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Competition Issues in Aftermarkets - Note from France

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1. Introduction

1. Secondary markets are those on which are bought, more or less repeatedly, goods and services that are complementary (or “secondary”) to the purchase of a principal (or “primary”) durable product. The entity consisting of both primary and secondary goods or services comprises what is sometimes known as a “system goods”. Typical examples of secondary markets are those for consumables (coffee capsules or ink cartridges, but also music for portable media players and smartphone applications, etc.) or for maintenance (car components and reprographic equipment, etc.).

2. The issues raised by secondary markets are not subject to any specific regulation under French or European consumer law. This law provides for a general obligation to provide information on the principal features of the product or service offered. The obligation may be fulfilled simply by displaying the overall price of a product (for instance, computer with preinstalled software). Nevertheless, some products and services are subject to a stricter French regulatory framework because of the cost of the ancillary services and their lack of price transparency. For instance, hearing aids must, under Article L.165-9 of the French Social Security Code (*Code de la Sécurité Sociale*), be defined in a standard-format quotation that lists the prices of each service (in particular fitting and follow-up).

3. The difficulties raised by secondary markets are better recognised in competition law, which is more adapted to weighing up the positive and negative effects of the practices in each individual case. As regards how competition authorities make their decisions, the main competition issue associated with these secondary markets is the desire of some businesses manufacturing primary products to retain the sales of secondary products and services (a strategy known as “closing” or “locking” the system). There may be a number of reasons why a manufacture chooses a closing strategy, with either a positive or a negative impact on consumers and/or economic efficiency.

4. The frequently-quoted positive impacts include top quality or compatibility between the different components of a “closed” system (see below for examples). In addition, a business owning a closed system can sell its various constituent services at prices that recognise the demand complementarities between the different products. For instance, it may sell the primary product at a low price in order to sell larger quantities of the secondary product, so that even consumers who make little use of the primary product may consider it worth acquiring. Lastly, closing a secondary market may encourage businesses to compete strongly for the sale of primary goods.

5. Closing may also have negative effects: it may reduce the variety of secondary goods produced, make it easier to set higher prices for them or prevent the customer from combining the primary product with the secondary goods that best meet his/her personal preferences.

6. According to the Chicago School, the behaviour chosen by businesses in opening or closing their goods system can benefit economic efficiency. In practice, a business, even a monopoly, that chooses to lock its sales on the secondary market will not necessarily make higher profits than a business that leaves the market open: the more competitive, diversified and innovative the secondary market, the more of its primary product the business can sell at a high price, since it becomes more attractive to customers. Following this view, the closing strategies observed in certain markets therefore correspond to efficiency gains (for instance, they ensure that the services offered on the secondary market are of better quality).

7. Nevertheless, there are circumstances that justify the intervention of the competition authorities in supporting the opening of a secondary market to promote economic efficiency or consumer surplus. In the first place, market imperfections may sometimes allow a business to increase its profit by locking a secondary market (for example, when the customer is “short-sighted” and is not able when choosing a primary product to take into account the price and quality of the goods offered on the secondary market).

8. Also, a secondary market may also be closed in order to damage competition, even where there are no “short-sighted” consumers. Two instances of this are given below.

9. Firstly, a business may wish to lock the secondary market when it provides a route into the primary market. In its “Microsoft” decision of 24 March 2004 (Case COMP/C-3/37.792, see in particular § 769), the European Commission considered that by excluding competitors from the market for work-group server operating systems, Microsoft was reinforcing the barriers to entering the client PC operating system market: to enter this market successfully, the business would have to guarantee that its proposed system operated with Microsoft work-group server operating systems, which had become dominant largely because of the locking censured by the Commission in its decision.

10. Secondly, the reasoning of the Chicago School no longer applies if the secondary product can be used without the primary product. Thus if there are economies of scale and the sales of secondary goods to consumers of the primary product are sufficiently large, closing the secondary market enables the business to exclude its competitors from sales not only to customers of the primary product but also to customers “outside the system”. For instance, during the McAfee/Intel merger¹, the Commission considered that the new entity might try to lock access to Intel systems for antivirus competitors of McAfee in order to restrict the market available to these competitors and thus to exclude them from the entire antivirus market².

