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I. INTRODUCTION

China just celebrated the 5-year anniversary of the Anti-Monopoly Law ("AML"), which took effect on August 1, 2008. The anti-monopoly enforcement agencies ("AMEAs") in China seem to be determined to celebrate this anniversary in dramatic fashion, including settling two significant cases concerning minimum resale price maintenance ("RPM"). This shows that RPM is an increasingly important issue under the AML, which enterprises should approach very cautiously.

RPM is a typical clause in a vertical monopoly agreement, which is regulated under Article 14 of the AML. Because this provision was drafted in relatively high-level terms, there has been much uncertainty on how the AMEAs would handle RPM cases—at least until this year.

Regarding RPM in general, there are two approaches—neither is unconditionally accepted on a worldwide basis. The first approach is to hold RPM *per se* illegal, without analyzing its effects on competition. The second approach is the "rule of reason" analysis, which examines the legality of RPM on the basis of analysis of both its anticompetitive and procompetitive impact. Since there is no uniform or explicit global rule that the AML could follow, it makes particular sense to look into China's recent RPM cases to find out which approach is applied in China.

Other issues relating to RPM include how to calculate the amount of fines or compensation and how the RPM prohibition is enforced. Generally, RPM is enforced by two means in China. The first is through public enforcement by the National Development and Reform Commission ("NDRC"), the antitrust agency is in charge of tackling price-related monopolistic behavior. The second is through private litigation, handled by the courts. This article provides insights into these issues by analyzing recent high-profile cases.

II. PUBLIC ENFORCEMENT

A. The *Maotai & Wuliang* Cases

1. Investigation

In early January of 2013, Maotai Marketing Co. Ltd., an affiliate of the Maotai Group Company, was exposed as having issued a warning to three distributors against their low-price and cross-regional sales practice. The distributors' contracts with Maotai were suspended and 20 percent of their deposits were deducted. Moreover, Maotai required the three distributors to recall products at the guiding price within three days, and modify their conduct within one week. If the distributors did not obey Maotai's orders, Maotai threatened them to penalize them. This

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was part of Maotai's actions to maintain its high retail prices during Spring Festival and in the coming year (2013).

Before long, the action of Maotai led to an investigation by NDRC, together with the Price Bureau of Guizhou Province. Subsequently, on January 16, Maotai released a statement calling off its previous marketing policy, but it was too late to withdraw from its involvement in an AML violation.

On the very next day, Wuliangye made a statement regarding the cancellation and adjustment of a similar RPM policy, with concrete measures to follow. Wuliangye was also confronted with a similar investigation by NDRC, caused by its action of sanctioning distributors for disobeying its RPM policy.

2. Decisions

On February 22, the Price Bureau of Guizhou Province announced that it had imposed a fine of RMB 247 million upon Maotai for entering illegal vertical agreements on, and implementation of, RPM. For the same reason, Wuliangye was penalized by the NDRC's local branch in Sichuan Province with a fine amounting to RMB 202 million.

3. Competition Assessment: Rule of Reason Instead of *Per Se* Illegality

In the *Maotai* and *Wuliangye* cases, according to the official penalty notice for Wuliangye, the fines imposed were decided on the basis of a concrete analysis of RPM's consequences, instead of merely establishing the existence of RPM and stopping the analysis there. Therefore, it is safe to conclude that rule of reason approach was adopted. The NDRC office in Sichuan Province listed three relevant factors:

1. RPM eliminates competition between distributors of the same brand (intra-brand competition).
2. RPM also removes inter-brand competition because of its negative effect within the industry.
3. Customers' interests are harmed, as their choices are largely compromised by needing to pay a fixed price.

Although the penalty notice for Maotai by the Price Bureau of Guizhou Province did not include as lengthy a reasoning as that for Wuliangye, it also mentioned that RPM eliminates and restricts competition and harms customers' interests.

