



INTERVIEW WITH MR. HANDONG ZHANG, DIRECTOR GENERAL OF THE NATIONAL DEVELOPMENT AND REFORM COMMISSION (NDRC) OF P.R. CHINA

BY VANESSA YANHUA ZHANG

Since the Anti-Monopoly Law (“AML”) took effect in August 2008, agency enforcement has been an important area that attracts scholars and practitioners’ attention. We are very honored to have an interview, conducted in January 2017, with Mr. Handong Zhang, Director General of the National Development and Reform Commission (“NDRC”) of P.R. China. Below is the full interview.¹

1. On June 14, 2016, the State Council officially issued the Opinion on Establishing Fair Competition Review Mechanism during the Development of the Market System (“the Opinion”), which marked the establishment of fair competition review mechanism in China. Introducing the fair competition review mechanism is a new milestone in China’s competition policy enforcement history, which further promotes the construction and development of the market economy in China (in light of the eight-year anniversary since the Anti-Monopoly Law went into effect). Could you give some background to the historical background, the basic starting point and the final objective when the mechanism was designed?

China is in a historical phase of deepening reforms to the market economy on all fronts. As we make progress on reforms, a modern market system is taking shape, market mechanisms are playing an ever greater role, and the market competition environment is constantly improving. However, some local governmental agencies still keep protectionism and industry barriers in place. These practices have jeopardized our single market which promotes openness and orderly competition. They have distorted the allocation of market resources, dampened companies’ passion to innovate and lowered the economy’s overall efficiency. So establishing and improving a mechanism to guarantee fair competition and create a market environment for fair competition has become the important element in reforms to the economic system. The Third Plenary Session of the 18th Central Committee of the Communist Party of China clearly pointed out that the key issue in reforms to the economic system is to properly handle the relationship between the government and the market so that the market plays a decisive role in resource allocation and the government does a better job doing what it should do. It also confirmed that establishing a single market featuring openness and orderly competition is a precondition for the market to play a decisive role in resource allocation. This is the historical background for introducing the fair competition review mechanism, which is crucial to create and maintain a market environment for fair competition.

The core of the fair competition review mechanism is a requirement for policy-making authorities to enhance, *ex-ante*, as well as on-going assessments, of their policies to prevent any policy from excluding or restricting market competition. The fair competition review mechanism intends to provide investors and operators with a policy environment that benefits fair competition and to constitute a nationwide single market featuring openness and orderly competition. This will cut institutional costs of transactions, promote market innovations and facilitate economic restructuring. As a result, the entire economy will run more efficiently, at last, benefiting consumers.

2. Could you explain the stipulations laid out by the Opinion and the way to implement the mechanism?

The Opinion includes comprehensive stipulations for establishing a fair competition review mechanism. These stipulations can be summarized as “**three combinations, four categories of criteria and four measures.**”

¹ We are grateful to Madame Qing Li, Mr. Huowang Wang and Ms. Qun Xin for coordinating and facilitating this interview.

Three combinations. (1) The combination of regulating new policies and screening existing ones. At the same time, regulating new policies is an urgent task. We should conduct fair competition reviews to comprehensively ensure that no new policies restrict competition. Meanwhile, we should move steadily to screening existing policies and, in accordance with the fair competition review standard, abolish those that hinder fair competition or harm the country's single market. (2) The combination of self-review by policy-making authorities, and scrutiny by the public and accountability. The Opinion puts forward self-reviews by policy-making authorities as the basic idea. In the process of formulating policies, they should perform rigorous self-reviews in accordance with the standards set in the fair competition review mechanism. Meanwhile, policies that have been reviewed and released should be open to public scrutiny. If any policy is found to have been released without undergoing a fair competition review, whoever has made it should be held strictly accountable. (3) The combination of principled prohibitions and exceptions. The Opinion stipulates that policies restricting competition should not be released or should be rectified to meet relevant requirements before being released. Meanwhile, in light of actual needs that arise from economic growth, the Opinion allows exceptions for policies that protect national security, the country's interests and public interests. If such policies restrict competition, they can be implemented as long as they comply with certain rules.

Four categories of criteria. The Opinion proposes 18 criteria for fair competition reviews in accordance with the requirements for building a nationwide single market featuring openness and orderly competition. These criteria fall into four categories: (1) Criteria for entering and exiting the market. Equitable entry and exit criteria should be set for all market players. (2) Criteria for the free flow of products and factors of production. The free flow of products and factors of production across the country should be facilitated so that a nationwide single market can take shape. (3) Criteria for influencing production and business costs. Production and business costs of any operator should not be illegally increased or decreased, since this harms fair competition. (4) Criteria for influencing production and business conduct. Each operator's right to operate independently should be protected, without any improper interventions.

Four measures. The Opinion provides four measures that ensure smooth and effective implementation of the mechanism: (1) Step-by-step implementation. The central government, provincial-level governments and their departments started implementation in June 2016. Since the start of 2017, the provincial-level governments, drawing on already accumulated experience, have been phasing in the fair competition review mechanism in their respective jurisdictions and offering guidelines for municipal and county governments and their departments in conducting reviews. (2) Regular assessments. Policies that have been reviewed and released should be regularly assessed in terms of their effectiveness and influence on market competition. Adjustments should be made based on assessment results. (3) Detailed rules. Detailed rules for implementation should be worked out to specify items to review and procedures to follow. This helps policy-making authorities with fair competition reviews. (4) Enhanced law enforcement. Anyone who abuses executive power to exclude or restrict competition should be timely investigated and punished, and such legal cases should be made public. This forces policy-making authorities into a position where they have to take fair competition reviews seriously.

