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Clara Ingen-Housz[1]

I. INTRODUCTION

Resale price maintenance ("RPM") is the practice whereby suppliers of goods or services specify a fixed, minimum, or maximum resale price to their resellers. If the distributors do not comply, supply can be suspended or there may be some other form of commercial retaliation. This mechanism has received considerable attention from competition authorities and the business community worldwide—including Asia—ever since the United States Supreme Court ruled in the 2007 *Leegin* case[2] that RPM was no longer *per se* illegal but, rather, should be assessed under a "rule of reason" approach.

In Mainland China, in particular, the treatment of RPM under the Anti-Monopoly Law has been a particularly hot topic this year. There were indeed major uncertainties as to whether RPM would be considered *per se* illegal and whether the chosen approach would be applied in a consistent way. The answer started to shape up earlier this year through a combination of vigorous administrative enforcement and high profile private litigation. First, the National Development and Reform Commission imposed its highest fines to date in relation to RPM cases in the alcohol and the baby formula sectors after conducting large-scale, highly publicized investigations.[3] Second, in the high-profile case against Johnson & Johnson, the Shanghai High People's Court awarded damages to the Chinese distributor.[4] At this juncture, it would appear that commentators conclude that RPM in China tends to follow a "rule of reason" approach.

While 2013 has offered at least some clarification about the Mainland Chinese position on RPM, the situation across Asia remains confused. It is, however, critical to understand the position of antitrust authorities towards RPM in Asia, for two main reasons. First, the region represents a formidable economic opportunity with fast-growing markets and the rise of consumption-driven economies. The ASEAN countries alone represent close to 9 percent of the

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[2] *Leegin Creative Leather Products, Inc. v. PSKS, Inc.,* Slip Op. No. 06–480 (Decided June 28, 2007), overruling *Dr. Miles Medical Co. v. John D. Park and Sons*, 220 U.S. 373 (1911).

[3] The first one, in the alcohol sector, involved Wuliangye Yibin Group Co. Ltd. and Kweichow Maotai Co. Ltd., with fines totaling RMB 449 million (approximately U.S.$73 million); the second was against six baby formula manufacturers including domestic and foreign companies, for a total of RMB 669 million (approximately U.S.$109 million).

[4] Shanghai High People's Court, *Bangrui Yonghe Technology Trading Co., Ltd. v. Johnson & Johnson (Shanghai) Medical Equipment Co., Ltd. and Johnson & Johnson Medical (China) Ltd.*, [2012] Hu Gao Min San (Zhi) Zhong Zi No. 63, August 1, 2013: The Shanghai High People's Court ruled against Johnson & Johnson, finding that the company's RPM program violated the AML and awarded damages in the amount of RMB 530,000 (approximately U.S.$83 million).

global population (about 600 million people) and a GDP of over U.S.$2 trillion, ranking it the eighth economy in the world. This region is one no multinational company can afford to ignore.

Second, this region has experienced in recent years a significant proliferation of competition laws: but for a few exceptions, all countries have more or less recently enacted a cross-sector competition regime (Hong Kong being the most recent). However in the absence of institutional or, at least, intense economic integration, competition regulators across the region have not pursued a uniform approach to RPM and businesses now have to deal with different legal systems being at varying stages of development and reflecting unique socio-economic circumstances.

The purpose of this article is to analyze enforcement trends on RPM in East and South-East Asian nations having a relatively young competition regime. I have excluded mature Asian jurisdictions (Japan, Korea, or Australia) where policies are more established and transparent; nor have I included India, due to the suggested length of this article. I will first (Part II) present the features of the different regimes using representative examples drawn from a spectrum ranging from pure exemption to strict prohibition. I will then attempt to anticipate the way forward (Part III) before making concrete proposals on how to navigate effectively the complexities of the current situation (Part IV). Part V concludes.

