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Legal Updates

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1. Analysis of New Shenzhen QFLP Scheme

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On 29 January 2021, the Shenzhen Municipal Financial Regulatory Bureau ("**Shenzhen FRB**") released the *Measures for the Pilot Program of Foreign-invested Equity Investment Enterprises in Shenzhen* (hereinafter referred to as the "**New Shenzhen QFLP Scheme**"), which is implemented beginning 8 February 2021 and will remain effective for the next three years. Upon its coming into force, the *Measures for the Pilot Program of Foreign-invested Equity Investment Enterprises in Shenzhen* enacted in September 2017 by Shenzhen FRB (Shen Jin Gui [2017] No.1) (the "**Previous Shenzhen QFLP Scheme**") has been repealed.

The New Shenzhen QFLP Scheme has been adopted in light of the general principle of establishing national treatment for QFLPs while taking into account their "foreign invested + private equity" nature as well as requirements of the latest laws, regulations and regulatory policies relating to foreign investment and private equity. The changes in the New Shenzhen QFLP Scheme over the Previous Shenzhen QFLP Scheme are quite "revolutionary" as compared to the relatively minor changes proposed in the *Measures for the Pilot Program of Foreign-invested Equity Investment Enterprise in Shenzhen (Draft for Comment),* released by Shenzhen FRB on 26 October 2020.

To analyze Shenzhen's QFLP policies both current and future and across jurisdictions, this article is divided into two parts. Part I of this article summarizes and comments on the substantial changes implemented by the New Shenzhen QFLP Scheme relative to the Previous Shenzhen QFLP Scheme.

Part II of this article compares key elements of the New Shenzhen QFLP Scheme side-by-side with those of QFLP schemes of Zhuhai City and Hainan Province, which are also located in South China.

Comparison of policies before and after release of the New Shenzhen QFLP Scheme

Innovative changes brought by the New Shenzhen QFLP Scheme mainly include the following:

1. Foreign-invested equity investment enterprises ("**QFLP Funds**") are no longer limited to directly investing in industrial projects. QFLP Funds are now permitted to invest as funds of funds (FOFs) in other domestic private equity and venture capital funds, while the underlying funds of QFLP Funds are encouraged to invest directly in industrial enterprises. Simply judging from the wording of the document, it will be practicable for QFLP Funds to invest in other private funds in the form of FOFs, although the actual feasibility of this structure awaits verification in scheme to be implemented later. We will monitor the administrative review practices for Shenzhen QFLP Fund's investments in other private funds and/or special purpose vehicles (SPVs) and share with you the most up-to-date experiences and information we obtain;

2. It is specified that QFLP Funds are permitted to acquire ordinary shares of listed companies through non-public offerings and transactions including but not limited to private placements, block trades, negotiated transfers, and participation in share allotments as the existing shareholders of the listed

companies;

3. Previous requirements are repealed for foreign-invested equity investment management companies ("**QFLP Managers**"), including those regarding registered capital amount or capital commitment, schedules of capital contribution, investors, professionals, the time limit for completion of fund manager registrations and the formation and registration of private funds, QFLP Fund capital commitment, QFLP Fund investors, the special requirement to unify the QFLP Manager and general partner, and QFLP Managers and QFLP Funds will only be required to comply with laws and regulations applicable to ordinary domestic private funds and the private fund managers in these aspects.

Despite all these welcome changes, it should be noted that the New Shenzhen QFLP Scheme in principle continues to require QFLP Managers to be registered in Shenzhen. Moreover, it is uncertain that whether general partners will also be required to be registered in Shenzhen where the general partner and the QFLP Manager are separate persons as permitted by the New Shenzhen QFLP Scheme. Some other cities have already enacted QFLP schemes that do not mandate the fund management company and/or general partner to be locally incorporated and registered. We look forward in this regard to further specific opening-up measures taken by the local Shenzhen authorities.

To be specific, the New Shenzhen QFLP Scheme introduces changes mainly in the following three aspects:

I Adjusting the supervisory structure to increase review efficiency

The "leading group + pilot program office" supervisory structure is replaced by a joint consulting mechanism between Shenzhen FRB and other related authorities, including Development and Reforming Commission of Shenzhen Municipality, so as to increase efficiency in reviewing QFLP applications. In addition, administrative authority is delegated to the Qianhai Financial Regulatory Bureau for QFLP scheme in Qianhai Shenzhen-Hong Kong Modern Service Industry Cooperation Zone and China (Guangdong) Pilot Free Trade Zone Qianhai and Shekou Area of Shenzhen. Provisions under the Previous Shenzhen QFLP Scheme regarding specific application procedures and application documents are deleted by New Shenzhen QFLP Scheme. We may reasonably expect Shenzhen FRB to specify the application procedures in future implementing rules or guidance. However, the possibility still exists that such implementing rules or guidance may adopt certain access thresholds for the actual review process.

II Lowering QFLP Manager access thresholds and removing several requirements for QFLP Manager management and operations

1. The following special requirements for QFLP Managers and their investors, professionals are repealed and QFLP Managers will instead be governed by the requirements of the Asset Management Association of China ("**AMAC**") applicable to the registration of ordinary private fund managers:

- Requirements for minimum registered capital/capital commitment;
- Time limit for contribution of registered capital/capital commitment;
- Requirements regarding status, net assets, assets under management, and investor qualifications;

- Professional experience requirements for senior management;
- Time limit for setting up new private funds after obtaining a private fund management company qualification.

2. The mandatory custody requirements for the QFLP Funds are repealed;
3. The prohibition is lifted on QFLP Managers making direct investments.

III Lowering QFLP Fund formation thresholds and removing several requirements for QFLP Fund management and operations

1. The following special requirements are repealed for QFLP Funds and their investors. QFLP Funds will instead be subject to requirements applicable to ordinary private funds in the following aspects:

- Requirements for minimum registered capital/capital commitment;
- Requirements for the net assets and minimum capital commitment in QFLP Funds of offshore institutional investors (i.e. we understand in this regard that, post implementation, QFLP Funds will be subject to the requirements for qualified investors of ordinary domestic private funds).

