

Antitrust

NDRC's Price Antitrust Investigation against Baby Formula Producers

On June 27, 2013, Biostime announced that its wholly-owned subsidiary, Biostime Guangzhou, was suspected in violation of Article 14 of the PRC Anti-monopoly Law (the "AML") for its management of distributors' and end-retailers' sale prices, and was under the investigation of the National Development and Reform Commission (the "NDRC"). This investigation of the baby formula maker drew the attention of the public. Subsequently, in early July, the media obtained the confirmation from the NDRC's Price Supervision and Antitrust Bureau that the bureau was conducting price antitrust investigation of several baby formula producers, including Biostime, Dumex, Mead Johnson, Wyeth, Abbott, Friso, etc.

On August 7, the NDRC announced the penalty action against the baby formula producers: Biostime shall be fined 6% of its last-year revenue, which amounts to approximately RMB 160 million, for its severe violation of law and failure to rectify actively; Mead Johnson shall be fined 4% of its last-year revenue, which amounts to approximately RMB 200 million; Dumex, Abbott, Friso, Fonterra each shall be fined 3% of their last-year revenues, which amounts to approximately RMB 4 million to RMB 170

million. Wyeth, Beingmate and Meiji were exempted from penalties because they provided important evidence in the investigation.

The aforesaid companies all proposed the following rectification actions: (1) stopping the unlawful acts immediately; (2) amending their distribution agreements, sales policies and business policies immediately in accordance of Chinese laws; (3) rectifying their distribution systems, providing antitrust training to employees to ensure that employee behaviors be in line with Chinese laws; (4) taking practical actions to eliminate consequences of the past violations and to provide consumers with real benefits.

By August 19, the six companies involved in the baby formula price monopoly, namely Biostime, Mead Johnson, Dumex, Abbott, Friso, Fonterra, have already submitted their fines in the total amount of RMB 668.73 million to the state treasury, i.e. the designated account of the Ministry of Finance. The six companies confirmed that they would not file administrative reconsideration application or administrative litigation.¹

¹ http://www.eupeople.com.cn/yw/20130702_2419.html

Similar to the NDRC's previous actions against Moutai and Wuliangye, this investigation focused on producers' resale price maintenance imposed on distributors, i.e. vertical price monopoly. According to Article 14 of the AML, such restraints include fixing resale price or minimum resale price maintenance ("RPM"). Since the AML took effect, there has been much discussion over the application of Article 14, i.e. whether the implementation of such acts is unlawful (the "per se unlawful" principle) or whether such implementation shall be condemned only when it brings anticompetitive effects under the AML (the "rule of reason"). Moreover, the feasibility of application of exemptions under Article 15 of the AML to such acts is also an issue of public concern. Although those debates have brought no conclusion, according to the media, the reasons why the baby formula industry invited the NDRC's attention and received the penalties include: (1) the prices of the involved products were relatively high in the Chinese market; (2) the degree of price increase has been significant since 2008²; (3) the gross profit margin is relatively high and the distribution channel pushed for a high price,³ (4) although the tariff and costs were lowered, the trend of price increase is still irreversible⁴,

² http://www.europepeople.com.cn/yw/20130702_2419.html
<http://money.163.com/13/0807/10/95LVJ5HB002526O3.html>

³ See "Antitrust Investigation against Multiple Foreign Baby Formula Brands including Dumex and Wyeth Confirmed", Guo Mengyi, Daily Economic News, July 2, 2013.

⁴ The Ministry of Finance announced in December 2011 that starting from 2012, the tariff on 730 products, including baby formula products, would be reduced resulting in an average tariff rate of 4.4%. (See http://gz.ifeng.com/lvyoujingdian/detail_2012_04/12/181973_0.shtml).

According to public information, from the 2008 Melamine Scandal up to now, the price increase of imported baby formula products has been significant with an average ratio over 60%. For the same volume of products, the prices of several brands sold in China have been over twice as much as the same brands sold in overseas markets. When interviewed by the Daily Economic News, Song Liang, an expert of dairy industry, said that the trend in price climbing

etc. Even reviewed under the rule of reason, due to the characteristics of the dairy industry, it is difficult to prove various potential defenses, such as that the RPM act would not restrain competition, it has justifications for exemption, it would not severely restrain market competition and may allow consumers to share the benefits from the relevant act, etc. Therefore, while all industries shall avoid the violation of AML, the industries with characteristics similar to the aforesaid should pay particular attention to this issue.

With regard to the investigation method, this investigation is the first time that the NDRC conducted price antitrust investigation on the price increase in baby formula industry, although it took a mild approach of interview toward such act in 2011 and 2012.⁵ Compared to other administrative penalties, the antitrust punishment is more severe. The punishments for monopoly agreement include the order to stop unlawful conduct, confiscation of illegal gains and a fine between 1% and 10% of the last-year revenue.

