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I. INTRODUCTION

On December 29, 2010, the National Development and Reform Commission (“NDRC”) released the Anti-Price Monopoly Regulation and the Regulation on the Anti-Price Monopoly Administrative Enforcement Procedure (“NDRC Procedural Regulation”).² Finalizing these measures signifies a new phase in NDRC’s enforcement of the Anti-Monopoly Law (“AML”) with respect to price-related violations of the rules against “monopoly agreements,” “abuse of dominance,” and “administrative monopoly.”³ The new measures, however, are less revolutionary than cautiously evolutionary.

In an era when Beijing’s policymaking climate favors robust industrial policy and selective adaptation of Western regulatory practices, NDRC has now integrated its new role as an antitrust enforcer with its longstanding roles as a price regulator and economic planner. NDRC’s initial AML enforcement efforts dovetailed with its standing goals of curbing inflation and its established enforcement practices. Whether NDRC’s future AML enforcement focuses on consumer welfare and economic efficiency or reinforces NDRC’s broader agenda of industrial policy and socioeconomic stabilization remains to be seen.

II. FROM CENTRAL PLANNING TO ANTITRUST ENFORCEMENT

NDRC is a macroeconomic control agency directly under the State Council.⁴ Its predecessor, the State Planning Commission (“SPC”), was established in 1952 to manage Mao’s centrally planned economy.⁵ The SPC was renamed the State Development and Planning Commission (“SDPC”) in 1998 after Deng Xiaoping ushered in a new era of “reform and opening up,” and later renamed NDRC in a post-WTO accession reorganization of the government in 2003. Although some of its powers were transferred to other agencies such as the Ministry of Industry and Information Technology during a further restructuring in 2008, NDRC remains among the mightiest agencies of the central government. NDRC’s focus has shifted over time from microeconomic management to macroeconomic planning and industrial policy. Its 28

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² Anti-Price Monopoly Regulation, released by NDRC on Dec. 29, 2010 and effective on Feb. 1, 2011, *available at* <http://www.ndrc.gov.cn/zcfb/zcfbl/2010ling/W020110104330950438166.pdf>; Regulation on the Anti-Price Monopoly Administrative Enforcement Procedure released by NDRC on Dec. 29, 2010 and effective on Feb. 1, 2011, *available at* <http://www.ndrc.gov.cn/zcfb/zcfbl/2010ling/W020110104333527987891.pdf>.

³See Anti-Monopoly Law of the People’s Republic of China, promulgated by the Standing Committee of the National People’s Congress on Aug. 30, 2007 and effective on Aug. 1, 2008, *available at* http://www.gov.cn/flfg/2007-08/30/content_732591.htm.

⁴See Notice of the State Council on the Establishment of Organs, issued by the State Council on Mar. 21, 2008, *available at* http://www.gov.cn/zwgk/2008-04/24/content_953471.htm.

⁵See 1949-1958: Issue of the Common Program, Established Economic Cooperation Region, ifeng.com, Aug. 26, 2009, *available at* <http://finance.ifeng.com/opinion/jjsh/20090826/1151403.shtml>.

internal departments play pivotal roles in formulating and executing nationwide fiscal, monetary, resource management, and developmental strategies. It acts through provincial and local Development and Reform Commissions and price authorities.

Among NDRC's principal statutory tools is the 1997 Price Law, which provides the legal framework for China's mixed economy through which prices for most goods and services are "determined autonomously by business operators and formed through market competition" while "the prices of an extremely small number of products and services shall be government-guided or government-set prices."⁶ The Price Law also preserves NDRC's prerogative to fix prices or issue price guidance for *all* products and services as it deems appropriate.⁷ Moreover, it bars certain "aberrant" pricing methods, including predatory pricing, price discrimination, and price-fixing as well as other unfair practices.⁸ While NDRC's Price Department issues price guidance, the Department of Price Supervision is responsible for administrative enforcement of pricing rules through supervision, inspection, and investigation of infractions.

