



# The 3Q case and the abuse of dominance analysis under China's Anti-Monopoly Law



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**O**n March 20, 2013, the Higher People's Court of Guangdong Province gave its judgment on the case of abuse of market dominance of Beijing Qihoo Technology Co., Ltd. ("Qihoo") vs. Tencent Technology (Shenzhen) Co., Ltd. and Shenzhen Tencent Computer System Co., Ltd. (collectively referred to as "Tencent") and dismissed all the plaintiff's claims. On October 8, 2014, the Supreme People's Court made a second trial on the case and held that in the first instance judgment the facts ascertained were basically true, the application of law was correct and the trial result was appropriate, thereby it judged to reject the appeal and maintained the original verdict.

Anti-Monopoly Law of the People's Republic of China took effect and began to be implemented on August 1, 2008. Qihoo vs. Tencent monopoly dispute is the first case of abuse of market dominance in antitrust civil litigation, also the most notable case in the field. This case was ruled by the highest courts so far in the antitrust civil disputes, the court of first instance was the Higher People's Court of Guangdong Province and the judgment on appeal was made by the Supreme People's Court with the vice president of the Supreme People's Court as presiding judge. The analytical method and logic applied by the first instance court and the appeal court in the proceedings as well as the application of the Anti-Monopoly Law and determination of specific legal points embodied in the judgment will have important guidance, significance and profound influence. Meanwhile, this case was heard and judged publicly to the highest degree so far with part of the contents of the trial broadcasted on live by television and other online media. The publicity embodied by the two courts during the proceedings is unprecedented, which in turn helps, on the one hand, to further develop the Chinese concept and culture of competition and, on the other hand, provides guidance for potential plaintiffs and defendants in civil litigation in the future.

Both the plaintiff and the defendant of this case are two of the most influential Internet industry companies in China. The antitrust dispute between them caused wide and hot debate at home and abroad inside and outside the industry. Two trial courts faced enormous challenges on aspects such as marked





definition, competition analysis and legal defense due to Internet industry's characteristics of short development history, strong competitive dynamics and involvement of complex and novel issues such as innovation and high tech. This case involved multiple market segments and multiple behaviors. Both parties argued for their own opinion and hired economists to support their claims that increased the complexity of the case. The legislation of China's Anti-Monopoly Law has been in force for 13 years and its main provisions are formed on the base of relevant mature legislations and enforcement policies from the United States and Europe as well as a comparative study of Chinese legal system. The Anti-Monopoly Law covers the main areas of competition law in the structure with provisions expressed in principle, while in civil litigation practice there are no precedents for further reference. This requires, on the one hand, that the court as law enforcement party, and the litigants and lawyers as the counterparts in antitrust civil litigation, apply the Anti-Monopoly Law strictly, and on the other hand, to take full advantage of competitive harm theory to achieve the purposes and objectives of the Anti-Monopoly Law and civil litigation. Accurately grasping legal points and proposing relevant ideas are crucial.

Qihoo, the plaintiff of the case, claimed that Tencent, the defendant of the case, abused its dominant market position which involved 3 legal points of the Anti-Monopoly Law: firstly, whether the defendant has dominant market position in the relevant market; secondly, whether the defendant conducted abuse behavior; thirdly, whether the defendant has any contestable situation. The plaintiff respectively proposed its claims with regard to the aforementioned issues and provided the corresponding evidence; and the defendant's litigation strategy mainly was to refute the plaintiff's claims point to point and to raise a plea at the same time. During the trial of the first instance and the second instance, the courts analyzed and sorted out the claims and defenses raised by the parties as well as both parties' evidence to identify the contents with significance under the Anti-Monopoly Law. Just on the text of the verdict, the first instance verdict was over forty-four thousand words, and the second instance verdict up to over seventy-four thousand words with the reasoning and argument section more than thirty thousand words. These huge data not only suggests the courts' ability and attitude to undertake professional analysis on antitrust cases but also fully explains the complexity of the case.

