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I. INTRODUCTION

On January 4, 2013, China's National Development and Reform Commission ("NDRC") published a decision under the Price Law imposing financial penalties of RMB 353 million (approximately U.S.$57 million) on six Korean and Taiwanese manufacturers of LCD panels—Samsung Electronics, LG Display, Chimei, AU Optronics, Chunghwa Picture Tubes, and HannStar Display.[2] The watershed ruling—the first extraterritorial application of Chinese cartel law with financial penalties almost 57 times greater than penalties previously imposed by a Chinese antitrust authority—signals a new and aggressive turn in behavioral antitrust enforcement for NDRC. I consider below the context for and implications of this revolution in Chinese cartel law practice.

II. NDRC AND THE FRAGMENTED ENFORCEMENT ARCHITECTURE OF CHINESE ANTITRUST

The world of antitrust is no stranger to complex enforcement architecture. The European Union has a "federal" enforcer in the European Commission, with each EU Member State having an additional national competition authority (or two), while the United Kingdom—often held up as a model of antitrust enforcement—has a further layer of sectoral regulators, each competent to apply competition law in its own sectoral sphere of responsibility. Some might say China has a modest level of complexity by EU standards with three antitrust enforcement authorities and three main competition laws:

- The Ministry of Commerce ("MOFCOM") is responsible for merger control under the central Chinese competition law – the Anti-Monopoly Law ("AML");
- The NDRC is the competent authority for price-related infringements of the AML's behavioral rules and for enforcing the provisions of the Price Law; and
- The State Administration for Industry and Commerce ("SAIC") is the competent authority for non-price related infringements of the AML's behavioral rules and for enforcing the provisions of the Anti-Unfair Competition Law.

NDRC is a ministerial level body within the Chinese administrative framework directly answerable to the State Council—the central administrative authority of the People's Republic of China. Successor to the powerful State Planning Commission, the entity which managed China's

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[2] The press notice announcing the decision is available on the NDRC website in Chinese: http://xwzx.ndrc.gov.cn/xwfb/t20130104_521959.htm.

centrally planned economy, the no less powerful NDRC is tasked with an array of functions including the formulation of industrial policy, coordinating China's economic and social development, and managing the restructuring of the national economy from a planned arrangement to one based on "socialist" market economy principles.

NDRC is also the national price regulator and in that capacity sets and adjusts the prices of certain important commodities. It enforces the Price Law's competition rules and the AML's behavioral rules in respect of pricing matters, as mentioned above. This complex mix of powers and functions—industrial policy coordinator, price regulator, and antitrust enforcer—can be seen, I would argue, in the remedies imposed by NDRC in *LCD Panels*.

The Price Supervision and Anti-Monopoly Bureau exercises the NDRC's functions under the Price Law and Chapter 2 (monopoly agreements) and Chapter 3 (abuse of a dominant market position) of the AML. But enforcement in these areas has also been delegated to provincial Price Bureaus or local Development and Reform Commissions.[3]

As regards the split between price-related provisions of the AML falling within the competence of NDRC, and non-price related provisions falling within the remit of SAIC, the AML itself is silent on the jurisdictional divide. NDRC's Anti-Price Monopoly Regulation issued under the AML notes that "price monopoly conduct," over which NDRC has jurisdiction, covers price monopoly agreements between companies and the price-related conduct of a dominant company.[4] The boundary between price and non-price related conduct is inherently somewhat subjective, however, and it is perhaps not surprising that NDRC has sometimes been accused of overstepping it.[5]

NDRC has at its disposal two legal instruments for the control of cartel pricing practices:

- Article 13(1) of the AML prohibits horizontal monopoly agreements (and concerted practices) including price-fixing arrangements; and
- Article 14(1) of the Price Law prohibits parties from engaging in the "manipulation of market prices in collusion to the detriment of the lawful rights and interests of other operators or consumers."

When *LCD Panels* was published (the decision was published in the form of a one-page press release—NDRC's typical practice[6]), NDRC also made available on its website the transcript of an interview in which an unnamed official explained why the Price Law was used in place of the AML for *LCD Panels*:

> The illegal pricing conduct in the present case took place between 2001 and 2006. As China's Anti-Monopoly Law had not yet been promulgated at the relevant

[3] Article 10 of the AML provides for the delegation of power by the central antitrust enforcement authorities. NDRC delegated enforcement under the AML in its Decision on the Delegation of Anti-Price Monopoly Enforcement, in 2008.

[4] Article 3 of the Anti-Price Monopoly Regulation.

