

# Research on the Path of Identifying the Online Live-Streaming Marketing Behaviors within the Framework of the Anti-Monopoly Law of the People's Republic of China

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**Abstract.** Although online live-streaming marketing shows nowadays play an important role in stimulating consumption and activating economic circulation, problems also arise and become more prominent, especially reflected from the marketing participants who are suspected of monopoly damage to the order of market competition. However, due to the absence of applicable antitrust norms for online live-streaming marketing, the legislation by far is insufficient for the determination of the subject in the process of the Anti-Monopoly Law. Worse still, there are legislative defects in constituting monopoly agreements and complex factors affecting the dominant market position. In recent years, foreign countries have attached great importance to the Internet antitrust issue and taken a number of powerful measures, such as the implementation of the hub-and-spoke conspiracy for identifying Internet platform and the clarification of the platform monopoly "synergistic behavior" judgment standards, etc., which is worthy of reference. China, in this sense, should adopt the antitrust law rules for the determination of the unincorporated form of the subjects in online live-streaming marketing, improve the identification path of online live-streaming marketing constituting the hub-and-spoke Conspiracy and collaborative behavior, update the determination criteria of the market dominance in the online live-streaming marketing and enrich the antitrust law determination procedure. All these methods will help to optimize the antitrust law identification path of the online live-streaming marketing.

**Keywords:** online live-streaming marketing, the Anti-Monopoly Law of the People's Republic of China, relevant market definition, hub-and-spoke conspiracy, cooperative behavior.

## 1. Background and Problem Introduction

The online live-streaming marketing refers to the marketing activities of promoting goods and services to the public through platforms on the Internet in the form of audio and video. As a way integrating online and offline sales channels, it is one of the products of the Internet platform economy and occupies a considerable share of both the online and real economy in China. However, some head anchors, as the subjects that enjoy a large share of market, tend to take advantage of their great speech power to get rid of those competitors weaker than themselves and prevent competitions. These acts, actually, can be accused of monopoly, and whether these acts should be regarded as monopolistic conducts is largely dependent on the determination path of relevant regulations (the Antitrust Law/the Anti-Monopoly Law) on the live-streaming marketing.

As live-streaming marketing, an emerging market form, is developing, it brings new challenges to the traditional antitrust law determination path. Should the subjects of live streaming marketing be subject to antitrust regulation? What is the definition of the relevant market in such marketing? Can the head anchors constitute a dominant position in the market? In what way is the monopolistic behavior of the live streaming marketing subject determined? The above questions are important for the legal regulation of live streaming marketing in the perspective of antitrust law and require profound study.

## **2. The Identification of Subjects and Definition of Relevant Market of Live-Streaming Marketing from the Perspective of the Anti-Monopoly Law of the People's Republic of China**

### **2.1 Identification of the Subjects**

It is necessary to clarify whether the subjects of live-streaming marketing are the objects of anti-monopoly regulation or not before delving into the antitrust law determination of live-streaming marketing. According to the "Measures on Regulations and Managements of Online Live-Streaming Marketing Industry (for trial implementation)", hereinafter "the Measures", there are three types of subjects of live-streaming marketing involving monopoly issues: platforms, operators, personnel (anchors) and personnel managing agencies (MCNs), and e-commerce operators. These aspects are identified by the Antitrust Law below, respectively.

#### **2.1.1 Online Live-Streaming Marketing Platforms**

According to the Measures, online live-streaming marketing platforms refer to various Internet platforms that provide services related to live-streaming online, including live-streaming show, audio and video, e-commerce, etc. Such platforms are with certain qualifications from their fulfillment of their obligations to obtain administrative permission according to law. By offering live network operation and maintenance services, they charging fees from whoever can makes profits on their platforms (e.g. anchors and e-commerce operators) for their entrance to the platforms.

Thereout, the live-streaming marketing platforms are objects established by law, registered and recognized by the government authorities, supported by necessary property, and has its own independent name, organization and place. Based on the Article 57 and 58 of the *Civil Code of People's Republic of China*, which defines the term "legal persons", online live-streaming platforms has the capacity for enjoying civil-law rights and the capacity for performing civil juristic acts, and that independently enjoys civil-law rights and assumes civil-law obligations in accordance with law. Since they are engaged in the market of online live-streaming, their characteristics meet the description of the Article 12 of the *Anti-Monopoly Law of the People's Republic of China* (hereinafter "the Anti-Monopoly Law"), which regulates those undertakings engage in manufacturing, or selling commodities or providing services, should be subject to this law.

