

Dilemmas and Optimization of Third-Party Assessment System in Chinese Fair Competition Review

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Abstract

The current predominant self-review mechanism by policy-making bodies suffers from deficiencies such as insufficient motivations, limited review capabilities, and weak external supervision. Third-party assessment, characterized by independence and specialization, is designed to mitigate these shortcomings. However, the implementation of third-party assessment faces challenges too. This paper intends to improve the third-party assessment system and to realize the legislative purpose of the system. Based on social research, discussions and exchanges with relevant parties, and the existing research results, this paper analyzes the challenges and possible optimization measures for the third-party assessment. The challenges include repulsion from policy-making bodies, insufficient independence of assessment bodies, disparity of assessment quality, and limited application of assessment outcomes. Possible optimization measures include promoting fair competition culture, increasing the acceptance of third-party assessment from policy-making bodies, enhancing the quality of third-party assessment, clarifying the relationship between policy-making bodies and assessment bodies, ensuring the independence of third-party assessments, and promoting the application of assessment results.

Keywords

Fair Competition Review, Self-Review, Third-Party Assessment, Dilemma, Optimization

1. Introduction

Fair competition review refers to the process whereby policy-making bodies or

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other agencies conduct analyses and assessments of the competitive impacts of proposed or already implemented policy measures. Policies that have the potential to exclude or restrict competition are either not enacted or adjusted to comply with relevant requirements. In order to prevent excessive government intervention in the market, optimize the business environment, and promote the establishment of a unified national market, China has established fair competition review system. The “Opinions on Establishing a Fair Competition Review System in the Construction of the Market System” (“Opinions”) issued by the State Council marked the formal establishment of Chinese fair competition review system. The “Opinions” clearly stipulate that the competition review mechanism is internal self-review by policy-making bodies. In 2017, relevant departments issued the “Implementation Rules for the Fair Competition Review System (Trial)”, revised in 2021, which defined the review subjects, objects, criteria, exceptions (exemptions), legal responsibilities, at the same time encouraging local governments and departments to entrust third-party professional organizations to assist in fair competition reviews. The “Implementation Rules” provide overly general principles regarding third-party assessment, lacking operational specificity. In 2019, The State Administration for Market Regulation¹ issued the “Guidelines for Third-Party Assessment of Fair Competition Review”, revised in 2023. The “Guidelines” specify the assessment organizations, procedures and methods, assessment outcomes and their application etc. The “Guidelines” serve as guiding principles for third-party assessment, without legal binding force.

Scholars have conducted extensive research on the fair competition review system. The research focus has gradually shifted from the construction of the competition review system to the improvement of the system. Scholars have put forward improvement suggestions from different perspectives, such as introducing third-party assessment, introducing financial incentives, and improving accountability and restraint mechanisms etc. There is relatively a little specialized research on the third-party assessment system of fair competition review, and the research mainly focus on the advantages, difficulties, and improvement of third-party assessment. However, the existing research do not distinguish between specific assessment and comprehensive assessment, treating them as a whole for macroscopic research [1] [2] [3], and ignoring the differences between the two. Third-party assessment for fair competition review includes specific assessments on policies and measures and comprehensive assessments on the implementation of fair competition reviews in certain region or department. They have different functions: specific assessments emphasize the supplementary func-

¹The State Administration for Market Regulation (SAMR) is Chinese State Council Anti-monopoly enforcement agency. In 2021, SAMR added the National Anti-monopoly Bureau, establishing three antitrust department: the Competition Policy Coordination Department, Anti-monopoly Enforcement Department I, and Anti-monopoly Enforcement Department II. Anti-monopoly Enforcement Department I is responsible for economic monopoly behaviors, while Anti-monopoly Enforcement Department II is responsible for Anti-monopoly reviews and enforcement of business concentration. The Competition Policy Coordination Department oversees the promotion of competition policy, organizes the implementation of the fair competition review system, and is responsible for enforcing administrative monopolies.

tion [3], aiming to remedy the lack of professional capability of policy-making bodies, usually initiated by the policy-making bodies themselves. The comprehensive assessments focus on performance assessment and supervision, aiming to promote the work of fair competition review in general, usually initiated by the Offices of the Joint Conference on Fair Competition Review² at the same level or higher level. Due to their different functional orientations, they are different in assessment motives, assessment objects, and the relationships between assessment bodies and entrusting parties, facing different challenges and problems.³ Therefore, a differentiated study should be conducted on the two. In addition, some viewpoints in existing research lack sufficient first-hand information; the analysis of some existing viewpoints is not deep enough, and the improvement measures are not comprehensive enough. This article primarily focuses on the specific assessments, intending to do more in-depth and comprehensive analysis of the existing problems and possible improvement measures for third-party assessment system.