[5] Michael Zhengping Gu, *NDRC's Antitrust Enforcement Decisions*, 2(2) CPI ANTITRUST CHRON. 6 (February 2011).

[6] To date, NDRC has not published any detailed infringement decisions, but only makes available a short press release announcing the results of its enforcement activities.

> time, based on the principle of non-retroactivity and the principle that when choosing between a new law and an old law the older should be applied with the exception of more lenient provisions in the newer law, we examined [the *LCD Panels*] case and determined penalties under the Price Law.[7]

The non-application of the AML in *LCD Panels* is uncontroversial as the AML came into effect only on August 1, 2008, two years after the investigated conduct had ended. That said, NDRC has a practice of applying the Price Law even when the AML is available. Contrary to what might have been expected when the AML came into force, overlapping provisions in the Price Law were not repealed. Indeed, the Regulation on Administrative Penalties for Illegal Pricing Conduct was amended in 2010 with a view to increasing the level of fines that might be imposed for breaches of Article 14 of the Price Law.

In practice, NDRC has, in a number of cases, appeared to operate under both laws concurrently and, in its recent *Rice Noodles Cartel*[8] and *White Paper Cartel*[9] cases, explicitly stated that both the Price Law and the AML were infringed, though the penalties in the latter case were imposed under the Price Law only.[10]

Use of the Price Law affords NDRC a more flexible mix of enforcement tools than the AML and will likely for that reason remain an option for future cartel cases (including international ones) potentially concurrently applied alongside the AML:

- Article 40 of the Price Law provides that "if a business operator commits any of the acts listed in Article 14 of this Law, it shall be ordered to take corrective measures, its illegal gains shall be confiscated and it may also be subject to a fine of not more than five times its illegal gains; …if the circumstances are serious, …[the business operator's] business license shall be revoked"; and
- Article 41 of the Price Law provides that "a business operator whose illegal pricing results in overpayment by consumers or other business operators shall return the overpayment and, if damage is caused, assume liability for compensation according to law."

In contrast to the Price Law, the AML makes no provision for any overpayment to be returned to consumers or other business operators (absent a claim in damages before a court) and does not provide for the revocation of a party's business license.[11] Fines under the AML can, however, be significantly greater than fines imposed under the Price Law. Article 46(1) of the AML provides for the possibility of fines ranging from 1 percent to 10 percent of the turnover of the infringing "business operator" (经营者) for the preceding year—i.e. total or worldwide

[7] *See* the NDRC website for the interview transcript, available in Chinese: http://xwzx.ndrc.gov.cn/zcjd/t20130104_521995.htm.

[8] The press notice for the decision is available on the NDRC website in Chinese: http://jjs.ndrc.gov.cn/fjgld/t20100331_338262.htm.

[9] The press notice for the decision is available on the NDRC website in Chinese: http://www.ndrc.gov.cn/xwfb/t20110104_389456.htm.

[10] *Rice Noodles Cartel* is unclear as to which law was relied upon for the imposition of the penalties.

[11] Other than where an infringement involves a trade association, in which case the association's registration with the Registration and Administration Authority for Social Organizations may be cancelled in serious cases.

turnover on all sales and not just sales in the relevant product and geographic market to which the infringement relates.

In any event, the uniquely flexible range of NDRC's cartel enforcement tools under the Price Law is demonstrated in *LCD Panels*. I turn now to the details of the decision and assess some of its implications.

III. *LCD PANELS* AND ITS IMPLICATIONS

As mentioned, NDRC did not in fact publish any detailed infringement decision for *LCD Panels*, choosing instead to release a brief press notice together with the transcript of an interview with an anonymous NDRC official in a "questions and answers" type document.[12]

NDRC explained in its press notice that, on a number of occasions since December 2006, it had received reports alleging Korean and Taiwanese LCD panel manufacturers had colluded to fix LCD panel prices amounting to monopolistic acts committed "on the Chinese mainland." Accordingly, NDRC opened an investigation (when exactly is not clarified) during which the investigated enterprises admitted to collusive pricing practices in respect of LCD panels—such panels are used in the production of TV and IT screens or monitors. In particular, NDRC confirmed in its press notice that from 2001 to 2006, six enterprises—Samsung Electronics, LG Display, Chimei, AU Optronics, Chunghwa Picture Tubes and HannStar Display—had held 53 so-called "crystal meetings" in Taiwan and Korea.[13] The meetings were hosted by the different operators in turn and were held roughly once a month. The main purpose of the meetings was the exchange of competitive information concerning LCD panels and to discuss LCD panel prices. When selling LCD panels in mainland China, according to NDRC's findings, the enterprises concerned manipulated market prices based on prices discussed in the crystal meetings or based on the information they had exchanged.

