

HOW CHINA'S ENFORCEMENT AGENCIES AND COURTS ARE SHAPING ANTITRUST POLICIES ON VERTICAL RESTRAINTS

*Zhao Bingling & He Jing**

INTRODUCTION

The Anti-Monopoly Law of the People's Republic of China ("AML")¹ and enforcement practice in China are in the early years, compared to 127 years of antitrust experience in the United States² and nearly sixty years in the European Union ("EU").³ But the impact of the AML has already been felt around the world, partly due to the rising significance of the Chinese market. It is therefore becoming particularly important to have deeper insights on how China's AML policies are being shaped. Similar to the United States and EU's antitrust statutes, the AML is only about 6,000 words long, setting up principles and leaving much room for the evolution of antitrust policies.

This Article focuses on the field of vertical restraints in China, as an example to show what is going on and what may be coming in the AML practice. It reviews the recent practice of three AML enforcement agencies and courts on vertical restraints with special attention on resale price maintenance ("RPM"). Based on both qualitative and quantitative analysis, this Article offers some observations and interpretation of the obvious inconsistencies in these antitrust policies.

This Article is divided in five sections. It begins with a review of conflicting debates over the interpretation of Articles 13–15 of the AML. Sections II–V then analyze recent civil and administrative judicial cases decided by courts, as well as the new developments at the National Development and Reform Commission ("NDRC"), the State Administration of Industry and

* Zhao Bingling is a Ph.D candidate at the University of International Business & Economics. Prior to taking on her Ph.D. studies, she worked as an attorney at the U.S. law firm Sidley Austin LLP's Beijing office and Siemens China. He Jing is a senior partner of AnJie Law Firm in Beijing. He is an advisor to Peking University and Tsinghua University Law School's Master of Law Program. He is also a member of the international board of advisors of the Global Antitrust Institute at the Antonin Scalia Law School, George Mason University.

¹ On August 30, 2007, China passed the AML, which became effective on August 1, 2008.

² In 1890, the U.S. Congress passed its first antitrust law, the Sherman Antitrust Act, 26 Stat. 209 (1890).

³ The European Union's competition law system originated in the 1950s. See William E. Kovacic, *The United States and Its Future Influence on Global Competition Policy*, 22 GEO. MASON L. REV. 1157, 1158 n.7 (2015).

Commerce (“SAIC”), and the Ministry of Commerce (“MOFCOM”). Section VI concludes that China may have to rely on a system of effective judicial review to reduce the risks of inconsistent AML enforcement in the greater context of China’s judicial reform and in particular, judicial reform in intellectual property (“IP”). This Article argues that Chinese judges, especially IP judges, will make a difference to how AML policies turn out in the future, in spite of the uncertainties and challenges in the current practice.

The majority of discussion in this paper focuses on RPM with a side discussion on non-price vertical restraints. This is because none of the courts, either NDRC or SAIC, have decided any non-price vertical restraints cases under Article 14(3) of the AML.

I. ORIGIN OF THE CONTROVERSY—WHAT THE AML SAYS

A. *The Statutory Basis—Articles 13–15 of AML*

The controversies surrounding vertical restraints originated from the confusing position where the definition of a “Monopoly Agreement” is placed in the AML.⁴ Article 13 lists six types of horizontal monopoly agreements and in the second paragraph, it goes on to define “Monopoly Agreement”: “For the purposes of *this Law*, monopoly agreements include agreements, decisions and other concerted conducts to exclude or restrict competition.”⁵

A natural question arises: is this definition applicable to Article 13 only, or Article 14 as well? Article 14 lists three types of vertical monopoly agreements: (1) those fixing the resale price of products for resale to third parties;

⁴ See Huang Yong & Liu Yannan (黄勇 & 刘燕南), *Guanyu Woguo Fan Longduan Fa Zhuanshou Jiage Weichi Xieyi De Falv Shiyong Wenti Yanjiu* (关于我国反垄断法转售价格维持协议的法律适用问题研究) [*A Study of Application of China’s Anti-Monopoly Law on the Issue of RPM*], 10 SHEHUI KEXUE (社会科学) [J. SOC. SCI.] 82 (2013), <http://d.wanfangdata.com.cn/periodical/shkx201310010> (China); see also Ding Maozhong (丁茂中), *Yuanze Xing Weichi Zhuanshou Jiage De Lifa Cuowu Jiqi Jiejue* (原则性禁止维持转售价格的立法错误及其解决) [*Dilemma and Solutions in Illegality of RPM under AML*], 5 DANGDAI FAXUE (当代法学) [CONTEMP. L. REV.] 91 (2015) [hereinafter Ding, *Dilemma and Solutions*]; Judge Ding Wenlian (丁文联), *Xianzhi Zuidi Zhuanshou Jiage Xingwei De Sifa Pingjia* (限制最低转售价格行为的司法评价) [*Judicial View on RPM*], 7 FALV SHIYONG (法律适用) [J. L. APPLICATION] 59 (2014) [hereinafter Ding, *Judicial Review on RPM*]; Xu Guang-Yao (许光耀), *Zongxiang Jiage Xianzhi De Fan Longduan Fa Lilun Yu Anli Kaocha* (纵向价格限制的反垄断法理论与案例考察) [*Anti-Monopoly Analysis of Theories and Cases On Vertical Price Restraints*], 1 ZHENGFA LUNTAN (政法论坛) [J. POL. SCI. & L.] 3 (2017), <http://cqvip.cgl.org.cn/article/detail.aspx?id=671273978> (China).

⁵ *Zhonghua Renmin Gonghe Guo Fan Longduan Fa* (中华人民共和国反垄断法) [Antimonopoly Law of the People’s Republic of China] (promulgated by the Standing Comm. Nat’l People’s Cong., Aug. 30, 2007, effective Aug. 1, 2008), art. 13, 2007 STANDING COMM. NAT’L PEOPLE’S CONG., http://www.npc.gov.cn/englishnpc/Law/2009-02/20/content_1471587.htm (China) (emphasis added) [hereinafter AML].

(2) those restricting the minimum price of products for resale to a third party; and (3) other vertical monopoly agreements that are determined by the anti-monopoly enforcement agencies under the State Council.⁶

Article 15 then lists seven exemptions, providing that companies involved in alleged monopoly agreements bear the burden of proof when they apply for exemptions.⁷

This confusing wording and structure inevitably gave rise to differing understanding of the relevant articles and vigorous debates. Two leading groups in China hold conflicting views on the interpretation of Articles 13–15.

B. *Conflicting Interpretations of Articles 13–15*

One group argues that the AML sets up a “*per se*” rule for vertical monopoly agreements because Article 14 states that RPM is prohibited without mentioning consideration of anti-competitive effects.⁸ This school of thinking implies that the definition of “Monopoly Agreement” in Article 13 should not apply to vertical restraints and neither should competitive effects be considered for Article 14.⁹ Plaintiffs or enforcement agencies only need to bear the burden of proof in proving the existence of vertical monopoly agreements, while the defendants or investigated companies should provide evidence to rebut the presumption of illegality by relying on Article 15 to qualify for an exemption.¹⁰ No matter the terminology, the underlying economic presumption is that vertical restraints have prevailing anticompetitive effects and therefore are *per se* illegal.¹¹

⁶ *Id.*

⁷ AML, *supra* note 5, art. 15.

⁸ See, e.g., Fan Jingbo (范静波), *Fan Longduan Jiufen Falv Shiyong Yantaohui Zongshu* (反垄断纠纷法律适用研讨会综述) [*Overview of Scholars' Speeches on Application of Law in Anti-Monopoly Disputes*], SHANGHAI SHI DIYI ZHONGJI RENMIN FAYUAN WANGZHAN (上海市第一中级人民法院网站) [SHANGHAI No.1 INTERMEDIATE PEOPLE'S Ct.] (Oct. 13, 2011), http://www.a-court.gov.cn/platform/Data/infoplat/pub/no1court_2802/docs/201112/d_1189558.html (China).

⁹ See Gao Mou & Xu Xin-Yu (高牟 & 徐新宇), *Meiguo Zai Zhuanshou Jiage Weichi Shang De Dutexing He Leegin An Queli De Fenxi Kuangjia* (Xia) (美国在转售价格维持上的独特性和Leegin案确立的分析框架(下)) [*Uniqueness of US Approach in RPM and Analytical Structure Established in Leegin (Part II)*], 12 ZHONGGUO JIAGE JIANGUAN JIANCHA (中国价格监管检查) [CHINA PRICE SUPERVISION & CHECK] 17 (2013), <http://60.191.152.123:85/article/detail.aspx?id=48209698> (China).

¹⁰ See, e.g., Huang Yong (黄勇), *Jiage Zhuanshou Weichi Xiexi De Zhifa Fenxi Lujing Tanta* (价格转售维持协议的执法分析路径探讨) [*Analysis of Enforcement Approaches on RPM Agreement*], 12 JIAGE LILUN YU SHIJIAN (价格理论与实践) [PRICE: THEORY & PRAC.] 4 (2012), <http://www.cqvip.com/qk/95585x/2012012/44451477.html> (China); see also Ding, *Judicial Review on RPM*, *supra* note 4.

¹¹ See, e.g., *Nat'l Soc'y of Prof'l Eng'rs v. United States*, 435 U.S. 679, 692 (1978) (“There are . . . two complementary categories of antitrust analysis. In the first category are agreements whose nature and necessary effect are so plainly anticompetitive that no elaborate study of the industry is needed to establish

NDRC's officials explicitly lead in this view.¹² NDRC officials tend to believe their approach is different from the “*per se*” rule, and their approach should be called “prohibition + exemptions,” similar to the EU model of competition law.¹³ No matter what name is given, this approach in nature assumes guilt until innocence is proven.

Mr. Xu Kunlin,¹⁴ the former head of the Price Supervision and Anti-Monopoly Bureau (“PSAMB”) of NDRC,¹⁵ who led the well-known *Qualcomm*¹⁶ case, said in an interview that the provisions of the AML on vertical monopoly agreements clearly specify that, Article 14, as a principle, prohibits vertical monopoly agreements, while Article 15 sets out the conditions for exemptions.¹⁷ There is no other alternative interpretation from the perspective of either legislative intent or literal interpretation.¹⁸

Ms. Li Qing, Deputy Director General of PSAMB, speaking at the China Competition Policy Forum on October 27, 2016, explained that investigated companies are entitled to use their legitimate rights to challenge NDRC's decisions, including applying for hearings, judicial review, and pleading for exemptions under Article 15 of the AML.¹⁹

their illegality—they are ‘illegal per se.’”); *see also* Huang, *supra* note 10; Ding, *Judicial Review on RPM*, *supra* note 4.

¹² *See, e.g.*, Wu Dongmei (吴东美), Zongxiang Jiage Longduan Xieyi De Diaocha Fenxi Yu Falv Shiyong: Yi Meidunli An Wei Shijiao (纵向价格垄断协议的调查分析与法律适用——以美敦力案为视角) [*Investigation and Application of Law in Vertical Price-Related Monopoly Agreement: From the Perspective of Medtronic Case*], 1 PRICE SUPERVISION & ANTI-MONOPOLY IN CHINA 38 (2017), <http://cn.oversea.cnki.net/law/detail/detail.aspx?filename=JGJD201701022&dbcode=CLKJ&dbname=CLKJTEMP> (China).

¹³ *See* WAN JIANG (万江), ZHONGGUO FAN LONGDUAN FA: LILUN, SHIJIAN YU GUOJI BIJIAO (中国反垄断法: 理论、实践与国际比较) [CHINA COMPETITION LAW: THEORY, PRACTICE & COMPARATIVE LAW] 9–13 (2015) (listing a comparison chart on the provisions of Chinese AML and EU's competition law).

¹⁴ Xu has recently left the NDRC and was promoted to the position of Vice Mayor in Shanghai in March 2017.

¹⁵ The Price Supervision and Anti-Monopoly Bureau of the NDRC is responsible for enforcing China's antitrust law with respect to price-related anticompetitive conduct, such as price-fixing, RPM, and excessive pricing.

¹⁶ *See* Guojia Fazhan He Gaige Weiyuan Hui Xingzheng Chufa Jueding Shu No. 1 [2015] (国家发展和改革委员会行政处罚决定书[2015]1号) [Nat'l Dev. & Reform Comm'n Admin. Penalty Decision [2015] No. 1 (against Qualcomm Inc.)] (2015), Guojia Fazhan He Gaige Weiyuan Hui (国家发展和改革委员会) [Nat'l Dev. & Reform Comm'n], http://jjs.ndrc.gov.cn/fjgld/201503/t20150302_666170.html (China).

¹⁷ *See* Xu Kunlin (许昆林), Kuanda Zhengce Shiyong Yu Zongxiang Longduan Xieyi (宽大政策适用于纵向垄断协议) [*Leniency Policies Applicable to Vertical Restraints*], ZHONGGUO JINGJI DAobao (中国经济导报) [CHINA ECON. HERALD] (Oct. 30, 2013), <http://www.ceh.com.cn/xwpd/2013/10/255896.shtml> (China) [hereinafter *Leniency Policies*].

¹⁸ *Id.*

¹⁹ *See* Li Qing: Jigou Yu Qiye Jian Lvshi Geng Yinggai Zhanzai Qiye Lichang Shang (李青: 机构与企业间 律师更应该站在企业立场上) [*Li Qing Said: Attorney Better Stand Up for Company Clients*

Mr. Zhang Handong, the new Director General of PSAMB, who succeeded Xu in early 2015, has not made any public comment on the *per se* rule, but he seems not as strong of a supporter as Xu, which could be inferred from the recent milestone NDRC case, *Medtronic*,²⁰ at the end of 2016, which is analyzed in greater detail in Section III below.

Another school of thought believes that Article 13 should be read together with Article 14. The definition of “Monopoly Agreement” under Article 13 is meant to be applicable to vertical monopoly agreements because Article 13 says explicitly the definition is “for the purpose of *this Law*.”²¹ This view presumes the legality of vertical restraints and supports the application of economic analysis of both pro-competitive and anti-competitive effects. Judge Ding Wenlian in *Rainbow v. Johnson & Johnson*²² gives a representative analysis, which has been endorsed by the Supreme People’s Court of the People’s Republic of China (the “SPC”).²³ The majority of leading scholars and practitioners also support this view.²⁴ Section II gives a detailed review on the opinions of judges.

before Enforcement Agencies], XINLANG CAIJING (新浪财经)[SINA] (Nov. 11, 2016), <http://finance.sina.com.cn/meeting/2016-11-11/doc-iffxxsmic6050216.shtml> (China).

²⁰ See Guojia Fazhan He Gaige Weiyuan Hui Xingzheng Chufa Jueding Shu No. 8 [2016] (国家发展和改革委员会行政处罚决定书 [2016] 8号) [Nat’l Dev. & Reform Comm’n Admin. Penalty Decision [2016] No. 8] (2016), Guojia Fazhan He Gaige Weiyuan Hui (国家发展和改革委员会) [Nat’l Dev. & Reform Comm’n], http://www.sdpc.gov.cn/zwfwx/xzcf/201612/t20161209_829745.html (China).

²¹ See, e.g., Ding Maozhong (丁茂中), *Yuanze Xing Jinzhi Weichi Zhuanshou Jiage De Lifa Cuowu Ji Qi Jiejue* (原则性禁止维持转售价格的立法错误及其解决) [*Mistakes of the Anti-Monopoly Law and Solutions on General Prohibition of RPM*], 1 ZHENGZHI YU FALV (政治与法律) [J. POL. SCI. & L.] (2017); see also Lan Lei (兰磊), *Zhuanshou Jiage Weichi Weifa Tuiding Zhi Pipan* (转售价格维持违法推定之批判) [*Criticisms on Assumption of RPM*], 2 QINGHUA FAXUE (清华法学) [TSINGHUA U. L. J.] (2016).

²² See Beijing Ruibang Yonghe Kemaoyouxian Gongsu Su Qiangsheng (Shanghai) Yiliao Qicai Youxian Gongsu, Qiangsheng (Zhongguo) Yiliao Qicai Youxian Gongsu Zongxiang Longdian Xieyi Jiufen An (北京锐邦涌和科贸有限公司诉强生(上海)医疗器械有限公司、强生(中国)医疗器械有限公司纵向垄断协议纠纷案) [Beijing Ruibang Yonghe Technology & Trade Co., Ltd. v. Johnson & Johnson Medical (Shanghai) Ltd. and Johnson & Johnson Medical (China) Ltd.] (Higher People’s Ct. of Shanghai, Aug. 1, 2012), (2012) Hugaomin San (Zhi) Zhongzi Di 63 Hao ((2012) 沪高民三(知)终字第63号) [(2012) Shanghai Higher Court No. 63], http://www.hshfy.sh.cn/shfy/gweb2017/flws_view.jsp?pa=adGFoPaOoMjAxMqOpu6a438PxyP0o1qop1tXX1rXaNjO6xSZ3c3hoPTUPdcssz (China).

²³ See generally *id.* (the first vertical restrictive agreement case litigated in the court room). The case has been selected by the Supreme Court as one of the Top Ten Creative IPR Cases in 2013 and one of the Eight Representative IPR Judicial Protection Cases. Furthermore, the Supreme Court announced that this case is a milestone in anti-monopoly civil litigation and its approach of analysis would have a significant influence on both private enforcement and administrative enforcement of AML.

