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大成 DENTONS

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中国女装品牌维格娜丝拟以 57 亿元收购衣恋旗下韩国品牌 Teenie Weenie

维格娜丝（上证.603518）创始于 1997 年，现已发展为中国高端时尚女装品牌之一。在全国 200 余家店铺中，直营店铺的比例高达 90%，与恒隆、王府井百货、银泰百货、万象城、东方新天地、金鹰商贸等集团建立了良好合作关系。

9 月 2 日，维格娜丝时装股份有限公司发布停牌公告，称拟收购韩国品牌 Teenie Weenie。交易将首先由 E-Land Fashion Hong Kong Limited（衣恋时装香港有限公司）及其关联公司将其在中国（不包括港澳台）持有的与 Teenie Weenie 品牌相关的资产与业务转让至甜维你（上海）商贸有限公司（以下称“甜维你”）。之后，维格娜丝将通过下列步骤获得甜维你 100%股权：(1)取得甜维你 90%的股权，并办理完成增资或相关的工商变更，与此对应，第一步收购资产的价款为标的资产整体价格的 90%；(2)《关于 Teenie Weenie 品牌的资产与业务转让协议》签订后，且甜维你运行三个完整的会计年度之后，双方按照“2019 年估值净利润”定义的方法调整确定 2019 年估值净利润，并按照本次交易价格形成的计算方法确定购买甜维你剩余 10%的股权对价。 本次交易预估值约为 57 亿元人民币。

维格娜丝在公告中表示，此次收购 Teenie Weenie 品牌，旨在丰富和完善公司的品牌和产品线，并认为这将有利于发挥公司各品牌之间的协同效应。衣恋集团 1994 年入驻中国市场，目前拥有 8000 多家直营店。此次收购 Teenie Weenie，维格娜丝看中的就是其背后衣恋集团品牌影响力和产品线。

The Chinese Brand of Women's Dress VGRASS is going to Buy Out the Korean Brand Teenie Weenie of E-Land Group with RMB 5.7billion

VGRASS (SH.603518), found in 1997, has now developed into one of the high-end fashion brands for women. Its self-managed stores achieve 90% of its 200 plus stores. And it has established good cooperative relationship with the properties groups including Hang Lung, Wangfujing, Yintai, MIXC, Oriental Plaza and Golden Eagle, etc.

On September 2, VGRASS announced a suspension notice and claimed that they are going to buy out the Korean brand, Teenie Weenie. The transaction will be made in the following manner. Firstly, E-Land Fashion Hong Kong Limited and its affiliates will transfer the assets and businesses of Teenie Weenie that they hold to a commercial trading company in Shanghai named Tianweini (hereinafter “Tianweini”). Secondly, VGRASS will purchase 100% shares of Tianweini in the following manner: (1) purchase 90% shares of Tianweini in consideration of 90% of the total sale price of the assets, and complete the increase of capital and the change of registration with AIC; (2) after the *Transfer Agreement of Assets and Businesses of Teenie Weenie* is executed and three full financial years of Tianweini are completed, the parties will adjust the net profits of Tianweini in 2019 in accordance with the methods defined in “2019 Estimated Net Profits” and determine the remaining consideration of the 10% shares of Tianweini in accordance with the calculation methods made in this transaction. The total sale price of this transaction is estimated to be RMB 5.7 billion.

VGRASS presented in the notice that the buy-out of Teenie Weenie is for the improvement of its brands and product lines, which will be beneficial to the synergy among its other brands. E-Land Group came into the Chinese market in 1994 and so far it has over 8000 self-managed stores in China. That's why VGRASS sets its sight on the brand influence and product lines of E-Land Group in this buy out.

娇兰入驻天猫，争夺年轻客户

LVMH 携旗下奢侈品牌娇兰（GUERLIAN）于 9 月 7 日正式登陆天猫开启预售。188 岁的娇兰携手青年影视明星杨洋，用直播的创新营销方式开启天猫娇兰官方旗舰店，通过为粉丝和偶像明星提供接触机会，从而带动产品销量，这无疑是奢侈品电商营销一大创新之举。

据透露，在 1 小时的直播里，打破了娇兰史上单小时会员招募记录。参与互动的人当中，18 到 25 岁的年轻群体占近 50%，逼近 400 万人次。仅从 9 月 7 日天猫直播的数字来看，奢侈品拥抱电商或将成为热潮。

在此之前，LVMH 集团下专业彩妆品牌 MAKE UP FOR EVER 也于去年 7 月开设天猫旗舰店。今年 9 月 22 日，露华浓 REVLON 通过天猫海外旗舰店重返中国市场。去年，Coach 阔别四年重返天猫，但仅仅一年之后，又宣布"分手"了。

另外，法国高级珠宝品牌卡地亚（Cartier）于今年 5 月增设了微信精品店，用于销售包括珠宝、腕表、皮具在内的部分商品。今年 8 月，著名奢侈品品牌 Dior 也在微信公众号上发起 Lady Dior Small 手袋的限期线上购买活动。

GUERLIAN entered TIMALL for Attracting Young Customers

LVMH-owned GUERLIAN officially opened booking on TIMALL on 7th Sep. The 188-year- old GUERLIAN announced the opening of its online store on TIMALL together with the young artist Yang Yang, through a live video ('Zhi Bo' in Mandarin). It provides an opportunity of meeting idols for fans in order to raise the sales. This is undoubtedly an innovative measure of e-commerce marketing by luxury companies.

