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Title: Antitrust Compliance Programs in China: Experiences from Practice

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Abstract
This paper is prepared for the American Antitrust Institute (AAI)'s 14th Annual Conference. There have been numerous heated topics surrounding the enforcement of Anti-Monopoly Law in China since its enactment in 2008. Antitrust compliance is one of the most notable issues. We choose in this paper to study antitrust compliance programs in China through interviews with Chinese practitioners and professors. The interviewees include experienced antitrust lawyers from Jun He Law Offices' Beijing Office, and Professor Xiaoye Wang from the AAI's Advisory Board and the Chinese Academy of Social Sciences. Interviews were also conducted with other Chinese lawyers and scholars on condition they not be identified. [1]The AAI sincerely appreciates their help with this research project.

Keywords: Antitrust, Compliance, China, Anti-Monopoly Law

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[1] Interviews were generally conducted by telephone and/or email, in the period from October 2012 to March 2013, in either English or Mandarin Chinese.

ANTITRUST COMPLIANCE PROGRAMS IN CHINA: EXPERIENCES FROM PRACTICE

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I. Guidance and Leniency Policies Provided by Chinese Government

In general, programs within companies aimed at preventing antitrust violations are still in an early educational phase. Chinese government has provided some guidance with respect to antitrust compliance. However, the current guidance, if any, seems to be limited and unclear.

All the three antitrust agencies in China, the Ministry of Commerce (MOFCOM), National Development and Reform Commission (NDRC), and State Administration for Industry and Commerce (SAIC), have organized training programs on antitrust law to help companies better understand the new Anti-Monopoly Law (AML). In addition, both NDRC and SAIC have promulgated detailed rules for implementation on anticompetitive agreements and abuse of dominant market position. Among the AML and rules there are leniency policies. For example, Article 46(2) of the AML provides, "[w]here any business operator voluntarily reports the conditions on reaching the monopoly agreement and provides important evidences to the anti-monopoly authority, it may be imposed a *mitigated* punishment or exemption from punishment as the case may be." Also, Article 12 of the Regulations on Prohibiting Monopoly Agreements of

SAIC (SAIC Circular No. 53) provides, the first whistle-blower of a monopoly agreement (not including price-fixing agreements) can receive a 100% reduction in punishment, and other companies who voluntarily report the agreement can also receive reduced penalties. Article 14 of the Provisions on the Administrative Procedures for Law Enforcement against Price Fixing of NDRC provides similar exemptions and reductions for price-fixing agreements.

There has been case law applying Article 46(2) of the AML. In 2012, the Guangdong Price Bureau, a local authority of the Price Supervision and Anti-Monopoly Bureau of NDRC, investigated and punished a price-fixing cartel in the local sea sand mining sector. Guangdong Baohai Sand and Stone Ltd. (Baohai) was the leader of the sea sand alliance but also the first whistle-blower. Pursuant to Article 46(2), the fine imposed on Baohai was reduced by 50%.

It has been broadly reported that the NDRC applied a leniency scheme in Liquid Crystal Display (LCD) panel price-fixing case in January 2013.[2] Whether and how the LCD makers confessed and cooperated with NDRC in the investigation was an important factor considered by NDRC in determining the administrative fines. For example, AUO, which was the first one to confess, was exempted from administrative fines and only needed to return the overpayment and confiscation of illegal gains. In contrast, Samsung, which was reported to be reluctant to cooperate with NDRC, was fined twice its illegal gains. The administrative fines on the other four LCD makers who also cooperated with NDRC were 50% of their respective illegal gains. However, it seems unclear whether other companies in China are fully aware of the steps taken by the government.

At least for now, whether a company has set up an antitrust compliance program will not be taken into account by the government when it is deciding whether to reduce the amount of

[2] Because the price-fixing activities occurred before the birth of AML, the NDRC applied the Price Law of China in this case.

penalties to be imposed. According to some practicing antitrust lawyers, the competition authorities have not expressly adopted any policy to encourage compliance programs within undertakings, and there is no mandatory requirement for compliance program under the AML or the regulations there under either. Also, the authorities have not promulgated any guidance for internal corporate compliance programs. Most legal practitioners are still struggling to understand current enforcement approaches and priorities taken by the Chinese antitrust multi-level regulators.

II. Issues Regarding Legal Advice on Antitrust Compliance Programs

1. An Overview of Antitrust Compliance Programs in China

Since the adoption of the AML, the NDRC has investigated 49 price-related monopoly cases, among which penalties have been imposed in 20 cases. The NDRC's latest investigations and sanctions on anti-competitive resale price maintenance (RPM), including the RPM practices by two state-owned liquor companies (February 2013) and the recent price-fixing cartel in the LCD industry (January 2013), suggest an unequivocal message that Chinese antitrust agencies are further strengthening their supervision and enforcement efforts. Companies will need to closely follow all the rapid developments of Chinese antitrust law and practices, and design and improve their antitrust compliance program for the Chinese market accordingly.

