

## **Guidelines on Trade Association Pricing Activities — a member's perspective**

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### **Introduction**

On July 20 2017 the National Development and Reform Commission (NDRC) published its Guidelines on Trade Association Pricing Activities<sup>2</sup>. The guidelines clarify trade associations' different pricing activities and categorise them according to their associated level of legal risk. The guidelines identify:

- eight activities which have no legal risk;
- five activities which have little legal risk;
- four activities which have a high level of legal risk;
- four activities which have a very high level of legal risk; and
- 12 activities which have an extremely high level of legal risk.

The guidelines aim to help trade associations to conduct pricing activities which can promote industry development, maintain fair competition and protect consumer interests. They clarify the grey areas regarding pricing activities that were not expressly covered by the Price Law and the Anti-monopoly Law. Further, they will help trade associations and their members to assess the legitimacy of relevant behaviours in order to identify and prevent antitrust conduct. In addition, with regard to protecting members' interests, the guidelines bestow various authorisations and limitations on trade associations.

As the guidelines advise associations on how to carry out their activities, they will have a direct impact on legal risk assessments and the day-to-day business of trade associations and

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<sup>2</sup> The Guidelines on Trade Association Pricing Activities are available on the NDRC's website: [http://www.ndrc.gov.cn/zcfb/zcfbgg/201707/t20170725\\_855400.html](http://www.ndrc.gov.cn/zcfb/zcfbgg/201707/t20170725_855400.html)

their members. This update analyses the effect that the guidelines will have on antitrust compliance from the perspective of members.

### **Broad definition of trade association**

The guidelines broadly define a 'trade association' and set out the required criteria. According to the guidelines, a 'trade association' generally constitutes a legal person that:

- is legally registered with the government's registration authorities at the county level or above;
- comprises economic organisations and individuals from the same industry; and
- conducts industry services and self-regulation.

Societies, chambers of commerce, associations, federations, promotion associations and unions which conform to the abovementioned definition of a trade association may fall within the scope of the guidelines. In accordance with the Guidelines on Trade Association Pricing Activities (Draft for Comments), which were published on March 24 2017, trade associations will be formed as non-profit associations. However, the final guidelines remove the non-profit requirement, which indicates that all trade associations will be regulated by the guidelines, regardless of whether they are for profit.

In addition, the guidelines remove the description of 'same industry', which implies that this term will be interpreted broadly. According to the definition of a trade association set out in the guidelines, an assessment of whether an organisation is a trade association cannot be based only on its registered name. Instead, the guidelines define almost all types of association on the basis of their organisation, nature and purpose, among other things.

### **Application of guidelines**

The guidelines apply to almost all pricing activities associated with trade associations, including:

- pricing activities that involve or affect members and other undertakings;
- the release of price information;
- the exchange of price information between different trade associations;
- activities undertaken jointly with other trade associations; and
- the sale of goods and the provision of paid services.

### **Protection of members' interests**

In accordance with the guidelines, when trade associations provide consultation, training, credit evaluation, exhibition and other services or sell journals, publications or other commodities with compensation, they will be treated identically to undertakings. In this context, a trade association must comply with the pricing and anti-monopoly laws and regulations which regulate undertakings and cannot abuse their management authority. Further, the guidelines authorise trade associations to speak for their members, including by facilitating effective communication with the government and participating in price dispute mediations which are conducive to members.

Specifically, trade association members enjoy the following benefits.

<b>Category of activity</b>	<b>Members' benefits</b>
Protection of members' interests	<ul style="list-style-type: none"> <li>• Trade associations can submit comments and suggestions relating to the interests of the industry and undertakings operating in the industry to the pricing authorities.</li> <li>• Where the administrative organs and organisations that have governing functions under laws and regulations undertake activities which infringe on members' price-setting rights, trade associations can report such activities to the pricing authorities.</li> </ul>

