

CHINA'S FAIR COMPETITION REVIEW: INTRODUCTION, IMPERFECTIONS AND SOLUTIONS



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I. INTRODUCTION

In recent years, the issue of “fair competition review” has become a key priority for the Chinese Central Government in its consideration of competition policy and a hot topic in the circle of Chinese agencies, jurists and economists specialized in competition policy.² China has attracted widespread attention since the promulgation of the *Opinion on Establishing a Fair Competition Review System during the Development of Market-oriented Systems* (“Opinion”) by China’s State Council on June 1, 2016³ and the successive implementation of the Opinion by China’s local governments thereafter.⁴

The fair competition review, according to the Opinion, is a mechanism enforced by the policy-making organs to review whether the regulations and policy measures involving market entry, industrial development, foreign investment attraction, tendering and bidding, government procurement and business code of conduct, fall into one of four prohibited categories.⁵ The competition agencies and the Legislative Affairs Office of China’s State Council shall assist these departments with the implementation of the review.

It is impossible for China to establish a fair competition review system without imperfection at the outset. Therefore, a review of its historical background seems necessary in order to achieve a better understanding of its evolution, imperfections and solutions to such imperfection.

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2 Since the beginning of 2015, the Central Committee of the Communist Party of China (“CCPC”) and China’s State Council have issued several significant notices, statements and opinions, laying a solid basis for China’s fair competition review and later the Opinion mentioned hereinafter. Many Chinese scholars have shown their support for this review. See, Xiaoye Wang, *Promoting the Fair Competition Assessment to Restrain Administrative Monopoly*, 1 Competition Law and Policy Review 3 (2016).

3 See: http://www.gov.cn/zhengce/content/2016-06/14/content_5082066.htm.

4 Jiangsu province took the lead by its promulgation of the *Implementation Opinion of Fair Competition Review*, which was followed by Beijing, Ningxia, Hunan, Shanxi and Guizhou with similar local regulations. See: http://www.js.xinhuanet.com/2016-08/26/c_1119460391.htm.

5 The four standards in the Opinion are: (a) standards on market entry and exit; (b) standards on the free movement of goods and production factors; (c) standards that affect production and operating costs and (d) standards that affect activities of production and business operations.

II. HISTORICAL BACKGROUND

Before 1993, China had been a centrally planned economy without necessary and due stress on the role of the market economy regime. That situation has been shifted to a huge extent since 1993 when China was determined to establish a socialist market economy regime. Since then, the Chinese central government has tried to reshape the relationship between government and markets by means of deregulation, decentralization, adoption of the rule of law and reform of state-owned enterprises.

However, this process has moved back and forth because of China's heavy reliance on industrial policy by governmental agencies, the intertwined sector interests and widespread local protectionism in China, which has resulted in "a larger government and a smaller market." This reliance, interconnectivity and protectionism can be seen from, and have been proven by, the fact that China's State Council announced its four trillion RMB market-rescue plan in 2008, hoping to address the international financial crisis and drive its double-digit annual GDP growth. However, it has been known to the public for its unsatisfactory results and side effects up to the present.⁶

In that same year, China adopted its Anti-Monopoly Law ("AML"), which has also attracted wide attention. Many people have attached great hopes to its possible role in pushing forward the above process, but it had turned out that it was less admirable in early years.⁷

Many agencies and researchers specialized in competition policy have agreed that one of the main reasons for such less admirable result in China is her lack of competition policy, which is relatively weak in comparison with the more influential industrial policies.⁸ Since the latter is centered on short-term economic performance and administrative approach, it is inevitable to bring about some drawbacks, which have indeed hampered China's current economic reform in the long run.⁹

These agencies and researchers have also acknowledged the limits of the AML in terms of restraining the expanded industrial policy. As a result, they advocate that the Chinese central government should take more measures in this regard and their proposals have been accepted in the end. In November 2013, China made an ambitious decision to establish a better market economy regime, with a focus on the safeguarding of a fair competition environment, which has been regarded as an official will of less government intervention and early official thoughts about the would-be fair competition review system in China.