2. The restriction is repealed that the actual controller of the general partner of a QFLP Fund cannot directly and/or indirectly hold more than 50% of the interests of a QFLP Fund. As many QFLP Funds had difficulty complying with this restriction when considering fundraising through accepting offshore funds promoted by their respective QFLP Manager or its affiliates as limited partners, the removal of this restriction undoubtedly provides QFLP Funds with greater flexibility in their overall structures.
3. QFLP Managers must still be an entity registered in Shenzhen in principle. However, the general partner and the management company of QFLP Funds in the form of limited partnership are no longer required to be the same entity, and the New Shenzhen QFLP Scheme also permits co-general-partners structures. Moreover, the New Shenzhen QFLP Scheme provides that permitted management approaches for QFLP Funds include QFLP Funds managed by QFLP Managers, domestic funds managed by QFLP Managers, and QFLP Funds managed by domestic management companies. Such modifications have been adopted in due consideration of the demands of the private fund market in recent years and to enable QFLP Fund structures to be more flexibly designed and diversified.
4. The requirement is repealed regarding the level of custodian banks.
5. The prohibition is lifted on QFLP Fund investments in other private equity or venture capital funds. In practice, we find that there have already been QFLP Funds set up in Shenzhen that adopted the FOF structure before the release of the New Shenzhen QFLP Scheme, which is absolutely good news for FOFs and secondary funds.
6. The special time limit is removed for QFLP Fund formation and private fund product registration.

IV Enhancing interim and post-event supervision

It is specified that Shenzhen FRB and other related authorities will introduce QFLP Managers, QFLP Funds and custodian banks into the Shenzhen private fund information service platform to file their data and information. This measure is taken in consideration of the common practice that custodian banks largely monitor QFLP Fund operations. The newly established information filing obligations for QFLP Funds will enable Shenzhen FRB to carry out interim and post-event supervision more effectively.

Side-by-side comparison of New Shenzhen QFLP Scheme with QFLP schemes in Zhuhai City and Hainan Province

Talk of Shenzhen naturally brings to mind its neighboring city, Zhuhai, once a hot choice for private funds, and Hainan Province, currently the most popular choice for private funds in South China, especially given that Zhuhai and Hainan Province released their local QFLP policies in January 2019 and October 2020, respectively, the *Interim Measures for Administration of the Pilot Scheme for Foreign-invested Equity Investment Enterprises in Zhuhai* (the "**Zhuhai QFLP Scheme**") and *Interim Measures for the Implementation of Qualified Foreign Limited Partner (QFLP) Inbound Equity Investment in Hainan Province* (the "**Hainan QFLP Scheme**"). The Hainan QFLP Scheme, which is the most recently enacted among the three locations, is noticeably superior given its flexibility. This table below outlines differences of key requirements among these three QFLP schemes:

#	Shenzhen QFLP	Hainan QFLP	Zhuhai QFLP
Governing Authorities	Governed by the joint consulting mechanism between Shenzhen FRB and other authorities including Development and Reforming Commission of Shenzhen Municipality. The liaison office is maintained by Shenzhen FRB.	Governed by the financial regulatory administration jointly with Administration for Market Regulation, China Securities Regulatory Commission (the "**CSRC**"), The People's Bank of China Haikou Central Sub-branch and other authorities.	Governed by the leading group of the Zhuhai Municipal Government.
Registered Place of Business	**QFLP Manager**: in principle must be registered in Shenzhen; **GP**: not specified; **QFLP Fund**: must be registered in Shenzhen.	**QFLP Manager**: in principle must be registered in Hainan; **GP**: not specified; **QFLP Fund**: must be registered in Hainan.	**QFLP Manager**: must be registered in Zhuhai; **GP**: must be registered in Zhuhai in principle while may be registered in other places subject to approval in the event that general partner is separate from management company; **QFLP Fund**: must be registered in Zhuhai.
Registered Capital/Capital Commitment of QDLP Manager	Requirements applicable to ordinary domestic private fund managers must be satisfied.	Requirements applicable to ordinary domestic private fund managers must be satisfied.	No less than USD 2 million or its equivalent in other currencies with more than 20% of the capital contributed within 3 months from the issuing of the business license, and the remainder contributed within 2 years following the set-up of the enterprise.

#	Shenzhen QFLP	Hainan QFLP	Zhuhai QFLP
Investors of QFLP Manager	Requirements applicable to ordinary domestic private fund managers must be satisfied.	Requirements applicable to ordinary domestic private fund managers must be satisfied.	■ Hong Kong or Macao investor with NAV of no less than USD 6 million or asset under its management of no less than USD 12 million or its equivalent in other currencies in the previous fiscal year; other foreign investor with NAV of no less than USD 100 million or assets under management of no less than USD 200 million or its equivalent in other currencies in the previous fiscal year; or foreign investor who has obtained asset management license issued by foreign financial administration; ■ Domestic investors shall be entities with asset management license or subsidiary with more than 50% of its capital controlled by such entity, or Zhuhai enterprise with NAV of no less than RMB 300 million or asset under management of no less than RMB 500 million in the previous fiscal year, or Zhuhai enterprise with a total net profit of the last three years of no less than RMB 60 million and total tax payment of no less than RMB 18 million, or Zhuhai enterprise listed on domestic or overseas main board market or its controlling shareholder.
Professionals	Requirements applicable to ordinary domestic private fund managers must be satisfied.	Has at least 2 senior management personnel satisfying all the requirements as follows: ■ Has at least five years of experience in equity investment or equity investing management; ■ Has at least two years of senior management work experience; ■ Has equity investment experience in China or experience working at domestic financial institutions; ■ Has no record of violating any law or regulation within	The same as Hainan.

#	Shenzhen QFLP	Hainan QFLP	Zhuhai QFLP
		the last five years or pending financial dispute litigation, and has a good credit record.	
QFLP Fund Structure	General partners and management companies may be separate persons, and co-general-partners structures are allowed.	There is no need for general partner and management company to be the same.	General partner and management company should be the same in principle. However, the general partner and management company may be different persons, subject to approval in practice.
Capital Commitment of QFLP Fund	/	/	■ QFLP Funds set up by Hong Kong and Macao enterprises or individuals must commit a capital no less than USD 6 million or its equivalent in other currencies; ■ QFLP Funds set up by other offshore enterprises or individuals must commit a capital no less than USD 15 million or its equivalent in other currencies.
QFLP Fund Investors	Requirements applicable to ordinary domestic private fund investors must be satisfied.	Requirements applicable to ordinary domestic private fund investors must be satisfied.	In the event that the general partner and certain limited partners share the same actual controller, such actual controller must not invest in more than 50% of the interests of the QFLP Fund.
QFLP Fund Investment Restrictions	■ Can invest in non-listed company equities; ■ Can invest in domestic private equity funds and venture capital funds, while such underlying funds invested in by QFLP Funds are encouraged to directly invest in industrial enterprises; ■ Can invest in non-publicly offered and traded ordinary shares of listed companies, including shares offered through private placements, block trades, negotiated transfers, etc.; ■ Can participate in share allotments as	The following activities are prohibited: ■ Invest in industries prohibited to foreign investment; ■ Invest in secondary market stocks and corporate bonds, except for investment targets otherwise approved by the Hainan Provincial Financial Regulatory Bureau, CSRC Hainan Provincial Administration, the People's Bank of China Haikou Central Sub-branch, Hainan Provincial Administration for Market Regulation. ■ Participate in futures and other financial derivative trading; ■ Invest in non-self-use real estate;	Investment as FOFs is prohibited, except for cases where the QFLP involves municipal or higher level strategic cooperation or the investment is directed toward a specific industrial project through a project fund.