	<ul style="list-style-type: none"> <li>• Trade associations can report any abuse of administrative power by an administrative organ which seeks to eliminate or restrict competition to the pricing authorities at or above the provincial level.</li> <li>• Trade associations can present criticisms and suggestions regarding the misconduct of the pricing authorities and their personnel on behalf of members and the industry.</li> <li>• Trade associations can provide members with lawful assistance to make representations or defend them against the pricing authorities during periods of price supervision, inspections and anti-monopoly law enforcement processes.</li> </ul>
Self-regulation	<ul style="list-style-type: none"> <li>• Trade associations encourage members to add clearly marked price tags.</li> <li>• Trade associations promote the use of electronic price tags and electronic price lists and other new forms of clearly marking prices.</li> <li>• Trade associations announce the scope and standards of services provided by members.</li> </ul>
Price dispute mediation	<ul style="list-style-type: none"> <li>• Trade associations can assist the pricing authorities in conducting mediation in the case of pricing disputes among members and consumers.</li> </ul>

### **Removal of de facto price alliance**

In the draft guidelines, the NDRC introduced the concept of a de facto price alliance and stipulated that when trade associations calculate, collect, provide or organise an exchange of price information between members and distribute such information among members and other industry enterprises, it could lead to price convergence and result in a de facto price alliance. As the draft guidelines did not indicate the requirements of a de facto price alliance, it would likely lead to an extensive interpretation in practice. The final guidelines do not adopt this concept, but generally emphasise that "a trade association's publication of price

information may influence undertakings in the industry to reach a price-fixing agreement and increase exposure to high legal risks".

The guidelines also highlight that compared with the release of historical, industry-wide and publicly available price information, the release of the following information may pose a higher level of legal risk and lead to a price-fixing agreement among undertakings in the industry:

- existing or future price information;
- price information pertaining to a specific undertaking or product; and
- price information which is difficult to collect.

Further, the guidelines stipulate that the following criteria will likely give rise to price monopoly agreements:

- If the production and operating costs in the industry are relatively stable, and the industry concentration is relatively high, the undertakings' cost or price information will have a greater impact on other undertakings. As such, a trade association's release of recent production costs, sales quotations, transaction prices and other price information of undertakings in the industry will likely give rise to price-fixing agreements.
- Where a trade association releases the future price of undertakings with a relatively high market share, such activity will likely give rise to price-fixing agreements.
- If the connection between the production and operation of the upstream and downstream markets in the industry is relatively close, the undertakings in the industry are more likely to respond consistently to upstream-downstream costs and price volatility. Where a trade association releases the volatility of upstream-downstream costs and price information, price-fixing agreements will likely occur.
- Where a trade association publishes a price trend analysis, this will likely give rise to price-fixing agreements if:
  - the association is relatively powerful;

- the data collected and processed by the association is relatively comprehensive;
- the analysis of the changing trends of releasing prices and costs is relatively specific; and
- the association's impact on and control over its members is relatively strong.

Despite the removal of the de facto price alliance, a trade association's release of price information to members may lead to a de facto information exchange among members or other undertakings in the industry. In particular, the publication of information relating to existing or future pricing strategies, discount rates or other sensitive information may likely induce price convergence among industrial undertakings. In some circumstances, such behaviour may constitute a 'concerted practice' as stipulated in Article 13 of the Anti-monopoly Law. At present, concerted practices are in the spotlight of the antitrust authorities and several cases have been concluded in this regard, such as the estazolam drugs cartel case, published by the NDRC in July 2016<sup>3</sup>, and the payment cipher device supplier collusion case, published by the State Administration for Industry and Commerce (SAIC) in November 2016<sup>4</sup>. Article 6 of the NDRC's Provisions on Anti-price Monopoly and Article 3 of the Provisions for Administrative Authorities for Industry and Commerce on Prohibiting the Conclusion of Monopoly Agreements provide specific criteria for concerted practices (see table below). While there are nuanced differences between them, both articles consider the following major factors when analysing whether concerted practice has occurred:

- uniformity;
- the exchange of information;
- whether there is a reasonable explanation; and
- market structure and changes (for further details please see "China intensifies pharmaceutical antitrust enforcement: NDRC rules in first-ever concerted practice case<sup>5</sup>").

