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 firmly adopt the principle of “prohibition + exemption” by imposing the burden of proof on the enterprises who are alleged to engage in RPM acts: enterprises have to apply for exemption once the agencies prove and prohibit the RPM acts. AML agencies do not need to prove the “restricting or excluding competition” effect under this approach. On the contrary, the courts had required the plaintiff in private enforcement cases to prove the “restricting or excluding competition” effects in addition to the RPM acts. In the Amended AML, such disagreement between public and private enforcement was formally addressed by explicitly adding the precondition of “restricting or excluding competition” and allocating such burden of proof to enterprises/defendants. Prior to the Amended AML, such a new trend was already seen in the landmark Supreme Court Yutai case, where the courts’ standards for determining the illegality of RPM started to move towards the approach of the AML public enforcement agencies. The new Supreme Court Judicial Interpretations on AML for comments issued in 2022 further confirmed the new trend and clarified that enterprises/defendants shall prove that there is no “effect of excluding or restricting competition” in RPM cases. Nonetheless, how such a reformed RPM policy will be applied in practice remains blurred. The Old AML was applied in all the RPM cases after the Amended AML took effect. It is unclear how to apply the “exemption” rule and in particular “safe harbor” rule once an RPM act is identified and presumed to be anti-competitive. No case 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 policies along the reform road with China’s post-pandemic economy conditions taken into consideration. This paper first introduces the previous RPM policy and the new trend in China and then takes the reference to EU policies on RPM. This paper finally concludes that the elements of competitive effects, the new safe harbor rule, and the exemption rule should be further clarified in the coming implementation regulations and judicial interpretations to avoid antitrust law Type I errors, i.e., over-regulation.

Keywords: RPM; Vertical Agreements; Anti-Monopoly Law; Per Se Illegal

1 Introduction

Resale price maintenance (“RPM”) refers to the act of an upstream enterprise to set a minimum 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 judicial practice, 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’ approach by stipulating that the RPM is prohibited and anti-competitive effects are presumed unless the enterprises can prove that such acts do not exclude or restrict competition. On the other hand, the Amended AML clarifies the heated question that the “effect of excluding and restricting competition” is an analytical element of RPM and introduces a safe harbor rule for RPM.

The Chinese Supreme Court (“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”) released by the SPC in 2022 after the Amended AML stipulates that enterprises shall bear the burden of proof that there is no “effect of excluding and restricting competition” in RPM cases. It reversed the long-term judicial standing that the general civil litigation rule - “who claims, who provides evidence” should be applied in RPM cases, requiring the plaintiff (such as distributors, consumers, etc.) alleging that RPM acts in question constitute a vertical monopoly agreement to bear the
burden of proof for anti-competitive effects.

Such a new trend departs from and addresses the long-term 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 anti-competitive and illegal and imposing the burden of proof on the enterprises alleged to engage in RPM acts to apply for exemptions. In other words, once the agencies prove the RPM acts, the anti-competitive effects will be presumed without going into detailed analysis and supporting proof, 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 prove both the RPM acts and the “excluding and restricting competition effect” to win an RPM case.

A good example to illustrate the rule of “prohibition and exemption” could be the Yangzijiang Case. 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. No solid proof or analysis on the “excluding and restricting competition effect” or exemption was required in the enforcement decision.

On the other side, the courts have required the plaintiffs in private enforcement civil litigation cases to bear the burden to prove the “excluding and restricting competition effect”. As a result, it is difficult to win in a private enforcement case against RPM. Up to now, there are 10 private enforcement cases involving RPM, including 7 vertical agreement 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 in 2012 and the Shanghai General Motors case in 2022. In other cases, the courts all found that the evidence in question could not establish the anti-competitive effects or illegality of the RPM agreements.

Such a new trend is not surprising as the landmark SPC case – Yutai v. Hainan Provincial Price Bureau (the “Yutai Case”), already signaled the SPC’s position.

However, in practice, it remains unclear 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 and proved for the “effect of excluding and restricting competition” in the new trend and how to apply the “exemption” rule and “safe harbor” rule along the reforming road. 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”), the AML public enforcement agencies have never granted an exemption to enterprises before. With the overall RPM analysis framework becoming consistent between public and private enforcement, it remains difficult for enterprises to grasp how to provide evidence for such an exemption. In civil private enforcement cases, it is also unclear whether the courts will apply the same level of difficulty in proving that “such acts do not exclude or restrict competition” and how the exemption rule will be further litigated once the defendant fails to prove “no anti-competitive harm” incurred by their RPM acts. In sum, the experience of public and private enforcement cases could hardly provide useful guidance in the new trend.

