

CPI's Asia Column Presents:

The Connection Between E-Commerce Law and Laws About Competition: System Logic and Future Enforcement

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The E-Commerce Law of the People's Republic of China (hereinafter "the E-Commerce Law") has been enforced since January 1, 2019. It has been the center of attention as early as the beginning of drafting, which took five years with four rounds of deliberation and three rounds of public solicitation for comments to finalize.² Unfortunately, the competition clauses in the E-Commerce Law have gained little notice, nor have they been carefully discussed. In fact, the competition regulations in the E-commerce Law are closely related to the Anti-Unfair Competition Law of the People's Republic of China (hereinafter "the Anti-Unfair Competition Law") and the Anti-Monopoly Law of the People's Republic of China (hereinafter "the Anti-Monopoly Law"), which affects the logic system of competition laws. The E-Commerce Law sets up supplementary regulations connected with the competition laws through the prohibition of misleading business advertising and abuse of market dominance. It also sets up independent regulations beyond the competition laws through prohibition of tying or imposing unreasonable trading conditions. These supplementary and independent regulations profoundly change the logic system of the competition laws, which would exert a great influence on competition enforcement in the environment of cyberspace.

Competition Clauses and Logic in the E-Commerce Law: Supplementary Regulations and Independent Regulations

As one of the few comprehensive legislations on e-commerce worldwide³, China's E-Commerce Law covers almost all behaviors related to e-commerce, and inevitably interacts with other laws. With this background, legislators should deal with the overlapping areas by following the principle of avoiding duplication, and refer them to other applicable laws through the necessary referral provisions.⁴ However, at least when regulating competition behaviors, legislators have done more for the sake of a comprehensive law. In addition to establishing channels for the intervention of other laws, legislators have also refined, improved and supplemented the application of the Anti-Unfair Competition Law and the Anti-Monopoly Law in the e-commerce environment. More noteworthy, an independent legal system to regulate competition behavior alongside the Anti-Unfair Competition Law and the Anti-Monopoly Law has been established.

I. Supplementary Regulations

Article 17 and Article 22 of the E-Commerce Law present the supplementary provisions on the competition laws. Article 17 stipulates the false or misleading commercial advertising conducts regulated in the Anti-Unfair Competition, i.e., "an e-commerce operator shall fully, authentically, accurately, and in a timely manner, disclose the information of commodities or services to safeguard consumers' right of information and choice. An e-commerce operator may not conduct false or misleading commercial advertising by fabricating transactions, making up customer reviews, or any other means, to defraud or mislead consumers." The prohibition on false or misleading commercial advertising is to avoid information asymmetries between e-commerce operators and consumers and to safeguard consumer's right of information and choice. Although meant for the sake of consumers' rights and interests, false or misleading commercial advertising behaviors by operators definitely harm the interests of their competitors and violate business ethics, so that the conducts fall into the scope of the Anti-Unfair Competition Law. Therefore, Article 17 of the E-Commerce Law has to link up and cooperate well with Article 8 of the Anti-Unfair Competition Law. Article 8 of the Anti-Unfair Competition Law regulates two categories of false or misleading commercial advertising behaviors, for their own or for others' commodities respectively. Clause 1 of Article 8 prohibits operators from false and misleading commercial advertising of customer reviews of their own commodities, while Clause 2 of Article 8 prohibits operators from helping other

business operators in false and misleading commercial advertising through fictitious trading, etc. Comparing the two, Article 17 of the E-Commerce Law adapts as follows based on Article 8 of the Anti-Unfair Competition Law: the two types of behaviors, “fictitious trading” and “fabricating customer reviews”, are explicitly prohibited without distinguishing the behavior objects, i.e., the false or misleading commercial advertising of the operators being for their own gain or for that others.

Article 22 of the E-Commerce Law provides supplementary provisions on the conducts of abusing market dominance in addition to the Anti-monopoly Law, i.e., “where an e-commerce operator has a dominant market position on account of its technological advantage, number of users, control of the relevant industry, other operators’ reliance on it in trading, or any other factor, the e-commerce operator may not abuse its dominant market position to exclude or restrict competition.” This article is in synch with Chapter 3 of the Anti-Monopoly Law, as it focuses on supplementary regulation on the specific factors that should be considered when determining market dominance in the e-commerce environment.

