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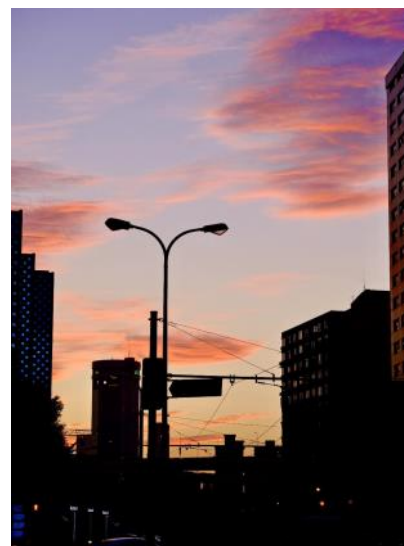
TABLE OF CONTENTS / 本期内容

ANTI-TRUST / 反垄断

SAMR Released Draft Anti-Trust Guidelines on E-Platform Economy for Public Comments / 国家市场监督管理总局就《关于平台经济领域的反垄断指南》公开征求意见 2

INTELLECTUAL PROPERTY / 知识产权

Chinese Legislature Adopted Newly Amended Copyright Law / 新修改著作权法获通过 3



ANTI-TRUST / 反壟斷

SAMR Released Draft Anti-Trust Guidelines on E-Platform Economy for Public Comments 国家市场监管总局就《关于平台经济领域的反垄断指南》公开征求意见

为了更好地规范与管理互联网平台经济领域的垄断行为，促进该领域市场主体的合规经营与有序竞争，2020年11月10日，国家市场监督管理总局发布《关于平台经济领域的反垄断指南（征求意见稿）》（“《征求意见稿》”）。《征求意见稿》分为总则、垄断协议、滥用市场支配地位行为、经营者集中、滥用行政权力排除限制竞争和附则六章，主要有以下几个方面的亮点值得特别关注：

1. **明确相关市场界定规则。**根据现有反垄断法律法规及实践，界定相关市场通常是对垄断行为进行违法性分析的必要步骤。考虑到平台经济领域涉及多方主体、业务类型复杂、竞争动态多变，适用现有法律规则进行相关市场界定的难度很高，《征求意见稿》主要提出了以下解决办法：(a) 区分相关市场界定在不同类型垄断行为中的作用。即对于平台经济领域经营者之间达成的固定价格、分割市场等横向垄断协议，以及固定转售价格、限定最低转售价格的纵向垄断协议，可以不明确界定相关市场；就经营者集中案件而言，通常需要界定相关市场；而对于滥用市场支配地位的案件，一般仍需认定相关市场，但对于符合一定条件的个案，可不对相关市场进行界定而直接认定经营者实施了垄断行为；(b) 确立了有针对性的界定平台经济领域相关市场的方法。例如，在界定相关商品市场时，可以基于平台功能、商业模式、用户群体、多边市场、线下交易等因素进行需求替代分析，可以基于市场进入、技术壁垒、网络效应、跨界竞争等因素进行供给替代分析。
2. **细化垄断协议与滥用市场支配地位的认定规则。**平台经济领域的固有特性以及对大数据、算法、人工智能等新兴技术的应用，导致一些垄断行为在现有反垄断法律体系下可能难以认定、缺乏明确的监管依据，《征求意见稿》就此补充与细化了相关规则，其中特别值得注意的是：(a) 关于垄断协议，《征求意见稿》明确将利用数据、算法、技术手段或平台规则达成、实施垄断协议的行为（即“算法合谋”）纳入规制范围，且明确了轴辐协议作为一种特殊形式的垄断协议，具体是指竞争对手之间借助与平台经营者的纵向关系或者通过平台经营者的组织、协调达成的具有横向垄断协议效果的垄断行为；(b) 在认定平台经济领域经营者是否具有市场支配地位时，《征求意见稿》将对于数据的获取和使用能力等因素纳入考量范围，并对滥用市场支配地位从事“二选一”、“大数据杀熟”等近年来备受争议的互联网平台经营行为，以及依托大数据、算法进行的其他不正当竞争行为提出处理思路。
3. **完善经营者集中的申报与调查标准**
 - (a) **明确涉及VIE架构的经营者集中属于反垄断审查范围。**一直以来，反垄断执法机构因VIE架构的合规性问题通常不受理涉及VIE架构的经营者集中案件，但VIE架构并

To curb monopolies and promote fair competition in the booming e-platform economy sector, the State Administration for Market Regulation or SAMR issued the *Draft Anti-Trust Guidelines for E-Platform Economy Sector* (the “Draft Guideline”) on November 10, 2020 to openly solicit public comments. The highlights of the Draft Guideline include, among others:

