The First Antitrust Decision by the Chinese Supreme People's Court *Qihoo 360 VS. Tencent*

Daniel Sokol, David Evans, Vanessa Zhang, Antonio Bavasso & Will Tom

The Chinese Supreme People's Court issued its first antitrust judgment in *Qihoo 360 v. Tencent* on October 16, 2014. In affirming a lower court ruling in favor of defendant Tencent, the Court addressed the question of market definition and market power in the context of dynamic platform-based businesses in which products are provided for "free". It is one of the most influential cases in the 65-year history of the Supreme Court according to the People's Court Daily.

CPI gathered leading antitrust lawyers and economists to discuss the implications of the Tencent judgment for antitrust in China and for Internet-based cases in other jurisdictions. The webinar was held on **16 December 2014.**

Professor D. Daniel Sokol moderated a discussion with Antonio Bavasso, Dr. David S. Evans, Willard Tom, and Dr. Vanessa Yanhua Zhang. Evans and Zhang, with Global Economics Group, advised Tencent and submitted testimony to the Chinese Supreme People's Court. Bavasso is a partner at Allen & Overy in London and Will Tom is a partner at Morgan Lewis in Washington D.C. and former General Counsel of the US Federal Trade Commission. Danny Sokol teaches at University of Florida Law School and is Senior Of Counsel to Wilson Sonsini Goodrich & Rosati.

The following is a transcript of the webinar.

Daniel Sokol: Welcome to the CPI webinar, "The First Antitrust Decision by the Chinese Supreme People's Court, Qihoo 360 versus Tencent." I am Professor Daniel Sokol. With me are a number of excellent panelists who are going to provide analytical insights into this historic decision.

First we have David Evans, Chairman of the Global Economics Group. David has provided economic advice on a wide range of industries but has special expertise on platform based businesses, which some of us know of as two-sided markets. David currently teaches economics and antitrust at the University of Chicago Law School where he is a lecturer and at University College London where he is a visiting professor and is co-founder and co-director of the Jevons Institute.

Let me also add, David contributed a brilliant chapter to the Oxford Handbook of International Antitrust Economics, Volume 1 which is out as of this month which I edited. I encourage people to take a look at it for what was really a wonderful piece of scholarship and background.

Dr. Vanessa Yanhua Zhang specializes in economic analysis and competition policy at Global Economics Group, where she heads the China practice. Dr. Zhang has taught regulation and antitrust economics to graduate

students at Renmin University of China. She also serves as the editor of the Asia Antitrust Column at Competition Policy International. Together, David and Vanessa worked as the economic consultants in this case for Tencent. Their insights as a result are highly appreciated.

Also joining us on the law side are two distinguished lawyers. The first is Antonio Bavasso. Antonio is co-head of the Global Antitrust Practice in Allen & Overy. He advises clients on all aspects of competition law, practicing primarily in London and Brussels. In addition to his work at the law firm, Antonio also teaches the EU competition law course at UCL, and along with David, is the co-founder and co-director of the Jevons Institute.

Joining us from the United States is Will Tom. Will is a partner in Morgan Lewis' antitrust practice in Washington, DC, and former General Counsel of the Federal Trade Commission. This is one of a number of senior positions that Will has held at both the Federal Trade Commission and the Department of Justice Antitrust Division. Over his career, Will has been very active on antitrust IP matters. Specific to China, Will was very active in the development of outreach efforts to China while at the FTC.

With those introductions, let me just note we have a historic case. There are a number of issues that we're going to discuss about abuse of dominance in China. We'll discuss platforms, high tech industries, economic analysis and reasoning by the court.

I think that maybe what we could do is start with Vanessa. Who are these companies?

00:03:46

Vanessa Zhang: Thank you, Danny. So let me give you a brief introduction of those two companies in this case. Tencent is the largest instant messaging software producer or provider and offers various free services. Those free services include the instant messaging platform, which also called QQ, Weibo, which is a micro-blogging platform, online games, online security software, social network services, search engine and e-commerce.

Tencent makes profits from selling advertising to companies that want to reach Tencent users, selling virtual products or items for its online gaming services, charging its users for the bundled SMS packages, providing mobile games and charging for other mobile value-added service such as the mobile books.

As its main product, QQ has 340 million monthly users in November 2010 and 452 million monthly users as of April 2013 according to iRresearch.

