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## Chinese Antitrust Guidelines on Leniency and Commitments Offer Companies a “Way Out”

Fay Zhou, Vivian Cao and Xi Liao of Linklaters discuss the recently introduced Leniency and Commitments Guidelines by highlighting their differences in application, scope and legal implications, as well as whether companies should adopt the leniency or commitments mechanisms to seek comparatively favorable or less severe outcomes when responding to antitrust investigations.

In the summer of 2020, China’s State Administration for Market Regulation (SAMR) published four antitrust guidelines signed-off by the Anti-monopoly Commission of the State Council. Two of these guidelines relate to how companies may avoid administrative penalty altogether or receive reduced fines in case of alleged antitrust infringements: (1) *Guidelines on Application of the Leniency System in Horizontal Monopolistic Agreement Cases* (the Leniency Guidelines) (横向垄断协议案件宽大制度适用指南); and (2) *Guidelines for the Undertakings Provided by Business Operators in Monopoly Cases*

(the Commitments Guidelines) (垄断案件经营者承诺指南).

Building on the analytical framework laid out by the *Anti-Monopoly Law* (AML) (反垄断法) and the two implementing regulations that SAMR brought into effect in 2019, the Leniency Guidelines and the Commitments Guidelines have codified some of the established practices from enforcement activities in previous years and additionally provide long-called-for guidance on certain important issues. The guidelines are in line with the rules and practices in major antitrust jurisdictions such as the EU and the U.S. in key aspects, whilst reflecting specific Chinese enforcement characteristics.

### Comparing the Guidelines

As detailed in the following sections, the two guidelines offer companies an opportunity to seek comparatively favorable or less severe outcomes, but they each have clearly distinct features:

- **Different scopes of application.** The Leniency Guidelines are typically applicable to companies engaged in cartels, while Commitments Guidelines do not apply to investigations against hardcore cartels such as price fixing, output restriction and market allocation.
- **Different purposes.** Due to the difficulty for authorities to uncover cartels, the Leniency Guidelines seek to encourage cartel members to turn themselves in, as well as other cartel members in exchange for full or partial immunity. To be eligible for immunity, the applicant must be transparent with authorities by submitting evidence to prove the existence of the cartel and admit participation in the cartel (i.e. infringements). In contrast, under the Commitments Guidelines, the company must provide sufficient factual information but is not expected to admit wrongdoing and instead, from a forward-looking perspective, focus on remedying anticompetitive effects through various measures.
- **Different legal implications.** While a leniency application may entitle the company full immunity or reduced fines, SAMR may still reach an infringement finding, which may open the door for follow-on litigation. In comparison, under the Commitments Guidelines, a company may avoid an infringement finding altogether if SAMR accepts the proposed commitments and suspends/terminates the investigation; therefore, a commitments decision would not be used against the company in any subsequent civil lawsuit.

Further observations about these guidelines are discussed in more detail below.

### Highlights of Leniency Guidelines

The Leniency Guidelines provide comprehensive and detailed guidance on leniency application in relation to horizontal monopolistic agreements and covers application procedure, consultation process, evidentiary/information requirements, magnitude of fine reduction, etc. Compared with the draft form (the Consultation Draft) published in 2016, most of the changes appear to be aligned with the *Tentative*

*Provisions for the Prohibition of Monopolistic Agreements* (the Monopolistic Agreements Provisions) (禁止垄断协议暂行规定) issued by SAMR in 2019.

**Scope of application.** In line with the practice in the EU and the U.S., the Leniency Guidelines provide that it is applicable to horizontal monopolistic agreements aimed towards concealed cartels that are often difficult for regulators to detect. However, the Leniency Guidelines do not explicitly exclude vertical monopolistic agreements from being qualified for leniency altogether; similarly, the Monopolistic Agreements Provisions provide that undertakings participating in “monopolistic agreements” (not limited to horizontal monopolistic agreements) fall under the leniency mechanism, which could be interpreted to cover both horizontal and vertical agreements. Therefore, there is residual uncertainty as to whether vertical agreements (e.g. resale price maintenance or RPM) are entirely excluded from the application of leniency treatment. In the Milk Powder RPM case in 2013, the then enforcement authority, the National Development and Reform Commission, granted full immunity to several milk powder suppliers that proactively reported to the authority its RPM practices.

