

SELF-PREFERENTIAL TREATMENT OF DIGITAL PLATFORMS AND ITS ANTI-MONOPOLY REGULATION

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Abstract: The rapid development of the digital economy has given rise to the issue of self-preferential treatment by digital platforms. This paper argues that self-preferential treatment stems from the dual role of platform operators and the "anchoring effect" in the operation of digital platforms. Self-preferential treatment conducted by digital platforms is a manifestation of the leverage effect in the digital economy, thus requiring corresponding anti-monopoly regulation. However, platform self-preferential treatment is significantly different from the restricted transactions, tying, and differential treatment stipulated in the current Anti-Monopoly Law. It should be regarded as an independent abuse of dominant market position and the concept of digital essential facilities should be introduced to regulate such behavior.

Keywords: Digital platforms; Self-preferential treatment; Anti-monopoly

1 INTRODUCTION

A digital platform can be defined as a trading place where users (such as buyers and sellers) exchange goods, services, and information[1]. With the rapid expansion of the digital economy, digital platforms have also made significant progress globally. According to the "Observation on Platform Economy Development (2023)" released by the China Academy of Information and Communications Technology under the Ministry of Industry and Information Technology, as of the end of 2022, there were 70 Internet platforms worldwide with a value of over 10 billion US dollars, with a total value of approximately 9.2 trillion US dollars. Moreover, during the period from 2020 to 2022, the top ten global platforms had an average annual compound growth rate of 18.4% in revenue and 19.3% in gross profit. The platform economy achieved growth against the trend.

However, as the digital platform economy develops in depth, large digital platforms vertically integrate downstream industries and radiate their platform advantages to adjacent industries, thereby forming platform self-operated businesses within the platform. From the perspective of the platform itself, this vertical monopoly can undoubtedly enhance the overall operational efficiency of the platform and expand the profit opportunities of platform operators. However, from the perspective of operators within the platform, the self-operated business of digital platforms clearly has competitive advantages different from those of other operators. The network externality of the digital economy and the "dual role" characteristic of the platform enable the platform to provide some kind of "special treatment" to its self-operated business, thus giving rise to the problem of self-preferential treatment by digital platforms, which harms the competitive interests of other competitors within the platform.

In recent years, cases of self-preferential treatment by platforms, such as the "Google Shopping case", have been frequent, attracting high attention from antitrust enforcement agencies in various countries. In China, although the State Council issued the "Anti-Monopoly Guidelines for the Platform Economy Field" (hereinafter referred to as the "Anti-Monopoly Guidelines") in 2021, classifying self-preferential treatments such as search demotion and abuse of non-public data under restrictions on transactions or tying, there are problems of incomplete concepts, unclear definitions, and difficulties in determining violations[2]. What are the differences between self-preferential treatment and traditional abuse of market dominance in terms of concept and scope? How can the current Anti-Monopoly Law be improved based on these differences to meet the needs of regulating self-preferential treatment? This paper will start from the characteristics of self-preferential treatment, analyze the differences between self-preferential treatment and general abuse of market dominance, and ultimately clarify the corresponding regulatory strategies based on these differences.

2 ORIGINS OF SELF-PREFERENTIAL TREATMENT BY DIGITAL PLATFORMS

2.1 The Dual Roles of Platform Operators

Some viewpoints suggest that digital platforms exhibit a dual "enterprise-market" nature in the marketplace[3]. On one hand, as enterprises, digital platform companies share the profit-seeking nature of other businesses and are also confronted with intense competition. For the platform itself, competition emanates from other platform enterprises. Regarding the platform's self-operated business, it must also compete with third-party operators within the platform. On the other hand, leveraging their advantages in data, algorithms, etc., platforms offer intermediary services to operators and consumers within the platform, facilitating transactions among various parties and thereby transforming the platform into a market. To ensure the orderly operation of this market, platform operators inevitably formulate corresponding rules. These include both rigid user and operator regulations and "soft" rules established through

programming and algorithms. For example, recommendation algorithms tailored to user preferences can be regarded as a type of internal platform rule.

