

Cartels

Enforcement, Appeals & Damages Actions

Second Edition

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China

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Overview of the law and enforcement regime relating to cartels

The Anti-Monopoly Law (AML) of China was adopted on 30 August 2007 and came into force on 1 August 2008. The AML is not China's first competition law, but it has rightly been described as China's first comprehensive competition law. Prior to the introduction of the AML, competition-related provisions of broad application were scattered throughout a range of legal instruments. These include in particular, provisions of the following:

- **Price Law:** Effective since 1 May 1998, this law addresses price-related anti-competitive conduct such as price-fixing, predatory pricing, price discrimination, and unfairly high pricing. For example, 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".
- **Bidding Law:** The Bidding Law, which entered into force on 1 January 2000, was formulated to regulate tendering and bidding activities, particularly regarding large-scale infrastructure and public utility or other government-related projects, and amongst other things directly prohibits certain forms of bid-rigging.
- **Anti-Unfair Competition Law:** Effective since 1 December 1993, this law prohibits tying, certain below-cost sales practices and a range of unfair trade practices. The Anti-Unfair Competition Law also prohibits bid-rigging.

These three laws remain in force today and operate alongside the AML to control restrictive cartel practices. The Price Law in particular remains an important enforcement tool and has been used in recent high-profile cases. The AML, however, is by far the most significant legal instrument in the cartel context. Article 13 of the AML prohibits the following "monopoly agreements" (agreements, decisions or concerted practices that eliminate or restrict competition) concluded by competing undertakings:

- monopoly agreements which fix the prices of products;
- monopoly agreements which limit the production volumes or sales volumes of products;
- monopoly agreements which divide sales markets or purchasing markets;
- monopoly agreements which limit purchases of new technology or equipment or that limit the development of new technology or new products;
- joint boycott monopoly agreements; and
- other monopoly agreements as determined by the AML enforcement authorities.

Technically, and in this respect the China regime has been inspired by the EU regime where there are no *per se* infringements, cartel agreements falling within Article 13 AML are capable of exemption under Article 15 AML. Article 15 provides that if the implicated undertakings can demonstrate that the allegedly restrictive agreement pursues any one or more of the following objectives, Article 13 AML shall not apply:

- (1) improvements to technological development or research and/or the development of a new product;
- (2) improvements to product quality, reductions in cost, improved efficiency, the harmonisation of

- product specifications and standards or the implementation of specialisation arrangements;
- (3) improvements to the operational efficiency and enhanced competitiveness of SMEs;
 - (4) social public interest benefits such as energy conservation, environmental protection and disaster relief;
 - (5) mitigating the impact of severe decreases in sales or production surplus/excess capacity during a period of economic recession;
 - (6) the protection of legitimate interests in foreign trade and economic cooperation; and
 - (7) other objectives as might be prescribed by law or by the State Council.

In order to successfully claim an exemption on the basis of items (1) through (5) above, the relevant undertakings must in addition demonstrate that competition in the relevant market will not be seriously restricted and that consumers can share in whatever efficiency or other public interest gains might be derived from the restrictive agreement. To date, in China cartel practice, Article 15 justifications do not however appear to have played any prominent role (although there is at least one precedent). In some respects this may be because the regime is relatively young. More generally though, it would seem likely that cartel conduct will not readily be defended on Article 15 grounds, and that an effective defence would be difficult to mount. From this perspective, Article 15 AML might not be expected to feature greatly in China cartel law, with the notable exceptions of Article 15(5) AML which allows for crisis cartels and Article 15(6) which provides for the possibility of export cartels. There are no reported decisions involving either of these grounds for exemption at present.

In addition to Articles 13 and 15 AML, Article 16 AML is also relevant in the cartel context given the regularity with which trade associations are associated with cartel conduct. Article 16 provides that industrial associations may not organise their members with a view to implementing monopolistic conduct prohibited by the AML. Accordingly, a trade association may not issue binding pricing guidelines for members, for example.

Aside from the “framework” provisions of the AML, there are a number of subordinate instruments with particular relevance for cartel conduct. These include the following:

