

外商投资法律热点问题

简评汽车制造业外资限制放开

2018年4月10日，习近平总书记在博鳌论坛上的重要讲话中宣布“中国将坚持改革开放不动摇，继续推出扩大开放新的重大举措”。国家发展和改革委员会（以下简称“**国家发展改革委**”）紧随其后响应习总书记的讲话精神，于2018年4月17日在政府网站上发布了“**国家发展改革委就制定新的外商投资负面清单及制造业开放问题答记者问**”，表示为贯彻落实习总书记的讲话精神，国家发展改革委正会同各有关部门抓紧研究具体措施，通过制定新的外商投资负面清单，使对外开放的重大举措尽快落地。其中着重强调了制造业将会成为新的外商投资负面清单开放工作的一项重点，而汽车产业的外商投资限制的放开更是重中之重。

一、汽车整车制造外资限制的放开和当前背景

在此次国家发展改革委的答记者问中，对于外商投资汽车整车制造的逐步有序放开，依据不同车型作了较为明确的部署，具体为：2018年取消专用车、新能源汽车外资股比限制；2020年取消商用车外资股比限制；2022年取消乘用车外资股比限制。除逐步取消股比限制之外，2022年将同时取消现行的关于同一家外商在国内同类车型的合资企业不超过两家的限制。最终，中国目前对于外商投资汽车整车制造的各项限制将在2018年起的5年过渡期届满后被全部取消。

其实放开外商投资汽车整车制造的限制酝酿已久，在工信部、国家发展改革委、科技部2017年

二、汽车制造业外商投资变迁过程

发布的《汽车产业中长期发展规划》中已提到“完善内外资投资管理制度，有序放开合资企业股比限制”；而在今年的政府工作报告中也明确提出全面放开新能源汽车领域，但始终未形成如何放开以及何时放开的具体方案。

此次习总书记在博鳌论坛的表态以及国家发展改革委迅速跟进公布具体落实方案，恰逢近期中美之间的贸易冲突，两者之间是否有关联或者仅仅是时间上的巧合，不得而知。但不得不承认，中国的确在进一步放开汽车制造业方面承受着不小的外部压力。中国的汽车工业长期以来一直处于政府的刻意保护之下，外国企业在中国本土生产汽车必须以组建合资公司的方式才能得以实现，并且还会受到股比、合资企业数量和品牌标识等各种严格限制，而如果选择向中国出口国外生产的汽车则又必须缴纳高达25%的关税，这与当前中国政府推动扩大开放的基本方针并不相称。而另一方面，中国本土汽车工业已经通过几十年以来与外资组建合资企业在技术研发、生产制造、人才培养等方面取得了长足的进步，一定程度上具备了与外资同台竞争的底气。在这样的大背景下，作为全球最大且增长最快的汽车消费市场，继续对本国汽车工业实行内外资差别对待已招致一些渴望打开中国市场的国外汽车品牌和外国政府的质疑，进一步放开外资限制势在必行，并且这样做也是对中国坚定不移开放市场和开放外商投资的最佳诠释。

纵观20多年来中国汽车制造业外商投资制度的变化，大致变迁过程可总结如下：

	汽车产业政策	外商投资产业指导目录	其他
1994年	1994年《汽车工业产业政策》		2001年《入世承诺》允诺： 1. 入世后2年内逐步取消限制生产汽车的类别、类型或车型的所有措施 2. 入世起取消发动机制造合资企业外资股比不超过50%的限制
1995年	1. 整车和发动机制造的合资合作企业的中方股比不低于50%” 2. 外国企业同一类整车产品不得在中国建立两家以上的合资合作企业	1. 仅汽车关键零部件制造（不包括发动机）为鼓励类 2. 整车和发动机制造均为限制类，并呼应产业政策明确中方须控股或占主导地位	
1997年		与1995年版相比，基本一致	
2001年			
2002年		1. 整车、发动机和关键零部件制造均为鼓励类 2. 保留整车制造的外资股比限制，但取消了发动机制造的外资股比限制	
2004年	2004年《汽车产业发展政策》：除取消了发动机制造的外资股比限制外，与94年《汽车工业产业政策》相比无实质性变动。仅进一步明确外方与中方联合兼并国内其他汽车生产企业可不受两家合资企业的限制，并且外方的相对控股企业视为同一外商	与2002年版相比，在整车、发动机和关键零部件制造的类别划分和股比限制方面未作变动	
2007年		1. 整车、发动机和关键零部件制造仍为鼓励类，但产品范围作了细化和缩小，并对部分产品的性能提出明确要求	
2009年	2009年《汽车产业发展政策》与2004年版相比，在外商投资限制方面未作变动	2. 继续保留整车制造的外资股比限制	
2011年		1. 发动机和关键零部件制造仍为鼓励类，但产品范围较2007年版有所调整，并对部分产品性能提出更高要求 2. 整车制造不再是鼓励类，被划为允许类	
2015年		1. 发动机和关键零部件制造仍为鼓励类，较2011年版仅产品范围有小幅调整 2. 整车制造被列入限制类，外资股比限制继续保留	

