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## China's NDRC Penalizes Global LCD Panel Price Cartel

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On January 4, 2013, the National Development and Reform Commission ("NDRC") of the People's Republic of China announced penalties against six foreign LCD panel manufacturers for colluding to manipulate the pricing of LCD panels in China between 2001 and 2006.[1] The respondents include two South Korean electronics manufacturers—Samsung and LG, and four Taiwan-based manufacturers—AU Optronics, Chunghwa Picture Tubes, Chimei InnoLux, and HannStar. The NDRC's decision follows enforcement actions by competition regulators and courts in many other jurisdictions arising from the same alleged collusion.

### *Investigation Findings*

The NDRC's official statements suggest that issuance of the enforcement decision follows a protracted investigation. The NDRC received multiple complaints about collusion in the LCD panel industry after 2006, and at least one LCD panel manufacturer voluntarily disclosed participation in the pricing conspiracy to the NDRC. The NDRC statements emphasize the complexity of the investigation process, noting that parallel investigations of the LCD panel cartel in other jurisdictions have taken many years. (The NDRC official statements do not, however, indicate when the NDRC commenced the investigation).

The NDRC found that (i) representatives of the six manufacturers met in Taiwan and South Korea 53 times between 2001 and 2006 to exchange information on the LCD panel market and discuss LCD panel pricing; (ii) the six manufacturers then implemented their agreements in pricing sales of

LCD panels to Mainland China during that period; and (iii) the six manufacturers collectively sold 5.14 million LCD panels in Mainland China between 2001 and 2006, making illegal gains of RMB 208 million (approximately USD 33.1 million).[2]

### *Administrative Penalties*

Based on these findings, the NDRC imposed monetary sanctions totaling RMB 353 million, including: payment of RMB 172 million (approximately USD 27.3 million) in restitution to Chinese TV manufacturers for past overcharges; disgorgement of RMB 36.75 million (approximately USD 5.8 million) in illegal profits; and administrative fines of RMB 144 million (approximately USD 22.9 million). Penalties for individual companies ranged from RMB 240,000 (approximately USD 38,158, 0.07% of the total) for HannStar up to RMB 118 million (approximately USD 18.8 million, 33.4% of the total) for LG.

### *Reliance on Price Law*

In an official press release, the NDRC noted that the penalties were imposed pursuant to the 1997 Price Law<sup>[3]</sup> rather than the Anti-Monopoly Law (“AML”), which took effect in 2008.<sup>[4]</sup> The NDRC Price Supervision and Anti-Monopoly Bureau has authority to enforce both laws, which contain overlapping rules against collusion. The older Price Law establishes a broad framework for the regulation of prices by the NDRC, and it prohibits “aberrant” pricing practices such as collusion and price manipulation. The AML, drafted as a comprehensive competition statute largely modeled on foreign antitrust rules, prohibits cartels as anticompetitive “monopoly agreements.” The official press release characterizes the LCD manufacturers’ conduct both as “price monopoly” (using the language of the AML) and as “colluding...to manipulate the market price” (using the language of the Price Law). However, the NDRC relied on the Price Law to impose penalties because the underlying conduct occurred in 2001 to 2006, before the AML took effect.

### *Intensifying Enforcement*

The NDRC’s LCD panel decision caps two years of increased regulatory and enforcement activity by the NDRC Price Supervision and Anti-Monopoly Bureau. The NDRC announced the decision exactly two years after issuing its implementing regulations for the AML, the Rules on Prohibition of Price Monopoly and the Rules on Administrative Enforcement Procedures on Prohibition of Price Monopoly, on January 4, 2011. During these two years, the NDRC has steadily expanded its competition enforcement program. Previous cartel cases had chiefly targeted small-scale schemes among local suppliers and trade associations. In 2011, the number of NDRC divisions responsible for anti-monopoly enforcement was expanded from 1 to 3, and the Bureau of Price Supervision and Anti-Monopoly Bureau of the NDRC added 20 officials at the national level and 150 officials at the local level.<sup>[5]</sup> In 2011 and 2012, the NDRC conducted several high-profile probes under the AML and Price Law, including an enforcement action against

