CPI COMPETITION POLICY INTERNATIONAL

# CPI Antitrust Chronicle
February 2014 (1)

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# Consideration of Economic Evidence by Chinese Courts in Antitrust Litigation

Fang QI, Marshall YAN, & Yan LUO[1]

## I. INTRODUCTION

The Anti-Monopoly Law ("AML") provides civil remedies to plaintiffs who have suffered damages "caused" by defendants' monopolistic conduct.[2] To grant remedies in an AML case, Chinese courts demand evidence showing that the defendant has engaged in monopolistic conduct, and that the "anti-monopoly injury" to the plaintiff is "causally linked" to the defendant's monopolistic conduct.[3] As the determination of these issues is based on antitrust economics, economic evidence plays a fundamental role in AML litigation.

This article examines the approaches that Chinese courts have taken to evaluate economic evidence in AML cases by examining the courts' rulings in two recent AML cases: *Rainbow v. Johnson & Johnson* ("*Johnson & Johnson*") and *Qihoo v. Tencent*. Although the approaches are likely to continue evolving as the Supreme People's Court has yet to issue any official guidelines for evaluating economic evidence, and lower courts in different provinces are still developing their approaches, a thorough analysis of the courts' approaches in the two cases can shed some lights on what parties will likely encounter in AML litigation.

The rest of the article is organized as follows. Part II discusses the general role of economic evidence as laid out in the AML. Part III discusses how the courts have considered economic evidence in connection with the determination of "relevant market" and "market position." Part IV focuses on the *Johnson & Johnson* court's analysis of competitive effects of resale price maintenance ("RPM"). Part V discusses how the courts have evaluated the relationship between the plaintiff's injury and the defendant's wrongdoing in order to determine whether the plaintiff is a proper party to bring an AML action and how to grant AML damages. Part VI concludes.

## II. ROLE OF ECONOMIC EVIDENCE IN AML LITIGATION

The AML implies that economic evidence should play a prominent role in AML litigation for three reasons:

First, the AML proscribes many types of monopolistic conduct, such as anticompetitive agreements reached between competitors or upstream/ downstream business operators, various types of abuse of market dominance, and concentrations of business operators which have the

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[2] Anti-Monopoly Law of the People's Republic of China, [2008] Presidential Order No. 68, Aug. 30, 2007, Chapter VII.

[3] AML, Art. 50.

effect of eliminating or restricting competition.[4] In defining these types of monopolistic conduct, the AML purposefully used economically contextual terms, such as "monopoly," "abuse," "dominant market position," and "effect of eliminating or restricting competition."[5] The use of these terms, which have their deep roots in modern antitrust economics, shows that the legislative intent is to require the courts and enforcement agencies to conduct economic analysis in AML cases and base their decisions on sound economic evidence.

Second, the structure of the AML leaves room for a "rule of reason" style analysis: Article 15 allows certain pro-competitive agreements, though deemed "monopoly agreements," to be exempt from the application of Articles 13 and 14;[6] Article 17 provides a "justifiable causes" safe harbor for "abuses," similar to the functioning of Article 15 for agreements;[7] and Article 28 requires the enforcement agency to balance the pro-competitive effect with the anticompetitive effect of a concentration.[8] This statutory language compels a two-dimensional approach in AML cases: while the court or agency must first identify "monopolistic conduct," it should also examine whether the pro-competitive effect of the monopolistic conduct outweighs its anticompetitive effect. The determination of both monopolistic conduct and competitive effects has to be based on sound economic analysis, and only economic evidence can support the courts' finding one way or the other.

Third, the AML requires that, after identifying monopolistic conduct whose anticompetitive effect outweighs its pro-competitive effect, the courts must also examine whether the plaintiff's damages were "causally linked" to the defendant's monopolistic conduct.[9] This causation requirement includes both "but-for" cause and "proximate cause." The plaintiff must show that he/she would have not suffered the harm-at-issue "but for" the defendant's violations. To satisfy the "proximate cause" requirement, the plaintiff must be a "foreseeable" victim who suffered a harm that flows from the anticompetitive aspect of the defendant's violation.[10] Without accurate and reliable economic evidence, the judges cannot validate or refute contradictory claims made by parties regarding causation and damages, even if "monopolistic conduct" has been identified.

Given that the economically contextual terms and the "rule of reason" analysis are embedded in the AML, judges in AML litigation have to carefully consider economic evidence generated by parties with opposite interests.

