



Anti-monopoly

Summary of Major Issues of the First Civil Action in China Concerning a Vertical Monopoly Agreement

The Anti-monopoly Law of the People's Republic of China (the "**AML**") has been in force for approximately four years. The trial of first instance as to the first civil action in China concerning a vertical monopoly agreement (the "**Case**") lasted approximately one and a half years from filing of the action to the delivery of judgment and has recently been concluded. Jun He Law Firm ("**Jun He**") acted as the attorneys for the Defendant (a wholly foreign-owned enterprise in China of a multi-national company) in the Case. The court of first instance (the "**Court**") accepted the arguments made by Jun He on behalf of the Defendant as to the key issues of the Case (as analyzed below) and rejected all litigation claims of the Plaintiff.

I. Litigation Claims of the Plaintiff

The Plaintiff, a distributor of the Defendant, alleged that (i) the Defendant included certain clauses in the Distribution Contract dated January 2008 between the Plaintiff and the Defendant pertaining to restricting the minimum prices at which the Plaintiff as the distributor might resell the goods to third parties (the "**RPM Clause**") and that the RPM Clause constituted a monopolistic act of restricting minimum resale price as prohibited under Article 14(2) of the AML¹; and (ii) the Defendant confiscated a partial deposit of the Plaintiff, ceased supplying to the Plaintiff, and terminated the distribution rights of the Plaintiff on the grounds that the Plaintiff breached the RPM Clauses and that such actions of the Defendant caused huge losses to the Plaintiff, and as a result of these actions the Plaintiff requested the Court to order the Defendant to compensate it for these damages.

II. Key Issues

There are two key issues in the Case. The first is whether the RPM Clause necessarily constitutes a vertical monopoly agreement under Article 14(2) of the AML², and consequently whether the inclusion of

the RPM Clause necessarily constitutes a monopolistic act, or in another word, whether the RPM Clause is a monopoly agreement per se; the second issue is whether the losses alleged by the Plaintiff are losses arising out of such alleged monopolistic act (the "**Monopoly Losses**"), assuming that such monopolistic act occurred, in another word, how to define the Monopoly Losses.

The Case is the first civil action in China concerning a vertical monopoly agreement and there has been no precedential case for reference. Therefore, in the Case, analyzing and making determinations pertaining to such key issues from the AML perspective were completely new to both the Court and to the attorneys of the parties.

1. Whether the RPM Clause is a monopoly agreement per se.

A key issue of the Case is whether the RPM Clause constitutes a monopoly agreement per se or if it is only an essential factor of all the elements for the determination of a monopoly agreement and could only be determined as a monopoly agreement if it causes an eliminative or restrictive effect on competition. Regrettably, however, the AML provides no explicit answer to this issue. As a result, Jun He and the attorney for the Plaintiff debated and expressed wholly opposite views on this issue during the trial.

(1) The attorney for the Plaintiff argued that the RPM Clause constituted a monopoly agreement per se prohibited under the AML and that it was not just an essential factor of the elements for the determination of a monopoly agreement. The attorney argued that because Article 14(2) of the AML expressly prohibits operators from entering into agreements on restricting minimum resale prices with their counterparties, and that entering into such agreements would inevitably eliminate or restrict competition among those operators dealing in different brands and those operators dealing in the same one brand and result in a monopoly, such agreements were monopoly agreements per se, and there was no need to prove whether such agreements had eliminated or restricted competition.

(2) Jun He argued that for the following reasons the RPM Clause

¹ Article 14(2) of the AML prohibits operators from entering into the monopoly agreements on restricting the minimum prices for resale to third parties with their counterparties.

