

Chapter 2

Anti-monopoly Analysis of Tencent QQ Versus 360 Dispute

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Abstract Anti-monopoly concerns are becoming more and more frequent for Internet industries competing all over the world. This paper makes a case analysis of Tencent QQ versus 360 dispute, then has some further thought from such dispute. Finally, it is hoped by this paper that China's anti-monopoly law (AML) be healthily and perfectly enforced in the future.

Keywords Anti-monopoly · Internet industries · Case analysis

2.1 Introduction

Anti-monopoly concerns are becoming more and more frequent for Internet industries competing all over the world. For example, in February 2011, Apple launched a new service that allows for magazine and newspaper subscriptions for its popular devices, might draw claim from publishers that Apple dominates the market for consumer tablet computers and that it has allegedly used that commanding position to restrict competition (Koppel 2011). Also in February 2011, Hudong.com, an online encyclopedia, is alleging that Baidu unfairly blocks its

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Web pages from search results in favor of its own encyclopedia service, Baidu Baike (Wang 2011). On April 1, 2011, Microsoft plans to file a complaint with the European Commission demanding action against competitor Google on competition law grounds. Microsoft claims that Google stops other companies from accessing the information needed to run effective search operations (Microsoft files EU 2011).

Notably, in 2010 in China which has more than 400 million netizens (2011), a “war” called “Tencent QQ versus 360 battle” happened in front of the desktop of tremendous Internet users and was well known both inside and outside the industry. The number 360, which relies on its 360 free anti-virus software become world renowned, is a top company of security software services company chiefs, and Tencent QQ, which is an “overlord” of instant messaging supported by 600 million users, these two desktop client software giants revealed a typical case of Chinese Internet industry’s competition. Undoubtedly, this case is regarded as an anti-monopoly law (AML) issue; however, compared to the traditional anti-monopoly cases, it has its own feature, i.e., it took place in Internet area.

Under the frame of analysis on AML to prohibit abusing the market dominance position, first of all, we must identify whether or not Tencent owns the dominant market position, and secondly to identify whether or not it carries on the action of abusing the dominant market position. But to identify the dominant market position, we have to begin from defining the relevant market (including commodity market and geography market).

In ordinary market, the definition of relevant market is a complex question, involving substitutable demand and supply analysis of alternatives, sometimes even having the hypothetical monopolist test. And in Internet market, it is even more complex. Its temporal and spatial boundary is difficult to determine. Internet market is in dynamic development because of the rapid technology innovation and Internet industry’s vivid characteristic of network externality. Thus, the traditional definition method for relevant market is limited in its application.

Moreover, a dominant market position in Internet market is more complex to determine either the market share or market entry barriers; all of this exhibited some characteristics different from the ordinary market. For example, Internet market entry barriers are mainly expressed as the network effects and intellectual property (IP), technical standards or other non-price factors.

For this reason, although the public tend to make sure that Tencent QQ has a conduct of violating the AML, but it is difficult to convict legally that Tencent QQ violates AML, this article thinks that this issue is very complicated and has a long way to go; it still wants to provide an analysis on the captioned Tencent QQ versus 360 case according to China’s Anti-Unfair Competition Law (AUCL) and the AML and brings forward some further thought and suggestion.

2.2 Anti-monopoly Analysis of Tencent QQ Versus 360 Dispute

2.2.1 *Fact Summary*

Tencent Technology (Shenzhen) Limited is an Internet service provider (ISP)—its most well-known product, however, is an instant messaging system known as “QQ” (Tencent QQ).

Beijing Qihoo Technology Limited supplies security software—its most well-known line of products, are its “360” line of security software (including software, which protects user’s privacy on the Internet and anti-virus software) (Qihoo 360).

In September 2010, Qihoo 360 launched the software called “360 Privacy Protector.” This product is used to keep tabs on other software on a user’s computer and is able to detect a number of things, for instance, the type of data that software extracts from a user’s computer. The objective of this product is to shield a user from software that illegally extracts or retains a user’s personal data—in other words, to protect a user’s privacy.

