting to remedy their main causes where possible. If the constraint episodes mainly had external causes, Apple would have in all likelihood introduced such a mechanism. In fact, as the Apple representatives stated in hearings, "strictly speaking there is no alert system when we are in a constraint period"⁶¹⁴. Moreover, Apple indicated during the investigation that it was incapable of giving a precise and exhaustive list of all the "constraint" periods during the years 2010-2014, as it did not have a tracking indicator for such episodes⁶¹⁵.
700. Lastly, the "constraint" and product shortage situations put forward by Apple can only be strongly put into perspective in comparison with the quantities actually available on the retail market, in particular within Apple's internal distribution channels such as the ARSs. The case file documents show that in certain cases, when the independent specialist distributors (APR) were receiving only limited quantities of "constraint" products from the wholesalers, at the same time they were experiencing strong competition by the Apple Stores or the Apple Online Store, which benefited from wide availability of the same products⁶¹⁶. The same availability was also observed at the retailers.
701. Given this information, and in particular the artificial character of the "constraint" concept, the circumstance that the APRs might have been given preference at certain times over the retailers does not call into question the overall assessment of the sufficient degree of harm of the alleged practice. Apart from no document in the case file seriously backing that assertion, other less anticompetitive means could have been found, such as the "forecast" policy implemented by Apple in 2013.

❖ The "fair share" objective

702. According to Apple, the purpose of the product and clientele allocations policy was to comply with the "fair share" principle, that is to say equitable sharing of the available quantities between the approved wholesalers, as discussed in paragraphs 225 to 232 hereinabove.

⁶¹³ Classification marks 44928 to 44933.

⁶¹⁴ Classification mark 11342

⁶¹⁵ Classification mark 42059

⁶¹⁶ Classification marks 29641 to 29643

703. However, the mechanism described above was intended to maintain the respective market share positions of the two wholesalers, by steering the retail distributors (APRs and retailers) towards one or the other of them, on the basis of the past performance of each one.
704. It is apparent that in this regard the underlying mechanism of the system, far from countering the intrinsic harmfulness of the practice, was in fact likely to prevent, restrict or distort competition. As emphasised by Apple itself in its observations, the "fair share" mechanism was intended to freeze the state of the market, by allocating the available quantities according to the sales made during the previous trading year in each channel ("Prosumer" and "Retail"). For its upcoming commercial policy, each wholesaler was constrained by its previous performance, in terms of both distribution channel ("Prosumer" or "Retail") and Apple brand product⁶¹⁷. Consequently the wholesalers had no hope of freely conducting their commercial policy by product in each sales channel if in doing so they exceeded their past results, themselves constrained by the same mechanism.
705. The allocation generated by the "fair share" mechanism thus appears, in its very construction, able to restrict or distort competition.

c. Economic and legal context of the practices

❖ *Economic context*

706. Apple argues in its observations that the economic context is defined, first of all, by demand that is both cyclic (determined by the seasons and the product life cycles) and evolving (always demanding new products). Secondly, it is also characterised by industrial and logistic contingencies, and difficulty of forecasting future demand, in particular for new product categories such as the iPad. Lastly, Apple stresses the existence of intense inter-brand competition, emphasising innovation in particular, which has obliged Apple to adopt a "lean manufacturing" system, that is to say production in optimal quantities to meet the demand, while limiting costs.
707. As these arguments put forward by Apple with regard to the economic context in fact concern the concept of "stress", they have already been discussed in paragraphs 697 to 700 hereinabove.

⁶¹⁷ Classification mark 16813 (VNC) / 16112 (VC) cited in paragraph 349 of the Statement of Objections.

708. Exploiting its dual status as supplier and competitor of the wholesalers on the wholesale market, Apple was able to manage their commercial outlets and thus distort the competitive context. Contrary to what Apple argues in its observations in response to the statement of objections, competition between a supplier and its wholesalers is a pertinent factor to be taken into account in the economic context of an anticompetitive practice by object. The fact that this factor is not expressly mentioned either in the Commission guidelines on vertical restraints, nor in its guidelines on horizontal cooperation agreements, does not call this analysis into question.
709. The horizontal cooperation agreements do not in practice apply to this specific case⁶¹⁸.
710. Moreover, the fact that the vertical guidelines do not expressly mention this factor in the context of analysis of the economic context does not necessarily mean that it must not be taken into account when required by the circumstances, as in this case.
711. Although a supplier is free to organise its distribution network by distinguishing between several channels and using wholesalers to market to certain retailers, while itself directly supplying other retailers, it is subject to this division of tasks not leading to anticompetitive practices. The organisation by Apple of its distribution network, consisting in reserving for itself the active sales to the direct clientele of the Apple Stores and of its Apple Online Store website, is thus not in itself contrary to the competition rules. On the other hand, that organisation of distribution could not authorise Apple to restrict the commercial freedom of its wholesalers and limit them to the execution of product allocations decided by Apple, particularly as they supplied the indirect APRs and retailers exclusively and the direct APRs and retailers in competition with Apple itself. This system resulted in distortion of competition on the wholesale market by total control of the sales made by the wholesalers.
712. Furthermore, the anticompetitive character of the practice appears all the more established in that it was associated with a very precise monitoring system set up by Apple on all its partners, using the information gathering mechanism discussed previously. As stated in paragraph 50 of the guidelines on vertical restraints, "These practices are even more likely to be viewed as a restriction of the buyer's sales when used in conjunction with the implementation by the supplier of a monitoring system aimed at verifying the effective destination of the supplied goods, e.g. the use of differentiated labels or serial numbers". This system not only gave Apple a very precise view of the commercial activity of its partners (by gathering and cross-referencing the information), but also allowed it to manage in detail the supply of its wholesalers according to their sales and to the business of their resellers.

⁶¹⁸ Paragraph 12 of those horizontal cooperation agreements states: "Therefore, vertical agreements between competitors fall under these guidelines", unless "competitors enter into a non-reciprocal vertical agreement and (i) 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, or (ii) the supplier is a provider of services at several levels of trade, while the buyer provides its goods or services at the retail level and is not a competing undertaking at the level of trade where it purchases the contract services. Such agreements are exclusively assessed under the Block Exemption Regulation and the Guidelines on Vertical Restraints (see Article 2(4) of the Block Exemption Regulation on Vertical Restraints)."

713. Through its product and clientele allocations, enabling it to manage the outlets of its wholesalers and implement a stable partition of the wholesale market between its wholesalers and itself, Apple thus limited the competition that could be applied by its approved wholesalers, not only with each other, but also with Apple.
714. In consequence, in this context, the practices related to product and clientele allocation implemented by Apple and its wholesalers have, by their very nature, affected the functioning of competition on the wholesale market.

❖ Legal context

715. Analysis of the anticompetitive object of the practices requires taking into account the legal context in which they are implemented, and in particular changes in the legal framework.
716. As Apple states, the practice at issue was implemented within the framework of an open distribution system, based on independent and autonomous economic operators, and took place outside any selective or exclusive distribution framework. Commercial relations between Apple and its approved wholesalers were not based on any agency or subcontracting contract, nor on any other contract that might have transferred the commercial risk to Apple.
717. In that context, the wholesalers should have been able to conduct their commercial policy freely.
718. In consequence, the product and clientele restriction practice implemented by Apple and its wholesalers was in practical terms, given the economic and legal context, likely to restrict competition on the market.

d. Conclusion

719. It follows from the evidence provided hereinabove that the practice of allocating customers and products between the approved wholesalers and Apple has, by its content, its objectives and the legal and economic context in which it was implemented, restricted intra-brand competition on the sale of Apple brand products (other than iPhone) between the wholesalers and Apple and between the wholesalers themselves on the consumer IT and electronic product wholesale distribution market.
720. Through its harmfulness, this practice thus constitutes a restriction of competition by object in the meaning of Articles 101(1) of the TFEU and L. 420-1 of the French Code of commercial law (Code de commerce).
721. It should nevertheless be investigated whether the practice at issue can benefit from exemption under Articles 101(3) of the TFEU and L. 420-4 of the French Code of commercial law (Code de commerce).

c) Granting of a block exemption

1. Hardcore restriction of clientele

722. In this case, as set out in the preceding paragraphs, the object of the actions of Apple with a view to limiting the clientele to which the wholesalers could sell their products was to restrict "the customers to whom the buyer may sell the contract goods or services", in the meaning of Article 4 b), i) of the exemption regulation cited hereinabove.
723. As demonstrated previously, Apple regularly informed the wholesalers, by binding recommendations both within and outwith so-called "constraint" periods, of the category or

even the identity of customers to which deliveries were to be made, the type of products concerned, and their quantities. By deciding instead of the wholesalers on their commercial outlets, Apple thereby directly restricted their clientele.

724. It follows from the above that the practice of clientele and product restriction at issue constitutes a hardcore restriction in the meaning of the exemption regulation cited previously, and consequently cannot benefit from the exemption mechanism defined by Article 2 of that regulation.
725. According to Ingram Micro, Tech Data and Apple, it follows from paragraph 23 of the European guidelines of 27 April 2004 on Article 81(3) of the TFEU that the practice of allocations at issue cannot be qualified as restriction by object, and as hardcore restriction, because it is not "absolute".
726. However, it should be emphasised that Article 23 of the said guidelines merely states that "Non-exhaustive guidance on what constitutes restrictions by object can be found in Commission block exemption regulations, guidelines and notices" and that "Restrictions that are black-listed in block exemptions or identified as hardcore restrictions in guidelines and notices are generally considered by the Commission to constitute restrictions by object". It is specified that "As regards vertical agreements the category of restrictions by object includes, in particular, fixed and minimum resale price maintenance and restrictions providing absolute territorial protection, including restrictions on passive sales", this listing not being exhaustive (underlining added).
727. The consequences suggested by the accused thus do not follow from these provisions, as the guidelines refer only to restrictions providing territorial protection, not to restrictions of clientele. Furthermore, the circumstance that the reseller customers were divided by Apple between the wholesalers case by case, where each reseller could be supplied in turn by either one, and not by clientele, in general, does not change anything in the characterisation of the practice, as the wholesalers could not compete with each other or with Apple.
728. Lastly, as shown previously, the practices at issue were implemented as part of a very precise monitoring system implemented by Apple, using the detailed information communicated regularly to it by all of its commercial partners, enabling it to verify not only the real destination of the delivered goods but also that its delivery allocation decisions were effectively complied with by the wholesalers.

2. Exceptions defined by Article 4 b) of the regulation 2790/1999

729. In its written submissions, Apple argues that the practice at issue is less serious than the practice defined by Article 4(b)(i) of the exemption regulation cited hereinabove, which does not constitute a hardcore restriction of clientele. In consequence, the practice at issue could be even less qualified as hardcore restriction of clientele.
730. Article 4(b)(i) of the exemption regulation cited previously removes from the benefit of block exemption vertical agreements which, directly or indirectly, in isolation or in combination with other factors under the control of the parties, have as their object the restriction of "the customers to whom, a buyer party to the agreement (...) may sell the contract goods or services (...), except (i) the restriction of active sales (...) to an exclusive customer group reserved to the supplier or allocated by the supplier to another buyer, where such a restriction does not limit sales by the customers of the buyer".
731. In paragraph 51 of its guidelines on vertical restraints, the Commission defines the two conditions to be satisfied for this exception to be applied. First of all, the clientele must be

allocated exclusively. This condition is satisfied when " when the supplier agrees to sell his product only to one distributor for distribution [...] to a particular customer group and the exclusive distributor is protected against active selling [...] to his customer group by the supplier and all the other buyers of the supplier inside the Union, independently of the sales of the supplier". This protection of exclusive customer groups must permit passive sales to such customer groups.

732. In this case, as stated by Apple on several occasions in hearings, the distribution system that it set up was open, non-selective and non-exclusive⁶¹⁹. Consequently no exclusive clientele had been allocated by Apple to each of the wholesalers in the contracts signed between the parties. Apple thus cannot claim an exception that it excluded deliberately. The consequence of the distribution model designed by Apple should have been that the wholesalers, not protected from active sales to their clientele, could have competed with each other on the wholesale market and also compete with Apple on that market. Moreover, with Apple, by choosing in practice to allocate customers to its wholesalers in a piecemeal manner, and deciding whether to switch those customers from one wholesaler to the other, the wholesalers could not compete with each other either actively or passively.
733. It follows from the above that the practice at issue, constituting a hardcore restriction in the meaning of the regulation cited previously, cannot benefit from the exemption provided for by Article 4(b)(i) of that regulation.
734. The argument by Apple according to which the practice at issue, as it is less serious than that concerned by the exemption provided for by the said regulation, should *a fortiori* benefit from the block exemption, is not pertinent. In fact, the case defined in Article 4(b)(i) of the regulation is, on the contrary, less anticompetitive than the allocation policy implemented by Apple. Allocation of an exclusive clientele effectively leaves an underlying passive competition, with each retailer free to approach each wholesaler (passive competition), whereas the system adopted by Apple eliminated both passive and active competition.
735. Furthermore, the *Autorité* notes that the other exceptions provided for in Article 4(b) of the exemption regulation – which are moreover not mentioned by Apple in its observations – are also not applicable to this case, as the situations defined are not comparable to the facts of this case.

3. Individual cases of hardcore restrictions which may not fall within the scope of Article 101(1) of the TFEU

a. Applicable principles

736. Apple argues that the practice in question relates to exceptional cases of hardcore restrictions that cannot fall within the scope Article 101(1) of the TFEU, by virtue of Article 60 of the guidelines on vertical restraints.
737. As stated by the Commission in its abovementioned guidelines on vertical restraints (paragraphs 60 and following), there are individual cases where hardcore restrictions may not fall under Article 101(1) of the TFEU.
738. The Commission states that these cases only occur “under exceptional circumstances”.
739. First, these may be hardcore restrictions which are “objectively necessary in exceptional cases for an agreement of a particular type or nature”, such as “to ensure that a public ban

⁶¹⁹ Classification mark 14932

on selling dangerous substances to certain customers for reasons of safety or health,” (paragraph 60 of the guidelines on vertical restraints).

740. Secondly, according to the guidelines, these exceptional cases can also apply to the first round of selling, which can specifically cover two situations.
741. First, the distributor can make a “genuine entry” onto the market (either by being the first to sell a new brand, or the first to sell an existing brand in a new market). In this case, the distributor may want to enter a distribution agreement with the manufacturer or supplier containing clauses protecting its interests given its often irrecoverable expenses, agreed upon to launch and establish the brand or to create and develop the new market. The protections thereby requested of the manufacturer or supplier (exclusive distribution, restrictions on the passive sales of other distributors) “generally fall outside the scope of Article 101(1) during the first two years [...], even though such hardcore restrictions are in general presumed to fall within the scope of Article 101(1)” (paragraph 61 of the guidelines on vertical restraints). To not fall within the scope of Article 101(1) of the TFEU, these restrictions must still be “necessary for the distributor to recoup those investments” (paragraph 61 cited above).
742. Then, the first round of selling can correspond to the situation in which the supplier has the intention of “genuine testing of a new product in a limited territory or with a limited customer group and in the case of a staggered introduction of a new product” (paragraph 62 of the guidelines on vertical restraints). The supplier may then restrict the “active selling [of designated distributors] outside the test market or the market(s) where the product is first introduced without falling within the scope of Article 101(1)” (paragraph 62 cited above). However, to not fall within the scope of Article 101(1) of the TFEU, these restrictions must be used for the “genuine testing of a new product” and are only acceptable for “the period necessary for the testing or introduction of the product” (paragraph 61 cited above).
743. The *Autorité de la concurrence* therefore concluded that the risk of harming competition can be ruled out if exclusivity is given when products are launched, provided that it is based on genuine economic rationale enabling the emergence of a new service and that it is acceptable in its field, scope and term⁶²⁰. This type of exclusivity is therefore examined in relation to numerous factors, such as the associated share of demand, the term of agreements, the termination and renewal conditions, atomistic competition, etc.

b. Application in this case

744. In the present case, first, it is important to rule out the possibility of considering that Apple’s allocation policy does not fall within the scope of Article 101(1) of the TFEU, in that the hardcore customer restriction in question is objectively necessary for an agreement of a particular type or nature.
745. The distribution of Apple products cannot be compared with situations requiring compliance with a general ban on selling dangerous substances to certain customers for reasons of safety or health.
746. Secondly, as to the question of whether the customer restriction in question could be justified by the fact that the products concerned fall within the first round of selling, none of the case documents allow such a conclusion to be drawn.
747. The wholesalers never asked Apple for special protection, such as exclusivity, which would enable them to recover specific and significant investments associated with the sale of Apple

⁶²⁰ See Decision 08-D-10 of 7 May 2008 regarding practices implemented by France Télécom and France Télévisions in the catch-up television sector.

products. Therefore the customer restriction in question cannot be justified by the fact that the wholesalers participated in a “genuine entry on the market” of Apple products.

748. In addition, given the well-known reputation of the brand’s products and its commercial successes over the years, the evidence of the case does not point to any specific commercial risks, or therefore a desire to test the brand’s new products, for a limited period and in a limited territory or with a specific end customer group.
749. The systematic allocations implemented by Apple with its wholesalers over several months, and for the successive launches of each new iPad range in fact show that Apple’s strategy was in no way based on an objective to carry out limited testing of a new product. The customer restriction in question cannot therefore be justified by the fact that Apple had the intention of “genuine testing of a new product in a limited territory or with a limited customer group and in the case of a staggered introduction of a new product”.
750. Finally, there are also no grounds for Apple’s argument that the allocations in question were implemented under exceptional circumstances due to “constraints” on the products.
751. As explained above and contrary to Apple’s written arguments, the product and customer allocations in question also occurred outside any “constraint” periods.
752. Furthermore, as mentioned above, it is advisable to put into perspective the situations of “constraint” put forward by Apple with respect to the quantities actually available on the market, particularly within Apple internal distribution channels such as “Apple Stores”, in direct competition with APRs⁶²¹ (Paragraphs 250 to 257 above), despite Apple’s denials in this respect.
753. In addition, if hardcore restrictions do not fall within the scope of Article 101(1) of the TFEU when their aim is to limit the commercial risks during the first rounds of selling, it is not the case when managing supply problems or if demand exceeds production, and even less so when the manufacturer makes the deliberate choice to implement lean production to optimise its supply chain, as in the case in point.
754. In any event, even if real constraints affect the production of the brand’s products, as soon as the distribution system implemented by Apple is open and non-selective, the wholesalers must be fully able to fulfil their commercial responsibility to their customers, without the intervention of their supplier, even if the volumes of available products are limited.
755. It was with this intent that Apple began the widespread implementation of forecasts in 2013. Based on information provided by wholesalers, Apple now has the ability to better assess the volumes that need to be produced and deliver volumes adapted to wholesaler demand, without directly or indirectly intervening in their sales policy.
756. The hardcore restriction of customers in question therefore does not correspond to the exceptional cases mentioned in Paragraphs 60 and following of the European Commission guidelines.
757. Based on all this information, the practice of allocating products and customers implemented by Apple with the consent of the wholesalers constitutes a restriction of customers in accordance with Article 4(b) of Commission Regulation No 330/2010 of 20 April 2010.
758. Therefore, Apple cannot claim application of the block exemption provided for by the regulation.

⁶²¹ Classification marks 29641 to 29643

d) The granting of an individual exemption

759. In their observations, Apple and Ingram Micro argued that the restriction of competition caused by the allocation of products and customers described above, assuming, which they contest, that it exists, must theoretically benefit from an individual exemption based on Articles 101(3) of the TFEU and L. 420-4 of the French Commercial code (*Code de commerce*). According to them, the allocations promote economic progress and improve the distribution of Apple products to the benefit of consumers. They also argue that they are essential for achieving these objectives and in no way eliminate a substantial part of the competition.
760. Article 101(3) of the TFEU states: “the provisions of paragraph 1 may (...), be declared inapplicable in the case of any agreement or category of agreements between undertakings, any decision or category of decisions by associations of undertakings, and any concerted practice or category of concerted practices, which contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, and which does not: (a) impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives; (b) afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question.”
761. Similarly, Article L. 420-4 of the French Commercial code states: “the following practices are not subject to the provisions of Articles L. 420-1 and L. 420-2: (...) 2° Those for which the authors can prove that they have the effect of ensuring economic progress, including by creating or maintaining jobs, and that they reserve for users a fair share in the resulting profit, without giving the undertakings involved the opportunity to eliminate competition for a substantial part of the products in question. Those practices that may consist of organising, for agricultural products or products of agricultural origin, under the same brand or trade name, the production volumes and quality and the commercial policy, including by agreeing to a common transfer price, may impose restrictions on competition only insofar as these are essential to achieve this aim of progress.”

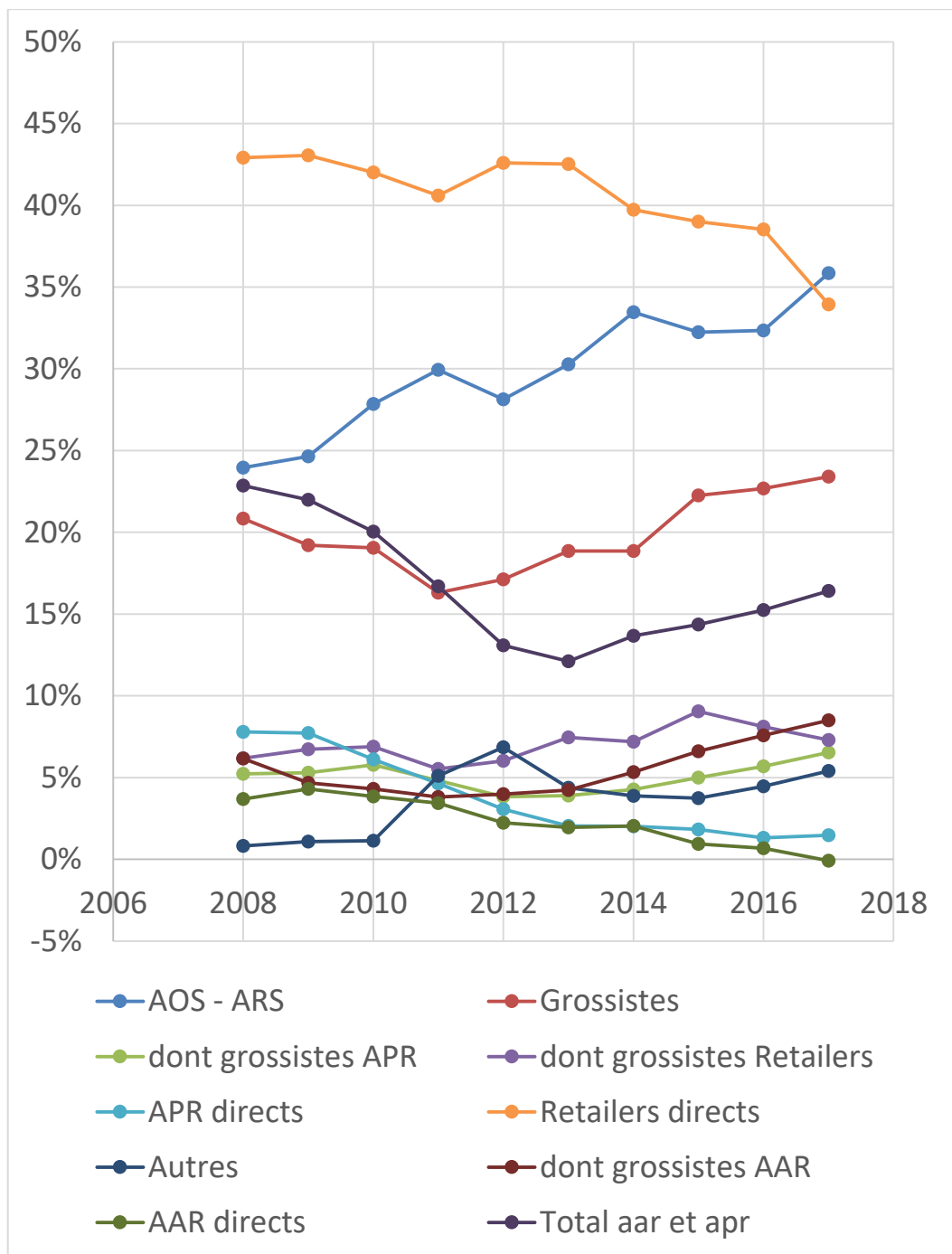
762. Article 2 of Regulation 1/2003 also states that “the undertaking or association of undertakings claiming the benefit of Article [101](3) of the Treaty shall bear the burden of proving that the conditions of that paragraph are fulfilled.” Both European and internal settled case law states that “(...) a person who relies on that provision must demonstrate, by means of convincing arguments and evidence, that the conditions for obtaining an exemption are satisfied”⁶²².
763. In this regard, in order to determine if an agreement contributes to improving the production or distribution of products, or promoting technical or economic progress, the *Autorité* must only examine the factual arguments and evidence provided by the company under its exemption request⁶²³.
764. Therefore in the case in point, it must be ascertained that these cumulative conditions are met.
765. Firstly, as regards the efficiency gains achieved by the allocation mechanism and essential nature of this restriction, Apple and Ingram Micro argue that the allocation mechanism in question discouraged Apple customers, including wholesalers and retailers, from exaggerating their order volumes.
766. The guidelines concerning the application of Article 81 [now Article 101](3) specify that Article 101(3) of the TFEU “requires that the efficiencies be specific to the agreement in question in the sense that there are no other economically practicable and less restrictive means of achieving the efficiencies” (paragraph 75).
767. In this context, the restriction of competition should be weighed against the essential nature of the agreement. Once again, according to the guidelines, “the more restrictive the restraint, the stricter the test under the third condition. Restrictions that are black listed in block exemption regulations or identified as hardcore restrictions in Commission guidelines and notices are unlikely to be considered indispensable” (paragraph 79).
768. In the present case, the efficiency gain represented by the allocation mechanism seems limited, while the restriction of competition is particularly significant.
769. Assuming that Apple only implemented its allocation mechanism during “constraint” periods, as it asserts, it could encourage retailers to increase their orders outside “constraint” periods in order to build up inventory that would be sold during “constraint” periods.
770. In addition, as the allocation mechanisms are based on the principle of “fair share”, i.e. fair distribution of available product volumes based on the orders placed, it was in the wholesalers’ and retailers’ best interest to order more products outside the constraint periods in order to obtain greater volumes of products allocated during “constraint” periods.
771. Apple’s aim to prevent wholesalers and retailers from exaggerating order volumes could therefore be amplified by the allocation mechanism, rather than reduce them, as argued by Apple and Ingram Micro.

⁶²² See judgment of the Court of Justice of 6 October 2009, *GlaxoSmithKline Services v Commission*, cited above, paragraph 82, and the case law cited; also see judgement of the the Court of Appeal of Paris of 14 December 2011, *Compagnie Emirates* and Decision of the *Autorité de la concurrence* 12-D-09 of 13 March 2012 on practices in the packaged flour sector.

⁶²³ See judgment of the Court of Justice of 6 October 2009, *GlaxoSmithKline Services v Commission*, cited above, paragraph 102.

772. This effect is even greater as “constraint” situations are frequent and unpredictable for wholesalers and retailers, who would therefore be even more driven to increase their stock outside “constraint” periods.
773. Furthermore, the parties have not provided any evidence that would show that there were no other means that would be economically feasible and less restrictive on competition than the allocations in question in order to achieve the same objective.
774. Whatever the case, as soon as Apple implemented its allocation mechanism during both “constraint” and “non-constraint” periods, the argument of efficiency gains does not stand.
775. In addition, with respect to the efficiencies gains from the sales forecasting carried out by Apple, the sophisticated information reporting system put in place, particularly for retailers, allowed it to produce accurate estimates of the level of demand and therefore prevent potential exaggerations of wholesaler and retailer orders from distorting its forecasts. Apple could therefore achieve these efficiency gains without resorting to such an allocation mechanism, with a method less harmful to competition.
776. It was with this intent that Apple declared to the investigation services that it began the widespread use of the forecasting mechanism in 2013. Based on information provided by wholesalers, the system gives Apple the ability to better assess the volumes that need to be produced and ship volumes adapted to its wholesalers so that they can meet their customer orders, without Apple intervening.
777. Consequently, the allocations in question are not necessary or proportionate to the efficiency gains cited.
778. On the contrary, the restriction of competition is particularly significant, in that it deprives wholesalers and retailers of their commercial freedom as stated in paragraph 711 above.
779. Therefore, for all these reasons, the condition related to the efficiency gains created by the restriction and its essential nature is not met.
780. Secondly, the benefits which Apple and Ingram Micro allege that this mechanism creates for the consumer and small retailers are not proven.
781. Firstly, contrary to what these companies argue, the allocation mechanism in question does not necessarily create better product distribution, whether in geographically or between the product distribution channels. Assuming that the allocation system results in each sales channel, each catchment area and each distributor within each sales channel effectively having Apple products, this allocation only changes the distribution of products, but not the total number. Due to the allocation, consumers who may not have needed products would receive them, but others who would have received them without the allocation did not receive them.
782. Furthermore, the risk of poor geographical distribution of products, without the use of the allocation practice at issue, is unlikely due to the fact that the major “Retailers” ensure good national coverage and are therefore *a priori* able to ensure even geographical distribution of Apple products.

783. In addition, there is little risk of the strategic product ordering conduct of distributors resulting in certain retailers taking longer to sell their products while others lack products, given the attractiveness of Apple products and the mobility of consumers between distribution channels. Furthermore, none of the case evidence shows that the stores likely to be less supplied than their competitors would provide services that other retailers would not be able to provide.
784. Next, the graphs presented by Apple in its observations in response to the report, comparing the first-level allocations carried out by Apple and those that would have resulted from a so-called “first in first out (FIFO)” mechanism, show that for four out of five product categories studied, the beneficiaries of Apple’s choices are direct resellers and not wholesalers meant to supply smaller retailers. This finding calls into question Apple’s claim that the beneficiaries of allocations were systematically “small” retailers.
785. Finally, as shown by examining the total sales allocated which Apple communicated in the graph below, stopping the alleged practices in 2013 did not deteriorate the situation of small retailers supplied by wholesalers (AARs and APRs). On the contrary, their weight in Apple product sales tends to increase, whereas that of direct APRs and direct AARs decreases. In general, the total weight of APRs and AARs increased slightly after 2013, after a significant drop during the previous years. Similarly, the weight of wholesalers in Apple product sales increased, not just with small customers, but also with major retailers (“Wholesalers, Retailer wholesalers):



AOS – ARS	AOS – ARS
dont grossistes APR	of which APR wholesalers
APR directs	direct APRs
Autres	Other
AAR directs	direct AARs
Grossistes	Wholesalers
dont grossistes Retailers	of which Retailer wholesalers
Retailers directs	Direct retailers
dont grossistes AAR	of which AAR wholesalers
Total aar et apr	Total AAR and APR

786. Therefore the alleged efficiency gains are not sufficiently convincing to compensate for the reduced competition between wholesalers, and between wholesalers and Apple, resulting from the practice at issue.
787. Consequently, the conditions required to benefit from an individual exemption are not met. Given the arguments put forward by Ingram Micro and Apple, they therefore do not have grounds to benefit from the provisions of Article L. 420-4 of the French Commercial Code or Article 101(3) of the TFEU.

e) Duration of the practice

1. Applicable principles

788. To determine the duration of an infringement of competition rules, it is necessary to identify the period of time between the date on which it began and the date on which it was ended⁶²⁴.
789. If there is no evidence directly establishing the duration of an infringement and its continuous nature, the *Autorité de la concurrence* must at least rely on evidence relating to actions that are sufficiently close in time for it to be reasonable to accept that the infringement continued uninterrupted between two specific dates⁶²⁵.

2. Application in this case

a. The starting point of the practices

790. According to the companies involved, assuming that the contentious practice is established, which they contest, the starting point is different than the date adopted by the investigation.
791. The parties involved first of all consider that the alleged practice cannot have as a starting point in December 2005, the date of an internal email at Apple.
792. According to Apple, said document concerned only allocations of products between two authorised wholesalers and only showed that the system which it implemented to distribute its products to its direct partners did not fully meet the needs of its “Apple Centers” (former APRs), which had to resort to wholesalers when they had stock shortages. For Ingram Micro, this email did not concern the alleged allocation mechanism, but reflected the division made by Apple between its direct and indirect sales. Tech Data considers that this document in no way indicates that Apple communicated allocation recommendations to Tech Data France, but simply shows the fact that it is legitimate that Apple concerns itself with the insufficient supply of Apple Centers and their frequent requests for additional supplies from wholesalers to make up for shortages.

⁶²⁴ Judgments of the Court of 27 July 2005, *Brasserie nationale v Commission*, T-49/02 to T-51/02, Rec. p. II-3033, paragraph 185, and of 5 December 2006, *Westfalen Gassen Nederland v Commission*, T-303/02, Rec. p. II-4567, paragraph 138

⁶²⁵ Judgments of the Court of 7 July 1994, *Dunlop Slazenger v Commission*, T-43/92, Rec. p. II-441, paragraph 79, and of 16 November 2006, *Peroxidos Orgânicos v Commission*, T-120/04, Rec. p. II-4441, paragraph 51; judgment of the Court of 5 April 2006, *Degussa v Commission*, T-279/02, Rec. p. II-897, paragraph 153

793. Therefore, on the basis of the case documents, Mingram Micro considers that the alleged practice began in September 2009, whereas, according to Apple and Tech Data, the first recommendations for allocations cannot be established before the launch of the first iPad, i.e. May 2010.
794. However, the internal email sent by Apple on 2 December 2005 shows that on said date, Apple was already deciding on the sales outlets for its wholesalers⁶²⁶. Indeed, the email clearly evokes the fact that Apple implements an allocation system (“Allocation problem: process too complicated and unreliable”⁶²⁷).
795. In addition, contrary to what Apple claims, the email does not just mention an allocation of products between the two authorised wholesalers that was meant to concern stock distribution by type of channel (“Retailer/Prosumer”) based on stock volumes and sales forecasts. It goes beyond this by evoking product allocation problems with customer accounts and by giving recommendations aimed at increasing, decreasing or redirecting reseller stocks.
796. Finally, by referring to the fact that “Apple Centers” buy products from wholesalers in the event of stock shortages, the email clearly shows that wholesalers must supply “Apple Centers” with sufficient quantities in the event of shortages, even though ACs theoretically receive their goods through an internal channel specific to Apple.
797. Wholesalers are therefore unable to freely do what they want with the product volumes which they nevertheless acquired in order to sell them to their own customers, which further limits their commercial freedom. The email therefore does concern product and customer allocations decided by Apple and carried out by the wholesalers.
798. Furthermore, in the report, the investigation services refer to an email from September 2005 sent by the APR iConcept to Apple regarding the delivery of iBooks with the subject titled “urgent iBook allocation.”⁶²⁸ The document shows that the customer, iConcept, is awaiting a delivery from Tech Data for a number of products, although the products are not considered as “constrained” and are available within 3 days on the “Apple Store”, and within 24 hours on FNAC’s website. The iConcept reseller therefore asks Apple for an urgent delivery.
799. This email demonstrates the fact that allocations of Apple products to resellers was decided by Apple and implemented by the wholesalers. If they did not receive the products in sufficient quantities on time, the resellers contacted Apple directly, as in this case, and not their designated wholesaler.
800. This email did not establish the date on which the practice in question in the statement of objections started, however it confirms the date established in the statement of objections as December 2005.

b. End of the practices

801. The case documents gathered mainly during surprise inspections which took place on the premises of the parties concerned on 26 June 2013 prove that the practice related to Objection no. 2 took place at least until March 2013.

