"The Case of Alibaba's Skyrocketing Ticket."--How to Define Relevant Market Identification in Internet Antitrust Law from a Comparative Law Perspective

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Abstract:

This article would select the relevant market definition as a specific perspective as a research problem, and combined with the relevant provisions of the U.S. law. It takes the use of traditional comparative law in the concept of functionalism, in order to functional issues as a research method, to achieve a comparison between the two countries in the law under the provisions of the summary extracted from the different points. As a result, it could absorb and reference to the advantages of the laws of other countries in order to remedy for the filling of the shortcomings of China's relevant legislation.

Keywords: comparative law, anti-monopoly law, functionalism, administrative penalties

1. Introduction of the case and overview of the seminar Introduction of the case and overview of the seminar

On April 10, 2021, the General Administration of Municipal Supervision of Alibaba Group "two choose one" the monopoly behavior according to the law to make administrative penalties, ordering it to stop the illegal behavior, and its 2019 total sales of 4% of the total sales for the calculation of 18.228 billion yuan of penalty results. This case is a typical regulatory authorities to strengthen the anti-monopoly and prevent capital expansion of specific behavior initiatives, against the platform of the strong control of illegal behavior of enterprises. In recent years, countries around the world have especially strengthened the antitrust regulation of Internet giants, such as the U.S. Federal Trade Commission in 2020 for Facebook's illegal monopoly in social networks. Therefore, this paper would discuss from the perspective of antitrust research in the Internet era, in-depth discussion of the different countries behind the relevant legal norms, which would also help to recognize and solve such problems in the future.

2. Problems of comparative research and its theoretical approach

Due to the chain effect brought from the rapid development of the platform economy, coupled with the high degree of dependence on any of the third-party trading platforms other than Ali Group, based on the investigation and research, in April 2021, in accordance with the provisions of the Anti-Monopoly Law and the Guidelines of the State Council Anti-Monopoly Committee on the Definition of the Relevant Markets, taking into account the characteristics of the platform economy, the General Administration of Municipal Supervision and Regulation determined that Ali Group had a dominant position in the internet retail platform market within China, constituting an illegal monopoly. Group has a dominant position in the Internet retail platform market in China, constituting an illegal monopoly. In the analysis of Ali's monopoly behavior, this paper would select the relevant market definition as a specific perspective as a research problem, combined with the relevant provisions of the U.S. law, uses traditional comparative law in the concept of functionalism with functional issues as a research method, to develop a comparison of the two countries in the law under the provisions of the United States, which could summarize the extraction of the differences and learn from the advantages of the law of other countries to make up for the filling of the deficiencies in China's relevant legislation. The study is based on the concept of functionalism in traditional comparative law.

3. Specific comparative analysis

3.1 Relevant Chinese legislation

Throughout China's relevant legislation, according to the current "Monopoly Law", to determine whether the subject has a monopoly a behavior, mainly based on several points: whether the actor has a dominant position

in the relevant market, the implementation of the abuse of a dominant position in the market, and whether the party's behavior excludes, restricts market competition. The above points of judgment are also based on the basis of the relevant market so as to produce the behavior. Hence, the determination of the relevant market is the primary focus of the judgment of monopolistic behavior.

First of all, according to the definition of relevant market in Article 3 of the Guidelines of the Anti-monopoly Committee of the State Council on the Definition of Relevant Markets, it can be expressed as "the range of commodities and geographic area in which operators compete over a certain period of time for a specific commodity or service." In this context, a commodity market refers to a market consisting of a group or class of commodities that are considered by demanders to be close substitutes based on factors such as the characteristics, uses and prices of the commodities, while a geographic market refers to a geographical area in which demanders have access to commodities that are close substitutes.[1] Secondly, articles 5 and 6 of the Law give three specific methods of analysis, namely substitution analysis, demand substitution and supply substitution, respectively, from the perspectives of operators and consumers. Finally, Article 8 of the Law provides an enumerative description of the five important factors to be considered in defining the market for the relevant goods. In other words, the scope and type of relevant market can be recognized on the basis of the commodity market and geographic market in which the operators are competing, and in which the commodities or geographic areas in the two markets have in fact demonstrated a strong competitive relationship, supplemented by the three analytical perspectives of substitution analysis, demand substitution, and supply substitution, with subdivided into specific considerations, such as shape of the commodities, price, and transportation. The scope and type of the relevant market can be determined.