Let's turn to the other company, Qihoo 360. Qihoo is the largest Internet security software provider. And it also provides free services such as online and mobile security software, a web browser and a game platform with the games developed by third-party game developers.

Qihoo 360 makes profit from selling advertising and providing web game services. Its main product is called 360 Safeguard. It had 275 million monthly users in November 2010 and 444 million monthly users as of April 2013. So that's the basic background of the two companies. Danny.

Daniel Sokol: Thank you. Well, ultimately in order to have a decision we need to have a legal claim. Will, I wonder if you might walk us through what is the legal issue here? What's the allegation?

Will Tom: Put very simply, the war started when Qihoo publicly claimed that Tencent QQ instant messenger invaded users' privacy and configured its security software to block QQ. In response, Tencent called on users to make an either/or choice between QQ and Qihoo's 360 software, and announced that it would block users who have installed 360 from using QQ. It also bundled the default installation of its own security software with QQ upgrades.

Through governmental intervention, compatibility was quickly restored, but Qihoo sued Tencent under Article 17 of the Anti-Monopoly Law, claiming that the either/or choice made to users was an abuse of a dominant market position.

Daniel Sokol: We're going to get into the details in just a little bit. The question for those listening is as follows - what are the key ramifications for the decision for Chinese antitrust? David, I wonder if you could take a first stab at this?

David Evans: Thanks, Danny and thanks Will and Vanessa for that introduction. I think there are three important ramifications. None of them really have to do with the abuse of dominance claim, which I don't think anyone really took very seriously. The court probably could have just bounced the case based on just looking at some of the details of the claim and the effects.

So the importance of the decision is really on market definition and market power analysis and how the courts are approaching that. There are really three things.

First, the court adopted what I think is a very modern approach to market definition and the analysis of market power. It said that market definition, and I'm using my own words here, but I think it characterizes it pretty well, that the market definition is really a guide and that it isn't necessary to establish rigid boundaries in doing a market definition analysis. So it didn't get stuck in the rigid market definition approach that is still used in the European Union and it used to be pretty common in the US as well.

It also found related to that that market share is really just one metric for assessing monopoly power and a metric that actually ought to be used with considerable care. So the Chinese Supreme Court isn't going to obsess about market share statistics. And that makes the Chinese approach similar to the approach that many economists and antitrust scholars have advocated and that got incorporated into the 2010 DOJ/FTC merger guidelines. So that's the first point.

A second point is that the Chinese Supreme Court and the intermediate court recognized the importance of two-sided platforms, two-sided markets, in conducting a sound antitrust analysis. Interestingly they followed the approach that the ECJ more or less took in the recent Cartes Bancaires decision, and that's really that the two-sided platform issues should be dealt with in the analysis of market power and effects rather than in market definition. But nonetheless, they took two-sided platforms seriously and made it clear that that needed to be part of the analysis.

Here's third thing. You know you always like decisions where you won better than those where you didn't win and I obviously come from that bias. But if you read the decision, it's clear that in their very first case the Chinese Supreme Court is very comfortable dealing with advanced topics in antitrust. You know you can quibble with various things that they do, but I think overall the decision reflects a highly nuanced understanding of antitrust concepts. They were able to get into SSNIP test and hypothetical monopoly tests and all sorts of relatively advanced topics in antitrust. And, again, whether you agree with them or not, it does seem to be an impressive first showing for the court.

Daniel Sokol: Thank you, David. First of all, let me start by saying I agree

with you entirely that this is not an easy first case. I think the Supreme People's Court really did a fine job. But we have legal experts from two other important jurisdictions and I thought maybe to get their thoughts. Antonio, you haven't had a chance to chime in yet. And I thought especially since David did bring up Commission cases and EC law more broadly, and given that you teach exactly these things in addition to practice it, I thought we would start with you.

Antonio Bavasso: Thanks, Danny. Yes. I think this judgment is extremely interesting. First of all, my high level reaction is that the Supreme Court went very deep, as David said, into the facts. I don't know if this is a function of the legal test of the Supreme Court is applying. Perhaps they have more leeway to do so under the standard that is applied in China. But it is impressive how detailed their analysis is about the economic evidence and how comfortable they seem to be to analyze and come to a view on advanced topics of antitrust economics.

