

# Evaluating the Effectiveness of China's Current Leniency Policy

CLARE GAOFEN YE\*

Tencent Research Institute

Institute of International Law, the Chinese Academy of Social Sciences

## Abstract

This chapter critically evaluates the effectiveness of China's current leniency policy in fighting cartels. It considers the lack of individual accountability for cartels, highlights the risks of over-reliance on the leniency policy to fight cartels and points out certain aspects of China's leniency policy that exhibit inconsistency and lack predictability. Drawing on lessons from overseas experiences, this chapter proposes that China should limit leniency to non-coercers or non-ringleaders only, establish a more structured and consistent program, and recognize and avoid the risk of over-reliance on the leniency policy in combating cartels. Additional resources and enforcement efforts are crucially needed for China to reach and maintain a rigorous enforcement level against cartels that is separate from the leniency policy, which will make leniency more effective.

---

\* Dr Clare Gaofen Ye is Director, Research Center for Competition and Development, Tencent Research Institute, and Adjunct Research Fellow of the Center for Competition Law at the Institute of International Law, the Chinese Academy of Social Sciences. I would like to thank Professor Caron Beaton-Wells and Professor Allan Fels for their guidance and suggestions. Financial support from China's State Visiting Scholarship Foundation is acknowledged. All errors remain my own. I would also like to express my heartfelt appreciation to Professor Wang Xiaoye, my PhD supervisor, for her guidance in my research in competition law and policy during as well as after my doctoral studies at the Chinese Academy of Social Sciences. I am deeply indebted to Professor Wang's help and supervision.

## I. Introduction

Hard-core cartels constitute very serious violations of competition rules. However, they are often covert and very difficult to detect, investigate and prove. Accordingly, leniency policies have come to play an increasingly significant role in the effort to detect and prosecute cartels at both national and international levels. Leniency policies are designed to encourage violators to come forward, confess their participation in the cartel, and implicate their co-conspirators with first-hand, direct “insider” evidence that provides convincing proof of the illegal conduct. Leniency in antitrust enforcement involves granting immunity from penalties or reducing penalties for antitrust violations in exchange for cooperation with antitrust authorities.

The rationale behind a leniency policy is generally twofold: (i) increased deterrence and detection and (ii) enforcement efficiency.<sup>1</sup> Effective leniency policies are aimed at creating a race among conspirators to disclose their conduct to enforcers, in some instances even before an investigation begins, and cracking cartels that may have otherwise gone undetected.<sup>2</sup> The European Commission argues that leniency “has a very deterrent effect on cartel formation and it destabilizes the operation of existing cartels as it seeds distrust and suspicion among cartel members”.<sup>3</sup>

China introduced its leniency policy when it enacted the Anti-Monopoly Law (AML) in 2007,<sup>4</sup> and has used it in its enforcement effort against cartels since the AML came into effect in 2008. This chapter will critically evaluate China's leniency policy. After providing an overview of China's current leniency policy in section II, section III will set out the framework that will be used in this chapter to evaluate its effectiveness. In this evaluation, this chapter considers the lack of individual accountability for cartels, highlights the risks of over-reliance on the leniency policy to fight cartels, and points out certain aspects of China's leniency policy that exhibit inconsistency and lack predictability. This chapter will then provide some recommendations to address these issues.

---

1 Organisation for Economic Co-operation and Development (OECD), “Fighting Hard Core Cartels: Harm, Effective Sanctions and Leniency Programs” (OECD, 2002).

2 United Nations Conference on Trade and Development (UNCTAD), “Competition Guidelines Leniency Programs” (UNCTAD, June 2016); International Competition Network, “Anti-Cartel Enforcement Manual” (ICN, 2009) ch 2, 2.

3 European Commission, “Competition: Leniency”.

4 Anti-Monopoly Law of the People's Republic of China, Standing Committee of the National People's Congress, Promulgated by Presidential Order No. 68, 30 August 2007.

## II. Leniency Policy in China: From Dual Track to Convergence

As in most other jurisdictions, the AML prohibits monopoly agreements, which covers horizontal and vertical agreements, abuses of dominant market position, and anticompetitive mergers and acquisitions. Articles 46 and 50 of the AML set out the liability for cartel behavior.

