

# THE DECISION OF THE SUPREME PEOPLE'S COURT IN *QIHOO V. TENCENT* AND THE RULE OF LAW IN CHINA: SEEKING TRUTH FROM FACTS<sup>1</sup>

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*Abstract: The rule of law creates social order, enhances legitimacy, and promotes economic growth. To accomplish these goals, the rule of law requires the development of administrable principles, the use of a system of case precedent, and the implementation of due process. In the area of antitrust, there is an additional gloss on the rule of law in that the need for administrable rules must be balanced against the application of economic theories. However, at bottom, these notions all depend on a competent judiciary that can, in fact, carry out these tasks. The 2014 antitrust decision by the Supreme People's Court—Beijing Qihoo Technology Co., Ltd. v. Tencent Technology (Shenzhen) Co., Ltd.<sup>4</sup>—is a thorough opinion demonstrating the judiciary in China is up to the job. However, this decision's ultimate significance will be determined by how China follows-up on it; in its receiving the quasi-precedential status under Chinese law known as a “Guiding Case;” in private litigants in China using all of the procedural and evidentiary tools entrusted to them to litigate antitrust cases going forward based on the lessons learned from this decision; and in the Chinese courts being now entrusted to exercise the administrative review power delegated to them vis-à-vis government agency actions. Given that China is the second largest economy in the world, China's fostering further the rule of law becomes particularly important not just for its own growth and reform but also for the rest of the world.*

## I. INTRODUCTION

The rule of law is important not only to create order in society and enhance government legitimacy but also to promote economic growth.<sup>5</sup> However, the development of the rule of law is about process as much as it is about results.<sup>6</sup> The English Common Law, for example, developed as it did because King Henry II sought to impose a system of courts that would administer a law common to England so as to increase his power at the expense of local

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1 See, e.g., RONALD COASE & NINA WANG, *HOW CHINA BECAME CAPITALIST* loc. 121 (2011) (ebook) (explaining origins and ramifications of the saying, ascribed to Deng Xiaoping, of seeking truth from facts).

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4 2013 CIV. JUDG. (Sup. People's Ct. Oct. 8, 2014) (China).

5 See, e.g., Margaret Lewis, *Criminal Law Pays: Penal Law's Contribution to China's Economic Development*, 47 *VAND. J. OF TRANSNAT'L LAW* 371, 374-75 (2014).

6 See, e.g., *id.* at 374 (quoting sources for the proposition that “the courts enable market actors to plan by resolving disputes predictably, efficiently, and in accordance with the legal rules” (internal quotation marks and citations omitted)).

customary feudal rights.<sup>7</sup> Such courts could offer litigants “better justice than they could have at the hands of their lords” via offering a fairer process.<sup>8</sup> For example, only royal judges could summon a jury.<sup>9</sup> And a jury came to be thought of as “a safeguard from arbitrary perversion of the law.”<sup>10</sup> This encouraged the people to resort to royal courts that now had to be staffed with professional judges, removed from local prejudices, who would apply a law common to the entire country.<sup>11</sup> Even though antitrust principles are subject to revision based on the evolution of economic understanding,<sup>12</sup> antitrust is no more exempt from the rule of law than any other body of law.<sup>13</sup>

The process behind the rule of law has important aspects that deserve widespread attention. In the first instance, the rule of law involves the development of principles that can be applied or expanded to novel circumstances.<sup>14</sup> Those principles have to be administrable—capable of ready understanding and application—even though insofar as antitrust is concerned, concerns of administrability can be foreign to economics.<sup>15</sup> Nonetheless, even in antitrust, the gap between developing administrable principles and applying complex fact-dependent

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7 See WINSTON CHURCHILL, *A HISTORY OF THE ENGLISH-SPEAKING PEOPLE, THE BIRTH OF BRITAIN, THE ENGLISH COMMON LAW*, 215-17 (New York, Dodd, Mead & Co. 1969) [hereinafter *ENGLISH COMMON LAW*].

8 *Id.* at 217. This is not an analogy without salience in China in terms of improving governance, for example, in the provinces. Although the full exploration of that aspect of the rule of law is beyond the scope of this Article. See, e.g., STEPHEN BREYER, *THE COURT AND THE WORLD: AMERICAN LAW AND THE NEW GLOBAL REALITIES* loc. 5782 (2015) (ebook) (“Our Chinese counterparts . . . saw in administrative law a method of preventing arbitrary action by regional government authorities.”).

9 *ENGLISH COMMON LAW*, *supra* note 7, at 218.

10 *Id.* at 219.

11 *See id.* at 220-22.

12 *See Kimble v. Marvel Entm’t LLC*, 135 S. Ct. 2401, 2412-13 (2015).

13 *See e.g.*, OECD, *OECD POLICY ROUNDTABLE, JUDICIAL ENFORCEMENT OF COMPETITION LAW*, 19 (1996) [hereinafter *JUDICIAL ENFORCEMENT OF COMPETITION LAW*] (on file with authors) (noting that “[i]n most countries, courts do play an important role in commerce” and then noting the importance of the role played by the courts in antitrust, especially because competition laws are written so broadly).

14 *See ENGLISH COMMON LAW*, *supra* note 7, at 224-25.

15 *See OLIVER WILLIAMSON, THE MECHANISMS OF GOVERNANCE*, 282-83 (1996) [hereinafter *THE MECHANISMS OF GOVERNANCE*] (citing and quoting now U.S. Supreme Court Justice Breyer for the proposition that antitrust law cannot simply replicate economists’ views, which may be conflicting, but in developing rules and precedent also follow administrative virtues of simplicity); *see also JUDICIAL ENFORCEMENT OF COMPETITION LAW*, *supra* note 13, at 10 (“The judiciary has two important functions in the implementation of competition policy: ensuring that procedural due process is observed, and applying the underlying substantive principles of the competition law in a correct and consistent manner. Thus, courts bring economic policy under rule of law.”).

economic theory has been filled by the use of presumptions and structural factors.<sup>16</sup> Thus, antitrust can be seen as presenting cutting-edge issues for the application of the rule of law because of the desire to balance the need to apply economic principles to often complex factual circumstances while avoiding every antitrust case from degenerating into a “graduate economic seminar.”<sup>17</sup>

The rule of law also involves the development of precedent, a body of published case law that judges could apply in similar cases and that commentators could reference to explain and comment on.<sup>18</sup> A system of precedent also involves lower courts standing by the decisions of higher courts and higher courts (generally) following their own prior precedent.<sup>19</sup> In this manner, the rule of law can “promote the evenhanded, predictable, and consistent development of legal principles” and ensure “the actual and perceived integrity of the judicial process.”<sup>20</sup> Indeed, it is now common to the rule of law in East Asia and the West alike that it rests, in the end, on a system of court decisions that involve binding precedent from higher courts.<sup>21</sup> And in this respect, antitrust presents interesting challenges in the development of precedent because of the desire to apply the latest economic principles

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- 16 See, e.g., *Philadelphia National Bank at 50: An Interview with Judge Richard Posner*, 80 ANTITRUST L.J. 205, 207 (2015) [hereinafter *Interview with Judge Posner*]; see also Harry First & Eleanor Fox, *Philadelphia National Bank: Globalization and the Public Interest*, 80 ANTITRUST L.J. 307, 326 (2015) [hereinafter *Globalization*] (noting that the shift from eschewing tests for competitive effects to the market share presumptions in *Philadelphia National Bank* “made effective enforcement more likely” because of the focus on economics and administrability); THE MECHANISMS OF GOVERNANCE, *supra* note 15, at 283–84 (citing and quoting the underlying article that gave rise to the *Philadelphia National Bank* presumption with approval for the proposition that a gradualist approach to incorporating the latest economic theories into antitrust rules is “arguably” the “way antitrust enforcement should work”); *id.* at 284–85 (noting that legal rules should not, however, in the service of administrability disregard economics altogether because of the costs imposed, but rather should be flexible and open to refinement); *id.* at 287–88 (discussing the use of “filters” or “factors” to distinguish between “problematic and unproblematic cases”); JUDICIAL ENFORCEMENT OF COMPETITION LAW, *supra* note 13, at 13 (discussing the various presumptions of fact that may be employed in the civil sphere).
- 17 See *Interview with Judge Posner*, *supra* note 16, at 207; see also JUDICIAL ENFORCEMENT OF COMPETITION LAW, *supra* note 13, at 19 (noting that the task of courts’ applying economic thinking in antitrust cases calls for the use of “shortcuts” or “legal presumptions” to make that task easier but also noting that for some tasks like market definition, such shortcuts are not possible and encouraging the exploration of how courts may better use economic evidence).
- 18 See, e.g., ENGLISH COMMON LAW, *supra* note 7, at 224–25.
- 19 See *James v. Boise*, No. 15–493, slip. op. at 1–2 (U.S. Jan. 25, 2016) (per curiam); see also *Kimble v. Marvel Entm’t LLC*, 135 S. Ct. 2401, 2409 (2015); BREYER, *supra* note 8, at loc. 5923–24.
- 20 See e.g., *Kimble*, 135 S. Ct. at 2409.
- 21 See Toshiaki Iimura, Ryu Takabayashi & Christoph Rademacher, Commentary, *The Binding Nature of Court Decisions in Japan’s Civil Law System*, CHINA GUIDING CASES PROJECT (2015), available at <https://cgclaw.stanford.edu/commentaries/14-Iimura-Takabayashi-Rademacher>; Yong Lim & Yunyu Shen, *A Tale of Two Courts: Handling Market Definition in Abuse of Dominance Cases under Market-Share Based Statutory Presumptions in China and Korea*, CPI ANTITRUST CHRONICLE, Feb. 12, 2015, at 7–8 (discussing Republic of Korea); Emilio Varanini, *Running Soft Convergence into the Ground: The Case for an International Antitrust Treaty*, 28 CHINESE (TAIWAN) Y.B. INT’L L. & AFF. 137, 143–45 (2013) (discussing Japan); *id.* at 142–43 (discussing European Union); Emilio Varanini, *American and European Antitrust Enforcement: Let One Hundred Flowers Bloom and One Hundred Schools of Thought Contend*, ANTITRUST BULLETIN 97, 100 nn.16, XX n.17, 101 n.26, 103–04 (Summer 2004) (discussing European Union).

without sacrificing the predictability of this system of precedent.<sup>22</sup> Finally, the rule of law also involves following a set process in which everyone has a chance to be heard and to respond in front of a neutral decision-maker where a litigant's legitimate interests, such as the protection of the confidentiality of business secrets, are taken into account.<sup>23</sup>

In the end, however, all of this presupposes a judiciary that can carry out these tasks—as evinced by the quality of their opinions.<sup>24</sup> And that point applies whether the judiciary is in a civil law country or a common law country.<sup>25</sup>

Since the Cultural Revolution, China embarked on its own course of developing a functioning legal system that would implement many features of the rule of law in the economic and commercial spheres: it passed legal codes and restored a functioning court system; it then steadily increased the power and reach of its courts as well as the tools available to civil litigants to pursue cases within that system. Eight years ago, it enacted the Anti-Monopoly Law, a civil antitrust law of such importance that a celebration of its five-year anniversary was televised on the premier, state-owned, television network CCTV.<sup>26</sup> This raises the dual questions of how China has addressed the challenges of applying the rule of law in the context of antitrust and what its efforts to date in the context of antitrust say about its commitment to the rule of law as a more general matter.

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22 See *Interview with Judge Posner*, *supra* note 16, at 206-07 (discussing the “presumption of illegality,” “plus a short list of possible rebuttal points that the defendant would be allowed to make” for mergers of a certain market share and whether the current state of economic learning suggests that this presumption should be revisited); see also *Kimble*, 135 S. Ct. at 2413 (noting that, by comparison to patent law, antitrust law turned over exceptional law-making authority to the courts); *Globalization*, *supra* note 16, at 326.

23 See Tad Lipsky & Randy Tritell, *Best Practices for Antitrust Law: The Sections Offers Its Model*, 15 THE ANTITRUST SOURCE 1, 17-20 (Dec. 2015) [hereinafter *Best Practices*], available at [http://www.americanbar.org/content/dam/aba/publishing/antitrust\\_source/dec15\\_full\\_source.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/publishing/antitrust_source/dec15_full_source.authcheckdam.pdf); JUDICIAL ENFORCEMENT OF COMPETITION LAW, *supra* note 13, at 10; see also BREYER, *supra* note 8, at loc. 5827 (setting out minimum standards for due process); THE MECHANISMS OF GOVERNANCE, *supra* note 15, at 289-90 (discussing the need for plaintiffs' arguments to not be peremptorily dismissed on summary judgment); *id.* at 292 (disagreeing with the notion advanced by Judge Easterbrook that private lawsuits by competitors against mergers should not be allowed as being “too simplistic”).

24 See JUDICIAL ENFORCEMENT OF COMPETITION LAW, *supra* note 13, at 10 (“Judges are uniquely qualified to perform this balancing of procedural and substantive principles in competition enforcement . . . [J]udges are experienced in this process—in discerning the underlying purpose or purposes of a law and reconciling those fundamental goals with the need for fair and transparent application of the law.”); see also *id.* (“The judiciary also brings a certain degree of flexibility to the implementation of the competition law, thus enhancing the development of law and the application of current economic thinking.”); BREYER, *supra* note 8, at 5821, 5837 (discussing how judges need to have the right state of mind to be independent in dealing “honestly” with the facts of a case, “working through the details,” and ruling “without regard for the press (for instance) would say”).

25 See *Best Practices*, *supra* note 23, at 4 (in discussing best practices for the conduct of antitrust proceedings, the authors point out that “[n]o system of enforcement—adversarial or inquisitorial, common-law or civil-law, judicial or administrative—has been assumed superior in its relevant capacities.”); JUDICIAL ENFORCEMENT OF COMPETITION LAW, *supra* note 13, at 10. Given that, for example, the common law has evolved in places such as the United States to become a system that is far more based on the enactment and application of statutes (see, e.g., *Campbell-Ewald Co. v. Gomez*, No. 14-857, slip. op. at 4-5 (U.S. Jan. 20, 2016) (Thomas, J., concurring)), the experience of common law systems with the rule of law is salient for civil law systems (and vice versa).

26 One of the two authors of this Article participated in that event.

Those dual questions are worth study, not just through an analysis of the development of China's legal framework for addressing antitrust issues but also through a detailed examination of a 2014 antitrust decision by the Supreme People's Court—*Beijing Qihoo Technology Co., Ltd. v. Tencent Technology (Shenzhen) Co., Ltd.*<sup>27</sup> (2014 QQ Decision). That comparison is enlightening as to the question of whether China is truly now on the road to the rule of law, at least in the economic and commercial spheres. This Article answers that question in the affirmative based on an analysis of China's legal system, and the comparative analysis of the 2014 QQ Decision with a 2015 decision of the California Supreme Court. However, this Article notes that there are still important milestones to meet flowing from the 2014 QQ Decision and legal developments contemporaneous-in-time with that decision.

This Article is divided into six parts following this introduction. Part II provides background on the development of China's civil law system following the Cultural Revolution. Part III provides background on the scope of China's Anti-Monopoly Law eight years out. Part IV provides an overview of recent changes in Chinese law, close-in-time to the 2014 QQ Decision, as well as the decision of the Chinese Communist Party's Central Committee on October 23, 2014 at the 4th Plenary Session of the 18th Central Committee on the rule of law (Fourth Plenum Decision)—all of which serves as an important backdrop that imparts further significance to that 2014 QQ Decision. Part V discusses the 2014 QQ Decision in extensive, but necessary, detail so that its significance may be readily understood in terms of how it provides careful guidance on a whole host of evidentiary, procedural, and substantive issues of great import for the Anti-Monopoly Law specifically and the rule of law generally. Part VI compares the 2014 QQ Decision to a more recent decision in California to further explore the significance of the 2014 QQ Decision for the rule of law in China. This part of the article also explores the milestones that we would want to see China surpass to confirm that China is indeed on the path to the rule of law as indicated by the 2014 QQ Decision. Part VII provides some closing thoughts.

## II. THE DEVELOPMENT OF CHINA'S CIVIL LAW AND PROCESSES AFTER THE CULTURAL REVOLUTION

Since 1979, China's lodestar has been economic development and social stability under Deng Xiaoping and his successors.<sup>28</sup> However, as the Cultural Revolution came to an end, China found itself without a legal system.<sup>29</sup> China's first task in addressing the renewal of economic development and social stability was thus to restore a legal system by enacting a Constitution in 1978 that restored the courts and procuratorates.<sup>30</sup> This was followed by the enactment of a new Constitution in 1982 that was revised four times through 2004 as well as over 229 national

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27 2013 CIV. JUDG. (Sup. People's Ct. Oct. 8, 2014) (China).

28 See, e.g., Lewis, *supra* note 5, at 373, 394-99 (discussing the need for social stability in China).

29 See RONALD COASE & NINA WANG, HOW CHINA BECAME CAPITALIST loc. 99 (2011) (ebook); see also DANIEL CHOW, THE LEGAL SYSTEM OF THE PEOPLE'S REPUBLIC OF CHINA IN A NUTSHELL loc. 56-59 (2nd ed. 2009) (ebook).

30 See COASE & WANG, *supra* note 29, at loc. 99-100; see also CHOW, *supra* note 29, at loc. 56-60; *id.* at loc. 80, 184, 198 (making this point in the context of the 1982 Constitution). The term procuratorates refers to the agencies in China that are responsible for prosecutions. See, e.g., *Supreme People's Procuratorate*, WIKIPEDIA, [https://en.wikipedia.org/wiki/Supreme\\_People%27s\\_Procuratorate](https://en.wikipedia.org/wiki/Supreme_People%27s_Procuratorate) (last visited on June 20, 2015). Any discussion of the development of procuratorates is mostly beyond the scope of this article, though similar agencies exist within other civil law systems. See *id.*

laws through 2008 that spanned a wide variety of criminal, civil, economic, and administrative subjects.<sup>31</sup> The 1982 Constitution, for the first time, emphasized the rule of law.<sup>32</sup>

The 1980 Organic Law of the People's Courts and the 1982 Constitution established the general administrative structure of four court levels, with the Supreme People's Court located in Beijing as the apex.<sup>33</sup> In 1986, China enacted the General Principles of the Civil Code,<sup>34</sup> enabling civil cases to be heard in its courts as a substantive matter.<sup>35</sup> In 1989, China enacted the Administrative Litigation Law,<sup>36</sup> enabling cases challenging certain administrative actions to be heard in its courts.<sup>37</sup> And in 1991, China enacted the Civil Procedure Law, setting out the general process and rules by which civil actions would be heard and adjudicated in Chinese courts.<sup>38</sup>

China's court system allows for a civil plaintiff to receive up to two trials at different levels (e.g., the equivalent of the district or superior court level in the United States and then again at an intermediate appellate level) with the second trial being *de novo*.<sup>39</sup> The courts are split into four divisions: civil, criminal, economic, and administrative.<sup>40</sup> Many provinces have

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31 COASE & WANG, *supra* note 29, at loc. 100; see CHOW, *supra* note 29, at loc. 60-61 (noting that in the first decade of reform after 1979-1980, "over 3,000 laws and regulations were enacted, including over one hundred major legal codes," as well as the enactment of a new Constitution).