Four high-level points that jump off at me about this judgment.

The first one is when you read the judgment and compare to the intermediate decision, they do appear to do market definition analysis which is fairly focused on a functional distinction between the products. And they explicitly say that the markets that business people refer to may provide clues, but cannot replace a rigorous relevant market analysis. I'm obviously looking at an English translation of the judgment.

But then, and this is my second point, having defined the market rather narrowly, they don't get stuck in that narrow market definition. Rather they do look at the question of dominance in a much more economically-minded way than what we are used to in many other jurisdictions. Therefore, as David said, they don't attribute an excessive importance to market shares, notwithstanding what appear to be some fairly constraining limits coming from the Chinese legislation about market shares. Effectively even though they look at dominance starting from a fairly narrow market definition they look also at the effect of the behavior and, most interestingly, they infer from the lack of effect that there is probably not a dominant position at play here. So the effects analysis loops back into whether there is a dominant position in the first place.

The third that struck me is that The Supreme Court venture quite confidently into an analysis of entry and consider

what are the effects of entry onto the behavior in question. Perhaps we can explore that later on during this seminar.

Fourthly, the last interesting point here, which differs from the practice that is developing (particularly in Europe), is that they stress very clearly that the burden of proving an abuse of dominance rests with the party alleging the abuse of dominance and not with the party that is alleged to have breached the relevant legislation through an abuse of dominance. And that is, again, procedurally very important point.

Daniel Sokol: Thank you, Antonio. So to recap, there are three major findings that David brought up. Number one, market definition is a guide but is not necessary to establish rigid boundaries. Number two, market share is just one metric for assessing monopoly power and should be used with care. And number three, while two-sided platform issues might not be relevant at the market definition stage, they can be considered in analysis of dominance.

Antonio then added a number of additional points to add clarity to the decision from a European perspective. Will, we would turn to you. It's been a while since a high-tech issue has come before the US Supreme Court. Since Actavis last year. What are your thoughts from the US perspective on this case?

Will Tom: Well, like the other speakers on this panel, I was really quite impressed. I did think that the opinion displayed quite a lot of sophistication both about the purpose and the techniques of the market definition. It understood that a hypothetical monopolist test was not a mechanical exercise but rather a means to assess the ability of the defendant to exercise market power. And it really, as Antonio said, delved pretty deeply into the facts specific to each proposed substitute in the course of its market definition, and went beyond market share to consider factors such as ease of entry and the impact of innovation.

I'm not sure it would be quite right to call its approach a functional analysis in the sense that if you delved into the old US Supreme Court law, it had talked about whether to define markets on the basis of what products are functionally substitutable, and rejected that approach because the mere fact of offering the same function doesn't really tell you very much about what would happen in the event that a party or parties actually tried to exercise market power. And I think this opinion really did focus on the right issue, which is the thought experiment that the

hypothetical monopolist test is supposed to offer. If a hypothetical monopolist in the proposed market tried to exercise market power, what would happen? And so the court went beyond functional substitutes and looked at, for example, whether single function IM services would actually constrain the behavior of suppliers of comprehensive services. And I'm not sure it would have included those companies as participants in the market had it not been for its conclusion that such companies were rapid entrants into providing full function services.

Similarly, in looking at whether mobile instant messaging services should be included in the market, it really looked not just at the functional characteristics or whether they were functional substitutes, but it also to what barriers, such as equipment acquisition costs, would inhibit rapid substitution in the event of an exercise of market power. So from a US perspective, this is very close to how we would think about market definition and market power. Maybe for the same reason that David being on the winning side of the case says, boy, this is great, being an American lawyer and having an American approach to what market definition and market power is all about it strikes me that this is a really good decision because it's so close to the way we think about things.

Daniel Sokol: Will, that's incredibly helpful and particularly if you talk about different frameworks for thinking this through as an American. I'm actually going to try a different framework here. David and Vanessa, you were the economic experts for Tencent. How did that work in a Chinese context? You've had significant experience as experts in Europe, in the United States, in Latin America. What's it like working as economic experts in the Chinese context?

