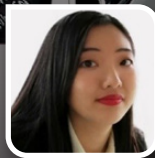


ANTITRUST ENFORCEMENT AND LITIGATION IN CHINA'S AUTOMOBILE INDUSTRY (PATTERNS AND UPDATES)



BY HAO ZHAN, YING SONG, ZHAN YANG & YUHUI YANG¹



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Antitrust Enforcement and Litigation in China's Automobile Industry (Patterns and Updates)

By Hao Zhan, Ying Song, Zhan Yang & Yuhui Yang

The automobile industry in China is a pillar of the national economy, and an area of significant importance for antitrust enforcement. This article provides an update on antitrust enforcement policies in China's automobile industry. To do so, it provides a background on China's *Anti-monopoly Guidelines for Automotive Industry*, and the legislative procedures used to enact said guidelines, in addition to highlighting their main characteristics. It then analyzes antitrust enforcement and private litigation in the automobile industry. To this end, it summarizes two cases: one being administrative, *Heze Auto Industry Association v. Shandong AMR*, and the other being private, *Guangming Trading v. Hankook*.

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As a major pillar of the national economy, the automobile industry accounted for roughly 10 percent of China's GDP in 2020, making it an area of significance for antitrust enforcement. Resulting from a supply and demand imbalance, in recent years a glut of supply has depressed the whole industry. Especially in 2020, tougher antitrust activity has arisen involving each link in the entire supply chain, from automobile manufacturing and distribution to after sale servicing.

The below review is divided into three parts: an update on antitrust enforcement policy, antitrust enforcement cases by Chinese authorities, and an analysis on typical antitrust litigation cases.

I. UPDATE ON ANTITRUST ENFORCEMENT POLICY IN THE AUTOMOBILE INDUSTRY

On January 4, 2019, the Anti-monopoly Commission under the State Council ("Commission") issued the *Anti-monopoly Guidelines for Automotive Industry* ("Guidelines"), which provides undertakings in the automobile industry with more guidance for anti-monopoly compliance. The Guidelines are formulated based on China's experience with law enforcement in the automobile sector together with relevant precedents from other jurisdictions, and aims to prevent monopolistic conduct, lower the costs of law enforcement, and increase compliance by undertakings.

A. Background to the Guidelines

Based on the fact that China has developed into the world's most important and most rapidly growing automobile market, it was necessary that the Guidelines be enacted to uphold fair competition in the automobile industry. In China, the automobile sector is a pillar of the national economy. At present, the automobile sector has become an important driving force behind the development of mid-to-high end consumption, innovation, the green economy, and finally the sharing economy. The Guidelines, aiming at maintaining fair competition, facilitating the healthy development of the automobile sector, and safeguarding consumer interests, are of great importance.

Since 2014, Chinese competition authorities handled a series of monopoly cases in the automobile sector, with competition concerns relating to both horizontal agreements between competitors and also to vertical agreements between manufacturers and distributors. The fines imposed since 2014 now total nearly RMB 2.6 billion yuan. The Guidelines, drafted based on previous law-enforcement practice, are essential to providing clearer anti-monopoly guidance for undertakings in this sector.

B. Legislative Procedure for the Guidelines

Beginning in June 2015, the Commission, together with other related administrative departments, began drafting the Guidelines. The team responsible took the following measures to ensure the Guidelines' quality and operability:

