SELF-PREFERENCING IN CHINA – NEW ANTITRUST RULES OR ENFORCEMENT CASES?

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Self-preferencing has been a hot topic in the global antitrust community over the past few years – including in China. This paper looks at how China has attempted to address self-preferencing practices within its antitrust framework. In this paper, we explain how China has mainly pursued the option of issuing new norms to tackle perceived risks related to self-preferencing. However, since none of the normative efforts have delivered a tangible outcome (as yet), the question is then whether self-preferencing practices could be addressed under existing antitrust rules. In addition, we review the provisions in China’s Anti-Monopoly Law which might apply to such practices. Lastly, we provide our conclusions and an outlook on how to tackle self-preferencing in China going forward.
I. INTRODUCTION

Self-preferencing – the practice of a dominant company to give preferential treatment to its own products or services when they are in competition with products and services provided by other undertakings using the platform offered by the dominant company – has been a hot topic in the global antitrust community over the past few years. The Google Shopping decision and the enactment of the Digital Markets Act (“DMA”) in the European Union (“EU”) have sparked debates about self-preferencing in many antitrust jurisdictions around the world — including in China.

This paper will look at how China has attempted to address self-preferencing practices within its antitrust framework. In section II, we will explain how China has mainly pursued the option of issuing new norms to tackle perceived risks related to self-preferencing.

However, since none of the normative efforts have delivered a tangible outcome (as yet), the question is then whether self-preferencing practices could be addressed under existing antitrust rules. In section III, we will go through the provisions in China’s Anti-Monopoly Law (“AML”) which might apply to such practices.

In section IV, we will provide our conclusions, with an outlook on how to tackle self-preferencing in China going forward.

II. LEGISLATIVE EFFORTS AGAINST SELF-PREFERENCING

There have been two major attempts to create new norms to address self-preferencing within the Chinese antitrust framework. The first attempt was to include a specific provision on self-preferencing in one of the new regulations implementing the amended AML. The second attempt is underway, and seeks to create new guidelines for online platforms similar to the DMA.

A. New Rules Following Anti-Monopoly Law Amendment

On June 24, 2022, the National People’s Congress enacted the amendment of the AML. One of the drivers to amend the AML was to update it to meet the requirements of the antitrust issues arising in the digital era.

The amended AML includes a new rule prohibiting companies in a dominant market position from engaging in abusive conduct through the use of data, algorithms, technology, or platform rules.

Three days later, on June 27, 2022, the Chinese antitrust regulator – the State Administration for Market Regulation (“SAMR”) – issued six draft implementing regulations for public comments, including the draft Regulation on the Prohibition of Abuses of a Dominant Market Position (“Draft Regulation”). Article 20 of the Draft Regulation was a newly designed rule against self-preferencing. It provided that online platforms in a dominant market position are prohibited from favoring themselves by (1) giving preferential display or ranking to their own products or (2) developing their own products or supporting their own decision-making through utilizing the non-public data of other companies operating on their platforms.

Article 20 also provided possible justifiable reasons for such self-preferencing practices, which would “exempt” the practices from the prohibition where the display or ranking is based on fair, reasonable and non-discriminatory (“FRAND”) platform rules; there exist legitimate industry customs or transaction practices; or there are other justifiable reasons.

According to the SAMR’s explanatory note accompanying the Draft Regulation, Article 20 was created by reference to theoretical studies as well as relevant legislation and enforcement practice in foreign jurisdictions. Obviously, this mainly points to the EU experience in dealing with self-preferencing by online platforms through case-by-case enforcement and through legislating with the DMA.
On March 24, 2023, the Draft Regulation was finalized and enacted by the SAMR, but Article 20 was removed from the final version. Apart from the Draft Regulation, a number of lower-ranking antitrust rules or guidelines have been adopted by SAMR branches in the provinces, which deal with self-preferencing practices.4

B. New Rules for the Online Platform Sector

The SAMR is a very large organization with multiple divisions and functions, and antitrust is only one of them. In 2021, the SAMR division responsible for online transactions issued draft guidance (the “Draft Guidance”).5

The Draft Guidance contained a provision against self-preferencing, which required online platforms to respect FRAND principles and to treat companies operating on platforms equally with the platform itself (including its affiliates) in supplying products or services.