² The monopoly agreements under Article 14 of the AML are entered into between or

among two or more operators at different levels of the supply chain in the same one industry that are not direct competitors but are buyers on one side and sellers on the other side, and are often termed "vertical monopoly agreements".

was not necessarily a monopoly agreement per se prohibited under Article 14 of the AML rather that it was simply an essential factor of the elements for the determination of a monopoly agreement, and that the RPM Clause could be determined as a monopoly agreement only unless and until it caused “an eliminative or restrictive effect on competition” (i.e., the other essential factor):

(a) Article 14 of the AML **prohibits operators from entering into “monopoly agreements” with their counterparties that restrict minimum resale prices with their counterparties**, but the AML **does not prohibit the operators from entering into “agreements” that restrict minimum resale prices with their counterparties**. In addition, the AML does not state that **agreements between operators and their counterparties that restrict minimum resale prices are necessarily monopoly agreements**. Therefore, the argument that the RPM Clause is a monopoly agreement per se is obviously does not comply with the meaning and logic of the foregoing provision of law.

(b) In order for clauses on restricting minimum resale prices entered into between operators and their counterparties to be deemed as monopoly agreements, **such clauses restricting minimum resale price must satisfy the conditions for being a monopoly agreement**. Article 13.2 of the AML expressly defines monopoly agreements as “agreements, decisions or other concerted actions that eliminate or restrict competition”, and thus monopoly agreements must “eliminate or restrict competition”. Therefore, one essential factor for a clause restricting minimum resale price to be determined as a monopoly agreement is that such a clause causes “an eliminative or restrictive effect on competition”, and if it does not cause such an effect, or such an element is missing, it should not be determined as such.

(c) A clause restricting minimum resale price entered into between an undertaking and its counterparties will not necessarily eliminate or restrict the competition among different brands, because the pricing of the other brands will not necessarily be restricted by the aforesaid clause. Such a clause restricting minimum resale price will not necessarily eliminate or restrict the competition among operators dealing in the same brand either. Such competition is not simply limited to price competition, but instead is carried out in multiple aspects and at multiple levels, including but not limited to sales volume, after-sales services, customer awareness, brand promotion and maintenance, maintenance of customer relationship, business integrity, and timeliness of payment. Therefore, the entry into of a clause restricting minimum resale price does not necessarily result in monopoly per se.

2. Definition of the Monopoly Losses

It is stipulated in Article 50 of the AML that “operators that cause losses to others as a result of their monopolistic acts shall bear civil liabilities in accordance with the laws”. However, the AML does not further define such losses (i.e., the Monopoly Losses). Therefore, this issue is another key issue in this Case.

(1) The attorney of the Plaintiff argued that the Defendant confiscated a partial deposit, narrowed down the authorized distribution areas, ceased the supply and eventually terminated the distribution rights of the Plaintiff on grounds of the alleged failure of

the Plaintiff to conform to the RPM Clauses, which were a monopoly agreement in nature, and that such acts caused substantial losses to the Plaintiff, including but not limited to the loss of performance rebates, loss of benefits from performance of the contract, severance pay, loss of goodwill, loss from unsold stock, and the excess of the price of the goods purchased from third parties to satisfy unperformed contracts over the price at which the Plaintiff would have otherwise purchased the goods from the Defendant had the Distribution Contract not been terminated, and that all such losses arose out of Defendant’s monopolistic acts and constituted Monopoly Losses within the meaning of Article 50 of the AML.

(2) Jun He strongly argued that (i) the Plaintiff produced no evidence that could prove the incurrance or existence of such losses, and (ii) assuming that such losses alleged by the Plaintiff did occur or exist, such losses were by nature just the contractual losses arising in connection with the entry into and performance of the Distribution Contract involved in the Case and did not arise out of the elimination or restriction of competition resulting from monopolistic acts and thus were not Monopoly Losses. In fact, the “monopolistic acts” alleged by the Plaintiff, i.e., the entry into and performance of the RPM Clauses, did not cause any eliminative or restrictive effect on competition and were not monopolistic acts at all, let alone the reason for the incurrance of any alleged Monopoly Losses.

III. Court Analysis and Determination

In the Judgment of First Instance, the Court analyzed and made its determinations as to the above two key issues involved in the Case. The Court’s determinations were essentially consistent with the arguments made by Jun He.

