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RESEARCH ARTICLE

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Leniency program in anti-monopoly and its Sinolization

Abstract Aiming at attracting cartel members to surrender or expose illegal acts of others by reducing or exempting them from public law responsibilities, the leniency program in anti-monopoly law is an effective mechanism throughout the world to discover and crack cartels. The leniency program can be divided into various categories, all of which are based on three preconditions: Filing an application, providing effective information and fully cooperating with anti-monopoly authorities. China has a legal tradition similar to the program as well as legal grounds for establishing such program. However, implementation of the program in China may face potential problems arising from various factors including inner conflicts of the anti-monopoly legal regime, ambiguity of enforcement rights and weakness and lack of administrative law liabilities.

Keywords anti-monopoly, cartel, lenient treatment, Sinolization

摘要 反垄断从宽处理制度旨在减免公法责任，以吸引卡特尔成员主动投案并揭发他人的违法事实，这是国际上通行的一种发现和打击卡特尔的有效机制。从宽处理制度分为多种类型，其共同的先决条件有三：提出申请、提供有效信息、完全配合反垄断执法机构的查处。中国具有与该制度相契合的传统法律土壤，也具备建构该制度的法律依据，但是中国反垄断法律体系内部的冲突、执法权归属的模糊、行政法律责任的薄弱与缺失等因素，使得该制度在中国的实施面临隐忧。

关键词 反垄断，卡特尔，从宽处理，中国化

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1 Meaning and features of the leniency program in anti-monopoly

The leniency program[1] is an important part of the anti-monopoly legal systems of many countries and regions in the world today. According to this program, if the person who has illegal monopoly acts exposes his or others' participation in cartels to enforcement authorities proactively and fully, his liabilities of monopoly in public law may be mitigated or exempted.

Such system that pardons the "tipper" for the purpose of investigating and prosecuting cartel conspirators is of three features:

1.1 Purpose of obtaining information on illegal cartels at a lower cost

Monopoly practices usually fall into three categories: Concentration of operators with anticompetitive effect, abuse of dominant market position and cartel behaviors (or concerted behavior), among which, the concentration of operators with anticompetitive effect often occurs among operators of a large scale, big influence and high popularity and the process of concentration often involves the changes of equity structure, name of enterprises and officers as well as the integration of businesses and brands. As those processes will be disclosed to the outside unexceptionally, if the concentration of operators is suspected of violating anti-monopoly law, it may be easier for enforcement authorities to detect it and adopt corresponding legal measures.

The abuse of dominant market position refers to the anticompetitive practice of the operator of dominant market position to abuse such position. The so-called dominant market position means the market position possessed by a single or several operators as a whole to control the price, quantity or transaction conditions of goods in the relevant market or hinder and affect other operators to enter into the relevant market. The expressions of abuse of dominant market position include, among other things, predatory pricing, refusal to deal, exclusive dealing, differential treatment and tying. All those practices of abuse will bring loss to the interests of specific victims, and hence the victims usually have a clear and intensive

[1] "Lenient treatment system" refers to the "leniency program" or "leniency policy" in the Anglo-American law system. Some Chinese scholars translate the term into "*Kuanshu Zhengce*" (see Wang Jian, 2006) and "*kuanmian zhengce*" (see Zheng Pengcheng, 2006), and others translate it into "*liangxing zhekou zhidu*" (see Wang E'dong, 2004). Taiwanese scholars translate it into "*jianmian zhidu*" (see Xu Yongqin, 2004). Considering the terms "*kuanshu zhengce*", "*kuanmian zhengce*", "*liangxing zhekou zhidu*" and "*jianmian zhidu*" are not common in the jurisprudential literature of Mainland of China, this article uses the term "*Tanbai Congkuan*" and translates "leniency program" or "leniency policy" into "lenient (*congkuan*) treatment system" or "lenient (*congkuan*) treatment policy".

cognition of the illegality of those monopoly practices. It is relatively easy for anti-monopoly enforcement authorities to prosecute the legal liabilities of monopoly of those who have abused their dominant market positions at the petition of the victims or through civil proceedings filed by the victims.

Cartel behaviors refer to practices of reaching a consensus on the price, output, market segmentation and technical development and utilization to eliminate or restrict competitions. Compared with concentration of operators and abuse of dominant market position, cartel is usually of high concealment, which is hard to detect by a subject outside the cartel. Such concealment is mainly derived from close relations of interests and secrecy of cartel members' behaviors, where the close relations means once cartel is formed among operators, their opposite relationship as competitors will become secondary temporarily and be replaced by partnership relations in cooperation against other parties, characteristic of the so-called "competition undertakings being friends while customers becomes enemy". Once a case is exposed, cartel members usually harbor each other and cooperate with each other in destroying evidences of illegal acts, hence creating obstacles for investigation and prosecution. Secrecy means most of the cartels are "backroom deals", where usually there is no third party witness present when cartel members reach a cartel agreement by secret means. With the dissemination of knowledge of anti-monopoly law and the prosecution of cartel cases, the awareness of self-protection and counter-investigation capability of cartel members are improved, and consequently, it will be harder for anti-monopoly enforcement authorities to collect evidences.

Thus, it can be seen from the above-mentioned illegal monopoly acts that cartel is the most secret, and it is hard for enforcement authorities to find the evidences of illegal acts of cartel initiatively or collect such evidences through petition of a third party witness. However, cartel is the "most striking violation" of competition law, and the crackdown on cartel is one of the core issues of competition policies and their implementation. How to design and implement an effective mechanism to deter and crack down on cartel is a common challenge of the countries and regions that implement anti-monopoly law. (OECD, 2001) If solely relying on their own power to discover cartel and make a thorough investigation on its inside details, enforcement authorities usually have to consume plenty of enforcement resources and fiscal costs. Restricted by manpower and budget, the number of cases investigated by enforcement authorities every year is bond to be limited and the strength of enforcement may not be sufficient to form effective deterrence on cartel.

