



ATTN: No.1 Anti-Monopoly Enforcement Department
State Administration for Market Regulation
No. 9, Madian East Road, Haidian District,
Beijing, China
Per email: fldys@samr.gov.cn

3 July 2025

Dear Sir/ Madam,

Draft revisions of the provisions on prohibiting monopoly agreements in the People's Republic of China

Please find enclosed a submission that has been prepared by the Unilateral Conduct and Behavioural Issues Working Group of the Antitrust Section of the International Bar Association in response to the SAMR's public consultation on the proposed draft revisions to the safe harbour rules in the *Provisions on Prohibiting Monopoly Agreements*. The Co-Chairs of the Antitrust Section and the members of the Working Group would be happy to discuss the enclosed submission in more detail if helpful.

The Working Group trusts that its attached response, which includes a high-level comparison of approaches in other jurisdictions, will assist SAMR as in finalizing the draft revisions. The Working Group looks forward to engaging in future consultations and, should any opportunities arise for further dialogue with SAMR, select members would be pleased to make themselves available for discussions or workshops.

Yours sincerely,

Kyriakos Fountoukakos
Co-Chair Antitrust Section

Julián Peñã
Co-Chair Antitrust Section



INTERNATIONAL BAR ASSOCIATION

ANTITRUST SECTION

**SUBMISSION TO THE STATE ADMINISTRATION FOR MARKET REGULATION
REGARDING COMMENTS ON THE DRAFT REVISION OF THE PROVISIONS ON
PROHIBITING MONOPOLY AGREEMENTS**

3 July 2025

INTRODUCTION

1. The International Bar Association's ("IBA") Antitrust Section ("Section") would like to thank the State Administration for Market Regulation ("SAMR") for the opportunity to provide comments on the draft revisions to the safe harbour rules in the *Provisions on Prohibiting Monopoly Agreements* ("Draft Provisions").
2. The Section's Unilateral Conduct and Behavioural Issues Working Group ("Working Group")¹ offers these submissions for SAMR's consideration as it finalizes the Draft Provisions.

ABOUT THE IBA

3. The IBA is the world's leading international organization of legal practitioners, bar associations, and law societies. As the "global voice of the legal profession", the IBA contributes to the development of international law reform and shapes the future of the legal profession throughout the world. It has a membership of more than 80,000 individual lawyers from over 170 countries, and it has considerable expertise in assisting the global legal community.
4. The Section includes competition law practitioners with a wide range of jurisdictional backgrounds and professional experience, including unilateral conduct. Such varied experience places it in a unique position to provide a comparative analysis for the development of competition laws, including through submissions developed by its working groups on various aspects of competition law and policy.
5. The Working Group is responsible for monitoring and commenting on a range of competition issues that arise, inter alia, from vertical agreements and abuse of dominance or misuse of market power as well as cooperative/horizontal (non-cartel). It aims to encourage best practice in the ongoing development of international laws in these areas by commenting on consultations on proposed new and reformed legislation.

OVERVIEW

6. The Working Group is grateful for the opportunity to provide its views on the Draft Provisions. The introduction of safe harbour rules for vertical agreements marks a notable development of China's competition law regime.
7. At the outset, the Working Group commends SAMR for recognizing the need to strike the right yet delicate balance between the pro- and anticompetitive effects of resale price maintenance ("RPM") and other vertical restraints. By setting clearer thresholds for the application of the safe harbour exemption, the Draft Provisions enhance transparency and predictability in antitrust enforcement, which will assist not only domestic enterprises but also multinational companies in assessing legal risk and ensuring compliance in China.

¹ The submission has been prepared by Ding Liang (DeHeng Law Offices – China) and Christoph van Opstal (Fangda Partners – China), under the coordination of the co-chairs of the Working Group (Chris Charter and Daniel Andreoli) with contributions from the following Working Group members: Nikolaos Peristerakis (K&L Gates - EU), Joanna Goyder (Freshfields - EU), Anastasia Dritsa (KYRIAKIDES GEORGOPOULOS – Greece/EU), Ronan Scanlan (Steptoe – UK/EU), Daniel Andreoli (Demarest - Brazil), Amanda Athayde (Pinheiro Neto Advogados - Brazil), and Francisco Borquez (Barros & Errázuriz - Chile),

The Working Group welcomes further clarification to facilitate its effective implementation in practice.

8. In Part I, this submission will provide comments on the specific comments about the operation and mechanics of the safe harbour rules under the Draft Provisions. In summary, the Working Group’s substantive comments on the proposed safe harbour rules are as follows:
 - (i) **Market share as sole criterion:** Market share alone should be used to determine eligibility for the safe harbour, excluding turnover. Market share is an acceptable proxy to determine the likelihood of absence of market power (i.e. to be used as a safe harbour threshold), whereas turnover has limited relevance to the competitive dynamics of the market.
 - (ii) **Higher market share thresholds:** The market share thresholds for safe harbour rules should be raised for RPM and other vertical agreements. This would better align with economic realities and encourage businesses to pursue efficiency-enhancing vertical agreements.
 - (iii) **Clear methodology for market share calculation:** Clearer guidance is needed on how market share (and turnover, if required) should be calculated. This should include clarification on whether the market share of affiliated companies should be included.
 - (iv) **Uncertainty in rebuttable safe harbour rules:** While the rebuttable nature of the safe harbour rules allows flexibility, it introduces significant uncertainty. Guidance is needed on the type of circumstances under which the safe harbour may not apply.
 - (v) **Assessment of agreements exceeding safe harbour thresholds:** Additional guidance is required on how RPM agreements and other vertical agreements that exceed the safe harbour thresholds will be assessed. SAMR should clarify that, even if such agreements exceed the thresholds, they may still be evaluated under a rule of reason and an “effects” analysis, given their potential pro-competitive benefits. While safe harbours are welcome, it is important to guard against an outcome that effectively outlaws conduct outside of the safe harbour, given that the rule of reason remains relevant in determining a sufficiently deleterious effect on competition.
9. In Part II, this submission provides an overview of the approaches taken by other key jurisdictions, including the European Union (“EU”), the United Kingdom (“UK”), Brazil and Chile, in applying safe harbours to vertical agreements. This includes useful insights into whether a safe harbour regime is adopted, how market share (or turnover) thresholds are set and calculated, and whether safe harbours create a presumption of legality. The Working Group is of the view that, in an increasingly interconnected enforcement landscape, examining the practices of other jurisdictions can offer valuable perspectives — both in identifying best practices and in promoting greater consistency and legal certainty for businesses operating across borders.

