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# **Abuse of Dominant Position in China and the EU**

A Comparative Legal Study

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# Abstract

This thesis presents the Chinese and European competition laws on abuse of dominant position. The thesis starts with an introduction, and goes on to present the purpose of the study, which is to determine the similarities and differences between the Chinese and European prohibitions on abuse of dominant position.

After the introductory part, consisting of background, method, material and previous research, the respective prohibitions are described in different aspects. The aspects are namely system, purpose, scope of application, what constitutes dominance and what constitutes abuse. Thereafter, the two prohibitions are compared. In the comparison, similarities such as similar purposes and similar scope are presented. The Chinese and European prohibitions turned out to be very similar in what constitutes a dominant position and abuse. The systematics however differ more, and so do the rules on extraterritorial application.

In the concluding remarks, the results of the thesis are highlighted and the author shortly analyses the results.

Keywords: *Chinese competition law, European competition law, Competition law, Comparative law, Anti-monopoly law, Tencent vs Qihoo.* 中华人民共和国反垄断法

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# List of Abbreviations

ADP - Abuse of Dominant Position

AML - *Zhōnghuá rénmin gònghéguó fǎn lǒngduàn fǎ* 中华人民共和国反垄断法. The Anti Monopoly Law (of China)

CMLR - Common Market Law Reports

ECJ - European Court of Justice

ECR - European Court Reports

EU - European Union

MOFCOM - *Zhōnghuá rénmin gònghéguó shāngwù bù* 中华人民共和国商务部 [Ministry of Commerce of the People's Republic of China]

NDRC - *Zhōnghuá Rénmín Gònghéguó Guójiā Fāzhǎn hé Gǎigé Wěiyuánhùi* 中华人民共和国国家发展和改革委员会 [National Development and Reform Commission of the People's Republic of China].

NPC - *Quánguó rénmin dàibiǎo dàhuì* 全国人民代表大会 [National People's Congress]

NPCSC - *Quánguó rénmin dàibiǎo dàhuì chángwù wěiyuánhùi* 全国人民代表大会常务委员会 [Standing Committee of the National People's Congress]

SAIC - *Guówùyuyàn Gōngshāng Xíngzhèng Guǎnlǐ Zǒngjú* 国家工商行政管理总局 [State Administration for Industry and Commerce].

SPC - *Zhōnghuá Rénmín Gònghéguó Zuìgāo Rénmín Fǎyuàn* 中华人民共和国最高人民法院 [Supreme People's Court of the People's Republic of China]

SOE - State Owned Enterprise.

TFEU - Treaty on the Functioning of the European Union.

# 1 Introduction

For decades, legal systems outside the West were mostly seen as trivial.<sup>1</sup> Globalization has however lead to increasing cross-cultural contacts, which in turn has generated a stronger interest in non-Western legal systems.<sup>2</sup> It is nowadays valuable for lawyers as well as businessmen to understand foreign legal systems.<sup>3</sup> In order to deepen our knowledge of Chinese<sup>4</sup> law, as well as of our own laws, the purpose of this bachelor's thesis is to compare Chinese competition law with competition law of the European Union (EU). This thesis is limited to analyzing Abuse of Dominant Position (ADP).<sup>5</sup>

ADP occurs when a company with a large market share uses that market share in ways that obstructs competition in an unfair way. The first prohibitions on anti-competitive behavior in Europe were enacted in 1951,<sup>6</sup> and the provisions on ADP have remained largely intact since the Treaty of Rome of 1957.<sup>7</sup> In China, the first law on anti-competitive behavior is the AML (*Zhōnghuá rénmin gònghéguó fǎn lǒngduàn fǎ* 中华人民共和国反垄断法), enacted in 2007. The AML is in my opinion a suitable symbol of China's move from flat-market communism to capitalism. 40 years ago, in communist China, private companies were not allowed. Today, the AML promotes competition between private entities. For this reason, the AML has been dubbed the 'Chinese economic constitution'.<sup>8</sup>

There are many reasons as to why a comparison between EU and Chinese competition law is of interest. Some have to do with comparative legal studies in general, others more specifically with Chinese law.

The *first* reason to engage in comparative legal studies is, just as with other academic studies, the knowledge itself.<sup>9</sup> One's own legal system's culture and ideology is often taken for granted. Through comparative legal studies, a law-practitioner or student can enhance his or her knowledge about the foreign legal system as well his or her own legal system.<sup>10</sup> Thus, it

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<sup>1</sup> Valguarnera p 151.

<sup>2</sup> Valguarnera p 151.

<sup>3</sup> Valguarnera p 151.

<sup>4</sup> In this thesis, China refers only to PRC, thus excluding Taiwan, Macau and Hong Kong.

<sup>5</sup> This means that other parts of competition law such as the laws on competition-restricting contracts and rules on business concentration will not be analyzed.

<sup>6</sup> Whish & Bailey p 49.

<sup>7</sup> Jones p 504.

<sup>8</sup> Liu p 255.

<sup>9</sup> Valguarnera p 142.

<sup>10</sup> Sacco p 4f. In doing this, comparative law could also be a method used in humanities or social science, since they also tend to show differences in societies and culture, in how societies tend to regulate different areas of life, whether it is social/economic/religious differences, see Valguarnera p 142.

helps us understand flaws or perks of our own competition law, by comparing solutions and effects of other legal systems.

The *second* reason is that comparative law-studies can be valuable in practice, in at least two different ways. Comparative law can be useful when designing legal systems, by drawing inspiration from others.<sup>11</sup> It can also be useful for businesses wanting to penetrate a new market.<sup>12</sup>

The *third* reason is that comparative studies are a valuable tool for lawyers from different legal systems to be able to communicate with each other.<sup>13</sup> Globalization means more contacts cross borders. Understanding that a term or function does not exist in another legal system therefore helps cross border contacts/business.

The *fourth* reason is that, since competition law often is extraterritorial,<sup>14</sup> it might have an impact on other markets. This is due to companies doing business in Europe as well as China.<sup>15</sup>

This thesis is a bachelor's thesis in Sinology. For that reason, the focus of this essay will be on Chinese competition law. The Chinese prohibition on anti-competitive behavior will be compared with the European counter-part, in order for us to understand the differences between the two.

I got the idea to write about Chinese rules on ADP when I heard about an interesting case in Chinese competition law between two software giants in China, Qihoo (*Qíhǔ Sānliùlíng* 奇虎 360)<sup>16</sup> vs Tencent (*Téngxùn Kònggǔ Yǒuxiàn Gōngsī* 腾讯控股有限公司)<sup>17</sup>. What was interesting to me is that the SPC (*Zhōnghuá Rénmín Gònghéguó Zuìgāo Rénmín Fǎyuàn* 中华人民共和国最高人民法院) concluded that Tencent was not a dominant actor, even though they had a market share above 80 %. Also noteworthy is that the case is the first decision by the SPC in the field of competition law.<sup>18</sup> My reaction back then was that a European Court

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<sup>11</sup> An example of that is roman law in Europe, later the French Code Civil and the transplanted of the Swiss civil code in Turkey, see Valguarnera p 142.

<sup>12</sup> Valguarnera p 151.

<sup>13</sup> Valguarnera p 143.

<sup>14</sup> Extraterritorial law means that it applies outside its main jurisdiction. For example, extraterritorial Chinese law applies in Europe under certain circumstances. This will not be further explained here.

<sup>15</sup> See for example AML Article 2.

<sup>16</sup> Qihoo is a Chinese company that offers internet and mobile security products. According to the company itself, they had 496 million monthly users in June 2014, see <https://www.360totalsecurity.com/en/about> (2016-01-04)

<sup>17</sup> Tencent is China's largest and most used Internet service portal. Tencent Ltd is listed on the Hong Kong Stock Exchange. <http://www.tencent.com/en-us/index.shtml> (2016-01-04)

<sup>18</sup> See *Qihoo 360 vs Tencent: First Antitrust Decision by The Supreme Court*, available at: <https://www.competitionpolicyinternational.com/assets/Uploads/AsiaOctober214.pdf> (2016-12-13)

would probably not have reached the same conclusion. That is how I came up with the idea to compare the Chinese and European prohibitions of ADP.

## 2 Purpose of the study

The purpose of this study is to compare the European and Chinese prohibitions of ADP. This thesis has two main research questions, which I split into different sections.<sup>19</sup> The two main research questions are:

- *What similarities are there between the European and Chinese prohibition of ADP?*
- *What differences are there between the European and Chinese prohibition of ADP?*

To answer these questions, I will divide them into different sections. I will compare the competitions laws' purpose, systematics and scope of application. I will also compare what constitutes dominance and what constitutes abuse. I will compare the laws and regulations concerning ADP, as well as case law. I will also look deeper into a high profile Chinese case, the above mentioned Qihoo vs Tencent case. The reason for this is that I think it is an interesting example of Chinese competition law being applied in practice. It is also a famous case that was well reported on when concluded.

Since this is a bachelor's thesis, the scope has been limited in many ways due to space and time concern. Since I deem rules on block exemptions, special rules concerning public services and state-owned enterprises, sanctions and objective justifications to be too complicated for a Sinology thesis, I have excluded them. For the same reason I have not looked deeper into how relevant markets are defined.

I have chosen to include references to notable cases I have come across in my research, and I have analyzed one case deeper. I have not looked at all available cases concerning ADP in Europe and China, which might affect the outcome of this thesis.

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<sup>19</sup> In 7.2-7.3 the different sections will be further explained.



### 3 Disposition

In the following chapters, the purpose and methodology will be presented. After that, a short presentation of ADP follows, for those unfamiliar with legal studies. After that, European and Chinese competition laws will be presented one by one. The presentations will follow the same pattern, starting with an introduction of the system of the competition laws, followed by the purpose, scope of application, what constitutes dominance and what constitutes abuse. After the laws have been presented individually, the two will be compared. After that, the analysis will be summarized in a few key points, basically the findings of this study. Finally, some suggestions for further research will be presented.

