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The Path Selection of Antitrust Regulation in the Platform Economy—From "Conduct" to "Identity"?

TAN Yuan
University of Chinese Academy of Social Sciences, Beijing, China

Antitrust regulation in the platform economy is riddled with numerous dilemmas. Both the European Union and the United States have introduced regulatory frameworks, termed the "gatekeeper" regime and the "covered platform" regime respectively, which impose specialized obligations directly on platforms distinguished by particular "identity". Similarly, China is in the process of introducing an analogous regime. The shift from conduct regulation to identity regulation, while addressing some traditional regulatory dilemmas, may give rise to new issues. China currently lacks the practical experience and systematic groundwork to introduce identity regulation. In reality, conduct regulation and identity regulation should not be viewed as conflicting or mutually exclusive approaches, and each possesses its own comparative regulatory advantages. A continuous regulatory model can be constructed from identity regulation to conduct regulation, and such a model would realize an integration of antitrust regulation in the platform economy.

Keywords: platform economy, antitrust regulation, conduct regulation, identity regulation, integration

Introduction

With the development of the Internet platform economy, the intrinsic network effects have led to structural monopolies within this industry. The entire internet industry has been controlled by a few giant platforms. New market entrants are either difficult to obtain a sufficient user base to compete with these established giants, or they are simply acquired by these giants when they are perceived as competitive threats. Recognizing this, strengthening the antitrust regulation of platform enterprises has become a global consensus. Consequently, major legal jurisdictions around the world have intensified their antitrust enforcement, especially against these giant platform enterprises (Wang, 2022).

The efficacy of antitrust law in regulating monopolies within platforms has become a hot issue in scholarly debates. It is generally believed that antitrust law frameworks, designed within the context of a traditional economy, grapple with the novel challenges posed by the burgeoning internet platform economy. "The antitrust

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TAN Yuan, Doctor, associate professor, School of Law, University of Chinese Academy of Social Sciences; executive director, Competition Law Research Center, University of Chinese Academy of Social Sciences, Beijing, China.

rules formed during the Industrial Revolution era are no longer fully adequate for the developmental demands of the Information Revolution era" (Zhang, 2020, p. 14).

To solve this problem, scholars have offered varied proposals. Some advocate for a paradigm shift in antitrust law intervention from reactive (ex post) to proactive (ex ante) regulation, thereby imposing a mandate of active competition on prominent internet platforms to preemptively curb monopolistic dominance (Zhang, 2023; Li, 2023). Some scholars advocate for the establishment of an antitrust enforcement-led model in coordination with industry-specific regulation. This industry-specified regulation addresses issues such as interconnectivity and platform exclusivity, which, while falling within the purview of antitrust law, have not been effectively resolved by antitrust enforcement and judicial practice (Bai, 2023; Wang, 2022). Some propose that large platform enterprises should be subject to oversight akin to public utilities (Khan, 2017; Zhang, 2021). Moreover, some suggest that China should learn from the European Union's "gatekeeper" regime, establishing a corresponding set of obligation for platform enterprises, complemented by a liability regime based on a "negative list" combined with exceptions exemptions (Hu, 2023).

Although scholars have different perspectives mentioned above, they converge on a foundational premise: the conventional ex post reactive supervision model of the antitrust law has not kept pace with the development of the internet platform economy. And they collectively contend that there should be a preemptive regulatory approach, stipulating that internet platform enterprises meeting certain criteria shall not engage in certain behaviors. The author calls this approach "identity regulation", posits that the actions of qualifying platform enterprises ought to be considered inherently illegal and prohibited outright, which stands in contrast to traditional analysis framework such as defining relevant market, identifying market power, and assessing competitive effects as dictated by antitrust law. Compared with the existing rules, such a shift greatly reduces the difficulty of identifying the responsible entities (Zhang, 2021). Antitrust law is essentially a form of conduct regulation, which regulates various actual or potential behaviors that exclude or restrict competition (Meng, 2010). Its primary feature is that it does not challenge the existence of a "monopoly position" per se, but oppose the abuse of "monopoly position" by operators to engage in "monopolistic behavior" (Liu, 2016). The shift from "conduct regulation" to "identity regulation" not only subverts the institutional concept and analytical framework of antitrust law, but also supplants a significant portion of antitrust law. This modality of "identity regulation" has been implemented in various jurisdictions, including the European Union and the United States.

The European Union has enacted the Digital Markets Act, which introduces the "gatekeeper" regime. The U.S. Congress has enacted the Ending Platform Monopolies Act, which prohibits "covered platform" from engaging in certain practices. Germany has made its tenth amendment to the Gesetz gegen Wettbewerbsbeschränkungen (GWB) and stipulates that companies considered to be of "paramount significance for competition across markets" shall not engage in certain behaviors. These jurisdictions aim to prohibit identified "identities" from engaging in behaviors that are inherently anti-competitive and therefore considered "per se illegal", hoping to solve the problem of damaging competition by large internet platforms once for all. Following suit, China is poised to embrace this regulatory trajectory, stipulating "super platforms" and "giant platforms" and specifying their specific obligations. However, this regulation model neglects the consideration of competition interests, strays from legislative intent, and incurs considerable costs in rectifying institutional missteps—potentially inciting widespread concern with the platform economy sector (Fang & Zhang, 2023; Hou, 2023). Moreover, it is viewed as merely symptomatic relief rather than a cure, because its regulatory objectives are not achieved through market competition, casting substantial theoretical doubt on its efficacy.

What regulatory path should we choose for large internet platform companies? Should we stick to the traditional “conduct” regulation, analyzing the competition effect of the relevant behaviors engaged in by large internet platforms and on this basis determine their legality, or should we take a leaf out of the European Union and the United States playbook and shift to “identity” regulation, presuming certain behaviors of large internet platforms to be inherently illegal and prohibit them directly? This is an institutional choice currently faced by China. The reasons for the European Union and the United States to adopt “identity” regulation are not entirely the same, and there are also different social, economic, and legal backgrounds to the regulation of large internet platforms in China compared with the European Union and the United States contexts. Whether China can draw from the European Union and the United States’ approaches requires an analysis combined with China’s specific conditions. In addition, it is necessary to clarify the respective values and drawbacks of these two different regulatory models and to make a choice after weighing. There is an urgent need for theoretical research on these issues in order to provide policy recommendations suited to China’s national conditions that effectively regulate behaviors of large internet platforms.

