

The Path to Establishing an Antitrust Regulatory System for Self-preference of Digital Platforms

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ABSTRACT

China's Anti-Monopoly Law currently fails to adequately cover the circumscribed regulation of self-preferential behavior on digital platforms. There are controversies in the academic circle about the definition of the illegality of digital platform self-preference. The purpose of this paper is to provide an institutional supply for the regulation of self-preference on digital platforms and to construct a localized system of self-preference on digital platforms through empirical research and comparative law study. Through the idea of "clear entry into the law - entry into the expansion - justified exemption", it defines, judges the illegality and regulates the self-preferential behavior of digital platforms, and explores the concise analysis path of anti-competitive behavior of digital platforms. It also explores the concise analysis path of anti-competitive behavior of digital platforms.

KEYWORDS

Self-preference; Digital Platforms; Anti-monopoly.

1. INTRODUCTION

The self-preferential behavior of digital platforms is closely related to the rapid development of the platform economy. At present, digital platforms generally show a trend of expanding into diversified and associated businesses. In the process of such business expansion, the competitive relationship between digital platforms and intra-platform operators is not limited to transactional relationships but evolves into a complex competitive pattern. The self-preferential behavior of digital platforms has gradually emerged under the combined effect of profit motive and technological advantage. Although the self-preferential behavior of digital platforms may enhance efficiency and economic benefits in terms of vertical integration and is even considered a reasonable business competition strategy under certain circumstances, if a digital platform abuses its dominant market position to arbitrarily implement self-preferential behavior, it may lead to the over-expansion of digital platforms, triggering exclusionary and competition-restricting effects, and thus undermining the diversity and innovativeness of the platform's market.

The concept of self-preference by digital platforms can be traced back as far as the 2017 case of Google Shopping, which suffered EU antitrust penalties for manipulating search results. The 2020 U.S. House of Representatives launching an investigation into competition in digital markets made several references to the implementation of self-preferential behaviors by large platform companies, such as Google and Apple, to exclude and restrict competition in the marketplace. The U.S. Innovations and Choices for Americans Online Act, released in 2021, and the Open Markets for Apps Act also address the regulation of self-preference by digital platforms. The EU's Digital Marketplace Act, which was formally adopted in July 2022, also incorporates the self-preferential behavior of

digital platforms into the regulatory framework. Compared with Europe and the United States, China's digital industry is developing rapidly, and large digital platform enterprises such as Tencent and ByteDance have emerged in the digital market. Therefore, China's digital market also faces the issue of platform self-preference. Given this, the Provisions on Prohibition of Abuse of Dominant Market Position Behavior (Exposure Draft) issued by the General Administration of Market Supervision (GAMS) in June 2022 for the first time regulates platform self-preference and initially enumerates the two forms of manifestation of digital platform self-preference that have already appeared in practice. However, this partial enumeration makes it difficult to completely and accurately explain and characterize the behavior of digital platform self-preference, therefore, the issue still needs to be further explored and researched.

2. THE REVIEW AND OPTIMIZATION OF DIGITAL PLATFORM SELF-PREFERENCE

At present, there is no clear conclusion in the academic community on the behavioral characterization and regulatory path of platform self-preference, and it is still controversial. The EU's Competition policy for the digital era, released in 2019, defines platform self-preference as a technique by which a platform operator, through the use of the market power of the main platform, treats itself or its affiliates as likely to offer more favorable conditions or preferential treatment than competitors or other operators.[1] According to some scholars, platform self-preference refers to a technique whereby a platform treats itself or its affiliates and their goods and services more favorably than other operators.[2] In general, platform self-preference involves two or more markets, namely the market in which the primary platform conducts its underlying business (i.e. the base market), and the upstream and downstream markets associated with the base market. In the underlying market, the digital platform has a dominant market position; while in the associated market, the digital platform plays the dual role of both regulator and market participant. Therefore, it is easy for digital platforms to manipulate the transactions in the associated markets by controlling the absolute monopoly of the upstream market (e.g., using traffic orientation, data control, etc.). Since digital platforms' self-preference is closely related to the establishment of their ecosystems across multiple markets, platform self-preference is often taken into account in policymaking and academic discussions on "capital sprawl".[3] Platform self-preferentiality is also a frequent concern in many controversial areas such as link blocking, data blocking, interconnection, platform access, compatibility, and interoperability.[4].

