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Yong Lim & Yunyu Shen[1]

I. INTRODUCTION

The decision by the Supreme People's Court of the People's Republic of China ("SPC") in the *Qihoo vs. Tencent* case[2] ("*Tencent*") is notable in many aspects starting from the fact that it is the SPC's first decision involving the country's Anti-Monopoly Law ("AML"). But, one eye-catching statement in the decision that commentators have been particularly quick to point out is the court's opening salvo in its reasoning that an explicitly and clearly defined relevant market is not necessary for every abuse of dominance case brought under Article 17 of the AML.[3] Other than hinting that the availability of evidence and relevant data, and the particular complexities of the market involved could all be factors in determining whether market definition is necessary,[4] the decision does not provide further guidance as to determine whether and when, if at all, market definition would be required for antitrust analysis in abuse of dominance cases.[5]

The unqualified and sweeping nature of the court's declaration on market definition may prompt some to believe that the SPC has embraced the renewed criticism on the futility of the market definition exercise,[6] and is on its way to eventually dumping market definition as a

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[2] SPC Judgment of October 8, 2014, (2013) 民三终字第4号.

[3] *See*, *e.g.*, David S. Evans & Vanessa Zhang, *Qihoo 360 v Tencent: First Antitrust Decision by the Supreme Court*, CPI ASIA COLUMN (Oct. 21, 2014) *available at* https://www.competitionpolicyinternational.com/assets/Uploads/AsiaOctober214.pdf; Susan Ning, Peng Heyue, Yang Yang, Qiu, Weiqing, Sarah Eder, & Guo Shaoyi, *The Supreme Court Goes Online with Anti-Monopoly Law Principles: A Review of Qihoo vs. Tencent Abuse of Market Dominance Case*, CHINA LAW INSIGHT (Nov. 12, 2014), *available at* http://www.chinalawinsight.com/2014/11/articles/corporate/antitrust-competition/the-supreme-court-goes-online-with-anti-monopoly-law-principles%ef%bc%9aa-review-of-qihoo-v-s-tencent-abuse-of-market-dominance-case/.

[4] *Tencent*, *supra* note 2, at 77. The decision states these factors as examples of specific circumstances of the case, which would determine whether a relevant market can be clearly defined.

[5] Nor does the decision explicitly qualify the above declaration in any other meaningful way (for example, limiting it to cases involving dynamic and innovative industries). *But*, *see*, XIANLIN WANG, RESEARCH ON CUTTING ISSUES IN ENFORCEMENT OF CHINA'S ANTI-MONOPOLY LAW 332-334, (2011) (in Chinese), and Yong Huang & Xiaojun Jiang, *Relevant Market Definition in the Internet Industry*, 6 LAW SCIENCE 92, 99 (2014) (in Chinese) (both arguing prior to *Tencent* that market definition should not be treated as essential in cases involving the Internet industry).

[6] *See*, *e.g.*, Louis Kaplow, *Why (Ever) Define Markets?*, 124 HARV. L. REV. 437 (2010).

clumsy partner in antitrust analysis for the more adroit and nimble direct analysis of anticompetitive effects. As further explained below, the authors believe that the embrace is short of a full one, likely just enough to enable the court to dance around the floor without tripping over market definition. And one of the reasons for this is the explicit statutory incorporation of market shares and market share-based presumptions of market power into the AML.[7]

This is in contrast with other major jurisdictions such as the United States and the European Union.[8] While U.S. courts continue to rely on market shares as an important factor in determining monopoly power after Judge Hand's holdings in *United States v. Aluminum Co. of America*[9],[10] nothing in the Sherman Act explicitly requires this nor does it provide for presumptions of market power based on market shares. This is the same for Articles 101 and 102 of the TFEU.[11]

However, China's AML is not unique in terms of such statutory embodiments. Korea's Monopoly Regulation and Fair Trade Act ("MRFTA") has long incorporated market shares and market share-based presumptions for market power (since 1990),[12] and the thresholds for presuming dominance are quite similar between the two statutes. In fact, shortly after the *Tencent* decision, the Supreme Court of Korea ("SCK") rendered its own judgment on the alleged abuse of dominance by NAVER Corporation ("Naver Corp"), which operates Naver.com, Korea's top search portal ("*Naver*").[13] Both cases shared the same outcome—the allegations were dismissed based on the failure to prove and establish market dominance and also illegal conduct.

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[7] While one should be careful not to overstate the significance of these statutory embodiments of market share-based presumptions, they maintain potency and legitimacy by virtue of existing within the statute unless courts and agencies deliberately choose to ignore them or otherwise degrade their legal importance in adjudicating cases. A famous example of this is the U.S. Supreme Court's interpretation of Section 1 of the Sherman Act, in which it essentially struck the word "every" out of the statute (Standard Oil Co. v. United States, 221 U.S. 1, 59 (1911)).

[8] In the United States, there is some disagreement over whether the "line of commerce" language in Section 7 of the Clayton Act should be interpreted to require market definition as ostensibly stated in *Brown Shoe* (Herbert Hovenkamp, *Markets in Merger Analysis*, 57 ANTITRUST BULL. 887, 888-900 (2012); Kaplow, *supra* note 6, at 513). This, however, does not seem to be the case for the Sherman Act. Rather, the view that market definition is necessary for monopolization cases under the Sherman Act seems to be predicated on perceived analytical necessity more than anything else (ABA SECTION OF ANTITRUST LAW, ANTITRUST LAW DEVELOPMENTS 227 (Jonathan I. Gleklen et al. eds, 7th ed. 2012) (hereinafter ANTITRUST LAW DEVELOPMENTS)). *But see* Kaplow, *supra* note 6, at 513 n.162 (noting that similar arguments could be made for Section 2, although "the inference from the statutory language is even weaker with the Sherman Act").