The Establishment of the Conduct Regulation Model and Its Dilemmas

After World War II, the United States established the structural regulation model for antitrust, and then shifted towards conduct regulation after the 1970s. The apparent reason is the formation of the Harvard School and its subsequent replacement by the Chicago School, but the underlying reason is the significant changes in the political, economic, and social environment faced by the United States, which led to the selection of theories that could meet its needs.

The Establishment of the Conduct Regulation Model: From the Harvard School to the Chicago School

At present, major jurisdictions generally adopt the conduct regulation model, of which the most typical manifestation is that antitrust law does not oppose the monopolistic position itself, but only opposes the abuse of such monopolistic position to exclude or restrict competition. The conduct regulation model was established as the dominant paradigm through the debate with the “structural regulation”. This shift in regulatory model reflects the evolution of economic theory. Antitrust regulation is heavily influenced by mainstream economic theories. To be sure, antitrust policy makers sometimes gravitated toward the fringes of economic theory rather the center, and sometimes pushed good points too far (Hovenkamp, 2005, p. 60). As the origin of modern antitrust law, the United States has emerged a number of economic schools in the history of its antitrust law development, among which the Harvard School and the Chicago School are the most important. This has had a profound influence on the antitrust system of many other jurisdictions outside the United States.

The Harvard School is a school formed between the 1930s and the 1960s, mainly represented by economists from Harvard University, key scholars including Edward Mason, Joe Bain, and Donald Turner. The Harvard School was staunch structuralist, and their most representative theoretical contribution is the Structure-Conduct-Performance (S-C-P) paradigm. The paradigm held that a given market structure dictated certain types of conduct, and that this in turn dictated performance (Hovenkamp, 2008, pp. 35-36). The basic logical principle of the S-C-

P paradigm is that if S entails C and C entails P, then S entails P, and as a result C can drop out; therefore, according to S-C-P theory, a specific market structure will inevitably lead to certain types of market behavior, making the analysis of behavior less important, and, antitrust analysis should focus directly on market structure (Hovenkamp, 2008, pp. 36-37).

After World War II, the United States believed that excessively concentrated economic power could lead to fascism, as had happened in Germany and Japan during the war, and decided to strengthen antitrust law enforcement. Against this backdrop, the Harvard School became the dominant economic thinking about competition policy from the 1940s through the 1970s and had a very considerable influence on antitrust policy (Hovenkamp, 2009). During this period, the Harvard School had a significant impact on U.S. antitrust enforcement. In the field of merger, the United States passed the Celler-Kefauver Act in 1950, granting antitrust law enforcement agencies strong powers to prevent operators from forming monopolies through concentration. The United States adopted very aggressive policies on business concentration reviews, prohibiting even those with a small market share from consolidating. In the famous *Von's Grocery* case, for example, the concentration was prohibited even though the combined market share of the two department store chains was only 7.5%. In the field of prohibiting abuse of market power, courts and administrative agencies have also shifted from analyzing monopolistic behaviors to market structure analysis. As long as an operator proven to be a structural monopolist could be deemed to have abused its position, even if it had not engaged in particularly egregious behavior, those enterprises that did not engage in abusive practices but had a durable monopoly position may also be dissolved, despite they did not engage in any abusive practice.

The perspectives of the Harvard School were criticized by academic community, with the most concentrated and sustained opposition coming from the Chicago School. The Chicago School emerged in the 1950s, coinciding with the rise of the Harvard School as the prevailing authority on antitrust thought in the United States. It was propelled by economists and legal scholars who taught at the University of Chicago, including notable scholars such as Robert H. Bork and Richard A. Posner. However, it was not until the late 1970s that the Chicago School gained prominence as the dominant antitrust ideology in the United States, and the Supreme Court began to overturn many decisions made under the influence of the Harvard School in the 1950s and 1960s. After Reagan assumed the presidency in 1981, antitrust policy underwent a significant shift towards a minimal intervention strategy, which was perceived as an endorsement of the principles advocated by the Chicago School. According to the Chicago School, the sole purpose of antitrust laws is to promote consumer welfare. Influenced by this ideology, courts and antitrust agencies became much less willing to prohibit behaviors that might appear monopolistic on the surface. "Instead, they felt compelled to engage in an extensive factual inquiry to confirm the effects of particular conduct on consumers before finding it illegal" (Piraino, Jr., 2007, p. 346).

However, the influence of Chicago School thought is merely a superficial factor, with the true underlying reason being the dramatic changes in both the international and domestic competitive landscape that the United States has faced since the 1970s. After the World War II, the United States extended support to Japan based on considerations of global strategy. As Japan continuously upgraded its industries, the relationship between Japan and the United States transformed from initially complementary production to homogeneous competition. Japanese textiles, steel, household appliances, automobiles, and semiconductors swiftly captured a significant share in the U.S. market (Lei, Gao, & Li, 2020).

This led to a substantive change in the economic backdrop the United States has faced since the 1970s, with growing discontent among U.S. enterprises towards antitrust laws. They believed that the previous very stringent antitrust policies had imposed significant costs on domestic businesses, placing them at a disadvantage in competition with foreign counterparts such as Japanese enterprises (Gerber, 2012, pp. 153-154). The Chicago School provided the theoretical support for the shift in U.S. antitrust policy. The triumph of the Chicago School was not because its theoretical views were more truthful than those of the Harvard School, but rather because it aligned with the policy choices of the United States at that time. The Chicago School does not concern itself with aspects of the market structure per se, such as the number of sellers, but rather focuses its antitrust investigations on whether corporate conduct can successfully constrain industrial levels of output (White, 1992).