It is said that in the one-hour live video, the record of recruiting VIPs in an hour was broken. The young between 18 and 25 accounts for approximate 50% in VIPs, amounting to around 4 million. If only considering the statistic regarding the live video on Tmall, it seems a trend for luxury to cooperate with e-commerce platforms.

Before that, LVMH-owned MAKE UP FOR EVER, a make-up brand also opened an online shop on TIMALL in July last year. This year, REVLON came back to the Chinese market by opening a TIMALL shop as well. Coach came back to TIMALL last year but finally they broke up only after one year.

In addition, Cartier, a French jewel brand, opened a boutique on Wechat in May for selling the products such as jewel, watches and leather. In August, the famous luxury brand Dior also started a time-limited sale of Lady Dior Small on Wechat.

Golfsmith，曾经全球最大高尔夫零售商，申请破产保护

美国时间 9 月 14 日，世界最大高尔夫运动用品零售商高尔夫史密斯国际公司根据美国破产法第十一章，正式向破产法庭申请破产。

近年来，高尔夫参与人数下滑对整个高尔夫零售业造成冲击。今年 5 月，阿迪达斯宣布出售旗下高尔夫产业；8 月，耐克也宣布放弃球具市场。

目前 Golfsmith 仍寄希望于重组寻找潜在买家，否则将清算高达上亿元的债务。Golfsmith 在全美拥有超过百间零售店，在加拿大拥有五十间以 GOLF Town 命名的零售店。目前，加拿大五十家零售店已找到两个买家，加拿大公司 CI Financial Corp. 和 Fairfax Financial Holdings Ltd.。

（大成上海办公室于 10 月 9 日召开了"中国企业参与跨境破产、不良资产收购的法律策略"研讨会，如有中外破产法问题，敬请来电咨询。）

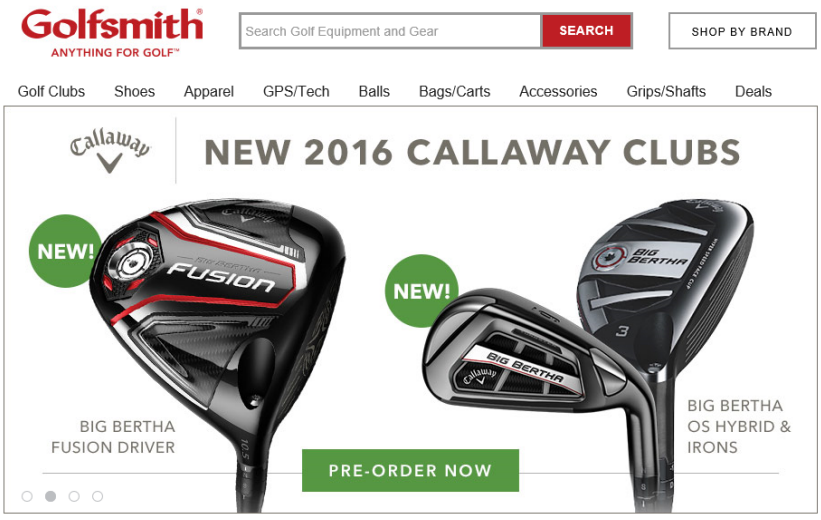
Golfsmith Applied for Bankruptcy, Which Was the Largest Golf Retailer in the World

On 14 September, U.S. local time, the largest golf retailer Golfsmith International Inc. filed for bankruptcy at the bankruptcy court in accordance with Chapter 11 United States Bankruptcy Code.

In recent years, the reduction of golf players impaired golf retail industry. In this May, Adidas announced to sell its golf industry; In August, Nike also declared to give up the market of golf clubs.

Now, Golfsmith is still looking for potential buyers, or it may have to liquidate over one hundred million USD debt. Golfsmith has over one hundred retailers in the U.S. named GOLF TOWN and fifty retailers in Canada. Currently, the latter have found two buyers which are two Canadian enterprises, CI Financial Corp. and Fairfax Financial Holdings Ltd.

(Dentons Shanghai Office held *The Discussion Forum on Legal Tactics Regarding Chinese Enterprises' Participation in Cross-border Bankruptcy and Purchase of Non-performing assets* on 9 Oct 2016. If there is any enquiry relating to domestic or foreign bankruptcy law, please feel free to contact us.)