[9] 148 F.2d 416, 424 (2d Cir. 1945).

[10] ANTITRUST LAW DEVELOPMENTS, *supra* note 8, at 230.

[11] Treaty on the Functioning of the European Union. While the Guidance on the Commission's Enforcement Priorities in Applying Article 82 of the EC Treaty to Abusive Exclusionary Conduct by Dominant Undertakings (2009) OJ C 45/2 refers to market shares (¶¶ 13-15), the document's purpose is to provide for guidance on the Commission's priorities and does not refer to presumptions *per se*. The presumption of dominance based on a 50 percent market share by the ECJ has been developed as a judicial rule rather than through statutory interpretation (ALISON JONES & BRENDA SUFRIN, EU COMPETITION LAW, 327-9 (4th ed 2011)).

[12] Professors Elhauge and Geradin provide examples of other jurisdictions that also incorporate such market share-based presumptions in their competition law statutes, *see* (EINER ELHAUGE & DAMIEN GERADIN, GLOBAL COMPETITION LAW AND ECONOMICS 290 & n.70 (2nd ed 2011)).

[13] SCK Judgment of November 13, 2014, Case No. 2009*Du*20366.

The two Supreme Courts, however, diverged in the paths they took to come to that conclusion, which in part reflects differences in how they dealt with the statutory embodiments mentioned above. As the *Tencent* decision grants lower courts and agencies a certain amount of flexibility to further explore and choose different approaches for handling market definition issues, the Korean courts' approach in *Naver* is worth observing because it shows one real world possibility among an array of alternatives.[14]

II. BACKGROUND

A. Relevant Statutes

1. China

Article 17 of the AML defines a dominant market position as one held by an enterprise having the capacity to control the price, quantity, or other trading conditions of goods in the relevant market, or to hinder or effect any other enterprise from entering the relevant market. The following Article 18 states that a dominant market position shall be determined according to: (i) the market share of the enterprise in the relevant market, (ii) the state of competition in the relevant market, (iii) the capability of the enterprise to control the markets for selling the goods or procuring the needed raw materials, (iv) the financial and technical capabilities of the enterprise, (v) the degree other enterprises depend on the enterprise in transactions, and (vi) the degree of difficulty for other enterprises to enter the relevant market.

Article 18 ends with a catch-all clause whereby the arbiter shall review "other factors" relevant to the determination, and the SPC made it clear in *Tencent* that the determination of dominance was a result of a comprehensive evaluation of multiple factors in a case- and fact-specific manner.[15] Note that the statute explicitly refers to a dominant market position in the context of a "relevant market," which is defined earlier as the scope of goods or territory within which enterprises compete against one another during a certain period of time for specific goods or services.[16] There is, however, no express requirement to define a relevant market in the statute.

Article 19 states the thresholds for presuming market dominance. An enterprise can be presumed to be dominant if: (i) its market share accounts for one-half or more of the relevant market; (ii) together with another enterprise, the combined market share accounts for two-thirds or more of the relevant market; or (iii) together with two other enterprises, the combined market share accounts for three-quarters or more of the relevant market. An enterprise with a market share less than 10 percent is excluded from the presumption. Article 19 makes it clear that this is a rebuttable presumption, and an enterprise that is presumed to have dominance can overturn the presumption by presenting proof otherwise.

[14] As a clarifying note, the authors' focus in this paper is how the Chinese and Korean Supreme Courts have chosen to deal with the statutory incorporation of market shares and market share based-presumptions. We do not base our observations on a particular opinion on whether one should retain market definition in antitrust analysis for abuse of dominance cases.

[15] *Tencent*, *supra* note 2, at 98.

[16] AML Article 12.

2. Korea

Article 2(vii) of the MRFTA defines a market-dominant enterprise as one that has the market position to determine, maintain, or alter the price, quantity, quality, or other terms of trade of goods or services unilaterally or together with another enterprise as a supplier or buyer within a "particular area of trade." A particular area of trade is further defined as an area where, by the object, stage, or territory of trade, a relationship of competition can or does exist.[17]

While the MRFTA itself does not explicitly refer to a "relevant market" or demand defining such a market, Korean courts have consistently interpreted the statutory language ("particular area of trade") to require market definition for analysis of abuse of dominance cases.[18] A claim of abuse of dominance can theoretically be dismissed upon failure to properly define the relevant market, since this would mean that the plaintiff or the KFTC has failed to affirmatively establish the dominant market position of the defendant or respondent.

The first reference to market shares in the context of abuse of dominance comes right after the statute defines a market-dominant enterprise. It states that market shares, the existence and extent of market entry barriers, the relative size of competitors, among other things, shall be comprehensively considered in determining whether an enterprise is dominant in the market.[19]

A presumption of dominance based on market shares is provided in Chapter II of the MRFTA, which specifically deals with abuse of dominance. According to Article 4, an enterprise with the following market shares in a particular area of trade shall be presumed to be a market dominant enterprise in accordance with Article 2(vii): (i) the enterprise has a market share of 50 percent or more, or (ii) if three or less enterprises (including the one alleged to have market dominance) have a combined market share of 75 percent or more, but excluding enterprises with a market share of less than 10 percent. This presumption is rebuttable. Yet, according to the knowledge of the authors, there has not been a single case where the courts have overturned the presumption once established within a properly defined relevant market.

B. The Cases[20]

1. *Tencent*[21]

China's top online security software provider Qihoo brought claims against leading instant messaging ("IM") service provider Tencent under Article 17 of the AML, arguing that

[17] MRFTA Article 2(viii).

[18] *See*, *e.g.*, Seoul High Court Judgment of Oct. 8, 2009, Case No. 2008*Nu*27102, 20-21 (hereinafter "SHC Decision"). This was the lower court decision in *Naver*.

[19] MRFTA Article 2(vii).

