

A Convergence Of Antitrust, Anti-Graft Enforcement In China

Law360, New York (October 14, 2014, 10:13 AM ET) --

Recent investigations and high-profile convictions highlight the ongoing crackdown by China's authorities against anti-competitive conduct. In their efforts to combat unfair competition, Chinese authorities have used both antitrust and anti-corruption laws, targeted specific industries, conducted swift investigations, executed dawn raids to obtain evidence, and shared information among different departments.

Companies that are charged face prosecution and, thus far, conviction, receiving increasingly higher fines, while their responsible executives are also being held accountable and sentenced to long jail terms. The authorities have used these investigations and enforcement actions to curb rising prices. Therefore, it is highly likely that they will continue for the foreseeable future, impacting the operations of many multinationals in China.



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This article provides an overview of the recent enforcement activities, considers their implications and offers some recommendations for multinationals in China to proactively address the challenges posed by the very public, swift and multifaceted investigations and enforcement actions undertaken by different authorities acting in concert.

Recent Enforcement Actions Involving the Life Science and Automotive Industries

Over the past two years, China's authorities have relentlessly investigated and carried out enforcement actions, clamping down on alleged anti-competitive conduct. Since its enactment, the National Development and Reform Commission and the State Administration of Industry and Commerce have typically relied on China's Anti-Monopoly Law to target anti-competitive conduct, with the NDRC having the remit on price-fixing issues, and the SAIC on anti-competitive agreements and the abuse of dominant positions.

Since late 2012 and as part of China's anti-graft campaign, the SAIC, the Public Security Bureau (PSB) and the Supreme People's Procuratorate (SPP) have also relied on the Anti-Unfair Competition Law and the Criminal Law to target commercial bribery on the basis that it is anti-competitive in nature. The Anti-Unfair Competition Law applies to all business operators (commercial and government entities) in China and prohibits the giving of bribes in the form of money or property (or through other means) and the

paying of secret commission for the purpose of selling or purchasing commodities or services.

Under the Criminal Law, offering a bribe for the purpose of seeking improper benefits is prohibited. Seeking improper benefits in commercial relationships means seeking competitive advantages in economic, organizational, administrative and other activities in violation of the principles of justice and fairness (e.g., for the purpose of influencing a counter-party to enter into an agreement).

As part of a move to curb rising drug prices in mid-2013, the NDRC launched an investigation into alleged price-fixing by 60 multinational and domestic life sciences companies. Soon thereafter, the investigations broadened to include investigations by the SAIC into alleged commercial bribery. One of those investigations culminated in a U.K.-based life science company being prosecuted for inter alia alleged payments of bribes to doctors of state-run hospitals and fined nearly \$500 million. This fine is record-setting and rivals the significant fines issued by the U.S. Department of Justice and the U.S. Securities Exchange Commission for Foreign Corrupt Practices Act violations. Five of the life science company's senior executives (both foreign and Chinese nationals) were also held criminally liable and sentenced to up to four years imprisonment (although the sentences were suspended).

Also, as part of a move to curb rising car and spare parts prices, a large number of well-known car manufacturers have been investigated for alleged antitrust violations in relation to inter alia the pricing of cars and spare parts. The investigations included raids on the car manufacturers by the NDRC, and almost concurrent announcements that several well-known car brands had been found guilty of anti-competitive conduct.

Two car manufacturers received fines of \$40.6 million and \$5.2 million, respectively, while 12 Japanese car part manufacturers received fines of over \$200 million. As a response to the investigations, several well-known car manufacturers lowered their spare part pricing in the Chinese market. Most recently, anti-corruption investigations have commenced against the joint venture partner of the car manufacturer that was fined \$40.6 million. The investigation is looking into allegations that the joint venture partner was fixing the prices of cars and spare parts, and some of its senior executives have been arrested.

Convergence of Antitrust and Anti-Corruption Enforcement in Combating Unfair Competition

The investigations into the life science and automotive industries have followed a similar pattern:

- The investigations have been on an industrywide basis, targeting alleged anti-competitive conduct.
- The investigations may have started off as investigations into pricing issues, anti-competitive arrangements and abuse of dominant positions, but moved to include commercial bribery, or vice versa.
- As part of these investigations, the Chinese authorities (the NDRC and the SAIC for antitrust issues, and the SAIC and the PSB for anti-corruption issues) moved in decisively to obtain evidence, including through dawn-raids.

- The investigations have been concluded swiftly, with announcements of guilt being made shortly after the investigation commenced, such as in the case of the raids on car manufacturers, and convictions and severe fines and prison terms being handed down within 14 months in the case of the U.K.-based life science company and its senior executives.
- In all cases, the process is very public, with significant negative effect on the reputation of the involved companies and individuals.

The consequences of these investigations and enforcement actions have been severe for the involved companies and their senior executives. The fines recently levied under the applicable laws demonstrate a hardening attitude towards anti-competitive conduct: 12 Japanese car part makers were fined a combined amount of over \$200 million; two carmakers were fined a combined amount of \$46 million; and the U.K.-based life science company was fined nearly \$500 million.

