The Regulation Anti-Unfair Competition Law on Either-or Choice Behavior of Online Platforms in E-Commerce

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Abstract. With the prosperous development of the digital economy, major e-commerce platforms have increased their competitive advantage by implementing either-or choice behavior on operators within their platforms. Compared to the anti-monopoly law, which has strict application standards, the Anti-Unfair Competition Law covers a wider range of either-or choice behavior. However, the concept of neutrality of the article exclusive of Internet (the Article 12) neglects the infringement properties of unfair competition, and the enumeration of behaviors lacks typology. If the general articles are too flexible, it will lead to the offsite of application, and the main elements of judgment rely excessively on subjective measurement. In this regard, based on accurately grasping the infringement attributes of the conduct, the abstract features of the Internet article are clarified and supplemented, and the types are classified according to the standard of "directly affecting the free decision of consumers". At the same time, the principle of "more or less" can be used to dynamically understand the application of Internet articles and traditional regulatory provisions in the regulation of unfair competition in the network environment. In addition, the principle helps to rationalize the relationship between the Internet underwriting articles and the general article, more objectively qualify the subjective discretionary scope of the general articles by whether the behavior has a legitimate interest and positive impact, and reduce the escape of the Internet article.

Keywords: either-or choice behavior, anti-unfair competition, Internet article, general articles.

1. Introduction

With the rapid development of mobile communication technology, people's consumption place has gradually shifted to the virtual Internet environment. Especially since the outbreak of COVID-2019, the digital economy has become a powerful engine for the healthy development of domestic economic and social life. Some e-commerce platforms take advantage of the operators' dependence on themselves to implement the either-or choice behavior, seeking more trading opportunities, damaging the legitimate rights and interests of other operators and consumers, and disrupting the market competition order. In 2021, the State Administration for Market Regulation (SAMR, henceforth) imposed administrative penalties on the either-or choice monopolistic behavior carried out by Meituan and Alibaba, two leading e-commerce platforms, respectively, which triggered people's heated discussion on the either-or choice behavior. However, when the market fails, in order to give full play to the function of economic law in maintaining fair competition in the market, it is necessary to coordinate the regulation of competition laws under various economic laws. As an important part of it, the Anti-Unfair Competition Law should also play its due regulatory role and function.

2. The Definition and Influence of the Either-or Choice Behavior of E-commerce Platform

The either-or choice behavior of e-commerce platforms is the behavior that platform operators make use of their comparative advantage in the transaction, and require the merchants in the platform to only trade with themselves by using technical means, reaching an agreement or other means. This behavior is characterized by concealment and compulsion. The either-or choice behavior occurs between platform operators and merchants in the platform, and it is directly operated in the background by the platform operators, with a certain degree of concealment. Secondly, the platform

operators are in a relatively advantageous position in the transaction because the merchants in the platform have a strong dependence on them, which can make the merchants in the platform give up the expected benefits on other platforms, reflecting the mandatory behavior. In addition, according to whether technical means are used or not, the either-or choice behavior of e-commerce platforms can be divided into soft behavior and hard behavior. The former shows that the platform operators provide the merchants in the platform with an either-or choice agreement that does not use technical means. The latter shows that the platform operators influence the clout sources of the operators in the platform through a series of technical means, which damages their economic interests and forces the merchants to give up business expansion on other platforms. Soft behavior and hard behavior often exist in the same either-or choice behavior. Platform operators use the former to force merchants in the platform to choose one, while the latter ensures the smooth implementation of the either-or choice behavior.

