



Analysis of Anti-monopoly Issues in the Digital Platform Economy. Take China's Anti-monopoly Supervision—Concentration Review of Business Operators as an Example

Chunyu Wu(✉)

School of Law, Boston University, Boston, USA
chunyuwu@bu.edu

Abstract. While the digital economy has developed vigorously recently, many internet platforms have monopolized platforms using “choosing one from two”, variable interest entities(VIE) structure, and self-preferential treatment. Such vicious competition has disrupted the market order. The article first summarizes the tactics of internet platform companies to monopolize, and then analyzes how these platforms attempt to monopolize through the merger of HUYA and DOYU. The anti-monopoly cases investigated by the European Union against Google, Apple, and Amazon show how internet platforms take advantage of “self-preferential treatment”. This paper analyzes the anti-monopoly supervision methods and the interim framework of the Concentration Examination in China. Through discussing the case of Alibaba Group Holding LTD and the case of Sherpa's, this paper analyzes how to judge the abuse of market dominance by competitors under the existing review framework.

Keywords: Digital Platform Economy · Anti-monopoly · Concentration Examination · Abuse of Dominant Market Position

1 Introduction

2021 is officially defined as the “anti-monopoly” year in China. Alibaba and Meituan were fined RMB 18.228 billion and RMB 3.442 billion respectively by the General Administration for Market Regulation for implementing “choosing one from two” monopolistic behaviors. The merger of Huya and Douyu was suspended. Several platform giants have received administrative penalties for the illegal implementation of concentration of operators.

The most common method of monopoly in China is “choosing one from two”. In the field of the platform economy, “choosing one from two” generally means that relevant market operators, through certain technical measures or contractual arrangements, make the trade objects face the option between “trade with themselves, not with other operators” and “refuse to do business with themselves”, and use punitive or rewarding measures to urge the counterparty to choose the previous “option”, thereby excluding

competitors' trading opportunities. "Choosing one from two" is generally used in the takeaway platform field, O2O field, and online retail platform field.

Another popular form of monopoly is the Variable Interest Entity structure. Instead of controlling the actual operating company through equity, this VIE structure achieves control and financial consolidation of the actual operating company through the signing of various agreements. Currently, the VIE structure is mainly used by Chinese companies to achieve overseas listing and financing and it is also used by foreign investors to circumvent domestic regulatory restrictions on foreign industry access.

In recent years, there have been numerous cases of using these monopolies in the internet platform sector. The Chinese government takes platform monopoly seriously. On February 7, 2021, the Anti-Monopoly Committee of the State Council released the "Antitrust Guidelines for the Platform Economy Industry".

This paper aims to analyze the criteria for defining abuse of dominant market position and discuss the concentration examination in China.

2 The Antitrust Supervision in China

The concentration examination of operators is the proactive regulation and supervision of antitrust enforcement. In 2021, with the purpose of forcing companies to take the initiative to declare, the General Administration for Market Regulation notified a great number of cases of "illegal implementation of concentration of business operators".

The concentration examination consists mainly of a declaration and a result. The concentration examination consists mainly of a declaration and a result. The key to pass or fail is whether the concentration of operators will eliminate or restrict competition. However, since the examination standard used by the department relies solely on revenue, this may result in companies easily avoiding scrutiny if their revenue does not meet the notification threshold.

"Choosing one from two" is an abuse of market dominance. There is a judgment criterion for abusing market dominance:

1. Defining the "relevant market"
2. Whether the company has a dominant position in the "relevant market"
3. The effect of behavior itself on competition.

2.1 Defining the "Relevant Market"

Defining the market in which internet companies operate is controversial. To avoid penalties, Internet companies prefer to define themselves as competitors in markets, both online and offline. However, as an emerging industry, the Internet is in an ever-changing market that includes advertising, communications, and retail. This means without identifying the market in which a company is located, dominance cannot be determined in the second step. Therefore, it is very difficult to investigate and prosecute Internet companies.

As a result, in 2021, the Anti-Monopoly Committee of the State Council released "Antitrust Guidelines for the Platform Economy Industry". The guidance defines the

“relevant market” as the market for e-tailing platform services in China. The Alibaba case is based on the definition of this market, as Alibaba’s market share exceeds 60% in terms of platform service revenues and platform merchandise transactions, and the relevant market is highly concentrated.

