

CHINA'S PRACTICE IN FINDING MARKET DOMINANCE OF ONLINE PLATFORMS



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By WU Peng, LONG Rui & DONG Ke

In the past year, one of the most important and noteworthy events for China's antitrust legislation and enforcement has been the intensification of antitrust scrutiny of large online platforms, with tech giants receiving huge fines for their abusive activities. Under China's antitrust laws and regulations, the dominant market position of a company is the first step and prerequisite for finding the illegality of its abusive behavior. This paper intends to analyze the approaches and practices of determining the market dominance of online platforms based on relevant antitrust enforcement cases, along with the newly issued guidelines for this economy sectors, in order to provide useful references for a better understanding of the latest developments in China.

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With a number of online platforms and e-commerce transactions, China is the largest e-commerce market in the world. The possible regulatory loopholes in antitrust law and regulations in the face of digital economy have aroused widespread concern. For this purpose, in the past year, the authority has successively issued the Anti-monopoly Guidelines on Platform Economy Sectors (“Guidelines”) and the Draft Amendment to the Antimonopoly Law of the People’s Republic of China (“Draft Amendment”) for public comments, in the hope of providing clearer guidance on the enforcement of antitrust laws to platform economy sectors. In addition to the Guidelines customized for platform economy sectors, the Draft Amendment intends to explicitly bring the platform economy under the regulatory framework of the Antimonopoly Law (“AML”),² although based on current regulations, the AML is equally applicable to these sectors.

In terms of enforcement practice, from April to October 2021, the State Administration for Market Supervision and Administration (“SAMR”) made a series of decisions, in which SAMR imposed high penalties on Alibaba Group, a leading company specializing in e-commerce, retail, Internet, and technology, Sherpa’s, an online platform providing food delivery service in English, and Meituan, an online one-stop platform for food, transportation, travel, shopping and entertainment respectively for their abuse of market dominance. Accordingly, the identification and abuse of market dominance by platform companies have once again become the focus.

Under the AML, the finding of market dominance is a necessary prerequisite for further analysis of the abusive conducts at issue, the same as for platform economy sectors. This chapter is to review the decisions of high-profile cases mentioned above and to discuss relevant issues related to the finding of market dominance of online platforms, combined with the provisions of the Guidelines.

I. TO DEFINE RELEVANT MARKET IN PLATFORM ECONOMY SECTORS

One of the significant features of platform economy is that the business models involve “two-sided markets,” or “multi-sided markets” proposed by economic theories,³ which brings divergent opinions on market definition regarding the cases in these sectors. Moreover, considering that business scopes of online platform companies often cover a range of areas, which may increase the uncertainty in market definition. With respect to market definition, the Guidelines first clarify that the principle of case-by-case review shall be adhered to, as the actual need for defining the relevant market varies in different categories of monopoly cases. Based on the wording of this article, it seems that the provision can be interpreted as market definition may not be a necessary step for the cases involving platform economy sectors,⁴ in fact, there have been different voices about the value of market definition for these cases in practice. Nonetheless, immediately afterwards, the Guidelines go on to provide that in cases related to online platforms, generally it is necessary to define relevant market. Accordingly, in the cases mentioned above, SAMR continued to follow the general approach of finding abusive conducts under the AML and carried out completed analysis on market definition in these decisions.

A. Back to the Market Where the Abuse Occurred

According to the general rules of market definition,⁵ all competitive activities should have occurred within a scope of certain market, relevant markets are defined to specify the scope of market in which the rivals compete. Therefore, when identifying the relevant market, the starting point should be the abusive activities at issue and then considering the scope of relevant market by assessing the scenarios in which the business models or activities at issue of the online platform companies took place, the competitors they face for specific business, and the business areas in which the rivals mainly compete for.

Although the platform economy sectors have more complex business models and more diverse forms of competition, the Guidelines clarifies that the traditional framework under the AML is still to be followed and substitutability analysis is the basic method of defining relevant market.

² See Article 10 and Article 22 of the Draft Amendment.

³ This was first proposed by Jean-Charles Rochet & Jean Tirole, please see Jean-Charles Rochet & Jean Tirole, Platform Competition in Two-Sided Markets 1 J. EUR. ECON. ASS’N 990 (2003).

