

China's Fair Competition Review System, 1 Year Later

By Shelley Zhang and Lingren Meng

Law360, New York (June 28, 2017, 12:37 PM EDT) -- One year has passed since China's State Council issued, on June 1, 2016, its "Opinions of the State Council on Establishing a Fair Competition Review System During the Development of Market-Oriented Review System." [1] The opinions contemplate the creation of fair competition review systems ("FCRS") aimed at restraining the government from participating in conduct that results in local protectionism, regional blockades, industry barriers, business monopolies, and grants of preferential policies in violation of the law or illegally prejudicing the interests of market players. It was hailed as one of the most significant developments in China's effort to revamp its unique socialist market economy since the enactment of the Anti-Monopoly Law of the People's Republic of China nine years ago. [2]



Shelley Zhang

For the past year, the opinions have been promulgated at various levels of government, including all departments of the State Council, provincial governments and their departments, and prefectural level governments. China's resolution to create a more market-oriented economy encouraging fair competition has started to materialize with (1) frequent international communication and studies on the subject of fair competition and continuing domestic public education and awareness campaigns, (2) increasing numbers of provincial governments engaging in the implementation of fair competition review procedures, (3) further development of the regulations and mechanism of FCRS by, and increasing cooperation and collaboration between, the departments of the State Council, and (4) the executive agencies' active response to calls from the private sector and review of policies that allegedly stymie fair competition. However, Rome was not built in a day. Discord exists among the nationwide implementation efforts, and there is still a long way to go before full and effective implementation is achieved.

Communication

Immediately after the issuance of the opinions, there was an intense round of public education and an awareness campaign consisting of training sessions for government officials, reports from experts and various symposia. [3] The efforts continued into this year. [4] In addition to these domestic efforts, there has been an increase in communication between China and other countries regarding FCRS.

The history of the development of competition law is relatively short, and in China, competition reforms are in many ways still lacking. [5] As a result, since the enactment of the opinions, the Chinese

government has expended effort in international communication and the mutual exchange of experience and knowledge with other countries. The four departments of the State Council (the National Development and Reform Commission; the Legislative Affairs Office of the State Council; the Ministry of Commerce; and the State Administration for Industry and Commerce), which are in charge of developing mechanisms and regulations for FCRS, have engaged, to some extent, in these sorts of communications.

In September 2016, the deputy director of the Bureau of Price Supervision and Anti-Monopoly of the NDRC was invited to the 43rd Annual Conference on International Antitrust Law and Policy, jointly held by Fordham University and George Washington University. The deputy director spoke at a special session, "China Antitrust Enforcement Today and in the Future," during which she introduced the establishment of FCRS and its current implementation in China to representatives from other countries, including the United States and Japan.[6] In October 2016, the director of the same bureau, Zhang Handong, met with Jeanne Pratt, the senior deputy commissioner for the Canada Competition Bureau, to discuss recent policies on the subject of anti-monopoly enforcement. They also exchanged views on how to strengthen international cooperation and communication between the countries.[7]

These sorts of communications are ongoing. In March 2017, the bureau participated in the American Bar Association's Antitrust Law Section's 65th Annual Spring Meeting, where the deputy director made speeches introducing FCRS to U.S., European and other scholars and lawyers.[8]

Other departments have introduced FCRS to international audiences, including individual companies. For example, in May 2017, the deputy director of the SAIC met with the chief counsel of Procter & Gamble and stated that the department he leads will build new methods of supervision and management to ensure fair and competitive markets, and in particular, through the implementation of FCRS.[9]

Implementation

As required by the opinions, starting in 2017, all provincial governments are required to promote FCRS and lead prefectural level governments and their departments in implementing their own FCRS.[10] In response to broad promulgation and education of FCRS, over 30 provincial governments have already established their own FCRS mechanisms in which the provincial government assigns review responsibilities to the designated departments.[11] In general, the enactment of local regulations or the issuance of documents on behalf of the provincial government will be reviewed by the department that drafts them with the supervision of the relevant legal departments. For documents that are issued by the departments that belong to the provincial government, the department, or the initiating department if there are multiple departments involved in the issuance of the documents, will be responsible for FCRS.[12]

