

A Review of the Implementation of the Fair Competition Review System in China

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ABSTRACT

In 2015, China introduced a fair competition review system. This system aims to ensure fair compensation and a national common market by preventing anti-competitive regulations and polices. Based on comparing the key elements and the implementation outcomes of the Chinese fair competition review system with the OECD's competition assessment mechanism, this article examines the structuring, function and effects of the Chinese system. The study found that the practical effect of the fair competition review in China is limited. In addition to technical reasons, the main reason for this outcome is that there is no consensus between the central government and the local governments.

Keywords: fair competition review, administrative monopoly, government intervention, market competition

1. INTRODUCTION

The The problem of unduly restrictive laws and policies is serious in China. Due to the history of the transition from a planned economic system to a socialist market one, China's market economy has generally taken a government-driven development path. The government is deeply involved in micro-economic activities, and administrative power plays a role in the operation of the market economy. Although the Anti-Monopoly Law (AML). To solve this problem, China's State Council issued the "Opinions of the State Council on Establishing a Fair Competition Review System During the Development of Market-Oriented Review Systems", establishing a fair competition review system (FCRS) on June 1, 2016. The FCRS aims to further a unified, competitive market by preventing excessive and inappropriate government intervention in it. The FCRS has been considered one of the most important developments in China's transformation to a fair competitive market since the enactment of the AML in 2008.

The FCRS obviously draws on the existing practices of other countries and international organizations around the world, such as the OECD's competition assessment framework. However, it is not clear whether there is any gap between China's practice and international practice, which prompts the following questions: 1) What are the unique features of China's FCRS in terms of policy? 2)

Do the unique features of the FCRS lead to different characteristics of the review output? 3) If there are differences, what are the reasons for them? This article aims to address these questions by comparing the key elements and the implementation outputs of the Chinese FCRS with the OECD competition assessment mechanism. The analysis draws from policy documents and review reports publicized by the OECD and China with an in-depth examination of the implementation practices of Guangdong Province.

2. COMPETITION ASSESSMENT POLICY AND CHINA'S FCRS

Throughout the practice of various countries, the mode to tackle with unduly regulation restricting competition can be roughly divided into judicial path and administrative self-examination path. The United States (U.S.) stands as perfect examples of judicial model. The Supreme Court of U.S. in a 1980 Midcal case, effectively implementing antitrust reviews of competition-restriction policies issued by counties, municipalities, and various professional committers without sovereign in themselves. In a 2015 case, The SPC ruled that the North Carolina State Board of Dental Examiners' policy to put an end to non-dentists providing teeth whitening services in North Carolina unreasonably restrained competition as it is a captured agency (Posner, 2013). The administrative self-examination is originated in Australia. Based on the consensus of the states, the Australia launched the

National Competition Policy in 1995, in which all states are required to commit themselves to reviewing and, where appropriate, reforming all competition-restricting legislation. Referring to the successful experience, the OECD launched Competition Assessment Toolkit (Toolkit) in 2006, thereby providing a systematic mechanism for the identification and possible revision of existing or proposed public policies and measures that unduly restrict competition. The mechanism is practicable and has been implemented in review projects in five countries, namely, Romania (OECD, 2016), Greece (OECD, 2017), Mexico (OECD, 2018), Portugal (OECD, 2018), and Tunisia (OECD, 2019).

In terms of the provisions, the AML of China seems provide a judicial remedy for administrative monopoly, preventing government agencies and organs from using their power to interfere in competition, particularly regarding inter-provincial and interregional business. Article 37 is a catch-all provision prohibiting government agencies from eliminating or restricting competition, which could be constructed as including problematic regulations. However, the Administrative Procedure Law prohibits courts to accept case against administrative rules, regulations, regulations, or decisions and orders with general binding force formulated and announced by administrative organs [Administrative Procedure Law, adopted at the 2nd session of the Seventh National People's Congress on April 4, 1989, last amended on July 1, 2017.]. The courts thereby have no jurisdiction to deal with unduly regulation. Now, by introducing a fair competition review, China has in effect chosen the route of administrative self-examination model, rather than extending judicial powers, to control regulations that limit competition. Some scholars have illustrated that the AML may also be viewed as part of a broader push to reassert central control of China generally and as a means of improving perceptions of local regulatory enforcement (BERGSTEN et al, 2009). The FCRS obviously increases the possibility of changing the political structure between the central government and local government (Schneider, 2010), but the direction of such a change remains unclear.

3. POLICY FRAMEWORK OF FCRS COMPARED TO OECD

The Chinese FCRS stems from the Chinese government's increasing emphasis on unified internal market. The major regulation in China is the No. 34 Opinion, as mentioned above, supplemented by the Implementation Rules for the Fair Competition Review Mechanism that were jointly issued by the National Development and Reform Commission, the Ministry of Finance and five other ministries and commissions. The Implementation Rules set out the review procedures, review standards, social supervision, and accountability. Comparing the policy frameworks specified by the above

documents, the OECD's mechanism and China's FCRS are the essentially the same, although they differ in some points. From our review of the current systems, we identified four elements common to the two systems: object, targets, standards, and assessment procedure.

