How to Apply Cartel Leniency in China

- Introduction of the NDRC Draft Guidelines on Application of Cartel Leniency

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On February 2, 2016, the National Development and Reform Commission ("NDRC") released the Draft Guidelines on Application of Leniency to Horizontal Monopoly Agreements ("Draft Guidelines") on its official website, seeking public comments. The leniency policy is introduced by Article 46(2) of the AML, which provides, “where an undertaking has voluntarily reported the relevant facts on entering into a monopoly agreement to the anti-monopoly enforcement agency and provided material evidence, the anti-monopoly enforcement agency may, at its discretion, reduce or waive the penalty for such undertaking”.

Leniency policy can assist the Anti-monopoly Enforcement Agencies ("AMEAs") to discover monopoly agreements, save administrative law enforcement resources, improve efficiency, and safeguard the interests of consumers and it is widely used by AMEAs in the anti-monopoly investigation. Since the leniency policy may provide full immunity or reduce the penalties to the undertaking, it is important for undertakings to know its application.

1 The Scope of Leniency
1.1 Leniency is applicable to monopoly agreement

There are three types of monopoly conducts under the AML, namely the monopoly agreement, abuse of dominant market position, and concentration of undertakings that eliminate or reduce competition. Not all monopoly conducts are within the application scope of leniency. First, leniency policy is set forth in Article 46 of the AML, which is the penalty provision for monopoly agreement. It does not relate to abuse of dominant market position or concentration. Second, for concentrations, there are only two outcomes, i.e. legal or illegal, and there is no room for leniency application. Third, abuses of dominant market position are normally a unilateral conduct, and undertakings would not voluntarily confess if their conducts were not found, so they are also not applicable for leniency. Therefore, leniency policy under the AML only applies to monopoly agreement, but not to abuse of dominant market position or concentration of undertakings that eliminate or reduce competition.

The Draft Leniency Guidelines limit its application only to “horizontal monopoly agreements”. Vertical monopoly agreements are not covered by the Draft Leniency Guidelines. However, we note that, in practice, an undertaking may apply for leniency to vertical monopoly agreements in China, the reasons are as follows:

1) The concept used in Article 46 of the AML is “monopoly agreement”, which includes both horizontal and vertical monopoly agreements. If the legislature wanted to narrow the application of leniency to only horizontal monopoly agreements, it could use the term “horizontal monopoly agreement” in Article 46, but it did not do so. It implies that leniency policy is applicable to vertical monopoly agreements.

2) In the infant formula RPM investigation, the NDRC approved the leniency to undertakings that entered and implemented vertical monopoly agreement. In this regard, there was precedent of leniency application to vertical monopoly agreements in China.

1.2 Time to apply leniency

1.2.1 Early application is encouraged

The time to apply for leniency has great implications in anti-monopoly investigation, the earlier the evidence is provided by undertakings, the faster that investigation is conducted, and the more administrative law enforcement sources can be saved. To encourage early application of leniency by undertakings, the Draft Leniency Guidelines provides different treatment for the undertakings applying leniency before and after the launch of the investigation. Article 13 of
the Draft Leniency Guidelines provides, “for the undertaking ranking the first, the law enforcement authorities may grant full immunity or may reduce the fine by no less than 80%. For the undertaking that applies for leniency and is confirmed as the first applicant before the launch of the investigation, full immunity should be granted”.

1.2.2 The deadline for applying leniency

Normally, at the time of issuing the preliminary notification of administrative penalty, AMEAs have confirmed and determined the suspected monopolistic conduct and completed preliminary analysis of the case. According to Article 11 of the Draft Leniency Guidelines, reporting monopoly agreement after receiving the preliminary notification of administrative penalty contributes little in saving investigation costs and discovering the facts, and cannot be granted leniency by AMEAs.

Nevertheless, we understand that if undertakings make a confession and accept the penalties, even if “the preliminary notification of administrative penalty” has been issued, they are still able to negotiate with AMEAs to reduce penalty.

1.3 Who may enjoy leniency

1.3.1 Who is eligible to apply?

The antitrust laws in many jurisdictions stipulate personal liability, so there is a question whether individuals involved in monopoly agreement should apply for leniency on their own initiative, or under a corporate leniency application. Given the fact that there is no personal liability under the AML, the application should be made by “undertakings involved in monopoly agreements”, and individuals without authorization cannot apply for leniency.

1.3.2 The organizer of a monopoly agreement is eligible to receive leniency

In accordance with Article 10 of the Draft Leniency Guidelines, “if an undertaking forces or organizes others to enter into or implement a monopoly agreement or prevents others from ceasing the illegal conduct ... may be given lesser penalty.” It means the organizer of a monopoly agreement is still eligible to receive leniency.

