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## Public Antitrust Enforcement of Resale Price Maintenance in China: A Crusade or Discrimination?

Jingmeng Cai

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# PUBLIC ANTITRUST ENFORCEMENT OF RESALE PRICE MAINTENANCE IN CHINA: A CRUSADE OR DISCRIMINATION?

*Jingmeng Cai\**

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## INTRODUCTION

**I**n 2013, China's most powerful bureaucracy, the National Development and Reform Commission (NDRC), began a series of proactive antitrust price investigations. Between 2008 and 2012, the first four years after the enactment of China's new

Anti-monopoly Law (AML),<sup>1</sup> the NDRC only conducted forty-nine price-related investigations.<sup>2</sup> In 2013 alone, however, more than eighty companies were investigated by the NDRC.<sup>3</sup> As of September 2014, 335 companies and industry associations have been involved in the NDRC probe.<sup>4</sup>

Many large, multinational companies have become targets in the flurry of NDRC investigations. For example, from 2014 to 2015, the NDRC fined multinational automakers Mercedes-Benz, Audi, Chrysler, and Dongfeng-Nissan for restricting resale prices of motor vehicles and associated spare parts.<sup>5</sup> The

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1. Zhonghua Renmin Gongheguo Fan Longduan Fa (中华人民共和国反垄断法) [Anti-Monopoly 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) CLI.1.96789(EN) (Lawinfochina) [hereinafter AML]. The term used to refer to the "competition law" area varies among different countries. In the United States, this area of law is referred to as "antitrust law." In China, the term used is "antimonopoly law." In this article, "antimonopoly law," "competition law," and "antitrust law" are used to refer to a set of laws that aims to fight restraints on competition in the marketplace. In this article, the terms "competition law," "antimonopoly law," and "antitrust law" are used interchangeably.

2. Yu Lan & Zhou Rui, *Zhongguo Fanjiage Longduan Huo Tupoxing Jinzhan, Yi Diaocha Anjian 49 Qi* (中国反价格垄断获突破性进展 已调查案件 49 起) [*The Breakthrough of China's Anti-price Monopoly Enforcement, Already Investigated 49 Cases*], CHINA NEWS (Jan. 4, 2013), <http://finance.chinanews.com/cj/2013/01-04/4454595.shtml>.

3. Sue Hao & John Lenhart, *China's "Golden Year" of Antimonopoly Investigations*, CHINA BUS. REV. (Dec. 12, 2013), <http://www.chinabusinessreview.com/chinas-golden-year-of-antimonopoly-investigations>.

4. Lu Yanchun, *Jin Yibu Zuohao Fanjiage Longduan Gongzuo* (进一步做好反价格垄断工作) [*Further Improve the Work of Anti-price Monopoly*], 1 ZHONGGUO JIAGE JIANDU YU FANLONGDUAN [PRICE SUPERVISION & ANTI-MONOPOLY IN CHINA] 11, 11 (2015).

5. See Guoxinban Juxing Fanlongduan Zhifa Gongzuo Qingkuang Xinwen Chuifenghui (国新办举行反垄断执法工作情况新闻吹风会) [Press Conference held by the Information Office of the State Council Regarding the Enforcement of AML] (Sept. 17, 2014, 9:59 AM) [hereinafter Press Conference Regarding AML Enforcement], <http://fldj.mofcom.gov.cn/article/i/201409/20140900733559.shtml>. At the press conference, Xu Kunlin, the former leader of the Antitrust Bureau of NDRC, stated that the NDRC investigated and fined Audi, Chrysler, and Mercedes-Benz for the companies' use of RPM. The penalty decision on Dongfeng-Nissan, however, was made in 2015. See *Dongfeng Richan Zai Guangdongsheng Shishi Jiage Longduan Bei Chufa* (东风日产在广东省实施价格垄断被处罚) [*Penalty on Dongfeng Nissan for Pricing Fixing*], GUANGDONG DEV. & REFORM COMMISSION (Sept. 10, 2015), [http://210.76.72.13:9000/pub/gdsfgw2014/zwgk/gzdt/gzyw/201509/t20150910\\_328993.html](http://210.76.72.13:9000/pub/gdsfgw2014/zwgk/gzdt/gzyw/201509/t20150910_328993.html) [hereinafter *Guangdong DRC's Decision on Dongfeng-Nissan*].

finances against the automakers totaled about \$116 million USD.<sup>6</sup> In addition, many foreign companies in a range of industries, including automobile, infant formula milk, pharmaceuticals, technology, and food packaging, have faced increased antitrust scrutiny as a result.<sup>7</sup>

The rise in investigations has led many international observers and companies to express concern that China may be using the AML in a discriminatory manner against multinational companies to undermine their ability to compete with their Chinese

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6. The amount was calculated based on the NDRC-disclosed decisions on Mercedes-Benz, Audi, Chrysler, and Dongfeng-Nissan for implementing RPM. See *Jiangsu Province Price Bureau, Jiangsu Sheng Wujiaju Dui Benchi Gongsi Jiage Longduan An Zuochu Xingzheng Chufa* (江苏省物价局对奔驰公司价格垄断案作出行政处罚) [*Price Bureau Of Jiangsu Province Imposes Administrative Penalty On Mercedes-Benz For Price Monopoly*], JIANGSU PROVINCE PRICE BUREAU (May 18, 2015), <http://www.jswwj.gov.cn> (search “Jiangsu Sheng Wujiaju Chufa Juedingshu (2014) Sujia Fanlongduan Er Hao” (江苏省物价局处罚决定书〔2014〕苏价反垄断案2号); then follow the hyperlink) [hereinafter *Jiangsu Provincial Agency's Decision on Mercedes-Benz*]; *Yiqi Dazhong Xiaoshou Youxian Zeren Gongsi Bufen Aodi Jingxiaoshang Zai Huibeisheng Shishi Jiage Longduan Bei Chufa* (一汽大众销售有限责任公司部分奥迪经销商在湖北实施价格垄断被处罚) [*Penalty FAW-Volkswagen and Part Audi Distributors in Hubei Province for the Price Monopoly*], HUBEI PROVINCE PRICE BUREAU (Sept. 11, 2014), [http://www.hbpic.gov.cn/zwgk/gfwj/xzkhcf/201701/t20170110\\_23774.html](http://www.hbpic.gov.cn/zwgk/gfwj/xzkhcf/201701/t20170110_23774.html) [hereinafter *Hubei Provincial Agency's Decision on FAW-Volkswagen*]; *Kelaisile Ji Shanghai Diqu Bufen Jingxiaoshang Shishi Jiage Longduan Bei Yifa Chachu* (克莱斯勒及上海地区部分经销商实施价格垄断被依法查处) [*Penalty on Chrysler and Part Distributors in Shanghai District for the Price Monopoly*], SHANGHAI DRC (Sept. 11, 2014), <http://www.shdrc.gov.cn/fzgggz/jggj/jgjd/12463.htm> [hereinafter *Shanghai Provincial Agency's Decision on Chrysler*]; see also *Guangdong DRC's Decision on Dongfeng-Nissan*, *supra* note 5.

7. See Keith Bradsher & Chris Buckley, *China Fines Volkswagen and Chrysler for Antitrust Violations*, N.Y. TIMES, Sept. 12, 2014, at B2.

counterparts in both the Chinese and global markets.<sup>8</sup> In the recent U.S.-China Strategic and Economic Dialogue<sup>9</sup> sessions, the United States also expressed concern and argued that the AML should be enforced in a transparent and nondiscriminatory way.<sup>10</sup> China's decision-makers<sup>11</sup> have taken pains to deny such criticisms, however, claiming that the AML has been applied equally to all companies.<sup>12</sup> Also, Li Keqiang, the Premier of the State Council of China, empathized that the AML does not selectively punish multinationals.<sup>13</sup>

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8. *Impact of China's Antitrust Law and Other Competition Policies on U.S. Companies: Hearing Before the Subcomm. on Courts & Competition Policy of the H. Comm. on the Judiciary*, 111th Cong. 1–2 (2010) (statement of Henry C. Johnson, Jr., Chairman, Subcomm. on Courts & Competition Policy); see also *Oversight of the Antitrust Enforcement Agencies: Hearing Before the Subcomm. on Regulatory Reform, Commercial & Antitrust Law of the H. Comm. on the Judiciary*, 114th Cong. 2, 69–71 (2015); see also U.S.-CHINA BUS. COUNCIL, COMPETITION POLICY AND ENFORCEMENT IN CHINA (May 2015), <https://www.uschina.org/reports/update-competition-policy-enforcement-china>.

9. The U.S.-China Strategic and Economic Dialogue (S&ED) is a high-level dialogue for the United States and China to discuss a wide range of regional and global strategic and economic issues between them. The S&ED was established on April 1, 2009, and the most recent meeting took place on June 6–7, 2016. See *2016 Strategic and Economic Dialogue*, U.S. EMBASSY BEIJING-CHINA, <http://beijing.usembassy-china.org.cn/sed-2016.html> (last visited Mar. 6, 2017).

10. For example, in the S&ED, the United States expressed: “Ensuring that China implements its Antimonopoly Law (AML) in a transparent and non-discriminatory manner has been a top priority for the U.S. government.” *2015 U.S.-China Strategic and Economic Dialogue U.S. Fact Sheet – Economic Track*, U.S. DEP’T TREASURY (June 25, 2015), <https://www.treasury.gov/press-center/press-releases/Pages/jl0094.aspx>.

11. Here the term the “decision-makers” refers to all legal institutions and individuals who are responsible for making decisions under competition laws, such as antitrust agencies and courts.

12. Chen Rongxue, *Guojia Fagaiwei Jiagesi Sizhang Xu Kunlin: Qinli Zhongda Fanlongduan An* (国家发改委价格司司长许昆林：亲历重大反垄断案) [*The Interview with the Head of Antitrust Bureau, Xu Kunlin: Experience Significant Antimonopoly Cases*], XINHUASHE [XINHUA NEWS AGENCY] (June 20, 2015), <http://finance.sina.com.cn/china/20150620/213322484073.shtml>; see also Press Conference Regarding AML Enforcement, *supra* note 5.

13. Zhou Xiaoyuan, *Zhongguo Fanlongduan Bu Cunzai Xuanzhexing Zhifa* (中国反垄断不存在选择性执法) [*No Selective Enforcement of China's AML*], RENMIN RIBAO HAIWAIBAN [PEOPLE'S DAILY OVERSEAS EDITION], Sept. 12, 2014, at A2, <http://www.scio.gov.cn/ztk/xwfb/2014/31540/sjfx31549/Document/1380903/1380903.htm>.

This article will address China's public enforcement of the AML with respect to resale price maintenance (RPM). RPM is a type of vertical price restraint. By entering into a typical RPM agreement, resellers are required to adhere to a price or price level set by a manufacturer.<sup>14</sup> Implementing RPM agreements may restrict resellers' freedom in setting prices, limiting price competition among resellers and affecting consumer welfare with a high price. Meanwhile, it may generate procompetitive effects, such as solving free-rider problem, improving products' after-sale services, and facilitating new products' market entry.<sup>15</sup> Therefore, carrying out RPM affects competition and consumer welfare in relevant markets, thus falling under the scrutiny of antitrust law. Enforcement of antitrust law is generally divided into two categories: public and private enforcement. Public enforcement occurs when an administrative agency has the enforcement authority to investigate and issue administrative decisions. Private enforcement, however, occurs when the interests of private parties are affected by anticompetitive behavior. Rather than report to antitrust agencies, these parties instead file civil lawsuits directly in courts to seek redress. This article will focus on public antitrust enforcement through a discussion of RPM cases decided by the NDRC, one of three antitrust agencies in China.

Part I of this article will provide an in-depth review of nearly all of the NDRC's disclosed decisions regarding RPM from August 2008 to March 2016. The discussion of these decisions includes background stories of the cases, which provide fundamental facts to analyze the factors that have shaped NDRC enforcement. Part II will point out factors that have shaped NDRC enforcement in order to explore why multinationals are easily targeted or why they are perceived to be easily targeted. There are three major factors fueling this discussion.<sup>16</sup> First is the "central factor," which states that domestic incentives drive the NDRC to target multinationals in order to generate greater social impact,

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14. ERNEST GELLHORN, WILLIAM E. KOVACIC, & STEPHEN CALKINS, *ANTITRUST LAW AND ECONOMICS IN A NUTSHELL* 339 (5th ed. 2004).

15. See SU HUA, FENXIANG XINGWEI DE FANLONGD GUIZHI (分销行为的反垄断规制) [ANTITRUST SCRUTINY OF DISTRIBUTION PRACTICES] 15–19 (2012).

16. See generally David J. Gerber, *Economics, Law & Institutions: The Shaping of Chinese Competition Law*, 26 WASH. U. J. L. & POL'Y 271 (2008) (suggesting that three factors affect decision-making: domestic incentive structure, foreign cognitive influence, and foreign institutional pressure).

alleviate public dissatisfaction, and efficiently meet political or regulatory goals. Second is the “external factor,” which articulates that foreign cognitive influence has further caused uncertainty and inconsistency of public antitrust enforcement because these sources have led to varying perceptions of antitrust law and its enforcement among antitrust decision-makers in China. Third is the “internal factor,” which notes the impact of traditional Chinese culture and its notions of paternalism on antitrust enforcement. The internal factor is implicit but steadier and more enduring than the other factors. This is exemplified by the NDRC, who enforces antitrust law in a paternalistic manner by encouraging companies to confess and carry out self-corrective measures, as the agency expects, and to disclose only limited information to the public. The analysis in Part II will suggest that the NDRC has not deliberately discriminated against multinational companies. When these three factors function collectively, however, multinationals become an easy target. Therefore, such “discriminatory” enforcement by the NDRC is not intended, but it is a consequence of the flaws in China’s antitrust enforcement system.

Part III will conclude by providing suggestions for China, which include implementing an enforcement system with specific rules and regulations to normalize and limit the NDRC’s discretionary power. In addition, considering China’s present situation, an analytical method for RPM should mirror the approach taken under EU competition law, which holds a stricter attitude toward RPM than U.S. antitrust law. Finally, in the conclusion, the article advocates for greater transparency and improvements in the consistency of the NDRC decision-making processes.

## I. PUBLIC ENFORCEMENT OF RPM IN CHINA

Today, RPM remains one of the most controversial areas of antitrust law. Some jurisdictions treat RPM hostilely, but other jurisdictions analyze it with a more benign attitude. For example, U.S. economists have argued extensively that RPM could enhance economic welfare and should be analyzed by “rule of reason” rather than the “per se rule.”<sup>17</sup> As a consequence, in 2007,

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17. The per se rule for RPM was established in *Dr. Miles Medical Co., v. John D. Park & Sons Co.* The U.S. Supreme Court ruled that RPM is “a general restraint upon alienation,” and its purpose is to destroy competition by fixing



the U.S. Supreme Court abandoned the century-old per se rule and adopted the rule of reason analysis for RPM in *Leegin Creative Leather Prods., v. PSKS, Inc.*<sup>18</sup> Although commentators in Europe have been arguing against the per se approach for RPM for twenty years, it persists in nearly every member country of the Organization for Economic Co-operation and Development.<sup>19</sup> Additionally, many Asian countries (like Japan, Korea, and Taiwan) still adhere to the per se approach when assessing RPM.<sup>20</sup>

China, as a new player in the field of antitrust law, stands at a crossroads because a clear and consistent approach to assessing RPM in the antitrust enforcement system has not been formed thus far. While Article 14 of the AML prohibits monopoly agreements that fix resale prices or restrict minimum resale prices,<sup>21</sup> Article 14 has, nonetheless, led to controversy. The NDRC has interpreted RPM agreements as per se illegal under the AML, provided that they are not exempt under the conditions set out in Article 15.<sup>22</sup> Article 15 provides for an exemption from the applicability of Article 14 if companies can prove that the procompetitive effects of the RPM would not be offset by its anticompetitive effects.<sup>23</sup> Such procompetitive effects include: improving technologies, developing new products, improving product quality, reducing cost, increasing efficiency, and serving public interests, among others.<sup>24</sup>

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prices, so the court ruled that the RPM was a per se violation of antitrust law. *Dr. Miles Medical Co. v. John D. Park & Sons Co.*, 220 U.S. 373 (1911). Under the rule of reason, RPM is not per se illegal, but the test requires courts to weigh procompetitive and anticompetitive effects of an RPM on a case-by-case basis. *See State Oil Co. v. Khan*, 118 S. Ct. 275, 279 (1997); *see also* *Leegin Creative Leather Prods., v. PSKS, Inc.*, 551 U.S. 877 (2007).

18. *Leegin Creative Leather Products*, 551 U.S.

19. *See* Org. for Econ. Co-operation & Dev. [OECD], *Policy Roundtable on Resale Price Maintenance*, at 23, DAF/COMP(2008)37 (Sept. 9, 2009), <https://www.oecd.org/daf/competition/43835526.pdf>.

20. For example, the Japan Fair Trade Commission published the Guidelines Concerning Distribution Systems and Business Practices under the Antimonopoly Act in 1991. In the guidelines, RPM is regarded as “in principle illegal as an unfair trade practice.” *See id.* at 153. In Korea, Article 29 of the Monopoly Regulation and Fair Trade Act (MRFTA) clearly states that RPM is “per se illegal.” *See id.* at 161. In Taiwan, Article 18 of the MRFTA also applies the per se illegal rule for RPM. *See id.* at 241.

21. AML, *supra* note 1, art. 14.

22. *Id.* art. 15.

23. *Id.*

24. *Id.*

In contrast, Chinese courts, like the one in *Rainbow v. Johnson & Johnson*, interpret Article 14 to only prohibit monopoly agreements rather than RPM agreements generally.<sup>25</sup> The court there reasoned that Article 14 of the AML attempts to condemn agreements that eliminate or restrict competition and defines such agreements as monopoly agreements.<sup>26</sup> Therefore, under the AML, RPM agreements are not per se illegal, and only RPM agreements that have the effect of eliminating or restricting competition are restricted.<sup>27</sup>

### A. Overview

This section will address two fundamental issues. First, it will draw a brief picture about RPM, which includes the definition and categories of RPM. Then it will introduce the antitrust system of public enforcement in China, which helps us understand how the NDRC operates in this system.

