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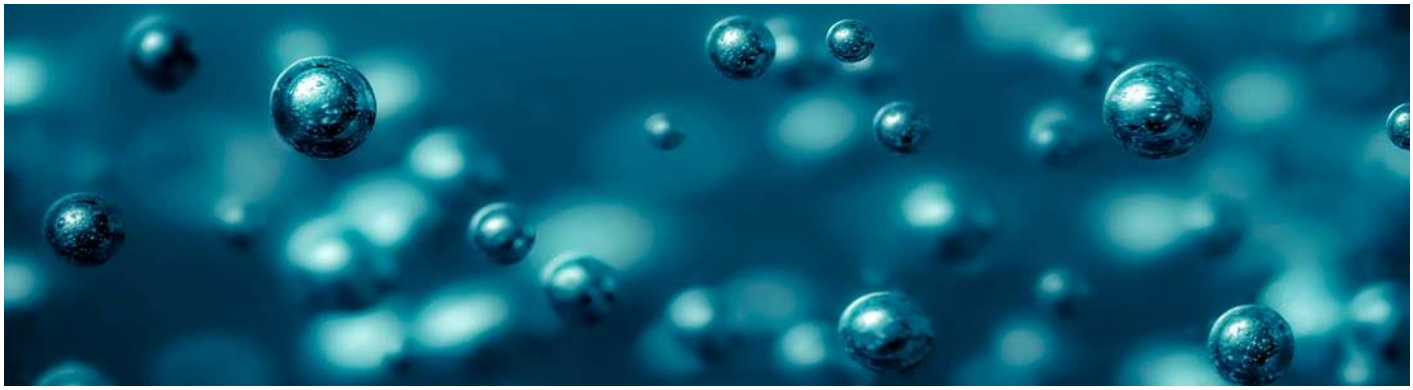

A fine balance – regulators weigh up the extent of permissible collaborations between competitors to achieve sustainability objectives

Antitrust regulators in the UK, Europe and the wider world face a challenge: how far should competitors in any given markets be allowed to collaborate and exchange information between themselves in order to achieve environmental targets or else pursue generally "green" objectives? Inherently, competitor collaborations are something of an anathema to antitrust laws. The orthodox view is that competition, not collaboration, drives market and consumer benefits. But, in the area of environmental sustainability, the picture is rather more nuanced – indeed, there is a burgeoning argument that collaborations can drive investment and innovation which, in turn, can lead to greater sustainability[1]. Thus, competitor collaborations in sustainability are arguably pro-competitive (in certain circumstances) and may assist in helping to meet ambitious climate goals (such as those set out in the EU's Green Deal). How far, then, should competitors be allowed to collaborate in this area and when can cooperation to meet a demonstrated sustainability goal lead to restrictions of competition?

Since the European Commission ("**Commission**") determined in June 2021 that collaborations between competitors on meeting emissions standards amounted to a cartel restricting competition and technical development,[2] this question has become all the more pressing to answer. The new draft Horizontal Guidelines[3] published on 1 March 2022 attempt to do this. This article will explore the extent to which competitor collaborations are currently permitted vis-à-vis environmental sustainability. Companies have previously had little guidance in this area and this article will discuss how much clarity stakeholders currently have and the extent of collaborations that are likely to be permissible for companies in future.

Background: lessons from the Emissions Cartel – "how legitimate cooperation went wrong"[4]

The Emissions decision concerned regular meetings held among three German car manufacturers[5] over a five-year period between 2009 and 2014 to discuss technology relating to selective catalytic reduction

[1] For instance, a joint paper submitted by the Business and Industry Advisory Committee ("BIAC") and the International Chamber of Commerce ("ICC") in 2020 noted that the "solution to sustainability 'collective action' problems is appropriate coordination". Indeed, the paper argues that, without the ability to collaborate on sustainability initiatives, companies will be incentivised to avoid the same due to the costs involved and fears that doing so will forfeit a competitive edge to rivals. Additionally, since companies are inherently reticent of collaborations for fear of competition law infringements, this (according to BIAC / ICC) strengthens the case both for further guidance on the issue and more flexibility when it comes to sustainable collaborations. The report can be viewed at: https://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP/WD(2020)75&docLanguage=En

