

Implementation Dilemma and Optimization Path of China's Fair Competition Review System

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Abstracts: As an important part of the market economic system, China's fair competition review system aims to maintain market order and safeguard fair competition. However, the system faces many difficulties in the process of implementation, such as flaws in the self-review mode, imperfect external supervision mechanism, unclear review standards, irregular review procedures, unreasonable review organizations, and so on, which have weakened the impartiality and consistency of the results of the fair competition review, and thus reduced the trust of market participants in the review work. In addition, the lack of transparency and effective supervision of the review process makes it difficult for market participants to know the detailed process and results of the review, and thus unable to effectively supervise the review work. To further improve the effectiveness and fairness of the system and provide a strong guarantee for the healthy development of the market economic system, it is necessary to solve the paradox of insufficient motivation of the reviewing body and introduce a third-party retrospective assessment mechanism to eliminate the inherent defects of self-censorship, increase the substantive review standards and issue guidelines on the application of the review standards to scientifically set the standards for the review, and optimize the procedures of the review of fair competition and strengthen external supervision to promote the implementation of regional coordinated review.

Keywords: Fair competition review; Scope of review; Review modalities; Review criteria

Online publication: December 31, 2024

1. The institutional structure of China's fair competition review system

1.1. Scope of review of China's fair competition review system

On 6 June 2024, China published the Regulations on Fair Competition Review, which stipulate that administrative organs and organizations authorized by laws and regulations with the function of managing public affairs (collectively referred to as drafting units) that are involved in laws, administrative regulations, local laws and regulations, normative documents as well as specific policy measures relating to the economic activities of

an operator, shall carry out a fair competition review in accordance with the provisions of these regulations. This is compared to the Implementing Rules for the Fair Competition Review System jointly issued by the General Administration of Market Supervision and other departments in 2021 ^[1].

Regarding the scope of the review, the policy-making authorities, when formulating regulations, normative documents, other policy documents, and specific policy measures in the form of “one-issue” measures, such as regulations, normative documents, and other policy documents relating to the economic activities of market players, such as market access and exit, industrial development, investment promotion, bidding and tendering, government procurement, business conduct norms, and qualification standards, should conduct a fair competition review. The Fair Competition Review Regulations broaden the scope of review to the drafting stage of the law, making the scope of review even broader and enabling the prevention of administrative monopoly behavior from the source, which is a breakthrough in China’s fair competition review system.

Specifically, the review targets of the fair competition review system mainly include the following three aspects. First, the main body of the formulation, i.e. administrative organs and organizations authorized by laws and regulations with the function of managing public affairs. Secondly, the policy measures formulated mainly include market exit and access, government procurement, qualification standards, investment promotion, etc., and the directions covered are relatively clear. Thirdly, administrative regulations and policy measures formulated by the state council, local regulations, autonomous regulations, and so on, also fall within the scope of review of China’s fair competition review system, but it is required that these laws and regulations should be relevant to the market’s business activities.

1.2. The way the fair competition review system is reviewed

Article 5 of the Implementing Rules for the Fair Competition Review System clearly states that the policy-making authority shall establish a sound internal review mechanism for fair competition. It states in detail that written review conclusions need to be clarified after the introduction of policy measures, and after the introduction of policy measures, the written review conclusions need to be filed with the policy-making organ, and at the same time shall not be introduced without doing a fair competition review. Review is also required in the drafting of policy measures and other aspects of the drafting, and responsibility is clarified in the manner of whoever formulates and reviews the policy measures. From this, it can be seen that the review mode of the fair competition review system is mainly based on self-review. The high degree of convergence between the self-review approach and China’s legal system and administrative management system can effectively reduce the operational costs of putting the system design into use, as well as achieve immediate results ^[2].

China’s fair competition review system is also safeguarded through a combination of external supervision and internal supervision in the form of review. Article 25 of the Implementing Rules of the Fair Competition Review System stipulates that any unit or individual who introduces policies and measures in violation of the standards can be reported to the higher-level departments, and the policy-making authority shall verify and deal with the matter accordingly. Article 28 stipulates that the relevant units will carry out effective spot checks on the introduced policies and measures to carry out effective spot checks, and regions with more serious situations will carry out focused spot checks. The competitive effects of documents issued after a fair competition review will be reassessed after a period of implementation, to regulate the abuse of administrative power and ensure that the purpose of the fair competition review is upheld ^[3]. In short, the review method of China’s fair competition review system mainly adopts a combination of self-review and internal and external review, to ensure the

fairness and rigor of the results of the review, and to prevent the introduction of policies that exclude and restrict competition.

2. Implementation dilemma of China's existing fair competition review system

2.1. Self-review Insufficient professional competence

Although China's fair competition review system has the regulatory strength of external supervision, the self-review mode is still the most important way. Self-review by policy-making organs is not a main source and is theoretically reasonable and practically feasible. Given China's vast territory and population, and the large number of government agencies at all levels, it is impossible to achieve the desired effect by relying only on external supervision or peer review, and the establishment of an independent and authoritative third-party assessment agency can pool the advantages of resources, and can independently exercise the right to review professionally and impartially ^[4]. However, practical factors such as the large number of policymaking organs, the large number of documents to be reviewed, high administrative costs, and limited staffing make it difficult to implement a third-party assessment body ^[5]. Self-review, in which the departments that formulate or draft policies and measures are responsible for reviewing them on their own, has now achieved full coverage at the national, provincial, municipal, and county levels of government, and has achieved a stage-by-stage breakthrough after years of practical exploration. However, there are several shortcomings in this type of self-review, such as the ineffectiveness of self-review and the fact that the fundamental purpose of the fair competition review system is easily defeated.

