

## Antitrust

### Key issues in the Draft Guidelines on the Anti-Monopoly Issues in the Automotive Industry

Following the significant fines imposed on auto manufacturers, auto distributors and spare parts manufacturers pursuant to the PRC Anti-monopoly Law (the “**AML**”) in the past two years<sup>1</sup>, the National Development and Reform Commission (the “**NDRC**”) has been authorized by the State Council to draft guidelines for the automotive industry, aiming to address competition issues in the industry and provide the market with a predictable enforcement of law and thus improve the compliance of all parties.

Since the initial meeting launching the initiative in June 2015, NDRC has aimed to remain open-minded and has held several seminars in the course of drafting the guidelines, inviting a diversity of voices from major auto manufacturers, auto distributors, spare parts manufacturers, industrial associations and lawyers to provide comments and suggestions. On March 23, 2016, NDRC published the Guidelines on the Anti-Monopoly Issues in the Automotive Industry (Draft for Comments) (the “**Draft Guidelines**”) on its website seeking public opinion.

#### I. Features and key issues of the Draft Guidelines

<sup>1</sup> As of 2015, NDRC has imposed 2 billion fines on the players in automotive industry. See <http://auto.sohu.com/20150911/n420877062.shtml>

The Draft Guidelines offer a comprehensive discussion of the definition of relevant markets, monopoly agreements, abuses of dominant positions, merger control filings, as well as abuses of administrative power in the automotive industry, with more focus on vertical restraints and abuses within the automotive aftermarket. We have highlighted the key issues involved in each of these sections so as to provide a more practical view of the document.

#### 1. Definition of the relevant markets in the automotive industry

Among various relevant product markets that may be involved in the value chain of the automotive industry, more focus is laid on the distribution markets and the automotive aftermarket in the Draft Guidelines. For the former, it is not necessary to further divide the market by brand but a line may be drawn between wholesale and retail markets. As for the automotive aftermarket, the automobile brand is an important factor in the market definition, impacting the compatibility and the lock-in effect of the markets. Thus, the automotive aftermarket may be considered by further segmentation by brand.

In light of this approach, auto manufacturers are likely to be deemed as having a dominant position

in the automotive aftermarket of their own brands and their practices with distributors in the aftermarket will need to be reviewed under the rules safeguarding against the abuse of a dominant position.

## **2. Monopoly agreement**

The Draft Guidelines have limited analysis of horizontal agreements because there is no substantial difference between horizontal agreements in the automotive industry and other industries. Rather, the Draft Guidelines underline vertical agreements, including anticompetitive territorial or customer restraints, which is consistent with the practice of other major jurisdictions such as the EU.

### **(a) Resale price maintenance and minimum resale price maintenance**

Article 14 of the AML explicitly prohibits resale price maintenance and minimum resale price maintenance (collectively, “RPM”) which usually restricts or eliminates competition significantly. Nonetheless, the Draft Guidelines illustrate a few circumstances under which RPM may be qualify for individual exemption under Article 15 of the AML<sup>2</sup>, considering the underlying efficiencies that may be gained, which include: 1) short term RPM in the promotion phase of new energy vehicles (e.g. 9 months from the date on which the auto supplier issues the first invoice); 2) RPM where distributors act only as intermediaries; and 3) RPM where distributors only assist in transactions for government procurement or online sales. Furthermore, it is confirmed by the Draft Guidelines that recommended/suggested resale price and maximum resale price, if without

any RPM effect in enforcement, normally will not trigger concerns under the AML.

### **(b) Vertical restraints on territory and customers**

In the absence of explicit prohibition, there have been different opinions on vertical restrictions on territory and customers under the AML. In the Draft Guidelines, explicit rules are provided in this regard and a few concepts similar to those in EU competition law are introduced, such as block exemptions, safe harbor, hardcore restrictions, passive/active sales<sup>3</sup>, etc.

Firstly, a few territorial or customer restrictions fixed by the undertaking without significant market power (i.e. market share is below 25%-30%) can be presumed to be exempted under Article 15, such as the restriction on active cross-territory sales or the restriction on sales from wholesaler to end users. Secondly, some restrictions on territory and customers will cause significant anticompetitive effects and cannot be presumed to be exempted regardless of the market power. These restrictions, having a similar nature as hardcore restrictions in the EU, include: 1) territory or customer restrictions on passive sales; 2) restrictions on cross-supplies between distributors; 3) restrictions on sales of required spare parts by distributors and repairers to end users; 4) except for an OEM agreement, restriction on the sales by suppliers of spare parts and relevant tools to distributors, repairers or end users. However, just like hardcore restrictions in the EU, the aforementioned restrictions are still eligible for applications for individual exemption.