⁶²⁶ Classification mark 26164

⁶²⁷ Classification mark 26164

⁶²⁸ Classification marks 26162 and 26163

802. Apple declares that it had implemented the “forecast” mechanism⁶²⁹ described above on said date. This mechanism enables Apple not only to better assess the needs of its sales partners, but also to adapt the production of its products, including iPads, even if this means that “in the event of constraint, the wholesaler manages the problem directly with its customers.”⁶³⁰ Now, according to Apple, the only impacts of “constraint” periods are an increase in the time it takes to ship products to wholesalers, without Apple intervening in their sales policy by issuing recommendations on the quantities that they must supply to their customers.
803. There is no evidence that the practice continued after March 2013.
804. Consequently, the customer restriction practice is established between December 2005 and March 2013 included.

f) Entities responsible for the practices

805. As established during the investigation, the alleged conduct of the second objection involves several entities.

1. The Apple group

806. The allocation mechanism implemented by Apple involves several entities of the Apple group, outlined below:

❖ Apple Sales International (ASI) and Apple Distribution International (ADI)

807. ASI (until March 2012) followed by ADI (starting in April 2012) were involved in several respects in the product and customer allocation practice implemented.
808. Firstly, the wholesalers entered the standard agreements mentioned in paragraphs 241 to 249 above with ASI.
809. Then, until 31 March 2012, ASI was in charge of the distribution and sale of Apple products in France, before ADI took over in this capacity.
810. Furthermore, as Apple declared to the investigation services, ASI, and later ADI, managed product shipments⁶³¹ and regularly distributed volumes between the wholesalers and various direct partners⁶³²: “Apple products are allocated by the Operations teams at ADI as follows. First, ADI allocates the available supply to each country in the EMEA region, based on sales forecasts in these countries. Secondly, the volume allocated to each country is then divided between the different distribution channels. As far as France is concerned, ADI divides the volumes between its approved wholesalers (IM and TD) and its various direct partners (for example, direct APRs) (...). In practice, at the end of the week, ADI provides each of the two wholesalers with a table describing for each product reference, the number of units that ADI plans to deliver to them, based on their target number of weeks of available stock and their sales forecasts.”⁶³³

⁶²⁹ Classification mark 19590 (VC) / 20953 (VNC)

⁶³⁰ Classification mark 34534

⁶³¹ See Apple statements: Classification mark 14765 (VC) / 14796 (VNC) - 34962 (VNC2) and classification mark 14766 (VC) / 14797 (VNC) - 34963 (VNC2)

⁶³² Classification marks 14190 (VC) / 14461 (VNC)

⁶³³ Classification marks 14191 (VC) / 14462 (VNC) and 34959 (VNC2)

811. Finally, ADI assisted Apple France in the allocation of products to indirect resellers⁶³⁴. In an email dated 25 April 2012, an ADI employee wrote to a manager at Apple France: “let’s agree how would be the best to help you to get this kind of info going forward that will help you in the indirect split.”⁶³⁵

❖ Apple France SARL

812. Apple France is the subsidiary that physically implemented the restrictive customer and product practices, with product and customer allocation recommendations mainly issued by employees of this company, who themselves received their instructions from ADI/ASI, as explained above.

❖ Apple Operations Europe (AOE)

813. According to Apple statements, “AOE handles the procurement and supply of Apple products for the EMEA region. AOE analyses demand forecasts, tracks inventory levels and places orders with various manufacturers in order to meet demand forecast estimates. To a lesser extent, AOE manufactures and assembles certain specific products in its plants in Cork, Ireland.”⁶³⁶
814. According to Apple statements, “from an operational standpoint, AOE has no relationship with Apple France.”⁶³⁷ “From an operational standpoint, the back-end role of AOE has nothing to do with the front-end role of Apple France, which assists ADI in the actual distribution of Apple products in France.”⁶³⁸
815. It appears in practice that this company was indirectly involved in the sale of Apple products in France. Apple itself explains that “in practice, in order to carry out its role, AOE can require information related to demand or the distribution of Apple products in the various markets of the EMEA region, including France. In this context, the employees of AOE may contact employees Apple France employees in order to access information related to demand or demand forecasts for Apple products in France. In the same way, employees at Apple France may contact employees at AOE in order to ensure that they take into account certain specific aspects of demand on the French market, particularly to establish demand forecasts. Overall, AOE plays a role in coordinating the distribution of Apple products in the French market in that it provides a number of services to ADI, which is the entity with a significant key role in the business, especially by managing orders and processing future urgent orders from customers.”⁶³⁹

⁶³⁴ Classification mark 26894

⁶³⁵ Classification mark 26894

⁶³⁶ Classification mark 34666 (VC) / classification marks 34875 and 34876 (VNC) - 34979 (VNC2)

⁶³⁷ Classification mark 34666 (VC) / classification marks 34875 and 34876 (VNC) - 34979 (VNC2)

⁶³⁸ Classification mark 34684 (VC) / 34873 (VNC) - 34980 (VNC2) and classification mark 34685 VC / 34874 (VNC) - 34981 (VNC2)

⁶³⁹ Classification mark 34684 (VC) / 34873 (VNC) - 34980 (VNC2) and classification mark 34685 VC / 34874 (VNC) - 34981 (VNC2)

816. A number of case documents confirm the role of AOE in the allocations which Apple decided to implement with the wholesalers. In particular, AOE sends the NPI Pro / retail table which is used by Apple France to allocate products to direct and indirect resellers⁶⁴⁰. In an email dated 12 April 2012, a representative of AOE wrote to employees at Apple France: “Hi Team, Please find attached detail of the Wk3 New iPad allocation as per your desired split respecting RTM fair share.<New iPad Alloc Model TOS Wk3.xlsx> Unfortunately I am unable to furnish the Allocation file for review at this stage as SAT issues have been evident during the course of the day. Currently being resolved. I have however attached the iPad allocation download from SAT to accompany your file. <Allocation Quick Fix Download.xls> Donal will endeavor to get you details of the allocation as early as possible tomorrow (time is depending on availability of SAT)”⁶⁴¹.
817. Furthermore, AOE asked to be informed regularly of allocations and priorities given to deliveries⁶⁴². In an email dated 6 September 2011, an AOE employee wrote to an employee at Apple France: “Could you please advise re availability of Thunderbolt displays and cables?”⁶⁴³ to which the Apple France employee replied: “We are talking about 9 x MC914ZM/A and 5 x MC913ZM/A. The Partner, Corse Informatique Développement, is an APR LAR. Order through Ingram (Distie).”⁶⁴⁴
818. Likewise, in an email dated 24 April 2012, an Apple France employee wrote to several AOE employees: “As agreed, please find the untreated backlog for IM and TD on the positioning of the PRO with reseller details,” to which she attached two tables, one for Tech Data and the other for Ingram Micro⁶⁴⁵.

❖ *Apple Europe Limited (AEL)*

819. The case includes evidence that AEL was involved in the allocations which Apple implemented with the wholesalers, either by directly intervening with ASI (later ADI), or by intervening indirectly with Apple France.
820. The case includes several pieces of evidence that AEL was involved in the allocations which Apple implemented with the wholesalers, either by directly intervening with ASI (later ADI), or by intervening indirectly with Apple France.
821. According to Apple statements, “Apple Europe Limited provides marketing and management services to other entities in the Apple group, such as ADI (this includes legal, human resources management or accounting services).”⁶⁴⁶

⁶⁴⁰ For example, classification marks 27057, 27705 and 27708

⁶⁴¹ Classification mark 27706

⁶⁴² For example, classification marks 25908 to 25912 (VNC) / 11354 to 11358 (VC), classification mark 10178 (VC) / 23554 (VNC), also see classification marks 26289, 26298, 26356, 26806 to 26807 (“c/ **Deliveries on credit blocked - 440 units** blocked as we speak for Alis Informatique, Ephesus, GDA, O2I – N..., can you please review and advise when can you release those deliveries?”).

⁶⁴³ Classification mark 11356 (VC)

⁶⁴⁴ Classification mark 11356 (VC)

⁶⁴⁵ For example, classification mark 27077

⁶⁴⁶ Classification mark 34666 (VC) / classification marks 34875 and 34876 (VNC) – 34979 (VNC2)

822. Apple underlines that “in practice, and insofar as ADI duties include the distribution of Apple products in France, the employees of AEL are frequently in contact with the employees of Apple France concerning various issues related to the French market.”⁶⁴⁷ Furthermore, several emails seized during inspections reveal that AEL partially supervised the activity of Apple France⁶⁴⁸, as illustrated in an email dated 7 September 2010, sent by an Apple Europe Limited employee to an Apple France employee: “Attached is an iPad velocity report updated for week 10 actuals. It is key that we ensure any allocations coming into the countries are put in the right place to ensure those with inventory are not building more and those who are short are getting their share to maximise the sell through.” Informed of this exchange, an Apple France employee forwarded the email to other Apple France employees on 9 September 2010, specifying: “Guys, see Mark’s email and the content of the attached file. We have big differences between Prosumer partners on the rotation of iPad stock... We need to review the forecasts for each reseller so that they are aligned with their actual potential, we avoid creating overstocks, and we send the iPads to the right places so we optimise our ST. Thanks for your support.”
823. Finally, Apple Europe Limited also gives directives for “channel rationalization”, particularly concerning the criteria for obtaining direct or indirect reseller status, and the way in which allocations are distributed in these different cases⁶⁴⁹.
824. In April 2012, following a problem with product allocations to an indirect APR, internal email exchanges between ADI and AEL representatives show ADI’s involvement in micro-management with Ingram Micro in order to ensure that Ingram Micro would deliver the quantities instructed by ADI to their customers. An ADI representative wrote: “The APR below, iTake is indirect and serviced via Distribution in France, specifically by Ingram France. We are expediting 5 units to Ingram so they can support the 2 units needed by iTake. We will micro-manage to ensure Ingram allocate to iTake and will track through to physical delivery. We are shipping a further 23 units next week to Ingram. We already shipped 28 units to Ingram France. We will follow up with them to understand how they allocated those units we already shipped to them.”⁶⁵⁰ The Apple Europe representative who received the email responded: “This is a very interesting case in the way that it demonstrates the difficulty to satisfy demand through disties. It is important that we find a way this to never happen again, possibly by a screening of all pending orders and ageing of them for critical partners as APRs.”⁶⁵¹

❖ Conclusion

825. On the basis of the foregoing, Apple France, Apple Sales International (ASI), Apple Distribution International (ADI), Apple Operations Europe (AOE) and Apple Europe Limited (AEL) must be considered as co-offending parties in the practice of customer restriction, penalised under Objection no. 2.

2. *The wholesalers*

826. Having agreed to allocate volumes of available products to their customers according to Apple recommendations, during periods of “constraint” and “non-constraint”, as explained

⁶⁴⁷ Classification mark 34684 (VC) / 34873 (VNC) – 34980 (VNC2)

⁶⁴⁸ For example, see classification marks 26986 to 26988 or classification marks 26721 to 26722

⁶⁴⁹ For example, see classification marks 27281 and 27282

⁶⁵⁰ Classification mark 26329

⁶⁵¹ Classification mark 26329

above, Tech Data France SAS and Ingram Micro SAS must be considered as having employed the practice in question.

g) Conclusion concerning Objection no. 2

827. On the basis of the foregoing, the Apple group – through its Apple France subsidiaries Apple Sales International (ASI), Apple Distribution International (ADI), Apple Operations Europe (AOE) and Apple Europe Limited (AEL) – and Tech Data France and Ingram Micro agreed on customer restriction practices over a period ranging between December 2005 and March 2013.

3. WITH REGARD TO RETAIL PRICE MAINTENANCE (OBJECTION NO. 3)

a) Applicable principles (on the standard of proof for resale price maintenance)

1. Demonstration of a joint intention of the parties

828. Established decisions and case law in European and internal law show that proof of a vertical agreement requires, first, proof that the parties expressed their joint intention to conduct themselves on the market in a specific way⁶⁵².
829. According to the European Court, the proof of such an agreement “must be founded upon the direct or indirect finding of the existence of the subjective element that characterises the very concept of an agreement, that is to say a concurrence of wills between economic operators on the implementation of a policy, the pursuit of an objective, or the adoption of a given line of conduct on the market, irrespective of the manner in which the parties’ intention to behave on the market in accordance with the terms of that agreement is expressed.”⁶⁵³
830. A joint intention of the parties may be proven by any means, bearing in mind that the European Court of Justice considers that if there is documentary or contractual evidence, there is no need to examine additional conduct-based evidence⁶⁵⁴.
831. In its judgement of 7 January 2004, *Aalborg Portland e.a v Commission* (Case C-204/00), the European Court of Justice qualifies “direct documentary evidence” as sufficiently explicit documents, such as memoranda, statements, minutes of meetings, draft agendas or notes taken during meetings (paragraph 237).

⁶⁵² Judgments of the Court of Justice of 15 July 1970, *ACF Chemiefarma v Commission*, 41/69, Rec. p. 661, paragraph 112, of the Court of 26 October 2000, *Bayer v Commission*, Case T-41/96, Rec. p. II-3383, paragraph 67 and of the Court of Appeal of Paris of 28 January 2009, *Epsé Joué Club*, 2008/00255, p. 9, which became definitive after the judgments of dismissed appeal of the French Supreme Court (*Cour de cassation*) of 7 April 2010.

⁶⁵³ Judgment of the Court of 26 October 2000, *Bayer v Commission*, T-41/96, paragraph 173.

⁶⁵⁴ For example, see judgement of 6 October 2009, *GlaxoSmithKline Services v Commission*.

832. The Court of Appeal of Paris followed this case law by iterating in a judgement of 16 January 2020 (*Société Canna France*, no. 19/03410, p. 8) that a joint intention of the parties may be proven by any means. The court also stated in the same judgement that in the presence of direct or clear evidence resulting from documents or contractual clauses, “it is not necessary to resort to indirect or conduct-based evidence constituting compelling, precise and consistent evidence, implicating the characterisation of a significant or effective application by the distributors of the prices recommended by the supplier,” (p. 8).
833. As reiterated by the Court of Appeal in its judgement of 28 January 2009, *Espé Joué Club*, to demonstrate a joint intention of the parties, the *Autorité* must establish “the invitation of one party to the agreement to implement a practice, and the agreement of at least one other party to the invitation” (underline added).
834. In the case of resale price maintenance, the invitation of the head of the network to its distributors to participate in price fixing is generally proven via the dissemination of recommended selling prices to these distributors and the implementation of price monitoring to establish that the “recommended” prices communicated are in fact fixed prices.
835. Distributor agreement is generally proven by their actual implementation of said prices. This “three-pronged body of evidence” is therefore the most widely used form of proof used to establish a joint intention of the two parties when proving resale price maintenance. However, insofar as a joint intention of the parties may be proven by any means, contrary to what Apple argues, the *Autorité* shall not be required in any case to combine this three-pronged body of evidence if it has other documentary or conduct-based evidence that establishes the invitation of the manufacturer and the agreement of the distributors to the contentious practice.

2. Proof of the existence of a restriction of competition

836. In the case of price fixing, competition authorities must establish the existence of a restriction of competition, whereby the agreement in question must have “the purpose and effect of preventing, distorting or restricting retail pricing through fair competition.”⁶⁵⁵
837. Articles 101(1) of the TFEU and L. 420-1 of the French Commercial Code both set out a distinction between restrictions of competition by object or by effect.
838. In its judgement of 16 May 2013, *Kontiki* (no. 2012/01227, upheld by the French Supreme Court (*Cour de cassation*) in its judgement no. 13-19.476 of 7 October 2014), the Court of Appeal of Paris stated that “Articles 101(1) of the TFEU and L. 420-1 of the French Commercial Code prohibit agreements between suppliers and distributors which have the object or effect of preventing, distorting or restricting the setting of retail prices through free competition” (p. 5).
839. Specifically regarding fixed prices, the Court of Appeal of Paris underlined in the same judgement that “price fixing practices are considered by Commission regulation (EU) No. 330/2010 of 20 April 2010 as hardcore restrictions and as such, an agreement or concerted practice which directly or indirectly has as their object to establish a fixed or minimum resale prices which the buyer must comply with, is presumed to restrict competition.”

⁶⁵⁵ Judgement of the Court of Appeal of Paris of 16 May 2013, *Kontiki*, no. 2012/01227, upheld by the French Supreme Court (*Cour de cassation*) in its judgement no. 13-19.476 of 7 October 2014.

840. The European Commission guidelines of 19 May 2010 on vertical restraints⁶⁵⁶, which constitutes a useful analysis guide for national competition authorities, defines price fixing, or resale price maintenance as “agreements or concerted practices having as their direct or indirect object the establishment of a fixed or minimum resale price or a fixed or minimum price level to be observed by the buyer” (paragraph 48).
841. To illustrate the type of practices which aim to impose a resale price through indirect means, the Commission gives the following examples: “an agreement fixing the distribution margin, fixing the maximum level of discount the distributor can grant from a prescribed price level, making the grant of rebates or reimbursement of promotional costs by the supplier subject to the observance of a given price level, linking the prescribed resale price to the resale prices of competitors, threats, intimidation, warnings, penalties, delay or suspension of deliveries or contract terminations in relation to observance of a given price level” (paragraph 48).
842. Paragraph 48 of the guidelines also state that: “Direct or indirect means of achieving price fixing can be made more effective when combined with measures to identify price-cutting distributors, such as the implementation of a price monitoring system, or the obligation on retailers to report other members of the distribution network that deviate from the standard price level. Similarly, direct or indirect price fixing can be made more effective when combined with measures which may reduce the buyer's incentive to lower the resale price, such as the supplier printing a recommended resale price on the product or the supplier obliging the buyer to apply a most-favoured-customer clause” (underline added).
843. There are therefore various forms of price fixing practices, the most obvious of which is the signature of a distribution agreement by the supplier and its distributors requiring observance of supplier prices or its communication policy, or which prohibits certain sales techniques, such as rebates, sales promotions or, which grant rebates to distributors provided they observe given prices. They can also take on more complex forms and require analysis of the parties’ conduct, as underlined by the European Court of Justice in its judgement of 2 April 2009, *Pedro IV Servicios*, C-260/07: “It is for (the national court) to ascertain, account being taken of all the contractual obligations in their commercial and legal context, and if the conduct of the parties to the main proceedings, whether the retail price recommended by the supplier constitutes, in reality, a fixed or minimum sale price” (paragraph 79). “It is for the referring court, furthermore, to examine whether it is genuinely possible for the reseller to reduce that recommended sale price. It must, inter alia, ascertain whether such a retail price is, in reality, fixed by indirect or concealed means, such as the fixing of the reseller’s margin or the maximum reduction he can make from the recommended sale price, threats, intimidation, warnings, penalties or incentives” (paragraph 80).
844. In Decision 97-D-31 of 20 May 1997 on practices in the professional cleaning product distribution sector, the *Conseil de la Concurrence* stated that “price advantages granted by the supplier to its distributors, who expressly or tacitly accept them,” constitute advantages prohibited by agreement law, “if the rebates or price advantages are not clearly and objectively defined, or have the object or potential effect of limiting the commercial freedom of distributors.”
845. Finally case law of the European Court of Justice shows that certain types of coordination between companies, such as, but not limited to price agreements, intrinsically reveal a

⁶⁵⁶ European Commission Guidelines of 19 May 2010 2010/C 130/01 on vertical restraints, OJEU C 130/1.

sufficient level of detriment to competition that examining their effects is not considered necessary⁶⁵⁷.

b) Application in this case

846. Apple contests the existence of an agreement with its Apple Premium Resellers (APRs) on the resale prices of its products. It denies all the evidence retained by the investigation services and argues that if a retail price alignment is observed with APRs, it only results from parallel conduct and not an anticompetitive conduct.
847. However, the investigation revealed that Apple unambiguously asked APRs to implement the same prices as those in its Apple Stores or on its website (1). This was accepted by the APRs, who applied these prices (2).

1. Invitation of Apple to restrict the price freedom of APRs

848. Apple's invitation to APRs to align their resale prices with those of its Apple Stores is evidenced by the combination of documentary and conduct-based evidence produced by or attributed to Apple. Together, this evidence establishes that the prices communicated by Apple to the APRs are fixed minimum resale prices under paragraph 48 of the abovementioned guidelines on vertical restraints (a).
849. Apple also relied on its in-depth knowledge of the APRs and its control of their supplies and discounts to provide them with incentive to consider these "recommended" prices as fixed prices (b).

a. Fixed prices disguised as recommended prices

850. The communication of prices took on several highly incentive-based forms, such that they were designed by Apple and perceived by the APRs as fixed prices. Apple's control of APR promotions and price monitoring underscore this perception.

❖ Price communication

851. All retail prices for Apple products are available to the public on its website (Apple.com) and in its "Apple Stores". They are therefore generally known by the public (see the response of the APR Olys to the questionnaire of the investigation services cited in paragraph 344 above⁶⁵⁸). Furthermore, it was found that ASI (later ADI from 1 April 2012), through Apple France, regularly communicated its resale prices to the public and to APR resellers, which Apple does not contest (see paragraphs 334 and following). The fact that these prices are those which Apple itself applies in its bricks-and-mortar stores and on its website increase their incentive nature for APRs.

⁶⁵⁷ For example, see the judgements of the European Court of Justice of 11 September 2014, *Groupeement des cartes bancaires*, C-67/13, paragraphs 49 and 50; of 20 November 2008, *BIDS*, C-209/07, paragraph 15, and of 14 March 2013, *Allianz Hungária Biztosító e.a.*, C-32/11, paragraphs 34 and 35.

⁶⁵⁸ Classification mark 3604.

852. Although, as Apple underlines in its written arguments, it is not in itself illegal for a supplier to communicate price lists to its distributors or resellers, it is well-established that there is collusive agreement on the prices when the commitments of the distributor or the conduct of the parties result in these prices being in reality considered as fixed prices⁶⁵⁹.
853. Furthermore, the fact that the price lists communicated by Apple France on behalf of ASI (later ADI) do not expressly present an obligation to observe the prices does not rule out the qualification of fixed price. It is well-established in European Union law that the form in which the agreement is manifested is unimportant as long as it constitutes the faithful expression of the parties' intention⁶⁶⁰. This case law establishes that the analysis of the joint intention of the parties is not limited to the form which the parties agreed to give it, but its actual scope. The Court specified in the abovementioned *Bayer v Commission* judgement that "the proof of such an agreement within the meaning of Article [101(1)] of the Treaty must be founded upon the direct or indirect finding of the existence of the subjective element that characterises the very concept of an agreement, that is to say a concurrence of wills between economic operators on the implementation of a policy, the pursuit of an objective, or the adoption of a given line of conduct on the market, irrespective of the manner in which the parties' intention to behave on the market in accordance with the terms of that agreement is expressed"⁶⁶¹ (paragraph 173).
854. Similarly, the fact that the prices communicated are not directly and expressly qualified as fixed prices by Apple itself has no consequence on their effective nature⁶⁶².
855. In this case, several APRs explicitly expressed their perception of the prices communicated by Apple (whatever the medium by which they were communicated) indeed as fixed prices.
856. In this regard, the APRs Acti Mac and PC indicated: "The resale prices are published and communicated by Apple and are therefore imposed."⁶⁶³
857. Similarly, Corsidev stated: "Apple fixes the prices."⁶⁶⁴
858. The APR Mac Tribu stated "The prices for Apple products are determined by Apple. Following the release of a new product, we receive an email in the form of "network communication" indicating the recommended resale price. It is therefore highly advised to adhere to the price communicated by the manufacturer across all these distribution channels."⁶⁶⁵
859. In the same way, Easy Computer responded: "The resale prices for Apple products are fixed by Apple. These are retail prices recommended [sic] by the manufacturer."⁶⁶⁶
860. Furthermore, the evidence presented by Apple to argue that it did not intend to intervene in the pricing policy of its partner distributors does not call into question the existence of an

⁶⁵⁹ See judgement of the Court of Appeal of Paris of 26 January 2012, *Beauté Prestige International*, no. 2010/23 945, p. 44, not called into question by the judgement of 11 June 2013 of the French Supreme Court (*Cour de cassation*), appeal no. Y 12-13.961, B 12-14.401, A 12-14.584, N 12-14.595, Q 12-14.597, R 12-14.598, U 12-14.624, V 12-14.625, C 12-14.632, V 12-14.648.

⁶⁶⁰ Also see judgement of *Bayer v Commission*, T-41/96, Rec. p. II-3383, paragraph 69.

⁶⁶¹ Underline added.

⁶⁶² For example, see Decision 11-D-19 of 15 December 2011 on practices implemented in the fancy goods and toys distribution sector, paragraph 119.

⁶⁶³ Classification mark 4569.

⁶⁶⁴ Classification mark 3721.

⁶⁶⁵ Classification mark 4207.

⁶⁶⁶ Classification mark 5919.

invitation from Apple to its APRs to observe the prices which it communicated. The evidence cited by Apple in its written arguments, as regards a hypothetical “price war” between Apple product resellers, concerns prices charged by “Retailers” (who were not identified by the investigation services as participating in price fixing), rather than the prices implemented by APRs (see the statements of the APR Easy Computer concerning the existence of a price war between “resellers such as FNAC/DARTY/Boulangier”⁶⁶⁷ which Apple does not wish to end due to the principle of price freedom).

861. In this regard, the statements of the Darty representative, according to whom “To our knowledge, there are no prices recommended by Apple and if there were, we would not feel bound by these recommended prices. We always set our prices freely in consideration of market prices,” may illustrate the fact that a “Retailer” such as Darty does not feel bound by the prices communicated by Apple, but they do not rule out the existence of an agreement on prices between Apple and the APRs. The statements of the APRs, on the contrary, confirm the perception of Apple price recommendations as a mandatory constraint, directly resulting from the prices communicated (see paragraphs **Erreur ! Source du renvoi introuvable.** and following above) or the indirect measures implemented by Apple (see paragraphs 882 and following below).
862. It is also the prices charged by the “Retailers” and Apple itself to which the representative of the association of APRs in France refers in the report cited by Apple, as confirmed by the evidence in said report, which Apple minimises in its summons: “5 / The competition of retail and Apple: Apple does not want to address this problem, in the name of price freedom in France. In Europe, some retailers apply the price excluding VAT as the price including VAT (how do they do this??). [JM] confirms that Apple does not participate financially in these price operations, while our contacts at FNAC claim the opposite! He thinks that one day there will be violent backlash from the corporation against retailers who take advantage of this system and who distort the profitability of ARSs who align their prices. He does not deny that ARS do not align. He maintains that it is not Apple’s intention to fight over prices (...).”⁶⁶⁸
863. Likewise, the indication that appears on the wholesaler “PAS-DAC” prices list (see paragraphs 335 and following above), according to which “The wholesalers remain free to determine their own product resale prices,”⁶⁶⁹ besides the fact that it would not be enough to call into question the existence of indirect measures through which Apple restricts the price freedom of APRs, concerns the wholesalers (who are not identified as parties to the agreement), and not the APRs themselves.
864. Finally, Apple cannot claim the confidentiality and product launch agreement sent by one of its managers to the APR Youcast, according to which “For the avoidance of doubt, the reseller remains free to determine the price payable for the products and the terms of sales”⁶⁷⁰ to prove that APRs are not invited, especially indirectly, to observe the communicated prices, as will be established below.

❖ Promotions control

865. Paragraphs 469 and following above established that Apple strictly controls the ability of APRs to implement promotional actions due to the strong restrictions imposed by the various

⁶⁶⁷ Classification mark 5920.

⁶⁶⁸ Classification mark 657, underline added.

⁶⁶⁹ Classification mark 23 620.

⁶⁷⁰ Classification mark 817

contractual stipulations, for the use of the brand in communication and promotional materials. The stipulations in question force the APRs to use the media and materials imposed by Apple, or whose specifications strictly comply with Apple's style and marketing guides, when they want to implement promotions (see paragraphs 472 and following above). For example, for the iPad, the "marketing kit" for March 2013 expressly stipulated that promotional marketing actions around the iPad were prohibited.⁶⁷¹

866. Failure to comply with the stipulations of the Design Kit and Merchandising Guidelines constitutes grounds for immediate termination of the APR agreement, without notice (see Article 7.1 of the APR Addendum agreement cited in paragraph 463 above)⁶⁷².
867. Furthermore, any violations of the specifications imposed by Apple for in-store advertising can also be identified by Apple during store inspections ("mystery shoppers" and "merchandising audits") and be taken into consideration in the evaluation of the store in question. As established in paragraphs 428 and following above, these audits determine the granting and in some cases the amount of certain discounts essential to the profitability of APRs (functional discount and performance rebate).
868. Consequently, most APRs only implement promotional actions when they are initiated by Apple and when part of their cost is covered by Apple (see the statements to this effect of the APRs IFormatik Partner, ActiMac & PC, Alis Informatique, Andromac, Arcan IDF, Corsidev, Easy Computer, Ephesus, FX Système, GDA Mac Tribu, I Artificielle – for certain promotions -, MCS, MLife and Olys cited in paragraph 470 above).
869. Furthermore, during the investigation, certain APRs shared their awareness of a risk of retaliation – in the form of non-delivery – if they implemented promotions that were not authorised by Apple. For example, one APR, Youcast, stated, "If we applied discounts too systematically and the sales representative in our sector knew about it, our competitors could be given priority over us for deliveries"⁶⁷³ (underline added).
870. An internal email exchange at Apple, dated 6 and 7 September 2012 seized during the investigation, confirms the intention of Apple managers to intervene to call to order an APR that had offered a 10% promotional discount not covered by Apple at the launch of the iPad. Although, as Apple raises in its written arguments, its managers emphasise that they did not use "coercive methods" to prevent it from doing so, the Apple France APR senior manager nevertheless writes: "I suggest writing them a more formal email because as a party to an APR agreement, they must be consistent in their communication."⁶⁷⁴ The fact that even though conscious of the illegitimate nature of such a call to order, the Apple senior managers still planned to call to order the APR regarding its obligations related communication highlights the role played by Apple to control the promotional campaigns of APRs in monitoring and controlling their pricing policy.
871. Consequently, Apple's control of promotions restricts APRs, who cannot implement promotions on Apple products without being impeded, and plays a role in making them consider the prices communicated as prices that must be observed.

⁶⁷¹ Classification mark 10438.

⁶⁷² Classification mark 14 024.

⁶⁷³ Classification mark 3743.

⁶⁷⁴ Classification mark 34 937.

❖ Price monitoring

872. It was found that Apple has implemented several control measures that enable it, in practice, without requiring formal reporting from APRs, to monitor the prices which these APRs apply.
873. The first piece of evidence of the case which confirms the use of price monitoring measures by Apple is an email dated 19 March 2009 from Apple to the APR Inter-actif, which refers to the merchandising audit asking that photos be taken in the store (including the price tags that must be displayed). As Apple underlines in its written arguments, this document does not in itself constitute proof of price fixing. However, it points to implementation of one of the measures that allow Apple to monitor the prices implemented by APRs and contributes – along with a more extensive body of evidence including contractual stipulations related to APR obligations to protect the corporate image of Apple products (see paragraph 865 above), to establishing the prices communicated by Apple as fixed prices.
874. While the measures implemented by Apple in this regard appear to be measures to protect the corporate image of its products, it has been established that in reality, they were also a way to control the prices implemented by APRs, and as appropriate, deter these APRs from implementing promotions outside those adopted by Apple itself. As established in paragraphs 459 and following above, the inspections carried out by Apple include price labels and their press proofs (see paragraphs 458, 0 and following above). Furthermore, the complainant underlined that it could be contacted by Apple representatives in the event of non-compliance: “We know that Apple implements a retail price policy. In the event that prices are lower than Apple's retail prices, local Apple sales representatives contact us to ask us to raise prices.”⁶⁷⁵
875. The fact that in this case the price monitoring measures implemented by Apple do not rely on systematic store inspections or algorithms does not rule out the existence or effectiveness nature of the control. Given the extent of information available to Apple on the wholesale distribution of its products and their allocation (see paragraphs 118 and following above), as well financial information concerning APRs, such measures would be unnecessary.
876. The component of Apple's distribution network that relies on APRs is organised by the manufacturer such as to ensure that APR prices are aligned with those of “Apple Stores”. The way in which it is organised makes it difficult for competition authorities to detect the practice. Due to the system put in place by Apple, the APRs do not have sufficient room for manoeuvre to implement lower prices than those communicated to them, other than on an exceptional basis (see paragraphs 349 to 456 above). In this context, the existence of periodic inspections, through merchandising audits or mystery shopper inspections, is sufficiently dissuasive to deter APRs from deviating from the agreement, while enabling Apple to collect information on the promotional practices of audited APRs, which also enable Apple to assess impacts on the accounting and financial data of the relevant APRs.
877. In any case, and contrary to what Apple maintains in its written arguments, it must be reminded that under established case law, competition authorities are not required to produce proof of the active implementation of a pricing policy. The Court of Justice has stated that an agreement prohibited by Article [101(1)] of the TFEU does not necessarily imply that there was a system of subsequent monitoring and penalties⁶⁷⁶.

⁶⁷⁵ Classification mark 428.

⁶⁷⁶ See judgement of the CJEU of 6 January 2004, *Bayer*, C-02/01 P, paragraph 84

878. Furthermore, the European Commission guidelines on vertical restraints consider the implementation of threats, intimidation, warnings, penalties, delay or suspension of deliveries or contract terminations if a given price level is not observed only as a method for implementing resale price maintenance, so as to reinforce the effects thereof and not as an essential condition of its existence (abovementioned guidelines on vertical restrictions, paragraph 48).
879. Under French law, it has been established that a pricing policy can rely on a price monitoring system implemented by the supplier and that retaliation is just an extreme category of the actions in question⁶⁷⁷.
880. The fact that the offence includes a policy mechanism or retaliation measures is therefore not required to establish the existence of resale price maintenance. However, it is taken into account by the *Autorité* in its assessment of the seriousness of the offences⁶⁷⁸.
881. Finally, although the APRs I-Artificielle and Informatique et Prévention stated that they applied discounts despite the restrictions that affect their profitability – without specifying the framework in which or how often they occurred⁶⁷⁹ – the responses to the questionnaires conducted by the investigation services show that most APRs do not feel that they are able to do so (see paragraphs 344 and following above). This is first due to the lack of room for manoeuvre resulting from the wholesale prices and Apple's contractual stipulations (see paragraphs 884 and following below). It is also due to the fact that when the APRs wanted to implement promotions without Apple's prior authorisation, they were deterred from doing so. As it was, certain promotional actions were expressly prohibited for the iPad (see paragraph 472 above) and promotions that were not expressly authorised by Apple were strictly controlled. As explained in paragraph 865 above, due to the contractual stipulations set to out to protect Apple's corporate image, promotional actions could only be implemented with marketing tools imposed by Apple.

b. Strong incentives implemented by Apple to force APRs to observe the recommended prices

882. In the case in point, Apple's invitation to observe the communicated prices constitutes, besides price communication, control of promotions and price monitoring, a set of indirect measures implemented by its ADI, AEL and Apple France subsidiaries. In this regard, it was established in paragraphs 367 to 477 above, that the abovementioned Apple subsidiaries developed a complex maze of contractual clauses and engaged in conduct that took away the APRs' room for manoeuvre for the resale prices of Apple products, such that the APRs are, *de facto*, obliged to observe the communicated prices.
883. Apple's deliberate intention to also use indirect incentives results from its full knowledge of the situation of each APR, thanks to information reporting (see paragraphs 201 and following above).
884. The small price gap (between 0 and 3 %), or even lack of any differential for certain products such as the iPad, between the Apple listed price ("ALP") and the wholesale price excluding discounts – whether they were applied by Apple with its direct APRs ("DACs") or by its two

⁶⁷⁷ See Decision 06-D-04 of 13 March 2006 on practices identified in the luxury perfume sector, not called into question on this point by the judgement of 26 June 2007 of the Court of Appeal of Paris and the judgement of the Court of Appeal of Paris of 28 January 2009, *Epsé Joué Club*, no. 2008/00255

⁶⁷⁸ See Notice 16 May 2011 on the method relating to the setting of financial penalties, paragraph 26

⁶⁷⁹ Classification marks 3140 and 3260.

wholesalers, for indirect resellers⁶⁸⁰ – means the sales margin of APRs depends on the discounts which they may be granted. This discount system developed and run by Apple through ASI (later ADI), AEL and Apple France does not allow APRs – whose business, given the mandatory stipulations related to this status, is almost exclusively limited to the resale of Apple products (see paragraphs 484 and following above) – to anticipate the benefit of certain discounts essential to their profitability.

