LEXOLOGY®
Getting The Deal Through

Vertical Agreements

in China

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Contributors

China

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LEGAL FRAMEWORK

Antitrust law

What are the legal sources that set out the antitrust law applicable to vertical restraints?

China's main competition legislation is the Antimonopoly Law of the People's Republic of China (PRC), which entered into force on 1 August 2008.

Vertical restraints are classified as a type of 'monopolistic conduct' under the Antimonopoly Law. The antitrust enforcement agency, the State Administration for Market Regulation (SAMR), issued two agency rules on 26 June 2019 that are directly applicable to vertical restraints. These rules became effective on 1 September 2019, and are:

- Provisional Rules on the Prohibition of Monopolistic Agreements (the SAMR Monopolistic Agreement Rules); and
- Provisional Rules on the Prohibition of Abuse of Market Dominance (the SAMR Anti-abuse Rules).

In addition to the Antimonopoly Law, certain other laws and regulations also have provisions regulating vertical restraints. In particular, there is some overlap between the Price Law and the Antimonopoly Law. Theoretically, government agencies could use the Antimonopoly Law and the Price Law to form the basis for their enforcement in relation to vertical restraints, and the outcomes under these two laws might be quite different; however, recent enforcement seems to indicate that, if any conflict occurs between the terms of the Antimonopoly Law and other laws, the Antimonopoly Law in principle prevails.

Where a party occupies a dominant market position in one of the markets to which the vertical agreement relates, articles 17 to 19 of the Antimonopoly Law may also be relevant to the antitrust assessment of a given vertical restraint.

Types of vertical restraint

List and describe the types of vertical restraints that are subject to antitrust law. Is the concept of vertical restraint defined in the antitrust law?

The Antimonopoly Law does not use the term 'vertical restraint', so does not define it. The Antimonopoly Law instead uses the term 'agreements between a business undertaking and its trading counterpart'. Restraints in these agreements would be vertical restraints.

Legal objective

Is the only objective pursued by the law on vertical restraints economic, or does it also seek to promote or protect other interests?

The Antimonopoly Law does not have a specific objective relating to vertical restraints. In general, the Antimonopoly Law pursues multiple objectives, which include both microeconomic efficiency and macroeconomic development. These objectives would also apply to the regulation of vertical restraints. Specifically, these objectives are to:

- prevent and prohibit monopolistic conduct;
- protect market competition;
- promote the efficiency of economic operations;
- safeguard the interests of consumers and the general public; and

- promote the healthy development of the socialist market economy.

In addition, article 15 of the Antimonopoly Law provides the possibility to exempt 'monopoly' agreements, including vertical ones, if certain conditions are fulfilled. Many of these conditions are not purely economic. They include, for example, social interests (such as energy-saving, environmental protection and disaster relief), alleviation of serious decreases in sales volumes or overcapacities during a recession and the safeguarding of legitimate interests in foreign trade and foreign economic cooperation.

Responsible authorities

Which authority is responsible for enforcing prohibitions on anticompetitive vertical restraints? Where there are multiple responsible authorities, how are cases allocated? Do governments or ministers have a role?

The State Administration for Market Regulation, including the national agency and provincial bureaus, is responsible for enforcing the prohibitions on anticompetitive activities, including vertical restraints.

Jurisdiction

What is the test for determining whether a vertical restraint will be subject to antitrust law in your jurisdiction? Has the law in your jurisdiction regarding vertical restraints been applied extraterritorially? Has it been applied in a pure internet context and if so, what factors were deemed relevant when considering jurisdiction?

The test is whether the vertical restraint has the effect of eliminating or restricting competition in China. Where the activity takes place, whether in or outside China, is not a relevant factor.

Since its inception, the Antimonopoly Law has been applied extraterritorially in multiple cases, but these cases concerned cartels, not vertical restraints. The Antimonopoly Law has not been applied to vertical restraints in the context of just the internet.

Agreements concluded by public entities

To what extent does antitrust law apply to vertical restraints in agreements concluded by public entities?

In principle, the Antimonopoly Law and the competition provisions in other laws and regulations (including provisions relating to vertical agreements) apply irrespective of the ownership of an entity.

The Antimonopoly Law stipulates that any 'undertaking' is subject to those provisions. The Antimonopoly Law defines an undertaking as a natural person, legal person or other organisation that engages in the manufacture or sale of products or the provision of services. No reference is made to the ownership of the undertaking. Therefore, these laws apply to vertical restraints contained in agreements concluded by public entities.

The Antimonopoly Law also prohibits administrative authorities and organisations from taking certain steps that might restrict competition, including the imposition of exclusive dealing obligations. The Antimonopoly Law does not have any provision that provides exemption or special treatment to public entities.

Article 7 of the Antimonopoly Law establishes a particular system for state-owned enterprises in industries vital to the national economy and national security, and industries subject at law to exclusive operations and sales. This complex provision seems to make the pricing policy of such enterprises subject to government intervention and, possibly, exempt them from the Antimonopoly Law.

