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Legal Practices and Development Direction for Anti-Monopoly Supervision of Data in China

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I. The Current Status of Data-related Monopoly Supervision in China

Data has become one of the most important factors of production in the development of the digital economy. In short, the accumulation of data helps market entities gain competitive advantages and market power. It therefore seems clear a key parameter of competition between platform companies lies in data. For platform enterprises, data is a key element in determining whether they can gain competitive advantages. New technologies, new industries, and new markets continue to emerge with the development of the digital economy. As a result, the collection, use, trading, and sharing of data have become ubiquitous behaviors. At the same time, data-related competitive behavior has gradually attracted greater attention from competition enforcement agencies around the world. Indeed, while the concept of a "data monopoly" in the context of the digital economy has not reached a unanimous viewpoint either in theory or practice, many countries have responded to data-related competition with concrete supervisory actions. As the second-largest economy in the world, the Chinese government has also strengthened its supervision of data monopolies and has formulated a series of laws and regulations to supervise data-related.

China first proposed the concept of a "data monopoly" in the wake of the alleged infringement of consumer rights by fintech companies such as Ant Group. Guo Shuqing, the chairman of the China Banking and Insurance Regulatory Commission said at the Singapore Fintech Festival of 2020 that "we would promote fair competition, and the fintech industry is characterized by a 'winner-takes-all market', where large tech companies use their data monopoly to disrupt fair competition in the market and reap exceptional returns." In contemporary society, digitalization is becoming a significant factor in restructuring the allocation of resources, reshaping industrial development, changing the competitive landscape, and allowing new forms of industry to emerge. Data-related monopolies are gradually emerging across various industries, starting with fintech. As far as the development of the digital industry is concerned, the key lies in the simultaneous enhancement of sharing capabilities and governance capacity. In turn, the key to ensuring fair competition lies in the adoption of effective means to regulate highly data-concentrated markets.

On March 20, 2020, the Chinese government stated in its ***Opinions of the CPC Central Committee and the State Council on Improving the Systems and Mechanisms for Market-based Allocation of Factors of Production*** that it would accelerate the cultivation of the data market as an important part of improving market-based allocation of resources. It noted that it would promote the effective circulation of data, enhance the value of its use, as well as strengthening data protection and setting up data governance mechanisms. For the digital market to develop in an orderly manner, it is necessary to effectively regulate certain behaviors by digital market operators that restrict competition and alter the competitive order. ***The Anti-Monopoly Law***, ***Guidelines of the Anti-monopoly Commission of the State Council for Anti-monopoly in the Field of Platform Economy (2021)*** (the **"Guidelines"**), and ***the Provisions on Prohibiting Monopoly Agreements***, enacted by the Chinese legislature, prohibit to varying degrees the use of data by operators to the extent they engage in monopolistic behaviors. But these rules do not specify the criteria for identifying individual acts of data monopolization. In practice, due to the special nature of the forms of monopolistic behavior relating to data, traditional means of antitrust

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supervision and evaluation criteria such as market definition may not be directly applicable.

II. Governance and Standards Relating to Data in China

The question of whether data constitutes an "essential facility" is controversial. In practice, however, data-related monopolies have become a key target for Chinese anti-monopoly enforcement authorities, and there are jurisprudential and legal foundations in China's anti-monopoly law enforcement system for this focus. In terms of the legal objective, since the multi-purpose Anti-Monopoly Law is designed to balance both economic and non-economic objectives, it is possible to adapt the existing law to these new complex issues. As the most important antitrust law in China, the *Anti-Monopoly Law* is the basic guideline for regulating and governing data-related monopolistic behaviors. Article 9 of China's Anti-Monopoly Law provides that "[a]n undertaking shall not engage in monopolistic conduct prohibited by this Law via data, or an algorithm, technology or capital advantage, or platform rule, among others." In addition, Article 22 of the Anti-Monopoly Law states that "[a]n undertaking with a dominant market position shall not engage in the acts of abusing the dominant market position specified in the preceding paragraph via data or an algorithm, technology or capital advantage, or platform rules, among others." The addition of data-related monopolization to the Anti-monopoly Law provides clearer guidelines for formulating and improving supporting laws and regulations.

