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On the Coordination of Private Enforcement and Leniency System of Anti-monopoly Law based on International Experience

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Abstract: ***The so-called act is not enough to act on its own. The anti-monopoly law has been in force for ten years, and the relationship between public enforcement and private enforcement is studied by scholars. The coordination between leniency system and private execution is the most representative in the conflict between public and private execution of anti-monopoly law. But at present in our country there is no clear provision about the leniency system in anti-monopoly law and the coordination of private execution. This paper takes the foreign cases as a hair point, analyzes the leniency system and the private execution issue in the anti-monopoly law, and combined with the effective and successful foreign practical experience, under the framework of the anti-monopoly law as a forward-looking question, mainly from the leniency evidence materials protection and the liability of compensation Two aspects of analysis. In order to promote the implementation of anti - monopoly law of procedure refinement.***

Keywords: forgiveness system; Private execution; Anti-monopoly law; coordinate.

1. INTRODUCTION

As for the definition of private execution, there are broad, middle and narrow differences. At present, the narrow sense theory occupies the mainstream view of the definition of private execution, that is, the private parties pursue the responsibility of monopoly violators through litigation or arbitration, so as to safeguard their own rights and interests [1]. In particular, the case of protecting competition rights through arbitration is very rare. Therefore, the academic circle usually does not distinguish between private execution and private litigation, and believes that the natural person, legal person and other market subject to restricted competition behavior to file an anti-monopoly lawsuit or countersuit to the court is the private execution of anti-monopoly law [2]. According to the law, our withdrawal recognizes the legal existence of private execution of anti-monopoly law.

The leniency system is in fact the "prisoners' dilemma" in the anti-monopoly law, which belongs to an important part of the public execution of the anti-monopoly law, the public execution is by the anti-monopoly enforcement organs to impose sanctions on the behavior of restricting competition, and then achieve the effect of the anti-monopoly law. The leniency system is special because it is similar to "surrender and confession" in criminal law, which grants monopoly actors certain immunity if preconditions are met. This system is specified in paragraph 2 of Article 46 of the Anti-monopoly Law. From the practice point of view, the system has been cited by many Chinese enterprises, so that it has a strong mark in the public implementation.

Earlier, scholars expressed their views on the role of public execution and private execution. Both public and private execution have their inherent advantages and disadvantages. Due to the natural authority of anti-monopoly law enforcement agencies, public execution has advantages such as the efficiency of dispute settlement, and undertakes the important task of "hoe one harm and all seedlings become, punish one evil and all people will be pleased". However, it still has inherent defects, such as high law enforcement cost and slack law enforcement, which affect the cultivation and development of competitive culture. The private execution overcomes the deficiency of public execution and saves the enforcement cost of antitrust law enforcement agencies to a certain extent. However, private enforcement remains at risk of indiscriminate prosecution and excessive deterrence. Therefore, at present, the general theory supports the coordination theory of public execution and private execution, and believes that public execution and private execution complement each other, and the two can complete the complementary function. In addition, some scholars prove the relationship between the two by function. The public enforcement and private enforcement of the anti-monopoly law are not only platforms to solve monopoly disputes, but also can provide practical guidance for specific monopoly behaviors, so as to better play the guiding role of the law and further help to solve the difficult and complicated diseases caused by the uncertainty of the law.

2. CONFLICT BETWEEN PRIVATE ENFORCEMENT OF ANTI-MONOPOLY LAW AND LENIENCY SYSTEM

Nowadays, most countries have chosen to promote the construction of coordination mechanism between public execution and private execution, and the independent mode system of public and private execution, that is, public antitrust law. Enforcement and private enforcement are not plagued by preconditions. In other words, the private execution of anti-monopoly law does not take public execution as the premise, and the two are in parallel relationship. This leads to the inevitable intersection of the two in terms of both practical experience and legislative function [3]. As a special product of public execution, leniency system is not

excluded. Therefore, to coordinate the relationship between leniency system and private execution is of great practical significance.