In practice, the third-party assessment system, designed as a supplementary measure to the self-review mechanism of fair competition review, has not fully realized its legislative goals. This article aims to analyze the practical dilemmas and challenges of the third-party assessment, and subsequently propose recommendations for improvement and optimization.

2. The Institutional Value of Third-Party Assessment in Fair Competition Review

To further strengthen the implementation of the fair competition review system, the third-party assessment mechanism has emerged as a supplementary measure to the self-review mechanism. With its independence and specialization expertise, the third-party assessment can overcome shortcomings such as insufficient self-review motivation, lack of professional knowledge and poor supervision.

2.1. To Remedy the Insufficient Self-Review Motivation of Policy-Making Bodies

Chinese current fair competition review system primarily relies on self-review by policy-making bodies. While self-review mechanism can effectively utilize the industry-information advantages of these bodies, but remains a lack of motiva-

²According to the "Implementation Rules", local governments at or above the county level are responsible for establishing and improving the system of the Joint Conference on Fair Competition Review. They are responsible for overall coordination, supervision, and guidance of fair competition review work in their respective regions. The offices of the joint meeting are located within the market regulation department and responsible for the daily operations of the joint meetings.

³The third-party comprehensive assessments are unconventional, and in some places they are implemented once every three years. They are usually initiated and actively introduced by Offices of the Joint Conference on Fair Competition Review. The third-party bodies are completely independent from the policy-making bodies. And third party assessment can achieve sharing in a certain area. But the third-party specific assessment faces repulsion from policy-making bodies, insufficient independence and limited application of assessment outcomes.

tion to review thoroughly, potentially resulting in the policies that exclude or restrict competition. On one hand, due to local fiscal revenues [4], governments may formulate fiscal policies that favor local enterprises to increase tax revenues. On the other hand, self-review mechanism encounters a conflict of interest [5]. As stakeholders, policy-making bodies inevitably exhibit tendencies towards self-protection and self-interest when formulating policies. In practice, some local government officials may enact policies with local protectionism to boost local GDP and to consolidate the local economy, such as administrative monopoly restricting the entry of products or services from other regions, thereby disrupting fair competition in the market. Sometimes, policy-makers, in pursuit of short-term economic development goals, may overlook the impact of their policies on market competition, and tend to justify their actions and relax review standards during the self-review process.

Introducing third-party assessment characterized by neutrality can effectively overcome these shortcomings and break the deadlock of the self-review conflict of interest. The third-party assessment system operates independently is crucial. It is important to ensure that third-party assessment organizations have no conflicting interests or affiliation relationships with policy-making bodies.

2.2. To Remedy the Insufficient Review Capacity of Policy-Making Bodies

Except for lacking motivation for thorough self-review, policy-making bodies also face challenges in their own review capabilities. Firstly, some bodies lack professional personnel with the required specialized skills. In practice, personnel responsible for competition review are usually part-time employees of the legislative affairs department, tasked not only with competition review but also with other legal duties such as legality reviews and legal publicity, thereby lacking sufficient expertise. Secondly, policy-making bodies usually comprise multiple departments with a large number of policies, which making it difficult for competition review personnel to cope effectively. Therefore, during the self-review process, policy-making bodies often need the support from third-party organizations. Third-party assessment bodies are usually composed of professionals with specialized knowledge and assessment experience, meeting the requirements for review. They can effectively supplement the insufficient capabilities of policy-making bodies and enhance review efficiency.

2.3. To Introduce Social Supervision

Third-party assessment is also a form of social participation and supervision [6]. Fair competition internal review is the internal supervision of policy-making agencies over their own limiting competitive behaviors, which requires high self-consciousness. The implementation effect is unsatisfactory. In China, third-party assessment organizations are non-governmental organizations, such as consulting firms, law firms, or universities etc. In the process, policy-making

agencies need to submit the drafted or existing policies and measures with related materials and data to third parties. The third parties will review and assess them according to certain methods. When they discover that policies and measures exclude or restrict competition, they can propose modification suggestions or alternative solutions with “less competition damage”. Third-party assessment also is a social supervision on policy-making agencies to a certain extent.

