

Original Paper

Legal Regulation on Abuse of Dominant Market Position in China's Internet Field

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Abstract

The legal regulation of abuse of market dominance in the Internet field needs to comprehensively consider the characteristics of subject specificity, subjective malice, illegal behavior, and harmful consequences. The abuse of market dominance in the Internet field differs from other industries in behavior, mainly including monopoly prices, predatory pricing, restricted transactions, tying or attaching unreasonable trading conditions, differential treatment, etc. This paper analyzes the main abuse of market dominance in the Internet field through cases, and studies its relevant legal regulations and preventive measures.

Keywords

Internet field, Tencent v. 360, abuse of market ascendancy, Legal regulation

1. Introduction

In 2019, 13 cases of abuse of market dominance in the Internet field in China (excluding Hong Kong, Macao and Taiwan) were filed; The number of cases filed increased by 19.4% year on year compared with 2018; In 2020, there were 43 cases of abuse of market dominance in the Internet field in China (excluding Hong Kong, Macao and Taiwan), with a year-on-year growth of 268% compared with 2018; In 2021, 76 cases of abuse of market dominance in the Internet field in China (excluding Hong Kong, Macao and Taiwan) were filed, and the abuse of market dominance in the Internet field was on the rise year by year (<https://www.samr.gov.cn>).

With the close integration of the Internet, cloud computing, big data and artificial intelligence, the era of artificial intelligence of “everything is connected, everyone is online and everything is algorithmic” has come, and mankind is slowly entering “a world dominated by algorithms”. Under the new economic situation, it is positive, urgent and necessary to prevent and punish Internet enterprises from

abusing their dominant position in the market in terms of system design to protect fair competition among market players and promote the development of socialist market managers (Xu & Li, 2017).

2. Basic Theory of Legal Regulation on Abuse of Dominant Market Position

In the anti-monopoly legislation or related laws and regulations of various countries in the world, most of them contain the legal norms of abuse of market dominance, but few have made specific definitions for the concepts of “abuse” and “dominance”. The relevant interpretation of the World Economic Cooperation Organization (OECD) on relevant concepts is: enterprises with special or certain market status in certain industries implement a non-competitive business behavior in order to maintain or strengthen their existing market status.

In China’s domestic Anti-monopoly Law, the term “abuse” is not clearly defined, but only the phenomenon of “market dominance” is described and explained. According to Article 17 of the Anti-monopoly Law, the dominant position of the market refers to the ability of enterprises or merchants to control the price, quantity or other trading conditions of commodities in a certain market, or to hinder or affect other enterprise subjects or merchants to enter the market.

In a word, the abuse of market dominance generally has the following characteristics:

2.1 Monopolistic Price

Item 1 of Article 17 of the Anti-monopoly Law of China has the following statement: it is not allowed for enterprises or other participants with a dominant position of a giant in the market to buy goods at a price that breaks through the high price of market fairness and sells goods, or at a price that violates the principle of market fairness. Such behavior is called monopoly price. “The price can reflect the degree of competition in the market, and is the vane that the anti-monopoly law pays attention to market competition”. Enterprises or other participants rely on their special status, mainly market dominance, to obtain excess profits by manipulating the prices of market commodities, which has a serious impact on the legitimate rights and interests of other market subjects and consumers (Luo & Qi, 2010).

2.2 Predatory Pricing

According to the relevant statement in Item 2, Article 17 of the Anti-monopoly Law of China, predatory pricing is mainly to try to scare off competitors through price, such as the extremely low price, so that other market subjects think it is unprofitable and protect their market share in the industry from being diverted by others.

2.3 Reject Transaction

According to the relevant statement in Item 3, Article 17 of the Anti-monopoly Law of China, this behavior is the refusal of some market subjects with market positions, especially market dominant positions, to trade with others without proper reasons. I said that the justification described refers to the justification according to the general laws of the market economy.

