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I. Overview

Resale price maintenance ("**RPM**") has been a hotly discussed issue in China's antitrust sphere over the last decade. While China's Anti-Monopoly Law ("**AML**") includes articles whose text generally prohibit RPM while offering limited exemptions, competition authorities and courts have adopted diverging approaches in practice. The newly-amended AML introduced a market share-based safe harbor rule and authorized the antitrust enforcement authority to quantify the market share standard[2]. However, a 15 percent market share standard proposed in a previous draft made available for public comments was not adopted in the *Regulation on Prohibiting Monopoly Agreements* of the State Administration for Market Regulation ("**SAMR**") – the Chinese antitrust authority[3], reflecting an unsettled debate in this regard.

Against this backdrop, this article attempts to answer a practical question – how is a company with a market share (i.e., 10-15 percent) exposed to RPM risks in China through the different lenses of antitrust enforcement authorities and courts?

II. The *"Prohibition plus Exemptions"* Approach in Early Public Enforcement

a) NDRC's Practices

The National Development and Reform Commission ("**NDRC**"), one of China's legacy competition authorities, pioneered RPM enforcements by probing into companies from a wide range of sectors including the liquor, infant formula, contact lenses, automotive, home appliances, and medical device sectors, among others, between 2013 and early 2018. The NDRC's aggressive enforcement and heavy penalties against RPM have provoked wide discussion as to whether RPM ought to be treated under the *per se illegal* or *rule of reason* approach. NDRC had insisted that the "prohibition plus exemptions" approach was neither *per se illegal* nor *rule of reason*, but many observers tended to compare the antitrust agency's approach to *per se illegal*, as the exemptions were seldom applied in practice.

b) Key Features of the Early Public Enforcement Cases

Chart 1 below shows all RPM cases concluded by antitrust authorities during this time period, and reveals several enforcement tendencies. First, antitrust authorities had failed to define a relevant market or calculate the market shares of the parties subject to penalty decisions, although in some cases such as *Medtronic* (2016) and *Eastman* (2017) antitrust authorities concluded that the relevant companies held a relatively strong market position. Second, the majority of cases related to competitive industries in which parties appeared unlikely to enjoy significant market power. Finally, most cases did not discuss RPM's alleged anticompetitive effects at all, or only touched this point briefly. There are 4 exceptions to this pattern, i.e., *Medtronic* (2016), *Smith & Nephew* (2016), *Eastman* (2017) and *Nordic Communications* (2017),

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[2] *See*, Article 18.3 of the Anti-Monopoly Law, available at http://www.gov.cn/xinwen/2022-06/25/content_5697697.htm.

[3] *See*, SAMR's Provisions on Prohibiting Monopoly Agreements, available at https://www.gov.cn/gongbao/content/2023/content_5754538.htm. In China's *Antitrust Guidelines for Automotive Sector* (2019), a 30 percent market share is deemed as a safe harbor presumption for vertical non-price agreements, such as vertical geographic restrictions and customer restrictions. The Antitrust Guidelines are available at https://www.samr.gov.cn/zw/zfxxgk/fdzdgknr/fldj/art/2023/art_c349cba8055045c197efcef5d84e8182.html.

which included relatively detailed discussions of the alleged restriction of competition, including the purported restriction of intra-brand and inter-brand competition, and the alleged harms to customers and consumers.

As a whole, the early public enforcement cases tend to show that antitrust authorities had been focusing on the RPM conduct, rather than on parties' market position and purported anticompetitive effects of RPM. This means companies with a low market share were still likely to be penalized for RPM during the early days of AML enforcement.

