

反垄断法律热点问题

关于医疗行业保证经销商转售最低利润率之管理模式的反垄断思考

2016年初，国家发展和改革委员会（以下简称“**国家发改委**”）价格监督检查与反垄断局发表“2016年价格监管与反垄断工作要点”一文¹，文中详细阐述了本年度国家发改委在反垄断执法领域所重点关注的领域，其中包括汽车和零配件、电信、金融、药品和医疗器械等多个行业。2016年6月29日，国家发改委价格监督检查与反垄断局副局长卢延纯在上海表示，下一步我国将加强药品反垄断，遏制药品价格“商量涨”、“任性涨”等违反《中华人民共和国反垄断法》（以下简称“**《反垄断法》**”）的行为²。这不是国家发改委首次表明其对医疗行业的监管决心，早在2015年5月4日，国家发改委就专门发布了《关于加强药品市场价格行为监管的通知》³，严禁监管经营者之间相互串通、操纵市场价格的行为。

基于上述反垄断执法态势，我们注意到，就纵向销售渠道的管理而言，目前有部分医疗行业生产商所采取的模式之一，即是通过保证各级经

销商转售最低利润率，从而保证经销商渠道的稳定和畅通。

一、保证经销商转售最低利润率的表现方式

《反垄断法》第14条对纵向垄断协议的规定，主要是针对经营者与交易相对人所达成的固定转售价格或者限定最低转售价格协议的行为⁴。而医疗行业生产商保证经销商转售最低利润率的方式，主要是向各级经销商作出最低利润率的保证。在执行该模式的过程中，若为实现各级经销商的最低利润保证而导致某级经销商以低于最低利润率的价格向次级渠道转售，则在其成交价格基础上，生产商将予以该经销商与最低利润率相对应的返利或者奖励，并承诺不足部分由生厂商进行补贴。

（示例如图一）

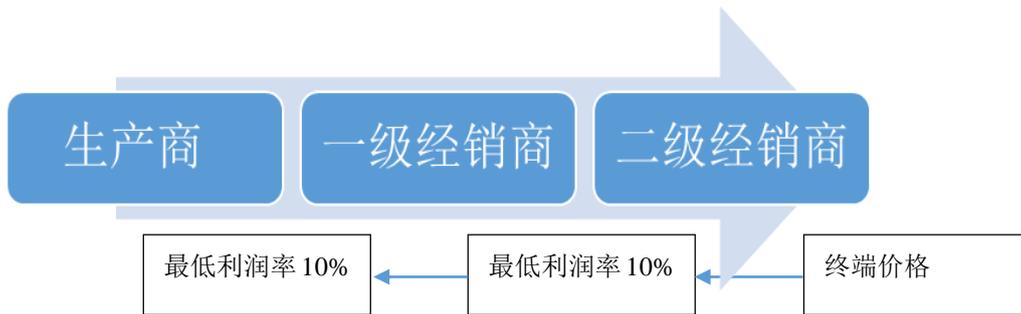
¹ 见《中国价格监管与反垄断》2016年02期，2016年3月4日

² 见新华网报道：
http://news.xinhuanet.com/2016-06/29/c_1119136394.htm，2016年6月29日

³ 见《国家发展改革委关于加强药品市场价格行为监管的通知》，发改价监[2015]930号，2015年5月4日

⁴ 《反垄断法》第14条“禁止经营者与交易相对人达成下列垄断协议：（一）固定向第三人转售商品的价格；（二）限定向第三人转售商品的最低价格；（三）国务院反垄断执法机构认定的其他垄断协议”

图一：



因此，从保证经销商转售最低利润率行为的表现形式上看（如图一），由于生厂商是根据终端价格以及转售最低利润率按级回溯，以返利或者奖励的方式向各级经销商提供利润保证，这一管理模式从表面上看更近似于建议限制上一级经销商向次一级经销商转售商品时的最高价格（由于保证了最低利润率，实践中转售价格可能会最终低于最低利润率价格）。而经营者在交易中限定交易相对人最高转售价格的行为虽然也会对市场竞争产生影响，但却不属于《反垄断法》所规定的典型违法行为。