32 See, e.g., CHOW, *supra* note 29, at loc. 77-78.; see also *id.* at loc. 184 (discussing importance of this commitment to rule of law to effectuate economic reform and social stability).

33 See Organic Law of the People's Courts of the People's Republic of China (promulgated by the Nat'l People's Cong., July 1, 1979, effective July 5, 1979) (amended 1983, 1986, & 2006), arts. 1, 2, 9-11, 13, 18, 20, 23-27, 29-32; see also CHOW, *supra* note 29, at 202-04.

34 General Principles of the Civil Law of the People's Republic of China (promulgated by the Nat'l People's Cong., Apr. 12, 1986, effective Jan. 1, 1987).

35 See CHOW, *supra* note 29, at loc. 330.

36 Administrative Litigation Law of the People's Republic of China (promulgated by the Nat'l People's Cong., Apr. 29, 1999, effective Oct. 1, 1999).

37 See generally Jianlong Liu, *Administrative Litigation in China: Parties and their Rights and Obligations*, 4 NUJS L. REV. 205 (2011) (DISCUSSING PROCESS OF CHALLENGING ADMINISTRATIVE DECISIONS IN CHINA); CHOW, *supra* note 29, at loc. 298-99.

38 Civil Procedure Law of the People's Republic of China (promulgated by the Nat'l People's Cong., Apr. 9, 1991, effective Jan. 1, 2013) (amended 1991, 2007, & 2012), arts 1-7, 10, 12, 17-20, 39-43, 75-77, 79, 125, 133-34, 138-39, 141, 152, 156, 164, 168-71.

39 See Organic Law of the People's Courts of the People's Republic of China (promulgated by the Nat'l People's Cong., July 1, 1979, effective July 5, 1979) (amended 1983, 1986, & 2006), art. 11; Civil Procedure Law arts. 10, 17-20, 39-40, 153, 164, 168-71; see also CHOW, *supra* note 29, at loc. 203-04. If the first trial is held in front of the Supreme People's Court in Beijing, then it is final. See CHOW, *supra* note 29, at loc. 203-04; see also Organic Law art. 32; Civil Procedure Law arts. 10, 20.

40 See CHOW, *supra* note 29, at loc. 204-05; see also Organic Law arts. 18, 23. Cases that involve such laws as the Anti-Monopoly Law fall within the civil area, rather than economic, as economic cases involve enterprises and industrial sectors, see, e.g., *id.*, unless it is administrative in nature. See *id.*; Anti-Monopoly Law of the People's Republic of China (promulgated by the Standing Comm. of the Nat'l People's Cong., Aug. 30, 2007, effective Aug. 1, 2008), art. 50; see also *Beijing Qihoo Technology Co., Ltd. v. Tencent Technology (Shenzhen) Co., Ltd.*, 2013 Civ. Judg. (Supreme People's Court Oct. 8, 2014) (China) [hereinafter *2014 QQ Decision*] (translated by Feng Jiang) (labelling opinion as a *civil judgment*).

established a separate division of one kind or another for intellectual property cases<sup>41</sup> and those divisions have become tasked with hearing cases involving the Anti-Monopoly Law (though not exclusively so as a theoretical matter).<sup>42</sup> Moreover, those intellectual property cases (and by extension Anti-Monopoly Law cases) may involve a trial in the first instance at the intermediate appellate court level, with a second-level Higher People's Court for the entire province that can retry the case and then the Supreme People's Court.<sup>43</sup> The Supreme People's Court is the court of final resort in Mainland China; though it has considerable room for the exercise of original jurisdiction, in practice it prefers to serve as an appellate court in hearing appeals from lower courts.<sup>44</sup>

At each level of a court system in a province, as well as at the Supreme People's Court, there will be a President, Vice-Presidents, a Chief Judge for each division within that system, deputy chief judges, and assistant judges—as well as People's Assessors or lay judges though such assessors are not included in second trials or appeals.<sup>45</sup> They are appointed for a term by the equivalent People's Congress for that level.<sup>46</sup>

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41 See Wang Chuang, Deputy Chief Judge, Supreme People's Court of the People's Republic of China, Presentation Before the 20th U.S.-China Legal Exchange: China's Judicial Reform slides 2-3 (Feb. 29, 2016) (on file with author); CHOW, *supra* note 29, at loc. 204.

42 See Susan Ning & Ding Liang, *Commentary on the Anti-Monopoly Judicial Interpretation*, CHINA LAW INSIGHT (Aug. 29, 2012), <http://www.chinalawinsight.com/2012/08/articles/corporate/commentary-on-the-antimonopoly-judicial-interpretation> (analyzing Article 3 of 2012 Supreme People's Court rules on the Anti-Monopoly Law, discussed *infra*). As discussed *infra*, challenges to local government actions for abuse of dominance conduct under the Anti-Monopoly Law and to antitrust enforcement actions, e.g., the imposition of fines, are now allowed under amendments to the Administrative Litigation Law that took effect this year. Whether lawsuits based on those challenges would be heard in the administrative system, as might be expected, remains to be seen though they should be heard in the first instance at an intermediate appellate level. Cf. CHOW, *supra* note 29, at loc. 300 (discussing how cases involving patent, grave, and complex cases, and cases involving an agency acting under direction of the State Council, are to be heard by such courts in the first instance); Organic Law arts. 18, 23 (intermediate courts can set up criminal, civil, economic, and other divisions whereas lower courts can only set up criminal, civil, and economic divisions).

43 See generally, e.g., CHOW, *supra* note 29, at loc. 209 (describing how the venue for patent cases and complex cases can end up in a first-level intermediate appellate court rather than a basic court); Civil Procedure Law arts.19-20. However, lower courts, colloquially referred to as district courts, have set up intellectual property panels in some areas such as in Beijing. These intellectual property panels may also hear antitrust cases. See, e.g., Anjie Law Firm, 2015 CHINA ANTI-MONOPOLY RPT. 46-48 (2016) [hereinafter 2015 CHINA ANTI-MONOPOLY RPT.] (on file with authors) (discussing holding of Beijing High Court that such panels have jurisdiction over antitrust cases based on regulations of the Supreme People's Court and the Beijing High Court).

44 See CHOW, *supra* note 29, at loc. 211-12; see also Organic Law art. 29; Civil Procedure Law art. 20.

45 See Organic Law arts. 9, 26, 30; Civil Procedure Law arts. 39-43; CHOW, *supra* note 29, at loc. 205-06, 212; see also Wang, *supra*, note 41, at slides 8-9 (describing intellectual property panels). The People's Assessor not only ensures some public participation in judicial proceedings but also may even be an expert in an area pertinent to the case, thus bringing his or her expertise to bear in supporting the court's decision.

46 See Organic Law arts. 34-36; CHOW, *supra* note 29, at loc. 205-06.

Judges are required to have advanced degrees specializing in law or a college degree plus one or two years of working experience and professional legal knowledge.<sup>47</sup> Though would-be judges can pass an examination to become judges, they may be directly appointed as assistant judges, even at the Supreme People's Court level. However, once appointed, judges must pass periodic examinations and evaluations like any other civil servant.<sup>48</sup> And judges at the higher levels, whom not uncommonly have scientific or engineering degrees of one kind or another, believe that those degrees help them in the performance of their judicial functions, e.g., by enabling those judges to ask court litigants the kind of questions necessary to address complex or technical matters, including those under the Anti-Monopoly Law.<sup>49</sup>

Judges decide cases by setting up a collegiate panel of an odd number of judges.<sup>50</sup> Civil cases will involve the questioning of civil litigants, the presentation of evidence—including witnesses and documents—and the presentation of argument before a judgment is reached.<sup>51</sup> Although pre-trial discovery is minimal as compared to the United States, the courts can, either on their own or in response to a request, order the gathering or preservation of

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47 See CHOW, *supra* note 29, at loc. 206–07; *see also* Organic Law art. 33. The expertise of the judges on the intellectual property panels in major cities such as Beijing is much greater. *See, e.g.,* Wang, *supra*, note 41, at slide 4 (noting judges on the intellectual property panels in Beijing, Shanghai, and Guangzhou have between 7–10 years of judicial experience). There were issues with the quality of judging in China, especially in the early years as China's set up its civil law court system. In response to such issues, China set up an administrative system of supervision in which decisions of lower courts could be reviewed by judges in higher courts and others to avoid mistakes being made. *See, e.g.,* Organic Law, *supra* arts. 10, 13 (discussing role of judicial committees, higher courts, people's congresses, and procuratores). Though there is less need for this system now on civil matters than has been true historically, it does continue to endure. This point is discussed in more detail at note 61, *infra*.

48 See CHOW, *supra* note 29, at loc. 206–07; *see also* Organic Law art. 36.

49 Anonymous, Statements at the 2014 Antitrust Civil Litigation Forum, Beijing, China (May 24–25, 2014). Though one of the authors attended this forum, the authors of this article are following the Chatham House Rule in avoiding any more specific description of the statements or the individuals making those statements. *See Chatham House Rule*, WIKIPEDIA, [https://en.wikipedia.org/wiki/Chatham\\_House\\_Rule](https://en.wikipedia.org/wiki/Chatham_House_Rule) (last visited on June 20, 2015) (Chatham House Rule is designed to foster debate and discussions on controversial issues by enabling participants to use information from that debate or discussion but not identify who made what comment).

50 See Organic Law, *supra* arts. 9, 23; Civil Procedure Law arts. 39–43; CHOW, *supra* note 29, at loc. 212; Wang, *supra*, note 41, slide 8 (intellectual property cases are decided collectively); *see also* 2014 QQ Decision, *supra* note 40, at 83 (case was decided collectively by a panel of the Supreme People's Court composed of Presiding Judge Wang Chuang, Judge Wang Yangfang, Acting Judge Zhu Li, and two clerks). The courts will strenuously use mediation or conciliation to try to get cases to settle before they proceed to trial, *see generally, e.g.,* CHOW, *supra* note 29, at loc. 212, 291–92, though the use of, and limitations on, such measures are beyond the scope of this article.

51 See Civil Procedure Law arts. 63–81; CHOW, *supra* note 29, at loc. 212–13, 291; *see also* 2014 QQ Decision, *supra* note 40, at 1–21 (describing the presentation of evidence in the Guangdong Higher People's Court as including such items as expert reports, market reports from companies and the government as well as other information available from government agencies such as the State Intellectual Property Office, Internet access demonstrations, Internet articles, and website posts).



evidence,<sup>52</sup> including in intellectual property cases<sup>53</sup> and anti-monopoly cases.<sup>54</sup> The courts can also allow civil litigants to present witnesses with professional knowledge that other civil litigants or the court can question,<sup>55</sup> or can, at least in an anti-monopoly case, designate their own independent economic experts to produce a report.<sup>56</sup> Taking into account which party has the burden of proof on an issue, judges can draw adverse inferences from the failure of civil litigants or their witnesses to be able to answer questions or provide information requested by them.<sup>57</sup> And reports by government agencies, presumably including decisions of government antitrust enforcers, have greater evidentiary weight than other forms of written evidence.<sup>58</sup>

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52 See Civil Procedure Law art. 64, 67, 81; CHOW, *supra* note 29, at loc. 288.

53 See, e.g., CHOW, *supra* note 29, at loc. 438.

54 Susan Ning, Kate Peng, Jia Liu & Rui Li, *The Dual System of Anti-Monopoly Law—The Interplay Between Administrative Enforcement and Civil Action*, CHINA LAW INSIGHT (Sept. 12, 2013), <http://www.chinalawinsight.com/2013/09/articles/corporate/antitrust-competition/the-dual-system-of-anti-monopoly-law-the-interplay-between-administrative-enforcement-and-civil-action/> (discussing the ability of civil plaintiffs filing claims under the Anti-Monopoly Law to use Article 64 of the Several Provisions of the Supreme People’s Court on Evidence in Civil Proceedings to ask the court to investigate and gather evidence). Whether, and to what extent, that would apply to evidence submitted by an amnesty applicant to a government antitrust enforcement agency remains to be seen. See *id.* In that respect, the authors note that other jurisdictions have found mechanisms by which civil plaintiffs can secure evidence from amnesty applicants without discouraging companies from applying to antitrust enforcers for amnesty status in the first instance. See, e.g., Antitrust Criminal Penalty Enhancement and Reform Act of 2004, Pub. L. No. 108-237, §213(b), 118 Stat. 665, 666 (codified as amended at 15 U.S.C. § 1 note); Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on Certain Rules Governing Actions for Damages under National Law for Infringements of the Competition Law Provisions of the Member States and the European Union, arts. 26-28, 2014 O.J. (L. 349) 5.

55 Ning et al., *Commentary on the Anti-Monopoly Judicial Interpretation*, *supra*, note 42 (discussing Article 12 of the Supreme People’s Court Rules on the Anti-Monopoly Law—discussed *infra*—and Article 61 of the Several Provisions of the Supreme People’s Court on Evidence in Civil Proceedings); see also 2014 QQ Decision, *supra* note 40, at 2 (both sides hired economic experts); Civil Procedure Law art. 79 (“The parties concerned may apply to the people’s court to notify a person with professional knowledge to appear before court and issue opinions on the expert evaluation opinions issued by the experts on professional issues.”).

56 See Ning et al., *Commentary on the Anti-Monopoly Judicial Interpretation*, *supra*, note 42 (discussing Article 13 of the Supreme People’s Court Rules on the Anti-Monopoly Law); see also, e.g., Civil Procedure Law art. 76 (“A party may apply to the people’s court for expert evaluation of specific issues concerning the facts); *id.* (“Where the party has not applied for expert evaluation but the people’s court deems it necessary with regard to certain specific issues, the court shall appoint a qualified expert to conduct expert evaluation.”).

57 Anonymous, Statements to the 2014 Antitrust Civil Litigation Forum, Beijing, China (May 24-25, 2014).

58 See Ning et al., *The Dual System*, *supra*, note 54 (discussing Article 77 of Some Provisions of the Supreme People’s Court on Evidence in Civil Procedures). However, there is a difference between a written government decision, with factual and legal findings, being admissible even if special evidentiary weight is placed on the decision, and the underlying findings in that decision having preclusive effect in follow-on civil litigation. See generally Stephen Freccero, *The Use and Effect of a Guilty Plea in Subsequent Civil Litigation*, 22 COMPETITION: J. ANTI. & UNFAIR COMP. L SEC. ST. B. CAL. 136, 144-48, 151-56 (Spring 2013) (discussing U.S. antitrust law). While the draft rules of the Supreme People’s Court discussed *infra* included a provision according such preclusive effect to government decisions, that provision was removed from the final promulgated version. See Ning et al., *The Dual System*, *supra*, note 54.

American courts must also interpret statutes; such cases have enhanced precedential value because Congress can amend the statute if it so chooses in response to a court decision.<sup>59</sup> The situation in China is more complex, though the courts have a greater role in that respect than it may appear at first glance.

As China has a system of legislative supremacy, interpretations of law are handed down by the Standing Committee of the National People's Congress (which is simultaneously a law-making body) while interpretations of administrative regulations are conducted by the State Council.<sup>60</sup> However, the Standing Committee's reported reluctance to give such interpretations has left a lot of room open for the Supreme People's Court to do so in a manner that can be so detailed and broad as to amount to supplemental legislation.<sup>61</sup>

In spite of the impressive steps made by China on the rule of law in the use of its courts,<sup>62</sup> much remains to be done on that subject to ensure continued economic reform and social stability.<sup>63</sup> To understand this point, as well as how the *2014 QQ Decision* is an important signpost of the continued development and use of law in China, this Article next turns to a description of China's Anti-Monopoly Law.

### III. CHINA'S ANTI-MONOPOLY LAW EIGHT YEARS OUT

On April 1, 2008, China's antitrust law, known as the Anti-Monopoly Law, took effect.<sup>64</sup> The Anti-Monopoly Law was enacted as part of a systematic effort to establish a

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59 See, e.g., *Kimble v. Marvel Entm't LLC*, 135 S. Ct. 2401, 2409 (2015).

60 See, e.g., CHOW, *supra* note 29, at loc. 173-75, 207.

61 See *id.* at loc. 176-79, 180; see also Organic Law of the People's Courts of the People's Republic of China (promulgated by the Nat'l People's Cong., July 1, 1979, effective July 5, 1979) (amended 1983, 1986, & 2006), arts. 15, 33. The word "reported" is intentional; the Supreme People's Court can consult with the Standing Committee (whose role as a law-making body is referenced *infra* in note 88) to determine if the Court's interpretation of a law is accurate. See Mei Gechlik & Dai Di, Commentary, *Guiding Case No. 5: Monopoly in China's Salt Industry and Amendments to the Legislation Law and the Administrative Litigation Law*, CHINA GUIDING CASES PROJECT, 4 (2015), available at <https://cgc.law.stanford.edu/commentaries/13-gechlik-and-dai>. As referenced in note 45, *supra*, there is a process of "adjudication supervision" by which otherwise final judgments can be corrected for errors (though parties have to abide by timelines). This process is thought to be important in a system where the competency of the courts, and the qualifications of their members, has required ongoing nourishing and development since their reestablishment following the Cultural Revolution. See CHOW, *supra* note 29, at loc. 217-18. The re-opening, or correction, of final judgments, albeit on the satisfaction of strict standards, is not unknown in the United States. See Fed. R. Civ. Pro. 60(b). This process of administrative supervision is coupled by a more informal process of administrative guidance, however, in which lower courts will seek the opinions of higher courts on a legal issue before them in a case for the same reasons that motivate the administrative supervision process. A more detailed exploration of the adjudication supervision process, or the more informal variant of administrative guidance, is beyond the scope of this article except to note that this administrative review and feedback process as a whole provides some explanation as to how case decisions from a court below the Supreme People's Court in Beijing can be viewed as being sufficiently important to warrant administrative designation as a guiding case by the Supreme People's Court. See Gechlik & Di, *supra*.

62 See Wang, *supra*, note 41, at slides 6-7 (noting that the intellectual property panels in Beijing, Shanghai, and Guangzhou accepted 15,772 cases and decided 9,872 cases as of December 31, 2015).

63 See COASE & WANG, *supra* note 29, at loc. 181-83, 185 (making that point by reference to Chinese statements made during the Qin Dynasty).

