Antitrust Chronicle

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Year of the Ox
Antitrust Enforcement in China

CPI COMPETITION POLICY INTERNATIONAL

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LETTER FROM THE EDITOR

Dear Readers,

We are delighted to release our CPI Antitrust Chronicle issue for March 2021, *Year of the Ox – Antitrust Enforcement in China* and present a selection of articles from enforcement authorities, law and economics experts, and practitioners in China.

2020 was an unprecedented year. Under the challenge of a global pandemic, the competition community in greater China area has set up a new norm. The central government of China set up its "dual circulation," strategy which involves relying on a robust cycle of domestic demand and innovation as the main driver of China's economy, and maintaining international markets and investors as another engine of growth. This strategy will require vigorous enforcement of competition policy in different industries, especially in the platform economy. In 2020, we witnessed new challenges in both mainland China and Hong Kong, as well as in the judicial system, with the emergence of new business models, along with new competition issues.

This issue starts with two special CPI Talks interviews, with senior officials from the antitrust authorities in mainland China and Hong Kong, respectively. The first is with Mr. Zhenguo Wu, Director General of the SAMR. DG Wu outlines the achievements and focus of the SAMR's anti-monopoly work in 2020, as well as the actions SAMR took in response to COVID-19. Mr. Samuel Chan, Chairman of the Competition Commission of Hong Kong (the "Hong Kong Commission"), outlines anti-monopoly enforcement and the response to COVID-19 of the Hong Kong Commission in 2020.

We would like to thank our contributors for their efforts and dedication to our March 2021 CPI Antitrust Chronicle, and hope you enjoy reading this special China issue.

Sincerely,

CPI Team

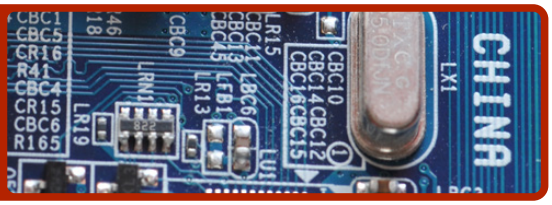
SUMMARIES

SUMMARIES

Mission Impossible? Promoting Sustainable Development Through China's Anti-Monopoly Law

By Wei Han, Hazel Yin & Tracy Lu

This paper submits that China's Anti-monopoly Law ("AML") should play a more active role in promoting sustainable development goals ("SDGs"), especially those goals related to environmental protection and social development. In terms of institutional design, the indirect model, i.e. applying exemptions to anti-competitive conducts that serve public interest remains the more suitable approach to promoting SDGs through the AML. We suggest that the direct model, i.e. including non-economic SDGs as legal objectives of the antitrust law should only be considered in exceptional cases, so that the antitrust law could avoid bearing "unbearable weight."



China: Tougher Merger Control Enforcement in the Semiconductor Industry?

By Yi (Josh) Xue & Tian Gu

The COVID-19 pandemic did not slow down M&A in the semiconductor industry. To the contrary, 2020 saw semiconductor M&A deals reaching an all-time high of $118 billion in terms of total deal value. Undoubtedly, the big news for 2021 will be which of those deals will be approved. It is commonly believed that one of the biggest challenges may come from China. This article provides an overview of how Chinese competition enforcers have applied merger control rules in the semiconductor sector. It also analyzes the major challenges faced by enterprises in the semiconductor industry in merger control and strategies to solve these challenges.

Antitrust Enforcement and Litigation in China's Automobile Industry (Patterns and Updates)

By Hao Zhan, Ying Song, Zhan Yang & Yuhui Yang

The automobile industry in China is a pillar of the national economy, and an area of significant importance for antitrust enforcement. This article provides an update on antitrust enforcement policies in China's automobile industry. To do so, it provides a background on China's *Anti-monopoly Guidelines for Automotive Industry*, and the legislative procedures used to enact said guidelines, in addition to highlighting their main characteristics. It then analyzes antitrust enforcement and private litigation in the automobile industry. To this end, it summarizes two cases: one being administrative, *Heze Auto Industry Association v. Shandong AMR*, and the other being private, *Guangming Trading v. Hankook*.

Antitrust and Unfair Competition Conduct in the Network Game Industry in China

By Vanessa Yanhua Zhang & John Jiong Gong

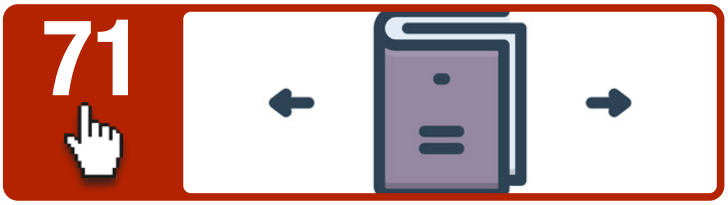
We introduce two related cases between a video game company and a live broadcasting company in China that were fought in terms of both Anti-Monopoly Law and Anti-Unfair Competition Law, involving Copyright Law. The High Court rulings indicate that it generally does not conduct relevant market definition based on one game alone, and that it treats animated moves embedded in games as copyright-protected content. These conclusions will have a profound impact on the broadcasting industry in terms of its implications to business models and revenue streams.

SUMMARIES

Could (China-Based) Arbitration Save the FRAND Rate Setting Game?

By Jing He, Annie Xue & Melissa Feng

This article aims to contribute to the debate on the practical solution to the stalemate repeatedly encountered in intellectual property disputes concerning FRAND rate-setting of standard essential patents ("SEP"). Digital transformation is underlining the importance of a well-functioning SEP/FRAND licensing system, which heavily relies on a sound conflict resolution mechanism. However, recent anti-suit injunction "wars" in cross-border SEP disputes have only led to judicial deadlocks and uncertainties that the regular court systems are not able to tackle. This is where arbitration can come into play thanks to its expertise, flexibility, and efficiency. This article's key inquiry is whether the China arbitration regime is geared up to lead the charge in handling FRAND rate-setting disputes and even developing a trusted arbitration system endorsed by all stakeholders at home and abroad. To answer this question, this article examines five critical aspects of arbitration procedure in China: arbitration panels, confidentiality, interim measures, procedural orders (including discovery), and awards enforceability.



Antitrust Guidelines for the Platform Economy in the Era of Enhanced Antitrust Scrutiny

By Wei Huang, Wendy Zhou, Xiumin Ruan & Xi Zhang

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.

WHAT'S NEXT?

For April 2021, we will feature Chronicles focused on issues related to (1) **Open Banking**; and (2) **Inclusive Competition**.

ANNOUNCEMENTS

CPI wants to hear from our subscribers. In 2021, we will be reaching out to members of our community for your feedback and ideas. Let us know what you want (or don't want) to see, at: antitrustchronicle@competitionpolicyinternational.com.

CPI ANTITRUST CHRONICLES MAY 2021

For May 2021, we will feature Chronicles focused on issues related to (1) **Section 230**; and (2) **Healthcare**.

Contributions to the Antitrust Chronicle are about 2,500 – 4,000 words long. They should be lightly cited and not be written as long law-review articles with many in-depth footnotes. As with all CPI publications, articles for the CPI Antitrust Chronicle should be written clearly and with the reader always in mind.

Interested authors should send their contributions to Sam Sadden (ssadden@competitionpolicyinternational.com) with the subject line "Antitrust Chronicle," a short bio and picture(s) of the author(s).

The CPI Editorial Team will evaluate all submissions and will publish the best papers. Authors can submit papers on any topic related to competition and regulation, however, priority will be given to articles addressing the abovementioned topics. Co-authors are always welcome.

CPI TALKS…

…with DG Zhenguo Wu

In this month's edition of CPI Talks… we have the pleasure of speaking to DG Zhenguo Wu, Director General of the Anti-monopoly Bureau of the Chinese State Administration for Market Regulation.

Thank you, DG Wu, for taking this time to talk to CPI.

1. Would you please outline the achievements and focus of anti-monopoly law enforcement by the SAMR in 2020? And what role has it played in the prevention and control of COVID-19?

In 2020, China's antitrust authority implemented the strategic deployment of the CPC Central Committee on strengthening anti-monopoly rules and preventing disorderly expansion of capital in face of the impact of COVID-19 and the complex and challenging domestic and foreign economic environment, and worked diligently to push forward anti-monopoly law enforcement to a new stage and reach a higher level.

Following the principle of fair competition, SAMR directly addressed the weaknesses in market entity development, solved consumers' most direct and practical problems, improved consumer welfare, and supported high-quality economic development through anti-monopoly work. SAMR balanced pandemic prevention and economic and social development, and successfully completed the tasks of competition enforcement. The officers overcame difficulties, strengthened anti-monopoly law enforcement, and accelerated the construction of the national market which is unified and open with orderly competition. SAMR acted proactively to improve the competition enforcement system, optimize marketization, the rule of law, and international business environment, and create a more innovative and fairer competition environment.

In 2020, 109 monopoly cases were settled nationwide, with total fines of 451 million RMB; 485 merger cases were filed, and 473 cases were closed, of which four merger cases, including Nvidia's acquisition of Mellanox, were approved with remedies, facilitating the development of a modern market system which is unified, open, and with orderly competition.

a) **Supporting epidemic prevention and control and the resumption of work and production.** The "Announcement on Adjusting the Work Methods of Reception and Other Works during the Period of Epidemic Prevention and Control" and the "Announcement on Supporting Anti-Monopoly Law Enforcement for Epidemic Prevention and Control and Resumption of Work and Production" were released in time. A series of measures were formulated in terms of anti-monopoly enforcement and fair competition review to stabilize expectations, promote development, and protect people's livelihoods. In 2020, the number of merger cases filed and closed has increased by 5 percent and 1.7 percent, respectively, and the average filing and reviewing time were shortened by 27 percent and 14.5 percent respectively. Over 3,800 telephone consultations from enterprises and the public were received.

b) **Regulating competition in the platform economy.** We implemented the decision and deployment of the CPC Central Committee and the State Council, and strengthened anti-monopoly law enforcement in the platform economy. We investigated three cases of platform companies failing to notify concentrations. These cases include Alibaba's acquisition of Yintai Retail's equity. We also investigated Alibaba for its "either-or" policy which was a suspected monopoly conduct, to send a clear signal that the Internet industry must comply with the anti-monopoly law. . Furthermore, we strengthened administrative guidance in the online economy and community group purchases, guided enterprises to operate in compliance with laws, and promoted the standardized, orderly, innovative, and healthy development of the platform economy.

c) **Deepening anti-monopoly law enforcement in key areas.** The anti-monopoly law enforcement has been strengthened in the pharmaceutical field. We imposed a fine of RMB 325.5 million on three calcium gluconate API distributors, investigated and dealt with the monopoly case of Simcere Pharmaceuticals, and guided the local authorities in handling monopoly cases involving twelve types of API. We continued to strengthen anti-monopoly law enforcement in areas including public utilities, automotive vehicle detection, second-hand vehicles, building materials, etc. A great number of typical cases were also exposed.

d) **Maintaining a unified national market.** We strengthened law enforcement on the abuse of administrative power to eliminate and restrict competition, and paid attention to reducing behaviors such as local protection, designated transactions, etc., eliminated improper government intervention, promoted a better integration of effective markets and effective governments, and pursued a virtuous cycle in the national economy.

2. In 2020, SAMR accelerated the revision of the Anti-Monopoly Law and issued a number of policies and guidelines. Would you please describe in detail what measures SAMR took to consolidate the foundations of the antitrust legal system and competition system in 2020?

Law is the foundation of governance. Following the law, SAMR built a scientific and complete anti-monopoly legal system, improved the fair competition system, promoted the modernization of the competition governance system, and provided guarantees for high-quality economic development.

a) **Continuously improving the anti-monopoly legal system.** We completed the "Amendment Draft of the Anti-Monopoly Law," issued the "Interim Regulations on the Review of Concentration of Undertakings," revised the "Provisions on Prohibition of Abuse of Intellectual Property Rights to Exclude and Restrict Competition," released the "Anti-monopoly Compliance Guidelines for Operators" and the "Anti-monopoly Guidelines in Platform Economy," drafted the "Anti-monopoly Guidelines in the Field of APIs," and the "Anti-monopoly Guidelines for Overseas Enterprises," focusing on strengthening the basic position of competition policy and the anti-monopoly supervision on the digital economy, and improving the anti-monopoly system. With them, the operability and predictability of the anti-monopoly legal system have been enhanced.

b) **Effectively strengthening the top-level design of competition policy.** In 2020, we carried out research in terms of strengthening the basic position of competition policy, and formulated competition policies compatible with a high-level socialist market economic system. We also approved pilot programs in Pilot Free Trade Zones of Shandong and Shanghai and Guangdong-Hong Kong-Macao Greater Bay Area and guided the Hainan Free Trade Zone to formulate the "Fair Competition Regulations," to innovate relevant mechanisms and accumulate experience to better implement competition policies.

c) **Accelerate the construction of a fair competition system.** We issued the "Notice on Further Promoting Fair Competition Review Work," amended the "Implementation Rules for the Fair Competition Review System," refined the review mechanism, optimized the review process, and strengthened the rigid constraints of the system. We organized a comprehensive screening of the policies and practices promulgated by governments before 2019, carried out direct supervision in twelve provinces, cleaned up 1.07 million policies and practices, of which nearly 6000 were abolished and revised. We carried out fair competition review and supervision throughout 2020, to significantly promote the authority and effectiveness of the system.

d) **Steadily perfecting the market competition evaluation system.** We formulated market competition evaluation regulations and industry competition evaluation examples, improved the overall market competition evaluation report, completed the evaluation of competition in eight industries, including the platform economy, automobiles, and aviation, to provide solid support for scientific and effective anti-monopoly law enforcement.

3. How did SAMR contribute to improving the domestic fair competition market environment?

The key to vitalizing market participants and boosting China's economic development is to create a market-oriented, law-based, and international business environment. SAMR enhanced anti-monopoly law enforcement capabilities, advanced the modernization of governance system, and promoted the continuous optimization of the fair competition market environment.

a) **Giving full effect to the role of the Anti-Monopoly Committee of the State Council.** A plenary meeting of the Anti-Monopoly Committee of the State Council was held to provide organizational and intellectual support for the revision of the "Anti-Monopoly Law," evaluation of competition in key industries, compilation of typical cases, anti-monopoly enforcement and training.

b) **Comprehensively fulfilling coordination duties for fair competition review.** We convened the third plenary inter-ministerial joint meeting for Fair Competition Review to study, optimize and improve the responsibilities of inter-ministerial joint meeting, the joint meeting office and the member units, and the organization and operation rules of the joint meeting. We pushed forward the implementation of thirteen key tasks, offering strong guarantee for maintaining a fair and competitive market environment.

c) **Strengthening anti-monopoly law enforcement capabilities.** We formulated the "Anti-monopoly Law Enforcement Report Filing Measures," "Verification Working Rules on Monopoly Case Clues" and other systems, compiled anti-monopoly law enforcement manuals and a compilation of rules and guidelines, and formulated the "Management Measures on Anti-Monopoly Work" to enhance anti-monopoly law enforcement capabilities.

4. What efforts did SAMR make to strengthen collaboration with international authorities in the competition field in 2020, to improve the international business environment?

In line with the internationalism and openness of anti-monopoly work, SAMR adhered to the "bringing in" and "going out" principle, and promoted institutional opening of the competition field, actively participated in global competition governance, discovered new strengths in international economic cooperation. The above efforts contributed to a better competitive environment for China implementing its high level of opening to the world.

a) **Promoting institutional opening up in the competition field.** We actively prepared for the 7th BRICS International Competition Conference. We deepened research on competition policy issues of free trade agreements, completed negotiation on regional comprehensive economic partnership agreement, and participated in negotiation on competition and anti-monopoly law enforcement under free trade agreements of China-Norway, China-Israel, China-Japan-Korea, and China-Peru. We co-sponsored with Russia and others, making the combat of cross-border cartels a priority work for the Intergovernmental Group of Experts of the United Nations Conference on Trade and Development ("UNCTD") from 2020 to 2025 to reinforce international cooperation on law enforcement.

b) **Actively participating in global competition governance.** We attended the video conference of the BRICS Coordination Committee on Anti-Monopoly Policy and issued the "Statement of the BRICS Competition Agencies in Response on COVID-19." We push forwarded the topic of competition and cooperation included in the important outcome documents of the 12th BRICS Leaders' Summit and the 25th Regular Meeting between Chinese and Russian Prime Ministers. We strengthened law enforcement exchanges with antitrust agencies in the United States, the European Union, Japan, South Korea and so forth, attended thirteen online international conferences such as the UNCTD and OECD, and held the EU-China Competition Week to achieve a higher level of international cooperation.

c) **Vigorously advocating for a fair competition culture.** We published the first Chinese and English edition of the "Annual Report on China's Anti-Monopoly Law Enforcement (2019)," selected and released ten representative cases of anti-monopoly law enforcement in 2019, compiled and printed the "Anti-Monopoly Laws and Regulations Collection of the Belt and Road Nations," published five anti-monopoly guidelines, and issued an interpretation of the "Interim Provisions on the Review of Concentration of Undertakings." We also produced the SAMR's first fair-competition-themed promotional film to continuously extend the influence of anti-monopoly law enforcement in China.

CPI TALKS…

…with Mr. Samuel Chan

In this month's edition of CPI Talks… we have the pleasure of speaking to Mr. Samuel Chan, Chairman of the Hong Kong Competition Commission (the "Commission").

Thank you, Mr. Chan, for taking this time to talk to CPI.

1. As the new leader of the Commission, would you please outline the enforcement achievements of the Commission in 2020? In particular, during the COVID-19 pandemic, what has been the Commission's experience of applying the Competition Ordinance?

Despite the pandemic, the year 2020 has seen important enforcement milestones with many "firsts" in Hong Kong's competition law regime. In just five years since the full implementation of the Competition Ordinance (the "Ordinance"), the Commission has brought seven cases before the Competition Tribunal (the "Tribunal"). Three of them, including the city's first ever abuse of substantial market power case, were filed in 2020. The Tribunal has to date ruled in the Commission's favour in five cases.

First, the Commission filed a case in January alleging that an IT company and a co-bidder exchanged competitively sensitive information about their intended quotations in a bidding exercise organised by the Ocean Park Corporation. The case was ruled in favour of the Commission with the judgment on pecuniary penalties handed down in November. It is the first case in which the Commission and the respondents reached agreement to resolve both the liability and relief portions of the proceedings by consent. It also represents the first proceedings in Hong Kong's competition regime resulting from a successful leniency application. The Commission also made use of an infringement notice as a remedy for the first time, to resolve the matter with one of the companies which also participated in the cartel conduct.

Second, in March 2020, the Commission filed another cartel case in the Tribunal against some leading textbook retailers in the city, claiming that the companies have engaged in price fixing, market sharing and/or bid rigging in relation to the sale of textbooks to primary and secondary school students in Hong Kong. It is the first time the Commission seeks to hold a parent company liable for the anti-competitive conduct of its subsidiaries, over which it exercised decisive influence.

Another notable achievement of the Commission during the year is the filing of Hong Kong's first abuse of substantial market power case in the Tribunal. The case was brought in December against a medical gas supplier which is said to have used its near-monopoly position in the supply of medical gases and engaged in a series of exclusionary acts against the only other potential service provider in the downstream medical gas pipeline system ("MGPS") maintenance market. In the Commission's view, this conduct harmed competition in the MGPS market, which in turn affected public hospitals that are providing close to 90 percent of hospital services to patients in Hong Kon.

Under the city's competition regime, the Commission may accept a commitment to take any action or refrain from taking any action from parties under investigation, where the Commission considers it appropriate to address its competition concerns. If the Commission accepts commitments, it may agree to terminate its investigation and not bring proceedings in the Tribunal regarding the matters covered by the commitments. If a person fails to comply with the commitment, the Commission may seek to enforce it in the Tribunal.

During 2020, the Commission accepted commitments in two cases.

First, the Commission concluded a case involving online platforms in May 2020 by accepting commitments offered by three large online travel agents, resulting in a complete removal of parity clauses in contracts between these online travel agents and accommodation providers in Hong Kong. The acceptance of the commitments seeks to ensure effective competition across different online travel agent platforms and it is expected that consumers, accommodation providers, potential new market entrants and the Hong Kong tourism industry as a whole will all benefit from it.

In addition, the Commission dealt with a case concerning the Hong Kong Seaport Alliance. The Hong Kong Seaport Alliance is a contractual joint venture between the city's four major terminal operators (out of five) to jointly operate and manage their 23 berths across eight terminals at Kwai Tsing port in Hong Kong. During the year, the Commission concluded its investigation into it by accepting a set of commitments from the parties to the Alliance, which addressed the Commission's competition concerns in an effective and timely manner. Major items in the commitments include capping handling charges and maintaining service levels for Gateway cargo, as well as an explicit reference to the plans and mechanisms the parties adopted to ensure customers receive a fair share of the efficiencies anticipated by the Alliance. A rigorous monitoring regime with an independent monitoring trustee is in place to ensure compliance.

The investigation into the case involved complex issues of market definition, competitive effects, efficiencies and remedy design, and its successful conclusion is a testament to the Commission's capacity to handle highly complex competition matters.

Further, in strengthening the Commission's overall capability and effectiveness in handling competition issues, the Commission signed a Memorandum of Understanding with the Hong Kong Securities and Futures Commission and the Philippine Competition Commission in April and December respectively, to enhance cooperation and the sharing of information.

Finally, specifically with regard to COVID-19, the Commission took prompt actions during the year both locally and internationally. At an early stage of the pandemic in March, the Commission issued a statement to address possible questions and concerns from businesses and consumers, stating that it would take a pragmatic approach in its enforcement and advisory functions for temporary measures among businesses which are genuinely necessitated by the pandemic and in the interests of Hong Kong consumers and society. The Commission also opened up an informal and expeditious channel for businesses proposing such measures, or their industry bodies, to contact the Commission.

To ensure that subsidy programmes implemented by the Government to help businesses weather the economic effects of the pandemic are not subject to anti-competitive conduct, the Commission issued guidance in May and August to remind all parties involved, including participating suppliers and businesses receiving the subsidy, of the importance of complying with the Ordinance and being vigilant against potential anti-competitive practices that may undermine procurement processes. We have also been working closely with public bodies which are tasked to administrate these subsidy programmes to take competition concerns into consideration.

Internationally, the Commission hosted two webinars, bringing together competition enforcers and academics around the globe to discuss a wide range of enforcement and policy issues arising from the pandemic.

2. Could you please give us more details concerning cartel investigations in Hong Kong?

As with all competition authorities, it is important for the Commission to make efficient use of its resources in order to be as effective and far-reaching as possible when fulfilling our enforcement mission.

Guided by the principle that the goal of competition law is to bring the benefits of competition to consumers, the Commission prioritises investigations and enforcement actions that result in the greatest overall benefit to competition and consumers in Hong Kong. To this end, disrupting hard core cartels has been one of our top priorities, particularly where such conduct is not an isolated incident but reflects ingrained industry practice. This approach is supported by the complaints and queries we have been receiving from consumers and businesses in the city, which predominantly feature concerns about cartel conduct.

The Commission has to date brought six cartel cases before the Tribunal, covering the most egregious types of anti-competitive conduct including bid-rigging, price fixing and market sharing. The defendants include subsidiaries of multinational companies which rigged bids invited by a non-governmental organisation, contractors who have been entrusted with renovation work for low-income families at public housing estates and leading textbook retailers in Hong Kong. The Commission has been consistently pursuing the liability of individuals involved in cartel conduct with seven individuals named as respondents in five of these cases. By focusing on individuals through whose acts businesses engage in cartel conduct, the Commission seeks to create additional deterrence.

Apart from the two cartel cases filed in 2020 (as mentioned above), the Commission has brought four cartel cases to the Tribunal between 2017 and 2019.

In March 2017, the Commission took its first enforcement action against bid-rigging in the IT sector, resulting in the conviction of four IT companies in May 2019. This case was notable not just for being the Commission's first case before the Tribunal but also for including a form of

vertical bid-rigging. The upstream supplier of the software surreptitiously arranged for the submission of dummy bids to ensure that the hardware provider they favoured would be awarded the contract. In December 2020, the Tribunal ordered each of the four companies to pay a pecuniary penalty as well as the Commission's cost of proceedings.

In August 2017, the Commission brought its second case to the Tribunal, against 10 construction companies for market sharing and price fixing in relation to the provision of renovation services for a public rental housing estate. This case required the Commission to present expert economic evidence to counter arguments that the Ordinance's economic efficiency exclusion applied to what appeared to be clear cartel conduct.[1] In May 2019, all 10 companies were found to have contravened the Ordinance. The pecuniary penalty imposed on seven of the companies reached the statutory cap of penalties allowable under the Ordinance[2] and all of the companies were also ordered to pay the Commission's litigation costs.

The Commission subsequently filed two more similar cases in 2018 and 2019. All 14 respondents, including both companies and individuals, in these two cases were found to have contravened or been involved in the contravention of the Ordinance. Judgment on sanctions in the latter case was handed down in January 2021[3], involving the first fine on an individual and the first written decision issuing a director disqualification order under the city's competition regime.

Another area that is worthy to mention is the enhancement of the Commission's guidance and policies. Over the last couple of years, the Commission has significantly improved the incentives for companies and individuals to self-report cartel conduct and cooperate with its investigations. To encourage cartel members to come forward, we published a Cooperation and Settlement Policy in 2019 and enhanced the leniency framework in April 2020, expanding its coverage to individuals, such as employees of a company.

The Commission also published a policy on recommended pecuniary penalties for anti-competitive conduct in June 2020, providing transparency on the methodology the Commission will use in making fine recommendations to the Tribunal against undertakings.

These three policies have formed a comprehensive framework for businesses engaged in cartels to assess the benefits of coming forward and cooperating with the Commission, thus strengthening enforcement and enhancing deterrence.

3. Compared to the other jurisdictions, what are the major challenges that the Commission has to face?

Given the relatively young age of the our competition regime, it is important for the Commission to establish judicial precedents and create sufficient deterrent effect to help shape the society's anti-competition culture and promote compliance. The Commission is on the right track building a solid pipeline of cases, setting precedents with favourable judgments by the Tribunal, and devising strategies for effective enforcement and litigation. Going forward the Commission will continue its effort in this regard.

The Commission's success in carrying out its missions rests on its staff, which makes developing and retaining talents a key priority and challenge. We will endeavour to ensure that the Commission is a constantly developing organisation and that our staff will benefit from the high quality training and learning opportunities that we provide them.

In regard to enforcement, it is well-known that cartels are generally secretive in nature and notoriously hard to detect. As the Ordinance has now been in force for a period of time and the Commission is bringing more cases to the Tribunal, cartelists might become more cautious when engaging in collusive practices which will make investigation and evidence gathering even harder. To improve detection and strengthen enforcement, as mentioned above, the Commission has enhanced its leniency and cooperation programme and published guidance on how it approaches the calculation of recommended pecuniary penalties. Importantly, it has also focused on enhancing its ability to detect anti-competitive conduct on its own initiative. We expect that all of these measures would increase incentives to self-report in exchange for leniency or reduction of penalties, drawing more businesses engaged in cartel to come forward and cooperate with the Commission.