According to Article 46(1), if a business concludes and implements a monopoly agreement, it can be ordered to stop the illegal conduct, have its illegal gains confiscated and be subject to fines of between 1% and 10% of total sales revenues in the preceding year; if the monopoly agreement is not implemented, then it faces a maximum fine of RMB 500,000. It should be noted that individual sanctions are not available under the AML. Further, Article 50 provides that, if the monopoly conduct is implemented and causes loss to others, the business may be subject to civil liability.

China's leniency policy, albeit in very general terms, is set out in Article 46(2) of the AML. It provides that if a business voluntarily reports information about the conclusion of a monopoly agreement and provides important evidence to the competition authority, the authority may reduce its penalty or grant it immunity. This general leniency policy was elaborated in 2011 through the implementation rules published by the Chinese competition authorities at the time, the National Development and Reform Commission (NDRC)<sup>5</sup> and the State Administration for Industry and Commerce (SAIC)<sup>6</sup>. These rules provided guidance on how NDRC and SAIC would each treat leniency applications for cartels falling into their areas of enforcement responsibility.<sup>7</sup> The implementation rules of the two authorities have provisions in common and differences. While full immunity from administrative fines was available from both NDRC and SAIC, their leniency programs differed in several key respects, such as their sliding scale of fine reductions and treatment of the organizer of a cartel. Although the regulations of NDRC and SAIC provided detail to Article 46(2) of the AML, important factors such as the scope of the policy, the eligibility of applicants and the procedure for implementing the leniency policy had not been stipulated clearly in either set of rules.

---

5 NDRC, *Regulation on the Anti-Price Monopoly Administrative Enforcement Procedure*, Order No. 8, 29 December 2010, art 14.

6 SAIC, *Regulation on the Procedure for the Investigation of Cases Involving Monopoly Agreements and Abuses of Market Dominance*, Order No. 42, 5 June 2009, art 20; Erik Söderlind, Yuan Cheng, "The Chinese State Administration for Industry and Commerce ('SAIC') adopts two sets of procedural provisions to implement specific areas of the Anti-Monopoly Law" (5 June 2009) e-Competitions Bulletin June 2009, Art N° 41343; SAIC, *Regulation on the Prohibition of Monopoly Agreements*, Order No. 53, 31 December 2010, arts 11, 12; Zhan Hao, "The Chinese State Administration for Industry and Commerce (SAIC) publishes three regulations on enforcement of the Anti-Monopoly law" (7 January 2011) e-Competitions Bulletin January 2011, Art N° 38570.

7 NDRC dealt with price-related monopoly agreements and abuses of market dominance, whereas SAIC was in charge of non-price-related monopoly agreements and abuse of market dominance conduct. Both of these enforcement powers have been transferred to the SAMR since March 2018.

For the first decade of the AML, there were effectively two different leniency policies in operation in China. However, this situation is about to change. First, since late March 2018, the enforcement of the AML is no longer divided among three different enforcement agencies but is unified under one body, the State Administration for Market Regulation (SAMR). Second, according to the working arrangement made by the Anti-Monopoly Commission under the State Council, NDRC was drafting a unified guideline on leniency policy which was expected to remove the differences between the two leniency programs and provide greater detail and clarity. In February 2016, NDRC issued the Draft Guideline for the Application of the Leniency Policy to Cases Involving Horizontal Monopoly Agreements (Draft Leniency Guideline)<sup>8</sup> for public comment. The Draft Leniency Guideline limits the scope of the leniency policy to horizontal anticompetitive agreements and provides much needed detail on the timing of application (including implementing a marker system), the eligibility of applicants, the scale of reduction of sanctions and confidentiality, as well as the factors affecting the competition authorities' decisions on exemption and reduction. The newly established SAMR has been working on a unified leniency policy and is expected to finalize it in 2019.

