

China Punishes Cartel Participants - But Yet to Unleash AML

China's National Development and Reform Commission ("NDRC") recently announced regulatory action against a group of rice noodle manufacturers in Guangxi province, due to the involvement of those manufacturers in a joint action to increase prices in the region. However, while a number of businesses involved in the cartel have been fined, reports that the case signals the commencement of more vigorous regulatory enforcement of the Anti-Monopoly Law conduct rules (rules prohibiting anti-competitive behaviour in the form of horizontal or vertical monopoly agreements, or abuse of a dominant market position) appear overstated.

While the authorities handling the case have noted that the relevant price-fixing behaviour was unlawful under the Anti-Monopoly Law ("AML"), it appears the specific enforcement action announced by the NDRC was primarily taken under the authority of several laws which pre-date the AML (and which are expected to play a reduced role once more active AML enforcement begins).

Accordingly, while the case serves as an example to business operating in China that the country's pre-AML competition laws and regulations remain in effect and have teeth, it also indicates that conduct rule enforcement under the newer AML is likely to remain low until the regulators charged with enforcing that law are further advanced in AML-related capacity building activities. This is significant, as the AML has a much broader scope

than many of its predecessor competition laws in China, and grants enforcement authorities the ability to impose substantially higher penalties and to potentially exercise greater investigatory powers in respect of business operators engaged in anti-competitive behaviour.

Background

On 1 November 2009 and 16 December 2009, 18 rice noodle manufacturers, led by the owner of Nanning Xianyige Food Plant (the "Organiser") held meetings seeking to reorganize the local rice noodle industry and increase rice noodle prices in the region. According to relevant Chinese authorities, after further exchanging ideas and discussions by telephone, agreements were struck and the 18 manufacturers "jointly raised prices" by RMB 0.2 Yuan per 500 grams from 1 January 2010.

Further, after learning the news, some rice noodle manufacturers from neighbouring Liuzhou city contacted the Organiser and initiated participation in the arrangements. Specifically, in January 2010, 15 manufacturers in Liuzhou organised three meetings discussing cooperative operation and collaborative price increase. Meanwhile, they "coerced" several other rice noodle manufacturers to increase price. Eventually, on 21 January 2010 the participating rice noodle manufacturers in Liuzhou jointly increased the rice noodle price and signed profit-sharing agreements with the Organiser.

In response to such price increases, the Nanning and Liuzhou Price Bureaus in Guangxi province (counterparts to the NDRC, which is responsible for tackling relevant price-related violations under both relevant pre-AML laws and the AML) launched an investigation in conjunction with several other relevant authorities. Subsequently, on 30 March 2010, the NDRC announced that a number of the rice noodle manufacturers involved in the cartel activities described above had been ordered to cease their collusion activities, and were being fined for their conduct.

The Organiser and another two Liuzhou manufacturers were fined RMB 100,000 (approx. US\$14,000), while 18 other rice noodle manufacturers were fined ranging from RMB 300,000 to RMB 800,000 (approx. US\$43,000 to US\$117,000) according to “the seriousness of their respective cases.” Another 12 manufacturers only received warning orders because they had “cooperated with the investigation, provided important evidence and taken corrective measures on their own initiatives.” Caution letters were also issued to other price increase followers who did not participate in any agreements, requesting that those business operators strengthen “price self-regulation” and maintain “good market order”.

The NDRC did not expressly cite a specific statutory provision as the basis for the punishment outlined in their announcement, but the fact that the AML was mentioned in the announcement led to the case garnering significant attention and caused many observers to cite the case as the first regulatory action targeting cartel activities under the AML. Upon closer inspection of the facts, however, it appears this may not be the case.

Analysis

As mentioned above, the NDRC did not quote any specific statutory provision in its announcement and press release as being the basis for the penalties imposed on the Guangxi cartel participants. However some clues as to the basis for the decision can be found from other sources.

Firstly, in an announcement titled *Some Rice Noodle Manufacturers in Nanning Received Administrative Penalties for Their Price Illegal Conduct* issued by the Nanning Price Bureau on 14 April 2010, there is no single reference to AML. Instead the legal basis used for determining the nature of the price increase is expressly quoted as Article 14(1) of the *Price Law*, and the price increase is considered as “an illegal conduct of price collusion and market manipulation”.

