

Internet Anti-monopoly Regulation Enters a New Era: Interpretation of Ten Highlights of the Antitrust Guidelines for the Platform Economy Industry

On 10 November, the Anti-Monopoly Bureau of the State Administration for Market Regulation (“**SAMR**”) issued the Antitrust Guidelines for the Platform Economic Industry (draft for comments) (“**Platform Guidelines**”).¹ The release of these important guidelines at the time of 11 November² signals that SAMR will continue to strengthen its antitrust enforcement in the Internet platform sector.

The *Platform Guidelines* consists of six Chapter with 24 articles, and it was drafted under the basic system and analytical framework of the Anti-monopoly Law (“**AML**”).³ The *Platform Guidelines* into account the characteristics of the platform/Internet economy and gives specified guidance regarding monopoly agreement, abuse of dominance, concentration of undertakings and other areas of concern in the context of platform/Internet economy. The following three points are particularly noteworthy:

- Method for market definition concerning the platform economy model. In response to the difficulty of applying traditional market definition methods in the platform economy/Internet industry, the *Platform Guidelines* notes that under certain circumstances, anti-competitive conduct can be directly identified without the definition of the relevant market.
- Considering the characteristic of the platform economy business model, the regulation of monopoly agreements and abuse of dominance in the field of platform economy is refined. For instance, the *Platform Guidelines* clarify that undertakings may reach a monopoly agreement via algorithms and technical methods. Furthermore, the *Platform Guidelines* refined relevant rules with regard to the characteristics of the platform economy to identify typical practices of abuse of dominance, such as unfair pricing, selling below cost, refusal to deal, exclusive dealing, tie-in sales or imposing other unreasonable conditions and discrimination. Moreover, the *Platform Guidelines* did point out that platform and data may constitute necessary facilities under certain circumstances. Certain hot and cutting-edge topics are also discussed, such as the algorithm conspiracy, hub and spoke conspiracy, “Either-or Choice” and Big Data Discrimination.
- With regard to the VIE structure, which is widely used in the field of Internet, the *Platform Guidelines* clearly provide that VIE structures also fall within the scope of merger control review. In view of the difference between platform economy and traditional economy, the *Platform Guidelines* give guidance on how to calculate the turnover of platform undertakings.

The issuance of the *Platform Guidelines* will undoubtedly provide better guidance for antitrust enforcement in the platform economy and provide guidance for companies to observe. In this article, we highlight ten noteworthy areas of the guidelines.

Highlights 1. Clarifying the method for relevant market definition in light of the characteristics of the platform economy

The *Platform Guidelines*⁴ first clarifies the characteristics of the platform economy, namely the involvement of multiple parties, the complexity of business types and the dynamic competition. When defining a relevant product market, demand-side substitutability analysis shall be conducted on the basis of factors such as the platform functions, business model, user groups, multilateral markets and offline transactions. Supply-side substitutability analysis shall consider factors such as market entry, technical barriers, network effects and cross-sector competition. For the relevant geographic market, it is generally defined as the Chinese market or regional market considering the characteristic of the platform, while in some particular cases, global market may be defined.

It is noteworthy that the *Platform Guidelines* provides that competition among competitors usually revolves around their core business in order to gain broad and sustained attention from users. Therefore, the relevant market definition cannot be simply based on the platform's underlying service, but also needs to consider the possible cross-platform network effects in order to define the platform as a distinct market or as multiple connected markets.

The *Platform Guidelines* clarifies the role of relevant market definition in the enforcement for the platform economy, and it particularly points out that under certain circumstances where it is difficult to accurately define the relevant market, anti-competitive conduct can be directly identified without defining the relevant market. In fact, it breaks through the traditional pattern of "relevant market definition - market dominance identification - abuse identification" in the case of abuse of dominance, and it addresses and solves the difficulty of identifying obvious abuse of dominance based on the traditional pattern.⁵

Types of Behaviour	Role of Relevant Market Definition in Platform Economy Law Enforcement
<p>Monopoly Agreements</p>	<ul style="list-style-type: none"> In the case of horizontal monopoly agreements, such as price fixing and market segmentation, and vertical monopoly agreements such as resale price maintenance and setting minimum resale prices, the relevant market may not be defined; For other agreements that need to be assessed, we understand that there is still a need to define the market to assess the impact on the relevant markets.

¹ See the official website of the State Administration for Market Regulation at http://samr.gov.cn/hd/zjdc/202011/t20201109_3234.html.com/yz/yz.utm_source=ZHShareTargetIDMore

² In China, 11 November is a date of annual promotion by giant e-commerce platforms.

³ The *Platform Guidelines* defines "platforms" as Internet platforms, and refer to business organization forms in which interdependent, multilateral entities that interact with each other under the rules provided by specific carriers through network information technology to jointly create value.

