

# PROMOTE OPENNESS OR STRENGTHEN PROTECTION? APPLICATION OF LAW TO DATA COMPETITION IN CHINA



BY WEI HAN & YAJIE GAO<sup>1</sup>



<sup>1</sup> Wei Han, Doctor of Law, lecturer at University of Chinese Academy of Social Sciences; Yajie Gao, PhD candidate of Queen Mary, University of London.

# I. INTRODUCTION

User data is playing an increasingly important role in companies' business models in response to China's rapid development in the digital economy. Since Chinese online platforms are data-driven, data conflicts between various platforms have gradually attracted public attention. Even if the Anti-Monopoly Law of the People's Republic of China ("AML") has not been directly applied to data conflicts, the concept of "data monopoly" has gradually been taken seriously in both theoretical and practical circles. In July 2017, Mr. Guofeng Sun, head of the Financial Research Institute affiliated with the People's Bank of China, indicated that financial companies shall be prohibited from monopolizing data to achieve an information monopoly, becoming an "isolated information island," when promoting the development of high quality companies.<sup>2</sup> "Open access to big data" was also heatedly discussed during the "Two Sessions" held in 2018.<sup>3</sup> Nevertheless, there is no consensus with respect to whether there is data monopoly in China and whether the law shall play a role in this regard. In the opinion of Jack Ma, board chairman of Alibaba Group ("Alibaba"), it is "too naïve" to prevent data monopoly in China, since data is flowing, even if information is not.<sup>4</sup> Since 2016, there have been several data disputes concerning online platforms in China, such as the case initiated by Sina Weibo against Maimai for illegally scraping information in 2016 and the dispute between Cainiao and SF Express in 2017.<sup>5</sup>

It remains unclear whether the goal is to promote openness or strengthen the protection of data, especially personal information controlled by powerful online platforms, in the Chinese legal environment. On the one hand, whether data concerning personal information controlled by certain online platforms shall be open to the public so as to maintain effective competition would become a major problem for the Chinese competition authority. On the other hand, with enactment of the Network Security Law of the People's Republic of China ("Network Security Law") and other new laws and regulations, Chinese authorities will likely attach greater importance to protection of data concerning personal information, while infringement of user privacy will also attract attention of all walks of life. There might be more clashes between the AML requiring open access to data as competitive elements and other laws and regulations protecting personal information.

## II. ANTI-MONOPOLY RULES PROMOTING OPENNESS OF COMPETITIVE ELEMENTS

On the basis of legislation and the practice of China's AML, the possibility for data (including personal information) obtained by a certain company, especially online platforms, to be considered as important competitive elements, cannot be excluded.

### A. Concentration – Input Foreclosure

Article 28 of the AML authorizes the authority for AML enforcement to prohibit concentration which is able, or has the possibility, to eliminate or restrict competition. Furthermore, Article 7 of the Interim Provisions on Assessment of the Impact of Business Operator Concentration on Competition enacted by the Ministry of Commerce ("MOFCOM") in 2011 lists elements which must be taken into account when analyzing market entry barriers. Besides, the Provisions of the MOFCOM on Imposing Additional Restrictive Conditions on the Concentration of Business Operators (for Trial Implementation) released in 2014 also explicitly list acceptable commitments for conditionally-cleared concentrations, including but not limited to requiring the business operators to make available their respective networks, platforms and other infrastructure. In reality, M&A as well as re-structuring in the Chinese digital economic sector have happened from time to time in recent years. In early 2018, acquisitions of Eleme by Alibaba as well as Meituan's acquisition of Mobike have also attracted public attention, one of the most important aims was data integration. The Chinese competition agency will likely pay more attention to data foreclosure during anti-monopoly review in the future. Accordingly, the rules mentioned above are ready to provide a legal basis.

