

China's NDRC Releases Draft Leniency Guidelines

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On February 3, 2016, China's National Development and Reform Commission (NDRC) published Draft Guidelines for the application of Lenient Treatment Rules in Horizontal Monopoly Agreement Cases (Draft Guidelines), seeking public comments by Feb. 22, 2016.¹ The Draft Guidelines are one of six sets of guidelines that the Anti-Monopoly Commission of State Council authorized the NDRC to prepare in November 2015. Grants of leniency by the three Anti-Monopoly Enforcement Agencies (AMEAs)² are authorized by article 46 of the 2008 Anti-Monopoly Law (AML), which provides, in relevant part, as follows:

If an undertaking involved in a monopoly agreement reports its monopolistic conduct to the AMEA and provides important evidence, the AMEA may grant reduced penalty or exemption from penalty at the discretion of the AMEA.

The guidelines provide welcome clarity and transparency regarding the procedures and standards to be used by the AMEAs in connection with applications for leniency from fines and other penalties under the AML, by companies that have been engaged in cartels or other horizontal "monopoly agreements."³

Pre-Filing Consultation

Prior to submitting an application, applicants are encouraged to communicate, orally or in writing, with the AMEA as early as possible, and may do so orally or in writing, under their own names or anonymously.⁴

Oral Applications Possible

Applications can be submitted orally or in writing, though oral submissions will be reduced to written minutes by the AMEA and the party making the submission must confirm and sign the minutes.⁵

Preliminary Applications

Applicants that cannot immediately provide all materials required for a formal application can submit a preliminary application by briefly explaining the nature of the monopoly agreement, identifying participants, the products or services involved, the time the agreement was reached, and time period during which it was implemented. After receipt of a preliminary report, the AMEA will issue a written order requiring the applicant to supplement the application with other materials required for a formal application within a period of time that generally will not exceed 30 days, which may be extended to 60 days.⁶

Formal Applications

A formal application must include the following information: (1) participants in the agreement and basic contact information of same; (2) communications by which the parties entered into the agreement (including the time, place, content, and specific participants in such communications); (3) the products or services, prices, quantities, and similar details of the agreement; (4) the geographic scope and size of the market affected by the agreement; (5) the duration of the agreement; and (6) an introduction or explanation of the evidence submitted with the application. In addition, the applicant must submit “important evidence” in the applicant’s possession. If the application is submitted before the AMEA has begun an investigation into the agreement in question, the important evidence must be sufficient for the agency to initiate an investigation under article 39 of the AML. If an investigation has been initiated, the important evidence must be of significant added value to information already in the agency’s possession to prove the ultimate finding of added significant value, including: (1) evidence with a greater probative force or supplementary value regarding the reaching and implementing of the agreement; (2) evidence with supplementary value on the contents of the agreement, time of reaching or implementing, scope of products or services involved, participants, and similar details; and (3) other evidence that enhances the probative force of the agency’s evidence in proving the existence of the monopoly agreement. Original evidence will be deemed to have more probative force than second-hand evidence; direct evidence more than circumstantial; and multiple types of evidence reflecting the same facts more than a single piece of evidence.

Conduct Required of Applicants

A leniency applicant generally will not be granted leniency unless it: (1) promptly stops the violations (unless the agency requires the entity to continue in order to assist the investigation); (2) reports any leniency applications submitted by the entity to agencies in other jurisdictions; (3) cooperates with the AMEA in a rapid, continuous, comprehensive, and sincere manner; (4) maintains and provides the agency with evidence and information; (5) does not conceal, destroy, or transfer evidence, or provide false materials or information; (6) without the consent of the agency, does not disclose the application; and (7) does not engage in any other conduct that may impede the investigation.⁷

Written Opinion Following Submission

After submission of a formal application report or preliminary report, the AMEA will, within seven working days, issue a written order specifying the time of submission and a list of materials received. If the AMEA determines that the contents of a formal applicant are insufficient, the agency will issue a written opinion to the applicant so stating. If the recipient of such an opinion later supplements the filing and it is found to be sufficient, the date when all supplementary materials are submitted will be deemed to be the date of the application. This does not apply to a preliminary application that is timely followed by a sufficient formal application.

