Anti-monopoly Regulation on Self-preferencing of Internet Platform

Yining Xu*
China Jiliang University, Hangzhou,China
**Corresponding Author.*

Abstract: In the past two decades, relying on the rapid development of information network, internet platform enterprises and the platform economy have developed rapidly. A considerable number of platform enterprises with market dominance use their own advantages to implement preferential self-operation business. This paper analyzes the anti-competitive effect and the inevitable positive effect of self-preferencing on the internet platform finding the legal nature of self-preferencing, to demonstrate the practical significance of regulating self-preferencing of platform in anti-monopoly law enforcement. By using literature research methods, value analysis methods, and comparative analysis methods, this paper assess the anti-competitive effects and positive effects of self-preferencing, and learns from extraterritorial legislation to improve regulation of self-preferencing of platform enterprises in China. It's found that drawing on the Gatekeeper system of the EU's Digital Market Act can maintain the healthy competition order of the internet platform market. We should strengthen pre-supervision of platform self-preferencing and optimize the regulatory path of current laws to actively regulate the platform self-preferencing from the perspective of anti-monopoly.

Keywords: Platform Economy; Self-preferencing; Anti-monopoly Law; Gatekeeper System

1. Introduction

The regulation of platform self-preferencing in competition law began with Google Online Price Comparison Service Case. The main performance is to enhance the competitiveness of the self-operated business and weaken the competitiveness of other operators in the platform.

There are many new challenges in antitrust practice, especially the legal issues of different types of self-preferencing; the problem of the relevant market definition because the platform as the multilateral market itself and as a multilateral market participants at the same time; the incomplete factors that determine the market dominance of the platform. These still hinder the regulation of self-preferencing by the anti-monopoly law.

2. Overview of Platform Self-preferencing

2.1 The Definition of Self-preferencing

The self-preferencing of the platform refers to the behavior of the platform operator to give more preferential treatment to its own business by formulating platform rules or using its own unique resources compared with other platform operators.[1] The main performance is to enhance the competitiveness of the self-operated business and weaken the competitiveness of the operator's business in other platforms. Article 20 of the deleted Regulations on Prohibition of Abuse of Dominant Market Position (Draft for Soliciting Opinions) has stipulated the definition and exemption (just cause) of self-preferencing, but the two types of examples are attributed to the same form of expression.The form of expression that weakens the competitive advantage of operators in other platforms should also be summarized, such as platform blockade.

Taking Google as an example, as a platform intermediary that initially connects consumers and advertisers, it provides free search and other low-cost services on the consumer side, and charges advertising fees on the advertiser side. Google improves search relevance by improving service quality and optimizing algorithms to lock users. With the development of the Internet economy, the

Internet platform began to experience the development of vertical integration [2] for the motivation of saving costs and competing for trading opportunities. Google is no exception. It develops different businesses at the same time, such as shopping comparison websites, mailbox services, online translation, etc. As the dual identity of 'athlete' and 'referee', Google began to modify the algorithm, gradually deviated from neutrality, and turned to the most profitable party for itself-self-operated business.

Different from the China, in practice, the Federal Trade Commission has determined that Google's display of proprietary content should be regarded as an act to improve the overall quality of Google's search products. At the same time, it is believed that there is no evidence that Google's manipulation of search algorithms puts vertical websites at an unfair disadvantage. It can be seen that the platform self-preferencing has a negative effect but may bring economic benefits.[3] Therefore, in practice, the principle of reasonableness should be applied to judge the illegality of the platform self-preferencing.

At present, there is no legal article in China that clearly defines and stipulates the illegality of self-preferencing, but the self-preferencing of the platform can still be identified in China according to the Article 22, paragraph 1, item 7 of the Anti-Monopoly Law.

2.2 Negative Effects of Self-preferencing

Anti-monopoly law does not necessarily prohibit platform self-preferencing. The rationality and competition damage coexist, such as the ability to form innovation incentives for operators in other platforms and the vertical integration can save the operating costs of the platform operators themselves. Therefore, before examining and regulating self-preferencing, its negative effects should be clarified to demonstrate the necessity of regulation.

2.2.1 Damage to the fair competition interests of the operators in the platform.

Improving the competitiveness of self-operated business and weakening the competitiveness of operators in the platform are two forms of self-preferencing. The relationship between the two is the same growth, which also makes the operators in the platform become the biggest victim of the platform operators to implement self-preferencing.

