

Antitrust Regulation Insight: China's Digital Platforms' New Phase

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The digital economy is rapidly growing across the world. While it greatly freed up and optimized the allocation of resources and stimulated the innovative development of new forms of business and technologies, the digital economy is observing a large number of disputes. In particular, problems in the platform economy such as compulsory “either-or” choice, self-preferencing, data monopolization, algorithm discrimination, and algorithm abuse have emerged from the rise and innovative application of digital platforms. For this reason, the effort to regulate the digital platform economy through antitrust law has taken over the world, which also gives rise to concepts such as the New Brandeis movement in the United States, the gatekeeper platform’s obligations in the European Union, and the notion of cross-market impacts in the platform sector in Germany, calling for new ways of approaching the matter by the legislative, enforcement, and judicial branches.

As one of the world’s leaders in the development of the digital economy, China’s massive user base provides a strong and continuous market demand for digital applications, which has led China to become the world’s second-largest digital economy in 2020 and the first in overall growth rate. Along with the rapid growth in the platform economy, cases of restrictions, exclusion of competition, unfair competition, and unfair trading have also increased.

Since the end of 2020, China has promoted and guaranteed the stable and healthy development of the platform economy by optimizing antitrust law and maintaining strong regulation. For example, on February 7, 2021, the Anti-Monopoly Commission of the State Council issued the *Antitrust Guidelines on Platform Economy*, the world’s first government-issued normative document specifically governing competition in the digital platform economy. In

April and October of the same year, Alibaba and Meituan were slapped with administrative penalties for compulsory “either-or choice” practices. These measures have produced substantial results for the implementation of the explicit requirements of the CPC Central Committee and the State Council to strengthen antitrust enforcement and prevent the disorderly expansion of capital, and laid a solid foundation for fostering new development pattern and smoothing the dual circulation economy.

The CPC Central Committee and the State Council jointly released a guideline on accelerating the establishment of a unified domestic market on April 10. This document seeks to “cultivate new advantages in international competition and cooperation. Make better use of global factors and market resources to better connect the domestic market with the international market, supported by the major domestic circulation and unified market” and to “[c]ultivate a group of digital platform enterprises with global influence.” China should pay attention to the standardization, specialization, and improvement of rule of law in China’s governance in the digital platform economy. China should keep up with international standards, summarize our own experience, refine our own experience and voice our viewpoints in the international arena.

On June 24, 2022, the 35th Session of the 13th National People’s Congress Standing Committee passed the Revised Anti-Monopoly Law (“the RAML”) on the premise that opinions were fully coordinated and the conditions were ripe. The RAML was officially implemented on August 1 of the same year. Anti-monopoly regulation over key elements of the platform economy has attracted widespread attention, and responded to general concerns over all sectors of the society in a timely and effective manner. At the same time, the RAML also provides a legal basis for the next steps in

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refining and delivering an effective supervision of the platform economy.

The RAML not only directly responds to the demand for regulation of digital platforms— it also focuses on refining the fundamental aims, [economic and legal] principles, and key next-steps for Chinese anti-monopoly law in the long term. Particularly, the RAML pays much attention to the characteristics and justification for competition practices. RAML is in an effort to incorporate these policies into the legislature to reduce uncertainty.

For example, Article 9 of the RAML reads: “[o]perators shall not use data, algorithms, technologies, capital advantages and platform rules to engage in monopoly activities prohibited by this Law.” This article has been seen as a direct response to the prevalence of these issues in the digital platform economy. We can say that antitrust regulation in the digital economy has focused on the specific, rather than general, elements of digital platform activities. From which can be found that the digital platform of antitrust regulation of the economy has been focused on the specific elements, the precise type legislation rather than in general about the digital platform of antitrust regulation of the economy, fully embodies the legislature, the national antitrust law enforcement agencies and other relevant departments on the digital platform economy antitrust legislation and law enforcement to strengthen professional next. Only by linking the specific behaviors with effects can the authorities adapt to the characteristics and needs of competition regulation in the digital economy.

I. The Basic Context of China's Platform Antitrust Regulation

China’s antitrust policies and laws for platform enterprises are also formulated and improved intensively and rapidly. The implementation of the Anti-Monopoly Law has been sustained and normalized, while precise regulatory concepts, principles, methods, and technologies are constantly adjusted and improved.

