

# The Application of Competition Law in the Building of Data Governance Order<sup>1</sup>

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As an essential factor of production in digital economy, data has played an increasingly important role in economic life, and is developing into a new economic form. Due to the increasing use of data resources, legal issues related to data's links such as generation, storage, circulation and use have continuously emerged. Thus, data governance has become a hot legal issue at present. However, all countries are still exploring ways for regulating such legal issues newly arising from data because it is a new essential factor of production. Obviously, all laws on data are formulated to resolve the said issues. Now, there is a rapid development of big data industry, and the most pressing issue for all countries is to resolve the protection of personal data. In addition, their legislatures face a common question: How to release data resources and promote data exchange and sharing? On the latter question, there have been discussions in the legislatures, industries and academic circles in all countries. In recent years, the hot issues have focused on the ownership, sharing (transaction) and competition of data. Among them, data governance under competition law is different from that of other laws. The rules under completion law have been established in all countries for a long time. Thus, the popular view in the academic circles of competition law is that there should be an adjustment according to data's feature when delating with cases involving big data. In fact, the enforcement of antitrust law in the field of data faces not only the challenge from the features and technologies of data but also the influence and restriction form the contents of other laws. The institutional design of other laws is an important factor in the implementation and analysis of competition law. Meanwhile, there is an important question for the regulators to consider in its building of data governance order: Should ex ante corporate code of conduct be established or ex post supervision under competition law be made?

After studying the relationship between data competition rules and other data rules, this paper concluded that:

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(1) A must for data sharing is the coordination between ex ante and ex post supervision

As a typical law on ex post supervision, competition law has to resolve, in its application in the field of data, the coordination between ex ante and ex post supervision on data in addition to the challenge from technology and concrete systematic application. At present, competition law overlaps with not only data sharing system in data resources sharing but also the right to personal data portability and the practices forcing consumers to accept privacy rules in personal data protection. At present, all countries are formulating laws on data protection. Thus, they should carefully assess the institutional design costs incurred in ex ante and ex post supervision, and the comprehensive influence of such supervision on personal data protection, industrial development, corporate innovation and production efficiency.

Due to the features of data and the freedom and development of business activities, the disputes over data transaction are diverse and unpredictable. If data sharing rules are mainly governed by ex ante supervision, corporate incentive to trade data may be more likely restricted. Therefore, ex post supervision and remedy is more important than ex ante supervision. Currently, China is actively advancing legislation in various aspects. Although it has not formulated proper law on personal data protection, China has had the opportunity to assess the effects and influences of other countries' relevant legislation. This paper believes that China can make active exploration and prudent argumentation in addition to a good balance between ex ante and ex post prudent supervision, and formulate a model law on data.

(2) There should be a full consideration of other legal factors when enforcing competition law.

Despite the rapid development in data industry, the legislation on data has lagged behind the requirement of a comprehensive legal order on data. Thus, many competition lawsuits between enterprises involving data have been filed in order to define the border of their rights by competition law. In a small number of antimonopoly cases up to the present, all kinds of legal factors have been taken into account. For example, the factors taken into account were the compliance with the law on data protection in the case of Facebook, and the users' willing to disclose their data in the case of HiQ vs. Linked-in. China's law in this regard has not become effective. Thus, the law enforcement and judicial departments should take a comprehensive consideration of the special features of cases involving data, and the

factors such as data protection and reasonable corporate rights and interests to data in order to make a reasonable decision. In the case of Sina vs. Maimai, the court rendered a judgment by taking into account the principle of user's willing to disclose data so that personal data was protected, business interest safeguarded and unfair competition prevented.

Therefore, there must be a combination of the legal provisions and basic principles on personal data protection in the enforcement of the laws on antimonopoly and anti-unfair competition. Meanwhile, numerous and complex interests are contained in competition cases involving data in the context of big data. Thus, a dispute resolution mechanism with all parties, including relevant experts and delegates, as participants should be established in the field of personal data protection and data trade. After that, the disputes in this regard can be resolved in a fair and equitable manner.