The Incursion of Antitrust into China’s Platform Economy

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Abstract
This article adopts a holistic approach to China’s antitrust strategy toward the platform economy. As enforcers everywhere come to terms with the unique challenges posed by the market power amassed by digital gatekeepers, China’s sudden, fierce attack on its own tech giants has been as effective as it has been baffling to observers, and has helped antitrust policy progress by leaps and bounds. However, antitrust is only one of several battlefields of the war on platforms. This article first dissects the competition law developments that have taken place in the first year of China’s “Big Tech crackdown,” focusing on enforcement, policymaking, and law and institutional reform. Thereafter, this article joins the dots and assesses the results of the (partly) Big Tech-motivated refurbishment of the Chinese antitrust law and policy landscape. It identifies certain risks stemming from the new reinforced system, and proposes ways circumvent these and reap the benefits of the improved legal framework.

Keywords
antitrust, competition law, platform economy, digital economy, innovation, Anti-Monopoly Law, China

I. Introduction
China’s rulers are constantly navigating between the Scylla and Charybdis of growth and control. To get more of one, they often have to sacrifice a measure of the other.1

1. James Kynge, Chaos vs Control: China’s Communists and a Century of Revolution, FINAN. TIMES, June 25, 2021, https://www.ft.com/content/6b3a7274-8fac-403e-a385-3f8920f5b369.

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Keeping up to date with the competition law developments affecting the platform economy in China has become a quasi-impossible endeavor. Since Dec. 2020, when the Chinese Communist Party (CCP) announced plans to strengthen antitrust enforcement as part of a strategy to prevent the “disorderly expansion of capital,” the State Administration for Market Regulation (SAMR) and other Antitrust Enforcement Agencies (AMEAs) have been exerting their antitrust powers with methodical and unrelenting thoroughness. Although multiple sectors have been targeted, tech giants are undoubtedly bearing the brunt of the investigations. China’s “tech crackdown” has garnered significant public approval, and has been arguably motivated by “a fervent desire to streamline and regulate the nation’s massive platform economy that was tending to grow too big and too fast in a haphazard way that threatened to create monopolies and destabilize the economy.” The cases against the likes of Alibaba and Tencent have attracted the lion’s share of the media attention, yet these high-profile investigations are all the more interesting when considered in the context of a wider movement that exceeds both national boundaries and the realms of antitrust.

It is imperative to acknowledge the innovative benefits of digital platforms, and the role they play in facilitating trade and global transactions. That said, these admirable achievements cannot give these companies carte blanche to engage in harmful conduct. In recent years, jurisdictions including the United States, Mexico, Brazil, the European Union, Germany, the United Kingdom, India, or Australia, each in their own fashion, have been wrestling with the issues associated with the power...
amassed by digital gatekeepers. The main problems relate to their ability to impose terms they would not successfully impose if they were constrained by competitors, and the virtual impossibility of challenging their hegemony due to, inter alia, strong network effects and high switching costs.\textsuperscript{10} Seen in this light, China would appear to be jumping on the tech squeeze bandwagon, and the recent events would be less unique.

What makes the developments in China peculiar is that, borrowing the well-known phrase coined by Xiaoping Deng, they reflect a crackdown with Chinese characteristics.\textsuperscript{11} The incessant fire the platform economy has come under may have come as a surprise, particularly since the initial hesitation to intervene had fueled the conviction that China would not—at least not aggressively—target its own companies.\textsuperscript{12} Now homegrown tech giants have been hit hard in what has been described as a “dramatic clash between public and private power,”\textsuperscript{13} the speed and intensity of which has been mind-boggling. In 2021 alone, the SAMR punished platforms’ exclusionary behavior,\textsuperscript{14} imposed close to ninety fines on reportable merger transactions concluded without approval,\textsuperscript{15} blocked the third concentration\textsuperscript{16} to be prohibited since the entry into force of the Anti-Monopoly Law (AML),\textsuperscript{17} and raced to adapt its policy to the Digital Era by issuing various pieces of guidance.\textsuperscript{18} Importantly, a significant reform of the AML is looming, and the changes announced in Oct. 2021 are clearly designed to ensure that China’s competition law is adequately equipped to tackle the challenges of the platform economy.\textsuperscript{19} The competition authorities’ resources have also been increased so as to enable them to adequately implement the revised legislation and curb monopolistic behavior.

These developments alone spell trouble for the country’s digital platforms, but they are facing an even bumpier ride. Antitrust is only one of the fronts in the multipronged war on Big Tech.\textsuperscript{20} In addition to their supremacy in the marketplace, their less-than-optimal labor standards and the (negative) impact of their presence on the wealth gap have been extensively documented globally.\textsuperscript{21} Eric Levitz made the point forcefully—and controversially—when he said that

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\textsuperscript{10} Andreas Hein et al., Digital Platform Ecosystems, 30 ELEC. MARKETS 87 (2020).
\textsuperscript{11} See, e.g., Yuanliang Wu, Socialism with Chinese Characteristics in a Comparative Vision, 29 SOCIAL SCI. CHINA 46 (2008); Roland Boer, Socialism with Chinese Characteristics: A Guide for Foreigners (Springer, 2021).
\textsuperscript{12} For instance, in 2014 Mark Williams referred to observers suggesting that “the AML is being used to discipline new entrants to the China market”, while a letter from the US Chamber of Commerce to the then Secretary of State John Kerry claimed that the AML was being relied on to further “China’s industrial policy goals”. See Matthew Miller, China’s Latest Anti-trust Probes Revive Protectionism Concerns, REUTERS, Aug. 7, 2014, https://www.reuters.com/article/us-china-antitrust-idUSKBN0G70VA20140807.
\textsuperscript{13} Liu & Leslie, supra note 5.
\textsuperscript{14} See infra Section II.B.
\textsuperscript{15} See infra Section III.C.
\textsuperscript{16} See infra Section III.B.
\textsuperscript{17} Anti-Monopoly Law of the People’s Republic of China (AML) (中國人民共和國反壟斷法) promulgated by the Standing Committee of the National People’s Congress (effective Aug. 1, 2008), http://english.mofcom.gov.cn/article/policyrelease/Businessregulations/201303/20130300045909.shtml.
\textsuperscript{18} See infra Sections IV.B and C.
\textsuperscript{19} See infra Section IV.D.
\textsuperscript{20} See Adrian Emch, Chinese Competition Law 2.0, KLUWER COMPETITION LAW BLOG (Nov. 24, 2021), http://competitionlawblog.kluwercompetitionlaw.com/2021/11/24/chinese-competition-law-2-0/ (claiming that antitrust is “one of the tools in its crackdown on the Internet sector”).
\textsuperscript{21} See, e.g., Martina Fuchs et al., Big Tech and Labor Resistance at Amazon, 31 SCI. CULTURE 29 (2022); Max Fraser, Big Trouble for Big Tech, 29 NEW LABOR FORUM 98 (2020); Inequalities Threaten Wider Divide as Digital Economy Data Flows Surge, UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT (Sept. 29, 2021), https://unctad.org/news/inequalities-threaten-wider-divide-digital-economy-data-flows-surge; Lina M. Khan & Sandeep Vaheesan, Market Power and Inequality: The Antitrust Counterrevolution and Its Discontents, 11 HARVARD LAW POLICY REV. 235 (2017); Jonathan B. Baker & Steven C. Salop, Antitrust, Competition Policy, and Inequality, 104 GEORGETOWN LAW J. ONLINE 1 (2015). But see Daniel Crane, Antitrust and Wealth Inequality, 101 CORNELL LAW REV. 1171 (2016).
Tech giants have grown so powerful that they’ve become a threat to the market’s dynamism and the state’s sovereignty. The gig workers have grown so tired of receiving low wages and no benefits that they’re going on strike. Inequality has grown so vast it’s starting to threaten social stability.22

Jessa Lingel has equally called out “an industry that prioritizes corporate profits over public good,”23 and that has been too often appallingly at protecting its users’ data.24 There is a very real risk that these factors combined could be forging the perfect storm for a society that is “less democratic, more isolated, and more beholden to corporations and their shareholders.”25

In China, beyond antitrust, the Cyberspace Administration of China (CAC), the country’s Internet regulator, has been addressing cybersecurity issues and data privacy breaches by platforms, as well as preparing the ground for the regulation of algorithms.26 It is responsible for having delayed ride-hailing app Didi’s initial public offering (IPO), after triggering a cybersecurity review and imposing restrictions to address a suspected data leak.27 Financial authorities, on their part, led the charge against Ant Group, the fintech giant founded by Alibaba’s chairman Jack Ma, when its IPO was soured by the intervention of the State Council’s Financial Stability and Development Committee (FSDC) only days before it was meant to launch.28 This surprising plot twist took place only days after Ma’s scathing speech at the 2020 Bund Summit in Shanghai, criticizing China’s financial regulation and banking institutions.29 Predictably, this timeline has led commentators to perceive the speech as the genuine watershed moment for the tech crackdown in general and the actions against Ant and Alibaba in particular.30