885. Consequently, the price freedom of APRs is bound, not as Apple argues, by competition or as a consequence of considerations related to their own economic efficiency, but by a set of measures defined unilaterally by Apple and accepted by the APRs.
886. When the APRs were asked about this by the investigation services, the majority stated that they were not able to charge prices below the prices communicated by Apple. Although two of them stated that in principle, they are free to set their own prices (see investigation services questionnaire for the APRs Corsidev⁶⁸¹ and Ephesus⁶⁸²), 20 out of 21 APRs who responded expressly underlined that they did not have the required room for manoeuvre to do so.
887. Concerning this point, the APR Alis Informatique explained: “We base our prices on the Apple Store listed price (“ALP”). We cannot charge more, and even less so, charge less due to lower margins in recent years.”⁶⁸³
888. Along the same lines, the APR Andromac stated: “Yes [there are recommended prices] but we have no room for manoeuvre.”⁶⁸⁴
889. Arcan IDF noted: “(...) in a highly competitive market, it is impossible to stand out by selling at higher prices. If there is room for manoeuvre, it is solely to the detriment of the margin that is already very low and fixed by a complicated and subjective system”.⁶⁸⁵
890. On this same subject, Corsidev explained: “There’s no real room for manoeuvre. They wouldn’t stop us from lowering prices, but the margins are so low that it would be suicidal to do so.”⁶⁸⁶
891. Easy Computer stated: “We have no leeway with this pricing policy. It would be difficult to sell at higher prices because the competition is stiff.”⁶⁸⁷

⁶⁸⁰ See paragraphs 351 and following above.

⁶⁸¹ Classification mark 3721.

⁶⁸² Classification mark 5527.)

⁶⁸³ Classification mark 3281.

⁶⁸⁴ Classification mark 3127.

⁶⁸⁵ Classification mark 4122.

⁶⁸⁶ Classification mark 3721.

⁶⁸⁷ Classification mark 5919.

892. In the same way, Informatique et Prévention stated: “For Apple products, our price guideline is the catalogue of Apple products with the associated price list. We are free to apply a discount depending on the competitive context. It is nevertheless complicated and dangerous to discount our sales given our low margin (RET)”⁶⁸⁸
893. I Switch stated “No, there are no recommended prices, but the “AppleStore” price is used as a customer reference. We can freely determine the selling price, but our markup rate leaves very little room for manoeuvre. We therefore have to establish extremely tight provisional cost budgets and ensure that we follow them.”
894. Similarly, LDK2 stated: “The recommended price is the AppleStore price. We have no room for manoeuvre.”⁶⁸⁹
895. Concerning the same subject, the APR M Life explained: “As far as (...) reducing [the official prices] is concerned, we are unable to do so due to our low margin. (However, sometimes we are forced to, as is currently the case with the release of the iPad 4, which has made the price of the iPad 3 obsolete, though we have a large number of them in stock.”⁶⁹⁰
896. Olys stated: “The recommended prices are the prices displayed by AppleStore. We have no room for manoeuvre.”⁶⁹¹
897. I-Arthurimmo stated: “We set our prices how we want,” while tempering the room for manoeuvre it feels it has, “but as explained earlier, we cannot sell at prices higher than Apple and we also avoid selling for less (given that our margins are very low). However we do apply in-store discounts from time to time, and always for the resellers with whom we work”.⁶⁹²
898. For discounts, it was found that, notwithstanding the allegations of Apple, they are uncertain in their existence in the criteria for allocating them. Furthermore, these discounts have a determining influence on the profitability structure of the APRs and therefore for their business as a going concern. Consequently, uncertainty on the existence and allocation criteria of discounts deprives the APRs of sufficient pricing freedom to charge prices lower than those of the “Apple Store”.
899. Although APRs can be granted a “functional discount” the value of which appears at the bottom of invoices and which can potentially be as high as 13% of the purchase price of products (see paragraphs 404 and following above), this discount alone is not enough to enable APRs to make a net profit due to its unpredictability (first point) and the fact that, in any event, the amounts actually given are generally lower than the potential maximum (second point). Consequently, the APRs are also highly dependent on other discounts/rebates that can be granted to them by Apple.

⁶⁸⁸ Classification mark 3260.

⁶⁸⁹ Classification mark 13 915.

⁶⁹⁰ Classification mark 3590.

⁶⁹¹ Classification mark 3604.

⁶⁹² Classification mark 3140.

900. Concerning the first point, contrary to what Apple maintains in its written arguments, the fact that the functional discount appears at the bottom of the invoice and that it is directly deducted from the purchase price does not reduce its short-term variability and unpredictability insofar as the criteria taken into account to evaluate it could be unilaterally modified at any time by the manufacturer. The amount of the functional discount is calculated – as established in paragraph 406 above – by taking into account the results of an evaluation that takes place at least every six months, during the merchandising audit. The APRs must obtain a minimum score of 80%, failing which, the discount is reduced or eliminated (see paragraph 428 above). As established in paragraph 406 above, the evaluation criteria also include “such other criteria as Apple may set from time to time” Consequently, the APRs are never assured that the introduction of new criteria – which can occur at any time at Apple’s discretion – will not compromise the benefit of their functional discount. Apple therefore wrongly contests the unpredictable nature of the discount.
901. Concerning the second point, the investigation services noted in their report that the functional discount obtained by the APRs is generally less than its potential maximum. Based on the (quarterly) data provided to support the financial study which accompanied its observations in response to the statement of objections⁶⁹³, the investigation services found that less than 1% of the cases where the functional discount was granted to APRs since the implementation of the “New Deal 4” contractual framework (which began at the beginning of the third quarter of 2008) reached the potential maximum discount rate⁶⁹⁴. Between the third quarter of 2008 and the second quarter of 2011, over half of APR resellers had received less than 80% of the potential maximum functional discount rate. Although the difference between the functional discount rate resulting from the Apple data and the potential maximum rate improved with the introduction of the subsequent contractual framework (“New Deal 5”), the investigation services found that over one third of the APRs obtained less than 80% of the maximum discount rate in the first quarter of 2012⁶⁹⁵.
902. Furthermore, in any event, the investigation services found that the net results of APRs – all discounts and rebates included – are low enough that a 1% loss of discount during a financial year could result in operation at a deficit. As established by the investigation services, the evidence of the case showed that on average, the net annual profit rate for stores with APR status and who submitted financial statements ranged between -10% and 5.4% for the 2012-2017 period (see paragraphs 350 and following above).

⁶⁹³ Calculations performed by the investigation services based on the *Keylearnings COS new version V2* Excel file submitted by Apple (classification mark 44 004) which appears in paragraphs 494 and following of the report (classification marks 45270 and following)

⁶⁹⁴ 4 out of 467 cases observed (Iswhich in the third quarter of 2008, I-Artificielle in the first quarter of 2011, Informatique et Prévention in the 2nd quarter of 2011 and ACTI Mac in the 4th quarter of 2011). It is only observed in these four cases that the rate is higher than the maximum theoretical rate. The available data does not enable this difference to be explained.

⁶⁹⁵ See paragraph 498 of the report, classification mark 45 272

903. This assessment is confirmed by the data provided by Apple in the financial study it produced in response to the statement of objections. According to the study, the operating income for stores with APR status varies between 0 and 4%, whereas their net income varies between 0 and 2%⁶⁹⁶. Consequently, the APRs depend highly on all the discounts for their profitability, and not just the functional discounts. The investigation services found that between the “New Deal 3” and “New Deal 4”, the weight of the discounts in the theoretical net sales margin of APRs increased from 67.5% to 78.5%⁶⁹⁷.
904. Given the heavy reliance of the APRs on discounts and their limited net markup rate, the variability of any of the discounts can jeopardise the profitability of APRs. The conditions for granting discounts other than the functional discount – which mainly contribute to the “back” margins of APRs – are determined at Apple’s discretion or depend on criteria on which it has a decisive influence.
905. The marketing development fund discount, equal to up to 0.80% of the purchases, is granted at Apple’s discretion on the basis of marketing and corporate sales development actions by the APR each quarter (see Article 4.3 (b) of the “APR Channel Terms” cited in paragraph 0 above).
906. The performance rebate, which can be up to 2% of the total net amount of purchases, is also granted at Apple’s discretion (see Article 4.4 of the “APR Channel Terms” cited in paragraph 412 above) based on the results of the evaluation that takes place during the mystery shopper inspection (see paragraph 413 above). This discount – the maximum amount of which is high in comparison with the other discounts contributing to the back margin of APRs – is essential to their profitability.
907. The geographical coverage discount, such as those related to credits, mainly depend on criteria over which Apple has decisive control. The geographical coverage discount, which is equal to 2% of the total net amount of the purchases, is granted to the APRs with more than three points of sale. An additional 1.5% discount can be granted to those with over six points of sale (see paragraph 415 above). By nature, this discount is conditional on the ability of APRs to open additional points of sale. As established in paragraphs 385 and following above, opening new points of sale requires prior authorization from Apple, which is difficult to obtain, and gives rise to a specific series of inspections.
908. Concerning the discount related to credits, the capability of APRs to settle orders within 15 days depends on their good financial standing. As established in paragraphs 502 and following above, APRs encounter difficulties related to supplies and the lack of transparency in the sales conditions issued by Apple. They are therefore confronted with various financial difficulties. Furthermore, the APRs receive different treatment between the various distribution channels. It was also found that, despite Apple’s contribution, investments related to the set-up of points of sale and staff training put a strain on the margins of APRs (see paragraphs 367 and following above).
909. As discounts play a decisive role in the profitability of APRs, the uncertainties related to them being granted deter APRs from deviating from the prices recommended by Apple, even when their net margin would ensure income at the end of the year, due to the high unit price of the products in question.

⁶⁹⁶ Financial study produced by Apple to support its observations in response to the statement of objections, Figures 42 and 45, classification marks 46 545 and 46 548.

⁶⁹⁷ Calculations made based on Apple’s keylearnings file (classification mark 44 004).

910. The fact that Apple occasionally adopted certain measures that stabilised the margins of APRs, that the margins of certain APRs increased for certain financial years since the start of the practices, or that certain APRs opted for this status in order to increase profit margin, does not call into question the existence of a restriction of their pricing freedom and price fixing. The adherence of resellers to price fixing can be guided by the hope of better gains if they cut themselves off from free competition, even if to do so, they have to abandon their pricing freedom and consequently, the possibility of meeting a greater share of demand.
911. In other words, although the APRs can have profitable businesses with enough sales margin to earn a profit, the uncertainties affecting the main components of their net margin deter them from implementing prices that are lower than the recommended prices and perpetuate the agreement mechanism. Contrary to what Apple suggests in its written arguments, Apple's invitation to APRs to restrict their pricing freedom, as characterised by the investigation services is not, strictly speaking, due to the fact that the APRs essentially had limited sales margins. The existence of limited margins can, in some cases, and when they result from the choice of the economic operators themselves, result from free competition. The objection attributed to Apple concerns all the conduct in which its subsidiaries engaged, depriving the APRs of the full freedom to set their own prices. In this regard, Apple's creation and maintenance of unpredictability for certain elements essential to the profitability of APRs when they set the resale prices for products of which they acquired ownership, results in deliberately restricting the room for manoeuvre of APRs when it comes to pricing.
912. The foregoing shows that Apple, which has thorough knowledge of the financial situation of its APRs, controls their supply and the granting of discounts, thereby directly enabling it to control the profitability of APRs. ASI (later ADI) issues the "Channel Terms", "New Deals" and "Sales Policies" contractual documents which establish the discount conditions and caps, and signs them with the APRs. ASI (later ADI) is also responsible for reminding APRs of their obligations to comply with agreements and their appendices when they are amended⁶⁹⁸.
913. Apple relies on the prerogatives afforded to it by the agreements signed with the APRs to indirectly establish the prices that it communicates to them as minimum fixed prices, while preserving the apparent legality of the system. While the APRs cannot, for competition reasons, charge resale prices that are higher than those of the "Apple Store", on the basis of the foregoing, the communicated prices take the form of maximum prices and minimum prices. It must therefore be considered that Apple invites its APRs to charge the prices that are communicated to them.

⁶⁹⁸ Classification mark 905.

2. *APR acceptance of Apple's pricing policy*

914. It was established in paragraphs 343 and following that the APRs applied the retail prices communicated by Apple, as clearly confirmed by their various statements on this subject (see paragraph 344 above) and the price collection carried out by the investigation services (see paragraphs 347 and following above).
915. The APRs interviewed by the investigation services all confirmed that they apply the retail prices communicated by Apple and which it charges in its own stores⁶⁹⁹.
916. Although, as Apple states in its written arguments, some APRs sometimes implement promotions, this cannot be cited to show the absence of an agreement on the resale prices.
917. Firstly, it has been well-established that the existence of an agreement cannot be called into question by the existence of occasional deviations. The resellers who are parties to a vertical agreement on prices can have an interest in opportunistically sidestepping the obligations of the agreement on occasion to attract a share of the demand, with prices remaining the same as their competitors. This is particularly the reason for which case law concerning the widespread nature of an agreement, traditionally accepts that it is established even if the agreement is not implemented by all the distributors, as the body of evidence can only concern a “significant” number of resellers implementing the agreement⁷⁰⁰.
918. Secondly, the evidence presented by Apple in its written arguments concerning the existence of regular promotional campaigns and actions of APRs do not hold up to the analysis.
919. Although the statements of the APRs IConcept, Inter-Actif, IArtificielle and Informatique et Prévention cited by Apple confirm that in some cases certain APRs implement promotional discounts, they do not establish (except in the case of IArtificielle, which stated that it fully manages its promotions⁷⁰¹) whether the promotions referred to are organised at the initiative of the APR concerned, at its own expense, or at the initiative of Apple, which would share the costs. Furthermore, two of the four APRs concerned explained that the promotions target either trade-ins of older versions for the purchase of a new one, or clearance sales on equipment that is obsolete or at the end of its service life⁷⁰².
920. Finally, whatever the case, two of the four APRs concerned stated in their response to the instruction services questionnaire that they were not able to implement as many discounts as would have liked as they did not have enough room for manoeuvre from a financial standpoint. For example, APR IArtificielle stated: “we cannot sell at prices higher than Apple and we also avoid selling for less (given that our margins are very low).”⁷⁰³ Similarly, Informatique et Prévention underlined “it is nevertheless complicated and dangerous to discount our sales given our low margin (RET)”⁷⁰⁴.
921. In addition, the examples of promotions put in place by APR which Apple raised in its written arguments show, contrary to what Apple concludes, that these promotions are rare and generally limited to certain specific events. In this regard, over a period from April 2012

⁶⁹⁹ See responses to the responses to the investigation services questionnaires at classification marks 3583, 4569, 3281, 3127, 4122, 3721, 5919, 5527, 4176, 4207, 3140, 3082, 3260, 3109, 3700, 13915, 5166 à 5167, 3590, 3604, 4146, 3743.

⁷⁰⁰ For example, see the judgement of the Court of Appeal of Paris of 4 April 2006, *Truffaut*, RG no. 2006/14057, p. 15

⁷⁰¹ Classification mark 3140.

⁷⁰² Classification marks 3073 and 3109.

⁷⁰³ Classification mark 3140.

⁷⁰⁴ Classification mark 3260.

to July 2019, Apple only cites, 22 promotional actions implemented by 12 APRs (i.e. only 15 promotional actions during the years during which the practises were implemented, i.e. from 2012 to 2017). Only 5 APRs (4 over the period during which the practices were implemented) offered promotions more than once, which invalidates the widespread nature of promotions.

922. Finally, for the promotions in question, Apple does not specify whether they are at the initiative of the APR itself or Apple or whether they are co-financed by Apple. In this regard, the *Autorité* found that 3 of the 22 promotional actions cited by Apple were implemented during “Black Friday” sales (offers from DMX concept on 22 November 2016, InterActif on 26 November 2016 and Iconcept in November 2018) and 3 others concern store openings or reopenings (Iconcept in November 2012, Iswitch in November 2012 and Ephesus in March 2013). However, these promotions could only be implemented with Apple’s authorisation as they could only be offered using marketing tools imposed by Apple.
923. With regard to the price collections, contrary to what Apple asserts, the fact that they only took place in 2016 and 2017 and do not take into account sales to professionals, does not call into question their probative value as evidence that includes qualitative and quantitative, documentary and conduct-based evidence. Proof of the existence of actual implementation of the prices communicated by the supplier is only one element among others of a body of evidence that establishes the existence of the practice in question, as it may be proven by any means⁷⁰⁵.
924. The requirement of proof of actual implementation of the prices would alter the competition authorities’ burden of proof under national and European law, by imposing that they establish the effects of the practice in order to qualify it despite the fact that under established case law, it is anticompetitive by its very object. In this regard, established European case law reiterates that such an approach would deprive the alternative and not cumulative nature of competition restriction by object and competition restriction by effects mentioned in Article 101(1) of the TFEU of its meaning. Consequently, besides their contribution to the body of evidence, used with other evidence to assess the agreement of APRs resellers to the practice, price collections help in assessing the effects of said practice (see paragraph 928 below).
925. Furthermore, the APRs agreed to the indirect measures implemented by Apple to establish the communicated prices as fixed prices by signing the agreements drawn up by the manufacturer, which include all the stipulations identified in paragraphs 898 and following above, particularly those concerning the conditions for granting discounts.
926. By charging the communicated prices and signing the agreements, the APRs accepted the invitation extended by Apple in this regard. The existence of a joint intention of the parties is therefore established.
927. Consequently, Apple invited its APRs to observe the resale prices which it communicated to them and the APRs agreed to the invitation. The investigation services established that Apple sent its retail prices to the APRs from the creation of the APR channel in October 2006 via the “Apple Sales Web” website for its resellers.

⁷⁰⁵ See the judgement of the commercial chamber of the French Supreme Court (*Cour de cassation*) of 11 June 2013, *Marionnaud*, appeal no. Y 12-13.961, B 12-14.401, A 12-14.584, N 12-14.595, Q 12-14.597, R 12-14.598, U 12-14.624, V 12-14.625, C 12-14.632 - V 12-14.648, p. 18

3. *The anticompetitive object and effects of the agreement*

928. As established above, Apple agreed with its APRs on the resale price of its products. Such practices are consistently considered as anticompetitive by their very object (see paragraphs 836 and following above).
929. By virtue of established case law, if the anticompetitive object of an agreement is proven, it is not necessary to establish the existence of the effects which it can create⁷⁰⁶. In the case in point, it will nevertheless be underlined that the investigation services found effective resale price alignment by the APRs with the prices communicated by Apple, which it charges in its “Apple Stores” and online on the “Apple Online Store”. The practice thus implemented had the effect of restricting intra-brand competition within and between these two retail distribution channels, for which sales account for 38% to 48% of Apple sales (excluding iPhones) during the period in question⁷⁰⁷.
930. Contrary to what Apple asserts, the fact that Apple only agreed on the prices with the APRs and not with all its product resellers does not invalidate the rationality of its conduct. APRs are, like “Apple Stores” themselves, stores specialised in the distribution of Apple products which join an optional sales programme to promote a selling environment and offer a consumer experience of a high standard (see paragraphs 77 and 78 above).
931. By restricting the pricing freedoms of the APRs, Apple is able to limit both competition between the APRs themselves, and competition between APRs and its own stores (bricks-and-mortar stores in the same geographical area or online stores). There is indeed strong competitive proximity between these two channels. This proximity has been noted by some APRs themselves (see answers to the investigation services questionnaire for I-Artificielle⁷⁰⁸, and Alis Informatique⁷⁰⁹).
932. In this regard, Apple underlines in its written arguments that the APRs are meant to, complementarily to “Apple Stores”, meet the needs of customers who are particularly loyal to the Apple universe by offering high level service quality and expertise, centred on Apple products, high added value services and the values of the Apple brand⁷¹⁰. That being the case, if the APRs were able, through free competition, to charge lower prices than those of “Apple Stores”, it would be to the detriment of Apple more than the other resellers who are not concerned by the infringement, since they offer a larger range of products than Apple.

⁷⁰⁶ For example, see the judgements of the European Court of Justice of 11 September 2014, *Groupeement des cartes bancaires*, C-67/13, paragraphs 49 and 50; of 20 November 2008, *BIDS*, C-209/07, paragraph 15, and of 14 March 2013, *Allianz Hungária Biztosító e.a.*, C-32/11, paragraphs 34 and 35

⁷⁰⁷ Evaluation based on sales data communicated by the companies in question (classification marks 49 707 to 49 708 and 49 711 to 49 715)

⁷⁰⁸ Classification mark 3137.

⁷⁰⁹ Classification mark 3275.

⁷¹⁰ Observations of Apple in response to the report, paragraph 837, classification mark 46 303.

933. Similarly, the fact that the restricted pricing freedom of APRs in some cases leads them to charge resale prices that are higher than they would have liked in order to compete effectively with the “Retailers” at the risk of driving away demand to these “Retailers”, is not, contrary to what Apple argues, contradictory to the existence of an agreement on prices or a pricing policy.
934. In this case, the risk of APR demand being carried over to the “Retailers” is, first, curbed by the fact that a portion of APR customers are consumers who are particularly loyal to the Apple universe and seek the high level of expertise offered by “Apple Stores” or APRs (see paragraphs 51 and following above). Secondly, since Apple is present at each level of the production and supply chain for its products, it is able to directly or indirectly regulate the price competition exerted by the retailers. Apple is able to both determine the wholesale prices (see paragraphs 351 and following above) and distribute product volumes between its wholesalers (see paragraphs 240 and following above) and its wholesalers’ customers (see paragraphs 250 and following above).
935. Furthermore, and in any case, price fixing practices are considered as “hardcore restrictions” under the abovementioned Regulation on vertical restraints. They are therefore exempted from the *de minimis* rule of the Notice on agreements of minor importance which do not appreciably restrict competition under Article 101(1) of the Treaty on the Functioning of the European Union (paragraph 13) and the market share thresholds provided for under the Regulation on vertical restraints (Article 3.1 of the abovementioned Regulation on vertical restraints). That being the case, the fact that the agreements in question only concern some Apple product resellers has no impact on the object of the practice. It will nevertheless be taken into account to assess the effect of the practice in question when evaluating the extent of damage to the economy.
936. It should also be added that the price fixing practices may not qualify for the block exemption under the abovementioned Regulation (EU) No. 330/2010 as explained by the abovementioned guidelines of 19 May 2010 which consider these practices as “hardcore restrictions”.
937. Furthermore, since Apple did not express a request in this sense, there is no reason to examine whether the practice could indeed be justified on the grounds of Articles 101(3) of the TFEU and L. 420-4 of the French Commercial Code.

4. The duration of price fixing

938. The statement of objections indicates that the price fixing began in March 2009 and is still being carried out.
939. Apple contests the duration of the infringement. It alleges that the evidence given by the investigation services to determine the starting point of the infringement does not prove the existence of the practice on said date. Apple also argues that, by bearing in mind that since the head of Apple made no change in strategy with respect to the APRs, the practices in question would still be in effect when the statement of objections was issued, the investigation services reverse the burden of proof. Finally, Apple asserts that the statement of objections and the report contain different durations for the practices referred to in Objections no. 2 and 3. According to Apple, as the investigation draws a connection between product allocations and pricing restrictions, the duration of these two practices should be identical.

940. In this regard, on the basis of the foregoing, while certain APRs mention difficulties related to the amount and calculation of discounts starting in 2009, it was established that Apple has communicated its retail prices to the APRs since this status was created in 2006 and that the contractual framework applicable to them includes a set of discounts whose predictability is uncertain. However the agreement of APRs to Apple's offer to apply the communicated prices is only sufficiently established on the grounds of the case evidence, based on the statements of the APRs in this regard, which were collected in October 2012 (see paragraphs 344 and following above).
941. As for when the practices ended, although the evidence related to Apple's invitation to observe the fixed prices mentioned above are established at least until the date of the statement of objections, the most recent evidence related to acceptance on the part of the APRs – the last price collections carried out by the investigation services, date back to April 2017 (see paragraph 348 and following).
942. Consequently, the price fixing practice implemented by Apple and its APRs took place between October 2012 and April 2017.

5. The entities responsible for the practices implemented

943. The price fixing implemented by Apple involved several of the group's entities, as established below:

a. Apple Distribution International (ADI)

944. The case establishes that since 1 April 2012, ADI has signed distribution agreements with the wholesalers and resellers.
945. ADI also communicates the "Apple List Prices" to the resellers and the amendments, including the "Channel Terms" and "Sales Policies", sends discounts via the "New Deals" system to Apple France, and reminds APRs of their obligations in implementing the agreements and their appendices when changes are occasionally made to the contractual framework for APRs⁷¹¹.
946. ADI also asks Apple France to ensure that the authorised resellers comply with their contractual obligations, particularly through external service providers who implement quality controls such as "mystery shopper" inspections or audits.

b. Apple Europe Limited (AEL)

947. AEL is in charge of marketing and helps evaluate resellers and their points of sale⁷¹². In this regard, it centralises the results of audits and mystery shopper inspections and forwards the scores to calculate discounts⁷¹³.
948. AEL implements marketing campaigns for France and provides marketing and sales advertising materials.

⁷¹¹ For example, see classification mark 905: "I refer to your Apple Authorized Reseller Agreement with Apple Distribution International "ADI") and your Apple Premium Reseller Addendum (the "Addendum") including any subsequent amendments and / or changes communicated to you by Apple after the date of the signature. This is a reminder notice that existing APR locations that do not meet the Store Location, Visibility, Size and Design criteria within Appendix 1 of the Addendum must relocate to a suitable approved location before 31 December 2012. If you have any questions, please contact your local Apple account manager."

⁷¹² Classification mark 34684 (VC) / 34873 (VNC) – 34980 (VNC2).

⁷¹³ See, for example, classification marks 26478 and 26479, 26512 and 26510.

949. AEL stays informed of APR direct and indirect sales and transfers to wholesalers⁷¹⁴.
950. Finally, AEL forwards New Deal modifications for France to Apple France⁷¹⁵.

c. Apple France

951. Apple France implements the directives from the entities listed above.
952. Apple France gathers information on the activity of points of sale to calculate the discounts⁷¹⁶ and send them to ADI. It forwards the price lists to wholesalers and the amount of discounts (quotations” for the “pass-through”⁷¹⁷.
953. Apple France oversees APR communications⁷¹⁸ and store set-up. It ensures that the “design kit” is properly implemented when stores are created or changed or when changes to “New deals”⁷¹⁹ take place. It also asks APRs to send in photos of the point of sale, including price labels⁷²⁰. It calls to order APRs who do not comply with group directives⁷²¹ and discount bans⁷²² (see paragraphs 462 and following above).

d. Conclusion

954. On the basis of the foregoing, Apple Distribution International (ADI), Apple Europe Limited (AEL) and Apple France must be considered as co-offending parties in the practice of price fixing, penalised under Objection no. 3.

6. Conclusion on Objection no. 3

955. On the basis of the considerations above, Apple, via its Apple Distribution International (ADI), Apple Europe Limited (AEL) and Apple France subsidiaries, agreed on the selling prices with its APRs, over a period ranging between October 2012 and April 2017.

4. WITH REGARD TO THE ABUSE OF A STATE OF ECONOMIC DEPENDENCE (OBJECTION NO. 4)

a) Principles

956. Under Article L. 420-2, paragraph 2, of the French Commercial Code, “the abuse of the state of economic dependence of a client or supplier by an undertaking or group of undertakings is also prohibited, if it is likely to affect the functioning or structure of competition. This abuse may include a refusal to sell, tie-in sales or discriminatory practices mentioned in I of Article L. 442-6 or in product range agreements.”

⁷¹⁴ See, for example, classification marks 655 and 10930 or for eBizcuss, classification marks 11111 and 11112 (VC) / 24308 and 24309 (VNC).

⁷¹⁵ See email from H... (Europe) to the Country Managers: “Last week we sent a communication to all authorised channel resellers to make them aware of changes in Sales Policies related to the Apple Authorized Reseller Agreement. This was the effective launch of New Deal 4 the general framework defining Apple EMEA’s commercial policies towards the Prosumer Channel partners,” classification mark 27374.

⁷¹⁶ Classification mark 4509

⁷¹⁷ For example, see classification marks 11704 and 11666

⁷¹⁸ Classification mark 13929

⁷¹⁹ For example, see classification marks 758 34841.

⁷²⁰ For example, see classification marks 34371 to 34372 (VC) / 39929 (VNC) and 34023 to 34025 (VC) / 39926 (VNC).

⁷²¹ Classification mark 5544

⁷²² For example, see, classification marks 34937 to 34939.

957. The abuse of a state of economic dependence therefore assumes that three cumulative conditions are met: the existence of a state of economic dependence of one company on another, abuse of this state and a real or potential affect on the functioning or structure of competition. If one of these three conditions is not met, the alleged abuse of a state of economic dependence is not established.
958. Originating from the Ordinance of 1 December 1986, this offence has no equivalent under EU law, but is similar to Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (now 101 and 102 of the TFEU), which states: “Member States should not under this Regulation be precluded from adopting and applying on their territory stricter national competition laws which prohibit or impose sanctions on unilateral conduct engaged in by undertakings.”

1. Existence of a state of economic dependence

959. In a judgement of 12 October 1993, *Concurrence*, no. 91-16988 and 91-17090, the French Supreme Court (*Cour de cassation*) defined four cumulative criteria for characterising a state of economic dependence as follows: “although the existence of a state of economic dependence is assessed by taking into account the well-known reputation of the supplier brand, it is also important to take into account the extent of its share in the market in question and in the turnover of the reseller and the inability of the reseller to obtain other suppliers of equivalent products.”
960. In a judgement of 25 January 2005, *Établissement français du sang versus SARL Reims Bio RG* no. 2004/13142, the Court of Appeal of Paris considered that to refute the existence of a state of dependence, it is not enough to prove that it results from a deliberate strategy on the part of the dependent company. Economic dependence is an “objective situation whose origin is indifferent.”
961. As regards the absence of an alternative solution to obtain equivalent products, the French Supreme Court (*Cour de cassation*) specified in a judgement of 3 March 2004, *Concurrence*, appeal no. 02-14529, that “the state of economic dependence, for a distributor, is defined as a situation where a company does not have the ability to replace its supplier(s) with one or more suppliers that can meet its supply needs under equivalent technical and economic conditions; that it deduces that the mere fact that a distributor purchases a significant or even exclusive part of its supplies from a single supplier is not sufficient to characterise its state of economic dependence within the meaning of Article L. 420-2 of the French Commercial Code.”

962. It was thus accepted that supply changes “which can take place immediately, at no cost, without specific arrangements” “are not likely to cause irremediable disturbances in the functioning of the petitioning companies” and therefore do not meet the conditions of a lack of an alternative solution⁷²³.
963. It should be noted that despite the repeal by French Economic Regulations Act (NRE) of the absence of an alternative solution criteria in the French Commercial Code, the French Supreme Court (*Cour de Cassation*) upheld the requirement, for the dependent party, to provide proof of the absence of such a solution⁷²⁴.
964. The *Autorité* specified that the effectiveness of an alternative must also be assessed with regard to the implementation time: “The possibility of transferring to other outlets should only impact the analysis insofar as said outlets constitute effective alternative solutions, capable of being implemented within a reasonable timeframe. The technical, commercial and legal constraints related to the transfer to other outlets must therefore be taken into account (...)”⁷²⁵.
965. For example, concerning dependence within a distribution network, the *Conseil de la Concurrence* ruled that an auto dealership (single-product, single-brand) is not in a state of dependence on its licensor if the dealerships can easily switch from one manufacturer network to another and if there are other reorientation solutions for the excluded dealership⁷²⁶, in the presence of numerous manufacturers distributing their automobiles in France in similar single-brand networks.
966. Furthermore, the ability of the distributor to find alternative solutions can be limited by an accumulation of contractual clauses imposed by the network head manufacturer, preventing the distributor from leaving the network, as underlined by the *Autorité* in Decision 10-D-08 of 3 March 2010 relating to practices implemented by Carrefour in the local general retail food sector, concerning a franchise network.
967. Finally, it has been established in case law that a state of dependence must be proven *in concreto*. The *Autorité* specified that “the state of economic dependence is assessed *in concreto*, either in the bilateral relationship between two economic operators, or more broadly, in the relationships between a supplier and its distribution network, provided that the network is a group of businesses with sufficiently similar characteristics, whose members are, with respect to said supplier, in the same economic and legal position”⁷²⁷.