At the same time, in the process of self-review, the professional knowledge, professional skills, and practical experience of the review subject are extremely important, and the review work involves a wide range of professional coverage and extremely high professional requirements, which test the comprehensive ability of the review authorities even more and will lead to bias in the results of the review if professional skills of the review authorities are not strengthened. As China's fair competition review system adopts the mode of self-review, the pressure on government agencies is high, which will inhibit the enthusiasm for review, and the policy organs will often start from their interests and neglect the public interests of the society in the review work ^[6]. From the government's point of view, subject to the self-interested tendency of expanding government revenue, realizing officials' performance, promotion, image change, and local economic growth, the local government is generally inclined to protect the market advantage of local goods when responding to the entry of foreign goods into the local market. It is impractical to let the policy organs themselves negate the policy measures they have formulated, which in turn leads to a loss of impartiality in the review, so China's fair competition review system should continue to improve the review model to achieve the purpose of fair competition.

2.2. Vague setting of review criteria

Although the review criteria are stipulated in the Implementation Rules of the Fair Competition Review System, there are still more problems. Firstly, the review criteria are vaguely defined. In the Implementing Rules for the Fair Competition Review System, the sentence on the review standard mainly adopts the phrase "shall not be, but is not limited to", and then lists a few situations, which are not complete and the wording is relatively ambiguous so that the review standard is not set clearly enough. One of the main problems is that, in addition to the circumstances listed in the regulations, there is no clear provision on other circumstances that are not limited

to, for example, Article 13(3) of the Implementing Rules for the Fair Competition Review System stipulates that, in addition to the circumstances listed in the regulations, there is no clear provision on other circumstances that are not limited to, which leads to the fact that the list of three circumstances is not sufficient to enable people to have a clear understanding of the provisions, and there is a lack of explanation of the criteria for not being limited to circumstances. Secondly, the criteria for exceptions are not clear. Although Chapter 4 of the Implementing Rules for the Fair Competition Review System provides for exception criteria, and policies and measures to safeguard the state and the public interest can be introduced and implemented in compliance with the regulations, there is a lack of specific prescribed criteria, and although it provides for other circumstances stipulated in laws and administrative regulations as the underpinning provisions, the coverage of public interest is too broad and the boundaries are relatively blurred, making it difficult to implement the provisions in practice. At the same time, there is also a lack of typical cases in judicial practice, which leads to a lack of awareness of the judiciary of the criteria for its determination, and on the other hand, also leads to difficulties in applying judicial practice ^[7].

3. The optimization path of China's fair competition review system

3.1. Overcoming the inherent flaws of self-censorship

3.1.1. Breaking the paradox of insufficient incentive to review

Since the implementation of the fair competition review system, the effect of its implementation has been significantly higher at the central level than at the local level, which is mainly due to the obvious protectionism of local governments, which excludes and restricts competition by granting financial subsidies, financial incentives, tax concessions, social insurance concessions, and other policies to local enterprises, and may even form administrative monopolies ^[8-9]. The fundamental reason for the formation of local protectionism is that the financial system is irrational. Since the 1994 tax reform, the central and local financial relations have an unbalanced match, the central financial power has large power, while local financial power has weak power, thus financial power faces an upward and downward shift in the financial distribution system. Hence, the income of local government finances in the long term is not enough to meet the needs of the state. To expand their fiscal revenues, local governments give more policies to local enterprises to prevent the outflow of local factors of production. At the same time, although the fair competition review system can help operators establish a level playing field in the market and lay a solid foundation for their long-term development, this initiative also means giving up the short-term benefits brought by local protection ^[10]. As the fair competition review system cannot effectively promote economic growth and increase fiscal revenue in the short term, local government officials focus on short-term benefits and pursue GDP growth for the sake of performance appraisals and promotion opportunities.

When a system lacks significant short-term benefits, actors naturally tend to respond negatively. However, maintaining a level playing field in the marketplace is of inestimable value to the sustainable and healthy development of the local economy. Therefore, when weighing short-term gains against long-term benefits, local governments should give careful consideration to ensure that economic development goes hand in hand with the principle of fair competition in the market ^[11]. To this end, Article 29 of the Rules should further improve the assessment system by including the implementation effect of the fair competition review system in the performance assessment of the policy-making bodies, to solve the problem of insufficient incentive for review ^[12]. To stimulate the enthusiasm and initiative of policy-making bodies

in assessing the fair competition review, the assessment system should be composed of two parts. On the one hand, clear positive incentives should be constructed, and a flexible built-in incentive mechanism should be designed for policy-making bodies by drawing on the international advanced experience, to encourage the local governments to conduct in-depth reviews of the relevant policy documents that involve exclusion and restriction of fair competition ^[13]. On the other hand, detailed penalty standards should be formulated, accompanied by corresponding constraints and accountability mechanisms, to ensure the effective implementation of the fair competition review system ^[14].