22. Eric Levitz, China’s Sweeping Crackdown on Big Tech Is a Wake-Up Call for the U.S., INTELLIGENCER, Aug. 6, 2021, https://nymag.com/intelligencer/2021/08/chinas-sweeping-crackdown-on-big-tech-is-a-wake-up-call.html.
23. JESSA LINGEL, THE GENETRIFICATION OF THE INTERNET: HOW TO RECLAIM OUR DIGITAL FREEDOM (2021).
24. On data privacy and Big Tech, see, e.g., Anne C. Witt, Excessive Data Collection as a Form of Anticompetitive Conduct: The German Facebook Case, 66 ANTI TRUST BULL. 276 (2021); Joe Toscano, Data Privacy Issues Are at the Root of Our Big Tech Monopoly Dilemma, FORBES, Dec. 1, 2021, https://www.forbes.com/sites/joetoscano1/2021/12/01/data-privacy-issues-are-the-root-of-our-big-tech-monopoly-dilemma/?sh=4d035e163cf.
25. LINGEL, supra note 23, 1. See also 43–70.
26. China Says to Set Governance Rules for Algorithms over Next Three Years, REUTERS, Sept. 29, 2021, https://www.reuters.com/world/china/china-says-set-governance-rules-algorithms-over-next-three-years-2021-09-29/.
27. See, e.g., Lingling Wei & Keith Zhai, Chinese Regulators Suggested Didi Delay Its U.S. IPO, WALL STREET J., July 5, 2021, https://www.wsj.com/articles/chinese-regulators-suggested-didi-delay-its-u-s-ipo-11625510600; Masha Borak, China Antitrust: Didi’s Ride Hailing Dominance Prompts Scrutiny Before It Sets Forth For Its Uber-beating New York IPO, SOUTH CHINA MORNING POST, June 19, 2021, https://www.scmp.com/tech/big-tech/article/3137912/china-antitrust-didis-ride-hailing-dominance-prompts-scrutiny-it-sets; Clay Chandler et al., How Didi’s Data Debacle Doomed China’s Love Affair with Wall Street, FORTUNE, July 10, 2021, https://fortune.com/2021/07/09/didi-ipo-stock-data-crackdown-china-wall-street-investors/; Zachary Karabell, China’s Didi Crackdown Isn’t All That Different from U.S. Moves Against Big Tech, TIME, July, 92021, https://time.com/6079121/chinas-didi-crackdown-big-tech/.
28. See, e.g., Anshuman Daga, Timeline: Key Events Behind Suspension of Ant Group’s $37 Billion IPO, REUTERS, Nov. 4, 2020, https://www.reuters.com/article/uk-ant-group-ipo-suspension-events-idUKKBN27K1AO; Eliza Gkritsi, Ant Group to Meet Regulators “In the Coming Days,” TECHNODE, Dec. 24, 2020, https://technode.com/2020/12/24/ant-group-to-meet-regulators-in-the-coming-days/; Jun Wang et al., Trends in the Non-banking Payment Industry in China, INT. FINAN. LAW REV., Jun. 15, 2021, https://www.iflr.com/article/b1s7zdzjtl9mp/trends-in-the-non-banking-payment-industry-in-china.
29. For a translation of the speech, see Kevin Su, Jack Ma’s Bund Finance Summit Speech, INTERCONNECTED, Nov. 9, 2020, https://interconnected.blog/jack-ma-bund-finance-summit-speech/.
30. David Chau, China’s Crackdown on “Powerful” Tech Giants May Be a “Terrible Own Goal,” ABC NEWS, Aug. 18, 2021, https://www.abc.net.au/news/2021-08-19/china-tech-crackdown-alibaba-jack-ma-risky-investment/100387392?utm_campaign=news-article-share-2-desktop&utmc_content=twitter&utm_medium=content_shared&utm_source=abc_news_web; see also Sandra Marco Colino, The Case Against Alibaba in China and Its Wider Policy Repercussions, 10 J. ANTI TRUST ENFORCEMENT 217 (2022).
As the opening quote of this introduction suggests, China’s intense curb on the industry has been said to be the result of fluctuations between “very lax and very harsh enforcement.” During the former, tech companies would have experienced a period of virtually unrestrained growth, which has been brought to a screeching halt with the sudden shift toward the latter. To be sure, it is not that there were no developments before the crackdown. Already in 2013, Adrian Emch referred to the “ever-increasing impact of antitrust law on the high technology sector.” Nonetheless, the context of this assertion was the publication of new rules for abuses of intellectual property rights, and cases fought in private litigation. Public enforcement had, in fact, been minimal until late 2020.

The metaphor of the swinging pendulum has been used to describe the evolution of the application of antitrust to the sector. Indeed, it suitably captures the abruptness of the change in the intensity of enforcement and policymaking. The pendulum narrative is similarly present in other jurisdictions, particularly those where the government’s political color is subject to change. The back-and-forth motion of the pendulum might nonetheless diminish the sense of durability of the new approach, since it suggests that a swing back to lax implementation could happen again at any time. Of course, as Herbert Hovenkamp ascertained back in 1985, nothing lasts forever, and antitrust trends, even their far-reaching intellectual foundations, are “mortal.” But while harsh enforcement phases may come and go, law and policy foundations tend to be less fickle. Hovenkamp was predicting the Chicago School’s inevitable future demise, and yet almost four decades later, its premises remain strongly influential in U.S. antitrust enforcement (although recent U.S. developments suggest a new era might be on the horizon). Back to China, the determination to build on the current momentum by chiseling antitrust policy and, to a great extent, shaping legal reform suggests the energization of antitrust is a testament to its maturity, and might be here to stay. Therefore, Lillian Li’s depiction of China’s approach as “innovate then regulate” might be more fitting, since it suggests progression rather than vacillation.

This article adopts a holistic approach to China’s antitrust strategy toward the platform economy by exploring all the means that have been employed to rein in the powerful tech giants, and the resulting law and policy landscape. There is little doubt that the changes are effective, and if adequately implemented could help enforcers expeditiously address threats to competition. However, taking into account the limited checks and balances on agency rulemaking, the enhancement of the enforcers’ powers carries its own obvious risks. This article proposes ways to limit the perils associated with the

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31. Angela Huyue Zhang, *Agility Over Stability: China’s Great Reversal in Regulating the Platform Economy*, 63 HARVARD INT. LAW J. (forthcoming, 2022). A draft of the paper is available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3892642. References to page numbers in this article are to the draft version.

32. Adrian Emch, *High Tech under Scrutiny in China*, KLUWER COMP. LAW BLOG (May 17, 2013), http://competitionlawblog.kluwercompetitionlaw.com/2013/05/17/high-tech-under-scrutiny-in-china/. In a similar vein, Angela Zhang acknowledges that “regulatory tensions in the tech sector had been building up for many years.” Zhang, supra note 31, at 29.

33. Zhang, supra note 31, at 5, 7, 13 and 26.

34. See, e.g., William E. Kovacic, *The Modern Evolution of US Competition Policy Enforcement Norms*, 71 ANTITRUST LAW J. 403 (2003).

35. Herbert Hovenkamp, *Antitrust Policy after Chicago*, 84 MICHIGAN LAW REV. 213, 216–17 (1985).

36. See, e.g., Federal Trade Commission v. Facebook Inc. (pending), https://www.ftc.gov/enforcement/cases-proceedings/191-0134/facebook-inc-ftc-v; FTC Press Release, *FTC Sues to Block $40 Billion Semiconductor Chip Merger* (Dec. 2, 2021), https://www.ftc.gov/news-events/press-releases/2021/12/ftc-sues-block-40-billion-semiconductor-chip-merger; Mark Glick, *Antitrust and Economic History: The Historic Failure of the Chicago School of Antitrust*, 64 ANTITRUST BULL. 295 (2019); Maurice E. Stucke & Ariel Ezrachi, *The Rise, Fall, and Rebirth of the U.S. Antitrust Movement*, HARVARD BUSINESS REV., Dec. 15, 2017, https://hbr.org/2017/12/the-rise-fall-and-rebirth-of-the-u-s-antitrust-movement; Sandra Marco Colino, *The Antitrust F Word: Fairness Considerations in Competition Law*, J. BUSINESS LAW 329 (2019).

37. “Innovate, then regulate” is a reference to a viral tweet by Lillian Li (@lillianml), which reads: China: Innovate then regulate. Europe: Regulate then not innovate. US: Innovate then not regulate. (July 7, 2021), https://twitter.com/lillianml/status/1412661449751621634.
Digital Era-ready legal framework. Section II critically discusses the actions taken against exclusionary conduct, while Section III focuses on the application of merger control to the industry. Policy developments and institutional and legal reform are covered in Section IV, and Section V reflects on the merits resulting system. Finally, Section VI concludes.

II. The Challenge of Crushing Abusive Conduct by Platforms

A. Energizing Enforcement: Who to Punish, and How

Since the end of 2020, a tidal wave of penalties has been unremittingly rocking tech giants. The intense ex post enforcement trend is consistent with the tardiness of the authorities’ reaction to the sector’s problems. By the time they decided to intervene, much harm had already been done. The inaction itself may have made tech companies feel untouchable, and antitrust compliance would not have featured high on their list of priorities. Furthermore, the government had previously actively nurtured an ideal environment for these firms to thrive, unintentionally helping to create the monster it then had to tame. It does not help that the officials working in the agencies entrusted with law enforcement often come from the private sector and are aware they may one day return. There would be little incentive to bite the hand that might feed them in a not too distant future.

The punishable substantive violations identified by antitrust agencies take many forms, not all of which are within the AML’s range. For instance, on Dec. 30, 2020, e-commerce platforms Vipshop (backed by Tencent), Tmall (owned by Alibaba), and JD.com were each fined RMB 500,000 (about USD 76,000) for resorting to misleading pricing strategies. The sites had, acting unilaterally, implemented a range of assorted deceptive tactics in the run-up to Singles’ Day, China’s biggest shopping festival. Some had raised prices immediately before so as to pretend to be offering discounts for the occasion, others made unsupported claims about having the best price on the market for certain goods. These practices were considered contrary to Article 14(4) of the Price Law, which prohibits unfair pricing by “luring consumers or other operators to conclude transactions with it by employing falsified or misleading price means.” The fines that can be imposed under the Price Law are modest when compared to those contained in the AML. However, in this case, it seems like the companies neither acted jointly nor would have reached the dominance threshold, and classing the described practices as abuses would have been quite a stretch.

