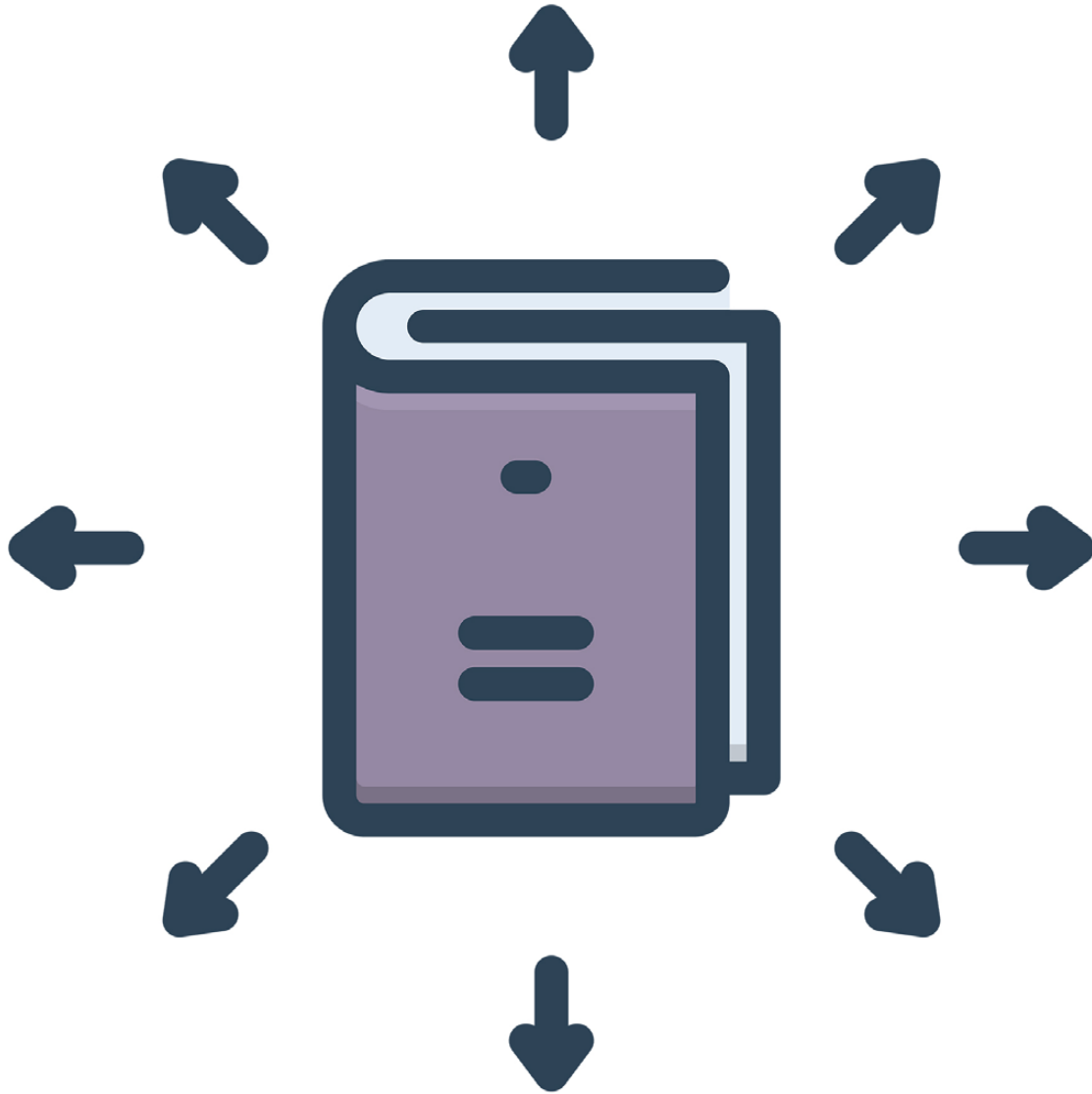


ANTITRUST GUIDELINES FOR THE PLATFORM ECONOMY IN THE ERA OF ENHANCED ANTITRUST SCRUTINY



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On February 7, 2021, the Anti-Monopoly Commission of the State Council of China released the *Antitrust Guidelines for the Platform Economy Field* ("Platform Guidelines"). These are the first antitrust guidelines in the world focused on the platform economy, and the short timespan between the draft for comments and its official promulgation shows China's determination to intensify antitrust scrutiny on the platform economy. While staying within the regulatory framework set by the Anti-Monopoly Law, the Platform Guidelines made a number of noteworthy breakthroughs and clarifications by taking the industry-specific features into account. This article reads into the meaning of those noteworthy provisions under the *Platform Guidelines*, and offers the authors' insights into their impacts on future antitrust practices in the platform economy.