David Evans: Well, let me start, Danny, by taking that and then turn it over to Vanessa, who obviously was closer to the Chinese teams we were working just because the language of the case was obviously Chinese. Let me answer that just to give a flavor of this for both the US and European audience. While the Supreme Court and the Intermediate Court were willing to take oral testimony, my involvement in this was on the paper. So the submission of expert evidence in this by both parties and the interplay was really by the submission of reports. And if you looked at the English version of those reports, they would look very much like a US expert report or a white paper that you would submit to the European Commission laying out arguments and evidence. In that sense what we did was very similar to what we do in the US and Europe with the exception that unlike the US there wasn't necessarily the

kind of cross examination that you have here.

For an American, for an English speaker, it was obviously an interesting experience because eventually everything needed to be done in Chinese. Just in terms of how we ended up doing the case, we initially worked in English, but then as things got far enough along and I was kind of comfortable with the arguments from my perspective, we switched to Chinese and I relied on Vanessa to tell me where changes were being made and so forth.

So that's the perspective from my standpoint. I think Vanessa can give you probably a closer perspective from the standpoint of Chinese national acting as an expert in China before the courts there.

00:24:08

Vanessa Zhang: Yes. Working on the antitrust litigation case in China has been very challenging. And it demands seamless integration of the international experts and a global team with the local counsels. Often time we have to work closely with the litigation team on the ground and with full understanding of the specificities of internet industry in China, market characteristics and modern industrial organization theory as well as the litigation strategy. So it doesn't just demand the interpretation of culture and language differences, but also demands full experience of products and services involved and the related theory that has been applied in the case.

So if we take a bigger picture of the court system in China, academic credentials have been highly regarded. And academic publications are one of the most important criteria for economic experts in antitrust cases in China. Chinese judges, especially the judges from the Supreme Court and the provincial courts such as high courts in Beijing, Shanghai and Guangdong, have various training programs throughout the year. And they have the opportunity to interact with international scholars and the practitioners on the development of modern economic theory and anti-trust practice. Therefore they dare to take further steps into the analysis and carry out rigorous reasoning before making a decision. Yeah, that's basically our understanding on how the case has been worked out in China.

00:25:58

David Evans: The other thing I would just add to that, Danny, and the thing that may surprise some people, is the Chinese Supreme Court, unlike – well, some would argue our

Supreme Court and certainly unlike the European Court of Justice, the Supreme Court is interested in basically rehearing or hearing additional factual evidence. So at the Supreme Court level it was possible to submit not only new reports but also new arguments. And that's a feature of the Chinese system that's certainly unlike my experience in the US and Europe.

Daniel Sokol: Thank you both. Just as an aside, Vanessa, I've participated in one of those training programs for Chinese judges. I thought that the judges were incredibly sophisticated, asked great questions and really cared about getting things right. I wish in other jurisdictions, including my own home jurisdiction, judges were nearly that eager to learn.

I do want to move on to a substantive question, Vanessa, maybe that you could answer. The security software was free. This is sometimes a very difficult concept for judges to understand. The fact that the software was free, did that pose any complication for the court and how did the Court handle it?

00:27:27

Vanessa Zhang: Yeah, you are right, Danny. It indeed posed complication for the court. First of all, the court acknowledged the “free” nature of the two companies' business models. They found that Internet service providers use free basic services to attract mass users, then leverage those users in value-added services and advertising to make profits. In turn, Internet companies promote their free services by those profits. That's a prevailing business model of the Internet industry. That's also why Internet service providers compete on quality, services and innovation, etc.

Therefore, when defining the relevant market, the court realized there is a limit of using the traditional Hypothetical Monopoly Test (HMT) into the Internet-based instant messaging (IM) service. So the court didn't fully take into account the price increase, but suggested a modified version by accepting a significant change over quality. In other words, it didn't use SSNIP test (small but significant and non-transitory increase in price) but accepted the test with small but significant and non-transitory decrease in quality. It is also called SSNDQ test by the court. Being aware that quality decrease could not be easily assessed and the quality data is not available, the court suggested qualitative but not quantitative hypothetical monopoly test with decrease of quality.

In the analysis the Court actually relied on product characteristics, function, quality, how difficult to acquire such a product, and other relevant factors to assess the demands substitution. And they also realized that, when it is necessary, supply substitution should also be applied. Therefore, the Court analyzed substitution between instant messaging and Weibo, SNS, mobile text messaging and email. At the end, the Court made a conclusion that relevant market is IM service market in China.

