

# Tying in Digital Platforms under the Competition Legal Framework in China and the EU

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## Summary (EN/CH)

The leveraging of market power in digital platforms has become a substantial challenge for competition enforcement. Tying and bundling behavior is one of the most frequently used methods to achieve such leveraging effects. Nevertheless, those practices may, at the same time, generate significant pro-competitive effects that would enhance consumer welfare. How to distinguish the blurred line between lawful and unlawful tying behavior in digital platforms has become an ongoing debate that receives worldwide attention. Confronted with these challenges, China and the EU have taken different approaches. This research examines, explains, and evaluates tying rules in digital platforms in China and the EU from a comparative law and economics approach.

This thesis has eight chapters. Chapter 1 provides the background, introducing that the coexistence of the anti-competitive effects and pro-competitive of tying in digital platforms brings challenges for competition enforcement and the academic community. It puts forward the main research question: Confronted with the challenges of the coexistence of anti-competitive effects and pro-competitive effects of tying in digital platforms, how can illegal tying be distinguished from legal practices? To address the main research question, this thesis raises several sub-questions: (1) What are pro-competitive effects and anti-competitive effects of tying in digital platforms from an economic perspective? (2) To what extent have economic theories about pro-competitive effects and anti-competitive effects of tying in digital platforms affected (i.e. improved or failed to permeate) the assessment of such behavior in China and the EU? (3) What are the similarities and differences regarding the rules on tying in digital platforms in China and the EU? Are there any law and economics explanations for these similarities and differences? How can China and the EU improve the current assessment frameworks to distinguish illegal tying from legal practices?

In order to answer the first sub-question regarding the economics of tying in digital platforms, Chapter 2 and Chapter 3 present an economic analysis of tying, and an economic analysis of digital platforms, respectively. Chapter 2 makes a distinction between tying practices by statutory dominant undertakings and tying practices by other dominant undertakings without statutory positions given their differentiated economic positions. Due to the legal privileges, tying by statutory dominant undertakings usually generates significant anti-competitive effects outweighing (potential) pro-competitive effects. In comparison, tying by dominant undertakings without statutory positions may generate both anti-competitive and pro-competitive

effects. When both effects exist, to determine the overall effects of tying, competition authorities need to conduct a trade-off analysis.

Chapter 3 examines the economics of digital platforms. It shows that digital platforms may become more concentrated due to the high fixed costs and low marginal costs, and indirect network effects. However, the highly dynamic competitive environment, the influence of reverse indirect network effects, digital giants' competition for users' attention across several products, as well as users' prevalence of multi-homing and switching are important factors that can countervail the concentration of digital platforms. It is important for competition authorities to take the specificities of digital platforms into account.

Based on the economic findings of Chapters 2 and 3, Chapter 4 answers the first sub-question. It finds that on the one hand, tying has become a common practice and an effective means of competition in digital platforms. The combining provisions of different services may lead to cost-saving efficiencies, including economies of scope in distribution, economies of scope in production, and reduction in consumers' search costs, and quality improvements when the added functionalities and values can better satisfy consumers' demand with technological advances. On the one hand, tying can be used as an effective leveraging method in digital platforms to induce the exit of efficient competitors in the tied product markets and strengthen monopoly power in the tying product markets. In the long term, barriers to entry generated by tying can be expanded considering the indirect network effects and economies of scale in digital markets. Thus, consumer welfare may be impacted both positively and negatively. When both effects exist, determining the overall effects of such behavior is, nevertheless, not be easy. Competition authorities and courts will have to conduct trade-offs between "the apples of anti-competitive effects and the oranges of pro-competitive effects" in specific cases, such as trade-offs between quantitative measures of welfare (price and output) and qualitative measures of welfare (quality, privacy, and consumer choice), between consumer welfare in the short term and in the long term, and between different groups of consumers, which might lead to error costs, legal uncertainties and high information costs in practice.

After illustrating the pro-competitive effects and anti-competitive effects of tying in digital platforms, Chapter 5 and Chapter 6 answer the second sub-question. Chapter 5 presents a law and economics analysis of Chinese rules, finding that China is cautious of not wrongly punishing pro-competitive tying in digital platforms. In the initial stage when intense competition existed among large digital platforms, rather than directly employing public enforcement to deter tying in digital platforms, private enforcement played a major role. With the increasing concerns about market

power in digital markets and anti-competitive risks of tying by those firms, China enters the second stage to strengthen public enforcement. Despite entering the second stage, before directly deterring anti-competitive tying in digital platforms, China has introduced platform guidelines and considered introducing *ex-ante* regulation in the form of soft law to provide more certainty and predictability for undertakings while giving warnings.

Chapter 6 conducts a law and economics analysis of EU rules, finding that the EU has continuously maintained a rigorous level of scrutiny to deter anti-competitive effects of tying in digital platforms. Since the 2000s, the European Commission has scrutinized digital platforms closely and imposed high fines in relation to tying and bundling practices. Recently, to facilitate the enforcement of tying in digital platforms, proposals at the EU level and new amendments at the national level are both relaxing the preconditions of establishing dominance. The EU also adopts the Digital Markets Act, directly prohibiting digital gatekeepers from conducting several tying and bundling practices *ex-ante*.

Following the findings in Chapter 5 and Chapter 6, Chapter 7 explains and evaluates the similarities and differences between these two jurisdictions from a comparative law and economics perspective. It first highlights main similarities in the legal tests and standards of evidence between the rules in China and the EU: public enforcement authorities in China and the EU are allowed to apply a pragmatic approach to enhance deterrence considering both error costs and information costs, while the courts emphasize the importance of adhering to legal principles. It offers solutions about how to achieve a balance between pragmatism and proportionality, and between deterring harmful tying in digital platforms and encouraging beneficial behavior. Chapter 7 also examines reasons for their differing preferences and there are no “best” rules to address tying in digital platforms that are suitable for all jurisdictions. China and the EU can learn valuable lessons from each other to address their challenges and improve the effectiveness of enforcement.

Chapter 8 provides the conclusions of this thesis. It answers the three sub-research questions while summarizing the entire research. Contributions to the current literature, limitations and future research are also presented.