Chart 1 – Early Public Enforcement RPM Cases

No.	Case	Products Concerned	Discussion on Market Share or Similar Facts	Restriction of Competition Analysis
1	Maotai case (2013)	Maotai brand Chinese liquor	None	③
2	Wuliangye case (2013)	Wuliangye brand Chinese liquor	As a leading Chinese liquor company, Wuliangye has great brand reputation and consumer loyalty.	①
3	Infant formula case (9 firms, 2013)	Infant formula	None	②
4	Contact lenses case (7 firms, 2014)	Contact lenses	None	②
5	Chrysler case (2014)	Automotive	None	③
6	FAW-Volkswagen case (2014)	Automotive	None	②
7	Mercedes-Benz case (2015)	Automotive	None	②
8	Dongfeng-Nissan case (2015)	Automotive	None	②
9	Hankook Tire case (2016)	Tire	None	③
10	Haier case (2016)	Home appliances	None	③

11	Medtronic case (2016)	Cardiovascular, restorative and diabetes care medical devices	Medtronic had a leading position in cardiovascular, restorative and diabetes care medical devices, based on its market share etc.	①
12	Smith & Nephew case (2016)	OTC products	None	①
13	SAIC-General Motors case (2016)	Automotive	None	②
14	Lingxian Logistics case (2016)	Milk	None	②
15	Yutai case (2017)	Fish feed	None	②
16	Wandersun case (2017)	Infant formula	The company was the sole wholesaler of Wandersun brand infant formula in a local county.	③
17	Baisheng Electronics case (2017)	Vivo cellphone	Vivo had some market power in China, including Jiangsu mobile phone markets.	②
18	Eastman case (2017)	Turbo oil	Eastman was in a highly concentrated duopoly market.	①
19	Nordic Communication case (2017)	Jabra earphone	None	①
20	PetroChina case (2018)	CNG	None	③

Source: NDRC official press releases, case decisions and news reports

Note:

① means the decision had a detailed discussion on restriction of competition.

② means the decision only briefly discussed the restriction of competition.

③ means no discussion of restriction of competition at all.

III. The *Rule of Reason* Approach Adopted by the Courts Before 2018

a) The *Johnson & Johnson* Case

The *Johnson & Johnson* (2013) case established the *rule of reason* approach for courts to analyze the legality of RPM in civil lawsuits. In this case, the plaintiff Rainbow sued Johnson & Johnson for damages due to an alleged RPM clause with punitive measures. The Shanghai High Court, in its appellate ruling, proposed a four-factor framework to determine whether a RPM clause is illegal or not: (i) whether competition in the relevant market is adequate, (ii) whether the company has a strong position in the relevant market, (iii) whether the company has the motive to restrict competition, and (iv) the balance of pro- and anti-competitive effects[4]. The court eventually ruled for the plaintiff, finding that competition in China's medical staplers and medical suture products markets was inadequate, Johnson & Johnson had a strong market position (more than 20.4 percent market share), had motive to restrict competition, and the anticompetitive effects outweighed any procompetitive effects.

b) Observations of the Early Court Cases

After *Johnson & Johnson* (2013), there were a few civil cases as shown in Chart 2 that strictly followed the *rule of reason* approach. For example, in *Hengli Guochang v. Gree* (2016)[5], the Guangzhou IP Court ruled in favor of the defendant on the basis that (i) Gree competed with many leading household air conditioner brands, and did not have a superior or even dominant market share in the Dongguan region; (ii) Gree had no motive to restrict competition; and (iii) consumers had adequate choices among Gree dealers even though Gree's RPM practice restricted intra-brand competition.

Tian Junwei v. Beijing Carrefour (2016) was a follow-on civil litigation after NDRC imposing penalty against Abbott's RPM practices in 2013. The plaintiff in this case claimed that a Carrefour branch in Beijing reached infant formula RPM agreements with Abbott which resulted in the plaintiff paying a higher price. To prove the existence of a RPM clause the plaintiff referred to the prior NDRC penalty decision. The Beijing IP Court and the Beijing High Court, however, concluded that the plaintiff had failed to meet their burden of proof as the NDRC penalty decision did not specify whether there had been a RPM agreement between Abbott and the Carrefour branch concerned, even if a general RPM had been proven by the NDRC decision. Furthermore, the distribution contracts submitted by the Carrefour branch did not contain any RPM clause[6].

