

## ESSAY

# Health Code and Digitalization of Antitrust Filings and Trials: China's Experiments in Coping with COVID-19

BY WEI HAN AND FEI DENG

**C**COVID-19 HAS CAUSED AN UPENDING OF SOCIAL and economic norms in many countries, including in China. To cope with the new environment, China has experimented with several measures, most significantly creating a health code system, digitizing merger filings and court filings, and conducting video court hearings. While some of these developments have brought the legal practice in line with the high level of digitization practiced throughout China in daily life, others have implications for antitrust enforcement and data privacy issues in China.

First, to keep track of individuals' COVID-19 risk, China has implemented a "health code" system using specifically designed programs within popular mobile apps. This system evaluates an individual's risk of spreading COVID-19 based on the individual's own infection record and the individual's record of direct contact with confirmed COVID-19 patients. For example, an individual who was on the same flight as a confirmed COVID-19 patient would be deemed to have a high risk of being infected and infecting others within 14 days after the contact occurred. An individual's mobility and whereabouts are tracked through the individual's mobile phone and these data are utilized to conduct the evaluation. The system generates color-coded scannable codes based on the evaluation results. Green indicates the individual is safe and can move about without restriction. Yellow indicates a potential low level of risk; the individual must quarantine for seven days and then the color code will turn to green if the individual does not show any symptoms. Red indicates a high level of risk and the individual must quarantine for 14 days; the color code will turn to green if the individual does not show any symptoms.

Initially, two companies—Alibaba and Tencent—developed these programs and worked with local (i.e., city or provincial) gov-

ernments and police departments to implement these localized systems, starting in early February. Under this approach, each city or province had its own health code system, and these systems were not interconnected. However, as China has lifted the travel bans and people began traveling across regions within the country, the central government stepped in to solve the interoperability issue between different systems. Currently, having a health code of green is now essential for anyone to go anywhere in China because an individual is not allowed to go back to work or board an airplane, train, or subway without the green health code. However, the exact algorithms used in these programs have not been made public, and there have been anecdotal reports of individuals experiencing errors with health code results.

The health code system implicates data privacy and antitrust. As to data privacy, in contrast to the likely data privacy concerns and objections that would be raised if something similar were proposed for the United States, to date there has not been any significant rejection or public outcry among Chinese citizens arising from data privacy concerns. This might be due to a belief that the government had already been monitoring and censoring messages and information exchanged before COVID-19 and utilizing data gathered through mobile phones to generate a system for infection control is seen as just a marginally broader use of personal data. Moreover, the urgency associated with addressing the COVID-19 crisis likely has increased the palatability of such measures.<sup>1</sup> However, as China successfully manages the crisis and life is returning back to normal, it is yet to be seen whether this type of health code program that tracks and monitors large amounts of personal data will become a new norm in China.<sup>2</sup>

There have also been antitrust concerns associated with Tencent blocking its app users from accessing Alibaba's health code program. It has been alleged that even before the COVID-19 crisis, Tencent was blocking messages and posts shared on its Wechat app—the most popular messaging and social media platform in China—that contain links to other platforms, such as Alibaba's enterprise communication platform, DingTalk, and ByteDance's social networking platform, TikTok. Blocking Alibaba's health code program would be the latest example of Tencent blocking internet platform rivals' products.<sup>3</sup> However, so far there has not been any known antitrust investigation or litigation related to this conduct.

A positive development resulting from the COVID-19 crisis is the digitization of merger filings and court hearings in China. Both the State Administration for Market Regulation (SAMR) and Chinese courts have implemented measures to process cases virtually, including digital filings and virtual trials. Compared with the high level of digitization in all aspects of daily life in China, ranging from payments to car hire, digitization of filings submitted to the government enforcement agencies and the courts surprisingly had lagged behind. Before COVID-19, for merger filings and antitrust investigations, parties were required to submit hard-copy documents to the SAMR. Similarly, for litigation matters, parties were required to submit and exchange all evidentiary

*Wei Han is an Associate Professor at the University of Chinese Academy of Social Sciences. Fei Deng is a Vice President at Charles River Associates and an Associate Editor of ANTITRUST.*

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documents in hard copy. Chinese lawyers were used to dragging large suitcases of documents to the agency and the courts.

In coping with COVID-19, both the SAMR and courts have rolled out interim measures that digitize the entire case-handling process. Since early February, merger filings to the SAMR have been conducted electronically or by mail, and meetings have been conducted via phone or virtually. As for litigation matters, not only are parties encouraged to file cases and submit and exchange evidentiary documents electronically, all levels of Chinese courts started implementing remote video court hearings in early February. The implementation of virtual trials enables courts to move forward with important cases and avoids significant delay and piling up of cases in the future.

China has responded with significant measures in response to the COVID-19 crisis. While these measures have achieved the short-term goal of ameliorating the crisis, they also may have longer term effects on society, including on antitrust enforcement and data privacy, which will unfold in the future. ■

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<sup>1</sup> In addition, there are certain laws and regulations in China, such as the Prevention and Control of Infectious Diseases Law and Emergency Regulations for Public Health Emergencies, which enable the relevant government departments to collect individual data when dealing with disease control.

<sup>2</sup> It is reported that there have been initiatives, in certain cities, such as Hangzhou, to continue and expand the use of the health code program in daily life. See, e.g., *Hangzhou Health Code Program Expected to Become a Regular Program with Gradient Color, the Greener the Healthier*, SINA, <http://zj.sina.com.cn/news/m/2020-05-23/detail-iirczymk3146809.shtml>.

<sup>3</sup> It is reported that Tencent lifted its blocking of Alibaba's health code program after Alibaba complained to the relevant government departments. However, Tencent allegedly continues to block Alibaba's and other rivals' other products. See, e.g., Hui Chao, *Tencent's Explanation of Its Blocking DingTalk, Causing HealthCode Programs of More Than Twenty Four Provinces and Cities Not Accessible*, MYDRIVERS (Mar. 3, 2020), <https://news.mydrivers.com/1/675/675689.htm>; Xu Liu, *It's Time to Restrain Tencent With Antitrust Law*, YICAI (Mar. 17, 2020), <https://www.yicai.com/news/100552265.html>.