## 4 Theories and Previous Research

### 4.1 Comparative law

#### 4.1.1 Introduction

Laws are mainly bound to national or regional circumstances.<sup>20</sup> It is therefore possible to speak of *e.g.* Swedish, Chinese or European law (unlike, for example, Swedish, Chinese or European math).<sup>21</sup> Thus it is possible to compare legal systems of different nations or regions. The comparative legal method is “the study of, and research in, law by the systematic comparison of two or more legal systems; or parts, branches or aspects of two more legal systems”.<sup>22</sup>

Comparative law encompasses at least four methods: comparative legal history, study of legal transplants, comparative study of legal cultures and functionalism.<sup>23</sup> This thesis is a functionalistic legal study, and therefore functionalism will be explained in the following section.

#### 4.1.2 Functionalism

There is no single ‘functional method’, instead there are many.<sup>24</sup> However, functional comparatists do agree on some things. For example, they all focus not only on the wording of the rules but also on the function of the rules.<sup>25</sup> Therefore, such studies often focus on judicial decisions instead of only terminology. Also, the functions themselves serve as objects of the comparison.<sup>26</sup> Objects are comparable if they serve a similar function in the two legal orders.

One of the most influential comparative legal scholars explained functionalism in the following way: *The basic methodological principle of all comparative law is that of functionality. (...) Incomparables cannot usefully be compared, and in law the only things which are comparable are those which fulfill the same function. (...) The proposition rests on what every comparatist learns, namely that the legal system of every society faces essentially*

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<sup>20</sup> Valguarnera p 141.

<sup>21</sup> Valguarnera p 141.

<sup>22</sup> See Kamba p 486.

<sup>23</sup> Michaels p 341.

<sup>24</sup> Michaels p 342.

<sup>25</sup> Michaels p 342.

<sup>26</sup> Michaels p 342.

*the same problems, and solves these problems by quite different means though very often with similar results.*<sup>27</sup>

The purpose of the principle is, first of all, to avoid that the analysis is misled by different meanings of similar terms. Legal terms have a specific meaning in legal systems, often even with a different meaning than in the country's own spoken language.<sup>28</sup> When engaging in legal comparisons, one should therefore use the function of the term as *tertium comparationis*, which basically means a steady ground to stand on when doing the comparison – a neutral ground so to speak – to be able to compare the two legal sources without looking at foreign laws and judging it from one's own nation's legal perspective.

The principle of functionality has been criticized because of the so called *presumptio similitudinis*, which means that the principle presumes that different legal systems (except parts heavily affected by political or religious reasons) lead to the same result by different means.<sup>29</sup> The critics mean that the principle goes against basic principles of academic methods. *Firstly*, the comparative method should instead try to falsify a hypothesis, not prove it to be correct. *Secondly*, similarities should not be actively preferred before differences. The viewpoint should instead be neutral. *Thirdly*, the presumption often only comes true if all unique features are removed. In other words, the presumption leads to an underestimation of the cultural context.

In defense of the principle, Ralf Michael points out that the theory was written when comparative studies were looked upon as undoable.<sup>30</sup> The presumption therefore had a rhetorical purpose. Michaels also notes that back then legal systems usually came up with similar practical results, meaning that legal systems that solve similar problems will produce rules that solve the problems similarly, and that those rules therefore are functionally equivalent. Rules can however differ in many other ways; therefore, *presumptio similitudinis* is a tautology. Since only rules that have the same function can be compared, it is also obvious that they will be functionally equivalent. Therefore, the functionalistic principle does not actually prefer similarities to differences.

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<sup>27</sup> See Zweigert & Kötz p 34 (cited in Valguarnera p 152 f).

<sup>28</sup> Valguarnera p 153.

<sup>29</sup> Valguarnera p 153.

<sup>30</sup> Valguarnera p 154.

## 4.2 Competition Law

### 4.2.1 Introduction

More than 125 jurisdictions have enacted competition laws.<sup>31</sup> The purpose of competition law is to protect the process of competition to maximize consumer welfare.<sup>32</sup> Without such rules, a company (or companies) with strong market power could hurt consumer welfare by *e.g.* raising prices or suppressing innovation.<sup>33</sup> Competition law restricts certain behaviors that are harmful to the competition process. The behaviors that are prohibited are (1) abusive behavior by dominant actors, (2) anti-competitive agreements, (3) mergers between competitors and (4) state-controlled restrictions. As mentioned above, this thesis focuses on the first mentioned one, abusive behavior by dominant actors (1).

In the following sections, the basics of the theory of competition will be presented as well as criticized.

### 4.2.2 Theory of Competition

Competition can be described as 'a process of rivalry between firms ... seeking to win customers' business over time'.<sup>34</sup> There is a growing consensus that markets deliver better outcomes when companies on the market are competing.<sup>35</sup> This conclusion is reached based on economic theory.<sup>36</sup>

Per neo-classical economic theory, a society's overall wealth is maximized when allocative and productive efficiency is achieved, which can only be reached in a competitive market.<sup>37</sup> Other benefits include maximized gains to consumers and stimulated innovation.<sup>38</sup>

The opposite of competition is monopoly. The negative effects of monopolies are that the producer can raise prices since the producer is responsible for all the output.<sup>39</sup> The output will be lower, and consumers will have to pay more than they would under perfect competition. Therefore, there is allocative inefficiency. The producer might also not feel the need to be innovative.

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<sup>31</sup> Jones p 505.

<sup>32</sup> Whish & Bailey p 2.

<sup>33</sup> Whish & Bailey p 2f.

<sup>34</sup> Whish & Bailey p 3.

<sup>35</sup> Whish & Bailey p 4.

<sup>36</sup> Whish & Bailey p 4.

<sup>37</sup> Whish & Bailey p 4.

<sup>38</sup> Whish & Bailey p 4.

<sup>39</sup> Whish & Bailey p 6.

### 4.2.3 Questioning the Theory of Competition

*Firstly*, the theory of perfect competition is only a theory. It presumes that each market has an infinite number of buyers and sellers, there are no barriers of entry (or exit), all products produced are identical and consumers have perfect information about market condition.<sup>40</sup> An ordinary market is somewhere between that and a monopoly.<sup>41</sup> Regulations can be put in place to enhance some of the cornerstones of perfect competition, such as the amount of information available to consumers.<sup>42</sup>

*Secondly*, the theory depends on the notion that all businesses and businessmen act rationally (to maximize profit), which is certainly not the case.<sup>43</sup> *Thirdly*, the theory does not include some costs of production, such as air pollution, which might be a cost to society in a different way.<sup>44</sup> *Finally*, the theory fails to encompass the dynamic nature of markets, as a dominant actor for a certain period might be surpassed by a competitor later.<sup>45</sup>

### 4.2.4 Abuse of Dominant Position

One way that competition can be restricted is through actions by a dominant actor.<sup>46</sup> The dominant actor does not have to be a monopolist. An example of abusive behavior by a dominant actor is reducing its prices to less than what it costs to produce the items to drive another actor out.<sup>47</sup> After the competitor has been driven out, the actor can once again raise the prices. Such behavior is called predatory pricing, and is only one way of abusing a firm's dominance.

The reason such behavior is bad was explained above; it restrains competition which ultimately hurts consumers.

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<sup>40</sup> Whish & Bailey p 8.

<sup>41</sup> Whish & Bailey p 8.

<sup>42</sup> Whish & Bailey p 8.

<sup>43</sup> Whish & Bailey p 8.

<sup>44</sup> Whish & Bailey p 9.

<sup>45</sup> Whish & Bailey p 9.

<sup>46</sup> Whish & Bailey p 3.

<sup>47</sup> Whish & Bailey p 3.

# 5 Chinese Competition Law

## 5.1 Background

The PRC's civil law is modeled on that of Germany, and was initiated in 1902 when Empress Cixi (*Cixī Tàihòu* 慈禧太后) was presented with the German Civil Code translated into Chinese.<sup>48</sup> When it comes to Chinese law, few legal fields can rival the attention that the AML has received within the PRC and overseas.<sup>49</sup> Globalization has surged the foreign interest and knowledge of the AML.<sup>50</sup> Because of the law's extraterritorial effects, conduct that takes place abroad but affects the Chinese market can cause the Chinese competition authorities to intervene.<sup>51</sup>

Working on Anti-Monopoly legislation started as early as at the 7<sup>th</sup> NPC (*dì qī jiè quánguó rénmin dàibiǎo dàhuì* 第七届全国人民代表大会) in 1988, so about 20 years before the AML was enacted.<sup>52</sup> Drafting an actual competition law started in China in 1994 when it was included in the legislation plan of the NPSC in the 8<sup>th</sup> NPC (*dì bā jiè quánguó rénmin dàibiǎo dàhuì chángwù wěiyuánhui* 第八届全国人民代表大会常务委员会).<sup>53</sup> The process of legislation, including study and research of foreign competition laws took 13 years. The process was speeded up towards the end partly due to nationalist and protectionist sentiments against expansion of foreign companies.<sup>54</sup> The AML was adopted at the 29<sup>th</sup> session of the standing committee of the 10<sup>th</sup> NPC (*dì èrshíjiǔ cì quánguó rénmin dàibiǎo dàhuì chángwù wěiyuánhui dì shí cì huìyì* 第二十九次全国人民代表大会常务委员会第十次会议) on 30 August 2007, and became effective on August 1<sup>st</sup> 2008.<sup>55</sup>

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<sup>48</sup> Jones p 1. Japan had already adopted a civil code based on German law in 1886.

<sup>49</sup> Zhang (2014) p 671, with citations for further reading: "Bruce M. Owen et al., *Antitrust in China: The Problem of Incentive Compatibility*, 1 *J. COMPETITIONL. & ECON.* 123, 126– 128 (2005) (discussing the economic context in which the AML may be enforced); Wentong Zheng, *Transplanting Antitrust in China: Economic Transition, Market Structure, and State Control*, 32 *U. PA. J. INT'LL.* 643,652– 71 (2010) (elaborating three economic forces that shape Chinese competition law and policy: China's current transitional stage, its market structures, and pervasive state control in the economy); Deng Fei & Gregory K. Leonard, *The Role of China's Unique Economic Characteristics in Antitrust Enforcement*, in *CHINA'S ANTI-MONOPOLY LAW: THE FIRST FIVE YEARS* 59, 60– 73 (Adrian Emch & David Stallibrass eds., 2013) (outlining a number of the characteristics of the Chinese economy that could shape the enforcement of the AML)."