Therefore, it is necessary to further clarify and answer the aforesaid questions. In particular, in the context of the post-pandemic economy, how such a new trend will fit into the whole economic picture raises concerns. This paper first introduces the previous RPM policy and the new trend in China and then takes reference of EU policies on RPM. This paper finally concludes that the elements of competitive effects, the new safe harbor rule and the exemption rule should be further clarified in the coming implementation regulations and judicial interpretations to avoid antitrust law Type I errors, i.e., over-regulation, in the post-pandemic economy.

2 Previous Deviation on RPM between AML Public and Private Enforcement

2.1 Previous Deviation on RPM between AML Public and Private 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” should be applied. For example, Mr. Xu Kunlin, 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. 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.

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. However, the agency hardly provides any detailed evidence or quantitative analysis on the competitive impact of the RPM acts. That is why some scholars argue that such an AML public enforcement approach sets up a “per se illegal” rule.

For example, in the administrative penalty case of Hainan Yishun Pharmaceutical Co., LTD. in 2022 (“Hainan Yishun Pharmaceutical Case”), 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. Conversely, after determining that the behavior constitutes an RPM, the agency then presumed that the RPM agreement has the effect of excluding and restricting competition.

In the administrative enforcement case of Beijing Gastri Trading (Beijing) Co., LTD. (“Gastri Case”), although the administrative AML enforcement agency mentioned the dominant position of the parties in the industry and the market competition status of relevant products, it failed to make a specific analysis of pro-competitive and anti-competitive effects or provide any other economic analysis. Overall, merely conclusive and qualitative statements are provided in such RPM cases.

In another recent AML administrative penalty case against Yangzijiang Pharmaceutical Group case in 2021 (“Yangzijiang Case”), the agency entrusted an economist to analyze the economic effect 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”. Nevertheless, 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.” Consequently, the defense of the party was refuted.

Now that both the Amended AML and the SPC’s AML Judicial Interpretation Draft confirmed that the burden of proof on competitive impacts is shifted to the enterprises who are alleged to engage in RPM acts, it is expected that no further efforts will be taken by the AML enforcement agencies in RPM cases unless the enterprises could present solid evidence to successfully defeat the anti-competitive presumption. Such foresaid first case of administrative punishment in the RPM case in the pharmaceutical industry after the new AML came into
effect, further confirms the attitude of AML enforcement agencies.

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 set up 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 enforcement agency, in which a party applies for exemption. It demonstrates the high difficulty in granting the exemption. In that case, the parties apply for exemption based on two reasons under Article 15 of the Old AML: (1) the short-term resale price limit conforms to the situation stipulated in Article 15 “to improve technology, research, and development of new products”; (2) to prevent low-price competition between distributors and pharmacies, so as to encourage dealers and retail pharmacies to strengthen investment in the distribution link and ensure the quality of drug products, so as to 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: first, 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”; Second, 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 limiting product prices. In addition, the SAMR held that it was necessary to prove that the RPM acts did not seriously exclude or restrict competition in the relevant market and were able to enable consumers to share the benefits generated. However, the party concerned did not succeed in proving this.

2.1 Competitive Effect Heavily Litigated in RPM Analysis Framework by Courts

In previous judicial practice, the court generally required the plaintiff to provide evidence to prove both RPM’s acts and the effect of excluding and restricting competition when reviewing RPM's illegality. 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\(^{16}\). 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 acts in question constitute a monopoly agreement to bear the burden of proof that such litigated RPMs have the effect of excluding and restricting competition. The following elements are often taken into consideration for the effect of “excluding and restricting competition” such as whether the relevant market competition is sufficient, the market position of the product and the enterprise in question, the purpose/motivation of the fixed or restricted resale price behavior, the impact of the fixed or restricted resale price behavior on the competition effect, etc.

As a result, defendants, who are alleged to engage in RPM acts, barely lost in an RPM private enforcement case, since it is difficult for downstream distributors or consumers to obtain evidence such as sufficient market data, and provide sufficient economic analysis to prove anti-competitive effects. According to the search, there are a total of 10 RPM cases in private enforcement including 7 AML disputes and 3 contract disputes. Among those, plaintiffs only won in two cases, namely the Johnson & Johnson case in 2012 and the Shanghai General Motors
In other cases, the courts all decided that the evidence did not successfully prove the RPM agreement.

