

First Price Cartel Cases Under the Chinese AML

The Chinese National Development and Reform Commission (“NDRC”), which is the authority responsible for price-related violations of the Chinese Anti-Monopoly Law (the “AML”),¹ recently announced action on two price cartel cases:

- On March 30, 2010, NDRC published the results of its (and its local agencies’) investigation of a price cartel among rice noodle producers in Nanning and Liuzhou (two cities in Guangxi province).
- On April 30, 2010, NDRC published the results of its local agency’s investigation of a price cartel organized by the local industry association among tableware disinfection product producers in Xiamen (a city in Fujian province).

These cases are the first enforcement actions against price cartels publicized by NDRC and/or its agencies since the AML came into force on August 1, 2008.² While both were straightforward cases of price-fixing, the authorities’ handling of these cases raises interesting questions about the relations between the AML and other Chinese laws.

I. THE CARTELS AND INVESTIGATIONS

A. RICE NOODLES

According to NDRC, beginning on November 1, 2009, the Nanning Xian Yi Ge Food Plant and its manager, Que Zhihe, organized a cartel among 18 Nanning rice noodle producers. On January 1, 2010, the 18 producers jointly raised prices, and other producers followed. After the price hike in Nanning, several producers in Liuzhou contacted Que Zhihe to discuss the price increase and organized three meetings in January 2010. Ultimately, 15 Liuzhou producers also agreed to raise prices effective January 21, 2010 and signed profit-sharing agreements with Que Zhihe. As a result, in

¹ Under the AML, the Ministry of Commerce (“MOFCOM”) is responsible for merger control notifications and antitrust conduct taking place in international trade, while the State Administration for Industry & Commerce (“SAIC”) is responsible for non-price related antitrust conduct.

² Unlike MOFCOM, which is required to publish conditional approvals and prohibitions of concentrations, SAIC and NDRC are not obligated to publish their AML decisions.

January 2010 wholesale rice noodle prices increased approximately 26% and retail price rose an average of 14%.

The investigation was led by NDRC, with the assistance of the Bureau of Commodity Prices of Guangxi Zhuang Autonomous Region (which is NDRC's local agency at the provincial level) and Nanning and Liuzhou government departments. According to NDRC's press release, the authorities involved also included public security departments, quality supervision departments, grain administration departments, SAIC's commerce and industry departments, food and drug administration departments, and local agencies of MOFCOM.³

After preliminarily confirming the existence of price collusion, the Nanning and Liuzhou authorities instructed the concerned rice noodle producers immediately to bring their violations to an end, held meetings to call on producers to ensure normal supply, and established an emergency response plan to stabilize prices and guarantee supply. Subsequently, prices in Nanning and Liuzhou dropped to levels in place prior to the collusion.

Administrative sanctions were imposed on 33 rice noodle producers, with the three organizers receiving the largest fines,⁴ 18 other participants receiving fines depending on the gravity of their offenses,⁵ and 12 producers who cooperated with the investigation, provided important leads, and took corrective measures on their own initiative receiving only administrative warnings. Price authorities also sent Price Supervision and Inspection Opinions/"reminder of caution" letters⁶ to some rice noodle producers that unknowingly followed the price rise, requesting these producers to strengthen "price self-discipline" and maintain "good market price order." Some media reports indicated that five individuals involved in the rice noodle cartel (including Que Zhihe) were detained in March by public security agents for allegedly engaging in the crime of "forcing to deal." It is not clear which authorities issued the decisions and/or imposed the sanctions.

³ MOFOCM was involved through a local agency, the department for "rectifying and standardizing the market economy order."

⁴ The fines were RMB 100,000 (~\$14,700 or €11,000).

⁵ The fines ranged from RMB 30,000 (~\$4,400 or €3,300) to RMB 80,000 (~\$11,700 or €8,800).