The enactment and revision of supporting laws and regulations also plays a complementary role in improving China's anti-monopoly enforcement, enabling China's Antitrust authorities to have a more robust legal basis for dealing with data monopolization and carrying out timely and effective supervision. In fact, prior to the revised Anti-monopoly Law, the Chinese legislature had imposed restrictions on an e-commerce businesses with dominant market positions due to their technological advantages, their number of users, their control of a relevant industry, and other factors (see Articles 22 and 35 of the *E-Commerce Law* enacted in 2019).

In the same year, Parts II, IV, and V of the *Guiding Opinions on Promoting the Healthy Development of the Platform Economy* (2019) and Chapters II, III, and IV of the "Guidelines" issued in 2021 provided relatively detailed provisions on monopoly agreements, abuse of dominant market position, and operator concentration in the new context. These provisions have expanded the field of platform competition regulation for digital governance and represent the backbone of China's regulation of data-related monopolistic behaviors. However, the enforcement framework of these laws and regulations is still based on the traditional concepts of "monopoly agreement," "dominant position," "concentration of operators," and so on.

In March 2022, the *Opinions of the CPC Central Committee and the State Council on Accelerating the Construction of a Unified National Market* (2022) emphasized "Focusing on increasing anti-monopoly efforts." It further stated that "[w]e will improve legal rules for identifying monopolies and a category-and-class-based system for antitrust review of concentrations between undertakings. We will address issues such as platform enterprises' monopoly of data to avoid eliminating and restricting competition by data, algorithms, technology, and other measures." In addition, the rules regarding data-related monopolies included legal provisions on the rights of the individual and property interests, such as Article 127 of the *Civil Code*, Article 45 of the *Personal Information Protection Law* and Article 51 of the *Data Security Law*. Although these provisions are also relevant to the application of the competition rules, they have a weak directionality and are yet to be harmonized in terms of their application.

The Chinese government has recognized that, in the context of developing the digital economy, undertakings with data advantages such as digital platform enterprises are more likely to engage in behaviors that may eliminate or restrict competition. Therefore, Chinese authorities have focused on these enterprises, and while the Anti-Monopoly Law and other economic laws and regulations have expanded the scope of the rules relevant to data-related monopoly behaviors, they have also regulated

these behaviors through non-economic laws and regulations. With the establishment of these laws and regulations, Chinese regulatory authorities have gradually started to step up their enforcement activity.

III. Data-related Anti-Monopoly Supervisory Practices in China's Digital Economy

The Organization for Economic Co-operation and Development ("OECD") maintains that data-driven markets are more concentrated than others, and more susceptible to being monopolized.[2] In September 2020 the inspection team of the National People's Congress Standing Committee noted that in recent years, Alibaba group, Tencent, and other digital enterprises frequently carried out mergers and acquisitions of innovative small and medium-sized enterprises, which did not reach the notification thresholds prescribed by the State Council, and were therefore not subject to the supervision of anti-monopoly law enforcement agencies. Many scholars argue that these concentrations have produced a monopolistic effect by restricting competition and inhibiting innovation.[3] Internet enterprises, especially digital platforms, have become therefore emerged as a key target in China's data-related antitrust enforcement practice.

In fact, China has many digital platform enterprises, with the overall value of the industry exceeding 50 trillion Yuan as of 2022. It also accounts for 27 percent of China's employment. Some scholars assert that most of the major obstacles to the development of the data industry have been removed in China, and the cost of data collection has been significantly reduced, especially with the development of Internet technology and the improvement of computing power, all of which have greatly facilitated exploitation of the value of data. Improper use of data, however, not only poses a risk to consumer rights, but also jeopardizes

social governance and national security. The risk of data-related monopolization posed by digital platforms has already been noted as the digital economy has evolved, and Chinese market regulatory authorities are under unprecedented pressure to regulate data-related monopolies.