On September 26, 2010, Qihoo 360 published an article on their Web site entitled “360 Privacy Protector 1.1 Beta—new function—privacy clean up function.” In this article, Qihoo 360 alleged that its 360 Privacy Protector software had recently detected that “a certain instant messaging software” was found to be “peeping” at the private files and data of users, without first obtaining the approval of those users. The article itself did not name which instant messaging software Qihoo 360 was referring to. However, a screenshot in the article bore the logo of the Tencent QQ instant messaging software.

On October 14, 2010, Tencent Technology (Shenzhen) Limited and Shenzhen Tencent Computer System Limited (hereinafter Tencent QQ) filed an application with the Beijing Chaoyang District People’s Court, alleging that:

Beijing Qihoo Technology Limited (manufacturer and copyright holder of 360 Privacy Protector; and owner of www.360.cn); Qizhi Software (Beijing) Limited (company which supplies 360 Privacy Protector software); and Beijing San Ji Wu Xian Internet Technology Limited (operator of www.360.cn) (hereinafter Qihoo 360) have fabricated or spread false facts about Tencent QQ’s instant messaging software resulting in the Tencent QQ’s business reputation or “commodity fame” being damaged. This conduct was allegedly in breach of Article 14 of the AUCL.

Further in Tencent QQ’s court application, they claimed that they could properly be construed as a competitor to Qihoo 360 as the latter also manufactures and supplies their own anti-virus or security software (i.e., called “QQ Computer Housekeeper”). In its complaint, Tencent QQ requested that the court prohibit Qihoo 360 from fabricating or spreading false facts about Tencent QQ’s instant messaging software; that Qihoo 360 apologize to Tencent QQ for the conduct described above; and that Qihoo 360 pay damages of RMB 4 million.

On November 3, 2010, the court accepted this case (the AUCL allegation).

On the same day, Tencent QQ issued a newsletter to all its users entitled “A letter to all users of QQ.” Through this newsletter, Tencent QQ informed all users that they have made the “difficult” decision of making the use of QQ instant messaging service incompatible with the use of 360 privacy or anti-virus software. In other words, QQ users who choose to use 360 privacy or anti-virus software will no longer be able to use QQ instant messaging in the same instance. Tencent QQ explained that this was mainly because they were not confident that they could continue to protect their user’s privacy (including data such as chats and passwords), if they continued to use the 360 line of security software. In its newsletter, Tencent QQ also requested that users use its “QQ Computer Housekeeper” or other anti-virus or security software in place of the 360 line of security software.

Notably, from November 3, 2010, users of QQ reported that they were not able to use the 360 line of security software and QQ at the same time. However, a few days later, reports suggest that government agencies intervened and users reported that their QQ and 360 softwares were able to be used concurrently.

On November 4, 2010, Li Changqing (a Beijing-based lawyer) filed a complaint with the State Administration of Industry and Commerce (SAIC) requesting that the SAIC should commence an anti-monopoly investigation against Tencent QQ. In his application, Li alleged that Tencent QQ had abused its dominance by restricting QQ users or “forcing” QQ users to uninstall 360 software, without a valid reason (in breach of Article 17(4) of the AML). Li also submitted a study report issued by iResearch Consulting Group—this report showed that Tencent’s market share in the instant messaging software market was approximately 76.2 %. Li requested that the SAIC impose an appropriate penalty on Tencent QQ for its alleged breach of Article 17(4) of the AML (the AML allegation) (Ning et al. 2010).

This paper then discusses and analyses the AUCL allegation and the AML allegation outlined above in some detail as follows.

2.2.2 The Anti-unfair Competition Law (AUCL) Allegation

As mentioned above, Tencent QQ’s allegation is that Qihoo 360 is in breach of Article 14 of the AUCL. Article 14 of the AUCL prohibits entities from fabricating or spreading false facts to damage the business reputation or commodity fame of a competing entity.

