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The Choice of Anti-Unfair Competition Law and Anti-Monopoly Law Regarding Platform Economy: A Study of the Digital Platforms in China

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ABSTRACT
With the continuous prosperity of the platform economy, Internet operators have created many unfair competition and market monopolies in order to compete for market and transaction opportunities, posing an increasingly serious threat to the market competition order and the innovative development of the digital economy. Therefore, taking the Internet platforms as the research object, it is particularly important to analyze the anti-unfair competition and anti-monopoly practices as well as the regulation of relevant laws in the field of the platform economy. The world's major economies have accelerated anti-monopoly legislation and enforcement actions in the field of digital economy to strengthen regulation of market competition for large digital platform companies. This paper aims to promote the regulation of unfair competition and monopolistic conduct of Internet operators in the platform economy, promote the choice of legal application of unfair competition and monopolistic conduct on the Internet in judicial practice. Moreover, the purpose of this paper is to optimize the definition and judgment path of illegal conduct in judicial practice, so as to promote the active alignment of Anti-Monopoly Law and Anti-Unfair Competition Law with foreign legislation.

KEYWORDS
Internet platforms; Anti-Monopoly law; Anti-Unfair Competition Law; Internet-specific

I Introduction

1.1 Background

Along with the booming development of the digital economy, the Internet economy has gradually entered the era of platform enterprise economy. E-commerce platforms, social networking platforms, life service platforms, mobile payment platforms, and other online platforms have been integrated into the lives of ordinary people, bringing great convenience to the majority of platform users. To compete for markets, consumers and trading opportunities, internet platform operators have given rise to a series of unfair competitions and monopolistic practices, which endanger the healthy development of the market economy and the legitimate rights and interests of consumers. Moreover, these unfair competitions and monopolistic practices hinder other operators from entering the relevant markets, and play a negative role in the sustainable development of the

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economy.

1.2 Analysis of legislation and judicial applicability based on internet platforms

Article 3 of the Anti-Monopoly Law of the People's Republic of China and the Law of the People's Republic of China Against Unfair Competition adopt the form of enumeration underwriting to regulate unfair competition, which is somewhat forward-looking. [1] Article 12 of the Law of the People's Republic of China against Unfair Competition, an Internet-specific provision, is a response to the new types of unfair competition disputes that have emerged in the Internet field, but it has not yet typified its specific content from the perspective of behavioural characteristics.[2] In terms of design logic, among the provisions of the Anti-Unfair Competition Law on the Internet, the boundary between the bottom item (paragraph 4) and its application is not clear, which may lead to the expansion of the scope of application. As for the scope of application, in the provisions of the Anti-Unfair Competition Law on the Internet, the expressions of "technical means" and "obstructing and disrupting network products and services" do not accurately define their scope of application. It is suggested to reposition it as a traffic damage provision, limit its scope and make this kind of behavior typical, so as to help protect competition rather than competitors in judicial practice, prevent the Anti-Unfair Competition Law from being turned into a tool to attack competitors, and ignore the protection of consumers and social welfare.

2 Literature review

In June 2017, the European Commission fined Google 2.42 billion euros for "abusing" its dominant search engine market position in the 13 countries of the European Economic Area to illegally manipulate shopping AD searches. Chao Ren′s research in 2020 analyzed Google's anti-monopoly appeal case and believed that a series of new issues in the digital economy era need to be guided by the fundamental goals of Anti-Monopoly Law, and addressed with new thinking and methods to protect market competition[3]. In 2020, Jiangli Zhang used a comparative research method to analyze that platforms′ "choose one of two" behaviour does not belong to a strictly legal concept. It usually refers to the behaviour of an operator of an e-commerce platform in a multilateral marketplace on the Internet, who prevents merchants from entering other types of e-commerce platforms to capture more profit. This is often referred to as Exclusive Dealing. In practice, the "choose one of two" behaviour of e-commerce platforms can be further categorized into an autonomous behaviour of “choose one of two” and an exploitative behaviour of "choose one of two". In general, the former is not guilty, while the latter infringes on the interests of other similar e-commerce platforms, consumers and social public interests. Therefore, legal regulations must be carried out. Unless otherwise stated, the "choose one of two" conduct in this article's refers to an exploitative behaviour of "choose one of two". In 2022, Saifei Wang and Lili Gui, proposed that the determination of anti-unfair competition in anti-unfair competition litigation is generally divided into three steps through literature research in their article Judicial Determination and Legislative Improvement of Competitive Relationships in the Platform Economy: A Review of Article 12 of the Anti-Unfair Competition Law. The first step is to determine whether there are protected interests. The second step is to determine whether the competitor is a competitor, that is, to confirm the litigation qualification. The third step is to determine whether the damage has been caused. And in the second step, it is necessary to determine whether there is a competitive relationship between the two. The impact of the platform economy on the determination of a competitive relationship and the significance of the determination of a competitive relationship for judicial decisions are profoundly explained.

