

NDRC antitrust enforcement in 2017

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Introduction

In 2017 the National Development and Reform Commission (NDRC) undertook a number of legislative and antitrust enforcement activities. It launched more than 80 investigations into enterprises and administrative agencies and imposed more than Rmb500 million in fines – a steady increase compared with Rmb353.1 million in 2016.

In terms of legislation, the NDRC published two guidelines concerning the pricing activities of market players. Further, it promoted the implementation and enforcement of the fair competition review system, particularly by publishing:

- the Detailed Rules of Implementation of the Fair Competition Review System (Interim); and
- the Work Plan to Remove the Existing Policies and Measures which Restrict or Exclude Competition 2017-2018.

As regards enforcement, the NDRC cracked down on antitrust violations. It focused on cases involving government agencies that had abused their administrative power in order to restrict or eliminate competition and published the details of many cases of this type on its website during 2017.

Others did not escape the NDRC's supervision. For example, a number of international shipping companies and port terminals were investigated, which resulted in them voluntarily reducing their service prices and therefore reduced import and export logistic costs for shipping companies, shippers and other enterprises. Further, in October 2017 the NDRC imposed penalties, including fines of Rmb457 million, on the 18 enterprises involved in the polyvinyl chloride resin (PVC) cartel case. This was the largest fine to have been imposed by the NDRC in a domestic cartel case.

Guidelines

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On July 20 2017 the NDRC published its Guidelines on Trade Association Pricing Activities², which clarify 33 different pricing activities of trade associations and categorise them into five classes according to their associated level of legal risk. The guidelines will help trade associations and their members to assess the legitimacy of relevant behaviours in order to identify and prevent antitrust conduct. At present, many horizontal monopoly agreements are organised or led by industrial trade associations. These associations can easily provide accessible platforms for members to exchange sensitive information and thus act as a breeding ground for price collusion. The guidelines have clarified the grey areas regarding pricing activities that were not expressly covered by the Price Law and the Anti-monopoly Law. As to the exchange of pricing information, the guidelines indicate that a trade association's publication of pricing information may facilitate undertakings in the industry to reach a price-fixing agreement and increase exposure to legal risks. According to the guidelines, compared with the release of historical, industry-wide and publicly available pricing information, the release of the current or future price of a specific undertaking or product, or pricing information which would be difficult for an undertaking to collect, may be more likely to result in a price-fixing agreement between undertakings in the industry³.

Further, on November 16 2017 the NDRC released its Price Conduct Guidelines for Operators of Drugs Prone to Shortages and APIs⁴. These are the first price-related anti-monopoly guidelines concerning a specific industry to be published since the Anti-monopoly Law was implemented. The guidelines provide risk assessment warnings and compliance guidance regarding monopolistic pricing behaviour in the drugs prone to shortages and active pharmaceutical ingredient markets. For the first time, the guidelines clarify that enforcement agencies use the so-called prohibition plus exemption principle to identify monopolistic pricing agreements rather than the 'per se illegal' principle. In other words, although the acts stipulated in Articles 13 and 14 of the Anti-monopoly Law are expressly prohibited, business operators can apply for exemptions if Article 15's requirements can be met. Further, the guidelines discuss five specific types of abuse of dominance:

- unfair pricing;
- refusal to deal;
- restrictive transactions;
- the charging of unjustified fees; and
- differential treatment.

The principle of prohibition plus exemption and market definition and the factors used to identify refusal to deal and unfair pricing included in the guidelines have created new antitrust

² The Guidelines on Trade Association Pricing Activities can be found on the NDRC's website: http://www.ndrc.gov.cn/zcfb/zcfbgg/201707/t20170725_855400.html

³ More detailed discussion on the *Guidelines on Trade Association Pricing Activities* please find the article "Guidelines on Trade Association Pricing Activities – A Member's Perspective" drafted by Michael Gu and Sihui Sun: <http://www.anjielaw.com/en/uploads/soft/180117/1-1P11G51J4.pdf>

⁴ The *Price Conduct Guidelines for Operators of Drugs Prone to Shortages and APIs* can be found on the NDRC's website: http://jjs.ndrc.gov.cn/zcfg/201711/t20171122_867540.html

compliance challenges for pharmaceutical enterprises. In practice, the determination of monopolistic behavior in other industries may also refer to these provisions in the guidelines⁵.