<sup>50</sup> Zhang (2014) p 672.

<sup>51</sup> See AML Article 2 and Zhang (2014) p 672.

<sup>52</sup> Liu p 254.

<sup>53</sup> Liu p 254 and US CoC p 19. See also Williams p 165. Substantive rules go back to 1980, when *Interim provisions on carrying out and protecting socialist competition* were issued by the State Council.

<sup>54</sup> US CoC p 20, Citing SAIC Fair Trade Bureau "Multinationals' Anti-competitive behavior in China and Counter-measures Therefor), Industry and Commerce Administration (Mar. 1 2004).

<sup>55</sup> US CoC p 1.

The AML has been praised as China's economic constitution and as a milestone of China's economic development.<sup>56</sup> However, concern has been raised about how the AML will be implemented and some provisions have been heavily criticized.<sup>57</sup> Before enacted, high ranking legislators stressed the importance of using competition law to curb influence of foreign companies, while also using it to make room for domestic companies.<sup>58</sup> Doubts have accordingly been raised over whether the AML is compatible with a market economy based on private freedom and competition.<sup>59</sup> Foreign observers predicted that enforcement of AML would differ from American and European enforcement.<sup>60</sup> It is also unclear how much the reference to a socialist market economy hampers the AML.<sup>61</sup>

## 5.2 Litigation

Another important factor concerning the AML (and litigation in China in general) is the lack of judicial oversight.<sup>62</sup> No administrative decision by enforcement agencies has been appealed since the AML went into effect.<sup>63</sup> Suing the government can prove to be a great risk and a great cost to any company.<sup>64</sup> Three factors have been holding companies back from consorting to such action:<sup>65</sup>

- i) Businesses could face a (retaliatory) backlash when dealing with the agency in the future.
- ii) The chance of winning such a case is minimal.
- iii) Enforcement agencies apply generous leniency toward firms who admit their guilt and comply with the government agencies' demands.<sup>66</sup>

Another concern is the lack of expertise within *xíngzhèng fǎyuàn* 行政法院 [administrative courts] necessary to handle technical economic analysis associated with antitrust-cases.

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<sup>56</sup> Liu p 254.

<sup>57</sup> Liu p 254.

<sup>58</sup> US CoC p 22.

<sup>59</sup> Liu p 254, with cit.

<sup>60</sup> Zhang p 3.

<sup>61</sup> Liu p 254.

<sup>62</sup> Zhang (2014) p 677.

<sup>63</sup> Zhang (2014) p 677.

<sup>64</sup> Zhang (2014) p 677.

<sup>65</sup> See Zhang (2014) p 677.

<sup>66</sup> Although leniency is also present in other jurisdictions, they are usually only granted to companies that help uncover a secret cartel, see Zhang (2014) p 677 with referrals to 'the Milk Powder Decision'.

*Mínshì fǎtíng* 民事法庭[civil courts] have instead been praised for being more adept with economic reasoning and analysis.<sup>67</sup>

### 5.3 Bureaucracy and Policy

Enforcement of the AML are split among the three government agencies MOFCOM (*zhōnghuá rénmin gònghéguó shāngwù bù* 中华人民共和国商务部), NDRC (*Zhōnghuá Rénmín Gònghéguó Guójiā Fāzhǎn hé Gǎigé Wěiyuánhui* 中华人民共和国国家发展和改革委员会) and SAIC (*Guówùyuyuàn Gōngshāng Xíngzhèng Guǎnlǐ Zǒngjú*). MOFCOM is responsible for merger-review, while NDRC is responsible for non-price related monopolistic conduct and SAIC is responsible for price-related monopolistic conduct. Although NDRC and SAIC had only about 15 and 8 people employed in the central ministry in Beijing in 2014, they have thousands of staff members on the local level with authority to enforce the AML.<sup>68</sup> Concerns have been raised about various political interests of the ministries and provinces charged with enforcing government policies within their respective jurisdictions.<sup>69</sup> State control and structural distortions can be said to still be the norm, although agencies and courts have made steady progress when it comes to law enforcement.<sup>70</sup> The CCP also still retains a dominant role.<sup>71</sup>

There have been complaints concerning that the AML was ‘only catching flies but not the tigers’, meaning that monopolistic behavior of the big state owned enterprises (SOEs) was not tackled. Since then, more behavior by SOEs has been investigated. Examples include China Telecom, China Unicom, Maotai, Wuliangye. Problems remain, especially on a local level, where protection of local SOEs (also called local champions) occurs due to the contribution to local GDP. The anti-monopoly laws are designed to deal with market failures such as monopolistic conduct. Since the protection of SOEs happens on a political level, the AML can be said to have to deal with failure at a political level, and not just on a market level.<sup>72</sup>

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<sup>67</sup> Zhang (2014) p 677.

<sup>68</sup> Zhang (2014) p 690 and 700.

<sup>69</sup> Zhang (2014) p 687.

<sup>70</sup> Zheng p 471.

<sup>71</sup> Sevastik p 288.

<sup>72</sup> Zhang (2014) p 705.



## 6 Material

Since this is a thesis using a comparative legal method, the main sources and materials used will be legal sources. However, since it is a thesis in Sinology, it is appropriate to include legal sources in Chinese. The sources I have used in this essay have been found through online search engines, speaking with lawyers (colleagues) in China, my own legal practice in China and through e-mail conversations with library staff. This thesis has used legal documents, articles and books from China as well as the EU. Since lawyers from international law firms with offices in China have released articles easily accessible online, they have also been used in this thesis.

I am certain that there are valuable sources that I have not come across, which might have an effect on the outcome of this thesis. However, considering that I have covered all the major laws on ADP in both the EU and China, I have the main sources covered. I have not covered all the relevant case law, since that would be too big of a task for a bachelor's thesis. Also, sector specific laws that might affect dominant positions have not been analyzed (such as any laws on internet, cellular phones, etc.).

Sources only available in Chinese have been interpreted by me, with the help of dictionaries. Although I have been cautious, there might still be mistakes in the translation. The Chinese AML is available online in Chinese and with an official English translation.<sup>73</sup> Rules by SAIC and NDRC are available in Chinese on the agencies' webpages, English translations are available on the webpages of some law firms, which I found to be credible enough to use as help to translate the original documents. Overall, finding accessible material in English about Chinese competition law proved to be quite difficult and time consuming. Also, finding Chinese case law can be quite difficult, although the SPC has been applauded for beginning to publish rulings online in July 2013.<sup>74</sup>

Since legal topics in China can be quite politically sensitive, I have made sure that my sources are verifiable and trustworthy by selecting internationally renowned authors' work. Sources for the choice of legal method is a Swedish publication used in Uppsala University's law program, "Juridisk Metodlära", as well as prominent Comparative law scholars' publications. The sources for EU law are mainly official EU publications together with a

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<sup>73</sup> Adopted at the 29th meeting of the Standing Committee of the 10th National People's Congress of the People's Republic of China on August 30, 2007. Available in Chinese at [http://www.gov.cn/flfg/2007-08/30/content\\_732591.htm](http://www.gov.cn/flfg/2007-08/30/content_732591.htm) and in English at [www.china.org.cn/government/laws/2009-02/10/content\\_17254169.htm](http://www.china.org.cn/government/laws/2009-02/10/content_17254169.htm).

<sup>74</sup> Slaughter & May p 17.

comprehensive book by Whish & Bailey. As for Chinese Competition law, I have used official Chinese publications together with a book published by Professor *Liu Jifeng* 刘继峰 and various articles written by scholars and other legal authors.

# 7 Method

## 7.1 Basic Legal Method

Since some readers are not familiar with law research, I will give a short description before I go on to present the comparative legal method.

The purpose of legal research can shortly be described as reconstructing a rule, or solving a legal problem by applying a rule to the problem.<sup>75</sup> Legal method is mainly about looking to legal sources such as laws, case law, the legislature's motives and legal literature when reconstructing a law to declare 'what the law is'.<sup>76</sup> Together they form rules that can be applied to situations. Quite often, the task for someone practicing law is to describe a situation from a legal situation.<sup>77</sup>

To further help with understanding law research, I have constructed a simple example of how the different forms legal sources work together to form a rule, see below.

**Example.** Let's say the legislature enacts a law that says "The income tax is 30 %". Although the rule seems clear at a first glance, what does *income* constitute? Does that include benefits from pensions, or gifts from your employer?

In an unclear case, such as this example, perhaps the legislature would let a government agency decide what constitutes income. In other cases, perhaps where a topic is too politically sensitive, or the government wants to let judges with expertise in an area decide the details, the legislature might leave it up to the courts to decide exactly what would constitute, for example, income. Another way of deciding what income means is by defining the term in the motives behind the law.

How much weight each source of law, i.e. laws, agency regulations, case law and motives, differs between different parts of the world and even legal fields, often depending on how politically sensitive the topic is. This example is important to remember throughout this thesis, since Europe or China might focus more on case law or agency regulations to define important terms.

A sophisticated form of legal method is the comparative legal method, where one first must clarify what the law is in more than one legal system before a comparing.<sup>78</sup>

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<sup>75</sup> Kleineman p 21.

<sup>76</sup> Kleineman, p 21.

<sup>77</sup> Kleineman p 21 ff.

<sup>78</sup> Kleineman p 40 ff.

## **7.2 Comparative Legal Method**

This study uses a functionalistic comparative method that was discussed above. This thesis will be explained in three steps below. The first step is to decide what to compare. The second step is to individually describe the two subjects of comparison. The third step is to compare the two. After that, I will present some concluding remarks.

### **7.2.1 Deciding what to Compare**

First, the two legal objects that I have chosen to compare are the Chinese and the European prohibitions of ADP. The rules can be found in laws, regulations issued by agencies or even case law, depending on the legal system that is to be compared. When deciding what to compare, it is important to bear in mind that it is the function of the rules that is to be compared, and not the wording. It does not matter if, for example, a rule on ADP in China is found in a law, while the same rule is found in a decision by a court or a regulation issued by an agency in Europe. Instead, it is the function of the rule that is to be compared. This way, we might end up comparing the function stipulated in law, with the function provided by a court in a case. In this thesis, I will focus on both the rules and case law, which is why it is suitable for me to look at the function of the rules, and not just the wording.

