UNINTENDED CONSEQUENCES: HOW A DOJ ANTITRUST INVESTIGATION COULD EXACERBATE GLOBAL WARMING

THE JUSTICE DEPARTMENT'S INVESTIGATION INTO A FUEL-EFFICIENCY AGREEMENT BETWEEN AUTOMAKERS COULD CHILL ENVIRONMENTAL COLLABORATION FOR YEARS TO COME.

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Earlier this year, the U.S. Department of Justice launched an antitrust investigation into four automakers—Ford, Volkswagen, Honda and BMW—that agreed with the state of California to abide by emissions standards stricter than those backed by the Trump administration. Because California's involvement arguably exempted the agreement from antitrust scrutiny under the state-action doctrine, antitrust experts from across the political spectrum questioned the investigation's legitimacy. Many viewed it as an act of political retaliation by the Trump administration, not a genuine inquiry into whether the agreement violated the antitrust laws.

This focus on the investigation's potential political origins, while well-founded, has overshadowed a broader issue raised by the investigation that may prove more consequential: antitrust's role in governing environmental collaborations between competitors in the age of climate change.

UNCHARTERED TERRITORY

Agreements like the one between the automakers are likely to become more common as climate change progresses (including purely private agreements that do not involve a state actor). Businesses are facing increasing pressure to reduce their carbon footprint, while, at the same time, the environmental regulations governing them remain inconsistent or, in some cases, nonexistent. If businesses wish to fill the void by collaborating with their competitors in ways that benefit the environment, to what extent does antitrust law stand in the way? Do agreements among rivals that restrict carbon-emitting practices unreasonably restrain trade by reducing output or consumer choice? Or is antitrust law flexible enough to recognize the benefits of environmental collaborations, even when they may have downstream effects on pricing and output?

There are no clear answers to these questions in the United States, which is what makes the DOJ's investigation into the automakers all that more significant. Generally, agreements among competitors to set industry standards or form joint ventures that do not directly relate to price are evaluated under the rule of reason and are not per se unlawful. Courts have upheld agreements under the antitrust laws that create uniform industry standards and certification programs on the grounds

that they serve a legitimate purpose and do not unreasonably restrain competition. At the same time, collaborations between competitors that go beyond standard-setting are evaluated with heightened scrutiny, and even genuine concerns about public health and welfare are typically not a defense to an otherwise anticompetitive restraint.

It is not clear how these principles might apply to agreements among rivals to reduce carbon emissions. The limited antitrust precedent that has addressed private environmental collaborations has focused on narrower environmental concerns with more quantifiable effects. For example, 20 years ago, the DOJ tentatively approved agreements among anglers to allocate their harvest of threatened fisheries; however, the DOJ based its approval on its understanding that the agreements would ultimately increase fishing output, not restrain it.

REGULATION VS. PRIVATE COLLABORATION

The same straightforward analysis is unlikely to apply to private agreements to reduce greenhouse gases. By their very nature, such agreements would likely limit businesses' productive capacity and output, at least in the short-term. Although not common today, examples of such agreements are easy to imagine. Oil companies might seek to preempt government regulation by voluntarily agreeing to tether oil production to gains in alternative energy. Or cattle farmers might collectively agree to restrict cows' diets to cut down on the amount of methane they release, a major contributor to global warming. While these agreements could meaningfully reduce emissions, they could also restrict output and raise prices, the very harms that the antitrust laws seek to prevent.

The fact that such agreements are not yet common likely has less to do with antitrust concerns than current market realities. The pressures to address climate change simply are not strong enough today to incentivize most major corporations to work together to reduce emissions. But that could change as climate change progresses. If industries come to believe that self-regulation is in their self-interest, whether for public relations purposes or to preempt more onerous government regulation, businesses might turn to private collaborations in greater numbers. If that occurs, antitrust concerns could become a major impediment to private environmental cooperation.

It will, therefore, be important for courts and enforcement agencies to adopt thoughtful guidelines for when private environmental collaboration runs afoul of the antitrust laws and when it does not. Such guidance will help encourage legitimate collaboration while still protecting the core purpose of the antitrust laws.

Unfortunately, the DOJ's current investigation flouts this measured approach. By loudly characterizing the automakers' agreement as a potential antitrust violation

despite the state of California's involvement and the limited relation to price, the DOJ set a hard-line precedent that could have long-lasting implications. Even if the DOJ takes no further action against the automakers, its investigation and public comments could chill environmental collaboration for years to come. That effect, more than the investigation's questionable origins, may prove to be the most troubling aspect of the investigation.

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