From the perspective of China's merger control practice, even though no case directly concerning data (input) foreclosure has been found yet, several conditionally cleared cases reflect the competition authority's concern with input foreclosure. Accordingly, behavioral remedies with respect to open access to input have been required. In 2014, MOFCOM conditionally cleared Microsoft's acquisition of Nokia's devices and services business. In the end, Microsoft was required to continue licensing its SPEs under fair, reasonable and non-discriminatory conditions as

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2 Available at: [http://finance.ifeng.com/a/20170715/15531939\\_0.shtml](http://finance.ifeng.com/a/20170715/15531939_0.shtml).

3 Available at: <http://tech.sina.com.cn/i/2018-03-06/doc-ixipenn7202082.shtml>.

4 Available at: [http://tech.cnr.cn/techgd/20170629/t20170629\\_523825156.shtml](http://tech.cnr.cn/techgd/20170629/t20170629_523825156.shtml).

5 Zhang & Gong, "The Economic Characteristics of Data Competition in China's Digital Economy," *CPI Antitrust Chronicle*, March 2018.

already promised to Standards-setting organizations.<sup>6</sup> There is the possibility for MOFCOM to regard data concerning personal information as an essential input and require the undertaking concerned to open data access to third parties in the future.

### ***B. Abuse of Market Dominance – Refusal to License***

In certain cases, if refusal to license data were analyzed from the perspective of anti-monopoly law, it may concern the controversial issue of essential facility. Article 17(3) of the AML prohibits undertakings with dominant market positions from refusing to trade with counterparts without justifiable reasons. Even if the “essential facility” principle is not explicitly listed, there is still space left for the Chinese competition authority to apply this principle. Article 4 of the Provisions for Administrative Authorities for Industry and Commerce on Prohibiting Abuses of Dominant Market Positions promulgated by the State Administration for Industry and Commerce (“SAIC”) in 2010 explicitly forbids undertakings with market dominance from refusing to trade with counterparties by rejecting the counterparties’ request to use essential facilities. Furthermore, the criteria to determine an “essential facility” are also clearly presented. Besides, the Provisions on Prohibiting the Abuse of Intellectual Property Rights to Eliminate or Restrict Competition released in 2015 by SAIC also explicitly make clear the applicability of the essential facility principle to intellectual property rights (“IPR”). In March 2017, the MOFCOM integrated drafts of the anti-monopoly guidelines against abuse of IPRs drawn up by three Chinese competition agencies and solicited public opinions, explicitly mentioning the essential facility principle.<sup>7</sup>

Chinese competition agencies have already dealt with several abuse cases concerning refusal to deal in practice, but excluding data refusal. Abuse of dominance via refusal to deal by Chongqing Southwest No. 2 Pharmaceutical Factory Co., Ltd. (“Chongqing Pharmaceutical”) was punished by the Chongqing branch of SAIC in 2016. In this case, the relevant undertaking refused to offer an input called “phenol Active Pharmaceutical Ingredient” (“API”), which is irreplaceable for preparations containing phenol. In the end, the authority required Chongqing Pharmaceutical to terminate the illegal conduct and imposed fines. As for fights for data between online platforms in China, for those entering judicial proceedings, the plaintiffs only turned to the AUCL instead of the AML. This might partly be explained by the huge burden to be born with respect to the definition of the relevant market, recognition of market dominance and other complicated issues. However, there would be increasing data conflicts between giant online platforms, including whether the essential facility theory is applicable to data disputes, while the AML would still be an important legal instrument.

## **III. OTHER LEGAL MEANS TO STRENGTHEN PERSONAL INFORMATION PROTECTION**

### ***A. AUCL***

Before enactment of the AML in 2017, the 1993 AUCL was actually a combination of *sensu stricto* anti-unfair competition law and anti-monopoly law. In 2017, the Chinese legislature amended the 1993 AUCL, deleting the types of conduct which should have been categorized as monopolistic conduct, to achieve coordination with the AML. Article 12 of the 2017 AUCL was designed to target unfair competitive conduct in the internet industry, which does not regulate conduct in relation to data directly, but acts as a miscellaneous provision: “A business operator shall not use technical means to carry out any activity that obstructs or disrupts the normal operations of online products or services lawfully provided by other business operators through affecting users’ choices or otherwise.”