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On February 7, 2021, the Anti-Monopoly Commission of the State Council of China promulgated the world's first antitrust guidelines especially focused on the platform economy – the Antitrust Guidelines for the Platform Economy (hereinafter as the “Platform Guidelines”), which took less than 70 days after the end of the consultation period. While previous antitrust guidelines usually took years to be officially promulgated, the Platform Guidelines set the record for taking the shortest time. This shows China's determination to intensify antitrust scrutiny on the platform economy.

The Platform Guidelines clarify the antitrust rules for the platform economy, taking thorough account of industry-specific features, aiming to provide clear guidance and useful reference for law enforcers in tackling antitrust challenges in this field. In light of the this, this article navigates the Platform Guidelines with a focus on the highlights and their impact on the antitrust practices in the platform economy.

Specifically, this article has six parts: the first part interprets the goals of the Platform Guidelines; the second to fifth parts introduces the highlights and practical impacts of the Platform Guidelines concerning relevant market, the monopoly agreements, the abuse of market dominance, and the concentration of undertakings respectively; and the sixth part sets out conclusions.

I. INTERPRETATION OF THE GOALS OF THE PLATFORM GUIDELINES: FROM “INCLUSIVE AND PRUDENT” TO “DISCIPLINED, ORDERLY, INNOVATIVE AND HEALTHY”

While reiterating the legislative goals of the Anti-Monopoly Law (“AML”), Article 1 of the Platform Guidelines add “promoting the disciplined, orderly, innovative and healthy development of platform economy” as one of the goals. This reflects China's change in attitude towards antitrust scrutiny over platform economy from “inclusive and prudent” to “disciplined, orderly, innovative and healthy.”

In recent years, China's platform economy has developed rapidly. It has gradually developed from an uncertain infancy to a relatively mature youth,² giving birth to some leading platform companies comparable to Facebook and Amazon.³ However, the conducts like “Choose One from Two,” “Big Data Discrimination,” and “Killer Acquisitions” engaged by some leading platform companies have caught more and more attention from both the general public and the regulators, and the competition harm produced by these conducts are becoming clearer. Therefore, there exists a wide consensus that disorderly expansion and growth are neither sustainable nor healthy, and proper regulations and guidance need to be put in place. At the same time, the policy makers and regulators in China are obtaining more knowledge of the platform economy over the time, and its ability to tackle antitrust issues in this field has also been further improved.

Especially since 2020, the Chinese government has emphasized that “the market plays a decisive role in resource allocation”⁴ and positioned the development strategy at “expanding domestic demand” and “accelerating domestic economy cycle.”⁵ This further urges a change in regulatory approach in the platform economy to ensure the proper functioning of the market in the domestic platform economy industry. Therefore, the Platform Guidelines promulgated at this time to strengthen the antitrust scrutiny over the platform economy are particularly crucial and provide a timely response to the regulatory need.

² XinhuaNet, *Strengthened Antitrust Enforcement to Create A Benign Interaction Between Competition and Innovation*, available at http://www.xinhuanet.com/politics/2021-01/31/c_1127045786.htm.

³ People.com, *Strengthening Antitrust Supervision Is for Better Development*, people.cn, available at <http://opinion.people.com.cn/n1/2020/1224/c1003-31977402.html>.

⁴ Sina Finance, *Xi Jinping: Let the Market Play A Decisive Role in Resource Allocation*, available at <http://finance.sina.com.cn/china/2020-05-23/doc-iiircuyvi4663351.shtml>.

⁵ Chinese government's official website, *Proposals of the Central Committee of the Communist Party of China on Formulating the Fourteenth Five-Year Plan for National Economic and Social Development and Long-Term Goals for 2035*, November 3, 2020, available at http://www.gov.cn/zhengce/2020-11/03/content_5556991.htm.

