The First Chinese Court Decision on Antitrust Issues in Labor Markets

Cunzhen Huang, Yiming Sun, and *Huanbing Izzy Xu*[*]

I. Introduction

Antitrust enforcement in labor markets has become a focus of the U.S. antitrust regulators in recent years, with particular scrutiny on agreements between employers not to recruit or solicit each other's employees—so-called "no poach" agreements. In a recent decision, a court in China held no-poach and employee compensation-fixing agreements to be illegal, the first such court decision in the country. The court's decision, however, reveals the difficulties in analyzing no-poach agreements within China's existing antitrust regime and analytical framework. This article provides an overview of the Chinese court's reasoning in its recent decision and a comparative assessment to the approach in the United States.

II. China's Antitrust Enforcement on Restrictive Agreements in Labor Markets

While there have been aggressive investigations and challenges of no-poach agreements across different industries in the United States, until recently the Chinese antitrust authority had not publicly investigated or penalized any alleged no-poach agreements or other anticompetitive practices in labor markets. In December 2021, the Chinese Supreme People's Court (the "SPC"), the highest court of the People's Republic of China, issued a judgment involving no-poach and employee compensation-fixing agreements (including wage-fixing and other benefits-fixing agreements) and finding them illegal under China's Anti-Monopoly Law (the "AML").[1]

A. Case Background and Procedural History

The case (the "*Driving School*" case) concerns an alleged horizontal agreement in the form of a joint venture arrangement (the "*JVA*") entered into by fifteen local driving schools and a related "disciplinary protocol" that implemented the JVA (the "*Disciplinary Protocol*"). As explained below, certain provisions of these agreements concern alleged no-poach and employee compensation-fixing agreements. The agreements also fixed the price charged to driving school students and stipulated that all new products in the future shall be jointly developed by all 15 driving schools. Two of the driving schools withdrew from the JVA around one year after the establishment of the joint venture, and sued the other thirteen in a local court in Ningbo, Zhejiang Province, alleging that the JVA and its associated agreements constituted unlawful horizontal agreements that restricted competition in the local market for driver training services. The plaintiffs sought to have the entire JVA invalidated, including the no-poach and employee compensation-fixing agreements, the price-fixing agreement, and the joint product development agreements, as well as the fundamental provisions of the JVA relating to its underlying shareholding structure. In the initial ruling, the lower court in Ningbo ruled partially in favor and partially against the two plaintiff

---

[*] Cunzhen Huang is Counsel at Cleary Gottlieb Steen & Hamilton LLP in Washington, DC. Yiming Sun is Associate at Cleary Gottlieb Steen & Hamilton LLP in Beijing. Huanbing Xu is Associate at Cleary Gottlieb Steen & Hamilton LLP in Cologne. The opinions expressed in this article are those of the authors. They do not purport to reflect the opinions or views of Cleary Gottlieb Steen & Hamilton LLP or those of its clients.

[1] *See Taizhou Luqiao Jili Motor Vehicle Driving Training Co., Ltd. et. al. v. Taizhou Luqiao District Donggang Vehicle Driving Training School et. al.*, Zui Gao Fa Zhi Min Zhong, (2021) No. 1722, Dec. 22, 2021.

schools. The lower court made two key findings: (i) certain aspects of the JVA are anticompetitive under the AML, including due to the impact of the labor restrictions on pricing and output in the market for driver training services; and (ii) certain aspects (*i.e.*, the agreement to fix the price of supporting services that the driving schools agreed to collectively offer through the joint venture, such as examination registration, physical check-ups, card-making, knowledge test training, and simulator training) could be partially exempted from the AML due to the joint venture's claimed procompetitive effects. The lower court, therefore, only found that the non-exempted provisions are anticompetitive and should be void but did not invalidate the provisions relating to the underlying shareholding structure of the JVA.

On appeal, the plaintiff schools sought to partially reverse the lower court's decision and argued that the JVA, in its entirety (including the provisions relating to the shareholding structure of the joint venture), should be deemed null and void for running afoul of the AML. The SPC sided with the plaintiff schools, ruling that the JVA and the associated Disciplinary Protocol are anticompetitive horizontal agreements that cannot be exempted from the AML. The SPC thus held that the entire JVA is void.