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

The foregoing analysis indicates clearly that although China's Old AML appears similar to the EU's rule of “prohibition and exemption” in terms of legal structure at first glance, administrative public enforcement and judicial practices used to deviate in terms of illegality standards of RPM. Part of the reason lies in that the Old AML leave 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. 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. 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. In establishing the illegality of RPM, AML administrative enforcement agencies will not prove or analyze in detail the anti-competitive effect of such behaviors, nor will they include exemption analysis as one of the “must-have” elements in their penalty decision analysis. That is why some scholars and practitioners consider the rule of “prohibition and exemption” has evolved into the principle of “per se illegal” in AML public enforcement practice. At the same time, the analysis method followed by the court is considered as the rule of reason, where the downstream counterparties such as dealers, consumers, and other parties claim for RPM enforcement have to prove the anti-competitive effect 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 conflicts, which is conducive to consistency in public and private enforcement to a certain extent.

Therefore, it is important to understand what the trend is and what it leads to in the field of RPM enforcement (both public and private). It is yet to be seen whether the divergence between public and private enforcement practices will be mitigated with such a new trend.

3 New Trend of AML Legislation and Practice 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 2022 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, which explicitly adds the burden of proof for enterprises who engage in RPM behaviors. As an implementing document of the 2022 Amended AML, the 2022 Provisions on Prohibition of Monopoly Agreement (“MAP”) further reaffirms the enterprises’ burden of proof 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.” Although the Amended AML makes it clear that “excluding and restricting the competitive effect” is a necessary standard to determine the illegality of monopoly agreement, RPM, as a special type of core anticompetitive category, is presumed to have anti-competitive effects unless the enterprises who engage in the RPM could prove and rebut such presumption. In other words, now from the level of the law, the enterprises’ duty of proof is explicitly increased and thus the risks of being held in violation of AML are increased as well in both private and public enforcement.
3.1.1 Newly Added Safe Harbor Rule

For the first time, the Amended AML added a safe harbor for vertical monopoly agreements applicable to various industries from the legislative level. The AML stipulates that if enterprises meet the market share and other conditions 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 with no specific and detailed provisions on how to apply such safe harbor. It is noticeable that the Provisions on Prohibition of Monopoly Agreements (Draft) issued by SAMR on June 27, 2022 (the “MAP Draft”) 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 said 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 practice, it does give rise to difficulty and ambitousness in practice. As a result, no safe harbor case has been seen for the past year since August 2022 till present.

In sum, the Amended AML chooses to follow the public enforcement approach and clarifies the principle of “prohibition + exemptions”. Article 18 of the Amended AML sets out the prohibition of vertical monopoly agreements, while Article 20 stipulates the exemption circumstances. In addition, the new safe harbor is added with no implementing rules in detail, which might lead to more RPM penalty cases in theory. However, it is yet to be seen how such rules will be applied and evolve in actual cases.

3.2 New Trend on RPM Reflected in Judicial Practice

In current judicial practice, courts have insisted on adopting a different approach from those by administrative enforcement agencies in assessing the illegality of RPM behaviors in most private enforcement RPM cases. However, since the Yutai Case by SPC discussed in the next paragraphs, the courts’ attitude in RPM civil cases gradually changed and moved towards the approach of public enforcement. After the Amended AML, the provisions on the burden of proof in the SPC Draft AML Interpretation issued in 2022 explicitly changed the previous point of view by imposing the burden of proof on defendants.

In the judicial review case over an AML administrative penalty decision - Yutai v. Hainan Proinvincial Price Bureau (“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 low. The administrative penalty decision was made by Hainan Provincial Price Bureau (“Hainan PPB”), where Hainan PPB imposed a fine of RMB 200,000 on Yutai for reaching RPM with its suppliers during years of 2014 and 2015. 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 SPC’s final retrial and attracted intensive attention from the public. In the second instance, 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 effect 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’ effect of excluding and restricting competition. Therefore, it is necessary to review whether the monopoly agreements have the effect 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 major controversial issue of the illegality principle of RPM, and clearly stated that it respects the administrative enforcement agencies’ determination principle of “prohibition and exemption”.

In addition, the SPC also clarified in the second instance judgment of Miao Chong v. SAIC General Motors Sales Co., Ltd. and Shanghai Yilong Automobile Sales Service Co., Ltd. on December 15, 2022 (“2022 GM Case”) that if an administrative penalty decision where the enforcement agencies recognize the behavior constitutes a monopoly behavior took effect, and the plaintiff claims that the monopoly behavior is established according to such penalty decision in the relevant monopoly civil case, no further proof is required unless that there is contrary evidence.