Sector-specific rules

Do particular laws or regulations apply to the assessment of vertical restraints in specific sectors of industry (motor cars, insurance, etc)? Please identify the rules and the sectors they cover.

The Antimonopoly Law does not contain any provisions on vertical restraints that apply to specific sectors. On 23 March 2016, the National Development and Reform Commission, which then had antitrust enforcement power, published a draft of the Antimonopoly Guidance in the Automobile Sector by the Antimonopoly Commission of the State Council for public comment. The comment period ended on 12 April 2016, and the Guidance has not been finalised.

Highlights of the Guidance are as follows: the Guidance describes several instances in which companies may seek exemption from the prohibition on resale price maintenance; the Guidance states that 'recommended prices', 'guidance prices' and 'maximum prices' might constitute resale price maintenance if they have the effect of fixing prices or setting minimum prices; territorial restrictions imposed by companies without 'significant market power' are presumed to be exempted; and four particular types of territorial restrictions, however, cannot be presumed to be exempted and may be exempted only on a case-by-case basis, including restrictions on passive sales.

In addition, some regulations enacted before the inception of the Antimonopoly Law have addressed vertical restraint issues in specific industry sectors. These regulations have very rarely been enforced, if at all, and it appears very unlikely that they will be enforced following the implementation of the Antimonopoly Law.

General exceptions

Are there any general exceptions from antitrust law for certain types of agreement containing vertical restraints? If so, please describe.

Article 15 of the Antimonopoly Law lists the circumstances under which an agreement containing a vertical restraint can be exempted from the prohibition of article 14. These circumstances are:

- improving technology or research and development of new products;
- improving product quality, reducing costs, enhancing efficiency, harmonising product specifications and standards, or dividing work based on specialisation;
- improving operational efficiency and enhancing the competitiveness of small and medium-sized enterprises;
- serving social public interests, such as energy-saving, environmental protection, and disaster relief and aid;
- alleviating serious decreases in sales volumes or significant production overcapacities during an economic recession; and
- safeguarding legitimate interests in foreign trade and foreign economic cooperation.

If a company wishes to argue that the prohibition of article 14 should be disapplied, it bears the burden of proof to show that the agreement in question fulfils one of these circumstances. If it claims that one of the first five circumstances exists, the company must also prove that the agreement does not significantly restrict competition in the relevant market and allows consumers a share of the resulting benefit.

TYPES OF AGREEMENT

Agreements

Is there a definition of 'agreement' – or its equivalent – in the antitrust law of your jurisdiction?

The Antimonopoly Law does not contain a precise definition of an 'agreement'. Nonetheless, article 13 of the Antimonopoly Law defines a 'monopoly agreement' as an 'agreement, decision or other concerted practice which eliminates or restricts competition'. The State Administration for Market Regulation (SAMR) Monopolistic Agreement Rules contain an identical definition.

In order to engage the antitrust law in relation to vertical restraints, is it necessary for there to be a formal written agreement or can the relevant rules be engaged by an informal or unwritten understanding?

The agreement does not need to be in written form. The Antimonopoly Law defines a 'monopoly agreement' as an 'agreement, decision or other concerted practice which eliminates or restricts competition'.

Furthermore, the SAMR Monopolistic Agreement Rules explicitly provide that a 'monopoly agreement' may be in written, oral or tacit forms (ie, a 'concerted practice'). The rules further provide that a 'concerted practice' means a practice where coordination and concordance exist between the relevant business undertakings although there is no explicit written or oral agreement or decision. The rules also list three factors that may be considered when determining whether a concerted practice exists, which are whether:

- the practices in the market taken by the business undertakings have concordance;
- the business undertakings conducted communications or exchanges of information; and
- the business undertakings have reasonable justifications for their coordinated practice.

The rules further provide that in determining what constitutes a concerted practice, other factors need to be taken into consideration, including the structure of the relevant market, the competitive situation, changes in the market, etc.

Parent and company-related agreements

In what circumstances do the vertical restraints rules apply to agreements between a parent company and a related company (or between related companies of the same parent company)?

It is unclear whether the Antimonopoly Law and the competition provisions in other laws or regulations apply to agreements between a parent and a related company. However, because one aim of the competition laws and regulations is to maintain fair market competition and since such intra-company agreements would not adversely affect the wider competitive environment, it appears unlikely that Chinese competition laws and regulations would apply to such agreements.

Agent–principal agreements

In what circumstances does antitrust law on vertical restraints apply to agent–principal agreements in which an undertaking agrees to perform certain services on a supplier's behalf for a sales-based commission payment?

There are no provisions in the Antimonopoly Law or the competition provisions in other laws or regulations that specifically address this question.