Wherever possible, the AMEAs have relied on the AML to build their cases against platforms. Besides the imposition of fines on contraventions of the law’s substantive rules (mainly abuses of dominance), procedural breaches have similarly been sanctioned. The latter investigations chiefly relate to mergers that were consummated without waiting for the necessary clearance. This section analyzes the penalties imposed through the application of the substantive provisions of the AML, as well as fines levied on similar practices but resorting to other pieces of legislation. The fines slapped on unreported mergers on the basis of the procedural rules of the AML will be covered in Section III.

38. See supra Section I.
39. Zhang, supra note 31, at 17.
40. Wentong Zhen, The Revolving Door, 90 NOTRE DAME LAW REV. 1265 (2015).
41. SAMR Administrative Penalty Decisions (2020) Nos. 29, 30 and 31 (Vipshop, Tmall and JD.com decisions), http://www.samr.gov.cn/xw/zj/202012/t20201230_324826.html.
42. Price Law of the People’s Republic of China (中华人民共和国价格法) (effective May 1, 1998), http://english.mofcom.gov.cn/article/policyrelease/Businessregulations/201303/20130300046121.shtml.
43. Id., art 14(4).
44. See infra Section III.
B. Exclusionary Conduct: The Legal Test and the AML’s Limits

The AML provides the AMEAs with a solid legal basis to tackle abuses of market power in any sector of the economy, including digital markets. Article 17 of the AML prohibits the abuse of a dominant position, and lists types of behavior that may amount to abusive conduct. Substantial penalties may be imposed in the case of a breach, oscillating between 1 and 10 percent of the undertaking’s sales revenues in the preceding year. Any unlawful gains may additionally be confiscated, and undertakings acting against the law will be further required to cease the unlawful conduct.

Competition law might seem like the obvious choice for tackling abusive behavior by platforms, but recent case law suggests that successfully invoking Article 17 might be an uphill battle. In Qihoo 360 v Tencent, the Supreme People’s Court (SPC) set a very high bar for both establishing dominance and the legal test applicable to exclusive dealing and tying. The judgment arose in the context of a cutthroat commercial and legal battle between the two companies. When Tencent entered the market for the production of security software in China back in 2010, it encouraged the users of its popular instant messaging (IM) application QQ to rely on its own software. Qihoo, a competing producer, responded with claims that Tencent scanned the private information of those using its IM service, and itself released updated security software claiming to protect the privacy of QQ users. Tencent then took the step of making QQ incompatible with Qihoo’s security software, thereby effectively forcing users to choose between the former and their popular IM app.

This practice is commonly referred to as “choose one from two,” and has been the prime focus of the abuse of dominance cases brought by public enforcers against platforms. The concern is understandable. Activist bell hooks once compared the absence of choices with “[b]eing oppressed,” asserting that it is “the primary point of contact between the oppressed and the oppressor.” If the provider of a popular service in an industry with strong network effects compels customers to shun its rivals to continue to have access to that service, it could lock them in completely, eviscerating the competition. In this specific scenario, the policy was only implemented for one day, but still Qihoo lost 10 percent of its customers. For consumers, losing the ability to freely choose between competing options is likewise detrimental.

It was Tencent that sued Qihoo first for unfair competition, and won, with the latter being ordered to pay RMB 400,000 (around USD 63,000). Qihoo subsequently filed a lawsuit against Tencent for breach of the AML through exclusive dealing and tying, seeking damages. When the case was dismissed by the Guangdong High People’s Court, Qihoo appealed to the SPC. For China’s highest court, market shares of over 80 percent were not sufficient to ascertain Tencent’s dominance, even though according to the AML it can be established when the market shares exceed 50 percent. Moreover, the judgment appears to suggest that proving anticompetitive effects would be necessary for a contravention of the AML to exist. With regard to exclusive dealing, the SPC found that Tencent’s conduct “did not have the obvious consequence of eliminating or restricting competition.” Even more explicitly, one of the criteria to consider the illegality of tying would be “the negative effect on competition” of the practice. This position is in stark contrast with the legal test for exclusive dealing developed by the European Court of Justice, according to which such practices would be unlawful save for objective justification.

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45. AML, supra note 17, art. 17.
46. Id., art 46.
47. Id.
48. Qihoo Technology Company Ltd v Tencent Technology (Shenzhen) Company Limited and Shenzhen Tencent Computer Systems Company Limited (2013) No. 4, announced 17 October 2014 (Qihoo 360 v. Tencent).
49. The Chinese term is 二选一.
50. BELL HOOKS, FEMINIST THEORY: FROM MARGIN TO CENTER (South End Press, 1984).
51. AML, supra note 17, art. 19.
52. Pablo Ibáñez Colomo, Legal Tests in EU Competition Law: Taxonomy and Operation, 10 J. EUR. COMPET. LAW PRACT. 424 (2019). See also Damien Geradin & Dimitrios Katsifis, Strengthening Effective Antitrust Enforcement in Digital Markets, 18 EUROPEAN COMP. J. (forthcoming, 2022).
In this context, it is unsurprising that some of the recent cases against tech companies have not been built on a violation of the AML, even when “choose one from two” practices were at stake. In Feb. 2021, Vipshop was fined once again, this time in excess of RMB 3 million (close to USD 465,000), for breaching the Anti-Unfair Competition Law (AUCL). According to the SAMR, Vipshop would have used sellers’ data to coerce them into relying exclusively on its platform, by inter alia boosting the products of those trading solely on Vipshop, and diverting traffic away from, and even blocking altogether, those using other competing platforms. This would be contrary to Article 12 of the AUCL, which prohibits attaching unreasonable conditions to sales, and spares the SAMR the trouble of proving the existence of a dominant position under Article 17 of the AML.

The application of the AML has been reserved for instances where dominance is all but a slam dunk. In Apr. 2021, tech giant Alibaba was famously found to have forced traders to sell exclusively on its platform via a “choose one from two” strategy. Those reluctant to comply with this requirement faced punishment, including being excluded from promotions and searches. According to the SAMR, such practices would be contrary to Article 17(4) of the AML, which prohibits dominant companies from “allowing their trading counterparts to make transactions exclusively with themselves of with the undertakings designated by them” without objective justification.

There was little question of Alibaba’s dominance in this case. In the market for virtual retail platforms in China, Alibaba was found to have market shares as high as 86 percent for total sales value and 76 percent for total revenues in the period from 2015 until 2019. To define the relevant market, the SAMR looked at demand- and supply-side substitutability, but without referring to the small but significant and non-transitory increase in price (SSNIP) test. In addition to the high market shares, the SAMR considered the extraordinary degree of market concentration—the Herfindahl–Hirschman Index (HHI) was between 7408 and 5350, and the four-firm concentration ratio (CR4) accounted for most of the market—the company’s control over price, the weak bargaining position of sellers on its platform, Alibaba’s financial resources and technical superiority, and the high switching costs for sellers. The SAMR concluded that competition in the relevant market had been restricted, and the actions of Alibaba were detrimental for actual and potential competitors, sellers using Alibaba’s platform, consumers, the optimal allocation of resources, innovation, and the economy as a whole.

As a consequence of the breach, Alibaba was fined RMB 18.228 billion (nearly USD 2.75 billion), which amounts to 4 percent of its 2019 turnover in China. It is, to date, the highest fine ever imposed on a single company for violating the AML, breaking the record set by the RMB 6.088 billion (almost USD 975 million) fine the National Development and Reform Commission (NDRC) slapped on Qualcomm in 2015. Interestingly, attached to the decision was an administrative instruction requiring Alibaba to additionally draw up a rectification plan, carrying out “comprehensive and profound”...
The SAMR additionally compelled Alibaba to prepare compliance reports for three years, to refrain from implementing anticompetitive behavior by means of technology, to train its staff to ensure compliance, to report mergers meeting the legal criteria for notification, and to strive to protect the rights of consumers. Unfortunately, there is not much in there as far as restorative remedies go, meaning that the measures are unlikely to reduce the profitability of the illegal conduct.

Other platforms have similarly been targeted for abusive practices contrary to the AML. In April 2021, the Shanghai Municipal Administration for Market Regulation (SMAMR) announced that back in Dec. 2020, it had fined Sherpa’s, an English language online food delivery platform popular among foreigners in Shanghai and other major Chinese cities. An eighteen-month investigation led to the imposition of a penalty of RMB 1.16 million (over USD 180,000), 3 percent of its 2018 revenue in China. Since the conduct had ceased in late 2019 and illegal gains were difficult to calculate, the agency did not order the confiscation of these. Unlike the SAMR in Alibaba, the SMAMR did apply the SSNIP test when defining the relevant market. Focusing mainly on demand-side substitutability, it found that online and offline food delivery services do not form part of the same relevant market. The same goes for Chinese and English language apps, since non-Chinese speakers living in China would rely almost exclusively on the latter. The investigation revealed that the company had forced restaurants to enter into “agreements containing ‘exclusive delivery right terms’ with all catering business partners and requiring them to stop cooperating with [Sherpa’s] competitors or face removal from the platform.”

