ENFORCEMENT OF THE AML IN CHINA'S DIGITAL ECONOMY – FROM THE PERSPECTIVE OF THE OVERALL REGULATORY ENVIRONMENT

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I. BACKGROUND

The digital economy has become the key driver of global economic growth. In 2018, the volume of China's digital economy reached CNY 31.3 trillion, accounting for 34.8 percent of GDP.[2] As of June 2019, there are as many as 854 million Chinese netizens (61.2 percent of China's population) and 847 million mobile netizens. 99.1 percent of Chinese netizens access the internet through cellphones. More specifically, the numbers of users of instant communications, internet news, online shopping, online takeaway, online payment, online video, online car hailing and online government services were as high as 825 million, 686 million, 639 million, 421 million, 633 million, 337 million, 339 million and 509 million respectively.[3]

The sound development of the digital economy requires effective market functioning. Since the enactment of the Anti-Monopoly Law of the P.R.C. ("AML") in 2007, the position of competition policy in China has consistently been promoted. The Decisions of the CPC Central Committee on Several Major Issues in Terms of Sticking to and Improving the Socialist System with Chinese Characteristics, Promoting the National Governance System and Modernizing Governance Ability, passed by the 4th Plenary Session of the 19th Central Committee of the Communist Party of China ("CPC") on 31st October 2019, reiterate the importance of *"strengthening the fundamental position of competition policy, implementing the fair competition review system, as well as enhancing and improving enforcement of the AML and the Anti-Unfair Competition Law of the P.R.C. ("AUCL")."*[4] The Guiding Opinions on Promoting the Normative and Sound Development of the Platform Economy ("Guiding Opinions"), released by the Office of the State Council in August 2018, make comprehensive provision for the development of the platform economy at the central government level for the first time.

The Guiding Opinions put forward proposals to investigate and punish abuses of dominant market positions that restrict competition, unfair competition, and other illegal conduct in the internet industry contrary to applicable laws and regulations. They emphasize the importance of prohibiting exclusive service provisions imposed by online platforms and set rules for regulating illegal pricing in the internet industry.[5] In October 2019, the State Council issued the Regulation on Improving Business Environment, stressing the importance of the creation of a market environment for fair competition.[6] During December 20-22, 2019, Mr. Yaqing Xiao, Director of the State Administration for Market Regulation ("SAMR"), the AML enforcement authority in China, conducted a survey of Alibaba, Pinduoduo, Meituan and other online platforms, underlining that:

> *supervision and regulation shall be conducted in accordance with laws and regulations; relevant rules shall be improved; a market-oriented, legalized and internationalized market environment shall be cultivated; while the healthy and orderly competition in the online market shall be promoted; so as to infuse the online market with more vigor and vitality and make consumers benefit more in this regard.*[7]

In order to fully understand how the AML is enforced in the digital economy, it is indispensable to have systematic knowledge of other related Chinese laws, and the regulatory system. In fact, besides the AML and the SAMR, other laws and regulations as well as other authorities, such as the AUCL, the E-Commerce Law of the P.R.C. ("E-Commerce Law"), the Cyber Security Law of the P.R.C. ("Cyber Security Law") as well as the Ministry of Industry and Information Technology ("MIIT") and the Cyberspace Administration of China ("CAC"), also materially affect the development of the competitive order in China's digital economy.

Section II briefly introduces the latest developments in AML enforcement in the digital economy in 2019, including the improvement of the relevant rules, administrative enforcement and judicial practice. Section III discusses some coordination issues, such as those between the AML and other branches of law, administrative anti-monopoly enforcement agencies and other supervision departments, as well as administrative enforcement and judicial practice. Section IV concludes with our proposals for promoting the application of the AML in China's digital economy.

2 China Academy of Information and Communications, "White Paper on the Management of the Digital Economy," available at http://www.caict.ac.cn/kxyj/qwfb/bps/201912/t20191226_272660.htm.

3 Office of the Cyber Security and Information Committee of the CPC Central Committee & Cyber Space Administration of China, "The 44th Statistical Report on the Internet Development of China," available at http://www.cac.gov.cn/pdf/20190829/44.pdf.

4 Decisions of the CPC Central Committee on Several Major Issues in Terms of Sticking to and Improving the Socialist System with Chinese Characteristics, Promoting the National Governance System and Modernizing Governance Ability, available at http://www.gov.cn/zhengce/2019-11/05/content_5449023.htm.

