THE ANTITRUST CAR EMISSIONS INVESTIGATION IN THE U.S. – SOME THOUGHTS FROM THE OTHER SIDE OF THE POND

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I. INTRODUCTION

The actions of companies inevitably play a central role in tackling climate change. Similarly, the Paris agreement and the United Nations' Sustainability Goals embodied in the UN Resolution 70/1[2] foresee substantial action by the private sector. To produce environmentally relevant effects, companies may occasionally be required to collaborate, which is where antitrust or competition law[3] comes into the picture. Many countries have seen industry-led initiatives setting up complex schemes aiming at making industries or markets more sustainable. In the midst of a climate change crisis and such efforts could and should be part of the global climate change solution. Yet, an antitrust investigation by the US the Department of Justice ("DOJ") launched against a voluntary commitment of Ford, Honda, BMW and Volkswagen regarding emissions standards highlights possible antitrust risk that such initiatives face.

This article was written during and after the DOJ's investigation to determine whether an agreement between Ford, Honda, BMW and Volkswagen to comply with emission standards set out by the state of California was illegal under U.S. antitrust regulations. The case was recently dropped by the DOJ, with the exact reasons for doing so remaining unclear. Despite the end of this investigation, it reignited discussions about the role of competition law where companies act to promote a public good.

This article takes a look at the DOJ's investigation and explores how such a case would be handled under the EU's legal framework. First, it briefly provides the background of the U.S. case, including some political implications and the regulatory landscape in the U.S. regarding emission standards and corporate collaboration. Second, it explains how the case would most likely be handled under in the U.S., before it turns to the EU framework. In this context, the paper focuses on scope and balancing under EU competition law. In general, it highlights the EU's approach to such sustainability initiatives. Although the case was dropped it is important to start a discussion concerning desirable approaches to industry collaboration.

2 "Transforming our world: the 2030 for Sustainable Development" (2015) available at https://sustainabledevelopment.un.org/content/documents/21252030%20Agenda%20for%20Sustainable%20Development%20web.pdf.

3 We use the term competition law and antitrust interchangeably.

II. THE CAR EMISSION STANDARDS CASE

It is best to understand the U.S. antitrust case concerning the car emission standards against its broader regulatory context. This context is marked by a fight between California, which has traditionally had more stringent emission standards for cars – in effect setting the national standard –, and the federal agencies under the Trump administration, who aim at introducing less stringent standards.

When the Trump administration and its Environmental Protection Agency ("EPA") proposed to roll back greenhouse gas emissions standards nationally and limiting California's possibilities to enact stricter standards, California reacted. The California Air Resources Board ("CARB") drafted a stricter yet non-binding emission standard for California and four major carmakers voluntarily agreed to comply with it.[4] Following this announcement, the U.S. DOJ was quick to inform that the federal government was concerned that the it may "violate federal antitrust laws" and "result in legal consequences given the limits placed in federal law on California's authority."[5] Shortly thereafter, the DOJ launched an antitrust investigation into the participating car makers Ford, Honda, BMW and Volkswagen.[6]

On the regulatory level, the proposal was passed and the Trump administration revoked California's authority to set its own emissions limits and instead introduced a nation-wide "One National Program Rule." The One National Program Rule allows the federal government to provide a nationwide uniform fuel economy and greenhouse gas emission standards for cars and other vehicles. The matter has now also reached the courts.

On the one hand California and some likeminded states and cities have launched proceedings challenging the EPA's One National Program Rule and government's auto emissions policy.[7] California's argument is that the Clean Air Act of 1970 provides them with the authority to write air pollution rules that go beyond the federal government's.[8] On the other hand, nine environmental groups sued the Department of Transportation and the DOJ for their efforts to block the environmentally friendly CARB agreement.[9] The issue quickly became political. The Trump administration argued that the automakers and California violated federal antitrust law. Congressional Democrats, along with House Speaker Pelosi, believe that the DOJ investigation is politically motivated, and the CARB agreement itself does no harm (rather, the opposite).[10]

4 See Office of Governor Gavin Newsom, "California and Major Automakers Reach Groundbreaking Framework Agreement on Clean Emission Standards" (July 25, 2019) available at https://www.gov.ca.gov/2019/07/25/california-and-major-automakers-reach-groundbreaking-framework-agreement-on-clean-emission-standards/. https://www.competitionpolicyinternational.com/DoJs-probe-into-four-automakers-impartial-investigation-or-politicization-of-antitrust/#_edn2.