In Oct. 2021, food delivery giant Meituan was fined RMB 3.442 billion (around USD 530 million, equivalent to 3 percent of its total domestic sales revenue in 2020). Following a six-month investigation, the SAMR established that it had applied “choose one from two” requirements, and pressured its merchants into signing exclusive cooperation agreements. In addition to charging higher commission rates and giving less publicity to those not willing to commit to trading exclusively on its platform, it retained deposits from them and relied on algorithms and data to induce loyalty. The relevant market was defined following the Alibaba playbook, and was found to be online food delivery platforms in China. Market shares exceeded 60 percent and concentration was found to be high, with an HHI of 5500 and a two-firm concentration ratio (CR2) of 99 percent. Additional factors suggested dominance. The access Meituan had to its merchants’ data enabled it to monitor whether they were using competing platforms. Moreover, its ecosystem of apps made sellers even more dependent on its services, and being excluded would bear further negative consequences. In addition to the fine, the SAMR imposed compliance requirements in an administrative instruction similar to Alibaba’s. Meituan was required to rectify its conduct, to improve its algorithms and rules for the calculation of commission rates, to strive to protect the legitimate interests of the businesses using its platform, and to even improve the working conditions of its riders. It will have to submit compliance reports for three years.

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60. *Chinese Regulator Fines Alibaba, Sends Policy Signal to Ensure Development and Fairness of Online Economy*, GLOBAL TIMES, Apr. 10, 2021, https://www.globaltimes.cn/page/202104/1220682.shtml.

61. Geradin and Katsifis, *supra* note 52, at 14. Interesting proposals regarding restorative remedies have been put forward by Michal Gal & Nicolas Petit, *Radical Restorative Remedies for Digital Markets*, 37 BERKELEY TECH. LAW J. (forthcoming).

62. SMAMR Administrative Penalty Decision (2020) No. 06201901001 (上海市场监管局行政处罚决定书) (Sherpa’s decision), https://mp.weixin.qq.com/s/N3LgRRmuclaoP_K1tWnjw.

63. Shanghai Municipal People’s Government Press Release, Sherpa’s Hit with 1.17 m Yuan Fine (Apr. 13, 2021), https://www.shanghai.gov.cn/nw648081/20210413/1edfaded3dada4a2eb1561c27344eac6.html.

64. SAMR Administrative Penalty Decision (2021) No. 74 (国家市场监督管理总局行政处罚决定书) (Meituan decision), https://www.samr.gov.cn/xw/zj/202110/t20211008_335364.html.

65. SAMR Administrative Guidance (2021) No. 2 (国家市场监督管理总局 行政指导书) (Meituan administrative guidance), https://www.samr.gov.cn/xw/zj/202110/t20211008_335364.html.
The decisions adopted by the SAMR and the SMAMR send out a clear message: exclusivity-inducing conduct by dominant players is likely to be unlawful and to be met with severe punishment. The SAMR’s investigations in particular suggest that, like under EU competition law, exclusive dealing might be presumed to be anticompetitive. The most striking difference with the current EU approach is that the SAMR hardly pondered the possible existence of an objective justification in its investigations. This is all the more surprising given that the recent guidance issued by the SAMR places significant emphasis on objective justification.

The Alibaba and Meituan decisions would appear to indicate that public agencies take a harsher stance to exclusive dealing than the SPC. It should be noted, however, that the SAMR has been careful when drafting its findings to avoid a direct clash with the judiciary’s position. It points out specific negative effects bore by the practices declared illegal, and therefore, it is not possible to completely rule out that effects will have to be demonstrated on a case-by-case basis to ascertain a violation of the AML. In a similar vein, although both Alibaba and Meituan exceeded the AML’s market share thresholds for dominance, the SAMR conducted a meticulous analysis of multiple factors supporting the existence of a dominant position in both cases. It is thus at least plausible, however unlikely, that the different outcomes do not stem from the application of different principles, but from factual dissimilarities. In Qihoo 360 v Tencent, the parties were entangled in an ugly commercial battle, and the (ephemeral) problematic conduct was a reaction to, inter alia, serious accusations of data privacy breaches. The behavior punished by the SAMR (and the SMAMR) took place in the context of contractual relationships with unbalanced bargaining power, since digital gatekeepers were effectively exerting their privileged positions over those depending on their services to ensure they faced as little competition as possible. Given that the affected companies have already confirmed that they do not intend to appeal the decisions, for the time being, these questions will remain unanswered. We will come back to the issue of judicial review later on in the article.

III. The (Preventive and Punitive) Application of Merger Control to Tech Acquisitions

A. The Problems Associated with Mergers in the Platform Economy

Besides punishing anticompetitive behavior, the SAMR has put the AML’s merger control provisions to good use in its attempt to keep mighty platforms in check. By virtue of Chapter IV of the AML, the SAMR is empowered to review, and ultimately block, concentrations of undertakings that have the potential to eliminate or restrict competition. This prerogative, when adequately exercised, may help thwart the market power failure mergers can spawn, and the problems derived from excessive market concentration. Nonetheless, the current state of some markets suggests that operations with detrimental effects may have slipped under the competition authorities’ radar. Giants like Tencent and Alibaba’s acquisitions of unicorns in the digital economy are in the hundreds, and yet they had (at least until recently) managed to escape scrutiny. Beyond China, GAFAM have purchased around nine hundred
companies over the last two decades—a strategy we now know helped consolidate their virtually unchallengeable positions.\textsuperscript{77}

There is strong evidence that “mergers and acquisitions have contributed directly to increased market concentration throughout the economy and the rise of the major tech companies in particular.”\textsuperscript{78} Dominant companies menaced by new entrants often opt to defuse the threat to their hegemony by buying out the competition. In 2012, Meta’s CEO Mark Zuckerberg infamously emailed his company’s chief financial officer expressing concerns about how nascent players like Instagram or Path “could be very disruptive” to Facebook, and effectively suggested acquiring them to “neutralize” them—a claim he subsequently retracted.\textsuperscript{79} And when a startup platform gets an attractive offer from a tech giant, its choices may be down to either letting the giant have its way or facing “existential threats.”\textsuperscript{80} Susan Athey and Fiona Scott Morton have further highlighted the perils of “platform annexation,” which occurs when a platform purchases an important asset in one side of the multisided market it caters for. That asset could be then used to give preferential treatment to its own platform, thereby reshaping “platform competition to its own advantage.”\textsuperscript{81} In the event that such a platform ecosystem is created, it has been shown, the digital markets it dominates are virtually impossible to contest.\textsuperscript{82}

What is perhaps most striking about the recently invigorated application of merger control to operations by players in the platform economy in China is that it has hardly been about preventing excessive concentration. The SAMR’s main line of action has involved retrospectively scrutinizing past acquisitions, some almost a decade old, and the majority of which were found not to bear any anticompetitive effects. Exceptionally, a merger between two videogame livestreaming services in which Tencent has a stake was blocked in the summer of 2021. The remainder of this section considers both of these aspects of merger control enforcement.

**B. Enhanced Ex Ante Control: The Huya/DouYu Merger**

In July 2021, the SAMR took the unusual step\textsuperscript{83} of blocking the merger between Huya and DouYu, China’s most popular videogame livestreaming platforms.\textsuperscript{84} Huya already owned half of DouYu’s shares, and wanted to buy the remaining stake to become the sole owner. Importantly, Tencent controls

\textsuperscript{77}. John Kwoka & Tomasso Valletti, *Unscrambling the Eggs: Breaking Up Consummated Mergers and Dominant Firms*, 30 *INDUS. CORPORATE CHANGE* 1286 (2021).

\textsuperscript{78}. *Id.*, at 1288.

\textsuperscript{79}. Casey Newton & Nilay Patel, ‘*Instagram Can Hurt Us*: Mark Zuckerberg Emails Outline Plan to Neutralise Competitors,’ *Verge*, Jul. 29, 2020, https://www.theverge.com/2020/7/29/21345723/facebook-instagram-documents-emails-mark-zuckerberg-kevin-systrom-hearing.

\textsuperscript{80}. Susan Ning et al., *China, in Digital Markets Guide—First Edition* (2021), https://globalcompetitionreview.com/guide/digital-markets-guide/first-edition/article/china.

\textsuperscript{81}. Susan Athey & Fiona Scott Morton, *Platform Annexation* (Mar. 2021), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3786434.

\textsuperscript{82}. Jacques Crémer et al., *Fairness and Contestability in the Digital Markets Act*, Policy Discussion Paper 3, Digital Regulation Project, Yale Tobin Center for Economic Policy (Jul. 6, 2021), https://tobin.yale.edu/sites/default/files/Digital%20Regulation%20Project%20Papers/Digital%20Regulation%20Project%20-%20Fairness%20and%20Contestability%20-%20Discussion%20Paper%20No%203.pdf.

\textsuperscript{83}. Only two other mergers have been blocked since the AML entered into force: Coca-Cola/HuiYuan in 2009 (MOFCOM Announcement on the Review Decision to Prohibit Coca-Cola’s Acquisition of China Huiyuan Co [2009] No. 22 (商务部关于禁止可口可乐公司收购中国汇源公司审查决定的公告#中华人民共和国商务部公告 [2009] 第22号), http://fldj.mofcom.gov.cn/aarticle/ztxx/200903/20090306108494.html?946530605=171424798); and Maersk/MSC/CMA CGM in 2014 (MOFCOM Announcement No. 46 of 2014 on Decisions of Anti-monopoly Review to Prohibit Concentration of Undertakings by Prohibiting Maersk, MSC and CMA CGM from Establishing a Network Center (June 20, 2014), http://english.mofcom.gov.cn/article/policyrelease/buwci/201407/20140700663862.shtml.

