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I. INTRODUCTION

On the judicial cognizance of vertical agreements stipulated in Article 14 of China's Anti-Monopoly Law ("AML"), scholars mainly have taken one of two views. One view adopts the dominant principle currently applied in U.S. judicial practice, the "rule of reason" approach, in which the burden of proof lies on the plaintiff to prove both the existence of vertical agreements and that the agreement has the effect of excluding or restricting competition. The second view adopts a dominant principle similar to what is currently used in EU judicial practice, the so-called "rebuttable presumption" approach, which presumes that vertical agreement is illegal. Under this view, the defendant needs to cite Article 15 of the AML and present legal evidence to prove its behavior legitimate.[2]

These views are applicable to antitrust enforcement and judicial practice. For the analysis of the nature of minimum resale-price-maintenance ("RPM") agreements and such acts, there are many differences in legal evaluation principles, analyses, evaluation factors, and the distribution of burden of proof. Regarding these issues, we would propose some preliminary opinions that are combined with the judgment of the second instance of the *Johnson & Johnson* case that was decided by the Shanghai Higher People's Court in August, 2013.[3]

II. LEGAL EVALUATION PRINCIPLES OF MINIMUM RPM BEHAVIOR

A. Three principles in European and American Practice

Antitrust regulations originated in the United States when the world's first antitrust law, the "Sherman Antitrust Act," was passed in 1890. Article I of the "Sherman Act" states that "[e]very contract, in trust form or other forms of alliance, conspiracy, used to restrict interstate trade or commerce with foreign nations, is illegal." This provision is considered to be the legal basis for antitrust intervention of minimum resale price maintenance behavior. In 1911, in *Dr. Miles Medical Co. v. John D. Park & Sons Co.*, the U.S. Supreme Court ruled, for the first time, that resale price maintenance was in violation of Article I of the "Sherman Act," and explicitly stipulated that the behavior of resale price maintenance was applicable to the "*per se* illegal" principle. As such, manufacturers' control of dealers' pricing behavior is considered illegal.

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[1] Deputy Chief Judge, Senior Judge of Intellectual Property Tribunal, Shanghai Higher People's Court. The author gratefully acknowledges helpful comments from Vanessa Yanhua Zhang.

[2] Huang Yong, *Enforcement Analysis and Path Discussion of Resale-Price-Maintaining Agreement*, 12 PRICE THEORY AND PRACTICE (2012).

[3] Vertical Monopoly Agreement Disputes among Beijing Ruibang Yonghe Technology Trading Co., Ltd. v. Johnson & Johnson (Shanghai) Medical Equipment Co., Ltd., Johnson & Johnson (China) Medical Ltd., Judgment of Second Instance No. [2012] Hu Gao Min San (Zhi) Zhong Zi No. 63, August 1, 2013.

For nearly 100 years since then, the protocol actions of fixed resale prices and minimum resale price maintenance have always applied to the " *per se* illegal" principle, though the United States Courts posed certain restrictions on the scope of illegal resale pricing activities during that time (e.g., manufacturers' unilateral acts, pricing behavior in agency relationships, and maximum resale price maintenance are excluded). On June 28, 2007, in *Leegin,*[4] the U.S. Supreme Court overthrew *Dr. Miles,* explicitly stipulating that RPM no longer applies to the "*per se* illegal" principle, and took the " rule of reason" principle as an impartial and efficient way to prohibit RPM with anticompetitive effects while protecting those RPMs that have the effect of promoting competition."[5]

The U.S. Supreme Court has given certain legislative powers to states in regards to antitrust law and, after the *Leegin* case, the judicial standpoint of many states regarding RPM diverged. Some states adopted the "rule of reason" principle in state law to follow the *Leegin* case, while some states clearly defined in their antitrust laws that the RPM behavior applied to the "*per se* illegal" principle.

The U.S. Supreme Court's changes in the legal evaluation principles of minimum resale price maintenance behavior not only affected U.S. antitrust law enforcement and judiciary, they also affected antitrust law enforcement and justice in other countries and regions. For example, the European Union, a major jurisdiction of international antitrust enforcement, has also experienced a process of change in its legal regulation of resale price maintenance. The current applicable legal bases include: Articles 101 and 103 of the "Lisbon Treaty," the 2010 European Commission Regulation on the Application of Article 101(3) of the Treaty on the Functioning of the European Union to Categories of Vertical Agreements and Concerted Practices (referred to as the "2010 Regulations"),[6] and the 2010 European Commission Guidelines on Vertical Restraints (referred to as the "2010 Guidelines").[7] The latter two documents replaced the old regulations from December 1999 and the old guidelines from May 2000.

