International Journal of Business and Economic Development
Vol. 2, No. 3; September, 2021. pp 24-29
ISSN 2692-5591 (print), 2692-5583 (online)

Published by International Center for Promoting Knowledge

Research on the Theory and Practice of the Fair Competition Review System in China

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Abstract

On June 1, 2016, the State Council of the People's Republic of China released its Opinions on Establishing a Fair Competition Review System in the Development of the Market System. It shows the determination of Chinese center government that firmly protect the Market System. Actually, the Chinese government is always making the effort to decrease the inappropriate intervention to Market System which from the public rights. Up to now, remarkable results have been achieved. And the stable and rapid growth of China's economy is the best proof. The release of the document about Fair Competition Review is conducive to consolidating the previous achievements of the Chinese government. The purpose of this paper is to introduce the content of this system and put forward some suggestions based on the actual situation in China.

Keywords: Fair Competition Review System in China, Theoretical analysis, Legal foundation, Improvement

Introduction

The Chinese government has been attaching great importance to maintenance of the market competition mechanism, and has integrated market mechanism improvement and regulation of government-market relations into the vision of China's future economic transformation and development. On June 1, 2016, the State Council released its Opinions on Establishing a Fair Competition Review System in the Development of the Market System (hereinafter the "State Council Opinion"). The document proposes that, "To establish a fair competition review system, we should, in line with the requirements for accelerating the development of a unified, open and orderly competitive market system, ensure that relevant government behaviors comply with the fair competition requirements and relevant laws and regulations, maintain the fair competition order, and ensure that various market players use production elements, participate in market competition and accept legal protection in an equal and fair manner".

I. Theoretical analysis of the fair competition review system

In the early 21st century, when it came to implementing competition policies, many countries began to shift their focus to public policy makers. They emphasize the importance of avoiding the negative impact of legislative organs, administrative authorities and other public institutions on the market competition order, holding that anti-competition contents in laws or public policies will be far more harmful than competition restriction behaviors of individual enterprises, and such harm is irreversible. [1] With such belief, many countries started to outline and establish mechanisms that coordinate laws and public policies with competition policies to ensure that there is no

conflict between the two. Their practices mainly consist of two aspects: first, clean up existing laws and policies, and amend and even abolish any laws and policies that contravene the competition policies; second, establish the mechanism to evaluate drafts of laws and policies in advance to guarantee that future national laws and public policies maintain a "competition friendly" state. Such approaches have been put in practice by the United States, Canada, Australia and many other countries for years.

(I) The essence of the fair competition review system

1. The fair competition review system is to prioritize the protection of market competition among various public policy objectives. The government's market regulation bears many goals which are reflected by different laws, and to secure no interruption to the market competition mechanism is only one of the many goals. "In some special circumstances, restriction on competition may bring benefits, but normally it will impose heavier costs on the public." [2] The underlying idea of the system is that the market competition mechanism is the most efficient way to guarantee optimal allocation of limited resources. Protection of the market competition mechanism should be the prerequisite for realizing any other value goal, or at least, the market competition mechanism should not be willfully compromised in order to realize any other value goal.

2. The basic approach of fair competition review is to compare and analyze the value of different policy goals. The general principle is that "formulation and implementation of other economic and social policies should not contravene the competition policies", otherwise "the fair competition review can be used to block the issuance of such anti-competition public policies". [3] For instance, it is provided in Australian law that, "All laws putting restriction on competition are presumed unlawful, unless legitimacy of such restriction can be proved", and that "the burden of proof of legitimacy shall be borne by the institution upholding retention of the law in question". The legal philosophy behind this provision is very clear, that is, to protect inviolability of the competition mechanism to the largest extent by combining "presumption of unlawfulness" with "the burden of proof". [4] Where it is necessary to enact laws or public policies that will restrict the competition mechanism, the law or policy maker should guarantee that the overall social benefits from such laws or policies are larger than the social costs caused by their restriction on competition.

