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Self-Preferential Behaviour of Internet Platforms

Comparing European and Chinese Competition law

Junyu Peng

DEPARTMENT OF BUSINESS LAW

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Contents

Abstract

This thesis discusses how self-preferential behaviour of Internet platforms is regulated in the EU and China under the competition law framework. The purpose of the study is to compare the strategies and practices of these two jurisdictions in terms of legislation and enforcement in order to answer the following research questions: what are the limits on self- preferential behaviour of Internet platforms under the competition laws of the EU and China? The study provides insights into the application of the respective laws and regulatory effects by analysing specific cases in the EU and China. Through regulations such as the DMA, the EU has adopted a forward-looking regulatory strategy aimed at preventing market abuse by large platforms. The Google Shopping case shows how the EU implements strict enforcement measures. In contrast, China's regulatory strategy focuses more on principle-based guidance and ex post correction, and strengthens the regulation of the platform economy through amendments to the Antitrust Law and case trials. Through comparative analysis, this study finds that although both are committed to preventing anticompetitive behaviours on Internet platforms, there are significant differences in regulatory approaches, legal transparency and preventive measures. The EU's approach is more systematic and prescriptive, while China shows greater flexibility and adaptability. These findings provide important perspectives and insights for understanding and improving regulatory strategies for digital markets on a global scale.

Keywords: EU Competition Law, China Antitrust Law, Internet Platforms, Self-preferential Behaviour, DMA

Abbreviations

DMA	Digital Market Act
EU	European Union
EC	European Commission
ECJ	European Court of Justice
GAMS	General Administration of Market Supervision
OECD	Organisation for Economic Co-operation and Development
TFEU	Treaty on the Functioning of the European Union

1 Introduction

1.1 Background

In this rapidly evolving digital age, the term 'Internet platform business' refers to companies that provide online services facilitating interactions and transactions between users. Common examples include social media networks, e-commerce sites, and search engines. These platforms have become integral to societal functions and individuals' daily lives. [1]However, the swift technological innovations and market growth within this sector have led some leading companies, which I will refer to as 'dominant platform companies,' to engage in self-preferential behaviours. [2] Such actions compromise fair market competition by favoring their own services over those of competitors. This practice not only infringes on the rights of other businesses and consumers on these platforms but also garners significant public concern. The COVID-19 pandemic, which restricted physical interactions, has further deepened society's reliance on these digital platforms, reinforcing the market strength of these dominant entities in their respective fields.[3]

Literally, self-preferential behaviour means that a competing entity uses its own advantages to get more benefits. In the platform economy, self-preferential behaviour refers to Internet platforms exploiting their dominant market position in order to gain a competitive advantage. Thereby obtaining more favourable conditions in the event that the products or services offered by the platform itself compete with those offered commercially by other subjects. Self-preferential treatment is therefore a specific market behaviour.[4]

The EU's Google case opened up the topic of self-preferential behaviour on platforms, and the Google case was followed by an antitrust review of self-preferential abuses by Amazon and Apple. The most important initiative of the EU at the moment is the adoption of two heavyweight acts, the Digital Market Act[5] and the Digital Services Act[6], which use Article 102 of the TFEU[7] as the source of the underlying legislation. Innovatively, it gives large Internet platforms the obligation

[1] OECD (2019), "What is an "online platform"?", in An Introduction to Online Platforms and Their Role in the Digital Transformation, OECD Publishing, Paris.

[2] Platform economy, From Wikipedia, the free encyclopedia. https://en.wikipedia.org/wiki/Platform_economy.

[3] De' R, Pandey N, Pal A. Impact of digital surge during Covid-19 pandemic: A viewpoint on research and practice. Int J Inf Manage. 2020 Dec;55:102171. doi: 10.1016/j.ijinfomgt.2020.102171. Epub 2020 Jun 9. PMID: 32836633; PMCID: PMC7280123.

[4] Hirokazu Matsumiya, European Commission's final report on competition policy in the digital age.2020.

[5] Regulation (EU) 2022/1925 of the European Parliament and of the Council of 14 September 2022 on contestable and fair markets in the digital sector and amending Directives (EU) 2019/1937 and (EU) 2020/1828 (Digital Markets Act).

[6] Regulation (EU) 2022/2065 of the European Parliament and of the Council of 19 October 2022 on a Single Market For Digital Services and amending Directive 2000/31/EC (Digital Services Act) (Text with EEA relevance).

[7] Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union - Consolidated version of the Treaty on the Functioning of the European Union, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A12012E%2FTXT.

to be "gatekeepers", adopting a pre-emptive approach to prevent platforms from favouring their own business through self-preferential treatment.[8]

China's Antitrust Law[9] in the field of digital economy started later than the EU, the academia as a pioneer field of research on the issue, scholars have been concerned about the antitrust issue in the field of platform economy, and have already launched a heated discussion on monopoly behaviours of Internet platforms, including the two choices, operator concentration and other monopoly behaviours. However, unlike Western countries, there has been relatively little systematic research on self-preferential treatment of Internet platforms in China. [10]On the legal side, on the basis of China's Antitrust Law, the "Guidelines for the Implementation of the Main Responsibility of Internet Platforms" was issued in October 2021, which is the first time the term "platform self-preferential treatment" appeared in China's current legal framework, but did not provide a clear definition and explanation of the term "platform self-preferential treatment". In June 2022, the General Administration of Market Supervision (GAMS) published an opinion draft of the Provisions on the Prohibition of Abuse of Dominant Market Position,[11] but in its official release in March 2023 it changed the opinion draft's dedicated article regulating self-preferential treatment by deleting the provision prohibiting platforms from granting specific preferential treatment to themselves. However, the platform's self-preferential behavior has been included in the relevant catch-all provision, which has brought certain difficulties to the resolution of related issues.[12]

Self-preferential behaviour may have a negative impact on the economic development dynamics of online platforms, scientific and technological innovation, and the openness of networks. [13] Therefore, the accurate identification of self-preferential behaviour is important, and the adoption of reasonable measures to regulate self-preferential behaviour raises new challenges in the field of antitrust and anti-competition. As the EU and Chinese Internet platforms continue to develop, they will inevitably face more and more problems of self- preferential.

1.2 Purpose and research questions

The purpose of this thesis is to describe, analyse and compare the limits on self-preferential behaviour by online internet platforms according to EU and Chinese competition law.

To fulfill the purpose, the following research question will be answered:

[8] Commission's press release, Europe fit for the Digital Age: Commission proposes new rules for digital platforms, December 15, 2020.

[9] Antitrust Law of the People's Republic of China, https://law.pkulaw.com/chinalaw/d3236788421feacfbdfb.html.

[10] Hongwei Liu, Research on the Self-Preferencing Behavior of Internet Platform by Anti-monopoly Law. East China University of Political Science and Law.

[11] Provisions on Prohibition of Abuse of Dominant Market Position, https://www.gov.cn/gongbao/content/2023/content_5754539.htm.

[12] Xitong Hao, Regulation on self-preferencing by platforms, Shanxi University of Finance & Economics.

[13] Guillaume Duquesne, Thibaut de Bernard, Kadambari Prasad, Paul Armstrong, Thomas Bowman. What Constitutes Self-Preferencing and its Proliferation in Digital Markets.

1. What are the limits on self-preferential behaviour by online internet platforms according to EU and Chinese competition law?

1.3 Delimitations

This study is limited to this essay's focus on the comparison between EU competition law and China's antitrust law in dealing with self-preferential behaviours on Internet platforms, and does not address comparisons in other areas of law or legal systems. The case study section will focus on specific cases, but may not include all relevant cases. The research in this essay mainly relies on publicly available literature, case reports and relevant legal documents, and is therefore subject to limitations on access to information. Moreover, this essay will use Chinese and English literature as the main research material, which may be affected by the language and cultural background.

1.4 Method and materials

The purpose of this essay is to present the performance of EU competition law and Chinese antitrust law in dealing with self-preferential behaviour on Internet platforms. For this purpose, the study will adopt a legal dogmatic method to analyse issues related to the field of law.[14] In addition, in order to compare the legal systems of the EU and China in this area, comparative legal analysis will be used.[15]

1.4.1 Legal dogmatic method

The research will be based on the EU legal framework, which is often referred to as the EU legal method.[16] The EU legal sources in this thesis are: (1) Regulations, such as the Treaty on the Functioning of the European Union(TFEU) and the Digital Markets Act (DMA). (2) Preambles to the regulations, in order to better study the background and purpose of the legislation. (3) Case law from the European Commission, such as CASE AT.39740 Google Search (Shopping), it was used to better describe the EU's approach to cases of self- preferential on internet platforms. (4) Directives, such as Guidelines on the assessment of non-horizontal mergers under the Council Regulation on the control of concentrations between undertakings.

For Chinese legal sources, they have: (1) Regulations, such as China Antitrust Law, It is basic and fundamental to the study of self-preferential behaviour of Internet platforms in China. (2) Policy guidance documents, such as Antitrust Guidelines on the Platform Economy, Measures for the Supervision and Administration of Internet Transactions, Guidelines for the Implementation of the Main Responsibility of

[14] Jan M. Smits, What Is Legal Doctrine? On the Aims and Methods of Legal-Dogmatic Research, in Rob van Gestel, Hans Micklitz and Edward L Rubin (eds), Rethinking Legal Scholarship: A Transatlantic Dialogue, (Cambridge University Press, 2017).

