

China joins international crackdown of price-fixing cartel for the first time

China's National Development and Reform Commission (NDRC) announced, on 4 January 2013, that it had fined six international liquid crystal display (LCD) screen producers, Samsung, LG, AU Optronics (AUO), Chunghwa Picture Tubes (CPTT), Chimei InnoLux (Chimei), and HannStar Display (Hannstar), for price-fixing actions during 2001 and 2006. This is the NDRC's first crackdown against an international price-fixing cartel, and the largest fine ever imposed by the NDRC for unlawful pricing conduct.

Background

Following complaints from Chinese colour TV manufacturers dating back to December 2006, the NDRC launched an investigation against Samsung, LG, AUO, CPTT, Chimei, and HannStar for fixing the price of LCD panels in Mainland China.¹

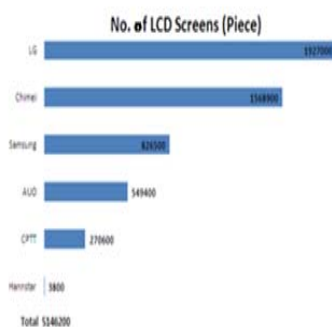
LCD panels are used in TVs, computer monitors and notebooks, and other electronic devices.

Investigation

During the NDRC's investigation, the six companies provided information on their price fixing activities, including details of 53 "Crystal Meetings" held in Taiwan and South Korea to exchange market data on LCD screens and to fix prices in Mainland China. The meetings were frequent – almost on a monthly basis.

The companies sold more than 5 million LCD screens during 2001 and

2006 when the cartel operated, and made illegal gains (or profit) of RMB 208 million (approximately USD 33 million or EUR 25 million).²



The NDRC found that LCD panels account for 70% to 80% of the production cost of flat screen TVs, and that the cartel significantly increased the production cost of colour TV screens. This in turn harmed China's colour TV industry and consumers.

The NDRC's investigation took several years, but it is unclear

precisely when it began. China's administrative law provides a statute of limitations of 2 years for infringements under the Price Law – beginning from the time the unlawful conduct occurred, or from the time the unlawful conduct ended in the case of continuing infringements. The decision does not specify when the limitation period began or ended.

Penalties

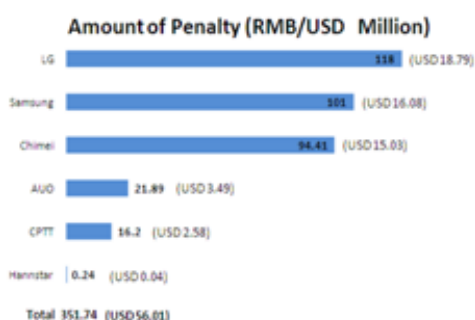
The NDRC imposed a total fine of RMB 144 million (approximately USD 23 million or EUR 17 million) on the companies (with the highest individual fines imposed on LG, Chimei and Samsung).

The NDRC also ordered the companies to repay RMB 172 million (approximately USD 27 million or EUR 21 million) of the profit made to Chinese colour TV producers that purchased the LCD screens (which they have reportedly done), and confiscated the remaining RMB 36.75 million (approximately USD 5.85 million or EUR 4.46 million) – bringing total penalties imposed to RMB 352

¹ See, our [China Antitrust Alert](#) "China's NDRC Imposes Fines on an International LCD Screen Producers' Cartel" published on 4 January 2013. In this briefing, we provide analysis on this case.

² Conversions are based on USD/RMB 1:6.2804, and EUR/RMB 1:8.2377.

million³ (approximately USD 56 million or EUR 43 million):



Commitment

In addition to the penalties imposed, the companies committed to:

- strictly abide by Chinese laws, to use their best efforts to maintain competition in the market and protect the legitimate rights and interests of other companies and consumers;
- use their best efforts to supply Chinese colour TV manufacturers on a non-discriminatory basis, and to treat all customers equally when supplying high-end and high-tech products; and
- extend the warranty period of the screens supplied to Chinese colour TV manufacturers from 18 months to 36 months.

Comments

China's NDRC investigated an international cartel for the first time, and joined the EU and US in fining LCD panel producers for price-fixing.⁴

This is the largest fine ever imposed by the NDRC for unlawful pricing activities. What are the possible implications for future competition enforcement in China?

China's first foray into punishing an international cartel suggests a more aggressive stance towards cartels, and increases the merits of pursuing leniency in China

Over 100 jurisdictions today have some form of competition law regime, but, to date, only a few of them enforce their competition laws aggressively. The NDRC's decision suggests a tough stance towards cartels with effects in China. With the prospect of aggressive cartel enforcement, cartel participants – in China or in multinational conspiracies with an impact in China – will need to consider the merits of filing leniency applications in China.