11. These different economic questions are described in detail in the study “The economics of open and closed systems”, produced jointly by the *Autorité de la concurrence* and the Competition and Markets Authority³. The rest of this Note focuses primarily on how the *Autorité de la concurrence* makes its decisions and on its consultative practices as regards secondary markets.

¹ Case Comp/M.5984-INTEL/MCAFEE

² See K-U. Kühn, S Albæk and M de la Mano, (2011), “Economics at DG Competition, 2010-2011”, Review of Industrial Organization 39 : 311-325.

³ http://www.autoritedelaconcurrence.fr/user/standard.php?lang=fr&id_rub=285&id_article=2465.

12. It discusses first the question of assessing the market power an operator may have when present in the after-sales market and seeking to monopolise access to it (1). It then reviews the question of how to characterise such closing practices by operators with market power (2).

2. Identifying the market power of an operator present in a secondary market

13. Practices for closing a secondary market are generally considered from the aspect of abuse of dominant position. Demonstrating such an abuse requires establishing that the business locking the market has a dominant position, either on the secondary goods market (section a), or on the primary goods market (section b).

2.1. Identifying a dominant position on a secondary market

2.1.1. Introduction

14. Demonstrating a dominant position in a secondary market must take into account the competition already existing on the primary market, which may compel the business to adopt competitive conditions of sale (price, quality of service, etc.) on the secondary market, even when it is the principal or sole operator present on that market. This implies that more transparent conditions of sale on the secondary market can strengthen competition on the primary market, by reducing the consumer's "short-sightedness" in choosing the primary product, and discouraging unjustified price increases on the secondary market⁴.

15. A number of decisions from the European Commission define a framework for analysing and assessing the strength of the competitive pressure from the primary market. Thus in Case IV/34.330 Pelikan/Kyocera (§ 61)⁵, the Commission considered that without a dominant position on the primary market, a dominant position on the secondary market can be excluded if four conditions are all met: i) consumers can make an informed choice including life-cycle-pricing; ii) consumers are likely to make such a choice; iii) if prices rise or quality deteriorates on the secondary market, a sufficient number of customers would adapt their purchasing behaviour on the primary market; and iv) would do so within a reasonable time⁶.

⁴ Thus in its Opinion 14-A-01 on the competitive process in the sector for the bulk distribution of propane, the *Autorité de la concurrence* recommended that contracts showed more clearly how the prices for bulk propane would evolve, so that customers could make a more informed choice when selecting the operator to install the tank and subsequently supply them with propane.

⁵ See also the decisions of the European Commission EFIM dated 20 May 2009 (case COMP/C-3/39.391) and Info-Lab/Ricoh (Case IV/E 2/36.431) which use the same analysis framework.

⁶ In its working paper "DG Competition discussion paper on the application of Article 82 of the Treaty to exclusionary abuses" dated 2005, the European Commission also indicates (§ 259) that lack of competition on the secondary market can lead to strong competition on the primary market, and that this would cause the margins of businesses present on both markets to disappear. Currently, however, decisions are not made following this line of argument. It is true that competition in the primary market is not necessarily enough to compensate for the high prices paid by customers on the secondary market, for instance if businesses competing on the primary market experience financial constraints that prevent them making losses equivalent to the future profits they will earn by locking sales on the secondary market. Competition on the primary market may also involve not just price but also factors such as

2.1.2. The analysis framework from the Commission's decision-making practice

The consumer can make an informed decision taking into consideration the price of the secondary-market product, and is likely to make such a choice (conditions i and ii)

16. As stated above, the European Commission considered in its Pelikan/Kyocera decision, that a business is not likely to have a dominant position on its secondary market when the consumer can take an informed decision that takes account of the future cost of buying secondary goods and when it is sufficiently likely that this informed choice will be made. If the price of the secondary product rises or its quality deteriorates, customers are able to buy a competing primary product, thus discouraging the business in the secondary market from increasing the prices or reducing the quality of its products and services (subject to the additional conditions described below).

17. Thus two conditions must be fulfilled. Firstly, customers must be able to take their decision to purchase the primary product with knowledge of the prices of the secondary goods: consumers must therefore know that they will need to use a secondary product and know how much it will cost. Secondly, the customer must actually consider the price of the secondary product when deciding to buy the primary product.