5 Shephardson, David "*U.S. launches antitrust probe into California automaker agreement*," Reuters (September 6, 2019). Available at https://www.reuters.com/article/us-autos-emissions/u-s-launches-antitrust-probe-into-california-automaker-agreement-idUSKCN1VR1WG.

6 Wayland, Michael "*DoJ launches antitrust probe over California emissions deal with automakers*," CNBC (September 6, 2019). Available at https://www.cnbc.com/2019/09/06/DoJ-launches-antitrust-probe-over-auto-emissions-deal-with-california-wsj-reports.html.

7 Petrosoyan, Grant "*DoJ's probe into Four Automakers: Impartial Investigation or Politization of Antitrust?*," Competition Policy International (October 29, 2019). Available at https://www.competitionpolicyinternational.com/DoJs-probe-into-four-automakers-impartial-investigation-or-politicization-of-antitrust/#_edn2.

8 Gendron, Marie "*U.S. launches antitrust probe into California Automaker Agreement*," The Street (September 8, 2019). Available at https://www.thestreet.com/markets/u-s-launches-antitrust-probe-into-california-automaker-agreement-15080868.

9 Petrosoyan, *supra* note 7.

10 *Ibid.*

III. U.S. PERSPECTIVES

While it is unclear why the DOJ dropped the investigation, Makan Delrahim declared that: "Even laudable ends do not justify collusive means […]."[11] Yet, a number of reasons have been suggested. As Hovenkamp notes, the initial aspect one has to consider is whether this is the kind of agreement that could be considered a conspiracy. A car maker that individually agrees to follow a proposal from the state of California might not constitute an antitrust violation. Antitrust only becomes relevant the car manufacturers need to have agreed with each other.[12] However, even if this were the case, the car manufactures might rely on the *Parker*[13] immunity for acts approved by a state.[14]

Similarly, Petrosyan argues that the car manufacturers have a strong defense against any allegations of federal antitrust law violations even if the car companies' agreement is found to be anticompetitive.[15] His main points also relate to the state-action doctrine, or *Parker* immunity, and to the right to petition the government. These establish the principle that state and municipal authorities are immune from federal antitrust lawsuits for actions taken pursuant to a clearly expressed state policy that, when legislated, had foreseeable anticompetitive effects.[16] As such, this immunity also includes private entities as long as the state put sufficient safeguards to ensure that the private entities pursue state's goals rather than their own. Moreover, the *Noerr-Pennington*[17] doctrine allows companies to petition the government in their favor, even if anticompetitive effects result from such government action. Thus, Petrosyan argues that even though the agreement might generally raise antitrust concerns, the involvement of the State of California changes the analysis in favor of the car manufacturers.

According to Hovenkamp,[18] a point to consider beyond antitrust's state action doctrine relates to standards. He argues that a court would have to see the agreement for what it is: a standard setting agreement, a ubiquitous element of the U.S. economy which have been upheld numerous times regarding safety measures. For example, the National Fire Protection Association contains 50,000 companies and organizations that draft model codes for state and local governments to enact.[19] Lastly, he points out the fact that the automakers hold approximately 26 percent of the market for new car sales in the U.S., and the same percentage of the Californian market. Hence, the firms do not dominate the market and any standard between them should be treated even more leniently.[20]

Although the exact reasons for ending the investigation remain unclear, one of the crucial elements seems the State action defense as the Californian regulator seems to have had the ultimate control over the standard.

11 See Delrahim, Makan, "DOJ Antitrust Division: Popular ends should not justify anti-competitive collusion" (USA Today, September 12, 2019) available at https://eu.usatoday.com/story/opinion/2019/09/12/doj-antitrust-division-popular-ends-dont-justify-collusion-editorials-debates/2306078001/.

12 Hovenkamp, Herbert "*Are agreements to Address Climate Change Anticompetitive?*" (September 2019). Available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3451931.

13 *Parker v. Brown*, 317 U.S. 34 (1943).

14 Hovenkamp, *supra* note 12.

15 Petrosoyan, *supra* note 7.

16 *Parker v. Brow*n, 317 U.S. 34 (1943).

17 Stemming from the cases *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961) and *United Mine Workers of America v. Pennington*, 381 U.S. 657 (1965).

18 Hovenkamp, *supra* note 12.

19 See for example *A list of NFPA Codes & Standards* available at https://www.nfpa.org/Codes-and-Standards/All-Codes-and-Standards/List-of-Codes-and-Standards; Hovenkamp, supra note 12.

