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# Kluwer Competition Law Blog

## The Dispute between Qihoo 360 and Tencent: What We Have Seen Thus Far

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The feud between the Chinese Internet companies [Qihoo 360 Technology Co., Ltd.](#) ('Qihoo 360') and [Tencent Inc.](#) ('Tencent') has been simmering for nearly two years. This article spotlights the facts and major issues of the dispute.

### The Facts

Tencent runs [QQ](#), the most popular instant messaging ('IM') service in the mainland China with over 700 million active users by the end of 2011. Tencent also provides information security products, search engine, online media, gaming, interactive entertainment, e-commerce, etc. Qihoo 360 is China's leading Internet security product and service provider and had over 400 million active users by the end of 2011.

Tencent and Qihoo 360 offer rival security software for QQ users. The dispute began in September 2010 when Tencent encouraged QQ users to download an upgraded version of Tencent security software. Qihoo 360 responded by accusing Tencent of scanning its users' computers for private data and then released new security software, claiming that the new software could speed up QQ and protect QQ users' privacy. In response, Tencent warned its users that Qihoo 360 software had caused QQ to malfunction and requested its users to uninstall Qihoo 360 software, otherwise Tencent would cease to provide QQ software service.

In November 2010, Tencent and Qihoo 360 issued an apology to their users after China's Ministry of Industry and Information Technology ('MIIT') [ordered the two parties to stop mutual accusations and to restore interoperability](#). The MIIT criticized that the unfair competition between the companies had harmed users and caused adverse social consequences.

### The Court Proceedings

The two companies are no strangers in the courtroom over the disputed behaviour.

In December 2010, Tencent sued Qihoo 360 in Beijing for unfair competition. Tencent won the lawsuit in April 2011 and Qihoo 360 was ordered to compensate Tencent CNY 400,000.

In October 2011, Qihoo 360 filed a complaint with the High People's Court of Guangdong Province ('Guangdong Court') under China's Anti-Monopoly Law ('AML') against Tencent's two wholly-owned subsidiaries, Tencent Technology (Shenzhen) Co., Ltd. and Tencent Computer System Co., Ltd. ('Qihoo 360 v. Tencent'). Qihoo 360 is seeking a court order to stop Tencent's alleged abusive behaviour and claiming damages of CNY 150 million. On 18 April 2012, the Guangdong Court held a public hearing. The hearing attracted an audience of over 300 people, lasted for over seven hours, and was widely covered by the media. The Guangdong Court has yet to render judgment.

Concurrently, Tencent also filed a suit with the Guangdong Court in October 2011, charging that Qihoo 360 had engaged in unfair competitive conduct by damaging the integration and security of Tencent's products and causing it to lose income from value-added businesses and advertising services. Tencent claimed damages of CNY 125 million. Qihoo 360 had unsuccessfully challenged the Guangdong Court's jurisdiction. The jurisdictional matter is currently on appeal at China's Supreme People's Court.

### **Defining the Relevant Market**

In Qihoo 360 v. Tencent, Qihoo 360 considered the relevant product market to be instant messaging software and the related services ('IM services'). Qihoo 360 argued that 'instant messaging software' provides system services for real-time communications over the Internet and allows multiple users to simultaneously communicate messages, files, and voice and video contents. Because of the unique pricing and profit mechanisms of IM services, there are no substitutability between IM services and other communications services, such as emails, telephony communications, and mobile text messaging. Qihoo 360 noted that there are different types of IM services, including comprehensive IM services (e.g. QQ and MSN), cross-platform IM services (e.g. Fetion), and cross-network IM services (e.g. Skype). However, there is no need to further segment the market for IM services because the different types IM services are substitutable from both the supply and the demand sides. Qihoo 360 argued that the relevant geographic market is mainland China given that the unique Chinese language, Chinese users' preference, Internet infrastructure and the relevant Internet regulations of the Chinese market are significantly differentiated from those of the foreign market.

Tencent argued that the market definition proposed by Qihoo 360 was too narrow and thus incorrect. It argued that the relevant product market should include IM services and other real-time communications tools, such as emails, microblog and social networking services. In addition, there are demand-side substitution between IM services and other communications services, such as mobile text messaging and mobile and landline telephony. Moreover, Tencent stated that QQ users come from inside and outside of China, and, because of the openness and interoperability of the Internet, the relevant geographic market should not be limited to the mainland China.

### **Establishing Dominance**

Qihoo 360 submitted a number of third-party reports on Tencent's market shares,

market penetration rate, and number of users. Qihoo 360 claimed that these proxies indicated that Tencent's market share significantly exceeds 50% and, pursuant to the AML, Tencent can be presumed to hold a dominant position in the relevant market. Qihoo 360 also alleged that Tencent has a strong financial and technical status and is able to use cross-subsidies and patent strategies to impede competitors' entry and expansion in the relevant market. In addition, the network effects of IM services enable Tencent to control trading parties and create significant entry barriers in the relevant market.

Tencent denied that it holds a dominant position in the relevant market and argued that the data submitted by Qihoo 360 was not convincing. In particular, one user may create multiple accounts and the number of users cannot be equal to market shares. Moreover, Tencent argued that it has no pricing power over IM services. A third-party survey submitted by Tencent revealed that IM users are highly price-sensitive and 81.71% of QQ users would cease to use QQ if Tencent started charging for use of QQ software.