²⁴ See Huang & Liu, *supra* note 4; see also Lan, *supra* note 21; Ding, *Judicial Review on RPM*, *supra* note 4; Ding, *Dilemma and Solutions*, *supra* note 4; see also Li Jian (李剑) & Tang Fei (唐斐), *Zhuanshou Jiage Weichi De Weifa Xing Yu Falv Guize* (转售价格维持的违法性与法律规制) [*Illegality of and Rules on RPM*], 10 DANGDAI FAXUE (当代法学) [CONTEMP. L. R.] (2010).

C. *Legislative Background*

It is necessary to examine the legislative background of the 2007 AML to better understand the conflicts in its interpretation. A change of tone can be identified even among legislative bodies.

In June 2006, the State Council submitted the AML draft before National People's Congress ("NPC"), the top legislature in China. In its explanatory report before NPC, the State Council explicitly explained that RPM or other restrictions on the vertical transactions were prohibited, which it said was consistent with the worldwide prevailing practice.²⁵

Shortly after, the landmark United States case, *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*,²⁶ was decided on June 28, 2007. It was already late for Chinese legislators to make any substantial changes given the AML draft was waiting for the final vote.²⁷ Two months later, the AML was formally enacted.²⁸

Leegin obviously exerted influence on how vertical restraints were considered. The second day after the AML was enacted, the Legislative Affairs Commission of the NPC Standing Committee published its commentary interpretation of the AML. In the section on Article 14, it recognizes *Leegin* and the rule of reason,

In the recent years, the rule of reason principle has been applied to more types of agreements worldwide and cases have been seen in the US applying the rule of reason principle to RPM. . . . It is notable that . . . the definition of monopoly agreement under the AML includes a precondition on whether such agreement has exclusive and restrictive competition effects.

²⁵ See Cao Kangtai (曹康泰), *Guanyu Zhonghua Renmin Gonghe Guo Fan Longduan Fa (Cao'an) De Shuoming* (关于《中华人民共和国反垄断法(草案)》的说明) [Note on the Anti-monopoly Law of the People's Republic of China (Draft)], ZHONGGUO RENDA WANG (中国人大网) [NAT'L PEOPLE'S CONG. OF CHINA] (Jun. 24, 2006), http://www.npc.gov.cn/wxzl/gongbao/2007-10/09/content_5374671.htm (China).

²⁶ *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*, 551 U.S. 877 (2007).

²⁷ A few days before *Leegin Creative Leather Products, Inc. v. PSKS, Inc.* was decided on June 25, 2007, NPC's Standing Committee held the second-round discussion meeting on the AML draft before the final formal vote two months later. In that meeting, the substantive changes of the draft had largely been agreed to and only minor wording changes were subsequently made. *Quanguo Renda Jiu Fan Longduan Fa Deng Sibufabu De Shenyi Qingkuang Juxing Fabu Hui* (全国人大就《反垄断法》等四部法律的审议情况举行发布会) [The National People's Congress on the "Anti-Monopoly law" and Other Four Legal Review of the Meeting Held Press Conference by NPC Standing Committee], ZHONGGUO WANG (中国网) [CHINESE GOV'T WEB PORTAL] (Aug. 30, 2007, 4:00 pm), http://www.china.com.cn/zhibo/2007-08/30/content_8785345.htm?show=t (China).

²⁸ AML was passed on a majority vote of 150 on August 30, 2007 and became effective on August 1, 2008.

Therefore, only when the agreement listed under this Article 14 fits in the definition of monopoly agreements in this AML, will it be considered as a monopoly agreement and vice versa.²⁹

The coincidental timing of *Leegin* and enactment of the AML may be an important factor facilitating a better understanding as to why Articles 13–15 remain in the current language and how such language gives rise to debates over vertical restraints.

D. Review – *The Beginning of Problems*

The controversies over Article 14 attract increasing attention from the United States³⁰ and the EU,³¹ but also lead to a clear diversion between Chinese courts and the NDRC.

Economic theory tells us that RPM has two sides: procompetitive efficiency benefits and anticompetitive harm.³² Nonetheless, NDRC's decisions on RPM do not include economic analysis, except for *Medtronic* and *Smith*

²⁹ See Quan Guo Renda Changweihui Fazhi Gongzuo Weiyuanhui Jingji Fa Shi (全国人大常委会法制工作委员会) [Office for Economic Law], *Zhonghua Renmin Gonghe Guo Fan Longduan Fa Tiaowen Shuoming, Lifa Liyou Ji Xiangguan Guiding* (中华人民共和国反垄断法条文说明、立法理由及相关规定) [*Literal Interpretation, Legislative Purpose and Relevant Provisions of the Anti-Monopoly Law of the People's Republic of China*], 80 PEKING U. PRESS (2007).

³⁰ See Liu Zhiyong & Qiao Yue, *Vertical Restraints, the Sylvania Case, and China's Antitrust Enforcement*, 51 REV. INDUS. ORG. 193, 203–04 (2017), <https://link.springer.com/content/pdf/10.1007%2Fs11151-017-9587-7.pdf>; see also Joshua D. Wright et al., *Comment of the Global Antitrust Institute, George Mason University School of Law, on the Questionnaire for the Revision of China's Anti-Monopoly Law 1–4* (Geo. Mason L. & Econ. Research Paper Series, Working Paper No. 15-56, 2015), <http://ssrn.com/abstract=2702169>.

³¹ See Legal & Competition Working Grp., *European Business in China Position Paper*, (2016–2017), at 121–22, http://www.europeanchamber.com.cn/en/publications-archive/426/Legal_and_Competition_Working_Group_Position_Paper_2016_2017.

³² See, e.g., Benjamin Klein, *Competitive Resale Price Maintenance in the Absence of Free-Riding*, 76 ANTITRUST L. J. 431, 431 (2009).

& *Nephew*³³ at the end of 2016.³⁴ On the opposing side are the judges who are willing to discuss economic analysis in vertical restraints cases.³⁵

In the context of the AML amendments³⁶ and China's judicial reforms, two questions should be asked: (1) how will this inconsistency be resolved and; (2) which approach will eventually prevail in China? The following sections attempt to answer these questions.

II. JUDICIAL RPM CASES

A. *Overview of How Chinese Courts Handle RPM Cases*

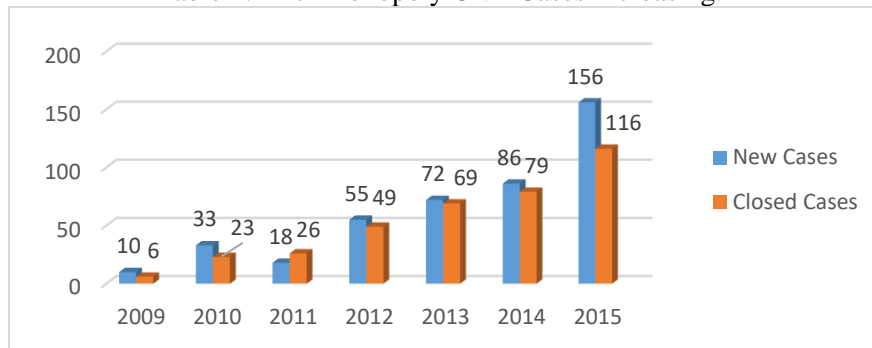
Anti-monopoly civil (or private enforcement) cases accepted by courts steadily increased from ten in 2008 and 2009 to 156 in 2015 as shown in Table 1 below.

³³ See Shanghai Shi Wujia Ju Xingzheng Chufa Jueding Shu Di 2520160028 Hao (上海市物价局行政处罚决定书 (施乐辉医用产品国际贸易 (上海) 有限公司) 第2520160028号) [Shanghai Price Bureau Admin. Penalty Decision No. 2520160028] (2016), Shanghai Shi Fazhan He Gaige Weiyuan Hui (上海市发展和改革委员会) [Shanghai Mun. Dev. & Reform Comm'n], <http://www.shdrc.gov.cn/fzgggz/jggj/jghzcfjds/25365.htm> (China).

³⁴ Going through the RPM penalty decisions publicly available, it is interesting to see no economic discussion included, but in some decisions, the rationale behind the penalty is stated in a single sentence. For instance, in Jiangsu Province Price Supervision Bureau Penalty Decision [2014] Su Jia Anti-Monopoly No. 2 (江苏省物价局处罚决定书 (2014) 苏价反垄断案 2 号), http://ccip.sjtu.edu.cn/Show.aspx?info_lb=682&info_id=3592&flag=679 (China), the court stated that resale price maintenance deprives of and interferes with distributors' autonomy on prices, eliminates and restricts price competition between distributors, reduces the signal role of prices in allocation of resources, and harm consumer welfare.

³⁵ See cases cited and discussion *infra* Section II.B.

³⁶ A research task force has been set up on the amendment of AML to be co-drafted by MOFCOM, the NDRC, and SAIC. See ZHONGGUO ZHENGFU WANG (中国政府网) [ST. COUNCIL OF CHINA], GUOWU YUAN BANGONG TING GUANYU YINFA GUOWU YUAN 2016 NIANLIFA GONGZUO JIHUA DE TONGZHI (国务院办公厅关于印发国务院2016年立法工作计划的通知) [NOTICE OF THE GENERAL OFFICE OF THE STATE COUNCIL ON ISSUING THE 2015 LEGISLATIVE WORK PLAN FOR THE STATE COUNCIL] (2016), http://www.gov.cn/zhengce/content/2016-04/13/content_5063670.htm.

Table 1: Anti-Monopoly Civil Cases Increasing.³⁷

However, civil antitrust cases are still limited compared to other types of IP cases. In 2016, the number of publicly available judgements in civil antitrust cases only amounted to seventy-six,³⁸ while the national-wide courts decided 147,000 civil IP cases in total at the first instance level.³⁹

As of February 28, 2017, at the state level, there was no judicial review case over any anti-monopoly enforcement decisions made by NDRC, SAIC, or MOFCOM. However, at the provincial level, there were two judicial review cases filed against the penalty decisions made, respectively, by NDRC's branch in Shan'xi Province,⁴⁰ and by SAIC's branch in Shandong Province.⁴¹

³⁷ This table is translated from an academic article by Judge Wang Chuang (Deputy Presiding Judge of Intellectual Property Tribunal at the Supreme People's Court of the People's Republic of China). Wang Chuang (王闯), *Zhongguo Longduan Sifa Susong Gaikuang Ji Zhanwang* (中国反垄断民事诉讼概况及展望) [Overview of China's Anti-Monopoly Civil Litigations and Its Future], 3 JINGZHENG ZHENGCE YANJIU (竞争政策研究) [COMPETITION POL'Y. RES.] 6 (2016), <http://www.cqvip.com/qk/89400a/201602/74909067504849544850484851.html> (China).

³⁸ According to search results from the SPC designated judgments publication website – China Judgment Online (<http://wenshu.court.gov.cn/>). See *2016 Nian Fan Longduan Niandu Baogao* (2016年反垄断年度报告) [2016 Competition Law Annual Report], <http://www.lexisn.com> (China) [hereinafter *2016 Competition Annual Report*].

³⁹ See Zhou Qiang (周强), *Zuigao Renmin Fayuan Gongzuo Baogao* (2017) (最高人民法院工作报告 (2017)) [Annual Work Report of the Supreme Court of China (2017)], ZHONGGUO RENDA WANG (中国人大网) [NAT'L PEOPLE'S CONG. OF CHINA] (Mar. 15, 2017, 18:41), http://www.npc.gov.cn/npc/xinwen/2017-03/15/content_2018938.htm.

⁴⁰ See Shaanxi Sheng Jidong Che Jiance Jiage Longduan An Bufen She'an Danwei Tiqi Xingzheng Fuyi He Xingzheng Susong Jun Bei Bohui (陕西省机动车检测价格垄断案部分涉案单位提起行政复议和行政诉讼均被驳回) [Shaanxi Province, Motor Vehicle Testing Price Monopoly Cases Involved in Administrative Reconsideration and Administrative Litigation were Dismissed] (2016), Guojia Fazhan He Gaige Weiyuan Hui (国家发展和改革委员会) [Nat'l Dev. & Reform Comm'n], http://www.sdpc.gov.cn/fzgggz/jgjdyfld/fjgld/201612/t20161226_832627.html (China).

⁴¹ See *Shandong Sheng Jinan Shi Lixia Qu Renmin Fayuan Yishen Weichi Shandong Shengju Xingzheng Chufa Jueding* (山东省济南市历下区人民法院一审维持山东省局行政处罚决定) [Report on Administrative Punishment of Shandong Provincial Bureau in First Instance of People's Court of Lixia District, Jinan City, Shandong Province], GUOJIA GONGSHANG XINGZHENG GUANLI ZONGJU (国家工商

It appears that judicial influence is limited based on the quantitative data. The qualitative analysis below, however, will reveal the potential of greater influence of IP judges.

B. *Key Anti-Trust Private Enforcement Cases Related to Vertical Restraints*

1. The *Abbott* Case

Alongside the rising volume of accepted cases, filings of antitrust civil cases by rights holders and consumers were also increasing. By contrast, during the early days, the majority of cases were brought by practitioners to explore the boundaries of the AML.⁴² The trend indicates not only the willingness of IP judges to review AML cases, but also enhanced awareness of the AML.

The *Abbott* Case,⁴³ an appellate case decided by the Beijing Higher Court in 2016, vividly illustrates the trend of how administrative decisions by AML enforcement agencies will be treated in a civil lawsuit.⁴⁴ Both the first instance court and the appellate court accepted the facts identified in the NDRC's penalty decision on RPM⁴⁵ as prima facie evidence, which may be rebutted by opposing evidence.⁴⁶ *Abbott* shows one possible direction of interaction between courts and AML enforcement agencies.

行政管理总局) [SAIC] (June 6, 2016), http://www.saic.gov.cn/fldyfbzdjz/gzdt/201609/t20160906_205297.html (China) [hereinafter *Rep. on Admin. Punishment of Shandong*].

⁴² See Vanessa Yanhua Zhang, *CPI Talks: Interview with Judge Chuang Wang*, CPI ANTITRUST CHRONICLE, Feb. 2016, <https://www.competitionpolicyinternational.com/wp-content/uploads/2016/02/Judge-Wang-Interview.pdf>.

⁴³ Tian Junwei Shangs Beijing Jialefu Shangye Youxian Gongsu Shuangjingdian Deng Longduan Jiufen Yian (田军伟上诉北京家乐福商业有限公司双井店等垄断纠纷一案) [Tian Junwei v. Beijing Carrefour Ltd. Co. et al., re Antimonopoly Disputes] (Beijing High People's Ct., Aug. 22, 2016), (2016) Jingmin Zhong 214 Hao ((2016) 京民终 214 号) [(2016) Beijing High Court Civil Case Final Judgment No. 214], <http://wenshu.court.gov.cn/content/content?DocID=7ad234f9-cfdc-453a-ae0a-a8f22dc22004&KeyWord> (China).

⁴⁴ See *id.*

⁴⁵ On September 22, 2013, NDRC announced its penalty decision, Fa Gai Ban Jia Jian Penalty [2013] No.4 (发改办价监处罚 [2013] 4号) [Nat'l Dev. & Reform Comm'n Admin. Penalty Decision [2013] No. 4] (2013), Guojia Fazhan He Gaige Weiyuan Hui (国家发展和改革委员会) [Nat'l Dev. & Reform Comm'n], http://www.ndrc.gov.cn/fzgggz/jgjdylfd/fjgld/201409/t20140903_624625.html (China).

⁴⁶ According to Article 114 of the *Judicial Interpretation on Application of the Civil Procedure Law of the People's Republic of China*, in civil litigations, the facts identified and recorded in a penalty decision shall be assumed by courts as authentic, unless rebutted by sufficient opposing evidence. In the judgment of *Abbott*, the NDRC decision that there is a vertical agreement between *Abbott* and its distributors has been recognized by the Beijing Higher Court, but the court also points out that it cannot prove

2. *Rainbow v. Johnson & Johnson*

Although facts identified in binding administrative decisions are honored, courts clearly stick to a different approach—the rule of reason—from NDRC, the enforcement agency in charge of price-related monopoly behaviors, in their judgments on RPM cases.⁴⁷ More specifically, the fundamental judicial diversion from NDRC focuses on how to identify RMP and how to allocate the burden of proof.⁴⁸ Starting with *Rainbow v. Johnson & Johnson*,⁴⁹ followed by the *Gree* case, IP judges consistently applied the rule of reason approach. Even in the *Abbott Case* and *Panasonic Case*, where the disputes did not directly focus on how vertical restraints should be analyzed, the judges unanimously took chances to express their support.

In *Rainbow v. Johnson & Johnson*, the Shanghai Higher Court clarified that the definition of monopoly agreement under Article 13 of the AML does apply to vertical agreements under Article 14 and the exclusive or restrictive effects on competition should be proved by the plaintiff as one key precondition to establishing a vertical agreement case (including RPM).⁵⁰ In assessing whether there exists any exclusive or restrictive competition effects, the court listed four aspects of the economic analysis: (1) competition in the relevant market, (2) the defendant's market power, (3) the purpose of RPM, and (4) the competitive effects of RPM.⁵¹

the existence of the specific agreement because the distributors have not been specifically identified by the NDRC decision.

⁴⁷ Ding, *Judicial Review on RPM*, *supra* note 4.