2. Abuse of the state of economic dependence

968. Once economic dependence is proven, the abusive nature of the situation must then be established.

⁷²³ See Decision 01-D-49 of 31 October 2001 relating to a complaint and request for interim measures presented by Concurrency concerning Sony

⁷²⁴ Opinion 15-A-06 of 31 March 2015 relating to the merger of group purchasing organisations and referencing in the mass retail sector, (paragraph 261)

⁷²⁵ Opinion 15-A-06 of 31 March 2015 relating to the merger of group purchasing organisations and referencing in the mass retail sector, (paragraph 269)

⁷²⁶ Decision 03-D-42

⁷²⁷ Decision 10-D-08

969. As stated by the *Autorité* in its opinion 15-A-06 of 31 March 2015 relating to the merger of group purchasing organisations and referencing in the mass retail sector, “Article L. 420-2 paragraph 2 of the *Code de commerce* contains a non-exhaustive list of practices which may be considered as abusive. Thus, according to this legislation, abuse of a state of economic dependence “may include a refusal to sell, tie-in sales or discriminatory practices mentioned in I of Article L. 442-6 or in product range agreements.” In November 2018, I of Article L. 442-6 addresses the offence of creating a significant imbalance.
970. The complaints of abusive practices lodged with the *Autorité* or, before it, the *Conseil de la concurrence*, consisted mainly of sudden termination of commercial relations (in the form of product delisting) or renegotiation without consideration of sales conditions, particularly following mergers between distributors.
971. Beyond these cases, Article L. 420-2 paragraph 2 of the French Commercial Code refers generally to the notion of abuse. In this regard, it must be recalled that this notion is not limited to predefined conduct, in that “the legal characterisation of an abusive practice does not depend on the name given to it, but on the substantive criteria used in that regard⁷²⁸. Thus “new forms of abuse capable of affecting competition” cannot be excluded under this provision⁷²⁹.
972. Consequently, the abuse of a state of economic dependence can result from a contractual clause, a conduct, or the imposition of several rules or commercial constraints, presenting a manifestly abnormal, unbalanced or excessive character in view of the facts of the case, or which directly or indirectly impose unfair transaction conditions.
973. Thus, the *Autorité* can refer to the definition of abuses committed by a company in a dominant position. A company that holds its distributors under its economic dependence can impose transaction conditions that it would not have obtained in the absence of this state of dependence. If these conditions are unbalanced or abnormal with respect to the facts of the case, the *Autorité* must examine whether they are necessary and proportionate to the legitimate objective claimed by the company.
974. Therefore, if the company which holds its distributors in a state of dependence refuses to sell to them or engages in unjustified late deliveries or unfair discount practices, the *Autorité* may consider these practices as abuses.
975. Case law of the European Court provides precisions in this regard concerning the conditions under which a discount system can be considered as abuse of a dominant position. The same reasoning can be applied in the case of abuse of a state dependence.
976. In its judgment of 30 September 2003, *Michelin*, the Court of First Instance ruled that⁷³⁰ “a discount system which is applied by an undertaking in a dominant position and which leaves that undertaking a considerable margin of discretion as to whether the dealer may obtain the discount must be considered unfair and constitutes an abuse by an undertaking of its dominant position on the market within the meaning of Article 82 EC [now Article 102 of the TFEU] (see, in that regard, *Hoffmann-La Roche v Commission*, cited at paragraph 54 above, paragraph 105). Because of the subjective assessment of the criteria giving entitlement to the service bonus, dealers were left in uncertainty and on the whole could not predict with any confidence the rate of discount which they would receive by way of service

⁷²⁸ Decision of the European Commission of 27 June 2017, case AT.39740, *Google Search*, paragraph 352.

⁷²⁹ Abovementioned Opinion 15-A-06, paragraph 274

⁷³⁰ Court, 30 September 2003, T-20301, *Michelin*, paragraph 141

bonus (see, in that regard, *Michelin v Commission*, cited at paragraph 54 above, paragraph 83).”

977. Finally, as the European Court underlined in its judgement of 30 January 2020, “if such conduct is to be characterised as abusive, that presupposes that that conduct was capable of restricting competition (...) and that assessment must be undertaken having regard to all the relevant facts surrounding that conduct.”⁷³¹

3. Real or potential effect on the functioning or structure of competition.

978. Under Article L. 420-2, paragraph 2, of the French Commercial Code, abuse of a state of economic dependence is prohibited “if it is likely to affect the functioning or structure of competition.”
979. The *Autorité* notes that this condition of being “likely to affect the functioning or structure of competition” results from the reform of the Act of 15 May 2001, whose purpose was to relax the proof of harm to competition, by substituting this phrase for that stipulating that the abuse was prohibited if it had “the effect of preventing, restricting or distorting competition in a market.”⁷³²
980. This criteria on the potential effect on competition is not identical to that stipulated in Articles L. 420-1 and L. 420-2 paragraph 1 of the French Commercial Code, prohibiting agreements or abuse of a dominant position “where they have the aim” and “may have the effect of preventing, restricting or distorting the free competition in a market.” The abuse of a state of dependence represses a practice even if it only affects the structure of the market, and not the functioning thereof.
981. A practice can thus be considered to be abusive under Article L. 420-2 paragraph 2 of the French Commercial Code if it is capable of having or likely to have such an effect. It is not necessary to demonstrate that the abuse in question had a concrete anticompetitive effect on the markets concerned⁷³³.
982. Finally, there is no appreciability threshold in terms of market share to assess the potential or real effects of an abuse of a state of economic dependence.

b) Application in this case

983. Objection no. 4 is based on the state of economic dependence of APRs in relation to Apple. Apple claims that no evidence of abuse of a state of economic dependence – the state of economic dependence, abuse of said dependence and the effect on competition – is established in the case in point.

1. State of economic dependence

984. Apple primarily argues that the economic dependence of APRs is not established based on the following evidence:

⁷³¹ European Court, 30 January 2020, *Generics*, C-307/18

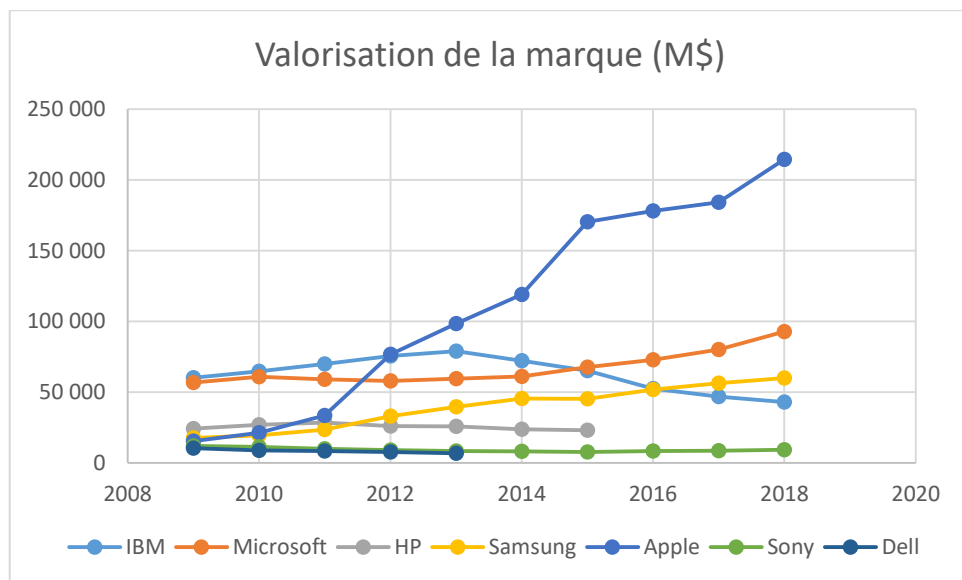
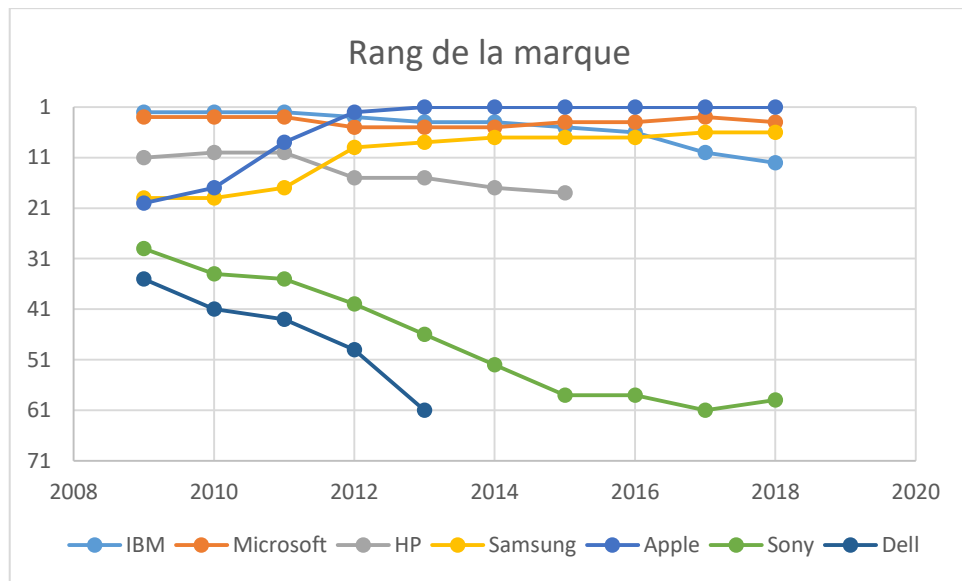
⁷³² Report 2072 of the French production and trade commission (*Commission de la production et des échanges*), J.Y Le Déaut, 11 January 2000)

⁷³³ European Court of Justice, 17 December 2003, *British Airways*, T-219/99, Rec. P. II-5917, paragraph 293

- it would be wrong to assert that throughout the entire duration of the practices, the well-known reputation of Apple was such that it was a key player in the market, as the brand was ranked 20th on the Interbrand rankings in 2009;
- Apple's market share is limited and similar to that of other players in the market such as Samsung and HP, and differentiated based on the types of products. This prevents it from evading competition; until presently, the *Autorité* has only fined companies in a dominant position under Article L. 420-2 paragraph 2 of the French Commercial Code;
- regarding its share in the turnover of APRs, Apple asserts that this share must not ensue from a deliberate choice of the complainant. In the case at hand, the choice of certain resellers to operate APRs is a deliberate strategy, as they are attracted by the growth opportunity presented by Apple products and by the various advantages of the APR programme;
- finally, regarding the existence of equivalent or alternative products, Apple claims that "the retailers (...) almost immediately have the ability to substitute Apple products with products of other brands" or find alternative solutions on the market, without these changes causing irremediable disturbance to their functioning.

a. The well-known reputation of the Apple brand

985. The well-known reputation of the Apple brand is undeniable, and has been since before the start of the practices in question in 2009. In 2008 the *Autorité de la concurrence* highlighted this reputation in its Decision 08-MC-01 of 17 December 2008 on the distribution of iPhones. According to statements gathered during the investigation of these interim measures in 2008, "Apple's greatest advantages are the brand and its marketing strategy. Apple is one of the most sophisticated brands of modern time, on par with Nike. It excels at attracting traditional and online media attention, in promotion that largely exceeds its market shares. It succeeds in creating a specific relationship with its customers who often become converts to the brand." Furthermore, according to the terms of the partnership agreement signed in late 2007 between Orange and Apple for the distribution of iPhones, "Apple is an undisputed leader in the retail computer and electronics sectors, on the cutting edge of the sector in terms of innovation thanks to its award-winning computers and the Mac OS X operating system, and at the forefront of the digital multimedia revolution thanks to its iPod music and video players, and its iTunes online store. This year, Apple will enter the mobile telephone market with its revolutionary iPhone."
986. This reputation was sustained throughout the duration of the infringement period and several brands of equivalent renown do not exist on the market. Listed 3rd on the Interbrand Best Global Brands ranking, Apple climbed to 1st place in 2012. In 2014, it was the world's most valuable company, worth nearly 118.9 billion dollars. This position was confirmed in 2015 as Apple was ranked first once again on the Interbrand ranking for the third consecutive year.



Rang de la marque	Brand ranking
Valorisation de la marque (M\$)	Brand value (million \$)

Source: <https://www.interbrand.com/best-brands/best-global-brands>

987. Furthermore, besides this ranking, the brand's high-end positioning, its technological reputation, and the support and loyalty of a portion of consumers make it difficult for electronics distributors to circumvent its products.
988. The brand's specific marketing strategy, its marketing around an "Apple universe" and the existence of a real Apple ecosystem, characterised by strong connectivity between its various products, associated with specific operating systems, reinforces this character.

989. Apple also sets itself apart with the organisation and layout of its points of sale. It is interesting to note that in the framework of an intellectual property rights dispute, the European Court of Justice ruled that the depiction of the layout of points of sale, such as an Apple flagship store, may under certain conditions, be registered as a brand, if the depiction is capable of distinguishing the products or services of Apple from those of other companies⁷³⁴.

b. Apple's market share in the market in question

990. In 2012, Apple had a 28% market share in the mass retail sale of electronics equipment, all products included, and 24.7% in 2013, according data from International Data Corporation and GfK (see paragraph 15 hereof), making it the market leader, with Samsung⁷³⁵.
991. If a distinction is made by type of products, with the exception of computers (for which Apple had the second highest value market share) and smartphones in 2012 and 2013, Apple systematically had the highest value market share⁷³⁶.
992. Contrary to what Apple argues, a state of economic dependence does not need to be proven to establish the dominant position of the company in question in a given market.
993. A dominant position is defined under European law as “a position of economic strength enjoyed by an undertaking which enables it to prevent effective competition being maintained on the relevant market by giving it the power to behave to an appreciable extent independently of its competitors, customers and ultimately of its consumers.”⁷³⁷ It is often measured by a high market share in a relevant market. However, economic dominance is not necessarily linked to the size of market shares, but the relative power of a company over its partners, making them vulnerable. It reflects a company's strong power of negotiation over another, which does not require a dominant position over an entire market.
994. In any case, the abuse of a state of economic dependence, prohibited by Article L. 420-2, paragraph 2 of the French Commercial Code, conceived from the inception of Ordinance 86-1243 of 1 December 1986 to repress abuses of purchasing power in mass retail distribution, did not, by design, target operators in a dominant position, as no major distributors are in this situation.
995. Although the *Conseil de la concurrence* only fined operators in a dominant position in its past decision-making⁷³⁸, it never excluded the ability to apply the abovementioned article to an affiliate retail network, whose head is not in a dominant position, as demonstrated in Decision 10-D-08 of 03 March 2010 related to practices implemented by Carrefour in the local general retail food sector.

⁷³⁴ Court of Justice, 10 July 2014, *Apple Inc.*, C-421/13

⁷³⁵ Classification marks 40874-40880

⁷³⁶ p.15 and following of the Report.

⁷³⁷ Court of Justice, *United Brands Company and United Brands Continentaal v Commission*, case 27/76, Report of Cases 1978, p. 207, paragraph 65.

⁷³⁸ Decisions 04-D-26 of 30 June 2004 and 04-D-44 of 15 September 2004

c. Apple's share in the turnover of APRs

996. Apple's share in the turnover of APRs stems from the actual stipulations of the agreements they sign with ASI and ADI. If these agreements did not contain exclusive Apple product supply clauses, they contained provisions with the same effect, which limited the in-store display, sale and promotion of competing products.
997. Thus, Article 4.3 paragraph 3 of the "Apple Premium Reseller Program Addendum" stipulated that "Reseller may not install any 3rd party fixtures or other fixtures not depicted in the Design Kit within the customer facing showroom, without prior approval from Apple"⁷³⁹.
998. Article 14 of the APR programme "Eligibility Criteria" also stated: Focus on Apple Products. The Authorized Location must not sell or display any computers (desktop, laptop or otherwise) except Mac; any digital music players except iPod; any tablet computing device except iPad; or any other mobile phone except iPhone."⁷⁴⁰
999. Article 15 of the same agreement stated: "Third party product & Accessories – Third party products sold or displayed must be complementary to, and compatible with, Apple Product lines. Third party gaming consoles, eBook readers, portable navigation devices, personal digital assistants, digital photo frames, customer facing showroom photo printing services or kiosks, mobile Internet devices, TVs or TV connected devices, pre recorded DVDs and CDs (not including pre recorded DVD's or CD's that contain Mac compatible third party software), shall not be sold or displayed."⁷⁴¹
1000. Furthermore, Article 11 of Appendix 1 of the APR agreement detailing eligibility criteria for APR programme points of sale states that "Apple Central Processing Units must account for at least 75 % of all CPUs sold through the Authorized Location at all times. Additionally, Reseller must not display CPUs from manufacturers other than Apple."⁷⁴²
1001. Article 3.4 of the "European Premium Reseller agreement" also stipulated that APR resellers could not promote the brand or products of another supplier without Apple's prior consent: "[...] Reseller acknowledges and accepts not to install any 3rd party logos within the store or on the fascia without prior approval from Apple. Reseller may not install any 3rd party fixtures within the store without prior approval from Apple."⁷⁴³
1002. Apple therefore cannot assert that resellers with APR status could freely sell products of competing third-party brands in their point of sale.
1003. As a result (see paragraphs 484 and following above), Apple products or software or Apple environment products made up the large majority of the turnover of authorised resellers with APR status.
1004. Furthermore, a graph created in 2011 by the Association of APRs shows that 80% of APRs' business concerned the sale of Apple products (equipment or software)⁷⁴⁴.

⁷³⁹ Classification mark 14 023

⁷⁴⁰ Classification mark 14 027

⁷⁴¹ Classification mark 14 027

⁷⁴² Classification mark 134

⁷⁴³ Classification mark 130 (VC) / 39874 (VNC)

⁷⁴⁴ Classification mark 632

1005. This evidence is corroborated by the answers of the 22 APRs questioned by the investigation services on 4 October 2012. They revealed that in 2012, Apple product sales accounted for, on average,⁷⁴⁵ 78% of their turnover between 2007 and 2012.
1006. Apple's tracking table concerning its share in the business of APRs for that year in fact shows much higher proportions⁷⁴⁶ (see paragraphs 485 and following above).
1007. The two resellers cited by Apple (paragraph 895 of its observations) are the only resellers whose turnover is comprised almost exclusively of Apple products, according to its own tracking table: Apple products accounted for 46.24% and 47.26% of the turnover of DXM and Micro Alphasoft. DXM's own answers to the rapporteur questionnaire revealed that in reality, Apple products accounted for 81% of its sales in 2011, meaning that Apple's claim concerning this company is inaccurate⁷⁴⁷.
1008. The fact that APRs are deliberately placed in this state of dependence by signing the contentious agreements cannot rule out the state of dependence of the APRs in relation to Apple, as this state is an objective state whose origin is indifferent.
1009. Additionally, the case evidence shows that eBizzcuss, like other APRs, such as Actimac⁷⁴⁸, joined the APR programme when it was created out of fear of losing advantages. This distributor stated: "refusing to adhere to the programme would have meant completely foregoing the sale of Apple products."
1010. eBizzcuss also stated that it had been pressured by Apple. This company, which had always been considered by Apple as a difficult partner, as "too inflexible", "too independent"⁷⁴⁹, revealed that the manufacturer implemented strong incentives, underlining that when the distributor asked about the continuation of its sales conditions, it was told that the "sales policies for authorized resellers and Premium Resellers are separate", implying a negative answer⁷⁵⁰ and that it would likely lose its advantages if it did not adhere to the APR programme. Most APRs recognised that they joined the APR programme due to its appeal at the time, and underlined that there was no negotiation prior to joining. Symbiose Informatique explained the reasons why it opted for the APRs status as follows: "one reason only: Apple's margin policy, if you don't do it you're dead" and the as for the terms of negotiation: "what negotiation? Nothing is negotiable. You just have to sign, and in English. End of discussion."⁷⁵¹

2. The absence of alternative solutions for APRs

1011. Within the meaning of Article L 420-2 paragraph 2 of the French Commercial Code, the lack of alternative solutions means the inability of a distributor to replace its supplier with one or more suppliers that meet its supply needs under equivalent technical and economic conditions, and within reasonable timeframes.

⁷⁴⁵ Classification marks 731, 3068, 3103, 3115, 3136, 3250, 3273, 3557, 3587, 3597, 3694, 3719, 4114, 4137, 4194, 4557, 5143, 5536, 5910 and 13904

⁷⁴⁶ Classification marks 13264 to 13266 (VC)/255522 to 25524 (VNC)

⁷⁴⁷ Classification mark 3677

⁷⁴⁸ Classification mark 4566.

⁷⁴⁹ Classification mark 30725 (VC)/39915 (VNC)

⁷⁵⁰ Classification mark 221

⁷⁵¹ Classification mark 4142.

1012. Finding similar technical and economic conditions generally implies that an operator would not have to completely change its business, which would generate excessive time and costs to convert it. Reorientation solutions must therefore be found in the same business sector, with another supplier with the same influence.
1013. The case evidence shows the existence of contractual limitations to the reorientation of APRs (a); the lack of equivalent economic and technical alternatives (b); and the limited financial room for manoeuvre of APRs, making it even more difficult to adopt any alternative solutions (c); finally, the status of AAR could not constitute this alternative (d)

a. Contractual limitations

1014. It was highlighted above that the APR agreement made these operators almost exclusive distributors of the Apple brand, with the inability to sell products of other brands in their stores. Their only ability to sell competing products during the contract would therefore have been to sell them in separate multi-brand stores.
1015. Furthermore, according to Article 6.1 of the agreement, during the performance of the agreement, they could not open stores in their sales region (i.e. Europe) in which they would exclusively sell competing products of Apple products (see paragraph 497 above).
1016. Finally, upon termination of the agreement, for whatever reason, for six months, they were also prohibited from opening a point of sale in Europe that exclusively distributes competing products. As a result, during this period, they could not become affiliated with an exclusive competing distribution network, assuming that any existed in the sector (see paragraph 498 above).
1017. Therefore, conducting business as a multi-brand reseller is the only way that they would have been authorised to sell products in competition with Apple products during this six-month post-contract period.
1018. However, a business as a multi-brand computer product reseller could not constitute an alternative to the specialised distribution of Apple products. Most APRs are SMEs located in city centres, where multi-brand retail demand is met by major retailers such as the FNAC. When asked about the possibility of converting to become a multi-brand retailer, the representative of Corsidev stated “it would be inconceivable to convert the store into a multi-brand computer store. There is no market for it in the city centre⁷⁵².”
1019. The *Autorité* finds that these contractual provisions made it difficult for APRs to prepare for a potential reorientation of their business during the term of the agreement, but also for them to leave the APR network since a fixed 6-month period limited their ability to convert their business within the contractual territory, that is to say all of Europe. They therefore constituted legal constraints for transferring to other outlets.

⁷⁵² Corsidev response to the investigation services questionnaire, classification mark 3717, see eBizcuss response, classification mark 4145.

b. The absence of equivalent economic and technical alternatives

1020. Irrespective of the contractual conditions, there was no effective alternative solution that could be implemented within a reasonable timeframe to enable the APRs to replace Apple with one or more suppliers under similar technical and economic conditions. Apple alone operated a network of specialised retailers in brick-and-mortar stores dedicated to its own brand across the national territory. No suppliers of equivalent size in the national electronics market owned a brand with the same portfolio, reputation and customer base or operated a national network of specialised retailers.
1021. Additionally, the level of engagement required of APRs in terms of training, presentation and sale of products in stores specially laid out according to Apple standards made it impossible to implement a conversion solution that was technically and economically equivalent to the contractual relationship within reasonable timeframes.
1022. The layout of stores according to Apple standards, which had to be carried out by suppliers recommended by Apple, presented a specificity such that the fixtures could not be used to sell products of other brands.
1023. Although Apple asserts that it financed 50% of this fixtures, Article 7 of the “APR Funding Guidelines” states that even in the purely discretionary case of this support, the distributor was required to reimburse the funding⁷⁵³ if it decided to shut down its business within 12 months of receiving the funding, such that Apple’s support was limited and in any case, according to the distributors, only accounted for 30% of the cost of these fixtures.
1024. In addition, the specificity of staff training on Apple products made it difficult to convert to selling a competing brand within a reasonable timeframe. The APR ActiMac stated that this training costs tens of thousands of euros and that a change in the brand of products distributed could, due to the high degree of specialisation of staff in Apple products, “be considered as a significant change to the employment contract of the employees and ActiMac could be held liable and be required to bear redundancy costs.”⁷⁵⁴
1025. Above all, leaving the Apple APR network would mean losing customers attached to the business and loyal to the brand (see paragraph 495 above) and therefore would cause an irremediable disturbance to their functioning, such that, given their financial situation and limited room for manoeuvre, they would not be able to convert the business within a reasonable timeframe without jeopardising their viability. This situation is confirmed by most of the APRs questioned during the investigation. ActiMac stated (page 18): “Converting to other products would force us to seek out new customers, carry out mass communication on the new services and new products, hire new teams and retrofit our sales spaces, which would mean completely starting over. This type of launch could take months with no guarantee of success.”

⁷⁵³ “In the event an APR qualifies for the first fifty percent (50%) of an SFF payment or receives the full one hundred percent (100%) on appointment, but ceases to be an APR for any reason within twelve (12) months of qualifying for such first payment, the APR must repay Apple the SFF reimbursement received”.

⁷⁵⁴ Classification mark 4564.

1026. Of the 24 APRs questioned by the investigation services on 4 October 2012, a large majority confirmed that it would be impossible for them, at the end of the contract, to diversify their business by shifting to selling products from other brands than Apple, particularly due to Apple's requirements in terms of displaying its products in stores, training their resellers or the loyalty of their customer base to the Apple brand⁷⁵⁵.

c. Limited financial room for manoeuvre

1027. Due to the absence of an effective alternative capable of being implemented within a reasonable timeframe, the limited financial room for manoeuvre of APRs would make any conversion illusory. Even the largest APRs remained small economic players, which made it difficult for them to make new investments and reorientate their business. Furthermore, their margin levels were limited: between 2009 and 2013, around half of the stores with APR status had a net income rate of less than 1% and only around 15% had a net income rate of 3%, without ever exceeding a rate of 7.1% (see paragraph 350 above). Finally, it was found (see paragraphs 367 and following above) that the investments that APRs were required make, and the strict control of new store openings which restricted their business, also limited their resources.

1028. In this regard, during the investigation, the representatives of the association of APRs stated that "The current agreement weakens our businesses and prevents us from further investing."⁷⁵⁶ As a result, a large number of resellers have experienced financial failure since the creation of the APR programme in 2009. Five were the subject of insolvency proceedings⁷⁵⁷. Six were dissolved in 2012 and 2013⁷⁵⁸. To gauge the weight of these failures on the APR network, it should be recalled that in 2014 Apple had 22 resellers with this status. In 2017, the channel only had 17.

1029. Consequently, the APRs had no effective alternative solution that could be implemented within a reasonable timeframe under similar technical and economic conditions.

1030. All this evidence confirms the state of economic dependence of APRs with regard to Apple.

d. The "Apple Authorized Reseller" or "AAR" status

1031. Apple claims that the APR distributors could have opted for an AAR status, enabling them to diversify their brand portfolio while distributing Apple products nonexclusively.

1032. However, it should be underlined that the only possible alternative with equivalent technical and economic conditions was in the specialised and almost exclusive distribution of a competing brand. Therefore, according to Article L. 420-2 paragraph 2 of the French Commercial Code, it cannot be considered that this alternative lies in conducting another non-specialised form of distribution, which *de facto* constitutes a system with unsimilar technical conditions.

1033. Furthermore, as established in paragraph 1018 above, opening a multi-brand point of sale to replace an APR does not constitute an equivalent economic and technical alternative.

⁷⁵⁵ Classification marks 4559, 3274, 3117, 4115, 3678, 5910, 5145

⁷⁵⁶ Classification mark 624

⁷⁵⁷ Arcan IDF (court-ordered liquidation, 10 April 2014); eBizcuss (filing of the statement of claims, 18 February 2015); Mac & Co, Hype IDF and Espace Conseil (insolvency proceedings, 23 October 2015); Mlife (default on payments) August 2013, court-ordered liquidation, closure for insufficient assets, 15 January 2015); YouCast (filing of the statement of claims, 12 May 2013).

⁷⁵⁸ Acta (6 April 2012); Ephesus (20 February 2015); Ithaque (11 January 2013); Krystena (closure in 2011); Micro Alpha Soft (31 January 2015); Oreditice (11 January 2013).

1034. Additionally, assuming that non-specialised distribution meets the conditions of the abovementioned article, the status of AAR could not be considered as a technical and economic alternative equivalent to the APR programme.
1035. Firstly, the APR programme had advantages related to the use of the brand and various discounts which the AAR status did not offer.
1036. APRs are companies which, by adopting the “Apple Authorized Reseller Agreement”, are already AARs, which also joined the APR programme by adopting a specific addendum (“Apple Premium Reseller Program Addendum to Apple Authorized Reseller Agreement”). This APR programme made these companies Apple authorised distributors based on selective criteria and benefited from the Apple brand, in exchange for which Apple approved their premises and imposed a specific layout for their store. It also enabled them to benefit from a programme of discounts listed in the “Channel Terms – Apple Premium Reseller”. These advantages were promoted by Apple when it created the APR network and distinguishes APRs from pure and simple AARs. Apple recognises in its observations in response to the report⁷⁵⁹ that the APRs have “particularly advantageous” pricing conditions compared to AARs (paragraph 979). It also underlines that “the APRs had better payment terms with Apple and their customers than AARs (...)” (paragraph 1004 of its observations).
1037. The AAR status, therefore, cannot constitute an alternative equivalent to the APR status.
1038. Secondly, it is not established that the AAR business would be as profitable as an APR business.
1039. The comparison of profit margins between APRs and AARs presented in the financial study submitted into evidence by Apple shows, on the contrary, that according to “several feedback indicators on invested capital, the APRs are generally more profitable than AAR companies,” whether in terms of the net sales/asset size ratio⁷⁶⁰, EBITDA/equity ratio⁷⁶¹ or net operating income/equity ratio⁷⁶².
1040. In addition, terminating an APR agreement to enter an AAR agreement would also entail costs, as seen above, related to the irrecoverable expenses mentioned above (store layout complying with Apple standards, fixtures, training), which are difficultly borne by operators with low margins.
1041. Therefore, the ability of an APR to opt for AAR status was not an equivalent technical and economic alternative that calls into question the dependence of APRs on Apple.
1042. These findings are corroborated by the statements of eBizcuss, which described the consequences of switching to AAR status: “We would have immediately begun operating at a loss by leaving the APR status. The discount differences between the APR and AAR status are quite significant (that can vary by twice as much)”.⁷⁶³

3. Abuse of the state of economic dependence

1043. To establish Apple’s abuse of the state of economic dependence of APRs, the statement of objections identified a set of rules and conduct implemented by Apple which, taken together,

⁷⁵⁹ “(...) APRs benefit from particularly advantageous pricing conditions (...) compared to other Apple product resellers, particularly AARs, which are their closest competitors”

⁷⁶⁰ Classification mark 46558, paragraph 370

⁷⁶¹ Classification mark 46559, paragraph 372

⁷⁶² Classification mark 46561, paragraph 374 and 46563, paragraph 376

⁷⁶³ EBizcuss hearing report, page 19, paragraph 141, classification mark 424.

constitute an abuse by restricting the commercial freedom of APRs in an abnormal and excessive manner.

1044. This particularly includes supply difficulties, discriminatory treatment, unstable remuneration conditions for APR business (discounts and credits), and discretionary implementation of certain rules. These various factors have had a direct impact on the business activity of the APRs beyond what an economic stakeholder can reasonably expect from a commercial partner and create an imbalance in their relationship with Apple.
1045. According to Apple, the alleged conduct is not abnormal or excessive and therefore does not constitute an abuse of a state of economic dependence.
1046. As for the conditions under which APRs are supplied, Apple states that if supply difficulties exist, they are linked to objective constraints and can affect the various distribution channels differently. Apple says that its internal channels (and “Retailers”) have large storage capacities and forecasting tools which APRs do not have. The aim of the allocations was specifically to divide up the volumes in the event of constraints and particularly to the benefit of APRs. Apple adds that if the “First In First Out” (or FIFO) rule had been applied, the largest players (“Retailers”) would have benefited to the detriment of the smaller players (APRs).
1047. As regards the discounts, Apple underlines that the ability to modify the general terms and conditions, and consequently, the discounts, is stipulated in Article 8 of the “sales policies” applicable to all Apple authorized resellers. Prohibiting the possibility of changing the contractual terms would mean regulating Apple’s sales policy and would infringe on its entrepreneurial freedom.
1048. Apple also asserts that APRs benefit from more favourable conditions than other Apple distributors, through permanent discounts (functional discount, marketing development fund discount, performance rebate, geographical coverage rebate and discounting) or other types of advantages (marketing budgets, recycling operations and “price protection”)
1049. The APRs also enjoy broad visibility of their discounts. The functional and marketing development discounts are paid on invoice, therefore predictable. Finally, citing its financial report, Apple claims that there is no link between contractual changes and the drop in margins of APRs, which had a tendency to increase, especially since the arrival of ARSs.
1050. Apple adds that these discounts are neither discretionary, nor subjective. Firstly, “Apple has no obligation to develop a discount system based solely on objective criteria applied in a non-discriminatory or discretionary manner.” Furthermore, financially, when certain performance aspects of a retailer cannot be evaluated in an objective quantitative manner, granting discounts with a degree of subjectivity would be effective. Finally, the discounts applied at Apple’s discretion are marginal (only the marketing development and performance discounts, i.e. no more than 2.8% are concerned, as the others are granted based on specific criteria being met, through verification during merchandising audits.

1051. Finally, regarding the credits and payment terms, Apple asserts that the APRs can buy from wholesalers if they are not satisfied with the conditions offered by Apple. Apple's payment terms also fully comply with legal obligations. Finally, according to Apple, "the investigation services do not prove how Apple's modification of the credits and payment terms would constitute an abuse. Apple was in no way obligated to maintain its credit and payment terms."

1052. However, under economic and legal circumstances marked by Apple's strong interference in the sales policies of its distributors and the dependence of APRs on Apple, the supply difficulties encountered by the APRs constituted an abuse of a state of economic dependence, reinforced by uncertainties regarding the discounts to which they would be entitled.

a. Economic and legal circumstances surrounding the alleged abuse

1053. Apple implemented a distribution system which Apple calls open. It therefore did not choose a selective or exclusive distribution system, or a franchise system.

1054. However, its distribution system borrows characteristics from each of these systems, in terms of obligations for distributors, without always presenting the counterpart for them.

1055. The distributors are chosen based on selection criteria, which makes them similar to authorised distributors in a selective distribution network. However, distributors are not protected from sales outside the network, since in theory, any distributor can sell Apple products.

1056. Distributors are also bound by strict obligations in terms of merchandising, as they are required to purchase expensive fixtures from Apple itself (paragraph 372 above), in return for Apple providing it (paragraphs 367 and following above), but have no exclusivity over their catchment area, where an Apple Store can be opened at any time.

1057. They are also required to ensure that 75% of the assortment of products they sell are Apple products, according to the contractual stipulations listed in paragraphs 996 to 1000 above.

1058. Their location is also controlled by Apple, as they require Apple's prior authorisation to invest in new retail space intended to have APR status (paragraphs 392 and following above).

1059. Apple has imposed operating constraints on its resellers since the launch of the APR programme (30 October 2006). However these constraints have increased with the opening of the "Apple Online Store" and "Apple Retail Stores", i.e. since 2008-2009, and have become increasingly frequent with greater implications on the business of APRs, as they informed the investigation services.

1060. In this general restrictive context, the APRs were subject to additional constraints, constituting abusive practices in terms of their supply volumes and sales conditions issued by Apple.

b. Supply difficulties

1061. These difficulties were made possible by contractual clauses. However, the abuse results from practices confirmed by the statements of the APRs, included as evidence to the case.