Therefore, the United States has transitioned from the structural regulation advocated by the Harvard School to the conduct regulation endorsed by the Chicago School. This shift entails a departure from previous proactive antitrust policies and a per se illegal abandonment, instead analyzing the competitive impact of the behaviors involved in individual cases based on the rule of reason. As the antitrust legal systems in major jurisdictions, such as the European Union and China, are deeply influenced by the United States, they have also established the model of conduct regulation.

The Dilemma of the Conduct Regulation

Since the Chicago School's interpretation of antitrust law took a dominant position, the idea that ex post conduct deterrence is superior to the ex ante structural prevention has become the theoretical basis of antitrust law (Li, 2023). Of course, ex post regulation is mainly applied in monopolistic agreements and abuse of dominant market position, while the concentration of operators is still subject to ex ante review. "The Chicago school has largely prevailed with respect to its basic point: that the proper lens for viewing antitrust problems is price theory" (Posner, 1979, p. 932). The New Brandeis School believes that the current framework in antitrust does not recognize specific types of competitive injuries, rendering it ineffective in fostering genuine market competition—a deficiency that becomes more pronounced and exacerbated within the realm of digital platforms and markets centered on data, and "[t]his failure stems both from assumptions embedded in the Chicago School framework and from the way this framework assesses competition" (Khan, 2017, p. 737). In practical terms, the transition from a structuralist approach to a price theory orientation resulted in two principal consequences for the evaluation of antitrust matters. Initially, this transition resulted in a considerable contraction in the understanding of what constitutes barriers to market entry. Secondly, as a result of moving away from a structuralist viewpoint, the evaluation of competitive practices began to predominantly focus on the impact on consumer pricing (Khan, 2017)

First, the Chicago School places significant emphasis on factors pertaining to potential competition. On the other hand, the Harvard School adopted a comprehensive perspective of market entry barriers, considering any long-term factors that enable incumbent enterprises to charge prices above competitive levels in the long term without inducing new entry. These may include production cost advantage, economies of scale, and product differentiation advantages (Ordover, 1988). According to the Chicago School, however, a much narrower interpretation was adopted, believing that apart from production cost advantages, other factors did not constitute market entry barriers. From the Chicago School's perspective, even operators with a monopolistic position are faced with intense potential competition, which dictates that their monopolistic status is unstable and may be fleeting; therefore, it is not necessary to subject them to antitrust regulation (Khan, 2017). Influenced by this theory, the EU, the United States, and China have refrained from implementing antitrust law against Internet platform enterprises for a long time. For example, in *Qihoo v. Tencent*, the Supreme People's Court of The People's Republic of China held that due to the highly dynamic characteristics of the Internet market, the indicative role of market share should not be overestimated. Instead, more attention should be paid to factors such as market entry, and ultimately, it was determined that Tencent did not have a dominant market position[1].

Second, the Chicago School focuses on the competition damage in terms of price. The Chicago School's consumer welfare standard is specifically reflected in a price-centric approach, which considers low prices as the paramount manifestation of effective competition (Tang, 2022). Therefore, as long as an operator's conduct does not result in consumers' paying higher prices, it would not be deemed monopolistic. However, a price-centered analysis approach is not suitable for the platform economy since numerous goods and services in this domain are often provided free of charge. Although consumers may not suffer harms in terms of price, operators' conducts could harm other legal interests such as privacy and innovation, which should be a focal point for the antitrust analysis framework in the digital economy era (Yang, 2020). Although in recent years, the academic community has recognized that the current evaluation model based solely on price and output is not entirely applicable in the context of a platform economy, and advocates exploring diverse evaluation standards (Chen, 2020), non-price factors lack quantitative criteria, posing significant challenges in practical implementation.

The two aforementioned changes brought by the Chicago School have rendered it challenging for the current analytical framework of antitrust law to effectively regulate the abuse of market dominant position by platform enterprises. On one hand, the excessive emphasis on potential competition makes it difficult for platform businesses to be identified as holding a dominant market position; on the other hand, the price-centric analytical framework fails to recognize abusive behaviors in the platform economy, which are characterized by "zero price", as illegal. In addition to abuses of market dominance, the Chicago School has also exerted a profound influence on the scrutiny of operators' concentrations.

The 1968 Merger Guidelines in the United States were formulated under the leadership of the Harvard School, focusing on assessing the impact of mergers on market structure and concentration. If a merger significantly increases market concentration, it would be deemed as illegal. With the rise of the Chicago School in the 1970s, the merger policy in the United States changed, particularly during the Reagan administration of the 1980s, when it shifted to the belief that "bigger is better" that "high market concentration has few negative consequences and that mergers had in the vast majority of cases to be efficiency increasing and seldom competition reducing" (Melsheimer, 1990, p. 1327). Then in 1982, the Department of Justice (DOJ) made revisions to the Horizontal and Non-horizontal Merger Guidelines (Miller, 2019). The 1982 Merger Guidelines represented a significant pivot from those of 1968, turning attention from the configuration of market structure to the nuances of market power, a concept that presents more complex measurement challenges (Miller, 2019). "The 1982 Guidelines included empirical analytical tools such as the Hypothetical Monopolist Test and the

[1] Beijing Qihoo Technology Co., Ltd. v. Tencent Technology (Shenzhen) Co., Ltd., Shenzhen Tencent Computer System Co., Ltd., Abuse of Dominant Market Position Dispute, the Supreme People's Court of The People's Republic of China (2013) Minsan Final Zi No. 4 Civil Judgment.

Herfindahl-Hirschman Index to aid agencies in measuring market power" (Miller, 2019, p. 320). The 1984 Merger Guidelines further supported the efficiency defense, arguing that the primary value of corporate mergers lay in their potential to enhance efficiency (Rose & Sallet, 2020). Under the influence of the Chicago School, since the 1980s, the DOJ and the Federal Trade Commission (FTC) have relaxed their scrutiny of horizontal mergers, and this policy shift is particularly evident for non-horizontal mergers (Gellhorn, Kovacic, & Calkins, 2009, p. 346). Take vertical merger for example, the last vertical merger case analyzed by the Supreme Court was in 1972, and "[t]he last vertical merger case litigated to conclusion by the Federal Trade Commission (FTC) dates back to 1979" (Salop, 2018, p. 1964). The United States has adopted a lenient approach towards antitrust scrutiny of mergers, which is very evident in the context of the platform economy.