\textsuperscript{84}. SAMR Press Release and Announcement (Jul. 10, 2021), https://www.samar.gov.cn/xw/zj/202107/t20210710_332525.html.
Huya and part of DouYu, meaning that the transaction would indirectly grant Tencent full control of the latter. The SAMR found both horizontal and vertical issues. To begin with, the parties jointly held over 70 percent of the revenue in the market for the livestreaming of videogames in China. There is reference to Tencent’s dominant position being further cemented by the transaction as a consequence of the elimination of the little remaining competition between Huya and DouYu. Second, since Tencent controls about 40 percent of the (upstream) Internet gaming operation services market, the transaction could bear strong input and customer foreclosure effects affecting both markets. While the parties did offer remedies, they were not deemed satisfactory and the merger was thus prohibited. Zhang has expressed concerns that no remedies were imposed “despite Tencent’s common ownership over these two companies and the risk of coordination.”85

C. Gun-Jumping Penalties: Ex Post Merger Control?

In the year 2021, the antitrust watchdog imposed almost 90 fines of RMB 500,000 (the maximum allowed by the AML)86 on companies that “jumped the gun,” having either failed to report a notifiable transaction87 or not waited for the necessary clearance.88 On Nov. 22, 2021, alone, forty-three gun-jumping penalties were announced—as many as the SAMR levied between Jan. and Oct. 2021.89 Tencent, Alibaba, and Baidu feature prominently on the list of punished companies, and Didi and Meituan’s operations have also been sanctioned.

As of Dec. 2021, only one gun-jumping investigation has led to a finding of anticompetitive effects. It relates to the concentration between Tencent and China Music Group, concluded in 2017, through which the former acquired control of the latter.90 According to the SAMR’s fining decision, issued in July 2021, the unreported transaction was between close competitors with substantial market shares, in excess of 70 percent of revenue and other aspects relating to online music broadcast platforms. The SAMR pointed to high levels of market concentration, as reflected by the post-merger HHI of 6950.

The new entity would have erected entry barriers with its exclusive music rights and a music catalog so broad that rivals would be unable to offer a remotely attractive alternative. Since the merger was reviewed ex post, the SAMR was able to show that market entry had decreased since the concentration had been concluded. In addition to the ubiquitous RMB 500,000 fine, the SAMR imposed certain remedies on the basis of Article 48 of the AML.91 Specifically, it asked Tencent to refrain from entering into new exclusive licensing agreements with record labels and other licensors, and to revoke existing ones, with a few exceptions. Furthermore, the company should not require music rights licensors to grant it more favorable terms than its rivals, nor should it pay licensors to raise its competitors’ costs. The

85. Zhang, supra note 31, at 45.
86. AML, supra note 17, art. 48.
87. The threshold for notification can be found in the Provisions of the State Council on Thresholds for Prior Notification of Concentrations of Undertakings, promulgated by Decree No. 529 of the State Council (Aug. 3, 2008). An unofficial English translation is available at http://en.moj.gov.cn/pdf/ProvisionsoftheStateCouncilonThresholdsforPriorNotificationofConcentrationsofUndertakings.pdf.
88. See, e.g., SAMR Press Release (Dec. 14, 2020), https://www.samr.gov.cn/xw/zj/202012/t20201214_324335.html; and SAMR Press Release (Jul. 7, 2021), https://www.samr.gov.cn/xw/zj/202107/t20210707_332396.html. See also Zhan Hao, SAMR Intensifies Antitrust Enforcement to Regulate the Platform Economy, LEXOLOGY (Dec. 9, 2021), https://www.lexology.com/commentary/competition-antitrust/china/anjie-law-firm/samr-intensifies-antitrust-enforcement-to-regulate-growing-digital-economy.
89. SAMR Press Release (Nov. 20, 2021), https://www.samr.gov.cn/xw/zj/202111/t20211119_337049.html. All 43 decisions can be downloaded from the link.
90. SAMR Administrative Penalty Decision (2021) No. 67 (国家市场监督管理总局 行政处罚决定书 国市监处 (2021) 67 号) (Tencent/China Music Group decision), https://www.samr.gov.cn/xw/zj/202107/t2021072430279586098.pdf.
91. AML, supra note 17, art. 48. In addition to the fine, this provision enables the AMEAs to impose restorative measures when a concentration is implemented in violation of the AML.
SAMR also asked Tencent to report concentrations that, although below the notification thresholds, may have anticompetitive effects, and to submit annual reports of its transactions for three years.

The sheer intensity of the trend to look back at past mergers could be seen as an implicit recognition that, before 2020, enforcement was woefully deficient. Gun-jumping penalties are not China-specific. By way of example, the European Commission has also been ramping up its review of unapproved mergers that have nonetheless been implemented. In 2018, it imposed a record fine of EUR 124.5 million (USD 140 million) on Dutch telecom giant Altice for its purchase of Portugal Telecom in 2015 before the operation had been cleared.\textsuperscript{92} There are, however, notorious differences between gun-jumping fines in the European Union and China. The first and most obvious is the amount: while China’s fines are capped at a modest RMB 500,000, the EU system allows for the imposition of fines of up to 10 percent of a company’s total turnover (hence the hefty penalty levied on Altice).\textsuperscript{93} It is therefore difficult to see the effectiveness of these virtually insignificant sanctions in China. Even when cumulatively considered (various companies are repeat offenders), they can hardly come close to deterring the lucrative potential of the operations they de facto merely “tax”. A second crucial distinction is in the strength of the judicial review of the fining decisions. In Europe, it is almost standard to expect an appeal when a large penalty is imposed. In fact, Altice appealed the fine to the General Court, and lost.\textsuperscript{94} Appeals of administrative acts remain a rarity in China. This might be logical in the context of the small fines attached to gun-jumping violations, but is more difficult to comprehend when more substantial penalties are at stake.

The above issues suggest that the SAMR’s gun-jumping strategy may serve a twofold purpose. First, it sends a strong message about the tenacity of the AMEAs when it comes to pursuing violations of the law. The bottom line is that there is no breach too small or too old to be pursued. Second, it contributes to a “strategic public shaming” of the companies under investigation, a tactic that has been common in China.\textsuperscript{95} Penalties amount to negative publicity, and contribute toward tarnishing the reputation of the businesses on the receiving end. The media is seen as playing a crucial role in the implementation of naming-and-shaming plans.\textsuperscript{96} Going by the public outcry generated around Big Tech companies in China, the strategy appears to be highly successful.

\section*{IV. Tech Crackdown’s Shaping of Antitrust Law and Policy}

The abrupt invigoration of antitrust enforcement fueled, at least in part, by China’s crackdown on tech giants looks set to leave a lasting legacy on competition law and policy. The swift action taken by the AMEAs with regard to specific breaches and potential threats to competition\textsuperscript{97} has been accompanied by both individual and general policy guidance. Moreover, the reform of the AML that had been on the cards since 2019 is expected to be adopted soon. The main pillars of the changes, the draft of which was published in Oct. 2021, demonstrate a reflection on the shortcomings of the law as evidenced by more than a decade of enforcement. The recent developments affecting the platform economy have undoubtedly acted as a driver for the limited but effective amendments, and there is a manifest attempt to adapt the law to the new reality. The impact of the assault on Big Tech on Chinese antitrust law and policy constitutes the focus of this section.

\textsuperscript{92} European Commission, Decision of Apr. 24, 2014 [Case M.7993 Altice/PT Portugal].

\textsuperscript{93} Council Regulation (EC) No. 139/2004 of Jan. 20, 2004 on the Control of Concentrations between Merger Undertakings (2004) OJ L24/1 (EUMR), art. 14(2).

\textsuperscript{94} Case T-425/18 Altice Europe v. European Commission ECLI:EU:T:2021:607.

\textsuperscript{95} ANGELA HUYUE ZHANG, CHINESE ANTI TRUST EXCEPTIONALISM 95–105 (2021). See also Yawen Chen and Peter Sweeney, "Nationalist Flame Wars will Singe China Inc," \textit{Reuters}, July 14, 2021, https://www.reuters.com/breakingviews/nationalist-flame-wars-will-singe-china-inc-2021-07-14/ (claiming that “pressure on Didi is being reinforced by angry Chinese nationalists. They’re deleting the ride-hailing app over accusations the company handed data to the U.S. government.”)

\textsuperscript{96} ZHANG, supra note 95, at 95–105.

\textsuperscript{97} See \textit{supra} Sections II and III.
A. Ad Hoc Policymaking in Individual Decisions

Specific manifestations of the “policy spillover” of energized enforcement, as Zhang calls this phenomenon,\(^\text{98}\) can be found in the rectification plans imposed on Alibaba or Meituan as a consequence of their abusive conduct,\(^\text{99}\) or the commitments slapped on Tencent for the (allegedly harmful) purchase of China Music Group.\(^\text{100}\) These are not binding, but the companies have vowed to comply,\(^\text{101}\) and they provide an accurate reflection of the SAMR’s action plan going forward.

