July 2, 2013
Attorney Articles

Written by Peter Corne, Partner, Dorsey & Whitney LLP
& Blake Yang, Associate, Martin Hu and Partners

On June 27, Biostime, a premium manufacturer of pediatric nutrition and baby care products in China, announced through its Hong Kong holding company that subsidiary Biostime, Inc. (Guangzhou) (广州合生元生物制品有限公司) is subject to investigation by China’s National Development and Reform Commission (“NDRC”). The main purpose of the investigation is in relation to an alleged violation of Article 14 of the Anti-Monopoly Law of the People’s Republic of China (“AML”) by Biostime, Inc. (Guangzhou) in managing the market sales prices at which the distributors and retailers sell Biostime products. This announcement caused the stock price of Biostime to fall by 7.55% to HKD 43.5 on June 28.

On July 2, it was also reported by National Business Daily, Beijing Times, and other news media that five foreign infant milk firms including Abbott Laboratories, Mead Johnson Nutrition Co., Nestlé SA, Wyeth Nutrition, and Dumex (a brand of Danone) had also been placed under investigation by the NDRC for alleged antitrust violations in relation to Article 14 of the AML.

By way of background, Article 14 of the Anti-Monopoly Law prohibits business operators from entering into vertical agreements with trading partners that fix the product prices or set minimum sales prices for resale to third parties. A violation of Article 14 may attract heavy penalties including a fine ranging from 1% to 10% of the business operator’s overall sales revenue for the preceding year. Early this year, two famous liquor manufacturers, Moutai and Wuliangye, were fined RMB 247 million and RMB 202 million respectively for violating Article 14 by fixing minimum liquor prices at which their distributors could resell to third parties.

This case is significant because it underlines the more aggressive approach that the NDRC has begun to take to anti-trust law enforcement in respect of matters within its own jurisdiction (in the area of pricing). It builds upon the trend established by the NDRC in the Moutai and Wuliangye cases of investigating resale price maintenance infringements. This also demonstrates a certain confidence in applying the AML (as opposed to Pricing Law and its implementing legislation) that was not in evidence as recently as a couple of years ago, illustrated by the NDRC electing to implement pricing legislation over the AML against Unilever for price signaling.

So what are the potential implications for the future of anti-trust enforcement in China? As the NDRC has become more proactive and gains more experience in this area, we would expect it to expand the scope of its attention beyond resale price maintenance and into other areas of anti-trust related to price, such as price discrimination, price gouging, bid rigging or price signaling. We would also expect the Administration of Industry and Commerce, whose investigatory activity (limited in scope to areas outside of purely pricing) has been relatively low key, to also step up its activity in this area. As suggested by its latest investigations into foreign infant milk formula companies, the NDRC appears to feel confident enough to press ahead with plans to investigate foreign companies. MNCs should prepare by conducting their own internal audits with the help of outside counsel to ascertain the extent of their exposure to risk of enforcement for AML violations.
Dorsey & Whitney LLP and Chinese law firm Martin Hu and Partners share a Special Counsel Relationship, and are contiguously located on the 8th Floor of Kerry Parkside, Shanghai.

© 2013 Dorsey & Whitney LLP. This article is intended for general information purposes only and should not be construed as legal advice or legal opinions on any specific facts or circumstances. An attorney-client relationship is not created or continued by reading this article. Members of the Dorsey & Whitney LLP group issuing this communication will be pleased to provide further information regarding the matters discussed therein.