Legal Regulation of Internet Platform Banning Behaviors

Zhihang Yin

Zhongnan University of Economics and Law, Wuhan City, China

Abstract: There are frequent banning behaviors in the field of Internet platforms in China, which harm the interests of other operators, harm market innovation, and damage the rights and interests of consumers. The market self-healing function in traditional economics does not have a realistic basis and cannot play its practical effect. The regulation of the banning behavior not only will not produce economic damage, but also is conducive to reduce the damage of rights and interests in the competitive market, so it is urgent to regulate this behavior through the anti-monopoly law.The exsiting anti-monopoly law has the dilemma of insufficient explanation and limited application to the regulation of the banning behavior. It is feasible and necessary to introduce the ex ante supervision mode of the comparative law, namely the platform gatekeeper theory, which can effectively suppress the banning behavior of the platform. Therefore, the gatekeeper theory should be perfected from the aspects of gatekeeper's definition standard, gatekeeper's obligation and gatekeeper's platform's defense.This paper provides implications for improving the regulation of banning behaviors in China.

Keywords: Platform Banning Behavior, Platform Gatekeeper Theory, Anti-Monopoly Law, Ex-ante Regulation.

1. Introduction

With the continuous advancement of the information revolution, super platforms have emerged and banned other operators from entering the platform by virtue of the advantages of traffic and channels.Similar improper practices occur frequently in China's law enforcement practices, which have aroused widespread concern.How to analyze and review such behavior from the perspective of competition law needs to start from the legal definition of platform and banning behavior.

First, about the definition of the platform, according to Anti-Monopoly Guidelines for the Platform Economy (hereinafter “Platform Guidelines”) promulgated by China, platform refers to a business organization form that enables interdependent bilateral or multilateral entities to interact under the rules provided by a specific carrier through network information technology, so as to jointly create value. This indicates that the core business of the platform is the information intermediary service that satisfies the transaction of bilateral or multilateral entities.[1]

Second, regarding the nature of the banning behavior or blocking behavior, Chinese scholars have not reached a consensus on its scope: Yin Jiguo argues that the specific content of the platform banning includes banning accounts, blocking contents, refusing direct links and closing API interfaces;Chen Bing, Chen Qing and other scholars believe that the scope of platform banning behavior is broader, and should also include exclusive dealing and self-preferencing treatment behavior. Exclusive dealing means that the relevant market operators, through some technical measures or contractual arrangements, make the trading objects "trade with themselves, but not with other operators".[2] Therefore, exclusive dealing involves three parties: the operator within the platform and the two platforms with the possibility of competition.At present, the banning behavior discussed in the academic circle are between the platform and competitors, and do not involve other subjects.In addition, self-preferencing behavior overlaps with platform banning in some respects, and there are many ways of self-preferencing treatment, not limited to the banning behavior. Therefore, platform banning behavior should not include exclusive dealing and self-preferencing behavior. In practice, what has a greater impact on market competition and is more controversial are refusing direct links and closing API interfaces. This also constitutes the main context of the discussion of banning.

In the existing literature, the research on banning behavior focuses on two questions: whether to regulate platform banning, and if so, which law should be applied to the regulation?

First, whether the platform ban should be regulated, that is, whether the behavior is illegal.Scholars who advocate that the banning behavior is legal and should not be regulated believe that Internet platforms have enough

© The Authors, published by EDP Sciences. This is an open access article distributed under the terms of the Creative Commons Attribution License 4.0 (http://creativecommons.org/licenses/by/4.0/).

operational autonomy and the right to refuse to open the existing platform traffic channels to competing platforms.If the platform does not violate relevant regulations, but is forced to open resources, the platform will be unjustly harmed. On the contrary, scholars who argue that banning behavior is illegal and should be adjusted argue that platform banning behavior deviates from the basic principles of Internet interconnection and damages the basic rights and interests of consumers and the normal competition order in the Internet field.