1. The Court held that the determination of a monopoly agreement referred to in Article 14 of the AML should not be made solely based on whether any restricting minimum resale price clause was entered into between an operator and its counterparty. Instead the Court found that Article 13.2 of the AML³ should be taken into consideration as well, i.e., whether the clause restricting minimum resale price causes “an eliminative or restrictive effect on competition” should also be assessed. Based on the findings of fact, the Court held that the evidence produced by the Plaintiff could not prove that the RPM Clauses in the Case had “an eliminative or restrictive effect on competition” and there was no adequate basis for the Court to determine the existence of any monopolistic act in the Case.

2. The Court defined Monopoly Losses to be those losses mainly arising out of the elimination or restriction of competition. Therefore, regarding the losses alleged by the Plaintiff, the Court held that all such losses were in nature the losses arising out of contractual disputes and were not directly relevant to the monopolistic act alleged by the Plaintiff, i.e., the RPM Clauses. This ruling indicates that the Court did not accept the losses alleged by the Plaintiff were Monopoly Losses⁴.

3. Consequently, the Court rejected in its judgment all litigation

³ It is stipulated in Article 13.2 of the AML that “*the term “monopoly agreements” referred to herein refers to the agreements, decisions or other concerted actions that eliminate or restrict competition*”.

⁴ The Court also pointed out that the evidence produced by the Plaintiff in the Case could not prove that the Defendant early terminated the Distribution Contract and refused to enter into further contracts with the Plaintiff due to its implementation of the RPM Clauses and thus there would also be lack of basis for the Plaintiff to claim against the Defendant for compensation for such contractual losses.

claims made by the Plaintiff.

IV. Summary

1. Many distribution or sales contracts contain clauses restricting minimum resale price. Whether such clauses are monopoly agreements per se prohibited under the AML has been the subject of debate after the AML took effect, since (i) the relevant provisions of the AML are not explicitly worded; and (ii) no further explanation or interpretation has subsequently been made in the administrative rules regarding anti-monopoly in terms of price. In this Case, the Court analyzed the foregoing issue and made it clear that the RPM Clause

did not constitute a monopoly agreement per se and that the RPM Clause should be determined as such only if it had caused “eliminative or restrictive effects on competition”.

2. The AML does not clearly define Monopoly Losses either. In the Case, the Court made it clear that the criterion for determining whether the relevant losses were Monopoly Losses is that the determination should be made based on whether the relevant losses arose out of the elimination or restriction of competition, and that such losses would be Monopoly Losses if they arose out of the elimination or restriction of competition and would be other losses (such as contractual losses) if not.

George (Zhao) Wang 合伙人 Tel: 8621 2208 6243 Email: wangz@junhe.com

Ji Guangming 合伙人 Tel: 8621 2208 6233 Email: jig@junhe.com

THIS BULLETIN IS INTENDED FOR LEGAL INFORMATION PURPOSES AND FOR REFERENCE ONLY,
IT DOES NOT CONSTITUTE OUR LEGAL OPINION OR ADVICE OF JUN HE LAW OFFICES.



反垄断的法律热点问题

简要解析中国首例纵向垄断协议民事诉讼案

《中华人民共和国反垄断法》(“《反垄断法》”)实施已近四年,期间国内第一起纵向垄断协议民事诉讼案件(“本案”)的一审工作经过了由立案到判决大约一年半的时间,日前尘埃落定。君合律师事务所在本案中作为被告代理人,一审法院(“法院”)在本案核心问题(如下所分析)方面采纳了君合代表被告所发表的答辩和代理意见,驳回了原告的全部诉讼请求。

一、原告的诉请

原告指控被告(系跨国公司在中国设立的独资企业)在与其于2008年1月订立的经销合同中规定了限定作为经销商的原告向第三人转售商品最低价格(“限定最低转售价格”)的条款,该等约定构成了《反垄断法》第十四条第一款第(二)项所禁止的限定最低转售价格之垄断行为¹;并且,被告因原告违反前述限定最低转售价格条款,没收了原告的部分保证金,停止供货给原告以及取消原告经销权等行动,给其造成了巨大损失,遂诉至法院寻求法院判令被告向其赔偿该等损失。

