New Trend in China's RPM Policies in the Aftermath of Amended Anti-Monopoly Law

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Abstract: Before the Amended Anti-Monopoly Law ("Amended AML") was implemented in 2022, the divergence on resale price maintenance ("RPM") between the AML public enforcement agencies and the courts had been noticeable and attracted heated debates. The AML administrative agencies responsible for public enforcement against RPM in China adopt the principle of "prohibition + exemption": enterprises have to apply for exemption once the agencies prove and prohibit RPM. The courts had taken "restriction or exclusion of competition" as one of the essential elements for vertical monopoly agreement and required the plaintiff in private enforcement cases to prove the "restricting or excluding competition" effects in addition to RPM under the general civil litigation rule – who claims, who provides evidence. In the Amended AML, such disagreement between public and private enforcement was formally addressed by explicitly adding the precondition of "restricting or excluding competition" into vertical monopoly agreements. Such clarification gives enterprises more room and leeway to defend the legality of RPM. Article 18(2) of the Amended AML appears adversely to place the burden of proof on the enterprises investigated or sued in RPM cases, but the actual implication is that such enterprises have more room for counter-evidence on competitive effects. The addition of a safe harbor provision in Article 18(3) also indicates that the legislature tends to be tolerant of RPM. After the Amended AML was issued, the new Supreme Court Judicial Interpretations on AML for comments issued in 2022 further confirmed the trend and clarified that enterprises/defendants shall first prove that there is no "effect of excluding or restricting competition" in RPM cases and at the same time provide a set of rules on elements to be considered in this regard, together with three more grounds for defendants to defend themselves. The new trend generally indicates a positive attitude on the competitive effects as an avoidable element in RPM cases and a tolerant position of RPM by the authorities. Nonetheless, how such a reformed RPM policy will be applied in practice remains blurred. The Old AML had been applied in all the RPM cases since the Amended AML took effect on August 1, 2023. It is unclear how to consistently analyze competitive effects and apply the "exemption" rule and "safe harbor" rule once RPM is identified and presumed to be anticompetitive at the first step. No case in China has ever touched such issues. EU's overall RPM practice on RPM appears similar to China's RPM policy with differences on safe harbor and exemption. It is useful to take reference to EU policy and practice along China's RPM reform road. This paper first introduces the previous deviation between public and private enforcement on RPM and the new trend in the aftermath of the Amended AML in China, and then takes reference to EU policies on RPM. This paper finally urges for clarification by detailed guidance or rules on the analysis of competitive effects, the new safe harbor rule, and the exemption rule so as to consistently put the general provisions of safe harbor and exemption into practical use, which will be beneficial to avoid inconsistency in the long run and antitrust law Type I errors, i.e., over-regulation.

Keywords: RPM; Competitive Effects; Vertical Agreements; Anti-Monopoly Law

1 Introduction

Resale price maintenance ("RPM") refers to the act of an upstream enterprise to set a minimum resale price or fix the resale price for a downstream independent third party. The new amended Anti-Monopoly Law, which took effect on August 1, 2023 (the "Amended AML"), together with the newly issued judicial interpretations for comments issued by the Chinese Supreme Court ("SPC"), brought a new trend on RPM public and private enforcement. On the one hand, the Amended AML is more inclined to follow the AML enforcement agencies' position and anticompetitive effects are presumed unless the enterprises can prove that such acts do not exclude or restrict competition.[1] On the other hand, the Amended AML clarifies the heated question that the "effect of excluding and restricting competition" is a key analytical element of RPM and introduces a safe harbor rule for RPM.

The new trend signals both challenges and opportunities for enterprises who have a distribution network to manage. The clarification on the "monopoly agreement" in the Amended AML gives enterprises more room and leeway to defend the legality of RPM. Article 18 (2) of the Amended AML appears to place the burden of proof on the enterprises investigated or sued in RPM cases, but in fact it makes it clear that such enterprises have more opportunities for counter-evidence of competitive effects. The addition of a safe harbor provision in Article 18(3) also indicates that the legislature tends to be tolerant of RPM.

The SPC seems to follow the new legislative spirit. An announcement soliciting public opinion on the Draft Judicial Interpretation of Anti-Monopoly Civil Procedures ("AML Judicial Interpretation Draft") was released by the SPC in 2022 after the Amended AML. The AML Judicial Interpretation Draft further clarifies that enterprises shall firstly bear the burden of proof that there is no "effect of excluding and restricting competition" in RPM cases. [2] Once the AML Judicial Interpretation Draft comes effective, the plaintiff (such as distributors, consumers, etc.) claiming against RPM in question no longer needs to bear the burden of proof for anticompetitive effects at the first step. It might be easier to preliminarily establish an RPM case than before, but at the same time, it leaves the defendants more room to defend themselves by proving no anticompetitive effects in the next step or satisfying one of the three defending grounds including (i) agency relationship, (ii) a low market share, or (iii) promotion of a new product within a reasonable period of time, as provided in Article 27 of the AML Judicial Interpretation Draft.

Such a new trend addresses the divergence on RPM between the AML public enforcement agencies and the courts. The AML agencies responsible for public enforcement against RPM in China have applied the rule of "prohibition and exemption" in RPM cases by presuming RPM acts anticompetitive at first and waiting for the enterprises alleged to engage in RPM to apply for exemptions. In other words, once the agencies prove RPM, the anticompetitive effects will be presumed without going into detailed analysis, while the enterprises will have to prove and apply for exemptions. In contrast, before the Amended AML, in a civil AML litigation, a plaintiff had to, as the first step, prove both RPM and the "restricting or excluding competition" effects in an RPM case.

A good example to illustrate the rule of "prohibition and exemption" could be the Yangzijiang Case.[3] In this RPM public enforcement case, Yangzijiang Pharmaceutical Group was fined 3% of its annual sales in 2018, in the amount of approximately RMB 764 million, for entering into and implementing RPM agreements with trading counterparties in pharmaceutical retail channels nationwide. The "excluding and restricting competition effect" was not a focus in the enforcement decision.

On the other side, the plaintiffs in RPM private enforcement civil litigation cases rarely won. Up to now, there are 10 publicly available private enforcement cases involving RPM, including 7 vertical agreement AML disputes and 3 contract disputes. Among those, only two winning civil cases were seen, in which RPM agreements were ruled as violating the AML, namely the Johnson & Johnson case[4] in 2012 and the Shanghai General Motors case[5] in 2022. In other cases, the courts all found that the evidence in the cases did not prove the anticompetitive effects.

The landmark SPC case – Yutai v. Hainan Provincial Price Bureau (the "Yutai Case"),[6] signaled the SPC's position, which will be discussed in greater detail in Section III of this paper.

However, in practice, it remains blurred how such a new trend will shape the RPM policies in the long term. It is yet to be seen which key elements to be analyzed related to "no anticompetitive effects" in the new trend, and how to apply the "exemption" rule and the new "safe harbor" rule along the RPM reforming road.[7]

Even though the exemption rules for RPM have been already there in the old Anti-monopoly Law of the People's Republic of China ("Old AML") [8] , no successful exemption cases have been disclosed to the public. With the overall RPM analysis framework becoming more consistent between public and private

enforcement, it remains difficult for enterprises to grasp how to successfully apply for an exemption.

This paper first introduces the deviation between public and private enforcement in RPM policy in Section II and the new trend brought by the Amended AML in China in Section III. This paper then introduces and discusses how EU policies on RPM could be potentially taken reference to by China's RPM authorities in Section IV and finally urges for more academic thoughts and detailed implementation rules on the key elements of competitive effects, the new safe harbor rule and the exemption rule in RPM cases to avoid Type I errors, i.e., over-regulation.

