TMT China Brief

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Hogan Lovells

Editor's note

Welcome to this edition of our bi-annual TMT China Brief!

This edition features a total of 19 articles which capture the significant TMT developments in Greater China since our last TMT China Brief. The sheer number of articles is testimony to the rapidly changing TMT legal landscape in this region.

For Mainland China, we have seen a series of new or draft laws and regulations which continue the "secure and controllable" theme underlying many recent legislative initiatives. Among them, the most significant is perhaps the second draft of the Cyber Security Law which we see as proposing more stringent regulation of China's cyberspace. Another important legislative reform is the draft amendments to the Anti-Unfair Competition Law (which has not been amended since its enactment in 1993) – among other changes, the proposed new intellectual property, antitrust and anti-bribery provisions could all have significant implications for TMT players in China.

On a more micro level, China has issued new or draft rules which target specific aspects of online activities, including online advertising, online publishing and domain name registrations. Some of these initiatives have raised a few eyebrows among foreign businesses who are concerned with being fenced off from the Chinese audience by the "Great Firewall." In our articles we offer our views on the controversies and have tried to distinguish between the fact and the fiction.

Amid these controversies, there is no doubt that China is striving to keep its TMT regime up-to-date with the advancement in technology. In this edition, we discuss the changes to China's telecommunications catalogue, online ride-hailing and cross-border film/media regulations as well as some recent cases and developments in the antitrust, data privacy and Intellectual Property fields.

For Hong Kong, two topics relevant to TMT players, namely data privacy and cybersecurity, are increasingly getting the attention of Hong Kong's regulators. Here we have captured Hong Kong's developments on this front, as well as a rare but interesting case relating to its anti-spam laws.

We trust that our TMT China Brief can help you navigate through all these new developments.

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China’s second draft of the Cyber Security Law

More stringent regulation of cyberspace

On 6 July 2016, a second draft of the Cyber Security Law (Draft 2) was released to the public for comment following its second reading by the Standing Committee of the National People’s Congress. The open period for submitting comments on Draft 2 closed on 4 August 2016.

Given the growing cyber threat globally, the Chinese government moves towards more rigorous cyber security regulation are in line with international trends. However, the specific approach to regulation being taken in China is a clear outlier, primarily for the broad and often imprecise terminology used in the draft law and also for the invasive and potentially discriminatory nature of the regulation.

The immediate reaction to first draft of the Cyber Security Law (Draft 1) was therefore confusion as to who the law would apply to and what requirements the law will bring to those within its reach. More broadly, the Cyber Security Law has raised fundamental concerns about regulatory intention, and in particular whether or not the law is meant to close certain areas of business to foreign participation.

We discuss below how Draft 2 now carries forward the key aspects of Draft 1, which we have categorised under the headings of technology regulation, co-operation with authorities, and data localisation.

Technology regulation

As in Draft 1, Draft 2 requires that “critical network equipment” and “specialized cyber security products” be inspected or certified by a qualified institution before they can be sold in China (see Article 22 in Draft 2). Both drafts envisage that an official catalogue will be issued identifying which equipment and products will specifically be subject to this rule.

The idea of restricting the use of technology in China to a closed list of pre-approved products is an important area of focus for most multinationals dealing in China, not just technology companies that could be facing approval requirements, but also companies reliant on foreign technologies that may or may not in future be available if a necessary certification is not forthcoming. Inspections and certifications may delay a product’s entry to the market and, as was the case with Draft 1, Draft 2 leaves open precisely how invasive any proposed inspections of technology would be.

Where Draft 2 differs from Draft 1 is in the introduction in Article 15 of a responsibility on the State Council and the governments at the provincial level to promote the use of “secure and reliable” network products and services. Draft 2 does not offer a definition of “secure and reliable” technology, nor does it elaborate on what the promotion of this classification of technology will mean in practice.

While Article 15 may just be a general call for technology to meet “secure and reliable” standards in the ordinary sense of the word (which may well be hard to argue against), the provision comes against the backdrop of the introduction of similar terminology (“secure and controllable”) to technology guidelines put forward in the banking and financial services sector. Those guidelines proposed a “secure and controllable” quota system, which engendered strong pushback, primarily driven by concerns that “secure and controllable” might in effect mean that only domestic Chinese products hand-picked by the authorities would be available for use in those industry sectors. If this view is correct, there would be a regulatory basis to

discriminate against foreign technology businesses which have developed their products offshore and so may be viewed by Chinese authorities and businesses to be inherently incapable of being "secure and controllable." By introducing a concept of "secure and reliable" into the Cyber Security Law, Article 15 of Draft 2 requires elaboration in order to avoid adding further to these concerns.

Co-operation with authorities

Article 27 of Draft 2 continues with Draft 1's obligation on "network operators" to provide technical support and assistance to public security organs and national security organs for their activities of lawfully protecting national security and investigating crimes.

The scope of the term "network operator" is considered by many observers to be unclear. In Draft 1, a network operator was defined to be "an owner or manager of any cyber network, and a network service provider who provides relevant services using networks owned or managed by others, including a basic telecommunications operators, network information service provider, important information system operator and so forth." Draft 2, by contrast, pares this back to "owner or manager of any cyber network, and a network service provider."

While there is a difference of wording, we still read both texts to define the term on fairly broad terms and so expect that Draft 2 would likely be interpreted in practice, as Draft 1 would have been, to include any businesses operating over networks and the Internet, from basic carriers to companies operating websites, with the consequence that all such businesses will be under Article 27's obligation to provide technical support and assistance (in Draft 1 this was limited to necessary support and assistance, but Draft 2 has deleted the word necessary).

The breadth of duties to cooperate with authorities in investigations, in particular with the expansive wording in Draft 2, is a concern, in particular given the relatively small role for judicial oversight in the procedures for conducting investigations in China. There have been a number of well-publicised instances in which investigations by Chinese authorities have raised brand or public relations challenges for technology companies.

Draft 2 also introduces some new requirements that appear to be directed at making network operators duty to co-operate more effective from the authorities' point of view, including

- Article 20's requirement that network operators keep network log records for six months, and
- Article 21's requirement that network operators notify the authorities of security defects discovered in their systems.

Data localisation

"Data localisation" is a term used to describe a legal or regulatory requirement to keep data in the jurisdiction where it has been collected or generated. Under Draft 2, as in Draft 1, data localisation is set out as an obligation on "critical information infrastructure operators" to store personal information collected or generated in their networks onshore in mainland China. Draft 2, however, makes three key changes to the approach of Draft 1.

The first key change is in respect of the definition of "critical information infrastructure operators." Draft 1 defined this very broadly in terms of certain industry categories (such as operators of systems in energy, finance, public utilities, military and others), and by the number of users of a system.

This proved controversial on two levels. First, there was no clarity as to which businesses (or which operational streams and functions) in the specifically named sectors, or which of their specific networks, would be considered to be "critical information infrastructure." Second, adopting the number of users of a system as a measure for identifying critical information infrastructure could potentially implicate a wide range of commercial businesses that have a large number of users but have little practical bearing on national security, such as e-commerce businesses or online game platforms.

Draft 2 drops this approach and pushes the question back to a later day. The itemized list of Draft 1 is removed, and instead there is a provision appointing the State Council to make a separate enactment setting out the specific scope and definition of "critical information infrastructure operators." Whether this will lead to a broadening or a narrowing remains to be seen, adding another layer of uncertainty to the developing law.

The second key change to Article 35 is Draft 2's extension of the data localisation requirement from personal data to also include "important business data." Neither category of information may be sent outside China unless it is "truly necessary" for business and the operator has conducted a security assessment in support of the offshore transfer. These security assessments will need to be carried out in accordance with measures to be jointly formulated by the state-level cyberspace administration authorities and the relevant departments of the State Council. No detail is provided in Draft 2 as to how broad the exemption for "truly necessary" international transfers would be or what the criteria for clearing the associated security assessment would be.

The third key change is the removal of "storage" of such information outside China. Draft 1 contemplated both the storage and sending of such information outside of China where necessary. The removal of this term in Draft 2 suggests that China no longer contemplates the possibility of data storage outside its borders, even if necessary.

Data localisation laws are not new to China. There are some confined localisation requirements in specific industry sectors such as e-banking, insurance, credit reporting, and network-based payment services. By contrast, the draft Cyber-Security Law would apply to all "critical information infrastructure operators," a potentially much larger segment of industries, depending on how the State Council proceeds to give life to this term.

Conclusions

Draft 2 of the Cyber Security Law stands as the latest in a series of regulatory developments that demonstrate a China increasingly focused on national security, stability, control of cyberspace and imposing restrictions on those who may operate and publish in it, and the particular challenges that a digitally connected

world poses for China's unique political, culture and economic context. Against a backdrop of geopolitical tensions over cyber security and Chinese concerns about the position that Western technology companies hold in the domestic industry, there can be no doubt that there is a much bigger picture to this draft law. The more typical concerns of cyber security regulation involve moves to shore up operational risk standards and facilitate the sharing of information about cyber incidents. China's approach to cyber security regulation includes some challenges to conventional wisdom on these fronts.

It is clear that Draft 2 is very much an evolution of Draft 1 rather than a re-write. The amendments introduced to this new draft will, if anything, stoke further concerns amongst multi-national businesses operating in China that lawmakers are taking cyber security as a basis to limit foreign access to China's vast, expanding markets for technology and technology services. The scope for technology regulation has both been made wider and less clear. Authorities' access to systems and data has been broadened. The scope of data localisation requirements is very likely to have increased.

Clouding the picture further is the fact that Draft 2 introduces more delegation of critical points of definition to implementing rules and regulations. There may, of course, be some mitigation of the impact of the Cyber Security Law in this. However, at the moment the key consequence of these changes is uncertainty.

