

China's Fair Competition Review System: A Single Case Study

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The case study methodology has proved to be a useful empirical tool for competition policy evaluation. However, as far as China's Fair Competition Review System (FCRS) is concerned, empirical studies are scarce. This article aims to partly fill this gap by thoroughly studying the first litigation case in light of three questions: (1) does China's FCRS contribute to a competitive market?; (2) does it face challenges regarding implementation, including judicial proceedings?; and (3) how to tackle these challenges? We find that China's FCRS promotes a competitive market to some extent, but diverse issues need to be tackled in the coming years. Some policymakers still lack understanding of the system. Public antitrust enforcement also faces understanding and capability problems to fully implement the FCRS. The review standards are not specific enough. Regarding judicial scrutiny of the FCRS, we note that also judges lack knowledge of the FCRS, especially in primary courts. Court jurisdictions for filing administrative monopoly litigation are not of high enough rank. In addition, the nature of the FCRS brings up doubts when entering into litigation as the case has to be connected with the Anti-Monopoly Law (AML). Consequently, we formulate several suggestions for improvement: First, strengthening competition advocacy and FCRS training for policymakers, antitrust enforcement officials, and judges. Second, establishing disciplinary and incentive mechanisms. Third, increasing enforcement capacity. Fourth, specifying industry-specific review standards. In terms of judicial scrutiny, in addition to the training for judges, we also propose to reform the administrative proceeding system, adding corresponding clauses connected to Chapter V of the AML and the FCRS into the Administrative Procedure Law. Abstract administrative actions should also have the possibility to initiate litigation in the near future, and administrative monopoly cases should be filed at least to an intermediate court or intellectual property court, rather than to a primary court. The establishment of a dedicated competition court could also add value. Last, we recommend upgrading the FCRS to proper law.

Keywords: China, Fair Competition Review System, Evaluation, Case study, Administrative monopoly

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1 INTRODUCTION

In recent decades, an increasing interest in the evaluation of competition policy can be found in internal studies carried out by competition authorities as well as in academic research.¹ Ex post evaluation has been recognized as a powerful tool for authorities to assess the effect of newly issued competition policies on the economy² and subsequently improve their performance.³ Case studies are widely used in competition policy research to evaluate the effect of a policy, mostly in the three largest jurisdictions, the US, China, and the EU. Single case studies are more frequently applied than multiple case studies, and the organizational level mostly constitutes the unit of observation.⁴

However, since China's Fair Competition Review System (hereinafter FCRS) was promulgated on the 14th of June 2016, based on the *Opinions of the State Council on Establishing a Fair Competition Review System During the Development of Market-oriented System*⁵ (hereinafter *Opinions*), a huge amount of literature discusses the FCRS at a theoretical level, with the majority of publications in Chinese. The topic covers the introduction of the FCRS and its significance, challenges, and possible improvements⁶; discusses exceptional provisions⁷ and incentives implied in the FCRS⁸; the relationships with the Anti-Monopoly Law

¹ K. Hüscherlath & N. Leheyda, *A Methodology for the Evaluation of Competition Policy*, 6(2) Eur. Competition J. 397–425 (2010).

² H. H. Chang, *Ex Post Evaluation of Antitrust and Unfair Competition Fines on Firms: Empirical Evidence from Taiwan*, 13(1) J. Competition L. & Econ. 103–124 (2017).

³ W. E. Kovacic, *Using Ex Post Evaluations to Improve the Performance of Competition Policy Authorities*, 31 (2) J. Corp. L. 503–548 (2005).

⁴ S. Lyu, C. Buts & M. Jegers, *Case Studies in Competition Policy Research: A Systematic Literature Review*, 4 (2) Eur. Competition & Reg. L. Rev. V–XXVII (2020).

⁵ State Council (1 June 2016) (Guo Fa [2016] No.34). *Opinions of the State Council on Establishing a Fair Competition Review System During the Development of Market-Oriented Systems*. See http://www.gov.cn/zhengce/content/2016-06/14/content_5082066.htm (accessed 3 Sept. 2021).

⁶ J. Shi, *Issues on Strengthening the Fair Competition Review System*, (1) Admin. Reform 43–46 (2017) (in Chinese); Y. Huang & B. Wu, *China's Fair Competition Review: Introduction, Imperfections, and Solutions*. *Competition Policy International*, Antitrust Chronicle, vol. 3, Winter 2017 (18 Mar. 2018), <https://www.competitionpolicyinternational.com/chinas-fair-competition-review-introduction-imperfections-and-solutions/> (accessed 3 Sept. 2021); Y. Kuang, *On the Improvement and Suggestions for China's Fair Competition Review System*, (16) Legal Sys. & Soc'y 17–18+48 (2019) (in Chinese); J. Zhu, *On the Obstacles to the Implementation of the Fair Competition Review System and Its Solutions*, (1) Econ. L. Rev. 96–122 (2019) (in Chinese); M. Liu, *On the Defect and Improvement of the Self-Review Approach of the Fair Competition Review System*, (1) Econ. Res. Guide 187–189+199 (2020) (in Chinese); etc.

⁷ X. Zou, *Normative Analysis and Improvement Direction of the Implementation of Exceptions for Fair Competition Review – Using the Principle of Proportionality as an Analysis Tool*, (2) Econ. L. Rev. 209–237 (2018) (in Chinese); Y. Huang, *The Application Methods of Exceptional Provisions of China's Fair Competition Review System*, (11) China Mkt. Supervision Res. 28–31 (2019) (in Chinese); Y. Huang, *The Functional Orientation and Improvement Path of the Exceptional Provisions of the Fair Competition Review System*, (4) Shenzhen Soc. Sci. 83–91+124+157 (2020) (in Chinese); etc.

⁸ H. Jiao, *Implement Incentives for the Fair Competition Review System*, 37(10) Hebei L. Sci. 107–121 (2019) (in Chinese).

(AML) and administrative monopoly.⁹ Empirical studies on the FCRS are scarce: as far as we know, only seven articles (Table 1) and all of them are published in Chinese.

Table 1 Empirical Studies Regarding China's FCRS

Author	Publication Year	Case Studies	Research Objective
Jingjie ZHU ¹⁰	2018	Fifty-nine cases having undergone a fair competition review	To investigate the implementation of the FCRS
Siwen AOYAN ¹¹	2019	Implementation of the FCRS in Jiangsu Province	To investigate the implementation, existing problems as well as legislative measures of the FCRS
Jing TANG ¹²	2020	Implementation of the FCRS in Sichuan Province	To explore how to strengthen the FCRS under the background of building a business environment ruled by law
Juan LUO ¹³	2020	Implementation of the FCRS in W District of C City	To find the difficulties, theoretical crux, and optimization plans for the implementation of the FCRS at the local level

⁹ F. Lai, *On the Internal Relations Between the Fair Competition Review System and the Anti-Monopoly Law*, (22) *Legal Sys. & Soc'y* 84–86 (2017) (in Chinese); Z. Zhang & J. Qi, *The Fair Competition Review System in the Anti-Monopoly Law System*, (2) *Competition Pol'y Res.* 16–24 (2018) (in Chinese); L. Chen, *Fair Competition Review, Anti-Monopoly Law and Administrative Monopoly*, (1) *Academic Res.* 106–113 (2019) (in Chinese); Z. Li & J. Li, *Research on the Regulations of the Fair Competition Review System on Administrative Monopoly*, (6) *Mod. Bus. & Trade Industry* 138–140 (2020) (in Chinese); etc.

¹⁰ J. Zhu, *An Empirical Study on the Implementation of the Fair Competition Review System – Taking 59 Reviewed Cases Announced by the National Development and Reform Commission as a Sample*, (4) *Competition Pol'y Res.* 121–134 (2018) (in Chinese).

¹¹ S. Aoyan, *Study on Legislation of Fair Competition Review – Based on Analysis of Policy Measures in Jiangsu Province*, 18(3) *J. Nantong Vocational & Technical Shipping C.* 15–19 (2019) (in Chinese).

¹² J. Tang, *Research on the Fair Competition Review System Under the Background of the Business Environment Ruled by Law: Taking Sichuan Practice as an Example*, (28) *Legal Sys. & Soc'y* 63–64 (2020) (in Chinese).

¹³ J. Luo, *Fair Competition Review System's Empirical Analysis and Approach Optimization*, (01) *Guanghua L.* 186–199 (2020) (in Chinese).

Rubing TANG ¹⁴	2020	City C's cleaning up of current policy measures that exclude or restrain competition	To analyse the implementation of the FCRS from three points of view: the review bodies, related industries, and violations of review standards
Sulun ZHANG & Songsong XU ¹⁵	2021	Implementation of the FCRS in Henan Province	To investigate the implementation achievements, dilemma, and optimization path of the FCRS
Xin GE & Lijuan WANG ¹⁶	2021	Implementation of the FCRS in Gansu Province	To investigate the local implementation of the FCRS under the background of 'Double Cycle'

Source: own compilation based on literature review in chronological order

The objective of this article is to evaluate the implementation of China's FCRS by means of a thorough case study of the first FCRS lawsuit, Shenzhen THSware Technology Co., Ltd. (hereinafter *THSware*) suing the Department of Housing and Urban-Rural Development of the Jiangxi Province (hereinafter *DHURDJ*) and the Jiangxi Construction Engineering Cost Administration (hereinafter *JCECA*) for violating the FCRS. Three important questions are under investigation: (1) is the FCRS conducive to a competitive market? (2) does it face implementation challenges, also in the judicial proceedings?, and (3) if challenges are detected, what are possible measures to tackle them? Our data mainly stem from the analysis of diverse documents and semi-structured interviews. Two case analysis techniques are applied, i.e., time-series analysis and explanation building. We find that China's FCRS can help to promote a competitive market to some extent. However, the policy faces implementation challenges, especially during judicial proceedings. Subsequently, several suggestions for improvement are formulated.

This article makes multiple contributions. First, as most extant literature on the FCRS is descriptive and theoretical, an empirical study certainly adds value.

¹⁴ R. Tang, *On the Perfection of the Fair Competition Review System in China: Taking City C's Cleaning Up Current Policy Measures of Eliminating or Restricting Competition as an Example*, 34(3) J. Chongqing U. Tech. (Soc. Sci.) 141–149 (2020) (in Chinese).