**Formal application and pre-consultation.** SAMR encourages potential applicants to have open dialogues as early as possible. Companies may make use of the consultation process to understand whether they can be eligible for full leniency or their potential ranking in the leniency application queue, before submitting formal applications. Consistent with the practice in the EU and the US, formal applications can be made in writing or orally; in the latter case, the application must be recorded and the transcript must be confirmed by the applicant in writing at SAMR’s office. Potential leniency applicants are encouraged to consult with SAMR in advance and such consultation can be conducted anonymously or on a real-name basis either oral or in writing.

**Evidentiary/information requirements.** Evidence-wise and consistent with the Monopolistic Agreements Provisions, the Leniency Guidelines require leniency applicants to provide “relevant information” on the monopolistic agreement in question and “important evidence”. More specifically, for the first applicant that seeks full immunity, “relevant information” should include:

- (1) information on parties to the agreement;
- (2) details of the agreement;
- (3) what was agreed in the agreement (including the products or services concerned and their price, quantity, etc.);
- (4) how the agreement was concluded and implemented;
- (5) the geographic scope and market size affected by the agreement;
- (6) duration of the agreement; and
- (7) whether parties have submitted leniency applications in other jurisdictions, etc.

Notably, under both the Consultation Draft and the Monopolistic Agreements Provisions, the first leniency applicant is not required to report whether it has made similar requests in other jurisdictions, whereas the Leniency Guidelines explicitly require such information to be disclosed to SAMR. This shows that SAMR is keen to understand the status in other jurisdictions and is mindful of the need to coordinate with its counterparts. “Important evidence” refers to evidence that is not yet available to the authority and can play a key role in initiating an investigation or finding a monopolistic agreement.

The evidentiary threshold for leniency applications above echoes that of the EU, which requires information or evidence that enables the European Commission to carry out a targeted inspection or find an infringement.

**Registration (marker) system.** While the Leniency Guidelines provide a similar registration mechanism known as “marker system” in the EU, it refers to the relatively stringent information requirements mentioned above for the benefit of securing its “first in line” status in a leniency application. If the first applicant has provided “relevant information” but fails to provide (sufficient) supporting “important evidence”, SAMR may reserve the ranking in queue on condition that the applicant supplements the outstanding evidence within 30 days (extendable to 60 days under special circumstances). A failure to provide evidence within the designated timeframe will disqualify the applicant from the reserved spot. In this situation, the applicant can apply for full immunity again with complete evidence, as long as there are no other leniency applicants; otherwise, the applicant will lose its “first in line” position and may only apply for a fine reduction. If the first applicant is disqualified, the

next applicant will be automatically promoted and be considered for full immunity. The registration system allows potential applicants to approach the authority with certain initial information to reserve a “place in line” and then supplement more concrete evidence at a later stage.

**“First come first served”.** Leniency applicants are entitled to full or partial immunity, depending on their positions:

- (1) first in line: full exemption, or no less than 80% reduction, of fines;
- (2) second in line: 30-50% reduction of fines;
- (3) third in line: 20-30% reduction of fines; and
- (4) subsequent applicants: no more than 20% reduction of fines.

A company that has organized a cartel or coerced other companies to participate in a cartel is not eligible for full immunity even if it is the first applicant, and instead may only be offered a reduced fine. Before the Leniency Guidelines, SAMR and its predecessors had already followed such an approach in previous cartel cases, as exemplified in the roll-on-roll-off cargo shipping cartel case in 2015 where the first applicant was granted full immunity and the second and the third applicants received descending fine reductions.

**Leniency application not incriminating evidence.** The Leniency Guidelines stipulate that the reports submitted, and the document developed by the leniency applicant during the course of the leniency application should remain confidential and is not accessible by any third party without the applicant’s consent. However, the Leniency Guidelines do not retain the rule proposed in the Consultation Draft that such materials should not be used as evidence in civil litigation.