[20] For purposes of this paper, we omit findings by the courts that are not directly relevant to the present discussion (namely, the SPC's holdings on illegal tying and the SCK's holdings on undue support).

[21] In describing *Tencent*'s holdings in English, the authors have referred to, although not exclusively, the unofficial partial translation provided by Global Economics Group, LLC, *available at* http://archive.constantcontact.com/fs193/1111629548505/archive/1119449629439.html. The authors, however, take sole and full responsibility for the restatements and description provided in this paper. All references to the court's decision in the footnotes correspond to the original Chinese text, *available at* http://file.chinacourt.org/f.php?id=2331&class=file.

Tencent had wrongfully abused its dominance in the putative "integrated IM" service[22] market when it terminated interoperability between its IM service ("QQ") and Qihoo's security software, allegedly in an attempt to force users to abandon Qihoo's security software for competing products such as its own security software, QQ Doctor.[23]

The SPC rejected the market definition suggested by Qihoo. While declaring that an explicitly and clearly defined market is not always necessary for every abuse of dominance case, it nevertheless proceeded with a lengthy analysis on market definition and concluded that the proper relevant market in this case was the market for IM (including both integrated and non-integrated, and covering both PC and mobile) services in mainland China.[24] Based on the number of active users and the usage time and frequency, Tencent was found to have a market share exceeding 80 percent in this market,[25] which triggered a presumption of market dominance under Article 19 of the AML.

The court, however, had stated earlier that market shares only give a rough indication of market dominance, and that the significance of market shares as an indicator of market dominance should be determined on a case-by-case basis.[26] For the present case, the court noted that the internet industry exhibited highly dynamic competition and the boundaries of relevant markets were far less clear compared to other more traditional industries.[27] Accordingly, it cautioned against overstating the significance of market shares as an indicator of market dominance in this case, and stated that more attention should be paid to other factors such as market entry and the competitive impact of the defendant's conduct.[28] The court pointed to, among other things, the current innovative and dynamic state of competition in the market, continued market entry, and the actual effects of the alleged abuse (specifically, the rise in the number of users of rival products of QQ),[29] to find that Tencent did not have a dominant market position in the relevant market, in effect overturning the presumption under Article 19.[30]

At this point, the SPC could have dismissed the plaintiff's claims without further analyzing whether Tencent had engaged in abusive (exclusionary) conduct. The court acknowledged this, but continued to analyze whether Tencent's conduct constituted an abuse of a dominance.[31] Interestingly, the main reason provided by the court for this additional (full)

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[22] Full-featured IM service, which integrates text, audio, and voice functionalities.

[23] Interoperability was restored the very next day following after the Chinese Ministry of Industry and Information Technology circulated a notice criticizing both companies (*Tencent and Qihoo Accept Criticism from MIIT and Apologize to Netizens Again*, XINHUANET, Nov. 22, 2010, *available at* http://news.xinhuanet.com/internet/2010-11/22/c_12800122.htm). For a fuller description of the case including Qihoo's bundling claim, *see* David S. Evans, Vanessa Zhang, & Howard Chang, *Analyzing Competition among Internet Players: Qihoo v. Tencent*, CPI ANTITRUST CHRON. (May 2013).

[24] *Tencent*, *supra* note 2, at 98.

[25] *Id.* at 100.

[26] *Id.* at 98.

[27] *Id.* at 99.

[28] *Id.*

[29] *Id.* at 100-105. This was in accordance with Article 18 of the AML, which lists factors that shall determine the existence of a dominant market position.

[30] *Id.* at 106.

[31] *Id.*

analysis was that the boundaries of the relevant market and the existence of market dominance remained relatively unclear in this case,[32] despite having just upheld the lower court's judgment that Tencent lacked dominant market power. The court eventually found that Tencent's actions had not significantly eliminated or restricted competition, and stated that this conclusion supported the court's prior finding that Tencent did not have dominant market power.[33]

2. *Naver*[34]

This case originated from a decision by the Korea Fair Trade Commission ("KFTC") that Naver Corp had abused its dominant market position.[35] Naver Corp had entered into indexing agreements with certain online video content providers ("CPs"), which prohibited these CPs from placing, without consultation with Naver Corp, pre-roll advertisement clips[36] in their content shown through Naver.com's search results.[37] Naver Corp's justification for such terms was that the pre-roll ads could degrade the user experience of Naver.com's search results, and thus the restrictions were necessary to ensure the quality its user experience.[38]

The KFTC, however, rejected the justification and ruled that such agreements had harmed the CPs, and had weakened competition from CPs in the online advertising market by unduly restricting their business activities, thereby maintaining and strengthening Naver Corp's dominance in the putative relevant market.[39]

In reaching this conclusion, the KFTC determined that the relevant market was the internet portal market, consisting of a collection of portal sites that provided at a minimum search ("1S") as well as content, communication, community, and commerce ("4C") services.[40] In this putative "1S-4C" internet portal market, the KFTC found that Naver Corp's market share was 48.5 percent, and found Naver Corp to hold a dominant market position based, among other things, on the presumption clause in Article 4 of the MRFTA.[41]

In discerning Naver Corp's market share, the KFTC rejected widely used industry metrics such as "unique visitors" or users' "average duration time" as unreliable,[42] and based its

[32] *Id.*

[33] *Id.* at 111.

[34] All references to the *Naver* decision in the footnotes correspond to the original Korean text.

[35] KFTC Decision, No. 2008-251, Case No. 2007*Seo-Ee*3007, Aug. 28, 2008 (hereinafter "KFTC Decision"). All references to the KFTC decision in the footnotes correspond to the original Korean text.

[36] Pre-roll ads are advertisement clips shown prior to the start of the video.

[37] KFTC Decision, *supra* note 35, at 9-10.

[38] *Id.* at 22; SHC Decision, *supra* note 18, at 3, 19.

