New antitrust tools for the digital economy in China and the EU—a comparative view of the Platform Antitrust Guidelines in China and the Digital Markets Act in the EU

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Despite the pandemic, this past year has been remarkably rich in terms of antitrust developments affecting the digital economy. These have consisted not just of intensifying antitrust enforcement actions against large digital companies globally, but primarily of legislative initiatives seeking to curb the market power of so-called "Big Tech" through new regulation.[1]

The two front-runners in terms of new regulation for the digital economy have been China and the European Union (EU):

- On 10 November 2020, one day ahead of the Singles' Day shopping spree,[2] China published the Draft Antitrust Guidelines for Platform Economy (Platform Guidelines) for public consultation. This was the first concrete legislative proposal in the world containing platform-specific antitrust rules. The mere announcement of the Platform Guidelines caused the share prices of Chinese technology companies to plummet, losing around USD 290 billion in value over two days.[3] Notably, it took China less than three months to finalise the Platform Guidelines as the Platform Guidelines formally came into force on 7 February 2021. This is probably one of the quickest legislative processes that has ever been seen in China. While stakeholders and legal practitioners were questioning whether the Chinese competition authority (i.e., SAMR[4]) would actually implement the Platform Guidelines to rein in online platforms in China, a wave of enforcement activities have followed in rapid succession (with more details provided in section 7 below).
  In general, the Chinese Platform Guidelines are built within the legal framework of the Chinese Anti-Monopoly Law[5] (AML) without providing new antitrust tools. The overarching purpose is to send a clear signal to the market that China is determined to ramp up enforcement efforts towards increasingly powerful Chinese tech companies. Nonetheless, once the Platform Guidelines came into force, China has acted quickly both from an enforcement side and on further legislation which aims to make antitrust scrutiny over online platforms more effective. Interestingly, China further consulted on two sets of guidelines relating to online platforms' classification and corresponding obligations, which appear to have reflected the spirit of the EU's Digital Markets Act (DMA), in particular the concept of gatekeepers.
- On 15 December 2020, the European Commission (EC) published a draft legislative package (the Digital Services Act package), comprising proposals for two new Regulations to govern the digital economy, the DMA and the Digital Services Act (DSA).[6] The announcement had been preceded by an open public consultation that took place between 2 June–8 September 2020 (EC Consultation).[7] After a record 16 months of legislative debate, the European Parliament

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[1] The term "ex ante regulation" refers to legislation that regulates the conduct of market players in advance, rather than interferes only after a violation of the law has already occurred. In that sense, it is distinguished from traditional (ex post) enforcement of competition law.

[2] This refers to 11 November of each year. On that day, online shopping platforms in China roll out their biggest promotions over the year. This activity was initiated by Taobao.com (owned by Alibaba) in 2009 and has become a sensational entertainment phenomenon in China. For example, the transaction value of Tmall/Taobao.com (both owned by Alibaba) on the single day of 11 November 2021 was RMB 504.3 billion (USD 79 billion), and the transaction value of JD.com (the closest competitor of Tmall/Taobao.com) on the single day of 11 November 2021 was RMB 349.1 billion (USD 54.7 billion).

[3] Hudson Lockett, "China tech stocks tumble after regulators step up antitrust pressure" (*Financial Times*, 11 November 2020), available at: *https://www.ft.com/content/25153489-1d3a-4ee3-8ab4-d1bdd613e023*.

[4] State Administration for Market Regulation.

[5] The AML first came into force on 1 August 2008 and was amended in 2022. The amended AML was published on 24 June 2022 and has taken effect on 1 August 2022.

[6] The Digital Services Act package as originally proposed by the EC can be accessed at: *https://ec.europa.eu/digital-single-market/en/digital-services-act-package*.

[7] The consultation and the contributions of consultation participants can be accessed at: *https://digital-strategy.ec.europa.eu/en/consultations/consultation-digital-services-act-package*.

