

# CHALLENGES AND PROSPECTS FOR MERGER CONTROL IN CHINA IN THE DIGITAL ECONOMY



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## I. BACKGROUND

The popularity of mobile services in the internet economy, with data and algorithms as both their key elements and driving force, have developed rapidly. Vibrant mergers & acquisitions (“M&A”) have become one of the most salient features of the Chinese digital economy. M&As between leading undertakings from certain sectors have sprung up constantly, such as that between Ctrip and Qunar, two top online traveling companies in 2015; Didi Chuxing’s (“Didi”) acquisition of Uber China (“Uber”) in 2016; Alibaba’s acquisition of Damai in 2017; and Meituan’s acquisition of Mobike in 2018 being classic examples. What’s worth mentioning is that only a few digital M&As have been officially reviewed by the Chinese competition authority<sup>2</sup> during the ten years since the Anti-Monopoly Law of the People’s Republic of China (“AML”) came into effect. This is due to the turnover-based notification threshold, the variable interest entity (“VIE”) arrangement and others, namely the conditional clearances of Walmart’s Acquisition of 33.6 percent Shares in Newheight Holding which concerned online direct sales business in 2012;<sup>3</sup> and Bayer Aktiengesellschaft, Kwa Investment Co.’s (“Bayer”) acquisition of Monsanto Company (“Monsanto”) shares which involved digital agricultural market in 2018<sup>4</sup> as classic examples.

In sharp contrast to these concentrations barely reviewed by the Ministry of Commerce (“MOFCOM”), much more influential M&As in the digital economy have triggered Chinese doubt regarding their compliance with competition law. Ever since the institutional reform of the Chinese anti-monopoly authority in 2018, merger control is no longer the competence of the MOFCOM, while the Anti-Monopoly Bureau affiliated with the State Administration for Market Regulation (“SAMR”) has become the exclusive central department to enforce anti-monopoly laws. Considering merger control plays an essential role, which attitudes the SAMR has towards digital concentrations is of great interest to the whole community.

This paper aims to present the challenges and predict the future of merger control in China’s digital economy. Part II would discuss the notification threshold. Special issues in the competition assessment of the digital economy will be analyzed in Part III. Part IV focuses on remedies. The authors have tried to summarize the development trends and main issues to be solved in Part V. Our Conclusion can be found in the final sections.

<sup>2</sup> Please note that the competence to review concentrations has been transferred from the Ministry of Commerce (“MOFCOM”) to the State Administration for Market Regulation (“SAMR”) after the central administration institutional reform in March 2018. In the following part, the explicit mention of the MOFCOM or the SAMR corresponds with the cases it has dealt with in practice.

<sup>3</sup> Available at <http://fdj.mofcom.gov.cn/article/ztxx/201303/20130300058730.shtml>.

<sup>4</sup> Available at <http://fdj.mofcom.gov.cn/article/ztxx/201803/20180302719123.shtml>.

## II. NOTIFICATION

### A. VIE

Though the advancement of the digital economy has facilitated a digital transformation of almost every industry, the most vibrant market participants are still internet companies who established their business models on the basis of the internet from the early beginning. A large majority of Chinese internet companies have a connection with VIE, which is one of the main reasons why barely any concentrations in the internet industry have been reviewed by MOFCOM in the last ten years. Since the Chinese authority's attitude towards VIE is not clear, MOFCOM was afraid that its anti-monopoly review of concentrations involving VIE might be understood as recognizing the legality of VIE indirectly. As a result, MOFCOM usually declined to accept any notification of concentrations, especially those between internet companies, involving VIE, which partly explains why most of the internet concentrations involving VIE have not been notified to MOFCOM.

Whether the VIE obstacle would be cleared directly determines the trend of anti-monopoly review of digital concentrations in China. Nowadays, China is on the way to passing the Foreign Investment Law of the People's Republic of China ("Foreign Investment Law").<sup>5</sup> If the nationality of the undertaking, now determined by "registered address," were revised to "actual controlling power," it could solve the VIE plight to large extent.<sup>6</sup> Otherwise, an eclectic alternative would be for the anti-monopoly authority to explicitly state that its enforcement would have no effect on obligations imposed by other laws and regulations, which would separate anti-monopoly enforcement from VIE. In other words, whether and how the SAMR would review digital concentrations depends on its attitudes towards VIE and whether anti-monopoly enforcement could be separate from VIE.