PART I: COMMENTS FROM THE CHINA LAW PERSPECTIVE

10. The Working Group understands that the Draft Provisions adopt the following safe harbour rules:
 - a) a safe harbour for RPM agreements where (i) the respective market share of the supplier and its distributor(s) (on a combined basis) is below 5% in the relevant

market;² and (ii) the respective annual turnover of the supplier and its distributor(s) (on a combined basis) is under RMB 100m (<USD 14m) in the relevant market;³ and

- b) a safe harbour for all other vertical agreements where (i) the respective market share of the supplier and its distributor(s) (on a combined basis) is below 15% in the relevant market; and (ii) the respective annual turnover of the supplier and its distributor(s) (on a combined basis) is less than RMB 300m in the relevant market (<USD 42m).⁴

11. The Working Group offers the following observations on the proposed safe harbour rules under the Draft Provisions to enhance their transparency and ensure their practical and effective application.

Market share should be the sole criterion for determining safe harbour eligibility

12. The proposed safe harbour rules incorporate both market share and turnover thresholds for the exemption of vertical agreements. The Working Group recommends that market share should serve as the sole criterion for determining the likely absence of risks to competition and thus safe harbour eligibility in line with other key antitrust jurisdictions globally.
13. Based on the explanatory notes provided by SAMR regarding the Draft Provisions, the purpose of introducing the safe harbour rules is to exclude conduct that can be presumed not to have the effect of eliminating or restricting competition in China. In line with other jurisdictions, the assessment of anticompetitive effects primarily hinges on market power of the undertaking(s).
14. Market power is the ability of a firm to act independently of competitive constraints, such as raising prices, restricting output, or foreclosing competition. Market share is widely recognized as a useful indicator of market power, as it reflects an undertaking's influence and competitive position within a relevant market, relative to competitors. Unlike turnover, market share is directly tied to the competitive dynamics of the market, making it a more reliable tool for evaluating competitive harm.
15. The addition of turnover thresholds alongside market share thresholds dilutes the focus on market power and introduces unnecessary complexity to the application of the proposed safe harbour rules. While market share can give an indication of a firm's competitive position within a specific market, turnover is a broader financial metric that does not directly indicate the likelihood of anticompetitive harm. Relying on both metrics introduces redundancy and risks undermining the core purpose of the safe harbour rules.
16. Moreover, it is possible for an undertaking to have a market share below 5%, indicating a lack of market power, while still exceeding the turnover threshold. Conversely, a firm with low turnover but high market share in a niche or concentrated market may wield significant market power, capable of harming competition. Market share alone provides a more accurate and targeted assessment of market power or rather the lack of market power and can therefore be used as a safe harbour threshold.
17. The purpose of the safe harbour rules is to simplify enforcement by exempting agreements that are unlikely to harm competition. Adding turnover thresholds undermines this goal by introducing a metric that is less relevant to competitive effects and harder to interpret or

² For example, the Working Group understands that the combined market share of all distributors that are subject to the RPM agreement need to be counted. Therefore, if the RPM agreement with a single supplier involves two distributors with a market share of 4% each, the safe harbour would not be available as the combined market share of 8% would exceed the 5% market share threshold. Further clarification from SAMR would be welcome.

³ As above, the combined turnover of all distributors subject to the RPM agreement would need to be counted.

⁴ Please see comments above regarding the calculation of market shares and turnover.

apply consistently. SAMR's adoption of a combined turnover-plus-market-share approach also deviates from established global antitrust norms and risks introducing unnecessary complexity into competition enforcement in China.

18. Accordingly, the Working Group strongly advises that the safe harbour rules rely exclusively on market share thresholds as the criterion for exemption. Market share provides a clear, objective, and competition-focused measure for a safe harbour, aligning with SAMR's stated goal of excluding agreements that are unlikely to eliminate or restrict competition in China.

The market share threshold of the safe harbour should be increased

19. The proposed 5% and 15% safe harbour market share thresholds for RPM and other vertical agreements, respectively, are exceptionally low and restrictive. The Working Group strongly recommends increasing the thresholds to align with global standards and focusing on market power rather than arbitrarily low market share limits. In particular, an undertaking with a market share above 5% (for RPM) or above 15% (for other vertical agreements) but below 15% (for RPM) and below 30% (for other vertical agreements) is highly unlikely to possess market power or the ability to harm competition. By applying such low thresholds, the rules impose unnecessary scrutiny on agreements that would almost certainly not restrict competition. Indeed, the low thresholds may create a chilling effect where businesses avoid legitimate vertical agreements altogether out of fear of regulatory scrutiny, even when such agreements are unlikely to harm competition.
20. At the least, the market share thresholds should also align with those adopted in sector-specific guidelines in China to avoid inconsistent treatment and application of the safe harbour rules across different sectors. In particular, the Antitrust Guidelines on the Auto Sector and Antitrust Guidelines on Abuse of IP Rights each provides a safe harbour market share threshold of 30% for non-price vertical restraints.
21. Market share thresholds as low as 5% (for RPM) and 15% (for other vertical agreements) would exclude a large range of undertakings that would exceed these thresholds but lack any market power or where their agreements would present no material competition risks. This undermines the very purpose of safe harbour rules, which is to provide legal certainty for agreements that are unlikely to harm competition in China.
22. The proposed thresholds in China deviate significantly from international norms, creating unnecessary regulatory burdens and inconsistencies. For example, in the EU (as well as in the UK), the market share thresholds for non-price vertical agreements (excluding certain hardcore restrictions which include RPM) is 30%. Therefore, comparatively speaking, the 15% threshold in particular appears too restrictive when seen against international practice and may discourage foreign and domestic businesses from entering into efficient vertical agreements in China, potentially impacting economic development and market efficiency.

The methodology for calculating market shares for the purposes of determining eligibility under the safe harbour should be clarified

23. The proposed safe harbour rules leave a number of practical uncertainties regarding the calculation of market share and turnover for the purposes of assessing safe harbour eligibility. The Working Group recommends that SAMR provide more guidance on the expected methodology for calculating market share and turnover.
24. The following clarifications would be particularly welcomed to ensure consistency and legal certainty in the application of the safe harbour rules:

- whether market share should be calculated based on sales revenue, sales volume, production capacity, or other relevant factors, and specify which metric is most appropriate in different contexts or industries;
 - whether the safe harbour thresholds must be satisfied in each individual year of a long-term agreement, or whether it is sufficient for the average figures over the entire agreement period to remain below the thresholds—even if one party’s market share or turnover temporarily exceeds the thresholds during certain periods;
 - whether market share and turnover should be calculated solely for the undertaking that is a direct party to the vertical agreement, and only applicable to affiliate companies within a group to the extent those affiliates are also involved in the same conduct;
 - whether, when calculating the market share of the counterparty, the market share of products it sells on behalf of other undertakings (e.g., competing brands) should be excluded in the calculation;
25. Furthermore, as indicated in paragraph (10) above, there may be some uncertainty as to whether the combined *or* individual market share (and turnover) of distributor(s) should be considered to determine eligibility of the safe harbour regime. Further clarification would be welcomed.