A comparative law study is a comparison between at least two legal objects, such as laws, statutes, case-law or legal families. As already made clear above, this essay compares the rules on ADP in Europe and China. They are comparable since they fulfil the same function in their respective jurisdictions.

### **7.2.2 System for describing**

When the two subjects to be compared have been chosen one must find neutral ground to be able to do a fruitful comparison. This means not focusing too much on terminology of the subjects to be compared. It is also important to remember that in different legal systems, some rules might be found in (for example) statutes and in others in case law. The core Chinese law on ADP is called “Anti-Monopoly Law”, while the core rule on ADP in Europe is in the TFEU<sup>79</sup>. This does not matter for the comparison, since the functions of the rules is what is to be compared, not the wording and/or statutory background.

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<sup>79</sup> Treaty on the Function of the European Union.

To make sure that we compare the same functions in the Chinese and European rules on ADP, we first need to make a neutral system for describing the two, so we do not get caught up in national terminology. For this reason, I follow the same pattern for both the Chinese and the European rules on ADP. The legal systems will individually be described in this order:

- i) The *system* of laws prohibiting ADP, i.e. is there only one law covering all of ADP? Are there rules from other agencies? Is there any important case law?
- ii) What is the *purpose* of the rules on ADP?
- iii) What is the *scope of application*?
- iv) What constitutes *dominance*?
- v) What constitutes *abuse*?

### 7.2.3 System for comparing

After the two legal objects have been described individually, they will be compared following the same pattern, i.e.:

- i) What are the differences and similarities of the *systems* of laws prohibiting ADP?
- ii) What are the differences and similarities of the *purposes* of the rules on ADP?
- iii) What are the differences and similarities of the *scope of application* in the two subjects of comparison?
- iv) What are the differences and similarities on what constitutes *dominance*? Here I will look deeper into the case *Tencent vs Qihoo*.
- v) What are the differences and similarities on what constitutes *abuse*?

## 8 ADP in China

### 8.1 System

AML's system is similar to other countries' competition law systems, and includes a comprehensive system of competition regulations.<sup>80</sup> However, implementing rules and guidelines also play a crucial role when applying AML. NDRC and SAIC have both released implementing rules relevant to ADP, on January 4<sup>th</sup> and 7<sup>th</sup> respectively. SAIC apply to non-price-related abuses, while NDRC only apply to price-related abuses. Because of limited available guidance, areas of AML's application remain uncertain. Authorities' practice must be relied on, which can be problematic since the practice may change over time.<sup>81</sup>

### 8.2 Purpose

**Article 1** This Law is enacted for the purpose of preventing and restraining monopolistic conducts, protecting fair competition in the market, enhancing economic efficiency, safeguarding the interests of consumers and social public interest, promoting the healthy development of the socialist market economy.

**第一条** 为了预防和制止垄断行为, 保护市场公平竞争, 提高经济运行效率, 维护消费者利益和社会公共利益, 促进社会主义市场经济健康发展, 制定本法。

The official purposes of the AML are presented in Article 1. The first few purposes are clear enough and need no deep explanation. As presented above, monopolistic conduct is believed to restrain economic efficiency and harm consumers. *Liu Jifeng* argues that if there is a goal of competition law, it must be to protect the national economy.<sup>82</sup> An accurate understanding of the AML shall per the legislature rely on Chapter I of the AML, the general provisions.<sup>83</sup> Thus, understanding the purposes of the AML is essential to understanding how the law will be applied.

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<sup>80</sup> Slaughter & May p 1.

<sup>81</sup> Slaughter & May p 1.

<sup>82</sup> *Liu Jifeng* p 22.

<sup>83</sup> Liu p 255.

*Shèhuì gōnggòng lìyì* 社会公共利益 [social public interest] can be interpreted quite widely, including, for example, enhancing competitiveness of domestic enterprises.<sup>84</sup> Including it as a goal in the AML has caused some concern among foreign investors.<sup>85</sup>

*Shèhuì zhǔyì shìchǎng jīngjì* 社会主义市场经济 [socialist market economy] is interesting in a Chinese historical context. One might say that *shèhuì zhǔyì* 社会主义 [socialist] and *shìchǎng jīngjì* 市场经济 [market economy] are words hard to combine into one. It is however the term coined during the economic reforms under *Deng Xiaoping* 邓小平 in the 1990's, after his famous *nán xún* 南巡 southern trip to gather support for economic reforms.<sup>86</sup>

The big change happened at the 14<sup>th</sup> NPC (*dì shí sì jiè quán guó rén mín dài biǎo dà huì* 第十四届全国人民代表大会) in 1992, when the party endorsed for the first time that *shèhuì zhǔyì shìchǎng jīngjì* 社会主义市场经济 [socialist market economy] was the goal of the economic reforms.<sup>87</sup> In *shèhuì zhǔyì shìchǎng jīngjì* 社会主义市场经济, *shèhuì zhǔyì* 社会主义 serves as an adjective to *shìchǎng jīngjì* 市场经济, which differentiates it from Eastern European market socialism.<sup>88</sup>

At the 14<sup>th</sup> NPC (*dì shí sì jiè quán guó rén mín dài biǎo dà huì* 第十四届全国人民代表大会), the party also decided to build market-supporting institutions and to transform SOEs into modern enterprises.<sup>89</sup> At this point, state ownership was still considered a *jīngjì de zhǔyào zǔchéng bùfèn* 经济的主要组成部分 [a principal component of the economy].<sup>90</sup> This gradually changed however, and in 1997 state ownership was downgraded to *jīngjì zhīzhù* 经济支柱 [pillar of the economy] and private ownership was elevated to *jīngjì de zhòngyào zǔchéng bùfèn* 经济的重要组成部分 [an important component of the economy].<sup>91</sup> Consequently, in 1999, article 11 of the *zhōnghuá rén mín gònghéguó xiànfǎ* 中华人民共和国宪法 [Constitution of China] was amended so private business was no longer regarded just as a supplement to public ownership, but instead an important component of the socialist economy.<sup>92</sup>

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<sup>84</sup> Liu p 255.

<sup>85</sup> Jones p 2.

<sup>86</sup> Qian and Wu p 6.

<sup>87</sup> Qian and Wu p 6.

<sup>88</sup> Qian and Wu p 6.

<sup>89</sup> Qian and Wu p 6.

<sup>90</sup> Qian and Wu p 7.

<sup>91</sup> Qian and Wu p 7.

<sup>92</sup> Qian and Wu p 7.

So what about the usage of such terms today? Similar used terms are *shèhuì zhǔyì chūjí jiēduàn* 社会主义初级阶段” [primary socialist stage] and *zhōngguó tèsè shèhuì zhǔyì* 中国特色社会主义 [socialism with Chinese characteristics].<sup>93</sup> Lin Chun argues that such phrases are used as a part of a political strategy, to make way for *gǎigé kāifàng* 改革开放 [reform and opening] in the 80s and 90s, and that the terms lack any actual socialist meaning.<sup>94</sup> Deng Xiaoping’s motto for the reform process was *bù zhēnglùn fāngzhēn* 不争论方针 [no arguing], in effect forbidding the direction of reform in terms of socialism versus capitalism.<sup>95</sup> In my view, that is a telling background as to how words such as *shèhuì zhǔyì* 社会主义 [socialist] and *shìchǎng jīngjì* 市场经济 [market economy] could be combined into one.

Therefore, from a legal perspective, one perhaps shall not put too much weight on the wording *shèhuì zhǔyì shìchǎng jīngjì* 社会主义市场经济 [socialist market economy], but instead focus on the last two characters, *jīngjì* 经济 [economy]. The law shall be interpreted in such a way that the AML prevents conduct that restrains the healthy development of the economy.

### 8.3 Scope of application

**Article 2** This Law shall be applicable to monopolistic conducts in economic activities within the People's Republic of China.

This Law shall apply to the conducts outside the territory of the People's Republic of China if they eliminate or have restrictive effect on competition on the domestic market of the PRC.

**第二条** 中华人民共和国境内经济活动中的垄断行为，适用本法；中华人民共和国境外的垄断行为，对境内市场竞争产生排除、限制影响的，适用本法。

Article 2 is interesting since it proclaims that the AML is not only applicable to economic activities in the PRC<sup>96</sup>, but also outside the PRC if they have restrictive effect on the Chinese market. The AML is the only economic law in China with extraterritorial effect.<sup>97</sup> If the law was not extraterritorial, companies could circumvent competition rules by agreeing on anti-

<sup>93</sup> Lin p 25.

<sup>94</sup> Lin p 25.

<sup>95</sup> Lin p 32.

<sup>96</sup> The PRC means Mainland China, excluding Taiwan, Hong Kong and Macau, who have their own competition laws.

<sup>97</sup> US COC p 22.



competitive behavior abroad. Under the current system, if the conduct has negative effects on competition in China, it is irrelevant where the conduct has taken place, see article 2 of the AML.

**Article 3** For the purposes of this Law, "monopolistic conducts" are defined as the following:

- (1) monopolistic agreements among business operators;
- (2) abuse of dominant market positions by business operators; and
- (3) concentration of business operators that eliminates or restricts competition or might be eliminating or restricting competition.

**第三条** 本法规定的垄断行为包括：

- (一) 经营者达成垄断协议；
- (二) 经营者滥用市场支配地位；
- (三) 具有或者可能具有排除、限制竞争效果的经营者集中。

Article 3 of the AML, *lǒngduàn xíngwéi* 垄断行为 [monopolistic conducts] includes *jīngyíng zhě lànòng shìchǎng zhīpèi dìwèi* 经营者滥用市场支配地位 [abuse of dominant market positions by business operators]. The term *jīngyíng zhě* 经营者 [business operator] is defined in Article 12.

**Article 12** For the purposes of this Law,

"business operator" refers to a natural person, legal person, or any other organization that is in the engagement of commodities production or operation or service provision, and

"relevant market" refers to the commodity scope or territorial scope within which the business operators compete against each other during a certain period of time for specific commodities or services (hereinafter generally referred to as "commodities").