This "enterprise-market" duality of platforms endows platform operators with a dual identity of "competition participant" and "rule enforcer". On one hand, the self-operated business of platform operators engages in competition with numerous operators within the platform. Driven by the pursuit of excess profits, platform operators inherently tend to eliminate internal-platform competition and secure a monopolistic position for their self-operated business. On the other hand, platform operators can regulate operators and consumers within the platform by virtue of the rules formulated within the platform, thereby acquiring "quasi-legislative power" and "quasi-judicial power"[4]. Such rules render it possible for platform operators to impose competitive restrictions on other internal-platform operators. The combination of these two aspects means that platforms are both motivated and capable of providing self-preferential treatment to their self-operated business, thereby disrupting the competitive equilibrium within the platform.

2.2 The "Anchoring Effect" of Digital Platforms

The dual-role nature of platform operators may create a predisposition and room for self-preferential treatment. However, this factor alone is insufficient to prompt actual self-preferential treatment. For instance, if platform operators bestow self-preferential treatment upon their self-operated services with inferior quality, the likely consequences are damage to the platform's reputation and erosion of user trust among platform operators, consumers, etc. Eventually, users may abandon the platform, jeopardizing the platform's long-term viability. In such a scenario, the platform may gain short-term benefits but incur substantial medium-to-long-term losses[5].

Evidently, for platforms to engage in self-preferential treatment, there must be a mechanism that "anchors" users to the platform. Firstly, platforms can capitalize on their data and algorithmic advantages to accurately match the supply and demand of operators and consumers within the platform. This reduces the search and negotiation costs for both parties. As users interact within the platform, the platform can gather information and refine its strategies, further enhancing the user experience. Consequently, both operator and consumer users develop a reliance on the platform's services due to the cost-saving incentives, and this reliance intensifies as the platform's operational strategies evolve. Secondly, digital platforms possess network externalities. An increase in the number of operators and consumers within the platform attracts more users to participate in transactions. The presence of a larger user base makes it challenging for both sides to forgo the transaction opportunities offered by the platform, thus fostering dependence. Stemming from the need to reduce transaction costs and access diverse transaction opportunities, digital platforms exert an "anchoring effect" on their internal users. This anchoring effect enables platforms to mitigate inter-platform competition and attain a dominant market position, thereby making self-preferential treatment a realistic possibility.

3 MONOPOLISTIC EFFECTS OF SELF-PREFERENTIAL TREATMENT BY DIGITAL PLATFORMS

3.1 Positive Effects

From the perspective of vertical mergers between industries, the self-preferential treatment of digital platforms is also a manifestation of vertical integration by manufacturers. This vertical integration can bring about efficiency improvements for both the digital platform itself and its self-operated services. Specifically, according to the "rational person" assumption in economics, a company will only add an internal business if the marginal cost of doing so is lower than the marginal cost of separating that business. Vertical integration can internalize the transaction costs that originally existed between the platform operator and third-party entities, turning them into administrative management costs within the enterprise. By leveraging its administrative management capabilities and advantages in logistics and distribution, the platform operator can replace platform-based operators with self-operated businesses, thereby strengthening quality supervision, simplifying transaction processes, and enhancing delivery efficiency, achieving "cost reduction and efficiency improvement". For instance, JD.com combines its self-operated business with its own logistics business, using its efficient logistics network across the country to deliver goods from its self-operated stores quickly, reducing logistics costs and enhancing the experience of platform users.

From the perspective of competition between platforms, the self-preferential treatment of digital platforms can reduce the operating costs of the platform, thereby giving the platform a competitive edge over other competing platforms. Additionally, some argue that self-preferential treatment by platforms can cause a certain degree of crowding out for platform-based operators, leading these operators to enter other platforms that do not engage in self-preferential treatment, thereby enhancing the competitiveness of these platforms and improving the competitive situation between platforms[6].

Furthermore, for downstream markets, self-preferential treatment also has the potential to promote competition among secondary markets. From the perspective of a platform's self-operated business, it is entirely possible that when the business is initially insignificant in the downstream market, the platform can rapidly expand its market share through self-preferential treatment, such as by enhancing the business's visibility, thereby challenging established players in the downstream market and generating competitive constraints within that market. In this case, self-preferential treatment is beneficial to competition[7].

3.2 Negative Effects

From the perspective of corporate profitability, self-preferential treatment by platforms does have its positive effects. However, some enterprises may engage in self-preferential treatment with the motive of eliminating monopolies and excluding competitors, and the negative effects on competition in downstream markets are even more severe.

