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# Market Definition in Case '3Q'

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# Summary

As the primary task of competition law enforcement, market definition is one of the core issues of competition law. The development of Internet, however, makes market definition more diverse and flexible. The special nature of the Internet market, such as the free model of product management, network effect, two-sided market, has become the basic elements of defining the relevant product market of Internet industries and also directly affect the methods of market definition. When the products have network effects, the impact on demand substitution should be fully considered; In order to avoid defining the relevant market too narrowly, the supply substitution is not applicable under the two-sided market; also, the time dimension and the innovation dimension should be considered in the Internet industries. Case ‘3Q’ is a landmark for the Chinese competition case in the field of Internet industries. It is the first case heard and decided by the Supreme Court under Anti-Monopoly Law. It gives us an example of market definition in Internet industries and also offers suggestions about how to define the relevant Internet market in China.

# Preface

I would like to express my gratitude to my supervisor, Julian Nowag, who gives me much strength during the process of writing the thesis. I also would like to thank my parents and friends who support me to do the master in Sweden.

May 2016, in Lund

*Jin Zhang*

# Abbreviations

|            |   |
|------------|---|
| Qihoo 360  | Qihoo 360 Technology Co. Ltd.                                     |
| Tencent    | Tencent Holdings Limited  |
| SCNPC      | the Standing Committee of the National People's Congress          |
| Guideline  | Guidelines on Relevant Market Definition                          |
| EU         | European Union  |
| SSNIP test | Small but Significant Non-transitory Increase in Price Test       |
| IT         | Internet Technology   |
| HMT        | Hypothetical Monopolist Test                                      |
| SSNDQ test | Small But Significant And Non-Transitory Decrease in Quality Test |
| RMB        | Ren Min Bi  |
| PC         | Portable Computer   |
| SNS        | Social Networking Site  |
| SMS        | Short Message Service   |
| HHI        | Herfindahl-Hirschman Index  |
| CNNIC      | China Internet Network Information Center                         |

# 1 Introduction

With the development of Chinese society and economy, competition law became more and more important in Chinese legal system since 1993. With the establishment of Anti-Monopoly law, more and more disputes were related to monopoly, abusing dominant position, etc. Additionally, with the rapid development of Internet technology, cases that combined Internet with competition law appeared. Among these cases, the most famous one is the case between Qihoo 360 and Tencent. In this case, the first issue to be solved is the definition of relevant market. In the history of competition law, market definition is always the first and foremost issue that is discussed by judges, lawyers and scholars in the worldwide.

Thus, the purpose of this thesis is to define the relevant market in Case ‘3Q’ based on the judgement from National Supreme Court. The research question will, therefore, be:

- What methods can be used when defining the relevant market in Case ‘3Q’?
- What is the relevant product market in Case ‘3Q’?
- What is the relevant geographic market in Case ‘3Q’?
- What other relevant markets should we consider?



## 2 Background

### 2.1 The Introduction of Case ‘3Q’

#### 2.1.1 The Introduction of Two Parties

Both of two parties of Case ‘3Q’ are the top Chinese biggest Internet companies,<sup>1</sup> Qihoo 360 Technology Co. Ltd. (hereinafter called ‘Qihoo 360’) and Tencent Holdings Limited (hereinafter called ‘Tencent’).

Qihoo 360, which is the complaint in Case ‘3Q’, focuses on solving the Internet security problem for widely ranged Chinese Internet users, by providing free and high-quality Internet security services. Qihoo 360 is the first company that provides the Internet security services for free in China, including 360 Security Guards, 360 Antivirus Software, etc. It stresses that the Internet security service is a kind of basic services for the Internet users, which is in the parallel position with other types of Internet basic services, like search engine, email and instant messaging service, which are all free for the Internet users. At the same time, Qihoo 360 develops the worldwide advanced Cloud Security System, which aims to rapidly distinguish the new Trojan Horse and Phishing in order to protect the Internet users’ security comprehensively. It is estimated that the user penetration rate of Qihoo 360’s Internet services in China had been highly as 96% at June, 2013.<sup>2</sup>

Tencent, which is the defendant in Case ‘3Q’, established in November, 1998. It is one of the biggest and oldest Internet companies in China. It defines itself as an Asian instant messaging service supplier which provides the instant messaging service and the online entertainment service for the Internet users via the instant messaging products they developed. The main instant

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<sup>1</sup> Mima Zhuoma, Review of Market Definition in Case ‘3Q’, *Law View*, 5(2015), page 15

<sup>2</sup> <http://www.360.cn/about/>

messaging products of Tencent are QQ and WeChat. Other online entertainment products consist of QQ Zone, QQ Game, etc. Tencent aims to meet the Internet users' demands on the aspects of communication, information, entertainment and E-commerce. Till October, 2015, the average monthly active QQ accounts are 853 million and the maximum number of simultaneous online QQ users are 241 million. The development of Tencent products has deeply changed the communication model and life style of millions of Internet users in China and broadened prospects of Chinese Internet industry.<sup>3</sup>

### **2.1.2 The Introduction of Case '3Q'**

'3Q' is the short name of 'Qihoo 360 vs. Tencent QQ'. It started from the incompatibility between 360 software and Tencent QQ software from 2010. On September, 27, 2010, Qihoo 360 developed a software called 'Privacy Protector', specifically aiming to inspect that whether the QQ software infringes the QQ users' right of privacy. Later, Tencent pointed out that the 360 explorer was suspected of being involved in spreading pornographic information. Finally, on November, 3, 2012, Tencent QQ announced to every QQ user via a window text that QQ cannot be used on the PC that has been installed 360 software. It advised users to unload 360 software in order to use QQ normally, forcing users to 'choose one from two'. This action is the immediate cause that makes Qihoo 360 claimed to Higher People's Court of Guangdong province that Tencent abused its dominant position that was set up by instant messaging software QQ in the relevant market and forced users to unload 360 software, which is an action that is a breach of Anti-Monopoly Law of the People's Republic of China, and asked Tencent to indemnify 150 million RMB.<sup>4</sup>

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<sup>3</sup> <http://www.tencent.com/zh-cn/at/abouttencent.shtml>

<sup>4</sup> Civil Judgement by the Higher People's Court of Guangdong Province, pages 3 to 4

Nearly one year later, on March 28, 2013, the Higher People’s Court of Guangdong Province dismissed all the claims from applicant Qihoo 360 and asked Qihoo 360 bear the cost of litigation, 790,680 RMB. the Higher People’s Court of Guangdong Province held that Tencent was not in a dominant position in the relevant market.<sup>5</sup>

There was a hot discussion immediately once the result came out. It is not surprising that Qihoo 360 could not agree with the Higher People’s Court of Guangdong province’s judgment and re-claimed to the Supreme Court to abrogate the judgement of the Higher People’s Court of Guangdong Province. The attorney agent of Qihoo 360 claimed that during 2009-2011, the defendant Tencent held 88%-90% of the market share in the relevant market. According to the Anti-Monopoly Law of the People’s Republic of China Article 19, Tencent can be assumed to have a dominant position in the relevant market since the market share of Tencent accounts for more than 1/2 in the relevant market.

In order to assess that whether Tencent has a dominant position in the relevant market, the Supreme Court needs to determine what the scope of the relevant market is in Case ‘3Q’ at first. Thus, the first and foremost core issue in this case is that how to define the relevant market.

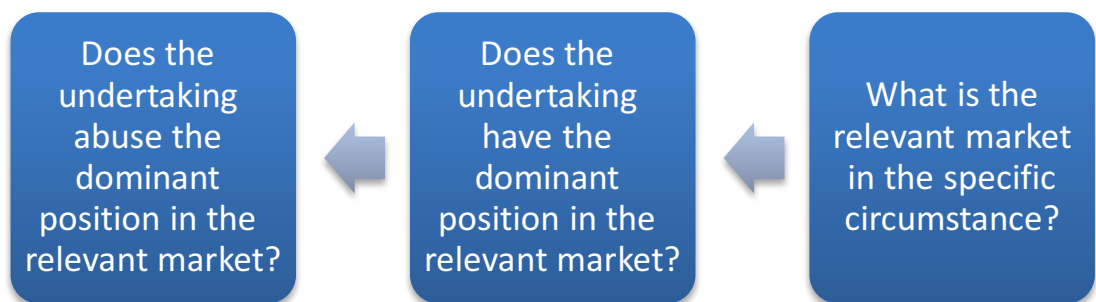


Figure 1. Why Should We Define the Relevant Market?

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<sup>5</sup> Civil Judgement by the Higher People’s Court of Guangdong Province, page 129 to 131

Case ‘3Q’ is the first case that relates to the Internet monopoly in China. It is also the first case that the Supreme Court judged in the field of the Internet monopoly. It pushed forward the development of Chinese Anti-Monopoly Law and laid a good foundation to the subsequent Internet anti-monopoly cases.

### **2.1.3 The result of the relevant market in ‘3Q’ case**

According to the final judgment from Supreme Court, it is decided that the relevant product market in this case is the instant messaging service market, while the relevant geographic market is the mainland China. At the same time, the Supreme Court defined the instant messaging service as ‘the instant messaging service not only includes the instant messaging service by PC, but also includes the instant messaging service by mobile terminal; not only includes the comprehensive instant messaging service, but also includes the non-comprehensive instant messaging service, such as text, audio and video’.<sup>6</sup>

## **2.2 The Development of Competition Law in China**

Compared with the development of competition law in the U.S. and European Union, competition law is a relative new area in China. With the development of Chinese economy and society, more and more cases were concerned with market and competition issues in recent years in China. Thus, the Ministry of Commerce of the People’s Republic of China began to draft Anti-Unfair Law and Anti-Monopoly Law. The competition law area in China started with these two legislations.

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<sup>6</sup> Civil Judgement by Supreme Court, page 48.

The broad concept of competition law of China comprises Anti-Monopoly Law and Anti-Unfair Law, while the narrow concept of competition law only refers to Anti-Monopoly Law. In 1993, the Standing Committee of the National People's Congress (hereinafter abbreviated as 'SCNPC') enacted the first statute law in the field of competition law, Anti-Unfair Law. It is the first time that the SCNPC put attention on the market competition regulation. It also opened a new door of regulating market competition by law in China. Later in 2008, the SCNPC published Anti-Monopoly Law, which plays the most important role in the development of Competition law in China. Also, many other regulations, norms and other forms of legislation about competition law had been published during this period. It is necessary to point out that in order to give more details about the method of defining the relevant market, the Anti-Monopoly Committee of the State Council published Guidelines on Relevant Market Definition (hereinafter called 'the Guideline') on May 24, 2009. The purpose of the Guideline is to 'provide guidance on relevant market definitions and improve the transparency of law enforcement of the Anti-Monopoly Law enforcement agency under the State Council'<sup>7</sup>.

## **2.3 The Traditional Theory of Market Definition**

### **2.3.1 General**

Market definition is the starting point of almost all competition cases. It is only by defining the relevant market that can decide which products and services can be assessed under a suspected infringement of the competition rules.<sup>8</sup> The purpose of defining a relevant market is to make clear that which products and services are mutually close substitutes, further, that whether the

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<sup>7</sup> Guidelines on Relevant Market Definition, Article 1.

