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Is There Gold at the End of the
Rainbow?**

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I. INTRODUCTION

This paper revisits the economics of resale price maintenance (“RPM”), comments on the extent to which economic principles were embraced by the Shanghai High People’s Court in ruling the first RPM private litigation in China involving Johnson & Johnson and Rainbow (“*Johnson & Johnson*”), and discusses potential implications for the use of economic analysis in future RPM cases in China.

Resale price maintenance refers to a form of vertical arrangement between a producer of a product and its downstream distributor, in which the producer sets bounds on the final price charged by the distributor. There are various types of RPM, for example setting maximum retail prices or minimum retail prices. An RPM provision that either leads to a fixed retail price or restricts the minimum retail price often attracts the attention of competition authorities.²

Economic theory tells us that RPM can lead to both pro-competitive efficiency benefits and anticompetitive harm. In practice, the debate among economists often lies in whether an RPM provision would result in an overall adverse effect on competition and consumer harm. Naturally, one would expect economic analysis to play an important role in antitrust cases involving RPM provisions. That said, most jurisdictions, including the European Union³ and the United Kingdom⁴ (although not the United States⁵), still consider RPM to be “hard-core” price-fixing conduct. As such, the role of economic analysis has been limited in practice.

Similar to other jurisdictions, the Anti-Monopoly Law in China (“AML”) prohibits certain types of vertical monopoly agreements, which capture RPM.⁶ The AML defines “monopoly agreements” as agreements, decisions, or other concerted practices that eliminate or restrict competition.⁷ Up to now, there has been no clarification of the standard of proof required to show that an RPM agreement constituted a vertical monopoly agreement. This leads to a practical question: Will China follow in the footsteps of the European Union and the United

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² Unless otherwise specified, “RPM” in this paper refers to a provision that either leads to a fixed retail price or restricts the minimum retail price.

³ European Commission Guidelines on Vertical Restraints (OJ C 130/1, 19.5.2010), ¶ 48.

⁴ 2003 OFT vertical Guidelines:

http://www.of.gov.uk/shared_of/business_leaflets/ca98_guidelines/of419.pdf.

⁵ In the U.S. *Leegin* case, the Supreme Court of the United States of America rejected the *per se* illegality approach that had been historically used by the United States – *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*, 551 U.S. (2007).

⁶ Article 14 of the AML prohibits any monopoly agreements among business operators and their trading parties that lead to a fixed price of commodities for resale to a third party, and the agreements that restrict the minimum price of commodities for resale to a third party.

⁷ AML, art. 13(2).

Kingdom which effectively consider RPM *per se* illegal (although it is possible to raise a defense), or will it follow the United States which leaves more room for economic analysis? In this regard, a mixed message emerges from the ruling by the Shanghai High People's Court on the *Johnson & Johnson* case, the first RPM private litigation case in China.

In the landmark *Johnson & Johnson* judgement, the Shanghai High People's Court expressed the principal view that it is necessary to demonstrate that an RPM agreement would have a significant adverse effect on competition in the relevant market in order to show that such an agreement constitutes a vertical monopoly agreement. However, as the *prima facie* concern, the Shanghai High People's Court alleged the adoption of the RPM provision by Johnson & Johnson reduced the ability of its distributors to set resale prices flexibly.

The judgement does not present any substantial economic evidence supporting that the price and/or non-price competition between Johnson & Johnson and its direct rivals in the relevant market have been adversely affected as a result of the alleged RPM. This seems to suggest that too much weight is being placed on competition among Johnson & Johnson's distributors, and thus the Shanghai High People's Court may have set a test that is almost impossible for Johnson & Johnson to meet in defending itself.

The economic arguments put forward by the Shanghai High People's Court, together with the recent decisions by the China's National Development and Reform Commission on certain RPM agreements,⁸ raise a question: How serious are the courts and competition authorities in China going to be when undertaking economic analysis on these types of cases going forward?

Fortunately, in the *Johnson & Johnson* judgement, the Shanghai High People's Court does set out a framework that it believes allowed the economic arguments to be debated. This suggests that there is scope for putting forward credible economic arguments supported by factual evidence. It will be interesting to see whether such an opportunity will be explored in any future RPM cases in China.

II. AN OVERVIEW OF THE ECONOMICS OF RPM

Conceptually, there is little debate that RPM can lead to both pro-competitive efficiency benefits and anticompetitive effects. The pro-competitive benefits include the following.