As at the end of 2018, there have been 14 cartel cases involving the application of the leniency policy. Based on the official statistics released since the AML took effect in 2008, NDRC investigated and closed 51 monopoly agreement cases. Among them, 13 or nearly 26% involved the use of the leniency policy. For SAIC, among the 31 monopoly cases that it dealt with, only one case involved the leniency policy. Overall, more than 35 companies have benefited from leniency policy, with at least 13 of them receiving full immunity.<sup>9</sup> Further, it is also worth noting that NDRC in its early years of enforcement applied its leniency policy to both cartel and resale price maintenance cases.<sup>10</sup>

---

8 NDRC, *Draft Guideline for the Application of the Leniency Policy to Cases Involving Horizontal Monopoly Agreements*, 2 February 2016.

9 Based on the data in Clare Gaofen Ye, "The Anti-Monopoly Regulation of the Monopoly Agreements: The Current State and Development of China's Competition Law and Policy Enforcement", in *Report on Competition Law and Policy of China* (The Law Press, Beijing 2015). The number of firms that were granted leniency in the 2015 Mercedes-Benz cartel in Zhejiang Province was not disclosed, so the total number here is based on an estimate of the number in that case.

10 RPM cases where the leniency policy was applied by NDRC include the *Infant Formula* case (2013): Hao Qian, "The Chinese NDRC imposes record fines on six major infant formula makers for vertical price-fixing practices (Biostime, Mead Johnson, Dumex, Abbott, FrieslandCampina, Fonterra)" (7 August 2013) e-Competitions Bulletin August 2013, Art N° 54929; the *Japanese Auto Parts and Ball Bearings* case (2014): Michael Gu, "The Chinese NDRC imposes record fines and applies explicitly for the first time its leniency program (Automotive component suppliers' cartel)" (20 August 2014) e-Competitions Bulletin August 2014, Art N° 68697; *Roll-on/Roll-off Shipping* case (2015): Robert E Connolly, "The Chinese NDRC fines shipping companies for price-fixing (EUKOR)" (28 December 2015) e-Competitions Bulletin December 2015, Art N° 77716.

### **III. Prerequisites of an Effective Leniency Policy: A Framework to Assess China's Leniency Policy**

China is part of a large group of competition jurisdictions that uses leniency policies in the battle against cartels. Leniency policies are considered to be one of the primary and most effective methods in anti-cartel enforcement. The optimal design of leniency policy for any given country should be based on a thorough understanding and critical assessment of the experiences and lessons from other countries, the insights from which are then adapted and applied to the circumstances of the country in question.

It is now internationally accepted that the three key characteristics of an effective leniency policy are: (i) severe sanctions, (ii) a heightened fear of detection and (iii) transparency. This framework was first articulated by the United States Department of Justice in the 1990s and subsequently adopted by the International Competition Network (ICN).<sup>11</sup>

First, severe sanctions are necessary to create fear among cartel members of punishment by the law if and once caught, so as to provide them with incentives to come forward to apply for leniency. Second, an effective leniency policy requires that there be a real likelihood of being caught. No matter how severe the sanctions are on paper, cartel members will not feel fear if they believe that the enforcement efforts of the competition authorities are so low that the expected punishment by the law is minimal. Unless they feel a real danger of detection and hence punishment, cartel members will not have a strong incentive to race to competition authorities to report violations, rendering the leniency policy ineffective. Third, an effective leniency policy must be able to provide certainty in terms of eligibility, requirements relating to the information about the cartel that needs to be submitted, and quantum of reductions in fines and sanctions for successful applicant(s). Otherwise, cartel members will be reluctant to come forward with information and evidence, as they will not be able to predict how they would be treated under the leniency policy.

How does China's leniency policy measure up when considered in terms of this analytical framework? This chapter argues that there are three main issues that could hinder the effectiveness of China's leniency policy: the lack of individual accountability, the risk of over-reliance on leniency and the lack of certainty and predictability.

---

<sup>11</sup> Scott D Hammond, Director of Criminal Enforcement, Antitrust Division US Department of Justice, "Cornerstones of an Effective Leniency Program" (ICN Workshop on Leniency Programs, 22 – 23 November 2004) 4–5; OECD (n 1); ICN (n 2).