	汽车产业政策	外商投资产业指导目录	其他
2017年		1. 发动机和关键零部件制造仍为鼓励类，较2015年版仅产品范围略有调整 2. 整车制造仍然被列入限制类，外资股比限制继续保留	《汽车产业中长期发展规划》提出有序放开合资企业股比限制
2018年	国家发展改革委答记者问表示将逐步放开并最终取消外商投资汽车制造业的限制。可以预见，现行的《外商投资产业指导目录》和《汽车产业发展政策》在此过程中将会作相应的修改或更新。		

如上所示，中国对于外资进入汽车制造业的管理规定主要是通过汽车产业政策和外商投资产业指导目录体现的。虽然这些规定在这20多年的过程中发生过若干次更改，但不难看出，对最为核心的外资进入整车制造业的股比限制和合资企业数量限制，中国政府始终未作出让步，仅有的一些变化只是整车制造在限制类和鼓励类之间的来回切换，以及入世承诺中对发动机制造企业股比限制的放开。因此，中国政府此次决心整体上逐步放开对外资在整车制造业的股比和合资企业数量限制可以说是一次重大改革。

三、放开外商投资汽车制造业可能带来的影响

1. 外资大举进军新能源汽车

从国家发展改革委的答记者问来看，5年过渡期中首当其冲放开的车型既包括新能源汽车。目前中国的新能源汽车市场正处于投资风口，但多以国有企业和民营资本为主，传统的外资汽车品牌在国内新能源汽车制造方面尚未正真发力。然而，这些传统汽车品牌的国外总部大都已经有了非常深厚的新能源汽车技术和产品储备，何时输入国内市场只是时间问题。因此2018年新能源汽车取消外资股比限制对于原本就希望尽快本土化生产以争夺国内新能源汽车市场的外资品牌无疑是一个重大利好消息，而其他一些原本处于观望的外资汽车品牌相信也会将在中国设立新能源汽车制造工厂提上议事日程。可以预见，在目前竞争已经异常激烈的新

能源汽车市场上，除了国企、民营企业和新造车势力之外，不久的将来外资也将大举加入。

2. 对本土汽车制造业的冲击

虽然我国汽车工业通过几十年来与外资品牌的合作取得了不小的进步，但总体而言，大而弱的问题依然存在，特别是关键零部件研发和制造能力薄弱，品牌影响力有限，产品质量不过关等问题较为突出。一旦全面放开外资限制，意味着外资品牌和自主品牌的产品将可能展开直接的竞争。而对于现有的合资企业而言，全面放开后即使外方不会马上退出或取得合资企业的全部或多数股权，但仍然可能通过控制输入给合资企业的车型或相关技术削弱合资企业产品的竞争力，从而间接为其在国内的全资或控股汽车生产企业铺路并赢得竞争优势。

3. 汽车行业的外资并购可能增多

如果国家发展改革委答记者问的开放步骤能够切实落地，则今年外商投资新能源汽车就可以不受股比的限制，而到2022年，市场占比最大的乘用车亦可以不受外资股比限制，同时合资企业不超过两家的数量限制也会被取消，理论上境外汽车制造企业在中国的投资发展将不再束手束脚，会有更多选择和机会。然而，值得注意的是，尽管汽车制造业外资股比和合资企业数量限制将放开，但这并不意味着外资进入中国汽车生产制造的门槛不复存在，