	SAIC	NDRC
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<sup>3</sup> Available on the NDRC's website: [http://jjs.ndrc.gov.cn/gzdt/201607/t20160727\\_812589.html](http://jjs.ndrc.gov.cn/gzdt/201607/t20160727_812589.html)

<sup>4</sup> Available on the SAIC's website: [http://www.saic.gov.cn/zwgk/gggs/jzsf/201611/t20161104\\_172076.html](http://www.saic.gov.cn/zwgk/gggs/jzsf/201611/t20161104_172076.html)

<sup>5</sup> Further analysis on concerted practice, please see Michael Gu's article "China Intensifies Pharmaceutical Antitrust Enforcement: NDRC Rules in First-ever Concerted Practice Case" on 22 August 2016: <http://www.anjielaw.com/en/uploads/soft/170125/1-1F125162044.pdf>

<b>Uniformity</b>	Did the companies commit acts uniformly?	Were the companies' price adjustment activities consistent?
<b>Information exchange</b>	Did the companies communicate their intentions or exchange information?	Did the companies communicate their intentions?
<b>Reasonable explanation</b>	Can the companies give a reasonable explanation for their concerted practice?	Not applicable
<b>Other factors</b>	<ul style="list-style-type: none"> <li>• Market structure</li> <li>• Competition</li> <li>• Market changes</li> <li>• Industry situation</li> </ul>	<ul style="list-style-type: none"> <li>• Market structure</li> <li>• Market changes</li> </ul>

Enterprises should screen and use relevant information on competitors published by trade associations prudently, particularly information on a leading undertaking's existing or future prices, upstream and downstream business costs and price changes. In certain circumstances, such information may be identified as a triggering factor behind a price monopoly agreement. For example, after a trade association publishes prices, if its members incidentally price their products or services following the same trend, such coincidence would likely be identified as a cartel due to the satisfaction of all of the elements of a concerted practice.

### **Pricing activities with extremely high level of legal risk**

The guidelines specify that the following types of activity will be considered to eliminate and restrict competition and pose an extremely high level of legal risk:

- organising undertakings in the industry to reach price monopoly agreements;
- organising the exchange of price information among members and notifying them or other undertakings in the industry of such price information;
- organising undertakings in the industry by means of uniform favourable treatment or reaching price monopoly agreements;

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- releasing industry-wide price guidance or benchmark, reference, recommended or other indicative prices;
  - limiting cost structures, profit margins and other factors by publishing price calculation formulas;
  - formulating price rules, decisions, notices and standards that may eliminate and restrict competition; and
  - ensuring or promoting undertakings' implementation of price monopoly agreements through internal disciplinary mechanisms within the industry.

If a trade association conducts the above activities which may eliminate and restrict competition, enterprises may violate the Anti-monopoly Law by participating in any meeting organised by the association. For enterprises, participating in a trade association's activities is a double-edged sword. On the one hand, it may facilitate the enterprise's development and that of the industry. On the other hand, enterprises should note that such participants may be competitors in the same industry and that trade associations provide a sensitive information exchanging platform by organising an activity. Enterprises must be aware of the potential risks of reaching price monopoly agreements. Therefore, when participating in trade associations' activities, meetings and arrangements, enterprises should:

- bear in mind that interacting with a competitor's employees may breach the Anti-monopoly Law;
- refuse to discuss product prices, price increase plans, market activities, preferential terms and periods, promotion plans, company production, customer distribution and other information when participating in meetings organised by trade associations;
- be vigilant with regard to price guidance and base, reference, recommended and average prices or costs issued by a trade association and report an association's activities and withdraw from the association if necessary;
- be careful about the language and wording used in meetings and recorded in the meeting minutes, in order to avoid misinterpretation and misunderstanding in the event of a potential investigation;
- require the association to record its objection and act prudently to avoid concerted practice when it is unlikely to leave or withdraw from the meeting;
- pay close attention to potential concerted practices, whether verbal or implied;
- launch any pricing behaviour based on its own business conditions and market competition, rather than any price guidance or base, reference or recommended prices issued by a trade association; and

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- consider compliance issues before making any sensitive business decisions involving other competitors.