II. HIGHLIGHTS OF THE PLATFORM GUIDELINES CONCERNING MARKET DEFINITION AND THEIR PRACTICAL IMPACT

A. The Platform Guidelines Delete the Provision in the Draft for Comments that Relevant Market May Not Be Defined in Certain Antitrust Cases

The Draft for Comments have explicitly set out that in certain cases relevant market may not be accurately defined. These include: (1) the horizontal monopoly agreement cases that contain hard-core restrictions; (2) the vertical monopoly agreement cases in which resale price is maintained; (3) certain abuse of market dominance cases, where the direct factual evidence is sufficient, the conduct that can be carried out only on the basis of market dominance has lasted for a long time with obvious harmful effects, and there is insufficient conditions or it is very difficult to accurately define the relevant market.

The Platform Guidelines as officially promulgated delete the aforementioned provisions in the Draft for Comments, and instead it emphasizes that “investigations over monopoly agreements, abuse of market dominance, and merger review in the field of the platform economy usually need to define the relevant market.”

With regard to the practical impact of the above stipulation, it should be interpreted together with the principle for deciding the role of relevant market. As clarified by the Platform Guidelines, the role of relevant market definition should “adhere to the principle of case-by-case analysis, and different types of antitrust cases requires differently in terms of relevant market definition.” Therefore, the above stipulation does not mean that defining the relevant market would be required in each and every case. At the same time, such stipulation puts forward higher requirements on antitrust enforcement activities in the platform economy, especially the law enforcement activities related to monopoly agreements in the platform economy.

B. The Platform Guidelines List Factors to Be Considered For Substitution Analysis When Defining The Relevant Market In The Platform Economy

In terms of demand-side substitute analysis, the Platform Guidelines state that when conducting demand-side substitution analysis in the field of platform economy, factors such as platform functions, business models, application scenarios, user groups, multilateral markets, and offline transactions can be considered.

In terms of supply-side substitution analysis, the Platform Guidelines provide that when conducting supply-side substitute analysis in the field of platform economy, factors such as “market entry, technical barriers, network effects, lock-in effects, transfer costs, cross-boundary competition, and etc.” can be considered.

It can be seen that the Platform Guidelines list the factors that need to be considered in the substitute analysis in the platform economy particularly taking into account the characteristics of such economy, which will provide more targeted guidance for defining the relevant market in the platform economy.

C. The Platform Guidelines Further Specify the Approach to Define the Relevant Product Market in Platform Economy in Light of The Characteristics Of The Platform Economy

The Platform Guidelines list three approaches to define the relevant product market in platform economy. Specifically, (1) define the relevant product market based on the product on one side of the platform; (2) define each relevant product market respectively according to the products on each side of the platform and consider the relationship among and their impact on each other; or (3) define the relevant product market by regarding the platform as a whole when the cross-platforms network effects of the platform can impose sufficient competitive constraints on the platform undertaking.

The three approaches specified by the Platform Guidelines have provided a more specific guideline to the identification of the relevant market for platforms. This stipulation has borrowed some ideas from the antitrust practices in other jurisdictions. In particular, the third approach reflects the mainstream international views. For example, in *Rethinking Antitrust Tools for Multi-Sided Platforms 2018*, the OECD states that “[i]n two-sided non-transaction markets, one should define two (interrelated) markets; [i]n two-sided transaction markets, one should define only one

market.”⁶ In addition, in *Ohio v. American Express Co.*, the Supreme Court of the United States finds the credit card networks as “two-sided transaction platform,” and thus defines a single market that combines the card companies’ merchant-related services and shopper-related services.⁷

In this regard, in tackling antitrust cases involving the platform economy, China’s antitrust agencies will likely fully consider the features of the platform concerned, and may borrow experiences from other regimes, to decide which one of the three approaches to take in individual cases.

III. HIGHLIGHTS OF THE PLATFORM GUIDELINES CONCERNING THE MONOPOLY AGREEMENTS AND THE PRACTICAL IMPACT

A. For the First Time, the Platform Guidelines Clearly Discuss Data and Algorithmic Collusion in the Platform Economy

In the platform economy, a growing number of firms are collecting and processing large amounts of data and deliberately influencing user behaviors on the platform by engaging algorithms. While few would dispute the benefits brought by the use of data and algorithms, there is a widespread concern over the possible anti-competitive effects posed by them “as they can make it easier for firms to achieve collusion without any formal agreement or physical interactions”⁸. Therefore, algorithmic collusion is becoming an emerging hotspot globally.