¹⁵ S. Zhang & S. Xu, *On the Optimization Path of Fair Competition Review System – Taking the Practice of Henan Province as an Example*, 40(1) J. Xuchang U. 130–134 (2021) (in Chinese).

¹⁶ X. Ge & L. Wang, *Reflections on the Local Implementation of the Fair Competition Review System Under the Background of Double Cycle – Taking Gansu Province as an Example*, (05) Shanghai Bus. 121–125 (2021) (in Chinese).

Second, this study collects a large amount of first-hand information on the case studied, clearly increasing understanding and knowledge regarding the first FCRS lawsuit. Third, to the best of our knowledge, this is the first study to explore whether the FCRS contributes to a competitive market. Fourth, it is also the first study to evaluate the implementation of the FCRS during judicial proceedings. Last, by interviewing diverse stakeholders, e.g., lawyers, judges, policymakers, antitrust enforcement officials, and academic experts, this study will provide an all-around perspective regarding this FCRS case.

The remainder of this article is structured as follows. Section 2 presents the framework of China's FCRS. Section 3 provides the research questions, methodology, and data. Section 4 presents the case analysis and results. First, we provide a detailed description of the case by means of time-series analysis. Then, the explanation-building technique helps to provide answers to each of the three research questions. Section 5 concludes the study with a summary of the main findings, research limitations as well as suggestions for further study.

2 CONTEXTUAL FRAMEWORK

In 1992, the 14th National Congress of the Communist Party of China stated that the objective of China's economic system reform was to establish a socialist market economy. The market should play a fundamental role in resource allocation under national macro-control.¹⁷ This played a significant role in China's economic and social development. In the successive National Congresses of the Communist Party of China, there were different descriptions of this decision.¹⁸ They all indicate that China attached great importance to the construction of a socialist market economy. In 2013, the Third Plenary Session of the Eighteenth Central Committee of the Communist Party of China stated that the core issue of an economic system reform is to handle the relationship between the government and the market and to let the market play a decisive role in the allocation of

¹⁷ Jiang Zemin (Then President of the People's Republic of China), *Accelerating the Pace of Reform, Opening Up, and Modernization, and Winning Greater Victories in the Cause of Socialism With Chinese Characteristics*, Report at the Fourteenth National Congress of the Communist Party of China (12 Oct. 1992), http://www.gov.cn/test/2007-08/29/content_730511.htm (accessed 3 Sept. 2021).

¹⁸ In 1997, the 15th National Congress of the Communist Party of China stated, 'let the market play a fundamental role in resource allocation under national macro-control'; In 2002, the 16th National Congress of the Communist Party of China stated, 'give full play to the fundamental role of the market in resource allocation'; In 2007, the 17th National Congress of the Communist Party of China stated, 'to better play the market as the fundamental role in the allocation of resources from the institutional perspective'; In 2012, the 18th National Congress of the Communist Party of China put forward, 'to make the market play the fundamental role in the allocation of resources to a greater extent'.

resources.¹⁹ In 2015, the State Council proposed to strengthen the AML and the position of competition policy.²⁰

The objective of competition policy is to protect and promote competition, to establish a free, fair competitive market environment, and to avoid monopolies.²¹ Monopolies can be divided into economic monopolies and administrative monopolies based on their nature.²² Administrative monopolies refer to the abuse of administrative power by administrative bodies and other public organizations authorized by laws and regulations to eliminate or restrict competition.²³ ‘Administrative monopolies, in a broad sense, are any government (administrative, judicial, or legislative) restrictions or distortions of competition, where the market could play a role’.²⁴ Administrative monopoly is a product of China’s transition from a centrally planned economy to a socialist market economy. Its impact on the economy and society exceeds the impact of an economic monopoly.²⁵ It not only has harmful consequences such as reduced resource allocative efficiency, high prices, low quality, and insufficient innovation caused by economic monopolistic behaviour but also establishes market barriers through administrative power, which hinder the formation and operation of a unified national market. It is also claimed to boost corruption and undermine government credibility.²⁶ As long as China is still in the primary stage of socialism, administrative monopolies will exist in various forms, and acting against these administrative monopolies should constitute the main task of China’s anti-monopoly policy.²⁷

¹⁹ Central Committee of the Communist Party of China, *Several Big Decisions on Comprehensive Deepen Reform Issues*, Passed at the Third Plenary Session of the Eighteenth Central Committee of the Communist Party of China (15 Nov. 2013), www.gov.cn/jrzq/2013-11/15/content_2528179.htm (accessed 3 Sept. 2021).

²⁰ The State Council of China, *Some Opinions on Advancing Reform of Price Mechanism* (12 Oct. 2015), http://www.gov.cn/xinwen/2015-10/15/content_2947548.htm (accessed 3 Sept. 2021).

²¹ X. Wang, *The Fundamental Position of Competition Policy and Its Main Realization Path*, (5) Price Supervision & Anti-Monopoly China 24–29 (2016) (in Chinese).

²² S. Shi, *The Economic Analysis on the Administrative Monopoly* (Beijing, China: Social Sciences Academic Press 2006) (in Chinese).

²³ J. Shi, *Building the Decisive Role of the Market in Resource Allocation by Breaking Administrative Monopoly – A Decennial of Implementing China’s Anti-monopoly Law* (3 Aug. 2018), http://www.legaldaily.com.cn/zt/content/2018-08/03/content_7610562.htm (accessed 3 Sept. 2021) (in Chinese).

²⁴ Z. Zhang & B. Wu, *Governing China’s Administrative Monopolies Under the Anti-Monopoly Law: A Ten-Year Review (2008–2018) and Beyond*, 15(1) J. Competition L. & Econ. 718–760 at 2 (2019).

²⁵ Shi, *supra* n. 22; Shi, *supra* n. 23.

²⁶ Shi, *supra* n. 23.

²⁷ Shi, *supra* n. 22.

Just like in other Asian countries and regions,²⁸ China's AML²⁹ already took effect a while ago, on the 1st of August 2008. Apart from prohibitions on anti-competitive agreements, abuse of dominance, and anti-competitive concentrations, the AML also includes a prohibition on administrative monopolies aiming to deal with government-related restrictions.³⁰ Chapter V of the AML mainly targets the abuse of administrative power to eliminate or restrict competition, which also gets insights from Russia and some Eastern European Countries.³¹ It includes six articles (32 to 37), which respectively forbid administrative bodies abusing their powers to restrict enterprises or individuals to operate, purchase, or use commodities provided by their designated products (Article 32); hinder the free movement of commodities nationwide (Article 33); exclude or restrict nonlocal operators participating in bidding (Article 34); exclude or restrict foreign enterprises to invest or establish branches (Article 35); compel operators to engage in monopolistic activities (Article 36); formulate regulations that exclude or restrict competition (Article 37). However, in practice, due to an immature competition policy system from 2008 to 2016, administrative monopoly cases are very rare, and the progress towards fully competitive markets is quite slow. The restriction on administrative monopolies and the protection of market competition seem to be inadequate within the AML.³² Therefore, a new competition institution was needed to supplement the AML and curb administrative monopoly.

On the 14th of June 2016, the State Council of China published the *Opinions of the State Council on Establishing a Fair Competition Review System During the Development of Market-oriented System*, which marked the establishment of China's FCRS. As the Deputy Director of the National Development and Reform Commission said, the purpose of implementing China's FCRS is to regulate government-related behaviours at the source, preventing the introduction of policy measures that eliminate or restrict market competition, and ensuring that

²⁸ The process of adopting competition law in Asia has taken place over almost one century. The Philippines adopted its first competition law in 1925; Japan did so in 1947; Korea enacted its competition law in 1980. Taiwan followed in 1992. Thailand and Indonesia adopted a competition law in 1999. India followed in 2002, then Singapore and Vietnam in 2004. China, Malaysia, and Hong Kong introduced competition laws in 2007, 2010, and 2012 respectively. ASEAN Member States committed themselves to introduce competition policies and laws by 2015 and all ASEAN Member States apart from Cambodia have complied with this commitment. Cambodia is still in the process of finalizing its competition law. See *Research Handbook on Asian Competition Law* (S. Van Uytsel, S. Hayashi & J. Haley eds, Cheltenham, England: Edward Elgar Publishing 2020).

²⁹ Jintao Hu (Then President of the People's Republic of China) *The Anti-Monopoly Law of People's Republic of China* (30 Aug. 2007) (Order No.68), http://www.gov.cn/flfg/2007-08/30/content_732591.htm (accessed 3 Sept. 2021).

³⁰ Van Uytsel, Hayashi & Haley, *supra* n. 28.

³¹ Lei Wang & Ivo Krzic, *Beyond Legal Transplant: China's 'Shopping Around' Approach and Formation of Anti-Monopoly Law*, 40(3) *World Competition* 505–528 (2017).

³² Chen, *supra* n. 9.

the market plays a decisive role in the allocation of resources.³³ The then Director of the State Administration for Market Regulation (SAMR) stated that the implementation of the FCRS is an essential guarantee for optimizing the business environment and promoting economic development. It is not only a response to global economic development and promotion of all-around opening up but also an effective path to strengthen the status of competition policy and to implement the principle of competitive neutrality.³⁴ The promulgation of the *Opinions* is thus a crucial step to gradually establish the fundamental position of competition policy required by the Central Committee of the Communist Party and the State Council of China.³⁵ The *Opinions* has made up for the shortcomings of the AML to a certain extent by regulating administrative monopolies and by preventing the introduction of policy measures that exclude or restrict competition. The FCRS and the AML combined constitute the core (or general outline) of China's competition policy.³⁶ With the FCRS playing an ex-ante role in prevention, combined with the ex-post perspective of the AML, a double guarantee system now regulates administrative monopolies.³⁷

The purpose of the *Opinions* is to standardize relevant government activities, prevent the introduction of policy measures that exclude or restrain competition, and gradually clean up and abolish provisions and practices that hinder fair competition and the development of a unified national market.³⁸ It thus not only regulates newly issued policy measures that may contain provisions excluding or restricting competition but also the existing policy measures. It requires all public authorities or policy-making bodies to undertake a fair competition review of their normative documents, regulations, and other policy measures that relate to market economic activities, e.g., market access, industrial development, investment, bidding, government procurement, business conduct, and qualified standards.³⁹ During the process of policy formulation, a strict self-review based

³³ Zucai Hu (Deputy Director of the National Development and Reform Commission), *Speech at the Press Conference on the Interpretation of the Fair Competition Review System Organised by State Council Information Office* (7 July 2016), <http://www.scio.gov.cn/xwfbh/xwfbfh/vqfbh/33978/34769/index.htm> (accessed 3 Sept. 2021).