Where antitrust rules do not apply (or apply differently) to agent-principal relationships, is there guidance (or are there recent authority decisions) on what constitutes an agent–principal relationship for these purposes?

The enforcement authorities have not issued guidance, or taken decisions, on this issue.

Intellectual property rights

Is antitrust law applied differently when the agreement containing the vertical restraint also contains provisions granting intellectual property rights (IPRs)?

In principle, the provisions of the Antimonopoly Law do not apply differently if an agreement grants an IPR. Article 55 of the Antimonopoly Law states that application of the law is not precluded as a matter of principle on the grounds that an IPR is involved. Where a company restricts or eliminates competition by abusing an IPR, the provisions of the Antimonopoly Law apply.

In 2015, the former State Administration for Industry and Commerce (SAIC), which was the predecessor of the State Administration for Market Regulation and had antitrust enforcement power at that time, issued the Rules on Prohibition of Restriction or Elimination of Competition Through Abuse of Intellectual Property Rights, and the Rules are still effective today. The Rules apply to the scenarios of both monopoly agreements and abuse of market dominance, including tying and bundling, exclusive grant-back of technology improvement, prohibition of challenging the validity of the IPR, etc. These issues are not unique to, but may arise in the context of, vertical agreements.

On 23 March 2017, China's Antimonopoly Commission issued a draft set of Antimonopoly Guidelines against Abuse of Intellectual Property Rights. The Guidelines had not been finalised at the time of writing. They contain provisions relating to certain restrictions that may occur in vertical agreements, such as exclusive grant-back and no-challenge clauses. More importantly, the Guidelines contain a section on 'other restrictions', and factors that should be taken into account when assessing whether such other restrictions are anticompetitive. Specifically, these 'other restrictions' are:

- restricting the fields where the IPRs are used;
- restricting the distribution channels, sale territories or sale targets of the products containing the IPR at issue;
- restricting the quantity of products provided by undertakings based on the IPR at issue; and
- restricting the undertakings from using competing technology or providing competing products.

When analysing whether these restrictions are anticompetitive, the following factors may be considered:

- the contents, degree and implementation method of the restriction;
- the characteristics of the products provided based on the IPR at issue;
- the relationship between the restrictions and the licensing conditions for the IPR at issue;
- whether the agreement includes multiple restrictions; and
- if other undertakings have IPRs involving alternative technology, whether those undertakings introduce the same, or similar, restrictions.

ANALYTICAL FRAMEWORK FOR ASSESSMENT

Framework

Explain the analytical framework that applies when assessing vertical restraints under antitrust law.

There is no uniform analytical framework that applies to the assessment of all vertical restraints under Chinese antitrust law. Rather, the various legal instruments provide limited information on the analytical approach that should be expected in relation to the specific types of conduct they cover. The instruments set out below cover the potential infringements identified. Where appropriate, explanations of likely analytical frameworks are provided.

Article 14 of the Antimonopoly Law identifies as illegal:

- resale price maintenance: the fixing of resale prices of products sold to third parties; and
- fixing of minimum resale price: the fixing of minimum resale prices of products sold to third parties.

Article 14 of the Antimonopoly Law also authorises the enforcement agency to prohibit other vertical restraints that they consider to be anticompetitive.

The general analytical framework underpinning the assessment of vertical restraints under the Antimonopoly Law is the following: if the enforcement agency finds that an agreement fixes resale prices or sets minimum resale prices, it is likely to conclude that article 14 of the Antimonopoly Law is breached. However, the parties can still argue that the prohibition in article 14 should be disapplied on the ground that the agreement fulfils one of the circumstances listed in article 15 of the Antimonopoly Law, or has other beneficial effects that are not explicitly listed. In addition, the parties must prove, as a general rule, that the agreement does not significantly restrict competition in the relevant market and allows consumers a share of the resulting benefit. This same analysis would, in principle, apply for all types of vertical restraints examined under the Antimonopoly Law, whether the explicitly prohibited resale price maintenance and minimum resale price-fixing, or additional yet unspecified restraints that the enforcement agency finds to be in breach of article 14.

Market shares

To what extent are supplier market shares relevant when assessing the legality of individual restraints? Are the market positions and conduct of other suppliers relevant? Is it relevant whether certain types of restriction are widely used by suppliers in the market?

As a general rule, the Antimonopoly Law and the competition provisions in other laws or regulations do not require the enforcement agencies to take account of market shares in their assessment of the legality of individual restraints. For example, article 14 of the Antimonopoly Law prohibits resale price maintenance and the fixing of minimum resale prices without referring to market shares. In addition, under article 15, the availability of exemptions for agreements containing vertical restraints refers, inter alia, to economic factors such as the improvement of product quality, cost reductions and efficiencies and requires that the agreements do not significantly restrict competition in the relevant market. Again, market share is not one of these factors.