The Price Law, on which the NDRC relied in the *LCD panels* case, does not provide leniency for cartel participants that voluntarily inform the NDRC of an unlawful cartel whereas the Anti-Monopoly Law (AML) does. The NDRC has discretion in setting fines under the Price Law and so companies that engage in cartels still have an incentive to inform and cooperate with the NDRC in return for reduced or less severe penalties – or just warnings.⁵ The NDRC's press

briefing suggests that the six companies involved in the *LCD panels* case obtained different levels of reduced penalties – presumably for cooperating with the NDRC. AUO escaped fines altogether and was ordered only to repay the profit of RMB 21.89 million (approximately USD 3.5 million or EUR 2.7 million) it made from LCD panel sales during the cartel.⁶

The AML offers full or partial immunity from fines for cartel participants that inform and cooperate with China's competition authorities.⁷ Full immunity is available for the first company to come forward with "relevant information" and "important evidence"⁸ – possibly also if that company is a ringleader according to NDRC's leniency regime.⁹ A sliding

ggl/zhd/t20110216_395185.htm.

⁶ Some Chinese press reports suggest that AUO was the whistle-blower, which could explain the zero fines.

⁷ Article 46(2), AML.

⁸ Article 14, Procedural Rules on Law Enforcement Against Price-related Monopolies, available at http://jls.ndrc.gov.cn/zcfg/t20110104_389401.htm; Articles 11-13, Rules of the Administration of Industry and Commerce in relation to Monopoly Agreements; and Article 20, Regulations of the Administration Authorities of Industry and Commerce on the Procedures Applicable to the Investigation and Handling of Cases Involving Monopoly Agreements and Abuse of Dominant Positions, available at http://www.saic.gov.cn/fldyfbzdjz/zcfq/zcfg/201101/t20110107_103378.htm; http://www.saic.gov.cn/fldyfbzdjz/zcfq/zcfg/200910/t20091013_71551.html.

⁹ See, Guangdong Provincial Price Bureau investigation in *Sea sand* cartel case, available at http://jls.ndrc.gov.cn/gzdt/t20121026_510834.htm. The Bureau imposed fines on three companies for

³ The individual penalties are as reported in the NDRC's press release. The total does not add up to the reported total of RMB 353 million in the NDRC's press release.

⁴ In the EU, the European Commission imposed total fines of EUR 648.9 million on some of the companies implicated in the NDRC's case. In the US, some of the companies also faced

fines by the Department of Justice and private litigation. Fines totalling more than USD 1.3 billion have been imposed, and 13 executives have been convicted to date.

⁵ Recent examples include the NDRC's *Rice Noodles* and *Green Beans* price-fixing cartel cases, available at http://jls.ndrc.gov.cn/fgld/t20100331_338237.htm; <http://www.ndrc.gov.cn/>

scale applies to subsequent informants under NDRC's leniency regime: the second informant is entitled to a reduction of no less than 50% in fines, and other informants to a maximum of 50%.¹⁰ The AML has no formal marker system. In the absence of a marker system, and given the NDRC's apparent limits on the fine reductions to which leniency applicants may be entitled, some companies may still think twice before applying for leniency in China.¹¹

Companies that engage in cartels (with effects in China) also face potential follow-on litigation in China for damages – at least under the AML. It remains to be seen whether any injured Chinese colour TV manufacturer may seek damages in this case. The NDRC's order that the six companies repay Chinese TV producers RMB 172 million could reduce the odds of follow-on damage claims. But, an injured Chinese TV producer might still be inclined to

seek damages for harm that is over and above overpaid LCD panels.

[The NDRC may continue to rely on the Price Law \(1999\) to challenge anti-competitive practices alongside the AML \(2007\) for some time yet](#)

The NDRC, which is responsible for price-related conduct, has authority to enforce both the AML and the Price Law. The provisions on anti-competitive pricing under the two laws are largely similar. The NDRC fined the six companies under the Price Law, as the cartel predated the AML, which was adopted in 2007, but came into force in August 2008. In line with China's administrative law, the NDRC could not apply the AML retrospectively and nor could it impose higher fines for anti-competitive conduct that predates the AML. From the NDRC's perspective, the exchange of market information and other confidential information on LCD screens and the fixing of LCD screen prices manipulated market prices in Mainland China contrary to Article 14(1) of the Price Law, and by *"colluding to manipulate market prices... [the six companies] harmed the legitimate rights and interests of other companies and consumers"*.

The NDRC's press briefing suggests that the NDRC will not hesitate to investigate anti-competitive conduct that begun or continued uninterrupted post-August 2008 when the AML came into force. That said, the NDRC has a more established tradition of enforcing the Price Law and, unlike the AML, the Price Law does not require relevant markets to be identified, impact on competition, etc.. The Price Law offers the NDRC an alternative standard for intervention – at least for the foreseeable future until the two laws are streamlined.