³⁴ Mao Zhang (Then Director of the State Administration for Market Regulation), *Deepen Understanding, Forge Ahead, and Continue to Promote Fair Competition Review System to Achieve Greater Achievements*, Speech at the Second Plenary Meeting of the Inter-Ministerial Joint Conference on Fair Competition Review (24 Jan. 2019). *Learning Book of Fair Competition Review System* 37–42 (In Price Supervision and Inspection and Anti-Unfair Competition Bureau of State Administration for Market Regulation eds, Beijing: China Industry and Commerce Press 2019).

³⁵ J. Wu, *A Crucial Step to Confirm the Fundamental Position of Competition Policy*, *People's Daily* (22 June 2016), www.gov.cn/zhengce/2016-06/22/content_5084234.htm (accessed 3 Sept. 2021).

³⁶ Chen, *supra* n. 9.

³⁷ Li & Li, *supra* n. 9.

³⁸ The *Opinions*, *supra* n. 5.

³⁹ *Ibid.*, Review Subjects of the *Opinions*.

on prescribed review standards has to be conducted. Only when the policy measure does not eliminate or restrict competition, can it be implemented. In case an elimination or restriction of competition is found, the measure shall not be promulgated, or shall only be issued after adjustments have been made. In the absence of a fair competition review, a measure cannot be put into effect.⁴⁰ The review standards are composed of eighteen criteria which are divided into four themes: market access and exit, free movement of commodities, affecting the production and operation costs, and impact on the production and operations. The exceptions are proposed policy measures that safeguard the national economic security, cultural security or are related to national defense, aim to achieve social protection such as poverty alleviation and disaster relief, aim to realize the conservation of energy resources and the protection of the public environment or other situations stipulated by laws and administrative regulations.⁴¹

After the introduction of the *Opinions*, on the 23rd of October 2017, another very important complementary document, the *Rules for the Implementation of the Fair Competition Review System (Interim)*⁴² (hereinafter *Rules*) was issued. It is composed of six chapters and twenty-six articles. The main regulations complement the *Opinions* and require administrative bodies to conduct a fair competition review following a basic review process⁴³ and to draft a clear review report,⁴⁴ which should subsequently be filed by the administrative bodies. If no written review report is formulated, then it shall be deemed that no fair competition review has been conducted.⁴⁵ The policymakers should annually undertake a fair competition review summary and submit the written summary report to the Joint Conference Office for Fair Competition Review before the 31st of January of the following year.⁴⁶ If administrative bodies fail to conduct a fair competition review or introduce policy measures in violation of the review standards, the antitrust enforcement authorities shall order correction. If they refuse to correct or do not correct in time, the directly responsible supervisor and other related personnel shall be punished in accordance with the Civil Service Law of the People's Republic of China and the Regulations on the Disposition of Civil Servants of Administrative

⁴⁰ *Ibid.*, Review Approaches of the *Opinions*.

⁴¹ *Ibid.*, Exceptions of the *Opinions*.

⁴² Price Supervision Bureau of National Development and Reform Commission (2017) (Fagai Jiajian [2017] No.1849), *Notice of the Five Departments on Printing and Distributing the Implementation Rules of the Fair Competition Review System (Interim)*, <http://www.gov.cn/xinwen/201710/5234731.htm> (accessed 3 Sept. 2021).

⁴³ See Figure 1. Fair Competition Review System-Basic Procedure from S. Lyu, C. Buts & M. Jegers, *Comparing China's Fair Competition Review System to EU State Aid Control*, (46) Eur. State Aid L. Q. 37–60 (2019).

⁴⁴ See Appendix 2. Fair Competition Review Form, *ibid.*

⁴⁵ *The Rules*, *supra* n. 42, Art. 6.

⁴⁶ *Ibid.*, Art. 11.

Bodies.⁴⁷ Regarding the four themes and eighteen review criteria, the *Rules* provides further clarifications to each of them.

On the 8th of July 2021, the *Implementation Rules of the Fair Competition Review System*⁴⁸ (hereinafter *Implementation Rules*) was issued by the SAMR combined with other four organizations, namely, the National Development and Reform Commission, Ministry of Finance, Ministry of Commerce, and Ministry of Justice. It further clarifies the provisions on procedures, review standards, exceptions, third-party evaluation, supervision, and accountability. The *Implementation Rules* contains seven chapters and thirteen articles. Compared with the *Rules (interim)* (six chapters and twenty-six articles), twenty-one articles have been revised, two articles were retained, and eight articles were added.⁴⁹ The *implementation rules* will be enacted from the date of promulgation, and the *Rules (interim)* is simultaneously abolished.⁵⁰

The establishment of the FCRS is a step-by-step process. First, from the 1st of July 2016 onwards, the provincial governments and their subordinate departments should have implemented the system. From 2017 onwards, the county and municipal governments and their affiliated departments implement it under the guidance of the provincial governments.⁵¹

3 RESEARCH QUESTIONS, METHODOLOGY AND DATA

3.1 RESEARCH QUESTIONS

It has been more than five years since the introduction of the FCRS and, as for all newly issued competition policies, questions arise regarding its performance and practical implementation. Extant literature discusses the implementation of the FCRS from a mainly descriptive and theoretical perspective. As one of the very few empirical articles, our study explores the following three research questions:

RQ1. Does China's FCRS contribute to a competitive market?

RQ2. Does the policy face challenges, including during the judicial proceedings?

RQ3. If challenges are detected, how can they be tackled?

⁴⁷ *Ibid.*, Art. 24.

⁴⁸ State Administration for Market Regulation etc., *Announcement of the Implementation Rules of Fair Competition Review System* (2021) (Anti-monopoly Regulations of SAMR, No.2). See gkml.samr.gov.cn/nsjg/fl/dj/202107/t20210708_332422.html (accessed 3 Sept. 2021).

⁴⁹ State Administration for Market Regulation, *Interpretation of the Implementation Rules of the Fair Competition Review System* (8 July 2021). See gkml.samr.gov.cn/nsjg/xwxc/202107/t20210708_332427.html (accessed 3 Sept. 2021), para. 1, Part 3.

⁵⁰ Article 31, the *Implementation Rules* (2021).

⁵¹ Zucai, *supra* n. 33.

These three research questions constitute the core of this study. The first question is, to the best of our knowledge, for the first time under investigation. The second and third questions are frequently discussed, but this would be the first time to discuss them in a litigation context. As Chen (2019) mentioned, there have been very few anti-administrative monopoly litigations during the eight years between the enactment of the AML in 2008 and the publication of the FCRS in 2016.⁵²

3.2 METHODOLOGY

To evaluate China's newly introduced competition institution, the FCRS, and to find answers to the three research questions mentioned above, a case study methodology is applied. An evaluation of competition policy can take many forms, depending on who undertakes the evaluation, the evaluated policy area, and the targets of the evaluation.⁵³ Both quantitative methodologies and qualitative approaches can be applied. Qualitative case studies make an important contribution to the evaluation literature.⁵⁴ Academic case studies carried out by competition economists and competition law experts contribute to a significant body of literature for antitrust evaluation, which both have an influence on antitrust authorities and courts.⁵⁵ Case study as a research methodology clearly improve understanding of a specific policy and its effects.⁵⁶

We opt for a single case study design. The fewer cases investigated, the more information can be collected for the case.⁵⁷ A single case study is the classic form of a case study and can fully focus on the most interesting case.⁵⁸ However, there is always a misunderstanding that a single case study cannot be generalized so that it cannot contribute to scientific development.

Flyvbjerg (2006) however finds that one can often generalize from a single case study. The strategic choice of the case can influence the generalizability to some extent, which is central to scientific development.⁵⁹ In this article, we choose the case of Shenzhen THSware Technology Co., Ltd. suing the DHURDJ and the

⁵² Chen, *supra* n. 9.

⁵³ S. W. Davies & P. L. Ormosi, *A Comparative Assessment of Methodologies Used to Evaluate Competition Policy*, 8(4) J. Competition L. & Econ. 769–803 (2012).

⁵⁴ *Ibid.*

⁵⁵ M. A. Bergman, *Quis custodiet ipsos custodes? Or Measuring and Evaluating the Effectiveness of Competition Enforcement*, 156(4) De Economist 387–409 (2008).

⁵⁶ R. E. Stake, *The Case Study Method in Social Inquiry*, in *Case Study Method: Key Issues, Key Texts* (R. Gomm, M. Hammersley & P. Foster eds, London: Sage 2000).

⁵⁷ *Case Study Method: Key Issues, Key Texts* (London: Sage 2000).

⁵⁸ G. Thomas, *How to Do Your Case Study* (London: Sage 2015).

⁵⁹ B. Flyvbjerg, *Five Misunderstandings About Case Study Research*, 12(2) Qualitative Inquiry 219–245 (2006).

JCECA for violating the FCRS. Since this is the only FCRS case going to the judicial procedure. To evaluate how the FCRS is implemented, especially for going to judicial proceedings, this case must be the best choice. Besides, no other FCRS case has attracted such wide attention in China. Perspectives of different stakeholders could jointly contribute to evaluating the implementation of the FCRS. Furthermore, the lack of a central official website for FCRS cases leads to the absence of a standard and transparent way to make the cases public. All FCRS cases are on different media websites or on official websites with only limited information available. Choosing any of them to do a thorough case study becomes unfeasible. Hence, compared to normal cases with limited information, a special and interesting case with diverse perspectives regarding the implementation of the FCRS constitutes a strategic choice.

3.3 DATA COLLECTION

'The case study is like a scrapbook or portfolio of sources and information'.⁶⁰ The vital characteristic of sound case study research is to use multiple sources of evidence.⁶¹ In general, case study evidence is mainly collected from six sources, that is, documents, archival records, interviews, direct observation, participant-observation, and physical artifacts.⁶² Documents and interviews are two indispensable sources for case study evidence.⁶³ Our study mainly collects data from documents and semi-structured interviews.