❖ Contractual clauses

1062. It should be reminded that the “APR addendum”, signed by the APRs with an AAR agreement, contains restrictive clauses related to the supply of distributors.
1063. Firstly, the list of Apple products which the distributors are authorised to sell can be changed by Apple at any time, without notice.
1064. According to Article 4.2 of the “Apple Authorized Reseller Agreement”, “Apple Reseller will only receive benefits from Apple in respect of the Apple Product category for which it has received Apple Product Authorization. Apple may, in its sole discretion, authorize Reseller in respect of additional Apple Product category by Issuing additional Apple Product Authorization. By selling such Apple Product category, Reseller agrees to any obligations pertaining to that Apple Product category”⁷⁶⁴ (underline added).
1065. Article 5.3 of the same agreement stipulates: Apple reserves the right to remove or add Products from or to the Apple Reseller Price Lists, restrict or otherwise limit Configure-to-Order Products, and change the Ancillary Terms and scope of Reseller’s authorization at any time and without prior notice. Apple will have the right to restrict Reseller’s access to Apple Products until Apple determines that Reseller complies with any and all changes to the Ancillary Terms.”⁷⁶⁵
1066. Secondly, as underlined above, Apple may, at its sole discretion, change the product allocations and give priority to its own stores over APR resellers.
1067. According to Article 5.4 of the “Apple Authorized Reseller Agreement”, “Apple may allocate Products in its sole discretion and without liability to Reseller. Reseller acknowledges that Apple may choose to allocate Products to or among Apple’s own retail and web-based stores, direct customers, education customers, sales territories, other resellers, or other sales channels, before Reseller, and that there may be delays in Apple’s fulfilment of Reseller orders”⁷⁶⁶ (underline added).
1068. Finally, Apple is authorised to cancel any previously accepted order⁷⁶⁷, reject or change an order, in which case the distributor has 7 days to accept the change⁷⁶⁸ and make partial shipments⁷⁶⁹.
1069. Finally, the “fast ship program” implemented by Apple for the launch of new products, leaves APRs who are part of the “fast ship program addendum” in the dark about the products until the day before their launch and about the quantities to be shipped to them. As product

⁷⁶⁴ Classification mark 14 011

⁷⁶⁵ Classification mark 14 012

⁷⁶⁶ Classification mark 14 012.

⁷⁶⁷ Also see Article 8.3 of the Apple Authorized Reseller Agreement; classification mark 14 013: “Any order placed with Apple is subject to acceptance by Apple, and Apple may decline any order, in whole or in part, for any reason. The taking and acknowledgment of orders does not, in any way, constitute automatic acceptance of such orders by Apple. Apple may cancel any accepted order prior to shipment”

⁷⁶⁸ Also see Article 8.4 of the same agreement: “Apple may at any time reject orders and change or modify Product models, offerings, specifications, construction or design. Any Products so changed or modified and offered to Reseller in fulfillment of original orders from Reseller are subject to acceptance by Reseller. If Reseller does not cancel the original orders within seven (7) days the change or modification will be deemed as accepted. Reseller acknowledges and agrees that Apple shall have no liability to Reseller as a result of any action it takes in furtherance of any of the foregoing ”

⁷⁶⁹ Also see Article 8.5 of the same agreement: “Apple may make partial shipments of Reseller's orders without liability for any failure to ship complete orders or for any shipment delay. Reseller will be invoiced separately for each partial shipment and will pay each invoice when due, without regard to subsequent deliveries”

launches are frequent, resellers send Apple an open purchase order each quarter. The APRs must then wait for Apple's authorisation to sell the products in question, without accepting pre-orders.

❖ *Proven practices*

1070. Most APRs reported that they regularly encounter delivery problems, particularly during new product launches or at the end of the year (see paragraphs 503 à 507 above). They faced restrictions in supply due to the customer allocation policy implemented by Apple, either directly or through its wholesalers.
1071. Some products proved to be totally unavailable (see paragraphs 507, 515 and 524 above).
1072. When new products were launched, APRs often found themselves without stocks (see paragraph 515 above) so that they were unable to meet the orders placed with them (see paragraph 523 above), while the network of Apple Stores and "Retailers" were regularly supplied (see paragraphs 512 to 526 above).
1073. This resulted in a loss of customers, including regular customers (see paragraph 523 above).
1074. In some cases, in order to meet an order, they were even forced to source from other distribution channels, such as ARS (see paragraph 525 above).
1075. These difficulties were the result of Apple's intention to prioritise its own network (website and "Apple Stores", see paragraph 518 above), demonstrated by the prohibition on pre-ordering for APRs, while APR customers received emails directly from Apple, encouraging them to pre-order on line from their "Apple Store" (see paragraph 521 above).
1076. The evidence gathered for this case shows that Apple primarily favoured its internal channels to the detriment of supplying its APRs, but many Apple products unavailable at APRs were also being sold by other retailers, and not only in the "Apple Store" network (see paragraphs 250 to 257 and 512 to 525 above).
1077. This different treatment was also observed in the implementation of the "fast ship program"⁷⁷⁰, dedicated to the launch of new products. "Apple Stores" received more information than APRs, who had no visibility on these programmes, and no information about the models involved, quantities and the product prices that would be imposed on them. This lack of visibility on new products to be distributed was all the more damaging for APRs because their customers "love innovations"⁷⁷¹. Moreover, this sometimes resulted in overstocking products (paragraph 326).

⁷⁷⁰ Paragraphs 228 to 237

⁷⁷¹ Acti Mac response to investigation services questionnaire, classification mark 4563.

1078. One APR said: “We never know when a new product is going to be launched, usually there are rumours (...) Apart from the iPad and iPhone, product launches are not announced. For other products there is no announcement, we are usually informed by the press, or we can deduce that there will be a product announcement when some Apple Stores announce a new product launch (...). For iPads we are not allowed to communicate about the launch.”⁷⁷²
1079. Apple has not justified this difference in treatment in implementation of the “fast ship program”. In any case, supposing that it wanted to maintain secrecy around new product launches, there were ways of doing so that would have had less impact on the commercial freedom of its APR partners, such as confidentiality clauses.
1080. Consequently, while the “Apple Stores” and the APRs were presented as specialist distributors in direct competition with each other, offering fundamentally identical services, these supply delays and refusals, the prohibition on pre-ordering and the unequal information in the implementation of “fast ship programs” constituted a competitive disadvantage for APRs, such as to reduce their credibility with regard to their customers. The CEO of eBizcuss told the investigation services that half of its customers “were lost by eBizcuss because they did not have the products they were looking for in stock.”⁷⁷³ Similarly, the representative of Acti Mac, another APR, stated: “Regularly receiving only a minimal supply, we cannot commit ourselves to delivering to our customers who, weary of the effort, cease soliciting us by ordering either from the Store or by going to the nearest ARS.”⁷⁷⁴
1081. A judgment of the Court of Justice of 16 September 2008⁷⁷⁵, pertaining to supply restrictions imposed by a dominant operator on distributors states that an undertaking in a dominant position may take reasonable measures proportionate to the necessity of preserving its own legitimate commercial interests, without being accused of abuse. It may therefore impose a supply delay or refusal on a distributor, as long as this delay or refusal is justified by objective reasons, such as stock shortages, lack of funds on the part of the distributor, or the “abnormal” nature of the order. For a manufacturer providing quasi-exclusive supply to an economically dependent distributor, it is even more important to offer objective justification for supply delays and refusals, since the distributor has no choice but to source its supply from the manufacturer.
1082. However, in this case, Apple gave no reasons to its APR distributors (see paragraphs 507 and 514 above).
1083. The only justification now given by Apple relates to its “fair share” policy, which, as shown above, actually covered an anticompetitive customer sharing practice. It was considered that the allocation mechanism implemented by Apple for its wholesalers restricted competition, because it prevented distributors from selecting their suppliers, since they are selected by Apple itself. Practices in which Apple set the number of products supplied to its resellers and distributed allocations, often without taking into account the actual needs expressed, led to irregular supply or non-delivery of products over several years.
1084. It has not been established that these supply delays or refusals were the result of stock shortages, with APR statements showing rather that the products were available in the “Apple Stores”, the “Apple Online Store” and at “Retailers”. No other reason linked to lack of distributor funds or the abnormal nature of orders is given. This discriminatory treatment

⁷⁷² Classification mark 613

⁷⁷³ eBizcuss hearing report, page 21, paragraph 153, classification mark 426.

⁷⁷⁴ Acti Mac response to investigation services questionnaire, classification mark 427.

⁷⁷⁵ CJEU, 16 September 2008, *GlaxoSmithKline*, C-468/06 to C-478/06

of APRs was all the more serious for them because their particular situation with regard to the manufacturer required more regular supply, except in the event of duly demonstrated material impossibility. APRs are commercially independent operators, unlike “Apple Stores”, and have to purchase the goods in order to carry out their distribution business. However, they are forced to stock Apple products and are put in a state of economic dependence, unlike “Retailers”, who run a multi-brand retail business and are not dependent on Apple.

1085. The volume of business and economic viability of APRs, obliged to sell 70% of their products under the Apple brand, depended on downstream sales volumes, based on upstream supply of Apple products. However, the investigation shows that their business was restricted by the supply difficulties they encountered with Apple and its authorised wholesalers.
1086. Apple cannot justify this differing treatment by the existence of constraint periods that it generated itself through a deliberately Malthusian product launch and supply policy. This strategy is illustrated by Acti Mac, who says “Apple organises a kind of shortage without penalising its own distribution networks.”⁷⁷⁶
1087. In addition, supply refusals and delays that are totally discriminatory and random, and subject to the sole discretion of Apple, could do nothing other than create a climate of uncertainty such as to negatively impact APR performance and limit their capacity to invest, which Apple has, in fact, admitted itself⁷⁷⁷.
1088. Finally, it has not been established that APRs have been better supplied thanks to the “fair share” policy implemented by Apple than they were without it, contrary to Apple’s claims. In fact, the case evidence shows that most of Apple’s interventions required wholesalers to supply indirect APRs as a priority over direct APRs, whose customers Apple reserved for itself. Cases where it requested wholesalers to supply APRs as a priority over other retailers are much less common. Finally, as seen above and in the statements of most APRs, they had great difficulty during the constraint periods.
1089. This information alone makes it clear that Apple’s recurring and continuous action to delay deliveries or refuse to supply APRs, and to disadvantage them with regard to its own network, prevented them from developing their distributor business under normal conditions.
1090. This policy of irregular supply that puts distributors at a disadvantage and is not justified by objective information is considered abnormal and constitutes an abusive practice.

c. Uncertainties regarding the price of products purchased

1091. The APRs were kept in uncertainty about the volume of their supplies, as well as about the terms of the discounts offered by Apple.
1092. The findings presented above (see paragraph 450 above) show that the system of discounts granted to APRs was unpredictable and discretionary in nature, creating uncertainty about the amounts involved, in addition to uncertainty about their deliveries.
1093. Given the significant and growing importance of discounts in the profitability of APRs and in their ability to generate a positive margin, the unpredictability of the discount system, arising from contractual agreements and their conditions of application, constitutes abuse.

⁷⁷⁶ Acti Mac response to investigation services questionnaire, classification mark 427.

⁷⁷⁷ Classification marks 29042 to 29045 (VC)/39906 (VNC)

❖ Unpredictability arising from the instability of contractual conditions

1094. Paragraphs 442 to 444 above show that by virtue of Article 5 of the APR Agreement, the terms of the agreement and its addenda can be modified by Apple at any time, subject to one month's notice⁷⁷⁸. The vast majority of APRs interviewed during the investigation said that they had virtually no room for negotiation with Apple⁷⁷⁹, and received the various addenda from the manufacturer in English without notice, and had to sign them with no option for discussion⁷⁸⁰.
1095. Apple may also, at its sole discretion, exclude any product from the discount base, in accordance with Article 4.1, d) of the "Channel Terms"⁷⁸¹.
1096. Apple also unilaterally and regularly modifies the methods of obtaining discounts and rebates, using "New Deals" agreements⁷⁸².
1097. Since 2005, there have been four different "New Deal" versions for "Resellers": "New Deal 3" (ND 3, April 2005 to June 2008), "New Deal 4" (ND4, July 2008 to March 2011), "New Deal 5" (ND 5, April 2011 to March 2013) and "New Deal 6" (which came into force from April 2013⁷⁸³). The criteria change in these different versions, as do their role in discount allocation.
1098. This change over time leads to a complexification of the applicable rules and a lack of visibility regarding the sustainability of reseller margins, confirmed by the vast majority of APRs in their statements to the investigation services (see paragraphs 450 to 456).
1099. Contrary to Apple's claims, the fact that the revised agreement clauses were signed by the APRs has no bearing, since it is the unpredictability for APRs resulting from frequent changes to contracts that is in question.

❖ Criteria for allocating discounts and checking them that are liable to discretionary application

1100. It has been shown above that some discounts are explicitly granted "at Apple's discretion", like the Marketing Development Fund ("MDF") (see paragraphs 407 to 0 above) for marketing and sales development operations on Macs, iPods and Apple TVs (0.8%) or the APR quality discount or performance rebate ("Perf rebate") for sales performance of Mac computers and iPods (see paragraphs 411 to 414 above).
1101. Apple reserves the right to grant or refuse some discounts whether or not the criteria are fulfilled. These discounts may not be the largest ones, but they can have a significant impact on APR margins, given that these are fairly low.

⁷⁷⁸ Classification mark 130 (VC) / 39874 (VNC)

⁷⁷⁹ See APR responses to the request for information of 4 October 2012, questions 30 and 33, for example classification marks 3255 to 3257, classification marks 5524 to 5525 and classification mark 3107.

⁷⁸⁰ Classification mark 4203.

⁷⁸¹ Classification mark 14 032: "Apple reserves the right to exclude specific Authorized Products and/or purchases from any discount and/or rebate entitlement and/or to set any discounts, rebates or other benefits in respect of any Authorized Products or purchases in specific Programs."

⁷⁸² ND6 was launched in February 2013: classification mark 29150 (VC) / 39907 (VNC), classification mark 27760 (VC) / 39888 (VNC), and classification mark 28998 (VC) / 39904 (VNC). See changes in programmes from ND1 to ND6: classification mark 32976 (VC) / 39919 (VNC), classification marks 27757 (VC) / 39887 (VNC), and classification mark 28865 VC / 39898 (VNC).

⁷⁸³ Classification mark 14200 (VC) / 14471 (VNC)

1102. Moreover, Apple grants discounts and rebates depending on assessments it performs using criteria liable to lead to subjective and non-transparent assessments through audits or mystery shopping (see paragraphs 428 to 434 above).
1103. The biggest discount, the functional discount, is subject to an evaluation carried out every six months to determine the discount rate. The criteria defined in the “Channel terms”, i.e. “point of sale location quality, staff skill and expertise, the availability of software and Apple solutions and the service to end customers” are set out in the “Reseller Evaluation Tool” (“RET”) questionnaire with 109 questions which gives a score and is carried out by an auditor. The criteria and any variations can be changed by Apple at any time, subject to a short 30-day notice period, on the basis of half-yearly inspections which may, at Apple’s discretion, be more frequent⁷⁸⁴.
1104. The information on the “RET” is only given at Apple’s discretion, provided that requests are “reasonable”⁷⁸⁵. Apple has provided no evidence to support the transparency of audits. The fact that they are performed by third-party companies is irrelevant in this regard.
1105. This system creates a high level of uncertainty regarding functional discount rates, illustrated by Apple itself in its observations in paragraph 963: “under New Deal 5 (2011-2013), if the point of sale has a BEST score, the APR gets a 4% discount. If it has a BETTER score, it gets a 2% discount,” but these descriptions are not explained further.
1106. In the same way, the performance rebate, whose share in the theoretical sales margin (based on the Apple recommended retail price) has increased, is based on the evaluation performed by the “mystery shopper”, for which some criteria are open to discretionary assessment, such as the quality of the “in-store consumer experience”. APRs complained about this situation on a number of occasions.
1107. Consequently, the subjectivity of the discount criteria put APRs in an insecure situation which made it generally impossible for them to know the discount rate they would get in advance.

⁷⁸⁴ Article 4.3, a), ii) of the Channel Terms

⁷⁸⁵ *ibidem*

❖ *The growing importance of discounts for APR margins*

1108. These discounts, which were generally unpredictable due to frequent contractual changes and associated conditions accounted for a growing percentage in APR margins, due to the erosion of the price differential between wholesale prices and retail prices mentioned in paragraph 362 above. The investigation services found that between “New Deal 3” and “New Deal 4”, the percentage of discounts in the theoretical sales margin of APRs rose from 67.5% to 78.5%⁷⁸⁶.
1109. It was established above (see paragraph 902) that any reduction in discounts impacted the reseller distribution margin, especially since this margin with no discounts was low.
1110. Uncertainty around discount levels further increased the negative impact on APRs of the uncertainty associated with irregular supply mentioned above.
1111. Kept in uncertainty regarding their supply conditions and pricing and sales conditions, it was impossible for APRs to forecast their volume of business and profitability.
1112. The abuse of a state of economic dependence associated with supply conditions was therefore reinforced by abuse linked to discount conditions.
1113. Contrary to Apple’s claims (paragraphs 981 to 988), it is not being accused of responsibility for the lack of growth and slight decline of the APR margin during the period investigated, or for its pricing structure, but for the unpredictable nature of discounts which, given their rising percentage in the margin, further hampered APRs visibility regarding their economic sustainability.
1114. Finally, contrary to Apple’s claims, the criteria for abuse of a dominant position with regard to discounts, as defined by the *Michelin* judgment, may be transposed to abuse of a state of economic dependence, even if competition is not affected in the same way in both cases. In some cases, a discount policy can allow an operator in a dominant position to exert strong pressure on resellers in order to prevent them ordering from a competitor. In other cases, it can also allow an operator with economically dependent resellers to keep them in a situation of uncertainty, which further reduces their commercial autonomy from the operator, already restricted by the state of dependence.

4. Real or potential effect on the functioning or structure of competition

1115. According to Apple, it has not been established that the practices had an impact on the market as a whole. It states that “while the APR channel is a central feature of Apple’s strategy, in that it allows Apple to present its products in a premium environment to consumers looking for specialist brand advice, it remains relatively marginal in terms of sales with regard to other Apple product distribution channels,” since it only represents 11% of Apple product sales. It holds, therefore, that there is no impact on intra-brand competition: “(...) it is clearly impossible for the sales difficulties or closures encountered by some APRs (which are in no way the responsibility of Apple, as shall be shown below) to have the slightest effect on intra-brand competition, in that consumers can always benefit from alternative offers from the many operators across the territory.”
1116. Moreover, Apple considers that the APR channel has been continually strengthened, thanks to its investment since 2010, and that “The dynamism of APRs is also a result of the high

⁷⁸⁶ Calculations based on Apple’s *keylearnings* file (classification mark 44 004).

level of remuneration that APRs generate. (...) APRs generally perform significantly better than AARs, indeed, better than a large number of CAC 40 companies.”

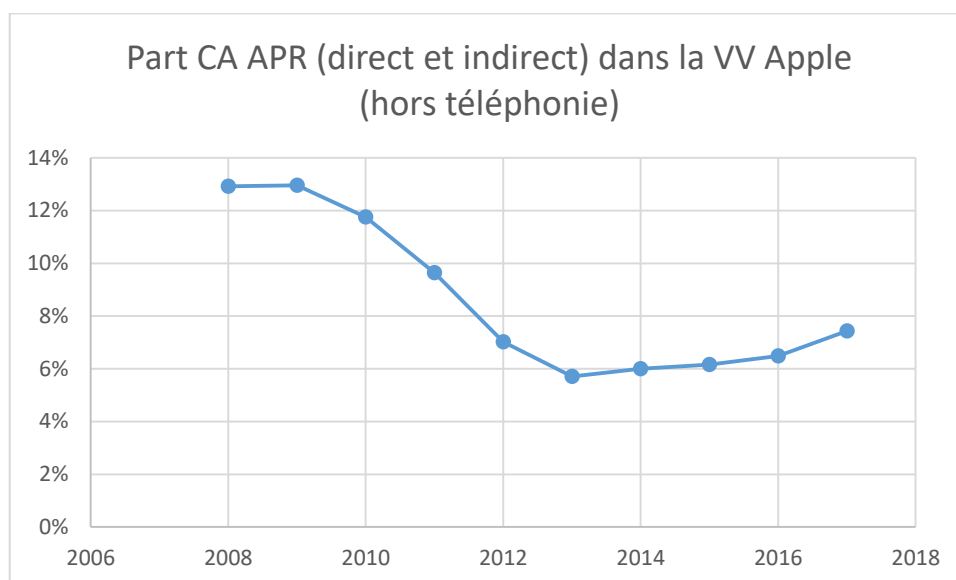
1117. Finally, Apple contends that APRs present a contrasting and heterogeneous situation, and a positive margin, which would preclude any abuse (see paragraphs 1072 of Apple’s written arguments). It uses a financial study to show that the alleged abuse has had no effect. It claims that APR difficulties are not linked to its practices, but to the general market situation and an APR growth crisis, and to management errors for some, especially eBiszcuss.
1118. However, first, in order to confirm a breach of the second paragraph of Article L.420-2 of the French Commercial Code, it is not necessary to establish that competition has actually been affected, but only that the functioning or structure of competition could potentially be affected. Moreover, the abuse of a state of economic dependence does not need to have had an impact on the market as a whole.
1119. It is clear that the abovementioned abusive practices restricted the autonomy and commercial freedom of APRs to an excessive extent. Kept in uncertainty regarding quantities delivered and Apple discounts, APRs were unable to have an overall perspective on their commercial situation. This uncertainty necessarily weakened their capacity to exert competitive pressure on other Apple distributors, such as the “Retailers”, “Apple Stores” or the “Apple Online Store”, and thereby exert effective competition in the distribution of Apple products.
1120. Moreover, Apple’s discriminatory treatment of them with regard to its internal distribution channels, in terms of supply of brand products, reduced their capacity to generate intra-brand competition with the specialised distributors that resemble them the most, i.e. the “Apple Stores”, in particular by reducing their competitiveness with “Apple Stores” and online direct sales by Apple. The distribution model represented by APRs, which was the closest to the “Apple Stores”, was likely to be particularly attractive to some of Apple’s customers, due to the level of service offered.
1121. By restricting competitiveness, these practices restricted competitive emulation, which encourages the development of new local services for consumers (purchase advice, product demonstrations, home delivery, pre-installed software), over and above price competition (which was already reduced for 50% of Apple product retail distribution, due to the lack of price competition between the Apple direct channel and the APRs organised by the agreement practice described above). The fact that some consumers consider it difficult or impossible for Apple products to be substituted by competing products (see paragraphs 494 and following) makes this limitation of choice even more damaging to competition.
1122. The fact that APRs only represented 11% of retail sales for Apple products during the time period in question, while the products themselves only accounted for 26% of the French IT and electronics market, does not mean that these practices had no significant effect on the functioning of competition. Through the alleged abuse of a state of economic dependence of which it is accused, Apple harmed the independence and commercial freedom of the operators responsible for distributing 11% of its brand products, and put itself in control of these independent distributors. Furthermore, no market share threshold has been set for assessing the potential effects of abuse of a state of economic dependence.
1123. The disadvantages experienced by APRs due to the abuse of a state of economic dependence of which they were victim particularly impacted competition between APRs and “Apple Stores”, which represent a different sales channel from other distributors. The weakening of this distribution channel affected the functioning of intra-brand competition for Apple products, as stated by some APRs (see paragraph 1080).

1124. Second, the APR network is not steadily growing, as Apple claims.

1125. The number of APRs dropped during the period studied, as shown by Figure 23 in the Apple financial study in response to the statement of objections⁷⁸⁷. At the start of 2011, there were 58 of them, with 50 left at the end of 2016, with a significant reduction in 2012 and 2013. Fewer APRs were opened too, and, particularly in the second part of the period investigated, where they were opened it usually involved companies already working in the APR segment – and encouraged to remain so by obstacles to changing their distribution model - and not the arrival of new companies. Finally, APR stores that shut down were generally due to business closures, demonstrating the economic challenges for these resellers.

1126. As stated in paragraph 90 of this decision, APRs are the least developed distribution channel in the distribution system implemented by Apple. Over time, their market share has decreased, both in value and volume, while over the same time period, only Apple's own distribution channels have experienced significant growth.

1127. In terms of sales, the following graph based on value of sales (VS) data supplied by Apple⁷⁸⁸ illustrates a significant drop of around 40% in Apple sales for the APR channel.



Part CA APR (direct et indirect) dans la VV
Apple (hors téléphonie)

Share of (direct and indirect) APR turnover
in Apple VS (excluding telephone sales)

⁷⁸⁷ Classification mark 43993

⁷⁸⁸ Confidential data not available to the other parties.

1128. In terms of absolute value, total sales (excluding telephone sales) for APRs also dropped during the period investigated (i.e. up to 2013), and the mean value of Apple sales performed by each APR also dropped slightly, contrary to the claims of Apple, which alleges that while the relative share of APRs decreased, the value of sales (VS) for each individual APR increased in absolute terms⁷⁸⁹.

€ million	Apple AOS ARS VS	Apple to APRs VS	No. of APRs at year end	Apple to APR by APR VS
2010	280	112	58	1.9
2011	398	115	62	1.9
2012	478	102	57	1.8
2013	494	79	50	1.6
2014	546	84	47	1.8
2015	582	88	49	1.8
2016	528	88	50	1.8
2017	617	107	47	2.3

1129. Moreover, the following observation by Apple (paragraph 589 of its written arguments) needs to be put into perspective: “The quality of APRs and their influence are actually an integral part of the Apple brand image. A poor customer experience in an APR, or a more general APR failure, negatively impacts Apple since they are closely associated with the Apple brand image. It is therefore in Apple’s interests to ensure the development and robustness of its APR network, which is complementary to other distribution channels.” While it may seem important for Apple that APRs provide a shop window for its products, in a similar way to its own stores (in terms of product presentation, user advice, etc.), the interests of Apple and the APRs are only partially aligned. For example, the fact that the products presented are not in stock in the APR store is less of a problem for Apple, in that customers can generally order products in the “Apple Stores” or on the “Apple Online Store”, which do not face the same supply restrictions.

1130. Third, Apple argues, on basis of APR performance as demonstrated by its financial study, that the alleged abuse has had no effect and/or that the situation of APRs varies. But this performance is not enough in itself to understand the effect of the practices, whose primary objective, for Apple, was to restrict competition on the retail market and not, first and foremost, to harm the performance of its independent distributors. Moreover, the evidence submitted by Apple confirms the analysis of the investigation services with regard to the situation of APRs and their limited resources. Finally, the variation between APRs alleged by Apple has nothing to do with understanding the effects of these practices, and, furthermore, has not been demonstrated by Apple.

1131. Finally, the particular situation of eBizcuss illustrates the specific and actual impact of the abuse of a state of economic dependence by Apple on the structure of competition itself.

1132. This company was in direct competition with “Apple Stores” in the Paris region and Lyon in November 2009.

1133. The eBizcuss stores in Paris and Lyon were unable to receive the Apple products required to satisfy the demand of its own customers and to be able to compete with the Apple Stores

⁷⁸⁹ Table in page 2 of the finance department report: specify references

by pricing or services, and were placed at a commercial disadvantage with regard to “Apple Stores”, leading to a drop in turnover for these stores of around 15%. Weakened by Apple's practices, the company went into liquidation.

1134. Although other APRs did not experience an equally negative outcome, the case of eBizcuss is not unique, since many APRs complained of similar practices on the part of Apple, including supply refusals or delays, which restricted their commercial and financial autonomy, damaged their distribution business and weakened their ability to compete (paragraphs 526 and following). You Cast blamed its financial difficulties and liquidation on “cash flow problems linked to Apple product delivery issues.”⁷⁹⁰
1135. Finally, although no exclusionary strategy has been demonstrated by the investigation services, the chair of the APR association considered Apple’s behaviour with regard to APRs as such, and complained of a “genuine exclusionary strategy on the part of Apple” with regard to APRs⁷⁹¹, with Alis Informatique talking in terms of a “chronicle of premeditated death.”⁷⁹²
1136. Apple’s behaviour therefore affected the functioning and structure of intra-brand competition for Apple products.
1137. Moreover, by adopting such behaviour in the distribution of its products, Apple ignored the applicable rules, giving itself a competitive advantage over other competing distributors.
1138. Having used the APR channel as a way to penetrate the French retail market, Apple decided to open up Apple Stores in the most profitable catchment areas, in competition with some APRs. These APRs, in a state of economic dependence and at a disadvantage with regard to the “Apple Stores” suffered from the competition of these new distributors who were bigger and better stocked. The fact that other APRs who were not in direct competition with “Apple Stores”, but in competition with the “Apple Online Store” remained in the market, but in less favourable conditions, does not mean that the abuse of a state of economic dependence had no inter-brand effects. Apple benefited from this network of specialised independent distributors, poor copies of “Apple Stores” in less popular catchment areas, which prevented it from having to open “Apple Stores” in these areas itself. Subjected to constraints comparable to those of an owned operator, while having to assume the commercial and financial risks of independent companies, the APRs enabled Apple to distribute its products throughout France without having to invest in its own stores and without its direct sales (online and physical stores) being affected by competition.
1139. The result was a competitive advantage with regard to manufacturers of competing products, likely to distort inter-brand competition
1140. Consequently the behaviour of which Apple is accused involving abusive restriction of the activity of APRs and affecting the functioning of competition, constitute an anticompetitive practice pursuant to the second paragraph of Article L.420-2 of the French Commercial Code.

5. Duration of the practices

1141. The statement of objections states that the abuse of a state of dependence practice began in November 2009, and lasted until the statement of objections was issued.

⁷⁹⁰ Statements of You Cast, classification mark 716.

⁷⁹¹ eBizcuss hearing report, classification mark 422.

⁷⁹² Alis Informatique response to investigation services questionnaire, classification mark 3282.

1142. Apple contests the duration of the infringement. It argues that since no specific behaviour has been alleged, the investigation services have established neither the start date nor the duration of the alleged practices, which in any case, cannot pre-date the date of the surprise inspection, in the absence of any evidence to the contrary.
1143. The abuse of a state of economic dependence of which Apple is accused comprises a set of contractual provisions and practices relating to supply problems and uncertainties regarding discounts, which, taken together, are considered abnormal.
1144. The start of the abusive practice therefore coincides with the implementation of these stipulations and practices, which the investigation services correctly date to the creation of the first Apple Retail Stores in France, in November 2009. The APR statements agree that their difficulties began at this time.
1145. However, the case shows no incriminating evidence subsequent to the surprise inspection of April 2013, since all documents and statements pre-date this. Apple's customer allocation policy, responsible for supply delays and disruptions for APRs, also came to an end in early April 2013.
1146. There is therefore reason to consider this as the end date for the state of economic dependence.
1147. Although the contractual provisions between Apple and its APRs remained unchanged after April 2013, it has not been demonstrated that the practices which together constituted abuse continued after this date.
1148. Consequently November 2009 should be considered the start date of the abusive practices, and April 2013 the end date.

6. Entities responsible for the practices implemented

1149. The investigation established that the behaviour of which Apple is accused involved various entities of the Apple group, as explained below:

a. Apple Sales International ("ASI") and Apple Distribution International ("ADI")

1150. The case shows that the agreements made with the resellers were signed with ASI, whose activity was taken over by ADI on 1 April 2012.
1151. It is therefore these subsidiaries that communicate addenda such as the "Channel Terms" and "Sales Policies" to resellers, including APRs (see paragraphs 399 and 912) and remind them of their obligations regarding implementation of agreements and their annexes during changes, which can sometimes be significant⁷⁹³. They also communicate discounts to Apple France via the "New Deals" system.

⁷⁹³ For example see classification mark 905: "I refer to your Apple Authorized Reseller Agreement with Apple Distribution International ("ADI") and your Apple Premium Reseller Addendum (the "Addendum") including any subsequent amendments and / or changes communicated to you by Apple after the date of the signature. This is a reminder notice that existing APR locations that do not meet the Store Location, Visibility, Size and Design criteria within Appendix 1 of the Addendum must relocate to a suitable approved location before 31 December 2012. If you have any questions, please contact your local Apple account manager"

1152. These subsidiaries also ask Apple France to ensure that authorised resellers comply with their contractual obligations, especially via external service providers that implement quality controls such as “mystery shopper” visits or audits⁷⁹⁴.
1153. With regard to reseller supply, it is also these companies that manage product shipments⁷⁹⁵ and the distribution of volumes between wholesalers and resellers⁷⁹⁶.

b. Apple Europe Limited (“AEL”)

1154. AEL is responsible for marketing and supports evaluations of resellers and their stores⁷⁹⁷. AEL therefore takes part in organising audits and mystery shopping, and may submit scores for calculating discounts⁷⁹⁸. It is AEL that sets up marketing campaigns for France and collects information on APR direct and indirect sales and transfers to wholesalers⁷⁹⁹. Finally, AEL sends changes to the “New Deals” to Apple France, including for France⁸⁰⁰.
1155. With regard to product supply and allocation, AEL’s role has been highlighted regarding allocations made to wholesalers by Apple, through both direct intervention with ASI (later ADI) and indirect interventions with Apple France (see paragraphs 817 and following above).

c. Apple Operations Europe (“AOE”)

1156. With regard to product supply and allocation, AOE’s role has been highlighted regarding allocations made to resellers by Apple, both through direct intervention with ASI/ADI and indirect interventions with Apple France (see paragraphs 811 and following above).

d. Apple France

1157. Apple France implements directives from other Apple group entities, in particular from ASI (later ADI).
1158. Apple France collects information on point of sale activity in order to calculate discounts⁸⁰¹ and report them to Apple.

⁷⁹⁴ Classification mark 4504

⁷⁹⁵ See Apple statements: Classification mark 14765 (VC) / 14796 (VNC) - 34962 (VNC2) and classification mark 14766 (VC) / 14797 (VNC) - (34963 (VNC2)

⁷⁹⁶ Classification mark 14190 (VC) / 14461 (VNC), classification mark 26894

⁷⁹⁷ Classification mark 34684 (VC) / 34873 (VNC) - 34980 (VNC2)

⁷⁹⁸ For example: classification marks 26478 and 26479, 26512, 26510

⁷⁹⁹ For example: classification marks 655 and 10930 or for eBizcuss, classification marks 11111 and 11112 (VC) / classification marks 24308 and 24309 (VNC)

⁸⁰⁰ For example: classification mark 27374, email from H... (Europe) to Country Managers: “Last week we sent a communication to all authorised channel resellers to make them aware of changes in Sales Policies related to the Apple Authorized Reseller Agreement. This was the effective launch of New **Deal** 4 the general framework defining Apple EMEA’s commercial policies towards the Prosumer Channel partners”

⁸⁰¹ Classification mark 4509

1159. It monitors APR communications⁸⁰² and store layouts. It checks that the “design kit” is properly implemented when stores are created or modified in line with “New Deal” changes⁸⁰³, and also asks APRs to send them photos of their store⁸⁰⁴. It calls APRs into line that do not observe the group’s directives⁸⁰⁵ and discount prohibitions⁸⁰⁶ (see paragraphs 435 and following above).
1160. With regard to supply and product allocation, it is Apple France that communicates directives for allocations of volumes in line with allocations made by ADI and ASI (see paragraphs 277 and following above).

e. Conclusion

1161. In view of the foregoing, Apple Sales International (“ASI”), Apple Distribution International (“ADI”), Apple Europe Limited (“AEL”), Apple Operations Europe (“AOE”) and Apple France should be considered co-offending parties to the practice penalised under Objection no.4.