According to the 2010 Regulations, in the case of maximum resale price maintenance when resale price recommendation behaviors are in line with certain conditions (i.e., the market shares of the seller and the buyer are lower than 30 percent in their relevant markets), a block exemption can be obtained. But minimum resale price maintenance and fixed resale price behaviors are core provisions to restrict competition, regardless of market share of the implementation enterprises, so no block exemption can be obtained. This practice is in line with the 1999 Regulations.

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[4] Leegin Creative Leather Products, INC.v.PSKS, INC., 551.US. (2007).

[5] Between "*per se* illegal" and "rule of reason," a "*per se* legal" legislative tendency also exists. In 1937, the U.S. Congress passed the Miller-Tydings Resale-Price-Maintenance Act, which stipulated that if the state law allows the minimum resale price to be legal, then the minimum resale prices will not be subject to Article 1 of the Sherman Act. Subsequently, in 1952, the McGuire Act passed by Congress expanded the scope of RPM, stating that as long as one distributor signs the RPM contract with the manufacturer the manufacturer can apply RPM to all distributors. However, these two Acts were widely opposed, and were abolished in 1975.

[6] Commission Regulation 330/2010 of 20 April 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices. Official Journal L 102, 23.4.2010, p. 1-7.

[7] Commission Notice- Guidelines on Vertical Restraints, Official Journal C 130, 19.05.2010, p.1.

However, possibly due to the influence of the 2007 *Leegin* case in the United States, the 2010 Guidelines are different from the 2000 Guidelines. For minimum resale price maintenance and fixed resale price behavior, individual case exemptions are granted based on the following circumstances: (i) when designed to stimulate the dealers to pay for the extra effort needed to sell products during a new product promotion period, especially when the same results cannot be achieved by other means; (ii) for franchises or similar forms of united sales organizations, a short-term (2-6 weeks for the vast majority of cases) low-price promotional activity is required, with such promotions being equally beneficial for consumers; and (iii) the parties can prove that resale price maintenance is a necessary measure to avoid pre-sale service freeriding.[8]

Elsewhere, some countries such as Australia and Japan are considered to apply the "*per se* illegal" principle. Other countries, however, such as South Korea, are considered to apply the "rule of reason" principle.[9]

In short, in the world's major antitrust jurisdictions, there are actually three legal evaluation principles against resale price maintenance: (1) "*per se* illegal" principle still used by a small number of states in the United States; (2) "rule of reason" principle adopted by the United States Supreme Court and most U.S. states; and (3) the so-called "principle of prohibition + exceptional exemption" principle represented by the European Union. Each of these three principles has their own merits. Whether they are applicable to China is subject to specific analysis.

B. Analysis and Evaluation of the Three Principles

1. The *Per Se* Illegal Principle

First, the "*per se* illegal" principle lacks empirical economic basis, and is in discord with real-world experience. Evaluating an act by the "*per se* illegal" principle means that this behavior is absolutely prohibited, and the legal basis should be that such behavior is: (i) in serious conflict with accepted ethical values, (ii) causes serious damage to private interests, and/or (iii) causes a certain degree of damage to the public interests.

In China, the Anti-Unfair Competition Law was adopted in 1993 to place curbs on certain kinds of anticompetitive excesses, such as deceptive advertising, coercive sales, appropriation of business secrets, and bribery. However, the leadership decided that more comprehensive anti-monopoly legislation was needed and in 2007, the country enacted the Anti-Monopoly Law. The Anti-Monopoly Law is different from the Anti-Unfair Competition Law, although both are designed to promote competition in the market. The evaluation basis of Anti-Unfair Competition Law to market behavior is mainly based on whether the behavior is contrary

[8] Guidelines on Vertical Restraints (2010 / c 103/01). In the Guidelines, preventing free-rides in pre-sale service means that, in some cases, the additional profits arising from resale price maintenance will enable retailers to offer additional pre-service especially for expensive or complex goods. Customers take advantage of this kind of pre-sale service to make purchasing choices, but purchase goods from those retailers who do not offer this pre-sale service, but just sell goods at a lower price. Then the number of retailers who provide pre-sale service will decrease, and even pre-sale service could be completely cancelled by retailers. Resale price maintenance may reduce this "free-riding" phenomenon.

[9] XU Xinyu, *Comparative Analysis of Vertical Price-Fixing Agreements Legal Regulation*, PRICE SUPERVISION AND INSPECTION IN CHINA, VOL. 7 (2012).

to accepted business ethics, while the evaluation basis of Anti-Monopoly Law to market behavior is based primarily on whether the behavior eliminates or restricts competition in the market. Therefore, the Anti-Monopoly Law should not use *a priori* moral law, but rather experienced-based evaluation as its legal basis.