2 Previous Deviation on RPM between AML Public and Private Enforcement

It is said that the deviation on RPM between AML public and private enforcement was originated from the confusing position where the definition of a "monopoly agreement" is placed in the Old AML, which took effect in 2008 and was amended in 2022. Article 13 of the Old AML first lists six types of horizontal monopoly agreements and it goes on to define a monopoly agreement: "for the purposes of this Law, monopoly agreements include agreements, decisions and other concerted conducts to exclude or restrict competition." So the heated question is whether the definition of monopoly agreements is applicable to Article 13 only since it is located in the article defining horizonal monopoly agreements, or whether it is also applicable to vertical monopoly agreements in Article 14 since vertical monopoly agreements are also a type of monopoly agreements. In other words, the controversies focus on whether "competitive effects" are one of the key elements that should be assessed to determine a vertical monopoly agreement and in particular, RPM agreements.

2.1 Approach of "Prohibition and Exemption" in AML Public Enforcement

Article 14 of the old Anti-Monopoly Law of the People's Republic of China ("Old AML"), which took effect in 2008, stipulates that enterprises are prohibited from reaching an agreement with the transaction counterpart to fix the resale price or set the minimum price, while Article 15 stipulates the exemption of RPM behaviors. Some Chinese scholars and officials in the AML enforcement agencies believe such an approach could be referred to as an approach of "prohibition and exemption." In practice, the AML enforcement agencies have always adhered to such an approach. Over the years, the AML enforcement agencies and their officials have more than once stated in public interviews or published articles that the principle of "prohibition and exemption"[10] should be applied. For example, Mr. Xu Kunlin[11], former director of the former RPM administrative enforcement agency made it clear that the Old AML applies the same approach to vertical monopoly agreements as horizontal monopoly agreements, which are prohibited in principle but the potential reasonableness will be shown through the exemption rule as exceptions. [12] He further said in an interview that the provisions of the Old AML on vertical monopoly agreements clearly specify that, Article 14, as a principle, prohibits vertical monopoly agreements, while Article 15 sets out the conditions for exemptions. [13]

2.1.1 Competitive Effect not Required in RPM Analysis Framework in AML Public Enforcement

In practice, when a China's AML enforcement agency makes a penalty decision, its main analysis steps and proofs will first show that the parties have reached and implemented a monopoly agreement with a fixed resale price or fixed minimum price. Then the analysis will follow a general description and a presumption that the RPM agreement excludes and restricts market competition, and damages the interests of consumers and social public interests. The deduction from RPM acts to anticompetitive effects is relatively arbitrary, and the standards of analysis are inconsistent in different cases, allowing AML enforcement agencies significant discretionary latitude. That is why some scholars argue that such an AML public enforcement approach sets up a "per se illegal" rule.

Before the Amended AML, public enforcement agencies do not go into details of the competitive effects.

For example, in the administrative penalty case of Hainan Yishun Pharmaceutical Co., LTD. in 2022 ("Hainan Yishun Pharmaceutical Case")[14], the agency did not explain in detail its analysis of excluding and restricting competition conclusion, nor did the agency consider the market share and market position of the enterprise in the relevant markets.

In a more recent AML administrative penalty case against Yangzijiang Case, more discussions on competitive effects were seen. The agency entrusted an economist to analyze the economic effects of excluding and restricting competition. The party, in this case, put forward a defense that "the market share of the party's products is low, and the relevant acts will not have the impact of excluding and restricting competition". The State Administration for Market Regulation ("SAMR") provided its economist's analysis and proved that the RPM acts "limited the price of the drug retail channel, resulting in a significant increase in the price of the drug terminal, which constitutes the effect of excluding and restricting competition (within the brand) and damages the interests of consumers." The defense of the party was refuted.

With the Amended AML and the SPC's AML Judicial Interpretation Draft confirmed that the competitive effects should form an essential part in an RPM case, more arguments and proofs are expected to be seen in RPM cases. Enterprises who are alleged to engage in RPM are expected to prove proactively that there are no anticompetitive effects to rebut the anticompetitive presumption. It is also expected that the AML enforcement agencies in RPM cases will need put together more supporting analysis and proofs to defend their cases. Detailed provisions on the key elements and analysis standards on such competitive effects are highly expected such as the relevant market and the market share in that relevant market.

2.1.2 No Successful Exemption Case Seen in RPM AML Public Enforcement Cases

Similar to the Amended AML, Article 15 of the Old AML sets up the same exemption events for RPM. However, to date, there is no successful precedence in RPM cases to obtain an exemption pursuant to this article.

The Yangzijiang Case[15] is the first RPM exemption case disclosed by the AML public enforcement agency, in which the party applies for exemption. It demonstrates the difficulty in successfully obtaining an exemption.

In that case, the parties applied for an exemption based on two reasons under Article 15 of the Old AML: (i) the short-term resale price constraints conform to the situation stipulated in Article 15 "to improve technology, research, and development of new products"; and (ii) it is to prevent low-price competition between distributors and pharmacies, so as to encourage dealers and retail pharmacies to strengthen investment in the distribution channels, ensure the quality of drug products, and achieve the purpose of safeguarding the social public interest, which is in line with the situation of "realizing the social public interest such as energy conservation, environmental protection, disaster relief, and relief" as stipulated in Article 15.

The SAMR held that none of the above-mentioned reasons for exemption was permitted. Firstly, the five drugs controlled by the parties had been in the market since 2015, but the resale price was fixed for a long time, which had a greater impact on the market price, falling outside of the terms "short-term" and "for the purpose of improving technology and researching and developing new products". Secondly, ensuring the quality of drug products is the basic behavioral requirement of drug manufacturers and distributors, and should not be based on the premise of constraining product prices. In addition, the SAMR held that it was necessary to prove that RPM did not seriously exclude or restrict competition in the relevant market and were able to enable consumers to share the benefits generated, but the party unfortunately did not succeed in proving it.

An application for exemption was also raised in another RPM case. In this case, Beijing Kairui Alliance Education Technology Co. Ltd ("CollegePre") was investigated and penalized for 3% of its annual turnover

in 2020. [16] CollegePre is the exclusive licensee of Sesame Street English within China and mainly engages in the franchise activities of English training for children after school. CollegePre collects royalty fees, management fees and other fees from franchisees, and authorizes franchisees to resell their course resources to carry out English training activities, and supports franchisees with management consulting, teaching materials, personnel training and other support services.

CollegePre applied for exemption on the ground of Article 15(7) of the Old AML, alleging that price control in the English education franchisee industry falls under the exemption of "other circumstances stipulated by law and the State Council". It was not approved by the AML enforcement agency. The penalty decision says that none of the laws and regulations or departmental rules in force concerning franchising provide that RPM clauses are a necessary part of the business model. The decision further points out that the online answers, model contract templates, and other materials cited by CollegePre are not laws or regulations by the State Council and thus do not satisfy the exemption as provided in Article 15(7) of the Old AML.

Even though more applications for exemptions are expected, the difficulty in obtaining an exemption remains unchanged. It is interesting to see how the enforcement practice will evolve in the coming years.

2.2 Competitive Effects Litigated in Courts

In the previous judicial practice, the courts believed that competitive effects are a necessary part of the analysis framework for an RPM case and generally required the plaintiff to firstly provide evidence to prove both RPM and the effect of excluding and restricting competition. Such AML judicial analysis framework is similar to the rule of reason under U.S. law. Such framework was first established in 2012 in the landmark Johnson & Johnson Case. The court of first instance, in this case, held that vertical monopoly agreements should be subject to the second paragraph of Article 13 of the Old AML, for which it is necessary to further examine the effect of excluding or restricting competition. In the second instance, the Shanghai High Court supported the view of the first instance court.

