

China's Antimonopoly Guidelines for the Platform Economy

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April 15, 2021 · SNU AI Policy Initiative

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Background

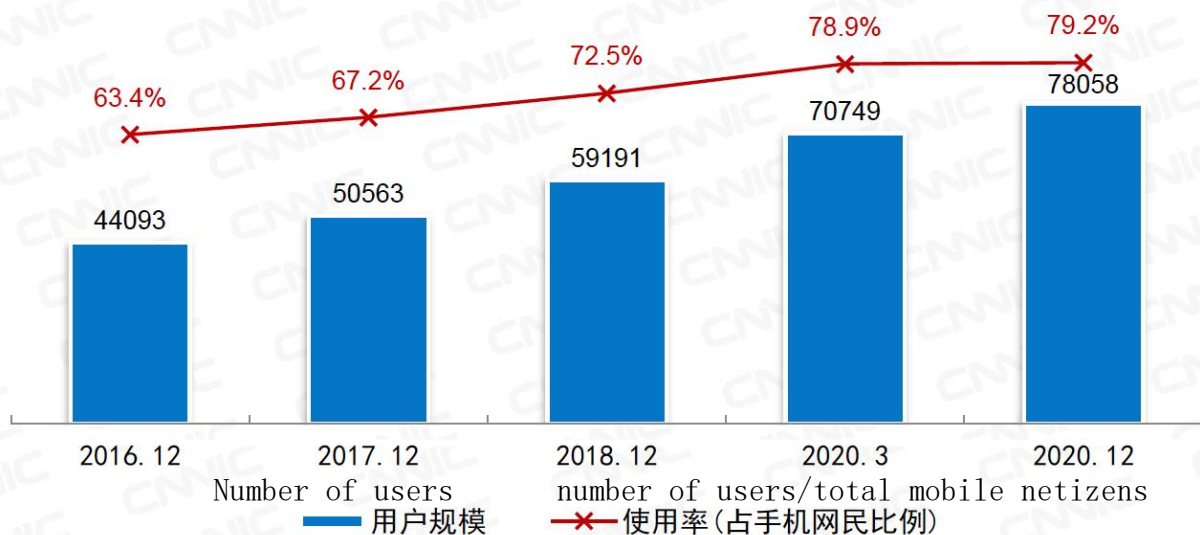
- Industrial background
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Industrial Background

Number of Mobile E-commerce Apps Users from Dec 2016 through Dec 2020 (Unit: 10 thousands)