Prior to the Alibaba case, the Shanghai Municipal Bureau of Market Supervision had investigated the take-away platform “Sherpa’s” and its “choosing one from two” tactics. It took a year and a half because more than half of the 15,000-word penalty decision was on the definition of the relevant market, which shows the difficulty in defining the relevant market.

3 The Regulation of Platforms

3.1 The Punishment of Integrated and Monopolistic Platforms

If the law enforcement agency finds that the market power of the platform is overmighty and eliminates or restricts competition, the platform can be restored to its pre-concentration state, which means breaking up. But there is no case of breaking up the platform yet.

Even if Tencent’s acquisition of China Music Group is deemed to have the effect of eliminating and restricting competition, it would only require Tencent to release the exclusive rights agreement to restore competition in the relevant market. Until 2021, 44 of the 45 cases penalized were procedural violations that did not involve elimination and restriction of competition, meaning that these companies would also be released if they filed early. This is because the cost of the remedies could significantly outweigh the possible economic benefits.

3.2 The Restriction of Merging Platforms

On July 10, 2021, HUYA and DOYU were barred from merging, which is the first case in the internet area that prohibits the concentration of operators in China. According to the regulatory authorities, if HUYA and DOYU merge, Tencent will independently control the merged entity. It will further strengthen Tencent’s dominant position in the market of the video game stream. At the same time, it will give Tencent the ability and motivation to implement closed-loop management and two-way vertical blockade in the upstream and downstream markets, which has or may have the effect of eliminating or restricting competition.

According to the statistics provided by State Administration for Market Regulation, in 2021, it investigated and punished 176 antitrust cases, with a total fine of RMB 23.586 billion. It shows that regulatory authorities take antitrust cases seriously.

However, the statistics in Fig. 1 show that only 1 case was prohibited from merging and 4 cases were approved with restrictive conditions. The other 107 cases were procedural violations, as they were not declared according to the law. The remaining 615 cases were unconditionally approved. Thus, it is clear that it remains difficult for the regulator to determine whether a case has the effect of eliminating and restricting competition. This is because the key to determining whether it has the effect of eliminating

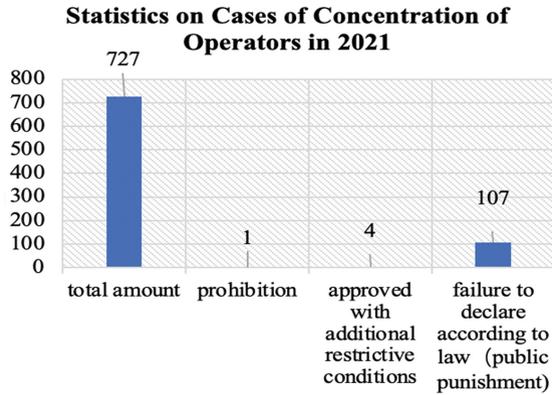


Fig. 1. Statistics on cases of Concentration of Operatos in 2021

and restricting competition is to assess its market power in the relevant market, which involves a great deal of economic analysis. Moreover, based on the previous discussion, it is difficult to determine “two-for-one” Internet platform cases.

4 Regulations on Platforms Have Dominant Positions in the Market

4.1 Regulations in China

There are several laws and regulations that regulate the “choosing one from two” and VIE structure in the digital economic field.

Article 17(4) of China’s *Anti-monopoly Law* if the latest Anti-monopoly Law(Draft Amendment) is passed, then Article 22(4)) prohibits business operators with a dominant market position to limit the counterparty only transacting with it or only with its designated business operator.

Article 12 of China’s *Anti-unfair Competition Law* is relevant to technical means. It provides that operators shall not use technical means to maliciously incompatible network products or services legitimately provided by other operators, while not using other means to obstruct or disrupt the normal operation of network products or services legitimately provided by other operators.

Article 22 of *China’s E-Commerce Law* stipulates that if an e-commerce operator has a dominant market position due to factors such as its technical superiority, number of users, ability to control the relevant industry and the degree of reliance of other operators on the e-commerce operator in the transaction, it shall not abuse its dominant market position to exclude or restrict competition. Besides, Article 35 stipulates that operators of e-commerce platforms shall not use service agreements, transaction rules, technology, and other means to unreasonably restrict or attach unreasonable conditions to operators’ transactions within the platform, transaction prices, and transactions with other operators. And shall not charge unreasonable fees to operators within the platform.