Fortunately, Draft 2 was opened for public comment, which means there still may be room for engagement and negotiation on some of the more challenging aspects of the draft law. We do not necessarily expect to see any further clarification per se on the uncertain elements of the draft law prior to its final enactment, as it is likely there is also uncertainty within the various government departments who may be charged with implementation as to exactly how they intend to or will actually apply the law in practice. However, following the comment period, we do hold some optimism that the lawmakers will be responsive to concrete suggestions for improvement.

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New rules for online advertising in China

On 4 July 2016, the State Administration for Industry and Commerce (SAIC) – the regulatory body charged with enforcing, among other things, the Advertising Law – released the Administration of Online Advertising Interim Measures (Interim Measures).

In effect since 1 September 2016, the Interim Measures are the first set of national level rules specifically regulating advertising activities through the Internet and other online media. The publication of these rules is in line with the Chinese government's earlier attempts to regulate virtually all areas of cyberspace.

Online advertising has become a massive industry in China, but has recently been dogged by controversy. Earlier this year the tragic death of a young student, who used a search engine to look for a last-resort medical treatment for his terminal cancer and who was given experimental treatment by an institution that appeared as the top search result, caused public outrage and an institutional crackdown on the alleged manipulation of search results for medical and other forms of online advertising. It was expected that there would be a clampdown on regulations in this area in addition to the tightening of rules under the Advertising Law.

The Interim Measures put flesh on the bones of Article 44 of the Advertising Law (which lays down the general principle that online advertising is regulated under the Advertising Law) and are largely modelled on a consultation draft published in July 2015.

It is also noteworthy that the new rules are titled "Interim Measures." According to SAIC, the title is to reflect the fast-changing practices in online advertising in China, which means that these rules may be revised from time to time to reflect new developments.

Scope of application of the Interim Measures

The Interim Measures cast a wide net, applying to all online advertisements for goods or services conducted via websites, emails, mobile applications, etc., whether in the form of words, images, audio, video or in other formats. Content with hyperlinks to these advertisements and paid search results will also fall within the regulated scope under the Interim Measures.

Paid search results

Consistent with the July 2015 Draft, the Interim Measures expressly categorise paid-for search engine listings as advertisements which are regulated under the Interim Measures.

Under the Interim Measures, there must be a clear visual distinction between paid-for search results and normal 'natural' search results. This is consistent with the new Internet Information Search Services Administrative Provisions (Internet Search Provisions), effective since 1 August 2016, which require search engines to

- examine the capacity and qualifications of customers who pay for sponsored search results
- apply a maximum percentage of paid-for search results, and
- conspicuously indicate and distinguish between paid-for and natural search results.

Explicit marking as "advertisement"

The Interim Measures require that all online advertisements be clearly marked as "广告" ("advertisement" in Chinese).

As this rigid requirement appears to apply to all forms of online advertisements, this suggests that even advertisements in foreign languages or which are obviously commercial advertising would still have to be marked as such. It remains to be seen how strictly this requirement will be enforced, but SAIC indicated in a recent interview that they expect all online advertisements to comply starting from 1 September 2016. Non-compliance with this requirement is punishable with a fine of up to RMB 100,000 (about USD 15,000).

Medical advertisements and others

In line with the tighter requirements under the new Advertising Law (in effect since September 2015), the Interim Measures expressly prohibit outright online advertisements in relation to certain categories of goods and services (e.g., prescription drugs and tobacco). Other categories can only be advertised where the

advertisement has been pre-approved by the relevant Chinese authorities, for example medical advertisements (i.e., for medical treatment, drugs, medical devices, etc.) and advertisements for agricultural chemicals, veterinary drugs and health foods.

No hidden advertisements

Following an approach consistent with the Advertising Law and the Chinese Government's increasing focus on data privacy in recent years, the Interim Measures prohibit the inclusion of advertisements (or hyperlinks to advertisements) in emails to users without their consent, though it is unclear as to whether this relates to users' opt-in or opt-out-type consent.

The Interim Measures also reiterate the principle under the Advertising Law that online advertisements must not interfere with people's normal usage of the Internet – hence the requirements that pop-up advertisements must be capable of being closed by one single "click" and that users must not be deceived into clicking on hidden advertisements.

Other prohibited activities

The Interim Measures also prohibit certain activities relating to online advertising that may be seen as forms of unfair competition, such as

– providing or using applications, hardware and so forth to block, filter, skip over, tamper with, or cover up lawful advertisements provided by others

– using network access, network equipment and applications to disrupt the normal transmission of other lawful advertisements provided by others, or adding or uploading advertisements without permission, or

– harming the interests of others by using fake statistics or traffic data.

Role of ICPs

Internet content providers (ICPs) – essentially website operators – may wear multiple hats in the online advertising context. On the one hand, ICPs publishing their own advertisements or engaging in online advertising services will be subject to the legal requirements applicable to traditional advertisers and publishers of advertising. On the other hand, under the Interim Measures, even if the ICPs only provide Internet content services and not advertising services, they will be required to stop unlawful advertisements if they know or ought to know about unlawful advertisements published on their website. This is quite an onerous obligation.

Conclusions

Businesses need to review their advertising practices in China to ensure compliance with the Interim Measures and the new Advertising Law, especially in light of the potential surge of regulatory enforcement and consumer complaints that are likely to follow in their wake. In particular, it is advisable to

– be prepared for increasing awareness and sensitivity among the Chinese public even for minor or technical breaches, leading to a rise in consumer complaints and regulatory enforcement

– implement a thorough internal policy review of online advertisement checks and reviews, especially for advertisement content originating from outside China that may be culturally or politically sensitive, covering all existing marketing channels in China (for example, mobile platforms, via SMS, email, etc.)

– monitor all advertisers placing advertising on the business' platform on an ongoing basis and be aware of the need to implement corresponding policies and changes to terms for clients placing advertising (even ICPs who are not as heavily regulated in other markets).

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China green-lights ride-hailing services and sets "rules of the road"

On 28 July 2016, the long-awaited Interim Administrative Measures for Network-based Taxi-hailing Services (Interim Measures) were released.

Jointly issued by seven ministries, including the Ministry of Transport (MOT) and the Ministry of Industry and Information Technology (MIIT), the Interim Measures are the first piece of comprehensive regulation for online ride-hailing services in China. The Interim Measures will come into effect on 1 November 2016.

Perhaps their most important feature, the Interim Measures confirm that online ride-hailing services are legal. At the same time, the Interim Measures lay out multiple requirements for participation in the industry by the various actors involved, consistent with the aim of assuring quality and safety. For example

- platform operators must demonstrate sufficient capacity for data exchange and processing, have adequate cyber security protection, locate their servers in China, and have established arrangements with payment institutions, if taking payment electronically
- cars are capped at seven seats, and must be equipped with devices that keep records of positioning and for reporting of emergencies
- drivers must be licensed, have three years' driving experience, and have no past record of violations for reckless driving, drug abuse, drunk-driving, violent crime, or too many "points" deducted from the driver's record.

In terms of licenses, a platform operator must apply for an operating permit from each local MOT office where it operates. This suggests a platform operator operating nationwide will need to apply in multiple locations, and may potentially be subject to strong local differences in each location, complicating the operations of China-wide operators.

So far, no local implementing regulations for the issuance of the operating permit have been enacted. A first draft local implementing regulation has reportedly been prepared in Lanzhou, in China's Northwest. Platform operators have apparently voiced concern about the draft's strict additional regulatory requirements, such as quotas for the number of platform operators, high thresholds for market entry, and pricing inflexibility.

In addition to the operating permit, a platform operator also needs to do a record-filing with the provincial MIIT office at its place of registry for "Internet information services," a legal term meaning the providing of any information over the Internet. We assume this record-filing will be similar to the record-filing required for all websites in China, and it should not be particularly difficult to obtain. Additional telecoms operating licenses must also be secured if any additional telecoms services are implicated.

Two other areas to highlight in the Interim Measures are data protection and pricing.

For data protection, conspicuous notices are required prior to the collection of personal information and consent must be obtained. Personal information may only be used as needed for providing services. All personal information and business information collected or produced by the platform must be stored and used within China with a minimum storage time of two years and, unless permitted by other laws, may not be transferred out of China. This is one of the strongest data localization requirements to date in any legislation in China, and similar in principle to the (controversial) requirements proposed for operators of "critical information infrastructure" found in the second draft of the Cyber Security Law. This requirement will present challenges for companies that operate globally and/or have global expansion plans.

For pricing, the Interim Measures target unfair competition conduct, in particular by prohibiting that platform operators "operate below cost and disrupt the ordinary market order" in order to "exclude competitors or monopolize the market." Such rule presumably takes aim at the generous subsidies offered by platform operators to drivers and passengers in recent times in the fight for market share.

In sum, the Interim Measures have been widely viewed as a welcome development, both for their legitimization of the industry and for being fairly adaptive to how ride-hailing services operate in practice, at least much more so than any previously proposed rules. A number of challenges remain though, especially given the amount of delegation for further rule making at the local level, which may result in additional stringent and varied regulation throughout the country.

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Chinese antitrust enforcer sanctions TV provider

On 7 June 2016, the Administration for Industry and Commerce (AIC) in Inner Mongolia held the Xilin Gol branch of the Inner Mongolia Radio and Television Network Group (Xilin Gol Radio and Television) to have violated the Anti-Monopoly Law (AML).

Xilin Gol Radio and Television was ordered to stop its illegal conduct, had illegal gains in the amount of RMB 91,600 (around USD 13,700) confiscated, and was fined around RMB 100,000 (approximately USD 15,000).