The analysis framework in the Johnson & Johnson Case has been applied by other courts ever since. Chinese court generally applies the general civil litigation principle of “who claims, who provides evidence”, requiring the plaintiff (such as distributors, consumers, etc.) alleging that RPM in question constitutes a monopoly agreement to prove such litigated RPMs have anticompetitive effects.

The elements taken into consideration for such effect include (i) whether the relevant market competition is sufficient, (ii) the market position of the product and the enterprise in question, (iii) the purpose/motivation of RPM, and (iv) the competitive effects of RPM, etc.

It is difficult for downstream distributors or consumers to obtain evidence such as sufficient market data and provide sufficient economic analysis to prove anticompetitive effects. From publicly available databases, there are two winning cases on RPM for plaintiffs, namely the Johnson & Johnson case in 2012 and the Shanghai General Motors case in 2022.

2.3 Deviation in Previous RPM Analysis Frameworks in Public and Private Enforcement

Although the Old AML appears similar to the EU's rule of “prohibition and exemption” at first glance, administrative public enforcement and judicial practices in China used to deviate in terms of illegality standards of RPM. Part of the reason lies in that the Old AML leaves room for different interpretation on whether the “effect of excluding and restricting competition” shall be one of the preconditions for a vertical AML agreement. Article 13 of the Old AML does explicitly provide that “exclusion or restriction” is a precondition to horizontal monopoly agreements. However, whether such a precondition applies to vertical monopoly agreements under Article 14 has been controversial.

In most judicial cases, the courts have consistently held that the provisions of Article 13 (2) are also applicable to vertical monopoly agreements. [17] Some scholars believe that although AML administrative enforcement agencies claim that it follows the rule of “prohibition and exemption”, such a rule is not a specific

analytical method, but only a conceptual principle.[18] In establishing the illegality of RPM, AML administrative enforcement agencies do not prove or analyze in detail the anticompetitive effects of such behaviors. That is why some scholars and practitioners consider that the rule of "prohibition and exemption" has evolved into the principle of "per se illegal" in AML public enforcement practice.

The analysis method followed by the court is commented by some scholars as the rule of reason, where the downstream counterparties such as dealers, consumers, and other parties claim for RPM enforcement have to prove the anticompetitive effects of RPM. Due to the high standard and difficulty of such proof, the probability of conviction in judicial practice is much lower than that in AML administrative enforcement.

The Amended AML in 2022 and the judicial practice of the SPC have responded to such divided practices, which is conducive to consistency in public and private enforcement.

Therefore, it is important to understand where the trend will lead us to in the field of RPM enforcement (both public and private).

In the aftermath of the Amended AML, Shanghai General Motors case signals the new trend of judicial view on RPM cases. It is a typical follow-up civil compensation lawsuit arising from a penalty decision made by an AML enforcement agency. The SPC did not support one of the arguments by the defendants that the criteria for determining a vertical monopoly agreement in AML civil lawsuit is different from that in AML public enforcement procedures. The SPC held that since the Old AML is the common legal basis for administrative law enforcement agencies and the courts to determine whether a business operator has committed monopolistic acts, the legal standard for AML administrative law enforcement and civil litigations should be the same. Another notable point of view of the SPC is that a monopolistic act penalized by an effective AML public enforcement decision does not need to be proved in a civil lawsuit by the plaintiff, unless there is sufficient evidence to the contrary to rebut it. In this sense, Shanghai General Motors case has illustrated the trend of consistency between public and private AML enforcement.

3 New Trend of AML Public and Private Enforcement on RPM

3.1 New Changes in 2022 Amended AML on RPM

3.1.1 "Excluding and Restricting Competition Effect" Is Clarified for RPM

Article 16 of the Amended AML responds to the long-time critics and stipulates that "for the purposes of this Law, monopoly agreements refer to agreements, decisions or other concerted conducts to exclude or restrict competition". It further provides that "if an undertaking can prove that it does not have the effect of excluding and restricting competition, it shall not be prohibited" in the second paragraph of Article 18 of the Amended AML.

As an implementing document of the Amended AML, the 2022 Provisions on Prohibition of Monopoly Agreement ("MAP")[19] further reaffirms the investigated enterprises should bear the burden of proof for no anticompetitive effects at the enforcement level. The second paragraph of Article 14 of the MAP is consistent with the provisions added in the Amended AML. It says that for RPM acts, "if an undertaking can prove that it does not have the effect of excluding and restricting competition, it shall not be prohibited."

Such clauses have two layers of meanings. Firstly, the Amended AML makes it clear that "excluding and restricting competition" is a necessary element to determine the illegality of vertical monopoly agreements including RPM. When the Amended AML is applied in an RPM case, it will be avoidable to go into more analysis of competitive effects. As a result, it is expected to offer the investigated enterprises more room to defend themselves. Secondly, as a special type of core anticompetitive category, RPM at the first step is presumed to have anticompetitive effects unless the enterprises who engage in RPM could prove and rebut such presumption. In this sense, enterprises in question need more professional insights and support in the AML field.

3.1.2 New Safe Harbor Rule

For the first time, the Amended AML added a safe harbor for vertical monopoly agreements from the

legislative level. The Amended AML stipulates that if enterprises meet the market share threshold and other conditions as prescribed by the AML administrative enforcement agency of the State Council, such agreements will not be prohibited by law. However, the Amended AML and the MAP only open the door for the safe harbor in principle. Specific and detailed provisions on how to apply such safe harbor are highly expected by both academics and practitioners to put the general principle into practice.

It is noticeable that the Provisions on Prohibition of Monopoly Agreements (Draft) issued by SAMR on June 27, 2022 (the "MAP Draft")[20] used to include a specific standard of market share (i.e. 15%) and the calculation method. The effective version of MAP deleted the detailed rules, and only summarized them as "if undertakings can prove that the market share of undertakings participating in the agreement in the relevant market is lower than the standard stipulated by the SAMR, and meet other conditions prescribed by the SAMR, such agreements will not be prohibited by law." It is understood to leave more room and flexibility for AML enforcement agencies to adjust the standards with the actual enforcement needs. However, from the perspective of enforcement, it may give rise to difficulty and ambitiousness in practice. No safe harbor case has been seen for the past year since August 2022 till present.

In sum, the Amended AML appears to opt for the public enforcement approach. Article 18 of the Amended AML sets out the prohibition of vertical monopoly agreements, while Article 20 stipulates the exemption circumstances.[21] But at the same time, the Amended AML clarifies that the anticompetitive effects are one of the necessary elements in the analytical framework of RPM and adds a safe hour principle. It is yet to be seen how such new rules will be applied and evolve in actual enforcement cases.

3.2 New Trend in Judicial Practice

In the judicial practice, courts adopted a different approach from those taken by administrative enforcement agencies in assessing the illegality of RPM behaviors. Nonetheless, since the Yutai Case by the SPC discussed in the next paragraphs, the courts' attitude in RPM civil cases gradually changed and moved towards a more consistent approach with the AML public enforcement.