As for whether a market behavior shall be absolutely prohibited, according to the Anti-Monopoly Law, a market behavior shall not be prohibited out of *a priori* moral judgment, but should be based on empirical analysis of the actual competitive effects of the market behavior. So, to take the absolute prohibition stance of the "*per se* illegal" principle on the use of minimum resale price maintenance, there should be empirical arguments to show that minimum resale price maintenance behavior is a behavior imposing serious harm to market efficiency (i.e., the behavior causes pure harm to competition in the market, or has the effect of promoting competition but its effect is far less than the competition harm effect).

However, we still have not seen such empirical economic analysis, and the existing empirical analysis neither supports the conclusion that minimum resale price maintenance does harm to competition, nor does it support the conclusion that minimum resale price maintenance promotes competition. However, empirical studies have shown that resale price maintenance can lead to price increases. But price increases may be caused by increased consumption or quality improvements of product and service, so it is difficult to conclude that minimum resale price maintenance harms market competition simply based on the observation of price increases.[10] Further, real-world experience and economic analysis tell us that, at least in some cases, minimum resale price maintenance does promote competition. For example, for those products that need effective pre-sale services, minimum resale price maintenance is efficient for promoting pre-sale services.

Due to this common understanding, EU legislation has experienced adjustments, as mentioned above, allowing minimum resale price maintenance in certain cases that clearly have the effect of promoting competition. Today, the continued use of the "*per se* illegal" principle for minimum resale prices maintenance not only lacks economic basis, but also goes against real-world experience.

[10] Nathaniel J. Harris, *Leegin's Effect on Prices, An Empirical Analysis*, J. L. ECON. POL'Y (Winter, 2013). This paper used a "Difference in Differences Model" to compare CPI (Consumer Price Index) changes for the same period in U.S. markets with resale price maintenance and without resale price maintenance. The author also compared CPI changes in the areas with absolute prohibition of resale price maintenance (called "*per se* illegal" principle areas) and the areas without absolute prohibition of resale price maintenance (called "rule of reason" principle areas). The author found that CPIs in areas with minimum resale price maintenance and absolute prohibition of minimum resale price maintenance are higher than those in the areas without minimum resale price maintenance and absolute prohibition of minimum resale price maintenance. After considering population composition, changes in income, and multiple other factors, he determined that implementing minimum resale price maintenance and the legal-attitude toward minimum resale price maintenance behavior are highly correlated with CPI, supporting the conclusion that minimum resale price maintenance tends to result in market prices increase. This article is rigorous and reasonable on sample selection and comparison methods, and its conclusions are credible. Nevertheless, this article still believes that there is also consumption increase and other factors that promote competitive effects in the presence of price increase. We shall not deny the principles established in the *Leegin* simply because the resale price maintenance leads to price increase.

2. The Principle of Prohibition + Exception Immunity Principle

Second, the "principle of prohibition + exception immunity" principle also lacks an empirical economics basis. Just like the "*per se* illegal" principle, the application of "principle of prohibition + exception immunity" principle to minimum resale price maintenance action should be based on the following empirical economic basis: in the market, the vast majority—or at least the majority—of minimum resale price maintenance behaviors have the effect of restricting competition. As mentioned earlier, at present there is still no empirical evidence to support such a conclusion. In this case, if we prohibit certain behavior that has unknown competitive effects, competition may either be enhanced due to correct judgment, or be harmed due to misjudgment.

In fact, competition is always dynamic. In the short-term, small-scale restrictions of competition do not often last long, and they will always be overcome by the dynamic development of competition in the market. Any so-called "market failure" will eventually be self-corrected by the market in most cases. Instead, wrongful interventions of the "visible hand" lead to reduced competition in the market and, because the error is institutionalized, it becomes difficult to get corrected by the market itself. Thus, on balance, the loss caused by the wrong judicial intervention will outweigh the benefits brought by the proper administration of justice. And taking the "principle of prohibition + exception immunity" principle for behavior with an unknown effect is a selection of higher risk. Taking the principle of prohibition to minimum resale price maintenance has a higher likelihood to undermine the economy than to improve the economy.

At the same time, we see that China's current market practice of minimum resale price maintenance behavior can be found everywhere, at a time when the Chinese AML practice in its infancy. Applying the "principle of prohibition" to minimum resale price maintenance will lead to a low threshold for minimum resale price maintenance enforcement and litigation, causing a huge impact on the reality of economic life. China, as an emerging market, has a market that is relatively active. New businesses, new products, and new brands come into the market constantly. Since the minimum resale price maintenance is conducive to the promotion of new businesses, new products, and new brands coming into the market, this behavior should not be denied in principle in China.