### Highlights of Commitments Guidelines

The Commitments Guidelines introduce details on how companies under antitrust investigation may offer remedial actions in exchange for suspension and eventually termination of the investigation. The final Commitments Guidelines have been brought in line with the Monopolistic Agreements Provisions, as well as the *Tentative Provisions for the Prohibition of Abuses of Dominant Market Position* (the Abuse of Dominance Provisions) (禁止滥用市场支配地位行为暂行规定).

**Legal implications of commitments.** Under the Commitments Guidelines, if a company under investigation offers remedial measures that SAMR considers sufficient to alleviate the potential anticompetitive effects of the alleged infringements, SAMR may suspend the investigation on account of the company’s commitments. After the company fulfils its commitments within the prescribed period, SAMR may terminate the investigation without concluding whether the alleged conduct contravened the AML. The absence of an infringement finding, in turn, would avoid SAMR’s administrative penalties (e.g. fines) and in a more far-reaching way, there would be no evidence of wrongdoing against the company if and when civil litigation arises at a later stage.

**Scope of application.** The Commitments Guidelines explicitly provide that they do not apply to three types of hardcore monopolistic agreements: (1) price fixing; (2) output restriction; or (3) market allocation. This means that other monopolistic agreements, even those explicitly prohibited by the AML (horizontally, restrictions on development or procurement of new technologies and joint boycotting; vertically, RPM) are still eligible. By the same token, in the EU only hardcore cartel cases are excluded from commitment decisions.

**When to offer commitments?** As a general rule, SAMR is open to companies’ commitments up to the point it has gathered sufficient evidence to find a violation. More specifically, companies under investigation are encouraged to propose commitments any time after SAMR initiates an investigation, but before SAMR issues an administrative penalty advance notice. This is largely rooted in the policy considerations behind the commitments regime, which is to save administrative resources to conduct investigations. By comparison, in the EU, commitments are still available even after the Statement of Objection is issued by the Commission, which aim to settle the allegation. Companies have the right to withdraw the commitments it has proposed before SAMR renders a decision; however, once it does so, SAMR will continue its investigation and the company will no longer be able to re-propose remedial actions.

**Factors to consider when deciding on suspension.** In determining whether to suspend the investigation based on the commitments proposed by the company, SAMR would consider:

- (1) the *mens rea* of the company when carrying out the alleged violation;
- (2) the nature, duration, effects and social impact of the alleged violation; and
- (3) the commitments and expected remedial effects.

Items (1) and (2) were not included in the Consultation Draft; further, item (1) was also not included in the Monopolistic Agreements Provisions or the Abuse of Dominance Provisions. The expanded list of factors suggest that SAMR's discretionary assessment is by reference to all relevant circumstances.

In two RPM cases, in 2019, where the companies under investigation managed to avoid a finding of breach by offering remedial measures (*Lenovo* and *Hydron*), SAMR did not elaborate on why it decided to suspend and ultimately terminate the investigation and how the two cases were distinguished from other RPM cases in recent years. In particular, the companies under investigation in other RPM cases also appear to have offered similar remedial measures in the form of e.g. enhanced compliance efforts, but SAMR did not suspend investigation. It remains to be seen how the above factors would play a role when SAMR reviews companies' proposed commitments in individual cases.

**Timeframe for delivering on commitments.** The Commitments Guidelines give SAMR discretion to decide on the length of period during which SAMR would monitor how the company is fulfilling its undertakings. This contrasts with the Consultation Draft that proposed a specific timeframe between six months and three years (which can be extended to five years in complex cases).

In addition, the Commitments Guidelines provide that a company may request SAMR to early terminate the investigation if the company has delivered on the commitments or there are material changes to the company's operations and market conditions that render it no longer necessary to continue the implementation of the initial remedial measures. Similarly, a company may request SAMR to modify the initial commitments if they are no longer appropriate due to material changes to market conditions.

## **Conclusion**

The Leniency Guidelines and the Commitments Guidelines provide further guidance on how companies may avail themselves with the leniency and commitments mechanisms and how SAMR may process companies' requests, building on the general and broad rules under the AML, and the implementing regulation and codifying established practice from previous enforcement activities in past years. For companies that uncover indications of potential infringements or are already under investigation, the further streamlined procedures and clarity mean increased predictability, which allow them to better evaluate and develop response strategies.