二、保证经销商转售最低利润率实质的探讨

然而，这一保证经销商转售最低利润率之管理模式在执行中实质上仍有可能属于间接限价的行为，且其内在逻辑顺序是存在问题的。

该问题的核心之处就在于，在正常的商品生产销售活动中，一般是先确定商品的出厂价格，而后逐层销售以最终确定终端价格。而如果抛开定价顺序的表象而言，保证经销商转售最低利润率的行为实际上就是要求次级经销商不得低于上级经销商销售价格的一定比率（由于保证了最低利润，经销商的转售价格可能会固定或限定在一个范围内），理论上仍有可能属于固定或限定最低

转售价格。

如图一所示，从表面上看是生产商鼓励一级经销商在向二级经销商销售产品时的转售价格不得高于终端价格的一定比例。但是，若忽略正常的商品定价顺序甚至跳出定价顺序，转而从结果来看，我们将发现，若执行这一管理模式，则各级经销商的最终成交价格可能会在返利和补贴政策的刺激下逐渐固定在一个可计算的价格区间内。

三、竞争效果分析

由于这一管理模式存在表现形式与实质之间的区别，其是否足以引起反垄断执法部门的监管，则需要进一步分析该行为的限制竞争效果。

在保证经销商最低转售利润率的管理模式下，由于协议一方的压力或者激励（例如通过实施价格监测，对不遵循模式的经销商采取取消返利、拒绝供货或者提前解除合作协议等措施），这一模式与溢价本能所产生的终端价格很有可能得到广泛的执行。

而这一模式虽然从表面上看只鼓励限定转售最高价格，但在执行这一管理模式的过程中，由于经营者的逐利本能，从而很容易产生转售价格维持或者固定的效果。此外，这一模式实质上减少了经销商之间的竞争（假设在一个充分自由竞

争的市场，该等产品的正常利润可能无法达到10%，因此转售价格在正常情况下可能会更低），若在行业范围内采用这一模式，不排除可能因为竞争的整体减少而导致产品终端价格的上升，而这显然有悖于反垄断执法部门所秉持的消费者福利和促进市场竞争等执法方向。

四、我们的观察

随着中国经济的整体增长和发展，自《反垄断法》生效以来，经过数年的发展，相关配套法律制度不断完善和细化，反垄断执法也已进入常态化。反垄断法体系是现代法律构架中的“经

济法大宪章”⁵，而医疗行业与广大消费者的切身利益密切相关，如今我国正在稳步推进医疗改革，行业所涉市场总量及影响都非比寻常，反垄断执法机构加强医疗市场的监管已呈必然。国家发改委价格监督检查与反垄断局已经专门指出，有些药企虽然不直接控制药品零售商的价格，但通过控制供货量和返点水平，试图对药品零售价格产生影响，也可能遭到反垄断部门的调查⁶。在这种大环境下，关于医疗行业所普遍采取的经销商渠道管理模式之反垄断思考势在必行，相关企业的潜在风险不容忽视。

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⁵ United States v. Topco Assocs., 405 U.S. 596, 610 (1972). 美国最高法院上世纪 70 年代的一次作为美国政治前沿的经典判例，美国最高法院在判决中注明了反垄断法显著的公共属性和意义，称反垄断体系为“经济的大宪章”：“反垄断法对保护经济自由和市场经济体系的重要性，如同权利法案对我们每个人最基本权利和自由的保护一样重要。”

⁶ 见新华网报导：http://news.xinhuanet.com/2016-06/29/c_1119136394.htm，2016 年 6 月 29 日

Antitrust

Brief Analysis under Anti-Monopoly Law (“AML”) of the Management Model to Ensure Distributors a Minimum Resale Profit Margin in the Healthcare Industry

