Can Suppliers Fix Final Prices? The Contribution of China to the Debate on Resale Price Maintenance
Qingxiu Bu*

The legality of resale price maintenance (RPM) has been scrutinised in the USA and the EU regarding the question whether it should be considered per se illegal or be subject to the rule of reason. But what did other jurisdictions find on the subject matter? In China, the Shanghai Court and the National Development and Reform Commission (NDRC) have expressed opinions—and these opinions demonstrate that it may be challenging to determine whether RPM can substantially increase the efficiency of a distribution chain or restrict competition.

I. The treatment of RPM in the USA and in the EU

A. Leegin Creative Leather Products, Inc. v PSKS, Inc.

The US Supreme Court’s landmark decision in Leegin reversed the long-standing precedent of Dr. Miles Medical,1 after which RPM is no longer considered per se illegal but instead is treated under the rule of reason, balancing the pro-competitive narrative and anticompetitive effects. In 1911, vertical price-fixing schemes became a per se violation of Section 1 of Sherman Act when the Supreme Court interpreted the statute in Dr. Miles Medical Co. v John D. Park & Sons Co.2 However, in a landmark case of Leegin, the Supreme Court overturned the century-old precedent and held that courts should apply the rule of reason when analysing vertical price-fixing schemes.3 The rule of reason allows for inquiry as to the economic rationale and competitive consequences of a manufacturer’s RPM policy.4 The decision renders the RPM subject to an ‘effects-based’ analysis. It appears that one must not state that RPM ‘always or almost always’ tends to restrict competition and decrease output.4 A ruling must be based on whether an agreement has an adverse impact on competition. Such a decision coincides with Tirole’s observation that:

‘Theoretically, the only defensible position on vertical restraints seems to be the rule of reason. Most vertical restraints can increase or decrease welfare, depending on the environment. Legality or illegality per se thus seems unwarranted.’5

The rule of reason can adequately assess potential pro-competitive and anticompetitive effects of RPM.6

The efficient promotion of consumer welfare is commonly recognised as the primary goal of antitrust.7 RPM agreements could have positive and negative effects depending on the context in which they are used. Although the Supreme Court ascertained four circumstances under

Key Points
- The legality of resale price agreements has been heavily discussed in the EU and the USA.
- It is now time to examine the position adopted by courts and authorities in other jurisdictions.
- In China, courts are progressively developing their approach and authorities are doing the same—not necessarily in the same direction.
which RPM may jeopardise competition and compromise consumer welfare,\textsuperscript{8} it does not necessarily mean that RPM will make consumers worse off because it raises retail prices or thwarts retailer discounting.\textsuperscript{9} Some observers even found that:

while some studies find evidence consistent with both pro- and anti-competitive effects . . . virtually no studies can claim to have identified instances where vertical practices were likely to have harmed competition.\textsuperscript{10}

The RPM-impelled increase in demand caused by increased retail service can make consumers better off even if this service is accompanied by a price increase.\textsuperscript{11}

As Elzinga and Mills observed, ‘there are no key inputs that Leegin controls that would keep out new entrants if, hypothetically, the company sought to exclude them by means of its RPM policy.’\textsuperscript{12} The Supreme Court’s decision in Leegin enables the antitrust agencies to scrutinise those instances when RPM promotes or reduces consumer welfare on a case-by-case basis rather than generally rejecting the well-established economic arguments about RPM’s potential pro-competitive effects.\textsuperscript{13} The Court further observed that lower courts can ‘devise rules over time for offering proof, or even presumptions where justified, to make the rule of reason a fair and efficient way to prohibit anticompetitive restraints and to promote pro-competitive ones.’\textsuperscript{14} However, considerable debate remains with a particular regard to how lower courts should shape the rule of reason.\textsuperscript{15} For instance, a very recent study showed that ‘RPM agreements are more likely to be anticompetitive than pro-competitive.’\textsuperscript{16} The debate over the appropriate legal treatment of RPM is not limited to the USA as it also happens to the EU and the UK.

\textbf{B. The legal treatment of RPM in the EU}

The European Commission (EC) defines RPM as ‘agreements or concerted practices having as their direct or indirect object the establishment of a fixed or minimum resale price or a fixed or minimum price level to be observed by the buyer.’\textsuperscript{17} The imposition of RPM is generally considered by the EC to be a serious restriction ‘by object’ and therefore presumed to infringe Article 101(1) of the Treaty on the Functioning of the European Union (TFEU), regardless of the actual effect on competition. There is a presumption that hardcore restrictions,\textsuperscript{18} such as RPM, impede competition.\textsuperscript{19} As Peeperkorn observed:

the direct consequence of including RPM in an agreement is that the Commission will assume that the agreement will have actual or likely negative effects; there is a presumption that such effects will result from the agreement that RPM will not have positive effects or that, where efficiencies are likely to result, these will not be passed on to consumers.\textsuperscript{20}

To discharge the presumption, the entity involved must adduce sufficient evidence that there are sufficient pro-competitive efficiencies to satisfy the criteria for an exemption.\textsuperscript{21} In practice, it is unlikely for the entities involved to meet the Article 101(3) conditions, which is a form of \textit{de facto} per se prohibition.\textsuperscript{22} Even so, it does not necessarily mean in practice there is no point in examining RPM’s effects on competition.