- **The SAIC Regulations on the Prohibition of Monopoly Agreements** (31 December 2010): These implementing regulations include important provisions on the factors that the regulator should have regard to when establishing the existence of a non-pricing concerted practice (whether there is parallel conduct; whether there has been an exchange of future intentions between the parties; whether there are alternative explanations for parallel conduct which might defeat the implication of a concerted practice); further examples of non-pricing conduct which amounts to conduct prohibited by Article 13 AML and provisions establishing a regime for leniency in the case of non-pricing monopoly agreements.
- **The SAIC Procedural Regulations on Enforcing the Prohibition on Monopoly Agreements and Abuse of Dominance** (26 May 2009): These implementing regulations (the SAIC Procedural Regulations) contain rules on the allocation of cases between central State-level regulators and provincial or local enforcers; provisions concerning complaints in cases of alleged non-price monopoly conduct; provisions on the investigative powers of the regulator; certain minimal provisions providing for rights of defence; additional provisions for settling cases and provisions for lenient treatment where investigated parties cooperate. The regulations also provide that the investigating authority “may make a public announcement” in respect of investigations.
- **The NDRC Regulations on Monopolistic Pricing Practices** (29 December 2010): These implementing regulations include provisions on the factors that the regulator should have regard to when establishing the existence of a price-related concerted practice (again, whether there is parallel conduct; whether there has been an exchange of future intentions between the parties); further examples of price-related conduct which amount to conduct prohibited by Article 13 AML; and provisions concerning price-related abuses of market power.
- **The NDRC Procedural Regulations on Enforcing the Prohibition on Monopolistic Pricing Practices** (29 November 2010): These procedural regulations (the NDRC Procedural Regulations) contain rules on the allocation of cases between central State-level regulators and provincial or local enforcers in cases of price-related infringements of the AML; provisions concerning

complaints; provisions on the investigative powers of the regulator; certain provisions providing for rights of defence; provisions for settling cases and provisions for lenient treatment. As with the SAIC Procedural Regulations referred to above, it is provided that the investigating authority may make public the results of an investigation. There is no obligation to do this and there is no wider obligation to give reasons – arguably an essential element in any framework that sought to provide robust rights of defence. The AML also does not impose any obligation on the relevant regulators to publish infringement decisions or to state reasons.

As might be apparent from the above discussion, in addition to a number of competing competition laws, China has more than one antitrust regulator. There are in fact three regulators at the central State-level in addition to an overarching Anti-Monopoly Commission which presently exercises a coordinating function but which may also be viewed as an embryonic future unified enforcer. The three anti-monopoly enforcement authorities under the AML are the following:

- The **Ministry of Commerce** (more commonly known by the acronym MOFCOM) is responsible for merger control.
- The **NDRC** (National Development and Reform Commission) is the competent authority for price-related infringements of the AML's behavioural rules and for enforcing the provisions of the Price Law. The NDRC is therefore one of two key regulators in the cartel context.
- The **SAIC** (State Administration for Industry and Commerce) is the competent authority for non-price-related infringements of the AML's behavioural rules and for enforcing the provisions of the Anti-Unfair Competition Law. The SAIC also enforces the Bidding Law in sectors that do not have any alternative dedicated sectoral regulator.

As regards the “division of labour” in the cartel context between price-related conduct falling within the competence of the NDRC, and non-price-related conduct falling within the remit of the SAIC, the AML itself is silent on the jurisdictional divide, and the rationale is to be found in historical competences of the regulators under older rules. The NDRC, for example, was and remains the China national price regulator and in that capacity sets and adjusts the prices of certain important commodities. This price regulator function was seen as giving the NDRC something of a claim over price-related antitrust conduct. Of course, the boundary between price and non-price-related conduct is inherently somewhat subjective and initially at least there was uncertainty as to how a cartel involving both pricing elements (e.g. pure price-fixing) and non-pricing elements (e.g. an agreement on production quotas) would be assessed and by which regulator. The position at present is that the NDRC and SAIC will agree among themselves who the lead regulator will be in a given case where there might be jurisdictional overlap. That said, it is generally recognised that the allocation of functions between the NDRC and SAIC under the AML is sub-optimal, and additional complexity is added by the possibility of both regulators delegating enforcement to provincial bureaux or local offices.

The AML envisages an administrative enforcement structure where the SAIC and the NDRC investigate, prosecute, determine liability and impose administrative penalties. If parties are dissatisfied with the results of an investigation, they can seek an administrative review before the relevant regulator or lodge an appeal with the courts.

Overview of investigative powers in China

Article 39 AML provides that when conducting an investigation into suspected cartel conduct, the anti-monopoly enforcement authority may take the following measures:

- the authority may enter the business premises of the undertakings subject to investigation or other relevant premises;
- the authority may question the undertakings, interested parties and other relevant entities or individuals and request that they provide relevant information;
- the authority may examine and take copies of relevant documents and information including agreements, accounting books, business mail or correspondence, electronic data etc. of the investigated undertakings, interested parties and other relevant entities or individuals;
- the authority may place relevant evidence under seal, seize or retain relevant evidence; and
- the authority may make inquiries into the bank accounts of the investigated undertakings.

The above provisions are rather broadly worded and appear to give the investigating authorities power to question and take evidence from a wide range of entities and not merely the investigated parties. This reading is followed by the SAIC in the SAIC Procedural Regulations which provide, among other matters, that the SAIC may:

- question the business operator under investigation, any other party concerned or other relevant organisations or individuals; and
- review and take copies of relevant documents and materials including receipts, certificates, agreements, accounting books, business correspondence, electronic data etc. of the business operator under investigation or any other party concerned, or other relevant organisation or individuals.