All in all, the fair competition review system serves as a legal tool to curb administrative monopolies, safeguarding market economy. The current predominant self-review mechanism by policy-making bodies suffers from deficiencies such as insufficient motivations, limited review capabilities, and weak external supervision. Third-party assessment, characterized by independence and specialization, is designed to mitigate these shortcomings.

3. Analysis on the Dilemma of Third-Party Assessment System

In theory, Chinese third-party assessment system for fair competition review should effectively promote the implementation of fair competition review systems. However, in reality, third-party assessment system face some challenges.

3.1. Psychological Repulsion to Third-Party Assessment from Policy-Making Bodies

As the primary entities responsible for self-review, policy-making bodies exhibit a traditional governmental self-isolation and exclusivity [7].⁴ This results in a reluctance towards third parties, which perceived as “outsiders”. The self-isolation and exclusivity hampers third-party entities from effectively accessing the necessary information and data required for assessments, causing information asymmetry [8] and thereby reducing the objectivity and comprehensiveness of assessment outcomes. Consequently, assessments under such circumstances may have difficult to gain genuine acceptance and recognition from both the government and citizen, with diminishing in their utility [9].

The underlying cause of the self-isolation and exclusivity lies in a lagging concept of competition neutrality. In a market economy, government intervention should be moderate, and a healthy market environment depends on effective competition. When market failure requires the government’s “tangible hand” to intervene, it is also necessary to always adhere to the dominant position of market resource allocation [10]. The fair competition review system is one of the contents of the competition neutrality principle. The principle of competitive neutrality is a guide to activate the market’s deterministic role in resource allocation, which should have been integrated into the entire work of local governments and functional departments. But because of the GDP-oriented practices, local governments do not attach enough importance to introduce third-party

⁴The government itself is a relatively closed operating system with a tendency to exclude external forces.

assessment. It is difficult to fully activate the fair competition review third-party assessment system.

3.2. Insufficient Independence of Third-Party Assessment

The independence of third-party assessment is a prerequisite for the credibility of assessment results. In practice, however, third-party assessment sometimes lacks sufficient independence. First, the independent status of third-party assessment is unclear. The absence of explicit legal provisions is a significant reason. Existing laws and administrative regulations, such as the Anti-Monopoly Law and the Fair Competition Review Regulations, do not specifically address the third-party assessment. While “Guidelines” emphasize the necessity and feasibility of introducing third-party assessment mechanisms into the fair competition review, being soft law in nature, which has difficult to exert strict force. Secondly, remuneration payment design for third-party assessment is unscientific. According to the “Guidelines”, the third-party assessment funds are managed within the government budget. The policy-making bodies are responsible for the payments. This increases the likelihood of third-party assessment organizations being influenced for interests capture, resulting in assessment outcomes that align with the preferences of the policy-making bodies. Additionally, according to the “Guidelines”, the relationship between the third-party agencies and policy-making bodies is an entrustment relationship [3]. But in practice, the relationship is not adequately rationalized, sometimes as a “supervisory” relationship,⁵ reducing the neutrality and independence of third-party assessment organizations.

3.3. Varied Quality of Third-Party Assessment

Third-party assessment bodies vary widely in quality with inadequate selection mechanisms, which fail to ensure the quality of assessment outcomes. Firstly, Articles of the “Guidelines” provide vague provisions regarding third-party assessment bodies, lacking clear market access standards. This leads to both good and bad assessment organizations entering the assessment market. According to the “Guidelines”, third-party bodies are defined as ones that have no conflict interest with policy-making agencies and possess the necessary assessment capabilities. They includes government decision-making consulting and assessment institutions, universities, research institutes, professional consulting firms, law firms, and other social organizations. The scope of third-party bodies appears broad, but the quality of them is different. There are little high level third-party bodies, especially in underdeveloped areas, to undertake or effectively complete third-party assessment services transferred by the government [11]. Secondly, the “Regulations” do not specify selection rules. The “Guidelines” vaguely stipu-

⁵According to the “Guidelines”, if third-party bodies in serious violations or breaches of contract, the relevant policy-making bodies have the right to report to the local joint meeting, which will then report to the inter ministerial joint meeting step by step. The inter ministerial joint meeting will then circulate a notice of criticism and record it as a bad credit.

late that policy-making bodies have the right to determine third-party assessment bodies through government purchase, without detailing specific selection methods. It may lead to some local government departments to abuse their powers on choosing third-party bodies that are beneficial or “obedient” to them. They sometimes directly appointing bodies without open bidding or other competitive procurement methods [12]. Thirdly, there is a shortage of professional talents in third-party bodies. Competition review has strong professionalism, requiring staff with high levels of competition culture knowledge and cultural literacy. Due to the late development of competition law in China and inadequate dissemination of competition culture, there is a shortage of specialized talent in this field. As a result, third-party bodies often lack the necessary talent pool to meet the requirements of fair competition review.