Before the addition of data-related aspects to China's Antitrust Law and regulations, data-related mergers and acquisitions had already attracted widespread attention in China. In the case of the DiDi-Uber merger, Uber (China) sold its China business to Didi Chuxing ("DiDi") for US$35 billion. The takeover solidified Didi's market dominance, leading it to having access to 15 million drivers and 300 million registered users. This prompted an investigation by the Chinese Ministry of Commerce that ultimately failed to find Didi in violation of any regulations, as the acquisition did not meet the relevant market turnover standards under China's existing antitrust laws. Many scholars argue that the merger potentially raised established data barriers, the abuse of data advantages, and other behaviors that could have the effect of excluding or restricting competition.[4,5]

The crux of the matter for solving problems related to data-related monopolies lies in the existence or non-existence of a "data monopoly" as a concept. In China's laws and regulations, the world "data monopoly" is seldom explicitly mentioned, but rather expressed in terms of the "use" of a data monopoly advantage, or the existence of a "data advantage," and so on. On the one hand, since the theoretical framework for analyzing data markets has not been fully established, there is a great deal of controversy surrounding the notion of a "data monopoly" at a theoretical level, with some scholars arguing that data itself is non-competitive, instantaneous and possesses other characteristics that are not sufficient to determine the existence of a monopoly. On the other hand, data is hard to consider as an essential facility, as it us unclear

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[2] OECD, Data-Driven Innovation, *supra* note 3, at 7; see also EVANS, PLATFORM ECONOMICS, *supra* note 7, at at 14–15, 276.

[3] http://www.npc.gov.cn/npc/c1773/c1849/c6680/fbzdjzfzfjc/fbzdjzfzfjc009/202101/t20210107_309460.html.

[4] Wang Y. C., "Data Legal Person: The Governance Path of Super Platform Data Monopoly" (2022)06 *Journal of National Prosecutors College* 145-159.

[5] SUN H. T., ZHOU Q. Q., "The Governance Dilemma of Platform Data Monopoly and the Shared Mechanism" (2023)03 *Jiangsu Social Sciences* 131-139.

whether data represent an impenetrable barrier to entry.

It is precisely because of these characteristics that the supervisory model for monopolistic behavior involving data must be different from traditional regulation. Some scholars believe that a data monopolist enjoys a competitive advantage through the volume of data they handle and technological advantages they may possess. As to platform operators being "monopolies," the key question is whether platform operators have collected a large amount of data, far exceeding that of ordinary operators and therefore might be able to eliminate or restrict competition. However, the main questions are whether data itself is exclusive and cannot be used by other operators, whether data itself is sufficient to constitute a market-dominant force that restricts competition, and whether one can understand data in. In theory, the scale of the data held by a given company does not in and of itself give rise to a dominant market position, and it is necessary to examine the market power of operators based on their data advantages over multiple dimensions, such as the value, type, and validity of data.

In China's regulatory practice, it is true that platform operators use a large amount of concentrated data to gain a dominant position in the market, and it is indeed an observable phenomenon that operators track users' preferences and daily lives in real time by providing them with free basic services. Treating users' personal data as a key input variable, adjusting and optimizing their services in a timely manner, and providing a basis for merchants to place online targeted advertisements based on users' consumption portraits, have been further steps in achieving digital industrialization. This has become the main profit model and a competitive advantage for many digital platforms. These phenomena are particularly evident in the series of cases handled by China's Anti-monopoly authorities, which have dealt with cases of abuse of dominant market positions. One such case occurred when the Alibaba group forced platform-based operators to make the company their exclusive online distributor or be delisted from its platforms (choose "one out of two"),

while a number of cases of unlawful concentration of business operators have also been dealt with by the regulators. The situation is particularly evident in the number of cases in which operators are accused of illegal concentration in the platform sector.

In addition to Chinese authorities regulating and supervising the competitive behavior of platform operators, China's antitrust regulators also focus on industry-specific regulators to supervise the platform economy, such as the Cyberspace Administration of China, Ministry of Industry and Information Technology, Ministry of Transport, and other departments, which have authority over various characteristics of the industry's operation, safety risks, and quality of services for the purposes of promoting standardized, orderly, innovative, and sound development of the platform economy while safeguarding consumers' welfare and public interests. As part of China's anti-monopoly regulatory practice, China's legislature will continuously strengthen and improve regulations based on the development status and characteristics of the platform economy, and enhance the pertinence and scientific rigor of anti-monopoly law enforcement.

