



EUROPEAN COMMISSION
Competition DG

CASE AT.40465 - ASUS

(Only the English text is authentic)

ANTITRUST PROCEDURE

Council Regulation (EC) 1/2003

Article 7 Regulation (EC) 1/2003

Date: 24.07.2018

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Brussels, 24.7.2018
C(2018) 4773 final

COMMISSION DECISION

of 24.7.2018

**relating to proceedings under Article 101 of the Treaty on the Functioning of the
European Union**

Case AT.40465 - ASUS

(Only the English text is authentic)

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Case AT.40465 - ASUS

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THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union,

Having regard 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 Treaty¹, and in particular Article 7(1) and Article 23(2) thereof,

Having regard to Commission Regulation (EC) No 773/2004 of 7 April 2004 relating to the conduct of proceedings by the Commission pursuant to Articles 81 and 82 of the EC Treaty,²

Having regard to the Commission Decision of 2 February 2017 to initiate proceedings in this case,

Having given the parties concerned the opportunity to make known their views on the objections raised on 24 May 2018 by the Commission pursuant to Article 27(1) of Regulation (EC) No 1/2003 and Article 12 of Regulation (EC) No 773/2004,

After consulting the Advisory Committee on Restrictive Practices and Dominant Positions,

Having regard to the final report of the Hearing Officer in this case,

Whereas:

1. INTRODUCTION

- (1) This Decision concerns AsusTek Computer Inc., Asus Computer GmbH ("Asus Germany") and Asus France SARL ("Asus France"). AsusTek Computer Inc., Asus Germany and Asus France are hereinafter referred to as "Asus".
- (2) Asus Germany implemented practices aimed at restricting the ability of retailers in Germany to determine their resale prices independently. Similarly, Asus France implemented practices aimed at restricting the ability of retailers in France to determine their resale prices independently.

¹ OJ C 115, 9.5.2008, p. 47.

² OJ L 123, 27.4.2004, p. 18.

- (3) This Decision establishes that those practices constitute two separate single and continuous infringements of Article 101 of the Treaty on the Functioning of the European Union ("the Treaty").

2. THE PARTIES CONCERNED

2.1. Undertaking subject to the proceedings

- (4) AsusTek Computer Inc. is a multinational manufacturer of computer hardware and electronics products. It is headquartered in Taipei, Taiwan, and offers a broad product portfolio, including inter alia notebooks, tablets, desktops, displays, motherboards, networking equipment and VGA cards.
- (5) Asus Germany, based in Ratingen, Germany, and Asus France, based in Noisy Le Grand, France, are both wholly-owned subsidiaries of AsusTek Computer Inc.
- (6) In Germany and France, the marketing, sales and repair services of Asus are – in line with Asus' general business organisation³ – divided into two separate business groups: the "System" business group (covering the product categories "Notebook", "e-pad", and "Mobile Phones") and the "Open Platform" business group (covering the product categories "Display", "Motherboard", "Networking" (WLAN), "VGA" (graphic cards) and "Desktop").⁴
- (7) The period covered by the practices to which this Decision relates was from 3 March 2011 to 27 June 2014 in Germany and from 7 April 2013 to 15 December 2014 in France (the period in each case is referred to in this Decision as "the relevant period").
- (8) Throughout the relevant period, AsusTek Computer Inc. owned (indirectly) 100% of Asus Germany and of Asus France.⁵

2.2. Distribution of Asus products in the relevant period in Germany and France

- (9) Asus [...]. It distributes its products via independent distributors.
- (10) Asus predominantly sells its products via (non-exclusive) distributors that act as wholesalers and do not sell to end-users. These wholesalers sell Asus' products to different retailers. In addition, Asus sells its products directly to a limited number of retailers or system integrators.
- (11) Asus' account managers are frequently in contact with retailers even if there is no direct supply relationship because Asus sells its products mostly via wholesalers. Nonetheless, Asus' account managers directly manage many retailers in the different channels.⁶ While wholesalers typically handle delivery and payment for those retailers, Asus directly negotiates the conditions for the purchase of the products.⁷
- (12) Asus' European distribution activities are organised on a country-by-country basis.

³ [...].

⁴ [...].

⁵ [...].

⁶ [...].

⁷ [...].

3. THE PRODUCT AND GEOGRAPHIC AREAS CONCERNED

- (13) The products concerned by this Decision are: (i) in relation to Germany the products sold in the Systems business group and the networking, desktop and display products in the Open Platform business group; and (ii) in relation to France, all products in the Open Platform business group.
- (14) The geographic areas covered by this Decision are Germany and France.

4. PROCEDURE

- (15) On 10 March 2015, the Commission carried out an unannounced inspection at the premises of retailer A in Germany.⁸ Retailer A is an online retailer selling *inter alia* Asus products. [...].
- (16) On 10 March 2015, the Commission carried out an unannounced inspection at the premises of retailer H in France.⁹ Retailer H is an online retailer selling *inter alia* Asus products. [...].
- (17) On 2 February 2017,¹⁰ the Commission initiated proceedings within the meaning of Article 2(1) of Regulation (EC) No 773/2004¹¹ against AsusTek Computer Inc., Asus Germany and Asus France.
- (18) On 15 February 2017, the Commission addressed a request for information to Asus Germany under Article 18(1) and (2) of Regulation (EC) No 1/2003, to which Asus Germany replied on 13 March 2017¹².
- (19) Shortly after the initiation of proceedings, Asus indicated its interest in cooperating with the Commission.
- (20) On [...], Asus submitted further evidence regarding the relevant conduct.
- (21) On [...], Asus submitted a formal offer to cooperate in view of the adoption of a decision pursuant to Article 7 and Article 23 of Council Regulation (EC) No 1/2003 ("settlement submission"). The settlement submission contained:
- an acknowledgement in clear and unequivocal terms of Asus' liability for the two single and continuous infringements summarily described as regards their object, the main facts, their legal qualification, including the role and the duration of AsusTek Computer Inc.'s, Asus Germany's and Asus France's participation in the two infringements;
 - an indication of the maximum amount of the fine Asus expects to be imposed by the Commission and which it would accept in the context of a cooperation procedure;
 - the confirmation that Asus has been sufficiently informed of the objections the Commission envisages raising against it and that it has been given sufficient opportunity to make its views known to the Commission;
 - the confirmation that Asus does not envisage requesting further access to the file or requesting to be heard again in an oral hearing, unless the Commission does not

⁸ [...].

