Rethinking Resale Pricing in China

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Introduction

In the past year, resale price maintenance (RPM) agreements have attracted attention in China's courts as well as before China's National Development and Reform Commission (NDRC), the enforcement authority responsible for price-related infringements under the Anti-Monopoly Law (AML), and its local branches. China's courts heard their first RPM case in 2012, in the Shanghai Intermediate People's Court. The plaintiff, Beijing Ruibang Yonghe Technology and Trade Co. Ltd. (Ru ibang), claimed damages against Johnson & Johnson for, *inter alia*, imposing minimum resale price obligations in a distribution agreement, contrary to Article 14 of the AML.[1] The action was dismissed, and Ruibang appealed to the Shanghai High People's Court (Court). On August 1, 2013, the Court allowed Ruibang's appeal awarding damages of RMB 530,000 (approximately USD 87,000) – a pyrrhic victory for a plaintiff claiming RMB 14.4 million (approximately USD 2.3 million) in damages.

The Court's judgment coincided with the NDRC's announcement of fines, a week later, on August 7, against six infant formula manufacturers and immunity for three others for fixing or imposing minimum resale prices in connection with distribution agreements (the *Infant Formula* cases). Earlier, on February 22, two local branches of the NDRC, the Guizhou Price Bureau and the Sichuan Development and Reform Commission (Sichuan DRC), announced fines against two leading Chinese premium spirits producers, Kweichow Moutai Co. Ltd. (Moutai) and Yibin Wuliangye Group Co., Ltd. (Wuliangye), for setting minimum resale prices in distribution agreements (together the *Spirits* cases).

These cases concerned the purported use of fixed and/or minimum RPM in the context of distribution agreements and measures taken by the manufacturers concerned to enforce resale price restrictions. RPM is a controversial area of competition law and policy. Approaches differ across (and even within) jurisdictions along a scale ranging from *per se* illegality to a more permissive effects-based or *rule of reason* approach that enables the potential anticompetitive effects of RPM to be weighed against its potential benefits.[2] The recent court and administrative cases highlight the areas of competition law and policy to be honed in China. As China's courts and competition authorities chart their own course, questions arise as to the treatment of RPM in China, the applicable standards, the relationship between the competition authorities and courts, the approach to investigations, the investigative techniques used to establish anticompetitive harm, the

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[1] Article 14 of the AML prohibits vertical monopoly agreements. It expressly prohibits two kinds of practices: price fixing and restricting the minimum resale price. It also prohibits other vertical agreements deemed unlawful by China's competition authorities.

[2] See, generally, OECD, Competition Committee, Roundtable on Resale Price Maintenance, 10 September 2009, DAF/COMP(2008)37, pp. 23, 36-57; Matthew Bennett, Amelia Fletcher, Emanuele Giovannetti and David Stallibrass, *Resale price maintenance: Explaining the controversy, and small steps towards a more nuanced policy*, available at http://mpra.ub.uni-muenchen.de/21121/, MPRA Paper No. 21121, 1, posted 7 March 2010, pp. 15-17.

calculation of fines, etc.[3] China has yet to adopt a clear, consistent and coherent paradigm for evaluating RPM – one that explains the specific circumstances in which RPM is/is not unlawful within the meaning of Article 14 of the AML and, if so, when the conditions for exemption under Article 15 can be met – and teaches when competition and consumer welfare are/are not likely to be adversely affected by the RPM commitment.

We examine the implications of the recent court and administrative cases in China in this article, and suggest filters that may assist in identifying instances when RPM may/may not be problematic in the China context. This effort is necessarily tentative in nature, as the law on RPM is still evolving and the very few cases to date are not necessarily definitive statements of the law in China.