## 1. Severe Sanctions: Lack of Individual Accountability

As mentioned civil and administrative liability under China's AML for cartel conduct is currently directed at businesses. No individual liability for cartel conduct is imposed on managers or employees of such businesses.<sup>12</sup>

By comparison, the competition laws of a number of developed economies contain individual sanctions against cartel members. For example, in the United Kingdom (UK), criminal sanctions are available against individuals who have committed a criminal cartel offense.<sup>13</sup> Furthermore, the UK Competition and Markets Authority may apply to have a director of a company that has committed a breach of competition law disqualified, on the basis that their conduct as a director makes them unfit to manage a company.<sup>14</sup> Similarly, in Australia, a person may be disqualified from managing a company for a certain period of time if they are ordered to pay a pecuniary penalty and disqualification is justified.<sup>15</sup> Individuals also face a maximum civil fine of AU\$500,000 or, in the case where a cartel offense is committed, up to 10 years imprisonment and/or a maximum criminal fine of AU\$420,000.<sup>16</sup> Although Hong Kong's relatively new competition law regime does not contain criminal sanctions, director disqualification orders are available as a means of individual accountability.<sup>17</sup> In the United States (US), the maximum individual fine for antitrust violations is US\$1 million.<sup>18</sup>

The lack of individual sanctions under China's current anti-cartel regime substantially compromises the efficacy of China's leniency policy. There have been only 14 leniency cases during the 10-year enforcement of the AML in China. This is likely an indication that cartel members in China are not sufficiently fearful about the punishment if caught, and hence are not coming forward to apply for leniency. China needs to increase the deterrence effect of its leniency policy by raising the severity of the sanctions available for cartel members. Introducing individual accountability is a suitable and critical way to make China's leniency policy more effective. At this stage, it may not be realistic for China to adopt criminal cartel sanctions. Nonetheless, other individual accountability measures could be introduced without needing to make substantial changes to the legal system, such as director disqualification.

---

12 Under Article 52 of the AML, fines of up to RMB 100,000 may be imposed on individuals in serious cases where they obstruct or refuse to cooperate with an investigation.

13 Enterprise Act 2002 (United Kingdom) s 190(1).

14 Company Directors Disqualification Act 1986 (United Kingdom) s 9A.

15 Competition and Consumer Act 2010 (Cth) s 86E.

16 *ibid* ss 76(1B), 79(1)(e).

17 On 6 September 2018, the Hong Kong Competition Commission announced that it had asked the Hong Kong Competition Tribunal to impose penalties against two directors allegedly involved in a cartel in the public housing renovation market and issue a director disqualification order against one of them: Hong Kong Competition Commission Press Release, "Competition Commission takes renovation cartel case to Competition Tribunal" (6 September 2018).

18 Antitrust Criminal Penalty Enhancement and Reform Act 2004, s 215; Sherman Act, 15 USC § 1.

## **2. Heightened Fear of Detection: Potential Over-reliance on Leniency**

Competition authorities in China should be aware of the possibility of over-relying on leniency and should try to avoid it. This has become a noteworthy issue in cartel enforcement in other jurisdictions. While leniency policies are regarded as one of the most effective methods to combat cartels, sometimes even described as much as a religion as a revolution in anti-cartel enforcement,<sup>19</sup> they should not be regarded as substitutes for traditional enforcement efforts. If a heightened fear of detection is to be preserved, it is crucial to maintain a credible threat by enhancing enforcement capability and maintaining rigorous enforcement activity.

Although to date there is little evidence to indicate that China is over-reliant on leniency, one cannot underestimate the risk of it occurring. For one thing, China adopts an administrative enforcement system, and the courts are not typically involved in how competition authorities deal with leniency cases. Therefore, unlike many other jurisdictions, the court does not act as a check-and-balance device in these cases.