The case dates back to October 2015, when the Inner Mongolia AIC's local bureau in Xilin Gol found indications during its market inspection activities that Xilin Gol Radio and Television had engaged in anti-competitive tying. The Inner Mongolia AIC formally initiated an antitrust investigation after receiving authorisation from the State Administration for Industry and Commerce (SAIC) in Beijing.

Decision's finding

In its decision, the Inner Mongolia AIC defined the relevant market as that for cable television (TV) and Internet protocol television (IPTV) services delivered in Xilinhot in Xilin Gol. IPTV operates in a closed system – a dedicated, managed network provided by an operator – whereas over-the-top television (OTT TV) streams the audio/video content using regular, open and unmanaged Internet. OTT TV and mobile TV (which allows users access to TV content via the mobile network) were not found to be part of the relevant market as they were not considered effective substitutes for cable TV and IPTV services. In particular, the AIC found that OTT TV providers were not allowed to stream live TV to users as a result of regulatory restrictions, and that mobile TV was generally more expensive and of a lower quality than cable TV and IPTV services.

The Inner Mongolia AIC considered Xilin Gol Radio and Television to be one of only two main service providers and to have a dominant position in the relevant market (with a market share of 98.6%). Its only competitor (which only entered the market in early 2015) had a market share of merely 1.4%. Xilin Gol Radio and Television was found to have a significant degree of control over the market and market entry was difficult, as potential entrants had to obtain relevant licenses and approvals.

The authority held that, from March 2015, Xilin Gol Radio and Television had forced customers to purchase a certain TV viewing package in addition to the standard viewing package and had done so without informing or warning its customers. When customers raised objections, the company used excuses to stall, refuse or delay the handling of the issue. In the authority's eyes, this conduct was contrary to the relevant local regulations and customers' wishes and deprived customers of their "right of choice," harming consumers and market competition. The authority held that this conduct was not justified.

The Inner Mongolia AIC concluded that Xilin Gol Radio and Television had imposed unreasonable conditions in violation of the AML. In determining the sanctions, the Inner Mongolia AIC took into account that the company had actively cooperated in the investigation, admitted its infringement and terminated the conduct in October 2015 before the investigation was over.

Antitrust in the TV area

This is one of the few antitrust cases in the TV sector in China. Recent cases this sector include, for example, the *Shaanxi digital TV* case in 2013 and three appeal judgments brought against one tying decision and two excessive fees decisions of a local AIC in Fujian Province in 2015.

In the *Shaanxi digital TV* case, defendant Shaanxi Broadcast & TV Intermediary Group (the only authorized cable TV provider in Shaanxi Province) prevailed against the allegation by the plaintiff (an individual TV user) that it had abused its dominant position by bundling basic TV services and premium TV services.

In another case of tying in the TV sector, Fujian Broadcast managed to overturn in court the Quanzhou AIC's decision that it had bundled TV services and set-top boxes. The Quanzhou court found that the local AIC had failed to ascertain if the bundling had been made on the basis of objective technical reasons or if the company imposed artificial, anti-competitive restrictions on customers. The case also involved two other decisions by the Quanzhou AIC alleging excessive fees imposed by Fujian Broadcast on customers, which were however upheld by the Quanzhou court.

Together, these cases and the latest decision by the Inner Mongolia AIC against Xilin Gol Radio and Television show that TV and – more broadly – the traditional media sector have come under closer scrutiny by antitrust enforcers. For example, SAIC has launched a nationwide enforcement campaign targeting anti-competitive behaviour by public utilities, which presumably include TV service providers.

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Hong Kong privacy regulator issues 2015 report, outlines 2016 focus

On 26 January 2016, Hong Kong's Privacy Commissioner for Personal Data (Commissioner) published his annual report on complaints and enforcement activity under the Personal Data (Privacy) Ordinance (PDPO).

The 2015 report reveals that 871,000 Hong Kong individuals were affected by data breaches in 2015 compared with 47,000 in 2014. The 98 incidents reported to the Commissioner in 2015 (an increase from 70 the previous year) all involved loss of data, hacking of data or inadvertent disclosure of personal data by organizations. The number of reported breaches continues to increase at a rapid pace even though Hong Kong's data breach notification regime is currently a voluntary one.

Interestingly, the Commissioner also hints in his statement of priorities for 2016 that the PDPO may need to be updated to better support Hong Kong's role as an international business hub and to keep up with regulatory developments around the world.

Trends

The report reveals three main trends:

- **Record number of public complaints.** The Commissioner's report of a year ago showed a significant uptick in the number of complaints in 2014, suggesting that this was the "new normal" for privacy awareness. That trend has continued in 2015 with public complaints to the Commissioner's office rising by almost 20% to 1,971. Of these, 74% were made against the private sector, with the financial sector receiving the most complaints. 40% of all complaints related to the use of personal data without consent and 37% to the purpose and manner of data collection.
- **More aggressive enforcement of the PDPO.** While the overall number of warnings and enforcement notices issued by the Commissioner dropped last year (17 warnings and 67 enforcement notices in 2015 compared with 20 warnings and 90 notices in 2014), referrals to the Police were up – from just one conviction in 2014 to 20 in 2015. With public awareness of data privacy issues clearly on the rise, we expect to see investigations and enforcement of the PDPO to be pursued at a more aggressive pace going forward.
- **Internet and telecommunications infringements.** The Commissioner stated in his 2014 report that more of his investigatory work related to the Internet and telecommunications services, with complaints more than doubling between 2013 and 2014 from 93 to 206. That trend has continued in 2015 with a further steep increase in the number of complaints to 241. Common privacy disputes arose from the use of mobile apps and social networking websites (161 cases), the disclosure or leakage of personal data via the Internet (85 cases) and cyber-bullying (22 cases). The number of general Internet enquiries concerning cyber-profiling, mobile apps and cyber-bullying also increased to 726 cases in 2015.

Strategic focus for 2016

The Commissioner has confirmed that, in 2016, there is a special focus on certain areas including:

- **Comparative research and analysis.** The Hong Kong privacy landscape has developed rapidly in recent years. The PDPO has now been in force for 20 years and the Commissioner is keen to ensure that the approach to protection of personal data in Hong Kong keeps pace with global developments. In particular, the report refers to the recent data protection reform in Europe (agreed in December 2015) and confirms the Commissioner's intention to closely monitor the progress of the new General Data Protection Regulation as it comes into effect.

- **Big data and the Internet of Things.** The Commissioner announced he would conduct research into the use of big data in Hong Kong in response to the challenges generated by the increased use of information and communications technology, including the increasingly sophisticated networking of devices as part of the Internet of Things.
- **Privacy management programme.** Building on one of the key aims from last year, the Commissioner has pledged to continue to press for greater awareness and uptake of the Privacy Management Programme accountability model, which encourages businesses to take a "top-down" and holistic approach to organizational data protection compliance.

What does the Commissioner's report mean for businesses?

2015 saw a significant rise in data security and data privacy breaches and enforcement actions in Hong Kong and across the region. The 2015 Report reveals a striking increase in the number of data breaches in Hong Kong. These developments have resulted in immediate consequences in the form of regulatory action, sanctions and adverse publicity for those investigated or found to be on the wrong side of the law. Nevertheless the Commissioner has confirmed the need to update policies and guidelines to ensure that Hong Kong keeps pace with the changing privacy landscape.

It is also clear from the report that as privacy complaints continue to rise in Hong Kong, enforcement of the PDPO is increasingly favouring the sharper end of the Commissioner's available remedies. Criminal sanctions for breaches notwithstanding, there are reputational risks for an organization that is subject to an investigation. With growing public awareness of personal data and related cyber security issues, the impact of a data privacy conviction on business reputation should not be underestimated. The Commissioner has the right to publish the results of any investigation, name the organization involved and give details of the breaches committed.

From the Commissioner's restatement of support for the Privacy Management Programme, the increased risk of privacy complaints and the more aggressive enforcement environment in Hong Kong, it is clear that businesses should prioritise compliance going forwards.

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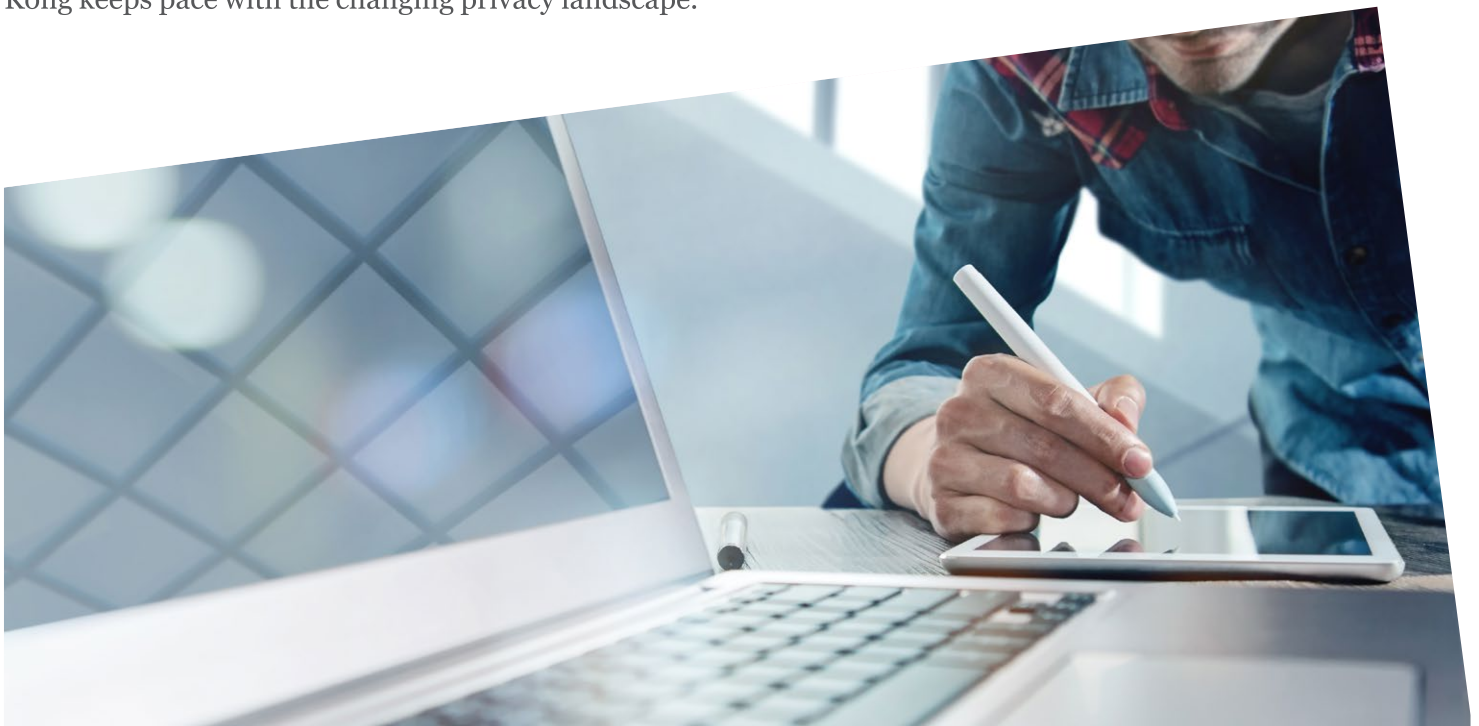