⁹ [...].

¹⁰ [...].

¹¹ Commission Regulation (EC) No 773/2004 of 7 April 2004 relating to the conduct of proceedings by the Commission pursuant to Articles 81 and 82 of the EC Treaty (OJ L 123, 27.04.2004, p. 18).

¹² [...].

reflect its settlement submission in the Statement of Objections and the final decision;

- the agreement to receive the Statement of Objections and the final decision pursuant to Articles 7 and 23 of Regulation (EC) No 1/2003 in English.

(22) Asus made the settlement submission conditional upon the imposition of fines by the Commission which do not exceed the amount as specified in that submission.

(23) On 24 May 2018 the Commission adopted a Statement of Objections addressed to Asus, which replied to the Statement of Objections by confirming that it reflected the content of its settlement submission.

5. FACTS

5.1. Germany

5.1.1. Introduction

(24) During the relevant period, Asus' products were distributed in Germany in an open distribution system through non-exclusive wholesalers and retailers.

(25) In line with the general sales organisation of Asus, sales activities in Germany were performed by the Open Platform and Systems business groups.

(26) While Asus' Open Platform and Systems business groups had different sales channel organisation, management, employees and reporting lines, Asus' conduct was to a large extent the same with regard to both business groups. During the relevant period, both business groups developed and implemented a strategy aimed at monitoring and intervening with the resale prices of its retail partners with the aim of keeping resale prices stable at the level of the recommended resale prices ("RRP").

(27) Price monitoring was conducted via various means, in particular through the observation of price comparison websites and, for some product categories, by way of internal software monitoring tools that allowed Asus to identify the retailers that were selling Asus products below the desired price level which typically equalled the RRP. Asus was also informed about low pricing retailers via complaints of other retailers. Retailers that were not complying with the desired price level would typically be contacted by Asus and be asked to increase the price.

(28) The retailers of Asus were fully aware of the business policy described and regularly agreed to maintain the resale prices at or increase them to the desired level.

5.1.2. The general strategy of Asus Germany

(29) During the relevant period, Asus Germany developed and implemented a strategy aimed at keeping prices stable at the level of the RRP. The strategy involved the systematic monitoring of resale prices, followed by price-related interventions vis-à-vis retailers that were selling below the desired price level which was mostly the RRP.

(30) Such a strategy and its implementation are confirmed by a number of documents on the Commission's file.

- (31) First, Asus confirmed that it was the general business policy of Asus Germany to monitor and control the resale prices of retailers in order to keep prices stable at the level of RRP.¹³
- (32) With regard to the Systems business group, Asus confirmed that it proactively, systematically and continuously monitored online resale prices of retailers in order to detect deviations from resale prices suggested by Asus Germany.¹⁴ Asus confirmed that, in case of prices below RRPs, the responsible employees approached retailers (by phone or in writing) and asked them to adjust their prices.¹⁵ In various instances the retailers subsequently agreed and adjusted the resale price as requested by Asus Germany.¹⁶
- (33) With regard to the Open Platform business group, Asus equally confirmed that it proactively, systematically and continuously monitored resale prices of online retailers for networking, desktop and display products in order to detect deviations from suggested resale prices.¹⁷ Different employees monitored the resale prices of retailers by observing the online price comparison websites "geizhals.de" and "idealo.de" and subsequently approached them (by phone or in writing) in case of prices below RRPs and asked them to increase or "adjust" their prices.¹⁸ In various instances the retailers agreed on the adjustment of the resale price.¹⁹
- (34) Retailers were fully aware of such a business policy and regularly complained about other retailers that were selling products below the suggested price levels.²⁰
- (35) Second, retailer A confirmed the strategy of Asus with regard to resale pricing.²¹ Asus operated a strict system in Germany to secure adherence to the desired resale price level, i.e., mostly the RRP, for Asus products that retailer A purchased directly from Asus or its distributors, but also - to some extent - for those that were purchased from other sources.²² Asus representatives communicated to the responsible employees of retailer A that Asus expected them not to sell products below the RRPs indicated in the price lists that Asus frequently provided for the respective product categories.²³ Retailer A confirmed that Asus representatives would contact the responsible employee about retailer A's reasons for price decreases and request an increase of the resale price.²⁴

5.1.3. *The relevant conduct of Asus Germany*

- (36) Asus Germany intervened regularly with retailers in order to increase their resale prices. In some product categories, Asus also applied more sophisticated methods to implement the strategy to monitor and control resale prices of its retailers.

13 [...].

14 [...].

15 [...].

16 [...].

17 [...].

18 [...].

19 [...].

20 [...].

21 [...].

22 [...].

23 [...].

24 [...].

- (37) First, in relation to networking products, a premium partner program was launched in Q3 2012.²⁵ A bonus was provided for retailers that complied with certain qualitative guidelines. This bonus was regularly made conditional on the retailer following the RRP. The prices of the premium partners were monitored by Asus by means of an internal monitoring list, called "OUVP-WLAN" which was in use between June 2013 and September 2014. The list indicated in red those retailers whose prices were below RRP. This typically led to actions by Asus, that is to say that employees of Asus would contact retailers and would ask them to increase the prices and point to the fact that otherwise the quality bonus would be in danger.
- (38) The existence of such a program and its implementation by way of a monitoring list is confirmed by the following evidence.
- (39) In the first place, Asus confirms the existence of the program. An Asus Germany employee, who was [...], created, with the full knowledge of the management of Asus Germany, certain programs and promotions aimed at maintaining a desired resale price level.²⁶ Asus confirms that it was for this purpose that the "OUVP-WLAN" monitoring list was created.²⁷ This list helped Asus Germany to have a complete picture of the resale prices of its partner retailers. When prices were shown in red, the Asus Germany employee instructed the responsible account managers to contact the respective retailers and ask them to increase the price.²⁸
- (40) In the second place, retailer A confirmed that Asus Germany had established a premium partnership program for networking equipment, granting premium partners better purchase prices than other retailers.²⁹ Asus Germany provided retailer A with new price lists for its networking equipment products every month. These lists included separate RRP for stationary sales and for online sales.³⁰ Retailer A's product managers knew that Asus Germany expected them to adhere to these prices, as Asus Germany representatives called them immediately and requested price increases if retailer A's resale prices of the listed products deviated from the RRP for online sales as indicated in this list.³¹
- (41) In the third place, in an e-mail dated 4 December 2013 sent by [...] of Asus Germany to an employee of retailer A with the title "WLAN Programm", he expresses his dissatisfaction with retailer A's pricing policy with regard to WLAN products asking why retailer A jeopardised its "status" by "pointless actions" indicating that the status of retailer A as a premium partner is in danger ([...]).³²
- (42) Second, in relation to display products, a comparable premium partner program was launched in Q3 2013 which also included a bonus payment that was made conditional on compliance with Asus Germany's RRP. Again, premium partners typically received a better purchase price than retailers which were not premium partners.³³