Since November 2020, a series of political meetings, including that of the Political Bureau

of the CPC Central Committee, the Central Economic Work Conference, and the 9th Meeting of the Central Financial and Economic Committee, have clearly demonstrated the attitude and determination of the Chinese authorities to strengthen antitrust regulation and prevent the disorderly expansion of capital. The 21st Meeting of the Commission for Deepening Overall Reform of the CPC Central Committee, held in August 2021, deliberated and approved the *Opinions on Strengthening Anti-Monopoly and Furthering the Implementation of the Policy of Fair Competition*, stressing that they “attach equal importance to both regulatory norms and development promotion.” The Central Economic Work Conference held in December 2021 proposed the goal as “to boost the confidence of market entities, further promote the implementation of fair competition policy, strengthen antitrust and anti-unfair competition, and ensure fair competition with fair regulation”, further confirming a push for the implementation of normalized and standardized antitrust oversight.

On January 19, 2022, the National Development and Reform Commission and nine other departments jointly issued the document entitled *Several Opinions on Promoting the Standardized, Sound and Sustainable Development of Platform Economy*. In view of the current focal issues in the platform economy, building on the new advantages of this sector and promoting its high-quality development is required. In March 2022, Premier Li Keqiang also mentioned in his government work report that in 2022, China would “further promote the implementation of fair competition policies, fight against monopoly and unfair competition, and maintain a fair and orderly market environment.” Li also called for the “timely improvement of regulatory rules in key areas, emerging areas and foreign-related areas, innovation of regulatory methods, and improvement of regulatory accuracy and effectiveness.”

In the formulation of relevant supporting regulations such as the *Antitrust Guidelines on the Platform Economy* released in February 2021. Those supporting regulations are comprehensive responses to the highly controversial “either-or choice” and “big data-

based price discrimination” practices in the platform economy was mounted, covering hot issues including the relevant market definition, the determination of antitrust violation through most-favored-nation clauses, and emerging innovative corporate takeovers. Those supporting regulations were significant efforts in strengthening antitrust regulation for the platform economy, as well as a helpful guide for operators in the platform economy to act in accordance with the law and promote orderly innovation and the healthy development of the platform economy.

On August 20 of the same year, the 30th Session of the Standing Committee of the 13th National People's Congress voted to pass the Personal Information Protection Law, which also put forward special requirements on data processing for large platforms, stipulated the system of information disclosure, external audit, and regulation of the platform subject, increased their responsibilities, and reduced their monopoly risks. These supporting rules have further strengthened the standardization and rigor of digital governance.

As what is said above, on June 24, 2022, the 35th Session of the 13th National People's Congress Standing Committee passed the RAML. The RAML further refined the applicable rules and provided stronger institutional support for the next steps of platform regulation. For example, Article 9 and Article 22 of the RAML include special provisions on platform antitrust. Article 22 of the RAML states that “[o]perators with a dominant market position [that] use data, algorithms, technologies and platform rules to set up barriers and impose unreasonable restrictions on other operators” will violate the law by their abuse of dominant market position.

In addition, the State Administration for Market Regulation (“SAMR”) published *Guidelines for the Classification and Hierarchy of Internet Platforms (Exposure Draft)* and *Guidelines for the Implementation of Main Responsibilities of Internet Platforms (Exposure Draft)* on October 29, 2021. The guidelines provide that the operation, behavior, and responsibility of various types of platforms should be regulated “comprehensively, multi-dimensionally, and hierarchically.”

It can be inferred from the policy positioning of the CPC Central Committee that revising the antitrust policy and the implementation thereof in the digital and platform economy has become a top priority for competition regulation in the Chinese market.

II. Under the Guidance of Antitrust Regulatory Policies and Laws, China Continues to Carry Out Antitrust Regulation of Digital Platform Enterprises

On December 14, 2020, SAMR announced its decision to impose the maximum administrative penalty available on three illegal business concentration cases, including Alibaba's investment in acquiring equity in Yintai Commercial, Yewen's acquisition of Xinli Media, and Fengchao's acquisition of Zhongyouzhidi. This is the first time that China's antitrust authority has imposed an administrative fine over the concentration of operators in the digital economy.

