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I. INTRODUCTION

Unlike the Ministry of Commerce (“MOFCOM”), which is in charge of merger control, the National Development and Reform Commission (“NDRC”) and the State Administration for Industry and Commerce (“SAIC”), which are respectively responsible for regulating price-related and non-price-related anticompetitive practices, have been regarded as relatively conservative in enforcing the Anti-Monopoly Law (“AML”). At the time of writing, SAIC has yet to announce any antitrust infringement decision or investigation since the AML came into force on August 1, 2008. In contrast, NDRC has published a few decisions and conducted investigations against enterprises and industry associations engaging in cartels or abusive conducts since early 2010. Although the deterrent effect might be questionable, given that the sanctions imposed in these cases were moderate in terms of the amount of fines, there are clear indications that NDRC is intending to actively exercise its powers.

This article will discuss some notable cases announced by NDRC and analyze their underlying legal implications.

II. THE CASES

A. Rice Noodle Case

In January 2010, Xianyige Food Company organized meetings among a number of rice noodle manufacturers in Nanning and Liuzhou in Guangxi province to agree to raise the sales price of rice noodles.²Thirty-three manufacturers participated in the meetings and raised prices; subsequently, other rice noodle manufacturers followed suit. As a result, sales prices of rice noodles were raised by RMB 0.2 per 500g. This led to an increase of the retail price of rice noodles (0.5 per bowl) in Nanning and Liuzhou. NDRC held that Xianyige Food Company and other relevant enterprises had breached the Price Law and the AML and made the following decisions:

- each of the three organizers, including Xianyige Food Company, Xiongdi Company, and Yongcai Company, was fined RMB100,000;
- 18 participants were fined from RMB30,000 to RMB80,000 according to their specific illegal activity;

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² The original Chinese notice issued by NDRC is *available* at http://jjs.ndrc.gov.cn/fjgld/t20100331_338262.htm.

- 12 whistleblowers were granted immunity from fines and only received “warning orders” because they had “cooperated with the investigation, provided important evidence and taken corrective measures on their own initiative”; and
- several rice noodle manufacturers and sellers who were “followers” of the price increase, but were not participants to the agreement, received caution letters requiring them to “enhance self-discipline” on pricing.

B. White Paperboard Case

In 2010, the Paper Manufacture Industry Association of Fuyang in Zhejiang province (“Fuyang Paper Association”) held five meetings where more than 20 member companies attended and discussed the sales price for white packaging paperboard.³ According to NDRC’s announcement on January 4, 2011, various pricing issues were discussed and coordinated during these meetings, such as price increases, discounts, production restrictions, and explicit price-fixing.

The Zhejiang price authority (the local counterparty of NDRC in Zhejiang province) held that the Fuyang Paper Association had organized a monopoly agreement on price-fixing between the companies in the paper manufacture industry. It found that the association had breached the AML and the Price Law. To maintain the order of market competition and protect the legal interests of consumers and other companies, the Zhejiang price authority imposed a fine of RMB 500,000 on the Fuyang Paper Association.

Interestingly, based upon the limited information released in the case notice, it seems that only the Fuyang Paper Association, but none of its members, was sanctioned.

C. Washing Powder Case

From July to August 2010, the Wuchang branch of Hubei Salt Industry Group Co., Ltd. (“Wuchang Salt”) forced two salt distributors to purchase a local brand washing powder, in addition to their salt purchases.⁴ The total revenue derived by Wuchang Salt from the sale of the washing-power was around RMB 20,000.

Wuchang Salt cooperated with the investigation conducted by the Hubei price authority (the local counterparty of NDRC in Hubei province) and submitted a written commitment to the authority to cease its improper sales activity. The Hubei price authority concluded that Wuchang Salt is the exclusive salt wholesaler in the local geographic market and thus had a dominant position in the local market. The forced purchase of washing-powder constituted tying which is prohibited under the AML. Wuchang Salt was given a warning and ordered to cease the tying practice and eliminate the negative effects within one month. The Hubei price authority suspended the investigation but announced that it would closely monitor Wuchang Salt’s compliance with the commitment within two months of the suspension decision. The authority reserved its right to re-open the investigation if Wuchang Salt failed to fulfill its commitment.

³ The original Chinese notice issued by NDRC is available at http://www.ndrc.gov.cn/xwfb/t20110104_389456.htm.

⁴ The original Chinese notice issued by NDRC is available at http://jjs.ndrc.gov.cn/gzdt/t20101115_380421.htm.

III. IMPLICATIONS OF THE DECISIONS

A. Parallel Enforcement of the AML and the Price Law

The *Rice Noodle* case is the first cartel case that NDRC announced citing both the AML and the Price Law as the basis for its investigation and penalties, after more than one and a half years of the AML's entry into force. Since then, NDRC has also published a number of decisions penalizing coordinated price increases and other price collusions.⁵ However, none of those decisions expressly cited the provisions of the AML. It was not until January 4, 2011 that NDRC announced the second cartel, the *White Paperboard* case, citing both the AML and the Price Law.

