CHINA'S INTERNET INDUSTRY: NEW CHALLENGES IN ANTITRUST REGULATION AND COMPLIANCE

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I. INTRODUCTION

2018 was a milestone year for the *Anti-monopoly Law of the People's Republic of China* ("Anti-monopoly Law"). The practical experience of anti-monopoly enforcement over the past decade has given this young law vitality and authority. Regulators, businesses and consumers have gradually become accustomed to examining economic life from the perspective of competition law, and the value provided by fair competition to social welfare is increasingly remarkable. It could be said that China's Anti-monopoly Law stands at a historical moment between the past and the future.

It is worth mentioning that the past decade also witnessed the rapid development of China's Internet economy. As of the first half of 2018, the number of Chinese netizens has passed 800 million, and internet penetration has reached 57.7 percent. China has already become a great power on the internet, with the largest number of internet users and the most abundant mobile network applications.[2] As has happened with regulators in other countries, China's Internet and digital economy, which was seen as representing equality, competition, and innovation during its early development, has now come to the attention of China's Antimonopoly Law, while the focus of discussion on antitrust and competition policies has shifted from traditional industries to the emerging digital economy. There can be no doubt that shaping China's response to the relevant competition issues raised in the era of the Internet and the digital economy will be one of the most prominent challenges that the Anti-monopoly Law's enforcers will face within the next decade.

II. COMPETITION CHALLENGES BROUGHT BY THE INTERNET AND THE DIGITAL ECONOMY

Practitioners of antitrust law are now facing the challenges brought by the Internet and the digital economy. Problems such as collusion through algorithms, price discrimination, and exclusionary conducts by platforms have become real-life competition problems, and over the past year several related hot-topic events have caused widespread competition concerns.

A. Competition Challenges Brought by Data and Algorithms

1. Algorithmic Collusion

Data and algorithms are widely used elements of the internet industry. By exploiting the data collected from their business activities through the use of computer algorithms, companies can achieve greater economic efficiency in customizing services, improving pricing models, forecasting market trends, and optimizing processes.[3] However, on the other hand, the use of data and algorithms may also brush against the red line of anti-mo-

2 See https://www.sohu.com/a/250731723_206427.

3 OECD: "Executive Summary of the Roundtable on Algorithms and Collusion," see https://one.oecd.org/document/DAF/COMP/M(2017)1/ANN3/FINAL/en/pdf.

nopoly law: facilitating enterprises in reaching monopolistic pricing.

First, the widespread commercial application of data and algorithms can make markets more prone to collusion. For example, the innovation of data mining and information processing technology makes it possible to supervise, analyze or predict competitors' current and future price response,[4] thereby enhancing the factor of market transparency that facilitates collusions.

In addition, the use of data and algorithms may also serve as an ancillary method for facilitating the conclusion of a monopoly agreement, or even constitute a monopoly agreement in itself. In the former, enterprises may agree to adopt the same pricing algorithm to achieve the effect of fixing prices, similar to a price monopoly agreement "agreeing to adopt standard formulas in calculating prices,"[5] which is essentially traditional cartel behavior using Internet technology. Another, more complex algorithm collusion, involves the use of big data and algorithms to achieve real-time price changes and tracking, which may coordinate prices without people's awareness. Under the current regulatory system of China's Anti-monopoly Law, the investigation and determination of this kind of algorithm collusion may become much more difficult in the future. On one hand, since the definition of monopoly agreements in the form of concerted practices under China's Anti-monopoly Law takes as its core factors the intention, communication, and exchange of information between undertakings, its applicability to algorithm collusion will be in question. On the other hand, given that big data and algorithm technology may bring huge efficiency gains, problems such as whether the rule of *per se* illegality generally adopted for price monopoly agreements continues to be applicable, or whether the anti-monopoly liability even exists when price consistency is caused by machine learning, have become unavoidable issues.

Even though there are no cases yet of algorithm collusion in China, we believe that Chinese anti-monopoly enforcement agencies will continue to pay close attention to the regulation of data and algorithms.