It is at best questionable that the remedies imposed have the power to restore competition in the market. Moreover, at times they appear to go beyond restorative purposes, and do not directly address the issues identified in the investigations. This is the case, for instance, with the obligation imposed on Tencent to report mergers below the legal thresholds, which would hardly fix the anticompetitive effects stemming from the Tencent/China Music Group deal.\(^\text{102}\) Zhang interprets these requests as an attempt on the part of the agency to “leverage its antitrust functions to enhance its authority in other areas of market regulation” over which it has competence to act.\(^\text{103}\) More surprising—and questionable—is the effective spillover into labor rights, with the obligation imposed on Meituan to ameliorate riders’ working conditions.\(^\text{104}\) This is in stark comparison with the insistence of antitrust agencies in other parts of the world on limiting their assessment to competition-related matters.\(^\text{105}\) This in part reflects the different nature, scope, and independence of the AMEAs when compared to other competition agencies.\(^\text{106}\) It raises questions about excessive agency discretion, particularly given the scarcity of judicial review of administrative decisions that takes place in China.\(^\text{107}\)

B. The Platform Economy Guidelines

On Feb. 7, 2021, the SAMR published new Guidelines for the Platform Economy (“Platform Economy Guidelines”).\(^\text{108}\) Over six chapters, the Guidelines flesh out rules aimed at preventing monopolies, protecting fair competition, promoting innovation, and safeguarding the interests of consumers and the society in aspects specific to platforms.\(^\text{109}\) Unlike the punctual enforcement developments previously described, the Platform Economy Guidelines are thorough and comprehensive, and cover all areas of competition law.

\(^\text{98}\) Zhang, supra note 31, at 38.
\(^\text{99}\) See supra Section II.B.
\(^\text{100}\) See supra Section II.C.
\(^\text{101}\) See, e.g., A Letter to Our Customers and the Community, ALIBABA GROUP (Apr. 10, 2021), https://www.alizila.com/a-letter-to-our-customers-and-to-the-community/; Tracy Qu & Minghe Hu, China Fines Meituan Less-Than-Expected US$530 Million for Monopolistic Behavior, Ending Five-Month Antitrust Probe, SOUTH CHINA MORNING POST, Oct. 8, 2021, https://www.scmp.com/tech/big-tech/article/3151675/china-fines-meituan-less-expected-us530-million-monopolistic (quoting a statement from Meituan saying that they “accept the penalty with sincerity and are determined to ensure our compliance”).
\(^\text{102}\) Tencent/China Music Group decision, supra note 90.
\(^\text{103}\) Zhang, supra note 31, at 38.
\(^\text{104}\) Meituan administrative guidance, supra note 65. See supra Section II.B.
\(^\text{105}\) For instance, in the context of the data protection concerns spurred by the Facebook/WhatsApp merger, the European Commission pointed out that it considered data concentration “only to the extent that it is likely to strengthen Facebook’s position in the online advertising market or in any sub-segments thereof”, clarifying that data privacy concerns would be within the scope of EU data protection rules and outside its competence. See European Commission, Decision of Oct. 3, 2014 [Case M.7217 Facebook/WhatsApp] para. 164.
\(^\text{106}\) See, e.g., Zhang, supra note 95, at 87–89.
\(^\text{107}\) See infra Section V. See also See Marco Colino, supra note 30, at 225–229.
\(^\text{108}\) Anti-Monopoly Guidelines of the Anti-Monopoly Commission of the State Council on the Platform Economy (Platform Economy Guidelines) (国务院反垄断委员会关于平台经济领域的反垄断指南) (Feb. 7, 2021), http://gkml.samr.gov.cn/nsjg/flld/202102/t20210207_325967.html.
\(^\text{109}\) Platform Economy Guidelines, supra note 108, arts. 1 and 3.
Chapter II focuses on joint anticompetitive conduct ("monopoly agreements"),\footnote{110} caught by Articles 13–15 of the AML. According to the Platform Economy Guidelines, it is possible to fall within the scope of the law in the event that collaborative behavior restrictive of competition occurs through data, algorithms, and other platform rules, even if no agreement has technically been concluded. Platforms may also be considered to collude if they collect or exchange information relating to price, sales volume, or customers to coordinate their behavior, whether through algorithms or other means.\footnote{111} With regard to vertical price fixing, situations where technical means (such as platforms or algorithms) are used to coordinate prices or other trading conditions might be considered contraventions of the AML.\footnote{112} To determine whether vertical arrangements are unlawful, it is necessary to take into account market power, competition in the relevant market, barriers to entry, and impact on consumers and innovation.\footnote{113} There is also a reference to most-favored nation clauses ("MFNs"), whereby "a seller grants a buyer terms that are at least as favourable as those offered to any other buyer,"\footnote{114} which were present in the Tencent/China Music Group merger.\footnote{115} Depending on the circumstances, they may amount to either a monopoly agreement or an abuse of dominance.\footnote{116} The Platform Economy Guidelines further clarify that platforms should not be used by merchants to implement and coordinate hub-and-spoke arrangements by using algorithms or technical means to restrict competition.\footnote{117} Where direct evidence of collusion is hard to obtain, it may be possible to rely on consistent indirect evidence about synergies, and operators would bear the burden of proof to show that no collusion took place.\footnote{118} The Platform Economy Guidelines specifically mention that the general leniency rules would also apply to the platform economy.\footnote{119}

Abuse of dominance is covered extensively in Chapter III. There is reference to a myriad of factors to be taken into account when determining whether a dominant position exists in a digital market. The Platform Economy Guidelines specifically mention market shares and competition in the relevant market. Therefore, “generally speaking” enforcers will be expected to engage in relevant market definition.\footnote{120} The wording of the guidance however suggests that it is not a must, in line with the spirit of an earlier draft of the Platform Economy Guidelines containing a list of circumstances under which relevant market definition would not be required. To calculate market shares, the aspects to be considered include number of transactions, the volume of sales, the number of active users, clicks, and usage time, as well as the time length the market share has been held. With regard to the level of competition in the relevant market, it will be measured by comparing the market share of the operator with the number and market shares of competitors, considering the existence of economies of scale and potential competitors, and measuring the impact of innovation and technological changes in the market.\footnote{121}

\begin{footnotes}
\item[110] The definition of monopoly agreements in art 13 of the AML (supra note 17) as “agreements, decisions and other concerted conducts designed to eliminate or restrict competition” suggests the concept is highly similar to the conduct caught by art. 101 of the Treaty on the Functioning of the European Union (“TFEU”). Jessica Su has pointed to a terminology “mismatch”, since the behavior of small and medium-sized enterprises (“SMEs”) could, in principle, fall within the scope of arts. 13 and 14 (although there is an exemption). See Jessica Hua Su, Competiton Law and Policy in a Traditional China: Transplantation and Localisation, PhD Thesis, Queen Mary, University of London 135 (2008), https://core.ac.uk/download/pdf/30695742.pdf.
\item[111] Platform Economy Guidelines, supra note 108, art. 6.
\item[112] Id., art. 7.
\item[113] Id.
\item[114] Sandra Marco Colino, Competition Law of the EU and UK 230 (8th ed., Oxford University Press, 2019).
\item[115] Tencent/China Music Group decision, supra note 90.
\item[116] Platform Economy Guidelines, supra note 108, art. 7.
\item[117] Id., art. 8.
\item[118] Id., art. 9.
\item[119] Id., art. 10.
\item[120] Id., art. 11.
\item[121] Id.
\end{footnotes}
The platform’s ability to control upstream and downstream markets, as well as other related markets, will also be taken into account, as will the capacity of other operators to influence markets, price, or traffic, and to attain network effects. The degree of dependence on the platform, assessed mainly in terms of lock-in effects and switching costs, is also significant. Finally, the ease of market access for other operators will be assessed by considering the existence of entry barriers, level of investment required, and access to data.\footnote{122}

Important details are provided with regard to various types of abusive conduct. For each kind of abuse, the Platform Economy Guidelines highlight the aspects to be taken into account to determine whether the conduct is abusive, and list potential objective justification defenses that could be successfully invoked by the platforms. Unfair pricing, for instance, might happen either when an operator is selling at unfairly high prices or buying at unfairly low prices, but SAMR’s guidance suggests it will only be unlawful if anticompetitive effects are shown.\footnote{123} As for predatory pricing, it is unclear how low prices need to be to constitute predation, but some of the factors taken into account are exclusionary potential, and ability to raise prices and harm consumers after eliminating a competitor.\footnote{124} Costs will have to be calculated bearing in mind the peculiarities of multisided markets.\footnote{125} Like in Europe, although predation appears to be prima facie unlawful, there is room for objective justification. Potential successful defenses include the willingness to develop new services, facilitating the entry of new products into the market, attracting new users, or engaging in promotional activities.\footnote{126} Refusals to deal without justifiable reason are also covered. They encompass, for example, raising obstacles to transactions using algorithms and data, particularly if the operator controls an essential facility. Objective justification would include force majeure, safety concerns, or others’ noncompliance with fair, reasonable, and nondiscriminatory (FRAND) terms.\footnote{127}