As to current law enforcement, the AML and relevant regulations of the NDRC (e.g. the Anti-price-monopoly Regulation, Anti-price-monopoly Law Enforcement Procedures Regulation, the Regulation on

is due to consumers' loss of confidence in domestic baby formula and the environment in the dairy industry. "Some baby formula makers argued that the price increase was due to the increase in costs and the change in formulas. However, with regard to the cost, the price of large-package baby formula has kept dropping along with increase in global supply of dairy products since 2012," shown to the journalist by Song Liang after rough calculation (see footnote 2).

⁵ In May 2011, the NDRC's Price Division convened the manufactures such as Abbott, Dumex, Wyeth, Nestle, Mead Johnson, Ausnutria to get information about the importation, quantity, price and production of dairy products. Domestic baby formula makers temporarily did not receive interview notices. See:

<http://www.caijing.com.cn/2011-05-09/110713099.html>.
In April 2012, relevant authorities interviewed 17 industry associations including the dairy industry association to ensure overall stability of prices. See: <http://news.hexun.com/2012-04-12/140326289.html>.

Evidence in Price-related Administrative Penalty, etc.) have formed an initial system of rules of price-related antitrust investigation.

As to the private parties, since major Western countries have experienced a relatively long history of antitrust law evolution, foreign enterprises have usually built up a system on how to avoid antitrust law violation and to respond to government investigation, such as internal training of Dos & Don'ts in relation to antitrust law, training about Dawn Raids, etc. Domestic enterprises need to attach more importance to trainings on antitrust compliance and cooperation with government investigation. For example, according to relevant media, since May, the NDRC's Price Supervision and Antitrust Bureau has dispatched 26 investigation teams with over 300 persons/times to conduct formal investigations in relevant companies. Some companies deliberately concealed information or provided false information, bringing great difficulty to law enforcement.⁶ As shown in the NDRC penalty decisions, the company's cooperation with investigation is taken into consideration when the NDRC makes its penalty decisions. For example, in this investigation, Wyeth, Beingmate and Meiji were exempted from penalty because they took initiative to report relevant situations about their monopoly agreements and provided important evidence to the NDRC.⁷ Other relevant companies involved in the investigation adopted measures such as price reduction, undertaking not to increase prices, etc.

In addition, a comprehensive training at a company's headquarters level to the branches level is also important. For example, the NDRC

and provincial Development and Reform Commissions (the "DRCs") may authorize DRCs of a lower level to conduct the price antitrust investigation, and there remains the possibility of simultaneous investigations on the company's branches in various places by the DRCs of different levels and in different places. Considering that distribution agreements and policies involve company staff and distributors in different places, the company should ensure that both its headquarters and branches acquire a sufficient understanding of the AML, for purpose of facilitating company compliance and cooperation with the investigation to receive a penalty exemption or lesser penalty.

It is worth mentioning that the vertical monopoly agreement is always a thorny issue because its competitive effects have two facets.⁸ According to Article 14 of the AML, it is relatively easy to identify a vertical price monopoly act. The illegality of the following acts mentioned by the NDRC is relatively evident: "punitive and restrictive measures such as contract agreement, direct fine, fine in a disguised form, rebate reduction, supply limit, supply cessation, etc.; once downstream operators do not sell in accordance with the prices set by the company or with the minimum prices maintained, they would be punished"⁹. But whether other non-price restrictive acts in vertical agreements, which are not expressly specified, would constitute an antitrust violation as a vertical issue, merits further consideration and judgment. For example, the Shanghai Higher People's Court pointed out in its

⁶ <http://www.chinanews.com/gn/2013/08-07/5133697.shtml>, <http://roll.sohu.com/20130808/n383646631.shtml>

⁷ See also the Company Announcement of Beingmate: <http://finance.chinanews.com/stock/2013/08-07/5133620.shtml>

⁸ See General Theory of the EU Competition Law, Xu Guanyao, pp. 269, 273: Vertical agreements could cause adverse effects such as increasing entry barriers, diminishing intrabrand competition, etc.; meanwhile, however, "apart from horizontal agreements such as price cartel, vertical agreements usually create some positive effects, particularly promoting non-price competition and improving services."

