



EUROPEAN COMMISSION  
Competition DG

***CASE AT.40469 –  
DENON & MARANTZ***

(Only the English text is authentic)

**ANTITRUST PROCEDURE  
Council Regulation (EC) 1/2003**

---

Article 7 Regulation (EC) 1/2003

Date: 24.07.2018

This text is made available for information purposes only. A summary of this decision is published in all EU languages in the Official Journal of the European Union.

Parts of this text have been edited to ensure that confidential information is not disclosed. Those parts are replaced by a non-confidential summary in square brackets or are shown as [...].



Brussels, 24.7.2018  
C(2018) 4774 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.40469 Denon & Marantz**

**(Only the English text is authentic)**

## TABLE OF CONTENTS

1.	Introduction .....	4
2.	The parties concerned .....	5
2.1.	Undertaking subject to the proceedings .....	5
2.2.	Distribution of Denon, Marantz and Boston Acoustic branded products in the relevant period in Germany and the Netherlands.....	5
3.	The product and geographic areas concerned .....	6
4.	Procedure.....	6
5.	Facts .....	7
5.1.	Introduction .....	7
5.2.	D&M Germany .....	7
5.3.	The relevant conduct in Germany .....	8
5.4.	D&M Netherlands .....	13
5.5.	The relevant conduct in the Netherlands.....	13
6.	Legal assessment.....	16
6.1.	Agreements and concerted practices between independent undertakings .....	16
6.1.1.	Principles.....	16
6.1.2.	Application to this case .....	16
6.2.	Single and continuous infringement.....	16
6.2.1.	Principles.....	16
6.2.2.	Application to this case .....	17
6.3.	Restriction of competition.....	17
6.3.1.	Principles.....	17
6.3.2.	Application to this case .....	18
6.4.	Effect on trade between Member States.....	18
6.4.1.	Principles.....	18
6.4.2.	Application to this case .....	18
6.5.	Non-applicability of Article 101(3) the Treaty .....	19
6.5.1.	Principles.....	19
6.5.2.	Application to this case .....	19
7.	Duration of the infringements .....	19
8.	Liability .....	20
8.1.	Principles.....	20
8.2.	Application to this case .....	21
9.	Remedies and Fines.....	21

9.1.	Remedies under Article 7 of Regulation (EC) No 1/2003 .....	21
9.2.	Fines under Article 23(2) of Regulation (EC) No 1/2003 - Principles .....	21
9.3.	The intentional or negligent nature of the infringement .....	22
9.4.	Calculation of the fines .....	22
9.4.1.	Value of sales .....	22
9.4.2.	Gravity.....	23
9.4.3.	Duration.....	23
9.4.4.	Calculation of the basic amount.....	23
9.4.5.	Aggravating or mitigating factors .....	23
9.4.6.	Application of the 10% turnover limit .....	23
9.4.7.	Reduction of the fine in view of cooperation.....	23
9.4.8.	Conclusion: final amount of the fine.....	23

# COMMISSION DECISION

of 24.7.2018

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

Case AT.40469 Denon & Marantz

(Only the English text is authentic)

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 Treaty<sup>1</sup>, 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,<sup>2</sup>

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 13 June 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 D&M Holdings Inc., D&M Germany GmbH ("D&M Germany") and D&M Europe BV ("D&M Netherlands"). D&M Holdings Inc., D&M Germany and D&M Netherlands are hereinafter referred to as "D&M".
- (2) D&M Germany implemented practices aimed at restricting the ability of retailers in Germany to determine their resale prices independently. Similarly, D&M Netherlands implemented practices aimed at restricting the ability of retailers in the Netherlands to determine their resale prices independently.

---

<sup>1</sup> OJ C 115, 9.5.2008, p. 47.

<sup>2</sup> 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) D&M is an international manufacturer in the audio/video consumer electronics and home entertainment sector.
- (5) D&M Holdings Inc. is based in Kawasaki, Japan, and owns the Denon, Marantz and Boston Acoustics brands.
- (6) D&M Netherlands is based in the Netherlands and coordinates the distribution of Denon, Marantz and Boston Acoustics branded products in the European Economic Area ("EEA"). It is also responsible for the distribution of those products in the Netherlands.
- (7) D&M Germany is based in Germany. It is a subsidiary of D&M Europe BV and is responsible for the sales of those branded products in Germany.
- (8) Under the Denon and Marantz brands, D&M offers AV receivers, Blu-ray players, CD players, AM/FM/DAB stereo receivers, mini-systems, amplifiers, turntables, network players, docks/Bluetooth speakers, soundbars, headphones and accessories.
- (9) Under the Boston Acoustics brand, D&M offers speaker products, including hifi speakers, home theatre speakers and in-wall and in-ceiling speakers.
- (10) The sales organisations concerned by this Decision are the German and the Dutch sales organisations operated by D&M Germany and D&M Netherlands respectively. The period covered by the practices to which this Decision relates was from 19 April 2011 to 19 January 2015 in the case of Germany and from 30 May 2011 to 6 February 2014 in the case of the Netherlands (the period in each case is referred to in this Decision as "the relevant period").
- (11) Throughout the relevant period, D&M Holdings Inc. owned either directly or indirectly a 100% stake in D&M Germany and D&M Netherlands.

### **2.2. Distribution of Denon, Marantz and Boston Acoustic branded products in the relevant period in Germany and the Netherlands**

- (12) D&M [...]. It distributes its products via independent retailers that sell the products to end-consumers. These retailers are members of a selective distribution system. [...]. Retailers have to satisfy different qualitative requirements to become authorised retailers [...]. Depending on the requirements they are able to satisfy, retailers are therefore authorised to sell [...].
- (13) Authorised retailers in this system can be broadly categorised as follows:
- (a) offline-only specialist retailers (without an online shop);
  - (b) hybrid specialist dealers (with brick and mortar and online shops);
  - (c) large chains that offer both online and offline sales; and
  - (d) retailers with an online-only presence.
- (14) D&M's European distribution activities are organised [...].