[39] KFTC Decision, *supra* note 35, at 20-22.

[40] *Id.* at 12-14. As a result, online portal or search sites that did not provide one or more of the 1S-4C features above were excluded from the relevant market.

[41] *Id.* at 15-16. According to the KFTC, the top three 1S-4C portal sites enjoyed a combined market share of 80.8 percent, therefore triggering the second presumption under Article 4.

[42] In contrast, the SPC accepted similar metrics in calculating Tencent's market share (*Tencent*, *supra* note 2, at 99). *See*, also, Wenming Yang, *Theoretical Reflection and Application Methods for Market Share Criterion Under the Identification of Dominant Market Position on Internet Company*, 3 J. NORTHWEST UNIV. (PHILOSOPHY & SOCIAL SCIENCES ED) 68, 73-74 (2014) (in Chinese), and Ming Ye, *Dilemma and Its Solution for Identifying a Market Dominant Position in the Internet Industry*, 1 STUDIES IN LAW AND BUSINESS 31, 35 (2014) (in Chinese) (both discussing the application of such metrics for cases involving the internet industry under the AML).

calculation on the total revenue of portal sites.[43] According to the KFTC, internet portal platforms operated in two-sided markets, which included one side facing advertisers.[44] Since a stronger user base on the side of users could ultimately translate into higher ad revenue on the other side, and Naver Corp's revenue enabled it to further procure and develop popular content to users, which would in turn increase its user base, the KFTC deemed that revenue was a proper metric for calculating market shares.[45]

On appeal, the Seoul High Court held that the KFTC had erred both in its definition of the relevant market (namely excluding other portal or online sites which did not provide the full set of 1S-4C services, but nevertheless provided competition to Naver Corp), and also its reliance on revenue figures to calculate market shares.[46] According to the Seoul High Court, the intermediary (platform) market for connecting CPs and users would have been the proper relevant market, and the extent CPs relied on Naver.com as a channel to connect with and deliver their content to end users was a critical factor in determining whether Naver held dominant market power.[47] In sum, the KFTC had failed to properly define the relevant market and establish Naver Corp's dominance.

Instead of concluding the analysis at this point, the Seoul High Court proceeded to find that Naver Corp's conduct did not constitute abusive behavior even when assuming, *in arguendo*, that Naver Corp was dominant. It pointed to the fact, among others, that: (i) Naver Corp also did not place pre-roll ads in its own video content, (ii) the restriction was not an outright prohibition but a duty to consult with Naver Corp, (iii) there was reasonable justification for limiting ads that interfered with the user experience to a certain extent, (iv) CPs that did not wish to accede to Naver Corp's terms could provide their content through other internet portal sites, and (iv) that at least one major CP had ended up placing pre-roll ads despite the agreement.[48]

After reiterating its long-held position that the relevant market must be specifically defined in order to determine whether an enterprise holds a dominant market position,[49] the SCK entirely concurred with the lower court in its holdings on how the KFTC had erred in defining the market and calculating market shares based on total revenue.[50] It also agreed with the lower court's assessment that it was difficult to view Naver Corp's conduct as having been carried out with the purpose or intent of maintaining or strengthening monopoly power, and as being one that objectively raised concerns of anticompetitive effects, thus rejecting the KFTC's arguments that Naver Corp had abused its dominance.[51]

[43] KFTC Decision, *supra* note 35, at 16.
[44] *Id.* at 6-8.
[45] *Id.* at 16.
[46] SHC Decision, *supra* note 18, at 19-25.
[47] *Id.* at 22.
[48] *Id.* at 25-28.
[49] *Naver*, *supra* note 13, at 3.
[50] *Id.* at 3-5.
[51] *Id.* at 5-7.

III. HANDLING MARKET DEFINITION UNDER MARKET SHARE-BASED STATUTORY PRESUMPTIONS OF MARKET POWER IN ABUSE OF DOMINANCE CASES

A. Market Definition and Statutory Presumption of Market Dominance

Compared to a prospective merger, one would tend to think that an allegation of an abuse of dominance could lend itself more readily to the argument that one should turn away from market definition and its market share-derived power inferences, and focus on direct evidence of market power, including anticompetitive effects. After all, if the allegation were true, the abusive behavior would have already harmed competition and the effects would likely be cognizable.[52]

There are a few wrinkles to this observation. The first one is that competition laws sometimes allow for abuse of dominance claims that target behavior that have a high propensity or danger of harming competition, even if the harm has not specifically materialized.[53] Another wrinkle is the possible benefits of maintaining the two-step analysis of finding dominance and then identifying competitive harm.

If the above argument were to be carried so far as to conflate both steps into one—essentially substituting the assessment of anticompetitive effects for a finding of dominance, there could be cases where a dominant firm would be over-exonerated by being found not only to have engaged in pro-competitive or otherwise legal conduct, but also lacking market power in the first place.[54] This could conceivably lead to false negatives for other illegal conduct committed at the same time (but not adjudicated in the same case), and under-deterrence against future abuses of the firm's dominant market power.[55]

Yet another wrinkle, and the focus of this article, is when plaintiffs or competition agencies present arguments relying on market share-based statutory presumptions. In order to properly adjudicate contesting claims involving a presumption of dominance based on market shares, the court would have to delineate the boundaries of the market and measure the accused's market share therein.

Whether relying on a presumption of dominance, and defining the market in this process, would be more feasible for the plaintiff (or competition agency) than proving market dominance through other direct or indirect evidence will depend on the specific facts and evidence available for a given case. But, experience shows that a presumption clause will often be utilized, if anything, to bolster the strength of an abuse of dominance claim.

According to a search of the KFTC website database, among the ten most recent abuse of dominance decisions rendered by the KFTC, a total of seven relied in part on the presumption

[52] J. Douglas Richards, *Is Market Definition Necessary in Sherman Act Cases When Anticompetitive effects Can Be Shown With Direct Evidence?*, 26(3) ANTITRUST 53 (2012).