The Henan provincial government has issued its own opinions on establishing a FCRS, which is subordinate to and closely modeled after the one issued by the State Council.[13] Other subordinate departments within the provincial government have incorporated the opinions into their more specific market regulations. In November 2016, Hubei Province Price Bureau amended its method on the management of its own regulatory documents so as to incorporate the concept of FCRS. Specifically, Section 11 of the amendment states that the FCRS of a local regulation should be conducted to ascertain that the regulation is not in violation of the Anti-Monopoly Law or the opinions. Section 13 of the amendment provides that for every local regulation the drafter must provide a self-review report on the regulation's impact on fair competition.[14]

Many provincial governments go further than just establishing their own FCRS mechanism, and they promote the mechanism further downstream to prefectural-level government. In early 2017, the deputy director of the Jiangsu Province Price Bureau went to Nantong City to research and investigate the implementation of FCRS.[15] Other regions in Jiangsu Province are also responding to the action taken by the provincial government and setting up their own review mechanisms and assignment of responsibilities.[16]

Further Development

The four departments of the State Council in charge of developing regulations and review mechanisms have closely cooperated in various areas since the issuance of the Opinions.

The NDRC, MOFCOM and SAIC have collaborated in a yearlong research effort on FCRS. This research is vast — encompassing over 31 provinces.[17] The three departments jointly held training sessions on the interpretation and requirement of FCRS and urged local governments to accelerate issuing regulations, establish review mechanisms and start the review process under the new mechanism. They also require local governments to be open to comments from industry and related parties.[18]

In the last month, the four departments together with 24 other departments held the first Inter-Ministerial Joint Meeting where they passed three important regulations: (1) Rules for the Implementation of FCRS (interim) (2) 2017-2018 Work Plan to Clean up Existing Policies that Exclude or Restrain Competition; and (3) Focus of the Work in Promoting and Enforcing FCRS in 2017.[19]

The participants agreed that the focus of the next stage of implementing FCRS should include (1) stricter examination of new policies to be promulgated, and further improvement in review procedures and assignment of review responsibility to prevent local governments from enacting policies that exclude or restrain competition, (2) gradual elimination of existing regulations that exclude or restrain competition; and, in 2017-2018 particularly, focusing on cleaning up those involving local protectionism, regional blockades and designated trading issues, (3) continuation of the public awareness campaign, (4) further strengthening enforcement of anti-monopoly law, joining forces with FCRS to regulate administrative acts and maintain fair and competitive markets, and (5) using the Inter-Ministerial Joint Meeting as a platform to ensure the effective and smooth implementation of FCRS.[20]

Policy Reviews in Progress

As review mechanisms are being developed, departments responsible for review are responding to calls from the private sector to evaluate regulations that claim to be unfair and anti-competitive.

For instance, the NDRC and the DRC of Guangdong Province in April 2017, after investigating the Shenzhen Health and Family Planning Commission's policy regulating practices for group procurement of medicine at public hospitals, concluded that it was inconsistent with the existing Anti-Monopoly Law and the opinions. Many of the commission's policy provisions were found to be anti-competitive, including the regulation that there can be only one service company providing the group procurement service, which means that all public hospitals must procure medicine through one company that does not face competition. After the investigation, the city commission agreed to immediately amend the regulation and allow any qualified service provider to enter the market.[21]

Possible Discord

It would not be surprising to find that those who have benefited from existing policies that exclude or restrain competition would not welcome FCRS and may try to circumvent it.