18. For instance, the customer will be more likely to consider prices on the secondary market when selecting the primary product if he/she has the ability and the motivation to make an optimal choice. It is frequently assumed that a business is more often in a position to take into account the purchasing conditions for a secondary product than is an individual consumer⁷. The choice will also more often be optimal when the secondary-product purchase represents a significant proportion of the purchasing costs of the system comprising the paired primary/secondary product⁸. Depending on circumstances, customers can more or less predict the prices of secondary products, for example maintenance or consumables⁹. There may be some direct evidence that consumers recognise the cost of the secondary product when they buy the primary product, for instance when they sign a maintenance contract at the time the primary product is

businesses' communication costs, so that the income will be spent without the consumer benefiting from low prices on the primary market.

⁷ See, for example, Decision 07-D-20 dated 19 June 2007, relating to a request from the company Integral Process for interim measures against the practices employed on the French oximetry market.

⁸ See Decision 16-D-29 dated 19 December 2016 on the practices employed in the after-sales sector for reprographic equipment, citing prices for maintenance that were between 1.5 and 1.8 times the cost of the photocopier. Conversely, in its Decision 05-D-46 on the practices employed by the company Jaeger-Lecoultrre, the *Conseil de la concurrence* noted that the price of a luxury wristwatch was over €1000 whereas the average repair cost was around €200.

⁹ For example, for the prices of watch maintenance, see Decision 05-D-46 referred to above. For consumables, see Opinion 14-A-01 on the competitive process in the sector for the bulk distribution of propane to individual consumers: the *Autorité de la concurrence* noted that the prices for propane (a secondary product, following the provision of the tank) were extremely opaque, as the consumer had no precise knowledge of how prices would change.

purchased¹⁰. Nevertheless, even in such situations, consumers may be unaware in advance of the quality of the services provided once the primary product is purchased¹¹.

A high price on the secondary market would lead consumers to seek a competitive primary product (condition iii)

19. We can distinguish the reactions of two distinct groups of customers, the first comprising consumers who already own the primary product, and the other potential consumers of the primary product who intend to purchase it shortly.

- The reaction of existing consumers

20. Customers who already own the primary product may influence the operator's prices on the secondary market if they are likely to change the primary product following a secondary-market price rise. They will be more likely to change if the cost of the secondary product is high compared with that of the primary product, as the costs of buying a new primary product and any costs incurred in switching systems can be offset against the savings made on secondary-market purchases. They are also more likely to change when the costs of changing the primary product (such as the associated financial cost of the change and also that of learning how to use the new primary product) are low¹². The change is also easier if the primary product has a short lifetime¹³.

- The reaction of potential consumers

21. Customers who do not yet own the primary product can also influence the prices of the secondary product, and their pressure is greater as they have no switching costs that might lead them to continue to use a primary product when its corresponding secondary product has risen in price. The higher the ratio of these potential consumers to those that currently use the goods system, the higher the pressure¹⁴. The pressure will also be stronger when the business cannot charge different prices to new and existing consumers on the secondary market. If price discrimination is possible, the operator can set high prices on the secondary market for existing captive consumers, thus exploiting the existing customer base, and low prices for new consumers, so that it can continue to

¹⁰ See Decision 16-D-29 dated 19 December 2016 on the practices employed in the after-sales sector for reprographic equipment ("Xerox").

¹¹ In its Opinion 16-A-24 on the competitive process in the hearing-aid sector, the *Autorité de la concurrence* noted that the hearing appliance and the services of fitting and follow-up were purchased simultaneously, but that the quality of the follow-up service was not known beforehand.

¹² See the Decision of the European Commission dated 29 July 2014 regarding the European Confederation of Watch and Clock Repairers' Associations (Case AT.39097), which highlights the high price of watches and their sentimental value to demonstrate the difficulties faced by an existing consumer in changing his/her watch if the repair price increases. See also the Opinion 14-A-01 on the competitive process in the sector for the bulk distribution of propane to individual consumers. There are switching costs in this sector deriving both from the contractual costs linked to the commitment to an exclusive supply throughout the contract period, and from the logistical costs of removing the old tank and installing another.