Notwithstanding the foregoing, market share is an important factor when an agency or court assesses the anticompetitive effects of activities. One example is the case involving Johnson & Johnson. On 18 May 2012, the Shanghai No. 1 Intermediate People's Court issued a judgment dismissing petitions from a lead distributor of Johnson & Johnson that accused Johnson & Johnson of retail price maintenance. On 1 August 2013, the Shanghai Higher People's Court issued a final judgment in the Johnson & Johnson case, in which it reversed the judgment of the first-

instance court, and ruled that Johnson & Johnson had engaged in illegal resale price maintenance. In its analysis, the appellate court viewed the market share of the supplier as an important factor when determining whether the pricing activities in question had anticompetitive effects. Specifically, the appellate court opined that resale price maintenance activities conducted by suppliers with 'strong market positions' will affect competition significantly, and therefore the supplier's 'market position' is an important factor in any analysis of competitive effects. Naturally, the most important factor when determining the strength of the supplier's 'market position' is its market share.

To what extent are buyer market shares relevant when assessing the legality of individual restraints? Are the market positions and conduct of other buyers relevant? Is it relevant whether certain types of restriction are widely used by buyers in the market?

The Antimonopoly Law does not address these issues.

BLOCK EXEMPTION AND SAFE HARBOUR

Function

Is there a block exemption or safe harbour that provides certainty to companies as to the legality of vertical restraints under certain conditions? If so, please explain how this block exemption or safe harbour functions.

The Antimonopoly Law does not contain any safe harbours, and there are currently no block exemptions.

TYPES OF RESTRAINT

Assessment of restrictions

How is restricting the buyer's ability to determine its resale price assessed under antitrust law?

Article 14 of the Antimonopoly Law prohibits a supplier from fixing the buyer's resale price or setting a minimum resale price. Nonetheless, an agreement containing such a restriction can be exempted if the conditions of article 15 are met. The adoption of measures implementing articles 14 or 15 may give further guidance on the circumstances in which exemptions might be available.

In 2012, in the first-instance trial of Johnson & Johnson at the Shanghai No. 1 Intermediate People's Court, the distributor claimed that, in its distribution agreements, Johnson & Johnson required it to sell products to hospitals in allocated territories only, and at prices no lower than the minimum prices decided by Johnson & Johnson. The distribution relationship was terminated by Johnson & Johnson after it discovered that the distributor sold products outside its allocated territories and at prices lower than the minimum price. The presiding judge (albeit in an interview) explained the rationale of the court's judgment, stating that minimum price maintenance is not a per se violation of the Antimonopoly Law, and the court should consider whether such restriction has resulted in the elimination or restriction of competition. The court dismissed the distributor's petitions because the distributor failed to prove that competition was eliminated or restricted.

In 2013, in the appellate trial of the Johnson & Johnson case, the Shanghai Higher People's Court ruled that Johnson & Johnson engaged in illegal resale price maintenance and ordered it to pay damages (530,000 yuan) to the distributor that filed the suit. The appellate court upheld the first-instance court's view that resale price maintenance is not a per se violation of law. It also laid out four factors that need be assessed when determining whether resale price maintenance practices have anticompetitive effects:

- whether there is sufficient competition in the relevant market;
- whether the defendant has a strong market position;
- what is the motivation of the defendant for its resale price maintenance activities, and whether the motivation is pro or anticompetitive; and
- what the effects of the resale price maintenance activities on competition are, and whether the effects are pro- or anticompetitive.

In 2016, more court cases have demonstrated that the court system in China employs a rule of reason approach, not a per se illegal approach. On 30 August 2016, the Guangdong Intellectual Property Court ruled, in Gree , that resale price maintenance obligations do not violate antitrust law if they have no intention and effect of eliminating competition. In this case, upstream distributors of Gree air-conditioners imposed clear, undisputed resale price maintenance obligations on downstream distributors. The court decided that it should apply the rule of reason, instead of the per se illegal doctrine, and on this basis decided that the resale price maintenance obligations did not violate the antitrust law, because: (1) Gree air conditioners did not have market dominance, and therefore the obligations had not restricted consumers from choosing other brands; (2) the obligations did not seem to impact intra-brand competition; and (3) even if the resale price maintenance obligations had hurt price competition, distributors could still compete in other ways, such as advertisements, promotion and after-sales services.

However, the enforcement agency has continued to employ a per se illegal approach to resale price maintenance issues. In all the resale price maintenance penalty decisions that are made publicly available, the former National Development and Reform Commission and the State Administration for Market Regulation have all used a de facto illegal per se approach to the resale price maintenance issue.

Have the authorities considered in their decisions or guidelines resale price maintenance restrictions that apply for a limited period to the launch of a new product or brand, or to a specific promotion or sales campaign; or specifically to prevent a retailer using a brand as a 'loss leader'?

