环球反垄断法律专递
（第七期）

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目录

对未依法申报经营者集中案件的行政处罚决定可否直接提起行政诉讼？

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《反垄断法》第 53 条第 1 款规定“对反垄断执法机构依据本法第二十八条、第二十九条作出的决定不服的，可以先依法申请行政复议；对行政复议决定不服的，可以依法提起行政诉讼。”也即，对于反垄断执法机构做出的有关于禁止或不予禁止经营者集中的行政决定（《反垄断法》第 28 条）和对有关对经营者集中附加限制性条件批准的行政决定（《反垄断法》第29条）不服的，应当先行提起行政复议，再行提起行政诉讼。《反垄断法》第53条第1款所规定的复议前置显然不适用于反垄断执法机构依据《反垄断法》第 48 条做出的行政决定：其一是因为第 53 条第 1 款没有明确将反垄断执法机构依据第 48 条做出的决定纳入，考虑到第 48 条与第 46 条、第 47 条的并列关系，应当一并适用第53条第2款由行政相对人自由选择何种救济方式；其二是因为反垄断执法机构对经营者集中做出的批准、不批准或附条件批准的行政决定与反垄断机构对未申报经营者集中案件做出的处理决定显然是不同的行政决定。在性质上前者是反垄断执法机构根据经营者申请，准许或者不准许其从事某种特定活动的行为，属于行政许可；后者是行政相对人违反《反垄断法》后，反垄断执法机构做出的惩罚性决定，属于行政处罚。二者性质不同、适用的前提不同、产生的法律后果也不同，不能因此推导得出反垄断执法机构依据第 48 条做出的决定也应当适用“复议前置”。

然而，2012 年 2 月起实施的《未依法申报经营者集中调查处理暂行办法》（以下简称《暂行办法》）第 18 条规定“经营者对商务部依据本办法做出的决定不服的，可以先依法申请行政复议；对行政复议决定不服的，可以依法提起行政诉讼”。如此一来，《暂行办法》与《反垄断法》存在冲突，引出的问题是：反垄断行政执法机构对于未依法申报经营者集中行为做出的行政处罚的救济措施是否应当复议前置？

从法律位阶的效力层次上看，下位法不得与上位法冲突，冲突的部分应当视作无效。《反垄断法》是全国人大常务委员会通过并颁布的法律，《暂行办法》是由商务部制定颁布的部门规章。依据《立法法》的规定，部门规章不得在没有法律依据的情况下，做出减损公民权利或增加本部门权力的规定。按照《暂行办法》的规定，行政相对人必须

先进行复议之后才能向法院起诉，实际上扩大了反垄断行政执法机构的复议案件管辖权力、限制了公民选择申诉途径的权利，因此该规定应当视作无效。

事实上，商务部作为《暂行办法》的制定机构，在具体行政实践中，其实际做法摒弃了《暂行办法》中关于复议前置的规定，认可了由行政相对人自主选择何种司法救济的做法。从 2014 年商务部发出的第一份对未依法申报的经营者集中案件的处罚决定书到 2018 年最新的处罚决定书中，所有的关于公力救济的表述均是"如不服本处罚决定，可以自收到本行政处罚决定书之日起60日内，向我部申请行政复议；也可以自收到本行政处罚决定书之日起 6 个月内，向北京市第二中级人民法院提起行政诉讼。"此种做法与《反垄断法》的规定相符。

综上所述，行政相对人不服反垄断执法机构对未依法进行经营者集中申报的行政处罚决定的，可以自行选择提起行政复议或者行政诉讼。相应地，我们也建议相关执法部门对《暂行办法》第 18 条做出修改，以免造成误解和争议。

The Legal 500 & The In-House Lawyer Comparative Legal Guide: China: Merger Control

By Qing Ren / Qunfei Zhu

Global Law Office was chosen by The Legal 500 and In-House Lawyer to write the China chapter for their 2018 Comparative Legal Guide: Merger Control. For each country chapter of this guide they select Contributing Editors who are ranked within The Legal 500.

受 The Legal 500 和 In-House Lawyer 邀请，环球律师事务所任清律师和朱群飞律师撰写了其 2018 年度并购控制比较法律指南中的中国章节。对于每一国别或地区的章节，The Legal 500 都会选择其专业领域在“The Legal 500 排行”中排名较高的律所来撰写。

Global Law Office’s chapter provides concise but comprehensive information about the merger control law and practice in China, covering issues of jurisdictional thresholds, the substantive test, process, remedies, penalties, appeals, as well as the author’s view on planned future reforms of the merger control regime.

此次环球律师事务所撰写的章节对中国的并购控制（经营者集中反垄断审查）法律和实践提供了全面而简明的介绍，涵盖申报标准、竞争影响评估、申报和审查流程、救济方案（附加限制性条件）、未依法申报的法律责任等内容，并分析了执法趋势和相关的法律法规修订计划。

1. Overview

Merger control is called anti-monopoly review of concentration of business operators in China. It is governed by the Anti-Monopoly Law of the People's Republic of China (“AML”) and relevant regulations and rules, including the Provisions of the State Council on the Thresholds for Declaring Concentration of Business Operators.

According to the Decision of the First Session of the 13th National People's Congress on the Institutional Reform Plan of the State Council (effective date: 03/17/2018), the new established State Administration for Market Regulation ("SAMR") is responsible for anti-monopoly review of concentration of business operators. Before that, Ministry of Commerce of People's Republic of China ("MOFCOM") is the competent authority.

2. Is mandatory notification compulsory or voluntary?

Notification is compulsory in China if the notification threshold determined by the State Council is met.

3. Is there a prohibition on completion or closing prior to clearance by the relevant authority? Are there possibilities for derogation or carve out?