#	Shenzhen QFLP	Hainan QFLP	Zhuhai QFLP
	the existing shareholders of listed company; ■ Can invest in other forms as permitted by CSRC or AMAC.	■ Divert non-proprietary funds into investments; ■ Provide loan or guarantee to non-invested entities; ■ Other activities prohibited by laws and regulations.	
Preferential Policies	*Several Measures Supporting the Development of Financial Industry of Shenzhen* provides settlement rewards, rewards based on managed asset scale, management fee income rewards, office purchasing or rental subsidies, and supporting policies for introduced key super large equity investment enterprises.	■ Equity investment fund management professionals may apply for the accreditation of high-level talents of Hainan Province pursuant to applicable policies. Those who satisfy the conditions can enjoy preferential policies regarding residence, home and vehicle purchases, spousal employment, children's education, medical and housing guarantees. ■ Each city's (county's) government or management commission of key industrial park shall enact QFLP supporting policies including settlement rewards, office housing rewards, economic contribution rewards, etc. ■ Hainan Provincial Financial Regulatory Bureau, CSRC Hainan Provincial Administration and the municipal level administration for market regulation shall promote private equity transactions, maximize the platform functions of each trading venue, and support custody, transactions and withdrawals of QFLP enterprises. ■ QFLP enterprises in good standing may be eligible for more convenient foreign exchange management measures. ■ Enterprises in encouraged industries registered in and running their business in	The QFLP Funds and management companies registered in Zhuhai Hengqin New Area can enjoy support policies for settlement and business operations under the *Measures for Supporting further Promotion and Development of Private Equity Investment Fund Industry in Hengqin New Area*. QFLP Management Company registered in other area of Zhuhai can enjoy preferential policies including: ■ For QFLP Managers (which must be registered in Zhuhai): 100% return of local retained part of its tax payment. ■ For investors of QFLP Funds and senior management: tax refunds based on different percentages depending on total taxes paid.

#	Shenzhen QFLP	Hainan QFLP	Zhuhai QFLP
		Hainan Province are eligible for the preferential enterprise income tax rate of 15%; high-level talents and urgently-needed talents working in Hainan Free Trade Port are eligible for an exemption from personal income taxes to the extent the actual tax burden exceeds 15%; ■ Depending on the registered place of business of the QFLP Fund or QFLP Manager, different regions, fund towns, industrial parks may provide preferential tax policies or rewards based on the specific circumstances of the QFLP Fund. According to current practices, there are chances for QFLP Funds and its QFLP Manager to obtain an actual tax rate as low as 10%.	

The New Shenzhen QFLP Scheme takes the first step to promote the constant and high-quality development of equity investment activities in Shenzhen[1], which sufficiently reflects the spirit of the Fifth Plenary Session of the 19th Central Committee of the Communist Party of China and requirements of "private equity and venture capital market access and developing environment optimization" raised by President Xi Jinping in his important speech in the Celebration of the 40th Anniversary of the Establishment of Shenzhen Special Economic Zone toward the comprehensive reform pilot program in Shenzhen. It may be reasonably anticipated that Shenzhen will later enact further polices and measures to realize the optimization of private equity and venture capital markets following the first steps in cross-border policy reform and perfection in Shenzhen taken by the New Shenzhen QFLP Scheme. We also expect such policies and measures will complement each other together with the New Shenzhen QFLP Scheme so as to highlight Shenzhen's unique attractiveness as a pioneer in reform and opening-up.

[1] Shenzhen FRB specified in *Several Measures regarding the Promotion of Constant and High-Quality Development of Equity Investment Activities in Shenzhen (Draft for Comment)* dated 8 January 2021 that "[e]xpanding the scale of foreign invested equity investment enterprise (QFLP) pilot program, reasonably expanding the scope of equity investment, lowering the access threshold for qualified investors. Deepening pilot program of qualified domestic limited partners (QDIE), promoting outbound investment facilitation."

2. Key Adjustments in the Finalized Anti-Monopoly Guidelines for the Platform Economy

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Introduction: On February 7, 2021, the State Council Anti-monopoly Commission (the "**Commission**") promulgated the *Anti-Monopoly Guidelines for the Platform Economy* (the "**Guidelines**"), following only three months after the State Administration for Market Regulation ("**SAMR**") issued an exposure draft of the same on November 10, 2020 (the "**Exposure Draft**"), which unveiled a more rigorous approach to anti-monopoly regulation. The brief interval between the Exposure Draft and the finalized Guidelines demonstrates fully the importance the authorities have attached to anti-monopoly work in the platform economy.

In our November 12 article, *The Way Forward: Anti-monopoly Guidelines for the Platform Economy*, we put forward for reference our industry observations regarding the Exposure Draft. Comparatively, the Guidelines resemble the Exposure Draft in style and structure but also differ significantly with respect to certain content, which may impact regulatory policies going forward for platform economy undertakings. In this article, we analyze the key adjustments in the Guidelines in conjunction with our earlier observations.

The Guidelines confirm some of our earlier assumptions: the Guidelines refine provisions found in the Exposure Draft and reduce legal uncertainty, thereby helping platform undertakings to enhance their understanding of relevant policies, promoting the implementation of those policies, and facilitating the development of the platform economy. We therefore see a promising future for platform undertakings - undertakings simply need to properly understand the new policies and cooperate with regulators in implementing them.

In this article, we summarize the key adjustments in the Guidelines compared to the Exposure Draft in five aspects, basic principles, defining the relevant market, monopoly agreements, abuse of dominance, and concentrations of undertakings. In general, we find these adjustments take practical scenarios into sufficient account and are conducive to the innovative development of platform undertakings.

