

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

Editor's Note: It has been over two years since China's Anti-Monopoly Law (AML) took effect, in August 2008. Three government agencies split enforcement responsibilities under the AML. The National Development and Reform Commission (NDRC) is in charge of regulating price-related anticompetitive conduct. In this interview with The Antitrust Source, Mr. Xu Kunlin, the Director General of the Department of Price Supervision of NDRC since January 2010, discusses the structure and function of the agency, the enforcement activities to date, and regulatory rules issued so far. DG Xu also provides helpful perspectives on cooperation between different antitrust agencies within China, and between NDRC and other antitrust agencies around the world.

DG Xu has had substantial experience in price regulation during his government service. Since 1990, he has served in various positions in the NDRC and the State Price Control Bureau, the State Planning Commission, and the State Development Planning Commission, which are former government entities that performed some of the functions of the current NDRC.

This interview was conducted on January 10, 2011, by Fei Deng and Yizhe Zhang for The Antitrust Source. Several other officials from the Department of Price Supervision of NDRC were also present at the interview and provided helpful comments, including Deputy Director General Li Qing, Director Zhi Shengmin, and Mr. Zhou Zhigao. We would like to express our thanks to DG Xu, and to the other officials from NDRC, for sharing their views with us.

—FEI DENG, H. STEPHEN HARRIS, JR., AND YIZHE ZHANG



DG Xu Kunlin

THE ANTITRUST SOURCE: It is our understanding that the Department of Price Supervision of the National Development and Reform Commission (NDRC) is in charge of anti-monopoly work related to prices. Could you please briefly describe the organizational set-up and functions of the Department of Price Supervision?

DIRECTOR GENERAL XU KUNLIN: As mandated by the State Council, the National Development and Reform Commission (NDRC), the Ministry of Commerce (MOFCOM) and the State Administration for Industry and Commerce (SAIC) are the anti-monopoly enforcement agencies in China, and NDRC is in charge of investigating and punishing anti-price monopolies, i.e., price-related anti-competitive conduct by monopolies. Such conduct includes price monopoly agreements among undertakings, price-related abuse of dominant market position, and price-related abuse of administrative authority to eliminate and restrict competition. Within NDRC, the Department of Price Supervision is specifically in charge of regulating anti-price monopolies. Within the Department, the Anti-Price Monopoly Division has been set up to specifically take charge of this work.

Pursuant to the relevant stipulations of the Anti-Monopoly Law (AML), NDRC has authorized and delegated the provincial-level pricing authorities to take charge of price-related anti-monopoly enforcement within its respective administrative jurisdiction in accordance with the AML, and cooperate with NDRC in the investigation of anti-price monopolies, whereby a two-tier enforce-

ment regime, comprised of the NDRC and the provincial pricing authorities, is set in place for enforcement against price monopolies. At the same time, the NDRC and the provincial pricing authority may, within their statutory limit of authority, delegate the pricing authority to a lower level to investigate suspected price monopolies.

ANTITRUST SOURCE: Please describe the *Anti-Price Monopoly Rules* and the *Administrative Enforcement Procedures Against Anti-Price Monopolies* recently enacted by NDRC.

DG XU KUNLIN: NDRC recently enacted two implementing anti-monopoly rules, the *Anti-Price Monopoly Rules* and the *Administrative Enforcement Procedures Against Anti-Price Monopolies*. The *Anti-Price Monopoly Rules* cover the forms of price monopolies, such as price monopoly agreements, price-related abuse of market dominant position, and abuse of administrative authority, and the legal liabilities thereof. On the other hand, the *Administrative Enforcement Procedures Against Anti-Price Monopolies* mainly cover case reporting and handling, investigative measures, penalties, suspending investigation, exemptions, and responsibilities of the pricing authority to ensure that the pricing authority duly performs its anti-price monopoly functions. The two sets of rules further refine the anti-monopoly legal system in China, and will duly strengthen anti-price monopoly enforcement, foster the culture of market-based competition, and promote self-conscious regulation of undertakings to jointly maintain orderly competition in the market.

ANTITRUST SOURCE: Please describe the enforcement actions taken by NDRC since the AML became effective.

DG XU KUNLIN: Since the AML came into effect, NDRC has been working actively to enforce the AML against price monopolies. NDRC has investigated and imposed punishments in a number of price monopoly cases. Based on the reported and investigated cases so far, the suspected price monopolies can mainly be categorized as follows: (i) where trade associations organized undertakings in their respective industries to reach monopoly agreements that aimed at fixing or changing prices or setting a minimum price for resale to third parties; (ii) where competing undertakings in some industries reached monopoly agreements aimed at fixing or changing prices; and (iii) where certain undertakings with dominant market positions abused their positions by engaging in tie-in, thus disrupting normal price order in the market. We have announced some of these cases, and you may access the relevant information from the Web site of NDRC.