**第十二条** 本法所称经营者，是指从事商品生产、经营或者提供服务的自然人、法人和其他组织。

本法所称相关市场，是指经营者在一定时期内就特定商品或者服务（以下统称商品）进行竞争的商品范围和地域范围。

*Jīngyíng zhě* 经营者 [business operator] is defined as basically any person, company or organization that engages in economic activity. *Xiāngguān shìchǎng* 相关市场 [relevant market] is the market in which two companies compete.

To sum up the scope of application, the AML applies to natural persons, legal persons or organizations that abuse their dominant position by eliminating or restricting competition in the PRC, no matter if the conduct takes place within or outside the PRC.

## 8.4 Dominance

### 8.4.1 Laws and regulations

**Article 17 (2)** For the purposes of this Law, "dominant market position" refers to a market position held by a business operator having the capacity to control the price, quantity or other trading conditions of commodities in relevant market, or to hinder or affect any other business operator to enter the relevant market.

**第十七条 (2)** 本法所称市场支配地位，是指经营者在相关市场内具有能够控制商品价格、数量或者其他交易条件，或者能够阻碍、影响其他经营者进入相关市场能力的市场地位。

Only companies with *shìchǎng zhīpèi dìwèi* 市场支配地位 [dominant position] can abuse their position according to the AML. The second paragraph of Article 17 describes the meaning of a dominant market position. A business is considered dominant if it can control prices, quantities or other trading conditions in the relevant market, or to hinder market-entry for other businesses.

The SAIC and NDRC rules explain that *qítā jiāoyì tiáojiàn* 其他交易条件 [other trading conditions] refers to factors that can substantially affect market transactions, such as quality of products, payment terms, delivery method and after-sale services, etc.<sup>98</sup> *Nénggòu zǔài, yǐngxiǎng qítā jīngyíng zhě jìnrù xiāng guān shìchǎng nénglì de shìchǎng dìwèi* 能够阻碍、影响其他经营者进入相关市场能力的市场地位 [Hindering or affecting other business operators ability to enter the market] includes delaying entry or applying an increased entry cost that makes it difficult for undertakings to compete effectively on the market.<sup>99</sup>

<sup>98</sup> SAIC Article 3 and NDRC Article 17.

<sup>99</sup> SAIC Article 3 and NDRC Article 17. See also Ning & Jia (2011).

**Article 18** The dominant market status shall be determined according to the following factors:  
(1) the market share of a business operator in relevant market, and the competition situation of the relevant market;  
(2) the capacity of a business operator to control the sales markets or the raw material procurement market;  
(3) the financial and technical conditions of the business operator;  
(4) the degree of dependence of other business operators upon of the business operator in transactions;  
(5) the degree of difficulty for other business operators to enter the relevant market; and  
(6) other factors related to determine a dominant market position of the said business operator.

**第十八条** 认定经营者具有市场支配地位，应当依据下列因素：  
(一) 该经营者在相关市场的市场份额，以及相关市场的竞争状况；  
(二) 该经营者控制销售市场或者原材料采购市场的能力；  
(三) 该经营者的财力和技术条件；  
(四) 其他经营者对该经营者在交易上的依赖程度；  
(五) 其他经营者进入相关市场的难易程度；  
(六) 与认定该经营者市场支配地位有关的其他因素。

The definition of *shìchǎng zhīpèi dìwèi* 市场支配地位 [dominant market position] is defined in Article 17. Article 18 gives 5 examples of factors that help determine if an actor is dominant. Those are *shìchǎng de shìchǎng fèné* 市场的市场份额 [market shares], *kòngzhì xiāoshòu shìchǎng huòzhě yuáncáiliào cǎigòu shìchǎng de nénglì* 控制销售市场或者原材料采购市场的能力 [capacity to control sales markets or raw material procurement], *cáilì hé jìshù tiáojiàn* 财力和技术条件 [financial and technical conditions], *qítā jīngyíng zhě duì gāi jīngyíng zhě zài jiāoyì shàng de yīlài chéngdù* 其他经营者对该经营者在交易上的依赖程度 [degree of dependence of other businesses] and *qítā jīngyíng zhě jìnrù xiàng guān shìchǎng de nán yì chéngdù* 其他经营者进入相关市场的难易程度 [difficulty for other companies to enter the market].

The market share means the share of a relevant market (defined by indicators such as sales value or volume) accounted for by a particular product during a certain time period.<sup>100</sup> The competitive conditions mean the relevant market's development status, number of competitors and their market share, extent of product differentiations etc.<sup>101</sup> The ability to control the sales market or raw materials procurement market includes its ability to control procurement channels, ability to affect or determine the price, quantity, duration of contracts etc.<sup>102</sup> The financial status and technical conditions and technical conditions include factors such as

<sup>100</sup> SAIC Article 10 (1).

<sup>101</sup> SAIC Article 10 (1).

<sup>102</sup> SAIC Article 10 (2).

assets, technical equipment, intellectual rights etc.<sup>103</sup> The degree of dependence by other undertakings, transaction value, duration etc. shall be taken into consideration.<sup>104</sup> The level of difficulty to enter the market includes factors such as technical requirements, facilities, sale channels etc.<sup>105</sup>

To help determine an actor as being dominant, there are legal presumptions when some market shares are reached.

**Article 19** Where a business operator is under any of the following circumstances, it may be assumed to be have a dominant market position:

- (1) the relevant market share of a business operator accounts for 1/2 or above in the relevant market;
- (2) the joint relevant market share of two business operators accounts for 2/3 or above; or
- (3) the joint relevant market share of three business operators accounts for 3/4 or above.

A business operator with a market share of less than 1/10 shall not be presumed as having a dominant market position even if they fall within the scope of second or third item.

Where a business operator who has been presumed to have a dominant market position can otherwise prove that they do not have a dominant market position, it shall not be determined as having a dominant market position.

**第十九条** 有下列情形之一的，可以推定经营者具有市场支配地位：

- （一）一个经营者在相关市场的市场份额达到二分之一的；
- （二）两个经营者在相关市场的市场份额合计达到三分之二的；
- （三）三个经营者在相关市场的市场份额合计达到四分之三的。

有前款第二项、第三项规定的情形，其中有的经营者市场份额不足十分之一的，不应当推定该经营者具有市场支配地位。

被推定具有市场支配地位的经营者，有证据证明不具有市场支配地位的，不应当认定其具有市场支配地位。

According to the AML, there is a presumption for dominance when a business has more than a 1/2 market share. If dominance is to be determined for two businesses, they are presumed to have a dominant position if their market share is more than 2/3. For three businesses, a market share of 3/4 is enough for a presumption of market domination. If one of the businesses has less than 1/10 of the market, they will not be considered dominant, even if the otherwise stipulated thresholds are reached.

A business that is presumed to have a dominant market position, can present evidence to the contrary in accordance with the factors listed in Article 17.

<sup>103</sup> SAIC Article 10 (3). When determining financial status, and technical conditions, those of its affiliated parties shall also be taken into account.

<sup>104</sup> SAIC Article 10 (4).

<sup>105</sup> SAIC Article 10 (5).

### 8.4.2 Tencent vs Qihoo

The Tencent vs Qihoo case shows that it is possible to rebut the presumption of being dominant, even though the company has a very high market share.<sup>106</sup> The appellee<sup>107</sup>, Tencent, had a market share exceeding 80 % in the instant messaging-market, but Tencent was able to rebut the presumption by presenting evidence of its market power and the dynamics of the instant messaging-market. The SPC considered the rapidly developing and constantly changing competitive landscape of the market, Tencent's inability to control prices, quantities or other trading terms, the existence of credible competitors and evidence of low barriers of entry, to be enough rebuttal to the presumption of a dominant market position.

After pointing out that Tencent held a market share above 80 %, the SPC argued that a high market share does not necessarily constitute market dominance, especially in a dynamic market such as the market for instant messaging.

Below I will present excerpts from the SPC's reasoning, followed by first my own translations and then my own analysis of how the SPC applies the AML in practice.

[...] as mentioned earlier, high market share does not necessarily mean market dominance, especially when it comes to instant messaging, where competition is more dynamic. Therefore, dominance can't solely be based on market share evidence. One also needs to examine the degree of difficulty of market access, the appellee's market behavior, the competition on the internet platform, competition constraints and other factors.

[...] 前已述及，高的市场份额并不当然意味着市场支配地位的存在，在动态竞争较为明显的即时通信领域更是如此。因此，仅仅依据市场份额证据还不能得出结论，尚需考察市场进入难易程度、被上诉人的市场行为、互联网平台竞争所形成的竞争约束等因素。<sup>108</sup>

The Court thus makes it clear that one must consider more factors than just market share evidence, which is also clear in Article 18 (1) of the AML. The court further discusses what needs to be analyzed to conclude a dominant market position.

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<sup>106</sup> Tencent vs Qihoo.

<sup>107</sup> Appellee: The winning party in a previous judgement, that the losing party, the appellant, wants to reverse.

<sup>108</sup> Tencent vs Qihoo p 99.

[...] mobile instant messaging develops rapidly and new service operators continuously enter the market, which brings new impetus<sup>109</sup> to the instant messaging market. Again, competition in instant communication is showing competition when it comes to innovation and salient features of dynamic competition. Operators foothold in the competitive market depends on quality, service, user experience and other aspects of continuous innovation, with a shorter product innovation cycle.

[...] 移动即时通信发展迅猛，新的移动即时通信服务经营者不断进入，为即时通信产业带来了新的推动力。再次，即时通信领域的竞争呈现出创新竞争、动态竞争的显著特征。经营者为在市场竞争中站稳脚跟，需要在质量、服务、用户体验等方面持续创新，产品创新周期较短。<sup>110</sup>

The market develops rapidly and new businesses keep entering the market. And due to the features in the market, to hold on to the market shares, one needs to continuously improve the quality, service, user experience and other aspects of innovation. The Court continued to discuss Tencent's ability to control prices, quantity and other terms of transactions.