In the past two decades, the five largest platform companies in the United States (Google, Amazon, Facebook, Apple, and Microsoft) have collectively undertaken approximately 600 mergers and acquisitions. Some scholar observes that of these mergers, "the FTC and DOJ appear to have challenged exactly one. That one challenge was to Google's planned acquisition of ITA Software, which resulted in its approval subject only to a remedy of questionable effectiveness" (Kwoka, 2020, p. 110). While many of these acquisitions were small, several were quite substantial in size and influence, such as Facebook's acquisition of Instagram and WhatsApp, the latter amounting to $19 billion, as well as Google's acquisition of YouTube and Microsoft's acquisition of LinkedIn. However, these acquisitions have not been challenged by the U.S. antitrust enforcement agencies, leaving the U.S. technology industry in effect controlled by a few giant Trusts (Wu, 2018, pp. 123-124). The laissez-faire merger policy adopted by the United States in the past decades was spurred in part by the emergence of Chicago School economics (Manne, Bowman, & Auer, 2021). The Chicago School insisted that "larger companies are naturally more efficient, and that mergers are therefore almost always justified, while the loss of small firms is both welcome and inevitable" (Kovacic, 2020, p. 460). Moreover, the burden of proof that merged entities will raise prices has enabled many mergers to escape prohibition (Wu, 2018). Under the lenient merger review policy, platform companies have carried out a large number of mergers and acquisitions, including "killer acquisition" aimed at numerous startups. In the European Union, mergers and acquisitions review also faces a similar issue, with a large number of mergers having not been challenged. Over the past three decades, the European Commission has received 8,083 merger notifications, but has prohibited only 30, with an additional 140 or so being approved conditionally (Parker, Petropoulos, & Van Alstyne, 2021).

Unlike the U.S., which has not carried out effective antitrust enforcement against platform businesses for decades, the EU has carried out extensive antitrust enforcement against platform businesses, primarily targeting the U.S. platform enterprises. The EU consecutively imposed antitrust fines on Google for three cases of abuse from 2017 to 2019, with a cumulative fine of more than 8 billion euros. Moreover, the EU has initiated antitrust actions against other U.S. digital platform companies such as Apple and Amazon and imposed a fine of 1.84 billion euros on Apple. However, such hefty fines have not diminished the dominant position of platform enterprises, nor restored the market basis for effective competition. They have even failed to serve as a deterrent against the occurrence of similar monopolistic behaviors (Hao, 2023).

The United States and the European Union are confronted with divergent challenges in the antitrust of platform enterprises: The U.S. has not carried out antitrust investigations on platform enterprises for a long time due to the influence of the Chicago School's laissez-faire philosophy. In contrast, the EU has actively carried out a large number of antitrust investigations on digital platform enterprises originating from the U.S. Despite these differing approaches, both jurisdictions encounter a common issue, that is, the traditional antitrust analysis framework cannot effectively regulate monopolistic behaviors within the platform economy. Therefore, the EU and the U.S. have concurrently opted to adopt a distinctive regulatory framework, designated as "identity" regulation, which operates adjunct to the prevailing antitrust legislation.

The Rise of "Identity" Regulation and Its Institutional Concept

The digital economy, typified by large Internet platforms, has characteristics such as two-sided market characteristics, network effects, and disruptive innovation (Sun, 2021), which set it apart from the traditional industrial economy. The antitrust rules established during the industrial era are no longer fully adapted to the three-dimensional competitive market structure shaped by platforms, data, and algorithms in the digital economy (Yang, 2020). The growth of super-platform enterprises has shaken the foundation of the U.S. antitrust theory, while also posing challenges to the competition legal system of the European Union and its major member states (Chen, 2020). It has gradually become a global consensus that the traditional antitrust legal system cannot effectively solve the competition issues in the digital market (Turner, 2022). In response, major jurisdictions such as the EU and the U.S. have introduced the "identity" regulatory model. China is also preparing to draw from the experience of the EU and the U.S., implementing graded and classified supervision over platforms.

The Rise and Domestic Introduction of "Identity" Regulation

The EU digital markets act and the "gatekeeper" regime. On December 15, 2020, the European Commission published the draft of the Digital Markets Act, and on September 14, 2022, the European Parliament and the Council of the European Union ultimately passed the Digital Markets Act (DMA). The DMA entered into force on 1 November 2022 and became applicable on 2 May 2023. The background of the enactment of the DMA is that, due to the extreme scale economies, strong network effects, lock-in effects, vertical integration, and data-driven advantages of core platform services, these features, when entwined with unfair practices by companies offering such services, can critically impede the competitive dynamics of these core platform services. Moreover, it can adversely affect the equitability of the trade relations between the service providers, their commercial partners, and the consumer base. This dynamic tends to lead to a swift and extensive diminution of options for both business clientele and end consumers. As a result, it positions the service provider in the influential role of what is commonly termed a "gatekeeper" within the market.[2] Certain enterprises exercise control over comprehensive platform ecosystems within the digital economy, establishing a structure that presents significant challenges to current or emerging market entities, and this dominance persists regardless of the level of innovation or efficiency that these market participants may demonstrate.[3]

Although Articles 101 and 102 of the Treaty on the Functioning of the European Union (TFEU) also regulate gatekeepers, the current competition law has limitations. On the one hand, it is difficult to prove that an undertaking has a dominant position in a particular market and that the acts it engages in have the effect of excluding or restricting competition. On the other hand, the current regulation is mainly ex post regulation and

[2] Digital Markets Act, Para. (2).
[3] Digital Markets Act, Para. (3).

requires extensive and in-depth investigations into very complex case facts on a case-by-case basis, which is not only time-consuming but also provides delayed remedy that may ultimately prove to be ineffectual.[4] Moreover, because gatekeepers also have a significant impact on the internal market of member states, and given that some member states had already responded to the challenges posed by the gatekeepers through legislation or industry regulation, the European Parliament and Council were concerned that such divergent regulatory solutions by member states might lead to the fragmentation of the internal market, which would contradict the original intent of establishing the EU.[5] In light of this, the European Parliament and Council decided to enact the DMA to establish consistent regulations for gatekeepers within the internal market.