(Parliament) and the Council of the EU (Council) provisionally agreed on the final text of the DMA on 24 March 2022.[8]

The DMA represents the EU's first ex ante antitrust legislative framework for the digital economy and is intended to complement the traditional ex post enforcement of EU competition law, with its stated aim being to protect the fairness and contestability of digital markets. The fast adoption of the DMA demonstrates a remarkable consensus amongst the EU institutions and across the political spectrum. As a result, the DMA could come into force by the autumn of 2022. The DSA, on the other hand, is not strictly antitrust related, but seeks to update the E-Commerce Directive[9] after 20 years, thus regulating the way that providers of online services interact with their customers and users, and their obligations in respect of harmful or illegal content. Political agreement on the DSA was reached on 23 April 2022. The DSA is not within the scope of this article, which focuses only on the DMA.

This article takes a comparative view of the Chinese Platform Guidelines against the DMA from the following angles:

- What is the background of the law?
- What is the approach to digital/platform players?
- Which companies would be caught by the law?
- Which types of conduct are or could be caught by the law?
- What is the approach to merger control under the law?
- When does/will the law come into force?
- What is expected to follow once the law is in force?

1. What is the background of the law?

China: Antitrust has attracted an unprecedented amount of attention in China in 2020, after Central Government on various occasions[10] highlighted the significance of antitrust law in combatting disorderly expansion of financial power and safeguarding healthy competition.[11] In addition, revising the previous AML alongside other antitrust-related work streams was set as one of the key priorities of the nation in 2021 and 2022. It was against this backdrop that the Anti-Monopoly Commission (AMC) of the State Council started drafting the Platform Guidelines on an expedited basis and completed the whole legislative process within three months.

EU: The discussion around the merits of establishing a sector-specific ex ante regulatory regime for the digital economy has been ongoing for a long time in the EU, with solid arguments both for and against. In recent years, reports by antitrust experts have been consistently expressing concerns about the economic power exercised by large digital players as well as the critical position that certain digital companies occupy as intermediaries between other businesses and their customers, and the dependency that this creates.[12] The EC's decision to proceed with ex ante regulation (in the DMA) appears motivated mainly by the recognition that the pace of ex post competition enforcement in Europe is too slow to match the rapid evolution and the characteristics of the digital economy. EU investigations into anti-competitive conduct in the digital economy typically take several years to complete, followed by several years of litigation before the EU courts. In an industry that evolves incredibly rapidly, this has often resulted in prolonged uncertainty and irreversible harm to competition and consumers.

2. What is the law's approach to digital/platform players?

China: The Platform Guidelines contain four key chapters dealing with anti-competitive agreements, abuse of dominance, merger control and administrative monopoly, respectively. In terms of structure, the Platform Guidelines closely follow the legal framework of the AML, but in terms of substance they provide a comprehensive set of rules which are tailor-made to reflect the characteristics of digital platforms. For example, the Platform Guidelines refer to algorithms and data 10 to 20 times throughout. With respect to the approach to conduct issues, the Platform Guidelines exhibit the traditional ex post enforcement logic, in contrast to the DMA.

EU: At the heart of the DMA is a list of 22 prohibitions and obligations, applicable to digital companies which have been designated as so-called "gatekeepers".[13] These "dos and don'ts" are one-size-fits-all—i.e., for the most

[8] The legislative text of the DMA has not been finalised, but the current near-final text can be accessed at: *https://www.consilium.europa.eu/media/56086/st08722-xx22.pdf*. All references to numbers of articles of the DMA in this article are references to this near-final text.

[9] Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market [2000] OJ L178/1, available at: *https://eur-lex.europa.eu/eli/dir/2000/31/oj*.

[10] E.g., over the Central Economic Work Conference jointly held by the Central Committee of the Communist Party and the State Council on 18 December 2020, the conference held by the Political Bureau of the Central Committee of the Communist Party on 11 December 2020 and in the annual Government Work Report addressed by the Premier over the Fourth Session of the 13th National People's Congress.

[11] Xu Wei, "Nation sets its 2021 goals for economy" (China Daily, 19 December 2020), available at: *https://www.chinadaily.com.cn/a/202012/19/WS5fdd346ca31024ad0ba9cc00.html*.