<sup>8</sup> Alison Jones and Brenda Suftrin, *EU Competition Law-Text, Cases and Materials*, 5th edition, 2014, Oxford University Press, page 61

suppliers of products and services infringe the competition rules in that determined relevant market. It is ‘a tool for aiding the competitive assessment by identifying those substitute products or services which provide an effective constraint on the competitive behavior of the products or services being offered in the market by the parties under investigation’<sup>9</sup>. The core issue of defining a market is to decide that which products or services are in the same market.<sup>10</sup>

Any competitive behavior (including any behavior that has resulted or may result in eliminating or restricting competition) occurs within a particular market scope. The relevant market definition is to define the market scope within which the business operators compete with each other. In the work of Anti-Monopoly Law enforcement, such as prohibiting monopoly agreements among business operators, prohibiting the abuse of dominant market positions and controlling the concentration of business operators that has resulted or may result in eliminating and restricting competition, issues related to the relevant market definition may be involved.<sup>11</sup>

Market definition is used for two purposes primarily: First, it is used for computing the market share and the related concentration statistics, such as HHI. Traditionally, market share is associated with market power. Additionally, market definition provides the framework for discussions of competitive constraints, such as the difficulty of entry and potential competition.

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<sup>9</sup> Bishop and Walker, *The Economics of EC Competition Law* (cited in n.119)4-002

<sup>10</sup> Alison Jones and Brenda Sufrin, *EU Competition Law-Text, Cases and Materials*, 5th edition, 2014, Oxford University Press, page 62

<sup>11</sup> Guidelines on Relevant Market Definition, Article 2.

### 2.3.2 The Definition of ‘the Relevant Market’

China refers EU’s method to define the concept of ‘relevant market’.<sup>12</sup> It comprises the relevant product market, the relevant geographic market and sometimes, the relevant timing market.

The relevant product market comprises all the products and services which are regarded as interchangeable or substitutable by consumers, by the reason of the products’ characteristics, their prices and their intended use.<sup>13</sup>

The relevant geographic market comprises the area in which the undertakings concerned are involved in the supply and demand of products or services, in which the conditions of competition are sufficiently homogeneous and which can be distinguished from neighboring areas because the conditions of competition are appreciably different in those areas.<sup>14</sup>

Where production cycle, lifetime, seasonal features, fashion style or protection period of intellectual property rights have become the product’s characteristics that cannot be ignored, the factor of timing shall be considered in the relevant market definition.<sup>15</sup>

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<sup>12</sup> Yanbei Meng, The Challenge of Market Definition in Internet Industries, *Electronics Intellectual Property*, 4(2013), page 43; Xu Liu, How to assess the relevant market in case ‘3Q’, *Electronics Intellectual Property*, 4(2013), page 30. The Commission of Legislative Affairs of NPC Standing Committee pointed that the concept of market definition defined in Anti-Monopoly Law refers to that illustrated by ECJ, although TEFU did not give a clear definition of market definition.

<sup>13</sup> Commission Notice on the Definition of the Relevant Market for the Purposes of Community Competition Law, Article 7.

<sup>14</sup> Commission Notice on the Definition of the Relevant Market for the Purposes of Community Competition Law, Article 8

<sup>15</sup> Guidelines on Relevant Market Definition, Article 3

### **2.3.3 The Basis and Method of Market Definition**

The basic economic theory of market definition is substitution analysis. It is to identify what products or services are considered as substitutes. There are 2 aspects of substitutability: demand substitution and supply substitution. Demand substitution refers to ability of consumers of the product to switch to substitute products. Supply substitution refers to the ability of producers of similar products to switch to producing the relevant products.<sup>16</sup>

There are some different methods of market definition. In the practice of competition law enforcement, that choose which method depends on the different specific circumstances.<sup>17</sup> The primary method that EU and China prefer to use for measuring ‘cross-elasticity of demand’<sup>18</sup>, as noted in both Notice and Guideline, is ‘Hypothetical Monopolist Test’ which was put into practice by using SSNIP Test.<sup>19</sup>

### **2.3.4 The Main Factors of Relevant Product Market Definition**

First we need consider about the perspective of demand substitution in the relevant product market definition. It includes several aspects: (1) whether consumers turn to buy other products because of the change of the origin product. (2) products’ characteristics and intended uses. (3) the variance of products’ price. (4) products’ distribution channel. (5) Other factors such as consumers’ preference, reliance and the barriers in the market.

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<sup>16</sup> Alison Jones and Brenda Sufrin, *EU Competition Law-Text, Cases and Materials*, 5th edition, 2014, Oxford University Press, page 66

<sup>17</sup> Guidelines on Relevant Market Definition, Article 7

<sup>18</sup> Alison Jones and Brenda Sufrin, *EU Competition Law-Text, Cases and Materials*, 5th edition, 2014, Oxford University Press, page 67

<sup>19</sup> SSNIP test will be introduced in Part 3.1.1



Regarding as the supply substitution, it is commonly considered the following factors: the operator's reaction of price change, the difficulties of switching and the marketing channels, etc.<sup>20</sup>

### **2.3.5 The Main Factors of Relevant Geographic Market Definition**

Similar with the analysis of the relevant product market definition, we also need analyze the perspective of demand substitution in the relevant geographic market definition. It covers the following aspects: (1) whether consumers turn to buy other products in other geographic area because of the change of the origin product. (2) Products' transportation cost and transportation characteristics. (3) the actual region where consumers choose their products. (4) trade barriers, such as tariffs, local regulations, etc. (5) other factors, such as the consumers' preference in a particular area.

From the perspective of supply, the following factors are commonly considered: the operators' reactions of price change, feasibility of supply or distribution of the relevant product in other geographic areas.<sup>21</sup>

## **2.4 Market Definition in the context of Internet Industries**

Worldwide commentators mostly agree on the usefulness of market definition in the field of the Internet industries. However, competition analysis will often have to look beyond a single market as traditionally defined if it deals with the complexity of competition issues that arise in this area. Sometimes

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<sup>20</sup> Guidelines on Relevant Market Definition, Article 8.

<sup>21</sup> Guidelines on Relevant Market Definition, Article 9.

market definition too much become the core issue itself, which may lead to incorrect results.

In addition, since the products and services in Internet industries change rapidly, market definition should be in caution. An initial correct market definition may become an erroneous one finally because new characteristics are added to the products continuously, the technology behind it changes dramatically, or the previous diverse technologies may converge together.<sup>22</sup> Thus, market definition may be drawn too narrowly for the new circumstances. It will become even serious if the trial goes on several years.<sup>23</sup>

The main problem in this issue is that courts do not keep the same pace as the change of technology and innovation, and the procedural obligations of the trial makes it even slowly. Thus the competition law experts become to realize that the market definition in the innovative Internet industries should be done from diverse dimensions, like innovation and other non-price factors, in general, rather than the price.

Consequently, the competition authorities should refrain from applying the traditional steps of market definition mechanistically. Instead, they should define the relevant market in the broader context based on the specific circumstances of each case. It is very necessary for the innovative Internet markets where the relevant products might not exist when the market is defined.<sup>24</sup>

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<sup>22</sup> Andrej Fatur, *EU Competition Law and the Information and Communication Technology Network Industries: Economic versus Legal Concepts in Pursuit of (Consumer) Welfare*, 2012, Oxford University Press, page 116

<sup>23</sup> Andrej Fatur, *EU Competition Law and the Information and Communication Technology Network Industries: Economic versus Legal Concepts in Pursuit of (Consumer) Welfare*, 2012, Oxford University Press, page 116

<sup>24</sup> Andrej Fatur, *EU Competition Law and the Information and Communication Technology Network Industries: Economic versus Legal Concepts in Pursuit of (Consumer) Welfare*, 2012, Oxford University Press, page 116

### 3 Market Definition or Not?

Although competition law cases have the similar framework more or less, each of them still has its special and specific circumstance. Whether the rigorous market definition can be taken out depends on several factors, such as the evidence of cases, the availability of the relevant statistics and the complexity of competition in the relevant market, etc.<sup>25</sup> When assessing whether an undertaking abuses its dominant position in the relevant market, it is a tool rather than the final aim that using the market definition to assess the undertaking's market power and to evaluate that whether the monopoly behavior has the negative influence on the competition. In some circumstances, even if the delineation of the relevant market is hard to be made, we still can assess the undertaking's market power or the negative influence of the monopoly behavior on the competition using other substitute methods, such as finding the direct evidence that indicates the undertaking eliminates or restricts the competition. In conclude, not every case related to abuse the dominant position needs to be defined an absolutely clear and strict delineation of the relevant market.<sup>26</sup>

In China, the burden of defining the relevant market is on the complaint.<sup>27</sup> It requires that the complaint should point out a clear scope of the relevant market. The court will decide later that whether the market definition is appropriate based on the evidence that the complaint provides, the complaint's proposition and the advice from specialists, etc. If the market definition is not appropriate, the complaint will be required to redefine the relevant market based on the fact of the case. If the complaint still cannot define the relevant market correctly, the case will be dismissed. It seems that the procedure of market definition in competition law cases are quite strict.

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<sup>25</sup> Civil Judgement by Supreme Court, page 38

<sup>26</sup> Civil Judgement by Supreme Court, page 38

<sup>27</sup> Judicial Interpretation of Monopoly Dispute, Article 8

But is it really appropriate? is it necessary for every competition law case to be given a specific and rigorous market definition?

If we overemphasize the accuracy of market definition, it will weaken the decision of abusing the dominant position on the field of industries that the relevant market is hard to be defined, even if the complained undertaking abused the dominant position in fact. At this point, the Merger Guideline published by U.S. Department of Justice and Federal Trade Commission has a profound guiding significance. It redefines the role of market definition in the process of scrutinizing the concentration of business operators, strengthening that market definition is not the necessary starting point of scrutinizing the concentration of business operators. Also, evaluating the effect of concentration should not only rely on the market definition. The United States Court of Appeals for the Second Circuit stated that if the complaint could prove that the defendant's behavior has an adverse effect on the market competition, it is a more direct evidence than proving the market power by calculating the undertaking's market share in the specific relevant market.<sup>28</sup>

Moreover, the Internet market has its own features. Compared with the traditional market, like the banana market or the widget market, the Internet market has its own mode of operation. No matter the banana market or the widget market, as the traditional market, they are all created within a tangible geographical area, for example, the geographic scope of a banana market may be limited in a province. People living in that province can easily buy the bananas from that banana market, while people living outside the province may cost more money and time to buy the banana from that banana market, so they may prefer to buy banana from other banana markets that are easier accessible for them. However, the Internet market creates a new channel for operators to provide services to customers. For example, people from any

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<sup>28</sup> Man Yi, The Definition of Network Monopoly Market, *Special Zone Economy*, 7(2013), page 174

countries can easily access and download the QQ software without any finance cost and time cost. They can chat with their friends at any time online freely using QQ. Thus it is hard for us to make out the specific and rigorous delineation of the relevant geographic market. And the boundary of the Internet market itself is relatively vague and amphibolous. In the U.S., a new concept called ‘market for innovation’ was put forward, which is separated from the traditional market. It is introduced in some cases involving the innovative Internet industries.<sup>29</sup>

Further, the market share that the undertaking holds in the relevant market is not the only decisive factor to determine whether the undertaking has the dominant position. Although market shares provide a first indication of the structure of any particular market and of the relative importance of the various undertakings active on it<sup>30</sup>, many other factors still need to be taken into consideration when assessing the undertaking’s market power, such as barrier to entry analysis. And the determination of market power should not rely on market share alone, instead, a comprehensive analysis should be undertaken from all factors affecting competition conditions in the dynamic and specific circumstances.