⁴ See, Article 2 of the *Platform Guidelines*.

⁵ See "Weight! Comments are hereby sought for the guidelines on anti-monopoly for platform economy, Say no to Either-or Choice and Big Data Discrimination", the Competition Law of the CASS via WeChat public account.

<p>Abuse of dominance</p>	<ul style="list-style-type: none"> • Relevant market definition is usually the first step in identifying an abuse of dominance; • In particular cases, the undertaking in the platform economic may be directly identified to have engaged in monopoly practice without defining the relevant market as long as: <ul style="list-style-type: none"> ✧ if there is sufficient evidence of direct facts in the practice concerned, which can only be carried out due to an abuse of dominance; ✧ the practice concerned has lasted for a considerable period of time with obvious damaging effects; and ✧ the practice concerned is insufficient or very difficult to precisely define the relevant market conditions.
<p>Concentration of undertakings</p>	<ul style="list-style-type: none"> • Relevant market definition is generally required.

Highlights 2. Listing explicitly algorithm conspiracy as a new form of a monopoly agreement

With the development of computer and network technology, monopoly agreements are no longer limited to written agreements or secret meetings. Advanced technical methods, data and algorithms may also be used to reach monopoly agreements, i.e. the algorithmic conspiracy, which has been a frontier issue of global focus. The *Platform Guidelines* explicitly provides that algorithms, technical methods, etc. can be used in reaching horizontal or vertical monopoly agreements:

<p>Type of Monopoly Agreement</p>	<p>New Form of Monopoly Agreements Involving Algorithms Conspiracy</p>
<p>Horizontal Monopoly Agreements⁶</p>	<ul style="list-style-type: none"> • Using technical methods for communication of intention; • Using data and algorithms to achieve concerted action.
<p>Vertical Monopoly Agreements⁷</p>	<ul style="list-style-type: none"> • Using technical methods in automated price setting; • Using data and algorithms for direct or indirect price restriction; • Using technical methods, data and algorithms for restricting other trading conditions and eliminate or restrict competition.

⁶ See Article 6 of the *Platform Guidelines*.

⁷ See Article 7 of the *Platform Guidelines*

Highlights 3. MFN clauses may be challenged as vertical monopoly agreements

As the goods and services increasingly shift from traditional offline sales to online platform sales, the most favoured nation clauses (“**MFN Clauses**”) have once again come to the attention of antitrust enforcement authorities of various countries. The *Platform Guidelines* specifies that a MFN clause may be challenged as a vertical monopoly agreement and further clarifies the factors to be considered, including the undertakings’ commercial motivation for entering into the clause, their ability to control the market, and the impact of the implementation of such clause on market competition, consumers’ welfare and innovation.⁸

In past enforcement cases, the Shanghai Administration for Market Regulation has held that agreements containing the MFN clause conditioned on minimum purchase quantity may constitute an abuse of dominance of exclusive dealing.⁹ Therefore, undertakings shall prudently assess the MFN clauses and analyse the legal risks thereof both from the perspectives of vertical monopoly agreements and abuse of dominance. At the same time, the risk of hub-and-spoke agreements should be also considered if MFN clauses result in the effect of horizontal price fixing.

Highlights 4. Including hub-and-spoke agreement into the scope of regulation.

Since the hub-and-spoke agreements often have the appearance of several unrelated vertical monopoly agreements, the competitors who play an organizing and coordinating role in hub-and-spoke agreements often cannot be effectively regulated. For the first time, the *Platform Guidelines* explicitly adopts the expression of “hub-and-spoke agreement” and clarifies that competitors may enter into a hub-and-spoke agreement through vertical relationship with a platform operator or through the organization and coordination by a platform operator.¹⁰ The *Platform Guidelines* also re-emphasizes that the hub-and-spoke agreements may also be concluded through technical methods, platform rules, data and algorithms. In early 2020, when SAMR sought public comments on the draft amendments of the AML (“**AML Amendments**”), SAMR also added a provision on prohibiting undertakings from organizing and helping other undertakings to conclude monopoly agreements; and the *Platform Guidelines*’ inclusion of hub-and-spoke agreements is consistent with the principles of the AML Amendments.

