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GAI concerned by NDRC fining guidelines

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George Mason University (Credit: Ron CogswellFlickr)

The Global Antitrust Institute at George Mason University's Antonin Scalia Law School has warned that draft guidelines by China's National Development and Reform Commission risk over-deterring procompetitive conduct.

The GAI submitted its recommendations to the NDRC on Saturday, after responding to a public consultation on proposed guidelines that seek to clarify how the country's anti-monopoly enforcement agencies set fines and calculate illegal gains resulting from monopoly conduct.

The GAI, established in 2014, has become one of the most assertive US antitrust think tanks. The institute is headed by former US Federal Trade Commission commissioner Joshua Wright and former FTC intellectual property and international antitrust counsel Koren Wong-Ervin, US federal appellate judge Douglas Ginsburg, and law professor Bruce Kobayashi.

In its comments, the institute urged the NDRC to “expand the circumstances under which the anti- monopoly enforcement agencies will not seek punitive sanctions”, and to recognise that unilateral conduct and vertical restraints can be justified by efficiencies.

The institute called on the NDRC to clarify how total fines relate to the theories of harm and, when calculating penalties, to include the recovery of illegally obtained profits as a component of the total fine, rather than as an additional sanction.

The draft guidelines appear to create “a framework under which the primary remedy for violations of [China’s] Anti-Monopoly Act will be a fine calculated as a percentage of affected sales” and also “a presumption that confiscation of illegal gains will be an additional remedy if available”, the GAI said in its commentary.

“We are concerned that such a framework may undermine [Chinese enforcers’] stated goal of promoting economic welfare and economic efficiency by possibly over-deterring procompetitive conduct.”

The draft guidelines allow the country’s anti-monopoly enforcement agencies to confiscate illegal gains related to the Chinese market, even where such conduct occurs outside of China, the institute said.

“We respectfully recommend that the [enforcers] apply this provision only in limited circumstances in order to avoid conflict with foreign laws and the possibility of duplicative penalties, which are likely to over-deter illegal conduct,” the GAI said.

A separate provision allowing the country’s anti-monopoly enforcement agencies to calculate fines based on sales in and outside of China should be “omitted in its entirety” for the same reasons, the GAI said.

The institute said the NDRC should impose punitive fines and disgorgement of profits only where antitrust violations are clear, when it is feasible to calculate the harm caused by infringements, and where no alternative remedies exist that would adequately deter future conduct.

Economic analysis should also be used to determine any harm, and fine calculations should be limited to those costs and revenues that are clearly and directly attributable to violations, the institute said.

“When the calculation of illegal gain is unclear due to a lack of relevant information, we strongly recommend that the [enforcers] refrain from seeking disgorgement,” the GAI said.

Adrian Emch at Hogan Lovells in Beijing, who sits on the GAI’s international board of advisors, said the submission by the institute proposes a more general framework for applying the “illegal gains” concept, which may be helpful as the NDRC progresses to a final version of the guidelines.

“The Chinese antitrust authorities have struggled to apply the 'illegal gains' concept in the Anti-Monopoly Law in practice. The draft fining guidelines, too, are not entirely clear-cut. They have a general principle of operating disgorgement of 'illegal gains' while recognising certain exceptions,” he said.

“The Global Antitrust Institute's proposal is interesting and welcome; for example, it proposes to treat abuse of dominance and vertical restraints differently from hard-core cartels in terms of fining principles, which seems to make a lot of sense,” Emch added.

The draft guidelines are part of a wider push by the NDRC to improve transparency and legal certainty in China’s competition law. It is finalising guidelines on the automobile industry, intellectual property rights, leniency rules, commitments and exemption procedures.

The GAI was established in 2014 and since then has built a reputation as one of the most assertive antitrust think tanks in the US. Earlier this year it critiqued the NDRC’s draft IP guidelines and provided feedback on proposed revisions to the country’s Anti-Unfair Competition Law.

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