It should be pointed out that there are views expressing the belief that Articles 13, 14, and 15 of China's Anti-Monopoly Law indicate that the AML applies principles similar to the European Union's "principle of prohibition + exception immunity" to the minimum resale price maintenance behavior. Therefore, judiciary implementation should follow this principle. In this regard, it is necessary to emphasize that during the development of the AML the U.S. *Leegin* case had little influence on the studies of Chinese antitrust legislation. The negative effects of minimum resale price maintenance behavior were more fully understood, and its positive effects were not recognized enough. So even though legislation at that time seems to have taken a relatively stringent stance, today we can still take advantage of the space left in the law as expressed, and explain its position to be more in line with market principles and more in line with market development needs.

3. The Rule of Reason Principle

Third, the "rule of reason" principle has been charged with being too flexible and lacking certainty. Relatively speaking, applying the "rule of reason" principle to minimum resale price maintenance behavior is a choice more in line with the real market situation and has greater accuracy of judicial adjudication. However, if we only apply the abstract "rule of reason" principle and make an exhaustive review of every point in each specific case, the defendant may form a "reasonable cause" defense, making such proceedings too flexible, resulting in a plethora of reviews and considerations in an individual case, and at too great a judicial cost.

A better situation would be if there were relatively clear guidelines on the direction and focus of antitrust analysis of minimum resale price maintenance behavior that are convenient for judges to follow and make it easy to render accurate and efficient analyses and judgments. They would also allow corporate entities to have clearly defined expectations of legality of minimum resale price maintenance behavior, and there would be a relatively clear guide for society.

C. "Real Effects Principle" in the Johnson & Johnson Case

The final judgment in the second trial of the *Johnson & Johnson* case referred to above upheld the view that minimum resale price maintenance agreement is not *per se* illegal, and it explicitly excluded the applicability of the "*per se* illegal" principle. According to the definition of a "monopoly agreement" in Article 13I of the AML, "the effect of excluding and restricting competition" is the constituent element of monopoly agreements. And the Article further defines minimum resale price maintenance behavior as a monopoly agreement only if the behavior produces effects of eliminating or restricting competition that are difficult to avoid or difficult to be offset by its effects of promoting competition. Therefore the Court advocated a practice which is different from the E.U.'s "principle of prohibition + exception exemption" approach, and the U.S. approach of "rule of reason" principle. For the time being, we can name it the "real effect measure" evaluation principle.

As described below, the "real effect measure" principle embodied in the judgment of the second instance of the *Johnson & Johnson* case has intentionally filtered factors not big or important enough to have impact on competition in the market, but just focuses on those factors that have substantial impact on competition in the market that can improve judicial accuracy and also improve litigation efficiency.

III. EVALUATION ELEMENTS OF MINIMUM RESALE PRICE MAINTENANCE BEHAVIOR

The second trial of the *Johnson & Johnson* case upheld that implementing antitrust intervention on a resale price maintenance action must be based on the premise that the resale price maintenance behavior obviously produced the effect of eliminating or restricting competition which is difficult to overcome or to offset. The four aspects most important to consider when evaluating whether minimum resale price maintenance behavior is legal or not are:

A. whether competition in the relevant market is insufficient,

B. whether the defendant's market position is strong,

C. the defendant's motivation in establishing resale price maintenance, and

D. the practical effects from the resale price maintenance arrangement.

A. Relevant Market: Whether Competition is insufficient

On the one hand, in a fully competitive market—such as the clothing market—due to the large number of firms competing with each other, it is difficult to form a tacit understanding on pricing between different brand manufacturers, and even harder to form an explicit or tacit price agreement. Therefore, it is difficult to achieve a so-called vertical restraint agreement on manufacturer cartels or dealer cartels in a fully competitive market. On the other hand, since there is sufficient competition of products in the relevant market, consumers have sufficient alternatives. If a firm agrees to a fixed price or minimum resale price maintenance arrangement for some reason, although the maintenance will reduce some purchasing behavior by consumers who would buy the product below the limit price, consumers can still choose other brands of products at lower prices or of better quality at the same price. Consumer welfare is not damaged, nor is the economic efficiency impaired.

But in an insufficiently competitive market, due to lack of adequate alternatives, consumers rely on a particular brand or a few brands. If price maintenance is implemented on certain brands of products, not only will price competition be absent within the brand, but there will also form a tacit understanding between the different brands on pricing. Or, if no understanding is formed, due to the lack of price competition market prices would rise or remain at a high level, resulting in damages to both consumers and social welfare as a whole.