3 Judicial practice analysis

3.1 Analysis of Alibaba and Meituan's behaviour of “choose one of two”

It was found that Alibaba Group had abused its dominant market position since 2015 by imposing a "choose one of two" requirement on merchants on its platform, prohibiting them from opening shops or participating in promotional activities on other competing platforms, and adopting various incentives and penalties to ensure that the "choose one of two" requirement was enforced. The "choose one of two" requirement was implemented in order to gain an unfair competitive advantage. On April 10, 2021, the State Administration for Market Regulation made an administrative penalty decision in accordance with the law, ordering Alibaba Group to stop illegal activities and imposing a fine of 4% of its 2019 domestic sales revenue of 455.712 billion yuan, totaling 18.228 billion yuan. Moreover, it was found that since 2018, Meituan had abused its dominant position in the market for online food and beverage takeaway platform services in China to induce merchants on the platform to enter into exclusive cooperation agreements with it and to secure the implementation of "choose one of two" practices by adopting various punitive measures. On October 8, 2021, the State Administration for Market Regulation issued an administrative penalty decision, ordering Meituan to stop its illegal conduct, refunding the full amount of the exclusive cooperation deposit of RMB 1.289 billion, and imposing a fine of 3% of its 2020 sales of RMB 114.748 billion in China, amounting to RMB 3.442 billion.

For the exploitative behaviour of "choose one of two" of e-commerce platforms in practice, a single application of the Anti-Monopoly Law Anti-Monopoly Law or the Anti-Unfair Competition Law is biased. We should insist on a case-by-case analysis and differentiate the application of the two, to form a combined regulatory force. On this premise, the application of the Anti-Monopoly Law in practice has the complexity of determining market dominance, but it can be resolved by further clarifying the criteria for determining it. In the application of the Anti-Unfair Competition Law, firstly, a distinction is made between the specific situations targeted by each paragraph of Article 12 of the Anti-Unfair Competition Law, and then the application of the general provisions of Article 2 of the Anti-Unfair Competition Law is refined and the abuse of relative dominance theory is introduced to analyze the problem. [4] Generally speaking, the platform that implements the exploitative and compulsory behaviour of "choose one of two" will often use its advantageous position to impose limited transactions on operators, which may infringe on the following legal interests. First, Consumers' right to choose will be infringed. The nature of the platform economy is an attention economy, and consumers' energy and choice are limited. As a result, merchants will spontaneously choose to be present on more e-commerce platforms to gain more trading opportunities. If a platform implements "choose one of two" behaviour, it is tantamount to depriving consumers of their right to choose. Second, E-commerce platforms that engage in "choose one of two" behaviour can easily gain more undue benefits from competition. The existence of exclusive trading agreements deprives other e-commerce platforms of the possibility to contract with specific merchants, ultimately leading to a loss of consumers and undermining the long-term development of the platform itself. Third, the implementation of "choose one of two" practices will not only create shackles on market competition but will also greatly suppress the enthusiasm and willingness of other small and medium-sized operators to participate in the Internet economy, seriously affecting market dynamics. Due to the existence of network externalities, large e-commerce platforms have a large number of users. Because of their strong financial resources and advanced technology, large e-commerce platforms tend to occupy the vast majority of other market shares. This may greatly undermine market vitality, overall innovation willingness, and other platforms with smaller market shares, ultimately causing serious damage to the market economy.