64 E.g., Zhenguo Wu, *Perspectives on the Chinese Anti-Monopoly Law*, 75 ANTITRUST L.J. 73 (2008).

comprehensive legal system to regulate the socialist market economy by 2010.<sup>65</sup> It embodies a desire to establish a market economy in China, combat abusive state power (as a second best measure to economic reform involving state power in the market), and protect the national interest.<sup>66</sup> The Anti-Monopoly Law has sections that address monopoly agreements (e.g., horizontal agreements among competitors to fix price or vertical agreements between manufacturers and distributors to fix price), abuse of dominant market position (e.g., tying or exclusive conduct by a company with certain levels of market power or abuse of intellectual property rights), mergers, abuse of administrative powers to eliminate or restrict competition, and supplemental provisions that include the power to block the conduct in question and assess civil penalties.<sup>67</sup>

The courts have an important role in carrying out the Anti-Monopoly Law in two ways. First, Article 50 of the Anti-Monopoly Law states that businesses can be held civilly liable for the damages that they inflict on others by engaging in practices that violate the law.<sup>68</sup> Analyzing Article 50 of that law in conjunction with the General Principles of the Civil Law means that the courts can, in a given case under this law, apply the following broad remedies: “(1) cessation of infringements; (2) removal of obstacles; (3) elimination of dangers; (4) return of property; (5) restoration of original condition; (6) repair, correction, or replacement; (7) compensation for losses; (8) payment of deposits or liquidation damages; (9) elimination of ill-effects and restoration of reputation; and (10) extension of apology.”<sup>69</sup> Indeed, this interpretation of Article 50 has been confirmed by the Supreme People’s Court.<sup>70</sup> Second, a business dissatisfied with a decision of a government antitrust enforcement agency can file an administrative litigation action with the courts.<sup>71</sup>

Though the courts have not, to date, heard administrative litigation cases involving specific decisions of government antitrust enforcers, Article 50 of the Anti-Monopoly Law has given rise to important activity by the courts over the eight years since its enactment,

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65 Yong Huang, *Pursuing the Second Best: The History, Momentum, and Remaining Issues of China’s Anti-Monopoly Law*, 75 ANTITRUST L.J. 117, 119 (2008).

66 *Id.* at 121-24.

67 *See, e.g.*, Wu, *supra* note 64, at 79-97, 103-12.

68 *See, e.g., id.* at 112.

69 *See id.*; *see also* 2014 QQ Decision, *supra* note 40, at 3 (Qihoo as the civil plaintiff requested that the courts order the following: (1) Tencent stop its conduct constituting an abuse of market dominance; (2) Tencent pay Qihoo 150 million RMB for Qihoo’s economic losses (3) Tencent apologize to Qihoo; (4) Tencent pay Qihoo’s reasonable expenses, including investigation fees, notarization fees, and attorney’s fees, all totaling 1 million RMB; and (5) Tencent pay other litigation fees); Ning et al., *Commentary on the Anti-Monopoly Judicial Interpretation*, *supra* note 42 (making these same points in analyzing the Supreme People’s Court rules on the Anti-Monopoly Law and Article 134 of the General Principles of Civil Law).

70 Ning et al., *Commentary on the Anti-Monopoly Judicial Interpretation*, *supra* note 42 (analyzing Article 14 of the Supreme People’s Court Rules on the Anti-Monopoly Law).

71 *See, e.g.*, Wu, *supra* note 64, at 109 (discussing civil penalties); *id.* at 113 (discussing decisions involving monopoly agreements and abuse of dominance). Because of the complexities involved with merger analysis, administrative review is required first insofar as a merger decision is concerned before a party may proceed to file suit under the Administrative Litigation Act. *Id.* at 113-14.

culminating in the *2014 QQ Decision*.<sup>72</sup> Most importantly, the Supreme People's Court issued rules in 2012 to govern civil trials by itself and by lower courts involving alleged violations of the Anti-Monopoly Law (Supreme People's Court Rules on the Anti-Monopoly Law).<sup>73</sup> Those rules provide in substantive part: (1) a court decision need not be stayed while a government investigation is pending, though civil law allows it to do so if it deems it necessary; (2) the statute of limitations is suspended if a plaintiff's report to a government agency has triggered an investigation for the duration of that investigation; (3) the burden of proof is placed on defendants to rebut the presumption of anti-competitive effects from horizontal monopolistic agreements though civil plaintiffs still carry the burden of showing such effects for vertical monopolistic agreements and abuse of dominance conduct; (4) the burden of proof is placed on defendants to rebut the presumption that it has a dominant market position if they have the requisite market shares spelled out in the Anti-Monopoly Law, if they have a dominant market position pursuant to the law, or if they are a public utility; (5) the burden of proof is placed on defendants to show the existence of justifications or excuses accepted under the Anti-Monopoly Law; (6) a defendant's statements of its market position in its documents (e.g., its stock market filings) may be accepted by the courts as conclusive proof of its market shares; and (7) the civil plaintiff bears the burden of showing injury, causation, and damages though compensation for losses may include the reasonable fees of a civil plaintiff in investigating and bringing the case.<sup>74</sup>

The courts have heard or are hearing cases that involve such areas as abuse of intellectual property, vertical price-fixing restraints, abuse of administrative monopoly to eliminate or restrict competition, tying, and abuse of market dominance, including two cases against state-owned companies.<sup>75</sup> It is predicted that private cases filed under the Anti-Monopoly Law will only continue to grow.<sup>76</sup>

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72 See, e.g., Vanessa Yanhua Zhang, *CPI Talks: Interview with Judge Chuang Wang*, CPI ANTITRUST CHRONICLE, Feb. 2016, at 1 (contrasting 2008–09 when the people's courts processed 10 cases of first instance and adjudicated 6 cases to 2015 when the people's courts processed 141 cases of first instance and adjudicated 98 cases, including backlogged cases).

73 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 Conduct (promulgated by the Supreme People's Court, May 3, 2012, effective June 1, 2012). The Supreme People's Court has administrative supervisory powers over lower courts that allow it to promulgate these rules. See, e.g., Organic Law of the People's Courts of the People's Republic of China (promulgated by the Nat'l People's Cong., July 1, 1979, effective July 5, 1979) (amended 1983, 1986, & 2006), art. 32; CHOW, *supra* note 29, at loc. 147, 211–12.

74 See Ning et al., *The Dual System*, *supra* note 54; Ning et al., *Commentary on the Anti-Monopoly Judicial Interpretation*, *supra* note 42.

75 See 2015 CHINA ANTI-MONOPOLY RPT., *supra* note 43, at 40–50; Anjie Law Firm, 2014 CHINA ANTI-MONOPOLY RPT. 36–48 (2015) [hereinafter 2014 CHINA ANTI-MONOPOLY RPT.] (on file with authors); Susan Ning, Li Rui & Hazel Yin, *Chinese Consumer Wins Abuse of Dominance Civil Case against Tie-In Sales in Program Bundling*, CHINA LAW INSIGHT (Apr. 6, 2013), <http://www.chinalawinsight.com/2013/04/articles/corporate/antitrust-competition/chinese-consumer-wins-abuse-of-dominance-civil-action-against-tie-in-sales-in-program-bundling-2>.

76 See Zhang, *supra* note 72, at 1–2; 2015 CHINA ANTI-MONOPOLY RPT., *SUPRA* NOTE 43, AT 50.

#### IV. COMMUNIST PARTY PRONOUNCEMENTS AND RECENT ENACTMENTS IN CHINESE LAW CONTEMPORANEOUS-IN-TIME WITH THE 2014 QQ DECISION

To understand the importance of the 2014 QQ Decision by the Supreme People's Court in Beijing, including its timing, it is important to look first at the Communist Party's relatively recent pronouncements on the rule of law before turning to recent legal reforms postdating that commitment. Those reforms enhance the potential application of the rule of law and their enactment impacts the assessment of the 2014 QQ Decision for the continued development of China's Anti-Monopoly Law specifically and the rule of law generally.

##### A. The Fourth Plenum Decision of the Communist Party's Central Committee

On October 23, 2014, the Communist Party's Central Committee (CCP Central Committee), the highest-level policy-making arm of the Communist Party, addressed what it characterized as major questions in moving China forward according to the rule of law.<sup>77</sup> The CCP Central Committee first recognized the need to "give even better rein to the guiding and driving role of the rule of law."<sup>78</sup> In doing so, the CCP Central Committee called for reforms that would enhance the responsibilities of the judiciary in administrative review of government decisions, in holdings trials according to evidence admitted via standardized evidentiary rules and an otherwise fair process, in handing down authoritative judgments according to a unified body of law, in having the judgments of lower courts be reviewed for errors of law by higher courts (with a second trial on the facts being available in the next highest court), and in calling for a system of case precedent on which the courts could draw.<sup>79</sup> However, the CCP Central Committee was aware that an enhancement of the judiciary's responsibility meant that professionally trained judges were required (just as King Henry II needed professional judges to expand the common law in England) and so called for the resources, the training, and the merit selection and promotion process necessary to develop such a judiciary.<sup>80</sup>

As part of this decision, the CCP Central Committee urged the Communist Party, among other things, to take "Deng Xiaoping theory" as "guidance."<sup>81</sup> That statement is an important signal as to the potential importance of these objectives for the Communist Party; during his

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77 See CCP Central Decision Concerning Some Major Questions in Comprehensively Moving Governing the Country According to the Law Forward (Oct. 30, 2014) (translated by Jeffrey Dawn) (on file with authors) [hereinafter Fourth Plenum Decision].

78 *Id.* at 1.

79 *Id.* at 11-15.

80 *Id.* at 19. The authors of this Article have been informed from a reliable source that the Communist Party is working on amendments to the Organic Law, Organic Law of the People's Courts of the People's Republic of China (promulgated by the Nat'l People's Cong., July 1, 1979, effective July 5, 1979) (amended 1983, 1986, & 2006), to effectuate its decision and that the first reading of any such amendments will be later this year.

81 Fourth Plenum Decision, *supra* note 77, at 2. Deng Xiaoping thought is one of the bases of China's 1982 Constitution, which is still in effect. See, e.g., CHOW, *supra* note 29, at loc. 75-76. Deng Xiaoping's objectives have been followed by his successors. See, e.g., LEWIS, *supra* note 5, at 373 (collecting statements of China's leaders from Deng Xiaoping through Xi Jinping on China's goal being economic development).

lifetime, Deng Xiaoping understood well the need for the development and deepening of the rule of law to ensure continued economic development and social stability.<sup>82</sup>

## B. The Increased Importance of Guiding Cases As Quasi-Precedent

A sign that the judiciary in China can meet the goals of the CCP Central Committee's Fourth Plenum Decision in furthering the rule of law in China is whether it has or would have a precedential system governing its decisions. The recent clarification of the role of so-called "Guiding Cases" in China sheds light on that question and provides a signpost against which one can evaluate the significance of the 2014 QQ Decision for antitrust law in China and, more generally, for the rule of law there.

On November 26, 2010, the Supreme People's Court created an administrative process to synopsise important decisions by itself and by lower courts in which the synopsis could be referred to by lower courts in a precedential fashion in adjudicating disputes before them as well as by commentaries; those synopses are referred to as "Guiding Cases."<sup>83</sup> It was open to debate then as to whether the Chinese court system had to follow these cases, though the most likely answer was yes, let alone whether they would evolve to becoming binding precedent in the Eastern Asian or Western sense.<sup>84</sup>

The Supreme People's Court provided at least a partial answer on May 13, 2015, when it issued its "Detailed Implementing Rules on the 'Provisions of the Supreme People's Court

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82 See COASE & WANG, *supra* note 29, at loc. 98-103, 131-33; EZRA VOGEL, DENG XIAOPING AND THE TRANSFORMATION OF CHINA loc. 574-75, 589-90, 671, 673, 684, 698, 706 (2011) (ebook); see also CHOW, *supra* note 29, at loc. 184 (discussing importance of the commitment to rule of law in the 1982 Constitution to effectuate economic reform and social stability); Lewis, *supra* note 5, at 398-400 (discussing Deng Xiaoping's commitment to the rule of law in the criminal context as a means of effectuating economic reform). Though the Fourth Plenum Decision discussed in this section of the Article involving the rule of law and the courts might be viewed by Westerners as a surprise given that they may view Chinese history as involving a lack of any accountability or review for the decisions by government agencies (except by petitioning very high-level officials); such a view would not be entirely accurate. See, e.g., F.W. MOTE, IMPERIAL CHINA 900-1800, 895-96 (Harv. Univ. Press 2nd ed. 2000) (discussing the use of the Chinese Censorate by the Qing Dynasty to ensure that "other offices of government were functioning honestly and effectively" and noting that Sun Zhongshan "decided to retain the Censorate (and the civil service examination system) as distinctly Chinese institutions worthy of being adapted to modern government, following the Revolution of 1911" (footnote omitted)). Nonetheless, throughout most of Chinese history, rule of law has been absent to a substantial extent in China, making recent advancements that much more striking even before the Fourth Plenum Decision. See, e.g., CHOW, *supra* note 29, at loc. 50-53.

83 See Seminar Summary: *Why China's Guiding Cases Matter?*, CHINA GUIDING CASES PROJECT 2 (Apr. 22, 2015), <https://cgc.law.stanford.edu/wp-content/uploads/sites/2/2015/08/GC-seminar-20150422-summary-English.pdf>; see also Wang, *supra* note 41, at slides 11-12. The authority for the Supreme People's Court ability to set up a Guiding Cases system stems from Article 32 of the Organic Law. See Organic Law art. 32.

84 See Seminar Summary, *supra* note 83, at 2 ("Although formally the new rule states only that courts at all levels in China 'should refer to' . . . guiding cases released by the Supreme People's Court, senior judges of the highest court have observed that they expect these cases to be followed and that, if they are not, there may be severe repercussions. Such comments, together with the fact that guiding cases are selected by the adjudication committee of the Supreme People's Court (the members of which include the president, vice-presidents, and chief judges of different chambers in the court) make clear that these cases carry far more weight than the phrase 'should refer to' would otherwise suggest. While not formally constituting binding precedent in the Western sense, the guiding cases may evolve to have a similar effect.").

Concerning Work on Case Guidance.”<sup>85</sup> Those rules set out the scope of those required synopses of the facts of, and law applied in, decisions that would be designated as Guiding Cases, encouraged the submission of candidate decisions by courts and others that can become Guiding Cases, set out the process by which notice of these cases can be distributed widely, encouraged the courts and court litigants to examine and refer to Guiding Cases, and set up the format in which Guiding Cases can be cited and quoted in subsequent decisions.<sup>86</sup> These detailed implementing rules specifically provided, for example, that whenever a civil litigant raises a guiding case as a ground for a position taken in litigation, the court handling that litigation “should” in providing the reasons for its decision, “respond [as to] whether [they] referred to the Guiding Case [in the course of their adjudication] and explain their reasons [for doing so].”<sup>87</sup>

The issuance of these detailed implementing rules has been viewed as “a clear step to achieve one of the goals stated by China’s top leaders in their Fourth Plenum decision adopted in October 2014: ‘to strengthen and standardize [the systems of] . . . case guidance to unify the applicable standards of law.’”<sup>88</sup> However, to implement those rules, and achieve this goal of furthering the rule of law, requires a competent judiciary, high-quality opinions that can serve as guidance, and an ongoing commitment to implement those rules in fact by designating high-quality opinions as Guiding Cases. All of these points provide milestones against which the 2014 QQ *Decision*’s impact on antitrust law specifically, and the rule of law generally, can be properly assessed.

### **C. The Importance of Recent Administrative Review Reform as a Signpost to the Enhancement of the Judiciary’s Role and China’s Commitment to the Rule of Law**

A competent judiciary is one that can be trusted to review government decisions, with or without some layer of deferential review be it heavy or light, to ensure that such decisions conform to the rule of law. The recently enacted statutory reform of China’s administrative judicial review process, known as the Administrative Litigation Law,<sup>89</sup> provides yet another signpost against which the significance of the 2014 QQ *Decision* can be assessed.

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85 See Detailed Implementing Rules on the Provisions of the Supreme People’s Court Concerning Work on Case Guidance (promulgated by Supreme People’s Court, May 13, 2015), translated in *Detailed Implementing Rules on the Provisions of the Supreme People’s Court Concerning Work on Case Guidance*, CHINA GUIDING CASES PROJECT, <http://cgc.law.stanford.edu/guiding-cases-rules/20150513-english> [hereinafter Detailed Implementing Rules].

86 See *id.* arts. 3–6, 9–11, 13; see also Wang, *supra* note 41, at slides 13–15 (describing process).

87 Detailed Implementing Rules, *supra* note 85, art. 11.

88 The CGCP Team, *Breaking News: China’s Supreme Court Explains How to Cite Guiding Cases*, CHINA GUIDING CASES PROJECT (June 5, 2015), <https://law.stanford.edu/2015/06/05/cgcp-2015-06-05-breaking-news-chinas-supreme-court-explains-how-to-cite-guiding-cases/>; see also Wang, *supra* note 41, at slide 12 (effect of designation of an opinion as a guiding case is that it is to be applied as a “reference in trials,” that it has “a strong binding force in similar cases,” and that “for cases in which it is not applicable, the original sentence may be changed or retrial may be held”).

89 For general background on China’s Administrative Litigation Law and a civil plaintiff’s rights under that law, see, e.g., Liu, *supra* note 37, at 205–10, 215–19, 220–28 (2011) (on file with authors); CHOW, *supra* note 29, at loc. 298–99; see also China Research Center, *New Trends in China’s Administrative Reform*, 13 CHINA CURRENT, No. 2 (2014) (discussing background behind reform), available at [http://www.chinacenter.net/2014/china\\_currents/13-2/new-trends-in-chinas-administrative-reform/](http://www.chinacenter.net/2014/china_currents/13-2/new-trends-in-chinas-administrative-reform/).