In the judicial review case over an AML administrative penalty decision - Yutai Case, the SPC clarified that the courts will respect the illegality determination principle of administrative enforcement agencies. As a result, the probability of enterprises overturning AML administrative penalties over RPM through judicial review is relatively low. The administrative penalty decision in question was made by Hainan Provincial Price Bureau ("Hainan PPB"), where Hainan PPB imposed a fine of RMB 200,000 on Yutai for reaching RPM agreements with its suppliers during the years of 2014 and 2015[22]. Yutai filed a complaint to the local courts to ask for a judicial review against this decision. Such a case went through the first and second instance as well as the SPC's final retrial and attracted intensive attention from the public. In the second instance[23], the Hainan Higher Court held that "fixing the resale price of products in resale to third parties" itself is a monopoly agreement explicitly prohibited by law, and it is not necessary to include the effects of excluding and restricting competition as an element. It means that the Hainan Higher Court basically recognized the public enforcement agencies' approach of "prohibition and exemption" adopted in identifying the vertical monopoly agreement.

In the retrial in 2019, the SPC upheld the judgment of the second instance and further explained that the premise for the enterprises to bear civil liability for monopoly agreements is to cause losses to the plaintiff, and the losses caused to the plaintiff are a direct reflection of the monopoly agreements' effects of excluding and restricting competition. Therefore, it is necessary to review whether the monopoly agreements have the effects of excluding and restricting competition in civil proceedings, so as to decide whether to support the plaintiff's claim. However, the illegality of monopoly agreements in AML administrative enforcement only requires the possibility of excluding and restricting competition, and does not need to incur actual effects. This case is the first time that the SPC clarified its position on the controversial

issue, and clearly stated that it respects the administrative enforcement agencies' principle of "prohibition and exemption".

In addition, as discussed in this paper, the SPC also clarified in the second instance judgment of Shanghai General Motors case that if an effective administrative penalty decision finds the behaviors in question as RPM, and the plaintiff claims against that monopoly behavior in a subsequent monopoly civil case, no further proof is required unless that there is contrary evidence. The SPC also indicates that the legal standard for AML administrative law enforcement and civil litigations should be the same.

The two cases show that Chinese courts, whether in pure civil or administrative judicial review litigation, respect consistency between the private and public enforcement. The cases also reflect that it is very unlikely for enterprises to urge the courts to overturn the enforcement agencies' penalty decisions in judicial review on the grounds of deviation between public and private enforcement on RPM.

After the Amended AML, the SPC Draft AML Interpretation issued in 2022 further clarified the burden of proof in vertical monopoly agreements. RPM will be preliminarily recognized to have anticompetitive effects unless there is proof to rebut such presumption, i.e. the enterprises implementing RPM should bear the burden of proof that the RPM agreement does not have anticompetitive effects.[24] The table below shows the new rule in the burden of proof for vertical monopoly agreements in the SPC Draft AML Interpretation.

Furthermore, the SPC Draft AML Interpretation answers to the questions of key elements to be considered for competitive effects. It provides that the courts should comprehensively consider anticompetitive and pro-competitive effects of a vertical monopoly agreement. The factors that might be considered include: (i) whether the defendant has a significant market power in the relevant market; (ii) whether the agreement has anti competitive effects such as raising market entry barriers, hindering more efficient distributors or distribution models, and restricting competition between brands; (iii) whether the agreement has pro-competitive effects such as preventing free-riding, promoting competition between brands or within brands, maintaining brand image, improving the level of pre-sales or after-sales service, and promoting innovation. It also points out that where the defendant has a significant market power in the relevant market, and the evidence in the case that can prove that the pro-competitive effect is not sufficient to outweigh the anticompetitive effect, the court shall find that the agreement has the effect of excluding or restricting competition.

In the public enforcement cases, whether RPM in question actually excludes or restricts the competition within the brand has been the focus. Whenever a particular RPM results in restricting inter-brand competition, it is generally deemed a monopolistic act by the AML enforcement agencies. The recent Yangtze River Pharmaceutical case was a good example. The market competitive conditions or intra-brand competition has never been a necessary element to be assessed.

In sum, in analyzing the competitive effects, it seems that the judicial practice may still have different considerations from the public enforcement agencies in practice. It is yet to see how the implementation rules will guide the officials and judges to avoid new differences between private and public enforcement practice.

Type of Case	Burden of Proof on the Effect of Excluding and Restricting Competition
RPM Cases	Defendant
Other Vertical Monopoly Agreement (excluding RPM) Cases	Plaintiff

4 After-Math of Amended AML on RPM

Based on the aforesaid analysis, the Amended AML answers the hotly debated question of whether Article 13 Paragraph 2 of the Old AML, i.e., anticompetitive effects, applies to RPM, and also confirms the AML enforcement agencies' RPM policy of "prohibition and exception". From a judicial perspective, the SPC seems to follow the Amended AML and added an explicit rule on the burden of proof in its SPC Draft AML Interpretation to confirm anticompetitive effects as a necessary element. It also seems to preliminarily recognize the anticompetitive effects of RPM behaviors in the first step and wait for

defendants to rebut such preliminary recognition by proving there is no anticompetitive effects.

It is consistent with the Amended AML. It may appear unfriendly to the defendants to some extent, but if Article 26 and 27 of the SPC Draft AML Interpretation are considered together, it seems to provide more defending grounds and elements for the defendants. Article 26 of the SPC Draft AML Interpretation sets forth the key elements to be considered in assessing anticompetitive effects and Article 27 lists three grounds for the defendants to defend themselves. If the defendants are able to prove (i) the counterparty is an agent of the defendants; or (ii) their market share in the relevant market is lower than the standard set by the AML enforcement agency and meets other conditions stipulated by AML enforcement agency; or (iii) the RPM agreement is implemented within a reasonable period of time for the purpose of incentivizing the counterparty to promote the new product, the court may preliminarily decide that the agreement does not constitute an illegal monopoly agreement.

Alongside the trend of consistency in public and private enforcement in RPM cases to specify anticompetitive effects as a necessary element for RPM case, the new safe harbor rule added in the Amended AML also reveals a new and positive signal for brands/ manufactures in pricing their distribution channels.

In the past public enforcement practice pursuant to the Old AML, the enforcement agencies usually did not analyze in detail how the relevant market was defined in the decision with a brief and relatively arbitrary statement of anticompetitive effects. With the implementation of the Amended AML, it is expected that there will be changes in the public enforcement practice. When an investigated company presents evidence to assert that RPM in question does not have anticompetitive effects, it is expected that the enforcement agencies will need to carefully review with solid reasons whether such defense is valid.

However, many questions remain unaddressed. Rules and guidelines are in need to know how the principle of "prohibition and exemption" shall be adopted in the aftermath of the Amended AML, how to incorporate the analysis of competitive effects into the overall assessment framework of RPM, and how to apply the exemption rule and safe hour rule. Such questions present challenges in practice.

In the new era of the Amended AML, RPM is expected to remain a focused area of AML enforcement. The new trend of RPM brings more room for enterprises to defend themselves once they are investigated or sued. Positively thinking, the probability of winning an RPM case might be increased under the new analytical framework, if every enterprise/defendant more proactively proves their price control acts do not have anticompetitive effects from multiple aspects, or successfully obtains an exemption, or proves their market share is too low to lead to any anticompetitive effects in the relevant market.

Consistent rules applicable to both private and public enforcement are useful to avoid new deviation in private and public enforcement or inconsistency on a case-by-case basis. Reference to the practice of the EU might be enlightening, which provides a more mature legal framework for the assessment of RPM. On the other hand, EU's experience brings more guiding cases and rules to clarify the standards of safe harbor, which could be beneficial to the study of academics and consistent enforcement activities of the AML enforcement agencies and courts in RPM cases.