3.2 Analysis of the case of public comments vs. Baidu ' s unfair competition

The case focused on whether the "information crawling" act constituted unfair competition. Baidu had copied and reproduced a large number of reviews from VWOD.com in Baidu Maps and Baidu Knows, directly replacing VWOD. com in providing content to users. It had used the name "VWOD", a unique name for a well-known service, without authorization.[5] In this case, the review information of VWAP is one of Hantao's core competitive resources, which can give Hantao a competitive advantage and has commercial value. Hantao has incurred significant costs to operate VWAP, and the reviews on the website are the result of its long-term business. The review information on VWAP is published by internet users who voluntarily publish their reviews on VWAP. Hantao's acquisition, possession, and use of such information do not violate any legal prohibitions or accepted business ethics. If Baidu was unable to obtain sufficient review information from its users, the company obtained review information from websites such as VWOD. com through technical means to enrich its own Baidu Maps and Baidu Know. Baidu's use of such information was a substitute for the information provided to users by VWOD. com and caused harm to Hantao. In addition, the fact that Baidu's search engine crawled the information in question did not violate the Robots Agreement, but it did not mean that Baidu could use the information at will. The Court of First Instance held that Baidu's extensive and full-text use of the review information in question violated accepted business ethics and the principle of honesty and credit, and was improper. [6] Therefore, the Court of First Instance ruled that Baidu should stop the unfair competition and compensate Hantao with RMB 3 million in economic damages and RMB 230, 000 in reasonable expenses paid to stop the unfair competition.[1,7]

4 The test of traditional rules and analytical tools

4.1 The insidious and coercive nature of the monopolistic behaviour of the platform

The monopolistic behaviour implemented by internet platforms is often covert. The giant platforms have advanced technology and powerful data processing capabilities.[8] On the one hand, it is designed to adapt to the needs of users, and on the other hand, it is a way for the platforms to implement their monopolistic behaviour. The concealment is reflected in a variety of behavior. Firstly, the platform can implement the content of the monopoly agreement through the use of technical means, and as the prices and other information in the platform change in real-time, the behaviour is more concealed, and difficult to be discovered. Secondly, the platform economy involves many subjects, and the platform can achieve the effect of excluding and restricting competition through the cooperation of multiple parties, which is more concealed than two subjects reaching an agreement directly.[9] Thirdly, platforms can use their technical and managerial advantages to implement acts of abuse of dominant market position, for example, e-commerce platforms force operators to operate only on their platforms by limiting the number of visitors, reducing the number of promotions and increasing fees, i. e. "choosing one of two", and then by algorithmically imposing significantly higher price standards on regular customers than on new customers. It can be seen that concealment raises the difficulty of determining whether the disputed conduct constitutes a monopoly in the regulatory process.[10]

4.2 The dilemma of defining markets for related commodities

Traditional methods of defining markets for related goods have focused on examining the degree of substitutability of goods, particularly demand substitutability. Reference factors include demand for the functional use of the commodity, acceptance of quality, price acceptance, and ease of access. These qualitative analyses apply to physical goods, but not necessarily to digital products that are easily replicated and shared. Firstly, the digital economy innovates much more efficiently than the traditional economy. The rapid updating of goods, especially digitalization of many traditional goods, has rendered many criteria that previously defined the relevant commodity markets inaccurate and irrelevant.

5 Exploration and prospects of the path to distinguishing choice of law

5.1 Methodology for defining relevant commodity markets

Any competition takes place in a concrete market relationship, a market in the concrete rather than the abstract sense. It is not advisable to avoid discussing competition in the market. To define the relevant market, it is necessary to clarify the scope of the market in which operators compete. Scientific and reasonable definition of relevant market is helpful to identify competitors and potential competitors, that is an important tool to evaluate and review the market power of enterprise behavior, and an effective way to determine whether the enterprise is competitively harmful. The Anti-Monopoly Guidelines of the Anti-Monopoly Committee of the State Council in the Field of Platform Economy affirm the necessity of defining the relevant market in the general antitrust enforcement in the platform economy. Article 4[3] of the Guidelines emphasizes the need to clarify the relevant market in the investigation of monopoly agreements and abuse of dominant position and the anti-monopoly review of platform economic operators. The provisions of the previous Draft for Public Comments have be deleted that the relevant market may not be defined in certain types of cases and under certain circumstances. As the platform economy is characterized by cross-network externalities and lock-in effects, the definition of the platform-related market involves many factors and is relatively complex and difficult. Therefore, the Guidelines insist on defining the relevant market in the process of antitrust enforcement in the platform economy, reflecting the concept of scientific supervision and prudent enforcement. Article 3[3]of the Guidelines stipulates the basic principle of "scientific and efficient supervision by the law", and clarifies that the Anti-monopoly Law and its related systems are equally applicable to all market players in the platform economy. Accordingly, platform antitrust enforcement should be positioned as a passive defense against damage to the market competition mechanism, focusing on balancing the relationship between the government and the market in the process, not being too hasty, and avoiding over-regulation. If competition damage can be directly identified without defining the relevant market in the process of anti-monopoly enforcement in the platform economy, in light of China's reality, it may be overkill and excessive enforcement in practice, which is contrary to the concept of scientific regulation.