Rebuttable presumption of “legality” of safe harbour rules creates significant uncertainty

26. Based on the explanatory notes provided by SAMR, vertical agreements which meet the safe harbour thresholds are presumed not to have the effect of eliminating or restricting competition. The Working Group understands that Article 17 of the Draft Provisions provides that this presumption may be rebutted if there is evidence demonstrating that the agreement has the effect of eliminating or restricting competition in China.
27. While the rebuttable presumption provides flexibility for addressing potentially harmful agreements, it also introduces significant uncertainty for businesses. Safe harbour rules are intended to offer legal certainty by exempting agreements that are unlikely to pose competitive risks. In the **EU**, the Vertical Block Exemption Regulation (“**VBER**”) provides a high degree of legal certainty, if a vertical agreement meets its criteria then it will be considered legal by EU and national courts and authorities. The European Commission can in exceptional circumstances withdraw the benefit of the block exemption but the effects of this would only apply post withdrawal (see also comments in paragraph 40 below). Allowing the presumption to be rebutted without clear guidance on the circumstances in which this might occur undermines the predictability and reliability of the safe harbour framework.
28. To address this, the Working Group strongly recommends that SAMR provide explicit guidance on the specific circumstances in which the safe harbour may not be available to a vertical agreement that otherwise meets the safe harbour thresholds. For example, the Working Group recommends that SAMR confirm whether and how any cumulative effects of parallel network of agreements would be taken into consideration by SAMR in its assessment of whether the safe harbour would be available.
29. By providing clear parameters for when the presumption may be rebutted, SAMR can better balance the need to protect competition with the goal of encouraging legitimate and efficiency-enhancing vertical agreements. Without such guidance, businesses may avoid entering into agreements that are beneficial to the market and consumers due to fear of regulatory uncertainty.

Standard of assessment of RPM and non-price vertical restraints outside safe harbour

30. The Working Group commends SAMR for recognizing that vertical agreements can have legitimate pro-competitive justifications and promote efficiencies. The introduction of the proposed safe harbours reflects this understanding.

RPM agreements

31. The Working Group understands that RPM agreements have historically been treated as per se illegal in China, although they have also been subject to an effects-based assessment since the amendment of the AML in 2022. With the proposed introduction of a safe harbour for RPM agreements, the Working Group respectfully requests clarification from SAMR regarding the treatment of RPM agreements that fall outside the safe harbour.
32. As SAMR will recognize, RPM agreements can produce pro-competitive effects. For example, they can help maintain consistent product quality, incentivize distributors to invest in promotional activities, and address issues such as free-riding. To enhance legal certainty and support compliance, the Working Group recommends that SAMR provide clear guidance on how RPM agreements exceeding the safe harbour thresholds will be evaluated including express clarity on whether a rule of reason will apply.
33. In line with this, as noted in items 19-22 above, if a rule of reason test will not apply outside of the safe harbour the Working Group reiterates its recommendation to increase the market share thresholds for RPM agreements. Given their potential to deliver pro-competitive benefits, higher thresholds would better reflect the economic realities of RPM agreements and provide businesses with greater confidence to engage in practices that enhance market efficiency.

Other vertical agreements

34. Additionally, the Working Group recommends providing express confirmation that vertical agreements that exceed the safe harbour thresholds will still be subject to a rule of reason approach.
35. The Working Group generally understands that SAMR adopts a rule of reason approach in relation to non-price vertical restraints (i.e. vertical agreements other than RPM agreements). The Working Group would welcome confirmation that a rule of reason analysis would apply to non-price vertical agreements that do not meet the relevant safe harbour thresholds.

PART II: COMPARATIVE APPROACH TAKEN IN OTHER KEY JURISDICTIONS

36. The Working Group provides below an overview of the approach taken in relation to safe harbour rules and vertical agreements in other key jurisdictions.

European Union

37. In the EU, the most important safe harbour is that provided by the VBER and further elaborated in Section 4.1 of the Vertical Guidelines. The VBER exempts all agreements that satisfy its requirements from the EU prohibition on anticompetitive agreements contained in Article 101 TFEU. It only applies if the parties are not actual or potential competitors, and if the relevant market shares of the supplier in the upstream selling market and of the buyer(s) in the downstream purchasing market do not exceed 30%. However, the VBER does not apply if the agreement includes any “hardcore” restrictions. These include RPM (minimum or fixed prices), prohibitions on “active” (i.e. initiated by the seller) cross-border sales between EU Members States, certain territorial or customer

restrictions, as well as certain restrictions on the effective use of the internet (see Article 4 VBER for the full list of hard core restraints, and Article 5 VBER for types of restriction that will be excluded from the benefit of any exemption).

38. In addition to the VBER, EU law also has two further safe harbours as follows:
- a de minimis Notice under which agreements between non-competitors involving market shares not exceeding 15% are considered not to infringe Article 101 (but this does not apply to hardcore restrictions); and
 - an “effect on trade” Notice which provides a 5% market share threshold and a EUR 40 million turnover threshold, below which agreements are in principle not capable of appreciably affecting trade between Member States, so that Article 101 does not apply (even those including hardcore restrictions).
39. Articles 1 and 8 VBER provide detail on calculating market shares. In particular, Article 1 includes a list of affiliates and subsidiaries to be included, and Article 8 includes flexibility as follows: “if a market share is initially not more than 30 %, but subsequently rises above that level, the exemption provided for in Article 2 shall continue to apply for a period of two consecutive calendar years following the year in which the 30 % threshold was first exceeded”.
40. The VBER provides a high degree of legal certainty as it is an EU Regulation. If an agreement meets its criteria then it will be considered legal by EU and national courts and authorities. Nevertheless, it is possible for its benefit to be withdrawn, either for a specific agreement (by the European Commission or a national competition authority), or for a category of agreements (by the European Commission), but in fact this has almost never occurred. In any case such withdrawal would be effective only for the future and not retrospectively. Unlike the VBER, the two additional safe harbours introduced by the European Commission and mentioned above (de minimis and effect-on-trade Notices), are not legally binding on EU or national courts. As such, they offer a lower degree of legal certainty.
41. For an agreement that does not benefit from exemption under the VBER, the EU does also apply a rule of reason. It asks first whether the agreement restricts competition and then, if so, whether it satisfies the four cumulative economic efficiencies criteria for exemption set out in Article 101(3). This assessment takes into account factors such as market structure, entry barriers, and the indispensability of the restrictions. The European Commission generally has a more lenient approach to vertical restraints compared to horizontal restraints. The Vertical Guidelines recognize that vertical agreements can generate many positive effects.