2016.12-2020.12手机网络购物用户规模及使用率

单位：万人



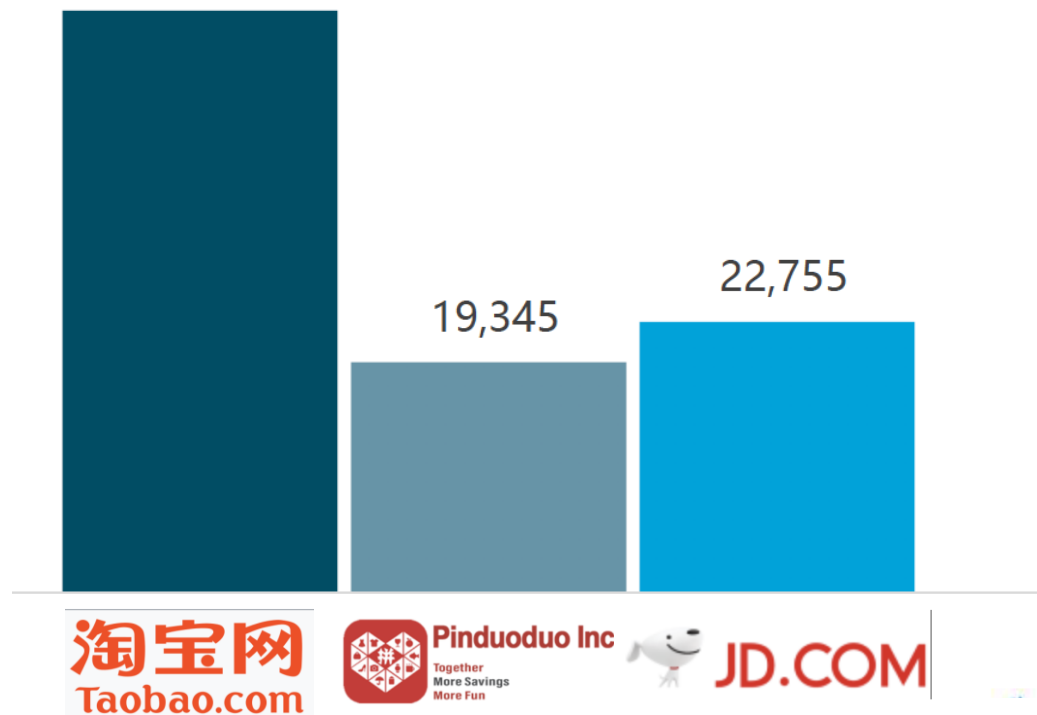
来源：CNIC 中国互联网络发展状况统计调查

2020.12

Source: The 47th Statistical Report on Internet Development in China by China Internet Network Information Center

2020年2月 TOP3电商平台月活用户数 (万)

MAU statistics for Feb 2020 of the top 3 e-commerce platforms in China (Unit: 10 thousand)



Source: Fastsata

Notable Pending Cases


京东诉天猫及阿里滥用市场支配地位“二选一”第一案将开庭

仇飞/法治周末
2020-11-26 18:17

被称为“二选一”第一案的京东诉天猫及阿里巴

11月24日至11月26日，北京市高级人民法院对

2017年11月28日，京东向北京高院针对天猫、张阿里滥用了在中国大陆B2C网上零售平台市场市场支配

2017年，高院诉，应以阿里住所地和侵权行为地确定地域管辖。2018年12月17日，北京高院作出管辖权异议一审判决，于2018年12月29日向最高人民法院提起上诉。最高人民法院审理后认为，北京高院对这起滥用市场支配地位纠纷案享有管辖权，驳回阿

双11前，格兰仕诉天猫涉嫌滥

分享到:

2019-11-05 16:27:50 字号: A- A A+

最后更新: 2019-11-05 16:30:04

导读

观察者网第一时间联系天猫，但截至发稿，天猫方面仍未搜索到格兰仕品牌的相关商品。



(观察者网讯文/口坊 编辑/尹折) 今年双11前影响正常销售，双方沟通通报称，已于2019年11月4日得到

北京知识产权法院 民事案件受理通知书

(2021)京73民初189号

北京微播视界科技有限公司、北京字节跳动科技有限公司:

关于你方诉被告: 深圳市腾讯计算机系统有限公司、腾讯科技(深圳)有限公司、腾讯科技(北京)有限公司、北京力天无限网络技术有限公司滥用市场支配地位纠纷一案,经审查,符合《中华人民共和国民事诉讼法》的相关规定,本院已经决定立案受理。



Regulatory Background

Guiding Opinions of the General Office of the State Council on Promoting the Regulated and Healthy Development of the Platform Economy (Aug.1 2019)

I. Optimizing and Improving Market Access Conditions and Reducing Corporate Compliance Costs

II. Innovating Regulatory Concepts and Methods and Implementing Inclusive and Prudent Regulation

3. Maintaining a market order featuring **fair competition**. The **SAMR** shall be responsible for formulating the relevant provisions on the supervision and management of online transactions, investigating and punishing illegal acts such as restricted transactions and unfair competition in the Internet field by abuse of market dominance, strictly forbidding platforms to unilaterally conclude exclusive service contracts, ensuring that the market players involved in the platform economy participate in market competition fairly, maintaining market price order, formulating regulatory measures according to the characteristics of price violations in the Internet field, standardizing price indications, promotions and other acts of platforms and the operators in the platforms, and guiding

