Resale price maintenance treatment under the Chinese Anti-Monopoly Law

Regulatory Update

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By:

Companies doing business in China face an increased risk of resale price maintenance (RPM) claims in China brought under the Anti-Monopoly Law (the AML). Chinese competition regulators are stepping up their enforcement activities against these types of vertical agreements, which are typically made between manufacturers, wholesalers and/or retailers. In addition to government enforcement, China has seen a number of private antitrust actions alleging RPM.

China enacted the AML in 2008 amid the country’s continued economic reforms and the transformation from a planned economy into one that is market-based. In the AML’s first four years, enforcement actions focused on merger notifications. China has a merger notification regime similar to that of other mainstream jurisdictions such as the European Commission and the United States. The widely-reported prohibition of Coca Cola's acquisition of Chinese fruit juice maker Huiyuan is a high profile example of such merger enforcement. With the concept of fair competition winning more support in the administration and the general public, and with the competition agencies and Chinese courts enhancing their competition capacity, an increasing number of high profile cases alleging cartels and vertical anti-competitive agreements have emerged in recent months.

The AML prohibits vertical agreements that fix resale prices or set minimum resale prices. However, it is not clear whether the AML views RPM as hardcore or per se violations, as the AML provides a set of exemptions for RPM. Exemption examples include technological improvement, research and development, efficiency enhancement and public interest. Given these exemptions, it is likely that China will view RPM in a manner similar to that of the United States by applying a US-style benefits and harm test (the US "Rule of Reason").

Rainbow v Johnson & Johnson Medical

Johnson & Johnson Medical (China) Ltd (J&J) was sued by its former distributor, Beijing Ruibang Yonghe Technology and Co., Ltd. (“Rainbow”), alleging resale price restrictions on J&J sutures distributed by Rainbow. The First Intermediate Court handed down its ruling in May 2010, dismissing the damages claims of the distributor. The Court requested market and product-related information to assess whether the RPM allegations had the effect of restricting or eliminating competition. The distributor was unable to prove harm to the competition. J&J, on the other hand, demonstrated that there were many suppliers of the same products in the upstream market, and thus there was no harm to competition. It is apparent from the Court's approach that it did not view the RPM as illegal per se. The case is now on appeal to the Shanghai High Court.

Maotai and Wuliangye
Two Chinese premium liquor distillers (Maotai and Wuliangye) were investigated by China’s antitrust regulator in January 2013, shortly after they penalized some of their distributors for selling under their minimum retail price. Upon investigation, both companies announced that they had withdrawn the penalties and would reorganize their sales practices to comply with the AML. In February 2013, two provincial competition regulators (in the province where the manufacturers were located) issued fines of ¥247 million (approx. €31 million) and ¥220 million (approx. €28 million), figures that represented one percent of their annual sales of the products in question. In one of the announcements, the regulator stated that the RPM restricted or eliminated competition. Because the regulator issued such fines with a finding that the RPM restricted or eliminated competition, this suggests a reluctance to consider RPM to be an automatic violation, or one that need not include a determination that competition was distorted, restricted or eliminated.

Other cases and legislation

According to 2012 media reports, Daimler’s China joint venture Beijing Benz was investigated by China’s competition regulator for imposing minimum resale price requirements on its dealers. Though no official announcement was made on this investigation, a series of media reports indicated that the automaker revised its dealership contracts and structurally reformed its Chinese distribution practices by eliminating the retail pricing restrictions.

According to sources, China has been forming an expert group to draft guidelines on vertical agreements and available exemptions and defenses. These guidelines may provide more clarity on how China will evaluate the legality of RPM. However, before such guidelines become available, Chinese regulators and courts will continue to assess allegations of RPM on a case-by-case basis. In practice, it is easier for an unhappy distributor to challenge the manufacturer than for a private consumer to litigate a price-fixing case. Therefore, companies that do business in China through distributors or retailers must be aware of any pricing restrictions they impose to ensure compliance with the AML.

1 The exemption under Art. 15 of the AML applies to all types of horizontal and vertical agreements, not just to RPM restrictions.