The Standing Committee of the National People's Congress,<sup>90</sup> enacting this reform on November 1, 2014 to take effect on May 1, 2015, amended the Administrative Litigation Law to broaden it in significant ways: (1) it eliminated the "specific administrative act" requirement so as to broaden challenges to administrative actions;<sup>91</sup> (2) it provided that challenges may be made to administrative actions in twelve broad areas encompassing a very wide range of abuses of administrative powers, including the "[e]xecutive abuse of administrative power to eliminate or restrict competition," "administrative punishment [such as] fines," "administrative enforcement of administrative measures," and "[the] confiscat[ion] [of] . . . illegal income" could all serve as a basis for an administrative review action;<sup>92</sup> (3) it enhanced the authority of a court judgment over the administrative agency in question;<sup>93</sup> and (4) it increased the statute of limitations from three months to six months.<sup>94</sup>

In implementing these reforms, China left intact the ability of foreign citizens and organizations (as well as Chinese organizations and citizens) to resort to the courts to review administrative decisions.<sup>95</sup> China also left intact civil plaintiffs' rights to the facts and legal basis on which a decision was made by the administrative agency in question and also left in place a bar on the agency's ability to obtain evidence from those plaintiffs retroactively

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90 Because it may not be immediately apparent to those readers from outside China, the Standing Committee of the National People's Congress has substantial law-making powers. See, e.g., *Standing Committee of the National People's Congress*, WIKIPEDIA, [https://en.wikipedia.org/wiki/Standing\\_Committee\\_of\\_the\\_National\\_People%27s\\_Congress](https://en.wikipedia.org/wiki/Standing_Committee_of_the_National_People%27s_Congress) (last visited on June 20, 2015); see also, e.g., CHOW, *supra* note 29, at loc. 79, 91-97, 148-49, 163-64. (The Anti-Monopoly Law came into effect as well via an enactment of the Standing Committee of the National People's Congress.) Though a detailed discussion is beyond the scope of the Article, other government organs in China have law-making powers such as the National People's Congress itself, see *id.* at loc. 90-91, 148-49, 160-63, or the State Council, see *id.* at loc. 97-102, 149-56, 165-68.

91 Decision of the Standing Committee of the National People's Congress on Revising the Administrative Procedure Law, Order No. 15 of the President (promulgated Nov. 1, 2014) [hereinafter *Administrative Procedure Decision*] (setting out this principle as an amendment throughout the Administrative Litigation Act per Item 60); see e.g., Laney Zhang, *China Administrative Procedure Law Revised*, LIBRARY OF CONGRESS (Apr. 2, 2015), [http://www.loc.gov/lawweb/servlet/lloc\\_news?disp3\\_1205404366\\_text](http://www.loc.gov/lawweb/servlet/lloc_news?disp3_1205404366_text) [hereinafter *China Administrative Procedure Law Revised*] (discussing this point more generally).

92 Administrative Procedure Decision, *supra* note 91 (setting out these bases for administrative litigation as an amendment to Articles 11 and 12); see e.g., *China Administrative Procedure Law Revised*, *supra* note 91 (discussing this point more generally).

93 Administrative Procedure Decision, *supra* note 91 (setting out the various amendments designed to enhance the enforceability of court judgments on administrative actions as to administrative agencies as Item No. 58); see e.g., *China Administrative Procedure Law Revised*, *supra* note 91 (discussing this point more generally).

94 Administrative Procedure Decision, *supra* note 91 (setting out the change in the statute of limitations as Item No. 48); see Susan Ning, Kate Peng, & Qiu Weiching, *China Toughens Up on Abuses of Administrative Powers*, CHINA LAW INSIGHT (Dec. 12, 2014), <http://www.chinalawinsight.com/2014/12/articles/corporate/antitrust-competition/china-toughens-up-on-abuses-of-administrative-powers-the-impact-of-reforms-to-chinas-administrative-procedure-law-in-respect-of-abuses-of-administrative-powers/> (last visited on June 21, 2015).

95 See CHOW, *supra* note 29, at loc. 332-33; Liu, *supra* note 37, at 207.



to justify its decision.<sup>96</sup> And the courts retained the power to overturn the actions of a government agency if those actions were based on insufficient evidence, on substantive legal error, or on procedural legal error; if those actions ventured beyond the jurisdiction of the agency in question; if those actions constituted an abuse of power; or if those actions raised an appearance of impropriety.<sup>97</sup>

On its face, these reforms extend to the Central Government, as well as provincial and local government agencies, thus reinforcing the possibility that the decisions of the antitrust enforcers in Beijing may be subject to such review by the courts.<sup>98</sup> Though the courts may engage in the administrative review of the decisions of those enforcers in a deferential manner, even such a deferential review could still be meaningful.<sup>99</sup>

However, allowing such challenges in the area of antitrust will require competent courts that can issue high-quality opinions that thread the needle in properly taking account of the latest economic theories and in developing administrable rules against which antitrust enforcers can be held accountable without unduly chilling their efforts in policing anti-competitive conduct.<sup>100</sup> The *2014 QQ Decision* provides an important benchmark against which the readiness of the courts in China to undertake such a duty can be judged.<sup>101</sup>

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96 Compare, e.g., Liu, *supra* note 37, at 227–28 (discussing these principles in the context of the original law), with Administrative Procedure Decision, *supra* note 91 (setting out amendment to Article 19 of Administrative Litigation Law re-stating the principle that an administrative agency cannot collect more evidence from a civil plaintiff to justify its decision once that plaintiff has filed suit and an amendment to Articles 24 and 25 that leave any person or organization with the ability to bring suit under the Administrative Litigation Act).

97 Compare Administrative Procedure Decision, *supra* note 91 (setting out these principles as amendments to Article 70 of the Administrative Litigation Law pursuant to Item No. 70), with CHOW, *supra* note 29, at loc. 302–03 (discussing the state of the law prior to these amendments).

98 See Anonymous, Statements at the 2014 Antitrust Civil Litigation Forum, Beijing, China (May 24–25, 2014).

99 See Anonymous, Statement to the 2014 Antitrust Civil Litigation Forum, Beijing, China (May 24–25, 2014) (speaking of the Chinese courts needing to be convinced that there was a clear mistake before they would consider overturning an administrative act of an antitrust enforcement agency). The European civil law system, which in the European Union requires courts to apply a certain measure of discretion in reviewing antitrust decisions of the European Commission, is discussed *infra*. In fact, the first such administration litigation case was filed by a defendant against a fine imposed by the regional bureau of a government antitrust enforcer in Jiangsu, although the complaint was dismissed before a decision was issued apparently due to statute of limitations problems. 2014 CHINA ANTI-MONOPOLY RPT., *supra* note 75, at 46–47. Now that the statute of limitations problem has been rectified, there should be more challenges—though allowing challenges against local government entities may be a different kettle of fish than allowing challenges against central government agencies.

100 See e.g., JUDICIAL ENFORCEMENT OF COMPETITION LAW, *supra* note 13, at 10 (“The judiciary also brings a certain degree of flexibility to the implementation of the competition law, thus enhancing the development of law and the application of current economic thinking.”).

101 In fact, the *2014 QQ Decision*’s quality and thoroughness may also provide a measure as to whether the courts can also undertake the parallel, but important, duty of reviewing private challenges to local administrative monopolies. The amendment to the Administrative Litigation Act now allows for challenges by private parties to abusive administrative monopolies by government entities, thus potentially broadening the reach of Anti-Monopoly Law provisions that were important but had been thought to be modest in effect. See Huang, *supra* note 65, at 131.

## V. THE 2014 QQ DECISION OF THE SUPREME PEOPLE'S COURT

Abuse of dominance cases (or monopoly cases to invoke the rough, though not totally comparable, analog under U.S. law) can require courts to make complex judgments about the effects of single firm conduct.<sup>102</sup> While market share presumptions can be used as a proxy to avoid determining directly a single firm's market power<sup>103</sup>—otherwise known as a direct effects analysis—courts are still required to make what can be extensive factual determinations as to the scope of the relevant product and geographic markets.<sup>104</sup> And courts must then also determine whether the conduct in question has a tendency to cause anti-competitive effects, e.g., the conduct is exclusionary or predatory in nature, before analyzing any proffered pro-competitive effects or justifications for that conduct.<sup>105</sup>

The Anti-Monopoly Law follows this approach. Article 17 of that law sets out conduct that is illegal when committed by a firm with a dominant market position, including refusals to deal without justification; tying without justification; exclusive dealing without justification; predatory pricing, predatory bidding, and pricing discrimination; and other conduct determined by the Anti-Monopoly Committee under the State Council<sup>106</sup> to violate this provision.<sup>107</sup> Article 18, in turn, sets out a number of factors to determine when a firm has a dominant market position, including an assessment on whether other firms can enter the market, on market shares and the positions of competitors, on the degree of dependence of other firms on the firm in question, and on any other factors that may be germane to that

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102 See *Am. Needle, Inc. v. Nat'l Football League*, 560 U.S. 183, 190-91 (2010).

103 See *Tops Market, Inc. v. Quality Market, Inc.*, 142 F.3d 90, 98 (2d Cir. 1998) (finding that market power “may be proven directly by evidence of the control of prices or the exclusion of competition, or it may be inferred from one large firm’s percentage share of the relevant market”); see also PHILIP AREEDA, HERBERT HOVENKAMP, & JOHN SOLOW, *ANTITRUST LAW*, ¶ 500 at 107 (3d. ed. 2007) (“And judgments about the ‘reasonableness’ of a particular restraint often depend upon the market power of the parties concerned.”); *id.* ¶ 531 at 233 (“Because they so often lack such data [for a direct effects analysis], antitrust courts traditionally define a market and examine the firms’ market shares.”).

104 See, *United States v. Microsoft*, 253 F.3d 34 (D.C. Cir. 2001); *United States v. Aluminum Co of America*, 148 F.2d 415 (2d Cir. 1945).

105 See, e.g., *Realcomp II v. FTC*, 635 F.3d 815, 826-27 (6th Cir. 2011) (quoting *Cal Dental Ass'n v. FTC*, 526 U.S. 756, 775 n.12 (1999) (“[T]here must be some indication that the court making the decision has properly identified the theoretical basis for the anticompetitive effects and considered whether the effects actually are anticompetitive. Where . . . the circumstances of the restriction are somewhat complex, assumption alone will not do.”)).

106 The Anti-Monopoly Committee of the State Council, provided for under the Anti-Monopoly Law, was constituted on July 28, 2008 to undertake a number of tasks, including researching and drafting competition policy and promulgating guidelines for enforcement of the law. Details regarding its members and activities can be found at *Anti-Monopoly Law of China*, WIKIPEDIA, [https://en.wikipedia.org/wiki/Anti\\_Monopoly\\_Law\\_of\\_China](https://en.wikipedia.org/wiki/Anti_Monopoly_Law_of_China) (last visited on June 23, 2015). As discussed in *supra* note 90, the State Council has substantial law-making powers even aside from those powers conferred specifically on its Anti-Monopoly Committee under the Anti-Monopoly Law.

107 Anti-Monopoly Law of the People's Republic of China (promulgated by the Standing Comm. of the Nat'l People's Cong., Aug. 30, 2007, effective Aug. 1, 2008), art. 17. For the benefit of readers of this Article, a translation of this law into English, available on Chinese web sites, has been accepted as authoritative in the United States. *Anti-Monopoly Law of the People's Republic of China (Chinese and English Text)*, CONGRESSIONAL-EXECUTIVE COMMISSION ON CHINA, <http://www.cecc.gov/resources/legal-provisions/prc-anti-monopoly-law-chinese-and-english-text> (last visited on June 23, 2015).

assessment.<sup>108</sup> Finally, Article 19 sets out market share presumptions applicable to a finding of a dominant position, including a market share of a single firm amounting to 50% or more of a relevant market.<sup>109</sup>

The Anti-Monopoly Law itself does not spell out how to define a relevant market. Beyond Article 18 discussed in the preceding paragraph, Article 12 only defines a relevant market as the scope of the product or geographic market within which firms compete against each other over a relevant period of time for products or services.<sup>110</sup> However, the Anti-Monopoly Committee of the State Council promulgated guidelines for market definition under the Anti-Monopoly Law in 2009.<sup>111</sup> Those guidelines provided that a relevant market must be defined by consumer demand as to product or geographic substitutability, meaning those products or geographic areas that consumers can consider to be close or strong substitutes for each other and will turn to in the event of a price increase as to a single product or geographic location.<sup>112</sup> The guidelines then defined the major factors to be considered in defining relevant product and geographic markets, including: product similarities and differences, shifts in consumer demand, price differentials, ease of entry, trade barriers (including local regulations), and changes in supply or production in response to price changes.<sup>113</sup> These guidelines also discussed the hypothetical monopolist test as the method for defining a market by measuring whether a hypothetical firm in a market can profitably raise the prices of the product in question 5-10%; however, and significantly for purposes of this article, those guidelines labelled the hypothetical monopolist test as the “usual[]” method for proving relevant markets.<sup>114</sup>

Courts in other jurisdictions have endorsed direct effects (e.g., directly measuring anti-competitive effects from a defendant’s conduct often based on transactional data-crunching as supported by a defendant’s internal documents) as an alternative means of measuring market power.<sup>115</sup> Nonetheless, the Anti-Monopoly Law itself is silent on whether direct effects suffice to demonstrate market power for purposes of applying THE ABUSE OF

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108 Anti-Monopoly Law of the People’s Republic of China (promulgated by the Standing Comm. of the Nat’l People’s Cong., Aug. 30, 2007, effective Aug. 1, 2008), art. 17.

109 *Id.*

110 *See* Lim & Shen, *supra* note 21, at 4.

111 Guide of the Anti-Monopoly Committee of the State Council for the Definition of a Relevant Market (promulgated by Anti-Monopoly Comm. of the State Council, May 24, 2009), translated in *Standards and Anti-Monopoly Law, Beijing, China*, 2ND CONFERENCE OF INTELLECTUAL PROPERTY (May 16-17, 2012) [hereinafter State Council Relevant Market Guidelines] (on file with the authors).

112 *Id.* arts. 3-9.

113 *See id.*

114 *Id.* art. 10.

115 *See FTC v. Ind. Fed’n of Dentists*, 476 U.S. 447, 460-61 (1986) (direct effects evidence enough under rule of reason); *Toys-R-Us v. FTC*, 221 F.3d 928, 937 (7th Cir. 2000) (same); *NCAA v. Bd. of Regents*, 468 U.S. 85, 109-10 (1984); *cf.* Decision and Order, *In the Matter of Evanston Northwestern Healthcare Corporation*, Docket No. 9315 at 78 (F.T.C. Aug. 6, 2007), available at [www.ftc.gov/sites/default/files/documents/cases/2007/08/070806opinion.pdf](http://www.ftc.gov/sites/default/files/documents/cases/2007/08/070806opinion.pdf) (actual price increase by merged entity in *post hoc* merger analysis enough to demonstrate anti-competitive analysis where regression analysis, pre- and post- merger documents of the merged entity, and testimony from insurers, all supported the conclusion that the price increase arose from the market power of the combined entity and not from any competitively-benign factors).

dominance provisions. It is against this specific backdrop of antitrust legal principles that the background, holding, and significance of the *2014 QQ Decision* should first be assessed.

### A. The Background and Holdings of the *2014 QQ Decision* on Evidentiary and Substantive Issues

This section of the Article will set out the background as to the parties involved, and the nature of the allegations made, pertaining to the *2014 QQ Decision*. It will then discuss the analysis and holding of the Guangzhou Higher People's Court before turning to a discussion of the analysis and holding of the Supreme People's Court on appeal from that lower court decision.

#### 1. Background of the Parties and the Allegations

QQ is a very popular Internet social network in China developed by defendant Tencent that is equivalent in many respects to Facebook or similar services in other countries. Its primary focus is instant messaging software though it provides a number of services such as instant messaging, news, games, group chats/microblogging, voice/video chat, and its own security software.<sup>116</sup> It provides such services (mostly) for free, making money off of Internet ads as do many other such social networks and search engines on the web.<sup>117</sup>

360 is an anti-virus software and browser program developed by plaintiff Qihoo.<sup>118</sup> In September 2010, Qihoo had informed its users that it had analyzed QQ's software using its 360 product and had come to the conclusion that QQ was automatically scanning its users' computers and uploading those users' personal information without their consent.<sup>119</sup> Following those statements, Qihoo and Tencent engaged in tit-for-tat retaliation: Qihoo first released a product that would allow QQ users to block QQ advertisements (even as QQ users could otherwise continue to use QQ); and Tencent then responded by filing a lawsuit against Qihoo on November 3, 2010 under China's unfair competition law and, the same day, blocking the ability of Qihoo to interoperate with QQ and instructing its users to uninstall Qihoo.<sup>120</sup> The Chinese government soon stepped in and mediated an accord in which Qihoo ceased selling its software blocking QQ ads and Tencent ceased its actions blocking Qihoo software from interoperating with QQ although both companies were free to pursue lawsuits against each other—Tencent against Qihoo under China's unfair competition law and Qihoo against Tencent under the Anti-Monopoly Law.<sup>121</sup>

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116 *Tencent QQ*, WIKIPEDIA, [https://en.wikipedia.org/wiki/Tencent\\_QQ](https://en.wikipedia.org/wiki/Tencent_QQ) (last visited on June 23, 2015); see *2014 QQ Decision*, *supra* note 40, at 2-3; Lim & Shen, *supra* note 21, at 3-4.

117 *Tencent QQ*, *supra* note 116.

118 *Id.*; see *2014 QQ Decision*, *supra* note 40, at 2, 53; Lim & Shen, *supra* note 21, at 3-4.

119 *Tencent QQ*, *supra* note 116; *Qihoo*, WIKIPEDIA, <https://en.wikipedia.org/wiki/Qihoo> (last visited on June 23, 2015); see *2014 QQ Decision*, *supra* note 40, at 16-17; Susan Ning, Ding Liang, & Angie Ng, *The QQ/360 Disputes: Who, What, Where, When and Preliminary Antitrust Analysis*, CHINA LAW INSIGHT (Nov. 12, 2010), <http://www.chinalawinsight.com/2010/11/articles/corporate/antitrust-competition/the-qq-360-disputes-who-what-where-when-and-preliminary-antitrust-analysis/>.

120 See *Tencent QQ*, *supra* note 116; see also *2014 QQ Decision*, *supra* note 40, at 2, 75-76.

121 See *Tencent QQ*, *supra* note 116; see also *2014 QQ Decision*, *supra* note 40, at 2, 19, 53; Ning et al., *The QQ/360 Disputes*, *supra*, note 119. Tencent's unfair competition lawsuit against Qihoo will not be discussed further in this article except to the extent that it bears on the *2014 QQ Decision* of the Supreme People's Court regarding Qihoo's lawsuit against Tencent under the Anti-Monopoly Law.