We cannot conclude that the 2017 AUCL pays great attention to personal information protection only from the relevant provision itself. In practice, whether protection of personal information would be strengthened depends on how administrative authorities and courts would explain the AUCL – whether public interest or personal interest shall prevail. Nevertheless, there is no consensus in the Chinese theoretical and practical circles. Within the Chinese law community, some IPR scholars contend that the main function of the AUCL is to provide miscellaneous provisions for IPR protection, which means that the AUCL belongs to the IPR system. Others contend that the AUCL bears more characteristics of private law. In contrast, economic legal scholars hold that the AUCL shall be categorized to the public legal system, which means that it will focus more on the maintenance of market competition mechanisms for public interests. The controversy here originates from the unclear expression of Article 2 of the 1993 AUCL (Definition and Principle), which was not made clearer by the 2017 AUCL.

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6 Available at: <http://fdj.mofcom.gov.cn/article/ztxx/201404/20140400542415.shtml>.

7 Available at: <http://fdj.mofcom.gov.cn/article/zcfb/201703/20170302539418.shtml>.

We consider that application of the AUCL will be more closely connected with strengthening personal information protection for two reasons below. First, Article 2 of the 2017 AUCL introduces “consumer” as a new kind of subject whose rights and interests shall be protected. In other words, the new AUCL is placed to provide more protection to consumers. Since personal information is an essential part of consumer rights and interests, the relevant authority will gradually pay more attention in this regard. Second, from judgements made by Chinese people’s courts through applying the AUCL to cases concerning data, we find the trend of stronger protection provided to personal information. For example, in the *Sina Weibo v. Maimai* case, the court established a triple authorization principle – “user authorization” + “platform authorization” + “user authorization.” Consumers’ freedom of choice shall be respected and protected. In reality, before the 1993 AUCL was revised, Chinese courts had applied the “Definition and Principle” provision to disputes in internet and other innovative industries. With promulgation of the revised AUCL, when it comes to data competition issue, courts could choose between the internet-specific sub-miscellaneous provision of Article 12(4) and the broader miscellaneous provision of Article 2. If analyzing from the perspective of private law, it is possible that protection of personal information will prevail access to it in certain cases.

## ***B. Law on Protection of Consumer Rights and Interests***

Law of the People’s Republic of China on Protection of Consumer Rights and Interests (“Law on Protection of Consumer Rights and Interests”) was enacted in 1993, and amended in 2013 on a large scale. One of the most prominent changes was the introduction of the internet consumption provision (Article 29), setting guidelines for business operators to collect and make use of personal information. Besides, the Opinions on Strengthening Protection of Consumer Rights and Interests in Internet Consumption enacted by the SAIC in 2016 further point out that illegal conduct which might infringe rights and interests of consumer information shall be prohibited. In recent years, various branches of SAIC have also investigated several cases concerning the leak and misuse of consumer information and punished relevant undertakings. We believe that the authorities will continue to focus more on enforcement in this area.

## ***C. Network Security Law***

In order to maintain network security, safeguard cyberspace sovereignty, national security and public interests, and promote the sound development of economic and social information technology, the Network Security Law was enacted in late 2016. The Network Security Law draws a border around network operator’s use of personal information from the perspective of network information security, to name Articles 41-44 as typical examples. The enactment of the Network Security Law has attracted attention from many different circles, while a series of supporting rules have also been under discussion since then, such as the Information Security Technology: Personal Information Security Standards (BG/T 35273-2017)(“Standards”) enacted by China National Standardization Commission and officially enacted on January 24, 2018. The Standards provide detailed compliance guidelines for collecting, conserving, employing, sharing, transferring, disclosing and any other conduct concerning information processing at the state level. It is predicted that the Network Security Law will play a pivotal role in China’s digital economy in the future.

