COMMENTS OF THE AMERICAN BAR ASSOCIATION’S SECTIONS OF ANTITRUST LAW AND INTERNATIONAL LAW REGARDING THE NATIONAL DEVELOPMENT AND REFORM COMMISSION’S (“NDRC”) FEBRUARY 3, 2016 DRAFT GUIDELINES FOR APPLYING LENIENCY PROGRAM TO HORIZONTAL MONOPOLY AGREEMENTS

The views stated in these Comments are presented on behalf of only the Sections of Antitrust Law and International Law. They have not been approved by the House of Delegates or the Board of Governors of the American Bar Association and therefore may not be construed as representing the policy of the American Bar Association.

March 15, 2016

Introduction

The American Bar Association Sections of Antitrust Law and International Law ("Sections") are pleased to offer the following comments on the draft Guidelines for Applying Leniency Program to Horizontal Monopoly Agreements ("Draft Leniency Guidelines") published for public comment by the Price Supervision & Inspection and Anti-Monopoly Bureau of the National Development and Reform Commission (“NDRC”) on February 3, 2016. The Sections very much appreciate the opportunity to comment on the Draft Leniency Guidelines and do so in the spirit of helping the NDRC to meet its laudable goal of transparent and effective enforcement of the Anti-Monopoly Law (“AML”) relating to horizontal monopoly agreements. The Sections and their members have substantial practical experience with the operation of leniency programs in the United States and internationally, and have provided comments on proposed leniency programs in several jurisdictions, including, most recently Hong Kong, Korea, and Chile.

Executive Summary

The Sections commend the NDRC for committing to the establishment of a Leniency Policy based on transparency and certainty. The Sections’ comments focus on the following areas where they believe the proposed Leniency Program could be made more effective:

(i) reducing the discretion of the Enforcement Authorities regarding whether immunity will be granted to the first-in applicant even in situations where an investigation has already been initiated (Articles 1 and 13);

(ii) the establishment of a centralized phone line or email address for making initial applications to all the Enforcement Agencies (Article 4);
(iii) clarification of the initial contact and preliminary report provisions to ensure that they allow undertakings quickly to obtain “markers” that protect their position in the queue while they conduct a full investigation and complete their application for leniency (Articles 5 and 7);

(iv) allowing applicants to interact with the Enforcement Authorities throughout the leniency process entirely on an oral basis (to avoid penalizing applicants in private antitrust litigation with increased risk of production / discovery of inculpatory material created for the Enforcement Agencies) (Articles 6, 7, 8 and 9);

(v) making the continuation of anticompetitive conduct at the request of the Enforcement Authority to assist an investigation voluntary rather than mandatory (Article 10);

(vi) removing the exclusion of eligibility for undertakings that were organizers of a horizontal monopoly agreement (Article 10);

(vii) providing undertakings with earlier disclosure of their position in the leniency queue, as well as clear notice and opportunities to explain and cure any deficiencies in an application before being removed from the Leniency Program (Article 11);

(viii) providing a clearer nondiscretionary commitment that an order confiscating illegal gains will not be issued against at least the first-in leniency applicant, rather than leaving this to the discretion of the Enforcement Authority (Article 14); and

(ix) clarifying that the confidentiality protections in the Leniency Program extend to the identity of an immunity applicant and that its materials will not be disclosed to foreign enforcement agencies without its consent.

Collectively, the Sections believe that these recommendations, which are consistent with practices that have been implemented in many other jurisdictions, will increase the attractiveness of the Leniency Program to the domestic and international business and legal communities. This, in turn, will advance NDRC’s objectives of more effective, efficient, and transparent enforcement of the AML provisions related to horizontal monopoly agreements.
Comments on Draft Leniency Guidelines

The comments below correspond to the indicated Article number of the Draft Leniency Guidelines. Attached as Appendix A is the English translation of the Draft Leniency Guidelines on which the Sections have relied for these comments.\(^1\)

1. **Article 1: The Basis and Purpose of These Guidelines**

This Article states that:

if the undertaking, on its own initiative, reports to the authorities for anti-monopoly enforcement ("Enforcement Authorities") about the monopoly agreement reached, and provides material evidence, the Enforcement Authorities may, at its discretion, reduce, or exempt the undertaking from, punishment ("Leniency Program").

