SPC Guiding Case No. 79: Wu Xiaoqin v. Shaanxi Broadcasting and TV Network Media (Group) Co., Ltd. (Tying Arrangement Dispute)

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Unofficial English translation prepared for reference only. The official Chinese text prevails.

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Keywords

Civil / tying arrangement / monopoly / dominant market position / tie-in sale

Holding

1. Where an operator is the sole lawful operator of cable television transmission business within a specific area and the sole centralized controller of television program broadcasting, and has advantages in all factors such as market access, market share, business status, and business scale, it may be found that the operator holds a dominant market position.

2. Where an operator uses its dominant market position to collect the basic viewing maintenance fee for digital television and the fee for paid digital television programs together as a bundle, it infringes consumers' right of choice in consumption and is unfavorable to other service providers' entry into the digital television service market. Even if the operator has exceptional circumstances of charging for the two services separately, that is insufficient to deny that it constitutes a tie-in sale prohibited by the Anti-Monopoly Law.

Basic Facts

The plaintiff, Wu Xiaoqin, alleged: On May 10, 2012, when he went to Shaanxi Broadcasting and TV Network Media (Group) Co., Ltd. ("Broadcasting Company") to pay the basic viewing maintenance fee for digital television, he learned that the fee had been adjusted from RMB 25 to RMB 30 per month. Wu Xiaoqin accordingly paid RMB 90 for three months, of which RMB 75 was the basic viewing maintenance fee for digital television and RMB 15 was the fee for digital television programs. Subsequently, Wu Xiaoqin learned that digital television programs should be freely selected by users and voluntarily subscribed to. Wu Xiaoqin believed that Broadcasting Company, as a public utility enterprise, held a dominant position in the digital television market, and that its act of collecting the digital television program fee had deprived him of his right of independent choice and constituted a tie-in sale. He therefore brought a lawsuit requesting the court to order: confirmation that Broadcasting Company's act of collecting the RMB 15 digital television program fee from him on May 10, 2012 was invalid, and that Broadcasting Company return RMB 15 to the plaintiff.

Broadcasting Company argued: As the sole centralized controller of television program broadcasting within Shaanxi Province, Broadcasting Company's collection of fees from consumers who chose to watch programs beyond the basic viewing service complied with the provisions of the Anti-Monopoly Law; Broadcasting Company held a dominant position in the cable television market of Shaanxi Province and encouraged users to choose cable television packages, but it had not abused its dominant market position, nor had it forcibly required users to consume service items that they must consume beyond the basic viewing service, and users had the right of independent choice; the determination of monopolistic conduct belonged to administrative power rather than judicial power, and the plaintiff had no right to request a determination that the monopolistic conduct was invalid; although Broadcasting Company had launched a series of television packages satisfying users' individualized choices, it had never engaged in compulsory tie-in sales, thereby ensuring the right of the overwhelming majority of the public to watch more television programs. It therefore requested that the plaintiff's claim to confirm that Broadcasting Company's act of

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adding programs and collecting fees was invalid be dismissed, and expressed its willingness to actively resolve Wu Xiaoqin's second claim.

The court found upon trial: On May 10, 2012, when Wu Xiaoqin went to Broadcasting Company to pay the basic viewing maintenance fee for digital television, he learned that the minimum monthly standard for the basic viewing maintenance fee for digital television had been raised from RMB 25 to RMB 30. Wu Xiaoqin paid RMB 90 as the basic viewing maintenance fee for digital television for the period from May 10 to August 9, 2012. The special fee invoice issued by Broadcasting Company to Wu Xiaoqin recorded: basic viewing maintenance fee for digital television of RMB 75 and digital television program fee of RMB 15. Subsequently, Wu Xiaoqin consulted Broadcasting Company's customer service center (service number 96766) and learned that Broadcasting Company's program upgrade had added different fee-based programs with different packages, among which the minimum package had a basic viewing fee of RMB 360 per year, and users had to pay at least three months' fees each time. Broadcasting Company was, with the approval of the Shaanxi Provincial Government, the sole lawful operator of cable television transmission business within Shaanxi Province and the sole centralized controller of television program broadcasting. Broadcasting Company admitted that it held a dominant position in cable television transmission business within Shaanxi Province.