4.1 "Exemption" Step in Analytical Framework of RPM

China's AML practice derives from the EU's competition law. The rule of "prohibition and exemptions" is similar to the EU's RPM policy. It is useful to understand the practice of the EU's RPM policy including its exemption and safe harbor rules. In the EU's system, although RPM is deemed as a kind of "hardcore restriction," which could not be applied with block exemption, RPM could still be exempted pursuant to Article 101 Paragraph 1 of EU's Treaty on the Functioning of the European Union ("TFEU") for having pro-competition effects as stipulated in Article 103 Paragraph 3 of the TFEU when satisfying certain criteria stipulated in the Communication From The Commission Notice Guidelines on Vertical Restraints ("Guidelines 2022"). The EU has also formed an analytical approach

in its judicial practice on how to apply the case-to-case exemption rule as stipulated in Article 101 Paragraph 3 of the TFEU, which may shed light on the application of RPM rules in China.

4.1.1 EU's RPM Exemption Policy

Article 101 Paragraph 1 of the TFEU prohibits "agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market, and in particular those which directly fix purchase or selling prices or any other trading conditions"[25]. Furthermore, Article 101 Paragraph 3 of the TFEU provides exemptions for monopoly agreements, i.e. the case-to-case exemption. Although Vertical Block Exemption Regulation ("VBER") regulates rules of block exemption, since RPM is regarded as a hardcore restriction "containing certain types of severe restrictions of competition" as stipulated in Article 4 of VBER, the EU only applies case-to-case exemption to RPM. Such concepts seem similar to what we have in China in the new trend.

According to Section 1 of Guidelines 2022, the analytical framework of "hardcore restrictions" such as RPM can be summarized as the following two steps: first, confirming if the behavior falls within the scope of Article 101 Paragraph 1 of the TFEU, and then analyzing whether the behavior satisfies the criteria of case-to-case exemption stipulated in Article 101 Paragraph 3 of TFEU.

According to Article 101(3) of the TFEU, the following elements shall be considered when applying case-to-case exemption: (1) RPM must "contribute to improving the production or distribution of goods or to promoting technical or economic progress"; (2) consumers must receive a fair share of the resulting benefits; (3) the restrictions must be essential to achieving these objectives; and (4) the RPM "must not give the parties any possibility of eliminating competition in respect of substantial elements of the products in question."

The Court of Justice of the European Union ("ECJ") further clarified in its judgment of the Super Bock case how Article 101 of the TFEU shall be applied to RPM. ECJ held that "restriction of competition by object" shall be accessed on the premise that "the agreement presents a sufficient degree of harm to competition", and shall take into account "the nature of its terms, the objectives that it seeks to attain and all of the factors that characterize the economic and legal context of which it forms apart"[26].

It could be summarized that the first step of the EU's assessment framework of RPM is determining whether it falls within the scope of Article 101 (1) of TFEU, which is actually a presumption that RPM is illegal in form. It seems similar to the logic of the Amended AML. The pro-competitive and anticompetitive effects assessment of RPM remains in the next steps when assessing whether RPM could be exempted through a case-to-case analysis.

In addition, Chapter 6 of the Guidelines 2022 further stresses the conditions when the efficiency defense for RPM could be invoked when applying the case-to-case exemption, including occasions when "a manufacturer introduces a new product," organizing "a coordinated short-term low price campaign (of 2 to 6 weeks in most cases), in particular in a distribution system where the supplier applies a uniform distribution format, such as a franchise system", preventing "a particular distributor from using the product of a supplier as a loss leader", allowing "retailers to provide additional pre-sales services, in particular in the case of complex products"[27]. Enterprises could invoke the efficiency defense by proving that their RPM behaviors satisfy such criteria so that it would not give rise to any anticompetitive effect.

4.1.2. Transparency is Expected in Applying Exemption Rules in China

The takeaways from the EU's practice could include two aspects for further study and discussion by academics and practitioners.

First of all, it is important to encourage enterprises to apply for case-by-case exemption and explore the "no anticompetitive effects or objects" defense on a case-by-case basis. In China's AML enforcement agencies' practice, the rule of exemption was rarely invoked by enterprises due to various reasons. Once the AML enforcement agencies initiate the investigation procedure, their main goal is to prove that such enterprises have

reached and implemented monopoly agreements. The public enforcement agencies lack of the motivation to proactively evoke the exemption rules. Objectively speaking, it is also unrealistic to require the AML enforcement agencies to conduct a thorough analysis for exemption with their current staffing.[28] A case-by-case discussion on exemption and anticompetitive effects have to be initiated by the investigated enterprises.

To promote the proactive application of the exemption rules in practice, it might be useful to stress on enterprises' right to explore the rule of exemption and require the AML enforcement agencies to respond to and publish such applications in transparency and in detail with both qualitative and quantitative supporting evidence. Detailed rules and procedures will encourage and support the enterprises in question to proactively apply for the exemption on a case-by-case basis. It will be beneficial if more detailed qualitative and quantitative analysis of each reason proposed by the enterprises, and reasons for approval or disapproval of such application are publicized in the AML enforcement agencies' written decisions. On the EU side, industries also call for guidance on the "conditions under which efficiencies can be argued for the use of RPM and the evidence needed for this purpose"[29].

The European Commission is generally obliged to provide reasons for its decisions on individual exemption applications under the principles of transparency and due process in EU competition law. In practice, the European Commission typically communicates its decision and the reasons in writing to the parties involved. This ensures that the parties have a clear understanding of why their application was rejected and allows them the opportunity to assess whether the decision is legally sound. The European Commission is also open to other potential defenses to justify the use of RPM in addition to the three exceptions mentioned in the Guidelines 2022.

Since individual exemptions are barely applied for or discussed in China's AML administrative and judicial practice, transparent statements of reasons for exemptions and anticompetitive effects could be a good step in China's AML enforcement and encourage enterprises to explore other reasons to defend themselves.

Both the Amended AML and the SPC Draft AML Interpretation stipulate that "the effect of excluding and restricting competition" is one of the key elements for vertical monopoly agreements. Similar to the EU competition law, the anticompetitive effect of RPM is presumed according to Article 18 Paragraph 3 of the Amended AML, which requires enterprises to bear the burden of proof and rebut this presumption. Therefore, once the parties provide evidence, the AML enforcement agencies or the plaintiff will in turn prove that RPM has the effect of excluding or restricting competition before making a substantive judgment. With such legislative latitude, it is not likely for AML enforcement agencies or courts to decide that the undertakings' RPM has violated Article 18 of the Amended AML solely based on the behaviors.

The AML enforcement agencies and the SPC may formulate more detailed RPM rules by issuing guidelines or provisions for further AML practice. In the new guidelines or regulations, the AML enforcement agencies or the SPC could consider, on the one hand, to clarify that the sound analysis of the individual exemptions shall be included in the process of assessment of RPM. The new guidelines or regulations are also expected to provide guidance on how to assess the competitive elements of RPM.