⁴ In the report Rethinking Antitrust Tools for Multi-Sided Platforms posted by OECD in 2018, when it comes to the market definition, there are considerations saying that there might be little value in carrying out a market definition exercise in markets involving multi-sided platforms. Therefore, consider carefully whether a market definition exercise is a necessary and proportionate use of resources, see p. 15.

⁵ See Article 2 of *Guidelines of the Anti-monopoly Commission Under the State Council Concerning the Definition of Relevant Markets*.

B. Based on One Side or Based on the Entire Platform?

Online platforms are two-sided or even multi-sided in nature. In the context of multi-sided platforms, the considerations⁶ to be used to conduct market definition exercise such as user cohorts, platform functionalities, use cases, etc. are intertwined with each other. This poses a challenge to market definition, for which the Guidelines provided that both defining one market and multiple markets are possible for platform economy sectors.⁷ In the *Alibaba* case,⁸ for instance, SAMR considered the parties entering into transactions through the platform as a whole and defined only one relevant product market based on the entire platform. Notwithstanding, neither in the Guidelines nor in the *Alibaba* case, the difference between “two-sided transaction and non-transaction” platforms has been mentioned, however, the practice shows that transaction platforms are more likely to be defined as one market.⁹ In the *Alibaba* case, the relevant product market was defined as online retail platform services.

The platform can gather and match merchants and consumers on its both sides and because of indirect network effect and scale effect, the demand of both sides closely related and the value of choosing one platform for one user cohort depends on the choice and demand of user cohort on the other side, thus, SAMR conducted demand substitution analysis from both the undertaking (the merchants) and the consumer side of the platform. According to Article 4 of the Guidelines, “when the cross-platform network effect embodied in such platform can impose sufficient competition constraints on platform operators, the relevant product market can be defined based on the entire platform.”

Accordingly, whether the services provided by the online platform to each side can be objectively separated can be an important consideration when defining the market for a two-sided platform. In the *Alibaba* case, it appears that the “pick one of two” practice is mainly targeted to the merchants, and the platform charges service fees only from the merchants as well. However, the amount of service fee charged by the platform is in fact based on a certain proportion of the transaction amount between the merchants and the consumers. The services provided by the platform serve actually both sides of the platform. The user cohorts connected by the platform are different but are closely interdependent with each other.

C. Further Segmentation of the Relevant Product Market?

For online business models, whether the relevant product market needs to be segmented is another challenge. Based on the enforcement cases above, we have noticed that the scope of relevant product market defined by SAMR varies greatly. In the *Alibaba* case, the relevant product market was “online retail platform services,”¹⁰ in the case of *Sherpa’s*, the relevant product market was “online catering takeout platform services in English (in Shanghai),”¹¹ and in the *Meituan* case, the relevant product market was “online catering takeout platform service” (in China).¹² The relevant geographic markets also vary in scope, from the national market (e.g. in China) to the individual city (specified as Shanghai).

- **The need for segmentation differs depending on the activities at issue.** The service provided by Alibaba is online retail platform services, which itself serves numerous merchants providing diverse products on the platform and does not differ depending on different categories of products. In this regard, SAMR held in the decision of the *Alibaba* case that “the online retail platform services provided for different product categories are included into the same relevant product market ... retail products trade on the platform can be divided as clothing, electronic digital, household appliances, food, cosmetics, household goods, building materials and home improvement products, etc., and each category can be further subdivided, but for merchants and consumers on the platform, there is no essential difference in the content of the online retail platform services.” While in the case of *Sherpa’s*, the platform provides only online catering takeout service, which itself already belongs to a subdivision of takeout service.
- **From the perspective of substitutability analysis.** From the perspective of substitutability analysis, it is to consider whether the demand for platform service and the input by supplier will be different depending on product categories. Take Alibaba’s Tmall platform as an example,

6 See Article 4 of the Guidelines.

7 According to Article 4 of the Guidelines, specifically, a relevant product market can be defined based on the products on one side of the platform; multiple relevant product markets can also be defined separately based on the multiple products involved in the platform, and the relationship and interaction between the relevant product markets shall be considered.