\textbf{1. Case C-279/06 CEPSA Estaciones de Servicio SA [2008] ECR I-6681}

In \textbf{CEPSA}, the European Court of Justice (ECJ) held that: ‘If [a distributor is] required to charge the fixed or
minimum sale price imposed by [a supplier], that contract [...] will be caught by the prohibition provided for in Article 101(1) TFEU only if its object or effect is to restrict appreciably competition within the common market and it is capable of affecting trade between Member States.\textsuperscript{23} The ECJ clearly indicated that RPM does not necessarily breach Article 101(1) TFEU, which overturned its previous decision in Binon, where RPM constituted, by its very nature, a restriction of competition.\textsuperscript{24} Such an approach has been reaffirmed by the ECJ in Pedro IV Servicios that: although the fixing of a retail price constitutes a restriction of competition expressly provided for in Article 101 (1) (a), it causes that agreement to be caught by the prohibition set out in that provision only where all the other conditions for applying that provision are met, that is to say, that the object or effect of the agreement is perceptibly to restrict competition within the common market and that it is capable of affecting trade between Member States.\textsuperscript{25} It seems that the approaches by the ECJ have not reshaped the anti-RPM in the EU. The Guidelines 2010 has even strengthened the hostile attitude towards an RPM agreement.

2. EC guidelines on Vertical Restraints 2010

Under the Guidelines on Vertical Restraints [2010] OJ C130/1, the EC arguably differs from the CEPSA judgment, states that when a hardcore restraint is included in a vertical agreement ‘that agreement is presumed to fall within Article 101 (1) [and it] is unlikely to fulfil the conditions of Article 101(3)’.\textsuperscript{26} However, the EC observes that ‘undertakings may demonstrate pro-competitive effects under Article 101(3) in an individual case.’\textsuperscript{27} It is further held that ‘RPM may not only restrict competition but also, in particular where it is supplier driven, lead to efficiencies, which will be assessed under Article 101(3).’\textsuperscript{28} The Vertical Agreements Block Exemption Regulation further specifies which vertical agreements benefit from an automatic exemption; known as a safe harbour.\textsuperscript{29} The two ECJ decisions in CEPSA and Pedro IV Servicios are consistent with EC Guideline §225, where the defendants either did not appreciably restrict competition or produced efficiencies pursuant to Article 101(3) TFEU. Even so, the prevailing hostility against RPM in the EU could not be substantially changed under the Article 101(1) TFEU.\textsuperscript{30} The Block Exemption 330/2010 on vertical agreements has maintained RPM as a hardcore restriction,\textsuperscript{31} although it has opened the door for some efficiency justification to be considered under Article 101 (3). There seems to be a presumption against RPM and pro-competitive justifications are often viewed sceptically.\textsuperscript{32} Relatively, the EU’s approach with more legal certainty gives sufficient notice for undertakings to prevent them from abusing market power.\textsuperscript{33} Despite the lack of substantive changes, the law and regulations governing RPM have been evolving.\textsuperscript{34} The Commission’s Proposal for a Directive on antitrust damages claims proposes that in the case of a cartel infringement, it should be presumed that the infringement caused harm and that the infringing undertaking should have the right to rebut this presumption.\textsuperscript{35}

II. NDRC’s approach: Maotai & Wuliangye

The Antimonopoly Law (AML 2008) prohibits undertakings from reaching agreements that eliminate or restrict competition, and contains an express prohibition on vertical agreements that fix the resale price or restrict the minimum resale price of goods.\textsuperscript{36} The general prohibition may be inapplicable to certain types of agreements, if they contribute to improving technological progress and research and development (R&D) or enhance operational efficiency and strengthen competi-
tiveness of small and medial enterprises (SMEs). As such, whether an RPM is illegal per se under AML needs to be further scrutinised, since it may allow consumers to share the benefits derived from the RPM. NDRC has undertaken high-profile investigations of two state-owned enterprises (SOEs) and concluded that both companies’ RPM arrangements restricted competition in the market and harmed consumers’ interests.

A. Maotai & Wuliangye

Guizhou Moutai (Moutai) and Yibin Wuliangye (Wuliangye) are SOEs listed on the Shanghai Stock Exchange, representing China’s most famous liquor brands. Maotai and Wuliangye requested distributors sell their products at a price no lower than a specified minimum price. For instance, the alleged anticompetitive behaviour occurred in December 2012 when Moutai required distributors that its 53 per cent volume spirit must not be sold for less than ¥RMB1519 (£155) per bottle or ¥RMB1400 (£135) for bulk orders. In Wuliangye, NDRC held that its RPM agreement with 3,200 distributors had the effect of eliminating and restricting competition according to a quantitative analysis. Following the NDRC’s investigations, both Moutai and Wuliangye have repealed their RPM policies and taken rectification measures. On 15 January 2013, Maotai rescinded the RPM and reimbursed distributors who had been penalised by its marketing policies. On 17 January 2013, Wuliangye repealed its own marketing policies to ensure compliance with the AML 2008. The two cases set a milestone in Chinese AML enforcement as it was the first time that the NDRC has penalised RPM, shedding some light on the calculation of fines and the treatment of the RPM agreements. The cases involved the highest penalty ever given after the AML 2008 came into effect.

B. Calculation of damages

1. Calculation methods

The NDRC has the discretion to impose fines of up to 10 per cent of the turnover of the infringing company. On 22 February 2013, NDRC imposed a fine of ¥RMB 247 million (£25 million) on Maotai and ¥RMB 202 million (£20 million) on Wuliangye for setting minimum resale prices for their respective distributors’ sales. The fines were equated to 1 per cent of the previous financial year’s turnover of the entities involved, in view of the two companies’ cooperation and remedies. However, it remains ambiguous as to how to calculate the turnover due to the lack of official guidelines. It seems that the NDRC has calculated the turnover based on the revenue of the subsidiary entities directly involved in the infringement, rather than those of the corporate groups. Notably, both companies have actively cooperated with NDRC’s investigation, terminated the impugned conduct and returned confiscated deposits.