In general, Chinese legislation may differ in the latitude of the criteria for determining the relevant market. However, the most important factor is the determination of the relevant product market and the relevant geographic market. In judicial practice, the determination of anti-monopoly behavior is divided into two simple steps: first, to define the scope of goods that may be competitive; second, to define the specific geographic area in which competition occurs for such goods. The following analysis of this case would be conducted accordingly.

3.2 Reduction of the case

In this case, according to the ruling issued by the court, it was found that the relevant market in this case was the e-tailing platform service market in China. Among them, the goods market is the e-tailing platform service market, which is objectively characterized by a cross-border network effect because it is a bilateral market, i.e.,

it covers both operators and consumers within the service platform, which also makes the demand for e-tailing platform services by bilateral users closely related. Therefore, the definition of the relevant market in this case needs to take into account the impact of the linkage between the bilateral users of the platform: it requires demand substitution analysis and supply substitution analysis from the perspective of operators and consumers, respectively, in order to complete the definition criteria in this case.

First, the merchandise marketplace in this case serves as an independent e-tailing platform, distinguishing it from the traditional sense of the term offline retail business services should be distinguished from offline retail business services, even though there is a certain degree of similarity between the two in terms of their constituent elements, such as business premises and the sale of goods. The reason is that neither demand substitution nor supply substitution satisfies the requirement of close connection. The former demand substitution from the operator and consumer two subjects to discuss, for the operator ring, network platform and offline entity platform covered by the region and time differences: network platform compared to the offline entity store covered by the region more widely, the service time is no longer confined to the fixed hours of the offline entity store, to the trend of all-weather service time development; at the same time, offline retail is more costly than the physical stores built by online platforms, such as store rent or labor costs; finally, online platforms can more accurately provide online platform operators with consumers corresponding to their consumption levels through the use of big data analysis and algorithms, and timely adjust the business ideas and corresponding countermeasures of the operators in the online platforms based on the feedback of their users. Thus, from the analysis of operator demand substitution, the two do not have a close substitution relationship. On the contrary, consumers in the e-commerce platform not only could enjoy a larger range of goods that offline platforms fails to obtain, experiencing a higher degree of convenience and modern logistics corresponding to the delivery service, but also gain enough matching efficiency of the purchase of goods when compared to the offline stores. As a result, according to the analysis of the consumer demand substitution, the two do not have a close substitution relationship. Finally, based on the different profit models of online platforms and offline retail, the supply substitution analysis method perspective, the two also do not establish a close substitution relationship. Therefore, the commodity market in this case is the service market of online retail platform, which is an independent individual, including different types of

operators selling different kinds of commodities on the same platform based on different sales means.

The geographic market in this case can also be concluded by following the steps described above. From the perspective of demand substitution by the operator, the operator has formed a long-term and stable domestic "self-sufficiency" model by selling the goods of the online platform in China to the users in China, which excludes a close substitution relationship between the online platform markets in China and those outside China. From the perspective of consumer demand substitution, because domestic consumers face many practical problems, such as language barriers, after-sales service or tariffs, they generally do not choose offshore platforms as their main consumer purchasing channels, and the two also do not establish a close substitution relationship. Finally, from the analysis of supply substitution, e-tailing platform services belong to Internet value-added telecommunication services, and overseas e-tailing platforms need to apply for business licenses in accordance with relevant laws and regulations to conduct business in China. What's more, it also needs to build logistics systems, payment systems, data systems and other facilities required to conduct business, which makes it difficult for them to enter the Chinese domestic market in a timely and effective manner, creating competitive constraints on them, so the relationship between the domestic and overseas e-tailing platform services is not close substitution. domestic and overseas e-tailing platform service markets do not have a close substitution relationship. Therefore, the relevant geographic area in this case is within China.

