Interview with Xu Kunlin, Director General of the Bureau of Price Supervision and Anti-monopoly Under the National Development and Reform Commission of the People's Republic of China

Editors' Note: The Antitrust Source *previously interviewed Director General Xu for the February 2011 issue.* Three years after the last interview, we followed up with DG Xu regarding NDRC's recent enforcement activities, policy drafting and revisions, and plans for the future. We would like to express our thanks to DG Xu for sharing his views with us, and to Deputy Director Zhou Zhigao and other officials from NDRC for facilitating this interview.*

—*Fei Deng and Yizhe Zhang*

THE ANTITRUST SOURCE: It has been three years since our last interview. Thanks for graciously agreeing to share your views with our readers again. We have seen that NDRC has been very active in the past year with quite a few enforcement activities and sizable fines. How have these cases come to NDRC's attention? How does NDRC decide which cases to pursue?

DIRECTOR GENERAL XU KUNLIN: During the past few years, NDRC has investigated and imposed penalties in a number of price-monopoly cases. They came to our attention mainly by three means: (1) informant reports; (2) our taking the initiative to identify clues from the media reports and online information; and (3) companies involved voluntarily reported on the monopoly agreements they had reached.

At present, informant reports are the main source for case discovery. According to the Chinese Anti-monopoly Law (AML), the anti-monopoly enforcement agencies shall conduct necessary investigation into those reports that are in writing and contain related facts and evidence. This is our duty delegated by law.

ANTITRUST SOURCE: What do you expect to be NDRC's areas of focus in the near future in terms of investigations?

DG XU: At present, investigated cases came to our attention mainly from informant reports. We will give priority to reports that have provided detailed and accurate evidence and information. Meanwhile, we also pay close attention to price-monopoly cases concerning people's livelihood, so as to effectively safeguard consumers' interest.

---

* *Interview with Xu Kunlin, Director General of the Department of Price Supervision Under the National Development and Reform Commission of the People's Republic of China*, Antitrust Source, Feb. 2011, http://www.americanbar.org/content/dam/aba/migrated/2011_build/antitrust_law/feb11_xuintrvw2_23f.authcheckdam.pdf.

The *Decision on Several Major Issues Concerning Comprehensively Deepening the Reform* made at the Third Plenary Session of the 18th Central Committee of the Communist Party of China (CPC) provides a mandate to "clear up and abolish various regulations and practices that impede the national unified market and fair competition, to prohibit and punish acts of any kind implementing preferential policy in violation of the law, and to combat local protectionism, monopoly and unfair competition." NDRC will work in response to this mandate, and further strengthen law enforcement against abuses of administrative powers that eliminate or restrict competition.

ANTITRUST SOURCE: What work has NDRC done recently in terms of legislation and does NDRC plan to issue any regulations, rules, or guidelines in the near future?

DG XU: During the past year, to improve the procedures related to determining penalties for price-related violations and to protect the legitimate rights and interests of the punished, we focused on formulating and amending a series of rules and normative documents related to law enforcement procedures, including the *Procedural Provisions on Administrative Penalties for Price-related Violations* (Decree No. 22 of NDRC), the *Provisions on Evidence for Administrative Penalties for Price-related Violations*, the *Model Texts of Administrative Penalties for Price-related Violations*, the *Provisions on File Management of Administrative Penalties for Price-related Violations*, and the *Rules for Investigation and Review of Price-related Violations concerning Administrative Penalties*. These documents set forth comprehensive provisions regarding the procedures for determining the administrative penalties for price-related violations, including the procedures for case initiation, investigation and evidence discovery, review, hearing, discussion and others, making the law enforcement procedures for price-monopoly cases more transparent and efficient. In the near future, we will also promulgate the *Measures for the Discretionary Power in Administrative Penalties on Price-related Violations*. In addition, we conducted dedicated studies of issues related to the calculation of fines, leniency treatment, and suspension of investigation for anti-monopoly cases. In the future we will actively push forward relevant legislation work.