3. The fair competition review system is, in its nature, professional assessment rather than statutory examination. Although the purpose of establishing the fair competition review system is to "examine" whether existing national laws (statutes, administrative regulations and local regulations) are in conformity with competition policies, and the examination conclusion will normally result in amendment or repeal of laws, this does not mean that the fair competition review system equals to the constitutional regime of cleaning up of laws. In the constitutional theory, cleaning up of laws refers to activities by the legislative body to sort out and review contents of laws on a regular basis and make decisions such as amendment or repeal of the effect of law, which is a constitutional function of the legislative body with the aim to maintain timeliness and consistency of a country's law. [5] By contrast, fair competition review is essentially a measure to facilitate competition policies. It is done by specific departments who give professional evaluation advice on existing laws according to competition policies without direct impact on the effect of laws. But in countries implementing the fair competition review system, most professional evaluation opinions given by the reviewer bodies are influential enough to result in decisions to amend or abolish laws.

(II) The content of the fair competition review system

1. The object of the fair competition review. The system of fair competition review should cover all domestic statutes, regulations and normative documents. For case law countries, judicial precedents with binding effects are also put under review. However, from a practical point of view, as the amount of legal documents within the foregoing scope is overly large, an all-inclusive approach will instead undermine effectiveness of the review. Given that, as a common practice in most countries, legal documents at higher authority levels and with extensive influence on market competition behaviors are incorporated in the scope of evaluation, though the specific scope should be determined based on special legislations or implementation documents of the country on fair competition review. Per experience of the United States, Australia, Russia, Korea and other countries, the following types of legal documents are generally included in the scope of fair competition review: first, statutes and their drafts; second, normative documents and their drafts issued by the central government; third, local regulations and their drafts. Although some countries also incorporate local legal documents at lower levels into the scope of fair competition review, most countries authorize provincial governments to conduct review of local

legal documents lower than the provincial level, including some administrative orders issued by those lower-level governments; forth, some precedents, here only referring to those in case law countries. Given the even broader scope of precedents, review authorities normally select typical precedents that are closely related to the competition mechanism as objects rather than covering all facets.

2. The subject of the fair competition review. As a convention observed by countries implementing the fair competition review, the subject of fair competition review should be separate from the lawmaking and policy making organs, or, if organizational separation is not fully achievable, it should be guaranteed that the subject can complete the review without intervention. In many countries, the authorities in charge of market competition would deeply engage in the work of fair competition review because they specialize in the protection of the market competition mechanism, focus on the overall efficiency of the country's economy and are less likely to be influenced by any certain industry.

3. Initiation mechanisms of the fair competition review. Under the first mechanism, the review is initiated by a special commission established by the legislative organ. Many countries pass special laws under which a special commission is set up in charge of detailed implementation of the fair competition review. For example, in April 2020, the Antitrust Modernization Act enacted by the US House of Representatives authorized the Antitrust Modernization Commission (AMC) to conduct comprehensive evaluation of the US antitrust legal system and present the evaluation report to the Congress and the President pursuant to the law. [6] Under the second mechanism, the review is firstly initiated by the administrative organ to achieve certain results before the legislative organ takes over by issuing relevant resolutions. For example, in the 1970s, the federal government of Australia implemented the National Competition Policy, requiring local authorities to carry out evaluation of enacted local decrees and their implementation rules under the criterion of "whether it restrains competition". The policy also required any law evaluated as restraining competition to be abolished or amended by its lawmaker within a stipulated period of time. Meanwhile, the federal and local governments jointly signed the Competition Principles Agreement which urged local governments to enact laws and establish special organs in charge of implementing fair competition reviews in their regions. The third mechanism empowers the authority in charge of market competition to initiate the review. For example, the Korean competition law provides that, where the market competition authority deems a law or draft law as likely to damage the market competition mechanism, it may make a proposal to the legislative organ suggesting amendment or abolishment of such law or draft law. Similar provisions can be found in the competition law of India and Russia.

(III) The procedure of fair competition reviews

1. Identify the policy goal of relevant laws to sort out key objects for review. Given the large amount of existing laws, for better efficiency and precision of the review, it is necessary to understand the policy goal of legislations first before carrying out the review in a well-targeted manner.