2. Personalized Pricing

Personalized pricing, another competition issue closely related to data and algorithms, attracted widespread attention in 2018 and has been voted as one of the top 10 catchwords of the year in China. Some well-known Chinese Internet platform companies, such as DiDi and Fliggy,[6] have reportedly been engaged in personalized pricing,[7] ie. platforms know the purchasing power and preferences of different consumers by collecting a large number of data reflecting consumers' attributes and historical behaviors, based on which those platforms charge different prices for the same product or service according to the consumers' willingness to pay. This amounts to online price discrimination. So, how to treat personalized pricing behaviors from the perspective of China's Anti-monopoly Law?

The legal basis for the regulation of personalized pricing behavior under China's Anti-monopoly Law should be the provision regarding the prohibition on the abuse of dominant market position by differential treatments.[8] However, the first question is whether the provision is applicable. One theoretical argument is that the differential treatment prohibited by the Anti-monopoly Law is limited to discrimination against commercial trading partners, and does not include final consumers. Therefore, its legal applicability remains to be discussed. Despite this, China's Anti-monopoly Law does not explicitly exclude final consumers from its definition of "the counterpart." Unless there are contradictory regulations or cases in the future, the personalized pricing strategy targeting final consumers should not be construed as falling outside the scope of the jurisdiction of prohibition on differential treatment.

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4 See above.

5 Article 7 of the *Provisions against Price Monopoly*: Competing business operators are prohibited from concluding the following price monopoly agreements: …(5) Agreeing to adopt standard formulas in calculating prices;…

6 DiDi is China's largest ride-hailing service platform; Fliggy, a company owned by Alibaba, is an online travel service platform well-known in China.

7 The personalized pricing behaviors of the platforms mentioned above have not been officially confirmed. This paper does not intend to make any inferences in any form about the facts or technical issues of these cases, but only to discuss them from an academic perspective based on the publicly reported events.

8 Article 17 of China's Anti-monopoly Law: Undertakings with dominant market position shall not abuse their dominant market position to engage in the following activities: … (6) implement differential treatment in terms of transactions such as transaction price for trading counterparts with identical conditions without justified reasons;… Article 16 of the *Provisions against Price Monopoly*: Undertakings with dominant market position shall not, without justified reasons, apply preferential treatment in terms of transaction price to trading counterparties with identical conditions.

If the differential treatment provision is qualified as abuse, the key theoretical problem is how to assess the market power of relevant companies and carefully consider the efficiency gains caused by personalized pricing (carefully handled and defended with legitimate justifications). On the former, the personalized pricing strategy has a natural connection with a certain degree of market power. The OECD pointed out in its report on personalized pricing[9] that a minimum level of market power is one of three necessary market conditions that are usually required for price discrimination behaviors.[10] Specifically, price discrimination may be particularly feasible in markets with some degree of economies of scale, economies of scope, network effects, entry costs or switching costs. As for the efficiency caused by personalized pricing, it may improve allocative efficiency and benefit low-end consumers who would otherwise be underserved. However, in some cases it may also lead to a loss in total consumer welfare. In addition, if these practices are conducted in non-transparent or deceptive means, there is also the risk of reducing trust in the market and triggering a perception of unfairness, potentially dampening consumer participation in digital markets. Therefore, even though antitrust authorities usually tend to be more open and inclusive in assessing conducts related to big data and algorithms, it is particularly important that online price discrimination behaviors be considered carefully based on overall social welfare.

B. Competition Challenges Brought by Platform Exclusionary Conduct

The development of the Internet in China and the wave of mergers and acquisitions in this industry over the years has created many 'super-platforms'. With the development of platform companies, their exclusive trading strategy gradually raised concerns about restrictions to competition. For example, in April 2018, DiDi entered the Wuxi take-away market, trying to start a subsidy war with Meituan and Eleme.[11] It is reported that both Meituan and Eleme required the local commercial users in Wuxi to sign exclusive agreements with them at the time.[12]

The either-or strategy adopted by platforms is essentially a vertical restriction. There exist two possible regulatory approaches for tackling vertical restrictions under China's Anti-monopoly Law: one is to apply the provision that undertakings which hold a dominant market position shall not abuse said position by restricting commercial counterparts to dealing only with them.[13] The other is to apply the catch-all provision related to vertical monopoly agreements.[14]

There are great uncertainties in the above approaches for dealing with exclusionary conducts by platform companies. For the first approach, when applying the provisions prohibiting exclusionary conducts, it will be difficult to overcome the "legal barrier" that Internet companies must be shown to hold a dominant market position. When considering the second approach, the catch-all provision related to vertical monopoly agreements, demonstrating the anti-competitive effects of vertical non-price restrictions will be a big hurdle. There are no precedents for determination of vertical non-price monopoly agreements in China, including within the scope of the internet sector.