#### **2.1.2 Anchors and Managing Agencies (MCNs)**

Anchors and MCNs are important media in the process of live-streaming promotions of goods, providing publicity services for e-commerce operations. Online live-streaming marketing anchors are individuals who register accounts on live-streaming marketing platforms or build their own websites to create a live-streaming room, and engage in live sales to the public and earn profit from them. Differently, MCNs are specialized agencies that provide planning, operation and training for anchors to participate in live-streaming marketing activities.

The two parties are closely related with each other, and there are three kinds of market operation modes between anchors and MCNs, namely, labor contract mode, service contract mode, brokerage contract mode. The anchors attract consumers to the live-streaming room with their own popularity and sells goods or services through live-streaming promotion; the MCNs provide the anchor with help in content creation for live show and liaison with e-commerce managers. The profits are distributed according to the specific cooperation model between the two.

It is indisputable that anchors who participate in the competition in the live-streaming market individually are natural person subjects regulated by the Anti-Monopoly Law. The following discussion focuses on the determination of whether MCN agencies are qualified as subjects regulated by the Anti-monopoly Law. In the Measures, MCN agencies are required to sign agreements with platforms and anchors in accordance with the rules to clarify the rights and obligations of each party. Moreover, the regulations also set prohibitive behavior norms for MCN organizations to participate in live-streaming marketing, and violation entails certain legal responsibilities. It can be seen that

MCN agencies are legal organizations with independent civil rights and civil capacity, and can independently bear civil liability. When they conduct business activities in the competitive market of live webcasting marketing, they belong to the subjects regulated by the Anti-Monopoly law.

### 2.1.3 E-Commerce Operators

According to the *E-Commerce Law of People's Republic of China*, an e-commerce operator refers to a natural person, a legal person or an unincorporated association that carries out business activities through information networks such as the Internet to sell commodities or offer services. E-commerce is developed by traditional offline merchants who expand business scope to the Internet, and it is characterized by the connection between online and offline industries. It is not directly involved in live-streaming marketing. Instead, operators tend to cooperate with anchors and platforms for sales, so its qualifications are more permissive. Laws and regulations also allow some sales of homegrown agricultural and side-products, handicrafts or services of small-scale provided with personal skills, which do not need to obtain an administrative license.

According to the interpretation of the text, whether an operator is under the regulation of the anti-monopoly law depends on whether it is involved in the competition of commodity business as a legally or economically independent actor, and there is no strict restriction on the type of subjects. The e-commerce companies themselves are economically self-sustaining production entities, and can engage in profit-making activities in live streaming marketing; at the same time, they can cooperate with anchors or platforms at their own will, and their independent status in law should also be recognized. Therefore, e-commerce operators are also regulated by the anti-monopoly law in the competitive market of live-streaming marketing.

## 2.2 Definition and Identification of the Relevant Markets

Before determining the subjects' behavior as monopoly acts, it is necessary to define the relevant markets scope. In the "Anti-monopoly Guidelines of the Anti-monopoly Commission of the State Council on Platforms Economy", hereinafter referred as "the Guidelines", the Article 4 clearly specifies the relevant markets for defining the platform economy. The market definition can be based on the traditional demand substitution, supply substitution and SSNIP market definition method, and the platform economy features should also be taken into account in combination with the individual cases. However, live streaming marketing relies on Internet technology to be spatially extended, and its bilateral market attributes exerts an impact on the traditional framework of market definition related to the Anti-Monopoly Law. Compared with the unilateral market of traditional industry, the bilateral market of live streaming marketing will be influenced by the demand and interaction of users (especially between e-commerce operators and consumers) on both sides of the transaction. Due to the cross-network externality of the live streaming marketing (The cross-network externality denotes that any party in the cross network with high degree of demand match and involvement to the platform will enjoy high economy value, and the higher the degree is, the larger its economic value will be.) and free service provided by the platforms, Traditional methods that rely on price movements to define the relevant market have failed. Besides, through the public-oriented live show for promotion, live streaming marketing actually broaden the range of goods to a boundless level, so that the boundaries of the target geographic areas become blurred.