### 3. THE PRODUCT AND GEOGRAPHIC AREAS CONCERNED

- (15) The products concerned by this Decision are the Denon, Marantz and Boston Acoustics branded products as set out in section 2.1. above.
- (16) The geographic areas covered by this Decision are Germany and the Netherlands.

### 4. PROCEDURE

- (17) On 10 March 2015, the Commission carried out an unannounced inspection at the premises of retailer A in Germany.<sup>3</sup> Retailer A is an online retailer selling inter alia products of D&M. [...].
- (18) On 2 February 2017,<sup>4</sup> the Commission initiated proceedings within the meaning of Article 2(1) of Regulation (EC) No 773/2004<sup>5</sup> against D&M Germany, D&M Netherlands and D&M Holdings Inc.
- (19) On 21 April 2017, the Commission addressed a request for information to D&M Netherlands under Article 18(1) and (2) of Regulation (EC) No 1/2003, to which D&M replied on 9 May 2017<sup>6</sup>.
- (20) Shortly after the initiation of proceedings, D&M indicated its interest in cooperating with the Commission.
- (21) On [...], D&M submitted further evidence regarding the relevant conduct.
- (22) On [...], D&M submitted a formal offer to cooperate in Case AT.40469 in view of the adoption of a decision pursuant to Article 7 and Article 23 of Council Regulation (EC) No 1/2003 ("settlement submission").<sup>7</sup> The settlement submission contained:
- an acknowledgement in clear and unequivocal terms of D&M's 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 D&M Germany, D&M Netherlands and D&M Holdings Inc.'s participation in the two infringements;
  - an indication of the maximum amount of the fine D&M expects to be imposed by the Commission and which it would accept in the context of a cooperation procedure;
  - the confirmation that D&M has been sufficiently informed of the objections the Commission envisages raising against it and that it has been given sufficient opportunity to make their views known to the Commission;
  - the confirmation that D&M does not envisage requesting further access to the file or requesting to be heard again in an oral hearing, unless the Commission does not reflect its settlement submission in the Statement of Objections and the 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.

---

<sup>3</sup> [...].

<sup>4</sup> [...].

<sup>5</sup> 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).

<sup>6</sup> [...].

<sup>7</sup> [...].

- (23) D&M made the settlement submission conditional upon the imposition of fines by the Commission which do not exceed the amount as specified in that submission.
- (24) On 13 June 2018, the Commission adopted a Statement of Objections addressed to D&M, which replied to the Statement of Objections by confirming that it reflected the content of its settlement submission.

## 5. FACTS

### 5.1. Introduction

- (25) In 2011, D&M reviewed and modernised its European selective distribution system in order to react to market developments, in particular an increased relevance of online selling and an increasingly competitive landscape.<sup>8</sup> In June 2011, a new standard selective distribution agreement was finalised and subsequently rolled out to be signed by *inter alia* German and Dutch retailers by 1 September 2011 ("the 2011 SD agreement").
- (26) The 2011 SD agreement aimed *inter alia* at maintaining the premium image of D&M's branded products and ensuring high levels of pre- and post-sale services for consumers. [...].
- (27) In order to incentivise specific promotional and pre-sales support services by its retailers in relation to newly launched products, D&M sought to support retailers and protect their investments by [...].<sup>9</sup> [...]. According to the 2011 SD agreement, retailers would otherwise be free in all other aspects to set their resale prices independently.
- (28) In practice, however, D&M Germany and D&M Netherlands never implemented these "margin stabilisation" provisions during the relevant period in the manner envisaged in the 2011 SD agreement.<sup>10</sup> Instead, before and after the roll-out of the 2011 SD agreement on 1 September 2011, D&M Germany and D&M Netherlands monitored the resale prices of retailers and requested and obtained the agreement of retailers to increase their resale prices to the desired level.<sup>11</sup> This was often achieved by putting commercial pressure on the low-pricing retailers and, in some cases, taking retaliatory measures against non-compliant retailers, in particular by temporarily blocking accounts and ceasing to supply the relevant products.

### 5.2. D&M Germany

- (29) Sales of D&M products in Germany were made by a combination of sales representatives employed by D&M Germany and independent sales agents that were typically responsible for specific brands and regions and were paid commissions based on the order volume that they generated. The sales agents acted in the economic interest, and under the instructions, of D&M Germany as intermediaries with the task of brokering contracts with appointed retailers without becoming a contractual party to such contracts.<sup>12</sup> In the context of price-related interventions,

---

<sup>8</sup> [...].

<sup>9</sup> [...].

<sup>10</sup> [...].

<sup>11</sup> While the senior European management of D&M was involved in developing the 2011 SD agreement, it was not involved in the day-to-day implementation of the strategy for which national general managers, commercial managers and sales managers were responsible.

<sup>12</sup> [...].



they typically passed on instructions received from D&M Germany to the appointed retailers for whom they were responsible.<sup>13</sup>