[53] This is the case in Korea, where the courts have recognized that a significant danger of harming competition is sufficient for abuse of dominance claims (*see*, *e.g.*, *supra* note 13 at 6).

[54] Kaplow, *supra* note 6, at 498-501.

[55] *Id.* at 501.

under Article 4 to find dominant market power.[56] In the remaining three cases, it was evident that the respondents enjoyed an absolute (100 percent) or virtual monopoly, thus making a presumption unnecessary. We are not aware of any particular reason to believe that the experience in China would be radically different.[57]

If the Chinese courts will be encountering claims invoking a presumption of dominance, and will likely be required to delineate markets in the process of assessing them, how should one square the SPC's holding that the relevant market need not necessarily be clearly defined in an abuse of dominance case with this reality? We believe that, when taken together with the court's overall determination of market dominance, the aforementioned holding is less of a statement about skirting market definition itself, but more about avoiding the possible pitfalls that can arise during the market definition exercise.

The logical and analytical merits and demerits of defining a relevant market have been extensively discussed in antitrust literature, and continue to generate commentary.[58] Regardless of where one stands on the issue, however, the fact that the market definition exercise in practice can create problematic outcomes seems non-controversial.[59] The core practical concern about the market definition exercise is its potential to either stunt a proper analysis of the facts (particularly, but not always, when market definition is treated as a threshold issue) or force the parties and courts to contort their analyses to conform to defined market boundaries (often caused by the rigid "in-or-out" (of the relevant market) nature of the exercise) that can either lead to seemingly tortured logic or inconsistencies fatal to the claims of either party.[60]

As it turns out in *Tencent*, the SPC from the get go seems to have realized the need to maintain a modicum of flexibility in approaching market definition, particularly in the face of claims relying on a statutory presumption of market dominance. The court, however, did little to instruct on how this flexibility should be exercised, and thus we are left to ponder the possible approaches.[61] In the following, we examine an array of possible approaches that could be taken by Chinese courts (and agencies) for market definition, with an eye on how the Korean courts have approached this matter in the past and more recently in *Naver*.[62]

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[56] *See* http://www.ftc.go.kr/laws/book/judgeSearch.jsp. The search was conducted on January 15, 2014. Decisions involving consent decrees, reassessment of administrative fines, or duplicative cases (totaling six cases) were excluded as non-relevant. The dates of the cases reviewed ranged from Jun. 18, 2008 up to Mar. 26, 2012.

[57] In *Tencent*, Qihoo also utilized AML Article 19 in an attempt to establish Tencent's alleged market dominance.

[58] For an example of a recent debate, *see* articles in 57 ANTITRUST BULL. (2012) (SPECIAL ISSUE: LOUIS KAPLOW'S WHY (EVER) DEFINE MARKETS?).

[59] *See*, *e.g.*, Duncan Cameron, Mark Glick, & David Mangum, *Good Riddance to Market Definition?*, 57 ANTITRUST BULL. 719, 720 (while defending the use of market definition, nevertheless pointing out the imperfections of market definition as a tool to measure market power).

[60] *Id.* at 721.

[61] One could interpret this lack of further guidance as being intentional on the part of the SPC; for example, to allow maximum flexibility for itself and lower courts in the future, thereby enabling case law to develop in a manner that comports with the specific facts and circumstances of the case at hand. This approach may be particularly prudent for a court that is staking out its position on antitrust matters for the first time.

[62] The following list of approaches is not meant to be an exhaustive one nor does it purport to identify and list the most preferable approaches.

B. The Good, The Bad, and The Ugly: Possible Approaches to Market Definition by the Chinese Courts following Tencent

1. The Bad: The Unlikely Extremes

a. Completely dispensing with market definition

The most radical approach from the perspective of the statutory language would be to drop market definition completely. While this would be the preferable approach for those disenchanted with the market definition paradigm, this approach would require the courts to legislate by effectively striking Article 19 from the AML in the form of deliberately ignoring market share-based presumption claims.[63] There is, however, another way to achieve a similar result. One could instead effectively render the market definition exercise meaningless by "backing-in" to market definition only after analyzing the effects of the conduct.[64]

One could conceivably take the SPC's holding that an explicitly and clearly defined market is not necessary for every abuse of dominance case, without further elaborating when it might be necessary, as an effective invitation for courts to ignore market definition in practice. The SPC's remarks that the lack of anticompetitive effects further informed and supported its finding that Tencent lacked a dominant market position,[65] and that market shares do not always have to be assessed in determining market dominance (in other words, market dominance may be determined based on factors other than market shares)[66] would seem to even hint to a backing-in approach.

However, there are reasons to doubt such a proposition. First of all, the SPC, despite stating the above, proceeded nonetheless with an extensive analysis to define the market in *Tencent*.[67] This rebuts the idea that the SPC will allow lower courts to dispense with market definition completely.

Second, from the decision's holding, it does not look like the SPC has wholeheartedly embraced the criticism of the current market definition paradigm despite acknowledging its limitations. In its decision, the court affirmed both the general and specific applicability of the HMT to the case (albeit in a different perspective from the lower court),[68] and its analysis

[63] We characterize this approach as "bad" due to this aspect, and not based on a particular disagreement with criticisms of the market definition paradigm.

[64] Some have argued that this is what U.S. courts often do in practice, at least in merger cases (Peter C. Carstensen, *Introduction*, 57 ANTITRUST BULL. 655, 657 (2012); Kaplow, *supra* note 6, at 509 (citing FTC v. Staples, Inc., 970 F. Supp. 2d 1066 (D.D.C. 1997) as an example)).

[65] *Tencent*, *supra* note 2, at 106.