## III. CONSIDERATION OF ECONOMIC EVIDENCE RELATED TO RELEVANT MARKET

To determine liability under the AML, the courts need to assess whether the challenged conduct amounts to monopolistic conduct. Among the three types of monopolistic conduct

[4] AML, Art. 3.

[5] *Id.*

[6] AML, Art. 15.

[7] AML, Art. 17.

[8] AML, Art. 28.

[9] AML, Art. 50.

[10] *See e.g.*, Shanghai High People's Court, *Bangrui Yonghe Technology Trading Co., Ltd. v. Johnson & Johnson (Shanghai) Medical Equipment Co., Ltd. and Johnson & Johnson Medical(China) Ltd.*, August 1, 2013, [2012] Hu Gao Min San (Zhi) Zhong Zi No. 6, pp. 37-38.

enumerated in Article 3 of the AML, the second one—"[a]buse of dominant market position by business operators"—has been most frequently adjudicated in the courts so far.

Abuse of market dominance requires the courts to resolve three issues: (1) the delineation of the relevant market,[11] (2) the determination of defendant's market share and dominant position in the relevant market,[12] and (3) the defendant's abuse of its dominant market position.[13] This section summarizes the types of evidence considered by the courts in resolving the first two issues, while the third issue is discussed in the next section.

### *A. The Delineation of the Relevant Market*

Article 12 of the AML provides that, "[f]or the purposes of this law, a relevant market is the product scope and the geographical scope where business operators compete against each other for a specific product or service [] within a certain period of time."

In economics, "relevant market" is the smallest product market for which the elasticity of demand and the elasticity of supply are sufficiently low that a firm with 100 percent of that market could profitably reduce output and increase price substantially above the competitive level.[14] This definition suggests the application of a demand—and supply—substitutability analysis in delineating a relevant market. It is also consistent with the principle of the Small but Significant and Non-transitory Increase in Price ("SSNIP") test, which inquires whether a small but significant and non-transitory increase in price would allow a hypothetical monopolist to profitably raise prices.[15] Both the demand—and supply—substitutability analysis and the SSNIP test have been conducted by the Chinese courts in delineating the relevant market in AML cases.

#### 1. Substitutability analysis in the *Johnson & Johnson* case

The Shanghai High People's Court in *Johnson & Johnson* defined the relevant market of "sutures for medical use" by analyzing the demand-side and supply-side substitutability and considering whether the market can be further segmented.[16] In addition, the *Johnson & Johnson* court stated that a court is not obliged to conduct a SSNIP test in every AML case if the analysis of demand and supply substitutability is "sufficient" to dispose the delineation of the market.[17]

In *Johnson & Johnson*, plaintiff Rainbow Medical introduced evidence showing that the China Administration of Food and Drug ("CFDA") divided sutures into two sub-categories: non-absorbable sutures and absorbable sutures.[18] CFDA also explicitly states the permitted uses of different types/models of sutures in the "medical device certificates."[19] Based on this, Rainbow Medical argued that a narrower product market should be considered as different types/models

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[11] AML, Art. 12.

[12] AML, Arts. 18 and 19.

[13] AML, Art. 17.

[14] HERBERT HOVENKAMP, THE LAW OF COMPETITION AND ITS PRACTICE, 83 (1994).

[15] U.S. Department of Justice, Merger Guidelines § II n.6, *reprinted in* 4 TRADE REG. REP. (CCH) ¶ 13,102 (June 14, 1982); and Guidelines on the Definition of the Relevant Market, [2009], Anti-Monopoly Commission under the State Council, May 24, 2009.

[16] *Rainbow Medical v. Johnson & Johnson*, *supra* note 10, pp. 25-26.

[17] *Id.* at 26.

[18] *Id.* at 8.

[19] *Id.* at 8-9.

of sutures are not substitutable. In rebuttal, defendant Johnson & Johnson argued that the permitted uses of non-absorbable sutures overlap with these of absorbable sutures under CFDA's rules and these two types of sutures are substitutable.