Articles 3.1 and 3.2 of the DMA define the "gatekeeper" from qualitative and quantitative dimensions respectively. According to DMA, an undertaking is designated as a gatekeeper if it fulfills the following three criteria: (a) the qualitative criteria: the undertaking has a significant impact on the internal market; the quantitative criteria: the undertaking achieves an annual Union turnover equal to or above EUR 7.5 billion in each of the last three financial years, or where its average market capitalization or its equivalent fair market value amounted to at least EUR 75 billion in the last financial year, and it provides the same core platform service in at least three Member States; (b) the qualitative criteria: the undertaking provides a core platform service which is an important gateway for business users to reach end users; the quantitative criteria: the undertaking provides a core platform service that in the last financial year has at least 45 million monthly active end users established or located in the Union and at least 10,000 yearly active business users established in the Union; (c) the qualitative criteria: the undertaking enjoys an entrenched and durable position, in its operations, or it is foreseeable that it will enjoy such a position in the near future; the quantitative criteria: the thresholds were met in each of the last three financial years.[6] However, it should be noted that the qualitative and quantitative criteria are not inseparable. An undertaking that has been designated as a gatekeeper based on the quantitative criteria may argue to the European Commission that it does not satisfy the qualitative criteria and should not be designated as a gatekeeper.[7] Similarly, the Commission could designate an undertaking as a gatekeeper that meets the qualitative criteria, but does not satisfy the quantitative criteria.[8]

After clarifying the gatekeeper standards, the DMA meticulously enumerates the obligations that the gatekeeper should comply with. For instance, Article 5.2 prohibits gatekeepers from the improper use of relevant user personal data, Article 6.5 prohibits gatekeepers from engaging in self-preferential behavior, Article 14 dictates that gatekeepers must notify the European Commission in advance of any intended concentration involved in the digital sector—regardless of whether it meets the reporting threshold—prior to implementation, among others. This equates to explicitly informing gatekeepers of specific prohibitions, such as self-preferencing, which is not inherently illegal under the traditional antitrust analysis framework. It is in this sense that the regulatory model of the DMA can be termed as ex ante regulation or "identity" regulation. Compared with the traditional ex post "conduct" regulation, the ex ante "identity" regulation has two characteristics: one is timeliness,

[4] Digital Markets Act, Para. (5).
[5] Digital Markets Act, Para. (4)-(5).
[6] Digital Markets Act, Article 3.
[7] Digital Markets Act, Article 3.5.
[8] Digital Markets Act, Article 3.8.

which can avoid lengthy and protracted investigation procedures and thus alter the monopolist's business conduct more quickly, albeit at the cost of accuracy; and the second is certainty, as the DMA lays out clear gatekeeper obligations, providing definite guidance to the "gatekeeper" platform, but at the same time losing the flexibility that traditional ex post antitrust enforcement may offer in individual cases (Akman, 2022).

The U.S. "covered platform" system. On June 24, 2021, the U.S. House Judiciary Committee passed six antitrust bills, among which three platform-related bills are the American Choice and Innovation Online Act, the Ending Platform Monopolies Act, and the Platform Competition and Opportunity Act of 2021. These three bills all define "covered platforms" in the same way, thereby introducing a gatekeeper regime similar to that of the European Union. Take the Americans Choice and Innovation Online Act as an illustration. Section 2(g) of the Act sets out three specific criteria. First, the online platform has at least 50 million United States-based monthly active users or at least 100,000 United States-based monthly active business users at any point during the 12 months preceding a designation under Section 2(d) or the filing of a complaint for an alleged violation of this Act. Second, the online platform is owned or controlled by a person with United States net annual sales or a market capitalization greater than $600 billion at any point during the 12 months preceding a designation under Section 2(d) or the filing of a complaint for an alleged violation of this Act. Third, the online platform is a critical trading partner for the sale or provision of any product or service offered on or directly related to the online platform. A "critical trading partner" means an entity that has the ability to restrict or impede the access of a business user to its users or customers, or a business user to a tool or service that it needs to effectively serve its users or customers.[9]

These three Bills regulate covered platforms from different aspects. Specifically, the American Choice and Innovation Online Act mainly prohibits covered platforms from engaging in discriminatory practices, including any conduct that: (1) advantages the covered platform operator's own products, services, or lines of business over those of another business user; (2) excludes or disadvantages the products, services, or lines of business of another business user relative to the covered platform operator's own products, services, or lines of business; (3) discriminates among similarly situated business users.[10] The primary objective of the Ending Platform Monopolies Act is to eliminate the conflicts of interest between covered platforms' services and other competing services. For example, covered platforms often own or control related business activities. In order to fight against emerging or potential competitors, covered platforms may favor their own products or services, or exclude competitors, or put competitors in a disadvantageous competitive position.[11] Therefore, the prohibitions in the Ending Platform Monopolies Act are essentially the same as those in the American Choice and Innovation Online Act. The Platform Competition and Opportunity Act of 2021 mainly prohibits covered platforms from acquiring directly or indirectly the whole or any part of the stock, assets, or other share capital of another person engaged in commerce or in any activity affecting commerce.[12]

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[9] See SEC. 2(g)(4)-(6), H.R. 3816, the "American Choice and Innovation Online Act", https://www.congress.gov/117/bills/hr3816/BILLS-117hr3816ih.pdf.
[10] H.R. 3816—American Choice and Innovation Online Act, https://www.congress.gov/117/bills/hr3816/BILLS-117hr3816ih.pdf.
[11] H.R.3825—Ending Platform Monopolies Act, https://www.congress.gov/117/bills/hr3825/BILLS-117hr3825ih.pdf.
[12] H.R.3826—Platform Competition and Opportunity Act of 2021, https://www.congress.gov/117/bills/hr3826/BILLS-117hr3826ih.pdf.