### **5.3. The relevant conduct in Germany**

- (30) Throughout the relevant period, D&M Germany applied a strategy aimed at achieving and maintaining a stable retail price level for its Denon, Marantz and Boston Acoustics branded products. Employees of D&M Germany, including its management, monitored the retail prices of retailers and contacted or asked its sales agents to contact retailers in order to request them to increase resale prices. They were also informed by retailers (mostly indirectly via sales agents) about lower price retailers in the distribution network.
- (31) The aim of the conduct was to stabilise or increase the overall resale price level for its products and discipline lower pricing retailers. Such conduct was also motivated by complaints emanating from certain retailers about resale price pressure exerted by aggressive pricing adopted by other retailers, which was preventing them from selling the Denon, Marantz and Boston Acoustics branded products at the desired higher prices and thereby preventing them from achieving the profit margins they expected.<sup>14</sup> If a need was seen to decrease resale prices in response to market developments, it was important for D&M Germany to implement such price decreases in an organised manner in order to avoid a downward spiral of resale prices.
- (32) As a result of these interventions, which were in various cases accompanied by threats or even sanctions, retailers regularly agreed to those requests and adjusted their resale prices.<sup>15</sup>
- (33) The relevant conduct of D&M Germany occurred in several different forms.
- (34) First, one retailer (retailer A) considered itself to have a "gentleman's agreement" with D&M Germany according to which it would not price Denon branded products aggressively.
- (35) This is confirmed by an e-mail<sup>16</sup> dated 14 May 2011 sent by retailer A to D&M Germany (with a sales agent in copy). In the e-mail, an employee of retailer A confirms that he is keen to generate – as a partner of Denon – attractive margins with its products. He expresses the fear, however, that certain other market participants see things differently and achieve a competitive advantage through aggressive pricing. He complains about retailer B who apparently has a free ticket and does not seem to understand the word "gentleman's agreement". The employee of retailer A attaches several screenshots to the email that compare prices charged by different retailers in order to emphasise his argument.
- (36) Second, D&M Germany provided its retailers with written or orally communicated lists of prices, in particular so-called "street prices", in other words certain minimum resale price levels that D&M Germany expected to be adhered to for the sale of its products. These street prices were partially below the recommended resale price ("RRP"), for example when products moved towards the end of their sales life-

---

<sup>13</sup> See for example [...].

<sup>14</sup> [...].

<sup>15</sup> [...] and [...] and [...]. See also [...].

<sup>16</sup> [...].

cycle.<sup>17</sup> Such lists were communicated several times a year, in particular between April 2011 and late 2012/2013.<sup>18</sup> Such price lists were occasionally combined with instructions in relation to specific products for which current resale market prices were considered too low.

- (37) This is confirmed by the following evidence.
- (38) In the first place, in an e-mail of 19 April 2011 sent by a sales agent of D&M Germany to retailer A, a table is attached with "street prices" for around 70 products, coupled with the instruction to urgently update prices on the next day ("*Morgen, bitte aktualisieren. Wichtig!!!*").<sup>19</sup> Retailer A's employee indicates that he will implement the street prices ("*setz ich um*") and he subsequently adjusts the retail prices of some of the products on the list.<sup>20</sup>
- (39) In the second place, in an e-mail<sup>21</sup> of 12 May 2011 sent by a sales agent to retailer A, a table<sup>22</sup> is attached with information on the RRP's as well as street prices of several products ("*hier noch mal die aktuelle Streetliste falls nicht zur Hand*"). In addition, the sales agent points out the "correct prices" of three particular Denon products and asks retailer A to check these ("*bitte mal prüfen*"). Retailer A replies that he has adjusted the resale prices of the three products indicated ("*hab die 3 unten angepasst*").
- (40) In the third place, in an e-mail of 9 November 2011<sup>23</sup> another sales agent provides retailer A with (new) street prices in the context of certain product offers. In the e-mail, the sales agent reports of a new offer by D&M Germany for retailer A. The offer relates to three different product models. Next to the purchase prices for retailer A, the e-mail also provides "street prices" for the products which have been lowered previously. The sales agent explains that retailer A would be allowed to apply these new street prices online, but only until December, as this is not an official price decrease ("*Alle Streetpreise dürfen im Netz dargestellt werden. Dieser Test gilt erstmal bis Ende Dezember. Dies ist keine Preissenkung!! [sic]*"). Retailer A partially accepts the offer and applies the requested street prices for most products for several weeks.<sup>24</sup> With respect to one product model, retailer A charges a higher price than the communicated street price.
- (41) In the fourth place, in an e-mail of 13 September 2012 sent by a sales agent to retailer A, a list of street prices is attached.<sup>25</sup> The sales agent emphasises that this list is applicable as of the next day ("*Morgen, neue Street gültig ab FREITAG!!!!!!!!!!!!!!!!!!!!*"). The new list includes several street price decreases and indicates that D&M Germany consents to a decrease in the resale prices for some products. Retailer A confirmed that it was important for D&M Germany that resale prices were not implemented before a specific date and time.<sup>26</sup>

---

<sup>17</sup> See for example [...] and [...].

<sup>18</sup> [...].

<sup>19</sup> [...].

<sup>20</sup> [...] and [...].

<sup>21</sup> [...].

<sup>22</sup> [...].

<sup>23</sup> [...].

<sup>24</sup> [...].

<sup>25</sup> [...].

<sup>26</sup> [...].