At present, scholars mainly focus on E-commerce Law, Anti-Unfair Competition Law and Anti-Monopoly Law on how to regulate platform banning. Ye Ming, Zhang Jie and other scholars believe that from Article 12 of the Anti-Unfair Competition Law (" Internet Special Article "), the banning behavior can be identified as the malicious implementation of incompatibility with the network products or services legally provided by other operators. Duan Honglei believes that relevant regulations can start from the provisions of Article 35 of the E-commerce Law, and determine that e-commerce platform operators cannot impose unreasonable restrictions on the transactions of other operators through their dominant position or some technical means. Scholars such as Guo Chuankai support the recognition of platform blocking as a refusal to deal under the Anti-Monopoly Law.

However, the above regulatory mechanism are controversial to some extent.First of all, the application scenario of Article 12 of the Anti-Unfair Competition Law is aimed at the vicious incompatibility in the PC era at that time. Whether it can be applied to the external chain blocking in the platform still lacks the support of legal precedent and the clear expression of judicial position.Secondly, the regulation object of the E-commerce Law is limited to the online sales platform with trading activities, while the most frequent scenes of banning behaviors are social networking platforms, which are different from each other in context.

In the application of the Anti-Monopoly Law, the theory does not specify the content of competitive damage caused by the banning behavior, and there is still a lack of systematic and consistent understanding of the definition of relevant market, the identification of market power, and the definition of abuse behavior.From the standpoint of protecting the competitive process, how to implement a proper regulatory mechanism for the platform banning behavior is not only related to the protection of consumer interests, but also closely related to market innovation. This paper will conduct an in-depth analysis on this issue.

2. The Competitive Harm of Platform Banning

The competitive harm caused by platform banning behavior is the core of the analysis of competition illegality, which is discussed in this section.

2.1 The Status of Competitive harm in Chinese Law

The category of monopoly closely related to platform banning behavior is abuse of market dominant position. Whether competitive harm can be regarded as an independent element of this behavior in China has not reached a consistent conclusion in practice and theory. From the perspective of comparative law, according to the development status of Internet platforms and the legislative purpose of the Anti-Monopoly Law, it is necessary for competitive harm to be an independent constitutive element.

In the eyes of China's law enforcement practice, the "Provisions of the Supreme People's Court on Several Issues Concerning the Application of Law in the Trial of Civil Disputes Caused by Monopoly Behavior" issued by the Supreme People's Court in 2012 confirmed in Article 8 that the abuse of dominant market position was determined by the following three elements: Dominant market position, abusive conduct and defense of just cause, excluding and limiting the effect of competition or competitive harm is not the content that must be proved.In the practice of law enforcement in China, there are three positions on the evaluation of competitive harm in abusive conduct, and no unity has been formed.[3] First, the constitutive elements of independence, namely supporting the effect doctrine model, affirm the significance of independent evaluation of competitive harm;Secondly, the non-independent constitutive elements, that is, the competitive harm is integrated into the abuse behavior to investigate, acquiesce to its secondary attribute of the constitutive elements function;Third, non-constitutive requirements, that is, without examining the existence of competitive harm, directly according to the three requirements to judge.

From the perspective of comparative law, the constitution of exclusive abuse in EU law can be summarized into four elements: market dominance, abuse, competitive harm and justification defense. Competitive harm clearly exists as an independent constituent element.The Vertical Merger Guide of the United States makes it clear that the definition of relevant market should be based on the determination of competitive harm.It can be seen that competitive harm as an independent evaluation requirement has a solid foundation of comparative law.

Therefore, although the requirement of competitive harm cannot be identified from existing Chinese legal norms.However, considering the historical process and legislative objectives of the emergence and development of the anti-monopoly law, it can be seen that the competitive harm requirement is indispensable.[4] If competitive harm is not considered as an independent component, this provision is likely to be abused, thus affecting the normal market order.

2.2 Analysis of Competitive Harm

2.2.1 Damage to the Interests of Competing Platforms

The implementation of the banning behavior infringes on the fair competition right of the competing platforms.The super platform makes use of its user traffic advantage to prohibit the normal operation behavior of the competitive platform under the pretext of independent management

rights, which makes the competitive platform cannot normally absorb traffic and attract consumers through the super platform, and the competitive ability in the relevant market is seriously impaired.Some scholars support the freedom of contract and believe that the blocking behavior is a normal means of competition, and the behavior of the competitive platform to absorb traffic through the super platform is a "free rider" behavior, and forcing the platform to provide channels will damage the platform's own interests and affect the normal competition order.