In particular, enterprises should acknowledge that, even under a trade association's organisation, any involvement in the activities that have associated legal risks, as stipulated in the guidelines, may violate the Anti-monopoly Law. Such enterprises will not be exempt from legal liability if a trade association assumes liability and the enterprise that leads or organises such activity will receive a severer punishment. This indicates that even if a meeting is organised or initiated by a trade association, the enterprises involved will assume independent liability if they engaged in discussions relating to monopolistic agreements or other illegal acts or reached and implemented price monopoly agreements. Further, even if they are forced by trade associations or another enterprise in the industry, enterprises that are negatively or passively involved in illegal acts cannot be exempted from or mitigate their liability.

### **Other pricing activities that may disrupt market prices**

The guidelines regulate certain pricing activities which may disrupt market prices and violate the Anti-monopoly Law, the Pricing Law and other price-related laws and regulations. These activities include where trade associations:

- fabricate or spread price increase information pertaining to the industry to cause the price of goods or services in the industry to increase quickly and significantly;
- fabricate or spread price increase information pertaining to the upstream or downstream industry to indirectly cause the price of goods or services in the industry to increase quickly and significantly;
- fabricate or spread price increase information pertaining to industry production and operating costs to cause the price of goods or services in the industry to increase quickly and significantly; and
- organise or guide members or other operators in:
  - hoarding a large quantity goods (beyond a normal number of storage units or for the duration of the storage cycle), where this strains market supply or subsequently causes abnormal price fluctuations; or
  - developing industry standards to regulate the number of commodities, storage cycle or other inventory management for members to cause the price of goods

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or services in the industry to increase quickly and significantly.

## Comment

Trade associations play an active role in promoting industry development and self-discipline and fulfilling social responsibilities. Trade associations should be a role model for members and encourage them to comply with anti-monopoly and pricing laws and regulations and promote awareness of fair competition. However, in recent years, trade associations have frequently organised their members to implement monopoly agreements or other illegal acts in the name of industry self-discipline or to stop low or predatory pricing. Some trade associations have been a driving force behind monopoly agreements, while association meetings have become the source of illegal activities. By the end of July 2017, the SAIC had published details of 24 cases of horizontal monopoly agreements, 12 of which concerned trade associations that had reached and implemented monopoly agreements. Further, five of the 16 horizontal monopoly agreement cases reported by the NDRC concern trade associations, two of which received maximum fines of Rmb500,000, while another was forced to deregister (for further details please see "Deregistration: trade association receives severest antitrust punishment")<sup>6</sup>. As such, the introduction of the guidelines is timely and should help trade associations to assess legal risks and curb and reduce association-led monopolies.

In this context of increasingly strict antitrust enforcement trends, enterprises should stay vigilant with regard to joining trade associations and participating in their activities. Enterprises are advised to have an accurate and comprehensive understanding of activities that violate the Anti-monopoly Law and the Pricing Law. Further, they should strengthen their risk management and compliance processes and not blindly enforce or follow any decision, price guidance or recommended price implemented by a trade association. Notably, when an enterprise engages in activities which, according to the guidelines, come with legal risks, they will not be exempt from legal liability simply because the trade association has assumed liability. Therefore, enterprises should remain independent when engaging in

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<sup>6</sup> Further details are available on the NDRC's website: [http://www.ndrc.gov.cn/xwzx/xwfb/201707/t20170710\\_854194.html](http://www.ndrc.gov.cn/xwzx/xwfb/201707/t20170710_854194.html). In regards to the detailed analysis, please see the article 'Deregistration – Severest Antitrust Penalty on Trade Association' written by Michael Gu and Sun Sihui on 28 July, 2017, <http://www.anjielaw.com/uploads/soft/170807/1-1FPG20143.pdf>.

industry activities. In addition, they should refrain from using the platform of a trade association to organise and participate in monopolistic agreements or submit to pressure from an association and become passively involved in a monopolistic agreement.