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Twelve Other Carmakers Move to Support Government Enforcement of Uniform Federal Standards on Emissions. – Will the DOJ Investigate?

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This article follows up on an October 15, 2019 article by the author on a reported investigation by the DOJ Antitrust Division into possible 'collusion' by four carmakers in entering into a framework agreement with the State of California on emissions standards.

What the government antitrust enforcers choose not to pursue may be as revealing as what they choose to pursue. The unfolding saga of state versus federal standards on automotive emissions, and the Department of Justice Antitrust Division's recent decision to investigate four carmakers for entering into a framework agreement with the State of California on emissions, has taken a new turn. A number of other carmakers have now joined the fray, throwing into further relief the question of the grounds for the Antitrust Division's previously reported investigation.

On October 28th, some 12 other car manufacturers, led by GM, Fiat Chrysler and Toyota, filed a motion to intervene in the federal Court of Appeals for the District of Columbia in support of the Trump administration's withdrawal of the waiver granted to California from the Clean Air Act, as discussed in the October 15, 2019, post [1] The motion comes in the wake of suits supporting California's waiver filed by California and 22 other states, the District of Columbia and two major cities, and by the Environmental Defense Fund and a coalition of environmental and public interest organizations. The stated purpose of the companies, which call themselves the Coalition for Sustainable Automotive Regulations and have moved to intervene in the name of both the Coalition and an umbrella trade association, the Association of Global Automakers[2], is to ensure uniform federal standards on emissions rather than allowing individual states to set their own standards.

The Coalition's initiative is the mirror opposite[3] of the actions of the four carmakers in entering into the framework agreement with California (the "Four"). Thus, whereas the Four would of course have to invest more resources into improving their technology to attain the higher standards agreed to with the state, the Coalition members – each one a competitor with the others – have joined forces among themselves to help defeat those higher standards through litigation. Rather than compete to develop their own technology to meet the higher California standards, each member of the Coalition, by supporting the federal government's bid to impose uniform (lower) federal standards, has in effect agreed with its fellow Coalition members not to compete to meet those higher standards. In so doing, the companies are effectively agreeing at the very least to

reduce competition among themselves to improve their technology to meet the higher California standards (unless they are disallowed). In short, The Twelve appear to have entered into an agreement not to compete on investment of resources directly relating to price – thus, by all appearances an agreement on price, quite arguably indefensible under the antitrust rule of reason, if not in fact per se unlawful. And if The Four comprise roughly 30 percent of the U.S. market, then The Twelve, notably including such 'majors' as Fiat Chrysler, GM and Toyota, surely possess market power, if not a dominant share, in the U.S. market. In brief, their conduct appears to sound far more clearly in antitrust than the decision by The Four to invest more resources to meet the higher standards of the framework agreement with California.

Why is this relevant to the DOJ's investigation of the Four? The motion to intervene by the Coalition automakers puts into even starker relief questions (discussed in the October 15, 2019, post) regarding the grounds for the Antitrust Division's investigation of The Four. If the concern of the DOJ with the framework agreement by the Four is the potential reduction of consumer choice – presumably, to buy cheaper, gas-guzzling cars – and, in the words of the AAG, to determine whether the companies decided on the compromise standard with California "collusively" or unilaterally, then, given the ostensible agreement by the members of the Coalition at least to *limit* competition on their emissions-reducing technology investment, the following question is raised: Will the Antitrust Division now open an investigation into the decision by The Twelve not to compete on investing more resources to meet the higher standards (in the name of their avowed objective of uniform federal standards), thereby potentially reducing consumer choice to buy more fuel-economical, less polluting cars and light trucks? The venerable legal principle, "What's good for the goose is good for the gander," would suggest that the DOJ should do so, given its investigation into conduct and substantive terms of an agreement far less suggestive of anticompetitive collusion. But there is of course just one major, overriding hitch: the Noerr Pennington doctrine, which should immunize the conduct of The Twelve, even though their conduct in the absence of the doctrine should far more readily trigger an investigation than the conduct of The Four.

If for no other reason than the applicability of the Noerr-Pennington doctrine and sound antitrust enforcement, then, it is quite unlikely that the DOJ will open an investigation into the conduct of The Twelve. But if that is the case here, the question now looms even larger: would the doctrine not apply with equal force to the conduct of the Four (as it surely should)? And given that the doctrine apparently did not stay the DOJ's hand in opening an investigation of The Four, presumably based on its own 'reason to believe' standard for exercising its prosecutorial discretion to commence such an investigation, inquiring minds are left to wonder: will the DOJ apply the same scrutiny to the conduct of The Twelve as to The Four, and if not, what exactly has triggered the DOJ's investigation of The Four.

Times and circumstances call for antitrust lawyers to climb out of our silos and look around. Admirably, the DOJ itself is not turning a blind eye to such high-profile issues as the conduct of Big Tech, among its other investigations. That inquiry certainly seems justified on antitrust grounds, even if the government ultimately concludes that antitrust does not reach the conduct. Also duly noted, however, is the fact that at every turn the Trump administration is seeking through judicial, legislative and executive powers to roll back environmental regulations. And emblematic of that effort was its formal notification to the United Nations on November 4th that the United States will withdraw from the Paris Agreement on climate change. This comes against a backdrop of daily, authoritative allegations of unusual and undue political influence on and within various

executive departments of the government, including, among others, the Environmental Protection Agency, the Department of State and the DOJ. Inquiring minds would therefore like to know: if the DOJ does not open an investigation into The Twelve, then what, under that hoary 'goose-and-the gander' principle of equal application, has moved it to open an antitrust investigation into the Four.

[1] Environmental Defense Fund et al. v. National Highway Traffic Safety Administration, Case No. 10-1200 (D.C. Cir., filed 9/27/19) (Motion to Intervene on behalf of the Respondent filed by The Coalition for Sustainable Automotive Regulations, a subgroup of, and also filing as, the Association of Global Automakers). The underlying carmaker intervenors, in addition to Fiat Chrysler, GM and Toyota, are Ferrari, Aston-Martin, Mazda, Nissan, Kia, Subaru, Hyundai, McClaren and Isuzu. The States of Ohio, Alabama, Alaska, Louisiana, Texas, Utah and West Virginia have also moved to intervene on behalf of the government.

[2] The Association membership is broader than the Coalition and includes at least one carmaker that is not a Coalition member – Honda, one of The Four.

[3] A non-superposable mirror image – analogous to stereoisomers in chemical structure terminology.

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