Uncharted legal territory? – European Commission fines Volkswagen and BMW for colluding on technical development in the area of emission cleaning

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Lena Hornkohl (Deputy Editor) (Max Planck Institute Luxembourg for Procedural Law) and Anna Jorna (General Court)

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On 8 July 2021, the Commission found that Daimler, BMW and the Volkswagen Group (Volkswagen, Audi and Porsche) violated competition law by colluding on technical development in the area of emission cleaning for new passenger diesel cars, fining the latter two a total of €875 million. The current hype regarding competition law and sustainability comes to life here: the Commission highlights the investigation as "an example of how competition law enforcement can contribute to the Green Deal by keeping our markets efficient, fair and innovative". However, naturally, in these cartel proceedings, the Commission did not determine whether the car manufacturers complied with EU car emission standards or cleaned to a higher standard than that required.

Yet, the case is interesting since the Commission (1) – for the first time – imposed a fine for collusion solely relating to technical development, and (2) relied on the calculation parameters of the 2006 fining guidelines but granted a 20% reduction due to the fact that "this is the first cartel prohibition decision based solely on a restriction of technical development". Lastly, this case could give the leniency programme a new push, which has been in a state of hibernation. On the one hand, Daimler received full immunity, thereby avoiding quite a hefty aggregated fine of circa €727 million. On the other hand, follow-on damages actions are still on the table – and leniency does not help (much) here.

Facts and Commission investigation

In October 2017, the Commission carried out inspections at the premises of BMW, Daimler, Volkswagen Group and Audi in Germany, as part of its initial investigation into possible collusion between the car manufacturers on the technological development of passenger cars. Subsequently, on 18 September 2018, the Commission opened a formal investigation into possible collusion between BMW, Daimler and Volkswagen Group on the development and deployment of technology to clean the emission of diesel and petrol passenger cars. The in-depth investigation focused on regular technical meetings, so-called "circles of five" between BMW, Daimler and Volkswagen Group, where they discussed numerous technical topics. However, the formal investigation was only geared to two emissions control systems, namely, (1) the selective catalytic reduction system (SCR-system) concerning the reduction of harmful nitrogen oxide emissions (NOx-emissions) from diesel passenger cars, and (2) the Otto particulate filters (OPF) concerning the reduction of harmful particulate matter emissions from petrol passenger cars.

On 5 April 2019, the Commission announced that it had adopted a Statement of Objections in the procedure against BMW, Daimler and Volkswagen Group. The Commission informed the car manufacturers about its preliminary view that they would have breached EU competition rules in the framework of the "circles of five" technical meetings via colluding to limit the development and roll-out of SCR-systems from 2006 to 2014 and the OPF from 2009 to 2014 for respectively new diesel and petrol passenger cars sold in the European Economic Area (EEA). In February 2021, the case switched from the ordinary procedure to a settlement procedure. Finally, on 8 July 2021, the Commission announced that it found that Daimler, BMW and Volkswagen Group violated competition law by colluding on technical development of SCR-systems between 25 June 2009 and 1 October 2014. The Commission dropped the OPF aspect of the case as it considered that the evidence was insufficient to prove an infringement.

Problematic conduct and Commission assessment

For the first time, the Commission concluded that collusion on technical development, as opposed to price-fixing or market sharing, amounts to a cartel. In particular, Vice-President of the Commission Margrethe Vestager stressed that this case "is about how legitimate technical cooperation went wrong". Technical development cooperations can be pro-competitive and permitted under EU competition law. Here, however, the parties have overstepped the permissible boundaries.

In 2007 European law had already introduced minimum standards for Nox-emissions for cars, which were to be implemented over time. A method to meet these EU regulatory requirements is via the mentioned SCR-systems, which eliminate harmful Nox-emissions from diesel passenger cars through the injection of AdBlue into the exhaust gas stream. Daimler, BMW, and the Volkswagen Group held regular technical meetings to develop SCR-systems for diesel passenger cars to meet these EU regulatory requirements.

However, the Commission found that during these meetings between 25 June 2009 and 1 October 2014, the car manufacturers decided not to compete on exploiting SCR-systems full potential above the minimum standard required by law. In particular, during these meetings, the car manufacturers agreed on AdBlue tank sizes and on the ranges until the next AdBlue refill. They also reached a common understanding on average estimated AdBlue consumption, and they exchanged commercially sensitive information on these elements. The Commission found that these conducts restricted competition on Nox-emissions cleaning effectiveness beyond legal requirements and AdBlue-refill comfort. As such, the Commission concluded that these conducts constitute an infringement by object in the form of a limitation of technical development (restriction of innovation competition). It, therefore, does not help the affected parties that they claim the agreement was not implemented: a by object infringement does not need any implementation.