It seems clear that, the plaintiff's success in *Johnson & Johnson* (2013) notwithstanding, the courts' *rule of reason* approach made it difficult for plaintiffs to prevail in a civil RPM case, especially when the defendants lacked a high market share.

[4] *See*, [2012] Hu Gao Min San [Zhi] Zhong Zi No. 63, Shanghai High Court's Civil Judgment of Rainbow v. Johnson & Johnson Case (August 1, 2013), available at http://gongbao.court.gov.cn/Details/55d47a6027b07c2b5ffcf9b458d1a8.html.

[5] *See*, [2015] Yue Zhi Fa Shang Min Chu Zi No. 33, Guangzhou IP Court Civil Judgment (August 30, 2016).

[6] *See*, [2016] Jing Min Zhong No. 214, Beijing High Court Civil Judgment (August 22, 2016).

Chart 2 – Pre-2018 Court RPM Civil Cases and Major Factors Considered

No	Case	Relevant Market	Market Share or Similar Facts	Restriction of Competition Analysis
1	Rainbow v. Johnson & Johnson (Shanghai High Court, 2012)	Medical staplers, and medical suture products in China	More than 20.4%	①
2	Tian Junwei v. Beijing Carrefour (Beijing IP Court, 2014)	Infant formula in China	n/a	n/a
3	Hengli Guochang v. Gree (Guangzhou IP Court, 2016)	Household air conditioner market in Dongguan	n/a	①

Source: Courts' public judgments and decisions

Note:

① means the decision had a detailed discussion on restriction of competition.

② means the decision only briefly discussed the restriction of competition.

③ means no discussion of restriction of competition at all.

IV. The "*Prohibitions plus Exemptions*" Approach Modified by SAMR

a) SAMR's Recent Cases

Since March 2018, SAMR has imposed penalties on 7 companies for RPM practices (see Chart 3). In *Yangtze River Pharma* (2021)[7], SAMR rejected the company's low market share argument and found the object of the RPM was to exclude competition. It is evident that SAMR, like its predecessor NDRC, insisted on the "prohibition plus exemptions" approach.

Chart 3 – SAMR RPM Cases and Major Factors Considered

No	Case/Court	Specific Products	Market Share or Similar Facts	Restriction of Competition Analysis
1	Bull (2021)	Converters, wall switch sockets, LED lighting, digital accessories and other power connection and power extension products	Bull's converters and wall switch sockets ranked 1st in terms of sales in Tmall, Alibaba's e-commerce platform, with 62.4%	②

[7] *See*, SAMR Penalty Decision of Yangtze River Pharma Case (April 15, 2021), available at https://finance.sina.com.cn/chanjing/gsnews/2021-04-15/doc-ikmyaawa9778051.shtml.

			and 30.7% market share in Tmall in 2020.	
2	Yangtze River Pharma (2021)	Lanqin oral liquid, Bailemian capsules, Astragalus extract, Epalrestat tablets, and Suhuang cough capsules.	Lanqin Oral Liquid ranked first in the category of throat medicines, Huangqijing ranked third in the category of nourishing medicines, and Bailemian Capsules ranked fourth in the category of tranquilizing sleep medicines.	①
3	Straumann (2022)	Oral implants	Straumann had a relatively high market share, and its sales and volume of oral implants were in a leading position.	①
4	Geistlich (2022)	Bone filling material and resorbable biofilm	Geistlich was in a leading position in terms of its sales and volume of relevant products.	①
5	Sesame Street English (2022)	English education	Sesame was the licensee of US Sesame Street English, and has exclusive use and sub-license rights in China.	①
6	E-Shun Pharma (2022)	Lianzhi anti-inflammatory dropping pills	100%	①
7	Zizhu Pharma (2023)	Emergency contraception pill	The product ranked 2nd on China OTC list's chemical medicine lifestyle product	②

Source: SAMR's public decisions

Note:

① means the decision had a detailed discussion on restriction of competition.

② means the decision only briefly discussed the restriction of competition.

③ means no discussion of restriction of competition at all.

b) New Features of SAMR's RPM Enforcement

Despite this consistency, SAMR's decisions showed a few new features, as shown in Chart 3.