Case study evidence which is collected from documents includes the following sources:

- (1) Announcements on official websites of the two defendants, the DHURDJ and the JCECA;
- (2) Notification and administrative rulings from the Jiangxi Nanchang Railway Transportation Court;
- (3) Statement of charges, evidence list, notarization of evidence, complementary testimonies, withdrawal application from the Plaintiff, Shenzhen THSware Technology Co., Ltd.;
- (4) Letters on the legality of documents from the first defendant, the DHURDJ;
- (5) Administrative litigation defenses and testimonies from the second defendant, the JCECA;

⁶⁰ Thomas, *supra* n. 58, at 38.

⁶¹ B. Gillham, *Case Study Research Methods* (Bloomsbury: Bloomsbury Publishing 2000).

⁶² R. K. Yin, *Case Study Research: Design and Methods* (London: Sage 2009).

⁶³ R. W. Scholz & O. Tietje, *Embedded Case Study Methods: Integrating Quantitative and Qualitative Knowledge* (London: Sage 2002).

- (6) Press releases from ChinaCourt.ORG, People.cn, Legaldaily.com.cn; and
- (7) Competition law and policy regulations, e.g. the Chapter V of the AML, the *Opinions*, the *Rules* and also the *Implementation Opinions of the People's Government of Jiangxi Province on Building a Fair Competition Review System*.⁶⁴

Semi-structured interviews have been conducted with the interviewees listed in Table 2.

Table 2 *An Overview of Interviews*

<i>Interviewee</i>	<i>Who</i>	<i>Date</i>	<i>Medium</i>
Mr. Shilin WEI ⁶⁵	Principal Lawyer of the plaintiff	20 February 2020	WeChat call
Mr. Yichun SHENG	Principal Lawyer of the second defendant	17 September 2020 15 October 2020	Telephone WeChat call
Mr. Yong ZENG	Judge of the Court	17 September 2020	Telephone
An anonymous policymaker	Policy and Regulation Division of the first defendant	21 September 2020	Telephone
Prof. Dr. Zili WANG ⁶⁶	Jiangxi University of Finance and Economics	15 October 2020	WeChat call
Prof. Dr. Zongjie GUO ⁶⁷	Jinan University	20 October 2020	WeChat call

⁶⁴ People's Government of Jiangxi Province (18 May 2017) (Gan Fu Fa [2017] No.16) *Implementation Opinions of the People's Government of Jiangxi Province on Building a Fair Competition Review System in the Construction of the Market System*, zfgb.jiangxi.gov.cn/art/2017/5/19/art_11443_399835.html (accessed 3 Sept. 2021).

⁶⁵ The same lawyer successfully represented the same plaintiff, *THSware* in the first China anti administrative monopoly litigation in 2015. *THSware* sued the Educational Department of Guangdong Province which designated Glodon Software as the exclusive software provided for the trial competition of the 'Engineer Cost Basic Skills Competition' organized by National Vocational Colleges in 2014, violating the Anti-Monopoly Law. His personal profile can be found on, <https://www.dentons.com/en/shilin-wei> (accessed 29 Jan. 2022).

⁶⁶ A well-known expert in competition policy and has a sound understanding of the implementation situations of the FCRS in Jiangxi province. A personal profile can be found on, <http://cyj.jxufe.edu.cn/news-show-1715.html> (accessed 3 Sept. 2021).

⁶⁷ A distinguished expert in competition law, especially in administrative monopoly regulation. He has a very good knowledge of the FCRS as well as the case studied. He has been giving FCRS training to the personnel from Guangdong provincial administrative bodies and also discussed this case on several occasions. A personal profile can be found on, <https://law.jnu.edu.cn/5e/60/c1196a89696/page.htm> (accessed 3 Sept. 2021).

An anonymous antitrust enfor- cement official	Market Supervision and Administration Bureau of Jiangxi Province	26 October 2020	Telephone
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Source: own creation based on interviews conducted in chronological order

4 CASE ANALYSIS & RESULTS

This research mainly draws on two techniques, namely time-series analysis, and explanation building.⁶⁸ To be more specific, all the data collected from documents and semi-structured interviews will be used to develop a case description by means of time-series analysis and is subsequently analysed through an explanation-building technique seeking answers to the three research questions.

4.1 CASE DESCRIPTION

The *JCECA* is a public institution affiliated with the *DHURDJ*. The supervision and management of the market for construction engineering pricing software in the Jiangxi Province constitute part of its main tasks.⁶⁹

On the 2nd of November 2017, the *JCECA* issued a notice on its official website regarding an upcoming comprehensive evaluation of the engineering cost software used in the 2017 version of the *Construction Project Quota of Jiangxi Province*.⁷⁰ All software companies involved were required to develop pricing support software based on the 2017 edition of Jiangxi Construction Project Quota and had to apply to the *JCECA* for a comprehensive evaluation before entering the Jiangxi market. Only after successfully passing the evaluation, could the software be sold and used in the Jiangxi Province.⁷¹ If the software was used which did not pass the

⁶⁸ Yin (2009) defined four case study strategies, i.e., relying on theoretical propositions, developing a case description, using both qualitative and quantitative data, and examining rival explanations. Any of these strategies can be applied using five specific techniques: pattern matching, explanation building, time-series analysis, logic models, and cross-case synthesis. These four strategies and five techniques are not mutually exclusive. Any combination of them can be applied. See Yin, *supra* n. 62.

⁶⁹ Department of Housing and Urban-Rural Development of Jiangxi Province. *Engineering Costs*, https://www.ksnxxf.com/html/jgxx_1zsdw.201608t20160802_668612.html (accessed 3 Sept. 2020).

⁷⁰ Jiangxi Construction Engineering Cost Administration, *Notice on Carrying Out the First Comprehensive Evaluation of the Pricing Software Supported 'Construction Project Quota of Jiangxi Province' (2017 Version)* (Gan Jian Jia Fa [2017] No.17) (*Notice No.17*) (2017).

The quota of the construction project is the quantity standards for labour, materials, and machinery that are needed to produce qualified a unit engineering product. It will be updated following the development of productivity and society and will be set by local governments. The last version of the Jiangxi Construction project quota was set in 2004. Now it updated to a new version in 2017.

⁷¹ *Ibid.*, Art. 1.

evaluation, the results would be considered invalid.⁷² Entrusted by the *DHURDJ*, the *JCECA* became the main responsible for this comprehensive evaluation.⁷³

On the 22nd of November 2017, the *JCECA* entrusted Jiangxi Guozi Engineering Management Co., Ltd.⁷⁴ to carry out the comprehensive evaluation. An agreement was signed, stipulating that the evaluation should result in a ranking, of which only the first five companies pass. The remaining applicants should leave the market and redevelop their software, to potentially re-enter during the next evaluation round.⁷⁵ The comprehensive evaluation applies a percentage scale test involving sixty credits scoring 'basic conditions', including ten credits for the company, forty credits for the software, and ten credits regarding technological development and after-sale services. The remaining forty credits evaluate the accuracy of the pricing software on three different tasks: building construction, installation construction, and municipal engineering. In total, seven companies applied for the evaluation, including Shenzhen THSware Technology Co., Ltd. (*THSware*).

On the 11th of December 2017, the comprehensive evaluation results came out. *THSware* ranked sixth with 92.63 credits. On the 13th of December 2017, the *JCECA* announced the final evaluation results on its official website and published the first five companies and the name of their software program. On the 22nd of December 2017, the *DHURDJ* also published the final announcements of the comprehensive evaluation results on its official website.⁷⁶ It announced that the products of these five companies qualify and can enter the Jiangxi market. The use of software from other companies in the Jiangxi pricing software market will be investigated and can be sanctioned.

THSware was founded in May 2000, mainly developing and providing technology products and services for the engineering and construction industry.⁷⁷ It has been providing pricing software services in the Jiangxi Province for many years. The evaluation results entailed that the firm could not continue to provide services for their current customers, but also lost the right to develop new business. *THSware* believed that the evaluation was not based on the technological ability of their software programs, nor on their service performance, but showed abuse of

⁷² *Ibid.*, Art. 2.

⁷³ *Ibid.*, Art. 3.

⁷⁴ Jiangxi Guozi Engineering Management Co., Ltd., <http://www.jxgzgc.com/guanyuwomen/> (accessed 3 Sept. 2021).

⁷⁵ *Comprehensive Evaluation Document*, signed by Jiangxi Guozi Engineering Management Co., Ltd. and Jiangxi Construction Engineering Cost Administration on 22 Nov. 2017, Art. 9.1.9.

⁷⁶ Department of Housing and Urban-Rural Development of Jiangxi Province, *Announcement of the First Batch Comprehensive Evaluation Results of the Supporting Pricing Software for the 2017 Version of the Construction Project Quota* (2017), zjj.jdz.gov.cn/nzcms_show_news.asp?id=7270 (accessed 3 Sept. 2021).

⁷⁷ Shenzhen THSware Technology Co., Ltd., *Company Overview* (2020), <https://www.thsware.com/oldthsware/gsgk.aspx?id=1> (accessed 3 Sept. 2021).

administrative power erecting entry barriers for the Jiangxi construction pricing software market. Moreover, there was no doubt on whether the evaluation procedure had undergone a fair competition review. The absence of such a review would clearly breach the FCRS, potentially harming *THSware* and other applications. To be more specific, the following law and regulations might have been violated:

(1) Article 32 of the AML:

Administrative bodies and other public authorities shall not abuse administrative power to limit or designate certain operators to provide products.

(2) Criteria regarding market access and exit of the *Opinions*:

Unreasonable and discriminatory entry and exit conditions shall not be set:

Public authorities shall not restrict the operation, purchase, and use of goods or services of specific operators.

(3) Article 14.1.3 of the *Rules*:

Without law or State Council's regulations, public authorities shall not set market entrance barriers in the name of registration, annual inspection, production supervision, certification, verification, designation, renewal, and requirement to establish branches, etc.

(4) *The Implementation Opinions of the People's Government of Jiangxi Province on Building a Fair Competition Review System*:

Provincial governments and their affiliated departments should completely review the policy measures that eliminate or restrict competition before the end of September 2017.