Highlights 5. Identifying the dominant position based on the characteristics of platform economy

The identification of dominance is usually the starting point and the difficult point in determining the abuse of dominance. In the *Interim Provisions on Prohibiting Abuse of Market Dominant Position*, SAMR puts forward additional factors to be considered in determining dominant position of undertakings in the new economy such as the Internet industry.¹¹ On the above basis and in light of the characteristics of the platform economy, the *Platform Guidelines* refined the additional factors to be considered:

**Basic Factors
in Determining
Dominance**

**Additional Factors to Be Considered in Light of Platform Economy
Characteristics**

⁸ See, Article 6 of the *Platform Guidelines*

⁹ See, http://gkml.samr.gov.cn/nsjg/fldj/201904/t20190429_293282.html

¹⁰ See, Article 8 of the *Platform Guidelines*

Market share and competition	<ul style="list-style-type: none"> • Adding new indicators, such as number of new users, number of website clicks, duration of use, etc., for determining the market share; • Considering duration of market share; • Emphasizing the economies of scale of the platform in the assessment of competition in relevant markets.
The ability to control the market	<ul style="list-style-type: none"> • In addition to the ability to control the upstream and downstream markets, it is necessary to consider the ability to hinder or affect the entry of other undertakings into the relevant market; • Considering business models and network effects of relevant platforms; • Taking into account the ability to determine factors such as commissions and flows in combination with industry characteristics when assessing the ability to influence trading conditions.
Financial and technical conditions	<ul style="list-style-type: none"> • Considering the investors of such undertaking; • Taking into consideration the ability to capture and process relevant data; • It is necessary to consider to what extent such financial and technical conditions can facilitate the business expansion and maintenance of the market position of the undertaking.
Degree of dependence on the transaction by other undertakings	<ul style="list-style-type: none"> • Considering lock-in effects and user stickiness
Difficulty of Market Entry	<ul style="list-style-type: none"> • Considering the economies of scale, user habitat, and data acquisition costs need to be considered.

¹¹ See, Article 11 of the *Interim Provisions on Prohibiting Abuse of Market Dominant Position*,” For determination of market dominance of the operators in new economic, competition characteristics of the industry, business model, number of users, network effects, locking effects, technical characteristics, market innovation, ability to master and process relevant data, the business operator’s market strength in related markets may be considered.”

Highlights 6. Further refining the rules on refusal to deal

The *Platform Guidelines* provides more detailed guidance on the rules related to refusal to deal, which used to be one of the major difficulties in identifying abuse in practice.

Firstly, the *Platform Guidelines* points out various forms of refusal to deal in the field of platform economy. In addition to the traditional forms of ceasing, delaying, interrupting existing transactions and refusal of new transactions, the *Platform Guidelines* encompasses industry-specific restrictions and obstacles in terms of platform rules, algorithms, technologies, and traffic allocation, etc. which make it difficult for counterparties to carry out transactions. The *Platform Guidelines* also re-emphasizes the form of refusal of undertakings controlling essential facilities to trade with counterparties on reasonable terms.¹² From the wording of the *Platform Guidelines*, it seems that essential facility is not an absolute prerequisite of proving refusal to deal but only one of various scenarios.

Secondly, the *Platform Guidelines* details the factors to be considered when determining whether the relevant platform or data constitutes an essential facility:

Considerations for Determining that the Platform Constitutes an Essential Facility	Considerations for Determining Data as an Essential Facility
<ul style="list-style-type: none"> • Substitutability of other platforms; • Existence of potentially available platforms; • Feasibility of developing a competitive platform; • The extent to which counterparties to the transaction rely on the platform; • Possible effects of the platform opening on the undertaking of such platform. 	<ul style="list-style-type: none"> • Whether the data is essential to participate in the market competition; • Existence of alternative access to data; • Technical feasibility of data opening; • Possible impact of data opening on undertakings in possession of such data, etc.

¹² See, Article 14 of the *Platform Guidelines*.

Furthermore, considering the industry characteristics, "the counterparties has expressly indicated or actually failed to comply with the fair, reasonable and non-discriminatory platform rules" is added to the justified reasons for refusal to deal.

Highlights 7. Regulating the issues concerning exclusive dealing such as "Either-or-Choice"

The *Platform Guidelines* explicitly lists the practice of requiring a counterparty to the transaction to choose between two competitive platforms as a type of exclusive dealing.

The *Platform Guidelines* puts forward two circumstances to be taken into account in determining whether a transaction constitutes an exclusive dealing. First, where a platform undertaking imposes restrictions by taking punitive measures, such as searching downgrade, traffic restrictions, technical barriers and deduction of deposits, which causes direct damage, such practice shall be generally deemed as exclusive dealing. Second, restrictions imposed by a platform undertaking by taking incentive measures, such as subsidies, discounts, preferences and traffic resource support, may have certain positive effects on undertakings using the platform, consumers' welfare and the overall social benefits, may also be deemed as exclusive dealing if it clearly eliminates or restricts market competition.