Notifiable concentration is prohibited to be closed prior to the clearance by SAMR. In case that business operators close the concentration prior to the clearance, SAMR may instruct them to dispose of their shares or assets, transfer the business or adopt other necessary measures to return to the state prior to the concentration within a specified time limit, and SAMR may impose on them a fine of not more than RMB 500,000.

4. What types of transaction are notifiable or reviewable and what is the test for control?

Concentration of business operators which meets the thresholds determined by the State Council is notifiable. Concentration of business operators includes the following three types of transaction,

(1) merger of business operators;

(2) control over other business operators gained by a business operator through acquiring their shares or assets; and

(3) control over other business operators or the ability capable of exerting a decisive influence on the same gained by a business operator through signing contracts or other means, including establishment of joint ventures.

As to the test for control, the Guiding Opinions on Declaration of Concentration of Business Operators ("Guiding Opinions), as amended by SAMR in September 2018, provides that control referred above includes sole control and joint control and the determination of control depends on various legal and factual factors, including not only concentration agreements, e.g. share purchase agreement and articles of association of the target business operator, but also other factors like the dispersed ownership of the target business operators which may result in de facto control. The Guiding Opinions set out the following factors that should be taken into account in determining whether one business operator gains the control over another business operator:

(1) purposes of the concentration and future plans;

(2) the equity structure of the said another business operator both before and after the concentration and the changes thereof;

(3) the matters for voting by the general meeting of the said another business operator, and the voting mechanisms, historical attendance and voting records of the general meeting;

(4) the composition and voting mechanisms of the board of directors or the board of supervisors of the said another business operator;

(5) the appointment and removal of the senior management personnel of the said another business operator;

(6) the relationship among shareholders and directors of the said another business operator, e.g. whether proxies are entrusted to exercise voting rights, whether there are parties acting in concert, etc.; and

(7) whether there exists significant business relationship, cooperation agreements, etc. between the business operator and the said another business operator.

5. In which circumstances is an acquisition of a minority interest notifiable or reviewable?

An acquisition of a minority interest is notifiable if it confers the acquiring party control over the target business operator and meets the notification thresholds. In other words, a test for control (see answers to question 4) is also necessary for an acquisition of a minority interest. In particular, if a party acquiring a minority interest obtains veto rights, at the level of shareholder's meeting, at the level of board of directors, or otherwise, over strategic commercial behaviors of the target business operator, including but not limited to decisions relating to the latter's business plan, budget, and appointment and removal of senior management, the party may be considered to obtain sole or joint control over the target business operator.

6. What are the jurisdictional thresholds (turnover, assets, market share and/or local presence)? Are there different thresholds that apply to particular sectors?

The jurisdictional thresholds are only related to turnovers of the relevant business operators. Where a concentration of business operators reaches any of the following thresholds, the business operators shall file a notification to SAMR:

(1) The total amount of the global turnover realized by all the business operators participating in the concentration during the previous accounting year exceeds RMB10 billion with at least two business operators each achieving a turnover of more than RMB 400 million within China during the previous accounting year; or

(2) The total amount of the turnover within China realized by all business operators participating in the concentration during the previous accounting year exceeds RMB 2 billion with at least two business operators each achieving a turnover of more than RMB 400 million within China during the previous accounting year.

The above thresholds apply to all sectors, although special methodologies of calculation of turnovers apply for business operators in financial sectors, including banking financial institutions, securities companies, futures companies, fund management companies and insurance companies.

7. How are turnover, assets and/or market shares valued or determined for the purposes of jurisdictional thresholds?

A business operator's turnover shall include the incomes obtained by the business operator from the sales of products and the provision of services in the previous accounting year, net of relevant taxes and surcharges. The turnover "within China" means incomes obtained from the buyers who are located within China. It includes the business operator's export of products or services into China, but excludes its export of products or services from China to other countries or regions. The global turnover includes the turnover within China.

The turnover of a business operator participating in the concentration shall be the sum of the consolidated turnover of all the entities controlled by the ultimate controlling entity of the business operator, excluding the turnovers derived from the internal transactions between the entities controlled by the same ultimate controlling entity.

Specifically, the turnover of an individual business operator participating in the concentration shall be the sum of the turnovers of the following business operators:

(1) the individual business operator itself;

(2) other business operators directly or indirectly controlled by the business operator referred to in Item (1);

(3) other business operators who directly or indirectly control the business operator referred to in Item (1);

(4) other business operators directly or indirectly controlled by the business operators referred to in Item (3); and

(5) other business operators jointly controlled by two or more business operators among those referred to in Item (1) through to Item (4).

It should be added that:

(1) If the individual business operator is jointly controlled by two or more business operators, its turnover shall include the turnovers of all the controlling parties;

(2) The turnover of the individual business operator shall not include the turnover of the business operators that the individual business operator has sold or over which it no longer has controlling power;

(3) Where several individual business operators participating in the concentration jointly control another business operator, or where the business operators participating in the concentration jointly control another business operator with business operators which do not participate in the concentration, the turnover of such an individual business operator participating in the concentration shall include the turnover generated by the jointly-controlled business operator from transactions with third-party business operators, and such turnover shall only be counted once.

8. Is there a particular exchange rate required to be used to convert turnover and asset values?

In normal circumstances, the average of the central parity rates of the corresponding accounting year published by the People's Bank of China should be used to convert turnover in foreign currency into RMB.

9. In which circumstances are joint ventures notifiable or reviewable (both new joint ventures and acquisitions of joint control over an existing business)?

Establishment of a new joint venture is considered as concentration of business operators if the joint venture will be jointly controlled by at least two business operators. In such a case, the two or more business operators controlling the joint venture will be considered as the business operators participating in the concentration, and the turnover of each of the them shall be calculated for purpose of determining whether the notification thresholds are met.