This paper argues that improvements and innovations should be made on the basis of the market definition methods related to the platform economy. First of all, we should deconstruct the bilateral market of live streaming marketing, and divide the platform function or a certain side of the market into two types: price symmetric market and price asymmetric market. In the price symmetric markets, the regular variation of price can be referred to, and the traditional SSNIP and other methods can be adopted; while in the price asymmetric market, the relationship between supply and demand is more complex, so it is necessary to add new comprehensive determination factors based on the traditional methods. There is also a need for segmentation in the price asymmetry market based on the category of goods for live-streaming marketing, which can be further classified as data services and physical goods. As for the former one, the comprehensive identification factors of the data service category

mainly include marketing platform functions, business models, application scenarios, user groups, multilateral markets, etc. Concerning the latter, physical goods, apart from the online factors related to live-streaming show, the offline factors like logistics, transportation, and warehousing should also be considered. Meanwhile, in the price asymmetry markets, the traditional alternative analysis method should be improved to a test method with "user base and time" as variables, which can more accurately locate the relevant market scope of live streaming marketing.

With all the above analysis, based on the definition method of the relevant markets of the platform economy, and in combination with the user base and time factor, the relevant markets of live streaming marketing should be defined as a technology-based and innovative market that engages in online goods or services transactions nationwide in the Internet economy based on live streaming show as a medium.

### **3. Analysis of the Monopolistic Behavior of Live Streaming Marketing and the Path of Identification**

The trend shows that the live streaming marketing in China tends to enter in a monopolized state, and it is needed to verify whether the newly-emerged live streaming marketing situation is a manifestation of monopolistic behavior and whether the Anti-Monopoly Law can be applied to regulate it. The following is an analysis of the path of identifying live streaming marketing in the field of the Anti-Monopoly Law from three typical models of monopolistic behavior.

#### **3.1 Monopoly Agreements**

According to the specification of the Anti-Monopoly Law, the Guidelines and the *Interim Rules on Prohibition Against Monopoly Agreements* (the "MLA Rules"), monopoly agreements refer to the acts between two or more operators that restrict the economic activities of both parties through collusive agreements, decisions or concerted acts to exclude competition in a certain field of transactions.

##### **3.1.1 Horizontal Monopoly Agreement**

Horizontal monopoly agreements mainly include a variety of acts such as fixing or changing the price of goods, limiting the number of goods produced and sold, dividing the sales market or raw material procurement market, limiting the purchase of new technology and new equipment, and joint boycott transactions by operators with competitive relationships in the same relevant market. In order to strive for a larger market share in the Internet economy, the live streaming marketing platforms may reach agreements regarding diversion and cooperation among themselves, and specify in the agreement the distribution of attribution among the platform traffic. This behavior belongs to the situation of dividing the sales market as the horizontal monopoly agreements require.

For the anchors, MCNs, and E-commerce companies, they may reach some hidden agreement or verbal agreement on the price and quantity of goods or services to be sold on the live streaming shows, which demonstrates the joint limitation or boycott behavior. Through the above intangible but strong economic cooperation, they can get rid of the market share of other online live streaming marketing competitors, and finally achieve their own goal of absolute dominance. Such situations constituting horizontal monopoly agreements need to be punished according to the regulations of illegal principles.

##### **3.1.2 Vertical Monopoly Agreements**

Vertical monopoly agreements are manifested in cases where operators in different economic sectors of the same industry fix the price of resale to third parties or set a minimum price for resale. The most typical case to exemplify the vertical monopoly agreements is the event of "pricing of L'Oreal products in China". The two most famous and influential anchors, LI Jiaqi and Weiya (Statistics provided by Sealand Securities demonstrates that LI Jiaqi and Weiya have accounted for high GMV and the highest share they enjoyed even reached 81.67% the TOP 10 anchors from Taolive, which is the live streaming platform of Taobao), both reach an agreement with L'Oreal that they can

sell its products at the minimum price. It has become a convention that head anchors require the E-commerce companies to provide their products with the lowest price in their cooperation agreement, which is suspected of vertical monopoly. It can be seen that when anchors or MCN agencies enter into cooperation with e-commerce companies to promote their products, they usually enter into contracts that require the fixed price, and highest or lowest price of resale by the anchors to consumers in the live streaming show, which to a certain extent excludes and restricts the normal competition of other operators in live streaming marketing. Such agreements violate the "resale price maintenance" clause of the vertical monopoly agreement and undermines the good market order. Since the principle of reasonableness applies to vertical monopoly agreements, it is necessary to regulate live streaming marketing when it constitutes a vertical monopoly agreement and causes adverse market effects that restrict competition.

