



Development of Anti-monopoly Supervision over Platform Economy in China and Recommendations on Compliance

Featured Article

Anti-monopoly is becoming a global concern as surging Internet technology sees more and more intense market competition and concentration around the world. As one of the leading digital economies, China is developing its platform economy which is now in a critical phase. Especially, platform companies have got more advantages of data resources and scale effect from the outbreak of COVID-19 in 2020, resulting in more prominent inequality in the industries. In the wake of rapid development of platform economy, some problems have become more and more serious, such as forced “exclusive choice”, implementation of “killer acquisitions”, burning money for occupying the “community group buying” market, abuse of “big data”, emerging data ownership issues and data privacy protection issues, etc. Among others, forced “exclusive choice” is a particularly highlighted problem, by which platform companies exclude their business partners from cooperate with their competitors in such a way that competition would be severely limited or precluded. This problem is caused by the willful and disorderly expansion of capital in the platform economy.

On April 10, 2021, the State Administration for Market Regulation issued an administrative punishment decision after a four-month investigation, ordering Alibaba Group to stop abusing its market dominant position and imposing a fine of 18,228,000,000 yuan, which is the largest fine ever imposed under China's Anti-Monopoly Law. What is more, on April 12, 2021, Shanghai Municipal Administration of Market Supervision publicly disclosed an administrative punishment decision made on December 25, 2020, which concluded that Shanghai Sherpa's Trading Development Co., Ltd. (hereinafter referred to as “Sherpa's”) had carried out the act of abusing its market dominant position to restrict market transactions and decided to impose a fine of about 1,168,600 yuan thereon. Although the Sherpa's case has not got as much external attention as the Alibaba case, the Sherpa's case is very typical and significant in that it sounded an anti-monopoly alarm to numerous hidden-champion Internet companies. Both the Alibaba case and the Sherpa's case involve implementation of forced “exclusive choice” behavior by Internet platform companies. Through the cases, an effective norm against illegal behaviors of platform companies has been demonstrated, setting up a benchmark for the handling of future cases in the field of platform economy by making effective ruling against platform companies' illegal behaviors.

I. Latest developments of anti-monopoly supervision in the field of platform economy in China

In recent years, China has witnessed clear signs of increasing market concentration and monopoly or oligopoly by some leading Internet platforms that have benefited from network

platforms that have benefited from network technology and scale economy effect. As a result, it is an inevitable trend to strengthen the anti-monopoly supervision in the field of digital economy in China.

Under the frame of Chinese Anti-monopoly Law, it is the administrative law enforcement agencies that are the main subject for enforcing the law. At present, anti-monopoly supervision is promoted by stepping up improvement of anti-monopoly related systems and rules and by strictly enforcing the law on monopoly cases in the Internet field.

At the end of 2020, the Central Economic Work Conference clearly pointed out “to strengthen anti-monopoly, to prevent disorderly expansion of capital, and to make more established rules over identification of platform monopoly, management of data collection and use, protection of consumer rights and interests”. Since then, anti-monopoly supervision has been strengthened over the Internet platform economy.

A series of regulatory measures have been issued for the platform economy successively. The Action Plan for Building a High-standard Market System, issued in early 2021, explicitly strengthens anti-monopoly and anti-unfair competition regulations over new forms of business such as platform economy. The Government Work Report of the State Council of this year points out that, on the one hand, platform companies are encouraged to develop innovatively, get more international competitiveness and run their business in accordance with the law, and, on the other hand, that a fairly competitive market environment shall be maintained by taking more efforts on anti-monopoly and preventing disorderly expansion of capital. On February 7, 2021, the Anti-monopoly Commission of the State Council issued Guidelines for Anti-Monopoly in the Field of Platform Economy, releasing a signal that Internet platform will be covered under the regulation and supervision of the Anti-monopoly Law. In particular, the Guidelines involve more detailed provisions on how to apply the Anti-monopoly Law in the field of platform

Anti-monopoly Law in the field of platform economy, which is of great significance to promote healthy development of the platform economy.