#### 1. What is RPM?

It is general knowledge that firms always seek the most cost-effective way to distribute their products. In other words, firms attempt to find the lowest cost or most effective way of distributing products in order to maximize profits.<sup>28</sup> Manufacturers may sell their products directly to end consumers through their “own employees, agents, or wholly owned subsidiaries.”<sup>29</sup> Other manufacturers, however, may choose to sign distribution contracts with independent distributors (such as jobbers, wholesalers, or retailers) to reach the consumer.<sup>30</sup>

Both self-distribution and independent dealer distribution are pervasive;<sup>31</sup> however, the method of distribution largely depends on firm size and product characteristics. For example, a local small flower store may utilize its own employees to quickly

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25. See Beijing Ruibang Yonghe Tech. & Trade Co., Ltd. (*Rainbow*) v. Johnson & Johnson Med. (Shanghai) Ltd. & Johnson & Johnson Med. (China) Ltd., 2014 SUP. PEOPLE'S CT. GAZ. (Shanghai Higher People's Ct. 2013) (China).

26. *Id.*

27. *Id.*

28. HERBERT HOVENKAMP, *THE ANTITRUST ENTERPRISE: PRINCIPLE AND EXECUTION* 181 (2008).

29. PHILLIP E. AREEDA, LOUIS KAPLOW, & AARON S. EDLIN, *ANTITRUST ANALYSIS: PROBLEMS, TEXT, AND CASES* 534 (6th ed. 2004).

30. *Id.* at 534.

31. HOVENKAMP, *supra* note 28, at 181.

transport fresh bouquets rather than hire express delivery companies because it is too expensive. Unilever, however, may choose to sign contracts with large retailers (like Walmart or Walgreens) to carry its shampoos and toothpastes rather than running its own retail stores. Because people generally prefer to purchase groceries in one store, distributing such groceries through independent retail stores is most efficient.<sup>32</sup> For other products, manufacturers may use independent dealers to exclusively distribute their products to maintain product quality, to guarantee before-sale and after-sale services, and to motivate dealers to carry their products.<sup>33</sup> Valuable products or well-known brands, such as Mercedes-Benz automobiles, Apple electronic products, and Hermès handbags, for example, are normally sold through such distribution arrangements.

When firms choose to use independent distributors rather than self-distribute their products, the relationship between them is vertical. This manufacturer-dealer vertical relationship can involve many forms of vertical restraint.<sup>34</sup> These restraints, which are subject to antitrust law, occur when those involved in the vertical supply chain impose restrictions on product distribution.<sup>35</sup>

Vertical restraints can be divided into several categories according to different standards. Depending on whether a restraint involves price restrictions, vertical restraints can be classified as price restraints (e.g., RPM) or nonprice restraints (e.g., territorial restrictions).<sup>36</sup> RPM, for example, is a price restraint because it requires dealers to sell products at certain prices. A territorial restriction, however, is a nonprice restraint because it insulates appointed dealers from competition from others who sell the same products of the manufacturer, but it does not directly restrict prices.<sup>37</sup>

Further, depending on the impact on competition, vertical restraints may be categorized as restraints on intrabrand competition (e.g., RPM) or restraints on interbrand competition (e.g.,

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32. *Id.* at 182.

33. *See id.* at 202–06.

34. AREEDA, KAPLOW, & EDLIN, *supra* note 29, at 534.

35. MASSIMO MOTTA, *COMPETITION POLICY: THEORY AND PRACTICE* 302 (2004).

36. *See* HOVENKAMP, *supra* note 28, at 186–90.

37. *See* GELLHORN, KOVACIC, & CALKINS, *supra* note 14, at 359.

tying).<sup>38</sup> Intrabrand restraints occur when a manufacturer seeks to limit competition among dealers carrying its products. The manufacturer may require its dealers to adhere to the same retail prices and/or separate its dealers geographically. In doing so, only competition among dealers carrying the manufacturer's brand is limited, but competition among different brands is not affected. Through interbrand vertical restraints, however, manufacturers use restrictions to limit competition among different brands. Tying and exclusive dealing agreements are typical interbrand restraints. Tying, for example, occurs when a dealer is required to purchase a freezer (tied product) as a condition to buying a manufacturer's ice cream (tying product). Additionally, exclusive dealing agreements, as the name implies, require dealers to sell only a manufacturer's product and no one else's brand.<sup>39</sup> In the context of automobiles, for example, an exclusive dealing agreement occurs when a dealer selling Mercedes-Benz automobiles is prohibited from distributing Chevrolet cars.

Shifting to RPM, these agreements can be categorized as price restraints of intrabrand competition. These restraints come in three varieties: (1) restrictions of the minimum resale price, (2) restrictions of the maximum resale price, and (3) fixing the resale price.<sup>40</sup> Because fixing resale price and restricting minimum resale price prevent consumers from purchasing products at a lower price, most antitrust laws focus on these RPMs rather than maximum RPMs.<sup>41</sup> This article will therefore focus on fixing or minimum RPMs, unless stated otherwise.

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38. See HOVENKAMP, *supra* note 28, at 183–84.

39. See *id.* at 184.

40. See GELLHORN, KOVACIC, & CALKINS, *supra* note 14, at 340–52.

41. For example, Article 14 of the AML only states that fixing and minimum RPM monopoly agreements should be prohibited, but does not address maximum RPM. See AML, *supra* note 1, art. 14. Under EU competition law, hardcore restrictions are “agreements or concerted practices having as their direct or indirect object the establishment of a fixed or minimum resale price or a fixed or minimum price level. . . .” Compared to other vertical restraints, the hardcore restriction can only be exempted under much stricter conditions. See Commission Guidelines on Vertical Restraints, para. 48, 2010 O.J. (C 130) (EC) [hereinafter Commission Guidelines on Vertical Restraints].

## 2. Profile of Public Antitrust Enforcement in China—a Two-Tiered and Tripartite System of Authority

The AML provides a two-tiered administrative structure to ensure enforcement of the Act.<sup>42</sup> The top tier is the Anti-monopoly Commission of the State Council (“Anti-monopoly Commission”), which is responsible for formulating policies and guidelines related to competition, coordinating high-level strategies, and supervising the overall enforcement of the AML.<sup>43</sup> After the AML was enacted, the State Council appointed three administrative agencies—the NDRC, the Ministry of Commerce (MOFCOM), and the State Administration for Industry and Commerce (SAIC) to enforce the AML. The three agencies can be thought of as the second tier of the enforcement mechanism. Specifically, both the NDRC and the SAIC are responsible for investigating monopoly agreements, abuse of dominant market positions, and abuse of administrative power.<sup>44</sup> The difference between the NDRC and SAIC’s responsibility is whether the relevant conduct is price-related.<sup>45</sup> In other words, the NDRC is responsible for investigating price-related behaviors, while the SAIC oversees nonprice-related behaviors. MOFCOM is responsible for reviewing mergers and international cooperation related to competition laws.<sup>46</sup> In the scope of this article, investigating and making decisions regarding RPM fall within the NDRC’s authority.

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42. AML, *supra* note 1, arts. 9, 10.

43. *Id.* art. 9.

44. See Guojia Gongshang Xingzheng Guangli Zongju Zhuyao Zhize Neishe Jigou He Renyuan Bianzhi Guiding (国家工商行政管理总局主要职责内设机构和人员编制规定) [Regulations of the SAIC Major Duties, Internal Institutions and Personnel] (July 11, 2008), sec. B, art. 6 [hereinafter Regulations of the SAIC], [http://gkml.saic.gov.cn/auto3743/200809/t20080901\\_112597.htm?type=1](http://gkml.saic.gov.cn/auto3743/200809/t20080901_112597.htm?type=1); see also Guojia Fazhan He Gaige Weiyuanhui Zhuyao Zhize, Neishe Jigou He Renyuan Bianzhi Guiding (国家发展和改革委员会主要职责内设机构和人员编制规定) [Regulations of the NDRC Major Duties, Internal Institutions and Personnel] (Aug. 21, 2008), sec. C, art. 23 [hereinafter Regulations of the NDRC], [http://www.gov.cn/gzdt/2008-08/21/content\\_1076506.htm](http://www.gov.cn/gzdt/2008-08/21/content_1076506.htm).

45. See Regulations of the SAIC, *supra* note 44; Regulations of the NDRC, *supra* note 44.

46. Shangwubu Zhuyao Zhize Neishe Jigou He Renyuan Bianzhi Guiding (商务部主要职责内设机构和人员编制规定) [Regulations of the MOFCOM Major Duties, Internal Institutions and Personnel] (Aug. 22, 2008), sec. C, art. 11, <http://www.mofcom.gov.cn/aarticle/ae/ai/200808/20080805739577.html>.

At the local level, the NDRC authorizes its local agencies at the provincial level (local agencies in provinces, autonomous regions, and municipalities directly under the central government, collectively referred to as “Provincial Agencies”) to enforce the AML within their respective administrative region, and, if necessary, the NDRC can require them to cooperate with its investigations.<sup>47</sup> The authorized Provincial Agencies’ activities are also under the NDRC’s supervision.<sup>48</sup>

### *B. Cases of RPM*

Historically speaking, many Chinese companies have used RPM.<sup>49</sup> An increasing number of high profile investigations and decisions between August 2008 and March 2016 by the NDRC, however, have alerted companies to be cautious in using RPM. This section will discuss the NDRC’s investigations into companies in the liquor, infant formula milk, corrective lens, and motor vehicle industries, which include the background story and decision of each case.

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47. Guanyu Fanjiage Longduan Zhifa Shouquan de Jueding (关于反价格垄断执法授权的决定) [Decision About Authorization of Anti-price Enforcement’s Authority] (promulgated by the NDRC, Dec. 15, 2008, effective Dec. 15, 2008), Order No. [2008] 3509 (China) [hereinafter Decision About Authorization of Anti-price Enforcement’s Authority], <http://www.xxpi.com/Article/ShowArticle.asp?ArticleID=10061>; see also Provisions on the Administrative Procedures for Law Enforcement Against Price Fixing (promulgated by the State Dev. & Reform Comm’n, Dec. 29, 2010, effective Feb. 1, 2011) art. 3, CLI.4.143498(EN) (Lawinfochina) [hereinafter Provisions on the Administrative Procedures for Law Enforcement Against Price Fixing]. In addition, the names of Provincial Agencies vary among the different provinces. In some provinces, they are called “Development and Reform Commissions.” In other provinces, they are called “Price Bureaus.”

48. Decision About Authorization of Anti-price Enforcement’s Authority, *supra* note 47; Provisions on the Administrative Procedures for Law Enforcement Against Price Fixing, *supra* note 47.

49. Zhou Rui, *Moutai Chufa Jiangjia Jingxiaoshang, Zhuanjia Cheng Huojiang Zhaozhi Fanlongduan Diaocha* (茅台处罚降价经销商, 专家称或将招致反垄断调查) [*Moutai Punished Discounters, Experts Claimed It May Cause Antitrust Probe*], CHINA NEWS AGENCY (Jan. 11, 2013), <http://finance.chinanews.com/cj/2013/01-11/4481529.shtml>.

### 1. The Liquor Case

In 2013, the NDRC imposed penalties on two of the most famous state-owned Chinese producers of premium liquor for using RPM. This marked the first time the NDRC penalized RPM under the AML.

#### *a. Background Story: Luxury Gift-Giving Culture and a Political Incident*

Kweichow Moutai Co., Ltd. (“Moutai”) and Wuliangye Yibing Co., Ltd. (“Wuliangye”), two state-owned liquor producers in China, specialize in producing premium alcoholic spirits (also known as “premium white spirits” in China). According to statistics issued by the China Alcoholic Drinks Association in 2006, the sales volume of premium white spirits was merely 0.48% of the whole white spirits industry, but the sales revenue accounted for 15% of the white spirits industry.<sup>50</sup> As leading producers of high-priced white spirits, Moutai and Wuliangye own roughly 75% of the market share in the high-priced white spirits market.<sup>51</sup>

The popularity of Moutai and Wuliangye’s products could be explained by the importance of white spirits in Chinese culture. White spirits are traditionally served during special occasions, such as weddings, family gatherings, reunions, and business or official banquets. White spirits are also popular gifts due to the tradition of Chinese gift-giving. Because of its price, the white spirits produced by Moutai and Wuliangye are usually chosen as gifts for official or business purposes. Therefore, such preference of picking white spirits as gifts further increases the price, which has soared since 2009. For example, the average retail price of Moutai was 800 yuan per bottle (\$123 USD per bottle) in 2009.<sup>52</sup> By the end of 2011, the price increased to 2,000 yuan per bottle (\$308 USD per bottle), and in January 2012, the price reached

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50. Zhang Juan & Tan Liyong, *Woguo Baijiu Hangye de Xianzhuang Yu Fazhan Qushi* (我国白酒行业的现状与发展趋势) [*Current Situation and Development of White Spirits Industry in China*], 5 SHIDAI JINGMAO [ECON. & TRADE UPDATE] 57, 58 (2007).

51. *Id.* at 58.

52. 2015 Nian Zuixin, *Jianguo Yilai Linian Maotaijiu Jiage Biao* (2015 年最新, 建国以来历年茅台酒价格表) [*The Latest Calculation in 2015, The Price Figure of Moutai Since the Founding of PR China*], JIUZHI WANG [LIQUOR WEB] (Aug. 8, 2015), <http://www.cnjiuzhi.com/price/p6706.html>.

its peak of 2,250 yuan per bottle (\$346 USD per bottle).<sup>53</sup> Wuliangye also admitted that the wholesale prices of its liquors increased by 20 to 30 percent as of September 10, 2011.<sup>54</sup>

On February 5, 2012, however, President Xi Jinping, the newly elected General Secretary of the Communist Party in China, issued his “eight-point principles” for government officials, which imposed a form of austerity on civil servants.<sup>55</sup> President Xi hoped to end extravagant taxpayer-financed banquets and bribes that are typically associated with the giving of gift-wrapped luxuries, such as premium white spirits.<sup>56</sup> This political incident was one of the major reasons why this best-selling period of premium white spirits ended.<sup>57</sup>

As a result, the sale of Moutai and Wuliangye’s white spirits plummeted before the 2013 Chinese New Year, which used to be a peak selling season.<sup>58</sup> During this time period, the price of Moutai dropped to 1,900–2,300 yuan per bottle (\$292–\$354 USD per bottle), compared to 2,600–3,000 yuan per bottle (\$400–\$462 USD per bottle) in the previous Chinese New Year. Further, the prices of Wuliangye spirits even dropped below 1,000 yuan per bottle (\$154 USD per bottle) during this time.<sup>59</sup> Despite the price

53. Zhang Xin & Liu Jingyi, *Canting Shou Moutai, Jieqian Po Liangqian* (餐厅售茅台, 节前破两千) [*The Price of Moutai Reached 2,000 RMB/Bottle Before the Spring Festival*], XINHUA WANG [XINHUA NET] (Jan. 28, 2013), [http://news.xinhuanet.com/fortune/2013-01/28/c\\_124289908.htm](http://news.xinhuanet.com/fortune/2013-01/28/c_124289908.htm).

54. SHENZHEN STOCK EXCHANGE, YIBIN WULIANGYE GUFEN YOUXIAN GONGSI DONGSHIHUI GONGGAO (宜宾五粮液股份有限公司 董事会公告) [WULIANGYE’S ANNOUNCEMENT OF BOARD OF DIRECTORS] (Aug. 30, 2011), <http://disclosure.szse.cn/m/finalpage/2011-08-31/59901595.PDF>.

55. *Zhonggong Zhongyang Zhengzhiju Zhaokai Huiyi Shenyi Guanyu Gaijin Gongzuo Zuofeng, Miqie Lianxi Qunzhong de Youguan Guiding, Fenxi Yanjiu 2013 Nian Jingji Gongzuo* (中共中央政治局召开会议审议关于改进工作作风、密切联系群众的有关规定 分析研究二〇一三年经济工作) [*CPC Central Committee Political Bureau Holding Meeting to Improve the Work, Keeping Close Contact with the Masses, and Analyzing the Economic Work in 2013*], PEOPLE.CN (Dec. 5, 2012), <http://cpc.people.com.cn/n/2012/1205/c64094-19793530.html>.

56. As the first point, President Xi emphasizes that no banquet or reception should be held or arranged for civil servants, as gifts and premium wines are traditionally given and served in such banquets and receptions. *See id.*

57. Xu Bing, “*Baxiang Guiding*” *Duiyu Jingji de Yingxiang* (“八项规定” 对于经济的影响) [*The Impact of “Eight Principles” on The Economy*], LIAOWANG ZHONGGUO [OUTLOOK CHINA], [http://www.outlookchina.net/template/news\\_page.asp?id=6392&page=1](http://www.outlookchina.net/template/news_page.asp?id=6392&page=1) (last visited Mar. 24, 2017).

