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中国反价格垄断案例专题研究
Special Review on China's Anti-Price Monopoly Cases

GLOBAL LAW OFFICE

LEGAL SERVICES TO CLIENTS WORLDWIDE

目 录
TABLE OF CONTENTS

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上海黄金行业协会及零售商价格垄断案

Shanghai Gold Association and Gold Retailers Price Monopoly Case

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一、案情简介

2013 年 8 月 12 日，国家发展和改革委员会（“国家发改委”）发布公告称，上海黄金饰品行业协会（“黄金协会”）[1]和上海市的五家金店通过制定并实施《上海黄金饰品行业黄金、铂金饰品价格自律实施细则》（“价格自律细则”），操纵黄、铂金饰品零售价格，分别违反了《反垄断法》第 16 条和第 13 条。因此，黄金协会将被处以人民币 50 万元罚款，五家金店则将被处以 2012 年度相关销售额 1%的罚款，五家共计人民币 1009.37 万元。

据报道，长期以来，上海几家大型金店的零售金价高度一致，且所公示的黄金价格和真实的黄金价格相差甚远。本次上海市发展和改革委员会（亦为上海市物价局，以下合称“上海发改委”）经国家发改委授权调查，最终查实黄金协会组织老凤祥银楼等沪上知名金店召开会长会议，商议制定《价格自律细则》，约定了黄、铂金饰品零售价的测算方式、测算公式和定价浮动幅度。其中老凤祥银楼、老庙、亚一、城隍珠宝和天宝龙凤五家金店被证实在实际经营中根据《价格自律细则》规定的测算公式，在规定的浮动范围内制定公司黄、铂金饰品零售牌价。

I. Case Overview

On August 12, 2013, the National Development and Reform Commission (the “NDRC”) announced that the Shanghai Gold & Jewelry Trade Association (the “Gold Association”)[2] and five individual gold retailers in Shanghai conspired to manipulate the retail price of gold and platinum jewelry in Shanghai’s market in violation of articles 16 and 13 of the Anti-monopoly Law of the People’s Republic of China (“AML”) by conceiving of and implementing an internal Gold Association agreement called the *Self-Regulatory Rules Re Pricing of Gold and Platinum Jewelry in Shanghai* (the “Price Self-Regulatory Rules”). In accordance with article 46 of AML, the Gold Association was fined RMB 0.5 million, while the five gold retailers were individually fined a total of RMB 10.0937 million, a figure which represents 1% of their respective relevant revenues in 2012.

Gold market analysts had noted for quite some time that retail gold prices posted by Shanghai’s major gold retailers were highly consistent with each other and varied wildly from the actual market price. As a result, the Shanghai Municipal National Development and Reform Commission (also known as the Shanghai price bureau; hereinafter referred to as the “SHDRC”) was authorized by the NDRC to launch an investigation into suspected monopoly behavior. The investigation revealed that the Gold Association invited Lao Feng Xiang (600612. SH) and other notable gold retailers in Shanghai to attend a board meeting to discuss drafting the Price Self-Regulatory Rules, which would ultimately stipulate a calculation method, pricing formula, and marginal fluctuation range for setting the retail price of gold and

[1] 黄金协会成立于 1996 年 12 月，现有各种所有制会员单位 226 家，行业覆盖面达到 85%左右。本案中遭受处罚的五家黄金零售商均为协会主要成员。

[2] The Gold Association was established in December 1996 and currently consists of 226 members accounting for approximately 85% of the total market players. All the five gold retailers being fined in this case are key members of the association.

platinum jewelry. The investigation revealed that Lao Feng Xiang, Lao Miao, First Asia (Ya Yi), Cheng Huang Jewellery, and Tian Bao Long Feng were all found to have consistently priced their gold and platinum jewelry within the given range established in the Price Self-Regulatory Rules.

值得注意的是，包括香港珠宝商周大福和周生生在内的数家曾被传因本案受到调查的企业最终并未受到任何处罚。

However, it is worth noting that several other gold retailers who were also members of the Gold Association, including Hong Kong based companies Chaw Tai Fook and Chow Sang Sang, were not given administrative penalties even though it was reported that their activities had also been closely investigated.

本次上海黄金价格垄断协议案件(“本案”)涉及到《反垄断法》框架下，与价格协议和行业协会相关的如下几个重要问题：(1) 如何判定同业经营者达成的价格限定协议的违法性; (2) 行业协会的行动何时可能涉嫌反竞争行为，(3) 行业协会的成员如何能避免参与行业协会组织的，可能使协会成员个体遭受《反垄断法》处罚的协会活动。

The Shanghai Gold Price-fixing Cartel Case (this “Case”) raises some key questions about price related agreements and trade associations in the context of the AML: i) how to judge whether an agreement restraining price concluded among competing business operators is illegal; ii) when are the activities of a trade association susceptible to charges of anti-competitive behavior; and iii) how can members of a trade association distance themselves from activities which could lead to their individual liability for anti-competitive behavior under the AML?

二、法律分析

II. Legal Analysis

（一） 立法原理简述

A. Antitrust Theory and Unreasonable Activities of A Trade Association

在反垄断法语境下，具有竞争关系的经营者（如本案中黄金协会的成员）之间达成的协议通常又被称为横向协议，相应的，作为上下游交易相对方的经营者之间达成协议的则被称为纵向协议。与纵向协议对市场竞争可能产生的复杂影响相比，具有竞争关系的经营者通过达成协议等方式进行共谋则通常会对相关市场内的竞争具有显著的排除或限制作用，并最终导致消费者利益的受损。因此横向协议是最为典型的垄断行为，在建立了反垄断法体系的世界各国，横向协议都是被重点监管的对象。在美国及欧盟，若是横向协议涉及固定或限制价格这一自由市场运行的核心要素，则更是被视为“本身违法”或“核心卡特尔”，而遭到立法的直接禁止。

Agreements reached between or among competitors such as the members of the Gold Association are called as horizontal agreements in the context of the AML. In contrast to vertical agreements, which are formed between business operators and their upstream and downstream trading counterparts, horizontal agreements are viewed by AML enforcement authorities as particularly suspicious because it is much more likely that agreements between market competitors will harm market competition through unreasonable restraints which ultimately jeopardize consumers’ interests. Antitrust regulators in all jurisdictions consider horizontal agreements to be a classic form of anticompetitive behavior between competitors seeking to manipulate their respective product markets. US and EU anti-trust laws single out horizontal agreements to fix or restrain prices as absolutely devoid of any benefit to the

market place, labeling them *per se illegal,* and the parties to the agreement as members of a *hard core cartel.* In the end, while some horizontal agreements made between competitors do not have anti-competitive effects, they will always be the subject of close scrutiny by antitrust regulators.

行业协会作为由具有竞争关系的同行业经营者构成的团体，也是反垄断执法关注的对象。行业协会通过统一标准和规范经营等行为无疑也能为促进企业发展和市场竞争做出贡献。但在另一方面，正如本案中的黄金协会，行业协会作为交流信息的天然平台，也可能为经营者操纵市场提供沃土。亚当·斯密早在 200 多年前即已指出："同业中人，会在一起，即令以娱乐消遣为目的，言谈之下，恐亦不免是对付公众的阴谋，或抬高价格的策划"。正如本案中黄金协会的内部决议，行业协会形成的价格固定机制除为了参与该机制的会员公司之利益限制竞争之外，并没有其他目的。事实上，一些行业协会活动对市场的负面影响与那些固定价格的垄断协议无异，而作为具有竞争关系的经营者的集合，行业协会与垄断卡特尔可能只有一步之遥。由于行业协会作为交流平台可能给其会员带来的复杂影响，我们有必要去判断何时行业协会的活动可能越界，而从合理的信息交流变成出于协会会员的利益而限制市场竞争的共谋。

Trade associations tend to attract the attention of antitrust regulators since they typically consist of competitors in the same industry, and are a natural environment for horizontal agreements to be formed. Trade associations can play a legitimate role in promoting competition by unifying product specifications or standardizing business operations through the organized and free exchange of market information,. However, they can just as easily be a platform for unscrupulous operators to manipulate the market for their own benefit. As Adam Smith wrote more than two hundred years ago, "[p]eople of the same trade seldom meet together, even for merriment and diversion, but the conversation ends in a conspiracy against the public, or in some contrivance to raise prices." It's clear that an outright trade association scheme to fix prices such as the one internally formed by the Gold Association in this Case can serve no other purpose than to restrain competition to the advantage of the member companies who have joined the scheme. Indeed, some trade association activities could be just as harmful to the market as those obvious price fixing monopoly agreements. It is important to remember that a trade association, which is a well-organized congregation of competitors, could be just a few small steps away from being deemed a hard core cartel at any moment. Because it is such a tricky platform for its members, it would be wise to clearly identify when the activities of a trade association cross the line from a reasonable exchange of information and ideas into a conspiracy to restrain the market competition to the advantage of its members.

（二） 美国对于涉及行业协会的价格垄断协议的司法实践

B. Comparison Study with US Judicial Practice Regarding Unreasonable Activities of A Trade Association

美国联邦最高法院在两个与行业协会有关的案件判决中对比了行业协会采取的合法和反竞争的行为，这可能为我们了解国家发改委今后如何看待行业协会行为合理性带来一些启示。

Two US Supreme Court decisions which contrast anti-competitive and legitimate trade association activities may give some insight into what the NDRC may deem as reasonable trade association activities in future cases.

1. 美国硬木生产商协会案

美国硬木生产商协会是一个拥有 400 名成员，且产量占美国硬木行业三分之一的行业协会。该协会推行一个“公开竞争计划”(以下简称“计划”)。“计划”要求每个成员定期向协会报告过去和当前的销售额、价格、购买者身份和生产量、库存量等信息，以及对未来产量的预测，协会将这些信息汇总后再提供给成员。尽管是否参加这个计划不是强制性的，但当该案诉讼开始之时，其 400 个成员中就有 365 个参加了这个计划。

对于该案，美国最高法院认为，正常的经营者不会向竞争对手提供如此详细的有关其生产经营状况的定期报告，不会像该协会成员那样进行如此广泛、深入的信息交流。尽管在协会成员中间没有一个具体的限制竞争的协议，但“计划”限制竞争的目的是非常明显的。正如协会成员所述“所给的那些关于价格的信息完全足够用于使价格保持在合理且稳定的高度”。而且，经调查发现，“计划”的实施确实造成了木材价格的大幅度上涨。因此最高法院认定“计划”与提供价格的共谋无实质差异，违反了反托拉斯法。

同时，最高法院指出，“计划”和公开发表的有关市场信息的区别在于：后者既对销售者公开也对购买者公开，而“计划”只对销售者公开；在公开发表的市场信息报告中，没有人像在“计划”中这样不厌其烦地建议采取共同行动以获取利润。

2、枫木地板制造商协会案

与前述案件相反的，在枫木地板制造商协会案中，美国最高法院认定这个协会（协会成员的产量占了同种类型地板材料 70%）所发起的且有详细书面记录的协会成员间就市场信息的广泛分享和深入交流，并未违反美国反托拉斯法。

1. American Column & Lumber Co. v. United States, 257 U.S. 377 (1921) (the “Lumber Trade Association Case”)

The Lumber Trade Association was a trade association consisting of 400 members and controlled 33% of the relevant market. The association promoted an *Open Competition Plan* (the “Plan”) which requested every member to report regularly to the association details on past and current sales of lumber, names of purchasers, members’ rates of production and inventory on hand, and estimates on future production. Upon collection such information, the association provided organized information to the members. Even though the Plan was not compulsory, there were 365 members of the 400 member joined the Plan when the Lumber Trade Association Case started.

In the Lumber Trade Association Case, the US Supreme Court regarded ordinary business operators would not disclose such detailed report on their market activities regularly or made such frequent and comprehensive information exchange. Even though a specific monopoly agreement was not formed, the Plan was quite clear for the purpose of restraining trade. Just as the members’ own words, “knowledge regarding prices actually made is all that is necessary to keep prices at reasonably stable and normal levels.” In addition, relevant investigation found enforcement of the Plan had caused raise of lumber price. Therefore, the court held that the Plan amounted to a conspiracy to raise prices in violation of US anti-trust laws.

The court also distinguished the Plan and public market information: the Plan was only available for sellers while public market information shall also be available for purchasers at same time; and there shall be no contents in public market information such as advices of conducting concerted activity to obtain profits.

2. Maple Flooring Manufacturers' Assn. v. United States - 268 U.S. 563 (1925) (the “Maple Flooring Manufacturers Association Case”)

In contrast, the US Supreme Court held in the Maple Flooring Manufacturers Association Case that a similarly well documented and thoroughly detailed ongoing exchange of market information among operators in command of 70% of their product market was not an unreasonable restraint on

trade under US antitrust laws.

协会引起争议的活动主要包括：(1)收集并为会员提供各种类型和等级的地板材料的平均成本的信息；(2)编辑并为会员提供有关运费的信息；(3)收集与已售出的产品信息和现有存货数量有关的报告，并将收集到的信息汇总整理后提供给会员，但不透露会员的具体身份；(4)召开会员代表参加的会议并讨论行业中的问题。

The issues for the association in organizing information sharing among these competitors consisted primarily of four main topics: i) gathering and disseminating the average cost of their products; ii) compilation and dissemination of freight rates; iii) individual reporting and subsequent anonymous dissemination of recent sales and inventories; and iv) meetings in which members met to exchange views on the industry and its problems.