### B. Notification Threshold

#### 1. Limitation of the Turnover-Based Notification Threshold

The notification threshold for merger control in China is based on turnover, which might not be the proper benchmark. In multi-sided markets, a widely used model in the digital economy, services provided by one side are free, which brings challenges for the application of turnover-based notification thresholds. In fact, it is quite normal for digital undertakings to remain in deficit for long periods of time. Nevertheless, they could still impose a non-negligible effect on the market. Just as Didi's acquisition of Uber in 2016 shows, in response to public doubts, Didi replied that, "Until now, neither Didi nor Uber has obtained any profits. Turnover obtained by Uber in China in the last financial year did not meet the notification threshold."<sup>7</sup> In general, the turnover-based notification threshold cannot screen out all the potentially problematic concentrations in the digital economy.

#### 2. The Introduction of a Transaction-Value-Based Threshold

It is worth mentioning that a transaction-value-based notification threshold has been introduced in certain jurisdictions, such as Germany and Austria,<sup>8</sup> as well as South Korea.<sup>9</sup> As for China, considering the increase in influential digital concentrations, the Provisions of the State Council on the Threshold for Notifying Concentration of Undertakings<sup>10</sup> ("Provisions on Threshold for Notification") should be amended, complementing the current turnover-based threshold with a transaction-value-based threshold in response to the practical requirement mentioned above. Before this amendment, the Chinese anti-monopoly agency could only obtain the authority to review concentrations where the turnover of the undertakings involved did not meet the turnover-based threshold through residual jurisdiction in accordance with Article 4 of the Provisions on Threshold for Notification. Part III will list special competition concerns in the review of concentrations in the digital economy, covering data, privacy, innovation

<sup>5</sup> Available at <http://finance.people.com.cn/n1/2017/1103/c1004-29625247.html>.

<sup>6</sup> Available at <http://fs.mofcom.gov.cn/article/as/201501/20150100871010.shtml>.

<sup>7</sup> Available at [http://m.21jingji.com/article/20160802/herald/29df68176ebf184049383a973596a939\\_zaker.html](http://m.21jingji.com/article/20160802/herald/29df68176ebf184049383a973596a939_zaker.html).

<sup>8</sup> Available at [https://www.bundeskartellamt.de/SharedDocs/Publikation/EN/Leitfaden/Leitfaden\\_Transaktionsschwelle.pdf?\\_\\_blob=publicationFile&v=2](https://www.bundeskartellamt.de/SharedDocs/Publikation/EN/Leitfaden/Leitfaden_Transaktionsschwelle.pdf?__blob=publicationFile&v=2).

<sup>9</sup> Available at [http://www.ftc.go.kr/solution/skin/doc.html?fn=d683557915e4704e9db250e2a6ae49f66deea36589173a4539a300a322d23592&rs=/fileupload/data/result/BBSMSTR\\_00000002402/](http://www.ftc.go.kr/solution/skin/doc.html?fn=d683557915e4704e9db250e2a6ae49f66deea36589173a4539a300a322d23592&rs=/fileupload/data/result/BBSMSTR_00000002402/).

<sup>10</sup> Available at <http://fdj.mofcom.gov.cn/article/c/200811/20081105917434.shtml>.

and the leveraging effect.

### III. COMPETITION ASSESSMENT

#### *A. Openness of Data*

Most of the online platforms in China are data-driven. Since data, especially personal information, plays an essential role in business, a large percentage of digital concentrations involve or are even undertaken for the very reason of data integration. As for the two concentrations that have raised widespread attention all over China, namely Alibaba's acquisition of Eleme and Meituan's acquisition of Mobike in 2018, data integration is probably what the acquirers were looking for. Competition agencies from the main jurisdictions across the globe pay close attention to data, which we believe SAMR will also focus on in the future, including determining whether the data could trigger input foreclosure.<sup>11</sup> In data-driven concentrations, huge controversies still remain regarding whether data held by one undertaking could be recognized as an essential competition element and whether competitors could obtain similar data from other sources. Besides, as for the request to open access to data, special attention shall be paid to the operability of data openness and its potential chilling effect on innovation.