25 [...].
 26 [...].
 27 [...].
 28 [...].
 29 [...].
 30 [...].
 31 [...].
 32 [...], [...].
 33 [...].

- (43) The existence of such a program and its implementation by way of a monitoring list is confirmed by the following evidence.
- (44) In the first place, the existence of such a program is confirmed by Asus.³⁴
- (45) In the second place, retailer A confirms the existence of the program³⁵ and explains that Asus Germany's representatives made it clear to retailer A that its participation in the premium partnership program for displays was subject to its adherence to Asus Germany's desired resale prices, i.e. the RRP's indicated in Asus Germany's product lists.³⁶ If Asus Germany noticed that retailer A had reduced the resale price of an Asus display that was part of the premium partnership program, Asus Germany's representatives immediately demanded an adjustment of the resale price back to the desired level.³⁷ These requests were mostly made orally and emphasised by threats to exclude retailer A from the premium partnership program.³⁸ Retailer A mostly complied with these requests and also generally adhered to the resale prices desired by Asus Germany because retailer A's responsible product managers were afraid that otherwise Asus Germany would sanction them.³⁹
- (46) In the third place, the establishment of the program and its operation is confirmed in an e-mail of 9 September 2013⁴⁰ with the subject "calendar week 39 final premium partner test week > punish" in which [...], informs several account managers about the state of play of the program. In his e-mail, he is reporting that the program is running very well for three months, but that there are still a few candidates that "would not understand" and either have large deviations or are 1 or 10 cent below the RRP. For these reasons, he announces a final run through calendar week 39. All retailers which have more than 2-3 articles below the RRP shall be informed that their Q3 bonus will be cut.
- (47) Third, mainly in relation to the product category notebook, Asus Germany circulated internally as of 2011 a so-called "online map" which gave employees on a daily basis an overview of regional as well as online pricing in Germany. If retailers sold below RRP's, they were contacted by employees of Asus Germany who regularly asked them to adjust the price.
- (48) The existence of such a tool is confirmed by the following evidence.
- (49) In the first place, the existence of such a tool has been confirmed by Asus.⁴¹
- (50) In the second place, an excerpt of the online map is set out in internal correspondence⁴² between the [...], and [...], dated 19 March 2012 regarding the partner retailer B. In the e-mail the Asus Germany employee sends an excerpt of the "online map" showing a significant deviation by retailer B from the RRP and concludes that the relationship with retailer B should be terminated ("turned off").

34 [...].
 35 [...].
 36 [...].
 37 [...].
 38 [...].
 39 [...].
 40 [...].
 41 [...].
 42 [...].

- (51) Fourth, Asus Germany threatened partners that were selling over the internet to withdraw their authorisation to use the Asus Online Logo in case they were not adhering to the pricing policy of Asus Germany.⁴³
- (52) The existence of such threats is confirmed by the following evidence.
- (53) In the first place, this has been confirmed by Asus.⁴⁴
- (54) In the second place, there is internal e-mail correspondence⁴⁵ between Asus Germany employees in which they consider to withdraw the authorisation of the use of the online logo by retailer C for the Open Platform business group as they "play dirty" in this area. In the e-mail correspondence, it is mentioned that threatening them with such a withdrawal had already worked for products in the Systems business group for which retailer C subsequently increased its prices.
- (55) Fifth, Asus Germany approached retailers to obtain their agreement to increase prices of specific products.
- (56) The existence of such approaches is confirmed by the following evidence.
- (57) In the first place, on 3 March 2011, [...] of Asus Germany informs the retailer D in an e-mail that he has received notice that the retailer had sold specific netbooks "too aggressively" and that they should "act accordingly". As a reaction, he receives the confirmation from retailer D that the price has been increased to EUR 329.⁴⁶
- (58) In the second place, in an e-mail⁴⁷ dated 12 March 2012, Asus Germany employees internally discuss price decreases on the price comparison website Geizhals for a number of Asus notebooks. The discussion shows that Asus Germany tried to control resale prices by getting retailers to remove their offers from price comparison websites.⁴⁸ An [...] of Asus Germany states that retailer A had already removed its offers from price comparison websites. However, the further correspondence indicates that this did not achieve the intended result because other retailers, including retailer D and retailer E, were "crawling" retailers' websites using pricing robots and matching prices. [...] therefore indicates that he will also approach retailer A and ask for an increase of the resale prices on retailer A's homepage.
- (59) In the third place, in an e-mail⁴⁹ dated 16 July 2012, the [...] of Asus Germany requests from retailer A to increase the price of a wireless network adapter stick and a WLAN router back to the RRP for online sales, namely EUR 14.90 for the wireless network adaptor stick and EUR 69.90 for the WLAN-Router. While the employee of retailer A responds with a standardised template response provided by its legal department, he nonetheless increases the prices to the requested level as can be seen from screenshots of retailer A's internal pricing tool.⁵⁰
- (60) In the fourth place, on 26 June 2013, [...] of Asus Germany sent an e-mail⁵¹ to retailer F with a link to an offer of a specific USB stick on the website of retailer F.

43 [...].

44 [...].

45 [...].

46 [...].

47 [...].

48 [...].

49 [...].

50 [...] and [...].

51 [...].

While she does not provide any comment on this link, it is clear that she wants retailer F to increase the price for the USB stick. Retailer F responds with a link to a price comparison website and names three other retailers. [...] of Asus Germany indicates that she would take care of them. Retailer F answers that he has aligned the price for the time being.

