CPI's North America Column Presents:

DOJ's Probe into Four Automakers: Impartial Investigation or Politicization of Antitrust?

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On August 28, 2019, the United States Department of Justice ("DOJ") sent letters to four major automakers informing them that the federal government is concerned about a possible agreement among the four car companies that may violate federal antitrust laws.[2] The letters asked the automakers to meet with the DOJ Antitrust Division and provide "more information regarding the formation" of their commitment to the State of California as well as the car companies' communications with each other.[3]

The four automakers – Ford Motor Company ("Ford"), American Honda Motor Co., Inc. ("Honda"), Volkswagen Group of America, Inc. ("Volkswagen"), and BMW of North America, LLC ("BMW") – each voluntarily agreed in July to meet more stringent environmental and emissions standards set by the California Air Resources Board ("CARB").[4] The voluntary framework agreement provides guidelines for achieving continuous annual reductions in greenhouse gas emissions. The framework, which supports a national solution for emissions standards, aims to revise greenhouse gas standards, promote zero emission technology, increase innovation, and simplify compliance.[5]

The framework agreement provides stricter fuel-economy standards than those proposed by the Trump administration.[6] The deal was drafted in response to the Environmental Protection Agency's ("EPA") proposal to roll back greenhouse gas emission standards. According to the framework agreement, automakers commit to increasing the fuel economy of their new vehicles to nearly 50 miles per gallon by model year 2026 by reducing their greenhouse gas emissions by 3.7 percent each year.[7] This is more stringent than the targets proposed by the Trump administration, which is seeking to roll back the Obama-era rules intended to reduce the auto industry's contribution to climate change.[8]

Political Reaction

This issue has quickly become political. On the one hand, the Trump administration and the DOJ Antitrust Division claim that the agreement among the four automakers and California may constitute collusion in violation of federal antitrust law. On the other side of the political aisle, Congressional Democrats argue that the antitrust investigation is politically motivated. Speaker Nancy Pelosi issued a statement that "[t]he Department of Justice's reported investigation of the auto companies is frivolous and pretextual, and seeks to weaponize law enforcement for partisan political purposes to advance the Trump administration's toxic special interest agenda."[9] In defending the grounds for the antitrust probe, the U.S. Assistant Attorney General for the Antitrust Division, Makan Delrahim, stated that the antitrust investigation is driven by an honest concern that the automakers may have colluded in reaching a deal on tighter emissions standards with state regulators.

The Trump administration has been outspoken against the agreement among the automakers from the outset. In addition to the antitrust probe, the U.S. Department of Transportation ("DOT") and the EPA sent a letter to the CARB putting California "on notice" that the agreement may be in violation of federal law.[10] In the letter, the General Counsels of the two agencies

stated that the Energy Policy and Conservation Act ("EPCA") "expressly preempts States from setting fuel economy standards for motor vehicles or taking any other action 'related to' the regulation of fuel economy."[11] However, the DOT and EPA letter did not make any mention of potential antitrust violations or an antitrust investigation.

Since the announcement of the DOJ antitrust probe, the Trump administration has already revoked California's authority to set its own auto emissions limits. On September 19, the EPA and the DOT's National Highway Traffic Safety Administration ("NHTSA") issued a final rule entitled the "One National Program Rule," to enable the federal government to provide nationwide uniform fuel economy and greenhouse gas emission standards for cars and other vehicles.[12] The One National Program Rule effectively rescinded California's waiver to the Clean Air Act and, thus, eliminated California's right to set its own greenhouse gas emission standards. "The One National Program that we are announcing today will ensure that there is one, and only one, set of national fuel economy standards as Congress mandated and intended," stated Elaine Chao, DOT Secretary. "No state has the authority to opt out of the nation's rules and no state has the right to impose its policies on everybody else in our whole country."[13]

California has already begun to fight back against the Trump administration. The State is leading a coalition of states and cities to challenge the federal government's auto emissions policy and the NHTSA's and EPA's One National Program Rule.[14] The states that have joined the lawsuit include those that have adopted California's more stringent emissions standards, such as New Jersey, New York, and Pennsylvania.

