



JONES DAY
COMMENTARY

CHINA'S NEW LENIENCY PROCEDURE IN CARTEL INVESTIGATIONS

This *Commentary* analyzes China's leniency program for cartel investigations, in the wake of adoption of new rules by the National Development and Reform Commission ("NDRC") and the State Administration of Industry and Commerce ("SAIC"), China's two non-merger antitrust enforcement agencies.¹

The importance of these new rules cannot be overstated. The adoption of leniency programs in other jurisdictions has led to significant increases in cartel enforcement. China is not expected to be different, even if its leniency program still contains (too) many gray areas. Other than one tying case, all published enforcement so far by NDRC appears to have involved cartels.

Companies implicated in worldwide cartels and seeking leniency in other jurisdictions now will have to consider whether also to file for leniency in China.² Of course, the same applies to undertakings implicated in cartels limited to the PRC's territory.

One of the major issues for would-be leniency applicants in China is that even the newly published rules do not contain the same level of detailed guidance found in other jurisdictions, especially the European Union and the United States.³ Also, the Chinese agencies expressly have reserved considerable discretion regarding whether and when to grant full or partial leniency.

1 NDRC Rules on Administrative Enforcement Procedures for Anti-Price Monopoly, adopted on January 4, 2011 (for a comment on these new rules, see Jones Day *Antitrust Alert*, "China Issues Rules for Price-Related Antitrust Enforcement," available at <http://www.jonesday.com/antitrust-alert--china-issues-rules-for-price-related-antitrust-enforcement-01-01-2011/>); SAIC Rules on the Prohibition of Monopoly Agreements adopted on January 6, 2011 (for a comment on these new rules, see Jones Day *Antitrust Alert*, "China's SAIC Publishes its Final Anti-Monopoly Law Rules," available at <http://www.jonesday.com/antitrust-alert--chinas-saic-publishes-its-final-anti-monopoly-law-rules-01-12-2011/>).

2 Similarly, undertakings implicated in cartels having effects in China after the entry into force of the AML on August 1, 2008, but which have not sought leniency in China because of the absence of a detailed leniency scheme, may want to revisit the issue.

3 See the European Commission Notice on Immunity from fines and reduction of fines in cartel cases and the United States Department of Justice's Corporate Leniency Policy (1993) and Individual Leniency Policy (1994).

CHINA'S PROHIBITION OF CARTELS AND APPLICABLE SANCTIONS

Like antitrust statutes in most jurisdictions, China's Anti-Monopoly Law ("AML") prohibits price-fixing agreements, as well as agreements restricting output or allocating markets and customers.

Sanctions for violations of the AML include fines between 1 percent and 10 percent of the infringer's total turnover.⁴ Indeed, it is unclear whether sanctions for any violation ever may be less than 1 percent of the infringer's turnover. The AML does not explicitly state whether such penalties will be calculated based on worldwide or China turnover, but neither the AML nor the implementing rules contain language limiting penalty calculations only to China-wide turnover. In addition, precedents in other jurisdiction, including Europe, would seem to point to the broader measure. However, when the anticompetitive agreement has not yet been implemented, a relatively small fine of no more than RMB 500,000 (roughly US\$75,000) may be imposed. In addition, the agencies may order the confiscation of illegal gains, a measure that could be considerable in some cases.

Follow-on damages litigation is possible in China, although there is no discovery system (China being a civil law jurisdiction), and treble damages are not available.

Finally, the AML does not provide criminal sanctions for anti-monopoly violations. However, there have been recent reports of criminal investigations (presumably arising under the Criminal Law) against cartel participants who have coerced others to participate, and the recently updated NDRC Provisions on Administrative Penalties on Price Violations indicates that certain price-related violations that "disturb market order" also may be subject to criminal penalties.⁵

LENIENCY PROVISIONS IN THE AML AND DEVELOPMENTS SINCE 2008

The AML, which came into force in August 2008, provides that if an undertaking involved in an anticompetitive agreement reports its conduct to the enforcement agencies (NDRC or SAIC) and provides "important" evidence, such agency "may" grant reduced penalty or exemption at its discretion.

However, until recently, there were few published rules implementing this leniency program, and these were too vague to provide useful guidance to would-be leniency applicants.⁶ As a result, cartel participants have been reluctant to file for leniency, even when their conduct may have had anticompetitive effects in China. No applications for leniency have been publicized by the agencies, although it appears that NDRC granted reduced penalties to some cartel participants for cooperation or because they acted under coercion in cartel enforcement actions under the Price Law.

