Reflections on Baidu Monopoly Litigation: Comments on Renren v. Baidu

Tong Shu

The action

The plaintiff: Tangshan City Renren Information Service Co., Ltd. (Renren)

The defendant: Beijing Baidu Network Information Technology Co. Ltd. (Baidu)

Cause of action: Dispute over molopoly

The court trying the case: Beijing No.1 Intermediate People's Court

Number of the case: Civil Case No. Yizhongminchuzi 845/2009

Issues

The plaintiff Renren made the allegation as follows. Renren was a provider of medical and drug information and consultation services. From March 2008, it began to pay for the paid websites rating program run by Baidu. In May 2008, the plaintiff had to reduce its payment due to its own business need. On 10 July 2008, it found the listings of "www.qmyyw.com" website dramatically reduced. In the month before and one after said date drastical reduction of listings occurred. On 25 September 2008, the plaintiff found out, by way of checking the search listings made on Google and Baidu, that there were 6,690 pages of search listings of the "www.qmyyw.com" on Google, while there were only as few as four pages on Baidu. Besides, the four such pages at Baidu were listed just because the plaintiff was involved in the paid websites rating program. The evidence fully showed that since the plaintiff reduced its payment for the rating system on Baidu, the defendant, Baidu, had fully shielded out the "www.qmyyw.com" website, thus causing dramatical reduction of the listings of the "www.qmyyw.com" website. According to some relevant reports in the industry and under Article 19 of the Antitrust Law of the People's Republic of China, Baidu had taken the dominant position in the search engine market in China. Taking advantage of its dominant position, the defendant shielded the plaintiff's website out, and thus inflicted huge financial damage to the plaintiff. Its act was contrary to Article 17 of the Antitrust Law, and constituted an abuse of its dominant position in the market to force the plaintiff to be involved in the transaction of paid website rating program. For all this, the plaintiff, under the relevant provisions of the Antitrust Law, petitioned the people's court to order the defendant: 1) to pay the plaintiff RMB 1.106 million yuan in compensation of its financial damage; and 2) to lift the shield and take full listings of the "www.qmyyw.com" website. Later, the plaintiff further alleged in writing to the court that since the plaintiff had changed its domain name into "www.qmyy.com", and the former litigant claim for lifting the shield of the former "www.qmyyw.com" domain name became practically meaningless, it requested the court to order the defendant to lift the shield of its new domain name of "www.qmyy.com".

The defendant Baidu made the defence as follows. First, the defendant did take measures to reduce the listings of the plaintiff's "www.qmyyw.com" website because on the plaintiff's website was set up so many rubbish external links that the search engine automatically punished it for practicing fraud. But, the punitive measures were directed merely to the natural rating results on the Baidu search engine, and had nothing to do with the plaintiff's payment for paid rating system, nor had any impact on the outcome of the plaintiff's paid rating system. Second, the plaintiff's allegation that the defendant's occupation of a dominant position in the mark under the Untitrust Law was not supported with facts. The de-

fendant provided its search engine service to the general internet users free of charge; therefore, the search engine-related services did not constitute the relevant market as mentioned in the Antitrust Law. Besides, the evidence from the defendant about the defendant's market share was only related to a very short period of time, and the market share could not serve as the sole standard for evaluating occupation of a dominant position in the market. Finally, regarding the two domain names the plaintiff mentioned in its allegation, the defendant reduced the listings of domain name 1, namely "www.qmyyw.com", because there were so many "rubbish external links" on it, and domain name 2, namely "www.qmyy.com", did not carry any content of information for as long as two years. The search engine would not list a website without any information on. Accordingly, the defendant requested the people's court to reject the plaintiff's all litigant claims.

Ascertained facts

According to the plaintiff's assertion, two domain names were used for its website: the "www.qmyyw.com", the use of which was ceased on 6 October 2008, and "www.qmyy.com", which was launched on the same day and carried no contents of information within the two years following the launch.

On 3 March 2008, the plaintiff paid a lump sum of fees to Baidu for making the search listings for paid rating. In May 2008, the plaintiff began to make less and less payment due to its own corporate business need, and made the lest payment in July 2008. The defendant raised no objection to the facts.