Additionally, nine environmental groups sued the DOT over its efforts to block California's more stringent emissions requirements.[15] The environmental organizations, which include the Sierra Club, Environment America, and Public Citizen, among others, argue that the DOT has no authority to revoke California's ability to set its own emissions standards. They assert that California has a long-standing right to set its own emissions limits, and that the federal government does not have the authority to suddenly declare the state's power is preempted by the EPCA.[16]

Accusations of the DOJ's political motivations in launching the antitrust investigation have reached far and wide including both the House of Representatives and the Senate as well as several 2020 Democratic presidential candidates. On September 13, U.S. Senator and presidential candidate Kamala Harris sent a letter to the Inspector General expressing her concerns about the antitrust probe and urging the Office of Inspector General to investigate the grounds for the DOJ's probe of the four automakers.[17] On September 17, Assistant Attorney General Makan Delrahim appeared for an oversight hearing by the Senate Judiciary Subcommittee on Antitrust. During the hearing, U.S. Senator and presidential candidate Amy Klobuchar questioned the reasons the DOJ launched the antitrust probe.[18] In her opening statement, Senator Klobuchar stated, "The automakers' reported conduct seems to be little more than an effort by regulated companies to petition a state regulator for more favorable rules … Quite frankly the antitrust investigation into these automakers appears to have less

to do with protecting competition than with intimidating parties that don't fall into line with the Trump administration's plan to relax admission standards."[19]

In response to the subcommittee's questions as to why the DOJ decided to launch an antitrust investigation into the four automakers' agreement, Delrahim claimed that he is not doing it for political reasons. He explained that there may be nothing wrong with the companies each announcing emissions targets independently or getting together to petition the government on regulations or legislation. However, he added, it becomes an issue if the companies effectively reached a joint agreement on emission standards in private.

On September 12, Delrahim published an op-ed in USA Today defending the DOJ's antitrust investigation into the four automakers.[20] In the op-ed, Delrahim stated that the DOJ has not been politicized and that "no goal, well-intentioned or otherwise, is an excuse for collusion or other anticompetitive behavior that runs afoul of antitrust laws," and that "[a]nti-competitive agreements among competitors – regardless of the purported beneficial goal – are outlawed because they reduce the incentives for companies to compete vigorously, which in turn can raise prices, reduce innovation and ultimately harm consumers." Delrahim provided examples of cases where the Supreme Court struck down anticompetitive conduct despite the "laudable" objectives of the conduct at issue.[21]

Parker Immunity and *Noerr-Pennington*

Even if the car companies' agreement is found to be anticompetitive, the automakers will have a strong defense against any allegations of federal antitrust law violations. The United States Supreme Court has long held 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.[22] Thus, under the *Parker* immunity, or state-action doctrine, when states approve and regulate certain conduct, even if it is anticompetitive under antitrust law, the federal government must respect the decision of the state. Consequently, if a state approves the anticompetitive conduct, it is exempt from the scope of the Sherman Act and is immune from any investigation by federal antitrust enforcement agencies. Thus, anticompetitive regulation will survive antitrust challenge as long as a court is satisfied that the restraint at issue is truly state action.[23]

The state-action doctrine can also apply to private entities under certain circumstances. In *California Retail Liquor Dealers Assn. v. Midcal Aluminum, Inc.,* the U.S. Supreme Court adopted a two-part test to determine whether antitrust immunity will apply to private entities. In order for the private entities to receive immunity under this doctrine, the following two requirements must be met: (1) there must be a clearly articulated policy to displace competition and (2) there must be active supervision by the state of the policy or conduct. [24] In *Parker,* the Supreme Court concluded that the Sherman Act "makes no mention of the state as such, and gives no hint that it was intended to retrain state action or official action directed

by a state." The Court added that "there is no suggestion of a purpose to restrain state action in the Act's legislative history."[25]