4. Calculation of Fines

The penalties of RMB 247 and 202 million, respectively, are, respectively, 1 percent of Moutai and Wuliangye's sales amounts of the preceding year. According to Article 47 of the AML, the illegal gains of business operator swhich concluded and implemented a monopoly agreement shall be confiscated, and the business operators shall be fined from 1 percent to 10 percent of their sales revenues of the preceding year.

It is understandable that, in these cases, the authorities selected the minimum percentage of 1 percent because the two companies assisted the investigation and were cooperative. However, no confiscation of illegal gain was enforced eventually.

5. Follow-up Legal Action

There has been no follow-up litigation against Maotai or Wuliangye, which could be quite favorable for plaintiff if there was one. The challenge in potential private litigation is how the plaintiff could demonstrate that the RPM conduct has the effect of eliminating or restricting competition, or how the damage and hence compensation is related to the RPM conduct (see Part III below). The penalty notices issued by NDRC may make plaintiffs' task to prove anti-competitive effects easier , but the causal relation between effects and harm – and the calculation of compensation – are still tough issues, especially with a tradition in China of inadequate compensation in private litigation more generally.

B. The *Baby Milk Formula* Cases

1. Investigation

On July 1, 2013, NDRC announced that it had investigated some well-known infant milk formula firms, including Biostime, Dumex, MeadJohnson, Wyeth, Abbott, and FrieslandCompina, suspecting that they had exerted price controls via vertical agreements with distributors. NDRC stressed that the infant milk formula market had been distorted since the quality crisis of domestic infant formula brands in 2008, as foreign brands had taken advantage of the situation and raised prices by 30 percent.

One of the accused firms, Wyeth, responded immediately by instituting price reductions, allegedly to comply with the AML. A domestic infant formula maker, Beingmate, also declared its intention to cut prices as a reaction to the NDRC investigation.

2. Decision

On August 7, NDRC issued its decision, imposing fines based on a varied proportion of the sales revenues in the previous year for each firm, including 6 percent for Biostime, 4 percent for MeadJohnson, and 3 percent for Dumex, Abbott, and FrieslandCompina. In contrast, Wyeth, Beingmate, and Meiji were exempted because, allegedly, they "cooperated with the investigation and provided important evidence," as set out in Article 46 of the AML. The total penalties imposed on all companies added up to RMB 670 million.

3. Competition Assessment

The administrative penalty notices for the infant formula firms were not revealed, but it is safe to say that NDRC will stay consistent and apply rule of reason in these cases. Its analysis of the competitive effects will merit careful consideration.

4. Calculation of Fine

As a percentage of previous year's sales revenue, NDRC imposed penalties of 6% against Biostime, 4% against MeadJohnson, and 3% against Dumex, Abbott and FrieslandCompina, the difference based on their cooperation during the investigation. The percentages were higher than in the *Maotai* and *Wuliangye* cases. No illegal gain was mentioned.

5. Follow-up Legal Action

At present, there is no information on any follow-up suit being filed with the courts.

III. PRIVATE ENFORCEMENT

A. The *Johnson & Johnson* case

The *Johnson & Johnson* case is the first example of private antitrust litigation on RPM, as well as of a vertical monopoly agreement. The judgment was given on August 1, 2013—the very day of the fifth anniversary of the AML. The judgment by the Shanghai High People's Court on appeal reversed the judgment at first instance of the Shanghai Intermediate People's Court and ruled in favor of the plaintiff. The appeal judgment may not only be a turning point for plaintiffs in the winding paths of litigation, but also a milestone in the history of AML private litigation.

1. Background Information

The plaintiff, Beijing Ruibang Yonghe Technology and Trade Co., Ltd ("Rainbow" with its English name), was a distributor of medical stapler and suture products of the defendant, Johnson & Johnson Medical Co., Ltd ("J&J"). The two companies had cooperated for fifteen years. Their distribution agreements, renewed annually, always contained RPM provisions, typical of vertical monopoly agreements. In 2008, Ruibang broke the fixed price set by J&J during a tender, lowering it and consequently winning the tender. To penalize Rainbow, J&J responded by cancelling its franchise and suspending supply. In addition, in 2009, J& did not renew their distribution agreement. It was quite a hit for Rainbow.