- (42) Third, D&M Germany and its sales agents issued individual resale-price related requests i.e. ad hoc requests to specific retailers when D&M Germany noticed that its retailers had reduced their prices below a level that D&M Germany considered appropriate, typically the RRP or the street prices.<sup>27</sup> Such requests were made both orally and in writing. Their frequency increased as of 2013.<sup>28</sup>
- (43) This is confirmed by the following evidence.
- (44) In the first place, in an e-mail<sup>29</sup> of 20 January 2012, a sales agent asks retailer A to increase its resale price of a Marantz blue ray receiver to EUR 799. Retailer A complies with this request and increases the price on 20 January 2012 from EUR 769 to EUR 799.<sup>30</sup>
- (45) In the second place, in an e-mail<sup>31</sup> of 18 May 2012, an employee of D&M Germany asks a sales agent to block retailer C for a "breach of contract" (*"Bitte [...] in Hamburg wegen Vertragsbruch sperren."*). He also proposes that retailer C should not receive any new products for three months (*"ich schlage vor dass [...] wie [...] für die nächsten drei Monate keine Neuheiten bekommt. Bitte Neuheiten zurück holen"*). A day later, the sales agent responds that prices have been corrected and that they should be visible once price comparison websites have been updated (*"Preise sind korrigiert und werden bei der nächsten Aktualisierung der Suchmaschine sichtbar sein"*). On Monday, 21 May 2012, the sales agent follows up and informs the employee of D&M Germany that he has managed to get retailer C to increase its price on the Saturday and that the price had previously been changed by an unauthorised employee of retailer C who would face sanctions that very day. (*"ich habe den Preis bereits am Samstag ändern lassen. Der Preis wurde durch ein nicht autorisierten Mitarbeiter geändert der Inhaber [...] wird noch heute den Mitarbeiter mit Konsequenzen belegen. [sic]"*). Moreover, the sales agent reports that he has made it clear to retailer C that such behaviour would not be tolerated again. He therefore asks the employee of D&M Germany to limit the delivery block to four weeks (*"Ich habe in aller Deutlichkeit klargemacht, dass ein solches Vorgehen nicht erneut durchgehen lassen. Das ist auch verstanden worden. Ich möchte Dich bitten die Liefersperre auf 4 Wochen zu begrenzen. Vielen Dank."*).
- (46) In the third place, in an e-mail of 16 November 2012 an employee of D&M Germany<sup>32</sup> asks a sales agent to speak to retailer D in order to request an adjustment of prices (*"lasse die Preise wieder anpassen"*). He includes a link to a Marantz AV receiver on retailer D's website. The sales agent replies shortly afterwards and states that it is "done" and will be changed today (*"ist erledigt. wird heute umgesetzt"*).
- (47) In the fourth place, in an e-mail of 19 January 2015, an employee of D&M Germany sends a screenshot of retailer A's online shop concerning a specific Marantz CD player to one of its sales agents. The sales agent subsequently forwards it to retailer A, coupled with a request to increase the resale price of the product to EUR 399.00.<sup>33</sup>

---

<sup>27</sup> [...] and [...].

<sup>28</sup> [...].

<sup>29</sup> [...].

<sup>30</sup> [...].

<sup>31</sup> [...].

<sup>32</sup> [...].

<sup>33</sup> [...].

Retailer A subsequently increases the resale price of the product from EUR 364.15 to EUR 399.00 and confirms compliance with the requested price increase.<sup>34</sup>

- (48) Fourth, besides the communication of its "street prices" and ad hoc requests addressed to individual retailers, D&M Germany instructed its sales agents to contact several retailers simultaneously in order to increase the overall resale-price level for one or more products.<sup>35</sup> Such requests sometimes included information of a particular date and time by which retailers had to adjust their resale prices accordingly.<sup>36</sup>
- (49) This is confirmed by an e-mail of 16 September 2012 sent by an employee of D&M Germany<sup>37</sup> to several sales agents in which he complains about "*massive disturbances on the net*" ("*es gibt zur Zeit massive Störungen im Netz*"). He requests that they speak to their dealers quickly to adjust prices ("*lasst die Preise anpassen*"). He refers specifically to the Marantz and Boston Acoustics brands ("*Es geht hier um Marantz und um Boston*") and warns that dealers that cannot be trusted will be blocked ("*Alle Händler, die kein Vertrauen haben oder nicht wollen, werden auch von uns gesperrt*"). He asks the sales agents to move quickly to stop the downward price spiral ("*Leider müssen wir so Vorgehen, da die Preisschraube sich sonst immer mehr nach unten dreht und wir nachher keine Möglichkeit mehr haben, die Preise zu korrigieren*") and to check for "*disturbances*" ("*Störungen*") using price comparison websites. The e-mail ends with a warning that dealers will be blocked from Tuesday onwards ("*Ab Dienstag, sperren wir die Händler!*").
- (50) Fifth, D&M Germany informed retailers if they were allowed to decide independently about resale prices and on what conditions.
- (51) This is confirmed by an e-mail of 17 May 2013 sent by a sales agent of D&M Germany to retailer A, in which he points out that "*the retailer may decide where, how and at what price it may sell the products*" ("*dafür kann der Händler selbst bestimmen, wo, wie und zu welchem Preis er diese Produkte verkauft*").<sup>38</sup> However, in exchange for this ability, retailer A has to agree to purchase the entire remaining stock and to market the relevant products solely in Germany and Austria.
- (52) Sixth, D&M Germany awarded retailers with financial benefits for their adherence to its street prices.
- (53) This is confirmed by e-mail correspondence<sup>39</sup> from 24 to 30 November 2011 between retailer A and one of the sales agents of D&M Germany. Retailer A decreases its resale prices in reaction to D&M Germany's decision to lower its street prices. Retailer A informs the sales agent that it is no longer able to sell some of the related products in its stock at a profit because the new street prices were not allowing any positive margin. He therefore asks for compensation after confirming compliance with the new street prices. In reaction to this, the sales agent informs him that he has initiated extra payments with respect to four product models. Retailer A confirmed that this is an example of a financial benefit in the form of so-called "*stock*

---

<sup>34</sup> [...] and [...].

<sup>35</sup> [...] [...].

<sup>36</sup> See for example [...].

<sup>37</sup> [...].

<sup>38</sup> [...].

<sup>39</sup> [...], [...].

protection" which D&M Germany granted in return for its cooperation and adherence to the street prices.<sup>40</sup>