Historically, the Price Law's rules against price-fixing were sparsely enforced. For example, in June 2000, nine major color television manufacturers openly entered an agreement to set minimum prices and organized an inspection process to monitor compliance. Although an official of the SPC commented that such conduct would violate the Price Law, no reports of formal action by the SPC were published.⁹ In 2007, however, NDRC began responding more forcefully to price-fixing amidst growing concerns about inflation, with a series of highly-publicized investigations and edicts aimed at cracking down on collusion in the food industry.¹⁰

NDRC's initial involvement in the drafting of the AML stemmed from its roles as a macroeconomic planner and price regulator. In an apparent bid for antitrust leadership, in 2003 NDRC released the Provisional Regulations on Preventing the Acts of Price Monopoly—which read like a rough draft of the AML¹¹ Following the enactment of the AML, the State Council designated NDRC, the State Administration for Industry and Commerce ("SAIC"), and the Ministry of Commerce ("MOFCOM") to serve as antitrust enforcement authorities.¹² NDRC is

⁶See Price Law of the People's Republic of China, promulgated by the Standing Committee of the National People's Congress on Dec. 29, 1997 and effective on May 1, 1998, art. 3, *available at* http://www.gov.cn/ziliao/flfg/2005-09/12/content_31188.htm. Whereas "government guidance" on prices allows business operators to set prices by reference to benchmarks and permissible price bands set by the government, "government-set" prices are, as the name suggests, fixed directly by the state.

⁷ See Price Law, arts. 18-19, 30-31.

⁸ See Price Law, art. 14.

⁹ See The SPC Indicated that Color TV Price Alliance Violated Price Law, *people.com.cn*, *available at* <http://www.people.com.cn/GB/channel3/22/20000613/100768.html>.

¹⁰ See *e.g.*, NDRC published Typical Cases of Price Collusion, Malicious Price Increase and Price Cheating, *available at* http://www.gov.cn/zxft/ft38/content_729143.htm.

¹¹ See Provisional Regulations on Preventing the Acts of Price Monopoly, released by NDRC on Jun. 18, 2003 and effective on Nov. 1, 2003, *available at* <http://fldj.mofcom.gov.cn/accessory/200812/1228439272213.pdf>. These provisional measures were formally repealed with the finalization of the new implementing measures by the NDRC. See Anti-Price Monopoly Regulation, art. 29.

¹² See AML, art. 10. See also, Rules on Major Responsibilities, Internal Departments, and Personal Arrangement of National Development and Reform Commissions, NDRC, Aug. 21, 2008, *available at* http://www.sdpc.gov.cn/gzdt/t20080821_231802.htm (NDRC "San Ding" Plan); Notice of the General Office of State Council regarding Issuing Rules on Major Responsibilities, Internal Departments, and Personal Arrangement of State Administration for Industry and Commerce, issued by the General Office of State Council on Jul. 11, 2008, *available at* http://www.law-lib.com/law/law_view.asp?id=261207 (SAIC "San Ding" Plan); Rules on Major

specifically charged with addressing “pricing related violations and acts of price monopoly,” while authority over non-price violations falls to SAIC.¹³

NDRC’s new mandate under the AML has not, however, eclipsed its previous planning and regulatory missions. The duties of the Department of Price Supervision have simply expanded to include policing for cartel behavior and abusive pricing practices by dominant firms while monitoring compliance with price controls. The AML has now been added to NDRC’s toolkit alongside the Price Law and other policymaking instruments. Ironically, China’s paramount economic planning body is now also one of its principal competition authorities.

The new Anti-Price Monopoly Regulation clarifies NDRC’s approach to the substantive rules against monopoly agreements, abuse of dominance, and administrative monopoly. The final text builds on a previous draft released for public comment in August 2009.¹⁴ Some revisions simply restate the AML. For example, the final rules repeat the AML’s admonition that competition authorities should safeguard the lawful interests of key state-owned enterprises which, in turn, should not to harm consumers’ interests.¹⁵ This amendment may underscore NDRC’s prioritization of the consolidation and strengthening of the state-owned sector.

Other revisions retreat from problematic provisions of prior drafts. For example, a troublesome proposal in the prior draft allowing a presumption of “consistency of price behavior” where firms “fix or change the prices of the same sorts of products in a same or similar period to the same or similar standard and extent” was deleted.¹⁶ Also omitted were detailed explanations of each statutory factor for the assessment of dominance, including controversial language listing “possession of essential facilities such as pipelines and networks,” requirements for “economies of scale” based on “sales networks, capital and technology,” and “cost advantages” as indicia of dominance.¹⁷ As explained below, however, many critical questions about NDRC’s enforcement program remain unanswered.

