# AntitrustConnect Blog

## The DOJ Investigates Car Manufacturers for 'Collusion' in Their Framework Agreement with California on Gas Mileage and Emissions Standards: Sounding the Depths of Prosecutorial Discretion on Anticompetitive Collusion As Distinguished from Procompetitive Collaboration

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At a historic moment in the country when political winds are doing flips, turning impossible corners and reaching even *weather forecasting*, it is imperative that law enforcement remain solidly grounded in fact and the law. An abiding hope, maybe now more than ever, and no less true for antitrust, especially given its economic and marketplace moorings. Antitrust lawyers of all political stripes are regularly heard echoing this proposition: we hope and expect it to be embraced and implemented by federal and state antitrust authorities in the exercise of their prosecutorial discretion and enforcement.

Not surprisingly, then, this proposition now frames a mini-tempest swirling around recent news of an antitrust investigation by the U.S. Department of Justice of four major automobile manufacturers. On September 6th, the media reported that the DOJ Antitrust Division had opened an investigation into possible collusion by four car manufacturers by entering into a framework agreement with the State of California on light vehicle emissions and gas mileage standards. In July the four manufacturers – Ford, Volkswagen of America, Honda and BMW – announced that they had reached an agreement in principle with the California Air Resources Board, a state agency, on emissions and fuel economy standards substantially higher than those sought by the Trump administration, although slightly lower than those previously endorsed by California. [1] On September 18th , less than two weeks after news of the DOJ investigation, the EPA announced that it was withdrawing a waiver granted under the Clean Air Act to allow California to exceed federal MPG and emissions standards. In response, the governor and attorney general of California promptly announced that the state will sue to block the EPA's action.

Various commentators have observed that these two federal initiatives, in timing and substance, create the appearance of a political motivation behind the DOJ's investigation. There has been extensive, ongoing media coverage [2] and considerable comment from the antitrust bar, much of it skeptical if not even critical[3]. Both the Senate and House Judiciary antitrust subcommittees have sent wide-ranging document requests to the DOJ and the White House for information regarding any communications pertaining to the investigation, including "any information relating to the President's dispute or disagreement with the State of California's position on the auto emission

standards." Each of the Congressional letters expressed concern over what the subcommittees described as "the weaponization of the antitrust laws for political purposes." At a hearing before the Senate Judiciary Committee's subcommittee on antitrust on September 17th, Assistant Attorney General Makan Delrahim, responding to intense questioning, "unequivocally" and emphatically denied any political involvement in the decision to open the investigation. It should be noted that Congressional inquiries into antitrust enforcement on particular matters, and generally, are hardly unusual; this one, however, has taken on a notably different tone and character.

*The black box of prosecutorial discretion to open an investigation.* Under the DOJ Antitrust Division Manual, the standard to commence civil or criminal prosecution of a case is probable cause. The standard for the Antitrust Division to initiate a preliminary civil or criminal *investigation*, as the DOJ has done here, is lower and includes as a major factor simply whether there is "reason to believe a violation may have been committed." To that point, Delrahim acknowledged in the hearing that there have been no public indications of an illegal arrangement. "I have nothing," he said, but "[t]hat's the purpose of investigation. Doesn't mean I'm bringing a lawsuit tomorrow. [. . .] All I have done so far is ask them for, to come in and explain to us, if there was communication between them, the context . . . and why they need to do that collusively." In response, Senator Sheldon Whitehouse (D-R.I.) was blunt: "It's just bizarre that of all the different political schemes that are going on right now to harm competition, the one that you pick out . . . is the one in which the White House has gotten itself engaged." Then he added, his voice rising, "You ever heard of predication? You just fire off letters at random without any evidence that the misconduct is underway?" Delrahim stated, "I don't view politics having a role into our enforcement decisions. Nor should it have a role from us abstaining any enforcement decisions." On the public evidence, however, and given Delrahim's acknowledgement that the Division lacked any evidence of wrongdoing, it is reasonable to question whether the "reason to believe" standard for initiating an investigation has been satisfied. Furthermore, the opening of the investigation appears to have had a partial *in terrorem* effect: Mercedes-Benz reportedly was poised to join the framework agreement but stepped back after the German government warned it not to, and the timing is suggestive. [4] In short, serious questions have been raised, knocking on the black box of prosecutorial discretion.