The Sections have concerns about the discretionary nature of the Leniency Program’s application. The Draft Leniency Guidelines provide that the Enforcement Authorities retain “discretion” on whether to grant immunity or reduce fines on undertakings that cooperate under the Leniency Program, particularly in those situations where the Enforcement Authorities have already initiated an investigation.\(^2\) The Sections believe that a discretionary standard is inconsistent with recognized principles for successful leniency programs. It is widely recognized that a successful leniency program, at least for the first-in entity, should involve as little prosecutorial discretion as possible in the determination of whether an applicant is entitled to immunity or a reduction in penalties.\(^3\) The Sections recommend that the

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1 The Sections have relied on a translation published by the Dentons law firm: “ANTITRUST ALERT: NDRC Solicits Public Opinions on Guidelines for Applying Leniency Program to Horizontal Monopoly Agreements (Draft for Comments),” dated February 2016, attached as Appendix A.

2 The Sections note that Article 13 of the Draft Leniency Guidelines states: "[w]hen the undertaking applies for leniency prior to Enforcement Authorities initiating investigation and is determined to be at the first place in queue, Enforcement Authorities will exempt such undertaking from punishment” (emphasis added). The Sections applaud the Draft Leniency Guidelines for applying this nondiscretionary position with regard to first-in leniency applicants when there is no preexisting investigation. This is consistent with international norms and is the hallmark of an effective and transparent leniency program.

3 Competition officials in the United States and elsewhere comment frequently about the importance of removing prosecutorial discretion from the leniency process. See, e.g., Scott Hammond, Director of Criminal Enforcement, Antitrust Division, U.S. Department of Justice, “Cornerstones of an Effective Leniency Program”, address before the ICN Workshop on Leniency Programs, Sydney, Australia (Nov. 22-23, 2004):
non-discretionary approach should be applied in all situations, even where the Enforcement Authorities have initiated an investigation.\textsuperscript{4}

While the Sections recognize that NDRC and the other Enforcement Agencies in China are not members of the ICN, the \textit{Anti-Cartel Enforcement Manual} has been developed over more than a decade by the Cartel Working Group and reflects the experience and lessons learned by numerous agencies around the world as well as experienced non-government advisors regarding the operation of leniency programs in diverse legal systems.

\textbf{Article 2: The Significance of the Leniency Program}

The Sections applaud the NDRC’s recognition of the importance of leniency programs and the fact that leniency programs assist enforcement authorities in efficiently “finding and investigating . . . monopoly agreement[s],” saving administrative costs related to enforcement, and “protecting the interests of customers.” In general, the Draft Leniency Guidelines reflect the widespread global practice of offering lenient treatment to early cooperating parties in order to increase the effectiveness of cartel enforcement and striving for transparency and certainty to achieve a successful leniency program.\textsuperscript{5}

\begin{quote}
“Prospective amnesty applicants come forward in direct proportion to the predictability and certainty of whether they will be accepted into the program. If a company cannot accurately predict how it will be treated as a result of its corporate confession, our experience suggests that it is far less likely to report its wrongdoing, especially where there is no ongoing government investigation. Uncertainty in the qualification process will kill an amnesty program.”
\end{quote}

\textsuperscript{4} See also the International Competition Network ("ICN"), "Drafting and implementing an effective leniency policy", ch. 2 of the \textit{Anti-Cartel Enforcement Manual ("Leniency Policy")}, p. 8, available at \url{http://www.internationalcompetitionnetwork.org/uploads/library/doc1005.pdf}:

\begin{quote}
“It is good practice to make leniency available both where, the competition agency is unaware of the cartel and where the competition agency is aware of the cartel, but the competition agency does not have sufficient evidence to proceed to adjudicate or to prosecute”.
\end{quote}

