

Economic Evidence and Application of Economics in Anti-Monopoly Civil Action in China

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Supreme People's Court

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the Supreme People's Court

Characteristics of Anti-Monopoly Civil Action in China

- ❑ The basic framework and primary rules of the anti-monopoly civil action system are established in *Provisions of the Supreme People's Court on Several Issues Concerning the Application of Law in the Trial of Civil Dispute Cases Arising from Monopolistic Conducts* (May, 2012).
- ❑ Main characteristics
 - Independence of civil action
 - Transparency of plaintiff qualification
 - Diversity of responsibilities

Characteristics of Anti-Monopoly Civil Action in China

- Independence of civil action
 - Civil action and administrative law enforcement run parallel and the administrative processing of anti-monopoly administrative organization is not taken as the precondition of civil action.
 - There are two types of civil action: direct action and follow-on action: monopoly victims can directly file a lawsuit with the people's court or can file a lawsuit after the administrative organ for law enforcement identifies monopoly status.
 - Independence of fact finding

Characteristics of Anti-Monopoly Civil Action in China

- Independence when determining facts
 - Facts identified by the administrative decision-makers are not legally binding in civil court. The administrative decision is only one piece of evidence for the court. If there is contrary evidence, the court can re-evaluate the decision.
 - If the administrative decision-makers have not provided evidence, the court should independently identify evidence.

Characteristics of Anti-Monopoly Civil Action in China

- Transparency of plaintiff qualification
 - Direct purchaser
 - Indirect purchaser

Characteristics of Anti-Monopoly Civil Action in China

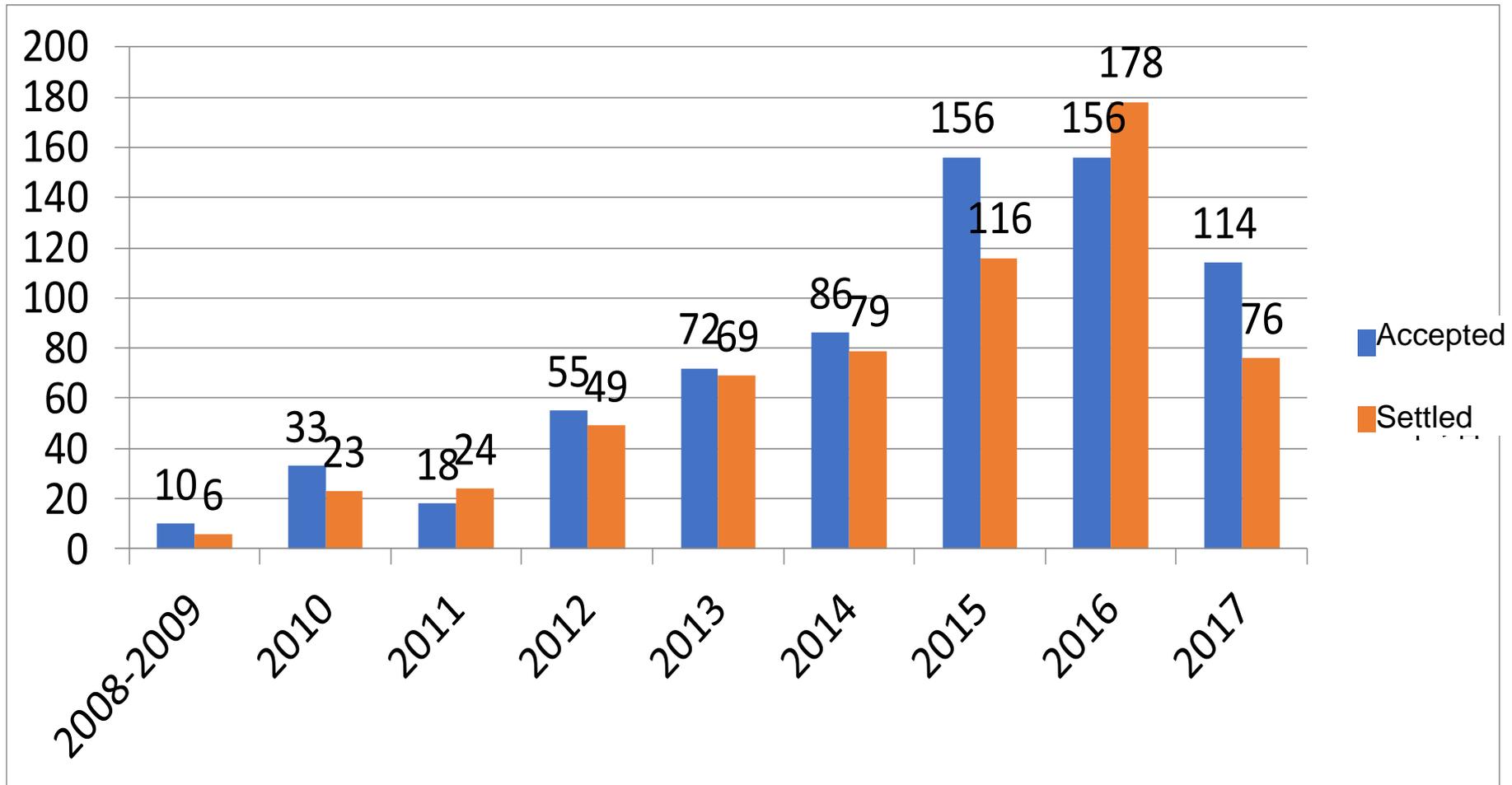
- Diversity of responsibilities
 - Compensation for damage
 - Injunctive relief
 - Confirming the act is invalid