[12] Inter alia, Jacques Crémer, Yves-Alexandre de Montjoye and Heike Schweitzer, "Competition Policy for the Digital Era" (4 April 2019), available at: *https://ec.europa.eu/competition/publications/reports/kd0419345enn.pdf* and "Unlocking digital competition, Report of the Digital Competition Expert Panel" (13 March 2019), available at: *https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/785547/unlocking_digital_competition_furman_review_web.pdf*.

[13] Articles 5, 6 and 7 DMA. There were 18 prohibitions in the EC's original draft. The number increased to 22 in the near-final text of the DMA.

part, they apply to all gatekeepers irrespective of their business model. This is expected to be one of the EC's biggest challenges in implementing the DMA in practice. The EC has based its list of "dos and don'ts" on real examples of specific conduct by known large digital companies about which the EC has previously expressed concerns or even formally investigated. Originally, the EC's intention was to propose even more far-reaching legislation, by creating the so-called New Competition Tool (NCT)—the NCT would allow the competent authority (most likely the EC) to carry out market investigations into sectors of the economy where competition appeared not to be functioning and impose remedies to address structural competition issues that could lead inter alia to markets "tipping" to monopoly. Similar regimes currently exist in other jurisdictions, such as the UK and Greece, while the EC currently has the power to conduct sector inquiries albeit without an ability to impose remedies thereafter.[14] Ultimately, while the NCT was subject to the EC Consultation, it did not make it into the Digital Services Act package as a separate instrument, but aspects of it were subsumed into the DMA.[15]

3. Which companies would be caught by the law?

China: The Platform Guidelines define the notions of "platform", "platform operator" and "undertakings that are active in platforms".[16] Platform, pursuant to Article 2 of the Platform Guidelines, means internet platform, a form of commercial organisation that facilitates interaction between bilateral or multilateral undertakings which depend on one another, through internet information technology and following certain rules, jointly to create commercial value. In practice, the potential targets of the Platform Guidelines are more likely to be large Chinese home-grown tech companies such as Alibaba, Tencent, Baidu and Meituan, than international tech giants.

EU: The DMA applies to so-called gatekeepers. Gatekeepers, under the DMA, are first of all providers of one or more Core Platform Services (CPS). CPS include 10 categories of digital services: (i) online intermediation services, which includes, among other things, app stores and online marketplaces;[17] (ii) online search engines, including not just display online search but also search through any other means, such as voice assistants, the latter being particularly relevant given the rising prominence of consumer internet of things devices; (iii) online social networking services, like Facebook; (iv) video-sharing platform services; (v) number-independent interpersonal communication services, such as email and other instant messaging services, such as WhatsApp; (vi) operating systems, such as iOS and Android; (vii) web browsers, such as Chrome or Safari; (viii) virtual assistants, such as Siri; (ix) cloud computing services; and (x) advertising services provided by a provider of any of the foregoing CPS.[18] Web browsers and virtual assistants were not part of the EC's original proposal, but were proposed as part of the Parliament's amendments. The list of CPS is exhaustive.[19] In the EC's view, CPS feature a number of characteristics that service providers can exploit, including inter alia extreme economies of scale, very strong network effects, multi-sidedness, lock-in effects, and an absence of sufficient multi-homing. Under art.3(1) of the DMA, a provider of CPS will be designated as a gatekeeper if three conditions are cumulatively met: (i) it has a significant impact on the internal market; (ii) it operates a CPS which serves as an important gateway for business users to reach end users; and (iii) it enjoys an entrenched and durable position in its operations, or it is foreseeable that it will enjoy this position in the near future. The EC sought to make it relatively straightforward to designate gatekeepers by relying on rebuttable presumptions at first instance. A company is presumed to meet the three gatekeeper conditions, if it meets three cumulative quantitative thresholds relating to (i) turnover, (ii) market capitalisation/fair market value, and (iii) stability of market presence in the EEA over the years. Each of the three quantitative thresholds reflects one of the three gatekeeper conditions under art.3(1) of the DMA. The presumption is rebuttable, so companies that meet the quantitative criteria can escape the gatekeeper designation if they provide sufficiently robust arguments that they do not satisfy the three gatekeeper conditions, taking into account the characteristics of its CPS and the market structure in which it operates. If a company provides such arguments, the EC will open a market investigation to determine whether designation is appropriate. During the market investigation the company's gatekeeper designation is pending, so no obligations for compliance arise for the potential gatekeeper in relation to these services. In the EC's original draft DMA, a presumed gatekeeper was required to provide "sufficiently substantiated" arguments to rebut the designation, the near-final text of the DMA clarifies that "sufficiently substantiated arguments" are those that "manifestly put into question" the presumption.