Anti-Unfair Competition Law amendment

What impact for Internet players?

On 25 February 2016, the Legislative Affairs Office of China's State Council issued a new draft of the amended Anti-Unfair Competition Law (Draft) for public comment.

The Draft proposes to undertake an important overhaul of the current law, which was first enacted in 1993. It aims to bring the Anti-Unfair Competition Law (AUCL) in line with more recent domestic legislation (e.g., the Trademark Law and the Anti-Monopoly Law), harmonize Chinese law with international legal standards, modernize the AUCL through the adoption of an array of brand-new principles and provisions, and codify the majority view in Chinese jurisprudence on certain intellectual property (IP) and Internet matters.

The AUCL as it stands is a potpourri of provisions covering a variety of legal fields. Not surprisingly, if adopted, the Draft's updated provisions would have a significant impact in the fields of IP, antitrust and anti-bribery in China. Many of the new provisions would apply to companies in all sectors. In addition, for Internet companies, two new provisions may be relevant.

Overview of changes

In the IP arena, the AUCL is at present often invoked to protect rights which cannot benefit from registration with the authorities, such as unregistered marks, trade dress and product packaging. The Draft effectively brings the AUCL's current provisions in sync with those of the Trademark Law, and codifies existing case law.

In the antitrust field, the Draft brings the AUCL generally in line with the Anti-Monopoly Law (AML). It proposes to delete a range of the AUCL's antitrust provisions such as those on "administrative monopolies," predatory pricing and tying, since they are already regulated in the more specialized provisions of the AML. At the same time, however, the Draft adds a new provision which can be interpreted as running against the AML's spirit. While the AML prohibits certain conduct deemed abusive when undertaken by companies in a "dominant market position," the Draft's new provision aims to tackle abuses of a "relatively advantageous position." This provision attempts to address situations where an entity is not (yet) dominant, and hence goes beyond the scope of the AML.

As for the AUCL's anti-bribery rules, the Draft introduces a number of significant changes to bring the AUCL in line with well-recognized international standards. For example, while the AUCL currently prohibits bribe payments made in order to "sell or purchase commodities," the Draft expands the definition of "commercial bribery" to conduct whereby "economic advantages" are provided or promised to counterparties or third parties, in order to secure opportunities or competitive advantages. This new proposed definition is broader than the existing standard, and would ensure consistency with the US Foreign Corrupt Practices Act. In addition, the Draft further codifies and clarifies the principle of employer liability for bribes provided or promised by its employees – an area of common misconception in China.

New Internet rules

The Draft contains two provisions which are not present in the AUCL's current version but may have significant implications for Internet players in China.

First, the Draft proposes to codify some of the existing case law by prohibiting four types of conduct deemed "unfair competition" in the Internet arena. The proposed rules were previously developed by Chinese courts on the basis of a vague, general provision of the AUCL, in *Qihoo 360 v. Tencent*, *Tencent v Sogou* and other cases. The targeted conduct is where companies

- use technical methods to stop users from using other companies' online services, without users' consent
- insert links in the online services provided by other companies to force skipping to targeted contents, without license or authorisation
- mislead, cheat or force users to revise, close, uninstall or stop normal use of online services legally provided by others, and
- interfere with, or destruct, the normal operations of the online services legally provided by others, without license or authorisation.

If it turns out to increase legal certainty and predictability, the codification of "unfair competition" conduct in the Internet space could be seen as an improvement. At the same time, the Internet sector is an industry with fast-moving technologies and business practices. If the codification were lead to reduce the flexibility of courts to decide Internet cases, the Draft would risk addressing 21st century problems with 20th century-style black letter regulation.

As to sanctions for "unfair competition" conduct in the Internet sector, the Draft provides for fines of up to five times of illegal revenues. If those revenues cannot be determined, a statutory fine ranging between RMB 100,000 to 3 million (around USD 15,000 to 450,000) could be imposed.

Second, the Draft appears to impose a "facilitation liability" on Internet platform operators/owners. If a platform operator or owner clearly knows or should have known the existence of conduct by another party violating the AUCL, but still provides certain services – such as network services, technical support, advertisement, payment settlement, etc. – it could be fined RMB 100,000 to 1 million (around USD 15,000 to 150,000).

The scope of this "facilitation liability" may be quite extensive. The AUCL violation to be facilitated can refer to any of the manifold prohibitions in the AUCL, ranging from IP or antitrust infringements to commercial bribery. As a result, if the Draft is enacted in the current form, the legal risks for operators/owners of Internet platforms (for example search engines, mobile app stores and news portals) could be significantly increased.

Conclusions

The Draft may be viewed as an effort by the Chinese government to modernize and increase the effectiveness of the Chinese unfair competition legislation. However, some of the proposed amendments would sharply increase compliance burdens for business in all sectors in general, and Internet players in particular.

Comments on the Draft were submitted until the end of March 2016. At present, it is not clear how much of the numerous stakeholder feedback was or will be taken into account, and when the amendment of the AUCL will eventually be passed and become effective.

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New anti-unfair competition guidance for Internet players from Beijing court

On 13 April 2016, the Beijing High People's Court released the Trial Guidelines on Network Related Intellectual Property Right Cases (Guidelines). To a large extent, the Guidelines seem to be an attempt to codify the vast – and at times inconsistent – case law in this area by courts across China.

The issuance of the Guidelines represents the second codification effort within a relatively short period of time, after the circulation of the draft amendments to the Anti-Unfair Competition Law (AUCL) for public comment in February 2016.

Background

Over the past few years, many of China's largest Internet companies were entangled in legal disputes under the AUCL. These disputes involved "new types" of conduct such as ad-blocking, enabling users free access to others' non-free content, inducing users of other products to use one's own products, etc.

Given the lack of specific rules on Internet-based conduct in the AUCL, courts have dealt with these cases mainly on the basis of Article 2, a provision referring to the high-level principles of voluntariness, equality, fairness, honesty, good faith, etc. From these high-level principles the courts have developed other, more concrete principles – such as that of "non-interference" with legitimate operations of competitors – though the case law is uneven across different courts in China.

The Guidelines contain 42 provisions, divided into three sections on copyright, trademark and unfair competition related aspects, respectively. Here we will focus on the unfair competition aspects that are not directly related to copyright, trademark or patent rules, among which two sets of provisions are particularly noteworthy: those on "non-interference" and on search keyword bidding.

Interference

The Guidelines provide rules on specific manifestations of unjustified "interference" with the legitimate business operations of other companies:

- **Undue appropriation of other companies' website content.** This rule targets the unauthorized use of content on another company's website with the result that user visits to that website are channelled to the unduly appropriated content. The aim here may be to prevent free-riding, as reflected in a number of past court cases like iQiyi v. Juwangshi (where the defendant's software was found to have "scraped" content from the plaintiff's video platforms, yet blocking all ads from those platforms) and other cases such as *iQiyi v. TVMao*, *Sohu v. Hualu Tianwei* and *iQiyi v. HiWifi*.
- **Interference with predictive search suggestions.** The Guidelines prohibit illegitimate changes to predictive search keywords suggestions by search engines. The background to this provision seems to be the dispute between Baidu and Qihoo 360 in 2013 (where the predictive search suggestions by Qihoo 360's browser directed users of Baidu's search engine to Qihoo 360's own services) and the *Baidu v. Sogou* judgment in 2015 (where Sogou's software for the Chinese-character-input-method replaced the predictive search function of Baidu's search engine, redirecting users to Sogou's own search results).
- **Ad insertions on other companies' websites.** The Guidelines also target the insertion of ads on other companies' websites, thereby free-riding on user visits to those websites. Previous judgments, which may have served as benchmark for this provision, are *Baidu v. Qingdao Aoshang & China Unicom* and *Baidu v. Qomolangma*.

– **Disruption of other companies' operations.** The Guidelines contain a general prohibition of disruption of other companies' business operations by interruption, impediment, or other means. This provision allows broad interpretations.

In addition, although one of the goals may be to reduce the courts' wide flexibility to apply Article 2 of the AUCL, the Guidelines contain a "catch-all" clause simply referring to "other circumstances" amounting to unfair competition in violation of Article 2.