现行的汽车产业发展政策和规划，准入和投资管理制度，以及各类别车辆生产企业及产品管理规则等相关规定所明确的条件和要求仍然适用。此外，考虑到我国汽车产业产能过剩（包括新能源汽车产能）的风险已经凸显，国家发展改革委和工信部等汽车行业主管部门已表示原则上不再核准新建传统燃油汽车企业投资项目，并且新建新能源汽车投资项目目前也已经暂停核准，新出台的核准标准极有可能进一步收紧。这意味着即使到2022年所有外资股比限制全部放开，通过新设独资企业生产传统燃油汽车的通道也已基本被堵死；而短期内通过新设独资企业生产新能源汽车基本也不可行。因此，我们

预计未来以兼并收购的方式盘活现有已取得生产资质的整车制造企业，以及以新能源汽车产能置换传统燃油汽车产能，可能是外资进入国内汽车制造业的主要方式，也可能是中国主管部门更想见到的方式。

四、结语

分阶段全面放开汽车制造业外资限制必将掀起一波外商投资汽车业的高潮，而对于成长中的中国汽车业来说既是挑战，但同样也存在机遇。外资品牌如何进一步撬开中国市场，而本土品牌如何应战，让我们拭目以待。

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Foreign Investment

Brief Comment on Easing Restrictions on Foreign Investment in Automotive Manufacturing

On April 10, 2018, President Xi Jinping attended the Boao Forum for Asia (“BFA”) Annual Conference 2018 and delivered a keynote speech stressing that “China will remain unchanged its adherence to reforming and opening up, and will continue to launch new, major measures to pursue further opening.” Following this speech, the National Development and Reform Commission (“NDRC”) published its *Answers to Reports’ Questions Regarding Promulgating New Negative List of Foreign Investment (“Negative List”) and Opening-Up of the Manufacturing Industry* (“Answers”) on the official website of the Central Government. Through this document, the NDRC expressed its efforts to accelerate its pace to formulate a new Negative List along with other relevant departments, which echoed the major measures mentioned in President Xi’s speech. It also stressed that the manufacturing industry will be the priority in the new Negative List, and easing the restrictions on foreign investment in the automotive industry will be the focus in this prioritized area.

I. Easing Restrictions on Foreign Investment in Vehicle Manufacturing: Backgrounds & Current Trends

In the Answers, the NDRC released its orderly plans for relaxing restrictions on the proportion of

foreign shares in the automobile Original Equipment Manufacturer (“OEM”) sector, distinguished by different types of vehicles. Specifically, for special-purpose vehicles and new energy car manufacturers, the ratio restriction of foreign shares will be eliminated in 2018. Further, the restriction for commercial vehicles and passenger cars will be removed in 2020 and 2022, respectively. Meanwhile, the rule that foreign car makers shall not have more than two joint ventures on as single vehicle type in China, is also expected to be removed by 2022. The NDRC expects to remove all the foreign investment restrictions on the OEM sector through a five-year transition period counted from 2018.

In fact, it has been a long-standing plan to ease the foreign investment restriction on the automobile OEM sector. In the *Plan for the Middle and Long-Term Development of the Automotive Industry* jointly issued by the Ministry of Industry and Information Technology, the NDRC and the Ministry of Science and Technology in 2017, the strategy to “improve the domestic and foreign investment administration regime and gradually relax restrictions on the proportion of foreign shares in joint ventures” was clearly mentioned. Moreover, Report on the Work of the Government of this year also pointed out the idea of

“substantially reducing restrictions on foreign investors to further open-up the new energy vehicles sector”. However, neither a specific timetable nor a detailed roadmap was formed during those plans and discussions.

President Xi’s declaration in the BFA and the NDRC’s quick follow-up in publishing specific implementation plans coincided with the recent tension in Sino-US trade conflicts. Nobody can tell whether the two events are indeed correlated or just pure coincidence. Still, what has to be admitted is that the Chinese Government is under huge external pressure in further opening-up the automotive industry. There is a long tradition of government protection in the Chinese automotive industry. Foreign car makers have to form joint ventures with Chinese partners to produce cars within the Chinese territory, plus various strict restrictions of share ratio, total number of joint ventures and brand identifications, etc. Furthermore, imported cars that were manufactured overseas have to bear a tariff as high as 25%. All of these restrictions are clearly inconsistent with the Chinese Government’s basic principles of furthering the opening-up of China.

On the other hand, the Chinese domestic automotive industry has gained enormous progress in technological development, product manufacturing, talent training and etc. during its practice of forming joint ventures with foreign counterparts, by which the Chinese automotive industry has won considerable competitiveness. In this context, as the world’s largest and fastest growing automobile market, removing foreign investment limits is imperative-- at the current stage, discriminations between the Chinese and foreign players in the automotive industry have already drawn skepticism from some foreign car makers and foreign governments. Removing these limits may also clearly illustrate China’s steady determination to open-up its markets and encourage foreign investment.