It was further found that the Interim Measures for the Administration of the Basic Viewing Maintenance Fee for Cable Television, printed and issued by the National Development and Reform Commission and the State Administration of Radio, Film and Television on December 2, 2004, provided that the basic viewing maintenance fee for cable television was subject to government pricing, and that the fee standards were to be formulated by the competent pricing authority. The Notice on Printing and Issuing the Several Opinions on Promoting the Overall Digital Conversion of Cable Television in Pilot Units (for Trial Implementation), issued by the State Administration of Radio, Film and Television on July 11, 2005, provided that, in the course of promoting overall conversion, each pilot unit should attach importance to the promotion of new businesses such as paid channels, for users to freely select and voluntarily subscribe to. The Notice on the Standards for the Basic Viewing Maintenance Fee for Digital Television throughout the Province, issued by the Shaanxi Provincial Price Bureau on May 29, 2006, provided that the standard for the basic viewing maintenance fee for digital television was: the billing unit was one receiving terminal used by resident users to watch one television set. For resident users in cities above the county level throughout the province, the fee was RMB 25 per month per main terminal; cable digital television users could, according to their actual circumstances, voluntarily choose to pay the basic viewing maintenance fee monthly, quarterly, or annually. The Notice on Strengthening the Administration of Cable Television Fees and Other Related Issues, issued by the National Development and Reform Commission and the State Administration of Radio, Film and Television on August 25, 2009, pointed out that the basic viewing maintenance fee for cable television was subject to government pricing, and that the fees for value-added cable television services and paid digital television programs were to be determined by the cable television operating institution itself.

In the second-instance proceedings, Broadcasting Company provided photocopies of four special fee invoices to prove that, around May 10, its business hall had collected a monthly service fee of RMB 25; as there were no originals, Wu Xiaoqin did not cross-examine them. After the hearing, Broadcasting Company provided the originals of three of them, and both parties conducted verification and cross-examination. Those invoices all showed an annual fee of RMB 300, i.e., RMB 25 per month. Broadcasting Company provided the originals of five invoices, including the three originals provided in the first instance, and the transaction locations were all Xianyang City. This proved that Broadcasting Company had provided a monthly fee service of RMB 25 around May 10.

In the retrial, Broadcasting Company submitted screenshots of its website fee packages for 2016, the Notice on Printing and Issuing the Implementation Measures for the Mass Business in 2016 (for Trial Implementation), and some customer fee invoices for 2016.

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Judgment

On January 5, 2013, the Xi'an Intermediate People's Court of Shaanxi Province rendered the civil judgment (2012) Xi Min Si Chu Zi No. 438: (1) It was confirmed that Shaanxi Broadcasting and TV Network Media (Group) Co., Ltd.'s act of collecting the RMB 15 digital television program fee from the plaintiff Wu Xiaoqin on May 10, 2012 was invalid; (2) Shaanxi Broadcasting and TV Network Media (Group) Co., Ltd. should return RMB 15 to Wu Xiaoqin within ten days from the effective date of the judgment. Shaanxi Broadcasting and TV Network Media (Group) Co., Ltd. appealed, and the Higher People's Court of Shaanxi Province rendered the civil judgment (2013) Shaan Min San Zhong Zi No. 38 on September 12, 2013: (1) The first-instance judgment was revoked; (2) Wu Xiaoqin's claims were dismissed. Dissatisfied with the second-instance judgment, Wu Xiaoqin applied to the Supreme People's Court for retrial. On May 31, 2016, the Supreme People's Court rendered the civil judgment (2016) Zui Gao Fa Min Zai No. 98: (1) The civil judgment (2013) Shaan Min San Zhong Zi No. 38 of the Higher People's Court of Shaanxi Province was revoked; (2) The civil judgment (2012) Xi Min Si Chu Zi No. 438 of the Xi'an Intermediate People's Court of Shaanxi Province was affirmed.

Reasoning

The effective judgment held that the focus of the dispute in this case included: first, whether the conduct in dispute violated the provisions of Article 17, item 5 of the Anti-Monopoly Law; and second, whether the first-instance court's application of the Anti-Monopoly Law was appropriate.