The section on Legal Liability indicates the legislative intention of the supplementary regulations. Article 85 of the E-Commerce Law explicitly stipulates that unfair competition behavior of false or misleading commercial advertising and the abuse of market dominance in Article 17 and Article 22 mentioned above should be punished subject to applicable laws, namely the Anti-Unfair Competition Law and the Anti-Monopoly Law, rather than independent legal liability as regulated in the E-Commerce Law.

II. Independent Regulations

The E-Commerce Law establishes an independent regulation of competition behaviors through Article 19 and Article 35. Article 19 stipulates “if an e-commerce operator performs tying of commodities or services, it shall request consumers to pay attention in a conspicuous manner and shall not set said tying as a default option.” The article aims at protecting consumers’ right of information and choice by setting two obligations for e-commerce operators. One is the obligation of informing consumers in a conspicuous manner when tying commodities and services, while the other is the obligation of soliciting consumers’ agree to tying rather than taking their consent for granted. Compared to the prohibition provision on tying in Article 17, paragraph 1, subparagraph 5 of the Anti-Monopoly Law, this article presents several characteristics: firstly, it guards against compulsory tying by information disclosure, preventing deception against consumers or using their negligence, rather than directly prohibiting the tying conduct itself; secondly, the article is not conditional on the operator’s market dominance. What’s more, Article 77 of the E-Commerce Law provides specific administrative penalties on tying behaviors in violation of Article 19. Apparently, the regulation on compulsory tying in this article is completely different from the Anti-Monopoly Law, providing an additional independent regulation on tying.

Article 35 of the E-Commerce Law regulates extremely broadly on the abuse of comparative advantage, i.e., “an e-commerce platform operator must not use platform service agreements, trading rules, technologies or other methods to impose unreasonable restrictions or trade conditions on on-platform business operators’ transactions, trading prices, or transactions with other business operators, or charge unreasonable fees on on-platform business operators”. The legislators interpreted the legislative purpose of this article as below, “the e-commerce platform operator may impose unreasonable restrictions on on-platform business operators or hinder market competition by means of aggregation effects from economies of scale, which will harm competition and distort the development and innovation mechanism in the emerging internet market”,

“therefore, this article provides the prohibitive provision on unfair competition and undermining the normal market order conducted by e-commerce platform business operators which engage in e-commerce businesses”.⁵ The legislature is aware that compared to on-platform business operators, e-commerce platform business operators have “inherent advantages” in terms of technical advantages, rulemaking and implementation, and masters the “legislative power”, “enforcement power” and “judicial power” similar to other market regulation subjects. It may abuse its dominance based on its increasing power over market regulation.⁶ This kind of dominant position is obviously different from market dominance in the context of Article 22 of the Anti-Monopoly Law. It is an inherent advantage of the e-commerce platform business operator derived from the platform, and is relative to on-platform operators. It’s noteworthy that, unlike the theory of abusing comparative advantage, which usually requires the victim to form a strong dependence on the dominant player, Article 35 of the E-Commerce Law does not set any conditions on the definition of the platform operator’s dominant position. Therefore, it greatly expands the range and objects for justification.⁷ In the mind of the legislature, the regulation on comparative advantage in Article 35 of the E-Commerce Law presents the following characteristics: the regulated legal relationship is between e-commerce platform business operators and on-platform operators; the comparative advantage of the e-commerce platform business operator is inherent based on the relationship; the regulation is not conditional on market dominance; the regulation is not conditional on constituting unfair competition;⁸ [the e-commerce platform business operator has] independent legal liability.⁹ To conclude, Article 35 of the E-Commerce Law provides independent provisions on abuse of comparative advantage besides the Anti-Unfair Competition Law and the Anti-Monopoly Law.

Supplementary Regulations of the E-Commerce Law – A Plus or Redundant?

The supplementary regulations on competition behaviors in the E-Commerce Law aim at dealing with the special conflicts and dilemmas that arise when competition laws are applied to the e-commerce field. Whether the supplementary regulations are successful depends on whether the conflicts and dilemmas are accurately identified and appropriate approaches are provided. If the supplementary regulations are successful, they will provide more perfect guidance on the application of competition laws in e-commerce; unsuccessful supplementary regulations will become redundant and may result in disorder for the application of competition laws in e-commerce.