An acquisition of joint control over an existing business is also considered as concentration of business operators. For example, a transaction in which company A acquires joint control with Company B over Company C which was solely controlled by Company B is considered as concentration of business operators. In such a case, the turnovers of each of Company A and Company B shall be calculated for purpose of determining whether the notification thresholds are met. For another example, a transaction in which company A and Company B acquires joint control over Company C which was solely controlled by Company D is also considered as concentration of business operators. In this case, the turnovers of each of Company A, Company B and Company C shall be calculated for purpose of determining whether the notification thresholds are met.

10. Are there any circumstances in which different stages of the same, overall transaction are separately notifiable or reviewable?

Generally, different stages of the same, overall transaction should be treat as one single concentration of business operators, and be notified for once after the concentration agreement is concluded and prior to the implementation of the first stage.

11. In relation to “foreign-to-foreign” mergers, do the jurisdictional thresholds vary?

The same jurisdictional thresholds apply. That said, “foreign-to-foreign” mergers, e.g. two foreign companies establish a joint venture which will not engage in any economic activity within the territory of China, may qualify as simple cases subject to simplified procedures.

12. For voluntary filing regimes (only), are there any factors not related to competition that might influence the decision as to whether or not notify?

Not applicable.

13. What is the substantive test applied by the relevant authority to assess whether or not to clear the merger, or to clear it subject to remedies? Are there different tests that apply to particular sectors?

The substantive test is whether the concentration will lead or will likely lead to elimination or restriction of competition. If the answer is affirmative, SAMR shall make a decision to prohibit the concentration. However, if the business operators participating in the concentration can prove that the advantages of the concentration to competition obviously outweigh the disadvantages, or that the concentration is in the public interest, SAMR may decide to approve the concentration with restrictive conditions for lessening the negative impact on competition.

Specifically, the following factors will be taken into consideration by SAMR in review of concentration of business operators:

(1) the market shares of the business operators in a relevant market and their power of control over the market;

(2) the degree of concentration in the relevant market;

(3) the impact of the concentration on assess to the market and technological advance;

(4) the impact of the concentration on consumers and the other relevant business operators concerned;

(5) the impact of the concentration on the development of the national economy; and

(6) other factors which SAMR deems to need consideration in terms of its impact on market competition.

For more details, please refer to Interim Provisions on Assessment of the Impact of Business Operator Concentration on Competition issued by MOFCOM in August 2011.

There are no special tests that apply to particular sectors.

14. Are factors unrelated to competition relevant?

The substantive test described in the relevant laws and regulations do not allow for non-competition factors to be taken into account.

15. Are ancillary restraints covered by the authority's clearance decision?

There are no explicit rules in this regard. Nevertheless, in case of notifications of establishment of joint ventures, other agreements or arrangement, if any, concluded between the parties or their affiliated entities are required to be submitted to SAMR for review. It seems that such agreements or arrangement, which may include restrictions directly related and necessary to the implementation of the concentration, are covered by SAMR's clearance decision.

16. For mandatory filing regimes, is there a statutory deadline for notification of the transaction?

There is no specific deadline for notification of the transaction, but the proposed concentration must be notified and cleared before its implementation. Taking the establishment of a joint venture as example, the registration of the joint venture with the industrial and commercial authorities is generally deemed to a sign of the implementation of the concentration. Given that it takes about 2 months to get clearance decisions for a simple case under the simplified procedures, the notification of a simple case should better be made, at the latest, 2 months before the date of implementation.

For transactions which do not qualify as simple cases, the notification should be made earlier.

17. What is the earliest time or stage in the transaction at which a notification can be made?

The notification can be made immediately after the signing of the concentration agreement, such as the shares or assets purchase agreement or joint venture agreement, which requires that the preparation of the notification documents should be started earlier.

The notification can be made before the signing of the concentration agreement if the business operators can demonstrate with sufficient evidence that they are not able to provide the signed concentration agreement when making the notification due to the reasons that there are business special arrangements, compulsory requirements of other laws, regulations or policies, mandatory requirements of other jurisdictions or other reasonable reasons, or that they will not be able to abide by the relevant statutory review period if making the notification after the signing of the concentration agreement. In such a case, the notifying parties shall provide relevant materials such as the memorandum or framework agreement of the transaction and the draft concentration agreement, with the main terms and conditions of the transaction. And the notifying parties shall provide to SAMR the concentration agreement after the signing of the same without delay.

18. Is it usual practice to engage in pre-notification discussions with the authority? If so, how long do these typically take?

Before the notification, the business operators involved in a transaction of concentration may apply in writing to SAMR for pre-notification discussion. Issues for which consultation may be requested include:

(1) whether a notification is required for the transaction, including whether the transaction is a concentration of business operators, whether the transaction has reached the notification thresholds, and etc.;

(2) the notification documents and materials required to be submitted, including the information types, forms, contents and level of details of the notification documents and materials;

(3) specific legal and factual issues, including how to define the relevant product market and the relevant geographical market, whether the transaction is qualified as a simple case, and etc.;

(4) issues about the notification and review procedures, including the timing of notification, the parties with obligations to make the notification, the duration of the notification and review, notification procedures for simple cases, notification procedures for non-simple cases, review procedures, and etc.; and

(5) other relevant issues, such as whether the transaction has not been notified pursuant to the law.

19. What is the basic timetable for the authority's review?

Having received a notification, SAMR will first examine whether notification documents or materials are in compliance with the statutory formality requirement. If so, SAMR will register the notification and send a notice to the notifying parties. If not, SAMR will request the notifying parties to make supplementary submissions or modifications, or provide clarifications or explanations. There is no statutory time limit for this examination period.

After the registration of the notification, SAMR will have 30 calendar days to conduct preliminary review of the notified concentration and make a decision whether to conduct further review. Where authority decides not to conduct further review or fails to make such a decision at the expiration of the 30 days, the business operators concerned may implement the concentration.

Where SAMR decides to conduct further review, it shall, within 90 calendar days from the date of the decision, complete the further review, and make a decision whether to prohibit the concentration.