Secondly, it is instructive that it was the local Price Bureau that issued the final administrative penalty decision, and not the NDRC itself (which according to developing administrative rules will have the highest authority in AML-related price monopoly enforcement actions). Specifically, in the *Replies to Press by the Nanning Price Bureau Regarding the Rice Noodle Price Increase Collusion* (the “Replies”) dated 14 April 2010, which contains no express reference to the AML, the Nanning Price Bureau noted that due to the regional nature of the case it is the Guangxi Provincial Price Bureau that has jurisdiction over determination of the case according to Article 40 of the *Price Law*. It is also noted the final administrative penalty decision was rendered in due process “in accordance with the price laws and regulations”. Accordingly, it seems clear that the determination of the enforcement body and the enforcement procedures are all based on the *Price Law* rather than the AML.

Thirdly, according to press reports, officials of the NDRC's Price Supervision Department have expressly stated that "the rice noodle manufacturers are all sole proprietors rather than companies. Thus the fine of RMB 100,000 is the maximum monetary penalty imposed on sole proprietors in accordance with relevant provisions in the *Price Law*." This is consistent with Articles 4 and 9 of the *Rules of Administrative Sanctions on Illegal Activities Relating to Price*, which supplement the *Price Law*, and in contrast to relevant AML provisions which provide that business operators involved in unlawful cartels will be fined from 1% to 10% of their turnover.

Fourthly, it is notable that the *Price Law* has the express aim of protecting the stability of market prices, while the AML Article detail its stated purposes relevantly focuses on the protection of fair competition. In this context, it is telling that wording in the announcement and press release of Nanning Price Bureau clearly focuses on the adverse impact the relevant price increases was seen to have on market price stability.

Fifthly, the fact that reduced fines or warning orders were issued to some companies who participated in the cartel arrangements has been viewed by some observers as evidence that the AML leniency provisions were applied. However, as Article 15 of the *Price Sanction Rules* also contains provisions that would allow leniency to be applied in the relevant circumstances of the Guangxi cartel, this is not necessarily the case.

Criminal sanctions?

Interestingly, sections of the Chinese media have reported that criminal detention was imposed on representatives of one rice noodle manufacturer during the process of investigation into the cartel activities. Specifically, it has been reported that Article 225 of the Criminal Law, which broadly

prohibits "unlawful business activities that seriously disrupt the market order" was applied as the basis for the detention.

None of the competition-regulators who have issued announcements or press releases relating to the case have mentioned this matter, and it is possible that the right of criminal detention were briefly exercised for the purpose of facilitating investigation at the initial stage only.

Neither the AML nor the Price Law criminalise price-fixing activities. Further, while Article 52 of the AML states that "where any conduct constitutes a criminal offence, the relevant individual or organisation shall be prosecuted for criminal liability in accordance with the law", the focus of that Article is penalising conduct which hinders regulatory investigations under the AML. Accordingly, while it is conceivable that violations of the key prohibitions in the AML could in future form a basis for criminal charges under Article 225 of China's Criminal Law, to date there has been no indication from the country's key competition regulators that this is intended.

Conclusion

It is clear that price-fixing activities relating to a market in China violate both Article 14(1) of the *Price Law* and Article 13(1) of the AML. However, it is important that the Chinese regulatory authorities involved in penalising the activities in the Guangxi rice noodle case appear to have relied largely on their powers under the former law - as this suggests that the authorities remain reluctant to engage in vigorous enforcement of the AML conduct rules at the present time. This has been the case since the law commenced on 1 August 2008.

The primary reason is that the Chinese authorities are continuing work on various implementation rules

and guidance documents that will eventually explain the enforcement approach and methodology to be applied to many of the broadly worded conduct prohibitions in the AML. Several revised drafts of those documents were recently released to the public for consultation purposes, and there is speculation that they could be finalised and adopted in the second half of the year.

Although review and application of those documents may be unnecessary to determine that conduct such as price collusion is unlawful under the AML, they will potentially offer crucial guidance to business operators grappling with the uncertainties surrounding the scope of other prohibitions in the AML such as the prohibition of abuse of a dominant market position.

In the interim, business operators should be aware that the Chinese authorities continue to engage in sporadic enforcement efforts relating to the various competition-related laws and regulations which pre-date the AML, particularly where widespread cartel activities are identified and politically or economically significant products and services (such as staple foods) are involved.

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