By contrast, Article 20 of the Provisions of the AIC on the Procedures for the Investigation and Punishment of Monopoly Agreement Cases and Abuse of Dominant Market Position Cases provides that “in respect of undertakings who take initiative to report the information of monopoly agreement and provide substantial evidence thereof, the Administration for Industry and Commerce (“AIC”) may reduce or exempt penalty on its own initiative. The preceding paragraph shall not apply to the organizer of a monopoly agreement.” According to such
provision, the AIC is not allowed to grant leniency to the organizer of a monopoly agreement. In practice, if a monopoly agreement has no clear organizer, undertakings would balk at applying for leniency when there is possibility of being identified as the organizer of the monopoly agreement and may incur risk of penalties. However, if the organizer of a monopoly agreement is eligible to receive leniency, it will have incentive to report. This can also give rise to the sense of distrust among cartel members, which impedes the monopoly agreement from being concluded.

1.3.3 How many undertakings may enjoy leniency and how much reduction can be received

According to Article 12 of the Draft Leniency Guidelines, in a single monopoly agreement investigation, the numbers of undertakings may enjoy leniency are as follow:

1) **Normal case**: 3 undertakings can enjoy leniency. The reduction of penalty can be received from leniency program:
   a) the first in: 80%-100%
   b) going in second: 30%-50%
   c) going in third: ≤30%

2) **Special case**: more than 3 undertakings can enjoy leniency, and the conditions are:
   a) the case is complicated and significant;
   b) numerous undertakings are involved; and
   c) applicants have provided different and substantial evidence.

2 Who is the first in?

According to Article 11 of the Draft Leniency Guidelines, “the law enforcement authorities should confirm the application sequence according to the time of leniency application, and inform undertakings, in written form, about its ranking.”

2.1 To whom shall undertakings submit their leniency application?

Before the anti-monopoly investigation has been launched, undertakings may apply for
leniency to NDRC or SAIC. If the monopoly agreement is price-related, undertakings may apply to NDRC, and non-price-related agreements could be reported to SAIC. Given to the fact that the majority of monopoly agreements directly or indirectly relate to price, there is higher possibility for undertakings to apply for leniency to NDRC.

Normally AMEAs will not announce its initiation of the investigation. Undertakings under the anti-monopoly investigation could not identify the enforcement authority until they are subject to investigative measures, for instance interviews with individuals, unannounced inspect premises, retain original documents, etc. Where the specific AMEA has been identified, undertakings under the investigation should apply for leniency to that specific authority.

2.2 A marker\(^1\) will be granted when the AMEA receives the preliminary report from an undertaking

The time of granting a marker is an objective matter, however, whether the evidence provided constitutes material evidence remains to be further evaluated. In order to encourage undertakings to apply for leniency, the Draft Leniency Guidelines introduces a marker system, which will allow undertakings to secure a marker in certain period of time, and then allow applicants to supplement it with substantial evidence. A marker will be granted when the AMEA receives a leniency application or preliminary report from an undertaking.

2.2.1 Preliminary report in written

Article 7 of the Draft Leniency Guidelines provides, “where undertakings are not able to provide all materials at the time of applying for leniency, it may submit a preliminary report about the monopoly agreement to the AMEA... if undertaking supplements relevant materials within the given period, the time of submitting preliminary report shall be deemed as the time of leniency application.”

According to Article 8 of the Draft Leniency Guidelines, preliminary reports may be submitted in forms of e-mail, fax, or paper documents. Preliminary reports shall be confirmed by signing, stamping or other means.

2.2.2 Preliminary report can be made orally

According to Article 8 of the Draft Leniency Guidelines, undertakings may submit preliminary reports orally. When undertakings report in oral, the AMEA should record the oral report,

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\(^1\) Article 9 of the Draft Leniency Guidelines regulates the "Registration and Acceptance of Leniency Application", which provides, "after submitting a leniency application or preliminary report, the law enforcement authority should record and confirm the application and send written feedback, specifying the time of acceptance and list of materials, to the applicant undertaking within 7 workdays.” The term “marker” is used to reflect the above process.
which shall be signed by the authorized reporter. Since the signature is required to confirm the accuracy and authenticity of the oral report, the oral preliminary report shall be recorded in a face-to-face meeting between the officials of AMEAs and the reporter authorized by the undertaking.

### 2.3 Cancelation and change in marker sequence

#### 2.3.1 Conducts that impede anti-monopoly enforcement

To receive immunity, the undertaking needs to satisfy certain conditions. The marker will be canceled if the undertakings carry out the following conducts that impede anti-monopoly enforcement:

1) Fail to cease the illegal conduct in a timely manner, except for what would, in the law enforcement authorities’ view, be reasonably necessary to preserve the integrity of the investigation;

2) Fail to cooperate genuinely, fully, on a continued basis and expeditiously with the AMEA;

3) Conceal, destroy and transfer the evidence or provide fake materials or information;

4) Disclose information concerning the leniency application;

5) Other conducts that impede the anti-monopoly law enforcement.