¹³ See Decision 16-D-29 dated 19 December 2016 on the practices employed in the after-sales sector for reprographic equipment, where the products have a relatively short life (3 - 5 years).

¹⁴ Conversely, for an example of a mature market in which the ratio of potential to existing consumers is tending by its nature to zero, see Opinion 14-A-01 referred to above.

attract new consumers to its system¹⁵. Such a strategy may however damage both the operator's reputation and also its sales (of the product to new consumers or on other markets), as consumers will fear being future victims of the business's opportunism.

Customers would change primary product within a reasonable time (condition iv)

22. This criterion has never been reviewed by the *Autorité de la concurrence* and therefore cannot be discussed in detail. In its Pelikan/Kyocera Decision, the Commission noted that the base of installed consumers is unlikely to be the decisive consumer group by which to evaluate this criterion (§ 68). These consumers have already made their investment, and it would be unrealistic to expect them to change primary product within a sufficiently short time. New consumers who have not already bought their primary product are, on the other hand, likely to react rapidly to any rise in the secondary market by changing their decision about buying the primary product.

2.1.3. Identifying a dominant position on a primary market

23. The analysis framework described above is useful in assessing the existence of a market power on the secondary market. It has been used in differing degrees in several of the Decisions from the *Autorité de la concurrence*¹⁶.

24. However, identifying a dominant position on the primary market removes the need to investigate the existence of a secondary market or of a market power on this secondary market. In such a situation, a business may increase the price of its secondary goods without seeing its sales decline in the primary market.

25. An example is given in Decision 14-D-09 on the practices employed by the companies Nestlé, Nestec, Nestlé Nespresso, Nespresso France and Nestlé Entreprises in the espresso coffee-machine sector (the "Nespresso" decision). Independently of the interactions between the markets for espresso machines and for capsules, the business complained against was probably dominant in the primary market for pod espresso coffee machines, and thus able to increase prices or reduce quality by locking the market for capsules compatible with its machines. Because of its dominance, consumers would not be able to substitute a competing primary product to a Nespresso machine.

3. Characterizing practices of secondary-market locking

3.1. Different methods of closing the market

26. Reading the decision-making practice allows us to identify various ways in which producers of primary goods have in some cases kept sales of secondary products to themselves. They include contractual clauses agreed when the primary product is sold (for instance, exclusive supply agreements¹⁷), purchase discounts for the primary product

¹⁵ For instance, in the Pelikan/Kyocera Decision referred to above, Commission noted that there did not seem to be any possibility of discriminating between old and new users of printers (§ 66). In particular, the toners marketed for new printers are compatible with previous printer models, so the business cannot charge high toner prices only for old models (§66).

¹⁶ See, for instance, Decisions 07-D-20 and 16-D-29 referred to above.

¹⁷ See Opinion 14-A-01 referred to above.

in return for a commitment to buy the secondary product¹⁸, refusal to licence intellectual property rights¹⁹, technical incompatibility between products, possibly supported by the communication of the firm²⁰, a refusal to sell spare parts²¹ or to allow access to the information necessary in order to offer services on the secondary market²².

27. In some cases, several different methods are employed together to lock sales: in the case of Nespresso machines, a series of changes rendering competitor capsules incompatible was compounded by a number of comments on the machines themselves or in their user guides that might lead the consumer to think that rival capsules were not compatible with his/her machine. For instance, the user guides cited restrictions stating that damage would not be covered by the guarantee if it was caused by using other than Nespresso-brand capsules. In this respect, the Court of the European Union had already emphasised that the combination of a legal and a technical constraint strengthened the foreclosure effect of the tied sale (Judgement of 17 September 2007, Microsoft/Commission, T-201/04, Rec. p. II-3601, points 963 and 965).

28. The two most common categories of anticompetitive practices cited in the decision-making practice are refusing access or sale (point 3.2 below), and tying (point 3.3 -below).

3.2. Refusing access or sale

29. In several cases, the *Conseil* or the *Autorité de la concurrence* has interpreted the locking of the secondary market as a refusal to allow access to an essential facility. This has been so when the secondary market is “locked” by refusing access to a patent licence²³ or to a particular device²⁴ or by refusing to sell certain spare parts²⁵.