- (1) Conducting Research. In order to make sure the close connection between the Guidelines and the industry and to underpin the development of automobile sector, the team conducted researches into the sector, such as the pricing of finished automobile and accessories, finished automobile distribution and after-sale modes and channels. In addition, for the main issues concerned in the Guidelines, the team conducted questionnaire surveys and interviews to upstream and downstream enterprises, industry associations, law firms, experts and scholars to study the current status of the sector.
- (2) To research for precedent enforcement cases. As mentioned above, the Chinese authority handled a number of cases in the automobile sector. By studying the monopolistic acts in different industries and business links, analyzing their characteristics and causes, and drawing on the characteristics and tendency of concentration of automobile undertakings, the work team took into account that the Guidelines shall be compatible with the market competition and regulation requirements and the development phase of China's automobile sector, and included in the Guidelines these requirements.
- (3) Drawing on international experiences. Relying on the work of research institutions and studying relevant legal regimes in the European Union, the US, Japan, and South Korea, among others, so as to draw on international experiences. The operability of the framework, principles and main content in the Guidelines are further adapted from both such experiences from other jurisdictions as well as the characteristics of China's own market competition regime and the current state of China's automobile market.

- (4) Widely Solicit Public Comments. From June 2015 to January 2016, five workshops were held to solicit opinions from upstream, middle and downstream enterprises, consumer representatives, scholars and experts. From March to April 2016, through soliciting public opinions, the team had received 228 opinions regarding the Guidelines from related government departments, companies at home and abroad, industry associations, research institutions, and law firms, among other entities. The draft of the Guidelines was amended accordingly. In February 2017, more opinions from Commission member units and experts of the advisory group under the Commission were provided and the draft of the Guidelines was further amended accordingly.

After the above-mentioned procedures, the Commission further amended the draft Guidelines in accordance with the institutional restructuring of the State Council. Upon approval by the director of the Commission, this new iteration was scheduled to be issued in January 2019.

C. Main Characteristics of the Guidelines

Taking into account the market status, context and characteristics of China's automobile sector, the Guidelines properly draw on domestic law enforcement experience as well as corresponding rules from jurisdictions with more mature competition regimes. The Guidelines also focus on new technology and business areas. There are four main characteristics of the Guidelines:

- (1) The Guidelines are China-specific. Consisting of six chapters including general provisions, monopoly agreement, abuse of dominance, concentration of undertakings, abuse of administrative powers to exclude or restrict competition, and supplementary provisions, the provisions in the Guidelines are compatible with the *Anti-monopoly Law of the PRC* (the "AML") and are China-specific. They are based on a comprehensive comparative and empirical study of the automobile industry and the law enforcement experience in China.
- (2) The Guidelines are question oriented. To provide automobile undertakings with clear and specific guidance for compliance, the Guidelines are question oriented. The Guidelines mainly state the approach adopted by anti-monopoly law enforcers in the automobile sector; their analysis, framework, principles and methodologies, together with details on the assessment of monopoly agreements and abuses of dominance leading to elimination or restriction of competition in the automobile sector.
- (3) The Guidelines seek to balance interests among different parties in the market. By properly defining freedom of contract and the autonomy and willingness of the undertakings, the Guidelines seek to balance interests among different parties of the upstream, middle and downstream undertakings in the market.
- (4) The Guidelines are compatible with other laws, regulations and policies. The automobile sector is capital-intensive and closely related to other sectors. It requires investment in new and cutting-edge technologies. Thus, the sector has become the driving force in the development of related industries. The Guidelines, therefore, seek to be connected and compatible with other laws, regulations and policies, especially those related to intellectual property right, industry policies, consumer protection, and civil and commercial contracts.

D. The Guidelines' Main Highlights

1. Market Definition Issues

The Guidelines stress that the role of market definition varies in different types of monopoly cases. For monopoly agreements cases, there is usually no need to clearly define the relevant market in practice. However, for cases involving an abuse of dominant market position, the definition of the relevant market is usually the first step for assessing and determining the suspected monopolistic conduct.

When defining the relevant product market, demand substitution analysis can be conducted based on the product's characteristics, usage, and price, and supply substitution analysis can be conducted when necessary. According to the specific circumstances of an individual case, automobile wholesale and retail may need to be defined as separate relevant product markets, and the automobile dealership market may be further divided from the perspectives of demand substitution and supply substitution. The automobile after-sales market can be divided into the after-sales parts dealership market and the after-sales maintenance market, and may need further segmentation through substitution analysis.

