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Competition Law, Climate Change & Environmental Sustainability

Simon Holmes, Dirk Middelschulte, Martijn Snoep

Foreword by Frans Timmermans

Introduction by Suzanne Kingston

COMPETITION LAW, CLIMATE CHANGE & ENVIRONMENTAL SUSTAINABILITY

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Introduction by Suzanne Kingston SC

Edited by

Simon Holmes
Dirk Middelschulte
Martijn Snoop

Managing Editor

Sonia Ahmad

The Role of Competition Law in Shaping the Future of Road Transportation

IAN ROSE*

Volvo Truck Corporation

I. Introduction

Road transport is considered to be a major source of greenhouse gas emissions, reportedly producing around 15% of the EU's CO₂ emissions.¹ Accordingly, the automotive sector has a highly significant role to play in achieving climate objectives.

Experience from previous cooperation and recent initiatives in the automotive sector show that with some “thinking outside the box”, environmental sustainability objectives can be pursued by companies working together, while keeping them vigorously in the “competitive game”.

The following are some examples of horizontal commitments, sustainability partnerships and collaboration projects. These show that, despite the efforts already taken, caution around going further persists. The examples illustrate that companies would greatly benefit from guidance, workable safe harbours and enhancements

* Vice President, Compliance, Volvo Truck Corporation. The views expressed in this article are personal. The author would like to thank the following for their valuable input in the preparation of the article: Patrik Hemberg (General Counsel, Volvo Bus Corporation); Eva Bennis (Director Responsible Purchasing, Volvo Group Purchasing); Magnus Prick (Corporate Legal Counsel, AB Volvo (publ.)); and Frank Wijckmans and Herlinde Burez (Partners, Contrast).

¹ Commission, “Environmental aspects of the automotive industry” <https://ec.europa.eu/growth/sectors/automotive/environment-protection_en>.

to investigation processes in managing their competition law risk by engaging in cooperation. Such guidance, safe harbours and process enhancements would enable companies to take even bolder steps and to contribute further to Europe's climate goals and to satisfying the pressing needs of the planet.

II. Horizontal Commitments

The 2001 version of the guidelines on the applicability of Article 81 of the EC Treaty to horizontal cooperation agreements contained a specific chapter on “environmental agreements”.²

The guidelines identified environmental agreements as generally not falling within the prohibition of anticompetitive agreements contained in what is now Article 101(1) TFEU, where no precise individual obligation was placed on the parties, or if the parties “loosely committed” to contributing to the attainment of a sector-wide environmental target.

In the case of such a “loose commitment”, the competition law assessment would focus on the discretion left to the parties as to the means that were technically and economically available in order to achieve the agreed environmental objectives. The more varied such means, the less appreciable would be the potential restrictive effects.

Prior to the 2001 guidelines, the Commission had considered, in three cases concerning, respectively, European, Japanese and Korean car manufacturing companies, the application of “loose commitments” by industry players, to achieve an industry-wide target. In each case, the trade association representing its members, ACEA for Europe, JAMA for Japan and KAMA for Korea, entered into commitments to reduce CO₂ emissions from new passenger cars in place of legislative measures.³

In the case of ACEA, the commitments were aimed to achieve an *average target* of 140g CO₂/km for new passenger cars by 2008, representing a reduction of 25% from 1995 levels. This would be monitored by the Commission and the Member States using publicly available data, and the Commission would consider binding legislation if the target was not achieved. Notably, the commitments did not impose *individual targets* on any manufacturer. Each ACEA member was free to apply more stringent or less stringent emissions levels, and they would develop new CO₂-efficient technologies independently and in competition with each other. It was only if the average target were not met that legislation would be considered.

2 Guidelines on the applicability of Article 81 of the EC Treaty to horizontal co-operation agreements [2001] OJ C3/2.

3 ACEA (Case COMP/37.231); JAMA (Case 37.634); KAMA (Case 37.612).

The Commission found that the ACEA commitments satisfied the Community's strategy on CO₂ emissions from cars, but that the Commission could not take a final position until the commitments had been notified under Article 85 of the Treaty (as it then was). It was only after notification by ACEA and review by the DG COMP that the Commission stated its view that the commitments did not restrict competition under Article 85(1). Accordingly, the Commission reported that it had sent a "comfort letter" to ACEA, stating that the Commission would not take any further action.