This may change now that NDRC and SAIC have issued final versions of their detailed enforcement rules outlining under what conditions and procedures they will grant leniency to cartel participants under the AML.

We analyze below the main features of the SAIC and NDRC leniency rules. The allocation of jurisdiction between SAIC and NDRC is somewhat unclear, with NDRC being responsible for price-related conduct and SAIC for non-price conduct. Although price-fixing cartels presumably fall under NDRC's jurisdiction, cartels aimed at market or customer allocation conceivably might fall under the jurisdiction of both agencies, given the likely price effect on such "non-price" conduct. In view of such vagueness, would-be leniency applicants may in certain cases need to file with both agencies.

4 Price fixing may also violate the PRC Price Law and the Anti-Unfair Competition Law. Recent revisions to the Regulation on Penalties against Price Violation under the Price Law now include fines of up to RMB 500 million (roughly US\$75 million) or five times the illegal gains.

5 See Jones Day *Antitrust Alert*, "China Takes First Action Against Price Cartel Under New Anti-Monopoly Law," available at <http://www.jonesday.com/antitrust-alert--china-takes-first-action-against-price-cartel-under-new-anti-monopoly-law-04-06-2010/>. The Criminal Law includes provisions penalizing both coercion and disturbing market order, including with imprisonment.

6 See SAIC's procedural rules for the investigation and handling of cases relating to monopoly agreements and abuse of market position.

NDRC LENIENCY RULES

The NDRC rules provide that the agency “may” grant immunity to the first undertaking to self-report and provide “important evidence” about an anticompetitive agreement. Similarly, NDRC “may” reduce the penalty for subsequent applicants.

It is unclear whether the immunity or leniency that NDRC may grant will cover not only the fines that it can impose under Article 46 AML but also confiscation of illegal gains.⁷ Article 46 AML provides that the exemption or reduction will apply to the “penalty” it can impose, thus possibly covering all the penalties covered by Article 46 AML—that is, both “fines” and “confiscation.”

NDRC’s Discretionary Powers to Grant Leniency. The AML and the NDRC rules stress that the agency “may” grant immunity or leniency at its discretion. NDRC retains such discretion even if the applicant brings forward the required “important evidence.” Unlike the SAIC procedural rules, discussed below, NDRC does not seem to exclude the possibility of immunity for cartel organizers.

The existence of so much administrative discretion may prove to be a deterrent for first applicants to come forward seeking leniency, as they may be reluctant to give the agency evidence of anticompetitive conduct, in the absence of concrete assurances of immunity.

Nevertheless, in practice, would-be applicants are likely to reach out informally to the agency, prior to making decisions about whether to file, to try to obtain further guidance. They could both seek to understand whether the agency considers the conduct to constitute a violation of the AML and whether the agency will grant immunity.

Finally, in addition to the formal leniency procedure, the AML and the NDRC rules provide for the possibility for the undertaking under investigation to offer commitments to remedy or cease the illegal conduct, which if accepted may result

in suspension of the investigation and, presumably, of any fine.⁸ However, it remains to be seen whether NDRC will accept commitments in cartel cases.

Possible Reductions in Fines. The NDRC rules indicate that it may grant full immunity to the first applicant. The second applicant may receive a reduction of at least 50 percent. The third and subsequent applicants may receive reductions of at most 50 percent.

Evidence to be Submitted to NDRC. Leniency applicants must submit “important” evidence, which is defined as evidence that plays a key role for the authority to ascertain the existence of a monopoly agreement.

It is unclear at this stage whether NDRC will accept oral statements as leniency applications, as is the practice in other jurisdictions. Article 20 of the NDRC procedural rules appears to require that any explanation or application be in writing and signed by the person in charge. Moreover, Chinese courts and agencies tend indeed to prefer evidentiary material in writing rather than oral. Therefore, it is likely that the agencies will at least require that the underlying evidence be in writing (such as emails or other documents).

Practical Considerations. Unfortunately, the NDRC rules are short on practical considerations, such as whether NDRC will grant a marker to the first application, protecting his place in the “queue,” and when it will confirm to the first applicant that immunity will be granted. It is also unclear whether the agency will ask the applicant to admit to the existence of a violation of the AML. Finally, the NDRC rules do not specify explicitly that the applicant must terminate its participation in the cartel nor the extent to which it must cooperate with the agency, although it is likely that both will be a prerequisite to leniency.

It is expected that NDRC will refine the details of its leniency program through practice over time.

7 In the U.S., restitutions to the cartel’s victims (where possible) are a condition for the grant of corporate leniency.