[66] *Id.* at 111. This means that the courts have some discretion in picking and choosing from the factors listed in Article 18 in their assessment of market dominance. This would be the same for competition agencies or plaintiffs, raising at least theoretically the possibility that direct evidence of anticompetitive effects could be accepted as sufficient to prove market dominance under AML Article 18(6) without defining a relevant market.

[67] *Id.* at 77-98.

[68] *Id.* at 79-81.

essentially follows conventional market definition practice by examining cross-elasticities between proffered substitutes.[69]

Third, while the court deemphasized the importance of market shares and the inference to be drawn from them,[70] the court had to address Qihoo's presumption argument under Article 19, define the relevant market in this process, and calculate Tencent's market share therein. The repeated references to "relevant market" in the AML both in and out of the context of abuse of dominance, and the fact that the statute expressly cites market shares as one of the factors to determine the existence of market dominance, also augur against market definition being pushed aside completely.

In the case of Korea, the SCK has made it abundantly clear that market definition is an important step for analysis in abuse of dominance cases under the MRFTA.[71] It also recently ruled that one cannot substitute an analysis of anticompetitive effects for market definition, effectively rejecting a backing-in approach.[72] As of now, the market definition paradigm seems to be firmly imbedded into the fabric of analysis under the MRFTA, which is not surprising given the court's interpretation of the statutory language that dominance be found in the context of a "particular area of trade."[73] The existence of Article 4 would also likely serve as a material impediment to completely abandoning market definition barring legislative action.

b. Enforcing market definition as a threshold issue in every case

This is the other side of the extreme, which could exacerbate potential problems caused by the market definition exercise mentioned above.

From the *Tencent* decision, it would seem to be fairly clear that the SPC does not intend to make market definition a threshold issue in every abuse of dominance case. It is unclear whether this will be the rule or the exception. But this observation is buttressed by the SPC's statement that courts should redefine the relevant market *ex officio* to the extent possible if they do not agree with the parties' arguments on the market definition, rather than directing the lower courts to dismiss the case if there are flaws in the plaintiff's proffered definition.[74]

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[69] *Id.* at 81. The Anti-Monopoly Committee of the State Council's Guidelines on Defining Relevant Markets (May 24, 2009), *available at* http://www.gov.cn/zwhd/2009-07/07/content_1355288.htm, also expressly refers to the HMT as a prominent method of market definition, and states its importance in the enforcement of the AML. This at least implies that market definition may continue to play an important role in competition law enforcement by Chinese competition agencies.

[70] *Tencent*, *supra* note 2, at 99.

[71] *See*, *e.g.*, SCK Judgment (*En Banc*) of Nov. 22, 2007, Case No. 2002*Du*8626; SCK Judgment of Dec. 11, 2008, Case No. 2007*Du*25183 (both cases were cited by *Naver*, *supra* note 14, at 3). *See*, also, Sung-Hoon Kim, *Regulation of Monopoly and Oligopolies in* 30 YEARS OF THE MONOPOLY REGULATION & FAIR TRADE LAW 167, 188 (Ohseung Kwon ed., 2011) (in Korean) (noting that the above 2002*Du*8626 judgment had confirmed what was already established theory regarding the relevant market).

[72] SCK Judgment of Apr. 26, 2012, Case No. 2010*Du*18703. Although this was a horizontal collusion case, it seems more likely than not that the SCK would also reject a similar approach for abuse of dominance cases.

[73] Jae-Hoon Cheong, *Undue Collusion and Defining the Relevant Market – Supreme Court of Korea, Judgment of April 11, 2013, Case No. 2012Du11829, etc.*, 62(11) *BUBJO* 283 (2013) (in Korean) (discussing the SCK's decision that market definition is required for even cases which would have received *per se* treatment under U.S. antitrust law).

[74] *Tencent*, *supra* note 2, at 78.

Meanwhile, on its face, statements by the SCK that market definition is a necessary step in the analysis to establish market dominance may seem to follow this approach. However, a closer look at *Naver* suggests otherwise, as elaborated further below.[75]

2. The Ugly: The Confounding Tests

a. The "difficulty" test

In its holdings on the necessity of a clearly defined market, the SPC refers to limitations in evidence and data and the complexities of the case and market competition as factors that could render a clear definition of the relevant market "extremely" difficult.[76] Based on such references, one might interpret the court's holding as meaning that market definition might not be strictly required when it is *difficult* to define the relevant market based on the factors mentioned above (or other relevant factors that could complicate market definition, *e.g.*, markets with goods provided free of charge[77]).

The problem with such an approach is that market definition is often a challenging endeavor so the issue would become a matter of degree. The test then quickly becomes vague, confusing, and virtually impossible to administer in a consistent and coherent manner, because perceptions on the level of difficulty are subjective in nature. As such, this approach seems neither feasible nor recommendable.

b. The "character" test

Some may also suggest that the SPC meant to allow dispensing with market definition (or at least deemphasizing it) in specific industries exhibiting certain characteristics (*e.g.*, where innovation is a critical element of competition). One might conceivably base this suggestion on the court's passing comment that the internet industry, in which the relevant market was situated, exhibited highly dynamic competition and the boundaries of relevant markets were far less clear compared to other more traditional industries.[78]

As noted earlier, the SPC did not explicitly qualify or limit the scope of its declaration that a clearly defined market is not always required to a particular industry or market, and one would expect the court to have made its intent clear if it had wished to do so. Moreover, such a test would quickly fall into disarray once lower courts tried to apply it to specific cases. Trying to discern which industries qualify as "non-traditional" industries, or how important innovation or

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[75] In the recent *Dong-A Pharmaceutical* case, the SCK upheld a lower court's decision, which declined to vacate the KFTC's corrective order against the plaintiff regardless of whether the KFTC had erred in defining the market, on the basis that the plaintiff's conduct was found to have harmed competition even in the broader market definition suggested by the plaintiff (SCK Judgment of Feb. 27, 2014, Case No. 2012*Du*27794, 5). The lower court did not affirmatively adopt, or for that matter, reject one or the other definitions suggested by the parties (Seoul High Court Judgment of Oct. 31, 2012, Case No. 2012*Nu*3035, 5). This was, however, a horizontal collusion case, and the SCK may be reluctant to apply the same logic to abuse of dominance cases.