The leniency program in anti-monopoly law aims at concealing cartels, and tries to seek a breakthrough point inside cartels for disclosing cartels, hence improving the efficiency of the rule system of implementation of anti-monopoly law. It encourages cartel members to surrender to enforcement authorities and

provide anti-monopoly enforcement authorities with inside information of cartels, hence acting as "the tipper" to disclose other cartel members and fully cooperating with enforcement authorities in investigation. The leniency program may intensify the conflicts and suspensions among cartel members and a group of competitors gathering together temporarily for illegal interests in the "prisoners' dilemma", exposing them to the big legal risk of being betrayed by their partners at any time, and hence deterring and cracking down on cartel in an effective manner.

Since other types of illegal monopoly acts, such as abuse of dominant market position and concentration of competitors with anticompetitive effect, are relatively easy to perceive by enforcement authorities and the public, usually, it is not necessary to give lenient treatment to the legal liabilities of those wrong-doers for exchange of information on illegal acts.

1.2 Mitigation and exemption of monopoly liabilities in public law as inducement

Legal sanctions on the persons who have monopoly practices are the necessary path to deter the wrong-doers and relieve the victims and one of the important marks for implementation of anti-monopoly law. The operators who participate in a cartel, a typical illegal monopoly act, shall bear corresponding legal liabilities for its faults. The leniency program, however, as an adjustment of legal liabilities of monopoly or exception of application to some extent, mitigates or exempts the legal liabilities of the tipper of cartels, which seems going against of the purposes of anti-monopoly law. Nevertheless, if the "surrender" act of proactive statement cannot obtain the mitigation and exemption of the legal liabilities in return to certain extent to bring the expected net benefits of the "tipper" more than those of keeping cartels secret, there will be no cartel member who would expose the inside information voluntarily. Therefore, the mitigation and exemption of the liabilities of illegal monopoly is the price necessary guide cartel members to request for the application of the leniency program.

However, the leniency program can only mitigate or exempt the liabilities in criminal law or administrative law other than civil legal liabilities. Firstly, due to the punitive and compensatory features respectively of pubic law liabilities and private law liabilities, [2] though the voluntary surrender and revelation of cartel

[2] The private law liabilities in anti-monopoly law of some countries are of punitive features besides compensation, and the most typical legislation is the triple damages system in the US laws. However, if considering such factors as depreciation of currency, loss of social warfare and litigation cost, the damages system that seems punitive may usually not be sufficient to make up for the actual damages incurred from illegal acts. Nevertheless, even with respect to the punitive private law liabilities, the prosecution of such liabilities is the inherent right of private subjects, which cannot be deprived of by anti-monopoly enforcement authorities.

members may mitigate or set off their due punishments, no compensation is formed to make up for the damages of the victims accordingly, and therefore, the leniency program shall not deprive the private law subjects of the right to prosecute the civil liabilities of cartel members who meet the conditions for leniency treatment. Secondly, the reservation of private law liabilities is conducive to preventing the moral risks and speculative behaviors of the wrong-doers less exemption of the entire legal liabilities may become an adverse incentive to the violation of law by cartel members.

The severe liabilities in public law for illegal monopoly acts are a critical factor in determining whether the leniency program may work well or not. Only by facing the risk of severe sanction by public law can cartel members be willing to surrender and reveal other conspirers so as to get lenient treatment. If the provisions on liabilities in public law are too weak or though there are severe laws, punishments are rarely imposed actually, cartel members will take their own ways and turn a blind eye to the leniency program.

To provide for the liabilities of a natural person for monopoly in public law is of important significance for the leniency program in anti-monopoly law. In practice, the participants of cartel are usually large-scale enterprises, and the decision to participate in a cartel is ultimately made by natural persons who run enterprises. If public law liabilities are only limited to enterprises rather than decision-makers, when an enterprise is of a financial strength enough to disregard public law liabilities, the enterprise will actually provide a shelter for the natural persons who make decisions from legal risks and consequently the mitigation and exemption of legal liabilities may not form an effective inducement for the enterprise. Hence, a natural person may bear liabilities in public law for participation of his enterprise in cartel, which is an important factor in promoting the implementation of the leniency program in anti-monopoly law.

1.3 Safeguard of certainty and confidentiality

The certainty of the leniency program in anti-monopoly law means that the procedures, conditions and standards for obtaining lenient treatment shall be clear and explicit and the relevant anti-monopoly authorities shall give up their right of discretion on whether and how to punish the wrong-doers who meet specific conditions, and consequently, cartel members may believe that as long as they surrender to the relevant anti-monopoly authorities and disclose the entire information on cartel in possession, their legal liabilities will be mitigated or exempted. In other words, the leniency program shall provide a stable expectation of interests for the “surrendering” cartel members. If the content concerning lenient treatment is vague, obscure and not operable, and the

consequences incurred by disclosing the relevant information of illegality to the enforcement authorities are uncertain, it may be a safer and more rational choice for operators to remain in cartel. Take for example, the provisions of the US leniency program were originally vague, and there was only about one case of petition to apply for such program a year; while after a material reform in 1993 where the conditions for the mitigation and exemption of the petitioners' liabilities were further specified and more transparent, the effect of its implementation was improved substantially. Thus, some scholars pointed out what was critical to the implementation of the leniency program was the transparency of the standards on the initiation by the anti-monopoly authorities of the investigation procedures on cartel, on whether to impose a penalty or not, on the assessment of sentencing and penalties and on the application of the mitigation and exemption of legal liabilities.