20. Under what circumstances may the basic timetable be extended, reset or frozen?

Under any of the following circumstances, SAMR may extend the period of further review for a maximum of 60 calendar days on condition that it informs the business operators of the extension in writing:

(1) The business operators agree to the extension;

(2) The documents or materials submitted by business operators are inaccurate and therefore need further verification; or

(3) major changes have taken place after the business operators made the notification.

Where the notifying parties withdraw a notification and then refile a new notification, the timetable shall be reset.

The timetable may not be frozen. That said, it should be noted:

(1) There is no time limit for SAMR to examine whether notification documents or materials are in compliance with the statutory formality requirements; and

(2) Where SAMR's concerns about the impact of the proposed transaction on competition have not been fully addressed by the notifying parties at the end of the review period, the notifying parties may apply to withdraw the original notification and refile a new one.

21. Are there any circumstances in which the review timetable can be shortened?

Simplified procedures may be applied to concentration of business operators which is qualified as a simple case. Most of the simple cases are cleared within the period of preliminary review, i.e. 30 calendar days from the registration of the case, although there is no mandatory requirement in this regard.

A transaction of concentration of business operators shall be considered a simple case if it falls under any of the following circumstances:

(1) Where in the same relevant market, the total market shares of all business operators participating in the concentration is less than 15%;

(2) Where an upstream-downstream relationship exists among the business operators participating in the concentration, and the market share of such business operators in both the upstream and the downstream markets is less than 25%;

(3) Where the business operators participating in the concentration are neither in the same relevant market nor have any upstream-downstream relationship, and their market share in each market relevant to the concentration is less than 25%;

(4) Where the business operators participating in the concentration intend to establish a joint venture outside the territory of China, and the joint venture will not engage in any economic activities within the territory of China;

(5) Where the business operators participating in the concentration intend to acquire the equity or assets of an overseas enterprise, and the overseas enterprise does not engage in any economic activities within the territory of China; or

(6) Where a joint venture jointly controlled by two or more business operators will be controlled by one or more of the existing business operators after the concentration.

Under either the simplified or non-simplified procedures, the notifying parties may inform SAMR of the urgency for closing the concentration with good cause and request SAMR to clear the concentration at its earliest convenience. In many cases, SAMR will

accommodate such requests and make the clearance decision ahead of the statutory deadline.

22. Which party is responsible for submitting the filing?

Concentration of business operators by way of a merger shall be notified by all the business operators participating in the merger. Concentration of business operators by other means shall be notified by the business operators who will obtain the controlling power, with the other business operators providing cooperation.

23. What information is required in the filing form?

SAMR publishes templates of Notification Form of Anti-monopoly Review of Concentration of Business Operators ("Notification Form") and Notification Form of Anti-monopoly Review of Simple Cases of Concentration of Business Operators ("Simplified Notification Form").

In the Simplified Notification Form, the parties are required to provide SAMR with detailed information regarding the business operators participating in the concentration, the transaction, the definition of the relevant markets, the market shares of the main competitors in each relevant market, the competition analysis of each relevant market, and etc.

In the Notification Form, additional information is required in respect of the supply and demand structure of the relevant markets, the information of the main customers and suppliers, the entry of the relevant markets, the possible efficiency gains arising from the transaction, and etc.

24. Which supporting documents, if any, must be filed with the authority?

In addition to the Notification Form or Simplified Notification Form itself, the following documents must be filed:

(1) the identity proof or registration certificate of each notifying party, and corresponding notarization and attestation documents if the notifying party is a foreign person;

(2) a power of attorney signed by each notifying party, where an agent is entrusted for the notification;

(3) the concentration agreement, such as shares or assets purchase agreement, joint venture agreement, and etc.; and

(4) the audited financial statements of each of the business operators participating in the concentration for the previous accounting year.

The notifying parties may also provide research or analysis reports on the transaction and/or the relevant sectors to assist SAMR to review the notification.

25. Is there a filing fee?

No filing fee is charged.

26. Is there a public announcement that a notification has been filed?

A public announcement will be published immediately after the registration of a simple case by the SAMR. There is no public announcement for registration of non-simple cases. Public announcements are now published on the official website of MOFCOM (http://fldj.mofcom.gov.cn/article/jyzjzjyajgs/), but will be published on the official website of SAMR which is under construction.

27. Does the authority seek or invite the views of third parties?

Under non-simplified procedures, SAMR may solicit opinions from relevant government agencies such as the Ministry of Industry and Information Technology (“MIIT”), industry associations, business operators and consumers when necessary.

Under the simplified procedures, SAMR normally seek views only from the relevant industry association or government agencies when necessary, but not from other business operators or consumers. However, given that a public announcement is published, any third party may submit comments to SAMR on the concentration.

28. What information may be published by the authority or made available to third parties?

For each notification, the notifying parties are required to provide a non-confidential version of the Notification Form or Simplified Notification Form and supporting documents. The non- confidential version may be made available to a third party when SAMR seeks views from that third party.

For notifications which have been prohibited or approved with restrictive conditions, the decisions of prohibition or approval are published timely by SAMR. For notifications cleared without conditions, the individual clearance decisions are not made public, but SAMR quarterly publishes information about the notifications cleared without conditions during the previous quarter, including the case name, the business operators participating in the concentration and the date of clearance.

Additionally, a public announcement will be published immediately after the registration of a simple case by SAMR (see question 26).

29. Does the authority cooperate with antitrust authorities in other jurisdictions?

The authority has entered into a number of cooperation agreements with other jurisdictions, such as the U.S., the EU, Japan, Canada, Brazil and South Africa. In addition to exchanges and dialogues on competition policies, enforcement cooperation in review of individual cases are carried out. In 2017, MOFCOM has cooperated with the authorities in the U.S., EU, South Africa and India in review of over 20 cross-border mergers and acquisitions.