⁴⁸ *Id.*

⁴⁹ Beijing Ruibang Yonghe Kemaoyou Xian Gongsi Su Qiangsheng (Shanghai) Yiliao Qicai Youxian Gongsi, Qiangsheng (Zhongguo) Yiliao Qicai Youxian Gongsi Zongxiang Longduan Xieyi Jiufen An (北京锐邦涌和科贸有限公司诉强生(上海)医疗器械有限公司、强生(中国)医疗器械有限公司纵向垄断协议纠纷案) [Beijing Ruibang Yonghe Technology & Trade Co., Ltd. v. Johnson & Johnson Medical (Shanghai) Ltd. and Johnson & Johnson Medical (China) Ltd.] (Higher People's Ct. of Shanghai, Aug. 1, 2012), (2012) Hu Gao Min San (Zhi) Zhong Zi Di 63 Hao ((2012) 沪高民三(知)终字第63号) [(2012) Shanghai Higher Court Civil Case (IPR) Final Judgment No. 63], http://www.hshfy.sh.cn/shfy/gweb2017/flws_view.jsp?pa=adGFoPaOoMjAxMqOpu6a438PxyP0o1qop1tXX1rXaNjO6xSZ3c3hoPTUPdcssz (China).

⁵⁰ *Id.* (holding that in accordance with Article 7 of the Judicial Interpretation of the Supreme Court entitled "Provisions on Several Application of Law in Civil Disputes Arising from Monopoly Behaviors," one of the preconditions to establish a horizontal monopoly agreement shall be the "effect of excluding or restricting competitions," and therefore, such effect shall also be inferred as a precondition in vertical anti-monopoly agreement (*a fortiori*), which is commonly considered to pose less anti-competitive harm).

⁵¹ See Beijing Ruibang Yonghe Kemaoyou Xian Gongsi Su Qiangsheng (Shanghai) Yiliao Qicai Youxian Gongsi, Qiangsheng (Zhongguo) Yiliao Qicai Youxian Gongsi Zongxiang Longduan Xieyi Jiufen An Minshi Panjue Shu (北京锐邦涌和科贸有限公司诉强生(上海)医疗器械有限公司、强生(中国)医疗器械有限公司纵向垄断协议纠纷案民事判决书) [Civil Case Judgment of Beijing Ruibang Yonghe Technology & Trade Co., Ltd. v. Johnson & Johnson Medical (Shanghai) Ltd. and Johnson & Johnson Medical (China) Ltd.] (Higher People's Ct. of Shanghai, Aug. 1, 2012), (2012) Hu Gao Min San (Zhi) Zhong Zi Di 63 Hao ((2012) 沪高民三(知)终字第63号) [(2012) Shanghai Higher Court Civil Case

3. The *Panasonic* Case

In June 2016, the Shanghai First Intermediate Court, which was the first instance court for *Rainbow v. Johnson & Johnson*, took a chance to further express its judicial view on how to assess both procompetitive and anticompetitive effects of vertical restriction agreements again in an alleged horizontal agreement case: the *Panasonic* Case.⁵²

The plaintiff, a distributor of Panasonic China, insisted on filing its lawsuit as a horizontal monopoly case under Article 13(3) of the AML.⁵³ The court rejected its claims on the basis that the distribution agreements between Panasonic China and its two distributors are not horizontal monopoly agreements.⁵⁴

The reasoning on competitive effects in *Panasonic* is indeed interesting. The court first emphasized the logic in *Rainbow v. Johnson & Johnson* that horizontal monopoly agreements are likely to result in more adverse competitive harm; and consequently, the burden of proof on competitive effects is shifted to the defendant.⁵⁵ It went on to analyze intra- and inter-brand competitive effects of vertical restraints in a separate paragraph.

The court noted that vertical restrictive agreements involve companies and its transactional counterparties that are at different levels of trade or industry in manufacture and sales.⁵⁶ They share economic benefits, which may

(IPR) Final Judgment No. 63], http://www.hshfy.sh.cn/shfy/gweb2017/flws_view.jsp?pa=adGFoPaOoMjAxMqOpu6a438PxyP0o1qop1tXX1rXaNjO6xSZ3c3hoPTUPdcpsz (China).

⁵² Shanghai Rijin Dianqi Su Songxia Ji Qi Jingxiao Shang Huafen Kehu An Yi Shen Panjue Shu (上海日进电气诉松下及其经销商划分客户案) [Shanghai Rijin Electric Ltd. Co. v. Panasonic & Distributors, re Customer Assignment] (2014) Hu Yi Zhong Min Wu (Zhi) Chu Zi Di 120 Hao ((2014) 沪一中民五(知)初字第120号) [(2014) Shanghai First Intermediate People's Court Civil Case (IPR) Judgment No. 120], (Shanghai First Interim. People's Ct., June 29, 2016), http://mp.weixin.qq.com/s?__biz=MzA5MTI2OTkzNg==&mid=2247484034&idx=1&sn=aff77dd000359d4c76263956a65fed9b&chksm=907fbcdad70835cbc60d503a63e05c33107134fc1668ff991617c7ac9b6f2ec034d779acc18a&scene=4#wechat_redirect (China).

⁵³ Judge Ding Wenlian, Address at China Competition Policy Forum (Oct. 27, 2016). See also ZHONGGUO SHIJIE MAOYI ZUZHI YANJIU HUI JINGZHENG ZHENGCE YU FALV ZHUANYE WEIYUAN HUI (中国世界贸易组织研究会竞争政策与法律专业委员会) [PROF'L COMM. ON COMPETITION POL'Y & L., REPORT ON COMPETITION LAW AND POLICY OF CHINA 2016] 290 (2017) [hereinafter *2016 PCCPL Report*].

⁵⁴ Shanghai Rijin Dianqi Su Songxia Ji Qi Jingxiao Shang Huafen Kehu An Yi Shen Panjue Shu (上海日进电气诉松下及其经销商划分客户案) [Shanghai Rijin Electric Ltd. Co. v. Panasonic & Distributors, re Customer Assignment] (2014) Hu Yi Zhong Min Wu (Zhi) Chu Zi Di 120 Hao ((2014) 沪一中民五(知)初字第120号) [(2014) Shanghai First Intermediate People's Court Civil Case (IPR) Judgment No. 120], (Shanghai First Interim. People's Ct., June 29, 2016), http://mp.weixin.qq.com/s?__biz=MzA5MTI2OTkzNg==&mid=2247484034&idx=1&sn=aff77dd000359d4c76263956a65fed9b&chksm=907fbcdad70835cbc60d503a63e05c33107134fc1668ff991617c7ac9b6f2ec034d779acc18a&scene=4#wechat_redirect (China).

⁵⁵ *Id.*

⁵⁶ *Id.*

be seen in their cooperation, management or controlling relationship, but they are not in a competitive relationship with each other. The court acknowledged that vertical restrictive agreements have their own procompetitive effects, such as reducing the “free-ride” problem, and improving quality of customer service, may enhance the competitiveness of a brand, and thus may benefit the inter-brand competition and increase consumer welfare.⁵⁷ However, if the competition in a relevant market is not sufficient, where market participants with market power exist to the extent that no other brands may effectively compete with them, such vertical restrictive agreements may increase the possibility of a stronger market power of such participants and maintenance of excessive price.⁵⁸ Only when the restrictive agreements within a brand have adverse harm on inter-brand competition, would such agreements be identified as the prohibited vertical monopoly agreements under Article 14 of the AML.⁵⁹

4. The *Gree* Case

It seems that the reasoning in both *Rainbow v. Johnson & Johnson* and *Panasonic* was followed in *Gree*,⁶⁰ two months after *Panasonic*.

In *Gree*, the Guangzhou IP Court held that the plaintiff (a retailer of Gree brand air conditioners) failed to prove that the defendants’ RPM excluded or restricted competition; and therefore, the RPM acts of the distributors of Gree Electric Appliances Inc. of Zhuhai (“Gree Electric”) did not fall within the scope of “monopoly agreement” under the AML, despite that the three-party agreement among the parties proved that the distributors of Gree Electric had entered into and carried on RPM.⁶¹

In its judgment, the court analyzed the competitive effects of RPM from both inter-brand and intra-brand perspectives again and concluded that the

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ Dongguan Shi Hengli Guochang Dianqi Shangdian v. Dongguan Shi Shengshi XinXing Geli Maoyi Youxian Gongsi Deng Zongxiang Longduan Xieyi Jiufen (东莞市横沥国昌电器商店诉东莞市晟世欣兴格力贸易有限公司等纵向垄断协议纠纷案) [Dongguan City Hengli Guochang Electronics Store v. Dongguan City Gree Air Conditioners Sales Co., Ltd. et al., re Vertical Monopoly Agreement Disputes] (Guangzhou Intellectual Property Court, Dated Aug. 30, 2016), (2015) Yue Zhi Fa Shang Min Chu Zi Di 33 Hao ((2015) 粤知法商民初字第33号) [(2015) Guangzhou Intellectual Property Court Civil Case First Instance Judgment No. 33], <http://wenshu.court.gov.cn/content/content?DocID=f9d94f5a-c0b9-4720-8789-a7f50cf3eb9a&KeyWord=%E6%A0%BC%E5%8A%9B>. In August 2016, Guangzhou Intellectual Property Court in its first instance decision ruled against the plaintiff, a retailer of Gree brand air conditioners. The defendants are, respectively, a wholesaler and a wholly owned distributor of Gree Electric. In 2017, Gree Electric ranks as No. 364 in Forbes Global 2000. The World’s Biggest Public Companies, FORBES, <https://www.forbes.com/global2000/list/#tab:overall>.

⁶¹ *See id.*

welfare of consumers will not be harmed because (1) competition among different air conditioner brands is sufficient with no barriers for new entry; and (2) competition among distributors within the Gree brand is also not harmed because distributors could compete in other non-price aspects such as pre-sales marketing, promotions, and after-sales service.⁶²

These cases are coherent with the view of the SPC Judge Zhu Li. He once expressed his concerns speaking at a conference, noting that if we look at the industries across over China, vertical restrictive agreements are commonly seen. Under the circumstances where RPM is common practice in numerous industries, a large percentage of firms could potentially be sued as defendants. If we shift burden of proof to defendants in proving procompetitive effects in vertical restraints cases, we need to consider first how this approach will affect the market.⁶³

In sum, courts are strong supporters of the rule of reason in vertical restraint cases and even in RPM cases. In contrast, NDRC, as the most proactive one out of the three AML enforcement agencies, seems to hold the opposite view. Section III will give a closer review of NDRC enforcement cases and practices in 2016.

C. *Recent Judicial Review of Local AML Regulators in 2016*

Decisions of Chinese AML regulators, whether at the central government or local levels, are subject to judicial review.⁶⁴ In April 2014, three companies, fined by SAIC's Jiangsu provincial branch for horizontal price-fixing, filed a lawsuit before Nanjing Intermediate Court in Jiangsu Province, asking the court to revise the penalty decisions⁶⁵ on the grounds that the agreements at dispute had not been performed and the penalty was obviously excessive.⁶⁶ This is arguably the first judicial review case filed against an

⁶² *Id.*

⁶³ See Shimao Zuzhi Yanjiu Hui (世贸组织研究会) [World Trade Org.], *Zhonghua Renmin Gonghe Guo Xingzheng Susong Fa* (中华人民共和国行政诉讼法) [Antimonopoly Civil Procedure Evidence Rules and Burden of Proof] (Dec. 18, 2012), http://www.mofcom.gov.cn/article/zt_jzzcflnh/lanmuthree/201301/20130100003562.shtml (China).

⁶⁴ See *Zhonghua Renmin Gonghe Guo Xingzheng Susong Fa* (中华人民共和国行政诉讼法) [Administrative Procedure Law of the People's Republic of China] (promulgated by the Standing Comm. Nat'l People's Cong., Apr. 4, 1989, effective Oct. 1, 1990), art. 2, 12 1989 STANDING COMM. NAT'L PEOPLE'S CONG., http://www.npc.gov.cn/englishnpc/Law/2007-12/12/content_1383912.htm (China).

⁶⁵ See (2013) Su Jia Fan Longduan An 3-008 Hao Xingzheng Chufa Jueding Shu ((2013)苏价反垄断案3-008号行政处罚决定书) [(2013) Jiangsu Province Bureau of Price Anti-Monopoly Case No. 3-008 Administrative Penalty Decision]; (2013) Su Jia Fan Longduan An 3-007 Hao Xingzheng Chufa Jueding Shu ((2013)苏价反垄断案3-007号行政处罚决定书) [(2013) Jiangsu Province Bureau of Price Anti-Monopoly Case No. 3-007 Administrative Penalty Decision].

⁶⁶ See Yuangao Nanjing Jiangong Jituan Youxian Gongsi Yu Hunningtu Fen Gongsi Yu Beigao Jiangsu Sheng Wujia Ju Wujia Xingzheng Chufa Xingwei Yi An De Xingzheng Caiding Shu (原告南京建工集团有限公司混凝土分公司与被告江苏省物价局物价行政处罚行为一案的行政裁定书)

AML regulator. The case was dismissed on the grounds of the statute of limitations and did not enter the stage of substantial review.⁶⁷

In 2016, some progress was made. Two judicial review cases (“2016 Judicial Review Cases”) were filed and went to hearings, respectively, against a NDRC provincial branch and a SAIC provincial branch.

One of the vehicle inspection companies, which was fined for horizontal price fixing, filed a case against NDRC’s Shan’xi branch, claiming that the penalty decision should be annulled.⁶⁸ On December 21, 2016, the specialized court, Xi’an Railway Transportation Court at the grassroots level, ruled in favor of NDRC’s Shan’xi branch.⁶⁹ Recently, Xi’an Railway Transportation Intermediate Court heard the appeal and supported the first instance court.⁷⁰

In the other case, seven local accounting firms filed jointly against the anti-monopoly penalty decision of SAIC’s Shandong branch on non-price

[Judgment of Nanjing Construction Group Concrete Branch v. Jiangsu Province Price Authority, re Issuance of Price-Related Administrative Penalty] (dated Sept. 25, 2014), (2014) Ning Xing Chu Zi Di 70 Hao (2014) 宁行初字第70号 [(2014) Jiangsu Province Nanjing Intermediate Court (Administrative Litigation) Judgment No. 70], <http://www.idianfa.com/judge/detail/13758#>; Yuangao Nanjing Jiasheng Hunningtu Youxian Gongsu Yu Beigao Jiangsu Sheng Wujia Ju Wujia Xingzheng Chufa Xingwei Yi An De Xingzheng Caiding Shu (原告南京嘉盛混凝土有限公司与被告江苏省物价局物价行政处罚行为一案的行政裁定书) [Judgment of Nanjing Jiasheng Concrete Co. Ltd. v. Jiangsu Province Price Authority, re Issuance of Price-Related Administrative Penalty] (dated Sept. 25, 2014), (2014) Ning Xing Chu Zi Di 70 Hao ((2014) 宁行初字第71号) [(2014) Jiangsu Province Nanjing Intermediate Court (Administrative Litigation) Judgment No. 71], <http://www.idianfa.com/judge/detail/13756#>.

⁶⁷ GUOJIA FAZHAN HE GAIGE WEIYUAN HUI JIAGE JIANDU JIANCHA YU FAN LONGDUAN JU (国家发展和改革委员会价格监督检查与反垄断局) [NAT’L DEV. & REFORM COMM’N PRICE SUPERVISION & ANTIMONOPOLY BUREAU], JIANGSU SHENG LIANGJIA HUNNING TU QIYE BUFU FAN LONGDUAN CHUFA BAISU (江苏省两家混凝土企业不服反垄断处罚败诉) [TWO CONCRETE COMPANIES IN JIANGSU PROVINCE LOST LAWSUIT AGAINST NDRC] (2013), http://jjs.ndrc.gov.cn/gzdt/201412/t20141208_651321.html (China).

⁶⁸ See Shaaxi Sheng Wujia Ju Xingzheng Chufa Jueding Shu (Shan Jia Fan Longduan Chufa (2016) 27 Hao) (陕西省物价局行政处罚决定书 (陕价反垄断处罚 (2016) 27号)) [Shaaxi Province Price Authority Anti-Monopoly Administrative Penalty Decision (2016) No. 27], http://www.snprice.gov.cn/admin/pub_newsshow.asp?id=1014126&chid=100439.

⁶⁹ See GUOJIA FAZHAN HE GAIGE WEIYUAN HUI (国家发展和改革委员会) [NAT’L DEV. & REFORM COMM’N], SHAANXI SHENG JIDONG CHE JIANCE JIAGE LONGDUAN AN BUFEN SHE’AN DANWEI TIQI XINGZHENG FUYI HE XINGZHENG SUSONG JUN BEI BOHUI (陕西省机动车检测价格垄断案部分涉案单位提起行政复议和行政诉讼均被驳回) [SHAANXI PROVINCE, MOTOR VEHICLE TESTING PRICE MONOPOLY CASES INVOLVED IN ADMINISTRATIVE RECONSIDERATION AND ADMINISTRATIVE LITIGATION WERE DISMISSED] (2016), http://www.sdpc.gov.cn/fzgggz/jgdyfld/fjgld/201612/t20161226_832627.html (China).

⁷⁰ On April 25, 2017, Xi’an Railway Transportation Intermediate Court decided to dismiss the appeal. See Xi’an Honglin Shiye Youxian Gongsu Su Shaanxi Sheng Wujia Ju Fan Jiage Longduan Xieyi De Xingzheng Chufa Yi an Shangsu Xingzheng Panjue Shu (西安宏林实业有限公司诉陕西省物价局反价格垄断协议的行政处罚一案上诉行政判决书) [Appeal Decision of Xi’an Honglin Industry Co. Ltd. v. Shaanxi Province Price Authority, re Issuance of Administrative Penalty for Price-related Monopoly Agreement], (2017) Shan 71 Xing Zhong 231 Hao ((2017) 陕71行终231号) [(2017) Xi’an Railway Transport Intermediate Court (Appeal of Administrative Litigation) Final Judgment No. 231], http://blog.sina.com.cn/s/blog_690414ba0102x1wf.html.

related factors.⁷¹ Judges in a district court in the capital city of Shandong Province, which is at the lowest level among China's four-level court system, heard this case and ruled in favor of SAIC.⁷²

Although neither of these cases in 2016 reversed the decisions made in the lower level authorities, the judges indeed heard the merits and put the authorities on the defendants' stands. This is arguably a step forward, compared to the result of the first judicial review case in 2014.