Regulatory Background

Central Economic Work Conference
(Dec 2020):

Priorities for 2021:

6. Strengthening anti-monopoly supervision
and prevention of disorderly capital
expansion.



An Overview of the Guideline

Anti-monopoly Laws and regulations in China

Law: Anti-monopoly Law (Aug. 1 2008)

Judicial Interpretation: Provisions of Supreme People 's Court on Several Issues Relating to Laws Applicable for Trial of Civil Dispute Cases Arising from Monopolies (Jan. 1 2021)

Departmental Regulation:

- Interim Provisions on Prohibition of **Monopoly Agreements** (SAMR, Sep. 1 2019)
- Interim Provisions on Prohibition of **the Abuse of Market Dominance** (SAMR, Sep. 1 2019)
- Interim Provisions on the **Review of Concentrations of Undertakings** (SAMR, Dec. 1 2020)
- Interim Provisions on Prohibiting Acts of **Abuse of Administrative Authority to Eliminate or Restrict Competition** (SAMR, Sep. 1 2019)

Anti-monopoly Law (Aug. 1 2008)

Article 9 The State Council establishes the Anti-Monopoly Commission to take charge of:

1. Researching and drafting policies relevant to competition;
2. Organizing examination and assessment of the market's overall situation with regard to competition and publicizing relevant reports;
3. Formulating and releasing anti-monopoly guidelines;
4. Coordinating anti-monopoly administrative law enforcement; and
5. Other duties prescribed by the State Council.

The State Council shall determine the composition of and procedural rules for the Anti-Monopoly Commission.

An Overview of the Guideline

Anti-monopoly Laws and regulations in China

Guidelines:

- Guidelines of the Anti-monopoly Commission of the State Council on the Definition of a Relevant Market (May. 24 2009)
- Anti-Monopoly Guidelines of the Anti-Monopoly Commission of the State Council on Anti-Monopoly in the Automobile Industry (Jan. 4 2019)
- Anti-Monopoly Guidelines of the Anti-Monopoly Commission of the State Council on the Intellectual Property Industry (Jan. 4 2019)
- Guidelines of the Anti-Monopoly Commission of the State Council for Application of the Leniency Program to Cases Involving Horizontal Monopoly Agreements (Jan. 4 2019)
- Guidelines of the Anti-Monopoly Commission of the State Council for Undertaking Commitment in Anti-Monopoly Cases (Jan. 4 2019)
- Anti-monopoly Compliance Guidelines for Business Operators (Sept. 11 2020)
- Anti-monopoly Guide of the Anti-monopoly Commission of the State Council for the Platform Economy (Feb. 7 2021)

Important Document:

Implementation Rules for the Fair Competition Review System (for Trial Implementation)

An Overview of the Guideline

Chapter I General Provisions - - Article 1-4

Chapter II Monopoly Agreements - - Article 5-10

Chapter III Abuse of a Dominant Market Position - - Article 11-17

Chapter IV Concentration of Undertakings - - Article 18-21

Chapter V Abuse of the Administrative Power to Eliminate or Restrict Competition - - Article 22-23

Chapter VI Supplementary Provisions - - Article 24

An Overview of the Guideline

Article 1 Purpose and Basis of the Guideline

This Guideline is formulated in accordance with the Anti-Monopoly Law of the People's Republic of China (hereinafter referred to as the "Anti-Monopoly Law") and other legal provisions with a view to preventing and stopping monopolistic practices in the platform economy sector, protecting fair market competition, promoting standardized, orderly, innovative and sound development of the platform economy, and safeguarding consumer interests and public interests.

Article 3 Basic Principles

1. Protecting fair market competition.
2. Legally conducting scientific and efficient supervision.
3. Stimulating the dynamism of innovation and creativity.
4. Safeguarding the legitimate interests of all parties.