Thus, it can be concluded that the market definition is not the only tool to analysis the competition law case. Although market definition provides a more economic and specific way to put the case in the economy and law environment as well as in the precise market scope, aiding in the competitive assessment by identifying those substitute products and services which make an effective constraint on the competitive behavior of the products or services that are offered in the market by the parties under the investigation<sup>31</sup>, it is not the end in itself. In some circumstances it is even unnecessary and not likely

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<sup>29</sup> Andrej Fatur, *EU Competition Law and the Information and Communication Technology Network Industries: Economic versus Legal Concepts in Pursuit of (Consumer) Welfare*, 2012, Oxford University Press, page 119

<sup>30</sup> Commission’s Guidance on Article 102 Enforcement Priorities

<sup>31</sup> Bishop and Walker, *The Economics of EC Competition Law* (cited in n.119) 4-002

to define the market. If market definition too often becomes the center of the analysis itself, it will maybe lead to erroneous results.<sup>32</sup>

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<sup>32</sup> Andrej Fatur, *EU Competition Law and the Information and Communication Technology Network Industries: Economic versus Legal Concepts in Pursuit of (Consumer) Welfare*, 2012, Oxford University Press, page 116, para 1

# 4 The Method of Market Definition in Case '3Q'

## 4.1 Can the Hypothetical Monopolist Test be Adopted in Case '3Q'?

### 4.1.1 The Introduction of HMT

The hypothetical monopolist test (hereinafter called 'HMT') is an analytical method that is used for market definition, which may assist in resolving the uncertainty that may arise from market definition.<sup>33</sup> It is currently being widely adopted in the formulation of anti-monopoly guidelines of various countries and regions. According to HMT, people may use economic tools to analyze relevant statistics so as to determine the minimum products aggregation level and geographic area in which the hypothetical monopolist is able to maintain a price higher than the competitive price level, thereby defining the relevant market.

In practice, the analytical methods of HMT are various. It can be exercised as SSNIP, small but significant and non-transitory in price, or SSNDQ, small but significant and non-transitory decrease in quality.<sup>34</sup> Here I use the SSNIP to explain how the HMT works when defining the relevant market.

The hypothetical monopolist test usually begins with the relevant product market definition. Starting with the product (target product) supplied by the business operator related to the anti-monopoly test, it hypothesizes that the business operator is a monopolist aiming at profit maximization (hypothetical

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<sup>33</sup> Alison Jones and Brenda Sufrin, *EU Competition Law-Text, Cases and Materials*, 5th edition, 2014, Oxford University Press, page 67

<sup>34</sup> Civil Judgement by Supreme Court, page 39

monopolist), and the issue that will be analyzed is whether the hypothetical monopolist is able to maintain the price of the target product to increase at a small scale (normally 5 to 10 per cent) continuously (normally one year), provided that the sales conditions of other products remain the same. A price increase of the target product will result in consumers' shifting to other closely substitutable products, which consequently leads to a sales reduction for the hypothetical monopolist. Subsequent to the increase of the target product price, if the hypothetical monopolist is still able to gain a profit after experiencing a sales reduction, the target product constitutes the relevant product market.<sup>35</sup>

If the price increase leads the consumers to shift to buy other products which have a close substitution relationship, the act of price increase by the hypothetical monopolist will become an unprofitable act. Thus, those substitutes shall be added into the relevant product market, forming a product group that consists of substitutes and the target product. Thereafter, the test shall be conducted on whether the hypothetical monopolist will still make a profit after the price increase of the product group. If the result is affirmative, then the new product group will be a part of the relevant product market; otherwise, the aforesaid analytical process shall continue.<sup>36</sup>

With the expansion of the product group, the products inside and outside the group become increasingly less substitutable. Eventually, a particular product group emerges, in which the hypothetical monopolist can attain profit through a price increase. Hence, the relevant product market is defined.

Methods for the definition of relevant geographic market and the definition of relevant product market are identical. It starts from the geographic area concerned in the anti-monopoly examination (target geographic area), within

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<sup>35</sup> Alison Jones and Brenda Sufrin, *EU Competition Law-Text, Cases and Materials*, 5th edition, 2014, Oxford University Press, page 65

<sup>36</sup> Alison Jones and Brenda Sufrin, *EU Competition Law-Text, Cases and Materials*, 5th edition, 2014, Oxford University Press, page 65



which business operators carry out operational activities, and the issue that will be analyzed is whether it is profitable for the hypothetical monopolist to maintain the price of the relevant product in the target geographic area to increase at a small scale (normally 5 to 10 per cent) continuously (normally one year), provided that the sales conditions of other geographic areas remain the same. If the result is affirmative, then the target geographic area constitutes the relevant geographic market. If the massive substitution in other geographic areas makes the price increase an unprofitable act, the geographic area needs to be expanded until the price increase finally becomes profitable, which is then defined as the relevant geographic market.

As a sort of analysis method, HTM either can be used as qualitative analysis, or can be used as quantitative analysis if it is easy to get the relevant statistics, the evidence of the case and the information of the market, etc.<sup>37</sup> In practice, it is the precise market situation and the relevant statistics that decide which method should we use to assess the relevant market in the specific case.<sup>38</sup> If the products are highly homogeneous in the specific market and the price competition is the main competition form, we should use SSNIP test to define the relevant market. However, if the differentiation of the products is obvious and others non-price factors, such as the product's quality, innovation, the consumer's experience, play a more important role, then it is supposed to use other methods to replace SSNIP.<sup>39</sup>

#### **4.1.2 Can the SSNIP Test be Adopted in Case**

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<sup>37</sup> Civil Judgement by Supreme Court, page 39

<sup>38</sup> Civil Judgement by Supreme Court, page 39

<sup>39</sup> Andrej Fatur, *EU Competition Law and the Information and Communication Technology Network Industries: Economic versus Legal Concepts in Pursuit of (Consumer) Welfare*, 2012, Oxford University Press, page 116, para 1

## '3Q'?

In the first-instance judgement, the Higher People's Court of Guangdong Province used SSNIP test to define the relevant market. However, the Supreme Court denied the SSNIP test used in '3Q' case to define the relevant market by the Higher People's Court of Guangdong Province, stating that SSNIP test is not applicable in such a special case.<sup>40</sup>

In Case '3Q', Tencent announced to every QQ user that QQ cannot be used on the PC that installed 360 software and advised users to unload 360 software. The complaint Qihoo 360 claimed that Tencent's behavior abused the dominant position in the relevant market and damaged Qihoo 360's profits. QQ, the instant messaging software, is the involved product, which Tencent used to provide the Internet instant messaging service to the QQ users for free. QQ has attracted and concentrated a large amount of users in China with its free instant messaging service. Here, non-price competition on the performance of the product is much more important than the non-existent price competition.<sup>41</sup> Thus, under this circumstance, I think SSNIP test may not provide very reliable information about competitors who could launch a challenge for the market.

According to CNNIC's 'the Research Report of Chinese Instant Messaging Users (2009)', 60.6% of users will not pay for the instant messaging service if it is charged.<sup>42</sup> It is similarly indicated that nearly 64.9% of users will not pay for the instant messaging service and turn to other message services if the

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<sup>40</sup> Civil Judgement by the Higher People's Court of Guangdong Province, Civil Judgement by Supreme Court

<sup>41</sup> Andrej Fatur, *EU Competition Law and the Information and Communication Technology Network Industries: Economic versus Legal Concepts in Pursuit of (Consumer) Welfare*, 2012, Oxford University Press, page 117, para 4

<sup>42</sup> CNNIC, *The Research Report of Chinese Instant Messaging Users (2009)*, page 33

instant messaging service is charged according to the statistical result described in ‘the Research Report of Chinese Instant Messaging Users Behavior (2010-2011)’. It also shows that 51.2% of Chinese instant messaging users have never paid for the instant messaging service before.<sup>43</sup> Besides, the media eNet did a survey to investigate that how many users are willing to paying for the instant messaging service. As expected, only 6.69% of QQ users still showed their interest on QQ if QQ is charges, the rest of 81.71% users said that they would turn to use other free charged software to substitute QQ.<sup>44</sup> Based on the statistics, it can be analyzed that SSNIP cannot be used under this circumstance:

First, the price that is risen from 0 to a small risen price (5%-10%) is not a simple issue itself in this case. For example, it can be assumed that Tencent begins to charge 0.05 RMB per month for each user. On the appearance, it seems that the pricing rising is only 5%-10%; in fact, however, it is completely different from that happened in the traditional market condition.<sup>45</sup> For example, if the price of banana rises from 5RMB/kg to 5.05RMB/kg, it is definitely ‘a small price rising’. However, in the instant messaging market, if the price rises from 0 RMB/month to 0.05 RMB/month, the price 0.05/month will be ‘an infinite rising’ compared with 0 RMB/month, which is not accord with the rigorous SSNIP test. And it also means that there will be a great change on the product’s characteristic and business model if QQ begins to be charged, since other mainstream instant messaging software are all free for users in China, such as Fetion, AliWangWang, Baidu Hi, MSN, etc.<sup>46</sup>

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<sup>43</sup> CNNIC, The Research Report of Chinese Instant Messaging Users Behavior (2010-2011), page 45

<sup>44</sup> Civil Judgement by Supreme Court, page 41

<sup>45</sup> Xianlin Wang, Review of Case ‘3Q’ Judgement by Supreme Court, *China Copyright*, 3(2013), page 23

<sup>46</sup> Xu Liu, How to assess the relevant market in case ‘3Q’, *Electronics Intellectual Property*, 4(2013), page 33

Additionally, if we analyze this issue based on the strict ‘SSNIP’ concept, obviously it will cause other problems: The current price of using QQ instant messaging service is 0 RMB/month, if the price is supposed to rise 5%-10% according to the strict mathematical method, the risen price is still 0 RMB/month, which makes the SSNIP test have no use under such circumstance.

In conclusion, if we use SSNIP test when assessing the instant messaging market, it is much possible to make the definition of the relevant market so broad, that is to say, include some products that are not substitutes. Thus, Adequate application of the SSNIP test presents significant challenges for analysis of innovative Internet industries.<sup>47</sup>

The SSNIP test focuses on the ‘small’ price change, while the Internet market focuses on the performance competition and product features that have proven to be of enormous value to consumers.<sup>48</sup> Thus the market definition method that is related to the product performance or quality can be considered in this case, like SSNDQ that we mentioned above. The issue that will be analyzed is whether the hypothetical monopolist is able to maintain the amount of users if the quality of QQ decrease in a small scale continuously, provided that the competition conditions of other products remain the same. However, it is difficult to control the level of quality decreasing. Besides, it is also difficult to get related statistics and information about the innovative and rapid changing Internet market. Thus we may use the quantitative analysis of SSNDQ quantitative analysis rather than the qualitative analysis of SSNDQ.<sup>49</sup>

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<sup>47</sup> Andrej Fatur, *EU Competition Law and the Information and Communication Technology Network Industries: Economic versus Legal Concepts in Pursuit of (Consumer)Welfare*, 2012, Oxford University Press, page 117, para. 1.

<sup>48</sup> Xu Liu, How to assess the relevant market in case ‘3Q’, *Electronics Intellectual Property*, 4(2013), page 36

<sup>49</sup> Civil Judgement by Supreme Court, page 39

## 4.2 Can the Demand/Supply Substitution be Adopted in Case '3Q'?

The traditional HMT is generally based on the analysis of demand substitution and supply substitution. However, the competition law mainly aimed to the traditional market when this method was put forward. Thus, it is not appropriate to use the old fashioned demand/supply substitution that is based on the price change when we analyze the innovative Internet market. Instead, the demand/supply substitution should be used based on the characteristics of Internet market.<sup>50</sup>

First, the Internet market is a typical two-sided market. The two-sided market refers to the market where the companies have to compete simultaneously for two groups of customers.<sup>51</sup> Take QQ in this case for example. There are two groups of customers which are attracted by QQ. One group of consumers is the QQ users, who use QQ chatting with others and making friends online for free. Another group of consumers is advertisers, which make advertisements on QQ interface to attract QQ users to buy the stuff which is appeared in advertisements. As a 'platform', QQ needs to balance these two groups: On the one hand, QQ attracts and gathers lots of customers by providing the free instant messaging service. On the other hand, QQ will use the huge user resource to attract advertisers that advertise and sell their products to the wide range of users. At the same time, QQ will provide some value-added services to the QQ users as another way to make profit. Circularly, QQ will use part of the profit to support the development of the free instant messaging service. This model is widely used in any of the Internet market. Under this model, the Internet service providers undoubtedly pay much more attention on the

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<sup>50</sup> Yanbei Meng, The Challenge of Market Definition in Internet Industries, *Electronics Intellectual Property*, 4(2013), page 42

<sup>51</sup> Ping Li, The Research of Market Definition in Internet Anti-Monopoly, *Guizhou Social Science*, Vol.292, No.4 (2014), page 163

products or services' quality and innovation in the competition, instead of price.<sup>52</sup> If we use SSNIP test to define the relevant market, in other words, make the service providers charge on the free basic service to the users, it will lead a mass loss of user resource. Further, it will break the balance of the circulation: advertisers will lose their interest on the 'platform'; and service suppliers will lose their profit.