III. Practical Challenges in China's Data-Related Anti-Monopoly Supervision

(a) Difficulty in Effectively Regulating Data-related Monopoly Behaviors by Traditional Standards

Under the traditional anti-monopoly supervision model, for example, the standard for assessing market shares in relevant markets based on the volume of trading seems not to be feasible in the digital economy. Concerning the *DiDi-Uber* merger, it is not difficult to see that under China's current Anti-Monopoly law it is difficult to prevent digital platforms in possession of massive amounts of data from engaging in monopolistic behavior. For example, in terms of market definition and abuse of dominant market position, the Hypothetical Monopolist Test ("HMT") is a generally applicable analytical method that defines the relevant market. In practice, it is assumed that the HMT can be conducted through methods such as the Small

but Significant and Non-transitory Increase in Price ("SSNIP") or Small but Significant and Non-transitory Decrease in Quality ("SSNDQ") tests. However, in judicial practice, market share in the platform economy is a relatively crude and potentially misleading indicator for evaluating a dominant market position. Its position and role in determining dominant market position must be evaluated based on the circumstances of specific cases.

Although the *Guidelines of the Anti-monopoly Commission of the State Council for Anti-monopoly in the Field of Platform Economy* and *the Provisions on the Examination of Concentrations of Undertakings* take into account the impact of the standards for declaration, proactive investigation, and remedies of concentration of undertakings on the characteristics of the platform economy, and affirm the role of data in the market competition, the data concentration of operators is still lacking in targeted provisions, and the specific evaluation criteria of data monopolies is not clear, which makes it difficult to effectively supervise the platform companies' monopolistic behavior. However, there is still a lack of targeted provisions on the issue of data concentration by operators, making it difficult to effectively restrict the concentration of undertakings of platform enterprises or enterprises with data as a core element that take advantage of data. The main reason why traditional anti-monopoly supervision methods are not compatible with data-related monopoly behaviors in the context of the development of the digital economy is that China's current standards are difficult to adapt to the exclusionary market competition effect brought about by the characteristics of data.

(b) Difficulty in Realizing the Purpose of Supervision by Traditional Supervisory Measures

China's Anti-monopoly institutions are still dominated by *ex post* measures such as administrative penalties, but some scholars believe that such penalties are insufficient to deter platform operators from engaging in anticompetitive conduct. For example, in the *Alibaba v. Meituan* case, China's anti-monopoly authorities imposed a fine of more than 20 billion

for "choose one from two"' monopoly behaviors. Yet the market capitalization of these two companies has not fallen, but risen; and the extent of the increase in their market capitalization is higher than the amount of the fines imposed by the anti-monopoly institutions. Therefore, it appears it is difficult to effectively regulate data-related monopoly behaviors by purely *ex post* means. In such circumstances, moderate *ex ante* supervision should be an important supplement, and eventually regulation should encompass a combination of *ex ante* and *ex post* measures. For example, the standards for notification of concentrations do not match the development of the digital economy, and the lack of standards for specific evaluation contents is also a key factor leading to the lack of *ex ante* supervision, while also being an important reason for the oligopolistic competition., This makes it difficult for other operators to enter the market. It is obvious that traditional supervisory means are powerless when it comes to monopoly regulation in new industries and markets.

(c) Combination of Industry Supervision and Market Regulation

China's supervision of data-related competition conduct not only involves the participation of market regulators, but also involves of intra-industry competition regulation. For example, since July 2021, the Ministry of Industry and Information Technology initiated the issue of platform inter-connectivity, which later also affected the Chinese market regulatory authorities' attention to the refusing to deal with the other transactional parties without any justifiable cause or self-preferential based on the data. For example, overlapping regulation also occurs in the online car-hailing industry. The Ministry of Transportation issued the "*Circular of the General Office of the Ministry of Transportation on Maintaining a Fair and Competitive Market Order and Accelerating the Conformity of Online Car-hailing*" in 2021 and the "*Work Plan to Reduce the Overcharging of Platform Enterprises for the Transportation Industry in 2023.*" These two regulations also refer to antitrust regulation when they systematically regulate the online car-hailing market. and the multi-departmental supervisor of data competition is also addressed in an

important policy document on promoting the development of the platform economy issued by the National Development and Reform Commission in January 2022, together with eight other ministries and commissions. All of this has led to the reality of multi-sectoral intervention and the resulting risk of regulatory overlap or even conflict.

