

Research on the Internet Antitrust Law and Its Improvement Path: Based on the Comparison of China, the United States, and Europe

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Abstract. The monopoly problem of Internet companies is of great significance to economic development. How to define the relevant market, how to determine the abuse of market dominance, etc., are all vacant in Chinese legal time. To fill this gap, based on the comparison of China and the United States, China and Europe, combined with the in-depth interpretation of judicial practice, jurisprudence analysis, and other aspects, a comparative law study is carried out here.

Keywords: Antitrust Law, Europe, The United States, China.

1. Introduction

With the rapid development of the global Internet, the Internet economy has become increasingly influential in various countries, and with it the monopoly of the business giants in this field. The determination of corporate monopolies varies from country to country due to the different levels of Internet development and the corresponding legal regulation. The US Antitrust Act has provisions for the determination of monopolistic behavior, but the scope of certification is relatively narrow. The EU has a more stringent determination of antitrust, which places more importance on market competition and focuses on the protection of vulnerable groups. Many laws, such as the EU Operational Regulation, emphasize the protection of consumers and SMEs. In contrast, there is no monopoly determination in Chinese law. When the Anti-Monopoly Law of the People's Republic of China and the Guidelines of the Anti-Monopoly Committee of the State Council on the Definition of Relevant Markets were formally implemented in 2008, China's Internet was still at an early stage of development and there were no detailed anti-monopoly provisions on the Internet in the relevant laws. With the inclusion of Tencent in the scope of the US antitrust review, legislation in China is imminent. However, the determination of anti-monopoly is a complex issue, such as the determination of the relevant market and the determination of the dominant position. This article will analyze the above.

2. Comparison of legal practice between China and the United States

2.1. Determination of the “relevant market”

Even if there are few relevant precedents due to the shortcomings of the Internet monopoly theory, the American Express case can still be cited here for comparison. Although Express is mainly engaged in the credit card business, the market theory it is based on is consistent with today's Internet companies, that is, the two-sided market theory. First of all, regarding the identification of the relevant market, we can spy on it by discussing the judgment theory of the American Express case. In a market, the reasons are as follows:

On the one hand, the credit card company faces a phenomenon known as “indirect network effects” between merchants and cardholders, that is, benefits or costs to one party that result from another party's actions. The academic definition of an indirect network effect is an externality associated with platform membership, reflecting the fact that more and more users are engaged on the other side of

the platform, and the platform becomes more valuable to users on one side. [1] In this case, when more merchants accept the credit card, it will be more valuable to the cardholder, and when more cardholders use the Express credit card, the credit card will in turn generate more value for the merchant.

On the other hand, this indirect network effect is strong enough to include both cardholders and merchants in the same market. As the minority of the U.S. Supreme Court held in this case, the farmers' market can also be considered a trading platform for both buyers and sellers of agricultural products [2]. The increase in the number of merchants and the increase in the number of sellers will harm each other. Positive impact, however, the problem is that the pricing basis of the farmer's market is not the same as that of American Express. At this stage, most of the income of the farmer's market comes from the rent of the booth. In this part, the fluctuation space of the rent only comes from the perspective of a single industry, for example, it depends on special factors such as gross profit in the industry. However, the situation of American Express Company is different. The pricing factor is not based on the consideration of the traditional, single industry market, but on the comprehensive consideration of multiple industries. In essence, when a bilateral platform charges one party a price below or above the cost, it is a reflection of the difference in the elasticity of demand between the two parties [3]. For example, in many two-sided markets, companies may subsidize consumers or even provide free services to attract enough consumers in one market, but such behaviors cannot simply be regarded as predatory pricing, because such behaviors are conducive to Attracting participants from the other side, thereby promoting the development of the platform economy. In conclusion, because the two-sided market cannot avoid the risk of a vicious circle of declining demand while raising prices, on the one hand, a price increase on the platform side does not imply an anti-competitive effect. Therefore, courts must include both sides of the platform-the merchant and the cardholder in defining the credit card market [4].

As a result, a phenomenon arises here, where both parties cannot make sales unless they both agree to use their services at the same time, and bilateral trading platforms exhibit more pronounced indirect network effects and interconnected pricing and demand. Therefore, a trading platform is better understood as "offering only one product" trading [5].