5 Available at http://www.gov.cn/zhengce/content/2019-08/08/content_5419761.htm.

6 Available at http://www.gov.cn/zhengce/content/2019-10/23/content_5443963.htm?from=timeline.

7 Available at http://www.samr.gov.cn/xw/zj/201912/t20191222_309374.html.

II. PROGRESS OF AML-RELATED LEGISLATION & ENFORCEMENT IN THE DIGITAL ECONOMY

A. Perfection of Supporting Rules for the AML

The powers of the anti-monopoly departments affiliated with the National Development and Reform Commission, the Ministry of Commerce and the State Administration for Industry and Commerce were consolidated in the SAMR in 2018. In 2019, the SAMR revised a series of supporting departmental regulations for the AML, responding to new issues brought by the digital economy.

Against the backdrop of the digital economy, the challenges brought about by algorithmic collusion for the application of the AML include, but are not limited to, the validity of the traditional definition of anti-competitive agreements, and the increasing difficulty in proving their existence. In accordance with Article 13 AML, the term anti-competitive agreement refers to any *"agreement, decision or other concerted practice which eliminates or restricts competition."* In theory, "anti-competitive agreements" could be interpreted broadly, especially if one takes into account all "other concerted practices." Article 6 of the Interim Provisions on Prohibiting Anti-Competitive Agreements, released by the SAMR in June 2019, lists elements to be considered when identifying "other concerted practices," including:

> *1. whether there is any consistency among conducts of relevant undertakings; 2. whether relevant undertakings have communicated intention with each other or exchanged information; 3. whether relevant undertakings could provide reasonable explanation for the consistency; and 4. structure, competition status, changes and others of the market.*[8]

What's clear is that "communication of intention or exchange of information" is one of the pre-conditions. What is not clear, however, is whether "meeting of minds" achieved through algorithm qualifies as one as well.

It is also more difficult than ever before to prove the dominant market position of undertakings in the digital economy.[9] Article 11 of the Interim Provisions on Prohibiting Abuse of Dominant Market Position, published by the SAMR in June 2019, suggests elements to be taken into account when determining whether an undertaking from the internet or other nascent industries has a dominant market position, such as the characteristics of competition in the industry, business models, user volumes, network effects, lock-in effects, technical characteristics, market innovation, the ability to master and process relevant data, as well as the market power of undertaking(s) on related market(s).[10] Article 15 has also revised the predatory pricing rules, stating that "When identifying price under costs, emphasis shall be put on whether the price is below the average variable price. As for the free-of-charge model in the internet and other nascent industries, both free products and products in exchange for monetary payment shall be considered comprehensively."[11]

B. Administrative Enforcement

In August 2019, it was reported that Tencent Music Entertainment Group was investigated by the SAMR for signing anti-competitive exclusive copyright license agreements with record companies, such as Universal Music Group, Sony Music Entertainment and Warner Music Taiwan.[12] However, by the end of December 2019, no case was put on the official record.

With competition between online platforms in the internet era fiercer than ever before, exclusive agreements prohibiting merchants from selling on rival platforms (known as "either-or" agreements in Chinese media), have become common. "Either-or" agreements on online platforms have not only aroused great attention from all walks of life in China in recent years, but have also become one of the most hotly discussed topics in every circle. On November 5, 2019, the SAMR held an Administrative Guidance Symposium for Regulation of Online Business Activities in Hangzhou City, Zhejiang Province, calling for more than twenty online platforms to participate, including but not limited to JD.com, Kuaishou, Meituan, Pinduoduo, Suning, Alibaba, Yunji, and Vipshop.

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8 Available at http://gkml.samr.gov.cn/nsjg/fldj/201907/t20190725_305165.html.

9 Wei Han, Yajie Gao & Ai Deng, "Algorithmic Price Discrimination on Online Platforms and Antitrust Enforcement in China's Digital Economy," *the Antitrust Source*, August 2018.

10 Available at http://gkml.samr.gov.cn/nsjg/fldj/201907/t20190725_305166.html.

11 Available at http://gkml.samr.gov.cn/nsjg/fldj/201907/t20190725_305166.html.

12 Available at https://baijiahao.baidu.com/s?id=1641815998327601484&wfr=spider&for=pc.

The symposium identified key problems in recent online business activities (especially the most typical ones arising from intensive online promotion activities), and set out specific requirements for regulating network operation activities. The symposium explicitly discussed "either-or" clauses in the internet industry, and participants suspected that they breach the AML. The SAMR declared it would pay close attention to "either-or" agreements, and would investigate those that have not only triggered strong opposition from all sides, but also might constitute monopolization. Any abuses of dominance identified would be severely punished under the AML.[13] As of the end of December 2019, the SAMR had not yet released any information on any active case file in this regard.