Unilever for RMB 2 million (approx. USD 317,980) in May 2011,[6] a probe of state-owned telecom giants China Netcom and China Unicom in late 2011 and early 2012,[7] and an inquiry into proposed limits on box office discounts by the State Administration of Radio, Film and Television in 2012. [8] Since the AML took effect, the NDRC has conducted 49 price-fixing investigations, and issued administrative penalties in 20 cases.[9]

### *Unprecedented Reach and Penalties*

The NDRC's decision in the LCD panel case is, however, unprecedented in China. Chinese media have reported that the penalties imposed in the LCD case are the largest ever imposed by the NDRC. The AML applies extraterritorially, and China's Ministry of Commerce has routinely reviewed foreign mergers, acquisitions, and joint ventures under the merger review provisions of the AML. Never before, however, has the NDRC penalized foreign respondents for the impacts in China of pricing decisions made beyond China's borders.

### *Future Shift to the AML?*

The decision may signal the NDRC's intention to rely on the AML to address future cases. As noted above, the NDRC justified its reliance on the Price Law by explaining that the misconduct occurred before the AML took effect, and the AML is not retroactive. However, in other recent cases, the NDRC has frequently invoked the Price Law to address cartel activities occurring after the AML took effect. The NDRC's explanation in such a high profile case may thus signal an intention to rely more heavily on the penalty provisions of the AML in future cases. Indeed, the NDRC expressly warned that the penalties would have been much higher under the AML. Penalties for collusion under the Price Law include administrative fines of up to five times the value of any illegal gains, as well as restitution and disgorgement of illegal gains. The AML, in contrast, prescribes administrative penalties of between 1% and 10% of the annual turnover of the violating parties. (Chinese authorities have not officially clarified whether such penalties are limited to turnover from China or from the relevant product markets).

### *Behavioral Remedies in Cartel Cases*

The decision also raises questions about the role of corrective measures in cartel cases in China. Under the Price Law, administrative remedies for price-fixing include correction of misconduct, disgorgement of illegal profits or warnings in the event of no illegal profits, fine, suspension of business, cancellation of business licenses, and restitution. Similarly, under the AML, administrative remedies for price-include cessation of illegal conduct, disgorgement, and fines. Neither law appears to contemplate corrective measures beyond terminating the illegal conduct and restitution.

In the LCD panel case, however, the NDRC announced that the respondents had also "proposed" a series of prospective "corrective" measures. First, the respondents committed to "strictly comply with PRC laws, consciously safeguard the order of market competition, and will

protect the legitimate rights and interests of other business operators and customers.” Second, the respondents committed to use their best efforts to supply goods to Chinese color television manufacturers in a fair manner, and will provide all customers equal opportunity for procuring high-end products and new technology.” Third, the respondents committed to “extend the warranty period for the television panel sold by Chinese color television manufacturers in domestic market from 18 months to 36 months.” The NDRC statement specifically noted that this extension of the warranty period (to match the Chinese color TV manufacturers’ warranties to consumers) would alone save Chinese color TV manufacturers RMB 395 million (approximately USD 62.8 million) in repair costs.[10] The nexus between the underlying price-fixing and these specific corrective measures is attenuated.

Indeed, these corrective measures resemble the kind of broad behavioral remedies designed to benefit Chinese consumers that have appeared in several MOFCOM merger decisions.[11] Whereas MOFCOM has adopted regulations governing the enforcement of remedial commitments in the merger context, the NDRC has not published similar measures. It remains to be seen whether these remedial commitments will result in NDRC supervision of the LCD makers’ future sales practices.

#### *A Warning for Multinationals*

Some Chinese media reports have highlighted the decision as redressing broader inequities in the relationship between Chinese TV manufacturers and foreign LCD panel suppliers.[12] However, LU Yanchun, the Deputy Inspector of the NDRC Price Supervision and Anti-Monopoly Bureau, affirmed the non-discriminatory enforcement of the AML. “No matter a company is foreign or Chinese, state-owned or non-state-owned, as long as its conduct eliminates or restricts competition in the Chinese market, the NDRC will penalize it according to the AML.” [13]

The NDRC’s decision in the LCD panel case demonstrates that the potential risks of cartel activity impacting China are neither hypothetical nor trivial. Multinational companies and Chinese companies alike should factor the emergence of a meaningful threat of penalties from the NDRC into their commercial decision making, risk management strategies, and compliance programs.