### ***A. Over-reliance and its Impact on the Effectiveness of Cartel Enforcement***

Over-reliance on leniency can limit the effectiveness of cartel enforcement in several ways. First, competition agencies may be inclined to wait for leniency applications, which may lead to a reduction in active efforts to detect cartels. Strong cartel enforcement is necessary for a leniency policy to work effectively. If competition agencies reduce their effort in detecting cartel conduct by other means, then the incentive of cartel members to come forward to apply for leniency will be weakened because they now believe (rationally) that the cartel is less likely to be detected by the enforcement agency. Such belief might translate into reduced incentive to apply for leniency, thereby lowering the effectiveness of such a program. Perhaps the best example of where the cartel members were aware of the possible sanctions but had no fear of detection is the lysine cartel, which was uncovered by covert tapes with the assistance of a cooperator (but without a leniency applicant). The conspirators had joked about the possibility of detection because a large international cartel had not previously been detected.<sup>20</sup> It is therefore of crucial importance that competition agencies establish a credible reputation that they are willing and able to detect cartels through their own

---

19 Caron Beaton-Wells, “Immunity Policy: Revolution or Religion? An Australian Case-Study” [2013] 2 *Journal of Antitrust Enforcement* 126.

20 See Ann O’Brien, “Leadership of Leniency” in Caron Beaton-Wells and Christopher Tran (eds), *Anti-Cartel Enforcement in a Contemporary Age: The Leniency Religion* (Hart Publishing 2015).

investigative efforts.<sup>21</sup> To do so, they will need to maintain a constant record of detecting and punishing cartels without relying on their leniency policy, and be seen to do so.<sup>22</sup> Further, leniency policies should not be viewed as the single most effective anti-cartel enforcement tool. It is only one important component of the competition agencies' overall enforcement armory.<sup>23</sup> Therefore, in designing a leniency policy, it is necessary to pay attention to the interplay between leniency policy and other components of anti-cartel regulation to form the best combined force to combat cartel conduct.

Second, enforcement agencies might rely on information provided by leniency applicants without taking due effort to verify its accuracy and completeness. It has been argued that many competition authorities are subject to pre-set enforcement targets, and hence they are under pressure to deliver more and more cases.<sup>24</sup> In such circumstances, there is a risk that competition agencies will take the information provided by leniency applicants at face value. In the European Union, there has been an allegation of overinflated evidence from leniency parties brought to the European courts. The British Airways criminal case in the UK is a stark example of a situation where a competition agency relied on the leniency applicant and failed to fully verify the accuracy and completeness of the information disclosed.<sup>25</sup> The case involved an alleged price-fixing cartel between Virgin Atlantic (the immunity applicant) and its competitor British Airways. The criminal prosecution was abandoned because the Office of Fair Trading (the UK competition regulator at that time) was not able to offer any evidence of price-fixing.<sup>26</sup>

Another potential risk of over-utilizing leniency policy is that such programs can be used strategically by cartel members to hurt their competitors. Successful cartels must be able to find ways to punish members that choose to deviate from the agreed-upon cartel price or output. An oft-used mechanism to punish deviators is to launch a price war following the detection of cheating by a certain member. Brisset and Thomas argue that leniency can be used as another weapon

---

21 Andreas Stephan and Ali Nikpay, "Leniency Decision-Making from a Corporate Perspective: Complex Realities" in Beaton-Wells and Tran (eds) (n 20).

22 Wouter Wils, "Leniency in Antitrust Enforcement: Theory and Practice" [2007] 30 *World Competition: Law & Economics Review* 25.

23 Caron Beaton-Wells, "Leniency Policies: Effectiveness-Testing" in Nicolas Charbit et al. (eds), *William Kovacic, An Antitrust Tribute Liber Amicorum – Vol II, Institute of Competition Law* (Concurrences 2014) 303–17.

24 Andreas Stephan, "The Direct Settlement of EC Cartel Cases" [2009] 58 *International and Comparative Law Quarterly* 627, 642.

25 See Andreas Stephan, "Cartels" in Ioannis Lianos and Damien Geradin (eds), *Handbook on European Competition Law: Substantive Aspects* (Edward Elgar, 2013) 230.

