

New Review System Milestone for Fair Market Competition

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Introduction

On June 1 2016 the State Council published its Opinions on Establishing a Fair Competition Review System in the Development of the Market Regime, signalling the formal establishment of China's fair competition review system. The fair competition review system is a major initiative to ensure fair play among participants in the Chinese market. It is also a significant instrument for promoting the development of China's socialist market economy and the reform of its economic system from the top down.

The opinions represent a key step towards establishing the competition policy and implementing the State Council's measures to streamline administration and delegate more power to lower-level governments. The opinions will also:

- have a profound influence on the supervision and regulation of government activity;
- promote market-oriented policy development;
- stimulate creativity and vitality among market players; and
- foster fair market competition.

Fair competition review system

Under the fair competition review system, government authorities must fully consider the impact of their policies and measures on market competition during the formulation stage and review any potential impact in accordance with the requirements of establishing a unified, open, orderly and competitive market system. The fair competition review system aims to:

- regulate government activity to prevent the implementation of policies or measures that would eliminate or restrain market competition; and
- ensure the decisive role of the market in resource allocation.

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It will also ensure that the government carries out its administrative functions pursuant to the law. The fundamental principles specified in the opinions are discussed below.

Respect market and prioritise competition

Under the opinions, the market economy rules must be adhered to and government micro-economic interventions minimised.

Assess entire picture and develop plan that considers all factors

It is important to focus efforts on abolishing regional blockades and industry monopolies to remove market barriers. Authorities must take into account the need to safeguard:

- national interests;
- economic security; and
- the promotion of coordinated regional development.

Scientific planning and step-by-step implementation

Establishing the fair competition review system is a long-term, systematic and complex task. As new policies are implemented, existing policies that hinder fair competition or the development of a unified national market will gradually be abolished.

Conduct reviews pursuant to law while reinforcing supervision

Under the opinions, it will be essential to align:

- the fair competition review system;
- the existing legal systems; and
- the existing administrative systems.

This coordination will enhance the fair competition review system's credibility and effectiveness.

Scope

The fair competition review system applies to all administrative regulations, rules, normative documents, local regulations and other policies and measures concerning the economic activities of market players, which are developed by administrative authorities at various levels (including the State Council) and organisations that have administrative public affairs functions (ie, policy-making authorities). Policies and measures involving the economic activities of market players which were implemented by policy-making authorities must

undergo a fair competition review during the formulation or drafting process. Applicable policies and measures include those regarding:

- market access;
- industry development;
- investment solicitations;
- tendering and bidding;
- government procurement;
- business codes of conduct; and
- qualification criteria.

Review methods

The opinions clearly stipulate that policy-making authorities must review the effectiveness and feasibility of their policies and measures during the development stage in accordance with the review system. Policies and measures cannot be introduced until they have undergone fair competition review. Policies and measures that are considered not to exclude or limit competition can be implemented, while those that will exclude or limit competition will not be implemented or will be implemented only after they have been adjusted to meet relevant requirements.

The opinions ensure the fairness and objectivity of an autonomous agency review by:

- providing a list of prohibitions which, if included in a policy or measure, will cause it to fail the review and not be implemented;
- strengthening supervision, including:
 - social supervision – which requires policy-making authorities to solicit public comments when reviewing relevant policies and measures. Such policies will be publicly available immediately on issue; and
 - law enforcement supervision – which requires additional surveillance and punishment of any abuse of administrative power that would eliminate or restrain competition. The timely disclosure of an enforcement case's status is also mandated; and
- reinforcing the pursuit of accountability. Relevant personnel will be held accountable if they:
 - enact policies and measures without undertaking a review; or
 - otherwise violate review standards.

Review standards

The opinions include a list of 18 prohibitions (in four categories), which aim to ensure that the fair competition review system operates correctly and transparently. The prohibitions cover relevant market entry and exit standards, under which policy-making authorities cannot:

- impose discriminatory market entry conditions;
- establish prior approval procedures with no legal basis; or
- allow undertakings to purchase or use goods or services from designated business operators.

The opinions also protect the free movement of goods. Policy-making authorities cannot enact discriminatory pricing policies for non-local goods or exclude non-local business operators from participating in local tendering and bidding. Further, policy-making authorities cannot restrict non-local business operators from investing in the local market. The opinions also clearly specify the standards that affect manufacturing and operating costs and activities. Relevant authorities cannot offer preferential policies to specific enterprises or withhold their deposits. In addition, they cannot interfere with the price fluctuations of market-oriented goods and services or set government-mandated prices unless specifically authorised to do so.