Apart from issuing the two guidelines mentioned above, the NDRC has also played a leading role in preparing six draft guidelines:

- the Anti-monopoly Guidelines on the Abuse of Intellectual Property Rights;
- the Antitrust Guidelines for the Automotive Industry;
- the Guidelines for Applying the Leniency Programme to Horizontal Monopoly Agreements;
- the Guidelines on Undertakings' Commitments in Anti-monopoly Cases;
- the Guidelines on the Calculation of Illegal Gains and Fines; and
- the Guidelines on Procedural Rules for Exemption Applications with respect to Monopoly Agreements.

The guidelines were submitted to the State Council Anti-monopoly Commission and are expected to be approved in 2018. They are expected to further refine the NDRC's antitrust enforcement practice and increase transparency through more uniform standards. The guidelines will also provide clear guidance on company compliance and defence strategies.

Promotion of fair competition review system

In 2017 the NDRC made great efforts to promote the implementation of the fair competition review system and formulated the relevant implementation rules and plans to remove the existing defective policies. Under the fair competition review system, government authorities must:

- fully consider the impact of their policies and measures on market competition during the formulation stage; and
- review any potential impact in accordance with the requirements of establishing a unified, open, competitive and orderly market system.

The fair competition review system aims to:

- regulate government activity to prevent the implementation of policies or measures that would eliminate or restrain market competition; and

⁵ More detailed discussion on the *Price Conduct Guidelines on Operators of Drugs prone to Shortages and APIs* please find the article "Pharmaceutical Companies Face Severer Antitrust Compliance Challenges" drafted by Michael Gu and Sihui Sun: <http://www.anjielaw.com/en/uploads/soft/171228/1-1G22Q04924.pdf>

- ensure the decisive role of the market in resource allocation.

The implementation of fair competition review is twofold. As such, in addition to developing new policies and measures that comply with the system, relevant authorities must gradually remove or rectify existing policies and measures that severely hinder fair competition⁶.

On October 23 2017 the NDRC, the Ministry of Finance, the Ministry of Commerce of the People's Republic of China (MOFCOM), the State Administration for Industry and Commerce and the Legislative Affairs Office of the State Council jointly promulgated the Detailed Rules of Implementation of the Fair Competition Review System (Interim)⁷. The rules develop the 18 review criteria of the fair competition review system and clarify the conduct that is prohibited under each. All proposed policy measures, regulations and prescriptive documents must be reviewed on the basis of each individual criterion and cannot be promulgated if it violates any one criterion. Any entity or individual can report to the policymaking agency if they suspect that it has promulgated policy measures without conducting a fair competition review or in violation of the review criteria. In such cases, the policymaking agency must verify the relevant circumstances.

On December 5 2017 the NDRC, together with the Ministry of Finance and MOFCOM, announced the 2017 and 2018 Work Plan to Remove the Existing Policies and Measures which Restrict or Exclude Competition⁸. The work plan requires all departments of the State Council and government agencies to:

- scrutinise their respective regulations, prescriptive documents and other policy measures that are in force according to the requirements of the fair competition review system and the Detailed Rules of Implementation of the Fair Competition Review System (Interim); and
- remove any content that could lead to:
 - ✧ local protectionism;
 - ✧ the designation of transaction parties; or
 - ✧ the creation of barriers to market entry.

Agencies have been directed to pay attention to policy measures that:

- impose unreasonable and discriminatory terms linked to market entry and exit;
- designate product or service providers;

⁶ More detailed discussion on the fair competition review system please find the article “New Review System Milestone for Fair Market Competition” drafted by Michael Gu and Sihui Sun: <http://www.anjielaw.com/en/uploads/soft/180117/1-1P11G52059.pdf>

⁷ The original text of the *Detailed Rules of Implementation of the Fair Competition Review System (Interim)* can be found on the NDRC’s website: http://jjs.ndrc.gov.cn/zcfg/201710/t20171026_864941.html

⁸ The Chinese original 2017 and 2018 Work Plan to Remove Anticompetitive Policy Measures can be found on the NDRC’s website, available at http://jjs.ndrc.gov.cn/zcfg/201712/t20171212_870241.html

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- impose discriminatory pricing for non-local products and services;
 - impose restrictive conditions that hinder the inflow of non-local goods or services or the outflow of local goods or services;
 - prevent or restrict non-local business operators from participating in local tendering and bidding activities; and
 - force business operators to engage in monopolistic conduct prohibited by the Anti-monopoly Law.