8 See Guo Shi Jian Chu [2021] No. 28.

9 The distinction among two-sided markets, see Lapo Filistrucchi, “Market definition in multi-sided markets,” Rethinking Antitrust Tools for Multi-Sided Platforms 2018, OECD, p.42.; see also Sebastian Wismer, Arno Rasek, “Market definition in multi-sided markets,” Rethinking Antitrust Tools for Multi-Sided Platforms 2018, OECD, p.60.

10 In Chinese 中国境内网络零售平台服务市场。

11 In Chinese 上海市提供英文服务的在线餐饮外送平台服务市场。

12 In Chinese 中国境内网络餐饮外卖平台服务市场。

merchants and consumers will consider the overall situation of the platform when they choose to reside in it or purchase from the platform. One consideration is the comprehensive level of platform services, which is reflected in specific services such as product information display, marketing promotion, search function, order processing, logistics service, payment tools, evaluation function of products, after-sales support, etc.; secondly, the number of users adhered to the platform is a key factor when choosing platform, for merchants for instance, the greater the number of potential consumers will be generated, the higher the likelihood that merchants may achieve profitability.

- **The scope of the activities implemented.** In the Alibaba case, SAMR found that the “pick one of two” practice was implemented on the entire platform, rather than concentrated in a certain segment of product categories. In contrast, in the case of Sherpa’s, the merchants (the restaurant in this case) were asked to enter into an exclusive agreement with the platform and the one who did not comply with the clause were required to be taken off from the “shelves” of competing platforms, which implemented only in the field of catering takeout service. Furthermore, from the approaches and considerations SAMR took by market definition, it can be concluded that the authority may have concerns not only with abuses that occur within a larger scope of market, but also with the competitive order in a relative smaller market. Thus, for companies in the platform economy sectors, their duty of care under the AML is to some extent independent to the scale of the platform among others but depends on its market power in specific defined relevant market.

II. FACTORS USED TO FIND MARKET DOMINANCE

A. Market Shares

Market shares is the only indicator that can be quantified among other factors used to find market dominance. According to Article 19 of the AML, unless there is evidence to the contrary, an undertaking with a market share of 50 percent in the relevant market may be presumed to have a market dominance. In finding the market dominance of a platform companies, according to the Guidelines, besides market shares, competitive conditions of relevant market should be considered at the same time. Accommodate to the characteristics of the platform economy sector, market shares are to be considered in the ways below.

- **High market shares do not equal to market dominance.** Online platform company with high market shares usually means it has strong market power, however, a market shares over 50 percent does not necessarily mean that the company has a dominant position. In finding market dominance, it is required to conduct comprehensive analysis based on, among others, the competitive situation of relevant market, its ability to control the market, its financial resource and technical conditions, the extent of reliance of other undertakings on it and the difficulties for other undertakings to enter the relevant market.
- **Result can be mutually confirmed.** Turnover is the main merit most commonly used to calculate market share in antitrust cases, but due to the particularity of business models in digital economy, turnover cannot always directly reflect the market power of a company. Therefore, the Guidelines provide that to determine the market share of undertakings in platform economy sectors, the proportional metrics in the relevant market in terms of monetary value involved in the transactions, number of transactions, sales volume, number of active users, click-throughs, duration of use or other metrics can be considered.

In the Alibaba case, SAMR calculated Alibaba’s market share based on two merits, e.g. service revenue and gross merchandise volume generated from the platform, with both over 50 percent. It follows that even though the merits in platform economy sectors are diverse and the result of individual indicator may sometimes not be credible enough, it cannot be concluded that market share is not significant in finding market dominance of a company. The results from different merits can be cross-examined and confirmed by each other.

In addition, the availability of data also needs to be considered when selecting metrics. Moreover, for some kinds of merits, it is less likely to find market dominance simply based on the result of such merits, by way of example, due to the multi-homing behaviors, it is common for users to be active on different competing platforms. Therefore, when determining market share using merits such as “number of active users, click-throughs, duration of use,” the market share of competitors may overlap and there will be issue of double counting, notwithstanding, the result is still reference significant.

- **The duration of market share can reflect market power to a certain extent.** The platform economy involves complex business categories and evolving competitive dynamics, which once made the authority inadequate. Generally speaking, highly concentrated market structures and high profitability can positively imply the market power to some extent, however, for platform economy, it is argued that the market power of platform companies is not stable and at the same time, in order to compete for the attention of users, there is “cross-border” competition among platform companies of different business categories. Thus, high market shares at one point in time are of limited indicative use.