[2] European Commission. Case AT.40178 – Car Emissions. ("**Emissions**" and "**Emissions Cartel**"). 8 July 2021. Available at: https://ec.europa.eu/competition/antitrust/cases1/202146/AT_40178_8022289_3048_5.pdf

[3] European Commission. Guidelines on the *applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements (Draft)* ***("Horizontal Guidelines")***. 1 March 2022. Available at: https://ec.europa.eu/competition-policy/public-consultations/2022-hbers_en

[4] See statement from Margrethe Vestager in the Commission's press release at: Antitrust: Commission fines car manufacturers (europa.eu)

[5] In full, the German car manufacturers were: (i) Daimler AG ("**Daimler**"), whose corporate group also includes Mercedes-Benz Cars, Daimler Trucks, Mercedes-Benz Vans and Daimler Buses; (ii) Volkswagen Aktiengesellschaft ("**Volkswagen**"), which (at the time of the decision) also owned Audi Aktiengesellschaft ("**Audi**") and Dr. Ing. h.c. F. Porsche Aktiengesellschaft ("**Porsche**") ("**Volkswagen Group**"); and (iii) Bayerische Motoren Werke Aktiengesellschaft ("**BMW**").

("**SCR**") systems for diesel engines[6]. These meetings – which were meant to focus on the best ways for diesel engine manufacturers to meet the applicable EU laws on emissions standards – were deemed by the Commission to have amounted to exchanges of sensitive information designed to avoid "over-fulfilment" of these same laws. As such, the Commission deemed this to be a hardcore restriction of competition designed to limit technical development and issued collective fines of €875 million.[7] It was the first time the Commission has ever found discussions around technical standards to be a form of cartel.

To give context, SCR technology is used to limit emissions of Nitrogen Oxide ("**NOx**") from a diesel vehicle's exhaust. It is thus an important tool used by car manufacturers to reduce harmful emissions from automotive vehicles. SCR technology depends on a chemical process using a liquid urea solution commonly referred to as "**AdBlue**". AdBlue is circulated within a diesel vehicle from a special tank, the size of which: (i) impacts the amount of additional space available in these vehicles; (ii) dictates the range diesel vehicles can be driven before the tanks need to be refilled; and (iii) corresponds to the overall efficacy by which NOx emissions are reduced from diesel engines.

In the course of their regular meetings, it became clear that the car manufacturers did not wish the size of the AdBlue tanks in their vehicles to be larger than was necessary. This was for mainly practical and aesthetic purposes as opposed to a desire to limit the effectiveness of the SCR technology per se. However, the Commission determined that the car manufacturers' discussions had the following consequences:

- The manufacturers knew (through their exchanges) that the larger the AdBlue tank was, the more NOx emissions could be reduced. By the same token, they identified the minimum size the AdBlue tank needed to be in order to meet EU environmental standards. As a result, the manufacturers were, in effect, deemed to have followed a mutual NOx-cleaning strategy which had the overt aim to identify how the EU legal emissions standards could be met to the minimum extent necessary. This strategy manifested itself predominantly in discussions around a mooted uniform AdBlue tank size. Introducing a mutually agreed size of AdBlue tank would have allowed diesel vehicles to travel within an effective distance range before being refilled and without compromising on their space capacity, whilst at the same time also sufficiently meeting the EU regulatory requirements vis-à-vis NOx emissions (but no more).

- The parties' internal documents revealed that environmental performance was a parameter on which they competed[8]. As such, the discussions regarding SCR allowed the parties to align their conduct on the market and removed an element of strategic uncertainty between them[9]. In the Commission's words, this conduct was, by its very nature, capable of restricting competition with regard to diesel car characteristics (including NOx-cleaning beyond regulatory requirements) and thereby limited the potential scope of consumer choice in this respect.