Second, the online social network has network effect.<sup>53</sup> It is the effect that one user of a product or service has on the value of that product to other people. Here I still take QQ for example. If I use QQ as the instant messaging software, my friends may also use QQ in order to keep in touch with me. Then their friends will be also invited to use QQ. Thus there will be more and more people who will use QQ. The more people who use QQ, the more value the QQ has to each user. It creates a positive externality since a user may use QQ without intending to create value for other users, but does so in any case. As a consequence, even if the QQ turns to charge on the free basic service, like the instant messaging service, the majority of people will not turn to other substitutes like Fetion and Baidu Hi because they have built a strong social network on QQ and it is time-consuming for them to turn to use other software.<sup>54</sup> These switching costs are very important and imply that QQ users will not move easily between one product to another. Unlike the consumers in the traditional market, the consumers in the Internet market are not sensitive with the price change. From the dominant undertakings' perspective, other new entrants are not easily break the market structure since the dominant undertakings have the strong user foundation.

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<sup>52</sup> Xianlin Wang, Review of Case '3Q' Judgement by Supreme Court, *China Copyright*, 3(2013), page 25

<sup>53</sup> Man Yi, The Definition of Network Monopoly Market, *Special Zone Economy*, 7(2013), page 175

<sup>54</sup> Man Yi, The Definition of Network Monopoly Market, *Special Zone Economy*, 7(2013), page 176

As we can see, there are so many factors need to be reconsidered when we try to define the Internet relevant market by analyzing demand or supply substitution. It needs to be considered carefully not only the products' intended use and price, but also the switching cost and users' foundation, which are difficult to measure, since these factors will interact with each other either congruously or oppositely, which will make the market definition more complicated. Moreover, we also can use other measures to define the Internet relevant market, such as 'Profit Model Test', 'Product Quality Test' and 'Sale Model Test', which can reflect the unique characteristics of the Internet relevant market.<sup>55</sup>

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<sup>55</sup> Yanbei Meng, The Challenge of Market Definition in Internet Industries, *Electronics Intellectual Property*, 4(2013), page 43

# **5 The Relevant Product Market in Case ‘3Q’**

## **5.1 Is the Non-Comprehensive Instant Messaging Service in the Relevant Market?**

In the first-instance judgement, the Higher People’s Court of Guangdong Province stated that the non-comprehensive instant messaging service cannot be included in the relevant product market in this case. It claimed that the comprehensive instant messaging service can be the substitute for the non-comprehensive instant messaging service, while the non-comprehensive instant messaging service cannot substitute the comprehensive instant messaging service.<sup>56</sup> However, the Supreme Court reconsidered the issue in the second-instance judgement, saying that the non-comprehensive instant messaging service is a part of relevant market product.<sup>57</sup> From my perspective, I agree with the opinion from the Supreme Court with following reasons.

Compared with the traditional market that is usually focused on price, the competition among the Internet industry is focused more on the rapidly changing technology and the innovation of products. In the Internet area, the undertaking that owns the advanced technology and has the ability to develop the innovative products or services will be easier to grab the market share and have a dominant position in the relevant market. Otherwise it will die out. For example, MSN was the most popular instant messaging service supplier 10 years ago. However, with the appearance of new style software, like Facebook, Twitter and Skype, MSN faded away step by step from the

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<sup>56</sup> Civil Judgement by the Higher People’s Court of Guangdong Province

<sup>57</sup> Civil Judgement by Supreme Court



public.<sup>58</sup> Another example is Renren in China. It is a social network platform that advocates users to use their real name in the online social network. Before 2012, it is one of the most popular instant messaging software among Chinese universities' students. After 2012, however, with the invention of WeChat designed by Tencent, Renren was subject to a disastrous impact and died out in few years.<sup>59</sup>

QQ is a software that provides users comprehensive instant messaging service. It provides users with 3 communication modes: text, audio and video. Compared with that, the software that provides users non-comprehensive instant messaging service refers to the software that provides 1 or 2 types of instant messaging service among text, audio and video.<sup>60</sup> In the area of instant messaging service, both of them are popular in China, for example, Weibo and Renren provide text instant messaging service, but they do not provide other two types of instant messaging services<sup>61</sup>; YY, Wing and Yahoo! Messenger can provide users with text and audio instant messaging services, but they do not provide any video instant messaging service. Compared with that, QQ, Baidu Hi, Ali Wangwang and Popo are the comprehensive instant messaging services supplier.<sup>62</sup> Although the comprehensive instant messaging service supplier and the non-comprehensive instant messaging services supplier have some similarities, they are still different in many aspects. Thus, the issue that whether the non-comprehensive instant messaging service can be included in the relevant market should be taken into consideration.

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<sup>58</sup> Yanbei Meng, The Challenge of Market Definition in Internet Industries, *Electronics Intellectual Property*, 4(2013), page 43

<sup>59</sup> Xu Liu, How to assess the relevant market in case '3Q', *Electronics Intellectual Property*, 4(2013), page 37

<sup>60</sup> CNNIC, the Research Report of Chinese Instant Messaging Users (2009), page 8

<sup>61</sup> Man Yi, The Definition of Network Monopoly Market, *Special Zone Economy*, 7(2013), page 174

<sup>62</sup> CNNIC, the Research Report of Chinese Instant Messaging Users (2009), page 10

According to the methodology of market definition, the demand substitution should be assessed at first as follows.

First, it should be assessed based on the product's characteristics. The characteristics of non-comprehensive instant messaging service are highly similar to that of comprehensive instant messaging service. Based on the advanced Internet technology, all of them can show the status that whether other software users are online or not to users. Besides, they can provide users with various ways to communication with each other, such as instant private message, instant group message and instant temporary message, etc. In addition, all of the instant messaging services they provide are free for the software users.<sup>63</sup>

Second, it should be assessed based on the accessibility. The instant messaging software is mainly used on PC and smartphone. According to the investigation, there are 2 mainstream PC systems and 3 mainstream smartphone systems popular in China as well as worldwide. The mainstream PC systems are IOS designed by Apple Inc. and Windows designed by Microsoft Company.<sup>64</sup> The main smartphone systems include IOS designed by Apple Inc., Android designed by Google Inc. and Windows designed by Microsoft. According to the system test, all of the software that is mentioned above can be downloaded freely under any of the PC/smart phone systems. Also, users can easily acquire the skills that how to use the different instant messaging software to chat with others. Although each software has its own characteristics and uniqueness in some sense, their use interface and use method are quite similar to each other.<sup>65</sup>

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<sup>63</sup> Civil Judgement by Supreme Court, page 40-41

<sup>64</sup> Net Market Share, Mobile/Terminal Operating System Market Share

<sup>65</sup> Zhong Chun, What is the Relevant Market in Case '3Q?', *Journal of Xibei University of Politics and Law*, 4(2012), page 126

Third, it should be assessed based on the products' intended use. According to the statistics, all of the instant messaging software provides the text instant messaging service at least, although they are different from each other on the aspect that whether they also provide audio and video instant messaging services. According to some reports, however, even if some of software provides audio and video instant messaging services, the use frequency of these two services is far lower than that of text instant messaging services.<sup>66</sup> For example, according to 'the Research Report of Chinese Instant Messaging Users (2009)' published by CNNIC, 93.2% of users usually use the instant text messaging service to communicate with others, whereas only 57.2% of users often use the instant audio messaging service and 54.1% of people often use the instant video messaging service. It can be concluded that the majority of users highly demand for using text instant messaging service, while they have less interest on audio and video instant messaging services.<sup>67</sup>

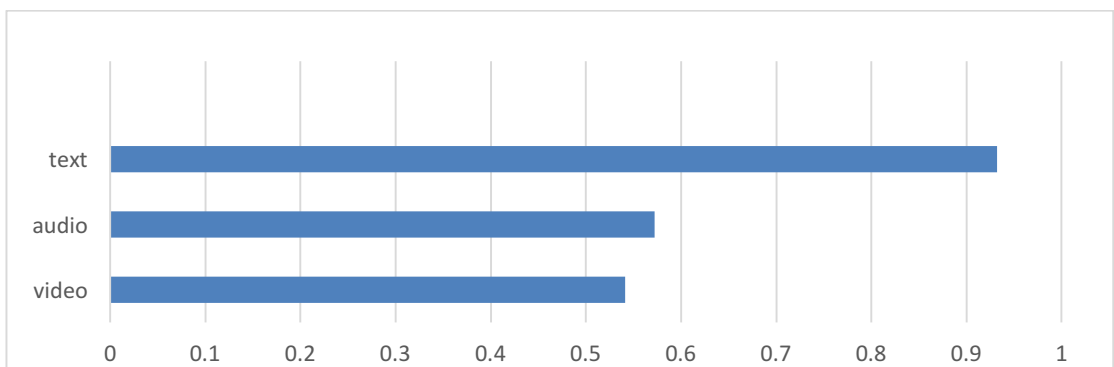


Figure 2. Which Type of Instant Messaging Service People Prefer to Use?

As the second step, we should analyze the supply substitutions. With the advanced Internet technology, it is very easy for non-comprehensive instant messaging service suppliers to turn to provide comprehensive instant messaging service without any highly extra financial and time costs. The main reason that they do not provide comprehensive instant messaging service is not that it is difficult for them to enhance their technology, but that they have

<sup>66</sup> Civil Judgement by Supreme Court, page 40

<sup>67</sup> CNNIC, the Research Report of Chinese Instant Messaging Users (2009), page 22

some strategic needs.<sup>68</sup> For example, Weibo, designed by Sina Inc., is one of the most popular instant messaging software in China, in use by well over 30% of Internet users, with a market penetration similar to the United States' Twitter. At the beginning, Weibo just allowed users to post at most 140 Chinese characters in one message on the website, and they did not provide any services related to audio or video instant message. The purpose of it is that they hoped users could keep the message short and sweet. They said that 140 Chinese characters is the perfect length for sending status updates via text message. Several years later, however, with the change of users' preference and the intended diverse ways that Weibo's users hope to experience, Sina Inc. canceled their '140 Chinese characters limitation' on Weibo and added other functions like audio and video instant messaging services to fulfil users' diverse needs.<sup>69</sup>

On the other hand, if the software that provides non-comprehensive instant messaging service and the software that provides comprehensive instant messaging service are divided into several separate market, like text instant messaging service market, text and audio instant messaging service market and comprehensive instant messaging service market, it will be not difficult to find that most of these separate markets have overlaps more or less. Thus, such market definition is a kind of meaningless immoderate relevant market division, which has no use either on processing the case or on deciding whether QQ abuses the dominant position.<sup>70</sup>

From the statement above, it can be noticed that in Case '3Q', the software that provides non-comprehensive instant messaging service should be consolidated into the comprehensive instant messaging service market.