[15] Calboli, Irene, 'Comparative Legal Analysis and Intellectual Property Law: A Guide for Research', in Irene Calboli, and Maria Lillà Montagnani (eds), Handbook of Intellectual Property Research: Lenses, Methods, and Perspectives (Oxford, 2021; online edn, Oxford Academic, 23 Sept. 2021), https://doi.org/10.1093/oso/9780198826743.003.0004.

[16] See Koen Lenaerts and José A. Gutiérrez-Fons, To Say What the Law of the EU Is: Methods of Interpretation and the European Court of Justice, EUI AEL, 2013/09, Distinguished Lectures of the Academy Retrieved from Cadmus, European University Institute Research Repository.

Internet Platforms and Provisions on Prohibition of Abuse of Dominant Market Position (Temporary Provision). These policy guidance documents were used to further analyse China's antitrust legislative system. Temporary Provision means that the official version of the file has not yet been released. (3) Reports on the work of government agencies, such as General Administration of Market Supervision, China Antitrust Enforcement Annual Report (2021). It was used to describe the revisions to the Antitrust Law.

1.4.2 Comparative legal method

In addition to single jurisdiction analyses, this study will also apply comparative law analyses to horizontally compare the legal systems of the EU and China. This will not only help to reveal the similarities and differences between the two legal systems in terms of their concepts, approaches and implementation, but also help to understand their roles and impacts in the global digital economy.

In making legal comparisons, the first step is the comparison of legal frameworks and specific articles, analysing and comparing the structure of the legal systems of the EU and China, especially in the areas of competition law and the regulation of Internet platforms. Then it is a case law comparison, by analysing important cases in the EU and China related to Internet platforms, such as the Google case in the EU and the Tencent case in China, and examining the practical impact and legal application of these cases on the legal articles.

1.4.3 Secondary sources

Legal literature, including books, journals, essays by scholars and legal organisations. [17]They are a good addition to the research material.

1.5 Outline

The chapter 1 provides an introduction to the general research background and issues. The chapter 2 will provide an overview of EU competition law and cases with a focus on legal provisions involving self-preferential treatment of Internet platforms. The chapter 3 will provide an overview of Chinese competition law and cases with a focus on legal provisions involving self-preferential treatment of Internet platforms. The chapter 4 will compare EU and Chinese competition law on self-preferential behaviour. The chapter 5 will summarise all the conclusions.

[17] For example, OECD (2019), "What is an "online platform"?", in An Introduction to Online Platforms and Their Role in the Digital Transformation, OECD Publishing, Paris.

2 The application of EU competition law on self-preferential behaviour

2.1 Introduction

Article 102 of the TFEU is the key EU competition law provision aimed at preventing the abuse of a dominant market position by undertakings. This article expressly prohibits, by summary and enumeration, unfair pricing, restriction of production and sale, differential treatment of trading partners, and mandatory attachment of obligations. The aim is to protect market competition and consumer rights. This is in contrast to the structuralist approach of the United States, where the EU takes a behaviourist approach, focusing on regulating corporate behaviour rather than market structure.[18]

Faced with the challenges of the digital economy, the European Union introduced the DMA in 2022, creating a regulatory framework based on the concept of "gatekeepers". Instead of relying on the traditional approach of defining the "relevant market", the law directly targets core platform service providers that may impede competition in the market. [19]The DMA emphasises the obligations of transparency, fairness and non-discrimination and aims to lower barriers to market entry and promote competition and innovation, while protecting the interests of consumers and business users.

The Google case played an important role in the EU's targeting of self-preferential and anti-competitive behaviour by internet platforms, marking an increase in the EU's regulation of the market behaviour of large tech companies. In 2017, the European Commission issued a €2.4bn fine against Google, one of the largest fines imposed on a single company in the history of the EU, demonstrating the EU's tough stance on anti-competitive behaviour. This section will also analyse the Google case in detail.[20]

2.2 Competition rules on self-preferential behaviour on internet platforms in the EU

Article 102 of the TFEU is the founding law of the EU prohibiting the abuse of a dominant market position. The complete text reads as follows: Any abuse by one or more undertakings of a dominant position within the internal market or in a substantial part of it shall be prohibited as incompatible with the internal market in

[18] Antonios E. Platsas, Comparing and Contrasting the EU and the US Approach in Competition Law: So Close but So Far.

[19] Per Hellström, The Commission designates six companies as gatekeepers under the DMA. https://www.vinge.se/en/news/the-commission-designates-six-companies-as-gatekeepers-under-the-dma/.

[20] The Guardian, Google fined record €2.4bn by EU over search engine results. https://www.theguardian.com/business/2017/jun/27/google-braces-for-record-breaking-1bn-fine-from-eu.

so far as it may affect trade between Member States. Such abuse may, in particular, consist in: (a) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions; (b) limiting production, markets or technical development to the prejudice of consumers; (c) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage; (d) making the conclusion of subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.[21]

This provision makes it clear that the EU is not against market dominance, but rather the abuse of its market dominance by an enterprise with a dominant market position. This track is different from US antitrust law, which was obsessed with splitting up dominant firms during the Harvard School.[22] The EU recognises the two-sided nature of the impact of big business on markets, which can either improve the efficiency of market functioning or seriously harm it. Thus, while allowing enterprises to acquire a dominant position in the market, special market responsibilities are granted to dominant enterprises and regulation is focused on the abusive behaviour of dominant enterprises. This approach is known as behaviourism, whereas the one adopted in the United States during the previously mentioned Harvard period was structuralism.[23] Another implication of this provision is that Article 102 of the TFEU applies only to enterprises with a dominant market position and not to any enterprise. Therefore, the premise in assessing whether the behaviour of an enterprise is responsible is to first complete the identification of the enterprise's dominant market position. A three-step process of defining the relevant market, identifying the dominant market position and identifying the abusive behaviour has evolved in practice.

Article 102 of the TFEU, after stating that " Any abuse by one or more undertakings of a dominant position within the internal market or in a substantial part of it shall be prohibited as incompatible with the internal market in so far as it may affect trade between Member States", lists four more specific abuses as typical. It can be seen that Article 102 TFEU adopts a general and enumerated legislative model. The concern it raises is whether the acts listed in the treaty are exhaustive. That is to say, it governs whether an enterprise's behavior beyond the scope of the enumeration can be regulated by this article. A related controversy arose in 1973 in the *Europem ballage* case. [24]The final judgement of the ECJ shows that the abusive conduct prohibited by Article 82 of the Treaty establishing the European Economic Community[25] is not strictly limited to the types of conduct enumerated in that provision. According to Articles 2 and 3 of the EEC, an infringement of the law should be established if the conduct has an adverse effect on competition in the

[21] Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union - Consolidated version of the Treaty on the Functioning of the European Union, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A12012E%2FTXT.

[22] Jay L. Levine and Porter Wright, 1990s to the present: The Chicago School and antitrust enforcement.

[23] Kong Xiangjun, Principles of Antitrust Law, Beijing: China Law Press, 2001.

[24] Case 6/72 Europem Ballage and Continental Can v Commission [1973] ECR 215, 26.

[25] Treaty establishing the European Economic Community (It has now become Treaty on the Functioning of the European Union).

Union market.[26] The Court therefore has a large margin of discretion in interpreting this provision.

EU competition law theory and enforcement practice classify the behaviour listed in article 102, as well as other behaviours found to be abusive, into two types: exploitative and exclusionary abuses. Exploitative abuse emphasises abusive behaviour, such as unfair pricing, in which the dominant firm obtains monopoly profits from other traders by charging excessive prices. Exclusionary abuse emphasises the abuse of competitive advantage by a monopolist to make market entry more difficult and to expand or maintain its market power. These two types of abusive behaviour are only a broad type of classification; they are not entirely different. In fact, some abusive behaviours contain elements of both, such as discrimination, when a dominant enterprise discriminates against a counterparty, may both exploit the counterparty and diminish its ability to compete in that market. Exploitative abuse is often difficult to recognise and exclusive abuse is more common in EU practice. The European Commission issued Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings in 2008. Several common types of exclusionary abuses are summarised in detail in the TFEU Article 102 Guidelines.[27]

2.2.1 Creation of EU DMA gatekeeper rules

On 18 July 2022, the EU adopted the Digital Markets Act (DMA), which has become the primary source of legislation for industry regulation. Until then, the main sources of monopoly regulation in Europe for competitive markets on the Internet have been Articles 101 to 109 of the TFEU provisions, in conjunction with other Member State laws and regulations, such as the Digital Markets Taskforce of the UKCMA (December 2020)[28] and the EU teleconmunications regulatory framework.[29] The DMA creates a platform industry regulator based on a "gatekeeper" role (originally proposed in the context of oversight of third-party intermediary organisations such as stock exchanges, accountants, securities dealers, etc.).[30] The EU believes that the traditional model of antitrust law is overstretched when faced with the "structural problems" posed by Internet platform giants, such as the multilateral nature of the market in the digital economy, the complexity of dynamic competition, and the multiplicity of interactions. For example, Article 102 of the current TFEU requires that the target of regulation has a "dominant market position" in the relevant market, but it is difficult to clearly define the relevant market in the digital area. As a result, "structural reforms" and interventions were needed, and the DMA created the new

[26] Liu Ningyuan, Si Pingping, Lin Yanping: International Antitrust Law, Shanghai: Shanghai People's Publishing House, 2001.

