

Competition law whistle-blowing to pay off in China?

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As the number of leniency applications is down globally and competition authorities are struggling to find alternative sources of supply for antitrust complaints, China has circulated a draft rule to financially incentivise employee whistle-blowing.

On 19 November 2019, the State Administration for Market Regulation (SAMR) posted a draft of the Interim Measures on Rewards for Complaints against Significant Illegal Conduct in the Market Regulation Field (Draft Reward Measures) on its website for public comment.

The Draft Reward Measures build on a series of similar rules issued by SAMR's predecessor bodies and some local authorities in the fields of counterfeiting, product safety, pricing conduct and intellectual property. The difference here is that rather than focusing on specific areas like these prior rules, the Draft Reward Measures propose to establish a unified system for providing financial incentives to whistle-blowers who come forward to report various types of significant violations of rules, whose enforcement falls within SAMR's jurisdiction, including serious competition law infringements.

The goal of the Draft Reward Measures is to expand coverage of prior rules, increase efficiencies and reduce administrative costs, provide more substantial incentives, and set out a more detailed procedure for whistle-blowers to obtain rewards. The Draft Reward Measures are clearly meant to apply only to reports of "significant illegal conduct," not any kind of illegality.

The Draft Reward Measures define "significant illegal conduct" as conduct which amounts to a crime or which could be sanctioned by ordering the suspension of operations, revocation of permits or business licence, or "fines of relatively large amounts." In addition, the Draft Reward Measures explicitly stipulate that "violations of competition law" fall within their scope of application.

Of course, violations of the Anti-Monopoly Law (AML) by market participants can be sanctioned by fines of between 1-10% of sales revenues – which would certainly appear to qualify as "fines of relatively large amounts."

The Draft Reward Measures put forward detailed procedures for whistle-blowers to report illegal conduct to SAMR. Importantly, only natural persons qualify. Although they do not explicitly say so, the Draft Reward Measures seem mainly designed to allow employees to report wrongdoing within their companies. In contrast, those directly harmed by the reported conduct (like a buyer of a cartelized product) cannot use the new whistle-blowing system. Similarly, whistle-blowing by the person committing the infringement is not accepted. This sets the whistle-blowing procedure apart from the leniency program under the AML, where participants in unlawful agreements are allowed to self-report (except for ringleaders).

Under the Draft Reward Measures, a whistle-blower can report to SAMR in writing, by telephone or email, either disclosing his or her identity or on an anonymous basis (as long as he or she remains contactable). A complaint needs to feature some basic information, like the name of the alleged lawbreaker; the specific facts underlying the illegal conduct or at least some "clues"; and key evidence in that regard. In addition, the information in the complaint must not already be in SAMR's hands, in order to qualify for a reward, and must be sufficient to allow the authority to close an investigation and impose sanctions on the perpetrator.

The Draft Reward Measures classify rewards into three levels. The first-level reward requires the whistle-blower to put forward a detailed description of the facts; direct evidence; a perfect match between the allegations in the complaint and the sanctioned conduct; and a finding of "very significant illegal conduct or a crime." A second-level reward will be granted if the complaint describes the facts; provides direct evidence; and the allegations and sanctioned conduct perfectly match up. For a third-level reward, the provision of just basic facts; "related" evidence; and a basic match between the allegations and the sanctioned conduct is sufficient.

The rewards for whistle-blowers are 5%, 3% and 1% of the amount of the fine and repayment of unlawful gains imposed on the perpetrator for the first-level, second-level and third-level rewards, respectively, with RMB 5,000, 3,000 and 1,000 as minimum amounts guaranteed for the whistle-blower. However, the Draft Reward Measures also set a maximum amount of RMB 1 million (around USD 142,000), which can be doubled to RMB 2 million for cases that cause significant harm to society, so the amounts are effectively capped.

The Draft Reward Measures also lay out a specific procedure for SAMR to assess complaints filed and grant rewards to whistle-blowers. A key feature of that procedure is that SAMR officials are subject to strict disciplinary measures for maintaining the confidentiality of the whistle-blower's identity. This is presumably to prevent companies which have been targeted from outing the whistle-blower and/or seeking revenge.

The public consultation period allowing third parties to comment on the Draft Reward Measures expired on 28 November 2019. If enacted in a similar form to the current draft, the Draft Reward Measures may provide a significant boost to antitrust enforcement in China. Given the generally high level of fines imposed under the AML and the fact that certain antitrust offences arguably are likely to have a significant societal impact, it seems quite realistic for whistle-blowers to be able to obtain the maximum amounts available under the Draft Reward Measures (RMB 2 million).

For companies doing business in China, the likelihood of having employees report allegedly illegal conduct to SAMR or its local offices can be expected to increase substantially, putting pressure on companies to comply, which is generally a good thing. However, this incentivising of whistle-blowers may be a double-edged sword, for example, if companies coming under pressure (potentially, blackmail) from disgruntled terminated employees to pay increased severance settlements to avoid a whistle-blower report on a purported breach of law which is unrelated to their employment.

Only after the Draft Reward Measures have been enacted and implemented over a certain period of time will we know the true impact and whether they have indeed become a "game changer" for antitrust compliance in China. In any event, companies would be well advised to upgrade their compliance programs and strengthen company internal whistle-blowing channels in order to 'cut this off at the pass' and mitigate the risk of getting bogged down in costly and lengthy antitrust investigations by SAMR.