58. Zhang Xin & Liu Jingyi, *supra* note 53.

59. *Id.*



decrease and distributors' promotional efforts, the market for high-priced white spirits remained sluggish.<sup>60</sup>

In response, Moutai and Wuliangye required their dealers to strictly implement RPM in order to prevent the retail price from decreasing.<sup>61</sup> According to disclosed information from the Provincial Agencies, beginning in 2009, Wuliangye entered into more than 3,200 RPM agreements with independent distributors.<sup>62</sup> For those who violated these RPM agreements, Wuliangye imposed various punishments, such as reducing supply, confiscating deposits, deducting market supporting fees, and imposing fines.<sup>63</sup> For example, in 2011, Wuliangye stopped supplying a large-scale supermarket chain because it sold Wuliangye white spirits below the minimum resale price set by Wuliangye.<sup>64</sup> Further, in 2012, Wuliangye punished fourteen distributors in eleven provinces and municipalities for "selling below the restricted price" by confiscating deposits and cutting fees for market promotions.<sup>65</sup> The CEO of Moutai stated publicly: "The key assignment of the company is to avoid these price drops. . . ." <sup>66</sup> Like Wuliangye, Moutai also punished three dealers for selling Moutai white spirits below the required price floor. Moutai imposed a penalty of 20 percent of deposits on the three dealers as a result of their violations of the RPM and threatened to revoke their distribution agreements in the event of future violations.<sup>67</sup>

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60. *Id.*

61. Sichuan Dev. & Reform Comm'n, *Wuliangye Gongsì Shìshì Jiàgè Longduan Bei Chufa 2.02 Yiyuan* (五粮液公司实施价格垄断被处罚 2.02 亿元) [*The Penalty of 202 Million Yuan on Wuliangye's Price Monopoly Behavior*], SCDRC.GOV (Feb. 22, 2013), <http://www.scdrc.gov.cn/dir25/159074.htm> [hereinafter *Sichuan Provincial Agency's Decision on Wuliangye*].

62. *Id.*

63. *Id.*

64. *Id.*

65. *Id.*

66. Yang Qiubo, *Moutai Huiying Jiàgè Longduan Jiànchá, Chèxiào Duì Xiàngguān Jìngxiàoshāng Chufa* (茅台回应价格垄断检查 撤销对相关经销商处罚) [*Moutai Responses to the Price Monopoly Investigation and Revoking Punishments on Distributors*], CAIXIN.COM (Jan. 16, 2013), <http://companies.caixin.com/2013-01-16/100483460.html>.

67. *Id.*

*b. The NDRC's Decisions*

The NDRC authorized Provincial Agencies in Sichuan province and Guizhou province to investigate Wuliangye and Moutai, respectively,<sup>68</sup> and the agencies started investigating around January 2013.<sup>69</sup> In response to the Guizhou agency's investigation, Moutai declared on its official website that (1) all of the company's marketing policies that violated the AML would be terminated immediately, (2) punishments for distributors would be revoked, and (3) all confiscated deposits would be returned to distributors.<sup>70</sup> One day later, Wuliangye made a similar announcement on its website.<sup>71</sup>

Despite the two companies' "confessions," however, the Provincial Agencies imposed on Moutai and Wuliangye fines calculated as 1 percent of each company's sales revenue of the previous year.<sup>72</sup> Both companies paid the penalties in full in less than a

68. This is because Wuliangye is headquartered in Sichuan province and Moutai is headquartered in Guizhou province.

69. In the end of December 2012 Wuliangye and Moutai punished their dealers for violating the RPM agreements. *See Sichuan Provincial Agency's Decision on Wuliangye*, *supra* note 61; *see also Guanyu Moutai Jiage Longduan de Gonggao* (贵州物价局关于“茅台价格垄断罚款”公告) [*Penalty Decision on Moutai's Price Monopoly*], CFDA.COM (Feb. 25, 2013), <http://www.cfda.com.cn/newsdetail.aspx?id=61047> [hereinafter *Guizhou Provincial Agency's Decision on Moutai*]. Shortly thereafter, on January 16, 2013, Moutai made an announcement on its official website claiming that it would stop implementing RPM agreements because of the Provincial Agency's investigation. One day after, Wuliangye made a similar announcement. *See Kweichow Moutai Group, Maotai Gonggao* (茅台公告) [Moutai Announcement] (Jan. 16, 2013) [hereinafter *Moutai Announcement*], <http://www.china-moutai.com/xinwen/2013/645.html>; *see also Wuliangye, Wuliangye Gonggao* (五粮液公告) [Wuliangye Announcement] (Jan. 17, 2013) [hereinafter *Wuliangye Announcement*], <http://www.wuliangye.com.cn/zh/main/main.html#/g=NEWS&id=33&dId=50>. Therefore, it is reasonable to infer that the agencies conducted their investigations between the end of December 2012 and January 16, 2013. Because, normally, companies respond quickly after the agencies launch their investigations, it is likely that the agencies started the probes only one or two days before the companies made their announcements.

70. Moutai Announcement, *supra* note 69.

71. Wuliangye Announcement, *supra* note 69.

72. *See Sichuan Provincial Agency's Decision on Wuliangye*, *supra* note 61; *see also Guizhou Provincial Agency's Decision on Moutai*, *supra* note 69. Guizhou Provincial Agency imposed a 247 million RMB fine on Moutai, and Moutai's annual report of 2012 revealed that its sales volume was 26.4 billion RMB

month.<sup>73</sup> While each of the Provincial Agencies issued their respective decisions, these decisions are brief with insufficient analysis. Compared to the Guizhou agency's one paragraph decision regarding Moutai, the Sichuan regulators disclosed relatively more information relating to Wuliangye. The Sichuan Regulators stated that by entering into price-restricting agreements and dividing geographical markets, Wuliangye set the price floor for products, which were vertical monopoly agreements and violated Article 14 of the AML.<sup>74</sup> Such behaviors thus restricted and eliminated the competition and harmed consumers' welfare.

## 2. The Infant Formula Milk Case

In 2013, the NDRC fined six multinational infant formula milk producers for implementing RPMs in violation of the AML. The NDRC launched the investigation on multinational dairy companies because prices of foreign-brand infant formula milk continuously increased after 2008, when Chinese domestic brands were involved in a food-safety scandal.

### *a. Background Story: The 2008 Chinese Milk Scandal Boosted Foreign Brands' Prices*

In 2008, China's infant formula milk industry was involved in a food-safety scandal.<sup>75</sup> Several domestic brands of infant formula milk were found to be adulterated with melamine, a toxic chemical.<sup>76</sup> The contaminated milk powder caused almost three hundred thousand babies to become ill, and six infants died of

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in 2012. See MOUTAI ANNUAL REPORT 2012, at 6 (Apr. 9, 2013), <http://www.moutaichina.com/touzi/2013/337.html>. Therefore, although Guizhou Provincial Agency did not clearly state the percentage of sales volume used to calculate the fine, one can deduce that, as in the Sichuan Provincial Agency's decision, the fine on Moutai was 1 percent of its sales volume earned in the previous year.

73. Chen Jie, *Moutai Wuliangye Yi Quan'e Jiaona 4.49 Yiyuan Jiage Longduan Fadan* (茅台五粮液已全额缴纳 4.49 亿元价格垄断罚单) [*Moutai and Wuliangye Paid the Penalty of CNY\$449 Million in Full*], NEWS.CN (Mar. 14, 2013), [http://news.xinhuanet.com/photo/2013-03/14/c\\_124460543.htm](http://news.xinhuanet.com/photo/2013-03/14/c_124460543.htm).

74. *Sichuan Provincial Agency's Decision on Wuliangye*, *supra* note 61.

75. Yang Fan, *Zhongguo Ruye Zhe Wunian* (中国乳业这五年) [*Five Years of China's Dairy Industry*], PEOPLE.CN (2013), [http://paper.people.com.cn/xaq/html/2013-10/01/content\\_1324677.htm](http://paper.people.com.cn/xaq/html/2013-10/01/content_1324677.htm).

76. *Id.*

kidney stones and kidney damage.<sup>77</sup> Afterward, it came to light that a well-known domestic brand of infant formula milk was contaminated with enterobacter sakazakii, a life-threatening bacterium to infants.<sup>78</sup> Later, several domestic milk brands were accused of selling milk powder that caused infants to have dangerously high levels of female hormones.<sup>79</sup>

As a result of safety concerns, the scandal ruined the reputation of infant formula milk producers in China, and Chinese parents resorted to purchasing foreign brands instead.<sup>80</sup> Prior to the milk scandals in 2008, domestic milk producers accounted for more than 60 percent of the market share. After the scandal, however, the market share dropped to 48 percent in 2013.<sup>81</sup> Due to Chinese parents' obsession with foreign infant formula milk and the growing distrust of domestic brands, prices of foreign-brand infant formula milk have increased by at least 30 percent since 2008.<sup>82</sup>

#### *b. The NDRC's Decision*

On August 7, 2013, approximately five months after launching the investigation, the NDRC imposed fines totaling 668.73 million yuan (about \$102.88 million USD) on six manufacturers of infant formula—five foreign producers and one Hong Kong company—for restricting the minimum resale price with distributors in violation of Article 14 of the AML.<sup>83</sup>

According to the NDRC's decision, the involved companies fixed their products' resale prices or restricted the minimum resale prices and punished violators through various methods,

77. *China Dairy Products Found Tainted with Melamine*, BBC NEWS (July 9, 2010), <http://www.bbc.com/news/10565838>.

78. Yang Fan, *supra* note 75.

79. *Id.*

80. *Id.*

81. *Id.*

82. Edward Wong, *Chinese Search for Infant Formula Goes Global*, N.Y. TIMES, July 26, 2013, at A1.

83. Nat'l Dev. & Reform Comm'n, *Heshengyuan Deng Rufen Shengchan Qiye Weifan Fanlongduan Fa Xianzhi Jingzheng Xingwei Gongbei Chufa 6.6873 Yiyuan* (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) [*Penalty on Milk Powder Producers of Restricting Competition and Fined 668.73 Million Yuan*], NDRC, [http://www.ndrc.gov.cn/xwzx/xwfb/201308/t20130807\\_552991.html](http://www.ndrc.gov.cn/xwzx/xwfb/201308/t20130807_552991.html) (last visited Mar. 29, 2016) [hereinafter *NDRC Decision on Infant Formula Milk Producers*].

such as imposing fines, deducting rebates, and limiting or stopping supply.<sup>84</sup> The NDRC further claimed that infant formula milk producers restricted resale prices, boosted prices, eliminated intrabrand competition, and damaged consumers' welfare.<sup>85</sup> Furthermore, the decision also disclosed that all the companies involved admitted that their conduct constituted RPM and that they failed to prove that their conduct could satisfy the exemption requirements under Article 15 of the AML.<sup>86</sup>

Notably, the NDRC investigated nine companies in total, but it only imposed penalties against six companies.<sup>87</sup> The NDRC did not penalize three companies because they voluntarily reported their RPM to the NDRC. Among the six companies, the NDRC gave mitigated penalties to five of them because they proactively cooperated with the investigation and/or carried out self-corrective measures.<sup>88</sup> The varying penalties imposed by the NDRC can be seen in Figure 1.<sup>89</sup>

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84. *Id.*

85. *Id.*

86. *Id.*

87. *Id.*

88. *Id.*

89. *See* Figure 1.

Figure 1. Penalties on infant formula producers.<sup>90</sup>

Name	Reasons for Penalty	Self-Corrective Measures	Commitment	Penalty (% of previous year's sales revenue)
Biosime	Serious violations. Failed to proactively cooperate with the investigation and failed to implement qualified corrective measures	Rewarded consumers extra 50% purchasing points (the resale price could be reduced by 11%)	No price increases within one year	6%
Mead Johnson Nutrition	Failed to proactively cooperate with the investigation, but proactively implemented corrective measures	Reduced the prices of its major products by 7%–15%	No price increases within one year	4%
Dumex	Proactively cooperated with the investigation and implemented corrective measures	Reduced the prices of its major products by 5%–20%	No price increases of its major products within one year	3%
Abbott	Proactively cooperated with the investigation and implemented corrective measures	Reduced the prices of its six major products by 4%–12%	Unclear	3%
Royal Friesland Campina	Proactively cooperated with the investigation and implemented corrective measures	Reduced prices by 5%	Unclear	3%
Fonterra	Proactively cooperated with the investigation and implemented corrective measures	Reduced prices by 9%	Unclear	3%
Wyeth Nutrition	Voluntarily reported RPM agreement to the agency, submitted important evidence, and proactively implemented corrective measures	The first company to reduce prices—reduced the prices of its twelve major products by 6%–20%	No price increases of new products within one year	0%
Beingmate	Voluntarily reported RPM agreement to the agency, submitted important evidence, and proactively implemented corrective measures	Reduced prices of its major products by 5%–20%	Cease implementing all RPM agreements	0%
Meiji	Voluntarily reported RPM agreement to the agency, submitted important evidence, and proactively implemented corrective measures	Reduced prices of all products by 3%–7%	No price increases within two years	0%

90. Data is taken from disclosed information provided by the NDRC. See *NDRC Decision on Infant Formula Milk Producers*, *supra* note 83; see also Gu Zhengping, *Ying'er Peifang Naifen Qiye Zao Chuangjilu Zhongchuan, Cong Chufa Jieguo Fenxi Fanlongduanfa Xia Kuada Zhengce de Juti Yunyong* (婴儿配方奶粉企业遭创纪录重罚从处罚结果分析反垄断法下宽大政策的具体运用) [*The Huge Penalty on Infant Formula Producers, Analysis of the Application of Leniency Policy by the NDRC*], CLI.A.216737 (2013), <http://v6.pkulaw.cn/lawfirmarticles/1778401633.html> (Lawinfochina).

### 3. The Corrective Lens Case

Before the AML's enactment, it was a well-known "secret" that distributors of corrective lenses (such as eyeglasses and contact lenses) received monopolistic profits. To a large extent, such profits can be attributed to implementing RPM. In 2013, however, the NDRC investigated and punished several multinational producers in the corrective lens market for making these agreements.

#### *a. Background Story: Abnormally High Profits and Boycott of Discounters*

According to a report by *Southern Urban Daily* in 2005, the cost of eyeglass lenses was normally less than 10 percent of retail prices.<sup>91</sup> Further, in 2013, an undercover journalist disclosed the incredibly high profits received by distributors of the largest corrective lens retail market in Beijing: eyeglass frames cost only 16–25 yuan (\$2–\$4 USD) to produce, but retailers charged customers between 200–500 yuan (\$31–\$77 USD) for the same pair.<sup>92</sup> The wholesale price of eyeglass lenses was only 8 yuan (\$1.2 USD), but the retail price was approximately 300 yuan (\$46 USD).<sup>93</sup>

With such extravagant markups, some savvy distributors began to reduce prices in order to gain a larger market share. In two cities, a few "pioneers" created "eyeglass supermarkets," which offered affordable prices.<sup>94</sup> For various reasons, however, such businesses faded away rather quickly. In Wuhan City, for example, manufacturers stopped supplying the eyeglass supermarkets with their brands and removed the existing stock from

91. Yang Xiaohong & Fan Suxian, *Kaiye Yitian Zao Fengsha, Hangye Baoli Nanrong Pingjia Yanjingdian?* (开业一天遭封杀 行业暴利难容平价眼镜店?) [*Be Boycotted on the First Business Day, No Room for Discounters?*], SOUTH-CN.COM (Feb. 23, 2005), <http://www.southcn.com/news/dishi/guangzhou/jingji/200502230417.htm>.

92. Yi Fangxing & Shen Zhimin, *Beijing Bufen Yanjingdian Xiaoshou You "Zhangyanfa"* (北京部分眼镜店销售有"障眼法") [*"Tricks" of Eyeglasses Selling in Beijing*], BEIJING NEWS, Apr. 15, 2013, at A16–17.

93. *Id.*

94. See *Dijia Xiaoshou Tiaozhan Hangye Qianguize, Pingjia Yanjingdian Zao "Zhiming Fengsha"* (低价销售挑战行业潜规则 平价眼镜店遭"致命封杀") [*Selling with Low Prices Challenges Unspoken Rules in Industry, Eyeglasses Supermarket been Deadly Boycotted*], CNR.CN (Aug. 14, 2013), [http://china.cnr.cn/yaowen/201308/t20130814\\_513312136.shtml](http://china.cnr.cn/yaowen/201308/t20130814_513312136.shtml); see also Yang Xiaohong & Fan Suxian, *supra* note 91.

their shelves.<sup>95</sup> These manufacturers claimed that they were threatened by other distributors, who said that they would stop carrying their brands unless the manufacturers stopped supplying products to discount retailers, such as eyeglass supermarkets.<sup>96</sup>

The Eyeglasses Business Association in Guangzhou City also played a key role in squeezing the discounters out of the market. The Eyeglasses Business Association, which has ninety-seven members (of which twenty-nine are eyeglass retailers), held a meeting in January 2005 in Guangzhou City with its members and issued a public letter encouraging its members to stop supplying brands that discounters sold.<sup>97</sup> After the issuance of the public letter, one third of the suppliers discontinued supply and removed the existing stock of corrective lenses from the discounters' shelves.<sup>98</sup>

#### *b. The NDRC's Decisions*

In August 2013, the NDRC launched an investigation into the corrective lens market and publicized its decision on May 29, 2014.<sup>99</sup> According to disclosed information, the NDRC ordered three Provincial Agencies—Beijing, Shanghai, and Guangdong—to investigate the corrective lenses producers within their administrative regions.<sup>100</sup>

Three aspects of the decisions deserve greater attention. First, although RPM is a common phenomenon in the corrective lens market, the NDRC only investigated and fined several “producers of well-known brands” that had larger market shares,<sup>101</sup> all of which are branches of multinational companies in China's

95. Yang Xinci, *Wuhan Shoujia Pingjia Yanjing Chaoshi Zao Fengsha* (武汉首家平价眼镜超市遭封杀) [*Boycott to the First Discounter of Eyeglasses in Wuhan City*], SOHU.COM (Mar. 27, 2006), <http://news.sohu.com/20060327/n242492655.shtml>.

96. *Id.*

97. *Id.*

98. *Id.*

99. Nat'l Dev. & Reform Comm'n, *Bufen Yanjing Jingpian Shengchan Qiye Weichi Zhuanshou Jiage Xingwei Bei Yifa Chachu* (部分眼镜镜片生产企业维持转售价格行为被依法查处) [*Imposed Penalty on Part Corrective Lenses Producers' RPM*], SDPC.GOV (May 29, 2014), [http://www.sdpc.gov.cn/gzdt/201405/t20140529\\_613562.html](http://www.sdpc.gov.cn/gzdt/201405/t20140529_613562.html) [hereinafter *NDRC Decision on Corrective Lenses Producers*].