1. **Elaborated rules for defining *relevant market*.** To identify if monopolies occur, the *relevant market* usually needs to be analyzed first, according to applicable anti-trust laws and practices. However, in light of the diversity of parties involved in the e-platform businesses, the complexity of the e-platform business models and the frequently changing competition dynamics, it is quite impractical to define all the relevant markets under the current anti-trust rules. Therefore, the Draft Guideline proposed the following solutions: (a) identifying the roles of the *relevant market* under different scenarios first. If the e-platform operators have entered into vertical or horizontal monopoly agreements, a case of monopoly can usually be established. In the case of abusing dominant market position, the *relevant market* usually requires to be defined. However, when certain requirements are met, the breach of anti-monopoly can be recognized without defining the *relevant market* first. On the contrary, identifying the *relevant market* is normally required in the case of *concentration of business operators*; and (b) using certain specific approaches to identify the *relevant market* in the e-platform business area. For example, when determining the *relevant commodity market*, SAMR could perform a demand substitution analysis based on such factors as e-platform functions, business models and user groups or, alternatively, supply substitution analysis based on market access, technical barriers and etc.
2. **Specified rules to identify monopoly agreements and abuse of dominant market positions.** Due to the inherent features and the increasing applications of big data, algorithm and AI technologies in the e-platform business, it becomes more and more challenging under the current anti-trust legal system to identify and regulate certain types of monopoly activities. In this connection, the Draft Guideline brought up the following proposals to close the regulatory loopholes: (a) making it clear that a monopoly agreement could be made by algorithm conspiracy through big data manipulation and other technological measures, among others. The Draft Guideline also recognized the hub-and-spoke arrangement as a special monopoly agreement, where the competitive business players take advantage of their relationships with the e-platform operators to reach vertical monopoly agreements, or to manipulate with those operators to make arrangements with horizontal monopoly effects; and (b) allowing SAMR to factor in the e-platform market participants’ ability to acquire and process the relevant data when analyzing dominant market positions. The Draft Guideline also discussed how to deal with certain highly controversial behaviors such as eliminating customers’ choice of platforms, big data based price discrimination and other unfair competitions emerged from e-platform business activities in recent years.
3. **Improved filing and investigation standards for *concentration of business operators*:**
 - (a) The Draft Guideline made it clear that all *concentration of business operators* involving VIE structures shall be subject to anti-trust investigations.

非我国《反垄断法》下豁免申报的法定情形，因此，就我国目前的经营者集中的申报实践而言，涉及VIE架构的经营集中普遍存在应报未报的合规隐患。继今年7月国家市场监督管理总局反垄断局首次无条件批准涉及VIE架构的经营者集中申报案件—“明察哲刚-环胜案”（*相关内容请参见本所2020年8月刊China Regulatory Updates*）在一定程度上打破了前述涉及VIE架构的经营者集中申报僵局后，此次《征求意见稿》首次在法律层面将涉及VIE架构的经营者集中明确纳入反垄断的审查范围，意味着平台经济领域涉及VIE架构的经营者集中申报不再有法律层面障碍。但鉴于《征求意见稿》对此仅有原则性规定，对于涉及VIE架构的经营者集中交易的反垄断申报难度及审查尺度，以及是否会对已完成的经营者集中历史交易造成不利影响等具体问题，仍有待通过后续规则及执法实践进一步明确；以及

- (b) **明确营业额认定与主动调查标准。**一方面，《征求意见稿》提出可以针对互联网平台的不同商业模式或平台收入结构（例如，是第三方交易撮合平台还是自营平台）适用不同的营业额计算标准；另一方面，对于未达到申报标准，但具有或者可能具有排除、限制竞争效果的经营者集中，《征求意见稿》除了沿袭《国务院关于经营者集中申报标准的规定》授予反垄断执法机构对该类案件的主动调查权外，进一步明确了平台经济领域“具有或者可能具有排除、限制竞争效果”的经营者集中具体情形，包括：(i)一方经营者为初创企业、新兴平台；(ii)经营者因采取免费或者低价模式导致营业额较低；以及(iii)相关市场集中度较高，参与竞争者数量较少等。随着平台经济领域经营者集中申报与调查标准的完善，未来有关方面的反垄断监管执法可能趋严，对于涉及VIE架构的、或者营业额未达申报门槛但符合特定情形的并购交易，相关交易主体应提高反垄断风险意识，并在交易前与反垄断执法机构进行充分沟通。

