

China's Antitrust Guidelines Clarify Important Aspects of the SAMR's Leniency Program

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The long-awaited leniency guidelines in China were recently published by the State Administration for Market Regulation (SAMR) (China's antitrust authority). The guidelines are currently available only in hard copy and in Chinese,^[1] so this post has the highlights for those unable to access the original text.

Overview

Broadly speaking, the guidelines clarify the criteria for obtaining leniency and the leniency benefits available, out of recognition of the previous lack of clear and practical guidance for those navigating the Chinese leniency system. And, substantively, there is now greater convergence of China's program with leniency programs in other jurisdictions—for example, by allowing applications for amnesty either before or after the SAMR has commenced an investigation (much like the Type A v. Type B distinction under the U.S. Department of Justice program), and by more aggressively encouraging early reporting with a new pre-application consultation provision, as well as marker rules that place a greater emphasis on speedy reporting even without evidence of a violation at the time of application.

The clarifications can be organized as follows:

1. Initial Reporting:

An undertaking (any entity that engages in economic activity) can anonymously consult with the SAMR via oral or written communication before submitting an official leniency application.

An undertaking can officially apply for leniency either (1) before the SAMR opens a case or initiates an investigatory procedure, or, (2) if the SAMR has already opened a case or initiated an investigation, before the SAMR issues a Pre-Notice of Administrative Punishment (an advance notification to an undertaking that the SAMR intends to penalize it).

A leniency application can be made via a verbal or written report.

- A verbal report will be recorded in audio and in writing at the SAMR, and it requires a signature from the applicant to confirm the written record.

- A written report can be sent via e-mail, fax, or hard copy, and requires a confirmation from the undertaking by signature, seal, or other means of identification.

2. Getting the “First-In” Marker and Requirements for Complete Leniency

The first undertaking that reports information relevant to the monopoly agreement, and that ultimately provides “important evidence” is eligible for complete leniency.

An undertaking’s report must explicitly admit that the undertaking has engaged in conduct that violates the Anti-Monopoly Law’s (AML’s) prohibition against monopoly agreements, and explain in detail the entry and implementation of the monopoly agreement, including the following details:

1. the parties to the monopoly agreement and their basic information (including name, address, contact information, representatives, etc.);
2. the entry of the monopoly agreement (including the time, place, and content);
3. the main contents of the monopoly agreement (including the goods and services involved, their price and quantity);
4. the geographic area and scale of the affected market;
5. the duration of the agreement’s implementation;
6. a description of the evidence being submitted by the undertaking (if any);
7. whether the undertaking has applied for leniency in foreign jurisdictions; and
8. other relevant documents and materials.

The required “important evidence” is either:

1. evidence that enables the SAMR to initiate an investigatory procedure under the AML (if an investigation is not ongoing already); or
2. evidence that the SAMR has not yet uncovered and that would establish a violation of the AML (if the investigation process has already begun).

The SAMR will issue a written reply (*i.e.*, a “marker”) to the first applicant for complete leniency whose report and evidence submitted satisfies the above-listed criteria. However, if the submission of “important evidence” is lacking or insufficient at the time of the initial application, the SAMR may still issue a marker, but will require supplemental evidence within a designated period (generally 30-60 days). If the supplemental evidence is insufficient, the marker may be revoked, but that undertaking can still re-apply for complete leniency (later upon acquiring more evidence) so long as no other applicant is in line. If there is another applicant in line, that next-in undertaking will automatically be moved up to the “first-in” spot.

Notably, a ringleader is not eligible for complete leniency.