Highlights of the Guideline

Market Definition

1. Generally necessary (Deleting the “might determine monopolistic acts without defining the market” in certain cases in the draft version)
2. The principle of case-by-case analysis
3. For the relevant commodity market, the basic method is substitution method

Enumerating specific factors to consider:

Demand substitution analysis may be conducted based on factors such as platform functions, business models, application scenarios, user groups, multilateral markets and offline transactions; when the competition constraints caused by supply substitution on undertakings' conduct is similar to those caused by demand substitution, supply substitution analysis may be conducted based on factors such as market access, technical barriers, network effects, lock-in effects, transfer costs and cross-border competition.

Highlights of the Guideline

Market Definition

4. Allowing for defining multiple markets

Relevant commodity markets may be defined based on commodities on one side of the platform; multiple relevant commodity markets may also be defined based on the commodities of multiple sides involved in the platform, and the relationship and influence among these relevant commodity markets shall be considered. When the cross-platform network effects existing in the platform can impose sufficient competition constraints on undertakings of the platform, the relevant commodity markets may be defined based on the platform as a whole.

Highlights of the Guideline

Monopoly Agreements

1. Emphasis on monopoly agreements concluded/carried out by making use of data, algorithms, platform rules, etc.
2. Guidance for analyzing hub-and-spoke agreements

To analyze whether hub-and-spoke agreements are monopoly agreements as regulated under Articles 13 and 14 of the Anti-Monopoly Law (i. e., horizontal agreements and vertical agreements), the following factors may be considered: whether platform-based operators with competitive relationships between them reach and implement monopoly agreements by means of technical means, platform rules, data, algorithms or other ways, so as to eliminate or restrict competition in relevant markets.

Highlights of the Guideline

Abuse of a Dominant Market Position

1. The Essential Facility Doctrine

Article 14 Refusal to Deal

Operators in the platform economy sector with a dominant market position may abuse their dominant market positions by refusing to enter into transactions with transaction counterparts without justifiable reasons, so as to eliminate or restrict market competition. In the analysis of whether a refusal to transact is constituted, the following factors may be considered:

*5. whether an operator which **controls necessary facilities** in the platform economy sector refuses to enter into transactions with counterparts on reasonable terms.*

*In the determination of **whether a relevant platform constitutes a necessary facility**, it is generally necessary to comprehensively consider **the platform's data occupancy status, substitutability of other platforms, the existence of potential available platforms, the feasibility of it developing into a competitive platform, the degree of dependence of transaction counterparts on the***

Highlights of the Guideline

Abuse of a Dominant Market Position

2. Exclusive Dealing (Art. 15)

Exclusive dealings may be conducted by written agreement, telephone, orally, or in any form as agreed with the transaction counterparts, or by setting up restrictions or obstacles in respect of platform rules, data, algorithms, technology or other aspects.

In the analysis of whether acts constitute exclusive dealings, the focus should be the following two situations: 1. restrictions imposed by platform operators through such punitive measures as shop shield, search right reduction, traffic restriction, technical obstacles and deposit deduction, which may cause direct damage to market competition and consumer interests, may generally be determined as constituting transaction limitation; and 2. restrictions imposed by platform operators through such incentive modes as subsidies, discounts, preferential offers and traffic resource support, which may have a certain positive effect on the interests of platform-based operators and consumers and the overall welfare of society but have an obvious impact of eliminating or restricting market competition as proved by evidence, may also be determined as constituting transaction limitation.

3. Differentiated Treatment (Art. 17)

Operators in the platform economy sector with a dominant market position may abuse their dominant market positions by implementing, without justifiable reasons, differentiated treatment for transaction counterparts with the same transaction terms, so as to eliminate or restrict market competition. In the analysis of whether differentiated treatment is constituted, the following factors may be considered:

- 1. implementing, based on big data and algorithms, differentiated transaction prices or other transaction terms according to transaction counterparts' payment ability, consumption preferences, use habits and other aspects;*
- 2. implementing differentiated criteria, rules or algorithms; and*
- 3. implementing differentiated terms of payment or transaction modes.*

The same terms mean that there are no differences substantially affecting transactions between transaction counterparts in terms of transaction security, transaction cost, credit status, transaction link, transaction duration and other aspects. Differences in transaction counterparts' privacy information, transaction history, individual preferences, consumption habits and other aspects obtained by the platform during transactions will not affect the determination that the transaction counterparts have the same terms.

