

China's MIIT Solicits Comments on Draft Internet Rules

On January 14, 2011, China's Ministry of Industry and Information Technology ("MIIT") unveiled draft rules to regulate competition between providers of internet information services ("PIIS")¹ and to protect users' rights and online personal data. The draft rules, entitled "Provisional Regulations for Maintaining the Social Order of the Internet Information Service Market" (the "Draft Internet Rules") appear to have been prompted by a recent dispute between two top Chinese Internet companies, Tencent and Qihoo. MIIT will accept comments on the draft rules until February 14, 2011.

The Draft Internet Rules are very broad, addressing issues that commonly arise in the antitrust, unfair trade and consumer protection contexts. If adopted, the Draft Internet Rules would have far-reaching implications for companies offering Internet-related products and services in China. The rules could also influence the development of Chinese antitrust law by the State Administration of Industry and Commerce ("SAIC"), the agency responsible for enforcing the Chinese Anti-Monopoly Law (the "AML") with regard to non-price-related anti-competitive conduct.

As background, the first part of this Memorandum describes the dispute between Tencent and Qihoo (the "Tencent-Qihoo Dispute"). The second part of this Memorandum summarizes the main provisions of the Draft Internet Rules.

¹ The Draft Internet Rules do not define the term "providers of Internet information services." According to Article 2 of the "Administrative Measures for Internet Information Services" promulgated by the State Council in 2000 (the "Administrative Measures"), the term "Internet information service" means the provision of information services through the Internet to online subscribers. Article 7 of the Administrative Measures requires providers of commercial Internet information services to obtain an operating permit, commonly known as an "ICP license." Thus, it seems the term "providers of Internet information services" mainly refers to Internet content providers ("ICPs"). Notably, although both Tencent and Qihoo are providers of application software, they are also ICPs, and they both have obtained ICP licenses in China. The Draft Internet Rules may be intended to apply to all activities of ICPs, regardless of whether those activities are directly related to the provision of online information.

I. BACKGROUND

Tencent is the operator of “QQ,” a popular instant-messaging tool in China. Qihoo is the provider of “360,” widely used antivirus software in China. On September 26, 2010, Qihoo alleged that its 360 software detected that QQ had engaged in suspicious spying activities in relation to the private files and data of QQ users. It subsequently launched the “360 Privacy Guard” software, which was designed to detect data that QQ had extracted from users’ computers. Tencent responded by filing a complaint with the Beijing Chaoyang District People’s Court on October 14, 2010, alleging that Qihoo had violated China’s Anti-Unfair Competition Law by fabricating and publicizing false information about QQ. The dispute intensified further on November 3, 2010, when Tencent asked its users to uninstall 360, alleging that the software would disrupt certain features of QQ and undermine its information security. Li Changqing, a lawyer based in Beijing, later filed a complaint with SAIC alleging that Tencent had abused its dominant position in the instant messaging software market by forcing its users to uninstall 360 without a valid reason. Mr. Li argued that Tencent had violated Article 17(4) of the AML, which concerns exclusive dealing. So far SAIC has not officially taken any action against these two companies.

On November 21, 2010, MIIT issued an announcement criticizing the unfair competitive practices of Tencent and Qihoo. MIIT ordered both companies, among other things, to issue public apologies within five working days, to cease attacking each other and to guarantee mutual compatibility. The announcement also mentioned that MIIT and other relevant authorities would conduct further investigations of suspected illegal actions by both companies. A few hours later, both companies issued public apologies, and the dispute was resolved.

II. THE DRAFT INTERNET RULES

A. THE LEGAL FRAMEWORK

MIIT is mainly responsible for overseeing China’s telecommunication industry. MIIT drafted the Draft Internet Rules under the Telecommunications Regulations of the People’s Republic of China and the Administrative Measures for Internet Information Services of September 2000. The Draft Internet Regulations would be enforced primarily by MIIT and local telecommunication agencies.

B. PRINCIPAL SUBSTANTIVE PROVISIONS

The Draft Internet Rules relate to a wide range of conduct by PIIS, including interference with competitors’ products and the protection of user rights and to the

protection of online personal data. The Draft Internet Rules reflect a mixture of antitrust, unfair trade law and consumer protection principles. They overlap to a certain extent with the Chinese Anti-Unfair Competition Law² and the Consumer Protection Law.³

Below is a summary of the principal substantive provisions of the Draft Internet Rules.

1. **Prohibition Against Interference**

Article 6 of the Draft Internet Rules provides that PIIS are prohibited from:

- Taking unauthorized measures, without reasonable justification, to cause competitors' products to be incompatible with their own or misleading or inducing users to make choices when incompatibility occurs with "existing" products or services due to "non-human factors";
- Preventing competitors' products or services from operating on user devices, tampering with the contents of competitors' products or services, or intercepting information from said products or services; and
- Misleading, deceiving, or compelling users to uninstall or shut down competitors' products or services.

In addition, Article 7 of the Draft Internet Rules prohibits PIIS from conducting independent testing of competitors' products or services suspected of violating users' security or private data. Instead, PIIS would be required to submit the suspected product or service to an authoritative third-party organization for evaluation. The Draft Internet Rules do not define "authoritative third-party organization," but future regulations may provide further guidance on this issue.

The prohibition against taking measures to cause "incompatibility" with competitors' products is very broad. In particular, in contrast to cases addressing interoperability issues

² Similar to Article 6(1) of the Draft Internet Rules, Article 14 of the Anti-Unfair Competition Law also prohibits defamation of competitors' products. As SAIC is the primary regulator of the Anti-Unfair Competition Law, it is unclear how SAIC and MIIT would handle the concurrent jurisdiction over a defamation case.