After bilateral negotiations, this dispute still could not be solved. *On the 18th of January 2018*, *THSware* entrusted principal lawyer Mr. Shilin WEI, to submit an administrative complaint to the Jiangxi Nanchang Railway Transportation Court. One week later, *on the 25th of January 2018*, the case was formally filed with litigation number (2018) Jiangxi 7101 Xing Chu No.132⁷⁸. It was reported as 'the first FCRS lawsuit' by Chinese media.⁷⁹

On the 12th of February 2018, the *JCECA* submitted a statement of defense to the Court. *On the 20th of April 2018*, the Court notified the plaintiff, *THSware*, and the first defendant, the *DHURDJ*, as well as the second defendant, the *JCECA*, to exchange evidence and hold a pre-court meeting *on the 11th of May 2018*. *On the 28th of May 2018*, the *JCECA* submitted a new administrative lawsuit reply. *On the 12th of June 2018*, the *DHURDJ* submitted a 'Letter on the

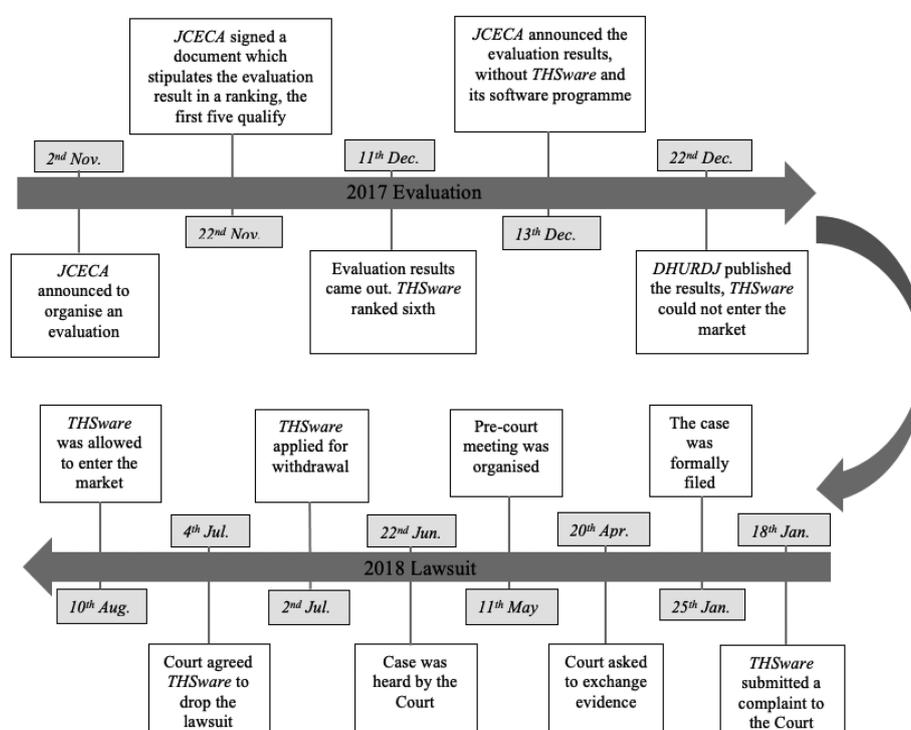
⁷⁸ [(2018)赣7101行初132号].

⁷⁹ See <https://www.chinacourt.org/article/detail/2018/01/id/3186140.shtml>; <http://legal.people.com.cn/n1/2018/0127/c42510-29790614.html>; http://www.legaldaily.com.cn/index/content/201801/26/content_7459988.htm?node=20908, etc. (accessed 3 Sept. 2021).

Legality of Ganjianjia [2005] No. 10 Document' and a 'Letter of Legality Statement about Article 56 of Ganjianzi [2010] No. 3 Document'⁸⁰ to the Court.

On the 22nd of June 2018, the case was heard at the Second Trial Division of Jiangxi Nanchang Railway Transportation Court. However, on the 2nd of July 2018, THSware submitted a withdrawal application to the Court. Two days later, on the 4th of July 2018, the Court published an administrative ruling agreeing with THSware to drop the lawsuit. Hence, the first FCRS lawsuit resulted in a withdrawal before a decision came out. Figure 1 presents the timeline of the case.

Figure 1 Timeline of the Case



Source: own creation based on case study

4.2 CASE ANALYSIS

This part provides a detailed case analysis and answers to the three research questions.

⁸⁰ [赣建价[2005]10号] and [赣建字[2010]3号]. These two documents were accused by the plaintiff had violated the FCRS.

4.2[a] *Research Question 1: Does China's FCRS Contribute to a Competitive Market?*

Perfect competition is typically characterized by: (1) many buyers and sellers; (2) largely homogenous products; and (3) free entry and exit.⁸¹ Although the litigation resulted in a withdrawal of the case before a decision was reached, at least *two positive effects* can be reported:

4.2[a][i] *THSware Was Allowed to Enter the Jiangxi Market*

Shortly after the case was heard by the Court, the defendants possibly realized their position was not defensible. They proposed a reconciliation with *THSware* and promised that if *THSware* withdrew the accusation, they were allowed to re-enter the Jiangxi market, just by symbolically reapplying for an evaluation. After careful consideration, *THSware* agreed. Thus, one month later, *on the 10th of August 2018*, the defendants introduced a new document on their official websites,⁸² with an attachment of 'Qualified software name lists of the second batch of the comprehensive evaluation results of the 2017 version of the engineering quota pricing supporting software'. Two software programs developed by *THSware* and Fujian Chenxi Information Technology Co., Ltd. were now qualified to enter the Jiangxi engineering pricing software market. These two companies and their software programs ranked 6th and 7th respectively in the first comprehensive evaluation.

4.2[a][ii] *The DHURDJ Cleaned Up the Existing Policy Measures Restricting Fair Competition*

In addition to *THSware* being allowed to enter the Jiangxi market, this lawsuit also pushed the defendants to comply with the FCRS. Just twelve days later, after the withdrawal of the accusation, *on the 16th of July 2018*, the *DHURDJ* drafted the '*Review results of the existing policy measures that exclude or restrict fair competition*' which was published on its official website on the *14th of January 2019*.⁸³ Seventeen normative documents listed with their numbers and titles were announced to be abolished and six normative documents were to be rectified. Interestingly, the

⁸¹ N. G. Mankiw, *Principles of Economics* (Boston: Cengage Learning 2015).

⁸² Department of Housing and Urban-Rural Development of Jiangxi Province, *Announcement on the Comprehensive Evaluation Results of the Second Batch of 2017 Project Quota Supporting Pricing Software in Jiangxi Province* (10 Aug. 2018) (Ganjianjia[2018] No.3), zjj.jdz.gov.cn/nzcms_show_news.asp?id=7299 (accessed 3 Sept. 2021).

⁸³ Department of Housing and Urban-Rural Development of Jiangxi Province, *Notification on Clearing Up Results of the Current Policy Measures that Eliminate or Restrict Fair Competition* (16 July 2018), zjt.jiangxi.gov.cn/zcwj_1/xgfzxxwj/201901/t20190114_734774.htm (accessed 3 Sept. 2021).

documents to be changed include two⁸⁴ that were brought up by *THSware* as being in violation of the FCRS and on which the *DHURDJ* had submitted a 'letter on the legality' to the Court on *the 12th of June 2018*. The lawsuit thus had an impact beyond the construction software market. Note however that this review process was supposed to be concluded by September 2017, more than one year earlier.

In short, the FCRS can intensify competition. Despite the withdrawal of the case, *THSware*, and Fujian Chenxi Information Technology Co., Ltd could enter the market and compete with the five companies, as initially selected, in the Jiangxi construction pricing software market. Besides, it triggered the review process of current policy measures issued by the defendants that possibly exclude or restrict competition and speed up the fair competition review procedures, forcing the defendants to abolish and rectify normative documents that eliminate or restrict fair competition. As Professor Wang believes, 'The FCRS is conducive to promoting fair competition in China. This is good. But more time is needed for the system to mature'.⁸⁵

4.2[b] *Research Question 2: Does China's FCRS Face Challenges?*

Multiple challenges have been detected while studying the *THSware* case. Table 3 provides a summary. Afterward, we will present each of these challenges in detail.

Table 3 An Overview of the Challenges Detected

<i>Perspective</i>	<i>Challenge</i>	<i>No.</i>
Policymaker	Lack understanding of the FCRS	(i)
Enforcement	Lack understanding and capabilities	(ii)
The FCRS	Review standards are not sufficiently specified	(iii)
Litigation	Most judges lack knowledge of the FCRS	(iv)
	Anti-administrative monopoly litigation at primary courts	(v)
	The nature of the FCRS results in legal uncertainty during litigation	(vi)

Source: own creation based on case analysis and results

⁸⁴ Ganjianjia [2005] No. 10 Document (赣建价[2005]10号) and Ganjianzi [2010] No. 3 Document (赣建字[2010]3号).

⁸⁵ Interview with Zili WANG, professor at the Institute of Industrial Economics, Jiangxi University of Finance and Economics (WeChat Voice Call, 15 Oct. 2020).

4.2[b][i] Policymakers Still Lack Understanding of the FCRS

Perhaps, the major challenge is a lack of awareness by policymakers and administrative bodies. As then Director of the SAMR, Mr. Mao Zhang, said, ‘the traditional governance concepts and methods show great inertia. For a long time, many policymakers did not have a strong market awareness, and believed that they knew better than the market mechanisms, and consequently excessively interfered in the market’.⁸⁶ ‘At the beginning of the litigation process, the responsible officials did not realize their mistakes and behaved rather arrogantly. After the second stage of their defense at the Court, the Deputy Director of the *DHURDJ* realized the faults, and subsequently proposed an agreement’.⁸⁷ Professor Guo also believes that:

The FCRS is promoted by a small number of officials behind the scenes. Most other officials from high as well as lower levels do not yet understand the essence of the system. They acknowledge that the FCRS is a good policy, but the traditional concepts used in practice have not changed. The idea that fair market competition could stimulate vitality, enhance economic efficiency, and finally positively impact the country and its population is not yet obvious for many policymakers.⁸⁸

4.2[b][ii] Antitrust Enforcement Officials Cannot Yet Fully Implement the FCRS

First, since the FCRS was completely new, the antitrust enforcement officials needed time to absorb the policy in their practices. *Second*, due to institutional reform, the fair competition review work has to be done by new staff members. In earlier stages, the fair competition review work was mainly a responsibility of the National Development and Reform Commission. From 2018 onwards, the SAMR was founded to deal with this policy area. The institutional reform also influenced the local antitrust enforcement authorities:

This system was introduced not long ago in the National Development and Reform Commission and soon the institutions reformed and staff re-adjusted. The combination of new staff and an entirely new process certainly slowed down the implementation, especially in lower-level antitrust authorities such as at the county level. Most of them do not yet know what this FCRS is meant to achieve exactly.⁸⁹

⁸⁶ Zhang, *supra* n. 34, at 40.