Thus, insufficient competition in the relevant market is the prerequisite to judge that a minimum resale price maintenance agreement constitutes a monopoly agreement. Only when the lack of full competition in the relevant market situation is affirmed do we need to further determine the competitive effects of the alleged monopoly agreement. As for judgment of sufficient competition in the relevant market, it should be determined in context with the specific circumstances of the case. We should not only consider the concentration ratio of the market, but also consider alternative products involved, the difficulty for potential competitors to enter the relevant market, the competitiveness of downstream markets, and many other factors that affect the degree of competition in the relevant market.

B. Implementation Enterprise: Does the Defendant Have Strong Market Power?

First, it should be clear that the "monopoly agreements" stipulated in Articles 13 and 14 of the AML and the "abuse of dominant market position" stipulated in Article 17 of the AML have different restrictions on market position of the firms. The latter requires companies to have a dominant market position in order to identify illegal behavior, but the former does not have this requirement. The reason for this is that the latter concerns the behavior of an individual firm, but the former concerns behavior jointly implemented by several firms. Although the two behaviors can only be deemed as illegal when they eliminate and/or limit competition as stipulated by the AML, the requirement of determining market power of these two types of companies is different. Therefore, judging minimum resale price maintenance behavior to be illegal does not take into consideration whether the company has a dominant market position.

However, it should be recognized that the market position of a company is the basis for whether a company's pricing behavior can affect market competition. If companies that

implement minimum resale price maintenance enjoy strong market positions in the relevant market and therefore can have an impact on competition in the market, this ability should be used as a necessary condition to judge whether the minimum resale price maintenance agreement constitutes a monopoly agreement. A company lacking a strong market position in the relevant market usually can only adapt to market competition, and has little ability to affect competition, let alone lead the competition. If the company does not have an advantage in any market aspects—including market share, supply of raw materials, key technologies, sales channels, or brand image—then the company does not have the power to affect market competition, and its implementation of minimum resale price maintenance would not affect competition in the market. Or, if it affected competition within a short time and a small range, it would soon be corrected by more efficient market competition. In short, the effect of competition that needs to be eliminated or restricted by the AML would not appear.

Therefore, whether the company implementing minimum resale price maintenance has a strong market position should be considered as the foundation to judge whether the conduct of minimum resale price maintenance might have the effect of excluding or restricting competition. That leaves the question: When should a company be considered as having a "strong market position," so that its behavior of minimum resale price maintenance may eliminate or restrict competition?

We argue that a company's market position lies in its pricing power. When other things are equal, if a company has a strong pricing power, it dominates in pricing negotiations with buyers, and it can calmly and freely set the prices rather than being a price taker. Then the pricing of other companies in the relevant market may be affected by the pricing of that company, and that company should be considered to have a strong impact on market competition. In another situation, when other things are equal, if the company implements minimum resale price maintenance, and its market share does not fall but rises, this can also indicate that the company has a strong market position in the relevant market (the reverse is not true—that is, one cannot conclude that a company does not have a strong market position if its market share falls after it implements minimum resale price maintenance.).

It should be pointed out that, among the above four elements, insufficient competition in the relevant market and whether the implementing company has a strong market position are necessary conditions to judge whether minimum resale price maintenance constitutes a monopoly agreement. The decision actually requires the market structure to be a screening condition to judge whether the minimum resale price maintenance constitutes a monopoly agreement. The screening scheme not only draws on the experience of other jurisdictions,[11] but

[11] In the *Leegin* case, when the U.S. Supreme Court judges whether an agreement of price-fixing and RPM is legitimate or not, three factors shall be considered: (1) whether the RPM agreement is driven by the upstream producers or downstream retailers; (2) whether producers or retailers implementing the RPM agreement have market power; and (3) whether the RPM agreement is related to a cartel or potential cartel plan. *Leegin Creative Leather Products Inc. V. PSKS Inc., 551 US877 (2007), p.897-898.* American scholars Phillip E. Areeda and Herbert Hovenkamp proposed that in cases involving resale price maintenance, the following eight market factors can be studied for rule-of-reason analysis: producers concentration, distributors concentration, RPM market coverage, distributors motivation, brand power, distributors dominance, optional RPM, and whether the products are homogeneous. PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW, 2ND ED., 328-329 (2004). Quoted from

also takes into account the current status of China's market's economic development, including its immature market development and the prevalence of minimum resale price maintenance in various industries. Taking the market structure as a screening condition helps to stop the conducts that cause actual damage to competition in the market as a whole.[12]

C. Motivation: Whether Inefficient Methods are Used to Cope With Price Competition

Although motivation does not correspond exactly to behavioral effects and motivation is difficult to observe in complicated market activities, if a company with a strong market position implements minimum resale price maintenance to limit competition in the market, due to its dominance in all aspects—including finance, technology, and information—its capacity to control the upstream and downstream markets is often strong and the possibility that its conduct of minimum resale price maintenance will lead to the effect of restricting competition will be greatly enhanced. Therefore, although the motivation to restrict competition cannot be deemed a necessary condition to judge that the minimum resale price maintenance has the effect of eliminating or restricting competition and that RPM constitutes a monopoly agreement, it still can be considered an important reference factor to determine the nature of minimum resale price maintenance behavior.