Firstly, for third-party operators in the downstream market, self-preferential treatment by platforms has an exclusionary effect on competition. Platforms can leverage their role as "rule enforcers" to manipulate platform rules to create obstacles for the commercial activities of third-party operators within the platform, thereby providing an unreasonable competitive advantage to their self-operated businesses. These "obstacles" can be direct price hikes or restrictive entry measures. For example, Apple charges a 30% fee on Spotify's subscription services in the App Store, while its own Apple Music subscription service is exempt from this fee[8]. This increases the cost for Spotify to enter Apple's platform, eventually leading to Spotify's withdrawal from the App Store. Moreover, these "obstacles" can also be "soft" measures that restrict competition, such as search ranking demotion. For instance, Google uses its advantage in search algorithms to display third-party comparison shopping services lower in search results while promoting its own comparison shopping services higher. This reduces consumer attention to third-party comparison shopping services, forcing them to spend additional advertising costs and weakening their competitive ability.

Secondly, for consumers within the platform, self-preferential treatment by the platform infringes upon their right to choose. The self-preferential treatment of the platform may exclude some third-party operators from the platform or reduce the contact between third-party operators and consumers, preventing consumers from making the best choices based on their own interests and hindering the maximization of their utility. Moreover, during the process of self-preferential treatment, the platform may also improperly utilize the consumer data it has collected, infringing upon consumers' personal information rights[9].

Furthermore, the self-preferential treatment of the platform may also dampen the innovation enthusiasm of third-party operators within the platform. On the one hand, third-party operators can only rely on their limited information and capabilities to grasp market trends and identify innovation opportunities, which means they have to bear higher costs for innovation activities. In contrast, platform operators can collect and analyze data of all operators within the platform, especially non-public data, to promptly detect the innovation activities of third-party operators. As a result, the platform can catch up at a lower cost and quickly launch similar products, thereby squeezing the innovation returns of third-party operators. On the other hand, the "search ranking reduction" and other behaviors of the platform are covert. By differentially pushing the platform's own business and third-party operators, the platform's own business may be mistakenly perceived by other third-party operators as highly profitable, leading them to imitate it. This reduces the innovation enthusiasm of third-party operators and results in the homogenization of goods and services within the platform[10].

4 THE DILEMMAS IN REGULATING SELF-PREFERENTIAL TREATMENT UNDER THE ANTI-MONOPOLY LAW

4.1 The Necessity of Anti-monopoly Regulation for Self-preferential Treatment

The necessity for anti-monopoly regulation of self-preferential treatment by online platform enterprises is derived from the leverage effect of self-preferential treatment. The leverage effect refers to a situation where an enterprise enjoying a dominant position in a certain market transfers its advantages in that market to an adjacent market, thereby attaining a dominant position in the latter. The leverage effect was initially applied in the regulation of complementary product tying and has since been further extended to the discrimination of corporate horizontal mergers and acquisitions[11].

In China, as early as 2009, in the case of Coca-Cola's acquisition of Huiyuan Juice, the Ministry of Commerce held that through the acquisition of Huiyuan Juice, Coca-Cola would transfer its dominant position in the carbonated beverage market to the juice market, thereby increasing the entry costs in the juice market. This case set a precedent for China in using the leverage effect to address the abuse of market dominance by enterprises.

Different from the industrial economy, in the digital economy era, the leverage effect of platforms brings about more prominent monopolistic consequences. During the operation of digital platforms, data plays an irreplaceable role. The characteristic of increasing returns to scale of data enables super platforms to achieve accelerated accumulation-based expansion by relying on the traffic and data at their disposal[12]. As a result, super platforms can obtain a low entry threshold in adjacent markets through self-preferential treatment, which, in effect, squeezes out other start-up enterprises.

In addition, for large-scale digital platforms, the means of transferring market dominance through self-preferential treatment come at a relatively low cost. For instance, digital platforms only need to rely on algorithms to give priority display to their own services. In contrast, other operators have to incur substantial costs to attract consumers' attention. Over time, digital platform enterprises can easily expand their market dominance, and the implications thereof cannot be underestimated.

In conclusion, for the purpose of preventing the transfer of market dominance brought about by the leverage effect, the self-preferential treatment of digital platforms should be regulated.

4.2 The Connections and Distinctions between Self-preferential treatment and Other Abusive Behaviors of Market Dominance

As previously discussed, there is a necessity for anti-monopoly regulation of self-preferential treatment. However, on the other hand, the current Anti-Monopoly Law of China does not recognize self-preferential treatment as an independent abusive behavior of market dominance. Although the Anti-Monopoly Guidelines issued in 2021 classify self-preferential treatment as restrictive trading practices such as "blocking stores, search ranking demotion, and traffic restrictions", the relevant abusive market-dominance behaviors stipulated in the current Anti-Monopoly Law, such as exclusive dealing, tying arrangements, or discriminatory treatment, may not comprehensively capture the characteristics of self-preferential treatment by digital platforms.