⁸⁷ Interview with Shilin WEI, senior partner at Dentons Law Firm in Beijing Office (WeChat Voice Call, 20 Feb. 2020).

⁸⁸ Interview with Zongjie GUO, professor and deputy dean at Law School & Intellectual Property School; Director of Competition Law and Industrial Development Research Centre, Jinan University (WeChat Voice Call, 20 Oct. 2020).

⁸⁹ Interview with antitrust enforcement official, Market Supervision and Administration Bureau of Jiangxi Province (Telephone, 26 Oct. 2020).

Third, there is insufficient staff to carry out the fair competition review work at the lower levels of the authorities. 'We only have four staff members in charge of the fair competition review work, but at the same time, they also have to do other tasks'.⁹⁰

As professor Guo summarized:

For practical enforcement, the staff is not sufficiently equipped at lower levels of antitrust authorities. Some departments do not even have one dedicated official. Especially, after the institutional reform in 2018, many organizations changed staff, and these new officials have yet to familiarize themselves with the FCRS.⁹¹

4.2[b][iii] Review Standards Are not Sufficiently Specified

The *Opinions* stipulates four themes and eighteen criteria as review standards to follow during a fair competition review process. The *Rules* further provides explanations for each of the eighteen criteria. However, in practice, the review standards still meet challenges. As indicated by an official from the first defendant 'Some of the review standards are too general. We have to conduct a fair competition review based on our own understanding. But every policymaker's understanding is different. In addition, the review results are interpreted differently'.⁹² Besides, 'even though we have a fair competition review form, different understandings of the review standards are still problematic'.⁹³

4.2[b][iv] Most Judges Lack Knowledge of the FCRS

Professor Guo mentioned, 'I have met many judges, and found that they have never understood the AML before accepting anti-monopoly cases'.⁹⁴ This was confirmed by the judge Mr. Zeng:

We have never received any training on the FCRS and the AML before. Due to the reform of the court system, we accept administrative litigation cases from October 2017 onwards. Previously we only accepted railway transportation cases. The FCRS case was filed in January 2018 with little or no time to learn and no experience at all with anti-administrative monopoly litigations. That case was thus very difficult for us to handle.⁹⁵

⁹⁰ *Ibid.*

⁹¹ Interview with Zongjie GUO, *supra* n. 88.

⁹² Interview with an anonymous policymaker, from the Policy and Regulation Division of the Department of Housing and Urban-Rural Development of Jiangxi Province (Telephone, 21 Sept. 2020).

⁹³ *Ibid.*

⁹⁴ Interview with Zongjie GUO, *supra* n. 88.

⁹⁵ Interview with Yong ZENG, judge at the Jiangxi Nanchang Railway Transportation Court (Telephone, 17 Sept. 2020).

Besides, he confirms that they still have not received training on the FCRS and the AML:

Maybe, in the developed coastal Provinces, like Jiangsu, Zhejiang, Guangdong, they have received more training and have some experience with administrative cases. However, there are still relatively few administrative cases inland. Except for this one case, our court has not yet received another administrative monopoly lawsuit.⁹⁶

According to Mr. Wei, this played an important role when deciding to withdraw the lawsuit: ‘Since judges have no background knowledge on the AML, the FCRS, nor any administrative monopoly litigation experience, we were afraid that the judge would take a negative decision’.⁹⁷

4.2[b][v] Anti-administrative Monopoly Litigation at Primary Courts

Anti-administrative monopoly litigations are treated as normal administrative litigations. Most of the anti-administrative monopoly litigations can only be filed at the primary court of first instance.⁹⁸ Only (1) the cases of litigation against the State Council or local People’s Governments at or above the county level; (2) customs cases; (3) big and complex cases in this jurisdiction and (4) other cases under the jurisdiction of the intermediate court regulated by other laws can be filed at the intermediate court of first instance litigation.⁹⁹ Now the railway transportation court in each province mainly accepts administrative litigation cases. Therefore, this lawsuit was filed at the Jiangxi Nanchang Railway Transportation Court, since the two defendants are departments of the People’s Government of the Jiangxi province. ‘The court jurisdiction for this case constitutes one of the main reasons to withdraw the case. Because, on the one hand, the judges at the primary court are not experienced in fully interpreting the FCRS. On the other hand, they may not be independent enough’,¹⁰⁰ the principal lawyer of *THSware* said.

4.2[b][vi] The Nature of the FCRS Results in Legal Uncertainty During Litigation

The principal lawyer of the second defendant, Mr. Sheng complained that ‘this is in fact not an FCRS lawsuit, since the fair competition review is an internal review

⁹⁶ *Ibid.*

⁹⁷ Interview with Shilin WEI, *supra* n. 87.

⁹⁸ President of People’s Republic of China (1 July 2017) (Order No. 71). Administrative Procedure Law (2017 Amendment), Art. 14.

⁹⁹ *Ibid.*, Art. 15.

¹⁰⁰ Interview with Shilin WEI, *supra* n. 87.

procedure conducted by administrative bodies, an abstract administrative act,¹⁰¹ not within the scope of administrative litigation. Administrative litigation must deal with specific administrative actions'.¹⁰² The comment is confirmed by Professor Guo, 'even though the fair competition review is an internal review procedure, once it is done, it is not a matter of fair competition review anymore but rather an issue of the AML. Since the FCRS has not yet become a law, it needs to be combined with the AML and the Administrative Procedure Law to enter litigation'.¹⁰³ Professor Wang believes that 'this case must be regarded as a fair competition review case. There is no problem to meet the standards for construction pricing software evaluation, but the limited number of five qualified applications is unreasonable, clearly violating the FCRS'.¹⁰⁴ The principal judge of this case also believes that 'this is the first fair competition review lawsuit. It is hard to say whether it violated the fair competition review or not without a final judgment, but the lawsuit was initiated mainly from the perspective of violations of the FCRS'.¹⁰⁵

4.2[c] *Research Question 3: Possible Measures to Improve China's FCRS?*

In terms of the six challenges we have detected, corresponding solutions are put forward. Table 4 presents an overview of them. Afterward, we will present each of them in detail.

Table 4 An Overview of Solutions

<i>Perspective</i>	<i>Solution</i>	<i>No.</i>
Policymaker	Strengthen competition advocacy and training	(i)
	Disciplinary and incentive mechanisms	(ii)
Enforcement	Strengthen competition advocacy and training	(i)
	Increase staff resources	(iii)
The FCRS	Specify industry-specific review standards	(iv)

¹⁰¹ In China, an abstract administrative act refers to the universally binding rules of conduct formulated by the administrative bodies for unspecified persons and unspecified matters, including administrative regulations, administrative rules, and other universally binding decisions and orders, etc. A specific administrative act refers to administrative bodies exercising administrative powers to conduct unilateral acts targeting specific citizens, legal persons, or other organizations, for specific matters. See http://www.npc.gov.cn/zgrdw/npc/flsywd/flwd/2002-04/18/content_293208.htm (accessed 3 Sept. 2021).

¹⁰² Interview with Yichun SHENG, lawyer of Jiangxi Guanrui Law Firm in Nanchang (Telephone, 17 Sept. 2020; WeChat Voice Call, 15 Oct. 2020).

¹⁰³ Interview with Zongjie GUO, *supra* n. 88.

¹⁰⁴ Interview with Zili WANG, *supra* n. 85.

¹⁰⁵ Interview with Yong ZENG, *supra* n. 95.

Litigation	Strengthen competition advocacy and training for the judges	(i) (v)
	Reform administrative proceedings	(vi)
	Establish competition courts	(vii)
	Embed the FCRS in legislation	

Source: own creation based on case analysis and results

4.2[c][i] Strengthen Competition Advocacy and FCRS Training for Policymakers, Antitrust Enforcement Officials and Judges

Policymakers call for more training on the FCRS. ‘We suggest more FCRS training from national to provincial level. First, it emphasizes the importance of the system. Second, it can build clearer awareness of the review standards, which facilitates our work during the review process’.¹⁰⁶ He also pointed out the current weaknesses of the training. ‘We currently receive training on the FCRS, but it is neither yearly nor extensive. Only a small part of the policymakers had a chance to attend the training’.¹⁰⁷ The antitrust enforcement official also calls for FCRS training for staff members as well as for policymakers. ‘We hope that the central government will strengthen training for our staff and administrative bodies’.¹⁰⁸ He further explained, ‘the fair competition review work can only be done with the cooperation of every administrative body. The leaders and those responsible for implementation should all have knowledge on the FCRS’.¹⁰⁹ Besides, training for judges about administrative monopoly proceedings becomes urgent, especially for judges from primary courts. Thus, frequent and extensive FCRS training to all levels of policymakers, antitrust enforcement officials as well as judges (especially at primary courts) is highly recommended.

4.2[c][ii] Disciplinary and Incentive Mechanisms

‘The FCRS is designed from the perspective of government. As there is no real internal driving force, external power and incentive should vitalize the system’ Mr. Wei said.¹¹⁰ Both private and public antitrust enforcement face challenges. The FCRS still has not been embedded into legislation and thus leads to legal uncertainty when entering into judicial review. Furthermore, antitrust enforcement

¹⁰⁶ Interview with an anonymous policymaker, *supra* n. 92.

¹⁰⁷ *Ibid.*

¹⁰⁸ Interview with antitrust enforcement official, *supra* n. 89.