At the same time, a series of anti-monopoly enforcement cases have been publicly issued intensively. On March 3, 2021, the State Administration for Market Regulation imposed an administrative penalty of 6.5 million yuan on five community group buying companies, including Orange Optimization Company, for improper price behavior. On March 12, 2021, the State Administration for Market Regulation concluded that Yintai Commercial (Group) and other eleven companies conducted illegal concentration behaviors and imposed a fine of 500,000 yuan on them respectively. On April 10, 2021, the investigation of the Alibaba case was publicly announced, which marked a new stage of Anti-monopoly Law enforcement in the field of platform economy.

Furthermore, on April 13, 2021, the State Administration for Market Regulation, together with the Central Cyberspace Administration and the State Administration of Taxation, convened an administrative guidance meeting for Internet platform companies in order to address outstanding issues such as forced implementation of “exclusive choice”. The meeting requires that platform companies shall comply with business requirements and shall not cross the bottom line. Accordingly, the platform companies are required to conduct comprehensive self-inspection and make rectifications within one month, striving to achieve “five preventings” and “five ensurings” as follows: preventing disorderly expansion of capital and ensuring economic and social security; preventing monopoly disorder and ensuring fair competition in the market; preventing technology blocking and ensuring innovation and development of the industry; preventing abuse of rules and algorithms and ensuring legitimate rights and interests of all parties; preventing systematic lockdown and ensuring open and shared business ecology.

In summary, the State Administration for Market Regulation not only showed its desire to regulate

Regulation not only showed its desire to regulate the platform economy, but also took real anti-monopoly measures. On the one hand, it strictly punished improper behaviors violating the law so as to prevent any platform companies from getting competitive advantages in any illegal way. On the other hand, platform companies are directed to do business in compliance with administrative guidelines. In this way, platform companies are encouraged to participate in the construction of a new order of platform economy for promoting the sound development of the platform economy in the long run.

II. Analysis of typical cases of anti-monopoly supervision

As the platform companies prevail in the Internet economy, a new “active, cooperative, prudent and law-based” philosophy is being adopted by market regulation, instead of the earlier “inclusive and prudent” philosophy, which can be seen in the Alibaba case and the Sherpa's case. The Alibaba case is a milestone, announcing the normalization of Chinese anti-monopoly enforcement in the field of platform economy and the end of a brutal growth era of Chinese Internet industry.

In order to identify conduct of abuse of market dominant position in the field of platform economy, the following three steps can be used: a). defining the relevant market in the platform economy; b). analyzing whether the undertaking has a dominant position in the relevant market; and c). specifically analyzing whether there is a conduct of abuse of market dominant position, depending on the circumstances of individual cases, by eliminating or restricting market competition without justifiable reasons. For enforcing the anti-monopoly law in the platform economy, the most difficult part is the definition of the relevant market. If the relevant market is not clearly defined, whether there is a market dominant position and there is any abuse of it cannot be identified, and thus clarifying the market scope of competition of an undertaking is the base for the analysis of competitive behavior. As prescribed in Article 3 of Guidelines on the

As prescribed in Article 3 of Guidelines on the Definition of Relevant Market, the term “relevant market” refers to the scope of goods and geographic area within which an undertaking competes during a certain period with respect to specific goods or services (collectively referred to “goods” as hereinafter). When defining the relevant market, the demand substitution analysis will be adopted based on the characteristics, utilities, price and other features of the goods, and the supply substitution analysis will only be adopted if necessary, as prescribed in Article 7 of the Guidelines, while where the scope of the market in which the undertakings compete is not clear or difficult to determine, an analysis theory known as the hypothetical monopolist test may be adopted to define the relevant market.