On the other hand, the NDRC Procedural Regulations are narrower in so far as they appear to confine the investigating authorities' power to a power to inspect and take copies of evidence or documents and material pertaining to the investigated parties. Further, the SAIC Procedural Regulations also provide that the business operators under investigation, any other party concerned, or other relevant organisations or individuals, may be requested to provide a range of material including:

- copies of business licences and certificates of incorporation, identity documents;
- copies of all agreements and foreign investment records pertaining to the three years before the investigation was initiated;
- trade associations may also be requested to provide business plans for the relevant industry.

The decision to deploy these various investigative powers does not require any court approval. Rather, decisions are taken by senior officials of the relevant investigating body itself – the NDRC and/or the SAIC. Relevant investigative decisions in respect of a given investigation are subject to judicial review although there is no information available on whether parties have sought a review of such decisions. That said, given the rather broad wording in Article 39 AML, coupled with the rather low threshold for opening an investigation (there need only be suspected monopolistic acts), the factors which might give rise to a successful judicial challenge are unclear.

The enforcement authorities may conduct enquiries through interviews, over the phone or in writing. Where inquiries are made by phone or interview, the interviewee will be asked to sign the inquiry record. Investigated parties are obligated to cooperate with an investigation and shall not resist or interfere with it. Interestingly, the duty to cooperate extends beyond the investigated parties and includes materially interested parties and other relevant persons. Article 52 AML provides that parties who obstruct an investigation may be subject to a range of penalties including fines of up to RMB 100,000 for individuals or RMB 1,000,000 in the case of an enterprise. Criminal penalties under the Criminal Law may also be pursued.

As regards examples of these various investigative powers being used, it is understood that unannounced raids occurred in the *Infant Formula* resale price maintenance (RPM) case (see below) and have occurred in recent abuse of dominance cases; there are, however, no dawn raid statistics available for cartel cases initiated or concluded in 2013. Penalties for failure to cooperate with the investigating authority (including for the destruction of evidence) were imposed in *Crystal Souvenirs* – a cartel case concerning sales of crystal souvenirs in Sanya, Hainan Island, China. In that case Haisha Crystals was fined RMB 99,000 and Changyuan Crystal was fined RMB 90,000 for non-cooperation including concealment and destruction of relevant evidence.

Finally, it is worth mentioning the NDRC's new Provisions on Evidence Concerning the Imposition of Administrative Penalties on Price-related Violations which provide important guidance on the collection of evidence in cartel cases, and exclude from consideration evidence collected by certain improper means such as by deception, duress or violence, and wire taps.

Overview of cartel enforcement activity during the last 12 months

The last 12 months have witnessed something of a revolution in the public enforcement of the AML's behavioural rules. In particular, there have been a series of high-profile cases relating to horizontal cartel conduct (mainly price-fixing) and vertical monopoly agreements (mainly resale price maintenance) as both the NDRC and, to a lesser degree, SAIC have begun to implement a new aggressive enforcement policy.

With respect to cartels, *LCD Panels* and *Shanghai Precious Metals* attracted the most comment and we explore these decisions in greater detail below. While these and certain other high-profile cases have been publicised by the enforcement authorities, neither the NDRC nor the SAIC have published statistical information as regards the total number of cartel investigations opened or concluded in 2013, nor indeed is it clear that all cases concluded have been publicised. As noted above, there is no obligation to publish cases and, in particular, no obligation to publish any detailed infringement decision (generally only press releases have been published in respect of concluded cartel investigations although the SAIC has very recently begun to publish more detailed decisions). That said, based on publicly available information from a variety of sources, it is estimated that the total number of active cartel investigations during the course of 2013 amounted to some 20 cases – NDRC and SAIC caseload combined. As regards concluded investigations made public by the SAIC and the NDRC during the course of the year, the total number amounts to seven cartel infringement decisions, with total fines of approx RMB 381m.

LCD Panels

In January 2013, the NDRC published a decision imposing financial penalties of RMB 353m (approx US\$57m) on six Korean and Taiwanese manufacturers of LCD panels. This 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 – signalled the advent of a new and aggressive turn in behavioural antitrust enforcement for China. The NDRC explained in its press notice for the case 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, the NDRC opened an investigation during which the investigated enterprises admitted to collusive pricing practices. In particular, the NDRC confirmed in its press notice that from 2001 to 2006, the six investigated enterprises had held so-called “crystal meetings” in Taiwan and Korea, the main purpose of which was the exchange of competitive information concerning LCD panels and to discuss LCD panel prices. When selling LCD panels in mainland China, according to the NDRC’s findings, the investigated enterprises had manipulated market prices based on prices discussed in the crystal meetings or based on the information they had exchanged. The NDRC noted that the total quantity of LCD panels sold by the six enterprises in China over the relevant period amounted to some 5,146,200 units, purportedly generating “illegal gains” of RMB 208m for the parties. The NDRC ordered the six companies involved to refund some RMB 172m in “overpayments” to Chinese domestic colour TV manufacturers. A further amount of RMB 36.75m of illegal gains was confiscated from the parties (and presumably retained by NDRC), and a fine of RMB 144m was imposed. The aggregate amount of all financial sanctions imposed was RMB 353m – as mentioned above.