In 2010, Rainbow sued J&J for imposing RPM and sought reimbursement of RMB 14,399,300, which was calculated based on its loss of:

- goodwill, stock, and other products;
- expected 2009 profits;
- incurred marketing expenses; and
- other costs.

However, in 2012, Rainbow's allegations were dismissed by the Shanghai Intermediate People's Court at first instance. The court held that Rainbow had not produced sufficient evidence to prove that the RPM practice had actually restricted or eliminated competition in the market.

Losing its major client, Rainbow became insolvent soon after suing. But Rainbow insisted on appealing to the Shanghai High People's Court, and the latter's judgment reversed the judgment of the first instance court and decided in favor of Rainbow. Notwithstanding, only a partial claim of RMB 530,000 was awarded.

2. Analyses of the Judgment

In the adjudication, the High People's Court addressed several key problems concerning the approach toward RPM.

a. Retroactivity of AML

The distribution agreement between Rainbow and J&J ended in 2008 and was not renewed. This was just the time when the AML began to take effect (in August 2008). While admitting that the AML was no't retroactive, the High People's Court stated that the parties'

distribution agreement had remained effective after August 1, 2008, the start of the implementation of the AML. Therefore, the AML applied to the case.

b. Plaintiff Qualification

Before court, J&J argued that Rainbow is a direct party to the distribution agreement featuring the RPM clause, and would therefore be precluded from bringing an action. The High People's Court did not agree, stating that Rainbow still qualified to be a plaintiff. It held that a party who participates or implements a monopoly agreement may still be a victim of monopolistic behavior. In this way, the court found the parties to monopoly agreements would be encouraged to expose violations of the AML, as outsiders have little if any visibility into the terms of distribution agreements, which are usually confidential.

c. Confirmation of Rule of Reason

The primary reason why Rainbow was disfavored in the first instance is that the rule of reason was adopted. As opposed to a *per se* illegal doctrine, which deems RPM to be illicit by definition, the rule of reason approach requires an analysis of the RPM conduct's impact on competition for the conduct to be illegal. However, at first instance, the Intermediate People's Court held that Rainbow did not sufficiently providethat J&J's RPM provisions had harmed competition and therefore constituted a violation of the AML.

Although the High People's Court reversed the lower court's judgment, it reconfirmed the principle of applying the rule of reason to RPM. It reasoned that, according to Article 13(2) of the AML, horizontal monopoly agreements need to eliminate or restrict competition to be harmful. Since vertical monopoly agreements in general inflict less harm on competition than horizontal ones, the court deducted that a showing of harm to competition is also a prerequisite for holding a vertical agreement to be illegal. From this perspective, the rule of reason approach was affirmed by the appeal court.

d. Burden of Proof

The High People's Court still advocated that the burden of proof lies in the plaintiff. The Provisions on Several Issues concerning the Application of the Law in the Trial of Civil Dispute Cases Arising from Monopolistic Conduct, issued by the Supreme People's Court stipulate that, in horizontal monopoly agreement disputes, the defendant has the burden to prove that a the agreement does not eliminate or restrict competition. The High People's Court did not accept Rainbow's argument that this principle would lead to the conclusion that the same would be true for vertical monopoly agreements. To the contrary, the court held that the plaintiff must prove anticompetitive effects for vertical agreements, since they are not as egregious as horizontal ones.

e. Proving a Vertical Monopoly Agreement

Despite placing the burden of proof upon the plaintiff, the appeal judgment of the High People's Court differs from the judgment at first instance in that the High People's Court lowered the proof standard relating to RPM's anticompetitive consequences. The High Pepole's Court indicated four key considerations in evaluating the competitive effects of RPM:

- whether the relevant market was fully competitive;
- whether the defendant had a strong market position;

- the motive of the defendant; and
- the actual effects on competition of the RPM practice.