2. Analyze the classification of laws and policies that restrain competition. In general, a law is deemed as restraining competition if it: (1) restricts a company or a person from entering or exiting from a certain market; (2) controls pricing or production quantity; (3) restricts the quality, product standard or the distribution of products or services; (4) restricts advertising and promotion means; (5) restricts the purchase and price of raw materials at the production stage; (6) has provisions that may significantly increase costs of the company; (7) has discriminative provisions putting some companies at a more advantageous position than others. [3]

3. Analyze the restraining impact on competition. The analysis consists of two aspects: first, the degree of restraint exerted by the law on competition; second, the benefit and cost of such restraint. In some cases where the legislation puts a limit on competition in order to achieve certain policy goals, it is necessary to consider whether such policy goals are reasonable enough to be deemed as a mitigating circumstance that can, to some extent, be quantified in the fair competition review to offset negative evaluation due to its restraint on competition. As it is very difficult to make quantitative analysis and precisely identify priority, the comparison analysis based on investigation is a more practical approach close to quantification.

4. Seek the alternative solution and make proposals. Since amendment of laws places very high requirements on institutional innovation, there are some more feasible and common reformative approaches in practice. For example, the following five reformative measures are available for laws concerning natural monopoly: (1) to make sure that no access threshold is set up for alternative industries; (2) to ensure the opening up of international market competition; (3) in some special areas, it may be possible to adopt the competitive approach

of contractual management to introduce private managers to operate government owned assets; (4) to authorize third parties to use the monopoly facilities so as to introduce competition in the upstream and downstream industries of the infrastructure; (5) to impose higher taxation on excess profits gained by companies in the natural monopoly industry. [4]

II. The content and legal sources of the fair competition review system in China

(I) Main content of the fair competition review system in China

The State Council Opinion draws a primary framework for the fair competition review system to be developed in China within a period of time in the near future. First, the objects of review are rules, normative documents and other policy measures that involve market access, industry development, business invitation and investment attraction, tendering and bidding, government procurement, operation activities norms, qualification standards, etc., which are formulated by administrative organs and organizations with public affairs administration functions as authorized by laws and regulations. As for administrative regulations, other policy measures formulated by the State Council and local regulations, which are at higher authority levels, the Opinion requires their drafting departments to conduct self-review in the drafting process, but does not clarify on how to evaluate the existing documents predating promulgation of the Opinion. Second, in terms of working steps, existing effective laws and policies should be reviewed first, and on that basis, a mechanism of regular assessment and improvement of documents issued after the establishment of the review system should be formed. Third, as for the subject of review, the State Council Opinion sets forth the principle that "those who formulate the measures shall clean up the same". At the central government level, every State Council department is the subject responsible for reviewing relevant documents formulated by it. Among those departments, the NDRC, Legislative Affairs Office of the State Council, MOFCOM and SAIC are in charge of leading the establishment and improvement of relevant working mechanisms, directing implementation of the review system and reflecting on working results and experience. At the local level, the Opinion designates people's governments at all levels as the responsible subjects of fair competition review, and requires that people's governments at the provincial level are responsible for directing municipal and county level governments to carry out reviews. Forth, in terms of the review standards, the State Council Opinion sets forth 18 review criteria from four aspects, namely "market access and exit", "free flow of goods and elements", "effects on production and operation costs" and "effects on production and operation behaviors", having established the basic indicator system for review and evaluation.

(II) Legal foundation of the fair competition review system in China

1. Provisions of the Legislative Law of the People's Republic of China on "review, amendment and repeal of laws and regulations". According to those provisions, subjects including the NPC, the State Council, people's congress at the provincial level, standing committees of local people's congress at all levels and people's governments at the provincial level are entitled to initiating relevant procedures within their authority scope to review, amend or even repeal laws, rules and local regulations that they deem as "improper". Although the Legislative Law does not specify circumstances deemed as "improper", theoretically this scope may cover the circumstance of "improperly restricting market competition". Given that, the Legislative Law has set out basic constitutional rules for the fair competition review system.