[14] Article 17 Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty [2003] OJ L1/1, available at: *http://data.europa.eu/eli/reg/2003/1/oj*.
[15] Inter alia, the market investigations tool established in arts 16–19 of the DMA.
[16] Article 2 Platform Guidelines.
[17] The DMA defines "online intermediation services" by referring to the definition in point 2 of art.2 of the Platform-to-Business Regulation (Regulation (EU) 2019/1150 of the European Parliament and of the Council of 20 June 2019 on promoting fairness and transparency for business users of online intermediation services [2019] OJ L186/57, available at: *http://data.europa.eu/eli/reg/2019/1150/oj*).
[18] Article 2(2) DMA.
[19] The EC may, however, conduct a market investigation with the purpose of examining whether additional services within the digital sector should be added to the list of CPS (art.19 DMA).

What is clear is that the EC's original quantitative thresholds are low enough to capture not just so-called "Big Tech" but also relatively smaller players. In December 2020, the EC had expressed the expectation that approximately 10 European companies would be caught. Around the time of the adoption of the near-final text of the DMA, the discussion was around 15–20 companies eventually being designated. The gatekeeper thresholds have been one of the most contentious parts of the DMA negotiations, with clear geopolitical implications and discussion around whether US-based tech companies are being disproportionally affected. In any event, under the current thresholds a number of large European players would be at risk of facing designation.

Companies that do not meet the quantitative thresholds are not subject to the presumption, but don't necessarily escape the gatekeeper designation, as they can be designated as gatekeepers through a market investigation. As part of the market investigation the EC will make a qualitative (rather than quantitative) assessment of the (potential) gatekeeper's market presence as well as structural market characteristics.[20] Finally, the DMA gives the EC the power to designate not only existing gatekeepers but also emerging ones—i.e., companies that do not yet enjoy an entrenched and durable market position, but it is foreseeable that they will do so in the near future.[21] A company identified as an emerging gatekeeper will only be subject to a sub-set of the "dos and don'ts" that the EC will deem appropriate and necessary to prevent the emerging gatekeeper achieve through unfair means an entrenched and durable position in its operations.[22]

4. Which types of conduct are or could be caught by the law?

China: As explained above, the Platform Guidelines' approach to conduct issues remains ex post and the overall scope of infringements remains consistent with the traditional legal framework, i.e., anti-competitive agreements and abuse of dominance. Nonetheless, there are some noteworthy features of the Platform Guidelines:

- **Role of data and algorithms highlighted when assessing the compliance of agreements, in particular concerted practices, with competition law**

  The Platform Guidelines explicitly refer to data, algorithms, platform rules (as designed by platform operators) when providing examples of horizontal and vertical anti-competitive agreements. Further, the Platform Guidelines define as "other concerted practice" conduct that consists of coordination of market behaviour that is not implemented through agreements or decisions but through data, algorithms, platform protocol or other means.[23]

  Similar to EU competition law, the Platform Guidelines recognise that parallel pricing practices based on independent decision-making are not anti-competitive.[24] In addition, in the finding of concerted practice, the Platform Guidelines also empower future enforcement by acknowledging indirect evidence, provided that it is logically consistent when direct evidence is not practically available.[25] However, there is no further detail provided in the Platform Guidelines as to what qualifies as "indirect evidence" and we are in the hope that SAMR's future practice would shed light upon this.

- **Hub-and-spoke formally recognised as anti-competitive behaviour in China for the first time**

  Notably, the Platform Guidelines explicitly prohibit hub-and-spoke practices to facilitate horizontal anti-competitive agreements among competitors (with competitors on "spoke" side and online platforms acting as the "hub").[26] This marks the first time that hub-and-spoke agreements are recognised as a form of anti-competitive agreements by law in China.