In addition to financial sanctions, the NDRC imposed notable behavioural commitments on the infringing parties:

- the companies were required to pledge that in future they would strictly abide by Chinese law;
- the companies were required to pledge on a “best endeavours” basis to supply Chinese colour 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
- 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 colour TV manufacturers from 18 months to 36 months.

It might be argued that certain of these remedies border on industrial policy, and certainly non-competition concerns are not unusual in the Chinese competition law context.

LCD Panels was investigated under the Price Law, as the AML had not come into force at the time the infringing conduct took place.

Shanghai Precious Metals

In August 2013, the NDRC published a decision finding that the Shanghai Gold & Jewellery Trade Association and certain of its members had engaged in cartel activity in the precious metals retail sector in Shanghai. In particular, the NDRC found that parties had established a mechanism for

calculating gold and platinum retail prices. The NDRC fined the trade association RMB 500,000 and the association's members RMB 10.1m in total. The fines imposed on the association members amounted to 1% of "relevant sales".

Interesting features of the case include the fact that a number of companies appear to have participated in cartel meetings and yet escaped fines on the basis that they did not implement the agreed pricing arrangements. One might compare this with the more rigorous "public distancing" requirement in EU law, or the EU law presumption of involvement in a cartel once a relevant party receives pricing information in circumstances where it remains active on the relevant market (see *C-8/08 – T-Mobile Netherlands & Others*). A further interesting feature of *Shanghai Precious Metals* is the extent to which the NDRC relied on "confessions" to establish its case. In this respect it is reported that many, if not most, of those undertakings which were eventually fined appear to have confessed to their involvement in the cartel in return for reduced penalties.

Other cases in 2013

Generally, the remaining cartel cases in 2013 involved localised conduct with relatively low fines in those cases where penalties were imposed. The industry sectors concerned were brick manufacturing, insurance, tourism, driving schools, car cleaning, LNG distribution, food and household appliances. The table below shows all fines imposed in the seven cartel infringement investigations that were concluded during 2013 and published on official government websites.

Cartel cases concluded in 2013

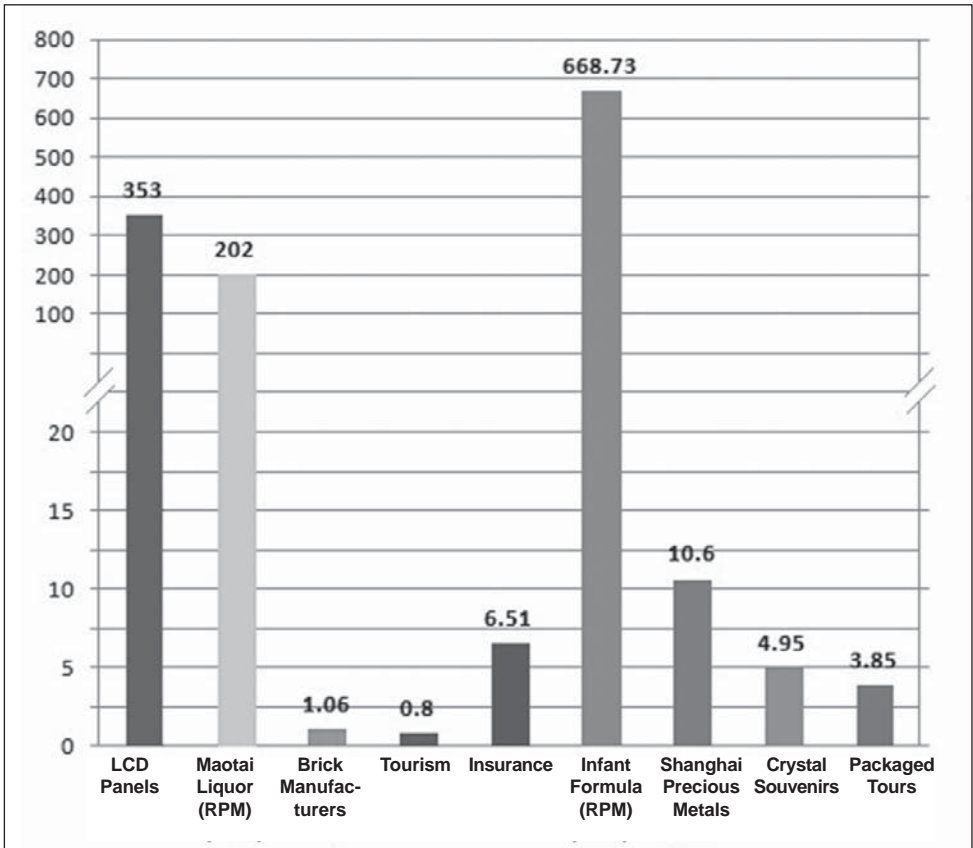
Date (Month 2013)	Investigating authority	Case	Penalty (million RMB)
Jan	NDRC	LCD Panels	353
Mar	SAIC	Brick Manufacturers	1.06
Apr	SAIC	Tourism Cartel	0.8
Jun	NDRC	Insurance Cartel	6.51
Aug	NDRC	Shanghai Precious Metals	10.6
Sep	NDRC	Crystal Souvenirs	4.95 (an additional RMB 189,000 was imposed on the parties for destruction of evidence and non-cooperation)
Sep	NDRC	Packaged Tours	3.85