In addition, according to the Antitrust Working Conference of the National Market Regulation System on March 17, 2022, 176 monopoly cases were investigated and resolved nationwide in 2021, and the total amount of fines was of 23.586 billion yuan (roughly 3.4 billion US Dollars). The court system reviewed 727 business concentration cases, conditionally approved four cases and enjoined one. The Chinese antitrust regulators achieved remarkable results, along with significant law enforcement breakthroughs, especially new developments in the field of digital and platform economy.

What is particularly noteworthy is that on April 10, 2021, the SAMR issued an administrative penalty decision on Alibaba's monopolistic behavior of compulsory “either-or choice”. On July 10 of the same year, the SAMR issued an antitrust review decision on the concentration of operators in the merger of Huya and Douyu declared by Tencent, forbidding the concentration and rejecting Tencent's promise of additional restrictive conditions. This is the first case of Internet platform merger and acquisition prohibition in China, effectively

strengthening the antitrust regulation of the digital and platform economy.

On July 24, 2021, the SAMR issued an administrative penalty for illegal concentration in the case of Tencent Holdings' acquisition of China Music Corporation, ordering Tencent and its affiliates to take measures to reinstate competitive order in the relevant market, notify the authority of any concentration in accordance with the law, and pay a fine of 500,000 yuan. This is the first case involving an illegal merger that has been ordered to restore competition in the market in over thirteen years since the implementation of the Anti-Monopoly Law and marks a significant step toward maintaining fair competition and promoting innovation and growth in the industry.

SAMR has also held several administrative guidance meetings with industry-specific regulators in the digital economy to present specific guidelines and requirements for *ex ante* regulation. On the eve of "Double 11" in the past two years, a digital sale day in China like the Amazon Prime Day, SAMR cohosted with other agencies the Administrative Guidance Symposium on Regulating Online Business Activities and Administrative Guidance Conference on Regulating Online Economic Order which was also attended by major digital platform enterprises. It attaches great importance to the supervision of centralized network promotion activities. In the meeting, for the false discount misleading consumers, false publicity and illegal advertising, unfair format terms, "brush single fried letter", restrictions on the choice of commercial platform and other issues were explained. It hope that the major digital platform enterprises will carefully examine the above issues, respond to consumer demand, and earnestly fulfill their responsibilities in terms of platform governance, information disclosure, fair competition and consumer rights protection.

The agencies in charge of regulating various industries have also put forward relevant work requirements for strengthening antitrust law enforcement and standardizing the healthy development of new business models in the industry. On July 30, 2021, the Joint Inter-Ministerial Meeting on Transportation and

Coordinated Regulation of New Forms set out "to strengthen antitrust regulation and oversight over unfair competition, investigate and punish online car-hailing and freight transportation platforms for monopolizing, excluding and restricting competition . . . to further strengthen network and data security regulation, [and] to protect consumers' personal information." Local market regulatory departments have also organized administrative guidance meetings for digital platform enterprises to help them operate within the parameters set by law. At present, a comprehensive, multi-level and multi-dimensional digital platform governance system and implementation mechanism are shaped into existence by local and central governments.

III. The Main Characteristics and Development Trend of Chinese Platform Antitrust Regulation

It is worth noting that although China's attitude towards digital platform governance is similar to that of other major nations, there are differences with regard to regulatory concepts, methods, and specific measures. In practice, China usually pays more attention to policy guidance and multilateral governance, stressing the importance of maintaining "stability" while making progress. In line with the general direction of policies, China pursues coordinated governance at a multi-level, multi-faceted and multi-field approach in an orderly fashion and under the rule of law. This is achieved through the scientific and prudent diversification of accurate and effective measures, where enforcement is characterized by consistency, science, and transparency.

Both the current legislation and agencies have fully implemented the central government's directions in strengthening antitrust regulation and enforcement against unfair competition, promoting fair competition, setting useful guideposts for market entities, and introducing systematic, holistic and scientific decision-making. The interpretation of specific laws and regulations and the implementation of regulatory measures should be more objective and based on scientific principles. Focusing on "regulations" aims to prevent the disorderly expansion of capital, promote fair market

competition and help in the healthy development of China's digital economy.