ANTITRUST SOURCE: Is the current anti-monopoly enforcement leaning towards certain industries, such as agriculture and its by-products? Do you think the focus of the anti-monopoly enforcement in the next phase will change? What are the specific plans?

DG XU KUNLIN: The purpose of enforcement against price monopolies is to protect fair competition in the market, improve economic efficiency, and safeguard the interests of consumers and the society's public interest. From this perspective, enforcement should focus on every industry in the economic area. Note that the AML does not apply to joint or concerted activities by farmers or rural economic organizations in the production, processing, sale, transportation, warehousing, and other activities related to agricultural products. Also, the AML does not apply to the conduct of undertakings exercising their intellectual property rights in accordance with the intellectual property laws and relevant administrative regulations, unless they abuse their intellectual property rights to eliminate or restrict market competition.

In addition to the AML, the Price Law also regulates the pricing activities of undertakings. During the first half of 2010, because of the rapid rise in the prices of garlic and mung bean and other agricultural products, some undertakings engaged in speculation to rampantly raise prices, which disrupted the normal market order. We investigated and punished some violations in a series of agricultural areas in accordance with the Price Law, and strongly safeguarded the normal price order in the market.

At present, the market economy in China is still in a primal stage, and price competition is the main means of competition for the majority of undertakings, and price monopoly is the main form of monopoly. Enforcement against price monopoly is an onerous task, and at a certain stage of economic development, it is possible that in certain industries there tend to be more price monopolies and more price monopoly cases. We will strengthen supervision to prevent and stop price monopolies based on actual economic conditions.

ANTITRUST SOURCE: We learned that in terms of division of responsibilities, NDRC is in charge of enforcement against price monopolies, while SAIC is in charge of enforcement against monopoly agreements, abuse of market dominant position, and abuse of administrative authority not relating to prices. Please explain how the two authorities cooperate in the investigation of suspected cases that involve both price-related monopolistic activities and monopolistic activities that are not price related. In addition, has there already been any such cooperation on a specific case?

DG XU KUNLIN: The pricing authorities and the administration for industry and commerce* have always maintained close cooperation for market supervision. Because monopolistic activities are rather complicated, and in many cases, both price and non-price issues are concerned, the close cooperation among the anti-monopoly enforcement agencies is of even more importance. Since the AML came into effect, NDRC and SAIC have gradually stepped up communications and cooperation, and there is also close cooperation between the provincial price authorities and the local administration for industry and commerce, and such cooperation has been proven effective. For instance, in the drafting of the implementing rules for the AML, the two authorities had many discussions regarding the common areas involving both authorities in anti-monopoly enforcement procedures, and reached a common understanding on those areas. Information and comments are exchanged between the authorities on an ongoing basis at meetings or by other means regarding reported suspected monopolistic activities.

In the course of enforcement, NDRC will continue to cooperate with SAIC to explore and set up a case coordination mechanism, and it is possible that the two authorities may jointly investigate high profile cases with significant impacts and media attention.

ANTITRUST SOURCE: We understand that in addition to the AML there are other laws concerning price and competition (for example, the Price Law). How does NDRC coordinate the relationship between the two sets of laws in the course of its law enforcement activities?

DG XU KUNLIN: The PRC Price Law, which came into force in 1998, explicitly prohibits conduct, such as collusive price increases, price discrimination, predatory pricing, etc. The AML, which

* *Editor's note:* The "pricing authorities" would include both national (NDRC) and local authorities. Similarly, the "administration for industry and commerce" would include both national (SAIC) and local authorities.

was promulgated in 2008, also contains relevant provisions. At present, both sets of laws do not contradict each other, though they have differences.

First, with respect to the regulation approaches, the Price Law emphasizes more the examination of whether the conduct itself stays in compliance with provisions of the law; the AML emphasizes the examination of the impact of such conduct on competition in the market.

Second, in terms of the law enforcement entity, at present, only the price authorities under the central government or at the provincial level are empowered to enforce the AML, while all responsible price authorities at the county level or above are empowered to enforce the law against price-related conduct in violation of the Price Law.

Third, in terms of determination, one example of the difference is that the finding of monopolistic conduct under the AML requires relevant economic analysis of the infringements. As another example, the finding of predatory pricing under the Pricing Law does not require that the undertaking has dominant market position, while under the AML, only when an undertaking with dominant market position engages in such activities, can we find it a violation of the AML.

Therefore, we will decide whether to apply the Price Law or the AML based on the specific circumstances of the case.

Irrespective of whether a price-related illegal conduct is investigated and punished under the Price Law or the AML, the procedure of law enforcement shall follow relevant provisions of the Administrative Punishment Law. However, compared to the Price Law, the AML introduces a new suspension procedure for the investigation of monopoly cases, which specifically includes the following three aspects. First, the undertaking may apply in writing for suspension of the investigation. Second, the anti-monopoly law enforcement authority may decide whether to suspend the investigation upon review and shall supervise the performance of commitments by undertakings. Third, the AML enforcement authority may resume the investigation based on the specific circumstance of the case.