The two cases show that Chinese courts, whether in pure civil or administrative judicial review litigation, are increasingly recognizing the public enforcement agencies’ decisions. The cases in judicial practice also reflect the side 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 cases on RPM.

Meanwhile, the SPC Draft AML Interpretation has explicitly changed the court's long-standing judgment tendency on the allocation principle in the burden of proof in RPM cases. When it takes effect, the plaintiff will have to prove the effect of RPM’s “excluding and restricting competition”. In other words, the general civil litigation principle of “who claims, who provides evidence” will be no longer applicable due to the provisions in the Amended AML and the SPC Draft AML Interpretation. RPM acts will be presumed to have anti-competitive effects unless there is proof to rebut such presumption, i.e. the enterprises implementing the RPM should bear the burden of proof that the RPM agreement does not have the effect of excluding and restricting competition. Accordingly, the probability of the enterprises implementing RPM behaviors being sued and losing in civil litigation is expected to increase. The table below shows the new rule in the burden of proof for vertical monopoly agreements in the SPC Draft AML Interpretation.

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<tr>
<th>Type of Case</th>
<th>Burden of Proof on the Effect of Excluding and Restricting Competition</th>
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<tbody>
<tr>
<td>RPM Cases</td>
<td>Defendant</td>
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<tr>
<td>Other Vertical Monopoly Agreement</td>
<td>Plaintiff</td>
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<td>(excluding RPM) Cases</td>
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4 Potential Feasible Approach in Applying the New RPM Rule

Based on the aforesaid analysis, the Amended AML answers the hotly debated question of whether Article 13 Paragraph 2 of the Old AML applies to RPM, and also explicitly confirms the AML enforcement agencies’ RPM policy of “prohibition and exception”. Besides, the SPC has also reversed the burden of proof in judicial RPM cases in its SPC Draft AML Interpretation and also confirmed the decisions related to RPM made by AML public enforcement agencies in most recent cases, indicating that the courts tend to adopt enforcement agencies’ RPM approach.

Alongside the trend of consistency in public and private enforcement in RPM cases, the new safe harbor rule added in the Amended AML reveals a new and positive signal for the brands to manage their distribution channels. However, how the principle of “prohibition and exemption” shall be adopted in the aftermath of the Amended AML, how to incorporate the analysis of competition effect into the assessment framework of RPM, and how to apply the exemption rule are not clear. It leaves difficulty in practice. Therefore, to prevent new deviation in private and public enforcement or on a case-by basis when enforcing RPM policy in practice, it is necessary to clarify the aforesaid questions and accompanying rules as soon as possible.

On the one hand, we could draw reference to the practice of the EU, which provides a legal framework for the assessment of RPM, incorporates the application of the exemption rule into the assessment, and further clarifies the conditions of exemptions. On the other hand, we could clarify the applicable standards of safe harbor to
provide guidance for the AML enforcement agencies and courts to apply a consistent standard of analysis level in RPM cases.

4.1 Explicitly Including “Exemption” Step in the 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. Therefore, it is useful to understand the practice of the EU’s RPM policy including its exemption and safe harbor rules. Under the EU’s regulation system, although RPM is deemed as a kind of “hardcore restriction,” which could not apply 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 effect 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”). EU has also formed an analytical approach in its judicial practice on how to apply the case-to-case exemption rule stipulated in Article 101 Paragraph 3 of the TFEU when satisfying certain criteria stipulated in the Communication From The Commission Notice Guidelines on Vertical Restraints (“Guidelines 2022”).

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”28. Based on this clause, 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 stipulated in Article 4 of VBER, the EU only applies case-to-case exemption to RPM, but cannot apply block exemption. Such concepts are similar to what we have in China in the new trend.

According to Section 1 of Guidelines 2022, the analytical framework of “hardcore restriction” behavior 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”29.

Based on the above rules and judicial practice, 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 anti-competitive effects assessment of RPM lies in the following 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”. Enterprises could invoke the efficiency defense by proving that their RPM behavior satisfies such criteria so that it would not generate any anti-competitive effect.

4.1.2. Potential Implications on China’s Exemption Rules

Based on the above analysis of the EU’s “prohibition and exemptions” rule, China’s legislation and enforcement officials could further improve the current exemption rules from two aspects.