3. In designing the fair competition mechanism, what considerations were given to China's fundamental realities?

(1) Criteria for fair competition reviews. With existing outstanding problems in mind, the Opinion proposes 18 criteria for fair competition reviews in accordance with the requirements for building a nationwide single market featuring openness and orderly competition. These criteria fall into four categories: (a) Criteria for entering and exiting the market. Equitable entry and exit criteria should be set for all market players; (b) Criteria for the free flow of products and factors of production. The free flow of products and factors of production across the country should be facilitated so that a nationwide single market can be taken form; (c) Criteria for influencing production and business costs. Production and business costs of any operator should not be illegally increased or decreased, since that harms fair competition; (d) Criteria for influencing conducts of production and business. Each operator's right to operate independently should be protected, without any improper interventions. The four categories of criteria define boundaries for the government participating in market activities. They mean a lot to the proper handling of the relationship between the government and the market and the prevention of the government from exerting undue influence on the market. Meanwhile, the Opinion has two miscellaneous provisions to ensure that government behavior is regulated to the largest possible extent: (1) unless there is a legal basis, no policy should be formulated that reduces the lawful rights of market players or increases their obligations; (2) no policy should be formulated that violates the Anti-Monopoly Law by excluding or restricting competition.

(2) Review models. The main review model specified by the Opinion is policy-making authorities conducting self-reviews, on the basic of comprehensive consideration of China's economic development phase, existing laws and regulations and China's executive system. In detail, there are a few reasons: (a) Such a model is compatible with China's existing laws and regulations as well as the country's executive system. According to the Anti-Monopoly Law, when executive power is abused to exclude or restrict competition, the

anti-monopoly authority can make a suggestion after conducting an investigation. The superordinate authority of the violating party should request rectification based on the suggestion. This is compatible with policy-making authorities conducting self-reviews; (b) Policy-making authorities have a better understanding of policies' backgrounds, purposes and contents. Letting them conduct self-reviews can help strike a better balance between protecting market competition and achieving policy targets; (c) The process of policy-making authorities conducting self-reviews is also a process of advocating competition. This can constantly raise policy-making authorities' awareness of fair competition and change their mindsets, thereby getting them to protect fair competition without being pushed.

Meanwhile, the Opinion requires combining self-reviews and external scrutiny. Public scrutiny and law enforcement scrutiny should be enhanced to ensure that fair competition reviews are objective, impartial and effective. Public scrutiny means that, during reviews, policy-making authorities should seek opinions from all stakeholders or the public. Policies that have been reviewed and released should be made public. Law enforcement scrutiny means that more efforts should be made to investigate and punish the abuse of executive power to exclude or restrict competition. Such cases should be made public in time, forcing policy-making authorities to take fair competition reviews seriously.

The "self-reviews plus external scrutiny" model is currently the most feasible way. Of course, as the Opinion points out, the fair competition review mechanism is a long-term, systematic and complex program. We need to think about the current phase and, at the same time, look to the future. We need to constantly sum up experiences and effectiveness so that we can keep honing the mechanism. When conditions are ripe, we can organize third-party assessments or set up an independent review mechanism.

4. The Opinion has been released for half a year. Could you offer a few examples or share with us some experience in the process of implementing the fair competition review mechanism across the country and across relevant departments?

As a whole, the fair competition review mechanism is being steadily implemented. Since the Opinion was issued, the NDRC has taken diverse measures to push for the implementation of the mechanism. (1) It has organized dedicated press conferences, workshops and training sessions to publicize and interpret the policy. (2) It has taken the initiative to set up an internal working procedure for fair competition reviews, which ensures that fair competition reviews are mandatory before policies can be released. In strict accordance with the requirements, all bureaus under the NDRC are conducting fair competition reviews on policies that are in the pipeline. (3) It has pushed for the establishment of a joint conference system that involves multiple governmental departments. This is aimed at good coordination in the implementation of the mechanism. At the moment, all regions and governmental agencies are working to build their own review procedures. Twenty-three provincial-level regions, including Guangdong, Jiangsu, Sichuan, Chongqing, Hunan, Hebei, Fujian, Liaoning, Ningxia, Beijing, Guizhou, Shaanxi, Hubei, Gansu, Guangxi, Zhejiang, Heilongjiang, Shanxi, Inner Mongolia, Jilin, Tianjin, Shanghai and Anhui have released detailed opinions for the implementation of the fair competition review mechanism. The NDRC, the Ministry of Industry and Information Technology, the Ministry of Housing and Urban-Rural Development and the Ministry of Commerce have set up the dedicated review procedures. Most other governmental agencies have incorporated fair competition reviews into existing legality reviews.

5. What do you think of the implementation of the fair competition review mechanism in the future? What challenges and opportunities are there?

China is pressing ahead with supply-side structural reforms. The key to supply-side structural reforms is to give full play to the market's decisive role in resource allocation. The market system needs to be improved further so that distortions caused by the overuse of executive power in allocating factors of production can be corrected. The fair competition review mechanism has a crucial part to play in supply-side structural reforms. So I believe that the mechanism will be properly implemented at all levels of executive authorities. That said, it takes time for the mechanism to yield the desired effects. It is a gradual process. The NDRC will keep working to intensify coordination with relevant governmental agencies and provide more guidance for local governments as it supervises them. It will also formulate detailed rules for the implementation of the mechanism and take a harder line on the abuse of executive power to exclude or restrict competition. All this will help implement the fair competition review mechanism effectively.