- ***Avoiding the “free-rider” problem:*** RPM can be used to protect retail margins in order to better align incentives of suppliers and retailers for the retailers to provide optimal pre-

⁸ On February 19, 2013, the National Development and Reform Commission fined two distilleries 449 million RMB (EUR 54 million) for RPM. The parties, Kuizhou Moutai and Yibin Wuliangye, were alleged to have engaged in RPM and financially penalized distributors who sold their products at prices lower than those they had set. On August 7, 2013, the National Development and Reform Commission fined six companies 668 million RMB (EUR 82 million) for resale price maintenance. In a statement, the National Development and Reform Commission says the companies—a mix of foreign and domestic baby milk producers—colluded to set minimum resale prices with distributors. The authority says the producers ensured the prices were adhered to by imposing sanctions on the distributors that did not comply, including direct fines and refusal to supply. The commission says the companies' actions led to inflated prices for baby milk powder and substantially reduced competition in the market. The recent decisions by the National Development and Reform Commission in relation to some RPM conduct provide no additional guidance with regard to the use of economics mainly due to limited transparency.

sales service. In the absence of margin protection, these services would be subject to erosion due to free-riding by non-frills dealers offering the same products without the services. Arguably, RPM makes suppliers more competitive against rivals and stimulates competition between rival brands.

- ***Helping with product quality certification:*** RPM can also be used in the product markets with less tangible services in which the role of RPM is to provide a quality certification. The idea behind quality certification is that the manufacturer would like its products to be distributed by a particular retailer who serves as a certificate of high quality and style to consumers. RPM serves as a tool to guarantee this retailer a margin necessary to provide certification or quality reassurance.
- ***Ensuring retailer contribution to product sales and services:*** RPM can help ensure a desired level of investment in retail services. Even absent free-riding, retailers may not be inclined to make the level of investment in service that would maximize the overall competitiveness of a supplier's products. Retailers may be more inclined to invest in service when they face the risk of losing an RPM-enhanced retail margin.

On the negative side, RPM may be used to facilitate tacit coordination at the supplier or the retailer level, or at least soften price competition, and lead to an increased ability to extract the monopoly or a higher price. Concerns (or theories of harm) include the following.

- ***Facilitating tacit collusion:*** In theory, RPM may facilitate collusion between *suppliers* via enhancing price transparency, as increased price transparency may make it easier for suppliers to monitor any deviation from a collusive agreement.⁹ In order for RPM to facilitate collusion, the market structure should be such that, absent RPM, it would be difficult to sustain collusive outcomes, primarily due to a lack of transparency, but that the market structure enables firms to collude once RPM is in place.
- ***Increased ability to extract monopoly or higher prices:***¹⁰ Competition concerns may arise from RPM if the manufacturer is a monopolist (i.e. it is the only manufacturer of the product for which there are no substitutes) as RPM can be used to solve the monopolist's "commitment problem" whereby it cannot credibly commit not to maintain a high price for all distributors it deals with. This concern is relevant when the contracts between the monopoly manufacturer and distributors are not publicly observable and the monopolist manufacturer deals with a competitive downstream market.¹¹

⁹ It may also facilitate collusion between *buyers* (distributors) as it eliminates intra-brand competition. If distributors are sufficiently strong or well organized, they may be able to encourage one or more suppliers to set the resale price above the competitive level, enabling them to reach or maintain a collusive agreement.

¹⁰ A monopoly price is above the competitive price level as the monopolist manufacturer is the only manufacturer of the product and therefore faces no (or very limited competition) for its product.

¹¹ In theory, RPM may reduce the pressure on margins at the manufacturer level, resulting in higher prices. Specifically, prior to the introduction of RPM, the contracts are secret between the manufacturer and retailer, and the manufacturer cannot commit to one retailer not to offer a lower price to his competitor, which enables it to set a lower retail price and capture downstream demand. This prevents the manufacturer from using contracts to obtain the monopoly price (and therefore extract the full monopoly surplus). RPM solves this commitment problem by

- **Soften competition and lead to a higher price:** RPM may result in an increase in the market price as it prevents distributors from reducing their sales price below the fixed or minimum price. There is less of an incentive for suppliers to lower the price charged to distributors as they are unable to pass on the price decrease to end consumers due to RPM and benefit from increased sales volumes.
- **Foreclose rival manufacturers:** If implemented by a manufacturer with market power, an RPM provision may foreclose competing manufacturers, particularly where the use of RPM increases the margins earned by distributors on a given brand, thus encouraging them to prefer that brand over rival brands.¹² Various conditions need to be met for this concern to be credible. Among others, the affected products should be differentiated and the threat of de-listing should be legitimate.¹³
- **Reduce dynamism in downstream market:** In theory, RPM may have a negative effect on dynamism at the distribution level, for example by preventing the entry and expansion of distribution formats based on low prices.