In *JAMA* and *KAMA*, the commitments were similar, aiming to achieve an *average* target of 140g CO₂/km for new passenger cars sold in the EU by 2009. The monitoring would be undertaken by the Commission and by JAMA and KAMA, rather than by the Member States as in *ACEA*. As in *ACEA*, the manufacturers would seek to achieve the average target in competition with each other, but it was added that the monitoring reports would not refer to individual companies' achievements, "in order not to distort competition between the members". As in *ACEA*, the Commission took the view that the commitments did not restrict competition under Article 81(1) of the EC Treaty (as the prohibition had become), and the Commission reported that it had sent "comfort letters" to JAMA and KAMA accordingly.

The commitments were accompanied by other activities to reduce CO₂ emissions from passenger cars, including raising consumer awareness through publication of information on fuel efficiency and fiscal measures such as relating car taxes to emissions. The success of such measures depended, respectively, on consumer sensitivity to the environmental impact of their purchasing decisions and on how Member States applied the discretion they have in tax matters.

ACEA, *JAMA* and *KAMA* show that industry commitments on environmental targets can be agreed, using the good offices of industry trade associations, which complement activities such as fiscal measures and consumer information campaigns, without infringing the prohibition of anticompetitive agreements under competition law. The cases show that there is a need to ensure that individual companies remain free to choose the means by which they contribute to the achievement of the targets, and that exchange of information to monitor achievement does not create a market transparency that could have an anticompetitive effect. Pressure on each manufacturer to "do its bit" in the affected market, and therefore avoid "free riding", comes from the threat of legislation if the average target is not achieved.

It is, however, important also to ensure that commitments are entered into on a global level, to avoid distortions of competition in world markets, but that is a matter for international diplomatic efforts.

In the event, the Commission found only limited success of the measures, reporting, "between 1995 and 2004 average emissions from new cars sold in the EU-15 fell by 12.4%, from 186g CO₂/km to 163g CO₂/km. Over the same period new cars

sold in the EU became significantly bigger and more powerful... the voluntary approach has delivered a solid CO₂ reduction but has not been as successful as hoped.”⁴ As a result, and since the Commission found that the 120g CO₂/km target would not be met by 2012 without additional measures, legislation to reduce emissions was proposed, alongside further financial and consumer-information measures.

The question then arises, should the trade associations and their members have been allowed to go further in collaborating to reach the targets? Would manufacturers have been able more easily to reach the targets, if they had been able to develop new CO₂-efficient technologies together and to exchange more information?

The commitments certainly seem to err on the side of caution, choosing to fall outside the prohibition of anticompetitive agreements altogether, rather than allowing for any potential restriction of competition that did not eliminate competition and that was manifestly outweighed by the environmental and, therefore consumer, benefits. The then-existing notification and “comfort letter” procedure would have enabled the Commission to reach such a conclusion, and the manufacturers thereby to have certainty. However, it seems that even with such a notification and comfort letter procedure, bolder steps were difficult to take.

The notification-and-comfort-letter procedure was consigned to history on 1 May 2004, with the coming-into-force of Regulation 1/2003.⁵ Companies were left to self-assess their agreements, with only a limited ability to obtain “informal guidance” from the Commission in cases of “genuine uncertainty” because of “novel or unresolved questions” for the application of EU competition rules.

The concept of the comfort letter was, however, revived on a temporary basis by way of a Commission Communication in relation to the COVID-19 pandemic.⁶ This allowed, for example, pharmaceutical manufacturers to share, under conditions, certain information on the availability of medicines, which might normally be considered an exchange of commercially sensitive information contrary to competition law. The Communication stated, in its first paragraph, “the COVID-19 outbreak is a severe public health emergency for citizens and societies. It is also a major and unprecedented shock to the global and Union economies.”

Short of a comfort letter, it was reported that ACEA had requested informal guidance in June 2020 from the Commission about ways in which manufacturers could support suppliers in a cooperative way, in order to safeguard the future

4 Commission, “Questions and answers on the proposed regulation to reduce CO₂ emissions from cars” (Memo 07/597, 19 December 2007).