Based on the interpretation and analysis of the above theories, we will have different views and thoughts on the Baidu case in 2008. In this case, the plaintiff's company appealed to the court because it was dissatisfied with the defendant Baidu's "bidding ranking" practice. The definition of the relevant market is the key issue in this case. In this case, is the relevant market the search engine service market in China? The court held that due to the service characteristics of search engine services, which can quickly find, locate and enable Internet users to obtain massive information in a short period of time, other types of Internet application services (such as online news services, e-mail services, etc.) cannot be replaced, so the "search engine service" itself can constitute an independent relevant market. However, such a definition of the relevant market is inevitably one-sided. Because it only determined the relevant market from a unilateral market that was not directly related to the plaintiff's interests, Baidu's Internet commercial advertising field was not taken into consideration. If the relationship between the two is discussed in depth here, it can be seen that the market definition, in this case, is not so simple.

According to a survey conducted in Beijing and Shanghai in March 2006, the dissatisfaction of netizens with access to information from portal websites is affected by various factors, including "too many advertisements, and always have to deal with many other pop-ups. Pages" accounted for the highest proportion, reaching 70.89%. It can be seen that if there are too many advertisement pop-ups, it will have a serious negative impact on users. Compared with other factors, the correlation is stronger (The content is complicated and it is difficult to find the information you need, accounting for 51.7%, the authenticity is low, the excessive hype information accounts for 41.8%, the recommended headlines are rarely interesting to you, accounting for 31.3%, and the other 0.5%), which means that their willingness to choose this search engine has dropped significantly [6]. This strong correlation between users on the same platform on both sides is in line with the characteristics of indirect network

effects, but it only appears in the image of the “negative network effect” here. Since the field of Internet commercial advertising can have a huge impact on the user search field, why does the court mistakenly determine that the relevant market, in this case, is only the search engine market, and ignore the Internet commercial advertising market on the other side? In essence, the Internet commercial advertising market and the search engine market should become a whole market [7].

2.2. Determination of “abuse of dominant market position”

Market dominance is essentially an ability to raise prices. The status itself is not illegal. Enterprises have the right to use this advantage to compete, but they should bear the special responsibility that their actions do not harm the effective competition in the market [8]. Abuse of market dominance is the inappropriate use of that capability by the company that possesses it [9]. This is the “conduct element” in the analysis of the abuse of dominant market position.

On how to identify this behavior, the definition of the US case law has gone through a lot of ups and downs. In the 1953 USM case, Justice examined various points of case law and stated that a business that has control over the market, if it uses or plans to use that power to carry out any “exclusionary practice”, violates Section 2 of the Sherman Act [10]. However, the opposite exploitative abuse is not included in the abuse of market dominance. In the Verizon Communs case in 2004, the U.S. Supreme Court pointed out that having monopoly power and charging monopoly prices at the same time is not only not illegal, but is an important factor in the free market system. The judgment believes that, first of all, in the short term, rising prices will attract more business acumen to join, which is an incentive for innovation. Monopoly prices are not inherently anticompetitive [11].

However, this provision is rooted in the special circumstances of the United States. American scholars believe that when the owner of a dominant market position raises the price, it will stimulate the entry or expansion of new markets, which will promote competition to a certain extent and make it difficult to raise prices [12]. But this process is very tortuous. How to ensure that new markets have the ability to enter smoothly? And how to ensure that the newly entered market is sufficient to maintain the balance of prices. In short, this is a very high requirement for sufficient, sufficient, and timely market entry, and a very high expectation for the market intervention mechanism. So just in terms of market entry, China and the US are very different.

The Internet anti-monopoly field is an emerging object. Although both theories and practices in China and the United States have paid attention, there is still a gap between the relatively mature legislation. The main problems are mainly manifested as follows: the identification standards of relevant issues are not clear, the judicial judgment standards are not agreed upon, and the normative system has not yet been established.

3. Comparison of Legal practice between China and Europe

Compared with China’s regulations, the European Union’s anti-monopoly regulations in the field of Internet platform economy are more stringent, paying more attention to market competition and protecting the interests of vulnerable groups. This has something to do with the fact that Europe lacks a homegrown Internet economy platform such as Microsoft and Amazon. In terms of the legal system, many laws, such as The Treaty on the Operation of the European Union, the Small Business Act of the European Union, and the General Data Protection Regulation, emphasize the protection of the interests of small and medium-sized enterprises and consumers [13]. In recent years, the EU has taken strict anti-monopoly measures against large Internet platform enterprises. In cases of concentration of operators and abuse of market dominance conducted across borders, the EU has imposed huge fines on Google, Facebook and Amazon. In this regard, some people believe that the monopoly position of these giant Internet platform enterprises threatens the competitiveness of the European market, so antitrust is more to show the role of trade protection tools. However, there is no denying that the EU’s strict regulation strategy can create a favorable market environment for SMEs,

especially focusing on the ecological transmission of the Internet platform and the centralized effect of data, which provides a strong guarantee for user data [14]. Specifically, the EU has taken the following measures in the process of legislation and law enforcement.