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<sup>68</sup> Zhong Chun, What is the Relevant Market in Case '3Q'?, *Journal of Xibei University of Politics and Law*, 4(2012), page 130

<sup>69</sup> [https://en.wikipedia.org/wiki/Sina\\_Weibo](https://en.wikipedia.org/wiki/Sina_Weibo)

<sup>70</sup> Ming Ye, The Impact of Internet for Market Definition, *Social Science Research*, 1(2014), page 20

## **5.2 Is the Instant Messaging Service that is Provided via Mobile Terminal in the Relevant Market?**

In our daily life, it is widely accepted that people often use Mobile Terminal to enjoy the instant messaging service, which is a convenient and portable way to contact with others. The common mobile terminal mainly includes smartphone and tablet computer, etc. How can we assess whether the instant messaging service supplied by mobile terminal is part of relevant market or not? The key of the issue is to assess that whether the instant messaging service provided by the mobile terminal constitutes the substitute for the instant messaging service provided by portable computer (PC) and whether the instant messaging service provided by the mobile terminal forms an effective competitive restriction on the instant messaging service market when the respondent behavior happened. The issue will be analyzed from the following aspects:

First, when ‘3Q’ happened, the instant messaging service provided by the mobile terminal and the instant messaging service provided by portable computer (PC) tended to be parallel in terms of the products’ characteristics, qualities, intended uses and access mode, etc. ‘The Yearly Brief Research Report of Chinese Instant Messaging Service (2010-2011)’ published by iResearch Inc. pointed out that with the rapid development of the Internet technology, the smartphone and tablet computer became more and more popular among the masses. At the same time, the type of mobile terminal system become more and more diverse and the function of the mobile terminal become more and more advanced.<sup>71</sup> Thus, portal computer is not the

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<sup>71</sup> iResearch, The Yearly Brief Research Report of Chinese Instant Messaging Service (2010-2011), page 55-56

only device that can connect with the Internet. Under this circumstance, the Internet service suppliers put much more attention on designing various software that can provides users with the instant messaging services via mobile terminal. Besides, the instant messaging service provided by mobile terminal makes people's communication more convenient and quick-reached, thus it has become a strong substitute for the instant messaging service provided by the portable computer.

Second, when '3Q' happened, the instant messaging services provided by the mobile terminal is flourishing. It has formed a large scale of market at that time, as the following statistics indicated:

I. According to 'The Yearly Brief Research Report of Chinese Instant Messaging Service (2010-2011)' published by iResearch Inc., the number of Chinese users that used the instant messaging service on the portable computer is about 350 million, accounting for 77.2% of the total Internet users. Compared with that, the number of Chinese users that used the instant messaging service on the mobile terminals has exceeded 200 million.<sup>72</sup>

II. According to 'the Research Report of Chinese Instant Messaging Service Users (2009)' published by CNNIC, 72.2% of Chinese Internet users used the instant messaging services before, while 27.8% of Chinese Internet users never experienced the instant messaging services.<sup>73</sup>

III. Based on the statistics above, it can be calculated that:

In 2010, the total amount of Chinese Internet users is:

$350 \text{ million} / 0.772 = 450 \text{ million}$

the total amount of instant messaging services users whatever via portable computer or via mobile terminal is:

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<sup>72</sup> iResearch, The Yearly Brief Research Report of Chinese Instant Messaging Service (2010-2011), page 58

<sup>73</sup> CNNIC, The Research Report of Chinese Instant Messaging Service Users (2009), page 16

350 million + 200 million = 550 million

It is assumed that in 2010, the rate of using instant messaging service from Chinese users increases 15%,<sup>74</sup> that is to say, the rate of using instant messaging service is 85%. Based on it, in 2010, the number of Chinese people who not only use the instant messaging service on the portable computer but also use the instant messaging service on the mobile terminal is:

$550 \text{ million} - 450 \text{ million} * 0.85 = 170 \text{ million}$

Thus, the proportion between people who use the instant messaging service not only on the portable computer but also on the mobile terminal and people who use the instant messaging service only on the portable computer is:

170 million : 350 million

that is:

0.48:1

The statistics above indicates that nearly half of users regard the instant messaging services on the mobile terminal as the substitute for the instant messaging services on the portable computer. Thus we can make a rough conclusion that these two services are close substitutes for each other.

IV. According to the calculation above, iResearch also predicted that with the rapid development of mobile Internet technology and the popularity of the mobile terminal, from 2011 to 2014, the amount of instant messaging users via mobile terminal will show the tendency of exponential growth. And it also estimated that the amount of users who use the instant messaging service on the mobile terminal will exceed the amount of users who use the instant messaging service on the portal computer in 2013.<sup>75</sup>

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<sup>74</sup> CNNIC, The Research Report of Chinese Instant Messaging Service Users (2009), page 34

<sup>75</sup> iResearch, The Yearly Brief Research Report of Chinese Instant Messaging Service (2010-2011), page 64

V. The research report from IDC also pointed out that the total sales volume of smartphone had exceeded that of portal computer for the first time in the worldwide in 2010.<sup>76</sup>

Third, the change of the Internet service suppliers' attitude also shows the change of Chinese Internet users interest on the instant messaging service suppliers. Here I take WeChat for example. WeChat is a software that provides users with text and audio messaging communication services. It is also developed by Tencent and first released in January 2011. Now it is the most popular instant messaging apps in China, owning 1 billion created accounts and 700 million active users.<sup>77</sup> At the beginning, however, Tencent only designed the mobile terminal for WeChat, that is to say, WeChat users could not use it on their portable computers. Since Tencent believed that the instant messaging service used on the mobile terminal would gradually replace the instant messaging service used on the portable computer.

In conclusion, it is reasonably foreseeable that in the several coming years, the instant messaging service on the mobile terminal will gradually replace the instant messaging service on the portable computer, if not, at least, the proportionality of the instant messaging service on the mobile terminal will gradually increase and will be much like to exceed the the instant messaging service on the portable computer. Thus, the instant messaging service that is provided via mobile terminal is in the relevant market.

### **5.3 Are the Social Networking Site and Weibo in the Relevant Market?**

In the first-instance judgement, the Higher People's Court of Guangdong Province stated that the Social Networking Site and Weibo should be included in the relevant product market in this case, since all of them have the similar

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<sup>76</sup> Civil Judgement by Supreme Court, page 42

<sup>77</sup> [http://www.wechat.com/en/features.html#live\\_chat](http://www.wechat.com/en/features.html#live_chat)



function and characteristics.<sup>78</sup> However, the Supreme Court disagreed with that.<sup>79</sup>

### **5.3.1 The Introduction of Social Networking Site and Weibo**

Social networking site (SNS) is a platform to build social networks or social relations among people who share similar interests, activities, backgrounds or real life connections. Most of social networking sites are web based and provide means for users to interact over the Internet, such as email and instant messaging. It allows users to share their ideas, pictures, posts, activities, events, and interests with people in their network. The main types of social networking site services are those that contain category places (such as former school year or classmates), means of connect with friends (usually with self-description pages), and a recommendation system linked to trust. Popular social networking sites often combine many categories into one site together. In China, there are so many popular social networking services, such as Renren, which is based on the network of alumnus; Kaixin001, which is based on the social games; QQ Zone, which is connected with QQ and Baidu Tieba, which mainly provides anonymous online communication service, etc.<sup>80</sup>

Weibo is a Chinese microblogging website. Akin to a hybrid of Twitter and Facebook, it is one of the most popular sites in China, in used by well over 30% of Internet users. A user may post with a 140-character limit, mention or talk to other people using “@Username” formatting, add hashtags with “#Hashname#” formatting and follow other users to make their posts appear in one’s own time line. Weibo is an Internet platform which makes an opportunity for people to share their daily life with others. People also can

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<sup>78</sup> Civil Judgement by the Higher People’s Court of Guangdong Province

<sup>79</sup> Civil Judgement by Supreme Court

<sup>80</sup> Ying Shi, The History of SNS, *Modern Science*, 2(2014), page 90

acquire other's information from Weibo, mainly focusing on some public figures in the field of entertainment, sport, politics and some hot discussed themes like travel, fashion and education, etc.<sup>81</sup>

### **5.3.2 The Characteristics of Social Networking Site, Weibo and Instant Messaging Services are Different**

It should be admitted that there are some common characteristics among social networking site, Weibo and instant messaging services. For example: 1. They are all Internet-based; 2. All of them can notify users that whether other users are online or not; 3. They are all free of charge and 4. All of them can save the users' basic information and manage it for free.<sup>82</sup> Nevertheless, social networking site and Weibo still have some essential differences, which are stated as follows.

Social networking site and Weibo aim to create the public open communication caused by a large number of users.<sup>83</sup> It requires less on the function of the instant messaging services. Compared with that, the instant messaging services pay more attention to the private close communication among the small close groups.<sup>84</sup> It is enclosed in some sense. And the characteristic of 'instant message' is highly required. Take the comparison between Weibo and QQ for example. Weibo users can follow celebrities' Weibo account, such as famous actors, athletics and entrepreneurs' Weibo account, as long as such celebrities have Weibo accounts.<sup>85</sup> In general, the

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<sup>81</sup> <http://a.weibo.com/proc/productintro.php>

<sup>82</sup> Civil Judgement by Supreme Court, page 42

<sup>83</sup> Man Yi, The Definition of Network Monopoly Market, *Special Zone Economy*, 7(2013), page 175

<sup>84</sup> Xu Liu, How to assess the relevant market in case '3Q', *Electronics Intellectual Property*, 4(2013), page 37

<sup>85</sup> Weibo has an identification policy. Once a user gets through the verification on the Internet, an orange V will be added behind their username for people who has been verified. Also

username of celebrities' Weibo is the same as their real name. And one Weibo username can only be used by one Weibo account, that is to say, there are no possibility that two Weibo users have the same name. Thus people can get some information about celebrities' daily life and schedule via Weibo. Also, Weibo users can follow anyone they want to follow without any limitation. Compared with that, QQ is much more private and enclosed. Since it is hard for people to get celebrities' QQ number. Additionally, QQ users can use any username, even if it has been used by other users, which makes it more difficult for users to know strangers' QQ account information. If QQ user A wants to add another QQ user B's account into the list, it must be obtained and agreed by B. Otherwise, if B rejects this requirement, A and B cannot be the 'QQ friends' anymore.

Thus, the characteristics of social networking sites, Weibo and instant messaging services are totally different in main aspects.

### **5.3.3 The Intended Use of Social Networking Site, Weibo and Instant Messaging Services are Different**

The main functions between social networking site and Weibo and instant messaging services are distinct. It can be reflected by the different behaviors that users showed when they use social networking site, Weibo and instant messaging services.

According to the result from "the Research Report of Chinese Instant Messaging Services Users (2009)" published by CNNIC, the most concerned and widely used functions of instant messaging services are text message

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there will be a graph and a declaration on its user page to show the verification. In general, the majority of celebrities get the verification.

(93.2%), audio message (57.2%) and video message (54.1%),<sup>86</sup> while people pay less attention on building social network, acquiring information and making friends via instant messaging services.