The Platform Guidelines address the issue of data and algorithmic collusion and clearly shows China’s regulatory approach. In particular:

- Article 5 of the Platform Guidelines sets out a general provision on data and algorithmic collusion, i.e., other concerted practices may be reached through data, algorithms, platform rules or other means.
- Article 6 of the Platform Guidelines illustrates the form of data and algorithmic collusion from the perspective of horizontal monopoly agreement. That is, competing undertakings in the platform economy may use data, algorithms, and platform rules to achieve coordinated practices and to reach horizontal monopoly agreements.
- Article 7 of the Platform Guidelines illustrates the form of data and algorithmic collusion from the perspective of vertical monopoly agreement. That is, undertakings may use platform rules to align prices; use data and algorithms to directly or indirectly maintain prices; or use technical means, platform rules, data and algorithms to restrict trading conditions to exclude or restrict market competition.
- Article 8 of the Platform Guidelines further illustrates the form of data and algorithmic collusion from the perspective of hub-and-spoke agreement. That is, platform undertakings may also use technical means, platform rules, data and algorithms to organize, coordinate, or assist competing undertakings to reach a hub-and-spoke agreement having the effect of a horizontal monopoly agreement.

As noted above, China takes a fairly comprehensive regulatory approach, covering all types of monopoly agreements. Relevant undertakings in the platform economy may need to develop and carry out an in-depth and thorough antitrust risk screening on the use of data, algorithm and other technical means. Such antitrust risk screening may need to cover not only the antitrust risks of potentially coordinating with competitors, but also the risk of fixing or restricting transaction counterparties’ resale price, and the risk of facilitating transaction counterparties who compete with each other to reach a horizontal agreement.

6 OECD (2018), *Rethinking Antitrust Tools for Multi-Sided Platforms*, page 42, available at www.oecd.org/competition/rethinking-antitrust-tools-for-multi-sided-platforms.htm.

7 *Ohio v. American Express Co.*, 138 S.Ct. 2274 (2018).

8 OECD (2017), *Algorithms and Collusion: Competition Policy in the Digital Age*, available at www.oecd.org/competition/algorithms-collusion-competition-policy-in-the-digital-age.htm.

B. The Platform Guidelines Specify the Way to Define and Prove “Other Concerted Practices” in the Platform economy

1. The Platform Guidelines clarify the meaning of “other concerted practices” in platform economy

Pursuant to Article 5 of the Platform Guidelines, “other concerted practices” refer to the undertakings’ substantially coordinated and consistent conducts achieved via data, algorithms, platform rules or other means without reaching an explicit agreement or decision. Meanwhile, Article 5 also exempts price following and other parallel conduct by the relevant undertakings based on their independent will. Article 9 further states that if the concerted practice is established by indirect evidence, the factors to be considered include the level of undertakings’ knowledge to the relevant information.

As can be seen from the provisions above, the Platform Guidelines require a meeting of minds and information exchanges as essential elements to establish concerted practices, though this requirement is not explicitly stated in the Platform Guidelines.

2. The Platform Guidelines set out the standard of establishing other concerted practice by indirect evidence

Other concerted practices in the platform economy may be carried out in more covert manners, including through data, algorithms, platform rules, etc. To address such an issue, Article 9 of the Platform Guidelines states that in addition to direct evidence, antitrust agencies can also prove the existence of other concerted practices by indirect evidence with logical consistency in accordance with Article 6 of the *Interim Provisions on Prohibition of Monopoly Agreements*.

The question of how to interpret and apply the so-called “indirect evidence with logical consistency” remains open under the Platform Guidelines. Under Article 6 of the *Interim Provisions on Prohibition of Monopoly Agreements*, such indirect evidence seems to be required to have four elements including (1) the uniformity of the undertakings’ conducts; (2) the meeting of minds and information exchanges of the undertakings; (3) the undertakings’ justification for their uniformity of conducts; and (4) the market structure, competition status, market changes. And therefore, logical consistency may mean that after considering all these four elements, all facts proven by the indirect evidence are still consistent in logic and all indicate the existence of collusion.