As noted above, the period of China's Anti-Monopoly legislation and enforcement is short and the relevant system has not really formed. For the court, this dispute occurred in the Internet and high-tech field involving worldwide difficulty of innovation, and the determination of market dominance and the identification of abuse behavior that must be resolved in abuse cases involve complex market and economic analysis with strong specialty and considerable difficulty. During the trial course of the case, the judge read the analysis report submitted by bilateral expert witnesses including foreign economists, heard expert testimony and the testimony and debate on the economics research results of the parties, and analyzed and commented on such testimony and debate in the verdict and made professional judgment on substantive issues.

First of all, in the determination of Tencent's market dominance, the Supreme People's Court returned to the essence of market dominance, integrating relevant factors and investigating whether Tencent, under the existing conditions of competition, has the ability to increase service price, reduce the quality of service, hinder market entry and delay innovation. To do so, the Supreme People's Court referred to the international influential competition law precedent and competition harm theory, in addition to the evidence and claim on Tencent's market share submitted by both parties. This involved the trade-off between competition effectiveness and efficiency, reflecting the Court's trial thought of not being bound by theory but putting more emphasis on the actual state of the market.





All along, competition law theorists have held a questioning attitude to the views of market share as the only standard for enterprises' market dominance. Sullivan and Grimes points out in the discussion of market control and market share:

Enterprises with large market share might have a small amount of market control, while enterprises with small market share might have greater market control. For example, if the market with low barriers to entry and the company's products are often replaced by other market products, the market control of a company even with 90 percent market share is quite limited.<sup>2</sup>

Supreme People's Court's consideration on market share and other factors in the trial coincide with the theoretical developments. Such considerations have an important significance and value in changing, rapidly growing Internet industry monopoly disputes. This is because in such industry the determination of an enterprise's market dominance only based on its market share often goes awry. Dynamic characteristics of the competition in the market involved, the variability of competitive factors and the variability rate not only make market share figures show dynamic characteristics, but also may fail to reflect the market forces and the market positions of enterprises. Aware of this, the Supreme People's Court strengthened the intensity and depth of the analysis on other relevant factors. For example, on the analysis of market entry, referring to the discussion on Microsoft/Skype<sup>3</sup> case by European Commission, the Supreme People's Court finally reached its conclusion after deep and empirical analysis on issues such as "customer stickiness" and network effects based on case facts and lots of research data.

Secondly, the verdicts of the two courts took fully into account the characteristics of the Internet industry. As described above, compared to other industries especially traditional industries, the Internet industry has distinctive features such as more innovation, a highly dynamic environment and continuous evolution, which will inevitably lead to its competitive factors changing rapidly. In traditional industries, price is an indicator reflecting competitive dynamics and dynamic level and also the key point for law enforcement agencies to consider and analyze. In the Internet industry, however, operators' on-line products are often for free, and even with consumer subsidies (such as "Didi taxi" and "Kuaidadi taxi" software operators in the initial market launch of their software had spent a lot of costs of subsidize the users in order to seize market share). As a result, prices lost its function as market force indicators in cases involving the Internet industry. In addition, competition in the Internet industry also shows significant cross-border competition feature. Although operators' core business may be different or even belongs to different fields, due to online provision of their products and/or services operators may have competitive relationship. In this case, for example, one of the parties provides instant communication products and services, the other provides solutions in computer security field. According to the characteristics of Internet industry, the courts chose to incorporate an industry professional analysis, combine industrial analysis with economics analysis, consider the platform competition theory in the Internet industry and fully explain and demonstrate such theory in the verdict so that the final outcome of the trial truly reflected the actual state of competition on the Internet.

Thirdly, in the trial of this case, in addition to the application of the provisions and analytical thought of abuse of market dominance under the Anti-Monopoly Law, the courts dealt with the particularity of the case that provided a viable solution for future antitrust judicial practice. For instance, during the trial of the second instance, with regard to both parties' claims on the content of the first instance verdict, the Supreme People's Court pointed out that the boundary of the relevant market in this case may blur and the definition of the relevant market was the tool not purpose for assessing operator's market power and competition effect of the alleged monopolistic behavior. Thus, the Supreme People's Court did not obsess with the boundary issue of the relevant market, it fully evaluated enterprise's market power and the anti-competition effect of the





accused behavior based on the detailed analysis of the actual and potential substitutable products with the definition of relevant market as evidence, and finally reached the conclusion that fitted with the actual state of the market. Such practice coincided with the direction where international antitrust enforcement thoughts and development are progressing. For example, the new version of the Horizontal Merger Guidelines responds to the new requirements for competitive analysis due to the new changes in the market today.<sup>4</sup> It clearly points out that the relevant market does not need to have a clear boundary, reduces the emphasis on the relevant market and market concentration, and strengthens the analysis of harm to competition.