[27] Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings.

[28] CMA. Advice of the Digital Markets Taskforce on a new pro-competition regime for digital markets. December 2020.

[29] P. Ibanez Colomo, The Draft Digital Markets Act: a legal and institutional analysis. Available at SSRN, 2021.

[30] Xu, Deyun. From norms to empirical evidence: on the uniqueness of Pareto optimality and the revision of the first and second welfare theorems Finance and trade Research, 2018.

concept of "gatekeepers".[31] In contrast to the traditional European approach to competition regulation, the DMA has dispensed with some of the usual competition law concepts and terminology (e.g. "relevant market" or "dominant position") [32]in order to analyse the impact of a specific case on the overall competitive market environment, regardless of the methodology used. To the extent possible, the DMA's behavioural rules should be universally applicable, without being constrained by previous competition law methodologies.[33] In contrast to the traditional antitrust regulatory framework, where defining the "relevant market" is a key step, a fundamental step that is difficult to capture in its entirety in the digital economy.

The DMA has taken a radical approach by removing the definition of the "relevant market" and using the core platform service providers to delineate the scope of market operations for gatekeepers. Generally speaking, the main obligations imposed on gatekeepers assessed as gatekeeping platforms are set out in Articles 5 and 6 of the DMA: (1) Reduce the barriers to entry for potential market competitors, allow users' data to flow between platforms, and allow other platforms to offer the same products and services. (2) Protect users' personal information and data, and do not misuse the data obtained from users to make profits for the platform. (3) Provide services in an open and transparent manner by not restricting commercial users from raising relevant issues with the competent authorities and by treating third-party commercial users fairly.[34] Through these obligations, the DMA aims to ensure fairness in the contestability of digital platform markets in the platform economy, which means that markets should not remain unchanged, but should be competitive markets that are easier for new companies to enter. Open to new entrants and innovators that provide digital services that can replace or complement the services already provided by existing partners, thus promoting competition and innovation. This ensures fairness in the relationship between digital gatekeepers and their business users.[35]

In the EU's gatekeeper rules, once a platform is defined as a gatekeeper, it is subject to stricter regulation. Under the rule, gatekeepers are required to provide transparency and fairness guarantees, while at the same time needing to guard against abuse of their dominant market position and detriment to the interests of other operators and consumers. For this purpose, the rules provide for a number of prohibitions, such as the prohibition of the use of personal data for purposes other than competition in the market, the prohibition of exclusivity agreements with competitors, and the prohibition of unduly restricting the market access of other operators. At the same time, gatekeepers need to comply with certain obligations, for example, to provide fair, transparent and non-discriminatory terms and conditions, and to safeguard consumer rights. The European Commission has also provided for a range of sanctions and fines to crack down and penalise platforms that

[31] Lin Xiuqin. On the Paradigm Shift of Antitrust in the Digital Economy - Taking the EU Digital Marketplace Law as a Mirror. 2022.

[32] J.U. Franck, M. Peitz. Market definition and market power in the platform economy, CERRE Report, 2019.

[33] Podszun. Proposals on How to Improve the Digital Markets Act. Available at SSRN, 2021.

[34] Regulation (EU) 2022/1925 of the European Parliament and of the Council of 14 September 2022 on contestable and fair markets in the digital sector and amending Directives (EU) 2019/1937 and (EU) 2020/1828 (Digital Markets Act).

[35] Xu Zuoran. Study on the Antitrust Legal Issues of Self-Preferential Behaviour of Internet Platforms. Beijing University of Posts and Telecommunications.

break the rules. In summary, the EU's gatekeeper rules aim to address the structural problems posed by large online platforms and to protect the interests of consumers and other operators.[36] And to promote innovation and competition in the digital economy, as well as to maintain a fair and free market order. The rules apply not only to large platforms within EU member states, but also to platforms located outside the EU, as long as they offer their services within the EU and fulfil the gatekeeper standard. At the same time, the gatekeeper rule provides a template for other countries and regions to follow in order to deal with the new challenges and issues brought about by the digital economy.

2.3 The Google shopping case

As scholars have said, no set of cases better illustrates the challenges of developing self-preferential policies than the Google case.[37] In the EC's decision, the EC identified Google's abusive behaviour as the more favourable positioning and display of Google's own comparison shopping service on Google's regular search results pages compared to competing comparison shopping services. Specifically, there are both Google price comparison shopping sites and competing price comparison shopping sites within the Google search platform. Prior to Google's abusive behaviour, consumers would enter keyword searches that returned search results that included different competing comparison shopping sites. These competitive price comparison shopping sites are natural search results, or non-paid search results, which are ranked automatically and dynamically according to an algorithm's predetermined reference factors. And after Google's human intervention, which made the most prominent and top-ranked positions in the returned results belong to Google Comparison Shopping, other operators were squeezed out of the main page. As the consumer's attention is primarily focused on the main page, this leaves other operators with much lower website traffic and no longer able to benefit from the traffic. As a result of the EC's investigation, Google's specific intervention was to enable the panda algorithm[38] and a number of other confidential algorithms to impose penalties on competing comparison shopping sites in addition to the usual algorithms. Google's own comparison shopping sites, on the other hand, are not assessed by the penalty algorithm. By imposing a code of conduct obligation on other competing comparison shopping sites, Google's own comparison shopping sites automatically stand out in the search results when other competing comparison shopping sites make mistakes that result in automatically lower rankings and ratings.

To summarise, the facts of this case are based on the fact that Google uses two different sets of algorithms for self-hosted and non-self-hosted websites. The consequences of this behaviour are: first, the ranking of self-operated comparison shopping is always in the most conspicuous and favourable position, but not because

[36] The Digital Markets Act: ensuring fair and open digital markets. https://commission.europa.eu/strategy-and-policy/priorities-2019-2024/europe-fit-digital-age/digital-markets-act-ensuring-fair-and-open-digital-markets_en.

[37] Salinger, Michael A. Self-Preferencing (November 11, 2020). The Global Antitrust Institute Report on the Digital Economy 10, Available at SSRN: https://ssrn.com/abstract=3733688.

[38] Google Panda algorithm is a search algorithm update introduced in February 2011. Panda's goal was to reduce the number of low-quality websites on search engine results pages (SERPs). It was one of Google's earliest updates aimed at controlling content quality. https://www.semrush.com/blog/google-panda/.

of the advantages of Google's comparison shopping products themselves; second, the ranking of other operators is severely reduced, so that they are unable to start trading normally. Third, between Google's own advantages and the disadvantages gained by other operators, there is a clear gap between the competitiveness of the two, which competitors need to pay more costs to make up for. Four common abuses of competition law will be analysed below.

2.3.1 Differential algorithm discriminatory abuse

Google's behaviour of using different algorithms for its own operators and others gives the intuitive impression that Google is algorithmically discriminating against other operators. [39] However, the combination of the right to freedom of property and the constitutive elements of discrimination can lead to two aspects of thinking: first, Google as the builder and owner of the platform, whether it has the platform's full right to self-determination, different user algorithms discriminate against and treat differently. Second, Article 102(d) TFEU prohibits discrimination against persons dealing on the same terms, and whether Google Comparison Shopping Network and other comparison shopping operators are dealing on the same terms for Google.

2.3.1.1 On the issue of search neutrality

Algorithmic discrimination has been one of the most discussed topics in academia since the beginning of paid search. The opposite of algorithmic discrimination is "search neutrality". Those who insist that search should remain neutral argue that search engines should position themselves as "conduits" of information, truthfully presenting the most relevant and important information to consumers and letting them ultimately decide which sites and information are most necessary and effective for them. Website owners and consumers are generally more likely to insist on search neutrality. The opposite of the " conduit theory " is the " editorial theory ". Those who adhere to the editorial theory believe that human intervention outside the algorithm is justified. The essence of the search engine is to respond to the information needs of consumers, the algorithm itself and the intervention of the algorithm represent the platform's general and specific response to consumer demand, and through algorithmic intervention, consumer demand can be met more effectively.[40]

In addition to this, due to the free nature of internet platforms to the consumer end, platforms based on the need to make a profit and the possibility of sustaining their business, internet platforms must rely on generating revenues from other merchants who have a desire to be promoted. This can satisfy the promotional purposes of businesses, but also continue the strategy of making it free to consumers, so that consumers can benefit. Google's Adwords, for example, is a promotional technique that the EU has positioned as a separate and relevant marketplace, but does not consider advertising as a service to consumers. It can therefore be argued that

[39] Köchling, A., Wehner, M.C. Discriminated by an algorithm: a systematic review of discrimination and fairness by algorithmic decision-making in the context of HR recruitment and HR development.