Daniel Sokol: Thank you. I guess now that we've heard about how things worked in China, Will, any reactions that you might have based on your experiences?

Will Tom: Well, I guess the first reaction is looking at the difference between generalist courts and specialist courts. It is interesting to see how much in tune this court and this decision was with standard international antitrust thinking which in some sense shouldn't be surprising because unlike our judges, by and large, these judges go to training programs at which Professor Sokol will teach them how to think about these issues. And he's obviously a very good teacher.

So that's –

Daniel Sokol: Let me add, by the way, that Will, and for that matter David, have both been gets lecturers in my class. So I outsource the teaching to the more effective teachers.

David Evans: Thanks, Danny.

Will Tom: Yeah. And unlike in the Internet market, the advertising is free and the service is expensive. So you've had your free advertising, Danny. So that's reaction number one. And, you know we all know that there are advantages and disadvantages to specialist courts. But here I think it was a clear advantage. Secondly, I think the point about dealing with the fact that the services were free; it was interesting to see how seamlessly the court handled that. Again, by focusing on what is the purpose of this exercise. The SSNIP test isn't some set of commandments handed down on stone tablets, but rather it is a tool to understand whether this defendant could really do something bad in the marketplace. Is there really a capability to illegitimately exercise power? And so it didn't get hung up on, you know what are the mechanics of modeling a 5 percent increase in price when 5 percent of 0 is still 0? But rather it did the kind of thought experiment that a hypothetical monopolist test was invented to do. Namely if this defendant, which

was accused of handing consumers an all-or-nothing choice or if you will, exclusive dealing or tying, however you want to characterize it, is it really capable of implementing a harm to the marketplace by so going? And if you think about the required bundling or tie-out if you want to call it that, as a kind of decrease in quality, the court asked itself whether the facts made it plausible for market power to be exercised that way. And when it went through the possible constraints on that behavior, it pretty readily concluded that market power could not be exercised despite high market share. So, again, I thought it handled the issues pretty well.

00:34:30

Daniel Sokol: Thank you Will. Antonio, does this look similar or different based on your European perspective?

Antonio Bavasso: A bit of both: in the sense that on the one hand the Court had to grapple with the question on market definition and the analysis of impact of decreases in quality. Interested in David and Vanessa's view, but I thought that analytically the Court got a little stuck in not following what the intermediate court had done, i.e. drawing an analogy between the decrease in quality and the potential increase in price (given that conceptually the way to estimate the decrease in quality could be done by assuming increase in price).

On the other hand – and so in common with many courts - they had to come to terms with market definition. Where the approach is very different is that The Supreme Court then goes to the effects analysis and uses its findings on the effects to conclude that the behavior in question does not constitute an abuse of dominant position. And in fact is on that basis, to conclude that they alleged infringer does not hold a dominant position in the first place.

That is a very different from analysis that would typically be carried out by – a European Court. A European Court would not typically call into question the finding of a dominant position based on the effects of the behavior of the allegedly dominant firm. In Europe there is much more of a two-stage approach. We define the market to determine where is the dominant position; we then look at the alleged abuses. We never go back to call into question the dominant position, which is probably one of the reasons why some judgments – not all of them do not make an awful lot of economic sense.

Daniel Sokol: Thank you for your honesty about your perceptions of

some of the decisions. I actually want to take a step back, because I think it would be helpful for those in the audience to understand. Vanessa, what was Tencent's share in what the court defined as the relevant market?

Vanessa Zhang: Yes. It depends on the calibration of the market share. And the Court has noticed in the decision that it would be effective usage time, effective usage frequency and active users. The data that has been used in the case is from iResearch. But iResearch only provides the PC-based data, which does not include the mobile-based data. So if we take monthly effective usage time as an example, Tencent's share exceeds 80 percent among the PC-based instant messaging service providers. That's also shown in the decision.

Daniel Sokol: I'm glad you raised that. Because then it leads to a much more important question. If the answer is around 80 percent, maybe, David, I could throw this in your direction. The court agreed that Tencent was not dominant. So why is it that the court dismisses this market share evidence that looks quite significant on its face at least?