In early 2016, the Price Supervision and Anti-monopoly Bureau of China’s National Development and Reform Commission (“NDRC”) issued the article “Key Issues on Price Supervision and Anti-monopoly in 2016”¹ which specified the target industries for antitrust enforcement in 2016, covering industries such as vehicles and parts, telecom, finance, and pharmaceuticals and medical devices. On June 29, 2016, Mr. LU Yanchun, Deputy Head of the NDRC Price Supervision and Anti-monopoly Bureau, indicated during his speech in Shanghai that China will specifically strengthen its anti-monopoly enforcement in the pharmaceutical industry against illegal conduct under the *PRC Anti-Monopoly Law* (hereinafter, the “AML”), including conduct

such as “negotiated price lifting” and “willful price lifting”, etc.² This is not the first time that NDRC has clearly demonstrated its commitment to monitoring the health care industry. As early as May 4, 2015, NDRC specifically promulgated the “*Notice on Strengthening Price Supervision in the Pharmaceutical Market*”³, which strictly prohibits collusion among operators as well as operator involvement in manipulating market prices.

Given the current situation, we note that some manufacturers in the healthcare industry have adopted a management model for their sales channels which offers a promise of minimum resale profit margins for

¹ “Key Issues on Price Supervision and Anti-monopoly in 2016”, *Price Supervision and Anti-Monopoly in China*, 02, 4 March 2016

² Xinhua Net reports:
http://news.xinhuanet.com/2016-06/29/c_1119136394.htm, on June 29, 2016

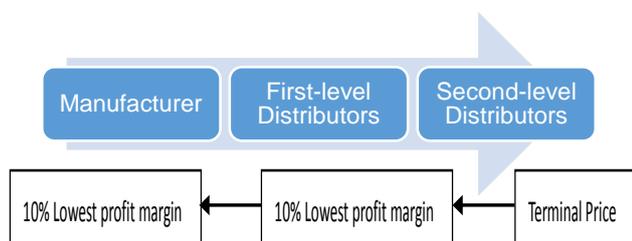
³ “*NDRC Notice on Strengthening Price Supervision in Medicine Market*”, *FaGaiJiaJian* [2015] No. 930, on May 4, 2015

distributors for the purpose of ensuring the stability and efficiency of the reseller channel.

I. Methods to ensure distributors a minimum resale profit margin

Article 14 of AML regulates vertical monopoly agreements, which mainly targets resale price maintenance or minimum resale price agreements entered into between operators and their trading counterparts.⁴ In the healthcare industry, the model for realizing the minimum resale profit margin, which is usually promised by manufacturer to distributors, is as follows: if a distributor, in carrying out the policy, suffers loss or fails to reach the minimum resale profit margin as promised by the manufacturer, the manufacturer will make up the insufficient portion by giving subsidies. For example, in order to ensure that the minimum profit rate be gained by a secondary distributor, a first level distributor may have to sell products to the secondary distributor at a price at less profit than the promised minimum profit margin, in which case the manufacturer will make up the missing portion by giving subsidies at an equal amount (see Figure 1).

Figure 1



⁴ Article 14 of the AML, operators are prohibited from reaching any of the following monopoly agreements with their trading counterparts: (1) on fixing the prices of commodities resold to a third party; (2) on restricting the lowest prices for commodities resold to a third party; and (3) other monopoly agreements as determined by the Anti-monopoly Law enforcement agencies under the State Council.

Therefore, from the methods to ensure distributors a minimum resale profit margin (see Figure 1), we can see that since the manufacturer makes the profit promise for all levels of distributors by means of rebate or reward based on the terminal price and the minimum profit margin is guaranteed, it may appear that this kind of management model suggests a restriction on the highest resale price by a certain level distributor to its next level distributor (in practice, the resale price may be below the price for minimum profit margin because of the policy). However, despite operators' conduct in restricting the maximum resale price for trading counterparts can also affect market competition, it is not a typical violation under the current AML.

