

# Resale Price Maintenance in China: Enforcement Authorities Imposing Large Fines for Anti-Monopoly Law Violations

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Recently Shanghai High People's Court reached a decision in the first lawsuit involving resale price maintenance (RPM) since China's Anti-Monopoly Law (AML) came into effect five years ago. Shortly thereafter, a key enforcement agency announced RPM-related fines against six milk powder companies, five of which are non-Chinese. Both cases clearly show that RPM can be a violation of the AML, and that RPM is currently under much greater scrutiny by enforcement authorities. It would be prudent for all foreign corporations active in China's consumer markets to take heed of these changes in China and conduct an immediate review of any potential RPM violations.

On 1 August 2013 the Shanghai High People's Court reached a decision in the first anti-monopoly lawsuit involving resale price maintenance (RPM) since China's Anti-Monopoly Law (AML) came into effect in August 2008. In addition to this judicial decision, on 7 August 2013 one of the key agencies in charge of enforcing the AML, the National Development and Reform Commission (NDRC), announced RPM-related fines of USD 109 million against six milk powder companies, five of which are non-Chinese. Both the High People's Court and the NDRC have been striving to clarify how they will treat RPM, and specifically have focused on the issue of whether RPM should be treated as a *per se* violation or should be evaluated according to a "rule of reason" analysis.

## Judicial Decisions in Civil Lawsuits

According to the recent decision by the Shanghai High People's Court, in order to hold that an RPM provision is a monopoly agreement, the court must find that the RPM provision has restricted or eliminated competition. Furthermore, the burden of proof will be on the plaintiff to show a restriction or elimination of competition arising out of the RPM. The High People's Court explicitly stated that this burden is the opposite from the burden of proof for horizontal monopolies, such as a cartel, in which case the burden of proof falls on the defendant to show that the agreement does not have any effect of eliminating or restricting competition. This burden for horizontal monopolies has been further examined and confirmed by the "Judicial Interpretation of Anti-Monopoly Disputes" that was issued by China's Supreme People's Court on 1 June 2012.

## Administrative Decisions in Enforcement Actions—Liquor and Infant Milk Formula

There have been several key RPM enforcement actions in 2013. In February, the NDRC imposed a

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fine of USD 80 million on the famous Chinese liquor brands Maotai and Wuliangye for requiring distributors to resell the products above a certain price, which is common in some sectors in China. On 2 July, according to the Price Supervision and Anti-Monopoly Bureau of the NDRC, six milk powder companies came under investigation for RPM violations of the AML. According to the NDRC's statements on the case, "from the evidence obtained, the milk powder companies under investigation instituted price controls over distributors and retailers, which excluded and limited market competition and therefore are alleged to have violated the Anti-Monopoly Law". The NDRC later announced record fines in that case of USD 109 million, which were the equivalent of between 3 per cent and 6 per cent of the companies' revenue in 2012.

According to media reports, in the Maotai and Wuliangye cases, the NDRC provided clear indications about some of the factors that it will consider when determining whether the RPM has "eliminated or restricted competition". Specifically, when assessing the relevant market and market power of the two companies, the NDRC analysed the market structure and the role played by the two companies in the liquor industry, as well as the degree to which the products are substitutable with similar products and the loyalty of consumers towards the two liquors. Based on this analysis, the NDRC concluded that the RPM provisions in the agreements with distributors of the two liquor giants eliminated and restricted competition, and thus were vertical "monopoly agreements".

According to recent media reports, the NDRC has indicated it will "severely crack down" on and sanction vertical monopoly agreements such as RPM if they are maintained by business operators dominant in the market. If business operators are not dominant, the NDRC reportedly indicated that it would still investigate all vertical monopoly conduct and determine if there has been any elimination or restriction of competition.

## Conclusions

These civil lawsuits and administrative cases clearly show that RPM can be a violation of the AML and that RPM is currently under much greater scrutiny by enforcement authorities. If RPM is an issue in civil lawsuits, a plaintiff will have to prove that RPM eliminates or restricts competition. However, there are some indications that this burden of proof may be easily met. In administrative cases, the NDRC will have to be satisfied that it has sufficient proof to show there is an elimination or restriction of competition. However, it is unclear what level of evidence would be required to show such a restriction and it may not be a very high level, especially if the accused business operator is dominant in the market.

RPM has been a common feature of distribution agreements and other contracts in many sectors in China. However, the recent cases clearly show there is a serious compliance risk if RPM continues to be part of a corporation's normal practices. This is particularly true for business operators that have a dominant market position or a group of business operators that are regarded as jointly dominant under the AML (in China, in certain circumstances, dominance is presumed with a market share as low as 10 per cent). Unless the RPM conduct clearly falls within an exception in Article 15 of the AML, a company using RPM may face serious fines and confiscation of illegal gains. It would be prudent for all foreign corporations active in China's consumer markets to take heed of these changes to the enforcement priorities of the competition/antitrust authorities in China and conduct an immediate review of any potential RPM violations.

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