The direct impact of either-or choice behavior is that the merchants in the platform cannot exist on other competitive platforms at the same time, which is essentially a restricted trading behavior. However, as a common competitive arrangement and means, the either-or choice behavior of e-commerce platforms has its rationality, and it has both positive and negative market influences. From the perspective of positive market effect, for the platform itself, signing an either-or choice agreement between platform operators and high-quality merchants can not only bring the bound user clout of merchants, but also enhance its image and bring intangible economic benefits. The stickiness of users' businesses and platforms is often tied together. The more high-quality businesses on the platform, the more favorable it is to improve the competitiveness of the platform (Huo, 2021). From the perspective of negative market impact, for merchants, because of their dependence on platform operators in repeated games with the platform, once the merchants refuse the either-or choice agreement proposed by the platform to convert the platform, the convenience provided by the existing platform and the investment reconstruction of the new platform will become the cost of obtaining uncertain expected benefits. Under equilibrium, most merchants, especially small and medium-sized merchants, will choose to accept the either-or choice agreement. For other competitive platforms, due to the limited total number of users, when the platform operators with the dominant trading position plunder the user clout in an either-or choice way, the number of users lingering in the merchants' shops will be reduced, and their living space will be continuously compressed and finally withdrawn from the market (Wang, 2020).

3. The Status Quo of Legal Regulation of Either-or Choice Behavior on the Internet Platform

3.1 Legislative Content of the Legal Regulation of the Either-or Choice Behavior of the Internet Platform

In the field of competition law, there are three laws that can be used as the legal basis for regulating the either-or choice behavior of Internet platforms, namely, the Anti-Monopoly Law, the Anti-Unfair Competition Law and the E-Commerce Law, In terms of maintaining the order of market competition, the Anti-Monopoly Law and the Anti-Unfair Competition Law provide different degrees of regulation for behaviors that disrupt the order of market competition. The former aims to provide a competitive environment for market players, while the latter guarantees free, fair, and honest competition for market players based on the existence of a competitive environment. According to the legislative intent of the E-commerce Law, Article 35 is directly concerned with the market order, but from the perspective of dealing with the internal relationship between the e-commerce platform and the operators within the platform, and more directly regulates the either-or choice behavior of the e-commerce platform.

3.2 The Necessity and Rationality of Applying Anti-Unfair Competition Law

When the either-or choice behavior of the Internet platform enters the field of vision of competition law, the platform operators who implement the either-or choice behavior at least have a relatively dominant position in the transaction. In this case, in order to seek greater economic benefits, platform operators generally do not only implement the either-or choice behavior for individual businesses, so private relief cannot curb the either-or choice behavior implemented by the platform. In order to balance the weak position of merchants in the cooperative relationship with operators, it is necessary for the state to effectively regulate their behaviors with the help of the Anti-Monopoly Law and the Anti-Unfair Competition Law. In 2021, SAMR officially launched an anti-monopoly investigation on Alibaba and Meituan, and regulated the either-or choice behavior with the Anti-Monopoly Law. However, there are many practical obstacles to regulating the either-or choice behavior of Internet platforms from the perspective of anti-monopoly.

First of all, the application threshold of the Anti-Monopoly Law is high, and it is difficult to effectively investigate and deal with the either-or choice behavior carried out by platform operators with comparative advantages but not yet market dominance. Generally speaking, the Internet platforms that implement the either-or choice behavior often have certain market control ability, but only when the platform's market control ability is enough to reach the market dominance can there be room for the application of the Anti-Monopoly Law. Therefore, the Anti-Monopoly Law cannot identify and regulate the either-or choice behavior of all Internet platforms.

Secondly, the process of analyzing and demonstrating the illegality of the application of the Anti-Monopoly Law is strict and complicated. To determine whether platform operators abuse market dominance or not requires a four-step demonstration: market dominance—abuse of market dominance—hazard analysis of behavior—no justifiable reason. Especially when it is determined that the market subject has a dominant market position, it is necessary to further define the scope of the relevant market. However, in the Internet environment, combined with the characteristics of the Internet, the problems, including "the commodity markets involved by the merchants are extensive", "the geographical scope is blurred", and "the bilateral markets connected by platforms" all pose a new test to the traditional method of defining relevant markets (Jiao, 2020). It is necessary to rule out that the platform constitutes an abuse of the market-dominant position, which is unjustifiable and harmful. Because the platform has the attribute of the manager, its implementation of either-or choice behavior can also be based on maintaining the normal and continuous operation of the platform. The either-or choice behavior has certain economic rationality and positive effects, so it cannot be regarded as an illegal behavior unilaterally.

