JONES DAY

COMMENTARY

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IN SHORT

The Background: Over the first decade of China's Antimonopoly Law ("AML"), there has been a divergence between the approaches adopted by the Chinese antimonopoly enforcement agencies ("AMEAs") and the Chinese courts toward resale price maintenance ("RPM"). The AMEAs treated RPM as automatically or "*per se*" illegal, while the courts used the "rule of reason" balancing test.

The Situation: Two recent high-profile rulings have confirmed that Chinese courts will stick to rule of reason for RPM civil cases.

Looking Forward: This divergence will not be solved anytime soon. Undertakings with relatively low market share are likely to be fined by the AMEAs for RPM but may win a civil action defending their conducts in courts.

AMEAs and the Chinese courts have taken divergent approaches over the last decade toward RPM—we summarized these divergent approaches in a recent *White Paper*. In short, RPM is treated as *per se* illegal by AMEAs, which take the approach that, once conduct falls under Article 14 of China's AML, it is extremely difficult for parties to escape a penalty decision by arguing no anticompetitive effects. On the other hand, when hearing civil lawsuits alleging RPM, Chinese courts pay much more attention to the effects of the alleged RPM—the conduct of an undertaking with small market share is often deemed as without anticompetitive effects and, therefore, does not constitute a violation.

However, as observed in our *White Paper*, Chinese courts usually defer to the AMEAs in administrative lawsuits brought by the parties challenging AMEA decisions. In the 2017 *Yutai* ruling, the Hainan High Court noted that it is necessary to prove "actual losses" in civil lawsuits, while AMEAs are not obliged to do so in public enforcement. Therefore, as far as AMEAs' public enforcement is concerned, no analysis of anticompetitive effects is required.

The *Yutai* ruling suggests that Chinese courts might converge with the AMEAs' *per se* approach in private civil lawsuits. Two recent high-profile rulings may indicate that courts will continue with their rule of reason approach.

> The *Yutai* ruling suggests that Chinese courts might converge with the Chinese antimonopoly enforcement agencies' *per se* approach in private civil lawsuits, but two recent rulings may indicate otherwise.

Two Recent High-Profile Rulings

The Shanghai Intellectual Property Court dismissed a civil antitrust lawsuit filed by a distributor against Hankook Tire in July 2018. The distributor alleged that Hankook forced the distributor to enter into a vertical agreement to restrict resale prices.

Although the Shanghai Intellectual Property Court confirmed the existence of resale price maintenance between Hankook and the distributor, it held that there was no evidence showing anticompetitive harm and, therefore, no vertical monopoly agreement at all. Assessing the anticompetitive effects, the court took into account: (i) the overall competition in the relevant market; (ii) the market power of the defendant; (iii) the motivation of the defendant in reaching a RPM agreement; and (iv) the effect of the agreement on competition. The court found that there were dozens to hundreds of tire brands in the relevant markets and that Hankook did not possess substantial market power. In addition, data showed consecutive year-to-year increases in output and decreases in prices from 2012 to 2016, which the court held was strong evidence that no intrabrand or interbrand competition had been adversely affected.

Several days later, the Guangdong High Court reiterated the Chinese courts' opinion with regard to RPM by dismissing an appeal of a private civil antitrust lawsuit filed by a distributor against Gree, a Chinese household appliances brand. As discussed in our *White Paper*, in the lower court, the distributor had complained that Gree implemented RPM, but the Guangzhou IP Court found that the agreement did not constitute an RPM prohibited by AML because it lacked the object or effect of eliminating and restricting competition.

On appeal, the Guangdong High Court adopted a test very similar to *Hankook*, considering: (i) overall competition in the market; (ii) the market position of the defendant; and (iii) the purposes and effects of the price restrictions. The court ultimately concluded that the market for household air conditioners from

2012 to 2013 was highly competitive and the alleged RPM did not have any anticompetitive purposes and effects. As a result, the relevant conduct did not constitute an RPM violation.

THREE KEY TAKEAWAYS

1. Chinese courts continue to use a rule of reason analysis in RPM civil actions.
2. Courts are reluctant to find RPM violations where defendants have low market shares.
3. Courts may consider market price trends to assess competitive effect.


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