100. *Id.*

101. *Id.*



market.<sup>102</sup> The NDRC claimed that these producers restricted distributors' rights to freely set their own prices through RPM agreements.<sup>103</sup> In this way, manufacturers eliminated and weakened the price competition by raising and maintaining prices at a high level.<sup>104</sup> The NDRC, however, did not investigate or decide whether there were price cartels (horizontal price-fixing agreements) among distributors or whether the Eyeglasses Business Association assisted in reaching and maintaining such price cartels. From the news reports mentioned above, the industry association in Guangzhou City played a key role in helping dealers to fix the minimum resale prices. Unfortunately, from the disclosed information, the NDRC did not mention any investigations or fines imposed on the distributors or the industry association.

Second, the NDRC, for the first time, used the term RPM in the headline of the NDRC-issued decision. Previously, in the liquor case, the NDRC used the term "price monopoly,"<sup>105</sup> while in the infant formula milk case it used the phrase "behaviors of restricting competition" in the headline of the decision to refer to such arrangements.<sup>106</sup> Some scholars note that RPM is a legal term transplanted from U.S. antitrust law, which indicates that the NDRC may follow the U.S. model in analyzing RPM, and argue that the NDRC should instead follow the analyzing model of EU competition law.<sup>107</sup> While this argument seems suspect because the mere use of the term does not necessarily determine which model the NDRC actually follows, the inconsistent use of terms in the NDRC's decisions, at the very least, reveals the

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102. They involved companies of the Shanghai branch of French Essilor, the Beijing branch of Japan's Nikon, the Guangzhou branch of German Zeiss, the Beijing branch of U.S.-based Bausch & Lomb, and the Shanghai branch of U.S.-based Johnson & Johnson. *See id.*

103. *Id.*

104. *Id.*

105. *See Sichuan Provincial Agency's Decision on Wuliangye, supra* note 61; *see also Guizhou Provincial Agency's Decision on Moutai, supra* note 69.

106. *See NDRC Decision on Infant Formula Milk Producers, supra* note 83.

107. *See Hong Yingying, Woguo Xianzhi Zhuanshou Jiage Zhidu de Tixihua Jieshi Ji Qi Wanshan* (我国限制转售价格制度的体系化解释及其完善) [*The Systematic Explanation and Improvement of RPM in China*], 4 HUADONG DAXUE XUEBAO [ECUPL J.] 49, 57; *see also* Liu Xu, *Jianping: Guojia Fagaiwei Chachu Bufen Yanjingpian Shengchan Qiye Weichi Zhuanshou Jiage Xingwei* (简评: 国家发改委查处部分眼镜镜片生产企业维持转售价格行为) [*Analysis on the NDRC's Penalty on Part Eyeglasses Producers' RPM*], BLOG.SINA (May 30, 2014), [http://blog.sina.com.cn/s/blog\\_6afc758f0101fisp.html](http://blog.sina.com.cn/s/blog_6afc758f0101fisp.html).

agency's uncertain attitude regarding the approaches to analyzing RPM.

Third, as in the infant formula milk case, the NDRC in the corrective lens case exempted some companies from paying a penalty because they voluntarily reported the RPM to the NDRC and gave mitigated penalties to others for proactively cooperating with the investigation and/or carrying out self-corrective measures. The difference, however, is that the infant formula milk producers received mitigated penalties calculated as 3 to 4 percent of the previous year's sales revenue, while in the corrective lens case, producers were given mitigated penalties of a mere 1 to 2 percent, even though the mitigated penalties were granted for similar reasons. Figure 2 displays the fines imposed on the involved companies and the NDRC's reasoning for its decisions.

Figure 2. Penalties on corrective lens producers.

Name	Reasons for Mitigated Penalties	Penalties (% of sale volume in the previous year)
Shanghai branch of Essilor, a French company	Although the company had a strong ability to control prices, it proactively implemented self-corrective measures	2%
Beijing branch of Nikon, a Japanese company	Failed to cooperate with the investigation, but proactively implemented self-corrective measures	2%
Guangzhou branch of Zeiss, a German company; Beijing branch of the Bausch & Lomb, a U.S.-based company; Shanghai branch of Johnson & Johnson, a U.S.-based company	Proactively cooperated with the investigation and implemented self-corrective measures	1%
Shanghai branches of Hoya Vision, a Japanese company; Shanghai branches of Weicon, a Taiwan-based company	Voluntarily reported RPM agreements to the agency, provided important evidence, actively cooperated with the investigation, and implemented self-corrective measures	0%

#### 4. The Automotive Industry Cases

The NDRC's investigation of the automotive industry has been referred to as a "storm," which has attracted close attention and concern from the automotive industry and the antitrust community.<sup>108</sup> From 2014 to 2015, the NDRC imposed fines totaling

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108. Liu Xu, "Fengbao Zhong" de Qicheye Yu "Fengbao Shi de" Fanlongduan Zhifa ("风暴中"的汽车业与"风暴式的"反垄断执法) [The Vehicle Industry in "A Storm" and The "Stormy" Antitrust Enforcement], PENGPAI NEWS (Aug. 7, 2014), [http://www.thepaper.cn/newsDetail\\_forward\\_1260375\\_1](http://www.thepaper.cn/newsDetail_forward_1260375_1).

over two billion yuan (\$308 million USD) on companies in the automotive market.<sup>109</sup> In 2014, the NDRC fined Audi (a Volkswagen subsidiary) and Chrysler (a Fiat subsidiary) for restricting resale prices of motor vehicles and their spare parts.<sup>110</sup> Several months later, Mercedes-Benz was also fined 350 million yuan (\$56 million USD) because it implemented RPM agreements.<sup>111</sup> Further, in 2015, Dongfeng-Nissan and its seventeen dealers in Guangdong Province were fined a total of 142.4 million yuan (\$22.25 million USD) for engaging in RPM.<sup>112</sup> Other than RPMs, the NDRC also investigated and ultimately penalized twelve Japanese companies—eight auto parts manufacturers and four bearings manufacturers—for reaching horizontal agreements to manipulate prices through a price cartel.<sup>113</sup> In Hubei Province, four distributors of Bayerische Motoren Werke (BMW) were fined for conspiring to charge a uniform fee for inspecting motor vehicles before delivering them to consumers.<sup>114</sup> In light of the subject matter of this article, the following section will only address cases related to RPM.

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109. Bai Chaoyang & Zhou Ju, *2015 Qiche Liutong Xiehui Nianhui Toulou 5 Da Fanlong duan Redian* (2015 汽车流通协会年会透露 5 大反垄断热点) [*Five Hot Issues Disclosed in the 2015's Auto Distribution Association Annual Meeting*], AUTOREPORT (Dec. 7, 2015), <http://www.autoreport.cn/cjgz/20151107/0906564608.html>.

110. See *Hubei Provincial Agency's Decision on FAW-Volkswagen*, *supra* note 6; see also *Shanghai Provincial Agency's Decision on Chrysler*, *supra* note 6.

111. See *Jiangsu Provincial Agency's Decision on Mercedes-Benz*, *supra* note 6.

112. See *Guangdong DRC's Decision on Dongfeng-Nissan*, *supra* note 5.

113. Nat'l Dev. & Reform Comm'n, *Riben Shi'er Jia Qiye Shishi Qiche Lingbujian He Zhoucheng Jiage Longduan Bei Guojia Fazhangaiwei Fakuan 12.35 Yiyuan* (日本十二家企业实施汽车零部件和轴承价格垄断被国家发展改革委罚款 12.35 亿元) [*Penalty of 1.235 Billion Yuan on Twelve Japanese Companies of Price Monopoly on Auto Spare Parts and Bearings*], NDRC, [http://jjs.ndrc.gov.cn/gzdt/201408/t20140820\\_622756.html](http://jjs.ndrc.gov.cn/gzdt/201408/t20140820_622756.html) (last visited on Mar. 30, 2016).

114. Hubei Province Price Bureau, *Guifan Qiche Xiaoshou Zhong de Jiage Xingwei Tixing Gaojiejhui* (规范汽车销售中的价格行为提醒告诫会) [*Warning Meeting on Distributors about Charging PDI Fees*], HUBEI (Aug. 13, 2014), [http://gkml.hubei.gov.cn/auto5472/auto5509/201408/t20140813\\_516440.html](http://gkml.hubei.gov.cn/auto5472/auto5509/201408/t20140813_516440.html).

*a. Background Story: RPM Was Once Supported by an Administrative Rule*

In 2005, three years before the enactment of the AML, the NDRC, SAIC, and MOFCOM collectively enacted Measures for the Implementation of the Administration of Automobile Brand Sales (“Measures”).<sup>115</sup> The goal of the Measures is to regulate branded automotive sales.<sup>116</sup> It permits manufacturers or general dealers of branded motor vehicles to use their discretion in establishing their distribution network, which includes, among others, determining resale prices, allocating geographic distribution markets, and providing requirements for after-sale services.<sup>117</sup> Moreover, the Measures states that distributors cannot carry any other brands without the authorization of the manufacturers.<sup>118</sup> Also, authorized distributors cannot sell motor vehicles to other distributors unless they have the permission of the manufacturers, and, thus, can only sell to end consumers.<sup>119</sup>

Following the provisions established in the Measures, the 4S retail model quickly became the most popular method for multinational auto producers and general dealers to distribute their automobiles in the Chinese market. The 4S represents sales, showrooms, services, and spare parts. A 4S store equips all four functions under one roof.<sup>120</sup> The branded motor vehicle manufacturers or imported motor vehicles’ general dealers have control over 4S stores, including the location and decoration of the stores, investment in these stores, and the fees charged for after-sale services and spare parts.<sup>121</sup> Operators of 4S stores, however, are independent distributors. As a result, each brand’s distribution network is its own closed system in which intrabrand competition is highly restricted.

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115. Qiche Pinpai Xiaoshou Guanli Shishi Banfa (汽车品牌销售管理实施办法) [Measures for the Implementation of the Administration of Automobile Brand Sales] (promulgated by the Ministry of Commerce, Feb. 21, 2005, effective Apr. 1, 2005), CLI.4.57048 (EN) (Lawinfochina).

116. *Id.* art. 1.

117. *Id.* art. 6.

118. *Id.* art. 27.

119. *Id.* art. 28.

120. SU HUA, *supra* note 15, at 203–04.

121. See Liu Jin, *Qiche 4S Xiaoshou Moshi de Fanlongduan Fa Guizhi Yanjiu* (汽车 4S 销售模式的反垄断法规制研究) [Study of 4S Model of Motor Vehicle Sales Under the AML], 8 SHENGCHANLI YANJIU [PRODUCTIVITY RES.] 110 (2010).

In the beginning, the Measures played an important role in regulating the chaotic auto market and attracting foreign companies to export their motor vehicles to China and to invest in the Chinese market. In 2009, China “emerged from the global recession as the world’s largest auto market,” with a total sales revenue that surpassed that of the United States.<sup>122</sup> To a certain extent, such impressive growth can be attributed to the Measures.

The drawbacks of the Measures, however, have gradually been exposed in recent years. While brand manufacturers and general dealers continue to reap high profits, consumers must pay high prices to purchase these vehicles, and retail dealers shoulder the high costs of operating a 4S store.<sup>123</sup> For this reason, many critics have called for action to dissolve each brand’s closed distribution network and to boost intrabrand competition, which would require repealing the Measures.

Since 2014, the NDRC has investigated and fined several well-known auto manufacturers for implementing RPM agreements. The NDRC’s recent investigations of RPM agreements seems to have paved the way for the enactment of the Measures for Automobile Sales (“New Measures”), which was published to solicit public opinion on January 6, 2016, and is expected to be passed in 2017.<sup>124</sup> If the New Measures is passed, the Measures will be repealed, and motor vehicle manufacturers will no longer have as much control over the distribution of their brands as they currently do. For example, under New Measures, a dealer can sell motor vehicles without the manufacturer’s authorization.<sup>125</sup> In addition, spare parts for a particular brand can be resold to other

122. Kyle Sullivan, *China’s Auto Retail Market*, CHINA BUS. REV. (July 1, 2010), <http://www.chinabusinessreview.com/chinas-auto-retail-market>.

123. Xu Xinyu & Su Hua, *Qiche Shichang Zongxiang Longduan Xingwei de Jieding Yu Guizhi* (汽车市场纵向垄断行为的界定与规制) [*Definition and Regulation of Vertical Monopoly Behaviors in Automobile Market*], 6 ZHONGGUO JIAGE JIANGUAN YU FANLONGDUAN [PRICE SUPERVISION & ANTIMONOPOLY CHINA J.] 21, 24 (2014).

124. *Qiche Xiaoshou Guanli Banfa* (Zhengqiu Yijian Gao) (汽车销售管理办法 (征求意见稿)) [Measures for the Administration of Automobile Sales (Draft)] (drafted by the Ministry of Commerce, Jan. 6, 2016), <http://tfs.mofcom.gov.cn/article/as/201601/20160101227922.shtml>.

125. Article 9 states that, if dealers do not obtain authorization from manufacturers, they shall give written notice to consumers to express the lack of such authorization and shall notify consumers who is responsible for the quality of the vehicles. *See id.* art. 9.

independent dealers as well as to consumers.<sup>126</sup> Further, a manufacturer cannot prevent its dealers from providing after-sale services for other brands.<sup>127</sup> As a result, New Measures would promote intrabrand competition and remove restrictions placed on the after-sales service market.

### *b. NDRC and its Provincial Agencies' Decisions*

From 2014 to 2015, the NDRC's flurry of RPM investigations in the automotive industry involved Mercedes-Benz, Audi, Chrysler, and Dongfeng-Nissan. The following section will discuss each NDRC decision in detail.

#### *i. The Mercedes-Benz Case*

The NDRC investigation of Mercedes-Benz was full of dramatic plot twists. On August 3, 2014, Mercedes-Benz publicly claimed that it would reduce the prices of some spare parts by 15 percent, on average.<sup>128</sup> Apparently, by reducing prices, Mercedes-Benz wished to escape from the "storm" of NDRC antitrust investigations. Nine officials of the NDRC, however, still raided the Mercedes-Benz office in Shanghai only a day after the price-cut announcement.<sup>129</sup> In the raid, officials of the Provincial Agency inspected computers and interrogated senior managers.<sup>130</sup> The timing of the raid confused Mercedes-Benz and some observers, who speculated that it may have been conducted because the price cut did not meet the authorities' expectations.<sup>131</sup>

Another interesting aspect of the investigation was who issued the final decision. Although Mercedes-Benz sells motor vehicles throughout mainland China, and dealers in several provinces

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126. *Id.* arts. 15, 16.

127. *See id.* art. 22.

128. Mercedes-Benz, *Jiang Tiaozheng Bufen Weixiu Peijian Jiage* (梅赛德斯-奔驰将调整部分维修配件价格) [*Reduces Prices of Part Auto Spare Parts*], MERCEDES-BENZ (Aug. 3, 2014), [http://www.mercedes-benz.com.cn/content/china/mpc/mpc\\_china\\_website/zhng/home\\_mpc/passengercars/home/passengercars\\_world/news/2014\\_News/tiaozhengpeijianjiage.html](http://www.mercedes-benz.com.cn/content/china/mpc/mpc_china_website/zhng/home_mpc/passengercars/home/passengercars_world/news/2014_News/tiaozhengpeijianjiage.html) [hereinafter *Mercedes-Benz Announcement*].

129. Wang Yipeng & Wang Junqing, *Benchi Shanghai Bangongshi Zao Fanlongduan Tuji Jiancha* (奔驰上海办公室遭反垄断突击检查) [*Antitrust Agency Raids Mercedes-Benz Shanghai Offices*], SINA.COM (Aug. 5, 2014), <http://finance.sina.com.cn/chanjing/gsnews/20140805/085419915156.shtml>.

130. *Id.*

131. *Id.*

were investigated, only the Jiangsu Province Agency made a final decision. Yet, the NDRC did not provide any reason for such a selective decision.

On May 20, 2015, Jiangsu Province issued a decision with respect to the RPM agreement implemented by Mercedes-Benz and its dealers. According to the decision, Mercedes-Benz and its dealers in Jiangsu Province agreed upon and carried out RPM agreements through teleconferences, as well as face-to-face meetings, to set the lowest resale price of its E-Class and S-Class model vehicles and certain spare parts.<sup>132</sup> According to the decision, the agency emphasized that by utilizing the market's superior position, Mercedes-Benz deprived and interfered with the rights of dealers to set prices, eliminated and restricted intrabrand competition, undermined the function of prices to allocate resources, and harmed consumer interests.<sup>133</sup>

The Provincial Agency penalized Mercedes-Benz 7 percent of its sales revenue in the previous year in Jiangsu Province, which totaled 350 million yuan (\$56.49 million USD).<sup>134</sup> In addition, the Provincial Agency stated that it had investigated thirty-three dealers in Jiangsu Province and levied fines as much as 1 percent of the previous year's sales revenue (a total of 7.87 million yuan (\$1.21 million USD)) against the dealers.<sup>135</sup> The agency, however, did not disclose any other details of the decision.

## ii. The FAW-Volkswagen Case

The FAW-Volkswagen Automobile Co., Ltd., a joint venture between FAW Group (a Chinese company) and Volkswagen Group (a German company), manufactures Audi and Volkswagen cars for sale in China. On September 11, 2014, the Provincial Agency in Hubei Province announced that it imposed penalties on FAW-Volkswagen and its dealers for implementing RPM agreements to restrict the prices of vehicles, after-sale service fees, and maintenance fees.<sup>136</sup> The Hubei Province Agency stated that, since 2012, FAW-Volkswagen and its ten dealers in Hubei province agreed and implemented a uniform price quotation to fix resale prices or restrict minimum resale prices.<sup>137</sup> In

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132. *Jiangsu Provincial Agency's Decision on Mercedes-Benz*, *supra* note 6.