Meanwhile, since its accession to the WTO, China has shouldered a number of international obligations which call for modifications of its relevant domestic economic and trade policies and laws which were incompatibility with WTO law.¹⁰ The requirement of compatibility has enhanced competition among various WTO members due to global economic integration. It has also pushed the convergence of domestic laws and rules, which requires, and is featured by, a "rule of law" government, more property protection, less market intervention and much fairer market competition. China has no reason to be an exception in this regard.

Therefore, it is necessary for China to establish the fair competition review system in order to meet the domestic demand for sustainable economic growth, faced with international pressure and to fulfill its international obligations, and make timely responses to the calling of agencies, jurists and economists engaged in competition policy. This is a major step forward and reflects the rising role of competition policy in China's public policies. Nevertheless, the implementation of this review has to overcome several challenges.

6 The State Council carried out 10 measures to expand domestic consumption demands and boost economic recovery at the end of 2008. See: http://news.xinhuanet.com/fortune/2008-11/09/content_10331109.htm.

7 Xiaoye Wang, *Anti-Monopoly Law – the Milestone in China's Economic Reform*, See: <http://www.iolaw.org.cn/showArticle.aspx?id=2154>.

8 Competition Policy first appears in Article 9 of the AML, which reads, "the State Council established the Anti-Monopoly Commission, which... fulfills the responsibilities, including researching and drafting competition policy..."

9 Mr. Jinglian Wu, a prominent economist, pointed out that, "Our industrial policy... chooses to support some industries and enterprises and limit others. This policy is obviously anticompetitive and exists in almost all economic sectors in China." See: <http://www.icc-ndrc.org.cn/Detail.aspx?newsId=5926&Tid=99>.

10 The former director of the Department of Treaties and Law, Ministry of Commerce ("MOFCOM") mentioned that, "the rules of WTO have played a basic role in the development of China's foreign trade. The accession to WTO has not only brought us legal improvements..." See Xiaojie Lv ed., *Ten Year's Accession to WTO and the Rule of Law in China*, People's Publishing House, 2011.

III. IMPERFECTIONS IN THE IMPLEMENTATION OF CHINA'S FAIR COMPETITION REVIEW

A. Cognitive Imperfection

Concept is the basis for, and has external and internal influence on, deeds. Therefore, the first imperfection in China's competition policy should stand at the conceptual level. By concept, it refers to the cognizable limitations of competition policy by many policymakers in China.

Although the scope of competition policy varies in different jurisdictions, it at least includes competition advocacy and competition law enforcement. The fair competition review system is the main component of China's competition advocacy. To that extent, it is safe to say that China's competition policy is basically complete.

However, the formulation of competition policy doesn't mean that it will naturally be one of China's basic economic policies. Many policymakers in China's central and local governments have an incorrect understanding of competition policy, which can be proven from two aspects. On one hand, policymakers have heavily relied on industrial policy to boost the economy instead of building a fair competition environment. For example, when the central government supported the photovoltaic industry,¹¹ some provinces assisted local firms in this industry through local industrial policies, which constituted discriminative measures against non-local firms in many ways.¹²

On the other hand, the Chinese government or authorities sometimes violate the AML without realization of its illegitimacy. In 2016, China's State Administration for Industry and Commerce ("SAIC") authorized its Anhui branch to investigate a cartel, which was organized by the Hefei Central Sub-branch of the People's Bank of China. This Sub-branch invited three firms, which sold payment ciphers, and 20 financial institutions in Anhui province, to attend the bidder's conference. It was at the meeting that, according to the arrangement and notification by the Sub-branch, the participants reached an agreement on the payment ciphers' price and type, market allocation plan and distribution measures. After the meeting, the Sub-branch assigned these three firms to deal with certain financial institutions respectively on the condition that they should not make contact or transactions with the clients of any other side. Undoubtedly, this is one typical case of cartels arranged by government departments.¹³