C. Judicial Practice

In 2019, the most high-profile anti-monopoly litigation in China's digital economy was that initiated by JD.com against Tmall for an "either-or" clause. Based on media reports, JD.com observed that Tmall required its registered online merchants to exclusively sell on Tmall through signing "exclusive agreements," and other means, prohibiting them from selling on JD.com or participating in any promotional activities organized by the latter. In JD.com's opinion, Tmall had infringed its legitimate rights and interests. The court was requested to order Tmall to pay compensation of CNY 1 billion to JD.com. Tmall argued that its practices constituted normal and legal competition, while JD.com alleged that they were illegal.[14] During the procedure, Pinduoduo and Vipshop applied to the Beijing High People's Court to join the litigation as third parties without independent claims.[15] Article 56 of the Civil Procedure Law of the P.R.C. defined "third-party (without independent claim)" as "any third party participating in the proceedings of a case for the reason that the outcome of the case would affect the third party's legal rights and interests, even if having no independent claim to the subject matter of action between both parties." The case is still pending.

In parallel, Galanz Group ("Galanz") declared through its official Weibo account on November 5, 2019 that Guangzhou Intellectual Property ("IP") Court accepted its claim against Tmall for a suspected abuse of market dominance on November 4, 2019. The case was filed on October 28, 2019 and also concerned an "either-or" agreement. Around the time of the shopping festival of June 18, 2019, ever since Galanz began selling on the Pinduoduo platform, abnormalities could be found in search results for Galanz on Tmall from time to time, seriously affecting its normal sales activities.[16] This case is also pending.

It is also worth mentioning the litigation between Luckin Coffee and Starbucks, heard by Shenzhen Intermediate People's Court. Media reports from November 2019 indicated that the case was dropped by Luckin Coffee. In May 2018, Luckin Coffee published an open letter, complaining about Starbucks' practice of signing lease agreements with owners of urban high-end office buildings, which contained exclusive provisions, alleging that this constituted an abuse of dominance. In addition, multiple suppliers of Luckin Coffee were also forced by Starbucks to sign "either-or" agreements.[17]

Moreover, the IP tribunal affiliated with the Supreme People's Court of the P.R.C. ("SPC") heard the dispute between Wende Huang ("Huang"), a lawyer, and Didi Chuxing. In May 2018, the complainant hailed a taxi via Didi Chuxing to travel from JW Marriot Hotel Zhengzhou to Shangdu Road. The 4.2 km mileage cost Huang CNY 18.63. More specifically, the CNY 18.63 consisted of the base price (CNY 7), a mileage fee (CNY 3.63), a low-speed driving fee (CNY 2 for 4 minutes), and a temporary price increase (CNY 6).[18] In the complainant's opinion, the "temporary price increase" violated Article 17(1), which prohibits "selling commodities at unfairly high prices." In March 2019, the case was dismissed by Zhengzhou Intermediate People's Court.[19] Because of relevant judicial reforms,[20] the case was directly appealed to the IP tribunal of the SPC.[21] The case is still pending.

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13 Available at http://sc.people.com.cn/n2/2019/1106/c345167-33511117.html.

14 Available at https://www.thepaper.cn/newsDetail_forward_4831204.

15 Available at http://www.it-times.com.cn/a/hulianwang/2019/1105/30696.html.

16 Available at https://baijiahao.baidu.com/s?id=1649342087713438737&wfr=spider&for=pc.

17 Available at https://tech.qq.com/a/20191115/009427.htm.

18 Available at http://www.ccn.com.cn/html/henan/fangchanqiche/2018/0709/356648.html.

19 Available at http://www.myzaker.com/article/5d8b18da8e9f090a8d5f63a9/.

20 Decisions of the Standing Committee of the National People's Congress on Several Issues Concerning the Litigation Proceedings of Patent and Other Intellectual Property Rights Cases, enacted on October 26, 2018, available at https://www.chinacourt.org/article/detail/2018/10/id/3549380.shtml.