总体而言，《征求意见稿》承继了当前反垄断法律法规以及《电子商务法》、《市场监管总局关于加强网络直播营销活动监管的指导意见》等涉及平台经济的法律法规的基本原则与监管思路，对适用于平台经济领域这一新兴业态的反垄断监管规则进行了补充与完善，为平台经济领域的市场参与者提供了更明确、操作性更强的合规指引。我们将对相关立法动态与实施情况保持持续关注。

For years, cases of *concentration of business operators* involving VIE structures have not been reviewed or approved by the Chinese anti-trust authority as a result of the ambiguous legal status of VIE structures. Since the VIE structure is not exempted from the statutory anti-trust filing requirements, in practice, business concentrations involving VIE structures often fall into deadlocks, having the underlying parties struggle with legal compliance issues. A breakthrough was seen in July 2020 when a high-profile anti-trust case featuring VIE structure has been approved unconditionally by the Chinese authority for the first time (*you may find briefings in our August 2020 issue of China Regulatory Updates*). Now the Draft Guideline takes a step forward by requesting eligible business concentrations with VIE structures be subject to mandatory anti-trust review and approvals, clearing in principle some regulatory obstacles in this connection. However, detailed requirements such as filing procedures and examination standards remained to be clarified. Also, it is not clear yet if the new requirements could somehow affect completed transactions retroactively; and

- (b) The Draft Guideline clarified methods for revenue calculation as well as standards for concentration investigations under the authority's discretion. On one hand, the Draft Guideline proposed that when calculating business revenues, different approaches may be taken to cater different e-platform business models or revenue breakdown plans. On the other hand, the Draft Guideline reiterated the anti-trust enforcement agency's discretionary authority to initiate investigations pursuant to applicable anti-trust rules and regulations, against business concentrations where the mandatory filing thresholds are not met, but fair competitions may otherwise be undermined. For example, a start-up e-platform business or a brand new type of e-platform business may contribute low revenues, but they may still be able to exclude or restrict fair competition in one way or another. Similarly, in a highly concentrated special market where the number of market players is limited, competitions may be unfairly eliminated, regardless of low revenue numbers. In summary, while the anti-trust legislation and enforcement tightens up, it is advisable that the investors take approaches more cautiously especially when it comes to VIE structures or transactions that may exclude or otherwise restrict fair market competition no matter the revenue standard is met or not.

Overall, the Draft Guideline has in principle inherited the existing anti-trust laws and regulations, while providing more implementing guidance and special touches on how to deal with anti-trust legal issues in the quickly evolving e-platform business sector. We will keep an eye on major developments in this connection closely.

INTELLECTUAL PROPERTY / 知识产权

Chinese Legislature Adopted Newly Amended Copyright Law 新修改著作权法获通过

2020年11月11日，第十三届全国人民代表大会常务委员会第二十三次会议审议通过《关于修改〈中华人民共和国

On November 11, 2020, China's top legislature approved the *Decisions on Revising the PRC Copyright Law*. The newly revised Copyright Law will take effect on June 1, 2021. It has

和国著作权法>的决定》，修改后的《著作权法》（“新《著作权法》”）将于2021年6月1日起施行。

新《著作权法》基本吸收采纳了今年4月发布的相关征求意见稿（相关内容请参见本所2020年5、6月合刊 *China Regulatory Updates*）中所做的主要修改，从完善作品的定义和类型、引入侵权惩罚性赔偿制度、大幅提高侵权法定赔偿额上限、明确合作作品著作权的行使规则等方面对现有规则进行了修订完善，以适应当前社会实践需求、对著作权领域的热点问题作出回应。随着新《著作权法》的通过，预计《著作权法实施条例》、《信息网络传播权保护条例》等配套法规不久后也将进行相应修改，我们将对此保持持续关注。

incorporated most of the major revisions proposed by the draft amendments earlier this year (please refer to our May & June 2020 issue of *China Regulatory Updates* for details) which include, among others, adopting the definition of works, introducing punitive damage compensations, increasing penalties on IP right infringements, and specifying the rules to use works with joint authorship, to better suit the needs of the rapidly evolving society and respond to some hot issues in the copyright sector. Following the promulgation of this new Copyright Law, it is expected that more detailed implementation rules and regulations will also be amended accordingly.

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For further information, please write us at inquiry@hanyilaw.com.

CONTACT US

上海市中山西路2020号
华宜大厦1座1801室
邮编：200235
电话：(86-21) 6083-9800



Suite 1801, Tower I, Huayi Plaza
2020 West Zhongshan Road
Shanghai 200235, China
Tel: (86-21) 6083-9800