\textsuperscript{5} It appears that the NDRC’s attention to transparency and certainty is generally consistent with the ICN’s position:

\begin{quote}
“Transparency and certainty – There must be transparency and certainty in the operation of a leniency policy. Competition agencies need to build the trust of leniency applicants and their attorneys by consistently applying the leniency policy. A leniency applicant needs to be able to predict with a high degree of certainty how it will be treated if it reports anticompetitive conduct and what the consequences will be if it does not come forward. Therefore, competition agencies should ensure
\end{quote}
Article 3: The Application Scope of these Guidelines

This Article provides that the Draft Leniency Guidelines and the Leniency Program apply only to “horizontal monopoly agreements.” This is an important clarification of the scope of the Draft Leniency Guidelines that will be well received by the legal and business communities.

Article 4: Authorities that Accept and Handle the Undertakings’ Application for Leniency

Effective leniency programs are designed to create a fast and efficient “race to cooperate” with the enforcement agency. The Draft Leniency Guidelines provide in Article 4 that an undertaking may apply under the Leniency Program “to different authorities for anti-monopoly enforcement under the State Council” and that the relevant Enforcement Authorities will negotiate and determine which Enforcement Authority should handle the particular investigation and leniency application.

While the Sections recognize that each of the Enforcement Authorities has its own areas of responsibility, difficulties may arise if leniency applications can be made to each of the anti-monopoly Enforcement Authorities in China in that manner. The Sections recommend that the Enforcement Authorities establish a centralized phone line or email address for making leniency applications. For example, the European Commission has a dedicated email address for making leniency applications: “To apply for leniency please contact the Commission only through the following dedicated email address: comp-leniency@ec.europa.eu.” Similarly, the Japan Fair Trade Commission requires submission of the initial leniency application to a dedicated fax number, which provides for clarity in the time and order of applications.

There are important reasons why the Enforcement Authorities and prospective applicants would benefit from a dedicated phone line or email address to accept leniency applications. First, undertakings generally will want to know whether full immunity is available (i.e. are they first in the queue?) before divulging all the details necessary in a preliminary report or formal application. By having a single centralized phone or email address for applications, this information can be conveyed more quickly and accurately. Also, the timing and order of leniency applications is critical to establishing an undertaking’s place in the queue. Having all

that their leniency policies are clear, comprehensive, regularly updated, well publicized, coherently applied, and sufficiently attractive for the applicants in terms of the rewards that may be granted.”


applications directed to one place will help establish the order in which applications are received and remove the possibility of confusion. Moreover, having leniency applications centralized in one place will provide consistency in the application of the Leniency Guidelines and help develop expertise in that area.

The Draft Leniency Guidelines provide that if the leniency application relates to an existing investigation in another Enforcement Authority, or falls within the jurisdiction of another Enforcement Authority, the application may be directed to that authority. Where there is a preexisting investigation, the Sections recommend that applications be required to be directed to the investigating Enforcement Authority.

**Article 5: Advance Communication Between the Undertakings and the Enforcement Authorities**

This Article is helpful to encourage an open dialogue between the Enforcement Authorities and undertakings. The purpose of advance communications by undertakings is generally to find out if full leniency is available, or if not, where in the queue the undertaking would be if it made a leniency application.

The Sections suggest that the following language be added to this Article: “An undertaking may provide sufficient information to determine whether it would be the first in the leniency queue, or if not, where in the queue it would stand, before making a leniency application.” The Sections would also welcome clarification regarding the interplay between Articles 5 and 7, especially as to the relationship between advance communications and preliminary reports.