- (61) In the fifth place, Asus Germany sent an e-mail⁵² on 26 August 2013 to the retailer A with four hyperlinks to the price comparison website "geizhals.de" which concerned different Asus desktop computer models. In the e-mail's subject line, Asus Germany requests from retailer A to check the price comparison website, i.e. to increase the resale prices ("GH bitte mal checken"). If a price increase is not possible, retailer A should at the very least remove the product models from the price comparison website geizhals.de. Retailer A increased the price of three of the four products on the same day.⁵³
- (62) In the sixth place, on 15 January 2014, a [...] of Asus Germany informs the online retailer G in an e-mail⁵⁴ about taking away their status as a premium partner for display products as they were selling below the RRP.
- (63) In the seventh place, on 27 June 2014 internal Asus Germany correspondence⁵⁵ shows that the OUVW-WLAN list has been used to identify at least two retailers that were selling below RRP. Those retailers subsequently received requests to increase their resale prices by Asus Germany.
- (64) In the eighth place, Asus Germany requested Asus France several times to contact the retailer H in cases where retailer H sold products it had purchased outside of Germany on its German website at prices that were below the desired resale prices in Germany.⁵⁶
- (65) As a result of those interventions, retailers regularly agreed to those requests and adjusted their resale prices. This is confirmed by various pieces of evidence in the Commission's file.⁵⁷
- (66) Sixth, retailers which repeatedly did not observe the desired resale price level were threatened and/or sanctioned by Asus Germany.
- (67) The existence of such threats and sanctions is confirmed by the following evidence.
- (68) In the first place, Asus confirmed the use of the following threats and sanctions⁵⁸ vis-à-vis retail partners who repeatedly did not observe the suggested resale price level:
- (a) shortage or cut of supply;
 - (b) shortage or cut of specific bonuses;
 - (c) exclusion from certain partner programs; and
 - (d) prohibition to use the Asus online logo.⁵⁹

⁵² [...] and [...].

⁵³ [...].

⁵⁴ [...].

⁵⁵ [...].

⁵⁶ [...]; [...]; [...].

⁵⁷ [...] and [...] and [...].

⁵⁸ The type of threats and sanctions differed depending on Business Group and product categories concerned.

⁵⁹ [...].

- (69) In the second place, on 15 January 2014, retailer G was excluded from the bonus program for displays because of a lack of compliance with price-related requests by Asus Germany.⁶⁰
- (70) In the third place, the use of bonus cuts in order to threaten retailers is confirmed by internal e-mail correspondence⁶¹ dated 6 September 2013 in which [...] instructed several account managers to take action vis-à-vis retailers in relation to certain products. He informs the account managers that as of 1 October 2013 repeating price breakers will be punished with a cut of the bonus as the "probation period is over".
- (71) In the fourth place, Asus Germany temporarily excluded retailer A from the premium partnership program for displays from 1 December 2013 until 1 January 2014, because its resale prices had allegedly been too aggressive.⁶²
- (72) Seventh, the management of Asus Germany was fully aware and approved practices aimed at controlling and intervening with resale prices of retailers.⁶³

5.2. France

5.2.1. Introduction

- (73) In France, Asus' products were distributed in an open distribution system through non-exclusive wholesalers and retailers.
- (74) In line with its general sales organisation Asus sales activities in France were operated by the "Open Platform" and "Systems" business groups, with different sales channel organisation, management responsibilities, employees and reporting lines.
- (75) During the relevant period, the Open Platform business group at Asus France monitored and intervened with the resale prices of its retailers with the aim of keeping prices at the level of the RRP. The retailers of Asus were aware of that business policy and regularly agreed to maintain the resale prices at or increase them to the desired level.

5.2.2. The general strategy of Asus France

- (76) During the relevant period, the Open Platform business group at Asus France, monitored and intervened with the resale prices of retailers with the aim of keeping prices at the level of the RRP.
- (77) The existence of such monitoring and interventions is confirmed by the following evidence.
- (78) First, Asus confirmed that its Open Platform business group in France regularly and continuously coordinated the resale prices of its retailers.⁶⁴ The overall aim of this approach was to keep prices stable at the level of the RRP.⁶⁵ Retailers regularly complained to Asus France about prices of other retailers, often by sending screenshots of other retailers' websites or price comparison websites.⁶⁶ In addition, employees of Asus France occasionally checked resale prices offered by retailers.⁶⁷

⁶⁰ [...].

⁶¹ [...].

⁶² [...].

⁶³ [...].

⁶⁴ [...].

⁶⁵ [...].

⁶⁶ [...].

⁶⁷ [...].

This was in particular the case for graphic cards and motherboards. Asus France would then follow-up and contact the relevant low pricing retailer and request an increase of the resale price.⁶⁸ This happened mostly by phone, rather than in writing.⁶⁹

- (79) Second, retailer H confirmed that Asus France had frequently put them under pressure during the relevant period in order to get retailer H to adjust resale prices of some Asus products.⁷⁰ Asus France exerted significant pressure on its team through aggressive and frequent communication by phone, by e-mail but also via Skype.⁷¹

5.2.3. *The relevant conduct of Asus France*

- (80) First, Asus France intervened regularly with retailers in order to increase their resale prices.

- (81) The existence of such interventions is confirmed by the following evidence.

- (82) In the first place, in an e-mail⁷² dated 10 April 2013, Asus complains to retailer H about its continuous low prices of certain motherboards products and asks for a price increase.

- (83) In the second place, in an e-mail⁷³ dated 6 September 2013, [...] of Asus France asks retailer I to increase the resale price for a certain desktop product to EUR 1499. He explains that other retailers have complained about the aggressive pricing of retailer I. The employee of retailer I responds that he will move the price to EUR 1489.99 on the condition that retailer H is doing the same.

- (84) In the third place, on 27 February 2014, a [...] of Asus France complains internally in an e-mail⁷⁴ vis-à-vis other employees of Asus France that there were complaints of retailers about the aggressive prices of other retailers for a certain display product. She asks the others to contact certain retailers to ask for an adjustment of the sales price as she considers it essential to keep Asus's prices stable on the market.

