

Note of Caution: Record Fines on 12 Japanese Auto Parts and Bearing Manufactures
- Analysis of the NDRC's Penalty Decision and Countermeasures of Companies

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Introduction

Within six years of implementation of China's Anti-Monopoly Law, the China's law enforcement agency responsible for supervising price monopoly, the National Development and Reform Commission ("NDRC"), continues to strengthen its law enforcement efforts with rounds of "antitrust storm" that swept across a number of industries and companies along with record fines. This is especially true since 2013, the NDRC has probed into number of high-profile penalty cases, including the *LCD Panel case*², *Moutai and Wuliangye case*³, *Baby Formula case*⁴, *Shanghai Gold Jewelers case*⁵ and *Spectacle Lenses case*⁶. Meanwhile, the NDRC has also launched investigation into the US high-tech giants, *InterDigital* and *Qualcomm*. For *InterDigital* case, the investigation has been suspended⁷. As for *Qualcomm* case⁸, Qualcomm has manifested their willingness to cooperate with the NDRC in its investigation and has submitted relevant commitment.

The "antitrust round up" of the automobile and auto parts industries is undoubtedly the most prominent case recently. Under such high pressure of antitrust law enforcement, a number of major foreign invested automobile manufacturers, including BMW, Benz, Audi, Toyota and Chrysler etc., have recently announced their price cut for auto parts. On August 20, the NDRC has

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² The original Chinese notice issued by NDRC for the *LCD Panel* case is available at: http://jjs.ndrc.gov.cn/gzdt/201301/t20130117_523203.html

³ The original Chinese notice issued by Sichuan Development and Reform Commission and Guizhou Price Bureau for the *Moutai & Wuliangye* case is available at: <http://www.scdrc.gov.cn/dir25/159074.htm> and http://www.gz12358.gov.cn/article.aspx?menuid=2030&tab=tab_News&tabid=48718

⁴ The original Chinese notice issued by NDRC for the *Baby Formula* case is available at: http://xwzx.ndrc.gov.cn/xwfb/201308/t20130807_552992.html

⁵ In August, 2013, the original Chinese notice issued by NDRC for the *Shanghai Gold Jeweler* case is available at: http://jjs.ndrc.gov.cn/gzdt/201308/t20130813_553441.html

⁶ On 28 May, 2014, the original Chinese notice issued by NDRC for the *Spectacle Lenses* case is available at: http://www.ndrc.gov.cn/xwzx/xwfb/201405/t20140529_613554.html

⁷ In May, 2013, the original Chinese notice issued by NDRC for the *IDC* case is available at: http://www.ndrc.gov.cn/gzdt/201405/t20140522_612466.html

⁸ On 22 August, 2014, the rectification measures proposed by Qualcomm to the NDRC is available at: http://www.ndrc.gov.cn/gzdt/201408/t20140822_623269.html

announced its punishment of 12 Japanese auto parts and bearing companies who engaged in price related monopolistic behaviour⁹. Eight auto parts manufacturers are imposed fines totaling RMB 831.96 million (approximately USD 135.50 million), although Hitachi is exempted of the penalty. Four bearing manufacturers are imposed fines totaling RMB 403.44 million (approximately USD 65.70 million), although Nachi-Fujikoshi is exempted of the penalty. The combined amount of the fines reaches RMB 1.24 billion (approximately USD 200 million), setting up another record in China's Anti-Monopoly Law's enforcement.

This article will analyze the train of thought and trends of the NDRC's anti-monopoly law enforcement, application of leniency program, impact of actions of the companies (including responses to investigations and illegal conducts) on the amount of the fines, and suggestions for relevant companies in dealing with antitrust investigation.

The Monopolistic Behaviour of the 12 Japanese Companies

I. Monopolistic Behaviour of the Eight Auto Parts Manufacturers

According to the public announcement of the NDRC, from January 2000 through February 2010, eight auto parts manufacturers including Hitachi, Denso, Furukawa Electric, Yazaki, Sumitomo, Asian Industry, Mitsuba and Mitsubishi frequently held meetings in Japan. The purpose of the meetings was to negotiate price quotations to minimize competition so as to win car parts contracts at the most advantageous price from automobile manufacturers. They reached agreements on price quotation on multiple occasions and acted accordingly. The price negotiations involved 13 products (starters, alternating current generators, throttle bodies and wire harnesses, etc) that were sold in China. The parts and components were used in more than 20 models of cars made by companies including Honda, Toyota, Nissan, Suzuki and Ford. Until the end of 2013, the eight car parts manufacturers continued to supply related car parts in accordance with collusion agreements in Chinese market.