Ruibang v. Johnson & Johnson, the Spirits and Infant Formula cases

Resale price maintenance is an agreement between supplier and distributor where a supplier restricts the price at which the distributor may on-sell the contract products. The RPM commitment may require the distributor to on-sell the products at or above a given price (fixed or minimum RPM), or below a given price (maximum RPM). The supplier may also recommend the price at which the distributor may on-sell the contract products. The distributor can also drive the RPM commitment.[4]

RPM agreements are common in China especially for suppliers dependent on a distribution model to service customers throughout China. From a supplier's perspective, an RPM commitment enables the supplier to manage and streamline the distribution chain across China. As will be discussed below, the *Ruibang v. Johnson & Johnson*, *Spirits* and *Infant Formula* cases suggest that fixed or minimum RPM is not *per se* illegal under the AML, but will be punished severely if found to infringe the AML. These cases addressed different forms of RPM and measures, which Ruibang, the NDRC, the Guizhou Price Bureau and the Sichuan DRC, as the case may be, considered ensured compliance with the RPM obligations under the distribution agreements concerned.

Ruibang v. Johnson & Johnson

Ruibang v. Johnson & Johnson arose from a contractual dispute over a distribution agreement concerning the supply of sutures to Chinese hospitals. Ruibang, Johnson & Johnson's non-exclusive distributor for 15 years, concluded a one-year distribution

[3] Many of these questions, although important for the development of a clear, consistent and coherent set of principles for RPM in China, are beyond the scope of this article.

[4] Buyer-induced RPM is generally regarded as more harmful than supplier-induced RPM. As the European Commission's Guidelines on Vertical Restraints explain: *"Strong or well organized distributors may be able to force or convince one or more suppliers to fix their resale price above the competitive level and thereby help them to reach or stabilise a collusive equilibrium. The resulting loss of price competition seems especially problematic when the RPM is inspired by the buyers, whose collective horizontal interests can be expected to work out negatively for consumers,"* OJ [2010] C 130/1, para. 224.

agreement to supply the sutures to a Beijing hospital.[5] Ruibang brought an action in the Shanghai Intermediate Court claiming damages against Johnson & Johnson for, *inter alia*, imposing a minimum RPM commitment in the distribution agreement and wrongfully terminating that agreement for non-compliance. Ruibang supplied the products below a price set by Johnson & Johnson. A warning followed, and later Johnson & Johnson ceased supply, eventually terminating the agreement. Johnson & Johnson concluded new distribution agreements with other distributors in 2009 omitting the minimum RPM clause.

The Shanghai Intermediate Court dismissed Ruibang's action for lack of sufficient evidence that the disputed clause restricted or eliminated competition.[6] It was thus lawful under Article 14 of the AML. Both the form and the likely effects of the RPM in the agreement had to be considered, which required evaluation of market shares; the level of competition at the supplier and distributor levels; and the impact of the RPM on competition and on the availability of the contract products in the market. Johnson & Johnson pointed to several other competing suppliers of sutures to establish that the market was sufficiently competitive and that the RPM had no adverse impact on competition.

Ruibang appealed, and on appeal the Court overturned the lower court's judgment. It held that Ruibang had adduced sufficient evidence during the appeal procedure, which showed that the minimum RPM obligation had anticompetitive effects in China and thus infringed Article 14 of the AML. The RPM eliminated intrabrand competition and reduced interbrand competition in sutures in China harming consumers' interests.[7] Relying on the Supreme People's Court's Judicial Interpretation on civil procedures in competition-related actions in China,[8] the Court reasoned that like horizontal agreements between competitors, which the AML prohibits under Article 13, an agreement with minimum RPM obligations infringes the AML only if it has anticompetitive effects.[9]

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[5] The agreement at the centre of the dispute was for the period 2 January 2008 to 31 December 2008. It was still in force when the AML entered into force in August 2008 and, therefore, the AML applied.

[6] The Court also determined that Ruibang failed to establish to a sufficient degree that there was a causal link between the harm claimed and the damages sought.