Overall, Article 17 of the E-Commerce Law is successful in its supplementary regulation of the Anti-Unfair Competition Law in the aspect of false or misleading commercial advertising. Article 8 of the Anti-Unfair Competition Law categorizes commercial advertising into two types according to the different parties involved, namely for the operator’s own commodities and for others’ commodities. Therefore, making up sales numbers and customer reviews is included in the rules for commercial advertising for the operator’s own commodities, while fictitious trading is covered by the commercial advertising for others’ commodities. In other words, the Anti-Unfair Competition Law only forbids operators helping others on false advertising, leaving ambiguity on whether fictitious trading for their own commodities should be prohibited.¹⁰ Article 17 of the E-Commerce Law does not differentiate the parties involved in commercial advertising. It explicitly prohibits “fictitious trading” and “making up customer reviews”, clarifying the ambiguity of the Anti-Unfair Competition Law. “Fictitious trading”, namely “brush traffic”, and “making up customer reviews”, namely “brush reputability”, are typical examples of false commercial advertising in e-commerce, which are explicitly prohibited by the E-Commerce Law. This is of positive significance for protecting consumers’ rights and interests, and maintaining order for fair competition.

On the contrary, Article 22 of the E-Commerce Law is not successful in its supplementary regulation of the Anti-Monopoly Law on abuse of market dominance. As mentioned previously, the core of Article 22 is to clarify the specific factors that should be taken into account when determining whether an operator possesses market dominance in the e-commerce environment. This article lists four factors including technological advantages, number of users, the ability to control related industries, and the degree of other operators' reliance on the e-commerce operators in trading. All four factors mentioned above seem to fail to capture the characteristics of market competition in the e-commerce environment correctly, and fail to touch the core elements that really need to be considered.

Firstly, technological advantage is the result of innovation. Even if technological advantage can bring competitive advantage to operators, it is the result of technological progress and deserves encouragement. Technological advantage is neither a reason to be regulated by competition laws nor a factor to determine market dominance. In fact, if we need to consider technological factors, we should consider the operator's research and development ability, technological innovation and application ability, technological substitution, intellectual property rights, and so on, rather than the technological advantage itself.

Secondly, about the number of users. Different business models vary greatly in the e-commerce environment. It is necessary to select appropriate indicators to evaluate market power according to the characteristics of different business models. For example, for e-commerce platform business operators, if the services they provide are mainly platform services for the on-platform operators to sell products, the product sales of the platform may be a better indicator to show the market power of the platform business operators, rather than the number of users. For operators who provide free-of-charge network communication services, the effective usage time of users is obviously more important than the number of users when measuring the market power of operators. In *Qihoo v. Tencent*, a monopoly dispute regarding abuse of market dominance, the Supreme People's Court preferred the effective usage time of users.¹¹ Therefore, in the context of e-commerce, it is necessary to consider the specific business models, the characteristics of products or services of operators and the available data, and flexibly choose the coefficients to evaluate market dominance such as number of users, sales volume, sales revenue, effective usage time, etc., rather than just focusing on the number of users.¹²

Thirdly, about the ability to control relative industries, market dominance is evaluated based on the relevant market, which has at least two dimensions: the product (or service) market and the geographic market. Taking the operator's ability for control in the relevant industries as the factor to evaluate the market dominance of the operator is not only divorced from the basis of the relevant market, but also makes the dimensions of the product market and the geographic market irrelevant. Obviously, there is misuse of the term "industry".

Finally, about the degree of other operators' reliance on an e-commerce operator in trading. It almost copies the terms in the Anti-Monopoly Law, is too abstract, and is in lack of guidance.

Obviously, the legislators deviate from the characteristics of market competition in the e-commerce environment. In fact, innovation in the field of e-commerce is accelerating. The focus of competition is shifting to non-price competition such as product differentiation, quality, and consumer experience. Attention competition, innovation competition, platform competition, and cross-border competition become the main forms of competition. The boundary of the relevant market is ever more indistinct, and the factors to determine market dominance are more uncertain.¹³ When deciding whether an e-commerce operator is dominant in the relevant market, different business models and competition facts combined with specific individual case circumstances should be further considered. "When applying the Anti-Monopoly Law, competition authorities need to take