At the time of writing, there does not appear to be a decision issued by the court or published by enforcement agencies that specifically addresses these questions. However, the draft Antimonopoly Guidance in the Automobile Sector provided for several examples of exemptions, which may be argued case by case, to the per se illegal classification of resale price maintenance violations (one being promotional periods for new-energy cars). This seems to be an indirect recognition of the legitimacy of resale price maintenance policies after the launch of a new product.

Relevant decisions

Have decisions or guidelines relating to resale price maintenance addressed the possible links between such conduct and other forms of restraint?

In the Johnson & Johnson case, the appellate court used Johnson & Johnson's ability to implement territorial sales restrictions (in fact, the 'territories' were hospitals, not geographical areas) as evidence proving Johnson & Johnson's 'strong market position', but did not find such territorial sales restrictions to be a per se violation of antitrust law. Other than this, at the time of writing, there does not appear to be a decision or guideline issued by the court or published by enforcement agencies that specifically addresses these questions.

In several past enforcement cases, the National Development and Reform Commission (NDRC) and its local authorities mentioned territorial restrictions in their decisions on resale price maintenance. However, the authorities seemed to imply that these territorial restrictions were a means of implementing or strengthening resale price maintenance, and not a stand-alone violation of the law. The State Administration for Market Regulation uses the same approach.

Have decisions or guidelines relating to resale price maintenance addressed the efficiencies that can arguably arise out of such restrictions?

In the Johnson & Johnson case, the appellate court, the plaintiff, the defendant and their respective expert witnesses discussed the potential efficiencies of the resale price maintenance agreements – or lack thereof – in great detail. The appellate court determined that the agreements 'do not have obvious effects of promoting competition', because the defendant had failed to demonstrate:

- the agreements had the result of improving product quality and safety;
- the agreements were necessary to prevent 'free-riding' of other distributors, because Johnson & Johnson had strong control of the distributors, and also assigned only one distributor for each hospital; or
- it needed to use the resale price maintenance agreements to promote a new brand or a new product in the relevant market, because the products at issue had been sold in China for over 15 years.

In the draft Antimonopoly Guidance in the Automobile Sector, the NDRC stated that territorial restrictions and customer restrictions imposed by companies without 'significant market power' should be presumed to be exempted from the Antimonopoly Law's prohibitions, because these restrictions 'typically can improve the quality of distribution services, increase distribution efficiency, and strengthen the business efficiency and competitiveness of small-and-medium-sized dealers'. However, enforcement agencies have not yet explained their view on efficiencies in any enforcement decision.

Explain how a buyer agreeing to set its retail price for supplier A's products by reference to its retail price for supplier B's equivalent products is assessed.

At the time of writing, there does not appear to be a decision or guideline issued by the court or published by enforcement agencies that addresses this issue.

Suppliers

Explain how a supplier warranting to the buyer that it will supply the contract products on the terms applied to the supplier's most-favoured customer, or that it will not supply the contract products on more favourable terms to other buyers, is assessed.

At the time of writing, there does not appear to be a decision or guideline issued by the court or published by enforcement agencies that addresses this issue.

Explain how a supplier agreeing to sell a product via internet platform A at the same price as it sells the product via internet platform B is assessed.

At the time of writing, there does not appear to be a decision or guideline issued by the court or published by enforcement agencies that addresses this issue.

Explain how a supplier preventing a buyer from advertising its products for sale below a certain price (but allowing that buyer subsequently to offer discounts to its customers) is assessed.

At the time of writing, there does not appear to be a decision or guideline issued by the court or published by enforcement agencies that addresses this issue.

Explain how a buyer's warranting to the supplier that it will purchase the contract products on terms applied to the buyer's most-favoured supplier, or that it will not purchase the contract products on more favourable terms from other suppliers, is assessed.

At the time of writing, there does not appear to be a decision or guideline issued by the court or published by enforcement agencies that addresses this issue.

Restrictions on territory

How is restricting the territory into which a buyer may resell contract products assessed? In what circumstances may a supplier require a buyer of its products not to resell the products in certain territories?

Territorial restrictions on sales appear to have formed part of the 2012 Johnson & Johnson case. In the first-instance trial of Johnson & Johnson at the Shanghai No. 1 Intermediate People's Court, the distributor claimed that, in its distribution agreements, Johnson & Johnson required it to sell products to hospitals in allocated territories only, and at prices no lower than the minimum prices decided by Johnson & Johnson. The distribution relationship was terminated by Johnson & Johnson after it discovered that the distributor sold products outside its allocated territories and at prices lower than the minimum price. The presiding judge (albeit in an interview) explained the rationale of the court's judgment, stating that minimum price maintenance is not a per se violation of the Antimonopoly Law, and the court should consider whether such restriction has resulted in the elimination or restriction of competition. The court dismissed the distributor's petitions because the distributor failed to prove that competition was eliminated or restricted.