京东首次公布全盘 VR/AR 战略

9 月 6 日京东首次对外公布了其 VR/AR 战略，核心信息包括：成立 VR/AR 产业联盟、创造 VR/AR 电商应用、参与 VR/AR 技术标准建立和打造 VR/AR 统一开放平台四个方面。京东选择在这样一个时间节点推出自己的 VR/AR 战略，明显就是为了能够在淘宝 Buy+以及支付宝 VR Pay 上线测试之前扳回一城。从内容上来说，京东的 VR/AR 战略四大板块可以拆分为 VR、AR、社交、技术、产业联盟五个方向。

此前，亚马逊正在招聘虚拟现实研发总监；eBay 则联合澳大利亚的 Myer 百货推出了一个基于手机 VR 的购物应用；阿里巴巴于今年三月成立了 VR 实验室，并发布了首款虚拟购物概念产品淘宝 Buy+。随后，支付宝也推出了 VR Pay 的概念，两者都将于今年 9 月在国内上线测试。全球主要的电商巨头都已经杀到了 VR 电商领域，电商 VR 之争才刚刚开始。

JD initially announced its whole VR/AR strategy

In Sep. 6th, JD initially announced its VR/AR strategy. The core information included four aspects of establishing VR/AR industry alliance, developing VR/AR e-commerce application, participating in the establishment of VR/AR technical standards and establishing VR/AR uniform opening platform. Obviously, JD launched its VR/AR strategy at that moment in order to win the game before Taobao Buy+ and Alipay VR Pay online. In content, JD's four plates of VR/AR strategy can be divided into five directions: VR, AR, social networking, technology and industrial alliance.

Before that, Amazon was looking for a VR research officer; eBay and the Australian department Myer cooperated to launch a mobile APP of VR shopping. Alibaba founded VR labs in this March, and released the first virtual shopping concept product named Taobao Buy+, and then Alipay also introduced the concept of VR Pay, both of which will be tested online in this September. The world's major e-commerce giants have been focusing on the field of VR e-commerce. The VR battle for all these suppliers has just begun.

案例研究
Case Study

卖正品 GUCCI 包包也被罚？GUCCI 正品销售商的商标侵权与不正当竞争案
——2015 年度上海知识产权法院十大典型案例之一

案情介绍

原告古乔公司系“GUCCI”包袋等商品商标和货物展出等服务商标的专用权人。被告盼多芙公司、兴皋公司未经授权在米兰广场开设店铺销售 GUCCI 商品。共同被告还包括米岚公司，是米兰广场的经营管理者。古乔公司以三被告共同构成商标侵权和不正当竞争为由提起诉讼，请求判令三被告停止侵权，连带赔偿古乔公司经济损失人民币 100 万元。

判决结果及理由

上海市杨浦区人民法院一审认为，盼多芙公司和兴皋公司经营的系正品“GUCCI”品牌的商品，不构成对古乔公司“GUCCI”包袋等商品商标的侵权。但两公司在店铺招牌、店内装潢中突出使用“GUCCI”，侵害了古乔公司“GUCCI”货物展出等服务商标专用权，并构成不正当竞争。米岚公司的行为构成虚假宣传的不正当竞争，同时对盼多芙公司、兴皋公司的赔偿承担连带责任。原审判决后，三被告均不服，提起上诉。上海知识产权法院二审认为，原审法院判决驳回上诉，维持原判。

法院判决结果及案件的事实与理由见下表：

<table>
<tr><th></th><th>商品商标</th><th>服务商标</th><th>不正当竞争</th></tr>
<tr><td>盼多芙、兴皋公司</td><td rowspan="2">不构成侵权
事实与理由：被告销售的商品均为正品</td><td>构成侵权
事实与理由：未经授权提供 GUCCI 商品的展出服务（详见解读 1）</td><td>构成不正当竞争
事实与理由：未经授权在店铺招牌、店内装潢突出使用有竞争关系的他人“企业名称”（详见解读 2）</td></tr>
<tr><td>米岚公司</td><td>构成帮助侵权
事实与理由：米岚公司明知盼多芙公司、兴皋公司与古乔公司无授权关系未予制止，还在官网及微博上以“GUCCIOUTLET 绿色米兰店开业”、“GUCCIOUTLET 店正式入驻绿色米兰广场”作为宣传，造成消费者的混淆与误认</td><td>构成不正当竞争
事实与理由：米岚公司在官网及微博上的宣传与事实不符，属于虚假宣传的不正当竞争行为。</td></tr>
</table>

解读 1：

涉案“GUCCI”注册商标其中一个核定使用的服务项目为第 35 类，包括货物展出、样品散发、直接邮件广告、组织商业或广告展览、组织商业或广告交易会、为服装组织商业或广告展览、