30. What kind of remedies are acceptable to the authority?

Where SAMR is of the view that a case of concentration of business operators leads, or may lead, to elimination or restriction of competition, the notifying parties may propose to SAMR remedies which could lessen the negative impact of concentration on competition. The remedies to be proposed may include behavioral remedies, structural remedies or comprehensive remedies that combine structural remedies and behavioral remedies. Structural remedies include divestment of tangible assets, intellectual property rights ("IPR") and other intangible assets, or relevant rights and interests, and etc. Behavioral remedies include commitments to make available to other business operators the notifying parties' networks, platforms and other infrastructure, to license key technologies (including patents, proprietary technologies or other IPRs), and to terminate exclusive agreements, and etc.

31. What procedure applies in the event that remedies are required in order to secure clearance?

The following procedures apply:

(1) The notifying parties may propose restrictive conditions as remedies after SAMR states that the concentration will lead or will likely lead to elimination or restriction of competition. The notifying parties may also do so before SAMR makes such a statement.

(2) SAMR will engage in consultation with the notifying parties on the restrictive conditions proposals, evaluate the effectiveness, feasibility and timeliness of the proposals, and inform the notifying parties of the evaluation results. For the purpose of evaluating the proposed restrictive conditions, SAMR may solicit the opinions of relevant government agencies, industry associations, business operators and consumers.

(3) Upon receipt of the evaluation results, the notifying parties may submit revised proposals to SAMR. The notifying parties are permitted to revise their proposals for more than once, but a final plan shall be submitted to SAMR 20 calendar days prior to the deadline of the further review.

(4) SAMR will make public the review decision in which restrictive conditions are imposed.

32. What are the penalties for failure to notify, late notification and breaches of a prohibition on closing?

Where business operators implement concentration in violation of the requirements of the AML, including failure to notify, late notification and breaches of a prohibition on closing, SAMR may:

(1) require them to discontinue such concentration;

(2) require them to dispose of relevant shares or assets, transfer the business and adopt other necessary measures to return to the state prior to the concentration within a specified time limit; and

(3) impose on them a fine of not more than RMB 500,000.

In determining which of the above penalties shall be imposed, SAMR takes into factors such as the nature, extent and duration of the violation as well as the assessment results on the impact of the concentration on competition.

33. What are the penalties for incomplete or misleading information in the notification or in response to the authority's questions?

Where a notifying party deliberately conceals important information, refuses to provide relevant materials and information, or provides false materials and information, SAMR may refuse to register the notification or revoke registration that has been made. In addition, SAMR may impose a fine of not more than RMB 200,000 on the notifying party and a fine of not more than RMB 20,000 on the responsible individuals; if the circumstances are serious, SAMR may impose a fine of not less than RMB 200,000 but not more than RMB 1 million on the notifying party and a fine of not less than RMB

20,000 but not more than RMB 100,000 on the responsible individuals; and if a crime is constituted, criminal liability shall be investigated for in accordance with law.

34. Can the authority's decision be appealed to a court?

For a decision of SAMR to prohibit concentration or to impose restrictive conditions on concentration, the business operators may first apply for administrative reconsideration, and if they are dissatisfied with the administrative reconsideration decision, they may bring an administrative action before a court. Other decisions, such as one to impose penalties for failure to notify or late notification, may be directly appealed to a court.

35. What are the recent trends in the approach of the relevant authority to enforcement, procedure and substantive assessment?

First, the numbers of notifications received, registered and completed have been growing. In the year of 2017, MOFCOM has received 400 notifications, registered 353 notifications and completed review of 344 notifications. In the first three quarters of 2018, MOFCOM and SAMR have completed review of 322 notifications.

Second, the vast majority of notifications have been cleared without conditions. In the year of 2017, out of the 344 notifications review of which had been concluded, 337 (98%) were cleared without conditions, 7 (2%) were cleared with conditions and none of the notifications was prohibited. In the first three quarters of 2018, out of the 322 notifications review of which had been concluded, 319 (99%) were cleared without conditions, 3 (1%) were cleared with conditions and none of the notifications was prohibited.

Third, the efficiency of the review procedures has been increased. In 2017, the average period of time for registration of a notification and the average period of time for completing review after registration have been shortened 14.2% and 8% respectively comparing to the last year. And 98% of the simple cases have been cleared within the preliminary review period, i.e. 30 calendar days from the registration of the case.

Fourth, MOFCOM and SAMR apply multiple analytical tools to assess compact of proposed concentration on market competition. Market shares and market concentration are important factors to be taken into account, but other factors like whether the parties participating in the concentration are close competitors are also attached importance. Furthermore, economic analysis tools such as diversion ratio, correlation coefficient of profit margins and gross upwards pricing pressure index (GUPPI), have been used in a number of cases.

Fifth, not only structural remedies but also behavioral remedies or comprehensive remedies have been imposed on concentration that were cleared with restrictive conditions.

Last but not least, MOFCOM and SAMR strengthen investigations and punishments on failure to notify and late notification. To date, 28 punishment decisions have been made public, out of which 11 were made public in the first three quarters of 2018.

36. Are there any future developments or planned reforms of the merger control regime in your jurisdiction?

MOFCOM planned to amend the Measures for Review of Concentration of Business Operators and published a draft to solicit public comments in September 2017. The amendment was proposed to clarify the concept of control, the calculation of turnovers and some other issues. It is expected that SAMR will proceed with the amendment process.

Further, the amendment of the AML has been put into the Legislative Plan of the Standing Committee of the 13th National People's Congress. The amendment may cover several issues concerning merger control, such as the notification thresholds and the penalties for failure to notify or late notification.