First of all, it is necessary to specify enterprises’ right to apply for the rule of exemption and incorporate the discussion of case-to-case exemption rules into the overall assessment framework of RPM. In AML enforcement agencies’ practices, the rule of exemption was rarely invoked by enterprises due to various reasons. The AML enforcement agencies, who initiate and conduct AML dawn raids and investigations, and impose penalties, are hardly neutral. Once the AML enforcement agencies initiate the investigation procedure, their main goal is to prove that the enterprises have reached and implemented monopoly agreements, therefore lacking the motivation to actively apply the exemption rules. Objectively speaking, it’s also unrealistic to require the AML enforcement agencies to conduct a thorough analysis for exemption with their current staffing.

To promote the proactive application of the exemption rules in practice, it might be useful to stress enterprises’ right to explore the rule of exemption in subsequent implementing regulations and require AML enforcement agencies to respond to and publish exemption applications in transparency and in detail with both qualitative and quantitative supporting evidence. It will encourage and support the enterprises in question to proactively apply for the exemption on a case-by-case basis, if more detailed qualitative and quantitative analysis of each grounding proposed by the undertakings, and reasons for approval or disapproval of the application are publicized in AML enforcement agencies’ written decisions.

Under the EU law, ECJ or the EU Commission shall first determine whether RPM could be exempted by Article 101 (3) of TFEU. Once the EU Commission has exempted RPM based on Article 101 (3) of TFEU, Article 101 (1) does not apply. Since the exemption rule is hardly applied or discussed in China’s AML administrative and judicial practice, the “prohibition and exemption” principle has nearly become a virtual prohibition. Consequently, some scholars criticize that a per se illegal principle is actually adopted in China’s practice.

Both the Amended AML and SPC Draft AML Interpretation stipulate that “the effect of excluding and restricting competition” is one of the key elements for vertical monopoly agreements. The anti-competitive effect of RPM is implied 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 should in turn prove that RPM has the effect of excluding or restricting competition before making a substantive judgment. The AML enforcement agencies or courts cannot directly conclude that the undertakings’ RPM approach or conduct has violated Article 18 of the AML solely based on the undertakings’ conduct.

The AML enforcement agencies and SPC may formulate RPM rules by issuing guidelines or provisions for further practice of the AML. In the new guidelines or regulations, the AML enforcement agencies or SPC could consider, on the one hand, clarifying that the analysis of the exemption shall be included in the process of accessing the pro-competitive or anti-competitive effect of RPM. On the other hand, the new guidelines or regulations could provide an overview and guidance on how to assess the elements in the positive and negative effects of RPM.

4.2 Potential Implications on the New Safe Harbor in RPM Cases

For the first time, Paragraph 3 in Article 18 of the Amended AML introduces the safe harbor rule for vertical monopoly agreements applicable to various industries. 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.”

Some scholars believe that safe harbor is a type of exemption in a broader sense. They argue that safe harbor and exemption are inherently related in the legal system and lead to similar legal effects, and thus the current safe harbor rule establishes a special exemption rule. However, the prevailing view is that different from the EU’s design of safe harbor under the group exemptions, the safe harbor rule in the Amended AML is in a special position. It adds a new objective rule – 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. 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”. In such a sense, this paper tends to follow the latter view.

Although the addition of safe harbor provisions to the Amended AML is widely considered as a positive progress in RPM rule, neither lawmakers nor AML enforcement agencies have yet to provide clear guidance on how the 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 about how the 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 as a legal system is not only a rule in the sense of anti-monopoly law but also a broader class of legal concepts that can exclude the application of a certain legal regulation when a specific threshold is met.

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.

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).

### 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. If no specific market share provision follows the Amended AML, the efforts of adding safe harbor rule may result in vain. On the other hand, since presumed anti-competitive effects are confirmed for RPM by the Amended AML, the efforts of adding safe harbor rule may result in vain. On the other hand, since presumed anti-competitive effects are confirmed for RPM by the Amended AML, the efforts of adding safe harbor rule may result in vain. On the other hand, since presumed anti-competitive effects are confirmed for RPM by the Amended AML, the efforts of adding safe harbor rule may result in vain. On the other hand, since presumed anti-competitive effects are confirmed for RPM by the Amended AML, the efforts of adding safe harbor rule may result in vain. On the other hand, since presumed anti-competitive effects are confirmed for RPM by the Amended AML, the efforts of adding safe harbor rule may result in vain. On the other hand, since presumed anti-competitive effects are confirmed for RPM by the Amended AML, the efforts of adding safe harbor rule may result in vain. On the other hand, since presumed anti-competitive effects are confirmed for RPM by the Amended AML, the efforts of adding safe harbor rule may result in vain.