8 In Europe, commitments are not considered to be appropriate in cases where the European Commission intends to impose a fine (see Article 9 of Regulation 1/2003). Given the Commission’s aggressive stance (and heavy fines) against cartels, it is unlikely to accept commitments for cartel infringements.

SAIC'S LENIENCY RULES

SAIC's guidance on leniency schemes is detailed in its 2009 procedural rules for handling cases relating to monopoly agreements and abuse of market position and (with some slight differences) in its recently issued substantive rules on the prohibition of monopoly agreements.

Besides the formal leniency procedure, the SAIC rules also provide for the possibility (i) to submit commitments once the investigation has started (as for NDRC, there is no indication that commitments would not apply in the case of cartels) and (ii) for SAIC to apply reduced penalties when the undertaking under investigation has voluntarily ceased its participation in an anticompetitive agreement.⁹

Hence, it seems that SAIC contemplates three scenarios: (i) the undertaking self-reports the existence of the cartel, in which case it may be granted immunity or amnesty, (ii) the undertaking stops participating before the investigation starts, in which case SAIC may grant a reduced penalty, and (iii) after the investigation has started, the cartel participant commits to terminate its behavior, in which case the agency may cease its investigation and thus not impose any penalty. It would, however, seem logical for the agency to grant the highest reward to the undertaking that self-reports rather than to the one that, after an investigation has started, agrees to stop participating in the cartel.

As with the NDRC rules, the SAIC rules do not seem to exclude the possibility of granting leniency not only for the fines under Article 46 AML but also the confiscation of illegal gains that the agency is empowered to impose. Indeed, Article 13 of SAIC's Rules provides that "exemption or mitigation" shall mainly refer to the exemption of fines that are specified in Article 46 AML, thereby not necessarily excluding an exemption for confiscation of the illegal gains.

SAIC's Discretionary Powers to Grant Leniency. There is some uncertainty about SAIC's discretion to grant immunity to an applicant that has brought forward the necessary "important evidence."

While the NDRC rules explicitly provide that NDRC "may" grant immunity for the first applicant, the SAIC rules do not specify whether SAIC "may" or "should" grant immunity, although a literal reading of the text suggests that the agency "should" do so. SAIC's press release on the occasion of the rules' publication also uses the term "should" for first applicants. Like the NDRC rules, the SAIC rules state that, for subsequent applicants, reductions of penalty "may" be granted at the discretion of SAIC.

Possible Reductions in Fines. There are two main issues that distinguish SAIC and NDRC in their ability to grant immunity or fine reductions.

First, according to the SAIC procedural rules, the "organizer" of a cartel will not be eligible for immunity or reduction in fines. There is no definition of the term "organizer." Referring to the distinction made in Europe between the "instigator" of a cartel (the undertaking responsible for *establishment* of the cartel) and the cartel's "leader" (the undertaking responsible for the cartel's "operation"), it seems likely that the term "organizer" would catch both the instigator and the leader.

Second, the SAIC rules leave the level of fine reduction for subsequent applicants entirely at the discretion of the agency. There are no ranges of possible reductions specified, as they are in the NDRC Guidelines. The only guidance provided is that the reduction will depend on the time sequence of the application, the importance of the evidence provided, the relevant information about the concluding or implementing of the agreement, and the cooperation with the investigation.

⁹ SAIC's substantive rules regarding abuses of dominant position similarly permit it to apply a mitigated penalty if the dominant firm ceases its abusive conduct.

Evidence to be Submitted to SAIC. Leniency applicants need to submit “important” evidence, which is defined by the rules as “evidence that is sufficient to initiate an investigation or that plays a key role in finding a monopoly agreement, including information on the parties to the agreement, the products involved, the form and content of the agreement and specific details of implementation of the agreement.” While this definition is not the same as that provided in the NDRC Rules (“evidence that plays a key role for the authority to ascertain the existence of a monopoly agreement”), in substance the evidence required is likely to be the same.

CONCLUSION

The rules published so far contain many gray areas, providing little guidance to undertakings deciding whether to seek leniency in China. In particular, the lack of certainty as to whether the agency will grant immunity could deter certain would-be applicants. It is expected that the agencies will refine their rules as they gain more experience dealing with cartel cases.

In practice, this imperfect system still could provide sufficient incentive for some cartel participants to self-report their behavior, especially in worldwide cartels for which cartel participants already have sought leniency in other jurisdictions. Even if a cartel has not been brought to the Chinese agencies’ attention through a leniency application, the agencies are likely to learn about the existence of such cartel from the publicity given to cartel investigations elsewhere and then to start their own investigation. In such a case, severe penalties could await the cartel participants in China.

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