2.1 Protection of lenient evidentiary materials

In the aspect of lenient material protection, the most typical case is Pfleiderer case. Pfleidere is a building materials company. On 21 January 2008, the Bundeskartellamt(Federal Cartel Office,FCO) awarded 6,200 to three major European producers of decorative paper for a fixed price agreement on prices A fine of 10,000 euros and the prosecution of five individuals responsible for the cartel. Pfleiderer, which had bought more than 60 million euros worth of decorative paper from the three companies, filed an application to obtain all the FCO documents for the authorities to impose the fine, in preparation for subsequent action to file damages. The FCO responded to a request for access to the file by sending versions of the three fines, but with the identifying information removed from them, as well as a list of evidence collected during the search. Pfleiderer then filed a second application, further requesting FCO access to all materials in the file, including documents voluntarily submitted by the applicant in connection with the clemency application and seized evidence. Pfleiderer is appealing the partial denial after the FCO again partially rejected the application. At this point the case took a turn. In February 2009, the Bonn Administrative Appeals Court ordered the FCO to grant Pfleiderer access to the files, but the FCO opposed it. The issue was then referred to the EU Court of Justice.

In this case, we can see the embarrassment of clemency applicants after they are granted immunity. If the evidentiary materials and information submitted by clemency applicants seeking exemption from antitrust laws are made public, private parties such as Pfleiderer used it in subsequent litigation, even to gain leverage for the private parties to win. The leniency system is set up to save the enforcement resources of anti-monopoly law enforcement agencies and its implementation depends on the cooperation of leniency applicants. But if the leniency applicant's voluntary cooperation imposes an additional burden on him, it will undoubtedly dampen the enthusiasm of the applicant. On the one hand, private parties are inherently less able to obtain information than antitrust law enforcement agencies and cartel members in the face of evidentiary information.

How to successfully achieve the above - mentioned corrective justice under asymmetric circumstances is a big problem. On the other hand, cartel members who apply for leniency admit their guilt and are subject to the estoppel rule. This means that if a cartel member becomes a defendant in a private lawsuit, he cannot deny the facts and evidence against him that he has admitted in the leniency application, but can only refute in terms of plaintiff qualification and damage result [3]. Public enforcement relies on leniency because cartels are hidden, and private parties increasingly rely on the results of antitrust enforcers to bring subsequent private lawsuits. Therefore, the protection of evidence and information in the leniency system in private execution is particularly important.

2.2 Liability for Compensation

There are even more cases of conflict between private subsequent enforcement and leniency regimes with respect to liability. Take the famous Empagran vitamin case, which involved a number of multinational companies, including in Germany, Belgium and Japan. In this case, vitamin indirect purchasers filed a class action lawsuit in United States court, alleging that vitamin manufacturers and distributors conspired to price and distribute vitamins to manipulate the sale of vitamins and raise vitamin prices in the United States and abroad, in clear violation of the Sherman and Clayton Acts, to the detriment of the common good of consumers. It is worth mentioning that the US antitrust enforcement agency has already launched an antitrust investigation into F.Hoffmann-La Roche Ltd. Because of the secrecy of the price agreements, some of the companies involved provided valuable evidence to antitrust enforcers, thus accelerating the breakdown of the cartel. Because of this evidence, antitrust law enforcement agencies identified the collusion of F. Hoffmann-La Roche Ltd and many other companies, and published the relevant charging agreement and other information. Some companies involved in the case were also exempted from prosecution for providing important evidence, such as Rhone-Poulenc SA [4]. However, many companies that filed the class action lawsuit demanded triple punitive damages in subsequent private lawsuits, and the above exempted companies argued that the triple punitive damages weakened the deterrence of public execution, so a new round of heated discussion on the conflict between private execution and leniency system was launched.

2.3 During the same period, Mitsui received lenient immunity for voluntarily confessing

The US subsidiary of Mitsui was ordered to pay three times the damages to the plaintiff. The legal liability corresponding to monopoly agreement is multiple, including criminal liability, administrative liability and civil liability. The establishment of leniency system is based on the exemption of administrative and criminal liability, and usually does not include civil liability. Hypothetical scenario: Once cartel members are told to pay punitive damages, the effect on leniency is less than satisfactory. The possibility of cartel members applying for leniency largely depends on the possibility and scope of exemption from monopoly legal liability. Therefore, the interest balance between the monopoly civil liability related to private interests and the leniency system under public execution is also an urgent problem to be solved.