[Fines imposed for anti-competitive conduct in China can be significant – especially if under the AML](#)

The NDRC's fines were the largest in its enforcement history. The total amount of fines it may impose under the Price Law for unlawful pricing, including price-fixing is considerably lower than the total amount under the AML. Fines are calculated based on profit (and not turnover like the AML), and the NDRC has discretion in assessing fines, with the amount ranging from one to five times the amount of the profit for infringements such as the six LCD panel producers.¹²

Based on reported profit of RMB 208 million, the maximum fine the NDRC could have imposed in the *LCD panels* case was RMB 1,040 million (approximately USD 166 million or EUR 126 million). Given the total fines, the fines imposed were arguably more symbolic than punitive. The NDRC's fines (and other financial penalties) in the *LCD panels* case pale into insignificance compared to the huge multi-million dollar and euro fines imposed in the EU and US. It is clear that the fines would have been much higher had the NDRC pursued the LCD panel producers under the AML. Reliance on the Price Law led to very different outcomes. The AML allows China's competition authorities to impose fines of between 1% and 10% of a company's annual turnover.¹³

conspiring to increase the price of sea sand. The fines were imposed on two ringleaders, and the main beneficiary of the cartel. One of the ringleaders received a reduction of 50% in fines.

¹⁰ The SAIC's parallel leniency regime do not specify the level of fine reductions to which the second and other informants may be entitled. Its leniency rules also appear to exclude ringleaders from enjoying leniency.

¹¹ It is worth noting that Chinese law does not recognise attorney-client privilege. As a result, communications between a client and its lawyer (including a PRC licensed lawyer, foreign lawyer in an international law firm, or its in-house counsel) is not protected by such privilege. Information considered privileged in other jurisdictions could be compelled by the NDRC and SAIC during its investigations.

¹² Article 4, Provisions on Administrative Penalties for Unlawful Pricing Conduct.

¹³ In the *Sea sand* case, the Guangdong Provincial Price Bureau imposed fines on three cartel participants: one company was reportedly fined 5% of its turnover (after fine reduction), whilst the two other companies each received fines equal to 10% of their respective turnover.

More generally, the NDRC's decision suggests increased scrutiny of the commercial activities of companies active in China

In recent years, the NDRC and its local branches have investigated unlawful pricing activities, including price-fixing and abusive pricing involving both domestic and foreign companies in China – relying on the Price Law, the AML, or both laws.¹⁴

The NDRC and its local branches have investigated 49 price-related cases with final decisions (including fines) in 20 cases across a range of industries, including pharmaceuticals, paper, insurance, cement, sea sand and dairy – and now in a high-technology market. In 2011, the NDRC also fined Unilever RMB 2 million (approximately USD 0.32 million or EUR 0.24 million) under the Price Law for publicly announcing its intention to increase prices, and attempting to coordinate price increases amongst competitors. The NDRC determined that by "*fabricating and disseminating information on price increases*," Unilever "*disrupted the market order*," contrary to Article 14(3) of the Price Law. The NDRC also noted subsequently that Unilever's conduct could have amounted to a price-related concerted practice, contrary to the AML.

The recurring theme(s) in the NDRC's recent cases include the perceived threat to social or market order, or to a Chinese industry that is heavily reliant on foreign imports or technology. The NDRC's latest decision is similar. Its *LCD panels* press release notes that the decision will improve the competitiveness of China's TV manufacturers, and that

the commitment by the six companies to extend the warranty for LCD panels from 18 to 36 months could save China's TV manufacturers RMB 395 million (approximately USD 63 million or EUR 48 million). The NDRC's underlying objective of protecting Chinese industry, and by extension Chinese consumers, mirrors recent behavioural remedies imposed in the merger control context in China.¹⁵

Conclusion

The NDRC's investigation took years, but this is not unlike cartel investigations in other jurisdictions.

The decision sends a strong signal that China is serious about investigating cartels, including international cartels with effects in China. For companies doing business in China, they now know that anti-competitive conduct outside China could end up being investigated in China. Participants in multinational cartels will carefully need to evaluate the merits of filing a leniency application in China alongside applications in other jurisdictions if the effects of the conduct can be felt in China. Participants in cartels in China will also need to assess the merits of pursuing leniency in China.

A steady increase in the number of regulatory investigations (with fines) can be expected, as China's enforcers target other cartels and anti-competitive conduct that affect Chinese industry, or disrupt the social or market order. The NDRC's press briefing makes clear that the NDRC is willing to investigate and punish anti-

competitive conduct under the AML, and to subject companies to higher fines.

Competition compliance has fast become a serious management risk matter in China, and regular competition training will be important. Companies may need to review and strengthen existing compliance programmes and internal procedures to ensure that these remain robust, but workable in China.

¹⁴ The SAIC is similarly stepping up enforcement activity.

¹⁵ Recent examples include *Uralkali/Silvinit* (potassium chloride used mainly to produce fertiliser); *Seagate/Samsung*, *Western Digital/HGST*, *Google/Motorola* and *ARM/Giesecke & Devrient/Gemalto* in the IT and high-tech context.

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