#### *B. Privacy Protection*

Theoretically speaking, privacy is a non-price competition element. A firm with a certain level of market power may not offer its customers a better deal in terms of privacy if it faces no pressure from competitors. Likewise, firms in a concentrated market may tacitly coordinate to avoid competition on privacy.<sup>12</sup> In a concentration, if one of the undertakings concerned has strong market power, data privacy might be a concern for competition. If two horizontal market players compete on privacy as an aspect of product quality, their merger could be expected to reduce quality.<sup>13</sup>

The passing of the Cyber Security Law of the People's Republic of China ("Cyber Security Law") and other laws shows increasingly stronger protection of personal information, especially for user privacy. In November 2016, The Internet Rule of Law Research Centre affiliated with the China Youth University of Political Studies, together with the Cover Institute, released the Report on Chinese Individual Information Security and Privacy Protection ("Report") on the basis of millions of questionnaires conducted for the first time in China. The Report shows that more than 70 percent of participants acknowledge the seriousness of information leaks; 26 percent have received at least two to three spam messages every day; 20 percent have received at least two to three harassing calls per day; as much as 81 percent have experienced unknown callers with knowledge of their name, employer and other personal information; 53 percent complain that they have been harassed continuously by certain advertisers only for having visited certain web pages, or leaving behind certain personal information; the percentage for unwelcome advertisement or fraud due to leaks of information on house rental/purchase, car insurance, admission to higher education, and others, is as high as 36 percent.<sup>14</sup>

Whether the SAMR would also assess data-driven concentrations from the perspective of privacy protection, as well as input foreclosure, also deserves commentary. The SAMR, which the Anti-Monopoly Bureau is affiliated with, is a comprehensive market supervision department, also consisting of a Price Supervision and Anti-Unfair Competition Bureau, Cyber Transaction Supervision and Management Bureau, Enforcement and Inspect Bureau, and others. Considering the current institutional arrangement many elements would affect the application of merger control rules, such as how the Anti-Monopoly Bureau would consider privacy or coordinate with other internal departments within the SAMR, as well as how the SAMR would coordinate with the Office of the Central Cyberspace Affairs Commission in specific cases, especially considering the increasing importance of privacy protection in the digital economy.

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<sup>11</sup> MOFCOM, Interim Provisions on Assessment of the Impact of Concentrations on Competition, 2011, Article 7.

<sup>12</sup> Organization for Economic Co-operation and Development ("OECD"), Considering non-price effects in merger control – Background note by the Secretariat, 4 May 2018, 34-35.

<sup>13</sup> Autorité de la concurrence & Bundeskartellamt, Competition Law and Data, May 10, 2016, 24.

<sup>14</sup> Available at [http://news.cyu.edu.cn/xyyw/hzjl/201611/t20161123\\_78640.html](http://news.cyu.edu.cn/xyyw/hzjl/201611/t20161123_78640.html).

### **C. Competition in Innovation**

The digital economy is closely connected with innovation. It is predicted that the digital economy will constitute the main area of innovation competition that will have to be analyzed by global anti-monopoly authorities. In accordance with Article 27 of the AML, elements which shall be considered when reviewing a concentration include, but are not limited to, its influence over market entry and technical progress, which has laid the legal foundations for considering innovation. Article 8 of the Interim Provisions on Assessment of the Impact of Concentrations on Competition further clarifies what influence a concentration could have on technical progress, both positively and negatively.<sup>15</sup>

In practice, the MOFCOM has already reviewed concentrations from the perspective of innovation. In 2017, the MOFCOM conditionally cleared the merger between the Dow Chemical Company (“Dow”) and E.I. Du Pont De Nemours And Company (“Du Pont”). The MOFCOM concluded that the merger would eliminate or restrict competition in the markets of selective herbicides and pesticides for rice, the competition analysis of which covered innovation. The MOFCOM observed that the transaction would cause side effects affecting technical progress in the market of selective herbicides for rice. To be more specific, before the concentration, both Dow and Du Pont were significant innovative powers in the market and competed fiercely in research and development (“R&D”), pouring huge amounts of money, being equipped with strong innovative power, and having a rich product reserve. The merger would eliminate the basis for this competition. Following the concentration both parties might lack the incentive to perform R&D, decrease investment in current parallel innovation (products having the same targets), or delay the launch of new products, which would drag down overall technical progress in the market.<sup>16</sup> Similarly, the MOFCOM conditionally cleared Bayer’s acquisition of shares in Monsanto, and concluded that the concentration would eliminate or restrict competition in the global digital agricultural market. Before the transaction both Monsanto and Bayer were essential innovative powers in the digital agricultural market, investing massively in R&D, while after the transaction Bayer would probably reduce its investment in innovation, which would have a detrimental impact on technical progress. Worse, Bayer might also raise the technical threshold and block market innovation.<sup>17</sup>