For the passenger vehicle manufacturing market, from a supply substitution perspective, this market is largely global. But from the demand substitution perspective, there are significant differences among the competitive environments of different countries, resulting from factors such as technical and trade barriers, motor vehicle taxes and fees, distribution systems, prices, and competitor market penetration. Therefore, the passenger vehicle manufacturing market may be defined as a national market.

For the passenger vehicle dealership market, important differences between the wholesale and retail markets affect the market definition applicable to each. Automobile suppliers generally carry out wholesale business nationwide. As a result, the geographical wholesale market for passenger vehicles can be defined as a national market. At the retail level, the passenger vehicle retail market can be defined as provincial or regional markets, considering various restrictions in place, such as vehicle license plates, vehicle access, after-sales service, and warranty terms, as well as cost factors that possibly prevent an end user from making a non-local purchase, such as the time and transportation needed.

2. Issues Related to Monopoly Agreements

With regard to horizontal monopoly agreements, the Guidelines describe certain types of salutary horizontal agreements that are understood to promote efficiency and competition, and increase consumer welfare. These include research and development agreements, specialization agreements, technical standardization agreements, joint production agreements, and joint procurement agreements. Automotive industry operators concluding such horizontal agreements can be exempted from enforcement actions.

With regard to the individual exemption of RPM, the Guidelines numerate the common situations under which auto industry operators may claim an exemption from resale price restrictions in practice, based on Article 15 of the Anti-Monopoly Law. These include: (i) short-term resale price restrictions for new energy vehicles; (ii) resale price restrictions for sales by dealers who only assume the role of intermediary; (iii) resale price restrictions involving government procurement; and (iv) resale price restrictions over auto supplier e-commerce sales.

For the recommended price, “guided” price and the maximum price, the Guidelines specify what may constitute price fixing. Namely, if due to pressure or inducement by one of the parties to the agreement, the recommended price, guided price and the maximum price is executed by most or all dealers, and the actual effect is equivalent to a fixed resale price or a limited minimum resale price, then, according to the specific circumstances of the case, such actions may constitute fixed or limited minimum resale.

Supplier imposition of territory or customer restrictions, when said supplier's market share is below 30 percent and the reasons are justifiable, can be assumed to be exempted. Applicable situations include: (i) the distributors are required to only engage in distribution activities within their business premises but are not restricted from passive sales and cross-supply with other authorized distributors; (ii) to prevent sales “cannibalization,” the suppliers limit distributors from actively selling beyond exclusive territories or to customers that the suppliers reserve for another distributor; (iii) the suppliers restrict wholesalers from directly selling to end users; (iv) to avoid customers’ use of spare parts to mimic or reproduce supplier’s products, the suppliers restrict distributors from selling spare parts to such customers.

3. Abuse of Market Dominance

The Guidelines focus on the abuse of dominance in two markets. Namely, the production and circulation of auto parts market and on the auto aftersales market. This is because the lock-in effects and compatibility issues that exist in the automotive aftersales market may limit and weaken effective competition and thereby harm the interests of consumers. The Guidelines also reminds undertakings that auto suppliers that do not have a dominant position in the new car sales market may be recognized as having a dominant position in the aftersales market of their branded cars.

Based on the provisions of the Guidelines, except for parts manufactured under the original equipment manufacturer (“OEM”) agreement, automakers that have a dominant position in the aftersales market of their branded cars should not, without justifiable reasons, restrict suppliers of parts used for the assembly of original vehicles from manufacturing dual-brand parts.