最高法院认为上述引起争议的活动不构成违法的理由是：(1)没有证据能够证明协会的以上活动产生了统一价格的后果，同时也没有证据证明协会的活动对消费者带来不利影响；(2)所有关于销售额和价格的报告都是针对过去的和已经结束的交易，而没有涉及到当前的价格。协会收集的统计资料都发表在有关期刊上，并送到商务部以及其他有关的机构。这些资料的性质与公开发表的资料并无不同；(3)会员在会议上没有讨论过价格问题。因此，尽管会员可能利用协会提供的资料做出较一致的判断， 从而使价格倾向于稳定，但并不能仅由这一结果而认定协会有共谋行为。 法律并不单纯地禁止资料收集和发布行为。

The court noted that i) it was impossible to identify any effect on prices of the products caused by the current factors complained of, and any evidence of adverse impact on consumers (in fact, comparatively lower prices were generally reported during the alleged conspiratorial period); ii) all the reports regarding sales revenue and prices were from already completed transaction, instead of any current situation. All the data collected by the association were published on relevant magazines and reported to FTC and other pertinent authorities which means nature of those data is not different from those public posted one; iii) No price related issues had been discussed among members during internal conference. Although members made similar decisions based on those data provided by the association which may be a cause of long-term stable price, it was not sufficient to find any collusion led by the association. Antitrust law does not simply prohibit data collecting and releasing.

最高法院的结论是：如果行业协会仅仅是公开和公平地收集和发布有关其产品成本、产量、在过去交易中产品的价格、存货量以及从生产地到销售地的大概的运输成本的信息，以及召开会议讨论这些信息但并不就产品的价格、数量或限制竞争达成任何协议或采取任何共同行动，则不违反反托拉斯法。

In the end, the court concluded that the conduct of the trade association in this case was simply the conduct of intelligent operators and that the specific activities listed in the complaint were not evidence of an unlawful restraint of commerce in the absence of actual or attempted agreement to fix prices or output.

从这两个案件中，我们可以了解到，行业协会成员以稳定未来的价格或产量为目的所进行的活动，大多会产生限制竞争的实际效果，而无针对性地收集分析过往的价格和产量数据，则可能仅仅是种商业策略。

What we can see from these two cases is that explicit activities by members of a trade association which seek to set or stabilize future prices or production are most likely to have the real effect of restraining trade without any benefit to the consumer; whereas gathering and analyzing past prices and production in generalized and nonspecific terms, are simply intelligent business practices.

（三） 我国现行立法对价格垄断协议和行业协会组织垄断的规定

1. 我国反垄断法对价格垄断协议的规制

我国《反垄断法》同样明文禁止具有竞争关系的经营者达成限制、排除竞争的协议、决定或其他协同行为，并将该等限制、排除竞争的协议、决定或其他协同行为统称为垄断协议。《反垄断法》第十三条更是以列举方式禁止具有竞争关系的经营者达成“固定或者变更商品价格”等五类典型的垄断协议以及国务院反垄断执法机构认定的其他垄断协议。

国家发改委作为主管价格反垄断的执法机构，在其颁布的《反价格垄断规定》第七条中进一步列举了应当禁止的与价格有关的典型横向垄断协议，包括(1) 固定或者变更商品和服务（以下统称商品）的价格水平；(2) 固定或者变更价格变动幅度；(3)…；(4) 使用约定的价格作为与第三方交易的基础；和(5) 约定采用据以计算价格的标准公式等。

2. 我国反垄断法对行业协会组织垄断的规制

我国《反垄断法》也将对行业协会垄断行为的规制置于垄断协议一章。《反垄断法》第十六条规定了行业协会不得组织本行业的经营者达成各类垄断协议。《反价格垄断规定》第九条进一步明确禁止行业协会从事下列行为：(1) 制定排除、限制价格竞争的规则、决定、通知等；(2) 组织经营者达成本规定所禁止的价格垄断协议；(3) 组织经营者达成或者实施价格垄断协议的其他行为。

C. The Current PRC Regulations on Price Related Monopoly Agreements and Monopoly Promoted by Trade Association

1. Price Related Monopoly Agreements under the AML

The AML prohibits competing business operators from concluding agreements, decisions and other concerted conduct designed to eliminate or restrict competition, describing all of these behaviors collectively as monopoly agreements. Article 13 of the AML identifies five typical monopoly agreements, including monopoly agreement for “fixing or changing commodity prices.”

As the authority supervising price related monopoly, the NDRC has promulgated the *Provisions of Prohibiting Price Related Monopoly* (the “Provisions”) as part of their regulatory framework for maintaining a competitive market. Article 7 further lists typical horizontal monopoly agreements related with price: (1) fixing or changing the price of commodities and services (hereinafter, "commodities"); (2) fixing or changing the range of price changes; (3)…; (4) adopting the agreed prices as the basis for transactions with a third party; and (5) agreeing to adopt standard formulas in calculating prices.

2. Monopoly Promoted by Trade Association under the AML

Regulations regarding trade association related monopolies are also located under the same chapter as monopoly agreement regulations in the AML. Article 16 of the AML stipulates that trade associations may not organize business operators in their respective trades to engage in any monopolistic practices related to monopoly agreements. Article 9 of the Provisions explicitly prohibit trade associations from engaging in (1) formulating rules, decisions or notices to eliminate or limit price competition; (2) organizing business operators to conclude price monopoly agreements forbidden by these Provisions; and (3) any other acts related to organizing business operators to conclude or implement price monopoly agreements.

3. 法律责任

针对经营者违反禁止达成垄断协议的法律责任，《反垄断法》第四十六条区分了达成但未实施垄断协议，和达成并实施垄断协议两个阶段。对于前者，执法机关可以处 50 万元以下的罚款，而对于后者，执法机关除了可以要求经营者停止违法行为，没收罚款，还可以并处上一年度销售额百分之一以上百分之十以下的罚款。

关于行业协会违反《反垄断法》，组织本行业的经营者达成垄断协议的，反垄断执法机构可以处五十万元以下的罚款；情节严重的，社会团体登记管理机关可以依法撤销登记。

3. Legal Liability

Article 46 of the AML provides that where a business operator concludes and implements a monopoly agreement, the anti-monopoly enforcement authorities shall instruct it to discontinue the violation, confiscate its unlawful gains, and, in addition, impose a fine of 1% to 10% of its sales in the previous year; if such monopoly agreement has not been actually implemented, it may be fined no more than RMB500, 000.

Where a trade association has organized business operators in the trade to reach a monopoly agreement in violation of the provisions of the AML, the AML enforcement authority may impose on it a fine of not more than RMB 500,000. If the circumstances are serious, the administrative department for the registration of public organizations may cancel the registration of the trade association in accordance with law.

（四） 对本案违法情形和处罚结果的分析

D. Analysis on the Shanghai Gold Price Fixing Case

上海发改委在本案的处理上具有充足的法律和事实依据，对于违法性的认定应当没有争议，但同时处罚结果也显示了执法机关对违法行为的处罚拥有较大的自由裁量权。

The SHDRC had sufficient legal grounds and evidence in this case to identify the Gold Association agreement as an impermissible restraint on trade under the AML. But, the fines and the manner of enforcement show that the enforcer of the AML has great discretion in penalizing the violator.

目前通过公开渠道无法查阅相关的处罚决定行政文书，但老凤祥银楼和豫园商城（系老庙、亚一的股东）均在其上市公司公告中对其收到的由上海发改委下发的《行政处罚决定书》进行了摘录。摘录显示，上海发改委认定涉案企业均违反了前文引述的《反垄断法》第十三条的有关规定以及《反价格垄断规定》第七条的有关规定。

Although administrative documents which give specific details on the grounds for the decision and the penalty determinations of the SHDRC are not accessible to the public, the public notifications on the case made by two listed companies, Lao Feng Xiang and Yu Yuan Tourist Mart (shareholder of Lao Miao and First Asia), disclosed certain contents abstracted from the *Administrative Penalty Decisions* issued by SHDRC. We learn from those notifications that the SHDRC had concluded that the companies involved in this case violated article 13 of the AML and article 7 of the Regulation mentioned above.

根据国家发改委关于本案的公告和相关媒体报道，黄金协会曾多次组织会员金店召开会议，制定《价格自律细则》。该《价格自律细则》约定了黄、铂金饰品零售价的测算方式、测算公式和定价浮动幅度等内容，从而固定了黄铂金的价格水平和价格变动幅度。而且，《价格自律细则》

According to the NDRC's public announcement and relevant media reports, the Gold Association organized major member gold retailers to discuss and conclude the Price Self-regulatory Rules on several occasions, during which time they agreed to benchmarks and ranges of gold and platinum's retail price by agreeing to a price calculating

作为黄金协会颁布的决议，将会告知所有会员，即沪上主要金店，并可能得到他们的普遍遵守。故《价格自律细则》明显存在排除上海黄铂金饰品零售市场竞争的可能，与具有竞争关系的经营者直接达成的垄断协议并无实质差异，也属于典型的横向价格垄断协议。黄金协会组织金店参与讨论制定，以及金店通过协会颁布限制同业价格竞争的《价格自律细则》均违反了《反垄断法》。

method and formula. Moreover, the Price Self-regulatory Rules, which were decided upon and issued by the Gold Association, were circulated to all the Gold Association member gold retail stores, many of which may have complied with these rules. It was determined that this behavior may have significantly increased the possibility of restraining competition in Shanghai's gold and platinum retail market, and which essentially amount to agreements to fix the prices. In the end, it was determined that the Price Self-regulatory Rules were classic horizontal monopoly agreements, and thus the Gold Association and relevant gold retailers were deemed to have breached the AML by agreeing to and implementing the Rules.

除了参加会长会议商议制定应被视为垄断协议的《价格自律细则》，经调查人员核实，老凤祥银楼、老庙、亚一、城隍珠宝、天宝龙凤五家金店在实际运用中确实依据《价格自律细则》规定的测算公式，在规定的浮动范围内制定公司黄、铂金饰品零售牌价，在零售价格进行调整时，该等企业在调价时间及调价幅度上也存在高度一致，充分证明了该等企业实施了已经达成的横向垄断协议。

In addition to participating in the discussion and concluding the Price Self-regulatory Rules, it was revealed in the investigation that five gold retailers (Lao Feng Xiang, Lao Miao, First Asia, Cheng Huang Jewellery, and Tian Bao Long Feng) actually implemented the Rules. The retail price of gold and platinum in those stores kept falling within the scope arranged according to the Price Self-regulatory Rules, and the timing and fluctuation in the change of the retail gold price in each of these competitor stores was shown to be nearly identical.

关于处罚内容，上海发改委根据《反垄断法》第四十六条第一款及第四十九条的规定，对老凤祥、老庙和亚一处以其各自 2012 年度相关销售额百分之一的罚款，分别为 323.29 万元，360.13 万元和 141.83 万元。

In terms of fines, SHDRC only imposed on Lao Feng Xiang, Lao Miao and First Asia administrative fines equivalent to 1% of their respective relevant revenues in 2012, in the amount of RMB 3.2329 million, 3.6013 and 1.4183.

本案的处罚内容中没有没收违法所得这一项，处罚金额亦远远低于近期其他反垄断法行政处罚案例。执法机关对所有违法企业统一适用了法定范围内最低的罚金比例 1%。目前的法律法规并未对罚金基数做出明确规定，本案中的罚金基数并非违法企业上一年度的总销售额，而是采用了相关销售额这一概念。据报道，本案中的相关销售额仅为上海地区销售额。上海发改委对从轻处罚没有做过多的说明，仅是在综合考虑本案违法行为性质、程度等因素的前提下，认定涉案企业已于调查前主动停止垄断协议行为，且能够配合调查，积极整改。

It's worth noting that there was no confiscation of illegal gains, and that the fines were also much lower than corresponding fines in other recent anti-monopoly cases. In this case, the SHDRC fined the violators merely one percent of their relevant annual revenue for 2012, the lowest rate under the Regulations. The AML and the Regulation do not provide accurate definitions of the base amount in calculating fines. In this Case, the fines were calculated on the basis of violators' relevant revenues from the previous year, instead of their total revenue. As it is reported, relevant revenues hereof are the revenues in Shanghai. The reasons provided by the SHDRC for imposing those rather lenient punishments are that those violators terminated the monopoly agreements, cooperated in investigation and made

rectification actively.

（五） 我国行政执法机关对价格垄断协议的执法尺度

在目前的反垄断法执法体系下，价格垄断协议由国家发改委及经其授权的省（直辖市）级发改委负责查处。尽管法理上和《反垄断法》条文均对横向和纵向垄断协议进行了区分，但根据国家发改委官网公布的垄断协议案件执法情况来看，在国家发改委或经其授权的省（直辖市）级发改委分析处理该等案件时，并无明显迹象显示其对横向垄断协议和纵向垄断协议做了区分对待：国家发改委对垄断协议限制排除竞争的效果均会稍加描述，但尚未出现深入的经济分析，亦未针对性地收集相关证据。关于行政处罚，国家发改委对纵向价格垄断协议的处罚力度并未因其对竞争更为复杂的影响而有所减弱，甚至可能超过对竞争的排除限制作用更为显著的横向价格垄断协议。

E. The Enforcement Practice against Price Related Monopoly Agreements by the Anti-Monopoly Administrative Authorities

NDRC and its authorized counterparts at the provincial (direct-controlled municipality) level are in charge of administrative enforcement against price related monopoly agreements under the current enforcement system of the AML. Even though horizontal monopoly agreements are distinguished from vertical monopoly agreements under the AML, such difference is not indicated in the enforcement practices of NDRC according to relevant case briefs on its official webpage. The NDRC simply tends to describe the effect of monopoly agreements on restricting or eliminating competition without in-depth economic analysis or corresponding evidence collection. Administrative penalties may not be lighter for a price related vertical monopoly agreement because of their complex effect on competition; on the contrary, the penalties can even be more severe than those price related horizontal monopoly agreements which have an even more significant likelihood of restricting competition.

（六） 我国司法机关对于价格垄断协议的执法尺度

尽管理论上，包括本案在内的价格垄断协议属于典型的垄断行为，应当遭到反垄断法的严格禁止和惩处，但在近期的司法实践中，就反垄断民事诉讼中的原告是否有必要进一步证明价格垄断协议（等法条明确列举的垄断行为）确实具有“排除、限制竞争”的内容或效果，仍出现了一定争议。

今年 8 月 1 日，上海高院在其就锐邦诉强生固定转售价格上诉案中，认定上诉人（原告）对限制最低转售价格协议具有排除、限制竞争效果承担举证责任。

从《反垄断法》对垄断协议的定义来看，其已经明确了“排除、限制竞争”是将一份协议、决定

F. The Judicial Practice against Price Related Monopoly Agreements by PRC Courts

It is true that the AML strictly forbids and penalizes price related monopoly agreements as classic monopolistic behavior, but a recent court case has stirred up some debate on what burden of proof a plaintiff in a civil case must meet to demonstrate that they have a case. Specifically, the issue is whether a plaintiff must show that price related monopoly agreements complained of actually do have the effect of “eliminating or restricting competition.”