While these fines are significant, it is worth noting that the authorities could issue even higher fines under the applicable laws: Under the Anti-Monopoly Law, the Criminal Law and the Anti-Unfair Competition Law, companies can be fined and illegal gains confiscated. The fines under the Anti-Monopoly Law could potentially be as high as 10 percent of a company's annual turnover, while fines could be limitless under the Criminal Law.

In addition, as demonstrated by the prison sentences of up to four years meted out to the executives of the U.K.-based life science company (even though these sentences were suspended), the responsible officers of an involved company could face criminal liability and loss of their liberty for significant periods of time. Under the Criminal Law, the maximum prison term for the responsible officers of companies convicted of bribery is 10 years. Criminal liability for individuals does not attach under the Anti-Monopoly Law, however, the Anti-Monopoly Law specifically provides for civil suits to be brought by competitors who have been harmed by anti-competitive conduct.

Domestic and Foreign Cooperation in Fighting Unfair Competition

The investigations and enforcement actions point to close cooperation amongst the authorities using their wide investigative powers: the NDRC and the SAIC, relying on their powers under the Anti-Monopoly Law, as well as the SAIC, the PSB and the SPP, relying on the Anti-Unfair Competition Law and the Criminal Law. The SAIC, in particular, plays a key role in these investigations given its responsibilities for both antitrust and anti-corruption enforcement.

Under the Anti-Monopoly Law, the NDRC and the SAIC can search a company's business premises (dawn raids), search for and copy relevant documents, books and records and electronic data, interview relevant individuals, and make inquiries about relevant bank accounts. Additionally, under the Procedure Rules for Investigations into Monopoly Agreements and Abuse of Market Position of the SAIC, the SAIC can, when it decides not to continue its investigations under the Anti-Monopoly Law, apply any other applicable law or regulation, and transfer the case to any other enforcement authority that has the relevant jurisdiction.

With its powers, the SAIC, if it discovers evidence of corruption during its investigations into alleged antitrust conduct, it can decide to continue its investigations under the applicable corruption laws (e.g.: the Anti-Unfair Competition Law) and/or transfer the case to any other relevant enforcement agency (e.g. the PSB and the SPP for criminal prosecution under the Criminal Law) as required.

In combating anti-competitive conduct, Chinese authorities have also taken steps to broaden their reach by cooperating with foreign enforcement authorities. Under the Anti-Monopoly Law, Chinese authorities have entered into a memorandum of understanding with the Department of Justice and the Federal Trade Commission on cooperation on antitrust enforcement. A similar memorandum of understanding also exists between the European Commission and the Chinese authorities.

As for anti-corruption enforcement, the U.K. Serious Fraud Office recently confirmed its cooperation with the Chinese authorities in the case of the worldwide investigations into improper practices of the U.K.-based life sciences company which led to the record-breaking fine in China.

Implications for Multinationals Operating in China

The results of these investigations and enforcement actions have been extremely effective in achieving their purpose: curbing rising prices. As such, it is highly likely that the Chinese authorities will continue for the foreseeable future using their wide-ranging powers, whether under applicable antitrust laws or anti-corruption laws, to investigate, obtain evidence and prosecute anti-competitive conduct. The current investigations focus on specific industries (automotive and life science); however, it is likely that Chinese authorities will move on to other industries where anti-competitive conduct is likely to seriously harm public interests and adversely affect the welfare of Chinese citizens.

Due to the swiftness of the investigative process and the ensuing prosecution, companies face difficulties in independently investigating, defending and, where necessary, mitigating the issues uncovered. In this environment, the best defense may be a strong focus on prevention and compliance. In order to avoid the harsh consequences and for companies and individuals, we recommend that multinationals operating in China:

- Recognize that prevention is the best defense, and training is the key to prevention.
- Be vigilant on all aspects of their business operations that might be seen as anti-competitive in nature, including the classic antitrust areas such as pricing arrangements, vertical agreements with distributors and suppliers, as well as the classic anti-corruption areas such as gift giving, entertainment, travel, kickbacks, off-the-book rebates for customers and other sales arrangements (e.g., Chinese authorities may view sales arrangements whereby free samples of a product are provided as a form of advertisement as potentially restrictive to competition and therefore in violation of the applicable laws).
- Include within their compliance program quick response plans that enable them to swiftly deal with dawn raids and/or multiple and repeated production notices, to conduct a parallel and targeted internal investigation, to remediate, to prepare its defense and to make disclosures, where necessary, to Chinese authorities as well as to offshore regulators.

- Take a broader view of investigations, if they take place, and be prepared to address not only the issues being targeted by the Chinese authorities conducting the investigation, but also those that could arise from the evidence seized (e.g., an antitrust investigation may not necessarily be confined to antitrust issues, but may depending on the evidence considered by the Chinese authorities evolve into an anti-corruption investigation).
- Continue to periodically review, assess and stress-test their compliance policies, and train their employees and third parties to ensure compliance with the applicable laws.

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