On November 15, 2011, Qihoo filed a case against Tencent under Article 17 of the Anti-Monopoly Law for abuse of dominance.<sup>122</sup> Qihoo contended as follows: (1) Tencent had market dominance in the relevant product and geographic markets—the relevant product market being instant communication services software involving integrated audio, video, and text, and the relevant geographic market being mainland China—with Tencent having a 76.2% share of that proposed market and a market penetration rate of 97%; (2) Tencent could effectively raise prices and hinder competition in that market and otherwise has a strong financial and technical position in that market; (3) Tencent had such a strong customer base that, due to network effects, other potential competitors would find it difficult to enter the market, let alone to be an effective competitor to Tencent; (4) Tencent’s conduct itself violated the Anti-Monopoly Law (as an abuse of dominance) by barring the interoperability of QQ with Qihoo’s software; and (5) Tencent’s conduct alternatively violated the Anti-Monopoly Law when it bundled or tied its instant messaging software with its own security software (QQ Doctor).<sup>123</sup>

Qihoo based its contentions as to the scope of the relevant product and geographic markets on the following items of evidence: (1) stock market or securities filings by QQ; (2) an expert report analyzing the market, including the correlation if any between the use of various Internet products, the similarities and differences in Internet product characteristics, and the various parallels between this proposed market and the market analysis conducted by the European Commission in its report in the *Skype/Microsoft* merger case; (3) a 2009 report by the Chinese Internet Network Information Center (CNNIC) as to the lack of churn in the installed base of social network users; and (4) a 2009–10 iResearch report as to the importance of instant messaging for Chinese users.<sup>124</sup>

Qihoo next based its contentions as to Tencent’s dominant position in its proposed market based on the following: (1) Tencent’s market share continuing to grow even after the dispute it had with Qihoo in November of 2010—referencing Qihoo’s expert report, from which Qihoo drew the inference of high barriers to entry; (2) Tencent’s unique product portfolio that would involve an additional expense for its competitor to replicate in its entirety and that had induced network effects in a large installed base—as spelled out in Qihoo’s expert report analyzing the attempts of a competitor to compete with QQ; (3) Tencent’s own interim securities report in 2011 making statements as to the scope of its installed base; (4) a 2009–10 report from iReports making statements as to the lack of interoperability between differing instant messaging products, thereby creating barriers to entry in the market for QQ’s instant messaging product; (5) a 2009 report from CNNIC making statements as to how virtual goods in online games essentially monetized instant messaging accounts, giving QQ’s software a huge monetary value, and how QQ had a considerable advantage in user adoption due to its large installed base and the lack of interoperability between differing instant messaging software products; (6) a 2010 article in

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122 2014 QQ Decision, *supra* note 40, at 3.

123 *Id.* at 2; *see also* Lim & Shen, *supra* note 21, at 5–6. Tying occurs when a monopolist bundles two distinct products for sale in such a way that the buyer is coerced into buying both products together. Under American and European Union law, tying is quasi-per se illegal when the monopolist has market power in the tying product market and forecloses a not insubstantial amount of sales in the tied product market. *See* Einer Elhauge, *Tying, Bundled Discounts and the Death of the Single Monopoly Profit Theory*, 123 HARV. L. REV. 397, 420–422 (2009).

124 2014 QQ Decision, *supra* note 40, at 3–5.

Guangzhou Metro making statements as to Microsoft's inability to attract QQ users to its competing instant messaging software (MSN); (7) Tencent's statements in its 2011 annual forecast as to its leading position and the uniqueness of its products; (8) Tencent's providing virtual currency on its web site to induce continued use of its products (apparently provided to buttress the case for barriers to entry); and (9) a variety of reports from Tencent and third parties making statements as to Tencent's substantial revenues and gross profits, substantial market shares and user penetration (per iResearch and CNNIC reports for 2010-11 and 2009 respectively as well as reports from Analysys International), and disputes with other companies over blocking allegations.<sup>125</sup>

Finally, as to whether Tencent's conduct itself constituted abuse of dominance, Qihoo first contended that it constituted abuse of dominance by citing statements by Tencent (e.g., on its web site) that Tencent made a deliberate decision to stop running QQ software on any computer with 360 software to stop what it termed "malicious competition."<sup>126</sup> Second, Qihoo contended that Tencent had engaged in tying based on its software setup sequence and automatic updating, with no justification for such tying, based on analysis of user demand by CNNIC (2009 report), iResearch (2003 report), and the benefits 360 software gave a user who would wish to protect his or her privacy vis-à-vis QQ.<sup>127</sup>

Tencent denied these allegations.<sup>128</sup> It argued that other Internet products and services could achieve real-time communications, such that Qihoo's proposed market was unduly narrow, referencing a wide-variety of products that could be downloaded such as Baidu Hi (Baidu is a search engine of comparable scope and popularity to Google in the United States).<sup>129</sup> It further argued that the market proposed by Qihoo was characterized by high levels of competition, product substitution, and low barriers to entry based on: (1) an analysis by Analysys International as set out in a 2008 article about a launch of an instant messaging product by one of China's large telecom companies that gained a lot of users; (2) a CNNIC report on the fast growth of microblogging products that have a high degree of overlap with instant messaging products; (3) the fact that MSN shows up at the top of Baidu search lists as an alternative to QQ and according to news articles has been growing its user base; (4) the fact that 81% of QQ users would leave QQ if it charged for its services; and (5) the news announcements about the launch of new instant messaging products in China, including through Sina, a microblogging service, as well as the growth of Facebook and Google outside of China.<sup>130</sup> Finally, as to whether its conduct amounted to abuse of dominance, Tencent argued that its conduct was justified as a response to Qihoo's violation of China's unfair competition laws, citing two earlier civil judgments handed down in Beijing.<sup>131</sup>

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125 *Id.* at 8-13.

126 *Id.* at 16-17.

127 *Id.* at 18-19.

128 *Id.* at 3.

129 *Id.* at 6-8.

130 *Id.* at 13-16.

131 *Id.* at 19-20. Tencent also argued that Qihoo did not suffer any economic losses based on Internet reports on downloads of Qihoo's programs as well as Qihoo's financial reports. *Id.* at 20-21.

## 2. The Analysis and Decision of the Guangdong Higher People's Court

In its decision, the Guangdong Higher People's Court defined the main issues as the following: (1) how to define the relevant market; (2) whether Tencent had a dominant position in the market in question; and (3) whether Tencent's conduct in the market amounted to abuse of dominance.<sup>132</sup>

For the first issue, the Guangdong Higher People's Court found Qihoo failed to meet its burden of proving the existence of its proposed relevant market. The court applied the State Council guidelines on market definition discussed in this Article *supra*.<sup>133</sup> It believed that the hypothetical monopolist test could be applied even though the market (however defined) was characterized by products offered at zero cost such that any price increase would cause users to switch to a free product.<sup>134</sup> Analyzing the market under this test, it found that not only real-time products such as QQ, MSN, China Mobile's instant-messaging product, and Skype should all be part of the relevant markets (which Qihoo and Tencent agreed on), but also text messaging, audio, and video calls should be so included (because any price increase by Tencent would cause users to flee to such alternatives).<sup>135</sup>

The court admitted that it was a more difficult question as to whether social networking services and microblogging services should be included in the relevant market as instant messaging communication. But it believed that these tools facilitated social communication in close enough a sense to instant messaging that these tools belonged in the same market given that a price increase by Tencent would cause its users to switch to these tools.<sup>136</sup> Rejecting the testimony of Qihoo's expert that the market analysis should be limited to a small slice of the year 2010 (when the conduct by QQ against Qihoo took place), the court alternatively found that the existence of these tools supported the notion of a broader dynamic market in Internet communication.<sup>137</sup>

Finally, the court found that building platforms, essentially product portfolios with a wide range of services, was the objective *sine qua non* of Internet competition. In that sense, offering free services or software was simply a device to drive users to a specific application platform and that dynamic meant that potential competition from such platforms in the instant messaging space (e.g., Apple) had to be taken into account.<sup>138</sup>

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132 *Id.* at 21.

133 *Id.* at 21, 24.

134 *Id.* at 21.

135 *Id.* at 21-22.

136 *Id.* at 23.

137 *Id.* However, the court drew a line at traditional phone, fax, and text messaging services, refusing to include those services in the market because of technological differences and because those services charged money while instant messaging like QQ was free. *Id.* at 23-24. It also found e-mail to be in a different market because it lacked the real-time nature of instant messaging. *Id.* at 24.

138 *Id.* at 24.

The court then rejected Qihoo’s proposed geographic market, finding that it should not be limited to Mainland China but rather should be world-wide.<sup>139</sup> It found QQ was used overseas and that foreign operators could provide services in Mainland China (e.g., MSN, Skype, or Yahoo Messenger). It also found no limits in terms of user demand, costs, or technical barriers to a world-wide market.<sup>140</sup>

Based on the court’s view as to the scope of the relevant market, it found that Qihoo could not meet its burden of showing Tencent had a dominant position in the market.<sup>141</sup> It specifically observed that the iResearch year 2010 figure of 76.2% did not reflect Tencent’s true position in the market. It also found a number of factors that supported a finding of lack of market power (which it correctly defined as being the ability to control prices, output, or other trading conditions):<sup>142</sup> (1) Tencent literally could not control price because users will not pay any money for instant messaging software; (2) given that users communicated with relatively few family and friends—only between four to six according to Facebook data and the findings of the European Commission in the *Skype/Microsoft* merger case—users were not locked into using only one type of instant message software; (3) entry into the market was easy with new and successful entrants in the market every year from large platforms and others (e.g., Baidu Hi, Ali Want, YY voice (from a games network), and China Mobile’s instant messaging software); and (4) new competitive products, such as social networking sites which had impacted instant messaging services, were always emerging, disciplining companies like Tencent that provide instant messaging services.<sup>143</sup>

On the question of whether Tencent could justify its conduct, the court found that it was inappropriate for Tencent to engage in such “self-help” given that (1) it targeted Qihoo’s users rather than Qihoo, (2) it could have simply issued a warning, and (3) it could have sought an injunction (even as an interim or emergency measure) based on the notion that Qihoo had infringed its intellectual property.<sup>144</sup> However, the court also found that Tencent’s conduct did not amount to tying because the element of coercion was absent—users could uninstall QQ products that they do not want and could refuse to accept QQ updates they did not want—and because the bundling of these services was economically rational (e.g., QQ Doctor as a security program could help other components of QQ work better).<sup>145</sup>

### 3. The Analysis and Holding of the Supreme People’s Court

#### a. Consideration of New Items of Evidence and Additional Fact-Finding

The Supreme People’s Court, reviewing the decision of the Guangdong Higher People’s Court in an appellate role—which could still reconsider facts and make new findings<sup>146</sup>—

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139 *Id.* at 25.

140 *Id.*

141 *Id.* at 25-26.

142 *Id.* at 26.

143 *Id.* at 26-28.

144 *Id.* at 28-29.

145 *Id.* at 29-30. Tying is explained in passing in *supra* note 123.

146 *See, e.g., id.* at 29-30, 61.



addressed at the threshold whether it could consider certain items of new evidence submitted by Qihoo. First, it ruled that it could consider two new expert reports submitted by experts for Qihoo, one of who had appeared in court to be examined, that set out the product and geographic market definition errors committed by the court below. The reports found that the product market should be limited to personal computer (PC) instant messaging services and the geographic market should be limited to Mainland China.<sup>147</sup> In doing so, the Court rejected arguments that the expert who had appeared in court was not sufficiently qualified and that his report went to legal issues that were the province of the courts, pointedly noting that civil litigants should focus instead on the issues of sufficiency of facts to justify an expert's opinion, the reliability of an expert's methodology or analysis, and the consideration by that expert of alternative analyses or explanations.<sup>148</sup> It also rejected attacks that the expert reports lacked sufficient authenticity since they originated from outside China.<sup>149</sup>

Next, the Supreme People's Court considered whether it could accept screenshots into evidence that purported to show the function, or lack thereof, of various mobile and PC instant messaging services, microblogging services, and social network chat services, all for purposes of aiding the Court in defining the relevant market.<sup>150</sup> Rejecting attacks such as lack of authenticity and lack of notarization, the Court found that the public availability of the statements depicted in these screenshots demonstrated authenticity given the lack of any proffered evidence suggesting otherwise.<sup>151</sup>

The Supreme People's Court then followed up by finding admissible similar evidence offered by Tencent that went to market definition and abuse of dominance, including media reports, notarized information, and web sites.<sup>152</sup> However, the Court also found admissible evidence that QQ software had similar functions to e-mail even though Tencent did not appeal its loss on that issue because, as it stated for apparently the first time in this case, market definition was a question of fact on which a court had to conduct a full and independent investigation.<sup>153</sup> It further found admissible citations to a market research firm's statistics report, even though background information about the data and statistics underlying the report was absent, because the report could be probative in conjunction with other items of

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147 *Id.* at 36-39, 41.

148 Compare *id.* at 39, with *Apple v. Microsoft*, 757 F.3d 1286, 1318-19 (Fed. Cir. 2014) (focusing in patent case on whether expert's methodology was sound, i.e., the product of reliable principles and methods, whether the expert applied that methodology in a sound way and supported it with legally sound facts, and noting that disagreements as to the factual underpinnings of an expert's opinion go to weight and not admissibility), and *United States et al. v. Apple, Inc. et al.*, 791 F.3d 290, 335 n.24 (2nd Cir. 2015), *petition for cert. den.* (U.S. Mar. 7, 2016) (No. 15-8278) (noting same focus in antitrust context).

149 *2014 QQ Decision*, *supra* note 40, at 41.

150 *See id.* at 39-41.

151 *Id.*

152 *Id.* at 41-46.

153 *Id.* at 43. Other countries also look at market definition as being a question of fact. *See United States v. Microsoft*, 253 F.3d 34, 81-82 (D.C. Cir. 2001) (determination of a relevant market is a factual question to be resolved by the district court) (citations omitted); Decision and Order, *In the Matter of Evanston Northwestern Healthcare Corporation*, Docket No. 9315 at 57 n.67 (F.T.C. Aug. 6, 2007), available at [www.ftc.gov/sites/default/files/documents/cases/2007/08/070806opinion.pdf](http://www.ftc.gov/sites/default/files/documents/cases/2007/08/070806opinion.pdf) ("However, market definition is a question of fact.").

evidence even if it was weak on its own.<sup>154</sup> And it also found admissible a global economic advisory paper issued by David Evans on the Internet commenting on the decision discussed *supra* of the Guangdong Higher People's Court.<sup>155</sup> Based on this evidence, the Supreme People's Court supplemented the factual record with evidence as to potentially alternative products such as the following: (1) the development of mobile instant messaging products (e.g., Apple's iMessage and Samsung's ChatOn) in 2011 and 2012; (2) the development of Sina microblogging services, Renren—a Chinese social networking service popular among college students,<sup>156</sup> and Netease mailbox; (3) the growth of smartphones generally per various reports as well as a 2012 usage study by CNNIC pertaining to the increased use of social network sites; (4) QQ's 2008 voice chat and file transfer products; (5) QQ's multi-lingual products from 2009 through 2012; (6) information regarding the worldwide market shares and growth of instant messaging products made by Facebook, Microsoft, and Twitter; and (7) feedback by Chinese users as to issues with the use of MSN vis-à-vis QQ.<sup>157</sup>

In sum, the Supreme People's Court erred on the side of admitting evidence and simply assessing its probative weight as part of its proceedings and its decision. That it eschewed a mechanical view of the evidentiary rules in China is supported by its denial at the end of its decision of a series of Qihoo's objections, including claims that the lower court failed to properly engage the parties on points that the lower court ended up referencing in its decision.<sup>158</sup>

The Supreme People's Court made a number of factual findings based on these supplemental facts, a cross-examination of the parties, and the evidence submitted to the Guangdong Higher People's Court.<sup>159</sup> The findings included the number of Internet users in China, the various uses of instant messaging software and social networking sites, the expectations of users as to instant messaging software being free, the features sought by instant messaging software users, the frequency by which users replace that instant messaging software, and the growth of mobile instant messaging software.<sup>160</sup> The Court also made findings as to changes in the use of QQ, MSN, Ali Wang, and China Mobile's instant messaging products in 2010, how QQ and 360 could fully interface with each other thanks to the intervention of the government, and as to another recent decision of the Supreme People's Court in a completely separate, though related, case involving China's Anti-Unfair Competition Law that found Qihoo had engaged in unfair competition in designing 360 to undermine QQ and in making various statements to the public about QQ.<sup>161</sup>

## b. Defining Relevant Markets

After reviewing the decision of the Guangdong Higher People's Court and making a

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154 2014 QQ Decision, *supra* note 40, at 44.

155 *Id.* at 46. It is also interesting (from the perspective of considering issues about barriers to entry) that it admitted a iResearch 2012-13 report on the instant messaging market, a report that post-dated the period in which Tencent committed the conduct in question. *See id.*

156 Renren, WIKIPEDIA, <https://en.wikipedia.org/wiki/Renren> (last visited on June 24, 2015).

157 2014 QQ Decision, *supra* note 40, at 46-52.

158 *See id.* at 81-82.

159 *See id.* at 52-54.

160 *See id.*

161 *See id.* at 53-55.

number of supplemental factual findings, the Supreme People's Court first addressed the issue of defining relevant markets. It noted that while it was often important to engage in this analysis, it is only a tool to determine the market power of the firm or firms in question.<sup>162</sup> Market power could be independently determined by looking at barriers to entry or by looking at the potential anti-competitive effects of the firm's conduct coupled with direct evidence of such effects. In brief, a clear and explicit definition of a relevant market would not be required in every case.<sup>163</sup> However, as that Court explained, even when a court addresses such direct effects, it is the civil plaintiff that carries the burden of proving such effects even as the defendant retains the burden of proving the existence of any justifications.<sup>164</sup>

The Court then went on to address the issue of proving the product market's scope. It noted that the party claiming abuse of dominance had the burden of proving the relevant product market.<sup>165</sup> It further reasoned that if a party's definition of the relevant product market did not fit the specific circumstances of a case, that party had a duty to propose a market that fit those circumstances.<sup>166</sup>

The Court observed that there were circumstances in which limitations on evidence and data, or the complexity of a case, may make it difficult to define a relevant market.<sup>167</sup> However, that observation was not made in conjunction with a civil plaintiff's burden of proof but against the backdrop of Qihoo's complaint that the lower court had not clearly

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162 *Id.* at 55.

163 *Id.* The reasoning and holdings of the 2014 QQ Decision as to points like these were double-checked against a second, albeit partial, translation that will be cited in tandem with the author-translated version. *The Supreme People's Court of the People's Republic of China, Paper of Civil Judgment*, GLOBAL ECONOMICS GROUP, <https://www.competitionpolicyinternational.com/assets/DecisionTranslation.pdf> (last visited Mar. 14, 2016) [hereinafter Global Economics Group]. Various commentators have read this aspect of the 2014 QQ Decision to be endorsing a direct effects analysis as an alternate means of showing market power. See Lim & Shen, *supra* note 21, at 11 n.66; Susan Ning et al., *The Supreme Court Goes Online with Anti-Monopoly Principles: A Review of Qihoo vs. Tencent Abuse of Market Dominance Case*, CHINA LAW INSIGHT (Nov. 12, 2014), <http://www.chinalawinsight.com/2014/11/articles/corporate/antitrust-competition/the-supreme-court-goes-online-with-anti-monopoly-law-principles%E7%BC%9Aa-review-of-qihoo-v-s-tencent-abuse-of-market-dominance-case/>. This parallels the substantive law in other jurisdictions. See HERBERT HOVENKAMP, FEDERAL ANTITRUST POLICY § 12.8, 550 (3d ed. 2005); see also *FTC v. Ind. Fed'n of Dentists*, 476 U.S. 447, 476 (1986) (“[T]he purpose of the inquiries into market definition and market power is to determine whether an arrangement has the potential for genuine adverse effects on competition. . . .”); *Tops Market, Inc. v. Quality Market, Inc.*, 142 F.3d 90, 98 (2d Cir. 1998) (finding that market power “may be proven directly by evidence of the control of prices or the exclusion of competition, or it may be inferred from one large firm’s percentage share of the relevant market”); *K.M.B. Warehouse Distribs., Inc. v. Walker Mfg. Co.*, 61 F.3d 123, 129 (2d Cir. 1995) (“If a plaintiff can show an actual adverse effect on competition, such as reduced output[,] . . . we do not require a further showing of market power.” (citation omitted)); *Capital Imaging Assoc. v. Mohawk Valley Med. Assocs.*, 996 F.3d 537, 546 (2d Cir. 1993) (explaining that plaintiffs may avoid a “‘detailed market analysis’ by offering ‘proof of actual detrimental effects such as a reduction in output.’” (citation omitted)).