Although the two cases are typical price cartels, which are expressly prohibited under the AML, NDRC seemed reluctant to apply the AML when it came to imposing specific sanctions. The NDRC statement provides no clear indication whether the sanctions in the *Rice Noodle* case were imposed by reference to the AML or the Price Law. In the *White Paperboard* case, NDRC quoted the Regulations on the Administrative Punishment of Price-related Violations ("Price Regulations")—the implementing rules for the Price Law—not the AML, as the basis for the calculation of fines.

The legislative objectives of the AML are different from those of the Price Law (and the Price Regulations). The main objective of the AML is to protect fair market competition, while the main objectives of the Price Law are to regulate pricing activities and preserve a stable and normal order of pricing. In other words, the AML is not to be applied if the price rise is due to a change of the market situation other than price collusion or abuse of dominance.

Compared to the AML, the Price Law regulates a broader scope of pricing activities such as price collusion, price hikes, and misleading pricing. This means price-fixing activities can be caught by both the AML and the Price Law—*i.e.*, Article 13(1) of the AML (which prohibits price fixing as an illegal "monopoly agreement") and Article 14(1) of the Price Law (which prohibits collusion in manipulating prices as "improper price behavior").

Having said this, the two laws provide for different penalties. Under Article 46 of the AML, an illegal monopoly agreement such as price-fixing will be subject to a fine of 1-10 percent of the violator's annual turnover plus confiscation of all illegal gains. The penalty under Article 40 of the Price Law and the Price Regulations is a fine of up to five times the amount of any illegal gains plus confiscation of those gains. If there is no illegal gain, a fine of RMB 100,000 to 5 million can be imposed.

Such overlaps between the AML and Price Law have raised great concerns over the authority of the AML. Since the Price Law and the Price Regulations (amended several times, including as recently as December 2010) have been in place for more than a decade, NDRC is well-experienced in handling illegal price cases on that basis. The two cartel decisions may

⁵ Such relevant cases include: Some enterprises in Shandong Province drove up the price of garlic; the Association of Refrigeration and Refreshment in Zhongmou County, Henan Province organized undertakings to manipulate the fees charged for garlic refrigeration; Jilin Corn Wholesale Market Co., Ltd. and other enterprises organized 109 enterprises to manipulate the price of mung bean; the Fujian Tableware Sterilization Industry Association Xiamen Office organized price collusion. The original case reports are *available in Chinese* at <http://jjs.ndrc.gov.cn/fjgld/default.htm>, http://www.ndrc.gov.cn/xwfb/t20100701_358443.htm, and http://www.ndrc.gov.cn/jggl/zhd/t20100702_358458.htm.

suggest that NDRC still prefers to rely on the Price Law regime, with which it is more familiar, when dealing with cartel cases.

NDRC's preference for the Price Law might be driven by the following reasons:

- NDRC and its local counterparts are keen to control price increases rather than to protect competition. In particular, as the consumer price index ("CPI") in China has skyrocketed, NDRC is under pressure to take measures to monitor and control the overall price increase. NDRC's decisions could also be taken as a sign for controlling commodity prices in response to the public resentment over dramatically increased CPI.
- The AML cases are relatively complicated compared with the cases under the Price Law regime. Without guidance of detailed supporting rules, NDRC, and particularly its local counterparts, may find it difficult to implement the AML in practice. With the recent promulgation of the implementing regulations for the enforcement of the AML, NDRC and the local price authorities are expected to be more willing to rely on the AML when taking enforcement actions against cartels.
- NDRC's prudent approach in finding a violation of the AML is also due to its lack of sufficient resources and talented manpower dedicated to AML enforcement.

The parallel enforcement of the AML and the Price Law might still exist for awhile. Nevertheless, NDRC has indicated in the case statements that it is determined to enhance AML enforcement to protect market competition. In recent months, NDRC officials have attended a number of extensive AML trainings. In January 2011, NDRC issued the relevant procedural and substantive regulations. Given these facts, it is foreseeable that the AML will be applied more frequently.

B. Leniency

As discussed above, in the *Rice Noodle* case, it seems that NDRC mainly relied on the Price Law and Price Regulations to fine the participants and organizers of monopoly agreements. However, the granting of warning-only penalties to 12 cartel participants in this case indicates that it was at least partially based on the AML. The concept of "leniency" was introduced by the AML and there is no such mechanism under the Price Law. Specifically, Article 46 of the AML allows for the possibility of reduced fines or full exemption from fines for companies that voluntarily report and provide important evidence of violations. The NDRC case notice indicates that 12 cartel participants cooperated with the investigation and provided important evidence to enforcers and thus were exempted from penalty, although it does not mention whether or not those exempted participants voluntarily reported themselves.