推销（替他人）等，其中服务项目货物展出、样品散发等包括了商标权人为一般消费者提供自己所生产商品的货物展出、样品散发的服务。本案中，盼多芙公司、兴皋公司在涉案店铺招牌上先后使用“GUCCI”和“OUTLETGUCCI”；在店铺内的醒目位置，使用较大面积的“GUCCI”和“OUTLETGUCCI”作为店内的装潢。在涉案店铺中售卖“GUCCI”商品，显然盼多芙公司、兴皋公司也同时提供了“GUCCI”商品的货物展出等服务。上述使用方式已经超出了说明、描述自己经营的商品的必要范围，而产生了对涉案店铺经营者、涉案店铺所提供的服务来源的标识作用，不属于“正当使用”的范围。同时也足以使相关消费者对涉案店铺与古乔公司的关系产生混淆和误认。

解读 2：

《反不正当竞争法》第五条第（三）项的规定，经营者不得“擅自使用他人的企业名称或者姓名，引人误认为是他人的商品”。古乔公司、盼多芙公司、兴皋公司都在销售“GUCCI”商品，存在竞争关系。“GUCCI”作为古乔公司企业名称“GUCCIO GUCCI S.P.A.”中的字号，属于《反不正当竞争法》第五条第（三）项所规定的“企业名称”。 盼多芙公司、兴皋公司在涉案店铺招牌上先后使用“GUCCI”和“OUTLETGUCCI”；在店铺内的醒目位置，使用较大面积的“GUCCI”和“OUTLETGUCCI”作为店内的装潢的行为，足以使相关公众对涉案店铺经营者的身份，涉案店铺经营者与古乔公司之间的关联关系产生混淆和误认，从而使盼多芙公司、兴皋公司获取不应有的竞争优势。

因此从本案来看，销售正品商品的销售者虽不构成对商品商标的侵权，但其销售过程中伴随的“展出”等服务仍会构成服务商标的侵权。而若销售者在店铺招牌、店内装潢突出使用商标，足以使消费者对销售者的身份产生混淆与误解或产生虚假宣传的效果，则会构成不正当竞争。

（如需进一步了解本案，可点击“阅读原文”查阅《如何解决“窜货”销售真品时的商标侵权和不正当竞争问题》，作者：鲁灿 大成上海办公室知识产权部律师）

Penalty for selling authentic Gucci handbags? The case of trademark infringement and unfair competition for authentic Gucci products retailer — — one of the ten typical annual cases from Shanghai Intellectual Property Court in 2015

Background of the case

The plaintiff, Guqiao Company, is the owner of the Commodity Trademark and Service Trademark of Display of goods etc. of GUCCI’s handbag. The defendant Pandufu Company and Xinggao Company sold GUCCI products in Milan Plaza without authorization. The third joint defendant, Milan Company is the operator and manager of Milan Plaza. Guqiao Company sued the three defendants for the trademark infringement and unfair competition, requesting the court to order the three defendants to stop the infringing acts, and seeking compensation for economic losses of 1 million yuan to Guqiao Company.

Judgment and Reasoning

People’s court of Shanghai Yangpu District held that Panduofu Company and Xinggao Company sold authentic GUCCI products; therefore they did not infringe commodity trademark of Plaintiff. However, two companies’ highlighting “GUCCI” in the shop signs and decoration had infringed Guqiao Company’s service trademark, specifically, the Display of goods; and the acts constituted unfair competition. Milan's acts constituted unfair competition of false advertisements. At the same time, Milan Company undertook joint liability of compensation for Panduofu Company and

Xinggao Company. After the trial judgment, three defendants appealed. The appellate court, Shanghai Intellectual Property Court, dismissed the appeal and sustained the trial judgment.

Court's opinion, facts and reasoning are as follows:

<table>
<tr><th></th><th>Commodity Trademark</th><th>Service Trademark</th><th>Unfair competition</th></tr>
<tr><td>Panduofu Company and Xinggao Company</td><td rowspan="2">No infringement
Facts and reasoning：Products plaintiff sold were all authentic.</td><td>Constituted Infringement
Facts and reasoning：Providing service of display of Gucci products without authorization.（for details see Note 1）</td><td>Constituted unfair competition
Facts and reasoning：highlighting "company name" of competitor in in the shop signs and decoration without authorization.（for details see Note 2）</td></tr>
<tr><td>Milan Company</td><td>Constituted Contributory infringement
Facts and reasoning：Milan Company knew that Panduofu Company and Xinggao Company did not have authorization from Gucci, but Milan Company didn't stop them. Furthermore, Milan Company advertised that "GUCCIOUTLET Green Milan Store Now Opening"; "GUCCIOUTLET Entering Green Milan Plaza" on its official website and Weibo, which may cause customers' confusion and misidentification.</td><td>Constituted unfair competition
Facts and reasoning：Milan Company's advertisement on its official website and Weibo was in no accordance with the fact. Therefore, the acts constituted unfair competition of false advertisements.</td></tr>
</table>

Note 1:

One of the involved "GUCCI" registered trademarks was approved for use in Class 35 (service) with a scope of use including display of goods, distribution of samples, direct mail advertising, organization of commercial advertising or exhibition, organization of commercial or advertising fair, organization business or advertising exhibition for the apparel and marketing (for others), etc. Among them, the service items of "display of goods", "distribution of sample" include the same activity (display of goods and distribution of sample) that a trademark owner will provide to his/her own goods. In the case, Panduofu Company and Xinggao Company had used the "GUCCI" and "OUTLETGUCCI" in the shop's signs successively; and used large signs of "GUCCI" and "OUTLETGUCCI" as shop decoration conspicuous. It was obvious that when the shop sold Gucci products, Panduofu Company and Xinggao Company provided the service of demonstration. The aforesaid methods have been beyond the necessary scope of the explanation and description of the goods, which indicated shop's operator and the source of the service and were beyond the scope of "fair use". Additionally, it was clear that these acts would

cause customers' confusion and misidentification of the relationship between the shop and Guqiao Company.

Note 2:

Article 5(c) of *The Law of the People's Republic of China against Unfair Competition* provides that business operators shall not be permitted to use, without prior permission, the names of other enterprises so as to mislead buyers. Guqiao Company, Panduofu Company and Xinggao Company all sold Gucci products, so they were competitive among each other. "Gucci" as the shop name of "GUCCIO GUCCI S.P.A", is within the scope of "names of enterprise" of article 5(c) of *Law of the People's Republic of China against Unfair Competition*. Panduofu Company and Xinggao Company had used the "GUCCI" and "OUTLETGUCCI" in the shop's signs successively; and used large signs of "GUCCI" and "OUTLETGUCCI" as shop decoration conspicuously, which caused relevant public's confusion and misidentification of the status of the shop and the relationship between shop operator and Guqiao Company. So, Panduofu Company and Xinggao Company could get unfair competition advantage.

In conclusion, selling authentic products won't constitute commodity trademark infringement. However, providing service such as "demonstrating the products" may constitute service trademark infringement. In addition, the seller's use the trademark in shop signs and shop decoration conspicuously may constitute unfair competition if such use may cause customers' confusion and misidentification and have the effect of false advertisements.

(For more information of the case, please press "Read More". You may refer to *How to deal with the problems of trademark infringement and unfair competition when selling authentic products without authorization*. Author: Can Lu, Attorney at Department of Intellectual Property of Dentons Shanghai Office.)

限制经销商转售产品价格可能被处罚----我国家电行业纵向价格垄断处罚第一案

案情介绍

本案是我国家电行业纵向垄断处罚第一案。本案行政处罚决定书显示，自 2012 年起，海尔等三家公司（即，重庆新日日顺家电销售有限公司上海分公司、重庆海尔家电销售有限公司上海分公司、重庆海尔电器销售有限公司上海分公司）向经销商发送各类销售政策、通知等以及与经销商签订《海尔产品经销总合同》、《奖励协议》、《保证金协议书》，要求经销商不得"窜货乱价"并执行统一指导价销售，不得扰乱线上市场秩序；对"乱价"经销商进行"罚款"、"没收保证金"，对于屡次"乱价"的经销商暂停供货、停止合作。

今年 8 月，上海市物价局经过长达 8 个月的调查，认定上述三家公司因达成并实施"限定向第三人转售商品最低价格"的垄断协议，对其作出行政处罚，合计罚款人民币 1234.80 万元。

禁止窜货、乱价的违法风险

《反垄断法》第十四条规定了"经营者与交易相对人达成"的纵向价格垄断协议和纵向非价格垄断协议。(1)纵向价格垄断协议，是指第十四条第（一）、（二）项规定的"固定向第三人转售

商品的价格”和“限定向第三人转售商品的最低价格” 的垄断协议。(2)纵向非价格垄断协议，是指第十四条第（三）规定的“国务院反垄断执法机构认定的其他垄断协议”，对于具体表现形式没有明确规定；在实践中，主要表现为地域/客户限制协议、搭售/捆绑销售协议、排他供应/购买协议等。

上述三家公司达成并实施的“禁止乱价”属于“纵向价格协议”，而其达成并实施的“禁止窜货”属于“地域限制协议”，即限定经销商只能在某个授权经销区域内销售产品，不能向跨区域销售产品。当然，并不是所有的纵向价格协议和地域限制协议都是违法的，都构成《反垄断法》第十四条规制的垄断协议。

在本案中，上海市物价局在行政处罚决定书中并没有进行详细的合理分析，直接通过罗列事实并认定上述三家公司达成协议内容构成“限定向第三人转售商品最低价格”的垄断协议，排除、限制了相关市场竞争，损害了消费者利益和社会公共利益。而对于其达成并实施的“地域限制协议”，上海市物价局的行政处罚决定书中并没有提及。