- (85) A few days later, she adds whether someone can ask retailer J to adjust the price for this model as soon as possible, as retailer J has meanwhile decreased the price further down to EUR 289. Her colleague responds the next morning with a screenshot showing that retailer J has increased the price from EUR 289 to EUR 349.

- (86) In the fourth place, in an internal e-mail⁷⁵ of 25 September 2014, [...] of Asus France asks her colleagues for "help to check" the prices of two motherboard products offered by two retailers. [...] of Asus France reiterates this request on the evening of the same day and asks a [...] of Asus France to talk with one of them. On the next morning, he confirms that the retailer has already increased the price the day before.

- (87) In the fifth place, on 15 December 2014 [...] of Asus France asks her colleagues in an e-mail⁷⁶ to intervene as a certain monitor is sold below the RRP of EUR 799 flagging that it is "really important to keep the price high in the market especially

68 [...].
69 [...].
70 [...].
71 [...].
72 [...].
73 [...].
74 [...].
75 [...].
76 [...].

since this model is in shortage". [...] of Asus France subsequently instructs an employee to help out and let him know if there is any difficulty.

- (88) As a result of those interventions, retailers regularly agreed to those requests and adjusted their resale prices, sometimes only after assurance that Asus France would also ask other retailers to increase the price. This is confirmed by various pieces of evidence in the Commission's file.⁷⁷
- (89) Second, retailers which repeatedly did not observe the desired resale price level were threatened and/or sanctioned by Asus France.
- (90) The existence of such threats and sanctions is confirmed by the following evidence.
- (91) In the first place, retailer H confirms that Asus France exerted significant pressure on its employees and in some instances issued threats or applied retaliatory measures against it in cases where retailer H did not adhere to the instructions of Asus France.⁷⁸
- (92) In the second place, in an e-mail⁷⁹ dated 7 April 2013, [...] for Asus France asks retailer H to maintain a certain margin and respect the RRP. Otherwise retailer H's price would damage the overall resale price level on the market. He continues that two other retailers no longer receive any support for this reason. Three days later he sent another e-mail⁸⁰ in which he again complains about the low prices of certain motherboard products and asks retailer H to increase the price.
- (93) In the third place, an Asus France employee requested on 18 February 2014 via a Skype chat⁸¹ from retailer H to increase the resale price of a specific motherboard to a certain level and that this was important. Otherwise Asus France would not grant any budget (i.e. financial support) to retailer H. He then goes on to explain that its headquarters control the pricing situation and were not happy that Asus France supported retailer H by providing "budget" while retailer H at the same time breaks the prices. This is followed by an exchange of views in which the employee of retailer H tries to explain that retailer H is not "breaking" the prices while the Asus France employee argues that other low pricing retailers are only adjusting their prices to retailer H. Ultimately, the employee of Asus France requests retailer H to increase the price to EUR 116 and repeats its threat. Subsequently, retailer H agrees to increase the price.
- (94) In the fourth place, on 17 September 2014 retailer H sent an e-mail⁸² to Asus France in which he complains that retailer H was unfairly accused of selling Asus products at resale prices which are too low while he did not consider this to be the case. Retailer H also complains that Asus France puts pressure on its wholesalers to stop delivering products to retailer H.
- (95) Third, the management of Asus France was aware and approved the above conduct aimed at controlling and intervening with resale prices of retailers.⁸³

⁷⁷ [...] and [...].

⁷⁸ [...].

⁷⁹ [...].

⁸⁰ [...].

⁸¹ [...].

⁸² [...].

⁸³ [...]; [...].

6. LEGAL ASSESSMENT

(96) Article 101(1) of the Treaty prohibits, as incompatible with the internal market, 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, unless they meet the conditions for an exemption pursuant to Article 101(3) of the Treaty.

6.1. Agreements and concerted practices

6.1.1. Principles

(97) For the purposes of Article 101(1) of the Treaty, in order for there to be an agreement between undertakings, it is sufficient that at least two undertakings have expressed their joint intention to conduct themselves on the market in a specific way.⁸⁴ Although Article 101(1) of the Treaty draws a distinction between the concept of concerted practices and the concept of agreements between undertakings, the object is to bring within the prohibition established by that Article a form of co-ordination between undertakings by which, without having reached the stage where an agreement properly so-called has been concluded, they knowingly substitute practical co-operation between them for the risks of competition.⁸⁵

6.1.2. Application to this case

(98) The conduct described in section 5 constitutes one or more agreements and/or concerted practices within the meaning of Article 101(1) of the Treaty. It presents all the characteristics of agreements and/or concerted practices entered into between, on the one hand, Asus Germany or Asus France, and, on the other hand, a number of independent retailers in Germany⁸⁶ and France⁸⁷.

(99) Via that conduct, Asus Germany and Asus France expressed their intention to act with the retailers in Germany and France respectively in such a way as to limit resale price competition.

6.2. Single and continuous infringement

6.2.1. Principles

(100) An infringement of Article 101 of the Treaty may consist not only in an isolated act but also in a series of acts or a course of conduct, even if one or more aspects of that series of acts or course of conduct could also, in itself and taken in isolation, constitute an infringement of that Article. Accordingly, if the different actions form part of an "overall plan", because their identical object distorts competition within the internal market, the Commission is entitled to impute responsibility for those actions on the basis of participation in the infringement considered as a whole.⁸⁸

⁸⁴ Judgment of 11 January 1990, *Sandoz Prodotti Farmaceutici v Commission*, C-277/87, EU:C:1990:6, paragraph 13; Judgment of 26 October 2000, *Bayer v Commission*, T-41/96, EU:T:2000:242, paragraphs 67 and 173.

⁸⁵ Judgment of 14 July 1972, *ICI v Commission*, C-48/69, EU:C:1972:70, paragraph 64; Judgment of 4 June 2009, *T-Mobile Netherlands and Others*, C-8/08, EU:C:2009:343, paragraph 26.

⁸⁶ [...]; [...]; [...]; [...]; [...]; [...] and [...].

⁸⁷ [...]; [...] and [...].

⁸⁸ Judgment of 7 January 2004, *Aalborg Portland and Others v Commission*, Joined Cases C-204/00 P, C-205/00 P, C-211/00 P and C-217/00 P and C-219/00 P, EU:C:2004:6, paragraph 258; Judgment of 21 September 2006, *Technische Unie v Commission*, C-113/04 P, EU:C:2006:593, paragraph 178.