[7] The Court focused on elimination of intrabrand price competition. A minimum RPM agreement necessarily limits distributors' ability to compete with each other. Even where pro-competitive, RPM may increase prices but also quality, etc. There is little discussion in the Court's judgment on the minimum RPM's impact on non-price competition and, unlike the lower court, whether competition at the upstream level was sufficient to undermine the anticompetitive effects.

[8] See, Provisions on Several Issues Regarding the Application of Laws to Civil Disputes Involving Monopoly Conduct published on 3 May 2012.

[9] The Judicial Interpretation provides no explicit guidance on whether the same approach applies to vertical agreements (such as distribution agreements between manufacturers and their distributors or wholesalers). The Court reasoned that since Articles 13 and 14 define anticompetitive effects in the same manner, the requirement to show anticompetitive effects applied to vertical agreements. The Judicial Interpretation is also silent on which party bears the burden of establishing anticompetitive effects in cases involving vertical agreements. The Court relied on the general civil procedure rules according to which the party that makes a claim must establish it. The Judicial Interpretation reverses the burden of proof in cases involving horizontal agreements and requires the defendant to establish that the horizontal agreement in issue has no anticompetitive effects.

For the Court, evidence of anticompetitive effects is an essential element for establishing that (minimum) RPM is unlawful within the meaning of Article 14 of the AML. In determining whether minimum RPM has anticompetitive effects, the Court proposed four questions to address:

- Is there sufficient competition in the relevant market (i.e. the competitiveness of the market);
- Does the company driving the RPM have a strong market position (i.e. does it have a leading position);
- What is the company's motive in setting the RPM (i.e. is there evidence of anticompetitive intent); and
- What are the competitive effects of the RPM in the relevant market (i.e. do the potential anticompetitive effects outweigh the potential pro-competitive benefits).

The Court found that Johnson & Johnson had a very strong market position (it was market leader with a more than 20 percent market share,[10] it had a well-established brand, it had strong pricing power and had consistently maintained high prices for the past 15 years, it wielded considerable influence over its distributors through a system of territorial exclusivity, short term agreements and single branding); the market was characterised by strong brand loyalty, high barriers to entry, customers posed little or no competitive constraints; and that Johnson & Johnson's motives were anticompetitive. The Court found that the distribution agreement expressly required Ruibang to maintain Johnson & Johnson's price levels, and marketing strategies discouraged distributors from engaging in price competition or lowering prices in response to competitive pressures. The Court also pointed to Johnson & Johnson's tight monitoring system, which encouraged compliance. Its conduct set an example for other competitors to follow.

The Court was not convinced that the minimum RPM had any redeeming features, but nevertheless considered Johnson & Johnson's efficiency claims under Article 15 of the AML. It found no causal link between the claimed product quality and safety efficiencies and the minimum RPM obligation; nor was the Court satisfied that any services provided by Ruibang contributed to the claimed product quality and safety efficiencies. The Court was also not persuaded that the RPM was necessary to streamline the distribution system. It is worth emphasising that the Court did not rule out the possibility for a manufacturer to claim efficiencies even where it has significant market power. As the Court expressly noted, an efficiency claim could include implementing RPM for new product entry.

The Spirits and Infant Formula Cases

[10] This is considerably lower than the 50 percent dominance threshold where single firm dominance is presumed under Article 19 of the AML. Although the Court questioned the reliability of the market share figures, based on publicly available information and data provided by an economist, it reasoned that Johnson & Johnson's market share was very likely higher if its share of sales in the Beijing hospital at the centre of the dispute were taken into account, and higher still across top Beijing hospitals. The reasoning raises questions for market definition and appropriate proxies for assessing market power.