ANTITRUST SOURCE: How does the leniency program work for NDRC investigations? We understand that companies have sought leniency and received it after cooperating with NDRC's investigation, but only after the investigation had been initiated. For example, two companies in the milk powder investigation received leniency in this fashion. Have there been any leniency applicants before the associated investigation was initiated? Does NDRC intend to release guidance regarding the leniency provision?

DG XU: As shown by the antitrust enforcement in various countries, leniency programs help to disband the monopoly agreements and improve efficiency in investigations. The Chinese AML also provides for a leniency program. In accordance with the AML and the *Procedural Rules on Administrative Enforcement Against Price Monopoly*, leniency treatment is applicable for a company only when the following two conditions are met: first, the company must take the initiative to report on the monopoly agreements it reached; second, it must provide important material evidence. The reporting company may be granted a reduction in or exemption from penalties only when both of these two conditions are met. In the infant formula case that we handled last year, we exempted some companies from the penalties, mainly for the reason that they met the above two conditions.

Generally speaking, in our law enforcement practices during the past few years, we have achieved positive results by applying the leniency program. To date, a precedent has been set in

that some companies were exempted from the penalties because they self-reported their violations before an investigation was initiated. Of course, at the present early stage, the provisions of the leniency program as stated in relevant laws and regulations are general. We are studying the issues with the goal of setting forth further detailed provisions so that the system is more transparent and the parties can have clearer legal expectations.

ANTITRUST SOURCE: On the calculation of penalties, we understand that Article 46 of the AML states that "where business operators reach a monopoly agreement and perform it in violation of this Law, the anti-monopoly authority shall order them to cease doing so, and shall confiscate the illegal gains and impose a fine of 1% up to 10% of the sales revenue in the previous year." There are several terms here that may need further clarification. First, how has NDRC defined and calculated the "illegal gains"? Second, how does NDRC determine the percentage fine (from the range of 1% to 10%) to apply in a given case? Third, what does the "sales revenue in the previous year" refer to? Lastly, is there a plan to release some guidance on how the penalties are calculated?

DG XU: It is very complicated to calculate the illegal gains from monopoly conduct, and a common practice in many jurisdictions is to compare the prices before and after the monopoly conduct, or to compare the price in a monopoly market and that in a competitive market. However, in general, there is no method unanimously accepted in administrative and judicial enforcement across jurisdictions. Therefore, we can only address this issue on a case-by-case basis.

As to the size of the fine, NDRC has discretionary power in imposing administrative penalties. To protect the legitimate rights and interests of citizens, legal entities, and other organizations, we are formulating specific measures regarding the discretionary power in imposing administrative penalties, which are expected to be introduced in the near future.

The AML treats "the turnover for the previous year" as a basis for determining the fines. How to interpret this has a great impact upon the rights and interests of the punished parties. In the law enforcement during the past few years, we tended to strictly limit "the turnover for the previous year," so as to prevent excessive penalties that may cause unnecessary impact upon the production and operation of the punished parties. But we also noticed that for cases in which price-related violations had continued for many years and in which the prices increased significantly, if we adopt a narrower reading of the "turnover" in determining the fine, it would be in favor of the law breakers. At present, we are studying the issues regarding anti-monopoly fines, and will push forward relevant legislation to provide further detailed regulations.

ANTITRUST SOURCE: What measures has NDRC adopted to allow a company under investigation to exercise its right of defense and to ensure transparency in investigation procedures? Does NDRC have a measure to protect confidential business documents and information from being released to other agencies or the public?