Competition is the basis of optimal allocation of resources, and the limited nature of resources determines that competition is a process of equality to inequality between operators. Thus the process of competition should be more fair, to ensure the equality of operators in the subject qualification [4] and a fair and free competitive environment.

However, the competitive advantage of the self-operated business in the platform is obvious: the motivation of the platform to participate in the market in a dual identity is to make the self-operated business gain an advantage in the competition. For consumers, if the platform cannot maintain a neutral position, the business of other operators in the platform will never be able to stand on the same starting line as the self-operated business of the platform.

As far as China is concerned, the protection of fair competition in the market as one of the principles of anti-monopoly supervision, acts detrimental to the fair competition interests of market players should be regulated.

2.2.2 Disrupting the competition mechanism of the platform market

The preferential self-operated business behavior of the platform operators will not only lead to the damage of the fair competition interests of the operators in the platform, but also affect the competition mechanism of the platform market. Once the fair competition interests protected by the anti-monopoly law of competitors are damaged, the competition mechanism of the entire market cannot play a role.

Although the anti-monopoly law does not require all operators to stand at the same starting line, the self-preferencing of the platform brings not only competitive disadvantages to other operators in the platform, but also information asymmetry. As we all know, data as an important new production factor, is the lifeblood of operators in a platform economy that does not take price as the core of competition. Platform operators with market dominance hold relevant data of massive consumers, which makes "information gap" between self-operated business and other businesses. Under the limited attention of consumers, the efficient information transmission efficiency of

self-operated business makes consumers have no time to pay attention to the business of operators in other platforms, which will further disrupt the market competition order of the platform.

2.2.3 Damage to consumer

Welfare to safeguard the interests of consumers is one of the main purposes and functions of antitrust law. The process of monopoly is also the process of eliminating competition. The market supply decreases but the price rises, so consumers lose their consumption choices. The implementation of self-preferencing by platform operators damages the fair competition interests of operators in other platforms, affects the competition mechanism of the platform market, and infringes the interests of consumers. [5] Specifically, the platform's inability to maintain neutrality and give preferential treatment to self-operated business firstly makes the competitiveness of other operators in the platform at a disadvantage, in the process of survival of the fittest competition, other operators are very likely to be unable to compete with the platform's self-operated business because of the disparity in data, traffic and other factors and finally withdraw from the market and reduce consumer choice. This also means that consumers' consumption costs rise, they have to choose self-operated business, which is difficult to provide consumers with better and lower-priced business or products because there is no competitive incentive.

Consumer welfare is one of the legislative objectives of anti-monopoly law, which is regarded as the status of 'economic constitution'. Safeguarding consumer welfare is the anti-monopoly policy that the Chicago School has always advocated. In the traditional market, it is difficult for consumers to talk with operators in a strong position, let alone platform operators with the dual status of 'referee' and 'athlete' . Although algorithm prioritization and traffic recommendation seem to save consumers' search costs, they are beneficial to consumers' preferencing. This 'illusion' stems from the information asymmetry between consumers and merchants. Consumers can only make the most altruistic consumption choices under the background of strong platform operators.

3 The General Legal Identification of Self-Preferencing of the Platform

Starting from the Google case, the legal identification is generally carried out by identifying the self-preferencing as an abuse. Article 7 of China's Anti-Monopoly Law stipulates that the abuse of dominant market position shall not be allowed, and Article 22 adopts enumerated laws to stipulate the abuse of dominant market position. If the operator's abuse needs to be regulated by the anti-monopoly law, it needs to meet the constituent elements, that is, the operator has a dominant market position, and the implementation of abuse, resulting in certain harm.

3.1 Definition of Relevant Market

According to the definition of market dominance in the anti-monopoly law, defining the relevant market is the premise of determining the dominant position of the operator in the market. However, based on the characteristics of the network externalities of the two-sided market of the Internet platform, compared with the traditional market, the definition of the relevant market is facing no small challenge. Secondly, the complex pricing strategy of the two-sided market gives consumers low or even free prices, making non-price competition an important form of competition. When free products cannot be priced, the traditional SSNIP method is difficult to apply.