The confidentiality of the leniency program in anti-monopoly law means that the competent authorities shall bear certain obligation of confidentiality concerning the identity and violation of cartel members who apply for lenient treatment, and shall not disclose this information unless otherwise specified by law or consented by the applicant. The leniency program is essentially a design to encourage revealing the information of illegal acts of cartel, but once a cartel member files an application for lenient treatment with the authority and provides the relevant information and cooperation, the authority shall bear the above-mentioned obligation of confidentiality. Such confidential requirement seems going against the purpose of obtaining the information on illegality, but in fact, it is an important safeguard for the successful implementation of the leniency program. This is because the applicant who applies for lenient treatment and reveals his conspirers jointly participating in cartel may confront the break of business cooperation and interpersonal relations, and suffer from revenges in various forms at the same time. In addition, if the applicant participates in a transnational cartel, once the information concerning his illegal acts is disseminated outside of jurisdiction where he applies for lenient treatment, the applicant may face the charges of cartel in other jurisdiction, hence incurring a series of legal risks hard to assess in advance. Therefore, with a view to freeing cartel members from those worries and encouraging them to apply for lenient treatment bravely, competent authorities shall strictly keep secret the relevant information of the applicant. For instance, as required by the US leniency program, the information concerning the identity of the applicant for lenient treatment as well as his illegal acts shall not be disclosed to anti-monopoly enforcement authorities of other countries including foreign competition enforcement authorities that have reached cooperation agreements with the US without prior consent of the information provider.

Though anti-monopoly authorities bear the obligation of confidentiality with

the relevant information concerning the applicant who applies for lenient treatment, the details of other cartel members than the applicant are not under the protection of confidentiality and may be transmitted and shared among the anti-monopoly enforcement authorities of different countries and regions.

However, even if anti-monopoly authorities strictly keep secret the information of the applicant, the fact that the applicant has reported the information on other cartel members for lenient treatment may be disclosed through other channels. For example, even if the name of the applicant has not been mentioned or the applicant is not listed as the object of punishment in the ruling or decision on cartel, people may deduce the fact of his application for lenient treatment from such phenomenon. In some regions, when reducing or exempting a cartel member from his legal liabilities, anti-monopoly authorities shall give an explanation on the decision, and thus the fact that a cartel member has surrendered to enforcement authorities and revealed his conspirers will be ultimately exposed to the public.

2 International experience of leniency program in anti-monopoly

Table 1: Current implementation of leniency program in anti-monopoly law in some countries and regions[3]

Region	Date	Major legal grounds for granting lenient treatment	Content of lenient treatment
US	1978	Corporate Leniency Policy ,US Antitrust Division of 1993 Individual Leniency Policy, US Antitrust Division of 1994	No criminal liabilities will be prosecuted against corporations and individuals
Canada	1999	Immunity Program under the Competition Act of 2000	Commissioners of Competition Bureau put forward suggestion on immunity of legal liabilities to the attorney general
EU	1996	Commission Notice on Immunity from Fines and Reduction of Fines in Cartel Cases (2006/C 298/11)	EU Commission may reduce the amount of fines of corporations involved or exempt such fines

(*To be continued*)

[3] Part of the contents of this table has drawn from a paper at the meeting of the ACCC on Sept. 24, 2004. See Funahashi Kazuyuki (2004), who then served as vice director of the Investigation Bureau of Japanese Fair Trade Commission.

(*Continued*)

Region	Date	Major legal grounds for granting lenient treatment	Content of lenient treatment
South Korea	1996	Paragraph 2 of Article 22 of the Monopoly Regulation and Fair Trade Act Article 33 of the Enforcement Decree of the Monopoly Regulation and Fair Trade Act	The correctional measures or the amount of levy on wrong-doers will be mitigated or exempted
UK	2000	Guidance on the Issue of Non-action letters for Individuals of 2003 Guidance as to the Appropriate Amount of a Penalty of 2004	Individual liabilities will not be prosecuted; penalty will be reduced or exempted
Germany	2000	Notice No. 9/2006 on the Immunity from and Reduction of Fines in Cartel Cases —Leniency Program (7 March 2006), the Federal Cartel Office	Immunity from or a reduction of fines

The US is the first country that has implemented the leniency program in anti-monopoly law in the world and the effect of the implementation of the US Antitrust Division Corporate Leniency Policy of 1993 is really a miracle. The first year when the system was implemented, there was only one case applicable to the system, while at present, there is one case every two weeks on average. At present, the leniency program has become the most important system that helps US authorities discover cartels and some scholars even praise that the system is the most effective anti-monopoly system from adoption of the Sherman Act in 1890. Subsequent to the administrative and criminal penalties against wrong-doers by public power authorities via the leniency program, there will usually be a number of actions for civil compensation of inducement anti-monopoly, the amount of compensation by the ruling or settlement of which is far beyond the amount of penalties imposed the US government. The combination of the leniency program and the private anti-monopoly litigation system give a heavy crack on cartels in the US. (First, 2001)