DG XU: In order to regulate the procedures for administrative penalties and protect the legitimate rights and interests of the parties, NDRC has formulated and amended a series of rules and normative documents. We believe that by way of improving the law enforcement procedures, the parties' rights to make statements and put forward defenses can be better protected. For example, the *Procedural Provisions on Administrative Penalties for Price-related Violations* provide that before making a decision to impose administrative penalties, the anti-monopoly enforcement

authority shall notify the parties in writing of the contemplated administrative penalty decision and the facts, reasons, and basis supporting the decision, and inform the parties of their rights to make statements and put forward defenses. When an administrative penalty with a large fine is to be implemented, the parties shall have the right to apply for a hearing. If the facts, reasons, and evidence offered in the parties' statements and defenses or by the parties during the hearing are well founded, they shall be accepted by the anti-monopoly enforcement authority. In addition, to ensure that the parties can fully exercise those rights, the *Procedural Provisions on Administrative Penalties for Price-related Violations* also provide that the anti-monopoly enforcement authority shall not increase the penalties on account of the parties' statements, defense or the hearings.

As to the protection of business secrets, it is explicitly provided for by Article 41 of the AML that the anti-monopoly enforcement authority and its staff shall keep confidential the business secrets obtained in the course of law enforcement. Information and materials received during the AML enforcement will be strictly limited to the use for the AML enforcement.

During the anti-monopoly law enforcement, economic analysis plays a very important role. At present, our Bureau has many law enforcement officials who have an economics background.

ANTITRUST SOURCE: What is your view of the usefulness of economic analyses in antitrust investigations? Does NDRC have its own economists or consult with outside economists?

DG XU: During the anti-monopoly law enforcement, economic analysis plays a very important role. At present, our Bureau has many law enforcement officials who have an economics background. Meanwhile, during the anti-monopoly investigations, we will also engage external economists to participate in the case analysis and discussion. For example, there are many economists on the expert panel of the Anti-monopoly Commission of the State Council. We will solicit opinions on cases from relevant experts.

ANTITRUST SOURCE: Scholars around the world are expressing increasing concerns that patents are being transferred from operating companies to "patent licensing companies," also known as "patent trolls," for assertion against the operating companies' competitors. This behavior, also called patent privateering, has the potential to drive up competitors' costs and raise prices to consumers. Is the NDRC concerned about patent privateering?

DG XU: The Chinese AML specifically provides that "this law is applicable to the conduct of undertakings that abuse their intellectual property rights, eliminating or restricting competition." Therefore, the Chinese AML prohibits any abuse of intellectual property by undertakings to eliminate or restrict competition. Compared with traditional operating companies, patent licensing companies are less restricted in exercising patent rights, which means it may be easier for them to abuse intellectual property rights and cause anti-competition concerns. We have also noticed that an increasing number of patents are being transferred from traditional operating companies to patent licensing companies. If patent licensing companies abuse their patent rights to eliminate or restrict market competition, harming consumer rights, we will conduct investigations in accordance with the law.

ANTITRUST SOURCE: What is your view on resale price maintenance (RPM)? Should a per se illegal rule apply or should it be analyzed on a case-by-case basis, weighing the potential anticompetitive and procompetitive effects? In the two RPM cases that NDRC has investigated so far, one with white liquor and the other with milk powder, did NDRC weigh the potential procompetitive effects against the anticompetitive effects? In practice, how does NDRC decide exemptions under Article 15 of the AML? Has NDRC ever granted exemptions?

DG XU: The AML has an explicit and clear provision regarding RPM: Article 14 in principle prohibits this kind of conduct, specifically indicating that in general RPM is illegal. Article 15 provides for exceptions, giving consideration to possible business rationales for imposing RPMs. Therefore, the approach of the AML toward RPM is "prohibition in principle, but with exceptions." In our law enforcement, we have adopted this approach consistently in addressing RPM. During investigations, we give the investigated undertakings sufficient opportunities to defend themselves. If the investigated undertakings are able to prove that their RPM activities meet the conditions set forth in Article 15 of the AML, then we will exempt them from penalties in accordance with the law.

In the white liquor case and the infant formula case, we performed an in-depth analysis of the impact of RPM on market competition and consumer interest, and further analyzed the nature and degree of the suspected monopoly conduct. We treated these issues as important factors in considering different penalties.