The Guidelines further elaborate that auto suppliers should not unjustifiably restrict the supply and circulation of after-sales parts. Such restrictions include (1) restricting dealers and repairers from purchasing after-sales parts, that is, from purchasing homogeneous parts or original parts (including import parts) supplied through other channels; (2) restricting parts suppliers, dealers and repairers from selling after-sales parts through other channels, including: (i) except for parts manufactured under the OEM agreement, requiring all parts to be “returned to the factory,” or restricting parts suppliers from supplying parts under their own brands to after-sales channels; (ii) restricting cross-supply of after-sales parts between dealers, repairers, and between dealers and repairers; (iii) restricting dealers and repairers from selling parts needed for auto repair services to end users.

The Guidelines provide that effective competition in the auto after-sales market requires the availability of after-sales maintenance technical information, testing instruments, and maintenance tools. Therefore, auto suppliers that have a dominant position in the after-sales market of their branded automobiles should not unjustifiably restrict the availability of the above-mentioned items, including by: (1) restricting the repairer’s rights and channels to obtain technical information for the maintenance of automobiles of specific brands; (2) restricting the suppliers of testing equipment, maintenance tools, or other equipment from selling related testing equipment, maintenance tools, or other equipment to dealers and repairers; (3) setting an excessively high market price for the maintenance of technical information, restricting the effective disclosure of maintenance technical information, and restricting auto repairers from obtaining relevant technical information.

4. Other Competition Issues

With regard to merger control in the automotive industry, the Guidelines specify that for the competitive analysis of operator concentration, there is no significant difference between the automobile industry and other industries. Antitrust enforcement authorities shall review merger filings in accordance with the relevant provisions of AML and the *Regulations on the Standards for Notification of Operator Concentration*.

II. ANTITRUST ENFORCEMENT IN THE AUTOMOBILE INDUSTRY

Following the implementation of antitrust legislation, law enforcement agencies have paid increased attention to the automobile industry, cracking down on monopoly agreements and restricting dominance abuse and administrative monopolies. Enforcement cases related to the automobile industry concluded by SAMR since the middle of 2019 are listed below. All are cartel cases.

Case Name	Penalized Undertakings	Date of Decision	Investigating Authority	Total Penalty (RMB)
Xianning Motor Vehicle Safety Technology Test Company Cartel Case ⁷	Xianning Landun, Hubei Hongda, and Xianning Shuntong	Mar. 14, 2019	SAMR Hubei Branch	1,194,194.9
Yongji Concrete Enterprises Cartel Case ¹²	Five concrete enterprises, including Xinli Concrete, Baobao Concrete, Yida Concrete, Jinxin Concrete and Sanxin Concrete	Sep. 17, 2019	SAMR Shanxi Branch	250,000
Case of Shandong Heze Automobile Trade Association Organizing Members to Reach Monopoly Agreement ¹³	Shandong Heze Automobile Trade Association	Oct. 18, 2019	SAMR Shandong Branch	300,000
Southwest Guizhou Xinyi Driving Training Industry Cartel Case	Seventeen driving schools, including State driving school, Jingsen driving school, Xingchang driving school, etc.	Dec. 31, 2019	SAMR Guizhou Branch	3,300,000

Guangdong Huizhou Vehicle Detection Industry Cartel Case	Huizhou Vehicle Detection Industry Association and thirty-one vehicle detection enterprises including Huidong Guoshun, Huidong Yuanlai, Huizhou Gexin, etc.	May 6, 2020	SAMR Guangdong Branch	1,766,857
Three Companies Including Hubei Huanggang Lantian Second-hand Vehicle Trade Market Co., Ltd. Cartel Case	Three second-hand vehicle trade market Companies including Huanggang Lantian., Huanggang Aojie, and Huanggang Fada.	Jul. 27, 2020	SAMR Hubei Branch	195,175
Zhejiang Huzhou Second-hand Vehicle Trade Market Cartel Case	Five second-hand vehicle trade enterprises including Huzhou Jiangnan Second-hand Vehicle Trade Market Co., Ltd, Anji Dazhong, Deqing Shunda, etc.	Nov. 2, 2020	SAMR Zhejiang Branch	415,258.18
Four Driving Schools including Driver Training Branch of Chuzhou Automobile Transport Co., Ltd. of Anhui Jiaoyun Group Cartel Case	Four driving schools including Driver Training Branch of Chuzhou Automobile Transport Co., Ltd, Dingyuan Nanfang, Dingyuan Qingfeng, etc.	Nov. 2, 2020	SAMR Anhui Branch	1,438,027.94
Zhejiang Jiaxing Second-hand Vehicle Trade Market Cartel Case	Nine second-hand vehicle trade enterprises organized by Zhejiang Jiaxing Second-hand Vehicle Trade Association	Jan. 29, 2021	SAMR Zhejiang Branch	4,413,681.97
Jiangsu Driver Training Market Cartel Case	Nine driver training companies, including Xinghua Bus and Motor Driver Training Company, etc.	Jan. 29, 2021	SAMR Jiangsu Branch	1,347,362