The Draft Guidance was not a law in nature and would not have had binding effect. Also, the Draft Guidance did not specify its legal basis. That said, from the perspective of the online platforms and the companies operating on the platforms, the draft guidance may be “soft law” to be relied on when disputes arise. As of today, there is no further news from the SAMR on the fate of the Draft Guidance. One of the reasons for the current inaction may be that online platforms have questioned its appropriateness, for example as to its legal basis and how it can be operated in practice.

To conclude, attempts to regulate self-preferencing either within the framework of the AML amendment and a separate DMA-like normative effort have both failed, at least for the time being.

One can speculate about the reasons for dropping the plan to tackle self-preferencing through a tailored normative effort. A wide range of possibilities exist. On the one end of the spectrum, it is possible that the SAMR thought that the stern antitrust enforcement campaign against online platforms in the past years has already cleaned up alleged anti-competitive practices in the internet industry.6 On the other side of the spectrum, it is equally possible that the SAMR believed that it wanted first to accumulate its own experience in case-by-case antitrust enforcement against self-preferencing, to allow it to design a more tailored set of rules against certain types of self-preferencing.

The simplest explanation for the normative impasse would be that the SAMR thought that new rules were not in fact required to tackle self-preferencing practices. Below, we will examine which AML provisions the SAMR could use — and Chinese antitrust regulators actually have used in the past — to address self-preferencing.

III. SELF-PREFERENCING UNDER THE EXISTING LEGAL FRAMEWORK

A number of past enforcement cases show that existing antitrust tools have been able to address self-preferencing issues in traditional “offline” industries. Below, we will look at the AML prohibitions against discriminatory treatment, restrictive dealing and excessive pricing by dominant companies.

A. Discriminatory Treatment

The AML prohibits dominant companies from discriminating against counterparties in equivalent conditions, unless there are justifiable reasons for doing so. However, the AML and its implementing regulations are silent as to whether a company favoring itself or its affiliates amounts to unlawful discriminatory treatment.


At least two past enforcement cases indicate that treating its own affiliates better than third-party players can amount to discriminatory treatment.

In *Xuzhou Tobacco*, the antitrust authority in Jiangsu fined a dominant cigarette manufacturer for discriminating against its third-party retailers. In this case, the manufacturer allowed its own affiliate to place orders twice a week and for up to 300 cartons of the top-selling cigarettes per order. In comparison, third-party retailers were able to place orders only once a week and for only 20-50 cartons of the top-selling cigarettes per order.

In the second case, Hubei’s antitrust authority imposed a fine on Hubei Yinxingtuo Port, a dominant pier operator, for discriminating against competing ferry operators. The ferry operators transported cars and other cargo between piers across the Yangtze River near Chongqing. Hubei Yinxingtuo Port was the operator of a pier in charge of loading and unloading cargo for ferries, warehousing etc. Hubei Yinxingtuo also operated its own ferry.

Through its position at the pier, Hubei Yinxingtuo had control over the slots (schedule) for ferries to enter and leave the pier. As it happened, Hubei Yinxingtuo Port allowed its own affiliated ferry to enter the pier whenever it arrived, ahead of other ferries, which had to wait.

In addition, as the pier operator, Hubei Yinxingtuo Port seems to have had the power to allocate cars (as an important form of cargo) to specific ferries. Hubei Yinxingtuo Port was found to have arranged for more valuable cars (with corresponding higher transportation fees) to be shipped by its affiliated ferry service.

In its decision, the antitrust authority found that the preferential treatment violated the scheduling rules made by the transportation authority and amounted to discriminatory treatment in violation of the AML, despite the preferred ferry being an affiliate of the dominant company.