2. Leniency

A proactive approach and cooperation are proved to be beneficial for companies to take advantage of the policy of leniency. Article 46 of AML requires that the companies in question provide information on an RPM and ‘important evidence’ as a precondition of partial or full leniency. NDRC issued a guideline entitled ‘Provisions on the Administrative Procedures for Law Enforcement against Price Fixing’ (NDRC Provisions 2011), which provides timely guidance for the sake of a more effective implementation. It specifies that the first undertaking to report proactively an RPM agreement and provide significant evidence may be fully immunised, the second one may receive a reduction of at least 50 per cent and subsequent undertakings may receive at most a 50 per cent reduction. The NDRC Provisions 2011, in principle, outlines the circumstances and procedures under which NDRC will grant leniency under the AML. On 7 August 2013, NDRC imposed fines of RMB ¥668.73 million (£67 million) on six infant formula manufacturers for the purported use of RPM. The fines ranged from 3 to 6 per cent of turnover in the preceding financial year. Wyeth, Beingmate, and Meiji were given immunity from fines due to their ‘proactive cooperation’ and ‘swift rectification’.

37 AML 2008 Art 15.
41 AML 2008 Art 46 enables NDRC to impose fines of between 1% and 10% of entity’s annual turnover in the year preceding the infringement.
43 The NDRC issued Provisions on the Administrative Procedures for Law Enforcement against Price Fixing on 29 December 2010, which became effective 1 February 2011.
44 NDRC Provision 2011 Art 14.
46 ‘NDRC Explains Why Wyeth Received Immunity Because It Was The First One to Admit Guilt and to Lower Price’ 21st Century Economic Report (8
exempted companies had rectified their price policies and committed to lower prices. The grant of leniency reflects the degree of cooperation during the NDRC’s investigations and measures taken to address the impugned conduct. Such mitigating factors are consistent with the legislative expectation under the AML 2008.57

On further reflection, it remains unclear as to how one must interpret the ‘important evidence’ under Article 46 of AML 2008. Coincidently, the Chinese government was launching a campaign against foreign multinational companies (MNCs) whose products are unaffordable for common Chinese consumers. Given the Chinese government’s priority to reduce consumer goods prices, as articulated in China’s 12th Five Year Plan,48 resal price restrictions that result in propping up retail prices or softening competition may rarely find protection under Article 15 of AML 2008 in the present climate.59 Paradoxically, NDRC may have used AML as leverage to fulfill its cornerstone role of price control. It remains unclear whether the companies have virtually taken advantage of the AML’s leniency provisions or catered to the Chinese government’s request to rectify their price policy.50 The NDRC Provisions 2011 does not contain the same level of detailed guidance as those in other leading jurisdictions, like the EU and the USA.51

The grey areas enable the enforcement agencies to have considerable discretion when deciding the extent to which an undertaking will be given leniency. Although the Provision defines ‘important evidence’ as one that plays a key role for the NDRC to ascertain the existence of a monopoly agreement,52 it does not clarify any specific conditions which ensure immunity. These uncertainties may deter the first undertaking from seeking leniency and giving NDRC evidence of anticompetitive conduct, due largely to the absence of concrete assurances of immunity. Given the divergent approaches, respectively, by the People’s Court and NDRC, the undertaking involved concerns whether the evidence reported to NDRC will be used in its detriment in case a lawsuit were to be initiated before the court. It is this ambiguity that accounts for the dearth of foreign MNCs’ challenges against the decisions by the Chinese enforcement agencies.

C. The treatment of RPM by the NDRC

Although NDRC has made it clear that it regards RPM as per se illegal when justifying its large fines against the two SOEs,53 it provided little guidance on its reasons for holding that the RPM is unlawful under Article 14 of the AML 2008.54 Both Maotai and Wuliangye have strong market positions and a network of RPM agreements across China, which represents important indicators in the main economic theories of harm.55 Similar to the EU’s by object approach,56 NDRC appears to deal with RPM on the basis of the per se illegal theory, arguing that neither Maotai nor Wuliangye adduced sufficient evidence for exemption under Article 15. The allegations make it increasingly difficult for companies to distinguish legitimate commercial behaviour from conduct that NDRC would treat as illegal.57 Given the lack of NDRC’s reasoning, it remains uncertain whether the antimonopoly agency uses a comprehensive analysis with regard to the impact of the RPM, such as the specific market shares and changes in price. The NDRC’s approach contrasts with a judgment by Shanghai Court in Johnson & Johnson (J&J), which did not consider RPM per se illegal, but critically highlighted certain benchmarks, such as the supplier’s market share, the extent of upstream and downstream competition, and the impact of the RPM on the quantity and price of the products. It is worth examining how RPM has come to the forefront in light of recent legal proceedings against J&J.