On August 1st, in Ruibang’s appeal against Johnson & Johnson’s resale price maintenance program (“RPM”), Shanghai’s high court held that the appellant (plaintiff) bears the burden of proving that the RPM agreement has a demonstrable effect of eliminating or restricting competition.

According to the AML’s definition of monopoly agreements, “eliminating or restricting competition” is an essential

或者其他协同行为认定为垄断协议的要件。包括固定价格在内的数项行为，既然被作为“垄断协议”由《反垄断法》十三条及十四条明文列举，则应该是在立法阶段已经充分考量，推定其具有“排除、限制竞争”的内容或效果的。据此推定，则执法机关或反垄断民事诉讼原告只需要证明垄断协议的存在，而无需进一步证明其“排除、限制竞争”。此处所述的法条内在逻辑应当同时适用于法条列举的横向和纵向垄断协议。

condition to identifying agreements, decisions or other concerted conduct as monopoly agreements. Since certain behaviors including price fixing are enumerated by article 13 and article 14 of the AML as explicit forms of monopoly agreements, there is a legal presumption that they have the effect of eliminating or restricting competition. Based on such presumption, the AML enforcer or plaintiff in anti-trust civil action only needs to prove existence of monopoly agreements instead of demonstrating further proof of their contents or effect of eliminating or restricting competition. This inner logic hereof shall apply to both horizontal and vertical monopoly agreements.

最高院《关于审理因垄断行为引发的民事纠纷案件应用法律若干问题的规定》（“《反垄断法司法解释》”）规定了针对被列举的横向垄断协议，举证责任倒置（即原告无需证明协议“排除、限制竞争”，而应由被告证明协议并非“排除、限制竞争”）。这从司法角度印证了被列举的横向垄断协议确系被法律推定为“排除、限制竞争”的。但同时，正是由于《反垄断法司法解释》仅仅规定了横向垄断协议举证责任倒置，而未明确就纵向垄断协议适用同样的规则，司法实践中就出现了在审理纵向价格垄断协议时，上海高院仍要求原告证明法条已经明确列举的垄断行为是“排除、限制竞争”的。

The *Provisions of the Supreme People's Court on Certain Issues Relating to the Application of Law in Hearing Cases Involving Civil Disputes Arising out of Monopolistic Acts* （the “AML Judicial Interpretation”）take the opposite position on the question of who bears the burden of proof for horizontal monopoly agreements enumerated by the AML. For those types of agreements, the AML Judicial Interpretation states that the plaintiff does not need to prove that the accused agreement is eliminating or restricting competition; and conversely, the defendant must prove that the problematic agreement does not eliminate or restrict competition. This tends to confirm from a judicial perspective that those enumerated monopoly agreements are presumed by law to restrict competition. Yet, the Shanghai court did not extend this concept to price related vertical monopoly agreements on the theory that the AML Judicial Interpretation only provides this reversed burden requirement for enumerated horizontal monopoly agreements, but not for price related vertical monopoly agreements even though they are also enumerated in the AML.

根据当前中国的反垄断法司法实践，司法解释和法院还是更倾向于以类似美国反垄断法“合理原则”的审判规则去评价垄断协议，甚至针对横向价格垄断协议这样的“核心卡特尔”，也只是做了举证责任倒置的安排；而对于纵向的价格垄断协议，更是与证明任何普通协议具有垄断性没有区别，尽管纵向价格垄断协议也是法条明确列举加以禁止的。

Based on the current judicial practice of the AML, the AML Judicial Interpretation seems to indicate that courts are in the position of adopting rules similar to the “rule of reason” as applied in U.S anti-trust law decisions when they evaluate potentially monopolistic agreements. While their approach to hard core cartel activities such as horizontal price related monopoly agreements is to shift burden of proof to the defendant to demonstrate that there has been no restraint on trade, vertical price related monopoly agreements, will involve the same burden of proof as proving any ordinary agreement creates a restraint on trade.

三、法律启示

（一） 行业协会并非对抗反垄断法的挡箭牌

中国进行广泛深入的市场经济改革不过是最近20 年的事。在这轮改革中，大部分商品的价格逐渐摆脱政府定价走向市场，同时也形成了一批介于政府和私营企业之间，以半官方身份自居的行业协会。所以，意识形态上，以权威身份制定的商品价格仍有大量信众，从本案中有关金店明示所谓“指导价”即可见一斑。另一方面，据报道，本案涉案企业也有意通过行业协会出台规定协调价格，避免直接达成价格垄断协议。

尽管存在前述情形，2008 年颁布的《反垄断法》已经明文禁止行业协会组织垄断。通过本案，我们也可以清楚地看到国家发改委对待行业协会组织价格垄断，以及参与该等价格垄断的企业所持的态度：有些价格协调行动表面上是由行业协会发起的，但对于参与该等协调行动的会员公司，反垄断行政执法机关仍将追究其个体法律责任。

行业协会的活动无疑将会持续成为对潜在垄断协议进行调查时的关注重点。由于对该等活动的调查将会涉及大量与行业协会相关的事实，以及与行业协会会员的访谈沟通，所有与制定行业协会价格协调方案有直接或重大关联的参与方，可能无法避免承担参与制定及执行协调行为的个体法律责任。

（二） 仔细判断及审慎参与可能涉嫌限制竞争的行业协会活动

值得注意的是，在上述各类案件中，并非行业协会的所有会员都被认定为参与了垄断活动。 在由国家发改委处理的多数垄断协议案件中，用于证明违法的证据主要是各类显示参与者限制竞

III. Legal Implications

A. Trade associations are not shields against the AML

It was merely the recent twenty decades witnessed China’s extensive and intensive market economy reforms. In this round reform, the market gradually discovered prices of most commodities which were formerly mandated by the government. At the same time period, a few trade associations emerged as quasi governmental organizations in those market fields where government exited. As a result, “authoritative price” for certain commodities are still accepted or even believed by the public, which is evidenced by those “guide prices” displayed openly in a few gold retailers’ store or on their webpage.

Although there are aforesaid circumstances, monopolistic conducts arranged by trade associations have been explicitly forbidden by the AML since 2008. Moreover, through this Case, we may find NDRC’s position towards trade association and its member companies in price related monopolistic activity: while certain price related concerted activities appear to be initiated by trade association, antitrust regulators will still hold individual members responsible for their role in the concerted activities of the trade association.

No doubt, trade association activities will always be a focus of an investigation on potential monopolistic agreements among competitors in future. The investigation of these activities will involve a significant amount of fact gathering and interviews with various members of the trade association, so it’s not likely that the parties who have been most direct, vocal and instrumental in the creation of any unlawful price related decisions for the trade association will be able to avoid individual liability for the concerted actions of the trade association.

B. Distinguish your trade association activities from activities of those who may be involved in an unreasonable restraint of trade.

In each of the cases, it must be noted that although each trade association was composed of a certain number of members, not all of them were found to have engaged in antitrust activities. As with most monopoly agreement

争意愿的书面记录。因此，企业中与行业协会进行沟通交流的关键人员就很有必要就什么样的行为可能构成不合理的限制竞争有一个初步了解，并且避免参与任何导致或可能导致限制竞争行动的讨论或方案，如不要参与协会的预测未来价格或产量的行动和谨慎地在协会内部分享有关产品价格、产量或消费者的具体信息。当他们发现自己已经身陷该等讨论或方案之时，则应做出反对或宣布放弃该等行动的明确声明。

cases processed by NDRC, the evidence used to prove the violation is almost always some form of written record demonstrating the participants' willingness to restrain competition. Therefore, it is wise for the key members of an enterprise who attend trade association functions to have a fundamental understanding of what constitutes an unreasonable restraint on trade, and to never comment or participate in discussions or plans for activities which lead or likely to lead to restraint of competition, for instance, not to engage in conduct where future price or input is predicted and be more cautious for inter-association dissemination of specifics on price, output, or consumers in past transaction information being shared. And when they find themselves already encumbered in such a discussion or plan, to explicitly make statements which object to or renounce such activities.

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液晶面板生产企业价格垄断案

LCD Price-Fixing Cartel Case

* 环球律师事务所竞争法部门
By Competition Department of Global Law Office

一、案情简介

2013 年 1 月 5 日，国家发展和改革委员会（“发改委”）对韩国三星、LG，我国台湾地区奇美、友达、中华映管和瀚宇彩晶六家国际大型液晶面板企业 2001 年至 2006 年的价格垄断行为进行了处罚，包括责令退还、没收和罚款总金额达 3.53 亿元。

2006 年 12 月以来，发改委多次收到举报，反映从 2001 年起，韩国三星、LG，我国台湾地区奇美、友达等液晶面板企业合谋操纵液晶面板价格，在中国大陆实施价格垄断行为。国家发改委依法对此案进行了立案调查。

在调查过程中，相关企业主动报告了合谋操纵液晶面板价格的情况。经查实，2001 年至 2006 年六年时间里，韩国三星、LG，我国台湾地区奇美、友达、中华映管和瀚宇彩晶等六家企业，在我国台湾地区和韩国共召开 53 次“晶体会议”，会议轮流承办，基本每月召开一次，主要内容是交换液晶面板市场信息，协商液晶面板价格。在中国大陆境内销售液晶面板时，涉案企业依据晶体会议协商的价格或互相交换的有关信息，操纵市场价格，损害了其他经营者和消费者的合法权益。

六家企业在中国大陆境内销售涉案液晶面板数量合计 514.62 万片，其中三星 82.65 万片，LG

I. Case Overview

On January 5, 2013, the National Development and Reform Commission (“NDRC”) announced that it would penalize six international LCD manufacturers (collectively, the “Group”), including (i) the Korean manufacturers Samsung and LG, and (ii) the Taiwanese manufacturers - Chi Mei Optoelectronics Corp., AU Optronics, Chunghwa Picture Tubes, Ltd. and HannStar Display Corporation, for illegal price-fixing activities occurred between 2001 and 2006. This penalty includes compelled restitution, confiscation and fines in the total amount up to RMB 353 million.

The NDRC has, since December 2006, received multiple complaints alleging that the Group had colluded to manipulate the price of LCDs and committed price-related monopolistic conducts within mainland China. The NDRC accepted this case and launched an investigation in accordance with the relevant PRC laws.

During the investigation, the relevant companies of the Group voluntarily reported the facts regarding the price-fixing of the LCDs to the NDRC. Upon the investigation, the NDRC found that the Group held a series of 53 so-called “Crystal Meetings” approximately once a month either in Taiwan or in Korea hosted in turn by the companies in the Group. LCD market information was exchanged and the LCD price was discussed during these meetings. It was determined that when selling the LCDs in mainland China, the Group fixed the market price according to the agreed upon price or the information exchanged at the meetings, which harmed the interests of the other LCD suppliers and the consumers.

The Group sold a total of 5,146,200 units of LCD panels, among which, Samsung accounted for 826,500 units, LG

192.70 万片，奇美 156.89 万片，友达 54.94 万片，中华映管 27.06 万片，瀚宇彩晶 0.38 万片，违法所得合计 2.08 亿元。国家发改委依法责令涉案企业退还国内彩电企业多付价款 1.72 亿元，没收 3,675 万元，罚款 1.44 亿元，经济制裁总金额 3.53 亿元。其中，三星 1.01 亿元，LG 1.18 亿元，奇美 9,441 万元，友达 2,189 万元，中华映管 1,620 万元，瀚宇彩晶 24 万元。

accounted for 1,927,000 units, Chi Mei Optoelectronics Corp. accounted for 1,568,900 units, AU Optronics accounted for 549,400 units, Chunghwa Picture Tubes, Ltd. accounted for 270,600 units and HannStar Display Corporation accounted for 3,800 units. The illegal gain amounted to RMB 208 million. The NDRC ordered the Group to refund the RMB 172 million overcharge to the PRC TV manufacturers, confiscated RMB 36.75 million illegal gains and imposed a RMB 144 million fine. The total amount of the economic sanction is RMB 353 million, among which, Samsung is liable for RMB 101 million, LG is liable for RMB 118 million, Chi Mei Optoelectronics Corp. is liable for RMB 94.41 million, AU Optronics is liable for RMB 21.89 million, Chunghwa Picture Tubes, Ltd. is liable for RMB 16.2 million and HannStar Display Corporation is liable for RMB 240,000.

截至目前，涉案的六家液晶面板企业已将国内彩电企业多付价款 1.72 亿元全部退还，并提出了整改措施：一是承诺今后将严格遵守我国法律，自觉维护市场竞争秩序，保护其他经营者和消费者合法权益；二是承诺尽最大努力向我国彩电企业公平供货，向所有客户提供同等的高端产品、新技术产品采购机会；三是承诺对我国彩电企业内销电视提供的面板无偿保修服务期限由 18 个月延长到 36 个月。

Presently, the Group has refunded the RMB 172 million overcharge to the PRC TV manufacturers and made the following undertakings: (i) they will strictly abide by the PRC laws, actively maintain the market competition order, and protect the legal interests of other business operators and customers; (ii) they will use their best efforts to supply the products to the PRC TV manufacturers fairly, and provide all customers with the same opportunity of purchasing high-end and new technology products; (iii) they will extend the quality warranty period for the LCDs contained in the TVs sold domestically by the PRC TV manufacturers from 18 months to 36 months.