However, the operational autonomy of incumbent platforms also has its limits.First, the super platform has strong technology, capital and data aggregation effect, and has become the main place for market transactions and resource allocation at the present stage. Therefore, it forms high market access barriers, and other operators cannot establish similar platforms by themselves at the present stage.Second, the public nature of the super platform formed by the free mode determines that denying competitors access to the existing platform without justifiable reasons violates the principle of connectivity.

2.2.2 Harm Innovation in Competitive Markets

Innovation is an important institutional pursuit of competition law, and the banning behavior will damage innovation to some extent.[5]

First, the innovation motivation of competitive platforms is frustrated.The ban will block the channel expansion of competitive operators and deprive competitive enterprises of the opportunity to innovate. Due to limited resources, small and medium-sized operators can only rely on super platforms to obtain user traffic and data in the early stage of entrepreneurship.In order to eliminate the impact of the ban, competitive platforms need to forcibly expand the investment of capital and build similar platforms, which will cause a waste of resources and seriously damage the innovation funds of small and medium-sized operators.The prohibitions imposed by the super platform on some start-ups will also make investors lose confidence, thus affecting the normal financing of the start-ups.

Second, the innovation motivation of existing platforms is insufficient.Super platforms implement prohibitions to block the development of competing platforms, thereby solidifying their dominant position in the market.Therefore, super platforms do not need to adopt risky innovative behavior to maintain good revenue and growth.In the meantime, failure to punish platform blocking is an incentive to continue abusing platform power, which goes against the innovative spirit of the market.

2.2.3 Harm the Interests of Consumers

The dominant service model for super platforms is zero-price service, which is often used to gain market power and impose prohibitions.[6] Some scholars believe that without price, there would be no market power, let alone harm to consumer welfare.This view ignores the special situation in the Internet field, where the traditional price-centric approach to damage analysis gradually fails.In addition to explicit price indicators, non-price factors such as consumer attention and choice are also important components of consumer rights and interests evaluation.

The implementation of the banning behavior makes the users unable to communicate the relevant links normally. If the users give up the communication links, their choice will be seriously damaged.If users choose to share links in ways other than easy means, their use costs, namely, information costs and attention costs, will rise accordingly.Viewed from this point of view, consumer welfare clearly suffers.

3. The Rationality of Regulation

3.1 The Economic Harm of No Regulation

Neoclassical economists believe that perfectly competitive market equilibrium models already describe the real world with considerable accuracy.First, this precise model does not require outside intervention, and works on its own, relying on private competitive markets to correct possible problems.[7] Second, they argue that even in the presence of market failures, government intervention will not achieve its intended purpose, but will only undermine the self-correction functions of the market economy and worsen the economic environment.Finally, economists believe that jurists lack a correct understanding of the field of economics and market behavior, and their conclusions are wrong, and they should keep silent about the business behavior that they are not familiar with.

However, the neoclassical economic theory system based on perfect competition models have the problems of inconsistent internal logic and poor practice effect.First, perfect competition lacks a solid foundation. In order to make the models fit the reality, the theoretical builders imposed multiple restrictions on it, such as free flow of information, symmetric structure, and balance of negotiation forces, which greatly reduced its application effectiveness.[8] Second, from the practical effect of countries that carry out the macro and micro economic policies of neoliberalism, the "ideal situation" considered by neoclassical economists did not appear, but there was a serious economic recession and even crisis.At the same time, in some developing countries, whether it is microeconomic behavior or macroeconomic behavior, government intervention exists in a wide range, and often produces effective control results.[9] Third, in the field of Internet platform, the market self-repair ability under the business ecological model is limited, and the super platform with the complete ecosystem has enough market power to suppress the competition space of each other.Therefore, although traditional economics believes that the market will heal itself, such ability is extremely limited for these super platforms.