How to value innovation, including how to judge the possibility for innovation, the motivation to innovate, as well as the costs and benefits of innovation, are challenges being confronted by various anti-monopoly agencies, which still require theoretical research and enforcement exploration. What’s worth mentioning is that the relationship between a concentration and innovation is not clear in every case, which means that the Chinese anti-monopoly agency shall be really cautious when assessing concentrations from the perspective of innovation.

### **D. Leveraging Effect**

It is quite common for an undertaking with market power to influence adjacent markets. Through a concentration an undertaking could weaken competition in the adjacent market by making use of its power in another market, which is usually called a “leveraging effect.” Under the influence of undertakings becoming platforms, network flow coming first, and trans-sector competition, the conditions for the application of leveraging theory, which have been widely questioned before, are also changing. The Commercial Use of Consumer Data – Report on the CMA’s Call for Information published by the United Kingdom’s Competition & Market Authority in 2015 pointed out that “Respondents raised concerns about the potential for consumer data to be used to generate or exacerbate market power in a single market, or being used as a source of power that could be leveraged into a related market.”<sup>18</sup> The Challenges for Competition Policy in a Digitalized Economy released by the European Parliament in 2015 also emphasized the effect certain conducts might have on adjacent markets through leverage.<sup>19</sup>

China’s anti-monopoly agency has applied leverage theory in practice. In the blocked Coca-Cola’s acquisition of Huiyuan, the MOFCOM concluded that Coca-Cola had the ability to leverage its dominant power in the carbonated beverage market to affect the juice beverage market so as to eliminate or restrict competition in the latter, and would ultimately harm the legitimate rights and interests of consumers. Furthermore, following the concentration Coca-Cola’s controlling power over the juice beverage market would be significantly enhanced through making use of two famous fruit juice brands, “Mei Zhiyuan” and “Huiyuan,” together with its dominant power in the carbonated beverage market and leveraging

<sup>15</sup> Available at <http://www.mofcom.gov.cn/aarticle/b/c/201109/20110907723440.html>.

<sup>16</sup> Available at <http://fdj.mofcom.gov.cn/article/ztxx/201705/20170502568075.shtml>.

<sup>17</sup> Available at <http://fdj.mofcom.gov.cn/article/ztxx/201803/20180302719123.shtml>.

<sup>18</sup> Competition & Market Authority, The commercial use of consumer data - Report on the CMA’s call for information, June 2015, 9.

<sup>19</sup> European Parliament, Challenges for Competition Policy in a Digitalized Economy, January 2015, 31-33, 61-62.

effect, which would remarkably increase the barriers to entry in the juice beverage market.<sup>20</sup> As for the Chinese digital economy, internet titans have engaged in large scale trans-sector acquisitions. The possibility for the application of leverage theory to the following anti-monopoly review of non-horizontal concentrations cannot be excluded.

## IV. REMEDIES

### A. Choice Between Remedies

Remedies consist of structural and behavioral remedies, with the former including the divestment of certain business units. Behavioral remedies regulate the future behavior of merging parties, which might include commitments not to engage in certain conduct, or contractual arrangements such as compulsory licensing or access to intellectual property. Generally speaking, competition agencies prefer structural remedies over behavioral remedies, as structural remedies are regarded as being more effective in avoiding the potential negative impacts of mergers.<sup>21</sup>

With regards to the digital economy, how to choose between structural remedy and behavioral remedy is well worth some contemplation. Considering that the digital economy is characterized by network effects and multi-sided markets, would this make a difference to whether behavioral remedies would continue to be preferred? Even if in the digital economy, behavioral remedies are still confronted with dilemmas, such as the difficulty of designing mechanisms and supervising compliance, as well as over remedies brought by the authorities' continuous intervention of the market. In this regard, how to apply behavioral remedies is still worth deeper research. Furthermore, use could be made of blockchain technology to solve the problems of supervising enforcement.<sup>22</sup>

