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Antitrust Law

NDRC Punished Enterprises Outside Mainland China for Price-related Anti-competitive activities for the First Time

Joyce Li | Tracy Zhou | Haoze Li

On January 4, 2013, the National Development and Reform Commission of the People's Republic of China (the "NDRC") announced a crackdown against six leading international LCD panel manufacturers (collectively the "Group"), namely Samsung, LG, Chimei, AU Optronics ("AUO"), Chunghwa Picture Tubes ("CPT") and HannStar, for price-fixing cartel among them from 2001 to 2006¹. The total penalty imposed against the Group is RMB 353 million. This case is the first enforcement action by China against price-related monopoly activities of firms outside mainland China, and the RMB 353 million penalty is also the largest penalty that China has ever imposed for price-related violations.

Background

Since December 2006, the NDRC has received a number of complaints regarding conspiracy among the Group members to manipulate prices for LCD panels and conduct price-fixing cartel in mainland China. The NDRC investigated the case accordingly.

The NDRC found that from 2001 to 2006, the Group had 53 "LCD" meetings in Taiwan and South Korea mainly to exchange information on LCD panel market and negotiate prices for LCD panels. The Group members artificially manipulated prices for LCD panels they sold in mainland China based on prices agreed on and information exchanged during the LCD meetings. The total illegal gains obtained by the Group from sale of LCD panels involved were found to be RMB 208 million.

On January 4, 2013, the NDRC announced its sanctions against the Group, including return by the Group to Chinese television enterprises overcharged prices for LCD panels in an amount of RMB 172 million, confiscation of all other illegal gains in an amount of RMB 36.75 million and

¹ For the decision of NDRC (in Chinese), please refer to: http://www.sdpc.gov.cn/xwfb/t20130104_521958.htm.

payment of fines in an amount of RMB 144 million. The penalty (including return and/or confiscation of illegal gains as well as fines) on each of Samsung, LG, Chimei, AUO, CPT and HannStar was RMB 101 million, RMB 118 million, RMB 94.41 million, RMB 21.89 million, RMB 16.20 million and RMB 0.24 million respectively. Since AUO was the first to report to the NDRC the price-fixing cartel among the Group, AUO was exempted from fines and the punishment on it was only return and confiscation of all illegal gains it obtained. Samsung was fined twice of its illegal gains, while the other four firms were each fined 50% of its illegal gains. In addition, the NDRC also ordered the Group to implement certain rectification measures, including fair treatment of all customers in respect of procurement of high-end or new technology products and commitment to extend the free repair warranty period for LCD panels used on televisions that Chinese television enterprises sell within the mainland China from 18 months to 36 months².

The price-fixing cartel among the Group has also been investigated and punished in the United States (US), the European Union (EU) and South Korea. The Group was fined USD 1.215 billion in the US, EUR 648 million in the EU and KRW 194 billion in South Korea, all being much higher than the NDRC's penalty. Samsung receive full immunity from fines in all the three areas because it blew the whistle on the cartel.

Comments

There are a few points that are worth noting in this case:

1. **China strengthens enforcement against foreign companies' anti-competitive activities.**

The Anti-monopoly Law of the People's Republic of China (the "AML"), which took effect on August 1, 2008, applies not only to anti-competitive activities occurred within mainland China, but also to those conducted outside mainland China but having an impact to eliminate or restrict competition within mainland China. The AML prohibited three types of monopolistic activities, which are monopoly agreements among business operators, abuse of dominant market positions, and concentrations among business operators that may eliminate or restrict competition. The NDRC and its competent local counterparts are in charge of enforcement against price-related monopoly agreements and abuse of dominant market positions, the State Administration of Industry and Commerce (the "SAIC") and its competent local counterparts are in charge of enforcement against all other monopoly agreements and abuse of dominant market positions, and the Ministry of Commerce (the "MOFCOM") is in charge of review and approval of concentrations.

Monopolistic activities occurred outside China may eliminate or restrict competition in

² It is reported that in addition to the price collusion, the Group also delayed supply of new products to Chinese television enterprises and provided Chinese television enterprises a much shorter warranty period for LCD panels than the 36-month warranty period provided by the Chinese television enterprises to customers.