C. The Platform Guidelines Address the Issue of Hub-And-Spoke Agreement

Hub-and-spoke agreement has always been a hot and complicated issue in antitrust law enforcement in China. For example, in the *Draft for the Revised Anti-Monopoly Law (Draft for Public Comments)*, a new provision has been added to prohibit hub-and-spoke agreement. Similarly, the Platform Guidelines also add a new article to emphasize the prohibition of hub-and-spoke agreement.

Viewing from the phrasing of the Platform Guidelines, antitrust law enforcement agencies’ actions against hub-and-spoke agreements are still under the current framework of the AML, i.e. Article 13 (horizontal monopoly agreement) and Article 14 (vertical monopoly agreement). Specifically, antitrust law enforcement agencies may:

- Rely on Article 13 of the AML to investigate and impose penalties on the competing undertakings on the platforms that have reached horizontal monopoly agreements.
- Rely on Article 14 of the AML to investigate and impose penalties on undertakings on the platform which are not competitors with the parties of the agreements but have coordinated, organized or facilitated the monopoly agreements.

IV. HIGHLIGHTS OF THE PLATFORM GUIDELINES CONCERNING THE ABUSE OF MARKET DOMINANCE AND THEIR PRACTICAL IMPACT

A. The Platform Guidelines Specify the Attitude to Regulate the “Choose One from Two” Conduct

The problem of “Choose One from Two” has been a hotspot in China in recent years. Based on a preliminary research on the public available information, “Choose One from Two” has triggered at least 8 antitrust litigations and unfair competition administrative penalties in the platform economy since 2017.⁹ Among those cases, Chinese e-commerce giant Alibaba’s “Choose One from Two” conduct has undoubtedly attracted the most public attention and concern, whose legality is under review by both the court¹⁰ and the SAMR.¹¹

“Choose One from Two” conduct is explicitly dealt with under Article 15 Paragraph 1(1) of the Platform Guidelines, and the rest of Article 15 (restrictive dealing), as listed below, also applies to “Choose One from Two” practice. In particular:

- The Platform Guidelines specify the approaches to apply the notion of restrictive dealing in the platform economy. The Platform Guidelines state that restrictive dealing can be achieved through a written or verbal agreement, or through the setting of actual restrictions or obstacles through platform rules, data, algorithms, technical means, etc. This stipulation shows that the real concern is the impact on competition rather than the forms of conduct. As a result, even when no written or oral agreement has been reached, undertakings that have market dominance may still violate the AML as long as the “Choose One from Two” conduct has been actually implemented. The agencies’ focus on competitive impact rather than forms of conduct has been confirmed by a recent case. Specifically, in an administrative penalty decision against Vipshop’s unfair competition conduct, the SAMR has clearly found that the “Choose One from Two” conduct can take the form of restrictive dealing implemented by “using the technical measures provided by the suppliers’ platform system, intelligent networking engines, operating middle stations, etc.”¹² Although this case is an anti-unfair competition case, it can still provide insights to the antitrust agencies’ approach to the forms of implementing the “Choose One from Two” conduct.
- The Platform Guidelines distinguish between the restrictive dealings by punitive measures and those by incentive measures, and suggest different regulatory approaches. The Platform Guidelines specifically point out that where a platform undertaking imposes exclusive restrictions by taking punitive measures, such practice will directly harm market competition and consumer interests, and thus shall generally be founded as restrictive dealing. Where such exclusive restriction is imposed by taking incentive measures, the Platform Guidelines state that such practice may have certain positive effects on the interests of the undertakings operating on the platform, consumer interests and the overall social welfare. However, such practice may also be found as restrictive dealing if there is evidence showing that it materially eliminates or restricts market competition. The above distinction is one of the main breakthroughs made by the Platform Guidelines in respect of restrictive dealing. This distinction suggests that the antitrust agencies in China tend to assess the competition effects of the practice at issue in deciding whether it constitutes an unlawful restrictive dealing and may take different analytical approaches according to the likelihood of anti-competitive effects.

⁹ NetEase, *JD.com Claims 1 Billion Against Alibaba!*, available at <http://js.news.163.com/suqian/19/1101/14/ESTG78EP04249CUB.html>.

Sina Finance, *Galanz Sued Tmall for Abuse of Market Dominance, Which Has Been Accepted by the Court*, available at <http://finance.sina.com.cn/roll/2019-11-05/doc-iiieczrr7367685.shtml>.