³ The protection of user rights overlaps with some of the provisions under the Consumer Protection Law, including consumers' rights to know the true situation of the products/services (Article 8), consumers' right to choose freely between products and services (Article 9) and consumers' right to fair dealing (Article 10).

under antitrust laws, the Draft Internet Rules are not limited to PIIS holding a dominant market position. While the Draft Internet Rules do not impose an affirmative obligation to assure interoperability, for products developed after the Draft Internet Rules enter into force, the question may arise whether development based on proprietary systems without providing for interoperability would be considered taking measures to cause competitors' products to be incompatible. The interpretation of the phrases "reasonable justification" and "non-human factors" can also be expected to generate considerable uncertainty.

2. Protection of User Rights

Article 8 of the Draft Internet Rules prohibits PIIS from unilaterally refusing, delaying or ceasing, without reasonable justification, to provide services to any user, forcing users to use services designated by them, or restricting users' freedom to use other PIIS' products. Article 9 prohibits PIIS from installing or uninstalling software on user devices without consent, failing to include an install option or leaving executable code or other documents on user devices after uninstallation when there is no interaction with other software or no intentional sabotage; or altering users' browsers or other key configurations without consent.

The prohibition against refusing to provide services again is worded much more broadly than would be considered appropriate in cases involving exclusive dealing issues under antitrust law. Again, the Draft Internet Rules are not limited to companies with dominant market positions. Even for dominant companies, making out a case that exclusive dealing or a refusal to supply violates antitrust laws is typically quite difficult. The practical impact of the Draft Internet Rules in this area is likely to depend significantly on what justifications are considered "reasonable."

3. Protection of Personal Data

The Draft Internet Rules would provide for comprehensive protection of online personal data. Article 12 prohibits PIIS from collecting or storing users' personal data. If private data is required for identification or is needed for the service to operate, then the user must be clearly informed as to the content and purposes for which the data will be used. Unless provided under other legislation, no organization or individual can provide user data to a third party for any reason. Moreover, PIIS are legally responsible for keeping users' personal data confidential and should increase system security accordingly (Article 13). Additionally, PIIS must guarantee the security of user data and guarantee users' rights to modify or delete said data at any time (Article 14).

The Draft Internet Rules' privacy-related provisions seem to have taken a more aggressive approach to data privacy protection than the E.U. and the United States have followed.

III. CONCLUSION

The Draft Internet Rules' development reflects the fluid nature of Chinese rules on competition. The Tencent-Qihoo Dispute provoked a complaint to SAIC under the AML and a lawsuit under the Chinese Anti-Unfair Competition Law. But it was MIIT that intervened to resolve the dispute, using its powers to regulate the Chinese telecommunications sector, and MIIT now proposes broad new rules that will have major implications for Internet-related products and services.

The Draft Internet Rules address a wide range of issues that in Europe and the United States have given rise to protracted antitrust litigation and investigations, such as software interoperability, and have given rise to extensive special-purpose legislation, such as privacy protection. Addressing such a wide range of issues in one broadly worded set of rules will doubtlessly give rise to many questions as these rules are finalized and implemented.

It is also unclear whether the Draft Internet Rules will influence SAIC's interpretation of the AML as it applies its enforcement powers to non-price antitrust violations, in particular exclusive dealing and refusals to supply. Although SAIC has not yet announced any decision under the AML, it recently adopted a relatively complete set of implementation rules and may be expected to become more assertive in the coming years.

* * *

If you have any questions, please feel free to contact any of your regular contacts at the firm or any of our partners and counsel listed under Antitrust and Competition in the "Practices" section of our website at <http://www.clearygottlieb.com>.

CLEARY GOTTLIEB STEEN & HAMILTON LLP

NEW YORK

One Liberty Plaza
New York, NY 10006-1470
1 212 225 2000
1 212 225 3999 Fax

WASHINGTON

2000 Pennsylvania Avenue, NW
Washington, DC 20006-1801
1 202 974 1500
1 202 974 1999 Fax

PARIS

12, rue de Tilsitt
75008 Paris, France
33 1 40 74 68 00
33 1 40 74 68 88 Fax

BRUSSELS

Rue de la Loi 57
1040 Brussels, Belgium
32 2 287 2000
32 2 231 1661 Fax

LONDON

City Place House
55 Basinghall Street
London EC2V 5EH, England
44 20 7614 2200
44 20 7600 1698 Fax

MOSCOW

Cleary Gottlieb Steen & Hamilton LLP
CGS&H Limited Liability Company
Paveletskaya Square 2/3
Moscow, Russia 115054
7 495 660 8500
7 495 660 8505 Fax

FRANKFURT

Main Tower
Neue Mainzer Strasse 52
60311 Frankfurt am Main, Germany
49 69 97103 0
49 69 97103 199 Fax

COLOGNE

Theodor-Heuss-Ring 9
50688 Cologne, Germany
49 221 80040 0
49 221 80040 199 Fax

ROME

Piazza di Spagna 15
00187 Rome, Italy
39 06 69 52 21
39 06 69 20 06 65 Fax

MILAN

Via San Paolo 7
20121 Milan, Italy
39 02 72 60 81
39 02 86 98 44 40 Fax

HONG KONG

Bank of China Tower
One Garden Road
Hong Kong
852 2521 4122
852 2845 9026 Fax

BEIJING

Twin Towers – West
12 B Jianguomen Wai Da Jie
Chaoyang District
Beijing 100022, China
86 10 5920 1000
86 10 5879 3902 Fax