Finally, the Anti-Monopoly Law should be applied moderately. Competition can effectively allocate market resources. When the market can regulate itself or the Anti-Unfair Competition Law is sufficient, the Anti-Monopoly Law does not need to appear. Once the Anti-Monopoly Law, the state will interfere in the market behavior excessively, disrupting the competition order, and even affecting the market structure. Once the law is wrongly executed, it will not only damage the authority of law enforcement agencies, but also waste law enforcement resources. In practice, the Anti-Monopoly Law mainly focuses on administrative punishment, and law enforcement agencies often post expensive fines to market players who practice monopolistic behaviors. These behaviors may bring the consequences of reputation damage, capital chain break, difficult turnover and finally unbearable withdrawal from the market, and these consequences are often difficult to remedy afterward.

4. The Legislative Defects of Anti-Unfair Competition Law Regulation of Either-or Choice Behavior of E-commerce Platform

4.1 Improper Regulation and Absence of Internet Article

The introduction of the article exclusive of Internet (the Article 12) has filled the gap of unfair competition in the network field in legislation, but there are still obvious problems of improper regulation. Internet article adopts the model of "concept + enumeration + fallback". In principle, this legislative model covers all network unfair competition behaviors that can be predicted by existing legislation through concepts. Enumeration can specify the abstract core elements. The miscellaneous provisions make up for the limitations of the existing legislative technology, which could have formed a benign closed-loop system. However, there are a large number of problems in the Internet articles: the definition of unfair competition on the Internet is too general, the typical characteristics of such behaviors are not abstracted, and the constituent elements are empty. For example, Internet articles define the core characteristics of unfair competition in the Internet article as "obstruction" and "destruction", but the essence of unfair competition lies in obtaining more trading opportunities by obstructing and destroying the business interests of other market players. These two characteristics are of course applicable to other competitive behaviors (Yang, 2020). In addition, several network unfair competition behaviors listed in this article lack classification combined with the characteristics of the Internet economy, ignoring the consideration of consumers' interests. For example, the "clout hijacking" behavior of unfair competition concurs with the description of the Article 12 (2) of the Anti-Unfair Competition Law which is to consider the viciousness of the behavior from the perspective of the operators. Moreover, several behaviors are not antagonistic and exclusive, so it is difficult to form a strict legislative framework, which leads to the limitation of the regulation scope of Internet articles, and it is difficult to provide a legal basis for the regulation of most unfair competition behaviors on the Internet. The miscellaneous provisions of Internet articles are too brief, and directly take the widest range of "interfering with or sabotaging" in the definition as the basic elements of fallback, which continues the emptiness of the concept. And the scope of the concept is too large and lacks operability.

In addition, Internet articles take "technical means" as the only element to constitute unfair competition on the Internet, which makes the regulation scope of Internet articles wide and requires sufficient legal argumentation when it is applied. And this becomes one of the important reasons why a large number of cases on the Internet move towards the general articles. The Internet either-or choice behavior implemented by technical means is a non-negotiable compulsory unfair competition behavior because it touches the underlying technical operation logic of products and services (Huang & Tan, 2021). Although technical means belong to the typical characteristics of Internet unfair competition, they are not the only characteristics that constitute network unfair competition. This constitutive requirement not only excludes the Internet unfair competition behaviors that do not use technical means, such as forcing "merchants to sign agreements" and "reducing service fees", but also generally includes the traditional unfair competition behaviors implemented in the Internet environment through technical means into its regulatory scope, such as the technical screen-flooding behavior for the purpose of "false propaganda". In addition, the technical means are neutral, and only when the market main body uses the technical means to cause the consequences which are not allowed by the law, the technical means can be condemned. It downplays the subjective fault characteristics of unfair competition on the Internet as a special infringement, and it is difficult to judge the subjective viciousness of the platform that implements the either-or choice behavior. Especially when the platform has the dual roles of operator and manager, it is difficult to objectively judge whether the subjective purpose of using technical means to implement incompatible behaviors is to manage the platform in good faith or malicious competition.

