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NDRC's Recent Cartel Decisions Shed Further Light on Chinese Leniency Policy

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1 Introduction

The Chinese National Development and Reform Commission (**NDRC**) has recently stepped up its cartel enforcement activities and for the first time has published non-confidential versions of a number of its cartel decisions. With its new activism and openness in regards to its policy and decisions, the NDRC seems poised to take its place as a leading global antitrust authority in the area of cartel enforcement, much as MOFCOM has done in the area of merger control. In global cartel investigations, multinationals need to take account of the NDRC's enforcement policy and the factors it uses to set base fines and to grant fine reductions as part of their global strategy of applying for leniency and cooperating with authorities to minimise fines.

The NDRC adopted a leniency policy under its 2010 Procedural Regulation on the Administrative Enforcement of the Prohibition of Monopolistic Pricing Practices (the **NDRC's Procedural Regulation**),^[1] which was adopted under the 2007 Chinese Antimonopoly Law (the **AML**).^[2] This policy is very general, however, and at the time concerns were expressed that the incentives would not suffice to induce many whistle-blowers to come forward. In fact, for several years the NDRC did not seem to be applying the policy actively; when it did take action against cartels, the NDRC often imposed sanctions not only or even primarily under the AML, but under the Price Law or other rules and regulations.

Recently, however, the NDRC seems to have stepped up its cartel enforcement activities under the AML. In particular, in September 2014, the NDRC published non-confidential versions of twelve decisions fining Japanese automotive components suppliers^[3] and 24 decisions in an insurance cartel.^[4] In its automotive components decisions, the NDRC granted immunity to two companies and fine reductions to the remaining ten. In the insurance cartel decisions, the NDRC granted immunity to one insurer and fine reductions to two others. Notably, the insurance cartel decisions were adopted in December 2013, whilst the automobile components cartel decisions were adopted in August 2014. It is unclear whether the NDRC has taken December 2013 as a starting point for publishing cartel enforcement decisions or whether the NDRC simply chose these decisions as

examples to raise the public's awareness of its leniency policy and does not intend to make a practice of publishing its decisions. In fact, the NDRC has not yet published non-confidential versions of other recent decisions, including decisions announced in September fining Chrysler and Volkswagen for resale price maintenance.

The NDRC's recent cartel enforcement decisions appear to demonstrate a new resolve to increase enforcement under the AML and provide important colour and detail on how the NDRC implements its leniency policy. It is to be hoped that the NDRC will continue publishing such decisions to increase transparency and public understanding of the NDRC's methodology in setting fines and the application of its leniency policy.

2 Background

The AML contains general provisions on the calculation of the base amounts for fines and conditions for fine reductions. These issues are addressed in more detail in the NDRC's Procedural Regulation.^[5]

As regards the base amounts for fines, the AML requires fines of between one and 10 per cent of "the sales revenue in the previous year" (Article 46). The AML further provides that three elements will be considered in determining the base amount: the nature, gravity and duration of the infringement (Article 49).

As regards fine reductions, the AML provides that a "mitigated sanction or exemption from sanction" may apply when a company "voluntarily reports the relevant facts about the conclusion of the anti-competitive agreement and provides important evidence". The NDRC's Procedural Regulation provides more specifically that the first company that takes the initiative to report the relevant facts about the conclusion of anti-competitive agreements and provide important evidence thereon may receive immunity. The second company to do so may receive not less than a 50 per cent reduction, while any other voluntary reporters may receive not more than a 50 per cent reduction. The NDRC's Procedural Regulation clarifies that "important evidence" refers to any evidence that has a significant bearing on the establishment of an anti-competitive pricing agreement.

3 The NDRC decisions

(a) Automotive component suppliers' cartels

(i) Summary of the cases

On 20 August, the NDRC announced that it had imposed fines of RMB1.24 billion (\$201 million) on ten Japanese automotive components suppliers for price fixing in contravention of the AML, while two other companies received immunity.^[6] The NDRC published the non-confidential versions of the decisions on 18 September.

The NDRC's decisions concern two cartels, each spanning over a decade. In the first cartel, eight suppliers (Hitachi Automotive Systems, Denso, Yazaki, Furukawa Electric, Sumitomo Electric, Aisan, Mitsubishi Electric and Mitsuba) were found to have fixed prices of up to 13 types of components supplied to car manufacturers including Honda, Toyota, Nissan, Suzuki and Ford. The components include starters, alternators and wire harnesses. In the second cartel, four suppliers (Nachi-Fujikoshi, NSK, NTN and JTEKT) were found to have jointly raised prices on car bearings.

Considering that both cartels lasted for more than 10 years and the participants were engaged in various pricing agreements, the NDRC imposed the maximum base amount of fine under the AML, 10 per cent of the turnover derived from sales of the relevant products in China in the year 2013.