2.4 Restricted Transaction

According to the relevant statement in Item 4, Article 17 of the Anti-monopoly Law of China, the act

of restricting transactions is mainly manifested in the act of a market subject requiring others to trade only with himself or with other designated third parties. The original intention of this act is to crack down on competitors, or control the upstream and downstream ends of the industrial chain.

2.5 Tie in or Attach Unreasonable Trading Conditions

According to the relevant statement in Item 4, Article 17 of the Anti-monopoly Law of China, this kind of behavior mainly means that a market subject takes advantage of its own market advantage in the transaction process of providing goods or services to others. The market advantage here mainly refers to the market position, especially the market position with a large relative share, which violates the consumers' personal will or the will of independent choice, Compulsory tying of a certain product is not only a violation of the anti-monopoly law, but also a violation of the consumer's right to independent choice. The tying goods are often unsalable or low-quality goods, which are only beneficial to the seller.

2.6 Differential Treatment

According to the relevant statement in Item 6, Article 17 of the Anti-monopoly Law of China, the main form of differential treatment is that the operator of a certain market subject implements the transaction price against the trading counterpart with the same conditions without proper reasons. In short or generally speaking, this is a kind of price discrimination, which is mainly provided by the party with a strong market position or market share, and these final unfairness will be passed on to consumers.

3. Tencent and 360 Litigation Dispute Case Analysis

The purpose of business is to pursue profits, so the essence of enterprises is to achieve the pursuit of profits by adjusting resource allocation through various means. Then the main means is to reduce costs or gain greater market share, so as to achieve the goal of reducing the "transaction costs" of the entire enterprise or unit. The final purpose of the litigation dispute between Tencent and Qihoo 360 is to compete for market share (Zhang & Chen, 2012).

3.1 Background

Beijing Qihoo 360 Co., Ltd. and Shenzhen Tencent Co., Ltd. have been and continue to have disputes. The core of the dispute between the two companies is mainly the dispute over market share or enterprise living space. The dispute needs to be reflected through the fuse. On September 27, 2010, 360 released its newly developed software, which is called "Privacy Protector". The software is highly targeted, mainly for QQ, to find the basis for its invasion of user privacy. Subsequently, Shenzhen Tencent released a public statement, pointing out that the browsers of Beijing Qihoo 360 were suspected of promoting yellow and unhealthy websites. On November 3, 2010, Shenzhen Tencent announced that if QQ users installed the relevant software of Beijing Qihoo 360 on their computers, QQ would automatically stop running in the background. If users continue to use QQ, they must meet the prerequisites for using QQ, and the prerequisite is that they must uninstall the relevant software of Beijing Qihoo 360. During the five years from 2010 to 2014, the two units argued with each other until

one unit filed a lawsuit. Finally, in the morning of October 16, 2014, the Supreme People's Court made a final judgment, which concluded that the software of Shenzhen Tencent (specifically QQ) did not form and do not have a dominant position in the market (<https://wenshu.court.gov.cn/>).

3.2 Recognition Basis of Legal Regulation

According to the understanding of various legal schools, which are mainly traditional law schools, to judge whether they have a dominant or leading position in a certain field of the market, the benchmark or ruler to measure is mainly not the market share or market share, but the Supreme Law has not made this decision according to or referred to such understanding, and the author believes that it may be a comprehensive, multi-dimensional, multi-dimensional and multifaceted factor, There should be roughly the following dimensions or aspects:

3.2.1 Subject Specificity - Prerequisites

In the view of law or law or legal theory, any crime or illegal or illegal act has its subject. The author analyzes whether the cause, process and final result of the case conform to the traditional public's cognition, and first of all, analyzes the responsible subject in the case. We should be clear about who is abusing market dominance, who can abuse it, and who can abuse it, whether it is an enterprise or a general operator or a consumer. The abuse of penetration means that there is no legal right to use the market in compliance with the law. Then the main body must be an enterprise in the market. At the same time, it also needs to be the main body with a very strong position or a leading position in the market. Only the traditional industry big brother, industry first brother and industry head can meet the conditions. The summarized expression is that the main body must be an enterprise in the market. At the same time, the enterprise also has a certain or considerable market scale. Secondly, it must have a deep influence on the market consumers. It needs scale and a long time of continuous operation on a certain scale. Finally, the enterprise's own behavior will affect the market participants Consumers should have a profound, big and special impact. In this case, the author believes that Shenzhen Tencent is more or more in line with the main characteristics of abusing the dominant position in the market, while Beijing Qihoo 360 is more or completely inconsistent with this feature. This conclusion is inconsistent with the results of the case but is more consistent with the market public or traditional legal logic.

3.2.2 Subjective Intention

The subjective intention here mainly refers to that the enterprises mentioned earlier in this article (enterprises with market dominant characteristics) subjectively take advantage of their own illegitimate or illegal advantages to intentionally or intentionally obtain illegal profits, that is, they are deemed to be subjectively intentional. Its main purpose is to destroy other participants' access to the market, and deprive others of the right to participate equally and fairly. The ultimate purpose is to consolidate and strengthen their market position (special dominant position) to obtain monopoly profits.

From the perspective of this case, Shenzhen Tencent has an obvious objective of pursuing unfair competition subjectively.

3.2.3 Illegality of Conduct

In the legal systems of previous countries, whether it is civil law or Anglo American law, whether an event is illegal or not is mainly evaluated by whether its behavior has some characteristics that constitute illegal legal regulations. Of course, in the actual judicial practice, illegality is mainly determined from the actual consequences of an event or the resulting consequences, which is generally known as the consequence theory. The illegality of the abuse of market position mentioned by me mainly refers to that the final act constitutes unfair, unfair or unreasonable competition. In the case I mentioned, in the dispute between Shenzhen Tencent and Beijing Qihoo 360 or in the subsequent litigation, both parties constituted violations of the law in objective fact.

3.2.4 Consequence Damage

The object of the enterprise's abuse of the dominant market position is other market participants. My participants mainly refer to other enterprises, other competitors or consumers. The damage caused by their actions is anti-competitive and socially harmful. The fairness and disputes that challenge and undermine public ethics and legal recognition continue, which will eventually lead to bad effects of comparison and imitation, and ultimately will damage the social public interests and consumer interests.

3.3 Case Conclusion

In the above-mentioned cases or case analysis in this paper, the final decision of the Supreme Court has great or very big disputes. The author believes that the main reasons are two aspects or two dimensions. On the one hand, the discretion of the judge or the presiding judge or the boundaries or systems of their own jurisdiction, or the power is not standardized, or is not clear, or is not clear, The reasons may be multifaceted or unilateral. They may be not professional or logical, or lack of understanding of the industry. It does not rule out that there may be judicial injustice or corruption. On the other hand, or in another dimension, it is mainly the law or regulation level that has a large or huge loophole or space, which gives criminals or illegal enterprises a large or huge or very large space for rent-seeking, loopholes or escape. The main purpose of enterprises or market operators or competitors abusing or illegitimate market dominance is to maintain or enhance the existing market position, prevent or eliminate or eliminate existing or potential competitors, and enter the market areas owned, developed or occupied by their companies for fair and legitimate competition. In the case analysis mentioned in this article, the final judgment of the Supreme Court, the highest judicial body, determined that Tencent's QQ (Shenzhen Tencent Company) did not have a dominant market position, but the basic situation of the actual enterprise and the basic situation of the public's understanding, especially the basic situation reflected in the final data, was inconsistent with the facts accepted by the court, It shows that there are still large areas that need to be improved, supplemented or optimized in the relevant legal regulations on the abuse of market dominance in the Internet field in China. At the same time, the quality of judges, or education, should or must have a great improvement (<https://wenshu.court.gov.cn/>).