5 Council Regulation (EC) 1/2003 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty [2003] OJ L1/1.

6 Temporary Framework for assessing antitrust issues related to business cooperation in response to situations of urgency stemming from the current COVID-19 outbreak [2020] OJ C116/1.

of suppliers hit by the pandemic.⁷ The Commission provided such guidance in September, although this could have taken longer if ACEA had sought a full comfort letter rather than informal guidance.

It was reported that the guidance confirmed that the envisaged cooperation would raise competition law compliance concerns in “normal times”, and that the Commission had made various recommendations to mitigate the risks. These included open access to the discussions and maintaining the participants’ freedom to act independently, as well as a suggestion that “clean teams” should be put together to have access to information about suppliers, which would not include those who would take part in commercial negotiations in the future. In any event, commercially sensitive information such as prices and volumes should not be shared, and an independent third party should be used to aggregate data.

Some might argue that the climate crisis represents a similar emergency to the pandemic and should be viewed as a similar shock. If that is the case, then the argument in favour of a similar system of comfort letters, even a system that addresses only the path to achieving industry commitments, rather than individual agreements between specific manufacturers, could be compelling. Even informal guidance of the type that it is reported ACEA received from the Commission would be helpful.

III. Sustainability Partnerships

For the last 10 years, the major international automotive manufacturers have been working together in an association, “Drive Sustainability”, moderated by CSR Europe, which is a European business network for Corporate Sustainability and Responsibility.⁸ Lead partners include the major global automotive manufacturers, with a “common strategy for a circular and sustainable automotive supply chain”.

The automotive manufacturing industry is characterised by its highly complex and diverse supply chain. Suppliers consist of businesses from major component manufacturers supplying a range of products, to small, specialist manufacturers supplying a limited but essential range. The businesses are located throughout the world and, where suppliers sit below the “Tier 1” suppliers who engage directly with the automotive manufacturers, they may have very limited contact with the manufacturers.

Automotive manufacturers may find it difficult to establish and forge direct relationships throughout the supply chain, while the achievement of sustainability

7 “Carmakers benefit from ‘soft’ EU cooperation guidance to weather Covid-19” (*MLex Comment*, 11 November 2020).

8 Drive Sustainability <www.drivesustainability.org/>; CRS Europe <www.csreurope.org/>.

goals requires the engagement of all players in the chain and support of them by the manufacturers. Sharing knowledge, capacity-building and supporting suppliers with a consistent approach in areas such as monitoring and reporting might be said to be important elements of such engagement.

The Drive Sustainability partners believe that in order to enhance supplier sustainability and to put in place the measures necessary to achieve sustainability, it is essential that they collaborate. This is echoed by the US organisation, the Automotive Industry Action Group (AIAG).⁹

Achieving carbon neutrality is part of the Drive Sustainability Action Plan, in addition to other activities within “sustainability”, including business ethics and human rights. Activities in the period 2020–2025 to achieve carbon neutrality are centred around standardisation. The aim is to agree on and promote the use of a common standardised method and tool, to measure and reduce emissions in the supply chain, and “impact key projects”, with the aim to reduce such emissions.

The competition law compliance issues around standardisation are tried and tested, and they are subject to case law and guidance. The indicators to ensure that standardisation agreements do not, as a starting point, infringe competition law are that participation should be unrestricted; the procedure for adopting the standard should be transparent; there should be no obligation to comply with the standard; and access to the standard should be provided on fair, reasonable and non-discriminatory (FRAND) terms.¹⁰ While these indicators are not the definitive rules for compliant standardisation, any different approach to the standardisation process and access to the standard creates legal uncertainty.

How “impact key projects” fit within competition law compliance requirements is, however, not as clear. Nonetheless, they are a very important element of the range of activities, which together can contribute to tackling the climate crisis. Standardisation on its own will not solve all of the issues, and legislation, tax incentives and subsidies bring their own challenges around global competitiveness and enforcement.

It is perhaps an indication of the difficulties around implementing projects within a forum such as Drive Sustainability, while ensuring competition law compliance, that activities have not gone further than supporting suppliers with information events, common reporting standards and guidelines. However impactful these are, it seems that they could be more effective if they were complemented by mandatory requirements. Such requirements could, however, carry the risk of being qualified as a collective boycott, contrary to competition law.

Drive Sustainability has published Global Automotive Sustainability Practical Guidance, which outlines the expectations of automotive manufacturers towards

⁹ AIAG <www.aiag.org/>.

