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EC imposes €875 million cartel fine on car manufacturers for jeopardising the EU's Green Deal and sustainability goals

On 8 July 2021, the European Commission (Commission) imposed a €875 million cartel fine on car manufacturers for restricting competition in emission cleaning for new diesel passenger cars. It is the Commission's first cartel decision ever to be based solely on a restriction of technical development (as opposed to 'classic' cartel behaviour such as price fixing, market sharing, customer allocation or bid-rigging). It is also the most recent example of the Commission using its antitrust enforcement powers against business practices that risk jeopardising the EU's Green Deal and sustainability goals. This has implications for businesses' entire product cycle, ranging from the sourcing of input products and the phasing out of unsustainable products, to the development and manufacture of goods, and their subsequent distribution.

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Businesses across a wide range of industry sectors are under significant pressure from regulators, shareholders and investors to meet the EU's sustainability goals. To achieve this, they will continue to cooperate – and increasingly so – with companies active on different levels of the supply chain and with current or potential competitors. While EU antitrust rules generally permit pro-competitive cooperation between competitors on, for instance, R&D and product development where this leads to efficiency gains (e.g., product improvements, and faster development and marketing of products, due to a combination of skills and assets), the boundary between what is permitted and what is prohibited is often blurry.

The Commission's decision now serves as a clear antitrust warning sign for technical (and other) cooperation that is anti-competitive in nature and not justified by efficiency gains under EU antitrust rules. More than ever, businesses need to focus on antitrust scrutiny and risk management before and while engaging in any sort of technical (or other) cooperation with competing businesses to avoid unwelcome surprises at a later stage.

Our Brussels antitrust team gives an overview of the case and addresses its key implications for EU antitrust enforcement and businesses.

Background

On 8 July 2021, the Commission found that five car manufacturers violated EU antitrust rules by limiting the development of selective catalytic reduction (SCR) technology, which eliminates harmful nitrogen oxide (NOx) emissions from diesel passenger cars through the injection of urea (also called 'AdBlue') into the exhaust gas stream.

More specifically, the Commission found that, over a period of more than five years, the car manufacturers:

- agreed on the sizes of AdBlue tanks and their range until the next AdBlue refill;
- reached a common understanding on the average estimated AdBlue consumption; and
- exchanged commercially sensitive information related to the above.

The Commission concluded that this conduct constituted an infringement by object (i.e., a cartel) in the form of a limitation of technical development as the manufacturers colluded to avoid competition even though they had access to technology that could have reduced harmful emissions to meet the legally required EU emission standards. While EU antitrust rules explicitly prohibit this type of behaviour (Article 101(1)(b) TFEU), it is the first cartel prohibition decision based solely on a limitation of technical development (as opposed to price fixing, market sharing, output limitation or bid-rigging).

Importantly, not all aspects of the manufacturers' SCR system-related technical cooperation were found to raise concerns under EU antitrust rules since they did not involve a restriction of competition and/or were pro-competitive, resulting in efficiency gains. These included the standardisation of the AdBlue filler neck, the discussion of quality standards for AdBlue and the joint development of an AdBlue dosing software platform. As for the producers also cooperating on the development of Otto particle filters (OPF) to reduce harmful particle emissions from the exhaust gases of new petrol passenger cars with direct injection, the Commission did not find sufficient evidence for a violation of EU antitrust rules. Finally, in its press release announcing the decision, the Commission further stated that it had "no indications that the producers coordinated the use of illegal defeat devices to cheat regulatory testing" (implying, though, that such practice would in principle also constitute a violation of EU antitrust rules).

The Commission ultimately imposed a total fine of €875 million. As the whistleblower, one car manufacturer received full immunity and avoided a total fine of approximately €727 million. A competitor was fined €502.3 million but benefitted from a 45 per cent leniency reduction and a 10 per cent discount for settling the case with the Commission. Another car manufacturer was fined €372.8 million, benefitting from a 10 per cent settlement discount. In addition, given the novelty of the theory of harm, the Commission granted a general 20 per cent reduction on all fines.

Key takeaways

- **Technical cooperation can give rise to a 'cartel'**: It is the first time that the Commission has found that collusion between competitors on technical development constitutes a 'cartel' just like pricing fixing, market sharing, customer allocation or bid-rigging. Previously, although EU antitrust rules explicitly prohibit competitors from restricting competition by limiting technical development (Article 101(1)(b) TFEU), the Commission had never found a violation of EU antitrust rules solely on the basis of a restriction of technical development. This has now changed. In a public statement commenting on the case, Executive Vice-President of the Commission Margrethe Vestager further stressed that "if we find that companies have restricted competition in such a way, we will not hesitate to take firm action".

- **Antitrust enforcement as a tool to deliver on the Green Deal**: The decision is the most recent example of the Commission using its antitrust enforcement powers to deliver on its ambitious Green Deal and wider sustainability objectives. In the press release announcing the Commission's decision, Vestager emphasised that "competition and innovation on managing car pollution are essential for Europe to meet our ambitious Green Deal objectives … and this decision shows that we will not hesitate to take actions against all forms of cartel conduct putting in jeopardy this goal".