2.1. Digital Platform Self-preference and Differential Treatment

China's anti-monopoly law defines differential treatment as "the application of differential treatment in terms of transaction prices and other trading conditions to trading counterparts with the same conditions without justifiable reasons." Article 17 of the Anti-monopoly Guidelines on the Platform Economy lists the constituent elements of differential treatment, including "(a) the imposition of differential transaction prices or other transaction conditions based on big data and algorithms, by the payment ability, consumption preferences, and usage habits of the counterparties to the transaction;(b) the imposition of differential standards, rules, and algorithms; and (c)the imposition of differential payment conditions and transaction methods." Although both digital platform self-preference and differential treatment involve adjusting the treatment received by different subjects, they are still different. From the perspective of theoretical definitions, differential treatment is directed at other operators different from the perpetrator of the conduct itself, while digital platform self-preference refers to conduct between the perpetrator itself (i.e., the digital platform) and other operators. In addition, the differential treatment emphasizes the requirement of "identical conditions", i.e., "the absence of differences between the counterparties to the transaction that materially affect the transaction in terms of the security of the transaction, the cost of the transaction, the creditworthiness

of the counterparties, the transaction process in which they are engaged, and the duration of the transaction." (Article 7 of the Anti-Monopoly Committee of the State Council's Anti-Monopoly Guidelines in the Field of Platform Economy) In contrast, the regulation of self-preference by digital platforms does not require the "same conditions". From the perspective of judicial practice, differential treatment is more reflected in the specific price factors, while platform self-preference is more reflected in non-price factors, such as through platform intervention, priority traffic, and other means to implement preferential behavior. Given the essential difference between self-preference and differential treatment of digital platforms, self-preferential behavior should be regulated independently of differential treatment.

2.2. Self-preference and Refusal to Deal with Digital Platforms

China's anti-monopoly law defines refusal to deal as "refusing to deal with the counterparty without justifiable reasons." Article 14(1)(4) of the Anti-monopoly Guidelines in the Field of Platform Economy describes refusal to deal in digital markets: unreasonable restrictions and barriers in platform rules, algorithms, technologies, traffic allocation, etc., which make it difficult for the counterparty to carry out transactions. Self-preferential behavior in digital markets is expressed as "facilitating the transaction of self-products" and is divided into two types: positive and negative. Positive self-preference refers to a platform's provision of services to itself and others while giving more favorable treatment to itself or its affiliates. Negative self-preference refers to a platform's taking measures to restrict or exclude competition from its competitors in the downstream market in the course of providing services, to gain a competitive advantage. Self-preference typically manifests itself in the form of platform blocking, so negative self-preference can also be considered as a refusal to deal. Although negative self-preference is included in the refusal to deal with behavior, the two have different emphases. self-preference emphasizes acts performed for the self, i.e., the digital platform performs self-preferential acts only to provide services for itself or its affiliates, while refusal to deal emphasizes maliciously excluding transactions with the other party. In determining this, it is necessary to consider the substitutability of other platforms, the existence of potentially available platforms, the feasibility of developing competing platforms, the degree of reliance of the counterparty on the platform, and the possible impact of the open platform on the platform operator. (Article 14 of the Anti-Monopoly Committee of the State Council's Anti-Monopoly Guidelines on the Field of Platform Economy).

2.3. Self-preference and Tying on Digital Platforms

China's anti-monopoly law defines tying as "selling goods together without justifiable reasons, or attaching other unreasonable trading conditions to the transaction." Article 16(1)(2) of the Anti-monopoly Guidelines for the Platform Economy lists specific cases of tying in the platform economy: forcing the counterparty to accept other goods using punitive measures such as search downgrading, traffic restriction, and technical barriers. These means have a high correlation with digital platform self-preferential behavior, but the manifestations of self-preferential behavior are more diverse. Although individual types of self-preferential behavior can be regulated under the antitrust law on tying, tying is only one part of self-preferential behavior, and the focus of the two remains different. self-preference aims to differentiate the platform itself from operators in the downstream market while tying is aimed at subjects in different production or sales segments, and this difference is also determined by the dual nature of the platform's identity.

3. THE NECESSITY ARGUMENTATION OF "DIGITAL PLATFORM SELF-PREFERENTIAL ANTITRUST REGULATION"

3.1. Argument for the Necessity of the Subject

In the digital economy, platform operators often act as market rule makers and participate in market competition at the same time, and this dual identity may lead to the abuse of their dominant market position and adversely affect market competition. Theoretically, under the existing antitrust law regulatory system, "differential treatment", "tying" and "refusal to deal" cannot cover the situation of self-preference by digital platforms, and from the perspective of the legislative purpose, the antitrust law should not be applied to the situation of self-preference by digital platforms. From the legislative purpose, the anti-monopoly law on the abuse of the dominant position of market regulation of the provisions of the same production or sales chain of different links of the subject of the transaction, these transactions do not exist in the competitive relationship between the subject of the self-preference involves in the same level of the competitive relationship between the operators.

3.2. Disadvantages of Touting Clause Regulation

Touting provisions have been proposed to regulate self-preferential behavior, but it is too broad, weakening the regulatory efforts. To make up for the deficiencies of the current legal system, a rationalized and systematic regulatory path should be explored. Based on the typology of platform self-preference, the possibility of institutional innovation can be sought in the mechanism of antitrust law.

3.3. Operability of Digital Platform Self-preference in Antitrust Law under the Threshold of Comparative Law

Germany's 10th revised German Anti-Restriction of Competition Act lists "self-preference without justifiable reasons" as an independent abuse of dominant market position, and the Innovation and Online Choice Act issued by the United States also regulates digital platform self-preference as an independent behavior. Therefore, our country can also consider the platform self-preference as an independent abuse of behavior to regulate.