B. Analysis of the No-Poach and Employee Compensation-Fixing Agreements

With respect to the alleged no-poach and employee compensation-fixing agreements, the Ningbo lower court's decision on these issues was not appealed to the SPC, so it was not necessary for the SPC to take an explicit position on this portion of the lower court's decision. Nonetheless, the SPC has the ability to correct errors even when not appealed by the parties and did not raise any concerns with the lower court's analysis or conclusion on these issues. As such, the SPC appears to have implicitly endorsed the lower court's opinion in this respect in general.

The lower court held that the relevant provisions in the JVA and its associated Disciplinary Protocol are anticompetitive because they restrict the movement of driving coaches among the driving schools and fix the wages or benefits of the driving coaches. More specifically, the relevant provisions required all fifteen driving schools to: (i) fix the wage of each driving coach at RMB 2520 per student; (ii) not provide driving coaches with vehicle maintenance, gasoline cards, social security, or travel benefits; (iii) not pay driving coaches any holiday allowances exceeding RMB 500 or any extra perks or benefits in any form; (iv) ensure the contract terms between driving coaches and driving schools are consistent; and (v) require the consent of the managers of both driving schools before any driving coach could move from one school to another. These provisions also applied to driving coaches who have their own vehicles and are only "affiliated" with the concerned driving schools.

The lower court ruled that wages and benefits of driving coaches are the necessary cost of driving schools and, therefore, agreements to fix these terms constitute horizontal agreements to fix costs between competitors. Interestingly, the lower court did not explicitly discuss the legality of a cost-fixing agreement on its own, but instead considered this issue together with the price-fixing arrangement contained in the JVA and Disciplinary Protocol, and held that, due to the "close correlation between costs and prices," the cost-fixing would significantly impact the price of the relevant products or services and the combination of fixing costs and fixing prices would "exacerbate the anti-competitive effects."

With regard to restrictions on the movement of driving coaches and their vehicles, the lower court held that these practices constitute anticompetitive horizontal agreements limiting output. Reasoning that both driving coaches and vehicles are indispensable inputs for driving schools and

the production output of driving coaches and vehicles within a certain time period is limited, the court ruled that limiting the output of driving coaches and vehicles would reduce the output of driving school services.

The Chinese court's decision followed a rather indirect and somewhat convoluted chain of reasoning. Rather than analyzing the anticompetitive effects on the directly affected labor market (*i.e.*, competition among driving-school employers for the labor of driving-coach employees), the Chinese court focused on the effects of the restraint on the relevant product/service market one step down the chain (*i.e.*, the provision of driver training services to students). The court's failure to treat the labor market as the relevant market led to challenges to fit the analysis within the current AML regime.

III. Comparison of Analytical Framework for Labor Market Restraints in China and the United States

The Driving School Case demonstrates three key differences in how antitrust law is applied to labor market restraints in China and the United States, in terms of: (1) the legal standard; (2) the definition of the affected market; and (3) the enforcement procedure.

First, in contrast with the rule of *per se* illegality in the United States, China applies a rebuttable presumption of illegality.

In the United States, the Federal Trade Commission (the "FTC") and the Department of Justice (the "DOJ") released the joint Antitrust Guidance for Human Resources Professionals in October 2016.[2] In the Guidance, the agencies made clear that "naked" no-poach and wage-fixing agreements—*i.e.*, which are not related to, or reasonably necessary for, a separate, legitimate transaction or collaboration, such as a share purchase agreement or a joint venture agreement—whether entered into directly or through a third-party intermediary, would be treated as *per se* illegal under the United States antitrust laws and be subject to criminal prosecution.[3] Under Section 1 of the Sherman Act,[4] certain types of agreements that "would always or almost always tend to restrict competition and decrease output" are considered "*per se* illegal" and may be condemned without the need for elaborate inquiry into the actual competitive effects.[5]