- (54) Seventh, D&M Germany applied pressure, in the form of threats, in order to get retailers to adhere to the desired resale price levels.<sup>41</sup> Typically, D&M Germany would instruct its sales agent to contact retailers who were selling below the desired price levels and threaten them that supplies would be blocked in the event of non-compliance.<sup>42</sup>
- (55) This is confirmed by the following evidence.
- (56) In the first place, an employee of D&M Germany sent an e-mail on 20 November 2012<sup>43</sup> to a number of sales agents and sales representatives attaching a link to a price comparison website. In the e-mail, he complains, with regard to three retailers, that a number of products are being offered at one euro below the required price (*"Es gibt immer noch diverse Produkte die mit einem Euro unter Preis angeboten werden"*). He requests that prices should be adjusted by 3p.m. that day at the latest, or the relevant dealers will be blocked (*"Falls dieses nicht so ist, wird der entsprechende Händler geblockt!"*). He states that he will be in the office, checking the product prices and ready to implement these blocks, if price adjustments are not happening (*"Ich bin heute im Büro und kann dieses somit umgehend umsetzen! Ich werde alle Produkte kontrollieren und erwarte eine reine Darstellung aller Produkte bei diesen Händlern"*).
- (57) In the second place, in an e-mail of 29 October 2014 to D&M Germany and one of its sales agents, retailer E complains that it has to be available for requested price corrections almost all the time and is frequently forced by D&M to sell at prices that are so high that no sales are possible (*"Wir stehen mittlerweile fast 24/7 für geforderte Korrekturen zur Verfügung, werden immer wieder in Preisbereiche gezwungen, in denen ein Verkauf nicht möglich ist und die Zahlungsziele werden für die Lagerhaltung aufgebraucht, da die geforderten Preise am Markt nicht durchsetzbar sind"*).<sup>44</sup>
- (58) Eighth, D&M Germany took retaliatory measures against retailers that regularly undercut desired price levels in order to secure adherence to its price-related requests. Such measures consisted in particular in ceasing supplies and temporarily blocking customer accounts.<sup>45</sup> As a threat and in order to secure adherence to requested resale price levels, D&M Germany and its sales agents also forwarded information to retailers in the distribution network on (alleged) sanctions that were imposed on other retailers because of their aggressive pricing.<sup>46</sup> In one instance, a retailer from the Netherlands was also blocked because it sold in Germany at resale prices considered too low.<sup>47</sup>

---

40 [...].

41 [...].

42 [...].

43 [...].

44 [...].

45 [...]. See also [...], [...].

46 [...].

47 [...] and [...].

- (59) The management of D&M Germany, including [...], was aware of the practices described in this section, often even actively participating in, or steering, those practices.<sup>48</sup>

#### 5.4. D&M Netherlands

- (60) Sales of D&M products in the Netherlands were made directly by D&M Netherlands to independent retailers via [...] sales representatives.

#### 5.5. The relevant conduct in the Netherlands

- (61) Throughout the relevant period, D&M Netherlands pursued a strategy aimed at achieving and maintaining a stable resale price level. That strategy involved frequent intervention and resale-price related requests.<sup>49</sup> Employees of D&M Netherlands, including its management, monitored retail prices and regularly contacted retailers to request them to increase resale prices for Denon, Marantz and Boston Acoustics branded products. The purpose of such interventions was to stabilise or increase the resale price level for D&M products. Such requests included, but were not limited to, newly launched products.<sup>50</sup> Like in Germany, such conduct was also motivated by complaints emanating from certain retailers about resale price pressure exerted by aggressive pricing by other retailers that was not allowing them to sell the Denon, Marantz and Boston Acoustics branded products at the desired higher prices and thereby to achieve the profit margins they had expected. Retailers regularly agreed to the requests made by D&M Netherlands and adjusted their resale prices.<sup>51</sup>
- (62) Unlike in Germany, however, the resale price that D&M Netherlands expected its retailers to adhere to typically equalled the RRP.<sup>52</sup>
- (63) The relevant conduct in the Netherlands occurred in different forms.
- (64) First, in order to achieve internet-wide price increases for its products, D&M Netherlands frequently launched initiatives aimed at "*cleaning up the prices*" in the market. These involved approaching several retailers on the same day and getting them to raise prices more or less simultaneously.<sup>53</sup>
- (65) This is confirmed by the following evidence.
- (66) In the first place, in an identically-worded e-mail of 15 January 2013<sup>54</sup> entitled "D&M enforcement policy January 2013" ("*D&M handhavingsbeleid januari 2013*") and sent separately by two employees of D&M Netherlands to three retailers, D&M Netherlands informs the retailers that, following negative comments about the enforcement policy for Denon, Marantz and Boston Acoustics, D&M Netherlands has prepared a new list of recommended minimum prices that should be applied in future. The retailers are requested to make the adjustments immediately ("*Wij verzoeken u deze aanpassingen direct uit te voeren*") and are told that all dealers must conform as this is essential for the premium image of the brands ("*Alle aanbieders dienen zich te conformeren aan bijgevoede lijst. Deze maatregel is van noodzakelijk belang om het premium imago van de merken te waarborgen*"). The

---

48 [...] See also [...].

49 [...].

50 [...].

51 [...] See also [...].

52 [...].

53 [...].

54 [...].

dealers were given a deadline of midday on 18 January to make the necessary adjustments, and it was made clear that those who did not conform would face "consequences" (*"Voor aanbieders die zich niet conformeren aan bijgaand verzoek zal dit consequenties hebben"*).

