

## NDRC Fined Unilever For Making Advanced Price Increase Announcements

On May 6, 2011, China's National Development and Reform Commission ("NDRC"), the agency responsible for enforcement of the Price Law and price-related conduct under the Anti-Monopoly Law (the "AML"), announced that Unilever had violated the Price Law by publicly announcing its intention to increase prices.<sup>1</sup> NDRC fined Unilever RMB 2 million (~\$308,000, €12,000), the largest fine imposed by NDRC for a violation of the Price Law. Interestingly, though NDRC found that Unilever had attempted to coordinate prices with competitors, it did not invoke the AML. NDRC took no action against three other companies (Proctor & Gamble, Liby and Nice) that announced price increases, perhaps because Unilever gave greater prominence to its announcement by means of press interviews.

Separately, in response to recent increases in commodity prices, NDRC held talks with 17 industry associations and asked delegates to comply with the government's request to keep prices stable. On May 6, 2011, NDRC called in representatives from six foreign dairy producers for talks about their pricing and production after they reportedly raised prices by an average of 20%.

NDRC's response to recent price increases illustrates the continuing tension between China's application of antitrust principles in a free market economy and more traditional State control of the economy. In particular, NDRC is willing to use its powers under the Price Law to encourage or even force domestic and multinational companies to maintain price "discipline" in ways that appear inconsistent with antitrust principles.

### **I. BACKGROUND**

In March 2011, several major manufacturers of household and personal care goods in China, including Proctor & Gamble, Unilever, Liby and Nice, separately and publicly announced an intention to increase the prices of their respective products by approximately

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<sup>1</sup> A copy of the decision (in Chinese) is available at: [http://jjs.ndrc.gov.cn/gzdt/t20110506\\_410563.htm](http://jjs.ndrc.gov.cn/gzdt/t20110506_410563.htm).

10% from early April 2011 due to the rising cost of raw materials. According to press reports, alarmed by surging inflation, Chinese consumers in several cities cleared supermarket shelves of shampoos, soaps and detergents shortly after the announcements. On April 1, 2011, in response to NDRC's request, Unilever announced its decision to cancel its plan to increase prices and apologized.

## II. NDRC'S DECISION

According to NDRC, the announcement of Unilever's price increase induced panic among Chinese consumers, leading to the hoarding of consumer goods in several Chinese cities. NDRC determined that Unilever's conduct seriously distorted market order and violated the Price Law, which prohibits businesses from engaging in unfair pricing by fabricating and spreading information about price increases, excessively increasing prices or causing commodity prices to increase excessively.<sup>2</sup>

In addition, NDRC stressed that Unilever's spokesperson, in several interviews with Chinese newspapers, mentioned that because the Chinese market for household and personal care goods is highly competitive and Chinese consumers are very price sensitive, prices must be increased gradually so competitors' responses could be monitored.<sup>3</sup> As a result of these statements, NDRC determined that Unilever attempted to coordinate prices among its competitors in an effort to collectively increase prices.<sup>4</sup> NDRC further noted that such price signaling can induce price increases by competitors.<sup>5</sup>

Pursuant to administrative measures under the Price Law, in the absence of illegal gains, a company can be fined up to RMB 3 million for offenses such as Unilever's.<sup>6</sup> Because Unilever suspended its plan to increase prices and made a public apology, NDRC decided not to impose the maximum fine.

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<sup>2</sup> Price Law, Art. 14(3).

<sup>3</sup> See NDRC's response to the press regarding its decision (in Chinese), available at: [http://jjs.ndrc.gov.cn/gzdt/t20110506\\_410562.htm](http://jjs.ndrc.gov.cn/gzdt/t20110506_410562.htm)

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

<sup>6</sup> Provisions on Administrative Punishment for Illegal Pricing Conduct, Art. 6. If the company has received illegal gains, it could be subject to a fine of up to five times its illegal gains.

Interestingly, NDRC did not invoke the AML.<sup>7</sup> It is possible that the agency relied on the Price Law to avoid the AML's higher burden of proof to establish the existence of "concerted practices." Pursuant to NDRC's guidelines, to determine whether practices are in fact "concerted," NDRC will consider the degree of consistency in the relevant companies' behavior, whether there has been communication of intent between the undertakings, the structure of the relevant market, and changes in the market.<sup>8</sup> In addition, since Unilever and other companies cancelled their price increases, the maximum fine under the AML would have been RMB 500,000,<sup>9</sup> much less than the RMB 2 million fine NDRC imposed under the Price Law.

### III. CONCLUSION

While NDRC imposed a record fine on Unilever, it has not taken any action against three other companies (Proctor & Gamble, Liby and Nice) that also announced price increases. As these companies did not conduct press interviews regarding their announcements, NDRC may have been particularly concerned about the public reaction to Unilever's more widely publicized announcements.

NDRC's recent behavior, including holding talks with industry associations and requesting delegates to keep prices stable, as well as calling in foreign dairy producers who reportedly ignored the government's request to keep prices stable, reveals the tension between the agency's longstanding role as a price regulator and economic planner and its new role as an antitrust enforcer. Companies operating in China must remain mindful that Chinese agencies are prepared to use an unconventional set of tools and policies to regulate prices in ways inconsistent with generally accepted antitrust principles.

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If you have any questions, please feel free to contact any of your regular contacts at the firm or any of our partners and counsel listed under Antitrust and Competition in the "Practices" section of our website at <http://www.clearygottlieb.com>.

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<sup>7</sup> Concerted practices are prohibited under Article 13 of the AML.

<sup>8</sup> See Anti-Pricing Monopoly Rules, Art. 6. See also our previous alert memo on the Anti-Pricing Monopoly Rules, available at: [http://www.cgsh.com/chinas\\_ndrc\\_issues\\_new\\_rules\\_and\\_announces\\_a\\_new\\_price\\_cartel\\_investigation\\_under\\_aml/](http://www.cgsh.com/chinas_ndrc_issues_new_rules_and_announces_a_new_price_cartel_investigation_under_aml/)

<sup>9</sup> AML, Art. 46.



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