⁹ <http://money.163.com/13/0807/10/95LVJ5HB002526O3.html>

appellate decision for the Rainbow v. Johnson & Johnson case that if the manufacturer has a strong market position in a market with insufficient competition, distributors will have a highly limited space for price competition after the manufacturer takes restrictive measures such as exclusive distribution, territorial limitation, customer deployment, short-term

contractual arrangements, etc. In that case, even if the manufacturer does not require minimum resale price maintenance, restraining effect on price may still occur.¹⁰

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<http://www.hshfy.sh.cn:8081/flws/text.jsp?pa=ad3N4aD01JnRhaD2jqDIwMTKjqbumuN/D8cj9KNaqKdbV19a12jYzusUmd3o9z>

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反垄断法律热点问题

国家发改委对奶粉企业进行价格反垄断调查

2013年6月27日，随着合生元发表公告称，其全资附属公司广州合生元因针对其经销商及终端零售商销售产品的市场销售价格进行管理，可能涉嫌违反《中华人民共和国反垄断法》（以下简称“《反垄断法》”）第14条的规定，正在接受国家发改委的调查，国家发改委对奶粉企业的价格反垄断调查引起了公众的关注。随后，媒体于7月初自国家发改委价格监督检查与反垄断局得到证实，该局正在对合生元、多美滋、美赞臣、惠氏、雅培、富仕兰（美素佳儿）等奶粉企业进行价格反垄断调查。

8月7日，国家发改委公布了对上述奶粉企业的处罚结果：合生元因严重违法、不积极整改，被处以上年销售额6%的罚款，约人民币1.6亿元；美赞臣被处以上年销售额4%、约人民币2亿元的罚款；多美滋、雅培、富仕兰、恒天然均处以上年销售额3%的罚款，约人民币1.7亿元至0.04亿元不等。提供重要证据的惠氏、贝因美、明治公司免于处罚。

上述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。

截至到8月19日，合生元、美赞臣、多美滋、雅培、富仕兰（美素佳儿）、恒天然等六家乳粉价格垄断

案涉案企业，已将罚款6.6873亿元人民币汇入财政部指定物价罚没收入账户，全部上缴中央国库。上述六家企业均明确表示不申请行政复议和提起行政诉讼。¹

与国家发改委之前对于茅台和五粮液的调查类似，本次调查针对生产厂商限制经销商转售价格的行为，即纵向价格垄断。根据《反垄断法》第14条的规定，该限制包括固定转售价格和固定最低转售价格。自《反垄断法》生效以来，实践中存在着对于该条规定适用的争论，即是否实施该行为即构成违法（“本身违法原则”），还是在实施该行为且达成了《反垄断法》所规定的排除和限制竞争的效果才构成违法（“合理原则”）。此外，对于该行为适用《反垄断法》第15条所规定的豁免理由的可行性也是人们所关注的问题。尽管上述争论仍无最终定论，但从媒体披露的情况来看，奶粉行业引起国家发改委关注并处罚的因素可能包括：（1）所涉产品在中国市场价格偏高；（2）自2008年以来涨价幅度较大²；（3）毛利率水平较高、流通环节对价格的推高³；（4）尽管存在关税降低和成本

¹ http://www.eupeople.com.cn/yw/20130702_2419.html
<http://money.163.com/13/0807/10/95LVJ5HB00252603.html>
http://money.163.com/13/0825/15/974PSK2K00252603.html#from=money_index

² http://www.eupeople.com.cn/yw/20130702_2419.html
<http://money.163.com/13/0807/10/95LVJ5HB00252603.html>

³ 2013年07月02日 郭梦仪 每日经济新闻 《多美滋惠氏等多个洋奶粉品牌证实遭反垄断调查》

降低情况，但涨价趋势依然难以逆转⁴等。由于此类行业的特点，即使采用合理原则进行分析，也很难论证包括限制转售行为不会排除和限制竞争、以及该行为具有合理的豁免理由、不会严重限制相关市场的竞争、并且能够使消费者分享由此产生的利益等可能的抗辩理由。因此，尽管各行业均应避免对《反垄断法》的违反，但对于具有上述特点的行业而言，更应当加以特别注意。

从本次调查方式来看，对于奶粉行业涨价问题，2011年、2012年时国家发改委采用了较为温和的约谈方式⁵，而本次调查则是首次对价格反垄断行为进行调查。相对于其他行政处罚，反垄断的处罚力度更大，对于垄断协议的处罚包括责令停止违法行为，没收违法所得，并处上一年度销售额1%以上10%以下的罚款。

目前，从执法机构层面，《反垄断法》及国家发改委的相关配套立法（例如，反价格垄断规定、反价格垄断行政执法程序规定、价格行政处罚证据规定等）对于价格反垄断调查的规定已经初步形成体系。

从行政相对人层面，由于西方主要国家反垄断法发展历史较长，境外企业往往已经建立如何避免反垄断违法及应对政府调查的体系，例如，企业内部反垄断法合规性（Do and Don't）培训，对于黎明突袭检查（Dawn Raids）的培训等。而国内企业对于