21 Available at https://www.sohu.com/a/342351749_742371.

III. REGULATORY ENVIRONMENT OF THE AML ENFORCEMENT IN CHINA'S DIGITAL ECONOMY

A. Coordination Between the AML and Other Laws

1. Coordination with the AUCL

The amendment of the AUCL was completed in 2017, deleting provisions on conduct that eliminate or restrict competition in the sense of the AML. Since then, the relationship between the AML and the AUCL has been better coordinated. It is worth mentioning that the legislative purposes of the AML and the AUCL partially intersect, such as protection of "fair competition."[22] In this regard, either the AML or the AUCL could be applied to certain market activities. The amended AUCL has a provision (Article 12) specifically targeting unfair competitive conduct in the internet industry. Article 12 of the AUCL prohibits broad range of activities undertaken by an undertaking via technical means which would obstruct or disrupt the normal operations of online products or services lawfully provided by other business operators through affecting users' choices or other means. For the reason of intersection in legislative purposes, with the AUCL also concerning regulation of competition on the market, undertakings concerned are free to choose between the AML and the AUCL in certain cases, such as the "either-or" discussed above in e-commerce.

Probably due to the excessively high burden of proof on the complainant in anti-monopoly litigation, especially market abuse cases, in recent years, the AUCL was more active than the AML in terms of enforcement in the digital economy. Article 2 of the AUCL, a general provision, was referred to the most by Chinese courts when hearing unfair competition cases. According to Article 2:

> *Business operators shall, when conducting production and business activities, abide by the principles of voluntariness, equality, fairness, honesty and good faith, comply with laws and adhere to commercial ethics. For the purpose of this Law, unfair competitive conduct refers to any conduct whereby a business operator violates this Law during the production and operating activities, thus disrupting the order of market competition and undermining the legitimate rights and interests of other business operators or consumers.*

Taking a hot issue in the digital economy, data scraping, as a typical example, theoretically speaking, data controller could file a case in accordance with the AUCL for suspicious unfair competition, while the counterparty could also initiate a litigation on the basis of the AML for refusal to deal (abuse of dominant market position). Accordingly, judgments on data competition made according to the AUCL might potentially affect the application of the AML. For example, in the 2019 *Sina v. Fanyou* dispute,[23] the Beijing Haidian District People's Court made clear the legitimate boundary of data scraping. Roadmap of recognition of unfairness of data scraping in unfair competition cases could provide kind of reference for that of refusal to deal (abuse of dominant market position) cases.

Furthermore, since both the AML and the AUCL were enacted to protect the legitimate rights and interests of multiple parties, including consumers, business operators and the society as a whole, specifically what welfare standard shall be counted on in certain cases determines how both laws shall be applied. In the *World Browser v. Tencent* case, the Beijing IP Court identified unfair competition from perspective of social welfare.[24] What's more, since both monopoly and unfair competition cases are heard by the same batch of judges from the IP courts, understanding of welfare standard in unfair competition cases might also exert influence on that in monopoly cases.

2. Coordination with the E-Commerce Law

The E-Commerce Law, effective as of January 1, 2019, also contains provision(s) in relation to anti-competitive conduct.[25] For example, Article 22 of the E-Commerce Law lists elements to be considered when determining whether an e-commerce business operator has abused a dominant market position, including but not limited to technological advantages, user volume, the ability to control related industries, and the dependence of other business operators on the e-commerce operator in terms of transactions. Besides, Article 35 of the E-Commerce Law prohibits e-com-

22 Article 1 of the AML, "… protect fair competition on the market …"; Article 1 of the AUCL, "… encourage and protect fair competition …"

23 Available at https://baijiahao.baidu.com/s?id=1638547002789761047&wfr=spider&for=pc.

24 Available at http://www.sohu.com/a/287062165_161795.

25 Wei Han & Yajie Gao, "Promote Openness or Strengthen Protection? Application of Law to Data Competition in China," *CPI Antitrust Chronicle*, May 2018.

merce business operators from exploiting service agreements, transaction rules, technologies or other means to unreasonably restrict or set unreasonable conditions for registered merchants in terms of transactions, transaction prices and transactions with other business operators, or charge unreasonable fees to registered merchants. The connection between the AML and the E-Commerce Law mainly relates to the interpretation and application of Article 35 of the E-Commerce Law. What is most controversial, currently, is whether market dominance is one of the conditions for applying Article 35 of the E-Commerce Law, even if Article 35 itself does not require the existence of "dominance."

