



Public Enforcement Against Cartels in China

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China's Anti-Monopoly Law ("AML") is entering its fourth year since taking effect on August 1, 2008.¹ Regulations, rules, and cases are still in development and it is expected that these outcomes will further shape antitrust law not only in China, but overall antitrust practice around the world.

Cartelization has long been recognized as classic monopolistic behavior. China, too, acknowledges the problem in Chapter II of the AML. Article 13 prohibits horizontal monopoly agreements, while Article 14 prohibits vertical monopoly agreements. The two administrative agencies handling public enforcement against cartels, the National Development and Reform Commission ("NDRC") and the State Administration for Industry and Commerce ("SAIC") investigate some cartel cases, although not all of the results of these investigations are disclosed to the public.²

I. PUBLIC ENFORCEMENT VERSUS PRIVATE ENFORCEMENT

China is a civil law jurisdiction and, as such, a statute is the primary source of law with respect to pursuing anti-cartel actions. The AML itself contains only 57 articles. Therefore, antitrust enforcement in China relies heavily on the implementing rules for public enforcement by administrative agencies and the judicial interpretations for private enforcement by the Supreme People's Court.

Both the NDRC and SAIC promulgated their Implementing Rules for anti-cartel enforcement by end of 2010.³ The Supreme People's Court's Judicial

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¹ The AML was enacted by the National People's Congress, China's top legislative body, on August 30, 2007.

² In the Chinese governing system, a San Ding (三定, meaning "three points" or "three decisions") is a document approved by the State Council that sets out the duties of the administrative organ, its departments and the staffing. According to the San Ding, there are three ministries that serve as AML enforcement authorities: the Ministry of Commerce ("MOFCOM") reviews mergers, while the NDRC and SAIC handle cartels and investigations into abuse of dominance. The NDRC reviews cases involving pricing issues and SAIC handles those without pricing issues.

³ The NDRC issued the *Anti Price Monopoly Rules* and the *Rules on the Administrative Procedures for Law Enforcement Against Price Monopoly* on December 29, 2010. They came into effects on February 1, 2011. SAIC issued three Rules on December 31, 2010, namely, *Rules on Prohibition of Abusing Dominant Market Position*, *Rules on Prohibiting Monopoly Agreements*, and *Rules on Prohibiting Abusing Administrative Powers*. These

Interpretation is still in the draft stage.⁴ This partially explains why public enforcement against cartels by the administrative agencies prevails over private enforcement by courts.⁵

It should further be noted that China lacks the culture, incentives, and litigation mechanisms that encourage private actions, such as triple damages and class action lawsuits in the United States. Thus it is more likely for the administrative agencies to play a leading role in AML enforcement, and this is also the case with anti-cartel enforcement.

II. CASE ANALYSIS

When comparing the levels of enforcement activity between the NDRC and the SAIC, the NDRC is the more aggressive body. At the end of 2011, the NDRC announced a total of four investigations against cartels. The SAIC, on the other hand, announced only one case.

The NDRC conducted three cartel investigations in 2010: two agricultural products cases (the Rice Noodle Case⁷ and the Green Bean Case⁸) and a cartel case involving a trade association. It is unsurprising that the NDRC's first two cases involved price hikes of agricultural products, given the central government's history of dedication to price stability for necessary goods and the great pressure of inflation at that time. It is also noteworthy that for the first two cases, NDRC relied on the Price Law more than the AML to reach its decisions. Although the Price Law has largely given way to the AML due to substantial overlap, the NDRC has been the authority to enforce the Price Law since 1997, and NDRC officials are more familiar with the Price Law than the AML.

The NDRC's investigation against price cartels in the paper making industry in 2011⁹ marks a turning point where the agency began to rely more on the AML than on the Price Law. In 2010, the Paper Making Trade Association of Fuyang City in Zhejiang Province held five member meetings to coordinate the price increase for packing papers. Such behavior was found by the NDRC to constitute a

three Rules took effect on February 1, 2011.

⁴ The Supreme People's Court issued the Draft Judicial Interpretation for public comment in April 2011. It is expected to be promulgated in 2012. See http://www.court.gov.cn/gzhd/zqyj/201104/t20110425_19850.htm (text in Chinese).

⁵ Judge Zhu Li from the Supreme People's Court noted in his speech (presented in Beijing at the 2011 Forum on Anti-Monopoly Civil Litigation in China, organized by the Competition Law Centre of UIBE and T&D Associates on June 25, 2011) that China's judicial system as a whole accepted around 70 civil AML actions by the middle of 2011. Most of these cases were alleged as abuse of dominance cases, and a few involved cartel allegations.

⁷ See http://news.xinhuanet.com/fortune/2010-03/30/content_13271788.htm (text in Chinese).

⁸ See <http://www.chinanews.com/cj/2010/07-17/2408374.shtml> (text in Chinese).