[76] *Tencent*, *supra* note 2, at 77.

[77] The SPC in *Tencent* defined the relevant market despite the fact that IM services are generally provided free of charge. However, this aspect has sometimes led some courts to rule that market definition is not possible when services are provided free of charge (*see*, *e.g.*, Kinderstart.com LLC v. Google, Inc., No. C 06-2057 JF (RS) at *5 (N.D. Cal. Mar. 16, 2007)).

[78] *Tencent*, *supra* note 2, at 96.

some other characteristic of the industry would have to be in order to ignore market definition, could easily lead to contradictory outcomes even for seemingly identical industries, and would fail miserably in providing coherent guidance to companies that wish to avoid liability under the AML. This test seems no less confounding than the difficulty test above.

3. The Good (but Possibly Dangerous?): Approaches Showcased in *Naver* and *Tencent*

a. *Naver*: Avoiding Type II errors by engaging in complete analysis

Perhaps because of Korea's earlier adoption of competition law, the Korean courts seem more orthodox in their approach to the market-definition paradigm compared to the SPC. As mentioned above, market definition has been espoused by the courts as a necessary step in the analysis to determine market dominance. The courts have also adhered to the two-step analysis of market dominance (market power) and anticompetitive effects, treating them as separate and sequential stages of analysis.[79] Under such circumstances, the more one treats market definition as a threshold issue, the specter of Type II errors (false negatives) increases, since an error in defining the market (however small) by the competition authority or plaintiff may result in a rejection of their claims despite actual evidence of anticompetitive harm.

In *Naver*, the KFTC's claims were in tatters—it was found to have erred in defining the market and calculating market shares, and the presumption of dominance it had relied on had crumbled in the process. As mentioned previously, the courts did not, however, choose to conclusively overturn the KFTC's prior ruling right away. They labored on to analyze the competitive effects of the conduct and only after confirming that there was no evidence of anticompetitive harm did they rescind the KFTC's decision against Naver Corp. Such an approach would allow the court to avoid Type II errors that could be caused by market definition.

According to our reading of *Tencent*, nothing would seem to bar lower courts from continuing their analysis despite flaws in the parties' market definition. In fact, (i) the SPC's openness to determining market dominance without considering market shares (at least theoretically),[80] (ii) the court's position that it may redefine the relevant market *ex-officio* if the proffered definition is flawed,[81] and (iii) the possible inclusion of direct evidence of anticompetitive effects as a factor under Article 18(6) together would seem to open the door for such an approach.

Anticompetitive effects were found to be lacking in both *Naver* and *Tencent*, which exonerated the accused firms. But what about cases where there is sufficient evidence of anticompetitive harm? Several U.S. courts have taken the position that in the presence of direct evidence of monopoly power (*e.g.*, actual evidence of price increase or output reduction), market

[79] *See* judgments cited in *supra* note 71.
[80] *Tencent*, *supra* note 2, at 111.
[81] *Id.* at 78.

definition is not necessary in a monopolization case.[82] *Tencent* certainly seems open to this approach based on its repeated statements that the competitive impact of the alleged abusive behavior can inform the determination of dominance.

In the case of Korea, the SCK's decision in the *Dong-A Pharmaceutical* case[83] could arguably be viewed as a broader example of this approach. However, the SCK's statements on market definition as a necessary step for determining market dominance, and the fact that it has maintained a distinction between the elements of market dominance and competitive harm in abuse of dominance cases, would likely make it difficult for courts to completely forgo market definition. The rejection of a backing-in approach of defining the market based on evidence of anticompetitive effects, albeit once again in a horizontal collusion case, also supports this observation.

On a separate note, there is a question whether the SPC may have been too quick in allowing courts to infer a lack of dominant market power from a concomitant lack of (evidence of) anticompetitive effects without any further qualification. While the facts and evidence described by the courts in *Tencent* would seem to support a finding that Tencent lacked dominance in the putative market, the fact that the conduct was carried out for only a single day could beg the question of whether anticompetitive effects might have been visible if it had continued for a more prolonged period of time.

As discussed earlier, there are risks to conflating the elements of market dominance and anticompetitive effects, particularly in a scenario where evidence of anticompetitive effects are lacking. While the outcome should certainly be a rejection of liability in such a case, this would not necessarily mean that the firm lacked market power.

b. *Tencent*: Avoiding Type I errors by allowing imprecisely defined markets

A careful reading of *Tencent* suggests that perhaps the true meaning of the SPC's holding on market definition was not that courts may dispense with market definition (even in limited cases) despite suggestions otherwise.[84] Instead, the court may have meant to convey that, while market definition is a normal step of the analysis (which would particularly be the case when confronted with a claim invoking Article 19), one may proceed to determine market dominance (including calculating market shares for assessing claims involving Article 19) on the basis of an *imprecisely* defined market, *i.e.*, one without sharply delineated boundaries.

The SPC did not declare that defining the market is unnecessary *per se*, but that the relevant market does not necessarily have to be explicitly and clearly defined in every abuse of dominance case.[85] The fact that Qihoo had argued in its appeal that the Guangdong High People's Court had erred by failing to clearly and precisely define the market is informative in

[82] *See* Broadcom Corp. v. Qualcomm Inc., 501 F.3d 297, n.3, and other examples cited in ANTITRUST LAW DEVELOPMENTS, *supra* note 8, at 229 n.20. The U.S. Supreme Court also took this position in FTC v. Ind. Fed'n of Dentists, 476 U.S. 447, 460-61 (1986) for Section 1 of the Sherman Act.