Keyword bidding

The Guidelines provide specific rules on search keyword bidding. They put forward a range of factors for the legal assessment of search keyword bids, in particular proposing to examine whether

– the bid would constitute an unauthorized use of another company's "commercial logos"
– the use of the keyword is made for valid reasons
– the unauthorized display is in the title or introduction of the search results, or on the bidder's own webpage
– the use would reduce trade opportunities or competitive advantages.

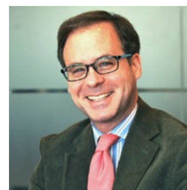
The above rules may be the result of the Beijing court's learnings from a number of court rulings such as *Qihoo 360 v. Baidu* (where the use of Qihoo 360's product name "Qihoo antivirus" in the title of the link directing to Baidu's antivirus software in Baidu's search results was found to be illegal).

At the same time, the Guidelines confirm that bidding for search result ranks is a legitimate business model for search engines – which are not obliged to engage in verifications of keywords used in the bidding. Search engines only need to remove content from search results if notified by an aggrieved party or if they become otherwise aware of an infringement.

Conclusions

Unlike the provisions in the to-be-amended AUCL which apply across the entire country, the Guidelines only apply to cases handled by the Beijing High People's Court. However, in light of the fact that many disputes between Internet companies are litigated in Beijing, the Guidelines will be important for many market players.

The Guidelines may be meant to reduce the wide discretion which Beijing courts currently have on how to interpret Article 2 of the AUCL, by providing more specific guidance on some of the frequently observed unfair competition conduct in the Internet space. At the same time, with the fast pace of innovation in technology and business models, we can expect novel legal questions to be placed before courts in the future.



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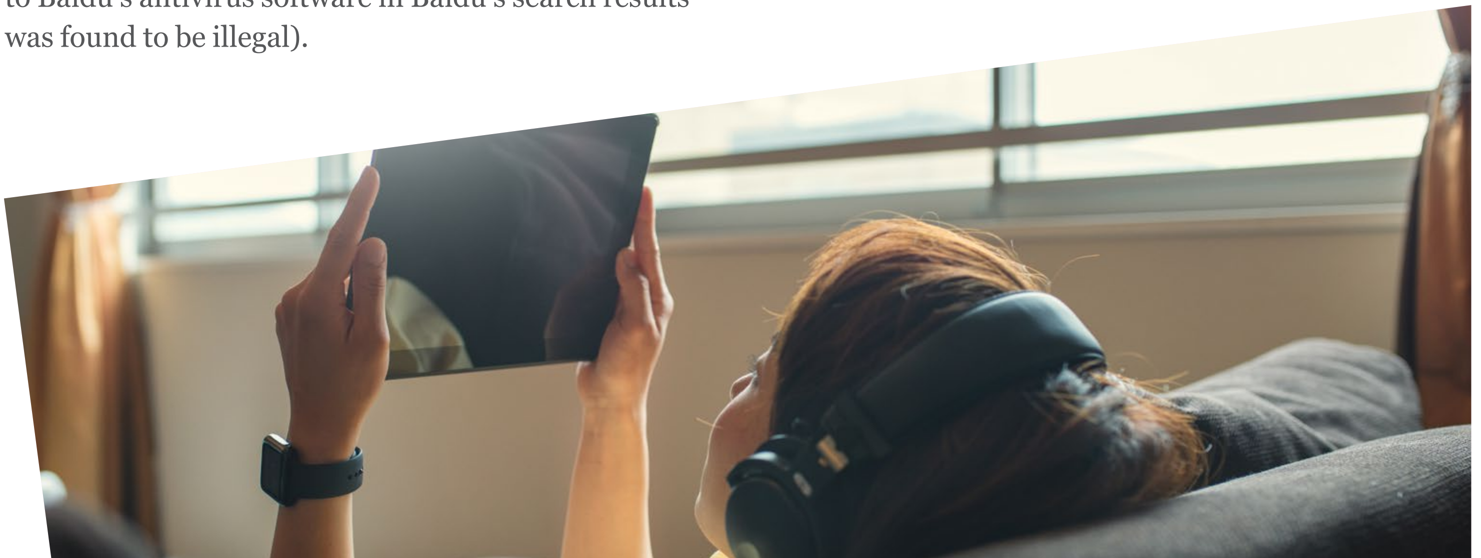

China issues new draft domain name rules

Strengthening the "Great Firewall"?

On 25 March 2016, the Chinese Ministry of Industry and Information Technology (MIIT) issued the Draft Rules on the Administration of Internet Domain Names (Draft) and issued a call for comments. The Draft has raised serious concerns among the public and the international media.

Overview of main changes

The Draft regulates most aspects of the domain name system in China, with provisions ranging from minimum requirements applicable to domain name registrars to detailed rules regulating domain name registration services. While the scope of application of the Draft is limited (somewhat vaguely) to domain name services "rendered within China," the Draft applies to all top-level domains, from ".cn" and ".中国" to ".com" and new generic top-level domain names.

The main changes under the Draft are that:

- root-server operators, domain name registries and registrars must be legal entities established in China with servers and databases located in China (echoing the recently issued Online Publishing Regulations) and must comply with extensive requirements (e.g., relating to personal data protection, network security, verification of registrant details and data keeping, etc.)
- enforcement authorities are granted increased investigation and enforcement powers, and
- any domain name (e.g., ".com," ".cn," etc.) whose website is hosted in China must be registered with a Chinese domain name registrar, otherwise Chinese Internet service providers (ISPs) must refuse Internet access.

Will all foreign websites be blocked?

By far the most controversial provision in the Draft is Article 37. The article provides that "domain names whose network connection takes place in China shall have services provided by domain name registrars in China and domain name registries in China shall carry out the operational management [of the domain name]. For domain names whose network connection takes place in China but which are not managed by domain name registrars in China, ISPs shall not provide network connection services."

To understand the impact of this provision, a brief summary of the steps involved in browsing the Internet may be helpful:

- To visit a website, one selects a certain protocol identifier (e.g., http) followed by a resource name, which includes a domain name (e.g., hoganlovells.com). The protocol identifier and resource name together make up a uniform resource locator (URL).
- The URL is linked to a specific Internet protocol (IP) address through the domain name system. Each IP address in turn points to a server that hosts the website files or other data being sought by the user.
- The server is connected to the Internet through an ISP, which in turn enables routing of the data through the Internet to the user. Websites hosted on a server located in China generally use Chinese ISPs, and websites hosted overseas normally use overseas ISPs.

The current rules (which came into operation in 2004) do not contain any prohibition against ISPs in China providing Internet access services to domain names registered with an overseas registrar. The Draft would change this. In a move in line with the Chinese government's aim to make the Internet and information technology (IT) industry "secure and controllable," all domain names hosted in China would be required to be registered with a Chinese domain name registrar.

This provision has been criticised by international media and interpreted as an explicit attempt to fence off the Chinese Internet from foreign websites. However, it would be jumping the gun to assume that all foreign websites (or even all websites with foreign top-level domain names) would be blocked in China.

Foreign websites hosted on foreign servers would in principle not be affected by the Draft, though they could still be blocked or disrupted by the Internet censorship controls often referred to as the "Great Firewall." This was recently unofficially confirmed by MIIT and appears to be supported by Article 2 of the Draft, which limits the territorial scope of application of the Draft to China. What remains to be seen, of course, is whether or not the restrictions of the "Great Firewall" would increase in the wake of the issuance of rules based on the Draft.

Will companies be forced to switch to a Chinese domain name registrar?

A significant number of Chinese e-businesses (including some of China's largest e-commerce companies) have registered their domain names overseas, with servers located abroad and in China.

If the Draft were to be enacted as proposed, these companies would need to choose to either transfer their domain names to a registrar located in China, or forego their Chinese server and operate as an overseas website. Thus while in principle the Draft does not force a localization of foreign websites in China, website operators choosing to hold foreign-registered domain names will risk being blocked or disrupted more frequently by the "Great Firewall."

Companies with domain names registered overseas but who do the bulk of their business and have website servers in China may therefore find that it makes sense practically to move the registration of their domain names to China, even if this is not required under the Draft.

Conclusions

The Draft appears to be aimed at increasing the Chinese government's control over the Internet through the registration of domain names, an approach consistent with the government's aim to make the 'Chinese Internet' and IT industry more "secure and controllable." This position has been reinforced by other recent legislation, including the recent National Security Law, the draft Cyber Security Law, the Counter-Terrorism Law and the Online Publishing Regulations.

Nevertheless the Draft's provisions appear to be more nuanced than the complete ban on foreign Internet traffic which has been suggested by some media reports. What is clear is that there will continue to be heated debate on this topic. The dust is far from settled.

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US government slams Chinese domain name rules

In March 2016, the Chinese Ministry of Industry and Information Technology (MIIT) released a draft of new rules concerning the regulation of the domain name system in China.

The proposed new rules contain a provision under Article 37 that any domain name whose website is hosted in China must be registered with a Chinese domain name registrar. Failure to meet this requirement could result in that website being blocked to Internet users based in China.

The language of Article 37 led the US government to take the unusual step of issuing a statement publicly criticising the Chinese government's proposed stance to Internet governance. The statement was released jointly by Ambassador Daniel A. Sepulveda, Deputy Assistant Secretary, Bureau of Economic and Business Affairs at the US Department of State and Lawrence E. Strickling, the Assistant Secretary of Commerce for Communications and Information and Administrator of the National Telecommunications and Information Administration.

In the joint statement, Sepulveda and Strickling claim that the proposed rule changes would "appear to create a barrier to access and force localization of data and domestic registration of domain names" and that this would have "potentially large and negative repercussions for everyone."

Article 37 was singled out for criticism as many initially interpreted its wording as a move by the Chinese government to prevent access to all websites hosted outside of China. This was seen as an expansion of the "Great Firewall." MIIT later clarified that these rules are not intended to prevent foreign websites from resolving within China.