133. *Id.*

134. *Id.*

135. *Id.*

136. *Hubei Provincial Agency's Decision on FAW-Volkswagen*, *supra* note 6.

137. *Id.*



addition, FAW-Volkswagen circulated notices and regulations and established working groups to supervise whether dealers adhered to the RPM agreements.<sup>138</sup> Moreover, the decision noted that, since 2013, some of the FAW-Volkswagen dealers in Hubei Province, through exchanging price quotation and holding meetings, entered into horizontal monopoly agreements.<sup>139</sup>

The Provincial Agency fined FAW-Volkswagen 6 percent of its sales revenue earned in the previous year in the market of Hubei Province.<sup>140</sup> With respect to dealers, seven were fined 1 to 2 percent of the sales revenue of the previous year. Two dealers were given an exemption: one dealer was the first to report the RPM to the Provincial Agency, provided significant evidence, and was in a subordinate position;<sup>141</sup> the other dealer received an exemption because it only had a minor violation and caused no damage.<sup>142</sup> One dealer was granted a mitigated penalty because it voluntarily reported the RPM to the Provincial Agency and played an insignificant role in implementing the RPM.<sup>143</sup>

### iii. The Chrysler Case

The Shanghai Provincial Agency announced similar accusations against Chrysler and its three dealers in the Shanghai District.<sup>144</sup> Chrysler was accused of implementing RPM agreements.<sup>145</sup> The Provincial Agency stated that, from 2012 to 2014, Chrysler signed RPM agreements with its dealers and circulated

138. *Id.*

139. *Id.*

140. *Id.*

141. See Hubei Province Price Bureau, *Mianchu Xingzheng Chufa Jueding Shu* (免除行政处罚决定书) [*Decision of Administrative Penalty Exemption*], NO. 1 E'JIA JIANMIAN (2014), [http://www.hbpic.gov.cn/zwgk/gfwj/xzkkhcf/201701/t20170110\\_23760.html](http://www.hbpic.gov.cn/zwgk/gfwj/xzkkhcf/201701/t20170110_23760.html) [hereinafter *Hubei Price Bureau Decision of Administrative Penalty Exemption*]; see also Hubei Daily, *Hubei Sheng Wujiaju Kaichu Shishang Zuida Fanlongduan Fadan* (湖北省物价局开出史上最大反垄断罚单) [*Hubei Provincial Agency Issued the Largest Penalty Decision*], PEOPLE.CN (Sept. 12, 2014), <http://hb.people.com.cn/n/2014/0912/c192237-22283362.html>.

142. Hubei Daily, *supra* note 141.

143. See Hubei Province Price Bureau, *Xingzheng Chufa Jueding Shu* (行政处罚决定书) [*Decision of Administrative Penalty*], NO. 18 E'JIA JIANCHU (2014), [http://www.hbpic.gov.cn/zwgk/gfwj/xzkkhcf/201701/t20170110\\_23763.html](http://www.hbpic.gov.cn/zwgk/gfwj/xzkkhcf/201701/t20170110_23763.html).

144. *Shanghai Provincial Agency's Decision on Chrysler*, *supra* note 6.

145. *Id.*

business polices involving price restrictions. For dealers who violated the RPM agreements, Chrysler reduced rebates, gave fines, circulated notifications, and delayed offering the newest or most popular products, among others.<sup>146</sup> In addition, three Chrysler dealers in the Shanghai District held a meeting on April 25, 2014, to sign a memorandum to conspire to fix prices on car maintenance time, spare parts, vehicle paint repair, and the period of time when price agreements would be enforced.<sup>147</sup>

Based on these facts, the Provincial Agency fined Chrysler 3 percent of its previous year's sales revenue for implementing RPM agreements in violation of Article 14 of the AML.<sup>148</sup> The Provincial Agency also imposed penalties on three dealers for reaching horizontal monopoly agreements in violation of Article 13 of the AML.<sup>149</sup> The dealer that was considered the organizer of the horizontal monopoly was fined 6 percent of its previous year's sales revenue, and the others were fined 4 percent of their sales revenue earned in the previous year.<sup>150</sup>

#### iv. The Dongfeng-Nissan Case

Dongfeng-Nissan is a joint venture between Dongfeng Motor Corporation (a Chinese state-owned company) and Nissan (a Japanese company) to make Nissan vehicles in China. In August 2014 the Guangdong Provincial Agency launched an investigation into Dongfeng-Nissan.<sup>151</sup> The Provincial Agency stated that, from 2012 to July 2014, Dongfeng-Nissan and its dealers fixed resale prices of its vehicles and punished dealers who violated such RPM agreements in Guangdong Province by circulating business rules and price regulations and establishing performance assessment systems.<sup>152</sup> In addition, the decision mentioned that dealers in Guangdong Province held several meetings from April 2012 to July 2014 to reach horizontal agreements to fix prices.<sup>153</sup>

The Provincial Agency issued its decision in September 2015 and fined Dongfeng-Nissan 123.3 million yuan (\$19.3 million

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146. *Id.*

147. *Id.*

148. *Id.*

149. *Id.*

150. *Id.*

151. *Guangdong DRC's Decision on Dongfeng-Nissan, supra* note 5.

152. *Id.*

153. *Id.*

USD, which was 3 percent of its sales revenue earned in the previous year), for implementing RPM agreements.<sup>154</sup> The agency also fined seventeen dealers a total of 19.1 million yuan (\$2.98 million USD, which was 2 to 4 percent of their sales revenue earned in the previous year) for reaching horizontal monopoly agreements.<sup>155</sup>

## II. FACTORS SHAPING THE NDRC'S ENFORCEMENT DECISIONS REGARDING RPM

Complicated and multifaceted factors have influenced and will continue to impact the enforcement of China's AML with respect to RPM. These factors are divided roughly into three categories: domestic incentives, foreign cognitive influence, and traditional Chinese culture.

The domestic incentive is the central factor that has shaped NDRC enforcement. The domestic incentives include two aspects: the impetus for launching an investigation and the discretionary power enjoyed by the NDRC. The impetus determines whether or not the NDRC will investigate a company, while the discretionary power affects how the NDRC investigates a company.

The foreign cognitive influence, however, is a significant external factor that influences NDRC enforcement. "Foreign cognitive influence" is defined as knowledge of foreign law and general experience obtained by foreign regulators, which can be accessed, utilized, and interpreted by Chinese antitrust agencies.<sup>156</sup> Today, the major foreign cognitive influence comes from the United States and the European Union, which provide important parameters for China with respect to antitrust matters. Meanwhile, the differences in attitudes toward RPM between the United States and Europe have caused confusion with respect to how China analyzes RPMs.

Finally, traditional Chinese culture is an internal factor that has shaped NDRC enforcement. Its influence is often not as obvious as the domestic incentive, but its impact is far-reaching. The domestic incentive may be more unpredictable due to certain political incidents, governmental policies, and even the NDRC's own interests. In comparison, the impact of traditional

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154. *Id.*

155. *Id.*

156. Gerber, *supra* note 16, at 273–279.

Chinese culture—such as the superior status of administrative officials in Chinese society—is relatively steady and enduring because it is deeply rooted in Chinese culture. This Part will discuss in detail how the three factors have influenced NDRC decisions thus far.

#### *A. Domestic Incentives—Impetus and Discretion*

The domestic incentives determine why and how the NDRC launches an investigation. This section will first discuss the impetus (besides economic consideration) for the NDRC's decisions to investigate certain companies and industries. Then it will discuss the discretionary power enjoyed by the NDRC and will analyze the criticisms of such discretionary power.

##### 1. Impetus for Launching an Investigation

From the cases discussed above, it is clear that there are many factors besides economics that have affected the NDRC's investigations. These include political, social, and policy-related reasons that influence the NDRC's decision to launch an investigation.

First, the NDRC impetus to launch investigations is significantly influenced by political reasons. Taking the liquor case as an example, President Xi's determination to end prodigal and taxpayer-financed banquets and bribery of officials was one of the major reasons for the NDRC's decision to launch an investigation. The NDRC's investigation can be interpreted as a response to President Xi's policy rather than a real attack on RPM in the liquor market. After this investigation, the NDRC and the Provincial Agencies did not subsequently launch further investigations into any other liquor producers,<sup>157</sup> even though RPM agreements were widely used in the liquor industry.<sup>158</sup>

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157. Based on disclosed information by the NDRC up until the end of 2016, the NDRC did not make any other decision on white spirit producers other than the decision on Moutai and Wuliangye.

158. Bai Xue, Fanlongduan Bumen Zai Chujian, Baijiu Qiye Jielian Chexiao Xianjialing(反垄断部门再出剑, 白酒企业接连撤销限价令) [After Antitrust Investigation, White Spirits Producers Cease Restricting Prices], NEWS.CN (Jan. 21, 2013), [http://news.xinhuanet.com/food/2013-01/21/c\\_124255824.htm](http://news.xinhuanet.com/food/2013-01/21/c_124255824.htm) (stating that, before the NDRC launched its investigation into Moutai and Wuliangye, the white spirits liquor industry experienced a "golden decade" and earned extravagant profits by using restrictive pricing, allowing us to infer that, other

Furthermore, economic reasons may even justify RPM agreements in the market of premium white spirits based on Marvel and McCafferty's "quality certification theory."<sup>159</sup> The quality certification theory states that deluxe shops, knowledgeable personnel, and well-regarded reputations of retailers of goods (especially luxury goods) can be perceived by consumers as implicit guarantees of quality.<sup>160</sup> This argument can justify RPM since a manufacturer hopes that, by carrying their products in upscale stores and offering no discount, the image of quality of its items will be preserved.<sup>161</sup> Moreover, discounts on luxury goods may drive consumers away from a particular brand since some consumers associate high prices with a product's prestige.<sup>162</sup> A lower price may indicate that certain goods should not be perceived as "luxury" anymore. As a result, some manufacturers utilize RPM to maintain the luxury status of their goods.

As previously mentioned, premium white spirits are regarded as a luxury item in China. The wine producers of these spirits in particular—Moutai and Wuliangye—could argue the potential procompetitive effects of RPM agreements. The two wine producers, however, did not attempt to defend their behavior on this basis, nor did the NDRC consider the potential procompetitive effects of RPM agreements. In short, because of political factors, any economic argument invoked by Moutai or Wuliangye would have been weak, if not pointless.

Second, NDRC discretion is affected by high-profile social incidents that concern the public and media reports. From the background stories of the previously discussed cases (other than the liquor case), it is obvious that people have growing complaints about products' high prices, including infant formula milk, corrective lenses, and after-sale service of motor vehicles. Chinese parents, for example, were furious after foreign-brand milk producers increased their prices in the wake of the contamination of domestic infant formula.

Certain social forces thus influence the NDRC to focus on particular industries and companies because imposing fines on well-

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than Moutai and Wuliangye, many other producers also used RPM to keep retail prices at a high level).

159. See Howard P. Marvel & Stephen McCafferty, *Resale Price Maintenance and Quality Certification*, 15 RAND J. ECON. 346 (1984).

160. See *id.*

161. MOTTA, *supra* note 35, at 315–16.

162. *Id.* at 334.

known companies and making them reduce prices would effectively alleviate consumer dissatisfaction and would lead to widely circulated reports by the media. Consequently, well-known multinational companies, like Mercedes-Benz, FAW-Volkswagen, and Chrysler in the vehicle market, Bausch & Lomb and Nikon in the corrective lens market, and Wyeth and Abbott in the infant formula milk market, become easy targets of NDRC investigations.

Third, the tripartite enforcement system, which includes MOFCOM, SAIC, and the NDRC, distributes the enforcement authority over the AML amongst the three agencies. This serves as another impetus for the NDRC to select which companies and/or industries it should investigate because the potential competition among the agencies motivates the NDRC to probe certain cases that could have a significant social impact and would be viewed by society as a remarkable achievement. Likewise, the potential competition among the agencies may also cause the NDRC to avoid (or be cautious of) investigating companies involved in certain interest groups, such as powerful state-owned companies.<sup>163</sup>

Lastly, the relationship between industry policy and competition policy also influences, to some extent, the NDRC's impetus to investigate. The Measures for the sale of motor vehicles is an example that reflects the changes within such a relationship. The enactment of the Measures indeed has regulated the chaotic market of motor vehicle distribution and has attracted foreign automakers to invest in the Chinese market. The Measures was geared toward the protection of manufacturers' interests, so it tolerated RPM agreements with the purpose of attracting automotive producers to invest in China. In recent years, however, the automotive industry has become much more prosperous and

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163. For example, on November 9, 2011, the NDRC launched an investigation against two state-owned tycoons in the telecommunication market—China Telecom and China Unicom. Due to pressure from other governmental regulators and complicated relationships between the antitrust agencies and the investigated companies, however, the investigation did not conclude with definitive results. The two companies were not penalized and the NDRC did not issue a final decision to the public. See Du Qiang, *Guowuyuan Fanlongduan Zhuanjia: Fanlongduan Fa Dui Xingzheng Longduan Hen Wunai* (国务院反垄断专家：《反垄断法》对行政垄断很无奈) [*Antitrust Expert of State Council: The AML is Weak to Administrative Monopoly*], S.URB.DAILY (Jan. 3, 2012), [http://tech.ifeng.com/telecom/special/fanlongduan/content-1/detail\\_2012\\_01/03/11725660\\_0.shtml](http://tech.ifeng.com/telecom/special/fanlongduan/content-1/detail_2012_01/03/11725660_0.shtml).

mature in China. Therefore, the industry policy to promote the development of the automotive industry no longer remains a priority, which gives way to competition policy.

The NDRC investigations sent a signal to all companies in the automotive industry that RPM is no longer legal per se. How was the NDRC able to communicate this message effectively? Investigating large, well-known companies was a wise strategy because investigating all RPM agreements in the automotive industry was impractical in the short-term.

In sum, the NDRC may not have intended to discriminate against multinationals through its investigations. Ultimately, however, the various impetuses for launching the investigations may have led the NDRC to target multinationals or large, well-known companies to effectively meet political or regulatory goals, impact social issues, and alleviate much of the public's dissatisfaction.

## 2. Discretion in Determining the Severity of Penalties

The second aspect of the domestic incentive, which helps to shape the current picture of the enforcement of the AML, is the discretion enjoyed by the NDRC. This is a direct result of the ambiguous and abstract language of the AML. The wide discretion enjoyed by the NDRC results in four major problems. This section will identify and discuss these four problems that have resulted from the NDRC's broad discretion.

First, the ambiguous criteria for calculating the severity of penalties under Article 46 the AML leads to inconsistent results and grants the NDRC with wide discretion. The relevant portion of Article 46 provides:

Where the business operators reach and fulfill a monopoly agreement in violation of this Law, the Anti-monopoly Law Enforcement Agency shall order them to stop the violations, confiscate the illegal gains and impose a fine of 1% up to 10% of the sales revenue made in the previous year. Where the reached monopoly agreement has not been fulfilled, a fine of less than 500,000 yuan may be imposed. Where a business operator who is engaged in a monopoly agreement voluntarily confesses the information about the monopoly agreement and provides the important evidence to the Anti-monopoly Law Enforcement Agency, the operator may be given a mitigated punishment or be exempt from punishment at the discretion of the

Anti-monopoly Law Enforcement Agency. Where a trade association organizes the business operators in its own industry to reach a monopoly agreement in violation of this Law, the Anti-monopoly Law Enforcement Agency may impose a fine of less than 500,000 yuan; where the circumstances are serious, the authority in charge of social group registration may deregister the trade association.<sup>164</sup>

In the liquor case, the NDRC imposed fines of 1 percent of the previous year's sales revenue on two state-owned liquor producers. The NDRC, however, did not give any reasons for why they chose the lightest penalty of 1 percent. In addition, in the infant formula milk case, the NDRC imposed a penalty of 4 percent of the previous year's sales revenue against Mead Johnson Nutrition because, while it was accused of failing to cooperate with the agency, it proactively implemented self-corrective measures.<sup>165</sup> Yet, in the corrective lens case, Nikon, much like Mead Johnson Nutrition, which did not cooperate with agencies but implemented self-corrective measures, was given a penalty of only 2 percent of its sales revenue earned in the previous year.<sup>166</sup> Similarly, companies that proactively cooperated with the agency and carried out self-corrective measures were fined 3 percent of the sales revenue earned in the previous year in the infant formula milk case, but, in the corrective lens case, the relevant companies were only fined 1 percent of sales revenue.<sup>167</sup>

This poses the question: "Why did the NDRC levy a heavier penalty on the infant formula milk producers than it did against the eyeglass producers?" From the facts introduced above, it is obvious that the facts of the two cases are similar. Further, the violations of companies in the corrective lens case were arguably even more serious than that of the infant formula milk case because the corrective lens distributors and the industry association were suspected of forming a price cartel to squeeze discounters out of the market.

The NDRC's discretion also applied to the distributors of the products. For example, when the NDRC investigated RPM agreements in the automotive market, both auto manufacturers and distributors were investigated and fined. Yet, according to

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164. AML, *supra* note 1, art. 46.

165. NDRC Decision on Infant Formula Milk Producers, *supra* note 83.

166. NDRC Decision on Corrective Lenses Producers, *supra* note 99.

167. See *id.*; see also NDRC Decision on Infant Formula Milk Producers, *supra* note 83.



the disclosed information provided by the NDRC, none of the distributors in the liquor, infant formula milk, or corrective lens cases were investigated or fined.

In summary, the penalties varied significantly in different cases. The NDRC, however, has not given persuasive explanations for these differences. For this reason, it is easy and natural for multinational companies to believe that the NDRC may be investigating antitrust cases in a discriminatory and unpredictable manner.