30. In such circumstances, the decision-making practice refers to case law ruling that the owner of an asset is not required to allow access to it, by granting a licence or by selling the products concerned, unless that asset is essential. A resource is considered to be essential and its holder must therefore allow access to it if: i) the resource is held by a

¹⁸ Decision 99-D-14 dated 23 February 1999 on the practices employed by the company Télédiffusion de France (TDF). This company was dominant on the primary market.

¹⁹ Decision 07-D-20 relating to a request from the company Integral Process for interim measures against the practices employed on the French oximetry market.

²⁰ See, for example, the “Nespresso” decision: a series of modifications to the machines meant that capsules from competitors were not compatible with the new machines.

²¹ Decisions 16-D-29 and 05-D-46 referred to above.

²² See, for example, Decision 06-D-35 on the practices employed in the inverter maintenance sector, where a manufacturer had inserted a secret code required to access the software necessary to carry out maintenance on its devices.

²³ Decision 07-D-20 referred to above.

²⁴ Decision 04-D-54 on the practices employed by the company Apple Computer, Inc. in the sectors for Internet music downloads and digital portable media players (the “Apple” decision), which considered the refusal to allow access to the digital rights management code owned by Apple.

²⁵ Decision 93-D-36 on the practices employed in the sector for spare-part sales for cameras, 05-D-46, 06-D-35, 07-D-20, referred to above, and 07-D-35 on the practices employed by the company Sirona Dental Systems GmbH and its national distributors of dental materials and equipment.

business that has a monopoly on it, or at least is in a dominant position; ii) access to the resource is indispensable in order to carry out a competing activity on a market that is upstream of, downstream of or complementary to that on which the resource holder has the monopoly (or the dominant position); iii) the resource cannot be reproduced under reasonable economic conditions; iv) access to the resource is subject to unjustifiable conditions; v) access to the resource is possible.

31. The Magill ruling (6 April 1995: C-241 and 242/91 P) and IMS Health ruling (29 April 2004: C-418/01) from the European Community Court of Justice extend this case law by stating that in the case of a request to access items protected by intellectual property rights, the refusal is not wrongful unless it prevents a new product emerging on the market: “in order for the refusal by an undertaking which owns a copyright to give access to a product or service indispensable for carrying on a particular business to be treated as abusive, it is sufficient that three cumulative conditions be satisfied, namely, that that refusal is preventing the emergence of a new product for which there is a potential consumer demand, that it is unjustified and such as to exclude any competition on a secondary market.”” (point 38 of the IMS Health ruling).

32. The Conseil de la concurrence relied on this case law in concluding that the practice of the oximeter manufacturer²⁶ Masimo in keeping to itself the manufacture and sale of sensors that operate with its devices was not abusive²⁷. In particular, the Conseil considered firstly that the refusal to grant a licence could be justified by the possible risks resulting from insufficient compatibility between the various components of the goods system; secondly, that there was no evidence suggesting that granting a licence would result in a new product or service for which there was an actual demand; and thirdly, that the fact that no licence had been granted to the patents covering the Masimo sensors did not rule out competition on the sensor market, which was competitive because of the existing competition on the oximeter market (primary product).

33. Similarly, in its Decision 06-D-35 referred to above, the Conseil considered that access to the software embedded in the inverters²⁸ was not strictly speaking indispensable for their maintenance, and that in particular alternative technical solutions had been developed by competitors of the manufacturer of these inverters.

34. Similarly, in its Decision 04-D-54, the Conseil de la concurrence judged that the conditions defined in case law for characterizing Apple’s digital rights management code as essential infrastructure, and thus requiring Apple to grant a licence to competitor downloading platforms, were not fulfilled. Firstly, many consumers listen to downloaded music without transferring it to a portable media player, and secondly, the incompatibility of the Apple system with that of the complainant could be surmounted by burning a CD. Lastly, there were many digital portable media players compatible with the complainant’s downloading platform and, in addition, the complainant did not intend to offer a new product, so that the condition defined by the Court of Justice in the judgement on IMS Health was not fulfilled.

