
Policies and Regulations to Be Made Consistent With Anti-Monopoly Law

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When China enacted its [Anti-Monopoly Law](#) (AML) in 2007, some called it “China’s Economic Constitution,” anticipating that it would serve as the statutory basis for fundamental market-based reform of China’s economy.

While the law has yet to fulfill that ambition, the National Development and Reform Commission (NDRC) on December 12 posted the [2017-2018 Work Plan to Overhaul Existing Policies and Measures that Exclude and/or Restrict Competition](#) (Work Plan) (dated December 5), jointly issued with the Ministry of Finance and Ministry of Commerce (MOFCOM) to implement the [State Council’s Opinions Concerning the Establishment of a Fair Competition Review System in the Buildup of the Market System \(2016\)](#) (Opinions). The Opinions require both reviews of new policies and measures (but not laws) and an orderly clarification of existing policies to ensure they are consistent with principles of fair competition embodied in the AML, i.e., to ensure they do not violate the AML’s prohibition on abuse of administrative power to exclude and/or restrict competition. Because other laws, such as the Anti-Unfair Competition Law, the Bidding Law and the Government Procurement Law, are not included in the overhaul, the AML cannot be regarded as a “constitution” superior to such laws. That is, such other laws are not subject to the prohibition of administrative power provisions in the AML.

According to the Work Plan, State Council departments, local governments at all levels and subordinate departments thereof are required—taking into account the purposes and policies of the AML—to overhaul existing regulations, normative documents, and other policies and measures that provide for local protectionism, enable abuse of administrative power to exclude and/or restrict competition, or create transaction and/or market access barriers. These provisions include, specifically:

- (i) imposition of unreasonable or discriminatory entry and exit conditions;
- (ii) imposition of restrictions on trading, purchase and use of goods and services provided by particular operators;
- (iii) imposition of discriminatory prices and subsidy policies against non-local and imported

goods and/or services;

(iv) imposition of restrictions on entry of non-local and imported goods and/or services into the local market or prevention of the outflow of local goods and/or services;

(v) elimination or restriction of non-local operators from participating in local bid and tender activities; and

(vi) forcing business operators to engage in monopolistic acts as specified in the AML.

The overhaul will proceed in five stages:

(i) December 2017–January 2018: State Council departments, local governments at all levels and subordinate departments thereof will undertake internal examinations and create a list of policies to be eliminated.

(ii) On or before March 2018: State Council departments, local governments at all levels and subordinate departments thereof will undertake verification of the policies and measures that may be eliminated and conclude preliminary opinions.

(iii) On or before May 2018: State Council departments, local governments at all levels and subordinate departments thereof will publish the policies and measures that have been abolished, adjusted or made subject to a grace period or transition period, and publish any exceptions for policies and measures deemed indispensable to achieve policy goals.

(iv) On or before July 2018: Local governments and their subordinate departments will summarize and report their work.

(v) On or before November 2018: The Inter-Ministerial Joint Meeting on Fair Competition Review will conduct inspections of the overhauls conducted by local governments.

The Work Plan takes immediate effect, and calls on the government entities to give full play to the role of social supervision, sufficiently listen to the opinions and comments provided by all aspects of the society, which include those with an interest in the policy measures under consideration, and effectively involve the society to conduct the overhaul led by the government.

Given the tight timeline and the incentives for officials to retain policies that discriminate against non-local business operators, it is unclear how much will be accomplished in 2018. It is also unclear whether foreign-invested enterprises will benefit as much as non-local domestic enterprises. Central government officials have, however, recently stated that foreign-invested enterprises are to be treated equally with their domestically invested counterparts, at least in those industries in which foreign investment is allowed on a wholly foreign-owned and/or joint venture basis.

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