Abstract:

1. The Guidelines substantially modify the wording of basic anti-monopoly principles by adding expressions such as "preventing the disorderly expansion of capital" as mentioned at the meeting of the CPC Central Committee Politburo and the Central Economic Work Conference, and striking expressions such as "stay open and inclusive" and expressions used in regulatory policy for the new economy such as "stay inclusive and prudent." From this, we understand anti-monopoly law enforcement will trend toward strengthening in the future, supported by detailed measures such as those specified in the *Interim Measures for Administration of Subsidies for Anti-monopoly Work,* promulgated by the Ministry of Finance.

2. The Guidelines further specify the methods for defining relevant markets in the platform economy by stipulating that relevant markets can be defined based on products on the platform, multiple relevant product markets can be defined respectively based on multiple related products on the platform, or multiple relevant markets can be combined into one market where the existing cross-platform network effects of a platform can impose sufficient competition constraints on platform undertakings. We expect regulators will have more flexibility in defining relevant markets in the platform economy in the future without struggling to consider which methods to employ. On this basis, the Guidelines do not contain a provision found in the Exposure Draft that would have permitted regulators to directly cite platform undertakings for abuse of dominance without first defining the relevant market in which the abuse occurred.

3. The changes in the monopoly agreement section are more akin to technical adjustments, of which two require particular attention. First, with respect to adjustments in horizontal monopoly agreements, the Guidelines specify that independent price-following behavior should not be regarded as a price cartel, so as to avoid undue interpretation of synergistic behavior that could result in disorder in the normal operation of markets. Second, the Guidelines specify the meaning of most-favored-nation treatment clauses (**platform undertakings require business undertakings on the platform to provide the undertaking with transaction conditions equal to or more favorable than those offered to other competing platforms in terms of product price or quantity**), and state that such clauses intersect with both vertical monopoly agreements and abuse of dominance.

4. With respect to abuse of dominance, the Guidelines retain the core content found in the Exposure Draft, such as the analysis framework for predatory pricing (below-cost sales), the "choosing-one-from-two" analysis framework, factors to consider when determining whether a platform constitutes an essential facility, and the prohibition on implementing different transaction terms based on big data and algorithms. It is particularly noteworthy that the Guidelines add two new bases to justify a platform undertaking selling below cost, which is intended to ease concerns over undertaking promotional activities, namely, "developing other businesses on the platform within a reasonable period of time" and "promoting the entry of new products into the market within a reasonable period of time." Furthermore, the Guidelines identify data as a criterion to consider when determining whether a platform constitutes an essential facility and strikes content found in the Exposure Draft that could have deemed related data as essential facilities. In addition, the Guidelines also make appropriate adjustments to the definitions of "unreasonable transaction terms" and "differential

treatment in transactions".

5. With respect to concentrations of undertakings, the Guidelines retain reporting requirements for control agreement structures while continuing to emphasize that regulators will closely scrutinize acquisitions of start-ups and emerging platforms, acquisitions that are not notifiable due to the adoption of free or low-price policies, and acquisitions with high market concentrations but which result in small overall market scale. In addition, the following changes are subject to special scrutiny: in calculating platform turnover, the Guidelines add "playing a leading role" as a criterion when analyzing the platform's turnover generating model; and, in terms of behavioral remedies, the Guidelines add data as a facility subject to open access and stipulate that concentrations of undertakings can be conditionally approved, including with commitments to compatibility and to no decrease in interoperability.

Key adjustments to fundamental principles

The Guidelines make significant adjustments to expressions of fundamental competition law principles. We believe the following adjustments warrant special attention:

Exposure Draft	Guidelines
Article 2 Basic Principles … … ~~To create a fair competition order~~. The Guidelines aim to prevent and curb monopolistic behaviors ~~that act to eliminate or restrict competition, maintain~~ a fair, open and inclusive development environment in the platform economy, reduce market entry barriers, allow more market players to enter the market, participate in competition in a fair and orderly manner, and inspire market vitality.	**Article 3 Basic Principles** … … To ensure fair market competition. The Guidelines consistently treat market players equally, aim to prevent and prohibit monopolistic behaviors, improve the laws and regulations on the identification of monopolistic behaviors of platform enterprises, ensure fair competition in the platform economy, prevent disordered capital expansion, support the innovative development of platform enterprises, and enhance international competitiveness.
To safeguard the legitimate rights and interests of all concerned parties. Many parties are involved in the development of platform economy. The aim of anti-monopoly regulation is not only to protect fair ~~market~~ competition ~~and safeguard and promote the development of the platform~~, but also to safeguard the legitimate rights and interests of all parties concerned including business undertakings ~~and~~ consumers within the platform, so as ~~to enable~~ the whole society to share the achievements of technological progress and economic development of the platform economy and realize the harmonious coexistence and healthy development of the platform economy.	To safeguard the legitimate rights and interests of all parties. Many parties are involved in the development of the platform economy. The aim of anti-monopoly regulation is not only to protect the fair competition in the field of the platform economy and give full play to the function of platform economy to promote the optimization of resource allocation, technological progress and efficiency improvements, but also to safeguard the legitimate rights and interests of all parties concerned including business undertakings, consumers and employees on the platform, as well as to strengthen the overall coordination between anti-monopoly law enforcement and industrial regulation, so as to enable the whole society to share the achievements of technological progress and economic development of the platform economy and achieve the harmonious coexistence and healthy development of the platform economy.

First, the Guidelines add "preventing disordered capital expansion" into its fundamental principle. The principle of "preventing disordered capital expansion" has been referred in the conference of the CPC

Central Committee Politburo and the Central Economic Work Conference successively held in December 2020, and "strengthening anti-monopoly and preventing disordered capital expansion" has also been stated as one of eight key tasks by the Central Economic Work Conference, demonstrating the determination of the State to strengthen anti-monopoly regulation, enhance anti-monopoly law enforcement, and promote capital to play the role of facilitating innovation and enhancing consumer welfare and public interests. In this respect, measures taken by the State include encouraging platform enterprises to pursue original and basic scientific and technological innovation by utilizing the advantages of data and algorithms. Correspondingly, the Guidelines delete the expression of "maintain a fair, open and inclusive development environment." We predict that anti-monopoly law enforcement work will trend toward strengthening in the future, supported by detailed measures such as those provided for under the *Interim Measures for Administration of Subsidies for Anti-monopoly Work*.

Second, added to the Guidelines as their fundamental principles are "support the innovative development of platform enterprises" and "enhance international competitiveness", indicating the intent of regulators to maintain a balance between strengthening domestic anti-monopoly law enforcement and enhancing enterprises' global competitiveness. It should be noted that anti-monopoly law targets monopolistic practices rather than large-scale platform enterprises. Only if we properly control monopolistic practices can we ensure platform enterprises develop on the right track and gain innovative capacity and competitive strength. On the contrary, over-regulation may occur if anti-monopoly enforcement is isolated from specific monopolistic practices, which ultimately will hurt the innovation and competitiveness of platform enterprises.

