Better Late Than Never:
NDRC Publishes Full Decisions on Zhejiang Car Insurance Cartel Case
– Analysis of NDRC’s Antitrust Law Enforcement Approach

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Introduction

Less than 2 weeks after the record fine (USD 200 million) in the *Japanese Auto Parts and Bearing Manufacturers* case that shocked the auto parts industry, on 2 September 2014, the Chinese price monopoly regulator, NDRC released its decisions to impose combined fines of RMB 110 million (USD 17.89 million) on 23 property insurance companies and a local trade association in Zhejiang province for their price fixing in relation to car insurance. Among the companies involved in the case, one company is fully exempted and two other are granted significant reduction of the fines. Investigations into the Zhejiang branches of other nine insurance companies were terminated because those nine companies had not fixed prices or reached monopoly agreements.

Although the decisions were released after the *Japanese Auto Parts and Bearing Manufacturers* case, the car insurance case was closed far before that case. The penalty decisions were actually dated on 30 December 2013.

In particular, for the first time since the implementation of the Anti-Monopoly Law of China in August 2008, the NDRC published all its penalty decisions related to the *Zhejiang Insurance Industry* case against the Zhejiang branches of 22 property insurance companies (including some leading Chinese insurers, such as China Life, Ping An Insurance, China Pacific Insurance and other Chinese insurers) and a trade association in Zhejiang province, and its penalty exemption decision for PICC Zhejiang branch. Prior to this case, NDRC used to announce its decisions in the concise form of press release without disclosing detailed information. In contrast, another competition enforcer in charge of non-price-related monopoly, the State Administration for Industry and Commerce has published final antitrust decisions in full since July 2013. Probably, due to the pressure of “transparency” required by the new rule issued in, 2014 Notice of Essentials of the Work Relating to Government

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2 The original decision of the NDRC is published on its website available at: [http://jjs.ndrc.gov.cn/gzdt/201408/t20140820_622756.html](http://jjs.ndrc.gov.cn/gzdt/201408/t20140820_622756.html)
3 The original announcement of the NDRC is published on its website available at: [http://www.sdpc.gov.cn/fzzggz/jjgyfljd/jsszhdt/201409/t20140902_624514.html](http://www.sdpc.gov.cn/fzzggz/jjgyfljd/jsszhdt/201409/t20140902_624514.html)
4 The original decisions of the NDRC is published on its website available at: [http://www.ndrc.gov.cn/gzdt/201409/t20140902_624550.html](http://www.ndrc.gov.cn/gzdt/201409/t20140902_624550.html)
5 The original decision of the NDRC is published on its website available at: [http://www.ndrc.gov.cn/gzdt/201409/t20140903_624633.html](http://www.ndrc.gov.cn/gzdt/201409/t20140903_624633.html)
Information Opening by General Office of the State Council, which unequivocally mentions promotion of transparency of administrative penalties, the NDRC released these decisions. Though the decisions are released nine months late, it is better late than never. Nevertheless, full disclosure of the decisions in this case marks the NDRC’s move towards a more transparent regulatory regime in relation to its antitrust law enforcement. As a NDRC official explained in an interview, part of the purpose to publish full decisions was to enable the public to supervise its law enforcement. These published full decisions also provide a perspective to understand the approaches and practice of the NDRC’s decision-making. The official also confirmed that the NDRC would make more effort to promote the transparency of its law enforcement. We look forward to seeing much more disclosed information about prior antitrust cases.

**Price-fixing conducts**

NDRC found that 23 local property insurers, organized by the Zhejiang Insurance Industry Association, held multiple meetings and agreed upon horizontal monopoly agreements to fix car insurance premiums and handling fees and acted upon these agreements:

(1) Price-fixing agreement on car insurance premiums.

Zhejiang Insurance Industry Association organized these 23 local property insurers to hold meeting in July 2009 to discuss premiums of new cars and high-end cars. It was agreed that the new car discount ratio should not be lower than 0.95 and that the discount ratio for high-end cars should not be lowered than 0.9 or 1 depending on their purchase price. The property insurers then acted upon such agreements.

(2) Price-fixing agreement on car insurance handling fees.

In May 2009 and May 2010, these local property insurers held meetings and agreed upon a unified handling fee for commercial car insurance based on market share. The Zhejiang Insurance Industry Association also established punishment mechanism by stipulating fine imposition provisions for companies in violation of such agreements. The property insurers also implemented these agreements.

**Violation of the anti-monopoly law**

NDRC concludes that the price-fixing conducts of the Zhejiang Insurance Industry Association are in violation of Article 16 of the Anti-Monopoly Law (“AML”), which forbids industry associations from engaging in monopoly conduct and also Article 9

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The 23 property insurers’ conduct breached Article 13 of the AML, which forbids competitors from forming monopoly agreements through price fixing of their products.