It is not clear whether the rules on vertical agreements contained in the Draft Guidelines will

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<sup>2</sup> Article 15 of the AML extensively sets forth a few general exceptions (such as efficiencies) where Articles 13 and 14 of AML may not apply. However, we are not aware of any investigation case in which the investigated companies have been successfully qualified for any of these exceptions. Actually, for a long time, there is no detailed rules specifying how this clause could be applied.

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<sup>3</sup> In line with the rules and practices in the EU, passive sales and active sales are distinguished from each other by the Draft Guidelines and online sales are normally qualified as passive sales. Passive sales mean delivery of goods or services to an individual customer upon such customer’s request.

be applied to other industries by the AML authorities and is worth close observation.

### **(c) Vertical restraints under warranty clause**

The Draft Guidelines prohibit auto manufacturers from manipulating the warranty clause to impose restrictions on the inappropriate flow of spare parts. In particular, an auto manufacturer is not allowed to 1) condition its implementation of the warranty clause on non-warranty repairs through its designated channels; 2) require the use of the original spare parts for repairs not covered by the warranty clause; 3) restrict the availability of repair or maintenance services for parallel imported vehicles.

### **(d) Other vertical restraints against distributors/repairers**

Considering the various interventions by auto manufacturers in the operation of distributors/repairers, the Draft Guidelines list several vertical restraints that may inappropriately restrict the distributors/repairers' capability to serve customers, including forcing distributors to accept unreasonable sales targets or quantities of inventory of motor vehicles or spare part sales, unreasonable requirements or restrictions by auto suppliers against the distributors on design, decoration, office facilities as well as the promotional activities, etc. Meanwhile, the Draft Guidelines require auto suppliers to explain reasons if they refuse to supply or terminate the distribution agreement early.

## **3. Abuse of a dominant position**

As we have illustrated above, the aftermarket of motor vehicle can be defined according to the segmentation of brand. Therefore, an auto manufacturer may be determined to have a dominant position in the motor vehicle aftermarket of its brand and its commercial

conduct thus is subject to scrutiny under the rules safeguarding the abuse of a dominant position.

Generally speaking, although there may be concurrence between vertical agreements and abuses of dominant market position, the main focus of abuse is laid on restrictions on the free flow of after-sale spare parts and disclosure of technical information on repair and maintenance.

In particular, the auto manufacturers with a dominant position shall not restrict 1) spare part manufacturers from producing "double branding parts" at the manufacturing stage; 2) the supply and circulation of after-sale parts (on one hand, distributors/repairers should be allowed to purchase qualitative equivalent parts or purchase original parts from other channels (e.g. parallel imported spare parts); on the other hand, the spare part suppliers, distributors and repairers should be allowed to sell after-sale parts to others, such as cross supply and supply to end users); 3) the availability of technical information on repair and maintenance, testing instruments and maintenance tools.

## **4. Merger control filing and abuse of administrative power**

The Draft Guidelines contain no details for merger control filings in the automotive industry in that there is no significant difference between the automotive industry and other industries with respect to the competitive analysis. Meanwhile, the Draft Guidelines also list several abusive behaviors of the empowered authorities and organizations with respect to the market entry of the auto market and the circulation of used vehicles.

## **II. Other highlights**

It is worth noting that, prior to the issuance of the Draft Guidelines, on January 6, 2016, MOFCOM

released the Measures for Administration of Automobile Sales (Draft for Comments) (the “**Draft Measures**”) for public comment, which contain similar regulations as the Draft Guidelines in respect to competition issues and will replace the Implementing Measures of Automobile Brand Sales issued in 2005 (the “**2005 Implementing Measures**”) to regulate the sales model in China’s auto industry. The 2005 Implementing Measures have been criticized for being excessively pro-manufacturer and contradicting the competition law principles. Meanwhile, several governmental authorities led by the Ministry of Transportation promulgated the Implementation Measures for Disclosure of Automobile Repair Technology Information on September 2015, which came into effect on January 1, 2016, provide detailed requirements on the timing, procedures, content and form of the

repair technology information to be disclosed. Moreover, we have known that the China Automotive Maintenance and Repair Trade Association is formulating standards for after-sales spare parts which will help define the qualitative equivalent spare parts.

