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**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS  
COMPETITION COMMITTEE**

## **Global Forum on Competition**

### **ABUSE OF DOMINANCE IN REGULATED SECTORS**

**Case submitted by China**

-- Session III --

*This case is submitted by China in view of its discussion in Sub-Session 3 on Friday 18 February 2005 (from 9.30 am).*

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## **A CASE OF COMPULSORY INSURANCE VIA SCHOOL MANAGEMENT BY SOME INSURANCE COMPANIES IN PARTIAL LEAGUES OF INNER MONGOLIA**

### **1. Outlines of the case**

1. In the first half of 2001, during the process of carrying out supervision and inspection of the competition acts of the public utilities and any other business operators occupying monopoly status, the Industrial and Commercial Administration of Inner Mongolia Autonomous Region found that some insurance companies of partial leagues forced the students (pupils) to purchase personal insurance with the help of school management by using the special position of the school without the consent of the pupils and their parents and paying the school management certain insurance commission fees. For example, the Yi League Life Insurance (Branch) Company, by sponsoring a meeting on Dongsheng life insurance coordination issues, attended by the competent educational authority and some other organisations, put forward, in the form of minutes of the meeting, requirements that all the pupils and children in schools and kindergartens have to purchase insurance. In light of the requirements of the insurance company, the school management collected insurance premium from the pupils at the start the new school term at a time when collecting enrollment fees, without the consent of the pupils and their parents.

2. Because it was difficult to determine the nature of the acts conducted by the insurance company and school management, the Industrial and Commercial Administration of Inner Mongolia, on May 18<sup>th</sup>, 2000, made an application to the State Industrial and Commercial Administration for an interpretation on the legal issues resulted from this case.

### **2. Legal issues resulted from the case**

3. Issues resulted from this case are the following three aspects:

- In accordance with the provisions as stated in Article 6 of the “Law of the People’s Republic of China against Unfair Competition” that “A public utility enterprise or any other business operator occupying monopoly status according to law shall not restrict people to purchase commodities from the business operator designated by him, thereby precluding other business operators from fair competition”, it is important to clarify whether the insurance company falls within the scope of “any other business operators occupying monopoly status according to law” or not. The answer to this question will directly relate to whether the provisions in the said article are applicable to the insurance company or not.
- In accordance with the provisions as stated in Article 2 (Sub-clause 3) of the “Law of the People’s Republic of China against Unfair Competition” that a business operator as mentioned in this Law refers to “a legal person or any other economic organisation or individual engaged in commodities marketing or profit-marking services”, it is also important to clarify whether or not the school (management) falls under “business operator” in this sense. The answer to this question will directly relate to whether or not the unfair competition acts conducted by the school management shall be punished according to the specific provision as stated in the “Law of the People’s Republic of China against Unfair Competition”.

- It is essential to clarify whether or not the insurance company's compulsory sales promotion of insurance by using the advantageous status of the school management falls within the prohibition of abuse of advantageous status.

### 3. Case Analysis

- Scope of restricting competition acts stated in Article 6 of the "Law of the People's Republic of China against Unfair Competition".

In accordance with the provisions as stated in Article 6 of this Law, the transaction or competition restricting acts of the business operators from a monopoly industry such as public utility enterprises include not only the competition restricting acts conducted by the business operators from a monopoly industry such as public utility enterprises by abusing their advantageous status, but also collusion between business operators from a monopoly industry such as public utility enterprises and those from administrative organisations or other monopoly industry or other business operators occupying special advantageous status, as well as competition restricting acts conducted by means of other's advantageous status, which commonly exists in the insurance industry. In the practice of sales promotion of insurance, the insurance companies frequently provide their compulsory insurance by means of the business operators in a monopoly industry occupying monopoly status according to law, such as some administrative organisations such as security, traffic policeman and family-planning departments, or by means of the public utility enterprises such as railway, highway, fuel gas and electricity etc., or by means of some business operators of a the monopoly industry occupying monopoly status according to law such as commercial banks etc., or by means of the advantageous status of particular organisations such as hospitals, schools, parks etc.