To find a way out, the Guidelines provide that, in determining market dominance, the characteristics of platform competition, innovation and technological changes of relevant market may be considered, while likewise the network effect and lock-in effect should be taken into account. As a counterbalance, the consideration of the time dimension, i.e. the duration of market share, is incorporated in the determination of the market power. In the Alibaba case, for example, SAMR found that Alibaba held a high market share for a long time and provided 5 years (from 2015 to 2019) as an observation period, which could serve as a non-binding reference period.

B. Market Power in Associated Markets

It is noteworthy that in the decision of the *Alibaba* case, with regard to market dominance of Alibaba, SAMR held that “the party has made ecological layout in the fields of logistics, payment tool and cloud computing, providing strong logistics service support, payment guarantee and data processing capacity for its online retail platform services, which further consolidate and enhance the market power of itself.” Based on the analysis, SAMR was of the view that market power of a platform company in associated markets may have a leverage effect and the market power in one market can be transmitted to another. Such a way of determination would increase the risk for platform giants to be found to have market dominance, as these companies are often active in numerous associated markets either by business operations or by investments.

The digital economy booms over the past decades and in the process of development, platform companies have accumulated a large amount of capital and gradually expanded their businesses. Platform companies are also widely distributed in fields such as entertainment industry, online to offline, mobile social networks, finance, and transportation services, etc. These companies are shaping their platform and ecosystem strategies to create value and stay competitive. The various business areas of these platform companies seem to be independent, but in fact they are interrelated, and the development of each business area can support and promote by each other.

For these group of companies, especially for the giants, the finding of market dominance would be even to some extent independent of market definition. Regardless of specific market in which the abuse at issue occurs, the companies may be found to have market dominance because of their comprehensive market power, which in turn would increase the risk of finding the abuse at issue illegal. Nevertheless, naturally whether the strength in associated markets will necessarily strengthen the market power in relevant market in specific case needs to be analyzed on a case-by-case basis. In addition, according to the *Alibaba* case, in finding of market dominance of platform companies, other factors such as financial resource and technical condition, the extent of reliance of other undertakings on such undertaking etc. are associated factors to be considered. It is the advantages that platform companies may have under multiple dimensions that ultimately establish their market power.

III. THE ROLE OF THE ABUSES AT ISSUE IN FINDING MARKET DOMINANCE

Although, as mentioned above, having market dominance is a prerequisite for further analysis of whether the abuse is illegal under the AML, however, it is worth noting that the finding of market dominance and the assessment of the abusive conduct at issue are not two completely separate and independent parts of each other. The specific abusive conduct will be considered when conducting analysis of market definition and the finding of market dominance.

Take the “pick one of two” practice as example, it is very difficult for a platform company that does not have market power to require in-platform operators to make an “either-or” selection between competing platforms or to enter into an exclusive agreement, because merchants don’t want to lose the opportunity to multi-home on several platforms they would presumably have in the absence of exclusive clauses, as more distribution channels means more trading possibilities. From this perspective, the ability to successfully perform certain conducts is in itself the evidence of the existence of market power or dominant position to some extent.

The draft version of the Guidelines has once provided that: “in individual case, if direct factual evidence is sufficient and conducts that can only be implemented by taking advantage of a dominant market position have lasted for a considerable period of time and caused clear damage, however, the conditions are insufficient or it is very difficult to accurately define relevant market, it may not be necessary to define the relevant market, in which case it can be directly found that undertaking in platform economy sector has committed monopolistic conduct.” In the final version of the Guidelines, this article has been removed, which indicate that the possible approach that finding monopolistic conduct without defining relevant market will not be followed, while this article is still relevant when assessing the market power of companies and their rivals.

IV. SUMMARY

With the Guidelines for platform economy sectors being effective and the publication of a series of cases, antitrust rules for digital economy are taking shape. In this context, Anti-Monopoly Law enforcement and judicial practice in the field of online platform economy sectors will become more active in the future and the relevant regulatory system will gradually become clearer. Online platform companies, especially those with a certain scale and market power, should pay more attention in daily operation for the purpose to lower the risk of being found illegal for certain activities and business models.



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