- (67) In the second place, on 30 and 31 May 2013 [...] of D&M Netherlands sent e-mails<sup>55</sup> to three other retailers with information on a number of products for which the prices should be adjusted. He informs two of the retailers that all dealers are being asked to adjust their prices by midday the next day and that it would be in their interest to raise prices to increase margins (*"Morgen om 12:00 willen wij alle partijen aangepast hebben. Dit is natuurlijk ook in jullie belang om weer marge te kunnen maken."*). Following a reminder the next morning, one of the retailers confirms that it has adjusted prices for most products.
- (68) In the third place, in an e-mail of 9 July 2013 sent by D&M Netherlands to retailer A<sup>56</sup>, a list of products and their respective prices is attached. D&M Netherlands explains that it has started a *"major clean-up operation"* with respect to Denon products (*"we zijn met Denon weer gestart aan een grote schoonmaak actie op het net"*) and that it wants retailer A to help in this effort (*"waar ik vanzelfsprekend ook jouw hulp voor wil inschakelen"*). With respect to the prices that it provides in the list, D&M Netherlands asks retailer A to use these *"recommended resale prices"* for the listed products (*"zou je bij de volgende producten de volgende adviesverkoopprijzen willen hanteren"*). For retailer A, this is meant not only as a recommendation, but as a request to adhere to the indicated prices.<sup>57</sup> D&M Netherlands further states that it has also asked *"all others"* to do the same.
- (69) Second, D&M Netherlands issued individual resale-price related requests.
- (70) This is confirmed by the following evidence.
- (71) In the first place, in two separate e-mails<sup>58</sup> dated 20 January 2012, [...] of D&M Netherlands asks two retailers to adjust prices for certain Boston Acoustics speakers. One of them replies on 23 January 2012 that it has adjusted the prices (*"Prijzen zijn aangepast."*).
- (72) In the second place, in a series of e-mails between 27 and 29 September 2013<sup>59</sup> entitled *"adjustment Denon"* (*"aanpassingen denon"*) sent by an employee of D&M Netherlands to retailer A, the employee states that he *"really urges the retailer to adjust and fix the strategic product"* (*"Ik wil je nu echt dringend verzoeken de strategische producten aan te passen en vast te zetten"*). Moreover, to emphasise his point, he states that he is tired of having to come back to retailer A because of this issue (*"Ik wil hier niet constant op terug moeten te komen"*). The employee of D&M Netherlands then points to one Marantz and three Denon product models that his request particularly concerns and the resale prices that he wants to see for these products. Retailer A replies that it has adjusted the prices (*"alles aangepast"*).
- (73) In the third place, in an e-mail of 6 February 2014<sup>60</sup>, D&M Netherlands requests retailer F to adjust the prices of two Denon AV receivers and a Marantz Blu-ray

---

55 [...].

56 [...].

57 [...].

58 [...].

59 [...].

60 [...].

player as soon as possible ("*prijzen svp zsm aanpassen*"), noting that retailer F is the last online retailer to move, and that he hopes that they will move swiftly ("*Ik heb dit gisteren ook al gevraagd. Je bent de laatste online, dus graag met spoed!*"). Later D&M Netherlands thanks retailer F for "switching" ("*Bedankt voor het schakelen*").

- (74) Third, D&M Netherlands applied pressure in the form of threats and took retaliatory measures vis-a-vis retailers that undercut desired price levels, if considered necessary to ensure adherence to the desired price levels.
- (75) This is confirmed by the following evidence.
- (76) In the first place, in a series of similar e-mails dated 30 May 2011<sup>61</sup> entitled "*internet prices*" ("*prijzen internet*") and sent by an employee of D&M Netherlands to two retailers, the two retailers are asked to adjust their prices for particular listed products to D&M's RRP ("*Zou je alsjeblieft de onderstaande prijzen willen aanpassen naar SRP. We hebben andere dealers ook gevraagd dit te doen*"). The employee also explains to the two retailers that he has asked other dealers to increase their prices for two Marantz AV receivers ("*Tevens hebben we de dealers gevraagd de prijzen van de [...] en [...] op te waarderen naar respectievelijk €.599, -en €.799,-!!*"). He goes on to say that all dealers that "do not follow" will have their "authorised Marantz logos" removed from a price comparison site and that deliveries will be "stopped" until the situation is resolved ("*Ter info. Als dealers dit niet opvolgen zullen we het logo op [...] verwijderen en stoppen met leveren totdat de situatie is opgelost*").
- (77) In the second place, in an e-mail<sup>62</sup> of 29 November 2013 sent by D&M Netherlands to retailer A, a screenshot of a price comparison website concerning Denon's [...] A/V receiver is attached showing that retailer A has the cheapest resale price for this product. D&M Netherlands comments in relation to the screenshot stating it does not see any other solution than to "block" retailer A again ("*Zie onderstaande screenprint. Ik zie momenteel geen andere oplossing dan de zaak maar weer op blok te zetten.*"). Retailer A's employee responds by first expressing his understanding that D&M Netherlands has blocked them from supply because retailer A has refused to apply RRP's. He then uses retailer A's standard message to reject resale price-related requests to indicate that he would not concede to the pressure. Retailer A, nonetheless, increases its resale price of the indicated product from EUR 555.00 to EUR 595.00 on 29 November 2013.<sup>63</sup> D&M Netherlands subsequently blocks retailer A from supply in December 2013 in the Netherlands because it has refused to adhere to RRP's and resale-related requests.<sup>64</sup>
- (78) In the third place, in mid-March 2013 D&M Netherlands blocked retailer G because of its failure to comply with resale price-related price requests by D&M Netherlands.<sup>65</sup>
- (79) The management of D&M Netherlands was aware of practices described in this section, often even actively participating in them.<sup>66</sup>

---

61 [...].

62 [...].

63 [...].

64 [...].

65 [...] and [...].

66 [...] and [...].



## 6. LEGAL ASSESSMENT

(80) 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 between independent undertakings

#### 6.1.1. Principles

(81) 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.<sup>67</sup> 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.<sup>68</sup>

#### 6.1.2. Application to this case

(82) 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, D&M Germany and a number of retailers in Germany<sup>69</sup> and, on the other hand, between D&M Netherlands and a number of retailers in the Netherlands.<sup>70</sup>

(83) Via that conduct, D&M Germany and D&M Netherlands expressed their intention to act with retailers in Germany and the Netherlands respectively in such a way as to limit resale price competition.

### 6.2. Single and continuous infringement

#### 6.2.1. Principles

(84) 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

---

<sup>67</sup> 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.

<sup>68</sup> Judgment of 14 July 1972, *ICI v Commission*, 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.

<sup>69</sup> [...]; [...]; [...]; [...]; [...]; [...]; [...]; [...]; [...] and [...].