II. RPM IN ASIA—A PATCHY PICTURE

The greatest risk relating to RPM enforcement in Asia at the moment is rooted in: (i) inconsistencies among the various legislations, (ii) legal uncertainty in the most nascent regimes, and (iii) different enforcement styles and priorities. Without attempting to over-simplify, this section broadly categorizes these variations based on our review of applicable law and most recent enforcement trends. The spectrum ranges from the most lenient regime (Singapore) to the strictest one (Taiwan), including "effects-based" regimes. Hong Kong, where the substantive provisions of the Competition Ordinance will not come into force before the end of 2014, is presented separately.

A. The Exemption Approach—Singapore

In Singapore, the common view is that RPM is exempted from the prohibition of anticompetitive agreements under Section 34 of the Competition Act. Indeed, while Section 34 of the Singapore Competition Act prohibits agreements, which directly or indirectly fix purchase or selling prices (i.e. including RPM), the Third Schedule excludes from the prohibition all vertical agreements. This is because undertakings "have a mutual interest in ensuring that as many goods and services are sold to consumers as possible" and because such agreement will have "pro-competitive effects that more than outweigh the potential anti-competitive effects."

Despite these provisions, however, the Minister for Trade and Industry may specify that this prohibition applies if a vertical agreement is considered to be anticompetitive. Indeed, the rationale for the exemption precisely is rooted in a presumption that vertical agreements are on balance pro-competitive; it seems that this presumption is rebuttable. Further, the exemption obviously only covers agreements having an effect on the Singapore market; this dramatically limits the benefit of the exemptions when considered by multinational companies with global operations.

Although to date there is no case law on RPM where the exemption would have been lifted, and the competitive effects of RPM would have been assessed, there has been an investigation of vertical practices, which suggests RPM should not be seen as entirely immune from regulatory scrutiny.

In March 2012, the Competition Commission of Singapore ("CCS") commenced an investigation into Coca Cola's supply agreements with retailers. Allegedly, the agreements included exclusivity restrictions and loyalty-inducing rebates. In January 2013, the CCS ceased its investigation after Coca Cola voluntarily amended its supply agreements to remove the potentially anticompetitive provisions.[5] Although the investigation reportedly mainly looked into practices from an abuse of dominance perspective, it nonetheless covered vertical agreements, suggesting that the exemption on RPM may not always be available. Arguably, though, it is reasonable to expect that RPM practices, absent high market shares, would largely benefit from the exemption—providing legal certainty to businesses.

B. The "Effects-based" Approach—Malaysia, Indonesia

Several jurisdictions in Asia have adopted an approach, which is akin to an "effects-based" or "rule of reason" approach. This means that RPM will not be considered illegal unless the competition authority can demonstrate its anticompetitive effects. To illustrate the above, I refer to Malaysia and Indonesia.

1. Malaysia

Malaysia has only recently adopted a comprehensive competition regime, with the 2010 Competition Act having come into effect on January 1, 2012. Under the Malaysia Competition Act, horizontal price fixing is explicitly prohibited and thus should be considered as *per se* illegal. Vertical agreements (including presumably RPM) are only susceptible to infringe the law if they have "the object or effect of significantly preventing, restricting or distorting competition in any market for goods or services." As such the Malaysia competition regime seems to embrace an "effects-based" approach to RPM. This impression should, however, be qualified as follows.

First, vertical agreements between parties having each individually less than 25 percent market share in any relevant market relevant to the agreement are considered *not* to be significant (§3.4, Guidelines on Chapter 1 Prohibition). This safe harbor would presumably cover RPM practices between small market players, which in turn means that companies with significant market shares should be particularly careful.

Second, the Competition Commission ("MyCC") in the same Guidelines on Chapter 1 Prohibition has stated that (i) it would take a "strong stance against minimum RPM and find it anti-competitive" (shifting the burden of proof to the company in case of minimum RPM) and (ii) other forms of RPM (including maximum or recommended resale price) would also be deemed anticompetitive if they serve as a facilitator of downstream collusion.