²⁶ An oximeter is a medical device that measures the proportion of oxygen in a patient’s blood to monitor the percentage oxygen saturation.

²⁷ Decision 07-D-20 referred to above.

²⁸ An inverter is a device used to suppress the disturbances to which electrical energy may be subject, such as supply cuts or voltage variations. Their use is virtually indispensable to secure sensitive systems such as, for instance, IT servers or electronic equipment used in hospitals.

35. In conclusion, the Autorité de la concurrence has not, at the moment, condemned a refusal of access that could lock sales on a secondary market, either because, as seen in the cases discussed above, the practice was not established, or because of efficiency gains (point d below).

3.3. Tying

36. The European Commission defines tying as a sale of a particular product (the tying product) that is conditional on the purchase by customers of another product (the tied product)²⁹. The Commission states that: “*Technical tying occurs when the tying product is designed in such a way that it only works properly with the tied product (and not with the alternatives offered by competitors). Contractual tying occurs when the customer who purchases the tying product undertakes also to purchase the tied product (and not the alternatives offered by competitors)*”. In the case of pure bundling “*the products are only sold jointly in fixed proportions*”. More specifically, the Commission also states that in the case of secondary markets, the characterization of a tied sale assumes that the business complained against is “*dominant in the tying market and/or the tied after-market (secondary market)*”³⁰.

37. On several occasions, secondary market locking has been analysed as a tying practice³¹. As regards decisions from the *Autorité de la concurrence*, this approach was used in Decision 99-D-14 referred to above, in which the practice complained about was a discount for the bundled sale of project-management services to implement infrastructures and broadcasting services for television channels (the primary market in which TDF was dominant), and the sale of installation and maintenance services for broadcasting equipment (secondary market)³². Similarly, technical incompatibilities between Nespresso machines, (probably dominant in the pod coffee machine market) and competitor capsules, together with the communication on the Nespresso machines, on their packaging and in their user guides that encouraged consumers to think that their Nespresso machine would not work with competitor capsules was examined as a tying practice. In particular, the Decision states that the malfunctions that were supposed to be remedied by the series of modifications were not “*unequivocally demonstrated*” (§ 118) and that only one of the technical modifications made required modifying the Nespresso capsules rather than just those of its competitors.

38. To characterise a practice as "tying", it must be verified that the complementary goods forming the system really comprise two distinct products, and are not an indissociable whole. In the latter case, bundling is inherent to the product, so the firm cannot be condemned if it bundles the primary and secondary goods. Conversely, if in the absence of tying many consumers would buy the primary and the secondary products from different manufacturers, or if there are manufacturers on the market that specialise

²⁹ Communication from the Commission — Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings, § 48.

³⁰ §50 of the Communication.

³¹ In its Hilti Decision dated 22 December 1987 (88/138/EEC) the Commission condemned “*making the sale of patented cartridge strips conditional upon taking a corresponding complement of nails*” (§ 75). In its Tetra-Pack Decision dated 24 July 1991 (92/163/EEC), the Commission characterised the obligation to use only Tetra Pak cartons in the machines as “*a system of tied sales*” (§ 117).

³² Decision 99-D-14 on the practices employed by the company Télédiffusion de France.

in making the secondary product, the two products may be considered to be distinct³³. In a ruling dated 2 March 1994, *Hilti AG v. European Commission*, the Court considered that the fact that there were independent producers and/or producers specializing solely in the manufacture of nails specifically designed for Hilti tools was in itself sound evidence of the distinction between the tied (i.e. secondary) product and tying (i.e. primary) product (C-53/92 P, Rec. p. I-667, point 8)³⁴. In its commitment Decision on Nespresso, the *Autorité de la concurrence* also considered that coffee machines and coffee capsules were distinct products because they could be made and/or marketed by different companies³⁵.

39. Lastly, it is worth noting that in some cases, although the practice complained about relates to a tied sale, the remedy might not be to end this practice of tying but to support the access of competitors to information that would limit the foreclosure effect. Thus to remedy the technical locking resulting from a series of modifications to Nespresso machines, Nespresso undertook to communicate in advance to current or potential competing capsule manufacturers technical changes that might affect the interaction between the capsule and the machine, and to make available to competitors prototypes of the new machines so that they could test the compatibility of their capsules.