3.2 Determination of Market Dominant Position

The market dominant position is generally determined by market performance, market behavior and market structure, which correspond to the profitability of the subject, whether to consider other operators and market share. According to Articles 23 and 24 of the Anti-Monopoly Law in China, we adopt two methods of presumption and identification in the identification of market dominance. The method of presumption mainly depends on the market share of the main body, which shows that China applies the market structure standard. Different from the traditional market, the free business launched by the platform market on the consumer side makes it difficult to apply the data such as sales and turnover of the traditional market share. At the same time,

because the relevant market in the field of Internet platform is difficult to define, many network platforms with the ability to exclude and restrict competition have not reached the threshold of market dominance in the relevant market. [6] Some platform enterprises are omitted by the current legal regulation because they do not have a dominant market position in form, even if they have actually caused competitive damage. It can be seen that the general anti-monopoly law regulatory framework is difficult to effectively apply in the platform market.

3.3 Identification of Abuse of Dominant Market Position

Under the current law, how to apply the law is made into a big problem. The first thing that should be clarified is the difference and connection between the concept of platform self-preferencing and the related concepts on the anti-monopoly law.

3.3.1 Differential treatment

Generally, the concept of differencing is there is no legitimate reason to implement differential treatment on trading conditions such as trading prices for trading counterparts with the same condition. The scope of differential treatment clauses covered by the platform's self-preferencing is relatively wide, which can reflect the regulation of unfair treatment. Identification factors of differential treatment in the platform economy include price discrimination and non-price discrimination, and it is more powerful to identify different types of self-preferencing.

However, there are some differences between differential treatment and platform self-preferencing. The biggest difference is the object condition. [7]

Secondly, according to the Principle of Economic Entity, the platform and the self-employed should be regarded as one. Therefore, the self-employed cannot be used as the trading object of the platform. Secondly, in the self-preferencing, the platform faces two counterparts, one is the self-operated business, that is the affiliated institution or related party, and the other is the platform's non-related party. The former has been integrated into the ecosystem of vertical integration of the platform, realizing the internalization of external effects, while the latter may generate more transaction costs.

In addition, the differential treatment in the traditional market is more reflected in the price factor; in contrast, in the platform market the preferential factor is the non-price factor.

Finally, the identification of the 'difference' of differential treatment in the platform market environment has a strong subjective problem. In the traditional market, the elasticity of consumers to the change of price factors is still different; in the Internet platform market, the base of users in the same platform is large, and the perception and sensitivity of users to the differences in the treatment of various factors are more different. Different users feel that they are treated differently from other users, which cannot become an illegal reason for operators to be regulated. When identifying search algorithm discrimination, it is necessary to give full play to the subjectivity of the subject, so that the fair competition behavior of some search engines can be easily generalized as monopoly behavior. [8]

3.3.2 Tie-in sale

Tie-in sale refers to tying goods without legitimate reasons, or attaching other unreasonable trading conditions to the transaction. Google has used its dominant position in the general search engine market to try to transmit its advantages to its own shopping parity service, which shows the similarity between tying and platform self-preferencing. But based on the free model characteristics of the platform economy on the consumer side, in many cases of platform self-preferencing, users are free to obtain tying goods, which is the biggest difference from the general tie-in sale to self-preferencing.

3.3.3 Refusal to deal

Refusal to deal in the EU competition law generally refers to the act of refusing to supply to a specific counterparty. The operator's independent choice of operation is reflected in the voluntary choice of trading objects, so the refusal to deal itself should not be regulated. In the field of anti-monopoly, if the operator with a dominant market position is essential facility, then the act of refusing to deal with the counterpart without proper reasons will be deemed as refusing to deal. It can be seen that the refusal of transactions should be subject to the principle of reasonableness, which is in line with self-preferencing.

In addition to determine that the platform constitutes the essential facilities in the refusal

to deal, the difference between the two is mainly reflected in the behavioral effects. [9] The platform self-preferencing can produce the leverage effect of the platform market and expand the competitive advantage of a market to the related market. For example, Google takes advantage of its dominant position in the search engine market to give preferential treatment to its shopping price comparison website, so that it gives priority to display and increases traffic, thus transmitting its dominant position. But the purpose of refusing to deal is to exclude a specific operator from a specific trading market.

