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China's National Development and Reform Commission Signals Three Major Trends in Anti-Monopoly Law Enforcement in Latest Penalty Decisions

China's National Development and Reform Commission ("NDRC") issued its final penalty decisions against eight international shipping companies on December 31, 2015, after an investigation into their alleged price-fixing and market-sharing agreements that lasted almost a year and a half. The NDRC found the eight companies in violation of Article 13 of the Anti-Monopoly Law ("AML") and imposed fines totaling RMB 407 million (approximately \$62.8 million). The first company to self-report and provide important evidence was exempted, while the seven other companies were fined from 4% to 9% of their 2014 total sales in China.

This is the first enforcement action by a Chinese regulator against the shipping industry. The penalty decisions also signal three major trends in China's AML enforcement priorities and raise new compliance concerns for multinational corporations doing business in China.

An Overview of the AML

China's AML prohibits three anticompetitive practices: (1) agreements restrictive of competition; (2) abuse of dominance; and (3) unauthorized concentration of undertakings. Like many antitrust regulations in other countries, the AML also includes a self-reporter rule for collusive agreement violations, which provides leniency to companies who self-report and provide significant evidence related to violations of the law to authorities.

In China, three national authorities, and their provincial branches, are tasked with enforcement of the AML under the guidance of the Anti-Monopoly Commission. The Ministry of Commerce ("MOFCOM") and provincial Departments of Commerce conduct reviews of mergers. The NDRC and provincial Development and Reform Commissions ("DRCs") investigate and punish price-related restrictive agreements and abuse of dominance. Finally, the State Administration for Industry and Commerce ("SAIC") and provincial Administrations for Industry and Commerce ("AICs") have jurisdiction over non-price-related anticompetitive conduct. The NDRC and SAIC are entitled to impose injunctions, confiscate illegal income, and impose fines ranging from 1% to 10% of the violator's revenue of the previous year for a violation.¹

The penalty decisions raise new compliance concerns for multinational corporations doing business in China.

The Decisions Against the Shipping Companies²

Prior to the decisions announced on December 31, 2015, the NDRC had been unsuccessful in bringing penalty decisions against international shipping companies. In 2012, the NDRC conducted preliminary investigation following raids in the shipping industry by U.S., EU, and Japanese competition authorities in other countries. However, the preliminary investigation proved to be unfruitful. Then, in August 2014, the NDRC had a breakthrough when three companies self-reported.³ Following the August 2014 breakthrough, the NDRC launched a formal investigation into the international shipping industry, much as it had previously done in the automobile, finance, and telecommunications industries.

The three companies that self-reported and provided important evidence to the NDRC were given leniency.

According to the NDRC's official report, the commission's investigation revealed that eight companies maintained frequent bilateral and multilateral communications over bidding and price-quoting for shipping orders, exchanged sensitive information, negotiated prices, shared customers and routes, and repeatedly entered into price-fixing agreements. The companies also allocated customers among themselves. By overbidding, or refusing to bid, the companies assisted each other with obtaining shipping orders, and maintaining or raising freight rates. The NDRC alleged that the conduct violated the price-fixing and market-sharing provisions of Article 13 of the AML.

In calculating the fines imposed on the companies, the NDRC considered how long the improper practices had occurred, the number of customers affected, the number of illegal activities involved, the severity of the violations, and whether the companies actively reported and provided important evidence. The three companies that self-reported and provided important evidence to the NDRC were given leniency. The NDRC exempted the first reporter altogether from fines and imposed reduced fines for the second and third reporters. The two companies which did not self-report, but provided information unknown to NDRC also received minor reductions in penalties. The other three were fined 4%, 5% and 6% because of their ancillary roles in the collusion and limited influence on the market.

The Three Major Trends

1. *China is monitoring and learning from the enforcement of competition laws across the globe.*

The NDRC's investigation of the international shipping industry is the first time that China has publicly acknowledged that it is both monitoring enforcement actions in other countries, and learning from investigations conducted in specific industries in other countries. Unlike previous investigations by the NDRC that were initiated after receiving complaints from aggrieved competitors or consumers, the NDRC actively launched its investigation into the international shipping industry following the 2012 raids conducted by U.S., EU and Japanese competition authorities. An NDRC official confirmed that the commission closely tracks investigations

in major jurisdictions such as the U.S., EU and Japan, and that the 2012 dawn raids alerted the NDRC to the possibility that collusion in the international shipping industry might affect China.