III. SPARSE GUIDANCE ON DEFENSES

The final Anti-Price Monopoly Regulation provides only limited guidance on the principles and methodologies for distinguishing permissible pricing practices from AML violations. The AML rules against monopoly agreements are structured as sweeping prohibitions against anticompetitive agreements under Articles 13 and 14 qualified by broad exemptions under Article 15 for arrangements that (1) serve one of the beneficial purposes designated under Article 15, (2) benefit consumers, and (3) do not eliminate competition in the relevant market.¹⁸ The AML technically bars any practice deemed to “eliminate or restrict competition” that does not qualify for an Article 15 exemption; there is no textual requirement for a “material” or

Responsibilities, Internal Departments, and Personal Arrangement of the Ministry of Commerce, MOFCOM, Aug. 22, 2008, available at <http://www.mofcom.gov.cn/aarticle/ae/ai/200808/20080805739577.html> (MOFCOM “San Ding” Plan).

¹³See NDRC “San Ding” Plan, *supra* note 12.

¹⁴See Draft Anti-Price Monopoly Regulation, (released by NDRC on Aug. 12, 2009), available at http://www.ndrc.gov.cn/fjbak/t20090812_296055.htm.

¹⁵See AML, art. 7; Anti-Price Monopoly Regulation, art. 4.

¹⁶See Draft Anti-Price Monopoly Regulation, art. 5.

¹⁷*Id.*, art. 18.

¹⁸AML, art. 15.

“substantial” restrictive effect.¹⁹ Consequently, Chinese enforcement authorities may be called upon to construe Article 15 broadly to avoid penalizing efficiency-enhancing arrangements.

The final Anti-Price Monopoly Regulation, however, simply mirrors the AML in providing that the prohibitions of horizontal and vertical monopoly agreements are “not applicable if the business operator may prove that the agreement concluded is in accordance with Article 15 of the Anti-Monopoly Law.”²⁰ Likewise, the NDRC Procedural Regulation simply provides that parties asserting an exemption under Article 15 shall present “relevant evidence” to the authorities for “examination and verification.”²¹

In a similar vein, the AML prohibits dominant firms from “abusing” their positions “to eliminate or restrict competition.”²² Most rules against specific abuses under the AML are formulated as prohibitions against engaging in certain practices “without justification.”²³ Although the Anti-Price Monopoly Regulation provides illustrative justifications for certain abuses listed in the AML, these rules fail to clarify the *general* principles or methodologies for gauging the elimination or restriction of competition or otherwise distinguishing abuses from reasonable competitive conduct. And with respect to the specific abuse of price discrimination, the new rules provide no guidance on cognizable justifications.²⁴

While waiting to develop the doctrines for balancing pro- and anticompetitive effects of specific practices through actual enforcement yields more refined principles, enforcement decisions can only provide compliance guidance if they are published in meaningful detail. The AML does not mandate the publication of enforcement decisions or firm standards for the rigor of factual or legal analysis in an administrative penalty notice. Without further guidance, Chinese and foreign companies face significant uncertainty regarding the scope of permissible and impermissible conduct.

IV. BLURRING PRICE AND NON-PRICE MISCONDUCT

In principle, NDRC exercises jurisdiction over pricing-related violations of the AML in light of its general authority over pricing under the Price Law, while SAIC has jurisdiction over non-price violations by virtue of its historical role enforcing the Anti-Unfair Competition Law (“AUCL”).²⁵ In practice, it remains to be seen how NDRC and SAIC will distinguish anticompetitive practices that are explicitly price-related from other anticompetitive practices with indirect effects on prices. It also remains to be seen how NDRC and SAIC will address cases involving both price-related and non-price-related conduct, whether at the complaint, initiation, amnesty, investigation, or penalty phases, as none of the rules yet issued by NDRC or SAIC formally address such scenarios. The new NDRC rules may signal NDRC’s willingness to encroach on SAIC’s presumptive turf based on the price effects of non-price conduct.

¹⁹ AML, arts. 2-3, 13, 17, 28, 37.