II. Policy Development: Deregulation towards a More Open Economy

The development of foreign investment policies regarding the Chinese automotive industry over the last 20-plus years could be summarized in the chart below:

Time (Year)	Policy of Automotive Industry	Catalogue of Industries for Guiding Foreign Investment	Other policies
1994	<i>Policy on Automotive Industry 1994</i>		
1995	<ol style="list-style-type: none"> The proportion of shares held by Chinese investors shall be no less than 50% in joint ventures manufacturing vehicles and engines. Foreign car manufactures shall not have more than two joint ventures for one type of vehicle in China. 	<ol style="list-style-type: none"> Only manufacturing of key automobile components and spare parts (excluding engines) is in the encouraged category. Vehicles and engine manufacturing are both in the restricted category, allowed only when Chinese parties control the shares or take dominant position consistent with the industry policy. 	
1997		Almost the same compared to the 1995 version	
2001			The 2001 Chinese WTO commitment promised to:
2002		<ol style="list-style-type: none"> Manufacturing of vehicles, engine, and key automobile 	

Time (Year)	Policy of Automotive Industry	Catalogue of Industries for Guiding Foreign Investment	Other policies
		<ul style="list-style-type: none"> components and spare parts is now in the encouraged category. 2. Retained the restriction on share ratio of foreign investment in vehicle manufacturing, but eliminated the ratio restriction in engine manufacturing. 	<ul style="list-style-type: none"> 1. Gradually cancel all restrictions on categories, types and models in automotive industry in two years after entering the WTO, and 2. Cancel the foreign investors' 50 per cent investment cap in engine manufacturing joint ventures.
2004	Aside from cancelling the restrictions on foreign ownership in engine manufacturing, <i>the Policy on Development of Automotive Industry 2004</i> made no substantial modifications. It only clarified the exceptions to restrictions on car manufacturing: if a foreign investor acquires other car makers in China together with a Chinese joint venture partner, it will not be restricted by the "two joint venture rule". An overseas enterprise and its controlled subsidiaries shall be regarded as the same foreign investor.	No modifications on foreign ownership restriction compared to the 2002 version	
2007		<ul style="list-style-type: none"> 1. Manufacturing of vehicles, engine and key automobile components and spare parts is still in the encouraged category, while the new Catalogue detailed and narrowed the scope of products. In addition, it added explicit performance requirements for some of the products. 2. Retained the foreign ownership restriction on vehicle manufacturing. 	
2009	<i>The Policy on Development of Automotive Industry 2009</i> made no modifications on the foreign investment restrictions compared to the 2004 version.	<ul style="list-style-type: none"> 1. Manufacturing of vehicles, engine and key automobile components and spare parts is still in the encouraged category, but the performance requirements for some products are enhanced. 2. Vehicle manufacturing was reclassified into the permitted category. 	
2011		<ul style="list-style-type: none"> 1. Manufacturing of engine and key automobile components and spare parts is still in the encouraged category. There are minor adjustments on the scope of products compared to the 2011 version. 2. Vehicle manufacturing was reclassified into the restricted category, and the foreign investment restrictions were retained. 	
2015		<ul style="list-style-type: none"> 1. Manufacturing of engine and key automobile components and spare parts is still in the encouraged category. Still 	<i>The Plan for the Middle and Long-Term Development of the Automotive</i>
2017		<ul style="list-style-type: none"> 1. Manufacturing of engine and key automobile components and spare parts is still in the encouraged category. Still 	

Time (Year)	Policy of Automotive Industry	Catalogue of Industries for Guiding Foreign Investment	Other policies
		<p>some small adjustments on the scope of products compared to the 2015 version.</p> <p>2. Vehicle manufacturing was reclassified into the restricted category, and the foreign investment restrictions were retained.</p>	<p><i>Industry</i> suggested relaxing restrictions on the proportion of foreign shares in joint ventures</p>
2018	<p>The Answers promised that China will gradually phasing out of all restrictions on foreign investment in the automotive industry. Predictably, the current <i>Catalogue of Industries for Guiding Foreign Investment</i> and <i>Policy on Development of Automotive Industry</i> will both be revised and updated accordingly during this transition process.</p>		

As demonstrated above, regulations on foreign investment in the automotive industry are mainly through the adjustments in the *Catalogue of Industries for Guiding Foreign Investment* and *Policy on Development of Automotive Industry*. Although multiple modifications were presented, the core restrictions on share ratio and number of joint ventures in car manufacturing remained the same. The Chinese Government historically has made no compromise on these issues, and only has accepted some insignificant changes, such as shifting the classification of vehicle manufacturing between the restricted category and the encouraged category, and canceling the restriction on foreign investment in engine manufacturing under the pressure of fulfilling WTO commitment. Therefore, the Chinese Government's determination to remove its longstanding restriction on foreign ownership in car manufacturing entities is considered a significant reform.