2. Provisions of the Administrative Licensing Law of the People's Republic of China on "establishing requirements, assessment, amendment and repeal of administrative licensing". The establishment and implementation of administrative licensing directly determines the threshold and mechanism to enter and exit from a certain market, which have significant impact on the market competition mechanism. The Administrative Licensing Law promulgated in 2003 puts strict restrictions on the establishment and implementation of administrative licensing on the following aspects. First, it clearly specifies matters where no administrative licensing is required. They are the matters that "can be decided by the citizens, legal persons or other institutions themselves; can be effectively regulated by the market competition mechanism; may be subject to the self-discipline management of the trade organizations or intermediary institutions; or can be solved by the administrative organs by means of supervision afterwards or through other administrative methods." Second, it puts strict limits on the establishment of administrative licensing, which can only be established by laws, administrative regulations and local regulations. Also, a lower-level law shall not add administrative licensing that is not set down by its upper-level law. Third, it requires a hearing or argumentation to be held in order to

establish administrative licensing. The Administrative Licensing Law also provides for the assessment procedure after the establishment of administrative licensing. The executive organ of administrative licensing shall evaluate the implementation of the administrative licensing and necessity of its existence at proper times, and shall report relevant opinions to the establishing organ of the administrative licensing. The above provisions cover advance control before the establishment of administrative licensing, its evaluation afterwards as well as the procedures to amend and abolish improper administrative licensing, which link up with the fair competition review system and can almost be regarded as the fair competition review system in the administrative licensing domain.

3. Provisions of the Anti-monopoly Law of the People's Republic of China against "the abuse of administrative power to restrict competition". The Anti-monopoly Law provides that "administrative authorities shall not misuse their authority by formulating regulations containing provisions that eliminate or restrict competition", and that "the anti-monopoly law enforcement authorities may submit opinions on how the power abuse should be legally handled to the relevant higher level authority".

III. Improvement of the fair competition review system in China

The State Council Opinion has sketched a rudiment of the fair competition review system in China, setting forth institutions and measures that are extremely groundbreaking and strongly operable at this initial stage. Nevertheless, such rudiment can be further improved in the long run:

1. The original purpose of the fair competition review system is not only ensuring legitimacy of administrative decisions, but, more importantly, making sure that national laws and public policies are in tune with competition policies. The administrative organs represent the government in its narrow sense, and administrative decisions only reflect a small part of public policies. If the fair competition review system only bears the purpose of ensuring legitimacy of internal decisions made by administrative organs, the effect of the system will be largely limited. The fair competition review system, in its real sense, should stand on the position of a broad-sense government, covering all laws and public policies with a purpose beyond "legitimacy of administrative decisions" but more focusing on coordinating national laws and public policies with competition policies.

2. The authority to execute the fair competition review system should not be decentralized but should be gradually vested in a small number of specialized departments. The authorities in charge of market competition are a better option to centralize execution of the fair competition review system. In the long run, fair competition review is essentially making value judgment between competition policies and other economic and public policies with observance of the general value orientation of prioritizing the competition policy objectives. This requires the subjects of fair competition review to have relatively comprehensive and profound understanding of competition policies, so as to achieve balance in light of the competition policy objectives when other economic and public policies conflict with the competition policies. Therefore, it is optimal that the review is conducted by relatively fixed and centralized departments.

3. Legislative organs may gradually link its cleaning up and review of laws with fair competition reviews, seek professional opinions from departments familiar with competition policies and timely initiate relevant procedures to amend and abolish provisions that truly restrict competition in an improper manner.

4. Competition law enforcement organs should establish the working mechanism to give information feedback to organs with the power to make and amend laws and policies, so that when provisions that may restrict competition are found in normative documents, the law enforcement organ can report the situation to the law making department or its upper level department with suggestion of amending or abolishing the relevant provisions.

5. The people's courts, administrative reconsideration organs and fair competition review organs should establish an information sharing mechanism, allowing reports to be filed to fair competition review organs if provisions likely to restrict competition are found in laws, administrative regulations, local regulations, rules and normative documents during handling of cases.

