

China Drafts Measures for Fair Competition and Consumer Protection on the Internet

Regulation inspired by battle between Tencent and Qihoo over security software

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In January 2011 the Ministry of Industry and Information Technology of China (MIIT) released its Interim Measures on the Supervision and Administration of the Internet Information Service Market (Draft Seeking Opinions) (“Measures”). The Measures are a short document with a challenging task: to maintain fair and orderly competition in the Internet information service market while protecting the legitimate rights and interests of users. The Measures overlap with several other laws and regulations, including China’s Anti-Unfair Competition Law and its Telecommunications Regulations.

To those who witnessed the high-profile battle between Tencent and Qihoo, which reached its zenith in November 2010, it is clear that the Measures are MIIT’s direct answer to the problems facing China’s Internet information service market: problems that must be overcome if China’s Internet is to be competitive and robust.

The outcome of this clash of wills signals an increased level of government involvement in what will be an ongoing give-and-take between Internet companies and China’s legal and jurisdictional establishment. All businesses involved should be aware of developing issues and stay current with China’s evolving regulatory environment. This advisory provides a brief background on the dispute, details how MIIT has responded, and discusses some key issues and questions still facing Internet companies, as well as Internet users, in China.

Background

Tencent built its Internet empire around its most successful product, QQ, an instant messaging (IM) tool that dominates China’s IM market. Since the beginning of 2010, Tencent has been trying to expand to the antivirus software market by bundling its own security software with QQ, thus threatening Qihoo’s 360, the leading product in China’s antivirus software market.

In October 2010, Qihoo claimed that QQ was secretly spying on its users and collecting data without their approval. To solve the problem, Qihoo launched new security software that blocked some of QQ’s functions. The software soon became extremely popular among QQ users. Tencent, claiming that the software was malicious and that it “kidnapped” QQ, announced in November 2010 that it had decided to disable QQ in all the computers on which Qihoo’s new security software had been installed.

Hundreds of millions of users in China were forced to choose sides, and either uninstall QQ or Qihoo’s security software. Also, in this dispute, each company used numerous pop-up windows on users’ computers that attacked the other company, and released evaluation reports claiming that the other company’s software was malicious, and thus illegal.

Most netizens in China were affected by this dispute. They complained that the two companies cared more about their business interests than about their users and that the customers’ own computers became a battlefield for the two companies. Lawyers and scholars commented that the companies had violated the Anti-Unfair Competition Law and the Law on the Protection of the Rights and Interests of Consumers, and that Tencent’s acts—tying and exclusive dealing—had violated the Antitrust Law.

MIIT quickly took control by holding internal meetings with the two companies, and then issuing an announcement ordering the two companies to stop the fight, resume their products’ compatibility, and apologize to their users. MIIT also said it would, with other relevant authorities, further investigate suspicious conduct at both companies.

Application of the Measures

The detailed provisions of the Measures are clearly tailored to the conduct of the two companies in this dispute. They forbid the following “unfair competition practices”:

- Defaming competitors or their products;

- Unjustifiably rendering others' legitimate products incompatible;
- Interfering with the operation of others' legitimate products; and
- Misleading, deceiving, or forcing users to uninstall or stop others' legitimate products.

Under the Measures an Internet information service provider should be very careful about criticizing another provider's products or services. The Measures state that, when one Internet information service provider raises a question about the security, privacy protection, or quality of another provider's products or services, the criticizing provider cannot evaluate and then publish an evaluation report by itself. Instead, it has to submit its question to a third-party authority for evaluation.

Some commentators have noted that the Measures, in this regard, are stricter than the Anti-Unfair Competition Law, which only forbids defaming competitors or their products by fabricating falsehoods, but not by making justifiable comments or critiques. Since the Anti-Unfair Competition Law is superior to the Measures in China's legal system, this provision may be problematic.

Consumer protection provisions

Other provisions of the Measures aim at protecting the interests and privacy of Internet users. The Measures forbid the following conduct that infringes users' legitimate rights and interests:

- Unjustifiably delaying or stopping services to users;
- Confining users to a providers own services or restraining users from choosing another provider's legitimate services;
- Without notifying users and obtaining their consent, installing, executing, upgrading, or uninstalling any software on users' equipment, or changing important settings on users' computers.

Forcibly bundling software and interfering pop-up windows is expressly forbidden. The Measures also require Internet information service providers to ensure the safety of users' personal information, and forbid them from collecting, processing, or disclosing users' personal information without explicit authorization by law or the explicit consent of users.

Dispute resolution

An entire chapter of the Measures is devoted to dispute resolution. It states that MIIT encourages the Internet industry to be self-disciplined, and that disputing parties should try to solve disputes through negotiation or mediation organized by industrial associations. However, MIIT and its local branches also may play an important role as the arbitrator. Article 18 states that once MIIT or one of its local branches issues a mediation opinion on the dispute, the disputing parties must execute it within the period stipulated by the opinion.

The Measures do not specify whether a disputing party may appeal the opinion under the Administrative Procedure Law or initiate a lawsuit against the other party after the issuance of the opinion.

Heeding the voice of the netizens: Will the sanctions deter?

Overall the Measures highlight the authorities' efforts to regulate the Internet information service market and to protect users from the impact of unethical competition on the market. There are now more than 400 million netizens in China, and the QQ-360 battle had a tremendous impact on many of them. MIIT's release of the Measures sends a strong signal that it intends to intervene when large portions of China's Internet community are affected.

The punishments for violating the Measures may not be enough to deter undesirable conduct. Violation of the provisions on unfair competition practices may result in a fine of between RMB 100,000 to 1 million. For violation of the provisions on users' interests and privacy, the fine ranges from RMB 10,000 to 100,000; in serious cases, the business may be ordered to shut down. For a company like Tencent, whose gross profit in 2009 exceeded RMB 8 billion, even the highest fine of RMB 1 million seems nominal compared with the interests at stake for Tencent.

Regulatory and jurisdictional issues

The Internet information service market is complex, and the Measures overlap with other laws on competition and consumer protection. This leads to potential conflicts among these overlapping laws and coordination difficulties among different government departments. For example, according to the Anti-Unfair Competition Law, the administrative authority for industry and commerce has jurisdiction over unfair competition conduct. But in the Measures, MIIT claims that it has such jurisdiction in the Internet information service market. Article 3 of the Measures states that when other administrative departments are involved, MIIT should contact relevant authorities for joint administration. How this coordination will be accomplished and whether it is practical is unclear.

Another question at issue is the role of MIIT. While hundreds of millions of users were struggling with the incompatibility of QQ and 360, MIIT made the two companies reach a solution in several days. It was indeed the fastest way to solve the problem, and the Measures show that MIIT is determined to continue to rely on its administrative power to regulate the market. However, such power may not be best for the long-term development of the market. Administrative decisions are less transparent and probably more arbitrary compared with litigation.

Conclusion

The Measures are not final, and are subject to changes. Even so, for Internet companies there are a few things worth taking notice of in the Measures:

- The Chinese government's efforts to regulate the Internet information service market, which is becoming increasingly important to the people of China;
- The expanding power of MIIT to resolve disputes in this market. MIIT tries to quickly solve problems on the administrative level;
- Companies should be more careful when criticizing competitors—even when those criticisms are fair and justifiable;
- Users' interests should always be a company's first concern, not how to defeat rivals.

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