### 3.1.3. Hub-and-Spoke Conspiracy

Hub-and-spoke agreement denotes that the operator in the hub position assists the operator in the spokes to reach a monopoly agreement. In other words, the horizontal competitors engage in conspiracy on the one hand, and the operators in the vertical industries actively promote the formation of horizontal conspiracy on the other hand, which is a combination of horizontal monopoly agreement and vertical monopoly agreement. To exemplify by a typical case, the price setting of live streaming marketing platforms here is discussed. In order to attract more traffic/popularity, the live streaming marketing platforms communicate individually with a number of e-commerce companies in the same industry, avoiding the situation where the e-commerce companies communicate with each other leading to what is easily identified as a horizontal monopoly agreement, and the platforms compare and summarize prices and other information to form a unified price feedback to each business. Or, E-commerce companies, in the hope of promoting their products or services more, actively contribute to the cooperation with anchors or MCN agencies to occupy more traffic in order to achieve the goal of increasing sales and excluding competition from other e-commerce companies. They may privately cooperate with multiple anchors or multiple MCN agencies individually to form a unified market segmentation or joint boycott of transactions. All of the above scenarios are hub-and-spoke agreements, which likewise constitute monopolies.

## 3.2 Abuse of Dominant Market Position

With the development of the Internet economy, e-commerce giants are suspected of monopoly problems, and the most representative one is the largest Internet anti-monopoly fine issued by China, which is known as "Fining Alibaba for its Induction of Either-or Choice in Platforms". This is the first time that China legally regards the "Either-or Choice" as restricted transactions which constitute the abuse of market dominance power.

According to The Anti-Monopoly Law and *Interim Provisions on Prohibiting Abuse of Dominant Market Positions*, the abuse of a dominant market position means that an operator holds a market position capable of controlling the price, quantity or other trading conditions of goods or services in the relevant market and prevents other operators from entering the relevant market. The dominant market position is judged based on multiple factors, including the market share, competitive situation in the relevant market, ability to control the sales market or raw material procurement market, financial and technical conditions, the degree of dependence of other operators on them and the difficulty level of access to the relevant market. As Article 19 of the Anti-Monopoly Law of China, the conclusion that an undertaking holds a dominant market position may be deduced from any one of the following circumstances: (1) the market share of one undertaking accounts for half of the total in a relevant market; (2) the joint market share of two undertakings accounts for two-thirds of the total, in a relevant market; or (3) the joint market share of three undertakings accounts for three-fourths of the total in a relevant market. If the market share of one of the undertakings is less than one-tenths of the total, the undertakings shall not be considered to have a dominant market position. The identification of abuse of a dominant market position requires the subjects occupying a dominant

market position to have specific manifestations of price fixing, predatory pricing, refusal or limitation of transactions, tied sales and unreasonable trading conditions, and differential treatment.

### **3.2.1 Monopolized Price**

In the live streaming marketing sector, head anchors have absolute market dominance and become a powerful force in attracting traffic through their strong appeal. Some of the head anchors have seized the market share by virtue of their popularity online, and have the pricing power to compete with the e-commerce companies. They are able to obtain the exclusive lowest price of goods or services of a certain e-commerce company. Under the effect of the price law, a large number of consumers are attracted to enter their live streaming rooms for purchasing goods at lower price, which prevents other anchors and MCN agencies from competing with the lowest price. This situation is consistent with the fact that the sales price given by the head anchors is significantly lower than the prices of other anchors or operators selling the same goods under the same or similar market conditions, which constitutes unfairly low prices and is a monopoly price situation in the abuse of a dominant market position.

### **3.2.2 Tied Sales and Unreasonable Trading Conditions**

As some of the head anchors have obtained the lowest price of products of a certain e-commerce company by virtue of their dominant market position, or they are able to become the exclusive live streaming cooperation party of certain e-commerce companies, consumers have no choice but to purchase in their live streaming rooms. Even worse, the anchors and MCNs may ask for tied sales with other products, or impose unreasonable fees on top of the original price, or set unreasonable restrictions on shipping and delivery methods in order to make profits. Consumers can only accept such unfair conditions because they have no choice. This is a phenomenon that damages consumers' rights and interests due to the lack of a healthy competition mechanism in the online live streaming market as a result of operators' abuse of monopoly position, and needs to be stopped.