On the other hand, it is also very important to manage public expectations about how quickly the Commission can bring cases to the Tribunal and what powers the Commission has to achieve under the law. Bringing seven cases to the Tribunal in five years is no mean feat and not all investigations will move so quickly, especially those presenting more complex issues of competition analysis.

1 This is set out in Schedule 1 Section 1 of the Ordinance and is similar to Article 101(3) of the Treaty on the Functioning of the EU.

2 This is based on 10 percent of the business's turnover in Hong Kong for each year of the contravention up to a maximum of three years. The Commission has, however, initiated an appeal based on the Tribunal's acceptance of certain respondent's arguments that the role of sub-contractors in the conduct should act as a mitigating factor.

3 In 2020, the Tribunal entered judgement on liability against the respondents in the two cases. All of the respondents admitted liability in these cases.

4. What is the Commission's enforcement plan for the digital economy?

In line with the Commission's enforcement policy, our focus remains on anti-competitive conduct that has the strongest impact to competition and consumers in Hong Kong and is supported by the necessary evidence, whether in the digital economy or not. The fact that a sizeable portion of commerce in Hong Kong is going digital means that we anticipate there will be more and more cases involving digital markets. But the Commission does not prioritize any particular type of commerce over another. We prioritize enforcement that brings about compliance with the law.

We are aware that digital markets have features that impact the types of anti-competitive conduct that can arise as well as how such conduct is investigated. Towards this end, the Commission has invested in training and systems which enhance our capability in this respect. The Commission will keep abreast of the global development, and continue to monitor the situation in Hong Kong with a view to promoting competition for the long-term benefit of the community.

As regards cases concerning e-commerce so far, as mentioned, the Commission accepted commitments offered by major online travel agents ("OTAs") in May 2020 removing parity clauses which require accommodation providers to always give the OTAs the same or better terms as those they offer in all other sales channels, as regards room prices, room conditions and/or room availability.

5. What is the future development plan of the Commission?

Going forward, the Commission will keep up its momentum in its enforcement, policy and advocacy work.

Enforcement of the Ordinance will remain a key focus of the Commission's work. While most of our current cases involve cartel conduct under the First Conduct Rule, we have started and will continue to broaden our enforcement and litigation in other areas of the law. It is expected that a number of promising investigations will result in various enforcement outcomes in the coming year.

The Commission is also looking to further enhance enforcement effectiveness and efficiencies, by strengthening deterrence on one hand and encouraging cooperation on the other. To strengthen deterrence, in addition to companies, we will continue to pursue the liability of individuals and parent companies where appropriate. It is also expected that the enhancement of our leniency policy coupled with focus on initiating investigations ex officio (without relying on a complaint or leniency application) will attract more cartel members to come forward, further strengthening our detection of and enforcement against cartel conduct.

Internally, to cope with the growing number and complexity of enforcement and legal actions, we will continue to strengthen our professional staff and raise our level of competition law expertise. This includes leveraging overseas experience as well as providing targeted training and learning opportunities for our staff members.

On the policy front, the Commission will keep on using various non-enforcement approaches to address market restrictions arising from, or which may arise from, existing and new public policies, as well as to encourage the integration of competition principles into the public policy-making process. To this end, the Commission has completed a comparative study of competition impact assessment regimes by engaging renowned academics from Hong Kong, Mainland China and Australia. The study has brought valuable insights and lessons for Hong Kong.

As regards advocacy and engagement, the Commission will carry on its momentum to actively engage the public and businesses through continuous outreach and educational initiatives across different sectors of the community. These include seminars and meetings, thematic advocacy campaigns and youth education programmes. Despite the challenges brought by the pandemic, the Commission has not stopped reaching out to the local community through webinars and online engagement events. Riding on our success in international advocacy contests organised by the International Competition Network, the Commission will expand our outreach and strengthen the use of social media through different channels.

The Commission will remain actively engaged with our Mainland and overseas counterparts to share knowledge, experience and best practices. The Commission is now working with the Guangdong Administration for Market Regulation to jointly publish a brochure on the key principles of the competition laws in Mainland China, Hong Kong and Macau. This initiative aims to promote better understanding of and compliance with respective competition laws among businesses operating in the Greater Bay Area, in particular the small and medium enterprises. The Commission is excited about this collaboration and looks forward to sharing with the international community on how competition law compliance may be promoted among different jurisdictions with close economic ties.

RETROSPECT AND PROSPECT: ANTITRUST ENFORCEMENT OF ABUSE OF DOMINANCE

BY CHENYING ZHANG[1]

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I. REVIEW OF ANTITRUST ENFORCEMENT IN CHINA IN 2020

In 2020, the global landscape has been reshaping, including an intensified competition in global economy. The effectiveness and implementation of the *Anti-monopoly Law of the People's Republic of China* have had a significant and positive effect on the order of free market competition and consumer benefits. Specifically, in terms of the legislation and enforcement:

- First, China commenced the amendment to the *Anti-monopoly Law of the People's Republic of China*. Based on the experience in the operation of law in the past 12 years, China started up the comprehensive amendment to the *Anti-monopoly Law*, which came into effect on August 1, 2008. On January 2, 2020, the proposed draft was publicly released, in which the provisions regarding the purpose of legislation, setting of law enforcement agencies, rules for identifying specific illegal acts, legal liabilities, and others were amended with major breakthroughs.

- Second, the anti-monopoly supporting systems were improved. As the antitrust enforcement agency, the State Administration for Market Regulation issued the *Interim Provisions on Review of Concentrations of Undertakings* (adopted on October 20, 2020), and amended on October 23, 2020the *Regulations on Prohibiting the Abuse of Intellectual Property Rights to Eliminate and Restrict Competition* (promulgated on April 7, 2015).

- Third, several anti-monopoly guidelines were put in place. The Anti-monopoly Commission of the State Council has introduced six guidelines, including the *Guidelines on the Anti-Monopoly Compliance of Undertakings*, the *Guidelines on the Anti-monopoly regarding Intellectual Property Rights*, the *Guidelines on the Application of the Leniency Program in Horizontal Monopoly Agreement Cases*, the *Guidelines on the Anti-monopoly in the Automobile Industry*, and the *Guidelines on the Conciliation Procedure in Monopoly Cases*, to further improve the transparency of law enforcement and the predictability of business behaviors, prevent anti-monopoly compliance risks, and ensure the sustainable and healthy development of the undertakings. In respect of the problems arising in the competition in the platform economy, the *Guidelines on the Antitrust in the Sector of Platform Economy* were issued on November 10, 2020, and passed on February 7, 2021, providing pertinent guidelines for the antitrust regulation on online platform operators.

- Fourth, greater antitrust enforcement was made. The competent antitrust enforcement agencies investigated and handled a number of monopoly cases affecting people's necessities, such as gas, water, and raw materials, to ensure orderly competition in the sectors of people's livelihoods, and protect consumer rights and public interests. The antitrust enforcement agencies strengthened the antitrust enforcement in the field of Internet, and imposed administrative fine (RMB 500,000, which is the maximum fines) against three large online platform operators (Alibaba, Tencent-backed China Literature, and Hive Box) for their failure in making a notification of concentrations of undertakings according to the law. By imposing the fine, China government reemphasized that all enterprises are treated equally in antitrust enforcement, and built a deterrent to the punished enterprises and set a general preventive warning to all operators in the market. On December 24, 2020, the State Administration for Market Regulation (SAMR) initiated an investigation into Alibaba Group's suspected monopolistic behaviors such as "one-out-of-two" choose (the merchant may only open its shop on Ali platforms or other platforms competitive with Ali platforms).

- In 2020, profoundly significant attempts and breakthroughs were made in the legislation and enforcement regarding antitrust enforcement against the abuse of market dominance, reflecting the new trend of antitrust enforcement in China. This paper will focus on the issues with respect to analyzing and discussing the abuse of market dominance.

II. CURRENT ENFORCEMENT AGAINST ABUSE OF DOMINANCE AND ANALYSIS

A. Current Enforcement Against Abuse of Dominance

1. Abuse of Dominance Laws and Regulations

There are two levels of laws and regulations now in force in China. The first level is the *Anti-monopoly Law*. Articles 17, 18, and 19 of the *Anti-monopoly Law* (hereinafter the "Law") sets out the rules for identifying abuse of market dominance, covering respectively the types of abuse of market dominance, the elements of market dominance, and the criteria for presuming dominance based on market share. In addition, Article 47 of the Law specifies the administrative penalties on the violations thereof. The second level is the *Interim Provisions on Prohibiting the Abuse of Market Dominance* (hereinafter "Interim Provisions"), issued by SMAR, which came into force on September 1, 2019. The Interim Provisions are departmental regulations and taken as the basis for law enforcement by SMAR and local administrations for market regulation.

In March 2018, the National People's Congress approved the State Council's organization reform program. According to the program, the State Administration for Market Regulation ("SAMR") was established with an anti-monopoly bureau. Since then, the joint antitrust enforcement by three agencies under a decentralized system was out, and the unified antitrust enforcement under a centralized system was put in place. On December 28, 2018, SAMR issued Notice [2018] No. 265, which authorizes all administrations for market regulation at provincial, autonomous regions, and municipal level directly (i.e. a total of 31 provincial administrations for market regulation) to enforce the antitrust law. Since then, the investment of the cases with respect to monopoly agreement and abuse of market dominance will be handled by SAMR and provincial administrations for market regulation. 2020 data shows that the number of cases investigated and handled by provincial administrations for market regulation is greater than that by SAMR.

2. Summary of Antitrust Enforcement

From January 1, 2020 to January 31, 2021, the two levels of antitrust enforcement agencies filed 38 cases of suspected abuse of market dominance, and imposed administrative penalties against 8 of them, with the fines and confiscations totaling approximately RMB430 million. According to the information and data in the announcements on the website of SMAR, a summary of the cases is given in Table 1. The cases cover various industries and sectors, such as water supply, power supply, gas, funeral service, banking, port, software, communications, chemicals, salt, tobacco, active pharmaceutical ingredients, packaging equipment, and refined oil operations. All 8 cases with administrative penalties imposed are related to people's necessities.

Table 1: Administrative Penalties in Abuse of Dominance Cases in 2020

Number	Law Enforcement Agency	Industry/Party Involved	Illegal Act	Amount of Confiscated Illegal Income (10K RMB)	Rate of Fine (%)	Amount of Fine and Confiscation (10K RMB)
1	Shanxi Administration for Market Regulation	Natural gas Shanxi Jianke	Exclusive trading	29.72	2	164.3
2	Shanxi Administration for Market Regulation	Natural gas XZRQ	Exclusive trading	118.84	2	241.66
3	Zhejiang Administration for Market Regulation	Funeral service Jiangshan Funeral Home	Unreasonable additional trading conditions	8.6	6	73.85
4	Jiangsu Administration for Market Regulation	Water Gaochun, Nanjing	Exclusive trading	0	4	182
5	Qinghai Administration for Market Regulation	Natural gas Qinghai Minhechuan	Tie-in sales	0	9	446
6	SAMR	Active pharmaceutical ingredients KH PYH TYS	Selling goods at an unfairly high price, unreasonable additional trading conditions	10890; 605; 605	10; 9; 7	25270; 5435; 1845
7	Zhejiang Administration for Market Regulation	Active pharmaceutical ingredients Wepon Pharmaceutical	Tie-in sales, unreasonable additional trading conditions	23.2	3	247.4
8	SMAR	Active pharmaceutical ingredients Simcere Pharmaceutical Group Limited	Refusal to deal	0	2	10000

In 2019, a total of 103 monopoly cases were instituted, 46 cases were concluded, and RMB320 million was fined and confiscated. Among them, 28 monopoly agreement cases were instituted, and administrative penalties were imposed against 12 of them; 15 cases of abuse of market dominance were instituted, and administrative penalties were imposed in 4 of them; 84 cases of abuse of administrative power to eliminate or restrict competition were handled, and 24 of them were instituted and 12 were rectified; 36 cases being suspected of failing to give a notification of concentration of undertakings according to the law were investigated, and administrative penalties were imposed in 18 of them. Compared with 2020 data disclosed by SAMR[2], more cases in respect of abuse of market dominance were instituted, with punished cases and the amount of fine increased.

According to Article 47 of the *Anti-monopoly Law*, "In case there exists an act abusing market dominance by the undertakings in violation of this law, the antimonopoly authorities shall order the undertakings to cease such act, the illegal gains shall be confiscated, and a fine between 1 and 10 percent of the turnover from the previous year shall be imposed." In the KH API case in 2020, one of the parties was fined 10 percent of its sales in the previous year, which, among the cases announced so far, is the only monopoly case imposed with penalty subject to the highest standard. This case calls for our particular concern, since it is a case of abuse of market dominance rather than hard core cartel.

a. Abuse of Dominance by KH and Others

Shandong Kanghui Pharmaceutical Co., Ltd. (hereinafter "KH"), Weifang Puyunhui Pharmaceutical Co., Ltd. (hereinafter "PYH"), and Weifang Taiyangshen Pharmaceutical Co., Ltd. (hereinafter "TYS") are three companies selling the active pharmaceutical ingredients of calcium gluconate (hereinafter "APIs"). Their shares in the relevant market, namely "China's market for APIs of calcium gluconate for injection," were 94, 91, and 87 percent during the three years in the case. Although the three companies are superficially independent legal persons and not related to each other, PYH and TYS are actually controlled by KH in terms of personnel, business, and finance, so they are identified as one operator. The three companies disrupted the original business model in which three API companies (none of them is any of the parties to this case) each sold APIs to preparation companies, and by entering into exclusive sales agreements with API producers, or agreeing with them that 85 percent of their outputs shall be sold to the parties, or that they shall not sell APIs and shall produce APIs only for their own use, controlled the sales of APIs in the relevant market, and became the only API supplier for downstream preparation companies. After that, the parties raised the price at which they sold the APIs to others by 19 to 54.6 times, which constituted selling goods at an unfairly high price. In addition, after controlling the API market, the parties forced downstream preparation companies to enter into repurchase agreements, and thus further controlled the sales of the preparation outside the API market, harming the interests of the preparation companies. The parties not only raised the price of the preparation significantly, but also caused a shortage of supply of the preparation. This preparation is a commonly used low-cost medicine and a clinically necessary medicine, and is in the *National Essential Medicine List*. According to public reports on the Internet,[3] the price of calcium gluconate injection rose from RMB 2 three years ago to about RMB 20 in 2018, and calcium gluconate injection was included in the list of medicines in shortage in Guangxi, Yunnan, Inner Mongolia, Shanghai, and other places successively, seriously hindering patients' medication and harming their interests. In view that KH played a leading role, PYH played a secondary role, and TYS played an auxiliary role in the monopoly, their illegal incomes were confiscated, and a fine of 10, 9, and 7 percent of their turnover from the previous year were imposed respectively, according to Article 47 and Article 49 of the *Anti-monopoly Law*.

Significantly, with respect to this case, the administrative penalties were imposed on April 9, 2020, and announced on the website of SAMR on April 14, 2020. On the same day, SAMR announced other 16 cases, directly related to this case and imposed with administrative penalties for obstructing antitrust enforcement investigations. According to the provisions of Article 42 and Article 52 of the *Anti-monopoly Law*, the operators and interested parties are obligated to cooperate with the antitrust enforcement. "In reviewing and investigating by the antimonopoly authorities, if the undertakings refuse to provide relevant materials and information, or provide incorrect materials and information, or remove, hide or destroy evidences, or other conducts to refuse or obstruct investigation, the antimonopoly authorities shall order the operators to cease such act, a fine below RMB20,000 may be imposed on individuals and a fine below RMB200,000 may be imposed on organization. If the circumstances are serious, a fine between RMB20,000 and RMB100,000 may be imposed on individuals and a fine between RMB200,000 and RMB1,000,000 may be imposed on organization; a criminal liability may be imposed if a violation of criminal law occurs" In this case, KH and PYH refused to provide relevant data and information, concealed, destroyed, and transferred evidence, rejected or obstructed the investigation carried out by the antitrust enforcement agency, so they were fined RMB1,000,000 (the fine at the highest standard under the law). The legal representatives of KH and PYH "organized and directed the employees of the companies and the unemployed in the society to violently snatch evidence, and forcibly conceal and transfer relevant evidence. When the antitrust enforcement officials ordered the parties to stop the illegal acts, the parties directed relevant personnel to violently obstruct the antitrust enforcement officials, causing injuries to some antitrust enforcement officials and seriously hindering the investigation." Therefore, the two legal representatives were fined RMB100,000 (the fine at the highest

2 Annual Report of Anti-monopoly Law Enforcement in China (2019), See http://www.samr.gov.cn/xw/zj/202012/t20201224_324676.html.

3 https://baijiahao.baidu.com/s?id=1664031938465801144&wfr=spider&for=pc.

standard under the law), and the remaining 12 were fined varying amounts between RMB20,000 and RMB100,000. The following issues in this case are of concern:

First, the identification of undertaking. Article 12 of the *Anti-monopoly Law* clearly stipulates that the subject is the "undertaking," including natural person, legal person and other organizations, and emphasizes the identification of undertaking based on "will of undertaking," not superficial legal status. The three companies in this case are superficially independent and not related to each other, but they cooperate with and are related to each other closely in business operation, staffing, financial resource allocation, and profit distribution, forming a *de facto* community of interests, and should be considered as one undertaking. This provision is intended to prevent the parties from setting up a shell company in order to evade penalties, and from covering up substance with form. Especially in the case of conglomerate, some independent legal persons are only vehicles, and other entities actually plan, decide on, implement, and supervise the operations. In this situation, it is necessary to accurately identify an undertaking based on the facts of the case.

Second, the damage to the order of competition in the API market and the preparation market. Since the production of APIs is subject to a production permit, the number of producers is limited, and the barrier to entry is high. As a result, in such cases, instead of substantial increase, only decrease may occur in the supply of APIs in the short to medium term, due to production permit holders' reduction or suspension of production, giving a relative advantage to upstream API producers over downstream preparation producers. In previous cases, such as the isoniazid case,[4] the phenol case,[5] and the allopurinol case[6] investigated and handled by the National Development and Reform Commission in 2017, the parties' abuse of market dominance and damage to competition usually had direct impacts on the API market – the increase in the price of APIs indirectly led to an increase in the price of preparations. However, this case is different in the sense that the parties had the obvious subjective intention to violate the law. They not only disrupted the original business model by adding distributor between API producer and preparation producer, but also monopolized the supply of preparations through agreement. What's more, in order to further control the sales of preparations, they extended the monopoly to the downstream preparation production, damaging the order of competition in the two markets.

Third, the application of the provision on exploitative abuse. Many instances of refusal to deal are found in previous API cases. From the perspective of business logic, refusal to deal might be intended to force the counterparty to accept unreasonable trading conditions, or in the case of integrated operation in both the API and preparation markets, to eliminate competitors. Exploitative abuse is relatively rare. The previous chlorpheniramine case[7] was a typical case in which both exploitative abuse and exclusionary abuse are found. In that case, the party refused to deal in order to sell APIs at high prices and to sell other APIs by means of tie-in sales. In this case, what the three companies did was purely exploitative abuse. Based on this, plus the aforementioned subjective intention, their behaviors were held illegal.

Fourth, imposing a fine at high rate. The rates of fines imposed on the parties to this case, 10, 9, and 7 percent respectively, were relatively high, especially for cases of abuse of market dominance. The previous highest rate of fine was 8 percent in such cases involving sale at unfairly high price, including the Er-Kang case (i.e. the aforementioned chlorpheniramine case) and the Qualcomm case. Article 49 of the *Anti-monopoly Law* sets out the considerations for an antitrust enforcement agency to determine the amount of fine. In this case, the parties eliminated and restricted competition in the relevant markets and seriously damaged the interests of preparation companies and patients (the products involved are relevant to the lives and health of patients), which meets the requisites serious circumstance, vile nature, and long duration, so fines were imposed at high rates, in addition to confiscation of illegal incomes. The circumstance and nature considered here refer to the circumstance and nature of monopoly, which damages fair competition order, not those of violent obstruction to antitrust enforcement, which harms the authoritativeness of public antitrust enforcement.

Fifth, the violent obstruction to antitrust enforcement. This case is an extremely rare case of violent obstruction to law enforcement. According to Article 52 of the *Anti-monopoly Law* currently in effect, KH and PYH and their respective legal representatives were fined RMB 1,000,000 (maximum fine on entity) and RMB100,000 (maximum fine on individual) respectively. However, the amounts of fines under the *Anti-monopoly Law* are relatively low for the nature and consequences of their behaviors, and does not conform to the principle of proportionality for administrative law enforcement. It is required to, according to the rules on determining legal liability in current laws, impose a fine amounting to a certain percentage of each offender's sales in the previous year. This is stipulated in Article 59 of the *Amendment to the Anti-monopoly Law* (Draft for Comments) issued in January 2020.

4 *Isoniazid* case involving Second and Handewei, Administrative Penalty Decisions [2017] No. 1 and (2017) No. 2 of National Development and Reform Commission.

5 *Phenol* case involving Chongqing Southwest No.2 Pharmaceutical Factory, Competition Enforcement Announcement [2016] No. 12, Administrative Penalty Decision Yu I&C E P [2016] No. 15.

6 *Allopurinol* case involving Chongqing Qingyang Pharmaceutical Co., Ltd., Competition Enforcement Announcement [2015] No. 12, Administrative Penalty Decision Yu I&C E P [2015] No. 15.

7 *Chlorpheniramine* case involving Hunan Er-Kang and Henan JiuShi, Administrative Penalty Decisions SAMR P [2018] No. 21 and [2018] No. 22.

This case did not end there. PYH filed an administrative lawsuit with the Beijing No. 1 Intermediate People's Court in connection with the administrative penalty for monopoly.[8] This case was heard by the court on December 15, 2020 and the hearing was broadcast live on the Internet. No verdict has yet been pronounced.

b. Comments on Antitrust Enforcement

The antitrust enforcement over the 13 months since January 2020 exhibits the following characteristics: First, antitrust enforcement agencies paid close attention to the market competition in the fields relevant to people's livelihoods, which is in line with the previous philosophy of philosophy. According to the author's summary of the cases of abuse of market dominance announced since 2008, as of January 31, 2021, penalties have been imposed in a total of 52 cases of abuse of market dominance; most of the cases occurred in civil energy (gas and water), salt, tobacco, telecommunications, radio & TV, and API industries, and one of the cases occurred in chip industry (Qualcomm), chemical industry (Eastman), software industry (Jiuyuan Yinhai - Changhui), and packaging industry (Tetra Pak) respectively. In terms of the number of cases, water and API ranked first, with 9 cases in each field. Second, antitrust enforcement agencies severely cracked down on illegal acts in the field of API. Many antitrust enforcement cases occurred and severe penalties were imposed in the field of API. In this field, abuse of market dominance has various manifestations, including refusal to deal, restriction on deal, tie-in sales, unreasonable additional trading conditions, and selling goods at an unfairly high price, which almost cover all types of "abuse" listed in Article 17 of the *Anti-monopoly Law*, so antitrust enforcement is difficult, time-consuming, and costly. In terms of penalty, the rate of fine is relatively high. Third, antitrust enforcement agencies put more efforts into antitrust enforcement and further standardized antitrust enforcement. As shown by the foregoing data, the number of cases filed, the number of cases concluded, and the amount of fine all increased. According to the provisions of the *Anti-monopoly Law*, if an operator abuses its market dominance, the operator shall be ordered to stop such illegal acts, its illegal income shall be confiscated, and a fine shall be imposed on it. However, in previous cases, illegal incomes were seldom confiscated. According to the author's summary, as of December 31, 2019, illegal incomes were confiscated in only 18.5 percent of the cases. In contrast, illegal incomes were confiscated in 5 cases among the 8 cases since January 2020, a significantly increased proportion.

III. LEGISLATION ON PROHIBITING ABUSE OF MARKET DOMINANCE

Legislations governing abuse of market dominance introduced in 2020 include the drafted revisions to the *Anti-Monopoly Law*, the *Regulations on Prohibiting Behaviors of Abusing Intellectual Property Rights to Exclude and Restrict Competition* (2020 Revision, hereinafter *IPR Abuse Regulations*), and the *Guidelines on the Antitrust in the Sector of Platform Economy* formulated by the Anti-Monopoly Committee of the State Council. This paper will not look into the *IPR Abuse Regulations* as the revision was made on the basis of the departmental rules released by the State Administration for Industry and Commerce ("SAIC") in 2015 and the revisions only involving the change of law enforcement agencies but not the substances and procedures.

A. Current Anti-Monopoly Law and Relevant Revisions

The current *Anti-Monopoly Law* was enacted in 2007 and implemented on August 1, 2008. Provisions with respect to abuse of market dominance within the law are mainly found in Article 17, 18 and 19 under Chapter III – identification of violations, as well as in Article 47 concerning administrative punishments for the violations. The drafted revision to the law unveiled in January 2020 by the State Administration for Market Regulation (SAMR) increased from 57 articles of eight chapters of the current law to 64 articles of eight chapters. Although the number of provisions relating to the identification of market dominance remained unchanged, the revisions featured some breakthroughs in this regard:

1. Defining a Dominant Position in the Digital Economy

New business models, emerging as a result of technological advances, boosted the formation of ecosystems where platforms act as a core and important bridge. While bringing conditions for economic development and innovation, this has caused a series of basic juridical logic issues, such as disputes over data ownership, privacy protection, and issues regarding legitimate collection, use and management of data and information. Due to the inherent "quasi-public attributes" of platforms, or features such as network effects and externalities, conducts on the platforms concerns the vital interests of ordinary consumers, including Big Data Killing (a form of price discrimination through which Internet platforms charge higher prices to frequent users than new ones), exclusive transactions, and data misappropriation. It is also why the operating behaviors of platform enterprises have attracted great attention from the regulators. Article 11 of the *Interim Regulations for Prohibiting Behaviors of Abusing Dominant Market Position* released by the SAMR in 2019 stipulated how to determine the market position of undertakings engaged types of businesses in the new economy, in light of the features of dynamic competition, cross-field competition, and network effects, among others,

8 Case Number: [2020] BJ 01 A F No. 459, http://tingshen.court.gov.cn/live/16319054.

peculiar to Internet platform-based economy. The latest drafted revisions to the *Anti-Monopoly Law* detailed factors that should be considered when determine whether an undertaking in the field of digital economy has a dominant position in the market including the operating model adopted by the undertaking, its technical characteristics, market innovation and its ability in gathering and handling related data. Considering lessons from cases involving the likes of Facebook, Google and Amazon in the European Union and the United States, China's new rule will have a profound influence on the field of digital economy and platform economy in the future

2. Collective Dominance

Issues regarding market monopoly by oligopolies are common within various jurisdictions. Aware of that, China's *Anti-Monopoly Law* provided a way to define "abuse of collective dominance." However, inference provided for in the current provisions on identification of collective dominance is solely made on the market share of the undertakings, that is, collective dominance exists where two undertakings jointly have a market share of two-thirds, or three undertakings jointly have a market share of three-fourths, in a relevant market. The lack of other identification factors leads to an application dilemma in practice. For instance, when demonstrating the decision on penalties in the isoniazide and chlorphenamine cases, the law enforcement agencies mentioned the inference criteria for determining the position of collective dominance by market share, as stipulated in Article 19 while demonstrations were either not made or vague in proving oligopolies enjoy "collective" dominance as "a whole." As a result, the violation is determined according to their respective independent dominant market position, without fully disclosing the fact that these undertakings "collectively" abused a dominant position. Even worse case is that, Article 19 had even been misused in civil lawsuits, such as in the case of *Fang GU v. China Southern Airlines Company Limited* for refusal-to-trade,[91] and the case of *Xinyu WANG v. China Telecom Corporation Limited Xuzhou Branch* for monopoly dispute.[102] In the second case, the plaintiff requested the court to hold that the defendant committed in the conduct of abusing a dominant market position, for which one of the focus lied in whether the defendant had market dominance. The court in the case held that there are three undertakings on the relevant market, China Mobile, China Unicom and China Telecom, and their collective market share exceeded three-fourths, the inference criteria as required in Paragraph (3) of Article 19 of the *Anti-Monopoly Law*. Meanwhile the defendant was unable to prove its market share was less than one-tenth. The court accordingly inferred that the defendant is an undertaking with market dominance. The wrong stemmed from the misunderstanding of "collective." The drafted revisions made improvements by refining identification factors, with the inclusion of market structure, transparency in the relevant market, the degree of homogenization among relevant commodities, and behavioral consistency among undertakings, among other factors.