法院和行政执法部门的不同态度

“北京锐邦涌和科贸有限公司与强生（上海）医疗器材有限公司、强生（中国）医疗器材有限公司纵向垄断协议纠纷案” 是《反垄断法》第十五条规定的豁免条件及合理原则最经典的司法实践和释义。该案中上海市高级人民法院经过非常详细合理性分析，认定强生公司限制经销商最低销售价格的行为严重排除、限制了相关市场竞争，动机在于利用强生公司自身的较高市场份额、定价能力、市场地位、品牌影响力、对经销商的控制力来回避价格竞争，因而其限制最低销售价格的纵向价格协议构成垄断协议。

然而，在著名的“茅台”、“五粮液”价格垄断巨额行政处罚案以及近几年国家发改委及其当地直属机构的执法中，发改委更倾向于直接认定制定和实施限制最低销售价格的价格政策即构成垄断协议。

总结

我们谨慎认为，在相关市场具有一定市场份额、具有一定品牌影响力、定价能力的经营者，制定和实施纵向价格协议的违法风险会比较高。

Restriction on Distributors' Re-sale Price May Be Punished – The First Case of Vertical Price Monopoly in Domestic Appliances Industry in China

Case Briefing

This is the first case of vertical price monopoly in domestic appliances in China. According to the administrative punishment decision, from 2012, Haier and another two companies (namely Chongqing Rirshun Domestic Appliances Sales Co., Ltd. Shanghai Branch Office, Chongqing Haier Domestic Appliances Sales Co., Ltd. Shanghai Branch Office and Chongqing Haier Electrical Appliances Sales Co., Ltd. Shanghai Branch Office) by sending various sales policies

and notifications to their distributors and signing "Master Distribution Contract of Haier Products", "Incentive Agreement" and "Deposit Agreement" with their distributors, requested that "purchase Haier products from other distributors or disturbance of the sale prices" are prohibited, the uniform sale prices shall be executed and no disturbance of online market. Fine was imposed and deposit confiscated when distributors were in violation of these rules; suspension of supply of products and termination of cooperation were exercised when the distributor offended for several times.

After eight-month investigation, Shanghai Municipal Price Bureau decided that the aforesaid three companies have executed and exercised the monopoly agreement of "restriction on minimum re-sale price to a third party" in this August and they were punished for RMB 123,480,000 in total.

The Legal Risks of "No Purchase of Products from Other Distributors and No Disturbance of Sale Prices"

Article 14 of the *Anti-Monopoly Law* provides the "vertical price monopoly agreement" and "vertical non-price monopoly agreement" that are prohibited from reaching by the "business operators with their trading parties". (1) Vertical price monopoly agreement refers to the monopoly agreement by "fixing on the re-sale price of the commodities to a third party" and "restricting the minimum re-sale price of the commodities to a third party" pursuant to the first two items of Article 14. (2) Vertical non-price monopoly agreement refers to "other monopoly agreements as determined by the Anti-monopoly Law Enforcement Agency under the State Council" pursuant to the third item of Article 14, however, so far there is no specific provisions in this regard. In practice, vertical non-price monopoly agreements mainly include territorial/client restriction agreement, tie-in sale/bundling agreement and exclusive supply/purchase agreement, etc.

"No disturbance of sale price" reached by the aforesaid three companies is "vertical price agreement", and "no purchase of products from other distributors" is "territorial restriction agreement", namely the distributor is allowed to sell the products within an authorized territory only, but not allowed to sell the products cross-territory. Of course, not all the vertical price agreements and territorial restriction agreements are illegal and will constitute the monopoly agreements regulated by Article 14 of the *Anti-Monopoly Law*.

In this case, Shanghai Municipal Price Bureau did not make detail analysis of rationality in its decision, instead it listed all the facts and decided that the contents in the agreement reached by the aforesaid three companies constituted the monopoly agreement of "restriction on minimum re-sale price to a third party", which eliminated and restricted competition in the relevant market and harm the consumers' benefits and public interest. On the other hand, the administrative punishment decision of Shanghai Municipal Price Bureau did not mention the territorial restriction agreement reached and executed by the three companies.

Different Opinions of the Courts and Administrative Department

"Beijing Ruibang Yonghe Science and Technology Trade Company v. Johnson & Johnson Medical (Shanghai) Ltd., and Johnson & Johnson Medical (China) Ltd." ("Ruibang v. J&J") is the first case of vertical monopolistic dispute and the most typical judicial practice and interpretation of the conditions for waiver and principle of rationality provided in Article 15 of the *Anti-Monopoly Law*. In that case, Shanghai High People's Court made very detail analysis of rationality and found that the restriction on the distributor's minimum re-sale price made by J&J had severely eliminated and restricted competition in the relevant market, with an aim to avoid price competition by virtue of J&J's relatively high market share, price decision, market position, brand influence and control over distributors; therefore its vertical price agreement of restriction on the distributor's minimum re-sale price constituted an monopoly agreement.