**Article 6: Materials Required for Applying for Leniency**

This Article requires that the “undertaking applying for leniency shall submit a report on relevant circumstances of the monopoly agreements,” and then identifies the specific information that is required to be included in the report.

The Sections understand that, where available, the Enforcement Authorities will want copies of preexisting business records that provide evidence of a monopoly agreement. However, the Sections note that Article 8 states that undertakings may submit a preliminary report or leniency application “orally.” As discussed more fully in the comments on Article 8 below, the Sections strongly believe that the Leniency Program will be more effective if leniency applications and any statements summarizing the evidence or the results of undertakings’ internal investigations and witness interviews are allowed to be submitted orally.

**Article 7: Preliminary Report Submitted by the Undertaking Applying for Leniency**

The preliminary report described in this Article appears to be the equivalent of what is generally referred to as a “marker” in other leniency systems.
The Sections agree that a marker is a necessary component to a successful leniency program. In order to encourage a race to the Enforcement Authorities to cooperate, undertakings should be permitted to make an application for leniency before obtaining all relevant information. The marker encourages the earliest possible reporting to the Enforcement Authorities by holding the undertaking’s place in the queue while the applicant has an opportunity to complete its internal investigation and finalize the leniency application.\(^7\)

Article 7 requires that “The preliminary report shall explicitly commit to the undertaking’s conduct of participating in suspected monopoly agreement which violates AML…” However, because a preliminary report will be made before all relevant conduct by the leniency applicant has been fully investigated, the applicant may not be certain, at the time of the preliminary report, that it has in fact engaged in conduct that constitutes an unlawful monopoly agreement, and therefore should not be required to admit to an actual violation at that stage. This is the approach adopted by the United States. The stated policy of the Antitrust Division of the United States Department of Justice (“U.S. DOJ”) is that:

[W]hen corporate counsel first obtains indications of a possible criminal antitrust violation, authoritative personnel for the company may not have sufficient information to enable them to admit definitively to such a violation. While confirmation of a criminal antitrust violation is not required at the marker stage, in order to receive a marker counsel must report that he or she has uncovered information or evidence suggesting a possible criminal antitrust violation.\(^8\)

The Sections recommend that the Enforcement Authorities adopt a similar approach, and revise the Leniency Guidelines to make clear that, at the preliminary report stage, the applicant need only represent that it has uncovered information or evidence suggesting that a violation of AML Article 13(1) has occurred — provided that when the undertaking makes a formal application complete with supplemental information it explicitly admits that it has engaged in a monopoly agreement in violation of AML Art. 13(1). Therefore, the Sections recommend that the language of Article 7 be revised to state: “The preliminary report shall identify the conduct that the undertaking believes may constitute a monopoly agreement that violates AML Article 13(1)...”

\(^7\) See generally, ICN, “Leniency Policy,” pp. 11-12.

In addition, Article 7 indicates that, upon receiving the preliminary report, the Enforcement Authorities will provide the applicant with written comments indicating required supplemental materials that must be submitted within a specified period. Although this approach is, in principle, a useful way of informing applicants of what additional information the Enforcement Authority needs in order to accept the final application, for the reasons discussed below the Sections recommend that care be taken not to include in those written comments any repetition of facts or other admissions from the preliminary oral report that might incriminate the leniency applicant should the written comments be subject to production or discovery in private antitrust litigation in China, the United States, or other jurisdictions. Moreover, as discussed in other sections of these comments, providing the undertaking with the option of oral communications throughout the leniency application would be preferable and would increase incentives for undertakings to voluntarily report horizontal monopoly agreements to the Enforcement Authorities.

**Article 8: The Forms of the Undertakings to Apply for Leniency**

The Sections commend NDRC for specifically providing in Article 8 that preliminary reports and final applications for leniency may be submitted orally. This is a key ingredient of a successful leniency program, as written reports may increase the private litigation risks and liability of leniency applicants to the extent that the reports can be ordered to be produced during discovery in private antitrust litigation.