C. Abuse of Dominance

The *Washing Powder* case is the first and also the only case (at the time of writing) announced by China's antitrust agencies in respect of abuses of a dominant market position. Unlike in the *Rice Noodle* case and the *White Paperboard* case, NDRC appeared to strictly follow the AML in rendering its decision as well as finding facts of market dominance and abusive behavior. In this case's decision, NDRC explicitly quoted Article 7, Article 17, and Article 45 of the AML.

Since salt is regarded as a crucial commodity related to peoples' well-being, it is exclusively operated by stated-owned companies in China. Wuchang Salt is the only authorized wholesaler to supply salt in the Wuchang district in Wuhan. According to Article 19 of the AML,

if the market share of one company accounts for half of the total in a relevant market, the company is presumed to hold a dominant market position. Hence, the Hubei price authority held that Wuchang Salt was dominant in the local wholesale market of salt.

It is apparent that washing powder and salt are two entirely distinct products as regards their nature, function, usage, etc. Wuchang Salt could not provide any legitimate reason for tying the sale of washing powder with the sale of salt. The Hubei price authority concluded that Wuchang Salt's behavior constituted tying in breach of Article 17 of the AML. In consideration of the nature of the exclusive operation by Wuchang Salt, the Hubei authority further concluded that Wuchang Salt violated Article 7(2) of the AML under which companies with exclusive or monopoly distribution status in accordance with the law:

shall operate their businesses in accordance with the law, act in good faith, engage in stringent self-discipline, accept supervision from the public, and shall not abuse their dominant market positions or their positions so as to allow them to carry out exclusive or monopoly distribution to harm the interests of consumers.

It is also notable that the Hubei price authority decided to suspend the investigation based on Article 45 of the AML with regard to the specific circumstances in this case—*e.g.*, Wuchang Salt's cooperative attitude, the remedial measures taken by it, the relatively small value involved (sales of the tied washing powder were only around RMB 20,000), and the insignificant social impact.

D. No Exemption for State-owned Companies

The *Washing Powder* case is also vivid evidence demonstrating that all companies—including state-owned companies, domestic private companies, and multinationals—are equally subject to the AML.

Article 7(1) of the AML provides that the state “protects the lawful operations of the business operators” in the industries that “hold controlling position in the state-owned economy, control the lifeline of the national economy, and are related to the national security, and the industries that implement exclusive or monopoly distribution in accordance with the law,” and shall “supervise and regulate, in accordance with the law, such business operators' operations and prices of their products and services, so as to protect the interests of consumers and promote technological advancement.”

Previously, this article was (mis)interpreted by many western commentators as a protectionist provision providing exemption for certain state-owned enterprises from the AML. This concern may no longer persist after Article 7 was tested in the *Washing Powder* case.

E. Overlaps in the Enforcement of the AML Between NDRC and SAIC

In contrast with the two cartel cases where the AML and the Price Law were both applied simultaneously, the *Washing Powder* case is quite straightforward in terms of application of the law. However, a more controversial issue is whether this case should have actually been handled by NDRC at all or at least in cooperation with SAIC?

According to the official arrangement of the State Council, SAIC has jurisdiction over all monopoly agreements and abuses of a dominant market position except pricing violations, over which NDRC has jurisdiction. However, it remains unclear how NDRC and SAIC will address cases involving both price- and non-price conducts. Needless to say, almost all anticompetitive

cases may involve certain price conduct to some extent. Such division of enforcement powers is bound to create uncertainty.

In particular, in this case Wuchang Salt did not impose unreasonable additional charges or excessive prices on salt. Instead, it engaged in a tying practice by requiring the distributors to purchase the tie-in washing powder. It seems that no specific anticompetitive price activity was identified in the *Washing Powder* case, and it is thus questionable why the case was dealt with by NDRC rather than SAIC.

IV. CONCLUSION

The decisions discussed in this article provide certain guidance on the practical approach taken by NDRC in enforcing the AML. Given that NDRC's implementing regulations for the enforcement of the AML came into force on February 1, 2011, NDRC is likely to take more proactive steps to investigate and penalize AML offenders.

These cases also clearly indicate that all entities—including domestic companies (in particular, state-owned companies are no exception) as well as multinational companies—are subject to the AML. In these cases, all of the companies penalized or given warnings were domestic Chinese entities. Concerns that the AML is applied more aggressively in matters involving foreign companies might be overstated.

However, since the Price Law, which also contains competition provisions, has not formally been amended or abrogated, it remains to be seen whether that law continues to apply concurrently with the AML and how to settle the ensuing conflicts.

Close cooperation and a clear division of powers between NDRC and SAIC are critical to the efficient and transparent enforcement of the AML. The *Washing Powder* case could be taken as an example that the jurisdiction boundary between NDRC and SAIC is still a blur. Practical mechanisms/rules dealing with the potential jurisdiction overlaps between NDRC and SAIC need to be put in place.