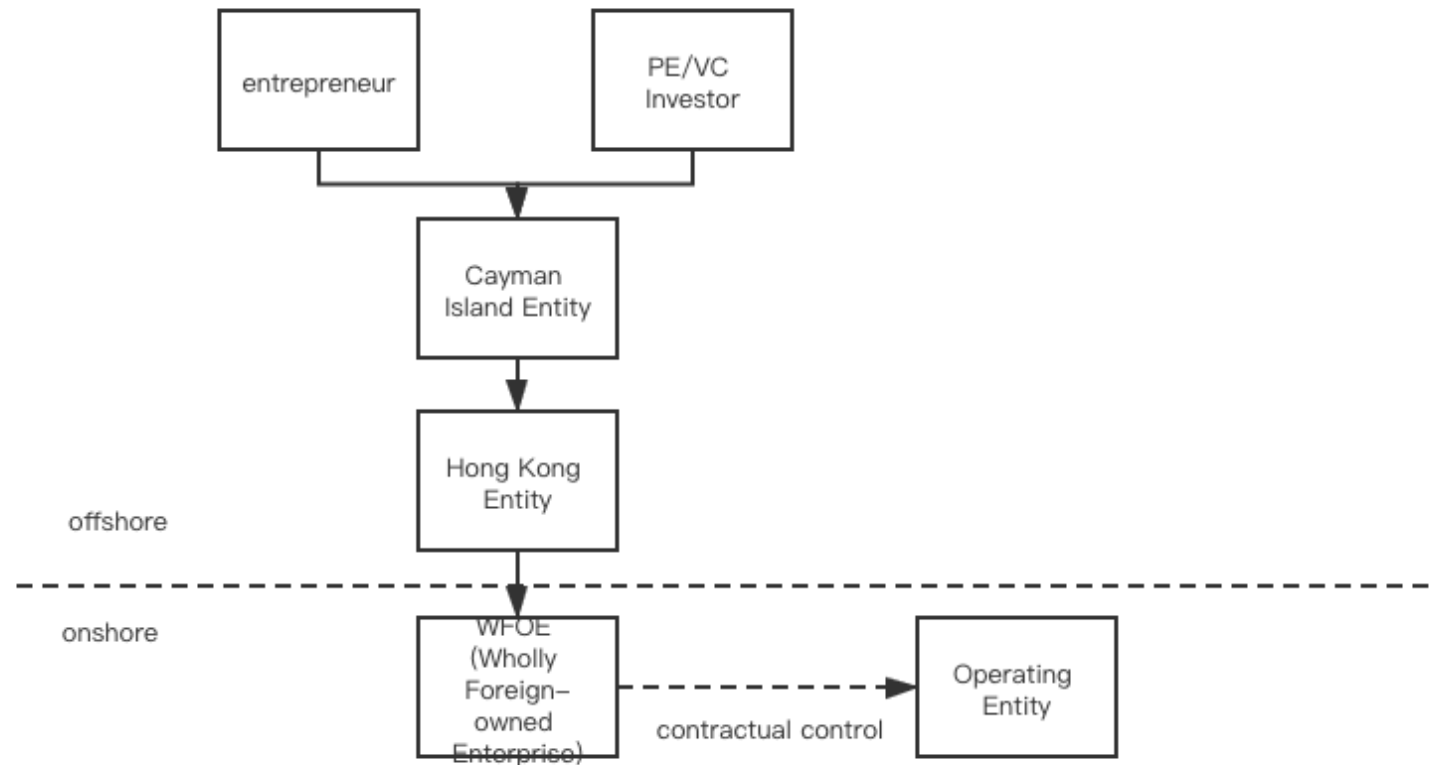
Highlights of the Guideline

Concentration of Undertakings

1. VIE structure under merger control
2. Proactive investigation by regulators
3. Structural & behavioral remedies

1. VIE structure under merger control

A typical VIE structure



2. Proactive investigation by regulators

Article 19 Proactive Investigation by the Anti-monopoly Law Enforcement Authority under the State Council