ANTITRUST SOURCE: Has NDRC received many complaints from consumers or enterprises since the enactment of the AML? To what types of complaints will NDRC respond and carry out an investigation? By which means will NDRC carry out the investigation? Is there any practical case that has been investigated and punished based on a complaint?

DG XU KUNLIN: Following the enactment of the AML, we did receive many complaints from consumers, undertakings, and lawyers. Up to now, complaints received by NDRC involve many sectors, such as cement, paper-making, car washes, insurance, express shipping services, etc. In accordance with relevant provisions of the AML, where a complaint is submitted in writing and contains related facts and evidence, the AML enforcement authority shall conduct the necessary investigation.

When conducting investigations of the suspected price monopoly cases, the anti-monopoly authority may take the following measures: (i) conducting inspection of the business premises or other relevant locations of the undertakings under investigation; (ii) inquiring of the undertakings under investigation, interested parties, and other relevant entities or individuals, requiring them to provide relevant information; (iii) examining or copying the relevant documents and information including related documentation, agreements, accounting books, business correspondence, electronic data, etc. of the undertaking under investigation, interested parties and other relevant entities or individuals; (iv) sealing off and detaining relevant evidence; and (v) inquiring about the bank accounts of the undertakings under investigation.

We have investigated and punished several price monopoly cases based on complaints. For example, recently we investigated and punished Fuyang Paper Making Industry Association in Zhejiang Province, which organized undertakings to reach a price monopoly agreement within the association. We found evidence of infringement indicating that since 2010, the association organized five meetings among twenty executive council members to jointly fix the ex-factory price of white paper board for packaging. The price authority imposed a fine of RMB 500,000 on this association according to law. This case was published to the public on January 4 this year.

ANTITRUST SOURCE: In recent years the anti-monopoly law enforcement authorities of other countries, such as the U.S. Department of Justice, the European Commission, and KFTC of South Korea, have investigated and punished several international price cartels. Does NDRC communicate and exchange information with these other law enforcement authorities regarding specific cases?

DG XU KUNLIN: We have been paying close attention to law enforcement activities of anti-monopoly law enforcement authorities of other countries, in particular the treatment of some international price monopoly cases. These cases involve certain multinational companies, and may cause adverse impact on the market competition in relevant economic areas in many countries. Therefore, we expect to conduct in-depth communication with anti-monopoly law enforcement authorities of these countries about the investigation and punishment of such cases. We would like to invite them to introduce the process and related details of the investigation and punishment, so as to further strengthen coordination in anti-monopoly law enforcement among different countries and jointly safeguard the market order of fair competition in the world.

ANTITRUST SOURCE: Is there any cooperation between NDRC and anti-monopoly law enforcement authorities of other countries? If yes, could you describe these cooperations?

DG XU KUNLIN: It is of significant importance to strengthen communication and cooperation for anti-monopoly enforcement among different countries and regions to safeguard fair competition in the market and facilitate healthy operation of the global economy. NDRC pays great attention to the international communication and cooperation in the anti-price monopoly area. Ever since the implementation of the AML, we have gradually established close connection with anti-monopoly law enforcement authorities of other countries and regions, including the DOJ and FTC of the United States, the Directorate General for Competition of the European Commission, the Office of Fair Trading of the United Kingdom, the Fair Trading Commissions of South Korea and Japan, etc.

Currently, we are in the process of coming to a memorandum of understanding with the anti-monopoly law enforcement authorities of the U.S., EU, and the United Kingdom, seeking to establish a long-term mechanism for anti-monopoly cooperation. At present we have developed cooperation, including joint workshops and visits, etc. We are actively exploring other forms, such as roundtable meetings, video conferences, etc. to discuss certain issues of mutual concern, in order to further broaden and strengthen the communications, to enhance understanding and mutual trust, and to jointly safeguard fair competition in the market.

ANTITRUST SOURCE: In your view, what are the challenges that NDRC is facing in AML enforcement?

DG XU KUNLIN: It has been more than two years since the AML came into force, during which time we have promulgated two sets of implementing rules, investigated and punished a series of price

monopoly cases, strengthened the training for law enforcement personnel, and actively launched international communications. Therefore we have made positive progress in anti-monopoly work.

At present, we are facing certain challenges in further strengthening AML enforcement. For example, we need to further refine the relevant laws and regulations based on the experience during the law enforcement practice. We need to accumulate more experience in AML enforcement, including through learning from and using for reference the law enforcement experiences of other countries, so as to improve our capabilities and competence level. In addition the competition consciousness of market participants remains to be further enhanced, etc. We will further strengthen efforts relating to anti-price monopoly enforcement, endeavor to build a sound competition environment for economic development, and protect consumer interests and public interests.

ANTITRUST SOURCE: Director-General Xu, thanks very much for sharing your views on these important issues with us. ●