Case Trial of Anti-Monopoly Civil Action in China

- From the implementation of the anti-monopoly law to the end of 2017, the courts throughout the country had accepted and heard 700 and settled 630 first trial anti-monopoly civil cases.
- These cases mainly include two types: abuse of market dominance and monopoly agreement, of which, the former accounts for more than 70%.
- Most of the cases are direct action cases, and there are only a few follow-on actions (no more than 10).
- On the whole, the winning rate of plaintiffs is low, this is mainly attributed to the difficulties in obtaining evidence and proving there is a monopoly.

Case Trial of Anti-Monopoly Civil Action in China

First Trial Anti-Monopoly Civil Cases Accepted and Settled by Chinese Courts over the Years



Economic Evidence in Anti-Monopoly Civil Action

- Characteristics of the courts when examining economic evidence in anti-monopoly civil actions
 - Independent examination: In direct action cases, if the administrative organ for law enforcement does not examine and judge the economic evidences in advance, the judge must examine and identify them during the case.
 - Comprehensive examination : Different from administrative proceedings, there is no need to respect the discretionary power of the administrative organ in civil actions, and the judge must conduct comprehensive examination on economic evidence.

Economic Evidence in Anti-Monopoly Civil Action

- Influence of civil proceedings on anti-monopoly administrative law enforcement procedure
 - The interpretation of laws, the application of economic analysis methods as well as the examination and judgment of economic evidences in civil judgment may affect the administrative law enforcement.
 - If the civil judgment determines that the defendant has committed to monopoly and the administrative organ can carry out an administrative investigation, the facts identified by civil decision-makers can be used as a basis and reference for administrative investigation and decision.

Economic Evidence in Anti-Monopoly Civil Action

- Main forms of economic evidence
 - Economic analysis report: A professional analysis report prepared by relevant professional institutes for definition of relevant markets, calculation of damage compensation and other problems.
 - Expert witness (expert assistant): A person with professional knowledge, who can offer opinions to the court in terms of specific professional technical facts, or address inquiries to the economic analysis report submitted by the other party or expert witness.

Economic Evidence in Anti-Monopoly Civil Action

- Economic analysis report
 - The report only includes opinions associated questions of professional facts.
 - If the party concerned has different opinions on the analysis report, or the court thinks that it is necessary for the reporter to appear in court, the reporter shall appear in the court to present his or her opinions. If the court announces that the reporter does not appear in court, the analysis report cannot be used as a basis for fact finding.
 - The economic analysis report can be issued by any global organization that employs suitable professionals.
 - The report can be prepared by a certain professional organization delegated by the party or prepared by a certain professional organization delegated by both parties together.