Second, the AML lacks a clear definition of "sales revenue" and does not define the market, which contributes to the wide discretion wielded by the NDRC. This causes NDRC decisions to be uncertain and unpredictable. Article 46 of the AML provides that the agency can "impose [on an investigated company] a fine of 1% up to 10% of the sales revenue made in the previous year."<sup>168</sup> Article 46, however, does not define the term "sales revenue." It can be understood as only the involved products' sales revenue in the market, such as the Audi cars in the FAW-Volkswagen case. It also can be defined, however, as the sales revenue of all products in the market, such as all models of motor vehicles produced by FAW-Volkswagen. Utilizing different definitions of "sales revenue" will lead to extreme variation in penalties.

Moreover, the definition of "market" is also unclear. It can be interpreted in many ways, such as sales revenue in the relevant market, sales revenue in the Chinese market, or sales revenue in the global market. For example, in the liquor case, the penalties on Moutai and Wuliangye were calculated based on their sales revenue in the Chinese market. In the automotive industry case, however, penalties on automotive producers were calculated based on the sales revenue of only certain provinces, even though the motor vehicles were distributed throughout Mainland China.

Third, the NDRC unduly used its discretion by not confiscating violators' illegal gains. Although Article 46 of the AML provides that violators' illegal gains must be confiscated, the NDRC did not confiscate any illegal gains from the violators in the cases discussed above. The NDRC, however, did not provide an explanation for these decisions. It seems that the NDRC inappropriately used its discretion by ignoring the provisions of the AML.

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168. AML, *supra* note 1, art. 46.

In addition, by collecting fines without confiscating illegal gains, the NDRC cannot sufficiently deter companies from engaging in future anticompetitive conduct.<sup>169</sup>

Finally, the NDRC's decision to only investigate and punish the involved companies' RPM agreements in certain regional markets failed to justify its selective investigations because these companies carried out the RPM agreements beyond these regional markets. We look to the cases in the automotive market as an example. Although the auto producers have enforced RPM agreements throughout China's market, the NDRC only investigated and fined RPM agreements that were implemented regionally (i.e., Mercedes-Benz in the Jiangsu Province, FAW-Volkswagen in the Hubei Province, Chrysler in the Shanghai District, and Dongfeng-Nissan in Guangdong Province).<sup>170</sup> According to media reports, when the NDRC raided the Mercedes-Benz office in Shanghai to collect evidence of resale price-fixing, other Provincial Agencies also raided dealers' stores in Dalian, Xi'an, and some cities in the Hubei Province.<sup>171</sup> In the end, only Mercedes-Benz and its dealers in the Jiangsu Province were fined. The NDRC, however, did not provide persuasive explanations for its selective investigations.

### 3. Greater Discretion—the Leniency Policy for RPM

Since the infant formula milk case, the NDRC began to adopt a leniency policy for RPM agreements. Three infant formula producers, two corrective lens manufacturers, and two automotive distributors have thus been exempted from penalties because they voluntarily reported to the NDRC and Provincial Agencies and provided important evidence about RPM agreements.<sup>172</sup> This

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169. See Wei Shibin, *Zongxiang Jiage Xianzhi Xieyi Falü Shiwu Yanjiu He Fenxi* (纵向价格限制协议法律实务研究和分析) [*Practical Study and Analysis of RPM*], 69 LÜSHANG ZHONGGUO FALÜ (LEXICNWEBDIGI-TAL CHINA L. REV.) (2013), [https://hk.lexisnweb.com/clr/view\\_article.php?clr\\_id=75&clr\\_article\\_id=941](https://hk.lexisnweb.com/clr/view_article.php?clr_id=75&clr_article_id=941).

170. See *Jiangsu Provincial Agency's Decision on Mercedes-Benz*, *supra* note 6; see also *Hubei Provincial Agency's Decision on FAW-Volkswagen*, *supra* note 6; *Shanghai Provincial Agency's Decision on Chrysler*, *supra* note 6; *Guangdong DRC's Decision on Dongfeng-Nissan*, *supra* note 5.

171. Liu Xiaolin & Zhang Xiangdong, *Bei Digu de Fanlongduan Fengbao* (被低估的反垄断风暴) [*The Underestimated Antitrust Storm*], JINGJI GUANCHAO [ECON. OBSERVER], Aug. 11, 2014, A1–2.

172. See *NDRC Decision on Infant Formula Milk Producers*, *supra* note 83; see also *NDRC Decision on Corrective Lenses Producers*, *supra* note 99; *Hubei*

begs the question: "Is it appropriate to apply the leniency policy for RPM agreements?"

Countries with developed antitrust law generally apply the leniency policy to criminal violations of antitrust law because such violations cause severe damage to competition but are difficult to detect.<sup>173</sup> Under U.S. antitrust law, for example, the leniency policy applies to wrongdoers who "report [to antitrust agencies] their illegal antitrust activity" in order to seek an exemption from "criminal conviction."<sup>174</sup> The reasoning for this is that "[a]pplicants that have not engaged in criminal violations of the antitrust laws have no need to receive leniency protection from a criminal violation and will receive no benefit from the leniency program."<sup>175</sup> Implementing RPM agreements is not a criminal violation under U.S. antitrust law, and it is analyzed with the rule of reason at the federal antitrust level. Therefore, companies that implement RPM agreements in the United States cannot be granted leniency. Many other countries besides the United States have also adopted the leniency policy to detect uncovered cartels rather than RPM.<sup>176</sup>

The purpose of the leniency policy in antitrust law is to provide antitrust agencies with the opportunity to obtain information and detect illegal antitrust conduct. Some violations of antitrust law, like cartels, have serious anticompetitive effects but are difficult to detect, so antitrust agencies grant leniency to incentivize one of the violators to report illegal conduct to the antitrust agencies. With that in mind, is the leniency policy necessary with respect to RPM agreements?

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*Price Bureau Decision of Administrative Penalty Exemption*, *supra* note 141; *Jiangsu Provincial Agency's Decision on Mercedes-Benz*, *supra* note 6.

173. See generally Org. for Econ. Co-operation & Dev. [OECD], *Leniency for Subsequent Applicants*, at 25, DAF/COMP(2012)25 (Oct. 2012), <http://www.oecd.org/competition/Leniencyforsubsequentapplicants2012.pdf> (noting that the members' competition authorities widely rely on leniency policies to detect, investigate, and prosecute hard-core cartels).

174. SCOTT D. HAMMOND & BELINDA A. BARNETT, U.S. DEP'T OF JUSTICE, FREQUENTLY ASKED QUESTIONS REGARDING THE ANTITRUST DIVISION'S LENIENCY PROGRAM AND MODEL LENIENCY LETTERS 6 (2008), <https://www.justice.gov/atr/frequently-asked-questions-regarding-antitrust-divisions-leniency-program>.

175. *Id.*

176. Including, for example, the European Union, France, Germany, and Japan. See OECD, *supra* note 173.

The NDRC misunderstands the leniency policy. Xu Kunlin, the former leader of the Antitrust Bureau of NDRC, stated that not applying the leniency policy to vertical monopoly agreements is simply illogical.<sup>177</sup> In Xu's view, horizontal agreements have more severe anticompetitive effects than vertical ones, so it is unreasonable to grant serious behavior leniency but refuse to pardon behaviors that have less anticompetitive effects, such as RPM.<sup>178</sup> Xu misunderstands the logic behind the leniency policy. The purpose of leniency policy is to detect and obtain information about illegal antitrust behavior (which normally involve criminal conduct, like cartels). In doing so, violators can avoid penalties by reporting the violation to antitrust agencies. On the one hand, granting a violator an exemption may lead to injustice because he or she does not receive punishment for his or her wrongdoing; yet, on the other hand, it may also help antitrust agencies detect other violators and punish illegal behavior that has serious anticompetitive effects. Due to the severe anticompetitive effects caused by these violations and the difficulty in detecting them, antitrust agencies trade leniency with wrongdoers to obtain evidence. This requires the balancing of efficient enforcement and justice. As to RPM agreements, however, evidence is relatively clear,<sup>179</sup> so it is not worth doing such a trade.

Yet, even if it is reasonable to apply a leniency policy to RPM, the NDRC investigations still have several problems. First, it is improper for the NDRC to grant more than one company exemptions. Under U.S. antitrust law, only the first qualifying wrongdoer may be granted leniency irrespective of whether the company reports the illegal activity before or after an investigation has begun.<sup>180</sup> This is referred to as the "first-in-the-door" rule.<sup>181</sup>

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177. Xu Kunlin, *Kuanda Zhengce Shiyong Yu Zongxiang Longduan Xieyi* (宽大政策适用与纵向垄断协议) [*Leniency Policy Applying to Vertical Monopoly Agreements*], ZHONGGUO JINGJI DAobao [CHINA ECON. HERALD] Oct. 31, 2013, at A3.

178. *Id.*

179. The identical retail prices set by all (or most of the dealers) serve as apparent evidence of RPM agreements. Especially in China, many companies have taken RPM agreements for granted, so evidence of carrying out RPM agreements are relatively easy to detect. For example, in the liquor case, the chief executive officer of Moutai once said in public that the company would set the minimum resale price of its products. See Yang Qiubo, *supra* note 66.

180. HAMMOND & BARNETT, *supra* note 174, at 4–6.

181. *Id.* at 3.

Under the rule, others cannot leapfrog over the first reporter,<sup>182</sup> which both guarantees that the regulator obtains evidence to investigate a violation and prevents abuse of the leniency policy. If the NDRC has the right to give an unspecified number of companies immunity, it runs the risk of abusing its administrative power. In addition, unfettered use of the leniency policy does little to deter companies from fixing prices in future.

Second, due to the lack of specific regulations about the leniency policy, the NDRC's discretionary power has been inappropriately expanded. The core of a well-designed leniency policy is transparency and predictability. A leniency policy should include detailed procedures for leniency application, the criteria for granting leniency, conditions for granting leniency or revoking it, and leniency applicants' confidentiality.<sup>183</sup> Unfortunately, the NDRC has not yet enacted any regulations or guidelines for applying a leniency policy to RPM agreements.<sup>184</sup>

In order to address this problem, on February 2, 2016, the NDRC issued the Draft of the Guidelines of Leniency Policy for Horizontal Monopoly Agreements ("Draft of Leniency Guidelines") to solicit public opinion.<sup>185</sup> The Draft of Leniency Guidelines provides recommendations for how to apply the leniency policy, including procedures, required documents, and period limitations, among others. The Draft of Leniency Guidelines clearly states, however, that its application is exclusive to horizontal monopoly agreements.<sup>186</sup> At this point, it is not clear if the

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182. *Id.* at 3.

183. *Id.* at 1.

184. In 2010, the NDRC issued the Provisions on the Administrative Procedures for Law Enforcement Against Price Fixing. *See* Provisions on the Administrative Procedures for Law Enforcement Against Price Fixing, *supra* note 47. Article 14 of the Provisions provides that the first reporter can be immune from penalty. For the second reporter, the penalty can be reduced by at least 50 percent. The other reporters, however, can have no more than a 50 percent reduction of the fine. Yet, in RPM cases, the NDRC did not identify the order of reporters, but it granted exemptions to three reporters in the infant formula milk case, two in the corrective lens case, and two in the vehicle market cases. The NDRC, however, did not explain why it did not apply Article 14 Provisions to these cases.

185. Hengxiang Longduan Xieyi Anjian Kuanda Zhidu Shiyong Zhinan (Zhengqiu Yijian Gao) (横向垄断协议案件宽大制度适用指南) (征求意见稿) [Guideline for the Application of Leniency Policy on Horizontal Monopoly Agreement (Draft)] (drafted by the NDRC, Feb. 3, 2016), [http://www.sdpc.gov.cn/gzdt/201602/t20160203\\_774297.html](http://www.sdpc.gov.cn/gzdt/201602/t20160203_774297.html).

186. *Id.* art. 3.

NDRC will issue another set of guidelines for RPM or whether the NDRC is aware that the application of the leniency policy to RPM is inappropriate.

### *B. Foreign Cognitive Influence*

Professor Wang Xiaoye, one of the major drafters of the AML,<sup>187</sup> once said: “Taking U.S. antitrust law, EU competition law, and German anticompetition law as references, the monopoly agreements in the AML are categorized as both horizontal agreements and vertical agreements.”<sup>188</sup> Therefore, the knowledge of antitrust law and enforcement experience from the United States and the European Union provide primary foreign cognitive influences for analyzing approaches of RPM under China’s antimonopoly laws.<sup>189</sup>

Articles 14 and 15 of the AML were designed and drafted based on the framework of EU competition law. Article 14 of the AML outlines provisions regarding vertical monopoly agreements, and Article 15 of the AML provides exemptions to Article 14 when certain conditions are satisfied. In practice, however, Chinese antitrust practitioners and academics alike have interpreted Articles 14 and 15 differently. As a result, there is a major divergence between the understanding and interpretation of EU and U.S. methods and their influences on the AML, which has resulted in confusion about what analyzing approaches China should use to assess the legality of RPM. Some scholars even claim that such foreign cognitive influences have led to a strange

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187. Professor Wang Xiaoye is a well-known antitrust law scholar in China and one of the major drafters of the AML.

188. Wang Xiaoye, *Zhonghua Renmin Gongheguo Fanlongduan Fa Xiping* (中华人民共和国反垄断法析评) [*Comments on the P. R. China’s AML*], 4 FAXUE YANJIU [CHINESE J. L.] 68, 68 (2008).

189. Some drafters of the AML, like Professor Wang Xiaoye, have an educational background in German law, so the AML also reflects the influence of German law. But, this article will not discuss the influence of German law separately because, to some extent, German competition law has structured EU competition law. The ideas of ordoliberal and neoliberal scholars have also contributed to formation of European integration. See DAVID J. GERBER, *LAW AND COMPETITION IN TWENTIETH CENTURY EUROPE: PROTECTING PROMETHEUS* 266–333 (1998). Therefore, we could say that EU competition law is based on the German model. This article, however, will only discuss the influence of EU and U.S. competition laws on China’s enforcement of the AML.

phenomenon in China: the AML uses the content of U.S. anti-trust law to fill in the framework of EU competition law.<sup>190</sup> This section will briefly describe the U.S. and EU approaches to analyzing RPM agreements and how this led to China's confusion.

### 1. RPM Under U.S. Antitrust Law

Antitrust statutes of the United States, which have expansive and open-ended language, do not provide clear and applicable guidance for analyzing RPM. In contrast, common law decisions gradually developed a body of law in regards to RPM, which have helped to flesh out the meaning of the statutory language.

In *Dr. Miles Medical Co. v. John D. Park & Sons Co.*,<sup>191</sup> the U.S. Supreme Court established the per se rule for RPM.<sup>192</sup> Thereafter, RPM was treated as per se illegal for nearly a century. In 1997, the U.S. Supreme Court ruled in *State Oil Co. v. Khan*<sup>193</sup> that the price ceiling (maximum RPM) set by an oil producer for its dealers should be treated with the rule of reason.<sup>194</sup> It was not until 2007 that the per se rule for minimum RPM was overruled by the U.S. Supreme Court in *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*<sup>195</sup>

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190. Hong Yingying, *supra* note 107, at 57.

191. In *Dr. Miles*, a proprietary medicines producer sued one of its wholesalers, who resold its medicine at discounted prices, refused to enter into an RPM contract with the producer, and induced others to violate the producer's price restrictions. *See Dr. Miles Medical Co. v. John D. Park & Sons Co.*, 220 U.S. 373 (1911). The U.S. Supreme Court relied on the common law doctrine and decided that a "general restraint upon alienation is ordinarily invalid." *See id.* at 404. The court reasoned that the complainant's RPM agreement was used as a means to limit freedom of trade and prevent price competition among dealers and to harm the public interest, which would be per se illegal. *See id.*

192. *See id.*

193. *See State Oil Co. v. Khan*, 522 U.S. 3, 9 (1997).

194. Under the rule of reason, RPM agreements are not per se illegal, but agencies or courts should analyze and balance both anticompetitive and procompetitive effects of RPM agreements on competition and consumers. The agreements are only illegal under the rule of reason if their anticompetitive outweigh their procompetitive effects.

195. Leegin was a manufacturer of handbags, belts, jewelry, and other products under the "Brighton" brand. Leegin distributed its products through its own stores as well as independent retailers. *See Leegin Creative Leather Prods., v. PSKS, Inc.*, 551 U.S. 877 (2007). The plaintiff, PSKS, an independent women's clothing and accessories store, carried the "Brighton" brand. *Id.* Leegin imposed a minimum RPM on its distributors. *Id.* When PSKS sold discounted "Brighton" products, Leegin terminated PSKS' distributorship. *Id.* Then PSKS sued Leegin alleging that Leegin violated the antitrust laws by

As the purposes of antitrust law began to change, the rules governing RPM similarly began to evolve. When the per se rule was first established, antitrust law in the United States was associated with several purposes, such as keeping the common law tradition<sup>196</sup> and protecting small and medium-sized companies.<sup>197</sup> A relatively clear, simple, and predictable goal of antitrust law was not formed until the economic revolution of the 1970s, with the emergence of the Chicago School. The Chicago School refers to an ideological movement that initially began at the University of Chicago in the 1950s and reached its peak in the 1970s and 1980s.<sup>198</sup> The Chicago School advocates that efficiency should be the sole purpose of antitrust law.<sup>199</sup> It focuses on the efficiency and effects of conduct on market prices rather than the forms of conduct itself.<sup>200</sup> Therefore, the Chicago School challenges the per se rule for RPM by claiming that the *Dr. Miles* rule is formalistic and that the courts have ignored the RPM's economic purpose and its effects on consumer welfare.<sup>201</sup> The Chicago School believes that nearly all vertical practices, such as RPM, “[a]re rarely or never anticompetitive.”<sup>202</sup>

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entering into minimum RPM agreements with retailers. *Id.* Leegin did not deny carrying out RPM agreements, but instead it challenged the per se rule for minimum RPM itself. *Id.* Finally, the U.S. Supreme Court held that the minimum RPM had procompetitive effects, which enhanced interbrand competition, facilitated market entry for new firms and brands, and encouraged dealers to offer services. *Id.* As a result, the court concluded that minimum RPM should not be regarded as per se illegal. *Id.*

196. For example, in *Dr. Miles*, the U.S. Supreme Court ruled that the right of alienation was the essential right of property in movables, and restraints on that would be “obnoxious to public policy.” See *Dr. Miles*, 220 U.S. at 404.

