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THE CHINA SOLUTION: IN THE CONTEXT OF THE EU'S REGULATORY INNOVATION FOR "GATEKEEPERS" IN DMA

Abstract. It is undeniable that Internet platforms play a vital role in the global digital economy. Nevertheless, as a result of their extensive bilateral connections and control over data, a select few super-platforms could potentially exploit their dominant position and become "gatekeepers" of the digital platform. This could lead to barriers for new entrants and pose a threat to consumer rights, fair competition, and overall market dynamics. Incorporating unique regulations for online platforms, the EU's Digital Market Act supersedes traditional competition laws and enhances proactive regulation. It also imposes new obligations on "gatekeepers" regarding data portability and interoperability, introducing various innovative regulatory measures. It reflects the current shift towards global regulation of online platforms. In the future, China may look to EU legislation for guidance on regulating and classifying Internet platforms. They may also explore local solutions for platform interoperability and data portability.

Key words: Digital Platforms, Competition Law, Ex Ante Regulation, China's Antitrust Legislation, Digital Markets Act, Comparative Law.

The period from 2021 to the present has been a significant and pivotal time in the history of China's antitrust legislation in the Internet sector. Chinese law enforcement agencies have transitioned from a previously ineffective and submissive regulatory approach to adopting robust and proactive tactics to investigate and combat unfair competition by internet enterprises. Due to the ever-changing nature of the digital industry and the availability of free services, the current regulatory model based on traditional competition law primarily focuses on regulating after the fact. This approach faces challenges when it comes to defining the relevant market for digital platforms, determining the dominant market position of platforms, and assessing operator concentration. As a result, it is unable to effectively address anticompetitive behaviors carried out by Internet platforms. China can draw inspiration from the

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Digital Markets Act Regulation 2022 (EU) 2022/1925 (DMA[1]) and the *Digital Services Act Regulation 2022 (EU) 2022/2065*(DSA[2]) implemented by the European Union and enhance the substance of China's digital platform legislation in the following areas:

Understanding the context of regulating digital platforms after the implementation of the DMA Act

Following the release of the draft DMA[3], it sparked conversations among scholars from different countries. Certain scholars have proposed a concerning theory regarding the "data-driven" nature of the digital market. They argue that this market is heavily influenced by network effects driven by data. When it comes to regulating the digital market, these scholars believe that the main objective of economic policy should be to ensure fair market access and competitiveness through proactive regulation[4]. This perspective is evident in the DMA. Certain scholars

[1] European Parliament, & Council of the European Union. (2022, September 14). Regulation (EU) 2022/1925 on contestable and fair markets in the digital sector and amending Directives (EU) 2019/1937 and (EU) 2020/1828 (Digital Markets Act). EUR-Lex. Retrieved from [https://eur-lex.europa.eu/eli/reg/2022/1925/oj]:

The Digital Markets Act Regulation 2022 (EU) 2022/1925, also known as DMA, is an EU regulation designed to promote fairness and competition in the digital economy. The regulation came into effect on 1 November 2022 and, for the most part, became applicable on 2 May 2023.

[2] Stolton, S. (2020, August 18). Digital agenda: Autumn/Winter Policy Briefing. Euractiv. Retrieved from www.euractiv.com: The Digital Services Act Regulation 2022 (EU) 2022/2065 ("DSA") is an EU statute that aims to modernize the Electronic Commerce Directive 2000 by addressing issues related to illicit material, transparent advertising, and disinformation. The European Commission proposed it to the European Parliament and the Council on 15 December 2020, as part of the Digital Markets Act (DMA). The Digital Services Act (DSA) was drafted by Margrethe Vestager, the Executive Vice President of the European Commission for A Europe Fit for the Digital Age, and Thierry Breton, the European Commissioner for Internal Market. Both Vestager and Breton are members of the Von der Leyen Commission.

[3] European Commission. (2022, October 31). Digital Markets Act: Rules for Digital Gatekeepers to Ensure Open Markets Enter into Force [Press release]. Retrieved from https://ec.europa.eu/commission/presscorner/detail/en/ip_22_6423.