## ***D. Other Laws and Regulations to Come***

### **1. Personality Rights Section of the Civil Code**

In recent years, the Chinese legislature has tried every effort to draft the *Civil Code*. In November 2017, the release of the Personality Rights Section (Draft) triggered widespread controversies. The relevant legal basis is Article 111 of the General Rules on the Civil Law of the People’s Republic of China (“General Rules on the Civil Law”). As a whole, the Personality Right Section (Draft) treats personal information as an object of privacy rights, establishing personal information protection in the mode of “*ex-ante* restriction on application scope + authorization,” which is obvious over-privatization of personal information, in our opinion. The Civil Law Working Group affiliated with the Chinese Academy of Social Sciences challenges that, “Whether such kind of legislation mode has fully, completely and systematically reflected changes to application scenarios of personal information in modern society and a new relationship between personal rights and public interests? It is well worth deep analysis.” Furthermore, the Civil Law Working Group stated:

In today’s information era, personal information is neither object of private right nor part of property right deriving from personality right, but has become invaluable resources which shall be shared between the state, companies and individuals. Therefore, personal information legislation shall not be restricted to protection of personal rights and interests or private rights, but pay extra attention to the balance of individual and public interests during exploring information assets, and better place the public goods

role played by personal information in promoting individual comprehensive development and social advancement. It is not only in line with the whole trend, but also a must for Chinese legislation to adapt to the big data era.<sup>8</sup>

From our perspective, future development of the Personality Rights Section of the Chinese Civil Code will have a non-negligible effect on the application of anti-monopoly law to online platform data concerning personal information. If sticking with the draft released in November 2017, emphasizing private rights attributed to personal information, there might be conflicts when applying essential facility theory to data conflicts during antitrust enforcement.

## 2. E-Commerce Laws

In recent years, China has also drafted e-commerce laws to protect the rights and interests of various parties participating in e-commerce activities, regulating market order and promoting sound development of e-commerce. In accordance with the second review of the draft of E-Commerce Law released by the Standing Committee of the National People's Congress in November 2017, e-commerce refers to "business activities of commodity or service transactions via information networks such as the Internet." E-commerce operators shall abide by relevant laws (such as the Network Security Law) and certain rules (Article 21 of the E-Commerce Law) when collecting and using individuals' personal data. Article 61 emphasizes the importance of balance between protection of e-commerce user information and promotion of public use of e-commerce data. Since huge amounts of data produced during the process of e-commerce directly concern personal information, the E-Commerce Law to be promulgated will probably restrict the AML's requirement to open access to data. For example, will consumers be able to request deletion of their personal data, access to which are required to be open to third parties by the anti-monopoly agencies, on the basis of the right to delete?

# IV. CONCLUSION AND OUTLOOK

## A. Potential Conflicts with Respect to Application of Various Laws to Data Competition

### 1. Conflicts between Legislative Goals of Different Branches of Law

With the development of the digital economy, the competitive and strategic resources role played by data will become increasingly prominent, which is usually closely connected with personal information. There is the possibility for the Chinese competition authority to require undertakings to open access to data in merger control and abuse of market dominance cases. From the perspective of the Chinese anti-monopoly legislation and practice, there is a relevant legal basis and enforcement possibility.

Both the application of the AUCL to data competition and amendment to and enactment of the Law on Protection of Consumer Rights and Interests and Network Security Law are characterized with stronger personal information protection. From the published draft of the Personality Rights Section of the Civil Code and E-Commerce Law, we could also find a trace of emphasis on personal information protection. Therefore, the rules mentioned above would unavoidably conflict with the requirement to open access to data brought by application of the anti-monopoly law to data competition in specific cases. To name the potential conflict between the Network Security Law and the AML as an example, if an online platform were required to open access to data concerning consumer data on the basis of "essential facility," then restrictions on personal information use stipulated by the Network Security Law might be breached.