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 some anti-competitive 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 anti-competitive. false judgment in which the court condemns a conduct that was not anticompetitive. However, the regime “prohibition +exemption” without a clear and 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.40 The Provisions on the Prohibition of Monopoly Agreements (Draft for Comment) set “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 have taken into account the existence of exceptions.

At the same time, it is necessary to pay attention to the position and role of safe harbor and exemption in the framework of RPM illegality 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. If so, the AML enforcement agency should then bear the burden of proof for the effect of RPM excluding and restricting competition. If RPM fails to meet the applicable standards of the safe harbor, then the enterprise needs to prove that RPM does not produce the effect of excluding or restricting competition. After that, the law enforcement agency in turn proves that RPM’s behavior has the effect of excluding or restricting competition. If the enterprises cannot provide such evidence, then the RPM behavior can be presumed as having anti-competitive effects and thus illegal. Finally, it is the enterprises’ obligation and right to further prove whether the conditions of the exemption are met. The table below illustrates the current burden of proof and steps under the Amended AML. It appears that the enterprises who alleged to engage in RPM now bear more burden of proof to prove the innocence.

4.3 Over Regulation vs. Under Regulation on RPM

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 the effect of competition imposed by RPM when assessing its legitimacy. The prevailing view was that the rule of “per se illegal” or the rule of “presumed to be illegal” shall not be applied to RPM as its main anti-competitive effects are within the brands according to the economics study results.

However, the Amended AML and the SPC Draft AML Interpretation show a new trend in assessing the legality of RPM. The legislature and courts seem more inclined to adopt AML enforcement agencies’ rules on RPM, that is, “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." From the current trend of legislation and practice, we can conclude that the legislature and SPC are taking a similar attitude towards RPM and tend to restrict vertical restraints strictly. Therefore, it might be possible to increase the possibility of over-regulation. Such antitrust enforcement errors may make enterprises more precautionary when the risk of being condemned is high. In terms of RPM within the distribution channels, brand companies with a good compliance function may reduce transactions with distributors and thus may limit the scale and availability of brand products and services to consumers. As a result, such errors may harm the overall market and economic health.

If taking into account the economic status in the post-epidemic era, how to apply the new trend in RPM policy needs more precaution. According to the data released by the National Bureau of Statistics, downward pressure on the domestic economy has been growing since 2022 struck by the international economic environment and covid-19 epidemic. From January to April, “total retail sales of consumer goods reached 13,814.2 billion yuan”, of which the total retail sales of consumer goods decreased by 11.1% and the total retail sales of goods decreased by 22.7% year-on-year.

Furthermore, President Xi pointed out in the 20th National Congress of the Communist Party of China that we must accelerate “the creation of a new development pattern” and pursue “high-quality development”. He further stressed that “we will build a unified national market, advance reforms for the market-based allocation of production factors, and put in place a high-standard market system”.

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 a pro-competitive effect on competition in general.

Therefore, with the rule of “prohibition and exemption” being established, specifying the requirements for applying for exemption and the safe harbor is earnestly expected. With clear and transparent guidance, more brand companies with a higher level of regulatory compliance motivation could avoid being condemned for competition on merits, which may appear “anti-competitive” but actually do not have anti-competitive effects in a dynamic market. 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.

Miumou Yu Shangqi Tongyong Qiche Xiaoshou Youxian Gongsi, Shanghai Yilong Qiche Xiaoshou Youxian Gongsi Zongxiang Longduan Xieyi Jiufen An.


[6] 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.


[9] 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.


[18] Monopoly Dispute between Tian Junwei and Beijing Carrefour Commercial Co., Ltd. Shuangjingdian, et al. (the “Abbott Case”), the 2016 Dongguan Shi Hengli Guochang Dianqi Shangdian Yu Dongguan Shi Sheng Xin Xing Ge Li Maoyi Youxian Gongsi Deng Zongxiang Longduan Xieyi Jiufen An


[23] Hainan Yutai Technology Feed Co., Ltd. v. Hainan Provincial Price Bureau, A Dispute over Administrative Penalty, China Judgments Online.


[27] Judicial Interpretation of Antitrust Civil Litigation (Draft for Consultation)] (promulgated by the Supreme Court, November 18, 2022).


[31] 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.

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


[38] 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.


