

Putting China's Fair Competition Review System Into Action

By **Shelley Zhang and David Goldstein**

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It has been approximately one and a half years since China's Fair Competition Review System (FCRS) was set as the cornerstone of Chinese competition policies. On Oct. 23, 2017, another "top-level design" [1] for promoting the implementation of the FCRS system — the Implementing Rule of the Fair Competition Review System (interim) (implementing rules) — was jointly issued by the five competition-related authorities, i.e., the National Development and Reform Commission (NDRC), the Ministry of Finance, the Ministry of Commerce, the State Administration for Industry and Commerce, and the Legislative Affairs Office of the State Council.[2] The implementing rules — which clarify the review mechanisms and procedures, refine the review criteria, provide more policy guidance, and strengthen supervision and accountability — should play a significant role in driving implementation of FCRS.[3]



Shelley Zhang



David Goldstein

Background

When the "Opinions of the State Council on Establishing a Fair Competition Review System During the Development of Market-oriented Systems" (opinions) were promulgated on June 1, 2016, it was welcomed as an important step forward by the Chinese government. However, many concerns and questions remained about implementation of the opinions. Many stakeholders had doubts about how far and how quickly the Chinese government would move in establishing the FCRS system.[4] After the opinions were implemented, the Chinese government demonstrated its resolve to create a more market-oriented economy by publicizing the opinions through both domestic and international communications, implementing the FCRS, developing the regulations, conducting policy reviews, etc.[5] In addition to facilitating implementation of the opinions, the government also identified problems that may hinder FCRS implementation if they are not solved. These problems include the following:[6]

1. Some government agencies lagged behind as they failed to realize the importance of FCRS;
2. Although most government agencies and regions have established an FCRS review mechanism, in some cases the review is not conducted seriously or the agencies lack the capability to do the

review;

3. FCRS is still new, and it would be beneficial for government agencies to share their approaches and experience in implementing the review mechanism, developing procedures and strengthening supervision.

The implementing rules, which were enacted in part to address these issues, are designed to help educate policy-making agencies, solve problems in the implementation of FCRS, and promote continuous improvement of FCRS.[7] NDRC commented that the implementing rules would “precisely” regulate and govern the abuse of administrative power by government agencies to exclude or restrict competition, and that the rules mark a substantive step for FCRS to take root.[8]

Implementing Rules

The implementing rules have six chapters and 26 rules that refine the review mechanism and procedures, as well as review criteria, exceptions, public supervision and accountability. The implementing rules feature the following:[9]

1. Strengthening Review Process: This is very important in the context of self-censorship, and it aims to solve situations where there has been no actual review or no serious review. The implementing rules emphasize the following: (1) they specify the internal review mechanism, i.e., the particular internal division responsible for the review; (2) they require a written conclusion that reflects the entire review process, including applying the review criteria, soliciting opinions, determining whether an exception should be applied, etc., to avoid reviews without due care; (3) they refine the rules and procedures for soliciting comments — making it mandatory, not an option, to solicit opinions either from interested parties (which have been defined in the implementing rules) or the public; and (4) they establish a periodic reporting system, which requests an annual report by a policy-making agency to the fair competition review joint conference at the same level,[10] so that proper guidance can be given based on the actual implementation.

The implementing rules developed a review flow chart and a review form for the fair competition review. The review flow chart reflects three basic steps: step one, determining whether the proposed policy is subject to fair competition review; step two, checking whether there is any violation of the 18 criteria set forth in the opinions; and step three, determining whether an exception should be applied for the violation (if any). The review form requests basic information concerning the proposed policies and explanation of the entire review process, as well as conclusions.

2. Strengthening Substantive Guidance: The opinions establish 18 criteria concerning (a) market entry and exit; (b) free movement of goods and inputs for production; (c) influence on production and operating costs; and (d) influence on activities of production and business operations. However, in practice, the opinions may not cover all situations. About 50 additional second-level criteria have been developed in the implementing rules based on experience in enforcing the Anti-Monopoly Law, problems in implementing the FCRS, and consultation with industry authorities, associations, enterprises and experts.