Although preliminary reports or formal applications may be made orally or in writing, in either case the undertaking is required by Article 8 to sign and confirm the information provided. Because preliminary reports will be made before a full internal investigation is complete, and therefore may be inaccurate in certain respects, the Sections suggest that this Article be revised to indicate that a preliminary report need not be signed. Otherwise, undertakings may be reluctant to submit preliminary reports for fear of adverse legal consequences by signing a document that is later determined to be inaccurate or incomplete in some manner.

If the final Leniency Guidelines require a written report for leniency applicants (or require a report to be signed and confirmed by the undertaking), the Sections would be concerned about the disincentives to self-report in China that this requirement would create, particularly where the leniency applicant anticipates private antitrust litigation. For example, a written report submitted to the Enforcement Authorities may be subject to mandatory disclosure in follow-on U.S. private damage lawsuits as an admission against the company’s interests, and would expose the leniency applicant to significant and unfair litigation risks that do not exist for companies that elect not to self-report or cooperate with the Enforcement Authorities.

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Authority’s investigation. Therefore, the Sections urge the Enforcement Authorities to follow the examples of the United States, Canada, the European Union, Japan, Australia, and many other jurisdictions by adopting a paperless leniency application process.

Finally, in light of the significant risk that any written records of leniency applications may be subject to discovery orders in private antitrust litigation, the Sections strongly recommend that the final Leniency Guidelines make clear that a copy of any signed written record of an oral report will not be provided to the applicant without its consent, or that applicants may orally confirm the contents of the written record without signing that document.

**Article 9: The Registration and Handling of the Leniency Application**

The Sections commend the proposed procedure in Article 9 to notify the applicant confirming the date and time that the preliminary report and/or application for leniency was received. However, Article 9 calls for a “written opinion” to be provided by the Enforcement Authority to the applicant.

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10 Public records would be admissible, if relevant, in the United States. See *Federal Rule of Evidence* 401 (governing relevance) and 803(8) (providing a hearsay exception for public records). Indeed, foreign public documents are self-authenticating under *Federal Rule of Evidence* 902(3) and can be proven as accurate under *Federal Rule of Civil Procedure* 44(a)(2). In addition, admissions of a party opponent would be permissible under the hearsay exceptions for prior witness statements and party opponent admissions in *Federal Rule of Evidence* 801(d).

11 Despite best efforts, antitrust enforcement agencies cannot guarantee the confidentiality of signed corporate statements. That is one reason why, in the United States, leniency applications are made through oral proffers. The European Commission at one time did require written corporate statements, but these became discoverable, over the Commission’s objection, in certain civil litigation. The European Commission now provides that leniency can be obtained through oral statements: “Oral corporate statements should be clear, factual and to the point, with precise and sufficiently detailed information.” The full procedure for oral statements can be found at the European Commission, DG Competition’s Leniency page, “Oral Statements procedure,” available at [http://ec.europa.eu/competition/cartels/leniency/leniency.html](http://ec.europa.eu/competition/cartels/leniency/leniency.html). See also ICN, “Leniency Policy,” p. 13.

12 The first sentence of the second paragraph of Article 9 indicates that if a final application for leniency is incomplete, the date of the application (and therefore the applicant’s place in the queue) will be deemed to be the date whenever the application is supplemented and deemed complete. The Sections assume that the last sentence of Article 9, “excepting undertakings that submit a preliminary report,” means that where an undertaking has submitted both a preliminary application and a final application that required supplementation, the date of the preliminary application should still be considered to be the date of the application instead of the later date that the application is deemed complete. If that assumption is incorrect, then the Sections urge that the foregoing approach be adopted, since otherwise applicants that initially attempt to file a complete application will be worse off than those that race to submit a preliminary application to claim a place in the queue.
Consistent with the importance of a “paperless” leniency application, as discussed above, the Sections have concerns about the possible content of any written opinion issued by the Enforcement Authorities to an undertaking that specifies the changes that must be made to the application for leniency or the manner in which the application must be supplemented. It is not clear what will be contained in this written opinion, but receipt of such a written opinion by the undertaking should be voluntary. It would be preferable to allow the undertaking to review the written opinion at the offices of the Enforcement Authority, and then leave it to the undertaking to decide whether it wants to receive a copy of the opinion. This is again based upon the concern that the written opinion may have to be produced in follow-on private damage litigation, which will place the leniency applicant in a worse position than companies that have not cooperated with the Enforcement Authorities, and will thereby create a disincentive for undertakings to participate in the Leniency Program.