Chinese markets. The MOFCOM has been actively involved in concentrations among foreign enterprises ever since before the adoption of the AML³. The NDRC's latest punishment has sent a signal that Chinese anti-monopoly regulators are further strengthening supervision on and enforcement against anti-trust related violations by foreign or international companies.

2. Price-related anti-competitive activities may be subject to huge fines.

Under the AML, competitors are forbidden from reaching monopoly agreements⁴. It is reported that since the adoption of the AML, the NDRC has investigated 49 price-related monopoly cases, among which penalties have been imposed in 20 cases. In addition, the local counterparts of the NDRC have also investigated and punished a number of price-related monopoly cases. Before the latest crackdown by the NDRC, the penalties imposed were generally not high. However, the LCD panel price-fixing cartel case indicates that price-related anti-competitive activities, whether occurred within or outside China, may be subject to huge fines in China in future.

The Group's conspiracy to manipulate prices falls within the definition of monopoly agreements that are prohibited under the AML. However, since the Group's monopoly activities occurred before the AML took effect, the NDRC decided the penalties based on the Price Law of the People's Republic of China (the "Price Law"), which took effect on May 1, 1985, instead of the AML. Both the Price Law and the AML provide for confiscation of illegal gains as penalties for business operators engaged in price-related monopoly activities. However, in respect of fines that may be imposed in addition to confiscation of illegal gains, the Price Law allows fines up to five times of illegal gains, while the AML provides for fines equal to 1% to 10% of turnovers in the last year. Since illegal gains are much lower than annual turnovers at most cases, fines imposed under the AML will normally be much higher than fines under the Price Law. According to the NDRC, if the AML were applied in this case, the fines imposed on the Group would have been much higher.

3. A firm's cooperation with the regulator during the investigation may significantly affect the fines imposed on it.

In a price-related monopoly agreement case, the fines imposed on each participating firm will not only vary according to the amount of its illegal gains or turnovers, and its roles in the monopoly agreements, but also be significantly affected by its cooperation with the regulator during the investigation.

Investigation on monopoly agreements is complicated and collection of evidences is

³ The anti-monopoly review of concentrations was provided in the Interim Regulation on Acquisitions of Domestic Companies by Foreign Investors which took effect in 2003.

⁴ Monopoly agreements refer to agreements, decisions or other concerted actions eliminating or restricting competition.

difficult. China, the US, the EU and South Korea all have investigated the LCD panel price-fixing cartel for more than four years. Information provided by internal participants of price-fixing cartels is always the key evidence. Therefore, most regulators have adopted a leniency program, under which firms that voluntarily cooperate with regulators and provide information of monopoly agreements to regulators may receive full or partial immunity from punishment. Samsung's exemption from fines in the US, the EU and South Korea is resulting from its voluntary provision of information to regulators under the leniency program.

China has also adopted leniency program. The AML provides that for any firm who voluntarily reports information on reaching the monopoly agreement and provides important evidence, the regulators may impose a mitigated punishment or exempt it from punishment in consideration of concrete circumstances. The regulation promulgated by the NDRC further provides that the NDRC may exempt from punishment the first firm that voluntarily reports information on reaching the price-related monopoly agreement and provide significant evidence, reduce penalties by no less than 50% for the second one that reports and provides evidence, and reduce penalties by no more than 50% for the other enterprises that reports and provides evidence. The SAIC has promulgated similar rules for monopoly agreements not related to prices. However, it is worth noting that the SAIC does not apply the leniency program to organizers of monopoly agreements, while the NDRC regulations do not prohibit organizer from benefiting from filing for leniency.

In this LCD panel price-fixing cartel case, AUO's illegal gains were RMB21.89 million, ranging the fourth among all six firms, but it was exempted from fines because it was the first to report the price conspiracy during NDRC's investigation. Besides, the NDRC stated that the fines imposed on all other five firms were also reduced due to their confession. The latest punishment by NDRC and some other decisions on price-related monopoly cases published before indicate that Chinese regulators have used leniency program in practice, and successful filing for leniency by a firm may significantly reduce its penalties.

Important Announcement

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If you have any questions regarding this publication, please contact **Joyce Li** (+86-10-8525 5551; joyce.li@hankunlaw.com), or **Tracy Zhou** (+86-10-8525 5512; tracy.zhou@hankunlaw.com).