

This paper addresses inconsistencies in the application of China's abuse of dominant position test set out in *China's Anti-Monopoly Law* ("AML") and considers whether the AML's abuse of dominant position test is sustainable in its current form, particularly given the new challenges posed by restrictive practices practised by major players in digital markets.

1. Introduction:

In April 2021, China's antitrust regulator – The State Administration for Market Regulation ("SAMR") – fined Alibaba (a massive Chinese multinational specializing in e-commerce, retail, Internet, and technology) an equivalent to USD \$2.8 billion¹ for abuse of dominance contrary to the AML's abuse of dominance provision, Art. 17(4).² SAMR found that Alibaba (over 50% market share³) had abused its dominant position by imposing a "choosing one from two" restrictive practice on traders, whereby they could not sell their products on other competing platforms, if they wished to sell on Alibaba's business to consumer ("B2C") online shopping platform.

In October 2021, SAMR had fined China's largest online food delivery platform – Meituan – an equivalent to USD \$530 million for abusing its dominant position contrary to AML Art 17(4)⁴ because it prohibited restaurants selling takeaway food via the Meituan platform (over 60% market share⁵) from offering their product via Meituan's main competitor platforms.

However, the same Article has not been applied consistently: In 2013, Tencent's (China's equivalent of Facebook) practice of "choosing one from two" was not condemned as contrary to Art 17(4), even though Tencent had over 80% market share!⁶ Tencent's "choosing one from two" terms forced consumers to make a choice between taking a competitor's antivirus software ("Qihoo 360") or Tencent's antivirus service: Consumers choosing Qihoo 360's antivirus product meant that the consumer lost access to Tencent's widely popular Instant Messaging service, effectively

¹ 国家市场监督管理总局行政处罚决定书, 国市监处 (2021) 28 号 [SAMR's Decision on Administrative Punishment, No.28 of 2021].

² 中华人民共和国反垄断法 [The Anti-Monopoly Law of the People's Republic of China] (2007), Art. 17: "A business operator with a dominant market position shall not abuse its dominant market position to conduct the following acts: [...] (4) requiring a trading party to trade exclusively with itself or trade exclusively with a designated business operator(s) without any justifiable cause [...]"

³ '2017-2020 年度中国网络零售市场数据监测报告' ['2017-2020 China Online Retail Market Data Monitoring Report'], (电子商务研究中心 [E-Commerce Research Center], June 2018-June 2021).

⁴ 国家市场监督管理总局行政处罚决定书, 国市监处 (2021) 74 号 [SAMR's Decision on Administrative Punishment, No.74 of 2021].

⁵ Chu Daye & Wang Bozun, 'Meituan Could Face Serious Penalties After Antitrust Probe: Experts', *Global Times* (26 April 2021) www.globaltimes.cn/page/202104/1222175.shtml.

⁶ As a counterattack to Qihoo 360's inappropriate market behavior in 2010 against Tencent (i.e., using its anti-virus software, namely "Qihoo 360 Safety Guard", to gather Tencent QQ (IM software) user's information; guiding Qihoo 360's users to uninstall Tencent QQ's value-added services and advertisements), Tencent announced a "choose-one-from-two" strategy – all Tencent QQ users should uninstall Qihoo 360's software in order to keep using QQ. Accordingly, Qihoo 360 sued Tencent to Guangdong Higher People's Court for the abuse of dominant position. On 20th March 2013, Guangdong Higher People's Court held that Tencent did not hold a dominant position in the relevant market (the global instant messaging market). This judgment had been appealed by Qihoo 360 to the Supreme Court; unfortunately, the Supreme Court rejected Qihoo's appeal on 16th October 2014, and held that Tencent did not hold a dominant position in the Chinese instant messaging market. *See*, 奇虎公司与腾讯公司垄断纠纷上诉案 [Qihoo 360 v. Tencent], 2013 SUP. PEOPLE'S CHINA CIVIL JUDGMENT No. Minsanzhongzi 4/2013, Chinese version available at: <http://www.court.gov.cn/wenshu/xiangqing-7973.html>.

meaning loss of access to IM for social and professional purposes (for consumers in China) to most IM users in China. Tencent held over 80% of the IM market share, yet was held not to be acting contrary to the AML.