164 2014 QQ Decision, *supra* note 40, at 79–80; Global Economics Group, *supra* note 163, at 34. The burden allocation is the same as in other jurisdictions, see, e.g., the discussion *infra* Part VI.A of the California Supreme Court’s *In re Cipro* decision.

165 2014 QQ Decision, *supra* note 40, at 55; Global Economics Group, *supra* note 163, at 2.

166 2014 QQ Decision, *supra* note 40, at 55; Global Economics Group, *supra* note 163, at 2.

167 2014 QQ Decision, *supra* note 40, at 55; Global Economics Group, *supra* note 163, at 2.

delineated the market.<sup>168</sup> Thus, while this statement would ordinarily be taken to mean that civil plaintiffs bear the burden of such shortcoming,<sup>169</sup> it is more likely—given the flexibility demonstrated by the Supreme People’s Court on the admission of evidence in the first instance—that this statement was intended to encourage courts to reach conclusions as to the scope of a relevant market on less than perfect evidence.<sup>170</sup>

Based on these principles, the Supreme People’s Court found that the lower court had clearly defined the relevant product market well-enough with any ambiguities at the boundaries being tolerable.<sup>171</sup> In doing so, it eschewed form over substance in doing a careful analysis of the facts, an important principle in making the complex economic judgments necessary to the application of antitrust law.

For example, in addressing Qihoo’s criticism of the lower court’s application of the hypothetical monopolist test to an area in which competition did not occur on the basis of price,<sup>172</sup> the Court first began with the premise that the test has “general applicability.”<sup>173</sup> However, as the Court further reasoned, if “non-price competition” were important in a market like the one at bar given that the products in that market are offered for free, then using this test would be particularly difficult.<sup>174</sup> Accordingly, it would not apply this test in this case because the facts as found by the Court demonstrated that users would not use instant messaging services unless they were free, and companies competed based on offering free products to attract users.<sup>175</sup>

A further example of eschewing form over substance can be seen in the Supreme People’s Court analysis of whether non-integrated instant messaging services (like Apple’s iMessage, which is text, as opposed to QQ, which is audio, text, and video) should be included within the scope of the relevant product market. The Court used as its baseline for addressing this question the principle that, as a “general approach,” it would define the product market based on qualitative criteria to determine demand substitution for products and that such a qualitative analysis should focus on product characteristics such as use, quality, and ease of access.<sup>176</sup> The Court then found the product similarities between

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168 2014 QQ Decision, *supra* note 40, at 55; Global Economics Group, *supra* note 163, at 2.

169 Ning et al., *The Supreme Court Goes Online with Anti-Monopoly Principles*, *supra* note 163.

170 See Lim & Shen, *supra* note 21, at 12-13, 15-16.

171 2014 QQ Decision, *supra* note 40, at 56; Global Economics Group, *supra* note 163, at 2-3.

172 The Supreme People’s Court set out the definition of that test in terms of the small but significant and not transitory price increase or SSNIP method and the alternative small but significant and not transitory quality decrease method. 2014 QQ Decision, *supra* note 40, at 56; Global Economics Group, *supra* note 163, at 3. Of course, the Court set out the correct test as set forth in the requisite guidelines. See State Council Relevant Market Guidelines, *supra* note 111, art. 10. But that the Court did not see itself bound to conduct a rote application of this test when faced with divergent market realities is yet one more example of the care with which this Court wrote this decision, a point that should not only factor into its designation as a guiding case but also into assessing China’s progress towards its rule of law goals.

173 2014 QQ Decision, *supra* note 40, at 56; *cf.* Global Economics Group, *supra* note 163, at 3 (translating the relevant term as “universal” and not “general”).

174 See 2014 QQ Decision, *supra* note 40, at 56-57; Global Economics Group, *supra* note 163, at 3.

175 See 2014 QQ Decision, *supra* note 40, at 57, 63-64; Global Economics Group, *supra* note 163, at 4-5, 12.

176 2014 QQ Decision, *supra* note 40, at 58; Global Economics Group, *supra* note 163, at 5.

non-integrated and integrated instant messaging services to be close enough (e.g., real-time communication, offered for free, and users' preferences for text as opposed to video and audio even in an integrated setting) to find non-integrated services fall within the relevant market.<sup>177</sup> The Court addressed and rejected the contentions of Qihoo's experts that there were quality differences between non-integrated and integrated instant messaging software that warranted them being placed in different markets: it observed that these contentions did not accord with user preferences, with partially overlapping functions of the various forms of instant messaging software, or with the ability of companies' providing non-integrated instant messaging software to reposition themselves to compete with more integrated instant messaging software products.<sup>178</sup>

Indeed, the Supreme People's Court also addressed whether mobile instant messaging services, social network sites, and microblogging sites should all be included in the relevant market. In reaching the conclusion that mobile instant messaging services were part of the relevant market, the Court found that around 2010-11, the functions were the same for mobile as for PCs regarding instant messaging communication, and that the use of mobile instant messaging services was growing fast at the time of the conduct and had already achieved considerable scale then (200 million users in 2010).<sup>179</sup> Although the Court recognized that this issue had not been addressed by the lower court, it found that it had the power to reach this issue not only because it had to have the power to examine all of the facts if there was a claim of error as to fact-finding in the court below but also because the question of what constitutes a relevant market was a factual one.<sup>180</sup>

Conversely, in reaching the conclusion that social networking and microblogging (aside from any instant messaging services that they provide) were not part of the relevant market, the Court emphasized the dissimilarities in product characteristics and user demand among these products.<sup>181</sup> The Court further observed that it could rely on a correlation analysis—whether the prices of commodities or services all change together as would be expected if they were in the same market—to support this result even if it could lead to false positives such that a court need be cautious in its use.<sup>182</sup> And the Court carefully found that the dynamic nature of the market did not alter this conclusion.<sup>183</sup>

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177 2014 QQ Decision, *supra* note 40, at 58-59; Global Economics Group, *supra* note 163, at 5-7.

178 2014 QQ Decision, *supra* note 40, at 59; Global Economics Group, *supra* note 163, at 6-7.

179 2014 QQ Decision, *supra* note 40, at 61; Global Economics Group, *supra* note 163, at 7-8.

180 2014 QQ Decision, *supra* note 40, at 61; Global Economics Group, *supra* note 163, at 8. The Court used a similar analysis briefly addressing and rejecting Tencent's contention that e-mail and Short Message Service (SMS) were also part of the same market as instant messaging services although it also noted that SMS had another distinguishing characteristic in that it was fee-based. See 2014 QQ Decision, *supra* note 40, at 64-65; Global Economics Group, *supra* note 163, at 12-14.

181 See 2014 QQ Decision, *supra* note 40, at 61-62, 65; Global Economics Group, *supra* note 163, at 11-13.

182 2014 QQ Decision, *supra* note 40, at 62-63; Global Economics Group, *supra* note 163, at 11-12. The Court rejected Tencent's argument that it should accept a correlation analysis over a longer period of time that showed a positive relationship on demand between these disparate products. The Court observed that the 312% growth in Internet usage over the longer time-frame urged by Tencent, 2006-2012, meant that this positive correlation may not reflect a close product relationship, thus leading to a greater chance of error. 2014 QQ Decision, *supra* note 40, at 63; Global Economics Group, *supra* note 163, at 11-12.

183 2014 QQ Decision, *supra* note 40, at 70; Global Economics Group, *supra* note 163, at 21.

The Supreme People's Court also painstakingly addressed the issue of whether the relevant product market should be determined on an Internet application platform basis. This would place firms that offer product portfolios on a platform, or a platform for a portfolio of services, in the relevant market.<sup>184</sup> As the Court observed, large Internet providers in mainland China had been increasingly building their own platforms that offered a range of services, such as e-mail, blogs, music, television programs, games, communication, and customer and/or business services. These services were gradually integrated into a single offering that would compete for advertisers who want to reach the users of such integrated platforms.<sup>185</sup>

On the one hand, the Court found that the scope of the relevant product market should not be expanded to include platform competition, even though it lacked definitive empirical data on this issue. The Court gave the following reasons: the focus of platform providers and advertisers in platform competition was on providing a secure Internet platform rather than on providing a single, integrated offering to compete with comparable, single integrated product offerings; different platform makers could offer a different mix of services with those services not all being substitutes for each other, e.g., an individual searching for information on a historical figure would need a search engine, not an instant messaging communication service; and those different platforms potentially competed for a different mix of users and advertisers rather than the inclusion of the same mix of users and advertisers.<sup>186</sup> Ultimately, the Court thought this issue of including platform competition was getting too far afield from those products and services actually provided by the parties to this case, on which a relevant product market analysis should be based.<sup>187</sup>

On the other hand, the Court ruled that this issue was still germane to whether there were additional constraints on Tencent that could prevent it from exercising market power.<sup>188</sup> Essentially, it found that this issue pertained to barriers to entry and the ability of companies outside the relevant market to re-position themselves and enter that market.<sup>189</sup> In fact, later in its decision, the Court returned to this point in agreeing with Tencent that Internet competition was dynamic, with foreseeable future changes in the market of being relevant to whether Tencent (or, for example, a firm committing alleged abuse of dominance misconduct for a year) faced competitive constraints.<sup>190</sup> This is one of the features of this thorough opinion thought to be salient by commentators.<sup>191</sup>

Finally, the Supreme People's Court also addressed the issue of the scope of the relevant geographic market. After noting that the test for determining the scope of the relevant geographic market focuses on both demand and supply substitution, the Court observed that it would start with Mainland China being the baseline market with the lack of cost,

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184 2014 QQ Decision, *supra* note 40, at 65-67; Global Economics Group, *supra* note 163, at 14-16.

185 2014 QQ Decision, *supra* note 40, at 65; Global Economics Group, *supra* note 163, at 15.

186 2014 QQ Decision, *supra* note 40, at 66; Global Economics Group, *supra* note 163, at 15-16.

187 2014 QQ Decision, *supra* note 40, at 66-67; Global Economics Group, *supra* note 163, at 16.

188 2014 QQ Decision, *supra* note 40, at 66-67; Global Economics Group, *supra* note 163, at 16.

189 See Lim & Shen, *supra* note 21, at 16.

190 2014 QQ Decision, *supra* note 40, at 70; Global Economics Group, *supra* note 163, at 21.

191 See Lim & Shen, *supra* note 21, at 6, 16; Ning et al., *The Supreme Court Goes Online with Anti-Monopoly Principles*, *supra*, note 163.

transportation, or technical barriers to worldwide distribution of software as being additional applicable factors (apparently because there was universal agreement as to all of those points). However, here too, it eschewed form over substance by conducting a deeper analysis of several important factors in applying this test: (1) the actual region in which demand for the products in question is most acute; (2) the laws and regulations that may bear on entry into Mainland China; and (3) the experience of foreign competitors in trying to enter the market in Mainland China as well as the timeliness for any such entry.<sup>192</sup>

Applying this test, the Court concluded that the relevant geographical market was Mainland China as opposed to the entire world as the lower court had thought.<sup>193</sup> The conclusion relied on three important facts: (1) the demand of users in Mainland China was overwhelmingly for instant messaging services provided by firms located in Mainland China (97% according to a 2010 iResearch report); (2) firms providing such services in Mainland China first had to comply with conditions set out in administrative rules and regulations, including obtaining a government telecommunications license, meeting minimum capital requirements, and (if a foreign company) also complying with special capital and corporate vehicle requirements;<sup>194</sup> (3) and foreign users of QQ had limited its use to keeping in touch with friends and family back home in Mainland China.<sup>195</sup>

### c. Whether Tencent Had a Dominant Market Position

The Supreme People's Court then turned to whether the lower court erred, as a matter of fact, in concluding that Tencent did not have a dominant market position.<sup>196</sup> Though it could be argued that a presumption of market power had to be applied to Tencent under Article 19 of the Anti-Monopoly Law given Tencent's market shares in the relevant market as defined by the Supreme People's Court,<sup>197</sup> the Supreme People's Court was not willing to do so without applying the factors set out in Article 18 of that law such as an assessment of the barriers to entry.<sup>198</sup> Indeed, in responding to Qihoo's claim that the lower court erred by failing to make an actual determination as to market share, the Court stressed that assessing a firm's dominant market position depended on a comprehensive assessment of all of the Article 18 factors, likely rendering the determination of market share an unnecessary step.<sup>199</sup>

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192 2014 QQ Decision, *supra* note 40, at 67; Global Economics Group, *supra* note 163, at 17. Other jurisdictions have observed that, given antitrust law must be sensitive to economic context, it is warranted to pay attention to the significance of regulation in an industry. See, e.g., *Verizon Commc'ns, Inc. v. Law Offices of Curtis V. Trinko*, 540 U.S. 398, 411 (2003).

193 2014 QQ Decision, *supra* note 40, at 67-70; Global Economics Group, *supra* note 163, at 17-20.

194 While foreign companies had entered China and provided such services, they did so through joint ventures with Chinese companies. 2014 QQ Decision, *supra* note 40, at 69; Global Economics Group, *supra* note 163, at 19-20.

195 2014 QQ Decision, *supra* note 40, at 67-70; Global Economics Group, *supra* note 163, at 17-20.

196 See 2014 QQ Decision, *supra* note 40, at 70-76; Global Economics Group, *supra* note 163, at 21-30.

197 Ning et al., *The Supreme Court Goes Online with Anti-Monopoly Principles*, *supra* note 163 (observing that, in the relevant market as defined by the Court, Tencent had an 80% market share).

198 See 2014 QQ Decision, *supra* note 40, at 71; Global Economics Group, *supra* note 163, at 23.

199 2014 QQ Decision, *supra* note 40, at 80; Global Economics Group, *supra* note 163, at 35.

This careful analysis does not constitute a sacrifice of the need for administrable rules much as it may seem otherwise to some commentators.<sup>200</sup> Certain factors listed in Article 18, such as barriers to entry, are germane to the calculation of market shares in the first instance and form part of a civil plaintiff's burden of proof for monopoly or abuse of dominance case before market power can be presumed from those market shares.<sup>201</sup> Though certain factors listed in Article 18 are admittedly for a civil defendant to raise in the first instance, such as a defendant's technical or financial condition, a civil plaintiff still bears the ultimate burden of proof on market power even if presumptions from Article 19 would otherwise apply in the name of administrability.<sup>202</sup>

Applying the Article 18 factors assiduously, the Supreme People's Court reached the following conclusions: (1) other factors such as barriers to entry and Internet platform competition had to be examined before it could be concluded that Tencent had market power, even though the Court observed that Tencent had an approximate 80% market share in the relevant product and geographic markets during the relevant time based on expert analyses offered by Qihoo of usage frequency and number of users (a figure that climbed to approximately 90% in 2012);<sup>203</sup> (2) the barriers to entry in the relevant product and geographic market were low as witnessed by the plethora of products (such as Baidu Hi, Ali Want, Apple's iMessage or Samsung's ChatOn) that had entered the market as well as by competition from other Internet platforms, thus requiring continuous innovation to stay ahead;<sup>204</sup> (3) as to Tencent's ability to control price, output, or other axes of competition, the Court found this dynamic nature of the relevant market, as well as the free nature of the software involved, militated against any finding of control as users were not, in effect, locked in via network

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200 See *Lim & Shen*, *supra* note 21, at 6, 10, 12, 17 & nn.29-30 (viewing the decision as using Article 18 to override Article 19 but noting that courts may become confused anyway in trying to reconcile seemingly different market power approaches in Article 18 versus those in Article 19); *Ning et al.*, *The Supreme Court Goes Online with Anti-Monopoly Principles*, *supra* note 163 (viewing the decision on the one hand as being consistent with the original intent of Articles 18 and 19 but then stating that its override of Article 19 was a surprise that may be due to the dynamic nature of the Internet market).

201 See *United States v. Microsoft*, 253 F.3d 34, 82 (D.C. Cir. 2001); *Concord Boat Co. v. Brunswick*, 207 F.3d 1039, 1059 (8th Cir. 2000); *CDC Techs. v. Idexx Labs.*, 186 F.3d 74, 80 (2d Cir. 1999); see also J. Robert Robertson, *Editor's Note: Philadelphia National Bank at 50 Symposium*, 80 ANTITRUST L.J. 189, 196 (2015) (recasting presumption of market power from high market shares applicable to mergers as the higher the market shares and barriers to entry in the government's *prima facie* case, the higher the defendant's burden of producing rebuttal evidence); but cf. *AREEDA ET AL.*, *supra* note 103, ¶ 420b at 75 (distinguishing between producing evidence that new entry into the market has not occurred within the past year or two, which should be plaintiff's burden, and producing evidence that likely, timely, and sufficient entry into the market will occur in the future, which should be defendant's burden, but noting that if a defendant were to produce such evidence, plaintiff should "generally" bear the burden of persuasion on the issue of new entry).

202 Regarding this point vis-à-vis the law of other jurisdictions, see discussion *infra* Part VI.A of the California Supreme Court's opinion in *In re Cipro* and Fed. R. Evid. 301 (in discussing presumptions, rule observes that while party against whom the presumption applies has the burden of producing evidence to rebut the presumptions, but that the party invoking the presumption still retains the burden of persuasion).

203 *2014 QQ Decision*, *supra* note 40, at 71-72; *Global Economics Group*, *supra* note 163, at 23-24.

