

CPI's Asia Column Presents:

The Judicial Attitudes toward Tying Practice in China: Commentary on a Guidance Antitrust Litigation Case Published by the Supreme Court

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Summary of the Case

The case *Wu Xiaoqin v. Shanxi Broadcast & TV Network Intermediary (Group) Co., Ltd.*, is a typical abuse of market dominance case by the form of tying practice, which was trialed by Xi'an Intermediate People's Court ("Xi'an Court") as the first instance court, then by Shanxi Higher People's Court ("Shanxi High Court" or "appellate court") in the appeal procedure, and lastly by the Supreme People's Court ("Supreme Court") in the retrial procedure.

On May 10, 2012, Wu Xiaoqin ("Wu", the Plaintiff) went to Shanxi Broadcast & TV Network Intermediary (Group) Co., Ltd. ("Broadcast Company", the Defendant) to pay the basic maintenance fee for digital TV services. He was informed by the Broadcast Company that the fee was raised from 25 Yuan to 30 Yuan per month. Therefore Wu paid 90 Yuan for three months, including 75 Yuan as the digital TV basic maintenance fee and 15 Yuan as the digital TV program fee (value-added service). However, Wu learned afterwards that the subscription of digital TV programs is only optional and voluntary. Therefore, Wu believed his right of free choice as consumers had been harmed by the Broadcast Company, and further held that Broadcast Company as a public enterprise possesses the dominant position in the digital TV market, and its behavior of charging digital TV program fees together with the basic maintenance fee without any notice constitutes the illegal tying.

On June 4, 2012, Wu filed an antitrust lawsuit in Xi'an Court and requested the court to confirm that Broadcast Company's charge of digital TV program fees was invalid, and the defendant should refund him 15 Yuan.

The Court's Decisions

On January 5, 2013, Xi'an Court found in the first-instance judgment that Broadcast Company charging Wu the additional digital TV program fees was invalid, and the defendant was ordered to return 15 Yuan back to Wu. The Broadcast Company appealed to the Shanxi High Court subsequently. On September 12, 2013, Shanxi High Court revoked the first-instance judgment and dismissed Wu's claims. Wu was not satisfied with the ruling of Shanxi High Court and therefore applied to the Supreme Court for retrial.

In the retrial procedure, the Supreme Court found that the Broadcast Company has a dominant market position in Shanxi Province's cable TV transmission service market. It's bundling of the basic digital TV service and the digital TV paid program service, violated Article 17(5) the PRC Anti-Monopoly Law ("AML"). Based on the above findings, the Supreme Court ruled to revoke the second-instance judgment and affirmed the first-instance judgment on May 31, 2016.

Analysis and Comments

In spite that the amount of this case is merely 15 Yuan, it was included in the Ten Guidance Antitrust Cases published by the Supreme Court, partly for its symbolic significance as a model of consumer win in antitrust private litigations, which has been rarely observed. Throughout China's antitrust judicial practice, there has been a low winning rate for the plaintiffs, especially when it comes to the plaintiff being a nature person. Therefore, this case had a great demonstration effect on application of Article 1 of AML to realize one of the legislative purposes, protection of individual consumers' interests. Moreover, rulings of this case can also serve to clarify the judicial standard for determining tying behavior under Article 17 (5) of the AML, which companies

operating in China could take it as a reference when conducting internal antitrust compliance work.

Market Definition and Determination of Market Dominance

The first instance court held that the relevant product market involved in the alleged monopolistic conduct should be the cable television transmission service market, and the relevant geographical market should be the region of Shanxi Province. Both the appellate court and the Supreme Court agreed with that definition.

Furthermore, the first instance court found the Broadcast Company possesses a dominant market position in the relevant market, based on the following facts finding. Firstly, it was recognized that a provincial-level franchise model has been adopted in the cable TV transmission service market, and the Broadcast Company was approved by the Shanxi Provincial Government as the exclusive legal operator in Shanxi Province to operate the cable TV transmission business. Therefore, the Broadcast Company possessed 100% share of the cable TV transmission service market in Shanxi Province at that time.

Secondly, entering into the relevant market faces great obstacles because of the provincial-level franchise model. Even assuming there is no franchise, establishing a large-scale transmission network for the purpose of entering into the cable TV transmission service market is indispensable in any means. In consequence, on account of such high investment requirement, entry barriers were found in the relevant market.

Although the Broadcast Company did not accept the finding of market dominance in the second instance but did not produce any evidence to rebut. In the retrial, the Supreme Court also affirmed the finding that the Broadcast Company possesses market dominance in the cable TV transmission service market in Shanxi.