The opinions contain two catch-all provisions, which restrict relevant authorities from:

- formulating policies and measures that might prejudice the legitimate rights or interests of market players or increase their obligations; and
- violating the Anti-monopoly Law to formulate policies and measures that eliminate or limit competition.

Implementation

The fair competition review will be implemented gradually. From July 2016, all State Council departments, provincial people's governments and their departments must conduct a fair competition review when they formulate relevant policies and measures. From the beginning of 2017, all city and county people's governments and their departments must undertake fair competition reviews under the guidance of their respective superior provincial people's governments.

In accordance with the opinions, in addition to developing new policies and measures that comply with the system, relevant authorities must gradually remove or rectify existing policies and measures that severely hinder fair competition, following the principle of "whomever formulates a policy is responsible for its revision". Several provisions and practices must be abolished as soon as possible, including those that have:

- provoked a strong response from market players;
- caused problems that are relatively concentrated; and
- had a particularly acute impact.

Conversely, the opinions envision a transitional period, during which preferential policies will be preserved, such as contracts and agreements granted to enterprises. Policies and measures will also be maintained during the transitional period if their immediate termination might have a significant impact. No retroactive measures will be taken regarding preferential policies that have already been honoured.

Relationship between system and Anti-monopoly Law

Chapter 5 of the Anti-Monopoly Law stipulates that administrative departments and other organisations authorised by law or regulation to administer public affairs must not abuse their administrative power. Some of the standards prohibited under the fair competition review system mirror the prohibited behaviour in this chapter. In accordance with Article 37 of the Anti-monopoly Law, administrative authorities must not abuse their administrative power to formulate regulations that eliminate or restrict competition.

The fair competition review system and the Anti-monopoly Law share the same objective (ie, safeguarding fair competition and improving market operational efficiency).

Further, the fair competition review system supplements Chapter 5 of the Anti-monopoly Law, as the list of prohibited items in the opinions is wider than the behaviour prohibited under the law.

In addition, the Anti-monopoly Law and the fair competition review system complement each other in their regulation of government misconduct. The fair competition review system emphasises that policy-making authorities must conduct their own reviews during the planning and drafting process for policies and measures, which must be done in accordance with the standards set out in the opinions. The Anti-monopoly Law focuses on the supervision of established policies and measures, such as that undertaken by antitrust enforcement

authorities, which inspect and punish abuses of power by administrative authorities to prevent the improper intervention of fair market competition.

Comment

The establishment of the fair competition review system on the Anti-monopoly Law's eighth anniversary will assist the overall competition policy strategy by establishing an increasingly market-oriented economy. The fair competition review system mainly limits government activity and will prompt authorities to develop a fairer competition environment for enterprises. Before the system was adopted, enterprises were helpless against improper government intervention in the market, such as intervention regarding:

- discriminatory market access treatment;
- qualification standards;
- government subsidies;
- pre-approval; and
- bidding activities.

The fair competition review system offers enterprises remedies against such inappropriate interference. Enterprises can participate in drafting the relevant policies and measures and ensure that government policies and measures are developed in accordance with the opinions and the Anti-monopoly Law. Further, enterprises can file an administrative lawsuit or report a policy or measure that has not undergone a fair competition review or violates the fair competition review principles to the antitrust enforcement authorities in accordance with the opinions and the Anti-monopoly Law.

The fair competition review system is a significant step towards the establishment of a unified, open, orderly and competitive market. However, effective implementation of the fair competition review system will depend on the formulation of detailed implementation rules. In accordance with the opinions, the competition enforcement authorities (ie, the National Development and Reform Commission, the Ministry of Commerce and the State Administration for Industry and Commerce) and the State Council's legislative affairs office must each research and draft detailed fair competition review implementation rules in conjunction with their relevant departments. Specific review mechanisms and procedures are subject to the guidance of the aforementioned implementation rules. Accountability for violations of the opinions has yet to be clarified. In particular, a violation entails only that

"stern measures shall be taken after relevant circumstances are confirmed upon verification pursuant to the law". A 'violation' includes:

- the implementation of a policy or measure without subjecting it to fair competition review;
- the implementation of a policy or measure that violates the fair competition review principles; or
- the failure of a local government or department to rectify contravening policies and measures promptly.

The opinions do not expressly:

- provide for the corresponding responsibility of policy-making authorities that fail to conduct fair competition reviews; or
- clarify the status of established policies and measures that violate the opinions.

Therefore, private remedies and safeguards beyond administrative antitrust enforcement should be made available to parties damaged by policies and measures that violate the fair competition review system.