On 25 September 2008, the plaintiff printed, real time, the webpage of "www. 51.La" and notarised the process. As was shown in the information flow of the columns on the website, "www.qmyyw.com" had secured an number of 2,666 IP visits and 10,331 PV browses on 9 July 2008; that of 701 IP visits and 6,322 PV browses on 10 July 2008; 626 IP and 6,210 PV on 11 July 2008; 88,095 IP and 251,684 PV from 10 June to 9 July 2008; and 18,340 IP and 123,905 PV from 10 July to 9 August 2008.

On 25 September 2008, the plaintiff printed, real time, the listings of the searches for "www.qmyyw.com" through the Google search engine and notarised the process. As was shown in what was printed, upon inputting the key words "site: www.qmyyw.com", there appeared 6,690 search listings in natural rating order that met the search requirements. On the same day, after the plaintiff input the key words "site www.qmyyw.com" at "www.baidu.com", as notarised, there appeared four search listings in the natural rating order that met the search requirements.

The plaintiff argued that according to the article entitled Baidu Taking up Two-Thirds Market Share in the Search Market in China[1] on P.4 of the China Securities Daily published on 17 September 2008, and the article entitled "Number of Baidu's Q3 Clients Going to Reach 200,000 and Its Search Revenue Increasing Steadily under the heading of "Corporate News" at "www.baidu.com"[2] as presented to the court by the plaintiff, Baidu took up over 50% of the market share in the "search engine service market in China", and it should be determined that it had taken up the dominant position in the market. Therefore, its acts of abusing the dominant position to shield "www.qmyyw.com" out should be banned under the Chinese Antitrust Law.

In the court trial of the case, the defendant admitted that it did take measures to reduce the listings of "www.qmyyw.com" in the natural rating system in the periods of time at issue. But it also pointed out that according to the evidence it presented to the court, under the heading "Webpage Search Help "FAQ" on the "www.baidu.com" was published a notice explaining to the public what the acts of setting up "rubbish external links" were and what punishment would be imposed once a "rubbish external link" was identified by the Baidu search engine. However, as was shown in the searches made by the defendant of the contents on 20 internet websites as notarised, there indeed existed a lot of "rubbish external links" pointing to "www.qmyyw.com". The plaintiff did not raise any objection to the facts. It was exactly due to the existence of a large number of the rubbish external links that the defendant had taken the anti-fraud measures to reduce listings. Accordingly, the defendant's action was due.

Outcome of the court trial

The Beijing No.1 Intermediate People's Court took the view, upon hearing the case, that according to the evidence made available, the plaintiff did not adduce evidence to show that the defendant had taken up the dominant position in the "search engine service provision market in China", nor prove that the defendant had abused its dominant position as such. On the contrary, the defendant showed with evi-

dence that it had taken measures to reduce the listings of the "www.qmyyw.com" to punish its act of allowing a lot of "rubbish external links" to exist on its website, and the defendant's action was due. Besides, the plaintiff's allegation that the defendant abused its dominant position in the market lacked factual and law bases, and its claim for the damages from the defendant and request for the latter to lift its shield of its domain name 1 (www.qmyyw.com) were not supported. Domain name 2 (www.qmyy.com) was launched by the plaintiff on 6 October 2008, and the plaintiff confirmed that the domain name did not point to any website before, nor did it produce any evidence to show that the defendant had taken any measures to reduce the listings of it. Accordingly, the plaintiff's litigant claim in respect of domain name 2 was not well based on facts and reason, so was not supported. Therefore, the court rejected the plaintiff's all litigant claims under the Civil Procedure Law and the Antitrust Law of the People's Republic of China.

Comments and analysis

This was one of the antitrust cases the court received in China and the first one the court in Beijing decided right after the Antitrust Law entered into force. The case with the new Antitrust Law applicable and a newly emerging internet technology involved was thus more difficult to hear, and drew wide attention from the academics and practitioners.

