

The Shanghai Court's Position on Resale Price Maintenance in the J&J Vertical Price-Fixing Litigation

Kluwer Competition Law Blog
June 4, 2012

Jessica Hua Su (Chinese Academy of Social Sciences (CASS))

Please refer to this post as: Jessica Hua Su, 'The Shanghai Court's Position on Resale Price Maintenance in the J&J Vertical Price-Fixing Litigation', *Kluwer Competition Law Blog*, June 4 2012, <http://competitionlawblog.kluwercompetitionlaw.com/2012/06/04/the-shanghai-court-on-jnj-rpm-case/>

On 18 May 2012, the Shanghai No. 1 Intermediate People's Court ('Shanghai Court') dismissed allegations that Johnson & Johnson Medical (China) Ltd. and its Shanghai branch had set a minimum resale price in breach of China's Anti-Monopoly Law ('AML') and rejected the plaintiff's claim of damages of CNY 14.4 million ('J&J RPM case'). It is understood that the plaintiff has filed an appeal to the Shanghai High People's Court. The Shanghai Court said that a plaintiff must meet three criteria in order to establish an antitrust injury and claim damages, including: (1) the defendant engaged in monopoly conduct; (2) the plaintiff suffered losses; and (3) a causal link must be established between the losses and the monopoly conduct.

The Shanghai Court found that the distribution agreement between the defendants and the plaintiff did contain a RPM clause. However, whether a RPM arrangement has caused a restrictive or eliminative effect on competition must be considered when determining whether the RPM constitutes a monopoly agreement. The Shanghai Court held that the plaintiff had failed to prove the market share of the disputed products and the competitive conditions in the relevant market. In contrast, evidence provided by the defendants indicated that there are a number of suppliers offering similar products. Thus, the evidence was insufficient to prove that the defendants had engaged in monopoly conduct. In addition, the plaintiff had failed to prove that its losses were directly related to the RPM arrangement and thus had failed to establish an antitrust injury.

The Shanghai Court's Approach to the Legality of RPM

Liu Junhua, Presiding Judge of the J&J RPM case, emphasized that the mere existence of a RPM arrangement is not sufficient for a finding of a monopoly agreement prohibited under Article 14 of the AML. Article 13, Paragraph 2 of the AML should be observed, which defines 'monopoly agreements' as 'agreements, decisions or other concerted practices that eliminate or restrict competition'. Thus whether the RPM arrangement has caused a restrictive or eliminative effect on competition must be assessed.

Judge Liu said, in order to find the correct answer, further considerations should be given to the share of the disputed products in the relevant market, the competitive conditions in the upstream and downstream markets, and the impact of the RPM on the supply and prices of the disputed products. In the J&J RPM case, the plaintiff provided brief website information published by the defendants in relation to the disputed products. The Shanghai Court held that the evidence was insufficient for a finding of monopoly conduct.

Themes to Watch for

China's AML deals with vertical restrictions through Articles 14 and 15. Article 14 prohibits vertical agreements that fix resale prices or restrict minimum resale prices and more generally prohibits other types of vertical practices as determined by the anti-monopoly enforcement agencies ('AMEAs'). Article 15 exempts vertical agreements that meet a set of broad criteria.

Articles 14 and 15 are anything but clear. To date no AML implementing regulations or guidelines have been issued that provide clarification. Despite the absence of articulated rules on vertical restraints, the Shanghai Court has sent important messages that RPM should neither be labeled as *per se* illegal nor *per se* legal but should be assessed by weighing up its anticompetitive effects. This approach is similar to that of the US Supreme Court in *Leegin* and differs from the EU's long-standing hostility towards RPM.

The J&J judgment, if upheld on appeal, would pose significant challenges to private litigants pursuing damages resulting from RPM conduct. The legality of RPM will largely depend on the share of the alleged business operator as well as the competitive conditions in the relevant market and the downstream market. Plaintiffs should note that proof is a complex and onerous exercise under the rule of reason test and they need to gather much stronger evidence for sophisticated business practices. Whether the J&J judgment would open the door for manufacturers to assert tighter control over resale prices, which may have far-reaching influence on the Chinese market, needs to wait and see.

The Shanghai Court takes the first step in developing concrete rules on RPM under China's AML. To date, the AMEAs have taken a cautious approach and have yet to publish any decisions in relation to RPM. However, in September 2010, the NDRC was reported to have requested the Publishers Association of China, the Books and Periodicals Distribution Association of China, and China Xinhua Bookstore Association to revise a rule that prohibited book retailers from selling new books published within a year at discount and Internet retailers from selling new books at more than 15 percent discount of the cover price. In March 2012, the NDRC was reported to have involved after the State Administration of Radio, Film and Television (SARFT) planned to impose a price floor that prohibits movie tickets to be sold at more than 30 percent discount. The potential anticompetitive consequences of vertical price-fixing should not be ignored or underestimated. The convergence and/or divergence between the approaches of the courts and the AMEAs in relation to RPM and the source of the RPM are well worth being observed.