4.2 New Safe Harbor Rule in RPM Cases

For the first time, Paragraph 3 of Article 18 of the Amended AML introduces the safe harbor rule for vertical monopoly agreements. Unlike the exemption rule, the safe harbor rule states that "the agreements between undertakings will not be prohibited if the undertakings can prove that their market share in the relevant market is lower than the standard prescribed by the Anti-monopoly Law Enforcement Agency of the State Council and meet other conditions prescribed by the Anti-monopoly Law Enforcement Agency of the State Council." [30]

Some scholars believe that safe harbor is a type of exemptions in a broader sense. They argue that safe harbor and exemption are inherently related in the legal system and lead to similar legal effects,[31] and thus the current safe harbor rule establishes a special exemption rule. [32]

However, a more prevailing view is that different from the EU's design of safe harbor under block exemptions, the safe harbor rule in the Amended AML adds a new objective standard – market share, which differs from the exemption in terms of proof method and analysis approach. Therefore, safe harbor should be considered as an independent rule from the exemption.[33] The Anti-monopoly Commission of the State Council has adopted the expression of "safe harbor rule" in Article 13 of the Anti-Monopoly Guide in the Field of Intellectual Property before the Amended AML, which also indicates the unique position of "safe harbor rule". [34]

Although the new safe harbor clause in the Amended AML is widely considered as a positive progress in RPM rule, neither lawmakers nor AML enforcement agencies have yet to provide clear guidances on how the general safe harbor rule should be applied. The Provisions on Prohibition of Monopoly Agreements also fail to specify the market share percentage. As a result, it leaves significant uncertainty on how the new rule will be implemented. From the perspective of legislation, the EU experience could be taken as a reference.

4.2.1 Safe Harbor Rule under EU Law

Safe harbor is not only a rule in the sense of anti-monopoly law but also represents a broader class of legal concepts that can exclude the application of a certain legal regulation when a specific threshold is met.[35]

From the perspective of EU competition law, the EU VBER establishes the safe harbor rule in the legislation of vertical agreements. That is, when the total market share of both suppliers and buyers does not exceed 30%, block exemption can be applied. It is worth noting that this rule is applicable only for vertical agreements with non-hardcore restrictions. Since RPM is considered as a hardcore restriction under the EU law, such a block exemption rule is not applicable. [36]

However, even if RPM constitutes a hardcore restriction, it is still possible to be recognized as legal under EU law. In addition to the individual exemption mentioned above, the EU Commission sets a rebuttable presumption in Guideline 2022: when (1) the company concerned does not meet the requirement of 5% market share; and (2) where the total annual turnover in the products covered by the agreement in the EU does not exceed €40 million, the vertical agreements concerned are in principle not capable of affecting market competition (market share is not a decisive factor itself, and the turnover of the enterprise in the product concerned must also be taken into account too). [37]

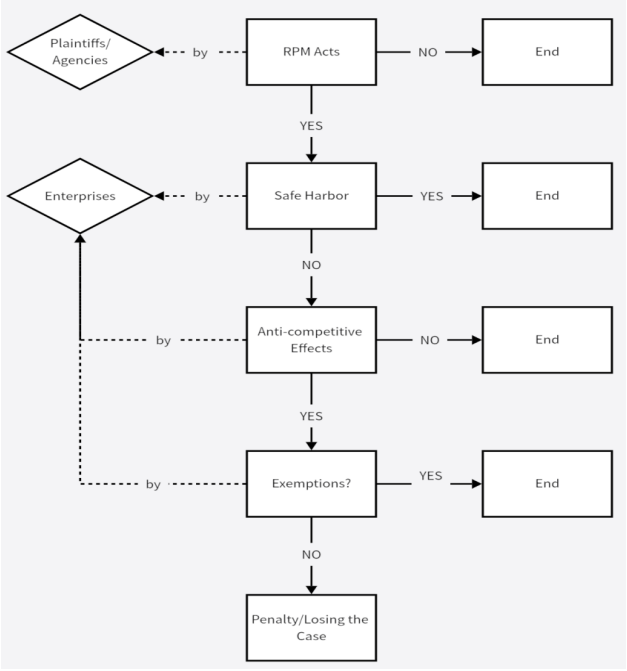
4.2.2. Potential Implications for China's New Safe Harbor Rule on RPM

It seems that a specific and straight-forward threshold is long awaited in the aftermath of the Amended AML. The legislative purpose of the safe harbor rule is to reduce the uncertainty under the supervision of the AML for enterprises, by providing specific and effective ex ante compliance guidelines. Without no specific market share provisions, the efforts of adding safe harbor rule in the Amended AML is likely to result in vain. On the other hand, since rebuttable presumed anticompetitive effects are linked with RPM by the Amended AML, RPM may be put under heavier AML enforcement if the potential defenses such as competitive effects, exemptions or safe harbor remain only a written principle without consistent and feasible implementation.

The hesitation of AML enforcement agencies may include the concern that safe harbor may create the problem of one-size-fit-all and such absolute certainty may improperly legalize certain anticompetitive behaviors in a dynamic market competition environment. In this regard, AML also include the exception for law enforcement agencies to provide contrary evidence to prove "excluding and restricting market competition" to rebut the safe harbor market share percentage so that the loophole of applying the safe harbor system in a low concentration rate market may be prevented. In this sense, the current logic behind of the Amended AML is more concerned with Type II errors, or so called false negative. It means a wrong decision not to condemn a conduct that is anticompetitive. However, the regime "prohibition +exemption" without practical safe harbor rule is more likely to lead to Type I errors, which reflect over-enforcement or over-regulation.

Before the promulgation of the Amended AML, China

has launched a long-term exploration of the legislation of percentage-based safe harbor in administrative regulations, which set differentiated market share standards in different fields and industries, but at the same time allow law enforcement agencies to exclude the application of safe harbor with contrary evidence.[38] The MAP Draft used to set forth "no contrary evidence to prove that it excludes or restricts competition" as one of the elements of the safe harbor, indicating that law enforcement agencies had taken into account the existence of exceptions.



At the same time, it is necessary to pay attention to the application sequence of safe harbor and exemption in the framework of RPM analysis. As noted above, the consequence of the application of the safe harbor is that the RPM is presumed to be legal, while the exemption applies only after the RPM is presumed to be illegal. Therefore, when determining RPM illegality, the first analysis step is to determine whether the safe harbor rule is applicable to the behavior in questions. If so, the AML enforcement agency will then need to prove the anticompetitive effects of RPM. If RPM fails to meet the applicable standards of the safe harbor, then the enterprise needs to prove that RPM does not have anticompetitive effects. After that, the AML enforcement agency in turn proves that RPM has the effect of excluding or restricting competition. If the enterprises cannot provide such evidence, then such RPM can be presumed as having anticompetitive effects and thus illegal. Finally, it is the enterprises' right to further prove whether the conditions of exemption are met. The table below illustrates the sequence of proof and steps under the Amended AML.

4.3 Over Regulation vs. Under Regulation

Before the Amended AML and the SPC Draft AML Interpretation Draft issued in 2022, influenced by the antitrust practice in America, Chinese courts were more concerned with Type I errors – over-regulation, and tended to emphasize on the effects of competition imposed by RPM when assessing its legitimacy. The prevailing view was that the rule of "presumed to be illegal" shall not be applied to RPM as its main anticompetitive effects are inter-brands according to the economics study results.

The Amended AML shows a new trend. The legislature and courts seem more inclined to adopt AML enforcement agencies' position on RPM, and take RPM as a core restriction with presumed anticompetitive effects. One of the penalty decisions made it clear that "the purpose of the fixed resale price and the minimum resale price agreement reached between suppliers and retailers is to eliminate competition, which has the effect of excluding and restricting competition, and such an agreement is prohibited by law." [39]

If taking into account the economic status in the post-epidemic era, how to apply the new trend in RPM policy needs more precaution. The domestic and foreign antitrust studies and theories reveal that RPM could facilitate introducing new products into the market, avoid free-riding from retailers, promote high-quality competition by improving the quality of products and services, and have pro-competitive effects.