The review criteria were refined in three respects. First, they clarify concepts incorporated into the criteria. For instance, the meaning of “unreasonable and discriminatory access or exit conditions”; what information is covered by the concept of nondisclosure of “sensitive information”; and conduct that will

be considered to violate the criteria. This is expected to help policy-making agencies understand the relevant criteria more accurately and improve their review capability. Second, they specify the consultation mechanism, which allows a policy-making agency to consult experts, scholars, legal advisers, professional bodies and, in particular, the Anti-Monopoly Law enforcement agencies for specific issues they encounter during an FCRS review. This is expected to help solve the problem of administrative agencies' lacking review capability. Third, they specify the dispute resolution mechanism in case of significant discrepancies, which allows a policy-making agency to submit the dispute/discrepancy to the fair competition review joint conference for coordination or determination.

3. Imposing Strict Supervision and Accountability: Although the current “self-review” mode may be the most realistic and feasible approach to implement FCRS as quickly as possible, there is concern that “self-review” is not sufficient to ensure the objectivity and validity of the review. To solve this problem, the implementing rules take four steps. First, they establish a supervision and reporting mechanism to allow any party to report a violation to the policy-making organization, the supervision organization, or the anti-monopoly enforcement department. Second, they specify the approach for correcting any violations.

Third, they improve the regular assessment mechanism for policies promulgated after the fair competition review. Such assessments, actually a post-review assessment, could serve as a supplement to the fair competition review before the policies are promulgated so as to abolish or revise policies that may not be consistent with the established criteria. Finally, they allow the Anti-Monopoly Law enforcement agencies to play the supervising role, i.e., to conduct necessary investigation and propose suggestions to stop or adjust the policies being reviewed.

Conclusions

The implementing rules reflect the Chinese government's determination to regulate the activities of government agencies and to maintain fair competition in markets, and they should make contributions to achieving these goals. However, more effort is needed for the FCRS to take root fully in China. For instance, there are calls for incorporating the FCRS into the Anti-Monopoly Law so as to endow it with more authority and enforcement power, introducing a third-party assessment system, and exploring the mechanism of co-review by Anti-Monopoly enforcement agencies and policy-making agencies so as to better combine their efforts.[11] Of course, additional problems may be identified when implementation of the FCRS system expands, which may justify further measures to improve the system. In view of the past and ongoing efforts by the Chinese government in establishing the FCRS system, one can expect to see more positive FCRS-related developments in the coming years.

Shelley Zhang is a partner in the Beijing office of Orrick Herrington & Sutcliffe LLP. David M. Goldstein is a partner in the firm's San Francisco office.

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[1] See Jianzhong Shi, “Another Top-Level Design to Promote the Implementation of the Fair Competition Review System – Interpretation of the Implementing Rule of the Fair Competition Review System (Interim)”, www.legaldaily.com.cn, Oct. 28, 2017, available at

http://www.legaldaily.com.cn/xwzx/content/2017-10/28/content_7370722.htm.

[2] See NDRC, Implementing Rule of the Fair Competition Review System (Interim), available at <http://www.ndrc.gov.cn/gzdt/201710/W020171026610334156557.pdf>.

[3] See Wen Xin, “Answers by NDRC to Journalists’ Questions on the Implementing Rules of the Fair Competition Review System (Interim)”, China.org.cn/China.com.cn, Oct. 26, 2017, available at http://news.china.com.cn/txt/2017-10/26/content_41841491.htm.

[4] Click here for an overview of the FCRS’s purposes and goals, as well as some concerns and questions regarding it.

[5] Click here for a six-month review of the FCRS and here for a one-year review of efforts to implement FCRS.

[6] See, e.g., supra note iii.

[7] See id.

[8] See NDRC, “A Step Forward for the Fair Competition Review System to Land and Take Root”, China Economic Herald, Oct. 27, 2017, available at <http://mp.weixin.qq.com/s/6TNdEld0kU3LkqOAAQE-Ecw>.

[9] See, e.g., supra notes i, ii & iii.

[10] According to the Letter of the General Office of the State Council on Agreeing to Establish a Joint Conference System for Fair Competition Review (Dec. 22, 2016), the joint conference mechanism, with members of 28 government agencies, is mainly responsible for (1) carrying out macro-guidance on the implementation of FCRS and coordinating and solving major problems in the implementation; (2) strengthening the communication and mutual cooperation between the various regions and departments in the implementation of FCRS, summarizing and promoting the effective practice and experiences from various regions and departments; and (3) studying and formulating detailed rules for the implementation of the FCRS.

[11] See, e.g., supra note i.