### **The Alleged Abusive Behaviour: Exclusive Dealing and Bundling**

Qihoo 360 alleged that Tencent, through requesting QQ users to uninstall Qihoo 360 software and denying users of 360 browser access to QQ, had engaged in exclusive dealing. In addition, through bundling its security software with QQ, Tencent had leveraged its dominance in IM services into the market for security software. Thus, Tencent had infringed Article 17 (4) and (5) of the AML that prohibits dominant business operators from exclusive dealing and tying and bundling without justifications.

Tencent rejected the allegations and argued that its conduct was legitimate, justifiable, and conforming to the industry practices. One of Tencent's main arguments was that its non-interoperability measures were taken in self-defence against Qihoo 360's infringing software that defamed and damaged Tencent's products and services. Tencent stated that installing its security software is not a precondition for using QQ. Both products are free of charge and users may easily uninstall them. Moreover, Tencent informs its users when an upgrade is available and the upgrade will only be performed after obtaining user consent.

### **The Role of Expert Witnesses\***

The Guangdong Court is conducting a pilot implementation of the expert witness system. It encourages parties to engage expert witnesses in complicated cases and allows cross-examinations between expert witnesses to assist the court in clarifying technical facts. In *Qihoo 360 v. Tencent*, both parties engaged expert witnesses to testify before the court. Qihoo 360 engaged [David Stallibrass](#), Special Consultant of RBB Economics LLP. Tencent engaged [Jiang Qiping](#), Professor of the Chinese Academy of Social Sciences, and [Wu Tao](#), Associate Professor of the Central University of Finance and Economics (Beijing). Presiding Judge Zhang Xuejun stated that although engaged by and on behalf of the parties, expert witnesses are obliged to truthfully express expert opinions based on their knowledge and experience.

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## Going Forward

Qihoo 360 v. Tencent is part of an ongoing, tit for tat litigation and media war.

The Guangdong Court's public hearing and use of expert witnesses have demonstrated steadily improved transparency and sophistication of China's judiciary. The trial is expected to set precedent for private antitrust litigation in China. However, defining the relevant market and testing the legality of business conduct in the fast changing Internet sector are daunting tasks. In particular if one considers the consumers' preference of using multiple communications services on multiple platforms and the trend of integration from the supply side.

\* China introduced an expert witness system in 2002 through Article 61 of the Supreme People's Court [Evidence Rules on Civil Procedure](#). Article 12 of the [Provisions on Issues Concerning the Application of Law in the Trial of Monopoly Civil Dispute Cases](#), issued by the Supreme People's Court on 8 May 2012, stipulate that the parties may apply to the court for engaging one or two experts to appear in the court and to explain specialized matter involved in the case.

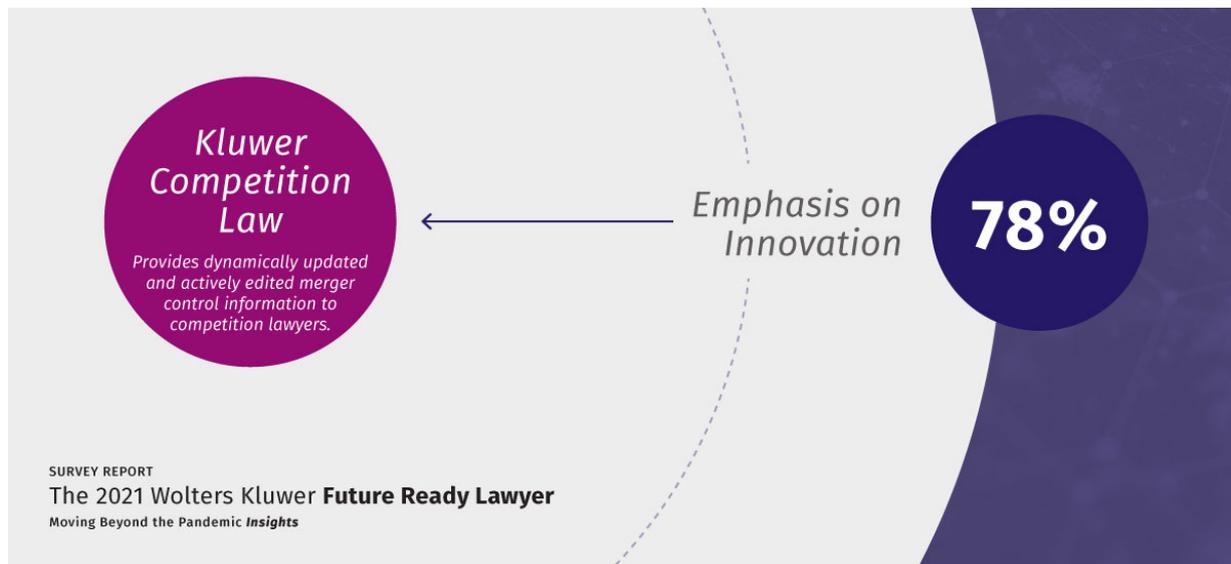
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