III. ANTITRUST LITIGATION IN THE AUTOMOBILE INDUSTRY

Article 50 of the AML establishes a dual-track law enforcement system: administrative law enforcement and civil litigation. The number of anti-monopoly civil litigation cases has increased steadily in recent years. Recently, a noteworthy change for antitrust civil lawsuit procedure is that from 1 January 2019, all appellate antitrust litigation will be directly handled by the Intellectual Property Tribunal of the Supreme Court of China.

Also, if a party is not satisfied with the result of administrative law enforcement, it can additionally bring an administrative lawsuit against the antitrust law enforcement agency, according to Article 12 of *Administrative Litigation Law*.

Although the automobile industry does not typically encounter such litigation in high numbers, the number of cases related to automobile companies has been increasing rapidly. We have selected two typical cases, below, to illustrate.

A. *Heze Auto Industry Association v. Shandong AMR*

The Jinan City Lixia District People's Court upheld a CNY 300,000 (USD 42,633) penalty against a local auto industry association in Heze City for organizing conduct amounting to a monopoly agreement among market players.

The Shandong Administration for Market Regulation ("Shandong AMR") found that the trade association required its members not to participate in auto shows organized by other parties since 2016, and even asked them to sign a letter of commitment in 2018. The letter was deemed as a monopoly agreement, and the regulator penalized the industry body for CNY 300,000 on 18 October 2019.

The trade association challenged the decision in an administrative lawsuit and the court made the following key observations:

1. Was the Penalty Decision Legitimate?

The court said the Shandong AMR sent the trade association relevant penalty notices, outlining its rights to explain and defend itself or seek a hearing. The association sought a hearing and attended it. Under the hearing procedure, the industry body had the right to cross-examine the evidence gathered by the Shandong AMR. The regulator did not deprive the penalized entity of its right to access case files.

However, the Shandong AMR failed to provide a transcript of the hearing as evidence despite the trade association's presence at the hearing. The regulator's action involved a minor violation of procedural rules.

The court held that the violation did not have any actual impact on the trade association's rights since the hearing report submitted by the Shandong AMR included basic information relating to the hearing.

2. Was There Sufficient Evidence in the Penalty Decision?

According to the investigation records of the Shandong AMR, the trade association organized some member operators to sign the letter and jointly commit to not participating in shows organized by other entities.

Although intended at preventing market confusion, the trade association actually used its position as the local auto industry body to control the time and scope of its members' participation in auto shows, the court held. The conduct restricted competition, amounted to a monopolistic practice, and, therefore, fell under the purview of the AML. The court also deemed the CNY 300,000 penalty amount to be appropriate.

Citing the second item of Paragraph 1 of Article 74 of the *Administrative Litigation Law*, the district court ruled that the procedure adopted by the Shandong AMR in issuing the penalty decision was illegal, but dismissed the industry body's appeal.

B. Guangming Trading v. Hankook

The Shanghai Higher People's Court upheld a lower court decision to dismiss a monopoly lawsuit filed by Wuhan Hanyang Guangming Trading ("Guangming Trading") against a local unit of South Korea's Hankook Tire.