The Antimonopoly Law prohibits a business operator with a dominant market position from 'requiring a trading party to trade exclusively with itself or trade exclusively with designated business operator(s) without any justifiable cause'. Reflecting this, the State Administration for Market Regulation (SAMR) Anti-abuse Rules prohibit a business undertaking from imposing unreasonable transaction terms on the other party to the transaction 'without justifiable cause', and one such unreasonable transaction term is the imposition of 'unreasonable restrictions on the geographic area into which the goods may be sold'.

In the Wuliangye case in 2013, the provincial National Development and Reform Commission (NDRC) authority in its penalty decision described the supplier's territory management as one means of implementing the resale price maintenance requirements, but did not impose a separate penalty for the territory management activities. In a few other enforcement cases, including the Medtronic case in 2016, central or provincial NDRC authorities appeared to espouse similar views, either expressly or implicitly. We believe that the SAMR also adopts this approach.

The draft version of the Antimonopoly Guidance in the Automobile Sector has taken a different approach. The Guidance states that in the automobile sector, territorial restrictions for resale may have anticompetitive effects. On one hand, the Guidance states that territorial restrictions are justifiable if operators do not have 'significant market power'; on the other hand, the Guidance states that certain types of restrictions are presumably anticompetitive and only case-by-case exemptions may be granted, including restriction on passive sales and restriction of cross-supply among dealers, etc. Because the Guidelines are in draft form, and also are supposed to apply to the automobile sector only, how these provisions may affect antitrust enforcement in other sectors remains unknown.

Have decisions or guidance on vertical restraints dealt in any way with restrictions on the territory into which a buyer selling via the internet may resell contract products?

At the time of writing, there does not appear to be a decision or guideline issued by the court or published by enforcement agencies that addresses this issue.

Restrictions on customers

Explain how restricting the customers to whom a buyer may resell contract products is assessed. In what circumstances may a supplier require a buyer not to resell products to certain resellers or end-consumers?

This type of restriction might constitute abuse of market dominance. The State Administration for Market Regulation Anti-abuse Rules prohibit the imposition of 'unreasonable transaction terms' by a business undertaking with dominant position 'without justifiable cause'. The rules list two factors to be assessed in determination of a 'justifiable cause', namely:

- whether the action in question is carried out on the basis of the operator's own ordinary business activities and its ordinary benefits; and
- the action's effects on the efficiency of the economy's operation, social and public interests, and economic development.

However, enforcement agencies have not made any penalty decision on this issue.

In the Medtronic case, Medtronic took a series of 'voluntary rectification measures', one of which was removal of restrictions on platform dealers' sales of products to end-users. However, the National Development and Reform Commission did not state that this type of restriction was a violation of the Antimonopoly Law, and what Medtronic committed to appears to be purely voluntary rather than as a result of a specific violation.

In addition, the draft of the Antimonopoly Guidance in the Automobile Sector also addresses the restriction on end-consumers together with the restriction on territory for resale as one issue. The Guidance states that in the automobile sector, territorial restrictions for resale may have anticompetitive effects. On one hand, the Guidance states that territorial restrictions are justifiable if operators do not have 'significant market power'; on the other hand, the Guidance states that certain types of restrictions are presumably anticompetitive and only case-by-case exemptions may be granted, including restriction on passive sales and restriction of cross-supply among dealers, etc. Because the Guidelines are in draft form, and also are supposed to apply to the automobile sector only, how these provisions may affect antitrust enforcement in other sectors remains unknown.

Restrictions on use

How is restricting the uses to which a buyer puts the contract products assessed?

At the time of writing, neither the Antimonopoly Law nor the competition provisions in other laws or regulations contain general rules on such use restriction clauses contained in vertical agreements.

Restrictions on online sales

How is restricting the buyer's ability to generate or effect sales via the internet assessed?

At the time of writing, neither the Antimonopoly Law nor the competition provisions in other laws or regulations contain rules addressing this issue.

Have decisions or guidelines on vertical restraints dealt in any way with the differential treatment of different types of internet sales channel? In particular, have there been any developments in relation to 'platform bans'?

The Antimonopoly Law, its implementation rules and enforcement decisions do not address this issue.

Selective distribution systems

Briefly explain how agreements establishing 'selective' distribution systems are assessed. Must the criteria for selection be published?

There are no rules either in the Antimonopoly Law or the competition provisions in other laws or regulations that specifically address selective distribution systems.

Are selective distribution systems more likely to be lawful where they relate to certain types of product? If so, which types of product and why?

There are no rules either in the Antimonopoly Law or the competition provisions in other laws or regulations that specifically address selective distribution systems.

In selective distribution systems, what kinds of restrictions on internet sales by approved distributors are permitted and in what circumstances? To what extent must internet sales criteria mirror offline sales criteria?

There are no rules either in the Antimonopoly Law or the competition provisions in other laws or regulations that specifically address selective distribution systems.