Rainbow Medical's economic expert was of the view that sutures, by themselves, form a distinctive product market and that no SSNIP test needed to be performed.[20] The economic expert of Johnson & Johnson did not object to this definition, although he pointed out that analyses on supply and demand substitutability have to be considered before the court renders such a conclusion. On the same note, he suggested that the court conduct a SSNIP test.[21]

The court first held that evidence introduced by Rainbow Medical did not prove that the sutures market should be segmented and that non-absorbable and absorbable sutures would form different markets. Instead, as CFDA permits non-absorbable and absorbable sutures to be used interchangeably, in the court's view this showed that these products are in the same market.[22]

The court then considered the demand-side substitutability of sutures: Because there is no other device that can replace the role of sutures in a surgery, there is no substitute for sutures that can be put in the same product market. Similarly, on the supply side, the production of sutures requires specialized equipment and know-how. Manufacturers of other devices cannot directly switch manufacturing facilities for other products to those for sutures.[23]

On this note, the court concluded that it was not obliged by the Anti-Monopoly Commission's Guidelines on the Definition of the Relevant Market ("Guidelines") to conduct a SSNIP test. Instead, a relevant market could be defined by analyzing demand-side substitutability (considering factors such as physical characteristic, product usage, and price) and supply-side substitutability (if necessary). Only in exceptional circumstances, where the delineation of the market is blurred, does a SSNIP test need to be used to further analyze the market.[24]

### 2. Substitutability analysis and SSNIP test in the *Qihoo v. Tencent* case

In the *Qihoo v. Tencent* case, the Guangdong High People's Court conducted the most sophisticated analysis on the relevant markets among all AML judgments by Chinese courts to date. In addition to a comprehensive and complicated demand- and supply-substitutability analysis, the court conducted, for the first time, a SSNIP test to evaluate the proposed definition of product market.[25]

The court's analysis started with three types of "core" services that can form the narrowest product market, as agreed by both parties.[26] The plaintiff defined the relevant product market as instant messaging ("IM") software and services that allow multiple users to

[20] *Id.* at 14, ¶ 8.

[21] *Id.* at 16, ¶ 2.

[22] *Id.* at 25-26.

[23] *Id.* at 26.

[24] *Id.*

[25] *See* Guandong High People's Court, *Beijing Qihoo Technology Co. Ltd. v Tencent Technology (Shenzhen) Co. Ltd. and Shenzhen Tencent Calculation Systems Co. Ltd.*, March 20, 2013, [2011] Yue Gao Fa Min Chu Zi No. 2.

[26] *Id.* at 31 ¶ 2.

communicate in real time over the internet via text message, documents exchange, and voice and video calls. This market includes at least three types of "core" IM services: multifunctional IM services such as QQ or MSN, cross-platform IM services such as Fetion offered by China Mobile, and cross-network IM services such as Skype.

The court went on to consider whether four other groups of services were also within the same market as the IM services. The first group considered was voice and video call.[27] The court held that voice/video calls should be placed in the same relevant market with the "core" services, because a consumer can switch easily, immediately, and without cost between integrated IM services such as QQ and voice/video calls, and most providers offer the whole range of functionalities.

In its analysis, the court also made a reverse application of the SSNIP test. The court reasoned that, since consumers are price-sensitive when using IM services, a consumer will leave multi-functional services for single function services, if the former is not offered for free. Accordingly, a hypothetic monopolist of the multi-functional services market is unable to make a small, significant, and non-transitory increase of price while maintaining his market position. The court thus concluded that multi-functional services in themselves do not constitute a relevant market on their own.

The second group of services that the court considered was social networking and micro-blogging websites, which offer real-time communication services.[28] The court evaluated (i) the functionality of the services, (ii) the price sensitivity of consumers, and (iii) competition dynamics, and concluded that social networking websites are in the same market as IM. Similar to the court's analysis of the first group of services, the court also made a reverse application of the SSNIP test—inquiring whether a hypothetical monopolist would retain its market position had it made a SSNIP test. Since consumers would switch from one service to another if a monopolist IM service provider were to charge a price for its service, the two types of services should be placed in the same relevant market.

The third and fourth groups of services analyzed by the court were traditional telecom services (text messaging and phone) and emails.[29] The court's opinions were straightforward: these services do not have the same functionalities as IM services and are not substitutable. Also, customers have to pay to use telecom services, while IM services are offered for free.

After considering the above four factors, the court finally came to the conclusion that it must reject the plaintiff's market definition wherein IM services form a distinctive product market.