In the Commission's view, if Daimler, BMW and the Volkswagen Group had not held these discussions then they would have competed more actively against each other vis-à-vis the quality of emissions standards in their vehicles. This therefore deprived both their customers and society as a whole of a fundamental benefit. As such, the car manufacturers' conduct constituted an agreement which limited

[6] European Commission. Case AT.40178 – *Car Emissions*. 8 July 2021. Available at: https://ec.europa.eu/competition/antitrust/cases1/202146/AT_40178_8022289_3048_5.pdf

[7] The prohibition under Article 101 of the Treaty on the Functioning of the European Union ("**TFEU**") states (*inter alia*) that a restriction on competition can arise in relation to agreements or concerted practices which are intended to *"limit or control production, markets, **technical development** or investment"* (emphasis added).

[8] Paragraph 89 of the Emissions Cartel decision.

[9] Indeed, though this was not mentioned in the Emissions Cartel decision, it is perhaps worth noting that the aesthetic and practical considerations driving the parties' desire to limit the AdBlue tank size – such as increasing storage space in the boot (see paragraph 51 of the decision) – are also arguably traditional parameters of competition between car manufacturers.

technical development under Article 101(b) of the TFEU.

Implications of the Commission's findings

The Commission's finding that the manufacturers' discussions amounted to a cartel (and were thus equivalent to such hardcore restrictions as price fixing or market sharing) was controversial for two reasons:

1. Firstly, though discussions around a uniform AdBlue tank size took place, none of the car manufacturers actually took any measures to implement this in reality. As the Commission acknowledged, actual tank sizes were often well above the uniform size discussed[10]. In some quarters, this meant that the anti-competitive effects of such discussions were hard to discern.
2. Though a market failure had been identified, the Commission was nonetheless drawing a fine (and, importantly, somewhat indefinable) line between discussions which are seen to promote technical standards and those which limit it. The former may qualify for an individual exemption under Article 101(3) of the TFEU, provided that any inherent restrictions linked to agreements, exchanges or practices between competitors are outweighed by their pro-competitive benefits[11]. Even meeting base level environmental standards were argued by some as being net pro-competitive. In any event, there was a distinct lack of guidance at the Commission or national level as to what sort of sustainable collaborations might be permissible in light of the fact that the discussions in the Emissions Cartel were not.

Aftermath of emissions cartel – the need for clarity on sustainable collaborations

Though the overall message of the Commission's decision in the Emissions case was clear – discussions relating to technical or environmental standards cannot be used to mask cartel-related activity – the precedent it set for businesses was far less so. Indeed, the decision triggered calls for the Commission and national competition authorities ("**NCAs**") to provide guidance on how and to what extent competitors would be allowed to collaborate on "green" initiatives. The need for businesses to collaborate to help realise ambitious goals like the EU's net zero target in 2050 and an evident hostility towards information exchanges that breached a largely unspecified threshold was a circle that needed to be squared.

Commission's revised Horizontal Guidelines

On 1 March 2022, the Commission published draft revised guidelines on the applicability of the Article 101 prohibition to horizontal agreements between competitors. Preceding this development, the Commission had carried out a detailed review of the previous guidance and undertaken a public consultation. The urgent need for guidance on permissible sustainable collaborations was something the Commission was very alert to. The upshot is that the Horizontal Guidelines now include a section devoted to sustainability agreements, which are defined as "any type of horizontal cooperation agreement that genuinely pursues one or more sustainability objectives"[12].

Importantly, however, the Commission makes it very clear that any pursuit of a sustainability objective (however genuine) is not enough, in and of itself, to offset any inherent restrictions to competition such intra-competitor agreement may result in[13]. This seems to be a clear nod to the Emissions case. Certainly, where any sustainability agreement seems designed to achieve a "hardcore" restriction (e.g. price fixing), it will be taken by the Commission as

[10] See paragraph 108 of the Commission's decision. Though an unsuccessful cartel is still a cartel, the fact that the uniform AdBlue tank size strategy did not come to fruition in reality reinforced (for some) the controversial issue surrounding the finding of a cartel infringement vis-à-vis discussions centred around environmental standards.