the business models as a starting point for the analysis. The analysis should primarily focus on how a company makes profits and how other companies or business models may steal that profit away.”¹⁴ Competition authorities can better capture where the real competitive pressure among e-commerce operators comes from when understanding the competitive thinking and behavior of market players from the perspective of the business model and market reality. In addition, as traditional indicators such as market share and profit margin in the context of e-commerce have greatly reduced their significance in determining market dominance, the courts or law enforcement agencies should shift their attention to the relevant indicators for competitiveness, such as the existence of market entry barriers, the accessibility of substitutive access to end-users, and the degree of innovation in technologies and services to be developed.¹⁵ During this process, many characteristics in the field of e-commerce, such as network effects, lock-in effects (determined by factors such as switching cost, brand loyalty, limited decision-making under uncertainties), data control, multi-homing of users, etc., could be reviewed.¹⁶

At the same time, due to the relative fragility of market power in the field of e-commerce, time is crucial for evaluating the market dominance of operators. Time helps to enhance market dominance. Firms may retain bigger and more obvious market power as long as it maintains a dominant position.¹⁷ Business paradigms shift frequently in markets such as e-commerce, where innovation is active and technological iteration is rapid. The operator will possess bigger market power if it constantly maintains market power for a long time, where the market is considered mature and inactive. It relies on the specific competition status to identify how long the operator maintains its market position in order to prove its strong market power. At a hearing on the digital economy by the Organization for Economic Cooperation and Development (OECD), some experts proposed that five years could be considered as the upper boundary for the business paradigm shift. If a company is not challenged after five years, it is likely to be in a dominant position. ¹⁸ Some also pointed out that, “a period of five years would probably afford sufficient evidence, while any period less than three years, especially in a dynamic market, might be considered too short for a high market share to be an indicator of dominance.”¹⁹ At least, time is essential for evaluating the market dominance of e-commerce operators. It should also be noted whether the reason for the operator to maintain its market power in the long term is due to continuous innovation or the exclusion of competition.

The traditional analysis method should be adapted based on the competitive characteristics in the field of e-commerce when analyzing whether e-commerce operators constitute an abuse of market dominance. In traditional anti-monopoly laws, the generic analysis follows the form of “Relevant market–Market dominance–Competition effect” (R-M-C). Here, the relevant market is the insurmountable starting point of any anti-monopoly analysis. R-M-C constitutes three sequential testing steps. However, since the boundary of the relevant market in the field of e-commerce is vague, the relationship among the three is no longer a rigid one-way logical relationship, but a mutual interaction.²⁰ Therefore, regarding the analysis of abuse of market dominance in the field of e-commerce, the R-M-C form should not be performed mechanically. The “Market dominance-Competition effect (M-C)” or “Conducts-Competition effect (C-C)” should be considered flexibly according to the case, with the focus on market entry, market conducts, economic effects, etc.²¹ In this regard, when examining whether e-commerce operators abuse their market dominance, it may not be appropriate to focus on determining market dominance.

From the analysis above, we can see that the supplementary regulations of the E-Commerce Law on abuse of market dominance added to the Anti-Monopoly Law are in fact redundant and confusing. More regrettably, the E-Commerce Law does not discuss monopoly agreements. However, in the field of e-commerce, along with the wide application of big data and pricing algorithms, price coordination through algorithms has occurred from time to time, which forms a

new type of collusion agreements. It is necessary to formulate supplementary provisions or referral provisions.²² The European Commission's survey report on e-commerce clearly points out that about two-thirds of e-commerce operators use automated software to monitor prices. The transparency of prices in e-commerce has increased significantly, and the accessibility of real-time price information may lead to automatic price coordination.²³ It is a great pity that the E-Commerce Law does not provide supplementary regulations on monopoly agreements.

Independent Regulations of the E-Commerce Law: System Logic and Law Enforcement Dilemma

The E-Commerce Law establishes independent regulatory standards for specific competition behaviors beyond the scope of the Anti-Unfair Competition Law and the Anti-Monopoly Law. Whether the independent regulations are successful depends on whether it's necessary to regulate the objects independently and whether it can straighten out the system logic of the independent regulations and the competition laws.

