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A Brief Review of Toyota China's Monopoly Case

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Recently, the State Administration for Market Regulation (hereinafter referred to as the "SAMR") issued an administrative decision made by Jiangsu Administration for Market Regulation (hereinafter referred to as "Jiangsu AMR"), which fined Toyota Motor (China) Investment Co., Ltd (hereinafter referred to as "Toyota China") for monopolistic actions. According to the decision, Toyota China reached an agreement with its dealers on restricting the online pricing and the resale prices for certain models of vehicles, and Toyota China and its dealers implemented price control through a number of management measures (including setting the unified online pricing as a KPI for dealers' regional managers, reviewing invoices of dealers, reducing supply to dealers that sell vehicles at low prices, etc.), and the dealers actually implemented the price requirements of Toyota China.

1. Fact finding and legal basis

Jiangsu AMR determined that Toyota China and its dealers reached an agreement on fixing online pricing and resale prices for certain models of vehicles, and Toyota China, by taking advantage of its advantageous position and implementing stringent pricing control measures, eliminated and restricted market competition, and harmed the interests of consumers.

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Toyota China's actions constitute "fixing the resale price to third parties" and "restricting the minimum resale price to third parties", which violate the provisions on monopoly agreements in Article 14 of the *Anti-monopoly Law of the PRC*. Consequently, Jiangsu AMR therefore imposed a fine of 2% of Toyota China's revenue in the previous year (around RMB 87.61 million). In response, Toyota China expressed its acceptance of the penalty without appeals and promised to make rectification.

The agreement between Toyota China and its dealers is a typical vertical monopoly agreement. Article 14 of the *Anti-monopoly Law of the PRC* explicitly prohibits vertical monopoly agreements. Article 14 provides that undertakings are prohibited to form the following agreements with transaction counterparts: (1) fixing resale price to third parties; (2) restricting minimum resale price to third parties; and (3) other monopoly agreements identified by anti-monopoly law enforcement agencies. On June 26, 2019, the SAMR promulgates the *Monopoly Agreement Prohibition Tentative Measures* (hereinafter referred to as the "*Tentative Measures*"), which sets forth detailed rules of various types of monopoly agreements. According to the *Tentative Measures*, "fixing resale price to third parties" includes fixing price, price range, profit margin or rebates or commissions; "restricting minimum resale price" includes restricting resale price through restricting price range, profit level or rebates and commissions.

Companies are understandably keen to know the legal facts based on which the SAMR identifies monopoly agreements. In this case, to conclude that Toyota China and its dealers had entered into vertical monopoly agreements, Jiangsu AMR ascertained the following evidence: statements made by dealers, vehicle sales statements, contracts, invoices, meeting minutes, WeChat records, work journals, emails, enquiry records of dealer employees, company business licenses, income statement for vehicle sales, and self-rectification reports.

2. Takeaways

1) The *Guidelines on Anti-monopoly in the Auto Industry* may serve as guidelines on anti-monopoly compliance for auto companies

The auto industry has been constantly targeted for anti-monopoly enforcement. In 2015 alone, anti-monopoly cases that were investigated and settled include BMW dealers' charge of PDI inspection fees; the price monopoly case involving 12 Japanese auto parts and bearings companies, as well as price monopoly cases involving Audi, Chrysler, Benz, Dongfeng Nissan and Hankook Tire, the fines for which amount to an astonishing RMB 2.051 billion. After a pause, large fines imposed on Chang'an Ford and Toyota China this year have once again drawn public attention to anti-monopoly in the auto industry.

In the context of frequent antitrust probes into the auto industry, since 2016, the SAMR has been proactively promoting the implementation of the *Guidelines on Anti-monopoly in the Auto Industry* (hereinafter referred to as the "*Guidelines*"). Among others, the *Guidelines* list detailed rules on vertical monopoly agreements. Although the *Guidelines* currently remain as an exposure draft, it nonetheless provides insights into anti-monopoly compliance in the auto industry which are definitely worth the auto undertakings' attention.