It is a pity that the first instance trials of the 2016 Judicial Review Cases were litigated in those "lower level" courts rather than before one of the IP Courts in Beijing, Shanghai, or Guangzhou⁷³ or other intermediate courts, despite the fact that private antitrust enforcement cases of first instance are under the jurisdiction of intermediate courts or IP Courts,⁷⁴ which are both at the intermediate court level.⁷⁵ This awkward situation results from the ambiguity left by the SPC on the jurisdiction of antitrust judicial review cases. To date, the SPC has not issued any explicit interpretation regarding which level of the first instance courts should handle the judicial review of the antitrust decisions made by AML regulators. By contrast, first instance private antitrust lawsuits are now clearly under centralized jurisdiction at the intermediate court level: they are heard by either a standalone IP Court (equivalent to

⁷¹ See *Rep. on Admin. Punishment of Shandong*, *supra* note 41.

⁷² *Id.*

⁷³ At the end of 2014, standalone intellectual property courts were set up in Beijing, Shanghai, and Guangzhou respectively. See *infra* notes 74–75.

⁷⁴ Zuigao Renmin Fayuan Guanyu Zhishi Chanquan Fayuan Anjian Guanxia Deng Youguan Wenti De Tongzhi (最高人民法院关于知识产权法院案件管辖等有关问题的通知) [Notice of the Supreme People's Court on Issues Concerning the Jurisdiction of Intellectual Property Courts] (promulgated by the Sup. People's Ct., Dec. 24, 2014, effective Jan. 1, 2015), art. 3, 2014 SUP. PEOPLE'S CT., <http://en.pkulaw.cn/display.aspx?cgid=267781&lib=law> (China) [hereinafter *2015 Notice*] (providing that the first instance monopoly civil cases within the province where an IP Court is located, shall be under the jurisdiction of such standalone IP Court); Provisions of the Supreme People's Court on Several Issues Concerning the Application of Law in the Trial of Civil Dispute Cases Arising from Monopolistic Conduct (promulgated by the Sup. People's Ct., Jan. 30, 2012, effective June 1, 2012), art. 3, 2012 SUP. PEOPLE'S CT., <https://www.competitionpolicyinternational.com/assets/Free/SPCAMLJudicial-Interpretationeng.pdf> (providing that civil monopoly disputes of the first instance shall be heard by intermediate courts in provincial capital cities unless otherwise designated by the Supreme People's Court).

⁷⁵ The jurisdictional and appellate court level of IP Courts indicate that the level of IP Courts is at the intermediate level. See, e.g., Zuigao Renmin Fayuan Guanyu Beijing, Shanghai, Guangzhou Zhishi Chanquan Fayuan Anjian Guanxia De Guiding (最高人民法院关于北京、上海、广州知识产权法院案件管辖的规定) [Provisions of the Supreme People's Court on the Jurisdiction of the Intellectual Property Courts of Beijing, Shanghai and Guangzhou] (promulgated by the Sup. People's Ct., Oct. 27, 2014, effective Nov. 3, 2014), art. 7, 2014 SUP. PEOPLE'S CT., http://www.kangxin.com/en/index.php?optionid=927&auto_id=687 (China) [hereinafter *2014 Notice*] (indicating that the appeal courts of IP Courts are the higher people's courts, which are also the same appeal courts as intermediate courts).

the level of intermediate court) or an IP tribunal within an intermediate court before IP judges.⁷⁶

In July 2016, the SPC issued a notice (“2016 Notice”) to push the Three-in-One reform (i.e., the consolidation of civil, administrative, and criminal IP cases under the jurisdiction of IP tribunals across the country).⁷⁷ In the 2016 Notice, monopoly and “anti-unfair competition,” are explicitly listed as sub-categories under IP civil disputes.⁷⁸ Nonetheless, in its definition of IP administrative disputes, only “anti-unfair competition” is included, while “anti-monopoly” is surprisingly not mentioned.⁷⁹ The 2016 Notice, together with the other two SPC interpretations on jurisdiction of IP Courts,⁸⁰ further implies the hesitation of the SPC on this topic.

This ambiguity is no doubt known to judges in China. In an interview, shortly after the AML became effective, the head of the SPC’s Administrative Law Tribunal said the SPC was expected to issue further interpretations and the first instance antitrust judicial review cases should be heard by intermediate courts or even higher courts.⁸¹ In the 2016 China Competition Policy Forum, Judge Jiao Yan of the Beijing Higher Court openly discussed this issue. Judge Jiao believed that judicial review cases against AML enforcement agencies should be under the jurisdiction of IP Courts, but in the absence of explicit rules, courts will have to apply to the SPC for its further guidance once lawsuits are filed.⁸²

⁷⁶ If the IP Court Notice is read together with the first SPC’s judicial interpretation on monopoly civil disputes (the Provisions on Civil Monopoly Disputes), the principle of centralized jurisdiction is evident.

⁷⁷ See Wan Hui Da, *Opinions of the Supreme People’s Court on Promotion of the “Three in One” for the Trial of Civil, Administrative, and Criminal Cases Involving Intellectual Property rights in Courts Nationwide*, LEXOLOGY (Oct. 31, 2016), <http://www.lexology.com/library/detail.aspx?g=4e9a507c-050a-4482-b74d-efba6d87b33f> (stating that “Three-in-One” means all the three types of cases including civil, administrative, and criminal cases arising from IP disputes shall be integrated under the jurisdiction of IP courts).

⁷⁸ *Zuigao ReNmin Fayuan Guanyu Zai Quanguo Fayuan Tuijin Zhishi Chanquan Minshi, Xingzheng He Xingshi Anjian Shenpan “San He Yi” Gongzuo De Yijian* (最高人民法院关于在全国法院推进知识产权民事、行政和刑事案件审判“三合一”工作的意见) [Opinions of the Supreme People’s Court on Promotion of the “Three in One” for the Trial of Civil, Administrative, and Criminal Cases Involving Intellectual Property rights in Courts Nationwide] (promulgated by the Sup. People’s Ct., July 5, 2016, effective July 5, 2016), art. 2, 2016 SUP. PEOPLE’S CT., <http://en.pkulaw.cn/display.aspx?cgid=275452&lib=law> (China).

⁷⁹ *Id.*

⁸⁰ 2015 Notice, *supra* note 74; 2014 Notice, *supra* note 75.

⁸¹ See *Zuigao Renmin Fayuan Xingzheng Ting Fuze Ren Tan Fan Longduan Fa Shiyong Wenti* (最高人民法院行政庭负责人谈反垄断法适用问题) [Interview with Administrative Tribunal Head of Supreme Court in Application of Anti-Monopoly Law] (Nov. 3, 2008), http://www.china.com.cn/policy/txt/2008-11/03/content_16703966.htm (China).

⁸² It was an annual high-profile competition conference held by the Expert Advisory Committee of the Anti-Monopoly Commission of the State Council in October 2016. See 2016 China Competition Policy Forum, Implementation of Competition Policy in Supply-side Structural Reform (Oct. 27–28, 2016), <http://www.xinhua.com.cn/huiyi/?from=groupmessage&isappinstalled=0>.

D. *Looking Forward*

With increased awareness of private enforcement concepts in China, there is optimism that more milestone cases will appear in the judiciary.⁸³ The economic analysis structure on competitive effects, briefly touched on in the *Panasonic* case, is consistent with EU's 2010 Guidelines on Vertical Restraints⁸⁴ by focusing on sufficiency of competition and market structure as key factors in a vertical agreement case. The approach, which has started from *Rainbow v. Johnson & Johnson*, and was developed in *Gree* and *Panasonic*, keeps up with international practice and is very likely to lead a new judicial trend.⁸⁵

Under the leadership of the SPC, IP judicial reform, including the establishment of IP Courts and Guiding Case Reform,⁸⁶ is moving fast and is setting up a platform for quality judicial review of AML enforcement determinations. The SPC has recently led a nationwide IP guiding cases reform ("Guiding Case Reform").⁸⁷ The SPC set up its IP Guiding Cases Research Center shortly after the formation of the Beijing IP Court.⁸⁸ As of December 3, 2016, the Beijing IP Court has applied effective precedents decided by the SPC and Beijing Higher Court in 148 cases.⁸⁹ In addition to domestic precedents, the Guiding Case Reform was very creative to include foreign cases in the pool of guiding cases. According to the draft of *Guiding Case Working*

⁸³ See Huang & Liu, *supra* note 4; see also Ding, *Judicial Review on RPM*, *supra* note 4.

⁸⁴ *Commission Notice: Guidelines on Vertical Restraints*, at 5, SEC (2010) 411 final (May 10, 2010) ("For most vertical restraints, competition concerns can only arise if there is insufficient competition at one or more levels of trade, i.e. if there is some degree of market power at the level of the supplier or the buyer or at both levels. Vertical restraints are generally less harmful than horizontal restraints and may provide substantial scope for efficiencies.").

⁸⁵ Wang Lei (王磊), *Fan Longduan: Xingzheng Ying Rangwei Sifa* (反垄断: 行政应让位司法) [Antitrust: Administrative Enforcement Should Follow Judicial View], TENGXUN CAIJING (腾讯财经) [TENCENT FINANCE] (Aug. 14, 2014), <http://finance.qq.com/original/caijingguancha/f1240.html> (China).

⁸⁶ See Provisions of the Supreme People's Court Concerning Work on Case Guidance (promulgated by the Adjudication Comm. Nat'l People's Ct., Nov. 15, 2010, effective Nov. 26, 2010), art. 1 2010 ADJUDICATION COMM. NAT'L PEOPLE'S CT., <https://cgc.law.stanford.edu/guiding-cases-rules/20101126-english/>.

⁸⁷ Guiding cases are different from precedents in U.S. courts. According to the explanation by judges and the rules announced by the Supreme Court, China does not recognize case law and the guiding cases are not legally binding as the written statutes. However, the guiding cases occupy a guiding role for the judicial work of courts across the country. The effect is that they have a strong binding force on similar cases. In the event that the guiding cases are not applied in such similar cases, such judgments may be subject to appeal and reversal, or a retrial may occur. See Mark Jia, *Chinese Common Law? Guiding Cases and Judicial Reform*, 129 HARV. L. REV. 2213, 2221 (2016).

⁸⁸ Paul Ranjard & Zhu Zhugang, *China's IP Courts, One Year On*, MANAGING IP (Mar. 16, 2016), <http://www.managingip.com/Article/3538234/Chinas-IP-Courts-one-year-on.html>.

⁸⁹ Presiding Judge Su Chi, Head of Beijing IPR Court, Address at the Conference on Theories & Practices of IPR Guiding Case Regime (Dec. 3, 2016).

Measures of Beijing IP Court, guiding cases have nine levels in order of priority, from SPC's guiding cases at the top, and foreign cases at the bottom ends.⁹⁰ It is worth noting that in judicial review of patent and trademark cases, both plaintiffs and the Beijing IP Court have quoted and applied prior effective judgments of higher courts and intermediate courts directly in the complaints and judgments.⁹¹ To date, judgments quoting foreign cases have not been available to the public, but allegedly the Beijing IP Court has already done that in its judgments. The next step of the Beijing IP Court is to establish the guiding cases regime for all courts nationwide in two years' time.⁹² The Guiding Case Reform is expected to improve consistency in judgements for similar cases and even keep up with the judicial practice abroad.

III. NDRC CASES ON RPM

A. Overview of NDRC's Enforcement Priorities

Before 2016, RPM cases were not a focus in the NDRC's enforcement. By the end of 2015, the NDRC had investigated twenty-nine antitrust cases

⁹⁰ Article 7 provides that the order of priority for guiding cases from high to low shall be: (1) SPC's guiding cases; (2) SPC's annual cases; (3) SPC's other cases; (4) Higher Court's typical cases; (5) Higher Court's reference cases; (6) other cases of Higher Court; (7) cases of Intermediate Court; (8) cases of district courts; and (9) foreign precedents. Jeremy Daum, *Unprecedented: Beijing IP Court's Use of 'Guiding Cases'*, CHINA LAW TRANSLATE (Aug. 31, 2016), <http://www.chinalawtranslate.com/beijing-ip-court-making-new-precedent-on-guiding-cases/?lang=en>. See also Jiang Huiling & Yang Yi (蒋惠岭 & 杨奕), *Beijing Zhishi Chanquan Fayuan: Yi Xianli Panjue Zhidao Panjue Gongzuo Zhidu De Chuangxin Shijian* (北京知识产权法院: 以先例判决指导审判工作制度的创新实践) [*Beijing IP Court: Pioneering Practice in Applying Precedents in Trials*], ZHONGGUO GUOJI MAOYI CUJIN WEIYUAN HUI ZHUANLI SHANGBIAO SHIWU SUO (中国国际贸易促进委员会专利商标事务所) [CCPIT PAT. & TRADEMARK L. OFF.] (Apr. 7, 2017), <http://www.ccpit-patent.com.cn/zh-hans/node/3135> (China).

⁹¹ Sixty-two typical cases were announced at the Beijing IP Court second anniversary press conference. See Beijing Zhishi Chanquan Fayuan Zhaokai Liang Zhounian Xinwen Fabu Hui (北京知识产权法院召开两周年新闻发布会) [Beijing IP Court Second Anniversary Press Conference] (Jan. 18, 2017), <http://mp.weixin.qq.com/s/2-KmhNaT2lazlx-K55J3AQ> (China).

⁹² The information was disclosed in an academic report by researchers of the Supreme Court. See Jiang Huiling & Yang Yi (蒋惠岭 & 杨奕), *Beijing Zhishi Chanquan Fayuan: Yi Xianli Panjue Zhidao Panjue Gongzuo Zhidu De Chuangxin Shijian* (北京知识产权法院: 以先例判决指导审判工作制度的创新实践) [*Beijing IP Court: Pioneering Practice in Applying Precedents in Trials*], ZHONGGUO GUOJI MAOYI CUJIN WEIYUAN HUI ZHUANLI SHANGBIAO SHIWU SUO (中国国际贸易促进委员会专利商标事务所) [CCPIT PAT. & TRADEMARK L. OFF.] (Apr. 7, 2017), <http://www.ccpit-patent.com.cn/zh-hans/node/3135> (China).

and its provincial branches had completed sixty-eight cases in total,⁹³ among which RPM cases account only for approximately eight percent.⁹⁴

The number of RPM cases increased dramatically in 2016. For that year, the NDRC, together with its provincial counterparts, struck down six RPM cases. Five were made by NDRC's Shanghai branch and only the milestone case *Medtronic* was enforced by the NDRC. The details of these six cases are listed in Table 2 below.

Table 2: NDRC RPM Enforcement Cases in 2016

Case Name	Companies Fined	Decision Date	Fines Imposed ⁹⁵	Fines In Revenue Percentage
Medtronic Medical Device Case (“ <i>Medtronic</i> ”) ⁹⁶	Medtronic Shanghai Management Co. Ltd.	December 5, 2016	USD 1.72 million (RMB 11.85 million)	4% of 2015
Hankook Tire Case (“ <i>Hankook</i> ”) ⁹⁷	Shanghai Hankook Tire Sales Co. Ltd.	April 12, 2016	USD 315,246 (RMB 2,175,200)	1% of 2015
Qingdao Haier Shanghai Distributors’ RPM Case (“ <i>Haier</i> ”) ⁹⁸	Shanghai branches of three sales subsidiaries of Qingdao Haier Co., Ltd.	August 8, 2016	USD 1,789,565 (RMB 12,348,000) in total	3% of 2015
SAIC General Motors Case (“ <i>General Motors</i> ”) ⁹⁹	SAIC General Motors Sales Co., Ltd.	December 23, 2016	USD 29,240,008 (RMB 201,756,059.72)	4% of 2015

⁹³ The data was disclosed by NDRC on its official website. See GUOJIA FAZHAN HE GAIGE WEIYUAN HUI (国家发展和改革委员会) [NAT'L DEV. & REFORM COMM'N], “SHI'ER WU” QIJIAN FAN JIAGE LONGDUAN QUDE ZHONGDA JINZHAN (“十二五”期间反价格垄断取得重大进展) [“Twelve Five” During the Anti-Price Monopoly Made Significant Progress], NAT'L DEV. & REFORM COMM'N (2016), http://zys.ndrc.gov.cn/xwfb/201603/t20160304_791933.html (China).

⁹⁴ There were eight NDRC RPM cases until the end of 2015. See *id.*

⁹⁵ The exchange rate of 6.9% was used to convert RMB to USD.

⁹⁶ Guojia Fazhan He Gaige Weiyuan Hui Xingzheng Chufa Jueding Shu No. 8 [2016] (国家发展和改革委员会行政处罚决定书 [2016] 8号) [Nat'l Dev. & Reform Comm'n Admin. Penalty Decision [2016] No. 8] (2016), Guojia Fazhan He Gaige Weiyuan Hui (国家发展和改革委员会) [Nat'l Dev. & Reform Comm'n], http://www.sdpc.gov.cn/zfwz/xzcf/201612/t20161209_829745.html (China).