Compared with the statistics listed above, “the Research Report of the Behavior of Chinese SNS and Weibo Users (2011-2012)” published by iResearch Inc. showed that the main purposes and the most popular functions that users use the social networking site are: Knowing a lot about friends’ daily life (74.3%); Contacting with old friends (73.1%); Recording their own daily life and experience (67.5%); Discussing some interesting topics (60.0%); Showing themselves by posting photos and diary (52.0%) and making new friends (45.5%).<sup>87</sup> Similarly, the main purposes and the most popular functions that users use Weibo are: Acquiring some new information (58.1%); Recording their own daily life and experience (57.6%); Paying attention on their interested celebrities (53.2%); Discussing some hot social issues or personal experiences (52.3%); Broadening their knowledge (48.8%) and making new friends/ contacting with old friends (41.0%).<sup>88</sup>

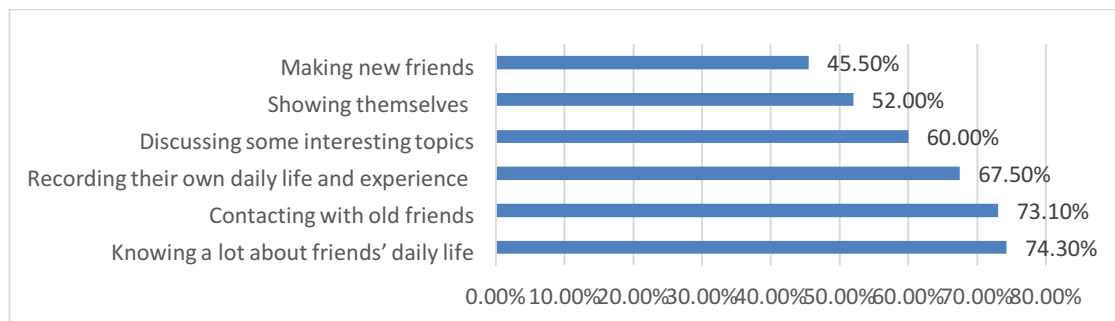


Figure 3. The most popular functions of social networking site

<sup>86</sup> CNNIC, the Research Report of Chinese Instant Messaging Services Users (2009), page 22

<sup>87</sup> iResearch, The Research Report of the Behavior of Chinese SNS and Weibo Users (2011-2012), page 42

<sup>88</sup> iResearch, The Research Report of the Behavior of Chinese SNS and Weibo Users (2011-2012), page 48

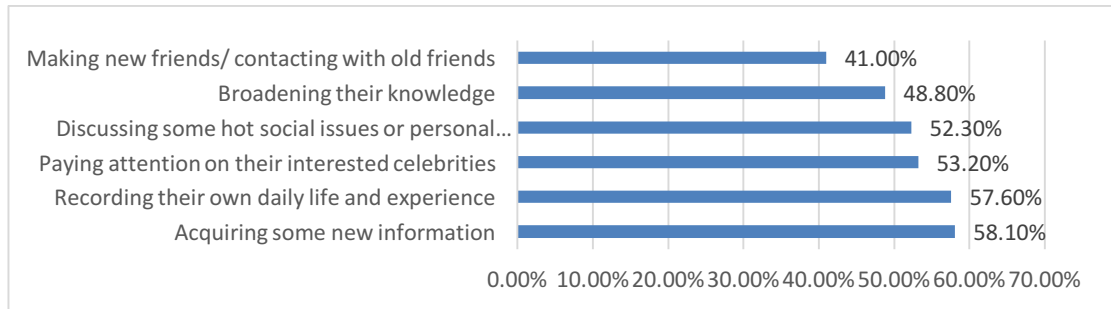


Figure 4. The most popular functions of Weibo

The analysis above obviously indicates that the purpose of using the social networking site and Weibo are much more diverse than that of using instant messaging services. By using the social networking site and Weibo, people concentrated more on social network functions such as contacting with friends, sharing useful information, showing themselves and making friends, etc. Thus the main point of the social networking site and Weibo is social network, while the main point of the instant messaging services is communication and message. They meet users' basic Internet communication demand from different aspects. From users' perspective, social networking site, Weibo and the instant messaging services are more likely as complement, rather than substitute.<sup>89</sup>

It should be emphasized that the instant messaging services provided by social networking sites and Weibo should be defined within the relevant market of Case '3Q', even though social networking sites and Weibo themselves are not part of the relevant market. The frequency that people use the instant messaging services supplied by social networking sites and Weibo cannot be considered as one of factors that are used to assess whether social networking sites and Weibo themselves are part of the relevant market in Case '3Q'.

### 5.3.4 The Correlation among Social Networking Sites, Weibo and the Instant Messaging

<sup>89</sup> Civil Judgement by Supreme Court, page 43

## Services are Different

The correlation among social networking sites, Weibo and the instant messaging services could prove that social networking sites and Weibo are not likely to be the close substitute for the instant messaging services from another side.

The correlation analysis is an empirical method that is used to analyze that which products are in the relevant market. It is an intuitive method that is commonly used in the economics analysis in the worldwide. This fundamental theory is based on an important hypothesis: The prices of the substitutes will fluctuate together. It cannot be denied that in some specific circumstances, the correlation analysis may increase the possibility of misjudgment. However, if we use the correlation analysis strictly according to the rules, the result of the correlation analysis can still be the convictive reference.

According to the statistics from economics experts, from January 2009 to June 2013, people gradually preferred to use the instant messaging services with an upward tendency.<sup>90</sup> In 2011, the total effective time that Chinese users spent on using the instant messaging services were 800-900 million hours per week. Compared with that, in the mid of 2010, the total effective time that Chinese users spend on using social networking sites had reached the highest point, and then the trend turned to be downward gradually. From 2010, the total effective time that Chinese users spend on using Weibo increased piece by piece, and then in 2012, it became to keep steady. The total effective time that Chinese users spend on using social networking sites and Weibo is 100 million hours per week in 2010. Based on the economics experts' calculation, it turns out that the correlation coefficient is -0.07, which proved that social

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<sup>90</sup> Jiangli Zhang, *The Regulation of Internet Competition*, *Peking University Law Journal*, Vol.27, No.1(2015), page 271

networking sites, Weibo and instant messaging services did not have the close correlation at that time.<sup>91</sup>

Based on the analysis, from my point of view, the conclusion is that the social networking site and Weibo cannot be included into the relevant market.

## **5.4 Is the Short Message Service and Email Service Included in the Relevant Market?**

It is commonly agreed in both Civil Judgement by the Higher People's Court of Guangdong Province and Civil Judgement by Supreme Court that the Short Message Service and Email service are totally different from the instant messaging service, thus cannot be included in the relevant market.<sup>92</sup> I also agree with such an opinion based on the following analysis.

### **5.4.1 The Short Message Service**

The short message service and the instant messaging service are different in many aspects that are supposed to be considered when defining the relevant market, such as the products' characteristics, the intended uses and the price, etc.

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<sup>91</sup> Jiangli Zhang, The Regulation of Internet Competition, *Peking University Law Journal*, Vol.27, No.1(2015), page 273

<sup>92</sup> Civil Judgement by the Higher People's Court of Guangdong Province, Civil Judgement by Supreme Court

Short message service (SMS) is a text messaging service component of mobile communication systems. It uses standardized communications protocols to allow mobile phone devices to exchange short text messages.<sup>93</sup>

First, the short message service and the instant messaging service are totally different at the level of technology. The instant messaging service is based on the Internet technology, which can notify users that whether other users are online or not and save the users' basic information and manage it.<sup>94</sup> Compared with that, the short message service provided by mobile phone companies is based on GSM technology, which is different from Internet technology. It cannot show the mobile phone users anything about other users.

Second, the short message has a length limitation while the instant message does not have. Take the Chinese SMS and QQ for example. In China, the amount of characters of one SMS cannot exceed 150, that is to say, if you send the SMS that the amount of characters exceeds 150, then this SMS will be divided into two or more pieces of message. Compared with that, users can send the instant message without the limitation of character amount to other users. Naturally, the instant message will be sent as a whole one, in other words, it will not be divided into several pieces.

Third, the short message service is charged by mobile phone companies, while the instant messaging service is free of charge. In China, the common price of short message service is 0.1 RMB per piece. As we discussed before, even if the quality of the instant messaging service decreases at a small scale continuously, the instant messaging service users will still keep using it and do not turn to use the short message service to replace it. Thus, the short message service and the instant messaging service are not the close substitute.

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<sup>93</sup> [https://en.wikipedia.org/wiki/Short\\_Message\\_Service](https://en.wikipedia.org/wiki/Short_Message_Service)

<sup>94</sup> Liyang Hou and Jian Li, The Free Model of Instant Messaging Service, *Modern Law Science*, Vol.36, No.6 (2014), page 74-76



Based on the analysis above, the short message service cannot be divided into the relevant market of Case ‘3Q’.

## 5.4.2 The Email Service

The email service and the instant messaging service are also different in many aspects that are used to define the relevant market, such as the products’ characteristics and the intended uses.

Email is a method of exchanging digital messages between computer users. It operates across computer networks, now primarily the Internet.<sup>95</sup> It cannot be denied that these two kinds of services have some similarities on the characteristics and intended uses. For example, both of the email service and the instant messaging service are free of charge. The development of them are all based on the Internet technology. The users can send messages in terms of text, picture, audio and video either via the instant messaging service or the email service.<sup>96</sup> Nevertheless, the email service and the instant messaging service still have obvious differences on the core function and characteristics.

The email service is not an instant communication service. According to our experience of emailing with others, the authors do not know whether the recipient is online when they send the email. It is unnecessary for authors and recipients to be online simultaneously.<sup>97</sup> Compared with that, if the message authors send others the instant message when others are online, they can get the reply from the recipient as soon as possible, which makes the communication more convenient and rapid. Thus, it is reasonably assumed that even if the quality of the instant messaging service decreases at a small

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<sup>95</sup> Craig Partridge, The Technical Development of Internet Email, *IEEE Annals of the History of Computing*, 2008 vol.30, page 25

<sup>96</sup> R.Tomlinson, Personal Communication, *IEEE Annals of the History of Computing*, Vol. 30, No.2 (2008), page 43

<sup>97</sup> Sulun Zhang, Market Definition in Internet Competition, *Law Review*, 3(2012), page 87

scale continuously, the instant messaging service users will still keep using it and do not turn to use the email service to replace it.<sup>98</sup>

Thus, the email service cannot be divided into the relevant market of Case ‘3Q’.

## **5.5 Can the Relevant Product Market in Case ‘3Q’ be Defined as ‘the Internet Platform’?**

This issue is caused by one of the characteristics of the Internet relevant market, ‘two-sided market’. Compared with the traditional single-sided market, the undertakings have to deal with two groups of consumers which interact with each other themselves. It is an economic platform having two distinct user groups that provide each other with network benefits. Two-sided market can be found in many industries, which the instant messaging service market is a typical one. On the one hand, the instant messaging service suppliers provide users with the free instant messaging service; On the other hand, they smartly make use of the the large group of users to attract advertisers to invest for the instant messaging service. The instant messaging service users will know about the advertisers’ products when they use the instant messaging service software and see the advertisement. Then it is highly possible that they will purchase some of products. Thus the advertisers make a profit in the process.<sup>99</sup> Based on the steps above, it forms a positive cycle among the instant messaging service suppliers, the users and the advertisers. So the instant messaging service market is a standard ‘two-sided market’. The instant messaging suppliers are like the mediator to balance the

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<sup>98</sup> Liyang Hou and Jian Li, The Free Model of Instant Messaging Service, *Modern Law Science*, Vol.36, No.6 (2014), page 74

<sup>99</sup> Man Yi, The Definition of Network Monopoly Market, *Special Zone Economy*, 7(2013), page 177

relationship between other two distinct groups. Take Google Inc. for example. According to the Google Financial Report 2012, the general revenue of Google is 50.1 billion USD in 2012, of which 43.6 billion USD comes from the advertising revenue.<sup>100</sup> It indicates that Google's search engine service has a close relationship with its advertising service. It can be assumed that without the solid foundation of advertising revenue, the free search engine service cannot survive for such a long time. At the same time, the development of free search engine service is the basis of the development of the online advertising service.