While not a cartel case, it is worth mentioning in this context *Infant Formula* in so far as it is representative of a broader trend toward ever-higher fines, a new willingness to pursue multinationals, and investigative processes generally under the AML. In this respect, in August 2013, after an investigation lasting a mere five months, the NDRC imposed record fines totalling RMB 669m on six producers of infant milk powder for certain resale prices maintenance (RPM) practices with distributors contrary to Article 14 AML (the previous record was a fine of RMB 449m imposed in the *Maotai Liquor* cases in February 2013 also for RPM practices). According to the NDRC's press release for *Infant Formula*, all of the investigated producers "admitted" to RPM practices while being unable to prove to the satisfaction of the NDRC that their actions fell within any of the grounds for exemption set out in Article 15 AML. Three manufacturers avoided penalties altogether as they voluntarily cooperated with the NDRC under its leniency programme by providing important evidence. This point is interesting in that it confirms that the NDRC might be willing to grant leniency in a vertical case – somewhat unusual by international standards, although it may be that the relevant undertakings offered information on an industry-wide practice (presumably not collusive) and did not merely report their own conduct. In addition to financial penalties, the companies involved in *Infant*

Formula were also required to organise competition compliance training for staff. Commitments of this kind are not uncommon in the China context.

More generally though, the significance of *Infant Formula* is that it confirms the trend toward a new aggressive enforcement of the restrictive agreement rules in a context where procedural protections might not be commensurate with the magnitude of the fines we are now seeing imposed. The chart below shows that the lower fines in the majority of the cartel cases in 2013 should not be seen as a general indication that enforcement remains lax.

Fines imposed in restrictive agreement cases in 2013 (RMB million)



Leniency/amnesty regime

Where parties voluntarily disclose their involvement in relevant conduct prohibited by the AML, and cooperate with the authorities, the AML provides this may be rewarded with a grant of leniency (Article 46). Specifically, the AML provides that the authority may impose a reduced penalty or exempt a party from penalty where that party reports a prohibited monopoly agreement such as a cartel, and provides material evidence about the conduct to the investigating authority on its own initiative.

Both the SAIC and NDRC Procedural Regulations and the SAIC Regulations on the Prohibition of Monopoly Agreements provide guidance on the respective regulator’s approach to leniency. Unfortunately, however, this is an example of an area where potential inconsistency is evident in the approach of the different regulatory bodies.

According to the NDRC Procedural Regulations, the fine reduction for a business operator who actively reports its involvement in a cartel, and provides material evidence regarding that violation, will be as follows:

Reporting entity	Fine reduction
First reporting entity	100%
Second reporting entity	No less than 50%
Third and subsequent reporting entities	No more than 50%

By contrast, while the SAIC Regulations on the Prohibition of Monopoly Agreements also stipulate that the first reporting entity will not receive a fine, those regulations do not mention specific fine reduction percentages for the second-in-time and any later reporting entity.

Both the SAIC and NDRC Procedural Regulations clarify that material evidence must be provided by a business operator concerning a monopoly agreement to which it is a party in order for the leniency provisions to apply. While the SAIC Procedural Regulations indicate that this evidence must play a pivotal role in the initiation of an investigation by the SAIC or have a significant bearing on the establishment of an infringement, the NDRC rules merely stipulate that the evidence provided must be sufficient for the NDRC to determine the existence of a monopoly agreement. The SAIC Regulations on the Prohibition of Monopoly Agreements also clarify that material evidence includes:

- information on the business operators party to the monopoly agreement and the products involved;
- details of the contents of the relevant agreement;
- information on how the relevant agreement was entered into; and
- details of how the agreement was implemented.