In order to prove that a breach of Article 14 has occurred, Tencent QQ would need to prove the following elements:

- that Tencent QQ and Qihoo 360 are “competing” entities (first element);
- that Qihoo 360 has undertaken conduct amounting to “fabricating or spreading false facts” about Tencent QQ (second element); and
- that the business reputation or “commodity fame” of Tencent QQ has been damaged (third element).

In respect of the first element, we note that a lot would depend on what the court would construe as the “relevant market”. If the court construes the relevant market to be a broad “market for Internet services,” for instance, then it is likely that Tencent QQ and Qihoo 360 could be construed as “competitors.” However, if the relevant market is more narrowly drawn, it might be more challenging for Tencent QQ to prove that they should rightly be considered “competitors” to Qihoo 360.

As mentioned above, Tencent QQ’s primary business is in providing QQ instant messaging software to users; whereas Qihoo 360’s primary business is in providing the 360 line of anti-virus or security software to users. In Tencent QQ’s court application, they have argued that they are competitors to Qihoo 360’s line of anti-virus or security software, because Tencent QQ also provides similar software in the form of “QQ Computer Housekeeper.”

The second and the third elements would depend on whether the court is satisfied that Tencent QQ has provided sufficient evidence to prove that Qihoo 360 has “fabricated false facts” and that this has resulted in “damage” to the former’s business reputation.

2.2.3 The Anti-monopoly Law (AML) Allegation

As mentioned above, Li’s allegation is that Tencent QQ breached Article 17 of the AML.

Article 17 of the AML prohibits entities, which hold a dominant position to abuse their dominance by engaging in several specified acts, including by restricting other entities to transact only with the original entity or only with specified entities, without a valid reason (Article 17(4), AML).

In order to prove that a breach of Article 17 has occurred, Li would need to prove or the SAIC would need to be satisfied that the following elements have been fulfilled: that Tencent QQ is “dominant” in the relevant market (the first element); that Tencent QQ has abused its dominance in the relevant market by restricting other entities to transact only with Tencent QQ or only with specified entities (thereby excluding others), without a valid reason (the second element).

With regard to the first element, Article 19 of the AML is instructive. Article 19 of the AML outlines three scenarios in which an entity would be considered a dominant entity, most relevant of which is an entity would be deemed dominant where the entity holds half of the market share (i.e., more than 50 %) in the relevant market. However, this is a rebuttable presumption—in other words, an entity which has been “deemed” as dominant may provide evidence that it is not dominant in the relevant market.

As mentioned above, Li submitted a study report, which alleged that Tencent QQ is dominant in the instant messaging software market (with a market share of 76.2 %). It remains to be seen if a court or the SAIC would be of the view that the report provides sufficient evidence that Tencent QQ is dominant in the instant messaging software market.

Another issue is, that, if indeed the allegation is that Tencent QQ is dominant in the instant messaging software market but that the alleged “abuse” has resulted in effects in the security or anti-virus software market; would a court or authority still consider this to be an abuse of dominance? In other words, if an entity is dominant in Market A but the alleged abuse has taken place in Market B—would such conduct still be construed as an abuse of dominance? If so, what are the factors that a court or authority would consider as relevant in proving such a case?

The allegation appears to be that Tencent QQ has somehow “made use” of or “leveraged” its dominance in the instant messaging market to influence another “market,” arguably the “anti-virus” or “security” software market. Whether an entity has “leveraged,” its dominance in Market A to influence conduct or outcomes in Market B is a complex issue—in overseas jurisprudence (such as the EU), there is conflicting jurisprudence on whether Market A and Market B have to be “related” markets, for an abuse of dominance breach to be made out.