United Kingdom

42. In the UK, restrictions in vertical agreements are now governed by the Vertical Agreements Block Exemption Order (“**VABEO**”) and the associated VABEO Guidance. The VABEO and the VABEO Guidance largely follow the approach of the EU.
43. The VABEO exempts vertical agreements between non-competitors from the application of UK competition law, provided that the relevant safe harbour market share thresholds are satisfied (i.e. both have a share of less than 30% on the relevant upstream / downstream markets) and the agreement does not include hardcore restrictions (e.g., such as price-fixing or market sharing). Companies are able to self-assess compliance with UK Competition Law through the application of the VABEO and the VABEO Guidance:

- if companies are below the safe harbour thresholds, are not competitors and the agreements contain no hard-core restrictions, that agreement can be deemed compliant with UK competition law;
 - if the companies are above the safe harbour threshold, they may still be able to apply the VABEO Guidance by analogy, provided that they are not competitors and the agreements contain no hard-core restrictions.
44. The calculation of market shares involves: (i) defining the relevant markets (i.e., the markets on which the supplier sells and the purchaser purchases the relevant products or services); and (ii) calculating the parties' respective share by reference to total revenue from sales of the relevant products or services (including all members of the same corporate group or affiliates over which the ultimate parent has control).
 45. There is no specific turnover-based threshold nor special regime for agreements contained RPM.
 46. Like the EU, the UK treats RPM as a hardcore restriction, which means that any vertical agreement that includes RPM cannot benefit from the VABEO and will be presumed to be unlawful, unless the parties can argue that RPM falls under Section 9(1) of the Competition Act 1998 (the equivalent to the EU's Article 101(3) exemption); for example, because it leads to rivalry-enhancing efficiencies.
 47. The VABEO also contains a list of "excluded restrictions" which withdraw the availability of the block exemption if present. These include where a non-compete exceeds 5 years or are indefinite, where a post-term non-compete exceeds 1 year, or where a selective distribution model is applied to the sale of competing goods. The presence of any of these restrictions does not give rise to a presumption of unlawfulness (unlike hard-core restrictions, which do give rise to such a presumption) but instead requires that the economic impact of the agreement be considered such that the automatic exemption is not available.
 48. If a vertical agreement involves parties that exceed the safe harbour threshold set down in the VABEO, then the economic context of the agreement will be examined to determine the risk of actual anticompetitive effects arising together with any positive effects, and whether the restriction is indispensable to obtaining those in the specific context of the agreement. This can be characterised as a "rule of reason" approach. However, if a vertical agreement contains "hardcore" restrictions, then it will be presumed to be anticompetitive absent countervailing factors.
 49. If a vertical agreement involves non-reciprocal agreements between competitors, it can be assessed by reference to the VABEO Guidance. If a vertical agreement involves reciprocal agreements between actual or potential competitors, it should be assessed by reference to guidance and case law in relation to horizontal agreements, including in relation to information sharing between competing undertakings.

Brazil

50. There is no safe harbour regime in Brazil. Any evaluation of a merger or an infringement under Brazilian competition law will encompass the entities under common control as a single entity, with market shares and other relevant metrics being accrued for the entirety of the alleged infringement's period within the evaluation of materiality.
51. Turnover is not a relevant metric for any infringement under Brazilian competition law.
52. With the exception of minimum RPM, all traditional vertical agreements are considered as

“by effects” infringements in Brazil, which are reviewed under a system not dissimilar to a rule of reason approach, involving successive evaluations of (i) materiality, (ii) dominance, (iii) economic rationale and (iv) net effects to competition in order to reach a determination of legality or lack thereof. On the other hand, minimum RPM is a “by object” infringement.

Chile

53. In Chile, with the exception of minimum RPM, the “FNE” (Competition Agency) established a safe harbour regime under vertical agreements where they are presumed lawful when each of the parties (suppliers and distributors) have a market share equal to or less than 35%. Turnover is not used as a metric applicable to the safe harbour regime adopted by FNE. However, this metric could be used by the “TDLC” (Competition Tribunal) or the Supreme Court in their decisions when analyzing a vertical restraint infringement.
54. Regarding the calculation of market shares, the FNE Mergers Guidance states that the calculation of market shares is conducted based on the annual monetary sales of the entity. On the other hand, according to FNE Competition Guidance, any evaluation of a vertical agreements under Chilean competition law will encompass the entities, or parts of them (suppliers or distributors) under common control that offer or demand goods or services, as a single economic entity.
55. Safe harbour rules adopted by the FNE provide legal certainty to companies, since the FNE’s interpretation establishes a formal opinion of the competition agency responsible for prosecuting these infringements. However, these rules are not legally binding on decisions by the TDLC or the Supreme Court. On the other hand, although these rules provide certainty on vertical agreements, they do not apply to: (i) minimum RPM; and (ii) cases where there are additional vertical agreements between the parties, even if the 35% market share threshold is not exceeded by the entities, these agreements create a cumulative impact. Likewise, even when a restriction exceeds this market share threshold, such agreements are not per se unlawful, as they are analyzed under the rule of reason and may provide procompetitive effects in the markets.
56. Vertical agreements, with the exception of minimum RPM, are generally analyzed according to “rule of reason” approach. These restrictions are evaluated by analyzing (i) the market on the vertical agreement; (ii) dominant position of the entity imposing the restriction; and (iii) the procompetitive or anticompetitive effects on competition. However, minimum RPM may be analyzed under the “per se rule” when this restriction creates restrictive effects at the same level of the supply chain, for example, a practice of price fixing among competitors.

