

Curbing Public Restraints in China: Achievements and Perspectives

Lingnan Competition Policy Forum

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What we will cover

- > The Legal framework (Art 7 and Chap 5)
- > Recent Enforcement
 - > Against SOEs
 - > Against Abuse of Administrative Monopolies
- > Policy developments
 - > FCRS and 34 Document
 - > International cooperation – towards a State Aid regime in China?

What public restraints?

> Definition

- > Actions or measures of the state (at large) that “significantly and unnecessarily harm market competition” (Fox Healey)
 - > “unnecessary” = not justified as important to carry out a public interest (→ is economic protectionism deemed public interest?)

> Illustrations

- > Preferential treatment or special protections for SOEs or regulated industries
- > Lax enforcement of the AML against SOEs
- > Barriers to trade amongst regions/provinces through discrimination against non-local companies (imposing special standards; licensing requirements; pricing differences; checkpoints; excluding from tenders directly or indirectly)
- > Issuing measures that compel participation in a cartel; that have an anti-competitive impact
- > **What tools does the AML provide to combat these public restraints to competition?**
 - > Are they used effectively?
 - > What can realistically be expected in a market whose legacy is to be centrally planned and highly regulated?

The legal framework under the AML

- > **Treatment of SOEs**
 - > Though **Art 7** sets out some limitations (State to protect/regulate SOE operations, pricing esp in strategic sectors; reference to catch all “promotion of the socialist market economy”)
 - > It is widely accepted that SOEs are subject to competition principles under the AML (and have been / are the subject of enforcement)
- > **Abuse of administrative power to eliminate or restrict competition (Art 8 and Chapter 5)**
 - > Aims to prevent gvt agencies from using their power to interfere with competition
 - > **Who?** Admin authorities; **How?** Misuse of admin power without a legal basis; **What?** Impact is to eliminate/restrict competition in a market
 - > Implications:
 - > The competition authorities (NDRC/SAIC) can only note the violation and propose corrective measures;
 - > The gvt official in charge may be individually liable (admin penalties)
 - > Private companies engaging in cartel “pursuant to” such measures may be liable under AML

Enforcement against SOEs

- > **Public enforcement** against SOEs exists
 - > One of the first NDRC cases was against liquor SOEs (Moutai and Wuliangye) fined USD80m in 2013; China Telecom/China Unicom for broadband pricing (no decision but practice changed)
 - > 2017: increased number of enforcement cases against SOEs:
 - > Hebei Telecom (tie-in sales); Wujian water supply (real estate developers restricted in their choice of water supplier); Jiangxi Salt Industry (tie-in sales); Shandong Power Company (designated own group affiliate as exclusive party to build power supply)
- > We note however that:
 - > Penalties tend to be on the low end of the spectrum (1-2% of revenue v. 4-6% or even 6-8% for private cos)
 - > More cases are abandoned / suspended subject to corrective measure voluntarily introduced
- > **Private enforcement also on the rise** – e.g. Yinding, a bio-energy co in Yunnan is suing Sinopec for refusing without justification to add their biodiesel (from waste cooking oil) into the Sinopec product portfolio
 - > Kunming IPC ruled against Sinopec (2014); on appeal Yunnan HPC ruled for Sinopec (2015); Yinding on appeal to SPC

Enforcement against administrative monopolies

- > Enforcement against administrative monopolies has been **on the rise since 2014** (both NDRC and SAIC; each reporting max 10 decisions per year though many cases are believed to be investigated)
 - > Ex: 2014 the Yunnan Provincial Communications Administration (YPCA) organised a cartel between the main telcos → restrictions to refund of benefits to customers. NDRC reached out to National Com Authority (the YCA supervisory body) to order that the practice cease immediately; the Telcos were each fined 2% of their previous year revenue
 - > Since then, many other cases:
 - > Conducts are varied: local protectionism; exclusion from public procurement; forcing to deal with certain cos.
 - > Sectors varied: electricity or water supply, education (school uniforms), transportation, environment, healthcare
 - > Geographical coverage is varied: Beijing, Shanghai, Shandong, Chengdu, Shenzhen
- > **Key features** of Chap 5:
 - > Straightforward investigation: no “efficiency arguments” / no “State action” defence it seems
 - > But no direct power for NDRC/SAIC to curb the conduct; only power to suggest to supervisory body
- > **State Council** issued in Jan 2017 a **market supervision proposal** calling for better enforcement against admin monopolies, as part of 13th Five-Year Plan → priority
- > **Rise of private litigation** in this space too, though the plaintiff must prove there is an “administrative decision” which forms the base of the appeal (e.g. Guangdong Dept of Education) (need to **prove harm?**)

Policy Framework - FCRS

- > Since ~2015 major move from the top towards establishing a “unified, open, competitive and orderly market system”
 - > SOEs reform; market liberalization
 - > But also establishing a fair competition review system = comprehensive mechanism to assess anti-competitive impact of laws and regulations
- > FCRS adopted in 2016 (live 1 July 2017), modelled after OECD guidelines. NDRC in charge; 28 ministries joint effort
 - > State Council issued in June 2017 “*Opinions of the State Council on Establishing Fair Competition review System during Building up of the Market System*” (aka **No34 Document**) → issued **18 standards of review**
 - > Three step process: (i) is it market activity related? (ii) does it “pass” the 18 tests?; (iii) if not, is an exemption justifiable?
 - > Supplemented by “**Detailed rules for the implementation of the FCRS**” jointly issued by NDRC, SAIC and MOFCOM → adds **50 sub-standards**
 - > Largely *ex ante* mechanism. Explains key concepts under the 18 standards, e.g. (i) what is “unreasonable and discriminatory market entry and exit condition”?; (ii) what is “sensitive information” the gvt should not disclose?
 - > Lists out key problematic conducts: see Chap 5 (ex post)
 - > Establish **consultation and dispute resolution mechanism**; clarify complaint-filing regime
 - > **Sanctions**: measure must be dropped if process has not been followed (or remedied); gvt official in charge can be **individually** sanctioned
- > Far reaching: In past year, under NDRC supervision, 1,200 sectoral documents and 1,000 provincial reviewed

Way forward

- > International Cooperation with EU on State Aid
 - > MOU signed on 2 June 2017; M. Vestager visit to China mid-November; Saluted FCRS
 - > Create a mechanism for consultation, cooperation and transparency in the field of State Aid and more generally policy on public restraints
- > Main tasks ahead ...
 - > Under Chap 5, empower NDRC/SAIC to act directly on the conduct (not mere power to suggest)
 - > Facilitate private actions (further reform of Administrative Litigation Law)