In the EU, the earliest legal document concerning the leniency program is the Commission Notice on Immunity from Imprisonment or Reduction of Fines in Cartel Cases of 1996, the provisions of which were relatively simple. Amended twice in 2002 and 2006, a relatively perfect EU document of Commission Notice on Immunity from Fines and Reduction of Fines in Cartel Cases was formed. In

the first year when the new version of notice was implemented in 2002, the commission received over 20 applications for lenient treatment and the number 70 of applications the next year. Hence the application for lenient treatment has become the most important channel for the competition enforcement authorities to obtain cartel information. It was estimated that among the investigation on cartels undertaken by the EU Commission, over 70% were launched according to the information obtained by use of the leniency program, while the cartel cases by initial discovery and investigation of the Commission in their supervision of markets only accounted for 30% of the total, which indicates the regulation of the EU through the lenient program on cartel behaviors including price fixing, colluded biding and tendering and segmentation of market is severer and more effective than ever before. (Riley, 2005)

Though some other countries do not adopted any statute of the leniency program, they also attach importance to the use of the principles of the leniency program to encourage voluntary surrender and report of illegal acts. For instance, there was a cartel case involving 19 enterprises engaged in the production of explosives in Italy in 1997. The fine of the case exceeded ITL1.406bn totally, when one of the enterprises was not fined, because it reported the case to the anti-monopoly authority, made great contributions to the investigation and prosecution of this cartel and stopped its illegal acts before the authority initiated the investigation of the case. (OECD, 2001)

So far, the countries that have implemented the leniency program include the US, Canada, the UK, Germany, Belgium, France, Finland, Greece, Ice Land, Poland, Sweden, Slovak, Luxemburg, Latvia, Hungary and South Korea. Considering the excellent effect of the leniency program in discovering and prosecuting cartel cases, the Organization for Economic Cooperation and Development (OECD) once explicitly suggested all EU members should introduce this program in a report. (OECD, 2002)

3 Application of the leniency program in anti-monopoly

3.1 Applicable objects of the leniency program in anti-monopoly law

The role of a cartel member in the designing and implementation of a cartel is of a crucial impact as to whether the leniency program is applicable to it. The ringleader and profit-gainer of a cartel that forces others to participate in the cartel is not eligible for the application of the leniency program as prescribed by some countries and regions.

For example, the EU provides that the person who applies for lenient treatment shall not be the abettor or the person who force others to participate in a cartel.

Canada provides that the applicant shall not be the abettor or the ringleader of illegal acts. The US requires the applicant shall not be the person who "forces others to participate in illegal acts" or "obviously acts as leader or abettor in such acts". It shall be noted that the Antitrust Division of US Department of Justice points out when interpreting the above-mentioned provisions that the "person" herein is singular; and if in an illegal act, two or more persons implement coercive behaviors or act as "leader or abettor" jointly, any of them are entitled to request for lenient treatment provided that the legal liabilities of the person who firstly applies for lenient treatment will be reduced or exempted. The UK has also the requirements similar to such provision of the US. (OECD, 2001) Moreover, in order to prevent the principal elements of a cartel from conspiracy in filing applications at the same time for acquiring lenient treatment for all of them, the US law further provides that in such case, all the applications of lenient treatment by such batch of principal elements shall be dismissed.

The exclusion of the application of the leniency program to the principal members of a cartel aims at reminding the operators not to initiate, organize or force others to participate in a cartel, hence checking the generation of cartel at source. Meanwhile, it may be conducive to alienating the relationship between principal members and accessory members of a cartel and encouraging those accessory members to supervise the illegal acts of principal members privately.

3.2 Premises for obtaining lenient treatment

To have lenient treatment, cartel members shall satisfy some special conditions. In the current leniency programs in anti-monopoly law of the world, there are generally the following three premises at least:

3.2.1 Take the lead to file an application for lenient treatment

The first cartel member who applies for lenient treatment with anti-monopoly authorities will obtain the priority in lenient treatment to the maximum extent, while those who file applications subsequently, even by only a step later, cannot have lenient treatment or may obtain only very limited lenient treatment. Such provision is designated to create a "prisoners' dilemma" or a "mechanism of competitive voluntary surrender" where "First Comes First" among cartel members. To be wary of being betrayed by cartel conspirers, cartel members will be nervous about their relationships and cannot reach mutual trust, while anti-monopoly authorities may benefit from such situation of conflicts.

The sequence of the applications for lenient treatment is of a very big impact on the reduction or exemption of the legal liabilities of cartel members. For instance, in the US Graphite Electrodes Case, the first applicant for lenient treatment did not

receive any punishment, the second applicant was imposed a fine of USD35mn; the third one, a fine of USD110mn; and the last applicant, a fine up to USD135mn.

3.2.2 Provide effective information

To have lenient treatment, a corporation or an individual shall not only "surrender" as early as possible, but also provide reliable and valuable information on illegal acts. The more specific the information is, the more powerful to prove the illegality of the cartel and the more helpful for the applicant to have lenient treatment. Specifically, firstly, the information and its source shall be reliable and the information provided by the party concerned throughout the investigation of case shall be true. Secondly, such information shall be of important value to the investigation on the cartel. In the EU leniency program, whether "a conclusive evidence has been provided first" to prove the existence of a cartel is a critical factor of consideration. Unlike the EU leniency program, the leniency programs of the US and the UK have not adopted such requirements as the weight of "conclusive evidence", since legislators believe that even the evidence provided by the applicant for lenient treatment is not "conclusive", such evidence may be a clue to obtain "decisive" evidence, and hence the party who provides such "non-decisive evidence" shall benefit from the reduction or immunity of liabilities.

3.2.3 Completely cooperate in the investigation by anti-monopoly authorities

The applicant for lenient treatment shall provide the competent authorities with completely ongoing cooperation and coordination. In further investigation, the anti-monopoly authorities need to understand the circumstances of all cartel members and collect necessary evidences and materials, and thus the applicant for lenient treatment shall offer cooperation throughout the process.