3.4. Justifications for locking secondary-market sales

40. Although several types of justification for locking are found in the economic literature, the main arguments put before the *Autorité* and the *Conseil de la concurrence* relate to the quality of the services offered on the secondary market, and, more marginally, to the opportunity to spread customer costs over time by locking secondary-market sales.

3.4.1. The quality of services offered on the secondary market

41. In some cases, the producer of a goods system wants to lock secondary-market sales in order to ensure that the services offered by the market reach a minimum quality standard. Thus only certain firms, or perhaps only the producer of the primary product, have access to parts and other information necessary to offer services on this secondary market. This objective of strengthening service quality, which may also be combined with a safety objective for some goods systems, such as those related to healthcare³⁶, has already been judged legitimate in a number of cases³⁷. In such instances, the refusal to

³³ Guidance from the European Commission, § 51.

³⁴ See also the Judgement of the European Union Court dated 6 October 1994, *Tetra Pak International v. European Commission* (T-83/91, Rec. p. II-755, point 82. See also points 79 - 85) and the Commission Guidance, § 81.

³⁵ The finding is similar in the TDF Decision, which states that “*in the market for installing and maintaining broadcasting equipment at the request of local and regional authorities, the company TDF is competing with other operators*” and that “*the company TDF is the only business nationally able to offer local and regional authorities a full service comprising project management and the installation and maintenance of the equipment necessary to re-broadcast television programmes*”.

³⁶ See Decisions 07-D-20 and 07-D-35 referred to above.

³⁷ See, for instance, Decisions 93-D-36 dated 28 September 1993 on practices noted in the sector for spare-part sales for cameras, 05-D-46, 07-D-20, 07-D-35.

sell to third-party companies is not abusive, unless the third parties are also subject to any unjustified discrimination. Lastly, if some producers of system goods have requirements for the security or quality of services offered on the secondary market that differ from those of their competitors, this is not sufficient in itself to indicate an abuse. An abuse requires a demonstration that the restrictions placed on secondary-market sales, purportedly on security or quality grounds, are actually abusive³⁸.

3.4.2. *Smoothing the costs borne by the consumer*

42. During the hearing for Opinion 14-A-01 referred to above, the propane suppliers stated that having an exclusive right to supply their tanks enabled them to raise the price of the propane and thus to subsidise the cost of installing tanks at customer premises. Customers therefore benefited from a more even pattern of expenses, because the actual cost of installing the tank was paid indirectly and after the event, as the propane was supplied. Nevertheless, the *Autorité de la concurrence* emphasised that the length of the exclusive period should at the least remain proportionate to the amount of the subsidy. In addition, costs could also be smoothed by dissociating the supply of propane from the hire of the tank.

43. Similar issues arise, but in a totally different context, in the hearing-aid sector. The combined purchase of the hearing aid (primary product) and its follow-up (secondary product), as is currently the practice because of the way these devices are reimbursed, requires the consumer immediately to pay a significant price. Conversely, optional “unbundling” of these services would reduce the entry cost associated with acquiring the device.

4. Conclusion

44. Relevant markets are defined and, more importantly, the market power of operators active on the secondary markets is evaluated using a framework that aims to assess to what extent a hypothetical monopolist selling secondary products would be able either to increase its price or downgrade its quality. The response to this question depends closely on the capacity of consumers both to take the conditions of sale of secondary products and services into account when buying the primary product, and to adapt their behaviour in consequence.

45. Practices of secondary-market locking judged to be anti-competitive or that could be anti-competitive remain relatively rare in the case law of the *Autorité de la concurrence*. In some cases, the operator complained against does not have the market power, on either the primary or secondary market. In others, the practice is to refuse access to an asset: so that operators are not discouraged from investing in such assets³⁹,

³⁸ Decision 07-D-35, § 72.