1. Defining "relevant market"

The "relevant market" is one of the most fundamental and important concepts of the Antitrust Law. The purpose to define the "relevant market" is to determine the scope of market within which market players compete. In the cases with acts of monopoly of abuse of dominant position in the market involved. Defining the relevant market is of great significance to assessing the issues, such as market share and impact of such activity on market competition.

1) Scope of "relevant market" in the present case

Article 12, paragraph two, of the Antitrust Law specifies that the relevant market refers to the scope and geographic region of goods or services within which businesses compete with regard to particular goods or services. Therefore, when a business provides a service, the "relevant market" covers the two aspects of the relevant market and the relevant region for the service. As is defined in Article 3 of the Guidelines of the Antitrust Board under the State Council for the Definition of Relevant Market, the relevant market for a service is a market consisting of a group or class of services that customers think they are closely related in terms of substitutionability according to the factors, such as characteristics, use and price of the services. The relevant regional market means a geographic region where customers obtain services that are closely related in terms of substitutionability. These regions, showing relatively strong relations of competition, may be a regional scope within which businesses compete. In the present case, the plaintiff argued that the "relevant market" was a "market for the search engine services in China". Regarding this, we take the view that the search engine service is an information search service on the internet by which a service provider, at the search request of an internet user, makes use of an internet application software system to search and catch relevant webpages, and then, by way of some processing and organising, feedbacks the search results or listings to the internet users. With the rapid IT developments, besides the search engine service, the applied internet technologies in such services as internet news coverage service, instant communication services, email services and network financial services are also quite frequently used by internet users. But the features of search engine service, such as instant search, location and making available huge amount of information to internet users quickly, are irreplaceable by other internet services. That is, the search engine services, as internet information search service, and internet news coverage service, and instant communication services are not a group or class of services that customers think they are closely related in terms of substitutionability. In other words, "search engine services *per se*" may constitute an independent relevant market. Meanwhile, considering the factors, such as cultural background and linguistic habits, the search engine services which are closely related in terms of substitutionability and which are chosen by, and made available to, the internet users in China are generally originated within the territory of China. That is, the relevant service providers within the territory of China show stronger relations of competition, which demonstrates that the market for the search engine services in China is the "relevant market" in the sense of the Antitrust Law in the present case.

2) Whether "free" services constitute relevant market in the sense of the Antitrust Law

The defendant had a different view on the issue of existence of a "relevant market" in the present case mainly for these reasons. Since the search engine services were free

for the general internet users and free services were not regulated by the Antitrust Law, there did not exist a relevant market in the sense of the Antitrust Law. The defendant made the defence actually based on that made by the defendant in an antitrust litigation[3] involving a search engine as decided by the Court of Northern District of California in the United States on 16 March 2007. The court held in the case that to claim against planned monopoly, the plaintiff was required to define the relevant market, but it failed to present any authoritative view to show that the Antitrust Law *per se* was also related to the area of free service provision. Providing search function was likely for the provider to benefit from other resources. But the plaintiff failed to explain that some had paid Google for search. For that matter, the search market was not a "market" as provided for the Antitrust Law with relevance to the legislative aim.

Regarding the matter, we believe that in the present situation of search engine service in China, indeed, an internet user, when using a key word and through a search engine to search information his targeted website or webpage, does not need to pay the search engine service provider. But as a marketing strategy of the latter, free provision of some products or services is often closely related to its charged provision of some other products or services. The search engine service provider's free provision of the search engine service is not equal to a free service made available for the good of the general public. The provider is still able to make its actual or potential business revenue by virtue of attracting internet users or advertising. Therefore, the defendant's view that the existence of a "relevant market" depended on payment of fees was not base on facts and law.

2. Whether the defendant occupied the dominant position in the "search engine service market in China"

Article 18 of the Chinese Antitrust Law provides that a business's dominant position in the market is determined depending on these factors, such as its market share and status of competition in the relevant market; its ability to control over the sales market or material procurement market; its financial and technical condition; extent to which other businesses rely on doing business with it; the ease with which other businesses can enter the relevant market; and any other factors relevant to the determination of the business dominant position in the market. Article 19 of the Antitrust Law also provides that when a business is involved, for example, its market share reached 50% of the relevant market, it is presumed to have occupied the dominant position in the market.