二、法律分析

II. Legal Analysis

（一） 适用《价格法》而不用《反垄断法》进行处罚

A. The PRC Price Law instead of the PRC Anti-Monopoly Law shall apply

本案价格违法行为发生在 2001 年至 2006 年，由于当时我国《反垄断法》尚未颁布施行，发改委依据《价格法》对此案进行了定性处罚。

The illegal price-fixing occurred between 2001 and 2006. As the PRC Anti-Monopoly Law (the "AML") was not in effect during that time, the NDRC determined to apply the PRC Price Law (the "Price Law") rather than the AML.

涉案企业在 2001 年至 2006 年通过晶体会议等形式交换价格信息，协商液晶面板价格，并在我国大陆境内进行具体实施，损害了其他经营者的合法权益。由于液晶显示器的原保质期只有 18 个月，少于彩电 36 个月的行业质保期，每年彩电

The Group violated Section 1 of Article 14 of the Price Law by information exchanging and price fixing at the "Crystal Meetings" during the period between 2001 and 2006, which were later implemented in mainland China. Such conducts fell within "colluding with others to manipulate the market

企业不得不因此多付 3.95 亿元人民币维修成本，违反了《价格法》第十四条第一项"相互串通，操纵市场价格，损害其他经营者或者消费者的合法权益"的规定，按照《价格法》第四十条、第四十一条规定，国家发改委责令涉案企业退还国内彩电企业多付价款 1.72 亿元，没收违法所得 3,675 万元，并处罚款 1.44 亿元，以上经济制裁总计 3.53 亿元。

price, thus harming the legal interests of other business operators or consumers", which are prohibited by the Price Law. The quality guarantee period of LCD products provided by the Group is only 18 months which is less than the 36 months of quality guarantee period of television sets installed with LCDs. As a result, the relevant TV manufacturers have to bear the RMB 395 million maintenance costs relating to the LCD problems. The NDRC cited Articles 40 and 41 of the Price Law to order the compelled restitution, confiscation and fines which amounted to RMB 353 million.

（二） 我国处罚比其他国家更轻

B. The fines imposed by NDRC are much less severe than those imposed in other jurisdictions

涉案企业针对全球市场共同协商液晶面板销售价格是典型的价格垄断行为。多个国家和地区对这一案件进行了严厉处罚。在美国，液晶面板制造商于 2010 年为和解因消费者和监管者提出的价格垄断诉讼而支付了 5.53 亿美元。2011 年，欧盟委员会也对涉案企业进行了高达 6.48 亿欧元的巨额罚款。与此形成鲜明对比的是发改委仅仅进行了 3.53 亿元人民币的经济制裁。

The setting of price through collective consultation by the Group is a very typical, monopolistic price-fixing conduct. Many jurisdictions have already severely penalized this conduct. In the United States (the "US"), the relevant LCD manufacturers settled consumer and regulatory claims for price-fixing cartel for US$ 553 million in 2010. The European Commission ("EC") imposed a fine up to € 648 million on the Group for price-fixing cartel in 2011. In sharp contrast, the total amount of the economic sanction imposed by the NDRC on the Group is RMB 353 million.

美国和欧盟委员会罚款是根据各自的反垄断法律，计算罚款金额的基数是营业额。然而发改委是根据《价格法》进行的处罚，计算罚款金额的基数是违法所得。通常，违法所得远远低于营业额，因此发改委处罚力度不及美国和欧盟委员会。

The fines imposed in the US and the EC were calculated based on the turnover under their respective antitrust legal regimes, while the NDRC-imposed fine was based on the "illegal gains" pursuant to the Price Law. Illegal gains are generally much lower than the turnover amount, so the fines imposed by the NDRC are much less than those imposed by the US and EC.

三、法律启示

III. Legal Implications

（一） 在《反垄断法》生效后发生的价格垄断行为处罚预期将更重

A. The penalties for post-AML price-fixing conducts are expected to be more severe

《价格法》和《反垄断法》均要求没收参与价格垄断行为的经营者的违法所得，但是他们在罚款力度上是不同的。《价格法》下的罚款是五倍以下的违法所得，而《反垄断法》下的罚款是 1% 到 10%的上一年度营业额。因此，发改委表示如果依据《反垄断法》处罚，罚款会高很多。也就

Although both the Price Law and the AML require the confiscation of the illegal gains for business operators engaged in monopolistic price-fixing conducts, they are different with respect to the amount of fines which may be imposed. The Price Law requires a fine up to five times of the illegal gains, and the fines under the AML may be

是说，如果价格垄断行为发生在《反垄断法》生效后，发改委及其地方对应部门将可能依据《反垄断法》而非《价格法》进行处罚。

equivalent to 1% to 10% of the violator's sales turnover in the previous year. This is why the NDRC indicated that the penalty would have been more severe had the NDRC enforced the AML instead of the Price Law. In other words, if the monopolistic conducts occur after the AML came into effect, the NDRC and its local counterparts would probably rely on the AML rather than the Price Law when determining the amount of fines.

（二） 与反垄断执法部门的全面配合看起来是能减轻罚款的最佳战略

B. Full cooperation with the PRC antitrust enforcement agencies during the investigation appears to be the best strategy to avoid significant fines

国家发展和改革委员会在本次调查处理中借鉴了发达国家比较成熟的经验，宽大政策，或者叫宽恕政策。宽恕政策主要是指，如果实施垄断行为的企业主动向反垄断执法机构来举报，并且提供重要证据的，反垄断执法机构可以酌情免除处罚，或者减轻处罚。

The NDRC implemented a leniency program that has been widely used in the developed countries. Under a leniency program, if a company engaged in the monopolistic conduct voluntarily whistle blows to the antitrust enforcement agencies and provides valuable evidence, it may be granted full or partial relief from the punishment.

本案中，尽管台湾的友达企业违法所得是 2,189 万元人民币，但被免予罚款，因为它第一个将价格垄断协议证明给发改委。由于有自首情节，其他五家公司也分别得到不同罚款的减轻。发改委免除对友达免予处罚提高了收集证据的效率，加快了调查进程。

In this case, although AU Optronics' illegal gains were RMB 21.89 million, it received a full relief from being fined because it is the first company that brought the price-fixing scheme to the NDRC's attention. The other five companies received partial relief for their participation in the price-fixing cartel due to their cooperation. The NDRC granted a total exemption in return for AU Optronics' full cooperation to enhance the efficiency of evidence collection, which expedited the investigation process.

因此，主动向反垄断执法部门报告和全面配合看来是避免巨额罚款的最佳战略。

Therefore, whistle blowing to, and full cooperation with, the antitrust enforcement agencies appears to be the best strategy to avoid significant penalties.

（三） 在华跨国公司可能面临中国政府的法律行动

C. Multinational corporations in China may face legal actions initiated by the PRC government

近年来，国家发改委和地方价格主管部门依照《价格法》和《反垄断法》的规定，查处了浙江省富阳市造纸行业协会串通价格案、广西部分米粉生产厂家串通涨价案、吉林和内蒙古部分绿豆经销企业价格串通案等一批典型案件。2010 年，全国查处价格串通案件达 192 件。这些案件中，没有一起涉及跨国公司。在本案前，因价格垄断

In recent years, the NDRC and its local counterparts enforced the Price Law and AML against domestic enterprises in a series of price-fixing cartel cases, such as paper manufacturing cartel organized by the trade association in Fuyang, Zhejiang Province, rice noodle manufacturing cartel in Guangxi Province, the mung bean distributor cartel in Jilin and Inner Mongolia. As of the end of 2010, there

行为受到的最高处罚是辽宁省 12 家水泥生产商遭受的 1,500 万元人民币罚款。与中国政府对外国公司通常的宽容态度不同，此次发改委通过 3.53 亿元的巨额处罚似乎在向跨国公司传递一个跨国公司亦无例外的信息。

have been a total of 192 cases which were identified as price fixing, but none of them had the involvement of any multinational corporations in China. Prior to the LCD case, the largest penalty imposed was RMB 15 million on 12 cement producers in Liaoning Province, which were found to engage in price fixing, limiting output and dividing the market into different specific territories. In the LCD case, however, by imposing a RMB 353 million penalty, it appears that the NDRC intends to send a message to the multinational corporations that there will be no exemption for multinationals from now on.

（四） 公司应当考虑采取预防措施以确保能够遵守竞争法的规定

D. Prudent corporations should consider implementing precautionary measures for compliance with competition laws

鉴于中国国家发改委和地方价格主管部门在制止价格垄断协议上执法力量的加强，我们建议企业应当结合自身情况，按照如下步骤尽快建立、审查和完善内部的竞争法合规方案。

In light of the strengthened enforcement against price-fixing by the NDRC and the local authorities in charge of price administration, it is advisable for companies to consider adopting the following internal procedures to establish, review and improve internal rules to ensure full compliance with the competition laws.

1. 风险识别：识别出您的企业在遵守竞争法方面面临的主要风险。

1. Risk identification: identifying the primary risks confronted by the companies related to the competition laws.

2. 弄清楚已识别风险的程度，通常分为高、中、低三个级别，应特别重视评估在高风险领域工作的员工面临风险的严重程度。这些员工包括与竞争者有联系及从事营销工作的员工。特别需要注意的是，横向竞争者之间固定价格的核心卡特尔在中国是被严格禁止的，企业应当避免参加同行或行业协会组织的旨在固定价格的任何会议。

2. Ascertaining the level of the identified risks. Risks are usually categorized at high, medium and low levels. Special attention shall be paid to evaluate the degree of the risks confronted by the employees working in the high-risk fields. Such employees include those connected to the competitors and the employees engaged in the marketing activities. In the PRC, price-fixing cartels by horizontal competitors are strictly prohibited. Therefore, a prudent company shall avoid attending any meeting aiming at price-fixing held by the other companies in the same industry or the trade associations.

3. 制定政策、程序确保已识别的风险不再发生，以及如果风险发生，应当如何紧急应对

3. Formulating policies and procedures to ensure the non-occurrence of the identified risks and to respond to the possible emergencies if certain risks materialize.

4. 审查：定期审查 1-3 步，以确保企业营造一种有效的合规氛围。建议一年进行一次合规审

4. Review: periodically reviewing the above three steps, in order to create an environment for effective compliance

查，在某些特殊时期，如接受竞争法调查或收购另一家企业时，应当考虑进行一次正常周期以外的合规审查。

of the competition laws. Companies are advised to conduct an annual compliance review. Under some special circumstances, such as when being investigated for failure to comply with the competition laws or when acquiring another company, company should consider additional compliance check outside the regular review.

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强生公司纵向垄断协议案

Vertical Monopoly Agreement Case of J&J

* 沈冬梅 | 江丽丽
By May SHEN | Lily JIANG

一、案情简介

(一) 案件事实

原告北京锐邦涌和科贸有限公司（“锐邦公司”）是被告强生(上海)医疗器械有限公司和强生(中国）医疗器械有限公司（以下统称“强生公司”）医用吻合器及缝线产品在北京的其中一位经销商，与强生公司有长达 15 年的合作，双方之间的经销合同每年一签，有效期为一年。在 2008 年与强生公司签订经销合同后，锐邦公司因在一次采购竞标过程中违反经销合同中规定的限制最低转售价格条款，私自降价销售，从而遭受强生公司处罚，先是被扣除保证金 2 万元，并被取消在部分医院的经销权，继而被完全停止供货。

锐邦公司向法院起诉称强生公司在经销合同中约定限制最低转售价格条款以及依据该条款对锐邦公司进行处罚直至终止经销合同的行为，构成《中华人民共和国垄断法》(以下简称“《反垄断法》”）第十四条第一款第（二）项所列“限定向第三人转售商品的最低价格”之违法行为，故诉请法院判令强生公司赔偿锐邦公司因上述违法行为而致经济损失人民币约 1400 万元。

(二) 法院判决

1. 上海市第一中级人民法院判决

上海市第一中级人民法院（“上海一中院”）一审判决驳回锐邦公司的全部诉讼请求。理由是锐邦公司既没有举证证明其与强生公司签订的包含有“限定转售商品的最低价格”的协议具有排除、

I. Case Overview

A. Facts of the case

Beijing Ruibang Yonghe Science and Technology Trade Company (“Rainbow”), the plaintiff, was one of the distributors of staplers and suturing products of Johnson & Johnson Medical (Shanghai) Ltd. and Johnson & Johnson Medical (China) Ltd. (collectively “J&J”), the defendants, in Beijing. Rainbow had been a business partner with J&J for 15 years. The distribution contract between each other was concluded every year and the term of the contract was one year. While J&J discovered that Rainbow bade at a price which breached the minimum resale price (the “RPM”) set in the contract agreed with each other in 2008. Consequently, Rainbow was punished by J&J, which withheld deposit of RMB20,000 first and then terminated distributorship in several hospitals and ceased supply entirely.

Rainbow filed a lawsuit against J&J alleging that it was illegal that J&J set a minimum resale price in the distribution contract, punished and terminated the distributorship of Rainbow based on the RPM. So Rainbow considered that the above-mentioned behaviors conducted by J&J have breached Article 14(2) of the *China's Anti-Monopoly Law* (the “AML”). Therefore, Rainbow requested the court to order J&J to compensate for its losses of RMB14 million.

B. Opinions of the court

1. The judgment of Shanghai No. 1 Intermediate Court

Shanghai No. 1 Intermediate People's Court (“Shanghai No. 1 Intermediate Court”) overruled all the claims of Rainbow. As the plaintiff failed to prove that the agreement which contained the PRM had excluded or restricted competition,

限制竞争的效果，也不能充分举证说明其因为限定最低转售价格条款而遭受了反垄断法意义上的损害。

2. 上海市高级法院判决

锐邦公司不服原审判决，遂向上海市高级人民法院（“上海高院”）提起上诉。法院经过三次开庭审理，还特别听取了双方委托的专家的意见，于2013年8月1日作出终审判决，即撤销了原审法院的判决，判令强生公司赔偿锐邦公司经济损失人民币53万元，并驳回锐邦公司的其余诉讼请求。

二、终审判决评析

在本案的上诉审过程中，上海高院围绕锐邦公司与强生公司之间存在的六个法律争议焦点做出终审判决：

(一)《反垄断法》的适用

上海高院的判决认为，虽然本案所指控的垄断行为在《反垄断法》生效之前就已经开始实施，但是该行为一直延续到《反垄断法》生效之后，所以本案应适用《反垄断法》的管辖。

(二) 垄断民事纠纷案件的适格原告

上海高院在综合考虑了《反垄断法》的立法目的、对民事权利的救济以及《最高人民法院关于审理因垄断行为引发的民事纠纷案件应用法律若干问题的规定》（《反垄断法司法解释》）第1条对“因垄断行为引发的民事纠纷案件”的定义的规定后，认为垄断民事纠纷案件的适格原告包括2类：因垄断行为造成损失和因合同内容、行业协会的章程等违反《反垄断法》而发生争议的自然人、法人或者其他组织。

or to prove its damages were caused by PRM provisions in the context of the AML.