In addition, after submitting their preliminary report, undertakings should perfect the marker by supplementing relevant information within the given time, or its marker might be canceled. The deadline to perfect the marker is as follows:

1) Normal situation: no more than 30 days;

2) Special situation: may be extended to 60 days

#### 2.3.2 Adjustment of marker sequence for organizers

In the case that the first reporter is the organizer of monopoly agreement, it may be moved to the second in the marker sequence; in severe circumstances, its marker may be canceled.

When the marker sequence of an undertaking is changed or canceled, the vacancy shall be taken by the next undertaking according to the marker sequence.

### 2.4 Contents of report
2.4.1 Contents of preliminary report

According to Article 7 of the Draft Leniency Guidelines, the following information shall be included in the preliminary report:

1) Confess explicitly that the undertaking has engaged in a monopoly agreement that violated the AML;

2) Illustrate general information regarding entering into and implementing the monopoly agreement, which include the participants, relevant products or services and the time of entering into and implementing the monopoly agreement, etc.

2.4.2 Contents of formal report

According to Article 6 of the Draft Leniency Guidelines, in the formal report, the undertaking should confess explicitly that it has been engaged in monopoly agreement that violates the AML, and elaborate information regarding entering into and implementing the monopoly agreement. The following information should be included in the formal report:

1) participants of the monopoly agreement and their basic information (name, address, contact information and representatives);

2) communication of the monopoly agreement (time, venue, contents, and participants);

3) products or service, price and quantity in the monopoly agreement;

4) geographic scope and market scale that might be influenced;

5) duration; and

6) explanation about the evidence provided by the undertaking.

3 What is material evidence?

3.1 material evidence

In accordance with the Article 46 of the AML, one of the conditions for an undertaking to obtain leniency is to voluntarily provide “material evidence”. But the term “material evidence” needs to be clarified. According to Article 6 of the Draft Leniency Guidelines, material evidence refers to:

1) Evidence that is sufficient for taking forward a credible investigation when the AMEA has not obtained any clue or evidence;
2) Evidence that is to add significant value for confirming the monopoly agreement, when the investigation has been launched by the AMEA, which includes:

a) evidence that is of high probative value or complement value in proving entering into and implementing the monopoly agreement;

b) evidence that is of complement value in proving the content, time of entering into and implementing the monopoly agreement, relevant products or services, participants, etc.; and

c) other evidence that reinforce the probative value of the monopoly agreement.

3.2 Probative value

According to Article 6 of the Draft Leniency Guidelines,

1) Original evidence that arises from the process of entering into and implementing the monopoly agreement has higher probative value than hearsay evidence;

2) Direct evidence has higher probative value than indirect evidence;

3) Several evidences, which are of different type whilst having same content, have higher probative value than a single piece of evidence.

4 Confidentiality obligation of AMEAs

4.1 the evidence submitted in the leniency application will not be made public by AMEAs

In order to encourage undertakings to apply for leniency, it is AMEAs' obligation that information provided by undertakings should be used only in anti-monopoly administrative cases. Besides, the information provided by undertakings shall not be disclosed, without permission of the undertaking, to other agency, organization or individual.

Article 16 of the Draft Leniency Guidelines provides, “the reports, documents and other materials, which are submitted during the application, should be archived and reserved by the AMEA and should not be made public without the permission of the undertaking, and should not be accessed by any other agency, organization or individual. The afore-mentioned materials shall not be used as evidence in relevant civil litigation, unless otherwise provided by
law."

4.2 the court may access to the evidence kept by AMEAs

Article 64 of the Civil Procedure Law regulates the investigation power of a people’s court. It provides, “a people's court shall investigate and collect evidence, where the evidence is unable to be collected by a party concerned and the agent ad litem thereof themselves for reasons beyond their control.”

Article 94 of the Interpretation of the Supreme People's Court on the Application of the Civil Procedure Law further provides, “the evidence mentioned in Article 64 of the Civil Procedure Law includes:

1) evidence that is kept by the relevant national departments and the party concerned and the agent ad litem thereof have no right to consult or take possession of;

2) evidence involving national secrets, trade secrets or individual privacy; and

3) other evidence that the party concerned and the agent ad litem thereof are unable to collect themselves for reasons beyond their control.

A party concerned and the agent ad litem thereof may apply in writing to a people's court for investigation and collection of evidence that is unable to be collected by themselves for reasons beyond their control before expiration of the period for adducing evidence."

The fact that the people’s court has the power to access to the evidence of the leniency application kept by AMEAs does not mean such evidence will be made public. According to Article 11 of the Anti-monopoly Judicial Interpretation, the people's court may exercise its powers or upon the application of the parties, take protective measures such as private trial, restriction or prohibition of copying, disclosure only to the lawyers involved to keep the confidentiality of the evidence.

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Along with the implementation of the AML and due to the increased penalty on monopoly agreements, undertakings will conceal the cartel activities to avoid penalties. The AMEAs are likely to make full use of leniency policy to acquire material evidence. Since the leniency policy may provide full immunity or reduce the fine, it has great impact on undertakings. We engage in leniency practice, and will continue to monitor the legislative development re the leniency policy in China.