



## WHITE PAPER

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### China Publishes Anti-Monopoly Guidelines on Leniency and Commitments

The Anti-Monopoly Bureau of China's State Administration for Market Regulation ("SAMR") released four sets of long-awaited anti-monopoly guidelines. This *White Paper* addresses the *Guidelines on Application of Leniency Program in Horizontal Monopoly Agreement Cases* and the *Guidelines on Undertakings' Commitments in Anti-Monopoly Cases*.

The Leniency Guidelines provide more clarity about the criteria that SAMR uses to rank leniency applicants and assess penalties in cartel cases. These guidelines are important because complaints and leniency applications have driven much of SAMR's enforcement related to antitrust conduct violations over the last decade.

The Commitment Guidelines provide details regarding SAMR's procedure for suspending and eventually closing an investigation without a finding of violation if the investigated company offers remedial measures to correct its behavior before SAMR gathers sufficient evidence of a violation. Both sets of guidelines provide more transparency and should help companies and legal professionals navigate SAMR's process for conducting investigations.

## INTRODUCTION

The *Guidelines on Application of Leniency Program in Horizontal Monopoly Agreement Cases* (“Leniency Guidelines”) apply to all types of horizontal monopoly agreements under China’s Anti-Monopoly Law (“AML”), including “hardcore” cartels. Companies may submit a leniency application before the State Administration for Market Regulation (“SAMR”) gathers sufficient evidence and issues a pre-notice of an administrative penalty decision. Typically, up to three applicants may receive certain reductions in fines and illegal gains, depending on their place in the queue for leniency applications, and the degree of cooperation in providing key evidence.

The *Guidelines on Undertakings’ Commitments in Anti-Monopoly Cases* (“Commitments Guidelines”) allow companies under investigation by SAMR to propose remedies that offset potential harm resulting from the alleged AML violation in order to terminate SAMR’s investigation. Parties cannot take advantage of the commitments mechanism in hardcore cartel investigations. SAMR may solicit comments from third parties and/or industry regulators when negotiating a commitment with the parties. If the investigated company fully complies with the commitments for an agreed period, SAMR may close its investigation. SAMR’s decision to suspend or close an investigation does not include a finding that a violation occurred and cannot be used as evidence of a violation in other proceedings.

## THE LENIENCY GUIDELINES

If a company discovers evidence that an employee has engaged in cartel conduct, the company typically must make an expeditious decision about whether to seek leniency from several major antitrust authorities. A leniency application typically involves self-reporting the violation and cooperating with and providing evidence to the antitrust authorities. Leniency, in general, offers reduced penalties, or in some cases, full immunity, but there are typically limited slots available. Winning the “race” for leniency in one jurisdiction does not necessarily mean winning the race in another jurisdiction. Timing is critical and uncertainty about the identity of the first whistleblower, and whether the authority will grant immunity or reduce penalties, may discourage leniency applicants. The Leniency

Guidelines, detailed below, are a substantial step forward in clarifying SAMR’s leniency policies.

### What Type of Conduct Merits Leniency?

In the past, SAMR granted leniency not only in cartel cases but also in resale price maintenance (“RPM”) cases.<sup>1</sup> RPM, also known as vertical price fixing, is an agreement between a manufacturer and a distributor to set the price at which a distributor will resell the manufacturer’s products to retailers. Since 2015, however, SAMR has not granted leniency in an RPM case.

The Leniency Guidelines clarify that leniency applies only to horizontal monopoly agreements specified in Article 13 of the AML, mostly cartels. Therefore, it is now clear that in China, leniency does not apply to vertical agreements such as RPM.

That approach is more consistent with practices in other jurisdictions. For example, in the United States, the U.S. Department of Justice Antitrust Division’s (“DOJ”) Leniency Program applies only to criminal antitrust conduct, e.g., price fixing, bid rigging, output restrictions, or allocations of markets, customers, sales, or production volumes.<sup>2</sup> Under U.S. federal antitrust law, RPM is not criminal conduct, and in civil cases, courts review the practice under the “rule of reason,” which focuses on the net competitive effect of an agreement. A small number of U.S. states still treat RPM as *per se* unlawful or unenforceable. In the EU, leniency also applies only to cartel cases according to the *Commission Notice on Immunity from Fines and Reduction of Fines in Cartel Cases* (“EC Leniency Notice”).