Third, the Guidelines stipulate a strengthening of the overall planning and coordination between anti-monopoly law enforcement and industry supervision, indicating China's emphasis on exercising coordinated supervision of monopolistic practices. Previously, the People's Bank of China (PBOC) called for "overall coordinated supervision" in Article 64 of *Regulations on Non-bank Payment Institutions (Draft for Comment),* proposing that non-bank payment institutions engaging in monopolistic behaviors be jointly punished in accordance with relevant laws and regulations by the anti-monopoly enforcement authorities under the State Council and the PBOC. However, detailed rules for implementing this "joint-punishment" mechanism in practice still need to be explored by anti-monopoly and industry supervisory authorities. OECD pointed out in a publication entitled *Relationship between Regulators and Competition Authorities* that competition authorities generally take a firmer stance on protecting competition in various industries, have more knowledge of market competition, are more experienced in dealing with restrictive competitive practices, and are less likely to be deterred by the regulation of industry regulators. Therefore, anti-monopoly law enforcement authorities may need to properly integrate their own competition concerns with the concerns of industry regulators to avoid what OECD suggests could otherwise lead to the resource duplication or inconsistent, investment-discouraging application of two sets of policies[2][3].

[2] *See* Org. Econ. Coop. & Dev, *Relationship between Regulators and Competition Authorities*, DAFFE/CLP (99)8, June 29, 1999, pgs. 9-10.

[3] Ibid. at pgs. 9-10.

Key adjustments to the definition of relevant markets

The Guidelines substantially revise content concerning the definition of relevant market. Below, we analyze two major adjustments in this aspect:

Exposure Draft	Guidelines
Article 4 Definition of Relevant Markets … … Substitution analysis will be used to define relevant product markets in the platform economy. For defining the relevant product market, demand substitution analysis may be conducted based on such factors as platform functions, business models, user groups, multi-sided markets, and offline transactions; if supply substitution competition exerts similar constraints on undertakings' behaviors as demand substitution, ~~supply substitution~~ analysis shall be conducted based upon factors such as market entry, technical barriers, network effects and cross-border competition. ~~In the platform economy, competition between undertakings is usually centered around their core business, and lies in how they obtain extensive and lasting user attention. Therefore, relevant product market should not be defined merely based upon basic services of the platform, possible cross-platform network effects should also be considered to determine whether an independent market or multiple relevant markets will be defined with respect to the platform.~~	**Article 4 Definition of Relevant Markets** … … Relevant product market Substitution analysis will be used to define relevant product markets in the platform economy. In defining the relevant product market, demand substitution analysis may be conducted based on such factors as platform functions, business models, application scenarios, user groups, multi-sided markets and offline transactions; if supply substitution competition exerts similar constraints on undertakings' behaviors as demand substitution, supply substitution analysis shall be conducted based upon such factors as market entry, technical barriers, network effects, lock-in effect, transfer cost and cross-border competition. Specifically, we may either define one relevant market based upon product on the platform side or define multiple relevant product markets according to the multilateral commodities involved on the platform, by taking into account the mutual relationship and interactions between the different relevant product markets. A relevant product market can also be defined based on the platform as a whole when the cross-platform network effect of the platform can impose sufficient competition constraints on the platform undertakings.
Necessity of relevant market definition in various anti-monopoly cases Adhere to the principle of case analysis, different types of monopoly cases have different actual needs for defining the relevant market. ~~There is no need to clearly define a relevant market in order to identify whether undertakings have reached the following monopolistic agreements: horizontal monopoly agreements such as agreements on price fixing and market segmenting reached among undertakings in the platform economy, vertical monopoly agreements such as agreements on fixing resale prices and limiting minimum resale prices.~~ ~~Identifying the relevant market is generally the first step to identify whether undertakings have engaged in abuse of dominant market position in the platform economy.~~ ~~In carrying out an anti-monopoly review of a concentration of undertakings in the platform economy, it is generally necessary to define the relevant market.~~ ~~In the following exceptional circumstances, the authority may directly determine that undertakings in the platform economy have implemented monopolistic conduct without~~	Necessity of relevant market definition in various anti-monopoly cases Adhere to the principle of case analysis, different types of monopoly cases have different actual needs for defining the relevant market. Defining the relevant markets is generally required in platform economy cases involving investigating monopoly agreements, investigating abuse of market dominant position, and anti-monopoly review of concentration of undertakings.

Exposure Draft	Guidelines
~~defining the relevant market: the monopolistic conduct is proved by sufficient and direct evidence; conduct that is possible only if the market dominance exists has lasted for a long time and have produced obviously harmful effects; and defining the relevant market proves very difficult or impossible for lack of sufficient market conditions.~~	

First, the Guidelines further specify methods for defining relevant markets in the platform economy. The Exposure Draft proposed that the cross-platform network effect could define either an independent market or multiple relevant markets without further analyzing what methods would be used to define such markets. The Guidelines provide specific methods to be used to define relevant markets. Specifically:

1. Relevant market is defined based upon the products on the platform. For example, in reviewing behaviors of an online car-hailing platform that imposes transaction conditions on drivers, the relevant market may be defined merely based upon drivers by examining whether the platform has a market dominant position in the recruitment of drivers.

2. Where a platform involves multiple products, multiple relevant markets may be defined based on the relationships among the products or multiple relevant markets may be combined into one market where there is a strong cross-platform network effect. We discussed in our November 12 article that the U.S. Supreme Court decided a credit card antitrust case in 2018 that ruled on whether a "two-sided platform" should be defined as one or two relevant markets with respect to cardholders and merchants[4]. In that case, whether monopolistic behavior could be substantiated, exempted, or justified rested upon how the relevant market was defined. Similarly, this conclusion will vary substantially if we use different methods of defining the relevant market when we examine whether monopolistic behavior has an effect on consumers.

3. As mentioned above, the Commission raises the restrictiveness of "cross-platform network effects" as determinative of whether there is one or multiple relevant markets. This idea echoes a proposition the U.S. Supreme Court put forth in its 2018 decision, in which the court ruled that "indirect network effects" determine whether or not a platform is considered a "two-sided transaction market." "Indirect network effects" is similar in meaning to "cross-platform network effects," with both providing that the value of a platform to customers on one side depends on the number of customers on the other. Judging from the practices of other jurisdictions, credit card organizations would generally be held as platforms subject to significant cross-platform network effect. In contrast, the "newspaper-advertising" two-sided market would generally be considered subject to less cross-platform network effect, because the readers of newspapers do not care about the quantity of advertising on the other side of the platform, so the cross-platform network effect can only affect the one side of the platform.