On the other hand, under its leniency program, the NDRC granted immunity to the first voluntary reporter and various degrees of fine reduction to the remaining cartel participants. In the first cartel, Hitachi received immunity as the first voluntary reporter of “the relevant facts about the conclusion of the price-fixing agreements” and the first company to provide “important evidence”. Denso, as the second such company, received a fine reduction of 60 per cent, resulting in a fine of 4 per cent of the turnover generated from the sales of the relevant products in China in 2013. Three companies received reductions of 40 per cent each, and the other three companies each received reductions of 20 per cent, because they voluntarily reported the conclusion of the agreements and provided important evidence. Overall, the fines amounted to RMB832 million (\$135 million).

In the second cartel, Nachi-Fujikoshi received immunity as the first voluntary reporter and the first company to provide important evidence. NSK, as the second such company, received a fine reduction of 60 per cent, resulting in a fine of 4 per cent of the 2013 turnover generated from the sales of the relevant products in China. NTN and JTEKT benefited from fine reductions (40 and 20 per cent, respectively). In addition to voluntarily reporting the conclusion of the agreements and providing important evidence, the NDRC noted that NTN withdrew from the cartel at an early stage. Overall, the fines imposed on these cartel participants amounted to RMB403 million (\$65 million).

(ii) Comments

The published decisions clarify that the NDRC calculates fines for AML violations based on the Chinese sales revenue of the cartelized products, rather than based on the entire group’s revenue. They also cite the AML’s criteria for reduced fines or immunity from fines – voluntary reporting and provision of important evidence in connection with the fining relief granted to Nachi-Fujikoshi, NSK and JTEKT. Interestingly, the decisions also indicate that there is no limit on the number of cartel participants who may qualify for fine reductions.

On the other hand, the decisions did not set out a clear framework for the determination of the base amount of the fine or the granting of reductions. For example, the NDRC appeared to view participation in multiple cartels as an aggravating factor in setting the base amount of the fines, which is not a relevant factor under the AML or the NDRC’s Procedural Regulation. On the other hand, the NDRC did not go so far as to set out a specific rule to penalise recidivism, as does the EU Commission. The NDRC followed its Procedural Regulation in that the third and following companies to voluntarily report the conclusion of the illegal agreement and to provide important evidence received fine reductions of less than 50 per cent, but the NDRC did not appear to distinguish between the third and subsequent such companies in determining the amount of the fine reduction. Rather, the NDRC seemed to take account of other factors, such as early withdrawal from the cartel, that are not listed in the AML or the Procedural Regulation as relevant to the amount of fine reduction. Hopefully the NDRC will publish other decisions clarifying what additional factors beyond those set out in the AML and the NDRC’s Procedural Regulation may affect the base amount of the NDRC’s fines.

The NDRC’s decisions mentioned that the cartel participants had undertaken price-fixing activities in Japan and on various occasions discussed the implementation of price fixing policies covering

the Asian region. Participants in the first cartel had already been fined ¥16.4 billion (\$208 million at the time) for the same practices by the Japanese competition authority in 2012. Participants in the second cartel were fined in Japan in 2013 (¥13.36 billion, or \$143 million) and in Singapore in May 2014 (\$9.3 million, or \$7 million). Collusive practices among these and other car component suppliers have already been sanctioned heavily or continue to be the subject of investigations outside of Asia, including in North America, Europe and Australia.

(b) Insurance cartel

(i) Summary of the case

On 2 September, the NDRC announced that it had fined 23 insurance companies in the Province of Zhejiang for participation in a cartel.^[7] The announcement further reported that the cartel was organised by the insurers' local association, which agreed on discounts and commission levels in relation to car insurance policies. It also listed nine companies (including American and Japanese companies) that did not participate in the cartel and were accordingly not sanctioned. On 3 September, the NDRC published 24 non-confidential decisions, revealing that the decisions were adopted on 30 December 2013.

In its decisions, the NDRC found that the insurers had violated the AML and imposed fines of close to RMB110 million (\$17 million), representing one per cent of the insurers' annual sales of the relevant products. The association, acting as the ringleader, was fined RMB500,000 (\$80,000), which was the maximum amount allowed under the AML.

According to the NDRC, the insurance companies' anticompetitive practices started in 2009, with different commission levels being agreed depending on each company's market share. Regarding the calculation of fines, the NDRC referred to the total sales of the relevant products (i.e., commercial car insurance policies) sold by each company's local branch in Zhejiang during 2012, the financial year preceding the adoption of the decision. The fines imposed on the infringing insurance companies were set at the minimum amount prescribed by Article 46 of the AML, i.e., one per cent of the relevant turnover in 2012.

The NDRC granted immunity to the first company that acknowledged its involvement after the NDRC began its investigation (the People's Insurance Company of China). The NDRC's decision specified that the People's Insurance Company of China took the initiative to admit the price-fixing activities and was the first company to provide important evidence, even though it did so after the NDRC had already initiated its investigation. Fine reductions of 90 and 45 per cent were granted to the second and third voluntary reporters (China Life and Ping An), respectively. None of the remaining insurers received fine reductions, apparently because they did not voluntarily report the conclusion of the illegal agreements or did not provide evidence the NDRC regarded as important.