It is noteworthy that the court's analysis does not directly show how quantitative data were evaluated, and no independent market study was conducted to collect information from market participants. Instead, the court substantially relied on expert reports submitted by the parties for its analysis. Direct evidence, such as language in the prospectus issued by Tencent in the course of its initial public offering in Hong Kong, was mentioned, but the court considered

[27] *Id.* at 31 ¶ 3.
[28] *Id.* at 32 ¶ 4.
[29] *Id.* at 33 ¶¶ 5, 6.

that such statements had little bearing on the issue of market definition. Also, the court was very determined to find a concrete market definition, instead of engaging in an analysis of different scenarios for market definition.

### *B. The Determination of a Dominant Market Position*

When presenting economic evidence to prove the defendant's dominant position in the relevant market, judges in both the *Johnson & Johnson* and the *Qihoo v. Tencent* cases held that a market share above 50 percent was not the sole determinant of market dominance.[30] Other factors that were considered by the courts included the ability to control price, quantity, or other terms of trade; the ability to raise barriers of entry; and the competitiveness of the relevant market.[31]

In *Johnson & Johnson*, the court analyzed the degree of competition in the relevant market and the defendant's abilities to control the market, such as its price-setting ability, brand name effect, and the ability to control the distributors downstream in the supply chain.[32] In *Qihoo v. Tencent*, the court inferred the defendant's market power from its capability to control the price and raise entry barriers, as well as the character of the relevant product and the degree of competition in the relevant market.[33]

#### 1. Dominance inferred from the low level of competition in the *Johnson & Johnson* case

In assessing Johnson & Johnson's market position in the relevant market of medically usable sutures, the *Johnson & Johnson* court focused on Johnson & Johnson's leading position and various market-controlling powers in the not-so-competitive relevant market. The court did not accept Rainbow Medical's calculation of market shares, which was based on both a market study as well as Johnson & Johnson's statements on its website about its market share in the United States and worldwide. The court also rejected Johnson & Johnson's calculation that used the number of patients who had had surgeries in 2008 and the volume of sales of Johnson & Johnson's sutures to estimate the company's market share, and, instead, considered that the number (20.4 percent) underestimated the actual market share of Johnson & Johnson.[34]

The court instead focused on the fact that Johnson & Johnson is the leading supplier in the global suture market.[35] The court inferred that, since there is not sufficient competition in the medical suture market in China, Johnson & Johnson should also have a leading position in China. Johnson & Johnson failed to rebut the court's inference with evidence indicating the existence of any other competitor in the market that could possibly have a higher market share than Johnson & Johnson.

The court also inferred the high market share of Johnson & Johnson's products in Beijing's high-end hospitals based on Rainbow Medical's statement that, as a distributor, it had

[30] *See Johnson &Johnson,* at 28; *Qihoo v. Tencent*, at 35-37.
[31] *Id.*
[32] *Johnson & Johnson*, at 28-30.
[33] *Qihoo v. Tencent*, at 35-37.
[34] *Johnson & Johnson*, at 29.
[35] *Id.*

been authorized by Johnson & Johnson to supply ten high-end hospitals in Beijing.[36] Because each hospital can only choose a few brands of sutures, the court deducted that Johnson & Johnson's products must have a high market share in Beijing. The court also stated that Johnson & Johnson could leverage its influence in high-end hospitals to other hospitals.

In addition, as mentioned, the court strengthened its analysis with its assessments of Johnson & Johnson's various market-controlling powers, such as its price-setting ability, the brand name effect associated with J&J, and the capability to control downstream distributors.[37]

In particular, the court first noted that Johnson & Johnson's market position was reinforced by the company's ability to set prices, which it found to be demonstrated by the stable price over the past 15 years, and insufficient competition in the market.

Second, the court noted that Johnson & Johnson's brand name contributed to its market position. Being one of the leading healthcare providers in the global market, and one that had a great reputation in China, the court found Johnson & Johnson to have strong and well-established goodwill associated with the company brand name.

Third, the court concurred with Rainbow Medical that Johnson & Johnson had strong bargaining power over its distributors, thus conferring it a high degree of market power. For example, the court pointed out that Johnson & Johnson's distributors were required to sign exclusivity agreements and accept territorial restraints in terms of hospital costumers. Johnson & Johnson was also found to monitor the distributors' performance and renew their contracts every year.

The court concluded that these market-controlling powers, together with the relative low level of competition in the relevant market, suggested that Johnson & Johnson had a strong position in the market of sutures for medical use.