3.1 Objectives

The OECD sets out that the competition assessment mechanism is aimed at promoting productivity through reviewing whether public polices and measures may be modified to meet their policy objectives without unduly restricting competition. By comparison, the No. 34 Opinion clarifies that the FCRS aims to regulate the relevant behaviours of the government, prevent the introduction of policies and measures to eliminate and restrict competition, and gradually eliminate and abolish the rules and practices that hinder the national unified market and fair competition. Both the OECD's competition assessment and China's FCRS are committed to eliminating laws and regulations restricting competition in the marketplace. However, the OECD emphasizes the government's self-examination, while China's FCRS emphasizes regulating the behaviour of sub-national or local governments, breaking local protection, and eliminating the rules and practices impeding the formation of a unified national market. By nature, in the OECD, the EU or federal states, the implementation of pro-competition policies is based on a consensus among the member states, while in China; the FCRS is a vertical governing policy in which the central government controls the local governments.

3.2 Targets

The OECD suggested that governments can use the Toolkit to evaluate newly drafted laws and regulations, existing regulations and law, and the competitive impacts of regulations. The No. 34 Opinion stated that the review targets of the Chinese FCRS covers administrative regulations and local regulations issued by the State Council and local governments, as well as normative documents and other policy measures issued by local governments or administrative agencies and organizations that are authorized by laws and regulations to manage public affairs. The FCRS cannot govern laws because it is an administrative mechanism rather than a legal mechanism. On the other hand, since policies issued by the local government in China are reflected not only in normative or regulation form but also in various internal documents, red-letterhead documents or other policy norms, the policy carrier targeted by the No. 34 Opinion is broader than the regulations.

3.3. Standards

As shown above, the OECD's Competition Checklist (Checklist) sets out four lead questions with 15 sub-

questions to examine regulations, with the potential to restrict competition. In contrast, the Chinese FCRS clarifies 18 detailed standards covering four areas plus two general standards for regulation and policy makers to undertake the review.

Generally, the OECD Checklist overlapped with the review standards of the Chinese FCRS. Limiting the number or range of suppliers falls into the scope of regulations that govern market entry and exit. Limiting the ability of suppliers to compete may be caused by regulations restricting the free flow of goods and production. Regulations impacting manufacturing and operating costs or acts would reduce the incentive of suppliers to compete.

However, there are some differences between the two sets of standards. The OECD's fourth major standard that limits the choices and information available to customers is not the main standard under the framework of China. By its nature, the OECD's Checklist focuses on competition efficiency, aiming to prevent suppliers from exercising market power, thereby reducing the intensity and dimensions of rivalry and yielding higher prices for consumers and less product variety. The FCRS fights against local protectionism. The FCRS's standards are generated from typically prohibited government behaviours specified by the AML, including compelling individuals and private undertakings to accept government-designed dealing enterprises, hindering the free movement of commodities nationwide, and restricting non-local undertakings to engage in local biddings and so on. Others, such as standards that affect manufacturing and operating costs targeted to local financial policies and regional competition for investment based on financial incentives, stem from the political and economic structure of China.

In addition, different from the OECD mechanism, which requires weighting the competition effect and policy objectives for each regulation, the Chinese FCRS lays out specific exceptions for undue regulation and policies, including (1) to protect national economic safety, cultural safety or that related to national defence construction; (2) to achieve social security goals, such as poverty alleviation and development, disaster relief and assistance, etc.; (3) to achieve public interest goals, such as saving energy and resources, protecting the environment, etc.; and (4) other circumstances provided by laws and regulations. The policy-making agencies shall explain the goals and necessities of the relevant policy measures and ensure that the policies will not significantly eliminate or restrict market competition, as well as determine the duration of such policies

3.4. Assessment Procedure

The OECD's fair competition review is mainly carried out in the form of a project commission. The state

competition authorization determines the specific sector and commissions the Competition Committee of the OECD to independently assess the competition.

The Chinese FSRS adopts an implementation that combines self-censorship and inspection. The State Council requires local governments and departments to conduct a comprehensive self-examination of their own policies and measures to identify policy measures that may need to be repealed, abolished or revised as those restricting competition, following the five steps. Then, the local governments and departments shall submit a written summary report on the progress of their review to each governing authority all the way up to the level of the supreme authority, namely, the State Market and Supervisor Bureau. To secure the implementation of the system, the FCRS finally requires an inter-ministerial meeting for each level of the local government to inspect the review process and outcomes of lower-level authorities.

4. CONCLUSION

Compared to the framework of the OECD, four important features of the legal framework of the FCRS are noteworthy: 1) the objective of the OECD's competition assessment is to improve competition and productivity, while the FCRS aims to promote a national unified market in addition to improving competition. The difference suggests that the FCRS strengthens the central government's control over local governments. 2) As the FCRS is an administrative mechanism, the objects of FCRS review are limited to legal documents and policies issued by the administrative agency and do not include laws and regulations issued by the legislature. 3) The OECD's standards are centred on consumer welfare and market competition, while the FCRS's standards focus on local subsidies. 4) The OECD's system is based on a commission contract, and the review body is independent of the regulation drafters. Most importantly, the Chinese FCRS is based on central directives, and the implementation authority lacks independence. The establishment of the FCRS is regarded as one of the country's most important steps in the fight against administrative monopoly. However, compared to the practices of the OECD, the outcome is relevant limited. This lower and limited outcome may be due to practical constraints, while the key obstacle is the non-consensus between the central and local governments.

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