26 See, e.g., Kylie MacLellan and Rhys Jones, "British Airways Price-fixing Trial Collapses", *Reuters* (10 May 2010). After the case, the Office of Fair Trading undertook a series of internal reviews and reforms of its leniency and wider investigative processes in order to strengthen its enforcement capabilities.



to strategically punish the cheater.<sup>27</sup> If it is more attractive than a price war, then self-reporting and applying for leniency becomes a credible threat. In this case, a leniency policy actually helps facilitate cartel formation. They argue that an imperfect weak leniency policy not only has no deterrence effect on cartels, it actually may become a means for cartel members to communicate, thereby enhancing the stability of cartels.<sup>28</sup> Similarly, Sokol suggests that the US immunity policy was having unreported adverse effects, including that it has been strategically used by businesses to damage their rivals.<sup>29</sup>

## ***B. Lessons for China***

From the above discussion, one can draw several lessons for China so as to improve the effectiveness of its leniency policy.

China must improve its enforcement capabilities beyond the leniency policy and introduce new mechanisms to facilitate the detection of cartels. The Chinese government must ensure that the competition enforcement agencies have the necessary resources and powers to uncover a good number of cartels without having to rely on leniency. Only by doing this can cartelists in Chinese markets feel sufficiently threatened to come forward to apply for leniency. NDRC and SAIC had fewer than 25 officials dedicated to AML enforcement, which was not sufficient for an economy the size of China's. The newly established SAMR has set up one division (with around five staff) that is responsible for monopoly agreement violations. In December 2018, SAMR formally delegated its enforcement power for monopoly agreements and abuse of market dominance violations of the AML in the regions to its provincial offices, meaning that SAMR will be responsible for cartel violations that have an impact on the national market. This delegation is a big step forward in China's efforts to build AML institutional and enforcement capacity.

In addition, the Chinese competition authority should be proactive in obtaining the necessary intelligence and evidence to detect cartels. They should closely monitor markets, observe publicly available information and data, and possibly use economic analysis of such data to try to detect and prove violations.<sup>30</sup> Moreover, China could adopt new mechanisms to help it detect cartels. For example, information and knowledge about ongoing cartels may come from such sources as competitors of the cartelized firms, former employees, and downstream

---

27 Karine Brisset and Lionel Thomas, "Leniency Program: a New Tool in Competition Policy to Deter Cartel Activity in Procurement Auctions" [2004] 17 *European Journal of Law and Economics* 5.

28 *ibid.*

29 D Daniel Sokol, "Cartels, Corporate Compliance and What Practitioners Really Think About Enforcement" [2012] 78 *Antitrust Law Journal* 201, 203.

30 Donald I Baker, "The Use of Criminal Law Remedies to Deter and Punish Cartels and Bid-Rigging" [2001] 69 *George Washington Law Review* 693, 708.

customers, including retailers and final consumers. One way to solicit such information and knowledge is to reward the informants. In April 2005, the Korean Fair Trade Commission introduced an Informant Reward System to facilitate the detection of secret violations of competition law. Its first reward of 66.87 million won was paid in June 2005 to an anonymous informant who had provided decisive evidence in a welding rod cartel case, including the names of executives of the six cartel member companies, meeting places and details of agreement.<sup>31</sup> China could investigate the implementation of a similar reward system to help improve cartel detection. Of course, in doing so, the Chinese government should be mindful of the interplay between leniency policy and other components (whether existing or proposed) of the anti-cartel regulation.

Further, Chinese enforcement agencies must be careful not to overly rely on the information provided by leniency applicants and make sure to verify its accuracy. As courts are not involved in cases initiated and dealt with by the competition authority under China's administrative enforcement system, there is a greater need for enforcement agencies to use due effort to verify the accuracy of information disclosed by leniency applicants.

### **3. Transparency: Lack of Certainty and Predictability**

Leniency policies should provide a high degree of transparency so that potential applicants can have a high degree of certainty as to how they will be treated in accordance with the policy.<sup>32</sup> If applicants are uncertain as to whether their application will result in leniency, they may be reluctant to put themselves and their agents at an immediate risk of serious sanctions; they might refrain from applying for leniency altogether. As such, the issue of who is eligible for leniency and its scope are the most important when designing leniency policies.