II. Monopolistic Behaviour of the Four Bearing Manufacturers

From 2000 to June 2011, Nachi-Fujikoshi, NSK, NTN and JTEKT had held a number of meetings both in Japan and Shanghai. The meetings were held to discuss price increase strategies, the timing and range of price increase of bearings in Asian and Chinese market, and the actual implementation of price increase strategies. The four manufacturers increased price of bearing products in China based on pricing information exchanged or collusion reached at these meetings.

The NDRC concludes that these manufacturers had reached price-fixing agreement related to car

⁹ The original Chinese notice issued by the NDRC for this case is available at:
http://jjs.ndrc.gov.cn/gzdt/201408/t20140820_622756.html

parts and bearing. Their illegal conduct lasted for ten years, which is in violation of China's Anti-Monopoly Law by restricting and excluding competition in the relevant market and exerting undue influence on the price of car parts and bearing in China. This has impaired the interests of downstream manufactures and Chinese consumers. The NDRC has listed the amount of fines in detail and the proportion of the fines in relation to the convicted enterprises' annual turnover. The NDRC also provides the relevant basis of reduction and exemption of penalties (please see Table 1 for details).

The Reinforcement of the NDRC's Punishment

In this case, the level of punishment imposed by the NDRC is apparently escalated in two aspects: (a) the absolute amount of the penalties reached a record breaking number and (b) the proportion of penalty to last year's turnover has significantly increased. The 12 auto parts and bearing manufacturers are imposed fines amounting to USD 200 million, which is the highest amount of fines imposed in NDRC's antitrust investigation (more than the total of USD 110 million fine imposed in the *Baby Formula* case and the total of USD 73 million fine imposed in the *Moutai & Wuliangye* case). In terms of the proportion of fine to last year's turnover, in previous cases where the amount of fine set record, the two companies in the *Moutai & Wuliangye* cases received reduced penalties with 1% of last year's turnover; in the *Baby Formula* case, the proportion of penalty to last year's turnover is between 3%-6%; in the *Spectacle Len* case, the proportion of penalty to last year's turnover is between 1%-2%. In this case, however, the proportion of penalty to last year's turnover is between 4% and 8%. Four auto parts manufacturers are given penalty of 8% of last year's turnover. According to the NDRC's announcement, the companies are given higher penalties because of the gravity of their illegal conduct. They have reached price-fixing agreement on many occasions and acted accordingly, which have lasted for more than ten years (please see Table 1 below for details on the penalties imposed).

Car Parts Manufacturers

Investigated companies	Basis of mitigation of punishment	Amount of fine (in million USD)	Proportion of fine to 2013 turnover
Hitachi	The first company that voluntarily reported collusion and provided important evidence	Exempted	-
Denso	The second company that voluntarily reported collusion and provided important evidence	24.52	4%
Furukawa	Reached price fixing agreements on only one product	5.63	6%
Yazaki	Reached price fixing agreements on only one product	39.26	6%
Sumitomo	Reached price fixing agreements on only one product	47.30	6%
Asian	Reached price fixing agreements on more than two products	4.85	8%
Mitsuba	Reached price fixing agreements on more than two products	6.63	8%
Mitsubishi Electric	Reached price fixing agreements on more than two products	7.31	8%
Subtotal		135.50	

Car Bearings Manufacturers

Investigated companies	Basis of mitigation of punishment	Amount of fine (in million USD)	Proportion of fine to 2013 turnover
Nachi-Fujikoshi	The first company that voluntarily reported collusion and provided important evidence	Exempted	-
NSK	The second company that voluntarily reported and provided all the Chinese market-related evidence and sales figures	28.49	4%
NTN	Exited Asian research meeting in September, 2006 but continued to participate in export market meeting in China	19.41	6%
JTEKT	Proposed to hold export market meeting specifically targeting the Chinese market	17.80	8%
Subtotal		65.70	
Total		201.20	

(Table 1: Summary chart of punishment imposed on 12 Japanese car parts and bearing manufacturers, based on the NDRC's public announcement.)