[11] In full, the criteria that must be met under Article 101(3) of the TFEU for a potentially anti-competitive agreement to be considered net pro-competitive are that the agreement in question: (i) contributes to improving the production or distribution of goods or to promoting technical or economic progress; (ii) allows consumers a fair share of the resulting benefit; (iii) only imposes restrictions which are indispensable to the attainment of the relevant pro-competitive objectives; and (iv) does not eliminate competition in respect of a substantial part of the relevant market(s).

[12] Though a genuine pursuit of a sustainability objective will be a factor that the Commission will consider in determining whether "by object" infringement has taken placed. See paragraphs 547 and 559 of the Horizontal Guidelines.

[13] See paragraph 548 of the Horizontal Guidelines.

being inherently anti-competitive unless the parties in question can advance satisfactory evidence to the contrary[14]. Otherwise, if a sustainability agreement contains any *potentially* restrictive effects, these may be offset by the pro-competitive outcomes in particular circumstances. With this in mind, the Horizontal Guidelines note three specified types of sustainability agreements that will (or at least may) be permissible under the Article 101 prohibition:

1. **Sustainability agreements not raising competition concerns[15]**

   As a (fairly obvious) starting point, the Commission notes that any sustainability agreement which is not capable of affecting key parameters of competition such as price, choice or innovation is equally incapable of raising a concern under Article 101[16]. In reality, it seems likely that the number of circumstances where sustainability agreements between competitors will be deemed incapable of affecting competition is still rather limited.

2. **Sustainability standardisation agreements**

   These specific horizontal agreements between competitors involve agreeing mutually applicable sustainability standards[17]. They specify the requirements that producers, traders, manufacturers, retailers or service providers in a supply chain may have to meet in relation to applicable sustainability metrics[18]. Though supply chain standards are generally introduced to remedy a particular market failing, sustainability standardisation agreements can often have positive effects on competition – for instance, by enabling the development of new products or markets, increasing product quality or improving supply / distribution conditions[19].

   The Commission states that sustainability standardisation agreements must not cover up any hardcore restrictions like price fixing, customer allocation or illegal information exchange then – otherwise the arrangement would automatically be deemed a restriction of competition by object. However, even if a sustainability standardisation agreement may result in an anti-competitive effect it can be permissible if it benefits from the criteria set out in a newly introduced safe harbour[20].

3. **Individual exemptions under Article 101(3)**

   The Horizontal Guidelines now provide specific examples as to how parties can apply the self-assessment criteria set out under Article 101(3)[21]

[14] Ibid. Paragraph 560.
[15] Ibid. Paragraphs 551 to 554.
[16] For instance, any sustainability agreement which relates purely to internal conduct (such as measures to eliminate single-use plastics in business premises) will be permissible. Similarly, horizontal agreements relating to the establishment of a database containing information on suppliers and/or distributors who have sustainable value chains will also be outside the scope of the Article 101 prohibition, provided that these databases are not used to exchange competitively sensitive information and do not involve any requirement to purchase from or sell to the suppliers and distributors respectively.
[17] The Commission gives the following examples: (i) agreeing to phase out, withdraw or replace non-sustainable products and processes; (ii) harmonising packaging materials to facilitate recycling and/or reduce waste; and (iii) introducing commonly applicable standards on animal welfare.
[18] See paragraph 562 of the Horizontal Guidelines.
[19] Ibid. Paragraph 568.
[20] A sustainability standardisation agreement will benefit from the new safe harbour where: (i) the procedure for developing the sustainability standard is transparent and all interested competitors can participate in the process leading to the selection of the standard; (ii) the sustainability standard should not impose on undertakings that do not wish to participate in the standard an obligation - either directly or indirectly - to comply with the standard; (iii) participating undertakings should remain free to adopt for themselves a higher sustainability standard than the one agreed with the other parties to the agreement (e.g. they may decide to use more sustainable ingredients in their final product than the standard may require); (iv) the parties to the sustainability standard should not exchange commercially sensitive information that is not necessary for the development, the adoption or the modification of the standard; (v) , effective and non-discriminatory access to the outcome of the standardisation procedure should be ensured. This should include effective and non-discriminatory access to the requirements and the conditions for obtaining the agreed label or for the adoption of the standard at a later stage by undertakings that have not participated in the standard development process; (vi) the sustainability standard should not lead to a significant increase in price or to a significant reduction in the choice of products available on the market; (vii) there should be a mechanism or a monitoring system in place to ensure that undertakings that adopt the sustainability standard indeed comply with the requirements of the standard.
[21] For a horizontal agreement to meet an individual exemption under Article 101(3) of the TFEU it must: (i) result in efficiency gains; (ii) allow consumers a fair share of the resulting benefits; (iii) only contain such restrictions as are indispensable to achieving