One factor worth stressing is that, in both *Xuzhou Tobacco* and *Yinxingtuo*, the authority decisions mentioned certain specific sectoral regulation or guidance requiring cigarette manufacturers and pier operators, respectively, to treat counterparties equally.

**B. Restrictive Dealing**

The AML prohibits dominant companies from forcing counterparties to deal exclusively with them or with companies designated by them, unless there are justifiable reasons. According to the SAMR’s implementing regulations, restrictive dealing may take the form of an explicit restriction or may be imposed in disguised form through punitive means, incentives, or other measures.

Although on its face this prohibition is quite similar to “exclusive dealing” as it is understood in other antitrust jurisdictions, there are significant differences. In China, the concept of restrictive dealing originates from antitrust rules pre-dating the AML, in particular the first version of the Anti-Unfair Competition Law (“AUCL”). The typical form of conduct this prohibition targeted was a requirement imposed by a public utility company (typically a natural monopolist) — say, an electricity company — on its customers to purchase related products or services which could be obtained from third parties in the open market — for example, electricity meters.

Hence, unlike the concept of exclusive dealing in most jurisdictions, which focuses on a single product market, many restrictive dealing cases in China have involved more than one product market.

In August 2022, China’s Supreme People’s Court (“SPC”) handed down a judgment against restrictive dealing in disguised form in *Weihai Water Supply*. The facts were quite typical for a classic restrictive dealing case, similar to the cases that had been brought under the AUCL in the past and then under the AML. The defendant in this case (Weihai Water) was a public utility company for water supply, and the plaintiff (Weihai

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Hongfu) was a real estate developer. Their dispute arose as the defendant had forced the plaintiff to dismantle the water supply and drainage pipelines already installed in the latter’s buildings by a third-party company, claiming that the pipelines did not meet the necessary standards. Otherwise, the defendant would not supply water to residents who purchased the apartments in the affected buildings from the plaintiff.

The plaintiff alleged that the defendant had abused its dominant market position by requiring it to procure design and construction services from the defendant’s two subsidiaries instead of from other companies freely selected by the plaintiff.

One of the key pieces of evidence provided by the plaintiff was the defendant’s “service guide,” which explained the process of applying for water supply. In this guide, the defendant only listed its two subsidiaries as possible providers of design and construction services.

In its judgment, the SPC held that the defendant’s practice constituted implicit restrictive dealing, which brought the defendant most of the business relating to design and construction services for water supply. It added that public utilities bear a higher duty of care to avoid anti-competitive practices. Hence, the defendant should have listed additional design and construction service providers in the service guide, or used explicit and reasonable methods to inform customers of their right to freely choose other companies. Similar to the restrictive dealing cases described above, the SPC implied that actions by a public utility within a regulated sector and appointed by government provide a context different from sectors with completely open markets.

To an extent, the facts in *Weihai Water Supply* resemble those of self-preferencing cases (in the online platform context) in other jurisdictions. The defendant leveraged its dominance in water supply to promote the sale of other products (design and construction services). Rather than contractually forcing customers to purchase these other products, it established a seemingly softer mechanism — the list of suggested service providers. In a way, these facts look somewhat similar to foreign self-preferencing cases where the dominant company was alleged to have put its own services in a more prominent position in its general search results, while here the defendant placed the name of its subsidiaries in a guide list, omitting competitors completely.

**C. Excessive Pricing**

The AML prohibits dominant companies from charging excessive (“unfairly high”) prices for their products. According to the SAMR’s implementing regulations, excessive prices can be determined by making a comparison between the prices charged by different suppliers for the same or similar products, between the price and cost of the dominant company, and other factors.

Enforcing this prohibition, the SAMR and its predecessor authority have brought cases both where the dominant company charging excessive prices was a competitor of its customers in the downstream market and where it was not. Where the dominant company competes downstream, such an excessive price case could also be viewed as a type of margin squeeze case. Yet, in a way, it could also be viewed as a self-preferencing case.