3. Second and Subsequent Leniency Applications

Second-in and later applicants that submit a proper report and eventually supply “important evidence” are eligible for partial leniency (*i.e.* a reduction in fines and in the amount of gains confiscated). A report from an applicant for partial leniency should include information on the parties, the goods or services involved, and the entry into and implementation of the monopoly agreement. The “important evidence” is evidence that the enforcement agency has not yet uncovered and that “bears significant weight” in the eventual establishment of a violation, such as:

1. new evidence with greater probative value or supplemental value (relative to previously uncovered evidence) to prove the entry or implementation of the monopoly agreement;
2. evidence with supplemental value to prove the contents, time of entry, or implementation of the monopoly agreement, the scope of goods or services involved, and the parties to the agreement; or,

3. any other evidence that strengthens the proof of the monopoly agreement.

4. Other Requirements Relevant to Applicants for Leniency (Complete or Partial)

In addition to the above, any applicant for leniency must:

1. cease the relevant conduct (unless the SAMR requests otherwise);
2. promptly, continuously, fully, and genuinely cooperate with the SAMR's investigation;
3. properly preserve relevant information, and not conceal, destroy, or transfer evidence or provide false materials or information;
4. not disclose information relevant to its leniency application without the SAMR's consent; and
5. not interfere with anti-monopoly enforcement and investigation through other conduct (not specified).

An applicant's marker can be revoked if it fails any of these additional requirements. Under these provisions, a vacancy created for complete leniency cannot be filled by the undertaking next in line for leniency. Complete leniency, in other words, appears to become unavailable in a scenario where the first company to receive a marker and submit sufficient evidence of a violation ultimately fails to fulfill one or more of these additional requirements for leniency. A vacancy created in the line of applications for partial leniency can be filled by moving up the rest of the line.

5. Total Number of Applicants

The SAMR will generally allow up to three undertakings to receive leniency in the same case. However, the SAMR can consider allowing additional leniency recipients (beyond the first three) if the case is complicated, involves many undertakings, and the later applicants are able to provide different and significant evidence.

6. The Benefits

If the SAMR concludes that there is a monopoly agreement, the agency will determine fines based on the "totality of the circumstances," considering various (unspecified) factors including the severity of the conduct. The SAMR will also then make decisions regarding leniency with respect to each specific undertaking based on its place in line as well as its level of cooperation and assistance.

The available benefits in terms of fine reductions are:

- First-in Applicants: 80%-100% potential fine reduction. The first-in applicant can be exempted from all fines only if it obtains its first-in position before the SAMR opens a case or otherwise initiates an investigation.
- Second-in Applicants: 30%-50% potential fine reduction.
- Third-in and Later Applicants: 20%-30% potential fine reduction for third-in applicants; fourth-in and later are eligible for up to a 20% reduction.

In addition to imposing a fine, the SAMR may also confiscate the applicant's "illegal gains" (not defined). The SAMR can consider granting exemption from, or reduction in, its confiscation of an undertaking's illegal gains following the same scale of fine reductions listed above.

7. Confidentiality of Submissions and Publicity of Final Leniency Decisions

The SAMR will not disclose an undertaking's submissions absent that undertaking's consent. On the other hand, if the SAMR decides to grant leniency, the SAMR will publicly disclose its decision to grant leniency and reasoning.

If the SAMR decides not to grant leniency to a particular applicant, that applicant's own submissions will not be treated as evidence of its participation in the monopoly agreement.

While the above contains only a general overview of the new leniency guidelines, we welcome you to contact us directly if you would like further information or assistance with respect to this subject. Winston works closely with the attorneys at the firm's strategic alliance partner, [YuandaWinston](#), who are qualified to practice PRC law and provide comprehensive legal services across the full range of PRC antitrust and competition matters under China's anti-monopoly law, including representing clients in connection with cartel and antitrust investigations.

[1] The leniency guidelines were included in a book published by the SAMR on August 6, 2020. 2019 Nian Fanlongduan Guizhang he Zhinan Huibian (2019年反垄断规章和指南汇编) [2019 Compilation of Anti-Monopoly Regulations and Guidelines] (2020). The publication also included other long-awaited antitrust guidance documents on (1) intellectual property rights, (2) the automotive sector, and (3) commitments.

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