Leniency Program Has Been Explicitly Applied for the First Time, and Exemption/Reduction of Punishment is Granted based on the Order of Leniency Application

The leniency program is stipulated in Article 46 of the Anti-Monopoly Law, which provides that “where any undertaking voluntarily reports the conditions on reaching the monopoly agreement and provides important evidence to the anti-monopoly authority, it may be imposed a mitigated punishment or exempted from punishment as the case may be.” The leniency program, as used in U.S. and E.U. practice, is usually applied in horizontal agreements since its purpose is to encourage cartel members to surrender information and further expose other members. In *Baby Formula* case, leniency program is applied to three companies, which are exempted of penalties. In *Spectacle Lenses* case, leniency program is applied to two companies, which are exempted of penalties. It should be noted that the *Baby Formula* case and the *Spectacle Lenses* case are both vertical monopoly cases in which the grants of amnesty to reporters who also provide important evidence are not, strictly speaking, how leniency program is usually applied. This case, however, is the first horizontal case where leniency program is applied, demonstrating more transparent and stringent application of leniency program.

According to NDRC’s *Procedural Regulations on the Administrative Enforcement of the Regulations on Anti-monopolistic Pricing Practices* (the “*Procedural Regulations*”), punishment may be mitigated by various degrees depending on the time order of reporting (please see Table 2 below).As the first horizontal case to which leniency program is applied, the NDRC specifies the timing order of their voluntary reporting and grants reduction and exemption of penalties in accordance with the *Procedural Regulations*. Hitachi and Nachi-Fujikoshi are exempted of penalties as the first in auto parts manufacturers and bearing manufacturers respectively to report collusion and provide important evidence. In comparison, Denso and NSK, as the second ones to report and provide important evidence, are merely given reduction of penalties (4% of last year’s turnover).

Order of Reporting	Degree of Mitigation of Punishment
First to Report	100%
Second to Report	More than 50%
Others	Less than 50%

(Table 2: based on Article 14 of the *Procedural Regulation*)

The NDRC makes clear distinction among the companies in deciding the amount of fines according to their order of voluntary reporting and evidence provision, which serves as a positive guidance to the companies in considering leniency application. In contrast to the vertical *Baby Formula* case and the *Spectacle Lenses* case, the NDRC in this case only takes the order of

voluntary reporting into account in application of leniency program and does not include considerations such as cooperative attitude in investigation and/or rectification, which specifies the vital importance of order of voluntary reporting in horizontal cases. Besides, in the *Baby Formula* case and the *Spectacle Lenses* case, the companies exempted of fines all reported after the investigation had been launched, while in this case, four companies, identified as leniency applicants, reported violations before the NDRC's initiation of investigation. This indicates more strict application of the leniency program by the NDRC.

In light of the all above, with the development of China's anti-monopoly law enforcement, the NDRC is becoming more stringent and prudent in its antitrust investigation and presenting a more advanced level of law enforcement. It is expected that in the future, more antitrust investigation triggered by whistle-blowers will emerge. Companies that engage in monopolistic conduct shall make their best effort to secure their first place as leniency applicant in order to have possible guarantee of exemption of punishment.

Main Factors Considered by the NDRC in Deciding Penalties

In addition to granting leniency to companies based on their voluntary reporting and importance of evidence provided, the NDRC would consider the nature, gravity and duration of illegal conduct in determining the specific amount of fines.

In this case, the NDRC imposed heavier punishment on account of the gravity of the conduct, which lasted for ten years. However, it has been only six years since the introduction of the Anti-Monopoly Law. It seems to be overly harsh to identify conducts occurred before the implementation of AML as illegal under the principle of non-retroactivity of law.

In this case, different treatment is given based on the nature and gravity of the illegal conduct: (1) JTEKT is given the heaviest punishment among the bearing manufacturers (8% of last year's turnover) because it proposed to hold export meeting that specifically targeted the Chinese market, which directly affects the Chinese market and is of great gravity. (2) Three auto parts manufacturers (Asian, Mitsuba and Mitsubishi Electric) are imposed penalties of 8% of last year's turnover because they have reached price-fixing agreements on more than two products. By contrast, the other three auto parts manufacturers (Yazaki, Furukawa Electric and Sumitomo) receive less harsh punishment (6% of last year's turnover) since they only reached price-fixing agreement on one product.

NDRC is Keeping Up with International Antitrust Investigation and International Cooperation of Antitrust Investigation is being Reinforced.

The companies penalized in this case have already being investigated in other countries, and most of them have been punished in other countries. This is the second case since the *LCD Panel* case where investigation and punishment handed out by NDRC to target companies that had already being investigated and penalized in other countries. It is also the second case where penalties are given to foreign companies whose major illegal conduct occurred outside of China.