B. Contradiction Related to Regional Gap, Official Performance and Review Implementation

The second imperfection arises from the contradiction between and among the uneven regional economic development and local officials' pursuit of political achievements and their weights and influences on the implementation of the fair competition review system. Since China launched its reform and opening-up in 1978,¹⁴ its unbalanced regional development policies have contributed to the huge economic success of coastal areas.¹⁵ However, it has also resulted in side-effects such as huge development gaps between these regions and the rest of the country. Although the Chinese central government has begun to employ a coordinated development strategy for the eastern, central and western regions since 1991, the gaps have remained to the present. Therefore, different regions may have different attitudes

11 China's State Council once stressed that, "[the governments shall] treat distinct photovoltaic enterprises differently, primarily support major enterprises which have advanced technology and market competitiveness and expel interior enterprises." See: http://www.gov.cn/zwqk/2013-07/15/content_2447814.htm.

12 For example, the Department of Energy in Jiangxi Province only provided provincial subsidy to the programs that used the photovoltaic products from its province. See: <http://nyj.jxdpc.gov.cn/filePub/201604/W020160426577772697700.pdf>. However, such discrimination against non-local firms is prohibited by China's National Energy Administration. See: http://zfxgk.nea.gov.cn/auto87/201601/t20160114_2096.htm. This shows that even if the Chinese central government makes an adjustment of its policy, local governments could still carry out anticompetitive policies based on their interests.

13 The Competition Law Enforcement Announcement No. 9 of SAIC. See: http://www.saic.gov.cn/zwqk/gggs/jzfi/201611/t20161104_172076.html.

14 China's Reform and Opening-up has been a long-term national policy since Xiaoping Deng initiated it in 1978, aiming at, among other things, shifting China's centrally-planned economy to the market-driven one, promoting international trade and attracting foreign capitals and technologies to boost domestic development. This policy has, to a great extent, led to China's economic success and political changes since 1978. See: http://news.xinhuanet.com/theory/2008-12/05/content_10458896.htm.

15 See, Houkai Wei, *The Economic Transformation within the Past 30 Years since the Reform and Opening-up*, 5 Economic Perspectives 9 (2008).

toward the implementation of the fair competition review system because of their distinct motivations, resources and approaches.

First, the developed regions usually have a relatively mature market development, due to which governments therein have more inclination to embrace market mechanism and restrict their powers. Under such circumstances, the main motivation to implement such a system is to safeguard fair competition, which is in line with the Opinion.¹⁶ However, the underdeveloped regions usually have a relatively low marketization, due to which governments therein have more inclination to intervene in markets. Under such circumstances, those governments have no, or less, motivation to conduct fair competition because such a system is incompatible with their habitual approaches.

Second, the developed regions usually have a number of relatively high-level policymakers and enforcement personnel involved in competition law, whose expertise can be given full play to the implementation of such a system. In contrast, there may be few human resources for the underdeveloped regions, and it is more difficult for them to take advantage of their expertise because of the lack of motivation of their regional governments to implement such a system.

Last but not least, developed regions attach more importance to the rule of law and property rights protection, and as a result, they are more likely to include the review system in their regional legal systems and make it long-term and systematically binding on their government powers. In contrast, the underdeveloped regions may put aside such a system because of their undue reliance on administrative policies and orders in their governance, and there may be a higher possibility of putting aside such a system in the event of a combination of the foresaid reasons.

In addition, there may be a conflict between the local officials' pursuit of short-term political achievements and their implementation of such a system.¹⁷ The former means that they may use government power to intervene in the regional economy in a more active way so that the respective regional or personnel benefits may be maximized in a short period. However, such practices may not only hamper the healthy development of a market economy, but also runs contrary to competition policy in terms of safeguarding fair competition and realizing a long-term healthy economic development, and the system may come to naught in the end.