[4] Krämer, J., & Schnurr, D. (2022). Big Data and Digital Markets Contestability: Theory of Harm and Data Access Remedies. Journal of Competition Law & Economics, 18(2), 255-322.

have examined the legislative reasoning behind the DMA, suggesting that the limitations of traditional competition law in the digital sector have necessitated the development of specialized laws. Several scholars have provided insights on the DMA, highlighting how it, along with the DSA, have transformed the regulatory landscape for digital platforms in the EU. Some scholars acknowledge the regulatory innovation of the DMA, which seeks to address the influence of super-platforms. Nevertheless, there have been scholarly inquiries into the DMA's effectiveness in achieving its legislative goal of promoting fair and sustainable competition through regulatory innovations like positive and negative lists. In general, the DMA has been praised as a significant internet antitrust legislation in the EU, which, along with the increasing influence of Brussels effect[1], will bring about a "new era of digital governance"[2]. In the ninth meeting of the Central Financial and Economic Commission, Xi Jinping highlighted the potential of the DMA to assist China in addressing the disorder caused by super-platforms and establishing fair competition in the digital market. Nevertheless, there is a scarcity of academic research on DMA in China. This paper explores the DMA as a starting point, examining the regulatory innovation of digital platform "gatekeepers" by thoroughly analyzing its policy motivation and the statutory obligations imposed on them. It also discusses China's potential response options in this context[3].

[1] Bradford, A. (2012). The Brussels Effect. Northwestern University Law Review, 107(1), Columbia Law and Economics Working Paper No. 533. Retrieved from SSRN: [https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2770634]:

The term Brussels effect was coined in 2012 by Professor Anu Bradford of Columbia Law School and named after the similar California effect that can be seen within the United States. The Brussels effect is the process of unilateral regulatory globalisation caused by the European Union de facto (but not necessarily de jure) externalising its laws outside its borders through market mechanisms. Through the Brussels effect, regulated entities, especially corporations, end up complying with EU laws even outside the EU for a variety of reasons.

[2] Petit, N. (2021). The Proposed Digital Markets Act (DMA): A Legal and Policy Review. Journal of European Competition Law & Practice, 12(7), 529-541.

[3] Wang, W. (2022). Antitrust law regulation of platform strangulation mergers and acquisitions. Chinese and Foreign Law, 2022(1), 84-103.

1. Utilizing the Principle Of Proportionality to Enforce Categorical Regulation And Increase the Maximum Amount Of Penalties

China's law enforcement authorities are adapting to the dynamic nature of digital business and the challenges posed by the platform economy. They are transitioning from passive to active regulation due to the limitations of classical competition law. The notion of proportionality should be the basic guiding premise for China's future local antitrust legislation. In the future, China must strive to achieve a balance between efficiency and fairness while enhancing the capabilities of law enforcement organizations. Put simply, it is important to enhance regulation and uphold market justice without compromising the dynamism and ingenuity of the market. Furthermore, there is a well-established equilibrium between the costs associated with regulation and the advantages obtained. The implementation of the principle of proportionality assists in preventing the misuse of discretion by law enforcement agencies and acts as a protective measure to uphold the legitimate rights of platform firms.

Initially, law enforcement agencies must categorize platforms and concentrate their efforts on controlling super platforms[1] Super platforms, which are similar to the "gatekeepers" in the DMA, are a top regulatory priority.

Additionally, law enforcement agencies should prioritize the regulation of platform data activities by enhancing the transparency of business information through frequent compliance reports on corporate data and algorithmic activities. This will allow for greater visibility and understanding of algorithmic processes. Furthermore, it is imperative to establish a transparent and precise accountability mechanism in the future to delineate the specific allocation of responsibilities among different regulatory departments, facilitate coordination of regulations across borders, and mitigate the financial burden on enterprises caused by having to comply with numerous and intricate regulations.

[1] In October 2021, the State Administration for Market Supervision and Regulation in China issued the Guidelines for the Implementation of Main Responsibilities of Internet Platforms (Draft for Public Comments), which classifies platforms into three categories: super platforms, large platforms and small platforms.

Finally, it is crucial to enhance the mechanisms through which businesses can seek resolution for grievances and develop efficient means for communication and protection. To prevent the abuse of power within an organization, it is important to follow the principle of proportionality and exert power with modesty. This ensures that power does not become excessive or oppressive. For instance, firms must promptly correct any issues within a specified time-frame, or they could face penalties. If a corporation consistently violates industry regulations over a long period of time and significantly disrupts the industrial environment, it should be divided. However, such structural solutions, which have a significant influence on the company's activities, should only be used as a last resort by the enforcement agency and with careful consideration. When comparing the fine limits set by the DMA and China's current Anti-Monopoly Law[1], it is evident that the DMA's cap of 20 percent[2] of total global turnover in a fiscal year is higher than China's cap of only 10 percent of the previous year's sales. This low limit in China's law is insufficient in deterring enterprises, and it is recommended that future revisions of the Anti-Monopoly Law should raise this standard.