Such difference in treatment of “choosing one from two” practices in China calls into question the AML’s sustainability as a foundational competition law, and highlights major inconsistencies in competition law enforcement in the digital markets in China. In 2021, China published the “Amendments to the AML” Bill, seeking to reform the AML, as well as seeking to make the AML fit-for-purpose in the digital era. In this paper the author will address the question of whether the sustainability of AML Article 17 can be achieved following the proposed Bill’s amendments, which seek to render the AML more suitable for application to digital markets competition issues. A conclusion will be drawn after critical analysis of leading decisions, new proposed guidelines and policy objectives.

2. Tencent’s Victory on “Choose One from Two”

The Supreme People Court of the People’s Republic of China (hereinafter “the Supreme Court”) issued its first anti-monopoly case decision on 16th October 2014⁷, under the AML, on the dispute between Qihoo 360⁸ and Tencent.⁹ Tencent at the time held over 80% market share in the Instant Messaging market in China via its QQ platform¹⁰, forced consumers to make a “choose one from two” decision, between

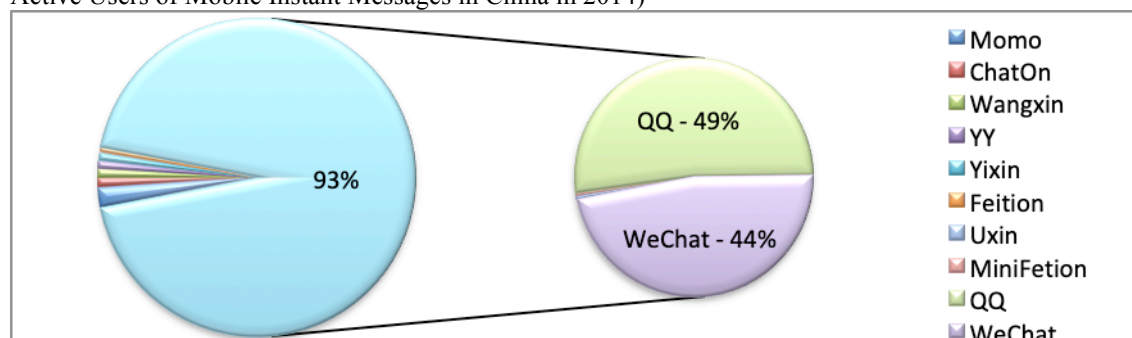
⁷ As a counterattack to Qihoo 360’s inappropriate market behavior in 2010 against Tencent (i.e., using its anti-virus software, namely “Qihoo 360 Safety Guard”, to gather Tencent QQ (IM software) user’s information; guiding Qihoo 360’s users to uninstall Tencent QQ’s value-added services and advertisements), Tencent announced a “choose-one-from-two” strategy – all Tencent QQ users should uninstall Qihoo 360’s software in order to keep using QQ. Accordingly, Qihoo 360 sued Tencent to Guangdong Higher People’s Court for the abuse of dominant position. On 20th March 2013, Guangdong Higher People’s Court held that Tencent did not hold a dominant position in the relevant market (the global instant messaging market). This judgment had been appealed by Qihoo 360 to the Supreme Court; unfortunately, the Supreme Court rejected Qihoo’s appeal on 16th October 2014, and held that Tencent did not hold a dominant position in the Chinese instant messaging market. *See*, 奇虎公司与腾讯公司垄断纠纷上诉案 [Qihoo 360 v. Tencent], 2013 SUP. PEOPLE’S CHINA CIVIL JUDGMENT No. Minsanzhongzi 4/2013.

⁸ Qihoo 360 (Beijing Qihoo Technology Co., Ltd) – a Chinese Internet security company, is the **plaintiff** in the case of *Qihoo 360 v. Tencent (2014)*.