²⁰ See Anti-Price Monopoly Regulation, art. 10.

²¹ See Regulation on the Anti-Price Monopoly Administrative Enforcement Procedure, art. 13.

²² AML, art. 6.

²³ *Id.*, art. 17.

²⁴ See Anti-Price Monopoly Regulation, art. 16.

²⁵ See Anti-Unfair Competition Law of the People’s Republic of China, promulgated by the Standing Committee of the National People’s Congress on Sept. 2, 1993 and effective Dec. 1, 1993, available at <http://tfs.mofcom.gov.cn/aarticle/date/i/s/200503/20050300027909.html>.

For example, most forms of “price monopoly agreements” covered by the new rules explicitly involve pricing, such as agreements:

- to “fix or change” the “price levels,” “price ranges”, or “commission fees, discounts, or other fees affecting prices;”
- to “use an agreed price as the basis for transactions with third parties;” to adopt a “standard formula” for “calculating prices;” and
- to abstain from changing prices without the consent of other participants in the arrangement.²⁶

A catch-all clause bars “other price monopoly agreements determined” by NDRC.²⁷ However, the new rules also bar agreements to “fix prices in disguise by other methods.”²⁸ What “other methods” might not be covered by the other broad rules against price-fixing? Curiously, this provision replaces language in an earlier draft prohibiting “fixing prices by restricting the output or sales volume or dividing the sales markets or the procurement markets.”²⁹ While the earlier draft recognized that non-price restraints ultimately impact pricing, it also extended NDRC authority to non-price monopoly agreements presumably covered by SAIC.³⁰

Similarly, the new NDRC rules potentially reach “abuses” by dominant firms that are not clearly price-related. Dominant firms are barred from refusals to deal “in disguise by setting unfair high prices for selling or unfair low prices for purchase without any justification.”³¹ Justifications include the credit risks or deteriorating condition of the counterparty, the availability of alternate suppliers or customers at “reasonable prices,” and other justifications.³² With respect to exclusive dealing, NDRC has asserted authority to deal with abuses aimed at limiting trading parties to conduct transactions with them or with other business operators designated by them without any justification “by methods such as price discounts.”³³ This clause may allude to theories of liability arising from exclusionary discounts and rebates, as addressed in the European Commission’s recent *Intel* decision.³⁴ It remains to be seen whether NDRC will tackle the price effects of “disguised” non-price conduct under these new provisions—and whether SAIC will follow suit.

²⁶See Anti-Price Monopoly Regulation, art. 7(1)-(6).

²⁷See *id.*, art. 7(8).

²⁸See *id.* art. 7(7).

²⁹See Draft Anti-Price Monopoly Regulation, art. 6(7).

³⁰See SAIC Regulation on the Prohibition of Conduct Involving Monopoly Agreements (“SAIC Monopoly Agreements Regulation”), released by SAIC on Dec. 31, 2010 and effective on Feb. 1, 2011, in particular arts. 4-8.

³¹See Anti-Price Monopoly Regulation, art. 13. Refusing to trade by means *other than price* is regulated by SAIC rules. See SAIC Regulation on the Prohibition of Conduct Abusing a Dominant Market Position (“SAIC Abuse of Dominance Regulation”), released by SAIC on Dec. 31, 2010 and effective on Feb. 1, 2011, art. 4.

³²See Anti-Price Monopoly Regulation, art. 13.

³³See *id.* art. 14. Conducts limiting trading counterparts by non-price-related means are regulated by SAIC rules. See SAIC Abuse of Dominance Regulation, art. 5.

³⁴See Commission Decision relating to a proceeding under Article 82 of the EC Treaty [now Article 102 of the Treaty on the Functioning of the European Union] and Article 54 of the EEA Agreement (COMP/C-3 /37.990 - Intel), ¶920-1001, available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2009:227:0013:0017:EN:PDF>.