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[5] CCS press release, Coca-Cola Singapore Beverages changes business practices in local soft drinks market following enquiry by CCS, http://www.ccs.gov.sg/content/ccs/en/Media-and-Publications/Media-Releases/coca-cola_singaporebeverageschangesbusinesspracticesinlocalsoftd.html.

To date, there has been no decision or case law on RPM in Malaysia, so guidance is fairly limited. It is, however, in the context of this new, untested legislation that, according to Malaysian media, the Federation of Malaysian Consumer Associations filed with MyCC a complaint in May 2012 against Nestlé Malaysia for fixing retail prices. According to the federation, under its "Brand Equity Protection Policy" ("BEPP"), Nestlé fixed the prices at which retailers should resell its products.

Nestlé Malaysia reportedly issued a statement that the resale price restrictions under the BEPP were limited to "loss leader selling" and "promotional loss" activities by some retailers and thus were justified. Nestlé also applied to MyCC for an individual exemption to exclude its BEPP *as a whole* from the application of the Malaysian Act.

On February 25, 2013, MyCC announced that the BEPP pricing policy was likely to infringe Section 4 of the Malaysia Competition Act (which prohibits anticompetitive agreements) as it essentially prevented resellers from setting their prices independently, potentially leading to increased prices for consumers. As reported in the press, after discussions with MyCC, Nestlé agreed to dismantle the pricing policy contained in its BEPP and also withdrew its exemption application.[6] Based on media reports,[7] it would appear that Nestlé intends to raise its concerns with the Ministry of Domestic Trade, Cooperatives and Consumerism, which it considers a more appropriate forum to review loss leader issues.

The situation in Malaysia therefore suggests that, against the backdrop of an "effects-based" approach, MyCC will presume that minimum RPM is on balance anticompetitive, and that exemptions seeking to immunize entire pricing policies displaying elements of minimum/fixed RPM will not be available.

2. Indonesia

The Law on the Prohibition of Monopolistic Practices and Unfair Competition ("Indonesia Competition Law") has been in effect since 2000 and covers a wide range of competition issues. Under the general heading of "Price Fixing," it specifically prohibits price-fixing agreements between competitors (Article 5) as well as minimum RPM, in so far only as it causes "unfair competition" (Article 8). Therefore, here again the language of the law is suggestive of an "effects-based" approach.

Furthermore, in 2011, the Indonesian competition authority—the Business Competition Supervisory Commission, or KPPU in its Indonesian abbreviation—issued Guidelines on RPM (No 8/2011). The Guidelines state that minimum RPM is prohibited if it may cause unfair competition, and that suggested resale price is permissible.

The KPPU has only considered very few RPM cases to date. The ultimate outcome of the most recent RPM case is encouraging, but the process leading to this outcome is less reassuring. This case involved Semen Gresik, a major cement manufacturer in East Java. Semen Gresik and its distributors in East Java agreed to specified resale prices. The KPPU found that Semen Gresik

[6] MyCC's press release, Nestle Withdraws Exemptions Application, http://www.mycc.gov.my/archive.asp?page=25feb2013.

[7] See, for instance, http://www.freemalaysiatoday.com/category/business/2013/02/26/nestle-to-take-up-pricing-policy-issue-with-ministry/ .

and its distributors had violated the RPM provisions of the Indonesian Competition Law.[8] However, the Supreme Court in 2008 partially dismissed the KPPU decision. The court considered that KPPU's interpretation of the RPM prohibition was too rigid, and that the pricing arrangement did not cause unfair business competition. In reaching its decision, the Supreme Court took into account a wide range of factors demonstrating that the pricing practice did not harm the cement business of other brands and therefore had no restrictive effect on competition.