Economic Evidence in Anti-Monopoly Civil Action

- Qihoo 360 Accusing Tencent for Abuse of Market Dominant Position
 - As the leading security software service provider in mainland China, Qihoo 360 mainly provides 360 security software service.
 - As the leading instant messaging software service provider in mainland China, Tencent mainly operates the instant messaging software QQ.
 - Since the 360 security software provided by Qihoo 360 has an influence on the normal operation of Tencent QQ software, Tencent explicitly forbids its users to use the 360 software of Qihoo 360. The result was that lots of users removed the software of Qihoo 360.
 - Qihoo 360 argued that Tencent abused its dominant position in the instant messaging field to exclude competitors; therefore, it requested the court to declare that Tencent should stop abusing the market dominant position and compensate them for their losses.

Economic Evidence in Anti-Monopoly Civil Action

- In this case, Qihoo 360 delegates RBB Economics in the UK to issue several analysis reports, one of which was the *Economic Review on Written Judgment of Guangdong Higher People's Court*.
- From the point of view of the Supreme People 's Court: as a professional economic consultative agency, it should offer opinions associated with economic facts and other professional problems involved in this case according to its own professional knowledge; however, this report makes comments on the first instance judgment, and declares that there are mistakes in the application of Chinese Anti-monopoly Law and evidence adopted during the first instance judgement; in fact, the consultative agency offers legal opinions. The report was not used.

Economic Evidence in Anti-Monopoly Civil Action

□ Expert witness

- The expert witness only offers comments on the questions over economic statements.
- With the approval of court, the parties can employ persons with the required professional knowledge around the world as the expert witness.

Economic Evidence in Anti-Monopoly Civil Action

- Qihoo 360 Accusing Tencent for Abuse of Market Dominant Position
 - Qihoo 360 applied to employ David Stallibrass, a UK expert, as its expert witness to appear in court.
 - Tencent raised doubts about the qualification of this expert witness: his highest educational degree was a Master of Science at the University of London, his competition law education was obtained through remote learning, without obtaining a degree, and he has never issued influential academic achievements on authoritative journals in the economics field.
 - From the point of view of the Supreme People 's Court: the expert only needs to have professional knowledge of the relevant field. Whilst educational background, work experience and research achievements can be noted, they do not need to have a PHD degree and have a history of appearing in top journals in the area of their work.

Economic Evidence in Anti-Monopoly Civil Action

- Review of expert opinions and economic analysis reports
 - Review mechanism
 - Courtroom inquiry: the expert witness or the reporter appears in court for the inquiry
 - Court cross-examination system: for the expert witness appointed by one party, the other party or the expert appointed by the party can address inquiries
 - Court-appointed expert: relatively uncommon. If it is difficult for the court to judge by courtroom inquiry, cross-examination, etc., so the method of consulting an expert can be adopted. Currently, Chinese courts do not use fixed economic experts.

Economic Evidence in Anti-Monopoly Civil Action

- Key Issues for Review:
 - It is important to examine whether the opinions are based on sufficient facts or data;
 - Whether reasonable and reliable market research or economic analysis methods are used;
 - Whether relevant facts that might change the results of market research or economic analysis are considered;
 - Whether the expert is as cautious and assiduous as a professional.

Refer to the Written Order of Second Instance of Qihoo 360 Accusing Tencent for Abuse of Market Dominant Position

Economics Application in Anti-Monopoly Civil Action

- Economics is not only widely used in anti-monopoly civil action, it also plays a very important role in the litigation outcome of the case.
 - Qihoo 360 Accusing Tencent for Abuse of Market Dominance
 - Johnson & Johnson Vertical Monopoly Agreement

Economics Application in Anti-Monopoly Civil Action

- Qihoo 360 Accusing Tencent for Abuse of Market Dominant Position
 - Qihoo 360 accused Tencent of abusing the dominant position of their instant messaging software and service related markets, limiting transactions without justified reason (forcing the user to "choose either-or") and bundling sales.
 - Method of definition of relevant markets under the network environment: the Supreme People's Court affirmed that the Hypothetical Monopolist Test (HMT) can be applied universally, but it also pointed out that in the area where the product differentiation is obvious, and quality, service, innovation, consumer experience and other non-price competition become the important forms of competition, it is difficult to use the method of Small but Significant and Non-transitory Increase in Price (SSNIP), the variant form of it might be used, such as the Hypothetical Monopolist Test based on quality reduction.