However, in the famous administrative punishment cases of "Maotai" and "Wuliangye" and the recent legal enforcement by National Development and Reform Commission ("NDRC") and its local subordinate departments, NDRC inclined to decide that price policy of restriction on minimum sale price constituted the monopoly agreement directly based on the facts.

Conclusion

We take a discreet view that the business operator, which makes and exercises vertical price agreement, has a higher risk of violation if it has certain market share in the relevant market, brand influence and pricing power.

立法动态
Regulation Update

《网络安全法（草案）（二次审议稿）》——限制数据跨境传输

当前，全国人大常委会正在制定首部关于网络空间安全的基础性法律——《中华人民共和国网络安全法》。至 2016 年 8 月 4 日，《网络安全法（草案）（二次审议稿）》已完成公开征求意见。据称，《网络安全法》最快将于年内出台。在正式出台之后，《网络安全法》将对在华运营企业产生重要影响，特别是有关数据跨境传输的规制。具体限制性规定如下：

受到规制的主体

根据《网络安全法（草案）（二次审议稿）》第三十五条，被规制的数据跨境传输的主体要求为“关键信息基础设施的运营者”，结合第二十九条的规定，关键信息基础设施系指“一旦遭到破坏、丧失功能或者数据泄露，可能严重危害国家安全、国计民生、公共利益的”信息基础设施，而其“具体范围和安全保护办法由国务院制定”。

受到保护的数据类型

《网络安全法（草案）（二次审议稿）》第三十五条规定，“关键信息基础设施的运营者在中国境内运营中收集和产生的公民个人信息和重要业务数据应当在境内存储”。因此，该类数据限于系在中国境内收集或产生，主要包括两类：

公民个人信息
关于公民个人信息的内涵和外延，目前主要规定于我国有关个人信息 / 互联网用户信息的法律法规中。

重要业务数据
关于重要业务数据的内涵与外延，二审稿并未作详细规定予以阐明，有待日后相关部门做进一步规定。

规制模式及具体要求

前述两类信息原则上应当存储在中国境内，“因业务需要，确需向境外提供的，应当按照国家网信部门会同国务院有关部门制定的办法进行安全评估；法律、行政法规另有规定的，依照其规定”。

法律责任

根据《网络安全法（草案）（二次审议稿）》第六十四条规定，“关键信息基础设施的运营者违反本法第三十五条规定，在境外存储网络数据，或者向境外提供网络数据的，由有关主管部门责令改正，给予警告，没收违法所得，处五万元以上五十万元以下罚款，并可以责令暂停相关业务、停业整顿、关闭网站、吊销相关业务许可证或者吊销营业执照；对直接负责的主管人员和其他直接责任人员处一万元以上十万元以下罚款”。

总结

作为中国首个规定个人信息保护的全国性文件《信息安全技术公共及商用服务信息系统个人信息保护指南》（GB/Z 28828-2012）在第 5.4.5 条中明确，“未经个人信息主体的明示同意，或法律法规明确规定，或未经主管部门同意，个人信息管理者不得将个人信息转移给境外个人信息获得者，包括位于境外的个人或境外注册的组织和机构”。但该指南作为“指导性技术文件”对相关企业及个人并不具有强制力。目前《网络安全法（草案）（二次审议稿）》对数据跨境传输的限制规定尚比较原则和模糊，在关键信息基础设施的范围、安全保护、评估办法、数据具体类型等方面的规定仍不明确，相关规定亦有可能会进一步修改完善，但其对限制数据跨境传输的规定应当引起在华运营企业的格外注意。

（注：如需进一步了解关于限制数据跨境传输的问题，点击“阅读原文”查阅《<网络安全法>出台在即 首次限制数据跨境传输》，原文作者：邓志松（大成北京办公室资本市场部高级合伙人）、戴健民（大成上海办公室知识产权部高级合伙人）。

Cyber Security Law (Second Draft) – Restriction on Cross-border Data Transmission

Currently, the Standing Committee of the National People's Congress is making the first basic law that exclusively focuses on cyber security, namely the *Cyber Security Law of the People's Republic of China*. The *Cyber Security Law (Second Draft)* has completed public consultation on August 4, 2016. It is said that the *Cyber Security Law* will be promulgated by the end of this year, which will make great influence on the foreign-invested companies in China, especially in the aspect of cross-border data transmission. The details of the restrictions are as follows.

Entity under Regulation

According to Article 35 of the *Cyber Security Law (Second Draft)*, the entity under regulation is the operator of “key information infrastructural facilities”. In addition, Article 29 provides that key information infrastructural facilities refer to “the information infrastructural facilities, which once being destroyed, lost or leaked, may severely impair the national security, national welfare and the people's livelihood and public interests”. The detail scope of protection and security measures will be made by the State Council.

Types of Data under Protection

According to Article 35 of the *Cyber Security Law (Second Draft)*, “the personal information and important business data, which are collected and produced during the business operation by operators of key information infrastructural facilities in China shall be stored in China.” Therefore, the data under protection are limited to those collected and produced in China, which include the following two types.

