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CASE CARD | 8 June 2022

Asus (AT.40465)

Resale price maintenance

1. CASE SUMMARY

A. Summary of facts

AsusTek Computer Inc. is a multinational manufacturer of computer hardware and electronics products. It is headquartered in Taiwan. The company offers a broad product portfolio, including inter alia notebooks, tablets, desktops, displays, motherboards etc. AsusTek Computer Inc. owned (indirectly) 100% of Asus Germany and Asus France during the relevant period, which is from 3 March 2011 to 27 June 2014 in Germany and from 7 April 2013 to 15 December 2014 in France.

Throughout the relevant period, Asus predominantly sold its products via non-exclusive wholesalers and retailers. Asus' European distribution activities were organized on a country-by-country basis.

Both in Germany and in France, Asus developed and implemented a strategy aimed at keeping prices stable at the level of the recommended resale price ('RRP'). Retailers were aware of Asus' business policy and regularly agreed to maintain the resale prices at, or increase them to, the desired level. Management of Asus Germany resp. Asus France was aware and approved the conduct aimed at controlling and intervening with resale prices of retailers.

To implement its strategy, Asus Germany proactively, systematically and continuously monitored the online resale prices of retailers in order to detect deviations from the recommended resale prices. Price monitoring was conducted in particular through the observation of price comparison websites and internal software monitoring tools. Asus was also informed about low pricing retailers via complaints of other retailers. Asus Germany intervened regularly with retailers in order to increase their resale prices.

Asus Germany furthermore introduced more sophisticated methods to implement its strategy of controlling resale price levels. It for instance launched a premium partner program for certain products. Under the program, retailers that complied with certain qualitative guidelines obtained a bonus. However, the bonus was regularly made conditional on the retailers following the RRP. In respect of certain products, Asus Germany circulated a so-called "online map" with contained a daily updated overview of regional as well as online pricing in Germany. Low pricing retailers were contacted by Asus Germany with the request to increase their prices. Retailers that sold below the desired resale price level were threatened and/or sanctioned by Asus Germany. These threats and sanctions consisted for instance of the withdrawal of the retailer's authorization to use the Asus Online Logo, a cut of

supply, a cut of specific bonuses and exclusion from certain partner programmes.

In pursuit of the same strategy, Asus France regularly intervened with retailers to increase their resale prices and retailers which repeatedly did not observe the desired resale price level were threatened and/or sanctioned.

B. Legal analysis

B.1 - Article 101(1) TFEU – restriction by object / single and continuous infringement

The Commission took the view that the conduct described above constituted one or more agreements and/or concerted practices within the meaning of Article 101(1) TFEU. Still according to the Commission Asus Germany and Asus France thus expressed their intention to act with the retailers in Germany and France respectively in such a way as to limit resale price competition. This conduct amounted to a single and continuous infringement in Germany and in France because the agreements were all in pursuit of an identical anti-competitive objective, namely, to keep prices stable at the level of the RRP. The conduct followed a similar pattern throughout the relevant period, the same individuals were involved and there was a continuity and similarity of method.

The Commission concluded that the conduct, by its very nature, restricted competition within the meaning of Article 101(1) TFEU because it restricted the ability of retailers to determine their resale prices independently. Lastly, the conduct is capable of affecting trade between Member States, meaning that all the conditions for a breach of Article 101(1) TFEU are fulfilled.

B.2 - Article 101(3) TFEU – no block exemption nor individual exemption

The Commission concluded that the conduct could not be exempted under the VBER because its object was to restrict the ability of retailers to independently determine their sale prices (hardcore restriction, Article 4(a) of Regulation 330/2010). The conduct did in the Commission's view also not meet the conditions set out in Article 101(3) TFEU.

B.3 - Fines – reduction of fine because of cooperation

The Commission required Asus to bring the two single and continuous infringements to an end in accordance with Article 7 of Regulation 1/2003 and to refrain from any measure which has the same or similar object or effect. Additionally, the Commission imposed a fine of EUR 58,162,000 on Asus Germany for the conduct in Germany and a fine of EUR 5,360,000 on Asus France for the conduct in France. AsusTek Computer Inc. was held jointly and severally liable for both fines as the parent company.

When determining the amount of the fine, the Commission granted a reduction of 40% under paragraph 37 of the Fining Guidelines. The reduction was granted to reflect the active cooperation by Asus beyond its legal obligation

to do so by providing additional evidence representing a significant added value, acknowledging the infringements and waving certain procedural rights, which resulted in administrative efficiencies.

2. QUOTES

"*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.*" (§27)

"*[…] a premium partner program was launched in Q2 2012. A bonus was provided for retailers that complied with certain qualitative guidelines. This bonus was regularly made conditional on the retailer following he RRP. The prices of the premium partners were monitored by Asus by means of an internal monitoring list […]. The list indicated in red those retailers whose prices were below RRPs. This typically led to actions by Asus, that is to say that employees of Asus would contact retailers and would them to increase the prices and point to the fact that otherwise the quality bonus would be in danger.*" (§37)

"*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.*" (§102)

"*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*." (§103)

"*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.*" (§116)

"*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.*" (§117)

"*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 conduct; and (iii) waiving certain procedural rights, resulting in administrative efficiencies*." (§144)

3. RELEVANT LEGISLATION

- Article 101 TFEU
- Regulation 1/2003
- Regulation 773/2004
- Regulation 330/2010
- Fining Guidelines

4. RELEVANT LITERATURE

On the prohibition of resale price maintenance, see F. WIJCKMANS and F. TUYTSCHAEVER, *Vertical Agreements in EU Competition Law*, Oxford University Press, 2018, §6.50 – 6.88.

5. PRACTICAL SIGNIFICANCE

The *Asus* decision was issued shortly after the conclusion of the Commission's e-commerce sector inquiry. On the same day, the Commission also fined, in separate decisions, consumer electronics manufacturers Pioneer, Denon & Marantz and Philips for imposing fixed or minimum resale prices on their online retailers in breach of EU competition rules. The four decisions marked a renewed interest of the Commission in vertical restraints and maintaining intra-brand competition with a particular focus on restrictions in the context of online sales. In all four cases, the Commission used its 'informal settlement' process to award significant reductions on the fines in return for cooperation