Graded and classified regulation of Chinese internet platforms. Influenced by the EU and U.S. “identity” regulation, regulators in China are also preparing to introduce similar regime to regulate internet platform enterprises for the graded and classified regulation of internet platform enterprises. On October 29, 2021, the State Administration for Market Regulation (SMAR) released the draft Guidelines of Classification and Grading of Internet Platforms (Draft for Public Consultation) and the Guidelines for Implementing Entity Responsibilities of Internet Platforms (Draft for Public Consultation), which were drafted by the Department of Online Transaction Supervision of the SMAR. The Guidelines of Classification and Grading of Internet Platforms (Draft for Public Consultation) classifies platforms according to their user scale, business types, and restrictive capacity, and specifies specific criteria. The specific criteria for super platforms are: the annual active users in China last year are not less than 500 million, the core business involves at least two types of platform business, the market value (valuation) at the end of previous is not less than 1 trillion yuan, and they have very strong ability to limit merchants’ access to consumers (users). The specific criteria for large platforms are: the annual active users in China last year are not less than 50 million, the main business of the platform has outstanding performance, the market value (valuation) at the end of last year is not less than 100 billion yuan, and they have strong ability to limit merchants’ access to consumers (users).

The Guidelines for Implementing Entity Responsibilities of Internet Platforms (Draft for Public Consultation) sets forth regulations for the operation conduct of super large platforms in its first nine articles, mandating them to assume numerous specific principal responsibilities, among which the first three articles are mainly related to the antitrust rules. Article 1 stipulates that a super large platform operator shall not, without justified reasons, utilize non-public data generated or provided by the operators and users on the platform when engaging in fair competition with them. Additionally, it shall not impose the use of services provided by other affiliated platforms as a prerequisite for accessing its own platform services. Article 2 stipulates that when providing relevant products or services, a super large platform operator shall treat the platform itself (or affiliated enterprises) and the operators on the platform equally and shall not engage in self-preferential behavior. Article 3 stipulates that a super large platform operator shall, on the premise of meeting the security requirements and protecting the rights and interests of relevant subjects, promote the interoperability between its services and those provided by other platform operators. Without justified reasons, a super large platform operator shall provide convenience for other qualified operators and users to obtain the services provided by it. The aforementioned three articles directly stipulate the obligations that may be derived from the antitrust law, implying that prohibitions on self-preferencing may become an inherent duty for super large platform operators, without seeking a basis in the antitrust law.

The Institutional Concept of “Identity” Regulation

The “identity regulation” path for Internet platform enterprises, which involves enacting specialized regulations for platform enterprises that have reached a certain scale, encompasses a significant shift in regulatory ideology: from “rule of reason” analysis to “per se illegal” analysis, and from ex post regulation to ex ante regulation.

Per se illegal analysis. Under the traditional conduct regulation, whether the behaviors of Internet platform enterprises constitute monopolistic conduct should be carried out strictly according to the antitrust analysis framework to determine whether it has the effect of excluding or restricting competition. The monopolistic conducts typically associated with internet platform enterprises are the abuse of dominant position and operator concentration. Take the abuse of dominant position as an example, to determine whether the conduct of platform enterprises constitutes abuse of dominant position, it is first necessary to define the relevant market and determine whether the enterprise has a dominant market position. Only in the case that it has a dominant market position can one proceed to analyze whether its conducts constitute abuse of market position. In fact, the analysis of abuse of dominant position is also a rule of reason analysis. Although the rule of reason applies to assessing the validity of monopoly agreements under Sherman Act §1, many courts also extend this to analyze cases involving abuse of dominant position (Ward, 2017).

The abuse of a dominant position without justified reasons is prohibited under Article 22 of Anti-Monopoly Law of the People's Republic of China (AML), which actually contains rule of reason analysis. However, such rule of reason analysis is often time-consuming and labor-intensive, and it is difficult to hold operators who engage in abuse of market dominance accountable. Even if they are finally found to have violated the antitrust law and penalized, it may be too late, because the exclusive abuse they engage in may have squeezed competitors out of the market, and the damage to market competition caused is difficult to rectify, or the remedies provided may be meaningless.

However, under the "identity" regulation, as long as the operator reaches the "identity" threshold, it shall not engage in the relevant specific behavior. On the one hand, this could be an alternative to the determination of market dominance. In both cases of abuse of dominant position and operator concentration, establishing market dominant position is crucial. Only if the business operator has market dominant position, can one proceed to analyze whether its behavior constitutes abuse of dominant position. The analysis of operator concentration is predictive, mainly to determine such concentration would create or enhance market dominance, which could likely lead to abuse of market dominance post-concentration. However, establishing market dominance is not straightforward; which requires first defining the relevant market and calculating the operator's turnover, among other things. While "identity" regulation directly prescribes relevant user or market value indicators, once these specific indicators are met, the threshold of regulation is reached, which essentially replaces the need to determine market dominant position. On the other hand, "identity" regulation can substitute for the analysis of the competitive effect of behavior. Operators that have reached the "identity" threshold shall not engage in behaviors such as self-preferencing or refusal of compatibility, and antitrust enforcement agencies do not need to analyze whether such behaviors have the effect of excluding or restricting competition. In this sense, the "identity" regulation can be regarded as per se illegal analysis. As long as the operator reaches the "identity" threshold and engages in the enumerated behaviors, it will be directly considered illegal.

Ex ante regulation. Traditional antitrust regulation is mainly an ex post regulation. Antitrust law enforcement agencies typically intervene and investigate whether the operators' behavior constitutes monopolistic behavior after they engage in suspected monopoly agreements and abuse of dominant market position. Both monopoly agreements and abuse of dominant market position also involve ex ante regulation. For example, through the monopoly agreement "leniency" system, operators who have reached a monopolistic agreement are encouraged to voluntarily "confess" in order to reduce or waive penalties, thereby dissolving the monopoly agreement. This would effectively move regulation forward to a point before the antitrust enforcement agency discovers the monopoly agreements through agencies' own investigation, allowing for early intervention to halt monopolistic behavior before it can implement agreements or produce greater exclusionary or restrictive competitive effects.