2. The judgment of Shanghai Higher Court

Rainbow refused to accept the judgment of first instance, and then appealed to Shanghai Higher people's court (“Shanghai Higher Court”). On 1 August 2013, the court, after going though three hearings, and especially considering the opinions of experts entrusted by the two parties, made a final judgment, which reversed the judgment of Shanghai No. 1 Intermediate Court. Shanghai Higher Court Ordered J&J, the appellee, to compensate for Rainbow, the appellant, losses of RMB530,000 and dismissed other claims against J&J.

II. Comments on Final Judgment

During the process of appellate hearings, Shanghai Higher Court made final judgment based on six legal disputes between Rainbow and J&J.

A. The application of AML

Shanghai Higher Court ruled that the alleged monopolistic behavior in this case was implemented before the AML came into force, but it still lasted until the AML was promulgated. As a result, the AML should be applied in this case.

B. The qualified plaintiff in civil monopoly cases

Shanghai Higher Court held that there were two kinds of qualified plaintiffs in civil monopoly dispute cases including natural persons, legal persons, and other organizations for disputes over losses caused by monopolistic conduct or violations of the AML by contractual provisions, bylaws of industry associations, and so on. The following factors were taken into account by the court: the legislative purposes of the AML, the relief of the civil right, and Article 1 of *Provisions of the Supreme People's Court on Several Issues concerning the Application of Law in the Trial of Civil Dispute Cases Arising from Monopolistic Conduct* (the “Judicial Interpretation of AML”) (the definition of civil dispute cases arising from monopolistic conduct).

(三) 纵向垄断协议应当以具有排除、限制竞争的效果为构成要件

上海高院对这一争议的判决意见表明并不是任何包含有固定转售价格、维持最低转售价格条款的协议都必然构成纵向垄断协议，其必须要有排除、限制竞争的效果。理由是纵向垄断协议相对于横向垄断协议的反竞争效果弱，所以法院并不将“本身违法原则”直接适用于纵向协议，认为《反垄断法》禁止的对象是具有排除、限制竞争效果的纵向协议。

C. Anti-competitive effect is an essential element in the finding of vertical monopolistic agreements

Shanghai Higher Court was of the view that not all the agreements which contained fixed resale price and minimum resale price provisions constituted vertical monopolistic agreements, a precondition is that the agreement should have the effect of eliminating or restricting competition. Comparing with the horizontal monopolistic agreements, the vertical monopolistic agreements had less anti-competitive effect. So the principle of per se illegal would not be directly applied to the vertical agreements and only those agreements which had the effect of eliminating or restricting competition were prohibited by the AML.

(四) “谁主张、谁举证”原则的适用

《反垄断法司法解释》第 7 条规定了横向垄断协议纠纷中，由被告对该协议不具有排除、限制竞争的效果承担举证责任(即举证责任倒置原则)；而对于本案中所涉及的纵向垄断协议纠纷的举证责任问题，不论是《反垄断法》还是《反垄断司法解释》都没有规定。上海高院认为“只有在法律、法规或司法解释具有明确规定的情形下，才可以在民事诉讼中适用举证责任倒置规则”，所以应该由原告锐邦公司证明纵向协议具有排除、限制竞争的效果。

D. The application of the principle: who claim, who proof

Article 7 of the Judicial Interpretation of AML stipulates that the defendant shall assume the burden to prove that the agreement does not have the effect of excluding or restricting competition regarding horizontal monopolistic agreements (the reversion of burden of proof). While when it comes to the burden of proof regarding vertical monopolistic in this case, neither the AML nor the Judicial Interpretation of AML has provided. Shanghai Higher Court held that the reversion of burden of proof only should be applied in civil procedure when it is clearly stipulated in the law, regulations or judicial interpretations. As a result, Rainbow, the plaintiff, bore the burden to prove that the vertical agreement in this case had the effect of excluding or eliminating competition.

(五) 构成纵向垄断协议的考量因素

本案中上海高院主要从以下四个方面分析包含限制最低转售价格的协议是否构成纵向垄断协议：

1. 相关市场的竞争是否充分。上海高院主要从买方价格竞争动力、品牌依赖程度，定价能力等三个方面分析认为在本案中相关市场竞争不够充分。

E. Factors to decide whether it constitute a vertical monopolistic agreement

In this case, to decide whether the RPM agreement constituted a vertical monopolistic agreement, Shanghai Higher Court mainly based on the following four factors:

1. Whether there is sufficient competition in the relevant market. Shanghai Higher Court ruled that the relevant market was not fully competed after analyzing the bargaining power of buyers, the degree of the reliance on bands, and defendants' power in price negotiation, etc.

2. 在相关市场是否有很强的市场地位。上海高院在综合考虑了强生公司的市场份额、定价能力、品牌影响力和对经销商的控制力后认为其在相关市场具有很强的市场地位。

2. Whether it has a strong position in the relevant market. After comprehensively considering the following elements such as: the defendants' market share, power in price negotiations, influence of brands and control over distributors, Shanghai Higher Court held that J&J had a strong position in relevant market.

3. 限制最低转售价格的动机。法院分析认为强生公司实施限制最低转售价格协议的动机在于回避价格竞争，维持其价格不下降。

3. Motivation to conduct minimum resale price. According to the judgment of Shanghai Higher Court, the motivation of J&J to conduct minimum resale price was to avoid price competition and to maintain the price.

4. 限制最低转售价格协议对竞争的影响。上海高院认为强生公司限制最低转售价格的行为具有明显的限制竞争的效果，且本案中的证据不足以证明所签订的纵向协议存在明显促进竞争的效果。

4. The effect of minimum resale price on competition. Shanghai Higher Court held that the minimum resale price conducted by J&J obviously had the anticompetitive effect, and there were no sufficient evidences in this case could prove that the RPM agreement had pro-competitive effects.

(六) 赔偿标准的认定

F. Calculation of damages

尽管本案中锐邦公司向法院主张了多项损失赔偿，但是上海高院仅判决强生公司赔偿锐邦公司2008 年相关产品的利润损失，原因是只有这项损失是由执行限制最低转售价格协议直接造成的。

Although Rainbow claimed for a number of damages, Shanghai Higher Court ordered J&J to compensate for rainbow the losses of profits of the relevant product in 2008. Because only this item of losses was directly caused by implementing the PRM agreement.

至于如何计算损失赔偿额，上海高院认为不应该按照已经被认定为纵向垄断协议中的限制最低转售价格协议规定的可得利润来计算损失，而是应当按照相关市场的正常利润对其予以调整。

As for how to calculate the damages, Shanghai Higher Court analyzed that the damages should not be calculated according to the profits available in the PRM agreement which had been regarded as a vertical monopolistic agreement. Instead, the loss of profits in this case should be calculated according to normal profit in the relevant market.

三、本案启示和建议

III. Implications and Advice

上海高院的上述生效判决推翻了上海市第一中级人民法院所认定的强生公司没有实施限定最低价格垄断协议的判决意见，相反，上海高院认定强生公司与下游经销商所签订的维持最低转售价格的协议违反了《反垄断法》第十四条第（二）项的禁止性规定，最终判决责令强生公司向其经销商承担赔偿损失约 50 万元的民事责任。

The final judgment of Shanghai Higher Court reversed the judgment of Shanghai No.1 Intermediate Court which ruled that J&J did not implement the antitrust agreement restricted the lowest prices. On the contrary, Shanghai Higher Court ruled that the minimum resale price agreement concluded between J&J and downstream distributors breached Article 14(2) of the ALM, and therefore ordered J&J to compensate for the distributor's losses of RMB 500,000.

作为全国第一起关于纵向垄断协议案件的终审

As a final judgment regarding the first case of vertical

判决，上海高院的判决意见引起了广泛关注和讨论。相较于之前学术界对《反垄断法》第十四条第（二）项关于维持最低转售价格协议的理解意见，上海高院在本案中对双方争议焦点的法律推理和分析、对举证责任分配的指定，体现了上海司法辖区对在具体案件中适用《反垄断法》第十四条第（二）项来干预商事主体之间所订立的维持最低转售价格这一类型的经济性垄断协议的谨慎态度。

monopolistic agreement in China, Shanghai Higher Court's judgment has attracted wide attention from the public and brought extensive discussion. Different with the opinions of the academia circle in China about Article 14(2) of the ALM, the judgment reflects that the courts having competent jurisdiction in Shanghai hold cautious attitude to the application of the Article 14(2) of the ALM in the relevant cases, with self-control not to intervene in commercial parties' setting minimum resale price agreements, a kind of economic monopoly agreements. The negative judicial policy can be seen from the legal reasoning, the legal analysis in the judgment and the Shanghai courts' allocating the burden of proof in this case.

上海司法辖区对这类纵向垄断协议争议所隐含的消极干预态度，我们认为可以从以下点推测得知：该判决对发动诉讼、请求司法认定维持最低转售价格垄断协议违反前述《反垄断法》禁止性规定的经销商课以了较重的证明责任，不仅仅要求经销商举证证明双方订有限定下游厂商转售商品时不得低于一定价格的协议，还要求经销商举证证明该协议具有排除、限制竞争的效果。

The negative intervention policy implied in the judgment can be speculated as follows: the court held that the distributor should bear heavy burden of proof to establish a minimum price monopoly agreement litigation case and ask for the court's relief to convict whether the minimum resale price has breached the Article 14(2) of the AML. The court not only asked for the distributor to prove that there was an agreement which restricted the lowest resale prices for commodities had concluded between J&J and distributor, but also demanded the distributor to prove that there existed result caused by the agreement which had eliminated or restricted competition.

这一司法意见不同于《反垄断法》出台初期时理论界对禁止维持最低转售价格这一法律条款的学理理解（即《反垄断法》严厉禁止该垄断行为，相关约定应视为本身违法行为），反映了上海高院以限缩的法律解释方式审慎介入纵向垄断协议争议的倾向。

This judicial opinion is different from the understanding of the minimum resale price among the researchers at the preliminary stage after the promulgation of the AML (i.e. the AML strictly prohibited this kind of monopolistic behavior, and the corresponding agreement itself shall be construed as per se illegal). The judgment reflects a tendency of Shanghai Higher Court not to easily intervene in the vertical monopoly agreement dispute by interpreting the related statutory law in a narrow way.

即使上海高院的前述司法判决意见可能体现了该辖区法官对纵向垄断协议争议所采取的司法克制态度，相关新闻和社会公众对本案的热情解读仍然有可能触发将来下游厂商或者律师事务所发动类似诉讼。为此，建议就最低转售价格条款问题，公司可以从以下几个方面强化与此相关的合规性合同审查和管理，并留意潜在争议的应对准备和防范：

Even though the above-mentioned judicial decision of Shanghai Higher Court might express that the judges adopt judicial restraint in vertical antitrust agreement disputes, it may still trigger downstream distributors or some law offices to initiate similar proceedings in the future, coming up with the enthusiastic understanding and interpretation of this case by the news and the social public. Therefore, with regard to the minimum resale price terms, we suggest company to

strengthen the compliance review and management of the relevant terms in sales contract and pay some attention to prepare for and prevent potential disputes in the following aspects:

1. 建议在与下游经销商订立的书面协议中，不明示约定强令经销商不得低于某一价格转售相关商品，尤其要留意尽量避免以书面方式作出这样的合同约定。

1. When entering into agreements with downstream distributors, company had better not expressly force the dealers to sign terms in which resale of commodities be restricted with a price no less than a certain amount, especially pay attention not to sign such terms in sales contract in a written form.

2. 实践中生产商通常推荐经销商在相关商品上标注“建议零售价”，目前看来这种建议方式没有明显的法律风险，其不但可以取代限定经销商最低转售价格的纵向垄断协议约定，而且政府执法部门据此对相关企业进行反垄断调查和处罚的可能性较低。

2. In practice, company usually recommends its dealers to label the “Suggested Retail Price” on the relevant goods. This way of recommendation has no obvious legal risks. In this way, company can replaces the minimum resale price terms which may be construed as one of the vertical monopoly agreement, and there’s less likely that the government enforcement divisions would investigate and fine the company according to it.

但是，如果以单方面的行为向经销商提出或者建议其对相关商品依一定的价格转售，应尽可能留意避免以监视、处罚、奖励或者威胁实施制裁手段或者其他强迫性手段实质性地迫使下游厂商遵守上游厂商单方面的最低价格要求或者建议。

However, if the upstream company unilaterally requires or suggests its dealers to resale the goods with a certain price, company had better pay attention to avoid substantially forcing the downstream distributors to comply with its minimum price policy by monitoring, punishing, rewarding or threatening to impose sanction and/or using other compulsive measures.

