
Competition Impact Review to Be Required for All New Chinese Regulations

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China's three Anti-Monopoly Law enforcement agencies—the National Development and Reform Commission, the Ministry of Commerce and the State Administration for Industry and Commerce—together with the Ministry of Finance and the State Council Legislative Affairs Office, on October 26 jointly published the [Rules on Implementation of the Fair Competition Review System](#) (for temporary effect) (Fa Gai Jia Jian [2017] No. 1849) (the “Rules”). The Rules are intended to implement the [Anti-Monopoly Law](#) and the State Council's [2016 Opinions on Implementation of a Fair Competition Review Market System](#), the latter of which targeted local monopolies that tended to balkanize the economy while reducing the power of the central government.

The Rules were promulgated immediately after the conclusion of the 19th Party Congress. As the Congress marked the consolidation of Xi Jinping's power atop the leadership of a Party whose supremacy was declared over all sectors of the economy throughout the country, the Rules signify a determination to prohibit anti-competitive protectionism by sub-central governments in order to enhance market-based competition. While privately-owned domestically-invested companies will be the primary beneficiaries, foreign-invested companies and foreign exporters to China should also benefit.

The Rules have temporary effect, meaning that they will have the force of law but are expected to be revised in the near term based on experience, and some degree of flexibility may be allowed in implementation until that occurs. The Rules will potentially have a very significant impact on the role of government in fostering market competition, but the depth, in practice, of the competition reviews they mandate remains to be seen.

The Rules apply both to administrative agencies and organizations with responsibilities to administer public affairs under law. Such entities are required to (i) conduct a fair competition review when formulating rules, policies, normative documents (i.e., guidelines), and other policy measures that involve economic activities in the market by business operators regarding market entry, industry development, investment, tender and bid competitions, government procurement, business operating behavior norms, and qualification standards; (ii) evaluate the impact on market

competition; and (iii) prevent exclusion or restriction of market competition (Article 2).

As part of the required competition reviews, “interested parties” – i.e., those with an interest in horizontal or vertical competitive effects of the policy measures under consideration including competitors and consumers (Articles 7 and 10) – will have an opportunity to comment during the draft stage. Policy measures may become effective only after the review has determined that they are not deemed to have an adverse effect by excluding or restricting competition except as otherwise provided by law (including national economic, cultural, and military security laws (Article 18)). Any policy measures that are deemed to have such effect may not take effect at all or may take effect only after relevant requirements have been met (Article 2 para. 2).

The Rules apply to the exclusion or restriction of products and services produced in parts of China that are not under the jurisdiction of the relevant administrative agency or organization or imported (Articles 7 and 10). They also apply to discrimination against investment by business operators from elsewhere in China, but it is unclear whether they also apply to foreign investment (Article 15). The Rules should apply to foreign-invested enterprises established in other parts of China, however, because they are Chinese legal persons.

Selective benefits to business operators in the form of financial benefits or subsidies, tax exemptions, grants of land use rights without charge or at a deeply discounted rate, environmental regulatory preferences, or other financial preferences are prohibited unless otherwise permissible under law. Such preferences would be permissible under law if they are embodied in central government law, but not if they are embodied in unauthorized protectionist sub-central regulations and policies (Article 16).

Aggrieved interested parties may appeal to the issuing entity or to its immediately superior entity (Articles 21-23). There is no provision directly authorizing businesses or consumers that believe a new policy will adversely affect fair competition to challenge the policy in court under the Administrative Litigation Law or another statute. There is also, however, no provision preventing such litigation, and the provisions providing for public comment appear to allow such litigation by parties who can establish standing.

The Rules take immediate effect, provided that any entity that cannot perform its responsibilities under the Rules may solicit comments from the anti-monopoly enforcement agencies (Article 11); and all entities subject to the Rules are subject to an annual reporting requirement by January 31 of the following year (Article 10). Remedial measures may be required if anti-competitive effects are discovered after a new regulation has entered into effect (Article 12).

The Rules promise benefits for foreign companies which are often hampered by sub-central government requirements to establish local subsidiaries or discriminated against in their efforts to do so. However, because many such companies still fear retribution for aggressive assertion of their interests, their prospects in the event of local protectionism may still be contingent on the vigor of central government enforcement.

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