B. Guidelines on the Antitrust in the Sector of Platform Economy ("Platform Guidelines")

The *Platform Guidelines* were released on November 10, 2020 for public comments and has not yet been adopted. The *Platform Guidelines* highly agree with the structure of the *Anti-Monopoly Law*. The *Platform Guidelines* consist of six chapters, namely General Provisions, Monopoly Agreements, Abuse of Market Dominance, Concentration of Undertakings, Abuse of Administrative Power to Exclude and Restrict Competition, and Supplementary Provisions, further divided into 24 articles in total, and provide comprehensive and detailed provisions on the application of the *Anti-monopoly Law* in the field of platform economy.

1. Objectives of the *Platform Guidelines*

With protecting fair market competition and promoting innovation and healthy development in the field of platform economy as the starting point and foothold, the purpose of the *Platform Guidelines* is to reduce market entry barriers, creating an open and inclusive development environment, fully stimulating the innovation vitality and development momentum of market entities, and improving the overall international competitiveness of China's platform economy. This is consistent with the new goal of "encouraging innovation" in the first article of the drafted revision of the *Anti-Monopoly Law*.

2. Particularity of the *Platform Guidelines*

Wide-ranging and require expertise, of the platform economy, it is necessary to give more detailed and targeted guidance to this industry by fully considering its dynamism, systematicity and complexity, apart from alignment with the current laws, regulations, rules and guidelines. This is conducive to accurately grasping the development rules of platform economy and supervision rules for anti-monopoly, constructing scientific anti-monopoly supervision rules, strengthening competition analysis and legal argumentation, improving the level of specialization and standardization of anti-monopoly law enforcement, and creating a targeted, predictable and transparent legal system for development of platform economy.

9 (2014) Y.G.F.M.S.Z. No. 1141 Civil Judgment for the case of *Fang GU v. China Southern Airlines Company Limited* for refusal-to-trade, before Guangdong Higher People's Court.

10 (2014) N.Z.M.C. No. 256 Civil Judgment for the case of *Xinyu WANG v. China Telecom Corporation Limited Xuzhou Branch* for monopoly dispute, before Nanjing Intermediate People's Court.

3. Rules of the *Platform Guidelines* on Prohibiting Abuse of Market Dominance

The *Platform Guidelines* focuses on the identification of market dominance of undertakings in platform economy and the common abuse of market dominance in this field.

- First, it expounds the common thinking of anti-monopoly law enforcement when identifying the abuse of market dominance, namely making further elaboration by the specific identification factors in Article 18 and Article 19 of the *Anti-Monopoly Law* as the framework when making analysis.

- Second, it enumerates in detail the factors that can be used to determine or infer the market dominance of an undertaking, including the market share of the undertaking, the competition situation of relevant markets, the ability of the undertaking to control the market, the financial and technical conditions of the undertaking, the dependence of other undertakings, the difficulty of entering the market, etc., and clarifies the specific items of each factor in the context of "platform." For example, when determining the "market share of an undertaking," the transaction amount, transaction quantity, number of users, page view, duration or other indicators, as well as the continuance of such market share may be taken into consideration.

- Third, it refines the manifestations of abuse of market dominance in the platform field detail by detail, such as unfair price behavior, sales below cost, refusal to trade, restricted trade, tie-in sales or imposing unreasonable trading conditions, differential treatment, and responds to the hot issues of widespread concern in society, such as "one-out-of-two," data monopoly, and Big Data Killing.

IV. OUTLOOK ON LAW ENFORCEMENT IN THE FUTURE

From the perspective of China's anti-monopoly practice, comparing with civil litigation, the public law enforcement of the two-level market regulators plays a more prominent role in maintaining market competition order. At present, China's anti-monopoly legal system is gradually improving, covering the anti-monopoly law, judicial interpretation of the Supreme People's Court, SAMR departmental rules and guidelines of the Anti-Monopoly Committee of the State Council. For the special competition issues of specific industries, effective and targeted guidance and governance can be carried out by issuing guidelines. For example, in 2020, two drafts for comments were issued to regulate platform economy and active pharmaceutical ingredients (API) field respectively. In future law enforcement, this model will continue as new problems emerge in development.

In addition, the practice of law enforcement shows that there is insufficient punishment for illegal acts in the current legislation. On the one hand, it is necessary to increase the business accountabilities of offenders in the new anti-monopoly law, and on the other hand, the proportion of fines within the scope of statutory discretion should be higher to achieve effective deterrence. In the implementation of the *Anti-Monopoly Law*, according to the past experience, the case of collateral public law enforcement and civil law enforcement is rare. Take the *Abbott RPM* case for example, the administrative law enforcement convicted Abbott guilt, but the finding was not supported in civil litigation because of insufficient evidence offered by the plaintiff; in another example, *Huawei v. IDC* for abusing its dominant market position, the civil lawsuit was supported, but the law enforcement agency accepted IDC's undertakings in administrative law enforcement. In December 2020, SAMR conducted an anti-monopoly investigation on Alibaba; JD.COM earlier filed a civil lawsuit with Beijing Higher People's Court on the limited transaction behavior of "one-out-of-two," the case is under trial, and it is the first case in which public law enforcement and civil litigation proceed in parallel. This will have a far-reaching influence on the enforcement of China's anti-monopoly law.

The development of digital economy produces a revolutionary effect on the market competition pattern, especially considering the characteristics of Internet-based platform economy, namely, dynamic competition, cross-border competition and network effects. A violation of the law will have a massive influence in both scope and depth. From the macro aspects of the market, it also concerns the industrial pattern and the innovation vitality of enterprises. Failure of effective supervision will lead to drastic changes in market structure and further result in competition disorder. A series of law enforcement and legislative measures, such as imposing the most severe punishment on failure of notification of concentration of undertakings by three Internet platform enterprises (Alibaba Investment, China Literature, and Hive Box) according to law, charge against Alibaba and issuance of the *Platform Guidelines*, all indicate the trend of strengthening supervision. This will become a focus in governing the market competition order in the future.

BIG DATA AND COMPETITION IN CHINA: ANTITRUST REGULATION AND BEYOND

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The digitization process in the last two decades has dramatically changed the way people live as well as the way companies compete. Today companies have had no doubt that they are in a digital era of competition of the big data, by the big data, and for the big data. Big data helps companies to improve the quality of their products, develop new products, know their customers, and personalize the products. Provided that a high volume and variety of data is essential for the operation of certain types of business, access to that big data may enable a company to foster a competitive advantage over its rivals and even result in a dominant market position. Also, the algorithms developed and trained based on big data might lead to tacit collusion and abuse of dominance.

Having realized potential antitrust issues with big data, China's antitrust watchdog began to consider in recent antitrust legislation scenarios where big data plays a role in anti-competitive behaviors prohibited by the Anti-Monopoly Law ("AML"). Particularly, in November 2020, China's State Administration for Market Regulation ("SAMR") issued a draft of *Antitrust Guidelines on the Field of Platform Economy* ("Draft Platform Guidelines") soliciting public opinions, which factors in big data and/or algorithm in its chapters on monopoly agreements, abuse of dominance, and merger control. In addition, some other policies have warned government agencies or local governments not to commit administrative monopoly in terms of sharing big data controlled by the government.

This article will provide an overview of current antitrust regulation in China related to big data in some typical scenarios. At the same time, the complex triangular relationship among antitrust issues, anti-unfair competition, and personal data protection will be touched upon in the scenario of data scraping.

I. SCENARIO 1: DATA SCRAPING

A. Gathering Data from Your Rivals

Many companies have developed methods to gather data from apps or web pages provided by their actual or potential rivals with automated bots. This kind of data accessing approach, which is known as data scraping or data crawling, and its legitimacy, have been a bone of contention among internet companies in recent years.

Companies in control of data may be able to find many legitimate reasons to prohibit data scraping, including intellectual property, unfair competition, personal data protection, unauthorized computer entry and so on. But the scrapers do not always play a defensive role in the battle, as they can employ the antitrust law as a weapon, claiming that restrictions on data accessing by dominant internet companies may harm competition. This issue has been highlighted by the *hiQ v. LinkedIn*[2] case.

In this case, the plaintiff hiQ is a data analysis company that relies on LinkedIn's public profile data. LinkedIn sent a cease-and-desist letter to hiQ asking it to stop data scraping and adopted technology to block its access after staying silent to hiQ's operating practices for several years. hiQ, in turn, filed suit against LinkedIn to seek relief, alleging that it has not violated any laws by "scraping" public data. On the contrary, hiQ asserts, LinkedIn has acquired and maintained monopoly power with unlawful means, including denial of "essential facility."[3]

Although refusal to data scraping is viewed as a rather novel threat to competition, the discussion on the "essential facility" doctrine can date back to a hundred years ago.[4] This doctrine, which mainly holds that a monopolist is liable for denying access to a resource that is essential to downstream competition,[5] has been condemned long, for its widely acknowledged that market participants enjoy the freedom of trading, signifying they also enjoy the freedom of choosing whom to trade with or not to, and even a dominant company should not, in principle, be obliged to promote its competitor's business. The U.S. Supreme Court has never endorsed the essential facilities doctrine after all these years, whereas some of their judicial practice did lend support to this theory.

In September 2019, the U.S. Court of Appeals for the Ninth Circuit affirmed the lower court's order granting a preliminary injunction barring LinkedIn from blocking hiQ from accessing and scraping publicly available LinkedIn member profiles to create competing business analytic products, as the court found credible that hiQ's entire business depended on being able to access public LinkedIn member profiles and the survival of its business was threatened absent a preliminary injunction. Despite the absence of direct reference to the essential facility, the ruling of the court undoubtedly has bearings on this doctrine.

2 938 F.3d 985 (9th Cir. 2019).

3 *hiQ Labs v. LinkedIn*, Case No. 17-cv-03301-EMC (N.D. Cal., 2020) (Order granting in part and denying in part defendant's motion to dismiss).

4 The essential facilities doctrine can be traced back to *U.S. v. Territorial Railroad Association of St. Louis* rendered by the US supreme court in 1912.

5 2 Antitrust Laws and Trade Regulation § 25.04 (LexisNexis 2d ed 2019).

B. Big Data as Essential Facility

The Draft Platform Guidelines provides that the refusal of undertakings that control the essential facilities in the platform economy sector to deal with its counterparties under reasonable terms can translate into the abuse of dominance. Further, the guidelines list several factors in determining whether relevant data can constitute an essential facility, including the indispensability of the data for participating in market competition, other ways to access the data, the technical feasibility of data opening, and the impacts of data opening on the companies who possess the data.

So far, there is no public or private enforcement in China alleging certain big data as the essential facility. However, there have been several disputes involving the restriction on data accessing which have the potential to be regulated by the Draft Platform Guidelines, for instance, the dispute between Cainiao and SF express.

Cainiao is an express delivery platform founded by Alibaba, which collects logistics data from major express companies, including SF Express, and allows consumers to know where their parcels are and when they expect to receive them. In 2017, Cainiao disconnected SF Express in the name of cyber security, causing the latter to be kept out of the logistics platform, resulting in information chaos for online sellers and consumers. This event sparked controversy over the dominant power of a digital platform, as it was reported that in 2016, China's major express companies adopted Cainiao's big data services in 70 percent of their logistics business.[6] This dispute was solved by the State Post Bureau soon via mediation, urging the two parties to reach an agreement of fully resuming the business cooperation and data exchange. Thus, the potential antitrust issues have not been brought into legal proceedings.

C. Other Legal Recourses

So far, most of the data scraping cases in China are resolved under the *Anti-unfair Competition Law*. One of the most representative cases is *Sina Weibo v. Maimai (2016)*.

Maimai is a LinkedIn-simulated platform providing career and social networking services in China. In order to expand its user population, Maimai scraped a large amount of user's educational and occupational information from Sina Weibo, a leading social networking platform, without the latter's authorization. The Beijing Intellectual Property Court ruled in December 2016 that Maimai's behavior harms the legitimate interests of Sina Weibo and constitutes unfair competition. Furthermore, the court established a fundamental principle for third parties to scrap data from companies in control of personal data, which is known as the "triple-authorization principle." According to the judgement, when a third party tries to obtain users' data from a data controller, it is required to ensure that there are "triple authorizations," that is, one authorization from the user to the data controller, one from the user to the third party, and one from the data controller to the third party. This principle has been recognized in several subsequent cases against data scraping in China. For example, in a dispute involving Tencent and ByteDance in 2019, a court in Tianjin decided that the "triple-authorization principle" has "become a business ethics that network operators in the field of open platforms should abide by."[7]

The triple-authorization principle shows the court's intention to find a point of balance among each stakeholder. The battle regarding data scraping and sharing between internet companies actually involves a tripartite relationship, as the collection and use of data may relate to invasion of privacy. In October 2020, China's *Personal Information Protection Law (Draft)* ("Draft PIPL") was unveiled, which establishes a rule that separate consent shall be obtained from the personal information subject before data controllers share it with third parties. The rule regarding "separate consent," which is the equivalent to the explicit consent under Article 9 of EU's GDPR, would apparently frustrate companies employing the data scraping method.

In view of the above, although antitrust regulation may intervene in cases of refusal to access big data, it needs to take into account anti-unfair competition and personal data protection issues. To draw a legitimate boundary among this triangle relationship would be a challenge, and it remains to be tested in the future.

6 See 21CBH, Logistics support express, Cainiao links new working population, https://m.21jingji.com/article/20170103/herald/5ed995d0f718ef724935e31cfb21daad.html, accessed 1/20/2021.

7 Shenzhen Tencent Computer System Co., Ltd. and Tencent Technology (Shenzhen) Co., Ltd. Commercial Bribery and Unfair Competition Dispute(2019)Jin 0116 Min Chu No. 209.

II. SCENARIO 2: ALGORITHMS AND COLLUSION

Price-fixing cartels can be more easily implemented with the development of information technology. The idea is known as algorithmic collusion: instead of sitting in a smoke-filled room to negotiate a horizontal agreement, people now only need to hide behind the screens and use algorithms to execute their collusion.

Algorithms contribute to the implementation of cartels by affecting certain market characteristics that make collusion more viable. They increase market transparency as they automate the process of monitoring and collecting price information from other market competitors. They also enable the conspiring firms to exchange information in a more clandestine and frequent manner, making it much harder for the regulator to discover such collusion. With the help of algorithms, the firms can retaliate immediately against any deviation from collusion, which might have been hard to detect in the past in a traditional cartel. Besides, algorithms also lower the cost and complexity of collusion, making it possible in a wider range of markets, including those with so many competitors where cartels were traditionally deemed impossible to implement.

Cases of this kind are not uncommon worldwide. In 2015, the U.S. Department of Justice charged David Topkins, the employee of a company that sells posters, for violating the Sherman Act. Topkins wrote computer code that instructed the company's algorithm-based software to set prices of certain posters in accordance with a previously determined agreement. He also exchanged price and sales information with other conspiring firms in order to monitor the effectiveness of the pricing algorithms and adhere to the agreement. This is the first case in which using algorithms to collude became the target of law enforcement.

The regulator in China must have been aware of the negative impact algorithms can have on market competition, as the newly issued Draft Platform Guidelines specifically address the issue. Chapter 2 of the guidelines highlights several horizontal monopoly practices that need to be regulated, among them are the ones related to algorithms. Article 6 of the guidelines, for example, mentions "using platforms to collect or exchange price, sales or other sensitive information" as well as "using data and algorithms to achieve concerted practices." Article 8, which concerns the hub-and-spoke conspiracy, also states that "whether undertakings with competitive relationships use methods such as technological means, platform rules, data and algorithms" should be taken into account in the relevant analysis.

Though there have been cases involving algorithmic collusion in other countries, no such case exists in China. However, a specific mention of algorithms in the guidelines may serve as a signal that declares the advent of stricter law enforcement in this regard.

III. SCENARIO 3: PERSONALIZED PRICING

For a long time, companies can only offer products to their customers at a uniform price. It creates what is known as consumer surplus, a concept that refers to the difference between the price that consumers pay and the price that they are willing to pay. However, algorithms are helping companies to encroach on consumer surplus so as to maximize their profits.

This is done through offering each consumer a personalized price, which is calculated in accordance with the personal data that companies have collected during their operation. In a very typical scenario, a platform may charge a higher price to an old customer than to a new customer, since it has learned the consumption habit of that old one from her purchase history on that platform and reached the conclusion that she is willing to pay more. Also known as first-degree price discrimination, this practice is especially common in online shopping, online car hailing services, online food delivery industries, and online travel agencies in China.

Issues related to first-degree price discrimination lies in the intersection between many legal sectors. Data protection law is applicable, as personalized pricing inevitably involves collecting and using users' personal data. In the Draft PIPL, there are also provisions regulating the automated processing of user information. From the perspective of consumers' interest protection, e-commerce Law may apply. Competition law also has a stake if such pricing strategy is carried out by an undertaking with a dominant market position.

The newly issued Draft Platform Guidelines reflect such a position. In Article 17, under the title of "differential treatment," the guidelines prohibit undertakings from "adopting differential pricing or other transaction conditions based on the paying capacity, consumer preferences, usage habits, and other factors, as revealed by big data and algorithms," as well as "adopting differential pricing or other transaction conditions between new and old users, as revealed by big data and algorithms." The guidelines also specify that having different privacy, transaction history, individual preferences, and consumption habits does not mean the transaction conditions of trading parties is different, thus cannot justify differential treatments.

With the complexity of modern business activities in mind, the guidelines include some exceptions with regards to the above-mentioned prohibition. For example, if the undertaking presents a special offer to new users in a reasonable period for the first-time transaction, it will not be caught by the prohibition. If the differential treatment is adopted in accordance with the actual need of the trading party and is in conformity with the trade usage and industry practices, it will also be exempted. The guidelines also contain a catch-all provision that allows undertakings to raise other justifiable reasons not listed in Article 17, leaving some degree of flexibility in future law enforcement.

There are only anecdotal reports on big companies' price discrimination practices, and none of them have entered legal procedure, whether in China or abroad. However, given the brewing public dissatisfaction in this regard, one might test the water through public or private antitrust enforcement proceedings based on the Draft Platform Guidelines when finalized in the future.

IV. SCENARIO 4: MERGER CONTROL

The trend towards increased scrutiny of big data-related transactions has been observed in many jurisdictions around the world, especially for transactions that occurred in the past and are considered to have raised competitive concerns in the present. As only part of the entities would be able to gather first-party data directly from data subjects and they may not be willing to share them with their rivals, a practical corporate strategy may be to acquire other companies owning large datasets.

The Draft Platform Guidelines contains several articles to cover the data-related merger control issues. In particular, the guidelines have counted data as a crucial factor in evaluating the competitive impacts of the concentration of undertakings in the platform sector. The guidelines provide that considerations for the undertaking's control over the market involve the undertaking's ability to collect and process data and to control the data interface. Furthermore, the difficulty for undertakings to obtain necessary resources and necessary facilities, including data, may result in market entry barriers.

When it comes to remedies, the guidelines provide the divestiture of data as an available restrictive condition. Although opening up API has not been listed as a type of behavioral conditions, it may still be resorted in future cases. As in the case of Google's acquisition of Fitbit, the European Commission found that a number of players in the relevant market currently access data provided by Fitbit through a Web API to provide services, and following the transaction, Google might restrict competitors' access to the Fitbit Web API. Based on this consideration, the Commission cleared the acquisition after Google offering the maintenance of access to users' data through the Fitbit Web API without charging as a commitment.[8]

By far, there has been no data-related representative merger control case in China. However, with the Draft Platform Guidelines, the on-going investigation of *Didi/Uber China* might end up with conditions of opening up certain data to competitors. In August 2016, Didi acquired all assets of Uber China business and thus acquired a market share of as much as 93.1 percent in the ride-hailing market in China.[9]

V. SCENARIO 5: ADMINISTRATIVE MONOPOLY

Administrative agencies have produced and collected a broad range of different types of data in order to perform their functions, which has simultaneously made them one of the biggest controllers of public data. With the increasing emphasis of data's strategic position, Open Government Data ("OGD"), as provided by OECD, has been acknowledged as "an important source of economic growth, new forms of entrepreneurship and social innovation." OGD-related policies and portals have proliferated all over the world since the mid-2000s.[10]

In response to the public outcry, China made public the *Action Plan for Promoting the Development of Big Data* in 2015, raising aspirations such as to accelerate the construction of a national government data opening and sharing platform, and to promote the opening of public data resources. Subsequently in 2020, China issued *Opinions on Building a More Improved System and Mechanism for Market-oriented Allocation of Elements* ("Opinions on Elements Allocation"), requiring the acceleration of the cultivation of the data element market via enhancing the opening and sharing of government data. However, these OGD initiatives may exert impacts on market competition if the government itself is involved in monopolistic behaviors.

8 European Commission, Mergers: Commission clears acquisition of Fitbit by Google, subject to conditions, https://ec.europa.eu/commission/presscorner/detail/en/IP_20_2484, accessed 1/22/2021.

9 Does Didi's Acquisition of Uber China Constitute an Industry Monopoly?, China Youth Daily (Aug. 5, 2016), http://zqb.cyol.com/html/2016-08/05/nw.D110000zgqnb_20160805_6-01.htm. , accessed 1/21/2021.

10 Ubaldi, B. (2013), "Open Government Data: Towards Empirical Analysis of Open Government Data Initiatives," OECD Working Papers on Public Governance, No. 22, OECD Publishing, Paris, https://doi.org/10.1787/5k46bj4f03s7-en.

Administrative monopoly, which refers to the abusive use of administrative power by government agencies to engage in monopolistic activities, is a unique part of the antitrust system in China. According to the AML, administrative agencies shall not abuse their administrative power to restrict competition in ways including designating trading partners, impeding the free flow of products between regions, or discriminating against non-local undertakings.

In the implementation of OGD policies, the government may face dilemmas due to the shortage of specific data processing and analysis technologies, which makes it inevitable to cooperate with private enterprises. Nevertheless, if the government authorizes an entity with exclusive rights in public data accessing or provision of services based on public data without going through legal procedures like a tender process, the market competition might be seriously impaired. To overcome this, the Opinions on Elements Allocation dictates that government agencies should break local protectionism and strengthen the enforcement of the AML to improve the regulation of element trading. Similar statements can also be observed in regulations formulated by local authorities. For instance, Guizhou, a testing ground for big data and the OGD policy in south-west China, has issued a regulation requiring local government agencies to select companies for public data processing services in a fair and merit-based manner.

Despite the lack of attention, administrative monopolistic practices related to big data and digital platforms have actually emerged in practice. With the respite of the COVID-19 pandemic, many local governments tried to promote economic recovery by issuing consumer vouchers. But the good intention went awry when some of them designated a single digital platform as the channel for issuance. When it comes to OGD, we have witnessed that some enterprises have exclusively provided services based on the public data of a local government, but the procedure of authorization remains ambiguous. Given that OGD has just entered a booming phase, governments in China may continue to refine their practice, ensuring public data to better serve market competition.

VI. CONCLUSION

The Chinese government has realized the potential antitrust issues with big data, and thus issued the Draft Platform Guidelines to try to cover every typical scenario. However, since enforcement in this area is still rare, it remains to be seen how challenging issues will be solved in specific cases. First, big data has enabled the emergence of all sorts of new business-models, complicating matters in the already obscure application of the antitrust law in practice. Second, most disputes over big data involve at least three stakeholders, namely the data subject, the data controller, and a third-party company, and therefore can hardly be resolved unless a way to balance the legal interest is worked out. Furthermore, as the parties may claim their legitimate rights (such as anti-unfair competition and personal data protection) under different laws, the manner of managing their overlaps would also be a major challenge.

In November 2020, the CPC Central Committee released its forthcoming five-year plan, which puts breaking up industry monopolies and local protectionism on the schedule. This move is recognized as an indication that the top leaders of China have started to pay unprecedented attention to the role that the AML can play for economic development and other government purposes. China's digital market has passed through a decade characterized by lax oversight and unencumbered growth where virtually none of M&A deals in this sector had been reviewed by the antitrust regulators, nor had any internet companies received an antitrust penalty decision until the end of 2020. On December 14, SAMR imposed its first VIE gun-jumping fines on internet companies following the introduction of the Draft Platform Guidelines, which has demonstrated its determination in enhancing scrutiny against internet giants. Therefore, although challenging, antitrust regulation over big data issues will play an important role in the digital era to complete the goals of economic structural transformation and the development of a higher-level market economy as set by the Chinese government.

MISSION IMPOSSIBLE? PROMOTING SUSTAINABLE DEVELOPMENT THROUGH CHINA'S ANTI-MONOPOLY LAW

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I. BACKGROUND

In March 1994, the State Council of China adopted the *Agenda of the 21st Century for China — White Paper on Population, Environment and Development* in which sustainable development was pinned down as an overarching strategy of the Chinese government. In 2016, the Chinese government announced the *National Plan on Implementation of the 2030 Agenda for Sustainable Development*[2] which addressed each of the seventeen Sustainable Development Goals ("SDGs")[3] set by the United Nations in 2015. In particular, the implementation plan for SDG 10 (i.e. reduce inequality within and among countries") emphasizes that "creating and improving the institutional environment for fair and healthy competition and equal access to capital and market opportunities." As pointed out in a report of the United Nations Conference on Trade and Development ("UNCTAD") in 2015, competition policy may play a significant role in achieving sustainable and inclusive growth and development.[4] In recent years, OECD has organized a series of events to discuss competition policy issues which are related to key SDGs including, among others, poverty reduction,[5] gender equality,[6] and fairness.[7] In addition, the relationship between environmental policy and competition policy has been on the radar of the competition authorities in some jurisdictions for over 10 years.[8]

It is worth noting that the antitrust law enforcement does not necessarily promote sustainable development. On the contrary, it may even have a negative impact on specific SDGs. For example, there are views that the rules related to anti-competitive agreements may have an over-deterrent "chilling effect" on the cooperation among competitors in the areas of raising workers' wages and promoting environmental protection. As some experts in Europe said, "climate change is an existential threat. Competition law must be part of the solution and not part of the problem. Competition law need not stand in the way of urgent action and co-operation by the private sector to fight climate change."[9]

Economic growth, social inclusion and environmental protection are the three cornerstones of sustainable development. The outbreak of COVID-19 and its long-lasting impact on the economy, environment and society further highlights the importance of sustainable development of the human society. On the other hand, the antitrust law typically focuses mainly on addressing economic issues and there has been no consensus on whether it can effectively handle social and environmental issues. This paper discusses sustainable development from the antitrust perspective with a focus on the role of the antitrust law in promotion of the non-economic SDGs and the areas where the antitrust law may play a more prominent role, which are still controversial at the moment. Against the background of China's strategic transformation from "high-speed growth" to "high-quality growth," the reflection on the question as to whether post-pandemic, China's Anti-monopoly Law ("AML") is able to play a more active role in promoting SDGs, especially those goals related to environmental protection and social development, is of even greater significance.[10]

In this context, Part II of this paper briefly sets out China's antitrust rules and cases that are relevant to the non-economic SDGs. Part III analyses the options and major challenges when applying the AML for promotion of the non-economic SDGs. In Part IV, we put forward a few concrete suggestions. Part V is the conclusion.