A business's dominant position in the market should be determined depending on the factor, such as market share and status of competition; its ability to control over the sales market or material procurement market provided for in Article 18 of the Antitrust Law. Of course, if its market share can be determined, its dominant position may also be presumed under Article 19 of the Antitrust Law. it is provided in the Antitrust Law that a business's dominant position may be presumed according to its market share since the factor of market share, as compared with the ability to control over the sales market or material procurement market, is more objective as it can be accurately calculated by way of economic analysis. Therefore, a plaintiff in an antitrust litigation should have sufficient evidence to support its calculation or proof of the defendant's market share when it chooses to apply the above market-share-presumptive provision of the Antitrust Law to show that the defendant has taken up the dominant position in the market.

In the present case, the plaintiff claimed that, as the news reports or articles it presented to the court showed, the defendant's market share had by far exceeded 50%, which was sufficient to prove its dominant position in the market. This shows that the plaintiff chose to apply Article 19 of the Antitrust Law and presumed the defendant's dominant position on the basis of its market share. In case like this, the plaintiff should have sufficient evidence to support its calculation or proof in respect of the defendant's market share. While the two articles the plaintiff presented mentioned the defendant's market share, it was impossible, based on them, to determine whether the scope of the relevant market of the "market share" mentioned in the two articles was consistent with that of the relevant market as defined in the present case. Besides the size of the relevant market is closely related to the calculation of the market share. Therefore, we were not sure whether the market share mentioned in the articles was calculated on the basis of the relevant market identical in scope. Next, the plaintiff failed present evidence to support the calculation of the market share as mentioned in the articles and the relevant fundamental data, so it failed to convince the court that the determined market share had resulted from a rational and objective analysis. Since the plaintiff's evidence was flawed and lacked support, it was insufficient to prove that the defendant had secured 50% of the market share in the search engine service mark in China. That is, it was insufficient to prove that the defendant had taken up its dominant position in the market.

3. Whether the defendant had "abused its dominant position in the market"

1) Issue of internet technology applications relevant to the present case

Since Baidu, defendant of the case, is an internet service provider, mainly engaged in search engine service provision, the present case involved the technical issues concerning the working principles and anti-fraud mechanism of the search engine.

In today's internet service provision industry, there is no uniform standards or industrial rules governing the ranking algorithmic rules of search results or listings and implementation of anti-fraud mechanisms used by the service providers. On the Baidu website, there are two rating systems: the paid website rating and natural rating. The former is a profit-making search engine service provision, in which the amount of a client's a payment is closely related to the order or place in the rating system. The more it pays, the further it is on top of the list. The latter is a non-profit-making search engine service provision, in which listing in a website requires no payment of any fees and its place in the rating system is decided by the algorithmic rules set by a search engine service provider. The two rating systems are mutually independent.

The algorithmic rules of the natural search rating system on Baidu are related to two factors: content weight value (namely the extent to which webpage contents and key words are associated) and the hyperlink weight value (namely the number of links a webpage has obtained). The more the webpage contents and key words are associated, the more links a webpage obtains, and the higher it is on top of the list in the rating system. By the so-called "hyperlink fraud" is meant an activity to setting up a lot of links (irrelevant to webpage contents (namely the so-called "rubbish external links") for the purpose of raising the rating of the website or webpage in the list of the natural rating system. Presence of "rubbish links" has impact on the place of a website in the natural rating listing on Baidu. When a "rubbish link" is identified by the anti-fraud mechanism in the search engine service, the search engine service will automatically imposes punishment on it. To date, the Baidu search system imposes two punishments: lowering the hyperlink weight value of a fraudulent website, namely deducting the weight-value of the fraudulent part of said website and deducting certain hyperlink value according to the severity of fraud; and reducing the listings of the fraudulent website, that is reducing the number of the webpages of such website as listed by the search engine service and even refusing to list it if the fraud is so serious.

