

Vertical Agreements Beyond the EU

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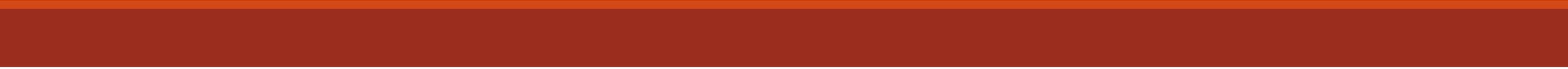
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The influence of EU competition law

- 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
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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
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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