References:

47 AML 2008 Art 46 (2).
48 China’s NPC approved a new national economic and social development strategy for the next five years (2011–2015) in March 2011; Stephen Roach, ‘China’s 12th Five-Year Plan: Strategy vs. Tactics’ (April 2011) 6 ‘Price stability is listed as number one – just ahead of efforts to stimulate consumer demand.’
51 Commission Notice on Immunity from fines and reduction of fines in cartel cases [Official Journal C 298, 8 December 2006].
52 NDRC Provisions 2011 Art 14 (3).
53 On 7 August 2013, NDRC fined six infant formula manufacturers for imposing RPM in connection with distribution agreements.
54 The AML prohibits suppliers from fixing the resale price or restricting the minimum price of resale.
III. Judicial approach: Ruibang v Johnson & Johnson

There is an increase in private enforcement of competition law on the horizon.58 In civil litigation, RPM does not appear to be per se illegal. The court examines not only whether an agreement contains monopoly clauses, but also whether the agreement has had an eliminative effect on competition. The parties in dispute are Johnson & Johnson Medical (Shanghai) Ltd., Johnson & Johnson Medical (China) Ltd. (hereinafter referred to as J&J), and Beijing Ruibang Yonghe Science and Technology Trade Company (Ruibang). In March 2008, Ruibang sold J&J’s products below the minimum resale price in contravention of an RPM provision in the distribution agreement. The latter then terminated the RPM agreement, confiscated its deposit, and ceased supplying Ruibang with the suture products. Ruibang filed a lawsuit at the Shanghai First Intermediate People’s Court against J&J in 2010,59 alleging that the RPM was in violation of the AML 2008 and claiming ¥RMB14,399,300 (£1.5 million) in damages.60 The court held that Ruibang had not met its burden of proof on the anticompetitive effect from the RPM restraint. Ruibang then appealed to the Shanghai High People’s Court,61 which held that Ruibang had not met its burden of proof on the anticompetitive effect from the RPM restraint. Ruibang then appealed to the Shanghai High People’s Court,61 which held that the RPM violated the AML and ordered J&J to compensate the plaintiff for ¥RMB530,000 (£55,000) on 1 August 2013.

A. The decision of Shanghai Intermediate Court

In May 2012, Shanghai First Intermediate People’s Court referred to ‘monopoly agreements’, which is defined under the AML as ‘agreements, decisions or other concerted actions which eliminate or restrict competition’,62 and held that this definition should apply to vertical agreements, like RPM. The court observed that a comprehensive assessment on the RPM agreement’s effects is indispensable to decide whether the RPM has constituted a violation of AML 2008. As such, in order to assess whether the agreement eliminated or restricted competition, the Court investigated some factors, such as the market share in the relevant market, the state of competition in the upstream and downstream markets, and the extent to which the restrictions would affect the supply volume and price of the product. The root of the problem lay with the challenges faced by plaintiffs in adducing sufficient evidence to establish a prima facie case. The Court placed a fairly high threshold with regards to the evidence needed to prove a causal link between the plaintiff’s loss and alleged anticompetitive conduct. It seems that most of the evidence accepted by the Court appeared to be circumstantial to prove the anticompetitive effect arising out of the minimum resale price.63 In its defence, J&J showed that there had been a number of alternative suppliers of similar products.

The court found that the plaintiff had adduced insufficient evidence to prove that the RPM had the effect of eliminating or restricting competition. On 18 May 2012, the Intermediate Court dismissed Ruibang’s claim given, in part, the absence of a causal link between the loss suffered and the RPM agreement and held that such loss did not stem from any elimination or restriction of competition. The case highlights that it is for the plaintiff to prove that the defendant has engaged in anticompetitive conduct from which the plaintiff’s loss has resulted. It seems from the decision that RPM is subject to something akin to a rule of reasons analysis64 and not to be treated as per se illegal. The Shanghai Intermediate People’s Court judgment appears to have adopted a literal interpretation of the AML, that is, an agreement to maintain minimum resale prices will not be prohibited unless it can be demonstrated that it eliminates or restricts competition.

B. Shanghai High Court’s reasoning

Upon appeal, the Shanghai High People’s Court rendered its final judgment on 1 August 2013, overturning the Intermediate Court’s ruling.65 The High Court held that J&J was liable for damages and was ordered to indemnify Ruibang the loss of its profit of RMB¥530,000 (£55,000) as a result of the monopolistic agreement. The

59 SPC Provisions 2012 Art 3: In competition litigation, an Intermediate People’s Court generally serves as the court of first instance, With SPC’s approval, Primary People’s Courts may also have jurisdiction as the court of first instance.
60 AML 2008 Art 14 (2).
61 Civil Procedure Law Art 147: litigants have the right to appeal to the People’s Court directly above the court of first instance; Civil Procedure Law Art 158: The court of second instance then renders a final judgment.
64 AML 2008 Ch II; AML 2008 Art 15.
65 Civil Procedure Law Art 20: High People’s Courts should exercise jurisdiction in cases with substantial influence on their respective jurisdictional regions; Civil Procedure Law Art 21: In cases with substantial national influence, the Supreme People’s Court may serve as the court of first instance.
High Court has shed some light on a few key issues, including: the status quo of competition in the ‘relevant market,’ the position of J&J in that market including the purpose of J&J’s minimum resale price requirement and the anticompetitive effect of this requirement. It is worth examining whether the decision reflects the legislative expectation of the AML 2008.66

1. The revenant relevant market

The High Court defined the ‘relevant market’ as the medical suture products market in mainland China. Based on the theory of substitutability, the lack of sufficient competition is the primary condition for RPM because consumers in a sufficiently competitive market would be able to switch to alternatives if the price of a given product is artificially inflated.67 Apart from an analysis of demand substitution, the Court examined J&J’s market concentration, market entry thresholds, and bargaining powers of downstream in determining the inexistence of sufficient competition. The High Court concluded that there was no sufficient competition in the relevant market based on the observations that

(i) motives of bargaining are absent from the downstream market as the costs of relevant product are shifted to end users;
(ii) downstream player’s loyalty to J&J brand decreases demand flexibility;
(iii) thresholds for entering into the relevant market are high due to the marketing authorisation required for the relevant products and the relationship-based sales model; and
(iv) the prices of J&J products remained consistently level for 15 years.68

