

Comment: China leniency program gives whistleblowers pause

Jurisdiction : Asia / China / EU / Europe / North America / North East Asia / USA

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IN BRIEF

Western antitrust lawyers who routinely urge clients to blow the whistle on cartels in the US, Europe or Japan hesitate to do so in China. Unclear criteria for leniency applications – and unpredictability in how leniency is applied – make many multinationals skittish about seeking immunity from prosecution and fines, as can be seen from recent Chinese rulings on cartels involving car parts and liquid crystal display panels.

China's antitrust authority last month imposed fines totaling 1.24 billion yuan (\$202 million) against 12 foreign car-part makers for price fixing – censuring companies that had already been penalized in Europe, the US and Japan for running cartels.

Tucked into the decision was a disclosure that three companies that had mostly missed out in the race for leniency in the other jurisdictions – Denso, Hitachi Automotive Systems, and Nachi-Fujikoshi – had applied for leniency with the Chinese authorities.

The disclosure highlighted a dynamic running through several recent global cartels: Western antitrust lawyers who would immediately recommend applying for leniency in the US, Europe or Japan shy away from doing so in China, even though the process gives the first company to come forward immunity from prosecution and fines.

The reluctance to seek leniency in China reflects some common factors: unclear criteria and procedures for leniency applications; a lack of transparency and predictability in how leniency is applied; and a lack of coordination with other jurisdictions in probes.

In the car-parts cartels, it is understood that the whistleblowers came forward only after China's National Reform Development Commission began its investigation.

– Test case –

A recent cartel among capacitor makers is understood to be one instance, if not the first, in which a company voluntarily chose to self-report to Chinese

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regulators at the same time as it applied for leniency in other jurisdictions such as the US and Europe. Lawyers the world over are expected to watch the Chinese probe closely as a test case for whether to apply for leniency in future investigations.

The first time the NRDC granted immunity on an international cartel came in January 2013, when the regulator imposed penalties totaling 353 million yuan on six makers of liquid crystal display panels. In the US and Europe, Samsung was the leniency applicant in investigations into this market. But the applicant in China was Taiwanese electronics company AU Optronics.

Lu Yanchun, a deputy director general of the NDRC's Price Supervision and Anti-Monopoly Bureau, said at a conference last September that the regulator welcomes business operators to self-report violations and provide key evidence (see [here](#)).

"Every applicant who makes confessions will surely get some benefits," Lu said. "The degree of confessions and how much valuable information is provided will determine the degree of exemptions. The more you confess and the earlier you confess, the bigger your reduction will be."

Lu said the leniency programs would only be applied in two circumstances: Whistleblowers must come forward either before the regulator has opened an investigation – or during an initial probe when regulators haven't yet gathered evidence.

The evidence they submit must deepen the regulator's understanding of agreements between companies and help it to determine whether they are monopolistic.

– Leniency, Chinese style –

Unlike leniency programs elsewhere in the world, China accepts whistleblowers for both vertical and horizontal agreements. Ringleaders, who are prohibited from applying for leniency in the US and other jurisdictions, are eligible in China. And multiple leniency applicants can be given full immunity in vertical cases under the Chinese rules.

Chinese lawyers often say the leniency program is effective, and they tend to bring their clients to the NDRC immediately. But some multinational companies have voiced doubts, amid concerns that local lawyers work too closely with regulators and don't put their clients' interests first.

International lawyers are more cautious about self-reporting. The way Chinese regulators use leniency isn't consistent with international practice, they say, noting that leniency is sometimes granted to companies that didn't even apply

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for it.

During recent probe into Audi and several car sellers, for example, dealer Hubei Aoze was granted exemption from fines because it self-reported and provided key evidence of the price-fixing agreement. But Wuhan Aojia was also exempted from penalties because it was less responsible for the illegal conduct, corrected its behavior immediately and because its behavior didn't cause harm.

In a high-profile investigation into the market for baby formula, the NDRC fined six companies 668.73 million yuan for price-maintenance agreements. Three manufacturers – Nestlé's Wyeth unit, China's Beingmate and Japan's Meiji – escaped a financial penalty. In statements, NDRC said only that the three provided important evidence and took proactive corrective action. It offered no further explanation for the decision.

– Reductions vary –

The agency's leniency decisions also vary when it comes to how much it lowers fines for cooperators who approach the NDRC second or third.

Last year, for example, the NDRC imposed fines totaling 110 million yuan on Insurance Association of Zhejiang Province and 23 insurance companies. In that case, fines were reduced 90 percent for the second leniency applicant and 45 percent for the third.

In the auto-parts cases, by contrast, second applicant Denso got a 60 percent reduction. The same occurred in the bearings case, where second applicant NSK saw its fines cut by 60 percent.

The way Chinese case handlers treat confidential documents also raises concerns among international lawyers. Take the case of NDRC's case against InterDigital Communications, a US wireless technology company that offered a package of commitments to address alleged monopolistic behavior.

The confidential proposal was leaked and aired on state broadcaster China Central Television, and the footage clearly showed the law firm's name and the words "confidential document" (see [here](#)).

Many international lawyers also point to the apparent lack of cooperation between Chinese authorities and their counterparts around in the globe. In many cartel cases, regulators in the US, Europe, Japan, Canada and elsewhere have acknowledged that they have worked together, by coordinating dawn raids and interviews, for example.

While US and European authorities have said publicly that they coordinate merger reviews with China's Ministry of Commerce, they haven't acknowledged

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working with the NDRC.

In the recent capacitors case, it is understood that the NDRC conducted a dawn raid in the probe on March 19. The US Department of Justice is understood to have sent out its subpoenas in late March, and raids in Korea and Japan didn't occur until late May and June.

Linked Case File(s)

Antitrust - NDRC - auto parts

Subjects : Antitrust

Industries : Energy-intensive Industries, Manufacturing

Regulators / Courts : China Courts, DOJ, The National Development & Reform Commission (NDRC), US Courts

Jurisdiction : North America, Asia, EU, Europe, USA, China, North East Asia

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