竞争法下大数据权益保护和垄断风险初探

——第七届“知识产权、标准与反垄断法”国际研讨会发言

作者：穆颖

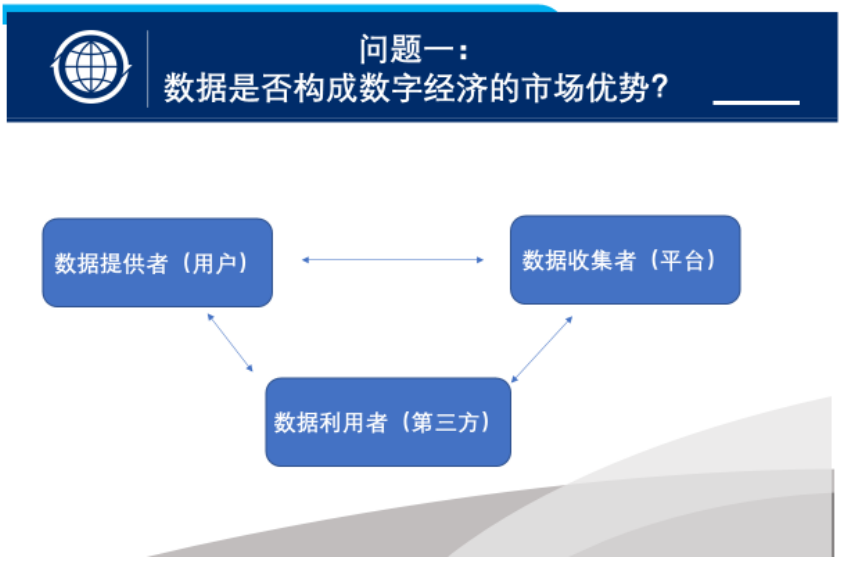
随着互联网科技的高速发展，数据价值在信息社会中显得尤为重要，成为整个数字经济时代核心的竞争要素或资源。一般认为，数据是以电磁等介质为载体的信息。如何保护数据发挥其经济价值，同时规范数据的使用来促进竞争以增加社会福祉，已经和必将成为未来一段时间内广泛研究和探索的前沿而重要的法律问题。

数据/大数据相关权益能否得到保护以及如何保护，是数据产业经营者广为关注的问题，而数据/大数据在数字经济时代是否存在可受或应受反垄断法关注与规制的必要，也成为从业者、监管者共同关注的话题。“保”与“反”不同角度的考量，本相应而生，亦统筹而存，一并思考有益于法律及政策的科学性与完整性。

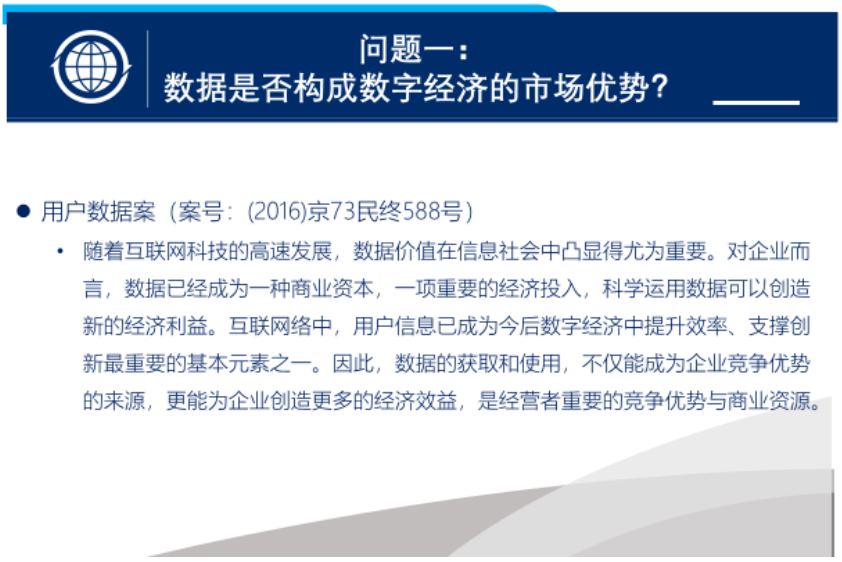
一、数据/大数据的司法保护路径——数据是否构成数字经济的市场竞争优势？

数据/大数据对数字经济具有极高价值，被称为互联网时代货币，而在法律层面上，其能否构成财产、抑或权益保护客体，理论研究界并无共识，而更多认为其属性较难认定的基础上，归属更难以确认。与理论研究并行的是，中国的司法实践对此有了一定尝试，虽属个案，但仍有突破。现仅举两例。

在(2016)京 73 民终 588 号案件中，脉脉软件作为一款社交软件，在合作期满后未经授权利用另外一个社交平台的 OpenAPI 平台接口获取其数据，该行为被法院认定为构成不正当竞争。在这起案件中，法官分析了数据提供者（用户）、数据搜集者（平台）以及数据利用者（第三方）之间的关系，并且创造性提出了当第三方希望运用数据时应当遵循“三重授权”的原则：即用户给平台授权，平台给第三方授权，用户再给第三方授权的规则。当然，这一规则的提出，考虑到了各方的利益和多方价值，尤其是用户信息安全的价值。毕竟该案中涉及到的信息，主要包括用户的职业、教育背景等信息。



除了“三重授权”原则外，该案值得关注的是，法官认定“随着互联网科技的高速发展，数据价值在信息社会中凸显得尤为重要。对企业而言，数据已经成为一种商业资本，一项重要的经济投入，科学运用数据可以创造新的经济利益。互联网络中，用户信息已成为今后数字经济中提升效率、支撑创新最重要的基本元素之一。因此，数据的获取和使用，不仅能成为企业竞争优势的来源，更能为企业创造更多的经济效益，是经营者重要的竞争优势与商业资源。”我们看到了司法机关对数据保护的认可，法官认为数据是经营者非常重要的经营优势与商业资源，应当得到反不正当竞争法的保护。