For example, the US leniency program provides that the applicant shall adopt all lawful and reasonable measures to coordinate the investigation by the Antitrust Division. If the applicant (usually one or more natural persons of an enterprise) fails to cooperate, the authority may determine whether the enterprise has offered a "complete, ongoing and thorough" cooperation according to the factors including the number of the persons who fail to cooperate and its impact on the investigation of the case and whether the enterprise has taken necessary measures to cause the relevant natural persons to cooperate with the authority.

3.3 Types of application of the lenient program in anti-monopoly law

Most of the lenient programs implemented by countries and regions are of

similar structures. For the convenience of research, they can be categorized by six methods based on partial differences:

3.3.1 "Reduction of liabilities" and "immunity of liabilities"

According to the differences of the extent of lenient treatment, the leniency program can be categorized into the leniency program for reduction of liabilities and that for immunity of liabilities. The former means the legal liabilities of the wrong-doer will not be exempted completely and the wrong-doer shall receive a sanction less severe than general legal abilities, such as reduction of the fines against the wrong-doer. The latter means that legal sanction will be exempted where public law liabilities of the wrong-doer will not be prosecuted.

3.3.2 "Leniency of administrative liabilities" and "leniency of criminal liabilities"

The public law liabilities of cartel behaviors consist of administrative liabilities and criminal liabilities. In the jurisdiction where the cartel is deemed as an administrative violation, administrative liabilities may be reduced or exempted through the leniency program; in the countries such as the US and Canada where the cartel shall also be subject to criminal liabilities, the criminal liabilities of wrong-doers may also be reduced or exempted through the leniency program.

3.3.3 "Leniency for one case" and "leniency for multiple cases"

"Leniency for one case" means that the applicant only provides the information on the illegal acts of one cartel with its participation and obtains lenient treatment only in such case. That is the most common and popular. "Leniency for multiple cases" aims at encouraging wrong-doers to give affidavit on multiple cartels they participate. For instance, the leniency programs of the US and the UK have provided that if an applicant reveals a second cartel in his cooperation with the authorities in investigation, besides the lenient treatment he may obtained for the second cartel, his legal liabilities for the first cartel may be further reduced or exempted. Practices show that such "amnesty plus" of the leniency program is an effective approach to obtain the secrets of illegal acts and discover more illegal acts. In practice, there are many cases where the information of a second cartel is provided when the application for lenient treatment of the first cartel is admitted. According to statistics, the clues of about half of the cartel cases under the US investigation are the information provided by the applicants for lenient treatment in investigations on other cases.

3.3.4 "Administrative determination" and "judicial determination"

The authorities ultimately empowered to grant lenient treatment are divided into administrative authorities and judicial authorities in practice. In general, the decision on lenient treatment is usually made by special administrative authority or an anti-monopoly enforcement agency at the end of administrative enforcement procedures. Before applying for lenient treatment with the competent authorities, cartel members usually contact the authorities for obtaining the approval and guarantee of exemption, and then reach agreements on lenient treatment with the authorities and disclose the information on illegal acts. Provided the applicant has fully performed the requirements of the leniency program, to safeguard the lawfully expected interests of the applicant, the authority shall give up its right of discretion on whether to grant the applicant the lenient treatment in accordance with the aforesaid agreement. However, the authority reserves the right to determine the extent of the lenient treatment for the applicant according to the performance of the applicant and the continuous cooperation of the applicant in the investigation process is the prerequisite for any of the agreement on lenient treatment reached between the authority and a corporation or an individual. For example, the EU provides that if an enterprise confesses the facts candidly, the EU Commission may reduce the amount of fines imposed on it or exempt it from fines; but if the enterprise withdraws a confession in the trial of the court of first instance, the EU Commission may request the court to increase the amount of fines.

Besides the administrative enforcement authorities, the implementation of the leniency program may involve other agencies such as courts and procuratorates. Thus, the decision on granting lenient treatment by the anti-monopoly enforcement authorities may not be final. If courts are the only agencies that rule on sanctions of illegal monopoly acts, courts shall agree on the decision made by the enforcement authorities according to the leniency program to ensure the stability and certainty of the leniency program. In Canada, for instance, the right to prosecute illegal monopoly acts and make the final decision on lenient treatment is vested with the attorney general, and thus, the way to implement lenient treatment by the authority is to give suggestions on lenient treatment to the attorney general, who is authorized to give approval or not.

3.3.5 "Ex ante application" and "application during investigation"

"Ex ante application" means that a wrong-doer can have lenient treatment only when he has filed an application for lenient treatment before initiating investigation proceedings against a cartel by the anti-monopoly authority; and the "application during investigation" means a cartel member may still apply for

lenient treatment after initiating the investigation proceedings by the authority.

The US, Canada and the UK allow for cartel members to file an application during investigation, because even the anti-monopoly authority is aware of the possibility of the existence of a cartel, the first-hand evidence from cartel members may still be very helpful to the investigation. However, after having obtained the information on illegal acts, the authority will be stricter in granting the lenient treatment to the applicant. According to the requirements of the US policies, upon the initiation of an investigation by the competent authorities, the cartel members who want to get immunity of liabilities shall file an application for lenient treatment before the authority has grasped evidences enough to determine the establishment of illegal acts.