Generally speaking, the restrictive effect of RPM on pricing flexibility within a brand (i.e. intra-brand competition) should not in itself be assumed to be anticompetitive, particularly if there exists evidence suggesting that rivals brands are able to compete effectively against one another both on price and non-price factors (i.e. inter-brand competition). The extent to which an RPM agreement would substantially reduce inter-brand competition, and the extent to which the same agreement may also generate procompetitive efficiency benefits, are two important empirical questions, which require careful consideration of the relevant facts and evidence on a case-by-case basis.

A robust economic assessment often starts with identifying realistic competition concerns based on the facts of a given case; in other words, the mechanisms through which an RPM could potentially harm competition (economists often refer to this as identifying the theory of harm). A properly defined theory of harm helps guide the key assessment, namely the extent to which a reduction of price competition within a brand (resulting from RPM) may lead to a reduction of price and/or non-price competition between rival brands. Finally, it is necessary to assess whether there are pro-competitive efficiencies resulting from RPM and the extent to which these efficiencies may be sufficient to offset the anticompetitive harm.

I now turn to the *Johnson & Johnson* case and examine how economic principles were used by the Shanghai High People's Court in this landmark ruling.

allowing the monopolist manufacturer to guarantee a monopoly price to all distributors as distributors are no longer able to pass on a lower wholesale price in the form of a lower retail price. As a result, the final prices will be higher.

¹² Market power refers to the ability of a firm to profitably raise price above the competitive level. A firm with a high market share that faces limited competition from other firms (e.g. because their products are highly differentiated or they face capacity constraints) and weak buyers (e.g. with limited negotiation strength) could be deemed to have market power.

¹³ Products are differentiated where, although being used for a similar purpose, they are substantially different from each other. Product differentiation may be the result of a number of factors including quality, design, functionality, branding, and advertising. For example, a family car and a sports car are differentiated types of cars.

III. ABOUT JOHNSON & JOHNSON

Johnson & Johnson manufactures and distributes medical devices including Ethicon brand staples and surgical sutures. It had had a 15-year business collaboration with the plaintiff, its distributor Beijing Ruibang Yonghe Technology and Trade Co., Ltd. (“Rainbow”), which sells Johnson & Johnson Ethicon brand staples and surgical sutures in dedicated geographic territories in Beijing.

In March 2008, Johnson & Johnson accused Rainbow of offering a lower price to the People’s Hospital than that set by the distribution agreement, without Johnson & Johnson’s permission, and selling outside of the agreed distribution area. On that basis, Johnson & Johnson withheld Rainbow’s deposit of RMB 20,000 and terminated its distribution rights to a number of hospitals. Rainbow in turn accused Johnson & Johnson of refusing to supply its products to meet orders after August 2008. On April 21, 2010, Johnson & Johnson filed a complaint against Rainbow to the Shanghai Pudong District People’s Court regarding an outstanding payment due from Rainbow and sought the full amount and interest from Rainbow. On November 1, 2010, the district court ordered Rainbow to pay Johnson & Johnson the outstanding purchase payment of RMB 2.9 million and the related interest payment.

In turn, Rainbow filed a complaint against Johnson & Johnson to the Shanghai Intermediate People’s Court, arguing that the defendant had engaged in a vertical monopoly agreement via adopting an RPM provision. In May 2012, the Intermediate Court dismissed Rainbow’s claims on the basis of insufficient evidence. Rainbow then appealed to the Shanghai High People’s Court, which eventually ruled in its favor on August 1, 2013.

The alleged RPM provision, which was removed from Johnson & Johnson’s distribution agreement from 2009 onwards, was described along the following lines in the Shanghai High People’s Court judgement.