* * * * *



致：国家市场监督管理总局
反垄断执法一司
中国北京市海淀区马甸东路9号
电子邮件：fldys@samr.gov.cn

2025年7月3日

尊敬的反垄断执法一司各位领导：

《禁止垄断协议规定（修订草案征求意见稿）》

随函请见国际律师协会（IBA）反垄断专委会下属单边行为与垄断行为问题工作组就国家市场监督管理总局（“市场监管总局”或“贵局”）关于《禁止垄断协议规定（修订草案征求意见稿）》安全港规则修订内容的反馈意见。如贵局对本意见书内容有任何进一步的问题，反垄断专委会联合主席及工作组成员非常乐意与贵局就相关内容进行详细讨论。

工作组相信，随附的反馈意见（包括与其他司法辖区相关规定的简要比较）将有助于贵局就上述修订草案的内容最终定稿。工作组也期待参与贵局未来的意见征求工作，并愿意在贵局需要时选派成员参与专题研讨或对话交流。

此致
敬礼

Kyriakos Fountoukakos
反垄断专委会联席主席

Julián Peña
反垄断专委会联席主席



国际律师协会
反垄断专委会

就《禁止垄断协议规定（修订草案征求意见稿）》向国家市场监督管理总局提交的
意见书

2025年7月3日

引言

1. 国际律师协会反垄断专委会（“专委会”）谨在此感谢贵局给予我们机会就《禁止垄断协议规定（修订草案征求意见稿）》（“《修订草案》”）提供意见。
2. 专委会下属单边行为和垄断行为问题工作组（“工作组”）¹谨提交如下意见供贵局在最终定稿《修订草案》的内容时参考。

关于国际律师协会

3. 国际律师协会是全球领先的国际性法律从业者、律师协会和法律学会所组成的国际组织，素有“全球法律界之声”之称。本协会致力于推动国际法律改革，引领全球法律职业的发展方向。本协会拥有来自 170 多个国家的 80,000 多名个人会员，在支持全球法律共同体发展方面具有丰富经验。
4. 专委会成员包括具有广泛司法辖区背景和丰富专业经验的竞争法执业律师，其中也包括单边行为领域的专家。正是凭借这一多元背景，专委会能够就竞争法的各个方面提出具有比较视角的分析意见，并通过其下属工作组围绕竞争法和政策的不同议题形成专业建议，支持竞争法的发展。
5. 工作组关注并评议一系列竞争问题，包括但不限于因纵向协议、滥用支配地位或市场力量，以及合作性/横向（非卡特尔）行为所引发的问题。工作组通过参与拟议立法或修法草案的相关意见征求，致力于推动上述领域国际竞争法律的持续发展，倡导最佳实践。

概述

6. 工作组感谢贵局给予本次机会，就《修订草案》提出意见。此次就纵向协议引入安全港规则，标志着中国反垄断法律制度的重要进展。
7. 首先，工作组非常欣喜地看到贵局在转售价格维持协议及其他纵向限制问题方面，努力就其促进竞争与限制竞争的效果之间寻求适当且审慎的平衡。通过为安全港豁免的适用设定更清晰的门槛，《修订草案》提高了反垄断执法的透明度和可预期性，不仅有助于中国本土企业把握合规边界，也有助于跨国公司评估在华业务的反垄断法律风险。工作组期待看到进一步明确细则的出台，以促进该规则在实践中的有效落地。
8. 在第一部分，工作组将就有关《修订草案》中安全港规则的适用和机制提出具体的意见。简而言之，工作组对拟议安全港规则的主要意见如下：
 - i. **以市场份额作为唯一标准：**建议仅以市场份额来确定是否可以适用安全港，营业额不作为判断标准。市场份额可以更有效地反映企业是否具有市场力量（即可用于设定安全港门槛），而营业额与市场竞争态势的关联度相对有限。
 - ii. **提高市场份额门槛：**建议提高转售价格维持协议和其他纵向协议安全港规则的市场份额门槛。这将更贴近经济现实，并为企业实施旨在提升效率的

¹ 本意见书由丁亮（德恒律师事务所-中国）和 Christoph van Opstal（方达律师事务所-中国）起草，工作组联席主席 Chris Charter and Daniel Andreoli 协调以下工作组成员参与贡献：Nikolaos Peristerakis（凯易律师事务所-欧盟）、Joanna Goyder（富而德律师事务所-欧盟）、Anastasia Dritsa（KYRIAKIDES GEORGOPOULOS-希腊/欧盟）、Ronan Scanlan（世达律师事务所-英国/欧盟）、Daniel Andreoli（Demarest-巴西）、Amanda Athayde（Pinheiro Neto Advogados-巴西）和 Francisco Borquez（Barros & Errrquezog 智利）。

纵向安排提供更多空间。

- iii. **明确市场份额计算方法：**建议就如何计算市场份额（以及营业额，如需）提供更明确的指导。例如，明确关联实体的市场份额是否应计算在内。
 - iv. **可推翻安全港适用规则的不确定性：**虽然安全港规则的可推翻性赋予了执法实践的灵活性，但相应增加了企业合规的不确定性。建议就安全港不予适用的具体条件提供明确指导。
 - v. **评估超过安全港门槛的协议：**建议就如何评估超过安全港门槛的转售价格维持协议和其他纵向协议提供更多指导。建议贵局明确，即使此类协议超过了安全港门槛，鉴于其仍然可能具有促进竞争的益处，仍可根据合理性规则和“效果”分析对其进行评估。鉴于合理性规则在判断协议是否对竞争产生足够不利影响时仍然具有重要作用，有必要防止实践中将超出安全港门槛的行为一概定性为违法。
9. 在第二部分，工作组将简要介绍其他主要司法辖区（包括欧盟、英国、巴西和智利）在适用纵向协议安全港规则方面的实践操作。具体包括：是否采用安全港规则，如何设定及计算市场份额（或营业额）门槛，以及安全港的适用是否构成行为合法性的推定。工作组认为，在全球执法趋势日益融合的背景下，借鉴其他司法辖区的实践不仅有助于识别最佳做法，也有助于为跨国经营的企业提供更高的一致性与法律确定性。

第一部分：中国法角度的意见

10. 工作组理解，《修订草案》设立了以下安全港规则：
- 针对转售价格维持协议的安全港豁免：经营者及其交易相对人（如涉及多个交易相对人，则合并计算）^{（1）}在相关市场中的市场份额均低于 5%²；且（2）在相关市场中的年度营业额均不超过人民币 1 亿元³（约合 1400 万美元）；以及
 - 针对其他纵向协议的安全港豁免：经营者及其交易相对人（如涉及多个交易相对人，则合并计算）^{（1）}在相关市场中的市场份额均低于 15%；且（2）在相关市场中的年度营业额均不超过人民币 3 亿元（约合 4200 万美元）⁴。
11. 为增强拟议安全港规则的透明度并确保其在实践中的有效适用，工作组谨此提出以下意见。