A good illustration of this type of case is *Northeast Pharmaceutical*. Northeast Pharmaceutical, an active pharmaceutical ingredient (“API”) manufacturer, was sanctioned by the antitrust authority in Liaoning for charging excessive prices for its APIs to manufacturers of finished dosage form (“FDF”) Levocarnitine drug products downstream. Levocarnitine is a drug to treat carnitine deficiency that could lead to muscle weakness, heart and liver problems. Northeast Pharmaceutical was both a manufacturer of the API upstream and of the FDF drug downstream. The antitrust authority reasoned that Northeast Pharmaceutical had abused its dominance in the API market by charging its competitors in the FDF drug market unfairly high prices, thereby gaining unfair advantage and raising the latter’s FDF drug production costs, which excluded competition in the FDF market.

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11 In addition to restrictive dealing, the plaintiff also alleged that the defendant tied construction services (tying product) with construction materials and components (tied product). However, the SPC dismissed this tying allegation for insufficient evidence that the defendant had actually coerced the plaintiff to purchase the construction materials and components.


16 *Id.*
D. Use of the AML’s Catch-All Provision

Apart from listing six types of abusive conduct, the AML also contains a catch-all provision allowing the SAMR to identify and sanction other types of conduct as abuse of dominance, even though they are not explicitly listed in the text.

The existence of the catch-all provision should not surprise stakeholders in other antitrust jurisdictions. Under U.S. and EU antitrust rules, the antitrust authorities are empowered to bring novel cases if they can credibly show that competition has been harmed.

In that sense, if the SAMR found that self-preferencing practices are a sufficiently distinctive type of case – or for policy reasons wanted to highlight the importance of risks brought about by self-preferencing practices – the SAMR could tackle these practices under the catch-all provision.

While this would be an option for the SAMR, it is not a familiar road that the SAMR would go down – especially if we look at past statistics. Indeed, in the 15 years of enforcement of the AML, the catch-all provision for abuse of dominance has only been invoked once, by the SAMR’s predecessor, to challenge a system of loyalty rebates under the AML.\(^\text{17}\)

IV. CONCLUSION

From late 2020 to mid-2022, the Chinese government implemented an unprecedentedly stern antitrust enforcement campaign against online platforms. The multi-billion fines against Alibaba and Meituan are testimony to this.\(^\text{18}\)

However, the tide seems to have turned, as different policy priorities have surfaced since 2022. In particular, the growth of the economy seems to have become the government’s key priority. Just recently, the government issued a series of policies to support the development of online platforms and other private sectors.\(^\text{19}\) This change of policy may have been a reason why self-preferencing has not (yet) been addressed through tailored new rules.

Does that mean self-preferencing cannot be addressed under the AML? As this paper has discussed, several of the AML’s abuse of dominance rules have in the past been applied to factual patterns in the “offline economy” similar to those discussed in the context of self-preferencing by online platforms, even though many of the cases described in this paper were brought against the background of particular, quite heavily regulated industries.

An interesting debate would be which of the existing AML rules are most appropriate for tackling self-preferencing practices by online platforms. Would it be discriminatory treatment, as by definition, self-preferencing means treating one’s own products or services more favorably? Would it be restrictive dealing, as customers are persuaded (in a soft or hard fashion) to give preference to the dominant company’s products or services? Would bundling the key platform service with another product or service count as self-preferencing? In more narrow circumstances, subject to a high burden of proof, could payments required for access to key platform services (for example search rankings) be deemed to amount to excessive pricing? While surely very interesting, such a debate is beyond the scope of this paper.

The bottom-line is that the SAMR has tools under the current AML rules to tackle perceived concerns about self-preferencing through case-by-case enforcement, if it so wants. It is equally possible that the SAMR or the Chinese government more generally will resume their normative efforts. Developments in other antitrust jurisdictions, say South Korea, or the EU experience with the DMA, may provide study materials – in parallel with any enforcement practice the SAMR may develop.


\(^\text{18}\) Alibaba and Meituan, supra note 6.

\(^\text{19}\) See e.g. Opinions of the Communist Party of China Central Committee and the State Council on Boosting the Growth of the Private Economy, July 14, 2023.
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