3.2 The Benefits of Regulation

Regulation of platform banning behavior can achieve better economic effects.First of all, the economic damage caused by the regulation of blocking behavior is

small.The regulation of the blocking behavior only makes the development of similar industries of the incumbent platform may be frustrated in the short term, but it does not mean that it cannot develop. The full competition after the lifting of the blocking behavior will produce better economic effects.And this frustration is not caused by misconduct, but the normal business result of fair competition.Second, the economic benefits of regulation are greater.The regulation will produce greater economic welfare.For the competiting platforms, the regulation is to protect their fair management right, which is conducive to the normal operation and development of these small and medium-sized competitive platforms.The regulation of the banning behavior encourages the banned platform itself and the competitive platform to actively innovate.And it protects the consumer interests, which are composed of non-price factors such as consumer attention and choice.

4. The Regulatory Model of Gatekeeper Theory

Some scholars support the essential facilities principle as the rule basis, the banning behavior is identified as the refusal of transaction under the Anti-Monopoly Law system, but its application is difficult and controversial.In contrast, the platform gatekeeper institution in the comparative law may be a more reasonable regulatory model.

4.1 The Dilemma of the Application of the Essential Facilities Theory

4.1.1 Contradiction between the Theory of Essential Facilities and Platform Economy

First of all, there are difficulties in applying the principle of essential facilities.The essential facilities doctrine presupposes that the violation of the law is a refusal to trade, so the relevant market, market power and abuse need to be identified.However, in the field of platform, these three aspects are difficult to identify and controversial, the application of law is not clear, and the academic community has not reached a consistent conclusion.[10]

Secondly, some scholars believe that the data mastered by the platform may constitute essential facilities, and without access to the data mastered by the super platform, new products cannot be developed. But judging from the development of Chinese and foreign tech giants such as Facebook, Tencent, Alibaba and ByteDance, the difference in their business is not determined by the data itself, but by the further processing of data to meet the development needs of their products and services.In the foreign music media service market, Apple's iTunes has accumulated a huge amount of data before Spotify entered the market. Spotify has surpassed the active amount of iTunes users by optimizing data processing without the accumulation of big data, which proves that data itself does not reach the level of essential facilities.

4.1.2 The Prudent Application of the Theory of Essential Facilities

The U.S. antitrust law first extended the concept of essential facilities through precedents, but there are obvious differences in its application in courts and academic circles. U.S. courts have shown extreme caution in applying the essential facilities theory to the digital economy, declining to comment on the application of essential facilities in both the Linkedin and Facebook cases.Compared with the United States, the European Union applies the essential facilities theory in a broader scale and scope.But in the digital economy, the EU has yet to identify a case for essential facilities.The Commission stressed "careful, case-by-case judgment" in a written response in February 2020 to the question of whether large Internet platform companies could become essential facilities.In short, the major anti-trust law systems outside China are cautious about applying the essential facilities theory to the digital economy.

Considering the damage to market innovation caused by the identification of essential facilities, China's anti-monopoly law enforcement agencies have not directly identified "essential facilities" in the handling of relevant cases, and the concept of "essential facilities" only appears clearly in anti-monopoly civil disputes. Therefore, China also holds a cautious attitude towards the theory of essential facilities. The practical value of regulating banning behavior through the theory of essential facilities is not great, and using this way may mean laissez-faire.

4.2 Feasibility and Necessity of Transplanting Platform Gatekeeper System

With the rise of the New Brandeis School,[11] the European Union and the United States are no longer limited to the Chicago school's simple analysis of the economic benefits of anti-competitive behavior, but adopt more radical structuralism, and the idea is adjusted from post-cautious review to pre-behavior supervision, the digital market gatekeeper system emerged.[12] The gatekeeper system is currently defined as a key enterprise providing core digital services. On July 18, 2022, the European parliament officially approved the "Digital Market Act" (DMA), in reference to the gatekeeper recognition basis.These criteria of gatekeeper will be met if a company:has a strong economic position, significant impact on the internal market and is active in multiple EU countries; has a strong intermediation position, meaning that it links a large user base to a large number of businesses; has (or is about to have) an entrenched and durable position in the market, meaning that it is stable over time if the company met the two criteria above in each of the last three financial years. Through the gatekeeper system of platform to regulate the abuse of market dominant position including banning behavior, it is an alternative plan for China's competition regulation.