Antitrust law enforcement agencies exhort operators with dominant market position through interviews and other flexible means to dispel their motives for engaging in abusive behaviors, or prompt them to stop their abusive behaviors that have not yet caused serious damage to competition in a timely manner, which is another form of ex ante regulation. Operator Concentration is mainly a kind of ex ante regulation. Concentrations meeting the notification thresholds must, in general, be suspended until the antitrust agencies' final decision either clearing (conditionally or unconditionally) or prohibiting the merger. Operator Concentration is also a kind of ex post regulation. For the concentration that is not notified, if it has or may have the effect of excluding or restricting competition, the antitrust law enforcement agency can take corresponding measures and impose corresponding fines.[13] Regarding the antitrust review of Operator Concentration, which is mainly manifested as ex ante regulation, if one considers that the review by the antitrust enforcement agencies only occurs after the operators have declared, then it also has attributes of ex post regulation.

However, "identity" regulation is different. From any perspective, it is a form of pure ex ante regulation. Operators who reach the threshold of "identity" shall not engage in certain specific behaviors. This is equivalent to clarifying the behavior boundaries of business operators in advance. The reason legislators can determine that operators who have reached the "identity" threshold engaging in these listed behaviors will inevitably produce the effect of excluding or restricting competition is mainly based on their empirical judgment, which is ultimately codified into legislation. This provides specific operators with clear expectations, and the regulation is in place before the operator has engaged in the related behaviors. Although antitrust law also has a similar effect, its ambiguity still leaves room for operators to misjudge. The "identity" regulation, due to its highly specific provisions, effectively operates as a form of direct regulation. The distance between the legislative provisions and the actual enforcement is minimized, allowing such legislative rules to have a direct regulatory effect and thus can be considered a form of ex ante regulation. The same is true of operator concentration under "identity" regulation, where operators that have reached the "identity" threshold are prohibited from acquiring start-ups, regardless of whether such acquisitions actually have a detrimental effect on competition. Therefore, operators can clearly know that such acquisition will be considered as "killer acquisition" and prohibited without notification. This is a step ahead of traditional antitrust review of operator concentration, encountering actual prohibitive regulation even before the operators plan the concentration.

The Choice of Antitrust Regulation Mode for China's Platform Economy

The European Union has formally adopted "identity" regulation. While the United States has already established "identity" regulation with the passage of the antitrust bill in the House of Representatives, it is uncertain whether it will make it through the lengthy legislative process of the Senate and Presidential approval

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[13] Article 58 of the Anti-Monopoly Law of the People's Republic of China stipulates that: If an operator violates the provisions of this Law to implement concentration, and has or may have the effect of excluding or restricting competition, the anti-monopoly law enforcement agency of the State Council shall order it to stop the implementation of concentration, dispose of shares or assets within a certain period of time, transfer business within a certain period of time, and take other necessary measures to restore to the state before concentration, and impose a fine of not more than 10% of the sales amount of the previous year; if it does not have the effect of excluding or restricting competition, it shall impose a fine of not more than five million yuan.

(Hou, 2023). However, it appears that China has already acknowledged the value of the “identity” regulation, and prepared to adopt it as previously did with other Western antitrust systems. Therefore, very shortly after the European Union and the United States introduced the “identity” regulation in legislative drafts, China swiftly incorporated the system in October 2021 within its draft guidelines for public consultation, demonstrating remarkable efficiency. Although it has been more than two years since the draft guidelines were issued for public comments without formal adoption, indicating that the regime still has great controversy, one cannot dismiss the potential for its enactment. Given the significant impact of the regime on the antitrust of China’s platform economy, the author believes prudence is essential. One should not be swayed by the apparent merits of the system but should seek to understand the context in which it was adopted abroad and deeply consider whether the necessary conditions for its implementation exist in China. However, the reasons for the European Union to introduce “identity” regulation do not exist in China, and there is no necessity for China to introduce “identity” regulation. Implementing “identity” regulation may incur substantial erroneous costs when the current antitrust law is capable of effectively regulating platform enterprises in China.

Lack of Practical Basis for the Introduction of “Identity” Regulation Regime in China

The establishment of regulation regime needs to have urgent practical needs. Although the European Union and the United States introduce the “identity” regulation regime for different reasons, they both reflect, to a great extent, their respective practical needs, which do not exist in China.

First of all, China no longer has a situation of inaction in terms of antitrust enforcement against the platform economy. Even if there was a prolonged period of enforcement vacuum, it is a proactive policy choice. The important reason the United States attempts to introduce the “identity” regulation regime is that under the influence of the Chicago School, the antitrust enforcement agencies have long pursued a non-intervention policy and rarely launched antitrust against large platform enterprises. However, the alleged monopolistic behaviors of large platform enterprises in the United States have attracted widespread attention and public dissatisfaction. In this context, the U.S. House of Representatives attempted to introduce the “covered platform” regime to address this issue.

However, the situation in China is different from that in the United States. On the one hand, China has launched antitrust enforcement against large internet platform enterprises. In late December 2020, the SAMR launched an investigation into Alibaba’s suspected monopolistic behaviors such as “choosing one from two” behavior and finally imposed a huge fine of 18.228 billion yuan on Alibaba on April 10, 2021 for abusing its dominant market position to engage in restricted transactions.[14] On April 26, 2021, the SAMR launched an anti-monopoly investigation into Meituan’s suspected abuse of market dominance and finally imposed a fine of 3.442 billion yuan on Meituan on October 8, 2021 for abusing its market dominance and engaging in “choosing one from two” behavior.[15] In addition, the SAMR imposed a fine of 87.6 million yuan on China National Knowledge Infrastructure (CNKI) for abusing its dominant market position. This shows that China, unlike the U.S., has not failed to effectively enforce antitrust laws against platform enterprises. On the other hand, even if China did not

[14] Administrative Penalty Decision of State Administration for Market Regulation—State Administration for Market Regulation (2021) No. 28, http://www.samr.gov.cn/fldj/tzgg/xzcf/202104/t20210409_327698.html.