4.2.1 Exclusive dealing: failure to exclude similar competitors

Firstly, self-preferential treatment shares certain similarities with exclusive dealing. Both serve to exclude a particular party from participating in transactions or create obstacles for a party to engage in transactions. Nevertheless, there are also notable differences between the two. Exclusive dealing is founded on the premise of impeding competitors' access to the market[13]. Its objective is to eliminate competition from similar rivals in the market. Specifically within the context of digital platforms, exclusive dealing is manifested as the platform preventing merchants or consumers on its platform from operating on other platforms. For instance, Alibaba implemented the "choose-one-out-of-two" policy on its e-commerce platform, preventing key merchants from conducting business on other platforms. The State Administration for Market Regulation determined that this practice excluded and restricted fair competition among relevant market operators.

In contrast, self-preferential treatment mainly involves the platform using algorithms and other means to prioritize the promotion of its own business, which restricts competition between other platform operators and the platform's self-operated business. Essentially, it is the platform seeking an edge in the competition between itself and the operators within the platform. These are not competitors of the same type. As previously mentioned, self-preferential treatment may actually foster competition among platforms for other platform operators.

In conclusion, self-preferential treatment of platforms does not meet the criterion of excluding competition from similar competitors in exclusive dealing. Therefore, applying exclusive dealing to regulate platform self-preferential treatment has certain limitations at present.

4.2.2 Tying arrangements: different mechanisms for transmitting market dominance

Secondly, self-preferential treatment differs from tying arrangements. Tying refers to a situation where a firm with market dominance abuses its position by compelling the sale of product B when selling product A. Some scholars suggest that self-preferential treatment can be regulated by drawing parallels with tying arrangements. This is because self-preferential treatment by platforms can be seen as the platform bundling its market transaction-opportunity service (service A) with its self-operated business (service B), thereby restricting and excluding competition from other platform operators[14].

In theory, both tying and self-preferential treatment involve monopolistic firms leveraging a "mechanism" to transfer market dominance from one area to another. However, the "mechanisms" for transmitting market dominance in these two cases vary. Tying requires a complementary relationship between the two products or services involved. For example, there is a complementary relationship between a computer's operating system and its browser, or between gas supply services and gas meters. Firms engaging in tying take advantage of this complementary relationship to monopolize one transaction and subsequently the other.

In contrast, platform self-preferential treatment does not necessarily rely on transactions to transfer market dominance. Instead, it relies more on the platform's control over its services (such as establishing platform rules and algorithmic discrimination) to differentiate between its self-operated business and other platform operators. Although the development of the digital economy has made tying more feasible, it should be noted that tying transfers market dominance through monopolizing transactions of complementary products, while platform self-preferential treatment achieves market-dominance transfer through the platform's control over its services. Consequently, using tying arrangements to define platform self-preferential treatment has certain inadequacies.

4.2.3 Discriminatory treatment: incompatibility with constitutive elements

Finally, some scholars argue that self-preferential treatment constitutes discriminatory treatment[15]. The rationale is that during the implementation of self-preferential treatment, the platform adopts discriminatory treatment methods for its self-operated business and other platform operators. For example, in the aforementioned Apple case, Apple applied different platform-rental strategies for its own applications and those of other developers in the App Store. This form of "discriminatory treatment" within the platform indeed bears some resemblance to discriminatory treatment under the Anti-Monopoly Law.

However, a closer examination of the constitutive elements of discriminatory treatment reveals certain disparities. Generally, the constitutive elements of discriminatory treatment include the following aspects: First, the objects of discriminatory treatment are transaction counterparts, which are multiple independent entities engaging in transactions with the operator. Second, the transaction counterparts are in the same conditions, meaning there are no substantial differences affecting the transaction during the process. Third, the party applying discriminatory treatment uses different transaction terms for different transaction counterparts, creating difficulties for the disadvantaged party and potentially driving them out of the market[16]. Self-preferential treatment conducted by platforms and discriminatory treatment differ primarily in terms of the objects. Discriminatory treatment requires that the transaction counterparts be independent. That is, at least two parties receiving different treatment should be independent operators. In the case of platform self-preferential treatment, although the platform differentiates between its self-operated business and

third-party operators within the platform, the platform's self-operated business can hardly be regarded as an independent operating entity. Instead, they are part of a vertically integrated structure. The platform's self-operated business is subject to the influence and constraints of the platform's business strategies, and the platform can also intervene through internal management mechanisms. As such, it is difficult to consider the platform's self-operated business as an independent operator. In this context, applying discriminatory treatment to self-preferential treatment would lead to an overlap in the identities of the subjects, failing to meet the object requirement of discriminatory treatment[17]. Therefore, there is currently insufficient reasonable basis to support the use of discriminatory treatment to define self-preferential treatment.