⁹⁷ Shanghai Shi Wujia Ju Xingzheng Chufa Jueding Shu Di 2520160001 Hao (上海市物价局行政处罚决定书第2520160001号) [Shanghai Price Bureau Admin. Penalty Decision No. 2520160001] (2016), Shanghai Shi Wujia Ju (上海市物价局) [Shanghai Price Bureau], <http://www.shdrc.gov.cn/fzggz/jjgl/jghzcfjds/23432.htm> (China).

⁹⁸ Shanghai Shi Wujia Ju Xingzheng Chufa Jueding Shu Di 2520160009 Hao (上海市物价局行政处罚决定书第2520160009号) [Shanghai Price Bureau Admin. Penalty Decision No. 2520160009] (2016), Shanghai Shi Wujia Ju (上海市物价局) [Shanghai Price Bureau], <http://www.shdrc.gov.cn/fzggz/jjgl/jghzcfjds/24137.htm> (China).

⁹⁹ Shanghai Shi Wujia Ju Xingzheng Chufa Jueding Shu Di 2520160027 Hao (上海市物价局行政处罚决定书第2520160027号) [Shanghai Price Bureau Admin. Penalty Decision No. 2520160027] (2016), Shanghai Shi Wujia Ju (上海市物价局) [Shanghai Price Bureau], <http://www.shdrc.gov.cn/fzggz/jjgl/jghzcfjds/25286.htm> (China).

Case Name	Companies Fined	Decision Date	Fines Imposed ⁹⁵	Fines In Revenue Percentage
Lingxian Logistics Case (“ <i>Lianxian</i> ”) ¹⁰⁰	Shanghai Lingxian Logistics Co., Ltd.	December 27, 2016	USD 286,634 (RMB 1,977,777.49)	1% of 2015
Smith & Nephew Case ¹⁰¹ (“ <i>Smith & Nephew</i> ”)	Smith & Nephew Medical Equipment International Trade (Shanghai) Co., Ltd.	December 29, 2016	USD 107,558 (RMB 742,147.98)	6% of 2014

B. *Limited Impact of Rainbow v. Johnson & Johnson*

Until December 2016, before the *Medtronic* case, it seems that the NDRC and its provincial branches were not affected much, if at all, by *Rainbow v. Johnson & Johnson* and other subsequent court cases.

In an interview, shortly after *Rainbow v. Johnson & Johnson*, DG Xu Kunlin said that from a legislative language perspective, China’s AML applies the same standard to both horizontal and vertical anti-monopoly agreements and therefore the enforcement agencies should follow the AML provisions in its decisions.¹⁰² When discussing the prevailing academic support on the rule of reason principle, DG Xu said that academic research often focuses on restructuring taking the relevant AML provisions as variable factors for debates and thus the majority of scholars choose to support the rule of reason principle, which is more associated with critical thinking, unfortunately, it cannot be applied by enforcement agencies.¹⁰³

Except for the two new cases elaborated on in Section III below, in 2016, no detailed discussion of competitive was identified in the decisions by the NDRC’s Shanghai branch. The penalty decisions in *Hantook*, *Haier*, *Lingxian*, and *GM*, have only two sections to address the existence and performance of RPM respectively. Similar to the prevailing majority of NDRC’s decisions, based on supporting evidence, those four decisions go on directly to draw a conclusion that such RPM excluded and restricted competition in the market and harmed consumer welfare and public interests without any

¹⁰⁰ Shanghai Shi Wujia Ju Xingzheng Chufa Jueding Shu Di 2520160030 Hao (上海市物价局行政处罚决定书第2520160030号) [Shanghai Price Bureau Admin. Penalty Decision No. 2520160030] (2016), Shanghai Shi Wujia Ju (上海市物价局) [Shanghai Price Bureau], <http://www.shdrc.gov.cn/fzgggz/jjgl/jghzcfjds/25364.htm> (China).

¹⁰¹ Shanghai Shi Wujia Ju Xingzheng Chufa Jueding Shu Di 2520160028 Hao (上海市物价局行政处罚决定书(施乐辉医用产品国际贸易(上海)有限公司)第2520160028号) [Shanghai Price Bureau Admin. Penalty Decision No. 2520160028] (2016), Shanghai Shi Fazhan He Gaige Weiyuan Hui (上海市发展和改革委员会) [Shanghai Mun. Dev. & Reform Comm’n], <http://www.shdrc.gov.cn/fzgggz/jjgl/jghzcfjds/25365.htm> (China).

¹⁰² See *Leniency Policies*, *supra* note 17.

¹⁰³ *Id.*

supporting analysis or evidence on procompetitive and anticompetitive effects.¹⁰⁴

Among the four cases, in *Haier*, the distributors of a household appliances giant in China, Qingdao Haier Co., Ltd,¹⁰⁵ was fined approximately USD 1.8 million for RPM. This decision contradicts the judgment of the Guangzhou IP Court in the *Gree* case, which was decided in the same month. The fundamental difference is because the IP Court analyzed the procompetitive and anticompetitive effects of RPM by Gree's distributors, while the NDRC branch only considered the existence and performance of RPM.

The varying results between *Gree* and *Haier* illustrated how inconsistency between judicial practice and administrative enforcement could affect the companies.

C. *New Trend: Competitive Effects Appeared in More Recent NDRC Decisions*

At the end of 2016, the NDRC started to make a shift in its RPM decisions.¹⁰⁶

1. *The Medtronic Case*

The *Medtronic* case attracted much attention.¹⁰⁷ The case at first was reported as the “tip of the iceberg,” among the med-tech and pharmaceutical companies investigated by the NDRC.¹⁰⁸ It sent the signal that pharmaceutical and medical equipment industries will be one of the focal areas of interest for the NDRC in its antitrust enforcement in 2017. More notably though, the NDRC finally started including economic analysis in its decision. For the first time, a separate section on competitive effects was included in the

¹⁰⁴ *Id.*

¹⁰⁵ Qingdao Haier Co., Ltd is a listed company in Shanghai Stock Exchange and principally engaged in the manufacture and distribution of household electrical appliance.

¹⁰⁶ Such a shift can be observed in Nat'l Dev. & Reform Comm'n Admin. Penalty Decision [2016] No. 8 (2016) and in Shanghai Price Bureau Admin. Penalty Decision No. 2520160028 (2016). *See Antitrust in China: 2016 Highlights and an Outlook on 2017*, LEXOLOGY (Feb. 28, 2017), <http://www.lexology.com/library/detail.aspx?g=9798ed78-6f0d-4e88-b3f5-396c582622f1>.

¹⁰⁷ *See 2016 Competition Annual Report*, *supra* note 38; *see also* Diao Cui (刁萃), *Fan Longduan Zhifa: "Toutiao Xinwen" Beihou De Gushi* (反垄断执法——“头条新闻”背后的故事)[*Questions on Details in Medtronic*], JINGJI DAobao (中国经济导报) [CHINA ECON. HERALD] (2016).

¹⁰⁸ Zhongguo Jingji Daobao (中国经济导报), *San Wen "Meidunli AN" Chachu Shimo* (三问“美敦力案”查处始末) [*Interviews Again on Medtronic Cases*], ZHONGGUO JINGJI DAobao (中国经济导报) [CHINA ECON. HERALD] (Dec. 9, 2016), http://www.ceh.com.cn/xwpd/2016/12/1019408_3.shtml (China).

NDRC's RPM decision.¹⁰⁹ In the *Medtronic* decision, the NDRC first wrote its usual discussions on existence and performance of RPM and then added a third section entitled "RPM Entered into and Performed by Firms Excluded and Restricted Market Competition and Harmed Interests of Consumers."¹¹⁰ In this section, the NDRC lists three aspects of anticompetitive effects on (1) price competition within the brand, (2) competition among different brands of medical devices, and (3) welfare of end-users and consumers.¹¹¹

This change shows the NDRC is putting new efforts in conducting the anticompetitive analysis in an RPM case, even though this relatively short 838-word section contains no supporting evidence or economic data.¹¹²

The change may be an indicator of DG Zhang's new attitude on the application of economic analysis in enforcement work. In a recent interview, DG Zhang said that AML enforcement calls for not only legal knowledge but accumulative economic knowledge. Unlike criminal cases, in which sanction is imposed once a behavior matches a crime, AML enforcement penalty should only be imposed based on sufficient economic analysis.¹¹³

2. The *Smith & Nephew* Case

The NDRC's Shanghai branch changed its format of decisions in the *Smith & Nephew* case¹¹⁴ decided after *Medtronic* on December 29, 2016. In its decision, the Shanghai branch included a section of 364 words in two paragraphs to explain anticompetitive effects of RPM.¹¹⁵ The first paragraph included two sentences arguing that RPM, which was imposed on first-tier and second-tier distributors, restricted price competition at the level of second-tier distributors and internet retailers.¹¹⁶ The second paragraph stated that RPM prohibited its distributors and retailers from exercising their own rights

¹⁰⁹ See Guojia Fazhan He Gaige Weiyuan Hui Xingzheng Chufa Jueding Shu No. 8 [2016] (国家发展和改革委员会行政处罚决定书[2016]8号) [Nat'l Dev. & Reform Comm'n Admin. Penalty Decision [2016] No. 8] (2016), Guojia Fazhan He Gaige Weiyuan Hui (国家发展和改革委员会) [Nat'l Dev. & Reform Comm'n], http://www.sdpc.gov.cn/zfwfzx/xzcf/201612/t20161209_829745.html (China).

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ Diao Cui (刁萃), *Fan Longduan Zhifa – "Toutiao Xinwen" Beihou de Gushi* (反垄断执法——“头条新闻”背后的故事) [*Anti-Monopoly Enforcement – The Story Behind "Headline News"*], ZHONGGUO JINGJI DAobao (中国经济导报) [CHINA ECON. HERALD] (Apr. 1, 2017, 12:00 AM), <http://www.ceh.com.cn/jryw/2017/1029325.shtml> (China).

¹¹⁴ See Shanghai Shi Wujia Ju Xingzheng Chufa Jueding Shu Di 2520160028 Hao (上海市物价局行政处罚决定书(施乐辉医用产品国际贸易(上海)有限公司)第2520160028号) [Shanghai Price Bureau Admin. Penalty Decision No. 2520160028] (2016), Shanghai Shi Fazhan He Gaige Weiyuan Hui (上海市发展和改革委员会) [Shanghai Mun. Dev. & Reform Comm'n], <http://www.shdrc.gov.cn/fzggg/z/jgggl/jghzcfjds/25365.htm> (China).

¹¹⁵ *Id.*

¹¹⁶ *Id.*

to decide prices.¹¹⁷ It continued by stating that RPM deprived consumers of opportunities to purchase at a lower price if there had been price competition.¹¹⁸ The analysis certainly remains brief, but it displays that the officials now have to address the competitive analysis. In the future, if the parties that are investigated aggressively push for economic analysis on pro-competitive benefits, the NDRC regulators may have to respond in much more detail. All responses and reasoning will also be subject to judicial review, giving the companies another opportunity to challenge regulators' decisions.

D. *Exemptions under Article 15 of AML*

Article 15 of the AML provides various exemptions for vertical constraints, but based on the publicly available information, no exemption cases have been reported. Article 15 is too broad to become an effective defense. In absence of explicit procedures and successful precedents, companies are concerned that asking for an exemption may be taken as an admission of wrongdoing, or a factor leading to heavier fines by NDRC.¹¹⁹

It is hard to tell whether and how Article 15 has been explored by companies. For example, the NDRC in its announcement of infant formula cases in August 2013, briefly mentioned that during the investigation, all the companies involved admitted their RPM behaviors and failed to prove exemptions under Article 15 of the AML are applicable to their acts.¹²⁰ It is hard to verify from this simple sentence whether any company had asked for exemptions or whether any supporting evidence had been rejected or accepted by the NDRC.¹²¹

The *Medtronic* case shows progress in transparency regarding applications for an exemption. For the first time in an NDRC decision, it stated that Medtronic had not applied or provided supporting evidence for exemptions under Article 15 of the AML.¹²²

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ See, e.g., Liu Xu (刘旭), *San Da Fan Longduan Zhifa Jigou Zai Zhifa Zhong Zuo Cuole Shenme (Shang)* (三大反垄断执法机构在执法中做错了什么(上)) [*What Three Enforcement Agencies Have Done Wrong*], CAIXIN (财新) [CAIXIN] (Aug. 6, 2014, 9:25 AM), <http://opinion.caixin.com/2014-08-06/100713435.html> (China).

¹²⁰ Guojia Fanzhan He Gaige Weiyuan Hui Zhengce Yanjiu Shi (国家发展和改革委员会政策研究室), *Heshengyuan Deng Rufen Shengchan Qiye Weifan Fan Longduan Fa Xianzhi Jingzheng Xingwei Gong Bei Chufa 6.6873 Yi Yuan* (合生元等乳粉生产企业违反《反垄断法》限制竞争行为共被处罚6.6873亿元) [*H&H Int'l Hldg and Other Milk Powder Manufacturers Were Fined 668.73 million RMB for Restrictive Competition Conduct – in Violation of Anti-Monopoly Law*], GUOJIA FAZHAN HE GAIGE WEIYUAN HUI (国家发展和改革委员会) [NAT'L DEV. & REFORM COMM'N] (Aug. 7, 2013), http://zys.ndrc.gov.cn/xwfb/201308/t20130807_552990.html (China).

¹²¹ *Id.*

¹²² See Guojia Fanzhan He Gaige Weiyuan Hui Xingzheng Chufa Jueding Shu No. 8 [2016] (国家发展和改革委员会行政处罚决定书[2016]8号) [Nat'l Dev. & Reform Comm'n Admin. Penalty Decision

Notably, the increased transparency is expected when it comes to exemptions. NDRC posted a final draft for public consultation of the *Guidelines on General Conditions and Procedures for Exemption of Monopoly Agreements (Consultation Draft)* (“Exemption Guidelines”) in May 2016.¹²³ Article 13 of the Exemption Guidelines explicitly imposes a disclosure obligation on enforcement agencies to post their exemption decisions within twenty working days of the decision.¹²⁴ The publication of exemption decisions may offer a clearer guidance on how the exemptions are explored. According to DDG Li Qing,¹²⁵ at the China Competition Policy & Law Forum on January 12, 2017 in Beijing, the Exemption Guidelines, together with the other four non-IP related guidelines are going through the approval procedure within the government. It is expected that the transparency clause will be retained in the guidelines, and the implementation will eventually reveal much more of what the NDRC and other regulators will do with exemptions and other critical aspects of the AML.

E. *Why the NDRC Behaves This Way*

Recent moves made by the NDRC send some positive signals towards economic analysis and greater transparency in the NDRC’s enforcement. It is yet to be seen how it will generally investigate other RPM cases, and how it will apply Article 15 in 2017. When Exemption Guidelines come into effect, the NDRC may have more chances to go into deeper economic analysis.¹²⁶ According to a former NDRC official, in the majority of NDRC cases, the companies that were investigated did not use Article 15 to apply for exemptions, and the NDRC had no chance to apply the rule of reason in its analysis.¹²⁷

In the meantime, NDRC’s AML enforcement bureau, as well as its delegated local counterparts, is struggling between the roles of modern competition law authority and traditional price supervision agency, which originated from a planned economy.¹²⁸ The reason why the NDRC is perceived as

[2016] No. 8] (2016), Guojia Fazhan He Gaige Weiyuan Hui (国家发展和改革委员会) [Nat’l Dev. & Reform Comm’n], http://www.sdpc.gov.cn/zwf/wzx/xzcf/201612/t20161209_829745.html (China).

¹²³ Guanyu Longduan Xieyi Huomian Yiban Xing Tiaojian He Chengxu de Zhinan (Zhengqiu Yijian Gao) Gongkai Zhengqui Yijian (关于垄断协议豁免一般性条件和程序的指南 (征求意见稿) 公开征求意见) [Guidelines on General Conditions and Procedures for Exemption of Monopoly Agreements (Consultation Draft)] (proposed by Nat’l Dev. & Reform Comm’n, May 12, 2016), NAT’L DEV. & REFORM COMM’N, http://jjs.ndrc.gov.cn/fjgld/201605/t20160512_801559.html (China).

¹²⁴ *Id.* at art. 13.

¹²⁵ The Deputy Director General of the NDRC Price Supervision and Anti-Monopoly Bureau.

¹²⁶ See WAN, *supra* note 13, at 91.

¹²⁷ *Id.*

¹²⁸ See U.S. CHAMBER OF COMMERCE, COMPETING INTERESTS IN CHINA’S COMPETITION LAW ENFORCEMENT: CHINA’S ANTI-MONOPOLY LAW APPLICATION AND THE ROLE OF INDUSTRIAL POLICY

the more “hawkish” one among all three enforcement agencies¹²⁹ is likely due to its link to its traditional role in price supervision. The NDRC has been the central economic planning authority since 1952,¹³⁰ and the prevailing officials’ thought is still price-focused, which leads to price reduction being as one of its top priorities.

According to published papers of the NDRC’s key officials, they believe China’s distribution channels are not efficient and in different market conditions than the United States and EU.¹³¹ For example, data shows a high distribution cost accounting for 25–30% of the retail prices in China, while the cost amounts to only 5–15% in the United States and EU.¹³²

NDRC indicates that reducing retail prices is one of its great achievements and will increase consumer welfare in RPM cases.¹³³ An NDRC work report quotes NDRC’s RPM cases in the infant formula industry in 2013: the price reduction commitments carried on by infant formula companies gave up margins and thus increased consumer welfare in the amount of approximately RMB 2.4 billion.¹³⁴

Nonetheless, economic and empirical research show lower prices do not necessarily increase consumer welfare and most vertical restraints and RPM have prevailing procompetitive effects.¹³⁵

13, 53–54 (2014), <https://www.uschamber.com/report/competing-interests-chinas-competition-law-enforcement-chinas-anti-monopoly-law-application>.