¹⁰ Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements [2011] OJ C11/1, [280].

suppliers on sustainability issues, based on the Drive Sustainability published Principles, which do not impose mandatory requirements.¹¹ The guidance is basic and does not contain specific targets. Suppliers are expected, for example, to track and document “greenhouse gas” emissions, and to have an energy management strategy and programme.

Guidance is published also by the AIAG, which perhaps goes further than Drive Sustainability by stating that not only does the guidance describe minimum expectations from suppliers, and their subcontractors and suppliers, but also that it is expected that the standards will be upheld and cascaded down the suppliers’ supply chain.¹²

Nonetheless, both Drive Sustainability and the AIAG could not be clearer in their commitment to competition law compliance. Both organisations emphasise their commitment and publish their antitrust policy.¹³ The policies naturally exclude the possibility of any kind of collective boycott of a supplier, as well as any other anticompetitive behaviour.

No policy could, however, exclude that an authority might object to an activity which fell into a grey zone. Even if ultimately the activity were found not to infringe competition law, this could be only after a time-consuming, expensive and disruptive investigation.

The conclusion which can be reached in the case of organisations such as Drive Sustainability is that the projects that the organisation wishes to develop and implement could be bolder and more impactful if they could benefit from detailed guidance. Giving the projects regulatory legitimacy would help in incentivising the suppliers to participate, and there could even be the possibility of including mandatory requirements within a competition law – compliant framework.

The guidance could outline not only where projects did not have any restrictive effects on competition, but also what restrictive effects could be permitted as the restrictions were outweighed by the benefits arising from the contribution the projects would make to tackling the climate crisis and achieving environmental sustainability goals. The guidance would usefully have global application, endorsed by multiple regulators. It would establish “safe harbours” within which companies could proceed with certainty. Such safe harbours would not usefully be based on market shares, as the establishment of a correct market definition would be difficult since markets would have novel features or could be completely new. Moreover,

11 Drive Sustainability, “Global Automotive Sustainability Practical Guidance” (*Drive Sustainability*, 12 May 2017) <www.drivesustainability.org/wp-content/uploads/2020/07/Practical-Guidance.pdf> accessed 7 January 2021.

12 AIAG, “Corporate Responsibility” <www.aiag.org/corporate-responsibility> accessed 7 January 2021.

13 Drive Sustainability, “Anti-trust Statement” <<https://drivesustainability.org/wp-content/uploads/2020/04/Anti-trust-policy-1.pdf>> accessed 7 January 2021, AIAG, “Antitrust Compliance Policy” <www.aiag.org/about/antitrust-compliance-policy> accessed 7 January 2021.

market shares in such novel or emerging markets are seldom an appropriate proxy for market power. The guidance would need to be specific and targeted, in order to provide the right level of comfort to the participants. If such guidance could not be provided, then a system of informal guidance or comfort letters would need to fill the gap.

IV. Collaboration Projects

The final area which this paper considers is collaboration projects in the quest for emission-neutral technologies. One of the greatest challenges facing automotive manufacturers is finding an energy source as an alternative to diesel. Several possibilities exist, notably electricity, but electricity has drawbacks in particular in terms of the weight, volume and capacity of batteries. Alternative technology needs to be developed, based on alternative fuels.

In the case of long-distance heavy transport in particular, power demands, and the weight of batteries and the space they take up mean that it is necessary to consider alternatives to electricity. Other fuels, in particular hydrogen, and the related “fuel cell” solutions, have been identified as viable alternatives.

However, the level of technological innovation and the investment required should not be underestimated. The development work itself is highly complex and challenging, involving cutting-edge science, as well as multiple sophisticated interacting technologies; but this is only part of the story. In addition, manufacturers, together with their suppliers, need to develop the components and the software that can run the systems. Moreover, the owners of the trucks need to be sure that there is, and that there will continue to be, reliable production of the fuel at competitive prices, as well as the distribution networks and infrastructure to deliver the fuel to the truck.

The following are three examples of reported horizontal collaborations between automotive manufacturers, in relation to alternative fuels and fuel cell technology.

First, on 28 October 2020, Traton SE, the subsidiary of the Volkswagen Group which includes the truck brands MAN and Scania, and Hino Motors, Ltd a subsidiary of Toyota Motor Corporation active in truck manufacturing, announced that they had entered into an “e-mobility” joint venture.