In a fully competitive market, there are usually two ways for companies to respond to market price competition: one is to reduce prices in order to maintain or expand market share and the other is to not cut the price, but improve the quality of products or services to gain market share. Both methods are conducive to providing better products and services at lower prices in the market. Both are efficient ways to compete.

However, in markets with insufficient competition, companies with dominant market position do not necessarily use these two efficient ways to deal with competition. Fixing resale prices and minimum resale price maintenance may be used to improve service, maintain the brand image, promote new brands, develop new products, etc., which benefit market competition and consumers. But they may also be used to realize price-fixing cartels. Dominant companies may also: (i) use monopoly power to obtain high profits, (ii) use monopoly power to squeeze out competitors, or (iii) use dominant market position to practice price discrimination and other goals that are not conducive to market competition or in consumers' best interests. When evaluating specific cases, specific evidence in the case should be used to analyze and judge the defendant's motivations to take minimum resale price maintenance behavior. For non-efficient ways to cope with price competition, the judiciary should maintain a high degree of vigilance.

Someone may raise the question: If whether the market competition is harmed is the result of completely objective evaluation, why should behavioral motives even be considered a factor in the determination of a monopolistic act? First, since behavioral motivation does not correspond to behavioral effect, this article takes behavioral motivation to harm competition as

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SANDRA MARCO COLINO, VERTICAL AGREEMENTS AND COMPETITION LAW-A COMPARATIVE STUDY OF THE EU AND US REGIMES, 85-87 (2010).

[12] LI JIAN & TANG FEI, ILLEGALITY AND LEGAL REGULATIONS OF RESALE PRICE MAINTAINING, CONTEMPORARY LAW. 6TH ED. (2010).

an important factor for auxiliary judgment—not as a necessary condition to determine whether minimum resale price maintenance constitutes a monopoly agreement, nor are these facts that the plaintiff must prove. Second, it should be recognized that whether determined by principles or not, behavioral motivation investigation has always been an important consideration factor in such cases.[13] Therefore, the plaintiff's failure to prove incorrect motivation does not affect the court's identification of monopolistic behavior based on other facts. But if the plaintiff can prove this fact, it will greatly enhance the judge's inner judgment of monopolistic behavior.

D. Actual Effect: Whether the Effect of Eliminating or Restricting Competition is Observed and is Difficult to Offset

Minimum resale price maintenance may produce a variety of negative anticompetitive effects, but it also may produce a variety of positive effects by promoting competition. On one hand, because the market has certain self-correcting capabilities, some anticompetitive effects will soon be corrected by the market; on the other hand, due to the possible existence of both positive and negative effects at the same time, some anticompetitive effects will be offset by some other pro-competitive effects. Therefore, only those negative effects that are difficult to be corrected by the market, or difficult to be offset by other positive effects, should be eliminated by antitrust intervention. Thus, in the analysis, assessment, and evaluation of the competition effect of the minimum resale price maintenance behavior, we pay special attention to positive and negative effects that have substantial impact on market competition.

1. Negative Effects of Limiting Price Competition

First, consider the negative effects of limiting price competition. In the existing economic literature, minimum resale price maintenance is considered to have some of the following negative effects of restricting competition:

1. it limits price competition within the brand, and reduces consumer welfare;
2. it limits resellers' pricing freedom, and cannot identify efficient distributors;
3. it facilitates manufacturer or distributor cartels, and restricts competition between brands;
4. although it may improve distribution services, some consumers do not need these services and would rather enjoy gains brought by lower prices;

[13] In the *Monsanto* case, the U.S. Supreme Court held that the Court of Appeal applied the wrong standard of proof. One should not determine that agreements or joint actions exist between Monsanto and other distributors just because Monsanto canceled plaintiff's sales qualification based on other distributors' complaints. The reason is that for manufacturers, distributors are important source of information, and distributors' complaints about price reducers are generated in a very normal process of transaction. There must be direct or indirect evidence that can reasonably prove that the manufacturer and others intentionally seek to achieve an illegal purpose, so it can be identified that manufacturer and distributors jointly fixed prices. This opinion can be quoted as an evidence standard issue. Looked at from another angle, it can also be considered to determine the manufacturer's maliciousness by evidence. In fact, in cases adopting "rule of reason," the defendant's interpretation and proof of behavioral motivation have always been an important factor in the court's judgment.