3.3 Relevant United States legislation

In December 2020, the U.S. government filed a lawsuit against Facebook alleging that Facebook violated antitrust laws by acquiring two social networking giants, such as ig and whats app, that were potentially threatening to it and gaining a significant market advantage. In that case, Facebook's acquisition and merger of the other two giants constituted a series of unbundled and diversified cluster markets as a whole, forcing its competitors in the same industry to leave that relevant market and achieving the realistic effect of phase isolation. As an important and typical extra-territorial antitrust case, the following discussion and analysis would focus on the antitrust law under the U.S. system.

On the contrary, the U.S. antitrust law on the identification of the relevant market, according to the introduction of the "Merger Guidelines" in 1982, 1992, gives a similar audit criteria with China, based on the supply substitution, demand substitution and SSNIP test three major criteria,[3] but the audit process in judicial practice due to the modern market mergers and acquisitions and other frequent changes in the reality of the

problem can not be reasonably quantified and applied. However, this process cannot be reasonably quantified and applied in judicial practice due to the frequently changing realities of modern markets, such as mergers and acquisitions.

First, the so-called "reasonable substitutability" standard was first established by the United States Supreme Court in 1962 in the Brown Shoe case as a modern rule of product market definition.[4] The Court held that, from the perspective of a group of consumers, if a product is similar to another product in terms of price, function and quality, and a reasonably prudent consumer would be willing to purchase another product as a substitute for the original product, this constitutes a substitute good, and the market for such a good constitutes the relevant product market. At the same time, the case also provides for the interpretation of the "cross-elasticity" criterion, i.e., if an increase or decrease in the price of one of the two substituting goods would significantly affect the decrease or increase in the sales volume of the other, the degree of cross-elasticity can be determined. The court held that both criteria could be applied in determining monopolistic behavior, and could be supplemented by market segmentation to further define the boundaries of the relevant goods market. However, this rule has given rise to many problems in judicial practice, for example, when the quality, attributes or functions of the products are different, the court's determination of the relevant market has given rise to great controversy. Hence, it might be difficult to unify the conclusions drawn from market segmentation.

Subsequently, the 1992 Horizontal Merger Guidelines introduced the "hypothetical monopolist" test, i.e. the minimum market principle and the 5 percent share criterion. In practice, this can be specified as follows: assuming that the price of a good increases opaquely by 5% and the increase cannot be ignored, the firm in which the good is sold can be recognized as a "hypothetical monopolist", which is also known as the "minimum market principle". In the SSNIP test adopted here, the purpose of the hypothetical monopolist is to seek out a smaller relevant market and discover a more competitive relevant market. The operation of this method can be summarized as follows: (1) establish a temporary relevant product market; (2) set up a hypothetical monopolist; (3) examine whether it is "profitable" to raise the price by 5% within a reasonable limit over a specific period of time; and (4) based on the aforementioned variables, determine whether the relevant operator has a monopoly market position in the product market. (4) Determine whether the relevant operator has a monopoly market position in the product market based on the aforementioned variables. [5] Taking the quantitative data of 5% price increase of commodities as the actual basis of analysis, combined with the qualitative analysis of the theoretical basis, the boundaries and scope of the relevant market can be more accurately determined, making up for the judicial rule once based on a single theory. This rule was further refined in the 1997 Merger Guidelines, which gave a five-stage analytical framework for analyzing the concentration of

operators: (1) definition of the relevant market and determination of market share; (2) analysis of potential anticompetitive effects caused by the merger; (3) analysis of market entry; (4) analysis of efficiency; and (5) analysis of the insolvent enterprise.[6] It can be seen that the determination of relevant markets plays an important prerequisite role in the concentration review analysis. Therefore, the U.S. has shifted from the traditional single-market approach to a multi-dimensional examination of the whole, local or relevant parts, specifically, the detailed and comprehensive segmentation of the relevant market by cluster, sub-markets and sub-sub-markets.[7] At the same time, the SSNIP test has been introduced to improve the analysis of relevant market definition with quantitative data as opposed to the original theoretical model.