By contrast, there is no widely recognized rule of "*per se* illegality" under the AML in China. In China, any agreement, in theory, could be exempted from the AML if the procompetitive effects of the agreement outweigh any anticompetitive effects. The SPC in its judicial interpretation of the

---

[2] The DOJ opened its first major no-poach case in 2010, when it filed complaints against several Silicon Valley companies for entering into alleged no-solicitation agreements and reached settlements with those companies to prohibit similar alleged conduct. *See* Complaint, *United States v. Adobe Sys. et al.*, No. 1:10-cv-1629 (D.D.C. Sept. 24, 2010), https://www.justice.gov/atr/case-document/file/483451/download; Final Judgment, *United States v. Adobe Sys. et al.*, No. 1:10-cv-1629 (D.D.C. Mar. 17, 2011), https://www.justice.gov/atr/case-document/file/483426/download. Prior to the 2016 Guidance, however, the DOJ's enforcement against no-poach agreements was through civil actions, rather than criminal prosecutions.

[3] Dep't of Justice Antitrust Division & Fed. Trade Comm'n, *Antitrust Guidance for Human Resources Professionals*, at 3 (Oct. 2016), https://www.justice.gov/atr/file/903511/download.

[4] 15 U.S.C. § 1.

[5] *Broadcast Music, Inc. v. Columbia Broadcasting System, Inc.*, 441 U.S. 1, 19–20 (1979) (citing *United States v. U.S. Gypsum Co.*, 438 U.S. 422, 441 n.14 (1978)); *see also National Soc'y of Prof'l Eng'rs v. United States*, 435 U.S. 679, 692 (1978) (*per se* rule applies to "agreements whose nature and necessary effect are so plainly anticompetitive that no elaborate study of the industry is needed to establish their illegality").

AML has stated that defendants have the burden (and opportunity) to rebut alleged anticompetitive effects even in cases involving alleged agreements to fix prices, boycott, restrict output, allocate markets, or restrict new technologies or new products.[6] Defendants have the opportunity to demonstrate that the relevant agreement falls within any of the efficiency-based exemptions under Article 15 of the AML, which is largely an equivalent to Article 101(3) of the Treaty on the Functioning of the European Union.

In the *Driving School* case, although the lower court claimed to adopt a *per se* illegality approach toward the no-poach and employee compensation-fixing agreements, it still went on to assess the potential procompetitive effects of the agreements and concluded that the relevant agreements would not generate any efficiencies. The SPC avoided referring to this analytical framework as one of *per se* illegality and emphasized that the rebuttal evidence needs to demonstrate "specific and realistic procompetitive effects instead of general or abstract speculation." In short, the current Chinese approach to no-poach and employee compensation-fixing agreements is more akin to a rebuttable presumption of illegality, rather than a pure *per se* rule.

Second, the U.S. agencies focus on labor markets as the markets affected by the restraints, whereas in China, the focus of the antitrust assessment is on the associated output markets.

The U.S. agencies consider employers as competitors competing to hire or retain employees in labor markets, "regardless of whether the firms make the same products or compete to provide the same services" and consider no-poach agreements as a type of conspiracy restricting competition in labor markets (*i.e.*, allocating the labor market).[7]

However, in China, as mentioned above, the lower court in the Driving School Case scrutinized the no-poach agreement as a form of output restriction agreement in a more traditional product/service market. The Chinese approach seems to suggest that labor market restrictions would tend to restrict the output volume, which may not always be the case in capital-intensive or technology-intensive sectors. The Chinese approach of focusing on the downstream output market also seems to presume that employers who may enter into no-poach agreements are likely to be competitors in the downstream market. This is not always the case. In reality, certain companies that do not compete in the downstream market can and do compete for talent in the labor market.

In the United States, courts have found that agreements to fix employee compensation may be viewed as equivalent to horizontal price-fixing agreements.[8] In the *Driving School* case, however,

---

[6] *See* the Provisions of the Supreme People's Court on Several Issues concerning the Application of Law in the Trial of Civil Dispute Cases Arising from Monopolistic Conduct (as amended in 2020), Fa Shi (2012) No. 5, May 3, 2012, art. 7.