According to Professor Wang, among private companies, multinationals are paying much more attention to antitrust compliance. In contrast, local private companies often choose to learn antitrust compliance through news media, because they typically do not have a scale large enough to cause competition problems except for cartels. Local Chinese private companies may not be willing to set up their own internal antitrust compliance programs. According to some practitioners, now many larger local companies as well as multinational companies are trying to

conduct a China anti-monopoly audit and put in place a robust compliance program in light of all the recent enforcement actions.

Compliance programs cannot simply be imported from other countries. A compliance program needs to be China-specific. The applicability of monopolization and abuse of dominance in the U.S. and China come with different market share thresholds. Firms that are not subject to concerns about monopolization compliance in the U.S. may need to worry about the abuse of dominance provisions in the AML. China seems to have adopted the concept of collective dominance under EU law, which allows the authorities to lump together a number of firms for the purpose of determining dominance.

In addition to paying attention to the letter of the law, it is necessary for a company in China to pay close attention to the enforcement trends of the authorities so that they could be better prepared for any possible investigations against themselves in the future. There seems to be a sense that enforcement authorities have focused on certain types of cases, such as straightforward price fixing cases by trade associations, in their enforcement activities.

Law firms have been asked to help set up internal compliance programs and/or provide training by companies in China, because those companies are paying more and more attention to the potential risks of violating the AML. According to lawyers from Jun He Law Offices, the general purposes of these antitrust compliance programs at this stage typically include: (1) to introduce AML to the companies, especially the management team; (2) to let the audience know the kind of behaviors that might trigger anti-monopoly investigation and the consequences thereof; (3) to provide suggestions as to how to avoid or lower the risks under the AML; and (4) to provide suggestions as to what should be done if an anti-monopoly investigation has been triggered. The risks that companies generally seek to avoid include (1) being targeted by the anti-

monopoly authorities for investigation; (2) being investigated by the anti-monopoly authorities; (3) the conduct of the company being determined as a violation of the AML; (4) being fined or imposed with other penalties as a result of violation of the AML. However, some other lawyers implied that most antitrust compliance consulting they provided were merely some collateral issues to other bigger regulatory or industrial matters.

2. What Companies in China Should Have in Their Antitrust Compliance Programs

Under the AML, both conducts that occur within China and outside of China but which have negative competitive effect on the domestic market of China fall within the jurisdiction of the AML. Accordingly, the law should be applied to domestic companies and foreign companies in the same way as long as the domestic market would be affected and there should be no substantial differences in terms of the enforcement of the AML due to difference in nationalities of the undertakings. However, a team of lawyers said that there should be substantial evidence to hold a parent company liable if such company has branches or subsidiaries in China whose conduct affects a market in China. Also, enforcement under concerted practices or cartel seemed to have focused on local firms until the LCD case.

As a practical matter, lawyers agree that the compliance program designed for domestic companies should focus on basic issues under the AML due to the fact that there had been no competition law culture in China before the AML came into effect and it is still hard for domestic companies to understand the basic idea of the law, let alone the importance of compliance. Under such circumstances, to draw attention of the domestic companies, a compliance program should be designed to show the possible consequences of violating the AML and what kind of conduct might raise competitive concerns. Besides, if the domestic

companies in question also have foreign related business, the relevant foreign competition law should be included in the compliance program as well.

A compliance program designed for international companies needs to focus on the differences between the AML and the competition laws in other countries or regions in terms of both legislation and enforcement, since such companies normally have compliance programs regarding competition law in other major jurisdictions such as the EU and the US, and the competition law system as well as the enforcement thereof in China have been reflecting more and more China-specific characteristics especially in the past two years.

Although the AML has been in effect for almost 5 years, it is still an emerging legal domain in China. In fact, both the authorities and the domestic companies are still in the process of learning and understanding competition law as well as accepting the culture of competition law. Therefore, the enforcement practice will keep changing for a certain period of time, and the historical practices and even "precedents" might not be as much a reference for future cases as in other jurisdictions with mature competition law systems. Therefore, a regularly updated compliance program as well as a close relationship to a professional law firm is very crucial. Also, at the minimum, it is important for companies to have an up-to-date understanding of the implications and interactions between political and economic forces that influence the State and local authorities' enforcement approaches and/or priorities.

3. Legal Advice Regarding Setting up Compliance Programs

If a client does not have a compliance program and does not want one, lawyers thought that it should still seek legal advice on compliance issues. The first tip a lawyer would give may be, "if you want to do your business in one of the ways prohibited by the AML, the risk of being investigated will be high at least at this stage, since the current enforcement is still form over

substance. Violating the AML might put your company at stake because of significant fines and uncertainty in the AML enforcement. Asking for the advice from your legal counsel would always be necessary to reduce such risk."

A client may want lawyers to establish a compliance program for the company. A program can be simple or comprehensive. According to Jun He Law Offices, the first step should be to show the whole picture of the AML system to the management team. And then, the management team can come up with specific requirements and ask questions based on the company's business to help lawyers design a company-specific compliance program. With company-specific information in mind, lawyers can start designing detailed sub-programs, such as a program targeting at a specific group of people (e.g., business section) or a specific business model (e.g., joint venture).