2. Strengthening Ex Ante Regulation: Implementing A Preventive Positive And Negative List And Reversing the Burden Of Proof

China can benefit from studying the Direct Market Access (DMA) system and establishing a hierarchical grouping of positive and negative obligation lists[3] to proactively manage superplatforms. The negative list explicitly and categorically forbids super platforms from engaging in harmful and repetitive illegal practices, such as algorithmic collusion, self-preference, bundled sales, etc. It also specifies the actions that enterprises are strictly prohibited from taking in order to stop their illegal

[1] Anti-monopoly Law of the People's Republic of China(2022 edition), (2009, February 20). Retrieved from www.npc.gov.cn website: http://www.npc.gov.cn/zgrdw/englishnpc/Law/2009-02/20/content_1471587.htm

[2] Article 30, Fines of DMA:

The financial liability of each undertaking in respect of the payment of the fine shall not exceed 20 % of its total worldwide turnover in the preceding financial year.

[3] Caffarra, C. (2021, January 5). The European Commission Digital Markets Act: A translation. Vox EU. Retrieved from [https://cepr.org/voxeu/columns/european-commission-digital-markets-act-translation]

behaviors and to control the disorderly growth of capital. Conversely, positive lists should consider the ever-changing nature of the digital market and proactively enumerate the issues that corporations should address, with a focus on safeguarding the rights and interests of consumers and business users. Given the limited expertise in China regarding these issues, it is advisable for the obligations outlined in the positive list to be more broad in nature compared to the specific requirements listed in the negative list. These obligations should include provisions for data portability, interoperability, and the inclusion of FRAND (fair, reasonable, and non-discriminatory) clauses in contracts between super platforms and users. This is to prevent super platforms from unfairly treating business users and consumers by leveraging their dominant market position in bilateral connectivity. The specific duties of the positive list must be determined on a case-by-case basis following an investigation and communication between the enforcement agency and the firm. The Positive List allows enforcement agencies to exercise discretion in response to changes in the digital marketplace. Its establishment signifies that the enforcement of laws against platform companies is guided by the principle of promoting healthy growth, encouraging innovation and development, and treating interference as a rare occurrence.

Law enforcement agencies in China have faced significant challenges when conducting antitrust investigations, with the burden of proof being a major obstacle. One prominent example is the antitrust investigation of China Knowledge. Criticism has been directed towards the monopoly position of CNKI[1] (China National Knowledge Infrastructure) . However, the investigation of CNKI under the Anti-monopoly Law, specifically in relation to traditional competition law, presents challenges such as identifying the relevant market and gathering evidence. As a result, the antitrust

[1] Xia, J. (2017). Scholarly communication at the crossroads in China. Oxford: Chandos Publishing. ISBN 9780081005422:

CNKI (China National Knowledge Infrastructure; Chinese: 中国知网) is a Chinese database of academic journals, conference proceedings, newspapers, reference works, and patent documents. It was launched in 1999 by Tsinghua University. https://oversea.cnki.net/index/

investigation of China Knowledge progresses slowly and has minimal impact. Thus, it would be prudent for China to consider implementing a shift in the burden of proof in future antitrust regulations. In cases where an enterprise is being investigated and is identified as an industry super-platform, the super-platform should be required to provide relevant evidence to support its defense. From one perspective, this supports the advancement of China's antitrust practice, lowers the monitoring costs for law enforcement agencies, regulates the misconduct of super-platforms, and establishes a favorable market and business environment. On the other hand, with the increasing complexity and diversity of cross-border legal supervision for overseas enterprises, the international trend of shifting the burden of proof has emerged. Embracing this trend can enhance the compliance capabilities of Chinese enterprises abroad and facilitate their global expansion in the future.

3. Breaking the Cloture, Nature Of the Platforms

Data portability and interoperability are crucial for countries to dismantle the closed nature of platforms and rejuvenate traditional competition law. This is evident in expert reports from various countries, including Australia, the EU, Japan, the Netherlands, the United Kingdom, and the United States. Addressing the power asymmetry between "gatekeepers" and consumers and business users, data portability and interoperability can play a crucial role. By enabling data portability, the expenses associated with transitioning between platforms are minimized for consumers, ultimately expanding their range of options. Simultaneously, it can assist in reducing the obstacles imposed by those who control access, enabling individuals to bring their data to platforms provided by small and medium-sized enterprises and emerging startups, thereby boosting market competitiveness. Interoperability can play a crucial role in dismantling the barriers between various platforms, empowering consumers with greater ownership rights. Understanding the significance of platform data portability and interoperability goes beyond its potential impact on China's antitrust law. It also plays a crucial role in fostering network inter-connectivity and building a unified national market.