Administrative Penalty Decision of Guo Shi Jian Chu [2021] No.3.

Administrative Penalty Decision of Tong Shi Jian Guan Fa Zi [2019] No. 3037.

Administrative Penalty Decision of Jin Shi Jian Fa Zi [2017] No. 22.

Administrative Penalty Decision of Yi Xu Shi Jian Chu Zi [2019] No. 0131.

Administrative Penalty Decision of Yan Shi Jian Chu Zi [2018] No. 160.

XinhuaNet, *An Online Food Platform Was Investigated Because It Forced Merchants to “Choose One from Two,”* available at http://www.xinhuanet.com/2021-01/26/c_1127024318.htm.

¹⁰ NetEase, *JD.com Claims 1 Billion Against Alibaba!*, available at <http://js.news.163.com/suqian/19/1101/14/ESTG78EP04249CUB.html>.

¹¹ SAMR official website, *The State Administration for Market Regulation Initiates an Investigation into Alibaba Group’s Monopolistic Conduct*, available at http://www.samr.gov.cn/xw/zj/202012/t20201224_324638.html.

¹² Administrative Penalty Decision of Guo Shi Jian Chu [2021] No.3.

- The Platform Guidelines elaborate and specify the justifications for restrictive dealing in platform economy industry. Prior to the promulgation of the Platform Guidelines, valid justifications for restrictive dealing include: (1) necessary to meet the requirements of product safety; (2) necessary to protect intellectual property; (3) necessary to protect the specific investment made for the trading; and others.¹³By factoring the characteristics of the platform economy, the Platform Guidelines further add a number of justifications for restrictive dealing in platform economy. These newly added justifications include: (1) necessary to protect the interests of counterparties and consumers; (2) necessary to protect trade secret and data security; and (3) necessary to maintain reasonable business model, etc. Noteworthy, an important element for all these justifications is “necessary.” This means that undertakings will bear a fairly heavy burden of proof and may be found as failing to establish the justifications if there are less restrictive ways to achieve the same goal. Therefore, relevant undertakings with market dominance shall try avoiding engaging in restrictive dealing practices. If such practices are inevitable, undertakings shall cautiously assess the possible competition effects of the practices and further evaluate whether the burden of proof for justifications can be fulfilled.

B. Refusal of Access — The Platform Guidelines Set Out Approaches to Refusals to Deal in the Platform Economy

In recent years, there are growing concerns on the refusal of access by certain key platforms, which has resulted in a number of antitrust litigations, including the high-profile antitrust litigation between two internet giants in China, i.e. ByteDance v. Tencent.¹⁴

The Platform Guidelines clearly deal with this issue in Article 14. In comparison with other laws and regulations, the Platform Guidelines set out the following noteworthy rules:

- The Platform Guidelines further specify the factors to be considered in finding essential facility in platform economy industry. Article 14(1) of the Platform Guidelines specify that “the undertakings controlling essential facility refuse to deal with counterparties on reasonable terms” is one form of refusal to deal, which clearly sets out the essential facility doctrine in platform economy. On basis of that, the Platform Guidelines further elaborate and specify the factors to be considered in finding essential facility in platform economy. Such factors include: the data owned by this platform, the substitutability of other platforms, and the existence of potentially available platforms, etc. This is also one of the major changes made by the Platform Guidelines in respect of essential facility doctrine. Notably, China is not the only jurisdiction which opts to impose transaction obligations on certain platform undertakings via essential facility doctrine. Other jurisdictions like United States are also considering this option. Therefore, it is foreseeable that in future antitrust enforcements in platform economy, the role of essential facility doctrine will be more important.
- The Platform Guidelines elaborate the justifications for refusal to deal in the platform economy industry. In addition to the justifications set out by other laws and regulations, the Platform Guidelines add a noteworthy justification for refusal to deal in platform economy, i.e. “the counterparties have expressly refused to or actually failed to comply with fair, reasonable and non-discriminatory platform rules.” This new justification somewhat reflects the rationale in previous court judgments. For instance, in Shenzhen Weiyuanma Software Development Co., Ltd. v. Tencent Technology (Shenzhen) Co., Ltd., the Shenzhen Intermediate People’s Court ruled that since the plaintiff had breached the Operation Specifications and Service Agreement agreed by both parties, it is proper for Tencent to suspend the account of the plaintiff according to the Operation Specifications and Service Agreement.¹⁵ This case was selected as one of the 10 Influential Cases of Internet Judiciary in China (Case 5) by the Supreme People’s Court (“SPC”),¹⁶ which reflects the endorsement of the SPC to such rationale to some extent.