B. The Anti-Monopoly Enforcement Agency and Other Departments

The SAMR, newly established in 2018, is a comprehensive central department equipped with complex competences. Acting as a sub-division, the Anti-Monopoly Bureau ("AMB") must coordinate with other divisions affiliated with the SAMR in law enforcement in the digital economy. In this regard, the Price Supervision & Inspection and Anti-Unfair Competition Bureau ("PSIAUCB"), the Online Transaction Supervision and Management Division ("OTSMD"), as well as the Audit Bureau of Law Enforcement ("ABLE") are the most relevant. Taking the PSIAUCB as a typical example, it is also competent to enforce the Price Law of the P.R.C. ("Price Law"). Article 14(2) of the Price Law prohibits dumping commodities at prices below cost to foreclose other competitors or monopolize the market. It might intersect and/or contradict with Article 17(2) of the AML. In December 2019, it was reported that Xuebing Ma, a first-degree inspector from the ABLE, led a team consisting of civil servants from the AMB, the PSIAUCB and the OTSMD to conduct a survey of Vipshop. As regards "platform competition," "either-or," "exclusive dealing" and other problems in the online business activities, the research team gained a deeper understanding of both the undertaking's confusion in applying the E-Commerce Law, the AML and AUCL, and more details about relevant cases.[26]

Besides coordination among its internal divisions, the SAMR also has to cooperate with other departments from the central level in response to new problems arising from the digital economy, especially the MIIT and the CAC. For example, in order to tackle various prominent social issues, such as illegal collection of personal information, harassment, and infringement of user rights and interests, the MIIT initiated special rectification actions against apps that infringe on user rights and interests.[27] On December 19, 2019, the MIIT circulated a list of the first batch of apps having infringed user rights and interests, including Sina Sports, Sohu News, and Renren TV, all of which are very popular in China.[28] Acting as the leading enforcement department for the Cyber Security Law, the CAC has released series of supporting department regulations, such as the Provisions on Management of Blockchain Information Services[29] and the Provisions on Management of Online Information & Content Ecosystems[30] published in January 2019 and December 2019 respectively, which will exert substantive influence on the development of China's digital economy. Besides the competition order, business operations in the digital economy might also raise other regulatory concerns, which require cooperation between the SAMR and other central departments in certain cases, among which the MIIT and the CAC play a more proactive role.

C. Administrative Enforcement and Judicial Practice

Application of the AML used to be led by administrative enforcement, but Chinese people's courts are increasingly playing a more important role. It is worth noting that there was conflict between the administrative enforcement and judicial practice with respect to interpretation of certain provisions of the AML. Specifically, concerning resale price maintenance ("RPM"), which is prohibited by Article 14 AML, there was a conflict between the Chinese competition agency and the Chinese people's court with respect to whether "elimination or restriction of competition" must be proved. The contradiction was not resolved until the retrial of a case by the SPC in 2019. In this case, Hainan Yutai Science and Technology Fodder Co. appealed against the judgment at the second instance made by Hainan High People's Court. The SPC clarified for the first time that the administrative enforcement agency could make a finding of an anti-competitive agreement as long as relevant conduct was proved to have been undertaken, and does not have to prove the "elimination or restriction of competition." The SPC judgment effectively solved the long-term divergence between administrative enforcement agency and judicial bodies, and will go some way to reduce uncertainties in compliance.[31]