Has the authority taken any decisions in relation to actions by suppliers to enforce the terms of selective distribution agreements where such actions are aimed at preventing sales by unauthorised buyers or sales by authorised buyers in an unauthorised manner?

There are no rules either in the Antimonopoly Law or the competition provisions in other laws or regulations that specifically address selective distribution systems.

Does the relevant authority take into account the possible cumulative restrictive effects of multiple selective distribution systems operating in the same market?

There are no rules either in the Antimonopoly Law or the competition provisions in other laws or regulations that specifically address selective distribution systems.

Has the authority taken decisions (or is there guidance) concerning distribution arrangements that combine selective distribution with restrictions on the territory into which approved buyers may resell the contract products?

The enforcement authorities have not issued guidance, or taken decisions, on this issue.

Other restrictions

How is restricting the buyer's ability to obtain the supplier's products from alternative sources assessed?

The Antimonopoly Law does not have provisions specifically relating to this issue but article 17.4 of the Law may be considered relevant. Article 17.4 prohibits a business undertaking with market dominance from 'without justifiable cause, requiring the business counterparts to only deal with this business undertaking, or to only deal with other business undertakings that it designates'.

The State Administration for Market Regulation (SAMR) Anti-abuse Rules contain a provision (article 17) that is identical to article 17.4 of the Antimonopoly Law. The Rules also state that a 'justifiable cause' may be: necessary to ensure product safety; necessary to protect IPRs; and necessary to protect the specific investments for a certain transaction.

There has not been, however, any court case or government enforcement of these clauses in the Law and the SAMR agency rules that could provide any additional clarity on their scope or application.

How is restricting the buyer's ability to sell non-competing products that the supplier deems 'inappropriate' assessed?

The Antimonopoly Law, its implementation rules and enforcement decisions do not address this issue.

Explain how restricting the buyer's ability to stock products competing with those supplied by the supplier under the agreement is assessed.

The Antimonopoly Law does not have provisions specifically relating to this issue, but article 17.4 of the Law may be considered relevant. Article 17.4 prohibits a business undertaking with market dominance from 'without justifiable cause, requiring the business counterparts to only deal with this business undertaking, or to only deal with other business undertakings that it designates'.

The State Administration for Market Regulation (SAMR) Anti-abuse Rules also contain a clause (article 17) that may be interpreted to address this issue. That being said, there has not been any court case or government enforcement of

these clauses in the Law and the SAMR agency rules that could provide any additional clarity on their scope or application.

In the Medtronic case, the National Development and Reform Commission (NDRC) stated that one problematic practice of Medtronic was that it prohibited dealers from distributing competing products, and this practice 'further expanded the restriction on competition'. As a result, Medtronic voluntarily agreed to remove exclusivity requirements for dealers with respect to products for which Medtronic had 'market power'. However, the NDRC did not state that such restriction itself was a violation of the Antimonopoly Law.

How is requiring the buyer to purchase from the supplier a certain amount or minimum percentage of the contract products or a full range of the supplier's products assessed?

The Antimonopoly Law, its implementation rules and enforcement decisions do not address this issue.

Explain how restricting the supplier's ability to supply to other buyers is assessed.

The Antimonopoly Law, its implementation rules and enforcement decisions do not address this issue.

Explain how restricting the supplier's ability to sell directly to end-consumers is assessed.

The Antimonopoly Law, its implementation rules and enforcement decisions do not address this issue.

Have guidelines or agency decisions in your jurisdiction dealt with the antitrust assessment of restrictions on suppliers other than those covered above? If so, what were the restrictions in question and how were they assessed?

The Antimonopoly Law, its implementation rules and enforcement decisions do not address this issue.

NOTIFICATION

Notifying agreements

Outline any formal procedure for notifying agreements containing vertical restraints to the authority responsible for antitrust enforcement.

Neither the Antimonopoly Law nor the competition provisions in other laws and regulations provide for a notification system for agreements.

Authority guidance

If there is no formal procedure for notification, is it possible to obtain guidance from the authority responsible for antitrust enforcement or a declaratory judgment from a court as to the assessment of a particular agreement in certain circumstances?

Enforcement agencies and the Chinese courts have disclosed any information that indicates such a possibility.

ENFORCEMENT

Complaints procedure for private parties

Is there a procedure whereby private parties can complain to the authority responsible for antitrust enforcement about alleged unlawful vertical restraints?

According to the Antimonopoly Law, any organisation or individual is entitled to report conduct that he or she suspects is an infringement of the law. This includes vertical agreements containing clauses fixing the resale price or setting a minimum resale price.

State Administration for Market Regulation (SAMR) agencies must keep the identity of the complainant confidential. If the complaint is made in writing and is supported by sufficient evidence, SAMR agencies are in principle under an obligation to conduct an investigation.

There are no detailed provisions on reporting procedures under the competition provisions in other laws and regulations. More generally, government authorities may accept complaints filed by private parties.

