Chinese Competition Authority Imposes Fines for Price-Fixing Involving Industry Associations

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IN SHORT

The Situation: In early September, three local Chinese chemical manufacturers received penalty notices from China's National Development and Reform Commission ("NDRC") for attending an association conference, exchanging price information through social media thereafter, and colluding to fix the prices.

The Background: This is the third NDRC cartel case involving industry associations during the past two months. During the same period, NDRC also published *Guidelines on the Price-Related Conduct of Industry Associations.*

Looking Ahead The active enforcement by NDRC in this area and the publishing of its Guidelines reinforce that it is important for companies to be alert to potential antitrust risks and ensure compliance when participating in or dealing with industry associations in China.

Historically, most industry associations in China were quasi-governmental and served as forums through which member companies coordinated their activities, in some cases including price-setting. For this reason, anticompetitive behavior through industry associations is even more of a salient issue under the relatively new Chinese antitrust law. From the very beginning of the enforcement of the Anti-Monopoly Law ("AML"), NDRC has paid close attention to cartels coordinated by industry associations and recently appears to have further stepped up its enforcement efforts in this area.

In July 2017, NDRC's Zhejiang branch issued a penalty decision against 17 local paper manufacturers and their industry association for engaging in a price cartel involving whiteboard sheet rolls. According to NDRC, the local industry association organized a meeting among member companies to discuss raising prices of whiteboard sheet rolls, which was followed by a local industry-wide 23 percent cumulative price increase. NDRC fined the local industry association and then required its dissolution, while also fining the 17 member companies a total of RMB 7.8 million (approximately US$1.2 million).

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Three weeks later, NDRC's Shanxi branch announced another penalty decision, finding that the Shanxi Electric Power Association had organized 23 local power companies to enter into agreements to set minimum electricity supply prices. The industry association was fined RMB 500,000, the maximum penalty that may be imposed on an association, and the 23 power companies were fined a total of RMB 73.4 million (approximately US$11 million). This is one of the largest AML penalties ever imposed on purely domestic Chinese companies.

Then in September, NDRC fined three chemical manufactures more than RMB 34 million (approximately US$5.3 million) for price fixing in the market for polyvinyl chloride ("PVC"). NDRC found that the companies had attended a Western China PVC association conference and exchanged price information through group chats on WeChat (the default electronic messaging platform in China) and then subsequently agreed to fix the sales prices of PVC products. Careless communications via social message platform have been increasingly used as evidence of violation.

Industry Association Activities Face Substantial Antitrust Risk under the New NDRC Guidelines

In addition to all of this enforcement activity, NDRC issued Guidelines in July 2017 addressing anticompetitive conduct by industry associations and shedding further light on Article 16 of the AML, which prohibits industry associations from organizing industry undertakings to engage in illegal monopoly agreements such as cartels.

The principles and rules set in the Guidelines are similar to those in the United States and European Union. For example, the Guidelines classify price-related conduct by industry associations into different categories of legal risk. As a general rule, the gathering and release of current or future price information, price information of specific competitors or products, or price information that otherwise is difficult to collect all increase the risk of a price fixing enforcement action. In contrast, release of historical, industrywide, or publicly available price information brings less risk (*see* Article 8).

Moreover, according to the Guidelines, the following conduct is "highly risky" (*see* Article 9):

- Coordinating member companies to reach price monopoly agreements.
- Exchanging price information of members or other players in the industry.
- Coordinating member companies to reach price monopoly agreements through unified preferential terms or time periods.
- Releasing price guidance, base prices, reference prices, and recommended prices.
- Imposing limitations on cost composition and profit margin by publicizing price calculation formulas.
- Formulating rules, decisions, notices, and criteria that could exclude and limit price competition.
- Requiring or encouraging member companies to implement price monopoly agreements through a penalty mechanism.

In practice, it is expected that most conduct falling into the above category will be treated essentially as *per se* illegal.

Conclusion

The publication of the Guidelines and recent enforcement cases indicate that industry association activities are subject to close scrutiny in China. Companies operating in China should be more alert to the potential antitrust risk in industry association activities given the historical quasi-governmental role of industry associations, the lack of competition culture and competition law awareness, and the popularity of social media facilitating group information sharing and discussion.

Additional Resources

Links to related information (in Chinese):

NDRC's Guidelines on the Price-related Conduct of Industry Associations

NDRC's Press Statement addressing the Guidelines

NDRC's penalty decision against the paper manufacturers

NDRC's penalty decision against the power companies

Stock exchange announcement issued by the PVC manufacturer

TWO KEY TAKEAWAYS

1. Companies doing business in China need to adhere vigilantly to the Guidelines while participating in trade associations to avoid antitrust risk.
2. Industry associations should take particular care with how they handle price information that is difficult to collect. The release of that type of information runs a high risk of price collusion.

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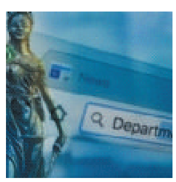

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