6.2.2. *Application to this case*

- (101) The Commission concludes that the conduct described in section 5 constitutes a single and continuous infringement in Germany and a single and continuous infringement in France.
- (102) The agreements or concerted practices described in section 5 with respect to retailers in Germany were all in pursuit of an identical anti-competitive objective, namely to keep prices stable at the level of the RRP in Germany. The same is true of the agreements or concerted practices with respect to retailers in France.
- (103) The evidence demonstrates that such resale price maintenance formed part of an overall business strategy implemented respectively by Asus Germany in Germany and by Asus France in France, aimed at controlling the resale price of Asus products and keeping it stable at the level of the RRP and above the price level that retailers in the territories in question would set independently. Beyond that immediate purpose, the broader objective of the continuous price monitoring and resale price maintenance was to avoid the possibility that, by adjusting to the prices of the lowest pricing retailers, market prices of other retailers, who would adapt, would also fall, generating a wider price decrease in the market.
- (104) The existence of two single and continuous infringements is further supported by the fact that the conduct of respectively Asus Germany and Asus France followed a similar pattern throughout the relevant period, the individuals involved were essentially the same and there was a continuity and similarity of method.

6.3. **Restriction of competition**

6.3.1. *Principles*

- (105) To come within the prohibition laid down in Article 101(1) of the Treaty, an agreement, a decision by an association of undertakings or a concerted practice must have as its object or effect the prevention, restriction or distortion of competition in the internal market.
- (106) Certain types of coordination between undertakings reveal a sufficient degree of harm to competition that it may be found that there is no need to examine their effects.⁸⁹ That case-law arises from the fact that certain types of coordination between undertakings can be regarded, by their very nature, as being harmful to the proper functioning of normal competition.⁹⁰
- (107) Consequently, certain collusive behaviour, such as resale price maintenance⁹¹, may be considered so likely to have negative effects, in particular on the price, choice, quantity or quality of the goods and services, that it may be considered redundant, for

⁸⁹ Judgment of 11 September 2014, *CB v Commission*, C-67/13 P, EU:C:2014:2204, paragraph 49; Judgment of 19 March 2015, *Dole Food and Dole Fresh Fruit Europe v Commission*, C-286/13 P, EU:C:2015:184, paragraph 113.

⁹⁰ Judgment of 11 September 2014, *CB v Commission*, C-67/13 P, EU:C:2014:2204, paragraph 50; Judgment of 19 March 2015, *Dole Food and Dole Fresh Fruit Europe v Commission*, C-286/13 P, EU:C:2015:184, paragraph 114.

⁹¹ Judgment of 3 July 1985, *Binon v AMP*, 243/83, EU:C:1985:284, paragraph 43; Judgment of 1 October 1987, *VVR v Sociale Dienst van de Plaatselijke en Gewestelijke Overheidsdiensten*, 311/8, EU:C:1987:418, paragraph 17; Judgment of 19 April 1988, *SPRL Louis Erauw-Jacquery v La Hesbignonne SC*, 27/87, EU:C:1988:183, paragraph 15.

the purposes of applying Article 101(1) of the Treaty, to prove that it has actual effects on the market.⁹²

6.3.2. *Application to this case*

(108) The Commission concludes that through the conduct described in section 5, Asus Germany and Asus France restricted the ability of retailers in, respectively, Germany and France to determine their resale prices independently.

(109) Such conduct, by its very nature, restricts competition within the meaning of Article 101(1) of the Treaty.⁹³

6.4. Effect on trade between Member States

6.4.1. *Principles*

(110) Article 101(1) of the Treaty is aimed at agreements and concerted practices which might harm the attainment of an internal market between the Member States, whether by partitioning national markets or by affecting the structure of competition within the internal market.⁹⁴

6.4.2. *Application to this case*

(111) The Commission concludes that the conduct of Asus Germany and Asus France was capable of affecting trade between Member States.

(112) During the relevant period, the retailers in Germany and retailers in France were selling Asus products to customers in various Member States. As described in recital (64), in several instances, the French retailer H received requests not to sell Asus products in Germany below a certain price level.

6.5. Non-applicability of Article 101(3) of the Treaty

6.5.1. *Principles*

(113) Pursuant to Article 4(a) of the Vertical Block Exemption Regulation ("VBER"),⁹⁵ the exemption provided for by the VBER does not apply to 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 buyer's ability to determine its sale price, without prejudice to the possibility of the supplier to impose a maximum sale price or recommend a sale price, provided that they do not amount to a fixed or minimum sale price as a result of pressure from, or incentives offered by, any of the parties.

(114) Moreover, Article 101(1) of the Treaty may be declared inapplicable pursuant to Article 101(3) of the Treaty where an agreement or concerted practice 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,

⁹² Judgment of 11 September 2014, *CB v Commission*, C-67/13 P, EU:C:2014:2204, paragraph 51; Judgment of 19 March 2015, *Dole Food and Dole Fresh Fruit Europe v Commission*, C-286/13 P, EU:C:2015:184, paragraph 115.

⁹³ See case law referred to in footnotes 90 and 91 above.

⁹⁴ Judgment of 15 March 2000, *Cimentaries CBR and Others v Commission*, T-25/95, EU:T:2000:77, paragraph 3930; Judgment of 28 April 1998, *Javico International and Javico AG v Yves Saint Laurent Parfums SA*, C-306/96, EU:C:1998:173, paragraphs 16 and 17.

⁹⁵ Commission Regulation (EU) No 330/2010 of 20 April 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices, OJ L 102, 23.4.2010, p. 1.

and which does not (a) impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objects; and (b) afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question.

6.5.2. *Application to this case*

- (115) The Commission concludes that the conduct of Asus Germany and Asus France was neither exempted under the VBER nor met the conditions for exemption provided for in Article 101(3) of the Treaty.
- (116) The conduct of Asus Germany and Asus France was not exempted under the VBER because that conduct had as its object to restrict the ability of retailers of Asus products to independently determine their sale price.
- (117) The conduct of Asus Germany and Asus France also did not meet the conditions for exemption provided for in Article 101(3) of the Treaty. In particular, there are no indications that it was indispensable to induce retailer investment in certain promotional measures or pre-sale services or to alleviate the repercussions of free-riding between online and offline sales channels.