Here, Toyota China, through its regional sales managers, required dealers in the regions of Suzhou, Wuxi and Changzhou to sell certain models at the recommended retail prices, inspected the dealers' implementation of the pricing mechanism by reviewing dealers' invoices, and adjusted the supply quantity according to the inspection results. With regard to recommended prices, the *Guidelines* stipulate that "(recommended prices) generally may raise efficiency and would not have the effect of eliminating or restricting competition. However, if recommended prices … are executed by a majority or all of the distributors due to pressure or incentive from one party to the agreement, which substantially effectuates fixing the resale price or restricting the minimum resale price, setting recommended prices may be deemed as resale price fixing or minimum resale price restriction under specific circumstances." The prices implemented by Toyota China meet the above conditions in that (i) Toyota China puts pressure on the dealers; and (ii) the "recommended prices" have been implemented by most or all dealers. Therefore, the "recommended prices" by Toyota China essentially realized the effect of fixing the resale price and limiting the minimum resale price. Therefore, Jiangsu AMR concluded that vertical monopoly agreements were reached in this case.

In addition to the *Guidelines* for auto industry, the SAMR and some provincial administrations for market regulation have promulgated various guidelines on undertakings' anti-monopoly compliance. It is advisable for all undertakings to refer to such guidelines in the course of formulating and implementing antitrust compliance schemes.

2) Anti-monopoly law enforcement powers have been delegated to lower levels of authorities and companies shall attach more importance to anti-monopoly compliance

This case was the first anti-monopoly administrative penalty issued by Jiangsu AMR after it was granted the authorization for anti-monopoly law enforcement. At the beginning of 2019, the SAMR issued the *Circular on the Authorization of Anti-monopoly Law Enforcement Powers*, specifying that provincial administrations for market regulation shall be in charge of anti-monopoly law enforcement on cases involving monopoly agreements, abuse of market dominance position, abuse of administrative powers to eliminate or restrict competition within their respective jurisdictions, unless such cases fall within the jurisdiction of the SAMR. This delegation of anti-monopoly investigation power to lower levels has changed from the "individual case authorization scheme" to the "general authorization scheme". Such change may impact companies in the following manner:

a) Companies are more likely to be investigated. Compared with the SAMR, it is more convenient for provincial administrations for market regulation to carry out investigation on companies within the province. Undoubtedly, provincial authorities are more convenient to spot suspected illegal acts of the companies within the province. In addition, the general delegation of anti-monopoly investigation powers to lower levels eliminated the previous cumbersome procedures which required provincial authorities to file with the SAMR before initiating an investigation. This change facilitates local anti-monopoly law enforcement and improves case handling efficiency. Facing these changes, companies must be more prudential and compliant in their day-to-day operations, because they are more likely to be investigated and they have less time available to respond to investigations. The enforcement regime by provincial administrations for market regulation is still developing, and the intensity and standard of administrative law enforcement by different provinces may vary. Nonetheless, companies must raise their anti-monopoly compliance awareness and must be well prepared.

b) Companies may have more room for communication with authorities. In accordance with law and practice, companies' attitude and cooperation in responding to anti-monopoly investigation are sufficiently considered by the law enforcement authorities when determining a penalty. After the delegation of the anti-monopoly investigation powers to lower levels, provincial administrations for market regulation have more discretion to consider in anti-monopoly law enforcement within their jurisdiction. Moreover, provincial authorities are more convenient to observe cooperative or rectification actions of companies. However, it is worth noting that different local administrations for market regulation vary in approaches of communicating with the investigated companies. Therefore, the effect of such communication or attitude of companies may differ in different places.

3) It is advisable for companies to integrate antitrust law compliance procedures into their business code of conduct

In the context of proactive anti-monopoly law enforcement, expedited anti-monopoly legislation and amendment of law, and strict anti-monopoly punishment, we suggest that companies stay alerted on their competitive actions to control monopoly risks. Moreover, it is advisable for companies to integrate antitrust law compliance procedures into their business code of conduct. To be specific, companies must establish and improve internal compliance system, establish reward and punishment mechanism and internal reporting system for employees' anti-monopoly compliance behavior, conduct regular and targeted training for employees (such as how to properly deal with "dawn raid"), and enhance compliance awareness of employees. For example, WeChat and other social media are ever-increasingly used by company employees in their daily work, while employees tend to be "relaxed" and "loose from company policy restraints" in WeChat communications. Nevertheless, WeChat chats are prone to be circulated and law enforcement authorities can easily access to WeChat chats after due process. Therefore, companies should strengthen compliance of employees' WeChat group by adopting and implementing appropriate social media policies.

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