3.4. Limited Utility of Third-Party Assessment Results

The effective application of third-party assessment is an acceptance of them. However, in practice, due to the lack of relevant measures and supporting mechanisms, the impact of assessment outcomes remains limited. First, according to the “Guidelines”, assessment results are only advisory, without legally binding. Articles of the “Guidelines” stipulate that policy-making bodies may consider assessment outcomes as “important reference”. If the recommendations of third-party assessment are not adopted, the policy-making bodies are only required to “explain the reasons”. Second, the legal accountability for policy-making bodies violating fair competition review is insufficient. The most commonly used accountability method is “order to correction”, which lacks sufficient deterrence. This results in insufficient attention from policy-making bodies to the third-party assessment outcomes, of course the quality of these assessments themselves may also be a contributing factor. Third, the sharing mechanism for third-party assessment results is imperfect, hindering the maximization of their utility. While the “Guidelines” encourage policy-making bodies to share assessment outcomes appropriately, it do not specify operational rules, lacking legal binding force. In China, there are multiple levels of local governments, including provincial, municipal, and county levels. Similar functional departments at different levels and regions may formulate similar policies to implement national or higher-level regulations and policies. So there are many similar practices of restricting or excluding competition. As government purchase of services, if the results of third-party assessment only apply to the policy-making bodies as the clients, it can lead to repeated assessments and resource waste, hindering the utility of third-party assessment results and dissemination of competition culture.

In short, the third-party assessment encounters challenges, including repulsion from policy-making bodies, insufficient independence of assessment bodies, disparities in assessment quality, and limited utilization of assessment outcomes. Optimization of third-party assessment in fair competition reviews depends on coordinated and targeted measures.

4. Possible Pathways to Optimize the Third-Party Assessment System

Based on social research, valuable information was discovered. By discussions and exchange with relevant parties, the feedbacks from some policy-making agencies, third-party assessment entities, and Offices of the Joint Conference on Fair Competition Review were collected. The existing research had been sorted out and analyzed, with valuable viewpoints absorbed. Based on a systematic and comprehensive summary and analysis, possible suggestions optimizing the third-party assessment system for fair competition review are proposed as the following aspects.

4.1. To Alleviate the Repulsion of Policy-Making Agencies to Third-Party Assessment

To alleviate the resistance or reluctance of policy-making bodies towards third-party assessments, it is crucial to foster the development and dissemination of competition culture, thereby creating a conducive environment for implementation. Firstly, fostering a favorable atmosphere nationwide will embed competition culture deeply in people's minds. The fair competition review system, including third-party assessment, synergizes effectively with competition culture. At the national or higher governmental levels, they should to emphasize the foundational role of competition policy and to cultivate competition culture. This can be achieved through efforts. Targeted training and dissemination of exemplary case studies are needed. It is need to enhance the understanding, support, and cooperation of policy-making bodies, particularly the leaders who directly involved in competition review. Policy-making bodies must proactively acquire competitive professional knowledge, enhance their competition culture literacy, and integrate the principle of competition neutrality into the review practice. Secondly, it is crucial to strengthen deterrence and restraint on violations of fair competition review, thereby enhancing policy-making bodies' attention to fair competition review, including third-party assessment.

4.2. To Safeguard the Independence of Third-Party Assessment

The independence of third-party assessment in fair competition reviews is the key and prerequisite. The following measures should be adopted to enhance the independence of third-party assessment. Firstly, it is proposed to elevate the legal status of third-party assessment by clearly defining. Currently, regulations concerning third-party assessment in China are mainly outlined in "Guidelines" and "Implementation Rules". However, "Guidelines" is just advisory, and Implementation Rules is departmental regulations, lacking sufficient legal authority. A low legal status often leads to policy-making bodies disregarding their importance. Unfortunately, "Regulations on Fair Competition Review" issued by the State Council on June 13, 2024, did not involve third-party assessment. It is advisable to bring provisions of third-party assessment into law in future. Sec-

ondly, steps should be taken to reduce the dependency of third-party assessment bodies on policy-making agencies, and to clarify their relationship. Third-party bodies should be strictly selected by policy making agencies in accordance with the requirements through bidding and other competition methods, reducing the “arbitrary” and “self-determination” of policy making agencies. Additionally, in terms of payment of assessment funds, the payment subject should be changed from policy-making agencies to the Offices of the Joint Conference at the same level. The implementation of these measures will strengthen the independence of third-party agencies and bolster their role in ensuring fair competition reviews.