20 Hovenkamp, *supra* note 12.

IV. THE VIEW FROM ACROSS THE ATLANTIC

So far, we have seen some comments on the U.S. law related aspects. The European Union's approach and messaging with regard to environmental protection or sustainability agreements and competition law contrasts remarkably to Attorney General Delrahim's "[n]o goal, well-intentioned or otherwise, is an excuse for collusion or other anti-competitive behavior that runs afoul of the antitrust laws."[21] The EU's friendly approach to horizontal collaboration can not only be seen in communications, but also in case law, guidelines and seems well encapsulated by a recent comment of Commissioner Vestager:

> [B]usinesses have a vital role, in helping to create markets that are sustainable in many different ways. And competition policy should support them in doing that. […] We know that *sometimes*, businesses can respond to that demand even better, if they get together to agree standards for sustainable products. And as you know […] they can do that, without breaking the competition rules; just as long as they design those agreements so they don't harm competition and consumers. (emphasis added)[22]

The different approach and focus are particularly visible with regard to car emissions. The EU has also launched a car emission investigation. However, the EU investigation does not relate to an agreement that would have reduced emissions, as the U.S. emissions case does. Instead, the Commission is probing whether car makers have conspired in the context of the Diesel emissions scandal to "limit the development and roll-out of emission cleaning technology for new diesel and petrol passenger cars."[23]

From an EU competition law perspective a case like the U.S. car emission standards case would be approached differently: in the EU there would be a high likelihood that such a case would not be caught by competition law in the first place. Even if it were to be subject to the prohibition of Article 101(1) TFEU, there is still the likelihood that such a scheme would be allowed on balance. Thus, we divide our brief exploration of how a case like the DOJ antitrust probe would be handled in the EU into questions of a) scope and b) balancing.[24]

A. Would a DOJ type of case be within the scope of Article 101(1) TFEU?

Commissioner Vestager's speech seems to suggest that EU competition law should support businesses in their work towards sustainability, and that sustainability agreements among competitors are or can be desirable, as long as they do not infringe competition rules[25]. There are a few areas in EU law where agreements such as the U.S. car emission standards case would not be subject to EU competition law. These seem to be primarily so-called loose commitments and certain forms of standard setting.[26]

While loose commitments together with the chapter of the environmental agreements have been deleted from the 2010 Horizontal Guidelines, the 2001 Horizontal Guidelines contained a helpful section on the topic. These explained that an environmental agreement would be unlikely to restrict competition if there were no precise individual obligations for the parties involved or if the parties commit only "loosely" to a sector-wide target.[27] This statement in the guidelines goes back to cases like *ACEA*,[28] *JAMA* and *KAMA*.[29] In *ACEA* and similar cases — *JAMA*

21 As stated by Delrahim in an opinion piece published by USA Today, *supra* note 11.

22 Commissioner Vestager "Competition and sustainability" Speech GCLC Conference on Sustainability and Competition Policy, Brussels (October 24, 2019) https://wayback.archive-it.org/12090/20191129200524/https://ec.europa.eu/commission/commissioners/2014-2019/vestager/announcements/competition-and-sustainability_en (accessed February 13, 2020).

23 See Commission Press Release (April 5, 2019) relating to case AT.40178 https://ec.europa.eu/commission/presscorner/detail/en/IP_19_2008 (accessed February 13, 2020).

24 This distinction is developed in J. Nowag, *Environmental Integration in Competition and Free- Movement Laws* (Oxford University Press 2016) 1-15.

25 As the Commissioner also made clear, it is important that environmental protection or sustainability agreements are not uses as a cover for cartels or other classical restrictions of competition.

26 Surprisingly maybe the U.S. car emission standards case would not be considered to fall under the State action defense in the EU. As these is not available in the case of voluntary action but only where the State forces compliance, see Joined Cases C- 359/ 95P and C- 379/ 95P *Commission and France v. Ladbroke Racing* EU:C:1997:531.

27 Nowag, *supra* note 24; 2001 Horizontal Guidelines (140), para 185.

28 European Commission, *XXVIIIth Report on Competition Policy 1998* (Office for Official Publications of the European Communities 1999), 151; European Commission, *Commission Press Release* (IP/98/865).