Over-regulation may make enterprises more precautionary when the risk of being condemned is high or unpredictable. In terms of RPM within the distribution channels, brand companies with a high level of compliance requirement may tend to reduce transactions with distributors and thus may limit the scale and availability of quality brand products and services to consumers. As a result, such errors might harm the overall

market dynamic and economic health.

Therefore, specifying the assessment standards for anticompetitive effects, exemption and safe harbor for RPM is earnestly expected. With detailed and transparent guidance, the legal consequences of RPM will be more predictable. Brand companies with a higher level of regulatory compliance motivation could better form their RPM regulatory compliance regimes within the group. In the long term, it will benefit and boost market vitality.

Reference

[1] the Anti-Monopoly Law (promulgated by the Standing Comm. Nat'l People's Cong., Aug. 30, 2007, rev'd Jun. 24, 2022, effective August 1, 2022) art. 18, 2022 Standing Comm. Nat'l People's Cong. Gaz. 616. The following monopolistic agreements are prohibited from being reached between undertakings and their trading counterparties:(1) those fixing the price of commodities for resale to a third party;(2) those restricting the minimum price of commodities for resale to a third party; or(3) other monopolistic agreements as determined by the Anti-monopoly Law Enforcement Agency of the State Council. The agreements prescribed in Items (I) and (II) of the preceding paragraph will not be prohibited if the undertakings can prove that such agreements do not have effects of eliminating or restricting competition. The agreements between undertakings will not be prohibited if the undertakings can prove that their market share in the relevant market is lower than the standard prescribed by the Anti-monopoly Law Enforcement Agency of the State Council and meet other conditions prescribed by the Anti-monopoly Law Enforcement Agency of the State Council.

[2] Provisions on Several Issues Concerning the Application of Law in the Trial of Monopolistic Civil Dispute Cases (Draft for Public Comments) (promulgated by the SPC, Nov. 18, 2022) art. 16.

[3] Beijing Administration for Market Regulation Administrative Punishment Decision, 2021, No. 29, available at the AMR official website.

[4] Beijing Ruibang Yonghe Technology and Trade Co., Ltd. v. Johnson & Johnson (Shanghai) Medical Devices Co., Ltd. and Johnson & Johnson (China) Medical Devices Co., Ltd., A Dispute over a Vertical Monopoly Agreement (the Johnson & Johnson Case), 2014, Sup. People's Ct. Gaz. (China).

[5] Miao v. SAIC-GM Sales Co., Ltd. and Shanghai Yilong Automobile Sales & Service Co., Ltd., A Dispute over a Vertical Monopoly Agreement, 2022, China Judgments Online. (China).

[6] Hainan Yutai Technology Feed Co., Ltd. v. Hainan Provincial Price Bureau, A Dispute over Administrative Penalty, China Judgments Online, (2018) Sup. People's Ct. Xing Shen No.4675, December 18, 2018 (China).

[7] Since China's existing safe harbor rule only has a general provision in Article 18, paragraph 3 of the AML, and there is no supporting rule guiding relevant behavior, the discussion of the safe harbor rule in the theoretical community is more focused on how to further refine and improve it. In this regard, some scholars believe that the two types of vertical price monopoly agreements in the second paragraph of Article 18 of the AML can be further divided into three types: A vertical price monopoly agreement exceeding a certain percentage (e.g. 15%) constitutes an inherently illegal agreement; Vertical price monopoly agreements between a certain percentage (10%-15%) are subject to the special exemption system provided for in this article; Vertical price monopoly agreements below a certain percentage (e.g. 10%) are subject to the safe harbor rule. See Liu Jifeng, The improvement of the safe harbor system of vertical monopoly agreements in China's anti-monopoly law, Academic Journal of Zhongzhou, no. 2, 2023, at 67. Some scholars have also argued for a higher market share threshold. They believed that "based on the rule of reason, the EU's safe harbor rules can also be appropriately referenced to avoid excessively cumbersome investigations." If a safe harbor within 30% of the share is set up (the specific share can be determined with the accumulation of judicial practice), it is legal to maintain the resale price within the safe harbor; if the safe harbor threshold is exceeded, it will be analyzed according to the rule of reason". See Zhangjun, The Path of Improving Resale Price Maintenance of Anti-monopoly Laws and Regulations, Law Science, no. 2, 2013, at 95. The difference between the above two views lies in the different understanding on the

determination of illegality of vertical monopoly agreements: in the former view, the safe harbor rule becomes part of the exemption rule in the process of determining illegality; in the latter view, scholars advocate that the rule of reason should be used as the basis of their illegality analysis method, and there is no need to conduct further illegality analysis for those that do not exceed the safe harbor share.

[8] The Anti-Monopoly Law (promulgated by the Standing Comm. Nat'l People's Cong., Aug. 30, 2007, effective August 1, 2008) art. 18, 2007 Standing Comm. Nat'l People's Cong. Gaz. 30.

[9] Zhao Bingling, He Jing, How China's Enforcement Agencies and Courts Are Shaping Antitrust Policies on Vertical Restraints, 24 Geo. Mason L. Rev. 1171 (2017).

[10] Shi Jianzhong, Hao Junqi, The Correctness of the Legislation Prohibiting the RPM in Principle and the Improvement of its Implementation, Political Science and Law, no. 11, 2017, at 20.

[11] Xu Kunlin, Former Deputy Secretary of the Jiangsu Party Committee in October 2021 and Deputy Secretary of the Jiangsu Party Committee and Governor of Jiangsu Province in January 2022.

[12] Xu Kunlin, Leniency Applies to Vertical Monopoly Agreements, China Economic Herald, Oct. 31, 2013, at A03.

[13] Zhao Bingling, He Jing, How China's Enforcement Agencies and Courts Are Shaping Antitrust Policies on Vertical Restraints, 24 Geo. Mason L. Rev. 1171 (2017).

[14] Hainan Provincial Administration for Market Regulation Administrative Penalty Decision, 2022, No. 32, AMR official website.

[15] Beijing Administration for Market Regulation Administrative Punishment Decision, 2021, No. 29, available at the AMR official website.

[16] Beijing Administration for Market Regulation Administrative Punishment Decision, 2022, No. 06002, available at the AMR official website.

[17] Monopoly Dispute between Tian Junwei and Beijing Carrefour Commercial Co., Ltd. Shuangjingdian, et al. (the "Abbott Case"), the 2016 Dongguan Hengli Guochang Electrical Appliance Store v. Dongguan Shengshi Xinxing Gree Trading Co., Ltd. and other Vertical Monopoly Agreement Disputes (the "Gree Case"), Lixin County Beibei Maternal and Child Home v. Shijiazhuang Junlebao Dairy Co., Ltd. Vertical Monopoly Agreement Dispute (the "Junlebao Case"), the court argued whether the vertical monopoly agreement should have the effect of "eliminating or restricting competition" In order to constitute an element, the reasoning is consistent with the Shanghai High Court's reasoning, that is, the determination of a vertical monopoly agreement needs to be combined with the content provided for in Article 13, paragraph 2 of the Anti-Monopoly Law, and further examine whether such an agreement has the effect of eliminating or restricting competition. In the 2018 case of Wuhan Shi Hanyang Guangming Maoyi Youxian Zeren Wuhan Hanyangming Trading Co., Ltd. v. Shanghai Hankook Tire Sales Co., Ltd. (the "Hankook Tire Case"), the Shanghai High Court used a variety of interpretation methods to once again make a more detailed argument on how Article 13.2 of the Old AML applies to vertical monopoly agreements, and the basic arguments are the same as the two reasons put forward in the Johnson & Johnson case. Kangjian Miaomiao (Hangzhou) Pharmaceutical Co., Ltd. v. Dentsply (Tianjin) International Trading Co., Ltd. (the "Kangjian Miaomiao Case"), the court held that a vertical monopoly agreement should have the effect of "eliminating or restricting competition" because "the definition of monopoly agreement in Article 13 of the AML shall also apply to the provisions of Article 14 on vertical monopoly agreements".