3. 如果遇到政府执法部门的反垄断突击调查、合作伙伴的反垄断诉讼袭击或者其他难以避免的反垄断争议，建议公司及时、全面地搜集、准备相关证据，以有效应对发起人的恶意缠讼等举动。具体而言，可包括：从程序法角度，利用程序性规定最大限度地影响反垄断诉讼、反垄断调查等程序的进程，向法院或者政府反垄断执法部门争取充分的时间和条件获取并提供对公司有利的证据；实体法方面，可以争取从企业集团抗辩、代销抗辩、纵向价格推荐抗辩、垄断协议豁免抗辩等多个角度对相关指控或者调查予以有力的回击或者反驳。

3. If company meets with a sudden investigation from the government divisions, antitrust litigation filed by business partner or other inevitable antitrust dispute, we suggest company collect and prepare evidence timely and comprehensively, so as to effectively respond to malicious litigation harassment and so on. Specifically, preparation jobs may be done in the following ways: i) from the perspective of procedural law, company may try to influence the process of the antitrust litigation or antitrust investigation proceedings, and try to win sufficient time and condition from the court or government enforcement divisions to collect and provide evidence in favor of company; ii) from the perspective of substantive law, company may try to strongly fight back against the counterparty’s accusation or enforcement investigation actions by presenting such defenses as company groups

defense, agent sales defense, vertical price recommendation defense, and exemption from monopoly agreement defense etc.

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茅台、五粮液价格垄断案

Premium Liquor Producers Price Monopoly Case

* 黄海 | 崔颖
By Hai HUANG | Ying CUI

一、案情简介

据媒体报道，2012 年 12 月上旬，茅台曾为了稳定价格、维护品牌形象，对经销商的零售价格制定了严格的限价令，并且对 6 家低价和串货的经销商作出了严厉的惩罚措施。同样在去年年底，五粮液曾对全国市场进行了例行抽查，批评了 15 家低价、违规销售的经销商。

在上述两家白酒公司向其经销商发布限价令后不久，国家发展与改革委员会（“国家发改委”）对茅台、五粮液的行为进行调查。2013 年 1 月 15 日，茅台发布公告称，由于国家发改委介入，公司宣布取消“限价令”。随着国家发改委反垄断调查的扩大，1 月 17 日五粮液相继撤销了对经销商的限制令。2013 年 2 月 22 日，据报道，茅台和五粮液因实施价格垄断行为分别被处以 2.47 亿元与 2.02 亿元的罚款。均占其各自 2012 年度销售额的 1%。

二、法律分析

上述案例涉及到纵向垄断协议。纵向垄断协议是指在生产或销售链的不同环节进行经营的两个或两个以上的经营者达成的，有关各方购买、销售或转售特定商品或服务的条件的协议、决定或协同行为。依据各国反垄断立法，对纵向垄断协议最重要的一项分类，便是根据是否涉及价格因素，将其分为纵向价格限制协议与纵向非价格限制协议。纵向价格限制协议是指产品制造商要求

I. Case Overview

It is reported that in December, 2012, Mao Tai (the maker of the Chinese high-end liquor), was in an attempt to stabilize prices and maintain its brand image, issued to its distributors strict minimum retail price requirement and imposed harsh penalties on six distributors for violating this requirement or making sales outside their designated areas. Similarly, at the end of 2012, Wu Liang Ye (another high-end Chinese liquor maker) made selective inspections on its distributors and specified and criticized 15 distributors for selling liquors at lower than the set prices.

Soon after the two Chinese liquor makers' restrictive orders to their distributors, the National Development and Reform Commission (the "NDRC") launched anti-trust investigation into the conducts of Mao Tai and Wu Liang Ye. On January 15, 2013, Mao Tai announced that, due to the NDRC investigation, it would cancel the "Price-fixing Notice". As the NDRC's anti-monopoly investigation continues, Wu Liang Ye also revoked its restrictive orders to the distributors. On February 22, 2013, it was reported that that Mao Tai and Wu Liang Ye were imposed fines in the amount of RMB247 million and RMB202 million, respectively, accounting for 1% of its annual sales in 2012.

II. Legal Analysis

The above case is associated with vertical monopoly agreements. Vertical monopoly agreements are agreements, decisions or concerted practices setting the conditions for purchase, sale or resale of specific goods or services concluded by two or more parties operating in upstream and downstream of production or distribution chains. Generally speaking, vertical monopoly agreements, depending on whether the price is a key factor, can be

购买其产品的批发商或零售商在销售商品时遵循一定的价格条件的纵向垄断协议，而制造商要求购买其商品的批发商或零售商遵守一些与价格无关的条件的纵向垄断协议即为非价格限制协议。

divided into (i) vertical price restraints and (ii) vertical non-price restraints. In vertical price restraints, manufacturers require their wholesale or retail distributors to observe certain price conditions; while in vertical non-price restraints, wholesale or retail distributors are required to abide by the conditions which are not related to prices.

茅台、五粮液限定其经销商最低转售价格的行为具有价格限制的特点。

Imposing minimum resale prices on the distributors by the two Chinese liquor makers has the price restraining features.

（一） 我国现行立法对纵向垄断协议的规定

A. The Current PRC Regulations on Vertical Monopoly Agreements under the AML

1. 我国反垄断法对纵向价格限制的规制

1. Vertical Price Restraints under the AML

《中华人民共和国反垄断法》（“《反垄断法》”）第 14 条的前两款禁止 (i) 固定转售价格和 (ii) 限制最低转售价格两种行为。

The first 2 sections of Article 14 of *the PRC Anti-Monopoly Law* (the “AML”) prohibit the practices of (i) fixing resale price and (ii) imposing minimum resale price.

2. 我国反垄断法对纵向非价格限制的规制

2. Vertical Non-price Restraints under the AML

我国《反垄断法》中没有对纵向非价格限制一一列举，只是在《反垄断法》第 14 条第 3 款做出了一个兜底性规定，即“国务院反垄断执法机构认定的其他垄断协议”。

Vertical non-price restraints have not been specifically provided for under the AML. Section 3 of Article 14 provides that “any other monopoly agreements deemed by the anti-monopoly enforcement authorities designated by the State Council” shall be prohibited, which is a “catch all” provision to prohibit, *inter alia*, the non-price forms of vertical restraints.

3. 法律责任

3. Legal Liability

《反垄断法》第 46 条规定，经营者违反本法规定，达成并实施垄断协议的，由反垄断执法机构责令停止违法行为，没收违法所得，并处上一年度销售额百分之一以上百分之十以下的罚款；尚未实施所达成的垄断协议的，可以处五十万元以下的罚款。

Article 46 of the AML provides that where an undertaking concludes and implements a monopoly agreement, the anti-monopoly enforcement authorities shall instruct it to discontinue the violation, confiscate its unlawful gains, and, in addition, impose a fine of 1% to 10% of its sales in the previous year; if such monopoly agreement has not been actually implemented, it may be fined no more than RMB500,000 (approximately US$80,000).

（二） 纵向限制竞争协议的主管部门及权限划分

B. The Enforcement Agencies With Respect to Vertical Agreements Restraining the Competition

在目前的执法体制安排中，价格垄断协议和非价格垄断协议分别由国家发改委和国家工商总局

Under the current enforcement framework, the NDRC and the State Administration for Industry and Commerce (the

负责查处。国家发改委具体承担反垄断职能的执法机构是价格监督检查和反垄断局，国家工商总局具体承担反垄断职能的执法机构为反垄断与反不正当竞争执法局。

"SAIC") are tasked with responsibilities for price monopoly agreements and non-price monopoly agreements. The specific enforcement agencies are the Price Supervisory and Anti-Monopoly Bureau in the NDRC and the Anti-Monopoly and Anti-Unfair Competition Bureau in the SAIC.

（三） 我国反垄断执法机关对于纵向价格垄断协议的执法尺度

C. The Enforcement Practice by the Anti-Monopoly Enforcement Authorities

1. 适用原则

1. Principle for analysis of the vertical price monopoly agreement

目前我国反垄断法并不存在一个统一适用于纵向垄断协议评估的分析框架。对于处理纵向价格垄断协议的适用原则，一直存在"本身违法原则"与"合理原则"的争论。本身违法原则为美国规制纵向限制竞争协议的反垄断实践中发展出的重要原则之一。本身违法原则是指某些限制竞争行为一经证实便将视为违法，不必对其是否促进或限制竞争进行分析。合理原则是为美国规制纵向限制竞争协议的反垄断实践中发展出的另一重要原则，指只有在协议被认定为对竞争产生了不合理限制的情况下才应被反垄断法所禁止。

Currently, a uniform analysis framework applying to vertical agreements has not been established in China. With respect to the principles applied to the vertical price monopoly agreement, there has been a debate between "Per se illegal" and "Rule of reason". "Per se illegal" is an important principle emerged from anti-monopoly practice restraining vertical restraints in the U.S. Per se illegal means that certain anti-competition behaviors, once confirmed, will be deemed to be illegal, needless to analyze if such behaviors promote or restrict competition. "Rule of reason" is another important principle emerged from anti-monopoly practice restraining vertical restraints in the U.S, which means that the agreement will only be prohibited by the law after it is deemed to have restricted competition.

五粮液限制其经销商低价出售白酒一案中，四川省发展和改革委员会（"四川省发改委"）出具的《行政处罚决定书》（"决定"）称"根据《中华人民共和国反垄断法》，本机关依法对你公司限定交易相对人向第三人转售白酒最低价格的行为进行了调查…本机关认为，你公司通过合同约定、价格管控、考核奖惩等方式，对经销商向第三人销售五粮液白酒的最低价格进行限定，对市场竞争秩序产生了不利影响，对消费者的合法权利造成了损害。本机关认定，你公司的上述行为违反了《中华人民共和国反垄断法》第十四条的规定…据此，本机关决定对你公司处以 2012 年度销售额百分之一的罚款二亿零二百万元"。

In the case that Wu Liang Ye required its distributors not to sell products below a fixed price, the Administrative Penalty Decision issued by the Sichuan Provincial NDRC (the "Decision") claimed that "in accordance with the AML, it is held by this administration that your company has fixed the distributors' minimum resale price of the liquor products through a system of price control, inspection and rewards and punishments, which has had a negative impacts on the competition of the market and undermined the interests of the customers. This administration holds the view that the abovementioned conducts of your company have violated Article 14 of the AML. … Therefore, this administration decides to impose a fine of RMB202 million (1% of the 2012 annual sales) on your company".

贵州省物价局于同天发布的公告（"公告"）称"2012 年以来，贵州省茅台酒销售有限公司通

The announcement issued on the same day by Guizhou Province Price Bureau (the "Announcement") claimed that

过合同约定，对经销商向第三人销售茅台酒的最低价格进行限定，对低价销售茅台酒的行为给予处罚,达成并实施了茅台酒销售价格的纵向垄断协议，违反了《反垄断法》第十四条规定，排除和限制了市场竞争，损害了消费者的利益”。

“since the year 2012, Guizhou Province Mao Tai Liquor Sales Co., Ltd. has set forth the minimum price in the contracts at which the retailers shall sell to the customers, imposed penalties on the retailers, concluded and executed the vertical monopoly agreement, which is in violation of Article 14 of the AML, and has eliminated and restricted the competition within the market, as well as compromised the interest of the customers.”

从决定的内容来看，四川省发改委似乎对于五粮液的行为所造成的反竞争效果进行了分析。但也有观点认为，从决定的逻辑上看，四川省发改委做出其决定并未基于五粮液行为所造成的反竞争影响，而只是附带论证了其决定的合理性；对于贵州省物价局做出的决定，业界倾向性意见认为贵州省物价局的决定似乎是认定只要存在限定转售价格的行为，即构成违反《反垄断法》。至于该行为是否必须被证明排除或限制了竞争，该决定似乎假定只要存在限定转售价格的行为，该行为就有排除或限制了竞争的结果。

By looking into the Decision, it seems that the Sichuan Provincial NDRC has analyzed the anti-competition results which caused by Wu Liang Ye. Nevertheless, from the logical perspective, some people held the view that the Sichuan Provincial NDRC did not make such decision on the grounds that the anti-competition effects has been resulted from the conduct of Wu Liang Ye, the analysis is provided only for legitimacy of its decision; regarding the decision made by Guizhou Province Price Bureau, the majority of the practitioners reckon that the Announcement deems that the resale price maintenance by Mao Tai is a *per se* violation the AML. As whether Mao Tai’s conduct has had an impact of eliminating or restricting competition, the Announcement seemed to have assumed such effect if the price maintenance exists.

因此，对于国家发改委的执法原则，有观点认为，国家发改委采用的是本身违法原则，而这种执法原则正是《反垄断法》中体现出的立法逻辑。纵向垄断协议不仅包括限定价格的协议，还有其他多种表现形式，如独家购买协议、独家销售协议和搭售等，但之所以《反垄断法》第 14 条明确禁止“固定向第三人转售商品的价格”和“限定向第三人转售商品的最低价格”，正是因为此两种形式为纵向垄断协议的典型。因此，无需再证明上述行为具有“排除、限制竞争”效果。换言之，只要能证明经营者之间通过书面或口头形式约定“限定向第三人转售商品的最低价格”，并能证明该约定具有约束力，似乎就应当足以认定该约定构成了《反垄断法》第 13 条第 2 款意义上的“限制竞争”。

Therefore, regarding the principle taken by the NDRC during the course of enforcement, an opinion held by certain people that the NDRC adopts the principle of “Per se illegal”, which is exactly the logic of the AML. Vertical monopoly agreement includes not only the agreements restricting the price, but also other various types of the agreements, for instance, exclusive purchase agreement, exclusive sales agreement and conditional sale. Therefore, the reason why the Article 14 of the AML explicitly listed the “maintaining the minimum resale price to the third party” and “restricting the minimum resale price to the third party” is these conducts are typical conducts which shall be deemed as monopoly agreements. In other words, provided that the agreement concluded by the undertakings in written or by oral providing “restricting the minimum price at which sold to the third party” is confirmed and such agreement binds upon both parties, it seems that the agreement shall be deemed to have the effect of “restricting the competition” under the Section 2, Article 13 of the AML.