C. Conflict Between Reform and Review

The Chinese central authorities initiated the supply-side structural reform in 2016 in order to alleviate the contradictions on the supply side and stimulate China's economic growth. This reform is featured by its cutting industrial capacity, destocking, de-leveraging, lowering corporate costs and improving weak links.¹⁸ Cutting industrial capacity mainly refers to the elimination of overcapacity in the field of iron and steel and the coal industry which have been featured by their low profits and high pollution. Although it has been repeatedly stressed that the market's key role should be played, there have still been inclinations in respective regional governments to achieve de-capacity targets through administrative orders from their policy orientation of "adhering to more Merger and Acquisition and re-organization than bankruptcy and liquidation" and their stresses on the policy of "good re-location of employees and bottom social security."¹⁹

There are two questions involved in the foresaid de-capacity. The first is the conflict between market economy disciplines and

¹⁶ The Opinion pointed out that, "Establishing a fair competition review system, and preventing excessive and inappropriate government intervention in the market are conducive to ensuring resources are allocated in a way that maximizes benefits and optimizes efficiency according to market rules, market prices and market competition."

¹⁷ See, Steven Cheung put forward the concept of "county economy" in his work, *The Economic System of China*, that the inter-province competition is the main reason for China's economic miracle in the 1980s. That inter-province competition is an example in this regard. However, many defects can be attributed to such competition. For example, local officials may attach importance to short-term economic effects which may hamper market competition. See, Steven Cheung, *The Economic System of China*, CITIC Publishing Group, 2012.

¹⁸ De-capacity aims at the dissolution of surplus capacity, destocking focuses on the reduction of inventory of commodity house, de-leveraging refers to the decrease of leverage existed in financial system and used by enterprises, lowering corporate costs point at the reduction of systematic cost in transaction and unreasonable tax and fees borne by enterprises, and improving weak links requires improvement in poverty alleviation, new industry cultivation, service industry promotion, infrastructure development, ecologic governance, etc. See: http://news.xinhuanet.com/fortune/2016-05/27/c_129021077.htm.

¹⁹ See: <http://politics.people.com.cn/n1/2016/0104/c1001-28006577-2.html>.

administrative intervention. In a market economy, those enterprises with low profits and high pollution are eliminated because of market competition and strict environmental protection laws. Governmental intervention is in violation of competition policy because governmental behavior should “restrict competition to the minimization” according to such policy and the fair competition review system.²⁰ Furthermore, there is no sustainability for de-capacity dominated by administrative organs from the perspective of effects. The second is that priority should be given to relocation or reemployment for the benefits of employees. De-capacity dominated by government will inevitably result in questions of relocation and reemployment. Plans for such relocations have been formulated by many regional governments, which have increased the cost or burden of public finance in essence.²¹ However, the re-location may not be a question for government if such de-capacity is realized or completed by bankruptcy or reorganization under the spontaneous market influence. What the government should take into account is how to further the reemployment and reduce employment measures taken by enterprises which are against competition.²² Although reemployment falls into the category of other public policies, it can still promote the competition in the human resources market, whereas measures adopted by enterprises against competition obviously fall into the category of competition policy. The simultaneous implementation of these two policies will be conducive to the enlargement of the human resources market and the increase of internal market competition. Therefore, the fair competition system should be applied to the consideration of the supply-side structural reform dominated by the government with an intention of de-capacity.²³

D. Lack of Independent Third Party for Fair Competition Review

The Opinion stipulates that:

Policy-making Organs shall, during the policy-making process, conduct rigorous self-review pursuant to review standards. Policies that are considered as will not exclude or restrain competition upon review may be implemented, while those that will exclude or restrain competition shall not be promulgated or shall be promulgated only after being adjusted to meet relevant requirements. Policies that have not been subject to fair competition review may not be introduced.

Furthermore, the Opinion clearly provides that “they are encouraged to entrust third parties to carry out assessment.” However, there are still many problems for such self-review.

First, there are huge differences between different regions and authorities in terms of self-review dynamics. Second, the organs in charge of policy formulation or competition policy should directly annul those policies and measures, namely, the four kinds and 18 types of policies and measures provided for in the Opinion which is obviously formulated to exclude or restrict competition effects.²⁴ However, there should be a complex economic consideration of those policies and measures without such obvious effects. Assessment conducted by a third party is a plausible way because the authorities in charge of policy formulation lack experience in complex economic analysis in general. At present, China lacks a professional and independent third party economics assessment institution, and as a result, there may be a higher possibility from the current situation that such authorities are more likely to approve such policies and measures with dim effect against competition. That is to say, there may be a higher false negative in governmental policies and measures against competition.²⁵

²⁰ See Yong Huang, *The Competition Policy in the Supply-side Structural Reform*, 1 Price Theory and Practice 21 (2016).