Article 10: The Other Conditions That the Undertakings Need to Satisfy to Qualify for Leniency

This Article identifies additional conditions that undertakings need to satisfy to qualify for leniency, including “ceasing suspected illegal conduct timely, except that the Enforcement Authorities request the undertakings to continue the abovementioned conducts in order to ensure the investigation is implemented smoothly.”

The Sections believe that any request to continue the anticompetitive conduct by the leniency applicant should be voluntary, not mandatory. Continuing to participate in a horizontal monopoly agreement after discovery of the illegal conduct can expose the undertaking to further prosecution and increased civil damage claims in other jurisdictions, even if the Enforcement Authorities would not take action against the undertaking under the AML. Therefore, given the risks of continuing to participate in the illegal conduct, the acceptance of such a request by the leniency applicant should be in the sole discretion of the leniency applicant. Failure to agree to such a request should not in any way jeopardize the acceptance of the leniency application by the Enforcement Authority.

By the same token, competition law enforcers in other jurisdictions in which an undertaking has requested leniency may have requested that the undertaking continue its participation in the monopoly agreement in order to facilitate the enforcer’s covert collection of evidence relating to the agreement. The Sections suggest that the Article be clarified to provide that the Enforcement Authorities will not condition leniency on an undertaking ceasing the suspected illegal conduct where the undertaking is continuing the conduct at the request of an enforcer in another jurisdiction.

This Article also states that “Enforcement Authorities normally will not exempt from punishment those undertakings that coerce or organize other
undertakings to participate in reaching and implementing monopoly agreements....” The Sections suggest that the phrase “or organize” should be removed, as it is often difficult for applicants to determine if they “organized” the conduct and thus including this term may lead to a high degree of uncertainty that discourages applications to the Leniency Program.  

Predictability is a hallmark of effective leniency programs. For this reason, many jurisdictions have eliminated all eligibility disqualifiers based on the applicant’s role in the offense. Making an “organizer” of a cartel ineligible for leniency injects a high degree of uncertainty into the process. The term “organize” is vague and subject to widely varying interpretations. The determination of which applicants meet this criterion is an inherently subjective and unpredictable exercise. Thus, the proposed change to remove “or organize” should enhance the Leniency Program’s effectiveness as it will give prospective leniency applicants confidence that the Enforcement Authorities will not disqualify them by applying ill-defined criteria.

Several jurisdictions that have adopted eligibility requirements frequently interpret terms such as “organizer” or “ringleader” narrowly to ensure, where possible, that leniency applicants are not disqualified from leniency programs. In the United States, the model corporate conditional leniency letter requires the applicant to represent that it “did not coerce any other party to participate in the anticompetitive activity being reported and was not the leader in, or the originator of, the activity.” However, in practice, the U.S. DOJ rarely disqualifies a leniency applicant for being a leader or originator, absent substantial and clear evidence of coercion.

13 Despite the importance of certainty, the Sections agree that it is appropriate for Enforcement Authorities to have the flexibility to deny leniency where there is clear evidence that a participant in a conspiracy has coerced others to join in a cartel. This approach is used in various other jurisdictions including the United States (see footnote 14, below).