In accordance with Article 15 of the AML, except for the circumstance listed in item (vi) "protecting legitimate interests in foreign trade and economic cooperation," under which the undertaking can be exempted directly, under other circumstances listed in items (i) to (v), the undertaking needs to prove that the following three conditions are met simultaneously: first, the agreement reached falls within at least one of the circumstances mentioned above; second, the agreement reached will not substantially eliminate or restrict competition in the relevant market(s); third, the agreement reached will benefit consumers. The exemption can be granted only when these three conditions are met. So far there has been no case we have handled where any undertaking was granted exemption in accordance with Article 15 of the AML.

ANTITRUST SOURCE: What is your view of whether a request of antitrust immunity for airline business agreements and airline alliances should be considered and how such a request should be evaluated?

DG XU: We have noticed that business cooperation and alliances are increasing in the airline industry. Article 15 of the AML sets forth the circumstances under which horizontal agreements shall be exempted and that provision also applies to the airline industry. In other words, if the business cooperation or alliance conforms to the relevant provisions of the AML, the anti-monopoly law enforcement agency may choose to grant an exemption.

At present, NDRC has established a joint meeting and working mechanism with the Civil Aviation Administration of China and will carefully review the applications submitted by air carriers for exemption of their horizontal agreements, giving full consideration to relevant provisions in the AML and the characteristics of this industry.

ANTITRUST SOURCE: What do you think is the current status of the relationship between industrial policy and antitrust policy in China? Some commentators have suggested that the former dominates the latter. What's your view? Do you think the relationship might change in the future?

DG XU: In light of the stage of its economic development and the actual characteristics of the economy, China keeps attaching great importance to the role of industrial policy in promoting economic development. For a long time, China has been implementing a series of industrial policies that have played key roles in advancing the adjustment and upgrade of industrial structures, and promoting economic transformation and development.

In accordance with the *Decision on Several Major Issues Concerning Comprehensively Deepening the Reform* made at the Third Plenary Session of the 18th Central Committee of the

CPC, the market shall play the decisive role in resource allocation. Competition is the key driver of market resource allocation. Therefore, at the present new stage of economic development, in order to adapt to the requirements of reform of the economic structure and transformation of government functions, China shall gradually establish the fundamental role of competition policy. At present, we have entrusted relevant experts and scholars to conduct research on the relationship of industrial policy and competition policy as well as coordination between the two, to clarify relevant issues from a theoretical perspective, and to study the establishment of a mechanism of communication and coordination between industrial policy and competition policy.

ANTITRUST SOURCE: There have been reports that a number of eyeglass manufacturers have reduced their prices recently due to NDRC's investigation. Are these price reductions commitments made as part of their settlements with NDRC? Will NDRC impose fines on all or some of these manufacturers?

Competition is the key driver of market resource allocation.

DG XU: Due to public concerns regarding the price of eyeglasses, in the second half of 2013, based on reports from consumers, NDRC initiated an investigation into the primary lens manufacturers and discovered that some manufacturers had engaged in anticompetitive conduct by restricting the resale prices of downstream players, which lessened the price competition in the relevant lens market and harmed consumer interests. Based on the rule-of-law principle that "the law must be observed and strictly enforced and the lawbreakers must be held responsible," the relevant local price authorities imposed administrative penalties on those companies in accordance with the AML. After becoming aware of the illegal nature of their pricing conduct, to reduce or eliminate the negative consequences of their illegal conduct, the companies concerned in the case took the initiative to undergo rectification measures such as lowering the factory prices of their mainstream products. To show their sincerity in rectifying their mistakes, the companies concerned made public announcements on their official websites for public supervision.

ANTITRUST SOURCE: What's your view on how FRAND (fair, reasonable, and non-discriminatory) royalty rates should be determined?

DG XU: The holders of standard-essential patents shall follow the principles of fairness, reasonableness, and non-discrimination in licensing. In standard-essential patent licensing, the role of the market mechanism is greatly constrained as the patent holders are able to control the licensing terms, including the patent royalty rates. To prevent the patent holders from abusing their patent rights, it is important to supervise and intervene, to the extent necessary, in their licensing activities and constrain their acts with objective requirements and the principles of fairness, reasonableness, and non-discrimination.