- The compulsory insurance conducted by the insurance company with the help of school management is deemed to be an act restricting competition as stated in Article 6 of the "Law of the People's Republic of China against Unfair Competition".

Most of the people from the State Industrial and Commercial Administration considered that the Insurance Companies shall fall under the "other business operators occupying monopoly status according to law" as specified in the "Law of the PRC against Unfair Competition". Firstly, the insurance company has specific rights assigned by the law on one hand, and it is subjected to control by the law on the other hand, thus it has a special status and is a business operator in a monopoly industry. Secondly, the monopoly status of the insurance company may be affirmed according to the specific provisions stated in the "Insurance Law of the People's Republic of China". According to relevant provisions in the Insurance Law, the setup of the insurance company shall apply special admission system and be subjected to special procedures for approval, and the insurance company shall engage in its business activities in line with specific rules without appropriate freedom of competition; additionally, the Insurer possesses monopoly status in the determination of insurance claims settlement, who can make decision on selection freedom of the insured or the assured. From what is mentioned above it can be affirmed that the insurance company is a business operator occupying monopoly status according to law.

The information offered by the Industrial and Commercial Administration of Inner Mongolia shows that the school management performs sales promotion of insurance at school on behalf of/for the insurance company based on its entrustment and on the instruction of the insurance company, as a matter of fact school management provides its compulsory insurance. It can be

seen from the above that the insurance company and school management have precolluded and preconspired and agreed with respect to the joint implementation of compulsory insurance. As far as the subjective desire is concerned the compulsory sales promotion of insurance conducted by the insurance company and school management forms their joint intentional acts, while from the objective point of view the insurance company conducted compulsory sales promotion of insurance by using the advantageous status of the school. Based on the theory of joint violation of law, the acts of the insurance company and school management constitute an act of compulsory sales promotion of insurance, who shall bear administrative and legal liabilities accordingly.

What shall be noted is that during compulsory insurance by the insurance company, using the school management or other business operators occupying specific advantageous status, in case of neither having desire nor performing compulsory insurance to the opposite side but the opposite side conducted compulsory insurance unilaterally for the purpose of obtaining “insurance commission fee” agreed to be paid by the insurance company, in this case the insurance company will not bear liability for compulsory insurance. The liability for the above act of compulsory insurance unilaterally shall be borne by the school management. Therefore the relevant evidence for certifying whether or not the insurance company acts on compulsory insurance becomes essential.

- While offering profit-making services the school management falls under the business operator as stated in the “Law of PRC against Unfair Competition”.

### ***3.1 Different understanding to the business operator***

4. It is specified in Article 2 (Sub clause 3) of the “Law of PRC against Unfair Competition” that “‘A business operator’ as mentioned in this Law refers to a legal person or any other economic organisation or individual engaged in commodities marketing or profit-making services”. How to understand the definition of business operator as stated in the “Law of PRC against Unfair Competition” will directly relate to the application scope of this Law, which will not only be of great importance theoretically, but also have a significant influence upon the practice of law enforcement.

5. Currently there exists two different opinions regarding the definition of business operator in theoretical circle and based on the administrative management and law enforcement practice: one opinion concludes that a business operator must be a person who possesses the corresponding legal principal qualification, otherwise even though he/she engages in commodities marketing or profit-making services without corresponding the legal principal qualification, he/she will not fall within the scope of the term “business operator.” The other opinion concludes that so long as one engages in commodities marketing or profit-making services and whether or not he/she possesses the said legal principal qualification for engaging in such activities, he/she will exceptionally fall within the scope of the term “business operators.”

### ***3.2 Evaluation and analysis on the above two opinions***

6. In the first opinion, where the definition of a business operator is given from the viewpoint of legal principal qualification, there exists defects and deficiencies based on the provisions in the “Law of PRC against Unfair Competition” and realistic economic life. For example, the staff of the business operator does not possess business qualification but he/she may become an executor in respect of infringement of commercial confidence. For additional example, an administrative organ does not possess business qualification but it becomes the restricted principal as stated in Article 7 of the “Law of PRC against Unfair Competition”. In our realistic life there exist lots of unhealthy phenomena where persons

without business qualification participate in unfair competition and perform actions restricting competition. These acts have always had a bad and harmful influence upon fair competition.