¹³ Article 17 Paragraph 3 of the *Interim Rules on Prohibition of Abuse of Market Dominance* provides that valid justifications for restrictive dealing include: “(1) necessary to meet the requirements of product safety; (2) necessary to protect intellectual property; (3) necessary to protect the specific investment made for the trading; (4) other reasons that can justify the conduct.”

¹⁴ Douyin WeChat Official Account, *Statement Regarding the Antitrust Litigation Against Tencent*, available at https://mp.weixin.qq.com/s/gP1oPRVpW6qD_dEGIKw3vQ.

¹⁵ *Shenzhen Weiyuanma Software Development Co., Ltd. v. Tencent Technology (Shenzhen) Co., Ltd. and Shenzhen Tencent Computer System Co., Ltd.*, A Dispute over Abuse of Market Dominance, (2017) Yue 03 Min Chu No.250.

¹⁶ Supreme People’s Court, *Chinese Court and Internet Judiciary*, available at <http://english.court.gov.cn/pdf/ChineseCourtsandInternetJudiciary.pdf>.

C. Big Data Discrimination — The Platform Guidelines Clarify the Discriminatory Treatment Issue in Platform Economy

In addition to “Choose one From Two” and refusal of access issues, the big data discrimination issue has also come to the fore of the platform economy. Some platform undertakings have long been criticized for charging different consumers different prices for the same products/services based on the big data regarding consumer preference, consumption habits, consumers’ ability to pay, etc. To address this issue, the Platform Guidelines add the following special provisions:

1. The Platform Guidelines clarify that big data discrimination may constitute discriminatory treatment under the AML

Article 17 of the Platform Guidelines sets out that “undertakings in platform economy with market dominance may, without justification, abuse their market dominance to apply differentiated treatment to counterparties with the same transaction conditions, thereby excluding or restricting market competition.” One of the factors listed in this article to assess whether an undertaking has engaged in discriminatory treatment is “by using big data and algorithms, applying differentiated transaction prices or other transaction conditions according to the payment capacity, consumption preference, use habits, and etc. of the counterparties.” This addresses the big data discrimination issue specifically.

2. The Platform Guidelines further clarify the standards for determining whether counterparties are with the same transaction conditions

In practice, one difficulty in compliance work in relation to discriminatory treatment is to evaluate whether relevant counterparties are with the same conditions or not. To facilitate the evaluation, the Platform Guidelines set out both a “positive list” and a “negative list” of factors to assess whether counterparties are with the “same conditions” or not. In particular:

- the positive list includes factors that will materially affect the transactions, such as transaction security, transaction cost, credit status, transaction stage, transaction duration, and etc.
- the negative list includes factors that will not materially affect the counterparties’ conditions, such as the privacy information, transaction history, individual preferences, consumption habits, and etc.

Therefore, in applying different transaction conditions or prices to different consumers, relevant undertakings in platform economy with market dominance shall cautiously assess whether the conditions of such consumers are the same or not in accordance with Article 17(2) of the Platform Guidelines.

V. HIGHLIGHTS OF THE PLATFORM GUIDELINES CONCERNING MERGER FILINGS AND THEIR PRACTICAL IMPACT

A. Notification of Transactions Involving VIE – the Platform Guidelines Specify the Scope of Transactions That Are Subject to Merger Review For the First Time

Since the legality of the VIE structure is not clear under Chinese laws and regulations, whether VIE-structured transactions must be notified to the competent authority used to be an unsettled issue. Therefore, there are a large number of transactions in China's Internet industry that have not been notified. However, in 2020, the SAMR expressed its regulatory attitude towards the concentrations involving VIE structures by reviewing a VIE-structured transaction for the first time,¹⁷ as well as by imposing fines for the first time on gun-jumping of VIE-structured transactions.¹⁸