In addition, the Exposure Draft mentioned the concept of "attention competition," proposing a possibility of incorporating platforms with different principal businesses into one same relevant market (for example, that social networking platforms and video platforms be incorporated into one relevant market due to the

[4] *Ohio* v. *American Express Co.*, 585 U. S. ___ (2018).

existence of attention competition). However, the concept was struck from the Guidelines, indicating that attention competition will not be considered a factor in defining relevant markets, but may merely be used to analyze market power once the relevant market has been defined.

Second, the Guidelines do not contain a provision found in the Exposure Draft that would have allowed regulators to directly identify abuse of dominance practices without defining the relevant market, provided certain conditions were met. As we mentioned in our November 12 article, this provision would have helped to reduce law enforcement difficulties in certain cases, but its application would have needed to satisfy a series of conditions, such as proving "the monopolistic behavior is proven by the sufficient and direct evidence; conduct that is possible only if market dominance has lasted for a long time and has produced obviously harmful effects," and the relevant conditions would have required further refinement. In fact, the Federal Trade Commission and Department of Justice explicitly puts forth in its Horizontal Merger Guidelines that "[law enforcement] analysis need not start with market definition[5]" and many scholars have also proposed more straightforward approaches to competition analysis — the problem is that we still lack a universally applicable, reliable, and widely accepted economic tool in practice. We believe the Guidelines have fully considered the feasibility of this issue in practice.

Nevertheless, as we have pointed out in our November 12 article, the Supreme People's Court indicated in a 2013 judgment that "the relevant market need not be **explicitly and clearly** defined in certain abuse of market dominance cases … Even if the relevant market is not clearly defined, the regulator may still assess the market position of the undertaking and the possible market impact of the alleged monopolistic behaviors by examining direct evidence of exclusion or restriction of competition." Therefore, while the relevant provisions were struck from the Guidelines, there still remains the possibility that regulators may still not clearly define the relevant market in some abuse of dominance cases in practice.

Key adjustments for monopolistic agreements

We understand that adjustments in monopoly agreements are akin to technical adjustments compared with adjustments in fundamental principles and in the definition of relevant markets. We believe the following adjustments warrant special attention:

Exposure Draft	Guidelines
Article 5 Form of monopolistic agreements Monopoly agreements in the platform economy ~~mainly~~ refer to agreements, decisions, or other concerted actions reached among ~~platform undertakings~~ and undertakings ~~within platforms~~ to eliminate or restrict competition. Such agreements and decisions may be made in writing, oral, or otherwise. Other concerted actions refer to undertakings who in fact engage in concerted acts, but no substantive agreement exists.	**Article 5 Form of monopolistic agreements** Monopoly agreements in the platform economy mainly refer to agreements, decisions, or other concerted actions reached among platform undertakings and undertakings within platforms to eliminate or restrict competition. Such agreements and decisions may be made in writing, oral, or otherwise. Other concerted actions refer to undertakings who engage in concerted actions through data, algorithms, platform rules, or other means but there exists no substantive agreement or decision, excluding parallel behavior conducted by undertakings out of independent declarations of will such as price leadership.

[5] U.S. Dept. Jus., U.S. Fed. Trade Comm., *Horizontal Merger Guidelines*, p. 7 (issued August 19, 2010).

Exposure Draft	Guidelines
Article 7 Vertical monopoly agreements … … ~~Analyze whether the most-favored-nation treatment clause constitutes a vertical monopoly agreement, and comprehensively consider the business motives of the undertaking to sign the clause, the undertaking's ability to control the market, and the impact of the implementation of the clause on market competition, consumer interests and innovation, etc.~~ ~~Exclusivity agreements reached between~~ platform undertakings~~ and transaction counterparties~~ may constitute ~~other~~ monopoly agreements as prescribed in Article 14 of the Anti-monopoly Law. ~~When examining whether an exclusivity agreement would exclude or restrict competition, factors~~ considered ~~by anti-monopoly law enforcement agencies generally~~ include the market power of the platform undertaking, competition in the relevant market, and to what extent market entry will be restricted for other undertakings, etc.	**Article 7 Vertical monopoly agreements** … … A monopoly agreement or abuse of dominant market position may be constituted where a platform undertaking requires undertakings within the platform to offer it transaction conditions that are equal to or superior to those offered to other competitive platforms in terms of price, supply quantity, etc. In order to analyze whether the above conduct constitutes a vertical monopoly agreement as provided in paragraph 3 of Article 14 of the Anti-monopoly Law, factors to be considered may include the market power of the platform undertaking, the status of competition in the relevant market, to what extent market entry will be restricted for other undertakings, the impact of such conduct on consumer interests and innovation, etc.
Article 8 Hub-and-spoke agreements Competitive undertakings may reach hub-and-spoke agreements with the same effect as horizontal monopoly agreements by virtue of the vertical relationship with the undertakings or platform undertakings may organize and coordinate the competitive undertakings to reach such agreements. The following factors need to be considered in order to analyze whether an agreement constitutes a monopoly agreement regulated by the Anti-monopoly Law: whether a monopoly agreement has been reached and implemented between competitive undertakings with effects to exclude or restrict competition in the relevant market by using means including technical means, platform rules, data and algorithms, etc.	**Article 8 Hub-and-spoke agreements** Competitive undertakings within the platform may reach hub-and-spoke agreements with same effects as horizontal monopoly agreements by virtue of the vertical relationship with the undertakings or platform undertakings may organize and coordinate competitive undertakings to reach such agreements. The following factors need to be considered when analyzing whether the agreement constitutes a monopoly agreement described under Article 13 and 14 of the Anti-monopoly Law: whether a monopoly agreement has been reached and implemented between competitive undertakings within the platform with the effects to exclude or restrict competition in the relevant market by using means including technical means, platform rules, data and algorithms, etc.

First, in terms of horizontal monopoly agreements, the Guidelines specify that independent price following does not constitute a price cartel. This provision clarifies the status of price following as a normal competitive behavior in the market economy, so as to avoid over-interpreting the scope of concerted actions that would affect ordinary commercial decisions. It is important to note that "data" is also specified as a means by which to engage in concerted actions. We understand "data" here to refer to the exchange of data. However, it would be difficult to prove that there exists price following conducted out of independent expressions of will when sensitive information is exchanged between competitors and those competitors engage in this practice in concert, even if they have not directly communicated their intent to take concerted action.