First, a relatively high market share or the mere fact of holding a leading market position is becoming a critical element in SAMR's decisions. For example, in *Bull* (2021)[8], SAMR concluded that Bull owned 62.4 percent and 30.7 percent shares in Tmall's (the e-commerce platform operated by China tech giant Alibaba) converters and wall switch sockets sales. In *E-Shun Pharma* (2022)[9], the company was found to have a 100 percent market share in the sale of Lianzhi anti-inflammatory pills. In *Straumann* (2022)[10], SAMR did not provide the market share, but claimed Straumann's sales and volume of oral implants were in a leading position. Similarly, in *Geistlich* (2022)[11] and *Sesame Street English* (2022)[12], SAMR found that both companies had leading market positions.

Second, a more detailed discussion of restrictions of competition seemed to be an integral part of an RPM decision. With the exception of *Bull* (2021) and *Zizhu Pharma* (2023), SAMR has explained restrictions of competition from three aspects, i.e., the restriction of intra-brand competition, the restriction of inter-brand competition, and harms to consumers and end customers, which is similar to the analysis of alleged competition effects in *Johnson & Johnson* (2013).

Those features illustrate that the antitrust enforcement authority is now paying more attention to parties' market positions and their potential anticompetitive effects. However, since SAMR usually doesn't define a relevant market, a company with a modest market share is still likely to be exposed to public enforcement, especially when the agency finds other evidence showing the company's market power and anticompetitive effects.

V. The *Rule of Reason* Approach Adjusted by the Courts After 2018

a) Post *Johnson & Johnson* cases

The court system has been largely consistent with the *rule of reason* approach established by the *Johnson & Johnson* (2013) case after 2018. However, there have also been a few new developments. Chart 4 below shows the post-2018 court cases and major factors considered.

[8] *See*, Zhejiang AMR's Penalty Decision of Bull Case (September 27, 2021), available at https://www.samr.gov.cn/fldys/tzgg/xzcf/202204/t20220424_341615.html.

[9] *See*, Hainan AMR's Penalty Decision of E-Shun Pharmaceutical Case (June 24, 2022), available at https://www.samr.gov.cn/fldys/tzgg/xzcf/202207/t20220722_348871.html.

[10] *See*, Beijing AMR's Penalty Decision of Straumann Case (December 28, 2022), available at https://www.samr.gov.cn/fldys/tzgg/xzcf/202212/t20221230_352562.html.

[11] *See*, Beijing AMR's Penalty Decision of Geistlich Case (February 9, 2022), available at https://www.samr.gov.cn/fldys/tzgg/xzcf/202204/t20220424_341747.html.

[12] *See*, Beijing AMR's Penalty Decision of Sesame Street English (July 12, 2022), available at https://www.samr.gov.cn/fldys/tzgg/xzcf/202207/t20220727_348944.html.

Chart 4 – Court RPM Civil Cases after 2018 and Major Factors Considered

Year	Case/Court	Relevant Market Defined	Market Share or Similar Facts	Restriction of Competition Analysis
1	Hengli Guochang v. Gree (Guangdong High Court, 2018)	China household air conditioner market	In 2013, Gree had 25-40% share in air conditioner market, followed with competent rivals.	①
2	Guangming Trade v. Hankook Tire (Shanghai High Court, 2018)	China passenger car tires market, passenger car tire replacement market, wholesale market in passenger car tire replacement market	Hankook's tire sales were less than 5% market share, and it was not among top 10 tire producers in mainland China.	①
3	Miuchong v. SAIC General Motors (Shanghai High Court, 2018)	Chevrolet 1.4AT Tracker	Plaintiff referred to Shanghai Price Bureau's RPM penalty decision against SAIC General Motors	③
4	Kangjian Miaomiao v. Dentsply (Hangzhou Intermediate Court, 2019)	Dentsply Sirona products	The plaintiff claimed that the defendant had more than 13% market share in global dental market	①

Source: Court's public civil judgments

Note:

① means the decision had a detailed discussion on restriction of competition.