- ***The alleged RPM provision was adopted in conjunction with other exclusionary terms:*** Johnson & Johnson does not engage in direct sales in China and all products are supplied via its dedicated distributors, which are not allowed to sell similar products from rival suppliers. Johnson & Johnson allocates authorized distribution areas based on hospitals, and its distributors are only allowed to sell to certain hospitals listed in each distribution agreement.
- ***Distributors are expected to take up service responsibilities:*** Johnson & Johnson’s distributors are required to offer certain sales-related services; for example, to recruit sufficient personnel to assist Johnson & Johnson to promote its products and to assist organizing regular sales and marketing activities, including professional training and various levels of medical research conferences. Distributors are also required to take on some market development responsibilities; for example, to obtain and manage orders and sales statistics, to establish a good relationship with hospitals, and to assist organizing marketing events.

Although not explicitly stated, the judgement also indicates that hospitals in China procure surgical sutures via a tender process. Hospitals often select one distributor for all surgical sutures products under one brand. In choosing a distributor, hospitals consider the price offered

by the distributor for the product, their historical business relationship with the distributor, the services provided by the distributor, and the credit status of the distributor, among other factors.

With the above background in mind, I now discuss the concerns raised by the Shanghai High People's Court and how they were assessed economically.

IV. COMMENTS ON THE SHANGHAI HIGH PEOPLE'S COURT'S ANALYSIS

As a general principle, the High People's Court took the view that vertical monopoly agreements are less likely to lead to competition harm than horizontal agreements. Hence the effect of eliminating or restricting competition forms a necessary condition for a vertical agreement to constitute a monopoly agreement. This view is consistent with modern industrial economic theory that recognizes that most vertical agreements do not directly affect competition between suppliers at the same level of supply chain. Any anticompetitive harm, either via tacit collusion or foreclosure, must be indirect and, as a result, less likely to arise.

The Shanghai High People's Court concluded that the relevant market was the market for the supply of surgical suture products in Mainland China.¹⁴ In the context of this relevant market, the Shanghai High People's Court ruled out the possibility that the alleged RPM may facilitate tacit collusion on the basis of a lack of evidence. Instead, it considered that the alleged RPM could lead to anticompetitive effects mainly through softening competition. Its rationale was that RPM prevented Johnson & Johnson's distributors from setting prices flexibly in competing with rival suppliers of surgical sutures in China.

It is worth noting that an RPM provision almost by definition softens price competition within a brand among distributors, but it could be designed to intensify non-price competition in order to ensure an optimal level of service offer. As described in the judgement, hospitals do value sales services and other non-price aspects of an offer in making their purchase decisions. As such, the lost flexibility in distributors' price setting for Johnson & Johnson's products in itself cannot be assumed to automatically lead to an overall softening in competition in the relevant market.

It is necessary to assess whether there is sufficient inter-brand competition to maintain a competitive level of price and quality of service with the alleged RPM in place. The Shanghai High People's Court may have attempted to address this question properly as the judgement does set out a clear analytical framework based on relevant economic questions. Nonetheless, the discussions in the judgment in relation to each key question under its framework suggest ample room for further development of the relevant economic assessment.

A. Is the Current Market Sufficiently Competitive?

First, the Shanghai High People's Court considered that the level of competition between rival sutures suppliers (i.e. inter-brand competition) in the current market was a primary factor that needed to be examined in assessing the RPM agreements. The Shanghai High People's Court suggested that RPM is unlikely to give rise to competition concerns if the upstream market is

¹⁴ The Shanghai High People's Court correctly recognizes that the Hypothetical Monopolist Test (the HMT) provides an analytical framework. The principles of the HMT are the assessment on demand-side and supply-side substitution. In practice, it may not be necessary to conduct an empirical HMT test.

sufficiently competitive. In a sufficiently competitive market, the suppliers of surgical sutures in China would have a stronger incentive to lower the price charged to distributors even if all suppliers adopt the RPM agreements in dealing with their distributors. In other words, a sufficiently competitive market would undermine the price softening concern raised by the Shanghai High People's Court.