4. The Enlightenment of Digital Markets Act to China Special Law

As a typical representative of the EU 's exploration of pre-intervention paths at the legal level, the Digital Markets Act can give some enlightenment to China from the perspective of other regulatory paths.

4.1 Regulatory Dilemma of Platform Self-Preferencing in China

At present, there is no legal special article on the self-preferencing of the platform in China, and the application of the third, fifth and sixth paragraphs of Article 22, paragraph 1, and the seventh miscellaneous provisions of the anti-monopoly law is generally applicable. In addition to the boundary between the platform self-preferencing and related concepts, if more cases are applied in practice for case analysis, it will lead to higher costs, lower efficiency, and lagging regulation. Using the general law's analysis path of 'defining market, identification of market dominant position, analysis of the consequences of abuse', it is obviously impossible to accurately determine the market position of the platform only by relying on the identification factors listed in Article 23 of the Anti-Monopoly Law and the presumption rules of Article 24. In the two-sided market of Internet platform where price analysis is difficult to apply, there are difficulties in the application of current laws.

4.2 The Gatekeeper in the Digital Markets Act

The Digital Markets Act first clearly lists eight core platform services, which greatly reduces the difficulty of defining the relevant market due to the free mode of the platform market. By pre-enumerating the type of market, directly avoid the problem of defining the relevant market.

Secondly, the so-called gatekeepers are enterprises that provide core platform services. The Digital Markets Act gives three standards for identification. At the same time, each standard has a corresponding quantitative standard, which can be used to presume that the platform operator meets the qualitative standard. The combination of the two has double insurance for the identification of gatekeepers, which improves the predictability of the law and reduces the possible omissions in market identification. At the same time, the scope and standard identification of the gatekeepers can be regarded as a substitute for the identification of market dominant position.

After determining the scope of the gatekeepers, the third chapter of the Digital Markets Act sets out a list of obligations to the gatekeepers for restricting competition and unfair competition in the platform. It mainly makes provisions on data, platform neutrality, and communication, including positive obligations and negative obligations. Once identified as gatekeepers, they cannot violate their obligations and fully reflect their own illegal principles and structuralism. Article 5 is also regarded as a blacklist, which clearly stipulates the behavior prohibited by the gatekeeper; the relatively broad sixth is the grey list, which requires the discretion of law enforcement departments.

The behavior of self-preferencing of the platform is also reflected in the negative obligations of the gatekeeper. "The gatekeeper shall not treat more favourably, in ranking and related indexing and crawling, services and products offered by the gatekeeper itself than similar services or products of a third party. The gatekeeper shall apply transparent, fair and non-discriminatory conditions to such ranking."

4.3 The Feasibility and Problems of the Gatekeeper Theory in China

4.3.1 Advantages and feasibility of the gatekeeper system

As mentioned above, Digital platform antitrust investigation is difficult in defining the relevant market in China. The gatekeeper system is out of the general anti-monopoly investigation framework. The Digital Markets

Act emphasizes prior supervision and adopts the combination of the principle of per se illegality and the principle of rationality to determine the legitimacy of the gatekeeper's behavior. Confirming the prohibitive obligations of the gatekeeper in advance can effectively prevent the monopoly behavior of the super platform, such as using its own advantages to implement preferential treatment for its own business. Also, reduce the investigation work of anti-monopoly investigation institutions, reduce the cost of regulation, and effectively resolve the primary problem of platform monopoly behavior identification-related market definition. At the same time, the EU does not rely solely on this step of special law to solve the monopoly problem of the platform market, and does not exclude post-regulation. Therefore, when exploring the regulatory path suitable for China, we should combine the development status of its platform market and link the post-regulation system in practical application to avoid the phenomenon of acclimatization of foreign models in China.

Secondly, in the development process of China's platform economy, typed monopoly behaviors emerge in endlessly in different platform markets. There are different types of self-preferencing, such as algorithmic discrimination, software bundling, and platform banning. Therefore, in the process of supervision, it is necessary to analyze the problems and motivations of various platform enterprises and evaluate the competitive damage of their monopolistic behaviors. The Gatekeeper has made the measure of grading the platform subject and confirming the content of different obligations. It is a new choice to optimize the regulatory path, which is conducive to accurate identification and timely regulation, so that China's platform economic market can continue to develop under the mechanism of fair competition.