2 http://www.gov.cn/xinwen/2016-10/13/content_5118514.htm.

3 The 17 SDGs include No Poverty, Zero Hunger, Good Health and Well-Being, Quality Education, Gender Equality, Clean Water and Sanitation, Affordable and Clean Energy, Decent Work and Economic Growth, Industrial Innovation and Infrastructure, Reduced Inequalities, Sustainable Cities and Communities, Responsible Consumption and Production, Climate Action, Life Below Water, Life on Land, Peace, Justice and Strong Institutions, Partnerships for the Goals.

4 UNCTAD, *The role of competition policy in promoting sustainable and inclusive growth*, 2015.

5 http://www.oecd.org/daf/competition/competition-and-poverty-reduction.htm.

6 http://www.oecd.org/daf/competition/gender-and-competition.htm.

7 http://www.oecd.org/daf/competition/how-can-competition-contribute-to-fairer-societies.htm.

8 Nordic competition authorities, *Competition Policy and Green Growth: Interactions and challenges*, 2010.

9 Simon Holmes, *Climate Change, Sustainability, and Competition Law* (Journal of Antitrust Enforcement, 2020), Volume 8, Issue 2, 354–405.

10 http://theory.people.com.cn/n1/2018/0131/c40531-29797885.html.

II. THE AML RULES AND CASES THAT PERTAINING TO NON-ECONOMIC SDGS

A. Relevant Provisions of the AML

Consideration of non-economic SDGs has been reflected in various provisions of China's AML which came into force in 2008. Article 1 of the AML provides that "this Law is enacted for the purposes of guarding against and prohibiting anti-competitive conducts, safeguarding fair market competition, improving economic efficiency, protecting the interests of consumers and the public interest, and promoting the healthy development of the socialist market economy." This article identifies multiple legislative goals of the AML including "protecting the public interest" and lays the foundation for China's AML to play a role in promoting non-economic SDGs.

Article 15 of the AML which provides exemptions for anti-competitive agreements specifically provides that an anticompetitive agreement "for the purpose of achieving the public interest such as energy conservation, environmental protection, disaster relief and rescue" may be exempted. Article 28 which concerns merger control review provides that "the Anti-Monopoly Enforcement Authority under the State Council may make a decision not to prohibit the concentration of undertakings where the undertakings can prove that the positive effects of the concentration on competition significantly overweighs its adverse effects, or that the concentration of undertakings is in the public interest." Here "public interest" may also be interpreted to capture non-economic SDGs in individual cases. In contrast, there is no explicit reference to social public interest in provisions addressing abuse of a dominant market position. Even so, while Article 17 sets out the abusive conducts which are prohibited in principle, it also provides that such conducts can have "justifications," leaving certain room for the non-economic SDGs to come into play.

In addition, it is worth noting that China's fair competition review system has also taken sustainable development into consideration. *The Opinions on Establishment of a Fair Competition Review System in the Development of the Market System* (the Opinions)[11] issued by the Chinese government in 2016 provide for "exceptions" in the fair competition review regime. Similar to exemptions of anti-competitive agreements, in exceptional cases, policies and measures having the effects of eliminating and restricting competition can still be implemented under given conditions. These exceptions include those concerning sustainable development such as "(measures) in order to achieve poverty alleviation and promotion of development, disaster relief and rescue, and other social security purposes" and "(measures) in order to achieve energy and resource conservation, ecological environmental protection and other public interest."

B. Relevant Antitrust Enforcement

There are very limited precedents in China's antitrust enforcement where non-economic SDGs have been directly taken into consideration. One example may be the conditional approval of the merger between Dow Chemical Company (Dow) and DuPont de Nemours, Inc. (DuPont) in 2017 (*Dow/DuPont*), where the antitrust authority alluded to the consideration of environmental protection in its competition analysis.[12] In its decision, the Ministry of Commerce ("MOFCOM"), the then merger control authority, concluded that the transaction may have the effect of eliminating or restricting competition in several markets, including the rice insecticides market. The decision noted that sulfoxaflor, Dow's rice insecticides already released to the market, was particularly effective in killing rice planthopper, one of the major pests of rice in China. On the other hand, DuPont's trifluoro pyrazine, which targeted rice planthopper as well, had been registered in China and was about to launch. Experiments showed that DuPont's product was "highly efficient, responsive and *environmentally friendly with low dosage required*."

MOFCOM was concerned that the transaction may have potential adverse impact on the technological development in the rice insecticides market because Dow and DuPont were major innovation forces in the rice insecticides market prior to the transaction and were competing with each other in the field of R&D, with large R&D investment and abundant product stock. Post-transaction, the two parties may lack impetus for further R&D, reduce investment in areas with parallel innovation, and delay the launch of new products, which may adversely affect the technological development in the product market. It appears that the concern over potential adverse impact of the transaction on technological development is likely to be related to the impact on R&D and introduction of more environmentally friendly new products. In other words, MOFCOM may have considered the possible adverse impact of the transaction on environmental protection in its competition assessment.

In addition, in some rare situations, non-economic SDGs are indirectly considered by applying the exemption rule for anti-competitive agreements under the AML. For example, in *Shenzhen Huierxun Technology v. Shenzhen Pest Control Society*, the Higher People's Count of Guangdong Province in the appeal affirmed the judgment by the intermediate people's court and ruled in favor of the defendant, a local pest control association. In the dispute involving a horizontal price-fixing agreement, the court supported the defendant's exemption claim based on the

11 http://gkml.samr.gov.cn/nsjg/fldj/202006/t20200603_316209.html.

12 MOFCOM, *Announcement of the Anti-Monopoly Review Decision to Conditionally Approve merger between Dow Chemical Company and DuPont de Nemours, Inc.*, Order No. 25, April 29, 2017.

public interest considerations including environment protection and public health under Article 15. In the ruling, the court held that the agreement concluded by the association members under the organization of the defendant constituted an anti-competitive agreement prohibited by Article 13 of the AML because it fixed the minimum price for disinfection and pest control services provided by the association members. However, the court found that the disinfection and pest control services were critical to the public health, environmental protection and epidemic prevention and the agreement was for the purpose of preventing below-cost pricing and malicious competition so as to protect the social public interest. In addition, the defendant successfully proved that there were no anti-competitive effects, and the consumers shared the benefits. On such basis, the court concluded that the public interest exemption should apply to the agreement.[13]

III. OPTIONS AND CHALLENGES IN THE INSTITUTIONAL DESIGN OF THE AML FOR PROMOTION OF THE NON-ECONOMIC SDGS

There are in general two approaches to promoting sustainable development by antitrust law: (1) indirect model, i.e. applying exemptions to the specific anti-competitive conducts that generate positive benefits such as environmental protection and social development, subject to certain legal requirements. This model reflects the compromise of competition policy to address environmental protection and social development policies; and (2) direct model, i.e. including non-economic SDGs such as environmental protection and social policies as legal objectives of the antitrust law and factoring them into competition assessment and the theory of harm of anti-competitive conducts as non-price effects on competition. The direct model, to some extent, can be considered as integration of environmental protection and social policies by the competition policy.

A. Indirect Model: Applying Exemptions to Anti-Competitive Conducts based on Environmental and Social Development Considerations

1. How to Achieve This

Exemption rules, in particular those applicable to anti-competitive agreements, are the main tools of antitrust law to promote sustainable development. By design and adoption of exemption rules, the SDGs could be endorsed in the regulation of each type of anti-competitive conducts, including anti-competitive agreements, abuse of market dominance and concentrations of undertakings that harm competition. In general, SDGs are addressed in China's AML mainly via the indirect model. As discussed above, the exemption rules for anti-competitive agreements under the AML shows the most consideration for sustainable development, as embodied in Article 15 which has a public interest exemption including exemption on the ground of environmental protection and disaster relief. In addition, the fair competition review system in China also shows the coordination of competition policy, environmental protection policy and social policy through exception provisions, which contributes to the promotion of the non-economic SDGs.

2. What are the Challenges?

The biggest challenge of adopting the indirect model is the clarity of exemption rules, i.e. how to design the exemption rules related to the non-economic SDGs to be clear enough to give sufficient clarity to both the antitrust authority and the business community when applying such rules. Only when the relevant exemption rules are sufficiently clear and specific, can the market players' concerns over violating the antitrust law for engaging in potentially anti-competitive conducts which are otherwise beneficial to the non-economic SDGs be alleviated. The current exemption rules under the AML are still very generic in terms of substance and there is limited procedural guidance, which leads to the existing rules playing a limited role in promoting sustainable development.

Let us take Article 15 of China's AML, which specifies the requirements for exemptions for anti-competitive agreements, as an example. Under Article 15, for an exemption to apply, undertakings shall also prove that "the agreements concluded will not substantially restrict competition in the relevant market, and consumers are able to share the benefits derived from such agreements." Due to the lack of detailed guidance, where the parties in a particular case intend to invoke public interest exemptions, there is a great deal of uncertainty on how to prove these agreements do not substantially harm competition and that consumers are able to share the benefits. For example, it is not clear whether in addition to end customers, the term "consumers" in this article also includes direct customers as business counterparties. If "consumers" only include end customers, then the situations where exemptions for anti-competitive agreements that are conducive to SDGs could apply under existing rules will be further reduced and, accordingly, the contribution of Article 15 to promotion of sustainable development will be even more limited.

13 http://ip.pkulaw.cn/ipjournal/1510121712.html.

What hopefully could resolve the issue is that according to the *Action Plan for Building a High-Standard Market System* published by the General Offices of the Central Communist Party and State Council in January 2021, the Chinese antitrust authority will formulate the highly anticipated guidelines on antitrust exemptions to shed more clarity on the application of the exemption rules so that the AML may play a more prominent role for the promotion of non-SDGs.[14]

B. Direct Model: Integration of Environmental and Social Objectives in the Legislative Goals of Competition Policy

1. How to Achieve This

Under the direct model, environmental protection, social development and other SDGs will be explicitly identified as the direct objectives of the antitrust law. Consequently, THE non-economic SDGs can be evaluated in individual cases as another dimension of competition. For illustration, someone takes the view that "the impact on sustainability of certain types of conduct or transactions can be considered in the analysis of their price or non-price effects on quality, choice and innovation. This approach has the advantage of bringing sustainability considerations within the traditional competitive assessment framework, as opposed to characterizing them as public policy considerations that are outside the realm of competition law."[15]

The direct model can be regarded as an expansion of the application scope of antitrust law and this model faces the great challenge of the "unbearable weight" of antitrust law. An example is the controversy in recent years over whether data privacy issues should be left with data privacy law or be addressed by competition law as well.[16] In our opinion, whether the direct model is reasonable or not depends largely on the feasibility of establishing a clear and convincing theory of harm that can integrate the non-economic SDGs in the competition assessment, which seems to be a challenging mission. As mentioned above, the indirect model can work particular well for anti-competitive agreements in the form of exemption rules. Therefore, we will explore if there is any space for application of the direct model under the AML to address abuse of dominance and concentration of undertakings.

When taking into account the non-economic SDGs during application of the rules on abuse of market dominance, it will be necessary to distinguish the application of the exploitative abuse rules from the exclusionary abuse rules. If the exploitative abuse rules are applied, the assessment of the anti-competitive effects of a specific conduct in a given market may not be necessarily required in a particular case. Instead, the specific conduct that harms the non-economic SDGs can be considered directly as an exploitative abuse. As the exploitative abuse rules can largely be independent from the assessment of the effects of eliminating and restricting competition, this type of rules is theoretically more suitable to be applied to address the non-economic SDGs. However, it should be noted that Article 6 of the AML provides that "undertakings with a dominant market position shall not abuse their market dominance to eliminate or restrict competition." Given this general provision, one may argue that to constitute an abusive conduct regulated by the AML, the conduct has to have anti-competitive effects, which leaves no room for regulation of exploitative abuses under China's AML. Therefore, if the non-economic SDGs were to be addressed directly in the rules regulating abuse of market dominance, the Chinese antitrust authority would have to consider how to integrate the relevant goals within the analytical framework for the anti-competitive effects of an abusive conduct. For example, Article 17 prohibits, among others "selling goods at an unfairly high price or purchasing goods at an unfairly low price." Such conducts may occur in circumstances where the counterparty to the transaction is the disadvantaged group in a society. Therefore, it is worth considering SDGs such as poverty alleviation and reduction of unfairness in the analysis of the theory of harm in a particular case.

As regards concentrations of undertakings, the factors for consideration set out in Article 27 of the AML include the impact of a concentration of undertakings on technological development, which may also include technologies related to environmental protection. As noted earlier, in *Dow/DuPont* (2017),[17] we understand that the Chinese antitrust authority's concern around the potential adverse impact of the transaction on technological development is likely to involve consideration of the adverse impact on environmental protection. In addition, Article 27 includes a catch-all clause, i.e. "other factors that have an impact on market competition," which leaves certain room for direct consideration of the non-economic SDGs.

14 http://www.gov.cn/zhengce/2021-02/01/content_5584030.htm.

15 Cristina A. Volpin, *Sustainability as a Quality Dimension of Competition: Protecting Our Future (Selves)*, (CPI Antitrust Chronicle, July 2020).

16 Wei Han, Cunzhen Huang, *Collingridge Dilemma? — The Interaction of Antitrust Law and Privacy in China* (Antitrust, Fall 2020), Vol. 35, No. 1.

17 MOFCOM, Announcement of the Anti-Monopoly Review Decision to Conditionally Approve merger between Dow Chemical Company and DuPont de Nemours, Inc., Order No. 25, April 29, 2017.

2. What are the Challenges?

Adoption of the direct model is prone to trigger debates about the improper expansion of the legislative objectives of the antitrust law. Even disregarding the divergence over the legislative objectives of the antitrust law, this model faces great challenges in its implementation. When the non-economic SDGs are part of the analytical framework of competitive assessment, the key challenge confronted by the antitrust authority is how to identify a specific anti-competitive conduct (including how to quantify the non-economic SDGs in a particular case) and what remedies could be imposed subsequently.

Due to the ambiguity of the non-economic SDGs, especially the goals related to the social development, the antitrust authority is faced with technical challenges as to how to reflect these goals in the competition analysis. Even in the case of the environmental protection goal, which is relatively easy to understand, it is not a simple task to quantify the achievements of environmental protection in individual cases. While a few environmental indexes have been developed in e.g. environmental economics, the outlook for application of such indexes in specific antitrust cases remains uncertain. In addition, even if the competitive assessment in a particular case mainly relies on the qualitative analysis, such qualitative analysis typically needs to be broken down into more specific considerations. Compared to the traditional analysis of economic indicators such as price, it remains difficult to identify the specific considerations for environmental and social goals. Moreover, it is an unavoidable question for the antitrust authority as to how to provide effective remedies from antitrust perspective for harm to the non-economic SDGs such as poverty alleviation, fairness and so on. It is likely beyond the competence of the antitrust authority to handle issues concerning environmental protection and social problems in a particular case.

Given the challenges in implementation of the direct model, the direct model is likely to significantly reduce the certainty of antitrust law enforcement and create issues for the business community. The other obstacle that cannot be ignored is that, if environmental protection and social development are also included as the legislative goals of the antitrust law, it is likely to significantly increase the costs of communication and coordination between the antitrust authority and the other administrative law enforcement authorities considering the institutional setting of the government.

IV. OUR PRELIMINARY PROPOSALS

A. The Role of China's AML in Promoting Sustainable Development

At the Fifth Plenary Session of the 18th Central Committee of the Communist Party of China ("CPC"), the principles of innovative, coordinated, green, open, and shared development were proposed.[18] The Report of the 19th National Congress of the CPC noted that "China's economy has shifted from a high growth stage to a high quality development stage."[19] Some people hold the view that to promote the high-quality development of China's economy is to push forward the comprehensive and deepened reform so as to provide institutional security for the achievement of higher quality, more efficient, fairer, more sustainable and safer development.[20] Meanwhile, the role of competition policy in the economic development in China has been increasingly strengthened in recent years. In the *Opinions of the Central Committee of the CPC and the State Council on Building an Improved Institutional Mechanism for Market-based Allocation of Resources*[21] which were issued on March 30, 2020, the Chinese government placed further emphasis on strengthening the fundamental position of competition policy, combatting administrative monopolies and preventing market monopolies, which reflected China's determination to further develop its market economy. The AML, which is the embodiment of China's competition policy, should play an essential role in sustainable development under the new development pattern of China's economy.

As China has a civil law system, the discussion on the role of the AML in promoting sustainable development must take into account the functions of other laws in China's legal system in promotion of sustainable development. Compared to the AML, many existing Chinese laws may contribute to the promotion of the non-economic SDGs in a more direct way, such as the *Environmental Protection Law*, the *Law on Promotion of Cleaner Production*, the *Law on the Protection of Wildlife*, the *Labor Law*, the *Employment Promotion Law*, the *Law on Promotion of Small and Medium-sized Enterprises*, the *Law on Protection of Rights and Interests of Women*, and the *Law on Promoting the Transformation of Scientific and Technological Achievements*. The AML of China follows the "negative list" approach and focuses on specific practices that eliminate or restrict competition. One can tell from the legislative objectives of the AML that, generally speaking, the AML is mainly applied to address economic issues although it has a broad range of objectives including the public interest which may include non-economic goals. In light of the above, SDGs

18 http://theory.people.com.cn/n1/2016/0429/c40531-28313643.html?tdsourcetag=s_pctim_aiomsg.

19 http://theory.people.com.cn/n1/2018/0131/c40531-29797885.html.

20 http://theory.people.com.cn/n1/2020/0818/c40531-31825674.html.

21 http://www.gov.cn/zhengce/2020-04/09/content_5500622.htm.

in relation to environmental protection and social policy may not be the priority among the legislative objectives of the AML. In addition, it has just been 12 years since the AML came into force and the Chinese antitrust authority still faces the constraints caused by lack of enforcement resources including human resources. These factors will limit the role of the AML in promotion of sustainable development. As discussed earlier, the AML faces certain challenges in facilitating the achievement of SDGs, regardless of direct or indirect models adopted. Therefore, we are of the view that in either direct or indirect model, the AML in general should play a supporting role in promotion of sustainable development. In terms of the choice between the direct and indirect models, we consider that the indirect model should play the leading role in the institutional design of the AML of China.

B. Specific Areas Where the AML May Promote SDGs

Given the increasingly important role of the AML in the Chinese economy, the AML can give the competition mechanism full play via primarily the indirect model so as to facilitate achievement of the economic SDGs out of the 17 SDGs. It is worth noting that "development driven by innovation" is getting increasingly important in the current economic development in China.[22] How the AML could further promote "innovation" in SDG 9 deserves greater attention from the Chinese antitrust authority.[23]

In terms of the goals related to environmental protection and social development out of the 17 SDGs, the scope of application of the antitrust law largely depends on the choice of the welfare standards, i.e. whether the consumer welfare standard or the total welfare standard is followed. The antitrust law which adopts the consumer welfare standard, in general contributes less to sustainable development compared to those that opt for the total welfare standard. It should be noted that there is no consensus in the academia or the legal professions in China as to which welfare standard is adopted by China's AML. While the impact of the anti-competitive conducts on consumers is emphasized in many cases, it can hardly be concluded that the AML adopts the consumer welfare standard. This is mainly because Article 1 of the AML refers to the public interest in addition to consumer interests, which leaves room for adoption of the total welfare standard in individual cases. Therefore, the extent to which the AML can contribute to environmental protection and social development goals out of the 17 SDGs is largely decided by how the antitrust authority deals with the relationship between consumer interests and the public interest in a particular case.

As a whole, in the event that emphasis is placed on consumer interests in specific cases, only those non-economic goals that are directly related to consumers can be easily covered by the AML. In contrast, if emphasis is placed on the public interest, then all of the non-economic goals out of the 17 SDGs can be considered in the enforcement of the AML as different manifestations of the public interest. In terms of enforcement model, as noted earlier, we suggest that the indirect model should play the leading role at this stage, through which the antitrust authority can treat environmental protection and social development goals as various dimensions of "public interest" for consideration in a particular case based on the exemption rules. This will enable the AML to play a greater role in promoting sustainable development. As far as the direct model is concerned, compared to environmental protection policy, social policies such as no poverty, zero hunger, quality education, gender equality are even more difficult to be assessed and quantified. Therefore, it is more challenging for social policies to be directly considered under the antitrust law. Given the challenges of incorporating social policies in the antitrust law and the limitations on the antitrust enforcement capabilities and resources, we suggest that the AML should apply the direct model only in exceptional cases and for the SDGs related to environmental protection.

C. Improvement of the AML for Promotion of SDGs

As discussed earlier, we are of the view that the AML should mainly apply the indirect model to the non-economic SDGs, and only in exceptional cases the direct model is applied and mainly to achieve environmental protection goals.

In the indirect model, goals related to environmental protection and social development should be assessed primarily based on considerations for the public interest. At present, the rules under the AML are still over generic, and it is expected that the exemption rules could be improved by amendments to the AML or new supporting regulations or separate exemption guidelines, for example, the antitrust exemption guidelines which is already on the Chinese antitrust authority's legislative agenda. In this regard, the latest progress in drafting the 'Sustainability Agreements' Guidelines[24] by the Netherlands Authority for Consumers and Markets ("ACM") also merits the attention of the Chinese antitrust authority.

22 http://www.qstheory.cn/wp/2019-10/23/c_1125139717.htm.

23 Wei Han, Yajie Gao, *Challenges and Prospects for Merger Control in China in the Digital Economy* (CPI Antitrust Chronicle, March 2019).

24 https://www.acm.nl/sites/default/files/documents/2020-07/sustainability-agreements%5B1%5D.pdf.

In terms of the regulation of anti-competitive agreements, taking Article 15 of the AML as an example, the application of public interest exemption requires further analysis on the impact of the agreement on consumer interests. This in fact limits the scope where the article could play a role in promoting non-economic SDGs as the burden of proving that consumers are able to share the benefits derived from the relevant conducts significantly reduces the chances of success in claiming exemption under this article. Our suggestion is to either delete the requirement that consumers shall also benefit, or to broadly interpret "consumers" in this article to include direct customers (i.e. business counterparties) to allow more space for application of the rules. In addition, for the exemption to apply, business undertakings shall also prove that the agreements will not *substantially restrict competition* in the relevant market. It may be worth applying a bit more tolerance to agreements for achieving the non-economic SDGs such that such agreements can be exempted as long as competition is not entirely eliminated. This would effectively lower the bar for exemption, thus enhancing the chances of successful application. To sum up, we consider it necessary to distinguish between exemptions related to facilitation of economic goals *vis-à-vis* non-economic goals under Article 15 and design differentiated requirements for application of exemptions.

With respect to abuse of a dominant market position, while the tolerance for "justifications" for abusive conducts specified in Article 17 of the AML leaves room for SDGs to come into play, the new *Interim Provisions on Prohibiting the Abuse of Dominant Market Position*[25] issued by the State Administration for Market Regulation in 2019 do not take into account the SDGs related to environmental protection and social development when substantiating "justifications." The Chinese antitrust authority may further consider whether these goals could be included as justifications in the future. Imagine a situation where an undertaking with a dominant market position refuses to enter into transactions with a specific counterparty or treat it discriminatorily because the conduct of the specific counterparty seriously hinders sustainable development (e.g. damaging the environment). Could the consideration of sustainable development constitute a justification for the undertaking's conduct?

In terms of concentrations of undertakings, it is still being debated as to how to properly consider the public interest in the review.[26] Currently, the AML and its supporting rules are yet to develop a more comprehensive framework for undertakings to defend their concentrations. It may be advisable for the antitrust authority to attach greater importance to the design of defense rules based on the public interest including environmental protection and social development, and properly balance the public interest defense and efficiency defense, including differentiating the role of consumer interests in specific defense rules.

In addition, there is also scope for improving the fair competition review system of China. The exception rules under the *Implementing Rules for the Fair Competition Review System (for Provisional Implementation)* (the "Implementing Rules")[27] which were promulgated in 2017 provide that policies or measures fall in the exception when they are "for the purpose of safeguarding national economic security and cultural security, concerning construction of national defense, for the purpose of achieving poverty alleviation and development promotion, disaster relief and rescue, and other social security purposes and for the purpose of achieving energy and resource conservation, ecological environmental protection and other public interest, as well as other exceptions prescribed by laws and administrative regulations." It is further provided that these policies and measures can be implemented if all of the following conditions are met: "(1) the policy or measure is indispensable for achieving certain policy objectives, i.e. in order to achieve the relevant policy objective, such policy or measure must be implemented; (2) it will not significantly eliminate or restrict market competition; and (3) the implementation period is specified."

Compared to the EU's state aid rules, the Implementing Rules lack sufficient clarity on how to specifically assess SDGs related to social development and environmental protection in the fair competition review, causing uncertainty over their application in specific cases. Post-pandemic, the coordination of competition policy with industrial policy is confronted with greater challenges, especially at the local government level.[28] In this context, it is necessary to introduce more specific rules or guidelines on fair competition review system with quantified factors for consideration so as to enhance predictability of the rules. For example, for disaster relief, protection of the ecological environment and the like, the relevant subsidy standards may need to be more detailed to include specific monetary thresholds to enhance legal certainty.

25 http://gkml.samr.gov.cn/nsjg/fldj/201907/t20190725_305166.html.

26 http://www.oecd.org/daf/competition/public-interest-considerations-in-merger-control.htm.

27 http://gkml.samr.gov.cn/nsjg/fldj/202006/t20200603_316208.html.

28 Wei Han, Yajie Gao, *Antitrust Enforcement During COVID-19: China's Response and the Long-Term Implications* (CPI Asia Column, September 2020).

D. Strengthening Competition Advocacy and Nurturing Sustainable Consumers

Competition advocacy is a helpful supplement to antitrust enforcement and is of great significance to a young antitrust enforcement jurisdiction like China. In recent years, the Chinese antitrust authority has paid particular attention and made significant efforts in promoting competition advocacy and has been fostering the competition culture in China in various ways including promulgating the *Anti-Monopoly Compliance Guide for Undertakings*.[29] In the context of promotion of sustainable development, the Chinese antitrust authority would also benefit from competition advocacy, especially competition advocacy targeting consumers. Through competition advocacy, the antitrust authority can proactively encourage undertakings to pay due attention to SDGs when competing in the market, and drive undertakings to focus on competing in aspects that are conducive to SDGs. In addition, the antitrust authority can guide consumers to pay attention to SDGs in their choice of products, raising consumers' awareness of sustainable development and nurturing "sustainable consumers."[30] In this way, consumer choices may exert pressure on undertakings which can be leveraged to drive undertakings to develop products, services and business models that are more in line with SDGs.