It seems that the parameter for determining dominance is ‘the degree of difficulty for other business operators to enter the relevant market.’69 An undertaking involved shall not be deemed to have a dominant market position if the operator can provide opposite evidence, indicating that the inference of dominance is rebuttable.70

2. J&J’s market position in the medical suture market

The anticompetitive effect in the context of RPM depends on the defendant’s possession of ‘strong market powers,’ which is notably different from the term ‘dominant market powers’71 as used in another dimension of the AML, ie abuse of dominant market powers.72 With its strong brand influences and effective control over distributors, J&J is a leading firm in the medical suture market, representing over 20 per cent of the total market sales.73 Despite the lack of any market share criteria for the determination of ‘strong market powers,’74 the Court held that J&J’s market position was reflected by the capabilities to control pricing. The Court also noted J&J’s strong control over its distributors in its affirmation of J&J’s possession of ‘strong market powers.’ There, among other things, include that the distributors are subject to

(i) the non-compete obligations, prohibiting it from selling competing brands;
(ii) segregation of downstream market, prohibiting it from selling to hospitals (other than those designated by J&J); and
(iii) a distribution contract with a short term of one year only, with an option to renew it.75

It was the existence of such a market power that effectively shifted the evidentiary burden on to J&J to prove that the RPM clauses did not restrict competition. J&J was able to use the RPM to preclude price competition in the relevant market and maintain high sales prices. There is no indication as to whether there is any market share threshold for RPM to be held illegal.76 J&J’s ability to retain the same RPM for 15 years was deemed indicative of its dominant position to set prices in the relevant market.

Furthermore, the motives of the establishment of the RPM were considered by the Shanghai High Court as an element in exploring anticompetitive effect. The Court held that J&J’s motive was to avoid price competition—as evidenced by the imposing of contractual obligations on the distributors to maintain the pricing level of its products. This was indirectly proved through one of the

66 AML 2008 Art 1: ‘…to prevent and restrain monopolistic practice, safeguard the fair market competition, and to protect the benefits of consumers and the common interests of society.’
68 Ruibang v J&J (Shanghais High Court, No 63, 1 August 2013).
69 AML 2008 Art 18 (v).
71 AML 2008 Art 17.
72 AML 2008 Art 6; Notably, Art 17 (6) of AML 2008 prohibits abuse of dominance throughout price discrimination without legitimate reasons.
73 It is considerably lower than the 50% threshold where single firm dominance is presumed under Art 19 of the AML 2008.
74 AML 2008 Art 19.
75 Ruibang v J&J (Shanghais High Court, No 63, 1 August 2013).
J&J’s action plans requiring distributors to ‘establish good relationships with physicians in order to mitigate the impact of unfavourable pricing’. However, it is arguable whether the motive should be included as an element to be considered in determining anticompetitive effect, given the inherent difficulties in proving the intent. It is these facts that helped Ruibang to establish a prima facie case that the RPM was likely to be anticompetitive based on a combination of the level of competition in the market, J&J’s market share, and the apparent motivations behind the RPM agreements. If a supplier holds a strong market position, the RPM is more likely to result in anticompetitive effects and may be considered unlawful unless the supplier can show that the RPM has pro-competitive benefits that outweigh the perceived negative effects.77

3. The restrictive anti-competition effect
RPM may have both adverse effect on competition and pro-competitive effect.78 The Court focused on elimination of the intra-brand price competition. The Court did not rule out that RPM may generate efficiencies even in the context of substantial market power. As an essential element in determining the existence of monopolistic agreements, the anticompetitive effect includes the elimination or restriction of intra-brand competition, whereas no obvious pro-competitive effect was proved. A monopoly agreement may be exempted when a company proves that the monopolistic agreement bears efficiencies or serves public interest, it does not severely restrict competition in the relevant market and that customers will be able to share the benefits.79 Specifically, the establishment of minimum resale price for the purpose of procuring distributors to improve after-sales services in the event of a new product’s market entry may be reasonable.80

The Shanghai High Court held that the medical suture was not sufficiently competitive after reviewing the replaceability of the products, bargaining powers, brand loyalty, and the market entry barriers.81 The Court’s analysis of the absence of pro-competitive effect shed some light on its stance towards such exemptions. The RPM prevents the distributor from setting its own prices resulting in an ‘anti-competitive’ effect that violated the AML 2008. In particular, the Court found that J&J had failed to justify itself with little finding that it had made efforts to improve the quality of products or services, eliminate insufficient distributors, or promote market entry of new brand or new product through the establishment of RPM. This indicates that the Shanghai High Court adopted a standard similar to the US Supreme Court, which ruled in Leegin that the legality of RPM agreements depends on whether or not they promote economic efficiency and consumer welfare.82

4. The calculation of damages
Shanghai High Court calculated the losses based on the fair profit margin in the market.83 It sought to quantify the actual financial loss suffered by the plaintiff. It may include, upon the plaintiff’s application, reasonable expenses and costs incurred during the investigation and steps taken to prevent the anticompetitive conduct. Neither the AML nor any other judicial interpretation specifies the scope of such ‘expenses and costs’, such as whether this includes legal and expert fees.

Jurisdiction over competition disputes is to be determined in light of the actual circumstances of a case in accordance with the jurisdiction provisions of the Civil Procedure Law and relevant judicial interpretations regarding torts, and contract disputes.84 It is implied that claims for breach of the AML 2008 can be either tortious or contractual in nature. Nevertheless, the Shanghai High Court held that Ruibang’s loss should not be calculated under contract, which would, otherwise, result in excessive profit derived from a monopolistic activity.85 It means that contractual clauses, such as the limitation of liability, will be likely to be enforceable in the context of an antimonopoly case.86 The High Court agreed to award Ruibang for lost profits due to the early termination of its distribution agreement, but held that the loss should be based on the normal profit margin level ie 16 per cent, rather than 23 per cent, that is, Ruibang’s profit margin under the distribution agreement.