### **3.2.3 Differential Treatment**

The live streaming marketing platforms also present self-preferential treatment. When anchors, products, and e-commerce companies have close relationship with a platform, it may give priority to them in terms of the "feed" or "advertisement", and even set these entrances to live streaming rooms on the on users' interface. In addition, some mainstream live streaming marketing platforms, with their huge user traffic and great market dominance, charge high service fees, traffic fees and advertising fees for other similarly qualified merchants and anchors, increasing the cost of other operators and limiting their fair competition. Apart from that, the platforms can also implement unequal restrictive measures. For example, they can restrict the duration of a certain entrant who also pay to join the platform for live streaming sales. These are actually discriminatory conducts that constitute the abuse of market position in the case of differential treatment. There is also a similar case: the international events that EU and US EU hits Amazon with antitrust charges and investigations. The case shows that some foreign countries clearly characterized and sanctioned Amazon's e-commerce platform for self-preferential treatment as an abuse of dominant market position. This sanction confirms that what constitutes differential treatment in live streaming marketing is a monopoly and should be punished.

## **3.3 Operator Concentration Restricting Competition**

According to the Anti-monopoly Law, Guidance on Thresholds for Prior Notification of Concentrations of Undertakings, and Temporary Provisions on the Review of Concentrations of Undertakings, a concentration of undertakings refers to situations where an operator acquires the control or the decision-making right over other operators through equity or contracts. The determination of control is made on the basis of comprehensive assessing factors such as business planning, equity structure, voting mechanism, personnel appointment and removal between the two parties. However, the regulation depends on whether operators' concentration hinders the healthy

market competition. China requires notification of operator concentration according to the turnover standard.

In order to gain advantages in the fierce market competition among livestream marketing platforms, mergers and acquisitions, technology joint ventures and other approaches are common, mainly in the form of horizontal mergers in the same industry and vertical mergers in upstream and downstream industries. In order to consolidate their dominance, large network platforms with sufficient funds continue to acquire small and medium-sized livestreaming platforms, which violates the restrictive competition concentration and constitutes monopoly when they exceed a reasonable proportion of market share and fail to file or pass the filing. The same applies to the situation where streamers and MCN agencies and e-commerce companies constitute a restrictive concentration of undertakings in the field of livestream marketing.

## **4. The Dilemma of Determining Antitrust Law for Livestreaming Marketing**

### **4.1 Legislative Deficiencies in the Subject Identification of Antitrust Law for Livestreaming Marketing**

The above analysis has proved whether the livestream marketing subject is under the regulation of anti-monopoly law through textual interpretation of laws and regulations. However, because livestream marketing is an emerging product with rapid development in recent years, the legislator has not yet evaluated and regulated it in anti-monopoly law. As a new Internet industry, livestream marketing features variability, which brings new challenges to the traditional identification of anti-monopoly subjects in judicial practice. Therefore, it is not a sustainable solution to solely depend on legal testimony without legislation that clearly grants the subject of stream marketing a status in anti-monopoly law.

Although China has introduced new anti-monopoly regulations for the platform economy, provisions for livestream marketing with special subjects are still relatively general, only for guidance. 2021 draft amendments to the anti-monopoly law has been released, no direct content of livestream marketing regulation. And if the amendment of recently was passed, the anti-monopoly law will not be easily modified for a relatively long time, leading to the lack of specific provisions on the livestream marketing subject. Moreover, due to the ambiguous position of livestream marketing platforms, anchors and MCN agencies, and e-commerce in the field of civil and commercial law, making the legal proof path suffers from obstacles. In practice, the following questions arise: whether there is an unincorporated form of livestream marketing platforms, MCN agencies, and e-commerce operators? If they are unincorporated, do they belong to the category of "undertakings" under the anti-monopoly law? If so, how should they be identified as unincorporated under the anti-monopoly law? Therefore, it can be seen that the lack of legal provisions on the application of anti-monopoly law to livestream marketing platforms, anchors, MCN agencies, and e-commerce companies may cause identification problems in judicial practice.

### **4.2 Deficiencies in the Identification of Livestreaming Marketing as Constituting a Monopoly Agreement**

China's Anti-monopoly Law adopts the traditional dichotomy for the classification of monopoly agreements, and thus the hub-and-spoke agreements are not included in the anti-monopoly law system. Although China's newly issued Guidelines have clarified the concept of hub-and-spoke agreement, the legal path of how to determine that livestream marketing constitutes a hub-and-spoke agreement is still unclear. In addition, the bilateral market of livestream marketing has contributed to the formation of hub-and-spoke agreements, hindering the normal competition, which needs regulation urgently. In practice, livestream marketing subjects often use indirect and hidden approaches to make hub-and-spoke agreements, increasing the identification difficulty.