Another related issue is whether the exclusionary conducts undertaken by Internet platforms should be treated more leniently due to their industry-specific attributes. The impact of these conducts on competition should be analyzed on a case-by-case basis. However, it is worth reflecting on whether exclusionary conducts in multi-sided markets may generate greater anti-competitive effects than in traditional one-sided markets. On one hand, exclusive trading arrangements are made between platform companies and users on side A, while the interests of users on side B are unlikely to be fully considered in the exclusivity agreements. On the other hand, the indirect network effect of platforms may create economies of scale. A platform with more users on one side will be more attractive to potential users on other sides.[15] Platforms with commercial advantages may increase the costs of their competitors or set up barriers to entry for potential competitors by engaging in exclusionary conducts,

9 OECD: "Personalised Pricing" in the Digital Era, see https://one.oecd.org/document/DAF/COMP(2018)13/en/pdf.

10 The other two necessary market conditions are identification of consumer's willingness to pay, and absence of arbitrage (consumers free of price discrimination cannot resell the product to consumers under price discrimination).

11 Meituan, one of the most successful local life service platforms, was listed on the Stock Exchange of Hong Kong in 2018. It has a competitive relationship with Eleme, a subsidiary of Alibaba, in the area of take-away services.

12 News article: "When Will the Stick of Anti-monopoly would be Waved against the Glorious Internet Giant?," September 20, 2018, see https://www.thepaper.cn/newsDetail_forward_2458842.

13 Article 17 of China's Anti-monopoly Law: Undertakings with dominant market position shall not abuse their dominant market position to engage in the following activities: … (4) restrict trading counterparts to transact only with the undertaking or only with designated undertakings without justified reasons;…

14 Article 14 of China's Anti-monopoly Law: The following monopolistic agreements between undertakings and trading counterparts shall be prohibited: …(3) any other monopolistic agreements as defined by the anti-monopoly enforcement agency of the State Council.

15 OECD: "Rethinking Antitrust Tools for Multi-Sided Platforms 2018," available at http://www.oecd.org/fr/concurrence/rethinking-antitrust-tools-for-multi-sided-platforms.htm.

which will lead to foreclosure effects. It is undeniable that the exclusive trading arrangements struck by Internet platforms may increase efficiency by things such as avoiding free-riding. A relatively balanced analysis methodology should consider both the efficiency factor and whether the efficiency so increased can offset the effects of restrictions on competition caused by the platforms' exclusionary conducts.

Other than applying the anti-monopoly law, the either-or strategy adopted by platforms can also be regulated by the laws against unfair competition. According to this, the Administration for Market Regulation of Jinhua, Zhejiang Province has determined that the either-or strategy adopted by Meituan constitutes unfair competition and imposed a fine of RMB 526,000.[16] Although falling back to the laws against unfair competition can avoid the "technical barrier" found when applying the anti-monopoly law, its limited legal liability may restrict the effectiveness of supervision, especially for those conducts causing severe restrictions on competition.

III. THE "CHANGED" AND "UNCHANGED" UNDER THE ANALYSIS FRAMEWORK IN THE ERA OF THE INTERNET AND THE DIGITAL ECONOMY

Though the Internet and the digital economy have given rise to a series of challenging competition issues, as some scholars have pointed out, the concentration of businesses, monopoly agreements, and the abuse of dominance are still the core contents of antitrust law in the era of the digital economy, and only the content of specific provisions and the assessment of competition effects will be adjusted according to contemporary developments. The framework of the Anti-monopoly Law is still applicable in the digital economy.[17] When dealing with the competition issues faced by the Internet industry, whether a monopoly agreement issue, an abuse of dominance issue, or a merger control issue, the key to solving such problems lies in the consideration of the particular traits of the Internet and the digital economy regarding the following aspects:

A. The Definition of Relevant Markets

First, the role of defining relevant markets in cases involving the Internet is starting to be questioned. In the case of the "3Q War," which is known as the "first antitrust case in China's Internet sector," the Supreme People's Court pointed out that "it is not necessary to define the relevant market clearly and accurately in every case concerning the abuse of dominant market position." However, it should be noted that under the existing system of antitrust civil litigation, the plaintiff bears the burden of proof for the defendant's dominant position in the relevant market. The definition of relevant markets is still a necessary step in antitrust cases. The flexible discretionary right to decide whether or not to clearly define relevant markets seems to be enjoyed only by the judicial authority. In addition, in terms of how to define relevant markets, how many markets should be defined in cases involving multi-sided markets is a typical problem for Internet-related cases. It is worthwhile to consider defining one or more relevant markets according to the different types of platforms (transactional or non-transactional platform).