In view of the US, more than half of the applicants for lenient treatment "surrendered" after the authority had initiated some investigation. Take for example, in a vitamin case, the governments of the US and other countries made investigation for two years and a half but still could not affirm whether the acts of the investigated party were illegal. It was the assistance of Rhone-Poulenc Company, a member of the cartel that helped clarify the whole truth of the case. But for granting the immunity of liabilities to the party after the commencement of the investigation, it is hard to predict whether the case could be solved smoothly. (OECD, 2001)

3.3.6 "Prepositive stop of illegal acts" and "Non-prepositive stop of illegal acts"

The so-called "prepositive stop of illegal acts" means the applicant for lenient treatment shall have made bona fide efforts to stop and correct the illegal monopoly acts in issue before providing the anti-monopoly authority with the information of illegal acts, otherwise, he may not have lenient treatment. The "non-prepositive stop of illegal acts" means the stop of illegal monopoly acts of the applicant is not taken as the prepositive condition for filing the application for lenient treatment. According to the requirements of the EU, the applicant who wants to have lenient treatment to the maximum extent shall no longer do illegal acts in issue when surrendering to the authority. The US requires that the applicant should have adopted immediate and effective measures to stop its/his participation in the illegal acts before voluntary surrender; the relevant provisions of the UK require that the applicant shall have stopped participation in the cartel when applying for lenient treatment; and Canada requires that the applicant shall have taken effective measures to stop the illegal act. Differently, the provisions of South Korea hold that the requirement for the applicant to stop illegal acts before voluntary surrender may delay his report to the authority, and hence the applicant is not required to stop his illegal acts before applying

for lenient treatment.

4 Sinolization of the leniency program in anti-monopoly

4.1 Leniency program in traditional Chinese legal environment

The proactive surrender to the competent authority and truthful statement of violations by cartel members are deemed as voluntary surrender, and their prosecution and revelation of other cartel members and assistance to the competent authority in investigation on the acts of other wrong-doers are deemed as "meritorious service". The leniency program in anti-monopoly law grants "awards" to the wrong-doer who has given voluntary surrender and meritorious services in the form of reduction or exemption of public law liabilities, and such program incorporates the two institutional paradigms of leniency for voluntary surrender and meritorious service with a long history and rich legislative and practice experiences in China, which is not a simple addition of such two paradigms.

4.1.1 Origin of the leniency program for voluntary surrender

Voluntary surrender generally means that an offender takes initiatives to surrender to the competent authority and truthfully report the facts of his crime, or a detained offender truthfully states his crimes that are not grasped by judicial authorities. The grant of lenient treatment to the surrendering party by reducing or exempting him from due punishments has always been deemed as a regime characteristic of the Chinese law system. All feudalistic dynasties attached great importance to the use of the leniency program for voluntary surrender in persuading wrong-doers to surrender and alienate and destroy joint offenders. The program was originated from Xia Dynasty (or West Zhou Dynasty as believed by some scholars), formally established in Qin Dynasty, fully developed as of Tang Dynasty and further improved and perfected in Song, Ming and Qing dynasties. There were several records of mitigation of the punishments on the persons who surrendered voluntarily in the Shuihudi Qin Tomb Bamboo Slip — Q&A of Law; the Han Shu (History of Former Han Dynasty)· Biography of the King of Hengshan had the record of "exempting the person who surrendered voluntarily from punishment"; and the Codes of Tang Dynasty contained many articles concerning lenient treatment of the surrendering party, for example, "The punishments on the person who voluntarily surrendered before his crime is discovered may be exempted". The Criminal Code of Song Dynasty, the Code of Ming Dynasty and the Code of Qing Dynasty further developed and

detailed the leniency program. Both the Interim New Criminal Code promulgated by Beiyang Government and the Criminal Law of the Republic of China promulgated by Kuomintang government adopted the provisions on voluntary surrender. During the periods of Chinese Anti-Japanese War and Liberation War, the political power of the Base Areas and the Liberated Areas of the Communist Party of China (CPC) had implemented some special regulations on the leniency program of surrender, which accumulated experience for the establishment of the leniency program of surrender after the establishment of the People's Republic of China.

There are mainly two provisions concerning the leniency program of surrender in the current Chinese laws. Article 67 of the Criminal Law provides "Anyone who voluntarily surrenders and reports his crime faithfully after having committed a crime shall be deemed as voluntary surrender. Those criminal elements who surrender voluntarily may be given a lighter or mitigated punishment, and those of them whose crimes are relatively minor may be exempt from punishment." Paragraph 4 of Article 19 of the Law of Administrative Punishments of Public Security provides: "Anyone who surrenders voluntarily and makes a statement faithfully about his violation to the public security organ" "shall be given a mitigated punishment or may be exempt from punishment".

By comparison, both the leniency program for voluntary surrender in traditional and current Chinese laws and the leniency program in anti-monopoly law grant lenient treatment to the person who surrenders voluntarily, but they vary in purpose actually. The former aims at prosecuting the person who surrenders voluntarily by granting lenient treatment, while the leniency program in anti-monopoly law reduces the legal liabilities of the person who surrenders voluntarily or exempts him from punishment is designated to discovering and investigating other members of a cartel, rather than prosecuting the person who surrenders voluntarily. The leniency program of voluntary surrender in Chinese law forms a complete system by itself, which does not require for the circumstance of meritorious service at the same time. The leniency programs for voluntary surrender and those for meritorious service may be applied separately or jointly, while in the leniency program in anti-monopoly law, voluntary surrender and meritorious service are closely related and indispensable from each other, and purely voluntary surrender or meritorious service is not applicable to such program.