26 Available at http://www.zggpjz.com/domestic/5445.html.

27 Available at http://www.miit.gov.cn/n1146295/n1652858/n1652930/n3757020/c7506353/content.html?&tsrtawbnrcn.

28 Available at http://www.miit.gov.cn/n1146290/n1146402/n1146440/c7575066/content.html.

29 Available at http://www.cac.gov.cn/2019-01/10/c_1123971164.htm.

30 Available at http://www.cac.gov.cn/2019-12/20/c_1578375159509309.htm.

31 Available at http://www.tylaw.com.cn/CN/Index.aspx?Lan=CN&MenuID=00000000000000000001.

As regards anti-monopoly litigation in the digital economy, the most high-profile case is the abuse of dominance dispute between Qihoo 360 and Tencent heard by the SPC and won by Tencent.[32] This case was listed by the Approval Committee of the SPC as guiding case No. 78 in 2017. As summarized by the SPC, several take-aways are: 1. In anti-monopoly cases, the definition of the relevant market is usually an essential step for analysis. Nevertheless, whether the relevant market can in fact be clearly and explicitly defined depends on specific situations of the case. 2. The hypothetical monopoly test ("HMT") is a widely recognized method for market definition. In practice, the HMT can be carried out using either the SSNIP or SSNDQ methods. 3. Considering the characteristics of online instant communication services, such as low cost and high coverage, the relevant geographic market must be defined on the basis of a comprehensive assessment, looking at the actual territories in which users choose certain products, relevant laws and regulations, the existence of foreign competitors, and the promptness with which foreign competitors to enter the market, etc. In the internet sector, market share is only a preliminary and probably misleading indicator of market power. When determining the existence of a dominant position, the importance of market shares might be adapted when necessary.[33] It is undeniable that guiding cases listed by the SPC, including the analysis roadmap, could also exert profound influence over the administrative antitrust enforcement in the digital economy.

IV. OUR PROPOSALS FOR PUSHING FORWARD THE APPLICATION OF THE AML TO THE DIGITAL ECONOMY

A. Consolidate the Fundamental Status of the AML in the Digital Economy

The development of China's digital economy still bears prominent regulatory characteristics. Both the CAC and the MIIT play a critical role in regulating the digital economy. Except in limited special areas, such as cyber security, the development of China's digital economy should have been led by market competition, rather than the authorities' exercise of regulatory power. Accordingly, the fundamental role of the AML in the digital economy should be reflected in effective anti-monopoly enforcement, so as to enable free competition, and drive the sustainable development of China's digital economy. This would raise consciousness of the notion that the foundation for sustainable development of China's digital economy must be effectively functioning market competition, and the maintenance of market dynamics. In such circumstances, nascent undertakings would continue to be cultivated.

In more detail, the fundamental position of the AML in China's digital economy could be established in three ways: First and foremost, the "fair competition review system" should be sufficiently recognized, while side effects of industrial policy on market development should be avoided. In June 2016, the State Council released its Opinions on the Establishment of a Fair Competition Review System in Market System Construction, explicitly requiring all the government policies to be reviewed by the fair competition system as of July 1, 2016.[34] The fair competition review system is designed to regulate government behaviors, prevent policies or measures that would eliminate or restrict competition, and gradually remove rules that obstruct the unification of the national market and fair competition. In recent years, Chinese governments have strengthened the implementation of the fair competition review system, removing a series of government documents that restrict market competition, some of which directly concern the digital economy. For example, the Interim Measures on the Management of Online Car Hailing Companies of Foshan City were released by the People's Government of Foshan City, Guangdong Province, requiring the wheelbase of online cars to be no shorter than 2700mm. After implementation of the rules for a certain period of time, a market investigation and a subsequent assessment found that this rule had restricted competition to large extent, against one of the fair competition review standards – "setting unreasonable and discriminatory conditions for market entry and exit shall be prohibited."[35] In September 2017, the Work Plan for the Preparation of E-Commerce Platforms of Daqing City, Heilongjiang Province, was published, requiring the local authority to choose one e-commerce company to provide government subsidies to. The work plan has been repealed for breaching the review standard that "preferential treatment shall not be illegally provided to specific business operators."[36]

32 Available at http://www.lifanglaw.com/plus/view.php?aid=733.

33 Available at http://www.court.gov.cn/fabu-xiangqing-37612.html.

34 Available at http://www.gov.cn/zhengce/content/2016-06/14/content_5082066.htm.

35 Available at https://baijiahao.baidu.com/s?id=1624085782567199379&wfr=spider&for=pc.

36 Available at https://baijiahao.baidu.com/s?id=1624085782567199379&wfr=spider&for=pc.

Second, when dealing with interactions between different branches of laws concerning market regulation, the rationale behind the market mechanism reflected in the AML should be fully considered. Taking Article 35 of the E-Commerce Law as a typical example, if the prohibition were applied without considering the market power of relevant undertaking, it would neither comply with the law of market development nor be rational. As for the general provision of Article 2 of the AUCL, the Chinese people's courts should be cautious when applying it, so as to avoid over-interference with the market development and potential side effects triggered by judicial evaluation of business ethic in specific cases.

Last but not least, the independence of the AMB should be maintained, while improper interference by other regulatory authorities should be flagged. Currently, the AMB is a sub-division of the SAMR, an organization in which is hard to guarantee independent anti-monopoly enforcement. As mentioned above, anti-monopoly enforcement in the digital economy requires not only coordination between the AMB and other sub-divisions affiliated with the SAMR, but also coordination between the SAMR and other central regulatory departments in certain cases. The independence of anti-monopoly enforcement by the AMB is the key to ensuring free competition and hence the sustainable development of China's digital economy.