³⁹ This justification may be subject to a detailed review. In its Opinion 12-A-21 on the operation of the vehicle repair and maintenance sectors, the *Autorité de la concurrence* recommended that the protection on the rights to designs and models for visible spare parts should gradually be lifted. It found firstly that the cost of the investment incurred in designing the parts, which represented only a very limited proportion of manufacturers’ turnover, could be written off during the sale of vehicle rather than on the after-sales market. In addition, since a vehicle’s appearance is an important criterion in deciding a model’s commercial success or failure, it considered it unlikely that removing the protection on the rights to designs and models would diminish perceptibly the incentive for manufacturers to invest in vehicle design.

such access can only be made compulsory under relatively strict conditions that are difficult to fulfil. For instance, in some cases, it may be possible to circumvent the refusal to allow access to the asset; in others, locking is the response to quality or safety requirements that it may be legitimate and effective to preserve. In addition, when the operator complained against does not dominate the primary market, the effect of the lock it applies must be assessed in the light of the weight of this operator on the primary-market.

46. On the other hand, in other cases locking consists in tying the primary product (of which the targeted operator is the dominant supplier) to the sale of the secondary product, and is done with no visible justifications, in terms either of investment or quality. In addition, in the case of tying, the effect on the market can be greater because of the weight of the operator dominant in the primary market, nearly all customers in the market are impacted. The *Autorité de la concurrence* has intervened on two occasions (see the TDF and Nespresso Decisions referred to above) to stop such behaviour.

47. Lastly, in its consultative role, the *Autorité de la concurrence* has recommended that some practices of closing secondary markets should be softened, by reducing the period of closure, or by allowing the primary and secondary goods to be sold unbundled, or by improving the openness of the secondary markets. Thus in its Opinion 14-A-01 on the competitive process in the sector for the bulk distribution of propane to individual consumers, the *Autorité de la concurrence* considered that, as well as providing better information to consumers at the time they purchased the goods system, the clauses linking the use of the primary product (the tank) to the purchase from the same operator of the secondary product (propane) (a practice common to all operators in the sector), should have a term not exceeding that necessary to write off the costs of installing the tank, and that options for buying the tank should always be offered to a customer. Similarly, in its Opinion 12-A-21 on sector of vehicle repair and maintenance, the *Autorité de la concurrence* recommended that the protection on the rights to designs and models for visible spare parts should gradually be lifted, in order to promote greater competition for the supply of these parts; it also requested better communication of the technical information necessary to repair the vehicles, and greater clarity in the terms and conditions of the vehicle guarantee. Lastly, in its Opinion 16-A-24 on the competitive process in the hearing-aid sector, the *Autorité de la concurrence* recommended that the method of reimbursement for hearing appliances should allow the patient to acquire a hearing aid and its associated follow-up services from different operators. Such an option should reduce the initial cost of hearing aids, enable the follow-up to be tailored better to patient needs, and strengthen competition, particularly in quality, between the follow-up services.

Annex: Decisions, opinion and report of the *Conseil* and the *Autorité de la concurrence* relative to secondary markets

- Decision 93-D-36 on practices noted in the sector for spare-part for cameras.
- Decision 99-D-14 on the practices employed by the company Télédiffusion de France.
- Decision 04-D-54 on the practices employed by the company Apple Computer, Inc. in the sectors for Internet music downloads and digital portable media players.
- Decision 06-D-35 relating to the practices employed in the after-sales sector for inverter maintenance.
- Decision 05-D-46 on the practices employed by the company Jaeger-Lecoultré.
- Decision 07-D-20 relating to a request from the company Integral Process for interim measures against the practices employed on the French oximetry market.
- Decision 07-D-35 on the practices employed by the company Sirona Dental Systems GmbH and its national distributors of dental materials and equipment.
- Opinion 12-A-21 on the operation of the vehicle repair and maintenance sectors
- Opinion 14-A-01 on the competitive process in the sector for the bulk distribution of propane to individual consumers
- Decision 14-D-09 on the practices employed by the companies Nestlé, Nestec, Nestlé Nespresso, Nespresso France and Nestlé Entreprises in the espresso coffee-machine sector.
- “*An economic analysis of open and closed systems*”, a study carried out jointly by the *Autorité de la concurrence* and the Competition and Markets Authority, http://www.autoritedelaconcurrence.fr/user/standard.php?lang=fr&id_rub=285&id_article=2465
- Opinion 16-A-24 on the competitive process in the hearing-aid sector
- Decision 16-D-29 relating to the practices employed in the after-sales sector for reprographic equipment