On February 22, two local branches of NDRC, Guizhou Price Bureau and Sichuan DRC, announced total fines of RMB 449 million (approximately USD 74 million) on a Moutai and Wuliangye subsidiary, respectively for engaging in minimum RPM, contrary to Article 14 of the AML. The fines were equivalent to about one percent of each subsidiary's turnover.[11]

Previously, in January 2013, Moutai and Wuliangye each announced that NDRC was investigating their respective commercial practice of requiring distributors to sell their products not lower than a given price. Moutai and Wuliangye penalized non-compliant distributors through various means including fines, confiscating deposits, deducting marketing support expenses, limiting supply, and monitoring compliance. The manufacturers also penalized distributors for selling outside assigned territories and undercutting prices in higher-priced territories. Each manufacturer actively cooperated with the authority's investigation and undertook to terminate the impugned conduct, cancel the penalties and return confiscated deposits, and to adopt measures correcting its conduct.

The Sichuan DRC's decision sheds further light on the approach taken in finding the minimum RPM unlawful.[12] It determined that the impugned conduct: eliminated intrabrand price competition between Wuliangye's distributors and harmed economic efficiency; limited interbrand competition between manufacturers, and set a negative example for other spirits manufacturers to follow – the presence of parallel networks of RPMs further harmed competition; and harmed consumers' interests as the impugned conduct limited opportunities for consumers to purchase products at lower prices. The Sichuan DRC also determined that as a leading spirits brand and with few alternatives in the market, Wuliangye's conduct adversely affected consumer choice. However, the decision does not consider whether there were any efficiency-enhancing reasons that might justify the RPM.

Several months later, on August 7, the NDRC imposed total fines of RMB 668.73 million (approximately USD 109 million) on six infant formula manufacturers and exempted three others for the purported use of fixed or minimum RPM in connection with distribution agreements and measures that enforced the RPM obligations.[13] The fines ranged from

[11] Article 46 of the AML enables the Chinese competition authorities to impose fines of between one percent and ten percent of a party's annual turnover in the year preceding the infringement. However, the AML is ambiguous as to how to calculate this turnover and there are currently no official guidelines that clarify this issue. If the *Spirits* cases are followed, fines may be calculated based on the turnover of the entity involved in the infringement, rather than on the turnover of the corporate group to which it belongs.

[12] The Guizhou Price Bureau's decision provides little guidance on the authority's reasons for concluding that the conduct involved is unlawful within the meaning of Article 14 of the AML.

[13] Nine international and domestic manufacturers were at the centre of the NDRC's investigation. The NDRC imposed fines on Abbott, Biostime, Dumex, Fonterra, FrieslandCampina, and Mead Johnson. Three companies, Beingmate, Meiji and Wyeth, were not fined. According to senior NDRC officials in public fora, the grant of leniency and the different fine levels reflect the degree of cooperation during the NDRC's investigations, the severity of the impugned conduct, whether companies took the initiative to report relevant circumstances establishing the existence of a RPM agreement, the relative importance of the evidence provided to the NDRC, and measures taken to address the impugned conduct.

three-to-six percent of turnover derived from infant formula sales in the preceding financial year.[14] According to the NDRC's press release, the impugned resale pricing obligations kept prices high, eliminated or restricted intrabrand competition, undermined interbrand competition, distorted fair and orderly competition in the market, and harmed consumers' interests and rights. The impugned conduct varied from manufacturer to manufacturer and, based on the NDRC's press release, included, *inter alia*, setting fixed or minimum resale prices, imposing penalties and disguised penalties for non-compliance, deducting or cancelling rebates, and limiting or terminating supply. The NDRC determined that the manufacturers' conduct infringed Article 14 of the AML, and that none of the available exemptions under Article 15 of the AML applied.

Convergence or Divergence in China?

The Court's judgment in *Ruibang v. Johnson & Johnson* and the *Spirits* and *Infant Formula* decisions suggest different approaches between local branches of the NDRC, the NDRC and its local branches, and the NDRC and the Court.[15] The Court's judgment calls for a solid economics, effects-based assessment for minimum RPM.
The position taken by the NDRC (and one of its local branches in the *Spirits* cases) sits comfortably close to a *by object* approach, but is only a stone's throw away from *per se* illegality. This approach in the context of the AML's current legislative framework considers the merits of each instance of RPM on a case-by-case basis. The inquiry focuses on whether there is a RPM obligation under the distribution arrangement concerned and the form of the RPM. Fixed or minimum resale price restrictions are presumed unlawful as expressly prohibited under Article 14 of the AML, unless justified by one of the exceptions under Article 15 of the AML and it can be shown that the RPM does not adversely affect competition, and consumers share in the resulting benefits.