[40] Grimmelmann, James, Speech Engines (April 7, 2013). 98 Minn. L. Rev. 868 (2014), U of Maryland Legal Studies Research Paper No. 2014-11, Available at SSRN: https://ssrn.com/abstract=2246486.

algorithmic discrimination has been justified by default based on the unique business model of Internet platforms. In previous cases of algorithmic discrimination, the platform algorithms discriminated by differentiating between advertisers and non-paying other operators.[41]

2.3.1.2 Same trading conditions

Article 102 of the TFEU provides that a dominant enterprise may not abuse its right to discriminate between persons subject to the same trading conditions. The question arises as to whether own operators and competitors are objects of the same trading conditions for the platform. In terms of the fundamental cost considerations, the general terms of the transaction include: transaction costs, number of transactions, and discounts. Google and Google Compare Shopping are undoubtedly a form of vertical vertical integration, and in the EU Guidelines on Non-Horizontal Mergers and Acquisitions, the EC considers that non-horizontal mergers are generally less likely to be a significant impediment to effective competition than horizontal mergers.[42] On the issue of concentration of operators, horizontal concentration of operators is generally considered to lead to a sudden reduction of competitors in the market, while directly strengthening the market share of the other party, and is considered to have a greater impact on the market. Vertical mergers and acquisitions, on the other hand, are seen as carrying out structural optimisation, which reduces the transaction costs of firms and ultimately the costs to consumers, and are considered to be beneficial to some extent. It is clearly less costly for a own operator business to transact with a platform than with other operators and platforms, and thus the terms of the transaction are not the same between the two as far as transaction costs are concerned.[43]

2.3.2 Leverage-bundling abuse

In defining the relevant market for Google, the EC defined two relevant markets. The EC specified that Google's behaviour was similar to Microsoft's use of the Windows computer operating system as a distribution channel to ensure that it had a significant competitive advantage in the streaming media player market.[44] In 2004, the EC fined Microsoft US$613 million for bundling. It said that operating systems and media player systems belonged to two different product markets, and that Microsoft had taken advantage of its dominant position in the operating system market to bundle media players with operating systems. This not only limited consumer choice, but also allowed the market power of operating systems to expand unduly into the media player market, creating a barrier to competition in the media player market.[45] Microsoft argued that the operating system and the media player system were not functionally independent commodities, that the media operating

[41] Dr. Charlton McIlwain, Algorithmic Discrimination: A Framework and Approach to Auditing & Measuring the Impact of Race-Targeted Digital Advertising.

[42] Guidelines on the assessment of non-horizontal mergers under the Council Regulation on the control of concentrations between undertakings.

[43] Liu Xiaochun: Self-preferential behaviour of superplatforms may harm consumers' rights and interests. https://baijiahao.baidu.com/s?id=1690579066417113589&wfr=spider&for=pc.

[44] CASE AT.39740 Google Search (Shopping), 2017, paragraph 600.

[45] European Commission Decision. 2007/53/EC.2004.

system was free and therefore not compulsory, and that consumers had the option of removing the media player.[46]

In the Google case, the EC firstly considered that Google's generic search and comparison shopping search belonged to two product markets and were complementary in nature. However, there was a view that the process by which Google responded to a query and returned comparison shopping results to the consumer provided a single service rather than a combination of services. The independence of the product's function is therefore somewhat controversial.[47] Secondly, on the issue of compulsion, Google simply moves its own comparison shopping site forward and adjusts the position of its competitors' sites backward, so that if a consumer does not accept Google's comparison shopping, he or she is free to continue browsing backward to seek the services of other comparison shopping sites. Google neither uses contracts to compel customers to stay, nor does it use technology to make it impossible for consumers to steer, or to restrict interference when consumers go to other sites. And with universal search and comparison shopping services free of charge to consumers, there is no extra cost to the consumer in terms of currency.

In response to Google's defence, the EC said that Google's conduct was at fault for actively and unreasonably transferring power from one market to another through leverage.[48] The theory of leverage originated in the United States. In the beginning, the Harvard school in the United States argued that the dominant enterprise used its dominant position in the bundled sales market to transmit its superior power to the bundled market, thus enabling the monopoly to derive another monopoly and obtaining double monopoly gains.[49] Then the Chicago School, with its new economic theory, disproved the assumption of duopoly profits and argued that the leverage theory conduction effect did not exist. As the theory developed, new dimensions of leverage theory were explored. Instead of the short-term monopoly profit perspective, proponents argued that the harm of a dominant enterprise's extension of its monopoly position into another market is that it increases the cost of competition in the other market.[50]

2.3.3 Rejection of trading abuse

Looking at Google's behaviour in sorting competing pages on a non-primary page of the search results, its behaviour is likely to be a refusal to supply. As noted above, EU enforcement and jurisprudence on rejections have included rejections of raw materials, rejections of intellectual property rights, as well as rejections of access to critical infrastructure and price squeezes. As far as the rejection of intellectual property rights is concerned, the construction of Google's search engine includes a great deal of technology related to intellectual property and trade secrets.

[46] Case T-201/04.

[47] Salinger, Michael A. Self-Preferencing (November 11, 2020). The Global Antitrust Institute Report on the Digital Economy 10, Available at SSRN: https://ssrn.com/abstract=3733688.

[48] CASE AT.39740 Google Search (Shopping), 2017, paragraph 649.

[49] Louis Kaplow, Extension of Monopoly Power Through Leverage, 85 Colum.L.Rev. 515, 516-17.

[50] Choi, Jay Pil, and Doh-Shin Jeon. 2021. "A Leverage Theory of Tying in Two-Sided Markets with Nonnegative Price Constraints." American Economic Journal: Microeconomics, 13 (1): 283-337.

Confidentiality measures were used in several places in the decision. However, throughout the investigation of comparison shopping, the EU did not mention issues related to the opening of intellectual property rights. Google's use of special algorithms to exclude other competitors from the main page appears to be consistent with Microsoft's refusal to open up its operating system interface in the 2004 Microsoft case to make it impossible for other media player software vendors to produce a compatible product and thus exclude them from the operating system, i.e., they both artificially make it more difficult to enter a competitive marketplace by placing restrictions on competitors. However, they are not the same in nature, but are only consistent in their behavioural strategies. Microsoft owns the patent of the operating system, and other competitors wishing to enter the operating system platform need to be informed of the detailed technical design of the operating system in relation to the patent. In the Google case, on the other hand, although Google's search results use specialised algorithms, competitors do not need to know the specific architecture of the search engine or the specific design of the algorithms. The right to be informed of the basic rules of operation of the algorithm is only limited to cases where transparency of the algorithm is required by law. Moreover, competitors' access to search results is an automatic process of algorithmic crawling, and it is in a passive position. At the same time, the EC has repeatedly emphasised in its decision that its enforcement intent is not to interfere with the autonomous operational structure of Google's platform.[51]

Google submitted that its own behavior did not constitute an abuse of a dominant market position, and that self-preferential behavior could only be considered an abuse prohibited by Article 102 of the TFEU if it met the requisite infrastructure standard established in the Bronner case. However, the EC made it clear that the behavior did not involve Google passively refusing to allow competing comparison shopping services onto the main page.[52] Judge Bo Vesterdorf, took a view in line with Google. He held that Google did not fulfill the standard established in Bronner and cited five alternative channels to show that Google's regular search results were not essential for its competitive comparison shopping. However, Petit, Nicolas argued that Judge Bo Vesterdorf's reasoning departed from the general perception of EU competition law. He argued that the non-substitutability of the necessary infrastructure was not paramount, and that the non-replicability of facilities was more important than substitutability.[53]

There is also a requirement for the necessary infrastructure to eliminate all competition downstream. This is also difficult for Google to fulfil on this point. According to the evidence provided by Google, there are no fewer active users on its search engine than before and traffic is still available, so it does not fall into the category of eliminating all competition in the market - after all, when the EC defined the relevant market, it only defined the comparison shopping market, not the main page of comparison shopping results under generic search. While a large number of competitors are still active within the Google platform, the competitors are not able

[51] Johannes Persch, Google Shopping: The General Court takes its position.

[52] CASE AT.39740 Google Search (Shopping), 2017, paragraph 650.