204 *2014 QQ Decision*, *supra* note 40, at 72-73, 75; *Global Economics Group*, *supra* note 163, at 24-25, 27-28.



effects<sup>205</sup> (in discussing the lack of customer “stickiness,” the Court discussed the rise and fall of MSN in China);<sup>206</sup> and (4) although the Court found that Tencent was in relatively strong financial and technical condition, it noted that so too were Tencent’s competitors such as Baidu, China Mobile, Alibaba, and Microsoft.<sup>207</sup> Finally, in addressing Qihoo’s contention that Tencent’s actions against it forced customers to choose between Qihoo and Tencent, thereby demonstrating Tencent’s market power, the Court found that Tencent had only engaged in this conduct for one day and that Tencent’s competitors gained significant market share during the period, a result contrary to the idea that Tencent had market dominance.<sup>208</sup>

#### **d. Whether Tencent’s Conduct Was Otherwise Illegal**

The Supreme People’s Court observed that, “in principle,” it was not required to address whether Tencent’s conduct itself was illegal as an abuse of dominance under the Anti-Monopoly Law given its findings as to Tencent’s lack of market power.<sup>209</sup> However, the Court observed that the more difficult it would be to determine the boundaries of a relevant market or the dominant position of a firm, the more a court should simply analyze directly the legality and competitive effects of conduct that is alleged to constitute an abuse of dominance.<sup>210</sup> Engaging in that direct analysis, the Court found that Tencent’s conduct did not negatively impact consumers as they had alternatives to turn to, that Tencent’s increased competition in the relevant market even though it lasted only one day, and that Tencent’s actions could be explained as self-help in response to Qihoo’s acts of unfair competition such that it was not “obvious” that Tencent’s intent was anti-competitive.<sup>211</sup>

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205 2014 QQ Decision, *supra* note 40, at 73-74; Global Economics Group, *supra* note 163, at 27. In particular, one report stated that more than 50% of users had two to three instant messaging software products with 8.7% changing the software they use within a half year while other reports had reported figures of 63.4% (CNNIC) and 90% (iResearch) for the number of users with two or more instant messaging software products. 2014 QQ Decision, *supra* note 40, at 73-74; Global Economics Group, *supra* note 163, at 27.

206 2014 QQ Decision, *supra* note 40, at 73-74; Global Economics Group, *supra* note 163, at 27.

207 2014 QQ Decision, *supra* note 40, at 74; Global Economics Group, *supra* note 163, at 26.

208 2014 QQ Decision, *supra* note 40, at 75-76; Global Economics Group, *supra* note 163, at 27-29.

209 2014 QQ Decision, *supra* note 40, at 76-77; Global Economics Group, *supra* note 163, at 30.

210 2014 QQ Decision, *supra* note 40, at 76-77; Global Economics Group, *supra* note 163, at 30. This corresponds to the experience of other jurisdictions. See, e.g., *FTC v. Actavis*, 133 S. Ct. 2223, 2237-38 (2013) (finding that courts can structure rule of reason analysis so that quality of proof required for elements can vary with circumstances and so that they need not consider every fact or theory no matter how minimal it is on the basic question of a restraint’s significant and unjustified anti-competitive consequences); *Am. Needle, Inc. v. Nat’l Football League*, 560 U.S. 183, 203 (2010) (characterizing the Rule of Reason as being flexible and noting that concerted activity may not always require a detailed analysis under the Rule of Reason but “can sometimes be applied in the twinkling of an eye” in finding such activity to be justified (internal citation omitted)).

211 2014 QQ Decision, *supra* note 40, at 77-78; Global Economics Group, *supra* note 163, at 30-32.

Lastly, the Court addressed whether Tencent's conduct constituted the kind of tying (of one product with another) prohibited by the Anti-Monopoly Law.<sup>212</sup> This analysis is worth examination in assessing the ability of Chinese courts to properly apply legal concepts to the facts before them, not only in separating the wheat from the chaff but also in doing so in a manner that can be readily understood and applied by later courts. The Court first found that Tencent's conduct failed at the onset to meet the requirements for showing tying as that conduct did not appreciably shrink Qihoo's share of the tied product market—Internet security software—even as it did not increase by much Tencent's share of the tying product market— instant messaging software.<sup>213</sup> The Court then alternatively found both that the force required for tying was not obvious, as consumers could uninstall QQ programs that they did not like or refuse to accept upgrades, and that bundling instant messaging software with Internet security software was rational as users of instant messaging software were concerned about the security of their instant messaging software.<sup>214</sup> Finally, the Court determined that the lower court properly required Qihoo to show a net negative effect on competition arising from the tying, given that Qihoo had failed to meet its burden of showing a dominant market position in the tying product market such that it could avail itself of the presumption of anti-competitive effects arising from such a tie.<sup>215</sup>

### **B. The “Dog That Did Not Bark:”<sup>216</sup> What Was Apparently Not Done in the 2014 QQ Decision**

The *2014 QQ Decision* involved a vigorously litigated case at multiple levels of the Chinese court system that provides great insight into China's progress toward the rule of law as discussed *infra*. However, it is important to also consider what did *not* occur in that case.

First, Qihoo does not appear to have sought either an order requiring Tencent to produce evidence or an order requesting the appointment of a court expert, though both are permissible.<sup>217</sup> Qihoo may have adopted this strategy of refraining from using these tools because its case may have centered on the market share presumptions set out in Article 19 of the Anti-Monopoly Law, which it thought it could easily satisfy.<sup>218</sup> However, the ability to request the court to secure evidence from a defendant, or have the court conduct an independent analysis using its own expert, becomes that much more important given the willingness of the Supreme People's Court in its *2014 QQ Decision* to sanction courts looking more closely at direct effects, the analysis of which is inherently data-driven. And the same observations hold true as to the use of these tools as the Supreme People's Court stressed in its *2014 QQ Decision* the need for lower courts to be willing to use the evidence

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212 *2014 QQ Decision*, *supra* note 40, at 78–80; Global Economics Group, *supra* note 163, at 32–34.

213 *2014 QQ Decision*, *supra* note 40, at 79; Global Economics Group, *supra* note 163, at 33.

214 *2014 QQ Decision*, *supra* note 40, at 79; Global Economics Group, *supra* note 163, at 34.

215 *2014 QQ Decision*, *supra* note 40, at 79–80; Global Economics Group, *supra* note 163, at 34.

216 SIR ARTHUR CONAN DOYLE, *Silver Blaze*, in *THE MEMOIRS OF SHERLOCK HOLMES* (1892).

217 Civil Procedure Law of the People's Republic of China (promulgated by the Nat'l People's Cong., Apr. 9, 1991, effective Jan. 1, 2013) (amended 1991, 2007, & 2012), arts. 64, 67, 76, 79.

218 *Cf.* Ning et al., *The Supreme Court Goes Online with Anti-Monopoly Principles*, *supra* note 163 (setting out statements by attorneys in the law firm retained by Qihoo observing that, in the relevant market as defined by the Court, Tencent had a 80% market share).

before them to determine the scope of the relevant market, even if that evidence is less than perfect and even if the plaintiff is the one who has the burden of proof on market-definition issues.<sup>219</sup>

Second, the Supreme People's Court was very interested in admitting as much evidence as it could, and leaving as wide a scope as it could for the admission of economic expert testimony, so that it could reach the most informed decision possible. Yet the absence of any input from government antitrust authorities, or from informed third parties (such as economics professors), in an *amicus* capacity is quite striking when viewed against this apparent goal in comparing the proceedings before that Court in the *2014 QQ Decision* case with cases in other countries.<sup>220</sup>

The absence is striking because the lack of such input hinders the Court in reaching the most informed decision possible. For example, it has been claimed that the Court's decision fails to account sufficiently for the two-sided market phenomenon. This might have given Tencent market power as it could take advantage of the large installed base it has for its own differentiated platform to extend its market share over products that run on that platform to keep users from defecting to rival platforms.<sup>221</sup> The Court's opinion does address both platform competition and network effects (the latter of which is related to two-sided markets) based on the evidence before it. Nonetheless, allowing for the formal presentation of informed views on two-stage markets from third parties and government agencies in an *amicus curiae* capacity might have allowed it to draw even more on the latest scholarship regarding two-sided markets and how that should interface with the market definition test and market share presumptions of the Anti-Monopoly Law.<sup>222</sup>

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219 Indeed, insofar as the Supreme People's Court appeared to be willing to infer that the intent behind Tencent's conduct was self-help—see *2014 QQ Decision*, *supra* note 40, at 77-78; Global Economics Group, *supra* note 163, at 30-32—a court order allowing for a tailored production of Tencent's business documents surrounding the key date in question could have shed light on Tencent's actual motives. After all, antitrust defendants can claim *post hoc* justifications for their conduct that end up clashing with their actual intent or goal as expressed in contemporaneous business documents—a point that future antitrust plaintiffs in China should be mindful of given the holding of the *2014 QQ Decision*. See *United States et al. v. Apple, Inc. et al.*, 791 F.3d 230, 335 (2nd Cir. 2015). However, this observation is not to impugn Tencent's motives in this case or suggest that they were, in fact, other than what has been reported in the *2014 QQ Decision*.

220 See Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on Certain Rules Governing Actions for Damages under National Law for Infringements of the Competition Law Provisions of the Member States and the European Union, art. 30, 2014 O.J. (L. 349) 5 (competition authorities in Europe should be able to submit observations to national courts in private damage actions); Varanini, *American and European Antitrust Enforcement*, *supra* note 21, at 104 (discussing *amicus* procedure set up by European Commission for weighing in on issues of European Community competition law that are raised by cases and enforcement actions in a Member State's court); see also JUDICIAL ENFORCEMENT OF COMPETITION LAW, *supra* note 13, at 40 (noting judges in private antitrust actions in Italy can ask for information from government departments about the economic sector in question in a given case). For examples of what such *amicus* briefing can involve, see, e.g., Brief for the United States and for the FTC as Amici Curiae in Support of Neither Party, *Motorola Mobility LLC v. AU Optronics Corp.*, 746 F.3d 842 (7th Cir. 2014) (No. 14-8003), 2014 WL 4447001.

221 See Ning et al., *The Supreme Court Goes Online with Anti-Monopoly Principles*, *supra* note 163.

222 For an example of such potentially informative scholarship, see, e.g., DAVID EVANS, ATTENTION RIVALRY AMONG ONLINE PLATFORMS, UNIV. OF CHI. INST. LAW & ECONOMICS, RESEARCH PAPER NO. 627, 4, 31-36 (2013), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2195340&utm\\_source=Copy+of+TencentWebinar&utm\\_campaign=April+30%2C+2013&utm\\_medium=email](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2195340&utm_source=Copy+of+TencentWebinar&utm_campaign=April+30%2C+2013&utm_medium=email) (discussing how differentiated platforms may be able to exercise market power); *id.* at 4 n.10, 40-42 (discussing the QQ decision of the Guangdong Higher People's Court). What makes this example particularly striking is that the views in this article may have been considered by the Supreme People's Court as part of its *2014 QQ Decision* as this article expressly mentioned and analyzed the lower court decision even though the Court did not cite to this article as support for its decision. See *2014 QQ Decision*, *supra* note 40, at 46. And, in the context of formulating guidelines for lower courts, the Supreme People's Court has accepted comments on drafts from interested third parties. See, e.g., AM. BAR ASS'N, JOINT COMMENTS OF THE AMERICAN BAR ASSOCIATION SECTION OF ANTITRUST LAW AND SECTION OF INTERNATIONAL LAW ON THE SUPREME PEOPLE'S COURT DRAFT PROVISIONS ON THE TRIAL OF CIVIL MONOPOLY CASES (June 2011) (on file with authors).

This case also does not involve a government decision following either an investigation with detailed factual findings and legal conclusions where it imposed fines and other relief, nor an investigation in which the government declined further action with a detailed statement of reasons. The review and treatment of such government decisions by the courts in the wake of the *2014 QQ Decision* will reveal much about China's commitment to the rule of law generally speaking as well as specifically in the context of antitrust.

## **VI. The Importance of the *2014 QQ Decision* for the general rule of law in china as well as the specific rule of law in the context of antitrust**

The detailed analysis of the *2014 QQ Decision* demonstrates that Chinese courts can, in fact, assume the role that is necessary for them to play if China is to stay on the path to the rule of law. First, it provides detailed guidance to lower courts on applying evidentiary and substantive rules in anti-monopoly cases and authoritatively addresses issues of market definition involving the assessment of economic evidence.<sup>223</sup> Further, it shows that private litigants in China can effectively use the court system to present facts and obtain a well-reasoned result that addresses the arguments they present in a neutral manner.<sup>224</sup> However, for observers to be convinced that the *2014 QQ Decision* is, as it appears to be, a welcome sign of China's commitment to the rule of law, further steps are needed.

Designating the *2014 QQ Decision* as a guiding case would be the most important next step that can be taken to demonstrate China's commitment to the rule of law, generally as well as specifically in the context of antitrust. Additional steps involve the tools available to private litigants in litigating these cases. Not only must private litigants in China use all of the tools currently available to them to bring and prosecute these cases but also those tools need to be expanded—at least in certain respects—so as to ensure that the judiciary's role in enforcing law in China will only continue to grow.<sup>225</sup> Finally, given that the *2014 QQ Decision* demonstrates the courts in China have the capacity to execute China's rule of law strategy, the proof of the pudding, as it were, will be whether China's courts can in fact review the decisions of government agencies under standards similar to those in other countries.<sup>226</sup>

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223 Cf., e.g., JUDICIAL ENFORCEMENT OF COMPETITION LAW, *supra* note 13, at 19 (noting that the task of courts' applying economic thinking in antitrust cases calls for the use of "shortcuts" or "legal presumptions" to make that task easier but also noting that for some tasks like market definition, such shortcuts are not possible and encouraging the exploration of how courts may better use economic evidence).

224 See *id.* at 21 (noting the importance of "economic agents" themselves bringing cases for the rule of law in antitrust cases); see also *Best Practices*, *supra* note 23, at 9-10.

225 Cf. Council Directive 2014/104/EU, art 3, 2014 O.J. (L 349) 1 ("National courts thus have an equally essential part to play in applying the competition rules (private enforcement). While ruling on disputes between private individuals, they protect subjective rights under [European] Union law, for example by awarding damages to the victims of infringements. The full effectiveness of Articles 101 and 102 [of the Treaty on the Functioning of the European Union (TFEU)], and in particular the practical effect of the prohibitions laid down therein, requires that anyone—be they an individual, including consumers and undertakings, or a public authority—can claim compensation before national courts for the harm caused to them by an infringement of these provisions.").

226 See JUDICIAL ENFORCEMENT OF COMPETITION LAW, *supra* note 13, at 21 (noting that part of the job of the courts in executing the rule of law in the antitrust context is reviewing the decisions of government antitrust enforcers); see also 2015 CHINA ANTI-MONOPOLY RPT., *supra* note 43, at 50 ("In 2016, it is anticipated that there would be more antitrust litigations against the state-owned companies or the authorities in China.").

## A. The 2014 QQ Decision's Being Worthy of Designation as Guiding Precedent

The Supreme People's Court's office responsible for the designation of an opinion as a guiding case will look to whether an opinion answers important questions as to the application of a law and can otherwise provide comprehensive guidance in the application of a law in a given area.<sup>227</sup> Looking to the interplay of economics with administrable rules, which lies at the heart of the rule of law in the antitrust context, the 2014 QQ Decision sets out detailed guidance on how Chinese courts should substantively analyze abuse of dominance cases to separate the wheat from the chaff. By way of just one example, it encourages courts to look to direct effects as an alternative to the difficulties that can be encountered in the exercise of market-drawing. Such substantive holdings, which go beyond the Supreme People's Court prior guidelines on civil trials in anti-monopoly cases, alone suggest that the 2014 QQ Decision should be designated as a guiding case.

However, the 2014 QQ Decision also involves a host of procedural rulings involving the admission and consideration of evidence and the burden of proof in anti-monopoly cases. To ensure the effective application of a law such as the Anti-Monopoly Law for purposes of achieving the rule of law, there is a need for appropriate procedural rules that involve presumptions and burdens of proof as well as the admission of evidence.<sup>228</sup>

This point about delineating the burden of proof of a litigant as a necessary step on the path towards the rule of law can be seen by comparing the detailed 2014 QQ Decision with an equally detailed 2015 antitrust decision from the California Supreme Court in the *In re Cipro* case.<sup>229</sup> This case discussed burden of proof questions in addressing the legality of reverse payments under state antitrust law (an issue with enormous consequences for the price of medicine in the United States). In particular, the California Supreme Court considered the question of whether a patent holder of a branded drug could pay a competitor issuing a generic equivalent of that branded drug with monetary and/or non-monetary compensation in exchange for a non-compete agreement from the generic competitor as part of a settlement of patent infringement claims.<sup>230</sup> Although the United States Supreme Court had answered that question in a general way by finding that such settlements were not categorically immune from antitrust liability,<sup>231</sup> it left a lot of questions unanswered, including which party carries which burden of proof as to what aspects of a so-called reverse payments claim.

As with the United States Supreme Court, the California Supreme Court found that such claims were not categorically barred if the settlement involved did not extend the patent past the expiration of its term.<sup>232</sup> Rather, applying a sliding scale flexible analysis

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227 See Gechlik & Di, *supra* note 61, at 5 (discussing Guiding Case No. 5).

228 Cf. Council Directive 2014/104/EU, art. 4, 2014 O.J. (L 349) 2 ("The right in [European] Union law to compensation for harm resulting from infringements of Union and national competition law requires each Member State to have procedural rules ensuring the effective exercise of that right.").

229 *In re Cipro Cases I & II*, 61 Cal. 4th 116, 348 P.3d 845 (Cal. 2015).

230 *In re Cipro*, 61 Cal. 4th at 129-30, 132-33, 135; see also *id.* at 151 & n.11 (discussing non-cash compensation).

231 *Id.* at 130 (citing *Federal Trade Commission v. Actavis*, 133 S. Ct. 2223 (2013)).

232 *Id.* at 141-45.