Second, the Guidelines clarify the meaning of the most-favored-nation treatment clause when it is used in the platform economy, pointing out that the clause cuts across both vertical monopoly agreements and abuse of market dominant position. Meanwhile, the Guidelines strike the term "most-favored-nation treatment clause" and emphasize review of form of acts of the business undertakings. Indeed, in addition to the most-favored-nation treatment clause, other clauses in vertical monopoly agreements may also involve vertical monopoly agreements and abuse of dominance, because most abuse dominance behaviors involve the conclusion of relevant agreements. In other words, if platforms engage in acts that involve both vertical monopoly agreements and abuse of dominance, they may still be held to violate relevant vertical monopoly agreement provisions even if they are found not to have engaged in abuse of dominance for lack of dominant market position. Possible scenarios include:

1. The first scenario is the enterprise occupies a market share that is greater than the market power standard but is lower than the market dominance standard. For example, the European Commission, in paragraph 26 of the Guidelines on the Application of Article 81 (3) [101 (3)] of the Treaty [Establishing the European Community][6], notes that enterprises may occupy less market share to reach an illegal vertical agreement than to engage in abuse of dominance as stipulated in Article 102 of the TFEU. We believe that competition authorities in the European Union would hold that an undertaking that has 30% or more market share could still be deemed to have illegally concluded a vertical agreement even if it does not have a dominant market position, based on provisions of the *Vertical Block Exemption Regulation* that stipulate only a 30% market share exemption standard for vertical agreements. Similarly, in China, the *Anti-monopoly Guidelines on the Automobile Industry* also provide a 30% market share standard for vertical, geographic, and customer restrictions, which may be of great reference value for undertakings in other industries when they design most-favored-nation treatment clauses or other vertical agreement clauses.

2. The second scenario involves cumulative monopolistic effects. The *Anti-monopoly Guidelines on the Automobile Industry* describe "cumulative monopolistic effects" as "most or even all undertakings in the relevant market have all adopted similar vertical monopoly agreements, and a vertical restrictions network which fully covers the entire relevant market has been formed thereupon." Where there exist cumulative monopolistic effects, undertakings may still be identified as being in violation even if their market share is relatively low (even lower than the 30% market share standard as mentioned above).

Third, in the provisions applicable to hub-and-spoke agreements, the Commission retained for regulators the flexibility to potentially apply either Article 13 or 14 to platform undertakings. In the future, we need to observe how relevant provisions of the Guidelines will be adjusted if Article 17 is retained in the current revision draft of the *Anti-monopoly Law of the People's Republic of China*, which would prohibit business undertakings from organizing and facilitating the conclusion of monopoly agreements.

Key adjustments in abuse of dominant market position

With respect to the abuse of market dominant position, the Guidelines retain core content such as the

[6] 26. The creation, maintenance or strengthening of market power can result from a restriction of competition between the parties to the agreement. It can also result from a restriction of competition between any one of the parties and third parties, e.g. because the agreement leads to foreclosure of competitors or because it raises competitors' costs, limiting their capacity to compete effectively with the contracting parties. Market power is a question of degree. The degree of market power normally required for the finding of an infringement under Article 81(1) in the case of agreements that are restrictive of competition by effect is less than the degree of market power required for a finding of dominance under Article 82.

analysis framework for predatory pricing (below-cost sales), "choosing-one-from-two" analysis frameworks, factors to consider when determining whether the platform constitutes necessary facilities, and prohibiting the implementation of different transaction terms based on big data and algorithms. Many adjustments in this area involve technical adjustments, including supplementing factors to consider when determining existence of market dominant position, adjusting circumstances that constitute abuse of the market dominant position, and providing more justifications for below-cost sales. Of these adjustments, we believe the following warrant particular attention:

Exposure Draft	Guidelines
Article 13 Sales below cost … … A platform undertaking may carry out sales below cost for the following justifiable reasons: Development of other businesses within the platform within a reasonable period; Promotion of market entry for new products within a reasonable period; Other reasons that can justify its actions.	**Article 13 Sales below cost** … … An undertaking in the platform economy may carry out sales below cost for the following justifiable reasons: Development of other businesses within the platform within a reasonable period; Promotion of market entry for new products within a reasonable period; Attracting new customers within a reasonable period of time; Carrying out promotion activities within a reasonable period; Other reasons that can justify its actions.
Article 14 Refusal to deal … … The following factors must be comprehensively considered when determining whether a platform constitutes essential facilities: substitutability with other platforms, the availability of other useful platforms, the feasibility of developing competitive platforms, the extent of reliance by transaction counterparties on such platforms, and the possible impact of platform opening on the platform undertaking. ~~Factors that must be comprehensively considered when determining whether relevant data constitute essential facilities include whether such data is indispensable for participating in market competition, whether the data can be acquired from other channels, the technical feasibility of open access to the data, and the possible impact of open access to the data on the undertakings possessing the data.~~ … …	**Article 14 Refusal to deal** … … The following factors must be comprehensively considered when determining whether a platform constitutes essential facilities: data possession status of the platform, the substitutability with other platforms, the availability of other useful platforms, the feasibility of developing competitive platforms, the extent of reliance by transaction counterparties on such platforms, and the possible impact of open access to the platform on the platform undertaking. … …
Article 16 Tying or attaching unreasonable conditions to transactions … … The following factors may be considered when analyzing transactions undertaken with tying or attaching unreasonable conditions: (V) Compulsory user information collection or imposing	**Article 16 Tying or attaching unreasonable conditions to transactions** … … The following factors may be considered when analyzing transactions undertaken with tying or attaching unreasonable conditions: (V) Compulsory collection of unnecessary user information or implementing transaction conditions, transaction

Exposure Draft	Guidelines
transaction conditions unrelated to the transaction. … …	processes and service items unrelated to the transaction.
Article 17 Differential treatment … … The following factors may be considered when analyzing whether differential treatment is constituted: Implementing differentiated transaction prices or other transaction terms based on big data and algorithms and according to the financial strength, consumption preferences, user habits, etc. of the transaction counterparties; ~~Implementing transaction prices or other transaction terms differentiated for old and new transaction counterparties based on big data and algorithms;~~ Implementing differentiated standards, rules, and algorithms; Implementing differentiated payment terms and transaction methods. … … Undertakings in the platform economy may implement differentiated transaction terms for the following justifiable reasons: ~~First order~~ preferential treatment offered to new users within reasonable period of time; ……	**Article 17 Differential treatment** … … The following factors may be considered when analyzing whether differential treatment is constituted: Implementing differentiated transaction prices or other transaction terms based on big data and algorithms and according to the financial strength, consumption preferences, user habits, etc. of the transaction counterparties; Implementing differentiated standards, rules, and algorithms; Implementing differentiated payment terms and transaction methods. … … Undertakings in the platform economy may implement differentiated transaction terms for the following justifiable reasons: Preferential treatment offered to new users within reasonable period of time; ……

First, the Guidelines add two justifiable reasons for predatory pricing, namely, "attraction of new customers within a reasonable period of time" and "carrying out promotion activities within a reasonable period" - both are common business practices taken by platform companies in market competition, indicating the Commission has considered relevant business practices.