### B. Would China Continue to Prefer Behavioral Remedies?

In China, Article 29 of the AML stipulates that mergers may be approved with restrictive conditions. Up through January 2019, the Chinese competition authority had conditionally cleared nearly forty mergers, having imposed both structural and behavioral remedies. The preference for behavioral remedies has been widely debated in the competition community, particularly the rather unique hold-separate remedy.<sup>23</sup> The use of this unique condition by the MOFCOM is partly explained by the specific Chinese context and market environment. It is no wonder why the MOFCOM adopts different remedies in merger cases. In addition, changes in the digital market require constant adaptation, which is a challenge faced by every competition agency globally. As such, the function and application of experimental and innovative remedies cannot be arbitrarily denied.

We predict that the SAMR would remain open to behavioral remedies, and the possibility for issuing creative remedies revolving around data, algorithms, privacy, and innovation cannot be excluded. Taking the openness of data as an example, Article 3 of the Provisions on Imposing Remedies on the Concentration of Undertakings (Trial Implementation)<sup>24</sup> has explicitly stipulated, "... requir[ement for] the undertakings participating in a concentration to make available their respective networks, platforms and other infrastructure, license key technologies (including patents, proprietary technologies or other IPRs), terminate exclusive agreements ...". Even if there is no precedent directly connected with "data" foreclosure, the MOFCOM did express concern over "input" foreclosure. Behavioral remedies, such as openness, have been applied several times. The possibility for SAMR to recognize data as an essential input for competition and require open access cannot be excluded. Nevertheless, the risk of conflicts between increasing access to data and the protection of personal information cannot be ignored.<sup>25</sup> Besides, the Chinese competition agency does not recognize arbitration in disputes arising from the implementation of behavioral remedies, especially those of openness to essential inputs. The introduction of an arbitration mechanism could be another worthy goal for the Chinese merger control system.

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<sup>20</sup> Available at <http://fdj.mofcom.gov.cn/article/ztxx/200903/20090306108494.shtml>.

<sup>21</sup> Alison Jones & Brenda Sufrin, "EU Competition Law," Oxford University Press, 2016, 1195-1200.

<sup>22</sup> OECD, Blockchain Technology and Competition Policy – Issues paper by the Secretariat, June 8, 2019, 8-9.

<sup>23</sup> Ariel Ezrachi & Wei Han, "Merger remedies – the Chinese experience, Journal of Antitrust Enforcement," Volume 3, Issue suppl\_1, October 1, 2015, i74, i80-i82, i86- i87.

<sup>24</sup> Available at <http://www.mofcom.gov.cn/article/b/c/201412/20141200835207.shtml>.

<sup>25</sup> Wei Han & Yajie Gao, Promote Openness or Strengthen Protection? Application of Law to Data Competition in China, CPI Antitrust Chronicle, May 15, 2018.

## V. PROSPECTS OF THE SAMR'S ENFORCEMENT

### A. Increasing Attention Paid to Monopolistic Issues in the Digital Economy

The Chinese academic community has paid growing attention to monopoly issues in the digital economy. Since 2018 in particular, topics discussing data and algorithms could be found in various seminars, for example, the 7<sup>th</sup> China Competition Policy Forum hosted by the Anti-Monopoly Commission affiliated with the State Council in July 2018,<sup>26</sup> and the seminar on Fair Competition and Anti-Monopoly in the Digital Economy organized by the SAMR in December 2018. During the latter seminar heated discussions were held about regulation and governance of trans-sector competition in the internet era, how to coordinate the relationship between competition policy and high-tech industrial policy, and other concrete issues, such as data monopolies. Mr. Zhenguo Wu, Director General of the Anti-Monopoly Bureau of the SAMR, also attended the seminar.<sup>27</sup>