Meanwhile, when livestream marketing subjects conduct implied collaboration through multiple channels online and offline, it is also a challenge to determine the harmful effects of monopoly

agreements. The problem on the legal level is as follows: How to interpret and apply the "collaborative behavior" of horizontal monopoly agreements in the livestream marketing? As the anti-monopoly law is not clear on the definition of collaborative behavior, nor is there a specific standard for the determination, there are obstacles to the identification of monopoly agreements in livestream marketing. However, without regulation, livestream marketing subjects will abuse implied collaboration and destroy the competition order in the market. Thus, further clarification is needed on the determination of the relevant behavior in the anti-monopoly law.

### **4.3 Complex Factors Affecting the Market Dominance of Livestreaming Marketing**

Compared with the traditional industry, it is much more difficult to identify the market dominance of the livestream marketing subject. Identifying market dominance is actually to judge the market control, which can be visualized through market share according to general practices. However, it is not possible to draw scientific conclusions in livestream marketing only through market share, because of the dynamic development of livestream marketing. Since common industry market structure is more stable, it is easier to judge the subject's market share. However, for the changing livestream marketing market, the market share changes are more complex. For example, as the competition in livestream marketing intensifies, the market share of the head streamers changes greatly with the monthly or quarterly data updates. Also, when the platform provides free services, it contributes zero to the market profitability, resulting in a inconsistency between the market control and specific sales figures. It is clear that market share is not equal to market control in livestream marketing, and thus the criteria by which market dominance is judged becomes an important issue for the determination of anti-monopoly law in livestream marketing.

### **4.4 Difficulties in the Investigation and Evidence Collection of Antitrust Liability Identification for Livestreaming Marketing**

Corresponding evidence is the key basis for determining the monopoly behavior of a livestream marketing subject, but in practice the anti-monopoly enforcement agencies often spend a lot of time with little success in the investigation due to the difficulty of obtaining evidence. As the monopoly behavior of livestream marketing is rather hidden, a large amount of data and information are in the hands of the suspected monopolist, which makes it hard to collect relevant monopoly evidence through public platforms, so it is difficult to carry out anti-monopoly investigations in livestream marketing.

Besides, the Internet is rapidly changing, and the dominant market position of the investigated subject or the competition restricting operator concentration may disappear in the antitrust investigation process. However, the acts of livestream marketing subjects that restrict and exclude market competition in a specific period thus endangering normal market competition still need to be identified and punished. Under such circumstances, the antitrust investigation in livestream marketing requires a lot of judicial resources and may not yield ideal results, unfavorable to maintain a fair market competition environment.

## **5. References to Antitrust Law Determinations for Livestreaming Marketing in Foreign Countries**

Since 2020, China, the United States, and Europe have all started a wave of anti-monopoly of Internet platforms. As livestream marketing has not yet dominated in foreign countries, they have not yet regulated this market behavior by antitrust law. However, the antitrust legislation of foreign countries in the field of Internet platform is relatively mature, which provides references to the antitrust identification of livestream marketing in China's legislation in a forward-looking manner. Analysis of typical practices in several foreign countries is as follows.

## 5.1 American Experience

In recent years, due to the increasing growth and negative impact of Internet platforms, the United States has shifted its antitrust attitude toward large Internet platforms from relatively loose to strict regulation. The Congress and states have initiated several antitrust lawsuits against large Internet platforms and introduced six bills to strengthen the platform economy antitrust, including Ending Platform Monopolies Act, American Innovation and Choice Online Act, Platform Competition and Opportunity Act, Augmenting Compatibility and Competition by Enabling Service Switching Act, Merger Filing Fee Modernization Act, State Antitrust Enforcement Venue Act. Among them, the determination of monopolistic behavior was first made for new performances of Internet platforms. For example, self-preferential behavior of Internet platforms was found to constitute abuse of dominant market position; and strangulation acquisitions among Internet platforms fell under the scope of anti-monopoly law regulation.