The infringement of technical development is explicitly mentioned in Article 101(1)(b) of the TFEU (and Article 53(1)(b) of the EEA-Agreement). However, it is the first time that the Commission has relied on the restriction of technical development as a theory of harm. Therefore, the Commission also provided the car manufacturers with a guidance letter on aspects of their SCR-systems related cooperation, which raises no competition concerns, such as the discussion of quality standards for AdBlue or the joint development of an AdBlue dosing software platform.

Fines and other procedural issues

The Commission applied the 2006 fining guidelines and considered the value of the parties' sales of diesel passenger cars equipped with SCR-systems in the EEA in 2013 (the last full year of infringement), the gravity of the infringement and the geographic scope. It granted an additional reduction of 20% since this is the first cartel prohibition decision based solely on a restriction of technical development. Furthermore, Daimler received full immunity, and Volkswagen Group benefited from a 45 % reduction under the leniency programme. In the case of Daimler, full immunity results in avoidance of an aggregate fine of circa €727 million. All parties benefitted from a 10% reduction under the 2008 settlement notice. Finally, Volkswagen Group will have to pay €502 million and BMW €372 in fines.

With the application of a "new" theory of harm, the dispute continued when it came to the setting of the fine. As the first cartel prohibition decision based solely on a restriction of technical development and not on price-fixing, market sharing or output limitation, the question arose how and to what extent can the Commission rely on precedents. Particularly BMW complained that the Commission had entered "uncharted legal territory" by applying the normal 2006 fining guidelines and only giving a 20% reduction due to the novelty of the conduct.

The Commission is ultimately bound by Article 23(2)(a) of Regulation 1/2003 and enjoys a wide margin of discretion within the Regulation limits. In line with the principle of legitimate expectations and legal certainty, the calculations generally (beware of para. 37!) have to be based on the 2006 fining guidelines. The guidelines apply to all kinds of violations, also new or never-been-used-before theories of harm. Price-fixing, market sharing, or output limitation agreements hold a special role in the guidelines. First, they are the most harmful restrictions of competition and therefore, the proportion of the value of sales taken into account for such infringements will generally be set at the higher end of the scale (para. 23 2006 fining guidelines). Second, for those hardcore infringements, the variable amount is increased by an entry fee (para. 25 2006 fining guidelines). These specifications, which were created for hardcore violations, show that the guidelines are not only applicable to them. On the contrary, in the case of hardcore violations, the special hardcore rules in the fining guidelines apply. Other competition law violations are, naturally, covered by the "normal" specifications of the guidelines.

The Commission used the mentioned discretion to grant a reduction due to the novelty that this is the first cartel prohibition decision based solely on a restriction of technical development. A 20% limit remains with regard to the reduction as the Commission rightfully takes into account that Article 101(1)(b) TFEU (and Article 53(1)(b) EEA) explicitly mentions the limitation of technical development. While subparagraphs a-e do not exhaustively regulate what constitutes a restriction in the sense of Article 101(1) TFEU – Article 101(1) TFEU remains relevant for non-typical cases – subparagraphs a-e demonstrate a specific typicality that the Commission now is using in the context of their fining policy.

The case underlines the (still existing) importance of the leniency programme, at least in the context of public enforcement. Daimler's lawyers are pleased to have saved their clients approximately €800 million with the successful leniency application. Too bad for Daimler – the case is not closed yet. Even if public enforcement (except for possible court proceedings) comes to an end here, the parties must prepare themselves for private enforcement, where Daimler's leniency status will be of little use. The Commission's decision also has a binding effect against them. The Damages Directive and its Member State implementing laws give leniency applicants only very limited advantages, such as blacklisting leniency applications from disclosure or special rules for joint and several liability. Follow-on damages actions are actually very likely as the parties acknowledged their participation also by settling, which is important for private action. Considering the Court's interpretation of Article 7 (1) and (2) Brussels Ibis Regulation in the competition sphere, this case will keep Member States courts busy. For the cartelists private enforcement will create another burden, as those companies are already involved in quite a few "Dieselgate" claims throughout Europe.

Comments and outlook

The decision illustrates the fine line between legitimate technical cooperation and illegal collusion and demonstrates how technical cooperation can amount to significant compliance risks. The dividing line is clear: you can cooperate but not limit the full potential of any type of technology!

For practice in other scenarios, determining the fine line between legal and illegal technological cooperation is crucial, particularly also with regard to the EU Green Deal. Vice-President Margrethe Vestager has stated that the guidance letter sent to the parties will become publicly available with the decision. Thus, the letter could serve as guidance for other companies who want to cooperate.

The case also comes in handy, as the European Commission, just in May 2021, published the findings of its evaluation of the horizontal block exemption regulations and guidelines (see the corresponding blogpost here). As respondents identified issues regarding the conditions for R&D cooperation, this case could serve as

a starting point for the delimitation of legal and illegal horizontal cooperations, particularly in the field of technological developments.

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