The existence of technology directly leads to the absence of Internet regulation, and its identification difficulty and burden of proof are also one of the reasons for the absence of Internet regulation in practice. The behavior of either-or choice often affects the user clout of shops by

reducing the search weight of shops and removing goods by technical means. Reducing the search weight is one of the most important means. In normal business activities, the platform operators will allocate search weights to merchants in the platform based on various factors such as store collection rate, service quality and consumer preference, and the final indicators will be automatically generated from background data. This means that there are many factors influencing the search weight of shops, and the results are always in dynamic change. When the platform operators maliciously restrict the shop clout of the merchants on the platform and result in a decrease in their search weight, it is often difficult to identify whether there is a causal relationship and the strength of the causal relationship between behavior and results. In addition, the merchants in the platform are in a weak position of information, and as the beneficiaries of the data services provided by the platform, their data are mostly stored in the servers of the platform operators, so they do not have the conditions for proof. Even though it has obtained the background data of the platform operators' either-or choice behavior, it takes the merchants a high price to prove the evidence because they often do not have relevant skills.

4.2 The Offside and Limitation of the Application of General Articles

With the continuous development of information technology, the new Internet unfair competition behavior patterns implemented with algorithms and data as basic elements are more diverse and complex. The abstract general articles can bring the new unfair competition behavior into the scope of regulation when other articles cannot. However, while the general articles are extremely open, they also show the problems of low application threshold, small difficulty and strong arbitrariness. Compared with other articles, general articles are made up of advocacy words that conform to the legislative value, lacking norms centered on behavior patterns, clarity and anticipation of rules, and so on, which reduces the difficulty of application. Although the newly added Internet articles in the Anti-Unfair Competition Law in 2018 stipulate the regulation path of unfair competition in the network field, the application and trial-and-error costs are too high due to the highly abstract definition of the concept of Internet articles and too limited enumerations. In quite a few cases, the courts directly use the general articles as the basis for judging. As of July, 2021, among the 29,474 cases of Anti-Unfair Competition Law included in the database of the Magic Weapon of Peking University, 8,255 cases, accounting for about one-third, were applied to Article 2 (Peng & Yu, 2021). As a value guiding article, general articles are unreasonably frequently applied or even abused. Too much flexibility in the application of general articles will not only lead to legal application problems such as the escape from Internet articles, but also directly lead to specific Internet unfair competition behaviors that cannot be regulated as expected, challenging the legal authority and making it difficult to achieve substantive justice.

In addition, the good faith principle and business ethics of the general articles have strong morality and subjectivity, and their contents are abstract. In practice, there are some objective factors such as judging that the behavior violates the good faith principle and business ethics only based on competition damage. And this practice is improper, because it does not consider the positive market effect brought by the behavior and the degree of competition damage. On March 20, 2022, the Interpretation by the Supreme People's Court of Several Issues Concerning the Application of the Anti-Unfair Competition Law of the People's Republic of China (Interpretation, henceforth) came into effect. Although Article 3 of the Interpretation provides a standard for the determination of business ethics, there are still some problems. For example, this article only provides the criteria for judging business ethics, but does not involve the principle of good faith. At the same time, the main judgment elements are still subjective, ignoring the comprehensive measurement of the objective market benefits of unfair competition. However, whether the scope of evaluation of general articles is only subjective or both subjective and objective depends on the judge's personal cognition of general articles. It is the biggest application demand of this article to enlarge and explain the core elements of the general articles through technical means such as legal interpretation and legal argumentation, which provides a huge discretionary space for judges (Guo, 2016). However, it also further enhances the possibility of "different judgments in the same case", which makes the general

articles less standardized than the application of other articles, and reduces the accuracy and predictability of the application results of the law.