The NDRC's approach to fixed or minimum RPM is not dissimilar to the EU's *by object* approach.[16] But, greater emphasis is placed on the form of the RPM seemingly leaving little

[14] The manufacturers also undertook to terminate resale price restrictions and to implement/reinforce compliance measures and training for personnel. Manufacturers further undertook to reduce or freeze infant formula prices for a prescribed period of time.
[15] We focus on *Ruibang v. Johnson & Johnson* and the Sichuan DRC's decision in the *Spirits* cases, which provide detailed information on the face of the record on the RPM analyses conducted.
[16] See, Luc Peeperkorn, *Resale Price Maintenance and Its Alleged Efficiencies*, (2008) 4 European Competition Journal, 201, p. 203: "*[T]he 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 [...]. The moment that [a] firm brings forward convincing evidence of efficiencies, the authority is forced to show the likely or active negative effectives*," emphasis added. In practice, the EU's current practice of treating fixed and minimum RPM as hardcore restrictions and presuming them to restrict competition and unlikely to satisfy the Article 101(3) conditions, is a form of *de facto per se* prohibition. See Article 4 of Commission Regulation (EU) No 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, OJ [2010] L 102/1; Guidelines on Vertical Restraints, *supra* note 5, paras. 48, 223-225. See also Frederik van Doorn, *Resale Price Maintenance in EC Competition Law: The Need for a Standardised Approach*, (November 6, 2009), available at

room for consideration of efficiency claims under Article 15.[17] Given the Government's priority to reduce consumer goods prices in China, as articulated in its 12th Five Year Plan, resale price restrictions that result in propping up retail prices or softening competition may rarely find protection under Article 15 in the present climate. Further, it may prove difficult to adduce detailed economic evidence of efficiencies in cases where the NDRC's investigation is conducted within a very short period and in summary fashion. If substantiated, efficiency claims are unlikely to be viewed favourably if the claimed benefits can be achieved by less restrictive means.

The Court, the NDRC and its local branches did not address recommended resale pricing. In the context of the current legislative framework of the AML, it seems that recommended RPM is unlikely to be characterised as unlawful if the supplier only *recommends* a resale price and does not penalize, apply pressure, or offer incentives, to encourage distributors to follow the recommended price.[18] There is of course a risk that the recommended price may serve as a focal point for distributors and might be observed by some or all of them – in which case the recommended price may be subject to challenge.

Despite diverging approaches, broad consensus appears to be emerging between different institutions in China. The evolving framework considers each instance of RPM on a case-by-case basis and requires (some) consideration of the effects of the RPM obligation on competition. This necessarily implies an assessment of the form and economic context of the RPM obligation. The outcome of the inquiry, the scope of the inquiry into the effects of the RPM on competition, the degree of sophistication and economic rigour of the inquiry, and the economic evidence underpinning the assessment may vary depending on various factors, including the institution reviewing the RPM. That is, until China adopts a clear, consistent and coherent approach to RPM.[19] There is also broad consensus that an efficiency claim will need to be significant, convincing and substantiated and result directly from the RPM.

The *signs* for lawful/unlawful RPM in the China context

RPM – especially minimum RPM – is a controversial area of competition law and policy not least because it may lead to anticompetitive harm, and it may also generate pro-

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http://ssrn.com/abstract=1501070, pp. 4-6; Alison Jones, *Resale Price Maintenance: A Debate About Competition Policy in Europe?*, (2009), available at http://ssrn.com/abstract=1932556, pp. 18-19.