29 XXIXth Report on Competition Policy, *supra* note 28, 160.

and *KAMA* — the agreement among the major car producers aimed at reducing the average CO^2 emissions of passenger cars. The important element was that the agreement did not impose a precise obligation on producers regarding the method to achieve this aim, giving them freedom in choosing how to meet the target. Hence, the argument was that "new CO^2 efficient technologies [would be developed] independently and in competition."[30] Thus, EU competition law contains a kind of *de minimis* rule for such cases. Cases are not caught by the prohibition when the inherent restriction on the parties' ability to act freely in the market does not reach threshold of a restriction of competition. While the precise details of the U.S. emission standard case remain unknown it may well be that the U.S. car emission standards case would provide sufficient flexibility in how the companies meet each year's emissions goal to fall under this category, as long as parties do not set up precise individual obligations and compliance controls.

A second important category of cases that do not fall within the scope of Article 101(1) TFEU are standard setting agreements. Such standard setting formats broaden the opportunities for competitors to collaborate. The 2010 Horizontal Guidelines contain a chapter on standardization agreements. Such agreements are in general more leniently assessed than other horizontal agreements as they are presumed to play an important role for technical innovation.[31] Although standards often have a technical focus, the same lenient approach applies to standards with an environmental focus. These also fall under the standardization framework in the 2010 Horizontal Guidelines.[32] The Commissioner in her speech highlighted some of the important elements:

> [I]t's important that every business that wants to take part in defining the standard has a chance to get involved. And every business has to have a fair and equal right to use the standard – so that, for example, any product that meets the requirements for a sustainability label should be able to use that label.[33]

This reasoning – with focus on transparency, accessibility and fairness – is in line with what the 2010 Horizontal Guidelines proclaim. Standard setting agreements that have unrestricted participation, transparent procedures, no obligations to comply, and that comply with the fair, reasonable and non-discriminatory conditions are within the standard setting safe harbor, and thereby outside of Article 101 TFEU.[34] Finally, one might highlight that the involvement of the government does not change the nature of the assessment in the EU.[35]

As far as details are known, the U.S. car emission standards case involved car manufactures voluntarily agreeing to meet the more stringent environmental and emissions standards set by CARB. As such, the terms seem to be set officially by the CARB and thus fit the transparency criterion. Moreover, other car manufactures are not hindered to adopt the standard.[36] As the deal is voluntary and does not set an obligation to comply – and there are also no immediate concerns regarding discrimination or fairness – it seems that such a deal might be well within the EU's safe harbor for standards. In fact, for the legality under EU competition law the involvement of California would not make much of a difference as the same conditions apply to government induced standards as to industry induced ones.[37]

30 XXIXth Report on Competition Policy, *supra* note 28, 151.

31 2010 Horizontal Guidelines, para 308. This is developed in A. Teorell, *A Company's Guide to Environmental Action*, 43-53 (2019), available at http://lup.lub.lu.se/student-papers/record/8976734.

32 See Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements [2011] OJ C11/01 para 257 and 329-330.

33 Commissioner Vestager's speech on Competition and Sustainability, presented at the GCLC Conference on Sustainability and Competition Policy, Brussels (October 24, 2019). Available at https://wayback.archive-it.org/12090/20191129200524/https://ec.europa.eu/commission/commissioners/2014-2019/vestager/announcements/competition-and-sustainability_en.

34 2010 Horizontal Guidelines, para 280.

35 See Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements [2011] OJ C11/01, para 330.

36 See https://www.gov.ca.gov/2019/07/25/california-and-major-automakers-reach-groundbreaking-framework-agreement-on-clean-emission-standards/.

37 See Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements [2011] OJ C11/01, para 330. Also note the difference between U.S. and EU state action defense, see Nowag, *supra* note 24.

B. What kind of balancing would apply if a DOJ type of case would be within the Scope of Article 101(1) TFEU?

If an agreement is within the scope of Article 101(1) TFEU, EU law foresees a number of possibilities that lead to a balancing exercise between the restriction of competition and redeeming factors. In this sense, the balancing might be compared to the U.S. rule of reason, yet important differences remain. First, balancing in the EU would as a matter of principle also be available in the case of hardcore restrictions.[38] Second, *not* all elements of the balancing are carried out in form of an economic assessment. In particular, Article 101(1) TFEU contains a so-called European Rule of Reason.[39] Moreover, in cases where an undertaking or a group of undertakings have been entrusted with a specific task, the balancing under Article 106(2) TFEU does not involve a detailed economic analysis of the pro and anti-competitive effects. While both of these routes remain available in EU competition law, the more commonly available route in form of an efficiency defense under Article 101(3) TFEU is also plausible.