Besides, the U.S., as the first country to focus on the Internet platform reaching hub-and-spoke agreements, has made helpful explorations on the ambiguous type of monopoly agreements between horizontal monopoly agreements and vertical monopoly agreements. "The Apple E-Books Case" is a typical four-year trial in the United States in which an e-commerce platform constitutes a monopoly agreement. Apple entered into agreements with a number of publishers to sell e-books online. Apple's agency contracts empowered publishers to set the retail prices of their own ebooks, subject to certain limits. This act was considered as constituting a typical hub-and-spoke agreement by the U.S. Federal Supreme Court and was punished. At the legislative level, the U.S. has recognized that the Internet platform hub-and-spoke agreements are an independent monopoly category and adopts the rule of indirect evidence presumption of intention liaison, which can be determined through additional factors to identify the collaboration. At the same time, the U.S. is experienced in evidence collection during the process of sanctioning suspected monopolistic Internet platforms. It gives Internet platforms, market participants, stakeholders, and self-regulatory associations the obligation to provide information for assisting the investigation, alleviating the pressure of evidence collection in the determination of platform antitrust law.

## 5.2 EU Experience

Although the EU lacks direct regulations for the determination of livestream marketing in the antitrust law, its legislative idea deserves consideration. The EU has introduced two acts in the field of Internet antitrust, the Digital Service Act and the Digital Markets Act, which cover various subjects of the Internet economy providing strict rules for subject identification in platform antitrust.

The EU has advanced experience in identifying cooperation between Internet platforms. In the Guidelines for Horizontal Agreements, the European Commission has clearly defined the term "cooperation" and summarized a framework for the determination of cooperation through individual cases, i.e., taking the intent liaison behavior of platforms as the main line and combining additional factors such as price and demand to determine whether an Internet platform constitutes monopoly cooperation. In addition, considering the complexity in handling the anti-monopoly acts of the Internet platforms, which affects the identification of market participants and monopoly construction, the EU has left legislation room in the Treaty on the Functioning of the European Union and the EEA Agreement to allow judicial practice to supplement the emerging practice.

## 6. Constructing Optimal Approaches to the Anti-Monopoly Law Determination for Livestreaming Marketing

### 6.1 Clarifying the Identification Rules of the Anti-monopoly Law for Unincorporated Subjects of Livestreaming Marketing

As an emerging public business model, livestream marketing has a low entry threshold for entities, so there will be a large number of unincorporated subjects in practice. When the unincorporated

entities gradually grow, dominate the market, and thus constitute a monopoly, they should be regulated. However, the existing connotation of the object regulated by the anti-monopoly law makes the unincorporated subject of livestream marketing controversial in the identification. Currently, China mainly relies on the general provisions of the anti-monopoly law and refers to the anti-monopoly laws and regulations of the platform economy to identify the anti-monopoly subjects of livestream marketing, lacking direct identification rules. The legislative technology of anti-monopoly is reflected in whether the livestream marketing subject should be regulated by the anti-monopoly law when it is unincorporated and how to make it scientifically. According to the analysis above, the livestream marketing participants are the subjects that restrict and exclude competition possibility of other operators in the market, and there is no direct relationship between the factual monopoly behavior and the specific subject form. Therefore, it is necessary and reasonable to include the unincorporated entities into the anti-monopoly law. Moreover, as the concept of operator is clearly stipulated in the anti-monopoly law, i. e. natural persons, legal persons, and other organizations engaged in the production, operation of goods or the provision of services, it is necessary to clarify the definition of "other organizations" when discussing unincorporated form of livestream marketing. With a general definition of "other organizations" in the law, in order to avoid controversies in judicial practice, the definition of unincorporated form in livestream marketing being "other organizations" should be clarified when the anti-monopoly regulations or judicial interpretations are introduced.

## **6.2 Improving the Identification of Livestreaming Marketing as Constituting Hub-and-Spoke Arrangements and Collaborative Behavior**

The bilateral market attribute of livestream marketing provides convenience for hub-and-spoke cooperation, giving rise to the phenomenon that many livestream marketing subjects reach hub-and-spoke agreements that need to be regulated. According to the current situation of China's hub-and-spoke agreements in livestream marketing, the approach of "platform behavior + additional factors" can be adopted to conduct analyses, with reference to the US identification methods. The main path is to analyze the behavior based on the communication between the hub and spoke operators and other factors (such as market conditions and competition) in livestream marketing. Meanwhile, when revising the Anti-monopoly Law and introducing relevant platform anti-monopoly regulations or livestream marketing anti-monopoly guidelines, China can incorporate the hub-and-spoke agreement and its identification into the legislation, which is conducive to the anti-monopoly regulation of the emerging market economy form and promote its healthy development.