Regardless, the US government has raised its concern that even if Article 37 was not drafted in order to prevent access to all domain names registered with a registrar outside of China, the language of Article 37 is "vague and open to differing interpretations." Indeed, the US government is worried that even on the narrowest interpretation of Article 37, it could "contravene, undermine, and conflict with current policies for managing top level domains that emerge from the Internet Corporation for Assigned Names and Numbers (ICANN), which follows a multistakeholder model in its community-based and consensus-driven policymaking approach."

The US government's statement goes on to criticize the proposal that root server operators, domain name registries and registrars must be legal entities established in China and that their servers and databases must be located in China. The US government views this as "forced localization" which would "potentially create new barriers to the free flow of information and commerce across borders and consequently infringe upon internationally recognized commitments on free expression and trade."

In a strongly worded conclusion, the US government stated that it "supports the open global Internet as a platform for free expression and economic and human development worldwide" but that what it could not accept "is the exercise of aggressive authority over people's use of the Internet or the ability of a government to prevent the world from reaching its people."

Whether or not the US government statement will have any impact on the Chinese government's stance and the wording of its proposed rule changes remains to be seen. Internet governance is a politically sensitive topic at the moment with the transition of the Internet Assigned Numbers Authority function away from the oversight of the US government to the global multistakeholder Internet community. There are fears that this will leave the Internet exposed to censorship and security risks. Indeed such concerns have been raised repeatedly during the current US presidential election campaign, with China often being the focus of such concerns.

The controversy surrounding the proposed MIIT rule changes is likely to continue. It will be interesting to see if any other governments issue statements concerning the proposed changes to Chinese domain name regulation and what the final policy will be.

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China's new online publishing rules

Excluding foreigners from publishing on the Internet?

China's media and publishing regulator – the State Administration of Press, Publication, Radio, Film and Television (SAPPRFT) – and its telecoms and Internet regulator – the Ministry of Industry and Information Technology (MIIT) – have jointly issued new rules governing online publications in mainland China: the Online Publication Services Administrative Provisions (Online Publication Provisions) on 4 February 2016. The new rules became effective from 10 March 2016.

Foreign investor concerns

The Online Publication Provisions have raised a number of concerns among foreign investors in China, largely due to their potentially expansive scope of what constitutes "online publishing services," coupled with a complete ban on foreign invested enterprises such as Sino-foreign joint ventures and wholly foreign-owned enterprises (collectively foreign invested enterprises or FIEs) from engaging in such activities. Not only are FIEs not allowed to directly participate in online publishing activities, but also all "cooperation projects in relation to online publishing business" (not further defined) between overseas entities, individuals and/or FIEs on the one hand and (domestic capital, licensed) online publishers on the other are subject to prior approval by SAPPRFT. This may be an issue for cross-border content licensing transactions.

The Online Publication Provisions also remind foreign and domestic investors alike that the license required for online publishing (the "online publishing permit") is non-assignable and may not be loaned, leased out, sold or transferred. Similarly, it is prohibited for a licensed online publishing entity to allow any other entity, even another online information service provider, to publish in its name.

Domestic investor concerns

Domestic companies have raised a different set of concerns focusing around the potential expansion of the scope of entities and/or individuals needing the online publishing permit, a permit that comes with a number of strings attached, such as possession of

- a specific website domain name, and an intelligent terminal application or other such like online publication platform
- a specific scope of online publishing services, and
- the necessary equipment for the provision of online publication services, with its servers and storage equipment obligatorily placed in China.

This is the list that applies to existing book, audio-visual, electronic, newspaper and periodical publishers, who presumably have already met gating requirements for traditional media publishers. By contrast, a much longer list of qualification criteria applies to other entities who might wish to engage in online publishing, for example blogging or information distribution platforms. For them, in addition to the above, they must also satisfy the following requirements:

- The company's legal representative and key person in charge must each be a Chinese citizen permanently resident in China.
- The domestic entity must employ a minimum of eight full-time editing and publishing staff who have SAPPRFT-recognized qualifications, of which at least three have mid-level or higher professional qualifications.
- The company must have a content proof reading system meeting the requirements for online publishing services.

– Another "string" attached is that even if a domestic company manages to obtain an online publishing permit, it will only be able to publish within an approved limited scope. For example, an online publishing permit may be issued for a specific type of publication, say "publication of the content of already formally published periodicals" or "online games," in which case it would be limited to those activities, and would not be permitted to publish anything else. This means that online publishers are pigeonholed into only publishing one or more category(ies) of publications, implying tight state control and monitoring.

In terms of ongoing obligations, an entity with an online publishing permit must also, among other things, adopt a content responsibility system including an editor and proofreader responsibility system and other management systems to ensure the "quality" of its online publications (and reading between the lines, to allow blame to be apportioned when something inappropriate gets published).

The entity must avoid publishing prohibited content, including pornography, ethnic discrimination, slander, and anything that would endanger the unity, sovereignty or territorial integrity of the State, or jeopardize the honour and interest of the State. These categories are broadly defined and open to interpretation. Publications that incite minors to engage in acts that go against social morality or involve illegal acts or crimes or any content that is harmful to the physical and mental health of minor's or any content that discloses personal information of minors are also prohibited. Content relating to state security, social stability and harmony or other "major topics" may potentially be published, but are subject to a separate record-filing with SAPPRFT prior to publication.

Penalties for non-compliance

Entities which engage in online publishing services in China without an online publishing permit or in violation the Online Publication Provisions are subject to administrative penalties (such as taking down of the website, removal of the online publications, confiscation of illegal proceeds and fines of five to 10 times the amount of any illegal turnover), and potentially criminal sanctions. This is fairly harsh compared with other similar legislation in China.

New ban on foreign investment?

The ban on foreign participation in online publishing services is not new. It was already stated in the current Guidance Catalogue of Foreign Investment Industries (2015 version and previous iterations such as the 2004 version), which listed online publishing services as a prohibited sector for foreign investment, and earlier in the 2005 Several Opinions on the Introduction of Foreign Capital to the Cultural Sector.

The new scope of online publishing

The Online Publication Provisions' definition of online publications is much more expansive than that of its predecessor regulation, the Internet Publications Interim Administrative Provisions.

First, is in the realm of "works." While, as before, these must still have the "features of publishing," such as editing, producing, or processing, now the list of what constitutes a work is expanded from a definition that leaned towards formal works), to an expanded definition that seems to cover just about everything and anything:

– written works, pictures, maps, games, cartoons, audio/video reading materials and other original digital works containing knowledge or ideas in the field of literature, the arts, science or other fields

– digitized work products whose content is identical to that of any published book, newspaper, periodical, audio/video product, electronic publication or the like

- network document databases and other digitized works derived from any of the aforementioned work products by extraction, editing, collection or other means
- any other forms of digitized works as determined by SAPPRFT.

With such a broad list (and an open-ended sweep-up that leaves the list to be expanded at SAPPRFT's discretion) it is hard to imagine what is not covered. Presumably "features of publishing" is supposed to define and constrain the universe of works and set some apart from others, but it is even more difficult now to ascertain just what that means.

Take for example, the new inclusion of "pictures." Does this mean "picture books" or any pictures? If the picture has been carefully framed, cropped, or even photo-shopped at all, would that mean it has the "features of publishing"? Is this meant to cover illustrations integrated in works or simply all pictures, and is SAPPRFT really claiming it has authority (or the interest or capability) to control the publication of any picture on the Internet and, if so, how does that cut across the rights of people to their image under the General Principles of Civil Law?

Some clarity may come with specific classifications of web publishing services which are to follow, but it is still hard to say how helpful this will be given the wide definition in the Online Publication Provisions. It may be the intention of the regulators to leave the definition opaque, as vagueness may be a useful tool for regulators wishing to claim a given case falls with its regulatory purview.

Implications for foreign invested entities posting works online

The issue is less whether foreign investment is banned (which is clear), but more to the point, what set of actions and activities are foreigners and FIEs banned from engaging in?

FIEs posting content online need to know whether the content constitutes an "online publication" which is required to be formally published online on a platform with an online publication permit, or whether they can go online without being seen as engaging in "online publishing."

With the definition described above, much content appears to fall within a grey area, in particular, pieces that are not formal works but may have involved considerable thought, production, formatting, or relative significance to them, for example articles and market reports. Our inquiries suggest it will take time before the policy positions and practice of SAPPRFT under the new Online Publication Provisions take shape for those types of "works."

Meanwhile, preliminary inquiries with SAPPRFT suggest that product descriptions or content related to a company's business posted by the business on its website are unlikely to fall within the Online Publication Provisions, provided that such posting is incidental to the company's main business and the company's main business is not online publishing. By way of example, a company that markets and sells mobile telephones would be unlikely to need an online publishing permit (or need the services of a licensed online publisher) to post an article on its website describing the difference between 3G and 4G technologies.

Another open question is the treatment of self-publishing platforms going forward. Apparently, posting content on self-publication media platforms, such as WeChat, will likely not require the user posting to have an online publishing permit. However, it is more unclear now whether the platform itself will need a license, and if it does, what level of editing the platform will need to engage in for the content to have the "features of editing" and hence constitute "online publishing,, and whether and how this would impact the timing for delivery of content.

Given the general lack of clarity in the Online Publication Provisions, it would be prudent for concerned companies (whether FIEs or domestic companies) to make inquiries on a case-by-case basis with SAPPRFT in order to further understand how and whether the Online Publication Provisions may apply to their specific online activities.

Implications for cross-border providers of online publications

The Online Publication Provisions apply to online publishing services within Mainland China. Companies which publish works outside of China technically fall outside the ambit of the Online Publication Provisions, even if web users in China may be able to access such overseas websites on a cross-border basis. This does not mean, however, that cross-border provision is an easy work around for the Chinese market. For one thing, a politically unacceptable cross-border offering may be still blocked to Chinese Internet users by China via the "Great Firewall," and overseas websites may suffer from slow access speeds deterring the target readership from purchasing subscriptions.