People can draw their own conclusions. I am writing neither to criticize nor to defend the DOJ's investigation but instead primarily to address a DOJ comment offered in its defense which, unless clarified with some elaboration of the referenced law, could raise further questions about the standards for opening an investigation. My goals as an antitrust lawyer broadly align with those of the DOJ and other federal and state enforcers – namely, to help ensure, no matter the issue at hand, that the relevant law is properly explained and applied. Hence, the following observations.[5]

In particular, a comment in an Op-Ed in the September 16th issue of USA Today by AAG Delrahim defending the agency's integrity, clearly regarding but not specifically mentioning the investigation, warrants elaboration. [6] The AAG wrote:

> Indeed, in multiple instances, the Supreme Court has struck down collective efforts by engineers to enhance "public safety" as well as a collective effort by criminal defense lawyers with the goal of improving quality of representation for "indigent criminal defendants." Even laudable ends do not justify collusive means in our chosen system of laws.

Quite right. But there is more to that reference than meets the eye, and it does not align with the public information about the car manufacturers' conduct. As antitrust lawyers know, the AAG is alluding to two U.S. Supreme Court cases that are part of the classical canon: the DOJ's suit against the National Association of Professional Engineers[7] and the FTC's case against the District of Columbia Superior Court Trial Lawyers' Association[8]. Both cases involved collusion to fix prices, which is per se unlawful under the Sherman Act. And it is correct that such laudable ends as enhancing public safety through properly engineered structures (*Professional Engineers*) or improving the quality of representation for indigent criminal defendants (*Superior Court Trial Lawyers*) do not justify price fixing. But the cases are clearly distinguishable from the conduct of the car manufacturers, based on public information to date.

In *Professional Engineers*, the association forbad its members from competing on price on the grounds that "the practice of awarding engineering contracts to the lowest bidder, regardless of quality, would be dangerous to the public health, safety and welfare." [9] The engineers agreed to refuse to discuss prices with potential customers until after negotiations resulted in the initial selection of an engineer. The Court found that the ban on competitive bidding "prevents all customers from making price comparisons in the initial selection of an engineer, and imposes the Society's views of the costs and benefits of competition on the entire marketplace." [10] Writing for the Court, Justice Stevens stated that the engineers' justification of their agreement "on the basis of the potential threat that competition poses to the public safety and the ethics of its profession is nothing less than a frontal assault on the basic policy of the Sherman Act." [11]

In *Superior Court Trial Lawyers*, lawyers appointed under the D.C. Criminal Justice Act to represent indigent criminal defendants voted, through the Superior Court Trial Lawyers' Association, after failing to obtain a pay raise above the $30/hour rate, to refuse to take any new cases until their demands for a higher hourly rate were met; in short, they agreed on a boycott as a means to obtain their desired rate. The Court found, as the FTC argued, that a group boycott aimed at manipulating prices was per se unlawful and that the alleged social utility of the boycott, to provide better representation by obtaining higher compensation from the District, was irrelevant and did not justify the conduct. The Court also rejected the Association's argument that the boycott was shielded by the Noerr-Pennington doctrine, which immunizes otherwise unlawful concerted conduct aimed at influencing legislation as protected First Amendment speech. Importantly, even though legislation – there, for instance, the Criminal Justice Act – may itself result in fixing prices or restricting output, that does not convert the joint effort to achieve such legislation into a contract in restraint of trade. But the Noerr doctrine does not permit competitors to fix prices or restrict output themselves as a *means* of pressuring the legislature, and the Association's boycott, by restricting the lawyers' output, did just that, as the District increased the hourly rate in response.

In short, in each case the price-fixing was direct and *per se* unlawful.

The alleged 'collusion' among the car manufacturers was quite different, at least based on public information: namely, to abide by gas mileage and emissions standards they agreed on in conjunction with the State of California. Based on public information and by all accounts to date, there is no apparent agreement on price or a reduction of output. Will prices increase in order to improve the gas mileage technology? Maybe. Is that an agreement on price? No. It is an agreement on a technological standard that might result in a price increase. It is not an attempt to reduce competition. Indeed, no other car manufacturers, including GM, have joined framework. The argument that consumers will be denied the choice of cheaper, more gas-guzzling cars would thus be unavailing, as the four carmakers represent only about 30 percent of the market. Furthermore,

the concerted conduct at issue arguably constitutes standard setting, and even if it did not qualify for protection under Noerr-Pennington, it would at least be judged under the rule of reason, which, under the DOJ and FTC joint competitor collaboration guidelines[12], takes account of efficiencies, including, in this case, the objective of reducing tailpipe emissions, a major contributor to greenhouse pollution.

