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QUICK LINKS

European Commission imposes €875m fine on car manufacturers in novel emissions technology cartel

On 8 July 2021 the European Commission announced that it has fined BMW and three companies within the Volkswagen group (Volkswagen, Audi and Porsche) a combined total of €875,189,000 for colluding on technical developments in respect of emission cleaning technologies in diesel cars. Daimler was also found to have participated in the cartel but received full immunity, having notified the Commission of the existence of the cartel.

The decision is the first time the Commission has imposed a fine on undertakings solely for collusion to restrict a technical development (as opposed to price fixing, market sharing or customer allocation) and demonstrates the Commission's intention to deploy competition law enforcement mechanisms as one means by which to achieve the European Union's Green Deal objectives.

BACKGROUND AND DECISION

The collusion identified by the Commission concerned nitrogen oxide emission cleaning technologies in diesel passenger cars. In 2007 the Commission introduced minimum standards for nitrogen oxide emissions (which are harmful to both the environment and human health) to be introduced over time from 2009. Selective Catalytic Reduction (SCR) systems are designed to limit such emissions: they work by applying liquid urea (known as "AdBlue") to the exhaust stream which (if added in sufficient quantities) separates the nitrogen oxide into harmless water and nitrogen gas.

In response to the introduction of these minimum standards, the five car manufacturers liaised to collectively develop these SCR systems so as to ensure conformity with the minimum standards. This co-operation was not itself anti-competitive, and instead *"allowed [the companies]…to bring that technology swiftly to the market, to the benefit of consumers and the environment"* according to a statement by Executive Vice-President Margrethe Vestager. However in the eyes of the Commission this *"legitimate co-operation"* subsequently *"went wrong"*, with the Commission conducting dawn raids of the manufacturers' premises in October 2017 and issuing a Statement of Objections in April 2019 and its prohibition decision on 8 July 2021.

THE DECISION

The Commission found that between 25 June 2009 and 1 October 2014 the car manufacturers had, in a number of technical meetings, exchanged commercially sensitive information in respect of AdBlue tank sizes and ranges, as well as the average estimated AdBlue consumption.

They were also found to have reached agreement, or at least come to a common understanding, in respect of these AdBlue specifications. Put simply, they decided not to

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compete on exploiting the technology to its full potential, beyond the minimum standards required by law.

FINES

This is the first time the Commission has issued a cartel prohibition decision based solely on the restriction of a technical development (as opposed to more traditional cartel infringements such as price fixing, market sharing or customer allocation). The Commission therefore reduced the fines imposed by 20 per cent to reflect the novelty of the decision.

Daimler received full immunity, avoiding a fine of in the region of €727,000,000. The Volkswagen group was fined €502,362,000, which included a 45 per cent reduction to reflect its cooperation under the Leniency Notice. BMW was fined €372,827,000. All parties benefitted from a 10 per cent reduction in light of agreeing to settle with the Commission.

CONCLUSION

As noted above, this is the first time the Commission has found a breach of Article 101 TFEU based solely on the restriction of a technical development. Perhaps more significantly, it demonstrates that the Commission is willing to use competition law enforcement as one avenue to progress its environmental objectives; in the Commission's press release, Vestager stressed that "*competition and innovation on managing car pollution are essential for Europe to meet our ambitious Green Deal objectives…this decision shows that we will not hesitate to take action against all forms of cartel conduct putting in jeopardy this goal*". Nevertheless, and no doubt wanting to avoid its decision having a chilling effect on permissible collaboration between companies in furtherance of legitimate objectives, the Commission has clarified for the car manufacturers the aspects of their cooperation which were permissible under competition law. It will be interesting to see the impact of this decision on companies' appetite to work together towards legitimate objectives in the future.

OTHER DEVELOPMENTS

MERGER CONTROL

EUROPEAN COMMISSION APPROVES AON/WTW TRANSACTION IN PHASE II WITH CONDITIONS

On 9 July 2021 the European Commission announced that it had conditionally approved the acquisition of Willis Towers Watson by Aon. Both parties are leading companies in the markets for commercial risk brokerage services, re-insurance brokerage services, and the provision of retirement, health and welfare and investment services to commercial customers. The two parties, along with Marsh, are referred to as the "Big Three" of the brokerage industry.

The Commission had opened a Phase II investigation on 21 December 2020, expressing concerns that competition would be harmed in the following markets: the provision of commercial risk brokerage services to large multinational customers based in Europe, the provision of treaty and facultative reinsurance brokerage services, and the provision of pension administration services to companies in relation to pension schemes offered to their employees for the market in Germany. The Phase II process lasted approximately 28 weeks in total, with a number of extensions and stoppages of time.