Notably, the court's above-mentioned reasoning is in line with current legislation. Article 9 of the *Provisions of the Supreme People's Court on Several Issues concerning the Application of Law in the Trial of Civil Dispute Cases Arising from Monopolistic Conduct* ("the Antitrust Judicial Interpretation") stipulates: "Where the alleged monopolistic conduct is conducted by public utilities or other undertakings legally possessing the exclusive position, the Court may presume the market dominance possessed by the public utilities or those undertakings, based on market structure and competition conditions, unless otherwise overturn by countervailing evidences."

In practice, for historical reasons, it is very common that franchise or one-operator situation exists in many regions of China in the public utilities sectors, such as water supply, power supply, heating, radio and television, and so on. Therefore, the operators in such industries are more easily to be determined by the anti-monopoly enforcement agencies or Chinese courts as having a dominant market position in the relevant market. The risks of violating Article 17 of the AML is relatively high.

Determination of "tying"

"Tying" is the bone of contentions in this case. In determining the "tying", the three courts all agreed that illegal tying behavior under the AML should refer to abuse of market dominance to sell the products or services that the purchaser does not demand against the purchaser's will.

Nonetheless, with regards to specific determination of the "tying" act, three courts had applied different standards.

During the first instance, Xi'an Court found that the Broadcast Company charged the basic maintenance fee for digital TV services together with the digital TV program fee for value-added service, and did not inform Wu of the option. Therefore, the bundling charges should be construed as "tying". Xi'an Court further held that the Broadcast Company's dominance in the cable TV transmission service market in Shanxi Province had naturally forced Wu to accept the digital TV paid program service. Consequently, Wu had to accept the above unreasonable conditions. As a conclusion, the first instance court found that the Broadcast Company has violated the AML, which prohibits tying or attaching other unreasonable trading conditions to its downstream customers.

The appellate court had further elaborated the difference between illegal tying and legitimate combined sales, by pointing out that combined sales are very common in commercial life and is not prohibited by the AML in nature when consumers could be offered more economical goods or services than separate sales. However, sales should fall into the illegal acts when it violates the wills of consumers and consumers have no way to reject because of the sellers' dominant position.

The appellate court further concluded the preconditions for determination of tying shall be: (1) there are two or more independent products/services that can be separately sold in the sales behavior; (2) the seller does not provide the products or services separately. Therefore, whether the right of free choosing is available to consumers is a key factor in distinguishing tying and legitimate combined sales. The aforementioned right of free choosing does not refer to the choice between different combinations of goods, but between separate purchase or bundling purchase. In the instant case, the appellate court believed that the Broadcast Company not only provided combined services but also provided basic services independently. Consumers have options to buy separate services at that period, hence tying should be unfound.

The Supreme Court overturned the appellate court's findings by pointing out, although the Broadcast Company had submitted evidence to prove the existing options for customers in the second instance, the evidence can only prove the exceptions of the tie-in sales, and the Broadcast Company could not reasonably explain those exceptions during the proceeding. Moreover, the evidence about separately charging fees is insufficient, for it is collected after the plaintiff's filing of this lawsuit. Therefore, the evidence produced could not prove that consumers could pay the basic maintenance fee or the digital TV program fee separately, that is, the consumer's right of free choosing cannot be proved.

Justifications and Anticompetitive Effects

The abuse of market dominance under Article 17 of AML is preconditioned by "no justification". Therefore, "tying" is not deemed as illegal when the justification could be proved accordingly.

In the final ruling, the Supreme Court held that the Broadcast Company failed to prove that provision of two services together is in accord with the commercial common practice; furthermore there is no evidence showing that separate sales of the basic service and added-value service could cause damage to the performance and use value of the digital TV services. The Broadcast Company could not explain the justification of the above behaviors either. Under such circumstance, the Supreme Court found in the end that the Broadcast Company had abused its market dominance by charging the basic maintenance fee and the digital TV program fee

together, which had objectively affected consumers' choosing of other service providers to provide relevant digital paid programs, and therefore had affected the market entry negatively, which led to anticompetitive effects in the relevant market.

From the view points of the Supreme Court, the following factors are usually taken into account when evaluating the potential justification for tying: (1) compliance with commercial common practice; (2) the performance and use value of products or services will be impaired by separate sales; (3) other justifications. Unfortunately the Supreme Court did not make clear in the instant case about whether the above-mentioned justifications should be considered aggregately, and what the “other potential justifications” may be. Those issues are still expected to be observed in future cases.

In addition, it had not been discussed in this case that whether “have or may have the effect of eliminating or restricting competition” should be a necessary condition for determination of tying practice. In many cases of abuse of market dominance by refusal to deal, Chinese courts emphasized that refusal to deal prohibited by the AML should be those having anticompetitive effects. Whether this conclusion is also applicable to tying has not been answered in the judicial precedents yet. From the Supreme Court’s judgment in this case, it seems that anticompetitive effects are not the necessary condition for finding the illegal tying, or it can directly presume that the tying behavior has or may have the anticompetitive effects on the relevant market. But this issue is still not clear from Chinese antitrust judicial practice.

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