⁹ Tencent (Tencent Technology (Shenzhen) Co., Ltd) – a Chinese technology enterprise, providing Internet-related services and products, is the **defense** in the case of *Qihoo 360 v. Tencent (2014)*.

¹⁰ *See*, 奇虎公司与腾讯公司垄断纠纷上诉案 [Qihoo 360 v. Tencent], 2013 SUP. PEOPLE’S CHINA CIVIL JUDGMENT No. Minsanzhongzi 4/2013

Tencent QQ’s market share changed dramatically in 2013, because Tencent introduced a new instant message App, namely WeChat. However, this change in fact did **not** reduce Tencent’s market share in the Chinese instant messaging market, if we take QQ’s market share and WeChat’s market share into account (93% market share in China’s Mobile Instant Message market in early 2014, *see* Chart below: Active Users of Mobile Instant Messages in China in 2014)



Source: Enfodest, 2014.

taking the plaintiff's antivirus software or Tencent's instant messaging platform. However, the court held that Tencent's "choose one from two" conduct (forcing users to delete Qihoo 360s anti-virus from their devices if they wished to retain access to Tencent's IM service) was not anti-competitive, because Tencent conducted self-protection to combat the plaintiff's actions – gathering personal data via Qihoo 360 anti-virus software. Tencent, based on AML Art 17(4)¹¹, was held to have justifiable reason for its anti-competitive activity. However, this should only be a business justification, rather than legal reasoning. The judgement, therefore, makes the effectiveness of the AML questionable by allowing competitors use one anti-competitive activity (leaving consumers with no choice) to correct another anti-competitive activity (gathering personal data).

It might be a question on whether Qihoo 360 and Tencen are competitors in the two-sided markets, given Qihoo 360's data gathering activities were conducted in the anti-virus software market and Tencent's "choose one from two" conduct stayed in the instant messaging market. Thus, in this case none of Qihoo 360 and Tencent's anti-competitive activities happened in the overlap market that Qihoo 360 and Tencent both had market shares, namely the online advertising market.¹² However, the aim for Qihoo 360 and Tencent currying out the anti-competitive activities was to obtain more market share in the online advertising market.¹³ They, thereby, are competitors.

Although AML Art 1 clearly states that "[t]his Law is enacted for the purpose of [...] maintaining the consumer interests [...]", this Article was not be considered by the Court along with Art 17(4) when made a decision on Tencent's "choose one from

See, David Moth, *Tencent and WeChat: 35+ Facts & Figures on the Chinese Tech Giant*, ECONSULTANCY (June 18, 2014), <https://econsultancy.com/tencent-and-wechat-35-facts-figures-on-the-chinese-tech-giant/>.

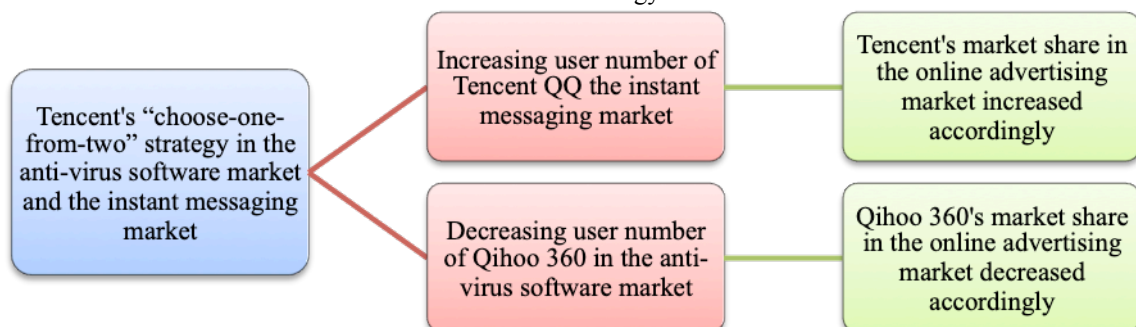
¹¹ 中华人民共和国反垄断法 [The Anti-Monopoly Law of the People's Republic of China] (2007), Art. 17: "A business operator with a dominant market position shall not abuse its dominant market position to conduct the following acts: [...] (4) without justifiable reasons, requiring a trading party to trade exclusively with itself or trade exclusively with a designated business operator(s) without any justifiable cause [...]"

