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Highlights Under New PRC Judicial Interpretation of Anti-monopoly Law

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The updated judicial interpretation of the PRC Supreme People's Court on the application of the Anti-monopoly Law in civil litigations (the Interpretation) came into force on July 1, 2024. This article discussed certain highlights under the Interpretation that companies doing business in the PRC should pay attention to.

1. Single Economic Entity

The Interpretation introduced for the first time in China the single economic entity (SEE) doctrine, i.e., where (i) an undertaking acquires control over, or is able to exercise decisive impact on, another undertaking or (ii) two or more undertakings are under common control of, or subject to decisive impact of, another undertaking, such undertakings are considered as a SEE and do not constitute competitors for the purpose of horizontal restraints between competitors.

The Interpretation does not include any guidance on how the control or decisive impact in the context of a SEE should be determined. Whereas a company and its wholly owned subsidiaries would generally constitute a SEE, it may require a case-by-case analysis to determine whether such SEE would also include joint ventures invested in by the company. Notably, the consolidation of a joint venture's financial statements by a company alone may not be sufficient to conclude that the company and such a joint venture constitute a SEE. Similarly, whereas a veto right of a shareholder with respect to strategic decisions of a joint venture, such as the adoption of annual budgets or business plans, typically indicates joint control for the purpose of, among other things, determining whether the establishment of the joint venture requires a merger control notification, such veto right alone may not result in the shareholder and the joint venture being considered as a SEE.

In principle, the SEE doctrine is based on the observation that members of a SEE are unable to determine independently the policy that they intend to adopt on the market and, therefore, they are not capable of competing with each other. Therefore, in the context of a SEE, whether a company controls or exercises decisive impact on a joint venture may depend on the extent to which such company may, on its own, control or direct the joint venture's operational and commercial activities, taking into consideration, among other things, (i) the joint venture's shareholding structure, (ii) the matters that are reserved for approval by the board of shareholders or the board of directors, (iii) the affirmative votes required for the board of shareholders or the board of directors to approve such matters, e.g., unanimous, supermajority or simple majority approvals, (iv) the company's rights to appoint or nominate directors and officers of the joint venture, (v) other factors that may result in the joint venture complying with, or deviating from, the company's instructions or directions related to the operational and commercial activities of the joint venture.

Surprisingly, the Interpretation appears to suggest that the SEE doctrine might not be applied to vertical restraints between noncompeting entities that operate at different levels of trade. It is not uncommon that a Chinese subsidiary of a foreign parent serves as a distributor of the parent's products in China, with resale prices to customers determined based on the parent's pricing policies. If such an intragroup pricing arrangement is not eligible for protection under the SEE doctrine, theoretically, it may constitute resale price maintenance. In such event, the foreign parent and its Chinese subsidiary may have to prove that such arrangement will not restrict competition in the relevant market or, if applicable, they are eligible for protection under the safe harbor rules.

2. Fixed Resale Prices Under Agency Agreements

It is clear that the resale price maintenance applies to distribution agreements, but it was unclear whether it also applies to agency agreements where an agent earns a commission for its marketing services but does not acquire or transfer ownership of the products.

Pursuant to the Interpretation, fixed resale prices (excluding minimum resale prices) under agency agreements where an agent does not assume any material commercial or operational risk are exempted. The Interpretation is silent on what commercial and operational risks are relevant for the purpose of such assessment. The rules in the European Union (EU) may shed some light in this regard. Under the EU rules, an agreement will generally be categorized as an agency agreement that falls outside the scope of resale price maintenance if all the following conditions are satisfied:

- The agent does not acquire the ownership of property in the goods bought or sold under the agency agreement and does not itself supply the services bought or sold under the agency agreement, with certain exceptions.
- The agent does not contribute to the costs relating to the supply or purchase of the contract goods or services, including the costs of transporting the goods.
- The agent does not maintain, at its own cost or risk, stocks of the contract goods, including the cost of financing the stock and the cost of lost stock. The agent should be able to return unsold goods to the principal without charge, unless the agent is at fault.
- The agent does not take responsibility for the nonperformance of the contract by customers, with the exception of the loss of the agent's commission, unless the agent is at fault.
- The agent does not assume responsibility towards customers or other third parties for loss or damage resulting from the supply of the contract goods or services, unless the agent is at fault.

- The agent is not, directly or indirectly, obliged to invest in sales promotion, including through contributions to the advertising budget of the principal or to advertising or promotional activities specifically relating to the contract goods or services, unless such costs are fully reimbursed by the principal.
- The agent does not make market-specific investments in equipment, premises, training of personnel or advertising, unless such costs are fully reimbursed by the principal.
- The agent does not undertake other activities within the same product market required by the principal under the agency relationship, unless those activities are fully reimbursed by the principal.

Where a company intends to impose a fixed resale price on its agent under an agency relationship, it would need to consider the restrictions above in negotiating the terms and conditions for such agency relationship.

3. Special Rules on Burden of Proof

The Interpretation established several special rules on the burden of proof in an anti-monopoly-related civil litigation, including those discussed below.

Definition of Relevant Markets

In principle, a plaintiff would need to define and justify the relevant markets for the alleged monopolistic agreement. The Interpretation creates an exception that if the alleged violation falls within the scope of "hardcore" restrictions (e.g., price fixing, division of sales markets, resale price maintenance), a plaintiff will not need to submit evidence supporting its definition for the relevant market.

Concerted Practice

Based on the Interpretation, in the cases of concerted practice, a plaintiff would only need to prove the high likelihood of concerted practice by, for example, submitting preliminary evidence with respect to (i) the consistency between market activities of the undertakings and (ii) the structure and development of, and competition on, the relevant markets (e.g., limited number of major market players, similar sales channels, transparent pricing mechanisms, etc.). In particular, a plaintiff would not have to prove the exchange or conveyance of information between such undertakings in such circumstance. Then, the defendants would have the burden of proof to justify the consistency of their market activities, e.g., those activities were conducted independently based on the changes in market conditions and competition.

Vertical Restraints

The Interpretation reiterates that undertakings that are accused of resale price maintenance would have the burden of proof to establish that such restraints would not have the effect of eliminating or restricting competition.

On a related note, according to a provision in the draft Interpretation released for public comments in 2022, if an undertaking that is accused of resale price maintenance proves that the market share tests and other conditions for the safe harbor protection are satisfied, the plaintiff would then have to prove the anti-competition effect arising from the arrangement at issue. Such provision was removed from the official version of the Interpretation, indicating that once the safe harbor protection is afforded, no further assessment would need to be conducted to determine the competition effect of the vertical restraint at issue.

Factual Information Established in Administrative Enforcement Actions

Pursuant to the Interpretation, if an administrative authority's decision is not appealed within the statutory period or is confirmed by a court, the factual information established by the administrative authority under such decision would be presumed to be true, though such presumption may be rebutted. This rule appears to indicate that a court might interpret the facts in a way different from the administrative authority and, consequently, may reach a different conclusion on whether a particular arrangement violated the Anti-monopoly Law.

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