²¹ In the *Administrative Measures for Special Rewards and Subsidies for Structural Adjustments of Industrial Enterprises* issued by the Ministry of Finance, the central public finance has arranged 100 billion RMB to support the overcapacity reduction by local governments and central SOEs. It will allocate 24 billion RMB to the resettlement of employees. See: <http://jjs.mof.gov.cn/zhengwuxinxi/zhengcefagui/201605/P020160519546386062558.pdf>.

²² The Antitrust Guideline for Human Resource Professionals that published by FTC and DOJ, prohibits professionals to commit anticompetitive employment conducts. See: <https://www.justice.gov/atr/file/903511/download>.

²³ Jiangping Wang, SAIC Deputy General Director, believes that the precondition for the supply-side structural reform is a healthy market regime and it depends on the basic role of competition policy.” See, Jiangping Wang, *On the Basic Role of Competition Policy in the Supply-side Structural Reform*, 11 Administration Reform 12, 2016.

²⁴ Id 5.

²⁵ U.S. Judge Frank Easterbrook analyzed the false positive and false negative in antitrust enforcement. If we borrow this to think about public anticompetitive policies and measures, we shall maximally eliminate them, which embrace false positive wrongs. See, Frank H. Easterbrook, *Limits of Antitrust*, 63 Texas Law Review 1, 1984.

E. Lack of Due Process for Fair Competition Review

The fifth problem relates to the lack of due process. The Opinion provides that “Policy-making Organs shall listen to the opinions of interested parties, or solicit public comments. After relevant policy measures are promulgated, they shall be disclosed to the public pursuant to *the Regulations of the People’s Republic of China on Government Information Disclosure*.” Despite this, the Opinion itself can’t be sufficient to that end. It is extremely difficult to have effective monitoring from the outside if there is no open and due procedure for the review process. For example, after the Beijing Municipal Commission of Transportation published the *Rules for the Administration of Network-based Reservation Taxi Business and Service* in 2016,²⁶ “one lawyer wrote to the Commission to inquire whether the Rules had gone through the procedure of fair competition review. The Commission explained that principles for the review were whether the Rules were formulated according to law because administration by law was a top requirement and it had no contents of excluding or restraining competition.”²⁷ However, there are still controversies about whether the sole access to the drivers with local household registration and to the cars with local automobile registration is against the Opinion. The public had no other way to know and monitor the review standard and process because no review procedure was released by the Commission.

F. No Opportunity for China’s People’s Congresses to Review Budget Considerations

The final institutional challenge is the deficiency of fair competition review in the budgetary considerations by the Chinese central and local people’s congresses. The funds for China’s numerous industrial policies mainly come from the annual budgets approved by the people’s congresses. The new Chinese Budget Law, which was enacted in 2014, adopted multiple standards for budget considerations, such as the legality and reasonableness of budget arrangements and debts, and appropriateness of budget arrangements for the major expenditures and investment projects.²⁸ However, it has no provision on whether budget arrangement may exclude or restrain market competition,²⁹ not to mention the supervision of budget implementation from the perspective of fair competition review.³⁰

It is almost impossible for Chinese People’s Congresses at all levels to cancel or modify the industrial policy arrangements because of short periods for their consideration of draft budgets, numerous projects involved and financial complexity. The lack of fair competition review in budget considerations and supervision will definitely increase the *ex-post* costs and difficulties to correct the anticompetitive policies. What’s more, regardless of being required by the Opinion, it may be difficult for, and there may be no jurisprudential basis for, authorities in charge of industry policy formulation to conduct self-review of “existing policies” and “incremental policies.” On one hand, those authorities may resist the self-review by exploitation of “existing policies” review under the pretext that the current policies have been approved according to legal procedure; on other hand, those authorities may take a negative attitude toward the implementation of the Opinion against their reviews of “incremental policies” on the grounds that such reviews have not been provided for in the Budget Law and its relevant rules, and that they have no statutory obligation to abide as a result.