- **Abusive conduct in response to long-held grievances in society**

  The Platform Guidelines have addressed all typical forms of abusive conduct, including predatory pricing, refusal to supply, exclusive dealing, tying and imposing other unreasonable conditions and discriminatory treatment. When providing examples for each conduct, the Platform Guidelines have addressed hot issues that have received considerable complaints from the public.

  Regarding exclusive dealing, the notorious "one out of two" practice is explicitly regarded as a factor that needs to be taken into account when assessing exclusivity.[27]

[20] Articles 3(8) and 17 DMA.
[21] Articles 3(1)(c) and 17(4) DMA.
[22] Article 17(4) DMA.
[23] Article 5 Platform Guidelines.
[24] Article 5 Platform Guidelines.
[25] Article 9 Platform Guidelines.
[26] Article 8 Platform Guidelines.
[27] Article 15(1)(i) Platform Guidelines.

Also, technical measures that are commonly adopted by online platforms to encourage or discourage exclusivity, such as blocking search results, downgrading search, volume restraints, volume support, etc., are also considered by the Platform Guidelines as critical means of implementing exclusivity.[28] Furthermore, discrimination based on big data and algorithms is set as a primary form of discrimination in the context of the platform economy.[29] Besides, the Platform Guidelines also touch upon the possibility that platforms in certain circumstances would be considered as essential facilities,[30] depending on factors including, data possession of the concerned platform, substitutability of other platforms, availability of substitutable platforms, feasibility of developing competing platforms, other parties' dependency on the concerned platform as well as the potential impact on the concerned platform if it becomes an open source. The draft version also considered the circumstances when data could potentially constitute essential facilities which however was dropped in the near-final version. In addition, the Platform Guidelines acknowledge the mandatory collection of unnecessary consumer data as a practice that can amount to imposing unreasonable trading conditions.[31]

The Platform Guidelines also take a rather balanced approach to some forms of abusive conduct. For example, platforms' need to attract new customers and promote new products/services within a reasonable period are recognised by the Platform Guidelines as justification for selling below cost that does not amount to predatory pricing.

EU: As mentioned above, the "dos and don'ts" of the DMA are based on the EC's real-world experience of enforcing antitrust rules in digital markets and primarily cover data-related practices, some forms of tying and imposing unrelated supplementary obligations to business users of gatekeeping CPS, enabling interoperability with gatekeeping CPS, providing more transparency to advertisers, and non-discrimination. Some of the prohibitions and obligations that could have a real impact on the market are highlighted below:

Restrictions on gatekeepers' use of data.[32]

The DMA considerably restricts how gatekeepers can use the data gathered through their various activities. For instance, without specific user consent, gatekeepers must not combine or cross-use personal data from a CPS with personal data from any other service of a gatekeeper. Gatekeepers are also required to obtain consent to use, for advertising purposes, the data collected from end users through their usage of, for example, third-party websites and apps. Repeated cookie banners requiring consent will also likely be banned, as the gatekeepers cannot request consent more than once in a year if consent has already been refused.

Prohibition of anti-steering practices.

The DMA will prohibit practices preventing business users from directing their consumers to alternative offers. These provisions appear to be inspired by the EC's ongoing antitrust investigations into Apple's App Store conduct.[33] Gatekeepers are required to allow businesses using their intermediation services (e.g., app developers distributing apps on app stores) to promote offers to end users free of charge and subsequently transact with these users without using the gatekeeper's services (e.g., without using the app store owner's in-app purchase solution). In addition, under art.5(5), app store owners may not eliminate so-called "reader apps", which allow end users to access content purchased from a business outside the app store (e.g., accessing a Netflix subscription purchased on Netflix.com on the Netflix iOS app). At the same time, the DMA prohibits wide and narrow Most-Favoured-Nation (MFN) clauses. Businesses will be able to offer their products and services on other sales channels (including their own) at better conditions than those offered through the gatekeeper's services.[34]

Prohibition of tying.