to their sustainability agreements in order to determine whether they are compliant. Previously, there was very limited guidance as to how sustainability agreements could meet the Article 101(3) criteria. That is to say, there were no specific examples or criteria that could be applied to collaborations covering sustainability objective. As such, this was perhaps the most anticipated aspect of the new Horizontal Guidelines to see how the Commission would approach this area and whether it would do so more leniently than with other types of collaboration.

In particular, the Commission has provided the following guidance in relation to the application of the Article 101(3) criteria:

a) **Efficiency gains:** The Commission has confirmed the widely-held viewpoint that environmental benefits – such as lower pollution, cleaner production methods and more sustainable products – can constitute efficiency gains.

b) **Indispensability:** Saliently, the Commission has stated that, where companies are obliged to meet certain standards by EU or national laws, any restrictions of competition contained within accompanying sustainability agreements cannot be deemed to be indispensable. This is because the companies in question are already bound to comply with these laws on an individual basis. Thus, it appears that, for a sustainability agreement to benefit from an individual exemption, it must either go beyond existing legal requirements or seek to achieve an entirely separate environmental objective.

c) **Benefits to consumers:** This criterion has received the most guidance and was the area that stakeholders submitted should be expanded the most vis-à-vis sustainability agreements. Generally, for consumers to receive a "fair share of the resulting benefit" this must be in the form of at least one of the following: lower prices, greater level of choice and/or higher quality. In each case, the consumers affected by the restriction(s) and those that receive the resulting benefit(s) must be "substantially the same". Advocates for a more lenient approach to sustainability agreements argue (*inter alia*) that "green" benefits should be taken into account (e.g. lower pollution, less wastage) in addition to traditional measures like lower prices. Further, it has also been argued that, as all consumers are affected by the environment, any resulting benefits affecting consumers in society as a whole should be taken into account and not simply benefits accruing to the consumers directly affected by any given sustainability agreement.

The Commission has not heeded such calls for a more flexible interpretation of the affected consumers. However, it *has* introduced new categories of benefits that can be factored into consideration when applying the individual exemption criteria under Article 101(3). These individual exemptions are divided into three sub-categories:

i. **Individual use benefits** – these refer to sustainability-related improvements to products which directly elevate the consumer experience. For instance, the use of organic fertilisers which improve the taste of perishable foodstuffs or the replacement of plastic with an eco-friendlier material which also increases a food product's shelf-life.

ii. **Individual non-use value benefits** – in essence, these comprise benefits arising from a consumer's enhanced appreciation of a product that go beyond an actual benefit to the consumer itself. For instance, consumers may be willing to pay more for a product that has wider environmental benefits based on their appreciation for this quality. Though this gives the consumer no actual

these same benefits; and (iv) not result in the elimination of competition.

benefit – indeed, it may result in higher prices – this has been deemed by the Commission to be a measurable benefit. This will be measured through (e.g.) customer surveys.

iii. **Collective benefits** – In essence, these relate to benefits which accrue to a wider group of beneficiaries than just the consumers directly affected by a sustainability agreement. For example – and to parody the Emissions case – a sustainability agreement centred around reducing greenhouse gas emissions from cars results in cleaner air not just for the drivers of these cars but for other citizens too. As such, the Commission notes that environmental benefits arising outside the relevant market (i.e. the target market of a sustainability agreement) can be taken into consideration under Article 101(3) provided that they are still significant enough to compensate consumers in the relevant market too[22]. In other words, even if a sustainability agreement results in wide-ranging environmental benefits this will be immaterial insofar as the application of the Article 101(3) criteria is concerned if the consumers directly affected by the restriction(s) do not share in these resulting benefits.