China's leniency policy presents several challenges to certainty and predictability, undermining its transparency. There were uncertainties surrounding the treatment of cartel ringleaders and "first-in" and subsequent cooperators, as well as inconsistencies in the way that NDRC and SAIC had granted leniency.

#### ***A. Cartel Organizers and Their Eligibility for Leniency***

In many jurisdictions that have an antitrust leniency policy, only those applicants who have not coerced others to participate in the cartel are eligible for leniency. For example, in Australia, the leniency policy clearly states that any applicant (corporation or individual) who has coerced others to participate in a cartel is

---

31 See William E Kovacic, "Private Monitoring and Antitrust Enforcement: Paying Informants to Reveal Cartels" [2010] 56 George Washington Law Review 766 – 97.

32 See, e.g., Hammond (n 11).

not eligible for immunity. However, they may be eligible for a reduction in fine.<sup>33</sup> Denying immunity to cartel members who coerce others to participate in the cartel enhances the deterrent effect of the leniency policy and helps to protect against the risk of cartelists using the leniency policy to harm their competitors.

In China, it is unclear whether a business that coerces another to participate in a cartel is eligible for leniency in China. The provisions in the AML regarding leniency do not address this issue, and the rules of NDRC and SAIC were inconsistent. Although the leader or organizer of a cartel would not have qualified for exemption or fine reduction under SAIC's leniency program,<sup>34</sup> there was no such restriction in NDRC's leniency program.<sup>35</sup> In fact, NDRC had granted a fine reduction to cartel organizers, as in the *Guangdong Sea Sand* case, where one of the three organizers was given a 50% reduction in the fine.<sup>36</sup>

This situation should change in the future. The Draft Leniency Guideline specifies that a cartel member who has coerced or organized others to join the cartel will not generally be exempted. However, they might still be eligible for a fine reduction.<sup>37</sup> This change is welcome, as it signals that those who coerce others or organize cartels will not obtain the benefit of immunity. However, as it may be difficult to identify cartel leaders or organizers in certain cases, the Draft Leniency Guideline should make it clear that exemption will not be granted to cartel members who coerced others to participate in the cartel, without having to identify a leader or organizer.

## **B. Treatment of the “First-in” Cartel Member and Cooperators**

Under China's leniency policy, there was also a fairly high level of uncertainty and even inconsistency between NDRC and SAIC rules regarding the treatment of the first-in and *subsequent* applicants that come forward to report cartel activity in several respects.

There was a difference in the way that a cartel member that was first to come forward with important evidence (the “first-in” applicant) was treated under NDRC

---

33 Australian Competition and Consumer Commission, “ACCC Immunity and Cooperation Policy for Cartel Conduct” (2014).

34 *Regulation on the Procedure for the Investigation of Cases Involving Monopoly Agreements and Abuses of Market Dominance* (n 6) art 10.

35 In the *Guangdong Sea Sand* cartel case, NDRC showed that even organizers/leaders of cartels can enjoy partial immunity – one of the three organizers was given a 50% reduction in the fine, and the other two organizers were given the maximum fine under the AML, namely 10% of sales revenues in the preceding year.

36 The other two cartel organizers were given the maximum fine under the AML, namely 10% of sales revenues in the preceding year; Allan Fels, Xiaoye Wang, Jessica Su, Wendy Ng, “The Guangdong Price Bureau of National Development and Reform Commission investigates and sanctions a cartel in the local sea sand mining sector (Baohai/Jianghai/Donghai)” (26 October 2012) e-Competitions Bulletin October 2012, Art N° 74334.