79 AML 2008 Art 15.
81 Ruibang v J&J (Shanghais High Court, No 63, 1 August 2013).
84 SPC Provision 2012 Art 4.
86 Alexander Kaufman, ‘Johnson & Johnson (JNJ) Loses Anti-Monopoly Case in China, Ordered To Pay $85,800 to Local Dealer’ International Business Times (1 August 2013).
agreement. Thus, the loss was calculated as ¥RMB530,000 (£53,000).87

5. The burden of proof

The effect of elimination or restriction of competition is a necessary element in the finding of a monopolistic agreement. Even though the Shanghai High Court overruled the lower court’s judgment, it still confirmed the latter’s analytical approaches. The plaintiff was statutorily required to bear burden of proving the anticompetitive effects of RPM.88 The burden of proof under Civil Procedural Law (CPL) will be reversed only by express terms under laws, regulations, or judicial interpretations. Since the Provisions on Several Issues Regarding the Application of Laws to Civil Disputes Involving Monopolistic Acts (SPC Provision 2012)89 does not include a clause to such effect, the general principle that ‘the burden of proof is upon the party who claims’ under the CPL shall apply.90 Thus, the Shanghai High Court expressly held that reversion of burden of proof does not apply to vertical agreements.91 Thus, the Court placed the burden of proof on Ruibang to present prima facie evidence showing that the RPM had caused unreasonable restraint on competition.

NDRC would not have had an aligned approach with the courts in Ruibang v J&J when it came to the level of burden of proof of anticompetitive effects. Even if NDRC held the same opinion as that of the Shanghai Court on prerequisite anticompetitive effect, it may not be likely to subject itself to the ‘burden of proof’ as heavy as a plaintiff would bear in a private enforcement lawsuit.92 The foregoing reasoning suggested a heavier burden of proof with respect to market share on a large MNC as a defendant, which, though understandable, is inconsistent with the Court’s allocation of burden of proof.93 Arguably, RPM is already explicitly listed in the AML 2008 as a type of vertical monopolistic agreement,94 just as horizontal price fixing. Given that the defendant concerned shall bear the burden of proof to show that the relevant agreement has no effect of eliminating or restraining competition,95 it raises a reasonable challenge on the judgment of whether the plaintiff should still bear the burden of proving an anticompetitive effect.

Second, the plaintiff bears a relatively heavy burden of proof in antitrust private litigation of vertical agreements. The requirement of plaintiffs to carry such a high evidential burden may prove to be a substantial impediment to future plaintiffs in RPM.96 Finally, there is no well-recognised standard of proof for competition cases. SPC Provisions 2012 is silent in respect of the standard of proof required in antitrust litigation. Article 73 of the Evidence Provisions97 provides that where both parties concerned produce contradicting evidence regarding the same fact but neither has enough evidence to rebut the other side’s evidence, the court must determine whose evidence prevails, taking the specific situation into consideration, and must then use the evidence that it considers prevails.98 Conventionally, a principle of ‘on the balance of probability’ applies in civil cases.99 In the Shanghai High Court, both the appellant and appellee hired economic experts to submit economic analysis,100 which may have affected the court’s judgment. This mirrors the UK’s practice where the rules on expert evidence are set out in CPR 35 and the Chancery and Commercial Court Guides.101 Expert evidence may only be given with the permission of the court, and follows the exchange of witness statements from the witnesses of fact.102

C. Is RPM per se illegal under the Antimonopoly Law?

In Ruibang v J&J, the first instance court held that Ruibang failed to establish to a satisfactory degree that there was a causal link between the harm claimed and

---

87 Ruibang v J&J (Shanghai High Court, No 63, 1 August 2013).
88 PRC Civil Procedure Law (CPL 2013) Art 64.
89 The SPC Provision 2012 will be given more details in Part IV.
91 SPC Provision 2012 Art 7.
95 AML 2008 Art 13 § 1; SPC Provisions 2012 Art 8.
96 Mark Cohen and others, Anti-Monopoly Law and Practice in China (OUP, Oxford 2011) 121, 122.
102 CPR 35.3: the expert is subject to an express duty to help the court on the matters within his or her expertise, and this duty overrides any obligation to the party from whom he has received instructions; CPR 35.7: the court can also order that expert evidence be provided by a single expert appointed jointly.
January 2011.

104 The National Development and Reform Commission (NDRC) promulgated the Anti-Pricing Monopoly Regulations (NDRC Regulation 2011), issued on 4 January 2011. The NDRC Regulation 2011 defines a ‘price monopoly agreement’ as an ‘agreement or decision or other concerted action that eliminates or restricts competition in respect of price.’ It prohibits ‘price monopoly agreements’ that fix the resale price of products or set minimum resale prices or RPM. This indicates that NDRC takes a ‘restriction by object’ approach towards RPM analogous to the EU position. Given NDRC’s recent decisions, it is obvious that the threshold of the burden of proof under Article 15 is considerably high for the companies to be exempted under Article 15.