二、核心问题

本案核心问题有两个,其一,限定最低转售价格条款是否当然构成《反垄断法》规定的纵向垄断协议²,从而订立该条款是否当然属于实施了垄断行为,即限定最低转售价格条款本身是否就属于垄断协议;其二,假定存在垄断,原告所提出的各项损失是否属于垄断行为所遭受的损失(“垄断损失”),即垄断损失如何界定。

由于本案系中国第一起纵向垄断协议的民事诉讼案件,没有任何先例可循,因此,在司法实践中,如何从《反垄断法》角度来分析和认定上述法律要点,对于法院和双方代理律师而言均是全新的课题。

1、 限定最低转售价格条款是否本身就属于垄断协议

限定最低转售价格条款本身就属于垄断协议,还是限定最低转售价格条款仅为垄断协议的构成要件之一,只有在产生排除或限制竞争的情况下才可被认定为属于垄断协议,这是本案的核心问题,而《反垄断法》对此没有明确规定,致使君合与原告的律师在庭审中对此问题进行了焦点辩论并发表了截然不同的观点。

(1) 原告律师认为,限定最低转售价格条款本身就属于《反垄断法》所禁止的垄断协议,而不是仅为垄断协议的构成要件之一,因为《反垄断法》第十四条第一款第(二)项明确禁止经营者和交易相对人达成限定最低转售价格的协议,并且该协议的达成必然影响不同品牌商品经营者之间和相同品牌经营者内部的竞争,造成垄断,其本身就是垄断协议,

¹ 根据《反垄断法》第十四条第一款第(二)项的规定,禁止经营者与交易相对人达成限定向第三人转售商品的最低价格垄断协议。

² 《反垄断法》第十四条所规定的垄断协议系同一产业中两个或两个以上处于不同经济层次、没有直接竞争关系但是有买卖关系的经营者所达成的协议,通常称为“纵向垄断协议”。

根本不需要再证明该协议是否排除或限制竞争。

(2) 君合认为,限定最低转售价格条款并不当然属于《反垄断法》第十四条禁止的垄断协议,其仅仅是垄断协议的构成要件之一,唯有在满足另一个要件——具有“排除、限制竞争的效果”的情况下,该等协议才可被认定为垄断协议,理由是:

(a) 《反垄断法》第14条规定的是禁止经营者与交易相对人达成限定最低转售价格的“垄断协议”,而不是禁止经营者与交易相对人达成限定最低转售价格的“协议”;同时,《反垄断法》也没有规定经营者与交易相对人达成的限定最低转售价格的协议就当然是垄断协议;所以,将限定最低转售价格条款当然认定为垄断协议显然不符合前述法律条款的文意和逻辑;

(b) 经营者与交易相对人之间达成的限定最低转售价格条款如果要被认定为垄断协议,必须符合垄断协议特征。《反垄断法》第十三条第二款对垄断协议明确定义为:“排除、限制竞争的协议、决定或者其他协同行为”。由此可见,垄断协议的特征就是“排除、限制竞争”。所以,限定最低转售价格条款被认定为垄断协议的一个必备要件是该条款要具有“排除、限制竞争的效果”,否则,该条款不可被认定为是垄断协议。

(c) 经营者和交易相对人之间达成限定最低转售价格条款并不一定会排除和限制品牌之间的竞争,其他品牌的定价并不一定会受该价格条款的制约。该条款也不一定会排除和限制相同品牌经营者之间的竞争,因为相同品牌经营者之间的竞争并不简单等同于价格竞争,该竞争是多方面、多层次的,包括销量竞争、售后服务的竞争、客户认知度的竞争、品牌推广和维系的竞争、客户关系维系的竞争、诚信守约的竞争、付款及时性的竞争等。所以,达成限定最低转售价格条款本身并非必然会产生垄断。