III. Possible Impact on Automotive Industry

1. Foreign Investors Flood into the Sector of New Energy Car

The Answers suggested that new energy cars will be the first sector for opening-up in the five-year transition period. Currently, the new energy car

market is a favorite of investors, but the key players are mostly state-owned enterprises and private enterprises, while foreign car makers are still largely outside this hot market. However, those foreign car makers are traditional multinational corporations ("MNCs") with solid foundations of developed technology and products in this sector, thus it is only a matter of time until they finally enter the Chinese market with their new energy cars. As a result, the cancellation of foreign ownership restrictions in new energy car manufacturing is a double dose of good news for those who have been eager to fight a battle over Chinese market shares. Also, other foreign automobile brands who were passively observing in the past may mark "establishing new energy car factories in China" in their calendar. Predictably, foreign investments will flood into the already highly competitive new energy car market with the current players of state-owned enterprises, private enterprises and the so-called "new car-making forces".

2. Strikes on the Local Automotive Industry

Despite the progress gained through several decades' cooperation with foreign brands, China's automotive industry is still famous for its quantity rather than quality, especially concerning the problems in the R&D of key components and

spare parts and the influence of its own brands, as well as quality issues. Once the foreign restrictions are all cleared, foreign brands will be in direct competition with the Chinese national brands and joint venture brands. Moreover, for the existing joint ventures, even though their foreign investors will not immediately exist or obtain the majority shares, they could still diminish current joint ventures' competitiveness by controlling the input of either car models or relevant technologies, and thus indirectly may assist the foreign investors' wholly owned or majority controlled subsidiaries, granting them competitive edges down the road.

3. M&A in the Automotive Industry May Increase

If the Answers are effectively implemented, then foreign investment in new energy cars will be freed from share ratio barriers in this year. In 2022, passenger cars, which occupy the largest market shares, will also face no restrictions in share ratio. Finally, the cap on two joint ventures for a single foreign investor will be removed. Thus, by 2022, foreign car makers will, in theory, have more options and opportunities for investment ahead of them, and will face far fewer restrictions than have existed since they began doing business in China.

However, the foreign car makers still need to be aware that even with the gradual easing of restrictions in share ratio and number of investments, it does not mean that there will be no threshold at all for the foreign investors to manufacture cars in China. The explicit requirements and conditions established by the prevailing automotive industry development policy and planning, regulations on market entrance and project investment, administrative rules on manufacturers and products of different types of vehicles and etc. are still in effect and applicable.

In addition, since risks of excessive production capacity (including new energy car production capacity) are growingly evident, industry regulators such as NDRC and Ministry of Industry and Information Technology have already expressed the principle that no approval will be granted for new investment projects producing traditional fuel cars. It is also noted that the approval for investment projects producing new energy cars has also been suspended and the new criteria on securing the approval, which are expected to be issued in the near future, are very likely to be stricter. As a result, even with all foreign share ratio restrictions removed towards 2022, making greenfield investments (such as setting up a WFOE) to produce traditional fuel car is almost impossible, and in the short run, it largely remains similarly infeasible to produce new energy cars by establishing a WFOE.

Therefore, we predict that M&A may become the main stream for foreign car makers entering the China market by acquiring the existing Chinese companies with proper regulatory approvals, and swapping new energy car capacity with traditional fuel car capacity. M&A may also be more welcome and acceptable to the Chinese authorities from the standpoint of resolving the redundant car manufacturing capacity.

IV. Remarks

Phasing out foreign restrictions in the automotive industry will definitely surge foreign investments in the automotive industry, and on the other hand, it is both an opportunity and a challenge for the growing Chinese automotive industry. People may need to wait and see how the foreign brands will enter the China market, and how the Chinese brands will cope with this new market dynamic.

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