V. CONCLUSION

China's economic development model is at the early stage of a massive transformation. The achievement of SDGs will become a key criterion to evaluate China's economic development at the next stage. Therefore, it is critical to think about to what extent the AML, as the core competition policy, could promote non-economic SDGs, in particular those related to environmental protection and social development, in addition to serving the economic goals.

In this paper, we briefly go through the Chinese antitrust rules and cases that are related to or have addressed non-economic SDGs. Based on a distinction between indirect and direct models, we analyze the options and major challenges the AML and its enforcement are facing for promotion of the non-economic SDGs. On this basis, we are of the view that the AML in general should play a more active yet supporting role in promotion of sustainable development and the indirect model remains the more suitable approach for law enforcement in light of the various constraints. We suggest that the direct model should only be considered for the non-economic SDGs related to environmental protection and only in exceptional circumstances.

The role of antitrust law in promoting sustainable development is a controversial topic that is attracting attention from all walks of life.[31] We should try to strike the balance between promoting the non-economic SDGs through the antitrust law and over-broadly expanding the application scope of the antitrust law, so that the antitrust law could avoid bearing "unbearable weight." We expect that the increased awareness and debates over the role antitrust law should play for promotion of SDGs, and in particular, the Chinese antitrust authority's legislative efforts (such as the promulgation of the exemption guidelines) and enforcement, will open up new horizons in China.

29 http://gkml.samr.gov.cn/nsjg/fldj/202009/t20200918_321796.html.

30 https://www.consumersinternational.org/what-we-do/world-consumer-rights-day/sustainable-consumer-2020/.

31 For example, the relevant research programs by the Greek antitrust authority. See, https://www.epant.gr/en/enimerosi/competition-law-sustainability.html.

CHINA: TOUGHER MERGER CONTROL ENFORCEMENT IN THE SEMICONDUCTOR INDUSTRY?

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I. INTRODUCTION

The COVID-19 pandemic did not slow M&A in the semiconductor industry. On the contrary, 2020 saw semiconductor M&A deals setting an all-time high of $118 billion in terms of total deal value. According to a report by IC Insights,[2] a semiconductor market research firm, the five mega-deals announced in the second half of the last year had a combined value of $94 billion, accounting for about 80 percent of the total for the entire year. Among these M&A transactions, NVIDIA's $40 billion acquisition of processor-design technology supplier ARM from Softbank is the most watched deal. Other high-profile deals also include AMD's all-stock deal worth $35 billion to buy Xilinx, Intel's sale of its NAND flash memory business and 300mm wafer fabrication plant for producing microchips in China to SK Hynix for $9 billion, ADI's acquisition of Maxim for $21 billion, and Marvell Technology's acquisition of Inphi[3] for $10 billion.

The wave of industry consolidation in 2020 was driven by the integrated circuit ("IC") giants' strategy to build their future competitiveness in emerging and high-growth market segments, such as embedded machine-learning and AI, automatic driving, data centers and the Internet of Things. Accordingly, the M&As are mainly characterized by strong alliance or complementary advantages between leading companies in each segment. However, those transactions are far from the final landing-the last but also the most critical and difficult hurdle will be obtaining the applicable antitrust approval(s). Undoubtedly, the big news for 2021 should be which of those deals will be approved?

From the perspective of competition concerns that may be caused by the transactions, NVIDIA's intended acquisition of ARM, which would be the biggest deal in the semiconductor industry if completed, seems to be most problematic.[4] According to public information, NVIDIA's deal is subject to antitrust clearance from competition authorities of UK, EU, U.S. and China. It is commonly believed that one of the biggest challenges may come from China. Some voices even indicate that it is unlikely that China will approve the transaction. Why is China? What factors make the antitrust review process of cases involving semiconductor industry in China more complicated?

In recent years, U.S. companies have always maintained the highest share of M&A in the semiconductor industry. Japanese and Korean companies are also revitalizing their semiconductor industry through M&As. However, for reasons known to all, Chinese semiconductor enterprises are difficult to participate in overseas M&As, also struggling to acquire supplies and expand the business landscape. It takes little imagination to foresee the impact on China's semiconductor industry once these industry giants build a diversified chip industry chain and then enter the Chinese market with competitive product portfolios. In this sense, this round of consolidation in the semiconductor industry do have special competition concerns for the Chinese market, and tougher merger control enforcement in the semiconductor industry seems on the horizon.

This article provides an overview of how Chinese competition authority have enforced merger control rules in the semiconductor sector. It also analyzes the major challenges faced by enterprises in the semiconductor industry in the merger control enforcement and the strategies to solve these challenges.

2 Available at https://www.icinsights.com/news/bulletins/Value-Of-Semiconductor-Industry-MA-Agreements-Sets-Record-In-2020/.

3 A high-speed interconnect and mixed-signal integrated circuit supplier.

4 It is reported that the *AMD/Xilinx* deal also caused some concerns among the industry insiders.

II. OVERVIEW OF MERGER CASES IN THE SEMICONDUCTOR INDUSTRY

The semiconductor industry is worth a huge value and critical to many of the products that we use most in our daily lives. Countries therefore tend to give strategic significance to the semiconductor industry. Accordingly, any monopoly in this industry will not be only detrimental to consumer welfare in a common meaning but also to a country's overall economic benefit. It is notable that the review standards specified by the Anti-Monopoly Law of China (the "AML") include not only competition-related factors of a transaction, but also public interests and the impact on the development of the national economy,[5] which explains semiconductor mergers being continuously under strict antitrust scrutiny in China.

A. Overview of Remedy Cases in the Semiconductor Industry

Since the AML came into force, China's merger control enforcement authority, SAMR (and formerly MOFCOM), have announced 48 conditional clearances up to the end of 2020, out of which ten cases involve the semiconductor industry, higher than the number of remedy cases in other industries.

Year	Remedy Cases	Total Remedy Cases	Percentage
2020	• Infineon/Cypress • Nvidia/ Mellanox	4	50%
2019	• II-VI/Finisar • KLA-Tencor/Orbotech	5	40%
2017	• Ase Semiconductor/Siliconware Broadcom/Brocade	7	29%
2015	• NXP/Freescale	2	50%
2013	• Media Tek/MStar	4	25%
2012	• Western Digital	6	17%
2011	• Seagate /Samsung's HDD Business	4	25%

The above table shows that in recent ten years remedy cases in the semiconductor industry account for a relatively high share of the total remedy cases in each year. Notably, the big deals in the semiconductor industry that have been challenged due to competition concerns identified in the merger review process are in fact more than those listed in the above table. In 2018, the famous *Qualcomm/NXP* deal collapsed for failing to secure the approval of Chinese antitrust authority. In 2016, another two high-profile merger deals, the *Applied Materials/Tokyo Electron* deal and the *Lam Research/KLA-Tencor* deal were dropped by the merging parties for the same reason.

B. Observations on Procedural Aspects of Remedy Cases

1. The Time Frame

Under the AML, in general, the maximum statutory review period for the notification of a transaction can be as long as 180 days after SAMR formally accepts the case.[6] However, SAMR can in practice take a longer time than 180 days by requiring the notifying party to withdraw and re-file the notification, where SAMR is running out of the time to complete its review owing to complex remedy negotiations.

Remedy cases in the semiconductor industry even saw longer time frame than the average. Among all 48 remedy cases, 21 cases experienced the withdraw-and-refile process and seven of them involve semiconductor industry. The average review period[7] for the conditionally approved cases is 259 days while the number for cases involving the semiconductor industry is 303 days, indicating that cases involving the semiconductor industry may cause more significant competition concerns and thus need a more complicated remedy negotiation.

5 SAMR considers the following factors as provided in Article 27 of the AML: (1) market shares and controlling power of the relevant market of undertakings to concentration; (2) degree of concentration of relevant market; (3) impact of the concentration of undertakings on market entry and technical progress; (4) impact of the concentration of undertakings on consumers and other relevant undertakings; (5) impact of the concentration of undertakings on the national economy; and (6) other factors which have an impact on market competition and that the anti-monopoly enforcement agency designated by the State Council deems should be considered.

6 The clock for review will not start to run until SAMR declares the materials and information submitted by the merger parties are complete.

7 From the date of submission.

Cases	Withdraw-and-Refile	Time Frame
Nvidia/ Mellanox (2020)	Yes	358 days
Infineon/Cypress (2020)	No	238 days
II-VI/Finisar (2019)	Yes	263 days
KLA-Tencor/Orbotech (2019)	Yes	301 days
Ase Semiconductor/Siliconware (2017)	Yes	456 days
Broadcom/Brocade (2017)	No	221 days
NXP/Freescale (2015)	Yes	236 days
Media Tek/MStar (2013)	Yes	416 days
Western Digital/Hitachi Storage (2012)	Yes	335 days
Seagate/Samsung's HDD Business (2011)	No	207 days

2. Solicitation of Stakeholders' Opinions

As explained above, SAMR also evaluates the impact of a transaction on public interests and the development of the national economy, and therefore SAMR takes into account and gives weight to the feedback it receives from the key stakeholders in its consultation process. Moreover, opinions solicitated from the stakeholders also play an important role in assessing the proposed remedy proposal. If the feedback is positive from all stakeholders, SAMR will clear the transaction with the proposed remedies imposed.

SAMR usually solicitates opinions from government agencies regulating the industry involved, trade associations, key suppliers and customers, competitors and sometimes industry experts.[8] It is particularly important to solicit the opinions of stakeholders in the merger case involving sensitive sectors such as the semiconductor industry when identifying competition concerns and assessing the effectiveness of the proposed remedies.

In reviewing merger cases in the semiconductor industry, SAMR usually seeks opinions from the Ministry of Industry and Information Technology ("MIIT"), the Ministry of Science and Technology ("MST") and the National Development and Reform Commission ("NDRC"). The most influential trade association is China Semiconductor Industry Association("CSIA").

3. Engagement of Independent Third-Party Consulting Agencies

Based on our review of the decisions of the cases approved with conditions, the authority mentioned in ten decisions that it engaged independent third-party consulting agency to conduct an economic analysis on the competition issues of the case. Overall, it is not a very high proportion against the total 48 remedy cases. However, it is notable that four semiconductor cases involve engagement of independent third-party consulting agency, including Media Tek/MStar, Ase Semiconductor/Siliconware Precision Industry, II-VI/Finisar, and Nvidia/Mellanox, maintaining a high presence among cases in other industries.

The economic analysis conducted by the third-party consulting agency plays an important role in identifying and quantifying the harm to the competition. For instance, in the *Ase Semiconductor/Siliconware Precision Industry* deal, a horizontal merger, the economic analysis shows that the profit margins of Ase Semiconductor and silicon Precision Industry to Chinese customers are relatively close, and the correlation coefficient of profit margins in China is 0.72 (1 is exactly the same), together with a strong correlation between the profit margins of both sides over time, indicating that they are close competitors in the Chinese market. Based on such observation, MOFCOM concluded that the concentration would eliminate the close competition between the merging parties and thus will cause damage to Chinese market even though the relevant geographical market should be defined as global. In the *II-VI/Finisar* case, SAMR concluded that there is fierce price competition between the merging parties in the relevant market based on the economic analysis on the relevant bidding data which indicate that with II-VI to participate in the bidding, Finisar's willingness to cut prices has increased significantly. Furthermore, as with the practice of the competition authority in other antitrust jurisdiction, in non-horizontal mergers, the economic analysis could also serve as a useful tool, for example to identify the intent of the merged firm to exercise foreclosure behaviors.

8 In *NXP/Freescale*, MOFCOM solicited for opinions from industry experts additionally.

C. Observations on Theories of Harm Applied in Remedy Cases

1. Competitive Concerns Identified in the Remedy Cases

Theories of Harm, which can generally be divided into unilateral effects and coordinated effects, provide an analytical framework to assess whether and if so, how a merger would eliminate or restrict the effective competition in the relevant market. However, the specific competition concerns that may be caused by a horizontal merger are usually different from those of a non-horizontal merger. The below table summarizes the competitive concerns underlying the SAMR/MOFCOM's enforcement decisions involving the semiconductor industry.

Cases	Business Relationship of Merging Parties	Competitive Concerns
Nvidia/Mellanox (2020)	Vertical/Neighboring	Tying and bundling sale, refusal to deal, degradation of interoperability and gaining access to competitively sensitive information of its rivals to seek unfair competitive advantage
Infineon/Cypress (2020)	Horizontal/Neighboring	Tying and bundling sale, refusal to deal, degradation of interoperability, and developing the all-in-one product and ceasing to sell each complementary product separately
I-VI/Finisar (2019)	Horizontal/Vertical/ Neighboring	Significantly increasing market concentration, eliminating close competition between the merging parties, and coordinated conducts
KLA-Tencor/Orbotech (2019)	Vertical/Neighboring	Vertical foreclosure, tying and bundling sale and gaining access to competitively sensitive information of its downstream rivals
Ase Semiconductor/ Siliconware (2017)	Horizontal	Reducing customer's alternative choice of suppliers; eliminating close competition between the merging parties and enhancing the ability of differential pricing
Broadcom/Brocade (2017)	Vertical/Neighboring	Tying and bundling sale, degradation of interoperability and gaining access to competitively sensitive information of its rivals to seek unfair competitive advantage
NXP/Freescale (2015)	Horizontal	Enhancing market control; eliminating close competition between the merging parties; reducing customer's alternative choice of suppliers; loss of innovation
Media Tek/MStar (2013)	Horizontal	Eliminating the major competitor; making the buyer gain market dominance and significantly change the market structure; restricting the customers' choices
Western Digital/Hitachi Storage (2012)	Horizontal	Reducing an important competitor and weakens the competitive pressure of the remaining competitors in the relevant market; enhancing the possibility for both parties to slow down the speed of innovation; increasing the possibility of market competitors to engage in collusive behaviours through coordination
Seagate /Samsung's HDD Business (2011)	Horizontal	Reducing an important competitor and weakens the competitive pressure of the remaining competitors in the relevant market; increasing the possibility of market competitors to engage in collusive behaviours through coordination

2. Competitive Concerns Identified by SAMR/MOFCOM in Horizontal Mergers

In reviewing of horizontal mergers, SAMR/MOFCOM basically used the similar theories of harm to assess both unilateral effects and coordinated effects of a merger as with its counterparts in other antitrust jurisdictions.

With regard to unilateral effects, the competitive concerns with high frequency are elimination of close competition between the merging parties; reduction of alternative choices for customers resulting in a higher procurement risk; and loss of innovation. The market structure has always been an important factor in assessing whether the merged firm has the ability to engage in anti-competitive practices. Another key indicator to evaluate the unilateral effect is the extent of close competition between the merging parties. As noted above, SAMR/MOFCO may use various economic tools to test if the merging parties closely compete with each other.

Coordinated effects are not commonly discussed in the enforcement decisions. Among seven cases involving horizontal overlaps, only the recent case of *II-VI/Finisar*, and two much more earlier cases of *Western Digital/Hitachi Storage* and *Seagate /Samsung's HDD Business* mentioned that the merger might lead to collusive practices. To our observation, the relevant markets in those cases show clear signs of vulnerability to coordinated conduct such as oligopoly structure, high degree of market transparency and lack of buyer's countervailing power.

3. Competitive Concerns Identified by SAMR/MOFCOM in Non-Horizontal Mergers

In line with the general trend of industry integration, most remedy cases in the semiconductor industry in recent years are non-horizontal mergers. In our view, the recent cases, on the one hand, reflect the latest development of the enforcement practices in assessing competition impact of non-horizontal mergers in major antitrust jurisdictions, and on the other hand show certain special competition concerns of Chinese competition authority.

In the remedy cases involving vertical or complementary integration, competitive concerns typically identified in the unilateral effect analysis include vertical foreclosure, degradation of interoperability, and gaining access to competitively sensitive information of upstream or downstream rivals. These competitive concerns are also highlighted in the relevant vertical merger guidelines in U.S. and EU.

In addition to the common theories of harm also shared by other jurisdictions, Chinese competition authority tends to assume that the merged firm would leverage its market dominance in one market to gain unfair competitive advantages in another neighboring market by abusive behaviors of tying and bundling. SAMR/MOFCOM raised this concern in all the remedy cases in a vertical or neighboring nature in the semiconductor industry. It is reasonable to infer that the concern of potential abusive behaviors may come from the feedback it receives from the key stakeholders in its consultation process. With a view to prevent the abusive behaviors in advance, identifying such competition concern helps to impose concrete behavioral remedies such as "no tying and bundling" commitment. An antitrust investigation against abusing dominance conducts can be much more challenging for the competition authority as tying and bundling sale is not an illegal *per se* conduct, even for dominant enterprises.

D. Observations on Remedies Imposed on Conditionally Approved Transactions

As noted above, it is widely recognized that the Chinese competition authority appears to have a stronger preference for behavioral remedies than any other competition authority. Remedy cases in the semiconductor industry reflect such preference in a more obvious way. Among the ten semiconductor related remedy cases, nine cases, including both horizontal and non-horizontal mergers involve behavioral remedies. The only one case that was imposed a structural remedy of business divesture is *NXP/Freescale* deal. The behavioral remedies imposed in semiconductor cases above mainly include commitments:

Commitment	Cases
Hold separate (some argue that this is a quasi-structural remedy)	II-VI/Finisar Ase Semiconductor/Siliconware Media Tek/MStar Western Digital/Hitachi Storage Seagate /Samsung's HDD Business
No tying or bundling, or any other abusive conducts	Nvidia/ Mellanox Infineon/Cypress KLA-Tencor/Orbotech Broadcom/Brocade
Comply with the FRAND principles	Nvidia/ Mellanox Infineon/Cypress KLA-Tencor/Orbotech
Maintain interoperability/ compatibility/open-source commitment	Nvidia/ Mellanox Infineon/Cypress Broadcom/Brocade
Take protective measures on information accessed from upstream/downstream rivals	Nvidia/ Mellanox KLA-Tencor/Orbotech Broadcom/Brocade

III. MERGER CONTROL ENFORCEMENT TRENDS AND TAKEAWAYS FOR ENTERPRISES

By observing those conditional clearances, one can reach conclusions about the general trends in merger remedy cases in the semiconductor industry in China. The enterprises in this industry considering M&A deals should get well prepared for the challenges that may encounter in the merger review process.

First, it is reasonable to foresee tougher merger control enforcement in the semiconductor industry due to its strategic sensitivity to the national economy. However, it does not mean that SAMR will necessarily give higher weight to industrial policy than competition policy when reviewing transactions in the semiconductor industry. A more reasonable interpretation is that the competition authority tends to pay a close attention to the potential competitive concerns that the proposed transaction may bring about to the Chinese market even though the relevant geographical market for semiconductor-related products should normally be defined as global. Therefore, the special competition environment faced by the enterprises operated in China's semiconductor industry chain, for instance, U.S. export restrictions and foreign investment restrictions driven by national security concerns, high dependence on foreign suppliers of domestic downstream customers, should be considered with prudence.

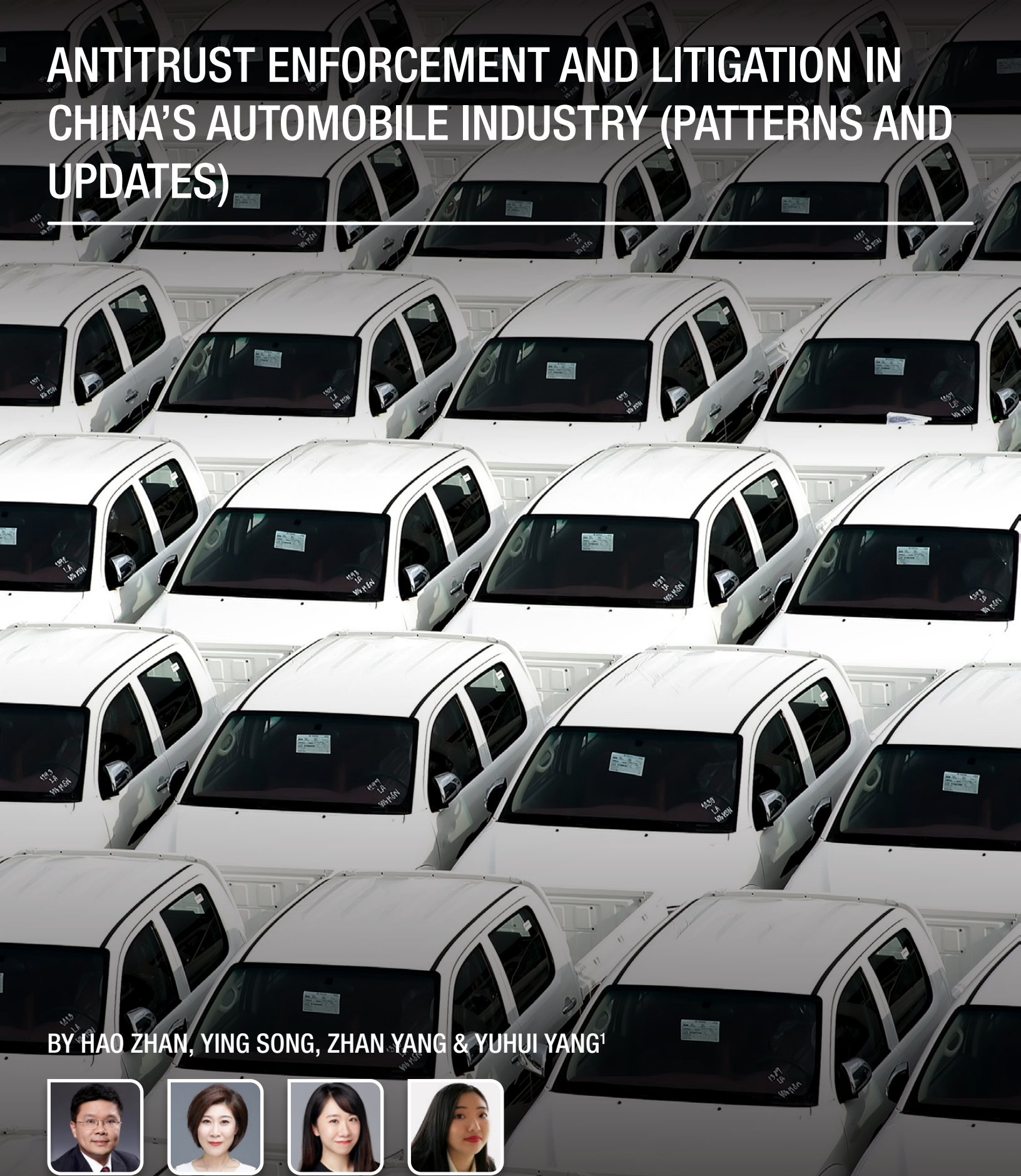
Second, SAMR is paying more attention to non-horizontal deals today and thus the merging parties should get prepared and expect more rigorous antitrust review of deals especially those involving significant vertical or neighboring relationships and thus it is important for the parties to make strategies for proactively addressing the competition concerns that SAMR may raise.

Third, SAMR is actively coordinating with other competition authorities with regard to the scope of remedies when reviewing global deals. However, it is not uncommon for SAMR to impose remedies out of the scope of the remedy packages imposed by other antitrust authorities to cope with the competitive concerns specific to Chinese markets. Notably, the commitment of "no tying or bundling" or any other abusive con-

ducts has become increasingly common in the high-profile mergers involving complementary product portfolios. The logic behind such remedy measure is to prevent abusive behaviors that might occur after the merger, and to a certain extent, it also reflects the consistent style of Chinese law enforcers that attach importance to proactive regulation and supervision.

Fourth, statistics show that the time taken for SAMR to review semiconductor-related cases are relatively longer. Parties to a transaction with competition concerns should therefore be prepared for a degree of uncertainty when it comes to the merger review time frames in China. The rights and obligations related to obtaining antitrust approval under the transaction agreement should be designed with care. Furthermore, it is highly recommended that the parties to the transaction to identify the potential competition concerns, to build the defending strategy under the assistant of antitrust counsel and economic consulting firm, and to plan the proposal for remedies at early stage.

ANTITRUST ENFORCEMENT AND LITIGATION IN CHINA'S AUTOMOBILE INDUSTRY (PATTERNS AND UPDATES)



BY HAO ZHAN, YING SONG, ZHAN YANG & YUHUI YANG[1]

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As a major pillar of the national economy, the automobile industry accounted for roughly 10 percent of China's GDP in 2020, making it a an area of significance for antitrust enforcement. Resulting from a supply and demand imbalance, in recent years a glut of supply has depressed the whole industry. Especially in 2020, tougher antitrust activity has arisen involving each link in the entire supply chain, from automobile manufacturing and distribution to after sale servicing.

The below review is divided into three parts: an update on antitrust enforcement policy, antitrust enforcement cases by Chinese authorities, and an analysis on typical antitrust litigation cases.

I. UPDATE ON ANTITRUST ENFORCEMENT POLICY IN THE AUTOMOBILE INDUSTRY

On January 4, 2019, the Anti-monopoly Commission under the State Council ("Commission") issued the *Anti-monopoly Guidelines for Automotive Industry* ("Guidelines"), which provides undertakings in the automobile industry with more guidance for anti-monopoly compliance. The Guidelines are formulated based on China's experience with law enforcement in the automobile sector together with relevant precedents from other jurisdictions, and aims to prevent monopolistic conduct, lower the costs of law enforcement, and increase compliance by undertakings.

A. Background to the Guidelines

Based on the fact that China has developed into the world's most important and most rapidly growing automobile market, it was necessary that the Guidelines be enacted to uphold fair competition in the automobile industry. In China, the automobile sector is a pillar of the national economy. At present, the automobile sector has become an important driving force behind the development of mid-to-high end consumption, innovation, the green economy, and finally the sharing economy. The Guidelines, aiming at maintaining fair competition, facilitating the healthy development of the automobile sector, and safeguarding consumer interests, are of great importance.

Since 2014, Chinese competition authorities handled a series of monopoly cases in the automobile sector, with competition concerns relating to both horizontal agreements between competitors and also to vertical agreements between manufacturers and distributors. The fines imposed since 2014 now total nearly RMB 2.6 billion yuan. The Guidelines, drafted based on previous law-enforcement practice, are essential to providing clearer anti-monopoly guidance for undertakings in this sector.

B. Legislative Procedure for the Guidelines

Beginning in June 2015, the Commission, together with other related administrative departments, began drafting the Guidelines. The team responsible took the following measures to ensure the Guidelines' quality and operability:

(1) Conducting Research. In order to make sure the close connection between the Guidelines and the industry and to underpin the development of automobile sector, the team conducted researches into the sector, such as the pricing of finished automobile and accessories, finished automobile distribution and after-sale modes and channels. In addition, for the main issues concerned in the Guidelines, the team conducted questionnaire surveys and interviews to upstream and downstream enterprises, industry associations, law firms, experts and scholars to study the current status of the sector.