在脉脉案后，杭州互联网法院审结了（2017）浙8601民初4034号案件，又成为涉及数据/大数据的经典案例。该案中，某电商平台开发、运营的涉案**数据产品**是在收集网络用户浏览、搜索、收藏、交易等行为痕迹所产生的巨量原始数据基础上，以特定的算法深度分析过滤、提炼整合并经匿名化脱敏处理后形成的预测型、指数型、统计型等衍生数据，其呈现方式是趋势图、排行榜、占比图等，主要功能是为网店运营提供系统的数据化参考服务，帮助商家提高经营水平。被告某互联网公司运营相关网站，提供远程登录已订购涉案数据产品的用户电脑的技术服务，并基于此招揽、组织、帮助他人获取涉案数据产品中的数据内容，以从中获取利益。杭州互联网法院确定被告行为构成不正当竞争。法院在该案中认定，电商平台就相关衍生数据产品享有“合法的财产性权益”。这一案件在司法实践以及理论研究领域均引起了关注和讨论。在实务界和理论界对于大数据的权益可否成为知识产权的保护客体不确定，甚至对大数据是否具有财产属性尚有争议的情况下，这起案件至少确定了衍生数据“产品”的财产属性，虽为个案，但仍具有极高的关注价值。

通过分析以上两个案例，我们可以看出在数据产业的各个不同发展阶段，需要不同的法律保护。如果跟随数据来源、数据分析、数据产品的不同阶段来分析：在用户信息阶段，没有财产性的权益存在，属于单纯的用户信息，此时法律需要关注的价值是安全保护和隐私保护；而搜集原始数据的过程中，则主要需要由各方主体之间的约定来调整法律关系；当数据的搜集者开发出了衍生数据产品时，则可以考虑给予数据产品一个相对独立的类财产性权益保护。

二、数据/大数据的反垄断规制必要——数据是否将成为关键必要设施

在考虑数据保护的同时，数据是否将会成为下一个有可能存在的垄断资源？是否有可能构成关键必要设施？是否有必要适用反垄断法进行规制？

第一、对数据垄断风险的规制处于忽略或谨慎状态。首先，不同于传统经济要素的排他性属性，普通用户数据具有强烈的非排他性和多归属性。作为产生数据的主体，其可能将自身数据提供给大量的数据收集者。举例而言，如果一个用户通过外卖平台订餐、支付并最终收到骑手送来的餐点。在这个网络交易过程中产生的数据，如用户姓名、电话、地址、餐品类型、支付价格、使用的支付方式等等，外卖平台掌握、达成交易的餐饮店掌握、支付系统掌握、送餐骑手也可掌握。可见，仅在一起网络交易中，用户就存在将其信息同时分享给大量不同主体的可能性。更不用说，用户可能同时安装和使用不同的订餐平台以及其他各类软件，这些软件运营者通过各自提供的服务，都能部分的、片段性的收集用户的特定信息和使用习惯。但有关用户偏好，个人消费习惯、使用习惯的数据，很难有某一个平台可以完全掌握。正是数据的非排他性和多归属性造成很多反垄断执法机构总体来说对于数字经济执法持有相对比较谨慎的态度。例如，在脸书收购 WhatsApp 时，美国反垄断执法机构基本上给出了无条件批准的结果，其中一个非常重要的原因就是数据是可以免费获取的，进入门槛非常低。

第二、数据具有运用反垄断法进行规制的必要。虽然数据具有非排他性和多归属性，且获取原始数据通常是免费的，但是当这些数据形成巨大规模，在网络效应的作用下进行跨市场传导时，则很可能使得大数据成为一种垄断资源。如果一个企业拥有的数据或形成的大数据产品，成为竞争者参与市场竞争所必不可少的要素，那么该企业则存在基于该支配地位从事造成进入或扩张壁垒、滥用其在大数据市场支配地位、签订涉及数据产品的垄断协议以及涉及大数据资产并购中的垄断风险等行为的可能性。部分国家和地区的竞争监管机构已经展开了部分针对数据的调查和规制。例如，在谷歌案件中，执法机构指出，除了市场份额，他们还考虑到其他跟谷歌竞争的市场主体，其很难达到如此数据规模以及整合能力跟谷歌对抗。又如，欧盟对亚马逊开展的反垄断调查中，重点监测对第三方卖家数据的使用，以判断亚马逊是否滥用其它商户的销售数据，使第三方卖家处于劣势，而确保自己的自营产品占据竞争优势。再如，2017 年，日本公正交易委员会竞争政策研究中心发布了《数据与竞争政策研究报告书》。在这部报告书中，日本明确了运用竞争法（日本称之为《独占禁止法》，相当于我国的《反垄断法》）对“数据垄断”行为进行规制的主要原则和判断标准。

从数据的角度分析数字经济市场的垄断风险需要研判数据这种竞争资源的特性以及其后续产生不同的效果，而如果扩展到整个数字经济市场，除了考虑数据，如果再加上网络效应、跨市场传导等因素将可能成为一个更复杂的规则。

虽然数据领域的竞争规则并未成熟清晰，然而，可以预判的是，数据相关权益的保护规则将日趋复杂，而权益与风险并存的状态以及规则不断细化的状态将持续较常时间。正值《反垄断法》实施十周年纪念之际，仅将与数据相关的竞争规则部分分享如上，而下一个十年中，随着大数据技术的发展和市场的成熟，数据领域的竞争司法、执法实践将成为不可或缺的内容。

本期作者简介

万江为环球律师事务所常驻北京的合伙人。万江律师自 2005 年开始执业。曾长期就职于国家发改委反垄断局，主要从事反垄断执法、立法和国际交流工作，先后主办、承办数十起反垄断案件，主笔起草关于反垄断宽大制度、承诺和解制度的反垄断指南草案。2012 年 2 月至 7 月期间万江律师获派赴欧盟竞争总司及爱尔兰竞争局实习工作。万江律师著有《中国反垄断法——理论、实践与国际比较》（第二版，中国法制出版社 2017 年 6 月出版）、《<企业国有资产法>释义》、《劳务派遣法律实务操作指引》等专著。

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Dr. Wan is a partner of Global Law Office in Beijing. Dr. Wan has extensive experience with complex antitrust and competition law issues. Prior joining Global Law office, he served as a senior case handler at Price Supervision and Anti-monopoly Bureau(PSAB) of National Development of Reform Commission(NDRC) participating in a number of significant anti-trust & cartel investigations and leading the draft of Leniency Program and Commitment Rules under China's Anti-monopoly Law. Dr. Wan received an intensive training in both DG Competition of the European Commission and Irish Competition Authority in 2013. He acquired Ph.D. in law in 2010 at China University of Political Science and Law.