建议将市场份额作为判定安全港豁免适用的唯一标准

12. 拟议的安全港规则将市场份额和营业额双重门槛作为纵向协议豁免的适用标准。工作组建议，将市场份额作为判断纵向协议是否存在竞争影响以及是否适用安全港豁免的唯一标准，以对齐全球主要反垄断法辖区的通行做法。
13. 根据贵局关于《修订草案》的起草说明，引入安全港规则的目的在于排除可被推定为对中国市场不具有排除或限制竞争效果的行为。与其他司法辖区的做法一致，对

² 例如，工作组理解，就转售价格维持的豁免而言，需要将所有受该协议约束的经销商的市场份额合并计算。因此，若某供应商的转售价格维持涉及两个市场份额各为 4% 的经销商，其合并市场份额 8% 将超过 5% 的安全港门槛，从而将无法适用安全港规则。我们期待贵局能就此计算方式进一步澄清。

³ 同理，所有受转售价格维持协议约束的经销商的营业额也需合并计算。

⁴ 关于市场份额与营业额的具体计算方式，请参阅前文所述。

行为的反竞争效果主要基于经营者的市场力量进行评估。

14. 市场力量是指企业在缺乏有效竞争约束的情况下，能够单方面实施提高价格、限制产量或排挤竞争等行为的能力。市场份额被公认为是反映市场力量的有效指标，因为它体现了经营者在相关市场中的影响力和竞争地位。与营业额不同的是，市场份额与市场竞争格局直接相关，是评估竞争损害更为可靠的工具。
15. 在市场份额门槛之外额外引入营业额门槛，会模糊对市场力量的评估重点，并为拟议安全港规则的适用带来不必要的复杂性。市场份额能够反映企业在特定相关市场中的竞争地位，而营业额则是一个更为宽泛的财务指标，无法直接体现企业是否具备产生反竞争损害的可能性。同时依赖这两项指标会造成冗余，并有可能削弱安全港规则设立的初衷。
16. 此外，有可能出现企业的市场份额低于 5%（表明其缺乏市场力量），但营业额仍超过门槛的情况。反之，某些企业尽管整体营业额较低，但若其在某一细分市场或高度集中的市场中占据较高的市场份额，仍可能具有显著的市场力量，对竞争造成实质影响。仅以市场份额作为评估标准，能够更准确地衡量企业的市场力量，因此，市场份额可以作为判断是否能够适用安全港规则的门槛。
17. 安全港规则的设立初衷是简化执法判断，通过豁免排除那些不太可能损害竞争的纵向协议。引入营业额门槛不仅偏离了上述简化执法判断的初衷，还可能引入一个与竞争效果相关性较低、难以统一适用的评估维度。贵局采用“营业额+市场份额”的双重标准的做法与其他司法辖区的做法不同，也可能为中国的反垄断执法带来不必要的复杂性。
18. 基于上述原因，工作组谨此建议，安全港规则应仅以市场份额门槛作为豁免标准。市场份额为安全港规则的适用提供了明确、客观且紧密关联竞争状况的衡量标准，更契合贵局提出的旨在豁免在中国不太可能具有排除或限制竞争效果协议的既定立法目标。

建议提高安全港的市场份额门槛

19. 《修订草案》拟设的市场份额安全港门槛，即对转售价格维持协议为 5%、对其他纵向协议为 15%，明显偏低且过于严格。工作组建议提高这一门槛，以更好地对齐国际通行标准，并聚焦于对市场力量的评估，而非基于人为设定的较低市场份额限值进行评判。事实上，市场份额超过 5%但低于 15%（针对转售价格维持协议）或超过 15%但低于 30%（针对其他纵向协议）的经营者几乎不可能具备市场力量或具备对竞争造成实质损害的能力。如此低的门槛将导致对本不具备竞争风险的协议施加不必要的监管压力。更重要的是，这一做法可能产生“寒蝉效应”，使企业因担心受到监管审查而主动放弃本可合法达成、且有助于市场效率的纵向协议，即便此类协议并不具备任何显著的反竞争效果。
20. 建议考虑将市场份额门槛与中国关于特定行业或领域的反垄断指南保持一致，以避免安全港规则在不同行业领域的处理和适用上出现不一致。具体而言，《关于汽车业的反垄断指南》和《关于知识产权领域的反垄断指南》均针对非价格纵向限制规定了 30%的安全港市场份额门槛。
21. 将市场份额门槛设定为 5%（针对转售价格维持协议）和 15%（针对其他纵向协议）的做法，可能导致大量事实上缺乏市场支配力，或其协议不会带来实质性竞争风险的企业被排除在安全港之外。这有悖于安全港规则设立的初衷，即为那些不大可能损害中国市场竞争的协议提供法律确定性。

22. 中国拟议的安全港豁免门槛与国际通行标准存在显著差异，这将对企业造成不必要的监管负担和不同司法辖区之间执法思路的不一致。比如，欧盟和英国皆将非价格纵向协议（不包括诸如转售价格维持在内的特定的核心限制行为）适用安全港的市场份额门槛设定为 30%。因此，相较而言，15%的门槛比起国际通行标准显得过于严苛，可能会阻碍国内外企业在中国达成具有效率增益的纵向协议，从而对经济发展和市场效率产生不利影响。

建议明确用于判断安全港适用的市场份额等计算方法

23. 拟议的安全港规则在如何计算市场份额和营业额以判断是否符合安全港适用方面，仍存在诸多实践层面的不确定性。工作组建议贵局就市场份额和营业额的计算方法提供更明确的指引。
24. 为确保安全港规则在适用中的一致性和法律确定性，工作组希望贵局特别就以下事项明确说明：
- 市场份额应依据销售额、销量、产能还是其他相关因素计算，特别是在不同情形或行业中，以哪种指标进行计算最为适宜；
 - 在涉及长期协议的情形下，是否必须每个年度均满足安全港门槛，还是仅需整个协议期间的平均数值低于门槛，即便协议某一方的市场份额或营业额在某些时期暂时超出门槛；
 - 市场份额和营业额的计算，是应仅限于作为纵向协议直接缔约方的经营者，且仅合并计算集团内实际参与相同行为的关联企业的份额；
 - 在计算交易相对人的市场份额时，其经销其他经营者（如竞争品牌）产品的份额是否应排除在外。
25. 此外，如上述第（10）段所述，在判断是否符合安全港规则适用条件时，应合并还是单独计算经销商的市场份额（及营业额）仍可能存在不确定性，有待贵局进一步澄清说明。