Whenever an assessment is made under Article 101(3) TFEU any procompetitive effects need to be assessed. As part of a net effect evaluation, the quality improvement that the car manufacturers' arrangement might bring about is to be considered and balanced against the restrictions of competition. Even adopting a rather narrow view looking only at the consumer welfare gain for the current final individual consumers an agreement such as the U.S. car emission standards can provide consumer welfare benefits. In particular, any welfare gain for the current individual final consumer in form of quality improvements of the relevant product are seen as consumer welfare benefits.[40]

Qualitative improvements are also those that relate to the environmental quality of the product. An improvement of quality is established by any material or immaterial differences between products that the consumers value[41] and can be established with regard to environmental differences of otherwise homogeneous products.[42] This approach to quality is also supported by the European Court of Justice which held that even physically identical products can be treated differently if their environmental quality differs.[43] Improved quality is a traditional efficiency gain that is taken into account within the well-established framework of competition law cases. Thus, in the EU context, any quality improvement derived from the car manufactures agreement to adhere to environmental and emissions standards set by CARB would need to be considered in the context of the overall competition law analysis of the agreement. Whether these improvements would be sufficient to tilt the balance is a factual question and would need to be answered in the individual case.

V. CONCLUSION

This brief paper examined the U.S. antitrust case concerning the car emission standards adopted by a number of car manufacturers where they agreed to voluntarily comply with California's more stringent emission standards. The paper first briefly outlined the case and the broader regulatory landscape in the U.S. regarding emission standards as well as some of relevant comments on the assessment under U.S. antitrust law. It then turned to explaining how such a case would most likely be handled under the EU framework. It highlighted how the messaging and focus in the EU as regards to competition and sustainability seems rather different to the U.S., before it explored in more detail the legal situation.

From the EU perspective it would be questionable whether such an arrangement would be subject to competition law in the first place, since such agreements might be considered loose commitments. Loose commitments might limit the overall commercial freedom of the parties involved. But as not all limitations of commercial freedom are restriction of competition to the extent that Article 101 (1) TFEU would be engaged. Similarly, standard setting agreements are not subject to the prohibition of Article 101 (1) TFEU when they comply with the EU's safe harbor criteria for standards. However, even when an agreement such the car emission standards case would be subject to Article 101 (1) TFEU, it would not mean that such a behavior is automatically prohibited. Instead a detailed assessment would be required to examine whether any benefits in terms of quality outweigh the competitive harm.

38 As the text of 101 TFEU itself makes clear, all agreements that fall within the scope of Article 101(1) can benefit from the 101(3) TFEU exception.

39 On this concept and its operation with regard to matters of environmental protection, see Nowag, *supra* note 24, 215-224.

40 See Guidelines on the application of Article 81(3) of the Treaty (2004/C 101/08), 33.

41 While the exact criteria of how to measure and treat such improvements in competition law are not always easy to establish, see OECD, "The Role and Measurement of Quality in Competition Analysis" (2013) DAF/COMP(2013)17. A practical assessment in the context of animal welfare is the Dutch Chicken of Tomorrow Case, see "ACM's analysis of the sustainability arrangements concerning the 'Chicken of Tomorrow'" dated January 26, 2015 https://www.acm.nl/en/publications/publication/13789/ACMs-analysis-of-the-sustainability-arrangements-concerning-the-Chicken-of-Tomorrow/ (accessed February 13, 2020).

42 See Nowag, *supra* note 24, 232-234.

43 Case C-2/90 *Commission v. Belgium* EU:C:1992:310, para 33.

While the U.S. case needs to be understood in the broader context of the struggle over emission standards in the federal system of the US, the closure of the case by the DOJ has to be welcomed. One the one hand, the closure of the case means that dangers for comity are averted. It would have gone against the core of comity considerations to find that the car manufactures violated competition law where this seems to be diametrically opposed to long standing and settled practice and case law in the EU. On the other hand, it also has to be welcomed from an internal U.S. perspective. Where the (pro)claimed aim of U.S. antitrust law is to ensure consumer welfare, the relevant standard should be whether actual consumer harm exists and whether such harm is outweighed by quality improvements. From the prospective of the consumer standard, U.S. antitrust law should not (ab)use antitrust to protect the (Trump administration's) federal regulator's authority against the voluntary compliance with more stringent standards suggested by a (Democrat) Californian regulator.

Although this specific case was dropped by the DOJ, similar cases will arise in the future as the fight against the climate crisis continues. It is important to think about how we – in the U.S., the EU, and beyond – can approach competition law and its interaction with industry initiatives that are beneficial to the environment and, by extension, to humanity.

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