The independent regulation on tying of Article 19 of the E-Commerce Law requires operators to provide sufficient information, and prohibits operators from taking the consumers' consent to accept tying for granted, which is not conditional on the operator's market dominance. This kind of independent regulation has its necessity and rationality. Firstly, tying is not usually regulated by the Anti-Unfair Competition Law. According to China's Anti-Unfair Competition Law, the essential elements of unfair competition include disruption of the market's competition order and damage to the legitimate rights and interests of operators or consumers, and the core standard is violation of the law and business ethics. It is difficult to consider tying itself as a violation of business ethics and therefore take it as unfair competition. Secondly, tying behaviors without market dominance are hard to constrain with the Anti-Monopoly Law. The tying behavior regulated by the Anti-Monopoly Law should meet the following requirements: tying products and tied products are independent products; tying seller has a dominant position in the tying market; tying seller imposes upon buyers to accept the tied products; tying is not legitimate, not compliant with the trading practices, consumption habits, or ignoring features of commodities; tying has a negative effect on competition. When the tying seller does not have a dominant position in the tying product market, the Anti-Monopoly Law is usually powerless. Thirdly, the independent regulation of tying in the E-Commerce law is helpful in the enforcement of the Anti-Monopoly Law. Article 19 of the E-Commerce Law requires operators to provide sufficient information and prohibits them from taking consumers' consent to accept tying for granted, which makes it easier to decide whether the tying seller imposes constraints on buyers. Finally, the independent regulations of tying in the E-Commerce Law and the Anti-Monopoly Law run in parallel. The regulatory conditions and the focus of the two are different, and they can coexist in harmony. Thus, it is appropriate to regulate tying independently in Article 19 of the E-Commerce Law.

The independent regulation on platform operators' abuse of comparative advantages in Article 35 of the E-Commerce Law has severely affected the system logic of the competition laws. As the premise of regulation, first it should be clear whether it's necessary to regulate the comparative advantage of platform operators as targeted by the legislator. In fact, with the development of the theory and practice of modern anti-monopoly laws, the boundary between a dominant market position and comparative advantages has become increasingly blurred, and the space for the existence of comparative advantage has almost disappeared. The main reasons are as follows:

Firstly, the modern anti-monopoly laws show a merging tendency for the absolute dominant position and the comparative advantage. In other words, market dominance under modern anti-monopoly laws has a relative trend, which is particularly evident in the field of e-commerce. Market dominance

is based on the definition of the relevant market, which is a relatively vague concept. Whether the operator has market dominance or not is related to the scope of the definition of the relevant market. Due to the shortcomings of the relevant market definition methods and difficulties in obtaining relevant data, the definition of the relevant market in the field of e-commerce presents greater uncertainty, which leads to the blurring of the boundary between absolute dominance and comparative advantage. The Eastman Kodak case heard by the Supreme Court of the United States typically reflects the uncertainty of the relevant market definition.²⁴ In this case, Kodak manufactured and sold photocopiers and provided after-sales services and equipment spare parts, which accounted for about 20-23 percent of the U.S. photocopier market at that time. Eighteen independent service organizations initially provided maintenance services for Kodak photocopiers, and Kodak refused to provide spare parts to users of photocopiers that did not use Kodak's maintenance services. The independent service organizations sued Kodak for illegal tying, monopolizing or attempting to monopolize the service market of its photocopier equipment. If the relevant market of the case is defined as the Kodak photocopier parts market, Kodak has strong market power. However, if we were to define the relevant market as a larger market for photocopier parts, we find that Kodak has only 20-23 percent market share in the main product market of photocopiers, and it is impossible for Kodak to have a dominant position in the market for photocopier parts. In this case, the Supreme Court of the United States finally decided that Kodak had significant market power in the Kodak photocopier spare parts market, although it did not have a dominant position in the photocopier market overall. It can be seen that different definitions of relevant markets will have a significant impact on the conclusion of whether a player has a dominant position, while the conclusion of the absolute dominant position or the comparative advantage can be changed.²⁵

Secondly, with the method of determining market dominance switching from relying on market share to comprehensively evaluating various indicators, the comparative advantage in the vertical relationship has become a factor of consideration in evaluating market dominance. Market dominance is not only the manifestation of horizontal market power, but also the manifestation of vertical market power, which blend with each other. In the Eastman Kodak case mentioned above, the market power of the Kodak Company determined by the Supreme Court of the United States is essentially its comparative advantage over independent service organizations.

