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## The Dongfeng Nissan Case and the Gaps of China's Competition Law Regime in Tackling Vertical Restraints

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The recent Dongfeng Nissan Case shed some interesting lights on the status of vertical restraints rules in China, three years after China's Anti-Monopoly Law (AML) became effective in August 2008. Currently, China's competition law regime is still insufficiently equipped to assess and deal with vertical restraints, in spite of frequent complaints on alleged anticompetitive vertical restraints in the Chinese market.

For example, car manufacturers in China typically prohibit authorized car parts suppliers from selling genuine car parts to independent repairers or distributors. Genuine car parts are often exclusively distributed through authorized car dealers, which both sell new cars and provide after-sales services. Consumers frequently raise complaints about the high prices for the spare parts as well as the maintenance and repair services as charged by authorized car dealers. At the same time, the lack of access to genuine car parts has limited independent repairers' abilities to compete effectively with authorized car dealers in providing repair and maintenance services. Issues in the Dongfeng Nissan case has demonstrated the gaps in China's competition law to deal with the potential vertical problems in the car aftermarket.

### The Dongfeng Nissan Case

The plaintiff, Mr Liu Dahua, is the owner of a passenger car manufactured by Dongfeng Nissan Passenger Vehicle Company (Dongfeng Nissan). Liu claimed that Hunan Huayuan Industry Corporation Ltd. (Huayuan), a Dongfeng Nissan's authorized dealer, had charged excessively high prices for spare parts and repair services and had tied the supply of repair services with the sales of spare parts. However, Huayuan told Liu that Dongfeng Nissan prohibited its authorized dealers from selling spare parts to end users without also providing the related services. Furthermore, except for Dongfeng Nissan's authorized dealers, there was no supply of genuine Dongfeng Nissan car parts in the market. In his complaint, Liu alleged that Dongfeng Nissan and Huayuan, through monopolizing the supply of spare parts for Nissan passenger cars, had engaged in excessive pricing and tying, and such conduct had constituted the abuse of a dominant position in violation of the AML.

On 15 December 2011, the Changsha Intermediate People's Court (Changsha Court) dismissed Liu's complaint. The Changsha Court held that the plaintiff had failed to produce sufficient evidence to establish that the defendants held a dominant position and had abused that position. The Changsha Court also held that the plaintiff had failed to sufficiently investigate the market for

the supply of car parts and repair services and that the defendants' management of the car aftermarket did not necessarily have a restrictive effect on competition. The plaintiff is appealing the ruling of the Changsha Court.

As this case demonstrated, relying on Article 17 of the AML that prohibits abuse of dominance could be a very demanding task on the plaintiff. The plaintiff will need to first define the relevant market and prove the existence of a dominant position in the relevant market, and then prove the actual abuse of the dominant position. The Chinese courts have imposed strict burdens of proof for each of these steps in this case and in all the previous dominance cases. Obviously, it would be very difficult, if not impossible, for an average consumer to collect sufficient evidence of such highly technical and legal nature. To date, where judgments were rendered for lawsuits challenging alleged abuse of dominance, the claims were all dismissed because of the plaintiffs' failures in meeting these burdens. The Dongfeng Nissan case again demonstrated that the Chinese courts are reluctant to rule in favour of the plaintiffs who fail to meet the strict burdens of proof and that abuse of dominance allegations are not an easy option for plaintiffs to obtain redress.

### The Gaps in the AML Vertical Rules

In the Dongfeng Nissan case, the plaintiff unsuccessfully challenged the pricing and tying conduct by trying to rely on the AML's prohibition on abuse of dominance. The disputed conduct was in essence the result of typical vertical arrangements in relation to the supply of spare parts in China's car aftermarket. The underlying vertical arrangements could have been challenged as suspected anticompetitive vertical agreements under the AML. However, the AML does not provide sufficient certainties for the scope and implementation of the relevant vertical rules.

The applicable vertical rules in the AML are Articles 14 and 15. Article 14 prohibits fixing resale prices or setting minimum resale prices. It also provides a catch-all clause that prohibits 'other types of vertical agreements as determined by the anti-monopoly enforcement agencies (AMEAs)'. The sweeping scope of the clause means that, in addition to resale price maintenance (RPM), the AMEAs could investigate non-price vertical restraints such as territorial and customer restrictions, exclusive distribution, tying, and assess their legalities under the AML. Article 15 exempts horizontal and vertical agreements that meet a set of broad criteria. Generally speaking, a vertical agreement will be exempted from the Article 14 prohibitions if the parties to the agreement prove that the purpose of the agreement is to achieve certain specified beneficial purposes, and at the same time, the agreement does not materially restrict competition in the relevant market, and can enable consumers to share the benefits derived from the agreement. To date, the AMEAs have neither published any decisions in relation to vertical restraints nor issued implementing regulations to clarify Articles 14 and 15 of the AML. For example, it is still unclear whether RPM will be considered as a non-exemptible hardcore restriction, or how non-price vertical restraints will be treated under the AML.

Under the AML, private parties can bring civil litigation to challenge alleged anticompetitive conduct and to claim damages. The relevant court practice has indicated that in general follow-on and stand-alone antitrust lawsuits are both allowed. To date, no court decision has addressed vertical restraints. Whether the courts will accept stand-alone litigation challenging non-price vertical restraints and to what extent the courts will play a role in interpreting the AML vertical rules remain to be seen.

In sum, relying on Articles 14 and 15 could be difficult because of the above-mentioned legal

uncertainties and the lack of guidance from the AMEAs and the courts.

### Other Potential Claims

It is also noteworthy that China's Anti-Unfair Competition Law (AUCL) prohibits tying against the will of purchasers and the Price Law prohibits collusion to manipulate prices to the detriment of the consumer interest. Both prohibitions do not require a presence of a dominant position. One should not ignore that the AUCL regulates unfair trading practice and tends to protect interests of individual competitors and consumers, and the Price Law is mainly a piece of price control legislation. Both are unsuited to assess complicated competition concerns. However, in light of the difficulties mentioned above, one might argue that, from the litigants' point of view, the plaintiff in the Dongfeng Nissan case would have been in a strategically better place if he had relied on the AUCL and the Price Law instead of the AML.

### Closing Remarks

It is generally recognized that vertical restraints could have many beneficial and pro-competitive effects. Further, restraints placed on vertical business partners' freedom to contract do not automatically equate to illegal restrictions on competition. However, the potential anticompetitive effects of vertical restraints that foreclose the market, reduce rivalry and facilitate collusion, and create obstacles to an open domestic market should not be left unattended. Based on the AMEAs' track record, vertical restraints are not among the current enforcement priorities. The Dongfeng Nissan case highlights the gaps of China's competition law regime in assessing and dealing with vertical restraints and the needs of the regime to develop further in this regard.

### Acknowledgments

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For more information on the Dongfeng Nissan case, see the [China Competition Bulletin](#), Edition 16, December 2011, 3-4.

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