4. How to Strengthen the Abuse of Market Dominance in the Internet Field

Therefore, to deduce the abuse of market dominance in the Internet field, first of all, from the political height of ruling the country by law, there should be a systematic top-level design in the top-level legal regulation design. Second, we should adhere to the rule of law to have a responsive law enforcement team with high quality, high awareness, and high execution. To deduce that the abuse of market dominance in the Internet field requires a high-quality, professional Focused law enforcement teams or agencies.

4.1 Perfection of Legal Regulation

There is no clear statement on the abuse of dominant market position in the Internet field in the Anti-monopoly Law. It is suggested to clarify it from the following aspects:

4.1.1 Clarification of Tort Liability

The act of market enterprises or participants or other business entities abusing the dominant market position is essentially a tort, which infringes the legitimate rights and interests of consumers and other market entities, and should be clarified in relevant laws, especially the Anti-monopoly Law and other laws.

4.1.2 Clear Definition of Loss

In the legal regulation system of our country and other countries, the identification of a crime, or tort liability or liability for compensation, can not bypass the link of loss identification. At present, the relevant laws and regulations of our country do not clearly define the losses caused by the abuse of market dominance, mainly through the relevant judicial interpretation. The scope, standard and basis of identification should be clearly defined in the legal regulations.

4.1.3 Clarification of Liability

If there is a criminal or illegal act, it will inevitably cause losses. We should respect the victim's right to claim compensation and demand the perpetrator's right to travel compensation. Therefore, the subject who abuses the dominant market position should bear the liability for compensation, but there is no specific compensation standard in the current law, regulation or judicial interpretation, which is mainly determined by the comprehensive discretion. China's domestic relevant laws and regulations should improve, supplement and optimize the recognition of compensation for losses caused by abuse of dominant market position in the Internet field as soon as possible, so that illegal enterprises or other subjects participating in market transactions will be appropriately punished, and the injured enterprises or other subjects who have been injured will receive compensation or compensation in accordance with the legal norms, and the law Fairness and justice of regulation.

4.2 Professional Construction of Law Enforcement Agencies

4.2.1 Independence of Law Enforcement Agencies

According to the relevant description of Article 9 and Article 10 of the Anti-monopoly Law in China and based on the practical basis, the law enforcement agency for monopoly acts such as abuse of dominant market position in China is mainly the National Anti-monopoly Administration, which is

located in the General Administration of Market Supervision. The relevant agencies of provinces, municipalities, autonomous regions and municipalities directly under the Central Government are subordinate to this agency. However, at present, this kind of organization setting mode is under the leadership of the General Administration of Market Supervision, which should be regarded as a subsidiary of the General Administration of Market Supervision. Its structure is not independent and flat enough, and it is under the dual leadership of the General Administration of Market Supervision and the corresponding administrative agencies of provinces, municipalities, autonomous regions and municipalities directly under the Central Government. It is suggested that it is necessary to set up an independent organ under the direct leadership of the State Councilor or the Vice Premier in charge of the State Council as a functional department of the State Council.

4.2.2 Professionalism of Law Enforcement Team

At present, the personnel of China's domestic anti-monopoly institutions are mainly transferred from the original market supervision institution or from the legal industry or the judicial industry. In terms of personnel training, antitrust has not formed or formed a professional theoretical knowledge system. Professional courses should be offered at the undergraduate and postgraduate education stages to complete the construction and training of relevant theoretical knowledge system and form a professional and systematic construction of talent echelon.

5. Conclusion

At present, the abuse of market dominance is becoming more and more prominent in the Internet field, and the construction of legal regulation on the abuse of market dominance by enterprises in the Internet field in China is generally at the initial stage. It is necessary to establish a sound system of abuse of market dominance as soon as possible, improve the ability of Internet enterprises more comprehensively, and create more value for the society.

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