Thus, private entities can avail themselves of state action immunity as long as the state has put into place sufficient safeguards to assure that the private entities are pursuing state goals rather than their own. The first requirement in the two-part test is "directed at ensuring that particular anticompetitive mechanisms operate because of a deliberate and intended state policy." The second requirement's purpose is to ensure that "the actor is engaging in the challenged conduct pursuant to state policy."[26]

In addition to the likelihood of the automakers' agreement with California being protected by the state-action doctrine, there is a strong possibility that it will also be protected under the *Noerr-Pennington* doctrine. Under this doctrine, private entities receive antitrust immunity for attempts to influence the passage or enforcement of laws, even if the laws they advocate for would have anticompetitive effects. Thus, if the car companies are coordinating with each other to influence California's emission standards, the *Noerr-Pennington* doctrine may apply and shield the agreement from antitrust liability.

The *Noerr-Pennington* doctrine was adopted in the context of two U.S. Supreme Court cases decided in the 1960s, *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). These cases and their progeny recognized that the generally broad reach of the Sherman Act had to be restrained where antitrust liability would impair the exercise of constitutional rights, even with the intent to illegally restrain trade.[27] The *Noerr-Pennington* doctrine is grounded in the First Amendment's free speech rights and protects the right of competitors to jointly petition the government for government regulation of the market.

Under the *Noerr-Pennington* doctrine, where the anticompetitive conduct is the result of valid governmental action, as opposed to private action, those urging the governmental action enjoy "absolute immunity" from antitrust liability for the anticompetitive restraint.[28] Additionally, where, independent of any government action, the anticompetitive restraint results directly from private action, the restrain cannot form the basis of antitrust liability if it is "incidental" to a valid effort to influence governmental action.[29]

Although agreements among competitors generally raise antitrust concerns, the involvement of the State of California in this particular situation changes the analysis. Whether Ford, Honda, BMW, and Volkswagen violated federal competition law by agreeing with each other to follow heightened emissions standards beyond those proposed by the Trump administration remains to be seen. The four automakers have said they are cooperating with the DOJ and were scheduled to have their first meeting with the Antitrust Division in October.

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[3] Shepardson, 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.

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[5] *Id.*

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[8] *Id.*

[9] Nancy Pelosi, Speaker of the House, *Pelosi Statement on DOJ Antitrust Investigation into Four Automakers*, (September 6, 2019), available at https://www.speaker.gov/newsroom/9619-2.

[10] Letter from the Department of Transportation and the Environmental Protection Agency, (September 6, 2019), available at https://www.epa.gov/sites/production/files/2019-09/documents/epa.dot_puts_california_on_notice.pdf.

[11] *Id.*

[12] EPA Office of the Administrator, *Trump Administration Announces One National Program Rule on Federal Preemption of State Fuel Economy Standards,* News Releases, (September 19, 2019), available at https://www.epa.gov/newsreleases/trump-administration-announces-one-national-program-rule-federal-preemption-state-fuel.

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[16] *Id.*

[17] Letter from Sen. Kamala Harris, (September 13, 2019), available at https://www.harris.senate.gov/imo/media/doc/Harris%20OIG%20DHS%20letter.pdf.

[18] Beene, Ryan, *Senate Democrats Grill DOJ Official Over Automaker Investigation,* Bloomberg, (September 17, 2019), available at https://www.bloomberg.com/news/articles/2019-09-17/doj-probe-of-automakers-looks-like-intimidation-klobuchar-says.

[19] *Id.*

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

[21] *Id.*

[22] *Parker v. Brown,* 317 U.S. 34 (1943).

[23] *Id.*

[24] *California Retail Liquor Dealers Assn. v. Midcal Aluminum, Inc.,* 445 U.S. 97 (1980).

[25] *Id.*

[26] *Id.*

[27] *Dell, Inc. v. 3K Computers, LLC*, 89 U.S.P.Q.2d 1958, 1959, 2008 WL 6600766 (S.D. Fla. 2008).

[28] *Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492, 108 S. Ct. 1931, 100 L. Ed. 2d 497 (1988).

[29] *Id.*