(d) The Increasingly Complex Relationship Between Data and Market Competition

The role of data in market competition is becoming more and more important, and with the continuous advancement of algorithms, powerful computers and other technologies, data plays different roles in different market competition orders. For example, the emergence of technologies such as Generative Pre-trained Transformers ("GPTs"), which also involve massive data use, has enhanced the role of data in the emerging digital economy market. In view of the role played by data in different industries and technologies, it is necessary to formulate appropriate regulations to regulate the anti-competitive effects that may arise. With respect to generative artificial intelligence, the Chinese government has formulated *Interim Measures for the Administration of Generative Artificial Intelligence Services*, which is the world's first regulation on Generative Artificial Intelligence. It provides that "...it is prohibited to carry out monopoly or unfair competition by taking advantage of algorithms, data, and platforms." Generative Artificial Intelligence technology involves extremely high training costs, and the role of data in such emerging technologies is even more critical. As such, data-related monopoly behaviors could directly influence the development of new technologies, further justifying targeted intervention.

IV. China's Method of Data-related Monopoly Supervision

(a) Implementing Regularized, Precise, and Agile Regulatory Mechanisms

The Chinese government has repeatedly emphasized the regulation of the digital economy, raising the level of regulation and supporting platform companies to lead

development, create jobs, and better compete internationally. During the 2023 annual sessions of the National People's Congress ("NPC") and the National Committee of the Chinese People's Political Consultative Conference ("CPPCC") of the State Administration of Market Regulation ("SAMR"), Luo Wen, head of the State Administration for Market Regulation, stated in an interview that "we need to ensure clarity of rules and process for enforcement and inspections conducive to improve a business environment, and strengthen the regular supervision, especially in key areas such as the digital economy and livelihood protection, and strengthen agile supervision to help strengthen compliance management and provide assistance for enterprise development." Regular and agile supervision has become a regulatory measure adopted by China's anti-monopoly authorities to cope with the context of the digital economy development.

(b) Implementing Interdepartmental Comprehensive Supervision

As data has multiple attributes, the interests brought about by data-related monopoly behavior are not only harmed by the market competition order, but also by the governance of data involving user data, personal information, and even public safety and national security, which requires interdepartmental comprehensive supervision. For example, Data Security Law, Personal Information Protection Law and other laws and regulations also contain provisions on the use of data advantages and platform advantages to implement monopolistic behavior. At the same time, combined with the multiple attributes of data, multi-dimensional and multi-level regulation also helps to clarify the theoretical basis of data, and perfecting the theoretical basis of data is a prerequisite for clarifying how to regulate data monopoly behavior. Taking ownership as an example, in the latitude of right ownership as a benchmark, it includes at least three categories of private, social and national, and the liquidity value can involve private interest, social interest and national interest; data also has a variety of states, which not only includes personal data. Meanwhile, industrial or commercial data, social data and other diversified sources of data based on the subject and function, but also includes

the collection, processing and analysis of data, and other data related behaviors. As a result, in terms of the multiple attributes of data, such as property attributes, personal attributes, sovereignty attributes, and national security attributes are all reflected in the data.

(c) Strengthening Basic Infrastructure Facilities

In respect of the character of data, it can hardly constitute an element of monopoly, but monopoly behavior regarding data still requires stronger governance. In 2020, the Chinese government has explicitly stated that link anti-monopoly regulation to the regulation of data collection and use behaviors, especially in relation to innovations in the financial sector. The Chinese government's governance of data monopoly emphasizes more on governance at the source. The Chinese government has carried out exploratory regulation of collection, processing and analysis of data and other aspects, and the increased emphasis on governance at the source involving data-related monopoly behavior can be seen in the intensive introduction of laws such as the Cybersecurity Law, the Data Security Law, and the Personal Information Protection Law.