1. Per se illegal vis-à-vis rule of reason

Since RPM became a focus of NDRC’s anti-competition enforcement, the illegality has been conclusively presumed without having to delve into the effect on competition. RPM is presumed unlawful as explicitly prohibited under Article 14, unless justified by one of the exemptions under Article 15 of AML 2008, that is, the company involved should successfully show that the RPM does not adversely affect competition and consumers share mutually the benefits. A similar position is adopted by the NDRC in its Anti-Pricing Monopoly Regulations (NDRC Regulation 2011), issued on 4 January 2011. The NDRC Regulation 2011 defines a ‘price monopoly agreement’ as an ‘agreement or decision or other concerted action that eliminates or restricts competition in respect of price.’ It prohibits ‘price monopoly agreements’ that fix the resale price of products or set minimum resale prices or RPM. This indicates that NDRC takes a ‘restriction by object’ approach towards RPM analogous to the EU position. Given NDRC’s recent decisions, it is obvious that the threshold of the burden of proof under Article 15 is considerably high for the companies to be exempted under Article 15. An ‘effects-based’ analysis is conducive to determining whether RPM has the effect of eliminating or restricting competition. The Shanghai High Court rejected the plaintiff argument for the ‘per se illegal’ treatment of RPM and affirmed a ‘rule of reason’ approach towards RPM. The plaintiff must prove the anticompetitive effects before the burden shifts to the defendant to show the pro-competitive effect of the challenged conduct. RPM may address the free rider problem and encourage distributors to offer consumers additional services; facilitate new product or brand entry; or encourage distributors to carry a supplier’s products with uncertain demand or maintain more stocks of a supplier’s products. However, Comanor argued that general consumers’ interests are not given sufficient consideration, which does not distinguish between marginal and infra-marginal consumers. In Ruibang v Je,f the defendant had failed to prove that RPM would not restrict competition but could enable consumers to benefit from the RPM.

2. A chain of reactions: implication on multinational companies in China

The judgement comes in the face of rising concerns that multinationals are being put through additional scrutiny in China. Enforcement risk associated with an RPM is increasingly higher. Ruibang v Je,f is not only the first case in which a vertical agreement imposing an RPM agreement has been challenged in a PRC court, but also the first AML case in which the High Court reversed the judgment of the first instance court in favour of a plaintiff. This, to some extent, signals the stance of the Chinese courts towards RPM. The Shanghai High Court’s decision may spur more distributors to resort to private antitrust litigation, instead of turning to the NDRC, the administrative authority in charge of enforcing price-related provisions under the AML 2008. It is also notable that NDRC can only punish offenders with fines accruing to the government rather than plaintiffs.

As China has become an integral part of the global market, the enforcement of AML 2008 has far-reaching implications on foreign multinationals in terms of their pricing strategies. NDRC is sometimes alleged to use the AML as a tool of the industrial policies to benefit the local revivals and consumers at the expense of the foreign MNCs. Many of them may be targets under the enforcement arena for both NDRC and People’s


104 The National Development and Reform Commission (NDRC) promulgated the Anti-Pricing Monopoly Regulations (NDRC Regulation 2011) on 4 January 2011, which took effect on 1 February 2011.

105 NDRC Regulations 2011 Art 5.

106 NDRC Regulations 2011 Art 8 (i), (ii); PRC Price Law Art 14(1): ‘undertakings must not “work collaboratively to control market prices to the great detriment of the lawful rights and interests of other undertakings or consumers.’


111 Susan Ning and others, ‘The Dual System of Anti-monopoly Law—The Interplay between Administrative Enforcement and Civil Action’ China Law Insight (12 September 2013).

Courts. Given the Chinese government’s priority to reduce consumer goods prices, RPM may rarely find protection under Article 15 of AML 2008. In this vein, it may not be easily justified to attribute the massive scandals against foreign MNCs as China’s selective enforcement campaign.

IV. The judicial practice in the court vis-à-vis the NDRC enforcement

There has not been a consistent and coherent paradigm for evaluating RPM in China. The NDRC has taken a strict liability approach towards RPM, while the Shanghai High Court’s focusing on the reduction of intra-brand price competition has set a high bar for establishing that a particular RPM obligation is unlawful. The Shanghai Court seems to have taken a ‘rule of reason’ approach, where the effect on competition needs to be proven and then balanced against pro-competitive effects. An explicit divergence by the two enforcement agencies arises from the different interpretations of the antimonopoly agreement. The judgements in *Ruibang v J&J* and *Maotai & Wuliangye* illustrate such different approaches taken respectively by NDRC and Shanghai Court.

A. The judicial interpretation: SPC provisions 2012—the legislative expectation

Given that the Chinese antitrust regime relies primarily upon administrative enforcement, it is essential to facilitate private follow-on and stand-alone damages actions. On 3 May 2012, the Supreme People’s Court (SPC) published its long-awaited *Provisions on Several Issues Regarding the Application of Laws to Civil Disputes Involving Monopolistic Acts* (SPC Provision 2012), which came into effect in June 2012. *Provision 2012* provides guidance on *inter alia* standing, jurisdiction, rights of action, burden of proof, evidence, liability, and limitations. A plaintiff may bring an action directly before the courts, or after AML enforcement agency has made its decision concerning particular anticompetitive conduct. With preserving the effectiveness of the public enforcement, the *SPC Provision 2012* was designed to encourage private stand-alone lawsuits under the AML, so as to facilitate the recovery of losses suffered resulting from anticompetitive behaviour.

It appears to be that the *SPC Provisions 2012* paves the way for significant private antitrust litigation and encourages more plaintiffs to bring private actions in the courts, establishing private litigation as an alternative to public enforcement of the AML. This seems to be the SPC’s intent with its focus on the rules of evidence and the apparent relaxation of the evidentiary burden on plaintiffs. Nevertheless, the *SPC Provisions 2012* provides no further guidance on how vertical agreements, like RPM, should be treated. Arguably, it is silent on the substantive aspects of the issue of burden of proof in vertical cases, which may suggest that RPM should be treated differently from horizontal agreements. It remains to be seen whether the *SPC Provisions 2012* will increase the tide of private litigation in China.