Another concern regarding the KPPU's enforcement style also stems from the following. The KPPU has been criticized for using, in RPM as well as other prohibited agreements cases, indirect, sometimes circumstantial evidence (such as mere economic or statistical analysis) rather than direct evidence (such as agreements or other contemporaneous records of the parties) to establish its cases. Thus, in one case the KPPU found evidence of RPM in a situation where the supplier penalized resellers who were selling "below price," while the resale contract itself did not provide for a mandatory minimum resale price. Businesses should therefore not derive major comfort from the fact that the KPPU bears the burden of proof.

C. The "Dominance-based" Approach—Vietnam, Thailand

Some jurisdictions seem to rely more heavily on the tool of market dominance to design their approach towards RPM enforcement. Although this may result in a more stringent outcome, this approach has the benefit of somewhat increased legal predictability. I review the cases of Vietnam and Thailand to illustrate this point.

1. Vietnam

Under the 2005 Vietnam Law on Competition ("Vietnam Competition Law"), RPM is captured through two different angles, with the parties' market share being a critical element of appreciation in each case.

First, directly or indirectly fixing the price of goods and services is prohibited if the parties to such an agreement combine a market share of 30 percent or more in the relevant market (Article 8(1) and 9(2)). The agreement may be exempt if the parties can prove that it is aimed at reducing costs (through e.g., increased efficiencies, uniform quality standards, and/or technological progress) and that it benefits consumers. The efficiency argument is hardly available for agreements relating to pricing. Therefore the exemption may not be easy to obtain in relation to any form of RPM.

Second, under the abuse of dominance provisions, an enterprise(s) in a dominant market position is explicitly prohibited from fixing a minimum resell price for goods or services causing a loss to consumers (Article 13(2)). Dominant market position is reached with a market share as low as 30 percent.[9] This is a strict prohibition with no exemption.

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[8] Full decision *available* in Bahasa Indonesia at: http://www.kppu.go.id/docs/Putusan/putusan_semen_gresik.pdf.

[9] In addition, where a group of enterprises are acting together, they are deemed to be in a dominant market position when they have 50 percent (two parties), 65 percent (three parties) or 75 percent (four parties) of market share.

There is no case law to date in Vietnam regarding RPM and no guidance is available. However, it would appear on the face of the law that Vietnam has adopted a strict approach towards minimum RPM practices adopted by dominant players. Other forms of RPM may receive the benefit of an exemption, but it would be very difficult to prove for the concerned operator. Although more restrictive towards companies enjoying a sizable market share, this approach has the benefit of increased legal certainty. However, I note that the entire Vietnam Competition Law is presently under review. We can expect to see more guidance regarding RPM in the context of this reform.

2. Thailand

Thailand is another example of a regime where the parties' market share is a determining factor in assessing the permissibility of RPM. Indeed, under the Thailand Trade Competition Act, RPM appears to be mainly captured under the abuse of dominance provisions (Section 25): a dominant business operator[10] is prohibited from unreasonably maintaining price levels; it is also prohibited from unreasonably imposing conditions to other business operators (including its customers), for instance in restricting opportunities related to purchasing or selling goods. No exemption is available. However, the "unreasonable" element would be considered in assessing the legality of the conduct. This was discussed in a case involving both tying and forms of RPM in the spirits and beer industry.[11] The practices were found abusive and had to be put to an end.

The provisions on collusion (Section 27) prohibit business operators to agree to fix prices regardless of market share, and agreements relating to pricing are not susceptible to be subject to an application for exemption to the Competition Commission even if they are "commercially necessary." These provisions in any event seem to be aimed primarily at agreements between competitors, not RPM.

D. The "Per Se Illegal" Approach—Taiwan

Taiwan is the most stringent regime of all in Asia, maybe in the world. This may change although there is no indication on the timetable.

RPM is strictly prohibited under Article 18 of the 1992 Taiwan Fair Trade Act. The law states explicitly that when an enterprise supplies goods to resellers, directly or indirectly, the resellers shall be allowed to decide their resale prices freely. Any agreement contrary to this provision shall be void and may result in civil and administrative sanctions.[12] RPM is a *per se*

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[10] This determination is subject to the views of the Competition Commission of Thailand. General practice has been that a business operator is dominant if it has a more than 50 percent market share and a turnover over THB1 billion (around U.S.$32 million), or it is one of the top three business operators combining a 75 percent market share and a turnover over THB1 billion.