The SAIC Procedural Regulations make it clear that leniency will not be available for the “initiator” of a cartel. The NDRC Regulations are silent on this point.

As regards recent practice, full immunity was granted to applicants in each of the *LCD Panels* and *Crystal Souvenirs* cases.

Administrative settlement of cases

There is no formal settlement mechanism (in the sense of detailed procedures for a plea bargain or procedures analogous to the EU settlement regime) although parties are generally encouraged to confess, cooperate and undertake to rectify their ways in return for a reduced fine. The investigative timeline is then shortened in such cases. A recent example of a cartel case that proceeded on this basis is *Shanghai Precious Metals* (see above). Typically the investigating authorities seem to settle on a fine approximating 1% of relevant sales in these cases on the basis of Article 27 of the Administrative Penalties Law.

Article 45 AML does however provide for what might be termed in other contexts a commitment decision. In particular, if an undertaking subject to investigation undertakes to take particular measures to eliminate the effects of its monopolistic conduct within a time-frame approved by the investigating authority, the authority may decide to suspend its investigation. Any decision to suspend an investigation must provide details on the commitments offered by the relevant undertaking. Where the investigating authority then decides to suspend its investigation, it will nonetheless supervise the performance of the relevant commitments offered by the undertaking concerned. Where the undertaking abides by its commitments, the investigating authority may decide to terminate the investigation. The investigating authority may however reopen its investigation, where the undertaking fails to perform its commitments, there have been substantial changes to the facts upon which the decision to suspend the investigation was based, or the decision to suspend the investigation was made based on incomplete or false information provided by the undertaking concerned. These provisions of Article 45 AML are also further developed to a limited extent by provisions in the NDRC Procedural Regulations and the SAIC Procedural Regulations which provide guidance on the procedural steps that parties must take when submitting an application to suspend an investigation, and on the factors the investigating authority must consider (the SAIC Procedural Regulations mention the nature, duration and consequences of the conduct at issue and effects on society; the NDRC Procedural Regulations do not offer guidance on this) when deciding to accept commitments and suspend a case.

While typically one might not expect competition authorities to agree to close every cartel case without imposing a penalty merely because the investigated parties have committed to comply with the law for the future, *Zhejiang Energy Efficiency Testing* may provide a precedent in the China context. The cartel was originally investigated in 2011 when it was determined that the parties had agreed to divide the market for energy efficiency testing in Cixi, Zhejiang. In March 2011 – during the course of the investigation – the parties applied to have the investigation suspended, given that they had abolished the cartel arrangement (this would appear to amount to an admission of guilt which strictly speaking does not appear to be required under Article 45 AML), would publicise this and undertook to abide by the law thereafter. The local SAIC agreed to the request and suspended the investigation for a year in light of the parties’ cooperative posture and the fact that customers had allegedly not suffered any anticompetitive harm – a finding which seems somewhat inconsistent with the reported determination that the parties’ conduct had resulted in the exclusion of other players from the market. The SAIC subsequently closed the investigation in March 2013, noting that it had not received any further complaints during the period when the investigation was suspended. Whether the exceptionally lenient treatment afforded to the parties in this case is a recipe for future cartel cases is difficult to say, but generally *Zhejiang Energy Efficiency Testing* appears as something of an anomaly when viewed against the backdrop of the NDRC cases reported above. That said, confessing to one’s involvement in the cartel, cooperating in the investigation, and undertaking to abide by the law for the future clearly appears to earn parties some leniency credit or otherwise reduced penalties as part of an effective plea bargain with the authorities.

Third party complaints

Article 38 AML provides that parties may submit a complaint to the authorities in respect of alleged anticompetitive conduct, and that where the complaint is in writing and provides relevant facts and evidence, the antimonopoly enforcement authorities “shall conduct the necessary investigation”.

The SAIC Procedural Rules provide additional guidance on the submission of complaints concerning alleged monopolistic conduct – for example, particulars with respect to the complainant, the accused party and relevant facts which should be provided. Similarly, the NDRC Procedural Rules confirm that complaints can be made, although very little detail is provided as regards procedures or other matters.

In practice, complaints are common in the cartel context in China and many recent cases have been complaint-driven – for example, *LCD Panels*, *Brick Manufacturers*, *Tourism Cartel* and *Shanghai Precious Metals*.

Civil penalties and sanctions

Article 46 AML provides that where undertakings conclude and implement a monopoly agreement, the enforcement authority must order the undertakings to cease and desist, confiscate whatever illegal gains might have been earned and impose fines on the parties of an amount “equal to or more than 1% and less than or equal to 10% of their total turnover in the preceding year”. Where a monopoly agreement has not been implemented, a fine of less than RMB 500,000 can be imposed.