B. Apply the AML More Flexibly on a Case-by-Case Basis

As mentioned above, future administrative enforcement and judicial practice should not be excessively constrained by precedent cases, such as *Qihoo 360 v. Tencent*, one of the "guiding cases" listed by the SPC. The time, market environment, product and specific conduct in each case are different, particularly given the nascent mechanisms of the digital economy. Relevant antitrust theories of harm are also evolving against this background. Both the anti-monopoly agency and the people's courts are advised to handle disputes on a case-by-case basis, and to apply the AML flexibly. Moreover, due to the relatively recent enactment of the AML, both the administrative agency and judicial bodies have not yet accumulated sufficient knowledge in the field of antirust. This is especially the case for the Chinese judicial system. It is judges from the IP courts who are competent to hear anti-monopoly cases, but their education and work experience is primarily in IP law and civil law. In this regard, training in anti-monopoly law and economics should be strengthened.

C. Pay Due Attention to the Risks of "False Negatives"

The Government Report for the 2017 Two Sessions proposed speeding up the cultivation and strengthening of nascent industries. The need to encourage innovation, as well as the principles of tolerance and prudence must be adhered to when formulating rules to regulate emerging industries. Against this background, the Chinese authorities have reiterated the importance of "tolerant and prudent regulation" in the last few years, in response to various new business models in the digital economy.[37] In our opinion, this regulatory principle should not be understood dialectically. Any enforcement action should consider costs associated with over-enforcement. Nevertheless, costs associated with under-enforcement should not be ignored either. A cautious and prudent attitude towards monopolistic conduct in the digital economy does not mean no enforcement at all. When it comes to merger control, "mega mergers" in the digital economy, especially those that attract widespread social attention, should receive due attention. This is especially the case for concentrations involving online platforms with significant market power in certain vertical sectors, or those with excessively high transaction value. The competition authority is advised to pay relatively more attention to non-horizontal concentrations, in comparison to previous experience, given the existence of network effects, ecosystem strategies, cross-sector competition, and other characteristics of the digital economy. For certain concentrations under the notification threshold, which might impede effective competition on certain relevant markets, and have attracted significant social attention, the AMB is advised to exercise its residual power under Article 4 of the Provisions of the State Council on Notification Thresholds for Concentrations, and initiate investigation proactively.[38]

D. Development of the Digital Economy in the Amendment to the AML

In May 2019, the China University of Political Science and Law published a set of proposed amendments to the AML ("Amendment to the AML Suggested by Academic Experts"), drafted by relevant Chinese anti-monopoly scholars.[39] The Amendment to the AML Suggested by Academic Experts responds to the development of the digital economy. For example, Article 1 adds "encouragement of innovation" as a new legislative purpose of the AML. In reality, whether the new purpose should be added or not is still a controversial issue among both academics and practi-

37 Available at http://politics.people.com.cn/n1/2017/0718/c1001-29410740.html.

38 Wei Han & Yajie Gao, "Challenges and Prospects for Merger Control in China in the Digital Economy," *CPI Antitrust Chronicle*, March 2019.

39 Available at http://www.competitionlaw.cn/info/1138/26864.htm.

tioners.[40] As regards Article 13 (horizontal agreements), a sub-provision concerning protection of privacy is added. More specifically, competitors are prohibited from entering into agreements that "fix or exchange quality conditions, such as the level of personal information protection." In addition, Article 15 introduces a legal basis for regulating "hub-and-spoke" cartels, providing that "Undertakings are prohibited from entering into anti-competitive agreement through algorithms or any other technical methods forbidden by this Chapter. Online platform operator is prohibited from organizing or coordinating registered business operators to reach ant-competitive agreement forbidden by this Chapter." Even if the Amendment to the AML Suggested by Academic Experts is only the result of certain Chinese anti-monopoly scholars' research, many of its provisions were met with huge controversy. How the AML should be amended to properly confront novel issues in the digital economy, such as platforms, data, algorithms, privacy, and innovation indeed deserves much attention from both the academics and practitioners.