4.1.2 Leniency program for meritorious service and its origin

Meritorious service generally refers to the acts in the interest of the society, including prosecution and revelation of the crimes of others, provision of clues to investigation of a case and assistance in seizing suspected offenders. The concept

of reduction or exemption of the criminal liabilities of an offender who makes meritorious service in China can be traced back to West Zhou Dynasty. In fact, all the feudal criminal laws of ancient dynasties had adopted the "provisions on the performance of 'meritorious service' and punishments of the offenders to different extent, though the term 'meritorious service' was not used." (Zhou, 1999) For example, the Code of Qin Dynasty • Feng-chen Shih collected the cases where an offender was exempt from punishment as he seized other offenders. Article 38 of the Code of Tang Dynasty explicitly provided that in case offenders escaped when their joint offense was discovered, if the offender who committed minor crime could seize those who committed severe crimes and surrendered to the authority, or if the escaped offenders had the same crime but one of them regretted and seized more than half of the escaped offenders and surrender to the government, he might be exempt from punishment. The Code of Yuan Dynasty and the Code of Qing Dynasty had also adopted the legal system of the leniency program for meritorious service. Since the New Democratic Revolution, the leniency program for meritorious service has been the consistent criminal policy of the CPC.

In the current Chinese laws, the provisions concerning the leniency program for meritorious service are as follows: Article 68 of the Criminal Law which provides "Where an criminal has the performance of meritorious service, including revealing the crimes of others which has proved to be true through investigation, or providing important clue to enabling other case to be solved, his punishments may be mitigated or exempted" and Paragraph 5 of Article 19 of the Law of Administrative Punishments of Public Security provides: "Anyone who has performed meritorious service" "shall be given a mitigated punishment or may be exempt from punishment".

Chinese leniency program for meritorious service encourages wrong-doers to disclose others' illegal acts, which is similar to the leniency program in anti-monopoly law. Besides the difference in independent application of voluntary surrender and meritorious service as mentioned above, the difference in the issue of meritorious services between both programs lie in that the former has a broader scope of items that can be deemed as meritorious service, since as long as others' acts revealed belong to acts of violation, such revelation may be deemed as meritorious service; while the items of meritorious services in the leniency program in anti-monopoly law are only limited to the revelation of others' cartel behaviors. Generally speaking, the leniency program for meritorious service has no special requirement as to whether the person who gives meritorious service shall report all the information he knows and give all the assistance possible at revelation of the crimes of others, which implies that even the person is aware of the crime of another person he disclosed, if he keep some reservations, his provision of meritorious service may well be affirmed, and what

is affected is only the level of meritorious service and the extent of lenient treatment, while the leniency program in anti-monopoly law requires for full, ongoing and thorough cooperation with the enforcement authority to prosecute other cartel members before the applicant has lenient treatment, and any cartel member who reserves, refuses or renders intermittent cooperation with the enforcement authority will not be granted the application of the program.

The leniency programs for voluntary surrender and meritorious service have rich institutional expression and ideological foundations in China. No matter whether they are deemed as the implementation of the Confucian thoughts of "clarifying punishments to assist education" and "emphasizing education and being prudent on punishments" or the embodiment of thoughts "moral education" and "ritual education", or understood from multiple perspectives including criminal policy, utilitarianism and holism, their long vitality and extensive recognition are undeniable in Chinese legal environment. Their differences from the relevant designing of the leniency program in anti-monopoly law are only technical, and their basic principles are consistent with the leniency program in anti-monopoly law.

4.2 Leniency program of anti-monopoly in the framework of China's Antimonopoly Law

The construction and implementation of the leniency program in anti-monopoly law is the integral part of that of the anti-monopoly law system and of mutual influence with other parts of the anti-monopoly law system. The Anti-monopoly Law is decisive for the formulation and implementation of the leniency program in anti-monopoly law. The basic framework of the newly promulgated Anti-monopoly Law of China provides legal grounds for the implementation of the leniency program in anti-monopoly law, which also lays hidden troubles for actual operation.

4.2.1 Legislative basis

China's Anti-monopoly Law is full of "compromises", and for the purpose of earlier promulgation, its draft has not drawn references from international experience and advanced philosophies in some important aspects. However, it is noteworthy that Paragraph 2 of Article 46 of the Law reflects the basic thought of lenient treatment, which provides: "Where an operator takes initiatives to report the relevant information on a monopoly agreement to the anti-monopoly enforcement agency and provides important evidences, the anti-monopoly enforcement agency may mitigate or exempt the punishments on it or him at discretion." It provides a legal basis for establishing the leniency program in

anti-monopoly law.

Since Chinese Anti-monopoly Law is only a framework, a series of normative and legal documents including rules and regulations will be formulated to supplement and enrich the Anti-monopoly Law. Such legislative process of "outlines before details later" and "legislation before rules and regulations" is consistent with the experience and practices of anti-monopoly or antitrust law in developed countries and regions. In fact, just as listed in the above-mentioned table, the leniency programs of nations are mainly formulated and implemented by special anti-monopoly agencies. Thus, according to the provision of Paragraph 2 of Article 46 of the Anti-monopoly Law and the authorization of Article 9 to draft competition policies and promulgate the anti-monopoly guidance, Chinese leniency program in anti-monopoly law may be formulated by an anti-monopoly commission.

