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China to Discipline Online Platforms with Antitrust Enforcement?

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On 7 February 2021, the Anti-Monopoly Commission of the State Council issued the Anti-Monopoly Guidelines for the Platform Economy (the [Guidelines](#)) clarifying the application of the Anti-Monopoly Law ([AML](#)) to the potential anti-competitive practices of the online platforms. The issuance of the Guidelines sends a clear message to the online platforms that antitrust enforcement in the sector could be activated to counter anti-competitive practices and the resulting harm to the consumers' interests. The Guidelines serve as an interpretative instrument that clarifies the application of the AML provisions in the digital environment.

One of the frequent challenges encountered by the antitrust enforcers is the [definition of the relevant market](#) which is complicated by the two-sided or multi-sided nature of the platforms, which facilitate the interactions of the market players. Since there are often several platforms or channels through which goods or services can reach their final consumers, the competition law authorities need to provide [sufficient evidence of the dominant position](#) of a certain platform operator before applying the abuse of dominance prohibitions.

The Guidelines address this problem by resorting to the concept of the “essential facility” and stipulate that in certain situations, the online platforms can be considered “essential facilities” for other undertakings, which will permit antitrust intervention in the “refusal to deal” cases and various forms of discrimination and exploitation. In February 2021, the Chinese short videos app Douyin has used the concept of “essential facility” when filing a [lawsuit](#) in Beijing court against Tencent, which allegedly restricted Douyin users from sharing its content via instant messengers WeChat and QQ. It remains to be seen whether the court will define the Tencent's instant messenger apps as “essential facility” due to their popularity with the Chinese users.

As the anti-competitive effects within an online platform environment are often facilitated by the [extensive data collection and sharing](#), application of [pricing algorithms](#), and [platform functionalities](#), the Guidelines instruct the State Administration for Market Regulation ([SAMR](#)) and its regional departments to increasingly consider the above evidence in their antitrust investigations.

The Guidelines direct SAMR to scrutinize the “choose one from two” exclusivity obligations imposed by an online platform on its users forcing or incentivizing them to offer their products or services exclusively on the specified platform. In December 2020, SAMR [announced](#) that it was investigating Alibaba for forcing merchants not to offer their products on rival platforms. The online platforms will be also prohibited from applying punitive actions or imposing unfair trading conditions on their users. Among such unfair conditions can be the extensive data collection practices: “mandatory collection of non-essential user information or additional transaction conditions, transaction procedures, and service items that have nothing to do with the subject matter of the transaction”. The Guidelines also explicitly target the discrimination practices that can be applied by the online platforms vis-à-vis their users.

In the field of merger control, the Guidelines urge SAMR to step up the assessment of concentrations in the online platform and sharing economy sectors. The companies are reminded that their merger transaction can be scrutinized by SAMR even if it does not reach the mandatory notification thresholds fixed in the AML. The Anti-Monopoly Commission thus advised the companies to file voluntary notifications that would permit SAMR to check the planned mergers and acquisitions for their compatibility with the competitive market environment.

Until recently, China has managed to regulate its extensive digital economy without significant antitrust interventions. The issuance of the Guidelines signals China’s intention to strengthen its regulatory arsenal for the effective governance of the digital economy by adding the enhanced enforcement of the AML to other regulatory tools. The recent regulatory instruments include the [Cyber Security Law](#) (2017), the [E-Commerce Law](#) (2019), the [Personal Data Protection Law](#) (draft 2020). The issuance of the Guidelines and the ongoing [reform of the AML](#) signals the determination to change the status quo and step up the regulatory enforcement and supervision that would ensure further development of the sector while preserving fair competition and protecting platform users and consumers from the abuses of the market power.

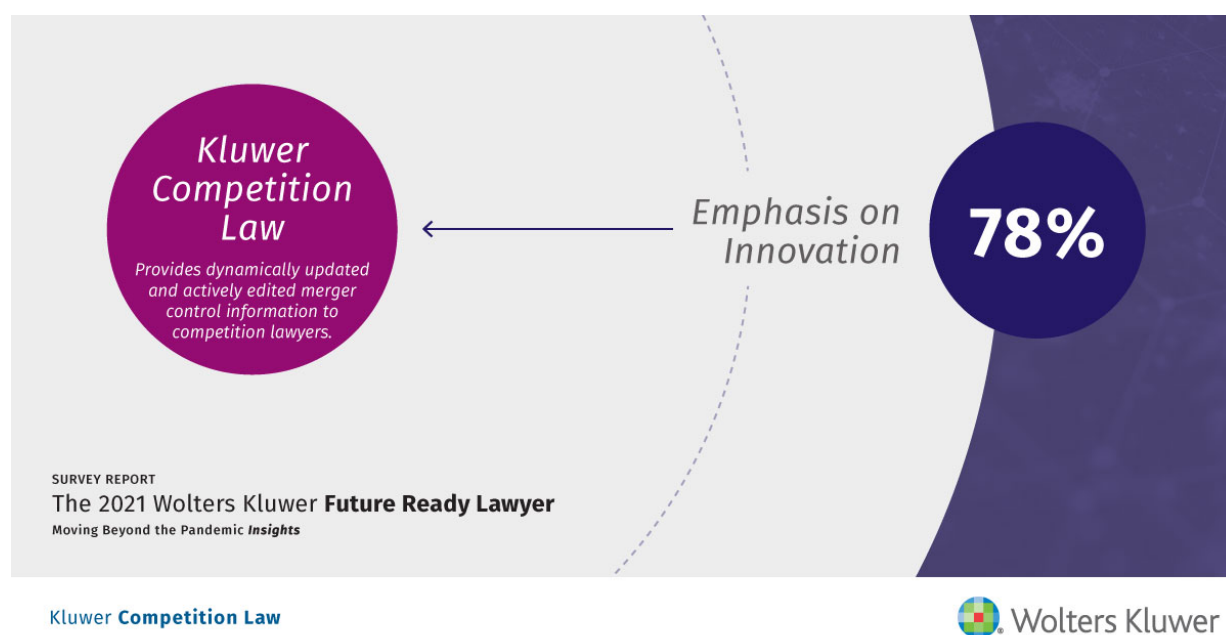
This step echoes a global tendency to level up the regulatory scrutiny of the online platforms in terms of competition, consumer protection, data protection and regulation of content. In December 2020, after repeated attempts to discipline the US tech giants with [record antitrust fines](#), the European Commission has [unveiled](#) an extensive [Digital Services and Markets Act package](#) proposing new rules for all digital services, including social media, online market places, and other online platforms. In the US, the Biden Administration is [considering](#) the enhanced antitrust enforcement against increasing concentration of the market power held by the Big Tech platforms. When it comes to China, the adoption of the new or more detailed regulatory instruments for the online platforms would not automatically result in the increased enforcement. The rapid growth of the industry, at least at the outset, was characterized by a laissez-faire approach and limited regulatory interventions. As in other economic sectors, the enforcement of the AML will be guided by the industrial policy priorities such as [building digital eco-systems](#) and the effectiveness of other governance mechanisms that would curb the abuses of market power by the online platforms.

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