[11] Boon Rawd Brewery Company Limited, the first brewery in Thailand and maker of Singha Beer, filed a complaint to the Commission against Suramaharasdr, the maker of Chang Beer, for unfair trade practices including forms of RPM and tying. *See* Suthatip Jullamon, *Comparison Study on Practices of Business Operators with Market Domination, Section of the Competition Act B.E. 2542 (1999)* and *United States Antitrust Law Regime*, 2(14) THAILAND L.J. (Fall 2011).

[12] Sanctions include the requirement to cease or rectify the conduct within a prescribed time, and administrative penalty of up to NTD 25 million (around U.S.$850,000), increased to NTD 50 million (around U.S.$1.7 million) in case of non-compliance.

violation regardless of the market power of the business, the status of competition in the market, the actual effects on the market, or whether there are any other justifications.[13] The law also does not distinguish on the basis of the types of arrangements in dispute; as a result the prohibition applies equally to both minimum and maximum resale price restraints.

Certain limitations to the prohibition under Article 18 can be observed. First, unlike the other provisions of the Taiwan Fair Trade Act, Article 18 only covers restrictions on resale of goods, to the exclusion of services. This may change as part of the current reform of the law. Second, the prohibition does not apply to genuinely recommended resale price policies. Thus, an upstream operator is not deemed in violation by simply affixing a price tag on the product in the form of a list price, a suggested price, or a specific range of resale prices. The Taiwan Fair Trade Commission ("TFTC") however will look closely at a range of evidence in order to determine whether the distributor in fact felt pressured to follow, and in fact followed, the price recommendation. Third, Article 18 also does not apply to genuine consignment contracts. This is normally tested by reference to who bears the economic risk and whether title passes.

In deciding the level of the fine, the TFTC uses a number of factors, including: the motives, anticipated improper gains, the size of the operator, the revenue and the market position, the profits generated from the illegal conduct, the degree of competition in the relevant market, and the respondents' cooperation with the investigation. The level of fines is to date relatively modest.

In over 20 years of implementation of Article 18, there have been numerous (over 50) cases brought by the TFTC. In the past year alone, there have been nine RPM cases. These have involved industries such as food, gas water heaters, outdoor equipment, bicycles, and books. Fines imposed in eight of the nine cases were not high (not more than NTD 200,000, i.e. around U.S.$6,700). However, a fine of NTD 3.5 million (around U.S.$120,000) was imposed on Giant Bicycles for stipulating clauses in the distribution contract to restrict the freedom of its distributors to determine their resale prices as well as to sell the products online.

Previous to these cases, there have been a number of other examples of RPM enforcement in Taiwan. These cases involved a number of sectors, types of conducts, and offenders (both domestic and foreign respondents). Examples include the following industries:

- cosmetics (restrictions on resale price and promotional activities, five companies given ten days to release their distributors from the restrictions);
- contact lenses fluids (Lee Min Optical fined for repeated offense in 1996 and 1999 involving minimum RPM and pro-active monitoring);
- reference books (Lung Teng Cultural Corporation imposing limitation on available discounts, and fined NTD 0.5 million);
- dairy products (Feng Ho Corporation fined for maximum RPM imposed on Yoplait brand products; the argument that the policy was only in place for the time of a promotion period was rejected);

[13] The law contained an exception for "daily products" used by general consumers and published as part of a list issued by the competent authority. This exception was eliminated in 1999.