4.2.1 The Difference between Essential Facilities and Gatekeeper Theory

The theory of essential facilities requires the analysis and identification of relevant markets, market power and abuse. There is no clear quantitative identification standard for essential facilities, so it has little practical significance.In the gatekeeper theory, there is no need to define relevant market and other factors, but the obligation of "inaction" can be directly imposed on platform enterprises with significant influence.The gatekeeper system has a clear quantitative standard compared with the law, and the identification cost is low, which is very helpful for the application of the law.This kind of regulation is ex ante. Compared with the ex post remedy model of the essential facilities theory, the gatekeeper system can reduce anti-competitive behaviors from the start, so as to better protect the interests of consumers and competitors.

4.2.2 The Necessity of Transplanting Platform Gatekeeper System

The gatekeeper system is a product of structuralism, and critics argue that it carries a risk of false positives and should not be widely applied.Antitrust enforcement often faces a lot of ambiguity, so it is inevitable to make two types of errors: the false positive error of identifying normal business behavior as anticompetitive behavior, and the false negative error of misidentifying anticompetitive behavior as normal business behavior.[13] In general, the risk of false positives in antitrust enforcement is greater than the risk of false negatives. Therefore, Anti-Monopoly Law enforcement mostly maintain a prudent, post-processing attitude. But false positive risk is greater than the risk of false negative is not widespread, in the field of Internet platforms, economies of scale, synergy, network effects and the effect of the bilateral market makes the structural market failures, the platform has a significant competitive advantage compared with other competitors, so as to have a higher risk of abuse of dominant market position and market difficult to self-correction in a short time. In this case, ex-ante supervision is necessary. This regulation logic is in line with the trend of China's increasing anti-monopoly supervision on Internet platforms, which is helpful to regulate the competition order in the platform economy.

4.2.3 The Feasibility of Transplanting Platform Gatekeeper System

Any reference of comparative law system should be judged to be reasonable and adjusted according to domestic conditions.First of all, the “Platform Guidelines” is the earliest legal document regulating the field of platform anti-monopoly, and China's platform anti-monopoly is in the forefront. There is already an institutional basis for the supervision of Internet platforms, and the gatekeeper system can be increased by revising and filling relevant rules under the existing regulatory system.Secondly, China's anti-monopoly policy towards Internet platforms is continuing to advance.Before this, the anti-monopoly law enforcement agencies applied the relevant anti-monopoly rules to the unfair competition behavior of Internet platforms less, and more laws and regulations were not implemented, so there was no institutional burden, and the introduction of gatekeeper system was less resistance.

4.3 Compents of Gatekeeper Rules in Chinese Law

On the premise of learning from the mature system of comparative law, the gatekeeper rule in Chinese law should be adapted to the existing domestic anti-monopoly laws and regulations and the development of the Internet platform. Its rule system can be roughly divided into three parts: defining the gatekeeper's standard, the gatekeeper's obligations, and the justifiable defense reasons.

4.3.1 Definition of Gatekeeper Standards

In the EU gatekeeper system, clear identification basis has been given, supplemented by corresponding quantitative criteria.The turnover criteria are defined as an annual turnover of at least 6.5 billion yuan or a market capitalization of at least 65 billion yuan in the previous year, and the user traffic criteria are defined as a minimum of 45 million monthly active end users who must meet the criteria for three years. These quantitative indicators are too small for China's Internet platforms, so the application of the defined gatekeeper system requires the anti-monopoly law enforcement agencies to make adaptive adjustments on the basis of collecting relevant market data, and define the gatekeeper according to the situation of turnover and user traffic, so as to conform to the Chinese context.