In China, the main Internet products are becoming the Internet 'platform' gradually. Take the defendant QQ for example. Not only does QQ keep providing the instant messaging services, but also develops many other functions like QQ email, QQ microblog, QQ music, QQ live, QQ game and QQ search, etc. It makes QQ become a comprehensive information platform that covers the fields of communication, entertainment, business work and customer service.<sup>101</sup> Under this circumstance, in order to gain profits from advertising and other value added business, QQ forms competition with other instant messaging service providers not only in the field of software users, but also in the field of advertisement investment.

Whether the relevant market of Case '3Q' can be defined as the Internet platform mainly concentrates on the situation that whether the competition between the Internet platforms on the fields of 'seizing' users and advertisers breaks the limitation that depends on the characteristics of products and forms the competition restrictions on the services providers. Since there is a lack of exact statistical data, we need to analyze this issue from four aspects as follows:

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<sup>100</sup> Google, Google Financial Report (2012), page 23

<sup>101</sup> Civil Judgement by Supreme Court, page 46

First, the competition between the Internet platforms on the fields of ‘seizing’ users and advertisers is based on the core products or services that the Internet platforms provide. In this case, the core service that the complainant Qihoo 360 provides is the Internet security service, while the core service that the defendant Tencent QQ provides is the instant messaging service that is based on the Internet. It is obvious that the core services that two parties provide are not the same.<sup>102</sup>

Second, the main products or services that the Internet platforms provide are highly different in terms of the characteristics, the intended use, the nature and the function. The advertisers may only pay attention to the price and effect of the advertisement, while pay no attention to the difference between those products or services. Thus, from advertisers’ perspective, all of the Internet platforms have no difference and can substitute for each other, since they just need the platform to make advertisement. As for users, however, the difference of the platforms’ products or services is the decisive factor for them to choose which ‘platform’ they will use.<sup>103</sup> For example, if a user wants to search out a celebrity’s life story via the Internet, he will definitely choose a search engine to finish it, rather than using the instant messaging service; if a user wants to send his friend a message, it is not possible for him to use the Internet security service to do that. Thus, from the users’ perspective, the Internet platforms which provide different products or services are not the close substitutes.

Third, if the main products or services that the Internet platforms provide are different from each other in terms of the characteristics, the intended use, the nature and the function, the main user groups and advertisers will also have some distinctions. It will also make the following steps be highly different,

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<sup>102</sup> Civil Judgement by Supreme Court, page 45

<sup>103</sup> Yihui Zheng, The Development of the Internet Platform, *Finance and Economics*, 12(2014), page 25

such as the mode of making profits, the target users groups and the products from downstream markets, etc.

Fourth, in Case ‘3Q’, it is obvious that the Tencent QQ mainly provides the instant messaging service via Internet. It should be considered, however, that whether Tencent QQ extends their market power into the Internet security service and restricts the competition of the Internet security service by strengthening its market power in this field. If the answer is yes, then the services that are provided by Qihoo 360 and Tencent QQ may be defined in the relevant market. In reality, Tencent QQ only provides users with the Internet security service via the mobile terminal at that time. Even so, people still know little about the Internet security service via the mobile terminal. Most of the Chinese Internet users still prefer to use the instant messaging service via QQ and use the Internet security services via Qihoo 360. Thus, if the relevant market in Case ‘3Q’ covers the Internet platforms which provides other services, such as the search engine, news portal and Internet security, the scope of the relevant market will be too broad, which weakens Tencent QQ’s actual market power in the relevant market.<sup>104</sup>

However, it is worth noting that in other cases, that the complainant and the defendant are competing with each other via the Internet platform should be taken into consideration when we try to define the relevant market. Since the Internet industry is a rapid-developing and new technology-based industry, the new characteristics and innovations should be considered at some extent, but it cannot be over emphasized. In Case ‘3Q’, however, since we do not have any accurate statistics and the effect of the Internet platform is not obvious, if the issue of the Internet platform is considered so much, it will exaggerate the effect that the Internet platform have on Tencent QQ.<sup>105</sup>

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<sup>104</sup> Xianlin Wang, Review of Case ‘3Q’ Judgement by Supreme Court, *China Copyright*, 3(2013), page 54

<sup>105</sup> Civil Judgement by Supreme Court, page 46

# **6 the Geographic Market in Case ‘3Q’**

## **6.1 How to Define the Relevant Geographic Market?**

Method for the definition of relevant geographic market is identical to that for the definition of relevant product market. It starts from the geographic area concerned in the anti-monopoly examination (target geographic area), within which business operators carry out operational activities, and the issue that will be analyzed is whether it is profitable for the hypothetical monopolist to maintain the price of the relevant product in the target geographic area to increase at a small scale (normally 5 to 10 per cent) continuously (normally one year), provided that the sales conditions of other geographic areas remain the same.<sup>106</sup> If the result is affirmative, then the target geographic area constitutes the relevant geographic market. If the massive substitution in other geographic areas makes the price increase an unprofitable act, the geographic area needs to be expanded until the price increase finally becomes profitable, which is then defined as the relevant geographic market.

## **6.2 the Geographic Market Definition in Case ‘3Q’**

In the first-instance judgement, the Higher People’s Court of Guangdong Province defined the relevant geographic market in ‘3Q’ case as global market. Once published, it was hotly discussed by scholars. Later in second-instance judgment, the Supreme Court modified the relevant geographic market as domestic market. It is hard to say which one is more specific, from

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<sup>106</sup> Guideline, Article 10

my perspective, however, the relevant geographic market in this case should be defined as domestic market.

The instant messaging service via the Internet can cover the global wide quite easily, since the cost of instant messaging service via the Internet is low and the technology of the instant messaging service via the Internet is identical in the worldwide.<sup>107</sup> In other words, it does not need to concern much with the extra cost of transportation, the extra cost of services and the technical barriers when we try to assess the relevant geographic market definition. Thus, some other factors will be taken into consideration when defining the relevant geographic market in Case ‘3Q’, such as the actual area where the Tencent QQ is widely used, the provisions of laws and regulations in China and the global competition environment of the instant messaging service via the Internet, etc. However, it must be noted that each of them are not the decisive factors, that is to say, we need to assess these factors comprehensively when defining the relevant market, rather than just depending on one of them. Then I will analyze each of them as follows.

First, the majority of users who live in China prefer to choose the instant messaging service that is provided by the operators that are from China. According to the statistics collected by iResearch, in 2010, less than 3% of the time that Chinese users spent on the instant messaging service was for the international instant messaging service provided by the operators abroad. And the percentage of the time that Chinese users spent on the instant messaging service provided by the international operators was gradually-declined year by year. Compared with that, people who live in China spend more than 97% of the time on the instant messaging service provided by the operators from China. The statistics implies that Chinese users paid little attention on the instant messaging service provided by the operators abroad.

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<sup>107</sup> Li Hu, How to Define the Geographic market in Internet Industries under Anti-Monopoly Law, *Law Journal*, 6(2014), page 45

Second, the Chinese legislations (mainly includes administrative law and regulations) that are related to the Internet industries explicitly point out the requirements and the limitations of the instant messaging services that are operated in China. Since the instant messaging service is considered to be a subset of telecommunication service according to the judicial interpretation published by National Supreme Court, the legislation that are related to telecommunication service also applies to the instant messaging services.

According to ‘Telecommunication Regulation of the People’s Republic of China’ Article 7, the State establishes a licensing system for telecommunications business according to the different categories of business. Telecommunications business shall be conducted with a license obtained from MII or the telecommunications administrative authorities of the provinces, autonomous regions and cities under the direct control of the Central Government. Any organization or individual that does not obtain a telecommunication business license shall not be engaged in telecommunications business.<sup>108</sup> Article 13 states the requirements that the value-added telecommunications business provider shall meet: 1. Being a company established in accordance with the law; 2. Having capital and professionals commensurate to its business; 3. Having the credibility and capacity to provide long-term business; 4. Other requirements provided by the State.<sup>109</sup> ‘Measures for the Administration of Permits for Operation of Telecommunication Business’ Article 6 gives more detailed requirements for the value-added telecommunication business provider. It requires that the applicant is supposed to meet the following conditions: 1. Its minimum amount of the registered capital shall be RMB 1 million Yuan if it operates the business within a province, autonomous region, or municipality directly under the Central Government; or its minimum amount of the registered capital shall be RMB 10 million Yuan if it operates the business throughout

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<sup>108</sup> Telecommunication Regulation of the People’s Republic of China, Article 7

<sup>109</sup> Telecommunication Regulation of the People’s Republic of China, Article 13



China or by covering different provinces, autonomous regions, or municipalities directly under the Central Government; 2. It has the feasibility study report and relevant technical schemes; 3. It has necessary place and facilities; 4. It has committed no major illegal act within the latest 3 years.<sup>110</sup> Moreover, ‘Regulation on Internet Information Service of the People’s Republic of China’ Article 6 states that a profitable Internet information service provider shall meet the following requirements: 1. having a business development plan and relevant technology solutions; 2. having well-developed safeguarding measures of network and information security, including measures to safeguard website security and systems to guarantee information security and secrecy as well as the security of user information; 3. having obtained the approval of the competent industry authorities.<sup>111</sup> Additionally, ‘Provision on the Administration of Foreign-funded Telecommunications Enterprises’ sets the requirement for the foreign operator to enter the Chinese telecommunication market. Article 5 states that the foreign-funded telecom enterprise shall meet the following provisions in terms of their registered capital: 1. If the enterprises is engaged in the basic telecom business nationwide or beyond a single province, autonomous region or municipality directly under the Central Government, it shall have a registered capital of not less than 1 billion yuan. If it is engaged in the value-added telecom businesses, it shall have a registered capital of not less than 10 million yuan; 2. If the enterprise is engaged in the basic telecom business within a province, autonomous region or municipality directly under the Central Government, it shall have a registered capital of not less than 100 million yuan. If it is engaged in the value-added businesses, it shall have a registered capital of not less than 1 million yuan.

According to the administrative laws and regulations listed above, the supply of the instant messaging service applies to the administrative permission

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<sup>110</sup> Measures for the Administration of Permits for Operation of Telecommunication Business, Article 6

<sup>111</sup> Regulation on Internet Information Service of the People’s Republic of China, Article 6

system. It means that if the instant messaging service operators intend to provide instant messaging services for users in China, those operators have to apply for engaging the instant messaging service to the appointed administrative institutions in advance. Only do the appointed administrative institutions approve the application, the instant messaging service operators can get the approval and provide the instant messaging service in China. In practice, it is hard for the foreign operators to get the approval in China. If the foreign operators want to enter in the Chinese instant messaging services market easily, they will be advised to set up the Chinese and foreign equity joint venture with other Chinese companies instead.

Additionally, it is common known that users in China cannot use Facebook, Twitter, Whatsapp and Google, etc, which are the most popular and widely used applications all over the world.<sup>112</sup> Take Whatsapp for example. It has no doubt that Whatsapp is application that provides users with instant messaging service. The main service it provides is totally the same as the main service provided by Tencent QQ. However, for the users in China, they have no possibility using Whatsapp, even have no possibility downloading that application according to the relevant Chinese regulations. Thus, even though Whatsapp is a worldwide popular instant messaging application, it is not 'popular' in China because of the passive force. Thus, it is not a substitute for Tencent QQ. These two applications cannot be defined in the relevant market.