Predictably, behavior designed to impose exclusivity, including “choose one from two” practices similar to those scrutinized in the Alibaba, Meituan, and Sherpa’s decisions, features prominently.\footnote{128} The Platform Economy Guidelines confirm that punitive measures such as those employed by the companies investigated in 2020 and 2021 (charging higher commission rates, withholding a deposit, limiting exposure) will be presumed to be unlawful, while exclusivity incentives (subsidies, discounts or rebates) will be against the law only if there is evidence of exclusionary intent.\footnote{129} Even though the recent administrative decisions paid little attention to objective justification, the Guidelines refer to the possibility of alleging, inter alia, that the conduct was necessary to protect the interests of consumers, intellectual property rights, or to maintain a business model.\footnote{130} Unreasonable trading conditions, such as requiring nonessential or irrelevant data, will be unlawful.\footnote{131} The same applies to bundling and tying, including situations where the purchase of certain commodities is forced on customers by means of threats to restrict their rights, traffic, or imposing other technical obstacles. It is possible for the companies to prove that their conduct is objectively justified, if for instance it responds to trading customs or aims to protect the interests of consumers or merchants. The application of different conditions to similar transactions, by relying on big data and algorithms, may also be abusive, and subject to objective justification.\footnote{132}
Chapter VI is dedicated to merger control, and contains some important clarifications. In the platform economy, the calculation of turnover will usually include income from selling goods and providing services. However, depending on the business model, different rules may apply.\(^{133}\) Operations capable of having an anticompetitive object or harmful effects may be scrutinized by the competition agencies even if the thresholds for notification have not been exceeded, and the merging parties can voluntarily decide to report such transactions.\(^{134}\) The factors to consider when analyzing the merger include market shares, control over the relevant market, level of market concentration, and ease of market entry.\(^{135}\) Among the remedies that may be acceptable are the divestiture of tangible assets or intellectual property rights, as well as behavioral remedies such as committing to opening up networks, sharing data, and licensing key technologies.\(^{136}\)

### C. Specific Guidance for “Super-Platforms”

In addition to the general Platform Economy Guidelines, in Oct. 2021, the SAMR published draft Guidelines for the Classification of Platforms (“Draft Classification Guidelines”), and draft Guidelines on the Responsibilities of Internet Platforms (“Draft Responsibilities Guidelines”).\(^{137}\)

The Draft Classification Guidelines implement a categorization of platforms based on number of users, businesses offered, market valuation, and ability to affect sellers’ ability to reach their consumers.\(^{138}\) On the basis of this classification system, “super-platforms,” subject to the special obligations detailed in the Draft Responsibilities Guidelines, are identified. They are defined according to three criteria: (1) they must exceed five hundred million users; (2) they should be active in at least two business categories from a list that includes sales platforms, life services platforms, social entertainment, information, and financial services; and (3) they ought to have a market value of at least RMB 100 billion in the previous year, and a strong ability to restrict merchant’s ability to reach consumers. The system envisaged in the draft guidance evokes the legislative proposals for digital gatekeepers in the European Union, in particular the Digital Markets Act (“DMA”).\(^{139}\) In Europe, gatekeepers are defined by whether they offer a “core platform service,” relying on a similar rationale to that of the business categories requirement of the Draft Classification Guidelines.\(^{140}\) They should additionally count with more than forty-five million monthly active users “established or located in the [EU],” and more than ten thousand annual active business users in the previous financial year.\(^{141}\) To be caught by the DMA, the platforms should also exceed the European Economic Area (“EEA”) turnover thresholds established in the law.\(^{142}\)

The obligations imposed by the Draft Responsibilities Guidelines on super-platforms are extensive, and also comparable to those of the DMA. However, as Zhang has pointed out, the SAMR’s guidance appears to go even further, since it requires super-platforms to “ensure interoperability and strong data protection, improve self-governance, conduct annual risk assessment, and above all, invest in CORE INNOVATION and help SMEs!”\(^{143}\) It is evident, therefore, that the guidance stretches beyond antitrust obligations.

133. Id., art. 18.
134. Id., art. 19.
135. Id., art. 20.
136. Id., art. 21.
137. SAMR, Guidelines for the Classification of Internet Platforms (Draft for Comments) (“Draft Classification Guidelines”) (互联网平台分类分级指南 (征求意见稿)), and Guidelines on the Responsibilities of Internet Platforms (Draft for Comments) (“Draft Responsibilities Guidelines”) (互联网平台落实主体责任指南(征求意见稿)) (Oct. 29, 2021), http://www.samr.gov.cn/hd/zjdc/202110/t20211027_336137.html.
138. Draft Classification Guidelines, supra note 137.
139. Digital Markets Act, supra note 2.
140. Id., art. 2(2).
141. Id., art. 3(2)(b).
142. Id., art. 3(2)(a).
143. Angela Zhang (@AngelaZhangHK), Twitter (Oct. 30, 2021), https://twitter.com/AngelaZhangHK/status/1454350040432922626?s=20&True=TPrH2AoFjzLEsXyQ87ScGw.
To begin with, super-platforms should refrain from using their operators’ data without valid reason, clearly thinking of some of the data misuse allegations of the cases against Alibaba and Meituan. In the European Commission’s ongoing Amazon Marketplace investigation, Amazon’s use of its merchants’ data to its own advantage is one of the issues under scrutiny. Super-platforms are further precluded from forcing users to resort to associated services as a precondition for using their platforms, and should avoid self-preferencing (à la Google Shopping). The Draft Responsibilities Guidelines oblige them to promote the interoperability of their services with those of other platforms, offer data security guarantees, implement compliance mechanisms, and conduct risk assessments to see how likely it is that illegal content may be shared on their platform or consumer interests may be harmed. They should be subject to independent audit, and use their privileged resources to promote innovation. They are also required to implement measures to prevent crime and illegal activity on their platform.

Specific guidance relating to mergers is also found in the Draft Responsibilities Guidelines, including a reminder to notify mergers that exceed the relevant thresholds (a clear reference to the gun-jumping fining extravaganza of 2021). There appears to be an allusion to the (non-AML) case against Vipshop in Article 17 of the guidance, which refers to using technical means to engage in unfair competition by, for instance, influencing consumer choice. In response to public concerns about platforms’ misuse of their private information, further data protection is also warranted in the Draft Responsibilities Guidelines. Super-platforms should not combine the data provided by their users with additional data about them obtained via third parties, and should not compel customers to log in with a view to collecting their data. Big Data processing must be done according to the law, and based on fairness and transparency principles, without infringing the fundamental rights of citizens. The use of data or algorithms to implement price discrimination and breach price-related laws is also condemned. Super-platforms are further obliged to take measures against data theft and guarantee data security.

The Draft Responsibilities Guidelines remind super-platforms that they must comply with, inter alia, advertising laws, intellectual property law, or employment law, and insist on the need to

144. Draft Responsibilities Guidelines, supra note 137, art. 1.
145. European Commission Press Release IP/20/2077 (Nov. 10, 2020), https://ec.europa.eu/commission/presscorner/detail/en/ip_20_2077.
146. Draft Responsibilities Guidelines, supra note 137, art. 1.
147. Id., art. 2.
148. European Commission, Decision of June 6, 2017 [Case AT.39740 Google Shopping].
149. Draft Responsibilities Guidelines, supra note 137, art. 3.
150. Id., art. 4.
151. Id., art. 5.
152. Id., arts. 6 and 7.
153. Id., art. 8.
154. Id., art. 9.
155. Id., arts. 10–14.
156. Id., art. 16.
157. See supra Section II.B.
158. Draft Responsibilities Guidelines, supra note 137, art. 17.
159. Id., art. 18.
160. Id., art. 19.
161. Id., art. 20.
162. Id., arts. 25–27.
163. Id., art. 21.
164. Id., art. 22.
165. Id., art. 23.
166. Id., art. 24.
167. Id., art. 25.
168. Id., art. 26.
169. Id., art. 27.
170. Id., art. 28.
171. Id., art. 29.
172. Id., art. 30.
comply with environmental\footnote{166} and tax responsibilities,\footnote{167} to cooperate with law enforcement,\footnote{168} to guarantee the protection of minors,\footnote{169} and to implement any measures necessary to fulfill their legal obligations.\footnote{170} In particular, they should strive to nip in the bud any illegal activity that takes place on its platform.\footnote{171} They should not deceive or mislead consumers,\footnote{172} and must refrain from using their position to implement unreasonable trading conditions on operators.\footnote{173}

**D. The (Platform Economy-Shaped?) Reform of the AML**

In Oct. 2021, 13 years after the entry into force of the AML, a draft for reform of the law was put forward to the Standing Committee of the National People’s Congress.\footnote{174} At the time of writing, it had yet to be formally adopted. While it was originally envisaged to encompass small modifications, and indeed the number of aspects affected by the changes is limited, the end result has been described as a “major revision” in terms of impact.\footnote{175} Not all the modifications stem from the recent Big Tech crackdown, but it is evident to anyone familiar with the developments that, when crafting several of the changes, the issues relating to the digital world were in the mind of the legislator.