[15] Administrative Penalty Decision of the State Administration for Market Regulation—State Administration for Market Regulation (2021) No. 74, https://www.samr.gov.cn/jzxts/tzgg/xzcf/art/2023/art_e10040bb366242629925685accabfab2.html.

launch anti-monopoly against platform enterprises for a long time before 2021, it is not because the anti-monopoly law enforcement agencies are influenced by the Chicago School, but because China has an active policy choice, that is, to implement a kind of inclusive and prudent regulation on the Internet industry. Although this regulatory concept also emphasizes strict regulation of activities that have a high probability of being identified as monopolies, in practice, there is often more emphasis on inclusiveness. It was not until the end of 2020 that the Central Committee of the Communist Party of China proposed to "strengthen antitrust enforcement and prevent the disorderly expansion of capital", leading to a true strengthening of antitrust oversight.

Secondly, China's Internet industry is facing the heavy responsibility of developing within a regulatory framework. The European Union is the jurisdiction that truly implements the "identity" regulation, which has a lot to do with the fact that the EU itself does not have large Internet platform enterprises. The cost of platform anti-monopoly regulation faced by the EU is much lower than that of China and the U.S. China and the United States have many large internet platform enterprises, and the imposition of strict "identity" regulation on these platforms, while prohibiting their monopolistic behaviors, may also have a certain inhibitory effect on their development, restraining their further growth. The "identity" regulation adopted by the EU is mainly targeted at large Internet platform enterprises in the U.S., which will not have a negative impact on the development of the Internet industry in the EU.

Negative Effects of "Identity" Regulation

Although "identity" regulation can effectively and definitively prohibit potential anti-competitive behaviors of large internet platform enterprises and facilitate the application by antitrust enforcement agencies, many negative effects of this "identity" regulation cannot be overlooked.

First of all, "identity" regulation may suppress the development of platform enterprises. The premise of "identity" regulation is to determine that platform enterprises have relevant "identity", which is mainly quantified by the number of users and market value of the platform. Regardless of whether the quantitative standards are scientific or not, they themselves may become the "ceiling" for the future development of platform enterprises. For those platform enterprises that have reached or exceeded the standards, it is difficult to avoid identity identification by proactively reducing the value, but for those platform enterprises that have not reached the standards, it is not ruled out that they may take the initiative to develop below the identity threshold due to the strict obligation of "identity" regulation. The platform economy has the characteristics of network effect and scale effect, and the platform enterprises actively avoid the "identity" regulation which will make it difficult to play the advantages of platform economy.

Secondly, "identity" regulation itself may lead to the cost of "false positives". "Identity" regulation takes the operator to reach a specific standard as the threshold of regulation, as long as the operator reaches a specific threshold, it has a specific obligation. Although behaviors prohibited by the "identity" regulatory regime have a solid empirical basis and usually have a large adverse effect on competition, there may still be a risk of error if it is absolutized. The platform economy has diverse forms of business and each business model has its own characteristics. Whether a behavior has a detrimental effect on competition still needs to be analyzed in combination with specific platform models. It is difficult to have a "one-size-fits-all" identification framework.

In fact, whether platform enterprises cannot engage in self-preferencing behaviors itself is still a controversial issue, and it is difficult to directly identify such behaviors as illegal behaviors without drawing a distinction. The acquisition of startups by platform companies serves as an avenue for the latter to exit and realize profits, and a complete prohibition may ultimately result in a decline in the number of startups. In short, the prohibited behaviors under the “identity” regulation itself are still controversial, and directly taking it as the basis for regulating platform enterprises may lead to law enforcement errors.

Finally, “identity” regulation may overshadow antitrust law. Although the European Union’s Digital Marketplace Act and the United States’ American Choice and Innovation Online Act assert that they do not affect the enforcement of antitrust laws within their jurisdictions, they may have the effect of overshadowing the antitrust law in practice. One of the important reasons for the rise of “identity” regulation is that the traditional analysis framework of antitrust law has many difficulties in regulating platform monopoly, which is time-consuming and laborious, heavy burden of proof, etc. In contrast, applying “identity” regulation is relatively simple and straightforward. Given the choice of regimes, antitrust enforcement agencies will be more inclined to choose the more friendly “identity” regulation, forsaking traditional antitrust regulations and, in essence, hollowing out antitrust law.

Where Is Antitrust Regulation in the Platform Economy Headed?

As a response to the dilemma of traditional behavioral regulation, “identity” regulation is not without merits. However, it should not be idealized as a panacea for all antitrust regulatory issues within the platform economy. The essence of antitrust regulation still lies in the analysis of competition impact, regardless of whether the impact of competition damage is caused by large or small platform enterprises. “Identity” is not a decisive factor in itself. The greatest value of “identity” regulation is mainly reflected in the fact that it points out which competitive behaviors should be highly concerned in a simple and clear way, and plays a role of risk warning. However, such alerts should not be conflated directly with risk itself. Whether it really constitutes a risk that needs to be eliminated can only be concluded after a specific analysis. And this kind of concrete analysis still needs to return to the traditional, relatively mature antitrust analysis framework. This is akin to a physical examination, a high indicator does not absolutely mean that there is a certain disease, as for whether there is really the corresponding disease, it needs to be further checked. The indicators identified by the “identity” regulation can be regarded as a preliminary screening or a situation that should be paid attention to, and linked to the behavioral regulation. In this way, “identity” regulation and behavior regulation are not mutually exclusive or conflicting approaches but can coexist as regulatory methods that work in concert, each playing to its comparative strengths.

Conclusion

Due to its inherent complexity, the platform economy presents numerous conundrums for antitrust regulation. Major jurisdictions are actively exploring new regulation methods, among which “identity” regulation is highly recommended by the European Union and the United States, and China is poised to adopt similar regime. The establishment of such a regulatory framework is intrinsically linked to the prevailing legal practices of the jurisdiction in which it is established. However, its application should not be viewed as all-encompassing, nor should it operate in isolation from traditional behavioral regulatory regime. It is imperative to foster synergies between these two regulatory paradigms, leveraging their unique strengths to achieve a more comprehensive and effective oversight mechanism.

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