[...] About the appellee's control of commodity prices, quantity or other trading conditions: As previously mentioned, since the services of the instant messaging service operators are free to the majority of users, users do not want to pay, which means that messaging service providers cannot have the ability to control the price. Therefore, the key considerations are whether the appellee has control over quality, quantity or other trading conditions. First, on whether the appellee has the ability to control the quality: Since the field of instant messaging with its high degree of innovation competition and the dynamic competition, as well as the fact that users are extremely sensitive to service quality and user experience, a decrease by the appellee's quality of service will lead to a large number of users switching to other instant messaging services. MSN's sharp decline in market share in a short period proves that. Also, the characteristics of the internet platform also restricted the appellee's ability to control the quality. To obtain advertising business and value-added business profits, instant messaging service providers must continuously attract many users on the client side. To attract more users,

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<sup>109</sup> Could also be translated as speed/energy/boost.

<sup>110</sup> Tencent vs Qihoo p 99 p.

continuously improve service quality and constantly develop new services. Again, the appellee does not have much control, there is free and convenient access [to other services] and they do not take up much space, there are no significant economic and technical barriers to access and changing instant messaging services, [which means that] users can relatively easy choose. [...] As a result, the appellee's ability to control commodity prices, quality, quantity and other trading conditions is weak.

[...] 关于被上诉人控制商品价格、数量或者其他交易条件的能力。前已述及，由于即时通信服务经营者向广大用户提供的基础即时通信服务均为免费，用户也缺乏付费意愿，任何即时通信服务经营者均不可能具有控制用户端价格的能力。因此，需要重点考虑的是被上诉人是否具有控制质量、数量或者其他交易条件的能力。首先，关于被上诉人是否具有控制质量的能力。由于即时通信领域的竞争具有高度创新、动态竞争的显著特征且用户对于服务质量、用户体验等极为敏感，因此，如果被上诉人降低服务质量，则会有大量用户转而使用其他即时通信服务。MSN 市场份额在短时间内的大幅下滑就说明了这一点。此外，互联网平台竞争的特点也制约了被上诉人控制质量的能力。为了获取广告业务和增值业务的盈利，即时通信服务经营者必须在用户端持续吸引大量的用户。为了吸引更多的用户，经营者必须不断提高服务质量，不断开发新的服务。其次，被上诉人也不具有控制商之多，均可免费便捷获得且占用空间较小，获取和转换即时通信服务不存在显著的经济和技术障碍，用户拥有较大的选择余地。[...] 因此，被上诉人控制商品价格、质量、数量或者其他交易条件的能力较弱。<sup>111</sup>

First, since the services are free of charge, Tencent did not have the power to control the price. Furthermore, users are considered 'extremely sensitive' to quality of service and experience. This factor, combined with the competition on the market meant that the company also could not control the quality on the market. This is also a factor that needs to be discussed according to Article 18 (2) of the AML. The Court went on to discuss Tencent's financial and technical conditions:

[...] On the appellee's financial and technical conditions: First, although the appellee has more powerful financial and technical conditions, there are multiple competitors in the

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<sup>111</sup> Tencent vs Qihoo p 100f.

field of real-time communications on the Chinese mainland with strong financial and technical conditions, such as Alibaba, Baidu, Microsoft, China Mobile and so on. These large enterprises have enough strength to impact the appellee's leading position. Second, there is active innovation in the field of instant messaging, technology and cost requirements are relatively low, technical and financial conditions do not significantly impact market power. Therefore, the appellee's financial and technical conditions influence on market power is very limited.

[...] 关于被上诉人的财力和技术条件。首先，虽然被上诉人具有较为强大的财力和技术条件，但是在中国大陆地区即时通信领域的多个竞争者均有雄厚的财力和技术条件，例如阿里巴巴，百度、微软、中国移动等。这些大型企业拥有足够的实力对被上诉人的市场领先地位形成冲击。其次，即时通信领域的创新活跃，对技术和成本的要求则相对较低，技术和财力条件对市场力量的影响并不显著。因此，被上诉人的财力和技术条件对其市场力量的影响非常有限。<sup>112</sup>

Although Tencent has strong financial conditions, so do its potential competitors, the Court argued. And since accessing the instant messaging market is not costly, the financial conditions also did not matter very much. Important to note is that the court acknowledges that Tencent is *shìchǎng lǐngxiān* 市场领先 [market-leading]. This does not mean the same as *shìchǎng zhīpèi* 市场支配 [market-dominant]. So the Court concludes that Tencent's financial and technical conditions do not influence market power significantly. This is one of the factors that shall be considered per Article 18 (3) of the AML.

[...] Other operators dependence on the appellee: Network effects, consumer loyalty and other factors did significantly improve users' dependence on the instant messaging service provided by the appellee. [...] The degree of difficulty for other business operators to enter the market. [...] The fact that instant messaging service market is a highly concentrated market, with newly entered instant messaging providers having a low market share, is not enough to show that the appellee can effectively constrain competition.

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<sup>112</sup> Tencent vs Qihoo p 104.



[...] 其他经营者对被上诉人在交易上的依赖程度。因此，网络效应和客户粘性等因素并没有显著提高用户对被上诉人提供的即时通信服务的依赖性。[...] 其他经营者进入相关市场的难易程度。[...] 即时通信服务市场是一个高度集中的市场，新进入的即时通信服务商的市场份额较低，不足以对被上诉人形成有效竞争约束。

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Since other companies are not dependent on Tencent, and it is not difficult to enter the market, which means that the court had also discussed Article 18 (4) and 18 (5). In conclusion, the Court said there was not enough evidence to conclude that Tencent had a dominant position:

In summary, there is not sufficient evidence available in this case to show that the appellee has a dominant position. The Court of first instance found that the appellee does not have a dominant market position, which is correct, the appellant's corresponding grounds of appeal cannot established, so the Court [SPC] dismisses the appellant's claim.

综上，本案现有证据并不足以支持被上诉人具有市场支配地位的结论。一审法院认定被上诉人不具有市场支配地位，并无不当，上诉人的相应上诉理由不能成立，本院不予支持。<sup>114</sup>

Altogether, there was not enough evidence to conclude that Tencent was in a dominant position. The case shows that the SPC is willing to look beyond the market share to rebut the presumption based on evidence of the dynamics of the market and Tencent's market power. The presumption of dominance with a market share above 50 % was rebutted because of the factors listed above.

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<sup>113</sup> Tencent vs Qihoo p 103 ff.

<sup>114</sup> Tencent vs Qihoo p 109.

## 8.5 Abuse

**Article 6** Any business with a dominant position may not abuse that dominant position to eliminate, or restrict competition.

**第六条** 具有市场支配地位的经营者，不得滥用市场支配地位，排除、限制竞争。

The core rule prohibiting ADP in China is Article 6 of the AML. It simply states that *jùyǒu shìchǎng zhīpèi dìwèi de jīngyíng zhě* 具有市场支配地位的经营者 [businesses with a dominant market position] may not *làngòng* 滥用 [abuse] that position. Article 17 goes on to explain what practices could constitute an abuse.

**Article 17 (1)** A business operator with a dominant market position shall not abuse its dominant market position to conduct following acts:

- (1) selling commodities at unfairly high prices or buying commodities at unfairly low prices;
- (2) selling products at prices below cost without any justifiable cause;
- (3) refusing to trade with a trading party without any justifiable cause;
- (4) requiring a trading party to trade exclusively with itself or trade exclusively with a designated business operator(s) without any justifiable cause;
- (5) tying products or imposing unreasonable trading conditions at the time of trading without any justifiable cause;
- (6) applying dissimilar prices or other transaction terms to counterparties with equal standing;
- (7) other conducts determined as abuse of a dominant position by the Anti-monopoly Authority under the State Council.

**第十七条 (1)** 禁止具有市场支配地位的经营者从事下列滥用市场支配地位的行为：

- (一) 以不公平的高价销售商品或者以不公平的低价购买商品；
- (二) 没有正当理由，以低于成本的价格销售商品；
- (三) 没有正当理由，拒绝与交易相对人进行交易；
- (四) 没有正当理由，限定交易相对人只能与其进行交易或者只能与其指定的经营者进行交易；
- (五) 没有正当理由搭售商品，或者在交易时附加其他不合理的交易条件；
- (六) 没有正当理由，对条件相同的交易相对人在交易价格等交易条件上实行差别待遇；
- (七) 国务院反垄断执法机构认定的其他滥用市场支配地位的行为。

The first paragraph of Article 17 lists 6 examples of conduct that could constitute ADP. The list is non-exhaustive. Some of the rules are further elaborated in rules formulated by SAIC and NDRC. This means that in Chinese law, these implementation rules must also be studied in order to understand the prohibition on ADP in China.

(1) When considering the first prohibition, *yǐ bù gōngpíng de gāojià xiāoshòu shāngpǐn huòzhě yǐ bù gōngpíng de dī jià gòumǎi shāngpǐn* 以不公平的高价销售商品或者以不公平的低价购买商品 [selling commodities at unfairly high prices or buying commodities at unfairly low prices] NDRC gives three examples of factors that shall be considered.<sup>115</sup> First, whether the price is obviously higher or lower than prices for other undertakings to buy or sell the same goods. Secondly, when prices are stable, if the selling prices increase or buy price decrease exceed the normal margin. Thirdly, whether the rate of price increase is obviously higher than the rate of cost increase, or if the rate of decrease in buying price is obviously higher than the decrease of the rate of cost for the counter-parties.

(2) When considering the second prohibition, *méiyǒu zhèngdàng lǐyóu, yǐ dī yú chéngběn de jiàgé xiāoshòu shāngpǐn* 没有正当理由, 以低于成本的价格销售商品 [selling products at prices below cost without any justifiable cause] products include fresh perishable goods, seasonal goods etc.<sup>116</sup> They also include promotions for marketing of new products, low prices due to debt repayment or switch of business or closure of business.<sup>117</sup>

(3) When considering the prohibition *méiyǒu zhèngdàng lǐyóu, jùjué yú jiāoyì xiāngduì rén jìnxíng jiāoyì* 没有正当理由, 拒绝与交易相对人进行交易 [refusing to trade with a trading party without any justifiable cause] Per NDRC, a company may not without proper justifications refuse in disguised form by imposing excessively high selling or excessively low buying price.<sup>118</sup> Per SAIC, refusing to trade includes curtailing volume of current transactions, delaying or suspending current transactions, refusing to enter new transactions, making it difficult to trade due to restrictive conditions, not allowing the counter party to use its essential facilities. An example of this rule being applied is when Shuntong and Huaxin were fined a total of RMB 7 million for controlling the supply of promethazine hydrochloride by entering into exclusive sales agreements with only two companies, consequently driving up prices.<sup>119</sup>

(4) When considering the prohibition *méiyǒu zhèngdàng lǐyóu, xiàndìng jiāoyì xiāngduì rén zhǐ néng yǔqí jìnxíng jiāoyì huòzhě zhǐ néng yǔqí zhǐdìng de jīngyíng zhě jìnxíng jiāoyì* 没有正当理由, 限定交易相对人只能与其进行交易或者只能与其指定的经营者进行交易

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<sup>115</sup> NDRC Article 11.