\* \* \*

[1] Six Overseas Enterprises are Investigated and Penalized for Engaging in Price Monopoly in relation to LCD Panels, NDRC news, 4 January 2013, available at [http://www.ndrc.gov.cn/xwfb/t20130104\\_521958.htm](http://www.ndrc.gov.cn/xwfb/t20130104_521958.htm). Replies to Press by Relevant NDRC officials regarding the LCD Panel Price Monopoly Case, NDRC News, 4 January 2013, available at [http://www.ndrc.gov.cn/xwfb/t20130104\\_521993.htm](http://www.ndrc.gov.cn/xwfb/t20130104_521993.htm).

[2] All currency conversions based on exchange rate of USD 1 = RMB6.2897, the average exchange rate on January 4, 2013 published by the People’s Bank of China at

[3] See Zhonghua Renmin Gongheguo Jiage Fa [Price Law of the People's Republic of China] (promulgated by the Standing Committee of the National People's Congress on Dec. 29, 1997 and effective on May 1, 1998), art. 3, available at [http://www.gov.cn/ziliao/flfg/2005-09/12/content\\_31188.htm](http://www.gov.cn/ziliao/flfg/2005-09/12/content_31188.htm).

[4] See Zhonghua Renmin Gongheguo Fanlongduan Fa [Antimonopoly Law of the People's Republic of China] (promulgated by the Standing Committee of the National People's Congress on Aug. 30, 2007 and effective on Aug. 1, 2008), available at [http://www.gov.cn/flfg/2007-08/30/content\\_732591.htm](http://www.gov.cn/flfg/2007-08/30/content_732591.htm).

[5] See <http://finance.people.com.cn/GB/16210564.html>;  
[http://www.crd.net.cn/2013-01/04/content\\_6230107.htm](http://www.crd.net.cn/2013-01/04/content_6230107.htm).

[6] See [http://www.ndrc.gov.cn/xwfb/t20110506\\_410543.htm](http://www.ndrc.gov.cn/xwfb/t20110506_410543.htm).

[7] See <http://it.sohu.com/20121211/n360078306.shtml>.

[8] See <http://finance.qq.com/a/20120301/000424.htm>.

[9] <http://finance.chinanews.com/cj/2013/01-04/4454595.shtml>.

[10] <http://world.people.com.cn/n/2013/0104/c157278-20084008.html>.

[11] For example, the commitment to use best efforts to ensure reliable supply to the Chinese market also appears in MOFCOM's *Uralkali/Silvinit* clearance decision. See

(<http://fdj.mofcom.gov.cn/aarticle/ztxx/201106/20110607583288.html?736206226=2549174838>).

Similarly, the commitment to supply all downstream customers on a fair, reasonable and non-discriminatory basis appears in MOFCOM's *Henkel/Tiande Chemical* clearance decision. See

(<http://fdj.mofcom.gov.cn/aarticle/ztxx/201111/20111107855595.html?2044894610=2549174838>).

The commitments regarding fair treatment resemble the requirement to treat all OEMs in a non-discriminatory manner and to license patents on "fair, reasonable and non-discriminatory"

(FRAND) terms in the *Google/Motorola Mobility* clearance decision. See

(<http://fdj.mofcom.gov.cn/aarticle/ztxx/201205/20120508134324.html?3689061778=2549174838>).

[12] <http://english.peopledaily.com.cn/102774/8077945.html>;

<http://tech.huanqiu.com/it/2013-01/3447609.html>;

<http://world.people.com.cn/n/2013/0104/c157278-20084008.html>;

[http://news.xinhuanet.com/fortune/2013-01/05/c\\_124187534.htm](http://news.xinhuanet.com/fortune/2013-01/05/c_124187534.htm).

[13] <http://world.people.com.cn/n/2013/0104/c157278-20084008.html>.

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