- soybean and rice milk products (Xiang Mei Foods imposing fixed RPM and fined NTD 1 million without the need to show anticompetitive effects);
- automotive (minimum resale price on Yamaha motorcycles sold by general distributor Cheng Yeh);
- baby milk formula (Enfalac Infant Formula, with Bristol-Myers Squibb and Nestlé fined NTD 4 million and NTD 2 million respectively; the argument that the prices were only recommended and non-binding was rejected); and
- salt and its derivatives (testing the notion of consignment contract, with a fine of NTD 1 million against Taiwan Salt Industrial Corporation).

The latest proposals of the amendment to the Taiwan Fair Trade Act suggest a more nuanced approach to RPM, under which RPM would be assessed using the “rule of reason” method. The amendment has been submitted to Taiwanese lawmakers for approval although there is no indication as to when the vote might take place. Such a change would narrow disparities in the law relating to RPM across the region. Until the change is confirmed, significant caution should be taken when negotiating distribution contracts in Taiwan.

E. Hong Kong

Although the Hong Kong Competition Ordinance (“HKCO”) was adopted in June 2012, its substantive provisions are not expected to come into force until the end of 2014 or beginning of 2015. However this transition period is an opportunity for companies to review their business practices and build awareness on this new law including RPM, which is a widespread business practice in Hong Kong.

The HKCO contains a first and second conduct rule. The first conduct rule prohibits a company from making or giving effect to an agreement or engaging in a concerted practice with an object or effect to prevent, restrict, or distort competition in Hong Kong. The fixing of purchase or selling prices is prohibited and considered to be a serious breach of the law. *Prima facie*, if RPM were agreed in Hong Kong when the CO came into force, this would appear to be a *per se* violation of the first conduct rule. However, this interpretation is debatable and guidelines on the HKCO are yet to be produced; in particular, there may well be exemptions provided for vertical agreements and it remains to be seen whether such exemptions, if any, would cover pricing conduct.

The second conduct rule prohibits a business with a “substantial degree of market power” from abuse of that power by engaging in conduct which has the object or effect of preventing, restricting, or distorting competition in Hong Kong. A company may also find itself in breach of the rules on RPM if it has used its position of substantial market power to fix prices in its distribution agreements.

Sanctions for breach of the conduct rules will be civil in nature, including a disqualification order preventing a person from being a director of a company and a fine of up to 10 percent of the annual local turnover during the period of the breach up to a maximum of three years.

Until the uncertainty on the Competition Commission's position towards vertical agreements is lifted, it is highly recommended to take a conservative approach towards RPM and to stay away, at a very minimum, from minimum- and fixed-resale price practices. Companies should monitor closely the issuance of draft guidelines as they may reveal the Commission's chosen policy and will also provide an opportunity to comment.

III. THE WAY FORWARD

As illustrated above, the region displays a variety of uncoordinated approaches towards RPM as well as a fair amount of hesitation on the part of the competition authorities and regulators as to what rules to apply, and how to apply them. This is no surprise in light of (i) the high degree of fragmentation and the different stages of legal and economic development observed across the region, but also (ii) the intense debate and soul-searching regarding RPM in recent years in the most advanced jurisdictions including the European Union and the United States. RPM is, admittedly, one of the most controversial areas of competition law in the world.

Yet, for the sake of legal certainty (often correlated with increased foreign direct investment), it is important that each jurisdiction quickly comes to terms with its own approach. Answers ought to be found in light of the objectives policy makers choose to assign to competition law in their respective jurisdictions.

By way of example, Europe has, over the years, assigned successively three main objectives to its competition regime: in a first phase, single market integration; in a second phase, the promotion of free competition and the defense of the competitive process; and, more recently, consumer welfare (with market integration remaining a strong factor). In the United States, consumer welfare is admittedly the main objective underpinning the Sherman Act. The determination of this objective may have significant implications over various aspects of competition policy, including towards RPM.