4.2 Regulations in Other Countries

As the core industry of the digital economy, China is also facing competition from Europe and the US in the field of digital technology at the political and legal levels. Since the beginning of 2020, the EU has issued a series of policy documents and legal frameworks to increase digital “technological sovereignty” and strategic autonomy, enhancing Europe’s digital innovation capacity, and reducing digital technology dependence on foreign countries. This series of actions has led to a “rift” in the development of the global digital economy.

Initially, some experts did not believe that Internet platforms would affect the health of the economy. However, it is worth noting that platforms may use sales data from third parties on the platform to decide which products to produce, leading to unfair competition. And because of the internet, platform markets can be dominated by one or two players, which can harm consumer welfare and innovation. In addition, the data collection advantages of platforms can give companies an advantage that other competitors cannot overcome. Initially, however, it is generally believed that these scenarios will not happen. Experts believe that these companies tend to grow quickly, so they keep attracting new users, retaining old ones, and investing heavily in research and development. Companies prefer to attract more third-party providers to their platform rather than compete with third-party competitors, and data alone rarely protects existing businesses from competitors with better products.

However, due to the growing threat of platform monopolies, in Europe, regulatory authorities have also developed regulations and definitions on how platforms can use their dominant position. One issue that has raised concerns is that Internet platform companies have created an “Ecosystem” in which they engage in “self-preferential treatment” of both “athletes” and “referees”. In December 2020, the European Commission issued the *Digital Market Law (draft)*, which explicitly prohibits large platform companies identified as “gatekeepers” from implementing self-preferential behaviors. The 10th Amendment, adopted by Germany in January 2021, also prohibits operators deemed “essential to cross-market competition” engaging in self-preferential conduct.

In a famous case, the European Commission decided to investigate Google, Apple, and Amazon. Google lost its appeal of a \$2.8 billion fine in the EU antitrust case, and European antitrust regulators said Google gave preferential treatment to its own price-comparison shopping services over those of its rivals.

The DOJ lawsuit alleges that Google used exclusionary agreements to prevent competitors from accessing its core distribution channels, thereby ensuring its continued monopoly in online search. Google used three tactics to consolidate its monopoly.

1. Engage in “artificially-restrictive contracts” to give it “de facto exclusivity” in most distribution channels for search. (It is similar to VIE structure)
2. Deny advertisers the ability to interoperate between their advertisement tools and competitors’ for general search ads, which disadvantages the advertisers.
3. Use “discriminatory conduct on its search results page” to limit the ability of vertical search providers, such as Yelp and Tripadvisor, to reach consumers.

In conclusion, internet platforms in different countries all attempt to use their dominant power to eliminate and restrict their rivals and other competitors. Besides, the majority of regulatory authorities have formulated corresponding laws and regulations with pertinence.

5 Prospects for Antitrust Regulation in China

Starting from the end of 2020, the Chinese government has repeatedly issued signals to strengthen anti-monopoly. In 2021, policies related to anti-monopoly and anti-unfair competition were released intensively, and enforcement actions for major cases will continue in the future. From the real economy to the internet platform economy, and from post-regulation to pre-regulation, anti-monopoly law enforcement has shown intensive and normalized characteristics. Internet companies are taking the initiative to open up the platform ecosystem.

As previously discussed, the declaration threshold for operator concentration lacks diversification. Therefore, when setting the declaration threshold for operator concentration, more dimensions can be added instead of considering only turnover. This is mainly because in some niche markets, the market volume itself is small, and if competitors occupying a large market share merge, it is easy to form a monopoly. Therefore, factors such as market share and turnover should be considered when setting the filing threshold.

Similarly, when assessing whether a platform has a dominant position in the relevant market, it is difficult to prove that an enterprise has a dominant market position based on market share alone. Law enforcement agencies need to prove that an enterprise has a dominant market position from various aspects, such as the ability to control prices, the ability to control trading conditions, and the ability to prevent competitors from entering the market.

China has been deeply influenced by the Chicago School of Economics in the past. According to the Chicago School, as long as the market is free to compete, resources will be allocated in the most rational way. This would not only lead to the most efficient allocation of resources, but also to the most just allocation effect. They believe that anti-monopoly is not against market dominance, but against specific monopolistic behaviors, and even certain monopolistic behaviors that are considered to be conducive to efficiency will be exempted.

Based on this perception, the Chicago School directly reverses the previous causal perception of monopolistic behavior. They propose that the fundamental reason why firms are able to hold a large market share, or even control the market, and then gain more profits through this dominant position is that they have an advantage in terms of efficiency. Thus, antitrust is not against market dominance per se, but against specific monopolistic behavior. According to this, even specific monopolistic practices are exempted if they are deemed to be conducive to efficiency.