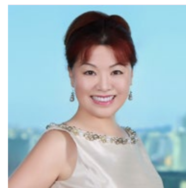
Conclusions

The Online Publication Provisions make it clear that SAPPRFT wishes to tighten up control over publications on the Internet and online publishing services in general. To what extent is not yet fully clear, and it is difficult to be optimistic given the direction of travel suggested by the Online Publication Provisions.

On the one hand, fears that all content online may become subject to the Online Publication Provisions and restricted from foreign participation are probably unfounded and amount to something of a "scare story."

On the other hand, the lack of clear direction about what is now regulated and what activities require an online publishing permit is more of an issue for business.

Perhaps of most concern is that the Online Publication Provisions appear to be pushing those who have published online to date on less formal unlicensed platforms to relocate to licensed platforms with an Online Publishing Permit. On this token, there is reason to expect that the bigger non-conventional publishing platforms will obtain Online Publishing Permits in due course, giving SAPPRFT and MIIT additional leverage to have unpalatable content removed by threatening the platform with withdrawal of its online publishing permit in the event it does not "play ball" with the censorship requirements.



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A snapshot of IP litigation in China – so far, so good

On 21 April 2016, China's Supreme People's Court (SPC) released its White Paper on Judicial Protection of Intellectual Property Rights (White Paper), containing interesting statistics on intellectual property (IP) litigation in China.

Importantly, the statistics also contain the first conclusive data on the operation of the new specialized Intellectual Property Rights Courts (IP Courts) in Beijing, Shanghai and Guangzhou, over a year after they started accepting cases.

The lesson so far is that the specialized IP Courts have proved to be a robust enforcement avenue for both domestic and foreign IP owners, especially for complicated IP disputes and technology-related cases.

Significant increase in administrative cases

According to the White Paper, in 2015, the courts at various levels accepted a staggering 109,386 civil IP cases at first instance (against a total of 123,493 IP cases), and handed down judgments in 101,324 cases.

The Chinese IP docket keeps growing, with the 2015 IP docket almost 6% larger than the 2014 IP docket. The difference between the number of cases filed at first instance and the number of judgments handed down, unfortunately, also means that the backlog of IP cases before the Chinese courts continues to grow.

Strong Beijing focus

According to the statistics released by the IP Courts, the Beijing, Shanghai and Guangzhou-based courts accepted a total of 15,287 cases. The Beijing IP Court accepted a total of 8,706 cases, while the Shanghai IP Court and the Guangzhou IP Court have accepted 1,641 cases and 4,940 cases, respectively.

However, no less than 74% of the cases that were accepted by the Beijing IP Court were administrative IP cases (with trademark cases representing 61%, and patent cases representing 13% of that number). This does not come as a surprise, given the Beijing IP Court's exclusive jurisdiction over appeals against decisions of the Trademark Review and Adjudication Board and the Patent Review Board.

More generally, the size of the administrative IP docket went from 4,887 in 2014 to a staggering 10,926 in 2015 (that is, an increase of 123.6%).

Mixed numbers for foreign-related IP cases

The share of "foreign-related" civil IP cases remains remarkably small, and keeps on shrinking: only 1,327 foreign related civil IP cases were decided at first instance in 2015, which is a decrease of 22.6% compared with the 2014 numbers. The amount of foreign related civil IP cases, as a percentage of the total amount of IP cases, has dropped from 1.9% (2013) and 1.8% (2014), to 1.2% (2015).

In contrast, no less than 4,928 administrative IP cases, or about 45% of the total amount, were foreign-related cases, confirming the pre-existing trend of an outsized foreign administrative docket and an undersized foreign civil docket. However, this dichotomy may be partially due to the fact that the SPC categorises litigation involving the Chinese subsidiary of a foreign company as domestic IP litigation, so the total percentage of foreign-related cases (in a broad sense) may be significantly higher.

Boom of patent cases

The number of patent cases has undergone a significant increase compared to the other types of IP cases. Specifically, the Chinese courts accepted 11,607 civil patent cases at first instance in 2015, which is a 20.3% increase compared to 2014. In addition, the courts accepted a total of 1,721 administrative patent cases at first instance in 2015, which is a 219.3% increase compared to 2014. Most of these administrative patent cases are appeals against the Patent Review Board's decisions.

Antitrust and unfair competition cases

Apart from IP cases in the strict sense, the IP Courts also have jurisdiction over antitrust and unfair competition cases. In 2015, the jurisdiction of the Beijing IP Court over civil antitrust litigation was explicitly confirmed in *Junwei Tian v. Carrefour & Abbott Laboratories*.

In terms of unfair competition litigation, in 2015, the Chinese courts accepted 2,181 cases, which represents a 53.4% increase compared to 2014.

Conclusions

The IP Courts in Beijing, Shanghai and Guangzhou were originally set up as a pilot-project, with the aim of improving the quality and uniformity of IP litigation in China. Now, over a full year into their existence, the IP Courts are increasingly proving to be a cornerstone of IP litigation in China.

While the specialized IP Courts are, by themselves, no panacea for some of the pervasive problems with IP enforcement in China, the new courts are commonly seen as a step in the right direction: the courts tend to be more willing to tackle controversial issues, seem to be more prepared to issue preliminary injunctions and have granted considerable amounts of damages to foreign parties in some cases.

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Are mobile chat messages caught by Hong Kong's anti-spam law?

In April 2016, the Magistrates' Court of Hong Kong directed a defendant to disclose information on the sending of unsolicited group chat messages on a mobile messaging application.

This confirms that mobile chat messages and potentially other forms of interactive messaging on social media would be subject to the anti-spam law of Hong Kong, the Unsolicited Electronic Messages Ordinance (UEMO). The regulatory authority, the Office of the Communications Authority (OFCA), received over 1,000 complaints about the sending of an identical, unsolicited short message promoting the defendant's tutor referral service via the mobile messaging platform. The defendant was investigated by OFCA as to potential contravention of various requirements under the UEMO, including:

- Commercial electronic messages (CEM) must include accurate sender information
- CEMs must contain an unsubscribe facility
- Senders must honour unsubscribe requests, and
- Senders must not send CEMs to a phone number listed on the do-not-call register.

The most interesting implication of this case is that the ambit of "commercial electronic messages" is considered wide enough to cover mobile messaging. This may potentially extend to other forms of interactive messaging on social media too. The court's decision was made despite the fact that when the UEMO came into force on 22 December 2007, many of these mobile messaging platforms were not yet in existence. This decision is consistent with the spirit of the UEMO, which aims to tackle unsolicited electronic marketing messages with a Hong Kong link sent through text or pre-recorded voice messages to electronic addresses including telephone numbers, fax numbers, email addresses and instant messaging accounts. The definition of "electronic messages" is also drafted in wide and technology-neutral terms, referring to messages in any form sent over a public telecommunications service to an electronic address, including text, voice, sound, image or video messages or messages combining those mediums.

OFCA has also stated that as a matter of policy, it takes a "technology-neutral approach" to enforcement.

Thus, the lesson to take away is, senders of marketing materials through existing or new messaging channels or media must carefully consider the potential implications of the UEMO and must comply with the applicable requirements.

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Hong Kong and Singapore financial services regulators move on cyber security

In May 2016, within the span of a week, the Hong Kong Monetary Authority (HKMA) and the Monetary Authority of Singapore (MAS) both announced significant new measures to advance their ongoing cyber security initiatives.

The new measures follow in the wake of parallel announcements in the autumn of 2015 in which the regulators called for financial institutions to up the ante in their preparations for cyber attacks. These earlier communications emphasised that conventional risk management philosophies were unlikely to be fit for purpose in combatting new and emerging cyber threats, and that board-level accountability is necessary in order to achieve adequate levels of threat assessment, prevention and incident-response planning.

The HKMA's Cybersecurity Fortification Initiative

On 24 May 2016, the HKMA issued a circular to Hong Kong banks announcing its Cybersecurity Fortification Initiative (CFI). The CFI has three key pillars:

- **The Cyber Resilience Assessment Framework.** The Cyber Resilience Assessment Framework is envisaged to be a self-assessment tool for institutions to assess their vulnerability to cyber risks. The objective is both to support and refine institutions' assessment of their readiness to detect and respond to cyber threats and to give the HKMA greater visibility of the financial services industry's overall level of preparedness. A draft of the framework will be issued to the industry for a three month consultation. The HKMA's letter provides a brief overview, indicating that the Cyber Resilience Assessment Framework begins with a self-assessment program that will look at a number of parameters, including the specific security technology used by the bank, the risk presented by the bank's products and organisational characteristics and the bank's track record in preventing and

responding to cyber threats. The outputs are a "maturity assessment" that benchmarks the bank against a standard and a roadmap plotting areas for improvement. The self-assessment and benchmarking process will be supplemented by "intelligence-led cyber attack simulation testing" that will supplement traditional penetration testing with simulation test scenarios based on real-time cyber threat intelligence.

- **The Professional Development Program.** The Professional Development Program aims to increase the number and level of expertise of cyber security professionals in Hong Kong. There is an explicit link to CFI, with the HKMA explaining its desire that the self-assessments be carried out by suitably qualified professionals. The HKMA proposes to collaborate with the Hong Kong Applied Science and Technology Research Institute and the Hong Kong Institute of Bankers to develop the program, and targets to open the program by the end of 2016.
- **The Cyber Intelligence Sharing Platform.** In line with cyber security initiatives in the US, the EU and elsewhere, the HKMA's cyber security program seeks to improve industry sharing of intelligence about cyber threats as a means of better identifying and containing emerging threats. The platform, which the HKMA intends to develop in collaboration with the Hong Kong Association of Banks, will support the collection, analysis and sharing of detailed cyber threat reports. The HKMA expects all banks to join and participate.