5. when lack of price competition and lack of competing pathways exist it may lead dealers to compete in high advertising investments, excess packaging, and other uneconomical activities; and
6. due to the lack of price competition, dealers may use commercial bribery and other illegal means to compete.

Among the results described above, points (4) and (5) involve excessive service, excessive publicity, excessive packaging, and other uneconomical problems that can be corrected by the market itself, and these do not need to be eliminated by antitrust enforcement. As for the unfair competition issues involved in point (6), there might exist a number of assumptions. For example, the dealer does not have other legitimate means to competition, or after the dealer makes a comprehensive assessment of risks caused by the punishment, he still believes the benefits from unfair competition outweigh the costs, etc. This point needs to be examined carefully in specific cases.

Points (1), (2), and (3) have direct or indirect impacts on price competition within brands and between brands. Because the price mechanism is the most competitive market-based mechanism, price restriction has more obvious effects of limiting competition in the market relative to non-price restrictions. So price restrictions should be of great concern in the effects analysis of whether minimum resale price maintenance agreements limit competition.

2. Positive Effects of Limiting Price Competition

Second, consider the positive effects of promoting the quality of products or services, enhancing new products, or enabling new companies to enter the markets. In the existing economic literature, minimum resale price maintenance is considered to likely have some positive effects of promoting competition, including:

1. it prevents free-riding dealers from not providing distribution services (advertising, products, promotions, etc.) but, instead, using price reductions to win customers from those dealers who provide distribution services, thereby contributing to improved dealer distribution services;
2. it helps maintain the business reputations of manufacturers, distributors, and products, leaving people with the impression of quality assurance;
3. it avoids confusing retail prices and provides a basis for consumers to compare prices;
4. it protects small dealers by safeguarding dealers' profits while limiting the market power of large-scale dealers and dealer concentration, and prevents arbitrage between dealers, thus contributing to the construction of the distribution network;
5. when dealers sell multiple brands of products of different competitors, companies adopting minimum resale price maintenance can motivate distributors to sell their products against competitors' discounts and sales;
6. it reduces risks for dealers when the market is uncertain, and guarantees products inventory and sales volume, which helps new manufacturers and new products enter into market; and

7. it facilitates the promotion of product quality competition among manufacturers and improves product quality.

Among these effects, effect (1) requires the existence of cost competition between dealers for customers and space for arbitrage; effects (2) and (3) involve maintaining product reputation and enable consumers to obtain definite pricing information not worthy of highlighting when the buyers are familiar with the product; effect (4) promotes the so-called distribution network construction, which may not benefit consumers; effect (5) takes as a precondition that dealers sell several brands and other brands reduce their prices; and effects (6) and (7) involve promoting the quality of products or services, and encourage new products or new companies to enter the market effect. The agreement's role of promoting competition in the market is more obvious and prominent compared to other effects.

3. Conducting a Comparative Assessment

Third, it's necessary to conduct a comparative assessment of how much overall consumer welfare has been increased. When minimum resale prices maintenance is showing both positive and negative effects, it is difficult for antitrust analysis to make accurate measures of differences between positive and negative effects. Therefore, there must be a clear value target to make a final evaluation of the balance between the positive and negative effects.

Although Article 1 of the AML stipulates that Chinese AML has multiple legislative purposes of maintaining fair competition, improving economic efficiency, safeguarding consumer interests and public interests, etc., in the specific analysis and evaluation of minimum resale price maintenance behavior, safeguarding consumer interests should be the most important legislative goal. Article 15 of the AML stipulates several circumstances that are not applicable to Articles 13 and 14. But such implementation must still satisfy a condition, i.e. "undertakings should also prove that the agreement reached would not severely restrict competition in the relevant market, and would enable consumers to share the benefits arising from such an arrangement." According to this provision, the final condition determining that an alleged conduct is not applicable to Articles 13 and 14 of the AML is that benefits from such conducts can be shared by consumers. This being said, an important criterion for the evaluation of conducts involved in Articles 13 and 14 of the AML is whether such conducts enhance the overall consumer welfare.

For increasing overall consumer welfare, we should be more concerned about the long-term impact of minimum resale price maintenance behavior on consumer welfare:

1. in the long run, as the core mechanism of market competition—price—provides consumers with the most important right to choose. In an effective competitive market, that is, a market where the price mechanism normally plays its role, the voting right is still ultimately owned by consumers. The consumers should always be able to choose goods of reasonable quality, service, and price, thus promoting multiple competitions of price, quality and service, and allowing consumers to benefit therefrom.
2. In the long run, businesses with significant market power or market dominance will set minimum prices of their products above competitive prices, but this may attract other companies to compete on price. The result may be beneficial to the growth of other

competing companies. In this process the consumers have to endure high prices, so consumers' welfare is sacrificed.