⁶ A "reminder of caution" is not an administrative sanction. According to NDRC's Measures Regarding Reminders of Caution in Price Supervision and Inspection issued on October 24, 2007, a "reminder of caution" only applies when (i) illegal price conduct has not yet occurred or (ii) the illegal price conduct is minor and the authority chooses not to impose administrative sanctions.

B. TABLEWARE DISINFECTION PRODUCTS

According to NDRC, the Xiamen Bureau of Commodity Prices (which is NDRC's local agency at the city level), and some media reports, on April 19, 2010, the Xiamen Office of Fujian Tableware Industry Association organized a cartel among 28 tableware disinfection enterprises. The association and its members decided that as of May 1, 2010, their distribution price would be increased by RMB 0.10 per 5-piece set. A "Meeting Minute Regarding Price Increase on Tableware Disinfection Products in Xiamen" was signed by the participating enterprises, which were asked not to reduce their prices or compete for customers for three months and to make a deposit of RMB 5,000 to ensure their compliance.

The Xiamen Bureau of Commodity Prices conducted the investigation and held a "reminder of caution" meeting on April 27. At the meeting, the Xiamen Bureau pointed out the illegality of the cartel and requested the industry association and enterprises to immediately bring the violation to an end, take corrective measures (including returning the deposits), and eliminate the ill effects. The Xiamen Office of Fujian Tableware Industry Association and participating enterprises committed to do so. The Xiamen Bureau of Commodity Prices will monitor their compliance.

II. LEGAL FRAMEWORK

Two principal Chinese laws apply to price cartels: the AML and the Price Law.

- Price cartels are prohibited by Article 13 of the AML. NDRC's development of implementing rules under the AML has progressed slowly, however; notably, NDRC has not yet proposed a leniency regime for cartels.
- The Price Law, effective as of May 1, 1998, is not specifically aimed at anti-competitive behavior, but it prohibits collusion on prices (Article 14). NDRC, together with its local agencies, has established a relatively comprehensive implementing framework for the Price Law and gained extensive enforcement experience.

Under the AML, NDRC may authorize its agencies at the provincial level to enforce the AML. Under the Price Law, government price departments at and above the town level are responsible for investigating and sanctioning illegal price conduct (Article 33), while in the case of price cartels and below-cost dumping, provincial agencies are responsible for making decisions on cases occurring below the national level (Article 40).

NDRC has stated that the AML must be applied together with the Price Law, since these laws are not substitutes for one another.⁷ However, the AML and the Price Law (and its implementing measures) differ with regard to their scope, the administrative sanctions that can be imposed, and the appeal process.

III. ANALYSIS

Although the rice noodle cartel case was widely reported as the first price cartel case under the AML, NDRC was in fact unclear regarding which law it applied. In the rice noodle case, both the AML and the Price Law were invoked, though interviews and press reports suggest that NDRC and its local agencies relied more heavily on the Price Law than on the AML. NDRC lists the tableware disinfection products cartel under the “anti-monopoly enforcement” tab on its website, but in its report, the Xiamen Bureau of Commodity Prices only cited the Price Law.

Although a number of authorities were involved in the rice noodle cartel investigation, the specific roles they played are unclear. There are no reports regarding the involvement of agencies other than NDRC and its local agencies in the investigation and decision-making process of the tableware disinfection product cartel.

In both cases, the speed and informality of the authorities’ approach was striking. In both cases, the authorities used “reminders of caution” in the form of meetings or letters, which are not administrative sanctions under Chinese law. In the rice noodle cartel, authorities in Nanning and Liuzhou held “reminder of caution” meetings even before establishing the preliminary evidence of price collusion. Press reports regarding the rice noodle case indicate that the Liuzhou government asked rice noodle producers to reduce their wholesale and retail prices to the pre-cartel level after uncovering preliminary evidence of price collusion. The legal basis for such measures is unclear, but Article 30 of the Price Law authorizes national and provincial agencies to take action when prices of important products or services rise or are likely to rise sharply.