There are two direct references to the platform economy. The first is the inclusion of a provision stating that undertakings ought to refrain from eliminating or restricting competition by using data, algorithms, technology, or platforms. There appears to be no requirement that a dominant position is held for the application of this new paragraph of the AML, which could enable the AMEs to successfully pursue the conduct it was previously only able to target using the Price Law or the AUCL, thus potentially imposing more substantial penalties.\footnote{176} In addition, it provides a way around the strict principles applied by the SPC for a finding of dominance in \textit{Qihoo 360 v. Tencent}.\footnote{177} The second reference is the addition of a new type of abuse, “where a dominant undertaking creates obstacles by using data, algorithms, techniques and platform rules and imposes unreasonable restrictions.”\footnote{178}

Some of the other changes, although not directly directed at the platform economy, will bear an impact on the shortcomings exposed by the recent crackdown. For instance, the penalties that may be imposed for merging before the transaction has been multiplied by ten, and will now be of up to RMB 5 million, or around USD 780,000. In general, fines look set to be increased, and individual penalties will also be applicable. Moreover, in the event that an unapproved merger is found to actually or potentially restrict competition, fines may be up to 10 percent of the relevant companies’ turnover in the preceding year, thus bringing them in line with the gun-jumping penalties available in the European Union. Also, mergers falling below the notification thresholds might be subject to scrutiny if the competition agencies have concerns, and remedies may be imposed if anticompetitive effects are identified. This was already the case before the reform, but it was not covered in the AML.

\begin{itemize}
  \item \textit{Id.}, art. 32.
  \item \textit{Id.}, art. 33.
  \item \textit{Id.}, art. 34.
  \item \textit{Id.}, art. 31.
  \item \textit{Id.}, art. 35.
  \item \textit{Id.}, art. 24.
  \item \textit{Id.}, art. 28.
  \item \textit{Id.}, art. 29.
  \item National People's Congress of the people's Republic of China, Draft Amendment to the Anti-Monopoly Law (Oct. 25, 2021), http://www.npc.gov.cn/flcaw/flca/ff8081817ca258e9017ca5fa67290806/attachment.pdf.
  \item Emch, \textit{supra} note 20.
  \item See \textit{supra} Section II.A and B.
  \item \textit{Qihoo 360 v. Tencent}, \textit{supra} note 48.
  \item François Renard et al., \textit{Proposed Amendments to the Anti-Monopoly Law: China Further Confirms Its Intention to Strengthen Its Antitrust Rules}, \textit{Allen & Overy} (Nov. 23, 2021), https://www.allenovery.com/en-gb/global/news-and-insights/publications/proposed-amendments-to-the-anti-monopoly-law-china-further-confirms-its-intention-to-strengthen-its-antitrust-rules.}
\end{itemize}
E. Institutional Reform: The Bigger the Better?

On Nov. 18, 2021, the national Anti-Monopoly Bureau was formally established, elevating the SAMR’s antitrust branch “to the deputy ministerial-level” and increasing its workforce. This important institutional change builds on previous expansions of the SAMR’s peoplepower and budget. Providing competition authorities with adequate resources is certainly a crucial step toward enhanced enforcement, and is a welcome consequence of phases of intense agency activity such as the one this article focuses on. At the same time, increasing the muscle of enforcers that are barely subject to checks and balances could lay down the ground for erratic, capricious policymaking in the future. This is further discussed in the next section.

V. A Holistic View of Antitrust’s Incursion into China’s Platforms

The specific developments affecting China’s platform economy since the end of 2020 are fascinating in their own right, and the global attention they invariably gather is a testament to their relevance. Nonetheless, as Aristotle once said, “the whole is something besides its parts.” As a tumultuous year for China’s tech giants draws to a close, it is worth taking a step back and looking at the bigger picture, so as to assess the merits of the resulting antitrust law and policy landscape.

Steven Johnson once described Big Tech as “the single most influential concentration of new wealth and information networks in the history of humankind.” If Chinese antitrust is anything to go by, the impact of tech giants is undoubtedly colossal. Notwithstanding possible ulterior motives, the fears and apprehensions ignited by their power and questionable behavior have led antitrust enforcement agencies to adopt largely solid, well-reasoned decisions that are fundamentally consistent with the principles of jurisdictions with more antitrust experience. To have achieved this level of expertise and proficiency in just over ten years is certainly remarkable.

There is also little doubt that the Big Tech crackdown has been swift and effective, and tech giants are reeling from the whirlwind of enforcement activity. It is hard to contest that the conduct addressed in the Alibaba and Meituan investigations is bound to have generated exclusionary effects, making it difficult for competitors to offer a viable alternative, or to even enter the market. Moreover, discouraging tech giants from going on “shopping sprees” by adequately scrutinizing their acquisitions could help contain the destructive effects such takeovers have been shown to bear. Equally significant are the efforts to build a system that might actually prevent anticompetitive conduct through a comprehensive policymaking exercise. In Europe, it took two years to adopt the DMA. The SAMR, on its part, has managed to implement similar rules for platforms, arguably with even more far-reaching consequences, in just a few months. While the former will be binding and the latter are not,
the fact that the AMEAs tend to have the final say over the investigations they conduct implies that the guidance is as good as set in stone. The timing of the AML reform has also been optimal to adapt the law to the Digital Era.

The progress made does however generate new risks that require careful consideration. The AMEAs have been able to get so much done in so little time partly as a consequence of the de facto absence of judicial review of administrative decisions, and the limited rights of defense the parties appear to have exercised. The little attention paid in recent investigations to potential justifications of the harmful conduct further enhances the perils concomitant to the lack of accountability. While the law does allow for appeals, these remain rare, and when they do happen, the courts have been criticized for being too quick to side with the agencies.\textsuperscript{187} One could intuitively think that invigorated enforcement could change this trend—the more penalties, the more chances of appeals—and ultimately end up propelling judicial review. However, seeing that all the companies recently punished have expressly accepted their fate, the outlook is not very promising. Perhaps once the proposed reform of the AML is effective, and sanctions can be imposed on natural persons as well as companies, the trend may be progressively reversed, since individuals may be less prone to accepting punishment without putting up a fight.

Paradoxically, in jurisdictions where judicial review is robust, the detrimental impact of lengthy court proceedings has been emphasized, particularly in “rapidly growing digital markets where a fast reaction is needed to avoid potential damage.”\textsuperscript{188} Nonetheless, the advantages of swift resolutions have to be offset against the risks of unrestrained arbitrariness.\textsuperscript{189} In China, the issue is further enhanced by the recent growth of the agencies\textsuperscript{190} and the greater powers conferred on them by the revised AML.\textsuperscript{191} Their decisional practice shows that they sometimes struggle to stay within the boundaries of antitrust, and attempt to influence other policy areas. Unfortunately however, judicial review is not a panacea, and the case law of the Chinese courts appears to suggest that the judges have, at times, struggled to grasp the complexity of antitrust analysis.

In light of the above issues, various substantive and procedural options could be considered in order to ensure the effectiveness and endurance of the ongoing law and policy reform. Two possibilities, in particular, could be considered. The first relates to remedies. Thus far, their use of remedies appears to have been somewhat out of line with the specific problems discovered in their investigations. The restorative value of some of the obligations imposed is questionable, and others are not designed to tackle competition-related concerns. In this sense, the AMEAs ought to use their enhanced powers to impose remedies that might actually \textit{restore} competition in digital markets.\textsuperscript{192} Proposals worth exploring include obligations to share data, guarantee interoperability with rivals, structural remedies for mergers (possibly even “unscrewing the eggs” and undoing a detrimental concentration)\textsuperscript{193}, and perhaps even temporary shutdowns of infringing platforms.\textsuperscript{194} If agencies are to take such drastic measures, the need for checks and balances becomes even more crucial.

\textsuperscript{187} Jungyan Ma, \textit{Competition Law in China} 222 (2020).
\textsuperscript{188} Special Report, \textit{The Commission’s EU Merger Control and Antitrust Proceedings: A Need to Scale Up Market Oversight}, \textit{European Court of Auditors} (2020), para 97. See also Jason Furman et al., \textit{Unlocking Digital Competition: Report of the Digital Competition Expert Panel} (Mar. 2019) (Furman Report), para 3.134, https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/785547/unlocking_digital_competition_furman_review_web.pdf.
\textsuperscript{189} Pablo Ibáñez Colomo, \textit{Case T-286/09 RENV. Intel v Commission, or the Sign of an Effective Competition Law System}, \textit{Chilling Competition Blog} (Jan. 28, 2022), https://chillingcompetition.com/2022/01/28/case-t%20%28%29%91286-09-renv-intel-v-commission-or-the-sign-of-an-effective-competition-law-system/.
\textsuperscript{190} See supra Section IV.E.
\textsuperscript{191} See supra Section IV.D.
\textsuperscript{192} See Gal & Petit, supra note 61, and Geradin & Kefidis, supra note 52.
\textsuperscript{193} Kwoka & Valletti, supra note 77.
\textsuperscript{194} Gal & Petit, supra note 61.
The second possibility would be the creation of a specialized antitrust tribunal (like the Hong Kong Competition Tribunal or the U.K. Competition Appeals Tribunal) to ensure judges are equipped to handle the technical aspects of antitrust cases. China is no stranger to specialized courts. In recent years, specialized courts have featured prominently in China’s “judicial reform agenda”, with beneficial results. A tribunal devoted to competition law enforcement could help ensure judges are properly trained and equipped to handle the technical aspects of antitrust cases. Moreover, the existence of a court of this nature could also pave the way for enhanced judicial review of the AMEAs’ decisions and policymaking, since it could possibly facilitate appeals. While it might take a lot more than that to invigorate judicial review, it seems like a step in the right direction, particularly if the recent revitalization of enforcement is not a temporary trend.

V. Conclusion
In 2020, the fate of China’s tech giants changed dramatically. The war declared on the disorderly expansion of capital saw the system that once protected Big Tech launch a virulent attack against these companies’ attempts to preserve their market omnipotence. Initially, intervention would seem to have been decided on an ad hoc basis, based on a “throw-everything-at-them” approach rather than a mediated strategy. Yet, in a matter of months, policymaking had been streamlined, with effective results. If the changes announced to the legal framework are eventually confirmed, the AMEAs will soon be in possession of the resources and the powers to prevent and/or solve many of the competition problems associated with digital platforms. To reap the potential benefits of this enhanced legal framework, competition agencies must strive not only to punish but also to fix, and the system must be prepared to thwart the risk of arbitrary decision-making. A competition tribunal could lead to an incrementation in the judges’ antitrust expertise, and contribute toward incentivizing or at least facilitating appeals of administrative acts.

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195. Mark Jia, Specialized Courts, Global China, 62 VA J INT LAW (forthcoming, 2022).