In light of the above, once the Guidelines on the Anti-Monopoly Issues in the Automotive Industry come into force, with the support offered by the aforementioned associated regulations and measures, we would expect a new ecosystem of markets and competitive status in the automotive industry, which would bring more efficiencies from the perspective of competition and lower prices for the end customer. Meanwhile, the market players would have to adjust their commercial practice in China in a significant way in order to adapt to the new regulatory environment and market ecosystem.

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## 反垄断法律热点问题

### 《关于汽车业的反垄断指南》（征求意见稿）解读

截至 2015 年底，中国反垄断执法机构针对汽车行业的调查所涉罚款金额已接近 20 亿人民币，涉案企业位于汽车产业链的各个部分，包括不同品牌的汽车制造商、配件供应商和经销商。以此为背景，经国务院反垄断委员会授权，国家发改委自 2015 年 6 月开始负责起草《关于汽车业的反垄断指南》，旨在为行业和市场提供更加明确的反垄断法问题合规指引。2016 年 3 月 23 日，发改委正式公布了《关于汽车业的反垄断指南》（征求意见稿）（下称“《征求意见稿》”），公开向社会征询意见，此前，发改委曾就该指南多次征求汽车行业的企业、协会、专家学者及中外律师的意见。

《征求意见稿》系统性地讨论了汽车行业下的相关市场定义、横向和纵向垄断协议、滥用市场支配地位、经营者集中和行政垄断的适用规则，其中，纵向限制、售后市场的限制和滥用行为是其规制的重点。我们将在下文对《征求意见稿》中所涉的关键法律问题和相应规定逐一予以解读。

#### 一、汽车行业相关市场定义

《征求意见稿》肯定了替代性分析在相关市场定义中的作用，并对汽车经销市场和汽车售后市场予以区分。就前者而言，批发环节和零售环节可能会被理解为独立的相关市场，而就后者而言，考虑到锁定效应和兼容性，汽车品牌是界定汽车售后市场时需要考虑的重要因素，换言之，售后市场有可能会根据不同的汽车品牌进行进一步的细分。

#### 二、汽车行业的纵向限制

##### 1、转售价格维持及豁免

《反垄断法》明确禁止转售价格维持及最低转售价格维持（合称“RPM”）作为一种“硬核性”的对竞争性的限制，RPM 一般难以获得豁免。但结合汽车行业实务并考虑到 RPM 可能产生的效率，《征求意见稿》列举了若干可主张个案豁免的情形，包括：新能源汽车的推广期（9 个月）内的 RPM，经销商仅作为中间商的交易的 RPM，经销商在政府采购或电商销售中仅充当协助交易角色的情况下的 RPM。同时，《征求意见稿》肯定了不具 RPM 执行效果的建议价、指导价和最高价一般不会产生排除限制竞争的影响。

##### 2、地域及客户的纵向限制

由于缺乏明文的禁止性规定，就地域及客户的纵向限制的合规性一直存在不同的理解。《征求意见稿》首次对此问题作出了较为明确的规定，这些规定与欧盟竞争法下的“集体豁免（block exemption）”、“安全港（safe harbor）”、“硬核限制（hardcore restriction）”、“主被动销售（active/passive sales）”等概念存在一定的相似之处。首先，不具有显著市场力量（即市场份额在 25%-30% 以下）的汽车业经营者所设置的某些地域/客户限制可被推定为符合豁免条件，如对跨区主动销售的限制（主动销售指主动营销，与被动销售相反），限制批发商直接向最终用户销售等。其次，一些地域



/客户限制被认为严重限制竞争，无论市场力量高低，不能适用推定豁免（但仍可主张个案豁免），这些限制包括：对经销商被动销售的限制，限制经销商之间交叉供货、限制经销商/维修商向最终客户销售配件以及除代工协议外，限制配件或相关工具设备供应商向经销商/维修商/最终客户销售配件及相关工具设备。