<sup>70</sup> [...]; [...]; [...]; [...]; [...]; [...]; [...]; [...]; [...] and [...].

the common market, the Commission is entitled to impute responsibility for those actions on the basis of participation in the infringement considered as a whole.<sup>71</sup>

#### 6.2.2. *Application to this case*

- (85) 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 the Netherlands.
- (86) 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 stabilise or increase the resale price of the relevant D&M products in Germany. The same is true of the agreements or concerted practices with retailers in the Netherlands.
- (87) The evidence demonstrates that such resale price maintenance formed part of an overall business strategy implemented respectively by D&M Germany in Germany and by D&M Netherlands in the Netherlands aimed in each case at maintaining or increasing the resale price of D&M products above the price level that retailers in the territory 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 would also fall, generating a wider price decrease in the market.
- (88) Even price decreases which were considered occasionally necessary to react to market conditions were frequently based on instructions by D&M Germany and D&M Netherlands, indicating clearly a particular date and time to achieve a "controlled" price decrease.
- (89) The existence of two single and continuous infringements is further supported by the fact that the conduct of D&M Germany and D&M Netherlands 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*

- (90) 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.
- (91) 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.<sup>72</sup> That case-law arises from the fact that certain types of coordination

---

<sup>71</sup> 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, 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.

<sup>72</sup> 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.

between undertakings can be regarded, by their very nature, as being harmful to the proper functioning of normal competition.<sup>73</sup>

- (92) Consequently, certain collusive behaviour, such as resale price maintenance,<sup>74</sup> 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 the purposes of applying Article 101(1) of the Treaty to prove that they have actual effects on the market.<sup>75</sup>

#### 6.3.2. *Application to this case*

- (93) The Commission concludes that, through the conduct described in section 5, D&M Germany and D&M Netherlands restricted the ability of retailers in, respectively, Germany and the Netherlands to determine their resale prices independently.

- (94) Such conduct, by its very nature, restricts competition within the meaning of Article 101(1) of the Treaty.<sup>76</sup>

- (95) Price monitoring and adjustment software programmes may multiply the impact of price movements. Consequently, by closely monitoring the resale prices of its retailers and intervening with the few lowest pricing retailers to get their prices increased, D&M Germany and D&M Netherlands could avoid price erosion across, potentially, its entire (online) retail network.

### 6.4. **Effect on trade between Member States**

#### 6.4.1. *Principles*

- (96) 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.<sup>77</sup>

#### 6.4.2. *Application to this case*

- (97) The Commission concludes that the conduct of D&M Germany and D&M Netherlands was capable of affecting trade between Member States.

- (98) During the relevant period, retailers in Germany and retailers in the Netherlands were selling D&M products in a selective distribution system operated across the EEA to customers in various Member States.<sup>78</sup> As described in recital (58), in one instance, a

---

<sup>73</sup> 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.

<sup>74</sup> 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.

<sup>75</sup> 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.

<sup>76</sup> See case law referred to in footnotes 73 and 74 above.

<sup>77</sup> Judgment of 15 March 2000, *Cimenteries 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.

<sup>78</sup> See for example Doc ID 89, Proc IDs 65, 66.

retailer in the Netherlands was blocked by D&M because the retailer sold in Germany at low resale prices.<sup>79</sup>

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

### *6.5.1. Principles*

- (99) Pursuant to Article 4(a) of the Vertical Block Exemption Regulation ("VBER"),<sup>80</sup> 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.
- (100) 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, 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*

- (101) The Commission concludes that the conduct of D&M Germany and D&M Netherlands was neither exempted under the VBER nor met the conditions for exemption provided for in Article 101(3) of the Treaty.
- (102) The conduct of D&M Germany and D&M Netherlands was not exempted under the VBER because that conduct had as its object to restrict the ability of retailers of D&M products to independently determine their sale price.
- (103) The conduct of D&M Germany and D&M Netherlands 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**

- (104) The Commission concludes that the single and continuous infringement in Germany started on 19 April 2011<sup>81</sup> and ended on 19 January 2015.<sup>82</sup>
- (105) The Commission concludes that the single and continuous infringement in the Netherlands started on 30 May 2011<sup>83</sup> and ended on 6 February 2014.<sup>84</sup>

---

<sup>79</sup> In this case, D&M Germany approached D&M Netherlands and asked it to intervene in order to achieve a price increase of a Dutch retailer, [...] as well as [...].

<sup>80</sup> 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.

<sup>81</sup> See recital 38 and [...] and [...].

<sup>82</sup> See recital 47 and [...].

## 8. LIABILITY

### 8.1. Principles

- (106) 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.<sup>85</sup>
- (107) 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.
- (108) 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 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.<sup>86</sup>
- (109) 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 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.<sup>87</sup>
- (110) A single undertaking may also be derived from a contractual relationship entered into by two companies that are distinct legal entities. This can be the case of agency agreements, where the agent is vested with the power to negotiate and/or conclude agreements on behalf of the principal. If an agent works for the benefit of his principal he may in principle be treated as an auxiliary organ forming an integral part of the latter's undertaking, who must carry out his principal's instructions and thus, like a commercial employee, forms an economic unit with that undertaking.<sup>88</sup> Two conditions must, however, be met: (i) the agent must not take on the financial risks associated with sales or the performance of the contracts entered into with third parties; and (ii) an agent must not undertake, as an independent dealer, a very

---

<sup>83</sup> See recital 76 and [...].

<sup>84</sup> See recital 73 and [...].

<sup>85</sup> Judgment of 13 June 2013, *Versalis v Commission*, C-511/11 P, EU:C:2013:386, paragraph 51.

<sup>86</sup> Judgment of 29 September 2011, *Elf Aquitaine v Commission*, C-521/09 P, EU:C:2011:620, paragraph 54.

<sup>87</sup> Judgment of 10 September 2009, *Akzo Nobel and Others v Commission*, C-97/08 P, EU:C:2009:536, paragraph 60.