14 Instead of addressing questions of instigation at the level of eligibility for immunity or leniency, many other jurisdictions have made instigation a relevant factor for the purposes of establishing penalties for parties that do not receive full immunity. See, e.g., European Commission DG Competition, “Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003” (Jan. 1, 2006), para. 28, available at http://ec.europa.eu/competition/cartels/legislation/leniency_legislation.html.

15 The U.S. DOJ has stated that:

“the leniency policy refers to ‘the leader’ and ‘the originator of the activity,’ rather than ‘a’ leader or ‘an’ originator. Applicants are disqualified from obtaining leniency only if they were clearly the single organizer or single ringleader of a conspiracy. If, for example, there are two ringleaders in a five-firm conspiracy, then all of the firms, including the two leaders, are potentially eligible for leniency. Or, if in a two-firm conspiracy, each firm played a decisive role in the operation of the cartel, both firms may qualify for leniency. In addition, an applicant will not be disqualified under this
Article 11: Determination of the Places of Undertakings’ Applications

This Article provides that “[p]rior to issuing Pre-Notice of Administrative Punishment, Enforcement Authorities place undertakings in a chronological sequence according to the time that undertakings apply for leniency, in order to determine the place of undertakings’ applications for leniency, and notify undertakings what places they are in the queue.”

The Sections commend the Draft Leniency Guidelines for providing additional information relating to the procedural steps and ranking of the leniency applicants. However, it would be helpful to provide information relating to placement in the queue earlier in the leniency application process to allow leniency applicants to understand where they fall in the queue. In addition, it would be helpful to provide more guidance on the timing and manner of the notification by the Enforcement Authorities of the undertaking’s place in the queue to provide more transparency and certainty to the process.

This Article also states that “[w]hen undertakings do not carry out the obligations listed in Paragraph 1, Article 10 of these Guidelines [cooperation, etc.], Enforcement Authorities will cancel their places in queue.” The Sections understand that leniency applicants that do not satisfy their obligations under the Leniency Program should not benefit from leniency and should be removed from the program. However, before any undertaking is removed for failure to meet its obligations, it should be provided with advance notice that its position is in jeopardy and given an opportunity to explain its failure to meet its obligations and cure any defects in its leniency application. Removing an undertaking from the Leniency Program is a significant course of action that should not be taken lightly. If the business and legal communities are under the impression, whether accurate or not, that undertakings have been unfairly removed from the Leniency Program, without adequate due process, it may create disincentives for other undertakings to participate in the Leniency Program.

condition just because it is the largest company in the industry or has the greatest market share, if it was not clearly the single organizer or single ringleader of the conspiracy. Wherever possible, the Division has construed or interpreted its program in favor of accepting an applicant into the leniency program in order to provide the maximum amount of incentives and opportunities for companies to come forward and report their illegal activity.”

Article 12: Enforcement Authorities’ Review of the Application

The Sections have no comments on this Article.

Article 13: Enforcement Authorities Exempt or Reduce the Punishment for Undertakings

Article 13 states in part that: “[w]hen the undertaking applies for leniency prior to Enforcement Authorities initiating investigation and is determined to be at the first place in queue, Enforcement Authorities will exempt such undertaking from punishment” (emphasis added).

The Sections applaud the Draft Leniency Guidelines for applying this non-discretionary position with regard to first-in leniency applicants when there is no preexisting investigation. As discussed in the comments on Article 1 above, automatically granting the first-in leniency applicant full immunity is consistent with international norms and is the hallmark of an effective and transparent leniency program. However, the Sections believe that this non-discretionary approach should also be applied to the first-in leniency applicants in all situations, even where the Enforcement Authorities have already initiated an investigation and have not developed sufficient evidence to establish a violation. 16

Article 13 also states that:

For the undertaking at the second place in queue, Enforcement Authorities could grant 30% to 50% reduction in punishment. For the undertaking at the third place in queue and the subsequent undertakings, Enforcement Authorities could grant no more than 30% reduction of punishment.