197. For example, the Robinson-Patman Act was a product of populism during the Great Depression, the purpose of which was to protect small and independent merchants from the chain stores’ price competition. Although the Robinson-Patman Act has been criticized extensively, it has not been repealed because of the advocacy of populism. See Robinson-Patman Act, 15 U.S.C. § 13 (2012).

198. For example, see Richard A. Posner, *The Chicago School of Antitrust Analysis*, 127 U. PA. L. REV. 925, 925–28 (1979).

199. John J. Gibbons, *Antitrust, Law & Economics, and Politics*, 50 LAW & CONTEMP. PROBS., no. 4, 1987, at 217, 218.

200. See DAVID J. GERBER, GLOBAL COMPETITION LAW: LAW, MARKETS, AND GLOBALIZATION 141 (2012); see also William E. Kovacic & Carl Shapiro, *Antitrust Policy: A Century of Economic and Legal Thinking*, 14 J. ECON. PERSPECTIVES, no. 1., 2000, at 43, 53.

201. GELLHORN, KOVACIC, & CALKINS, *supra* note 14, at 341.

202. HOVENKAMP, *supra* note 28, at 32.



Notably, there are two preconditions for U.S. antitrust law changing from per se rule to rule of reason for RPM. First, a large body of economic literature enables U.S. courts and anti-trust agencies to conduct comprehensive economic analyses on RPM. Second, U.S. courts play a central role in the antitrust system so they can create relatively flexible rules for RPM to meet the rapidly changing nature of business.

## 2. RPM Under EU Competition Law

Although EU competition law is based on the common law tradition, RPM agreement rules highlight prominent features of the civil law system because the European Commission, as a bureaucracy, has sole authority to assess anticompetitive and pro-competitive effects of RPM agreements in accordance with Article 101(3) of the Treaty on Functioning of the European Union (TFEU).<sup>203</sup> Therefore, unlike U.S. antitrust law, the enforcement of EU competition law is administratively driven.

Article 101(1) of the TFEU generally prohibits RPM,<sup>204</sup> which is categorized as a “hardcore restriction,”<sup>205</sup> and cannot be applied to a block exemption.<sup>206</sup> The block exemption provides virtually all vertical agreements with exemptions if the market share of both suppliers and buyers of the agreements are below

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203. Marsela Maci, *The Assessment of RPM under EU Competition Rules: Certain Inconsistencies Based on a Non-Substantive Analysis*, 35 EUR. COMPETITION L. REV. 103, 103–04 (2014).

204. See Consolidated Version of the Treaty on Functioning of the European Union art. 101 (1), Oct. 26, 2012, 2012 O.J. (C 326) 47 [hereinafter TFEU].

205. Commission Guidelines on Vertical Restraints, *supra* note 41.

206. See Commission Regulation 330/2010, Apr. 23, 2010, O.J. (L 102), 1 (EU) [hereinafter Regulation 330/2010]. Article 4 provides:

[T]he exemption . . . shall not apply to vertical agreements which, directly or indirectly, in isolation or in combination with other factors under the control of the parties, have as their object: (a) the restriction of the buyer’s ability to determine its sale price, without prejudice to the possibility of the supplier to impose a maximum sale price or recommend a sale price, provided that they do not amount to a fixed or minimum sale price as a result of pressure from, or incentives offered by, any of the parties. . . .

*Id.* art. 4.

30 percent;<sup>207</sup> however, RPM is excluded from applying the block exemption, which can only be exempted on a case-by-case basis.

The U.S. Supreme Court holding in *Leegin* also impacted the way the European Union views RPM agreements. In response, the European Commission issued the Guidelines on Vertical Restraints in 2010 (“Vertical Guidelines”).<sup>208</sup> Although the Vertical Guidelines still classifies RPM agreements as a hardcore restraint,<sup>209</sup> it emphasizes economic analysis in the need for a more open-minded approach to RPM.<sup>210</sup> It notes that “undertakings may demonstrate pro-competitive effects under Article 101(3) in an individual case,”<sup>211</sup> which would exempt an RPM agreement. The impact of U.S. antitrust law on the way the European Union views RPM, however, is still limited. It is theoretically possible for companies in Europe to claim that RPM agreements create efficiencies and thus should be exempt under Article 101(3) of the TFEU; however, in practice, this is always difficult and almost impossible.<sup>212</sup> Dereck Ridyard, a practicing European lawyer in competition law, noted in his article that “the current treatment of RPM in EU competition law is and seems destined to remain very hostile, [and it] is highly unlikely that

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207. See Commission Guidelines on Vertical Restraints, *supra* note 41, sec. III. The block exemption provides a safe harbor for most vertical agreements. The block exemption requires three conditions that must be fulfilled in order to exempt a vertical agreement from the prohibition of Article 101 (1) of TFEU. First, the agreement shall not contain any hardcore restrictions. Second, both suppliers and buyers need to have a market share cap of 30 percent. Third, the block exemption needs to impose specific conditions on three vertical restraints, specifically noncompete obligations during the contract, non-compete obligations after termination of the contract, and the exclusion of specific brands in a selective distribution system.

208. Commission Guidelines on Vertical Restraints, *supra* note 41; see also Dereck Ridyard, *Resale Price Maintenance: An Overview of EU and National Case Law*, Art. No. 41915, CONCURRENCES 1, 10 (Jan. 24, 2012), <https://www.concurrences.com/en/bulletin/special-issues/Resale-Price-Maintenance/>.

209. Commission Guidelines on Vertical Restraints, *supra* note 41, para. 48.

210. See *generally id.* para. 5 (“Article 101 provides a legal framework for the assessment of vertical restraints, which takes into consideration the distinction between anti-competitive and pro-competitive effects.”).

211. *Id.* para. 47.

212. Filippo Amato, *RPM in the European Union: Any Developments Since Leegin?*, CPI ANTITRUST CHRON., Nov. 2013, at 1, 7, [http://www.jonesday.com/files/Publication/76e7c33e-1d73-4393-8835-b1507529b575/Presentation/PublicationAttachment/1dd8dab7-6324-472c-b876-b2a2328990a6/AmatoNOV-13\(1\).pdf](http://www.jonesday.com/files/Publication/76e7c33e-1d73-4393-8835-b1507529b575/Presentation/PublicationAttachment/1dd8dab7-6324-472c-b876-b2a2328990a6/AmatoNOV-13(1).pdf).

the EU competition law or the authorities that enforce it will move away from its instinctive dislike of RPM.”<sup>213</sup>

In short, there are two main characteristics of the approaches for RPM under EU competition law. First, RPM is presumed to be anticompetitive, and overturning such a presumption is difficult. Second, unlike U.S. antitrust law, the enforcement of EU competition law is administratively driven. The European Commission is the dominant authority to assess whether RPM agreements are anticompetitive, and EU courts only conduct limited judicial review because they usually defer to European Commission decisions.<sup>214</sup>

### 3. Chinese Confusion in Analyzing RPM Under the AML

As mentioned earlier, the design of the AML was based off the TFEU framework. Article 14 of the AML is similar to Article 101(1) of the TFEU and prohibits three categories of vertical restraints: fixing resale prices, setting minimum RPM, and other vertical monopoly agreements identified by antitrust agencies.<sup>215</sup> In addition, similar to Article 101(3) of the TFEU, Article 15 of the AML lists conditions of exemption.

In practice, the method for analyzing RPM remains one of the most controversial issues in China today. In the liquor case, the NDRC did not explicitly state which analytical approach of RPM it adopted; it simply ruled that the RPM agreement directly violated the AML.<sup>216</sup> In the infant formula milk case, the decision stated that the RPM agreement violated the AML generally and that the involved companies failed to prove that the RPM agreements were exempt under Article 15.<sup>217</sup> This train of thought is similar to the methods used under EU competition law.

In the corrective lens case, the NDRC seemed hesitant to follow the EU approach to RPM agreements. The NDRC used the term “resale price maintenance,” which is a term transplanted from the United States, for the first time in the decision. Moreover, if the NDRC follows the EU approach, it should first apply Article 14 to generally ban RPM, and then discuss whether an alleged RPM can be exempted according to Article 15. The

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213. Ridyard, *supra* note 208.

214. Maci, *supra* note 203, at 106.

215. AML, *supra* note 1, art. 14.

216. See *Sichuan Provincial Agency's Decision on Wuliangye*, *supra* note 61; see also *Guizhou Provincial Agency's Decision on Moutai*, *supra* note 69.

217. See *NDRC Decision on Infant Formula Milk Producers*, *supra* note 83.

NDRC, however, did not mention whether Article 15 could be applied in the corrective lens case, so it seems that the NDRC did not stick to the EU approach in this case.

In the automotive industry decisions, however, the NDRC returned to the EU approach. Xu Kunlin, the former leader of the Antitrust Bureau of the NDRC, summarized the approach toward RPM as “Prohibition + Exemption.”<sup>218</sup> Xu explained that, under the AML, RPM agreements are generally prohibited but may be exempted if listed conditions are satisfied in accordance with Article 15.<sup>219</sup> Based on Xu’s comments, we can conclude that the NDRC has accepted the EU method with respect to RPM agreements.

The state of RPM agreements under the AML, however, is still in flux because agencies and courts have not yet reached a consensus. For example, in *Rainbow v. Johnson & Johnson*,<sup>220</sup> the court explicitly adopted a method similar to that of the rule of reason under the U.S. antitrust law.<sup>221</sup> Moreover, Professor Huang Yong, the deputy chief of the experts panel of the Antimonopoly Commission, once stated in an interview that there are two major approaches to analyzing RPM agreements in the global antitrust community: namely, the per se rule and the rule of reason.<sup>222</sup> From the use of terminology, it seems that the Antimonopoly Commission may prefer the U.S. analyzing methods for RPM, which may directly conflict with the NDRC’s preferences for using the EU approach.

In conclusion, agencies and courts differ in their perceptions of foreign laws and enforcement strategies. Such cognitive differences are the result of several reasons, such as different educational backgrounds of scholars with whom agencies and courts consult, the type of information that is available to decision-

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218. Xu Kunlin, *supra* note 177.

219. *Id.*

220. See Beijing Ruibang Yonghe Tech. & Trade Co., Ltd. (Rainbow) v. Johnson & Johnson Med. (Shanghai) Ltd. & Johnson & Johnson Med. (China) Ltd., 2014 SUP. PEOPLE’S CT. GAZ. (Shanghai Higher People’s Ct. 2013) (China).

221. See *id.*

222. Zhou Rui, *supra* note 49.

makers, and the way these decision-makers perceive and interpret foreign laws and experience.<sup>223</sup> As a result, the foreign cognitive influence on the AML has caused greater uncertainty and inconsistency in analyzing RPM.

### *C. The Impact of Traditional Chinese Culture—Paternalistic Administrations*

Since 2013, the NDRC has ramped up antitrust probes to “cement its reputation as the most aggressive of China’s antitrust enforcers,”<sup>224</sup> which has drawn heavy criticism from foreign officials and companies alike. For example, a report by *Reuters* described the NDRC’s direction of investigations as “interrogations,” which included “[making] threats or insinuations in face-to-face meetings that [the companies’] employees might be held personally liable,”<sup>225</sup> or “[using] widespread behind-the-scenes tactics - from personal threats to forced apologies and brow beatings,”<sup>226</sup> to push companies to confess. As the former leader of the Antitrust Bureau of the NDRC, Xu Kunlin earned the nickname “Mr. Confession.”<sup>227</sup>

The way of investigation may be ascribed to the paternalistic culture of Chinese bureaucracy to some extent. As early as the eleventh to seventh centuries BCE, the term “parent-like officials” emerged in Chinese Classic of Poetry Collection (*Shi Jing*).<sup>228</sup> In the *Book of Rites* (*Liji*), Confucius also advocated that “[o]fficials should act like people’s parents.”<sup>229</sup> On the one

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223. See generally David J. Gerber, *Searching for a Modernized Voice: Economics, Institutions, and Predictability in European Competition Law*, 37 *FORDHAM INT’L L.J.* 1421 (2014).

224. Michael Martina & Matthew Miller, *‘Mr. Confession’ and His Boss Drive China’s Antitrust Crusade*, *REUTERS* (Sept. 15, 2014), <http://www.reuters.com/article/us-china-antitrust-ndrc-insight-idUSKBN0HA27X20140915>.

225. *Id.*

226. *Id.*

227. *Id.*

228. The term “parent-like officials” is recorded in *Shijing* *Daya Jiongzhuo*, which is “Kaiti Junzi, Minzhi Fumu” (The happy and courteous sovereign, be the parent of the people). See *SHIJING* (诗经) [CLASSIC OF POETRY] (2015).

229. Confucius advocated the term “parent-like officials” and said that “rulers should act like a dignified father and an amiable mother. Then they can be the parent of people.” This statement has been recorded in *Liji* (*Book of Rites*), which is a collection of texts describing the social forms, and administration and ceremonial rites of the Zhou Dynasty. See *Liji* (礼记) [BOOK OF RITES] (Dai Sheng ed., 2015).

hand, this idea expresses one's expectations that officials are responsible for the people, work hard for the people, and are devoted to the people. On the other hand, this concept reflects the opinion that officials, like parents, enjoy a superior status. Parents have the right to judge minors' behaviors, and, according to paternalism, their authority should be respected. In Chinese history, there are many legendary stories of officials, such as Hai Rui and Bao Zheng, who acted like good parents.<sup>230</sup> The drawback to such a traditional value, however, is that people can only expect the best from their officials but cannot choose them, as we cannot choose our parents.

Influenced by the paternalistic culture, the NDRC's investigations highlight two features. First, the NDRC encourages targeted companies to devoutly confess and proactively self-correct their behaviors. Also, because the NDRC is in a superior position, it ultimately determines whether companies' confessions and self-corrective measures satisfy its expectations. Second, the decision-making process by the NDRC is less transparent because limited information is disclosed to the public.

Regarding the first feature, the NDRC's tradition of paternalistic administration led to a culture of confessions, which encourages the NDRC to treat companies who confess their violations with more leniency. Therefore, influenced by such tradition, the investigation will proceed and be completed quickly because companies are incentivized to confess their violations soon after the launch of the investigation rather than defend their actions. In the liquor case, for example, the NDRC launched the investigation in early January 2013. Only a few days later, both Moutai and Wuliangye confessed on their official websites their violations of the AML and made promises to terminate illegal behaviors and issue corrective measures.<sup>231</sup> On February 22, 2013 (less than two months after the launch of the investigation), the Provincial Agencies announced their decision.<sup>232</sup> By March 11, 2013,

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230. Hai Rui (1514–1587 CE) was a government officer of the Ming Dynasty who was remembered as being an honest and righteous official. Bao Zheng (999–1062 CE) was a government official during the reign of Emperor Renzong in the Song Dynasty who represented a cultural symbol of justice and integrity in China.

231. See Moutai Announcement, *supra* note 69; see also Wuliangye Announcement, *supra* note 69.

232. See Sichuan Provincial Agency's Decision on Wuliangye, *supra* note 61; see also Guizhou Provincial Agency's Decision on Moutai, *supra* note 69.

both companies paid their respective fines in full.<sup>233</sup> Overall, the investigation for each liquor company took less than three months. Such an “efficient” probe made the NDRC’s decision appear more like an administrative order than an antitrust investigation.

In addition, due to paternalistic tradition, the NDRC incentivizes companies to confess and behave as the agency expects because, like a parent, the NDRC enjoys a superior status and judges whether companies’ confessions and self-corrective behaviors satisfy its expectations. In the infant formula milk case, for example, Xu Kunlin stated in an interview that the investigated companies’ cooperation and self-corrective measures were the major factors in determining the severity of the penalties imposed.<sup>234</sup> Based on the disclosed information, Biostime (one of the violators in the infant formula milk case) actually implemented self-corrective measures to reduce the price; nonetheless, the NDRC imposed the highest level of fines on Biostime in comparison to other companies involved in the investigation.<sup>235</sup> An officer of the NDRC explained to the media that “Biostime [wa]s not proactive, and the follow-up corrective measures [did] not [do] enough, which prevent[ed] us [the NDRC] from giving a mitigated penalty.”<sup>236</sup> Thus, it seems that the NDRC emphasizes companies’ sincerity and cooperation with the investigations, speedy responses to give commitments, and self-corrective measures. Therefore, in order to receive an exemption or a mitigated penalty, most of the investigated companies in RPM cases have admitted their violations and announced rectification even before the NDRC made its final decisions.<sup>237</sup>

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233. See Chen Jie, *supra* note 73.

234. Jiang Guocheng, *Redian Jiedu: Liu Jia Ruqi Beichu Ju'e Fadan; Jiage Longduan, Qudao Feiyong Zuigao Sicheng* (热点解读: 六家乳企被处巨额罚单; 价格垄断, 渠道费用最高四成) [*Hot Issue: 6 Milk Powder Producers been Imposed Huge Fines; Price Monopoly, Distribution Fee at Most by 40%*], RENMIN RIBAO [PEOPLE'S DAILY], Aug. 8, 2013, at A9.

235. Biostime was fined 6 percent of sales volume earned in the previous year, but other violators were given mitigated penalties of 3 to 4 percent of sales volume earned in the previous year. See *NDRC Decision on Infant Formula Milk Producers*, *supra* note 83.

236. Luo Fei, *Fagaiwei 6.7 Yi Dafadan Beihou de Luoji* [*The Logic Behind the NDRC Imposing Huge Fines of 670 Million Yuan*], TENCENT FIN. (Aug. 8, 2013), <http://finance.qq.com/zt2013/focus/fgw.htm>.