4. Research methodology

Taking into account the different provisions of the legal systems of the two countries, the following discussion would be introduced to the issue of antitrust-related market identification from the functionalist approach in the context of the traditional functionalism in comparative law.

First of all, the functional purpose of the relevant market identification legislation of the two countries is to limit any competitive behavior to a specific market. In order to effectively exclude and control the emergence of monopolistic behavior of the operator, the definition of the relevant market becomes the first task and the starting point for analyzing any competitive behavior. Therefore, both China and the United States have, to varying degrees, solved the problem of defining the relevant market and combating anti-monopoly behavior.

Secondly, the differences between the two countries are particularly noteworthy. As mentioned above, the market definition method proposed by the United States at a later stage, which is based on a detailed delineation of the attributes of the market itself, is to a large extent adapted to the diversified trend of mergers and divisions of enterprises in the modern society. China's anti-monopoly legislation is more confined to the provisions of statutory law, lacking the legal principles summarized in case law as in the U.S. and other European and American legal systems. The case law-guided anti-monopoly law, supported by real-life cases, can better solve the doubts arising from real-life judicial practice. Based on the empirical theories summarized in reality, it might better solve the many problems arising in the judicial practice of antitrust which are not applicable by the traditional definition method; starting from the whole and the part, and the specific relevant part as the basis, it could

contribute to better understand and grasp the market in the process of antitrust determination. Compared with China's demand-supply substitution analysis, the U.S. legislation makes up for its weak quantitative standards, strong subjectivity and arbitrariness, and is more suitable for the development trend of modern economy.[8]

5. Summary

To summarize, the issue of defining the relevant market still has a long way to go. Compared to Chinese legislation under the traditional civil law system, the application of law is more limited to statutory law; whereas in the United States under the common law system, the legal principles formed with the help of past jurisprudence could better ensure the advancement of its legislation, which might reduce the lag. Only by constantly learning from and absorbing the advantages of other countries' legislations, the deficiencies of domestic legislations could be found in a timely manner. Furthermore, appropriate modifications are supposed to be made, so that the control and prevention of domestic antitrust behaviors could play an important role.

Reference:

[1] Article 3 of the Guidelines of the Antimonopoly Committee of the State Council on the Definition of Relevant Markets.

[2] Chen Wang, (2012) "A Comparative Study on the Definition of Relevant Markets in Competition Law", Overseas Chinese University

[3] The SNIP test refers to the method of first assuming that there is a monopoly producer of a certain product, and then observing the likelihood that buyers will switch to other substitutes within one year when the monopoly raises the price of the product by 5%.

[4] Robert Pitofsky, (1990) New De6flidom of Relevant Market and the Assault on Antitrust[J] .Colum. law Review, 90, 1805-1807.

[5] Wang Xianlin, (2008) "On the Definition of Relevant Markets in the Implementation of the Antimonopoly Law", in Legal Science, First Issue, 123-129.

[6] Dai Long, (2012) "Definition of Relevant Markets in Antitrust Law and China's Orientation", in Journal of Beijing Technology and Business University, First Issue, 118.

[7] Peng Xiaoshan, (2014) "Study on the Definition of Relevant Markets in the Enforcement of U.S. Antitrust Laws," Master's Thesis, Hunan Normal University.

[8] Dai Long, (2012)"Definition of Relevant Markets in Antitrust Law and China's Orientation", Journal of Beijing Technology and Business University (Social Science Edition), First Issue, 122.