¹²⁹ See Qianwen Lu, *China’s Three Antitrust Agencies Apply Markedly Different Enforcement Styles*, 2017 ABA Antitrust Annual Spring Meeting Coverage 63 (2017), <https://app.parr-global.com/intelligence/view/1519130>.

¹³⁰ The NDRC originated from the State Planning Commission, established in 1952 as a macro-economic management authority and called China’s “Mini State Council.” See Peter Martin, *The Humbling of the NDRC: China’s National Development and Reform Commission Searches for a New Role Amid Restructuring*, 14 CHINA BRIEF, no. 5, Mar. 7, 2014, at 14, <https://jamestown.org/program/the-humbling-of-the-ndrc-chinas-national-development-and-reform-commission-searches-for-a-new-role-amid-restructuring/>; see also Meiti Cheng Fagaiwei Yue Gai Quan Yue Da Fu Sheng Chang Bu Gan Bo Chu Zhang (媒体称发改委越改权越大 副省长不敢驳处长) [Media Says NDRC is Gaining More Power], XINWEN ZHONGXIN – TENGXUN WANG (新闻中心_腾讯网) (May 30, 2013, 11:11 AM), <http://news.qq.com/a/20130530/012423.htm> (China).

¹³¹ See WU, *supra* note 12.

¹³² Gao Mou & Xu Xinyu (高牟 & 徐新宇), *Meiguo Zai Zhuanshou Jiage Weichi Shang De Dute Xing He Leegin An Queli De Fenxi Kuangjia (Shang)* (美国在转售价格维持上的独特性和Leegin案确立的分析框架(上)) [*Uniqueness of US Approach in RPM and Analytical Structure Established in Leegin (Part I)*], 11 ZHONGGUO JIAGE JIANDU JIANCHA (中国价格监督检查) 30, 33 [CHINA PRICE SUPERVISION & CHECK] (2013), <http://60.191.152.123:85/article/detail.aspx?id=47717413> (China).

¹³³ Press Release, NDRC, Shi’erwu Qijian Fan Jiage Longduan Qude Zhongda Jinzhan (十二五”期间反价格垄断取得重大进展) [Major Achievement of Price-Related Anti-Monopoly During the Twelfth Five-Year Plan] (Mar. 4, 2016), http://www.sdpc.gov.cn/gzdt/201603/t20160304_791948.html (China).

¹³⁴ *Id.*

¹³⁵ See Klein, *supra* note 32, at 462; see also TANG YAOJIA (唐要家), ZHUANSHOU JIAGE WEICHI DE JINGJI XIAOYING YU FAN LONGDUAN ZHENGCE (转售价格维持的经济效应与反垄断政策) [THE ECONOMIC EFFECTS AND ANTIMONOPOLY POLICY OF RESALE PRICE MAINTENANCE] 2013.

According to economic research,¹³⁶ RPM is often offered by manufacturers as a strong incentive to induce its distribution channels for greater promotion and service. It is also used as compensation for the opportunity cost of its distribution channels (such as cost for storage space, inventory, shelf space, sales staff) to sell this manufacturer's products rather than other manufacturers' products.¹³⁷ Ideally, such compensation is expected to equal or exceed the profits that an alternative manufacturer may offer. Uncontrolled discounts by some distributors may result in an unexpected low margin and make the other distributors reduce their promotion of this manufacturer's products or even make them cut off the manufacturer's products altogether.¹³⁸ Consequently, it would harm inter-brand competition and eventually consumer welfare.¹³⁹

The household appliances industry is a good example. BSH Home Appliances (China) Co., Ltd ("BSH"), that entered China's market as early as 1997, and holds the high-end international brand—"Siemens"—is facing a paradox between drawing sufficient incentives to its distribution channels and RPM compliance.¹⁴⁰ According to distributors of Siemens brand household appliances, an increasing number of distributors complain and drop Siemens due to the chaos in price discounts.¹⁴¹ In order to manage its compliance risks on RPM, BSH does not have resale price control policy in its distribution channel, which leads to random price competition among different levels of distribution.¹⁴² It is reported that dozens of varying prices could be offered for the same type of Siemens refrigerators or washing machines throughout the country.¹⁴³ For a consumer who chooses this high-end brand, he is likely to care more about quality than lower prices.¹⁴⁴ As reasoned in *Gree*, even though intra-brand price competition is restricted, competition on quality may be enhanced and eventually benefit consumers.

Unlike the EU, China's AML and anti-monopoly policies do not set up explicit and consistent block exemptions or case-by-case exemption guidelines for vertical monopoly agreements. Against the background where RPM is still a common practice across different industries in China, prohibition of RPM in general without economic analysis of competitive effects is a dangerous approach.¹⁴⁵ Narrowing its value on price control will limit the

¹³⁶ See Klein, *supra* note 32, at 436–37.

¹³⁷ *Id.* at 436.

¹³⁸ *Id.*

¹³⁹ *Id.* at 443–44, 462.

¹⁴⁰ Chen Wei (陈维), *Hou Ximenzi Shidai De Boxi Kunju* (后西门子时代的博西困局) [*Predicament for BSH Hausgeräte GmbH in the post-Siemens Era*], BEIJING SHANGHAO WANG (北京商报网) [BEIJING BUS. TODAY] (Nov. 24, 2016), <http://www.bbtnews.com.cn/2016/1124/170620.shtml> (China).

¹⁴¹ *Id.*

¹⁴² *Id.*

¹⁴³ *Id.*

¹⁴⁴ *Id.*; see also Tang, *supra* note 32, at 43.

¹⁴⁵ See Ding, *Judicial Review on RPM*, *supra* note 4; see also Huang, *supra* note 10.

NDRC's vision in contrast to leading international antitrust practices. For example, another competition enforcement agency, the European Commission's ("Commission"), values and principles in enforcement policy are much broader, including "safeguard[ing] impartiality, enforce[ing] the rule of law" as well as respecting "the values of fairness, political independence, transparency and due process."¹⁴⁶

To date, the NDRC has only struck down a few companies in fourteen RPM cases¹⁴⁷ involving limited industries including auto, infant formula, white liquor, eyewear, logistics, medical device, and household appliances. It is obvious that most RPM behaviors across industries have not been investigated. It naturally leads to the conclusion that NDRC's RPM enforcement is selective.¹⁴⁸ For example, within the household appliances industry, RPM is a prevalent practice.¹⁴⁹ There are many other brands within Shanghai, and distributors of the Haier brand outside of Shanghai, that have not been investigated by NDRC or its local delegates. It might be one of the reasons why NDRC is perceived as having bias against foreign invested enterprises, although the statistics show the majority of NDRC's cases target domestic companies instead of foreign invested companies.¹⁵⁰

The new Director General has brought a new point of view in *Medtronic*. It is unclear in which direction he will lead the NDRC in RPM enforcement in 2017. Given the *Medtronic* case and intensive economic training within the NDRC in 2016,¹⁵¹ it is reasonable to expect more economic analysis before striking down an industry practice.

However, one cannot be too optimistic given the final draft of the *Anti-Monopoly Guidelines for Auto Industry* ("Auto Guidelines"), which is led by the NDRC.¹⁵² The draft seems to be drifting again between the *per se* rule and the rule of reason. First, it acknowledges that the effect of an alleged monop-

¹⁴⁶ See European Commission, *Report on Competition Policy 2015*, at 2, COM (2016) 393 final (June 15, 2016), http://ec.europa.eu/competition/publications/annual_report/2015/part1_en.pdf.

¹⁴⁷ By the end of 2016, there were thirteen RPM cases in total.

¹⁴⁸ See, e.g., Huang, *supra* note 10.

¹⁴⁹ See Bo Dongmei (薄冬梅), *Jiadian Hangye Xian Shou Bi Longuan Fakuan Hai'er Bei Fa Yin Shengyi* (家电行业现首笔垄断罚款 海尔被罚引争议) [*First Antitrust Penalty in Home Appliances and Haier's Penalty is Criticized*], SOHU (搜狐) [SOHU] (Aug. 16, 2016, 7:11 PM), http://www.sohu.com/a/110776759_393779 (China).

¹⁵⁰ By the end of 2015, domestic companies are 87.4 percent and foreign invested companies are 12.6 percent. See LIN WEN (林文), *ZHONGGUO FAN LONGDUAN XINGZHENG ZHIFA BAOGAO (2008–2015)* (中国反垄断行政执法报告 (2008–2015)) [REPORT ON THE ADMINISTRATIVE ENFORCEMENT OF ANTI-MONOPOLY LAW IN CHINA (2008–2015)] 139 (2016).

¹⁵¹ In 2016, PSAMB had two months of economic and legal training by outside experts, which is said to have become routine training. See Diao, *supra* note 113.

¹⁵² Guanyu Qiche Ye de Fan Longduan Zhinan (Zhengqiu Yijian Gao) Gongkai Zhengqiu Yijian (《关于汽车业的反垄断指南》(征求意见稿)公开征求意见) [*Anti-Monopoly Guidelines for the Automotive Industry (Consultation Draft)*] (proposed by Nat'l Dev. & Reform Comm'n, Mar. 23, 2016), http://www.ndrc.gov.cn/gzdt/201603/t20160323_795743.html (China).

oly behavior is the focus of AML and the key assessment of an alleged monopoly act shall be anticompetitive effects.¹⁵³ The Auto Guidelines also briefly discusses both procompetitive and anticompetitive effects of vertical restraints.¹⁵⁴ Nonetheless, the draft still adopts the old “prohibition + exemptions” approach for vertical restraints:

(1) RPM is deemed *per se* illegal regardless of market share and could apply for exemptions on a case by case basis with supporting evidence on the four grounds listed in the draft; and

(2) Other non-price vertical restraints such as restricting territory and customers, will be automatically exempted without application if (1) the manufacture’s market share is below 25%–30% and (2) the behavior does not fall within the four prohibited hardcore non-price monopoly behaviors including restricting passive sale as set forth in the Guidelines, but the hardcore behaviors are still deemed *per se* illegal regardless of market shares.¹⁵⁵

Arguably, progress in this draft includes that it (1) points out four specific exemptions grounds for auto industry, which is more specific than the broad provisions of Article 15 of the AML, (2) takes into consideration of market power for non-hardcore vertical restraints, and (3) it differentiates RPM from other non-price vertical restraints.

The Auto Guidelines have been in the final approval process and is expected to be issued soon.¹⁵⁶ Although these are industry specific guidelines, the approach applied in RPM and other non-price related vertical restraints in this industry is likely to have influence on other industries because it indicates how the enforcement agencies tend to consider similar behavior. It is possible the enforcement agencies are using the Auto Guidelines as a trial case to test the effects of the new approach. It is interesting to observe the potential influence on administrative enforcement generally, and the practice of other industries.

¹⁵³ *Id.* at art. 2(A)(1).

¹⁵⁴ *Id.*

¹⁵⁵ *Id.* at art. 2(C).

¹⁵⁶ See Wang Erde (王尔德), *Tuidong Xiuding “Fan Longduan Fa” Qiche Deng Liu Xiang Fan Longduan Zhinan Jiang Jinkuai Chutai* (推动修订《反垄断法》汽车等六项反垄断指南将尽快出台) [Six Guidelines including Auto Guidelines to be Finalized], 21 JINGJI WANG (21经济网) [21 ECON. NETWORK] (Jan. 13, 2017), http://epaper.21jingji.com/html/2017-01/13/content_54598.htm (China).

IV. SAIC

A. Overview

As one of the three AML enforcement agencies under the State Council, SAIC is responsible for non-price related monopoly behavior and perceived as the most “friendly” agency.¹⁵⁷

On the vertical monopoly agreement side, SAIC has not yet taken an action. By the end of February 2017, among fifty-five cases closed and announced by SAIC, there had been no enforcement case on vertical monopoly agreements. The majority of SAIC cases focus on abuse of dominant power. For instance, from January 2016 until February 2017, thirteen abuse of dominant power cases accounted for sixty-two percent of the twenty-one total SAIC cases.¹⁵⁸

There might be three potential reasons to explain absence of non-price related vertical restraints cases.

First of all, types of non-price vertical restraints are not explicitly listed in the AML. In addition to RPM under Articles 14(1)–(2), Article 14(3) only prohibits, “other monopoly agreements confirmed as such by the authority for enforcement of the Anti-monopoly Law under the State Council.”¹⁵⁹ According to this provision, even the courts cannot decide on non-RPM vertical restraints in judicial cases. Therefore, it may be hard for SAIC to identify a non-price vertical restrictive behavior based on Article 14.

Secondly, non-price vertical restraints are often interwoven with RPM, but RPM, as price related cases, shall be led by the NDRC.¹⁶⁰ Currently, in the NDRC’s RPM cases, non-price restraints are often treated as supplementary elements to reinforce anticompetitive effects. In *Medtronic*, the NDRC

¹⁵⁷ See Lu, *supra* note 129.

¹⁵⁸ The data is calculated based on the SAIC’s official announcement. See GUOJIA GONGSHANG XINGZHENG GUANLI ZONGJU FAN LONGDUAN YU FAN BU ZHENGDANG JINGZHENG ZHIFA JU (国家工商行政管理总局反垄断与不正当竞争执法局) [SAIC ANTI-MONOPOLY & ANTI-UNFAIR COMPETITION ENF’T BUREAU], JINGZHENG ZHIFA GONGGAO (竞争执法公告) [COMPETITION ENFORCEMENT ANNOUNCEMENTS], GUOJIA GONGSHANG XINGZHENG GUANLI ZONGJU (国家工商行政管理总局) [SAIC] (2017), <http://www.saic.gov.cn/fldyfbzdzjz/jzzfgg/> (China) (hereinafter *SAIC Enf’t Announcements*).

¹⁵⁹ AML, *supra* note 5, art. 14.

¹⁶⁰ See GUOJIA FAZHAN HE GAIGE WEIYUAN HUI JIAGE JIANDU JIANCHA YU FAN LONGDUAN JU (国家发展和改革委员会价格监督检查与反垄断局) [NAT’L DEV. & REFORM COMM’N PRICE SUPERVISION & ANTIMONOPOLY BUREAU], JIGOU SHEZHI (机构设置) [AGENCY STRUCTURE], Guojia Fazhan He Gaige Weiyuan Hui (国家发展和改革委员会) [NAT’L DEV. & REFORM COMM’N], <http://jjs.ndrc.gov.cn/jgsz/> (China) (last visited July 6, 2017).

decided that non-price vertical restraints on its distributors including territorial restrictions, exclusion of sale of competing brands, together with RPM behaviors, aggravated the anticompetitive effects of RPM.¹⁶¹

Finally, ninety-five percent of SAIC's fifty-five cases, out of were investigated by SAIC-delegated provincial bureaus.¹⁶² The officials at the provincial level may be reluctant to establish non-price vertical restraints cases on their own.¹⁶³

B. *Review: What SAIC Would Do in The Future?*

SAIC is expected to take more enforcement actions in the future, in part to compete with the NDRC. SAIC seems to have gained much confidence after issuing its milestone *Tetrapak*¹⁶⁴ decision in 2016.

Tetrapak is helpful in predicting SAIC's future approach and potential actions. It is a dominant power case and the first penalty decision imposed on foreign-invested companies by SAIC. It is also the first case in which an enforcement agency ever applied AML's catch-all provision, i.e., "other acts," for abuse of dominant power under Article 17.1(7) of the AML.¹⁶⁵

It will be unsurprising if SAIC applies the catch-all provision—Article 14(3)—in non-price vertical restraints as it did in *Tetrapak*, alongside with its application of the Auto Guidelines on non-price vertical restraints.

Furthermore, in theory, abuse of dominant power is a different type of monopoly act independent from a vertical monopoly agreement.¹⁶⁶ However, in practice, such acts are often in the form of vertical agreements between upstream or downstream transaction counterparts (such as contracts with suppliers or distributors). In this sense, abuse of dominant power and vertical restraints are often interwoven with each other in vertical business arrangements. A clear line between the two could be whether there is a dominant power involved under certain market structures.

¹⁶¹ See Guojia Fazhan He Gaige Weiyuanhui Zingzheng Chufa Jueding Shu [2016] 8 Hao (国家发展和改革委员会行政处罚决定书 [2016] 8号) [Nat'l Dev. & Reform Comm'n on Admin. Punishment [2016] No. 8], (2016), Guojia Fazhan He Gaige Weiyuan Hui (国家发展和改革委员会) [Nat'l Dev. & Reform Comm'n], http://www.sdpc.gov.cn/zfwz/xzcf/201612/t20161209_829745.html (China).

¹⁶² Only three investigations were made by SAIC directly.

¹⁶³ See 2016 PCCPL Report, *supra* note 53, at 289.

¹⁶⁴ Guojia Gongshang Zongju Xingzheng Chufa Jueding Shu (Gongshang Jing An Zi [2016] 1 Hao) (国家工商行政管理总局行政处罚决定书 (工商竞争案字 [2016] 1号)) [SAIC Competition An Zi [2016] No.1 Penalty Decision], <http://www.saic.gov.cn/fldyfbzdzjz/jzzfgg/201703/P020170309853689741679.pdf> (China).

¹⁶⁵ See 2016 PCCPL Report, *supra* note 53, at 288.