7. Conclusion on Objection no.4

1162. In view of the foregoing, the Apple group – through the companies Apple Sales International (“ASI”), Apple Distribution International (“ADI”), Apple Europe Limited (“AEL”), Apple Operations Europe (“AOE”) and Apple France – implemented practices constituting an abuse of the state of economic dependence of APRs in their regard, between November 2009 and April 2013.

E. IMPUTABILITY

1. APPLICABLE PRINCIPLES

1163. It is apparent from established case law that Articles L. 420-1, L. 420-2 of the French Commercial Code and 101 of the TFEU cover infringements committed by undertakings. The notion of an undertaking must be understood as designating an economic unit, even if, from a legal point of view, that unit is made up of several natural or legal persons. It is this economic entity that shall, where it infringes competition rules, be liable for the infringement in accordance with the principle of personal responsibility⁸⁰⁷.

⁸⁰² Classification mark 13929 (VC Inf)

⁸⁰³ For example, classification mark 758 and classification mark 34841.

⁸⁰⁴ For example, see 34371 to 34372 (VC) / 39929 (VNC), or classification marks 34023 to 34025 (VC) / 39926 (VNC)

⁸⁰⁵ Classification mark 5544

⁸⁰⁶ For example, classification marks 34937 to 34939.

⁸⁰⁷ See, in particular the judgments of the Court of Justice of 10 September 2009, *Akzo Nobel e.a. v Commission*, C-97/08 P, Rec. p. I-08237, paragraphs 55 and 56, and of 20 January 2011, *General Química v Commission*, C-90/09 P, Rec. p. I-0001, paragraph 36; see also the judgment of the Paris Court of Appeal of 29 March 2012, *Lacroix Signalisation e.a.*, paragraphs 18 and 20

1164. Therefore, in French and European law, within a group of companies, the parent company may be held liable for the behaviour of a subsidiary, particularly when, although the subsidiary has a separate legal personality, it is not autonomous in determining its behaviour on the market, but primarily applies instructions given by the parent company, in particular with a view to the economic, organisational and legal ties between these two legal entities⁸⁰⁸.
1165. In the specific case where a parent company directly, or indirectly via an intermediate company, owns all or almost all of the capital of a subsidiary that perpetrates an infringement, it is simply assumed that the parent company has a decisive influence on the behaviour of its subsidiary. In this case, the competition authority need only provide evidence of this capital ownership to attribute the behaviour of the subsidiary that is the perpetrator of the practices to the parent company. The parent company can rebut this presumption by providing evidence to demonstrate that its subsidiary is autonomous in determining its line of action on the market. If the presumption is not rebutted, the competition authority will be able to hold the parent company jointly and severally liable for the payment of the fine imposed on its subsidiary⁸⁰⁹.
1166. In the aforementioned judgment *Lacroix Signalisation e.a.*, the Paris Court of Appeal reiterated that these rules of imputability, which arise from the notion of an undertaking defined in Articles 101 and 102 TFEU, are connected to the material rules of European competition law. The way in which it is interpreted by European jurisdictions is therefore binding on national competition authorities applying European law, and on the jurisdictions that control them⁸¹⁰.
1167. Moreover, as both French and EU jurisdictions have reiterated, this presumption is compatible with the principles of personal responsibility and the individual nature of penalties. When an economic entity infringes competition rules, it is liable for the breach in accordance with the principle of personal responsibility.

2. APPLICATION IN THIS CASE

a) With regard to Apple

1168. Apple Inc. has a 99% ownership stake in Apple France, with the remaining capital owned by Apple Operations International (“AOI”), itself (i) owned by Apple Inc. (96% stake) up to 29 May 2017, with the remaining capital owned by Apple UK Limited, itself wholly owned by Apple Operations International (“AOI”) and ii) since that date, Apple Inc. has had a 99.99% stake in its ownership.⁸¹¹
1169. Apple Sales International (“ASI”) was (i) almost wholly owned up to 14 August 2014 by Apple Operations Europe (“AOE”)⁸¹², itself wholly owned by Apple Operations

⁸⁰⁸ Aforementioned judgments *Akzo Nobel e.a. v Commission*, paragraph 58, *General Química v Commission*, paragraph 37, and *Lacroix Signalisation e.a.*, paragraphs 18 and 19

⁸⁰⁹ Aforementioned judgments *Akzo Nobel e.a. v Commission*, paragraphs 60 and 61, *General Química v Commission*, paragraphs 39 and 40, and *Lacroix Signalisation e.a.*, paragraphs 19-20.

⁸¹⁰ See also the judgment of the Court of Justice of 4 June 2009, *T-Mobile Netherlands e.a.*, C-8/08, Rec. p. I-04529, paragraphs 49 and 50

⁸¹¹ Classification mark 14179; classification mark 34658 (VC) / 34671 (VNC); classification mark 29077 (VC) / 29767 (VNC)

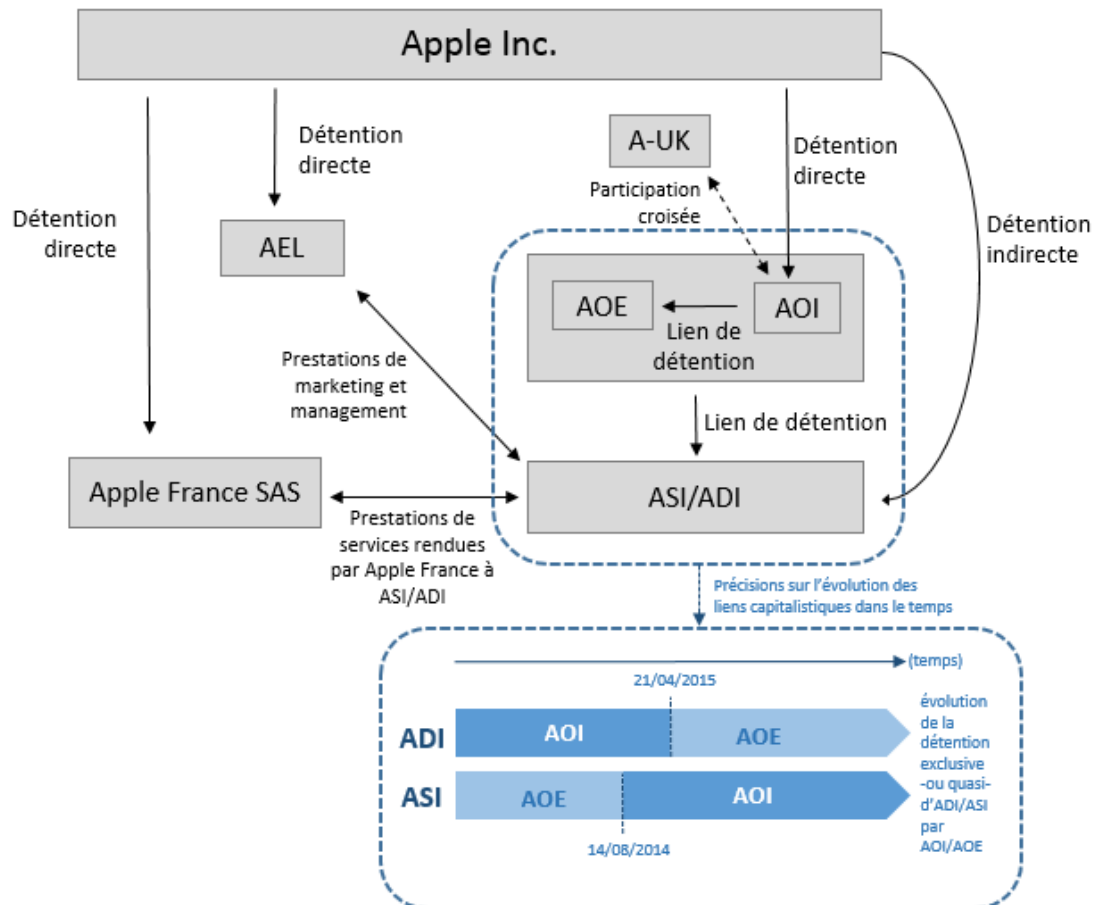
⁸¹² Classification mark 35565 (VC) / 39974 (VNC)

International (“AOI”)⁸¹³ and (ii) since this date, has been wholly owned by Apple Operations International (“AOI”)⁸¹⁴.

1170. Apple Distribution International (“ADI”) was (i) almost wholly owned up to 21 April 2015 by Apple Operations International (“AOI”)⁸¹⁵, and (ii) since this date, has been owned by Apple Operations Europe (“AOE”)⁸¹⁶, itself wholly owned by Apple Operations International (“AOI”)⁸¹⁷.

1171. Finally, Apple Europe Limited (“AEL”) is wholly owned by Apple Inc.⁸¹⁸.

1172. In summary, capital ownership can be set out as in the following diagram:



⁸¹³ Classification mark 29077 (VC) / 29767 (VNC)

⁸¹⁴ Classification mark 29077 (VC) / 29767 (VNC)

⁸¹⁵ Classification mark 35565 (VC) / 39974 (VNC)

⁸¹⁶ Classification mark 29076 (VC) / 29767 (VNC) - 40046 (VNC2)

⁸¹⁷ Classification mark 29077 (VC) / 29767 (VNC)

⁸¹⁸ Classification mark 34849 (VC) / 34872 (VNC) - 35367 (VNC2)

Apple Inc.	Apple Inc.
Détention directe	Direct ownership
Apple France SAS	Apple France SAS
Détention directe	Direct ownership
AEL	AEL
Prestations de marketing et management	Marketing and management services
Prestations de services rendues par Apple France à ASI/ADI	Service provision by Apple France to ASI/ADI
A-UK	A-UK
Participation croisée	Mutual holdings
Détention directe	Direct ownership
Détention indirecte	Indirect ownership
AOE	AOE
AOI	AOI
Lien de détention	Ownership link
Lien de détention	Ownership link
ASI/ADI	ASI/ADI
Précisions sur l'évolution des liens capitalistiques dans le temps	Details of changes in ownership over time
(temps)	(time)
ADI	ADI
AOI	AOI
AOE	AOE
évolution de la détention exclusive –ou quasi- d'ADI/ASI par AOI/AOE	change in sole – or almost sole – ownership of ADI/ASI by AOI/AOE
ASI	ASI
AOE	AOE
AOI	AOI

1. On Objection no.2

1173. Objection no.2 was issued against Apple Inc., Apple Operations Europe (“AOE”) and Apple Operations International (“AOI”) as parent companies of Apple France, Apple Sales International (“ASI”), Apple Distribution International (“ADI”), Apple Europe Limited (“AEL”) and Apple Operations Europe (“AOE”).
1174. Paragraphs **Erreur ! Source du renvoi introuvable.** and following of this decision establish that Apple France, Apple Sales International (“ASI”), Apple Distribution International (“ADI”), Apple Europe Limited (“AEL”) and Apple Operations Europe (“AOE”) should be considered perpetrators of the customer restriction practice penalised under Objection no.2.
1175. Given the capital holdings presented in paragraphs 1168 and following above, the decisive influence of Apple Inc., Apple Operations Europe (“AOE”) and Apple Operations International (“AOI”) on Apple France, Apple Sales International (“ASI”), Apple Distribution International (“ADI”), Apple Europe Limited (“AEL”) and Apple Operations Europe (“AOE”) may be assumed.
1176. Consequently, it should be noted that:

- the practices of Apple France, perpetrator under Objection no.2 throughout the period concerned, may be attributed to Apple Inc., the parent company that owned almost all Apple France's capital throughout this time;
- the practices of Apple Sales International ("ASI"), perpetrator from December 2005 to 31 March 2012, may be attributed to:
 - Apple Operations Europe ("AOE"), the parent company that owned almost all its capital for this period;
 - Apple Operations International ("AOI"), sole owner of Apple Operations Europe ("AOE") for this period; and
 - Apple Inc., sole owner of Apple Operations International ("AOI") for this period;
- the practices of Apple Distribution International ("ADI"), perpetrator from April 2012 to the start of April 2013 may be attributed to:
 - Apple Operations International ("AOI"), owner of almost all its capital for this period;
 - Apple Inc., sole owner of Apple Operations International ("AOI") for this period;
- the practices of Apple Operations Europe ("AOE"), perpetrator of the practices raised under Objection no.2 throughout the period concerned, may be attributed to:
 - Apple Operations International ("AOI"), its sole owner for this period; and
 - Apple Inc., sole owner of Apple Operations International ("AOI") for this period;
- the practices of Apple Europe Limited ("AEL"), perpetrator under Objection no.2 throughout the period concerned, may be attributed to Apple Inc., the parent company that owned almost all its capital throughout this time.

2. On Objection no.3

1177. Objection no.3 was issued against Apple Inc., Apple Operations Europe ("AOE") and Apple Operations International ("AOI") as parent companies of Apple France, Apple Sales International ("ASI"), Apple Distribution International ("ADI") and Apple Europe Limited ("AEL").
1178. Paragraphs **Erreur ! Source du renvoi introuvable.** and following of this decision establish that Apple France, Apple Distribution International ("ADI") and Apple Europe Limited ("AEL") should be considered perpetrators of the price restriction practice penalised under Objection no.3.
1179. However, since these practices were implemented after the activities of Apple Sales International ("ASI") were transferred to Apple Distribution International ("ADI"), the practice cannot be attributed to Apple Sales International ("ASI") as a perpetrator.
1180. Given the capital holdings presented in paragraphs 1168 and following above, the decisive influence of Apple Inc., Apple Operations Europe ("AOE") and Apple Operations International ("AOI") on Apple France, Apple Distribution International ("ADI") and Apple Europe Limited ("AEL") may be assumed.
1181. In the light of this information, it should be noted that:
- the practices of Apple France, perpetrator under Objection no.3 throughout the period concerned, may be attributed to Apple Inc., the parent company that owned almost all Apple France's capital throughout this time;

- the practices of Apple Distribution International (“ADI”), perpetrator throughout the period concerned by Objection no.3 may be attributed to:
 - Apple Operations Europe (“AOE”), the parent company that has owned almost all of its capital since 21 April 2015;
 - Apple Operations International (“AOI”), which directly owned almost all its capital up to 21 April 2015, and indirectly, via Apple Operations Europe (“AOE”) since that date;
 - Apple Inc., sole owner of Apple Operations International (“AOI”) for this period;
- the practices of Apple Europe Limited (“AEL”), perpetrator under Objection no.3 throughout the period concerned, may be attributed to Apple Inc., the parent company that owned almost all its capital throughout this time.

3. On Objection no.4

1182. Objection no.4 was issued against Apple Inc., Apple Operations Europe (“AOE”) and Apple Operations International (“AOI”) as parent companies of Apple France, Apple Sales International (“ASI”), Apple Distribution International (“ADI”), Apple Europe Limited (“AEL”) and Apple Operations Europe (“AOE”).
1183. Paragraphs **Erreur ! Source du renvoi introuvable.** of this decision establish that Apple France, Apple Sales International (“ASI”), Apple Distribution International (“ADI”), Apple Europe Limited (“AEL”) and Apple Operations Europe (“AOE”) should be considered perpetrators of the practices of abuse of a state of economic dependence penalised under Objection no.4.
1184. Given the capital holdings presented in paragraphs 1168 and following, the decisive influence of Apple Inc., Apple Operations Europe (“AOE”) and Apple Operations International (“AOI”) on Apple France, Apple Sales International (“ASI”), Apple Distribution International (“ADI”), Apple Europe Limited (“AEL”) and Apple Operations Europe (“AOE”) may be assumed.
1185. In the light of this information, it should be noted that:
- the practices of Apple France, perpetrator under Objection no.4 throughout the period concerned, may be attributed to Apple Inc., the parent company that owned almost all Apple France’s capital throughout this time;
 - the practices of Apple Sales International (“ASI”), perpetrator from December 2009 to 31 March 2012, may be attributed to:
 - Apple Operations Europe (“AOE”), the parent company that owned almost all its capital for this period;
 - Apple Operations International (“AOI”), sole owner of Apple Operations Europe (“AOE”) for this period; and
 - Apple Inc., sole owner of Apple Operations International (“AOI”) for this period;
 - the practices of Apple Distribution International (“ADI”), perpetrator from April 2012 to the start of April 2013 may be attributed to:
 - Apple Operations International (“AOI”), owner of almost all its capital for this period;
 - Apple Inc., sole owner of Apple Operations International (“AOI”) for this period;

- the practices of Apple Operations Europe (“AOE”), perpetrator under Objection no.4 throughout the period concerned, can be attributed to:
 - Apple Operations International (“AOI”), its sole owner for this period; and
 - Apple Inc., sole owner of Apple Operations International (“AOI”) for this period;
- the practices of Apple Europe Limited (“AEL”), perpetrator under Objection no.4 throughout the period concerned, may be attributed to Apple Inc., the parent company that owned almost all its capital throughout this time.

b) With regard to Ingram Micro

1186. Objection no.2 was issued against Ingram Micro Europe BVBA and Ingram Micro Inc. as parent companies of Ingram Micro SAS, perpetrator of the practices in question (see paragraph 537 of this decision).
1187. At the time of the practices, Ingram Micro Europe BVBA, a company under Belgian law, itself wholly owned by Ingram Micro Inc., a company under American law, owned a 99.99% stake in Ingram Micro SAS. Since 30 June 2015, Ingram Micro Europe BV, a company under Dutch law, itself wholly owned by Ingram Micro Inc., has owned a 99.9% stake in Ingram Micro SAS.⁸¹⁹
1188. Consequently, the decisive influence of Ingram Micro Europe BVBA and Ingram Micro Europe Inc. on Ingram Micro SAS may be assumed.
1189. There is therefore reason to hold liable Ingram Micro Europe BVBA and Ingram Micro Europe Inc. as parent companies with decisive influence over Ingram Micro SAS, perpetrator under Objection no.2, which is not contested.

c) With regard to Tech Data

1190. Objection no.2 was issued against Tech Data France Holding, Tech Data BV and Tech Data Corp., as parent companies of Tech Data France SAS, perpetrator of the practices in question (see paragraph 538 of this decision).
1191. Tech Data France SAS is wholly owned by Tech Data France Holding, itself wholly owned by Tech Data BV, a company under Dutch law, which is itself indirectly wholly owned by Tech Data Corp, a company under American law. There was no change to Tech Data’s shareholder body between 2006 and 2016⁸²⁰.
1192. Consequently, the decisive influence of Tech Data France Holding, Tech Data BV and Tech Data Corp. on Tech Data France SAS may be assumed.
1193. Tech Data argues, in its observations in response to the Statement of Objections, that the presumption of imputability made with regard to Tech Data BV and Tech Data Corp should be rebutted, because these two companies do not exercise decisive influence over their French subsidiary, Tech Data France SAS⁸²¹.
1194. In support of this argument, Tech Data explains, first, that there is a very clear structural separation between Tech Data Corporation, Tech Data (Netherlands) BV and Tech Data

⁸¹⁹ Classification mark 34509

⁸²⁰ Classification marks 34522 and 34525

⁸²¹ Classification marks 42720 to 42722

France. It states that there are numerous layers separating Tech Data France SAS and Tech Data Corporation, and that their registered offices are a very long way from each other, concluding that the links between these three entities are exclusively based on capital.

1195. Nevertheless, the presumption associated with sole ownership does not only apply where there is a direct relationship between a parent company and its subsidiary, but also where there is an indirect relationship via intermediate subsidiaries⁸²². Moreover, the fact that the parent company and its subsidiary are active in different markets is not sufficient to rebut the presumption⁸²³. The French Supreme Court (*Cour de cassation*) has decided that defining a commercial strategy that takes into account local market specifics is not enough to demonstrate that a subsidiary makes independent decisions, particularly when its decision-making freedom does not exceed what is inherent to the geographical distance between a parent company and its subsidiary⁸²⁴.
1196. Second, Tech Data argues that there is no legal entity responsible for coordinating the European business of the Tech Data group, and that the executive bodies of Tech Data Corporation and Tech Data (Netherlands) BV do not make operational decisions regarding the day-to-day management of Tech Data France. It underlines that the Tech Data France executives only report to the European Executive Board, which defines the group's strategic priorities in Europe, and whose members are not employed by Tech Data Corporation or Tech Data (Netherlands) BV. It also states that Tech Data (Netherlands) BV is a pure holding company, with no commercial or operational business. Moreover, it declares that the companies concerned have no employees or executives in common, and that there is no contractual agreement between Tech Data France and Tech Data Corp or Tech Data (Netherlands) BV to provide a single group commercial policy.
1197. But the fact that a parent company only operates as a holding company is not sufficient to rebut the presumption of imputability, because "even supposing the applicants were no more than non-operating holding companies, that fact alone is insufficient to disprove that they exercised a decisive influence on Arkema, in particular by coordinating financial investments within the group. Indeed, in the context of a group of companies, a holding company is a company which seeks to regroup shareholdings in various companies and whose function is to ensure that they are run as one (see, to that effect, Case T-69/04 *Schunk and Schunk Kohlenstoff-Technik v Commission* [2008] ECR II-2567, paragraph 63)⁸²⁵. Moreover, the fact that a subsidiary has its own local management and resources does not in itself prove that it determines its behaviour in the market independently of its parent company. The division of tasks between subsidiaries and their parent companies, and in particular, entrusting operational management to local managers of a wholly owned subsidiary is common practice for large corporations made up of multiple subsidiaries all ultimately owned by the same parent company⁸²⁶. In addition, the fact the parent company and the subsidiary have no executives in common is not enough to demonstrate the

⁸²² Judgment of the General Court of 27 October 2010, *Alliance One International*, T-24/05, paragraph 126

⁸²³ Judgment of the General Court of 14 July 2011, *Total and Elf Aquitaine v Commission*, T-206/06, paragraph 71

⁸²⁴ Judgment of the French Supreme Court (*Cour de cassation*) of 6 January 2015, no. 13-21305.

⁸²⁵ Judgment of the European Court of 14 July 2011, *Total and Elf Aquitaine v Commission*, T-190/06, paragraph 68; see also Decision 13-D-12 on practices implemented in the commodity chemicals marketing sector (paragraph 848).

⁸²⁶ Judgment of the European Court of 11 July 2014, *RWE*, T-543/08, paragraphs 49 and 50

subsidiary's autonomy⁸²⁷. Finally, a parent company's responsibility for the anticompetitive practice of its subsidiary does not require it to have been involved in instigating the infringement, so the fact the parent company or companies did not instruct the subsidiary to commit an infringement or that they were not directly involved in said infringement is irrelevant⁸²⁸.

1198. Consequently, these facts, which were not supported by any material evidence, are not enough to rebut the presumption of imputability.
1199. This argument shall therefore be ruled out.
1200. There is therefore reason to hold liable Tech Data France Holding, Tech Data BV and Tech Data Corp., as parent companies with a decisive influence over Tech Data France SAS, perpetrator under Objection no.2.

F. PENALTIES

1201. The provisions of part I of Article L. 464-2 of the French Commercial Code and Article 5 of Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles [101 TFEU] and [102 TFEU] (OJ 2003, L1, p.1) authorise the *Autorité* to impose financial penalties on undertakings and bodies engaged in anticompetitive practices forbidden under Article L. 420-1 and L.420-2 of the French Commercial Code, and Articles 101 and 102 of the TFEU.
1202. The third paragraph of the abovementioned Part I of Article L. 464-2 of the French Commercial Code states that “financial penalties are proportionate to the seriousness of the charges brought, to the scale of the damage done to the economy, to the financial situation of the body or company penalised or to the group to which the latter belongs, and to the likelihood of any repetition of practices prohibited by [title VI of Book IV of the Commercial Code]. They are individually determined for each company or body penalised, with reasons given for each penalty.”
1203. Furthermore, under the terms of the fourth paragraph of Part I of Article L. 464-2 of the French Commercial Code “The maximum amount of the penalty for a company is 10% of the highest worldwide turnover, excluding VAT, achieved in one of the financial years ended after the financial year preceding that in which the practices were implemented. If the accounts of the company concerned have been consolidated or combined by virtue of the texts applicable to its legal form, the turnover taken into account is that shown in the consolidated or combined accounts of the consolidating or combining company.”
1204. In this case, the *Autorité* shall assess these legal criteria according to the methods described in its Notice of 16 May 2011 on the Method Relating to the Setting of Financial Penalties (hereinafter “the Penalties Notice”).

⁸²⁷ Abovementioned judgment of the General Court of 14 July 2011, *Total and Elf Aquitaine v Commission*, paragraph 65, abovementioned Decision 13-D-12, paragraph 850.

⁸²⁸ Judgments of the Courts of 30 April 2009, *Itochu v Commission*, T-12/03, Rec. p. II-909, paragraph 58, and of 27 October 2010, *Alliance One International e.a v Commission*, T-24/05, Rec. 2010 p. II-5329, paragraph 127, and Decision 12-D-10 of 20 March 2012 on practices in the cat and dog food sector, paragraphs 225 to 232.

1. SETTING THE BASIC AMOUNT OF THE FINANCIAL PENALTY

1205. The Penalties Notice states that “The basic amount is set for each undertaking or entity in view of the appraisal made by the *Autorité* of the seriousness of the charges and of the scale of the damage done to the economy (...)” (paragraph 22).
1206. The duration of practices is a relevant factor for determining the seriousness of the charges⁸²⁹ and the extent of damage done to the economy⁸³⁰. It shall be taken into account separately, from both perspectives, according to the practices and methods set out in the aforementioned Penalties Notice.

a) Value of sales

1. Principles

1207. In application of paragraph 23 of the Penalties Notice, the *Autorité*’s decision-making practice is to calculate the base of the basic amount for calculating the penalty using the value of sales made by the undertaking in question for the products or services to which the infringement relates.
1208. Moreover, according to paragraph 33 of the Penalties Notice, the value of sales is determined by reference to the last full accounting year during which the practices were implemented. Nevertheless, following paragraph 37 of said notice, when this last year is “manifestly not a representative reference, the *Autorité* opts for an accounting year that it considers more appropriate, or for an average of accounting years, and gives reasons for its choice.”

2. On Objection no.2

1209. The infringement penalised under Objection no.2 – which started in December 2005 and came to an end in March 2013 – involves wholesaler sales of Apple products and accessories (excluding iPhones) in France.

a. Financial penalty base

❖ On wholesalers

1210. Tech Data and Ingram Micro argue that using the value of sales as a base for calculating their financial penalty would be inappropriate and would lead to a disproportionate result. First, they state that given their intermediary role – which they consider limited to that of a logistics provider – and their low margin, turnover would not be a good indicator of their economic share of the market. Second, they allege that using the value of sales as a basis for calculating financial penalties on vertical agreements in which suppliers and distributors are penalised would mean fining the same sales twice. They therefore consider that any penalty should be based on their gross margin.
1211. However, from a legal standpoint, Ingram Micro and Tech Data do not operate as logistics providers, or receive a commission on sales, but they operate a wholesaler business, which means that there is a transfer of ownership of the products acquired from their supplier, Apple, in order to sell them on to retailers. Consequently, only the turnover of the

⁸²⁹ For example see the judgments of the French Supreme Court (*Cour de cassation*) of 28 June 2003, *Domo services maintenance*, and of 28 June 2005, *Novartis Pharma*

⁸³⁰ Judgment of the French Supreme Court (*Cour de cassation*) of 12 July 2011, *Lafarge ciments e.a.*

wholesalers offers an appropriate and objective reference for making the calculation base for their penalty proportionate to the significance of the infringement and their respective economic share. Moreover, it should be underlined that the limited nature of their gross margin is not relevant for determining the financial penalty base, since the capacity of each undertaking to pay is assessed, as per the Penalties Notice, under the final adjustments.

1212. Furthermore, the practices penalised under Objection no.2 involve vertical agreement between various independent companies. For a group of companies forming a single undertaking for the purposes of competition law, the *Autorité* can use a single value of sales, but this does not apply to independent economic operators. The fact that Apple and the wholesalers penalised in this case operate on different levels of the production chain does not justify the penalty base being determined by anything other than the turnover of the undertakings concerned.

1213. These arguments shall therefore be ruled out. The financial penalty issued against the wholesalers shall be based on their turnover.

❖ On Apple

1214. The case evidence shows that up to 31 March 2012, Apple Sales International (“ASI”) was the only Apple group entity distributing and marketing Apple products in France. From 1 April 2012, Apple Distribution International (“ADI”) took over the distribution and marketing of Apple products in France. Apple France, Apple Europe Limited (“AEL”) and Apple Operations Europe (“AOE”), also perpetrators of the practices in question, sell no Apple products on the French market.

1215. Given the specific circumstances of the Apple group, it would be inappropriate to issue a financial penalty for each company in the group. Where a group of companies forming a single undertaking for the purposes of competition law takes part in an agreement through several of the legal persons of which it is constituted, it is possible to consider the group as a single participant in the agreement⁸³¹.

1216. The financial penalty issued against Apple shall therefore be based on a single value of sales, corresponding to the turnover of group companies marketing products to which the infringement relates, i.e. Apple Sales International (“ASI”) and Apple Distribution International (“ADI”).

1217. According to Apple, the turnover of Apple Sales International (“ASI”) and Apple Distribution International (“ADI”) as calculated under Irish law, should be used to determine the value of sales. However, only using the turnover as determined by French accounting rules will ensure that the data on value of sales can be checked⁸³². Consequently, the turnover of Apple Sales International (“ASI”) and Apple Distribution International (“ADI”) processed according to French accounting standards and certified by chartered accountants should be used⁸³³.

⁸³¹ Decision 18-D-26 of 20 December 2018 regarding practices implemented in the sector for marketing liquid fertilizers used in above ground home farming, paragraphs 339 and 340; Decision 16-D-17 of 21 July 2016 regarding practices implemented in the liquid fuel mobile heating equipment sector, paragraphs 180 and 181.

⁸³² Judgment of the Paris Court of Appeal of 27 October 2016, no. 15/01673, p. 46; Judgment of the French Supreme Court (*Cour de cassation*) of 27 March 2019, no. E 16-26.472 et al., p. 47.

⁸³³ Classification marks 49702 to 49715

b. Scope of the value of sales

1218. The practices penalised under Objection no.2 relate to the consumer IT and electronics wholesale market. They aimed to restrict intra-brand competition for the sale of Apple products (excluding iPhones) between wholesalers and Apple on the wholesale market, and between retailers and Apple's own distribution channels in the retail market.
1219. Apple argues that the turnover scope should be limited to the sale of products and accessories (excluding iPhones) to wholesalers. Similarly, Tech Data considers that the financial penalty base should take into account the limited scope of the relevant products.
1220. However, in accordance with paragraph 33 of the Penalties Notice and French and EU case law and doctrine to date⁸³⁴, the value of sales of products or services "to which the infringement relates" should be taken into account for determining the financial penalty base. Therefore, contrary to what is argued by the accused, the fine calculation base shall not be restricted to sales directly affected by the infringement.
1221. Consequently, for the value of sales, there is reason to use the turnover of Apple, Tech Data and Ingram Micro corresponding to the sale of all Apple products (excluding iPhones) on the French wholesale market, i.e. sales from Apple to wholesalers and other resellers (excluding Apple's own distribution channels) and the sales of wholesalers to retailers.

c. Reference financial year

1222. Ingram Micro argues that the latest full accounting year, i.e. 2012, is not representative of the period covered by the infringement penalised under Objection no.2.
1223. However, examination of the value of sales of the penalised companies between 2005 and 2013 shows that 2012 – the last full financial year of involvement in the practices – shows no unusual variation or irregularity which would justify using another value of sales or an average.
1224. Consequently, it should be noted that 2012 is a representative reference of the period concerned, and is therefore taken to be the reference year. Ingram Micro's argument shall be ruled out.
1225. More specifically for Apple, in the light of its successive involvement in the practices penalised under Objection no.2, the turnover taken into account shall be that of Apple Sales International ("ASI") between October 2011 and March 2012 and that of Apple Distribution International ("ADI") between April and September 2012.

d. Conclusion

1226. In view of the foregoing, the base for the penalty issued under Objection no.2 is as follows:

Undertakings	Value of sales (in Euros) ⁸³⁵
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⁸³⁴ See, in particular, the judgment of the Paris Court of Appeal of 19 July 2018, no. 16/01270, p. 122-124 and the judgment of the Court of Justice of 23 April 2015, *LG Display and LG Display Taiwan v Commission*, C-227/14, paragraphs 56-59.

⁸³⁵ Classification marks 35 571 (Tech Data), 41 887 (Ingram), 49 704 – 49 715 (Apple)

Apple	[...] ⁸³⁶
Ingram Micro	118,262,974
Tech Data	152,459,915

3. *On Objection no.3*

1227. The infringement penalised under Objection no.3 – which began in October 2012 and came to an end in April 2017 – covers retail sales for Apple products and accessories (excluding iPhones) in France.

a. Financial penalty base

1228. For the reasons given in paragraph 1215 of this decision, it would be inappropriate to issue a penalty for each company in the group.

1229. The financial penalty issued against Apple shall therefore be based on a single value of sales, corresponding to the turnover of the group company marketing products to which the infringement relates, i.e. Apple Distribution International (“ADI”), as processed by Apple according to French accounting rules and certified by chartered accountants.

b. Scope of the value of sales

1230. The practices penalised under Objection no.3 relate to the consumer IT and electronics retail market. They aimed to restrict intra-brand competition for the sale of Apple products and accessories (excluding iPhones) between APRs and Apple’s own distribution channels.

1231. For the reasons given in paragraph 1220 of this decision, there is reason to use Apple’s turnover corresponding to the sale of all Apple products (excluding iPhones) on the French retail market as the value of sales, including Apple sales to direct or indirect APRs, and to its own distribution channels (ARS and AOS).

c. Reference financial year

1232. The case evidence shows that ADI’s accounting year ending 30 September 2016 – which corresponds to the last full financial year of involvement in the practices - constitutes a representative reference for the period concerned, and is therefore taken to be the reference year.

d. Conclusion

1233. In view of the foregoing, the base for the penalty issued under Objection no.3 is [...] Euros ⁸³⁷.

⁸³⁶ The value of sales communicated by Apple is in US dollars. It totals [...] US dollars for the financial year ending 30 September 2012, i.e. [...] Euros according to the average ECB exchange rate between 1 October 2011 and 30 September 2012.

⁸³⁷ Classification marks 49 704 – 49 715. The value of sales communicated by Apple is in US dollars. It totals [...] dollars for the financial year ending 30 September 2016, i.e [...] Euros according to the average ECB exchange rate between 1 October 2015 and 30 September 2016.

4. On Objection no.4

1234. The infringement penalised under Objection no.4 – which began in November 2009 and came to an end in March 2013 – covers retail sales for Apple products and accessories in France.

a. Financial penalty base

1235. For the reasons given in paragraph 1215 of this decision, it would be inappropriate to issue a penalty for each company in the group.

1236. The financial penalty issued against Apple shall therefore be based on a single value of sales, corresponding to the turnover of the group companies marketing products to which the infringement relates, i.e. Apple Sales International (“ASI”) and Apple Distribution International (“ADI”), as processed by Apple according to French accounting rules and certified by chartered accountants.

b. Scope of the value of sales

1237. The practices penalised under Objection no.4 relate to the consumer IT and electronics retail market. They related to entire activity of the APRs, and were therefore such as to lead to a reduction in intra-brand competition for the sale of all Apple products and accessories between APRs and Apple’s own distribution channels.