At the same time, the *Platform Guidelines* notes, *inter alia*, that the maintenance of the platform's reasonable business model may also be a justification for exclusive dealing.¹³

Regarding the practice of "Either-or-Choice", the *Platform Guidelines* also points out that the exclusive agreements between platform undertakings and transaction counterparties may constitute other vertical monopoly agreements subject to the AML.¹⁴

Highlights 8. Clarifying the issues of discrimination including "big data discrimination"

The *Platform Guidelines* also added special provisions for the "Big Data Discrimination" behaviour that has caused widespread controversy before.¹⁵ An undertaking in the platform economy with a dominant position may be deemed as abusing its dominance through discrimination if it implements differentiated transaction prices or other transaction conditions based on big data and algorithms and in accordance with the payment capacity, consumption preference, use habits, etc. of the counterparties; or if it formulates and implements differentiated standards, rules and algorithms or implements differentiated payment conditions and transaction methods.

With regard to discrimination, one of the major difficulties in practice is how to determine that the counterparties' transaction conditions are the same. In this regard, the *Platform Guidelines* points out that the same conditions mean that there are no differences among counterparties in terms of security of transaction, cost of transaction, credit status, stage of transaction, and duration of transaction that materially affect a transaction, etc. The differences in terms of the privacy information, transaction history, individual preferences, consumption habits and other aspects of the counterparties obtained by the platform in a transaction do not affect the identification that the condition of counterparties are identical.

¹³ See, Article 15 of the *Platform Guidelines*.

¹⁴ See, Article 7 of the *Platform Guidelines*.

¹⁵ See, Article 17 of the *Platform Guidelines*.

The *Platform Guidelines* also enumerates a number of possible justifications for discrimination. For example, if the platform undertaking conducts preferential activities carried out by the platform undertaking within a reasonable period for the first transaction of a new user or if the platform undertaking conducts random transactions based on the fair, reasonable and non-discriminatory rules of the platform, then the platform undertaking's conduct may not be identified as discrimination.

Highlights 9. Interpreting the notification threshold of concentration of undertakings for the platform economy business model

The *Platform Guidelines* takes into account the differences in business models between the platform economy and the traditional economy, which may result in a difference in the calculation of turnover. In this regard, the *Platform Guidelines* provide that, for platform undertakings that only provide information matching and commissions receiving, the turnover may be calculated based on the service fees and other income received by the platform. For platform undertakings that compete in the market competition on the platform side, the turnover may be calculated based on the value of the transaction the platform engaged in and other income of the platform.¹⁶

In addition, due to the special nature of the platform economy business model, there may be a case where the turnover is so low that it is not possible to meet the threshold of concentration of undertakings notification, while such a concentration will have a clear eliminating or restrictive effect on competition in the relevant market. In particular, the *Platform Guidelines*¹⁷ points out that where the undertakings participating in the concentration is a start-up or an emerging platform, or the undertaking concerned has a relatively low turnover as a result of its adoption of the free-of-charge or low-price mode, and under such circumstances, although the concentration does not reach the threshold for notification, antitrust enforcement authorities may still launch investigation in accordance with the law if such concentration has or is likely to have effects of eliminating or restricting competition.

There are similar principles in the *Antitrust Guidelines for the Field of Pharmaceutical Active Ingredients (Draft for Comment)*¹⁸ previously issued by SAMR. Where concentration of undertakings in the field of pharmaceutical active ingredients has or may have the effect of eliminating or restricting competition but involves undertakings that do not meet the notification threshold has or may have the effect of eliminating or restricting competition, the antitrust enforcement authorities may carry out investigations. This particularly emphasized issue in the guidelines of two different industries may indicate that, in the future, the antitrust enforcement authorities may take a more proactive approach in investigating the concentration of undertakings that may eliminate or restrict competition but fail to meet notification thresholds.

Highlights 10. Clarifying that a concentration involving VIE structure is subject to merger control review

As the legality of the VIE structure itself has not been clear, the issue of how to deal with the concentration of undertakings with VIE structure has presented major difficulties in practice and has been debated in some of the Internet industry M&A involving VIE structure due to the alleged failure to filing. In July 2020, for the first time, SAMR publicly accepted and unconditionally approved a transaction involving an undertaking concerned with VIE structure¹⁹, however, whether this means that all transactions involving VIE structure will be normally accepted and ultimately pass review is still uncertain.

The *Platform Guidelines* clarifies this issue and clearly points out that the concentration of undertakings involving the VIE structure falls within the scope of the merger control review.²⁰ In light of this, an undertaking shall prudently assess whether its transactions involving VIE structure may trigger a notification obligation.

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¹⁶ See, Article 18 of the *Platform Guidelines*.

¹⁷ See, Article 19 of the *Platform Guidelines*.

¹⁸ See the official website of SAMR at http://www.samr.gov.cn/hd/zjdc/202010/t20201013_322278.html

¹⁹ See the official website of SAMR at http://www.samr.gov.cn/fldj/ajgs/jzjyajgs/202004/t20200420_314431.html

²⁰ See, Article 18 of the *Platform Guidelines*