In May 2017, the China Auto Dealers Chamber of Commerce urged fair competition reviews on policies that relate to the country's new energy vehicle industry which allegedly encourage local protectionism.[22] This is not the first time that such a challenge was made. In August 2016, soon after the publication of the opinions, an expert, in an interview with Legal Daily, called for fair competition review of existing subsidy policies for China's new energy automobiles, as those policies are believed to have led to local departments' interference with the use of the subsidy funds in a way preferable to local enterprises.[23] In March 2017, the president of Great Wall Automobile submitted proposals to the National People's Congress and Chinese People's Political Consultative Conference, suggesting action to eliminate local protectionism and improvements to policies and regulations. In particular, she criticized the fact that some local departments added new policies that exclude and restrain competition even after the publication of the opinions, and that the required procedure that "Policy-making Organs shall listen to the opinions of interested parties, or solicit public comments" has not been fully followed.[24] It seems that no official, public response has been made to those calls from the industry. However, cleaning up policies involving local protectionism and regional blockades, hopefully including those policies in the new energy vehicle industry, have been listed as the work focus in 2017-2018 by the first Inter-Ministerial Joint Meeting.

Conclusion

When the opinions were first released, there was some skepticism about whether they would be embraced. A year later, it seems clear that the four departments, together with the other departments of the State Council and local governments, have made significant strides in implementing relatively comprehensive and practicable mechanisms of fair competition review. This is a welcome development, although obviously much more effort, including that from local governments, is needed to effectively implement FCRS. It is hoped that through increased collaboration among these bodies, the vestiges of local protectionism and favoritism, which impede the development and realization of efficient and competitive markets, will be gradually eliminated.

Shelley Zhang is an IP partner in the Beijing office of Orrick Herrington & Sutcliffe LLP. Lingren Meng is a summer intern in the firm's Beijing office and is in his last year at George Washington University Law School.

The opinions expressed are those of the author(s) and do not necessarily reflect the views of the firm, its clients, or Portfolio Media Inc., or any of its or their respective affiliates. This article is for general information purposes and is not intended to be and should not be taken as legal advice.

[1] See Chinese Government Network, Opinions of the State Council on Establishing a Fair Competition Review System During the Development of Market-oriented Review System, The State Council, PRC, June 1, 2016, available at http://www.gov.cn/zhengce/content/2016-06/14/content_5082066.htm.

[2] For an overview of the purposes and goals of the Fair Competition Review System, see S. Zhang, China's Fair Competition Review System: China Takes Another Significant Step Eight Years After Enacting

the Anti-Monopoly Law, AntitrustWatch.com, July 1, 2016, available at <http://blogs.orrick.com/antitrust/2016/07/01/chinas-fair-competition-review-system-china-takes-another-significant-step-eight-years-after-enacting-the-anti-monopoly-law/>. See also Zhang Qiong, Implementing Fair Competition Review System and Safeguarding Fair Competition in Market, People's Daily, June 21, 2016, available at http://www.gov.cn/zhengce/2016-06/21/content_5084029.htm.

[3] For an overview of efforts on FCRS, including the public education and awareness campaigns, see S. Zhang, R. Goldstein and D. Goldstein, A Six-Month Update of China's Fair Competition Review System, AntitrustWatch.com, December 21, 2016, available at <http://blogs.orrick.com/antitrust/2016/12/21/a-six-month-update-of-chinas-fair-competition-review-system/>.

[4] See, e.g., Bureau of Price Supervision and Inspection and Anti-monopoly, Director Zhang Handong of the Bureau of Price Supervision Attended the Launching Ceremony of the Project "Study on the Path to the Implementation of FCRS" of the National Academy of Macroeconomic Research and Gave a Speech, September 9, 2016, available at http://www.ndrc.gov.cn/fzgggz/jgjdyfld/jjszhdt/201609/t20160909_818117.html; Bureau of Price Supervision and Inspection and Anti-monopoly, Director Zhang Handong of the Bureau Is Invited to Give Report on Fair Competition Review System at China Academy of Governance, November 18, 2016, available at http://jjs.ndrc.gov.cn/gzdt/201611/t20161118_827045.html; Western Development Division of NDRC, Guizhou Province DRC Holds Internal Training on Fair Competition Review System, May 11, 2017, available at http://xbkfs.ndrc.gov.cn/mzfs/201705/t20170522_848159.html.

[5] See Liu Xu, Calm Thinking - How to Ensure the Implementation of the Fair Competition Review System, The Paper, June 17, 2016, available at http://www.thepaper.cn/newsDetail_forward_1485143.