I. On whether the conduct in dispute violated the provisions of Article 17, item 5 of the Anti-Monopoly Law

Article 17, item 5 of the Anti-Monopoly Law provides that an operator with a dominant market position is prohibited from, without justifiable reasons, tying the sale of goods or attaching other unreasonable trading conditions at the time of trading. In this case, Broadcasting Company clearly acknowledged in its first-instance defense that it was "the sole lawful operator of cable television transmission business within Shaanxi Province, approved by the Shaanxi Provincial Government. As the sole centralized controller of television program broadcasting within Shaanxi Province, Broadcasting Company held a dominant position in the cable television market of Shaanxi Province and encouraged users to choose richer cable television packages, but it had not abused its dominant market position, nor had it forcibly required users to consume service items that they must consume beyond the basic viewing service." In the second instance, although Broadcasting Company did not acknowledge this, it failed to adduce corresponding evidence that it did not hold a dominant market position. During the retrial review, Broadcasting Company did not raise any objection to the finding by the first- and second-instance courts that it held a dominant market position. Given that Broadcasting Company was the sole lawful operator of cable television transmission business within Shaanxi Province and the sole centralized controller of television program broadcasting within Shaanxi Province, the first- and second-instance courts' finding, on the basis of the facts as ascertained, that Broadcasting Company had advantages in all factors such as market access, market share, business status, and business scale in the cable television transmission market, and held a dominant position, was not improper.

On the question whether Broadcasting Company constituted a tie-in sale when providing services to Wu Xiaoqin. Article 17, item 5 of the Anti-Monopoly Law prohibits an operator with a dominant market position from tying the sale of goods without justifiable reasons. In this case, according to the facts as ascertained by the original-trial court, when Broadcasting Company provided services, its staff informed Wu Xiaoqin that the minimum monthly fee standard had been raised from RMB 25 to RMB 30 as of March 2012, and that a minimum of one quarter's fee had to be paid each time, but did not inform Wu Xiaoqin that he could pay the basic viewing maintenance fee for digital television or the fee for paid digital television programs separately. Wu Xiaoqin learned through consultation with Broadcasting Company's customer service center (service number 96766) that Broadcasting Company's program upgrade had added different fee-based programs with different packages, among which the minimum package had a basic viewing fee of RMB 360 per year,

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i.e., RMB 30 per month, and users had to pay at least three months' fees each time. Based on the foregoing facts, combined with the fact that the special fee invoice issued by Broadcasting Company to Wu Xiaoqin recorded the fee items of RMB 75 for the basic viewing maintenance fee for digital television and RMB 15 for the digital television program fee, it could be found that Broadcasting Company had in fact sold the basic viewing programs of digital television and the paid programs of digital television to Wu Xiaoqin together as a bundle, and had not informed Wu Xiaoqin whether he could separately purchase the basic viewing service of digital television. In addition, the reply from Broadcasting Company's customer service center (service number 96766) also corroborated that, when providing this service, Broadcasting Company collected and provided the basic viewing maintenance fee for digital television and the fee for paid digital television programs together. Although Broadcasting Company submitted in the second instance relevant invoices of its separate collection of the basic viewing maintenance fee for digital television from other users, that evidence could only prove that, when collecting the fee, there existed exceptional circumstances beyond the packages described by the customer service center. In the retrial, Broadcasting Company did not provide a reasonable explanation for the exceptional circumstances beyond the packages described by the customer service center, and the invoices of separate collection it submitted also occurred after the lawsuit in this case, which was insufficient to prove the circumstances at the time of the lawsuit and was therefore not accepted. Hence, the existence of exceptional circumstances beyond the packages described by the customer service center was insufficient to deny Broadcasting Company's general practice of collecting the basic viewing maintenance fee for digital television and the fee for paid digital television programs together. The second-instance court's finding that Broadcasting Company provided not only combined services but also basic services was insufficiently evidenced and should be corrected. Therefore, the existing evidence could not prove that ordinary consumers could pay only the basic viewing maintenance fee for digital television or the fee for paid digital television programs, i.e., it could not prove the existence of consumers' right of choice. The second-instance court, in the absence of proof of whether there was a right of choice, directly held that this case involved an infringement of consumers' right to know because consumers were not informed of their right of choice, and on that basis found that Broadcasting Company's sales conduct did not constitute a tie-in sale without justifiable reasons as regulated by the Anti-Monopoly Law; this was insufficient in both factual and legal basis and should be corrected.

