



# CHINA MATTERS

Paul Hastings' Newsletter for Investing & Operating  
in the People's Republic of China

## NDRC's Recent Enforcement of the PRC Anti-Monopoly Law: A More Aggressive and Transparent Direction

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As one of the three anti-monopoly enforcement authorities in the People's Republic of China (the "**PRC**" or "**China**"), the National Development and Reform Commission (the "**NDRC**") is in charge of the examination and regulation of price-related monopolistic activities. Traditionally, NDRC took the leading role in the investigation and regulation of any violations of pricing law and regulations in China. The PRC Anti-Monopoly Law (the "**AML**") now provides NDRC with additional authority and resources to investigate and punish pricing-related activities which eliminate or restrict competition.

According to China News Service (a state-owned news agency in China), since the AML came into effect on August 1, 2008 and as of February 2013, NDRC (alone and together with its local counterparts) has initiated 50 investigations of pricing-related monopolistic cases and publicly issued penalties in 21 of such investigated cases. In early 2013, NDRC levied RMB353 million (approximately US\$56.8 million) in fines against six liquid crystal display (LCD) manufacturers (including two Korean companies and four Taiwanese companies) for such companies' participation in a price fixing cartel agreement (the "**LCD Case**"), which is the first time NDRC has investigated and sanctioned international companies. Less than two months after the LCD Case, two provincial counterparts of NDRC in Guizhou Province and Sichuan Province respectively imposed significant sanctions (i.e., RMB449 million, approximately US\$71.8 million) upon two state-owned, high-end liquor enterprises (i.e., Kweichow Moutai Co., Ltd. and Wuliangye Group) for setting minimum resale prices for their respective distributors' sales of the white spirit products (the "**White Spirit Case**"), which is the first published penalty imposed for resale price maintenance activities. The White Spirit Case also involves the highest penalties imposed by NDRC ever since the AML came into effect.

The above two cases signal that NDRC is strengthening its enforcement of the AML. According to people.com (the online version of People's Daily), since 2011, in addition to the delegation of AML enforcement authority to the local Price Bureaus of its provincial counterparts, NDRC has established eight independent enforcement agencies at its local counterparts in the Northeast Region, North China Region, Southwest Region, South China Region, Central China Region, Guangdong Province, and Jiangsu Province, in charge of the supervision of price-related, non-merger monopoly activities in such regions. Furthermore, NDRC is currently recruiting more experts and conducting comprehensive anti-monopoly related training to support its enforcement of the AML.

All of such recent activities and high-profile cases demonstrate NDRC's determination to aggressively enforce the AML and its willingness to disclose its investigations in the near future. Below is a summary of our observations regarding the future trends regarding NDRC's enforcement of the AML and some open issues.

## **I. FUTURE TRENDS REGARDING NDRC'S ENFORCEMENT OF THE AML**

### **1. Multi-national Cartels Are Being Watched**

As noted, the NDRC for the first time investigated and punished international companies in the LCD Case. Until the LCD Case, NDRC had never imposed penalties against international cartels. This may have been due to the lack of enforcement experience and resources for such investigations. The LCD Case took NDRC six (6) years of investigation, and the penalties were issued following decisions made by the United States, Korea and the European Union (the "EU"), which signals that the NDRC intends to join the international crackdown on international cartels.

### **2. Leniency Provision Will Be Frequently Invoked**

Article 46 of the AML provides that if a business operator voluntarily reports to the NDRC regarding the monopolistic agreements it has entered into, or will enter into, and provides material evidence, the AML enforcement authorities have discretion to mitigate or exempt such business operator from punishment. *The Regulations on Procedures for Administrative Enforcement of Anti-Price Monopoly* (《反价格垄断行政执法程序规定》 in Mandarin) issued by the NDRC effective from February 1, 2011 (the "NDRC Regulations") further clarified the leniency provisions in the AML. The leniency provisions in the NDRC Regulations provide that the first business operator that voluntarily reports and provides material evidence to the NDRC regarding pricing-related monopolistic activities may be exempt from punishment, the second voluntary reporting business operator may receive at least a 50% reduction of punishment, while the rest who voluntarily report may receive up to a 50% reduction of the penalty.

It was reported that a case dated October 2012 involving a domestic cartel among more than 20 sea sand extraction companies is the first case where the leniency provision has been applied. The Guangdong Provincial Price Bureau awarded a 50% reduction in fine to the Guangdong Baohai Sea Sand Stone Co., Ltd., which voluntarily provided key material evidence. Later in 2013, both the LCD Case and the White Spirit Case invoked the leniency program.<sup>1</sup> It is anticipated that the leniency provisions will be invoked and companies may be inclined to disclose monopoly activities to the NDRC as whistle-blowers.

### **3. Amount of Monetary Fines may be Increased**

In the early days of NDRC's enforcement of the AML, NDRC was very conservative in imposing fines. From 2008 to 2010, the average fines imposed on companies which violated the AML were around RMB50,000 for each case. The end of 2010 marked a breakthrough for NDRC, when the fines increased to around RMB1,000,000 for each case. However, the fines imposed by NDRC in the LCD Case exceeded the total amount of the fines imposed by NDRC in all of 2012, while the White Spirit Case imposed a fine which is nearly RMB100 million higher than that in the LCD Case.