In 2023, the setting up of a national data bureau was proposed to advance the development of data-related fundamental institutions, and marked a new stage in data protection. In response to data-related monopolization, both source governance and multi-governance have been implemented, and the relationship between data and enterprises has been adjusted at the source to break the data-related monopoly. In addition, the Chinese government is also improving the data exchange market, data registration system, trading system and other infrastructures to strengthen data circulation and promote data sharing, because the development of data circulation can help to break the monopoly of data by digital platforms, especially for the market where data and holdings are the core competitive factors and data is used as a market barrier, sharing is important to promote competition and break monopoly. Sharing is important for promoting competition and breaking monopolies, especially in markets where data and holdings

are the core competitive elements and where data is a market barrier.

V. Summary

With the development of the digital economy, data-related monopoly conducts have attracted the attention of various countries, and data-centered digital platforms have been subjected to anti-monopoly investigation repeatedly, while how to regulate this issue is still controversial in academic circles. As data is the most important production factor in the digital economy, the regulation of monopoly behavior derived from it must comply with the basic development law and characteristics of digital industry. At present, China's main regulatory model is to regulate competitive behavior that may be brought about by the development of the digital economy on the premise of promoting its development and incentivizing development of the data industry under safe conditions. Regulatory efforts in countries around the world are more focused on the impact on the overall market than on the structure of specific behaviors, although there are differences in the regulation of monopoly standards. The same is true for the regulation of data-related monopolistic conduct.

Compared with China, the European Union has adopted a more cautious attitude and has formulated a more detailed rules to regulate related monopolistic behavior. The EU's General Data Protection Regulation ("GDPR") strengthens individuals' fundamental rights in the digital age and facilitates business by clarifying rules for companies and public bodies in the digital single market. The Digital Markets Act and the Digital Services Act provide more comprehensive and detailed regulations on data sharing, data transactions and the regulation of digital enterprises in the digital economy. The European Commission has designated Alphabet, Amazon, Apple, ByteDance, and six other tech giants as "gatekeepers" under the Digital Markets Act, but such strict regulatory means seem to target only non-domestic companies, restricting the development of tech companies outside of the EU, while creating a space for the growth of domestic platform companies. On the one hand, such a regulatory

approach has been highly politicized and discriminates against large technology companies in the normal order of market competition; on the other hand, such strict *ex ante* regulation is more prone to regulatory fallacies and selective targeting of offshore companies to the extent that it may lead to a scramble for countries to follow suit, resulting in higher market barriers between countries.

Unlike the EU's consistently strict regulatory approach, the U.S. regulation platform enterprises has shifted from lax to prudent. U.S. antitrust practice against digital platform giants is primarily reflected in litigation, such as *United States v. Microsoft Corp*, *hiQ Labs v. LinkedIn*, and *Federal Trade Commission v. Meta Platforms, Inc,* which provide guidelines on the competitive behavior to be expected of digital economy platform enterprises. In addition, the U.S. has continuously promoted the reform of antitrust enforcement agencies, as well as considering data factors by introducing the concept of "covered platforms".

In general, compared with the data-related anti-monopoly regulatory practices of the European Union and the United States, China is continuously improving its existing antitrust laws and regulations, and continuously incorporating data elements into antitrust regulation. Although China's antitrust authorities have not clarified the notion of a "data monopoly," they have formulated a series of laws and regulations on data-related monopoly behavior. It is worth noting that China's existing regulatory tools are not sufficient to fully regulate data-related monopolies, or even accurately identify related monopolies, and it is difficult to match the new monopoly situation spawned by the development of the digital economy. However, China's anti-monopoly authorities have introduced a series of means that are closely aligned with their practices in response to the characteristics of the data elements and competitive behaviors, and have enriched and perfected the anti-monopoly regularization regulatory means by Continuously enriching anti-monopoly regulatory tools and implementation methods, strengthening and refining anti-monopoly prior review in the platform economy, helping data enterprises to do a good job of complying with the regulations, and creating a full-cycle, full-chain regulatory mechanism for data competition, so as to achieve the ultimate goal of prospering the data industry market and protecting fair competition in the market.