V. TARGETING TRADE ASSOCIATIONS

Collusion orchestrated by trade associations has been a target of NDRC enforcement efforts under both the Price Law and the AML. Indeed, NDRC recently imposed the maximum fine of RMB 500,000 on the Zhejiang Fuyang Paper Industry Association for organizing uniform price increases among its members.³⁵ Article 16 of the AML warns that “industry associations shall not organize business operators within their industries” to violate the rules against monopoly agreements.³⁶ The Anti-Price Monopoly Regulation specifically bars trade associations from “formulating rules, decisions and notices to eliminate or limit price competition,” from “organizing business operators to form price monopoly agreements,” and from “other activities that organize business operators to conclude or implement price monopoly agreements.”³⁷

VI. FUSING OLD & NEW STANDARDS FOR PREDATORY PRICING

The AML prohibits dominant firms from “selling products at prices below cost without any justification.”³⁸ The Price Law and the AUCL, in contrast, each address below-cost pricing by non-dominant firms. Article 11 of the AUCL prohibits certain sales below costs. It generally bars a company from “selling products at a price that is below the cost for the purpose of excluding its competitors.” The elements of a violation thus include the conduct of below-cost pricing and exclusionary intent. Exceptions include:

- 1) “selling fresh products;
- 2) disposing of products the useful life of which is about to expire, or of other overstocked products;
- 3) seasonal lowering of prices; and
- 4) selling products at lowered prices for paying off debts, changing the line of production or closing the business.”³⁹

Similarly, Article 14(2) of the Price Law prohibits companies from “dumping at prices below cost to disrupt the normal production and management order, and to damage the national interests and the lawful interests and rights of other business operators for the purposes of squeezing out other competitors or being the sole player of the market.” Article 14(2) refers to “dumping” (*qingxiao*), the same term used in the international trade remedy context. Article 14(2) expressly excludes “sales of fresh and live products, seasonal products and overstocked products at reduced prices in accordance with law.”

The Anti-Price Monopoly Regulation tethers the AML to prior law by identifying three cognizable justifications:

³⁵ Zhejiang Fuyang Paper Industry Association Has Been Strictly Punished for Organizing Business Operators to Conclude Monopoly Agreements], NDRC, Jan. 4, 2011, *available at* http://jjs.ndrc.gov.cn/gzdt/t20110104_389453.htm.

³⁶ AML, art. 16.

³⁷ See Anti-Price Monopoly Regulation, art. 9.

³⁸ AML, art. 17(1)(2).

³⁹ See AUCL, art. 11. Unlike most provisions of the AUCL, the rule against predatory pricing is not tied to any provisions allowing for administrative penalties. Accordingly, enforcement of this provision has historically been limited.

- 1) “selling fresh and live products, seasonal products, perishable products, and overstocked products at reduced prices in accordance with law;”
- 2) “selling products at reduced price dues to liquidation in debt, changing product lines, or closing business;” and
- 3) “sales promotions to attract customers.”⁴⁰

The first two justifications derive directly from the prohibitions against predatory pricing by non-dominant firms under the Price Law and the AUCL.⁴¹ A catch-all clause captures other justifications.⁴² These provisions reflect NDRC’s general approach to the AML as a complement to other pricing regulations.

VII. PANDORA’S BOX: UNFAIR PRICING BY DOMINANT FIRMS

Perhaps the most controversial of the AML’s rules against abuse of dominance, is Article 17(1)(1) which prohibits dominant firms from making sales at “unfairly high prices” or buying products at “unfairly low prices.” This text derives from Article 102(a) of the Treaty on the Functioning of the European Union, which bars dominant firms from “directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions.” European authorities have narrowly construed Article 102(a), and commentators urged the deletion of Article 17(1)(1) from the AML. With this wilting strain of European practice transplanted to China in the AML, NDRC now has a statutory basis for scrutinizing the “fairness” of the pricing practices of dominant firms.

The Anti-Price Monopoly Regulation outlines factors to be considered in evaluating the fairness of a dominant firm’s pricing practices. These factors include:

- 1) “Whether the sales price or the purchase price is obviously higher or lower than the price of other business operators in the sale or purchase of products of the same type;
- 2) Whether the sales price was increased or the purchase price was decreased beyond the normal range when the costs are generally stable;
- 3) Whether the extent of the increase in the sales price of a product obviously exceeds the extent of the increase in cost, or the extent of the price decrease in the purchase of a product obviously exceeds the extent of the cost decrease of the trading party; [and]
- 4) Other related factors which shall be considered.”⁴³