Personal Information
Currently, the definition and scope of personal information are mainly provided in the laws and regulations, which cover personal information and Internet user's information.

Important Business Data
The definition and scope of personal information are not provided in the Second Draft, which depends on further provisions by the related government department.

Regulation Methods and Detail Requirements

In principle, the aforesaid two types of data shall be stored in China. If it has to be transmitted overseas for the needs of businesses, the security assessment shall be conducted in accordance with the rules made by the state department for cyberspace affairs and the State Council unless otherwise provided by laws and regulations.

Legal Liabilities

Pursuant to Article 64 of the *Cyber Security Law (Second Draft)*, the operator of key information infrastructure facilities shall be ordered correction, warning, confiscated illegal gains and fined more than RMB50,000 but less than RMB500,000, meanwhile, it may also be ordered to suspend the related businesses, stop doing business for internal rectification, close the website and revoke the relevant business permit or business licenses; the person in charge directly and other person directly responsible shall be fined more than RMB10,000 but less than RMB100,000.

Conclusion

As China's first nationwide applicable provision of personal information protection, Article 5.4.5 of *Information Security Technology -- Guidelines on Personal Information Protection of Public and Commercial Service Information Systems (GB/Z 28828-2012)* (the "*Guidelines*") provides that "Without the expressed consent of a subject of personal information, or in the absence of explicit provisions of laws and regulations, or without the approval of the relevant competent department, an administrator of personal information may not transfer personal information to an overseas receiver of personal information, including an individual located overseas or an overseas-registered organization or institution." However, the *Guidelines* do not have mandatory legal binding effect on the related enterprises and persons. Currently, the provisions of the *Cyber Security Law (Second Draft)* are still very principled and vague, especially in the aspects of the scope of key information infrastructure facilities, security protection, assessment methods, detailed types of data, and the related provisions are to be made. However, the provisions on cross-border data transmission are noteworthy for the foreign-invested enterprises in China.

(Note: If you wish to learn more information about the restrictions on cross-border data transmission, please click "read the original article" and check "Cyberspace Security Law is to be Promulgated Soon – the First restriction on Cross-border Data Transmission" by Jet Deng, senior partner at Capital Market Department of Dentons Beijng Office, and Ken Dai, senior partner at IP Department of Dentons Shanghai Office.

End

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大成律师事务所成立于 1992 年，是中国最早的合伙制律师事务所之一。 2015 年 1 月，大成律师事务所与全球十大律所之一的 Dentons 律师事务所正式签署合并协议，共同打造一个全新的、布局全球的世界领先国际律师事务所。这将是目前全球律师业规模最大的律师事务所。合并后的新律所在全球统一使用中文名称“大成律师事务所”（“大成”），英文名称“Dentons”。2016 年 4 月 25 日，大成与新加坡历史最悠久、最负盛名的律师事务所瑞德正式合并。目前，新律所执业律师人数超过 7300 人，新律所将在全球设有 125 多个办公室，遍及五大洲 55 多个国家和地区，为国内外客户带来更多的法律服务优势。

大成在中国的北京、长春、长沙、成都、常州、重庆、大连、福州、广州、哈尔滨、海口、杭州、合肥、呼和浩特、黄石、吉林、济南、昆明、拉萨、南京、南通、南宁、南昌、宁波、青岛、石家庄、上海、沈阳、苏州、深圳、太原、天津、武汉、乌鲁木齐、无锡、温州、厦门、西安、西宁、银川、郑州、舟山、珠海设有分所，在中国台北设有台湾大成律师事务所。

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Founded in 1992, Dacheng Law Offices is one of the first partnership law firms in China. In January 2015, Dacheng Law Offices and Dentons, one of the top 10 global law firms, signed their contract of combination in order to build a new and global leading international law firm in the world. The new law firm is now the largest law firm globally. The new law firm, after the combination, will be known as “大成律师事务所” in Chinese and "Dentons" in English. On 25th April 2016, Dentons and Rodyk, the most famous and oldest law firm in Singapore combined. Now, the new law firm has over 7300 lawyers. It will show more superiority to national and global clients in more than 125 locations serving 55-plus countries and areas over the five continents.

Dentons China Offices’ network: Beijing, Changchun, Changsha, Chengdu, Changzhou, Chongqing, Dalian, Fuzhou, Guangzhou, Ha’erbin, Haikou, Hangzhou, Hefei, Hohhot, Huangshi, Jilin, Jinan, Kunming, Lhasa, Nanjing, Nantong, Nanning, Nanchang, Ningbo, Qingdao, Shijiazhuang, Shanghai, Shenyang, Suzhou, Shenzhen, Taiyuan, Tianjin, Wuhan, Urumqi, Wuxi, Wenzhou, Xiamen, Xi’an, Xining, Yinchuan, Zhengzhou, Zhoushan, Zhuhai and Taipei.