Thirdly, with the transfer of the analytical methods on abuse of market dominance from the traditional "R-M-C" paradigm to the "M-C" paradigm and the "C-C" paradigm, the economic realities of abusing market dominance, such as empirical rules, market behaviors, and effect evidences, have become important factors when determining abuse of market dominance. The necessity of distinguishing absolute market dominance from comparative advantage has been greatly weakened.²⁶

In addition, it's unnecessary for the legislators to concern themselves with the advantages or strengths of the platform operators derived from their rights to formulate platform rules. Depending on the inherent attributes of the platform, any e-commerce platform operator, regardless of its scale of operation or market power, must have the right to manage the platform. For any platform operator, reasonable regulation on the behavior of platform users and prevention of improper behavior by individual users with negative externalities on the platform are conducive to enhancing the interests of platform operators and the long-term interests of platform users. ²⁷ "The value of these software platforms, and their ability to support large communities, depends on the ability of the platform to promote positive externalities and reduce negative externalities. Software platforms need to impose rules and standards through governance systems, request the platform participants to adhere to these rules and standards by the relevant mechanisms, and exclude the participants

that harm others from the platform.”²⁸ There is no need to strictly restrict the necessary management rights of the platform operators through legislation.²⁹

As far as the system logic of competition laws is concerned, the independent regulation on abuse of comparative advantage in Article 35 of the E-Commerce Law undermines the internal logic system of the competition laws. As we know, the Anti-Unfair Competition Law upholds the fairness of competition from the perspective of business ethics, focusing on ensuring the fairness of the means of competition. The Anti-Monopoly Law upholds the freedom of competition from the aspect of economic efficiency, focusing on ensuring competition opportunities and their fairness. The combination of the two forms a complete regulation on market competition. In addition to the Anti-Unfair Competition Law and the Anti-Monopoly Law, the E-Commerce Law regulates specific competition behaviors separately, which will inevitably destroy the existing competition law system. The legislators believe that the provisions of Article 35 of the E-Commerce Law are different from those of the Anti-Unfair Competition Law and the Anti-Monopoly Law in terms of legal relationship, involving standards and targeted subjects.³⁰ The idea is obviously oversimplified. The legal relationship regulated by the Anti-Unfair Competition Law does not necessarily depend on the existence of the competition relationship between the parties.³¹ The relationship between the e-commerce platform business operators and the on-platform operators can also be subject to the Anti-Unfair Competition Law. At the same time, under the circumstance of ambiguous boundaries between comparative advantage and market dominance, the provisions of the Anti-Monopoly Law on market dominance may also extend to platform business operators and the on-platform operators. As a result, the independent regulation of Article 35 of the E-Commerce Law may invade either the regulatory scope of the Anti-Unfair Competition Law or that of the Anti-Monopoly Law, leading to the confusion of the system logic.

More importantly, from the perspective of law enforcement, Article 35 of the E-Commerce Law will cause a variety of future difficulties. Firstly, there is a danger that the regulation on abuse of comparative advantage is too wide. From the specific explanation of abuse of comparative advantage by the legislators, exclusive sales agreements and restrictions on sales areas or targeted customers are all prohibited.³² These conducts could hardly have a negative impact on competition when platform business operators do not possess market dominance. Of course, if the platform business operator increases the cost of competitors through exclusive trading and prohibiting the competitors from achieving the minimum scale economy through their output, it's also possible to restrict competition.³³ However, it should be subject to a rigorous economic analysis rather than a direct prohibition of conducts. Secondly, the platform business operator will bear a heavy burden of proof. In the view of the legislators, the e-commerce platform business operator has an inherent comparative advantage. Therefore, once the platform business operator is questioned whether it imposes constraints to the on-platform operators or charges unreasonable fees, the platform business operator has to bear the responsibility of proving the rationality of the restrictions and charges. The platform business operator will be forced to disclose sensitive business information and undertake a heavy burden of proof and risks. Thirdly, the provisions of the Anti-Monopoly Law on abuse of market dominance have the real risk of being overridden in the field of e-commerce. Because the platform business operators are deemed as having an inherent comparative advantage, law enforcement agencies may not need to consider the factors that affect market power or even examine the dependence of the on-platform operators on the platform business operators, when applying Article 35 of the E-Commerce Law. Compared to the regulations on abuse of market dominance stipulated in the Anti-Monopoly Law, it is easier to enforce the law according to Article 35 of the E-Commerce Law. The law enforcement agencies and parties will tend to apply the clause on comparative advantage, evading the clause on dominant position.