Second, it is controversial in business circles as to whether data can constitute essential facilities, as studies of data are still in their initial stages. The Exposure Draft failed to resolve this controversy, although it stipulated general rules for identifying essential facilities to be used when examining whether data constitutes essential facilities. In this area, the Guidelines adopt a flexible approach by taking data as one of the considerations for determining whether a platform constitutes an essential facility, while striking provisions on identifying data to constitute an essential facility. Similarly, the *Anti-monopoly Guidelines on Intellectual Property Rights* in Article 16 struck references to "essential facilities" that were mentioned in its exposure draft, so as to avoid disputes over this issue by avoiding defining whether intellectual property rights can constitute essential facilities.

Third, with respect to attaching unreasonable transactions terms, the Guidelines impose limitations on the scope of "compulsory user information collection" as referenced in the Exposure Draft, by making it clear that information prohibited from collection refers to "unnecessary" user information, thus avoiding excessive regulation by regulators. Meanwhile, the Guidelines clearly prohibit platforms from attaching unrelated transaction procedures and service items in dealing with users, which are common unreasonable terms that many platforms implement in practice.

Fourth, with respect to differential treatment, the Guidelines strike the provision in the Exposure Draft that would have prohibited platforms from "implementing transaction prices or other transaction terms differentiated for old and new transaction counterparties based on big data and algorithms." In our opinion, this adjustment is reasonable because: (1) it is a common practice for platform enterprises to provide preferential treatment to new customers within a reasonable period of time (not limited to the first transaction the new customer concludes). Therefore, the Exposure Draft faced criticism for being too harsh for defining this practice as illegal, although violations could have been exempted if the platform could prove such practices were implemented for justifiable reasons; and (2) the practice "implementing transaction prices or other transaction terms differentiated for old and new transaction counterparties based on big data and algorithms" is covered by situations of differential treatment as listed in the first paragraph, "[i]mplementing differentiated transaction prices or other transaction terms based on big data and algorithms and according to the financial strength, consumption preferences, user habits, etc. of the transaction counterparties." Nevertheless, platform enterprises still need to note the "reasonable period of time" criterion so as to avoid being deemed to implement differential treatment based upon big data or algorithms.

Key adjustments to concentrations of undertakings

In terms of concentrations of undertakings, the Guidelines retain the core content of the Exposure Draft, such as mandatory declaration of control structure agreements, and stressing that regulators shall pay close attention to acquisitions of start-ups and emerging platforms, acquisitions that are not notifiable due to free or low-price policies adopted by undertakings and acquisitions that result in a high market concentration but a small market size. Adjustments in this area are basically technical improvements in terms of consistency, completeness and accuracy, and wording. Of those adjustments, the following warrant special attention:

Exposure Guidelines	Guidelines
Article 18 Criteria for declaration In the field of platform economy, turnover may be calculated in different manners ~~according to~~ the undertaking's business model. For platform undertakings that only provide information matching services and charging commission therefor, the turnover may be calculated based upon the service fees collected by the platform and other income of the platform; ~~for~~ platform undertakings that participate in the market competition on one side of the platform, the turnover may be calculated according to the transaction amount involved in the platform ~~and other income of the platform~~.	**Article 18 Criteria for declaration** In the platform economy, the turnover of business undertakings shall include the income derived from sale of commodities and provision of services. The calculation of turnover may be different according to the industry practice, charging methods, business model and the role of platform undertakings. For platform undertakings that only provide information matching services and charging commission therefor, the turnover may be calculated based upon the service fees collected by the platform and other income of the platform; for platform undertakings that participate in the market competition on one side of the platform or play a leading role in the transaction, the turnover may be calculated according to the transaction amount involved in the platform and other income of the platform.
The anti-monopoly law enforcement agency may	The anti-monopoly law enforcement agency under the

Exposure Guidelines	Guidelines
conditionally approve concentration of undertakings that is not prohibited. Conditions can be attached include: Giving access to infrastructures including networks or platforms, licensing key technologies, terminating exclusive agreements, and modifying platform rules or algorithms; and	State Council may conditionally approve concentration of undertakings that is not prohibited. Conditions can be attached include: Giving access to infrastructures including networks, data or platforms, licensing key technologies, terminating exclusive agreements, modifying platform rules or algorithms and undertaking of compatibility or not reducing the level of interoperability; and

First, regarding the platform turnover calculation, the Guidelines further specify that the turnover of platform enterprises includes sales income and service fee. With respect to the calculation of sales income, the Guidelines divide platforms into two circumstances, i.e., the platforms participating in the market competition on one side of the platform (e.g., self-operated stores) and platforms playing a leading role in the transaction. Although the Guidelines do not specify what circumstances constitute "play a leading role in the transaction," we understand leadership forms when platform enterprises can decide the transaction terms for the platform side, such as online car-hailing platform.

Second, the Guidelines categorize data as facilities and stipulates that regulators may conditionally approve concentrations of undertakings by ordering open data access. In addition, the Guidelines add "undertaking of compatibility or not reducing the level of interoperability" as a behavioral condition upon which concentrations of undertakings may be conditionally approved, whose main purpose is to prevent owners of facilities from excluding third parties by technical means.

Conclusion

Compared with the Exposure Draft, the Guidelines present substantial technical adjustments and improvements. In addition, the Guidelines also strike certain substantive content that is subject to debate and improve relevant provisions according to commercial practices so as to further reduce legal uncertainty and promote the understanding of platform enterprise regulatory policies. Despite this, there remain many issues for regulators to further clarify and we expect detailed measures to be promulgated in relevant competition policies and in enforcement practice. We believe that the implementation of the Guidelines will promote the healthy development of the platform economy in China.

Important Announcement

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