### 2. Dominance inferred from the market-controlling powers in the *Qihoo v. Tencent* case

Compared with the *Johnson & Johnson* court, the court in *Qihoo v. Tencent* conducted a more detailed and complex analysis of the defendant's market-controlling powers. The court explicitly noted that a market share above 50 percent—which, according to the AML, allows for a presumption of dominance—is not the sole determinant of dominance.[38] Other factors—including the ability to control price, quantity or other terms of trade, the ability to raise barriers of entry, and the degree of competition in the relevant market—need to be considered.

First, the court noted that the defendant had no ability to control price, quantity, or other terms of trade for three reasons.[39] As customers are unwilling to pay any fee for IM services, and all competing IM services were provided free of charge, the court held that the defendant did not have any price-setting ability that would prevail over its competitors. The court also found that

[36] *Id.*
[37] *Id.* at 29-30.
[38] *Qihoo v. Tencent*, at 35.
[39] *Id.* at 35-35.

customers could immediately switch to other IM services without a cost and that there was no demonstrable reliance on the defendant's services.

Second, the court considered that the defendant had no capability to raise barriers for new entrants.[40] In its view, the relevant market had low barriers to entry, because:

- there was no excessive capital or technical requirements to enter the market;
- past entrants came from different industries, such as telecom providers, social networking websites and gaming websites; and
- new entrants could quickly achieve shares in certain market segments because of their existing client base.

Also, the court considered that there were limited network effects in this market. Because each IM services user tends to communicate only with a limited number of "core" people in his/her network, the network effect would be significantly weakened. The defendant gave the example of MSN—before QQ entered into the market, MSN was the largest IM service provider in China. After only a quick period, QQ was able to take over a significant market share from MSN and became the largest IM service provider. The court accepted that this showed that network effects had little effect as an entry barrier.

Third, the court noted that IM services were part of a nascent and dynamic sector where new entrants and technologies can easily replace the existing players.[41] It found competitive constraints to come from traditional IM service providers, as well as new providers such as social media sites. As a result, the court thought it would be impossible for service providers to reduce the quality of the service by, for example, placing too much advertisement.

Finally, the court stated that there were potential entrants which had sufficient capital or technological capacity to enter the market and the defendant did not have the capacity to prevent those potential entrants from entering the market.[42] Companies such as China Mobile, China Telecom, China Unicom, Alibaba, and Baidu have all entered into this market and these are powerful competitors that have sufficient funding and technical capacity to compete.

In conclusion, the court stated, "due to special conditions of the Internet sector, market shares in particular cannot be deemed as a decisive factor in the determination of a dominant market position."

## IV. CONSIDERATION OF ECONOMIC EVIDENCE RELATED TO ANTICOMPETITIVE EFFECTS

When analyzing whether the defendant had abused its market dominance, the *Johnson & Johnson* court conducted a "rule of reason" analysis—asking whether the pro-competitive effect of the concerned "abuse" outweighed its anticompetitive effect. The court stated that, because the challenged RPM contract could have both pro-competitive and anticompetitive effects, one

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[40] *Id.* at 36.
[41] *Id.*
[42] *Id.*

needed to examine the actual effects of the contract in order to determine whether the contract was pro-competitive or anticompetitive in the real world.[43]

When assessing the actual effect of the defendant's RPM contract on competition, the *Johnson & Johnson* court considered evidence for both pro-competitive and anticompetitive effects. The court was of the view that some anticompetitive effects could be self-corrected by market forces or offset by pro-competitive effects, and that the RPM contract at issue should be deemed as a monopoly agreement only if it had actual anticompetitive effects that could not be self-corrected or offset.[44] Following this framework, the court found that there was strong evidence that the RPM contract at issue had actual anticompetitive effects that could not be corrected by the market. The court also determined that there was not enough evidence to substantiate the argument that the contract had pro-competitive effects.

When analyzing the contract's anticompetitive effects, the court first identified possible anticompetitive effects of RPM under economic theory, including reducing intra-brand price competition, limiting distributors' ability to freely set prices, increasing the likelihood of cartel behavior, and requiring excessive advertising and services. Without citing any evidence, the court determined that the possibility of excessive advertising and services could be self-corrected by the market. The court also found that there was no evidence showing the RPM contract at issue had any cartel-enhancing effect.[45]

Thus, the court chose to focus on the possible effects of the RPM contract on intra- and inter-brand price competition. By analyzing business and market evidence, the court determined that Johnson & Johnson's RPM conduct had reduced intra- and inter-brand price competition in the relevant market.