(2) To research for precedent enforcement cases. As mentioned above, the Chinese authority handled a number of cases in the automobile sector. By studying the monopolistic acts in different industries and business links, analyzing their characteristics and causes, and drawing on the characteristics and tendency of concentration of automobile undertakings, the work team took into account that the Guidelines shall be compatible with the market competition and regulation requirements and the development phase of China's automobile sector, and included in the Guidelines these requirements.

(3) Drawing on international experiences. Relying on the work of research institutions and studying relevant legal regimes in the European Union, the US, Japan, and South Korea, among others, so as to draw on international experiences. The operability of the framework, principles and main content in the Guidelines are further adapted from both such experiences from other jurisdictions as well as the characteristics of China's own market competition regime and the current state of China's automobile market.

(4) Widely Solicit Public Comments. From June 2015 to January 2016, five workshops were held to solicit opinions from upstream, middle and downstream enterprises, consumer representatives, scholars and experts. From March to April 2016, through soliciting public opinions, the team had received 228 opinions regarding the Guidelines from related government departments, companies at home and abroad, industry associations, research institutions, and law firms, among other entities. The draft of the Guidelines was amended accordingly. In February 2017, more opinions from Commission member units and experts of the advisory group under the Commission were provided and the draft of the Guidelines was further amended accordingly.

After the above-mentioned procedures, the Commission further amended the draft Guidelines in accordance with the institutional restructuring of the State Council. Upon approval by the director of the Commission, this new iteration was scheduled to be issued in January 2019.

C. Main Characteristics of the Guidelines

Taking into account the market status, context and characteristics of China's automobile sector, the Guidelines properly draw on domestic law enforcement experience as well as corresponding rules from jurisdictions with more mature competition regimes. The Guidelines also focus on new technology and business areas. There are four main characteristics of the Guidelines:

(1) The Guidelines are China-specific. Consisting of six chapters including general provisions, monopoly agreement, abuse of dominance, concentration of undertakings, abuse of administrative powers to exclude or restrict competition, and supplementary provisions, the provisions in the Guidelines are compatible with the *Anti-monopoly Law of the PRC* (the "AML") and are China-specific. They are based on a comprehensive comparative and empirical study of the automobile industry and the law enforcement experience in China.

(2) The Guidelines are question oriented. To provide automobile undertakings with clear and specific guidance for compliance, the Guidelines are question oriented. The Guidelines mainly state the approach adopted by anti-monopoly law enforcers in the automobile sector; their analysis, framework, principles and methodologies, together with details on the assessment of monopoly agreements and abuses of dominance leading to elimination or restriction of competition in the automobile sector.

(3) The Guidelines seek to balance interests among different parties in the market. By properly defining freedom of contract and the autonomy and willingness of the undertakings, the Guidelines seek to balance interests among different parties of the upstream, middle and downstream undertakings in the market.

(4) The Guidelines are compatible with other laws, regulations and policies. The automobile sector is capital-intensive and closely related to other sectors. It requires investment in new and cutting-edge technologies. Thus, the sector has become the driving force in the development of related industries. The Guidelines, therefore, seek to be connected and compatible with other laws, regulations and policies, especially those related to intellectual property right, industry policies, consumer protection, and civil and commercial contracts.

D. The Guidelines' Main Highlights

1. Market Definition Issues

The Guidelines stress that the role of market definition varies in different types of monopoly cases. For monopoly agreements cases, there is usually no need to clearly define the relevant market in practice. However, for cases involving an abuse of dominant market position, the definition of the relevant market is usually the first step for assessing and determining the suspected monopolistic conduct.

When defining the relevant product market, demand substitution analysis can be conducted based on the product's characteristics, usage, and price, and supply substitution analysis can be conducted when necessary. According to the specific circumstances of an individual case, automobile wholesale and retail may need to be defined as separate relevant product markets, and the automobile dealership market may be further divided from the perspectives of demand substitution and supply substitution. The automobile after-sales market can be divided into the after-sales parts dealership market and the after-sales maintenance market, and may need further segmentation through substitution analysis.

For the passenger vehicle manufacturing market, from a supply substitution perspective, this market is largely global. But from the demand substitution perspective, there are significant differences among the competitive environments of different countries, resulting from factors such as technical and trade barriers, motor vehicle taxes and fees, distribution systems, prices, and competitor market penetration. Therefore, the passenger vehicle manufacturing market may be defined as a national market.

For the passenger vehicle dealership market, important differences between the wholesale and retail markets affect the market definition applicable to each. Automobile suppliers generally carry out wholesale business nationwide. As a result, the geographical wholesale market for passenger vehicles can be defined as a national market. At the retail level, the passenger vehicle retail market can be defined as provincial or regional markets, considering various restrictions in place, such as vehicle license plates, vehicle access, after-sales service, and warranty terms, as well as cost factors that possibly prevent an end user from making a non-local purchase, such as the time and transportation needed.

2. Issues Related to Monopoly Agreements

With regard to horizontal monopoly agreements, the Guidelines describe certain types of salutary horizontal agreements that are understood to promote efficiency and competition, and increase consumer welfare. These include research and development agreements, specialization agreements, technical standardization agreements, joint production agreements, and joint procurement agreements. Automotive industry operators concluding such horizontal agreements can be exempted from enforcement actions.

With regard to the individual exemption of RPM, the Guidelines numerate the common situations under which auto industry operators may claim an exemption from resale price restrictions in practice, based on Article 15 of the Anti-Monopoly Law. These include: (i) short-term resale price restrictions for new energy vehicles; (ii) resale price restrictions for sales by dealers who only assume the role of intermediary; (iii) resale price restrictions involving government procurement; and (iv) resale price restrictions over auto supplier e-commerce sales.

For the recommended price, "guided" price and the maximum price, the Guidelines specify what may constitute price fixing. Namely, if due to pressure or inducement by one of the parties to the agreement, the recommended price, guided price and the maximum price is executed by most or all dealers, and the actual effect is equivalent to a fixed resale price or a limited minimum resale price, then, according to the specific circumstances of the case, such actions may constitute fixed or limited minimum resale.

Supplier imposition of territory or customer restrictions, when said supplier's market share is below 30 percent and the reasons are justifiable, can be assumed to be exempted. Applicable situations include: (i) the distributors are required to only engage in distribution activities within their business premises but are not restricted from passive sales and cross-supply with other authorized distributors; (ii) to prevent sales "cannibalization," the suppliers limit distributors from actively selling beyond exclusive territories or to customers that the suppliers reserve for another distributor; (iii) the suppliers restrict wholesalers from directly selling to end users; (iv) to avoid customers' use of spare parts to mimic or reproduce supplier's products, the suppliers restrict distributors from selling spare parts to such customers.

3. Abuse of Market Dominance

The Guidelines focus on the abuse of dominance in two markets. Namely, the production and circulation of auto parts market and on the auto aftersales market. This is because the lock-in effects and compatibility issues that exist in the automotive aftersales market may limit and weaken effective competition and thereby harm the interests of consumers. The Guidelines also reminds undertakings that auto suppliers that do not have a dominant position in the new car sales market may be recognized as having a dominant position in the aftersales market of their branded cars.

Based on the provisions of the Guidelines, except for parts manufactured under the original equipment manufacturer ("OEM") agreement, automakers that have a dominant position in the aftersales market of their branded cars should not, without justifiable reasons, restrict suppliers of parts used for the assembly of original vehicles from manufacturing dual-brand parts.

The Guidelines further elaborate that auto suppliers should not unjustifiably restrict the supply and circulation of after-sales parts. Such restrictions include (1) restricting dealers and repairers from purchasing after-sales parts, that is, from purchasing homogeneous parts or original parts (including import parts) supplied through other channels; (2) restricting parts suppliers, dealers and repairers from selling after-sales parts through other channels, including: (i) except for parts manufactured under the OEM agreement, requiring all parts to be "returned to the factory," or restricting parts suppliers from supplying parts under their own brands to after-sales channels; (ii) restricting cross-supply of after-sales parts between dealers, repairers, and between dealers and repairers; (iii) restricting dealers and repairers from selling parts needed for auto repair services to end users.

The Guidelines provide that effective competition in the auto after-sales market requires the availability of after-sales maintenance technical information, testing instruments, and maintenance tools. Therefore, auto suppliers that have a dominant position in the after-sales market of their branded automobiles should not unjustifiably restrict the availability of the above-mentioned items, including by: (1) restricting the repairer's rights and channels to obtain technical information for the maintenance of automobiles of specific brands; (2) restricting the suppliers of testing

equipment, maintenance tools, or other equipment from selling related testing equipment, maintenance tools, or other equipment to dealers and repairers; (3) setting an excessively high market price for the maintenance of technical information, restricting the effective disclosure of maintenance technical information, and restricting auto repairers from obtaining relevant technical information.

4. Other Competition Issues

With regard to merger control in the automotive industry, the Guidelines specify that for the competitive analysis of operator concentration, there is no significant difference between the automobile industry and other industries. Antitrust enforcement authorities shall review merger filings in accordance with the relevant provisions of AML and the *Regulations on the Standards for Notification of Operator Concentration*.

II. ANTITRUST ENFORCEMENT IN THE AUTOMOBILE INDUSTRY

Following the implementation of antitrust legislation, law enforcement agencies have paid increased attention to the automobile industry, cracking down on monopoly agreements and restricting dominance abuse and administrative monopolies. Enforcement cases related to the automobile industry concluded by SAMR since the middle of 2019 are listed below. All are cartel cases.

Case Name	Penalized Undertakings	Date of Decision	Investigating Authority	Total Penalty (RMB)
Xianning Motor Vehicle Safety Technology Test Company Cartel Case[7]	Xianning Landun, Hubei Hongda, and Xianning Shuntong	Mar. 14, 2019	SAMR Hubei Branch	1,194,194.9
Yongji Concrete Enterprises Cartel Case[12]	Five concrete enterprises, including Xinli Concrete, Baobao Concrete, Yida Concrete, Jinxin Concrete and Sanxin Concrete	Sep. 17, 2019	SAMR Shanxi Branch	250,000
Case of Shandong Heze Automobile Trade Association Organizing Members to Reach Monopoly Agreement[13]	Shandong Heze Automobile Trade Association	Oct. 18, 2019	SAMR Shandong Branch	300,000
Southwest Guizhou Xinyi Driving Training Industry Cartel Case	Seventeen driving schools, including State driving school, Jingsen driving school, Xingchang driving school, etc.	Dec. 31, 2019	SAMR Guizhou Branch	3,300,000
Guangdong Huizhou Vehicle Detection Industry Cartel Case	Huizhou Vehicle Detection Industry Association and thirty-one vehicle detection enterprises including Huidong Guoshun, Huidong Yuanlai, Huizhou Gexin, etc.	May 6, 2020	SAMR Guangdong Branch	1,766,857
Three Companies Including Hubei Huanggang Lantian Second-hand Vehicle Trade Market Co., Ltd. Cartel Case	Three second-hand vehicle trade market Companies including Huanggang Lantian., Huanggang Aojie, and Huanggang Fada.	Jul. 27, 2020	SAMR Hubei Branch	195,175
Zhejiang Huzhou Second-hand Vehicle Trade Market Cartel Case	Five second-hand vehicle trade enterprises including Huzhou Jiangnan Second-hand Vehicle Trade Market Co., Ltd, Anji Dazhong, Deqing Shunda, etc.	Nov. 2, 2020	SAMR Zhejiang Branch	415,258.18

Four Driving Schools including Driver Training Branch of Chuzhou Automobile Transport Co., Ltd. of Anhui Jiaoyun Group Cartel Case	Four driving schools including Driver Training Branch of Chuzhou Automobile Transport Co., Ltd, Dingyuan Nanfang, Dingyuan Qingfeng, etc.	Nov. 2, 2020	SAMR Anhui Branch	1,438,027.94
Zhejiang Jiaxing Second-hand Vehicle Trade Market Cartel Case	Nine second-hand vehicle trade enterprises organized by Zhejiang Jiaxing Second-hand Vehicle Trade Association	Jan. 29, 2021	SAMR Zhejiang Branch	4,413,681.97
Jiangsu Driver Training Market Cartel Case	Nine driver training companies, including Xinghua Bus and Motor Driver Training Company, etc.	Jan. 29, 2021	SAMR Jiangsu Branch	1,347,362

III. ANTITRUST LITIGATION IN THE AUTOMOBILE INDUSTRY

Article 50 of the AML establishes a dual-track law enforcement system: administrative law enforcement and civil litigation. The number of anti-monopoly civil litigation cases has increased steadily in recent years. Recently, a noteworthy change for antitrust civil lawsuit procedure is that from 1 January 2019, all appellate antitrust litigation will be directly handled by the Intellectual Property Tribunal of the Supreme Court of China.

Also, if a party is not satisfied with the result of administrative law enforcement, it can additionally bring an administrative lawsuit against the antitrust law enforcement agency, according to Article 12 of *Administrative Litigation Law*.

Although the automobile industry does not typically encounter such litigation in high numbers, the number of cases related to automobile companies has been increasing rapidly. We have selected two typical cases, below, to illustrate.

A. Heze Auto Industry Association v. Shandong AMR

The Jinan City Lixia District People's Court upheld a CNY 300,000 (USD 42,633) penalty against a local auto industry association in Heze City for organizing conduct amounting to a monopoly agreement among market players.

The Shandong Administration for Market Regulation ("Shandong AMR") found that the trade association required its members not to participate in auto shows organized by other parties since 2016, and even asked them to sign a letter of commitment in 2018. The letter was deemed as a monopoly agreement, and the regulator penalized the industry body for CNY 300,000 on 18 October 2019.

The trade association challenged the decision in an administrative lawsuit and the court made the following key observations:

1. Was the Penalty Decision Legitimate?

The court said the Shandong AMR sent the trade association relevant penalty notices, outlining its rights to explain and defend itself or seek a hearing. The association sought a hearing and attended it. Under the hearing procedure, the industry body had the right to cross-examine the evidence gathered by the Shandong AMR. The regulator did not deprive the penalized entity of its right to access case files.

However, the Shandong AMR failed to provide a transcript of the hearing as evidence despite the trade association's presence at the hearing. The regulator's action involved a minor violation of procedural rules.

The court held that the violation did not have any actual impact on the trade association's rights since the hearing report submitted by the Shandong AMR included basic information relating to the hearing.

2. Was There Sufficient Evidence in the Penalty Decision?

According to the investigation records of the Shandong AMR, the trade association organized some member operators to sign the letter and jointly commit to not participating in shows organized by other entities.

Although intended at preventing market confusion, the trade association actually used its position as the local auto industry body to control the time and scope of its members' participation in auto shows, the court held. The conduct restricted competition, amounted to a monopolistic practice, and, therefore, fell under the purview of the AML. The court also deemed the CNY 300,000 penalty amount to be appropriate.

Citing the second item of Paragraph 1 of Article 74 of the *Administrative Litigation Law*, the district court ruled that the procedure adopted by the Shandong AMR in issuing the penalty decision was illegal, but dismissed the industry body's appeal.

B. Guangming Trading v. Hankook

The Shanghai Higher People's Court upheld a lower court decision to dismiss a monopoly lawsuit filed by Wuhan Hanyang Guangming Trading ("Guangming Trading") against a local unit of South Korea's Hankook Tire.

Guangming Trading was a distributor of the defendant Shanghai Hankook Tire Sales' ("Hankook") products in Wuhan from January 2012 to June 2016. The former brought the suit against Hankook, alleging that the defendant engaged in activities that amounted to vertical restraint and abuse of dominance. However, the first-instance court dismissed the suit. Guangming Trading appealed the decision.

The Shanghai Higher People's Court deemed that there were three key points under appeal:

Whether Hankook engaged in actions amounting to abuse of dominance. The relevant markets that might be affected by the alleged abuse of dominance. The higher court affirmed the first-instance court's determination of the relevant product market as the passenger vehicle tire market and the geographical market as Mainland China. It also supported the lower court's identification of the relevant markets as follows:

- The passenger vehicle tire market in Mainland China, including the original assembly tire and after-sales tire replacement markets;
- The passenger vehicle tire replacement market in Mainland China, including the wholesale and retail segments; and
- The wholesale passenger vehicle tire replacement market in Mainland China.

The court did not support the contention by Guangming Trading that the relevant market should be the distribution market for Hankook's branded tire series products. It held that Guangming Trading's proposal of defining the relevant market as the market for the distribution of Hankook brand tire products was too narrow, because it confined the competition effects to intra-brand competition, but failed to consider inter-brand competition. The court also noted that the relevant market should not be the wholesale distribution market since end consumers were also involved.

Whether Hankook held a dominant position in the three relevant markets. The court said Guangming Trading failed to provide evidence to support its claim relating to Hankook's tire products' share in above three markets. It also failed to prove that the defendant had competitive advantages in terms of market position and business scale, or could control the price, volume, market entry of other operators or other transaction conditions in the sales or raw materials purchase market. Thus, the court concluded that Hankook did not have a dominant position in each of the three markets.

Whether Hankook implemented any conduct amounting to abuse of a dominant position. Since Hankook was deemed as not holding a dominant position in the relevant markets, the court said it is logically impossible for the company to engage in any conduct amounting to abuse of dominance. For the contractual clause that bundled sales volume targets with incentives, the court said such a practice was not prohibited by law. No evidence suggested that the clause would harm the competition order of the relevant markets, it added.

Finally, the court found that the distribution contract the two parties signed in 2012 did contain RPM clauses that required Guangming Trading to comply with the lower limit of prices set by Hankook for distributors, dealers and consumers, and that Hankook could terminate the contract if Guangming Trading sold products cross-region or at a price below the lower limit. The contract also penalized Guangming Trading in

the event of any violation. However, the court noted that Guangming Trading failed to prove that Hankook had penalized the company in accordance with the contracts when its actual sales price of Hankook tires was lower than the agreed limit in the pact. Therefore, it held that the parties did not implement the relevant RPM clauses.

Economic analysis suggested that an RPM agreement could either improve efficiency and competition or assimilate prices and hinder competition. Given the uncertainty of its effect, analysis of its impact on competition in the relevant market was the key for determining its legitimacy under the AML, the court said. Given that the concerned contracts, in this case, involved only intra-brand competition, unless provided otherwise, Guangming Trading should bear the burden of proof on the alleged effect of eliminating or restricting competition.

However, Guangming Trading failed to prove the anti-competitive effects of the two contracts. Thus, the contracts could not be deemed as a monopoly agreement prohibited by the AML. The court held that when the alleged monopoly behavior, in this case, was disputed, the first-instance court's interpretations of relevant laws and regulations did not exceed its relevant authority.

The court, therefore, dismissed the appeal and upheld the first instance ruling.

IV. CONCLUSION

In conclusion, public antitrust enforcement, and private litigation in the automotive industry, have assumed a higher profile this past year. We expect that the automotive industry will continue to evolve, and emerging forms of competition might grow as the emphasis shifts towards segmented industries such as new energy, and high-technology and innovation.

ANTITRUST AND UNFAIR COMPETITION CONDUCT IN THE NETWORK GAME INDUSTRY IN CHINA

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I. INTRODUCTION

The gaming industry has gone through dramatic growth over the years in China. In 2020, total gaming market revenue has reached RMB 278.7 billion, or US$ 42.7 billion, a 20.7 percent growth over the previous year.[2] About RMB 209.7 billion is associated with mobile gaming, accounting for about 75.2 percent of the market.[3] The game broadcasting market has seen even better growth in 2019, having reached a market size of RMB 20.8 billion, or US$3.0 billion.[4] Both markets are relative competitive with no significant barriers of entries, considering the upfront cost is not high and the R&D cycle is generally short. While both industries have been enjoying their good days so far, the relations between the two sides are contentious so far.

The game owners would certainly like to monetize the revenue opportunities in live broadcasting businesses via enforcing copyright protections and developing their own broadcasting platforms in competition. The broadcasters respond by further investing in developing a community of star players aka broadcasting anchors. They have also responded along the legal front by invoking antitrust weapons. At the forefront of this inter-industry battle is the NetEase-Huaduo ("YY") rivalry. Several lawsuits between the two companies have led to court rulings. In this short article, we provide a brief analysis of two recent lawsuits involving these two companies. One regards unfair competition by NetEase against YY based on unauthorized copyright infringement, which eventually resulted in a favorable court ruling for NetEase. As a strategic arrangement, the legal battle festers into the antitrust arena, with YY claiming that NetEase has been engaged in abuse of market dominance behaviors. We introduce these two related cases and provide some analysis with respect to its legal and economic implications for the industry.

II. CASE BACKGROUND

NetEase is one of the top game developers in China. The game "Fantasy Westward Journey" was one of the most popular games in China since its launch in 2003. Guangzhou Huaduo Network Technology Co. Ltd. ("YY") operated a popular game live broadcasting platform "YY" in China, where the "Fantasy Westward Journey II" had been broadcasted since 2012. On November 24, 2014, NetEase sued YY at the Guangzhou Intellectual Property Court (hereinafter referred to as "the Guangzhou IP Court"), alleging that YY infringed NetEase's copyright of "Fantasy Westward Journey II" through illegally transcribing and capturing the content of this game and broadcasting live on its broadcast platform YY. NetEase also alleged that YY's conducts constituted unfair competition. NetEase sought a court judgment that YY should indemnify NetEase for damages in the amount of RMB 100 million and issue an apology on designated websites.

The key dispute between the two parties was whether the motion images presented in the game at issue can be considered as copyrighted works just like film works. On October 24, 2017, the Guangzhou IP Court determined that these images do constitute copyrighted works and NetEase is the right licensor. The Guangzhou IP Court ordered YY to stop the infringement behavior and compensate NetEase for damages in the amount of RMB 20 million.[5]

Both NetEase and YY appealed to the Guangdong High People's Court (hereinafter referred to as "the High Court") for a second trial. On January 17, 2018, the appeal was accepted by the High Court. NetEase insisted its damage claim of RMB 100 million and the request of a public apology. YY appealed to the High Court to reject all NetEase's claims or remand the case for retrial. On December 10, 2019, the High Court issued its final decision on this case and upheld the ruling of the first trial.[6]

Shortly after NetEase's first copyright and unfair competition lawsuit, YY fought back with a lawsuit against NetEase at the Guangzhou Intellectual Property Right Court, alleging that NetEase abused market dominance and had been engaged in unfair competition conducts too. The alleged abuses included prohibiting users from broadcasting the game "Fantasy Westward Journey II" on the YY platform and bundling the "Fantasy Westward Journey II" with NetEase's own CC live broadcast platform software. YY argued that the said abuses also violated the Anti-Unfair Competition Law. The unfair competition conduct also manifests in NetEase's CC platform imitating the YY platform in its overall design and page layout. YY sought a damage compensation of RMB 10 million plus other reasonable expenses of RMB 0.3 million.

2 Game Publishing Committee of the China Audio-Video and Digital Publishing Association, "2020 China Gaming Industry Report," December 18, 2020, http://www.cgigc.com.cn/gamedata/22132.html.

3 Game Publishing Committee of the China Audio-Video and Digital Publishing Association, "2020 China Gaming Industry Report," December 18, 2020, http://www.cgigc.com.cn/gamedata/22132.html.

4 iResearch, "China Game Broadcasting Industry Report," July 2020, at p.7, http://report.iresearch.cn/report_pdf.aspx?id=3625.

5 See the first instance judgement in *NetEase v Huaduo*, Guangzhou Intellectual Property Court, Civil Judgment (2015) Yue Zhi Fa Zhu Min Chu Zi No. 16, October 24, 2017.

6 See the second instance judgement in *NetEase v Huaduo*, Guangdong High People's Court, Civil Judgment (2018) Yue Min Zhong No. 137, December 10, 2019, https://wenshu.court.gov.cn/website/wenshu/181107ANFZ0BXSK4/index.html?docId=8c109eabfe124d6a987eab3100fe7b13.

On November 28, 2017, the Guangzhou IP Court rejected all YY's claims. The Guangzhou IP Court defined the relevant market as the network game service market in the mainland China as opposed to the market of the particular game at issue, and consequently YY failed to prove that NetEase held market dominance in the relevant market. The Guangzhou IP Court also supported NetEase's right to prohibit others from broadcasting its game without authorization. And the alleged bundling behavior didn't meet the conditions of bundling under the Anti-Monopoly Law ("AML"). The Guangzhou IP Court also rejected the allegation of NetEase's unfair competition conducts.[7] On May 28, 2020, the High Court rejected the appeals of YY and upheld the conviction of the first trial.[8]

III. CASE ANALYSIS

As described in the section above, the conflicts between NetEase and YY involve both unfair competition and antitrust issues. We will analyze each case based on the alleged conducts and discuss if and why certain conducts are ruled legitimate or not.

A. Copyright and Unfair Competition Issues

The unfair competition case was brought by NetEase against YY for its infringement conduct of using its copyrighted game content for broadcast online without authorization. Fantasy Westward Journey II is arguably one of the most successful games in the network gaming market in China. NetEase released the first version of Fantasy Westward Journey in 2003. Ever since then, it has become one of the important revenue generators for NetEase, ranked as the second most popular game by revenue in 2019 in China.[9] There have been several important channels to distribute games in China. One channel is direct distribution. Here, game players can download the game directly from the game's official websites by searching interested game's name, or from the third-party traffic ads apps or websites such as TapTap and Douyin etc., which will direct users to the games' official websites for downoading. The other channel is to download the games directly via app stores such as OEMs' app stores like Huawei's Apps Gallery and Apple's App Store, or third-parties' app stores like Tencent's MyApp and 360 Mobile Assistant.

In the direct distribution channel, NetEase spent quite a large amount of resources on advertisement expenses on third party apps or websites such as social network platforms, like Douyin, YY and etc. The industry calls it traffic purchase, which means that game developers pay to the apps or websites to bring new users via downloading (cost per download) or clicking (cost per click). Meanwhile, there are gaming communities on the SNS (Social Network Service) platforms where game players gather in chat rooms to watch game anchors to broadcast in a live streaming pattern. Some SNS platforms even organize and sign contracts with these game anchors and regularly broadcast game matches. Naturally, popular online games become the main content input of those matches during live streaming events and the SNS platforms usually split the revenues with game anchors. Majority of the revenues come from audience's tipping to game anchors, mainly from game players and game enthusiasts. YY is one of those SNS platforms which operate the broadcasting business by sharing the revenue with those game anchors and/or also by selling advertising slots.

YY is a multi-sided platform which connects audiences, i.e. game players or game enthusiasts and game anchors. It also attracts general audiences and other entertainment anchors whose focus could be on sports, music, dance, food and cooking, and skin products etc. Gaming, however, accounts for the largest activities on its platform and it has devoted more resources to boost the development of gaming ecosystems.

In the unfair competition case, NetEase's main allegation is that YY has infringed NetEase's copyrights by organizing and allowing game anchors to use unlicensed game content of Fantasy Westward Journey II to broadcast on YY's platform. It also alleged that it is illegal under the Anti-Unfair Competition Law in China.

The focus of the legal issues in this case regards:

i) whether the animated pictures of Fantasy Westward Journey II are considered as copyrighted works;

ii) whether broadcasting of copyright protected content for obvious commercial purposes is considered as proper use.

7 See the first instance judgement of Huaduo v NetEase, Guangzhou Intellectual Property Court, Civil Judgement (2015) Yue Zhi Fa Min Chu Zi No. 25, November 28, 2017.