4.3. To Enhance the Quality of Third-Party Assessment

In China, the introduction of third-party assessment is mostly encouraged rather than mandatory. Policy-making bodies have the rights to decide whether to adopt them. Elevating the quality of third-party assessment can encourage policy-making bodies to actively adopt and utilize the assessments outcomes. The quality of third-party assessment is significantly influenced by the assessment bodies themselves. Firstly, it is need to clarify the market access criteria for third-party assessment bodies. The current criteria in Articles of the “Guidelines” are somewhat broad, needing further refinement. It is advised to encourage to establish third-party assessment bodies with different professional backgrounds, meeting the different needs in specific industries and fields. Secondly, it is essential to enhance the selection procedures for third-party assessment bodies. Ensure that the third-party bodies are determined through competitive methods. The interest avoidance system is recommended too. Assessment bodies and evaluators who have conflicts of interest with the assessment matters should be excluded [13]. Additionally, the selection process and outcomes should be made public for social oversight. Since policies formulated by policy-making bodies affect the public closely, the public has the right to be informed and supervise these processes. Thirdly, efforts should be intensified to cultivate competition talent and to nurture third-party assessment bodies market. It is need to introduce talented professionals at home and abroad, and at the same time cultivate new ones by colleges and universities.

4.4. To Enhance the Application of Third-Party Assessment Results

According to the “Guidelines”, the third-party assessment results serve as recommendations, and their adoption depends on policy-making bodies. Without effective linkage mechanisms or supporting measures, the practical effectiveness of assessment results is limited. Firstly, within the existing framework, enhancing assessment linkage mechanisms is crucial [14]. On the premise of improving the quality of third-party assessment, it is necessary to prevent policy-making bodies from arbitrarily accepting or rejecting assessment results based on their preferences, especially for policies that need forcible introduction of third-party

assessments. It is advisable for policy-making bodies to consult with the Offices of the Joint Conference at the same level. Secondly, it is need to increase the attention of policy-making bodies to third-party assessment results. On the one hand, the work of fair competition reviews can be linked to accountability mechanisms and cadre assessments. On the other hand, enhancing the deterrence on violations of competition review. Additionally, publishing third-party assessment results and subjecting them to public scrutiny can generate public pressure [15].⁶ Thirdly, establishing mechanisms for sharing third-party assessment results can reduce redundant assessments of similar policy measures and optimize the usage of government funds and human resources. Depending on Chinese administrative management system, vertical or regional mechanisms should be established for share. Vertical share mechanism may focus on intra-departmental share of similar policy measures. The regional share mechanism may focus on regional share of third-party assessment information within a specific geographical area. These measures will contribute to enhancing the applicability of third-party assessment results, thereby promoting their effective integration into policy-making processes for fair competition reviews.

5. Conclusion

Since its inception, the fair competition review system has not met anticipated effectiveness due to the self-review mechanisms by policy-making bodies. Policy-making bodies lack of strong review motivation and professional expertise. The third-party assessment mechanism aims to mitigate these shortcomings. However, as a new system, third-party assessment encounters implementation challenges, including repulsion from policy-making bodies, insufficient independence of assessment bodies, disparities in assessment quality, and limited influence of assessment outcomes. Effective implementation of third-party assessment in fair competition reviews depends on coordinated measures. These possible measures include promoting the culture of fair competition, increasing the acceptance of third-party assessment by policy-making bodies, enhancing the quality of third-party assessment, clarifying the relationship between policy-making bodies and assessment bodies, ensuring the independence of third-party assessments, refining the selection mechanisms for assessment institutions, and promoting the application of assessment results. Through the synergy of these efforts can the comprehensive implementation of the fair competition review system be advanced.

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⁶For example, in the implementation measures of the Nanjing Area of Jiangsu Free Trade Zone, policy-making bodies should publicly disclose assessment results according to legal provisions, thus inviting societal oversight.

Conflicts of Interest

The authors declare no conflicts of interest regarding the publication of this paper.

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