Overall, the potential conflict mentioned above reflects controversies between public and private rights protected by different branches of law, namely effective competition mechanism and personal information, including privacy rights. Since an effective competition mechanism to be maintained by anti-monopoly law will finally be reflected in the upgrade of consumer rights and interests, the conflicts in application of the law could be explained as conflicts between short-term consumer rights and long-term consumer rights, as well as direct consumer rights and indirect consumer rights. There is an urgent need to rethink how to protect personal information in the modern digital economy.

### 2. Conflicts Arising from Enforcement of Different Branches of Law

First, there might be conflicts in enforcement practice between different administrative departments and ministries. To name the Network Security Law as an example, the main administrative enforcement body is the Cyberspace Administration of China ("Cyberspace Administration").

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<sup>8</sup> Civil Law Working Group: Reform of Legislation Mode concerning Personal Information Protection in the Big Data Era, "To Go with Civil Law" WeChat Public Account.

With enactment of the Network Security Law and consecutive supporting rules to come, the Cyberspace Administration will have an increasingly important position. The relationship between the Cyberspace Administration and competition agencies is, accordingly, well worthy of attention. For example, when it comes to conduct of a specific online platform, anti-monopoly authorities may require it to open access to data, while the Cyberspace Administration would pay more attention to protecting user data and personal information. It would make online platforms confront contradictory regulation requirements. Second, the current Chinese anti-monopoly judicial mechanism would also have an effect. There is no independent competition judicial tribunal in China, and anti-monopoly cases are heard by IPR tribunals. In reality, the Chinese IPR circle has also tried to explore data issues from their perspective. In the first version of the General Provisions of Civil Law (consultation draft), “data information” was stipulated under “IPR,” which was strongly opposed by the majority of experts. In the final version, one cannot find “information” or “data” in the IPR section. This legislation process also reflects the close and complicated relationship between data and IPR. Since the training obtained by Chinese IPR judges from school or during work mainly focuses on IPR or civil laws and regulations, private rights will probably prevail when there is conflict between personal data rights and public interests in a case concerning anti-monopoly issues.

## ***B. Enforcement Conflict Resolution and Relevant Challenges***

### **1. Upgraded Status of Competition Policy**

The status of competition policy in China has been continually upgraded in recent years. In 2013, the Decision of the CPC Central Committee on Several Major Issues about Comprehensively Deepening Reform put forward during the 3<sup>rd</sup> Plenary Session of the 18<sup>th</sup> CPC Central Committee clearly states that, the “Market shall play the decisive role in resources allocation. Monopoly and unfair competition shall be prohibited.” Chinese authorities have also tried to make competition policy play a more important role in the Chinese economy by establishing a “fair competition review system.” To be more specific, the State Council released the Opinions on Establishing Fair Competition Review System during Market System Construction in 2016.<sup>9</sup> In 2017, the three Chinese competition agencies, together with the Legal Office of the State Council and the Ministry of Finance published the Implementing Rules of Fair Competition Review System (Trial).<sup>10</sup> Acting as the key of competition policy, the AML will play an increasingly important role in the construction of the Chinese market economy. Whether the AML will prevail when contradiction arises between the AML and other branches of law still remains to be seen.

### **2. Consideration of Other Branches of Law during AML Enforcement**

#### **a) Concentration**

On the one hand, the Chinese authorities could take effects which might be brought by other branches of law into account appropriately in anti-monopoly review. Whether a concentration would foreclose data as an input will depend on whether the undertaking to be established has the ability, incentive and viability to foreclose. When analyzing foreclosure ability, the authorities shall weigh the importance of laws and regulations aimed at protecting personal information, such as the Law on Protection of Consumer Rights and Interests and the Network Security Law. The decision on whether to constrain or restrict the consolidated undertaking’s ability to foreclose an input will influence the competition agency’s judgement on potential anti-competitive effects. That is to say, potential conflict between enforcement of anti-monopoly and other branches of law could be avoided if protection of personal information is duly taken into account when reviewing a concentration.