⁹ See <http://www.chinanews.com/cj/2011/01-04/2764453.shtml> (text in Chinese).

price cartel. The trade association was fined 500,000 RMB, the upper limit of such a fine under Article 46 of the AML.

In 2011, the NDRC conducted a high-profile investigation of abuse of dominance against China Telecom and China Unicom, two giant state-owned enterprises. At the same time, the NDRC announced an investigation decision for a cartel case. Two medicine distributors in Shandong province were found guilty of jointly controlling the supply of a medicine's raw materials, and then raising prices of the medication.¹⁰ The NDRC in this investigation referred only to the AML, without any mention of the Price Law.

The SAIC, compared to the NDRC is relatively low-profile. The authority announced only one case against cartel. In 2009, a trade association for the concrete industry in Lianyungang city of Jiangsu province organized its 16 member companies to enter into an agreement to coordinate the concrete supply in the city and prohibit any sales without permission of the association. The SAIC fined the trade association 200,000 RMB and also fined five of the 16 member companies.¹¹

III. COMPARING THE NDRC WITH THE SAIC

Two factors contributed to the NDRC's high-profile investigation, especially in 2011. First, the Chinese central government approved the NDRC's request to expand its AML enforcement team in July 2011. The Price Supervision and Inspection Department handles AML enforcement in the NDRC, and was subsequently renamed as the Price Supervision and Inspection and Anti-Monopoly Bureau. Following this restructuring, the NDRC added twenty more officials to its quota.

Second, the NDRC is a powerful ministry under the State Council. Although its stature has been steadily diminishing as reforms move forward, the NDRC is arguably the politically most powerful of the three agencies (MOFCOM, SAIC and NDRC). The NDRC is the successor to the State Planning Commission that was set up in 1952 to run China's economy. The NDRC is also responsible for the enforcement of the Price Law.

Yet the role of the SAIC should not be understated. SAIC only had one case to announce, but the agency has fulfilled its responsibilities using closed-door investigations. SAIC is a smaller ministry in terms of size and official numbers. However, it has much experience handling unfair competition cases, and is the only agency that enforces the Anti-Unfair Competition Law in China.

¹⁰ See http://www.ndrc.gov.cn/xwfb/t20111114_444330.htm (text in Chinese).

¹¹ See <http://www.antimonopolylaw.org/article/default.asp?id=2837> (text in Chinese).

III. THE FUTURE OUTLOOK

As the two authorities handling anti-cartel enforcement, the NDRC and the SAIC promulgated the implementing rules. However, both agencies intentionally avoided the issue of vertical agreement. In the *Anti Price Monopoly Rules*, NDRC simply duplicated Article 14 of the AML, unlike the further clarification it provided to other behavior, such as horizontal agreements and abuses. In the *Rules on Prohibiting Monopoly Agreements*, the SAIC did not pen a single word on vertical agreement, even as it created four articles to address the specific categories of horizontal agreements. Vertical agreements were mentioned in the previous draft version of the implementing rules, but were eventually removed.

Moreover, the four cartel investigations by the NDRC and the sole cartel investigation by the SAIC involve horizontal agreements; there has yet to be brought a single case of vertical agreement. Vertical agreements continue to occupy a complex and controversial area for China AML enforcement, and we expect this issue to be clarified slowly in the coming years. Such clarification would possibly be taken via future revisions to the implementing rules of the NDRC and the SAIC.

Another angle with which to observe enforcement of the AML is that four of the five NDRC investigations were against cartels, as was the SAIC's one announced case. Even when taking unannounced cases into account, cartel enforcement still prevails over dominance abuse enforcement. Such a phenomenon may be explained by the fact that Chinese companies and individuals are still learning and exploring the new law, and the higher burden of proof poses obstacles for the administrative agencies and potential plaintiffs.

Chinese agencies and companies are becoming more familiar with the AML, and as abundant experiences from foreign jurisdictions such the U.S. and the EU are introduced into China, it is safe to predict that more cartel investigations will occur in China. The more controversial area of vertical agreements may also enter into the scope. With the addition of 20 officials, the NDRC's antitrust team is now the same size of that of MOFCOM; the NDRC is poised to continue playing an aggressive role in China's anti-cartel enforcement in the coming years.

With more limited human resources¹² than their western counterparts, the AML enforcement agencies' capacity of public enforcement is highly constrained. There will be more private actions brought before courts, and after the Judicial Interpretation by the Supreme People's Court is promulgated in 2012, cartel players will be facing challenges from competitors and consumers in addition to the administrative agencies. It will be interesting to observe potential conflicts in procedure between the courts and administrative agencies, and their eventual resolution.

¹² MOFCOM's antitrust team is comprised of about 30 people; the NDRC amounts to the same number after its expansion, and the SAIC has fewer than ten officials.