值得注意的是，虽然《征求意见稿》对地域/客户限制作出了突破式的规定，考虑到其仅适用于汽车行业，这些规定是否反映了纵向限制的新的执法思路，以及对其他行业的合规执行的影响，仍有待思考和实践查验。

### 3、保修条款下间接的纵向限制

此类限制为汽车行业独有的纵向限制，主要防止汽车制造商利用保修条款，对维修服务及配件施加限制，排斥独立维修商，限制配件流通渠道。这类限制主要包括：以履行保修条款为条件限制非保修范围内的服务需在渠道内完成，对保修范围外的配件要求使用原厂配件，无正当理由限制维修网络对平行进口车提供维修保养服务。

### 4、其他对经销商/维修商的纵向限制

《征求意见稿》中此部分所规定的限制种类比较繁杂，主要是基于实务中存在的汽车供应商对经销商/维修商的经营活动的各种干预和限制。《征求意见稿》列举了若干种可能会对经销商/维修商销售服务能力造成不当限制的纵向限制，这些限制如果导致显著的排除限制竞争的效果，则可能被认定为纵向垄断协议，具体包括：1）强制搭售；2）强制经销商/维修商接受不合理的汽车和配件销售目标、库存品种和数量等；3）强制要求经销商承担以供应商名义开展的宣传推广活动费用或强制限定宣传推广活动的方式及平台；4）对经销商/维修商所使用的设计、装修材料和办公设施的品牌、供应商及渠道进行限制。同时，《征求意见稿》要求，汽车供应商拒绝供货或提前解除经销协议，应明确列出理由。

## 三、售后市场的滥用行为

如前所述，汽车品牌是界定汽车售后市场时需要考虑的重要因素，换言之，售后市场有可能会根据不同的汽车品牌进行进一步的细分，因此，对于在新车销售市场上不具有支配地位的汽车供应商，在其品牌的汽车售后市场上则有可能被认定为具有市场支配地位。《征求意见稿》主要关注汽车售后市场的滥用行为，从配件的生产、到供应流通以及维修信息公开等。

具体而言，首先，就配件的生产环节，为便于消费者和维修商辨识同质配件，在其品牌汽车售后市场具有支配地位的汽车制造商，除代工协议下的配件外，不应无正当理由限制初装汽车配套的配件制造商生产“双标件”，即限制该配件制造商在配件上加贴自有商标，标识及零件代码。

其次，在配件的供应及流通环节，在其品牌汽车售后市场具有支配地位的汽车制造商不应：1）限制经销商/维修商外采售后配件即购买同质配件及从其他渠道购买原厂件（如平行进口）。《征求意见稿》中明确举例，对经销商设定不合理的配件销售目标等实质可达到限制外采配件目的的行为属此等限制；2）限制配件供应商、经销商及维修商外销售后配件，具体包括代工协议外要求配件全部“返厂”，限制经销商/维修商交叉供应配件及向最终用户销售配件。

最后，为保证独立维修商的服务能力，在其品牌汽车售后市场具有支配地位的汽车制造商不应限制维修信息及维修工具的可获得性。

此外，《征求意见稿》还对汽车行业可能出现的针对汽车市场准入、汽车自由流通及二手车市场交易的滥用行政权力的行为做出了规定，在此不予赘述。

## 四、其他亮点

值得一提的是，其他法规和政策文件已经与《关于汽车业的反垄断指南》进行衔接，以保证后者正式出台后法规环境的一致性。例如，在《征求意见稿》出台前，商务部于2016年1月6日发布

了《汽车销售管理办法(征求意见稿)》，公开征求意见并预计年内实施，该管理办法所包含的规则已与《征求意见稿》中所述规则大体一致。同时，由交通运输部等部委联合制定的《汽车维修技术信息公开实施管理办法》(2016年1月1日正式实施)，该管理办法已将《征求意见稿》中要求的维修技术信息公开在程序及细节上予以明确。此外，我们也了解到，售后配件的标准化工作已由中国汽车维修行业协会负责开展，这将解决同质配件的认定问题。

## 五、小结

一旦《关于汽车业的反垄断指南》正式出台，结合上述政策和法规的支持，汽车行业将呈现出全新的市场体系和竞争态势。作为汽车行业的经营 者，无论是汽车制造商，零配件制造商还是经销商，均需要对自身的商务政策和业务实践进行大幅的调整，以适应新的市场体系和监管环境，保证自身运营的合规性。

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