安全港豁免“合法性推定”的可推翻性带来了较高的不确定性

26. 根据贵局发布的起草说明，达到安全港门槛的纵向协议可被推定为不会产生排除、限制竞争效果。工作组理解，《修订草案》第 17 条提出，若有证据证明协议在中国市场具有排除、限制竞争效果的，则可以推翻对安全港豁免的推定适用。
27. 尽管安全港豁免的推翻机制为处理潜在的反竞争协议提供了一定的灵活性，但同时也大大增加了企业在合规方面的不确定性。工作组理解，设立安全港规则的初衷在于，通过豁免那些竞争风险较低的协议，为企业提供法律上的确定性。在欧盟，《纵向协议集体豁免条例》（Vertical Block Exemption Regulation）为企业提供了较高的法律确定性——若某项纵向协议符合该条例规定的条件，欧盟及各成员国法院与监管机构即应认定为合法。欧盟委员会可在特定情况下撤销集体豁免的适用，但该撤销的效力仅适用于撤销之后实施的协议（具体可参见下文第 40 段内容）。如果在缺乏明确指引的前提下允许适用推翻机制，将会削弱安全港规则的可预期性与可靠性。
28. 为此，工作组提请贵局就以下情形提供明确指引：对于已符合安全港门槛的纵向协议，在哪些具体情况下仍可能无法适用安全港豁免。例如，建议明确在评估安全港豁免的适用性时，执法机关是否会考虑由多个类似协议构成的平行协议网络可能带来的累积排除效果，以及具体的评估方式。

29. 明确推翻安全港豁免的具体情形，有助于更好地在保护市场竞争与鼓励合法、提升效率的纵向协议之间实现平衡。如缺乏相关指引，企业可能因对监管适用的不确定性产生顾虑，从而放弃达成成本可能有利于市场效率和消费者利益的协议安排。

关于安全港规则之外转售价格维持协议及非价格纵向限制的评估标准

30. 此次拟议引入的安全港规则，体现了贵局对于纵向协议可能具有促进竞争、提升市场效率等正当理由的肯定。工作组高度赞同贵局的理念。

转售价格维持协议

31. 工作组理解，在中国的反垄断执法实践中，转售价格维持协议通常被视为“本身违法”的行为，尽管自 2022 年《反垄断法》修订以来，执法机构在实践中已开始采用“合理原则”对该行为进行评估。随着有关转售价格维持安全港豁免的拟议引入，工作组期待贵局就如何分析和认定超过安全港门槛的转售价格维持协议进行明确。
32. 我们理解贵局也认可，转售价格维持可能带来促进竞争的积极效果。例如，转售价格维持有助于确保产品质量的一致性，激励经销商加大促销投入，并有效防范搭便车行为。为提升法律确定性并促进合规，工作组建议贵局就对于超过安全港门槛的转售价格维持协议将采用何种评估标准提供明确的指引，包括是否可以适用“合理原则”。
33. 与此相呼应，如果“合理原则”无法适用于超过安全港门槛的转售价格维持行为，正如前文第 19 至 22 段所述，工作组再次建议提高此类协议的市场份额门槛。鉴于转售价格维持行为潜在的促进竞争效果，适当提高门槛能够更准确地反映其经济实质，同时有助于增强企业开展提升市场效率的经营活动的信心。

其他纵向协议

34. 此外，工作组建议明确说明，对于超过安全港门槛的其他纵向协议，是否仍可以适用“合理原则”的分析方法。
35. 工作组理解，贵局在评估纵向非价格限制（即除转售价格维持以外的其他纵向协议）时，采用“合理原则”的分析方法。工作组希望贵局进一步确认，对于超出安全港门槛的此类协议，是否仍将适用该分析方法。

第二部分：其他主要司法辖区的实践操作

36. 工作组将通过下文简要介绍其他主要司法辖区在安全港规则和纵向协议方面采取的做法。

欧盟

37. 在欧盟，最重要的安全港规则载于《纵向协议集体豁免条例》，并且在《纵向限制指南》的第 4.1 部分予以细化。《纵向协议集体豁免条例》规定，符合其条件的协议可豁免适用《欧盟运行条约》第 101 条关于反竞争协议的禁令。该豁免适用须满足两个前提条件：（1）协议各方不存在实际或潜在竞争关系；（2）供应商在上游供应市场的份额与买方在下游采购市场的份额均不超过 30%。然而，若协议包含任何“核心限制”条款（如转售价格维持（即限定最低转售价格或固定转售价格）、禁止欧盟成员国间“主动”跨境销售（即卖方的主动销售）、特定地域或客户限制，以及限制互联网有效使用的条款等），则不得适用《纵向协议集体豁免条例》的豁免。完整的核心限制条款清单请参见《纵向协议集体豁免条例》第 4 条，被排除豁免的限制类

型请参见前述条例的第 5 条。

38. 除《纵向协议集体豁免条例》外，欧盟法律还设有两项补充性安全港规则：
- 《低影响协议通告》（*De minimis notice*）规定，市场份额不超过 15% 的非竞争者之间达成的协议不会被认定为违反《欧盟运行条约》第 101 条（但该规则不适用于涉及核心限制的协议）；
 - 《影响贸易通告》（*Guidelines on the effect on trade concept contained in Articles 81 and 82 of the Treaty*）设定了 5% 的市场份额门槛和 4000 万欧元的营业额门槛，低于前述门槛的协议原则上不会对成员国间贸易产生显著影响（即使协议包含核心限制条款），故不适用《欧盟运行条约》第 101 条。
39. 《纵向协议集体豁免条例》第 1 条和第 8 条详细规定了市场份额的计算方法。其中，第 1 条明确了应纳入计算的关联企业及子公司范围；第 8 条则设有灵活性条款：“若企业的市场份额最初未超过 30% 但后续超出该门槛，第 2 条规定的豁免可继续适用，直至首次超出 30% 门槛后的连续两个完整日历年度届满为止”。
40. 作为一项欧盟条例，《纵向协议集体豁免条例》提供了较高的法律确定性。凡符合其标准的协议，将被欧盟及成员国法院和监管机构认定为合法。虽然理论上欧盟委员会或成员国竞争主管机构可撤销对某一特定协议或某类协议的豁免，但实践中几乎从未发生。即便作出撤销，此类撤销仅会影响未来的协议，不具有溯及力。不同于《纵向协议集体豁免条例》，欧盟委员会制定的前述两项补充性安全港规则（即《低影响协议通告》和《影响贸易通告》）对欧盟及成员国法院并无法律约束力，因此其所能提供的法律确定性相对较低。
41. 对于未能适用《纵向协议集体豁免条例》豁免的协议，欧盟采用“合理原则”进行审查。首先判断该协议是否构成对竞争的限制，若构成限制，则进一步评估其是否同时满足《欧盟运行条约》第 101 条第 3 款规定的四项经济效率豁免标准。该评估将综合考虑市场结构、进入壁垒及相关限制条款的必要性等因素。相较于横向限制，欧盟委员会对纵向限制通常持更为宽松的监管态度。《纵向限制指南》亦明确指出，纵向协议可能产生诸多积极效益。