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任清律师为环球律师事务所常驻北京的合伙人，主要执业领域为反垄断、国际争议解决、WTO/国际贸易。任律师代表国内外企业办理了数十起经营者集中申报案件，涉及非简易案件、简易案件和未依法申报案件等。任律师还代理反垄断调查和民事诉讼，并提供反垄断合规服务。任律师受聘为中国国际经济贸易仲裁委、中国海事仲裁委、北京仲裁委、上海国际经贸仲裁委、重庆仲裁委仲裁员，并代理商事仲裁和投资仲裁案件。任律师担任中国世贸组织法研究会常务理事，在 WTO 法、301 调查、出口管制、经济制裁等领域具有丰富的实务经验。

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Mr. Ren is a partner of Global Law office and specialized in anti-trust, dispute resolution and international trade. Mr. Ren has represented international and domestic clients in dozens of merger filings, including simple cases, non-simple cases and "gun jumping" cases. He also represents clients in anti-trust investigations and litigations, and provides anti-trust compliance advices. Mr. Ren is arbitrator of China International Economic and Trade Arbitration Commission, Beijing Arbitration Commission, Shanghai International Arbitration Center and Chongqing Arbitration Commission, practicing investment arbitration and commercial arbitration. Mr. Ren is member of the board of executive directors of China WTO Law Society, with rich experiences in WTO disputes, Section 301 investigations, export control and economic sanctions.

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穆颖为环球律师事务所常驻北京的顾问，主要从事知识产权及竞争法律业务。主要专业领域包括商标法、著作权法、专利法及不正当竞争领域的争议解决，同时在与知识产权相关的反垄断法律方面具有丰富的经历。
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环球反垄断招募信息

环球反垄断团队近期拟招募以下人员：

1、高级律师

要求：国内外知名大学法学院研究生毕业，从事反垄断法律实务工作 3 年以上，具有中国律师执业资格，可以英文为工作语言，男女不限。

2、初级律师

要求：国内外知名大学法学院研究生毕业，通过司法考试或已经取得律师执业资格，具有 1-2 年反垄断法律实务工作经验，英文流利，30 岁以下，男女不限。

3、实习生

要求：国内外知名大学法学院竞争法方向研二、研三年级硕士研究生，通过司法考试，英文流利者优先，要求每周至少保证三天以上工作时间。

有志加入环球反垄断团队者，可将个人电子简历等资料投递到环球人力资源部电子邮箱：hr@glo.com.cn，并注明“反垄断业务申请”。

环球简介

环球律师事务所（“我们”）是一家在中国处于领先地位的综合性律师事务所，为中国及外国客户 就各类跨境及境内交易以及争议解决提供高质量的法律服务。

历史. 作为中国改革开放后成立的第一家律师事务所，我们成立于 1984 年，前身为 1979 年设立的中国国际贸易促进委员会法律顾问处。

荣誉. 作为公认领先的中国律师事务所之一，我们连续多年获得由国际著名的法律评级机构 评选的奖项，如《亚太法律 500 强》（The Legal 500 Asia Pacific）、《钱伯斯杂志》（Chambers & Partners）、《亚洲法律杂志》（Asian Legal Business）等评选的奖项。

规模. 我们在北京、上海、深圳三地办公室总计拥有近 300 名的法律专业人才。我们的律师 均毕业于中国一流的法学院，其中绝大多数律师拥有法学硕士以上的学历，多数律师还曾学习或工作 于北美、欧洲、澳洲和亚洲等地一流的法学院和国际性律师事务所，多数合伙人还拥有美国、英国、德 国、瑞士和澳大利亚等地的律师执业资格。

专业. 我们能够将精湛的法律知识和丰富的执业经验结合起来，采用务实和建设性的方法解决法律问题。我们还拥有领先的专业创新能力，善于创造性地设计交易结构和细节。在过去的三十多年里，我们凭借对法律的深刻理解和运用，创造性地完成了许多堪称“中国第一例”的项目和案件。

服务. 我们秉承服务质量至上和客户满意至上的理念，致力于为客户提供个性化、细致入微 和全方位的专业服务。在专业质量、合伙人参与程度、客户满意度方面，我们在中国同行中名列前茅。在《钱伯斯杂志》举办的“客户服务”这个类别的评比中，我们名列中国律师事务所首位。

环球反垄断团队介绍

环球反垄断团队由十余名合伙人和律师组成，其中一些合伙人和律师既有实务操作经验也有丰富的执法经验，已为医药、互联网、汽车、电器、IT、食品、化工、航运、零售等行业的众多境内外客户提供一站式反垄断专业服务，服务范围包括经营者集中申报、反垄断调查、反垄断诉讼、反垄断风险防范与合规等。我们对中国反垄断法律法规及其实践具有深刻认识和专业理解。我们的主要服务内容包括：

- 为客户提供关于垄断、不正当竞争的风险防范以及合规审查的法律咨询；
- 就境内外经营者集中起草反垄断申报报告；
- 代表客户进行反垄断申报；
- 代表客户应对反垄断部门发起的反垄断调查；
- 代表客户进行反垄断民事和行政诉讼等。

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联系我们. 如您欲进一步了解本报告所涉及的内容，您可以通过下列联系方式联系我们。

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