This also directly promotes the tendency of the U.S. anti-monopoly judiciary to take efficiency first. Antitrust enforcement in the United States is constantly oscillating between “fairness” and “efficiency”. In China, the antitrust goals of the past decade have focused too much on efficiency. In recent years, however, it has become clear that competition policy needs to be fair and that regulators should put fairness ahead of efficiency.

6 Conclusion

Unlike traditional antitrust laws in the industrial economy. Defining the “relevant market” is a major challenge in regulating monopolies in the digital platform economy. It is gratifying to note that China’s Anti-Monopoly Guidelines for the Platform Economy, published in 2021, define the “market for e-tailing platform services in China” as a substantial step forward.

The second difficulty is that the Anti-Monopoly Law prohibits “abuse of dominant market position” only when the subject has a “dominant market position”, and the abuse of dominant position can be regulated by the Anti-Monopoly Law. However, as discussed above, platforms have the characteristics of many different markets. Thus, even if a platform does not have a dominant market position, the abuse of its combined advantages can bring harm to the market, SMEs (small and medium-sized enterprises and medium-sized enterprises) and consumers because of its great power in different markets. Therefore, it is a challenge to regulate the platform that “intuitively has a dominant position in the market but it is difficult to find a dominant position in the market”.

In the context of the continuous and in-depth promotion of anti-monopoly regulation and the successive enforcement cases against the monopolistic behavior of Internet enterprises such as super platforms, China’s economic development model has been transformed into a high-quality economic development model. Besides, it is necessary to pay more attention to the innovation of regulatory methods and the in-depth promotion of fair competition policy. In conclusion, the pursuit of a fair and orderly market environment means that the regulation no longer targets a certain type of market competitors, but implements competition policy without discrimination. Ultimately the transformation to a normalized anti-monopoly regulation will be realized.

Bibliography

1. Lina M. Khan, Amazon’s Antitrust Paradox, *The Yale Law Journal*, Volume 126, 2016-2017, Number 3, January 2017, 564-907
2. Joe Kennedy, Monopoly Myths: Do Internet Platforms Threaten Competition?, Information Technology and Innovation Foundation, 2020
3. Adam Satariano, Google loses appeal of \$2.8 billion fine in E.U. antitrust case. *The New York Times*, 2021-11-10
4. Lauren Feiner, Google hit with its third antitrust lawsuit since October, this time by a bipartisan coalition of states, *CNBC*, 2020-12-17
5. Weishan Chen, How to rewrite the Rules of the Internet after Alibaba’s 18.2 billion fine, *China News Week*, 1012, 2021-09-13
6. State Administration for Market Regulation: In 2021, 176 monopoly cases were investigated and fined with a sum of 23.586 billion yuan, *CNTV*, 2022-03-14
7. Farhad Manjoo, Tech’s ‘Frightful 5’ Will Dominate Digital Life for Foreseeable Future, *N.Y. Times*, 2016-01-20
8. Raghuram Rajan & Luigi Zingales, *Saving Capitalism from the Capitalists*, 2003
9. George J. Stigler, *The Organization of Industry* 67 1968
10. Daniel A. Crane, *The Tempting of Antitrust: Robert Bork and the Goals of Antitrust Policy*, 79 *Antitrust L.J.* 835, 847, 2014

11. Interim Provisions on Prohibiting Abuse of Dominant Market Positions [Revised], Order No. 11 of the State Administration for Market Regulation, Effective date: 09-01-2019
12. Edith Ramirez, Chairwoman, FTC, Keynote Remarks at 10th Annual Global Antitrust Enforcement Symposium, 2016-09-20

Open Access This chapter is licensed under the terms of the Creative Commons Attribution-NonCommercial 4.0 International License (<http://creativecommons.org/licenses/by-nc/4.0/>), which permits any noncommercial use, sharing, adaptation, distribution and reproduction in any medium or format, as long as you give appropriate credit to the original author(s) and the source, provide a link to the Creative Commons license and indicate if changes were made.

The images or other third party material in this chapter are included in the chapter's Creative Commons license, unless indicated otherwise in a credit line to the material. If material is not included in the chapter's Creative Commons license and your intended use is not permitted by statutory regulation or exceeds the permitted use, you will need to obtain permission directly from the copyright holder.