As prescribed by Anti-monopoly Guidelines of the Anti-monopoly Commission of the State Council on Platform Economy, “the basic method for defining relevant commodity markets in the field of platform economy is substitution analysis. For the definition of relevant commodity markets in individual cases, demand substitution analysis may be conducted based on factors such as platform functions, business patterns, application scenarios, user groups, multilateral markets and offline transactions; when the competition constraints caused by supply substitution on undertakings' conduct is similar to those caused by demand substitution, supply substitution analysis may be conducted based on factors such as market access, technical barriers, network effects, lock-in effects, transfer costs and cross-border competition. To be specific, relevant commodity markets may be defined based on the unilateral commodities in the platform; multiple relevant commodity markets may also be defined based on the multilateral commodities involved in the platform, and the relationship and influence among these relevant commodity markets shall be considered. When the cross-platform network effects existing in the platform can impose sufficient competition constraints on undertakings of the platform, the relevant commodity markets may be defined based on the platform as a whole.”

As prescribed in Article 3 of Anti-monopoly Law,

As prescribed in Article 3 of Anti-monopoly Law, where an undertaking has violated the provisions of this Law in abusing its market dominant position, the anti-monopoly enforcement agency shall order the undertaking to stop the illegal act and confiscate the illegal income; a fine of 1% to 10% of the sales amount of the preceding year shall be imposed.

Case 1: Alibaba case

Please see Administrative Punishment Decision No. 28, 2021 issued by State Administration for Market Regulation.

As can be seen from the decision regarding Alibaba case, the regulatory authority (“State Administration for Market Regulation”) identified the behavior of Alibaba and determined administrative punishment thereon by strictly following the Anti-monopoly Guidelines. Specifically, the decision thoroughly analyzed the “exclusive choice” behavior both in the legal and in the economic aspects and thus identified Alibaba as constituting a restricted transaction, thereby excluding or restricting market competition.

First, in terms of the definition of relevant market, the regulatory authority conducted demand substitution analysis and supply substitution analysis respectively from the perspective of the undertakings and consumers, and then defined the relevant commodity market in this case as an online retailer platform service market, and defined the relevant geographic markets in this case as the mainland territory of China.

Second, in the investigation of whether the party concerned (“Alibaba Group”) had a market dominant position in the relevant market, the regulatory authority concluded that it is necessary to take relevant factors into comprehensive consideration. Specifically, it concluded that the party concerned had a dominant position in the online retailer platform service market in China by mainly considering the following seven aspects: (1) from the perspective of the service income of the platform and the transaction volume of the platform, the market share of the party exceeded 50%; (2) The

market share of the party exceeded 50%; (2) The HHI index and CR4 index of the relevant market indicated that the relevant market was highly concentrated; (3) The party had strong market control ability, being able to control the service price, the sales channels and the network traffic available by the merchants on the platform; (4) the party had strong financial resources and advanced technology; (5) other merchants were highly dependent on the party in transaction; (6) it was difficult to enter the relevant market; and (7) the party had significant advantages in the relevant market.

Third, the regulatory authority concluded that the party had committed acts that constituted an abuse of the market dominant position. First of all, the party identified core merchants out of the merchants on the platform according to relevant factors, prohibited the core merchants from opening stores on other competitive platforms, and particularly required the core merchants on the platform not to participate in important promotional activities on other competitive platforms. Secondly, the party took various reward and punishment measures to ensure implementation of the “exclusive choice” requirement. In particular, by virtue of market forces, platform rules and data, algorithms and other technical means, the party imposed penalties on the merchants on the platform who did not implement the relevant requirements of the party, including reducing resource support for promotional activities, canceling the qualification to participate in promotional activities, reducing search service, canceling other rights and interests on the platform, etc. These punishment measures significantly reduced the attention of consumers paid to the merchants on the platform and more merchants on the platform had to implement the “exclusive choice” requirements put forward by the party.