[17] It is worth noting that a number of senior NDRC officials discussing the *Spirits* and *Infant Formula* cases in public fora have argued that none of the manufacturers involved in the cases adduced sufficient evidence for exemption under Article 15.

[18] None of the institutions considered maximum RPM. The institutions can be expected to have some sympathy for maximum RPM especially in markets subject to price regulation in China.

[19] A consistent approach is preferred for legal certainty. It is not uncommon for approaches to differ within jurisdictions. In the US, for example, several States still apply a *per se* standard to minimum RPM despite the Supreme Court's five-to-four majority opinion in *Leegin* overturning *Dr. Miles*, a century-long precedent, and holding that minimum RPM should be analysed under a rule of reason standard. *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*, 551 U.S. 877 (2007); *Dr. Miles Medical Co. v. John D. Park & Sons Co.*, 220 U.S. 373 (1911).

competitive benefits from an economic perspective.[20] As illustrated and summarised by one set of economists:

> *"[F]rom an economic perspective RPM sits rather awkwardly [...] Yes, for sure, it can be anticompetitive. But it can also give rise to important efficiency benefits, and in some cases will be indispensable for achieving those efficiency benefits [...]. [M]ost economists would agree that its precise position in any given case will depend on market circumstances..."*
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> *"Faced with having to choose whether RPM is mostly harmful or mostly beneficial, some economists (such as us) [...] plump for RPM being an 'object' infringement. Others cannot stomach the fact that this approach has the implication of presuming unlawful, on the one hand, agreements that could not possibly have an anticompetitive effect and, on the other hand, agreements that have real efficiency benefits. These economists plump for RPM being an 'effect' infringement."*[21]

Other economists concur pointing to a *rule of reason* as a defensible basis to assess the legitimacy of vertical restraints:

> *"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."*[22]

Proponents of RPM's anticompetitive potential generally point to RPM's ability to facilitate collusion between distributors or between suppliers; increase or maintain prices at artificially high levels, or prevent direct price reductions; prevent price competition between distributors and thereby discourage new entry or expansion based on low(er) price models at the distribution level; enable dominant distributors or suppliers to maintain their market power; or reduce pressure on a supplier's margins.[23]

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[20] See, for example, Luc Peeperkorn, *supra* note 17, pp. 206-212; William S. Comanor, *The Two Economics of Vertical Restraints*, 5 Rev. Indus. Org. (Summer 1990); John B. Kirkwood, *Rethinking antitrust policy toward RPM*, The Antitrust Bulletin: Vol. 55, No. 2/Summer 2010, 423; Warren S. Grimes, *The Seven Myths of Vertical Price-Fixing: The Politics and Economics of a Century-Long Debate*, 21 Sw. U.L. Rev. 1285 (1992).

[21] Matthew Bennett, Amelia Fletcher, Emanuele Giovannetti and David Stallibrass, *supra* note 3, pp. 16-17.

[22] Luc Peeperkorn, *supra* note 17, p. 205, quoting John Tirole, *The Theory of Industrial Organization*, Cambridge, MIT Press (1990), 186.

[23] See, for example, P. E. Areeda & Hovenkamp, Antitrust Law (2nd ed. 2004), para.1604b, at 40 noting that RPM *"tends to produce higher consumer prices than would otherwise be the case. The evidence is persuasive on this point"*; Luc Peeperkorn, *supra* note 17, pp. 206-211; Eric Gippini-Fournier, *Resale Price Maintenance in the EU: In Statu Quo Ante Bellum* (September 21, 2009), available at http://ssrn.com/abstract=1476443, pp. 2-16; Christian Ewald, *The Economics of Resale Price Maintenance – Why Europe is Right not to Follow the US on the Slippery Slope of Leegin*, Journal of European Competition Law & Practice, 2012, Vol. 3, No. 3, 300, pp. 301-302; F. M. Scherer, *The Economics of Vertical Restraints*, 52 Antitrust L.J. 687 (1983), pp. 702-704; Warren S. Grimes, *Resale Price Maintenance: A Competitive Assessment*, Federal Trade Commission Workshop on Resale Price Maintenance Panel on Anticompetitive Effects, pp. 5-10; Marina Lao, *Free Riding: An Overstated, and Unconvincing, Explanation for Resale Price Maintenance*, in Robert Pitofsky, (ed.), How the Chicago School Overshot The Mark: The Effect of Conservative Economic Analysis on U.S. Antitrust, Oxford University Press