In the Johnson & Johnson case, the appeal court found that the plaintiff successfully provided evidence in this regard. The High People's Court noted that the relevant market, referring to medical suture products in Mainland China, was not adequately competitive, and that the defendant had an advantageous market position. It further held that the defendant's RPM provisions inflicted significant harm on competition, without any or obvious efficiency justification. To conclude, the RPM provisions imposed by J&J constituted a vertical monopoly agreement, thus violating the AML.

f. Compensation

Since the AML was implemented after August 1, 2008, Rainbow could merely compensation for damages as a result of its 2008 profit loss, found to be equivalent to RPM 530,000. Apart from the loss of profits, other claims for compensation by Rainbow were entirely rejected by the High People's Court because of the lack of causation.

B. Weizhong vs. Xilanger

Another RPM related litigation case occurred in Nanjing. It followed, and was less influential than, the J*ohnson & Johnson* case, but ended sooner (in 2011) with all of the plaintiff's claims dismissed. The plaintiff did not appeal.

1. Background Information

Like in the *Johnson & Johnson* case, the plaintiff Weizhong was a small private business and a distributor for the defendant, Nanjing Xilanger Investment Management Co., Ltd ("Xilanger"). Xilanger grants franchises and supplies packaged snack food under the trademark of "Xilanger" to distributors. The contract between the litigants contained restrictions on the plaintiff including, *inter alia*, RPM provisions.

Disputes arose when Weizhong found out that the defendant's own product was not branded as "Xilanger" and was priced significantly higher than market prices. Therefore, Weizhong brought the legal action against defendant and claimed their agreement (which contained the RPM provision) to be void and asked to be reimbursed the management service fee, contract deposits, and a shipment fee of RMB 29,000 it had paid in advance.

2. Analysis of Judgment

The Nanjing Intermediate People's Court hearing the case ruled that a monopoly agreement, no matter whether horizontal or vertical, must eliminate or restrict competition. In the case, the court found that the plaintiff had failed to prove this extent. The court held that, since the relevant market was broadly defined as "snack food" – with numerous operators present – the RPM provisions in an agreement would not eliminate or restrict competition in the relevant market. Therefore, all the claims by the plaintiff were rejected.

IV. CONCLUDING AND LOOKING FORWARD

The following issues regarding RPM can be concluded from an analysis of the cases discussed above:

i. Public and private enforcement decisions are intertwined. Decisions by the courts or NDRC will be referenced by, and influence, each other. In the future, it is likely that public enforcement will be followed by private litigation, and vice versa. Therefore, it is best to view RPM enforcement comprehensively, looking at all cases.

ii. Since the adoption of the rule of reason approach has prevailed, the following factors should be taken into consideration when evaluating RPM: the degree of competition in the relevant market; the market position of the companies involved; the motive behind the RPM conduct; inter-/inter-brand competition; and the impact on consumer interests.

iii. The burden of proof is still an obstacle in private antitrust litigation and the damages amounts are not expected to be high, even in successful cases. The High People's Court in the *Johnson & Johnson* case mentioned that economics experts are to be encouraged to testify in court. It is reasonable to believe that the same guidance applies to those companies that face the investigation of NDRC.

Both the victory in a private litigation by a plaintiff in the *Johnson & Johnson* case and the active enforcement by NDRC is a big leap forward regarding the legal approach to RPM practices in China. But these cases hardly eliminate all uncertainty in the field of RPM enforcement. Foreign companies are happy to see that their Chinese competitors are less able to rely on exclusivity and protectionism, but they also have become more cautious as to their own conduct, just as they are in the United States or European Union. As antitrust practices progress in China, everybody is on alert and continuously endeavors to find new developments in AML enforcement to adapt themselves to the changing times.