Regulatory enforcement

How frequently is antitrust law applied to vertical restraints by the authority responsible for antitrust enforcement? What are the main enforcement priorities regarding vertical restraints?

Vertical restraints are the frequent target of the antitrust enforcement formerly by the National Development and Reform Commission and currently by the State Administration for Market Regulation (SAMR), and resale price maintenance is a top enforcement priority among all types of antitrust violations.

What are the consequences of an infringement of antitrust law for the validity or enforceability of a contract containing prohibited vertical restraints?

The Antimonopoly Law does not itself stipulate the consequences of an infringement of article 14 for the validity and enforceability of a contract that contains a prohibited vertical restraint. Nonetheless, according to articles 52 and 56 of the Contract Law, such a contract is null and void, and has no legally binding force from the beginning.

However, article 56 of the Contract Law also stipulates that invalid portions of a contract will not affect the validity or enforceability of the rest of the contract if such portions can be severed or separated from the whole.

May the authority responsible for antitrust enforcement directly impose penalties or must it petition another entity? What sanctions and remedies can the authorities impose? What notable sanctions or remedies have been imposed? Can any trends be identified in this regard?

The SAMR can directly impose penalties without the involvement of other agencies or the courts.

If the SAMR finds that a vertical agreement violates article 14 of the Antimonopoly Law, it may order that the parties to the agreement cease giving effect to the illegal clause of the agreement, and confiscate the gains obtained through the illegal conduct.

Furthermore, in the case of antitrust violation, the SAMR may impose a fine of 1 to 10 per cent of a company's annual turnover, unless:

- the agreement is not implemented (in which case a fine of up to 500,000 yuan will be imposed);
- the company has filed a leniency application (in which case the SAMR can grant immunity or impose a reduced penalty); or
- the company makes specific commitments that eliminate the negative effects of the agreement (in which case, in principle, no fine will be imposed).

Under the competition provisions in other laws and regulations, the enforcement authorities normally impose two types of sanctions, that is, the cessation of the illegal conduct and the imposition of penalties. If a company has obtained illegal gains, the authorities may also confiscate those gains. In addition, if the illegal conduct is serious, the authorities may suspend the company's business licence.

Courts can also hear cases alleging the illegality of clauses inserted in vertical agreements in actions for damages.

Investigative powers of the authority

What investigative powers does the authority responsible for antitrust enforcement have when enforcing the prohibition of vertical restraints?

Under the Antimonopoly Law, the State Administration for Market Regulation (SAMR) has the following powers when investigating alleged infringements, including those relating to vertical agreements to:

- conduct on-the-spot-inspections at the business premises of the companies under investigation or other relevant places;
- interrogate the companies under investigation, interested parties and other relevant parties, and request that they explain all relevant circumstances;
- examine and take copies of the relevant documents and information of the companies under investigation, interested parties or other relevant entities or individuals, such as agreements, accounting books, faxes or letters, electronic data, and other documents and materials;
- seal and retain relevant evidence; and
- investigate the companies' bank accounts.

The investigation must be carried out by at least two SAMR enforcement officials who need to present their credentials for the investigation. The officials must keep a written record of the inspection to be signed by the companies being investigated. The SAMR must maintain the confidentiality of any business secrets collected during the investigation.

Private enforcement

To what extent is private enforcement possible? Can non-parties to agreements containing vertical restraints obtain declaratory judgments or injunctions and bring damages claims? Can the parties to agreements themselves bring damages claims? What remedies are available? How long should a company expect a private enforcement action to take?

Non-parties to a monopolistic agreement can bring damages claims if they have suffered losses owing to an anticompetitive clause contained in a vertical agreement. The Antimonopoly Law does not explicitly address the issue of whether parties to an agreement can bring damages claims. However, the Supreme People's Court of China issued a judicial interpretation in 2012 that states that persons who have a dispute over whether a contract violates antitrust laws have standing to file antitrust suits. Therefore, the parties to agreements can themselves bring damages claims in the court by alleging the agreements violate antitrust laws. The appellate court in the Johnson & Johnson case upheld the plaintiff's standing to sue because it found that the plaintiff suffered loss owing to the resale price maintenance

scheme, and also it had a dispute with Johnson & Johnson over the distribution agreement's compliance with China's antitrust law.

Such cases are generally expected to be decided by the intermediate courts. Injunctions and damages can be granted.

Generally, the adjudication is to be made within six months of the acceptance by the court of the case, with the possibility of extension for another six months upon approval. For expedited summary procedures, adjudication is made within three months without a possibility of extension. Successful parties can also recover from losing parties the legal costs charged by the court.

OTHER ISSUES

Other issues

Is there any unique point relating to the assessment of vertical restraints in your jurisdiction that is not covered above?

Not applicable.

UPDATE AND TRENDS

Recent developments

What were the most significant two or three decisions or developments in this area in the last 12 months?

No updates at this time.