To address the Commission's concerns, Aon offered a substantial remedies package which was accepted by the Commission. This includes a commitment to divest a series of WTW's businesses (including WTW's risk brokerage businesses in France, Germany, Spain, the Netherlands and the UK; its global treaty reinsurance business organisation risk brokerage business in France, Germany, Spain, the Netherlands and the UK; and its global treaty reinsurance business organisation) to Gallagher. It also includes a commitment to sell its German retirement benefits consulting and pension administration business and its German investment solutions businesses. Both of these latter divestments concerning the German businesses are subject to an "upfront buyer" requirement, namely that a binding divestment agreement for each needs to have been concluded with a "suitable purchaser" (as determined by the Commission) before the parties can complete the main transaction.

Regulatory clearance is meanwhile still awaited in a number of jurisdictions worldwide, including in the US, where on 17 June 2021 the Department of Justice initiated proceedings to block the merger.

THIRD MERGER PROHIBITED IN CHINA AND SAMR'S RECENT GUN-JUMPING DECISIONS

On 10 July 2021 the State Administration for Market Regulation (SAMR) blocked HUYA Inc. from acquiring DouYu International Holdings Limited, both game live streaming platforms, in another example of SAMR's tough enforcement stance towards digital platforms. It is the third time a merger has been blocked in China, following prohibitions of Coca-Cola's takeover of Huiyuan in March 2009 and of a proposed operational joint venture, known as the P3 Network, in June 2014.

The case at hand primarily involved two domestic Chinese companies. HUYA is solely controlled by Tencent Holdings, while DouYu is jointly controlled by its founder and Tencent. Tencent (through HUYA) had intended to acquire the entirety of DouYu, which would have constituted a move from joint to sole control.

SAMR analysed HUYA and DouYu's horizontal overlap in the game, entertainment, and e-commerce live streaming and short video markets, as well as the vertical relationships between the parties. SAMR held that the merger would have strengthened Tencent's dominance and restricted competition in the game live streaming market in China (with a combined market share of over 70 per cent in terms of both turnover and number of active users), as well as in the upstream market for online game operation services in China, where Tencent is the largest provider with a market share of over 40 per cent. SAMR was not satisfied that any of the commitment proposals submitted by Tencent would have effectively addressed its concerns. Following a relatively short review period of around seven months, SAMR therefore decided to block the merger.

This is not to suggest, however, that SAMR is no longer willing to clear tech deals. Indeed, on 12 July 2021 SAMR unconditionally approved Tencent's US$3.49bn acquisition of Sogou (which was also one of 22 gun-jumping decisions in the internet sector that was announced by SAMR on 7 July 2021, resulting in US$2.78m of cumulative penalties). Thus, SAMR's recent actions suggest it is not necessarily determined to block tech deals, but rather to subject them to closer scrutiny and to ensure tech firms follow due process in notifying SAMR of their transactions.

ANTITRUST

EUROPEAN COMMISSION UNVEILS NEW DRAFT VERTICAL DISTRIBUTION RULES

On 9 July 2021 the European Commission published a revised draft of the Vertical Block Exemption Regulation (VBER) and accompanying Vertical Guidelines. The VBER exempts vertical agreements that meet certain conditions from the prohibition on restricting competition in Article 101(1) TFEU.

This reform follows a lengthy review process that began in October 2018 and concluded in September 2020 with the publication of a Staff Working Document outlining the conclusions. The Commission found that the market had changed significantly since the adoption of the VBER and the Vertical Guidelines, most notably with the rapid growth of online markets. The Commission subsequently launched an impact assessment which included an open public consultation, a summary of which was published in June 2021.

In brief, the draft seeks to adjust the scope of the VBER safe-harbour, particularly in light of online sales. Among the proposed amendments are the removal from the safe harbour of certain instances of dual distribution and "most favoured nation" clauses. Conversely, the draft extends the safe harbour to other practices regarding online sales (including certain active sales restrictions and indirect measures restricting online sales). In addition, the draft aims to provide up-to-date guidance on online sales and advertising restrictions, as well as to reduce compliance costs by simplifying the existing rules and guidance.

The Commission now invites comments from all interested parties by 17 September 2021, and plans for the rules to come into force in June 2022.

For further details on the substantive changes in the draft, see our blogpost in *The Lens*, our blog dedicated to covering digital developments.

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