3. COORDINATED PRACTICE OF PRIVATE ENFORCEMENT OF ANTI-MONOPOLY LAW AND LENIENCY SYSTEM ABROAD

3.1 United States

In the US, mandatory treble punitive damages under Title IV of the Clayton Act are the catalyst for private antitrust litigation. U.S. antitrust lawyers are in regular contact with lawyers in private cartel cases and keep abreast of developments in private antitrust litigation. The United States stresses the importance and confidentiality of evidence and strictly controls the access of grand jury materials. Article 6 (e) of federal criminal procedure explicitly prohibits government lawyers from disclosing anything that happened before the grand jury. Only "special need" can be proved in civil discovery

Even so, the interest in grand jury secrecy is balanced against the need for discovery. When a private party to a lawsuit seeks to obtain from another party information that the other party has provided to the government (for example, by requesting from a clemency applicant all information provided to the government in the course of a criminal investigation), the government may seek to intervene to suspend the exchange of evidence rule. More specifically, the US Department of Justice acknowledges the use of secrecy rules in the leniency system, which means that cartel membership and illegal information cannot be disclosed to antitrust authorities in other countries without the consent of the leniency applicant [5].

In the Empagran vitamin case and the Mitsui case, the court ultimately followed the Clayton Act to the letter and awarded cartel members three times damages. Although these cases did not abandon the benefits of private execution in individual cases, the relevant departments gradually realized the benefits of private execution and leniency system. As a result, the U.S. Congress enacted the Antitrust Penalty Enhancement and Reform Act on June 2, 2004. The decree, while increasing the public enforcement of fines under the anti-monopoly law, also increases the allure of leniency. It states that lenient applicants only need to provide satisfactory cooperation with the US Antitrust Office to investigate cartel cases, which not only reduces their civil liability, but also only takes responsibility for part of the interests damaged by their actions. That is, we understand the principle of proportionate liability in civil liability. In this way, the conflict between leniency system and private execution is eased to some extent. American cartel-leniency applicants abound, and private litigation is flourishing.

3.2 European Union

In Europe, the relatively underdeveloped state of private enforcement has not been seen as deterring companies from applying for leniency, so until 2012 there had been no case to impose restrictions on private actions in lenient cases. But throughout the history of anti-monopoly law legislation, the European Union has realized the coordination between public enforcement and private enforcement as early as possible. There are four provisions on the relationship between private enforcement and public enforcement in Regulation No. 1/2003 promulgated in 2002. Nevertheless, public enforcement remains the leader in the application of TFEU 101 and 102, while private enforcement continues to play a complementary role. In 2005, the EU refined the relationship between public enforcement and private enforcement to that between private enforcement and leniency. The Green Paper contains three solutions for harmonizing private enforcement and leniency regimes. Option 1: Protect the confidentiality of leniency applicants' submissions to antitrust enforcers by excluding the availability of clemency application materials; Option two, conditionally reducing the amount of compensation granted to lenient applicants; Option 3: Exempting lenient applicants from joint and several liability, limiting lenient applicants' liability to losses in cartelized market share. Article VI of the Commission's Notice on the Reduction of Fines in Cartel Cases of 2006 also makes clear that "in addition to the submission of existing documents, enterprises may voluntarily provide the Commission with information they know about cartels and their role in them, which is submitted specifically for the purpose of this leniency regime. These initiatives have proved useful for the effective investigation and termination of cartel torts, and they should not be hampered by the rules of exchange of evidence issued in civil proceedings. This may harm their standing in civil proceedings compared to non-cooperative companies, which may result in potential leniency applicants not cooperating with the Committee under this notice. This adverse effect would seriously prejudice the public interest in ensuring that Article 81 EC has effective public enforcement in cartel cases and thus effective private enforcement. Soon after, the EU adopted the White Paper.