¹² The two-sided market in the *Qihoo 360 v. Tencent (2014)* case:



See: Joshua White, Antoine Chapsal and Aaron Yeater, *European Union – Two-Sided Markets, Platforms and Network Effects*, GLOBAL COMPETITION REVIEW (December 7, 2018), <https://globalcompetitionreview.com/insight/e-commerce-competition-enforcement-guide/117729/european-union---two-sided-markets-platforms-and-network-effects>.

¹³ The influence of Tencent's "choose-one-from-two" strategy in the two-sided market:



two” strategy. Tencent therefore escaped from Art 1’s protecting consumer interests requirement, left consumers with no choice as Tencent’s QQ platform was at the time China’s overwhelmingly popular IM service for both social and professional purposes. However, such decision on “choose one from two” could be overturned if it happened in the 2020s rather than in the 2010s. This calls into question the sustainability of the AML as a foundational competition law.

3. Sharp Turn in Dealing with “Choose One from Two” Conduct

There have been developments in the 2020s regarding online platforms “choosing one from two” practices in China’s digital market, in both AML statutes (through new guidance¹⁴ and amendments¹⁵) and AML enforcement.

3.1 Change & Affirmation

In April 2021 SAMR fined Alibaba an equivalent to \$2.8 billion¹⁶ following on its December 2020 investigation into Alibaba’s “choosing one from two” conduct – Meaning, sellers who sell on Alibaba’s B2C Tmall.com online shopping platform were forbidden by Alibaba to sell their products on other competing platforms (such as JD.com, Vipshop, etc.).¹⁷ SAMR’s decision was made under the abuse of dominance provisions of the AML (Art 17(4)), which is opposite to the 2013 Judgement on Tencent’s “choosing one from two” activity. Although unlike Tencent, Alibaba had no justifiable reasons for its anti-competitive activity, this is still a positive change which confirmed “choosing one from two” practices breach the AML. This decision improves the effectiveness of the AML via proper application of the abuse of dominant position test.

SAMR’s decision is compatible with the approach now taken under *China’s Anti-Monopoly Guidelines on the Platform Economy* (adopted after the Alibaba investigation had commenced and now in force), Article 15(1)¹⁸ of which prohibits “choosing one from two” practices *in the digital platform market* as constituting an abuse of dominant position. SAMR has ordered Alibaba not to prohibit traders selling their products or offering promotions on other B2C platforms.

Immediately following SAMR’s decision on Alibaba, SAMR has opened an antitrust investigation into China’s largest online food delivery platform, Meituan, into its “choosing one from two” practices.¹⁹ Meituan, which occupies over 60% in the online food delivery platform market since 2018, was fined by SAMR²⁰ for alleged abuse of dominance by restricting restaurants to sell their takeaway food via the Meituan platform only, while prohibiting the restaurants offering their takeaway products via Meituan’s competitor platforms, such as Ele.me (whose market share has remained

¹⁴ 国务院反垄断委员会关于平台经济领域的反垄断指南 [The Anti-Monopoly Guidelines on the Platform Economy] (China’s State Admin. for Mkt Regul., 7 February 2021).

¹⁵ SAMR, ‘Amendments to Anti-Monopoly Law of China (AML)’ was released on 23 Oct. 2021.

¹⁶ 国家市场监督管理总局行政处罚决定书, 国市监处 (2021) 28 号 [SAMR’s Decision on Administrative Punishment, No.28 of 2021].

¹⁷ ‘市场监管总局依法对阿里巴巴集团涉嫌垄断行为立案调查’ [‘SAMR opens investigations into possible anti-competitive conduct of Alibaba’] (SAMR, 24 December 2020).