Regarding intra-brand price competition, Rainbow Medical introduced evidence showing that after it lowered its bids to supply Renmin Hospital, the price of the Johnson & Johnson product for this hospital stayed at the lowered level. The court interpreted this as evidence confirming that Rainbow Medical's pricing was not profit-losing and was the result of market forces. The court also agreed with Rainbow Medical's interpretation of the higher price of Johnson & Johnson's products, i.e. Johnson & Johnson's price was consistently higher than those of other brands (including other foreign brands) because its contract arrangements with its distributors enabled it to maintain prices above the competitive level.[46]

However, because RPM contracts are designed to limit intra-brand price competition while increasing non-price competition, the finding that the contract limited intra-brand price competition was not surprising and did not answer the question if the contract had reduced overall competition. It is interesting to note that the court used the comparison between Johnson & Johnson's price and the price of its competitors (including other foreign brands) as evidence to determine whether the defendant's price was above the competitive level. In doing so, the court

[43] *Johnson & Johnson*, at 32.
[44] *Id.*
[45] *Id.*
[46] *Id.* at 32-33.

did not consider the possibility that Johnson & Johnson's price may have been higher because of factors such as better quality and services.

Regarding the effect on inter-brand competition, the court considered the following evidence: First, it cited a 2008 episode in which Johnson & Johnson tried to increase its price for a product but a hospital (Beijing Jishuitan Hospital) refused to pay the higher price and forced Johnson & Johnson to continue charging the old, lower price.[47] Second, Rainbow Medical submitted evidence showing that when it lowered its price for the Renmin Hospital bid, the price of competitors also decreased.[48]

The court viewed these facts as evidence supporting the conclusion that there was space for inter-brand price competition between Johnson & Johnson and its competitors but that competition was limited and weakened given Johnson & Johnson's leading market position. The court then determined that Johnson & Johnson's RPM contract enabled both Johnson & Johnson and its competitors to avoid price competition and maintain high prices. Finally, the court read the fact that Rainbow Medical was able to reduce its bids for supplying the Renmin Hospital, while still earning a reasonable profit, as evidence that the RPM contract had prevented efficient distributors from conducting inter-brand price competition.

Throughout the decision, the court viewed any episode of price competition between Johnson & Johnson and its competitors, or price concession by Johnson & Johnson for its customers, as evidence that there was "space" for inter-brand price competition. From an economic perspective, such events could also be interpreted as evidence that the market is competitive, i.e., competitors and buyers would respond to price movements by the defendant.

However, the court appeared to be of the opinion that Johnson & Johnson's RPM contract had prevented its distributors from reducing prices that would have led to price reductions by Johnson & Johnson's competitors and for its customers. Thus, in the court's view, the question of whether the RPM contract at issue was anticompetitive appeared to hinge on whether there was a pro-competitive reason for the defendant to limit its distributors' ability to reduce prices—the question next examined by the court.

When assessing whether the RPM contract had any pro-competitive effects, the court first identified a list of possible pro-competitive effects of RPM (as presented by the defendant), including preventing the "free-rider" problem among Johnson & Johnson's distributors, facilitating entry of new brands or new products, improving product quality and safety, protecting product reputation, providing consumers with uniform price information, helping with the development of distributors and distribution networks, and so on.[49] The court then concluded that the evidence did not support the claim that the RPM contract at issue generated any of the pro-competitive effects identified above, even though it recognized that a RPM contract could theoretically generate such effects.

First, the court determined, without citing any evidence, that given customers' familiarity with the products at issue, RPM contracts were not needed for protecting product reputation or

[47] *Id.* at 33.
[48] *Id.* at 33-34.
[49] *Id.* at 34.

providing consumers with uniform price information.[50] Again without citing any evidence, the court stated that it did not believe the development of distributors or distribution networks in this case necessarily benefited consumers. The court thus focused on the potential benefits of preventing the "free-rider" problem among Johnson & Johnson's distributors, facilitating entry of new brands or new products, and improving product quality and safety.

The court found that there was no evidence that the RPM contract at issue improved product quality and safety.[51] When Johnson & Johnson argued that the RPM contract helped to maintain its distributors' profitability and gave them incentives to provide better services, the court pointed out that Johnson & Johnson had not provided evidence that the product quality had improved as the result of the RPM contract. In other words, the court wanted evidence linking Johnson & Johnson's argument of possible effects in economic theory to facts in the real world. The court concluded that Johnson & Johnson had failed to provide such evidence.