The companies said that they would combine to develop electric vehicles including battery electric vehicles, fuel cell vehicles and relevant components, as well as creating common electric vehicle platforms including software and interfaces. They would form a team of specialists from both companies and launch activities first in Sweden and then in Japan, teaming up to shorten lead times for future products with battery and fuel cell technology, having been convinced that both technologies would be needed in the future.

The joint venture followed the signing between the parties of a strategic long-term partnership in 2018 and a procurement joint venture in 2019, and the parties would explore each other's capabilities and investigate further possibilities to collaborate in other future fields of technology.

Second, on 2 November 2020, the truck manufacturers Volvo Group and Daimler Truck AG announced that they had signed a binding agreement for a joint venture to develop, produce and commercialise fuel-cell systems for use in heavy-duty trucks as the primary focus, as well as other applications.

The parties stated that it was their ambition to make the new company a leading global manufacturer of fuel cells, and thus help the world take a major step towards climate-neutral and sustainable transportation by 2050. The transaction was expected to close during the first half of 2021, subject to merger control review by relevant authorities as well as other approvals. The Volvo Group and Daimler Truck AG would own equal interests in the joint venture, but they would continue to be competitors in all other areas such as vehicle technology and fuel-cell integration in trucks.

Third, in the USA, Kenworth Truck Company, a truck manufacturer within the PACCAR group (which also includes the DAF brand), and Toyota North America, announced in January 2019 that they were collaborating to develop ten zero-emission Kenworth T680s models, powered by Toyota hydrogen fuel cell electric powertrains.

The collaboration came within a grant-funded project administered by the California Air Resources Board, which was part of a larger programme to put fuel-cell electric tractors, hydrogen fuelling infrastructure and zero-emissions cargo-handling equipment into operation in the ports and Los Angeles basin in 2020. The programme also includes support for the establishment of hydrogen fuel infrastructure, including fuel stations.

The above examples illustrate that there are many different ways in which competitors might collaborate to achieve emission-neutral solutions, not only using electricity but also finding other energy sources. The complexities of the science and the technologies, and the need to ensure reliable production and distribution networks and infrastructure, mean that multiple specialists need to work together, and the investments are immense.

V. Conclusions

In addition to legislation, tax incentives and subsidies, cooperation between industry players has its part to play in working towards environmental sustainability goals to deal with the climate crisis. Indeed, such cooperation is often essential in order to achieve the objectives.

It can be seen from the discussion above on horizontal commitments, sustainability partnerships and collaboration projects that companies are ready and willing to engage. However, given the uncertainties around competition law compliance, and the consequences of taking a wrong step, companies need guidance and support from competition authorities when engaging with each other. The more supportive the authorities can be, the bolder companies can be in bringing about the changes which are so urgently required.

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Foreword by Frans Timmermans

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The consensus is clear - climate change is the defining challenge of our time. Meeting this challenge requires a collaborative and inclusive response from all segments of society - including private businesses. What role then for competition law and policy?

This important and timely book gathers academics, enforcers, economists, lawyers, and industry representatives to explore the applications and limitations of EU competition law in achieving environmental sustainability aims in line with the European Commission's Green Deal as well as the UN's Sustainable Development Goals. They identify the challenges of integrating environmental considerations into competition analysis presented by the existing framework, whether through cooperation by businesses, practices by dominant companies, or consideration of sustainability efficiencies in merger assessments. Practical examples across various sectors are also provided, alongside agency views from different jurisdictions, to illustrate how competition policy can facilitate a sustainable economy.

Simon Holmes is Visiting Professor at Oxford University & Member of the UK Competition Appeal Tribunal.

Dirk Middelschulte is Global General Counsel Competition at Unilever.

Martijn Snoep is Chair of the Netherlands Authority for Consumers and Markets (ACM).

” *This is an excellent collection of essays by experts and deep-thinkers, into whether and how to receive sustainability into competition law and policy.* “

Eleanor Fox, Professor, New York University

” *This innovative book provides rich inspiration for policymakers when defining the important role of competition law in achieving a more sustainable economy.* “

Alan Jope, CEO, Unilever

” *The book is superbly structured and will be indispensable for anyone wishing to engage with this most important of subjects.* “

Richard Whish, Emeritus Professor, King's College London

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