¹⁸ The Anti-Monopoly Guidelines on the Platform Economy, Art 15(1).

¹⁹ ‘China Probes Food Delivery Giant Meituan Amid Antitrust Squeeze’ *Reuters* (Shanghai, 26 April 2021) www.reuters.com/technology/china-launches-antitrust-probe-into-food-delivery-giant-meituan-2021-04-26/.

²⁰ 国家市场监督管理总局行政处罚决定书, 国市监处 (2021) 74 号 [SAMR’s Decision on Administrative Punishment, No.74 of 2021].

between 25% and 30% during the past few years²¹). Meituan's conduct is clearly a breach of the AML Art 17(4) and *China's Anti-Monopoly Guidelines on the Platform Economy* Art 15(1). SAMR, thus, has ordered Meituan not to prohibit restaurants selling their products on other food delivery platforms.

To echo the prohibition of “choosing one from two” practices in the digital platform market, the “Amendments to the AML” Bill (2021)²², which was published by SAMR seeking to reform the AML to keep pace with the technology, works on the sustainability of AML by amending its Art 17 (now Art 22 in the 2021 Bill). The following wording were added into the AML Art 17 – “A business operator with a dominant market position to [...] set up platform rules to impose unreasonable restrictions on other operators constitutes an abuse of dominant position”²³ – to affirm “choosing one from two” practices are prohibited by competition law.

3.2 Establishing “Choosing One from Two” Prohibition Model

At the time of writing, SAMR proposes to design a “Choosing One from Two” Prohibition Model in a year or two²⁴, by gathering information of major e-commerce platforms, such as Alibaba's Tmall.com, Meituan, using big data technology to analyse the degree of overlap between online platform operators under different dimensions, in order to comprehensively judge whether e-commerce platforms abuse their dominant market position, or not. Such Model shall assist SAMR to see through platform operators' business conduct and ensure “choosing one from two” practices will be under timely observation and control.

Although this is only a start of establishing a “Choosing One from Two” Prohibition Model, such proposal demonstrates a foreseeable consistency in the application of China's abuse of dominant position test on “choosing one from two” practices in the digital era, following SAMR's 2021 decision on Alibaba's practices via Tmall.com.

4. Conclusion

All recent developments in “choosing one from two” practice area oppose to the Supreme Court's judgement on Tencent in 2013 (unlike the 2013 decision allowing Tencent to correct an anti-competitive conduct by another anti-competitive conduct). Such developments maintain the functioning of AML's abuse of dominant position test (Art 17). The sustainability of AML Art 17, therefore, shall be expected to achieve following the recent developments, including the proposed 2021 Bill's amendments. However, it is still too early to reach a firm conclusion on this, given the 2021 “Amendments to the AML” Bill has not yet become an Act, and whether the Courts could apply the abuse of dominant position test properly, or not, remains a question.

²¹ Chu Daye & Wang Bozun, ‘Meituan Could Face Serious Penalties After Antitrust Probe: Experts’, *Global Times* (26 April 2021) www.globaltimes.cn/page/202104/1222175.shtml

²² SAMR, 《反垄断法》修订草案(公开征求意见稿) [Draft (for public comment) on the Amendment of *the Anti-Monopoly Law 2007 of China*] (2 Jan. 2020) was issued 2 Jan. 2020 to amend the AML. Based on the Draft, a Bill titled ‘Amendments to Anti-Monopoly Law of China (AML)’ was released to the public for consultation on 23 Oct. 2021.

²³ Amendments to the AML, Art 22.

²⁴ ‘国家市场监督管理总局竞争政策与大数据中心网络交易风险评估与热点专题服务项目公开招标公告’ [SAMR Competition Policy and Big Data Center's Public Tender Announcement for Online Trading Risk Assessment and Hot Topic Service Projects] (15 April 2022) www.ccg.gov.cn/cggg/zygg/gkzb/202204/t20220415_17782127.htm