[18] Shi Jianzhong, Hao Junqi, The Correctness of the Legislation Prohibiting the RPM in Principle and the Improvement of Its Implementation, Political Science and Law, no. 11, 2017, at 31.

[19] Interim Provisions on Prohibition of Monopoly Agreements (promulgated by SAMR, Mar. 24, 2022, effective May 1, 2022), available at SAMR official website, https://sjfg.samr.gov.cn/law/pageInfo/main.main?order=10&iframe=pageInfo/law_search_new.law_details?lawId=46dab797b38340e2a3ee4a6c01bcd618 (last visited Dec. 12, 2023).

[20] Provisions on the Prohibition of Monopoly Agreements (Draft for Comments) (promulgated by SAMR, Jun. 27,

2022, available at SAMR official website, https://www.samr.gov.cn/hd/zjdc/art/2023/art_81dec3b2c6364891b45d005528d03fea.html (last visited Dec. 12, 2023).

[21] the Anti-Monopoly Law (promulgated by the Standing Comm. Nat'l People's Cong., Aug. 30, 2007, rev'd Jun. 24, 2022, effective August 1, 2022) art. 20, 2022 Standing Comm. Nat'l People's Cong. Gaz. 616. The provisions of Article 17, the first paragraph of Article 18 and Article 19 hereof will not apply, if the undertakings can prove that the agreement they concluded falls under any of the following circumstances: (1) for the purpose of improving technologies, researching and developing new products; (2) for the purpose of improving product quality, reducing cost, improving efficiency, unifying specifications or standards, or carrying out professional labor division; (3) for the purpose of improving operational efficiency and enhancing the competitiveness of small- and medium-sized undertakings; (4) for the purpose of realizing public interests such as energy conservation, environmental protection and disaster relief and aid; (5) for the purpose of mitigating serious decrease in sales amount or obviously excessive production during economic recessions; (6) for the purpose of safeguarding the legitimate interests in foreign trade or foreign economic cooperation; and (7) any other circumstances as prescribed by laws and the State Council. Where the provisions of Article 17, the first Paragraph 1 of Article 18 and Article 19 hereof do not apply as a result of any of the circumstances prescribed in Items (I) to (V) of the preceding paragraph, and the undertakings shall also prove that the agreement they have concluded will not seriously restrict competition in the relevant market and will enable consumers to share the interests arising therefrom.

[22] Hainan Yutai Technology Feed Co., Ltd. v. Hainan Price Bureau, A Dispute over Administrative Penalty, China Judgments Online, (2017) Qiong Xing Zhong No.1180, December 11, 2017 (China).

[23] Hainan Yutai Technology Feed Co., Ltd. v. Hainan Price Bureau, A Dispute over Administrative Penalty, China Judgments Online, (2017) Qiong Xing Zhong No.1180, December 11, 2017 (China).

[24] Judicial Interpretation of Antitrust Civil Litigation (Draft for Consultation) (promulgated by the Supreme Court, November 18, 2022), website of the Supreme People's Court of the People's Republic of China. Article 25 "Where the alleged monopoly behaviors fall under the monopoly agreement stipulated in Item (I) and (II) of the first Paragraph of Article 18 of the AML, the defendant shall bear the burden of proof that the agreement does not have the effect of excluding and restricting competition. Where the alleged monopoly behaviors fall under the monopoly agreement stipulated in Item (iii) of the first paragraph of Article 18 of the AML, the plaintiff shall bear the burden of proof that the agreement has the effect of excluding and restricting competition.".

[25] Consolidated Version of the Treaty on the Functioning of the European Union art. 101, January 30, 2020, 2020 O.J. (C 202) 47.

[26] Case C-211/22, S. B, SA, AN, BQ v. Aut. Con, 2023, E.C.J Web. https://curia.europa.eu/juris/document/document.jsf;jsessionid=9F93C82A18D40928DCF789F058872315?text=&docid=275033&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=1689298 (last visited Nov. 22, 2023).

[27] Communication from the Commission Commission Notice Guidelines on Vertical Restraints, June 30, 2022. 2022 O.J.(C 248) 1.

[28] Member of the National Committee of the Chinese People's Political Consultative Conference ("CPPCC") Li Shouzhen expressed that the AMR staffing shall be extended in interview, he held that "the current number of personnel for AML enforcement in the AMR is less than 50, while America has over 1000 and the European Union has over 100 staff in their antitrust enforcement agencies. See Liling, Strengthen the Enforcement of the AML! Member of the National Committee of Chinese People's Political Consultative Conference (CPPCC), Li Shouzhen: Increasing Staffing, Setting up Specialized Courts, https://mp.weixin.qq.com/s/1qqbLGLDHn9_MJjaHA_sNw (last visited Nov.11, 2023).

[29] Summary of the replies of the national competition authorities of the European Competition Network provided during the targeted consultation for the impact assessment of

the review of Regulation (EU) No 330/2010.

[30] Anti-Monopoly Law (promulgated by the Standing Committee of the National People's Congress, June 24, 2022, effective August 1, 2022) art. 18.

[31] Li Guohai, Wang Yining, The Construction of Safe Harbor Rules for China's Anti-monopoly Law, Journal of Jishou University, no. 2, vol 43, 2022, at 66, 67.

[32] See Liu Jifeng, The Improvement of the Safe Harbor System of Vertical Monopoly Agreements in China's Anti-monopoly Law, Academic Journal of Zhongzhou, no. 2, 2023, at 66.

[33] However, the third paragraph of Article 18 of the Amended AML is different from the original exemption clause. This difference also reflects its particularity, as the exemption under the safe harbor rule is different from the existing standard based on the type of conduct or special circumstances, and adopts the new exemption criterion of market share of the enterprise. Therefore, due to the differences in the abstraction and typology of the rules, the difficulty level of proving them is also very different. The safe harbor rules and exemption rules of monopoly agreements are in a relatively independent state of rules in the new law, and they are not contradictory. See Xu Zelin, Application of the Safe Harbor Rule for Monopoly Agreements in China: From Legislation to Implementation, Wuhan University Journal, no. 3, vol 76, 2022, at 179.

[34] Guidelines on Antitrust in the Field of Intellectual Property (promulgated by Anti-monopoly Commission, Jan 4, 2019, effective Jan 4, 2019) art. 13.

[35] Safe Harbor, Black's Law Dictionary (11th edition (2019)).

[36] Commission Regulation of 10 May 2022, on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices, 2022 O.J. (L 134) 7, 8.

[37] Commission Regulation of 10 May 2022, Guidelines on vertical restraints, 2022 O.J. (C 248) 10, 11.

[38] The safe harbor system has been reflected in various legal documents, such as Provisions on Prohibiting the Abuse of Intellectual Property Rights to Eliminate or Restrict Competition, the Anti-Monopoly Guidelines of the Anti-Monopoly Commission of the State Council on the Automobile Industry, the Anti-Monopoly Guidelines of the Anti-Monopoly Commission of the State Council on the Field of Intellectual Property, and Provisions on Prohibition of Monopolistic Agreements, published in 2019 and 2022.

[39] Beijing Administration for Market Regulation Administrative Punishment Decision, 2021, No. 29, available at the AMR official website.