8 See the second instance judgement of Huaduo v NetEase, Guangdong High People's Court, Civil Judgment (2018) Yue Min Zhong No. 552, May 28, 2020, https://wenshu.court.gov.cn/website/wenshu/181107ANFZ0BXSK4/index.html?docId=51aac1bb823d47cbb575ac0d012414c6.

9 Nan Lu, "2019 Global and China Mobile Game Market Trends Report," Sensor Tower, January 22, 2020, https://mp.weixin.qq.com/s/iNv7cHQa_VfG3RogM5ATCg.

Regarding issue (i) above, the Guangdong High Court confirmed the decision of the court of first instance, that animated pictures of Fantasy Westward Journey II should be considered as copyright protected content. The Court stated that Fantasy Westward Journey II is a role-playing online game and the continuous animated pictures of the game are qualified to have the key characteristics of a series of music-accompanied or non-music-accompanied pictures. The process of producing such animated pictures and the final expression in audio and video combination demonstrates a high-level originality and creativity. It falls into the category of literacy and art, possessing unique elements of originality and creativity in terms of tangible and duplicable intellectual products. Essentially it's similar to the movie products that are protected by the Copyright Law.

Regarding issue (ii) above, the Guangdong High Court acknowledged that live broadcasting is a way of communication with the public in real time. Live broadcasting games is in fact distributing the products or works in a public way. Live broadcasting does not fall into the categories of exhibition right, projecting right, performing right, broadcasting right or distribution right via information network, which are protected by the Copyright Law. It belongs to other rights that are possessed by the copyright owner but does not belong to any scenarios prohibited by Article 22 of the Copyright Law.[10] The live broadcasting conduct, by using NetEase's copyrighted content on YY's platform, is as a matter of fact for business profit purpose. The usage volume has exceeded the proper use limit. Such conduct has infringed upon the normal licensing right that NetEase possesses on the game pictures involved in the case. It therefore harms revenues of NetEase's potential market, which could not be considered as proper usage.[11]

During the appeal process, along with other additional evidence YY submitted an economic report which intended to demonstrate that game broadcasting is not a substitute for game but creates its own value to the distribution of the games based on a consumer survey. By this logic the report intended to prove that game broadcasting is indeed proper usage of game and benefits the gaming industry. Furthermore, the report also alleged that YY's live broadcasting of Fantasy Westward Journey II is not a substitute for the game itself, either. Therefore, organizing broadcasting such a game will not hinder the development of the game industry. Moreover, the economics report relied on the commercial value game broadcasting has created to conclude that the percentage of the total value anchors generated is much higher than the percentage of the total value that the game produced. Following this logic, leaving the copyright to the game developers will jeopardize the growth of the game broadcasting industry.

NetEase, instead, retained its own expert team to challenge the findings in the survey as well as in the economic report. NetEase's expert argued for the flaws in the survey methods, such as unrepresentative samples and limited sample size, misleading survey design and questionable reliability of the online survey. Broadcasting and game are both complementary and substitutive, where the net effect is an empirical question. It may depend on individual games and the different stage in the game's life cycle. Given that the Fantasy Westward Journey II has been operated for over fifteen years and are quite matured and well penetrated among the game players, the marginal benefit of advertisement is limited. It's questionable if broadcasting the game will increase the revenue of the game. The example in the YY's economic report used the anchor's revenue data of another game King's Glory rather than Fantasy Westward Journey II. Such data cannot reflect the revenue distribution of the game involved in the case.

The High Court did not support the findings in the economics report and the consumer survey submitted by YY. Instead, the High Court concluded that the logical flaws of the statistical analysis in YY's economic report negated the basis that this case should rely on. The Fantasy Westward Journey game series have become quite popular and have a stable base of game players after several years of operation. The alleged live broadcasting conduct has limited promotional effect for Fantasy Westward Journey II. The fact that the top anchors generate a majority of broadcasting revenue does not mean that live broadcasting revenue mainly comes from anchors. The High Court concluded that any promotion and distribution of games may have certain effect on the game itself but does not mean the copyright owners' right should be ignored. Even though game broadcasting may improve the distribution of games, it's not sufficient to deny the game developers' copyrights.

10 The National People's Congress of the People's Republic of China, "Copyright Law of the People's Republic of China," November 19, 2020, http://www.npc.gov.cn/npc/c30834/202011/848e73f58d4e4c5b82f69d25d46048c6.shtml.

11 See the second instance judgement of NetEase v Huaduo, Guangdong High People's Court, Civil Judgment (2018) Yue Min Zhong No. 137, December 10, 2019, https://wenshu.court.gov.cn/website/wenshu/181107ANFZ0BXSK4/index.html?docId=8c109eabfe124d6a987eab3100fe7b13.

B. Anti-Competitive Issues

YY filed an antitrust case against NetEase at the Guangzhou Intellectual Property Court as a strategic response to NetEase's allegation of YY's unfair competition conduct. This is not something new and has often been used in private litigations in China. For example, in the landmark series of cases between Qihoo 360 and Tencent in 2011, Qihoo 360 used the same strategy alleging that Tencent abused its dominant position as a revenge to fight back the unfair competition claim brought by Tencent.[12]

In the *YY v. NetEase* antitrust case, the main issues include:

i) whether NetEase has bundled its NetEase CC Live Broadcasting software when offering Fantasy Westward Journey II to its game users, and

ii) whether NetEase prohibited live broadcasting users from using non-NetEase CC Live Broadcasting software or other game live broadcasting platforms which are not licensed by NetEase to broadcast Fantasy Westward Journey II.

When evaluating the antitrust matter, the High Court stated that the relevant market of this case is the network game service market. In such a market, NetEase's market share was below 50 percent which cannot be termed as a dominant firm. Therefore, NetEase's bundling and exclusionary conducts cannot constitute abuse of dominance. [13]

1. Market Definition

The plaintiff ,YY, claimed that the network game service market of Fantasy Westward Journey II should be an independent relevant market, which is also regarded as a typical aftermarket. The Guangdong High Court disagreed with YY's claim that a network game service market of a single game can constitute an independent relevant market given that i) the lock-in effect of game users is very limited; ii) the content competition and dynamic competition among game developers are quite intense; iii) the restriction of users to switch to other games is very limited; vi) the plaintiff failed to demonstrate that the lock-in effect of Fantasy Westward Journey II has foreclosed competition.[14]

To support YY's market definition, YY's expert used SSNIP test to show that Fantasy Westward Journey II increased its price from 4 points per hour to 6 points per hour in 2013. The search of Fantasy Westward Journey II in Baidu Search has dropped 10 percent. If the lost users are estimated as 10 percent, NetEase's revenue increase is 35 percent due to such a price increase. YY's expert considered this simple analysis proves that the network game service market of Fantasy Westward Journey II constitutes a separate relevant market.

NetEase's expert refuted such an SSNIP test and emphasized that competition in the game market can be reflected in many kinds of non-pricing competition such as quality, innovation, service, consumer experience etc. Simply relying on SSNIP in such an industry will not deliver reliable results. NetEase's expert found that the price increase of Fantasy Westward Journey II is a reasonable price adjustment as a result of inflation, price increase of its related products, and significant cost increase of game development. Furthermore, technology is well implemented in the network game market and talent movement is frequent. There is no significant difference among the hardware used by game developers. Meanwhile the investment funding is bountiful in the capital market in China and any existing or potential supply substitutes may emerge quickly in the market. Those facts all support that NetEase did not possess any market power to prevent other competitors from entering the market.

The High Court relied on demand substitute to evaluate the relevant market. [15] First, the High Court analyzed the product characteristics and functions and found that Fantasy Westward Journey II is not different from other popular games. Second, the High Court analyzed the prices and did not find any evidence of significant pricing differences of Fantasy Westward Journey II from other games, and emphasized that content and services are the important criteria when users choose among different games. Third, the High Court analyzed the impact of distribution channels on demand and found that like other games, Fantasy Westward Journey II needs game distribution platforms to be launched to the

12 See the first instance judgement of *Qihoo 360 v. Tencent*, Guangdong High People's Court, Civil Judgment (2011) Yue Gao Fa Min San Chu No. 2, March 20, 2013. Dr. Vanessa Yanhua Zhang along with Global Economics Group's experts Prof. David S. Evans and Howard H. Chang assisted Tencent in the antitrust matter.

13 See the second instance judgement of *Huaduo v. NetEase*, Guangdong High People's Court, Civil Judgment (2018) Yue Min Zhong No. 552, May 28, 2020, https://wenshu.court.gov.cn/website/wenshu/181107ANFZ0BXSK4/index.html?docId=51aac1bb823d47cbb575ac0d012414c6.

14 See the second instance judgement of *Huaduo v. NetEase*, Guangdong High People's Court, Civil Judgment (2018) Yue Min Zhong No. 552, May 28, 2020, https://wenshu.court.gov.cn/website/wenshu/181107ANFZ0BXSK4/index.html?docId=51aac1bb823d47cbb575ac0d012414c6.

15 See the second instance judgement of *Huaduo v. NetEase*, Guangdong High People's Court, Civil Judgment (2018) Yue Min Zhong No. 552, May 28, 2020, https://wenshu.court.gov.cn/website/wenshu/181107ANFZ0BXSK4/index.html?docId=51aac1bb823d47cbb575ac0d012414c6.

users or downloaded from its official website. Given that they use the same distribution channels, this doesn't lead to a different impact on users' choices. Last, the High Court also relied on the survey in the iResearch's 2017 China Network Game Industry Research Report and found that the demand substitution among network games is quite high.

The High Court further discussed supply substitution and found that there is no significant technology, capital and regulatory barriers in the network game services market. Therefore, the High Court did not support YY's expert opinion that the R&D cost is high, relevant knowledge is difficult to acquire, and the risk of IPR infringement is high.[16]

Regarding the SSNIP test done by YY's expert, the High Court found that the price increase happened after NetEase had kept its price constant for ten years during which the purchase power had changed significantly due to inflation. It's not rigorous to conduct a simple SSNIP test based on those conditions. Even if a SNNIP test could be conducted, YY did not produce a decent test. The search results of Baidu Search can be affected by many factors, especially susceptible to the influence of recent headline news events. Using Baidu search results to estimate the revenue gain after NetEase's price increase is not reliable. The High Court therefore did not support the SSNIP test result presented by YY's expert and confirmed the relevant market of the case should be the network game service market.

Both YY and NetEase have no dispute over the geographic market which is China mainland market.

2. Market Dominance

The next question is whether NetEase possesses a dominant position in the relevant market. Given that YY has defined a wrong relevant market, the evidence YY provided to support that NetEase has a 100 percent market share of the network game service of Fantasy Westward Journey II was not accepted by the High Court. Instead it evaluated NetEase's market share of network game services, market competition, NetEase's ability to control price, quantity and other trading conditions, NetEase's financial and technology conditions, and the difficulties of market entry.[17]

The High Court first assessed NetEase's market share and used two data sources to crosscheck the results. One is from China Game Publisher Committee,[18] Gamma Data, and IDC. The other is from iResearch. Both data sources proved that NetEase's market shares are well below the presumed single firm dominance threshold 50 percent. Market share is not the only criterion to evaluate market dominance. Second, the High Court further looked at the market competition of the relevant product market and found that competition is intense and games with premium quality will replace inferior ones. Third, the High Court affirmed that game players have freedom to choose from different games which leave NetEase no ability to control product prices, quantities and quality. Users can choose to play or not to play games, or choose from a large number of games. Fourth, there are many other competitors such as Tencent, 37Games, Perfect World, etc. The High Court found no evidence to prove that NetEase possessed market dominance. Last, there are no obvious entry barriers from the technological and regulatory perspectives. The High Court supported that competition in this case mainly focuses on innovation such as competition on talent and innovative ideas.

Therefore, the High Court concluded that NetEase did not possess any market dominant position in the relevant market.

3. Abuse of Dominance

Although YY has alleged that NetEase restricted game players to broadcast Fantasy Westward Journey II on YY's platform and bundled NetEase CC Live Broadcasting software with Fantasy Westward Journey II, the High Court did not accept its claim that such conducts violated bundling or restriction of trade without legitimate reasons. Instead, the High Court stated that abuse of dominance should be based on the basis that the firm has market dominant position. Given that NetEase has no dominant position in this case, bundling Fantasy Westward Journey II and NetEase CC software is in line with traditional industry practices and consumption habits. Therefore, the High Court concluded that such a bundling/tying conduct did not foreclose competition in the tied market, and is not in violation of the Anti-Monopoly Law.[19]

16 See the second instance judgement of *Huaduo v. NetEase*, Guangdong High People's Court, Civil Judgment (2018) Yue Min Zhong No. 552, May 28, 2020, https://wenshu.court.gov.cn/website/wenshu/181107ANFZ0BXSK4/index.html?docId=51aac1bb823d47cbb575ac0d012414c6.

17 See the second instance judgement of *Huaduo v. NetEase*, Guangdong High People's Court, Civil Judgment (2018) Yue Min Zhong No. 552, May 28, 2020, https://wenshu.court.gov.cn/website/wenshu/181107ANFZ0BXSK4/index.html?docId=51aac1bb823d47cbb575ac0d012414c6.

18 Official website www.cgigc.com.cn.

19 See the second instance judgement of *Huaduo v. NetEase*, Guangdong High People's Court, Civil Judgment (2018) Yue Min Zhong No. 552, May 28, 2020, https://wenshu.court.gov.cn/website/wenshu/181107ANFZ0BXSK4/index.html?docId=51aac1bb823d47cbb575ac0d012414c6.

IV. POLICY IMPLICATIONS

The unfair competition case in our view essentially boils down to copyright protection of original content during live broadcasting. The High Court ruling established the precedent that animation pictures embedded in games are indeed considered as copyrighted works and thus warrant protection. This is a landmark legal development that will most likely impact the business model and revenues of the live broadcasting industry. Once this is established, the second issue of the lawsuit with respect to whether broadcasting of copyright content without authorization is considered proper use would then have an obvious answer in consideration of the huge amount of revenues brought in during the broadcasting process. It would only be expected of the High Court to rule in NetEase's favor, since Article 47 of China Copyright Law provides that "radio stations and TV stations have the right to prohibit others from rebroadcasting the radio or TV broadcasted by these stations." [20] Certainly, there is an analogy that can be drawn here.

The implication of the antitrust case is more profound, as it harbingers in a way a more interventionist approach by the High Court when it comes to regulating the Internet economy in general and the game industry in particular, in accordance with quite a few recent administrative actions by the central government in China against big Internet platform companies. This is against the larger political backdrop of the government's step-up antimonopoly campaign in the space of the digital economy in 2020. For a long time, the prevailing regulatory philosophy in China with respect to the Internet industry has been of laid-back and tolerance, mainly based on the dynamic competition argument, which was first postulated by Schumpeter to describe industries that see "perennial gale of creative destruction."[21] This argument was frequently cited to justify lax Internet regulation so as to facilitate its further development. No more, as the political wind started to change recently. The new draft guideline for stricter regulation of Internet platform companies has been circulated by SAMR for public comments since November 10, 2020.[22]

Nevertheless, the High Court in this case was not swept away by the political climate to rush to judgment, but instead, still adopted the traditional antitrust analytical framework to judge this case. The High Court's analytical framework starts with the relevant market definition, and this definition could be a landmark definition for many years to come for the game industry.

In fact, the High Court's determination of the relevant market definition sets such a precedent in the game industry that is probably equally profound as this case's political implication. That is, a game of its own, no matter how popular it is and how addictive it can be, cannot qualify as a separate independent relevant market. In the absence of that, a dominant position is then extremely difficult to be established, let along the abuse of dominance allegation. In this case, without NetEase's dominance assessment, all of the alleged conducts, including bundling and exclusionary dealing in the form of restriction of trade brought concomitantly by YY, all expectedly fell apart.

It is important to mention that the High Court did not specify a separate relevant market for the downstream industry as in a traditional approach for disputes arising from vertical relationships. We think the High Court might have the following two reasons. First, whether the downstream broadcasting industry would constitute an independent relevant market has no bearing on assessing NetEase's conduct legality status under the antitrust framework, because whether NetEase abused its market dominance first hinges upon NetEase's dominance status. Given that the High Court did not find NetEase have a dominant position, there is no basis for abuse of dominance. Second, it can certainly be argued that the abuse allegation even with market dominance status could be questionable. But this is an intriguing question, because game broadcasting won't constitute an independent relevant market in our opinion. Many things are put on the broadcasting platforms these days, not just games anymore. Most broadcasting platforms provide game live broadcasting services, so do short-video platforms such as Douyin and Kuaishou. Downstream competition is dynamic and there is no significant entry barrier.

It is also interesting to observe that the High Court's sanctioning of NetEase's restrictive conducts is not only just based on its lack of a market dominance basis, but also based on an IPR protection argument that the copyright owner is entitled to. The copyright owner has the right to choose the licensees as it wishes simply due to the protected copyright content. The High Court's ruling specifically said that such entitlement does not belong to the domain of excluding and limiting competition as related to the abuse of dominance conduct under Article 17 of the Anti-Monopoly Law, but instead belongs to the area of intellectual property right. To a western audience, it may appear to sound odd that abuse of market dominance can happen in the area of IPR protection. But in practice, the bar is quite high for interpreting what is exactly abuse of dominance based on a particular kind of intellectual property right. In any case, the defendant in this case lacks the market dominance basis and thus whether alleged anticompetitive conducts based on copyright qualify as abuse then becomes a moot point. Nevertheless, the High Court seems to indicate the answer would still be a "No" even with market dominance.

20 The National People's Congress of the People's Republic of China, "Copyright Law of the People's Republic of China," November 19, 2020, http://www.npc.gov.cn/npc/c30834/202011/848e73f58d4e4c5b82f69d25d46048c6.shtml.

21 Joseph A. Schumpeter (1942), Capitalism, Socialism, and Democracy, at p.84.

22 SAMR, "Anti-Monopoly Guidelines on the Internet Platform Economy (Exposure Draft)," November 10, 2020, http://www.samr.gov.cn/hd/zjdc/202011/t20201109_323234.html.

V. CONCLUSION

The two unfair competition and antitrust cases between NetEase and YY are landmark cases in the network game industry and broadcasting industry in China. In those cases, the courts' rulings set certain standards for treating unfair competition and anticompetitive conducts in the network game and broadcasting industries. The judges affirmed that enforcing copyright in the network game market should not be considered as one of unfair competition or anticompetitive conducts. Other related conducts upon a market dominant basis but nevertheless not directly related to copyright content may run afoul with the competition law that would call upon rule of reason based on rigorous legal and economic analyses. There will be continuing cases in the future that may have profound impact on the fast-growing game and broadcasting industries in China, bringing about more complicated conducts and issues for IPR and antitrust scholars to debate.

COULD (CHINA-BASED) ARBITRATION SAVE THE FRAND RATE SETTING GAME?

BY JING HE, ANNIE XUE & MELISSA FENG[1]



1 GEN Law Firm.

I. INTRODUCTION

The recent fights among different courts around Anti-suit injunctions ("ASIs") and anti-anti-suit injunctions ("AASIs") and similar demonstrate how FRAND rate setting litigations could escalate. [2] ASIs and AASIs are so troubling as it directly touches on the issue of a state's sovereignty, in the eyes of many governments and judges. The ASI "war" leads to stalemates and uncertainties and may become focal points of new trade disputes.

One aspect we analyzed before in our earlier CPI article – The Science of China FRAND Rate Setting – brings up the possibility that arbitration world, especially China, continue reforms and developments to the extent that patent owners and implementers may eventually find some trusted place for FRAND rate setting, assuming key stakeholders even have the willingness to deal with the rate issue.[3]

There seems no argument that arbitration would be a good alternative solution to FRAND rate setting game. Some legal experts agree that disputes around SEPs and FRAND are tailor-made for arbitration because the arbitration mechanism is relatively less time-consuming, more flexible, and cost-saving than litigating across multiple jurisdictions around the world.[4]

As China is already the key battleground for SEP cases, the question is whether China arbitration world take the lead to work with global partners to convince patent owners and implementers to sit down and accept arbitration, no matter where such arbitration would take place.

China's arbitration system has undergone significant development and growth over the years. Various local governments are keen to attract foreign arbitration centers to join. China's CIETAC recently made some international initiatives to promote China arbitration to support the Belt and Road Initiatives.[5] In particular, China has been promoting cooperation with WIPO in arbitration/ADR of foreign-related Intellectual Property ("IP") cases. The Shanghai government announced the opening up of a WIPO arbitration center in Shanghai in 2020, and reportedly the WIPO Shanghai arbitration center already closed IP cases after being entrusted to do so by the local Pudong district court.[6]

Assuming China-based implementers might be willing to accept arbitration in China or through a China-based arbitration organization, is it possible for China to develop such a system trusted by all the stakeholders? This article tries to expand our earlier discussions and examines several critical aspects of arbitration procedures in China, (i) arbitration panels; (ii) confidentiality; (iii) interim measures; (iv) discovery; and (v) enforceability of awards, to shed more light on what will be required to develop arbitration in China.

The first part of the article reviews the current stalemates in the ASI/AASI battles, as the background or urgency of alternative solutions. The second part provides more explanations on foreign-related arbitration in China (arbitration law/rules/practices and arbitration atmosphere) and analyze how the current system might handle SEP/FRAND disputes. The last part presents some possible ideas for going forward.

2 A review of the anti-suit injunction can be seen here: The Anti-Suit Injunction - A Transnational Remedy for Multi-Jurisdictional SEP Litigation (May 10, 2017). Cambridge Handbook of Technical Standardization Law - Patent, Antitrust and Competition Law, https://dc.law.utah.edu/scholarship/40/.

3 He Jing, *THE SCIENCE OF CHINA'S FRAND RATE-SETTING, Competition Policy International*, March 2020.

4 Joff Wild, *Despite the difficulties, it is time to embrace arbitration as the best way to resolve licensing disputes*, August 31, 2019, https://www.iam-media.com/embrace-arbitration.

5 A Belt and Road Arbitration Joint Declaration was made in Beijing in November 2019. http://www.moj.gov.cn/Department/content/2019-11/12/612_3235567.html.

6 See the press report. https://finance.sina.com.cn/tech/2020-10-22/doc-iiznctkc6964132.shtml. Also, please see the Supreme Court IP Tribunal's article on Qiushi magazine Issue 1 of 2021.

II. BACKGROUND: ASI STALEMATES

Recently, two cases happening in Wuhan, China caught huge attention in the world of SEP. In the case between Samsung Electronic Co., and Ericsson Telephones before Wuhan Intermediate People's Court ("WIPC China") concerning technologies related to 4G and 5G FRAND rate-settings, the WIPC China granted an anti-suit injunction requested by Samsung regarding the FRAND rate-setting dispute on December 25, 2020. Three days later, the U.S. Court granted Ericsson's anti anti-suit injunction request against Samsung three days later.[7]

Interestingly, *Samsung v. Ericsson* is not the first case that WIPC issued ASI. In *Xiaomi v. InterDigital* (2020), WIPC China granted Xiaomi's ASI's request against InterDigital on September 23, 2020.[8] In response, DHC India granted an anti-enforcement injunction requested by IDC on October 9, 2020, in which DHC India ordered Xiaomi not to enforce WIPC China's ASI during the proceedings in India.

In August 2020, the first anti-suit injunction that China granted is *Huawei v. Conversant*, which eventually resulted in a settlement according to the most recent Supreme Court guidance.[9] After Nanjing Court issued its China FRAND rate decision in September 2019, the Supreme Court IP Court of China granted an anti-suit injunction prohibiting the Düsseldorf Regional Court ("Dusseldorf court") from enforcing its injunction against Huawei in Germany. A major reason in the ruling is that Conversant's act of enforcing the Dusseldorf judgment may hinder the judicial review of Chinese courts or may render the Chinese court's judgment unenforceable, given German court's FRAND rate determination is about 18.3 times higher than that in Nanjing court decision.

Also, in Shenzhen, back in October 2020, in a FRAND rate setting case, Oppo apparently was granted an anti-suit injunction against Sharp, which also was said to win an anti-anti-suit injunction in a German court, while the details remain unknown. The same court indeed rejected Sharp's objection to jurisdiction.[10]

Unsurprisingly, courts that are involved in the ASIs and AASIs are all have their own justifications. Chinese courts highlighted their key concerns that a failing of issuing ASIs would cause irreparable harm to the implementer's market and balance of interest tips in favor of the implementers. The Chinese courts believe that the ASIs will not interfere with the foreign court's jurisdiction. By contrast, Justice C. Hari Shankar at DHC India criticized WIPC China's anti-suit injunction in its ruling as it "directly negates the jurisdiction of this Court and infringes the authority of this Court to exercise jurisdiction in accordance with the laws of this country." Comity suddenly seems to be wide open for differing interpretations.

A deeper motivation underlying ASIs is believed to relate to the UK court decision in the *Unwired Planet* case.[11] Some commentators said that WIPC China's ASI issued against IDC in its SEP litigation with Xiaomi is a predictable reaction to the UK Supreme Court decision against Chinese implementers in *Unwired Planet v. Huawei* and *Conversant v. Huawei & ZTE*.[12] Even a widely distributed article written by Chinese judges in Beijing Higher People's Court openly called for a direct response to the UK Supreme Court decision.

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7 In *Samsung v. Ericsson* (2020), the WIPC China granted Samsung's anti-suit injunction request on December 25, 2020 by holding that the respondent Ericsson and its affiliates, during the proceeding of this case until when the judgement of this case becomes effective, shall not request counts in China or other countries and region to determine the license conditions (including the license royalty rate) or license fee, over the 4G and 5G SEPs involved in this case, and immediately withdraw or cease any such request that have been raised.

8 On September 23, 2020, WIPC China granted an anti-suit injunction requested by Xiaomi after Xiaomi paid a bond of RMB 10 million (approximately USD 1.5 million), ordering that during the case proceedings in PRC: 1) IDC shall immediately withdraw or suspend any preliminary and/or permanent injunction(s) filed before DHC India; 2) IDC shall not file any application for preliminary and/or permanent injunction(s) before courts in China and/or other jurisdictions; 3) IDC shall not file requests to enforce any injunction granted or likely to be granted in any jurisdiction; 4) IDC shall not file any lawsuit against Xiaomi in any jurisdiction for concluding the relevant global royalty rate; and 5) if IDC fails to comply with this court order, it will be fined RMB 1 million (approximately USD 150,000) per day. http://patentblog.kluweriplaw.com/2020/11/20/recent-development-on-sep-disputes-in-china-anti-suit-injunction/.

9 See https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3725921.

10 See https://www.juve-patent.com/news-and-stories/legal-commentary/china-wakes-up-in-global-sep-litigation/.

11 On August 26, 2020, the Supreme Court of the United Kingdom (UKSC) gave judgment in *Unwired Planet v. Huawei and Conversant Wireless Licensing v. Huawei & ZTE* [2020] UKSC 37. The judgment confirms that English courts may set the terms for global FRAND licenses to portfolios of declared standard essential patents. https://www.bristows.com/viewpoint/articles/unwired-planet-v-huawei-and-conversant-v-huawei-zte-supreme-court-judgment-2020/.