To assess whether the relevant market was sufficiently competitive, the Shanghai High People's Court claimed to have considered the following principal factors: market concentration, product substitutability, entry barriers, and downstream competition, among others that could affect the competition in the relevant market. The Shanghai High People's Court then reached the conclusion that the relevant market was not sufficiently competitive based on the following findings:

- there was limited buyer power since customers (hospitals) can pass on the surgical sutures costs to patients and it is a small part of the overall cost of surgery;
- suppliers exerted lower pressure on price competition since the brand was very important to users;
- barriers to entry were high due to regulation, brand stickiness, and the cost of building up the customer relationship; and,
- Johnson & Johnson has had a strong price-setting ability given that the price of its surgical sutures had remained largely unchanged for 15 years.

Despite referring to some useful factual evidence, the judgement does not address the key questions; for example, how different suppliers of surgical sutures compete on price and on services in the relevant market, the extent to which non-price factors (such as after-sales service and brand/quality investment) play an important role in the overall competition, how different suppliers distribute their products, whether an RPM provision forms a common practice among all suppliers in China, and whether the implied tender process and the regional exclusionary arrangement adopted by Johnson & Johnson in China change the dynamics of the competition between rival suppliers.

The answers to these questions would have helped to draw out a clearer picture on the competition dynamic between Johnson & Johnson and the competing suppliers of surgical sutures in China, which would have formed a sensible first step in assessing the potential impact on competition of the alleged RPM.

B. Does Johnson & Johnson Have Strong Market Power?

Second, the Shanghai High People's Court considered that having strong market power forms an important and necessary condition to conclude that an RPM agreement is a monopoly agreement. As to how strong the market power needed to be in order to make RPM anticompetitive, the judgement referred to firms' ability to set prices and control distributors.

The market power question essentially related to the level of competition in the current market. It created another opportunity for the Shanghai High People's Court to assess how price and non-price competition may take place in the affected relevant market, and to examine the

potential competitive constraints that rivals may impose on Johnson & Johnson with and without the alleged RPM.

Johnson & Johnson's market share in the relevant market inevitably became a point of heated debate. While finding that the submitted estimates of Johnson & Johnson's market share were not reliable, the Shanghai High People's Court concluded that Johnson & Johnson had strong enough market power.

To support its conclusion, the Shanghai High People's Court put forward various economic arguments supported with factual evidence. For example, the Shanghai High People's Court decision referred to the alleged fact that the prices of Johnson & Johnson's products have remained largely unchanged over 15 years to indicate Johnson & Johnson's ability to set prices in the relevant market. The judgement also referred to various distribution terms to demonstrate that Johnson & Johnson has a strong controlling power over its distributors,¹⁵ and stated that distributors face a constant risk in losing their rights to sell Johnson & Johnson products, suggesting that they have very weak bargaining power over Johnson & Johnson.

Unfortunately, most of the evidence put forward by the Shanghai High People's Court focused on the relationship between Johnson & Johnson and their distributors in China. This provides little insight on how Johnson & Johnson competes with other rival suppliers of surgical sutures in China. It is not clear whether there is any direct evidence suggesting that the level of inter-brand competition in the relevant market is limited, and that rivals simply cannot impose sufficient competitive constraints on Johnson & Johnson both in term of product price and sales service (and other non-price elements).

C. What is the Motive for RPM in This Case?

Third, the Shanghai High People's Court referred to the motive for the alleged RPM. The judgement suggested that the purpose for Johnson & Johnson to impose an RPM agreement was to maintain its pricing system and to avoid price competition in the current case, but it ignored the services and non-price responsibilities that distributors carry under the affected contract.

An RPM provision, on face value, restricts the price flexibility between distributors of the same branded product, but the motivation behind it is often to incentivize distributors to offer the optimal level of sales services and other non-price commitments to customers. Even if the benefits from such pro-competitive purpose were not substantial, this is not to say that the RPM was imposed in order to harm competition.

The emphasis on motives seems to risk heading towards a common trap, namely confusing the reduction of price competition between Johnson & Johnson's distributors due to the alleged RPM with the potential restriction on price and non-price competition between Johnson & Johnson and their rival suture suppliers. Too much prominence on the reduction of intra-brand competition could mask the fundamental importance of price and non-price

¹⁵ These distribution terms include: (1) its distributors cannot sell other rival brands' products; (2) distributors cannot sell within the territories (to the hospitals) authorized by Johnson & Johnson, and Johnson & Johnson only allocates one Johnson & Johnson distributor for each hospital; (3) Johnson & Johnson imposes strict supervision on its distributors; and (4) the contracts are signed each year.

competition between rival suture suppliers in China, which could lead to finding a potentially benign RPM provision as being anticompetitive (a so-called Type I error).