Guangming Trading was a distributor of the defendant Shanghai Hankook Tire Sales' ("Hankook") products in Wuhan from January 2012 to June 2016. The former brought the suit against Hankook, alleging that the defendant engaged in activities that amounted to vertical restraint and abuse of dominance. However, the first-instance court dismissed the suit. Guangming Trading appealed the decision.

The Shanghai Higher People's Court deemed that there were three key points under appeal:

Whether Hankook engaged in actions amounting to abuse of dominance. The relevant markets that might be affected by the alleged abuse of dominance. The higher court affirmed the first-instance court's determination of the relevant product market as the passenger vehicle tire market and the geographical market as Mainland China. It also supported the lower court's identification of the relevant markets as follows:

- The passenger vehicle tire market in Mainland China, including the original assembly tire and after-sales tire replacement markets;
- The passenger vehicle tire replacement market in Mainland China, including the wholesale and retail segments; and
- The wholesale passenger vehicle tire replacement market in Mainland China.

The court did not support the contention by Guangming Trading that the relevant market should be the distribution market for Hankook's branded tire series products. It held that Guangming Trading's proposal of defining the relevant market as the market for the distribution of Hankook brand tire products was too narrow, because it confined the competition effects to intra-brand competition, but failed to consider inter-brand competition. The court also noted that the relevant market should not be the wholesale distribution market since end consumers were also involved.

Whether Hankook held a dominant position in the three relevant markets. The court said Guangming Trading failed to provide evidence to support its claim relating to Hankook's tire products' share in above three markets. It also failed to prove that the defendant had competitive advantages in terms of market position and business scale, or could control the price, volume, market entry of other operators or other transaction conditions in the sales or raw materials purchase market. Thus, the court concluded that Hankook did not have a dominant position in each of the three markets.

Whether Hankook implemented any conduct amounting to abuse of a dominant position. Since Hankook was deemed as not holding a dominant position in the relevant markets, the court said it is logically impossible for the company to engage in any conduct amounting to abuse of dominance. For the contractual clause that bundled sales volume targets with incentives, the court said such a practice was not prohibited by law. No evidence suggested that the clause would harm the competition order of the relevant markets, it added.

Finally, the court found that the distribution contract the two parties signed in 2012 did contain RPM clauses that required Guangming Trading to comply with the lower limit of prices set by Hankook for distributors, dealers and consumers, and that Hankook could terminate the contract if Guangming Trading sold products cross-region or at a price below the lower limit. The contract also penalized Guangming Trading in the event of any violation. However, the court noted that Guangming Trading failed to prove that Hankook had penalized the company in accordance with the contracts when its actual sales price of Hankook tires was lower than the agreed limit in the pact. Therefore, it held that the parties did not implement the relevant RPM clauses.

Economic analysis suggested that an RPM agreement could either improve efficiency and competition or assimilate prices and hinder competition. Given the uncertainty of its effect, analysis of its impact on competition in the relevant market was the key for determining its legitimacy under the AML, the court said. Given that the concerned contracts, in this case, involved only intra-brand competition, unless provided otherwise, Guangming Trading should bear the burden of proof on the alleged effect of eliminating or restricting competition.

However, Guangming Trading failed to prove the anti-competitive effects of the two contracts. Thus, the contracts could not be deemed as a monopoly agreement prohibited by the AML. The court held that when the alleged monopoly behavior, in this case, was disputed, the first-instance court's interpretations of relevant laws and regulations did not exceed its relevant authority.

The court, therefore, dismissed the appeal and upheld the first instance ruling.

IV. CONCLUSION

In conclusion, public antitrust enforcement, and private litigation in the automotive industry, have assumed a higher profile this past year. We expect that the automotive industry will continue to evolve, and emerging forms of competition might grow as the emphasis shifts towards segmented industries such as new energy, and high-technology and innovation.

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