B. Divergent approaches between the NDRC and the Shanghai High Court

The Shanghai High Court has taken solid economics, effects-based approach for RPM whereas the NDRC has taken a position that mirrors the EU’s ‘by object’ approach. The Shanghai High Court tried to ascertain whether the J&J’s RPM has had a restrictive effect on competition in the medical suture market in China. The rule of reason approach requires plaintiffs to proffer such evidence as part of their *prima facie* burden before requiring defendants to offer evidence of the restraint’s efficiency. It allows courts to determine, on a case-by-case basis, whether a particular RPM agreement is anticompetitive. The rule of reason may enable consumers to realise the benefits of the RPM agreements that are pro-competitive while also allowing AML to be used to effectively govern those RPM arrangements that actually harm competition. NDRC appears to have conducted some quantitative analysis before it concluded that the RPM agreement had the
effect of eliminating and restricting competition. \(^{121}\) It seems that NDRC may be less inclined than the High Court to consider the restrictive competition effects on the relevant market when examining the RPM. It regards RPM to be ‘in theory prohibited’ under Article 14 of the AML 2008. A bright-line prohibition is less costly to administer than a standard requiring a case-by-case assessment of the competitive effects. \(^{122}\) On the other hand, a case-by-case analysis may lead to further legal uncertainty due to the lack of precedents in China. \(^{123}\) Based on the balance between two values of cost and certainty, it can be inferred that NDRC will take an active role in identifying and vigorously prosecuting RPM arrangements in China.

The cause for this uncertainty primarily lies with AML 2008, which lacks specific provisions to clarify whether an RPM agreement shall be regarded as illegal. Furthermore, the SPC Provisions 2012 does not address potential inconsistencies between the courts and the antitrust authorities. Given the divergences between the judicial and administrative approaches to RPM cases, a company prevailing in a civil suit involving an alleged violation of the AML 2008 is likely to be subject to NDRC enforcement for the same matter. It is unclear whether NDRC is expected to stay proceedings or vice versa, if an action regarding the same conduct is to be brought before the courts. Relevant laws do not, however, provide whether competition authority decisions constitute binding evidence in proceedings private actions. It remains unclear as to whether plaintiffs are allowed to use the decisions of China’s antitrust enforcement authorities as evidence of unlawful conduct, calculation of damages, and passing on defence. \(^{124}\) Neither does SPC Provisions 2012 address potential conflicts between private action through the courts and public enforcement of the AML, which leaves considerable discretion to individual courts. However, if the NDRC made a decision against an undertaking involved, the People’s Court are more likely to adopt it as a stronger proof than other evidences. This also raises the possibility of diverging outcomes in relation to the same RPM agreement conduct. \(^{125}\) The possibility for the joiner of cases may reduce the incidence of conflicting results. \(^{126}\)

Many foreign MNCs have faced administrative scrutiny and civil liability for engaging in RPM practices. Foreign MNCs do not feel reassured by the divergence in NDRC’s and the court’s positions towards RPM. A manufacturer involved in an RPM runs the risk of substantial fines unless it can be shown that the RPM agreement satisfies the Article 15 exemption criteria. The potential challenge for foreign MNCs is the lack of a clear, consistent, and coherent set of criteria as well as standards for determining when RPM is lawful. Such an uncertainty will inevitably incur considerable operational and legal costs particularly for those MNCs with dominant positions in the Chinese markets. It is critical for the courts and the antitrust enforcement agency to be aligned on the RPM issue. Given the regulators’ lack of practical experience in dealing with RPM, the regulator should allow the court system to develop legal precedent through addressing live cases. \(^{127}\) The evolving legal and regulatory framework deal with each RPM issue on a case-by-case basis, a consistent and coherent approach will provide legal certainty. More parameters will clarify the stances of the antimonopoly authorities as well as the People’s Court.

V. Conclusion

Unlike the US Supreme Court’s structured rule of reason in Leegin and the EU’s ‘by object’ approach coupled with a set of guidelines, China has yet to adopt a framework that clearly explains when RPM is lawful in China. The NDRC holds that RPM is in principle prohibited under Article 14 of the AML unless the companies involved can prove that the RPM in question could be exempted under Article 15. Although the NDRC has endorsed something close to per se illegality for RPM, the courts appear to apply an analytical framework more similar to the rule of reason. A long-awaited final decision was made on 1 August 2013, when Shanghai High Court applied a ‘rule of reason’ approach in a landmark vertical price control case between Ruibang and [J&J]. The Shanghai High Court’s decision may give rise to a more private enforcement action against RPM.


124 SPC Evidence Provisions 2011 Art 77: the documents formulated by state organs or social bodies according to their respective functions are, as a general rules, more forceful than other written evidences.


126 PRC Civil Procedure Law (CPL 2013) Arts 54, 55.

Any approaches towards liability determinations under antitrust laws must focus upon maximising consumer welfare. Given the lack of the safe harbour, the question of whether the RPM can maximise the consumer welfare plays an indispensable role in determining the RPM’s lawfulness or unlawfulness. At the current stage, a legal approach under which RPM agreements are evaluated on a case-by-case approach would be appropriate. Given that court decisions are not binding in China, the uncertainty will not be addressed until the SPC issues a judicial interpretation that specifically addresses the issue. There is a long way to go to develop a consistent and coherent set of principles for RPM agreements, particularly in the Chinese transitional economy.

doi:10.1093/jeclap/lpu111

Advance Access Publication 21 November 2014