### Who is the First Leniency Applicant?

The timing and sequence of leniency applications are of critical importance because it determines the level of immunity or the amount of any fine reduction. To qualify for leniency, SAMR requires companies to meet certain conditions, e.g., providing “important evidence,” to secure a place in the line of applicants. In practice, SAMR and applicants often dispute the sufficiency of the evidence provided and eligibility for leniency treatment.

When counsel first obtains information about a potential violation, it may not yet have sufficient information to know for certain whether a violation has occurred. Because the order of leniency applications significantly impacts the penalty in many jurisdictions, time is of the essence, and there may be

a “race” to apply for leniency. The Leniency Guidelines introduce a marker system that allows a leniency applicant to hold its place in line while it perfects its application. Under the new marker system in Article 7 of the Leniency Guidelines, the first applicant has 30-60 days from submission of its application to perfect its evidence and secure its place in the queue.

A number of other jurisdictions, such as the United States and Europe, also use a marker system. For example, the threshold to receive a leniency marker is relatively low in the United States, but an applicant also must then meet additional criteria that vary depending on the type of leniency sought. To receive a marker for a client, counsel must report to the DOJ the identity of the applicant; the product, service, or industry involved; that the company has uncovered information indicating that it has engaged in a criminal antitrust violation; and the general nature of the conduct. Although the time period to perfect a leniency application varies, a 30-day period for an initial marker is common. In the EU, the European Commission determines the relevant period on a case-by-case basis.

#### **Who Can Receive a Reduced Penalty?**

The Leniency Guidelines allow for up to three companies to receive leniency benefits. The first applicant may receive full immunity or an 80% plus reduction of fines. The second and third applicants may receive 30%-50% and 20%-30% reductions of fines, respectively. In complex cases involving numerous parties, SAMR may grant leniency to more than three applicants, in which case later applicants may receive a fine reduction of no more than 20%. It is also important to understand that a cartel leader or organizer is not eligible to receive full immunity in China.

In the United States, only one applicant per investigation may receive leniency. Companies that subsequently offer to cooperate without leniency, however, may still obtain substantial fine reductions and the DOJ may exercise discretion to prosecute fewer executives individually. In the EU, the Commission may grant successful applicants full immunity from fines or a reduced fine. Reductions of fines range between 30-50% for the first undertaking to provide “significant added value,” 20-30% for the second undertaking, and up to 20% for subsequent undertakings.

Notably, Article 14 of SAMR’s Leniency Guidelines provide that leniency may apply not just to statutory fines but also to

“confiscation of illegal gains.” In the United States, the DOJ does not typically seek restitution on behalf of private victims, who have an option to file civil lawsuits, which can result in treble damages. A successful leniency applicant may qualify for “detrabling,” so long as it provides ongoing cooperation to victims. In the EU, the leniency program does not apply to such other penalties.

## **THE COMMITMENTS GUIDELINES**

The commitments mechanism encourages parties to terminate alleged violations and take remedial measures in exchange for SAMR suspending, and eventually closing, an investigation. According to published decisions since the AML went into effect in 2008, SAMR and its predecessor agencies have accepted commitments in at least 21 cases, which resulted in SAMR closing 17 cases without administrative penalties.<sup>3</sup>

Until now, the lack of detailed rules meant that there was significant uncertainty about when and how best to take advantage of the mechanism. The Commitments Guidelines are a welcome development that increase transparency and provide guidance about when SAMR will close investigations, including without remedies.