4. LOCALIZED SYSTEM CONSTRUCTION OF ANTITRUST LAW TO REGULATE DIGITAL PLATFORM SELF-PREFERENCE

4.1. Dual Regulation of Behavior and Effect

Based on the neutrality of digital platform self-preferential behavior, the path of regulation cannot be limited to the behavioral level. Only when the self-preferential behavior produces consequences that are detrimental to the competition will it fall within the scope of regulation of the antitrust law.

According to the "leverage theory" of antitrust law, a multi-product enterprise with monopoly power in a market can use the leverage provided by its monopoly power in the tying market to realize monopoly in the tying market, but not all tying behaviors are anti-competitive, and it is necessary to analyze them in light of the competition situation in specific markets.[5].

Specifically about China's antitrust enforcement practice, in the case of Coca-Cola's merger with Huiyuan Juice, the Ministry of Commerce invoked the leverage theory as the main basis for rejecting the merger application, recognizing that "after the completion of the concentration, Coca-Cola can transfer its dominant position in the carbonated soft drinks market to the juice drinks market, which will have an exclusionary and restrictive effect on the competition of the existing juice drinks enterprises, thus jeopardizing the legitimate rights and interests of beverage consumers". This will, in

turn, jeopardize the legitimate rights and interests of beverage consumers".(Announcement of the Ministry of Commerce of the People's Republic of China No. 22 of 2009).

When engaging in dual regulation, firstly, the dominant position of the digital platform in the upstream market should be determined, i.e. based on the number of users, economic scale, and type of business of the platform in the upstream market; secondly, the platform utilizes its dominant position in the upstream market to implement a series of business operation behaviors at the upstream end, which has the effect of giving preferential treatment to its own or related parties in the downstream market; and thirdly, the effects of such preferential behaviors have the effect of exclusion, Thirdly, the effect of the preferential behavior has the effect of excluding and restricting competition, preventing competitors from facing consumers fairly, and ultimately transferring to consumers, which is reflected in the reduction of consumers' opportunities to choose high-quality products; and lastly, the preferential behavior does not have a justifiable reason.

4.2. Paths to Legalization

At a higher legal level, China's regulation of platform self-preference is still in the exploratory stage. The Anti-Monopoly Law responds to the requirement of strong regulation of platform economy and makes clear provisions on the anti-monopoly system in the field of the platform economy, specifically, Article 9 of the General Provisions of the Anti-Monopoly Law: operators shall not utilize data and algorithms, technology, capital advantages, and the rules of the platform to engage in monopolistic behaviors prohibited by this law; and Paragraph 2 of Article 22 of the Anti-Monopoly Law stipulates that: operators with dominant position in the market shall not use data and algorithms, technologies, and platform rules to engage in the behavior of abuse of dominant market position as stipulated in the preceding paragraph. Based on the fact that self-preferential behavior is essentially an abuse of market dominance by operators and is relatively independent of differential treatment and refusal to deal, the regulatory provisions on self-preferential behavior of digital platforms should be included in the seventh item of the review of the first paragraph of Article 22 of the Anti-monopoly Law: without justifiable reasons, making use of data and algorithms, technologies, and platform rules to preferentially treat the self-owned goods or services. Where self-preferential behavior overlaps with tying and refusal to deal, provisions should be made to prioritize the application of provisions regulating self-preferential behavior, to build momentum for subsequent legislation at the level of a separate digital marketplace.

At the non-legal level, the specific circumstances of platform self-preference have yet to be stipulated.2022 Article 20 of the Provisions on Prohibition of Abuse of Dominant Market Position (Solicitation of Opinions) issued by the State Administration for Market Supervision and Administration (SMAS) on June 27, 2012, stipulates the provisions on platform self-preference and enumerates two circumstances, which is the first time that platform self-preference has explicitly appeared in the legal framework of China's anti-monopoly law. To a certain extent, this provision responds to the dilemma of the existing types of abusive behaviors, but the only two situations listed cannot cover all situations, especially the negative preferential treatment behaviors that are ignored. Therefore, referring to the enumeration of self-preferential behaviors in the Digital Market Law, the types of self-preferential behaviors can be increased and presented in the form of guidelines: (a) giving priority to displaying or sorting one's commodities; (b) utilizing the non-public data of the operators on the platform to develop one's commodities or assist in one's decision-making; (c) differentiating the application of the privacy policy; (d) implementing the blocking of links and the blocking of data ports; (e) removing software from the application market; (f)refusing access to small programs; (g) refusing data crawling.[6] Presenting the specific situations in the form of guidelines is a significant addition to the reality of law enforcement.

5. CONCLUSION

Digital platforms with their dominant position in the market implement self-preferential behavior contrary to the concept of fair competition, will disrupt the market order, serious harm to market competition, resulting in a market monopoly will lead to small-scale operators to survive difficulties, and transmitted to consumers so that consumers lose the right to choose, harming consumer interests. The purpose of this article is to optimize the existing provisions on the abuse of dominant market position and at the same time regulate self-preference of digital platforms as an independent abusive behavior, to avoid self-preference that may produce serious competitive harm and reduce the antitrust risk.

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