7. DURATION OF THE INFRINGEMENTS

- (118) The Commission concludes that the single and continuous infringement in Germany started on 3 March 2011⁹⁶ and ended on 27 June 2014.⁹⁷
- (119) The Commission concludes that the single and continuous infringement in France started on 7 April 2013⁹⁸ and ended on 15 December 2014.⁹⁹

8. LIABILITY

8.1. Principles

- (120) Union competition law refers to the activities of undertakings and the concept of an undertaking covers any entity engaged in an economic activity, irrespective of its legal status and the way in which it is financed.¹⁰⁰
- (121) When such an entity infringes Union competition rules, it falls, according to the principle of personal responsibility, to that entity to answer for that infringement. However, the infringement must be imputed unequivocally to a legal person on whom fines may be imposed, and the statement of objections must be addressed to that person. Where several legal persons may be held liable for an infringement committed by one and the same undertaking, they must be regarded as jointly and severally liable for the infringement.
- (122) The conduct of a subsidiary may be imputed to the parent company, even if the parent company does not participate directly in the infringement, where the parent company and the subsidiary form a "single economic unit" and therefore form a single "undertaking" for the purposes of Union competition law. In particular, this may be the case where a subsidiary, despite having a separate legal personality, does

⁹⁶ See recital (57) and [...].

⁹⁷ See recital (63) and [...].

⁹⁸ See recital (92) and [...].

⁹⁹ See recital (87) and [...].

¹⁰⁰ Judgment of 13 June 2013, *Versalis v Commission*, C-511/11 P, EU:C:2013:386, paragraph 51.

not decide independently upon its own conduct on the market, but carries out, in all material respects, the instructions given to it by the parent company, regard being had in particular to the economic, organisational and legal links between those two legal entities.¹⁰¹

- (123) In the specific case in which a parent holds all or almost all of the capital in a subsidiary that has committed an infringement of the Union competition rules, there is a rebuttable presumption that that parent company in fact exercises a decisive influence over its subsidiary. In such a situation, it is sufficient for the Commission to prove that all or almost all of the capital in the subsidiary is held by the parent company in order to take the view that that presumption applies.¹⁰²

8.2. Application to this case

- (124) The Commission concludes that, having regard to the body of evidence and the facts described in section 5, the Asus's clear and unequivocal acknowledgements of the facts and the legal qualification thereof, liability for the two single and continuous infringements should be imputed to the following legal entities:

- (i) Asus Germany for its direct participation in the infringement in Germany;
- (ii) Asus France for its direct participation in the infringement in France;
- (iii) AsusTek Computer Inc. as jointly and severally liable with Asus Germany for the single and continuous infringement in Germany as the parent company of its wholly-owned subsidiary Asus Germany; and
- (iv) AsusTek Computer Inc. as jointly and severally liable with Asus France for the single and continuous infringement in France as the parent company of its wholly-owned subsidiary Asus France.¹⁰³

9. REMEDIES AND FINES

9.1. Remedies under Article 7 of (EC) No Regulation 1/2003

- (125) Where the Commission finds that there is an infringement of Article 101 of the Treaty it may by decision require the undertakings concerned to bring such infringement to an end in accordance with Article 7 of Regulation (EC) No 1/2003.
- (126) The Commission concludes that it is appropriate to require Asus to bring the two single and continuous infringements to an end (if it has not already done so) and to refrain from any measure that has the same or a similar object or effect.

9.2. Fines under Article 23(2) of (EC) No Regulation 1/2003 - Principles

- (127) Under Article 23(2) of Regulation (EC) No 1/2003, the Commission may by decision impose on undertakings fines where, either intentionally or negligently, they infringe Article 101 of the Treaty. For each undertaking participating in the infringement, the fine cannot exceed 10% of its total turnover in the preceding business year.

¹⁰¹ Judgment of 29 September 2011, *Elf Aquitaine v Commission*, C-521/09 P, EU:C:2011:620, paragraph 54.

¹⁰² Judgment of 10 September 2009, *Akzo Nobel and Others v Commission*, C-97/08 P, EU:C:2009:536, paragraph 60.

¹⁰³ During the relevant period, AsusTek Computer Inc. owned (indirectly) 100% of Asus Germany and of Asus France.

- (128) Pursuant to Article 23(3) of Regulation (EC) No 1/2003, the Commission must, in fixing the amount of fine, have regard both to the gravity and to the duration of the infringement. In setting the fines to be imposed, the Commission will also refer to the principles laid down in its Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation (EC) No 1/2003¹⁰⁴ ("Guidelines on fines").
- (129) The basic amount of the fine is to be set by reference to the value of sales to which the infringement directly or indirectly relates in the relevant geographic area within the EEA.¹⁰⁵ The basic amount consists of a percentage of the value of sales of up to a maximum of 30%¹⁰⁶, depending on the degree of gravity of the infringement, multiplied by the number of years of the infringement.¹⁰⁷
- (130) In calculating the value of sales, the Commission normally takes into account the sales made by the undertakings during the last full business year of their participation in the infringement.¹⁰⁸
- (131) In assessing the gravity of the infringement, the Commission has regard to a number of factors, such as the nature of the infringement, the market shares of the undertaking concerned, the geographic scope of the infringement and whether or not the infringement has been implemented.
- (132) The Commission may take into account circumstances that result in an increase or decrease in the basic amount. It will do so on the basis of an overall assessment which takes account of all the relevant circumstances.¹⁰⁹
- (133) The Commission pays particular attention to the need to ensure that fines have a sufficiently deterrent effect.¹¹⁰

9.3. The intentional or negligent nature of the infringement

- (134) The Commission concludes that, based on the facts described in section 5 above, the two single and continuous infringements were committed intentionally.

9.4. Calculation of the fines

9.4.1. Value of sales

- (135) Based on the principles outlined in section 9.2. and on the information provided by Asus, the Commission takes into account the value of sales in 2013, which is the last full business year of the participation of Asus Germany in the infringement in Germany and of Asus France in the infringement in France, for the purposes of calculating the fine.
- (136) The products taken into consideration for the value of sales are: (i) in relation to Germany the products sold in the Systems business group and the networking, desktop and display products in the Open Platform business group; and (ii) in relation to France, all products in the Open Platform business group as those were the products that were affected by the business strategy of Asus Germany and Asus

¹⁰⁴ OJ C 210, 1.9.2006, p. 2.