Without a doubt, it is a complex issue to abstractly discuss how to set fair, reasonable, and non-discriminatory patent royalty rates. However, for a specific case with clear facts and sufficient evidence, it is quite clear whether the patent royalty set by the patent right holder is fair, reasonable, and non-discriminatory because, although the fairness, reasonableness, and non-discrimination could not be accurately quantified, excessive unfairness, unreasonableness, and discrimination would result in a change in the nature of the licensing conduct, and can be determined in a qualitative way. Therefore, if we view the FRAND principle from the perspective of anti-monopoly law enforcement, we will come to the following three conclusions. First, it is permissible and necessary for AML enforcement to intervene in the licensing terms, including patent royalty rates.

Otherwise, the FRAND principle will be rendered powerless and will not matter in practice. Secondly, the intervention by AML enforcement in patent licensing originates from the FRAND principle, but whether licensing conduct is anticompetitive shall be determined based on the specific provisions of the AML. Thirdly, whether the royalty rate is fair, reasonable, and non-discriminatory should be analyzed and determined on a case-by-case basis in AML enforcement.

ANTITRUST SOURCE: Regarding the InterDigital (IDC) investigation, we have heard that IDC applied for and was granted suspension. How is an application for suspension of investigation evaluated? Would companies under suspension of investigation be subject to fines? If yes, how would NDRC calculate fines in such a case?

DG XU: NDRC made the decision to suspend the investigation of IDC on May 22. The commitment system set forth in Article 45 of the AML aims to reduce the costs of AML enforcement and effectively resolve potential anticompetitive concerns. Therefore, with regard to the application for suspension of an investigation, we mainly consider the following two aspects. Firstly, it should be unclear whether the acts of the undertaking are anticompetitive and the case should be in a "suspected" status. If the evidence collected through investigation confirms that the acts of the undertaking are anticompetitive, or do not trigger anti-competition issues, this provision shall not apply. Secondly, the commitments made by the undertaking should be able to eliminate the consequence of the suspected monopoly acts and restore market competition. The determination of whether to suspend an investigation is made according to the specifics of the case. We made the decision to suspend the investigation of IDC based on the state of the investigation and the commitments made by IDC.

According to the AML, the investigated company shall not be subject to any penalty after the decision to suspend the investigation is made. However, if the investigated company fails to fulfill its commitments or triggers any other conditions prescribed by law, we will resume the investigation and may impose penalties.

ANTITRUST SOURCE: Is the pharmaceutical industry one of the areas that NDRC is investigating right now? What are some of the potential antitrust issues in this industry?

DG XU: The issues existing in the pharmaceutical industry are major issues concerning people's livelihood, and the pharmaceutical industry has always been the focus of our AML enforcement. In 2011, NDRC published its fines on two drug distributors in Shandong province, which acquired a market dominant position by exclusive distribution of Promethazine Hydrochloridethe (a type of medicine raw material) and resold it to downstream companies for an unfairly high price. The decision was well received by the public. Similar cases still exist in the Chinese pharmaceutical industry, and we always take them seriously, holding a zero-tolerance policy. At present, relevant anti-monopoly investigation is ongoing. In addition, abuse of dominance by pharmaceutical manufacturers with intellectual property rights and patented technologies, such as licensing at high royalty rates, refusal to license, compulsory grant-back, and imposing unreasonable trading conditions, is also the focus of our AML enforcement.

ANTITRUST SOURCE: Other jurisdictions are in the process of investigating price-fixing cartels in the auto parts industry. There have also been complaints domestically about cars and auto parts being too expensive in China. Has the NDRC started any investigation of the auto industry? Is the

investigation focused on the auto parts suppliers or are other channels of the auto industry being investigated as well? Is the investigation focused on horizontal or vertical issues? Is the investigation focused on foreign companies or domestic companies?