The court also identified several reasons why the RPM contract in this case likely had little effect on product quality. For example, the court found that: (i) the product quality was primarily affected by Johnson & Johnson's own manufacturing and training of hospital staff, (ii) the RPM contract with distributors did not specify any role for the distributors that would affect product quality in a significant way, and (iii) there was little difference in product quality between J&J and its competitors.

Third, the court dismissed the defendant's argument that the RPM contract was needed to address the "free-rider" problem among Johnson & Johnson's distributors.[52] Based on Johnson & Johnson's contracts with its distributors, the court determined that, even without the RPM contract, Johnson & Johnson had very strict control over its distributors and thus a distributor would not be in a position to "steal" business from another distributor via "free-riding."

Fourth, the court determined that Johnson & Johnson did not need to use the RPM contract to help introduce new products into the relevant market.[53] The court's main evidence was that the defendant had been operating in China for 15 years and already had a strong reputation. Moreover, the court pointed out that the products at issue were introduced several years before the contract period and thus were no longer "new" products.

Finally, the court stated that Johnson & Johnson did not provide evidence for any other possible pro-competitive effects of the RPM contract at issue.[54]

Overall, comparing the evidence for possible anticompetitive effects with that for possible pro-competitive effects, the court found that there was stronger evidence to support the former and concluded the RPM contract at issue had a net anticompetitive effect. The court did consider economic testimony submitted by Johnson & Johnson's economic expert as well as that by Rainbow Medical's economic expert.[55] The court determined that while the testimony of

[50] *Id.*
[51] *Id.* at 34-35.
[52] *Id.* at 35.
[53] *Id.* at 35-36.
[54] *Id.* at 36.
[55] *Id.* at 36-37.

Johnson & Johnson's expert identified possible theoretical reasons why the RPM contract at issue may be pro-competitive, he failed to provide evidence to show that those theoretical effects were material in this case. The court was of the view that there should be better and more comprehensive economic evidence involving both theoretical and empirical evidence.[56] The significance of the court's statement is that, in future cases, the parties likely need to conduct economic analyses based on actual facts and empirical evidence to support their theoretical models.

## V. CONSIDERATION OF ECONOMIC EVIDENCE RELATED TO DAMAGES

The appropriate damage in an AML case should be sufficient to redress the plaintiff's injury caused by the anticompetitive aspect of the defendant's monopolistic conduct.[57] Accordingly, the aggrieved AML plaintiff needs to prove that his interests would be served by enhanced competition in the market (redressibility), and that he/she was injured by the defendant's conduct to restrain competition in the market (causation).

Regarding "redressibility," Article 119 of the Civil Litigation Law provides the threshold that an AML plaintiff must satisfy. Article 119 requires that any plaintiff in a civil litigation have "a direct interest in the case."[58] This requirement is elastic and general. So long as the plaintiff asserts an injury of a type that the legislature sought to redress in providing a private remedy under Article 50 of the AML, the plaintiff should be deemed having "a direct interest in the case."

The language of Article 50 of the AML more directly indicates the legislature's intent that "redressibility" in AML cases should be construed as a mere threshold gatekeeper rather than a rigid hurdle. Article 50 requires that an AML defendant be liable for civil damages caused by his/her monopolistic conduct, and provides no particular requirement on the issue of plaintiff's standing.[59] Theoretically, any market participant or consumer who suffered harm, either directly or indirectly, caused by the defendant's monopolistic conduct should have standing to institute an AML lawsuit. This proposition is consistent with the "spirit" of the AML of preserving consumers' and public interests, because any negative impact of the defendant's AML violation would conceivably pass through the supply chain and eventually result in the harm to be borne by the ultimate consumers. Thus, granting AML standing to indirect victims, particularly consumers, could help to timely reveal and condemn AML violations as well as recover damages incurred by end consumers.

An additional factor is the causal link between the asserted anticompetitive injury and the monopolistic conduct. When presenting evidence to the court, the plaintiff should be able to specify his/her injury and to establish the proximity between his injury and the defendant's violation. The plaintiff should avoid including vaguely defined links in the chain of causation. The claimed injury should not be an indirect result of whatever harm may have been suffered by

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[56] *Id.* at 37.

[57] *See, e.g.*, Id. at 37-38.