However, the fine imposed by NDRC in the LCD case is far less than those imposed by the United States and EU. The press reported that the United States imposed over US\$1 billion (RMB7.57 billion) while the EU imposed a fine of US\$648 million (RMB4.04 billion) on the companies. As emphasized by the principal of NDRC in charge of this case, there are two main reasons for this. Firstly, both the United States and EU fined the companies in accordance with their anti-monopoly law, in which the standards of penalty are based on the

percentage of the amount of sales. Thus the amount of penalty was quite huge. While the penalty in China is based on the illegal gains of the companies according to the *PRC Price Law*, the amount of penalty is relatively small. NDRC indicated that because the AML went into effect in 2008, while the illegal behavior in the LCD Case had happened from 2001 to 2006, according to the PRC principle of "Law of Non-Retroactivity," the AML penalty did not apply to this case. In other words, since the penalty in China is based on the amount of sales under the AML, the amount of penalty under the AML will be greater than that under the Price Law. Secondly, NDRC indicated that since some of the companies in the LCD Case voluntarily confessed during the investigation, NDRC gave a lighter punishment to such companies, reducing the fine. As reported by the press, AUO was exempted from the penalty since it was the first to confess in the investigation.

#### 4. Behavioral Remedies

In the LCD Case, in addition to the monetary penalties, NDRC required the six LCD companies to make certain commitments, including compliance with PRC law to provide PRC domestic color television companies a fair opportunity to purchase the LCDs or other related products, and to extend the warranty period for LCDs from 18 months to 36 months. Such remedies demonstrate that NDRC can adopt a very flexible approach in imposing penalties, which is similar to the practice of MOFCOM in its review of merger-control cases. By imposing such remedies, NDRC has shown its intention to protect the interest of domestic enterprises and protect the competitive status of the PRC market.

## II. OPEN ISSUES

In the nearly four and a half years' enforcement of the AML by the NDRC, we now know much more about how the NDRC will investigate and penalize price-related monopolistic activities. However, there are certain issues which still need clarification by the NDRC, including the following:

#### 1. Calculation of Turnover

Article 46 of the AML provides that the fine imposed on the business operator who engages in monopoly agreements should be no less than one percent but no more than 10 percent of its turnover in the previous year. However how to calculate the turnover is not clear. NDRC needs to further clarify whether the turnover (i) is the turnover of the single entity investigated or the turnover of all such single entity's group companies, (ii) is the turnover generated from the entire business of the company or only from the business of the company in the relevant market, or (iii) is the PRC domestic turnover only or covers the overseas turnover.

In the White Spirit Case, the penalties were imposed on the distribution entities of Kweichow Moutai Co., Ltd. and Wuliangye Group. Furthermore, NDRC expressly stated the fines were calculated based on the "turnover involved in the case" ("涉案销售额" in Mandarin). Therefore, it seems that NDRC only used the turnover of business that was affected or investigated.

#### 2. Investigation Approach

Due to the limited information published by NDRC about its investigation, it is unclear whether NDRC, for example, in the investigation of the White Spirit Case, used a comprehensive analysis regarding the impact of the RPM (resale price maintenance) practices on the relevant market such as the specific market share, changes in quantity or price of the white spirit, etc. Contrast this with the judgment made by the Shanghai No. 1 Intermediate People's Court in the *Rainbow v. Johnson & Johnson* case, which expressly

stated that a comprehensive assessment on the anti-competition effects is necessary for the court to decide whether the RPM constitutes a violation of the AML.

Since the White Spirit Case is the first case where the NDRC imposed penalties against RPM activities, NDRC's investigation approach appears to be on the basis of the per se illegal standard, which is different from the rule of reason approach applied by the court. Whether the NDRC and the court can reach a consistent agreement on the approach in the future is not clear.

3. Statute of Limitation

According to Article 29 of the *Administrative Penalty Law*, the statute of limitation for administrative punishment of illegal conduct is two years from the single occurrence of such illegal conduct or from the termination of such illegal conduct if it continues. In the LCD Case, NDRC indicated that the cartel activities occurred from 2001 to 2006 and NDRC discovered such illegal conduct in December 2006. Therefore, it is not clear as to when the statute of limitation commenced, i.e., from the date on which NDRC became aware of the violations or the date on which NDRC initiated the investigation.

**III. SUGGESTIONS**

Given the above, foreign companies should consider the following in order to comply with the AML:

1. Since international cartels that affect the PRC market will also be subject to NDRC investigations, foreign companies that have engaged in international cartels in other countries but have significant business presence in the PRC should be aware of the risks in China, and if filing for leniency in other jurisdictions, should consider making use of the leniency provisions contained in the AML.
2. RPM will be strictly punished. Foreign companies should avoid setting minimum resale prices or fixing resale prices to avoid investigation.
3. Foreign companies should strengthen their internal competition compliance training as NDRC focuses on anti-competition activities.

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- <sup>1</sup> In the LCD Case, it was reported by some domestic media that AU Optronics (AUO) was the whistleblower which may explain why AUO received the least amount of penalties among the six companies. In the White Spirit Case, since Moutai and Wuliangye were very cooperative during the investigation, NDRC only imposed a fine equaling 1% of each company's turnover in the previous year.

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