Vertical Agreements Beyond the EU

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The influence of EU competition law

• New antitrust regimes often look to the EU system when designing their laws and policies

• Pursuit of goals through antitrust may go beyond the consumer welfare standard

• Vertical restraints remain an area where differences between jurisdictions are notable

• Discussion of developments in China
A decade of antitrust ‘with Chinese characteristics’

- Anti-Monopoly Law (AML) in force since August 2008
- It pursues goals in Article 1, including fair competition
- Enforced by 3 agencies, currently being merged into 1
- Chinese courts have also applied the AML in private litigation
- Vertical agreements have been at the centre of various investigations and leading cases
Legal framework for vertical agreements

**Article 14 AML** prohibits “monopoly agreements” between “business operators and their trading parties” which:
- Fix resale price
- Restrict minimum resale price
- Any other agreements as determined by the Anti-Monopoly Authority

**Article 15 AML** exempts agreements which:
- Improve technologies or R&D for new products
- Enhance product quality, reduce cost, improve efficiency, unify product specifications or standards, or carry out professional labor division
- Improve operational efficiency and reinforce competitiveness of SMEs
- Achieve public interests (conserving energy, protecting the environment, relief for disaster victims)
- Mitigate serious decrease in sales or excessive production during recessions

Need to prove 1) consumers’ share of benefits + 2) absence of severe restrictions of competition
- Safeguard interests in the foreign trade or foreign economic cooperation
- Other circumstances as stipulated by laws and the State Council
General approach to vertical restraints

- Minimum RPM can be unlawful
- Other restraints generally acceptable, however:
  - Could be caught under the “other agreements” rubric
  - Draft Guidelines on Automotive Industry:
    - Exempted from prohibition, efficiency justifications
    - Safe harbour of 25-30%
    - Exemption not automatic for restrictions of passive sales and cross sales between distributors
    - Exclusive purchasing obligations might be cause for concern
Enforcement to date

• Private enforcement: *Rainbow v. Johnson & Johnson*
  - First instance: restriction of competition needs to be established in each case for minimum RPM to be unlawful
  - On appeal: obvious anti-competitive effects; no evidence of pro-competitive effects; free rider defence irrelevant since consumers are familiar with products; 20% market share and pricing control suggest strong market power; damages awarded

• Public enforcement:
  - *Kweichow Maotai*: minimum RPM for third party distributors unlawful; 247 million CNY fine
  - *Wuliangye*: minimum RPM on 3,200 distributors, punished those who did not abide; firm with strong market position; 202 million CNY fine
  - *Infant formula*: resale price fixing and minimum RPM; 670 million CNY fine
Conclusion

• China shares the EU’s concerns with regard to minimum RPM

• ‘Prohibition plus exemption’ system – note *per se* illegal, comparable to exclusion from block exemption in the EU, application of 101(3) TFEU

• Justifications for tough stance on minimum RPM:
  ◦ Negative effects of the practice
  ◦ Integration concerns: to fix China’s fragmented economic system?
  ◦ Protectionism?
  ◦ Conscious distancing from some Western regimes
END
Thank you! Queries and suggestions: s.marcocolino@cuhk.edu.hk