The decisions also provide some details of the procedure, showing in particular that the NDRC provided advance notice of its proposed decision to impose fines and allowed the participants to offer comments.

(ii) Comments

Unlike in the automotive components cartel cases, the NDRC in this case set the base fine amount for the insurers at the minimum permitted level (one per cent of the relevant annual sales), while imposing the maximum fine on the association. The NDRC cited two mitigating factors justifying the imposition of minimum base fines: (1) the companies actively cooperated in the investigation,

corrected illegal conduct in a timely way and prevented such conduct from reoccurring; and (2) the cartel was led by the local association, and the insurers were neither the initiators nor the organizers of the cartel. Interestingly, these factors are not mentioned in the AML or the NDRC's Procedural Regulation. By contrast, the decisions do not mention the cartel duration, although duration is a relevant factor under the AML and NDRC Procedural Regulation. It is also noteworthy that the NDRC was willing to grant immunity to the first voluntary reporter, even though the NDRC had already begun its investigation; i.e., the immunity recipient was not a "whistle blower".

In contrast to the automotive components cartel decisions, in which the NDRC granted fine reductions to all of the infringers, in the insurance cartels the NDRC granted fine reductions only to the second and third companies to admit their participation in the cartel and to provide important evidence. On the other hand, the reductions granted were larger in percentage terms than those granted to the automotive components cartel participants. Moreover, since the NDRC set the insurance companies' fines at the minimum level allowed by the AML, the total fines represented a smaller percentage of turnover than those imposed on automotive components suppliers. Strikingly, all of the companies fined in the insurance cartel were Chinese, while all of the companies who received the maximum fines in the automotive components cartels were Japanese.

Conclusion

This NDRC's publication of relatively detailed cartel decisions is a welcome step, providing greater transparency about the NDRC's leniency policy. Previously, the NDRC announced its decisions in concise press releases but did not publish the texts of the decisions themselves. It remains to be seen whether the NDRC will continue the practice of publishing its decisions and even extend that policy to decisions outside the cartel area.

The published decisions clarify that the NDRC determines the base amount of cartel fines by reference to Chinese revenues of the cartelised products and services and show that the NDRC applies a number of factors in setting those fines and granting reductions.

Although the decisions are not entirely clear as to the NDRC's methodology, the NDRC appears to take account of factors beyond those indicated in the AML and the NDRC's Procedural Regulation in setting the base amounts of its fines. In the insurance cartel decisions, in particular, the NDRC did not refer to the statutory factors of the nature, gravity and duration of the cartel, but it did refer to other mitigating factors. In the automotive components cartels, moreover, the NDRC appeared to treat participation in multiple cartels as an aggravating factor, although recidivism is not listed in the AML or the NDRC's Procedural Regulation. The published decisions also illustrate the NDRC's great discretion over the range of fines, since the base amounts ranged from the maximum to the minimum allowed under the AML.

Similarly, the published decisions illustrate the NDRC's flexibility in granting immunity from or reductions in fines. The decisions are consistent with the NDRC's Procedural Regulation in that the first voluntary reporter to provide important evidence received immunity, the second received a fine reduction above 50 per cent and others received reductions of less than 50 per cent. In other respects, however, the decisions vary considerably, and the NDRC appears to take account of factors other than companies' voluntarily reporting of the conclusion of illegal agreements and the provision of important evidence as relevant to the amount of fine reduction. In particular, there is no indication that the fourth and subsequent voluntary reporters received lower fine reductions than

the third such company. The insurance cartel decisions also show that the NDRC may grant immunity to the first leniency applicant even after an investigation has been launched, i.e., immunity is not limited to whistle-blowers.

In summary, the NDRC's decisions suggest that the NDRC takes a flexible approach to imposing fines in cartel cases. That flexibility may offer some comfort to companies under investigation for alleged cartel violations, but the same flexibility makes it difficult to predict the NDRC's approach to fines in any particular case. It is to be hoped that the NDRC will continue publishing its cartel enforcement decisions and extend this practice to other enforcement areas. Over time, if the NDRC makes a practice of publishing its decisions, these will go a long way to clarifying the manner in which the NDRC applies its leniency policy and its rationale for setting the fines to which reductions apply.

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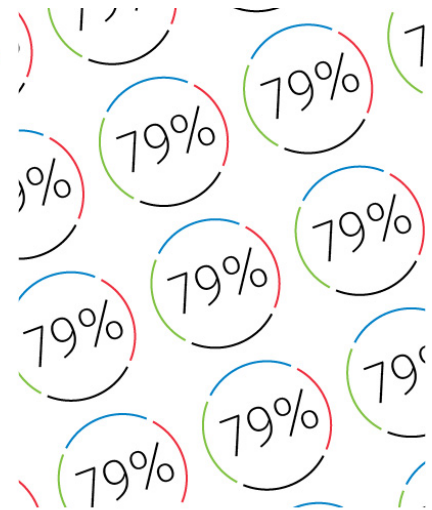
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