Conclusion

In general, the competition clauses in the E-Commerce Law do not link up well with the competition laws. The supplementary regulation on abuse of market dominance provided by this law do not capture in depth the competition characteristics in the e-commerce environment. The independent regulations on abuse of comparative advantage run the risk of destroying the logic of the competition law system. It may also cause difficulties in law enforcement, leading to excessive prohibition of legitimate competitive conducts. In the future, it's a challenge for law enforcers and judiciaries to correctly interpret and apply the competition clauses of the E-Commerce Law, reasonably delimit the boundaries between illegal and legitimate behaviors, and rationalize its logical relationship with the Anti-Unfair Competition Law and the Anti-Monopoly Law.

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- ² Zhang Cong, "Support Healthy Development of E-Commerce", *People's Daily*, September 5, 2018.
- ³ Some experts said China's draft of the E-Commerce Law was the first comprehensive legislation in the e-commerce area worldwide. See Xue Hong, "China in Hope of Leading Legislation in E-Commerce Worldwide", November 2, 2018, available at <http://www.100ec.cn/detail-6377385.html>.
- ⁴ When introducing the legislative principle and logics, the Report on the Amendment of the Draft E-Commerce Law of the People's Republic of China by the National People's Congress Constitution and Law Committee pointed out that, "[the Law shall] deal well with the relationship with the relevant civil laws and administrative laws, and does not duplicate the provisions which are explicitly regulated by the existing laws." November 2, 2018, available at http://www.npc.gov.cn/npc/xinwen/2018-08/31/content_2060320.htm.
- ⁵ Drafting Group of the E-Commerce Law, "Interpretation of the E-Commerce Law of the People's Republic of China", Law Press China, 2018, p.110.
- ⁶ "Interpretation of the E-Commerce Law of the People's Republic of China", pp. 110-111.
- ⁷ Regarding the dependence conditions on comparative advantage, see Zhang Xin, "Study on the Regulation of Abuse of Superior Bargaining Position", *Competition Policy International*, May 2016 (Vol. 6), pp. 32-37.
- ⁸ The legislator believes that the regulation is about the relationship between the e-commerce platform business operators and the on-platform operators, irrelevant to whether there is market dominance. Additionally, it's not the competitive relationship nor the upstream-downstream relationship between the platform business operators and the on-platform operators. Thus the abuse of comparative advantage by the platform business operators cannot be attributed to unfair competition behavior. See "Interpretation of the E-Commerce Law of the People's Republic of China", p. 112.
- ⁹ Article 82 of the E-Commerce Law clearly stipulates the legal liability of platform business operators for abusing their comparative advantages.
- ¹⁰ In fact, the fictitious trading made up by the operators for their own products belong to the false commercial advertising through making up sales.
- ¹¹ See the Civil Judgment of the Supreme People's Court, (2013) Min San Zhong Zi No. 4.
- ¹² See Zhu Li, "Anti-Monopoly Justice in the Network Economy", *Research on Financial and Economic Issues*, 2018 Vol. 9, p. 6.
- ¹³ For the characteristics of competition in the Internet area, see Zhu Li, "Legal Borderlines of Competition in Internet Sector: Challenges and Judicial Countermeasures", *Competition Policy Research*, July 2015 (Vol. 1), pp.11-12.
- ¹⁴ See Policy Department A of European Parliament's Committee on Economic and Monetary Affairs, Challenges for Competition Policy in a Digitalized Economy. IP/A/ECON/2014-12, July 2015. IP/A/ECON/2014-12, July 2014, p. 67.
- ¹⁵ Policy Department A of European Parliament's Committee on Economic and Monetary Affairs, Challenges for Competition Policy in a Digitalized Economy. p. 68.
- ¹⁶ Several pieces of literatures have expounded the influence of the above characteristics on competition. See e.g., David Evans & Richard Schmalensee, The Industrial Organization of Markets with Two-Sided Platforms, *Competition Policy International*, Vol. 3, No. 1, 2007, pp. 151-179; The Monopolies Commission of Germany, Competition policy: The challenge of digital market. Special Report No. 68, 2015, p. 15. See also Daniel O'Connor, Understanding Online Platform Competition: Common Misunderstandings, *Antitrust Law and Economics of Internet Industry* (edited by Shi Jianzhong & Vanessa Yanhua Zhang), Law Press China, 2018, pp.131-165.
- ¹⁷ The E.U. Court emphasized the importance of the time factor in the Hoffman-La Roche judgment. See Hoffman-La Roche, para 41.
- ¹⁸ OECD, The Digital Economy, DAF/COMP (2012) 22, p.146.
- ¹⁹ See Bellamy and Child, *European Union Law of Competition*. 7th Edition, Oxford: Oxford University Press, 2013, p. 26. Also see Hedvig K. Schmidt, "Taming the Shrew: There's no need for a new Market Power Definition for the Digital Economy", translated by Zhan Fujing, *Competition Law and Policy Review*, Vol. 4, Law Press China, 2018, pp.161-162.
- ²⁰ For the characteristics of competition in the Internet area, see Zhu Li, "Legal Borderlines of Competition in Internet Sector: Challenges and Judicial Countermeasures", *Competition Policy Research*, July 2015 (Vol. 1), p.17. See