[58] Civil Litigation Law of the People's Republic of China, [2007] Presidential Order No. 75, Oct. 28, 2007, as amended (last amendment in 2012), Art. 119.

[59] AML, Art. 50 ("If business operators implement monopolistic conduct and cause loss to others, the business operators shall be responsible for civil liabilities in accordance with the law.")

certain intermediate parties along the supply chain, in which case the intermediate parties would be entitled to the AML damages.

As there are only a limited number of AML decisions specifically discussing the damage issue in China, it may be valuable for the Chinese courts and future AML plaintiffs to get some implications from the U.S. jurisprudence on such issues. In the United States, the federal courts apply a five-factor test to "evaluate the plaintiff's harm, the alleged wrongdoing by the defendants, and the relationship between them to determine whether a plaintiff is a proper party to bring an antitrust claim."[60] These factors are: "(1) the nature of the plaintiff's alleged injury; that is, whether it was the type the antitrust laws were intended to forestall; (2) the directness of the injury; (3) the speculative measure of the harm; (4) the risk of duplicative recovery; and (5) the complexity in apportioning damages."[61] To some extent, the *Johnson & Johnson* court performed an analysis with several aspects similar to the factors listed above.

In *Johnson & Johnson*, while the court found Johnson & Johnson's RPM agreement at issue to be anticompetitive, it determined that most of the damages claimed by Rainbow Medical were not related to the anticompetitive conduct and hence should not be part of the damages considered under the AML.[62] As a result, the court reduced the plaintiff's damages claims of RMB 13,990,000 (about U.S.$2 million) to just RMB 500,000 (about U.S.$80,000).

In making this determination, the court took the following approach in considering economic and other evidence:

First, the court determined that the "but-for" world for calculating the damages should not be the profits that the plaintiff would have earned had it complied with the RPM contract at issue.[63] Rather, the court stated that the damages should only be the normal profits that the plaintiff would have earned in the relevant market during the relevant period. In other words, the court determined that the "but-for" world should be a world in which the alleged anticompetitive conduct was absent.

This is a logical conclusion—under the AML, the defendant should not be liable for both what would have happened if the plaintiff had followed the RPM contract (the anticompetitive effect claimed by the plaintiff and found by the court) and for what actually happened as the plaintiff did not follow the contract. If the RPM contract is ruled illegal, the relevant profits should be normal profits without the RPM contract.

With the "but-for" world being the market without the RPM agreement, the court dismissed the plaintiff's damages claims related to the scenario where the RPM agreement was implemented, e.g., loss due to high purchase prices (due to the need to buy the product from third party vendors), loss of anticipated profits, harm of business reputation, staff redundancy,

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[60] *Associated General Contractors of California, Inc. v. California State Council of Carpenters*, 459 U.S. 519, 535 (1983).

[61] *American Ad Mgmt., Inc. v. General Telephone of California*, 190 F.3d 1051, 1055 (9th Cir. 1999).

[62] *Johnson & Johnson*, at 37-38.

[63] *Id.* at 38.

loss due to overstocked products, loss of marketing expenses, etc.[64] The court also dismissed the plaintiff's claim of profit loss related to products not covered by the RPM agreement at issue.

To estimate the damages based on normal profits of companies in such a market, the court found that under the terminated contract between Rainbow Medical and Johnson & Johnson, the gross profit margin was about 23 percent. It then calculated that the margin for normal business should be 16 percent based on the fact that the defendant's price was about 15 percent above its competitors and that certain taxes and discounts should be deducted.[65]

However, it is not clear how exactly the court derived the 16 percent figure. Nonetheless, the court's ruling makes it clear that it is important for the plaintiff to submit economic and other evidence to show how its damages estimate is related to the conduct challenged under the AML. For example, one may consider an analysis of the price in a "but-for" world where the challenged conduct is absent.

## VI. CONCLUSION

It is widely accepted among Chinese courts that AML claims should be based on sound economic principles and creditable economic evidence. This article provides a summary of the key issues considered by the courts in two AML cases and the judges' interpretations of economic evidence in disposing these issues. Since judges usually are not adequately trained in economics, the assistance by expert witnesses should become more important in future AML litigation in China. Accordingly, policy and appellate decisions should develop to encourage judges to use special expert opinions in complicated AML cases, and to guide judges to conduct appropriate economic analysis based on reliable economic evidence.

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[64] *Id.*

[65] *Id.* at 38-39.