- **Focus on technical (and other forms) of cooperation between competitors**: Businesses across a wide range of industry sectors are exposed to significant pressure from regulators, shareholders and investors to meet the EU's ambitious Green Deal and sustainability objectives. This has implications for businesses' entire product cycle, ranging from the sourcing of input products and the phasing out of unsustainable products, to the development and manufacture of goods, and their subsequent distribution. To achieve this, they will continue to cooperate – and increasingly so – with companies active on different levels of the supply chain and also with current or potential competitors.

  EU antitrust rules generally permit cooperation between competitors on, for instance, R&D and product development where this leads to efficiency gains (e.g., product improvements, and faster development and marketing of products, due to a combination of skills and assets). This decision now serves as a clear antitrust warning sign for technical cooperation that is deemed anti-competitive in nature and not justified by efficiency gains under EU antitrust rules.

  In practice, however, the boundary between what is permitted and what is prohibited under EU antitrust rules is often blurry. Additional antitrust guidance is highly warranted to give businesses the legal certainty necessary to ensure that antitrust rules and enforcement do not unnecessarily hamper or slow down the meeting of Green Deal and sustainability goals (see below). One can therefore hope that, once published, the Commission's cartel prohibition decision and related guidance letter in which it provided guidance to the parties on those elements of their technical cooperation that did not raise antitrust concerns, will shed more light on the antitrust grey areas. In parallel, the Commission recently opened a public consultation with a view to overhauling its rules on horizontal cooperation between competitors (namely, the Horizontal Block Exemption Regulations for Specialisation[1] and R&D Agreements[2], and the general Horizontal Guidelines[3]) and invited stakeholders to give their

views on several policy options by 5 October 2021. The current rules will expire on 31 December 2022, and in the new rules the Commission intends to provide additional antitrust guidance on technical (and other) cooperation and sustainability initiatives by competitors.

- **Commission's increased willingness to provide informal antitrust guidance**: The case demonstrates the Commission's flexibility in providing businesses with ad hoc, informal antitrust guidance on cooperation between competitors. Under EU antitrust rules, businesses are in principle required to self-assess whether their commercial agreements with other market players are in line with EU antitrust rules, and it has been standard Commission practice for many years to refrain from giving businesses any guidance in that respect. Recently, however, owing to the COVID-19 crisis and related supply chain disruptions, the Commission has shown more flexibility and provided businesses with additional guidance on envisaged cooperations with competitors (so-called comfort letters) to increase legal certainty (see also our recent alert on a cooperation in the pharmaceutical sector). The Commission took the same route in this case and provided the car manufacturers with guidance on those aspects of their SCR system-related cooperation that did not raise competition concerns, such as the standardisation of the AdBlue filler neck, the discussion of quality standards for AdBlue and the joint development of an AdBlue dosing software platform.

  Even though comfort letters are unlikely to become the 'new normal', businesses increasingly turn to the Commission to obtain additional guidance and legal comfort, and it can be expected that the Commission will remain flexible in individual cases, in particular in relation to sustainability initiatives that raise novel issues. In addition, where it is in the public interest, the EU antitrust rules (Article 10 Regulation 1/2003) also allow the Commission to adopt formal decisions finding that antitrust rules are not applicable to a particular instance of cooperation (although this option has not played a role in practice to date). In fact, in a recent speech, Vestager explicitly encouraged businesses to ask the Commission for its antitrust assessment of specific agreements and indicated that "in the right cases, [the Commission] is ready to give individual guidance – or even take a formal decision that an agreement is legal".

- **Be aware of whistleblowing**: The cartel investigation was triggered by an application for immunity from fines by one car manufacturer (followed by an application for reduction of fines by one of its competitors). The Commission's leniency regime continues to be an important tool for cartel enforcement in the EU, and hence remains an attractive tool for businesses to disclose potential wrongdoing even in cases that do not involve 'classic' cartel behaviour such as price fixing, market sharing or bid-rigging. More than ever, businesses need to focus on antitrust scrutiny and risk management before and while engaging in any sort of technical (or other) cooperation with competing businesses to avoid unwelcome surprises at a later stage.

  Even though whistleblowers and leniency applicants can benefit from immunity from fines or significant fine reductions under the EU's leniency regime, they (and other cartel members) remain fully exposed to follow-on damage claims before national courts in the EU. All five car manufacturers will likely be confronted with a multitude of damage claims by suppliers of AdBlue

tanks and/or customers in the years to come. Antitrust authorities in Europe are, however, starting in parallel to look at possibilities of protecting leniency applicants from follow-on damage claims to further increase the attractiveness of whistleblower regimes going forward.[4]

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1. Commission Regulation (EU) No. 1218/2010 of 14 December 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to certain categories of specialisation agreements, *Official Journal, 2010/L335/43*.

2. Commission Regulation (EU) No. 1217/2010 of 14 December 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to certain categories of research and development agreements, *Official Journal, 2010/L335/36*.

3. Commission Communication, Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements, *Official Journal, 2011/C 11/01*.

4. "Mundt touts immunity from damages for leniency applicants", *Global Competition Review, 10 September 2021.*

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