

New Internet Rules in China

Summary

The PRC Ministry of Industry and Information Technology (“MII”) has recently promulgated “Several Provisions on Regulating the Market Order of Internet Information Services” (“Provisions”) to ensure a level playing ground for website operators in China and to enhance protection to Internet users in areas such as Internet security, web advertising and data protection. The Provisions will come into effect on 15 March 2012.

Background

According to the MII officials, the key objectives of the Provisions are in response to the increasing number of malpractices of Internet service providers (commonly referred to “Website Operators”) and online illegal activities ; and to safeguard consumer interests.

On 12 January 2011 and 27 July 2011, MII released respectively for public consultation a draft of the “Interim Measures on Supervision and Management of the Market Order of Internet Information Services” and “Regulations for Internet Information Services Management”. The Provisions appear to have combined the core provisions of those two initiatives.

Anti-competition

The Provisions prohibit Website Operators from engaging in unfair practices that would prejudice the legitimate interests of another Website Operator, such as:-

- i) maliciously interfering with the services of another Website Operator or its software;
- ii) making false statements or spreading false rumours about another Website Operator or disparaging its services or products;

- iii) maliciously making one’s products (likely software) incompatible with those of another Website Operator;
- iv) deceiving, misleading or compelling users to use or not to use the services or products of another Website Operator; and
- v) maliciously modifying the parameter(s) of the services or products (usually software) of another Website Operator, or deceiving, misleading or compelling users to do so.

Software bundling has long been a serious issue from the antitrust perspective. The Provisions now stipulate that if a Website Operator has bundled another software with its user terminal software, it should:-

- i) prominently notify the users and allow them to choose whether to install and/or use the bundled software;
- ii) provide independent tools to uninstall or shut down the bundled software; and
- iii) not impose any unreasonable conditions on users.

Consumer Protection

Various measures are placed to provide a higher level of consumer protection for services or products offered to the Mainland China consumers via the Internet. These include:-

- i) Product/ Service Evaluation - Any assessment and evaluation made in respect of the services and/or products of a Website Operator must be fair, objective and accurate. If an assessor makes available to the public an evaluation report about certain products or services of a Website Operator, all the relevant information such as the assessor’s identity, the assessment method,

approach and environment, the data source, the users' original comments, etc. must also be released.

ii) Users' Rights - The Provisions prohibit Website Operators from engaging in a number of activities that may undermine the users' rights, including:-

- » delaying or terminating the provision of services or products without a legitimate reason;
- » imposing restrictions on users to use or not to use the services or products of a particular Website Operator without a legitimate reason;
- » providing services or products in a deceitful or misleading manner or by way of coercive means;
- » providing services or products which are inconsistent with their representations or promises;
- » unilaterally amending service agreements or business policies to downgrade the service quality or shift the burden to users;
- » not alerting nor explaining to users in case their services or products are incompatible with other Website Operators';
- » modifying the settings of the users' browsers or other devices without prior alert and users' consent.

iii) Software - Website Operators are required to provide clear and complete software functionality information and obtain users' consent before allowing users to download, install, run, upgrade or uninstall a software. Website Operators are prohibited from deceiving, misleading or compelling their users to do any of the above action and leaving any executable code (such as virus or malware) or other unnecessary features in the users' computers without users' consent. Website Operators must also provide an equivalent or a more convenient way to uninstall their software on the users' computers.

iv) Pop-up Window Advertisement - If a Website Operator displays any pop-up window advertisement or any pop-up window unrelated to the user's terminal software, it shall ensure that buttons to close or exit those windows are

shown prominently.

v) Data Protection - China does not have data privacy law as yet. This is the first time the Chinese government attempts to define personal data in the PRC laws. Under the Provisions, "User's Personal Data" refers to any data which is related to a user and is able to identify a user if used independently or in conjunction with other information. Such broad definition is similar to, or arguably broader than that in the Hong Kong Personal Data (Privacy) Ordinance, Cap.486. Website Operators are not allowed to collect a User's Personal Data or disclose the same to a third party without the user's consent, unless otherwise provided for by laws or administrative regulations. Upon obtaining the users' consent (interestingly, not before obtaining consent), Website Operators shall inform users the method and purpose of collection and process of the data and what information has been collected. Website Operators are not allowed to collect any data more than necessary to enable them to provide services or use the Users' Personal Data for any purpose other than for the provision of services. Website Operators shall properly keep their Users' Personal Data and take immediate remedial actions in case of an actual or potential leakage of information. They shall report any leakage to the local telecommunications authority and assist in the investigation if the incident may cause serious consequences. As in many PRC laws, it is not specified in the Provisions what may constitute "serious consequences" and such term is subject to interpretation on a case by case basis.

vi) Information Security - Website Operators shall safeguard the security of the information uploaded by users ("Uploaded Information") and allow users to use, modify and delete the Uploaded Information. Website Operators are prohibited from modifying or deleting the Uploaded Information without a legitimate reason; disclosing the Uploaded Information to others without users' consent; and transferring the Uploaded Information without authorisation; or impersonating, deceiving, misleading or compelling users to transfer the Uploaded Information.

- vii) **Complaint Process** - A Website Operator must show its contact information prominently on its website and accept complaints from users or other Website Operators and respond thereto within 15 days upon receiving the complaint.

Penalty

Any violation of the Provisions may attract a fine of RMB 10,000 - 30,000 (~US\$1,580 - \$4,760). Though the fine is relatively low, Website Operators, who are in breach of the Provisions, may put their reputation and goodwill at risk because the telecommunications authorities have the power to make a public announcement about the wrong doings.

Conclusion

The Provisions have filled up a good number of the loopholes in China's Internet regulatory regime, which were not deal with by the existing laws such as the Telecommunications Law, the Anti-Unfair Competition Law and the Anti-Monopoly Law.

It remains to be seen how MII and the telecommunications authorities are going to enforce and interpret the Provisions. Yet, all Website Operators in China, particularly those who offer online services and transactions to the Mainland Chinese Internet users, shall take heed to ensure due and timely compliance of the new Provisions.

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