¹⁶⁶ Abuse of dominance requires dominant market power. See *Commission Notice: Guidelines on Vertical Restraints*, at 5, para. 97, SEC (2010) 411 final (May 10, 2010) ("The degree of market power normally required for a finding of an infringement under Article 101(1) is less than the degree of market power required for a finding of dominance under Article 102.").

Tetrapak is a typical illustration of such a phenomenon. It touches two aspects of vertical restraints: loyalty discounts and exclusive dealing.¹⁶⁷ A question should be asked: will Article 14 be applied if *Tetrapak* does not have dominant power?

Based on the analysis of SAIC in *Tetrapak*, SAIC tends to assess anti-competitive effects before rushing to a conclusion.¹⁶⁸ For example, on royalty discounts, SAIC included over 6,000 words of economic analysis.¹⁶⁹ It acknowledged that discounts in general benefit competition and consumers: a dominant power would only be condemned when it uses discount policies under certain market circumstances, resulting in “obvious” anticompetitive effects.¹⁷⁰

Suppose there is an agreement that the rule of reason approach was applied in *Tetrapak*. Logically, it could be inferred that in a vertical restraints case without the elements of dominant power, the rule of reason should be applied as well, because it has been internationally recognized that vertical restraints without dominant market power generally have less anticompetitive effects than abuse of dominant power. In absence of actual cases related to non-price vertical restraints, what happened in *Tetrapak* may demonstrate how SAIC might consider royalty discount policies in a vertical monopoly agreement.

It is also worth mentioning that the NDRC and SAIC may also coordinate and share information to strike down monopoly behaviors, despite the fact that they have been competing with each other since the drafting process of the AML.¹⁷¹ This practice could be observed from the cases involving a pharmaceutical sales company in Chongqing. On October 28, 2015, SAIC’s Chongqing branch imposed an abuse of dominant power (refusal to deal) penalty decision¹⁷² on Chongqing Qingyang Pharmaceutical Co., Ltd., (“Qingyang”). Three months later, the NDRC imposed a penalty on Qingyang and other four pharmaceutical sales companies for horizontal price fixing and allocation of the market.¹⁷³ According to NDRC and SAIC officials

¹⁶⁷ See SAIC *Enft* Announcements, *supra* note 158.

¹⁶⁸ *Id.*

¹⁶⁹ *Id.*

¹⁷⁰ *Id.*

¹⁷¹ In 2004, when AML was still in the drafting process, there was speculation on whether MOFCOM would become the sole AML agency. *Anti-monopoly Office Established*, CHINA DAILY (Sept. 17, 2004), <http://www.china.org.cn/english/BAT/107324.htm>.

¹⁷² Chongqing Shi Gongshang Xingzheng Guanli Ju Xingzheng Chufa Jueding Shu (Yu Gongshang Jing Chu Zi [2015] 15 Hao) (重庆市工商行政管理局行政处罚决定书(渝工商经处字(2015)15号)) [Chongqing City Administration of Industry & Commerce Penalty Decision (Yu AIC Jing Chu Zi [2015] No. 15)], http://www.saic.gov.cn/fldyfbzdjz/jzzfzg/201703/t20170309_232277.html (China).

¹⁷³ See Guojia Fazhan He Gaige Weiyuan Hui Xingzheng Chufa Jueding Shu No. 1 [2015] (国家发展和改革委员会行政处罚决定书 [2016] 1号) [National Development & Development Commission Administrative Penalty Decision [2016] No. 1 (against Chongqing Qingyang Pharmaceutical Co. & Chongqing Qingyang Pharmaceutical Co.)] (2016), Guojia Fazhan He Gaige Weiyuan Hui (国家发展和

speaking at conferences, where there might be duplicating efforts, they may consult with each other from time to time.¹⁷⁴

The medical device industry may become one important enforcement focus of SAIC in 2017. According to recent PaRR news, SAIC held a research seminar on the medical device industry with Renmin University of China.¹⁷⁵ In the meantime, SAIC, together with its Jiangsu branch, has recently carried on an onsite antitrust survey regarding local healthcare companies.¹⁷⁶ The antitrust survey signals SAIC's priorities in AML enforcement in the coming years. Following the *Medtronic* case by the NDRC on medical devices, SAIC is expected to have a much greater interest in taking on enforcement actions in this area.

Once the Auto Guidelines come into effect, SAIC may also use them to strike down non-price vertical restraints in the auto industry, such as restraints on passive sale. Probably as a hint for its future priorities, at the 14th EU–China Competition Week held at the end of March 2017, non-price vertical monopoly agreements were signaled as another enforcement focus of SAIC in the coming years. In this event, one of the focused topics was on “Analysis Framework for Non-Price Vertical Monopoly Agreement.”¹⁷⁷

In summary, SAIC is expected to quickly catch up with the NDRC in its enforcement on vertical restraints, but its approach may show more deference towards the rule of reason approach.

V. MOFCOM'S APPROACH ON VERTICAL MERGERS

As the only merger review AML enforcement agency, MOFCOM had reviewed 1,719 merger cases, approved twenty-eight applications with conditions, and blocked two cases by the end of 2016.¹⁷⁸ Among conditionally approved and blocked mergers, seven are related to vertical mergers, accounting for twenty-three percent of the thirty total mergers.¹⁷⁹

改革委员会) [Nat'l Dev. & Reform Comm'n], http://www.sdpc.gov.cn/zfwfzx/xzcf/201602/t20160202_774520.html (China).

¹⁷⁴ For example, in the Q&A session of 2016 Competition Policy Forum, NDRC and SAIC officials acknowledged it. See *2016 Competition Annual Report*, *supra* note 38.

¹⁷⁵ See Qianwen Lu & Shangjing Li, *SAIC Conducts Antitrust Site Surveys in Jiangsu Healthcare Industry - Sources* (Mar. 28, 2017, 11:34 CST), https://app.parr-global.com/intelligence/view/1518236?src_alert_id=184044.

¹⁷⁶ *Id.*

¹⁷⁷ The meeting was announced on SAIC's website and the details are reported by Chinese media. See GUOJIA GONGSHANG XINGZHENG GUANLI ZONGJU (国家工商行政管理总局) [SAIC], <http://www.saic.gov.cn/> (China) (last visited Nov. 18, 2017).

¹⁷⁸ The updated data was announced by Mr. Wu Zhenguang, Director General of the Antimonopoly Bureau of Ministry of Commerce of the People's Republic of China, Address at the American Bar Association's Antitrust 2017 Spring Meeting (Mar. 2017).

¹⁷⁹ See cases cited *infra* Table 3.

Table 3: Conditionally Approved Vertical Mergers By MOFCOM

No.	Industry Involved	Case Name	Notes
1.	Chemical	Mitsubishi Rayon's Acquisition of Lucite International (2009) ¹⁸⁰	Vertical + Horizontal
2.		Joint Venture by Henkel Hong Kong Holding Limited and Tiande Chemical Holdings Limited (2012) ¹⁸¹	Vertical
3.	Auto Vehicle	General Motors Corporation's Acquisition of Delphi Corporation (2009) ¹⁸²	Vertical
4.	Telecommunication	Google Inc.'s Acquisition of Motorola Mobility Holdings Inc. (2012) ¹⁸³	Vertical
5.	Software & IT Service	Joint Venture by ARM Holdings PLC, Giesecke & Devrient GmbH and Gemalto NV (2012) ¹⁸⁴	Vertical
6.	Automotive Battery	Joint Venture by Hunan Corun New Energy, Toyota Motor China Investment, Primearth EV Energy, Changshu Sinogy Venture Capital, and Toyota Tsusho (2014) (" <i>Toyota Joint Venture</i> ") ¹⁸⁵	Vertical + Horizontal
7.	Smart Device	Microsoft's Acquisition of Nokia's Devices and Services Business (2014) ¹⁸⁶	Vertical

¹⁸⁰ SHANGWU BU (商务部) [CHINA MINISTRY OF COM.], SHANGWU BU GONGGAO 2009 NIAN DI 28 HAO (商务部公告2009年第28号) [CHINA MINISTRY OF COM. ANNOUNCEMENT NO. 28 OF 2009] (2015), <http://www.mofcom.gov.cn/article/b/g/200906/20090606299847.shtml> (China).

¹⁸¹ SHANGWU BU (商务部) [CHINA MINISTRY OF COM.], SHANGWU BU GONGGAO 2012 NIAN DI 6 HAO (商务部公告2012年第6号) [CHINA MINISTRY OF COM. ANNOUNCEMENT NO. 6 OF 2012] (2012), <http://www.mofcom.gov.cn/aarticle/b/c/201202/20120207960518.html> (China).

¹⁸² SHANGWU BU (商务部) [CHINA MINISTRY OF COM.], SHANGWU BU GONGGAO 2009 NIAN DI 76 HAO (商务部公告2009年第76号) [CHINA MINISTRY OF COM. ANNOUNCEMENT NO. 76 OF 2009] (2009), <http://www.mofcom.gov.cn/article/b/c/200909/20090906540220.shtml> (China).

¹⁸³ SHANGWU BU (商务部) [CHINA MINISTRY OF COM.], SHANGWU BU GONGGAO 2012 NIAN DI 25 HAO (商务部公告2012年第25号) [CHINA MINISTRY OF COM. ANNOUNCEMENT NO. 25 OF 2012] (2012), <http://www.mofcom.gov.cn/article/b/c/201205/20120508134325.shtml> (China).

¹⁸⁴ SHANGWU BU (商务部) [CHINA MINISTRY OF COM.], SHANGWU BU GONGGAO 2012 NIAN DI 87 HAO (商务部公告2012年第87号) [CHINA MINISTRY OF COM. ANNOUNCEMENT NO. 87 OF 2012] (2012), <http://www.mofcom.gov.cn/article/b/fwzl/201212/20121208469908.shtml> (China).

¹⁸⁵ SHANGWU BU (商务部) [CHINA MINISTRY OF COM.], SHANGWU BU GONGGAO 2014 NIAN DI 49 HAO (商务部公告2014年第49号) [CHINA MINISTRY OF COM. ANNOUNCEMENT NO. 49 OF 2014] (2014), <http://www.mofcom.gov.cn/article/b/g/201409/20140900732395.shtml> (China) [hereinafter *China Ministry of Com. Announcement No. 49*].

¹⁸⁶ SHANGWU BU (商务部) [CHINA MINISTRY OF COM.], SHANGWU BU GONGGAO 2014 NIAN DI 24 HAO (商务部公告2014年第24号) [CHINA MINISTRY OF COM. ANNOUNCEMENT NO. 24 OF 2014] (2014), <http://www.mofcom.gov.cn/article/b/e/201404/20140400542508.shtml> (China).

There is little controversy that MOFCOM is the most experienced in applying economic analysis among the three enforcement agencies. In applying remedies on the seven vertical mergers, MOFCOM focuses its economic analysis on market power and concentration rate.¹⁸⁷ For example, in the *Toyota Joint Venture*¹⁸⁸ case, listed in Table 3, five domestic and foreign companies wanted to establish a joint venture to manufacture and sell nickel metal-hydrate car batteries.¹⁸⁹ In its analysis, MOFCOM focused on the concentration rate, market power, and potential new entry.¹⁹⁰ It particularly mentioned that vertical restraints on the joint venture in its supply to third parties other than Toyota China, taking Toyota group's market power into consideration, are likely to foreclose competition in the hybrid vehicle market and increase Toyota's market dominance.¹⁹¹ As a remedy, MOFCOM required the joint venture to sell products to third parties on a fair, reasonable, and non-discriminatory basis.¹⁹² Within three years of its commercial production, the joint venture is supposed to start selling to the market.¹⁹³

It is worth noting that only when a vertical merger involves a dominant market power and/or high concentration rate in the competitive landscape, that anticompetitive effects will become of concern to MOFCOM.

VI. THE FUTURE OF ACCESS TO JUDICIAL REVIEW BY COURTS

In the nine years since AML became effective, courts and the three AML enforcement agencies, have contributed in different ways to improve AML awareness and formulate antitrust policies in China as a whole. With the AML amendments and NDRC's antitrust bureau in a transition period, more improvements are expected.

Arguably, one of most critical barriers is the potential inconsistencies in the antitrust practice and policies among the AML regulators. China chose not to follow the suggestions from many international experts at the time of enacting the AML and has set up three antitrust enforcement agencies.¹⁹⁴ How to manage the inter-departmental competition and ensure consistency in executing the competition policies inevitably becomes a huge task.

¹⁸⁷ See SHANGWU BU (商务部) [CHINA MINISTRY OF COM.], <http://www.mofcom.gov.cn/> (China) (last visited Aug. 10, 2017).

¹⁸⁸ See *China Ministry of Com. Announcement No. 49*, *supra* note 185.

¹⁸⁹ *Id.*

¹⁹⁰ *Id.*

¹⁹¹ *Id.*

¹⁹² *Id.*

¹⁹³ *Id.*

¹⁹⁴ See *Calls for Single Anti-monopoly Agency*, CHINA DAILY (Dec. 14, 2007), <http://www.china.org.cn/english/GS-e/235609.htm>.

A major concern for all competition law authorities worldwide is how to control the costs of wrong decisions and discretion of enforcement agencies.¹⁹⁵ Theories of antitrust law are uniquely diversified and hard to reach unanimous concepts on many fundamental principles, given the continuous evolution of underlying economic theories and market competition. Such dynamics could become a source of confusion and lead to errors.¹⁹⁶ The United States and European Union are not immune from this, and there is no surprise that China is facing larger amounts of challenges to handle during the early stage of the AML.

As analyzed above, this paper has identified the different approaches to enforcement as well as collaboration among the different agencies and the courts. For example, in 2016, SAIC and some courts moved in opposite directions from the NDRC's price-focused approach, which ended up sparking some positive changes by the NDRC. The Beijing Higher Court in *Abbott* accepted the facts identified by NDRC decisions, and two judicial review cases were finally tried on substantive issues in district courts.¹⁹⁷ Some kind of cooperation between the NDRC and SAIC was shown in the *Qingyang* case.¹⁹⁸

The question is what could be done to cause faster changes or at least reduce the risks of inconsistency among the antitrust enforcement agencies, especially in light of the reality that each of the agencies is busy developing its own practices and policies in parallel.

This article calls for competent and authoritative judicial review of the antitrust enforcement agencies' future decisions. Without such judicial review, it may take much longer before consistent antitrust policies come into place in China, especially with respect to controversial issues such as vertical restraints and IP related antitrust issues.

A. *Reality*

At present, the judicial review role of courts has not been fully utilized in antitrust cases. Some recent significant antitrust investigations (e.g., NDRC's investigation into *Qualcomm* and SAIC's case against *Tetrapak*), all ended up in penalty decisions including an agreement not to appeal to the court by the parties.¹⁹⁹ Lower courts' decisions and even the SPC's judicial

¹⁹⁵ See Org. for Econ. Cooperation & Dev., *Report on Competition Policy and Vertical Restraints: Franchising Agreements*, (1994) at 176, <https://www.oecd.org/competition/abuse/1920326.pdf>.

¹⁹⁶ See Damien Geradin & Nicolas Petit, *Judicial Review in European Union Competition Law: A Quantitative and Qualitative Assessment* 9 (TILEC Discussion Paper No. 2011-008; Tilburg Law School Research Paper No. 01/2011, 2011), <http://dx.doi.org/10.2139/ssrn.1698342>.

¹⁹⁷ See *supra* Section II.

¹⁹⁸ See discussion *infra* Section IV.B.

¹⁹⁹ Both Qualcomm and Tetrapak publicly announced they would not bring judicial review cases against the penalty decisions. See Yan Yan (严言), *Gaotong Yanxia* 9.75 Yi Meijin Fadan Santian Zhinei

interpretations in the antitrust field barely have any influence on the three enforcement agencies. The discrepancy between the NDRC and courts on RPM vividly indicates the weak position of judicial review.

By contrast, empirical research shows that the EU's judicial review system functions much better in correcting decisions of enforcement agencies.²⁰⁰ Taking the data of the General Court's competition judgments in the EU during ten years from 2000 to 2010, there were 207 judicial review cases in total and 117 cases raised in connection with Article 101 of the EU Treaty.²⁰¹ Among 117 infringement cases under Article 101, thirty-one annulments (37%) were made by the General Court against the Commission.²⁰²

The differences between antitrust and other areas of law in China are apparent. In trademark law, for example, the Beijing IP Court, in 2015, accepted 5,501 trademark granting and validation judicial cases,²⁰³ among which 18.6 percent were ruled in favor of plaintiffs.²⁰⁴ In 2016, its acceptance increased to 5,936 cases, among which 23.78 percent of the administrative decisions were annulled.²⁰⁵ The data indicates the influential role of courts in controlling administrative discretion and correcting errors. To avoid being repeatedly defeated in judicial review, it is natural for the agencies including the Trademark Review and Adjudication Board of SAIC to accept the rules and policies from the courts.

Fajin Quan'e Shangjiao (高通咽下9.75亿美元罚单 三天之内罚金全额上缴) [*Qualcomm Accepted USD 975 Million Fines – Fines Paid Up Within 3 Days*], RENMIN WANG (人民网) [PEOPLE'S NETWORK] (Mar. 2, 2015, 9:10 CST), <http://it.people.com.cn/n/2015/0302/c1009-26619457.html> (China); *see also* Jingji Ribao (经济日报), *Lile An Beihou De Jiaofeng* (利乐案背后的交锋) [*Wars Behind Tetrapak Case*], JINGJI RIBAO (经济日报) [ECON. DAILY] (Dec. 14, 2016, 5:59 CST), <http://finance.china.com.cn/roll/20161214/4024608.shtml> (China).