The NDRC alleged that these price-fixing conducts directly excluded price competition between each other, diminished the incentive of the companies to promote quality of their services so as to win customers, deprived the options of the consumers and precluded them from obtaining high quality products and services with low prices. To be more specific, their price-fixing agreement on car insurance premiums resulted in provision of homogenous car insurance services without any price difference and personalized services. The consumers also have to pay higher price for the insurance. Price-fixing agreement on car insurance handling fees impaired competition among the insurers for high quality agents, solidified market share, impeded competition on insurance product, price and service quality, and downgraded economic efficiency in the markets and adversely affected the consumer’s welfare.

**NDRC’s analytical approach of price-fixing conduct**

In the full penalty decisions, the NDRC laid out its limbs of reasoning in reaching its conviction, which enabled us to understand its analytical approach.

For the insurers, the NDRC concluded their violation of the AML through the following steps: (1) The companies were qualified undertakings under the AML. The NDRC quoted Article 12 of the AML and *Civil Procedure Law* and relevant judicial interpretations to reach this decision. (2) The companies were in a competitive relationship. NDRC did not explicitly define the relevant market, while the decisions imply that the relevant market is the car insurance service market and the geographic market is Zhejiang Province when it comes to identify the competitive relationship among the 23 insurers. (3) The companies were not affiliated to each other. Therefore, their price-fixing agreements were not internal operational decision-makings by one economic entity. (4) Fixing car insurance premium was “fixing product price”. According to the AML, product includes both product and service, and premium was the price for car insurance service. (5) The companies were involved in the conclusion of price-fixing agreement and acted accordingly. (6) The companies’ conducts excluded and restricted competition in the market, and thus they were in violation of Article 13.

The Zhejiang Insurance Industry Association is in violation of Article 16 and Article 9 of the Regulations on Anti-Price Monopoly because: (1) it organized the companies in reaching monopoly agreement; (2) it urged the companies to implement the monopoly agreement; and (3) it excluded and restricted competition in the market.
Understanding NDRC’s practice

The decisions provide implication on certain practical issues, such as leniency treatment, identification of the entity receiving the fines, calculation method for turnover, etc. Also, there is certain inconsistency between this case and previous case which might indicate that NDRC retains considerable discretionary power in determining the specific amount of fines. It remains to be seen whether the NDRC will keep a consistent approach or will resort more to a case-by-case approach in the future. On top of that, several interesting points could be seen throughout the NDRC’s decisions, which will be discussed below.

(1) Application of the leniency program

This is the second published case where leniency program is explicitly applied in the NDRC’s antitrust investigation in relation to cartel after the Japanese Auto Parts and Bearing Manufacturers case. In this case, the first reporter PICC Zhejiang Branch is fully exempted from penalties, which proactively provided detailed report on the meetings and the price-fixing agreements as well as key evidence. The second reporter, China Life Zhejiang Branch is exempted 90% of its penalties, which provided key evidence and detailed report on price-fixing agreement on car insurance premiums. The third reporter, China Ping’an Zhejiang Branch is granted a 45% reduction of its fines, which also provided key evidence. It is worth note that, in this case, voluntary report occurred after investigation had been launched, while in the Japanese Auto Parts and Bearing Manufacturers case, voluntary report was before the commencement of official investigation. It seems that the NDRC has adopted a seemingly flexible approach in application of leniency policy as it did in vertical monopoly cases, such as the Baby Formula case (voluntary report also happened after the initiation of investigation).

In comparison with the Japanese Auto Parts and Bearing Manufacturers case, it is interesting to note that (1) the second reporters were treated very differently in these two cases. In this case, the second reporter obtained 90% exemption of its fines, while in the Japanese Auto Parts and Bearing Manufacturers case, the second reporter’s penalty was merely reduced by 50%; (2) the third reporter was identified for the first time in this case, which received a 45% reduction of its fines (almost equal to the reduction level of the second reporter in the Japanese Auto Parts and Bearing Manufacturers case). The message to be read from this is that companies should cooperate with NDRC’s investigation and provide key evidence in any case, because significant reduction in punishment could be granted even to the second and third reporter.

(2) Branches qualify as undertakings

The insurers involved in the cases are all Zhejiang branches of insurance companies,
which in a conventional sense, should not be regarded as qualified as an entity to receive the antitrust penalty. Usually, the direct parent companies of such branches shall be liable for the legal consequence resulted from the breaches committed by their branches. However, the NDRC utilized concepts in the PRC Civil Procedure Law and relevant judicial interpretation and ruled that the branches, notwithstanding their lack of legal personality, were legally incorporated with its own organization and property, provided car insurance service for the purpose of profit-making and had the independent ability to exercise their rights and undertake corresponding legal liability. Therefore, branches constituted “other organizations” under the AML and were thus subject to the regulation of AML. This also leads to another interesting area of the NDRC’s decision to be discussed below - calculation of turnover.

(3) Calculation of turnover

In this case, the NDRC took a different approach in calculating turnover in its penalty decisions in two aspects: (1) Following its approach in qualifying branches as other organizations under the AML, in calculating turnover, the NDRC only included the turnover of the branches. In its prior decisions, however, the NDRC resorted to the calculating method used in merger control regime and calculated the consolidated turnover in China of the parent company as basis of fine. (2) This case also clarifies that turnover, as basis of fine, only includes those of the specific products or services involved and is not the consolidated turnover of the company (even the branches in this case). In this case, turnover only include that of the car insurance services.