[83] *See* n.75.

[84] Ning et al., *supra* note 3, at 2 (stating that market definition is not an "essential step" for abuse of dominance cases after *Tencent*).

[85] *Tencent*, *supra* note 2, at 77.

this regard. Furthermore, the SPC's discussion on whether to expand the definition of the relevant market to include other internet platforms is indicative of such an approach. The court declined to affirmatively define the relevant market as the internet platform market,[86] which later meant that internet platforms (other than those providing IM services) were not considered in calculating the market share of Tencent under Article 19. At the same time, however, the court did not completely exclude such platforms from the analysis. Instead, it stated that while it would not principally consider competition from internet platforms in defining the relevant market, it would nonetheless consider the competitive constraints provided by such platforms in assessing Tencent's position in the market.[87]

It had good reason to do so. While it seemed likely that such platforms could exert competitive constraints on Tencent (particularly in terms of competing for the attention of users),[88] simply including all internet platforms in the relevant market may have likely resulted in an understatement of Tencent's actual market power.[89] Faced with the in-or-out problem of market definition for internet platforms, the SPC decided *out* for Article 19 (calculation of market shares), but *in* (at least to some extent) for the final determination of market dominance under Article 18. Its genius was in utilizing Article 18's non-exclusive list of factors (and likely the catch-all clause in Article 18(6)) for determining dominance to recognize potential competitive pressure on Tencent that would have been difficult to fully capture in the market definition exercise.[90]

By defining the relevant market to be the IM services market, the SPC was now confronted with a significant market share that triggered a presumption of dominance. Because a finding of dominance in the first stage of the analysis can color the court's following assessment of competitive harm,[91] such presumptions may entail concerns of Type I errors (false positives). This time the SPC, armed with evidence under other factors cited in Article 18 including competitive pressure outside of the defined market (*e.g.*, internet platform competition), overturned the presumption and concurred with the lower court's decision that Tencent lacked a dominant market position.[92]

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[86] *Id.* at 91-92.

[87] *Id.* at 93.

[88] *See* David S. Evans, *Attention Rivalry Among Online Platforms*, 9(2) J. COMPETITION L. & ECON. 313 (2013), *available at* http://jcle.oxfordjournals.org/content/9/2/313.full.pdf+html?sid=fd6b5ae9-2c16-4f2f-8395-d8f3b23773b5, for a fuller discussion on characterizing competition in the online industry as one for attention.

[89] *Tencent*, *supra* note 2, at 92.

[90] To the authors' knowledge, the SCK has not taken such an approach in past cases, and there is no indication that this is a real possibility in the future. That being said, *Tencent* does make one ponder whether the SCK could also interpret the factors for determining dominance in MRFTA Article 2(vii) to allow for a determination without (primarily) considering market shares.

[91] Kaplow, *supra* note 6, at 498 (noting that "many worry that a finding of substantial market power will automatically, or at least too readily, lead to condemnation, even when no improper behavior is present.")

[92] It seems more likely than not that the force of a presumption of dominance under Article 19 will continue to remain weak since the plaintiff (or competition agency) may well have to contend again with certain facts and evidence, which it had managed to exclude from the analysis during the market-definition stage, when the court makes its final assessment of dominance under Article 18.

Utilizing imprecisely defined markets may allow future courts to avoid the problems ensuing from the in-or-out problem of market definition, and also overcome Type I errors in cases where a presumption of dominance has been triggered. This approach would also allow courts and the parties to avoid being forced into contorted arguments to adhere to a particular definition of the market by providing flexibility in determining market dominance.

However, this approach is not without its dangers. The effective bifurcation of market definition (essentially allowing differently defined markets for Articles 18 and 19) through blurring the boundaries of the relevant market could result in confusion when analyzing the possible competitive harm of the behavior since courts may feel unsure which definition to follow. Also, until the courts (or perhaps to be more accurate, economists) come up with a reliable and coherent method to properly weight the competitive restraints provided by competition at the fringe or near the fuzzily defined market boundary, utilizing imprecisely defined markets may prove to be insufficient in overcoming the potential pitfalls of the market definition exercise. In addition, allowing impreciseness can introduce much needed flexibility, but it can also entail confusion and unpredictability.[93]

IV. CONCLUDING REMARKS

We expect the SPC to have opportunities to clarify its holding in *Tencent* in the future. However, abuse of dominance cases tend to be a rarer breed within the antitrust lexicon, and it may take some time until the SPC finally meets such an opportunity, even if it wishes to do so. Until then, the lower courts and competition agencies will have to craft their own paths toward handling market definition while confronting claims on presumptions of dominance.

The forgoing discussion sheds light on some of the paths that the lower courts may wish to consider, and possibly choose to explore. What is clear from the above is that there remains much work to be done, particularly if one takes the *Tencent* holding to mean that the courts will now entertain imprecisely defined markets in their analysis. It is one thing to allow for a pinch of impreciseness in a single case to obtain the right amount of seasoning. It is a completely different thing to introduce indiscriminate sprinklings of fuzziness into market definition and create a stew of uncertainty. The challenge is how to be discreet, and the irony is that the SPC may well be asked to draw the line once again.

[93] As a final note, any shift away from the market-definition paradigm, if anything, increases the importance of properly conducting the analysis of competitive harm to avoid both false positives and negatives. One easy mistake to make is equating harm to the business of a particular competitor or group of competitors as harm to competition. Fortunately, both the SPC and SCK seem to have managed to avoid this mistake by expressly rejecting arguments that harm to a particular business or competitor was sufficient to establish abusive behavior (*Tencent*, *supra* note 2, at 108; *Naver*, *supra* note 13, at 6-7).