In addition, the issue of whether the implied cooperation among livestream marketing subjects constitutes a "cooperative behavior" in a horizontal monopoly agreement is also important to discuss. In terms of the legislative intent of regulating monopoly agreements, what needs to be regulated is the act of reaching an intent consensus to exclude or restrict competition, rather than the typical factual performance such as fixed pricing. Therefore, the traditional criteria of facts cannot cover the situation of livestream marketing constituting a monopoly agreement, which requires the optimization of the identification methods and specific criteria. Factors, including the data exchange among the livestream marketing subjects suspected of implied cooperation, the synchronization of the livestream marketing operation, and the market share of the livestream marketing subjects, should be taken as the basis for determining whether or not a cooperative act is constituted. The act that meets the above factors should be deemed to constitute a horizontal monopoly agreement.

## **6.3 Updating the Identification Criteria for Market Dominance in Livestreaming Marketing**

In the livestream marketing that relies on the decentralization technology of the Internet, many market factors different from those of the traditional industry have emerged affecting the identification of market dominance under the antitrust law. Therefore, in order to accurately determine the market dominance in livestream marketing, it is necessary to update the market dominance determination criteria.

The traditional standard that uses market share as a single judging basis is no longer applicable in livestream marketing. A comprehensive consideration should be given to user traffic and data mastery as new criteria. Although market share cannot serve as the only determining factor in livestream marketing, it remains valuable for identifying market control. The user traffic criterion can avoid the situation that non-price parity affects the market control determination due to the free livestream marketing features. The user traffic standard needs to be defined in the context of livestream marketing development, for example, taking the livestream marketing market in 2021 as an example, it could be inferred that a streamer has a dominant position if it steadily holds 80 million people per show in a period of time (in weeks or months). The data mastery can eliminate the influence of the changing factors in livestream marketing on market control. For example, investigating whether a certain livestream marketing platform occupies more than one-half key data resources of user demand and product performance, if it does, it can be judged to have a dominant position in the livestream marketing market. Those above show that updating the market dominance criteria can help to accurately identify the dominant position in livestream marketing.

#### **6.4 Enriching the Identification Procedure of the Anti-Monopoly Law for Livestreaming Marketing**

Since it is difficult to obtain evidence in the livestream marketing antitrust investigation, enriching the anti-monopoly law identification procedures can help enforcement agencies to carry out the investigation smoothly. One approach is to improve the evidence retention mechanism for livestreaming marketing. Livestream marketing subjects should be required to regularly notify the antitrust enforcement agencies of their performance of antitrust compliance and establish a legal filing mechanism. On the one hand, it can strengthen the anti-monopoly supervision of livestream marketing to reduce the risk of monopoly, on the other hand, it can facilitate the evidence collection of anti-monopoly law enforcement, change the situation where key data is mastered by the suspected monopoly subject, and save judicial resources. Furthermore, the evidence retention system of livestream marketing can also hold the evidence and prevent the evidence loss caused by market changes.

Another approach is to encourage self-regulatory associations and other subjects in the livestream marketing industry to actively provide evidence during the anti-monopoly investigation. This is because in addition to the livestream marketing subjects conducting monopolistic acts, self-regulatory associations are also able to hold certain monopoly evidence in the supervision process. In terms of regulations and policies, guiding the self-regulatory associations to regularly disclose the industry data and voluntarily guarantee the operation of the evidence retention mechanism through industry regulations can assist the anti-monopoly law enforcement agencies to conduct anti-monopoly identification.

### **7. Conclusion**

In the emerging livestreaming marketing, which plays an important role in the platform economy, there is an increasing risk of monopoly endangering the market competition. The paper aims to prove that the entities of livestreaming marketing fall into the scope of antitrust regulation, clarify the relevant market definition of livestreaming marketing, and analyze the specific monopoly practices of livestreaming entities. Accordingly, it proposes the problems existing in the anti-monopoly law for China's livestreaming marketing, such as insufficient legislation for subject identification, deficiencies in the recognition of monopoly agreements, complex factors affecting market dominance, and difficulties in the anti-monopoly liability investigation. In addition, the author refers to foreign practices, such as the identification rules of the innovative Internet platforms constituting a hub-and-spoke agreement and the criteria for assessing the monopolistic collaborative behavior of platforms in European and American antitrust regulations, hoping to provide legal implementation experience for China's use of anti-monopoly law to regulate livestream marketing. In the end, optimal approaches

for regulating livestream marketing, including clarifying the identification of unincorporated entities, improving the recognition of hub-and-spoke agreements and collaborative behavior, updating the market dominance criteria, and enriching the anti-monopoly procedures, are proposed to better protect fair competition, safeguard the interests of online consumers, and promote the healthy development of the livestream marketing economy.

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