英国

42. 就英国而言，纵向协议限制受《纵向协议集体豁免令》（*Vertical Agreements Block Exemption Order*）及其配套指南规制。该制度在很大程度上沿袭了欧盟的相关做法。
43. 《纵向协议集体豁免令》规定，非竞争者间的纵向协议在满足以下条件时，可豁免适用英国竞争法：(1) 相关安全港市场份额门槛达标（即上下游的相关市场份额均低于 30%）；(2) 协议不包含核心限制条款（如固定价格或划分市场等）。企业可基于《纵向协议集体豁免令》及配套指南进行合规自评：
- 若企业之间不存在竞争关系且未超过安全港门槛，如协议未包含核心限制条款，则该协议可直接认定符合英国竞争法；
 - 若企业之间虽不存在竞争关系但超出安全港门槛，只要协议未包含核心限制条款，仍可类推适用《纵向协议集体豁免令》指南进行个案评估。
44. 市场份额的计算包含以下两方面：(1) 界定相关市场，即供应商销售与买方采购相关产品或服务的市场；(2) 基于相关产品或服务总销售收入计算协议各方的市场份额，计算范围包括母公司所控制的集团成员及关联企业。

45. 英国未设定专门的营业额门槛，对涉及转售价格维持的协议亦无特殊适用机制。
46. 与欧盟相同，英国将转售价格维持视为核心限制。凡包含转售价格维持的纵向协议，不得适用《纵向协议集体豁免令》豁免，且将被推定为违法，除非当事人能证明该行为符合《1998年竞争法》（the Competition Act 1998）第9(1)条的豁免条件（相当于《欧盟运行条约》第101条第3款）的豁免条件，例如能证明转售价格维持产生促进竞争的效率。
47. 《纵向协议集体豁免令》还列明若干“除外限制”条款。一旦协议中包含以下情形，则不能适用上述豁免：非竞争条款超过5年或无期限、交易终止后非竞争义务超过1年、选择性分销体系限制竞品的销售等。与核心限制不同，此类“除外限制”虽不适用豁免，但并不直接构成违法，而是需要根据协议的具体经济影响进行个案评估。
48. 对超出《纵向协议集体豁免令》所设安全港门槛的纵向协议，需综合考虑其经济背景以评估其是否可能产生实际的反竞争效果以及是否存在相应的积极效应，并进一步判断限制条款对实现积极效应是否不可或缺——此即“合理原则”分析方法。然而，如纵向协议包含核心限制条款，则在无相反证据的情况下将被直接推定为具有反竞争效果。
49. 如纵向协议涉及竞争者间的非互惠性约定，可参照《纵向协议集体豁免令》的配套指南进行评估。但如协议涉及实际或潜在竞争者间的互惠性约定，则需参照适用横向协议相关指南及判例进行评估，包括有关竞争者之间的信息共享行为的规制。

巴西

50. 巴西尚未设立安全港制度。根据巴西竞争法，在评估并购或涉嫌违法行为时，会将所有受共同控制的实体视为单一实体进行考量，并在评估行为实质时，计算整个涉嫌违法期间的市场份额及其他相关指标。
51. 在巴西竞争法下，营业额并非评估违法行为的相关考量因素。
52. 除最低转售价格维持外，巴西将所有传统纵向协议视为“效果型”违法行为，采用类似“合理原则”的分析框架进行审查。该分析框架包含四个递进的评估步骤：(1) 行为的实质性；(2) 是否具有市场支配地位；(3) 是否具有经济合理性；(4) 对竞争的净影响，最终据此判断该行为是否违法。相比之下，最低转售价格维持被认定为“目的型”违法行为。

智利

53. 在智利，除最低转售价格维持外，国家经济检察院（Fiscalía Nacional Económica，“FNE”，即智利的竞争执法机构）针对最低转售价格维持之外的其他纵向协议设立了安全港制度，即当协议双方（即，供应商与经销商）的市场份额均不超过35%时，协议可被推定为合法。FNE设立的安全港制度并未将营业额作为评估指标，但智利竞争法庭（Tribunal de Defensa de la Libre Competencia）或最高法院在审理纵向限制案件时可能会将营业额作为参考因素。
54. 关于市场份额计算，《FNE 并购指南》明确应以企业年度销售额为基础计算市场份额；依据《FNE 竞争指南》，在评估纵向协议时，凡受共同控制、并在市场中提供或采购相关商品或服务的实体或其组成部分（无论是供应商还是经销商），应被视为单一经济实体。
55. FNE设立的安全港制度为企业提供了较高的法律确定性，因其反映了该竞争执法机

构对相关问题的正式解释立场。然而，该规则对竞争法庭或最高法院的裁决并不具有法律约束力。此外，虽然安全港制度可为纵向协议提供法律确定性，但应特别注意以下情形不予适用：(1) 协议涉及最低转售价格维持；(2) 即使协议各方市场份额未超过 35%，若协议方之间存在多个纵向协议，则可能产生累积效应从而排除安全港的适用。需说明的是，超过市场份额门槛的限制性协议也并非本身违法，而是仍可依据“合理原则”进行个案评估，以判断其是否具有促进竞争的效果。

56. 除最低转售价格维持以外，智利竞争法下通常基于“合理原则”评估纵向协议。评估将聚焦于以下几个方面：(1) 纵向协议涉及的特定相关市场；(2) 实施限制的一方是否具有市场支配地位；(3) 纵向协议对市场竞争产生的促进或排除限制效果。但是，最低转售价格维持协议在产生横向限制效果时（如同业竞争者之间固定价格），则可能适用“本身违法原则”进行评估。