DG XU: We have noticed that the AML enforcement agencies of some other countries are conducting investigations into price collusion among auto parts manufacturers. In recent years, NDRC has been conducting anti-monopoly investigations of auto parts manufacturers regarding their reaching and implementation of horizontal monopoly agreements. We keep a close watch on anticompetitive acts that may exist in the entire car and auto parts industries, and have so far engaged in some investigations. We will conduct investigations and impose applicable penalties in accordance with the law regardless of whether the product at issue is the entire automobile or a part, the suspected price related violation is a horizontal agreement, vertical agreement, or abuse of dominance, or the manufacturers involved are domestic or foreign.

Since the AML came into force, NDRC has always attached great importance to international cooperation and communication in the anti-monopoly sector, and has signed cooperation memoranda with the anti-monopoly law enforcement agencies of the UK, the U.S., South Korea, and the EU . . .

ANTITRUST SOURCE: China appears to have entered a golden era of online platform competition with large, well-funded entities. The market appears to be dynamic and many of these companies such as Tencent and Baidu provide free services. Does NDRC consider this space to be a priority for enforcement?

DG XU: Chinese Internet companies are growing rapidly, and many new business models are emerging in the Internet industry. However, some acts suspected of eliminating or restricting competition have occurred during the development of Internet finance, Internet media, Internet shopping and other new business models, which to some extent, have caused worry and concern on the part of the AML enforcement agencies.

To achieve the positive externalities of networks and attract more users, the Internet platform companies such as Tencent and Baidu often compete with each other by providing free services. We keep a close watch on this new competition model. If any anticompetitive acts are discovered, we will conduct investigations pursuant to the law and endeavor to maintain the fair market competition of the Internet industry.

Meanwhile, since the Internet platforms adopt the business model of providing free services, which is quite distinct from traditional business models, we will face many new challenges during our anti-monopoly investigations. For example, the features of two-sided markets or multi-sided markets will raise new considerations for the definition of relevant markets. SSNIP and other analysis tools need to be modified, or other measures focusing on the sales or profitability models will be used to define the relevant markets. Due to the broad scope of Internet users, the definition of the relevant geographic market will also need to reflect the new features. In addition, we also pay attention to the potential anticompetitive acts of abusing intellectual property rights in the Internet industry.

ANTITRUST SOURCE: Has there been any cooperation with other jurisdictions on investigations? Will there be further cooperation in the future?

DG XU: Since the AML came into force, NDRC has always attached great importance to international cooperation and communication in the anti-monopoly sector, and has signed cooperation memoranda with the anti-monopoly law enforcement agencies of the UK, the U.S., South Korea, and the EU to provide for the framework for cooperation and to establish a long-term cooperation

mechanism. At the same time, by organizing or attending international seminars, paying mutual visits and other means, we have strengthened international anti-monopoly cooperation and drawn lessons and experience from the practices of agencies in mature market economies, so as to improve the capabilities and skills of Chinese anti-monopoly enforcement authorities.

We notice that with the deepening of economic globalization, more and more anticompetitive acts present international features including international cartels, abuse by multinational corporations of their market dominant positions, etc. It is very important for the anti-monopoly law enforcement agencies in different jurisdictions to enhance their information communication and law enforcement coordination. We will take the initiative to establish relevant communication and coordination mechanisms with the anti-monopoly law enforcement agencies of other jurisdictions. If the time is right, we will also consider conducting joint enforcement to effectively regulate anticompetitive acts and maintain a sound market order with fair competition.

ANTITRUST SOURCE: Does NDRC have any plan to publish formally initiated investigations and the penalty decisions in order to increase enforcement transparency and improve compliance by companies through self-evaluation?

DG XU: We always believe that timely publication of information on anti-monopoly investigations increases law enforcement transparency, provides convenience for public supervision, and encourages lawful company operations. In recent years, NDRC and local anti-price monopoly law enforcement authorities have made public a large number of price monopoly cases, which received positive outcomes. In the future, we will continue to take the initiative to further our efforts in making public information about anti-monopoly law enforcement. ●