It should be noted that the courts' process of definition of the relevant market in this case has distinct specific case characteristics that should neither be construed as a principle or rule, nor be applied rigidly in future cases. Furthermore, it should not be misread that the definition of the relevant market is becoming dispensable. The trial thought of combining law principle and rules with the industry involved and the individual case is in favor of the conclusion of judgment truly reflecting the actual state of competition in the industry. However, if the methodology is rigidly construed and applied to a specific case, we will deviate from the nature and objectives of Anti-Monopoly Law enforcement. Take the definition of the relevant market for instance, in most traditional industries, the relevant market and market share are still important indicators reflecting enterprise's market power and the competition effect of its behavior. In an antitrust lawsuit, even if the parties have direct evidence to prove the effect on competition of the alleged conduct, the analysis of the definition of the relevant market and market share are still indispensable.

The actual state of competition in the Internet industry has great confusion. The competitive structure is usually embodied as oligarchs split state; and in practice, "rapidly evolving technology can sometimes render market power transient in high-tech markets,"<sup>5</sup> the intensity of competition in the industry and the cruelty of competition means may also be unmatched by traditional industries. Internationally, the actual complex state of competition in this industry derived from theory of competition specifically applicable for the industry. Even the application and development of this competition theory often becomes the object of questioning and controversy. The meaning of the judgment of the Supreme People's Court is that it specifies that like other economic evidence, the determination of the relevant market and market share is just one of the factors for determining market dominance which complies with the requirement of the Anti-Monopoly Law. Meanwhile, for the Internet industry, highly dynamic due to technological innovation, its boundary of the relevant market is inevitably blurry, the comprehensive consideration of all factors affecting competition is very important.

The Anti-Monopoly Law and its enforcement in China are still new things especially in the early stage of Anti-Monopoly Law enforcement and relevant judicial practice has great room for development. Qihoo vs. Tencent as well as Ruibang Yonghe vs. Johnson & Johnson — as the first cases of monopolistic agreement — laid a solid foundation for the development of judicial practice. The reasoning of the court, combining theory and practice, verified by experience and empirical judgment — as well as the court's attitude of flexibility on issues of specific case characteristics and verification and supporting its conclusion through various channels — reflect the combination of Anti-Monopoly Law and reasoning to prevent the judicial practice from deviating from the basic objectives of the law and becoming a tool of rigid application. In addition, China's Anti-Monopoly Law is applied by both its enforcement and court of justice. Justice has great significant implications for Anti-Monopoly Law enforcement. According to the State Council's authorization, three administrative authorities are responsible for Anti-Monopoly Law enforcement, and in the more than six years of the implementation of the Anti-Monopoly Law they have dealt with a large number of cases with some influential case included. The clarifying of some principles and rules in judicial practice could become an important reference for Anti-Monopoly Law enforcement. The trial thought and attitude will enhance the





transparency of Anti-Monopoly Law enforcement and will promote a better interaction between Anti-Monopoly Law enforcement and the court of justice.

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  - <sup>2</sup> Lawrence A. Sullivan and Warren S. Grimes, *The law of Antitrust: an integrated handbook*, (Minnesota: Thomson/West, 2006), 64.
  - <sup>3</sup> Commission Decision C (2011) 7279 declaring the concentration between undertakings involving the acquisition of Skype by Microsoft to be compatible with the internal market and the Agreement on the European Economic Area (EEA) Case COMP/M.6281 – Microsoft/Skype.
  - <sup>4</sup> Horizontal Merger Guidelines, U.S. Department of Justice and the Federal Trade Commission, August 19, 2010, <http://www.justice.gov/sites/default/files/atr/legacy/2010/08/19/hmg-2010.pdf>.
  - <sup>5</sup> Speech by the deputy minister of the U.S. Department of Justice, Renata Hesse on January 22, 2014, “At the Intersection of Antitrust & High-Tech: Opportunities for Constructive Engagement,” <http://www.justice.gov/atr/public/speeches/303152.pdf>.