The current Anti-Monopoly Law in China lacks comprehensive provisions regarding platform data portability and interoperability. Article

45(3) of the *Personal Information Protection Law of the People's Republic of China 2021*[1], introduces the right to portability of personal information. This is a positive step towards exploring the localization of data portability rights. However, it is important to note that China's provision on the right to portability is currently limited to a statement of principle. Nevertheless, China's provision regarding the right to portability is currently only a general statement, and the practical implementation of this right requires further clarification from law enforcement authorities through the issuance of guiding cases. This provision is derived from Article 20 of the *General Data Protection Regulation (Regulation (EU) 2016/679* (GDPR[2]). Given the influence of EU legislation, other regions may look to it as a model. China should seize the chance to examine how to adapt the regulation to local needs.

Data portability has the potential to greatly enhance the movement and value of data, while platform interoperability offers a solution to unfair practices like limited choices and self-preferential treatment. By promoting openness and sharing in the Internet ecosystem, these measures can contribute to a healthier and more inclusive online envi-

[1] The Personal Information Protection Law of the People's Republic of China (Chinese: 中华人民共和国个人信息保护法; pinyin: Zhōnghuá rénmín gònghéguó gèrén xìnxī bǎohù fǎ) referred to as the Personal Information Protection Law or ("PIPL") protecting personal information rights and interests, standardize personal information handling activities, and promote the rational use of personal information. It also addresses the transfer of personal data outside of China.

[2] Council of the European Union. (2015, June 11). Presidency of the Council: 'Compromise text. Several partial general approaches have been instrumental in converging views in Council on the proposal for a General Data Protection Regulation in its entirety. The text on the Regulation which the Presidency submits for approval as a General Approach appears in annex' [PDF file]. Retrieved from [https://data.consilium.europa.eu/doc/document/ST-9565-2015-INIT/en/pdf]:

This regulation, known as the General Data Protection Regulation (GDPR), is a legal framework established by the European Union to safeguard information privacy within the European Union and the European Economic Area. Understanding the GDPR is crucial in navigating EU privacy law and human rights law, specifically Article 8(1) of the Charter of Fundamental Rights of the European Union. It also regulates the transfer of personal data outside the EU and EEA. The GDPR aims to empower individuals by giving them greater control and rights over their personal information, while also streamlining regulations for global business.

ronment. Nevertheless, there are significant hurdles when it comes to implementing both of these approaches. If not utilized correctly, they can pose a burden for businesses. One such challenge is ensuring the security and privacy of data transmissions. This vulnerability can allow other companies to take advantage of the system's openness, potentially hindering the research and development investment and innovation of large-scale platforms. Thus, it is important to approach data portability and platform interoperability in a methodical and individualized manner. In the initial phase, law enforcement authorities can provide guidance to superplatforms, encouraging them to voluntarily explore ways to achieve platform data portability and interoperability. Alternatively, authorities should have the flexibility to enforce platform data portability and interoperability as a solution to market harm resulting from the misuse of superplatforms' dominant position. This approach can then be incorporated into formal regulations once enough practical knowledge is gained. Once enough experience is acquired, it can be included in the lists of both positive and negative aspects as a proactive regulatory measure. Given the EU's extensive expertise in antitrust investigations and the fact that the obligations set by the DMA primarily affect foreign companies with minimal impact on local ones, China should exercise caution before hastily adopting the DMA.

In July 2021, the Wall Street Journal reported that Ali and Tencent were contemplating the possibility of mutually opening up their ecosystems. This reflects a positive trend towards platform inter-connectivity in China, highlighting the importance of law enforcement agencies in actively promoting and encouraging platforms to share their data and systems with one another. When it comes to anti-competitive behaviors like prohibiting external links, it is important to consider using the Essential Facility Doctrine[1] as a basis for compelling platforms to open

[1] Lipsky, A. B. Jr., & Sidak, J. G. (1999). Essential Facilities. Stanford Law Review, 51, 1187, 1190–91. Retrieved from [https://www.criterioneconomics.com/docs/lipsky-sidak-essential-facilities.pdf]:

This legal doctrine, known as the essential facilities doctrine, pertains to a specific type of monopolization claim under competition laws. Typically, it pertains to a form of anti-competitive conduct where a company with significant market influence exploits a market bottleneck to prevent competitors from entering the market. This is closely tied

their systems as a remedy after the fact. To ensure that this is done in a way that aligns with China's national conditions, it would be beneficial to issue guiding cases and establish a platform interconnection model through a phased approach, starting with a pilot program before implementing it more widely.

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to a claim for refusal to engage in business. The doctrine has its roots in United States law, but it has been embraced (sometimes with certain adjustments) by the legal systems of the United Kingdom, Australia, South Africa, and the European Union.