

China's MIIT Issues Final Internet Rules

On December 31, 2011, China's Ministry of Industry and Information Technology ("MIIT") published final rules on competition between providers of Internet information services ("PIIS"), users' rights and protection of online personal data (the "Internet Rules").¹ An interpretation of the Internet Rules (the "Interpretation") was published on the same day.² The Internet Rules will come into effect on March 15, 2012.

The Internet Rules reflect a mixture of antitrust, unfair trade law and consumer protection principles and overlap to a certain extent with each of the Chinese Anti-Monopoly Law, Anti-Unfair Competition Law and the Consumer Protection Law. This Memorandum summarizes the scope and main substantive provisions of the Internet Rules.

I. SCOPE

The Internet Rules do not define "PIIS." According to Article 2 of the Administrative Measures for Internet Information Services, however, "Internet information services" ("IIS") means the provision of information services through the Internet to online subscribers. The Internet Rules are also vague as regards the "relevant activities" to which they apply. The Interpretation indicates that the installation of software, evaluation and testing, and protection of users' personal information are relevant activities. The substantive rules described below cover a wide range of activities, suggesting that the terms PIIS and "relevant activities" will be interpreted broadly.

II. PRINCIPAL SUBSTANTIVE PROVISIONS

The Interpretation summarizes six principal areas regulated by the Internet Rules. We summarize each area below.

¹ "Rules on Regulating the Market Order of Internet Information Services", available at: <http://www.miit.gov.cn/n11293472/n11293832/n12843926/n13917012/14414975.html>. MIIT previously published two drafts, on January 14 and July 27, 2011.

² The Interpretation (in Chinese) is available at: <http://www.miit.gov.cn/n11293472/n11293832/n12771663/14417071.html>.

A. PROHIBITION AGAINST INTERFERENCE

Article 5 prohibits PIIS from:

- Maliciously disturbing competitors' services operating on user devices or disturbing a competitor's IIS-related products from being downloaded, installed, operated, or updated;
- Maliciously making incompatible a competitor's services or related products; and
- Maliciously tampering with or deceiving, misleading, or compelling users to tamper with the operating parameters of a competitor's services or related products.

The requirement that prohibited interference be "malicious" represents a narrowing of the Internet Rules' scope compared to prior drafts. The Interpretation acknowledges that incompatibility issues are common in the security software industry and would be better resolved by the operation of the free market than by regulation.

B. EVALUATION AND TESTING

Under Article 6, if PIIS publish the results of evaluation and testing of competitors' products or services or provide those results to their customers, they are required to provide information on the evaluator, evaluation method, data sources, customers' evaluation and evaluation environment. PIIS may not make any subjective comments regarding the results of their evaluations of competitors' services or products.

C. PROTECTION OF USER RIGHTS

Article 7 prohibits PIIS from:

- Refusing, delaying or suspending IIS or products without reasonable justification;
- Requiring customers to use or refrain from using PIIS-designated IIS or products without reasonable justification;
- Taking deceiving, misleading, or coercive measures to provide customers with IIS or products;

- Supplying IIS or related products that are not consistent with their advertisements or promises;
- Changing their services agreements or business processes without authorization if the change results in a reduction of service quality or an increase in customers' obligations;
- Failing to inform customers of or to explain to customers incompatibility between the PIIS services' or products' and those of competitors; and
- Modifying customers' browser configuration or other settings without their agreement.

The Internet Rules expanded Article 7 compared to prior drafts but introduced a welcome “without reasonable justification” to the prohibition against forcing users to use or refrain from using services or related products designated by the PIIS.

D. RULES OF INSTALLING, OPERATING, OR TYING SOFTWARE ON USERS' DEVICES

Article 8 permits PIIS to download, install, operate, update, or uninstall software on user devices if PIIS provide clear and complete information on the software's function and receive the user's consent. PIIS are required to provide a convenient option for software uninstallation. Absent interference from other software or intentional man-made disruption, PIIS are prohibited from leaving, without user permission, executable code or other documents on user devices after uninstallation.

Article 9 provides that where a PIIS wants to bundle two or more pieces of software, the PIIS should make this clear to consumers. Consumers must have the option to prevent installation of, and to uninstall or turn off, bundled software without unreasonable conditions.

E. RULES ON POP-UP ADS

Article 10 provides that users must have an obvious option to turn off or exit pop-up ads if a PIIS delivers pop-up ads or other pop-ups that are unrelated to software functions. The Internet Rules dropped the prohibition in prior drafts of the reappearance of the same pop-ups without reasonable justification after users turn them off or exit. The Interpretation indicates that this provision was deleted because online advertisement generates turnover that supports the provision of IIS for free.

F. PROTECTION OF PERSONAL DATA

The Internet Rules define “users’ personal data” as information that is related to users and could, on its own or combined with other information, identify users. Article 11 prohibits PIIS from providing users’ personal data to a third party or collecting such data without users’ consent, unless other laws or regulations state otherwise. When PIIS collect users’ personal data, PIIS must inform users of the content of the data and the purposes for which, and the means by which, the data will be collected and used. The collection and use are limited to data that are necessarily linked to PIIS services.

PIIS are legally responsible for keeping users’ personal data confidential. In case of disclosure or possible disclosure of stored users’ personal information, PIIS should promptly take remedial measures (Article 12). PIIS must guarantee the security of users’ data and guarantee users’ rights to use, modify or delete said data at any time (Article 13).

III. CONCLUSION

The Internet Rules will likely have a significant impact for many providers of information technology and telecommunications products and services in China, as well as companies in other sectors that provide goods or services in China over the Internet. The scope of the rules is very broad, covering activities that in other contexts may be the subject of antitrust or unfair competition rules. The Chinese regulatory environment was already complicated, with the Ministry of Commerce, the National Development and Reform Commission and the State Administration for Industry & Commerce frequently having overlapping jurisdiction. MIIT’s involvement as the regulator of IIS adds further regulatory complexity.

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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>.

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