¹⁰⁹ *Ibid.*

¹¹⁰ Interview with Shilin WEI, *supra* n. 87.

authorities have no ‘weapons’ to deal with violations. As the antitrust enforcement official said, ‘based on the *Opinions* and the AML, if we find that administrative bodies have violated the FCRS, we cannot decide on appropriate penalties. We can only send them a “Letter of Advice”, which requires them to correct the situation. Thus, cooperation is essential’.¹¹¹ Therefore, next to training, we can also recommend strong disciplinary and incentive measures to push policymakers to emphasize the importance of the FCRS and speed up the implementation. The SAMR together with three other organizations issued a document in 2020 developing an incentive and disciplinary mechanism. It stipulates that:

To promote the implementation of the FCRS as an important part of the supervision work and depending on the situations to consider incorporating the implementation of the FCRS into the evaluation system of governance by law and construction of a government under the rule of law, it is necessary to praise and promote those who have achieved remarkable results and adequately implemented the FCRS. Those who have slow progress or no progress at all should be promptly urged for rectification, and those who have problems and have caused adverse consequences should be treated strictly in accordance with laws and regulations.¹¹²

Professor Guo indicated that:

The FCRS is closely related to administrative monopoly proceedings. The FCRS is a pre-procedure. If policy measures do not undergo a fair competition review, administrative monopolies could be created. Why have administrative monopolies not yet been eradicated? Because there is no clear accountability and no clear legal responsibility system. If the accountability problem is not resolved, administrative monopolies will never be overcome.¹¹³

He further supplements:

We must increase the degree of accountability from the establishment of legal liabilities, set up clear procedures for accountability, and at the same time, request to financially compensate for the damages caused. Up to now, we still did not see any reports of policymakers being held accountable for failing to conduct fair competition reviews. There is only corrective action, no financial responsibility.¹¹⁴

We believe that strong and clear accountability and incentive systems can incentivize policymakers to change their traditional conceptions and build competition consciousness.

¹¹¹ Interview with antitrust enforcement official, *supra* n. 89.

¹¹² State Administration for Market Regulation, National Development and Reform Commission, Ministry of Finance & Ministry of Commerce, *Notice on Further Advancement of Fair Competition Review System* (国市监反垄断〔2020〕73号) (12 May 2020), http://gkml.samr.gov.cn/nsjg/fldj/202005/t20200512_315127.html (accessed 3 Sept. 2021).

¹¹³ Interview with Zongjie GUO, *supra* n. 88.

¹¹⁴ *Ibid.*

4.2[c][iii] Increase Enforcement Capacity

A shortage of antitrust enforcement officials becomes more and more obvious with the increasing load of antitrust enforcement tasks in China. Many scholars and practitioners have noticed this problem. Chinese antitrust enforcement resources are severely lacking compared with its counterparts in the USA and the EU. Before the institutional reform, three organizations responsible for antitrust enforcement were operational in China, while now after the reform they are combined into one organization,¹¹⁵ most staff have been reallocated to other departments, the personnel left for antitrust enforcement are less, even for the Anti-Monopoly Bureau of SAMR. The same problem also exists in provincial, autonomous regions, and municipalities, especially for county-level antitrust enforcement authorities. Thus, the staff responsible for the FCRS is substantially lower. The full implementation of FCRS needs the guarantee of a strong enforcement capacity.¹¹⁶

4.2[c][iv] Specify Industry-Specific Review Standards

We believe that the review standards need to be more detailed. It is easier for policymakers to undertake fair competition reviews by themselves when the review standards are more specific and clearer. We suggest specifying the review standards for each industry at the national level. Since different industries have different characteristics, each ministry and commission can specify the review standards based on their characteristics, which will make it easier for policymakers to understand and to operationalize the fair competition review.¹¹⁷

The SAMR also addressed this issue in the newly published notice, ‘to specify review standards, study and formulate the fair competition review standards based on industries.’¹¹⁸

4.2[c][v] Reform Administrative Procedure

First, although the 2014 amendment of the Administrative Procedure Law expanded the scope of accepting lawsuits to twelve items compared to its 1989

¹¹⁵ Previously, China had three public antitrust enforcement authorities: the Ministry of Commerce (MOFCOM) is responsible for merger control; the National Development and Reform Commission (NDRC) is responsible for price-related market dominance, monopoly agreement, and administrative monopoly; the State Administration of Industry and Commerce (SAIC) for non-price abuse market dominance, monopoly agreement, and administrative monopoly. From Aug. 2018 onwards, the State Administration for Market Regulation combines them together.

¹¹⁶ Interview with Shilin WEI, *supra* n. 87 and Zongjie GUO, *supra* n. 88.

¹¹⁷ Interview with an anonymous policymaker, *supra* n. 92.

¹¹⁸ State Administration for Market Regulation, National Development and Reform Commission, Ministry of Finance & Ministry of Commerce, *supra* n. 112.

version of Administrative Procedure Law with only eight items. The added items include one that especially addresses administrative behaviours. It stipulates that the People's Court accepts the lawsuits filed by citizens, legal persons, or other organizations that accuse the administrative organs of abusing administrative power to eliminate or restrict competition.¹¹⁹ However, this item still faces ignorance by judges. The judges just consider administrative monopoly cases from the perspective of administrative litigation. Thus, we suggest corresponding clauses on administrative monopoly litigation to be added in the Administrative Procedure Law better connecting with Chapter V of the AML as well as with the FCRS. Second, we suggest that abstract administrative acts could also result in litigation in the near future since, in practice, most administrative monopolies are caused by abstract administrative acts. A lack of effective judicial review has caused some administrative bodies to consider their own interests and make decisions that restrict or exclude competition.¹²⁰ The possibility of abstract administrative actions to result in litigation is called for by most scholars and practitioners. Some scholars even believe that the new Administrative Procedure Law deletes the 'specific administrative actions' wording which incorporates abstract administrative actions.¹²¹ However, other scholars point out that the deletion does not mean that abstract administration acts can also be accepted by the People's Court since the Administrative Procedure Law further stipulates, 'the People's Court will not accept litigations brought by citizens, legal persons or other organizations on the following matters: administrative regulations, rules or universally binding decisions and orders formulated and issued by administrative organs'.¹²² This means that abstract administrative acts can only be judicially reviewed based on the occurrence of specific administrative acts, and cannot directly initiate litigation.¹²³ *Third*, we suggest that administrative monopoly litigation should be filed at least at the Intermediate People's Court or at the Intellectual Property Court of the first instance since the primary courts have limited experience, capacity, and independence to deal with complicated administrative monopoly litigations.

¹¹⁹ Administrative Procedure Law of the People's Republic of China, item 8, Art. 12, http://www.npc.gov.cn/wxzl/gongbao/2014-12/23/content_1892467.htm (accessed 3 Sept. 2021).

¹²⁰ Li & Li, *supra* n. 9.

¹²¹ D. Liu, *Judicial Relief of Administrative Monopoly Caused by Anti-abstract Administrative Act*, (2) *Econ. L. Res.* 138–144 (2016)

The 1989 original version of Administrative Procedure Law stipulated, 'the People's Court accepts lawsuits initiated by citizens, legal persons, and other organizations against the following specific administrative actions' (Art. 11). The 2014 amendment of Administrative Procedure Law stipulates, 'the People's Court accept the following lawsuits brought by citizens, legal persons or other organizations' (Art. 12), which deleting 'specific administrative actions'.

¹²² Administrative Procedure Law of the People's Republic of China, *supra* n. 119, item 2, Art. 13.

¹²³ L. Liao, *Deconstruction and Reconstruction of Anti-administrative Monopoly Litigation – Taking the Item 8, Article 12 of Administrative Procedure Law as the Starting Point*, (1) *Econ. L. Forum* 106–125 (2017) (in Chinese).

4.2[c][vi] Establish Competition Courts

Since court jurisdiction for infrequent anti-administrative monopoly litigations is at a very low level, it is difficult to push administrative monopoly litigation forward, which is also one of the main reasons for little administrative monopoly litigations in China. Professor Guo puts forward an advice which we believe to be potentially very helpful:

Most judges have no knowledge regarding the AML before accepting their first anti-monopoly case. As anti-monopoly cases require specific and detailed knowledge, a competition court will be composed temporarily of any three of six judges who are allocated in different courts at the capital city of each province to deal with anti-monopoly litigations. These six judges can receive professional training on competition law from seminars, legislative and judicial processes. The first instance will be filed at the Intermediate Court and the second instance at the Supreme Court of each province and municipality, which can ensure the correct application of the AML.¹²⁴

Establishing a competition court can improve the efficiency and quality of the anti-monopoly litigations. It can play an important part in controlling economic and administrative monopolistic behaviour.

4.2[c][vii] Embed the FCRS in Legislation

So far, the FCRS is only founded on a normative document of the State Council, the *Opinions*, and the implementation *Rules* introduced by five ministries and commissions. To fully implement the FCRS, it is better to introduce external supervision. Embedding the FCRS into law so that it can be judicially reviewed, will further implementation. As professor Guo stated, ‘for the FCRS to be really implemented, it must be legally binding. It should be incorporated into the AML amendments as much as possible, and correspondingly added into judicial review procedures, so that it can truly become a “tiger with teeth”’.¹²⁵ It is good to see that the FCRS is added in the draft revision of the AML which was published for public comments in January 2020.¹²⁶ One article added in the ‘General’ section (Chapter 1) stipulates that ‘the State establishes and implements a fair competition review system, which regulates government administrative behaviors, and prevents the introduction of policies and measures that eliminate or restrict competition’.¹²⁷

¹²⁴ Interview with Zongjie GUO, *supra* n. 88.

¹²⁵ *Ibid.*

¹²⁶ State Administration for Market Regulation, *Announcement of the State Administration of Market Supervision on the Revised Draft of the Anti-Monopoly Law (Draft for Public Comments)* (2 Jan. 2020), www.samr.gov.cn/hd/zjdc/202001/t20200102_310120.html (accessed 3 Sept. 2021).

¹²⁷ Draft revision of the Anti-Monopoly Law of the People’s Republic of China (*draft for public comments*) (*in attachment*), Art. 9.

In Chapter 5 we also find an article that addresses the FCRS. 'Administrative bodies and other organizations authorized by laws and regulations to manage public affairs shall conduct a fair competition review in accordance with relevant State regulations when formulating policy measures involving market entities' economic activities'.¹²⁸ Opinions were collected from the 2nd of January to the 31st of January 2020. In total, 265 feedback points have been collected from seventy-five experts, which are under review by the State Administration for Market Regulation at the time of writing.¹²⁹ However, 'it is difficult to say whether the final amendment of the AML will eventually turn the fair competition review system into a law since we have a lot of controversies over this issue', Mr. Wei said.¹³⁰ Hopefully, we can see the FCRS finally embedded in legislation, but it could still take a long time.

5 CONCLUSION

The Report of the Nineteenth National Congress of the Communist Party of China decided to speed up the implementation of the socialist market economy and to clean and abolish regulations and practices that hinder a unified market and fair competition.¹³¹ It is also the first real attempt to break and prevent administrative monopolies to render the socialist market economy 'fair and orderly competitive'.¹³² The Fourth Plenary Session of the Nineteenth Central Committee of the Communist Party of China further emphasized the importance of competition policy, implementing the FCRS, and strengthening and improving anti-monopoly and anti-unfair competition law enforcement.¹³³ In 2020, the Central Committee of the Communist Party and State Council of China

¹²⁸ *Ibid.*, Art. 42.