37 *Draft Leniency Guideline* (n 8).

and SAIC leniency programs. Under NDRC's program, the first-in applicant *may* have enjoyed full immunity,<sup>38</sup> whereas SAIC's program provided more certainty by stipulating that full immunity *would* be granted to such applicant.<sup>39</sup> Therefore, SAIC's program provided certainty by ensuring that full immunity was granted to first-in applicants, unless they were the organizer of the cartel. In contrast, there was some degree of uncertainty as to whether immunity would be granted to first-in applicants by NDRC. This uncertainty may have discouraged cartel members from coming forward with evidence.<sup>40</sup>

Similar inconsistencies existed between NDRC and SAIC in the treatment of second, third and subsequent leniency applicants. NDRC's leniency program provided that the second-in applicant may have received at least a 50% fine reduction and that subsequent applicants may have received at most a 50% fine reduction.<sup>41</sup> There was no provision regarding how subsequent applicants were treated under SAIC's leniency program. While SAIC's leniency program guaranteed that the first-in applicant would be granted leniency, given that a cartel member may not have known whether it was the first to report the cartel, the uncertainty surrounding the possibility of fine reductions for second or subsequent applicants may have meant that a cartel member was hesitant to report the cartel to SAIC. Hence this may have been the reason that NDRC received more leniency applications than SAIC.

Again, this situation will change in the future under the unified leniency program. The Draft Leniency Guideline provides more specific provisions regarding the treatment of first-in and subsequent applicants, which should be applauded. This enhances certainty and predictability, and limits the discretionary power of the enforcement authorities.

### ***C. Inconsistency between China's Two Agencies***

As one can see from the previous discussion, there was a degree of inconsistency between the leniency programs of NDRC and SAIC. The main cause of this problem lay in the division of responsibility between NDRC and SAIC. As the division of cartel enforcement duties between SAIC and NDRC was based on whether the monopoly agreement was price-related or non-price-related, it may have caused some problems in practice. For instance, where a cartel involved both price-related and non-price-related conduct, a cartelist may have been

---

38 *Regulation on the Anti-Price Monopoly Administrative Enforcement Procedure* (n 5) art 14.

39 *Regulation on the Procedure for the Investigation of Cases Involving Monopoly Agreements and Abuses of Market Dominance* (n 6) art 11.

40 Clare Gaofen Ye, "Combating Monopoly Agreements under China's Anti-Monopoly Law: Recent Developments and Challenges" *CPI Antitrust Chronicle: China Update* (14 February 2014).

41 *Regulation on the Anti-Price Monopoly Administrative Enforcement Procedure* (n 5) art 14.

confused as to whether an application for leniency should have been made to NDRC or SAIC. As such, coordination between the two agencies was required.

Improvements in this regard will certainly be desirable for China and are already taking place. In addition to formulating the Draft Leniency Guideline that will apply across the board, the enforcement of the AML is now consolidated and unified into one enforcement agency (SAMR). This will eliminate the inconsistencies that we saw between NDRC and SAIC.

## IV. Conclusion

This chapter has assessed the effectiveness of China's leniency policy using a framework that examines the severity of sanctions, fear of detection of cartel and transparency. The effectiveness of China's leniency policy can be enhanced in several ways.

First, China needs to increase the severity of the sanctions applicable to cartel members. Individual accountability, especially in the form of disqualification of directorship orders at this stage, is a suitable and critical way to making China's leniency policy more effective.

Second, China should be aware of the pitfalls of over-relying on its leniency policy to enforce the anti-cartel laws and avoid such over-reliance. Of particular importance is the need to recognize that rigorous enforcement without using leniency is necessary for the leniency policy to be effective. Only when cartel members are sufficiently fearful that their cartel will be detected will they have the incentive to come forward to apply for leniency. Waiting for leniency applicants to approach the enforcement agency while exerting very little effort in detecting cartels through other means will result in no or very few applications. For this reason, this chapter urges the Chinese government to give the enforcement agencies more staff and resources to enforce their anti-cartel legislation. Another form of over-reliance on leniency that should be avoided is relying solely on information provided by a leniency applicant without verifying the accuracy of such information.

Third, a number of measures could be taken to enhance the transparency of the leniency policy. Clear and consistent treatment of cartel members who coerce or organize others to participate in the cartel and first-in applicants and those who subsequently report the cartel should be established. It is critical for China to establish a more structured and consolidated enforcement system.

Finally, it is important to be aware that leniency policies should not be viewed as a panacea in combating cartels. It is only one important component of the competition agencies' overall enforcement armory which includes, for instance, competition advocacy, corporate compliance and private action.