00:38:58

David Evans: Yeah. No, it's very interesting. So they – part of it is what Antonio described, which is sort of the backward looking from the effects. But there's also what I would characterize as kind of a forward-looking analysis as to whether Tencent was capable of doing bad stuff. And there it really came down to their view of dynamic competition in this sector in China. So they recognized what we would call leapfrog competition--not their term—but essentially leapfrog competition where firms are constantly introducing new features to create products that are better than the other guy's products. And where are firms that are basically forced to do that if they want to keep their position. And that Tencent in fact is forced to do that if it wants to keep anything like the share that it has. My recollection is they gave the example of Microsoft's instant messaging service, which, of course, is very successful out of China, collapsing in China because of the perception that its quality was not only not that good but also that it had declined.

The court also, as Antonio and Will pointed out, placed a lot of weight on the fact of entry and the possibility that entry could discipline the large players. Then finally, they recognized this the broad competition between the platforms, the internet platforms in China, and that what

these companies are really trying to do is to acquire people's attention in order to monetize it in some other way. That was kind of a driving force between the competition that was taking place. So it was that kind of analysis of the realities of market competition, at least in my reading, that led them to not place a lot of weight on the static share statistic.

00:41:30

Daniel Sokol: So this leads to a broader question. How much of the analysis is really dependent on the fact that this was an internet industry? And maybe with this question I'll return to Antonio and Will. Antonio, do you want to maybe walk us through whether or not this is highly dependent on the particular industry?

Antonio Bavasso: Well, I don't know if it's dependent on the internet industry. I think it is generally dependent on what the court perceives to be the characteristics of this industry. And the importance that innovation plays in this sector and in these markets generally. But I wouldn't infer from that that the impact of this precedent is limited. I think that a similar analysis is equally applicable as a matter of principle in all sectors where innovation can lead to what David called leapfrog entry and development. It seems to me that the court thinks that that type of analysis is central to any finding of dominance and rightly so. So that approach is rooted in the characteristics of the particular market, but is equally applicable to those markets which display similar characteristics.

Daniel Sokol: Will? Any additional thoughts?

Will Tom: I very much agree with Antonio that this is not unique to internet industries but rather is a function of the specific market being analyzed and that the broad principles would apply to any markets. You can imagine lots of internet markets in which there really is the kind of degree of lock-in and barriers to entry that would make it possible to exercise market power. Just as you can imagine lots of brick and mortar industries in which rapid entry is possible. And we've had lots of cases in highly traditional markets in which high market shares were not deemed to confer market power because entry was easy.

So I think it is very fact-specific at the level of the individual market. But principles are broadly applicable. I guess the other thing I would add here is I do think that the court was reasonably disciplined in treating the issues of market definition, market power, and anticompetitive effect or abuse separately. And so I may disagree slightly with

Antonio on this point. The emphasis on lack of market power despite the high market share was really based more on the ease of entry I think than on the lack of effect. And while there was certainly a section of the opinion that dealt with whether one could infer market power from the ability of defendant to engage in this conduct, and the court rejected that possibility, it was focused on whether one could make that inference and not the other direction of rebutting the existence of market power simply from the fact that this particular conduct didn't have an effect.

00:46:30

Daniel Sokol: Thank you, Will. You raise a number of important points that there have potentially broader implications. So I thought as the last question, in fact, I'd focus on that. What is the relevance of this decision in cases in other jurisdictions? If, in fact, there is any relevance. I don't know. David, why don't I start with you?

David Evans: Yeah. I think there are three things. Obviously I don't know all the decisions out there, but at least from what I've seen, this appears to me to be one of the most important decisions concerning the analysis of fast moving internet markets. You know the other one that comes to mind is the European Commissions decision approving Microsoft's acquisition of Skype. So even though the precedential value isn't necessarily just about the internet industries, I think it is a particularly good analysis of those kinds of markets.

Second, it confirms the importance to the analysis of multi-sided platforms in antitrust. And it really is one of the two high court decisions now that recognized the concept and uses it in the analysis. The other one, of course, is the European Court of Justices decision, in September 2014, in Cartes Baincaires. That's two high courts now – one in Europe and one interestingly in China-- that has adopted the multi-sided platform approach explicitly in a decision.

And third, since we're all doing advertising here, my personal favorite, it recognizes the importance of the work I've done on attention markets--where firms compete in a variety of ways to capture scarce attention from consumers and then monetize that attention through advertising or other means. And that's the framework that I brought to the expert opinion in the case. They seemed to have picked up on that in the analysis.