This is perhaps the most difficult consumer benefit to accurately quantify and assess. The market coverage (i.e., geographic scope) of an environmental benefit will often be a key factor. For instance, a sustainability agreement between logging companies active in one EU Member State may create environmental benefits for local citizens but none for consumers in another Member State who ultimately purchase products made from the timber (the price of which has risen as a result of the sustainability agreement). In order to help resolve this ambiguity, the Commission has provided a list of factors that need to be taken into account when assessing collective benefits[23]. Nonetheless, it remains to be seen whether the application of this criteria in reality proves to be an easy task – it is possible that the assessment of whether the beneficiaries in the target market and wider society are "substantially the same" will be a complex one.

d) **No elimination of competition:** The Horizontal Guidelines reinforce the fact that no sustainability agreement (or any other cooperative arrangement) should result in the removal of competition in relation to a substantial part of any given market. That said, a sustainability agreement can benefit from an individual exemption if it affects an entire industry or market so long as the parties in question continue to compete on an important parameter of competition (e.g., price and/or quality of products).

Next steps and the position of other regulators

The Public consultation on the Horizontal Guidelines concluded on 26 April 2022. It will be interesting to see what (if any) substantive changes the Commission makes to this guidance in due course to reflect the responses received before the Horizontal Guidelines are finalised.

More generally, European NCAs and the UK's Competition & Markets Authority ("**CMA**") have also been publishing updated guidance documents and official recommendations as to how competition law can be used to meet environmental goals via permissible collaborations. Perhaps most notably, the Dutch NCA has published guidance that in many places goes much further than the Commission's Horizontal Guidelines – for instance, by stating that environmental benefits can be taken into account if they benefit society as a whole, without the need for the directly affected consumers to necessarily receive a fair share of the resulting benefit.

[22] Paragraph 603 of the Horizontal Guidelines.

[23] For any collective benefits to be taken into account, parties should be able to: (i) describe clearly the claimed benefits and provide evidence that they have already occurred or are likely to occur; (ii) clearly define the beneficiaries; (iii) demonstrate that the consumers in the relevant market substantially overlap with the beneficiaries (or part of them); and (iv) demonstrate what part of the collective benefits occurring or likely to occur outside the relevant market accrue to consumers of the product in the relevant market.

It is notable therefore that some NCAs are taking a much broader approach to sustainability collaboration than the Commission. The resulting inconsistency in approach at the Commission and national levels is something that will likely need be resolved if businesses are to receive complete clarity as to what they can and cannot do to collaborate in the area of environmental sustainability.

Comment

The exact role that competition has to play in meeting environmental targets is still to be firmly resolved. In general terms, it is welcome that the Commission and other competition regulators have acknowledged the growing view (amongst some stakeholders) that collaboration is, and will continue to be, an important factor in achieving sustainability objectives. Guidance like the new Horizontal Guidelines thus marks an important step towards providing clarity to businesses as to what is and isn't permitted vis-à-vis competitor collaborations in this area.

That being said, consensus between different regulators as to how lenient to be in this area remains far off. Indeed, even the Commission itself remains somewhat on the fence. Though the Horizontal Guidelines provide some clarity on its views vis-à-vis sustainability collaborations, a number of ambiguities raised by the Emissions Cartel case remain unresolved. It is likely that businesses will continue to request, if not clearer guidance, then more wide-ranging and bespoke exemptions in the area of environmental sustainability. Time will tell whether the Commission and others heed this call.

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