¹⁰⁵ Point 13 of the Guidelines on fines.

¹⁰⁶ Point 21 of the Guidelines on fines.

¹⁰⁷ Point 19 of the Guidelines on fines.

¹⁰⁸ Point 13 of the Guidelines on fines.

¹⁰⁹ Point 27 of the Guidelines on fines.

¹¹⁰ Point 30 of the Guidelines on fines.

France aimed at keeping resale prices in Germany and in France, respectively, stable at the level of RRP.

- (137) Accordingly, the Commission takes into account in relation to the single and continuous infringement in Germany the value of sales of EUR [400 000 000 – 450 000 000]¹¹¹ and in relation to the single and continuous infringement in France the value of sales of EUR [60 000 000 – 90 000 000]¹¹².

9.4.2. Gravity

- (138) Resale price maintenance, by its very nature, restricts competition within the meaning of Article 101(1) of the Treaty. However, vertical agreements and concerted practices such as resale price maintenance are, by their nature, often less damaging to competition than horizontal agreements.¹¹³ Taking account of these factors and in light of the specific circumstances of the case, as described in section 5, the proportion of the values of sales to be taken into account is set at 7%.

9.4.3. Duration

- (139) The Commission takes into account the duration of the two single and continuous infringements as set out in section 7 above.

9.4.4. Calculation of the basic amount

- (140) Applying the criteria set out in this section, the basic amount of the fine to be imposed in relation to the single and continuous infringement in Germany amounts to EUR [80 000 000 – 110 000 000] and in relation to the single and continuous infringement in France to EUR [5 000 000 – 15 000 000].

9.4.5. Aggravating or mitigating factors

- (141) The Commission concludes that there are no aggravating or mitigating circumstances for either of the two single and continuous infringements.

9.4.6. Application of the 10% turnover limit

- (142) The fine for each of the two single and continuous infringements does not exceed 10% of Asus's total turnover relating to the business year preceding the date of adoption of this Decision pursuant to Article 23(2) of Regulation (EC) No 1/2003.

9.4.7. Reduction of the fine in view of cooperation

- (143) In order to reflect that Asus has effectively cooperated with the Commission beyond its legal obligation to do so, the fine that would otherwise have been imposed should, pursuant to point 37 of the Guidelines on fines, be reduced by 40%.
- (144) Asus has cooperated with the Commission beyond its legal obligation to do so by: (i) providing additional evidence representing significant added value with respect to the evidence already in the Commission's possession as that evidence strengthened to a large extent the Commission's ability to prove the infringements; (ii) acknowledging the infringements of Article 101 of the Treaty in relation to the

¹¹¹ Sales in Germany for 2013 for products sold in the Systems business group and the networking, desktop and display products in the Open Platform business group.

¹¹² Sales in France for 2013 for the products in the Open Platform business group.

¹¹³ Judgment of 14 March 2013, *Allianz Hungária Biztosító and Others*, C-32/11, EU:C:2013:160, paragraph 43.

conduct; and (iii) waiving certain procedural rights, resulting in administrative efficiencies.

9.4.8. *Conclusion: final amount of the fine*

(145) In conclusion, the final amount of the fine to be imposed pursuant to Article 23(2)(a) of Regulation (EC) No 1/2003 for the single and continuous infringement in Germany amounts to EUR 58 162 000 and the final amount of the fine to be imposed pursuant to Article 23(2)(a) of that Regulation for the single and continuous infringement in France amounts to EUR 5 360 000.

HAS ADOPTED THIS DECISION:

Article 1

Asus Computer GmbH and AsusTek Computer Inc. infringed Article 101 of the Treaty by participating from 3 March 2011 until 27 June 2014 in a single and continuous infringement aimed at restricting the ability of retailers in Germany to determine their resale prices independently.

Asus France SARL and AsusTek Computer Inc. infringed Article 101 of the Treaty by participating from 7 April 2013 until 15 December 2014 in a single and continuous infringement aimed at restricting the ability of retailers in France to determine their resale prices independently.

Article 2

For the infringements referred to in Article 1, the following fines are imposed:

- (a) EUR 58 162 000 on Asus Computer GmbH and AsusTek Computer Inc., jointly and severally.
- (b) EUR 5 360 000 on Asus France SARL and AsusTek Computer Inc., jointly and severally.

The fines shall be credited, in euros, within a period of three months of the date of notification of this Decision, to the following bank account held in the name of the European Commission:

BANQUE ET CAISSE D'EPARGNE DE L'ETAT
1-2, Place de Metz
L-1930 Luxembourg

IBAN: LU02 0019 3155 9887 1000
BIC: BCEELULL
Ref.: European Commission – BUFI/AT.40465

After the expiry of that period, interest shall automatically be payable at the interest rate applied by the European Central Bank to its main refinancing operations on the first day of the month in which this Decision is adopted, plus 3.5 percentage points.

Where an undertaking referred to in Article 1 lodges an appeal, that undertaking shall cover the fine by the due date, either by providing an acceptable financial guarantee or by making a

provisional payment of the fine in accordance with Article 90 of Commission Delegated Regulation (EU) No 1268/2012¹¹⁴.

Article 3

AsusTek Computer Inc., Asus Computer GmbH and Asus France SARL shall immediately bring to an end the infringement(s) referred to in Article 1 insofar as they have not already done so.

They shall refrain from repeating any act or conduct described in Article 1, and from any act or conduct having the same or similar object or effect.

Article 4

This Decision is addressed to

AsusTek Computer Inc., 15, Li-Te Road, Beitou District, Taipei 11259, Taiwan

Asus Computer GmbH, Harkortstr. 21-23, 40880 Ratingen, Germany

Asus France SARL, 10 Allée Bienvenue, 93160, Noisy-le-Grand, France

This Decision shall be enforceable pursuant to Article 299 of the Treaty.

Done at Brussels, 24.7.2018

For the Commission

Margrethe VESTAGER

Member of the Commission



¹¹⁴ OJ L 362, 31.12.2012, p. 1.