4.3.2 Gatekeeper's Obligations: Competitive Obligations

Although various obligations of gatekeepers are stipulated in the gatekeeper system of the European Union, they cannot be well targeted against existing banning behavior.On the basis of learning from the gatekeeper system, the concept of competitive obligation can be introduced. Scholars believe that the chaotic competition phenomenon of Internet platform stem from mutual exclusion of private interest and publicity, so the key to regulate the platform is return to the public. Therefore, competitive obligations should be set for the Internet platform and incorporated into the gatekeeper system. That is to say, the platform should adopt the general principles of openness, neutrality and connectivity, and take the refusal to open and neutrality to specific operators as exceptions. Such exceptions should be justified. [14] The content of its opening must include public services, that is, operators should open the services that meet the two standards of universality and scarcity, and can selectively open the services that do not meet the two standards.

4.3.3 Justifiable Defense Reasons

An operator's refusal to open neutrality to a particular operator requires a valid defense.First, if other operators' links exist illegal, against public order and good custom content, the platform has the right and obligation to implement the ban.Second, if the banned link is suspected of inducing the collection of user information, the platform can block it in order to protect the legitimate rights and interests of users. If the platform can prove that opening the platform to a particular operator will increase the maintenance cost of the platform and seriously damage its own interests, it can be banned accordingly.Finally, if the platform proves that the open link causes other platforms to "free ride", the damage of market innovation drive will affect the public interest, and the ban can also be implemented.

5. Conclusion

The introduction of gatekeeper rules for super platforms can effectively reduce the difficulty of ex-post review after the occurrence of monopoly behavior, directly enshrine special obligation requirements for platform enterprises, avoid the illegal behavior of Internet platform enterprises abusing platform power, and easily strengthen the control of platform enterprises.However, the definition and scope of platform gatekeeper is still a complex and challenging regulatory work, which will depend on the special review and continuous evaluation and adjustment of professional institutions. The relevant work will be carried out soon. It is believed that the regulation of platform gatekeeper will have positive effects in the future.

References

1. Liyang Hou (2022).On the Legal Subject Status of Internet Platform, Peking University Law Journal, 34(2),346-365.
2. Xiaoye Wang(2020).On the Legal Regulation of the Exclusive Dealing of E-commerce Platform, Modern Law Science, 42(3),151-165.
3. Haitao Jiao (2020). Nature Orientation and Norm Revision of Abuse of Dominant Market Position, Journal of China University of Political Science and Law, 87(1),186-200.
4. Yanbei Meng (2017). On the Analytical Framework of Prohibiting the Abuse of Dominant Market Position -- A Case Study of Tetra Pak Anti-Monopoly Case, Competition Policy Research, (3), 5-12.
5. Federico, G., Morton, F. S., & Shapiro, C. (2020). Antitrust and innovation: Welcoming and protecting disruption. Innovation Policy and the Economy, 20(1), 125-190.
6. Newman, J. M. (2015). Antitrust in zero-price markets: Foundations. University of Pennsylvania Law Review,164,149-206.
7. Jijun Tang (2021).The Evolution, Behavioral Shift and Contemporary Significance of Development Economics, Academic Monthly, 53(11),49-59.
8. Zhijun Zhao, Guochun Zhao (2021). Discussion on the Logical Contradiction of Perfect Competition Theory, Social Scientist, 294(10),80-85.
9. Jing Yang (2015). The Double Paradox of Neoliberal "Market Failure" Theory and Its Criticism -- and Thinking on Better Playing the Role of Government, Marxist Studies, (08),70-80.
10. Lambert, T. A. (2022). Addressing big tech's market power: comparative institutional analysis. SMU Law Review, 75(1), 73-116.
11. Khan, L. (2018). The new Brandeis movement: America's Antimonopoly Debate. Journal of European Competition Law & Practice, 9(3), 131-132.
12. Geradin, D. (2021). What is a digital gatekeeper? Which platforms should be captured by the EC proposal for a digital market act? . Which Platforms Should Be Captured by the EC Proposal for a Digital Market Act.
13. Easterbrook, F. H. (1984). Limits of antitrust. Tex. L. Rev., 63, 1.
14. Chenying Zhang (2021). Anti-monopoly Regulation of Internet Platform from the Perspective of pPublicity.Chinese Journal of Law,43(04),149-170.