Fourth, the regulatory authority concluded that the party's behavior excluded and restricted market competition. Specifically, the party restricted the merchants on the platform from opening stores on other competitive platforms or participating in promotional activities on

or participating in promotional activities on other competitive platforms in order to reduce its pressure of competition and consolidate its own market position improperly. This did not comply with the principle of orderly, open, and inclusive development of the platform economy, eliminated or restricted competition in the relevant market. It damaged the interests of the platform merchants and consumers, discouraged innovation and development vitality of the platform merchants, and hindered optimal allocation of resources in the relevant market.

Fifth, taking into account the nature, extent and duration of the violations by the party, the regulatory authority imposed a fine which is 4 percent of the sales of the party in 2019 in China. The fine was carefully determined by the regulatory authority, which would serve as a good warning to large Internet platforms without excessively hurting the party.

Case 2: Sherpa's case

Please see Administrative Punishment Decision No. 06201901001, 2020 issued by Shanghai Municipal Administration of Market Supervision.

Defining the relevant market in the field of platform economy is a very complex matter, which requires careful analysis of various factors involved in the specific case, determination of the boundary of the relevant market. The identification of the act of abuse of market dominant position in this case is basically consistent with the Alibaba case. One highlight of this case is that the regulatory authority ("Shanghai Municipal Administration of Market Supervision") defined the relevant commodity market by means of "hypothetical monopolist test", which is specifically explained herein below.

First, the regulatory authority considered the nature, function, price and other aspects of the services provided by the party ("Shanghai Sherpa's Trading Development Co., Ltd."), in combination with the business pattern and competition characteristics of the relevant industry, to conduct demand substitution

industry, to conduct demand substitution analysis and supplemental supply substitution analysis. On the basis of this, it was determined that there was no substitute relationship between the online food delivery platform providing English service and the online food delivery platform providing Chinese service.

Secondly, the regulatory authority made a hypothetical monopolist test by means of economic tools and used critical loss analysis to analyze market business data.

By critical loss analysis, the target goods are considered as the goods set to be tested, and the hypothetical monopolist is assumed to control all the target goods in the market and has a small increase (generally 5 percent to 10 percent) in the price of the target goods for a period, and it is determined whether the hypothetical monopolist is still profitable after the price increase of the goods by comparing the actual loss and the critical loss upon increase of the price of the target goods. If the actual loss exceeds the critical loss, the hypothetical monopolist is unprofitable by increase of the price, and the target goods cannot constitute the relevant market alone. On the contrary, if the actual loss is less than the critical loss, it indicates that the price increase is profitable and the target goods can constitute the relevant market.

The hypothetical monopolist test needs to be carried out based on the business pattern of the relevant undertaking, focusing on evaluating the influence of core price increase by the undertaking (the hypothetical monopolist) on the market demand under the business pattern.

The hypothetical monopolist in this case was an online food delivery platform providing English language services in Shanghai. After analyzing the transaction data of the undertaking, the regulatory authority concluded that the order volume of the hypothetical monopolist was mainly affected by the meal cost and the delivery cost, and its income mainly came from the commission of cooperative restaurant merchants and the delivery cost paid by consumers. Therefore, it was necessary to

consumers. Therefore, it was necessary to evaluate the impact of the increase of these two costs on the order volume. Based on the market transaction data, the regulatory authority analyzed the critical loss in two cases: (a) only the delivery cost changed; and (b) both the delivery cost and the commission changed. The increase of delivery cost, commission and the meal cost would increase the gross profit in any cases, but only the delivery cost and meal cost would affect the order volume. In the first case (case a), it was found that consumers were relatively insensitive to delivery cost, and it was profitable to increase the level of delivery cost slightly in the current market with the meal cost and other factors unchanged. In the second case (case b), it was found that although increase of the meal cost might lead to decrease of the order volume, the monopolist might still be profitable by increasing the commission slightly if possible. With the meal cost and other factors being unchanged, the hypothetical monopolist was more likely to get more profit if both the commission and the delivery cost were slightly increased.