1238. For the reasons given in paragraph 1220 of this decision, there is therefore reason to use Apple’s turnover corresponding to the sale of all Apple products⁸³⁸ on the French retail market as the value of sales, including Apple sales to APRs (made directly by Apple or via wholesalers) and to its own distribution channels (ARS and AOS).

c. Reference financial year

1239. The case evidence shows that the 2012 financial year – which corresponds to the last full financial year of involvement in the practices - constitutes a representative reference for the period concerned, and is therefore taken to be the reference year.

1240. More specifically for Apple, in the light of their successive involvement in the practices penalised under Objection no.4, the turnover taken into account shall be that of Apple Sales International (“ASI”) between October 2011 and March 2012 and that of Apple Distribution International (“ADI”) between April and September 2012.

d. Conclusion

1241. In view of the foregoing, the base for the penalty issued under Objection no.4 is [...] Euros⁸³⁹.

⁸³⁸ It should be noted that iPhones are excluded from the value of Apple sales, since at the date of the infringement, APRs did not sell iPhones.

⁸³⁹ Classification marks 49 704 – 49 715. The value of sales communicated by Apple is in US dollars. It totals [...] US dollars for the financial year ending 30 September 2012, i.e. [...] Euros according to the average ECB exchange rate between 1 October 2011 and 30 September 2012.

b) Seriousness of the charges

1242. When assessing the seriousness of an infringement, the *Autorité* particularly takes into account the sector in question, the nature of the infringement and its objective features, such as its degree of refinement (see paragraph 26 of the Penalties Notice).

1. On Objection no.2

1243. The foregoing shows that Apple agreed a system for allocating Apple products (excluding iPhones) to resellers with its wholesalers Ingram Micro and Tech Data, specifying with great precision the exact quantities to be allocated to each reseller.

1244. These practices aimed to restrict the customers to which Ingram Micro and Tech Data could sell on Apple products. More specifically, they deprived resellers of access to competing wholesalers. These practices also reduced the intensity of the competition that could be exerted between wholesalers and Apple on the wholesale market, since the latter also functioned as an economic operator in competition with wholesalers for supplying direct retailers (APRs and direct retailers).

1245. By preventing both active and passive sales, the practices not only deprived wholesalers of the ability to prospect for foreign customers, but also of responding (passively) to demand from distributors in other Member States.

1246. According to established case law and decision-making practice, vertical agreements involving companies working at different stages of the production chain are considered with less severity than horizontal agreements between competitors.

1247. Nevertheless, these kinds of anticompetitive practices are consistently considered, in both European and French law, as somewhat serious, because they tend to limit intra-brand competition on the French market, and partition markets⁸⁴⁰.

1248. In this case, the practices in question affected not only retailers, who had limited sources of supply from wholesalers, but also, through them, end customers, who are particularly attached to the Apple brand. The case evidence shows that Apple is one of the high-tech companies with the most loyal consumers⁸⁴¹.

1249. Moreover, the fact that the practices in question took place in a context in which intra-brand competition was already diminished makes them all the more serious, since only two wholesalers were authorised by Apple to distribute its products. While this is a legitimate choice for a manufacturer to make, it remains the case that no other wholesaler could compete for the Apple product wholesale activity, which further reduces the competition on this market.

1250. Apple, Ingram Micro and Tech Data argue that the seriousness of practices should be put into perspective, given that the allocations did not partition markets, since they simply aimed to establish an order of priorities for deliveries. Apple and Ingram Micro state that in fact, the respective market shares of wholesalers frequently changed, and APRs continually changed suppliers.

⁸⁴⁰ For example see the judgment of the Court of Justice of 21 September 2006, *JCB v Commission*, C-167/04, Rec. p. I-08935, paragraph 216; judgment of the Paris Court of Appeal of 4 March 2008, *José Alvarez e.a.*, no. 2007/00370.

⁸⁴¹ Classification mark 390 and <http://www.macnn.com/articles/06/07/11/apple.google.find.loyalty/>

1251. Nevertheless, contrary to the claims of the accused, and as underlined in paragraphs 664 to 720 of this decision, the practices penalised went well beyond a delivery recommendations system, but consisted of imperative quantity and customer allocations implemented by Apple and applied by the authorised wholesalers. With regard to the change in market share, please refer to paragraphs **Erreur ! Source du renvoi introuvable.** and following below with regard to assessment of the damage done to the economy.
1252. In any case, it should be noted that the more influence a supplier has in setting the commercial policy of its distributors, the more serious the practice should be considered. In this case, Apple had extremely detailed and precise involvement in setting the commercial policy of Ingram Micro and Tech Data, determining on a case by case basis the quantities of products and the identity of the customers they could sell them to, and even the order of priority of supplies. Consequently, the allocation practices penalised under Objection no.2 must be considered more serious than in the case of practices in which allocations apply only to customer categories, a system that leaves wholesalers free to choose between the various customers in the relevant category, and allows them to respond to customer demand (passive sales).
1253. Finally, the seriousness of the practices is linked to their degree of refinement. Contrary to the arguments of Ingram Micro and Tech Data, the practices in question were combined with a surveillance mechanism, and sometimes reprisals against wholesalers that did not observe the allocations decided and applied by Apple (see paragraphs 683 to 694 of this decision). The allocation system established by Apple also relied on an elaborate system involving reporting of extremely precise information on the sales of Apple products by each wholesaler and retailer.

2. *On Objection no.3*

1254. Paragraphs 846 to 954 of this decision show that Apple implemented practices to restrict the pricing freedom of APRs, by directly or indirectly fixing Apple product retail prices.
1255. These practices sought to and succeeded in restricting the effect of competition on setting retail prices. More specifically, they contributed to harmonising the prices of Apple products (excluding iPhones), thereby reducing intra-brand competition for resellers of these products, depriving end customers of competitive prices.
1256. As noted above, while vertical agreements between a supplier and its distributors are treated with less severity than horizontal agreements between competitors, they are nevertheless considered somewhat serious (see paragraph **Erreur ! Source du renvoi introuvable.** of his decision). More specifically with regard to vertical agreements on prices, the Paris Court of Appeal stated, in its *Epsé Joué Club* judgment, that such agreements “although not treated with as much severity as horizontal agreements, feature among the most serious anticompetitive practices.”⁸⁴²
1257. Apple argues, however, that a lot of evidence in the case demonstrates active pricing competition on the market concerned. It underlines in particular that APRs, which account for 10% of Apple product sales, do not compete with each other, but face intra-brand competition with the Retailers. Apple also underlines that there was no policing of prices and no coercion.
1258. In this case, the practices in question affected end customers whose opportunity to benefit from competition between retailers was restricted.

⁸⁴² Judgment of the Paris Court of Appeal of 28 January 2009, no. 2008/00255, p.17.

1259. Moreover, while the seriousness of the practices in question should be nuanced by the fact that they only targeted a small proportion of Apple product resellers, it should be noted that the practices occurred in the context of Apple's close control of its distribution network, which treated APRs as if they were part of the Apple group, but without having to bear the constraints thereof.

3. On Objection no.4

1260. Paragraphs 983 to **Erreur ! Source du renvoi introuvable.** of this decision show that Apple implemented abusive practices for APRs, who were in a state of economic dependence, which weakened them, and in some cases, led them to leave the market.

1261. In the context of its development of its own distribution channel, Apple was able – given its particular position with regard to its commercial partners – to impose a set of rules and behaviour that abnormally restricted their activity, through an irregular supply policy, a discount system that lacked transparency and predictability and, finally, treatment that differed unjustifiably between the various distribution channels.

1262. These practices thereby damaged the financial viability of some APRs who are, for the most part, small-scale operators with low levels of activity and resources, and therefore reduced, or destroyed, their ability to compete with other Apple product distributors and Apple's own distribution channel.

1263. This kind of reduction in the competitive capacity of distributors implemented by a manufacturer who keeps them in a state of economic dependence is of a serious nature, because this dependence gives the manufacturer a particular responsibility with regard to its dependent partners under their commercial relationship, especially since, in this case, the supplier has disproportionate financial power with regard to its APRs.

1264. Moreover, the particular seriousness of the practices is linked to the extent to which they were implemented and their degree of refinement. They come within a more general context of Apple's close control of its distribution network, both in terms of the wholesale distribution of Apple products (penalised under Objection no.2) and the retail distribution of Apple products (penalised under Objection no.3). Apple also has a stranglehold on all aspects of APR activity, through a set of contractual provisions and practices, leaving them very limited commercial autonomy, such as to restrict their economic independence with regard to the manufacturer in proportions that very rarely occur in distribution networks. Moreover, Apple closely supervises APR management, having developed elaborate and sophisticated monitoring of their financial ratios, and the specific impact of its decisions on these factors, in terms of supply, discounts and other commercial conditions.

1265. The case evidence seen above therefore shows that Apple was able to control the activity and profitability of its partners, with detailed knowledge of their financial statements and accounting results, together with their business plan, based on twice-weekly reporting (see paragraphs 366, 384 and 425).

1266. Extremely detailed Excel spreadsheets were seized at the Apple offices⁸⁴³. The “additional units to maintain margin” tab in the “APR margin analysis”⁸⁴⁴ file shows that Apple knew how many extra units stores needed in order to be able to maintain their margin depending on the number of units sold. Apple was also in a position to control APR margin levels by changing quantities delivered. It controlled these quantities, as shown above. Moreover, each “New Deal” [applicable contractual framework] regarding discounts was subject to simulations, and a number of documents show that Apple understood the impact of these modifications on reseller margins (see paragraphs 436 to 0 and following). In the end, Apple’s wide-ranging knowledge of APR activity gave it detailed understanding of their financial situation, which meant it could change supply quantities and prices in order to keep their activity fully under control, by adjusting their situation.

c) Scale of the damage done to the economy

1. Principles

1267. The scale of the damage done to the economy should not be confused with the damages experienced by the victims of the practices in question, but is assessed in line with the overall disruption that they are likely to cause to the economy⁸⁴⁵.
1268. With regard to this overall disruption, in its *Adecco France* judgment of 26 January 2010, the Court of Appeal stated that “assessing the scale of the damage done to the economy...which in principle is not limited to damages done to the economic surplus of consumers, must cover the loss of surplus experienced by all market operators including competing undertakings in both supply and demand.”
1269. The existence of damage to the economy cannot be assumed⁸⁴⁶. It is assessed through an overall objective approach that takes into account all the evidence related to the case.
1270. However, it should be stated that, according to established case law, the *Autorité* is not required to precisely quantify the damage done to the economy, but must assess whether or not it exists and the scale thereof, based on as full an analysis as possible of the case evidence, including research into the various aspects of the overall disruption to the normal operation of the economy caused by the practices in question⁸⁴⁷. Also according to established case law, in order to assess the damage done to the economy, the *Autorité* takes into consideration both the proven and potential effects of the practice⁸⁴⁸.
1271. Finally, in order to assess the economic impact of the practice in question, the *Autorité* particularly takes into account the scale of the infringement, as characterised in particular by

⁸⁴³ For example see extraction from computer seizures “seal 28 / 268208.emlx + attachment” (VC) / classification mark 39941 (VNC) and extraction from computer seizures “seal 32 / 268255.emlx + attachment” (VC) / classification mark 39938 (VNC).

⁸⁴⁴ Classification mark 28238 (VC) / 39892 (VNC), and classification marks 34774 and 34775 (VC) / 39931 (VNC) and extraction from computer seizures “seal 32 / 214854.emlx + attachment” (VC) / classification mark 39937 (VNC), in particular APR margin Analysis and “simu” file.

⁸⁴⁵ For example see the judgment of the Paris Court of Appeal of 8 October 2008, *SNEF*, no. 2007/18040, p. 4

⁸⁴⁶ Abovementioned judgment of the French Supreme Court (*Cour de cassation*) of 7 April 2010, *Orange France e.a.*

⁸⁴⁷ Judgment of the French Supreme Court (*Cour de cassation*) of 7 April 2010, *Orange France e.a.*, no. 09-12984, 09-13163 and 09-65940

⁸⁴⁸ Judgment of the French Supreme Court (*Cour de cassation*) of 28 June 2005, *Novartis Pharma*, no. 04 13910

its geographical scope or the market share of the penalised undertaking in the market concerned, its duration, its economic or structural consequences, and the economic characteristics of the sector concerned⁸⁴⁹.

2. On Objection no.2

a. Scale of the practices

1272. The practices penalised under Objection no.2 were implemented by international players, Apple and its two wholesalers. It should be noted in this regard that the market power of these two wholesalers exceeds the impression given by their market share alone (in 2009, 15% by value for Tech Data and 8% by value for Ingram Micro, which grew respectively to 16% and 9% in value in 2013) on the consumer IT and electronics market, primarily because they are the only ones to distribute Apple products (see paragraphs 51 to 55 of this decision).
1273. Moreover, the practices were on a national scale, and affected all customers that wholesalers could serve (direct and indirect Retailers and Resellers) and cover all Apple products, except for iPhones. They involved allocation of wholesaler customers for distributing Apple products.
1274. Thanks to the information exchange mechanism between the wholesalers and Apple, and the latter's action on the wholesale market to ensure a balance between these two providers, Apple controlled the upstream part of its activity for distribution of its products, and maintained its share of the wholesale market.
1275. According to the accused, the scale of the practices is nevertheless limited since it affected only 6% of the French consumer IT and electronics wholesale market by value. However, as noted above, while it is true to say that there is inter-brand competition on this market, the characteristics of Apple products (reputation, quality, top end positioning, limited interoperability with other brands) generate customer loyalty, and more generally limits the capacity for them to be substituted with products from competing manufacturers. Consequently, the restriction of competition between Tech Data, Ingram Micro and Apple in the market could only be partially circumvented by buyers moving over to products from other brands, both for resellers specialised in Apple products and multi-brand retailers. Moreover, the impact of the practices is not limited to the share of the wholesalers' activity on the electronics wholesale market, but covers the entire Apple product wholesale market in France, assessed by Ingram Micro as 25% of the global market.
1276. Apple also states that the allocations only related to a limited share of Apple products, and only temporarily, during "constraint" periods. Nevertheless, as underlined in paragraph 696 of this decision, the practices were not restricted to the first months of the iPad launch, but covered the launch of each iPad version, over long periods, outside "constraint" periods. In the same way, with regard to other products, allocations covered both "constraint" periods and "non-constraint" periods.
1277. Finally, Apple states that the practices could only have restricted competition between wholesalers, but could not have restricted competition between them and Apple. Nevertheless, the practices also involved dissuading wholesalers from approaching and responding to requests from Apple's direct customers. For example, in an email dated 9 July

⁸⁴⁹ For example see the abovementioned judgement of the French Supreme Court (*Cour de cassation*) of 28 June 2005, *Novartis Pharma*

2010, Apple told Ingram Micro and Tech Data: “directs will continue to be supplied by Apple so ... focus on indirects”⁸⁵⁰ or in an email dated 20 July 2010, Apple reminded Ingram Micro, regarding iPad sales, that “the rule stays the same => indirect APRs first!!!! then direct APRs.”⁸⁵¹

1278. Moreover, the allocation system has particular significance, given the various forms it took: fixing the identity of customers that wholesalers could supply, fixing the quantities that each wholesaler could sell to allocated customers, and finally, fixing an order of priority in supplying customers.
1279. In addition, contrary to the arguments of the accused, as demonstrated in paragraphs 664 to 720 of this decision, the disputed practices went well beyond a delivery recommendations system, but involved implementing restricted quantity allocations, which sometimes served as the condition for accepting customer orders by the wholesalers. Moreover, it should be noted that the fact that Apple fixed the delivery lead times for wholesalers was likely to have an impact on their sales, given that the products concerned depreciate very quickly, and that, in general, delivery lead times are one of the key areas in which wholesalers can compete with each other, and therefore have an impact on their competitiveness.
1280. Finally, the restrictive nature of the practices is backed up by the detailed data to which Apple had access to ensure compliance with allocations, even if it appears that, at times, Apple’s instructions were not always observed⁸⁵², as shown in paragraph 0 of this decision.

b. Economic characteristics of the sector in question

1281. First, it should be noted that while the existence of inter-brand competition on the market concerned limited the damage, Apple products have characteristics (reputation, quality, top end positioning, limited interoperability with other brands) which generate significant customer loyalty, and more generally, limit the capacity for them to be substituted with products from other brands. This means that a reduction in intra-market competition cannot be fully compensated for by inter-brand competition.
1282. Second, the negotiating power of customers buying from wholesalers was not enough to stop the practices. Tech Data notes that its customers had a lot of negotiating power, alleging that ten of them accounted for 48% of its total Apple product sales, with this ratio hitting 65% for iPads and 89% for iPods.
1283. However, examination of Tech Data sales distribution shows that for the duration of Objection no.2 (2006 to 2013 inclusive), the sales share for its biggest customer was between 8% and 18% (average 13%) while the sales share for its second biggest customer was between 3% and 9% (average 7%), with the other main customers accounting for an even lower sales share. These customers cannot therefore be considered to have a lot of negotiating power. This is even truer for Tech Data’s other customers, outside the first ten, who nevertheless accounted for around half of sales.
1284. Finally, Tech Data and Ingram Micro claim to have low margins, in comparison with products from other brands, which encourage intense competition on the market. Tech Data claims that its margins dropped during the period concerned.

⁸⁵⁰ Classification mark 26873

⁸⁵¹ Classification mark 11368 (VC) / 25915 (VNC)

⁸⁵² Classification mark 26960

1285. However, these low wholesalers margins needs to be put into perspective. First, the wholesale business is a high-volume activity, which is naturally characterised by low margins. Moreover, the percentage margin rates need to be understood in the context of the relatively high price at which Apple sells its products to its wholesalers. Furthermore, the practices also had the effect of increasing the sales price of Apple products to its wholesalers. Lower margins can therefore give wholesalers the same remuneration as higher rates, based on lower sales prices. The comparison made by Tech Data and Ingram Micro is therefore not convincing. Finally, the practices also affected Apple's margins, since they enabled it to more easily fix the wholesale prices of its products to direct customers, given the limited nature of intra-brand competition. Its market power over wholesalers meant it could take a larger share in the margin, while reducing that of its wholesalers.

c. Economic and structural consequences of the infringement

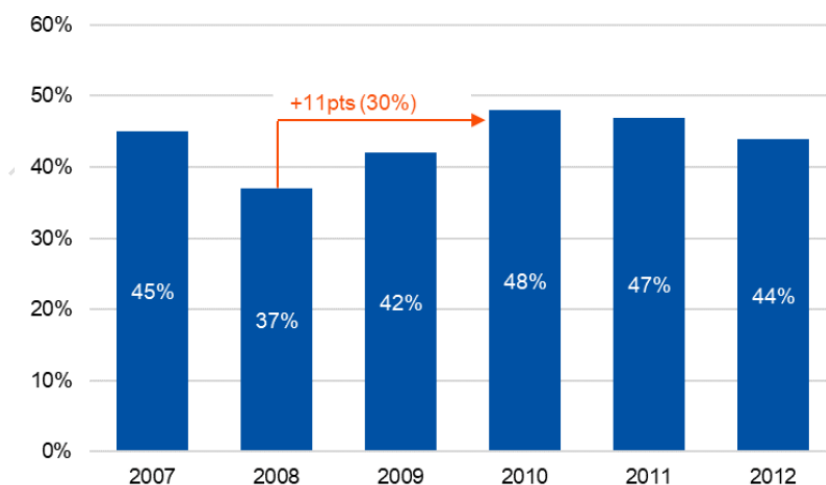
❖ Market share variations

1286. First, in order to demonstrate that there have been no economic consequences, Apple states that there were frequent significant market share variations for the various wholesalers with regard to each APR distributor. According to Apple, this means that there is dynamic competition between the two wholesalers.
1287. However, while these market share variations may mean that Apple failed to totally prevent competition between its wholesalers, it cannot be deduced that the competition was as dynamic as it would have been without the practices.
1288. First, the strong growth in APR orders with regard to a particular wholesaler could be explained by a reallocation of the orders from other APRs (or other retailer type) to the competing wholesaler, in order to maintain a balance between them. Second, this analysis does not take into account the impact of the practices on the behaviour of the wholesalers with regard to customers other than APRs, and especially Retailers. It is therefore incomplete.
1289. Next, according to the Apple and Ingram Micro financial studies, the practices in question had no real impact, given that wholesaler market shares do not converge towards a point of equilibrium, regardless of the period examined and scope considered (all products or by product category). Neither do market share variations observed for a given quarter (increased market share for one wholesaler) follow an inverse trend the next (reduction in market share for this wholesaler). For the accused, this demonstrates that no balance was maintained between the two wholesalers, and that they competed with each other.
1290. The *Autorité* reiterates, however, that the purpose of Apple's allocation practice was to distribute customers between the two wholesalers, in order to reduce the level of competition they were likely to offer Apple itself in supplying its direct clients (APRs and direct retailers), and to diminish competition between them. However, the financial studies performed for this case do not undermine this conclusion.
1291. First, the market share of each wholesaler is calculated based on their total market share, which does not take into account Apple's direct wholesale sales. The wholesaler market shares do not therefore tell us anything about the level of competition between them, in that the variations observed (e.g. a reduction in the Ingram Micro market share) may be due to Apple capturing volumes itself, and not to competition exerted by the other wholesaler.

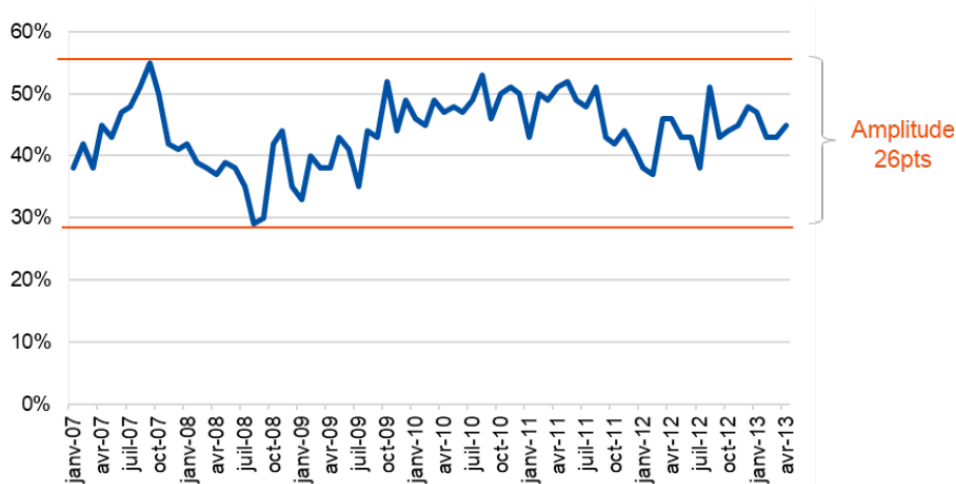
1292. Second, it has never been claimed that the two wholesalers' market shares were restricted such as to give them an equal share of the market. The market shares presented in the Apple and Ingram financial studies on the upstream indirect channel (i.e. the market shares analysed are the sales of each wholesaler as a percentage of total wholesaler sales – see graphs below) offer no evidence to the contrary. They show that Ingram Micro had a relatively low market share in 2008 and early 2009 (January to April), that it grew over the following months, and that wholesaler market shares remained relatively stable until late 2011. More generally, between July 2009 and April 2013, Ingram Micro's market share was under 40% over only four months of the 46 months covered by this period⁸⁵³. So convergence towards a point of equilibrium can be observed when all sales of Apple products affected by the restrictions are taken into account, and when the timeframe considered is long enough. In the same way, Ingram Micro market shares were relatively low in early 2007, but they increased later. The large 26 point difference in market share between its minimum and maximum levels presented by Ingram Micro corresponds to just two periods, late 2007 and late 2008, and is therefore not representative of the situation observed across the period.
1293. Finally, the 8 point difference in market share observed over half the months in the period concerned (which Ingram also states), is not substantial enough to establish that the practice had no effect on competition between the two wholesalers. This difference shows that the point of equilibrium that the practices led to is not necessarily a strictly equal division of the market, but a relative market share stability for the two wholesalers and low levels of expansion into the Apple direct client segment.

⁸⁵³ Ingram's market share was 35% in July 2009, 38% in January 2012, 37% in February 2012 and 38% in July 2012.

1294. Consequently, the market share variations observed do not lead to the conclusion that the practices did not contribute to freezing the market between the two wholesalers, even if they did not create perfectly stable market shares for the competitors, as shown by the following graphs:



Source: Cote 11 520

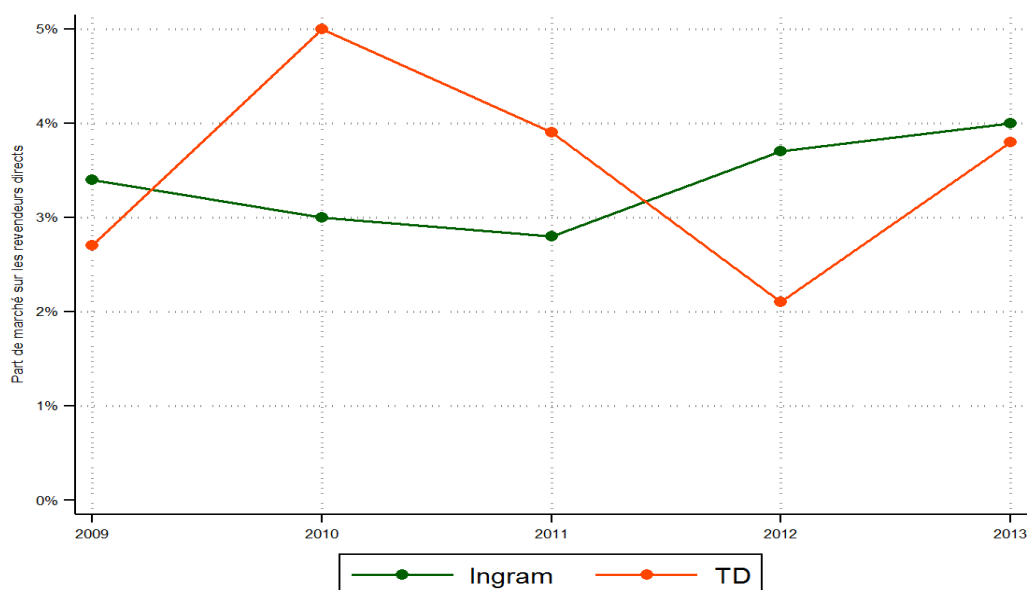


Source : Cote 11 520

+ 11pts (30%)	+ 11pts (30%)
Source : Cote 11 520	Source: Classification mark 11 520
Amplitude 26pts	26 pt variation
janv-07	Jan 07
avr-07	Apr 07
juil-07	Jul 07
oct-07	Oct 07
janv-08	Jan 08
avr-08	Apr 08
juil-08	Jul 08
oct-08	Oct 08
janv-09	Jan 09

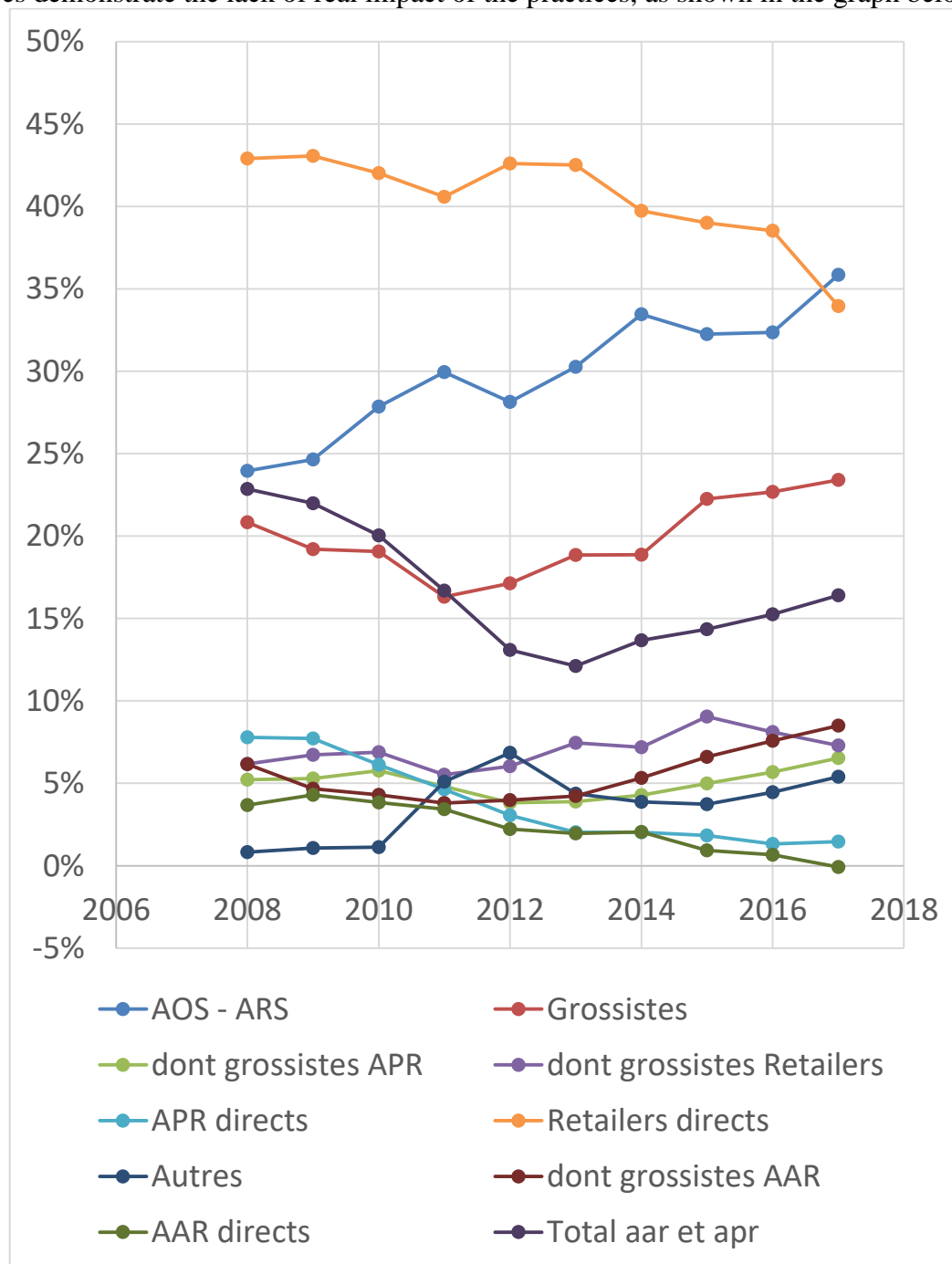
avr-09	Apr 09
juil-09	Jul 09
oct-09	Oct 09
janv-10	Jan 10
avr-10	Apr 10
juil-10	Jul 10
oct-10	Oct 10
janv-11	Jan 11
avr-11	Apr 11
juil-11	Jul 11
oct-11	Oct 11
janv-12	Jan 12
avr-12	Apr 12
juil-12	Jul 12
oct-12	Oct 12
janv-13	Jan 13
avr-13	Apr 13
Source : Cote 11 520	Source: Classification mark 11 520

1295. With regard to competition between wholesalers and Apple for its direct customers, the graph below shows that the market share for the two wholesalers on this segment did not grow over the period concerned, varying between cumulative totals of 6% and 8%:



Part de marché sur les revendeurs directs	Direct reseller market share
Ingram	Ingram
TD	Tech Data

1296. However, the wholesalers' share in Apple product sales grew after the end of the practices. Between 2008 and 2013, it was between 16% and 21%, and between 19% and 24% between 2014 and 2017. The wholesalers' share of direct Retailers also increased slightly, from 6-8% during the period of the practices, to 7-9% afterwards. While this growth may not simply be down to increased competition between wholesalers and Apple (since Apple could choose to prioritise its own distribution channels and give increasing amounts of its third party customers to the wholesalers), and it remains very low and varied depending on the product category, it nevertheless puts into perspective the accused's statements that varying market shares demonstrate the lack of real impact of the practices, as shown in the graph below:



AOS – ARS

AOS – ARS

dont grossistes APR	of which APR wholesalers
APR directs	direct APRs
Autres	Other
AAR directs	direct AARs
Grossistes	Wholesalers
dont grossistes Retailers	of which Retailer wholesalers
Retailers directs	Direct retailers
dont grossistes AAR	of which AAR wholesalers
Total aar et apr	Total AAR and APR

❖ Consideration of the context of the restriction

1297. Apple's financial studies estimate that the potential and real effects attributable to the allocations implemented by Apple during the constraint period can only be limited, since the shortage of products naturally limited the competition that wholesalers could exert with each other and with Apple.
1298. However, it was not the fact that there was a supply shortage that stopped the wholesalers competing with each other (and potentially, with Apple) for orders from retailers. On the contrary, the allocation system reduced their incentive to compete with each other, since the quantities sold by each wholesaler to each retailer or distribution channel were *de facto* limited by Apple. The restriction of competition during the "constraint" period is not without impact on competition in non-constraint periods. A wholesaler who, due to the practices, is not able to deliver products under constraint to a retailer or distribution channel is also less attractive to this retailer or distribution channel for products that are not under constraint. From a more dynamic perspective, the inability of this wholesaler to supply products under constraint may also reduce its attractiveness during non-constraint periods, in particular in comparison with Apple for direct clients.
1299. Finally, and in any case, as stated in paragraph 1277 of this decision, the allocations penalised under Objection no.2 were not limited to clearly defined constraint periods.

❖ Effects of the practices on wholesaler prices or margins

1. *Econometric analysis produced by Ingram Micro*

1300. Ingram Micro included an economic analysis of the real impact of the allocations in a financial study submitted under the case, identifying the products and periods covered by the allocation mechanism involving wholesalers, which it says are separate from the products and periods in which the allocation mechanism was unilaterally imposed by Apple without involving the wholesalers. It says the study shows that the "front" and "total" margins were not higher during these allocation periods than outside them.
1301. However, the suggested analysis has several limitations. First, the margin rates studied are only those of Ingram Micro, and do not take into account Apple's margin rates. Second, the margin rates calculated by Ingram Micro cannot be used to fully assess the anticompetitive effect of the practices in question. The analysis put forward by Ingram Micro does not take into account the volumes it sold (higher volumes can, for example, compensate for lower margin rates), aspects of wholesale competition other than price (such as customer credit, the availability of products thanks to sufficient stocks, etc.) which impact the operating costs

of wholesalers and therefore their margin levels, or potential variations to the Apple wholesale price due to the practices which change margin rates. Third, the method for estimating the effects of the practices is debatable, and the use of alternative methodologies shows that the results are not very robust, both in terms of the analysis of the overall impacts of the practices on margin rates and of the real effect of the allocation mechanism.