¹²⁹ State Administration for Market Regulation, *Explanation of the Acceptance of Public Opinions of the Anti-Monopoly Law Revision Draft (Draft for Public Comment)* (28 Feb. 2020), www.samr.gov.cn/hd/zjjg/202004/t20200414_314212.html (accessed 3 Sept. 2021).

¹³⁰ Consultation with Shilin WEI, senior partner at Dentons Law Firm in Beijing Office (WeChat Message, 11 July 2020).

¹³¹ Jinping Xi (President of the People's Republic of China), *Decisive Victory to Entirely Build a Well-off Society and Achieving the Great Victory of China's Special Socialism in the new Era*, Report at the Nineteenth National Congress of the Communist Party of China (18 Oct. 2017), www.gov.cn/zhuanti/2017-10/27/content_5234876.htm (accessed 3 Sept. 2021).

¹³² *Ibid.*

¹³³ Central Committee of the Communist Party of China, *Decision on the Important Issues of Upholding and Improving China's Special Socialist System to Promote the Modernization of the National Governance System and Governance Capabilities*, Passed at the Fourth Plenary Session of the Nineteenth Central Committee of the Communist Party of China (31 Oct. 2019), http://www.gov.cn/zhengce/2019-11/05/content_5449023.htm (accessed 3 Sept. 2021).

combined published a document that requires the full implementation of the FCRS.¹³⁴ In addition, the Fifth Plenary Session of the Nineteenth Central Committee of the Communist Party of China publishes the Communiqué, which proposes that one of the main objectives of economic and social development during the ‘Fourteenth Five-Year Plan’ period is to further improve the socialist market economy.¹³⁵ This shows that the Chinese Central Government is committed to fully implementing the FCRS and thus regulating administrative monopolies. Especially, on 30 August 2021, President Xi Jinping presided over the meeting of the Central Committee for Comprehensively Deepening Reform and announced that the *Opinions on Strengthening Anti-monopoly and Deepening the Implementation of Fair Competition Policies* was passed. He explained that strengthening anti-monopoly and deepening the implementation of fair competition policies are the inherent requirements for improving the socialist market economy system.¹³⁶ He further stressed to accelerate the improvement of the fair competition review mechanism, to prevent and stop the abuse of administrative power that eliminates or restricts competition.¹³⁷

The State Administration for Market Regulation is responsible for antitrust enforcement in China from its foundation in March 2018. According to Item 2 of Article 10 of the AML, the SAMR authorizes at all levels the Market Supervision and Regulation Commissions of the People’s Governments, e.g., provinces, autonomous regions, and municipalities directly under the Central Government to be responsible for antitrust enforcement within their administrative area.¹³⁸ In December 2019, the SAMR together with three other ministries and commissions issued a document that required administrative bodies to strictly undertake a fair competition review of policies and measures introduced from the 1st of January 2020, to regularly evaluate and dynamically clean up the policies and measures that have been introduced after the

¹³⁴ Central Committee of the Communist Party and State Council of China (11 May 2020). *Opinions on accelerating the improvement of the socialist market economic system in the new era.*, www.gov.cn/zhengce/2020-05/18/content_5512696.htm (accessed 3 Sept. 2021).

¹³⁵ Central Committee of the Communist Party of China, *Communiqué of the Fifth Plenary Session of the Nineteenth Central Committee of the Communist Party of China*, Passed at the Fifth Plenary Session of the Nineteenth Central Committee of the Communist Party of China (29 Oct. 2020). See www.gov.cn/xinwen/2020-10/29/content_5555877.htm (accessed 3 Sept. 2021).

¹³⁶ Xi Jinping (President of the PRC) (30 Aug. 2021). Xi Jinping presided over a meeting of the Central Committee for Comprehensive Deepening Reform: Strengthening the anti-monopoly and anti-unfair competition supervision, improving the material reserve system and mechanism, and deepening the fight against pollution. See www.gov.cn/xinwen/2021-08/30/content_5634220.htm (accessed 3 Sept. 2021), para. 2.

¹³⁷ *Ibid.*, para. 4.

¹³⁸ State Administration for Market Regulation, *Interim Provisions on Preventing Abuse of Administrative Power to Eliminate or Restrict Competition (Order No.12 of SAMR)* (25 July 2019), Art. 2, http://gkml.samr.gov.cn/nsjg/fldj/201907/t20190725_305167.html (accessed 3 Sept. 2021).

fair competition review, and to resolutely prevent and rectify the abuse of administrative power to eliminate or restrict competition.¹³⁹ In May 2020, these four ministries and commissions published a new document which states that, in about three years, an FCRS with overall coverage, complete rules, clear rights and responsibilities, effective operation and supervision will be established, which will provide more institutional guarantees for creating a market-oriented, stable and international business environment.¹⁴⁰ To execute the *Implementation Rules* next, the SAMR decides to strengthen the enforcement of AML. Combining the ex-ante fair competition review and ex-post AML enforcement of abuse of administrative power to exclude or restrict competition, a unified national market and fair competition by means of 'combined punches' will be achieved.¹⁴¹

The Chinese Central Government manifests its determination to implement the FCRS to curb administrative monopolies. The SAMR also takes steps and makes plans on how to implement and improve the FCRS. Our research aims to evaluate how the FCRS is implemented by means of a detailed case study, Shenzhen THSware Technology Co. Ltd. suing the *DHURDJ* and the *JCECA*. Our study targets three research questions: (1) does China's FCRS contribute to a competitive market?; (2) does the FCRS face challenges in implementation, including during the judicial proceedings?; and (3) if challenges are detected, how can they be tackled?

Our research finds that the FCRS contributes to a competitive market to some extent. It not only helped *THSware* and one other company, Fujian Chenxi Information Technology Co., Ltd to enter the targeted and previously foreclosed market, but also stimulated policymakers to conduct a fair competition review process of their existing policy measures. However, we also have to admit that the system still meets several challenges during the implementation phase, including during judicial procedures. *First and foremost*, policymakers still lack awareness of competition policy and the comprehensiveness of the FCRS. *Second*, the antitrust enforcement officials lack understanding and power of execution to ensure the correct implementation of the FCRS. *Third*, the review standards are far from specific and clear. *Fourth*, judges are very much short of knowledge and understanding of the FCRS. *Fifth*, court jurisdiction for anti-administrative monopoly litigations is not at the right level. *Lastly*, the nature of the FCRS faces legal uncertainty when initiating litigation.

¹³⁹ State Administration for Market Regulation, National Development and Reform Commission, Ministry of Finance & Ministry of Commerce, *Notice on Carrying Out the Clean-Up of Policy Measures that Hinder a Unified Market and Fair Competition* (国市监反垄断〔2019〕245号) (26 Dec. 2019), http://gkml.samr.gov.cn/nsjg/fldj/201912/t20191226_309506.html (accessed 3 Sept. 2021).

¹⁴⁰ State Administration for Market Regulation, National Development and Reform Commission, Ministry of Finance & Ministry of Commerce, *supra* n. 112.

¹⁴¹ State Administration for Market Regulation, *supra* n. 49, para. 5, Part 5.

As Professor Guo said, we are now at the beginning stage of the establishment of the FCRS. It already achieves very good results. Every system's implementation needs a process and transforms slowly.¹⁴² The then Director of the State Commission for Market Regulation also said that 'Fair competition review is a fundamental and overall reform task. It takes time from its introduction to full implementation. It requires long-term efforts and continuous vitality'.¹⁴³ As a response to the challenges, we propose the following solutions: *First*, strengthening competition advocacy and FCRS training for policymakers, antitrust enforcement officials, and judges; *Second*, installing disciplinary and incentive mechanisms; *Third*, increasing enforcement staff resources; *Fourth*, specifying review standards tailored to different industries; *Fifth*, reforming the administrative procedure; *Sixth*, establishing a competition court in each province, autonomous region, and municipality; *Last*, upgrading the FCRS into a law. To address administrative monopolies, Zhang & Wu (2019) designed an optimal framework that is supported by four vital pillars, the FCRS, competition advocacy, competition enforcement, and administrative litigation.¹⁴⁴ Anti-administrative monopoly litigation is another way to regulate administrative monopolies. Its ultimate value is not only to provide post-relief for the infringement of individual rights, but more importantly, it can play a regulatory and preventive role. It is better to control the administrative monopolies at the source than ex-post.¹⁴⁵

Since the establishment of the FCRS in 2016. It has achieved fruitful results, with full coverage of four governmental levels, that is national, provincial, municipal, and county. It has cleared a total of 1.89 million policy measures related to market entities' economic activities, revising and abolishing nearly 30,000 documents, reviewing 857,000 newly issued policy measures, and more than 4,100 policy measures that violated the review standards were found and corrected.¹⁴⁶ This research chose the only FCRS lawsuit case for in-depth study, it not only provides a deep investigation on how the FCRS is implemented but also takes us to the judicial proceedings. However, this study inevitably has limitations. First, interview invitations with the principal lawyer of the first defendant and the policymakers from the second defendant's perspective were declined. It is a pity that we could not have their points of view. Second, the case took place in 2017 and 2018. Though it is not the most recent case, it is still the only FCRS case going to lawsuit, hence, it is still worthwhile to study. Furthermore, choosing the only FCRS lawsuit case to evaluate the implementation of the FCRS may have potential shortcomings. However, a case study is

¹⁴² Interview with Zongjie GUO, *supra* n. 88.

¹⁴³ Zhang, *supra* n. 34, at 41.

¹⁴⁴ Zhang & Wu, *supra* n. 24.

¹⁴⁵ Liao, *supra* n. 123.

¹⁴⁶ State Administration for Market Regulation, *supra* n. 49, para. 1, Part 1.

interesting if the case studied is about the particular rather than the general.¹⁴⁷ Both single and multiple case studies are studies of a particularization rather than generalization.¹⁴⁸ Future research can possibly be done on multiple case studies to evaluate the implementation of the FCRS for a specific industry or at a certain governmental level. A more detailed economic analysis of recent cases, if possible, would also add great value.

¹⁴⁷ Thomas, *supra* n. 58.

¹⁴⁸ Robert E. Stake, *Multiple Case Study Analysis* (Guilford Press 2006).