4.3.2 Possible problems in the application of the gatekeeper in China

In the identification of the status of the gatekeeper, in order to reduce the difficulty of defining the relevant market, the Digital Markets Act divides the core platform services into seven areas in the first article. However, the qualitative standards and quantitative standards are not subdivided, and the amount of market influence standards and active users in the portal are stipulated in a one-size-fits-all manner.

In terms of the obligations of the gatekeepers, the provisions of the obligations are more fragmented. Articles 5 and 6 are mixed with each other in a simple way, lacking the logic and rules of arrangement, and it is difficult to divide specific categories. For example, the prohibition of self-preferencing of platforms appears in Article 6, Item 5 and Item 11 respectively, and Item 11 also stipulates anonymous protection measures for consumers search information, which shows the confusion of provisions and the lack of legislative logic. The setting conditions of the grey list obligation in Article 6 are relatively broad. When the discretion is too large, it is easy to have different standards and abuse of power.

Too many gatekeeper obligations may also lead to too much government intervention and inhibit innovation.

5. Antitrust Regulation Path of Self-Preferencing

5.1 Strengthen pre-supervision

According to the law in force, we still adopt the general post-regulation model. Future legislation can refer to the Digital Markets Act with the Gatekeeper as the core, and adopt the pre-regulation mode independent of the anti-monopoly law framework, which is also the revival of structuralism advocated by the new Brandeis school in recent years.

5.1.1 Combine the Doctrine of Perse and the Rule of Rationalization

Generally, monopoly agreements are regulated by the doctrine of perse, while the abuse of market dominance is generally regulated by the rule of rationalization.

In practice, Amazon Prime Members, as a preferential service that can benefit consumers, locks in a large number of customers, and causes merchants to use Amazon's distribution and Amazon's cloud services through network effects. In the process, Amazon has experienced cross-industry integration and cross-border network effects, enabling Amazon to obtain cross-subsidies-profits on the operator‘s side to subsidize its losses on the consumer side. In this two-sided market, the welfare of consumers is not only not weakened, but even good. At the same time, the low price of prime members can lock users

and reduce users' consumption on other platforms. Judging from the criteria for the degree of damage to consumer welfare, Amazon cannot be blamed. However, it has quietly consolidated its market dominance, even if it does not implement abuses, it still undermines the market and competition mechanism. This has a strong impact on the current anti-monopoly law system that mainly evaluates competition based on short-term consumer interests. It is confirmed that the new Brandeis school believes that the monopoly structure itself will bring about the destruction of the market order [10], and the result of the analysis at the level of behavioral effect is that the doctrine of perse illegality should be applied.

5.1.2 Special legislation independent of the anti-monopoly law

In view of the platform self-preferencing, it is very difficult to define the relevant market and identify the market dominance as the pre-procedure under the current legal framework. There is no legal clause to accurately analyze the illegality of the platform, which will make the judicial efficiency low. After all, the results of case analysis are not universal. The self-preferencing lacks more accurate legal regulation. The effect of its regulation is really limited by scattered laws. The low cost of illegality will only double the monopoly of the platform enterprises and endanger competition. It is confirmed that the new Brandeis school believes that the monopoly structure itself will bring about the destruction of the market order, and the result of the analysis at the level of behavioral effect is that the doctrine of perse illegality should be applied. [11]

China is also trying to introduce the gatekeeper system but a principled law, and it is difficult to accurately regulate the platform self-preferencing in practice. The timely introduction of corresponding legal norms is the proper meaning of regulating the platform self-preferencing.

5.2 Optimization of General Regulation Path

5.2.1 Determine the principle of case analysis for typed self-preferencing

The definition of relevant market as the first pre-procedure in the general analysis path, should be more targeted in different types of platform self-preferencing. For example, in the case of Qihoo v. Tencent's abuse of dominant market position, the SSNDQ method is used instead of the commonly used SSNIP method in the market where cross-subsidy is more used to provide free services to consumers.

In terms of dominant market position, although the market share in the market structure standard is not the only standard to determine the market dominance, and other factors need to be considered, there is no clear guidance of the superior law, and it may fall into the dilemma of different standards in case analysis. Therefore, in terms of the identification factors other than market share, we can learn from the factors that should be taken into account in the identification of market dominance caused by the network effect in the platform economy stipulated in Competition Act (Gesetz gegen Wettbewerbsbeschränkungen) in Germany.