5.2 Methodology for determining market dominance

The determination of market dominance has always been a difficult issue in the field of digital platforms. It is closely related to the extremely cautious judicial approach taken by the Supreme People's Court in the "3Q" case[1], which held that the high market share of an internet company cannot be taken for granted as market dominance, but rather that the network effect and lock-in effect should be taken into account. This approach is also recognized by the Guide. At the same time, although the relevant market definition methods that have been innovated can compensate

1 The "3Q" case refers to 360 Tencent's mutual lawsuit, Qihoo and Tencent, two large software companies in China, accused each other of unfair competition in 2010.

for the shortcomings of the existing analytical tools to a certain extent, due to the dynamic nature of the digital economy, the above methods are not applicable in all contexts. Therefore, some scholars and law enforcement agencies consider that in the digital economy, a strict definition of the relevant market is no longer a necessary step in antitrust analysis and that the analysis of firms' market power is the most important. As discussed above, common analytical tools such as market share, marginal profits, and market concentration may not be able to accurately determine the true market power of platform companies in the digital economy, and non-price-related considerations are beginning to receive more attention. For example, big data collection and analysis have become an important feature of the digital economy. The use of the internet in e-commerce, online streaming, and social networking has made data a valuable strategic asset for businesses in the digital ecosystem. Based on business models that collect and process user data in almost real-time, companies can offer a wide range of innovative and customized services at zero price and the consumer experience is constantly being optimized. At the same time, the data-driven network effect, enhanced by user feedback effects and economies of scale tied to the IT infrastructure, can provide a considerable competitive advantage for companies that have data. In some cases, restrictions on access to data may act as a barrier to entry for potential competitors. In the case of the merger, the US Department of Justice decided to ban it because the concentration would create a significant barrier to entry for "star and review platforms" through a data monopoly. The necessary link between data ownership and market power ownership has not been established. Both the US and the EU have similarly concluded that having data does not necessarily mean that a platform can successfully keep out competitors, because having more data does not give a competitive advantage if the data is widely available and easily accessible to competitors. In the Google/Double Click decision, the Commission found that combining the data collection of Double Click and Google did not provide an advantage to the newly merged entity, as competitors could easily access similar data and there were already competitors offering both search and advertising services. [3]In this case, even if the merging parties had access to valuable data, the Commission still found that the data was not unique and did not create a competitive advantage that could not be easily replicated by other competitors. Similarly, the US Federal Trade Commission in the same merger case also found that the merger of Google and Double Click was unlikely to significantly reduce existing competitive constraints.

6 Conclusion

A Guideline alone is not enough to improve the rules of digital competition, and timely amendments to the anti-monopoly Act are needed to properly supplement the digital rules. However, it is not advisable to expect the amendment to solve all the problems arising from the development of the platform economy. It is advisable to adhere to the principle of inclusiveness and prudence in amending the Anti-Monopoly Law. The innovative nature of the digital economy objectively requires that the market regulation model be innovated by the laws of market development, and eventually form an institutional environment and policy and legal system that can adapt to the requirements of innovation-driven development. The 13th Five-Year Plan for Market Regulation and the Regulations on Optimising the Business Environment both establish "adherence to prudential regulation" as the main principle of market regulation, requiring inclusive and prudent regulation of new technologies, new industries, new business models, and new modes around encouraging innovation. Although the specific connotation, criteria, and scope of application of "being inclusive and prudent" have not yet been determined, "simplification of government and decentralization + negative list" can be regarded as the specific application of this principle in the market regulation system. In the context of anti-monopoly, the regulation of digital platforms follows the principle of inclusiveness and prudence, which requires seeking a balance between innovation and order, and avoiding going to the extreme of either not regulating or prohibiting it. The old approach may not be "right" for the new industry, and the innovation potential has not been fully released, so the new industry and new models should be given a higher degree of tolerance than the traditional industry. The market economy is an economy governed by the rule of law, so innovation is not an excuse to do as you wish. Legislation and market supervision and enforcement need to face up to the risks brought about by the digital economy in a prudent manner and to deny and combat new industries and new models that disrupt the order of competition in the digital sphere under the guise of innovation. Although the "Internet+" business model represented by the sharing economy has brought great convenience to consumers in the early stages of industrial development, the legal and social problems brought by it have become more prominent with the unrestricted entry of capital into the market. In the digital economy, anti-monopoly rules should be adapted to protect the interests of consumers and enhance the efficiency of innovation.[11]

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