Some other Chinese lawyers agree that depending on the size and risk profile of the company, a compliance program can be simple or comprehensive. A simple program typically includes implementing an effective complaint handling system and providing all relevant staff with trade practices training tailored to the business activity in question. A comprehensive program may include: (1) setting up a team of dedicated compliance officers (currently only a few companies, mostly multinational companies, have compliance officers or risk officers); (2) conducting regular trade practice compliance risk assessments and compliance program reviews; (3) designing detailed guidelines and procedures for different business units facing antitrust risks; (4) establishing systems to keep track of all legal and regulatory standards the company should comply with; and (5) developing and maintaining staff training programs. Every compliance program, simple or comprehensive, should be well managed, adequately resourced, properly documented and actively supported by the board and senior management.

More specifically, a Chinese lawyer used to be substantially involved in two multinational companies' compliance matters in China. Her assignments included: (1) formalization of a set of compliance policies which should be fully and actively supported and complied with by the company's board of directors and senior management team (who should actively play a leading role); (2) appointment of a specialist compliance officer (the in-house legal counsel may be the best candidate) and a compliance advisor; (3) producing risk assessment to ensure that there would be adequate resources and strategic monitoring of the compliance program; (4) internal training that was the foundation of any compliance program (operational staff must be provided with the training, information and resources so that they could understand the compliance aspect of their work); (5) establishment of a complaint handling system that provides prompt risk alerts and improves customer service; (6) preparation of documents for anti-monopoly compliance allowing the agencies to assess the adequacy of and provide input into the development of compliance program; and (7) Follow-up reviews, reporting and updates that would ensure the compliance program to continue meeting its purpose and addressing antitrust risks.

4. Special Role of In-House Counsel

In-house counsel is usually in charge of all kinds of daily legal issues of an undertaking and is familiar with all its concrete conditions. Therefore, an in-house counsel is generally in the best position to ensure that the communication between a law firm and a company goes on smoothly. Also, naturally being more intimately familiar with the company, an in-house counsel can help outside lawyers design the compliance program so that it can better address all the company-specific legal issues. In the same way, an in-house counsel is also at a better position to communicate with different departments within the company, understand different interests and

concerns of each department, and communicate those issues to the outside lawyers designing the compliance program. A lawyer also suggested that the in-house counsel should be appointed as the company's special compliance officer.

III. Special Concerns for State Actions and State Owned Enterprises (SOEs)

There used to be skepticism surrounding Chapter 5 of the AML which prohibits restraints of trade imposed by administrative authorities: would there be any *de facto* state action doctrine in China despite this chapter? A case has proved that this chapter actually has its teeth. In January 2010, the local government of Heyuan city, Guangdong province designated a GPS tracking and monitoring platform made by New Space-Time Navigation Technology Co., Ltd as the only municipal tracking and monitoring platform. Later, three other GPS operators filed a complaint with the Guangdong Administration for Industry and Commerce ("Guangdong AIC") claiming that the local government abused its administrative power. Following the Guangdong AIC's investigation, the Guangdong government issued an administrative review decision, which found that the local government of Heyuan city violated the Anti-Monopoly Law and invalidated its administrative order.

In China, state owned enterprises (SOEs) also need to care about antitrust compliance. Article 7 of the AML provides that SOEs may engage in monopolistic conduct and they will receive some special protection in certain industries. At the same time, however, there is no absolute immunity. For example, Article 7 points out that these SOEs shall not harm consumer welfare. The Chinese government also understands the danger posed by these special privileges and has already started to regulate SOEs' anticompetitive conduct. Former Premier Jiabao Wen stated in 2010 that China was going to "accelerate the reform of monopoly industries to facilitate fair competition among private and state-owned businesses." He also noted that these reforms

would require the Chinese government to balance the interests of different parties and, especially, to ensure that there would be no impact on the basic living conditions of people with low income.

The regulatory agencies have had training programs designed for SOEs. There have been SOEs seeking legal advice on AML compliance both under the AML and the competition laws of other relevant jurisdictions. In November 2011, Professor Wang was invited by China Telecom to give antitrust lectures in the company after the NDRC announced its investigation on the China Unicom and China Telecom's alleged monopolistic activity in the broadband Internet service market, where they charged their rivals higher fees for internet service but did not optimize the speed.

On February 22, 2013, the NDRC imposed penalties of RMB 449 million on Wuliangye Yibin Group Co., Ltd. and Kweichow Maotai Co., Ltd., two state-owned liquor companies, for their RPM practices in violation of Article 14 of AML. Basically, the two companies had set minimum resale prices on liquor sold by their distributors and punitive measures for distributors that failed to implement the agreed minimum price. The total penalties imposed have been the highest since the birth of AML.

There is no evidence that SOEs would be treated differently from private companies. However, it is unclear whether SOEs have started adopting internal compliance programs. The possible answer seems to be "not yet," but it may also be "soon."