Organizers of Unlawful Agreements Generally Not Eligible

Entities that organized or coerced others to participate in the monopoly agreement will generally not be granted full leniency, though they may receive a reduction of penalties.⁸

Chronological Ranking of Multiple Applicants

The AMEA will determine the chronological order of multiple leniency applications in connection with a monopoly agreement, and may adjust or cancel the ranking if an applicant fails to fulfill its obligations described above. When a ranking is adjusted or cancelled, other applicants may be moved up in the queue. At the conclusion of the investigation, the AMEA will, in an investigation report, determine the penalty for each entity involved based on the severity of its wrongful conduct, and provide proposed reductions of, or exemption from, penalties based on each applicant's ranking. In most cases, no more than three applicants will be given leniency in a single case. However, in complex major cases where each applicant provides different types of important evidence, more than three may be granted leniency.⁹

Mandatory Grant of Full Leniency; Discretion in Granting Partial Leniency

The applicant first in the sequence “shall” be granted full immunity if it applied before the agency had initiated an investigation and is determined to be the first applicant in the queue. In any case, the applicant first in the sequence will receive at least an 80% reduction of the applicable fine. The second applicant in the sequence may receive a reduction of from 30% to 50% of the fine, and the third applicant may receive a reduction of no more than 30% of the fine.¹⁰

Discretion to Grant Leniency as to Confiscation of Illegal Gains

The AMEA may also, at its discretion, exempt applicants from, or reduce the amount of, the confiscation of illegal gains provided for in article 46 of the AML, based on the levels of reduction set forth for fines above.¹¹

Advance Notice of Administrative Sanction

The AMEA will issue a written Advance Notice of Administrative Sanction specifying the amount of reductions of penalties for the leniency applicant, and the basis for such reductions. The applicant may respond to the notice by making a statement or asserting a defense, or may apply for a hearing according to law.¹²

Final Decision

If leniency is granted, the AMEA will publish a final decision of penalty exemption (if full exemption is granted) or a final decision of administrative penalty (if less than full exemption is granted).¹³

Confidential Treatment of Information

The Draft Guidelines provide for confidential treatment of information submitted by leniency applicants, and will not disclose such information to any third party without the applicant's consent. Moreover, such materials shall not be used as evidence in related civil litigation, except as otherwise provided by law. If an applicant is refused leniency, the AMEA will not use as evidence the materials submitted by that entity in determining whether that entity engaged in the unlawful conduct.¹⁴

¹ The Chinese text of the Draft Guidelines is available at: http://jjs.ndrc.gov.cn/fjgld/201602/t20160203_774287.html.

² The AMEAs are the anti-monopoly enforcement bureaus within the following three agencies: NDRC; the State Administration for Industry & Commerce (SAIC); and the Ministry of Commerce (MOFCOM).

³ The AML itself, and preexisting rules issued by NDRC and SAIC, provide for the possibility of leniency for both horizontal and vertical agreements. It is unclear whether the Draft

Guidelines are intended to disallow leniency for vertical agreements. See AML, art. 46; NDRC Rules on Administrative Enforcement Procedures (NDRC Rules), art. 14; SAIC Procedural Rules of the Administration for Industry and Commerce (SAIC Rules), art. 20.

[4](#) Draft Guidelines, art. 5.

[5](#) Draft Guidelines, art. 8.

[6](#) Draft Guidelines, art. 7.

[7](#) Draft Guidelines, art. 6.

[8](#) Draft Guidelines, art. 10. This provision reconciles a difference between the previously issued NDRC Rules and SAIC Rules. The NDRC Rules do not prohibit granting leniency to organizers or coercers, while the SAIC Rules expressly provide that the leniency provisions are not applicable to entities that organize a monopoly agreement.

[9](#) Draft Guidelines, art. 11.

[10](#) Draft Guidelines, art. 13. This provision seems to resolve an inconsistency in the previously issued rules of the NDRC and SAIC, in that it makes clear that all agencies must grant full leniency to the first applicant if it fulfills all requirements set out in the Draft Guidelines and submitted its application before the AMEA had begun an investigation. In all other cases, the Draft Guidelines provide that agencies may, but are not required to grant partial leniency as described. The NDRC Rules provide that the NDRC “may” grant leniency to the first applicant; the SAIC Rules provide that the SAIC “should” grant leniency to the first applicants. Both sets of rules provide that each agency “may” grant leniency to subsequent applicants. The specific amounts of reductions for subsequent applicants also differ from those specified in the agencies’ rules. NDRC Rules, art. 14; SAIC Rules, art. 20.

[11](#) Draft Guidelines, art. 14.

[12](#) Draft Guidelines, art. 15.

[13](#) Draft Guidelines, art. 15.

[14](#) Draft Guidelines, art. 16.

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