3.1. Determination of “Relevant Market”

In terms of the relevant market definition, the EU mainly defines the relevant market from two aspects: product characteristics and substitutability. In terms of product characteristics, the EU not only considers free products or services but also the implementation of such free policies or economic practices; In terms of substitutability, it mainly analyzes demand substitution and supply substitution. At the same time, in defining the relevant regional market, the EU will take a comprehensive consideration of the country, nationality, language, consumer preference, market entry barriers, and other aspects. In terms of identifying the dominant market position of Internet platform enterprises, the EU classifies the competitors in relevant markets from two aspects of product and region. Compared with the US approach, the EU has increased the consideration of buyer power, user transfer costs, and other aspects. In terms of user transfer cost, the main consideration is the user locking effect, Internet platform dependence, market share, etc. In terms of buyer power, considerations on bargaining space, transaction price, and price control are added. The identification of the “relevant market” is mainly composed of commission announcements and precedents of the European Court of Justice [15]. The European Commission published in the official press of 9 December 1997 Journals published on no. 372 document, the EU competition law in the determination of relevant market of the European Commission in the bulletin board for the committee in implementing the EU competition law in the judgment related goods and definition of the regional market have played a guiding role, the committee the move also hopes to increase its enforcement in the European Union transparency of its policies and decisions. Since then, the European Court of Justice has also improved this provision when hearing different cases, thus establishing a relatively perfect “relevant market” identification system [16].

3.2. Determination of “abuse of dominant market position”

In terms of defining the abuse of dominant market position by Internet platform enterprises, Article 102 of the Treaty on the Operation of the European Union lists four major cases of abuse of dominant market position, mainly targeting exclusive abuses. At the same time, in order to determine the existence of abuses, the EU has also added a practice survey and a strategy for the necessary consideration of acts. The EU recognizes that the abuse of dominant market position is mainly concentrated in the following three aspects: first, the behavior of preying on consumers, such as overpricing and price discrimination; The second is the behavior of eliminating competitive relations; Third, we will crack down on behaviors that harm consumers’ right of choice, ensure that consumers have more choices, and strictly restrict such behaviors as “choosing one or the other”. The EU also includes privacy protection in antitrust enforcement [17]. In 2018, the EU issued the General Data Protection Regulation, which is characterized by strict privacy protection and high fines. The General Data Protection Regulation not only makes a very detailed description of the rights that individual users enjoy in respect of private data, such as the right to access, the right to be forgotten, the right to restrict processing, and the right to transfer data but also makes very detailed provisions on the processing of personal data by enterprises. In addition, the EU is highly concerned about data-driven mergers and acquisitions and the impact of data collection and processing on the competition. The Commission is highly concerned about competition issues arising from data centralization, as well as the loss of consumer welfare and invasion of privacy.[18]

In the identification of abuse of market dominance, there is still a lag in legislation. Neither the Anti-Monopoly Law of the People's Republic of China (hereinafter referred to as the Anti-Monopoly Law) nor the Guidelines of the Anti-Monopoly Commission of The State Council on the Definition of Relevant Markets (hereinafter referred to as the Guidelines) have paid timely attention to the bilateral marketization and digital characteristics of the Internet platform economy. [19]This is mainly

because when the Anti-Monopoly Law was formally implemented in 2008 and the Guidelines in 2009, China's Internet economy was still in the initial stage of development, and relevant laws and policies focused on regulating and adjusting traditional industries, resulting in legislation lagging behind the development of the digital economy. For example, the method of defining relevant markets in the Guide is divorced from the actual development of the Internet economy. At the same time, the lag in legislation leads to problems in factors, standards, and applicable methods at the law enforcement and judicial level when defining the relevant market and identifying the abuse of market dominance [20].

4. Conclusions

4.1. Judicial Aspects

Due to historical reasons, the Anti-monopoly Law of Our country has not made specific provisions on some procedural rules and quantitative standards, so there is a certain uncertainty in law enforcement. To this end, on the one hand, through relevant regulations, government reform policies, departmental regulations to refine, on the other hand, to strengthen anti-monopoly law enforcement. As a new form of monopoly, it is very important to adopt a scientific and reasonable anti-monopoly law enforcement strategy in law enforcement.