The DMA prohibits certain forms of tying by gatekeepers. Gatekeepers must not impose on businesses or end users, inter alia, their identification services, web browser engines, payment services and in-app purchase mechanisms (art.5(7)). Gatekeepers must also refrain from requiring end users to subscribe to further CPSs, as a condition for subscribing to any of their other CPSs.

[28] Article 15(3) Platform Guidelines.
[29] Article 17(1)(i) Platform Guidelines.
[30] Article 14(2) Platform Guidelines.
[31] Article 16(1)(v) Platform Guidelines.
[32] Article 5(2) DMA.
[33] On 30 April 2021, the EC sent a Statement of Objections to Apple informing it of its preliminary view that it has distorted competition in the music streaming market as it abused its dominant position for the distribution of music streaming apps through its App Store. The EC's Press Release can be accessed here: *https://ec.europa.eu /commission/presscorner/detail/en/ip_21_2061*. There are two additional EC investigations ongoing against Apple for similar App Store conduct.
[34] Articles 5(3) and 5(4) DMA.

Interoperability.

The DMA also includes new and far-reaching obligations related to interoperability. Gatekeepers will need to provide third-party services interoperability with the same software and hardware features as their own services.[35] An entirely new art.7 that did not exist in the EC's original legislative proposal addresses interoperability between messaging services. Subject to conditions, gatekeeper messaging services must interoperate with competing messaging services for basic functions such as text messaging, voice and video calls and sharing files. In practical terms, this would mean that iMessage users must be allowed to correspond with, for instance, Signal users on iMessage.

FRAND Access to App Stores, Online Search, and Social Media.[36]

In the EC's original draft, art.6(2) of the DMA applied specifically to app stores and obliged app store gatekeepers to apply fair, reasonable and non-discriminatory (FRAND) general conditions for app developers' access to the app store. In the near-final text, the provision expanded to also impose an obligation of FRAND access to search engines and social networking sites. The preamble to the DMA explains that benchmarks that can be used to determine the fairness of an app store's conditions of access are the prices charged and conditions imposed: (i) by other app stores, or (ii) by the same app store for different services, to different types of end-users, for the same service in different geographic regions, for the same service the gatekeeper offers to itself.[37] The DMA makes it clear that this provision should not be equated to a general access right to app stores.[38]

The DMA intends to complement and expand on the EU's existing Platform to Business Regulation (P2B Regulation), which entered into force in 2019 to achieve a baseline of transparency and fairness by online platforms regardless of their size or position.[39] The DMA narrows its focus to establish narrow and clearly defined obligations vis-a-vis a small set of international providers of CPS, which are operating as gatekeepers for business (or end) users to reach end users. In fact, as the EC itself states in the Preamble to the DMA, the transparency obligations imposed on certain types of online platforms via the P2B Regulation can help uncover conduct that would be illegal under the DMA, if engaged in by a gatekeeper.

5. What is the law's approach to merger control?

China: The Platform Guidelines have settled the long debate over VIE[40] structures by including VIE cases as part of the Chinese merger control review.[41] As many Chinese tech companies adopt VIE structures, the limbo status of reviewing mergers involving VIE in China[42] has, to a large extent, contributed to the rapid growth of these Chinese tech giants.

In addition, the Platform Guidelines recognise the potential harm to competition arising from some types of mergers that do not meet the existing filing thresholds.[43] Among such mergers, the Platform Guidelines specifically show willingness to capture (i) killer acquisitions, through which established players seek to acquire rising start-ups which in most cases do not cross the filing threshold; and (ii) acquisitions between parties that have revenues disproportionately low (or even loss-making) compared to their market power due to the implementation of a low price strategy at a certain period of time.

For completeness, the amended AML has further empowered SAMR to review transactions which do not meet the Chinese filing thresholds if there is evidence indicating that such transactions have or may have the effect of eliminating or restricting competition, irrespective of industry sectors. Although parties have no obligation to file a below-threshold transaction in China unless SAMR requires them to, once filings are submitted, SAMR has the power to suspend an ongoing transaction until clearance is given or take interim measures against a closed transaction. Furthermore, China is also seeking to introduce a new threshold[44] to capture killer acquisitions by sizable Chinese companies.