For any concentration of undertakings which fails to meet the criteria for filing in accordance with Article 4 of the Provisions of the State Council on the Criteria for Filing of Concentrations of Undertakings, but the facts and evidence collected according to the prescribed procedures show that the said concentration of undertakings has or is likely to have the effect of eliminating or restricting competition, the anti-monopoly law enforcement authority under the State Council shall carry out an investigation in accordance with the law.

Operators may take the initiative to make a filing to the anti-monopoly law enforcement authority under the State Council any concentration of undertakings that fails to meet the criteria for declaration.

The anti-monopoly law enforcement authority under the State Council pays careful attention to concentrations of undertakings in the platform economy sector where one operator participating in the concentration is a start-up or an emerging platform, the turnover of an operator participating in the concentration is relatively small because it adopts a free or low-price mode, the relevant market is relatively highly concentrated, and the number of participating competitors is small. Where any concentration of undertakings in the platform economy sector fails to meet the criteria for declaration but has or is likely to have the effect of eliminating or restricting competition, the anti-monopoly law enforcement authority under the State Council will investigate and handle it in accordance with the law.

3. Structural & behavioral remedies

Article 21 Remedies

For concentrations of undertakings that have or are likely to have the effect of eliminating or restricting competition, the anti-monopoly law enforcement authority under the State Council shall make a decision in accordance with Article 28 of the Anti-Monopoly Law. For those concentrations of undertakings which are not prohibited, the anti-monopoly law enforcement authority under the State Council may decide to attach the following types of restrictive conditions:

- 1. **structural conditions** such as divestiture of tangible assets, intellectual property rights, technology, data, other intangible assets or relevant equities;*
- 2. **behavioral conditions** such as opening networks, data, platforms or other infrastructures, licensing key technologies, terminating exclusive agreements, modifying platform rules or algorithms, or promising to be compatible or not reduce the level of interoperability; and*
- 3. **comprehensive conditions** that combine structural conditions and behavioral conditions.*

The Latest Case: Punishment for Alibaba's Abuse of Dominant Market Position

公告

今天，我们收到《国家市场监督管理总局行政处罚决定书》，对此处罚，我们诚恳接受，坚决服从。我们将强化依法经营，进一步加强合规体系建设，立足创新发展，更好履行社会责任。

阿里巴巴集团
2021年4月10日



“We accept the penalty with sincerity and will ensure our compliance with determination. We will operate in accordance with the law with utmost diligence, continue to strengthen our compliance systems and build on growth through innovation to serve our responsibility to society.”

The Latest Case: Punishment for Alibaba's Abuse of Dominant Market Position

I. Market Definition:

Commodity Market: Online Retailing Platform Service Market (substitution analysis)

Geographic Market: China (substitution analysis)

II. Dominant Market Position

1. Market share of Alibaba (judged by revenue and sales volume)
2. How Concentrated the relevant market is
3. Market control ability of Alibaba
4. Financial and technical conditions of Alibaba
5. To what extent other operators' transactions depend on Alibaba (network effect and lock-in effect, branding, switching cost)
6. How difficult market entry is
7. Superiority of Alibaba in related markets (logistics, payment, cloud computing)

III. Abuse of Dominant Market Position

The Latest Case: Punishment for Alibaba's Abuse of Dominant Market Position

Possible Trends

- The Administrative Guidance Letter from SAMR (ongoing oversight)

Thank you!