According to the facts as ascertained by this court, the basic viewing maintenance fee for digital television and the fee for paid digital television programs were two separate services. In the original-trial proceedings and in the proceedings before this court, Broadcasting Company did not prove that providing the two services together conformed to the trade practice of providing digital television services; at the same time, if the basic viewing maintenance fee for digital television and the fee for paid digital television programs were collected separately, there was likewise no evidence that this would impair the performance and use value of the two services; and Broadcasting Company further failed to explain the justifiable reasons for the foregoing conduct. Under these circumstances, Broadcasting Company, taking advantage of its dominant market position, collected the basic viewing maintenance fee for digital television and the fee for paid digital television programs together, which objectively affected consumers' choice of other service providers to provide the relevant digital paid programs, and was likewise unfavorable to other service providers' entry into the television service market, producing an unfavorable effect on market competition. Therefore, the first-instance court's finding that it violated the provisions of Article 17, item 5 of the Anti-Monopoly Law was not improper. Some of Wu Xiaoqin's grounds for retrial application were established and were supported.

II. On whether the first-instance court's application of the Anti-Monopoly Law was appropriate

In the proceedings, Broadcasting Company argued in its defense that this case was in substance a dispute over whether Wu Xiaoqin's rights that he should enjoy under the Law on the Protection of Consumer Rights and Interests had been infringed, and was unrelated to monopolistic conduct, and that the first-instance court should not have relied on the Anti-Monopoly Law and relevant provisions to find that it held a dominant market position and thereby confirm that its fee collection was invalid. According to Articles 226 and 228 of

the Interpretation of the Supreme People's Court on the Application of the Civil Procedure Law of the People's Republic of China, the people's court should, based on the parties' claims, defense opinions, and the exchange of evidence, summarize the focus of the dispute, and solicit the parties' opinions on the summarized focus of the dispute. At the hearing, the trial should be conducted around the focus issues of the facts, evidence, and application of law in dispute between the parties. According to the facts as ascertained, Wu Xiaoqin clearly asserted in his complaint that "the defendant's collection of the digital television program fee from the plaintiff was in fact the defendant's provision of additional services beyond the scope of the above services to the plaintiff, over which the plaintiff should have the right of independent choice. The defendant was a public utility enterprise or other operator with an exclusive position under the law, and held a dominant position in the digital television market. The defendant's above conduct violated Article 17, paragraph 1, item 5 of the Anti-Monopoly Law concerning 'the prohibition of an operator with a dominant market position from engaging in the abuse of dominant market position by tying the sale of goods without justifiable reasons, or attaching other unreasonable trading conditions at the time of trading', and infringed the plaintiff's lawful rights and interests. The plaintiff, pursuant to the 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, brought a civil lawsuit requesting the people's court to confirm in accordance with the law that the defendant's tying transaction was invalid, and to order it to return RMB 15 to the plaintiff." In that complaint, Wu Xiaoqin did not assert that his consumer rights and interests had been damaged. Therefore, the first-instance court's application of the Anti-Monopoly Law to the trial based on Wu Xiaoqin's claims was not improper.

In sum, Broadcasting Company held a dominant market position in the cable television transmission service market within Shaanxi Province, and it sold the basic viewing service of digital television and the paid program service of digital television to Wu Xiaoqin together as a bundle, in violation of the provisions of Article 17, paragraph 1, item 5 of the Anti-Monopoly Law. Wu Xiaoqin's retrial claims to confirm that Broadcasting Company's act of collecting the RMB 15 digital television program fee from him was invalid and to order the return of RMB 15 were established. The first-instance judgment ascertained the facts clearly and applied the law correctly and should be affirmed; the second-instance judgment was insufficient in its factual basis and erroneous in its application of law and should be corrected.

Relevant Legal Provisions

Article 17, paragraph 1, item 5 of the Anti-Monopoly Law of the People's Republic of China.

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