(4) Key evidence

The NDRC also listed the forms of evidence in the decisions it collected and identified in the investigation. There are various types of evidence including meeting attendance document, notice, mail, insurance policy, agency agreement, and inquiry record, which are similar to forms of evidence used in previous investigations.

It’s worth noting that the NDRC explicitly mentioned the evidence provided by the leniency applicants. Evidence provided by the first reporter (PICC), among other things, includes detailed information on the meetings and detailed information on price-fixing conducts. Evidence provided by the second reporter (China Life) includes document of attendance and full description on price-fixing agreement on car insurance premiums. The third reporter (Ping An Insurance) provided a report on self-regulation of car insurance industry and other related documents. Such evidence is regarded as the key evidence in NDRC’s decisions. This is in accordance with the Procedural Regulations on the Administrative Enforcement of the Regulations on Anti-Monopolistic Pricing Practices, which stipulates that the evidence provided by leniency applicant must be critical evidence in identifying a monopoly agreement. This case surely provided guidance for leniency applicants on assessing their evidence to be provided.
(5) **Other factors considered in reaching penalty decisions**

In this case, the NDRC imposed penalty of 1% of 2012’s turnover on all the insurers (except for the first three reporters). Two main factors were considered by the NDRC in imposing the relatively light punishment: (1) they actively cooperated with the NDRC in its investigation, corrected illegal conducts timely and prevented them from reoccurring; and (2) the cartel was led by Zhejiang Insurance Industry Association and the insurers were neither initiator nor organizer as a major driving force in the aforementioned illegal conduct.

According to Article 49 of the AML, to determine the specific amount of fines, factors such as the nature, extent and duration of the violations should be considered. As for duration, the illegal conduct in the *Japanese Auto Parts and Bearing Manufacturers* case had lasted for more than 10 years, which resulted in heavier punishment. The illegal conducted in this case lasted for less than four years, which might be part of the reason that they received less harsh punishments. As for gravity, in the *Japanese Auto Parts and Bearing Manufacturers* case, price-fixing on two products was considered to be severe violation. In this case, the insurers fixed price on insurance premium and handling fee, which should constitute severe violation following the *Japanese Auto Parts and Bearing Manufacturers* case approach. However, the NDRC did not take this factor into consideration but rather put more emphasis on mitigating circumstances.

(6) **How defense was managed**

In response to criticism that the NDRC did not accept any defense, the NDRC in this decision clearly addresses this issue. The decision disclosed defense raised by Zhejiang Insurance Industry Association regarding its illegal conducts: (1) the price-fixing agreement on car insurance premiums had ceased in 2011; (2) the price-fixing agreement on handling fee was concluded for protecting medium and small size insurers and enhancing their competitiveness and it did not harm the welfare of consumer, which qualify Article 15(3) of the AML that the AML “shall not be applicable to the agreements between undertakings which they can prove to be concluded for increasing the efficiency and competitiveness of small and medium-sized undertakings”. The decision also spells out the NDRC’s reasoning in rejecting its defense: (1) the insurers were continuing implementing the agreed insurance premium after 2011, and also regardless of whether the price-fixing agreement had terminated, the illegal nature of the price-fixing conduct cannot be denied; (2) the price-fixing conduct on handling fee in effect protected companies with low efficiency, which could not lead to promotion of competitiveness of these medium and small companies and also diminished their willingness to promote service and innovate. This adversely affected the welfare of consumers and harmed competition in the market.
Investigation into other nine companies were terminated

The NDRC’s investigation initially targeted all 32 property insurance companies in Zhejiang province upon receiving complaints filed by the public. It was then revealed that the Zhejiang branches of nine insurance companies, including US-headquartered Liberty Insurance, Japan’s Aioi Nissay Dowa Insurance, Zheshang Property & Casualty Insurance, ZKing Property & Casualty Insurance, China Huanong Property & Casualty Insurance, Cathay Insurance, Cinda Property & Casualty Insurance, Yingda Taihe Property Insurance and Taishan Property & Casualty Insurance, did not participate in these price-fixing conduct. In particular, Liberty Insurance Zhejiang branch prepared their anti-trust manual, which they strictly adhere to, and were not involved in price-fixing conduct. The investigations into these nine branches were therefore formally terminated. NDRC official stated that this is a clear example that NDRC has been and will treat all companies equally and will honor the fact that no violation of the anti-monopoly law exists so long as evidence could be provided.

Conclusion

The publication of all the decisions is a big step forward in promoting transparency of the NDRC’s antitrust law enforcement. It also manifests the NDRC’s willingness to be supervised by the public and to enhance its antitrust law enforcement regime. Also, the NDRC has adopted a flexible approach in implementing the anti-monopoly law. The takeaway from this case on the relevant companies is still to take proactive approach when facing antitrust investigation. Those companies that have breached the AML are strongly advised to report to the NDRC with the assistance of competition law professionals in a timely manner to mitigate damages to the maximum. Even the first place to report is obtained by others, there still exists a fair chance to obtain lighter penalty.

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