In the course of anti-monopoly law enforcement, the relevant market definition should be evaluated creatively and flexibly. Due to lower prices in the Internet market, the importance of law enforcement, and more attention from the supply side to the demand side, an in-depth analysis was carried out on the Internet platform for enterprise business model, comprehensive consideration is an examination of the specific types of the Internet platform for enterprise, the alternative source of profits, products or services, to determine the scope of the relevant market.

Under the framework of abusing dominant market position, monopoly agreement, and concentration of operators, more attention should be paid to the behavior standards of Internet platform enterprises in the process of anti-monopoly law enforcement, focusing on the analysis of whether Internet platform has created market barriers, and objectively evaluating the negative factors of Internet platform enterprises. In terms of whether to create market barriers, Antitrust law enforcement need to the system, with emphasis on the Internet platform for enterprise data processing (such as data monopoly behavior, algorithm, data), the user lock (such as force users to agree to privacy read permissions, forced a choice behavior), price discrimination, such as "big data kill cooked" behavior), cross-border competition (such as multiple investments, tying behavior), and other aspects of behavior, The focus is on whether Internet platform companies have capabilities and whether they use these capabilities (or one of them) to create barriers to market entry, transaction, and exit. In addition, to judge whether Internet platform enterprises have carried out monopoly behaviors, it is necessary to conduct a systematic evaluation combined with other factors and comprehensively investigate the negative factors existing in Internet platform enterprises, mainly in two aspects: First, the innovation ability of Internet platform enterprises should be examined. Whether there is a sound intellectual property system, a sound production and research system, and whether there are substantially innovative products or services, all of which are necessary conditions for Internet platform enterprises to have innovation ability. The second is to investigate the internal governance effect of the Internet platform and systematically investigate the community governance and compliance system construction within the Internet platform. The above are some suggestions for the relevant standards in the process of anti-monopoly law enforcement, but the improvement of law enforcement is far more than this. If the professional level of anti-monopoly law enforcement needs to be improved, the law enforcement should keep pace with the development and changes of the Internet platform economy; Another example is to speed up the legal process of anti-monopoly law enforcement, strengthen procedural control, ensure the rationality of the results; For example, the communication and cooperation between anti-monopoly agencies and industry regulators and financial regulators should be strengthened to form joint forces in the industry, competition and

financial supervision.

4.2. Legislation

At the law enforcement level, there is a great deal of discretion in the definition of relevant market and the identification of abuse of dominant market position, which is bound to cause disputes in practice, which depends on the improvement of relevant standards and identification methods at the judicial level. On the one hand, the judiciary can play the function of providing the bottom, on the other hand, it can promote the improvement of relevant standards and systems.

First, a case guidance system can be established for monopoly cases of Internet platform enterprises, and relevant cases can be released in a targeted and rapid manner. Judicial departments, based on neutral and professional judgment and combined with relevant evidence and facts, have certain advantages in determining standards, defining market dominance, and identifying the abuse of market dominance, which can provide a reference for the operation of Internet platform enterprises and anti-monopoly law enforcement.

Second, in view of the special circumstances of monopoly and unfair competition cases on Internet platforms, the existing burden of proof and impudence principles can be changed. Because of the Internet platform across time and space, and the characteristics of the digital economy, in the event of lawsuits consumer, user, platform, merchants terms proof is very difficult, sometimes even injury consequence is hard to calculate, the burden of proof can be passed on to the side of market advantage, for alleged monopoly Internet platform for enterprise since the innocence, Thus protecting the interests of the disadvantaged party in terms of proof. Therefore, the principle of presumption of the fault of tort liability legal system can be referred to. Such proof mode can not only change the situation that there is no way to provide proof, but also conform to the reality of the economic development of the Internet platform.

Third, in view of the uncertainty of anti-monopoly in the field of the Internet platform economy, the corresponding public interest litigation system can be gradually established. The Internet economy is different from the general industrial platform, technological innovation, and product update speed, product-market life is short, damage behavior and its consequences are complex and diverse, and may also appear to cause violation of public interests, therefore, within the field of civil public interest litigation should join to an Internet platform for enterprise's special litigation cases, in this way, on the one hand, It can effectively alleviate the situation that private victims can not bring lawsuits for relief; On the other hand, it can effectively protect public interests and ensure that there is someone responsible for public damage. On this basis, public interest litigation can also form a certain constraint on the Internet platform, which is beneficial to curb monopoly behavior from the source.

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