These qualitative principles may be “less- untenable” than earlier drafts that imposed quantitative limits on the profits margins of dominant firms and the gaps between the pricing of dominant and non-dominant firms.⁴⁴ Nevertheless, these provisions expose dominant firms to an *ad hoc* review by NDRC of the intuitive fairness of their pricing practices benchmarked against their own profit margins (*i.e.*, by comparing their pricing with their costs) or against their competitors’ pricing. To the extent that NDRC has always retained discretionary authority to regulate pricing of all goods and services within China pursuant to the Price Law, the AML’s rule against “unfair pricing” does not necessarily equip NDRC to take actions it could not previously

⁴⁰See Anti-Price Monopoly Regulation, art. 12(1)-(3).

⁴¹See AUCL, art. 11; Price Law, art. 14.

⁴²See Anti-Price Monopoly Regulation, art. 12(4).

⁴³See Anti-Price Monopoly Regulation, art. 11.

⁴⁴See Draft Anti-Price Monopoly Regulation, art. 12.

take. However, the AML provides a clearer basis for addressing price instructions to specific dominant firms and, unlike the Price Law, the AML applies extraterritorially.⁴⁵ It remains to be seen whether the rules against unfair pricing by dominant firms will remain dormant or emerge as a significant constraint on the conduct of leading firms.

VIII. MOBILIZING THE NDRC BUREAUCRACY

The NDRC Procedural Regulation addresses the allocation of enforcement authority within NDRC's nationwide bureaucracy. Provincial level pricing authorities shall address misconduct occurring within their jurisdictions, while the national level pricing authorities will designate provincial authorities to investigate cases cutting across jurisdictions and will directly handle "major cases."⁴⁶ Moreover, provincial-level authorities may delegate (*wei tuo*) to price departments at the "next-lower level" the power to conduct investigations "in the name" of the delegating provincial authority.

While Article 10 of the AML expressly limits the authorization (*shou quan*) of enforcement power to the provincial level, it does not explicitly prohibit delegation (*wei tuo*) of enforcement authority to the local level.⁴⁷ To mitigate the risks of inconsistent interpretation of the AML, local price departments with "delegated" powers are required to report back to their provincial level superiors within 5 working days of completing their investigation. Provincial-level price departments, in turn, are required to report their enforcement decisions up to the national level NDRC within 10 working days.⁴⁸ It remains to be seen whether this delegation scheme will balance effectively the need to harness local-level enforcement resources with the need to promote nationwide consistency in AML enforcement.

IX. DISCRETIONARY LENIENCY

One shortcoming of the new NDRC Procedural Regulation is the failure to provide concrete assurances of mitigated penalties for leniency applicants. Article 46 of the AML lays the foundation for a program of granting amnesty or leniency to participants in *any* prohibited monopoly agreements who voluntarily disclose the agreement(s) to the authorities. It provides that "where business operators, on their own initiative, report information concerning the conclusion of monopoly agreements and provide important evidence to the anti-monopoly enforcement authority, the anti-monopoly enforcement authority may reduce the penalty imposed or grant exemption from penalty after weighing the relevant circumstances."

Article 46 itself does not, however, *compel* the enforcement authorities to grant amnesty or leniency under any circumstances. The NDRC Procedural Regulation preserves this discretion. The first, second, and third parties to step forward as qualified leniency applicants *may* receive, respectively, a complete exemption from penalty, a reduction in penalty of no less than 50 percent, and a reduction in penalty of no more than 50 percent. The leniency application does not restrain the administrative authorities' general discretion either to seek maximum penalties or

⁴⁵See Price Law, art. 2 (providing that the Price Law applies to "price behaviors that occur within the territory of the People's Republic of China." This language arguably forecloses the investigation of wholly offshore cartel activity affecting the pricing of products imported into China under the Price Law..

⁴⁶See Anti-Price Monopoly Procedural Regulation, art. 3.

⁴⁷See AML, art. 10.