Others emphasise RPM's pro-competitive benefits highlighting the fact that RPM may address the free rider problem and encourage distributors to offer consumers additional services promoting demand; 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.[24] The limited empirical evidence and studies on the actual effects of RPM suggest that most cases involving RPM are pro- and not anticompetitive:

> *"While different theoretical models yield diametrically opposed predictions as to the welfare effects of vertical restraints, we find that [...] with manufacturer/retailer of franchisor/franchisee relationships, the empirical evidence concerning the effects of vertical restraints on consumer wellbeing is surprisingly consistent. Specifically, it appears that when manufacturers choose to impose such restraints, not only do they make themselves better off, but they also typically allow consumers to benefit from higher quality products and better service provision."*[25]

Unlike the US Supreme Court's *structured rule of reason* proposed by the majority in *Leegin*,[26] the *by object* approach employed by the European Commission, coupled with a set of guidelines, China has yet to adopt a framework that clearly explains when RPM is/is not unlawful in China. The NDRC has taken a strict approach towards RPM, whilst the Court's focus on the reduction of intrabrand price competition has set a high bar for establishing that a particular RPM obligation is not unlawful. There are currently no guidelines, and

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(2008), available at http://ssrn.com/abstract=1024221, pp. 199-207; John B. Kirkwood, *supra* note 21, pp. 429-454.

[24] See, for example, Bastiaan M. Overvest, *A note on collusion and resale price maintenance*, E.J.L. & E, 2012, 34(1), 235; Kenneth G. Elzinga and David E. Mills, *Leegin and Procompetitive Resale Price Maintenance* (February, 10 2010), available at http://ssrn.com/abstract=1885001; Lester G. Telser, *Why Should Manufacturers Want Fair Trade?*, 3 J.L. & Econ. 86 (1960).

[25] See, F. Lafontaine and M. Slade, *Exclusive Contracts and Vertical Relationships: Empirical Evidence and Public Policy* in Paolo Buccirossi (ed.), Handbook of Antitrust Economics, Cambridge, MIT Press (2008), pp. 408-409. See also, James C. Cooper, Luke M. Froeb, Daniel O'Brien and Michael G. Vita, *Vertical Antitrust Policy as a Problem of Inference*, 23 Int'l J. of Indus. Org. 639 (2005), p. 640; Thomas R. Overstreet, *Resale Price Maintenance: Economic Theories and Empirical Evidence*, Bureau of Economics Staff Report, Federal Trade Commission (1983), pp. 119-129; Pauline Ippolito, *Resale Price Maintenance: Empirical Evidence from Litigation*, 34 J.L. & Econ. 263 (1991), pp. 282-285. Overstreet and Ippolito are criticised for reliance on limited evidence and narrowly focusing on two theories of anticompetitive harm, the likelihood of manufacturer or dealer collusion. See, John B. Kirkwood, *supra* note 21, pp. 441-442; Thomas A. Lambert, *A decision-theoretic rule of reason for minimum resale price maintenance*, The Antitrust Bulletin: Vol. 55, No. 1/Spring 2010, 167, p. 189.