Economics Application in Anti-Monopoly Civil Action

- The Supreme People's Court has used the economic method of correlation analysis to judge whether the social network site and microblog belong to the same relevant market with the instant messaging service.
 - Correlation analysis result provided by the expert of Qihoo 360: 1-2 years before and after the case was accused for the monopoly, the correlation coefficient between the total weekly effective usage time of social network site and the microblog and the weekly effective usage time of instant messaging was -0.07; (this method and result were accepted by the court)
 - Correlation analysis result provided by the expert of Tencent: From July 2006 to December 2011, the correlation coefficient of monthly effective use time between all instant messaging and social network site was 0.7574. (This method and result were denied by the court)

Economics Application in Anti-Monopoly Civil Action

- The Supreme People's Court considers that:
 - From 2006 to 2012, the number of internet users in China increased by 312%. The fast increase in internet users resulted in the rapid growth in overall demand for social network sites and instant messaging, as well as a positive correlation between social network sites and instant messaging which do not have necessarily have a close correlation. Tencent's expert checked the relevance of commodities in a period away from the time point at which they were accused of monopoly, and argued that there was a greater possibility of misjudgment, so it should not be accepted.

Economics Application in Anti-Monopoly Civil Action

- Qihoo 360's expert witness analysed the period 1-2 years before and after the case was accused of monopoly. The association coefficient of -0.07 indicates that there is no close correlation between the social network and microblog and the instant messaging.

Economics Application in Anti-Monopoly Civil Action

□ Johnson & Johnson Vertical Monopoly Agreement

The Plaintiff Ruibang was a distributor of medical suture, surgical staple and other medical instruments for the Defendant Johnson & Johnson, and had cooperated with Johnson & Johnson in distribution for 15 years. In January 2008, Johnson & Johnson contracted with Ruibang that Ruibang cannot promote products with a price lower than that specified by Johnson & Johnson. Consequently, because the sale price of Ruibang was lower than that specified by Johnson & Johnson, Johnson & Johnson canceled the distribution right of Ruibang in partial hospitals and discontinued the supply of Ruibang because they reduced the price without permission. Ruibang accused Johnson & Johnson of forming a vertical monopoly agreement, which is prohibited by the AML. During the trial of the latter case, the court affirmed that Johnson & Johnson's behavior constituted the vertical monopoly agreement, and ordered it to compensate Ruibang for the normal profit loss of suture products RMB 530,000 caused by the above mentioned monopoly in 2008.

Economics Application in Anti-Monopoly Civil Action

- Anti-monopoly analysis framework of vertical monopoly agreement
 - The reasonable principle should be used to analyze the vertical agreement of Minimum Resale Price Maintenance.
 - When analyzing and evaluating whether the behavior of Minimum Resale Price Maintenance can exclude the limit competition, the comprehensive assessment can be carried out from the aspects of whether the competition in relevant markets is sufficient, whether the implementing enterprise has strong market power in relevant markets, the behavioral motive of the implementing enterprise with minimum resale price maintenance, and the actual effect of minimum resale price maintenance on the market competition.

Economics Application in Anti-Monopoly Civil Action

- Assessment for the market power of Johnson & Johnson
 - Johnson & Johnson has the leading market share;
 - The price of Johnson & Johnson's suture products has remained basically unchanged for 15 years, and it has had a strong pricing capability in the relevant market for a long time;
 - Strong brand influence;
 - Control power to distributors.

How do judges make good use of economics

- A basic understanding of economic principles is important
 - Familiar with widely accepted economic theories and an openness to new economic theories.
 - Do not limit thought to one economic theory and always keep open to other schools of thought.
 - Understand the limits of economics, especially, fully recognize the method defect, data limitation, condition restriction, etc. of the economic analysis in a specific case

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- Emphasize the effect-orientated idea
 - Grasp the essence of monopoly which has the actual or potential negative effect on the competition, put the accused monopoly in the specific competitive environment and specific market, and pay attention to verify the economic analysis result through effect-orientated direct evidence.
 - In the field of the information economy, the innovation and dynamic competition should be integrated into the anti-monopoly analysis.

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- Creative combination of judicial opinion and economic analysis method
 - The analysis and identification for the legality of monopoly are always conducted with the help of the economic analysis, but the legality of the behavior should be in accordance with the law finally.
 - Economic analysis is just one of the tools to achieve the correct legal judgment and the judge could not cede the right of judgment to the economist.

Thank you for listening!
Your comments are highly
appreciated!