5. The Improvement of the Regulation of Anti-Unfair Competition Law of E-commerce platform's Either-or Choice Behavior

5.1 Understanding and Optimizing the Legal Provisions of Behavior Regulation

Unfair competition is essentially an infringement behavior, with subjective fault as the core element. Internet articles should not ignore the infringement attribute of Internet unfair competition. Before the unfair competition was regulated by separate departmental laws and regulations, countries generally included it as an infringement into the regulation scope of civil law. With the development of social life, the unfair competition was regulated by separate legislation. The most fundamental feature of infringement behaviors is the principle of fault-based liability. However, the technical means of Internet articles are neutral and objective, and only through technical means, its infringing property is separated from objective behavior. However, if the either-or choice behavior carried out by Internet operators by technical means is recognized as fault liability, it will directly increase the burden of proof of the victim, making the element of fault becomes another barrier to the application of Internet articles. Therefore, the subjective elements of network operators can be defined as the fault presumption responsibility, and the burden of proof can be inverted to reduce the burden on victims.

Several unfair competition behaviors listed in Internet articles lack typology and do not have extensibility (Xie, 2021). Therefore, it is urgent to make a typological analysis of unfair competition on the Internet by combining examples and behavior characteristics, and making clear regulations. The essence of the Internet economy is the consumer economy. As the Internet market is no longer limited by time and space, the consumer market far exceeds offline business, and the decisive role of consumers is more prominent. Platform operators should choose high-quality merchants and optimize platform functions to cater to consumers' preferences so as to attract more user clout. In addition, in Article 2 of the Anti-Unfair Competition Law, consumer rights and interests become one of the constitutive requirements of unfair competition, which means that consumer rights and interests are no longer the incidental protection part of merchants' rights and interests, and the Anti-Unfair Competition Law can also become a relief path for consumers (Chen, 2018). Therefore, the behavior enumeration of Internet articles can add the elements of consumer interests to divide the behavior types.

It is reasonable to take the interests of consumers as the standard of Internet articles, but the interests of consumers are too broad. If all the Internet unfair competition behaviors that harm the interests of consumers are included in the regulation scope of Internet articles, there will inevitably be suspicion of excessive market intervention, so it is necessary to explain the interests of consumers in a limited way. As long as consumers' choices are free, the competition in the Internet market is fair. Therefore, the first step in limiting consumer interests is to protect consumers' freedom of decision-making. Further discussion reveals that traditional unfair competition, such as confusion and false propaganda, also violates consumers' freedom of decision making, and therefore cannot be regulated by the Internet only if technical means are used. The fraud and concealment of traditional unfair competition behaviors to consumers are based on consumers' voluntary choices, while the "clout hijacking" and "forced uninstallation" regulated by Internet articles directly infringe on consumers' freedom of decision-making. Therefore, the second step to limit the interests of consumers is to limit the way of infringement to direct infringement (Zhang & Chen, 2021). To sum up, the specific requirement of taking consumers' interests as the type of Internet articles is that the behavior "directly infringes consumers' decision-making freedom".

5.2 Straightening out the Applicable Relationship of Relevant Articles

In reality, it is difficult to completely separate the Internet unfair competition behavior pattern from the traditional unfair competition behavior pattern, and it needs to be understood and applied dynamically. Things are always intrinsically connected, not always as antagonistic and exclusive as A and non-A. When the attributes of Internet unfair competition behavior and traditional unfair competition behavior appear in the same behavior, the principle of "more or less" can be adopted to characterize it. That is, when an unfair competition has both new and traditional attributes, the law should be dynamically selected according to the proportion of the two attributes in the case. In August, 2021, the SAMR issued the Regulation on Prohibiting Unfair Competition on the Internet (Draft for Public Comment) (Regulation, henceforth). The regulation identifies the behavior of using other people's or enterprise's names to increase the search weight without authorization and the behavior of fictitious data of clout as confusion and false propaganda. Even though the above-mentioned behaviors all appear in the Internet environment and use technical means, they still aim at the confusion and false propaganda in essence, and the traditional unfair competition attribute occupies a higher proportion. These regulations show traces of the "more or less" principle.