On the other hand, the defense rights of undertakings must be fully respected. In certain cases, undertakings may defend themselves from the input foreclosure concerns (from the perspective of personal information protection) so as to maintain the public interest. In this situation, the competition authority must make an assessment, determining whether closed access to data is in line with the public interest in the sense of the anti-monopoly law, and whether it is persuasive enough to constitute an effective defense in the anti-monopoly legal system.

#### **b) Abuse of Market Dominance**

As for suspected abuse of market dominance, the AML authorizes relevant undertakings to put forward “justified reasons” to defend themselves. Article 8 of the Provisions for Administrative Authorities for Industry and Commerce on Prohibiting Abuses of Dominant Market Positions provides some references on how to define “justified reasons.” The competition authority shall fully respect a defense put forward by relevant parties

<sup>9</sup> Available at: [http://www.gov.cn/zhengce/content/2016-06/14/content\\_5082066.htm](http://www.gov.cn/zhengce/content/2016-06/14/content_5082066.htm).

<sup>10</sup> Available at: <http://www.gov.cn/xinwen/201710/5234731.htm>.

in certain cases with respect to their refusal to license specific data to determine whether it is justified, including whether denial of access to personal information is also legally justified from the perspective of competition policy. As for the final remedies, even if relevant undertakings are required to open access to data, authorization of users could be requested if it concerns personal information.

### c) Influence of the Competition Authority Structure Reform

It has been ten years since the AML came into force in 2008. In early 2018, significant changes were made in the central government departments. In March 2018, the State Council Institutional Plan was ratified by the 1<sup>st</sup> Session of the 13<sup>th</sup> National People's Congress. The State Administration for Market Regulation ("SAMR") was established, combining the competences of the SAIC, the General Administration of Quality Supervision, the Inspection and Quarantine, the Price Supervision and the Anti-Monopoly Bureau under the National Development and Reform Commission, the Anti-Monopoly Bureau under MOFCOM and the Office of Anti-Monopoly Commission under the State Council. The SAMR is directly affiliated with the State Council, and the commencement ceremony was held on April 10, 2018. The new arrangement for competences, structure and staff should be released by the end of September 2018. Even if news of detailed plans for specific anti-monopoly law enforcement agencies under the SAMR has not been heard of till now, the combination of *ex-ante* review of concentrations and *ex-post* regulation of anti-competitive agreements and abuse of market dominance, as well as investigation rights of price-related and non-price-related monopolistic conduct, means a lot, compared with the division of anti-monopoly enforcement competence between the three competition agencies before. The SAMR will also keep the competence of anti-unfair competition and consumer protection which the SAIC was in charge of before.

On the one hand, the structural reform could eliminate potential conflicts at certain administrative enforcement stages to some extent. On the other hand, the structural reform only plays a limited role in resolving legal conflicts. First, it would bring no direct difference to the court when balancing private and public rights when applying the AML and AUCL. Second, legal enforcement power of the Network Security Law is not within the competence of the SAMR and it remains unclear whether it would be competent to enforce the E-Commerce Law. Potential conflicts in this enforcement aspect cannot be ignored, either.

To sum up, how to coordinate open access to, and protection of, data is the basic issue for the modern digital economy. In order to predict the future development of anti-monopoly enforcement in China's digital economy, full consideration must be taken of China's current legal system, and relevant legislative and enforcement trends. This paper tries to analyze the relationship between two trends – open access to, and stronger protection of, data – from a non-negligible perspective. Acting as a globally significant digital economy, China must make full use of the potential of its digital economy so as to better enjoy various rights and interests brought by the digital economy while maintaining a proper balance. However, it is no easy task and also one of the most challenging obstacles for competition jurisdictions all over the world.