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“Fair competition review system” – competition advocacy and State aid rules through the back door?

Adrian Emch (Hogan Lovells, China) · Thursday, June 23rd, 2016

On 14 June 2016, China’s State Council made public the **Opinions on Establishing a Fair Competition Review System in the Development of the Market Regime** (“Opinions”). The Opinions were approved on 1 June.

The “fair competition review system” forms part of China’s broader efforts to tackle so-called “administrative monopolies,” a term used for various forms of government action or inaction leading to anti-competitive results. Abuse of administrative power with anti-competitive effects – the more technical term for “administrative monopolies” – is prohibited under the Anti-Monopoly Law (“AML”). This law also prohibits a number of specific manifestations of abusive government conduct.

However, the Opinions go beyond the AML framework, both in terms of process and substance.

Review process

The “fair competition review system” works somewhat like an “advocacy” type of mechanism, only in a decentralized way. In many foreign jurisdictions, “advocacy” is used to indicate a process whereby antitrust authorities attempt to influence the rule- and decision-making processes by other government bodies to prevent anti-competitive outcomes.

With the new system in China, each government body (and entity with a public policy mandate) is required to conduct a self-review when formulating new business-related rules or policies, in order to check whether they may give rise to anti-competitive effects. In other words, each body is being told to police itself.

The only exception is the State Council, where the actual drafting body, typically a ministry or commission under its supervision, is responsible for conducting the “fair competition review.”

The scope of the review mechanism is broad, including:

- all types of business-related rules and policies (including administrative regulations issued by the State Council)
- all levels of government (the obligations apply to central and provincial-level bodies from July 2016, and to city and county-level bodies from 2017)
- not only will new rules and policies come under scrutiny, but existing ones are also required to be

re-examined.

Indeed, each government body is required to carry out a periodic review of its rules and policies: the Opinions encourage government bodies to outsource the assessment to third parties. The report produced is required to be made public.

Importantly, during its review of new rules and policies, the government body must consult with interested parties or launch a public consultation before they are enacted.

The Opinions do not provide for any specific sanctions if a government body does not follow the Opinions. That said, the Opinions vaguely speak of personal consequences under Party and government disciplinary rules for individuals who contravene the Opinions.

Another interesting facet is that the Opinions empower the three antitrust authorities, the National Development and Reform Commission (“**NDRC**“), the Ministry of Commerce, and the State Administration for Industry and Commerce (“**SAIC**“), together with the State Council’s Legislative Affairs Office to formulate implementing rules for the self-review and other aspects of the new system (the Anti-Monopoly Commission, the high-ranking antitrust policy body, is also mentioned at one point in the Opinions but its role in this new system seems unclear).

Substance of review

The Opinions feature four categories of benchmarks for the substance of the “fair competition review” (each with a set of specific benchmarks/prohibitions):

- market access (for example, no unreasonable or discriminatory market barriers)
- free flow of goods (for example, no discrimination against non-local companies in tenders)
- impact on costs (for example, no individual subsidies or tax breaks)
- impact on operations (for example, no undue intervention in market pricing).

Some of the substantive rules mirror, or are inspired by, similar prohibitions in the AML. On various occasions, the Opinions even directly refer to the AML. Other provisions, however, cover new ground. For example, there appear to be a set of rules aiming to curb favorable tax treatment by local governments not approved by the State Administration of Taxation for the benefit of specific companies. In a roundabout way, it could be argued that through the Opinions, China is introducing at least the basis of a “State aid” system similar to that in the European Union (where advantages selectively granted by government to companies, thereby distorting competition, can be unlawful under antitrust rules).

Interestingly, as with the AML provisions applicable to companies, the Opinions provide for “exemptions” to the prohibitions, in particular:

- to safeguard national economic and cultural security, or defense-related construction
- for social security purposes, such as poverty alleviation or disaster relief
- for social public interests, such as energy conservation or environmental protection, and
- other circumstances prescribed by laws and regulations.

The last point, of course, leaves the door open for further exceptions to be added in the future through legislation.

Impact of the new system

The adoption of the Opinions and the launch of the “fair competition review system” are significant. They create a new policy (working like “soft” law) outside, or alongside, the AML framework.

The main driver behind this development may have been NDRC’s antitrust bureau, which has been dealing with numerous “administrative monopoly” cases in the recent past (as has SAIC’s antitrust bureau). The AML provides relatively weak sanctions (only recommendations) for anti-competitive government actions, hence the need for a system with “more teeth.”

For domestic and foreign companies alike, a major advantage of the new system (if properly and even-handedly enforced – which cannot be taken for granted at the outset) would be the additional transparency it could bring. Businesses would have greater opportunities to be consulted, and to feed into the normative processes. They would face fewer barriers to trading across administrative divisions, as the system challenges “administrative monopolies” through local protectionism.

Whether China’s call for “doctors to heal themselves” will succeed in practice remains an open question, especially when implementing the Opinions would cut across powerful local interests. It is, however, a positive start and a step in the right direction to spread the “fair competition” message down throughout all layers of government in China.

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