V. SOLUTION TO PERFECTING FAIR COMPETITION REVIEW SYSTEM IN CHINA

Although there have been so many imperfections in terms of the Chinese fair competition review system, there are still plausible solutions to such imperfections from different perspectives.

First, China should advance the status of its competition policy. Establishing the fair competition review and enforcing the AML are the initial steps to reinforce Chinese nascent competition policy. Predictably, China has to walk back and forward before its competition policy finally substitutes the industrial policy and becomes one of its fundamental economic policies.

26 See: http://www.bjysj.gov.cn/xxgk/ggl/201612/t20161221_165385.html.

27 See: http://www.legaldaily.com.cn/index/content/2017-01/13/content_6955611.htm?node=20908.

28 See: http://www.npc.gov.cn/wxzl/gongbao/2014-11/02/content_1892137.htm.

29 See Article 48 of the *Budget Law of the People’s Republic of China*. There is no provision requiring consideration from the perspective of competition policy.

30 See Chapter 9 (Supervision) of the Budget Law of PRC. http://www.npc.gov.cn/wxzl/gongbao/2014-11/02/content_1892137.htm.

To achieve this target, the Chinese competition policy community should try to persuade key policymakers, state-owned enterprises, private firms and the public to realize the advantages of competition policy and disadvantages of industrial policy, and share the view with them that competition policy needs to play a central role in the Chinese market economy. Of course, it will take a long time and patience to reach a consensus, which calls for the joint efforts of the Chinese courts, agencies, jurists and economists specialized in competition policy.

Second, China may introduce fair competition review into the system for assessment of local officials' political achievements. Regional leaders and officials may harm the competition policies beyond their levels for local protectionism or other reasons because the local developments have bigger and direct influence on their career promotion in comparison with competition policies above their levels. Therefore, China may make an improvement in its system for assessment and promotion of local officials by introduction of a competition policy record in order to have a better and leveled development with less unnecessary competitive construction and more necessary fair competition.

Third, China may reform the current supply-side structural reform by using competition policy. The policy preference of the supply-side reform to administrative order has been costly and probably unsustainable. This approach is nothing new, but an old-fashioned and customary repetitive construction. Market-driven reform, as claimed by itself, shall come into play. However, the shift from the government-led track to the market-driven route would be much tougher and more sophisticated than anyone could imagine. As a practical matter, it would be an operational attempt to put this reform under competition policy and focus on the fair competition review of its stimulus measures, such as the financial rewards to local governments and resettlement arrangements.³¹

Fourth, China should make systematic legislation of fair competition review. At present, the Opinion has been a general public policy and many provisions need to be formulated. Therefore, China's State Council should, within a reasonable period, draft and enact the *Rules for the Implementation of the Fair Competition Review* according to law. The Rules should include the authorities, criteria, due process and liabilities in terms of such review. In particular, with regard to the review of "existing policies" and "incremental policies," the Rules should establish competition agencies and governmental legal authorities as review authorities and the policymaking authorities as supporting ones. Additionally, the review procedure has to be open to the public and adopt hearing procedures.

Fifth, China should push for coordination between its fair competition review and budget laws. It is necessary to review the industrial policy arrangements when drafting, approving and implementing budgets. This requirement should be a part of the Budget Law and local Regulations on supervision over budgets. The Beijing Municipality took a lead in this regard. In January 2017, Beijing's Department of Finance, after hearing the advice from the members of the Finance and Economy Committee of Beijing Municipal People's Congress, amended its *Report on the Budget Implementation in 2016 and Budget Draft in 2017* to Beijing Municipal People's Congress. A clause was added in the Report which provides that "when making finance policies in support of industrial development and government procurement, the government and its departments shall implement fair competition review to regulate their conducts."³² But this initiative has to be pushed harder and further by merging this statement into the *Regulations on Supervision over Budgets of Beijing Municipality*, which is under modification.