Except for the cases above, the Platform Guidelines for the first time specify in written rules that “[t]he VIE-structured concentration of undertakings may fall under the scope of concentration of undertakings subject to antitrust review.” This undoubtedly signals stricter law enforcement, and “VIE structure is not an excuse for Internet companies to escape from being monitored and regulated.”¹⁹

Therefore, undertakings in the field of platform economy shall ensure that they will file future transactions in accordance with the relevant laws and regulations. Meanwhile, they shall also revisit the completed transactions involving the VIE structure and find proper ways to cope with the violation of failure to file. In addition, considering that the imminent revision of the AML is likely to aggravate the penalties on failure to file, undertakings in the field of platform economy shall consider whether to take advantage of this time window before the promulgation of the amended AML to file the transaction with the antitrust agency.

B. Killer Acquisitions – the Platform Guidelines Clarify the Types of Concentration of Potential Concern

In recent years, “killer acquisitions” in Internet industry have been of concern. As pointed out by the of U.S. House Judiciary Report in October 2020, tech giants might neutralize a competitive threat through acquisitions, and they may even shut down or discontinued research and development to eliminate potential competition.²⁰ Such concentrations have caused key markets online highly concentrated. Killer acquisition is also concerned in China. The SAMR stated in December 2020 that in the review of concentration of undertakings, agencies shall “prevent undertakings from conducting monopolistic conducts through mergers and acquisitions, or from stifling potential competitors and hindering innovation through acquisitions of small and medium-sized enterprises.”²¹

For the first time, the Platform Guidelines directly address the issue of killer acquisition by stipulating that “[t]he antitrust law enforcement agency under the State Council shall pay close attention to the concentration of undertakings in the field of platform economy where one undertaking participating in the concentration is a start-up enterprise or emerging platform, where the undertaking participating in the concentration adopts the mode of free or low-price, resulting in low turnover, or where relevant market is highly concentrated with small number of competitors, and etc. For the ones below the filing threshold but have or may have the effect of eliminating or restricting competition, the antitrust agency under the State Council shall initiate investigations in accordance with the law.”

It is foreseeable that the killer acquisition strategy implemented by certain large Internet platforms aimed at hindering potential competitors and curbing innovation will be subject to stricter antitrust supervision and intervention.

¹⁷ Establishment of a new joint venture between Shanghai Mingcha Zhegang Management Consulting and Huansheng Information Technology (Shanghai).

¹⁸ Administrative Penalty Decision of Guo Shi Jian Chu [2020] No. 26.

Administrative Penalty Decision of Guo Shi Jian Chu [2020] No. 27.

Administrative Penalty Decision of Guo Shi Jian Chu [2020] No. 28.

¹⁹ SAMR official website, *The Person in Charge of the Anti-Monopoly Bureau of the State Administration for Market Regulation Answered Reporters' Questions on the Three Penalties Imposed on Alibaba Investment, China Literature, and Shenzhen Hive Box Network Technology for their Failure to Notify*, available at http://www.samr.gov.cn/xw/zj/202012/t20201214_324336.html.

²⁰ House Judiciary Committee, *Investigation of Competition in Digital Markets*, available at https://judiciary.house.gov/uploadedfiles/competition_in_digital_markets.pdf.

²¹ People.cn, *Alibaba, China Literature, and Hive Box Have Been Penalized, And Anti-Monopoly Monitor in Internet Industry Is Becoming Stricter*, available at http://paper.people.com.cn/gjjrb/html/2020-12/21/content_2024759.htm.

VI. FINAL NOTE

Unlike traditional industries, business models in the platform economy are complex and volatile, which has brought huge challenges to antitrust law enforcement. Against this background, the promulgation of the Platform Guidelines shows the Chinese government's firm and explicit determination to overcome difficulties to strengthen antitrust supervision and regulation of the platform economy, in order to facilitate the lawful and benign development of the industry.

While the Platform Guidelines do not go beyond the legal framework set by the AML and the related regulations, they specify and reinstate many rules with a due consideration of the features of the platform economy. They will provide more specific guidelines and greater confidence to antitrust law enforcement in this field. It is foreseeable that after the promulgation of the Platform Guidelines, antitrust supervision in the platform economy will continue to be intensified. Therefore, undertakings in the platform economy must refer to the Platform Guidelines to carefully review their business models, business practices and transactions, to identify antitrust risks and conduct compliance in a timely manner.



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