²⁰⁰ Geradin & Petit, *supra* note 196, at 26–31.

²⁰¹ *Id.* at 30–31.

²⁰² *Id.*

²⁰³ The data was disclosed at the Provisions of the Supreme Court on Several Issues Regarding the Trial of Trademark Authorization and Verification Cases Press Conference (Jan. 11, 2017). *See* Luo Shuzhen (罗书臻), *Wanshan Falv Shiyong Biaozhun – Cujin He Weihu Chengxin Youxu De Shangbiao Fazhi Huanjing* (完善法律适用标准 促进和维护诚信有序的商标法治环境) [*Improve the Legal Standards Applicable to Promote and Maintain the Integrity and Orderly Environment Trademark Law*], ZHONGGUO FAYUAN WANG (中国法院网) [PEOPLE'S CT. NEWS] (Jan. 12, 2017, 9:00 CST), <http://www.chinacourt.org/article/detail/2017/01/id/2511473.shtml> (China).

²⁰⁴ *See* *Tubiao Quanjie Shangbiao Quequan Shouquan Xingzheng Anjian* (图表全解商标确权授权行政案件) [*Illustration of Trademark Authorization and Verification Judicial Review Cases*], BEIJING SANYOU (北京三友) [SANYOU] (Feb. 22, 2017, 9:35 CST), <http://www.sanyouip.com/zh-cn/a/9522.htm> (China).

²⁰⁵ *See* Judge Su Chi (宿迟), *Beijing Zhishi Chanquan Fayuan Liang Zhounian Gongzuo Qingkuang Tongbao* (宿迟: 北京知识产权法院两周年工作情况通报) [*Work Report of Beijing IP Court for Past Two Years*], ZHICHAN FA WANG (知产法网) [JUD. PROT. FOR INTELL. PROP. IN CHINA] (Jan. 10, 2017), <http://www.chinaiplaw.cn/index.php?id=4592> (China).

Looking at the big picture, it is widely known that judicial review over government agencies' decisions in China has traditionally been weak.²⁰⁶ Even with a recent reform of administrative litigation procedure, only about thirteen percent of judicial review cases in recent years were ruled against administrative decision makers.²⁰⁷ In many cases, except for the IP field, courts face difficulty resisting the interference of local governments.

There could be two major reasons for such less optimal roles of judicial review of administrative decisions.

First, administrative branches are playing a much more dominant role in China's politics and economic affairs. Courts in the same regions or at similar levels are often financed by local governments and are often ranked somewhat lower in the political power structure, although the policy makers are increasingly making efforts to promote the influence of courts under the initiative of developing socialist rule of law system.²⁰⁸ Very often it is quite hard for a court to overrule decisions made by the NDRC or SAIC's branches, when it comes to antitrust or other public law fields. Under the AML, the lowest AML enforcement agencies are at the provincial level.²⁰⁹ As illustrated in the 2016 Judicial Review Cases, without further clarification on IP Courts' jurisdiction in antitrust judicial review cases, the general rule in administrative procedure law is arguably applicable unless otherwise challenged by the parties on other legal grounds such as being "significant and complex" cases.²¹⁰ This means, in principle, the district/county court judges

²⁰⁶ See Jyh-Pin Fa & Shao-Chuan Leng, *Judicial Review of Administration in the People's Republic of China*, 23 CASE W. RES. J. INT'L L. 447, 449 (1991), <http://scholarlycommons.law.case.edu/jil/vol23/iss3/3>.

²⁰⁷ He Haibo (何海波), Cong Quanguo Shuju Kan Xin 《Xingzheng Susong Fa》 Shishi Chengxiao (从全国数据看新《行政诉讼法》实施成效) [*Achievement of New Administrative Procedure Law: From Perspective of National Data*], 3 ZHONGGUO FALV PINGLUN (中国法律评论) [CHINA L. REV.] 145 (2016), <http://www.chinalawreview.com.cn/article/20160705144858.html> (China).

²⁰⁸ See Chen Baopeng (陈宝鹏), *Sifa Duli Zhidu Zai Woguo De Kunjing Jiqi Wanshan* (司法独立制度在我国的困境及其完善) [*Difficulty and Solution of Judicial Independence in China*], 11 SHANG (商) [BUS.] 238 (2016), <http://d.wanfangdata.com.cn/periodical/shang201611211> (China); see also Chen Weidong (陈卫东), *Sifa Jiguan Yifa Duli Xingzhi Zhiquan Yanjiu* (司法机关依法独立行使职权研究) [*Research on Judicial Independence*], 2 ZHONGGUO FAXUE (WENZHAI) (中国法学 (文摘)) [CHINA LEGAL SCI.] 20 (2014).

²⁰⁹ AML, *supra* note 5, art. 10.

²¹⁰ See *Zhonghua Renmin Gonghe Guo Xingzheng Susong Fa* (中华人民共和国行政诉讼法) [Administrative Procedure Law of the People's Republic of China] (promulgated by the Standing Comm. Nat'l People's Cong., Apr. 4, 1989, effective Oct. 1, 1990), art. 14–15, 1989 STANDING COMM. NAT'L PEOPLE'S CONG., http://www.npc.gov.cn/englishnpc/Law/2007-12/12/content_1383912.htm (China) (providing that (1) district courts shall hear first instance of judicial review cases; (2) the intermediate courts have jurisdiction over first instance of significant and complex cases, or cases against the departments of the State Council or the municipal or provincial government). However, a decision made by a NDRC or SAIC provincial branch does not fall within such scope because such provincial branch is a department of provincial government, but not "provincial government" itself and its antitrust enforcement decisions are not fixed with the official chop of the provincial government and thus is not a case against municipal or provincial governments.

will hear a first instance judicial review case against a provincial agency's decision and intermediate courts will hear a first instance antitrust judicial review case against the NDRC, SAIC, or MOFCOM at the national level.²¹¹ Even though the courts have the power and jurisdiction under the law, there is always a concern whether such cases will be handled with sufficient autonomy and independence. Lower court judges generally lack expertise on anti-monopoly law. The financial reliance on local governments also makes it more difficult for judges to render impartial decisions. Technically speaking, as shown in the 2016 Judicial Review Cases, in the antitrust field, it is extremely difficult, if not impossible, to overrule provincial NDRC and SAIC decisions by a district/county court. Under the current legal system, it is also not feasible to change the jurisdiction of first instance antitrust cases from district/county courts directly to provincial higher people's courts, which is the highest level of local courts immediately below the SPC.

Second, it is unclear whether the SPC's interpretation, which is legally binding on all levels of courts, is also binding on administrative agencies.²¹² China's statutes tend to be drafted in broad language, which leaves many operative rules to the SPC. Therefore, the SPC often invokes the power to set out judicial interpretations to clarify ambiguity and provide more detailed guidelines.²¹³ Although some scholars criticize the judicial interpretations as judge-made law,²¹⁴ which has led to extra caution by the SPC, the role of judicial interpretations is incredibly important. However, the attitude of government agencies towards such judicial interpretations is complex. For example, SAIC is inclined to take the SPC's interpretation as reference²¹⁵ and in some fields, such as trademark, the SPC's interpretation and cases are in fact binding.

²¹¹ For example, the searching result in the SPC designated judgments publication website – China Judgment Online (<http://wenshu.court.gov.cn/>), shows twenty-eight first instance cases against the NDRC heard by Beijing First Intermediate Court and 145 first instance cases against provincial NDRC branches heard by grassroots courts.

²¹² See *infra* notes 66–70.

²¹³ Lifa Fa (立法法) [Law on Legislation] (promulgated by the Standing Comm. Nat'l People's Cong., Mar. 15, 2000, effective July 1, 2000), art. 104, 2000 STANDING COMM. NAT'L PEOPLE'S CONG., http://www.npc.gov.cn/englishnpc/Law/2007-12/11/content_1383554.htm (China) (indicating that the SPC has the authority to issue judicial interpretation to guide courts).

²¹⁴ See, e.g., Cui Guo-bin (崔国斌), *Zhishi Chanquan Faguan Zaofa Pipan* (知识产权法官造法批判) [*Critical Opinions on Judge-Made IP Law*], 1 ZHONGGUO FAXUE (中国法学) [CHINA LEGAL SCI.] (2006); see also Meng Qin-guo (孟勤国), *Sifa Caipan Ying Weihe Chengwen Fa De Hexin Jiazhi: Zuigao Renmin Fayuan 2013 Min Er Zhong Zi Di 42 Hao Panjue Shu Yandu* (司法裁判应维护成文法的核心价值——最高人民法院2013民二终字第42号判决书研读) [*Judicial Practice Ought to Respect Key Value of Written Statute: Reading the Supreme People's Court (2013) Civil Case Final Judgment No. 42*], 2 FASHANG YANJIU (法商研究) [ZUEL L. J.] (2017).

²¹⁵ See, e.g., *Reply on Issues Concerning Whether Administrative Authorities May Apply Judicial Interpretations Directly*, GUOJIA GONGSHANG XINGZHENG GUANLI ZONGJU (国家工商行政管理总局) [SAIC] (Jan. 29, 2004), http://www.law-lib.com/law/law_view.asp?id=82601 (China) (requiring its branch to take SPC's interpretation as a reference, but not directly applying it as law in SAIC's decision).

In brief, the qualitative and quantitative analysis above clearly shows China's judicial review of regulators' decisions concerning antitrust has obvious weaknesses. Three AML enforcement agencies in China enjoy powerful discretion, nearly free from judicial review. This might explain why the inconsistency on RPM has remained since 2013 and has become apparent in 2016.

B. *Solution: Specialized IP Courts Should Play Bigger Roles in Reviewing Regulators' Decisions*

This article proposes that China's IP Courts and its future appellate courts may provide feasible solutions for a much more robust antitrust judicial review, which will eventually contribute to a uniform and consistent antitrust rule-making and policy-making process.

Currently, IP Courts have two-in-one jurisdiction over most IP first instance civil and administrative cases.²¹⁶ Since first instance antitrust civil cases within Beijing, Shanghai, and Guangdong Provinces are already explicitly adjudicated by the respective IP Courts,²¹⁷ as a matter of course, first instance antitrust administrative cases within the same region should be under the jurisdiction of IP Courts too. IP judges in intermediate courts also have clear jurisdiction in first-instance antitrust civil cases outside of Beijing, Shanghai, and Guangdong Province.

Nonetheless, the jurisdiction of antitrust judicial review cases is still left open. In light of the lack of any meaningful cases that push forward clarification on jurisdictional issues, any immediate hope remains with the SPC. Once the SPC issues a judicial interpretation to clarify, then judicial review of three AML enforcement agencies cases should be adjudicated by IP Courts,²¹⁸ it would send a strong signal to the market to attract more judicial review applications.

Notably, the Beijing IP Court has an impressive track record in reviewing administrative agencies' decisions. In the Beijing IP Court's Work Report for 2016,²¹⁹ it uses a full section to describe its leading judicial review role in the IP authorization and verification field. During 2016, the Beijing IP Court issued judgments in 431 patent and 4,032 trademark judicial review

²¹⁶ See Judge Zhu Li (朱理), *Woguo Zhishi Chanquan Fayuan Susong Zhidu Gexin* (朱理: 我国知识产权法院诉讼制度改革) [*Innovative Reform of China's IP Courts*], ZHICHAN FA WANG (知产法网) [JUD. PROTECTION FOR INTELL. PROP. IN CHINA] (Dec. 20, 2015), <http://www.chinaiprlaw.cn/index.php?id=3267> (China).

²¹⁷ To date, three courts shall have cross-region jurisdiction in hearing IP cases within its own provinces. See Guo Xiaojun, *IP Courts in China, Jurisdiction and Prospect*, CCPIT PAT. AND TRADEMARK L. OFF. (Apr. 27, 2015), <http://www.ccpit-patent.com.cn/node/2447>. In the near future, Beijing IPR court jurisdiction is expected to expand to surrounding areas including Tian Jin and Hebei Province.

²¹⁸ Three IP Courts are at the same level of intermediary courts. See discussion *supra* Section II.

²¹⁹ Su Chi, *supra* note 205.

cases, among which 12.06 percent and 23.78 percent of administrative decisions were annulled.²²⁰ The data indicates the Beijing IP Court's competence and determination in resisting governmental influence.

Second, clarification on jurisdiction is also in line with the international commitments made by China.²²¹ China has committed to allow intermediate courts to hear first instance AML judicial review cases; IP Courts are at the level of intermediate courts.²²² In the seventh meeting of the Economic Track of the U.S.–China Strategic and Economic Dialogue on June 23–24, 2015 in Washington, D.C, China committed to the following policy:

The intermediate people's court in the locality of the antimonopoly enforcement body issuing the administrative decision under the AML would have jurisdiction over the administrative appeal regarding that decision; provided that when such decision involves intellectual property rights, and the issuing authority is located in Beijing, Shanghai or Guangzhou, the intellectual property (IP) court in that municipality would have jurisdiction over the administrative appeal.²²³

Third, the pioneering IP judicial reforms, including Guiding Case Reform, IP Courts, and IP Appeal Courts at sight, lay down a solid systematic foundation to facilitate effective judicial review on antitrust enforcement and thus improve the consistency of China's antitrust policies. Judges on the IP Courts are professionals, they are specialized and have more trial experience than the average judge. For example, the judges in the standalone Beijing IP Court, the first and most influential IP Court in China,²²⁴ have an average trial experience of ten years and ninety-one percent of the judges have received master or doctoral degrees.²²⁵ The judges in the Shanghai IP Court and the Guangzhou IP Court have an average trial experience of 8.4 years and seven years, respectively.²²⁶

²²⁰ *Id.*

²²¹ See U.S. DEP'T OF TREAS., 2015 U.S.–CHINA STRATEGIC AND ECONOMIC DIALOGUE JOINT U.S.–CHINA FACT SHEET – ECONOMIC TRACK (2015), <https://www.treasury.gov/press-center/press-releases/Pages/jl0092.aspx>.

²²² *Id.*

²²³ *Id.*

²²⁴ It was established on November 6, 2014. See Shen Liu et al., *China's First Intellectual Property Court Established in Beijing*, LEXOLOGY (Nov. 17, 2014), <http://www.lexology.com/library/detail.aspx?g=777a6b66-28b2-4398-8722-a53a01b8cf5e>.

²²⁵ Guo Jingxia & Zhao Yan (郭京霞&赵岩), *Quanguo Shoujia Zhishi Chanquan Fayuan Zai Beijing Zhengshi Chengli* (全国首家知识产权法院在北京正式成立) [*The First IPR Court was Established in Beijing*], ZHONGGUO FAYUAN WANG (中国法院网) [PEOPLE'S CT. NEWS] (Nov. 11, 2014), <http://www.chinacourt.org/article/detail/2014/11/id/1479627.shtml> (China).

²²⁶ See Conference Power Point Slides, Judge Wang Chuang, China's Judicial Reform: From Perspective of IP Judicial Protection (Mar. 2016), http://2016.export.gov/china/build/groups/public/@eg_cn/documents/webcontent/eg_cn_097626.pdf.

The consistency in IP judgements across the country is improving through Guiding Case Reform.²²⁷ Notably, the Beijing IP Court reportedly has even tried out the use of “amicus briefs” to solicit opinions from influential thought leaders and industries on significant cases.²²⁸ Such a system will truly benefit the adjudication of complex antitrust cases.²²⁹

Three-year trial run of IP Courts have received positive feedback, and more IP Courts will be set up. According to recent media reports,²³⁰ more IP Courts will be established based on four new cross-jurisdiction IP tribunals in Nanjing, Suzhou, Chengdu, Wuhan, and new IP appeal courts are also expected. One of the appeal courts is likely to be in Beijing.

In short, the pioneering IP judicial reforms have gradually built up a solid infrastructure and received international recognition. Accordingly, China has now even been perceived by some as an IP powerhouse and has increasingly been selected for patent litigation thanks to the efforts of IP judges and systematic reforms.²³¹ In the broader context of Chinese legal reform, with a simple clarification of the SPC on antitrust judicial review jurisdiction, the controversial AML enforcement can be reformed alongside the rise of China’s IP protection. Since 2008, China has quickly become one of the most important competition law jurisdictions in the world, but critics have never stopped, as predicted. Reforms have been long-awaited both domestically and internationally. Empowering courts is an indispensable step to give the world genuine hope.

²²⁷ See Guiding Case Reform discussion *supra* Section II.

²²⁸ See He Jing, *Will China Welcome Amicus Briefs in Patent Cases?*, ANJIE L. FIRM (Dec. 14, 2015), http://en.anjielaw.com/publications_detail/newsId=337.html.

²²⁹ *Id.*

²³⁰ See Wang Feng (王峰), *Si Chengshi Huopi Sheli Zhishi Chanquan Fating – Guojia Zhishi Chanquan Shangsu Fayuan Weilai Huoke Qidai* (四城市获批设立知识产权法庭 国家知识产权上诉法院未来或可期待) [*IP Tribunals Approved in Four Cities and IP Appeal Court Expected*], 21 JINGJI WANG (21 经济网) [21ST CENTURY ECON. REP.] (Feb. 9, 2017), <http://www.21jingji.com/2017/2-9/wMMDEzNzlfMTQwMjUwMA.html> (China).

²³¹ See Wayne Sobon, *The Surprising Rise of China as IP Powerhouse*, CRUNCH NETWORK (Apr. 11, 2017), <https://techcrunch.com/2017/04/11/the-surprising-rise-of-china-as-ip-powerhouse/>.