It is worth noting that the SAMR is still investigating Didi's acquisition of Uber. During a press conference held by the State Council Information Office in November 2018, Mr. Zhenguo Wu announced that, "The SAMR is investigating the acquisition in accordance with anti-monopoly laws and regulations. Online car hailing is an emerging social phenomenon, no matter whether it is in China, the European Union, or the United States, which is different from traditional industries. Competition in this market is not only complicated, but also versatile, which has drawn widespread attention. We are doing research into regular patterns and characteristics of internet competition, comprehensively analyzing and assessing the effects the acquisition has on market competition and sector development, and would seriously punish monopolistic conducts which would harm consumer rights. Acting as the anti-monopoly enforcement agency, the SAMR pays close attention to competition problems in the innovative sectors, and would regulate internet and other emerging sectors in accordance with their respective innovative development, new regulatory methods, as well as sticking to tolerant and prudent principles, so as to maintain fair competition in the market, and provide a loose and tolerant environment for the emerging form and innovative business model of internet. The market competition mechanism shall play its due role to strengthen innovation momentum, while the regulatory system over the internet industry should also be reinforced. The SAMR will coordinate with other departments properly in order to strengthen market supervision, prohibit industrial monopoly and clear market entry barriers, and protect legitimate consumers' rights and public interests."<sup>28</sup>

According to an official public report, priorities for the SAMR's work in 2019 would include, "... evaluating the competition status of the Chinese market as a whole and key sectors; establishing an anti-monopoly database; initiating dynamic assessment of competition in the markets of medicine, internet, I-cloud, and other industries so as to provide support for the implementation of competition policy and the enforcement of anti-monopoly law. ..."<sup>29</sup> With better understanding of the digital economy and more experience obtained through investigating Didi's acquisition of Uber, it is expected that the SAMR will officially review more digital concentrations in the future.

### B. Insufficient Enforcement Human Resources

There are four divisions within the Anti-Monopoly Bureau which are in charge of merger control, namely the Law Enforcement Supervision Division, and Merger Control Divisions 1, 2, and 3.<sup>30</sup> These consist of less than twenty case handlers in total. In comparison, even if three other divisions are authorized to investigate monopoly agreements, abuse of dominance and administrative monopoly respectively, market supervision departments at the provincial level are also empowered to investigate certain cases, as stipulated by the Notice of the SAMR on the Authorization of Anti-Monopoly Enforcement Power;<sup>31</sup> while the SAMR is the one and only agency entitled to review concentrations. However, the number of notified concentrations is much higher than that of other anti-trust cases. If VIE is not an obstacle any longer then the notification of concentrations in the digital economy would become commonplace. It would make the insufficient human resources for enforcement even worse. We recommend that the SAMR take the following actions in response to this shortage:

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26 Available at <http://news.uibe.edu.cn/info/1381/36140.htm>.

27 Available at [http://samr.saic.gov.cn/xw/yw/zj/201812/t20181225\\_279045.html](http://samr.saic.gov.cn/xw/yw/zj/201812/t20181225_279045.html).

28 Available at [http://www.xinhuanet.com/fortune/2018-11/16/c\\_129995829.htm](http://www.xinhuanet.com/fortune/2018-11/16/c_129995829.htm).

29 Focus of Anti-Monopoly Work in 2019: Promote Competition Enforcement and Maintain Fair Competition, China Market Regulation News, January 9, 2019.

30 Interview with Wu Zhenguo, Director General of China's State Administration for Market Regulation (SAMR), the Antitrust Source, December 2018, 2.

31 Available at [http://samr.saic.gov.cn/xw/yw/wjfb/201901/t20190103\\_279720.html](http://samr.saic.gov.cn/xw/yw/wjfb/201901/t20190103_279720.html).

First and foremost, local enforcement forces must be made good use of. Since the key to institutional reform in recent years has been streamlining organisms and decreasing the number of enforcers, it is not practical to enlarge the enforcement team at the SAMR in short term. With this context, it would be proper to make better use of local enforcement forces. To be more specific, the SAMR could explore empowering market supervision departments in developed regions where concentrations are really active, such as Beijing, Shanghai, Guangdong, Zhejiang and Jiangsu, to review concentrations, on the basis of “location of notifying undertaking” and other standards.

Second, to revise substantive merger control rules. The SAMR is advised to pay special attention to data, privacy and innovation on the basis of deep research into the digital economy and to try to ameliorate relevant rules. For example, the Interim Provisions on Assessment of the Impact of Concentrations on Competition could be complemented with competition elements specific to the digital economy. Besides, the introduction of clear rules over how to judge controlling power, notification of JVs and the others, would also help. To be more specific, guidelines on how to judge the change of control in M&As with the purpose of data integration should be provided. Nowadays, the MOFCOM treats all JVs the same, no matter it is fully-functional or non-fully-functional, as long as the notification threshold has been surpassed.<sup>32</sup> After the institutional integration, rules on how to coordinate the three Merger Control Divisions and the Monopoly Agreement Investigation Division when it comes to non-fully-functional JV shall also be given.