In September, 2012, the Department of Justice of the United States has imposed fines up to USD 745 million on nine companies and their senior management for price-fixing agreement, including Hitachi, JTEKT, Mistuba, Mitsubishi Electric, NSK, Mitsubishi Heavy Industries, T.RAD, Valeo and Toyo Rubber. Last July, Yazaki, Leoni, Yazaki's European subsidiary, Sumitomo and Furukawa Electric were given a total fine of EUR 142 million in European Commission's investigation into their price-fixing (Sumitomo is the amnesty reporter and is exempted of fines). Later afterwards, auto parts suppliers NFC, NSK and NTN confess to the European Commission about their conspiracy in setting up a bearing cartel. This June, NSK, Nachi-Fujikoshi and JTEKT were penalized for their cartel in Australia.

Above all, the NDRC is closely monitoring and following the trend in international antitrust law enforcement and its coordination with competition authorities in other jurisdictions (especially those in US, EU, Japan and Korea) are being reinforced. It is expected that there will be more investigations into companies that have been investigated in other countries. For such cases, relative easiness in law enforcement and evidence collection enables the NDRC to have more confidence in identification of facts and application of relevant laws. Therefore, companies that are involved in international monopolistic behaviour, especially those already being investigated in other countries are urged to take responsibility for their conduct, to take appropriate actions and to report to the NDRC timely if necessary. Multinational companies should be alerted that their monopolistic conduct will be supervised by the Chinese competition authority as long as there is direct or indirect impact on the Chinese market, even if the conduct occurred outside of China. The possibility that the NDRC will take initiative in pursuing such illegal conduct cannot be ruled out either.

Conclusion and Suggestions for the Companies

This record penalty decision demonstrates NDRC's determination to intensify its antitrust law enforcement. Six years since the implementation of AML, the NDRC has taken more active and aggressive approach targeting a wider range in industries. This case will not be the finishing line, but merely a starting line that directs enforcement to areas closely related to the people's

livelihood, which have always been under its antitrust radar, such as petroleum, health care, telecommunication, pharmaceuticals, automotive, banks and consumer goods.

It is worth mentioning that, the NDRC has indicated in its announcement that it will conduct further investigation following the leads uncovered in this case. Thus, the relevant companies should pay special attention to their possible monopolistic conduct related to this case or other auto parts and take necessary actions in a timely manner. They are strongly encouraged to report to the NDRC as early as possible in order to obtain exemption and reduction of fines.

The NDRC has adopted more stringent and definitive approach in application of leniency program. The NDRC has placed the leniency applicants in order and granted them exemption and reduction of fines accordingly. Companies need to seek professional advice in making leniency applications as to set up appropriate strategies in securing its first place by submitting the most important evidence to the NDRC within a short period of time and cooperating with the NDRC in its investigation.

The current heated antitrust law enforcement has posed unprecedented compliance challenges to all types of companies including foreign, domestic and even state-owned companies. Companies are suggested to take the following proactive measures to control and minimize risks associated with antitrust compliance:

- (1) Companies should conduct internal antitrust audit to inspect and evaluate potential antitrust risk with the assistance of external counsel. It's also advisable to provide up-to-date and tailored antitrust trainings for senior management and employees, promote awareness of antitrust compliance.
- (2) For companies that are already found to be in potential violation of AML, it is recommended to voluntarily report to antitrust law enforcement agencies as soon as possible and to take rectification after seeking professional advice. Rectification measures may cover rectified sales policy and sales agreement that involves price-fixing and correction of conducts of price-fixing and collusive bidding, etc. Such measures shall be sufficient to maintain competition in the market and benefit the consumers.
- (3) Companies that have been dawn-raided by the antitrust law enforcement agencies should cope with the investigation appropriately, defend its legitimate interest and be proactive depending on the situation (e.g. propose defense regarding the gravity of the conduct and calculation of fines). In this case, Sumitomo has submitted written defense within one week of its receipt of the Prior-Notice of Administrative Penalty issued by NDRC. The defense addresses the

miscalculation of turnover of joint venture that is involved. The NDRC has accepted its defense and granted a reduction of RMB 52.32 million in its fine¹⁰. It can be seen that proactive approach and proposal of defense could help the companies avoid or mitigate penalties.

¹⁰ Please see news report by Xinhua Net, China's Antitrust Protects Companies' Right to Defense, Sumitomo Is Granted A Reduction of 50 Million in Its Fines Having Raised Defense
http://news.xinhuanet.com/world/2014-08/21/c_126897947.htm