NDRC further noted in its press release that the total quantity of LCD panels sold by the six enterprises in China over the relevant period amounted to 5,146,200 units, of which Samsung accounted for 826,500, LG for 1,927,000 units, Chimei for 1,568,900 units, AU Optronics for 549,400 units, Chunghwa Picture Tubes for 270,600 and HannStar Display for 3,800 units. These sales purportedly generated "illegal gains" of RMB 208 million for the parties. NDRC therefore ordered that the six companies involved in the conduct refund some RMB 172 million in "overpayments" to Chinese domestic color TV manufacturers (interestingly, no other sector is identified as having suffered loss). A further amount of RMB 36.75 million of illegal gains was confiscated from the parties (and apparently retained by NDRC), and a fine of RMB 144 million was imposed. The aggregate amount of all financial sanctions imposed was therefore RMB 353 million payable by the companies in the following proportions:

[12] This recalls a similar document issued by MOFCOM in respect of the well-known *Coca-Cola/Huiyuan* prohibition and which was widely seen at the time as an attempt to bring some additional transparency in the face of criticism leveled at the opaqueness of MOFCOM's procedures and reasoning in that case.

[13] The European Commission's *LCD Panels* decision (COMP/39.309) clarifies that these meetings took place primarily in Taiwan. The European Commission's decision is available here: http://ec.europa.eu/competition/antitrust/cases/dec_docs/39309/39309_3580_3.pdf.

Company	Sanction (million RMB)
Samsung	101
LG	118
Chimei	94.41
AU Optronics	21.89
Chunghwa Picture Tubes	16.20
HannStar Display	0.24

In addition to these financial sanctions, NDRC also imposed some rather notable behavioral commitments on the LCD manufacturers:

- First, the companies were required to pledge that in future they would strictly abide by Chinese law, support competition in the market, and safeguard the rights and interests of other enterprises and consumers;
- Second, the companies were required to pledge on a "best endeavours" basis to supply Chinese color TV manufacturer enterprises in a fair manner and to provide all customers with the same purchasing opportunities in terms of high-end and new products; and
- Third, the manufacturers were asked to extend the "free of charge" warranty period for LCD panels installed in TV sets sold domestically in China by Chinese color TV manufacturers from 18 months to 36 months.

While the first of these commitments can hardly be considered onerous, the same cannot be said for the other two behavioral remedies and particularly not the third. As regards the second commitment, there have been allegations in the Chinese press that the LCD manufacturers had a (collusive?) practice of withholding new products from the Chinese market and/or ceasing to supply certain products to the China market.[14] These allegations have not, however, been reflected in the NDRC press notice or questions and answers document. That said, if there had in fact been collusion on decisions to withhold certain products from the Chinese market, it is not entirely clear that this would have been a pricing infringement within NDRC's competence (although one could seek argue the arrangement was ancillary to the pricing conduct).

The third commitment however is particularly striking and has something of an industrial policy flavor to it, unless one were to argue that it was a remedy imposed in view of collusion on the original 18 month warranty period by the LCD manufacturers (there is no suggestion of this in the NDRC's press notice or questions and answers document). That said, the financial impact of the third commitment is also considerable, making it perhaps a disproportionate remedy for any possible collusion on a warranty period in any event. NDRC mentions in its questions and answers document on *LCD Panels* that Chinese industry estimated this measure alone would save domestic color TV manufacturers as much as RMB 395 million

[14] *See* http://finance.chinanews.com/cj/2013/01-04/4455217.shtml. Last visited on 13 February 2013. *Also see*: http://finance.chinanews.com/cj/2013/01-04/4454870.shtml. Last visited on 13 February 2013.

(approximately U.S.$63 million) in costs annually which might be seen as underlining the industrial policy nature of the mechanism.

Whatever the criticisms that might be leveled against it, there can be no questioning the seminal nature of *LCD Panels* in Chinese cartel practice. The fines imposed far surpass anything previously seen and the clear suggestion is fines of this magnitude may become commonplace. The reporter in the NDRC questions and answers document asks "in comparison with the U.S. and EU, the [sanctions imposed] were light. Why was that?" The anonymous NDRC official explains:

> In this case the sanctions for the price monopoly acts have been imposed under the Price Law, with the reference point for the fines being the illicit gains of the enterprises concerned. Moreover, since all of these business operators cooperated with the investigation, more lenient sanctions were imposed to a greater or lesser degree. The amounts of the sanctions were therefore comparatively small. Had sanctions been imposed under the Anti-Monopoly Law, the benchmark for the fines would have been the turnover of the business operators concerned and the magnitude of the fines would have been significantly greater.