6. Fair competition reviews may transit from qualitative analysis to quantitative analysis. Given the increasingly complicated and comprehensive situations in the future where purely qualitative judgment can hardly cope, it is necessary to introduce certain ways to make judgment on degrees, such as the degree to which a certain policy measure will restrict competition as well as analysis comparing the degree of other social benefits brought by such policy, and cost and benefit analysis between the alternative measure and the original measure, etc.. On the

basis of qualitative analysis, more and more quantitative analysis methods should be introduced in fair competition reviews.

7. The time node of review. Transit from retrospective review to in-process review, that is, at the drafting period, prevent vast amounts of measures inconsistent with competition policies from turning into effective laws and policies. When the fair competition review system is developed from zero to one, the priority is to review existing laws and policies, thus the work mostly consists of retrospective review and rectification. In the long run, however, retrospective review and rectification not only means that the cost of trial and error has already been incurred, it will also cause additional costs of rectification, which will all become a burden to be borne by the entire society. Therefore, a sound fair competition review system should center on in-process review during the making of laws and policies by preventing vast amounts of measures inconsistent with the competition policies from turning into formal laws and policies. Only an extremely small number of laws and policies the effect of which on restricting competition is difficult to determine accurately at the drafting stage will require retrospective review.

8. Legal effect of review. Give certain legal status to fair competition reviews. The policy making department should abolish or amend laws following the conclusion made by the fair competition review that such laws ought to be abolished or amended. The effect of fair competition review should finally be achieved through the procedure of amendment or repeal of laws and policies. Amendment or repeal of lower-level regulations and policies only need to be filed according to relevant procedures by the review organ authorized by the central government or provincial-level governments through written documents, whereas statutes, administrative regulations and local regulations should be amended and repealed through special procedures initiated by corresponding legislative bodies pursuant to the Legislative Law. Fair competition review should be given certain legal status to ensure that its conclusion will be accepted by these legislative bodies. Thus, fair competition review will transit from a temporary task carried out according to a policy document to fulfilment of a legal duty and function, which will effectively enhance the impact of its conclusion on the legislative body.

Remarks

[1] The establishment of ICN was accompanied by the establishment of the Advocacy Working Group, making "Competition Advocacy" the first research project of the organization. Before long, the research group published the result of its research on promoting and implementing competition policies, holding that there are effectively two routes to achieve the competition policy objectives: first, implement the competition law to regulate its applicable objects, directing the market order back to the competition policy objectives; second, take measures other than the competition law on the subjects and their behaviors that are not subject to the traditional competition law but inflicting damage to the market order. The second route focuses on institutions other than conventional market players, mainly public power institutions such as the legislative, administrative and judicial bodies. The aim of imposing competition policies on the above institutions is to prevent them from conducting behaviors restrictive to competition, such as formulating public policies that restrict competition.

[2] See Centre for International Economics（CIE）, Guidelines for NCP legislation reviews 1999 （prepared for NCC）, [Hereinafter Guideline for NCP LR]p.3, at http://www.thecie.com.au/content/publications/CIE-NCP-guidelines_report.pdf, Mar. 10, 2007.

[3] The Outline of China's Competition Policies by Xu Shiying, Economic Law Symposium (2013 Volume Two, Volume No. 25), the Law Press (2013 edition), p.36.

[4] See Centre for International Economics, Guidelines for NCP legislation reviews, [hereinafter Guideline for NCP LB.] at: http://ncp.ncc.gov.au/docs/LEGu-001.pdf, Mar. 11, 2016. pp.6-7.

[5] See Constitutionality Review during Legal Cleaning Up by Mo Jihong, Annual Review of the Constitution of China (2009), the Law Press (2010 edition), p. 20 to 30.

[6] See U.S.C.§11054(a), §11057.

[7] See Centre for International Economics (CIE), Guidelines for NCP legislation reviews 1999 (prepared for NCC), [Hereinafter Guideline for NCP LR] p.34.

[8] See Guideline for NCP LR, p.52.