237. For example, right after the launch of investigation, both of the wine producers in the liquor case that were investigated posted announcements that

With respect to the second feature, the paternalistic tradition leads to a less transparent decision-making process of NDRC and limits the information disclosed to the public. Based on the case decisions discussed above, limited information is accessible to the public. The published information normally includes only conclusions and simple reasoning. Necessary information is not revealed to the public, such as information regarding the start and end dates of investigations, evidence collected by the NDRC, defensive arguments claimed by investigated companies, minutes of meetings between the NDRC and companies, and transcripts of public hearings, among others. Affected by paternalistic tradition, the NDRC believes it enjoys the authority to decide which information is included and how much detail is disclosed to the public. It is similar to how Chinese parents punish their children when they misbehave: they close the door and discipline them.

This helps explain why Chinese officials have taken pains to deny that they are enforcing the AML in a discriminatory manner, because, in their minds, they conduct investigations in a paternalistic manner rather than target multinationals intentionally.

### III. SUGGESTIONS FOR CHINA: RULES AND TRANSPARENT PROCEDURES

Although there are problems with NDRC enforcement of RPM agreements, we should applaud the NDRC's efforts to investigate companies in various industries engaging in anticompetitive practices. The NDRC's flurry of activity has ultimately legitimized the AML and improved its development.

This Part will offer suggestions as a path to normalize and limit the NDRC's discretion, to clarify the confusion caused by foreign methods, and to limit the negative effects of the tradi-

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admitted violations and promised to implement corrective measures. See *Moutai Announcement*, *supra* note 69; *Wuliangye Announcement*, *supra* note 69. In the infant formula milk case, the NDRC claimed that all the investigated companies admitted to illegally implementing RPM agreements. See *NDRC Decision on Infant Formula Milk Producers*, *supra* note 83. In the auto distribution cases, even before the agency made a decision, Mercedes-Benz claimed on its website that it would reduce prices of spare parts. See *Mercedes-Benz Announcement*, *supra* note 128.



tional Chinese culture. Thus, the NDRC should develop a predictable, transparent, and consistent system of enforcement, if not in the short-term, at least in the long-term.

First, to accomplish these goals, more regulations and guidelines should be drafted and issued to specify and normalize the discretion of antitrust agencies. Like the European Union, the enforcement of China's antimonopoly laws is administration-oriented. More specific regulations and detailed guidelines can flesh out the abstract language of the AML on the one hand and limit the administrative regulators' discretion on the other hand.

Since the enactment of the AML in 2008, the NDRC has drafted and issued several guidelines and regulations.<sup>238</sup> There remains, however, two roadblocks to achieving meaningful change. First, the NDRC is unlikely to limit its own authority. Second, guidelines and regulations issued by the NDRC are likely to conflict with other agencies' rules. For example, in 2015, the SAIC issued a regulation to deal with the use of intellectual property rights to restrict competition.<sup>239</sup> In the same year, the NDRC drafted a guideline to deal with the same issue.<sup>240</sup> Inconsistency thus arises between the two agencies' regulations. For example, the provisions about the exemption of certain RPM

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238. For example, the NDRC issued Provisions on the Administrative Procedures for Enforcement against Price Fixing in 2010. *See* Provisions on the Administrative Procedures for Law Enforcement Against Price Fixing, *supra* note 47. As of January 2016, the NDRC drafted four guidelines in succession to solicit public opinion, including the Guideline for the Leniency Policy for Horizontal Agreements, the Guideline of Antimonopoly in Auto Market, the Guideline for Businesses Commitments, and the Guideline for Abusing of Intellectual Property Rights. *See* Guideline for the Leniency Policy for Horizontal Agreements (Draft) (drafted by the State Dev. & Reform Comm'n, Feb 2, 2016), [http://jjs.ndrc.gov.cn/fjgld/201602/t20160203\\_774287.html](http://jjs.ndrc.gov.cn/fjgld/201602/t20160203_774287.html); *see also* Guideline of Antimonopoly in Automotive Market (Draft) (drafted by the State Dev. & Reform Comm'n, Mar. 23, 2016), [http://jjs.ndrc.gov.cn/fjgld/201603/t20160323\\_795740.html](http://jjs.ndrc.gov.cn/fjgld/201603/t20160323_795740.html); Guideline for Abusing of Intellectual Property Rights (drafted by the State Dev. & Reform Comm'n, Dec.31, 2015) [hereinafter NDRC Antimonopoly Guideline for Abuse of IP Rights (Draft)], [http://jjs.ndrc.gov.cn/fjgld/201512/t20151231\\_770233.html](http://jjs.ndrc.gov.cn/fjgld/201512/t20151231_770233.html).

239. Provisions of the State Administration for Industry and Commerce on Prohibiting the Abuse of Intellectual Property Rights to Preclude or Restrict Competition (promulgated by the State Admin. for Indus. & Com., Apr. 7, 2015, effective Aug.1, 2015) (Lawinfochina) (China) [hereinafter SAIC Provisions of IPR].

240. NDRC Antimonopoly Guideline for Abuse of IP Rights (Draft), *supra* note 238.

agreements are inconsistent between the SAIC's regulation and the NDRC's guideline.<sup>241</sup> Thus, this practice leads to conflicts as well as a waste of legislative resources.

As the top tier of the enforcement body of the AML, the Anti-monopoly Commission should be the one shouldering the responsibility of issuing guidelines and regulations to normalize and limit the agencies' discretion. Yet, little is known with respect to how effective the Anti-monopoly Commission has been in performing its duty since the enactment of the AML. The Anti-monopoly Commission does not have its own official website.<sup>242</sup> Information about the Anti-monopoly Commission's works, activities, members, and annual meetings is scarce and relatively inaccessible to the public. Yet, according to Article 9 of the AML, the responsibility of the Anti-monopoly Commission is to "formulat[e] competition-related policies and guidelines, coordinat[e] high-level strategies, and supervis[e] overall enforcement of the AML."<sup>243</sup> As to the duty of making antitrust policies and guidelines, however, the Anti-monopoly Commission did not draft and issue most of the existing regulations and guidelines but rather authorized the three agencies—the NDRC, MOFCOM, and SAIC—to enact them. The Anti-monopoly Commission also does little to satisfy the duties of coordinating and supervising enforcement of the three agencies. In an interview,

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241. Article 5 of the SAIC's Provisions on the Prohibition of Abuse of Intellectual Property Rights to Eliminate or Restrict Competition provides that when companies and distributors' market share in total are less than 30 percent and there are at least two substitute technologies in the relevant market, RPM agreements can be exempt from the provision of vertical monopoly agreements in accordance with Article 14 of the AML. SAIC Provisions of IPR, *supra* note 239, art. 5. The NDRC Antimonopoly Guideline for Abuse of Intellectual Property Rights (Draft), however, provides that when noncompete companies and distributors' market share in total are less than 25 percent, or compete companies and distributors' market share in total are less than 15 percent, the companies' RPM agreement can be exempted. See NDRC Antimonopoly Guideline for Abuse of IP Rights (Draft), *supra* note 238, sec. II, pt.3. In other words, it provides companies with smaller market share a "safe harbor" for their RPMs, which means that these RPMs can be exempted automatically. In any event, however, safe harbor cannot be applied to fixed and minimum RPM agreements.

242. Searches of the Anti-monopoly Commission on the Internet will lead to the website of the Anti-monopoly Bureau of MOFCOM.

243. AML, *supra* note 1, art. 9.

several officials of the three agencies admitted that there is almost no cooperation among the three agencies in practice.<sup>244</sup> The conflicts between the regulation enacted by the SAIC and the guideline drafted by the NDRC regarding the abuse of intellectual property right to restrict competition exemplifies the insufficient coordination amongst the three agencies.

Therefore, the Anti-monopoly Commission should draft and issue regulations and guidelines about certain issues in particular: for example, specifying criteria of penalties, defining ambiguous terms (like “sales revenue”), clarifying if and how illegal gains should be confiscated, and further regulating the application of leniency policy. Furthermore, the Anti-monopoly Commission’s efforts to set up more specific guidelines and rules for antitrust agencies would curb the abuse of administrative power and would also help to avoid inconsistent enforcement between different antitrust agencies when they encounter same issues.

Second, analytical methods, to some extent, should mirror the EU approaches to RPM agreements. As discussed earlier, there are two preconditions for the United States to analyze RPM with the rule of reason, namely, a large body of economic literature and the central role that U.S. courts play in the antitrust system. Presently, however, such preconditions cannot be satisfied in China. As a relative newcomer to enforcing antitrust law, Chinese regulators and judges generally are not equipped with sufficient economic knowledge and experience to conduct comprehensive economic analysis of RPM agreements. In addition, courts in China do not play a central role in the antitrust law system.

China, however, shares some similarities with the European Union, which has an administration-oriented enforcement system of RPM. There are two advantages if China adopts the EU methods. First, RPM, which is still commonly used in Chinese industries, continues to have clear anticompetitive effects in their respective markets. For example, RPM still provides retail dealers of corrective lenses with extravagantly high profits.<sup>245</sup> Similarly, consumers are still paying unreasonably high prices

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244. Zhang Quanwei & Zhong Jingjing, “Zhongguoshi Fanlongduan” Zhengyi (“中国式反垄断” 争议) [*Controversy over “Chinese Antimonopoly”*], XINJING NEWS (Feb. 27, 2013), <http://www.bjnews.com.cn/finance/2013/02/27/250000.html>.

245. See Yi Fangxing & Shen Zhimin, *supra* note 92.

for vehicle spare parts and after-sale services in Chinese automotive market due to RPMs.<sup>246</sup> A stricter analyzing approach to RPM would reign in these anticompetitive effects. Second, the European Union's approach limits decision-makers' discretionary power. Since RPM is treated as a hardcore restriction and can be exempted in EU competition law only under limited conditions, it leaves relatively little space for the antitrust agencies to decide the legitimacy of the RPM. Therefore, limiting and normalizing the antitrust agencies' discretion can provide more specific rules and guidelines for agency decision-making, which will improve the predictability and certainty of antitrust enforcement.

In addition, the Anti-monopoly Commission should issue rules to clarify the analytical approach to RPM, which is critical to solve conflicts and reduce confusion among antitrust agencies. This could also provide reference for courts in adjudicating matters related to RPM.

Third, transparency of investigations could alleviate the negative effects of the paternalistic administration. Most of the criticisms and concerns from foreign observers and companies with respect to Chinese antimonopoly laws are in reference to the lack of transparency within the decision-making process. The lack of transparency of administrative activities is a cultural remnant of Chinese tradition, which lets administrative officials feel that they enjoy a superior status. This tradition, which culturally has been embedded in officials' minds, makes them believe they have

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246. As discussed earlier, cars in China are distributed through 4S stores. Manufacturers utilize 4S stores to restrict retail prices, spare parts prices, and prices of after-sale services. The parts-to-whole price ratio is used to check whether suppliers and/or dealers gain unreasonably high profits for spare parts and after-sale services. The parts-to-whole price ratio is defined as the ratio between prices of all spare parts of a vehicle in total and prices of the vehicle. A parts-to-whole price ratio below 300 percent is regarded as reasonable. According to a report issued in April 2016 by China's Insurance Association and Chinese Automotive Maintenance and Repair Trade Association, the two associations found that the parts-to-whole price ratios for 46 out of 100 brand automobiles in the Chinese market were over 300 percent. For some premium cars, such as Audi, BMW, and Mercedes-Benz, their parts-to-whole price ratios were over 500 percent. See INS. ASS'N CHINA, REPORT OF AUTOMOTIVE PARTS-TO-WHOLE PRICE RATIOS, ISSUED BY CHINA'S INSURANCE ASSOCIATION AND CHINA'S AUTOMOTIVE MAINTENANCE AND REPAIR TRADE ASSOCIATION (Apr. 19, 2016), [http://www.iachina.cn/content\\_e3ff1892-05f2-11e6-95c5-b3e04bd54cfb.html](http://www.iachina.cn/content_e3ff1892-05f2-11e6-95c5-b3e04bd54cfb.html).

the prerogative to judge whether and which information can be released to the public.

The situation has changed significantly, however, since the beginning of the twenty-first century. The Law of the Disclosure of Government Information was enacted in 2007,<sup>247</sup> which legally obligates the government to disclose information involving public interests and the structure, duties, and working procedures of administrative organs.<sup>248</sup> As a result of the law, the three antitrust agencies are required to publish their enforcement decisions.<sup>249</sup>

Thus far, however, the information disclosed by the antitrust agencies has been insufficient. Overall, the disclosed decisions of the NDRC are brief and only include penalties imposed on companies and conclusory reasoning. Such oversimplified decisions will naturally generate concern that the NDRC may be using “widespread behind-the-scenes tactics”<sup>250</sup> during investigations. The NDRC needs to disclose more detailed information including, but not limited to, the process of enforcement, evidence collected, defensive arguments of investigated companies, minutes of meetings between the NDRC and companies, transcripts of public hearings, and other related information. In short, the more transparent that the decision-making process by the NDRC is, the more persuasive the evidence obtained by the NDRC will be to rebut accusations of discriminatory enforcement.

## CONCLUSION

Since China introduced the AML in 2008, China’s efforts to enforce the AML should be applauded. China, however, still faces significant challenges of implementing the new antitrust

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247. Regulation on the Disclosure of Government Information (promulgated by the St. Council, Apr. 5, 2007, effective May 1, 2008), CLI.2.90387(EN) (Lawinfochina).

248. *Id.* art. 9.

249. As of December 31, 2015, the SAIC and its Provincial Agencies have published 117 decisions regarding the enforcement of the AML. The NDRC and its Provincial Agencies have published 190. The MOFCOM has completed 1,308 cases of merger review and 5 cases regarding the failure to legally declare the concentration of business operators. See LIN WEN, ZHONGGUO FANLONGD 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], at 3 (2016).

250. Martina & Miller, *supra* note 224.

law. This article discussed in detail nearly all the disclosed RPM cases and highlighted factors that have shaped antitrust enforcement in China. It encouraged Chinese competition authorities to flesh out the enforcement system by establishing more specific regulations and guidelines and to disclose more detailed information of the enforcement's process. These steps will help China build a predictable, consistent, and transparent system of competition law on the one hand and will help to soundly rebut the accusation of discrimination against multinationals on the other.

## APPENDIX—PENALTIES IN RPM CASES

Name	Fines (% of Previous Year's Sales Revenue)	Reasons for Mitigated Penalties	Reasons for Exemptions	Illegal Gains Confiscated?	Multinational Companies (Branches)?
<b>The Liquor Case</b>					
Moutai	1%	N/A	N/A	No	No
Wuliangye	1%	N/A	N/A	No	No
<b>The Infant Formula Milk Case</b>					
Biostime	6%	N/A	N/A	No	Yes
Mead Johnson Nutrition	4%	Although the company did not cooperate with the investigation, it proactively implemented self-corrective measures.	N/A	No	Yes
Dumex Baby Food	3%	Proactively cooperated with the investigation and implemented self-corrective measures.	N/A	No	Yes
Abbott	3%	Proactively cooperated with the investigation and implemented self-corrective measures.	N/A	No	Yes
Royal Friesland Campina	3%	Proactively cooperated with the investigation and implemented self-corrective measures.	N/A	No	Yes
Fonterra	3%	Proactively cooperated with the investigation and implemented self-corrective measures.	N/A	No	Yes
Wyeth Nutrition	0%	N/A	Voluntarily reported to the agency, submitted important evidence, and proactively implemented self-corrective measures.	No	Yes
Beingmate	0%	N/A	Voluntarily reported to the agency, submitted important evidence, and proactively implemented self-corrective measures.	No	No
Meiji	0%	N/A	Voluntarily reported to the agency, submitted important evidence, and proactively implemented self-corrective measures.	No	Yes
<b>The Corrective Lens Cases</b>					
Essilor	2%	Although it had control in setting prices, it proactively implemented self-corrective measures.	N/A	No	Yes

Name	Fines (% of Previous Year's Sales Revenue)	Reasons for Mitigated Penalties	Reasons for Exemptions	Illegal Gains Confiscated?	Multinational Companies (Branches)?
Nikon	2%	Although it did not cooperate with the NDRC's investigation, it proactively implemented self-corrective measures.	N/A	No	Yes
Zeiss; Bausch & Lomb; Johnson & Johnson	1%	Proactively cooperated with the investigation and implemented self-corrective measures.	N/A	No	Yes
Hoya Vision; Weicon	0%	N/A	Voluntarily reported information to the agency, provided important evidence, actively cooperated with the investigation, and implemented self-corrective measures.	No	Yes
<b>Cases of Vehicle-Distribution Market</b>					
Mercedes-Benz	7%	N/A	N/A	No	Yes
33 Dealers of Mercedes-Benz	Some of them received fines of 1% of the previous year's sales revenue; the others were exempt from penalties because they voluntarily reported RPM agreements to the agency and provided important evidence. The fines totaled 7.869 million yuan (\$1.21 million USD). Detailed information on the case, however, was not disclosed.			No	No
FAW-Volkswagen	6%	N/A	N/A	No	Joint-venture
10 Dealers of FAW-Volkswagen	Seven dealers were fined 1%–2% of previous years' sales revenue. As to two dealers who voluntarily reported their RPMs to the agency and provided important evidence, one was exempt from a penalties, and the other was fined 0.5%. One dealer was exempt from penalties because its violation was minor, quickly self-corrected, and did not cause damage.			No	No
Chrysler	3%	Voluntarily stopped implementing RPM agreements, alleviated damages, and cooperated with the investigation.	N/A	No	Yes
3 dealers of Chrysler	The organizer of the horizontal agreements was fined 6%, and the other two were fined 4%.	N/A	N/A	No	No



Name	Fines (% of Previous Year's Sales Revenue)	Reasons for Mitigated Penalties	Reasons for Exemptions	Illegal Gains Confiscated?	Multinational Companies (Branches)?
Dongfeng-Nissan	3%	Proactively cooperated with the investigation, modified distribution policies, and stopped implementing RPM agreements.	N/A	No	Joint-venture
17 dealers of Dongfeng-Nissan	2%–4%	Unclear	N/A	No	No