12 "It was apparent that Chinese IP courts would move in this direction in response to the UK Supreme Court's decision in the *Unwired Planet/Conversant* cases. As with the recent issuance of anti-anti-suit injunctions, the Chinese IP courts are forcing scrutiny of how influential their rulings will be with global SEP stakeholders. As the Unwired Planet decision acknowledged, a court cannot force a party to accept a license that the court has determined is FRAND, but it may be able to impose unacceptable consequences for the failure to do so." *Is This Seat Taken? A Chinese IP Court Proclaims Its Authority to Declare Global FRAND Terms* https://www.natlawreview.com/article/seat-taken-chinese-ip-court-proclaims-its-authority-to-declare-global-frand-terms.

At this moment, there is still no conclusive assessment on what ASIs and AASIs may impact on the pending SEP licensing negotiations, for at least two reasons. First, how courts will enforce their ASIs and AASIs remain unclear. Second, patent owners find it very challenging to persuade Chinese courts from not continuing the current proceeding on FRAND rate setting.

What seems to be clear is that Chinese courts are at least willing to exercise their powers to intervene into the current SEP licensing negotiations. According to Judge Zhu Jianjun, who presided over the trial of *Huawei v. InterDigital* and *Huawei v. Samsung*, he is convinced that China should actively establish an antisuit injunction system as a counter measure.[13] Another commentator believes that China would be the last market that most foreign companies would give up, which would provide China's courts a privilege to set the rate.[14]

A bigger worry is that as the courts now jumped into the ASI war in the United Kingdom, Germany, China, and India, which carries SEP/FRAND disputes to a risky path where the commercial disputes become political, and the rule of law and comity issues are increasingly be controversial point. It might not take very long before the court behaviors will be on agenda of trade talk or bilateral government meetings.

While courts are expected to trade injunctions and rulings in such FRAND cases, we want to examine how arbitration can make a difference here, especially a China-based arbitration can somehow resolve the dilemma.

III. OVERVIEW OF ARBITRATION IN CONTEXT OF FRAND LICENSING

In an ideal world, arbitration is supposed to be very useful dispute resolution mechanism, where the dispute involves a multitude of patents and spans several jurisdictions. Researchers generally agree that arbitration in SEP/FRAND cases have several advantages that can make it the preferable choice in appropriate settings.

First, the main strength of arbitration mechanism enables parties to choose arbitrators with the necessary expertise for SEP/FRAND disputes, "which are often complex, not only in a legal but also in a technical and economic sense."

Second, arbitration promises a higher degree of confidentiality, which can be of particular relevance for SEP/FRAND dispute because "the economic stakes are often high, and the proceedings allow for a deep insight into the licensing practices and business models of the parties involved."

Third, there is the advantage of significant efficiencies and cost savings. Because SEP portfolios consist of numerous patent "families," with siblings originating from multiple jurisdictions, they can cause legal disputes before various national courts, which base their jurisdiction on the respective domestic SEPs in the portfolio, triggering invalidation actions and even stalemates in the cases of ASIs and AASIs.[15] In contrast, arbitration mechanisms can "more easily … cover entire SEP portfolios" because the territoriality principle does not hinder arbitration tribunals from hearing patent cases from various jurisdictions, which is more efficient than court proceedings. Cross-border emergency arbitration hearings would be far more efficient in terms of interim or conservatory measures than a plethora of state court proceedings in various jurisdictions for interim or conservatory measures, providing parties with relatively effective enforcement of IP rights.[16]

Finally, the cross-border enforcement of arbitral awards requires recognition and enforceability according to the New York Convention — resolving the stalemate of ASIs in court proceedings.

However, in reality, arbitration as alternative has yielded mixed results, at best, when it involved Chinese implementers. InterDigital and Huawei used arbitration to reach a settlement after their lawsuit in Shenzhen was done in the court of first instance and the Chinese regulator's investigation was suspended. What put both parties together for the arbitration seemed to be the flexibility offered by arbitration. According to some researchers, InterDigital and Huawei noticed that "what constitutes a FRAND royalty can be characterized by acute legal uncertainty" and this uncertainty is only distinguished when the warring parties come from countries "with different ideas about how to compensate owners of

13 Zhu Jianjun, Judge of Shenzhen Intellectual Property Court, *Standard essential patent global license rate—A study of judicial adjudication*.

14 Sophia Tang, *Anti-Suit Injunction Issued in China: Comity, Pragmatism and Rule of Law*, September 27, 2020/in Views, https://conflictoflaws.net/2020/anti-suit-injunction-issued-in-china-comity-pragmatism-and-rule-of-law/.

15 Peter Georg Picht & Gaspare Tazio Loderer, *Arbitration in SEP/FRAND Disputes: Overview and Core Issues*, https://www.ius.uzh.ch/dam/jcr:32d2c1e3-21ca-4e0b-a175dad6bdd10272/Picht_Loderer__Arbitration%20in%20SEP-FRAND%20Disputes__JOIA%202019_575-594.pdf.

16 *Id*.

[IP] rights."[17] Because of the legal uncertainty could leads a dissatisfactory FRAND royalty, IDC and Huawei achieved an agreement on choosing three technical standards administered by at least three standard organizations (ETSI, TIA, and ITU) without specifying the national law to govern the hear issue in their arbitration, and their disputes were submitted to arbitration before the International Chamber of Commerce (the "ICC").[18] The arbitration, finally took place in Paris, the headquarters of the ICC. As for the procedural law, the parties achieved an agreement on choosing the New York law to govern the arbitration itself. In May 2015, the ICC rendered an award in setting a patent FRAND rate.

Regrettably, the experiment would eventually end up with a New York court action to enforce the arbitration award.[19] Huawei was unsatisfied with the arbitral panel award and filed a motion for vacatur before the Paris courts, and IDC reacted through a petition in the Southern District of New York to confirm and enforce ICC award relied on the court's "interpretation of the New York Convention, a widely adopted convention that governs the enforcement of international arbitral awards."[20]

After the *InterDigital* arbitration, it seems that few other Chinese implementers agreed on using arbitration to resolve licensing disputes with the patent owners. Anecdotal evidence shows that Chinese parties have a general suspicion about arbitration outside China. This is consistent with the way commercial disputes are handled through arbitration. Many Chinese companies give up their rights to defend themselves or initiate arbitration in foreign arbitration proceedings.

What if these arbitrations are handled by CIETAC or other China-based arbitration centers? Or even by WIPO's arbitration centers in Shanghai? Since China is one of the main battlefields of global SEP/FRAND disputes, would these be feasible (or even ideal) choices for parties bringing arbitration? Next, we will analyze various critical aspects of the arbitration system that are relevant to a trusted outcome of a FRAND case.

IV. ANALYSIS OF CHINA ARBITRATION

Arbitration related legislation and judicial practice in China, on both substantive and procedural aspects, have grown over years and now are generally considered consistent with international arbitration practice. As examples, the validity of foreign related arbitration agreement used to be challenged in judicial and arbitration practice before 2006. China thus issued a special judicial interpretation - Implementation of the of the Supreme People's Court concerning Some Issues on Application of the Arbitration Law of the People's Republic of China (the "Judicial Interpretation of the Arbitration Law") in September 2006 to address this issue. For the review of the validity of a foreign-related arbitration agreement, the law agreed by the parties shall apply; if the parties have not agreed on the applicable law but the place of arbitration, the law of the place of arbitration shall apply. If there is no agreement on the applicable law and no agreement on the place of arbitration or agreement on the place of arbitration If it is unclear, the law of the forum shall apply.[21]

Besides the substantive arbitration law in China, to accommodate China's economic transition and promote China's trade and reform policy objectives, such as the "Belt and Road Initiative," China has announced its intention to create a more transparent and arbitration-friendly atmosphere, aligning with the internationally accepted standard.

17 Greenbaum, Eli, *Arbitration Without Law: Choice of Law in FRAND Disputes* (2016). Res Gestae. 26. https://ir.lawnet.fordham.edu/res_gestae/26.

18 The IDC and Huawei arbitration involved technical standards administered by at least three standards organizations-the European Telecommunications Standards Institute (ETSI), the Telecommunications Industry Association (TIA), and the International Telecommunications Union (ITU). See *Certain Wireless Devices with 3G Capabilities and Components Thereof*, Inv. No. 337-TA-800, slip op. at 418-19 (ALJ June 28, 2013) (Initial Determination).

19 IDC, licensor of patents for wireless technology filed petition against licensee, seeking order enforcing foreign arbitration award setting forth the terms and conditions of patent license agreement. Huawei, licensee brought cross petition, seeking to say enforcement proceeding pending resolution of proceeding to annul the award filed in Paris, the seat of the arbitration. The District Court, John G. Koeltl, J., held that: (1). New York courts had secondary jurisdiction, pursuant to Convention on the Recognition and Enforcement of Foreign Arbitral Awards, over award, and thus parties' dispute was limited to whether United States should enforce the award, and (2). New York enforcement proceeding would be stayed pending resolution of annulment proceeding in Paris. Petition stayed; cross-petition granted. *InterDigital Commc'ns, Inc. v. Huawei Inv. & Holding Co.*, 166 F. Supp. 3d 463 (S.D.N.Y. 2016).

20 *Id.*

21 Interpretation of the Supreme People's Court concerning Some Issues on Application of the Arbitration Law of the People's Republic of China http://www.lawinfochina.com/display.aspx?lib=law&id=5496&CGid=.

China established various arbitration tribunals to resolve large commercial disputes involving foreign-related disputes, including as China International Economic and Trade Arbitration Commission ("CIETAC"), Shanghai International Economic and Trade Arbitration Commission ("SHIAC"), South China International Economic and Trade Arbitration Commission/ Shenzhen Court of International Arbitration ("SCIA"), and Beijing International Arbitration Center ("BIAC").[22]

Noteworthily, the WIPO's Shanghai Center for Arbitration and Mediation was established and put into operation in 2020. It is understood that WIPO may also establish a center for arbitration in Beijing and other cities. According to the head of the Shanghai Municipal Justice Bureau, "[t]he establishment of the center is a milestone for the opening up of China's foreign-related arbitration business to the outside world. It is also a vivid example and best practice to show Shanghai's efforts to build itself into an international highland of IP protection and an arbitration center in the Asia Pacific region."[23]

According to CIETAC Annual Report, in 2017, the total number of foreign related arbitration cases accepted by the CIETAC is 2298 (the total amount of monetary damages involved in the claims reached about 10.4 billion U.S. dollars), with a year-on-year increase of 22.5 percent; among them, 476 cases involving foreign affairs, Hong Kong, Macao, and Taiwan, accounting for 20.7 percent of all cases accepted by the CIETAC.[24] The main parties involved in the cases are from the United States, Canada, Brazil, Mexico, Germany, Britain, France, Italy, Austria, the Netherlands, South Africa, Russia, Australia, India, Japan, South Korea, Singapore, Hong Kong, etc. To provide more choices for the foreign parties, the New Trade Arbitration Committee has 1,437 arbitrators in the directory, which has been implemented on May 1, 2017. Among them, 405 arbitrators come from Hong Kong, Macao, Taiwan and foreign countries, accounting for 28.2 percent of the total number of arbitrators. In 2017, 47 arbitrators from foreign countries or Hong Kong, Macao and Taiwan participated in 71 cases.

Putting aside the size and scale of arbitration, we will examine five specific aspects relating to foreign-related arbitrations in China to have a depth comprehension on the current arbitration in China regarding foreign-related SEP/FRAND disputes: (i) arbitration panels; (ii) confidentiality; (iii) Interim or conservatory measures; (iv) procedure order in practice; and (v) the enforceability of awards.

A. Arbitration Panels

The panel system for arbitrators is a well-kept tradition since the establishment of the Chinese arbitration regime in 1954. In 2005, Article 21 of the CIETAC rules confirms this practice. The panel of arbitrators is a pool of arbitrators available for parties' selection. In a foreign-related dispute arbitration, parties usually decide to have an arbitral tribunal is made up of three arbitrators. Each party will select or authorize the chairman of the arbitration commission to appoint one arbitrator. The third arbitrator must be selected jointly by the parties or be appointed by the chairman under a joint mandate from the parties, and the third arbitrator will be the presiding arbitrator.[25]

A foreign party may benefit from the fact that in a CIETAC arbitration, appointments of arbitrators may include individuals not included on CIETAC's panel of arbitrators, granting it access to a wider array of candidate arbitrators. In SEP/FRAND disputes, it is very important for warring parties of different countries to have an independent and impartial arbitral tribunal. Parties also need to have sufficient choice of arbitrators with the necessary expertise for SEP/FRAND disputes, which are often complicated, not only in a legal but also in a technical and economic sense. The pool of arbitrators given by the arbitration institutions available for the parties' selection often has limitations to respond their need in such complex disputes. Thus, it is important to ensure the access to experts not on the existing roster of arbitrations.

This is something to improve in China. In practice, while the parties can, in theory, select arbitrators from outside the panel, such appointments are subject to the approval of the CIETAC, which, in many cases, will be refused.[26] Moreover, as for the neutral nationality issue, the arbitration rules of the Chinese arbitration institutions do not include a clear provision. Unless the parties have decided, in their arbitration clause, that the sole arbitrator or the chief arbitrator is a citizen of a third country, most of the foreign-related cases arbitrated in the Chinese arbitration institutions end up having chief arbitrators of Chinese nationality.

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22 Zhang Shouzhi, *Arbitration procedures and practice in China: overview*, https://uk.practicallaw.thomsonreuters.com/3-5200163?transitionType=Default&contextData=(sc.Default)&firstPage=true.

23 *WIPO arbitration and mediation center in Shanghai established* https://www.chinadaily.com.cn/a/202010/23/WS5f926ab8a31024ad0ba80904.html.

24 See http://news.cctv.com/2018/09/16/ARTIRFvQ3ctPIPDbEZccGtVa180916.shtml.

25 Article 31, Arbitration Law.

26 Salient Issues in Arbitration in China.

A bigger issue is the choice of presiding arbitrator, in case of failure of consent among the parties. The arbitration commission must act fairly and choose someone who is seen as truly capable and neutral. This would be one of most significant tests for any China-based arbitration. At present, China's arbitration commission always picks the presiding arbitrator from the existing roster. If they continue such practice, they must be able to include more experts to this list.

B. Confidentiality

Arbitration promises a higher degree of confidentiality than court proceedings, which can be particularly relevant to SEP/FRAND disputes because "the economic stakes are often high, and the proceedings provide a deeper insight into the licensing practices and business models of the parties involved." Almost all the major international commercial arbitration institutions have made provisions on confidentiality in their arbitration rules, which mainly involve the principle of non-disclosure of arbitration procedures, arbitration institutions' responsibility in confidentiality, etc.

CIETAC, as the domestic arbitration institution with the largest number of cases, clearly defined "confidentiality" in Article 38 of its Arbitration Rules revised in 2014: "(1) Hearings shall be held in camera. Where both parties request an open hearing, the arbitral tribunal shall make a decision; (2) for cases heard in camera, the parties and their representatives, the arbitrators, the witnesses, the interpreters, the experts consulted by the arbitral tribunal, the appraisers appointed by the arbitral tribunal and other relevant persons shall not disclose to any outsider any substantive or procedural matters relating to the case."

The Arbitration Rules of CIETAC, on the basis of the principle of a non-public hearing, have also added the obligation of confidentiality of the parties involved in arbitration, that is, the obligation of confidentiality of both the substantive matters and the proceedings of the arbitration.

Practically speaking, Chinese arbitration should make sure to respect the parties' positions on what constitutes confidentiality by accepting parties' agreements on confidentiality and the way they are willing to protect that confidentiality. That practice is more practical and reasonable than only depending on Article 38 language.

We have inquired with experts who are familiar with CIETAC arbitration procedures to find out to what extent its current practice on protecting confidentiality may be improved to ensure sufficient protection of all the sensitive business information, including the kind of confidentiality club that we have seen in UK and other jurisdictions. The response is that China's current rules are flexible enough to grant such protection, as long as the panel of arbitrators is willing to grant procedural orders. The violation of the procedural orders could result in negative consequences in the final arbitral award.

C. Interim or Conservatory Measures

While it may not be used at all in SEP/FRAND cases, it is worth pointing out that China's arbitration law indeed offers the option of granting interim measures, for injunction or property reservation. There may be a situation where parties need interim measures to prevent irreparable, serious, or substantial harm. For example, in a SEP/FRAND arbitration dispute, the SEP holders have a strong incentive to seek an interim injunction against bad faith acts by implementors.

Under CIETAC Arbitration Rules, Article 23 stipulates that "in accordance with the applicable law or the agreement of the parties, a party may apply to the Arbitration Court for urgent interim relief pursuant to the CIETAC Emergency Arbitrator Procedures (Appendix III). The emergency arbitrator may decide to order *necessary* or *appropriate* emergency measures. The order of the emergency arbitrator shall be binding upon both parties."

However, this rule does not necessarily lay down the conditions for the grant of interim measures, often leaving the arbitrators, in the light of the circumstances of a particular case, with broad discretion to order 'any interim measure which they consider "necessary" or "appropriate." In practice, the lack of clear standards poses major challenges: for the parties, it leads to uncertainty as to whether their request will be accepted; for arbitrators, it leaves them without firm guidance on the criteria they should apply.

D. Document Production (Discovery)

Discovery in China arbitration proceedings is mostly limited to document production. Most such document production processes are directed by procedural orders, which is a type of procedural document that is widely used in international arbitration to assist the tribunal to exercise its administrative power in organizing an arbitration proceeding. An arbitration expert in China told the author that, in practice, this approach tends to improve both the efficiency and the transparency of the arbitration procedure, particularly in parties' discovery requests and their determination on confidentiality.

According to the experts, generally, arbitrators consider parties' conduct when making order as to costs. This conduct includes the party's compliance with the terms of procedural orders. Furthermore, parties who delay proceedings, e.g. document production, and thereby significantly impact the costs of the arbitration by making unreasonable procedural requests such as filing of additional documents long after pleadings have closed can be implicitly sanctioned when an order as to costs is made.

In SEP/FRAND arbitrations involving trade secrets, procedural orders can be made to limit the scope of discovery under Chinese arbitration law and arbitration rules, and the corresponding penalties are used to guarantee execution.

E. Enforceability

China is a party to the New York Convention and therefore subject to reciprocity and commercial reservations. The New York Convention was ratified by a diplomatic conference of the United Nations in 1958 and came into effect in 1959. To arbitrate and accept and execute arbitration awards made in other contracting states, the Convention allows the courts of contracting states to give effect to private agreements. It refers to arbitrations that are not considered domestic awards in the state where recognition and compliance is sought and is generally considered the basic instrument for international arbitration.

China has been trying hard to improve its records of enforceability of arbitration decisions, whether made domestically or overseas. This is seen as a critical test of credibility of China's arbitration system. The outcome of enforceability of international arbitration decisions will be reported to the Supreme Court for review.

In theory, the award of foreign-related arbitration issued in China can be enforceable in other jurisdictions that signed the Convention. According to the past experiences, there are several grounds to challenge awards such as no valid arbitration agreement between parties; the subject matter of the dispute is not contemplated by the terms of the arbitration agreement or is not arbitrable; or the arbitral award is in conflict with public policy etc.

In reality, the level of difficulty in enforcing an award is connected to the arbitral institution's reputation. For parties to determine the integrity of an arbitration institution, publicly available data on a forum is vital. The most well-established international arbitral institution in China, CIETAC, has consistently provided specific data and annual reports to establish its reputation. Moreover, the awards of these Chinese arbitration institutions are facing challenge of enforceability abroad. Therefore, it is hoped that China will ongoingly improve transparency of arbitration institutions by offering specific data and annual reports to the public for reference, and therefore establish its reputation.

V. COULD WIPO ARBITRATION BE A PREFERRED CHOICE IN CHINA?

While we are not concluding if any of China's arbitration center is already or will soon be a place acceptable to patent owners and implementers, it is important to highlight what WIPO arbitration center has been making available.

WIPO is an agency of the United Nations. It was created by an international convention in 1967 "to promote intellectual property protection throughout the world."[27] the WIPO Arbitration and Mediation Center (the "WIPO Center") was established in 1994 and offered alternative dispute resolution services to resolve international commercial disputes involving intellectual property. In late 2013, the WIPO Center announced model submission agreements built on the standard WIPO Mediation, Arbitration, and Expedited Arbitration Rules propose parties choose arbitration in a dispute concerning FRAND.[28]

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27 Convention Establishing the World Intellectual Property Organization, Article 3.

28 *Id.*; and also see *WIPO ADR for FRAND Disputes* https://www.wipo.int/amc/en/center/specific-sectors/ict/frand/.

A framework collaboration between the Supreme People's Court of China ("SPC") and WIPO has been established upon the signing of a Memorandum of Understanding (the "MoU") in April 2017. Among a number of activities involving WIPO under the MoU, SPC and the WIPO Arbitration and Mediation Center collaborate in the area of mediation to help resolve IP disputes in China. In October 2019, the WIPO Arbitration and Mediation Shanghai Service has been accredited by the Ministry of Justice of China to provide foreign-related mediation and arbitration services for foreign-related IP disputes in China. Cooperation has commenced concerning mediation of foreign-related IP cases pending with relevant courts in Shanghai.[29] By December 31, 2020, the WIPO Shanghai Service had received in total 18 foreign-related IP mediation cases referred from courts in Shanghai. To date, substantive mediation proceedings have been conducted in four out of these 18 cases. Out of these four cases, three were settled, resulting in a settlement rate of 75 percent.[30]

At present, it appears that WIPO arbitration centers, in Shanghai or a possible future Beijing center, would stand out as very desirable candidate on solving SEP/FRAND disputes for WIPO's reputation and other reasons.

First, WIPO is apparently the trusted international organization in China IP world. In one of most important policy roadmap speech on IP in December 2020, President Xi has openly called for China's participation in the global intellectual property governance within the framework of the World Intellectual Property Organization.[31] The arbitral awards made by WIPO centers in China will be more likely accepted. Second, WIPO Center is probably trusted more by non-Chinese patent owners, compared to local courts. WIPO should be more adapted to demands from patent owners, in terms of following international practice and providing bigger choice of trusted experts who know the SEP/FRAND fields. Finally, it is secure and easy to implement. Some international arbitration rules set confidential matters in the arbitration process. If a party refuses to perform within China's territory after WIPO Center makes the award, it may apply to a Chinese court for enforcement following the Civil Procedure Law's relevant provisions on foreign-related arbitration. The application of the award in other countries requires the adoption of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards. The Convention has been ratified by more than 140 contracting parties, covering major countries and regions globally, and it can be implemented after being recognized by the competent authorities of the execution place.

VI. CONCLUSION

All the above reflect the somewhat hopeful thinking of the authors. Would WIPO be interested in taking bold steps to quickly build its centers in China and actively approach patent owners and implementers? Or would those already in ASIs/AASIs stalemate situations proactively engage with WIPO or other China arbitration centers for possible solutions?

Time to choose.

29 *WIPO Arbitration and Mediation Shanghai Service Initiates "Court-referred Mediation Promotion Scheme"* http://sipa.sh.gov.cn/ywzx/20210114/8a6c8e2cfed64c7baf00c-470daab821e.html.

30 *Id.*

31 See the Xinhua press report at http://www.xinhuanet.com/english/2020-12/02/c_139556530.htm.

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 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 promogulated 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-iircuyvi4663351.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.

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.

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.

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 court[10] 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.

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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-iicezzrr7367685.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.[13] By 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. Noteworthily, 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.

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:

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_dEGlKw3vQ.

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.

1. he 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.

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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.

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.

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.

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.

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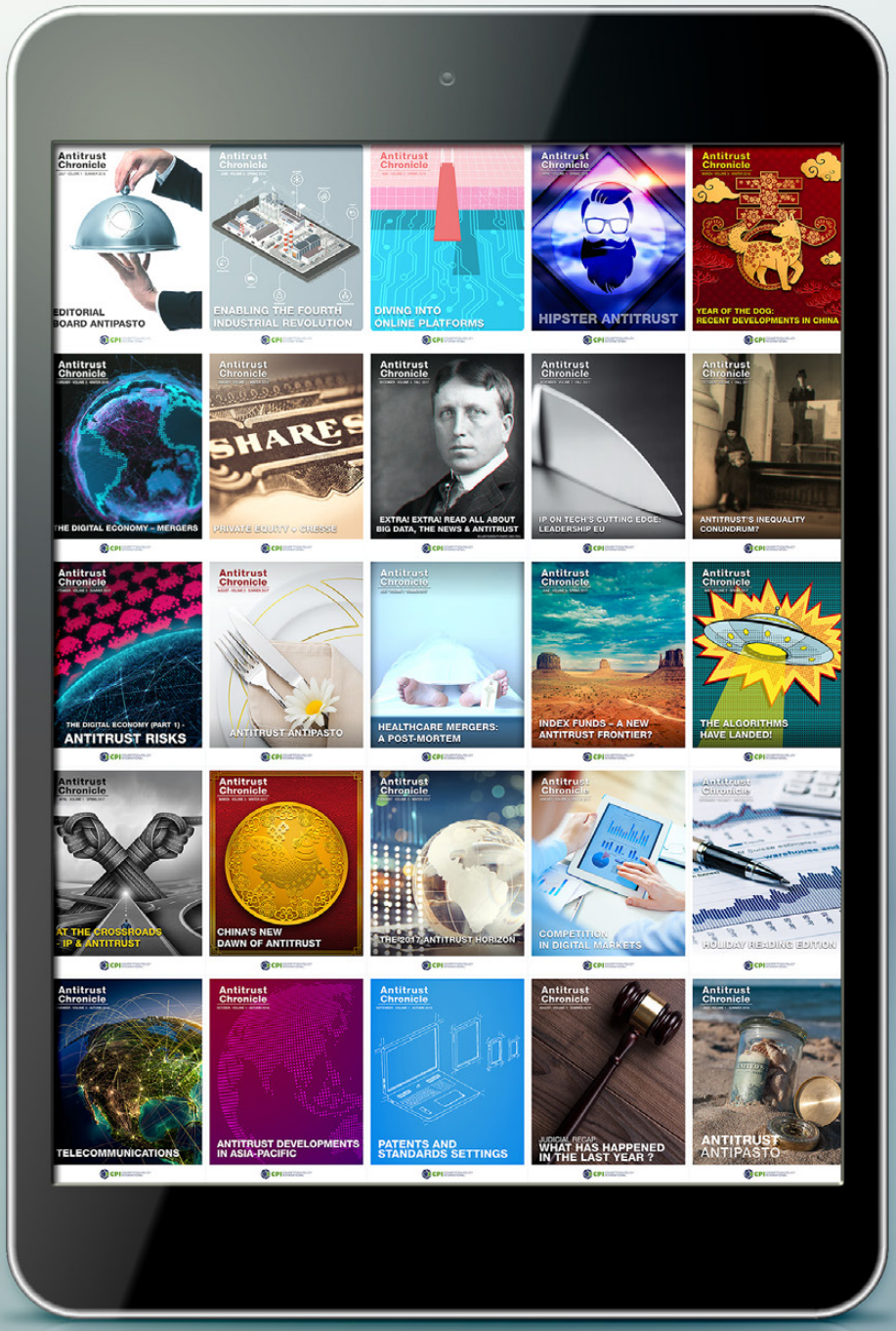


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