[53] Petit, Nicolas, Theories of Self-Preferencing Under Article 102 TFEU: A Reply to Bo Vesterdorf (April 29, 2015). Competition Law & Policy Debate 1 CLPD (2015), Available at SSRN: https://ssrn.com/abstract=2592253 or http://dx.doi.org/10.2139/ssrn.2592253.

to profit from effective competition. This strange contradiction is likely because, in the industrial-era market, consumers were dispersed and operators had more opportunities to actively request contact with them; but in the Internet platform economy, consumers are aggregated and locked into specific Internet platforms due to the elimination of time and space, and their accessibility has been greatly compressed, and the competitiveness of the entire market has been diminished. At the same time, under the generic search results, only a very small number of demands will be extended to the subsequent pages due to the phenomenon of consumers' attention spans, which results in a de facto limited number of effectively supplied pages that can be provided by the platforms. The nature of the non-existence of redundant supply makes it even more difficult to recognise it as essential infrastructure.[54]

2.3.4 Price squeeze abuse

From the EC's requirement that Google's comparison shopping and competitive comparison shopping should have used the same set of algorithmic mechanisms, it was clear that the EC did not deny that Google conducted its own business. At the same time, the EC did not object to the algorithmic bias behavior of Google's advertising business. But the EC opposed Google's self-referential behavior. In the Google decision, the Commission compared the traffic of generic search results with the traffic of Adwords results and concluded that: 1. Adwords traffic was not as effective as generic search; 2. even if Adwords traffic had not been lower than generic search results, a shift to Adwords by competing price comparison shopping networks would have significantly increased their operating costs and made it impossible for them to compete efficiently.[55]

The EC concluded from heatmap experiments and click-through rate studies that Adwords does not drive more traffic than generic search results, even though it has a higher page preference. This is because consumers are already knowledgeable about paid search results and, especially after being disappointed with the results of paid advertisements, they change their behaviour and actively bypass ad-marked search results. It can be concluded that psychologically, most consumers trust generic search results more than they trust paid search results.[56] Therefore, it can also be concluded that the competitive outcome does not lead to a competitive loss for competitive comparison shopping sites when the algorithm is biased in favour of other enterprises. In December 2002 Google launched the first version of its comparison shopping service in the US under the brand name "Froogle". Google's internal communications indicated that Froogle was not well marketed. One study reported that by the beginning of 2007, traffic to Froogle was declining at a rate of 21 per cent per year, and in April 2007, Google rebranded Froogle as "Google Product Search", but in October 2007, Google's comparison shopping service was still failing to achieve successful traffic. But as of October 2007, Google's

[54] Anthony Milton, Antitrust Action Against Google May Transform the Internet, A global court and regulatory battle could have ramifications far beyond the news.

[55] CASE AT.39740 Google Search (Shopping)，2017，paragraph 544.

[56] CASE AT.39740 Google Search (Shopping)，2017，paragraph 545-548.

comparison shopping service was still not receiving successful traffic.[57] At the same time, Google's internal letter reveals that Froogle will not be ranked higher if it is entered into the site ranking mechanism with other websites.

Therefore, for competitive comparison shopping, neither the competition from paid search nor the competition from Google's own operation is to be feared. The competitive disadvantage of paid search is that it is not trusted by consumers, while the disadvantage of self-operation is that its products are not competitive enough in the market. However, the algorithm bias and Google's self-operation model have caused other competitors to gradually lose their competitive advantage. The positioning and display method of Google's comparison shopping in general search has eliminated the sense of distrust caused by deliberate algorithmic bias in a way that breaks through consumers' inherent cognition. More importantly, if competitors attempt to improve their rankings, they have to pay additional costs to achieve this through paid search channels, which will increase their operating costs and squeeze their profits. [58]Therefore, Google's comparison shopping appears in a prominent position without paying any fees, which is equivalent to Google giving comparison shopping two benefits of long-term trust guarantee and advertising subsidies through its status as a manager.

Some scholars have argued that Google's behaviour is a price squeeze. However, as with rejection of trade, it is not clear whether the application of price squeeze requires the fulfilment of the special subject matter element. And from the EU's previous cases, the dominant enterprises were titled price squeeze, including Germany's telecoms companies and Spain's telecoms companies, both of which are of a certain public nature of the industry, in the nature of the subject of Google and the nature of the two are more different.[59]

2.3.5 Conclusion for the case

In its Decision, the European Commission does not characterise Google's conduct as a specific type of abusive conduct under Article 102 of the TFEU, but rather interprets it in a logical manner of monopolistic behaviour as "the extension of one market power to another". [60] In the course of the investigation, Google put forward five major reasons for objective necessity and efficiency, however, the EC refuted each of them, arguing that: Google had not succeeded in proving that the behaviour was objectively necessary, or that the exclusionary effect could be offset by increased efficiency and benefits to consumers. [61]

In a sense, the EU has more discretion in the use of effects-based analyses, and the standards have become more stringent, particularly with regard to the efficiency defence, which scholars have found that no enterprise has been able to escape

[57] CASE AT.39740 Google Search (Shopping)，2017，paragraph 105.

[58] Matt Hunt, Safter Burak Darbaz, Robert Scherf, Self-Preferencing in Digital Markets.

[59] Jiang Yanbo, Research on Antitrust Issues in the Internet Industry, Shanghai, Fudan University Press, 2019.

[60] CASE AT.39740 Google Search (Shopping), 2017, paragraph 649.

[61] CASE AT.39740 Google Search (Shopping), 2017, paragraph 653-671.

liability for so far. [62] This "formal defence" was also reflected in the Google comparison shopping case. Therefore, a large part of the academic discussion on Google's behaviour focuses on the characterisation of Google's behaviour, which in turn makes the discussion on the Google case as a whole tend to adopt a form-based analysis method to identify the behaviour as abusive. However, as mentioned above, in terms of subject elements (rejection of trade, price squeeze), behavioural elements (bundling) and the internal logic of the rules (discrimination), Google's self-preferential behaviour does not fully meet the substantive criteria of abusive behaviour established by the EU competition law rules. The Google case also highlighted some of the limitations of existing laws in dealing with the digital economy, prompting the EU to consider and develop competition regulations that are more adapted to the digital age and laying the foundation for the subsequent introduction of the DMA.

[62] Andrea Renda, Searching for harm or harming search? A look at the European Commission's antitrust investigation against Google, CEPS Special Report 118/2015.

3 The application of Chinese competition law on self-preferential behaviour

3.1 Introduction

In China, the law dealing with self-preferential behaviour of Internet platforms has developed relatively late compared to the EU. However, with the rapid growth of Internet platforms and their expanding influence in the market, self-preferential behaviour and abuse of market dominance by platforms have gradually become the focus of regulatory attention. The traditional antitrust law has demonstrated certain limitations in dealing with these modern digital economy issues, especially in directly addressing the unique operating modes and market behaviours of Internet platforms. Therefore, in order to more effectively regulate the anti-competitive behaviour of Internet platforms, the Chinese government has continued to revise and improve the relevant laws and regulations, especially with regard to self-preferential behaviour and abuse of dominant market position.[63]

In response to this issue, the Antitrust Law (Draft Amendment) Act 2021 updates the Antitrust Law by including provisions specific to internet platforms, clarifying the definition of abuse of a dominant market position and expanding the prohibited behaviours, including self-preferential behaviour. This draft amendment strengthens the regulation of market manipulation by Internet platforms using data and algorithms, and is intended to reduce the reliance on catch-all provisions and provide more specific and direct guidance on the application of the law.[64]

In addition, China has issued the Antitrust Guidelines on the Platform Economy, which is the first guidance document on issues specific to the platform economy, providing detailed guidance on market definition, the identification of essential facilities, and how to deal with monopoly agreements and abuse of dominant market position in the platform economy. [65] Regulations such as the Measures for the Supervision and Administration of Internet Transactions and the Provisions on Prohibition of Abuse of Dominant Market Position (Temporary Provision) also further refine the specific manifestations of inappropriate trading practices and dominant market positions in the platform economy, and enhance the supervision of unfair market practices. [66] In response to the special influence of large Internet platforms and potential market-restrictive behaviours, the Guidelines for the Implementation of the Main Responsibility of Internet Platforms put forward the concept of mega platforms and made it clear that these platforms are required to assume higher responsibilities due to their size and market influence, and prohibit

[63] Xue Yi, Yu Wei, Commercial Common Sense or Monopolistic Behaviour? An Introduction to Self-Preferential Treatment in the Platform Economy Field.

[64] General Administration of Market Supervision, China Antitrust Enforcement Annual Report (2021).

[65] Sun Jin, The Antitrust Regulatory Dilemma and Optimisation of Self-Preferential Treatment on Digital Platforms, Rule of law studies, 2024.

[66] Meng Yanbei, Reasonable Regulation of Self-Preferential Behaviour of Superplatforms under Antitrust Law.

self-preferential behaviours such as using non-public data within the platforms to compete with the operators.[67]

This chapter will introduce in detail the legal system of China's competition law against self-preferential behaviours of Internet platforms based on the antitrust law and supplemented by platform antitrust policies, and discuss and analyse them with practical cases.

3.2 Competition rules on self-preferential behaviour on internet platforms in China

3.2.1 Based on the China Antitrust Law

Chapter III of the Chinese Antitrust Law[68] is dedicated to "abuse of dominant market position", which lists seven main types of behaviours. Self-preferential behaviours of Internet platforms are weakly targeted in the current Antitrust Law, and can only be regulated by the catch-all provisions, and the applicability of the elements for determining the nature of the behaviours in the current law to Internet platforms has been weakened due to the characteristics of the Internet industry. Therefore, in order to further improve the antitrust regime and enhance the applicability of the Antitrust Law to emerging industries, the Antitrust Law of the People's Republic of China (Draft Amendments) was released in October 2021[69]. New provisions have been added to address the hotly debated abuse of market dominance by Internet platforms, with Articles 3 and 9 making the monopolistic behaviour of Internet platforms fall directly into the category of abuse of market dominance without the need for the application of catch-all provisions. Article 3 provides that operators shall not abuse data and algorithms, technology, capital advantages and platform rules to exclude or restrict competition. Article 9 provides that if an operator with a dominant market position uses data and algorithms, technology and platform rules to set up barriers and impose unreasonable restrictions on other operators, it is an abuse of a dominant market position as stipulated in the preceding paragraph. As the Internet industry is very different from other traditional industries in terms of operating characteristics and development mode, how to adjust the original competition analysis framework to regulate the monopolistic behaviour of Internet enterprises has been the focus of attention in antitrust academia and practice.[70]

3.2.2 Complemented by platform antitrust policies

The antitrust law serves as the basis for the regulation of monopolistic behaviour, and the antitrust rules within it are more adaptable and operable in relation to monopolistic behaviour in traditional industries, while being less relevant to Internet

[67] Susan Ning, Ruohan Zhang, Weimin Wu, China: The Latest Steps Towards a More Robust Enforcement Framework for Anti-Monopoly.

