Supplier terms and pricing issues under Asian legal systems

Introduction

The majority of the legal systems in Asia that have a competition law regime include provisions similar to Article 101 TFEU encompassing vertical restraints. Such provisions are typically based on – or operate in a manner similar to – the EU competition law system. However, there are some important differences, most notably in Singapore, where absent dominance, vertical arrangements benefit from a broadly worded exemption from the prohibition on anti-competitive agreements.

At the time of publication, the following Asian jurisdictions are amongst those that have provisions regarding vertical restraints that operate in a similar manner to those in the EU: China, Hong Kong, Indonesia, Taiwan, Thailand, Malaysia, Philippines, Myanmar and Vietnam. Japan and Korea also have provisions relating to vertical restraints.

What is the basic position under the active Asian systems regarding resale price maintenance (RPM)?

Typically, under Asian systems, RPM occurs where a manufacturer or supplier establishes a fixed or minimum resale price which a distributor or retailer must observe when reselling the contract goods or services. RPM can be achieved directly or indirectly. RPM is typically viewed as a serious infringement of competition law in most Asian systems, leading to a restriction of competition in the downstream market. For example, China, Hong Kong, Indonesia, Japan, Taiwan and Korea all treat RPM practices as a serious competition law infringement.

As with the EU, in most of the active Asian systems, recommended retail prices (RRP) and maximum resale prices will generally be permitted provided they do not amount to a *de facto* minimum or fixed resale price (for example, through an upstream supplier threatening stock availability or offering incentives to a downstream distributor).

What do recent cases and investigations tell us about the Asian position on RPM?

There has been recent enforcement action taken by various Asian competition authorities which suggests a continued focus on RPM practices. In China, the Shanghai branch of the NDRC imposed a fine of RMB201 million (approximately US$29 million) on Shanghai General Motors for the maintenance of resale price on certain types of its cars in December 2016. The fine represented 4% of the company's sales revenue from said products in China in the previous year.

Also in China, the NDRC imposed a fine of RMB118.5 million (approximately US$17 million) on Medtronic (Shanghai) Management Co. in December 2016, Ltd. for fixing the resale price of medical apparatus and instruments.

In Hong Kong, in May 2015, an association of 300 cosmetic and beauty product companies announced plans to scrap industry wide practices that potentially violated the Hong Kong Competition Ordinance, including certain RPM practices. More recently, in June 2017, the then Chief Executive of the Hong Kong Competition Commission stated that the regulator still held the view that RPM could constitute a hardcore restriction of competition law.

We expect that, for those Asian competition law systems based on the EU regime, we will see an uptick in cases involving vertical restraints (including RPM) in the not too distant future. In particular, the use of pricing algorithms being used as a means of facilitating RPM could come under scrutiny given that this is something that the Competition Commission of Singapore has already commented on (albeit in the context of cartel behaviour).

How are online sales restrictions treated?

Are Platform restrictions permitted?

Platform restrictions have not yet been examined in Asian competition law systems. We expect that a similar approach to that taken in the EU would be taken in those regimes based on the EU competition law system, but of course, a different approach cannot be ruled out.

A limited number of the competition law systems in Asia draw a distinction between active and passive sales (for example, China in its draft Guidelines on Auto Sales and also Japan). We expect that most Asian systems would tend to follow the EU system in terms of the treatment of online sales as passive sales, although again a different approach cannot be entirely ruled out.

What about online pricing restrictions?

Dual pricing structures have not yet come under scrutiny in Asian competition law systems. We expect that, in most Asian competition law regimes which are based on the EU system, a similar approach would be taken to that in the EU.

Some regulators in Asia (e.g. Singapore) have already started considering the role and use of pricing algorithms and we suspect that Asian regulators interest in online pricing restrictions will increase in the future.

What is the approach and recent cases relating to discounts and rebates in Asia?

As is the case under EU competition law, under most Asian systems, certain types of rebates could amount to the abuse of a dominant position. We consider that the EU approach is likely to be indicative of the types of rebates that could be considered problematic in Asia (also bearing in mind the Chinese State Administration of Industry and Commerce's ("SAIC") approach in Tetra Pak, discussed below). Accordingly, exclusivity rebates and loyalty inducing rebates are likely to be problematic.

In *Tetra Pak*, the SAIC found that, in the sale of its materials, Tetra Pak had offered its customers: retroactive rebates and personalised sales target-related discounts. Tetra Pak also offered "special discounts" or "exceptional discounts" in the sale of its materials. The SAIC acknowledged that Tetra Pak's dominant position meant that a significant proportion of market demand had to be fulfilled by Tetra Pak. However, competition between Tetra Pak and other competitors could still have occurred for the market demand outside of this non-contestable portion, but Tetra Pak's loyalty discounts and the specific circumstances of the market made the contestable portion of the market demand essentially non-contestable.

We expect that other competition law systems in Asia would be guided by the principles in the *Intel* judgment and European Commission guidance (and possibly to a lesser extent the SAIC's *Tetra Pak* case). We note that a number of Asian competition law systems already follow the EU approach in their published guidance on abuse of dominance (for example, Hong Kong and Singapore).

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