These cases also shed light on NDRC’s approach to leniency. NDRC’s press release on the rice noodle cartel mentions that 12 producers that cooperated with the investigation, provided important leads, and took corrective measures on their own initiative were given immunity from monetary penalties. This announcement suggests that NDRC applied a kind of leniency policy, though officially NDRC has not yet proposed a leniency regime. The legal basis for these 12 rice noodle producers to be exempted from fines may be Article 15 of the Regulations on Administrative Sanctions for Price-Related Illegal Conduct and Article 27 of the Law of Administrative Sanctions, which provide that “if the illegal conduct is minor and is corrected in time and the conduct does not lead to damages, no administrative sanctions will be imposed.” Under

⁷ See http://www.ndrc.gov.cn/jgg1/zhd/t20080829_248411.htm

Article 15, there is no limit on the number of undertakings who can benefit from the exemption. NDRC's approach is inconsistent with SAIC's proposed leniency policy, which apparently applies to at most three companies, with only the first reporter receiving complete immunity.

Interestingly, while the AML does not criminalize antitrust violations, some media reports indicated that five individuals involved in the rice noodle cartel (including Que Zhihe) were detained in March by public security agents for allegedly engaging in the crime of "forcing to deal" under Article 226 of the Chinese Criminal Law.

IV. CONCLUSION

Compared to SAIC and MOFCOM, NDRC has been slow to develop rules and guidelines implementing the AML within its field of jurisdiction. NDRC has also been slow to take action, at least publicly, in respect of price cartels. The announcement of two price-fixing investigations in the space of a month may herald a shift in NDRC's enforcement practice. On closer examination, however, NDRC's announcements raise as many questions as they answer.

First, do NDRC's announcements represent a more aggressive approach to cartel enforcement or simply a decision to publicize its enforcement actions? It is notable that in both cases the illegal conduct was identified and action taken very quickly, and both cases involved price fixing on a local level. NDRC may have detected and taken action against other such cartels since the AML entered into force, but chosen not to publicize them.

Second, what is the relationship between the AML and other Chinese laws? Although the AML entered into force in 2008, NDRC continues to apply the Price Law alongside (or even in preference to) the AML. NDRC may feel more comfortable with the Price Law, which has more fully developed implementing rules and a substantial enforcement history.

Third, how is enforcement authority divided between NDRC and other government agencies? The AML and the Price Law confer jurisdiction for price-related violations on NDRC (and its local agencies). In the rice noodle case, however, a number of other authorities were involved, even though the statutory basis for their involvement was not entirely clear.

Fourth, what do these cases indicate about NDRC's approach to leniency? NDRC appears willing to grant leniency to some cartel members, but it does not seem to apply a leniency policy of the type proposed by SAIC and used in other jurisdictions. Twelve members of the rice noodle cartel received only warnings, and no fines were imposed in the tableware disinfectant cartel, even though none of the participants is credited with having blown the whistle on the cartel. NDRC seems to grant leniency based at least in

part on the harm done by cartel members, instead of (or in addition to) granting leniency to one or a small number of cartel members while imposing high fines on other members as an inducement for whistle-blowers.

Fifth, what is NDRC's policy on fixing fines and other penalties? Although NDRC imposed fines on a number of rice noodle cartel members, it did not indicate how these fines were calculated. Unlike Western antitrust authorities, NDRC and its agencies seem to rely on informal measures such as "reminder of caution" letters and meetings quickly to put an end to cartel violations.

Although NDRC's announcements in the rice noodle and tableware disinfection products cases raise many questions, these announcements are a welcome indication that NDRC is actively enforcing Chinese legal prohibitions against price fixing. As NDRC develops its implementing rules and enforcement experience in this area, it can be expected that the AML will evolve into the principal tool for enforcement of price-related antitrust violations, as anticipated when the AML entered into force almost two years ago.

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If you have any questions, please feel free to contact any of your regular contacts at the firm or any of our partners and counsel listed under Antitrust and Competition in the "Practices" section of our website at <http://www.clearygottlieb.com>.

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