In other words, the regulation of digital platform enterprises should focus on scientific, accurate, and effective regulation strategies and methods, stimulate the innovation in the market, and enhance the sustainable growth in the digital and platform economy. Meanwhile, it is necessary to balance the relationship between short-term policy goals and long-term, high-quality development requirements, avoid the excessive pursuit of short-term regulatory benefits, form a long-term sustainable model that assigns equal weight to development and regulation so as to build a fair and orderly digital market.

Recently, the safeguarding of free, fair, and orderly competition and the standardized development of the digital market have become the indispensable requirement of China's "14th Five-Year plan" and its guiding mission, which is to promote the sustainable and high-quality development of the digital economy and to create new advantages in international competition. Faced with increasingly fierce competition in the regulation game, China should take the initiative and adapt to the new trend of competition and regulation in the global digital economy. On the basis of improving and strengthening the rule of law and its own regulation strategy, China should clarify the key direction for adjusting the concept, subject matter, and methodology of its digital antitrust regulation .

In terms of regulatory philosophy, China should implement the concept of science-based and prudent supervision subsidized by the rule of law, attach equal importance to development and regulation, and seek a dynamic equilibrium among cracking down on monopolistic behaviors, containing the risks of unfair competition, and encouraging the innovation and development of digital platform enterprises. China should also strive to provide clear demarcation of liability and regulatory boundaries to facilitate transparent antitrust enforcement and avoid overlapping liabilities or enforcement crossover between regulators. Tailoring to the characteristics and principles of the digital market and preventing market harms

caused by stringent or improper enforcement through multi-disciplinary regulatory cooperation that improves the efficacy and efficiency of digital oversight would also benefit the Chinese regulators and the Chinese society as a whole.

It can be said that China's current legislation and law enforcement have fully implemented the central government's decision to "strengthen antitrust" deployment. However, our understanding of "strengthening antitrust" should not go to extremes. **"Strengthening antitrust" cannot be simply equivalent to "strengthening platform antitrust", nor can it just strengthen antitrust law enforcement with regard to platforms.** As the 26th Meeting of the Commission for Deepening Overall Reform of the CPC Central Committee stressed on June 22, 2022:

[t]o strengthen the regulation of platform enterprises against monopoly and unfair competition, strengthen the regulation of platform enterprises over sediment data, and regulate the big data-based price discrimination and algorithm discrimination, China needs to consolidate the regulatory responsibilities of all relevant departments, improve the coordinated regulatory framework between the central and local governments, **strengthen functional, penetrating, and sustained oversight, strengthen regulatory coordination and joint law enforcement, and maintain consistency between online and offline oversight.**

On June 24, 2022, the 35th Session of the 13th National People's Congress Standing Committee passed the RAML. Compared with Article 10 of the first draft, article 11 of the RAML adds the goal of "strengthening anti-monopoly law enforcement and judiciary, hearing monopoly cases fairly and efficiently in accordance with the law, and improving administrative law enforcement and judicial connection mechanisms." Specifically in the field of platform regulation, it is clear that antitrust is a part of platform regulation, but platform regulation cannot be equated with platform antitrust. At the same time, platform

antitrust should not be understood as merely involving antitrust law enforcement, but should also include platform antitrust justice, as well as platform enterprises and other participants' compliance with the anti-monopoly law, such as platform enterprises' compliance and supervision of other participants.

The interpretation of specific laws and the implementation of regulatory measures should be objective and scientific. The purpose of focusing on "regulations" is to prevent the disorderly expansion of capital, promote fair market competition, and encourage the healthy development of the digital economy. In other words, China should pay attention to scientific, accurate, and effective regulation strategies and methods for digital platform enterprises, adhere to both development and regulation as guiding principles, stimulate innovation among market entities, and enhance the driving force and sustainability of growth within digital platform enterprises.

At the same time, it is necessary to balance the relationship between phased policy goals and long-term high-quality development requirements, avoid excessive pursuit of short-term regulatory benefits, form a long-term sustainable development model that pays equal attention to development and regulation, and build a unified, fair and orderly digital market.