This is obviously correct, but raises considerable questions as to the availability of effective rights of defense. In that respect, Article 53 of the AML provides for administrative reconsideration of NDRC enforcement action by NDRC itself or, in the alternative (at the option of the appellant), full judicial review under the Administrative Litigation Law on grounds such as the inadequacy of the evidence, error of law, procedural irregularity, the decision was *ultra vires* the decision maker, *etc*.

It is, however, unclear how effective such a review action might be (there have been none to date under the AML) or whether the review would be of the required "intensity" given the magnitude of the possible penalties. Clearly, NDRC's practice of not publishing any detailed and reasoned decision following an investigation places a significant obstacle on the path to an effective review. Additionally, it has been said that the general perception of the review procedure in China is that it is ineffective, as the courts are not perceived as independent of government.[15]

Aside from the revolutionary nature of the fines imposed in *LCD Panels*, the decision is also ground breaking in terms of its extraterritorial reach. While the NDRC press release refers to Taiwan as an integral part of China (this would be a standard formulation), the notice also hints at a theory of extraterritorial jurisdiction that will be familiar to antitrust practitioners everywhere: Korean and Taiwanese LCD panel manufacturers colluded to fix LCD panel prices amounting to monopolistic acts committed "on the Chinese mainland" where the products were sold. Equally, NDRC's questions and answers document comments that "when selling LCD panels in mainland China, the business operators involved in the case manipulated market prices for LCD panels based on prices discussed in the crystal meetings."

[15] MARK FURSE, ANTITRUST LAW IN CHINA, KOREA AND VIETNAM, p. 117 ¶¶2-5.16 (2009): "…judicial review of administrative actions in China is not generally perceived to be an effective redress against the misuse of administrative power. This in part reflects the position of the courts, which are not perceived as an entity independent of the State."

Against this background, it appears that NDRC very consciously applied an "effects doctrine" or "implementation doctrine" theory of extraterritorial jurisdiction and, on that basis, the application of Chinese antitrust law to the facts of the *LCD Panels* case would be consistent with international practice. Nonetheless, this is not to say the decision is without controversy on the point. Consider the following:

- Article 2 of the Price Law: "This Law shall be applicable to pricing conduct taking place within the territory of the People's Republic of China."
- Article 2 of the AML: "This Law is applicable to monopolistic conduct in economic activities within the territory of the People's Republic of China. This Law is also applicable to monopolistic conduct outside the territory of the People's Republic of China that has the effect of eliminating or restricting competition in the domestic market of the People's Republic of China."

The Price Law's silence on its extraterritorial application has led some to wonder whether NDRC's decision in *LCD Panels* is not vitiated by an excess of jurisdiction. Additionally, reading the two laws together, one might well be tempted to argue that there is no legislative intent that the Price Law be extraterritorially applied. These questions are however academic in that there does not appear to be any prospect of any of the LCD manufacturers appealing the NDRC's decision.[16]

Given that *LCD Panels* establishes the Chinese antitrust authorities' willingness to enforce Chinese law even in the case of overseas conduct, a question arises as to whether China is now one more jurisdiction to be added to the list of places where would-be whistle blowers involved in international cartels will need to consider the pros and cons of making an immunity application. Interestingly in this context, the anonymous NDRC official explained (as mentioned in the extract from the questions and answers document quoted above) "since all of these business operators cooperated with the investigation, more lenient sanctions were imposed to a greater or lesser degree." The Chinese version of the questions and answers document in fact refers to the LCD manufacturers "turning themselves in" or "giving themselves up" (自首) which conveys not merely cooperation but that the parties self-reported and accepted they had infringed China's antitrust laws. Further, reports in the Chinese press suggest that Taiwanese producer AU Optronics "under pressure from NDRC" was the first to "self-report" cartel conduct in the period 2001—2006 with the other LCD panel manufacturers.[17] This was described as being a "breakthrough in the investigations" encouraging LG and others to lodge leniency applications of their own—the so-called leniency race to the door of the authority.[18]

As a practical matter in *LCD Panels*, NDRC had the benefit of investigations overseas which established the existence of an international global cartel (the full European Commission decision was published on the European Commission's website in December 2010) and therefore the LCD manufacturers were something of a soft target. Moreover, the involvement of Taiwanese

[16] Samsung has explicitly stated it will not be appealing the NDRC decision: http://www.sino-us.com/10/China-fines-Samsung-LG-for-manipulating-LCD-panel-prices.html. Last visited on 13 February 2013.