In addition, even if a court or authority was willing to accept that an “abuse” may occur in a separate market, then the next step would be to prove the second element or nature of the abuse. In this case, it appears that the allegation is that Tencent QQ has restricted users from transacting or using the 360 line of anti-virus software, without a valid reason—in breach of Article 17(4) of the AML (Ning et al. 2010).

2.2.4 Brief Comment

Nevertheless, having a dominant market position itself is not illegal. Only the abuse of such a status falls under the jurisdiction of AMLs. Although in the above analysis, Tencent was suspicious of abusing dominant market position, but the concrete determination requires adequate reasons and evidence. In fact, the foregoing China’s AML, Article 17 (4), provides the condition that corresponding actions constitute an abuse of dominant market position is “not justified,” so obviously, there is need for an application of rule of reason, whether the relevant conduct of Tencent QQ is justified, it is not only a fact-finding problems, but a standard for judgment.

From the Tencent QQ versus 360 dispute, the relevant facts here cannot be fully established; now the parties just act on their own; thus, it requires the fact to be identified by presiding agencies. There are different opinions about the nature of relevant conduct acted by Tencent QQ, whether or not it is a legitimate defensive conduct or an abuse of dominant market position also need further judgment after relevant facts are clear. If it can support that Tencent is “justified” to act this conduct in relevant fact finding, then the behavior does not constitute abuse of dominant market position.

Obviously, even though all the captioned analysis supports that Tencent QQ constitutes the act of abusing dominant market position, going through the whole investigation and analysis must be a very complicated procedure and long process.

Furthermore, in fact, Tencent QQ stopped such suspicious conduct immediately under the strong public opinion pressure and after presiding agency's intervention. Therefore, the problem of prohibiting such suspicious conduct to continue does not exist any more. Certainly, it does not influence the attribution and enforcement of penalty, etc., punishment against such happened conduct, only the level of punishment will be different.

2.3 Further Thought Arising from Tencent QQ Versus 360 Dispute

2.3.1 Need We Different Anti-monopoly Law in Internet Area

Despite the anti-monopoly issue in Internet area has its own characteristic; this paper thinks that it does not mean the application of law must be totally different.

The above analysis shows that, related to anti-monopoly in traditional markets, the anti-monopoly enforcement of Internet area is much more complex and difficult. Comparing with the traditional economy, the Internet economy has the characteristics on faster innovation, easier market entry, market share instability, as well as first-mover advantage, network effects, two-sided markets, and so on.

On the one hand, technical renovation brings impact on the maintenance of the dominant market position and can reduce the demand of rapid anti-monopoly action, but on the other hand, network effects, especially combined with IP, allows the enterprises to rely on its customers, who have already been locked in the use of many existing products and services, to prevent new competitors and high-tech challenges.

Therefore, we must think over these characteristics when enforcing AML in Internet area and developing the analytical methods of AML enforcement, but not completely confined to the traditional AML. For example, such as "price discrimination," "tying," "predatory pricing," and other conducts, which is concerned by the anti-monopoly policy, it is a strategy for the companies that have considerable market power in the traditional economy; however, in the Internet economy, it becomes just one way to survive for the enterprises and it is a necessary way to keep the most of them survived, so the rationality of "tying" conduct problems requires further research combining with the characteristics of the industry. But these characteristics of the Internet economy has not shaken the basic principles and institutional mechanism of AML, it just needs to consider its distinctive feature when making a concrete analysis.

In this respect, there can be specific guides or regulations aiming at the AML enforcement in Internet area, which come into being based on fundamental principle and system by State Council Anti-Monopoly Committee or relevant legal authority of anti-monopoly enforcement.

2.3.2 Accurate Understanding on Anti-monopoly Law in China Is Required

Undoubtedly, the public pay close attention to the Tencent QQ versus 360 dispute is in favor of popularizing and propagating the AML in China, but it requires an accurate understanding on this law.

