Antitrust Regulation of Loyalty Rebates in China:

How Groundbreaking Is the *Tetra Pak* Decision?

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The *Tetra Pak* Decision

- A landmark of the Chinese Anti-Monopoly Law (AML) public enforcement
  - the SAIC: non-price-related cartel cases and abuse cases
    - issued on November 9, 2016
    - almost five years of investigation
    - largest amount of fine from the SAIC: $97 Million
  - introducing loyalty rebates into the AML, by invoking a catchall clause
The Loyalty Rebates Analysis in Tetra Pak

› Identifying two types of problematic rebates:
  • retroactive rebates
  • individualized rebates

› How they can be anticompetitive:
  • the loyalty-inducing nature
  • the leverage of market power from non-contestable to contestable share of demand

› Three aspects of the market circumstances:
  • customer dependence, tying, and the combo-implementation of rebates schemes
Appraising the *Tetra Pak* Analysis (I): Merits

- An effects-based approach looming large
  - the three-fold analytical framework
    - introducing the notion of loyalty-inducing effect;
    - ascertaining the anticompetitiveness, based on the leverage theory and considerations on the market conditions;
    - looking for empirical evidence to confirm the existence of anticompetitive effects
  - effectively reorienting the analytical focus on abuse cases under the AML
  - against the backdrop of the Supreme Court judgment: *Qihoo v Tencent* (2014)
Appraising the *Tetra Pak* Analysis (II): Problem

- The insufficiency of contextualized effects-analysis
  - the lack of substantiation in the second and third fold of the analysis
  - practically *per se* illegality rule on individualized rebates
  - the absence of efficiency justification
Appraising the *Tetra Pak* Analysis (III): Cause of the Problem

› An ambiguous and underdeveloped theory of harm

› The tying analogy?
  - *Economides* (2012); *Elhauge* (2009)
  - applies to the multi-product scenario: package sold at discounted price
  - supplies the leverage theory

› Predatory pricing?
  - *Hovenkamp* (2005); *Klein & Lerner* (2016)
  - rebates as a form of discriminatory pricing
  - pricing below costs → excluding competitors
  - provides the as-efficient-competitor (AEC) test

› Exclusive dealing?
Constructing a Theory of Harm on Loyalty Rebates (I)

› A solution: exclusive dealing, synthesized with the other two analogies
  - Salop (2016); Wright (2013); Melamed (2006); Spector (2005)
  - focusing on the conditionality of rebate schemes:
    - loyalty rebates=exclusive dealing with profit-sharing
    - above-cost pricing can still be anticompetitive
  - requiring the assessment of contextualized effects
  - utilizing the leverage theory and the AEC test
Constructing a Theory of Harm on Loyalty Rebates (II)

> What the SAIC should do

- a more nuanced look at exclusive dealing conducts
- be careful when drawing inspirations from EU case law
- more fundamental concerns: selective and inadequate enforcement
Thank you!

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