2、 垄断损失的界定

《反垄断法》第五十条规定经营者实施垄断行为,给他人造成损失的,依法承担民事责任。但该法律并没有进一步对前述损失(即垄断损失)进行界定。因此,这个问题也成为本案的争议焦点之一。

(1) 原告律师认为,由于被告声称原告未履行具有垄断协议性质的限定最低转售价格条款,便对原告采取了扣除部分保证金、缩减授权经销区域、停止供货以及最终取消经销权,给其造成了重大损失,该损失包括绩效返利、合同履行利益、员工遣散费、商誉损失、积压库存、高价购货价差等。这些损失均是垄断行为所致,属于前述《反垄断法》第五十条所述的垄断损失。

(2) 君合则非常明确地指出,就上述损失原告无任何有力证据可证明其确实发生或存在,而且假设发生或存在原告所称的该等损失,其从法律性质上而言,也仅属于与本案所涉经销合同履行和订立有关的合同损

失，而非因垄断行为产生的竞争被排除或限制所致，不属于垄断损失。事实上，原告指控的所谓“垄断行为”——限定最低转售价格条款的订立和履行并未产生排除或限制竞争的效果，根本未构成垄断行为，当然也就更不可能发生垄断损失。

三、法院评判

法院在其一审判决中对于本案所涉的上述两个核心法律问题进行了分析和认定，其结果和君合的观点基本一致，具体而言：

- 1、 法院认为，对《反垄断法》第十四条所规定的垄断协议的认定，不能仅以经营者与交易相对人是否达成了限定最低转售价格条款为准，而需要结合《反垄断法》第十三条第二款所规定的内容³，即需要进一步考察该协议是否具有“排除、限制竞争的效果”。法院根据查证的事实，认为原告提供的证据并不能证明本案项下的限定最低转售价格条款具有“排除、限制竞争的效果”，本案要确定存在垄断行为依据尚不充分。
- 2、 法院对垄断损失进行了界定，即该损失主要应该为排除、限制竞争所带来的损失。由此，针对原告所主张的所谓损失，法院认为从性质上而言，该等损失均是合同纠纷的损失，与原告主张的垄断行为——限定最低转售价格条款并无直接关联。从前述认定可以看出，法院认为原告主张的损失不属于垄断损失。⁴
- 3、 由此，法院判决驳回原告全部诉讼请求。

王 钊 合伙人 Tel: 8621 2208 6243 Email: wangz@junhe.com

季光明 合伙人 Tel: 8621 2208 6233 Email: jigm@junhe.com

³ 《反垄断法》第十三条第二款规定，“本法所称垄断协议，是指排除、限制竞争的协议、决定或其他协同行为。”

⁴ 法院同时还指出，根据原告在本案中所提供证据，也不能认定被告系执行价格限制条款而提前终止并拒绝继续与原告签订经销合同，从这个角度而言，原告主张被告赔偿这些合同损失也缺乏依据。

四、总结

- 1、 经营者和交易相对人之间约定限定最低转售价格条款在很多经销合同或者销售合同中普遍存在。《反垄断法》实施后，对于该条款是否当然构成违反《反垄断法》的垄断协议一直存在争论，其原因是(i)《反垄断法》相关条款的文字表述并不明确；(ii)国家发改委在《反垄断法》实施后颁布的有关反价格垄断的行政规章中对此也没有进一步说明和解释。法院在本案的审理和判决中，对于前述争议的事项进行了分析和界定，明确了限定最低转售价格的条款并不当然构成垄断协议，其必须产生“排除、限制竞争的后果”才可被视为是垄断协议。
- 2、 如何界定垄断损失也是《反垄断法》没有明确的事项。法院在本案中对此明确了界定的标准，即视该损失是否因排除、限制竞争所致，如是，则属于垄断损失；如否，则属于垄断损失以外的其他损失（如合同损失）。