[6] See Bureau of Price Supervision and Inspection and Anti-monopoly, The Bureau Designated Representative to Participate in the 43rd Annual Conference on International Antitrust Law and Policy, September 27, 2016, available at http://www.ndrc.gov.cn/gzdt/201609/t20160927_820019.html.

[7] See Bureau of Price Supervision and Inspection and Anti-monopoly, Delegation Led by Director Zhang Handong Met with Senior Deputy Commissioner from the Canada Competition Bureau. October 27, 2016, available at http://www.ndrc.gov.cn/gzdt/201610/t20161027_824342.html.

[8] See Bureau of Price Supervision and Inspection and Anti-monopoly, The Bureau Delegation Visited the US Department of Justice and the Federal Trade Commission, and Participated in 65th Annual Spring Meeting of the ABA, Anti-Trust Law Section, April 7, 2017, available at http://www.ndrc.gov.cn/fzgggz/jgjdyfld/jjszhdt/201704/t20170407_843714.html.

[9] See China Industry & Commerce News, Wang Jiangping Met with the Chief Counsel of Procter & Gamble, Deborah Majoras, Xinhua, May 24, 2017, available at http://news.xinhuanet.com/fortune/2017-05/24/c_129617407.htm.

[10] See supra note 1.

[11] See Bureau of Price Supervision and Inspection and Anti-monopoly, The First General Inter-Ministerial Joint Meeting Regarding the Fair Competition Review System, May 9, 2017, available at http://jjs.ndrc.gov.cn/gzdt/201705/t20170509_846885.html.

[12] See Diao Cui, 28 Departments Work in Tandem, Big Move is Expected in Fair Competition Review

System, NDRC's Long Microblogging, May 12, 2017, available at <http://p.t.qq.com/longweibo/index.php?id=485391124561195>.

[13] See Luan Shan, Henan Provinces to Establish Fair Competition Review System, Henan Daily, April 4, 2017, available at <http://www.henan.gov.cn/jrhn/system/2017/04/04/010713827.shtml>.

[14] See Hubei Province Price Bureau, Notice on Issuing the "Normative Documents Management Measures of the Hubei Province Price Bureau (interim)", November 8, 2016, available at http://pkulaw.com/fulltext_form.aspx?Db=lar&Gid=18018432&keyword=&EncodingName=Duo&Search_Mode=.

[15] See Nantong Provincial Price Bureau, Deputy Director Chen Qihong of the Provincial Price Bureau Went to Nantong to Investigate the Work on Fair Competition Review System, March 29, 2017, available at http://xxgk.nantong.gov.cn/govdiropen/jcms_files/jcms1/web32/site/art/2017/3/31/art_6973_502485.html.

[16] See Nantong Government, Rugao City to Establish Its Fair Competition Review System, February 15, 2017, available at http://www.nantong.gov.cn/art/2017/2/15/art_39345_2428513.html.

[17] See supra note 12.

[18] See id.

[19] See id.

[20] See id.

[21] See Bureau of Price Supervision and Inspection and Anti-monopoly, Shenzhen Health and Family Planning Commission Promises to Correct Its Policy Regulating the Group Procurement of Medicine for Public Hospital, April 7, 2017, available at http://jjs.ndrc.gov.cn/fjgld/201704/t20170407_843754.html.

[22] See Sohu.Com, Annual Meeting Special Topic— "The Legal Analysis Report on the Chinese Auto Sale and Services" Will Be Released at the CADCC 2017 Annual Meeting, May 25, 2017, available at http://www.sohu.com/a/143492972_372792.

[23] See Legal Daily, Subsidy Policies for New Energy Vehicles Are Seeking Changes, and Expert Reminded Fair Competition Review, August 24, 2016, available at <http://auto.qq.com/a/20160824/003781.htm>.

[24] See Sina Auto, Wang Fengying: Breaking Local Protection, and Creating A Fair Competition Market Environment for New Energy Vehicles, March 3, 2017, available at <http://auto.sina.com.cn/news/hy/2017-03-03/detail-ifycaasy7458969.shtml>.