Sixth, China should promulgate its *Rules for the Implementation of Fair Competition Policy Review*. Currently, there are only 18 types of obviously anticompetitive policies under the Opinion. However, more in-depth economic analysis is vital for the assessment of the uncertain restricted policies. In fact, it is an optimal choice to enact the Rules. By learning from the competition assessment toolkit of the OECD,³³ the Rules, along with economic analysis, can be utilized by the review bodies to evaluate different industries. On the basis of these review results, the authorities could gradually clear the "existing policies." As a law of great significance with a would-be basic economic policy for China, the drafting of such Rules should be opened to the public and there should be full consideration of the opinions from practical, academic and the social experts. The task should be assigned to the Competition Commission or the three central competition agencies. Although China's State Council has established an *Inter-Ministerial Joint Meeting for the Fair Competition Review*, it is

31 Jiangping Wang, the Deputy Director General of SAIC stated that, "the Supply-side Structural Reform shall depend on a healthy market system and the fundamental role of competition policy." Jiangping Wang, *Strengthening the Fundamental Role of Competition Policy in the Supply-side Structural Reform*, 11 Administration Reform 12 (2016).

32 See: http://www.bjrd.gov.cn/zd gz/zyfb/bg/201702/t20170206_170507.html.

33 About the principle, guideline and operation manual of the OECD's competition assessment toolkit, see: <https://www.oecd.org/competition/assessment-toolkit.htm>.

difficult to operate and coordinate because it consists of 28 ministries and commissions.³⁴ Under this framework, the three competition agencies and the Legislative Affairs Office, which are members of the Meeting, are expected to play leading roles.

Lastly, China should strengthen the public and private AML enforcement to public anticompetitive policies. Some provinces and municipalities have promulgated their follow-up versions of the Opinion.³⁵ But they share a common flaw – similarity of content with the Opinion, and lack of thoughtful and enforceable plans. Frankly speaking, this review still stays in a vacuum. The local implementations of the review may be worse if motivations, resources and approaches of self-review are taken into consideration.

The 18 prohibited policies provided for in the Opinion could be a part of the AML, which is also hostile to the abuse of administrative power to eliminate or restrict competition. Now that policymaking authorities seem to be reluctant to enforce the Opinion, the competition agencies could do more according to the authorization of the AML.³⁶

The implementation of this review also depends on the courts. The rulings against the anticompetitive policies, which would be used by corporations affected by them, could be another powerful external restraint to the policymakers and in turn force their self-review.³⁷

VI. CONCLUSION

The enactment of China's fair competition review system is a major step toward the strengthening of its competition policy. However, implementation of the system has to overcome many difficult institutional, legal and systematical obstacles in the long run, such as the cognizable limitations of competition policy by many policymakers, the uneven local economic development and officials' pursuit of political achievements, the current administrative supply-side structural reform, the absence of independent third party assessment and the inadequate due process. To better counter these obstacles, practical efforts have to be made, including reinforcing the understanding of competition policy, adopting the fair competition review progress into officials' political achievements' assessment, navigating the supply-side structural reform by the competition policy, legalizing the fair competition review, connecting the fair competition review and the budget laws, drafting the *Rules for the Implementation of Fair Competition Policy Review* and strengthening AML enforcement forces as well.

34 The full list of departments and commissions, see: http://www.gov.cn/zhengce/content/2017-01/24/content_5162929.htm.

35 As previously stated, Jiangsu, Beijing, Ningxia, Hunan, Shanxi and Guizhou are among the earliest provinces and municipalities to promulgate their *Implementation Opinion of Fair Competition Review*. Id 4.

36 The competition agencies have increasing experience in investigating the anticompetitive conducts of public enterprises. For example, NDRC stated that it would pay special attention to the abuse of dominance in public facilities. See: http://www.ndrc.gov.cn/xwzx/xwfb/201607/t20160712_811004.html. SAIC and its local branches investigated 1,267 anticompetitive cases in certain sectors, such as water supply, electricity supply, natural gas supply and public transportation in 2016. See: http://www.gov.cn/xinwen/2017-01/12/content_5159120.htm.

37 See: Yong Huang, Baiding Wu and Zhanjiang Zhang, *The Implementation of the Fair Competition Review from the Perspective of Competition Policy*, 4 Price Theory and Practice 31 (2016).