[68] Antitrust Law of the People's Republic of China. http://www.gov.cn/flfg/2007-08/30/content_732591.htm.

[69] Antitrust Law of the People's Republic of China (Draft Amendments). https://m.thepaper.cn/baijiahao_15047396.

[70] Shangjia, Platform Self-Favouritism under the Threshold of Antitrust Law-Comparison of Google Shopping Cases in Europe and the United States.

platform monopolistic behaviour.[71] The release of the Antitrust Guidelines on the Platform Economy (Draft for Comment) in November 2020 opened a new phase of antitrust in China's Internet platform economy.

3.2.2.1 Antitrust Guidelines on the Platform Economy[72]

Officially released in February 2021, the Platform Guidelines is China's first guiding document specifically designed to guide antitrust in the platform economy, organising and innovating the basic principles and analytical methods of the Antitrust Law to apply specifically to the platform economy. This is a major step forward in China's antitrust regime for the platform economy, providing micro-guidelines for regulating the monopolistic behaviour of Internet platforms.

The Platform Guidelines make it clear that, in general, the review of monopoly agreements, abuse of a dominant market position and concentration of operators requires the definition of the relevant market. It is worth noting that it provides that when the cross-platform network effect existing on the platform is able to impose sufficient competitive constraints on the platform operator, the relevant goods market can be defined based on the platform as a whole, which provides a clearer direction for thinking about the definition of the relevant market in the self-preferential behaviour of Internet platforms. At the same time, the Platform Guidelines make it clear that the platform in question may be recognised as an essential facility, and that Internet platforms recognised as essential facilities should by default open up their platforms unless there are valid reasons to do so. This provision brings the unfair trade practices of platforms, which have long been in the grey zone, into the regulation of the antitrust law, which is of great significance to the protection of fair trade in the field of platform economy.[73] This also makes it necessary to consider whether it constitutes necessary facilities when studying the self-preferential behaviour of Internet platforms. In addition to this, Article 16 of the Platform Guidelines further details and lists the considerations for determining market dominance in the platform economy.[74] Article 17, on the other hand, refines the determination of differential treatment in accordance with the characteristics of the platform economy, providing a basis and guidelines for the regulation of self-preferential treatment by platforms.

3.2.2.2 Provisions on Prohibition of Abuse of Dominant Market Position (Temporary Provision)[75]

Provisions on Prohibition of Abuse of Dominant Market Position (temporary provision) published in 2022. The Temporary Provisions contain provisions on the

[71] Liu Shan Shan, Antitrust Regulation of Platform Self-Preferential Behaviour in International Perspective.

[72] Antitrust Guidelines of the Antitrust Committee of the State Council in the Field of Platform Economy. http://www.gov.cn/xinwen/2021- 02/07/content_5585758.htm.

[73] Xu Shiying and Ying Pingguang, Creating a Chinese Model for Antitrust Regulation in the Platform Economy - A Brief Introduction to the Antitrust Guidelines of the Antitrust Committee of the State Council in the Field of Platform Economy, China Market Supervision Research, No. 2, 2021.

[74] Liu Weihong, Research on the Self-Preferencing Behavior of Internet Platform by Anti-monopoly Law. East China University of Political Science and Law.

[75] Antitrust Guidelines of the Antitrust Committee of the State Council in the Field of Platform Economy. http://www.gov.cn/xinwen/2021- 02/07/content_5585758.htm.

specific manifestations of the six types of behaviour listed in the Antitrust Law as abuse of a dominant market position. It further refines and confirms the factors for determining market dominance, and provides a list of factors for determining that operators in new economic sectors such as the Internet have market dominance.[76] The conditions for the application of a catch-all provision to find an abuse of a dominant position of market power are also refined in Article 21, which provides criteria for the application of a catch-all provision.[77] The Temporary Provisions provide more detailed provisions on the abuse of a dominant position of market power, incorporating the factors for determining market power in the Internet industry. It provides a more detailed framework for the determination of self-preferential behaviour of platforms.

3.2.2.3 Measures for the Supervision and Administration of Internet Transactions[78]

One of the highlights of the Measures for the Supervision and Administration of Internet Transactions (hereinafter referred to as "the Measures"), issued in March 2021, is the strengthening of the regulation of unfair trade practices on platforms. In particular, it prohibits or restricts the independent business activities of operators on the platform by lowering the weight of platform searches and restricting business operation, and prohibits or restricts the independent choice of courier logistics by operators on the platform, and other behaviours interfering with the right of independent business operation of operators on the platform have been prohibited.[79] Although the Measures are not a platform-specific antitrust policy, the search downgrading referred to in the Measures is effectively the same as the EU's finding that Google engaged in self-preferential behaviour in the comparison shopping case. It is only in the Measures that this behaviour, together with the restriction of operation and the blocking of shops, is uniformly recognised as the platform's unfair trade practices, and the reason for restricting these behaviours is to safeguard the right to operate independently of the operators on the platform. The Measures actually regulate some specific behaviours in the self-preferential behaviours of Internet platforms, and to some extent impose restrictions on the self-preferential behaviours of platforms.[80]

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[76] Article 11 of the Provisions on Prohibition of Abuse of Dominant Market Position (temporary provision): In determining the dominant market position of an operator in the Internet and other new economic sectors in accordance with Article 18 of the Antitrust Law and Articles 6 to 10 of the present provisions, factors such as the characteristics of competition in the relevant industry, the business model, the number of users, the network effect, the lock-in effect, the characteristics of the technology, the innovation in the market, the ability to grasp and process the relevant data, as well as the market power of the operator in the relevant market, etc., may be taken into account. The market power of the operator in the relevant market may be taken into account.

[77] Article 21 of the Provisions on Prohibition of Abuse of Dominant Market Position (temporary provision): The General Administration of Market Supervision shall determine that other abuses of dominant market position shall meet the following conditions: (a) the operator has a dominant market position; (b) the operator has committed an act of exclusion or restriction of competition; (c) there is no justifiable reason for the operator to have committed the act in question; and (d) the relevant act of the operator has an exclusionary or restrictive effect on market competition. (d) the relevant behaviour of the operator has an exclusionary or restrictive effect on competition in the market.

[78] Measures for the Supervision and Administration of Internet Transactions. https://www.gov.cn/zhengce/zhengceku/2021-03/16/content_5593226.htm

[79] Wang Xiaoye, A Critique of the EU Model of Antitrust Regulation in China's Platform Economy. Law Review (Bimonthly). 2024.3.

[80] Mingjian Huang, Sun Chan Ho Kit. Data Scraping Behavioural Justification Boundaries of the Law. The Chinese, US and EU Models as an Example. FINANCE AND ECONOMY.

3.2.2.4 Guidelines for the Implementation of the Main Responsibility of Internet Platforms [81]

The Guidelines for the Implementation of the Main Responsibility of Internet Platforms (hereinafter referred to as the "Responsibility Guidelines") published in October 2021 for the first time clearly stipulated that Internet platforms shall not implement self-preferential treatment, and refined the responsibilities of Internet platforms, which is of great significance for the antitrust regulation of self-preferential behaviour of platforms.

The Responsibility Guidelines introduce the concept of "mega-platforms"[82], which are recognised as such because they may have a greater ability to restrict competition due to their advantages in terms of the size of their user base, data, technology and so on. As a result, they are also subject to higher levels of responsibility and liability. After clarifying the definition of mega platforms, Article 1 of the Responsibility Guidelines makes it clear that mega platforms shall not, without justifiable reasons, use non-public data generated by the use of the platform services by the platform operators to compete with the platform operators. Articles 2 and 29 further require platform operators to refrain from exercising self-preferential behaviour in the provision of the relevant goods or services.[83]This is the first time that China has explicitly addressed self-preferential behaviour on internet platforms. Although some specific behaviours of self-preferential treatment were previously restricted in other regulations, they were based more on the possible anti-competitive consequences of the behaviour, without paying attention to the deep-rooted factors such as advantage transmission and weakening of competitors' competitiveness behind the behaviour of self-preferential treatment by Internet platforms. The Responsibility Guidelines incorporate the prohibition of self-preferential behaviour into the equal governance of platforms and the protection module for operators on platforms respectively, not only restraining self-preferential behaviour from a behavioural perspective, but also showing the determination to maintain the fair competition order in the market of the platforms and to protect the interests of operators on the platforms from a purposive perspective.[84]

3.3 Douyin v. Tencent case

In February 2021, Douyin (TikTok) officially filed an antitrust lawsuit against Tencent. Douyin claimed that since 2018, Tencent's products have been continuously blocking and restricting the sharing of Douyin and other products on the grounds of

[81] Guidelines for the Implementation of the Main Responsibility of Internet Platforms https://baijiahao.baidu.com/s?id=1714949377259907439&wfr=spider&for=pc.