<sup>88</sup> Judgment of 15 July 2015, *voestalpine and voestalpine Wire Rod Austria v Commission*, T-418/10, EU:T:2015:516, paragraph 138.

considerable amount of business for its own account on the market for the product or service in question.<sup>89</sup>

## **8.2. Application to this case**

- (111) The Commission concludes that, having regard to the body of evidence and the facts described in section 5, D&M'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:
- (a) D&M Germany for its direct participation in the single and continuous infringement in Germany and for the conduct of its sales agents in Germany. The sales agents acted as auxiliary organs acting in the economic interest, and under the instructions, of D&M Germany. They also neither (i) took on any financial risks associated with the performance of the contracts entered into with third parties nor (ii) undertook, as an independent dealer, a considerable amount of business for their own account;
  - (b) D&M Netherlands for its direct participation in the single and continuous infringement in the Netherlands;
  - (c) D&M Holdings Inc. as jointly and severally liable with D&M Germany for the single and continuous infringement in Germany as the parent company of its wholly-owned subsidiary D&M Germany;
  - (d) and D&M Holdings Inc. as jointly and severally liable with D&M Netherlands for the single and continuous infringement in the Netherlands as the parent company of its wholly-owned subsidiary D&M Netherlands.

## **9. REMEDIES AND FINES**

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

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

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

- (114) 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.
- (115) 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

---

<sup>89</sup> Judgment of 15 July 2015, *voestalpine and voestalpine Wire Rod Austria v Commission*, T-418/10, EU:T:2015:516, paragraphs 139-141.

the principles laid down in its Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation (EC) No 1/2003<sup>90</sup> ("Guidelines on fines").

- (116) 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.<sup>91</sup> The basic amount consists of percentage of the value of sales up to a maximum of 30%<sup>92</sup>, depending on the degree of gravity of the infringement, multiplied by the number of years of the infringement.<sup>93</sup>
- (117) 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.<sup>94</sup>
- (118) 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.
- (119) 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.<sup>95</sup>
- (120) The Commission pays particular attention to the need to ensure that fines have a sufficiently deterrent effect.<sup>96</sup>

### **9.3. The intentional or negligent nature of the infringement**

- (121) 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*

- (122) Based on the principles outlined in section 9.2. and the information provided by D&M, the Commission concludes that the products taken into consideration for the value of sales are all Denon, Marantz and Boston Acoustics branded audio and video consumer electronics products as they were the products that were affected by the strategy of D&M Germany and D&M Netherlands aimed at stabilising or increasing the resale prices in Germany and the Netherlands respectively.
- (123) Accordingly, the Commission takes into account the value of sales of these products made by: (i) D&M Germany in 2014, which was the last full business year of its participation in the single and continuous infringement in Germany; and (ii) D&M Netherlands in 2013, which was the last full business year of its participation in the single and continuous infringement in the Netherlands.
- (124) Accordingly, the Commission takes into account in relation to the single and continuous infringement in Germany the value of sales of EUR [30 000 000 –

---

<sup>90</sup> OJ C 210, 1.9.2006, p. 2.

<sup>91</sup> Point 13 of the Guidelines on fines.

<sup>92</sup> Point 21 of the Guidelines on fines.

<sup>93</sup> Point 19 of the Guidelines on fines.

<sup>94</sup> Point 13 of the Guidelines on fines.

<sup>95</sup> Point 27 of the Guidelines on fines.

<sup>96</sup> Point 30 of the Guidelines on fines.

55 000 000]<sup>97</sup> and in relation to the single and continuous infringement in the Netherlands the value of sales of EUR [5 000 000 – 20 000 000].<sup>98</sup>

#### 9.4.2. *Gravity*

(125) 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.<sup>99</sup> 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*

(126) 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*

(127) 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 [5 000 000 – 15 000 000] and in relation to the single and continuous infringement in the Netherlands to EUR [1 000 000 – 5 000 000].

#### 9.4.5. *Aggravating or mitigating factors*

(128) 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*

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

#### 9.4.7. *Reduction of the fine in view of cooperation*

(130) In order to reflect that D&M 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%.

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

#### 9.4.8. *Conclusion: final amount of the fine*

(132) 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 6 327 000 and the final amount of the fine to be imposed

---

<sup>97</sup> Sales in Germany for 2014 for the Denon, Marantz and Boston Acoustics brands.

<sup>98</sup> Sales in Netherlands for 2013 for the Denon, Marantz and Boston Acoustics brands.

<sup>99</sup> Judgment of 14 March 2013, *Allianz Hungária Biztosító and Others*, C-32/11, EU:C:2013:160, paragraph 43.



pursuant to Article 23(2)(a) of that Regulation for the single and continuous infringement in the Netherlands amounts to EUR 1 392 000.

HAS ADOPTED THIS DECISION:

*Article 1*

D&M Germany GmbH and D&M Holdings Inc. infringed Article 101 of the Treaty by participating from 19 April 2011 until 19 January 2015 in a single and continuous infringement aimed at restricting the ability of retailers in Germany to determine their resale prices independently.

D&M Europe BV and D&M Holdings Inc. infringed Article 101 of the Treaty by participating from 30 May 2011 until 6 February 2014 in a single and continuous infringement aimed at restricting the ability of retailers in the Netherlands to determine their resale prices independently.

*Article 2*

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

- (a) EUR 6 327 000 on D&M Germany GmbH and D&M Holdings Inc., jointly and severally.
- (b) EUR 1 392 000 on D&M Europe BV and D&M Holdings 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.40469

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 1268/2012<sup>100</sup>.

### *Article 3*

D&M Holdings Inc., D&M Germany GmbH and D&M Europe BV 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:

D&M Holdings Inc., D&M Building, 2-1 Nissin-cho, Kawasaki-ku, 210-8569  
Kawasaki-shi, Kanagawa, Japan

D&M Germany GmbH, An der Kleinbahn 18, 41334 Nettetal, Germany

D&M Europe BV, Beemdstraat 11, Postbus 8744, 5605 LS Eindhoven, the  
Netherlands.

---

<sup>100</sup> OJ L 362, 31.12.2012, p. 1.

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*