Finally, both the qualitative analysis based on substitution analysis and the quantitative analysis based on the hypothetical monopolist test indicated that the online food delivery platform service market providing English service constituted an independent market for the relevant goods.

III. Reflections on the anti-monopoly regulation in the field of platform economy

It can be seen from the current situation that anti-monopoly law enforcement is more normalized and more stringent in the field of platform economy in China. At present, since the anti-monopoly law enforcement team is still too small to meet the demand of market, the law enforcement authorities, including State Administration for Market Regulation, will mainly focus on big cases in the platform economy. By investigation into and handling of more big cases that have significant impact on people's livelihood and market competition and

people's livelihood and market competition and by strengthening punishment in those cases, those typical cases will play a leading, exemplary and guiding role for anti-monopoly law enforcement. We believe that with the recent developments, the antitrust supervision and investigation in the platform economy will become a routine in the future, and therefore, would recommend internet enterprises, particularly those in the leading position in the corresponding industry, taking immediate actions to strength antitrust compliance programs to avoid potential compliance risks.

1. Monopolistic behaviors carried out by platform companies may be more secretive and involve more complex technical problems, putting forward higher requirements on anti-monopoly analysis methods. More professional resources may be introduced to strengthen anti-monopoly, including using more professional economic analysis tools. As an example, in order to analyze the behavior of abuse of market dominant position, it is necessary to make a comprehensive analysis for the determination of the market dominant position, the legitimacy of the behavior, and the effect of excluding or restricting competition. If necessary, economic analysis may also be conducted. Also, it is an urgent requirement to enlarge the law enforcement team with improved ability for strengthening supervision.

2. It is suggested to combine quantitative analysis with qualitative analysis for the definition of the relevant market, so as to improve the accuracy of judgment of an individual market. In the Sherpa's case, in addition to qualitative analysis by means of basic substitution analysis, the regulatory authority also conducted quantitative analysis by means of the hypothetical monopolist test, thus reasonably defining the relevant market. However, the hypothetical monopolist test is a relatively static approach, which might be not sufficient for platform companies having highly mixed goods and service business. Therefore, studies may be done on how to verify the accuracy of definition of the relevant market by

accuracy of definition of the relevant market by economic analysis and how to establish a suitable economic model for quantitative analysis.

3. For the judgment of the market dominant position of platform companies, the market share of undertakings in relevant markets should not be considered alone, while the business pattern and the characteristics of the Internet technology should also be fully considered. More attention might be paid to the network effect, the difficulty of market entry, the market behaviors of the undertaking, the impact on competition, etc. In the Alibaba case, the regulatory authority comprehensively considered multiple factors. In the Sherpa's case, the regulatory authority considered not only the market share, but also the competition situation of the relevant market, the dependence of other merchants on the party concerned and the difficulty of market entry.

4. Platform economy is characterized by dynamic innovation. Market and the competitive behaviors of participants in the market are affected by the entry of innovative companies, the occurrence of disruptive innovation, and the change of business pattern. However, the traditional theory of anti-monopoly law pays less direct attention to

anti-monopoly law pays less direct attention to innovation. When judging the increase or decrease of consumer welfare, it mainly depends on evaluation of static efficiency based on price and outcome. This makes it impossible to pay attention to the dynamic competitive process in the market and to evaluate the impact of platform companies' competitive behaviors on innovation. Therefore, in addition to the static allocative efficiency and production efficiency, the theory of anti-monopoly law should also consider the innovation efficiency with dynamic characteristics.

5. In view of the dynamic innovation characteristics of platform economy, regulatory authorities should strengthen the pre-supervision over platform monopoly. On the one hand, regulatory authorities can conduct regular market research in the field of platform economy, release competition evaluation reports of relevant markets, and guide subsequent regulation and law enforcement, and, on the other hand, regulatory authorities can further strengthen the anti-monopoly compliance supervision on platform companies and encourage platform companies to be in compliance with the law.

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