According to Article 1 of the Interpretation, the three acts listed in the Internet articles or the traditional unfair competition articles should be given priority in solving the Internet unfair competition. For example: when the enumeration behavior cannot be regulated, the Internet article shall apply; when the miscellaneous provisions are also difficult to solve, they will be solved by the general articles. However, the applicable conditions of the miscellaneous provisions and the general articles are not clear. The "obstruction and destruction" of the Internet articles has a broad connotation and weak operability, which makes many courts formally use the Internet articles in practice, but actually interpret reasons according to the analysis path of general articles (Diao, 2021). In view of the difficulties in the operation of the miscellaneous provisions of Internet articles, Article 22 of the Regulation lists seven subparagraphs for the application of the miscellaneous provisions, which enhances the applicability of the miscellaneous provisions. The first four subparagraphs of this clause are the service operation and cost impact on other operators, the fifth subparagraph is aimed at consumer welfare, and the sixth and seventh subparagraphs are the duration and space impact on behavior. It is precise because of the clarity of the consideration elements of the miscellaneous provisions that the application difficulty of the miscellaneous provisions becomes higher than the good faith principle and business ethics of the general articles. There are still judges who refuse to apply the miscellaneous provisions to avoid the application difficulty and mistakes and move towards the general articles. In order to reduce the possibility of moving to general articles after the implementation of the Regulations, it is necessary to clarify the constitutive requirements of general articles and raise the application threshold of general articles.

The general articles are vague and broad mainly because of the subjective generalization of business ethics and the good faith principle, which needs to be objectified and concretized to better apply to practice. Paragraph 2 of Article 3 of the Interpretation refines the constitutive requirements of business ethics. However, careful analysis reveals that it has not jumped out of the strange circle of subjectivity. This paragraph identifies business ethics from six angles: industry rules or business practices, the subjective state of merchants, the choice will of counterparties and the three rights and interests protected by the Anti-Unfair Competition Law. Although the latter three angles are objective analyses, they have broad connotations, while the first three angles are the essential requirements of business ethics. After analysis one by one, the first three are extremely subjective. For example, under the background of economic globalization, market ideas and habits are rapidly updated and iterated, and industry rules and business practices are unwritten norms, which are changeable and fuzzy. Therefore, it is still necessary to further refine the relevant regulations, objectify and concretize the principles of business ethics and good faith, and objectively identify them with "whether they have legitimate interests" as the standard to realize the combination of subjective and objective (Kong, 2021). In the Baidu bidding case, the Beijing High Court held that although 360 Securit pleaded "bidding some Baidu websites for the benefit of the public", they not only did not get the consent of

Baidu operators, but also intentionally guided users to install 360 Security Browser to access their operated pages in order to get more clout. This behavior damaged Baidu's right to operate, exceeded the rationality of their behavior and violated business ethics. In this case, the defendant's bid-inserting behavior itself pursues the public interest, which is a necessary legitimate competitive interest. However, without the consent of the plaintiff, it has carried out a series of behaviors to realize its own business interests, which lost its legitimacy, thus violating the business ethics and the principle of good faith.

6. Conclusion

The Fourteenth Five-Year Plan points out that it is necessary to speed up digital development and build digital China. The prosperity and development of China's Internet economy are the general trend. In order to compete for the limited attention of consumers, e-commerce platforms bind high-quality merchants to seek more trading opportunities by either-one choice behaviors, which damages the legitimate rights and interests of other operators and consumers and disrupts the market competition order. Under the background that the existing legislation is insufficient to cover the either-one choice behavior of e-commerce platforms at all levels, it is particularly important to give full play to the flexibility of the Anti-Unfair Competition Law. By sorting out the logical relationship between Internet articles and other articles, it aims to point out the infringement attribute of unfair competition and attach importance to the consumer interests that need core protection under the Internet economy. It is worth pointing out that the principle of "more or less" can dynamically define the relationship between Internet articles and traditional unfair competition articles, and satisfy the development needs of new things. However, when determining which nature is dominant, we should not only consider the technical means, subjective faults and the influence on consumers' decision-making freedom, but also consider whether there are other factors in combination with the nature of individual cases. The complexity of this principle needs to be further explored. At the same time, future research should focus on the complex new unfair competition behaviors in the field of the platform economy, provide a more perfect theoretical basis for behavior regulation, and enhance the accuracy and effectiveness of legal norms.

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