

NEWS FOCUS

China's cartel-buster flexes its muscles

Adrian Emch of *Hogan Lovells'* Beijing office explains why a recent decision on cartel behaviour may herald a new era in the enforcement of the PRC Anti-Monopoly Law.

On 30 March 2010, China's National Reform and Development Commission and its local offices (NDRC) published a summary of what appears to be the first decision in the public domain imposing fines for cartel behaviour since the entry into force of the Anti-Monopoly Law (AML) eighteen months ago.

The decision is a landmark ruling that may well give an indication of NDRC's approach in future cases, and companies operating in China would be well-advised to take note.

Agreements on rice noodle prices

In November and December 2009, local manufacturers of rice noodles – a key ingredient particularly in Southern Chinese cuisine – struck a series of agreements to raise wholesale prices in the city of Nanning. In January 2010, the agreement was extended to producers in neighbouring Liuzhou. Other producers that neither entered into these agreements nor participated in the cartel meetings followed suit and raised prices to the same level.

The investigation

The local NDRC offices launched a broad investigation under the supervision of central NDRC in Beijing, and also involved other government bodies, including the police. On the basis of the evidence gathered during the investigation, NDRC found that thirty-three companies had participated in meetings where prices were discussed, and that their conduct amounted to an unlawful cartel.

NDRC imposed fines of between RMB 30,000 and 100,000 (approximately US\$4,400 to \$11,700) on twenty-one of the cartel members. The remaining companies were granted immunity because they had voluntarily cooperated with NDRC and had provided evidence relating to the

cartel. Interestingly, NDRC also issued warnings to, but did not impose any sanctions on, the rice noodle producers that did not participate in the meetings but which had raised prices following the implementation of the cartel.

Signs for optimism...

This case appears to be China's first decision in the public domain imposing fines for price-fixing since the AML entered into force. It may be an indication that NDRC – which so far has not shown itself to be particularly proactive in the implementation of the AML – may step up its enforcement, and that other decisions may follow.

There are certain signs for optimism following the *Rice Noodle* decision, for a variety of reasons. Firstly, NDRC showed its ability to exercise reasonable judgment by sanctioning the most egregious anti-competitive conduct: price-fixing. This makes sense not only because price cartels are widely perceived to be most harmful to consumer welfare, but also because cartel cases are relatively straight-forward from a legal perspective. Once the authority has compelling evidence in its hands, the case is easier to bring than, say, a complex case against conduct leading to market foreclosure in the information technology sector.



Secondly, the fact that the companies targeted by NDRC all seem to be Chinese may allay potential fears that enforcement of the relevant provisions of the AML would only target foreign players or would be focused on these.

Thirdly, NDRC's granting of immunity to companies willing to cooperate in the investigation aligns the authority's approach with international practice. The possibility of being granted immunity or receiving a reduced fine can create strong incentives to self-report for companies that want to come clean.

Fourthly, although the published NDRC documents are not explicit on the point, it is likely that the legal basis for imposing the fines was the Price Law, rather than the AML. Application of the Price Law can be advantageous for companies subject to investigation, as the level of the fines is considerably lower than those that can be imposed under the AML.

...but uncertainties remain

On the other hand, the fact that the Price Law and the AML were both applied simultaneously points to some risks for market participants. First of all, there appear to be no rules that would limit NDRC's ability to exercise its discretion in opting to bring a case under one or the other of the two laws. In future cases, including those involving foreign participants, NDRC may well adopt the fine thresholds under the AML and impose fines in the amount of 1 to 10 percent of the infringing companies' annual turnover.

More generally, it remains unclear as to the dividing line for when NDRC applies the AML and when it applies the Price Law. The provisions of the two laws are largely similar, but there are also divergences – both in terms of substance and procedure – that can lead to different outcomes.

Uncertainties also persist as to how NDRC's approach to leniency works; that is, what precisely a company must do in order to be granted immunity or to have its fine reduced in return for cooperation with NDRC. Here, too, there are two sets of rules under the AML and the Price

Law, and both are rather rudimentary. Experience in the United States and the European Union has shown that leniency programs need to be based on detailed legislation in order to confer a sufficient degree of certainty on potential whistle-blowers, so as to encourage them to come forward or to allow companies to cooperate effectively with the authorities.

In addition, certain aspects of the *Rice Noodle* decision may give the impression that NDRC's approach is partly that of an antitrust authority and partly that of a price regulator, a function which NDRC continues to have in certain sectors such as energy or pharmaceuticals. In particular, the warnings issued against non-participants in the cartel meetings are not easy to reconcile with antitrust principles.

Where to from here?

As the first decision in the public domain relating to a price-fixing cartel since the AML's entry into force, the *Rice Noodle* decision may herald a new era in the enforcement of the law. So far, the Ministry of Commerce (MOFCOM) has, by a large margin, been the most active antitrust authority in China, having enforced the AML quite actively in the field of mergers and acquisitions.

Now, it seems that NDRC has also entered the fray.

Foreign companies operating in China should not assume that NDRC's cartel enforcement will only target domestic companies. Far from it in fact – if NDRC discovers anti-competitive practices by multinationals, the effects of any NDRC decision may be felt far away. In the extreme, China's role as the "factory of the world" may mean that the anti-competitive effects of an agreement entered into in China or which relates to China could potentially be "exported" to other jurisdictions, and their impact subject to review by antitrust authorities in such overseas jurisdictions.

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