<sup>116</sup> NDRC Article 12 (1).

<sup>117</sup> NDRC Article 12 (2)-(3).

<sup>118</sup> NDRC Article 13. Proper justifications include (1) the counter-party's bad debt or other risks to transaction safety, and (2) if the counter parties can purchase the same or similar goods from or sell similar goods to other businesses.

<sup>119</sup> Slaughter & May p 9.

[requiring a trading party to trade exclusively with itself or trade exclusively with a designated business operator(s) without any justifiable cause] requiring exclusivity also includes where a company, without proper justifications, through price discounts or other means limit parties to enter into parties exclusively with them or parties designated by them.<sup>120</sup> Requiring exclusivity also includes not allowing the counter party to enter transactions with one's competitors.<sup>121</sup>

(5) When considering the prohibition *méiyǒu zhèngdàng lǐyóu dā shòu shāngpǐn, huòzhě zài jiāoyì shí fùjiā qítā bù hélǐ de jiāoyì tiáojiàn* 没有正当理由搭售商品，或者在交易时附加其他不合理的交易条件 [tying products or imposing unreasonable trading conditions at the time of trading without any justifiable cause], tying includes grouping different products going against transaction practice, consumption habits etc.<sup>122</sup> Other unreasonable transaction terms include payment methods, transportation and delivery methods, sales regions, and irrelevant to the subject matter of the transaction.<sup>123</sup> According to the NDRC, adding unreasonable fees other than price during a transaction is also prohibited.<sup>124</sup>

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<sup>120</sup> NDRC Article 14. Examples of proper justifications include (1) guaranteeing product quality or safety, (2) maintaining brand image or enhancing service level and (3) significantly reduced cost, increased efficiency with the benefits of which being shared with consumers.

<sup>121</sup> SAIC Article 5.

<sup>122</sup> SAIC Article 6 (1).

<sup>123</sup> SAIC Article 6 (2)-(4).

<sup>124</sup> NDRC Article 15.

## 9 ADP in the EU

### Art 102 TFEU

Any abuse by one or more undertakings of a dominant position within the internal market or in a substantial part of it shall be prohibited as incompatible with the internal market in so far as it may affect trade between Member States. Such abuse may, in particular, consist in:

- (a) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions;
- (b) limiting production, markets or technical development to the prejudice of consumers;
- (c) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
- (d) making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

### 9.1 System

The core rule on ADP in Europe is article 102 of TFEU.<sup>125</sup> Per article 102 FEUF, a dominating actor on the European market (or a substantial part of it) may not abuse its dominant position. Besides article 102, there is not a lot of sources of law enacted by the EU concerning ADP. Instead, much is left up to the courts.

Although the European Commission, the enforcer of competition law in Europe, has promulgated guidelines about the agency's enforcement, those guidelines are not sources of law. Thus, in Europe, one is left to analyze case law in order to reconstruct rules on ADP.<sup>126</sup>

### 9.2 Purpose

The current purpose of European competition law, according to the European Commission, is 'to protect competition on the market as a means of enhancing consumer welfare and of ensuring an efficient allocation of resources'.<sup>127</sup> Another purpose, unique to the EU, is to

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<sup>125</sup> The other being Article 101, concerning cohesive behavior, which will not be discussed in this thesis.

<sup>126</sup> See Article 3 in *Communication from the Commission*.

<sup>127</sup> See Jones p 506 and *Communication from the Commission* Article 13.

prohibit conduct which 'might tend to restore the national divisions in trade between Member States'.<sup>128</sup>

On the official EU webpage, it says that, "Competition policy in Europe is a vital part of the internal market. Its aim is to provide everyone in Europe with better quality goods and services at lower prices. Competition policy is about applying rules to make sure companies compete fairly with each other. This encourages enterprise and efficiency, creates a wider choice for consumers and helps reduce prices and improve quality. These are the reasons why the EU fights anticompetitive behavior, reviews mergers and state aid and encourages liberalization."<sup>129</sup>

Other purposes that have been taken into account includes public policy goals such as environmental protection.<sup>130</sup> The reason is the contextual and teleological readings that according to Article 11 of TFEU must be 'integrated into the definition and implementation of the Union's policies and activities, in particular with a view to promoting sustainable development'.

### 9.3 Scope of Application

Per Article 102 TFEU, the European rules on ADP apply to 'undertakings', which is defined by case law as encompassing 'every entity engaged in an economic activity, regardless of the legal status of the entity and the way in which it is financed'.<sup>131</sup> Natural persons, legal persons as well as states have been included in the interpretation of undertakings.<sup>132</sup> Article 102 also applies when two or more undertakings are collectively dominant on a market.<sup>133</sup>

To qualify as an undertaking, the entity also has to be engaged in economic activity, i.e. offering goods and/or services on a market.<sup>134</sup> In order to come within the prohibition imposed by Article 102, conduct must have a minimum level of cross-border effect. However, it is hard to find cases where a conduct does not influence cross-border trade.<sup>135</sup>

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<sup>128</sup> Cases 56/64 and 58/64 *Établissements Consten and Grundic-Verkaufs v Commission* [1966] ECR 299, 340. See Jones p 507.

<sup>129</sup> See *Competition: opening markets to competition - European Commission*. Available at [http://ec.europa.eu/competition/general/overview\\_en.html](http://ec.europa.eu/competition/general/overview_en.html). (2016-12-13)

<sup>130</sup> Jones p 508.

<sup>131</sup> *C-41/90 Höfner and Elsnér v Macrotron* [1991] ECR I-1979, para 21.

<sup>132</sup> Jones p 510.

<sup>133</sup> Jones p 528. See also Jones and Sufrin, *EU Competition Law* p 112.

<sup>134</sup> Jones p 511.

<sup>135</sup> Jones p 512 f. Also, if the act doesn't affect trade between countries, national competition laws apply. This happens rarely though, since EUD interprets 'affect' extensively, which means that most acts by companies are considered as affecting the trade between member states.

Several exclusions exist based on Treaty provisions, other EU regulations and case law. An example of this is article 346 (1) TFEU, which stipulates that Member States measures necessary for security reasons does not affect conditions of competition.

It is not entirely clear if the EU competition laws are extra-territorial, meaning that they can be applied to conduct outside the EU in all situations.<sup>136</sup> However, it is clear that the applicability of the competition laws is not dependent on where the agreements have taken place.<sup>137</sup> Applying EU competition law to conduct abroad can be based on three theories: the economic entity theory, the implementation theory and the economic effect theory.<sup>138</sup>

In the case *Dyestuffs*<sup>139</sup> parent-undertakings in companies had conducted in competition-restraining ways outside the EU and then exercising control over the companies following through with the practice inside the EU. Thus, per the economic entity-theory, the companies shall be seen as one, and even though the practice took place outside the EU, it was still within the scope of application of European competition laws.

In the case *Woodpulp*<sup>140</sup> no matter where the location of the sources of supply and the production plant where agreements are entered into, it is the place of implementation of the agreements that decides whether or not EU competition laws apply.<sup>141</sup> So, for example, if two parties agree on a competition restraining-deal abroad, it will still fall under the scope of EU law if it is implemented in Europe.

The European Court of Justice (ECJ) has still not explicitly affirmed the effects doctrine, although the Commission has recognized it.<sup>142</sup> For this reason, it is unclear whether it is enough to prove that agreements concluded abroad have a restraining effect on competition in EU for the agreement to fall under the scope of European competition laws.<sup>143</sup>

## 9.4 Dominance

Article 102 TFEU applies to dominant actors. According to case law, dominance relates to a position of economic strength that ‘enables it to prevent effective competition being maintained on the relevant market by affording it the power to behave to an appreciable extent

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<sup>136</sup> Whish & Bailey p 496.

<sup>137</sup> Geradin, Reysen & Henry p 4.

<sup>138</sup> Geradin, Reysen & Henry p 4.

<sup>139</sup> Case 48/69, *Imperial Chemical Industries Limited v. Commission* [1972] E.C.R. 619, para 64.

<sup>140</sup> Joined cases 89, 104, 114, 116, 117 and 125 to 129/85. *A. Ahlström Osakeyhtiö and others v Commission* [1988] E.C.R. 5193.

<sup>141</sup> Geradin, Reysen & Henry p 5 f.

<sup>142</sup> Geradin, Reysen & Henry p 6.

<sup>143</sup> Geradin, Reysen & Henry p 6.

independently of its competitors, its customers and ultimately of the consumers.’<sup>144</sup> This was equated as being able to the ability of maintaining high prices.<sup>145</sup>

Assessing market power is a two step-process. First, the relevant market must be defined, after which it can be determined whether the undertaking is dominant on that relevant market.<sup>146</sup>

Market dominance is based on market shares, except for in exceptional cases. A market share above 50 % is a presumption for dominance.<sup>147</sup> Finding dominance is unlikely if market share is below 40 %, although it has occurred; see the case *Virgin/British Airways*.<sup>148</sup> Besides market shares, it is also important to look at factors such as the market share of its rivals, how market shares have changed over time, dynamics of competition on the market, barriers to entry and buyer power.<sup>149</sup>

Whether there are barriers to entry or expansion is an extra important factor to consider.<sup>150</sup> Low barriers will deter a dominant actor from increasing prices because other companies might enter the market. Therefore, an actor with 100 % market share might (or could in theory) still not have market power. Under high barriers, even a price increase will not make other companies enter the market. Barriers to entry include tariffs, quotas, economies of scale and scope, privileged access to essential inputs, important technologies etc.<sup>151</sup>

There is a fair amount of relevant case law in this matter. In the case *Hoffman- La Roche v Commission* the ECJ said:

“[...] although the importance of the market shares may vary from one market to another the view may legitimately be taken that very large shares are in themselves, and save in exceptional circumstances, evidence of the existence of a dominant position. An undertaking which has a very large market share and holds it for some time... is by virtue of that share in a position of strength.”<sup>152</sup>

In the case *AKZO v Commission*, the ECJ continued that a market share of 50 % could be considered so large that, in absence of exceptional circumstances pointing the other way, an

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<sup>144</sup> Jones p 528 and *C-85/76 Hoffman-La Roche v Commission* [1979] ECR 461, paras 38 and 39.