II. Discussion on the nature of the promising distributors a minimum resale profit margin

However, there might be an indirect price restraint in essence for this kind of management model in ensuring distributors the lowest resale price, and this kind of management model also has problems in internal logistics.

The core of the problem is that, in normal business activities, the ex-factory price of products is generally the first to be determined, and then the market determines the terminal price step by step from one level of distributors to next level of distributors. In terms of putting aside the appearance of pricing order, the conduct to ensure distributors' minimum resale profit margin actually requires the next level distributor to

resell the products no less than a certain percentage of the selling price of its up-level distributor (the resale price of distributors might be fixed or restrained within a certain range of price, because of the minimum profit margin guarantee), which theoretically may constitute price fixing or restraint of minimum resale price.

As shown in Figure 1, superficially, the manufacturer is encouraging the first-level distributors to resell products to the second-level distributors at a price no more than a certain percentage of the terminal price. However, if we ignore the normal order of commodity pricing and judge from the results instead, we can see that, in the implementation of this management model, the final transaction price of distributors at all levels may be gradually fixed within a range of calculable price under the incentives of rebate and subsidies.

III. Analysis on Competitive Effects

Due to the difference between the form and substance of this management model, whether there are sufficient concerns to cause AML enforcement would need our further analysis regarding the effects it may bring upon market competition.

Under the management model of ensuring distributors a minimum resale profit margin, due to the pressure or incentives given by a one party of agreement (e.g., manufacturers may monitor distributors' resale prices and take action against those distributors who fail to adhere to the policy. Such actions include cancellation of rebates, refusal to supply

products or early termination of a cooperation agreement, etc.) and together with the instinct of merchant premiums, the terminal price produced therefrom is likely to be widely implemented.

Although superficially this pattern only encourages restraints of the maximum resale price, due to operators' instincts for profit-seeking in the course of implementation of this management model, it is very likely to cause the negative effects of price fixing or resale price maintenance. In addition, the competition between distributors is to be substantially reduced by this pattern (assuming it is in a market with free and complete competition, it is possible that the normal profit margin of such products may not reach 10%, and thus the resale price under normal circumstances may be lower). Furthermore, if this model is to be adopted widely in the industry, it is possible that the terminal prices of products will be increased in light of reduced competition as a whole, which is obviously in contrary to the goal of AML enforcement agencies to increase the welfare of consumers and promote market competition, etc.

IV. Our View

With the overall growth and development of China's economy, and after several years of development since the promulgation of the AML, the relevant supporting legal system has continued to be perfected and refined, and the enforcement of AML has become normalized. The anti-monopoly legal system is considered the "Economic Magna Carta"⁵ of the legal framework of modern society, and

the healthcare industry is one that closely relates to the interests of innumerable consumers. Now that China is steadily advancing its reform of the healthcare industry, the total market and scale involved in this industry is significant, it is inevitable that the AML enforcement agencies will strengthen and focus their monitoring of this industry. NDRC has specifically indicated that, even though some pharmaceutical companies don't directly control the retail

price of drugs, they may still be subject to investigation by AML enforcement agencies if they attempt to affect the retail prices of drugs by controlling supply and rebate levels.⁶ In such a climate, from the perspective of potential AML enforcement it is imperative to reconsider the models for management of the distribution channels which have generally been adopted in the healthcare industry, and the potential risks for the relevant enterprises shall not be ignored.

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⁵ United States v. Topco Assocs., 405 U.S. 596, 610 (1972), a typical case by US Supreme Court in 1970s, in which SPC expressed the significant public properties and meanings of anti-trust laws, and regarded Anti-trust law as the “Economic Magna Carta”, “They [anti-trust laws] are as important to the preservation of economic freedom and our free-enterprise system as the Bill of Rights is to the protection of our fundamental personal freedoms.”

⁶ See Xinhuanet news report, available at http://news.xinhuanet.com/2016-06/29/c_1119136394.htm, June 29, 2016.