(between *per se* or hard-core illegal on one end of the scale and full rule of reason with market definition et al. on the other),<sup>233</sup> the *In re Cipro* Court found that a civil plaintiff must show four elements, on which that plaintiff would bear the burden of proof, to make out a prima facie case that the reverse payments settlement is anti-competitive: (1) the settlement limits entry of the generic drug manufacturer; (2) the settlement includes cash or equivalent financial consideration; (3) the value of such consideration (minus any value originating from the delay itself) to the generic drug manufacturer exceeds whatever goods or services the generic drug manufacturer was providing to the brand; and (4) the value of the settlement exceeds the expected litigation cost absent settlement for the brand manufacturer.<sup>234</sup>

However, because evidence on the third and fourth element was more likely to be in the hands of defendant drug manufacturers, the Court found that those defendants must first meet their burden of producing evidence on those elements before the ultimate burden of proof as to those elements would shift back to the plaintiff.<sup>235</sup> Put another way, a plaintiff's showing of these four prima facie elements would allow for a presumption that the patent holder has market power without the need to delineate a relevant market and figure out market shares.<sup>236</sup> To reach these conclusions, the Court relied heavily on economic scholarship.<sup>237</sup>

In turn, the *In re Cipro* Court found that, if a civil plaintiff could make out such a prima facie case, the burden would shift back to defendants to offer evidence of pro-competitive justifications for the settlement.<sup>238</sup> Although the Court rejected the contention of the plaintiffs that the defendants should be barred from presenting any justifications, the Court also rejected, in following the lead of the United States Supreme Court, several potential justifications. These justifications included allowing competition at all earlier than patent expiration when the baseline should be the average period of competition that could be expected in the absence of settlement or re-litigating whether the patent was valid when the parties chose to settle without such a determination being made.<sup>239</sup> Moreover, as the last step here, the Court reiterated that “the ultimate burden throughout rests with the plaintiff to show that a challenged settlement agreement is anticompetitive,”<sup>240</sup> and that plaintiffs who have made the requisite prima facie showing need only show that any such justifications offered by a defendant are “unsupportable” to prevail.<sup>241</sup>

Ultimately, this kind of flexible and pragmatic burden of proof analysis in *In re Cipro* is redolent of the similar analysis performed by the Supreme People's Court in its *2014 QQ Decision*, both of which were based on economic thought. Just as the *In re Cipro* case has been important for demonstrating how the rule of law in the antitrust context can reconcile economic thought with administrative imperatives in devising the very burdens of production

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233 *Id.* at 146–47.

234 *Id.* at 151–57.

235 *Id.* at 153 n.12, 153–54.

236 *Id.* at 157.

237 *Id.* at 154–55.

238 *Id.* at 157–58.

239 *Id.* at 158–59.

240 *Id.* at 159.

241 *Id.*

and proof that govern a case, so too could the *2014 QQ Decision* play a similar role in China if it were designated as a guiding case. Thus, the designation of the *2014 QQ Decision* as a guiding case would constitute an important milestone in demonstrating China's commitment to the rule of law, both as a general matter and as a specific matter with respect to antitrust.<sup>242</sup>

## **B. The Need for the Use, and Further Development, of Legal Tools in Anti-Monopoly Cases Handled by the Courts as Part of the Goal of Achieving Rule of Law**

For the courts to do their part in the rule of law, civil litigants must be willing to fully use the tools granted to them by Chinese civil law, especially when, as in the *2014 QQ Decision*, that very law is found to require a pragmatic and flexible analysis and when the courts have indicated that they will eschew a technical approach to the consideration of evidence.

The use of existing tools could include, among other options, seeking court orders requiring defendants to produce documents and data,<sup>243</sup> and encouraging the courts to hire their own economic expert.<sup>244</sup> But it may include the development of other tools much along the lines of the European Union's 2014 Damages Directive setting out a range of evidentiary, procedural, liability, and damage standards for ensuring more effective private litigation.<sup>245</sup>

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242 Cf. Zhang, *supra* note 72, at 4 (Deputy Chief Judge Wang of the Supreme People's Court stated that the courts should "provide guidance to the parties to ascertain their economic analysis on market definition, market power, and damages calculation, and improve the scientific nature of economic analysis. When identifying market power, the parties must fully understand that market share is just one of the many aspects used [to] determine market dominance, not the only one. Other methods should be given equal weight to avoid unjustified reliance on market share"). This set of recommendations by Deputy Chief Judge Wang would be achieved via designation of the *2014 QQ Decision* as a guiding case.

243 See Civil Procedure Law of the People's Republic of China (promulgated by the Nat'l People's Cong., Apr. 9, 1991, effective Jan. 1, 2013) (amended 1991, 2007, & 2012), art. 64; cf. Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on Certain Rules Governing Actions for Damages under National Law for Infringements of the Competition Law Provisions of the Member States and the European Union, arts. 15-18, 2014 O.J. (L. 349) 3-4 (directing that local courts in the European Union permit such orders); Zhang, *supra* note 72, at 4 (Deputy Chief Judge Wang is quoted as observing that "[f]rom the practice of civil antitrust cases, we have learned that the bottleneck in civil antitrust cases is the plaintiff's difficulty in collecting evidence and proving monopolistic behavior").

244 See Civil Procedure Law, art. 76; cf. *Interview with Judge Posner*, *supra* note 16, at 207 (Judge Posner sets out his practice of having the court retain its own expert as judges are "not well-equipped to deal with complex economic and statistical issues" and he is "skeptical about expert witnesses except those appointed by the judge"); JUDICIAL ENFORCEMENT OF COMPETITION LAW, *supra* note 13, at 41 (describing practice of Italian courts of appointing experts to assist them); see generally Zhang, *supra* note 72, at 4 (Deputy Chief Wang observed that the courts need to "improve the use, procurement[,] and examination of experts' opinions, economic analysis, and market survey reports to fully take advantage of the experts' function in evaluating professional and technical facts").

245 See Council Directive 2014/104/EU, arts. 2-4, 12-16, 18-19, 23, 25-45, 47-52, 2014 O.J. (L. 349) 1-9; Zhang, *supra* note 72, at 4 (Deputy Chief Wang is quoted recommending the courts "standardize the ruling criteria at an appropriate time" and that the burden of proof on plaintiffs must be "moderated"); see also OECD, RELATIONSHIP BETWEEN PUBLIC AND PRIVATE ENFORCEMENT, WORKING PAPER NO. 3, DAF/COMP/WP3 14, 12-37 (2015) (on file with authors) [hereinafter *Relationship Between Public and Private Enforcement*] (setting out a multi-jurisdictional comparison on the subject); cf. *Clayworth v. Pfizer*, 233 P.2d 1066, 1070 (Cal. 2010) (holding "generally" pass-on should not be a defense under state antitrust law even in a case brought by indirect purchaser plaintiffs).

One important tool would be the ability of civil litigants to use government decisions in conducting follow-on actions if those decisions can first be subject to meaningful, if also deferential, review.<sup>246</sup>

Chinese law may permit the use of government decisions as evidence in subsequent litigation, though so far no such use has apparently occurred.<sup>247</sup> That is important as any private right, such as the right to compensation for violations of antitrust law, needs to have a meaningful path by which that right can be exercised.<sup>248</sup> As the European Union has recognized, rules allowing for the recovery of compensation, and the remediation of harm, “should not be formulated or applied in a way that makes it excessively difficult or practically impossible to exercise the right to compensation . . . .”<sup>249</sup> Accordingly the European Union has now provided that findings regarding the violation of European Commission law by a competition authority or a reviewing authority “should not be relitigated in subsequent actions for damages” and “should be deemed to be irrefutably established in actions for damages . . . .”<sup>250</sup>

However, government findings regarding antitrust liability do not emerge from a vacuum even in comparable civil law systems such as in Europe. Rather, those findings are scrutinized by the courts albeit with a measure of discretion<sup>251</sup>: “while the [European Union] Courts may scrutinize the Commission’s factual analysis and are the ultimate arbiters with respect to matters of law, the Commission has traditionally enjoyed a ‘margin of discretion’ in relation to complex economic matters, which are often at the heart of merger control

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246 See *Best Practices*, *supra* note 23, at 9–10 (discussing the need for government decisions to be reviewed by an independent tribunal and distinguishing between findings of fact, that should receive deference, and intertwined questions of fact and law, such as the drawing of inferences, that “implicate important economic and/or competition policy aspects” that should be reviewed); see also Douglas Ginsburg & Joshua Wright, *Philadelphia National Bank: Bad Economics, Bad Law, Good Riddance*, 80 ANTITRUST L.J. 377, 386–87 & nn.45–46, 388 n.57 (2015) (explaining that because “market definition is a question of fact,” reviewing courts apply a highly deferential standard of review that, in the case of fact-finding by the FTC, is equivalent to the “substantial evidence” standard for reviewing agency determinations).

247 See Regulations on Open Government Information of the People’s Republic of China (promulgated by the State Council, Jan. 17, 2007, effective May 1, 2008), arts. 6, 9, 13, 21, 23, *translated in Regulations on Open Government Information of the People’s Republic of China*, CONGRESSIONAL-EXECUTIVE COMMISSION ON CHINA, <http://www.cecc.gov/resources/legal-provisions/regulations-of-the-peoples-republic-of-china-on-open-government> (last visited Mar. 26, 2016); see also Ning et al., *The Dual System*, *supra* note 54 (discussing Article 77 of Some Provisions of the Supreme People’s Court on Evidence in Civil Procedures).

248 See Council Directive 2014/104/EU, arts. 3–6, 9, 11, 2014 O.J. (L 349) 1–3; *Relationship between Public and Private Enforcement*, *supra* note 245, at 3–4, 6–7, 8–10; see also Clayworth, 233 P.2d at 1070 (discussing the goals of state antitrust law in price-fixing cases as “maximizing effective deterrence of antitrust violations, enforcing the state’s antitrust laws against those violations that do occur, and ensuring disgorgement of any ill-gotten proceeds”); *id.* at 1083 (discussing the need to select a damages rule that is “most consistent” with the “focus” on the importance of private litigation as a means of ensuring the enforcement of the antitrust law and deterring would-be violators even if such a rule results in “overcompensation”).

249 Council Directive 2014/104/EU, art. 11, 2014 O.J. (L. 349) 3 3.

250 *Id.* art. 34, at 6.

251 See, e.g., JUDICIAL ENFORCEMENT OF COMPETITION LAW, *supra* note 13, at 19.



decisions.”<sup>252</sup> Moreover, these courts cannot engage in the *de novo* review of facts found by the Commission,<sup>253</sup> rather (on the factual side) the courts ensure that relevant procedural rules are complied with, that the statement of reasons for the decision are adequate, that the facts have been accurately stated, and that there has not been any “manifest” error or “misuse of powers.”<sup>254</sup>

At first blush, it may appear that this standard is no standard at all. Nonetheless, the General Court (the court of first instance for antitrust cases) has been able to exercise meaningful review, annulling the following merger decisions: *Airtours/First Choice* (2002) (Commission decision was impermissibly based on “assertions,” without “cogent evidence,” that the merger would lead to collective dominance. Commission was required to follow legal test set out by General Court); *Schneider/Legrand* (2002) (Commission committed “substantive ‘errors, omissions, and inconsistencies of undoubted gravity,’” using transactional data without doing a country-by-country analysis of markets outside of France and shifting its theory as to competitive effects within France without giving the defendants an opportunity to address that theory); and *Tetra Laval/Sidel* (2002) (Commission reached conclusion of “anticompetitive conglomerate effects” without conducting a “precise examination” supported by “convincing evidence” that the transaction would in all likelihood create or strengthen a dominant position,” thus creating “a ‘manifest error of assessment’”).<sup>255</sup> Regarding *Tetra Laval/Sidel*, the Commission appealed the General Court’s decision to the Court of Justice (the European Union equivalent of the Supreme People’s Court), claiming that the General Court disregarded the margin of discretion accorded to the Commission and exceeded its powers of review by substituting its own view of the facts for that of the Commission and by requiring a disproportionate standard of proof.<sup>256</sup> The Court of Justice rejected the Commission’s arguments, particularly finding that the General Court had to review all of the evidence (even that of an economic nature) in determining whether the evidence relied on is “factually accurate, reliable, and consistent,” whether the evidence “contains all of the information necessary to assess a complex situation,” and whether the evidence “is capable of substantiating the conclusions drawn from it.”<sup>257</sup>

The exercise of this review of Commission decisions by the courts in turn encouraged the Commission to take steps to ensure that its decisions are of the highest caliber in balancing economic thinking with concerns for the development of administrable rules.<sup>258</sup> The Commission handed down new merger guidelines that brought more analytical rigor to the theories of competitive harm by, for example, identifying more clearly the types of evidence relevant to different kinds of competitive harm, the hiring of a Chief Economist with a team of economists as a recognition of the need to place greater emphasis on detailed quantitative and economic evidence, the formation of industrial sectorial units to better understand conditions

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252 Mark Leddy et al., *Transatlantic Merger Control: The Courts and the Agencies*, 43 CORNELL INT’L L.J. 25, 28 (2010) (internal citations and footnotes omitted).

253 *Id.* (internal citations and footnotes omitted).

254 *Id.* (internal citations and footnotes omitted).

255 *Id.* at 28, 30-33 (internal citations and footnotes omitted).

256 *Id.* at 33-34.

257 *Id.* at 34 (internal citations and footnotes omitted).

258 *See id.* at 41-45.

in specific markets, an extended timetable for investigations, and the formation of peer review panels (experienced officials from across DG-COMP—the antitrust authority of the European Union) to perform an effective internal check on investigators’ preliminary theories.<sup>259</sup> As a result, “[m]ost observers believe that the Commission now grounds its decisions more firmly in facts and economics, a positive development for European merger control.”<sup>260</sup>

The 2014 QQ Decision’s thoroughness and quality of reasoning suggests that Chinese courts could play a similar role to their counterparts in Europe in reviewing decisions of government antitrust enforcers. This would set up a sort of virtuous feed-back loop in which court review of those decisions not only would foster a sense of compliance with the rule of law but also would result in government decisions that private litigants would be encouraged to use in bringing their own antitrust cases in court.<sup>261</sup>

## VII. CONCLUSION

That the rule of law has been important to the effective functioning of a state and its market economy by promoting certainty and fairness is no accident. The original development of the rule of law accompanied the rapid administrative and economic development of a range of countries in Europe, including Prussia (later Germany), England, and France.<sup>262</sup> Even for fully developed countries in the economic first-rank, the rule of law requires ongoing nurturing, including in the field of antitrust.<sup>263</sup> In this sense, comparing cases such as the 2014 QQ Decision and *In re Cipro* begin to inform us as to how the rule of law may be implemented world-wide in the field of antitrust in the 21<sup>st</sup> century.<sup>264</sup>

Moreover, as the second largest economy in terms of nominal gross domestic product with massive global reach,<sup>265</sup> China’s ability to foster a strong civil and administrative court system through rule of law becomes particularly important,<sup>266</sup> not just for its own continuing

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259 *Id.* at 42-43.

260 *Id.* at 50 (internal citations and footnotes omitted).

261 Except for decisions on mergers, China’s Anti-Monopoly Law allows a party either to file an application for administrative reconsideration or to initiate an administrative lawsuit. Anti-Monopoly Law of the People’s Republic of China (promulgated by the Standing Comm. of the Nat’l People’s Cong., Aug. 30, 2007, effective Aug. 1, 2008), art. 53. For decisions on mergers, a party must first file an application for administrative reconsideration before being able to initiate an administrative lawsuit. *Id.*

262 See FRANCIS FUKUYAMA, POLITICAL ORDER AND POLITICAL DECAY: FROM THE INDUSTRIAL REVOLUTION TO THE GLOBALIZATION OF DEMOCRACY loc. 49-52, 57, 180 (2014) (ebook).

263 See, e.g., *Empowering the National Competition Authorities to be More Effective Enforcers*, EUROPEAN COMMISSION (Nov. 4, 2015), [http://ec.europa.eu/competition/consultations/2015\\_effective\\_enforcers/index\\_en.html](http://ec.europa.eu/competition/consultations/2015_effective_enforcers/index_en.html) (survey by European Commission as to whether the Member States of the European Union have the tools necessary to enforce European Community antitrust law); see also *supra* Part VI.A (discussion of the *In re Cipro* decision in California).

264 See, e.g., BREYER, *supra* note 8, at loc. 5767, 5812, 5821, 5827.

265 See, e.g., Lewis, *supra* note 5, at 373-74.

266 See, e.g., *id.* at 376 (noting that China could rely on a strategy of using criminal law as an “alternate mechanism” to civil and administrative law but that such a mechanism was “incomplete and imperfect”).

attempts at growth and reform,<sup>267</sup> but also for the rest of the world. China has recognized the importance of the rule of law to further reform and growth by setting 2020 as a target date for the implementation of the rule of law.<sup>268</sup> And in that sense antitrust law is the canary in the coal-mine, not just because it requires rule of law in the sense discussed in this Article,<sup>269</sup> but also because a well-functioning antitrust system of law is an important harbinger of market reform, equal market access for domestic and foreign firms, and economic growth.<sup>270</sup>

The *2014 QQ Decision* is an important sign of China's march to the rule of law in the development of a professional judiciary that can fairly assess evidence, competently apply economic principles as well as the law, and develop administrable rules in cases with precedential value. In the end, whether the *2014 QQ Decision* impacts the rule of law will depend on whether China hits certain signposts flowing from that decision. Nonetheless, this decision ultimately will prove in the end to be important, both in and of itself and as a catalyst, such that symposiums will be held 10 years in the future as to the decision's enormous impact on Chinese antitrust law and the rule of law in China.

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267 See, e.g., *id.* at 374 (discussing concerns that China's economy is slowing); *id.* at 448 (talking about not only how China's proactive reforms in the past have been the key to its success but also how the calls for reform in China still continue).

268 See, e.g., *President Xi Stresses More Reform, Rule of Law in New Year Address*, XINHUA (Dec. 31, 2014), [http://news.xinhuanet.com/english/china/2014-12/31/c\\_133890353.htm](http://news.xinhuanet.com/english/china/2014-12/31/c_133890353.htm).

269 See e.g., JUDICIAL ENFORCEMENT OF COMPETITION LAW, *supra* note 13, at 10.

270 See, e.g., Trans-Pacific Partnership Agreement ch. 16, Austl.-Brunei-Can.-Chile-Japan-Malay-Mex.-N.Z.-Peru-Sing.-U.S.-Viet., Feb. 4, 2016, U.S. Trade Representative, <https://ustr.gov/trade-agreements/free-trade-agreements/trans-pacific-partnership/tpp-full-text> (2016) (as part of comprehensive trade treaty to reduce trade barriers, provide reciprocal market access, and harmonize laws, signatories are required to adopt or maintain competition laws, follow rule of law procedural fairness requirements, and provide for an independent right of private action for violation of a country's competition laws); Toshiaki Takigawa, *The Prospect of Antitrust Law and Policy in the Twenty-First Century in Reference to the Japanese Antimonopoly Law and Japan Fair Trade Commission*, 1 WASH. U. GLOBAL STUD. L. REV. 275, 276-77, 285-86 (2002) (due to the Structural Impediments Initiative negotiations between the U.S. and Japan, Japan strengthened its Antimonopoly Law and the Japanese Fair Trade Commission); Mitsuo Matsushita, *The Structural Impediments Initiative: An Example of Bilateral Trade Negotiation*, 12 MICH. J. INTL. LAW 436, 436-37, 443 (1991) (joint report of the Structural Impediments Initiative recommended, among other things, establishment of more formal procedures for enforcement of Japanese Antimonopoly Law, transparency in the enforcement process, more effective criminal prosecutions of cartels and bid rigging, and the establishment of a program to facilitate private damage suits by plaintiffs—all to facilitate market access and equal opportunity).