#### **What Types of Monopoly Conduct do the Commitments Guidelines Cover, and When Should Companies File Commitments?**

Among the 21 cases in which China’s antimonopoly enforcement authorities accepted commitments, 13 cases involved alleged abuse of dominance, and the remaining cases related to alleged horizontal or vertical monopoly agreements. According to Article 2 of the Commitments Guidelines, the commitments mechanism applies to all anticompetitive conduct, except three hardcore cartel practices, i.e., price fixing, output restrictions, or market allocations. Under the new guidelines, SAMR’s practice will be more consistent with certain other major jurisdictions. For example, in the EU, commitments are deemed not appropriate in cases where the Commission intends to impose a fine. In practice, commitments would therefore not be applied in cases involving cartel-like violations.

According to the Commitments Guidelines, SAMR is open to discuss commitments during an investigation up to the point

it gathers sufficient evidence to find a violation. This policy is consistent with the stated goal of the commitments mechanism, i.e., saving enforcement resources while correcting violations.

In addition, a company may withdraw its commitment application before SAMR decides to suspend its investigation. In that case, SAMR will continue its investigation and refuse to accept a new application from the same party in that investigation.

### **The Involvement of Stakeholders**

To better evaluate the effectiveness of commitments measures, Article 8 of the Commitments Guidelines provides that SAMR and the investigated company may jointly invite third parties, industry regulators, trade associations, or independent experts to provide comments.

In addition, under Article 9, when SAMR believes that an alleged AML violation has affected public interests or the legitimate interests of consumers or business operators, the agency may publish the proposed commitments for public comment for a period of at least 30 days. This also is consistent with certain other jurisdictions, such as the EU, in which the Commission subjects commitments to a market test and consults identified stakeholders for comments.

The involvement of stakeholders (including industry regulators or competitors) in a SAMR investigation may provide the third parties an opportunity to exploit the investigation for their self-interest. Of course, aggrieved third parties can file civil lawsuits under article 50 of the AML, but the new rules provide third parties with an opportunity to weigh in on settlement/remedies.

## **SUSPENSION AND TERMINATION OF AN INVESTIGATION**

If SAMR concludes that parties' remedial measures are sufficient to eliminate its concerns, SAMR may suspend the investigation and allow the parties to implement the measures within a certain period of time. In practice, this period may last between less than two months to several years, depending on the complexity of the case.<sup>4</sup>

SAMR may resume an investigation, however, if it finds that (a) the commitments are not fulfilled, (b) the factual grounds for

suspending the investigation changed dramatically, or (c) the decision of suspending the investigation is based on incomplete or untrue information provided by the applicant.<sup>5</sup>

A party's commitment offer and SAMR's decision to suspend or terminate an investigation does not constitute evidence that the party violated the AML. Therefore, plaintiffs cannot use the fact of a commitment against the company under investigation in follow-on civil litigation.

## **THREE KEY TAKEAWAYS**

1. Companies that have unearthed evidence of a horizontal monopoly agreement in China, including cartel conduct, should expeditiously consider whether to file for leniency. The first applicant may be eligible to receive full immunity. The second and third applicants may receive higher, but still reduced, fines.
2. SAMR allows the first applicant to secure its place in the queue if it can perfect its evidence within 30-60 days of submitting its application.
3. Companies under investigation may offer remedies so long as the offer occurs before SAMR gathers sufficient evidence to find a violation. SAMR's decision to suspend or close an investigation does not constitute evidence of a violation in follow-on civil litigation.

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## ENDNOTES

- 1 For example, in *Baby Formula* case (2015), three baby formula suppliers received a full immunity for reporting their violations to and cooperating with China's National Development and Reform Commission, one of the predecessors of SAMR. See the [NDRC press release](#), available in Chinese.
- 2 Dep't of Justice, [Frequently Asked Questions about the Antitrust Division's Leniency Program](#) (Updated Jan. 26, 2017).
- 3 See the official website of [SAMR](#), available in Chinese.
- 4 In *Hubei Lianxin* case (2019), such duration was approximately 45 days. See the [Decision of Terminating Investigation of Lianxin Case](#), available in Chinese.
- 5 See Article 45 (3) of the AML and Article 17 of the Commitments Guidelines. In addition, stakeholders such as sectoral regulators, consumers, and other undertakings also may recommend to SAMR that it resume the investigation if they believe any one of the above-referenced circumstances have occurred.

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