7. In the second opinion, there exists some merit from both the viewpoint of legal principle and actual rationality. That equal acts are subjected to equal legal evaluation reflects an important principle of equal and fair modern legality. The “Law of the People’s Republic of China against Unfair Competition” protects the order of fair market competition. Anyone who violates the provisions as stated in this Law will exceptionally be investigated and punished whether or not he/she has a business qualification.

### **3.3 *When engaging in profit-making services school management falls within the scope of the term “business operator”***

8. From the viewpoint of principal qualification and in general sense school is affirmed to be a utility without taking profit-making as its goal, which will not fall within the scope of the term “business operator” as stated in this Law.

9. But from nature of the acts it conducted, school management performs profit-making services by sales promotion of insurance; although it does not have the principal qualification for carrying out various business activities including agency sales of insurance. In fact, however, in light of current educational and insurance regulations, it is impossible for the school management to obtain a legal principal qualification for agency sales of insurance. The acts, therefore, of violation of this Law during the school management’s agency sale of insurance are identical in nature to those conducted by other business operators during their engagement in the same activities. From the viewpoint of the principle of modern law the same illegal acts shall bear identical legal liabilities. Because of its engaging in profit-making services the school management should be affirmed to be a business operator as stated in Article of the “Law of the People’s Republic of China against Unfair Competition” and regulated/punished in line with this Law.

## **4. Treatment**

10. Based on the analysis mentioned above, the State Industrial and Commercial Administration has put forward the following treatment proposals to this case:

### **4.1 *For the restricting competition acts conducted by the insurance company***

11. The restricting competition acts conducted by the public utility enterprises or any other business operators occupying monopoly status according to law as specified in Article 6 of the “Law of PRC against Unfair Competition” refer to the abuse of its advantageous status as a public utility enterprise or any other business operator occupying monopoly status according to the law or restricting competition acts conducted by means of others advantageous status. The insurance company belongs to the category of a business operator occupying a monopoly status according to law as stated in Article 6 of the “Law of PRC against Unfair Competition”, whose acts of compulsory insurance by means of the special status of schools, thereby precluding other insurance business operators from fair competition and violating the provisions as stated in Article 6 of the “Law of PRC against Unfair Competition” shall be investigated and treated according to the provisions in Article 23 of this Law, i.e. order the ceasing of the illegal acts and impose a fine of not less than 50,000 Yuan but not more than 200,000 Yuan in light of the circumstances.

### **4.2 *For the restricting competition acts conducted by the school management***

12. Because of its engaging in profit-making services the school management may be affirmed to be a business operator as stated in Article 2 of the “Law of PRC against Unfair Competition”, that is, the acts of engaging in profit-making services conducted by the school management shall be regulated/punished in line with this Law.

13. In this law, however, for the acts of restricting transactions conducted by other business operators other than a utility enterprise or any other business operators occupying monopoly status according to law the applicable administration and legal liabilities have not yet been specified. Therefore how to treat the acts, according to law, of its compulsory insurance conducted by the school management, has no legal basis so far, it is suggested that the industrial and commercial administration authority stop such acts in terms of administrative warning or recommendations.

## **5. Updates**

1. This case happened in 2001 when adequate competition had not been formed in the insurance market. It was the State Industrial and Commercial Administration that affirmed the insurance company to be an “enterprise occupying monopoly status according to law”. At present in some fields of China’s insurance market there exists keen competition. So it is worthy to be discussed whether or not the insurance company can continuously be affirmed to be “an enterprise occupying monopoly status according to law”. But such cases of compulsory insurance by the insurance company using the advantageous status of an administrative organ, a public utility enterprise or other organisations will still happen, it is therefore of practical or immediate significance to deal with such cases.
2. To date in China the regulatory system for restricting competition acts in the insurance industry has greatly changed. Proper treatment of restricting competition acts happening in the insurance industry by the Insurance Supervision Commission instead of by the Industrial and Commercial Administration will further reflect the relationship between the competent institution in charge of insurance and the regulatory authority.