Significant cases

In 2017 the NDRC focused on investigating abuses of administrative power by local government authorities which aimed to eliminate or restrict competition. In accordance with Article 51 of the Anti-monopoly Law, where an administrative department or organisation authorised by law to administer public affairs abuses its administrative power in order to eliminate or restrict competition, a higher-level department must instruct it on how to rectify its behaviour. Further, the person directly responsible for the abuse of power and other persons directly responsible will receive administrative penalties in accordance with the law. The Anti-monopoly Law enforcement authority may submit a proposal to the relevant higher-level department for handling the matter according to the law. Most government authorities that were investigated by the NDRC and the relevant provincial price bureau actively cooperated and rectified their illegal activities. By virtue of this crack down on abuses of administrative power, the NDRC maintained fair market order and promoted an orderly market system.

As regards the investigation of enterprises, the most high-profile case of 2017 was the PVC cartel case. This was the first investigation in which messages exchanged via the online social media app WeChat were regarded as key evidence. In this case, 18 PVC suppliers colluded with regard to price increases multiple times via a WeChat group. Based on their discussions, the PVC suppliers set different prices for some customers and the same prices for another. The involved enterprises accounted for three-quarters of the nationwide PVC output. According to its penalty decision, the NDRC believed that the enterprises' illegal conduct had seriously damaged competition in the relevant market, as well as the rights and interests of downstream business operators and consumers. However, due to the relatively short duration of the violations and the enterprises' active cooperation in the investigation, the NDRC imposed a relatively small fine of 1% or 2% of the PVC suppliers' respective market sales in 2016, totalling Rmb457 million.

Another significant case involved a cartel comprising 17 paper manufacturers and the Fuyang Paper Manufacturers Association, which acted as the organiser and a recidivist and was subsequently deregistered by the price bureau. This was the first instance of a Chinese antitrust authority invoking Article 46(3) of the Anti-monopoly Law to deregister a trade association.

On October 28 2016 the Fuyang Paper Manufacturers Association organised a meeting attended by 17 paper manufacturers. At this meeting, the manufacturers agreed to raise the price of whiteboard sheet rolls collectively. In particular, they agreed to:

- implement the adjusted price;
- increase the price in stages, starting with an increase of Rmb200 per ton; and
- supervise each other and report any non-compliance to the Paper Manufacturers Association, which would undertake an inspection and impose penalties in accordance with the rules of self-discipline.

In November 2016 each cartel member raised the price of whiteboard sheet rolls as agreed. In December 2016 the monthly average price of whiteboard sheet rolls was increased by 23% compared with the pre-collusion price. The 17 companies were fined 1% of their 2016 whiteboard sheet roll sales, which totalled Rmb7.78million. The penalty was relatively light, as the price bureau considered:

- the cooperative attitude of the companies during the investigation;
- the short duration of the monopolistic activity (ie, two months); and
- the companies' willingness to rectify their illegal behaviour.

In contrast, the price bureau levied the severest penalty available against the Paper Manufacturers Association – namely, deregistration – due to its recidivist conduct. The NDRC had levied a fine against the association for monopolistic behaviour of a similar nature in 2011⁹.

By the end of 2017, the NDRC has published 18 cases relating to horizontal monopoly agreements, five of which were against trade associations. These cases involved a variety of industries, including insurance, paper manufacturing, property management and gold jewellery. Of these, two cases involved trade associations that received maximum fines of Rmb500,000. Notably, in 2017 the NDRC fined two trade associations in one month.

These active enforcement practices demonstrate that the NDRC has been more aggressive in monitoring and investigating the anti-competitive conduct of trade associations. In future, trade associations should diligently prepare to meet the NDRC's stringent compliance standards.

Comment

⁹ More detailed discussion on the 17 paper manufacturers cartel case please find the article “Deregistration: Severest Antitrust Punishment on the Trade Association” drafted by Michael Gu and Sihui Sun: <http://www.anjielaw.com/en/uploads/soft/171016/1-1G016152S0.pdf>

In 2017 the NDRC actively carried out legislative work and formulated and promulgated industrial guidelines and enforcement procedures. These efforts have greatly improved the regulation system for antitrust enforcement and enhanced the transparency of law enforcement activities. The guidelines also provide clearer guidance on enterprises' operations. In addition, the NDRC remained active in its antitrust enforcement by not only penalising a variety of enterprises for anticompetitive conduct, but also targeting administrative agencies that had abused their administrative power in order to restrict or eliminate competition. Although no significant penalties were imposed on foreign enterprises, the NDRC interviewed many foreign enterprises and issued warnings.

In 2018 the NDRC will reinforce its cartel and enforcement supervision efforts so as to uphold fair market competition. At the same time, it will strengthen its cooperation with competition authorities from other jurisdictions with regard to international cartel cases. Both the number of investigations and the amount of penalties are expected to increase in 2018.