[82] According to the Guidelines for the Implementation of the Main Responsibility of Internet Platforms, mega platforms are defined as "platforms in China that have no less than 50 million annual active users in the previous year, have a main business with outstanding performance, have a market capitalisation (or valuation) of no less than RMB 100 billion at the end of the previous year, and have a strong ability to limit the access of operators within the platform to consumers (users)".

[83] Article 2 of the Guidelines for the Implementation of the Main Responsibility of Internet Platforms: Operators of mega platforms should observe the principles of fairness and non-discrimination. When providing relevant products or services, they shall treat the platform itself (or its affiliates) and the operators within the platform equally, and shall not apply self-preferential treatment.

[84] Zhang Wenjun, Study on Antitrust Regulation of Self-Preferential Behaviour of Internet Platform Operators. Anhui University.

short-video remediation, which constitutes an abuse of market dominance prohibited by the Chinese Antitrust Law. Specifically, when users share links to Douyin videos on Tencent's apps such as WeChat, they are automatically blocked by the system. The banning battle between Douyin and Tencent has been going on for a long time, and in 2018, the "circle of friends blocking Douyin " became a Weibo hot search, which was the first time that Tencent's products were banned from Douyin. In April 2018, Tencent formally blocked Douyin and other ByteDance products. In May 2018 Tencent said that it was "in the period of short video rectification", saying that only short video products with audiovisual licences issued by the regulator could be disseminated within WeChat. It is worth noting that at that time, in addition to Tencent's related products with audiovisual licences that were not blocked, a total of more than 30 short video Apps were banned from sharing and disseminating.[85]

During the short video regulation period, WeChat unblocked the Tencent own short video product Weishi. WeChat's circle of friends began to support Weishi sharing, and then WeChat began to channel traffic to Weishi, with the option to "shoot with Weishi" appearing in the user photo menu bar. At the same time, Tencent said that only the account certified by Weishi can be played directly after sharing through WeChat, the rest of the account can only be shared in the form of a link at present. Since then, WeChat version 7.0 was launched, adding the Moment Video feature (Moment Video is also a short video app owned by Tencent.) On 15 January 2019, WeChat blocked DuoFlash, a social product launched by Douyin, as well as a number of other social products released by other companies. On 18 January 2019, WeChat blocked the domain name of ByteDance (bytedance.com). On 22 January 2019, Tencent unilaterally stopped new users from logging in to Douyin with their WeChat accounts on the grounds of preventing large-scale leakage of WeChat's relationship chain. This change has a huge impact on the users. There are a large number of users who have logged in to Douyin through WeChat's open platform, and if WeChat is further blocked, it may even destroy the user's data and affect the safety of the user's wide range of properties. In February 2021, Douyin filed an antitrust lawsuit on the basis that Tencent's blocking of Douyin constituted an abuse of market dominance.[86]

In this case, in addition to Tencent's act of blocking short video links such as Douyin, there was also WeChat's act of channelling traffic to its short video apps in the Circle of Friends as well as other in-built features during Tencent's short video remediation period while it blocked a large number of short video apps. Tencent's approach is clearly one in which the platform uses a series of differential operations on the platform to give preferential treatment to its own products or services in the course of its own competition with other operators through platform self-preferential behaviour.[87]

After the elements of the behaviour have been satisfied, consideration should also be given to the reasonableness of the behaviour and the effects of that behaviour. With

[85] Netease Technology News, Douyin v. Tencent Unfair Competition Case, 2021.3.

[86] Financial News Agency: “Douyin v. Tencent unfair competition case latest progress: Douyin withdrew the case". https://www.163.com/tech/article/G69BUNB400097U7R.html.

[87] Liu Weihong, Research on the Self-Preferencing Behavior of Internet Platform by Anti-monopoly Law. East China University of Political Science and Law.

over 1.2 billion active users, WeChat is clearly a dominant market position and meets the conditions for constituting "infrastructure" in terms of the number of WeChat users that Tencent has and the stickiness of its users. This is consistent with the concept of a mega-platform as defined in the Guidelines for the Implementation of the Main Responsibility of Internet Platforms.[88] Tencent banned ByteDance 's Douyin and other products on the grounds of short-video remediation, but at the same time gave special treatment to other similar products such as Weishi and Tencent video, which are linked to its interests, and such a differentiation is certainly unconvincing. And Tencent comprehensively blocked ByteDance's products in the name of maintaining data security, and blocking is one of the most serious of the platform's self-preferential behaviours. In addition to banning Tencent actually has data protection, limited authorisation, risk tips and many other options to maintain data security, the behaviour has far exceeded the necessary limits to maintain data security, only to maintain their own interests as a starting point to ban other platforms clearly has lost its reasonableness.[89]

Tencent's blocking of ByteDance not only infringes on ByteDance's commercial interests, but also increases the cost of users' sharing behaviours, restricts users' sharing behaviours, and damages users' rights and interests.[90] It also made it difficult for emerging enterprises to enter the relevant market through technological innovation, hindering technological progress and innovation. Tencent's behaviour is actually an infringement of users' interests in the name of safeguarding their rights. It has also transferred its dominant market position in the social communication market to the short video product market, disrupting the market order and having a deleterious effect on market competition by excluding and restricting competition. The case ended with Douyin dropping the case after several rounds of trial. But what is clear is that Douyin and Tencent reached a private agreement, and Tencent compensated Douyin to some extent for its losses.[91]

[88] According to the Guidelines for the Implementation of the Main Responsibility of Internet Platforms, mega platforms are defined as "platforms in China that have no less than 50 million annual active users in the previous year, have a main business with outstanding performance, have a market capitalisation (or valuation) of no less than RMB 100 billion at the end of the previous year, and have a strong ability to limit the access of operators within the platform to consumers (users)".

[89] Financial News Agency: “Douyin v. Tencent unfair competition case latest progress: Douyin withdrew the case". https://www.163.com/tech/article/G69BUNB400097U7R.html.

[90] Ben Li, The China Solution: Implications of the EU's Regulatory Innovation for Digital Platform "Gatekeepers". Journal of Shanghai University (Social Sciences Edition).

[91] Financial News Agency: “Douyin v. Tencent unfair competition case latest progress: Douyin withdrew the case". https://www.163.com/tech/article/G69BUNB400097U7R.html.

4 Comparison EU and Chinese competition law on self-preferential behaviour

4.1 Similarities

4.1.1 Purpose of the law and fundamental principles

In the protection of competition and consumer rights and interests. In China, according to article 1 of the Chinese Antitrust Law, the law aims to prevent monopolistic behaviour, promote market competition, enhance economic efficiency, protect the interests of consumers and the public, and promote the healthy development of the economy.[92] The law provides a range of measures to counteract monopolistic behaviour by enterprises, including a definition of market dominance and specific guidance on how to deal with abuse of market dominance. In the EU, the abuse by any enterprise of its dominant market position is prohibited under Article 102 TFEU. The EU defines abuse as including the direct or indirect imposition of unfair purchase or selling prices, limiting production, markets or technological development, imposing different conditions on trading partners, and subordinating trading to the acceptance of other additional obligations not obtained from suppliers or customers.[93] These provisions are designed to protect the fairness of the market and the interests of consumers by preventing large companies from using their market power to the detriment of the overall economy and consumer welfare.

In terms of preventing the abuse of market dominance, article 22 of the Chinese Antitrust Law contains detailed provisions on the abuse of market dominance, including unfairly high or low prices for the sale of goods, refusal to deal without justifiable reasons, restriction of transactions, compulsory bundling of sales, or the imposition of unreasonable trading conditions.[94] These measures are designed to prevent enterprises from exploiting their market position to the detriment of other operators and consumers. Article 102 of the EU's TFEU contains similar provisions

[92] Article 1 of the Antitrust Law of the People's Republic of China.

[93] Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union - Consolidated version of the Treaty on the Functioning of the European Union, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A12012E%2FTXT.

[94] Article 22 of the Chinese Antitrust Law. An operator with a dominant market position is prohibited from engaging in the following behaviours that abuse the dominant market position: (i) Selling goods at an unfairly high price or buying goods at an unfairly low price; (ii) Without justifiable reasons, selling goods at a price below cost; (iii) Without justifiable reasons, refusing to enter into transactions with counterparties; (D) without a valid reason, to limit the transaction counterparty can only with its transactions or only with its designated operators to carry out transactions; (E) without a valid reason to sell goods, or in the transaction to attach other unreasonable trading conditions; (vi) Without justifiable reasons, to the same conditions of the transaction counterparty in the transaction price and other trading conditions to implement differential treatment; (vii) Other abuses of dominant market position as determined by the anti-monopoly enforcement agency of the State Council. An operator with a dominant market position shall not make use of data and algorithms, technology and platform rules to engage in acts of abuse of a dominant market position as stipulated in the preceding paragraph. For the purpose of this Law, a dominant market position refers to a market position in which an operator has the ability to control the price, quantity or other trading conditions of commodities in the relevant market, or the ability to impede or influence the ability of other operators to enter the relevant market.

detailing what constitutes an abuse of a dominant position of market power, such as the use of price mechanisms to crowd out competitors, restrict technological development or production, and enforce market segmentation. In addition, EU competition law pays particular attention to the accumulation and use of data, and given the importance of big data in the Internet economy, how data is handled to prevent abuse of a dominant position of market power becomes critical.