[35] Article 6(7) DMA.
[36] Article 6(12) DMA.
[37] Preamble 62 DMA.
[38] Preamble 62 DMA.
[39] Regulation (EU) 2019/1150 of the European Parliament and of the Council of 20 June 2019 on promoting fairness and transparency for business users of online intermediation services.
[40] VIE stands for Varied Interest Entity, which is a domestic company whose control and economic benefits, through various contractual arrangements, are attributable to a wholly foreign owned enterprise incorporated onshore that is in turn indirectly owned by an offshore special purpose vehicle (SPV) for foreign investors to invest.
[41] Article 18(2) Platform Guidelines.
[42] In China, the authorities responsible for merger control, the previous regulator Ministry of Commerce and its successor SAMR were reluctant to officially accept merger filings involving VIE structures for a long time until in July 2020 when SAMR cleared the first merger filing involving a VIE structure. That was the initial indication on SAMR's changed practice in relation to reviewing merger filings involving VIE Structures.
[43] Article 19 Platform Guidelines.
[44] The new filing threshold, as proposed in the Consultation Draft of Merger Control Review (draft published on 27 June 2022, not yet in force), is as follows: when the primary threshold is not met, a Chinese filing would still be required if the below new threshold is met—(i) acquirer/merging party with more than RMB 100 billion (USD 14.9 billion) turnover in China in the previous financial year; and (ii) the other party (merging party or target) with (a) market value or valuation of RMB 800 million (USD 119.6 million) or more, and (b) more than one third (1/3) of its worldwide turnover generated from China in the previous financial year.

EU: The EC has purposefully avoided using the DMA as a vehicle to make amendments to merger control rules.[45] In practice, however, the DMA does not leave merger control unaffected: art.15 of the DMA establishes an obligation on gatekeepers to report to the EC (pre-closing) any intended merger & acquisition (M&A) transaction involving another digital service provider. Reporting the transaction discharges the gatekeeper's obligation and there is no clearance process involved—this is intended for information purposes only. While this obligation does not bring about any changes to the EU merger control regime, it will put several more transactions on the EC's radar. In combination with the EC's recently amended interpretation of art.22 of the EU Merger Regulation,[46] resulting in referrals of mergers to the EC by EU Member State authorities even when neither the EC nor the Member State has jurisdiction, the obligation in art.15 of the DMA is likely to result in more EC reviews of transactions in the digital space.[47]

6. When does/will the law come into force?

China: The Platform Guidelines came into force in China on 7 February 2021.

EU: The DMA is expected to come into force in October 2022, with no further changes expected to the language of the provisions themselves. The DMA will start applying six months after its entry into force, with gatekeepers being designated in the first half of 2023 and expected to comply by early 2024.

7. What is expected to follow once the law is in force?

China: Following the initial publication of the draft Platform Guidelines in November 2020, China has seen a clear focus on online platforms in antitrust enforcement, related legislation as well as organisational changes on the part of SAMR.

Notable enforcement activities include: A record fine of RMB 18.2 billion (USD 2.8 billion)[48] was slashed upon Alibaba for its abuse of dominance through restricting e-commerce sellers from selling on competitors' platforms (otherwise known as "one out of two" in Mandarin); a fine of RMB 3.4 billion (USD 531.3 million) was imposed upon Meituan also for the exclusionary "one out of two" conduct; the proposed merger of Huya and Douyu (both controlled by Tencent) was blocked; the unreported Tencent's acquisition of China Music Corporation, which was completed in 2016, was not only fined for failure to file but required to take burdensome measures to restore competition. On merger control front, SAMR has published more than 100 failure-to-file fines on Chinese online platforms to date.

