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CASE CARD | 20 June 2022

Pioneer (AT.40182)

Resale price maintenance

1. CASE SUMMARY

A. Summary of facts

The decision relates to the consumer home electronic products of Pioneer, distributed in the following countries via wholly owned subsidiaries or branches during the relevant period: Germany, France, Italy, the United Kingdom, Spain, Portugal, Sweden, Finland, Denmark, Belgium, the Netherlands and Norway (the '12 EEA countries').

During the relevant period, namely from 20 January 2011 to 14 November 2013, Pioneer developed and implemented, through its wholly-owned subsidiaries and branches in the 12 EEA countries, a pan-European strategy to encourage, coordinate and facilitate the close monitoring and maintenance of the resale prices of its Pioneer Home Division products.

Pioneer aimed to prevent lower online resale prices of Pioneer Home Division products by putting pressure on lower-pricing retailers to increase their resale prices (resale price maintenance) and by preventing them from selling cross-border to other EEA countries (restriction on parallel trade).

To achieve this, Pioneer took measures to prevent or slow down the decrease of resale prices charged by online retailers. Pioneer monitored resale prices of retailers and contacted retailers to get them to increase their resale prices and organizing meetings with the retailers to discuss the resale prices. This resale price maintenance also took place on a cross-border basis by simultaneously contacting for instance French and German online retailers to increase their prices of Pioneers products sold in France and Germany. If retailers did not increase their prices after such requests, threats followed. Pioneer applied various forms of retaliatory measures to sanction non-compliant retailers, such as not supplying follow-up orders.

The objective of maintaining resale prices at a certain level in the 12 EEA countries also led Pioneer to impose restrictions on parallel trade by preventing the cross-border sales of Pioneer products by retailers that did not respect the market prices in certain territories. Pioneer Europe identified retailers of lower-priced products through serial number tracking, contacted them and instructed its subsidiaries to prevent parallel trade of products sold in their home country. Pioneer Europe furthermore established "blacklists" with lower-pricing retailers that were selling "outside their territory" to limit sales to such retailers. Retailers on the blacklist were also sanctioned by higher wholesale prices and ultimately by a refusal to supply.

B. Legal analysis

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

According to the Commission, the conduct described above constituted one or more agreements and/or concerted practices within the meaning of Article 101(1) TFEU. Via that conduct, Pioneer expressed its intention to act with the retailers in such a way as to limit resale price competition and restrict parallel trade of Pioneer Home Division products. This conduct amounted to a single and continuous infringement because the agreements or concerted practices were all in pursuit of an identical anti-competitive objective, namely, to achieve an increase or avoid a decrease in the resale price of Pioneer Home Division products. The conduct followed the same pattern throughout the relevant period and in each of the 12 EEA countries.

The Commission took the view 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 and restricted the territories into which retailers could sell Pioneer Home Division products. Price monitoring and adjustment software programmes multiply the impact of price interventions. Consequently, Pioneer, by closely monitoring the resale prices of its retailers and intervening with the few lowest pricing retailers to get their prices increased, could avoid online price erosion across its online retail network. The Commission concluded that the conduct was capable of affecting trade between Member States and between contracting parties to the EEA agreement, meaning that all the conditions for a breach of Article 101(1) TFEU were fulfilled.

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

The Commission concluded that Pioneer's conduct could not be exempted under the VBER because its object was to restrict the ability of retailers to independently determine their sale price (hardcore restriction under Article 4(a) of Regulation 330/2010) and the territories into which they could sell (hardcore restriction under Article 4(b) of Regulation 330/2010). The conduct did in the Commission's view also not meet the conditions set out in Article 101(3) TFEU. The Commission emphasized that there were no indications that the conduct of Pioneer was indispensable to alleviate the repercussions of free riding between online and offline sales channels.

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

The Commission required Pioneer Europe, Pioneer GB Ltd and Pioneer Corporation to bring the infringement to an end in accordance with Article 7 of Regulation 1/2003 and to refrain from any measure with the same or similar object or effect. Additionally, the Commission imposed a fine of EUR 10,173,000 jointly and severally on (i) Pioneer Europe for its direct participation in the infringement and as parent company and legal successor of the wholly-owned subsidiaries involved in the infringement, (ii) Pioneer GB Ltd for its direct participation in the infringement; and (iii) Pioneer Corporation as the ultimate parent company of Pioneer Europe and Pioneer GB

Ltd.

When determining the amount of the fine, the Commission granted a reduction of 50% under paragraph 37 of the Fining Guidelines. The reduction was granted to reflect the active cooperation by Pioneer 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

"*By closely monitoring the resale prices of its retailers, intervening with the lowest pricing retailers to get their prices increased and by preventing cross-border online sales, Pioneer sought to avoid or slow down online price "erosion" across its entire (online) retail network.*" (§134)

"*The agreements or concerted practices described in Section 5 were all in pursuit of an identical anti-competitive objective, namely to achieve an increase or avoid a decrease in the resale price of Pioneer Home Division products."* (§147)

"*The evidence demonstrates that resale price maintenance and restrictions on parallel trade formed part of an overall business strategy implemented by Pioneer aimed at maintaining the resale price of Pioneer Home Division products above the price level that the retailers set independently, either by obtaining their agreement to increase the price or by limiting the territories where the retailers were able to sell. Beyond the individual agreements with particular retailers, via the continuous price monitoring, resale price maintenance and restrictions on parallel trade Pioneer had the objective of avoiding the possibility that, by (automatic) adjustments to the prices of the lowest pricing retailers, market prices of other retailers in the 12 EEA countries would also (automatically) fall, generating a wider price decrease in those countries.*" (§148)

"*Price monitoring and adjustment software programmes multiply the impact of price interventions. Consequently, Pioneer, by closely monitoring the resale prices of its retailers and intervening with the few lowest pricing retailers to get their prices increased, could avoid online price erosion across its online retail network*." (§155)

"*Pioneer's conduct was not exempted under the VBER because that conduct had as its object to restrict the ability of retailers of Pioneer Home Division products in the EEA to independently determine their sale price and the territories into which they could sell.*" (§164)

"*Pioneer's conduct also did not meet the conditions for exemption provided for in Article 101(3) [TFEU]. In particular, there are no indications that the conduct of Pioneer was indispensable to alleviate the repercussions of free-riding between online and offline sales channels.*" (§165)

"*Pioneer Europe, Pioneer GB Ltd and Pioneer Corporation have cooperated with the Commission beyond their*

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 very large extent the Commission's ability to prove the infringement; (ii) acknowledging the infringement of Article 101 [TFEU] and Article 53 of the EEA Agreement in relation to the conduct; and (iii) waiving certain procedural rights, resulting in administrative efficiencies." (§191)

3. RELEVANT LEGISLATION

- Article 101 TFEU
- Article 53 EEA Agreement
- 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 *Pioneer* decision was issued shortly after the conclusion of the Commission's e-commerce sector inquiry. On the same day, the Commission imposed fines on consumer electronics manufacturers Denon & Marantz, Asus and Philips for imposing fixed or minimum resale prices on their online retailers in breach of EU competition rules. The four decisions show a renewed interest of the Commission in vertical restraints and maintaining intra-brand competition. In all four cases, the Commission awarded significant reductions on the fines in return for the companies' cooperation with the Commission.