② means the decision only briefly discussed the restriction of competition.

③ means no discussion of restriction of competition at all.

b) The New Developments after 2018

First, courts seem to still require a relatively high market share. As discussed in the previous section, in *Hengli Guochang v. Gree* (2016)[13], the Guangzhou IP court ruled that, among other things, Gree did not have a superior market share or even a dominant position. In the appeal, Guangdong High Court further concluded that the China household air conditioner

[13] *See*, [2016] Yue Min Zhong No. 1771, Guangdong High Court's Civil Judgment of Dongwan Hengli Guochang Electronic Shop v. Dongwan Shengshi Xinxing Gree Trade Co., Ltd. Case (July 19, 2018), available at https://www.gdcourts.gov.cn/index.php?v=show&cid=236&id=54702.

market was quite competitive and there was no serious anticompetitive effect, even though Gree owned a 25-40 percent share in that market. This market share was higher than 20.4 percent in *Johnson & Johnson* (2013), which found competition in China's medical staplers, and medical suture products market was inadequate. For another example, in *Guangming Trade v. Hankook Tire* (2018)[14], Shanghai's High Court dismissed the plaintiff's appeal due to the failure to prove Hankook (with less than 5 percent market share) had a strong market power. Similarly, in *Kangjian Miaomiao v. Dentsply* (2019)[15], the Hangzhou Intermediate Court emphasized that the 13 percent market share held by the defendant in the global dental product market was far from representing strong market power.

Second, the follow-on litigation seems to have provided the plaintiff with an alternative vehicle for bypassing the rigid market share requirement. For example, in the recent *Miuchong v. SAIC General Motors* (2018)[16] case, the Supreme People's Court ruled that the plaintiff's direct reference to the antitrust authority's prior penalty decision was adequate to prove the existence of RPM and its anticompetitive effect. Therefore, the plaintiff only has to prove the damages suffered from the defendant's RPM practice regardless of the fact that the defendant is not likely to have a strong market position given the competition landscape of China's automotive market.

Therefore, it remains challenging for plaintiffs to prevail in RPM civil cases when the defendants lack strong market power. However, the courts seem to attach less importance to defendants' market shares in follow-on cases as long as the administrative penalty decisions successfully withstand administrative reconsideration or judicial review or become unchallengeable due to statute of limitations.

VI. Conclusions

A company with a market share (i.e., 10-15 percent) that implements RPM clause may face different degrees of antitrust risks depending on the individual development of public enforcement or judicial proceedings.

On the one hand, although SAMR has attached more importance to the party's market power and competition effects analysis than NDRC, it's still likely to apply the RPM articles of the AML to companies with modest market shares in practice.

On the other hand, the courts, which have consistently observed the *rule of reason* approach, have shown great reluctance to rule for plaintiffs when the defendants lack strong market power. However, in follow-on civil lawsuits, plaintiffs may be more likely to circumvent the high bar under the *rule of reason* approach and prevail, as the recent *Miuchong v. SAIC* (2018) indicates.

[14] *See*, [2018] Hu Min Zhong No. 475, Shanghai High Court's Civil Judgment of Wuhan Hanyang Guangming Trade Co., Ltd. v. Shanghai Hankook Tire Sales Co., Ltd. Case (July 13, 2020), available at http://yxcpws.court.gov.cn/wspx/hundred/detail?oid=ac020201-229e-11ec-874a-286ed488c78e.

[15] *See*, [2019] Zhe 01 Min Chu No. 3270, Zhejiang Hangzhou Intermediate Court Civil Judgment of Kangjian Miaomiao v. Dentsply Case (October 13, 2020), available at https://cclp.sjtu.edu.cn/Show.aspx?info_lb=672&info_id=4805&flag=648.

[16] *See*, [2018] Hu 73 Min Chu No. 537, Civil Judgment, Shanghai Intellectual Property Court (Feb 28, 2020); and [2020] Zui Gao Fa Zhi Min Zhong No. 1137 Civil Judgment, Supreme People's Court (Dec 25, 2022).