⁴ 2011年12月，财政部宣布从2012年开始降低包括婴幼儿配方奶粉在内的730类产品的关税，平均税率仅为4.4%（见http://gz.ifeng.com/lvyoujingdian/detail_2012_04/12/181973_0.shtml）

公开资料显示，从2008年“三聚氰胺事件”到现在，进口奶粉平均涨价幅度已经超过60%，其中有多款相同品牌、容量的进口奶粉国内外价差已超过两倍。奶业专家宋亮在接受《每日经济新闻》记者采访时说，愈演愈烈的涨价潮是消费者对国内奶粉的信心丧失和奶粉行业环境导致的。“对于产品价格上调，曾有奶粉企业将其归咎于成本上涨以及配方的更换。然而，从成本上看，2012年以来，随全球市场乳制品供应量增加，作为婴幼儿奶粉原料的大包装奶粉价格是一直在下降的。”宋亮向记者简单测算后表示。（见上文脚注2）

⁵ 2011年5月，发改委价格司召集了雅培、多美滋、惠氏、雀巢、美赞臣、澳优生产商开会，了解乳品进口、数量、价格、生产等情况。国产奶粉生产商暂时未收到约谈通知。（见

<http://www.caijing.com.cn/2011-05-09/110713099.html>）

2012年4月，为了确保价格总体稳定，国家有关部门近日约谈了包括奶业在内的等17家行业协会。

<http://news.hexun.com/2012-04-12/140326289.html>

反垄断法合规性以及政府调查的配合工作的培训方面，则需要加以重视和开展。例如，据有关媒体报道，从5月份开始，国家发改委价格监督检查与反垄断局共派出26个调查小组，300多人陆续到相关企业正式调查，有的企业故意隐匿资料、提供虚假材料，给执法增加了很大困难⁶。从国家发改委的处罚决定中可以看出，处罚时也考虑了企业是否配合调查的因素。例如在本次调查中，惠氏、贝因美、明治公司因在调查中主动向发改委报告达成垄断协议的有关情况、提供重要证据而被免于处罚⁷。也有涉案企业采取了降价、承诺不涨价等措施应对。

此外，企业从总部到分支机构的全面培训也很重要，例如，对于价格垄断行为，国家发改委和省一级发改委可以委托下一级发改委进行调查，不排除各级和各地的发改委同时对于企业各地分支机构进行调查的可能，考虑到经销协议和政策涉及企业各地工作人员和经销商，企业不仅应在总部层面充分理解反垄断法规定，也应使在各地分支机构的人员了解相关规定，以便于企业合规及配合调查以减轻或免于处罚。

值得注意的是，由于纵向约束行为对于竞争影响的两面性⁸，纵向垄断协议一直是垄断协议中的难点问题。由于《反垄断法》第14条的规定，纵向价格垄断行为的认定相对明确，对于国家发改委所提到的“合同约定、直接罚款、变相罚款、扣减返利、限制供货、停止供货等多种惩罚性和约束性措施，一旦下游经营者不按涉案企业规定价格或限定的最低价销售，就会遭到惩罚”⁹等行为，在违法认定上已经比较明显。但对于纵向协议中尚没有明确列举的其他非价格限制行为，其是否可能间接引起纵向价格垄断行为，则将引起进一步的思考和判定。例如，在上海市高级人民法院对锐邦涌和诉强生案的二审

⁶ <http://www.chinanews.com/gn/2013/08-07/5133697.shtml>，<http://roll.sohu.com/20130808/n383646631.shtml>

⁷ 亦可参见贝因美公司公告

<http://finance.chinanews.com/stock/2013/08-07/5133620.shtml>

⁸ 《欧共体竞争法通论》许光耀/著，第269页和273页：纵向协议可能会产生增加市场进入障碍、减弱品牌内部竞争等消极效果；但同时，“与价格卡特尔等横向协议不同，纵向协议往往更能产生一些积极效果，特别是有助于促进非价格竞争和提高服务质量”。

⁹ <http://money.163.com/13/0807/10/95LVJ5HB00252603.html>

判决中指出，在竞争不充分的相关市场已具有很强的市场地位，在采取独家品牌经销、区域限制、客户调配、短期合约安排等多种限制性措施后，经销

商价格竞争空间已十分有限，生产商即使不采取限制最低转售价格措施也可能会产生限制价格的效果。¹⁰

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<http://www.hshfy.sh.cn:8081/flws/text.jsp?pa=ad3N4aD01JnRhaD2jqDIwMTKjqbumuN/D8cj9KNaqKdbV19a12jYzusUmd3o9z>

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