Apart from the Platform Guidelines, the amended AML also reflects antitrust implications for digital platforms. It is stated in the General Principles chapter of the amended AML that abusing data and algorithms, technologies, capital advantage, and platform rules to eliminate or restrict competition is prohibited. Under the Abuse of Dominance chapter, a new paragraph is added to prohibit dominant undertakings from using data and algorithms, technology and platform rules to impose unreasonable restrictions on other undertakings. In addition, on 29 October 2021, China consulted on another two sets of guidelines: Guidelines for the Classification and Grading of Online Platforms (Classification Guidelines) and Guidelines for the Implementation of Online Platforms' Obligations (Obligation Guidelines). The Classification Guidelines divide online platforms into six categories (by sector[49]) and three types (by size—Super, Big and Mid-to-small). The Obligation Guidelines accordingly impose stricter obligations on Super and Big platforms than other platforms. For example, Super and Big platforms are prohibited from using users' non-public data, conditioning access to platform on using services provided by other affiliated platforms and engaging in discriminatory conduct. These Guidelines appear modelled on the gatekeeper mechanism in the DMA to some extent.

As regards SAMR's organisational reform, on 18 November 2021, China set up the National Anti-monopoly Bureau (official English name not confirmed), which marks an elevation of the Chinese antitrust authority in the administration hierarchy. The new bureau consists of three newly established divisions, each of which has established a sub-division to specifically handle antitrust cases relating to the digital economy. The new bureau has also been recruiting to double its antitrust enforcement resources. Furthermore, on 16 December 2021, SAMR established the Competition Policy and Big Data Centre for the purposes of conducting research on novel antitrust issues, in particular regarding platform economy.

The above legislative and organisational developments are indicative of China's strong determination to deal with the antitrust challenges posed by the growing digital economy, and that SAMR has become increasingly equipped to implement its antitrust agenda in respect of platforms. 2022 is expected to see more noteworthy antitrust developments in the digital economy in China.

[45] This is mainly for "constitutional" reasons as, to do so, the EC would need to rely on a different legal basis in the EU Treaties, which would require the unanimous approval of the EU Member States, with all the complexities and shift in power dynamics that this would entail. Instead, the DMA was adopted under the ordinary legislative procedure (Council of the EU and European Parliament as co-legislators).

[46] Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings [2004] OJ L24/1, available at: *http://data.europa.eu/eli/reg/2004/139/oj*.

[47] On 26 March 2021, the EC issued guidance explaining its new approach to the interpretation of art.22 of the EU Merger Regulation (Commission Guidance on the application of the referral mechanism set out in Article 22 of the Merger Regulation to certain categories of cases C(2021) 1959 final, 26 March 2021, available at: *https://ec.europa.eu/competition/consultations/2021_merger_control/guidance_article_22_referrals.pdf*).

[48] SAMR decision is available at: *http://www.samr.gov.cn/fldj/tzgg/xzcf/202104/t20210409_327698.html* (Chinese only).

[49] Online sales, Life services, Social entertainment, Information news, Financial services and Computing application.

EU: The DMA is a far-reaching legislative instrument that is unprecedented in the EU competition legal framework—it nevertheless attracted broad political support, both at the EU level and at the level of the Member States. However, Member States with prominent competition authorities, such as France or Germany will be keen to ensure that they continue to play an active role in antitrust enforcement given that they have been deeply involved in the enforcement of competition law against large digital platforms. This is particularly evident in Germany, with the adoption in January 2021 of a new competition law providing the FCO with additional powers to deal with anti-competitive behaviour by digital platforms. Given that the DMA will take the form of a Regulation, which is directly applicable in the EU Member States, it is likely also to result in a flood of actions before the national courts as well as enforcement by the EC (and any role that national competition authorities might ultimately have).

The DMA might have become law at record speed by EU legislative standards, but the real challenge for the EU will be its enforcement in practice. While the EC has endeavoured to make the rules clear and unambiguous, the reactions of industry stakeholders since the adoption of the DMA already show that more legal certainty will be required. This becomes all the more relevant as the DMA imposes a single set of rules across a range of diverse activities and business models. Once an initial body of decisional practice has been developed, the DMA is expected to contribute to speed of antitrust enforcement, including due to the use of relatively short statutory deadlines for the completion of the key steps in the DMA process (e.g., designation of gatekeepers, conclusion of market investigations).

As the DMA is intended as a complement, rather than a substitute, of traditional antitrust enforcement—the EC is expected to continue pursuing its currently open antitrust investigations the content of which may overlap with the prohibitions and obligations in the DMA.