然而，另一种观点认为，反垄断司法解释规定对于《反垄断法》第 13 条规定的横向垄断协议，推定其具有排除、限制竞争的效果，因此不同于《民事诉讼法》中规定的“谁主张、谁举证”原则，被告需要就其行为不具有反竞争效果进行举证，否则被告可能面临败诉的风险。而对于纵向垄断协议却无此规定，表明纵向垄断协议并不必然具有反竞争的效果，仍需结合具体情况进行分析。2013 年 8 月 1 日，上海市高级法院在锐邦诉强生案中正是持有的此种观点。

However, there is an another opinion that antitrust judicial interpretation sets forth that with respect to the horizontal monopoly agreement providing in Article 13 of the AML, the horizontal monopoly agreement is presumed to have the effect of eliminating, restricting the competition, thus unlike the principle of “the burden of proof lies with the person who lays charges”, the defendant shall prove that its conducts did not have the anti-competition effects, otherwise the award might not in favor of the defendant. However, regarding the vertical monopoly agreements, there is no such provision, which evidences the vertical monopoly agreements are not necessary have the anti-competition effects, and an analysis shall be carried out before an conclusion is made. On August 1, 2013, Shanghai High Court held such opinion in Rainbow vs. Johnson & Johnson.

相比于上海市高级法院在锐邦诉强生案的判决书中明确的“合理原则”，国家发改委在处罚决定中的寥寥数语并未对实务界提供更多的分析纵向价格垄断协议的所需的帮助。价格垄断执法机构对于限定最低转售价格行为所采取的处理原则仍不明确。

Comparing with the “Rule of reason” determined by the judgment made by Shanghai High Court in Rainbow vs. Johnson & Johnson, the decision made by the NDRC did not provide an in-depth analysis into the vertical price monopoly agreement which can enlighten the practitioners. The principle adopted regarding the restricting the minimum resale price by the law enforcement agency is not definite.

2. 举证责任

2. Burden of Proof

若适用合理原则，则执法机构需要举证证明行为排除、限制了竞争；若适用本身违法原则，则执法机构仅需要证明行为的存在，举证责任即转移至经营者，除非经营者可以依据我国《反垄断法》第 15 条规定的豁免情形，举证证明其符合第 15 条第 1 款中任何一项与第二款的要求，否则执法机构便可判定经营者构成了反垄断所规制的纵向垄断行为。

If the Rule of reason applies, the law enforcement agency shall prove the conduct concerned restricts or eliminates the competition; if Per se illegal applies, then the law enforcement agency shall only need to prove the existence of the conduct, the burden of proof would be fall on the side of undertakings, unless the undertakings can satisfy the requirement of any item of Section 1 of Article 15 and the Section 2 of Article 15 in accordance with Article 15 of the AML, the law enforcement agency is empowered to deem the vertical monopoly conduct has been performed by the undertaking which is prohibited by the AML.

一方面，由于执法原则的不明确，我们无法确定执法机构在查处涉嫌构成纵向价格垄断协议的行为时需要承担何种程度的举证责任；另一方面，四川省发改委与贵州省物价局并未在决定与公告中就此进行详细的说明。因此，四川省发改委与贵州省物价局在作出处罚决定时，是否证明了或是在多大程序上证明了五粮液与茅台的行

On one hand, since the principle is not clear and definite, we do not know for sure that at which level the law enforcement agency shall be burdened to prove its allegations when it comes to the investigation of vertical price monopoly agreement; on the other hand, the Sichuan Provincial NDRC and Guizhou Province Price Bureau do not give extensive explanation on this in the Decision and the Announcement.

为对相关市场造成的反竞争效果，仍不得而知。

Therefore, it is unclear when the penalty is imposed, whether the Sichuan Provincial NDRC and Guizhou Province Price Bureau has examined the anti-competitive effects upon the relevant markets resulting from the conducts of the two liquor producer or at which level the anti-competitive effects have been analyzed.

3. 处罚金额

3. Fines levied for violations of Article 14 of the AML

五粮液与茅台分别被四川省发改委与贵州省物价局处以了上一年度销售额 1%——2.02 亿元与 2.47 亿元的罚款。《反垄断法》在垄断协议的法律责任中规定，经营者达成并实施垄断协议的，罚款金额区间为上一年度销售额百分之一以上百分之十以下。但“上一年度销售额”应该何如计算却并不明确，如是指经营者在全球市场的销售额还是在全国市场的销售额，是包括经营者全部产品的销售额还是仅包括涉案产品的销售额。上述问题仍需国家发改委出具相关操作指引。

In terms of this case, the fines levied on Wu Liang Ye and Mao Tai are RMB202 million and RMB247 million, respectively, accounting for 1% of their respective annual sales in 2012. The legal consequence provided by the AML for violations of articles regarding the monopoly agreement shall be, among which, imposing a fine of 1% to 10% of the sales of the undertaking concerned in the previous year. However, it is not definite as to the way to ascertain the “sales in the previous year”, for instance, whether the sales in the global markets or in the domestic market, whether the sales of all the products produced by such undertaking or the sales of the specific product produced by such undertaking. The above issues outlined call on the relevant guidance issued by the NDRC.

三、法律启示

III. Legal Implications

（一） 公司需谨慎处理限定最低转售价格条款

A. Companies shall deal with resale price maintenance clauses cautiously

国家发改委作为反垄断执法机构之一，有权对其认定为违反《反垄断法》的限定转售价格行为采取措施并处以高额罚款。但是鉴于目前国家发改委与法院对于同一行为的反竞争效果可能会采取不同的处理原则，因此作为企业，需要在签订经销协议中需谨慎处理该类条款。另外，若是作为纵向垄断协议案件中的原告，则需要充分搜集证据以争取有利的判决结果。

The NDRC, as one of the enforcement agencies, has the power to take actions against resale price maintenance that is deemed to be violations of the AML and impose heavy fines. Given the possibility that different approaches might be taken by the NDRC and the court with respect to the same conduct, therefore, when entering into distribution agreements, companies shall deal with price maintenance clauses cautiously. Also, if companies are the plaintiff in a lawsuit concerning the vertical monopoly agreement, .sufficient evidences shall be collected in order to obtain a judgment in favor of the companies.

（二） 公司应当考虑采取预防措施以确保能够遵守竞争法的规定

B. Prudent companies should consider implementing precautionary measures for compliance with AML

鉴于触犯《反垄断法》规制纵向垄断协议条款的

In light of the penalty may be up to 10% of the sales in the

行为将可能最高面临上一年度销售额 10%的巨额罚款，我们建议公司采取谨慎的态度，对于内部的法律合规检查提出以下几点建议：（1）定期分析市场地位；（2）搜集相关市场情报；以及（3）仔细审查合同中可能涉嫌纵向限制竞争的条款。

previous year resulting from a violation of the AML, it is advisable for companies to adopt the following approaches to establish, review and improve internal rules to ensure full compliance with the AML: (1) analyze marketing occupancy periodically; (2) search relevant market information; and (3) review agreements that might be deemed to have clauses which restrict competition vertically.

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奶粉企业纵向垄断协议案

Case Study of Milk Powder Manufacturers Vertical Monopoly Agreements

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一、案情简介

从 2013 年 3 月开始，国家发展改革委价格监督检查与反垄断局（“国家发改委”）对广州市合生元生物制品有限公司（“合生元”）、美赞臣营养品（中国）有限公司（“美赞臣”）、多美滋婴幼儿食品有限公司（“多美滋”）、雅培贸易（上海）有限公司（“雅培”）、富仕兰食品贸易（上海）有限公司（“富仕兰”）、恒天然商贸（上海）有限公司（“恒天然”）、惠氏营养品（中国）有限公司及惠氏（上海）贸易有限公司（“惠氏”）、浙江贝因美科工贸股份有限公司（“贝因美”）、明治乳业贸易（上海）有限公司（“明治”）九家乳粉生产企业开展了反价格垄断调查。

2013 年 8 月 12 日，国家发改委发布了一则关于“合生元等乳粉生产企业违反《反垄断法》限制竞争行为共被处罚 6.6873 亿元”的新闻。新闻中，国家发改委表示，“涉案企业均对下游经营者进行的不同形式的转售价格维持，存在固定转售商品价格或限定转售商品最低价格的行为，事实上达成并实施了销售乳粉的价格垄断协议，违反了《反垄断法》第十四条关于禁止纵向垄断协议的规定……在调查过程中，涉案企业均承认自身的转售价格维持行为涉嫌违法，并且无法证明其控制价格的行为符合《反垄断法》第十五条规定的豁免条件。”[1]

I. Case Overview

Since March 2013, the Price Supervision and Anti-Trust Bureau under the National Development and Reform Commission (”NDRC”) had implemented an anti-price monopoly investigation against the following nine infant milk powder manufacturers: Guangzhou Biostime Biological Products Co., Ltd. (“Biostime”), Mead Johnson Nutrition China Co., Ltd. (“Mead Johnson”), Dumex Infant Food Co., Ltd. (“Dumex”), Abbott Laboratories Trading (Shanghai) Co., Ltd. (“Abbott”), Friesland Food Trading (Shanghai) Co., Ltd. (“Friesland”), Fonterra Trading (Shanghai) Co., Ltd., Wyeth Nutrition (China) Co., Ltd. and Wyeth (Shanghai) Trading Co., Ltd. (collectively, “Wyeth”), Zhejiang Beingmate Scientific-Industrial- Trade Company Limited by Shares (“Beingmate”) and Meiji Dairies Trading (Shanghai) Co., Ltd. (“Meiji Dairies”).

On August 12, 2013, the NDRC released a piece of news - *Certain Milk Powder Manufacturers Like Biostime Had Violated the PRC Anti-monopoly Law (“AML”) by Conducting Competition-Restrictive Activities and thus having been Penalized for RMB 668.73 Million* (“News”). As indicated by the News, the NDRC found that (i) the accused manufacturers used various methods to maintain the resale prices against retailers, including fixing a price for resale and restricting the minimum price for resale; (ii) these actions, as a matter of fact, were treated as reaching and implementing a monopoly agreement and thus violated Article 14 of AML; and (iii) during the investigation, all accused manufacturers acknowledged that they had violated AML and failed to prove that they could be qualified for exemption under Article 15 of AML.[2]

[1] 国家发展改革委员会政策研究室：《合生元等乳粉生产企业违反<反垄断法>限制竞争行为共被处罚 6.6873 亿元》，参见 http://www.sdpc.gov.cn/xwfb/t20130807_552991.htm（2013 年 8 月 23 日访问）。

[2] *Certain Milk Powder Manufacturers Like Biostime Had Violated the PRC Anti-monopoly Law (the “AML”) by Conducting Competition-Restrictive*

国家发改委依据《反垄断法》第四十六条的规定，决定对其中六家乳粉生产企业的价格垄断行为进行处罚，共处罚款 6.6873 亿元。对主动向反垄断执法机构报告达成垄断协议有关情况、提供重要证据，并积极主动整改的惠氏、贝因美和明治免除处罚。

Pursuant to Article 46 of AML, the NDRC made its decision to punish six of these nine involved manufacturers (collectively, the "Punished Manufacturers") in a form of fine totaling RMB 668.73 million (approximately, US$[110] million) for their illegal activities. Meanwhile, Wyeth, Bingmate and Meiji Dairies were exempted from punishment because they proactively (i) informed the NDRC of the relevant information about the monopoly agreement, (ii) provided critical evidences and (iii) implemented rectifications.

罚单开出后，涉案企业均提出了具体的整改措施：1、立即停止违法行为；2、立即根据中国法律，对经销协议、销售政策和商务政策进行修改；3、整顿销售系统，对公司全体成员进行反垄断培训，确保员工行为符合中国法律要求；4、采取实际行动，消除过去违法行为的后果，使消费者获得切实利益。

Following the penalties, all the Punished Manufacturers have put forward their specific rectification measures, which included (i) ceasing all illegal activities immediately; (ii) amending the distribution contract, sales policy and business policy immediately to make them comply with Chinese laws and regulations; (iii) rectifying the sales system and providing antitrust training to all employees to ensure each employee's behavior will conform to Chinese laws and regulations; and (iv) taking specific measures to eliminate the adverse effects so as to ensure consumers' benefits.

截至目前，上述措施正在逐步落实。

As of the latest practical date, the above mentioned rectification measures are being implemented in progress.

二、案件评析

II. Comments

（一） 因达成并实施纵向垄断协议行为而违法

A. Violating AML by Reaching and Implementing Vertical Monopoly Agreement

经国家发改委查实，本案中涉案奶粉企业通过合同约定、直接罚款、变相罚款、扣减返利、限制供货、停止供货等，对奶粉经销商和零售商进行约束和惩罚。这些措施和手段均具有惩罚性和约束性，一旦下游经营者不按照涉案企业规定的价格或限定的最低价格进行销售，就会遭到惩罚。国家发改委认定，这些约束和惩罚措施使得同一品牌的销售商之间不能开展价格竞争，实际上建立起一个纵向的价格垄断协议，固定商品的价格或者限定最低价格。

After investigation, the NDRC has found that the accused milk powder manufacturers had implemented punitive and binding measures against distributors and retailers, including but not limited to contract, direct and covert fines, rebates, cutting and ceasing supply. Once distributors and retailers did not resell the infant milk products as per the price or minimum price set by the accused milk powder manufacturers, they would be penalized and sustain losses. The NDRC has determined that these restrictions and punitive measures would effectively exclude competition among distributors and retailers for the products of the same brand, which had actually established a vertical price

Activities and thus Be Penalized for RMB 668.73 million (approximately, US$[110] million), The Policy Research Office of National Development and Reform Commission, see http://www.sdpc.gov.cn/xwfb/t20130807_552991.htm (last visited on August 23, 2013).

monopoly agreement, fixing the price of products or restricting the minimum price of them.

一般来说，鉴定纵向垄断协议的违法性有两大基本原则：本身违法原则和合理原则。本身违法原则是指某些限制竞争行为一经证实便将视为违法，不必对其是否促进或限制竞争进行分析。在司法实践中，通常认为以下一些垄断协议应适用本身违法原则：横向价格固定垄断协议(即价格卡特尔)、划分销售市场、划分销售对象(即客户)、联合抵制协议以及限制转售价格协议。对上述协议，没有必要进行具体的分析，只要协议存在即可认定其为非法并予以制裁。

Generally, there are two principles applied in determining whether a vertical monopoly agreement is legal, (1) *per se* illegal and (2) rule of reason. *Per se* illegal principle refers to some competition restrictive behaviors are illegal once confirmed, no matter whether they are pro-competitive or anti-competitive. In legal practice, the *per se* illegal principle should apply to the following monopolistic agreements, including but not limited to the horizontal price-fixing monopoly agreement (i.e. price cartels or hard core cartels), dividing sales market, allocating sales targets/customers, boycotting agreements and resale price restriction agreement. The above-mentioned agreements could be considered as violating AML and should be punished once the conclusion of such agreements is confirmed.