In terms of abuse of dominant market position, platform self-preferencing has a negative effect, but also has certain rationality. Based on the fact that there is no legal provision to analyze the illegality of the self-preferencing of the platform, the regulation should be judged based on the case situation. Firstly, the rationality of the self-preferencing of the platform operators should be accurately evaluated, such as forcing the technological innovation of the operators in other platforms, so as to promote competition and provide consumers with better and cheaper services or products. When the platform is not identified as a super platform or gatekeeper, there is no obligation to treat the business provided by all merchants in the platform, including the self-operated business, equally, so the nature of the platform self-preferencing cannot be extremely identified.

5.2.2 Forming a reasonable principle of fast application in practice

In some cases, self-preferencing is reasonable and legal, which can produce great quality and price advantages on the demand side. Therefore, the judgment of its illegality under certain circumstances undoubtedly requires the application of the rule of rationalization to make a specific analysis of the purpose and consequences of its behavior. For the platform self-preferencing, especially in the case of providing free services on the consumer side, it is not simple to determine rationality and

competitive damage. In practice, the use of the rule of rationalization is often complicated, which makes the regulatory cost increase accordingly.

Based on the purpose of efficiency, the rule of rationalization of quick application should be formed for the self-preferencing of the platform. Specifically, for example, it can be assumed that the platform self-preferencing is illegal because the behavior itself is more harmful to competition, but at the same time, it gives the actor a certain right of defense. When the defense is justified and there are legitimate reasons, the economic benefit analysis of the behavior should be carried out. If the defense is not established, the behavior should be considered illegal.

6. Conclusion

Although the self-preferencing of the Internet platform is reasonable, its negative effects on the operators, market order and consumers in the platform make the regulation necessary. Based on the general anti-monopoly law regulation, it is necessary to first define the relevant market, identify the dominant market position, and identify the abuse of dominant market position, that is, to analyze the illegality of platform self-preferencing. However, compared with the traditional market, the platform market has many special features, such as bilateral market, free mode, leverage effect, etc., which makes the current regulatory method fall into a dilemma, and the platform self-preferencing is still controversial in theory and practice. Nowadays, the Internet permeates all aspects of daily life. The Digital Market Act with the Gatekeepers as the core gives some reference from the perspective of pre-regulation. In addition, we can also be optimized under the general regulation path to achieve the optimal solution of the anti-monopoly law regulation of the self-preferencing of the Internet platform.

References

[1] Bo Vesterdorf. Theories of self-preferencing and duty to deal – two sides of the same coin? Competition Law & Policy Debate, 2015:4-9

[2] Herbert Hovenkanmp. Federal Antitrust Policy: The Law of Competition and its Practices. West Academic Publishing, 2020, 489-511

[3] Meng Yanbei, Zhao Zeyu. Reasonable regulation of self-preferential treatment behavior of super platform under anti-monopoly law. Journal of Central South University (Social Science Edition), 2022,28(01):70-82

[4] Zhu Yifei. On the Fair Competition Right of Operators. Political and Legal Essays, 2005(01):66-71

[5] Wu Kaiwen, Wang Chengtang. Regulation of competition law on preferential treatment of proprietary business by using data of operators in the platform. Administration and Law, 2021(06): 120-129

[6] Lin Xiuqin. On the Paradigm Shift of Antitrust in the Digital Economy - Taking the EU 's Digital Market Law as a Mirror. IPR, 2022, No.257(07):3-19

[7] Fang dianhui. Analysis on the Regulation Path of Platform Self-Preference Behavior under Antitrust Law. Finance and Economy, 2023(02):41-50+ 63.

[8] Nazzini R. Google and the (Ever-stretching) Boundaries of Article 102. Journal of European Competition Law & Practice,2015,6(5):301–314,

[9] Zhou Wei. Antitrust Law Analysis on the Regulation of Platform Prohibition - Based on the Perspective of Self-Preference. Law, 2022(07):163-178

[10] Frank Pasquale, Platform Neutrality: Enhancing Freedom of Expression in Spheres of Private Power, 17 Theoretical Inquiries in Law 487, 489(2016).

[11] Lina M. Khan, Amazon’s Antitrust Paradox, 126 Yale Journal on Regulation 564 (2017)