3. In the long run, quality improvements, new products, and new companies can increase choices for consumers, and compensate for the loss of consumers in prices, which is the long-term positive effect that can overcome and offset the short-term negative effect of minimum resale price maintenance.

So the general principle to evaluate the effects of minimum resale price maintenance agreement can be further simplified as follows: If no negative effects of limiting price competition is produced, it can be generally considered to not constitute a monopoly agreement that eliminates or restricts competition. If negative effects of limiting price competition are generated without corresponding positive effects of improving product quality and services or promoting new products or new enterprises to enter the market, the minimum resale price maintenance agreement can generally be considered to constitute a monopoly agreement which eliminates or restricts competition.

IV. BURDEN OF PROOF THAT MINIMUM RESALE PRICE MAINTENANCE BEHAVIOR EXCLUDES OR RESTRICTS COMPETITION

Finally, the evaluation and analysis of minimum resale price maintenance behavior determines the allocation of burden of proof for plaintiffs and defendants involved in such conducts in antitrust civil litigations.

An important focus of controversy in the *Johnson & Johnson's* case was how to allocate the burden of proof in evaluating whether the minimum resale price maintenance agreements excluded or restricted competition. The second trial of the *Johnson & Johnson* case explicitly stated that, in antitrust litigation, the plaintiff bears the burden of proof that the minimum resale price maintenance agreements eliminates or restricts competition. The reason cited in the decision is that the burden of proof could be reversed only when explicitly stipulated by laws. Because there is no law and judicial interpretation that make special provisions for whether a minimum resale price maintenance agreement excludes or restricts competition, following the basic principle "burden of proof borne by claimant" in civil litigation, the appellant Ruibang Company bore the burden of proof that the minimum resale price maintenance agreement eliminated or restricted competition.

Meanwhile, regarding the standard of evidence, the decision did not raise extra requirements for the appellant, but believed that the evidence submitted by appellant must tentatively prove that: 1) the appellee had a strong market position in the relevant market and market competition was not sufficient; 2) the motivation of the appellee's minimum resale price maintenance was to limit competition, and 3) the appellee's behavior had the effect of harming competition. If proved, and if the appellee failed to provide sufficient counterevidence, one could determine that the minimum resale price maintenance agreement limited competition and thus constituted a monopoly agreement.

In the second trial of the *Johnson & Johnson* case, in addition to the legal basis cited in the decision to determine the allocation of the burden of proof in evaluating whether the effect of minimum resale price maintenance agreements restricted competition, there were the following considerations:

First, in line with the aforementioned legal evaluation principles, since the maintenance on minimum resale price agreements does not apply the position of "principle of prohibition," it should not allocate the burden of proof to the defendant, otherwise it would assume the principle of prohibition.

Second, assigning burden of proof to the defendant in such antitrust litigation would lower the threshold for such litigation, reduce judicial efficiency, and affect the effective implementation of the AML.

Third, as a given in such proceedings, the plaintiff and the defendant in general have asymmetric information. The plaintiff often doesn't get access to sufficient information. However, the burden of proof is allocated to the plaintiff to prove whether minimum resale price maintenance agreements eliminate or restrict competition. Under the high probability standard of proof in civil action, it is fair for the judge to reduce the requirements of the plaintiff's burden of proof. It also helps realize actual fairness in such litigations.

V. CONCLUSIONS

In summary, in the absence of sufficient empirical evidence indicating that most minimum resale price maintenance behaviors harm competition, for China—an emerging market—it is not a wise choice to adopt either a "*per se* illegal" or "principle of prohibition + exceptions exemption" for minimum resale price maintenance behavior. "Rule of Reason principle" fits the actual needs of the market, but should not be applied in a manner that is too flexible or at too high a cost.

In the second trial of the *Johnson & Johnson* case, the court tried to identify some of the most basic and important analysis elements, so as to provide a simple analytical framework for judges, and also to help enterprises establish clear behavioral expectations. In this analytical framework, the structure of relevant markets, the market position of implementing companies, motives to establish minimum resale price maintenance, and actual competitive effects of minimum resale price maintenance are the most important four factors for judgments. And judges should focus on the effects of market competition that have a substantial impact on the market, and filter out those results that produce non-substantive impact on competition in the market. As a result, this analytical framework can be named the "substantial effect measurement" principle. In this framework, the plaintiff bears the burden of proof with respect to the defendant's substantial damage to competition, but the judge will set the standard of proof based on the specific case.