China's involvement in the global effort to enforce competition laws should come as no surprise. The United Nations Conference on Trade and Development, of which China is a member, has continuously pushed for enforcement cooperation among various countries.⁴ The NDRC also participated in various international competition conferences and proposed strengthening enforcement cooperation.⁵ Antitrust cooperation MOUs between Chinese authorities and their overseas counterparts in the U.S., EU, UK, Canada, Australia, Russia, Portugal, Japan, Korea and Brazil all include the prospect of enforcement cooperation. In particular, the NDRC and SAIC and the Directorate-General for Competition of the European Commission agreed to exchange information to coordinate competition law enforcement against cartels and abuse of dominance cases.⁶

This shift sends a message to multinational corporations that China is not only watching antitrust enforcement actions in other countries, but will investigate and punish companies and industries for engaging in similar conduct in China. Going forward, companies should be prepared for increasing cooperation between Chinese and other enforcement agencies worldwide on the enforcement of competition law violations.

2. *The leniency program is seriously enforced.*

Whether, and to what extent, a company could benefit from the leniency provision under the AML has been a major concern for companies doing business in China. Prior to this investigation, the NDRC has granted leniency in only three investigations under the AML. The NDRC's granting of leniency to three companies as part of its shipping industry investigation suggests that self-reporting is a valid option if a company discovers a potential AML violation.

According to the NDRC, the commission decided to grant leniency to the self-reporters because the admissions offered such a breakthrough in the NDRC's investigation after two years of little progress. The NDRC also explained that although the three companies self-reported within one week of each other, the companies received different treatment. This treatment is consistent with guidance given by the NDRC in the Procedural Provisions on the Enforcement against Price-Related Monopolistic Practices. Those provisions state that the first to report and provide important evidence may get an exemption from fines, the second may get a reduction in punishment no less than 50 percent, and that subsequent reporters may get reduction not exceeding 50 percent.

In addition, the NDRC clarified in its penalty decisions what qualifies as "important" evidence under Article 46 of the AML. An NDRC official disclosed during an interview that the three companies that self-reported provided email correspondence, meeting minutes, and travel records. These documents provided a whole pic-

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ture of how the collusive agreements were structured and implemented.

The NDRC's decision to grant leniency, and its description of what evidence must be provided to the NDRC to win leniency, can serve as a guidepost to companies who discover a potential AML violation in the future and seek to self-report that violation to the NRDC.

3. *China remains focused on the automobile industry.*

Several industries are under intense scrutiny by China's competition authorities, none more so than the automobile industry. Although the most recent penalty decisions involved the international shipping industry, the eight companies that received penalties are major carriers of automobiles into and out of China. The case can be viewed as part of the NDRC's efforts to regulate the upstream automobile market. In its press release about the penalty decisions, the Anti-Monopoly Commission made a point to emphasize that the collusive agreements harmed the interests of Chinese consumers who were importing cars and automobile manufacturers who were exporting cars.

The NDRC's focus on the automobile industry can be traced back to 2014, when the DRCs of Shanghai and Hubei fined Chrysler and Audi for a form of vertical price-fixing. Soon after, enforcement actions were brought against auto parts suppliers and after-sales service providers. The NDRC also disclosed that the Anti-Monopoly Guidelines for the Automobile Industry would be issued in the near future.⁷

Conclusion

Chinese competition authorities are continuing to strengthen enforcement of competition laws. Given the trends, multinational corporations doing business in China should consider:

- Implementing effective antitrust compliance programs in China;
- Providing regular antitrust compliance training to employees;
- Developing a protocol to respond to dawn raids and inquiries by China enforcement agencies and training relevant employees;
- If investigated in other major jurisdictions, considering risk assessment or internal investigation of your China business to understand whether similar issues exist in China and evaluating options, including self-reporting, as early as possible;
- Tracking and assessing how enforcement trends relating to your industry in other major jurisdictions might affect enforcement in China and tailor your compliance program and trainings accordingly.

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- 1 Article 46 and 47 of the AML.
 - 2 See http://www.ndrc.gov.cn/fzgggz/jgjdyfld/jjszhdt/201512/t20151228_769085.html.
 - 3 See http://www.cfgw.net.cn/2015-12/28/content_18263997_4.htm.
 - 4 See, for example, http://unctad.org/meetings/en/SessionalDocuments/tdrbpconf8d5_en.pdf and http://unctad.org/en/Docs/ciclpd10_en.pdf.
 - 5 See http://jjs.ndrc.gov.cn/gzdt/201010/t20101022_376458.html, http://www.ndrc.gov.cn/gzdt/201409/t20140904_624914.html and http://jjs.ndrc.gov.cn/gzdt/201511/t20151116_758672.html.
 - 6 See http://www.ndrc.gov.cn/fzgggz/jgjdyfld/jjszhdt/201209/t20120929_508132.html and http://www.saic.gov.cn/ywdt/ldhd/hd/xxb/201210/t20121022_130315.html.
 - 7 See http://news.xinhuanet.com/auto/2015-10/12/c_128307495.htm.
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