4.2.2 Difficulty in implementation

It is clear that the Anti-monopoly Law supports the establishment of the leniency program in anti-monopoly law, but it also sets some hidden and even serious obstacles for the implementation of such system. In summary, the negative factors thereof may be in the following three respects:

4.2.2.1 Conflicts of the sources of anti-monopoly law may cause confusions to the application of the leniency program in anti-monopoly law

Before the promulgation of the Anti-monopoly Law, some separate statutes have granted the anti-monopoly enforcement power in some industries to the relevant competent authorities of industry. For instance, the Price Law has authorized the Development and Reform Commission and price control administrations under local governments to exercise the enforcement power against the acts including "collaboration with others to control market prices", "dumping of goods at below-cost prices so as to exclude rivals or monopolize the market", and "adoption of price discrimination against other operators of the same trading conditions"; the Foreign Trade Law authorizes the Ministry of Commerce to take necessary measures against the "implementation of monopoly acts with harms to fair market competition" and the acts "that endanger foreign trade order"; and the Port Law authorizes the Ministry of Transport to exercise enforcement rights against the port operators who "have acts of monopoly and illegal competition".

Though the Anti-monopoly Law provides that the anti-monopoly enforcement agency under the State Council shall "be responsible for anti-monopoly enforcement works according to this law", it does not provide that any former laws and provisions concerning the allocation of anti-monopoly enforcement

rights shall be repealed. Hence, the Anti-monopoly Law and the relevant provisions of former industrial regulatory laws constitute the Chinese anti-monopoly law system jointly. Since the allocation of enforcement rights within this system is highly obscure and of serious conflicts, it is still not clear how to solve such conflicts and identify the competent enforcement agencies.

Under such circumstance of obscure attribution of enforcement rights, it is difficult to set up a single agency to accept the applications for lenient treatment or ensure the decision of lenient treatment made by the accepting agency is predictable and the standards are uniform, hence causing the leniency program short of a stable power base or an operation mechanism.

4.2.2.2 The leniency program is unattractive as the anti-monopoly agency lacks desire of enforcement

In the supervision agencies of such industries as banking, information, transport, power and civil aviation in China, many key officials are selected and appointed from the enterprises or organizations under supervision (mainly large state-owned or state-holding corporations), and some key officials of industrial supervision organizations are directly dispatched to enterprises to hold the positions of officers. Such cross appointment and dismissal of personnel is indeed conducive to nurturing and selecting officials with experience of practice and familiar with basic situations and business managers capable for understanding policy guidance with broad visions. Under the circumstance where there are relatively insufficient high-level professionals of expert or scholar, that may be the best choice from no choices. From the perspectives of anti-monopoly law, however, the exchange and conversion between the senior management of the regulator and the regulated tend to form an "integrated" recognition and interest patterns among them, causing the regulator short of the desire to adopt anti-monopoly enforcement measures against some of the regulated, which tends to indulge some cartels, especially industrial cartel allied with administrative monopoly.

For instance, in the telecommunication field under fierce criticism, China Telecom and China Netcom once concluded a "non-competition agreement", and decided that China Telecom would stop developing new clients in the northern market and China Netcom would stop developing new clients in the southern market since 1 March 2007, and ultimately both parties would stop their fixed telephone businesses in the above-mentioned regions respectively and mutually "stop developing new clients in their non-dominant regions". (Ma, 2007) Though some persons in the legal circle wrote to the Ministry of Information Industry endowed with anti-monopoly enforcement rights in telecommunication industry and requested for investigation and prosecution (Li, Wang, 2007) , facing such naked monopoly agreement, the competent authority has not made any open

response so far. This case of silence of powers vividly indicates how easily the anti-monopoly enforcement agency reluctant to exercise enforcement rights can render the anti-monopoly law as an empty shell.

Since the enforcement agency has no desire for enforcement, it is difficult to form a pressure on cartel members to impel them to make voluntary surrender for reduction or exemption of their liabilities. In such environment of excessive relaxed enforcement, the leniency program in anti-monopoly law is bound to be a mere scrap of paper.

4.2.2.3 The strength of public law liabilities of monopoly is insufficient

The reduction or exemption of public law liabilities is the main inducement for cartel members to apply for lenient treatment. As China has not criminalized the legal liabilities of monopoly practices, the liabilities that may be reduced or exempted through the leniency program are only administrative liabilities.

According to the provisions of Article 46 of the Anti-monopoly Law, the illegal proceeds of a cartel member shall be confiscated concurrently with a fine no more than 10% of its sales turnover the last year, and where a cartel agreement has been reached but not implemented, the fine shall not exceed RMB500,000. Such establishment of liabilities is short of deterrence on industrial monopoly operators of powerful financial strength. In reality, cartel members are mostly large-sized enterprises and the decision for the enterprise to join a cartel is made by business managers. However, China's Anti-monopoly Law does not provide for the administrative liabilities against the decision-makers, which enables natural persons to hide behind enterprises almost in every case, free from legal liabilities of monopoly. The weakness of Chinese administrative law liabilities of monopoly and the lack of liabilities against natural persons for an enterprise to participate in cartels will result in failure of the leniency program to form an effective inducement to cartel members.

5 Conclusions and suggestions

The true value of the leniency program is to provide a procedure channel to guide cartel members to approach law, hence implementing the substantive and procedure rules of anti-monopoly law. The substantive and procedure rules of anti-monopoly law will affect the leniency program as a counter force, with influence on its practicability. Only when the severity of public law liabilities of monopoly and the efficiency of administrative enforcement authorities are raised to a level enough to constitute a powerful deterrence against cartel members can the leniency program exert its attractiveness to wrong-doers. To formulate and implement the leniency

program in anti-monopoly law, China shall clarify the priority of the Anti-monopoly law to the clauses of other separate statutes on anti-monopoly, unify the anti-monopoly enforcement rights and the rights for decision on lenient treatment, enhance administrative law liabilities and establish the public law liabilities of natural persons in the participation of the enterprise in cartel activities.

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