[17] See http://finance.chinanews.com/cj/2013/01-04/4455217.shtml. Last visited on 13 February 2013.

[18] *Id.*

companies may have been seen by NDRC as giving rise to special circumstances. In any event, it would seem very probable that in the future whenever overseas authorities establish the existence of an international cartel, we will now see follow-on or "piggy back" investigations in China.[19] Once these investigations are perceived as inevitable by cartelists, the likelihood of leniency applications being submitted to NDRC or SAIC or both (in cases where cartels straddle the rather blurred jurisdictional boundary between the two) will inevitably increase, though companies will likely "test the water" first with the European Commission and the U.S. Department of Justice. Obviously, if an application in these jurisdictions does not trigger an investigation, then the case for an immunity application in China may be weak.

As regards AU Optronics in the specific context of *LCD Panels*, I noted above that NDRC found that the total quantity of LCD panels sold by the six enterprises in China over the relevant period amounted to 5,146,200 units of which AU Optronics sold 549,400 units (approximately 10 percent of the total). Further, the aggregate amount of all financial sanctions imposed in *LCD Panels* was RMB 353 million of which AU Optronics was required to pay 22 million approximately (around 6 percent of the total financial penalties imposed). This would tend to suggest that there was some credit given to AU Optronics for its cooperative posture generally.

In this regard, Article 27 of the Administrative Penalties Law provides for lenient treatment in cases where enterprises have assisted in the investigation of unlawful acts—this was presumably the basis for NDRC's leniency in *LCD Panels*. The immunity or leniency available under the AML (where the leniency benefit is greater given the possibility of higher fines), is provided for in Article 46(2) of the AML and further elaborated in rules issued by NDRC and SAIC respectively.[20] The leniency architecture in these rules largely follows international practice (immunity for the first applicant, reductions in fines thereafter) and in principle should serve to encourage applications where NDRC and SAIC establish a stringent enforcement practice going forward.

It is perhaps interesting to note that *LCD Panels* followed the signing last year of memoranda of understanding on competition law enforcement between the Korea Fair Trade Commission ("KFTC") and NDRC and between the European Commission and NDRC and SAIC. NDRC and SAIC have also entered into a similar memorandum of understanding with the U.S. Department of Justice and the Federal Trade Commission.

Article 2.3 of the memorandum with the European Commission provides that "[s]hould the two Sides pursue enforcement activities concerning the same or related matters, they may exchange non-confidential information, experiences, views on the matter and coordinate directly their enforcement activities, where appropriate and practicable." Similarly, the memorandum with the U.S. authorities provides that "[e]ach agency recognizes that, when a U.S. antitrust and a PRC antimonopoly agency are investigating related matters, it may be in those agencies' common interest to cooperate in appropriate cases, consistent with those agencies' enforcement interests, legal constraints, and available resources."

[19] China of course would be following the example of a number of other jurisdictions in letting the European Union and United States "set the pace" in international cartel investigations.

[20] *See* Article 14 of the NDRC Regulation on Administrative Law Enforcement Procedures for Anti-Price Monopoly, and Articles 11 – 13 of the SAIC Regulation on the Prohibition of Monopoly Agreement Conduct.

While there is no suggestion to date that NDRC engaged in any exchange of information with the KFTC, the European Commission, or the U.S. authorities in *LCD Panels*, it is tempting to speculate whether there might in fact have been some exchange of views or information. If no such cooperation occurred, it is surely now only a matter of time before it does—to the extent that NDRC continues to pursue the aggressive extraterritorial enforcement policy evident in *LCD Panels*. Of course, the possibility of such cooperation would have a bearing on a whistle blower's incentives to self-report conduct in China in the context of a global cartel.

Finally, it is worth recalling that in China, as in other jurisdictions, injured parties may commence follow-on private litigation under the Price Law to the extent they have not been adequately compensated by NDRC's order for a reimbursement to those suffering loss. As damages actions are the typical "Act II" in cartel cases in the United States, European Union, and elsewhere, one might now be inclined to wonder whether we will not soon witness a similar pattern emerging in the China context. Time will tell.