The Sections applaud the NDRC for providing in the Draft Leniency Guidelines discount ranges for undertakings that are second and third in line, as this provides greater transparency and certainty for undertakings that are not first-in leniency applicants. This is consistent with the approach used in various jurisdictions including the European Union, Canada, and Japan. 17

16 In the United States, under “Type B Leniency,” full immunity is available to a leniency applicant that is the first company to report a violation, even where the U.S. DOJ, has already initiated an investigation, if “[a]t the time the corporation comes in, the Division does not have evidence against the company that is likely to result in a sustainable conviction.” See U.S. DOJ, “Frequently Asked Questions Regarding the Antitrust Division’s Leniency Program,” p. 5, available at http://www.justice.gov/atr/frequently-asked-questions-regarding-antitrust-divisions-leniency-program.

17 See also ICN, “Leniency Policy,” p. 14, which describes partial leniency for subsequent cooperating parties as a good practice.
**Article 14: Enforcement Authorities Grant Reduction of Confiscating Illegal Gains of Undertakings**

Article 14 states that:

To encourage undertakings to proactively report conducts of monopoly agreement and provide material evidence, the Enforcement Authorities may consider exemption or reduction on confiscating illegal gains in addition to the punishment reduction, referring to Article 13 of these Guidelines.

The Sections recognize that the possibility exists under the AML that leniency applicants, including even the first undertaking that submits an application before an investigation has been initiated and that therefore qualifies for a complete exemption from punishment, could be subject to an order confiscating illegal gains (which in the United States is called “disgorgement”). The Sections appreciate that the possibility of an exemption or reduction is contemplated by this Article but that it is left to the Enforcement Authority's discretion at the end of its investigation.

Such a confiscation of illegal gains could potentially be very onerous – possibly amounting to a larger monetary amount than any penalty imposed for the violation of the AML. The possibility that a leniency applicant, and in particular the first leniency applicant, could be subjecting itself to a large disgorgement order by filing a leniency application may discourage undertakings from applying to the Leniency Program. The Sections therefore recommend that Article 14 state that, at least for any leniency applicant that qualifies for a complete exemption from punishment under Article 13, the Enforcement Authority will also exempt that undertaking from any order to confiscate illegal gains. Such a leniency applicant would still be subject to private litigation to recover any damages suffered by victims of the cartel conduct.

**Article 15: Notification and Publication of the Decisions of Enforcement Authorities**

The Sections have no comments on this Article.

**Article 16: Enforcement Authorities’ Obligations in Relation to Confidentiality**

The Sections appreciate the provisions in Article 16 indicating that the reports, documents, and other materials included in an application for leniency shall be kept confidential and shall not be released to the public or disclosed to any other authority, organization, or person without the leniency applicant’s consent. Similarly, the statement that “such materials shall not be used as evidence in relevant civil litigations, unless otherwise provided for by laws” will also remove an uncertainty that could otherwise be a disincentive to the use of the Leniency Program.

The Sections recommend that Article 16 be further clarified to state that the identity of the first-in leniency applicant will also not be disclosed without the
applicant’s consent, and that leniency application information and materials will also not be shared with foreign antitrust authorities without the explicit consent of the applicant. This is an approach that various other jurisdictions, including Canada, have used to reduce uncertainty and disincentives for leniency applicants.\textsuperscript{18}

**Article 17: Effective Time**

The Sections have no comments on this article.

**Conclusion**

The Sections appreciate the opportunity provided by the NDRC to comment on the Draft Leniency Guidelines. The Sections would be pleased to respond to any questions the NDRC or other Enforcement Authorities may have regarding these comments or to provide any additional comments that may assist the NDRC in finalizing the Leniency Guidelines.

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\textsuperscript{18} See also International Competition Network, "Leniency Policy," pp. 14-15, regarding the importance of such confidentiality protections.