The Tencent QQ versus 360 dispute caused universal public concern and widely reported by the media had a strong influence on the society. For the feverish comments and discussions, in addition to refer to concern for right and wrong and resentment between the two companies in China's Internet industry, it also involves a large number of monopoly and anti-monopoly issues. This makes China's AML, which has implemented more than 2 years, become the focus of public attention again. Whether or not they look forward to the AML enforcement agencies' intervening in the dispute effectively and dissatisfy with reality, or the discussion of applicable law and the assumption of improving law concerning the specific conduct, all of these have played a very important role in publicizing the knowledge of AML, but there are some conditions that are seemingly right but actually wrong even misread the law in the feverish comments and discussions here.

For example, several reports mentioned that the supervision agency considers to split the Tencent Company; this is an unfounded claim. As a private enterprise and listed company, Tencent does not have a responsible supervision agency like state-owned enterprises. Although administration regulator can supervise the conduct of their operations, yet it is without foundation to split. Even the anti-monopoly enforcement agencies of a few countries like the USA can apply to the court to split companies, which made monopolistic conduct, but the AML enforcement agencies in China have no power in this regard.

Except the operators who conduct illegal concentration, the State Council Anti-Monopoly Law Enforcement Agency can order to stop conducting concentration, disposing stocks or assets for duty by the prescribed time and taking other necessary measures to restore the status before the concentration. Except which belong to structural relief measure, for relief measures of the other monopolistic conduct (including abuse of dominant position) are behavioral, that is to say, the Anti-Monopoly Enforcement Agency can order to stop illegal conducts, confiscating illegal gains, and fining more than 1 %, fewer than 10 % sales last year.

Therefore, even if Tencent is convicted of having the monopolistic conduct to abuse dominant market position, according to the laws of China, although they have to receive the appropriate punishment, but the situation to be split is impossible. In a word, intertype competition is a good thing, it is terrible without it; but, we need to regulate competition in order to ensure it is free and fair.

Both 360 and Tencent are all Internet industries, although their main business scopes are different, but there are many intersected areas, and they both take the business model of free services like advertising or add-service, to attract users and to dominate the market quickly, then to be profitable, so there is an obvious competition between them. Under the condition of market economy, an intertype competition in the market is a normal thing, which is the market mechanism to play

a role in the fundamental mode. Technological progress, economic development, as well as the rational allocation of resources, all of which can only be achieved in this competition. If there is no competition between the parties (for example, according to plan instruction to manufacture to produce under the planned economy), and even restrict competition artificially (for example, in a case of one party has a monopoly or the both parties conspire to make a plan for monopolize), that have problems and are more terrible.

Therefore, it is a normal phenomenon that fierce competition between the operators in order to survive and develop themselves under the condition of market economy, from another standpoint; this is a proof of China's market economy status. Of course, the market competition has a difference both in intensity and even in means. Even though competition is a good thing, it has advantages and disadvantages of the means and results. Not all of people like competition in any conditions; on the contrary, the tendency to distort and limit competition is always existent.

For this reason, despite the competition of spontaneous market can't guarantee its fairness or even freedom, it becomes necessary to ensure free and fair competition in modern society by enacting and enforcing of competition laws and regulations Anti-Monopoly Law (2010).

2.4 Conclusion

As we know, the promulgation in August 2007 and implementation in August 2008 of the AML is a milestone in the history of China's legislation. However, the implementation of AML has been accompanied by endless controversies in every country just as several cases we mentioned in the beginning in this article. Anti-monopoly is an exotic area in China's legal system, so it lacks sound local resources for self-growth and independent improvement. China's legislative, law enforcement, and judicial sectors are all quite unfamiliar with AML and have virtually no independent experience. They mainly depend on foreign experiences and theoretical research at the literary level. Anti-monopoly is a complex issue involved with legal, policy, economic, and social factors and should be considered thoroughly from various perspectives (You 2010). Nevertheless, it is hoped by this paper that China's AML be healthily and perfectly enforced in the future.

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