D. What is the Effect on Competition?

Finally, the Shanghai High People's Court examined the overall effect of the alleged RPM on competition by weighing the likely anticompetitive harm against the likely pro-competitive efficiencies.

1. Significant Anticompetitive Effects

The Shanghai High People's Court concluded that the RPM had led to a higher price due to the reduction of intra-brand price competition, and that it had also reduced the overall market competition via avoiding inter-brand price competition.

As to a reduction of intra-brand competition, the Shanghai High People's Court pointed out that there is a need for price competition even within a brand, but RPM prevents such competition from taking place. To support the proposition that intra-brand price competition is necessary it referred to the parties' common view that hospitals are not price sensitive when they choose between brands, but that they do consider prices when they choose distributors for one brand, ahead of many other factors including service level and credit history etc. It is not clear from the judgement why the elimination of intra-brand price competition results from the alleged RPM since Johnson & Johnson also adopts other exclusionary provisions in its distribution agreements such as regional exclusivity, which could have led to the same outcome.

As to a reduction of inter-brand competition, no substantial evidence was presented. It is a pity that a key question is left out, which is whether the lack of inter-brand competition results from the alleged RPM or simply from the strong market power that Johnson & Johnson has (as concluded by the court).

More importantly, the fact that the judgement does not look beyond intra-brand competition hints at a *per se* rule against RPM. This raises a further question: If it takes an effectively *per se* approach, why would the Shanghai High People's Court suggest looking into the effect of competition in the first place?

2. Limited Pro-competitive Efficiency Benefits

On potential pro-competitive efficiency benefits, Johnson & Johnson put forward economic arguments to the effect that the sales services are accomplished through the collaboration between suppliers and distributors in the affected market and distributors offer invaluable after-sales services. The alleged RPM encourages an increased level of "sales services," thus it stimulates demand or sales volume and leads to an overall increase in social welfare.

The Shanghai High People's Court rejected the defendant's claim that the RPM agreement led to an increased level of sales service and enhanced product quality and safety on the basis that defendant failed to present evidence to prove that the alleged RPM provided these benefits. It also pointed out that the responsibilities that distributors have under the distribution agreement do not cover activities that could increase product safety, and any specific services requirements.

The debate would be more interesting if there existed any factual evidence on the level of services (or other non-price) competition between Johnson & Johnson and its rivals with/without the alleged RPM. Moreover, evidence based upon misaligned contractual terms simply cannot be conclusive as the arguments can go either way. It can be difficult for a supplier to prescribe the optimal level of services required since it may not have direct access to end customers. It is also challenging for a supplier to monitor the level of services distributors offer to end-customers. These possible difficulties could have motivated Johnson & Johnson to adopt an RPM provision in the first place.

V. IMPLICATIONS FOR ASSESSING RPM CASES IN CHINA

Although the Shanghai High People's Court seems to have devoted a great deal of effort to consider an analysis of RPM in a way that went beyond a *per se* objection, its assessment does not draw out how in practice Johnson & Johnson competes with its rival suppliers and the extent to which the bidding processes may affect competition dynamics in the affected market. Other than pointing out that the alleged RPM reduces the distributor's ability in setting prices flexibly, there is no substantial evidence supporting or dismissing the importance of non-price competition in the affected market, and how the price and non-price competition between rival brands might be affected by the RPM.

An RPM provision by definition will soften price competition within a brand, but this does not automatically lead to a reduction of inter-brand price and it may well enhance non-price competition. The Shanghai High People's Court seems to set a very high standard of proof by giving too much weight to the importance of intra-brand competition, which would make it very difficult for Johnson & Johnson to defend itself in the first place. However, it is unclear a) what type of economic evidence in relation to inter-brand competition (price and non-price) was presented to the Shanghai High People's Court, and b) the extent to which any substantial and robust evidence was simply dismissed by the Shanghai High People's Court, which led to the clearly unbalanced focus on intra-brand competition in its decision.

Nonetheless, the Shanghai High People's Court has clearly indicated a willingness to consider economic analysis, which suggests that there is potential for more economic analysis in future RPM cases. It will be interesting to see whether other cases focus more on inter-brand competition in order to try and answer the questions that are critical to any sensible assessment of RPM agreements.