Record Fines Imposed in Chinese *Maotai Liquor* RPM Cases

On 22 February 2013, the National Development and Reform Commission (NDRC) imposed record penalties under China's *Anti-Monopoly Law* (AML) of RMB 449 million on two liquor companies for resale price maintenance (RPM) practices.

These two new NDRC decisions signal not only a new hardline approach to enforcement of the AML's behavioural prohibitions generally (in that respect the rulings hammer home a message most recently conveyed in *LCD Panels* where the NDRC imposed sanctions of RMB 353 million on six Korean and Taiwanese companies), but also possibly set the stage for a clash with China's judiciary which appears to take more of a 'rule of reason' approach to RPM.

China's largest ever penalties under the AML

In parallel rulings issued by two of its provincial branches, the NDRC has fined two state-owned liquor companies for implementing vertical monopoly agreements with distributors in respect of liquor resale prices, contrary to Article 14 of the AML. In particular, Wuliangye Yibin Group Co., Ltd ("Wuliangye") was fined RMB 202 million for setting minimum prices for its distributors' sales of liquor to third parties. Similarly, Kweichow Maotai Co. Ltd. ("Kweichow Maotai") was fined RMB 247 million for comparable conduct.

While the NDRC can impose fines ranging from 1–10 percent of an infringing company's turnover under Article 46 of the AML, total penalties imposed in the *Maotai Liquor* RPM cases (equivalent to around USD 72 million) are the highest ever imposed by China's antitrust enforcement authorities under the AML. Though they might be high, these fines are not a complete surprise however after the NDRC's *LCD Panels* ruling in January which saw sanctions of around USD 57 million – although, technically, those sanctions were imposed under the Price Law which prohibits horizontal collusion among other matters (*LCD Panels* concerned horizontal cartel conduct which predated the introduction of the AML and therefore the AML was not available).

Perhaps surprisingly given the magnitude of the sanctions in *Maotai Liquor*, statements in the NDRC press releases for the cases indicate that the parties were treated leniently in view of their "active cooperation" in the investigations. In the case of Wuliangye, the NDRC's press release indicates that this translated into a fine equivalent to 1 percent of the company's turnover – the lower end of the spectrum (the AML suggests a 1 percent fine is the minimum where an infringement is established).

Maotai Liquor – the facts

The NDRC investigative teams, comprising officials at the Sichuan Provincial Development and Reform Commission and the Guizhou Price Bureau (Article 10 of the AML provides for the delegation of power by the central antitrust enforcement authorities and the NDRC delegated enforcement under the AML to provincial price bureaus and local development and reform commissions in 2008), found that the two companies' conduct restricted competition and harmed consumer interests in contravention of the AML. In particular, according to the Sichuan regulator, Wuliangye used its position of strength on the market to impose minimum resale prices on liquor sold by more than 3,200 independent distributors of its products through the use of various punitive measures (the imposition of fines, refusals to supply, withdrawal of marketing support and claims for liquidated damages where parties refused to comply with the agreed minimum price) and extensive monitoring of distributors' pricing practices. According to the NDRC press notice, the regulator identified in its ruling theories of harm involving restrictions on both intra-brand and inter-brand competition resulting in reduced consumer choice overall. These latter findings are telling as they may be suggestive that the NDRC did in fact assess restrictions on competition and the press release refers to Wuliangye's market power twice.

As regards Kweichow Maotai, the Guizhou Price Bureau found that it had fixed minimum resale prices for third-party distributors of its liquor products, and sought to punish distributors that did not implement the agreed minimum price. The Guizhou Price Bureau's press release is notably short on detail but appears to assume RPM is contrary to the AML as such.

RPM in China: *per se* or 'rule of reason'?

Whether the Chinese antitrust authorities are required to demonstrate that a given RPM practice adversely impacts competition or is deemed to infringe the AML *per se* and regardless of its effects on competition remains somewhat unclear presently. In particular, there are no AML guidelines dealing with the point, though Article 14 of the AML may be taken to suggest a *per se* approach. Article 14 provides that "[b]usiness operators are prohibited from reaching the following types of monopoly agreement with trade counterparties: (1) agreements that fix the price of goods sold on to third parties". A plain reading of the text here would suggest that an agreement that contains RPM provisions is a monopoly agreement *in and of itself* though it might still be possible to justify the agreement on the basis of the factors listed in Article 15 of the AML (the agreement improves technology, increases efficiency *etc.*). The *Maotai Liquor* decisions appear (though the Wuliangye decision less so) to have taken this literal reading of Article 14 and viewed the RPM practices as illegal *per se* though there is no direct discussion of this important issue in the NDRC press releases.

By contrast, the Shanghai Intermediate People's Court more explicitly preferred a 'rule of reason' type analysis in the 2012 case *Beijing Rainbow/Johnson & Johnson* when it dismissed a claim alleging Johnson & Johnson had engaged in RPM practices.

The Court noted that Article 14 of the AML had to be read in conjunction with Article 13 which provides that for the purposes of the AML the term monopoly agreement "means an agreement, decision or other concerted act that eliminates or restricts competition". The Court reasoned that it followed that the mere fact of engaging in RPM was not contrary to the AML *per se* but rather the issue turned on whether there was a restriction of competition in fact and this would need to be established in a given case. The ruling in *Johnson & Johnson* is now currently on appeal but a judgement by the Shanghai High People's Court upholding the first instance decision would add further uncertainty as to how RPM should be viewed under the AML and may even invite an appeal of the NDRC's rulings in *Maotai Liquor*.

Of course if the first instance ruling in *Johnson & Johnson* is overturned on appeal, that might offer greater legal certainty as to the correct approach to RPM under the AML. Even so, clarity of this kind – that RPM was *per se* prohibited – would be cold comfort for suppliers active on the China market today whose business practices stand to be severely impacted.

Whatever the position ultimately as regards RPM, it is now clear that aggressive enforcement of the AML's behaviour rules is upon us. Companies selling into China or based there would be well advised to pay heed.

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