4.1.2 Concerns about Internet platforms

With the rise of the Internet economy, both China and the EU have greatly increased the regulation of Internet platforms. In 2021, China issued the Antitrust Guidelines on the Platform Economy, a policy document that specifically addresses the economic behaviour of Internet platforms and seeks to clarify the rules of competition in the platform economy, including by addressing exclusive agreements within platforms and potential abuses of market dominance. The The Guidelines for the Implementation of the Main Responsibility of Internet Platforms issued in the same year introduced the concept of "mega-platforms", which are recognised as mega-platforms centred on the fact that they may have a greater ability to restrict competition due to their advantages in terms of the size of their users, data and technology.[95] This is similar to the concept of "gatekeepers" established by the EU DMA Act.[96] The DMA specifically targets large platforms in what are known as " gatekeepers " roles, which are of particular interest because of their market position, number of users and ability to control key data. the DMA's main objective is to prevent these companies from abusing their dominant position in the market by limiting the market entry of competitors or new entrants, and to ensure fair competition and innovation in the digital market.

4.2 Differences

4.2.1 Legal provisions and implementation

From a practical standpoint, China's legal system is relatively weak in terms of legal specificity and transparency in the Internet area. While the Antitrust Law and the policy guidelines derived from it provide a certain framework, it tends to be less detailed than the EU in its handling of specific cases and interpretation of the law. For example, China tends to focus on administrative guidance and internal decision-

[95] According to the Guidelines for the Implementation of the Main Responsibility of Internet Platforms, mega platforms are defined as "platforms in China that have no less than 50 million annual active users in the previous year, have a main business with outstanding performance, have a market capitalisation (or valuation) of no less than RMB 100 billion at the end of the previous year, and have a strong ability to limit the access of operators within the platform to consumers (users)".

[96] Article 3, 2(a) of the DMA, An undertaking shall be presumed to satisfy the respective requirements in paragraph 1: (a)as regards paragraph 1, point (a), where it achieves an annual Union turnover equal to or above EUR 7,5 billion in each of the last three financial years, or where its average market capitalisation or its equivalent fair market value amounted to at least EUR 75 billion in the last financial year, and it provides the same core platform service in at least three Member States; (b)as regards paragraph 1, point (b), where it provides a core platform service that in the last financial year has at least 45 million monthly active end users established or located in the Union and at least 10 000 yearly active business users established in the Union, identified and calculated in accordance with the methodology and indicators set out in the Annex;(c)as regards paragraph 1, point (c), where the thresholds in point (b) of this paragraph were met in each of the last three financial years.

making when dealing with specific antimonopoly cases, making it difficult for outsiders to access detailed case information and judgement logic.[97]

In contrast, the EU competition law provisions are more clear and detailed. For example, the DMA not only sets out in detail the specific behaviours that constitute an abuse of a dominant position of market power, but also provides extensive opportunities for public consultation and legal debate to ensure that the application of the law's provisions is fully understood and foreseen by all stakeholders. In addition, the highly independent and professional process of law enforcement in the EU, where competition law enforcement is the responsibility of the European Commission, ensures consistency and strictness in the application of the law.[98]

4.2.2 Trials and penalties

The EU has high standards in terms of openness and transparency in the adjudication of cases. For example, the handling of the Google case was not only conducted in public, but also the investigation findings, legal basis and calculation of fines were published in detail. This practice not only helps to increase public trust in competition law, but also strengthens the deterrent effect of the law.

In China, on the other hand, although there are announcements for major cases such as the Alibaba antitrust fine, the details of the entire trial process are rarely open to the public. [99]The information made public is usually limited to the amount of the fine and a brief description of the offence, lacking in-depth legal and economic analysis. While this practice contributes to rapid enforcement and maintenance of market order, it may limit the public's perception of the transparency and fairness of antitrust laws.

4.2.3 Powers and independence of the regulatory institutions

In the EU, competition law enforcement is primarily the responsibility of the Directorate-General for Competition of the European Commission, which has extensive powers, including investigative, adjudicative and penalty powers. The Directorate-General for Competition of the European Commission has demonstrated a high degree of independence and professionalism in dealing with antitrust cases, which are its globally recognised characteristics. For example, the European Commission can initiate an investigation into any undertaking or individual suspected of violating Articles 101 and 102 of the TFEU, and can request detailed information from undertakings, carry out on-site inspections, and freeze the assets of undertakings if necessary. The European Commission bases its decisions not only on a strict legal framework, but also takes into account economic analyses and market effects. The transparency and independence of this decision-making process

[97] Zhang Jia, Antitrust Regulation of Platform Self-Preferential Behaviour: A Comparative Analysis of European and American Laws, Journal of Henan University of Animal Husbandry and Economy.

[98] EU Digital Markets Act (DMA): everything you need to know. https://blog.didomi.io/eu-digital-markets-act-dma-everything-you-need-to-know.

[99] On 10 April 2021, the General Administration of Market Supervision (GAMS) issued an administrative penalty decision in accordance with the law, ordering Alibaba Group to cease the illegal practice of abusing its dominant market position to conduct " 2 for 1", and imposing a fine of 4% of its sales in China in 2019 of RMB 455.712 billion, which amounted to RMB 18.228 billion.

is ensured by a variety of mechanisms, such as the fact that its decisions can be reviewed by the EU General Court and the European Court of Justice. In addition, the European Commission's decision-making process is open and transparent, and all important antitrust rulings are published in detail, including economic and legal analyses of the case, which provides a high level of predictability and trust for market participants and the public.[100]

In contrast, China's antitrust regulator institution, the General Administration of Market Supervision, although it has broad powers to investigate and sanction firms that violate the competition law, its operational processes and independence are sometimes affected by national policies and other external factors. China's competition law regulator institution operates within the administrative system, so its decision-making process may interact with other government policy objectives. For example, the Chinese Government's promotion of certain strategic industries or its handling of international trade issues may affect the independence of the GAMS in particular cases. In addition, the legal process in China is usually not as open and transparent as in the EU, and the details of antitrust investigations are often not made public, which makes it more difficult for the public to understand and anticipate regulatory decisions. For example, in the Douyin v Tencent case mentioned in Chapter 3, the details of the case have not been released in detail yet.[101] Although improvements have been made in recent years in terms of enhancing transparency and regulating operations, such as making public decisions on major antitrust penalties. However, compared to the EU, China still needs to strengthen the openness and independence of its regulatory process.[102]

[100] Competition Policy of Directorate-General for Competition of the European Commission, https://competition-policy.ec.europa.eu/index_en.

[101] Financial News Agency: “Douyin v. Tencent unfair competition case latest progress: Douyin withdrew the case". https://www.163.com/tech/article/G69BUNB400097U7R.html.

[102] Di Jiamin, Study on Antitrust Regulation of Self-Preferential Behaviour of Super-Platforms, Henan University of Finance and Economics and Law.

5 Summary and Conclusions

In the new digital era, which is centred around data as a productive force, the market competition relationship between various Internet platforms appears to be more multilateral and the means of competition more diversified. The platform's own development approach is also multidimensional and cross-border in nature. The purpose of this thesis is to explore, analyse and compare the regulatory frameworks for self-preferential behaviour of online internet platforms under EU and Chinese competition law. The issue of what limits are placed on self-preferential behaviour of internet platforms under EU and Chinese competition law is studied. The study exhaustively compares aspects of legislation and enforcement in the two jurisdictions.

In the EU section, this paper details the key regulations in Article 102 TFEU and the DMA. By analysing how the EU prevents anticompetitive behaviour by dominant platforms through conduct regulation, and in particular through the examination of the Google Shopping case, it shows the stringent enforcement and high fines imposed by the EU for violations. In contrast, the paper reviews the rapid development of antitrust law regulation in China, particularly the legal adjustments around the digital economy in recent years. Chinese law favours regulatory interventions based on broad principles, which are flexible but less predictable. By analysing cases such as Tencent, it reveals the practical impact of the Chinese legal framework on prominent Internet platforms. A comparative analysis reveals many commonalities and differences between the two regions when it comes to regulating large online platforms. While both recognise the need to regulate these platforms to prevent them from impeding competition and innovation, the EU legal framework is more detailed and predictable than China's in terms of specificity and transparency. In addition, this study explores the effectiveness of the strategies employed by each jurisdiction in addressing the challenges of the digital economy. The EU has adopted a comprehensive and proactive regulatory approach through measures such as the DMA, focusing on prevention and early intervention. China's approach, on the other hand, focuses more on enforcement after the event and increasingly on data and algorithmic abuse.

Overall, this paper emphasises that while both the EU and China have made efforts to adapt their antitrust laws to the digital age, they have each taken different routes, which have been heavily influenced by their respective legal traditions, market dynamics and policy objectives. The EU approach provides an detailed and procedural model that can be used as a reference standard for international antitrust practice; China, on the other hand, is developing a unique framework that is consistent with its broader economic and social governance objectives.

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