In terms of regulation subjects, taking market operation as the starting point and respecting the basic laws of market operation, an all-round, multi-level and multi-dimensional regulation system led and regulated by the General Administration of Market Regulation and coordinated with other actors and local regulation departments should be established to improve regulation efficiency.

The SAMR was set up through the institutional reform of 2018, integrating anti-monopoly law enforcement powers originally scattered across three departments, thus offering a partial solution to the problem of overlapping functions and a more efficient antitrust regulation. At the same time, it should be noted that compared with traditional physical platforms, digital economy platforms are more convenient for expansion. Hidden monopolies, complex competition mechanisms, and a diversified

operation with cross market competition are more serious issues. Therefore, all industries and market entities are required to participate in the multi-faceted regulation. This approach links market entities with industry-specific authorities, forms a complete set of regulatory chains, establishes regulatory coordination in the finance, manufacturing, information technology, Internet, and other industries, and encourages the sharing of information, joint enforcement, and regulatory cooperation. China will open channels for market entities to report, attach importance to supervision by public opinion, improve correspondence procedures, and emphasize the disclosure of results. Under the overall management of the SAMR, the regulatory subjects in all fields and on different regulatory levels should play active roles in improving regulatory efficiency.

In terms of regulatory methods, China's authorities could improve the anti-monopoly review mechanism to form a chain of supervision and control over consolidations *ex ante* and *ex post*. To achieve this goal, it is necessary not only to clarify the rules regulating business conduct in the platform market and strengthen structural control and other obligations through legal norms, but also to introduce scientific and technological tools to link regulatory authorities and platform operators to establish a real-time, digital, intelligent and full-cycle regulation mechanism as well as to respond to the digital economy in the whole cycle, the whole airspace, the whole scene, the whole chain, the whole value of the new competition paradigm and the new requirements of antitrust regulation.

In terms of regulatory logic and procedures, China should promote scientific and prudent *ex ante* regulation, encourage and support platform entities to actively participate in compliance governance, and take accurate measurements to ensure effective prevention and control while fully respecting the independent operation of platform entities. China can make comprehensive use of administrative guidance, interview, investigation and other administrative methods to link industry regulation departments and market regulation departments, increase input in science and technology regulation, and enhance capacity for prior regulation. Concrete

measures including but not limited to scientifically issued relevant policy documents in time, strengthen communication between enterprises and government authorities, provide policy explanations and consultation for all platform entities, provide scientific and timely behavioral guidance, advocate for guidance first, encourage platform subjects to combine self-compliance with external regulations so as to improve efficiency in advance. Regarding *ex post* regulation, this should be strictly in accordance with the law, setting up a list of positive and negative scientific management systems. Policy makers should also clarify and publicize start-up procedures, investigation procedures, hearing procedures, and result disclosure procedures, which would enhance the authority's position in its enforcement to deliver open, fair, and equitable regulation.

In terms of regulatory content, China should pay attention to the balance of diverse interests in the dynamic process of data collection, use and management to effectively deter and regulate data monopolization, blockade, and abuse by players in the platform economy. At the same time, it should standardize and provide guidance for the lawful operation of cross market digital platform enterprises, incentivize their innovation, creativity and competitiveness on a global scale, and seize the vantage point of international competition in the digital economy. In accordance with the *Guidelines for*

Overseas Antitrust Compliance issued by SAMR in November 2021, Chinese digital platform enterprises should raise their awareness of overseas regulation compliance by establishing and improving international antitrust compliance solutions, as well as accurately identifying and assessing the potential risks in the international arena including antitrust risks and the associated risks relating to data security, financing, and IP infringement.

Due to the highly dynamic, cross-industrial, and transnational activities of competitions among digital platform enterprises, the effective antitrust regulation of the digital economy in an international context depends on countries and regions to continuously deepen bilateral, multilateral, and regional cooperation in antitrust enforcement. On the basis of safeguarding the sovereignty, national security and economic interests of all countries in the digital field, it is necessary that authorities promote the establishment of practical international governance rules for competition in the digital economy that will reflect the interests and demands of all countries, so as to build a new regime for global competition in the digital economy featuring joint construction, joint governance, and shared benefits. These subjects need to be considered and further explored in the future research and practice.