On January 2, 2020, a draft amendment to the AML was released by the SAMR ("Amendment to the AML Released by the SAMR") to solicit public opinion until January 31, 2020.[41] It marks the initiation of the first official amendment to the AML since it came into effect in 2008. Similar to the Amendment to the AML Suggested by Academic Experts, the Amendment to the AML Released by the SAMR also adds "encouragement of innovation" to the legislative purposes of the AML. It is in line with the relevant principles put forward by the Chinese authorities to encourage the development of nascent industries. As for merger notification thresholds, the SAMR is entitled to set and/or adapt it in accordance with economic developments, industry scale and other elements, which leaves space for the introduction of a transaction-value-based notification threshold. This could screen out problematic concentrations in the digital economy more effectively. A sub-provision explicitly listing elements that help to identify whether an internet company has a dominant market position or not (including but not limited to network effects, economies of scale, lock-in effects, and the ability to process data) was added to Article 21. It corresponds with Article 11 of the Interim Provisions on Prohibiting Abuse of Dominant Market Position released by the SAMR in July 2019. Besides, "personal privacy" should be respected when enforcing the AML.[42]

E. Promote the Application of Digital Technologies in Enforcement

The development of the digital economy has brought changes to antitrust enforcement in almost all jurisdictions. Besides raising new problems with respect to identify anti-competitive conduct, and the design of remedies, data, algorithms, platforms and other elements have also created enforcement difficulties. As for China, its competition authority is also confronted with shortage of manpower, which is unlikely to be solved in the near future. Together with challenges brought about by the digital economy itself, the Chinese competition authority's ability to enforce anti-monopoly law faces significant challenges. In these circumstances, the use of science and technologies by enforcers could be a way out. This would also be in line with the Chinese authorities' encouragement of "intelligent administration," as emphasized in recent years. More specifically, "intelligent administration" was put forward in the Development Plan for the Next Generation of Artificial Intelligence ("Development Plan"), released by the State Council in 2017. The Development Plan proposes to develop an artificial intelligence platform suitable for government services and decision-making. It is also tasked with promoting the widespread application of artificial intelligence in performing complicated social research, policy assessment, risk prevention, emergency responses, and other important matters. It is worth noting that Chinese competition authorities, taking Quanzhou Fujian branch of the SAMR as a typical example, have used cloud algorithms, big data, and other technologies to support enforcement activities since 2019.[43]

It is also suggested that enforcers make better use of blockchain technology. As early as October 2019, the Political Bureau of the CPC Central Committee began to learn about both the *status quo* and future trends in blockchain technologies. President Jinping Xi pointed out that:

> *[t]he integrated application of blockchain technologies plays an essential role in technology innovation and industry evolution. We shall regard blockchain as an important breakthrough for the self-innovation of nuclear technologies. More capital and manpower shall be clearly invested so as to accelerate the growth of blockchain technologies and to promote the development of industry innovation.*[44]

40 Available at http://www.mzyfz.com/cms/faxunkuaibao/xinwenkuaibao/zhengfadongtai/html/1049/2019-11-07/content-1409863.html.

41 Available at http://www.samr.gov.cn/hd/zjdc/202001/t20200102_310120.html.

42 Article 46, "The anti-monopoly law enforcement agency and relevant civil servants shall bear confidentiality obligation with respect to the business secrets and personal privacy obtained from the enforcement activities."

43 Available at http://www.gov.cn/zhengce/content/2017-07/20/content_5211996.htm; available at http://www.cicn.com.cn/2020-01/08/cms123059article.shtml.

44 Available at http://www.xinhuanet.com//2019-10/25/c_1125153665.htm.

Blockchain technologies have been applied in the Chinese judicial system, such as in the consolidation of evidence. Since electronic evidence is so easily falsified, the confidentiality and non-falsifiability of blockchain systems could make up for this deficiency. On September 7, 2018, the SPC released its Provisions on Several Issues Regarding Case Hearing by Internet Courts,[45] acknowledging the legal validity using blockchain for evidence collection and storage.

Besides the innovative judicial attempt noted above, the anti-monopoly agency could explore other areas for the use of blockchain technologies. For example, rather than structural remedies, behavioral remedies, such as standalone hold separate orders,[46] are favored in China. Blockchain technologies might be of use in the supervision and enforcement of behavioral remedies.

45 Available at http://courtapp.chinacourt.org/zixun-xiangqing-116981.html.

46 Han Wei, Yin Ranran & Zheng Xiong, "Standalone Hold Separate Orders as Remedies in Chinese Merger Control," *Wang Xiaoye: The Pioneer Of Competition Law In China - Liber Ami*corum, Concurrences 2019, pp 27-42.

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