It is helpful to inform the public that "laudable ends do not justify collusive means." But given the circumstances and the questions being raised, it would surely also be helpful to inform the public that companies, such as the four car manufacturers, may engage in joint efforts to implement or affect legislation with immunity under the antitrust laws – if indeed it is determined that this is what the manufacturers did. And even assuming no Noerr protection, it is equally important to clarify that their conduct, as presumptive standard setting, would not be *per se* unlawful (unless an agreement on price or reduction of output) but would instead be judged under the rule of reason. And under the rule of reason, efficiencies and procompetitive business justifications would be taken into account, including the companies' business rationale for manufacturing less polluting cars – including, arguably, prolonging the very existence of internal combustion engine vehicles. Indeed, competitors engage in formal, concerted standard setting activities all the time, with appropriate antitrust safeguards, and such standard setting is vital to the economy.

As a practical matter, the question whether the DOJ's investigation is politically motivated, at bottom, is in any case most likely irrelevant. A court would probably not entertain arguments that the investigation was prompted by political motives and certainly not that such motives would negate unlawful conduct. [13] What counts for review under the law is simply whether there is a legal basis to find the conduct illegal. If a violation is proven, the government's political motives, if any, are irrelevant. But there should be no room in the 'reason to believe' standard for political motive. The AAG has denied any and we also can ignore, for our purposes here, the Trump administration's withdrawal of California's exemption to allow it to exceed federal standards. We can further credit the AAG's statement to the Senate that the DOJ first wants to find out exactly what the four manufacturers have done, without preconception. But with the stated focus on 'collusion', it is therefore important to note that in the cases to which he alludes, there was clear collusion on *price* and output, whereas based on public information to this date, there is no indication that the car manufacturers' joint conduct related to either. And it is further important for the public to understand that joint standard setting – even in the absence of possibly applicable immunity for lobbying the government (here, the state) for legislation – would be evaluated under the rule of reason, under which the manufacturers would be entitled to raise efficiency defenses, including their objectives to reduce emissions and raise gas mileage.

In sum, based on public information to date and given the AAG's disavowal of any predicate knowledge of illegal conduct ("I have nothing"), the cases to which the AAG alludes are clearly distinguishable. Furthermore, in the absence of *per se* unlawful conduct, present in those cases, certain 'laudable objectives' may indeed arguably count as efficiencies in a rule of reason analysis, if the conduct is not altogether immunized in the first place under the Noerr doctrine.

What the investigation of the carmakers reveals about the Antitrust Division's current enforcement policy, and whether or how it derives from the leadership's broader views on the role of antitrust – whether one calls this 'political' or not – remains an open question, about which we may learn more as the investigation unfolds.

[1] For instance, the agreement calls for the manufacturers' cars to achieve 51miles per gallon by

2026, slightly lower than the 54 mpg by 2025 ordered by the Obama administration but significantly higher than the White House's recent rollback to 37 mpg.

[2] *The New York Times*, "Justice Dept. Investigates California Emissions Pact That Embarrassed Trump" (Sept. 6, 2019); *Wall Street Journal*, "Justice Department Launches Antitrust Probe Into Four Auto Makers" (Sept. 6, 2019); *The Washington Post*, "Justice Department launches antitrust probe of automakers over their fuel efficiency deal with California" (Sept. 6, 2019).

[3] *See, e.g., Law 360*, "DOJ Defends Emissions Deal Probe, But Is It Blowing Smoke?" (Sept. 25, 2019) (including commentary from antitrust bar).

[4] *The New York Times*, "Justice Dept. Investigates California Emissions Pact That Embarrassed Trump" (Sept. 6, 2019).

[5] I do not represent any interests targeted by the DOJ investigation or peripheral to it.

[6] *USA Today*, M. Delrahim, "DOJ Antitrust Division: Popular ends should not justify anti-competitive collusion" (Sept. 12, 2019).

[7] *National Society of Professional Engineers v. United States*, 435 U.S. 679 (1978).

[8] *FTC v. Superior Court Trial Lawyers Ass'n*, 493 U.S.411 (1990).

[9] *Id.* at 685.

[10] *Id.* at 695.

[11] *Id.*

[12] Antitrust Guidelines for Collaborations Among Competitors, Issued by the Federal Trade Commission and the U.S. Department of Justice (April 2000).

[13] In a recent example, in 2018 the district court judge presiding over the DOJ's (ultimately unsuccessful) suit to block the AT&T-Time Warner merger denied the merging parties' bid to introduce evidence of President Trump's negative comments about CNN (owned by Time Warner) as a political motive behind the DOJ's action.