<sup>145</sup> *T-321/05 AstraZeneca v Commission* [2010] ECR II-2805, para 267.

<sup>146</sup> Jones p 529.

<sup>147</sup> *C-62/86 AKZO Chemie v Commission* [1991] ECR I-3359, para 60.

<sup>148</sup> See Case T-219/99 *British Airways plc v Commission* [2003] ECR II-5917, [2004] 4 CMLR 1008, paras 189-225. See also Whish & Bailey p 181 ff.

<sup>149</sup> Jones p 529 with references.

<sup>150</sup> Jones p 529.

<sup>151</sup> *Communication from the Commission* para 17.

<sup>152</sup> Case 85/76 [1979] ECR 461, [1979] 3 CMLR 211.



undertaking with such a market share will be presumed dominant; that undertaking will bear the evidential burden of establishing that it is not dominant.<sup>153</sup>

The ECJ has kept the presumption from the AKZO-case intact, in cases such as *France Télécom v Commission*, *Solway SA v Commission* and *AstraZeneca AB v Commission*, saying that high market shares are in themselves indicative of dominance.

Collective dominance, i.e. when many companies are dominant together, requires complex evidence to be proven, including evidence that the companies are economically linked.<sup>154</sup>

## 9.5 Abuse

Although it is not an offence for a firm to hold a dominant position, a dominant actor has a special responsibility not to ‘allow its conduct to impair genuine undistorted competition’.<sup>155</sup> Abuse is an objective concept relating to the behavior of an undertaking in a dominant position. Through methods different from normal business practice, competition is weakened.<sup>156</sup> It is not essential that there is a subjective intent to weaken competition, although that may reinforce a finding that there is an ADP.<sup>157</sup>

Article 102 sets out an exemplary list of abuses including (a) imposing unfair prices or other trading conditions, (b) limiting production, markets or technical developments to the prejudice of consumers, (c) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage and (d) imposing supplementary conditions which have no connection with the contract in question.

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<sup>153</sup> Whish & Bailey p 182.

<sup>154</sup> Slaughter & May p 8.

<sup>155</sup> Jones p 531 and 322/81 *NV Nederlandsche Vanden-Industri Michelin v Commission* [1983] ECR 3461, para 57.

<sup>156</sup> Jones p 531 and C-85/76 *Hoffman-La Roche v Commission* [1979] ECR 461, para 91.

<sup>157</sup> Jones p 532 and T-321/05 *AstraZeneca v Commission* [2010] ECR II-2805, para 359.

# 10 Comparison

## 10.1 Introduction

The following comparison will be based on the findings above on both the Chinese and the European prohibitions of ADP. I will go through the different aspects of the prohibition in the same order as the countries' prohibitions were presented above, starting with the systematics.

## 10.2 System

The European and Chinese legislators have chosen to systemize their respective competition law in different ways. First, as made clear above, China's AML is quite comprehensive. The EU on the other hand, has let the Courts define quite important terms such as dominant, relevant market etc. Therefore, a clear difference between the two is that China has a more compact and clear law on competition, and is perhaps therefore also easier to grasp.

China has also let government agencies such as NDRC and SAIC formulate regulations that clarify some of the terms. This has not been done in Europe, although the European Commission has formulated guidelines on how they interpret the prohibition on ADP in Article 102 TFEU.

## 10.3 Purpose

Both China and Europe have a goal to protect competition on the market and promote consumer welfare. In Europe, another goal is to ensure an efficient allocation of resources'.

Another difference is that EU prohibits conduct which might restore the national divisions in trade between Member States. Since China does not consist of different member states, such a rule would be pointless.<sup>158</sup>

Although the inclusion of public interest as a purpose in the AML, it is not alone in doing so. Both Europe and China include public policy goals. In Europe, the reason is the contextual and teleological readings that must be done per Article 11.

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<sup>158</sup> However, in my opinion, if China and Hong Kong become more unified in the future, it is not unrealistic to see competition law being used to restrain regional divisions in trade between the Mainland and Hong Kong. Perhaps the same goes for Macao, and maybe even Taiwan (in a very distant future, as they are not on the path of reconciliation).

## **10.4 Scope of Application**

When it comes to who the laws apply to, the laws are pretty much identical. They both apply to businesses as well as natural persons.

The AML is quite clear on the territorial scope. It applies to activities within the PRC or activities with an effect on the Chinese market. This differs from the European prohibition which is not clear on whether it always applies even if conduct has an effect on a European market, although it applies if conduct is implemented on a European market.

## **10.5 Dominance**

EU and China rely on similar factors when deciding if a company is dominant. But unlike the AML (in Article 19), the EU law does not specify market share thresholds which create a presumption of dominance. Unlike in China, there has been no (that I have found in my research) case of a company in Europe having more than 80 % market share and still not being considered dominant, such as the Qihoo v Tencent-case. I am therefore skeptical as to whether a European court would have come to the same conclusion. Therefore, there might be a difference in the European and Chinese views on what constitutes a dominant actor.

In the EU complex evidence is required to prove collective dominance to prove that the companies are linked economically. The AML has no such requirements.

## **10.6 Abuse**

What constitutes abuse is very similar in the AML and Article 102 TFEU (together with the case law that is based on Article 102 TFEU), and I have seen no noteworthy differences.

# 11 Conclusion and Discussion

## 11.1 General

I answered the research questions by breaking down the competition laws of the EU and China into different aspects. First, I described the system, purpose, scope of application, what constitutes dominance and what constitutes abuse in China. After that I described the same aspects in the EU. This descriptive part was followed by a comparative part that followed the same breakdown into different aspects. In the comparative part of this thesis, my questions were answered.

## 11.2 Main research question 1: Similarities

In this section I will answer the question of what similarities there are between the European and Chinese prohibition of ADP.

There are several similarities between the respective rules on ADP. They serve the same purpose in that they are in place to prevent monopolistic behavior that harms the economy and/or consumers. They are also both meant to protect public interests.

They both in one way or another apply to conduct abroad. They also have similar rules on determining what constitutes a dominant market position, and are quite similar on what conduct constitutes abuse.

## 11.3 Main research question 2: Differences

In this section I will answer the question of what differences there are between the European and Chinese prohibition of ADP.

The difference between European and Chinese prohibition of ADP are first of all systematic. AML encompasses many rules and is quite detailed, while TFEU Article 102 lacks in detail. The AML is therefore more comprehensive. In my opinion it is also easier to grasp, since one do not have to look to case law too much.

The purposes differ in that the EU include a prohibition of rules that divide the member states, which China does not, since it does not consist of member states. They also differ in that Europe include efficient allocation of resources as an official goal.

Concerning the scope of application, they first of all differ since they apply to two different regions. The EU laws apply to conduct in Europe, and the Chinese laws apply to China. The Chinese prohibition is also clear in that it applies to conduct which has an effect in China, while Europe is not as clear on that point.

Concerning what constitutes a dominant market position, the Chinese and European rules might differ a little. I have not found any cases showing that a company with an 80+ % market share has not been considered dominant, as was the case in Tencent vs Qihoo. So there might be a difference when it comes to what constitutes a market dominant position, although that is not for certain until we have a similar case in Europe.

The rules on collective dominance also differ, since the Chinese rules have clear thresholds on how large a market share is required to be for two or more companies to be considered dominant, while the EU requires a quite advanced economic analysis.

## **11.4 Concluding remarks**

This thesis looked at the functions of the prohibitions, and looked past whether rules were placed in laws, regulations or case law. This thesis showed that China and the EU, through different means, end up regulating ADP the same way. The Chinese prohibition is however more clear, and thus easier for courts to apply in practice.

One might wonder why that is. Since the AML is newer than the European counterpart, it had more years to prepare clear rules. Also, perhaps the Chinese government simply wants to decide more in detail how the courts shall apply the laws. Since Chinese rules on anti-competitive behavior evolved quicker when the dominance of foreign companies was more evident, a reasonable conclusion might be that the Chinese government was so concerned that they wanted a detailed competition law to curb foreign dominance.

Although the AML is detailed, it seems it can be applied in a quite flexible way, proven by the Tencent vs Qihoo decision, which initially made me interested in this topic. Personally, I highly doubt that a European court would have rebutted the presumption of dominance if the company in question had a market share well above 80 %. This does however not mean that the Chinese way of looking at a dominant company is worse.

In my opinion, the excerpts above show that the Chinese court had reasons to conclude that Tencent was not dominant. I think the argument that the market for instant messaging is quickly evolving, and therefore it is hard to be dominant, weighs heavy. Restricting too many companies could potentially be bad for the economy. Perhaps the Chinese courts did not want

to hinder a quickly evolving market by restricting a company that might be competitive on the international arena one day (if it is not already).

I am surprised that the SPC accepted Tencent's rebuttal of the presumption of dominance, but due to the points made above, I cannot say it was wrong. The fact that Tencent has a high market share at that period of time does not mean that they were dominant as the SPC said.

## 12 Future Research

Suggestions for further research is comparing other parts of competition law, such as anti-competitive contracts or mergers between big companies. One could also look at more cases in order to get a more comprehensive comparison. In this thesis, many parts of the regulations were exempt. Another suggestion is therefore to study those exempted parts of the legislations, such as how the relevant market is determined, what the rules for state owned enterprises are, etc. Chinese law is evolving, so there will, in my view, be plenty of possible fields to research within Chinese law in the future.

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