

How to mitigate monopoly risks on cartels in China—— when overseas businesses are under investigation



I. What should be initial actions when responding to overseas investigations

1. The group shall properly and immediately inform the management or response teams of local subsidiaries or offices in China (collectively as “local subsidiaries”) of the overseas AML investigation, while not to raise unnecessary panic.
2. Local subsidiaries shall (1) prepare for possible dawn raid, (2) consider retaining outside counsels, and (3) conduct (with the support of outside counsels) brief AML training to the management.
3. When available, the group shall inform local subsidiaries about the substance and the scope of the overseas AML investigation.
4. It is advisable to have the procedures in place across all of local subsidiaries to respond to such enforcement. Procedures include having trained response teams at all sites, having agreed protocols on group communication, and IT response.

II. Case studies on overseas antitrust cartel investigations and how to evaluate if China-related business can be involved in any manner

1. The group shall transmit documents and information relating to the overseas investigation to the management or the response team of local subsidiaries.
2. Local subsidiaries shall share the transmitted documents and information with outside counsels for legal analysis.
3. Outside counsels shall, with the support by local subsidiaries, look into the local business and compare it with the overseas business being investigated to evaluate the legal risk under the AML.

III. How to conduct internal investigation to collect information?

1. Based on its legal analysis and review of local business, outside counsels shall develop an information request list for internal investigation.
2. Local subsidiaries shall generally inform the relevant personnel about the overseas investigation and the corresponding preparation in local subsidiaries, and ask for their cooperation.
3. Local subsidiaries shall prepare documents requested in the list.
4. Outside counsels shall assist local subsidiaries to conduct interview with relevant personnel.
5. It is advisable to have systems and procedures in place that enable the management or the response team of local subsidiaries to collect and preserve information centrally.

IV. How to deal with privilege issue in multi-jurisdiction investigation?

1. There is no client-attorney privilege in China. Therefore, we cannot refuse to provide communication between outside counsels and local subsidiaries or the group by alleging client-attorney privilege.
2. It is advisable to provide information regarding overseas investigation if it so requested.

V. How to develop response strategy, including evaluating the option of leniency application?

1. Based on information gathered from internal investigation, outside counsels shall make a further evaluation of the legal risk.
2. Outside counsels shall evaluate the possibility that local subsidiaries would be dawn raided by China anti-trust enforcement authorities.
3. Based on the evaluation of legal risk, local subsidiaries shall consider whether to apply for leniency.

VI. How to adjust horizontal agreement on price fixing and market allocation among competitors

1. Consider the parties of the suspicious horizontal agreement, the content of the agreement, and the period that the agreement lasts.
2. Do not try to conceal the existence of the suspicious agreement by destroying relevant information. Such behavior may cause criminal liability when the enforcement authorities initial their investigation.
3. If leniency has already been applied for in other jurisdictions, it may be necessary for the Chinese business to keep this secret, in order not to tip off competitors who are still being investigated by the competition authorities.
4. Also consider the possibility that other parties of the agreement would be dawn raided by overseas/China anti-trust enforcement authorities.

VII. What are the guidelines of leniency

1. Under China AML regime, the first applicant who provides significant evidence may be granted a 100% reduction of the final penalty. The second one may be granted a reduction over 50% but less than 100%. The third and the rest may be granted a reduction less than 50%.
2. Significant evidence refers to those which can help to determine the illegality of the confessed conducts.
3. There is no particular requirement on the form of evidence. Emails, affidavits, and interview notes are all acceptable to the authorities.
4. There is no marker system in China. Application without submission satisfactory evidence may not guarantee the position among leniency applicants.

VIII. Discussing price law impact to the investigation

1. In cases where both the Price Law and the AML are applicable, the enforcement authorities tend to choose the AML.
2. The AML was enacted in August 1st 2008 and is not retrospective. For violation dated earlier than that date, only the Price applies.
3. In regard to “sell below cost” and “discriminatory pricing”, the application of the AML is preconditioned that the accused holds a dominant market position, while the application of the Price Law does not require such dominant market position.

Thank you!

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