In fact, apart from the EU legislation, the court in Pfleiderer had already made a choice between private enforcement and leniency, in which the judges found that the harm caused by the cartel members' illegal acts outweighed the personal benefits claimed by the private parties. Then, in a 2006 cartel case involving nine hydrogen peroxide producers, the judge emphasised the balance of interest on a case-by-case basis. It shows that the EU antitrust enforcement agency to protect the leniency of the attitude of the firm. In recent legislative documents, it is clear that the Commission recognises that the question of reducing the civil liability of successful clemency applicants lies at the heart of the relationship between public and private enforcement. Although the EU does not have the three times punitive damages of the United States, its exemption from joint and several liability and proportional liability is similar to the United States.

4. COORDINATION PROSPECTS OF PRIVATE EXECUTION AND LENIENCY SYSTEM OF ANTI-MONOPOLY LAW IN OUR COUNTRY

At present, though, there are no cases of conflict between the system of forgiveness and private enforcement in our country. but It is pointed out in Article 17 of the Provisions of the Supreme People's Court on Evidence in Civil Proceedings that "evidence belongs to the archival materials kept by the relevant state departments and which must be procured by the people's court according to its authority, or commercial secrets and objective reasons cannot be collected, the private parties may apply to the people's court for retrieval." Accordingly, when a private subsequent action is met with leniency, the private party has the right to apply to the court for investigation. But it certainly challenges the enforcement of leniency. The passivity of leniency applicants in damages proceedings has already been mentioned. Provided that leniency application materials can be disclosed, antitrust enforcement agencies have, in a sense, fulfilled the burden of proof on behalf of private parties, and executive power has interfered with judicial power. This is not an exemption for lenient applicants. The good news is that Article 16 of the 2016 draft of the Guidelines on the Application of Leniency System in Horizontal Monopoly Agreement Cases provides that: "Without the consent of the operators, the reports, documents and other materials submitted by the operators applying for leniency in accordance with the Guidelines shall not be disclosed to the public, and no other organs, organizations or individuals have the right to consult; The above materials are not considered relevant.

Use of evidence in litigation, except as otherwise provided by law." Where the anti-monopoly law enforcement agency does not make a lenient decision, the material may not be used as evidence to determine the conduct of restricting competition. Antitrust legislators are clearly aware of the problem between leniency and private enforcement. In dealing with cartel cases, leniency guidelines are supposed to serve as rules of evidence for special law over general law, but leniency refers to documents in force in South Africa.

In conclusion, in the first place, our country should establish a guidelines for the leniency application of the anti-monopoly law as soon as possible, so as to make clear the confidentiality of the kind of evidence material for applicant, drawing on the practice of the European Commission, for example, if the lenient applicant submitted is pre-existing evidence material, then it does not belong to the scope of protection. In addition, the guidelines for the application of clemency should include provisions limiting civil liability for successful clemency applicants. As a civil law system, our country denies the stipulation of 3 times punitive damages of United States. The limitation of civil liability has the following two meanings: first, the exemption of the civil and joint liability of the member of cartel; Second, the court is required to decide the applicant's share of the overall liability, based on his cooperation with the authorities and his level of participation. Antimonopoly law is the law of public and private merger, its purpose is to protect the rights and interests of individual parties in the maintenance of competition order. After understanding the first essence of anti-monopoly law, leniency system as an important means to break the bottleneck of cartel cases, the author believes that it is desirable to sacrifice part of the rights and interests of private parties from the overall situation.

5. CONCLUSION

Through the way of inquiring, the author's statistics found that the private follow-up litigation cases in our country are far from that of private independent litigation cases, compared with other countries, the conflict of anti-monopoly law private execution and leniency system is slightly weaker at present. However, the conflict between the private enforcement of anti-monopoly law and the leniency system is definitely left blank. Adhering to the "legislative first" is the way to build China's society under the rule of law, and can also provide a "escort" for comprehensively deepening the reform. This year, the country's "three-pillar" law enforcement pattern has been completely changed, the three anti-monopoly law enforcement agencies integrated into the State Administration for Market Regulation. Leniency system, as an important tool of anti-monopoly public enforcement, promotes the frequency of private subsequent enforcement, and the increase of private subsequent enforcement frequency in turn restricts the application of leniency system. It is imperative that we call for leniency guidelines to be implemented as soon as possible, especially considering the competing interests with private enforcement in terms of civil liability and material confidentiality.

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