As regards trade associations which organise members to conclude a monopoly agreement, the enforcement authority can impose a fine of up to RMB 500,000 and in serious cases the relevant licences and registrations of the association may be cancelled.

The application of these provisions is discussed elsewhere in this article. There are at present no specific fining guidelines, although the SAIC Regulations on the Prohibition of Monopoly Agreements provide that the SAIC shall have regard to the nature of the violation, the circumstances of the case, the extent of the relevant conduct and its duration when setting the level of a fine. In addition, the Administrative Penalties Law may be applicable:

- Article 4 of the Administrative Penalties Law provides that the imposition of administrative penalties shall be based on the facts of the case and shall correspond with the nature and gravity of the offence and harm to society; and
- Article 5 of the law provides that “penalties shall also be educational in nature”, i.e. have deterrent value.

Right of appeal against civil liability and penalties

Article 53 AML provides a right of appeal against decisions of the NDRC and SAIC. The appellant has a choice between seeking a re-hearing before the relevant regulator (an administrative review) or a review by the courts. The review in this context can be a “full merits” review. There is thus far no information available on whether parties have appealed cases on the basis of Article 53.

Review is also available under the Administrative Procedure Law and, in theory, third parties would have standing. That said, the NDRC and SAIC’s general practice of not publishing detailed decisions would appear to be a significant barrier to a third party challenge, although the SAIC in particular has begun to issue much more detailed decisions than heretofore, as mentioned previously.

Criminal sanctions

While the AML does not provide for criminal sanctions – except in cases of non-compliance with an investigation or for abuse of power by officials – the Criminal Law provides that bid-rigging is a criminal offence. In particular, Article 223 of the Criminal Law provides that parties engaged in bid-rigging may be imprisoned for up to three years and, in addition or in the alternative, subject to a fine. A recent example of criminal sanctions being imposed can be found in *Household Appliance Bid-Rigging* (2013) where seven individuals were jailed for terms of between one and two years and subject to a fine of RMB 0.14m in total. Two parties subsequently had their custodial sentences reduced on appeal.

Aside from Article 223 of the Criminal Law, Article 225 prohibits “unlawful business activities that seriously disrupt market order”. Persons infringing this rule may be imprisoned for up to five years (or “not less than five years” in especially serious cases) and in addition, or in the alternative, subject to a fine of not less than one time, and not more than five times, the illegal gains earned, and/or have their property seized. While there are no precedents, it would seem that Article 225 may provide a basis in certain cases for the criminal prosecution of the more serious cartel offences.

Additionally, Article 226 of the Criminal Law provides that any person who “by violence or coercion, forces others to purchase or sell commodities or provide or accept services” may, if the circumstances are serious, be sentenced to three years’ imprisonment, otherwise detained and in addition or in the alternative, be fined. It has been argued that Article 226 may have provided a basis for arresting parties involved in organising a cartel and coercing other cartelists to abide by cartel rules in 2010.¹ That said, publicly available information on this point is limited and it is unclear whether this case represents a genuine precedent.

Cross-border issues

The Chinese antitrust authorities stepped up efforts in 2012 at cooperation and dialogue with foreign authorities, which included signing an impressive list of memoranda of understanding – no fewer than five in 2012, in fact. These include the following, which are of relevance in the behavioural context:

- Memorandum of Understanding between the Korea Fair Trade Commission and the NDRC on Antimonopoly Cooperation;
- Memorandum of Understanding on Cooperation in the area of Antimonopoly Law between the European Commission and the NDRC and SAIC;
- Memorandum of Understanding on Cooperation between the SAIC and the Australian Competition and Consumer Commission (ACCC); and
- Memorandum of Understanding on Cooperation in the Competition Field between the Brazilian Council for Economic Defence of the Federative Republic of Brazil and the SAIC.

In addition, the UK’s OFT has concluded memoranda of understanding with each of the NDRC and SAIC, and the U.S. Department of Justice and Federal Trade Commission have concluded a memorandum of understanding with the SAIC and NDRC on antitrust and anti-monopoly cooperation.

Generally these documents are modest in terms of content and often do little more than codify existing arrangements in respect of capacity-building assistance for the Chinese regulators. In this

context, one might point to certain provisions of the Memorandum of Understanding with the EU Commission which provide for the “exchange of views on developments in competition legislation and... experience in... enforcement”, “the enhancement of the operation of the Sides’ competition authorities”, the sharing of “experiences on competition advocacy” and “technical cooperation”, etc. Even so, it would be a mistake to underestimate the significance of these documents and there is clearly something genuinely ambitious in the reference in the Memorandum of Understanding with the EU’s DG Competition to a possible framework for the exchange of information in respect of ongoing cases and the possibility of coordinated enforcement activity.