而合理原则下，某些限制竞争行为并不必然地视为违法，其违法性得依具体情况而定。具体而言，反垄断主管机构或法院应具体地、仔细地考察和研究相关企业的行为目的、方式和后果，以判断该限制竞争行为的合理与否，如果经调研认为该限制竞争行为属于“不合理”地限制竞争，则该限制竞争行为构成违法而将被禁止；如果经调研认为该限制竞争行为属于“合理”地限制竞争，则该限制竞争行为属于合法的限制竞争行为，应当得到许可。

However, under the rule of reason, some anti-competitive behaviors are not necessarily illegal. It depends on the specific situation. In detail, AML enforcement authorities and courts should investigate the purpose/ways/results of the actions of the operators carefully, in order to determine the reasonableness of the restriction. If the restriction is unreasonable, it should be prohibited for violation of AML; if not, then it shall be permitted.

本案中，国家发改委发布的处罚新闻中显示，涉案企业的垄断行为，违反了《反垄断法》第十四条的规定，“不正当地维持了乳粉的销售高价，严重排除、限制同一乳粉品牌内的价格竞争，削弱了不同乳粉品牌间的价格竞争，破坏了公平有序的市场竞争秩序，损害了消费者利益。”由此可见，国家发改委做处罚时考虑了涉案企业行为对竞争秩序和消费者利益的影响，强调了涉案企业行为的危害性，并为处罚增添了正当性。但是，无法判定国家发改委是否将该危害效果作为做出处罚的必要条件。因此，此处适用何种原则尚有争议，亟待国家发改委明文解释。

In this case, the NDRC stated in the News that the monopolistic behaviors of the involved manufactures have violated Article 14 of AML, by “unfairly maintaining the high price of selling milk powder, severely precluding and restricting the price competition under same brand, weakening the price competition under different brands, destroying the fair and ordered market competition and infringing the interest of consumers.” Therefore, we can see the NDRC has considered the effects of the acts of the involved manufactures on competition order and consumers interest. These words stressed on the perniciousness of those behaviors and provided the justification of punishment. However, according to the publicized facts, we cannot see whether the NDRC has taken the harmful consequence as an essential requirement of imposing punishment. Therefore, it is unclear which principle the NDRC applied in this case and

requires the NDRC to clarify.

（二） 国家发改委行使自由裁量权确定处罚额度

根据处罚公告，国家发改委对于违法行为严重、不能积极主动整改的合生元处以上一年度销售额 6%的罚款，计 1.629 亿元；对不能主动配合调查但能积极整改的美赞臣处上一年度销售额 4%的罚款，计 2.0376 亿元；对能够配合调查，并主动整改的多美滋、雅培、富仕兰和恒天然处以上一年度销售额 3%的罚款，分别计 1.7199 亿元、0.7734 亿元、0.4827 亿元和 0.0447 亿元。此罚单是迄今为止国家发改委处罚最重的案件。[3]

根据《反垄断法》第四十六条，反垄断执法机构对于违反本法规定达成并实施垄断协议的经营者，有权对其处以上一年度销售额百分之一以上百分之十以下的罚款。作为反垄断执法机构之一，国家发改委享有在其职权范围内对违法的经营者进行处罚的自由裁量权。本案中，国家发改委主要依据违法行为严重性和违法企业的态度，即在调查中的配合程度以及整改积极性，确定对各奶粉企业的罚款比例。此为国家发改委行使自由裁量权的体现。

（三） 采用宽恕政策

《反垄断法》第四十六条第二款规定了宽恕政策。反垄断法语境下的宽恕制度又称自首从轻政策等，是指参与卡特尔的经营者在被发现或调查之前，主动向反垄断执法机构报告的，反垄断执法机构可以酌情减轻或者免除对该经营者的处罚。该制度有利于发现并破除隐蔽性极强的核心卡特尔，将其从内部分化瓦解，以解决反垄断执法机关对这类卡特尔发现难、取证难的问题。

B. The NDRC Exercising Its Right of Discretion to Determine the Penalty

As stated in the News, the NDRC has imposed a fine of RMB 162.9 million on Biostime, about 6% of its previous year's sales, due to its severity and no active rectification. Mead Johnson who did not proactively cooperated with the investigation but proactively rectified was fined RMB 203.76 million, about 4% of its previous year's sales. Dumex Abbott, Friesland and Fonterra were fined about 3% of their previous year's sales, RMB 171.99 million, RMB 77.34 million, RMB 48.27 million and RMB 4.47 million, respectively. This is the most serious penalty imposed by the NDRC so far.[4]

According to Article 46 of AML, AML enforcement authorities are empowered to impose a fine of between 1 and 10 percent of the previous year's sales. As one of AML enforcement authorities, the NDRC has the discretion to penalize the business operators failing to conform to the legislation. In this case, the NDRC focused on the severity of violation and attitude of the violating business operators，i.e. proactively cooperating in the investigation and rectifying their illegality, to determine the amount of penalty on the milk powder manufacturers. The NDRC exercised its discretion in this case.

C. Application of the Leniency Policy

The paragraph 2 of Article 46 of AML provides the Leniency Policy. The Leniency Policy under AML is also called voluntary surrender in exchange for a lighter or mitigated punishment policy. It means that if the business operators involved in cartels confess to AML enforcement authorities before being discovered or investigated, the penalty on them could be mitigated or exempted. This policy effectively facilitates uncovering of some deeply hided

[3] 2011 年 11 月 14 日，山东药企案，罚款逾 700 万元；2013 年 1 月 4 日，六家企业合谋操纵液晶面板价格案，罚款达 3.53 亿元；2013 年 2 月 22 日，茅台五粮液价格垄断案，罚款共计 4.47 亿元；2013 年 8 月 12 日，上海黄金垄断案，罚款 1009.37 万元。

[4] On Dec. 14, 2011, two pharmaceutical companies of Shandong were fined of RMB 7 million. On Jan. 4, 2013, six manufactures were fined of RMB 0.353 billion for conspiring to manipulate the price of LED panels. On Feb. 22, 2013, Maotai and Wuliangye were fined of RMB 0.447 billion for monopolizing the prices. On Aug. 12, 2013, Shanghai gold companies were fined of RMB 10.0937 million.

cartels, disintegrates them from inside， therefore, mitigates the difficulties in detecting and investigating this kind of cartels.

如上文所述，国家发改委对主动向反垄断执法机构报告达成垄断协议有关情况、提供重要证据，并积极主动整改的部分奶粉企业免除处罚。此为对宽恕政策的实践应用。

As mentioned above, the NDRC has taken into consideration the factors such as cooperation and rectification provided by the manufacturers when making the penalty decisions and exempted some manufacturers due to their rectification efforts. This is a case of the application of the Leniency Policy.

三、法律启示

III. Legal Implications

（一） 密切关注纵向垄断协议的违法性问题

A. The Illegality of Vertical Monopoly Agreement

《反垄断法》上的纵向垄断协议是由生产商和销售商、批发商与零售商或者其他在生产和销售链中有上、下游关系的经营者之间达成的，其参与主体相互间没有竞争关系，但在经济上存在着互惠和互补关系。[5]虽然纵向垄断协议不是由竞争者之间达成的，但是其仍会对竞争产生消极影响，主要体现在推动价格卡特尔上，即形成垄断高价，攫取垄断利润，从而损害消费者利益。

Vertical monopoly agreements under AML are reached by and among the manufacturers and distributors, wholesalers and retailers or other business operators with a vertical relationship in the chain of production and distribution. These entities are complementary rather than competitive with each other from economic perspective[6]. Although these vertical monopoly agreements are not reached among competitors, they could also negatively affect the competition, mainly by creating price cartels, i.e. forming monopolistic high price and seizing monopolistic profit, which would damage consumers' interest in hence.

固定价格和限制最低价格的纵向价格垄断协议对竞争具有显著影响，属于我国《反垄断法》重点规制的一种卡特尔。现实中，企业可能是由于缺乏对价格卡特尔的明确认识而参与价格卡特尔，从而导致违法。因此，企业应当注意审查运营中的协议是否涉及此类纵向垄断协议问题，甄别此类违法风险并采取措施积极改正。

Vertical monopoly agreements on price-fixing and restricting minimum price, for their obvious effect on competition, are main cartels regulated by AML. In practice, corporations might be involved into a price cartel without realizing its illegality and thus violated AML. Therefore, corporations should pay more attention to the vertical monopoly agreements during the course of business operation, in order to identify the legal risk in advance and take preventive measures.

（二） 宽恕政策下，主动积极地向反垄断执法机构报告和配合能够使违法责任得到减免

B. Under the Leniency Policy, Proactively Reporting to and Cooperating with AML Enforcement Authorities Could Get Liability Mitigated or Exempted

国家发改委在其 2010 年发布的《反价格垄断行

Article 14 of the *Regulations on Procedures for Enforcement of*

[5] 王晓晔，《中华人民共和国反垄断法详解》，北京：知识产权出版社，2008，第 101 页。
[6] WANG Xiaoye, Detailed Annotation to Anti-Monopoly Law of PRC, Beijing, Intellectual Property Press, Page 101 (2008).

政执法程序规定》（“《**规定**》”）第十四条按照报告达成价格垄断协议情况并提供重要证据的企业的先后次序分别规定了不同程度的减免：

Administrative Law on Anti-Price Monopoly (“Regulation”) issued by NDRC in 2010 provided that it would mitigate or exempt the liabilities of business operators in accordance with the order of the relevance of the information reported and the importance of the evidence provided:

“经营者主动向政府价格主管部门报告达成价格垄断协议的有关情况并提供重要证据的，政府价格主管部门可以酌情减轻或者免除对该经营者的处罚。第一个主动报告达成价格垄断协议的有关情况并提供重要证据的，可以免除处罚；第二个主动报告达成价格垄断协议的有关情况并提供重要证据的，可以按照不低于 50%的幅度减轻处罚；其他主动报告达成价格垄断协议的有关情况并提供重要证据的，可以按照不高于 50%的幅度减轻处罚。重要证据是指对政府价格主管部门认定价格垄断协议具有关键作用的证据。”

“[w]here the operator takes its initiative to report to the price control authority the relevant information on conclusion of price monopoly agreements and provide important evidence, the price control authority may reduce or exempt punishment on the operator, as the case maybe. For the first operator to report the relevant information on conclusion of the price monopoly agreement and to provide important evidence, the punishment may be exempted; for the second operator to report the relevant information on conclusion of the price monopoly agreement and to provide important evidence, the punishment may be reduced by no less than 50 percent; for others that take the initiative to report the relevant information on conclusion of the price monopoly agreement and provide important evidence, the punishment may be reduced by no more than 50%. The “important evidence” refers to the evidence that is critical for the price control authority to determine a price monopoly agreement.”

此规定是在价格垄断协议中应用宽恕政策的细化，进一步限定了国家发改委在执法过程中对企业进行减免的自由裁量权，从而明确了企业的积极性与承担责任大小直接的直接关系。

This regulation provides detailed rules for the application of the Leniency Policy, which further restricts the discretion of the NDRC in enforcing the law and clarifies the relationship between the proactive attitude of business operators and their legal liabilities.

（三） 对宽恕政策的恶意应用

C. Abuse of the Leniency Policy

宽恕政策的存在可能会引发恶意组织卡特尔打击竞争对手问题，即一企业或会主动联络竞争对手，牵头组织达成并实施垄断协议，并在事后向反垄断执法机构举报，使除其自身外的其他企业得到处罚，以此达到打击竞争对手的目的。此种行为即为对宽恕政策的恶意应用。这种行为直接打击竞争者，损害正常的竞争秩序。因此，实践中需要对此类企业进行甄别，以打击不正当竞争行为。

The Leniency Policy could be used to attack competitors by organizing cartels, i.e. a corporation takes the lead in organizing its competitors to reach and implement a monopoly agreement and later reports to AML enforcement authorities proactively to get exemption under the Leniency Policy while its competitors get punished. This is an abuse of the Leniency Policy. It is a direct stroke to competitors and is harmful to the fair competition. Therefore, it is necessary to distinguish this kind of corporations in practice.

关于此问题，国家工商行政管理总局于 2009 年颁布的《工商行政管理机关查处垄断协议、滥用市场支配地位案件程序规定》中规定，对垄断协

To tackle this problem, the State Administration for Industry and Commerce has stated in the *Provisions on the Procedures for the Administrative Organs for Industry and Commerce to Investigate*

议的组织者，不适用宽恕政策。然而，根据《规定》第十四条可以看出，国家发改委采用宽恕政策减免企业的违法责任时，并未特别指出若被减免企业是核心卡特尔的组织者的情况下该如何操作。本案中，国家发改委未明确说明被免除处罚的三家奶粉企业是否是该纵向垄断协议的组织者的情形。此问题亟待国家发改委做出进一步解释。

Cases Concerning Monopoly Agreement and Abuses of Dominant Market Positions that the Leniency Policy is not applicable to the organizers of monopoly agreements. However, as indicated by Article 14 of the Regulation, the NDRC have not clarified as to how to deal with it when the exempted operator(s) is the organizer of core cartels. In this case, the NDRC have not clarified as to whether it had taken this situation into consideration when deciding as to whether to exempt these three milk powder manufacturers. This problem requires a further clarification by the NDRC.

因此，企业应预防被卷入竞争对手恶意组织的卡特尔。如有发生，可主动向反垄断执法机构报告此类恶意行为，避免不正当竞争危害自身利益。

Therefore, corporations should protect themselves from being involved into such maliciously organized cartels. If being investigated, they could disclose this malicious behavior to AML enforcement authorities.

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