1302. The analyses performed by Ingram Micro to assess the effect of the allocations specifically identified by Ingram only cover a few products. The behaviour studied is therefore much more limited than the practice for which an objection was issued, so these assessments can be ruled out. Neither does the analysis take into account how the restrictions placed on these products affected, under a “one stop shop” model, other products and periods, which were supposedly not affected by the practices. Moreover, regardless of these practices, the products covered by the constraints are products for which demand exceeds supply. They may therefore be subject to changes in margin rates which differ from those of other products, skewing comparison between the two types of product. Finally, the analyses proposed are not very robust, and the measured effect of the practices varies depending on the level of data aggregation (i.e. at the model or product reference level) and the trend variable used⁸⁵⁴.
1303. With regard to the comparison of margin rates during and after the end of the allocation practices, the estimates only cover part of the practices period (from 2011), and some potentially important control parameters (such as credit or stock levels, and more generally cost or demand shocks) are not taken into account⁸⁵⁵. Moreover, some specifications examined by the investigation services produce effects that run contrary to those presented in the financial study, especially when the linear trend used by Ingram Micro in its study is excluded from the analysis or when product reference margin rates are used instead of the model margin rates used by Ingram Micro⁸⁵⁶.
1304. The criticisms in Ingram Micro’s second financial study on the estimations made by the investigation services that seek to illustrate the weakness of analyses are not convincing. With regard to the level of data aggregation in particular, given the high level of product reference variation within a single product reference category, a product reference level estimate seems at least as relevant as a model level estimate, since it prevents results being weighted by potential composition effects, but without taking away the negative consequences suggested by Ingram Micro’s second financial study.
1305. For these reasons, Ingram Micro’s econometric study cannot be used to conclude that the practices had no effect.
1306. Moreover, Ingram Micro notes that the effects of the practice penalised under Objection no.2 as estimated by the investigation services (i.e. an increase of Ingram Micro’s margins of around 0.15 to 0.36 percentage points) lead to illegal gains of between “€115,000 and €275,000 on average” per year. However, this assessment is inadequate. First, the damage to the economy is not limited to the illegal gains. Second, as shown above, using the “front” or “total” margin as the only indicator for the effects of the practices is reductive. The practices restricted other aspects of competition between wholesalers than prices alone, including credit, stock levels, or the quality of service provided to retailers. Third, the fact that sales restrictions also limited wholesalers’ competition with Apple for direct customers is not taken into account. Fourth, the limits associated with the data used by Ingram also

⁸⁵⁴ See section 659-667 of the Report.

⁸⁵⁵ See section 642-643 of the Report.

⁸⁵⁶ See sections 644 to 648 of the Report.

apply to the investigation services' estimates, so that the interest coefficient could be higher (or lower) than estimated.

2. Econometric study produced by Tech Data

1307. In its econometric study, Tech Data compares the prices during and after the period concerned. According to this analysis, the practices had no effect on Tech Data's prices.
1308. However, studying sales prices only means that the econometric specifications do not take into account the costs of Tech Data's services to its clients, or parameters other than price (such as customer credit or stocks available), which are important competition parameters in the IT wholesale market. Changes in Tech Data prices could, however, be the result of changes in these parameters over time.
1309. Moreover, the price of Apple products may present a "natural" development or "life cycle" that can be taken into account in different ways. For example, the specification of the parties assumes a "natural" development of prices for all products examined, despite the fact these products vary a great deal. Measuring the effect of the prices on Tech Data prices may be sensitive to the way in which we take into account this natural price trend. The results of the estimates do not therefore seem sufficiently robust to conclude that the practices had no effect.

3. Conclusion on econometric studies

1310. The econometric studies produced by Ingram Micro and Tech Data to demonstrate that the practices had no effect have important limitations regarding the data used and the robustness of their results. In any case, given the evidence presented above, and regardless of the results of these studies, the damage done is considered to be limited, so there is limited scope for them, and for the criticisms that can be levelled at them.

d. Conclusion

1311. In view of the foregoing, while the practices penalised under Objection no.2 were significant, examination of sector characteristics and developments in wholesaler pricing, margins and market shares lead to a conclusion of limited damage.

3. On Objection no.3

a. Scale of the practices

1312. The practices penalised under Objection no.3 were implemented with regard to APRs, who accounted for around 6% of Apple product sales (excluding iPhones) during the infringement period⁸⁵⁷. These retailers face intra-brand competition from direct or indirect Resellers and Retailers, as well as from resellers of products competing with Apple products. APRs' limited market share therefore tends to moderate the damage done by the practice penalised under Objection no.3.

⁸⁵⁷ Classification marks 49 704 – 49 715.

1313. However, restricting the pricing freedom of APRs prevented them from competing with other Apple product retailers, including other Resellers, Retailers or Apple's own stores or website. In particular, as demonstrated in paragraphs 77 and following of this decision, APRs are closely linked to the "Apple environment", and constitute a shop window for Apple products. By restricting APRs' capacity to reduce their resale prices, Apple contributed to protecting its own distribution channel from this intra-brand competition. While there were potentially few overlaps between the catchment areas of APRs and Apple Stores, at least by the end of the period in which the practices were implemented, APRs also compete with the Apple online store. Restricting the pricing freedom of APRs prevented them from competing with the Apple website.
1314. Moreover, primarily restricting intra-brand competition impacts inter-brand competition across the relevant market. In particular, the lack of intra-brand competitive pressure on Apple product pricing necessarily restricted competitive pressure on other market brands.
1315. Moreover, as noted above, the strength of inter-brand competition needs to be put into perspective, in that Apple products have characteristics (reputation, quality, top end positioning, limited interoperability with other brands) which generate significant customer loyalty, and more generally, limit the capacity for them to be substituted with products from other brands.

b. Economic characteristics of the sector in question

1316. First, APR margins are generally low, which restricted the scale of price cuts that these retailers were willing to offer to their customers.
1317. However, margin levels were not so low that no price promotions or competition would have been possible if discount levels and conditions had been predictable, especially since APR margin rates need to be understood in the context of the relative high retail prices of Apple products. Despite generally low margin levels, the uncertainty associated with Apple's various discount mechanisms limited the price cuts that APRs could have offered.
1318. Second, the fact there are a large number of retailers selling Apple products (including Apple Stores in some cities) limits the damage done by the practices, since there are retailers, some of whom are important players, who are able to drive price competition on this market. In the same way, there was competition over prices from products of brands other than Apple. Nevertheless, in this context, the practices prevented APRs from responding to the competition from other retailers and products. Moreover, the strength of this competition which continued to stimulate the market, despite the price restriction practices implemented by Apple, is diminished by the difference between Apple products and those of other brands and between specialist Apple resellers (primarily Apple Stores, AOS and APRs) and more general Retailers and Resellers.
1319. Finally, Apple argues that since it is both a competitor and supplier of APRs, it could have restricted promotions by raising wholesale prices, either directly to APRs, or indirectly via the wholesalers.
1320. However, this alternative system would have had its limitations. If the wholesale price increase was too low, some APRs would still have been able to offer price cuts, but if it was too high, it could have led to APRs that Apple needed to shut down, especially in catchment areas with no Apple Stores.

c. Economic and structural consequences of the infringement

1321. Paragraphs **Erreur ! Source du renvoi introuvable.** and following of this decision show that the practices did not totally eliminate price competition between retailers, since APRs were able to offer occasional promotions, and some APRs complained to Apple of a price war on the market.
1322. However, first, if the practices had not been implemented, the price cuts or promotions offered by APRs could have been more common and extensive. Second, while it is true that APRs offered occasional promotions, it should be underlined that they were primarily at Apple's initiative. Third, the prices collected and set out in paragraphs 347 and 348 of this decision show that prices were aligned. Fourth, the practices also damaged the capacity of the APRs to respond to commercial initiatives of their competitors, and particularly Retailers. Fifth, as noted above, they contributed to protecting Apple's own distribution channel, given that the APRs and physical and online Apple Stores have a similar premium positioning for customers looking for a high level of service and expertise on Apple products.

d. Conclusion

1323. Given the small market share of APRs, and their low margin levels, the damage caused by the practices is limited. They nevertheless restricted intra-brand competitive pressure by preventing APRs, which stand out from other Apple product resellers by strong specialisation on Apple products, making them direct competitors with Apple's own sales channel, from implementing price cuts.

4. On Objection no.4

a. Scale of the practices

1324. The practices penalised under Objection no.4 were implemented with regard to APRs, whose significance in reselling Apple products can be understood through the value of sales communicated by Apple itself. Between 2008 and 2013, Apple sales to APRs, excluding iPhones and including both direct and via wholesaler sales, went from 13% to less than 6% of total sales, with an annual average share of around 10%. This sales share is even lower if we take into account products of brands other than Apple, that could be substituted for Apple products.
1325. However, as stated in paragraphs 51 to 55 of this decision, a number of differentiating factors reduce the competitive pressure that products from competing brands exert on Apple. In the same way, APRs stand out from other Apple product resellers via their premium positioning, providing customers with service quality and specific expertise for Apple products, and offering an extensive local network (see paragraph 1138 of this decision). Moreover, the low and decreasing market share of APRs during the practices may be, in part, the result of the practices implemented by Apple and penalised under Objection no.4, with the aim of restricting their development or even ousting them from the market (see below).
1326. Moreover, as paragraphs **Erreur ! Source du renvoi introuvable.** to 1009 of this decision show, the decisive role that Apple plays in the economic activity of APRs gives the practices particular significance. In this regard, Apple's argument that APRs were able to order from wholesalers is irrelevant, in that Apple dictated the quantities and product references to be delivered to APRs, together with some sales conditions (such as credit and payment deadlines) to its wholesalers.

b. Economic characteristics of the sector in question

1327. First, the existence of significant inter-brand competition in the market concerned limits the damage done by the abuse of a state of economic dependence of APRs implemented by Apple. Nevertheless, as stated above, this competition did not prevent the damage done to the development of APRs from impacting the well-being of end consumers, in that Apple products have characteristics (reputation, quality, top end positioning, limited interoperability with other brands) which generate significant customer loyalty (paragraph 55).
1328. Second, as set out above, while there are a large number of resellers selling Apple products, APRs had a premium positioning and a specific local network which made them stand out from out Apple product resellers and helped them reach a specific customer base.
1329. Third, neither the inter-brand competition nor the intra-brand competition reduces the damage done by Apple's abuse of a state of dependence to APRs themselves (as opposed to the damage done to end consumers). It should be noted in this regard that assessing damage to the economy from an abuse of a state of economic dependence can only tend to overvalue the damage done to victim undertakings, the weak parties that this legal provision is specifically designed to protect. Finally, while Apple could have terminated its agreements with the APRs without the disputed practices, after a reasonable notice period, in order to progressively restrict them from competing with its own stores or website, these lawful means could have harmed Apple sales in some geographical areas, making such a strategy less profitable, and generating additional costs for Apple, given the reasonable notice period to be given to distributors, some of which had commercial relationships with Apple going back nearly twenty years.

c. Economic and structural consequences of the infringement

1330. Apple claims that the practices penalised under Objection no.4 did not prevent APRs from developing. It notes in particular that APRs are its customers, and that they share the same economic objective, the development of the Apple brand. Moreover it states that APRs were able to develop on the market on their own merit, by opening, for example, new non-APR stores. Finally, it observes that APRs overall turnover increased over the period considered.
1331. However, the interests of Apple and APRs are only partially aligned, since the latter's sales can negatively impact those of Apple's own stores (ARS or AOS). Furthermore, there was very little incentive for APRs to open new stores using the Apple brand, given the difficulties resulting from the abuse they faced, and the constraints associated with using the Apple brand. In addition, the fragile financial situation of most of these APRs made new investment for development unlikely. Nor did the economic situation of AARs offer APRs an avenue for development, since the status of APRs, which allows them to benefit from the Apple brand and a programme of specific discounts and payment deadlines, is more advantageous than AAR status.

1332. In addition, direct and indirect sales of Apple products excluding iPhones to APRs rose from €82 million in 2008 to €115 million in 2011, before dropping to €79 million in 2013⁸⁵⁸. They did not, therefore, increase across the entirety of the infringement period, while Apple sales (excluding iPhones) grew over the same period, from €633 million to €1.4 billion between 2008 and 2013. Moreover, one of the potential effects of the alleged practice was also to restrict the competitive pressure that APRs were able to exert in the market in the absence of these practices. APRs' share of Apple product sales excluding iPhones would be a more relevant indicator than turnover, which can vary in line with external factors such as an extension of the range of Apple products. This share dropped from 13% in 2008 to 6% in 2013. While factors other than the abuse of a state of dependence of which Apple is accused could have been responsible for this change (for example, the development of Apple Stores), paragraphs 1126 and following of this decision confirm the role of Apple's practices in this drop in APR market share.

d. Conclusion

1333. The foregoing shows that the practice of abuse of a state of economic dependence causes clear damage. The damage is evidenced by Apple's share in APR activity, by the specific nature of these retailers in the market, by the competition between APRs and Apple's direct distribution channel (via its Apple Stores and online sales) and by the decline of APRs observed on the market.

d) Conclusion on the proportion of the value of sales

1334. Given its assessment above of the seriousness of the charges and the moderate impact of the damage done to the economy in the sector concerned, the *Autorité* shall, for the purposes of determining the base amount of the penalty imposed on the accused undertakings, take into account:

- 8% of the selected base value for the penalty sanctions issued under Objection no.2;
- 7% of the selected base value for the penalty sanction issued under Objection no.3;
- 9% of the selected base value for the penalty sanction issued under Objection no.4.

e) Duration

1335. The *Autorité* has undertaken to consider the duration of infringements exceeding one year according to the following practices and methods: to translate its appraisal of the seriousness of the charges and of the extent of the damage done to the economy into a figure, the proportion determined is applied once, for the first full year of individual participation in the practices of each undertaking under investigation, to the value of its sales during the reference financial year, then to half of this value for each full year of participation that follows. Beyond the final full year, the remaining period is taken into account to the nearest month, providing that the case evidence allows it.

1336. In each case, this method results in a multiplying factor, which is defined in proportion to the individual duration of each undertaking's participation in the practices and applied to the proportion of the value of sales made by each of them during the reference year.

⁸⁵⁸ Classification marks 49 704 – 49 715. The value of sales communicated by Apple is in US dollars. It is converted into Euros using average ECB exchange rate.

1. On Objection no.2

1337. Paragraphs 790 to **Erreur ! Source du renvoi introuvable.** of this decision show that in his case, the infringement began in December 2005 and ended in late March 2013.

1338. The duration of the practices is therefore 7 years and 4 months, representing a multiplying factor of 4.16.

2. On Objection no.3

1339. Paragraphs **Erreur ! Source du renvoi introuvable.** to **Erreur ! Source du renvoi trouvable.** of this decision show that in this case, the infringement began in October 2012 and ended in late March 2017.

1340. The duration of the practices is therefore 4 years and 5 months, representing a multiplying factor of 2.7.

3. On Objection no.4

1341. Paragraphs **Erreur ! Source du renvoi introuvable.** to **Erreur ! Source du renvoi trouvable.** of this decision show that in this case, the infringement began in November 2009 and ended in late March 2013.

1342. The duration of the practices is therefore 3 years and 5 months, representing a multiplying factor of 2.2.

f) Conclusion on determining the basic amount

1. On Objection no.2

1343. With regard to the seriousness of the charges and the extent of the damage done to the economy by the practices in question, the basic amount of the financial penalties determined as a proportion of the sales to which the infringement relates made by the undertakings concerned and the duration of the infringement, shall be as follows:

Undertakings	Basic amount (in Euros)
Apple	348,675,515
Ingram Micro	39,357,918
Tech Data	50,738,660

2. On Objection no.3

1344. With regard to the seriousness of the charges and the extent of damage done to the economy by the practices in question, the basic amount of the financial penalty determined as a proportion of Apple's sales to which the infringement relates and the duration of the infringement shall be €116,414,977.

3. On Objection no.4

1345. With regard to the seriousness of the charges and the extent of damage done to the economy by the practices in question, the basic amount of the financial penalty determined as a

proportion of Apple's sales to which the infringement relates and the duration of the infringement shall be €114,893,694.

2. INDIVIDUALISATION OF THE PENALTY

1346. The *Autorité* has also undertaken to adjust the basic amount to reflect the seriousness of the charges and the extent of the damage done to the economy with regard to the legal criterion linked to the individual nature of the penalised undertaking, and where appropriate, of the group it belongs to.
1347. To this end, according to evidence in each case, it can take into consideration various attenuating and/or aggravating circumstances which characterise the behaviour of the undertaking accused of committing the infringements, and other relevant objective information linked to its individual situation. This may lead to adjusting the penalty amount up or down.

a) On aggravating or attenuating circumstances

1348. The companies in question argue that the penalties issued should be lowered due to various extenuating circumstances. Apple notes in particular the exceptional nature of the penalised practices, the fact that the nature of its distribution network encourages competition, and the high level of inter-brand competition it faces. Tech Data states that the penalties issued against distributors for vertical practices should be put into perspective.
1349. However, first, there is no principle that requires the penalties borne by distributors involved in a vertical agreement to be less severe than those issued against suppliers that are part of the agreement. If it has been shown that the wholesalers actively participated in applying the customer allocation policy of their supplier, Apple, whose anticompetitive purpose has been established, they must be held responsible in the same way as their supplier, unless they prove that they were forced to take part in the infringement, which is not the case here. Tech Data's argument shall therefore be ruled out.
1350. Second, contrary to Apple's claims, the penalised practices are not exceptional. As the restatement of the principles for assessing each objection has shown, the *Autorité de la concurrence* has frequently issued decisions on practices of the same kind related to customer restriction (Objection no.2), restriction of pricing freedom (Objection no.3) and abuse of a state of economic dependence (Objection no.4). Apple incorrectly states in its written arguments that the practices raised under Objection no.3 may only be penalised if the scope of application of price fixing bans is extended in an unprecedented manner. The ban on price fixing consistently applies to all practices which aim to restrict the buyer's capacity to set its sale price (see article 4 a) of the abovementioned regulation on vertical restraints).
1351. In the same way, as stated in paragraphs 833 and following above, and contrary to Apple's written arguments, the *Autorité* is not required to set out the various indicators relating to the price fixing within a three-pronged body of evidence. The *Autorité* is, however, required to demonstrate, as it did in paragraphs 848 and following above, by virtue of established decision-making practice and case law, the existence of a joint intention of the parties between the undertakings in question in response to the invitation of one of the parties to

implement an anticompetitive practice, and the express or tacit agreement of the other party to said practice.

1352. Moreover, the fact that implementation of the practice in question relied on indirect measures does not mean that it can be considered exceptional. Practices that impose resale prices via indirect price fixing mechanisms are consistently prohibited in the same way as those using direct mechanisms. These kinds of practices, involving the manipulation of distributor margins or their discounts or rebate have previously been penalised by national competition authorities⁸⁵⁹ and the European Union⁸⁶⁰.
1353. Finally, the argument that Apple's distribution network encourages competition and the strength of inter-brand competition was discussed during qualification of the infringement. They do not need to be examined under the individualisation of penalties.
1354. In view of the foregoing, no attenuating circumstance justifies reducing the fines issued. Moreover, no case evidence suggests that any of the undertakings penalised should have their fine increased due to aggravating circumstances.

b) On other individual aspects of individualisation

1355. Paragraphs 47 and 48 of the Penalties Notice state that “in order to ensure the deterrent effect and proportionate nature of the financial penalty, the *Autorité* may subsequently adjust the basic amount up or down in line with other objective information associated with the situation of the undertaking or organisation concerned.

(...)

It may also adjust it up in order to take into account the fact that:

- the undertaking concerned is of significant size and economic power and has large-scale general resources, in particular in comparison the other perpetrators of the infringement;
- the group to which the undertaking concerned belongs is of significant size and economic power and has large-scale general resources. This is particularly taken into account when the infringement can also be attributed to the company that controls it within the group.”

1356. With regard to adjusting the penalty up, established case law shows that assessment of the individual situation can involve taking into consideration the size of the undertaking in question, or the group to which belongs⁸⁶¹.

⁸⁵⁹ For example see decision 05-D-70 on practices implemented in the pre-recorded videotapes sector in which the price fixing practice was based on negotiating discounts and rebates with false conditions in order to artificially increase the below-cost selling threshold.

⁸⁶⁰ For example see Commission decisions of 5 July 2000, COMP F. 1. 36.516, - *Nathan Bricolux* and of 16 July 2003, COMP/37.975 – *Yamaha*.

⁸⁶¹ For example see the judgment of the French Supreme Court (*Cour de cassation*) of 28 April 2004, *Colas Midi-Méditerranée e.a.* no. 02-15203.

1357. For example, the European Court of Justice states that the value of sales of the undertaking in question can be used to ensure that the financial penalty base is proportional to the economic scale of the infringement and the its relative share of the market or sector in question, and that it is legitimate to take into account this undertaking's total turnover, in that it gives an indication of its size, economic power and resources⁸⁶².
1358. The fact that an undertaking has significant financial power can be a reason for the penalty issued for one or more infringements to be higher than if this were not the case, in order to ensure the deterrent effect and proportionate nature of the financial penalty⁸⁶³.
1359. In this respect, the French Supreme Court (*Cour de cassation*) has already had the opportunity to specify that effective prevention of anticompetitive practices means that the financial penalty should have a proper deterrent effect – an objective that has also been highlighted with regard to penalties issued by the European Court of Human Rights⁸⁶⁴, with regard to the financial situation of each undertaking at the time that it is fined⁸⁶⁵.
1360. The Paris Court of Appeal recently reiterated this in its judgment of 11 July 2019, *Janssen-Cilag SAS*⁸⁶⁶. It specified that increasing the basic amount of the penalty due to membership of a group depended on the circumstances of the charges and the context of each case. Moreover, it accepted that this power could be demonstrated by the low ratio between the value of sales used for calculating the penalty base and the turnover of the group to which the perpetrator of the infringement belongs.

1. Economic power of the Apple group

1361. In this case, the infringements in question were attributed to Apple France, Apple Sales International (“ASI”), Apple Distribution International (“ADI”), Apple Europe Limited (“AEL”) and Apple Operations Europe (“AOE”) as perpetrators, and Apple Inc., Apple Operations Europe (“AOE”) and Apple Operations International (“AOI”) as parent companies which taken together, constitute a parent company for the purposes of competition law, as demonstrated by the arguments of this decision pertaining to the imputability of the practices.
1362. These companies belong to the Apple group, which is a major corporation with a high level of economic power. The Apple group has massive overall financial resources. Its total net sales figure was \$265.6 billion (i.e. roughly €223.3 billion) as of 30 September 2018⁸⁶⁷.
1363. The value of sales selected as a base for the penalties issued under the three infringements represents just 1.02% of Apple's total turnover for 2019, and less than 5% of its consolidated net income for 2019⁸⁶⁸.

⁸⁶² Above-mentioned CJEU, *Musique Diffusion Française/Commission*, paragraphs 119 to 121, CJEU, 26 June 2006, *Showa Denko/Commission*, aff. C-289/04 P, Rec. p. I-5859, paragraphs 16 and 17 and CJEU, 4 September 2014, *YKK Corporation*, C-408/12, paragraph 86.

⁸⁶³ Above-mentioned judgments of the Paris Court of Appeal, 11 October 2012, *Entreprise H. Chevalier Nord e.a.*, p. 71, and of 30 January 2014, *Société Colgate-Palmolive Service*, p. 41.

⁸⁶⁴ Judgment of the European Court of Human Rights of 27 September 2011, *Menarini Diagnostics/Italy* (Req. no. 43509/08, paragraph 41).

⁸⁶⁵ Judgment of the French Supreme Court (*Cour de cassation*) of 18 September 2012, *Séphora e.a.*, no. 12-14401.

⁸⁶⁶ Judgment of the Paris Court of Appeal of 11 July 2019, *société Janssen-Cilag S.A.S e.a.*, no. 18/01945, paragraphs 581 and following.

⁸⁶⁷ [https://s2.q4cdn.com/470004039/files/doc_financials/2018/q4/10-K-2018-\(As-Filed\).pdf](https://s2.q4cdn.com/470004039/files/doc_financials/2018/q4/10-K-2018-(As-Filed).pdf)

⁸⁶⁸ [https://s2.q4cdn.com/470004039/files/doc_financials/2019/ar/10-K-2019-\(As-Filed\).pdf](https://s2.q4cdn.com/470004039/files/doc_financials/2019/ar/10-K-2019-(As-Filed).pdf)

1364. In the light of this information, the basic amount of the financial penalties issued against Apple France, Apple Sales International (“ASI”), Apple Distribution International (“ADI”), Apple Europe Limited (“AEL”) and Apple Operations Europe (“AOE”), jointly and severally with their parent companies, Apple Inc., Apple Operations Europe (“AOE”) and Apple Operations International (“AOI”), should be increased by 90 %.
1365. In view of the foregoing, the penalty amount to be issued against Apple France, Apple Sales International (“ASI”), Apple Distribution International (“ADI”), Apple Europe Limited (“AEL”) and Apple Operations Europe (“AOE”), jointly and severally with Apple Inc., Apple Operations Europe (“AOE”) and Apple Operations International (“AOI”), shall be:
- €662,483,478 under Objection no.2;
 - €221,188,456 under Objection no.3;
 - €218,298,018 under Objection no.4.

2. Economic power of the Ingram group

1366. Ingram Micro argues, under assessment of other aspects of individualisation, that its turnover does not represent its share of the market or the added value it contributes.
1367. Nevertheless, as detailed in paragraphs 1210 to 1213 of this decision, Ingram Micro’s turnover accurately reflects its wholesaler activity and represents its economic share of the market affected by Objection no.2.
1368. In this case, the infringement penalised under Objection no.2 was attributed to Ingram Micro SAS as perpetrator, and Ingram Micro Europe BVBA and Ingram Micro Inc. as parent companies, together constituting an undertaking for the purposes of competition law, as presented above in the decision section on the imputability of the practices.
1369. However, these companies belong to the Ingram group, which is a significant corporation with significant economic power. The Ingram group has very extensive overall financial resources. Its total net sales figure was \$50.4 billion (i.e. roughly €42.7 billion) as of 31 December 2018⁸⁶⁹.
1370. The value of sales selected as a base of the penalty issued against it represents just 0.28% of the group’s total turnover, and around 40% of its consolidated net income.
1371. In the light of this information, the basic amount of the financial penalty issued against Ingram Micro SAS, jointly and severally with its parent companies, Ingram Micro Europe BVBA and Ingram Micro Inc., should be increased by 60 %.
1372. In view of the foregoing, the penalty amount to be issued against Ingram Micro SAS, jointly and severally with Ingram Micro Europe BVBA and Ingram Micro Inc., shall be €62,972,668.

⁸⁶⁹ <https://ingrammicro.gcs-web.com/static-files/b01b797a-d988-4ef6-8b52-cfaf3c06ba70>

3. Economic power of the Tech Data group

1373. Tech Data argues that increasing the sanction due to the group's size would be pointless and unjustified. It states that given its low margins, any financial penalty would have an excessive deterrent nature. It also argues that the turnover does not adequately represent Tech Data France's economic size, and considers that such an increase would lead a disproportionate fine.
1374. Nevertheless, as detailed in paragraphs 1210 to 1213 of this decision, Tech Data's turnover accurately reflects its wholesaler activity and represents its economic share of the market affected by Objection no.2.
1375. In this case, the infringement penalised under Objection no.2 was attributed to Tech Data France SAS as perpetrator, and Tech Data France Holding, Tech Data BV and Tech Data Corp., as parent companies, together constituting an undertaking for the purposes of competition law, as presented above in the decision section on the imputability of the practices.
1376. However, these companies belong to Tech Data, which is a significant corporation with significant economic power. The Tech Data group has extensive overall financial resources. Its total net sales figure was \$37.2 billion (i.e. roughly €31.7 billion) as of 31 January 2019⁸⁷⁰.
1377. The value of sales selected as a base of the financial penalty issued against it represents just 0.48% of the group's total turnover, and around 53% of its consolidated net income.
1378. In the light of this information, the basic amount of the financial penalty issued against Tech Data France SAS, jointly and severally with its parent companies, Tech Data France Holding, Tech Data BV and Tech Data Corp., should be increased by 50 %.
1379. In view of the foregoing, the penalty amount to be issued against Tech Data France SAS, jointly and severally with Tech Data France Holding, Tech Data BV and Tech Data Corp., shall be €76,107,989.

3. CONCLUSION ON THE AMOUNT OF THE PENALTY

a) On Objection no.2

1380. In view of the foregoing, there is reason to issue the following penalties under Objection no.2:

⁸⁷⁰ https://s23.q4cdn.com/711282220/files/doc_financials/annual/2019-10K-TechData.pdf

Undertakings	Jointly and severally with	Penalties (in Euros)
Apple France	Apple Inc.	662,483,478
Apple Sales International	Apple Operations Europe, Apple Operations International and Apple Inc.	
Apple Distribution International	Apple Operations International and Apple Inc.	
Apple Europe Limited	Apple Inc.	
Apple Operations Europe	Apple Operations International and Apple Inc.	
TOTAL Apple group		
Ingram Micro SAS	Ingram Micro Europe BVBA and Ingram Micro Inc.	62,972,668
Tech Data France SAS	Tech Data France Holding, Tech Data BV and Tech Data Corp.	76,107,989
TOTAL OBJECTION No.2		801,564,135

b) On Objection no.3

1381. In view of the foregoing, there is reason to issue the following penalty under Objection no.3:

Undertakings	Jointly and severally with	Penalty (in Euros)
Apple France	Apple Inc.	221,188,456
Apple Distribution International	Apple Operations Europe, Apple Operations International and Apple Inc.	
Apple Europe Limited	Apple Inc.	
TOTAL Apple group		

c) On Objection no.4

1382. In view of the foregoing, there is reason to issue the following penalty under Objection no.4:

Undertakings	Jointly and severally with	Penalty (in Euros)
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Apple France	Apple Inc.	218,298,018
Apple Sales International	Apple Operations Europe, Apple Operations International and Apple Inc.	
Apple Distribution International	Apple Operations International and Apple Inc.	
Apple Europe Limited	Apple Inc.	
Apple Operations Europe	Apple Operations International and Apple Inc.	
TOTAL Apple group		

4. ON THE LEGAL MAXIMUM

1383. For consolidated accounts, the maximum legal penalty corresponds to 10% of the highest worldwide consolidated turnover, excluding VAT achieved in one of the financial years ended after the financial year preceding that in which the practices began.

1. On the Apple group

1384. As of 30 September 2018, the highest known worldwide consolidated turnover excluding VAT for the Apple group was \$265.6 billion (around €223.3 billion).

1385. The value of the penalty set out above is less than 10% of this figure. It is therefore not subject to modification.

2. On the Ingram group

1386. As of 31 December 2018, the highest known worldwide consolidated turnover excluding VAT for the Ingram group was \$50.4 billion (around €42.7 billion).

1387. The value of the penalty set out above is less than 10% of this figure. It is therefore not subject to modification.

3. On the Tech Data group

1388. As of 31 January 2019, the highest known worldwide consolidated turnover excluding VAT for the Tech Data group was \$37.2 billion (around €31.7 billion).

1389. The value of the penalty set out above is less than 10% of this figure. It is therefore not subject to modification.

DECISION

Article 1: It is not established that Apple France SARL, Apple Sales International, Apple Distribution International, Tech Data France SAS and Ingram Micro SAS, as perpetrators of the practices, and Apple Inc., Apple Operations Europe, Apple Operations International, Tech Data France Holding, Tech Data BV, Tech Data Corp., Ingram Micro Europe BVBA and Ingram Micro Inc., as parent companies, infringed the provisions of Article L. 420-1 of the French Commercial Code, and of Article 101 (1) of the Treaty on the Functioning of the European Union, by implementing exchanges of information on the consumer IT and electronics wholesale market.

Article 2 : It is established that Apple France SARL, Apple Sales International, Apple Distribution International, Apple Europe Limited, Apple Operations Europe, Tech Data France SAS and Ingram Micro SAS, as perpetrators of the practices, and Apple Inc., Apple Operations Europe, Apple Operations International, Tech Data France Holding, Tech Data BV, Tech Data Corp., Ingram Micro Europe BVBA and Ingram Micro Inc., as parent companies, infringed the provisions of Article L. 420-1 of the French Commercial Code, and of Article 101 (1) of the Treaty on the Functioning of the European Union, by implementing, from December 2005 to March 2013, customer restriction practices on the consumer IT and electronic product wholesale market.

Article 3: It is established that Apple France SARL, Apple Distribution International and Apple Europe Limited, as perpetrators of the practices, and Apple Inc., Apple Operations Europe and Apple Operations International, as parent companies, infringed the provisions of Article L. 420-1 of the French Commercial Code, and of Article 101 (1) of the Treaty on the Functioning of the European Union, by implementing, from October 2012 to April 2017, practices aiming to restrict the pricing freedom of APRs, by directly or indirectly fixing Apple product retail prices on the consumer IT and electronics retail market.

Article 4: It is not established that Apple Sales International, as perpetrator, and Apple Operations Europe, Apple Operations International and Apple Inc., as parent companies, infringed the provisions of Article L. 420-1 of the French Commercial Code, and of Article 101 (1) of the Treaty on the Functioning of the European Union, by implementing practices aiming to restrict the pricing freedom of APRs, by directly or indirectly fixing Apple product retail prices on the consumer IT and electronics retail market.

Article 5: It is established that Apple France SARL, Apple Sales International, Apple Distribution International, Apple Europe Limited and Apple Operations Europe, as perpetrators of the practices, and Apple Inc., Apple Operations Europe and Apple Operations International, as parent companies, infringed the provisions of Article L. 420-2, paragraph 2, of the French Commercial Code by implementing, from November 2009 to April 2013, practices aiming to abuse the state of economic dependence of APRs, by applying a set of rules and behaviours that abnormally restricted the activity of these distributors.

Article 6: The following financial penalties shall be imposed for the practices referred to in Article 2:

- €662,483,478 jointly and severally on Apple France SARL, Apple Sales International, Apple Distribution International, Apple Europe Limited, Apple Operations Europe, Apple Operations International and Apple Inc. ;
- €62,972,668 jointly and severally on Ingram Micro SAS, Ingram Micro Europe BVBA and Ingram Micro Inc. ;
- €76,107,989, jointly and severally on Tech Data France SAS, Tech Data France Holding, Tech Data BV and Tech Data Corp.

Article 7: For the practices referred to in Article 3, a financial penalty of €221,188,456, shall be imposed jointly and severally on Apple France SARL, Apple Distribution International, Apple Europe Limited, Apple Operations Europe, Apple Operations International and Apple Inc.

Article 8: For the practices referred to in Article 5, a financial penalty of €218,298,018, shall be imposed jointly and severally on Apple France SARL, Apple Sales International, Apple Distribution International, Apple Europe Limited, Apple Operations Europe, Apple Operations International and Apple Inc.

The investigation by Estelle Peres-Bonnet, Marianne Combaldieu and Franck Bertrand, *Rapporteurs*, the oral report by Marianne Combaldieu, Franck Bertrand, Etienne Pfister, Frédéric Fustier and Eshien Chong, *Rapporteurs*, and the intervention of Nicolas Deffieux, Deputy General *Rapporteur*, having been deliberated on by Irène Luc, Vice-President, chairing the session, Catherine Prieto, Marie-Laure Sauty de Chalon, Savinien Grignon-Dumoulin and M. Jérôme Pouyet, members.

Hearing Secretary,

President of the hearing,

Armelle Hillion

Irene Luc