In conclusion, whether it is exclusive dealing, tying arrangements, or discriminatory treatment, each has its limitations in regulating platform self-preferential treatment. Given that self-preferential treatment by platforms cannot be effectively regulated by the existing abusive market-dominance behaviors stipulated in the current Chinese Anti-Monopoly Law, it is necessary to explore new regulatory strategies and approaches.

5 REGULATORY COUNTERMEASURES FOR THE SELF-PREFERENTIAL TREATMENT OF DIGITAL PLATFORMS

5.1 Regarding Self-preferential Treatment as an Independent Act of Abusing Market Dominance

As discussed above, the existing regulations on the abuse of market dominance in the Anti-Monopoly Law have limitations in regulating self-preferential treatment. Therefore, self-preferential treatment can be regarded as an independent act of abusing market dominance. Specifically, the constitutive framework of self-preferential treatment can be divided into the following aspects:

Firstly, there must be an associated relationship between the platform and its in-platform self-operated business. When a platform engages in self-preferential treatment to seek benefits for itself, there must be a target for such preferential treatment. Thus, the connection between the platform and its self-operated business is a prerequisite for the platform to carry out self-preferential treatment.

Secondly, platform operators leverage their own operational advantages during business operations. By "leveraging their own operational advantages," it means that platforms utilize their control over platform rules (such as creating or amending in-platform rules) or their control over platform resources (such as allocating more traffic resources to self-operated businesses or using relevant technologies to collect data) to provide more favorable conditions for self-operated businesses compared to third-party operators.

Thirdly, the platform operator's utilization of these advantages results in the exclusion of competition within the platform. Objectively speaking, it is reasonable for an operator to use its resources to drive its own development. For example, in the preliminary response of the US District Court for the District of Columbia in June 2021 to the antitrust civil lawsuit jointly filed by the US Federal Trade Commission and 46 states against Facebook, the judge opined that even if Facebook indeed held a dominant market position, it was not obliged to use its resources to benefit its competitors. Excessive intervention by antitrust enforcement may also have an adverse impact on market efficiency. Based on the principle of "protecting competition rather than protecting competitors," the regulation of platform self-preferential treatment should be grounded in the fact that it leads to anti-competitive consequences, rather than using the act itself as the trigger for regulation.

5.2 Innovating the Criteria for Judging Market Dominance and Introducing the Concept of Data Essential Facilities

For platform enterprises, data serves as a springboard for self-preferential treatment and the transmission of market dominance. In the information society, some super platforms, by virtue of the vast amount of data resources at their disposal and their large and stable user bases, have evolved from being mere providers of products (or services) to entities with dual natures of products and markets during their development[18]. This has given rise to a strong user-locking effect, making it difficult for merchants and users within the platform to disengage and compelling them to passively accept the platform's abuse of market dominance. Considering the crucial role these platforms play in the digital economy, it is necessary to introduce the theory of essential facilities to impose more obligations on them. Specifically, the number of users and transaction frequency can be used as criteria for determining whether a platform constitutes an essential facility.

6 CONCLUSION

digital economy of China is currently experiencing a phase of remarkable growth. Large-scale digital platform enterprises, by virtue of their dual roles as both "participants in competition" and "rule-makers," along with the anchoring effect stemming from platform data and traffic, are extending their monopolistic influence within the platform, thereby giving rise to the issue of self-preferential treatment.

Self-preferential treatment of platforms differs from the circumstances of abusing market dominance such as exclusive dealing, tying arrangements, or discriminatory treatment as stipulated in the current Anti-Monopoly Law. It is thus imperative to regulate self-preferential treatment as an independent form of abusing market dominance. Concurrently,

the introduction of the concept of data essential facilities is necessary to effectively govern this phenomenon.

COMPETING INTERESTS

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