Those are the three things that I would mention. The one other point that I guess I'll make if I have some liberty on this, Danny, just to respond to – maybe to respond to Will

and to Antonio and to raise a question. It does occur to me that, you know one of the interesting aspects of what happens to courts is sort of a path dependence issue. The fact that the Chinese courts are beginning their development of cases by having two cases that focus on Internet industries is interesting. You wonder whether the dynamics of antitrust law would be different if like the Europeans had started with a dynamic industry rather than bananas. I think it is interesting that the Chinese are starting their analysis of antitrust with these dynamic industries. That may itself have some impact on how antitrust evolves over there. Anyway, just kind of a random thought.

Daniel Sokol: That's all very helpful. Vanessa, you've spent a lot of time working in China, but you were trained at Toulouse. You live in the United States primarily. You also are truly a world citizen and understand a number of different jurisdictions. What do you think the impact might have on any of these other jurisdictions?

***00:*50:38**

Vanessa Zhang: Yeah. We have seen, and probably the other panelists have already raised this comment, this is the first antitrust case ruled by the Supreme Court of China. And it's also the most significant antitrust case which has set up the standard for analyzing the abuse of dominant cases in China.

Given the fast growing Chinese internet market, there might be more and more competition issues which might not have taken place in the other jurisdictions. So it would be a good example for a national supreme court to take into account rigorous economic analysis and to apply the modern industrial organization concepts into the decision. On one hand, China is trying to learn experience and lessons from its peers and trying to get in line with the international best practice in antitrust enforcement. On the other hand, China is also contributing to the international antitrust community with its own experience and dares to adopt the cutting-edge economic theory such as two-sided market theory into the antitrust analysis, which also improves our understanding of competition issues in innovation-driven industries. That's a couple of my thoughts.

Daniel Sokol: Will?

00:52:16

Will Tom: I guess I'm going to step away from the importance of this

decision in terms of the economics of it and the antitrust analysis and step back to the question of institutions and the interplay of different voices on the international stage. I think one of the most significant impacts is that China will have to be taken seriously as a major contributor and thinker in this area. It is assuming a place among equals. So I think that's one thing to think about and the implications of that.

A second point is that, of course the courts in China, at least so far, have spoken only in the context of private disputes. So it will be interesting to watch the other governmental institutions in China and see whether you see a similar degree of care and sophistication. Because the executive branch, if you will, is also assuming a place among equals in the international enforcement community, and because you do not, at least as yet, see the kind of unification of those institutions that flow from the fact that in the US, for example, the agencies have to prove their cases in court. I think the dynamic in China may be somewhat more complex.

But I think that, regardless, you're seeing a tremendous globalization of antitrust and it really underscores the importance of dialogue among both the enforcers and the courts to achieve some degree of consensus about how to approach these issues.

Daniel Sokol: Antonio, I leave the last word with you.

Antonio Bavasso: I think the point that David made about what he calls path dependency, which lawyers would probably call the value of precedents, is one of the most interesting ones to my mind. It's true that we perhaps need to distinguish the judicial setting, the judgment which represents a fine example of decision making from the administrative enforcement.

The point that I find fascinating is that when China adopted an antitrust regime, it looked at European rules. Inevitably, as a result, it inherited a certain degree of “path dependency” is the presumption relating to market shares that found their root in cases such as United Brands and so on. So they've inherited a little bit of that baggage. But with this judgment the Supreme Court makes the most of being as a new kid on the block of judicial enforcement, the Supreme Court raises the stakes by adopting a very interesting judgment which does away and doesn’t absorb into their judicial system all the fallacies and rigidities that have developed over the years; the rigidities coming from precedents that judges in Europe need to deal with. This

is a new start with a very interesting and in many respect I would say innovative approach to those issues. So I think that the Judgment it's to be saluted as a great achievement judicially.

Daniel Sokol: Excellent. Again, this is Daniel Sokol, Professor of Law at the University of Florida and Senior Of Counsel at Wilson Sonsini. I want to thank all of our participants: David Evans of Global Economics Group, University of Chicago and University College London; Vanessa Yanhua Zhang of Global Economic Group and Renmin University; Antonio Bavasso of Allen & Overy and University College London; and Will Tom of Morgan Lewis. Thank you all very much for your participation.