Third, the cultural diversity<sup>113</sup> and the tradition difference<sup>114</sup> will also affect the relevant geographic market definition. The most distinctive factor is the

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<sup>112</sup> Li Hu, How to Define the Geographic market in Internet Industries under Anti-Monopoly Law, *Law Journal*, 6(2014), page 49

<sup>113</sup> Li Hu, How to Define the Geographic market in Internet Industries under Anti-Monopoly Law, *Law Journal*, 6(2014), page 47

<sup>114</sup> Yanbei Meng, The Challenge of Market Definition in Internet Industries, *Electronics Intellectual Property*, 4(2013), page 44

difference of language using.<sup>115</sup> With the development of globalization, more and more Internet products and services are provided with multi-languages, among of which Chinese is usually an indispensable part. It seems that there is no difference wherever the instant messaging software ‘comes from’ in theory. In fact, however, the software whose basic language is Chinese is more widely used than the software whose basic language is English or other languages. Since the Chinese users prefer to use Chinese services, while US users tend to use English services. If the software’s basic language is Chinese, it will be more specific and conventional than the software which Chinese is the translation language. Thus the software whose basic language is Chinese will be more popular and easily-spread among Chinese users. In Case ‘3Q’, according to the relevant investigation, 85% of QQ users are living in China, while only 15% of them live abroad. Among these 15% users, the main reason that they use Tencent QQ is keeping in touch with Chinese friends and relatives, that is to say, the majority of these 15% users are also Chinese. From this respect, the relevant geographic market cannot be defined as global market in Case ‘3Q’.<sup>116</sup>

Fourth, the foreign instant messaging service operators do not form the competition restriction on the domestic operators in the instant messaging service market. Although some of the foreign operators are providing Chinese users with the instant messaging service, it does not mean that they have entered into the Chinese market successfully or restricted the competition with domestic operators in the instant messaging service market. The definition of geographic relevant market is concerned that whether the foreign operators come into the market easily and restrict the competition in domestic.

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<sup>115</sup> Li Hu, How to Define the Geographic market in Internet Industries under Anti-Monopoly Law, *Law Journal*, 6(2014), page 47

<sup>116</sup> But this analysis causes a new issue: can the relevant geographic market be defined as ‘Chinese language market’?

Fifth, there is a case law that we can refer to, which is ‘Renren vs. Baidu’.<sup>117</sup> The complaint Renren is a medical information consulting company, which invested in Baidu search. The defendant Baidu is a Chinese web services company which offers many services, including a Chinese search engine for websites, audio files and images. Renren claimed that Baidu abused its dominant position and held the opinion that the relevant geographic market was Chinese market. However, Baidu claimed that the relevant geographic market should be the global market. In the judgement, the trial judges from the Higher People’s Court of Beijing pointed out that although the Internet information service is easily transnational at the technical level, users who use the Chinese search engine mainly live in China, and the search engines that people choose as substitutes for Baidu are also from China, that is to say, only the search engine providers that are from China are in the competition with each other. Thus, the geographic market in this case is Chinese market. There is also some foreign case law that are related to the competition law in the Internet industries. In EU case ‘Microsoft vs. Skype’, ECJ defined the relevant geographic market as ‘European union market’;<sup>118</sup> In US case ‘Liveuniverse vs. Myspace’, the relevant geographic market is ‘US market’, rather than global market.<sup>119</sup>

Thus, in Case ‘3Q’, the geographic market should be Chinese market.

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<sup>117</sup> Sulun Zhang, Market Definition in Internet Competition, *Law Review*, 3(2012), page 89

<sup>118</sup> Sulun Zhang, Market Definition in Internet Competition, *Law Review*, 3(2012), page 89

<sup>119</sup> Yanbei Meng, The Challenge of Market Definition in Internet Industries, *Electronics Intellectual Property*, 4(2013), page 46

# **7 the Relevant Temporal Market**

## **7.1 Should the Market Conditions Happened after the Competition Behavior and the Development of the Information Technologies be Considered?**

As we know, the competition in the field of the Internet industries is dynamic competition. If the relevant market is defined only according to the market situation at a point of time, rather than a period of time, it is possible that the scope of the relevant market will be narrowly defined and the market power of the hypothetical monopolist will be overestimated. Many anti-competitive actions are designed to affect future competition, in turn, they will also affect future prices and future product configuration.

In order to define the relevant market precisely, when we define the relevant market, the future market interaction that are possibly predictable should be taken into consideration. For example, in order to estimate that whether the hypothetical monopolist is restricted by other undertakings' competition behavior correctly and accurately, it is possible to be reasonably predict the future market condition that happens after the hypothetical monopolist maintains its behavior continuously (normally one year). Additionally, if the predicted market interaction and change is confirmed by the later development of the market, it means that the earlier prediction is logical and correct. In this regard, the potential competition theory is very useful although

it is an imperfect tool for analyzing immediate or near-future competition effects.<sup>120</sup>

## 7.2 the Relevant Temporal Market in Case '3Q'

According to the traditional product life cycle theory, a new product progresses through a sequence of stages from introduction to growth, maturity and decline. That a product goes through from when it was first thought of until it finally is removed from the market needs quite a long period of time. Compared with that, however, because of the rapid development of the Internet technology and the fast speed of the Internet-related products' innovation, the Internet-related products' life cycle is quite short, even the popularity of a specific Internet-related product is transient.<sup>121</sup> Thus, it is very important that take the relevant temporal market into consideration when defining the relevant market.

The relevant market definition comprises the concept of the relevant temporal market. The relevant temporal market refers to the competition time period that the relevant products compete with each other in the relevant geographic market.<sup>122</sup> It was discussed in UK Market Definition (Understanding Competition Law). Article 5.1 and 5.2 states that a time dimension might be appropriate where it is not possible for customers to substitute between time periods or suppliers cannot substitute between time periods. For example, peak customers might not view peak and off peak train tickets as substitutes.

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<sup>120</sup> Andrej Fatur, *EU Competition Law and the Information and Communication Technology Network Industries: Economic versus Legal Concepts in Pursuit of (Consumer)Welfare*, 2012, Oxford University Press, page 116, para 3

<sup>121</sup> Yanbei Meng, The Challenge of Market Definition in Internet Industries, *Electronics Intellectual Property*, 4(2013), page 3

<sup>122</sup> Ping Li, The Research of Market Definition in Internet Anti-Monopoly, *Guizhou Social Science*, Vol.292, No.4 (2014), page 20

Capacity to produce fruit may vary between time periods and it may not be possible to store fruit from one period to another.<sup>123</sup>

The rapid development of the Internet makes the time as a decisive factor when defining the relevant market, which is mainly based on the dynamic behavior of the Internet products competition, the provisionality of the specific undertaking's dominant position and the time period of cost accounting. In Case '3Q', the disputing behavior happened in 2010, but the legal action was processed in 2012-2013. Apparently, from 2010 to 2013, the Internet industries had great changes, such as technology, products and services. For example, the smartphone became widespread rapidly during this three-year period. Thus, the time factor should be significantly taken into consideration when defining the relevant market. The rapid change of the Internet industries also implies that the undertaking's dominant position is only the temporal dominant position in the relevant market.

In '3Q' case, the first-instance trial did not mention this issue, while the second-instance trial just discussed few words on it, without any effective judgement. It affirmed that the purpose of market definition is to clear the market definition when the disputed behavior happened, but it should be dynamic, that is to say, to assess whether the undertaking is competing with other potential competitors more precisely, the predictable change should be taken into consideration.<sup>124</sup> However, as we can see, it did not give us a specific method to determine how to assess the relevant temporal market.

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<sup>123</sup> UK Market Definition (Understanding Competition Law), Article 5.2

<sup>124</sup> Civil Judgement by Supreme Court, page 48.

## 8 the Innovation Market

As an important non-price factor, innovation has a considerable effect on the market definition. Since the cross-price elasticity test and the hypothetical monopolist test are all based on the price analysis, the change of demand and supply caused by innovation cannot be assessed by these two traditional methods that are used to define the relevant market.

Additionally, the innovation of the Internet technology will strengthen the possibility that products or services become the substitutes for others. In the Internet industries, two products that are seemed to be totally different at first may become the substitutes because of the rapid development and innovation of the technology. It will have a significant effect on the relevant market definition. Take Weibo for example. At the initial stage, Weibo is just a platform where people can share their interests and daily life within 140 characters with others and know about others' life. With the demand of the users and the innovation of technology, now the users also can send instant message to their friends via Weibo message. It has no doubt that at first no one can imagine that Weibo can also be used for the instant messaging service.

However, the factor of innovation also causes some new problems. Since the Internet industries competition is mainly based on the products' innovation competition, it is less possible for us to make a quite clear and specific delineation for the relevant market. Under a dynamic competition condition, the theory of welfare economics that concerns with price changes and products' quantity changes is not applicable. Thus, the market definition is



supposed to be vague in a certain extent,<sup>125</sup> which leaves space for the innovative products.<sup>126</sup>

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<sup>125</sup> Wei Zhai, The Market Definition in the Innovative Industries, *Internet Law Review*, 1(2013), page 77

<sup>126</sup> Yanbei Meng, The Challenge of Market Definition in Internet Industries, *Electronics Intellectual Property*, 4(2013), page 46

## 9 Conclusion

Based on the analysis above, we can define the relevant market in Case ‘3Q’ as the instant messaging service market in China, which includes not only the PC instant messaging service, but also the mobile terminal instant messaging service; not only the comprehensive instant messaging service, but also non-comprehensive instant messaging service.

Case ‘3Q’ is the first case that National Supreme Court dealt with in the field of Internet competition. It has a far-reaching impact on development of competition law in China and opens a new door for the Internet industries competition. It provides us with a way that how to define the relevant market in the Internet industries. At the same time, it also presents some new challenges of dealing with the market definition of Internet industries. We should draw lessons about market definition in Internet industries from the above discussion as follows.

First, when defining the relevant market in Internet industries, we should figure out the possible competitors and the industry types based on the business mode and the characteristics of products. In general, with the development tendency of Internet platform, an Internet company maybe in two-sided competition, even in multi-sided competition. Thus, in order to assess the competition environment comprehensively, the relevant market of each side competition needs to be considered. It does not mean, however, that products from every side competition should be included in one market.

Second, we should choose the using of market definition method according to the specific circumstance of the case. We should neither copy the traditional methods directly, nor be completely bound by the provisions of

Anti-Monopoly Law.<sup>127</sup> When the products are free for users, adequate application of the SSNIP test always presents significant challenges.<sup>128</sup> Instead, the method that mainly focuses on economic analysis is much better, such as Profit Model Test, Product Quality Test and Sale Model Test. Compared with the analysis of traditional market, the analysis of Internet industries requires more on collecting and analyzing the statistics. It is always easier for us to get more available and reliable statistics from Internet industries than that from traditional industries. Thus, the legal workers are required to acquire the knowledge of economics and IT, as well as enhance the ability of collecting and analyzing the statistics.

Third, the network effect should be assessed rationally. The more positive the network effect, the more difficult potential competitors enter into the relevant market. Although we do not have any simple method to quantize the network effect, when we define the relevant market of Internet industry, several issues of network effect still need to be considered, for example, which relevant market has the network effect? Is the network effect positive or negative?

As to the geographic market definition, we cannot arrive the conclusion from the globalization or non-rationality of the Internet that the relevant geographic market is the global market. We must have a comprehensive measurement based on the product's characteristics, location of target groups, the legal provisions, cultural diversity and the tradition difference.

Last but not least, other new concepts that are related to the relevant market need further to be developed, such as the relevant temporal market and the innovation market. Under some specific circumstances, the market

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<sup>127</sup> Yanbo Jiang and Junqi Zhang, The Market Definition in Internet Industries-From the Undertaking's Profit Perspective, *Chaoyang Law Review*, 1(2012), page 27

<sup>128</sup> Andrej Fatur, *EU Competition Law and the Information and Communication Technology Network Industries: Economic versus Legal Concepts in Pursuit of (Consumer) Welfare*, 2012, Oxford University Press, page 117, para 1

delineation should be modified to take time and innovation into account by focusing primarily on the market for know-how in a time period. The relevant concepts of temporal market and innovation market should be consummated in the statute law in China, to make the judges have real law to abide by when they define the relevant market of Internet industries.

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