2) Whether the defendant had abused its dominant position

The Antitrust Law does not prohibit a business from arriving at an economy scale to such an extent as to take a dominant position in the market by virtue of its own corporate developments or expansion. What the law prohibits are activities and measures taken by a business to influence the market structure and disrupt the order of market competition. Any business's activity that is justifiable and does not result in a disrupted order of the market competition does not constituted an activity prohibited by the Antitrust Law.

Though admitting that it had taken technological measures to reduce the listings of the plaintiff's website "www.qmyyw.com", the defendant argued that what it did was justifiable as it did it to punish the website for the existence of "rubbish links" thereon. We believed that what the defendant published in the Baidu's search help: the Website Leader's FAQ on some pages of the website had actual publicised, to an extent, the algorithmic rules and mode of punishments to be imposed on fraud. The plaintiff had its own way to know that Baidu had taken actions against setting up "rubbish links" and would punish such acts. Besides, the punitive measures were directed to all search websites that set up the "rubbish links", not to the www.qmyyw.com website only, and such "rubbish links" did exist on said website of "www.qmyyw.com", which showed that the listings of the "www.qmyyw.com" were reduced by Baidu as a way of punishment by the antifraud mechanism after the search engine identified the "rubbish links" on it. Since said antifraud mechanism was implemented to ensure truthful and reliable search results to protect the interests of all the search engine users. Meanwhile, the evidence available did not show that the defendant's measures were discriminative or coercive; hence the technological measures taken to reduce the listing of the "www.qmyyw.com" owing to existence of a lot of "rubbish links" on is due and justifiable.

As regards the plaintiff's argument that the defendant taking the technological measure to reduce the listing of its website because it reduced its payment thereto for the paid website rating program of Baidu, we believed that the paid website rating and the natural rating were two different rating systems, and two mutually independent technical service provision systems. Only the former was closely related the

amount of payment a client makes and the place in the latter and the listings thereof were irrelevant to the involvement by and payment from a client in connection with the paid website rating program. Further, the plaintiff failed to adduce evidence to prove that its reduced payment for the paid rating had resulted in the reduced listings of the website "www.qmyyw.com". Therefore, the plaintiff's claim that its reduced payment had presumably affected the result of its place in the paid rating was not based on facts.

Nor did the plaintiff prove that the defendant had occupied the dominant position in the market, nor show that the latter abused the dominant position in the market. By contrast, the defendant had evidence to prove that the measures it took to reduce the listings of the "www.qmyyw.com" website to punish it for the existence of a lot of "rubbish links" thereon. Accordingly, the defendant's act was due and justifiable, and the court rejected the plaintiff's claims in the end. ■

The author: Judge of the IP Tribunal of the Beijing No.1 Intermediate People's Court.

[1] It was pointed out in the article that "as was shown in the results of survey of the search engine market in China released yesterday (namely on 16 September 2008) by the Beijing Zhengwang Consulting Co., Ltd., Baidu is by far a leader, taking up 65.8% of the market share … . In its survey from 2007, Zhengwang began to use the percentage of times/users of a search engine of all the times/users of search engines on any particular day to define the market share of that search engine. Zhengwang noted that the present survey was made using computer-aided telephones, and it prepared altogether 4,150 valid samples …, covering 18 major urban centres in the East, Middle and West of China, with relatively high representation in terms of economic regions and internet users."

[2] It was pointed out in the article that "according to the third party statistic data, in 2007, the overall search engine advertising market reached an value of RMB 2.73 billion yuan, and the market value in 2008 will increase by more than 80% that of 2007. … According to the analysts, Baidu, as the word largest Chinese search engine service provider, has firmly taken up over 70% of the market share of the search engine market, and is now the sole business holding a single brand with the largest internet subscribers of all the websites worldwide, which has made it possible for its Baidu platform users to almost cover the entire web users in China. That is why Baidu's paid search business has been kept increasing at such a steady and rapid rate."

[3] KINDERSTART.COM,LLC v. GOOGLE, INC. Case No. C 06-2057 JF(RS).