B. The Determination of Market Position

The market position of the parties is an important aspect in assessing the competitive effects of relevant conducts. In practice, determining the dominant position of Internet companies has always been a difficult problem in antitrust litigation. Following the "3Q War" case, the Supreme People's Court still refused to rule that Tencent held a dominant market position in the case of "Wechat Emoji Package"[18] in 2018. In this case, the emoji uploaded by the plaintiff was not approved because the content of said emoji violated Tencent's conditions on emoji content. The plaintiff claimed that Tencent's conduct constituted an abuse of dominant market position by refusing and restricting transactions. It is worth noting that the Supreme People's Court clearly stated in the case that:

> the characteristics of highly innovative and dynamic competition under the Internet environment make the boundaries of relevant markets far less clear than those in traditional sectors and more susceptible to 'cross-border competition'. Therefore, paying more attention to market entry, market behavior, and the impact on competition, contributes to analyzing the specific facts and evidence related to dominant market position, rather than sticking to the level of market shares.

16 Available at http://www.jhsc.gov.cn/gjjjc/13003.htm.

17 Economic Daily – www.ce.cn: "The Practice of Anti-monopoly Law is Facing the Challenge of Digital Economy — A Summary of the Symposium on Fair Competition and Anti-monopoly in the Era of Digital Economy," January 9, 2019, available at http://www.ce.cn/cysc/zljd/yqhz/201901/09/t20190109_31215535.shtml.

18 The civil ruling paper issued by the Supreme People's Court, September 14, 2018, available at http://www.pkulaw.com/pfnl/a6bdb3332ec0adc4a7ed3703b3bb8ba0108d1465a66b602fbdfb.html?keyword=%20%E5%BE%90%E4%B9%A6%E9%9D%92.

On January 30, 2019, the State Administration for Market Regulation requested public opinions on the Rules on the Prohibition of Abuse of Dominant Market Position Behaviors (exposure draft) ("the Rules"),[19] and for the first time made provisions for determining the dominant market position of Internet undertakings. The Rules provides that:

> when identifying the dominant market position of new economic agents such as Internet undertakings, the competition characteristics, business models, network effects, technical characteristics, market innovation, relevant data, and the market power of undertakings in relevant markets, etc. should also be considered based on the factors stipulated in the first paragraph of this clause.

The Rules, expected to pass into law this year, will give relatively clear guidance on the analysis of market power for Internet businesses. We are looking forward to seeing the application of this clause in practice in the future.

IV. TRENDS AND SUGGESTIONS

The challenges to competition posed by the Internet and the digital economy are not limited to the issues discussed above. Issues such as data storage and merger control for Internet companies have also caught much attention from anti-trust authorities. It is foreseeable that competition issues surrounding the Internet and digital economy in China will become increasingly prominent. In addition to the antitrust litigations, the anti-trust authority is also expected to take a groundbreaking step in the supervision of competition in the Internet industry.

For those in the Internet industry, we advise relevant companies to abandon outdated ideas such as that there is are no monopoly issues in the Internet industry, and to treat antitrust compliance issues with more discretion. They should assess their own market power in advance for the markets where they belong, keep close attention to updates to the legislation and enforcement by competition authorities, review the antitrust risks of business practices systematically, and make adjustments in due course.

Finally, Internet companies should be wary of algorithms. From an antitrust perspective, people who design algorithms should bear relevant responsibility. As the position held by the EU competition authority: "they (some of the algorithms) all have to go to law school before they are let out."[20] In a way, antitrust is becoming a new "technical ethic."

19 Available at http://samr-saic-gov-cn.wvpn.ncu.edu.cn/gg/201901/t20190130_281326.html.

20 Available at https://www.recode.net/2017/12/9/16752750/european-union-eu-competition-commissioner-margrethe-vestager-recode-decode-lisbon-web-summit.

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