It is suggested that in emerging competition regimes, while the defense of consumer interests is often listed, the promotion of national economic development[14] is the first and most important objective of competition law. If this is correct, increased legal certainty and reduced regulation costs should be viewed as paramount, maybe at the expense of an accurate but costly economic analysis of the net effects of RPM policies. The impact on RPM would be that these jurisdictions would gravitate towards an "effects-based" model (the pure *per se* illegal model having now admittedly been widely rejected), but with strong built-in protections to afford as much legal certainty as possible (e.g. via safe harbors or explicit regulations listing permissible or impermissible conduct).

Increasingly, also, the question of the objectives of competition laws should receive a regional rather than purely national response, in light of the strengthening integration of Asian markets. Thankfully, institutional tools are available to operate this convergence, whether within UNCTAD or, more importantly, as part of the ASEAN nations' commitment to an ASEAN

[14] The Malaysia Competition Act for instance encompasses all the above objectives: "An Act to promote economic development by promoting and protecting the process of competition, thereby protecting the interests of consumers and to provide for matters connected therewith." It will be a matter of time before we know which aim is considered the most important of all.

Economic Community by 2015. This process is expected to bring about more coordination, convergence, and consistency on implementing competition policy, including RPM.

Finally, whether within institutional frameworks (ICN) or outside, competition authorities increasingly look to each other for guidance as enforcement develops. China's lead this year on RPM may inspire more enforcement actions across the region in the near future. It will be interesting to see whether more consistent solutions start to emerge. For now, though, companies need to ensure they are compliant within the ambit of vastly different approaches to RPM. I will address this final point in turn.

IV. MANAGING UNCERTAINTY

The policy issues highlighted above bring about numerous practical complexities for businesses managing operations regionally, often through multiple distribution channels and models. For entrants into these new markets, the reliance (and dependence) on local distribution networks is significant and risky. It may justify the desire to exercise close control over pricing conduct. This desire is often, but not only, driven by commercial considerations—the ever more complex web of regulations in the entrant's home jurisdiction also imposes major legal constraints.

Further, the rise of online selling adds a layer of difficulties. Not only are there no geographical boundaries in internet sales, but also the internet is the forum where the most aggressive pricing conduct occurs. It is therefore not surprising that companies attempt to control closely the distribution of their products in those new markets and are worried about compliance.

Several approaches can be considered to be compliant and commercially effective at the same time:

A. The Stringent Approach

One approach is to embrace on a region-wide basis the most stringent regime in the region, namely Taiwan's. This would mean that there could be no control over the resellers' price whatsoever. Although legally safe, this approach may expose companies to be undercut in price by their resellers on a widespread scale and may not be commercially viable. This article has also shown that Taiwan may be an outlier and that the position may not sustainable over the long run. Therefore I do not recommend this approach.

B. The Custom-built Approach

At the other end of the spectrum, a completely custom-built approach would be to use separate distribution agreements for each jurisdiction. This way, compliance could be ensured and maximum flexibility would be afforded. However, such a complex approach would carry high administrative costs and would require constant updating. Also, considering that some jurisdictions appear to have similar approaches, it may not be necessary.

C. The Tiered Approach

Another, more workable solution, is to create a "default master distribution agreement" usable in a maximum number of jurisdictions and integrating the key principles identified in this article as underpinning most regimes. These principles are mainly two-fold: (i) companies should

stay away from minimum/fixed RPM, regardless of their market share; (ii) when they have significant market share, any pricing policy falling short of minimum/fixed RPM (recommended/suggested resale price, minimum advertising pricing policy, etc.) should be handled with great care. Local adjustments would then be made to the master agreement as required, (i) to reflect regimes which are outliers (e.g., Taiwan or Singapore), and (ii) to reflect local specificities as needed (e.g., unusual definition of market dominance, availability of application for an exemption).

IV. CONCLUSION

The business and legal competitive landscape in Asia is a fast-evolving picture. While it is hoped that the near future will bring about more convergence and consistency across Asia, it is important to remain informed as to developments on an on-going basis. It is also required to have a high degree of commercial and legal flexibility to maintain performance without being trapped.