Third, internal management of knowledge should be strengthened. Good knowledge management could strengthen internal communication, facilitate knowledge transfer, cut down on redundant work, enhance enforcers’ ability, and increase working efficiency. If combined with a suggestion for empowering local authorities to review concentrations, it would be necessary to train local enforcers with the support of better knowledge management. Furthermore, enforcement databases could be established, while the results of various exchange training programs and external commissioned research projects should be better transformed to application, so as to improve the enforcement quality.

Fourth, more support shall be provided by technical experts. Besides external legal and economic experts, technical experts also play an irreplaceable role in anti-monopoly enforcement. From a long term perspective, apart from external technical experts, a permanent independent technical support team is also advised to be set up.<sup>33</sup>

Last but not least, international exchange in anti-monopoly enforcement in the digital economy shall continue intensify. China keeps frequent communications with many jurisdictions, such as the regularly held BRICS International Competition Policy Conference<sup>34</sup> and the China-EU Competition Policy Week.<sup>35</sup> During the 16<sup>th</sup> Competition Policy Week held in March 2018, the application of competition law to big data, the sharing economy and other emerging issues were discussed.<sup>36</sup> Ever since the reform of Chinese competition agency, it is necessary to further enhance international communications through bilateral cooperation agreement, especially in the area of digital economy. Besides, in order to strengthen cooperation with its overseas counterparts, the SAMR could also consider joining the International Competition Network.

## VI. CONCLUSION

The digital economy is blending in with almost every aspect of the Chinese economy and has infused it with impetus.<sup>37</sup> In comparison to the active M&As in the digital economy, only few official investigations have been initiated by the MOFCOM. In recent years, increasing concentrations have attracted public attention to competition concerns, and people from all walks of life deeply care about the Anti-Monopoly Bureau’s attitudes in this regard. VIE, with the enactment of the Foreign Investment Law, would probably not be an obstacle for review any more. Besides, the introduction of the complementary transaction-value-based threshold could help the SAMR better capture problematic digital concentrations, in our opinion. As for competition assessment, openness to data, privacy protection, innovation competition and leveraging effect shall be paid special attention to, on the basis of characteristics of digital economy. With regard to remedies, how to choose between structural and behavioral ones is still well worth some attention. From anti-monopoly enforcement in the last ten years, the possibility for the Chinese competition authority to remain open to behavioral remedies cannot be excluded.

<sup>32</sup> Ariel Ezrachi & Wei Han, “Merger remedies – the Chinese experience, *Journal of Antitrust Enforcement*,” Volume 3, Issue suppl\_1, 1 October 2015, i70.

<sup>33</sup> 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.

<sup>34</sup> Available at <http://fdj.mofcom.gov.cn/article/xxfb/201711/20171102673003.shtml>.

<sup>35</sup> Available at <http://www.euchinacomp.org/index.php/zh/>.

<sup>36</sup> Available at <http://www.cicn.com.cn/2018-04/19/cms106206article.shtml>.

<sup>37</sup> Available at [http://www.ndrc.gov.cn/xwzx/xwfb/201709/t20170929\\_862265.html](http://www.ndrc.gov.cn/xwzx/xwfb/201709/t20170929_862265.html).



Ever since the establishment of the SAMR, enough importance has been attached to the digital economy, which has also been included in the 2019 working plan. Nevertheless, the Anti-Monopoly Bureau would still face the challenge of having insufficient case handlers. In order to review digital concentrations more efficiently, we suggest empowering certain local competition agencies to review concentrations, amending the current merger control rules, strengthening internal knowledge management, increasing support from technical experts and maintaining international communications.

Only effective anti-monopoly enforcement can help ensure adequate competition in China's digital economy, so as to provide rich soil for more excellent undertakings, like Alibaba and Tencent. Maintaining a market which could constantly bring up undertakings of high quality is where the value of the anti-monopoly law lies, which would benefit consumers in the end. After all, only effective competition can truly protect consumer rights and interests.



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