3.1.2. Introduction of a third-party retrospective assessment mechanism

At present, China's fair competition review model is mainly based on self-review, and although the joint review and external supervision models have been introduced, due to the limitations of the actual situation, there are many shortcomings in the joint review of other departments and external supervision, such as the lack of professional knowledge, the lack of information disclosure, and the relationship of interests affecting impartiality. The third-party retrospective assessment mechanism, because of its professionalism, independence, authority, and impartiality, is designed to ensure the impartiality of the review results by encouraging or supporting the introduction of an external assessment force by the policymaking organs ^[15]. The so-called third-party assessment mechanism encourages and supports the introduction of third-party assessment by policymaking organs in their fair competition review work to achieve the objective of improving the quality and effectiveness of the review and promoting the in-depth implementation of the fair competition review system ^[16].

The core purpose of the third-party assessment mechanism is to enhance the quality and efficiency of the review and to promote the in-depth implementation of the fair competition review system. At present, some regions, such as Tianjin, have formulated specific working methods for third-party assessment, such as the Tianjin Third-Party Assessment Working Methods for Fair Competition Review, which set out in detail the assessment methods and procedures. These practices show that external support is indispensable in carrying out fair competition review work, and the third-party assessment mechanism helps to enhance the professionalism of the review.

Compared with the self-review model, a third-party assessment body is more capable of maintaining objectivity and impartiality and eliminating interference from various interests, thus ensuring the fairness of the review. If relying solely on the self-review model, policymaking organs may deviate from the principle of fair review out of consideration of their interests. Therefore, the introduction of a third-party retrospective assessment mechanism not only significantly enhances the fairness of the review results, but also further ensures the fairness and effectiveness of the review through regular testing to assess the effectiveness of the implementation of the mechanism ^[17].

3.2. Scientific setting of review criteria

3.2.1. Guidelines on the application of the review criteria are in place

Articles 13 to 16 of China's Implementing Rules for the Fair Competition Review System of 2021 set out in detail the criteria for the fair competition review and provide a breakdown of each criterion. However, the rules use a lot of jargon and provide insufficient details, making it difficult for the public to fully understand their meaning. In addition, as the Implementing Rules of the Fair Competition Review System mainly play a macro-guiding role, and as China has a vast territory and the actual situation varies from region to region, it is difficult to apply the standards in the rules with precision in actual operation.

Given this, there is an urgent need to issue guidelines on the application of the review criteria, and to study the Competition Assessment Toolkit in-depth and incorporate the professional expressions therein into the guidelines, to enhance the universality of the provisions^[18]. This will help improve the application standards of the Regulations for the Implementation of the Fair Competition Review System, make them more comprehensible to the public, enhance the efficiency of the review, and provide a learning direction for professionals to safeguard the enhancement of their professionalism.

3.2.2. Increasing the standard of substantive review

In response to China's specific national conditions, the standard of review stipulated in the Implementing Rules of the Fair Competition Review System is biased towards formal review and lacks a substantive standard of review. In contrast, the fair competition review standards of Australia and other countries show remarkable features in terms of substance, especially the inclusion of social public interest. The Australian review criteria not only reflect the aims and objectives of the fair competition review system but also extensively cover social issues such as ecologically sustainable development, regional investment growth and employment, social resource allocation, and consumer rights and interests, fully demonstrating the importance of public interest in the review criteria^[19]. This suggests that policy-making authorities should have a broader vision and thinking when drafting or formulating policies, to further improve China's fair competition review system.

At the same time, the review criteria in China's Implementing Rules for the Fair Competition Review System have too many general enumerations, lack specific provisions, and use a large number of vague terms, such as "and other measures", "and other behaviors", "including but not limited to." These ambiguous expressions have created many difficulties in practical operation and weakened the scientific and rational nature of the review criteria. To cope with these problems, the government needs to refine the standard of review, clarify the types of conduct that exclude market competition, and elucidate the specific meaning of ambiguous terms^[20]. In addition, the members should learn from the experience of Australia and other countries in reviewing standards, and incorporate public interest into the reviewing standards, to enrich and improve the knowledge system of fair competition review in China, and thus ensure the reasonableness and scientificity of the reviewing standards.

4. Conclusion

Given the specific national conditions, the review standards stipulated in the Implementing Rules of the Fair Competition Review System are mainly formal and lack substantive review standards. In contrast, the fair competition review standards of Australia and other countries show significant advantages in terms of substance, especially about social public interests. Australia's review criteria not only reflect the aims and objectives of the fair competition review system but also extensively cover social issues such as ecologically sustainable development, regional investment growth and employment, social resource allocation, and consumer rights, fully reflecting the importance of public interest in the review criteria. This shows that policymaking bodies should have a broader vision and mindset when drafting or formulating policies to further improve China's fair competition review system.

Disclosure statement

The authors declare no conflict of interest.

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