As regards the extraterritorial application of the AML more generally, the position is clear that the AML has extraterritorial effect – Article 2 AML provides for this in explicit terms by noting that the “law shall apply to monopolistic acts outside the People’s Republic of China that have the effect of eliminating or restricting competition in the domestic market”. As regards the enforcement of Chinese cartel law against extraterritorial conduct, *LCD Panels* is the clearest statement in this respect although, as noted, this case was technically based on the Price Law. Additionally, as we have mentioned above, Article 15 AML provides for the possibility of exempting export cartels. There are no relevant cases dealing with this, although there is no specific requirement that export cartels seek an explicit *ex ante* exemption or that they register with the relevant authorities which is sometimes required in other jurisdictions.

Developments in private enforcement of antitrust laws

Article 50 of the AML provides a legal basis for private enforcement of the competition rules in China. Article 50 is supplemented by the Provisions of the Supreme People’s Court on Issues in Respect of the Application of the Law in the Trial of Civil Disputes Arising out of Monopolistic Conduct (Supreme Court Provisions). The Supreme Court Provisions provide guidance on a number of points:

- the availability of actions on both a stand-alone and follow-on basis;
- the consolidation of claims;
- matters concerning the burden of proof and, in particular, that a truncated rule of reason applies in cartel cases such that where a plaintiff alleges cartel contact, the defendant shall bear the burden of proving that the relevant agreement does not have the effect of eliminating and/or restricting competition (the defendant can in addition defend the relevant conduct on the various grounds referenced in Article 15 AML – see above);
- the appointment of expert witnesses including economic experts; and
- the limitation period.

As a general point, the levels of private enforcement of the competition rules in China are extremely healthy and there have been dozens of cases since the AML took effect in 2008. Initially the cases were abuse of dominance cases and the Chinese Supreme People’s Court has just recently heard its first antitrust appeal in a dominance case – *Qihoo 360 v. Tencent QQ*. The judgement in this case is expected during the course of 2014. Additionally there have been high-profile cases involving foreign companies such as *Huaiwei v. InterDigital* (an abuse of dominance case which found that wireless technology company InterDigital had charged unfairly high patent licensing fees in violation of the AML – damages were assessed at RMB 20m but it is understood that InterDigital is looking to challenge this) and *Johnson & Johnson v. Rainbow Medical* (an RPM case which established that a rule reason applies in cases of RPM in contradistinction to the NDRC’s apparent *per se* approach) and in general, antitrust in the courts demonstrates a genuine economics-based approach and rigorous engagement with the issues that one does not yet see in the administrative rulings. Further, it should be mentioned that all of the reported cases to date have been stand-alone cases although we would expect this to change in the near future, given the recent up-surge in administrative enforcement. (In some respects, private action to date might be seen as filling a vacuum left by the relative inactivity of the NDRC and the SAIC. Both regulators have embarked on a new aggressive policy since the end of 2012, following a change of leadership in the Chinese government in the autumn of that year when President Xi Jinping took over from President Hu Jintao.)

In the cartel context specifically, it is now reported that parties have sought to lodge a follow-on action in the aftermath of *Shanghai Precious Metals* although it is too early to offer any view on the prospects of this case. There have also been two stand-alone cartel rulings that are worthy of mention: *Beijing Aquatic Products* and *Shenzhen Pest Control*.

In *Beijing Aquatic Products*, the Beijing Aquatic Products Wholesale Industry Association (APWIA) was sued for allegedly monopolistic conduct including fixing the prices of scallops sold by its members. In November 2013, the Beijing Second Intermediate People's Court ruled that APWIA had in fact infringed the AML, apparently granting the plaintiff's request for a declaration that the relevant APWIA association rules were invalid. APWIA is reported to have appealed.

In *Shenzhen Pest Control* the Shenzhen Pest Control Association (SPCA) was alleged to have engaged in horizontal monopolistic conduct causing loss to the plaintiff. According to the judgment, the SPCA required its members not to lower their prices below 80% of a certain recommended price issued by the local municipal authorities. The plaintiff had argued that this amounted to price-fixing. On appeal, the Guangdong Higher People's Court ruled that the plaintiff had failed to put forward evidence to show that competition had been restricted, and that the relevant conduct was in any event exempt on the basis of Article 15(4) AML (exemption on the basis that the agreement pursues social public interest benefits such as energy conservation, environmental protection and disaster relief), given that the business of pest control was a matter of public importance and that price-related agreements were appropriate to guard against poor quality service. It must be questioned whether this ruling was rightly decided, given the rather broad reading given to Article 15(4). Further, the judgment is clearly inconsistent with the Supreme Court Provisions, as it is not for the plaintiff to show a restriction of competition in a cartel case.

* * *

Endnote

1. *Rice Noodle Cartel*. See *Anti-monopoly Law and Practice in China*, Harris, Wang, Zhang, Cohen and Evrard, Oxford, 2011, p.328.



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