[26] The *Leegin* majority directed the lower courts to "*devise rules [...] for offering proof, or even presumptions [...] to make the rule of reason a fair and efficient way to prohibit anticompetitive restraints and to promote pro-competitive ones.*" Since then, different approaches have emerged to evaluate RPM. See, Thomas A. Lambert *supra* note 26, pp. 194-223 for a decision-theoretic approach and a summary of four alternative approaches together with their limitations. The alternative approaches focus respectively on the RPM's impact on consumer prices, the identity o the instigator of the RPM, the likelihood of free riding, and mechanically applying the *Leegin* factors. See also, John B. Kirkwood for a discussion of presumptive illegality with safe harbours, *supra* note 21, pp. 463-470; Christine A. Varney then Assistant Attorney General Antitrust Division, U.S. Department of Justice, Antitrust Federalism: Enhancing Federal/State Cooperation, October 7, 2009, pp. 7-14.

guidelines are not expected soon. A *by object* approach, underscored with a robust effects-based analysis, alongside a clear set of guidelines and/or safe harbours drawn from China-specific precedents would offer the much needed degree of legal certainty under the AML. In the absence of guidelines or safe harbours, are there filters that can be used by companies and their advisors to determine when RPM is/is not likely to be unlawful in China?

The likely triggers for an investigation seem to be concern over high prices in China, in particular sustained over a considerable period of time, concern over harm to the consumer interest, and complaints. The Court's judgment in *Ruibang v. Johnson & Johnson* also teaches that if there is sufficient competition in the market, RPM is unlikely to be found unlawful. Conversely, if a supplier (or distributor) with a strong market position and anticompetitive motives drives the RPM then the RPM is more likely to result in anticompetitive effects and be considered unlawful – unless the supplier can show that the RPM has pro-competitive benefits that outweigh the perceived negative effects. However, the *Infant Formula* cases show that evidence of market power is not a necessary prerequisite in every situation.

Ruibang v. Johnson & Johnson and the *Spirits* cases further suggest that RPM may be harmful if implemented in a market characterised by relatively high concentration levels at the upstream or downstream level, limited interbrand competition, high entry barriers, the presence of multiple networks of supplier/distributor relationships, and where the use of RPM is widespread and is used by most manufacturers to maintain resale prices. RPM may also be harmful if coupled with territorial exclusivity and/or single branding. In addition, RPM may be harmful if used to facilitate collusion between suppliers or distributors.

Further, the kind of product involved may be relevant in determining whether possible efficiency claims can be entertained in an individual case. As the Court indicated, RPM may be pro-competitive where a manufacturer employs RPM to facilitate product entry. One may also reasonably infer that an efficiency claim in an individual case is more likely to be considered where the product involved is most likely to be susceptible to free riding such as in the case of products with special features (e.g. differentiated, intricate, and highly sophisticated products).[27] A distributor's own efforts in promoting the product in terms of pre- or aftersales services may be relevant, as the Court suggests.

Conclusion

The Court called for a solid economics, effects-based approach for RPM in *Ruibang v. Johnson v. Johnson*, whereas the NDRC and its local branches adopted a position in the *Spirits* and *Infant Formula* cases that mirrors a *by object* approach. They made clear that a supplier that imposes a fixed or minimum RPM obligation on its distributors runs the risk of huge fines unless it can be shown that the RPM obligation satisfies the Article 15 criteria. In spite of apparent differences in approach, the Court's assessment in *Ruibang v. Johnson & Johnson* and references to impact on intrabrand and interbrand competition in the *Spirits*

[27] See also, Christian Ewald, *supra* note 24, p. 306; John B. Kirkwood *supra* note 21, pp. 465-470.

and *Infant Formula* cases both suggest that at least some effects-based inquiry is required when assessing whether fixed or minimum RPM is/is not unlawful. The assessment may vary depending on a various factors, including the institution reviewing the RPM obligation.

Given the recent focus on vertical agreements, companies operating in China may need to review distribution agreements to strengthen compliance. Companies will need to consider whether to conduct detailed reviews, including economic analyses, of their distribution arrangements. The potential challenge for companies is the lack of a clear, consistent and coherent set of criteria as well as standards for determining when RPM is/is not unlawful.