also, Policy Department A of European Parliament's Committee on Economic and Monetary Affairs, Challenges for Competition Policy in a Digitalized Economy. IP/A/ECON/2014-12, July 2015, pp. 50-51.

- ²¹ In *Qihoo v. Tencent*, the Supreme People's Court paid more attention to factors such as market behavior and competition effect rather than unilaterally determined the market dominance. For the characteristics of competition in the Internet area, see Zhu Li, "Legal Borderlines of Competition in Internet Sector: Challenges and Judicial Countermeasures", *Competition Policy Research*, July 2015 (Vol. 1), p.17.
- ²² Regarding the main way to achieve collusion through algorithm, see Ariel Ezrachi and Maurice E. Strucke, *Virtual Competition: The Promise and Perils of the Algorithms-Driven Economy*. Cambridge and London: Harvard University Press, 2016, pp. 35-81; Ariel Ezrachi and Maurice E. Strucke, *Artificial Intelligence & Collusion: When Computers Inhibit Competition* (translated by Jiao Haitao), *Competition Policy in Digital Market* (edited by Han Wei), Law Press China, 2017, pp. 340-364.
- ²³ Report from the Commission to the Council and the European Parliament, Final Report on the E-commerce Sector Inquiry.com(2017) 229 final, Brussels, 10.5.2017, p. 5.
- ²⁴ See *Eastman Kodak Co. v. Image Technical Services, Inc.*, 504 U. S. 451 (1992).
- ²⁵ See Zhu Li, "The Legal Regulation on Abuse of Superior Bargaining Position: Illusory Enemies and Real Risks, Electronics Intellectual Property", Vol. 6, 2016, p. 33.
- ²⁶ See Zhu Li, "The Legal Regulation on Abuse of Superior Bargaining Position: Illusory Enemies and Real Risks, Electronics Intellectual Property", Vol. 6, 2016, pp. 31-39.
- ²⁷ See the Civil Judgment of the Supreme People's Court, (2017) Zui Gao Fa Min Shen No. 4955.
- ²⁸ David Evans & Vanessa Yanhua Zhang, "The Antitrust Analysis of Rules and Standards for Software Platforms and Its Implications for China", *Competition Policy Research*, July 2015 (Vol. 1), p. 33.
- ²⁹ The legislator believes that the rights of e-commerce platforms need to be strictly restricted. See Interpretation of the E-Commerce Law of the People's Republic of China, p. 111.
- ³⁰ See Interpretation of the E-Commerce Law of the People's Republic of China, p. 112.
- ³¹ See Kong Xiangjun, *The Innovative Application of the Anti-Unfair Competition Law*, China Legal Publishing House, 2014, pp. 129-132.
- ³² See Interpretation of the E-Commerce Law of the People's Republic of China, p. 111.
- ³³ See Thomas G. Krattenmaker and Steven C. Salop, "Anticompetitive Exclusion: Raising Rivals' Costs to Gain Power over Price", *Yale Law Journal*, Vol. 96, No. 2, 1986, pp. 209-293.