⁴⁸See Anti-Price Monopoly Procedural Regulation, art. 22.

to seek no penalties at all in light of the seriousness of the case under the Administrative Penalties Law.⁴⁹

In NDRC's first publicized enforcement action under the AML, twenty-one regional rice-noodle makers in Guangxi province were fined for their roles in an elaborate cartel scheme, but *twelve* plants that cooperated with the investigation received only warning letters.⁵⁰ The absence of concrete guarantees of leniency for the first three applicants coupled with the apparent availability of leniency for late-comers may significantly undermine the effectiveness of the NDRC leniency program in enticing participants in otherwise undetected cartels to step forward.

X. ADMINISTRATIVE INVESTIGATIONS & SOFT GUIDANCE

The NDRC Procedural Regulation outlines the process for administrative investigations of monopolistic conduct by NDRC personnel. China's Administrative Penalty Law establishes a basic framework for administrative investigations, and its provisions are replicated with minor variations in many laws—including both the Price Law and the AML. The new regulations essentially repeat the procedural provisions of the AML.

One notable feature of Chinese administrative practice is the discretion of investigative authorities to calibrate penalties ranging from warnings to substantial fines to the circumstances, or to decline to issue any formal warning or penalty whatsoever. Regulators' expectations and requests are often signaled through initial inquiries and informal suggestions—and Chinese companies routinely comply. Although the AML and the new regulations provide formal mechanisms for suspending investigations on the strength of remedial undertakings, these formal procedures may, in practice, be eclipsed by soft guidance.

NDRC appears comfortable relying on soft guidance rather than formal orders to address anticompetitive conduct. On January 8, 2010, the Publishers Association of China, the Books and Periodicals Distribution Association of China, and the China Xinhua Bookstore Association jointly published “Book Fair Trading Rules” capping discounts on new books (published within the past year) at 15 percent.⁵¹ The measures were subsequently revised and the discount cap stricken, reportedly at the request of NDRC. NDRC, however, did not publish any report of its investigation and any remedial measures.⁵² Similarly, Chinese media have reported that NDRC in 2009 investigated the implementation by TravelSky, a computerized air ticketing network responsible for most computerized airline ticket sales in China, of a uniform discount formula resulting in increased fares, though no results of the investigation were published.⁵³ Reliance on informal guidance is flexible and expedient, but it provides little guidance for compliance by other companies.

⁴⁹ Law of the People's Republic of China on Administrative Penalties, promulgated by the National People's Congress on Mar. 17, 1996, and amended by the Standing Committee of the National People's Congress on Aug. 27, 2009, art. 38, *available at* http://www.gov.cn/banshi/2005-08/21/content_25101.htm.

⁵⁰ See Response of Relevant NDRC officials to Press regarding the Collusion on Price Increase of Rice Noodles in Some Areas of Guangxi, NDRC News, March 30, 2010, *available at* http://www.ndrc.gov.cn/xwfb/t20100330_338105.htm.

⁵¹ See Report on Competition Law and Policy of China 2010, edited by Competition Policy and Law Section of China Society for World Trade Organization Studies, LAW PRESS CHINA, Sept. 2010, at 134.

⁵² *Id.*

⁵³ *Id.*, at 133.

XI. WIELDING TWO SWORDS

The enforcement actions against the Guangxi rice noodle cartel and the Zhejiang Fuyang Paper Industry Association remain NDRC's only formal enforcement actions under the AML. Tellingly, NDRC invoked the Price Law alongside the AML in both cases. In the Zhejiang paper case, NDRC expressly found that the conclusion of "monopoly agreements to change or fix prices violated relevant provisions of the Price Law and the Anti-Monopoly Law." In the rice noodle cartel case, NDRC "ordered the operators to stop illegal activities, correct their faults, and formulated the emergency proposal for stabilizing the rice noodle price and ensuring the market supply."⁵⁴ Although Article 46 of the AML contemplates ordering cartel participants to "cease illegal acts" by ending collusion, the local price authorities specifically directed the cartel participants to restore pre-cartel pricing pursuant to the Price Law rather than wait for the resumption of competition to reset pricing. The Price Law also enables NDRC to reach conduct not barred by the AML (*e.g.*, predatory pricing and price discrimination by non-dominant firms).

Companies active in China should not expect NDRC to undergo a swift metamorphosis from economic planning to competition advocacy. NDRC's new regulations and recent enforcement practices suggest continuity with past enforcement practices and incremental innovations in NDRC's regulation of Chinese markets.

⁵⁴*Id.*