[7] *See* Dep't of Justice Antitrust Division & Fed. Trade Comm'n, *supra* note 3, at 2. *See also United States v. eBay, Inc.*, 968 F. Supp. 2d 1030, 1038–1039 (N.D. Cal. 2013) (at motion to dismiss stage, holding that DOJ allegations of a no-solicitation/no-hire agreement "suffice to state a horizontal market allocation agreement"); *United States v. DaVita Inc.*, No. 1:21-cr-00229-RBJ, 2022 U.S. Dist. LEXIS 16188, at *9–*20 (D. Colo. Jan. 28, 2022) (denying defendants' motion to dismiss and holding DOJ adequately alleged "agreement entered was a horizontal market allocation agreement carried out by non-solicitation").

[8] For example, the court in *Jindal* explained that horizontal price-fixing agreements are not limited to those that "literally directly fix the price of a commodity." *United States v. Jindal*, No. 4:20-CR-00358, 2021 U.S. Dist. LEXIS 227474, at *12–*13 (E.D. Tex. Nov. 29, 2021). Instead, the court explained that "the scope of anticompetitive conduct that constitutes price fixing is broad—it covers agreements among buyers in the labor market" and held that the DOJ's claim of a wage-fixing conspiracy among employers "sufficiently alleges a price-fixing conspiracy that warrants the per

as mentioned above, the employee compensation-fixing agreements were ruled illegal on the ground that they, in conjunction with price-fixing agreements, would exacerbate anticompetitive effects. It remains to be seen whether employee compensation-fixing agreements could be deemed illegal on their own in China.

Third, the procedure and potential liability are different in each jurisdiction. In the United States, both civil and criminal procedures have been invoked by the DOJ in its enforcement actions against no-poach and employee compensation-fixing agreements, with particular emphasis on criminal enforcement in recent years following the 2016 Guidance. In China, there is currently no criminal procedure or general criminal liability for antitrust violations arising from no-poach or employee compensation-fixing agreements. Under the AML, criminal liability is imposed only for severe conduct that impedes the government's investigation, such as refusal to provide information, provision of false information, concealment, destruction, or transfer of evidence, or obstruction of the government's investigation in any other manner.

IV. Conclusion

Antitrust enforcement in labor markets has been in the global spotlight in recent years. In the United States, the Executive Order on Promoting Competition in the American Economy issued by President Biden on July 9, 2021 highlights issues affecting labor and employment, including no-poach and wage-fixing agreements, as areas of heightened antitrust scrutiny and enforcement.[9] While there have been no EU-level enforcement actions against no-poach agreements to date, the European Commissioner for Competition, Ms. Margrethe Vestager, made clear in her speech to the Italian Antitrust Association in October 2021 that "no-poach" agreements "can create a cartel" and "do have a very direct effect on individuals."[10]

Although China has not publicly announced labor market issues as one of its antitrust enforcement priorities, the *Driving School* case sheds some light on China's approach to antitrust issues in labor markets. Companies that conduct business in China (and elsewhere around the world) should be mindful of the Chinese (and global) antitrust risks associated with no-poach and employee compensation-fixing agreements and implement effective compliance programs to manage and minimize the risks.

---

se rule." *Id.* at *9–*26 (E.D. Tex. Nov. 29, 2021); *see also id.* at *14 ("The Supreme Court has made clear that the Sherman Act applies equally to all industries and markets—to sellers and buyers, to goods and services, and consequently to buyers of services—otherwise known as employers in the labor market.").

[9] Exec. Order No. 14036, 86 Fed. Reg. 36987 (July 14, 2021) (encouraging the DOJ and FTC "to consider whether to revise the Antitrust Guidance for Human Resource Professionals of October 2016" and the FTC to exercise "statutory rulemaking authority under the Federal Trade Commission Act to curtail the unfair use of non-compete clauses and other clauses or agreements that may unfairly limit worker mobility").

[10] Margrethe Vestager, Commissioner, European Commission for Competition, A new era of cartel enforcement, Address at the Italian Antitrust Association Annual Conference (Oct. 22, 2021).