The MAS's Cyber Risk Management Project

On 16 May 2016, the MAS announced the launch of Singapore's Cyber Risk Management Project, a partnership of government (in the form of the MAS and the Singapore Cyber Security Agency), public institutions (including the Nanyang Technological University) and a number of private organisations. The focus of the initiative is on fostering research and development into cyber threat assessment tools and encouraging the uptake of cyber risk insurance.

The MAS's Cyber Risk Management Project did not include any call for specific new cyber security compliance measures. However, at the project's announcement MAS officials responded to questions about the recent cyber attacks directed at banks in the region using the SWIFT financial messaging system, reportedly causing losses of USD 81 million to a Bangladesh bank. MAS spokespersons explained that they would continue to monitor the cyber security threat landscape and provide additional guidance where necessary.

Conclusions

The recent revelations concerning the potential compromise of the SWIFT messaging system, which is responsible for more than USD 6 trillion in transfers every day, have escalated cyber security concerns in the financial services sector to a new level of anxiety. The recent initiatives by the HKMA and the MAS are therefore important and timely, but the regulators' directions leave open questions about the specifics of the regulators' expectations. The initiatives to date call for a change in general approach and methodology for assessing and responding to cyber threats, but do not shed much light on what benchmarks the regulators are seeking and how they will assess achievement against evolving standards.

The HKMA's consultation will no doubt drive thinking forward at a time when the industry needs focussed thinking on emerging cyber security challenges.

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China eases cross-border film and media regulations

On 18 May 2016, China's media regulator – the State Administration of Press, Publication, Radio, Film and Television (SAPPRFT) – issued the Decision on the Amendment of Certain Rules (Decision), amending five of its rules.

This amendment is part of a broader government-wide effort to reform and simplify China's complex and sprawling system of administrative approvals across all fields. As media is one of the most heavily regulated and restricted sectors to foreign investment, any changes in this area, however small, are likely to be closely followed by industry players looking for an opportunity to enter the market.

Three amendments included in the Decision in particular will have an impact on those involved in cross-border film and media activities.

Movie negatives

Negatives and workprints for Sino-foreign co-produced films shot in China can now be processed or post-produced overseas without any special SAPPRFT approvals. Furthermore, producers of Sino-foreign co-produced films will no longer need to report in their applications to SAPPRFT for initial project approval where the processing and post-production of their film negatives or workprints will take place. Previously, approval and reporting were required, and applicants had to demonstrate a special technical need as the basis for seeking approval for overseas processing or post-production.

On a related note, it also used to be the case, conversely, that companies in China could not perform processing or post-production of negatives or workprints of films shot overseas without SAPPRFT approval. However, this approval item was recently cancelled as well, in SAPPRFT's April 2016 Decision on the Repeal of Certain Rules and Normative Documents, which abolished the 2004 Approvals for Films to Come in or Go Out of the Country for Processing or Post-Production Administrative Procedures. This is, of course, only part of the story and Chinese companies will still not be able to participate in any processing of films shot overseas which have content that offends SAPPRFT's censorship principles.

Both of the above-mentioned changes are in conflict with the Film Administrative Regulations (Film Regulations), which still contain approval requirements for these actions and penalties for non-compliance. However, it appears that the SAPPRFT policy has been to relax how these rules are applied in practice for quite some time now, especially as movie production has moved away from traditional film and into digital footage, digital storage and digital post-production, with the ability to transfer files across borders in cyberspace with or without approval, making the rules difficult to enforce in practice. Through the Decision, SAPPRFT essentially codifies this policy shift and brings into line its departmental rules. However, SAPPRFT is not empowered to amend the Film Regulations, as these are higher-level administrative regulations issued by a legislative body higher up the chain, namely the State Council.

The result is a slightly awkward position of having conflicting legislation on the books, and technically the Film Regulations should prevail according to well-established rules of statutory interpretation. However, given that SAPPRFT is the body actually charged with implementing the Film Regulations, we expect SAPPRFT will not have gone out on a limb and 'overruled' the State Council's regulations without getting some kind of assurances from the State Council that it was authorised to do so. As a result, we expect that under its current policy, SAPPRFT will follow the Decision and not enforce any provisions to the contrary. Nevertheless, out of prudence, companies with relevant projects may still want to liaise with the relevant SAPPRFT body to confirm the requirements that may be applicable to their own specific situations.

Film exhibitions

Film exhibition events in China co-hosted with foreign countries are encouraged, and the door is open to a potentially wide range of work units in China to host them, subject to SAPPRFT approval.

"Film exhibition events" is the new term for what the relevant rules used to call "localized film festivals with foreign elements." Both these terms, new and old, stand in contrast to "international film festivals (exhibitions)." In fact, none of the foregoing terms are explicitly defined in the law, but it is implicit in the rules that full-on international film festivals (exhibitions) are events imbued with great weight and significance (and risk from the censor's perspective), so they may only be hosted by government bodies in China.

Film exhibition events, implicitly, appear to be on a smaller scale and hence likely to have less impact, and are divided between those which involve a single country, and those involving multiple countries. Those involving one country can be approved by provincial level SAPPRFT, with a copy of the approval sent to central SAPPRFT. If multiple countries are involved, however, then approval must be obtained from central SAPPRFT. There is one variant on this: if the host is a "central unit in Beijing" (a term not defined within the statute but in other statutes as, for example, organs of the central government and/or centrally governed state-owned enterprises), or a directly subordinate agency thereof, then approval must come from central SAPPRFT, regardless of the number of countries involved.

Prior to the Decision, all "localized film festivals with foreign elements" had to be government organized (albeit, it could be local government) and centrally approved.

Participation by foreigners in domestic TV series

Censorship of Chinese domestic TV series that involve foreigners in their creation has been decentralized and delegated to provincial-level SAPPRFT, putting such series on an equal footing with Chinese domestic TV series without foreign involvement. Previously, such foreign participation triggered approval by central-level SAPPRFT.

Exceptions to this provincial-level delegation apply. Censorship will still be at the central level for a Chinese domestic TV series if

– it is produced by production entities which, according to regulations, record file directly with central SAPPRFT (the production entities of departments directly under the Central Committee of the Communist Party of China or of centrally governed state-owned enterprises)

– a provincial-level authority submits it to the central level authority for censorship, or

– the series raises social controversy or the series ought be censored at the central level in the public interest.

A “domestic TV series” is one produced by Chinese domestic production entities. The term stands in contrast to a “jointly produced TV series” (i.e., one produced jointly by a Chinese domestic production entity and one or more foreign production entities) and “imported TV series”(i.e., foreign TV series that are produced overseas and brought into China for domestic broadcasting). Jointly produced TV series and imported TV series are subject to censorship by central level SAPPRFT.

Conclusions

Each of the above-mentioned amendments in the Decision represents a small, but positive shift for the industry and for foreign players interested in participating in it. Of course, more substantive relaxations and a greater shift away from prior approvals and restrictions or an after-the-fact responsibility system would be welcomed by foreign investors and industry participants alike.

SAPPRFT’s overall trend, though, appears to be for more restrictive regulation, not less, as demonstrated by, for example, its sweeping new rules on online publishing published in February; reports that SAPPRFT in May had “talks” with video websites to persuade them to transfer a part of their equity to state-owned enterprises as part of a “special management share system” and sign letters of intent to that effect before 10 June; and the issuance of SAPPRFT’s new online game publishing rules (the Notice on the Administration of Mobile Games Publishing Services) of 24 May requiring SAPPRFT pre-approval of every single online game (and pre-installed game) in China beginning 1 July, with games launched prior to that needing to obtain approval before 1 October.

Such backdrop of increased scrutiny of online activity and content leaves little room for optimism that any of the spaces regulated by SAPPRFT, including film, TV and film exhibitions, will see a greater move towards regulatory relaxation, at least not in the near term.

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Hong Kong court overturns competition regulator's TV decision

On 29 January 2016, Hong Kong's Court of First Instance quashed a 2013 decision (Decision) by the Communications Authority (CA) – upheld by the Chief Executive In Council (CEIC) – against Television Broadcasters (TVB), primarily on the grounds that the CA and CEIC are inherently political entities lacking objective impartiality as decision makers due to their concurrent policy, advisory and executive roles.

While the Decision was ultimately set aside on constitutional grounds, as the CA and CEIC were not found to be an independent and impartial tribunal, the Honourable Justice Godfrey Lam of the Court of First Instance upheld most of the competition analysis by the CA and confirmed that TVB's practices were anti-competitive. As the first President of the Competition Tribunal under Hong Kong's new competition regime, Justice Lam's judgment provides considerable insight as to how future competition cases might be interpreted in Hong Kong.

September 2013 Decision

In September 2013, the CA found that TVB had violated the antitrust provisions of the Broadcasting Ordinance, in that the station had imposed certain restrictions on artistes and singers with the purpose and effect of restricting or distorting competition in the Hong Kong television (TV) programme service market ("downstream market"). The restrictions included the

- "no promotion policy" which prohibited TVB's contractual artistes from appearing in promotional activities of other local TV stations, even if they starred in the production promoted
- "no original voice policy" which prohibited TVB's contractual artistes' original voice from being used in productions featuring their images broadcasted by other local or overseas TV stations
- "no Cantonese policy" whereby artistes on contracts with TVB were prohibited from speaking Cantonese in programmes of other TV stations in Hong Kong, and
- "no-obligation-to-use-clause" whereby TVB was not under an obligation to use a contracted artiste.

Despite the ability for the artistes or singers to seek consent prior to appearing on or providing services to other TV stations in Hong Kong, in reality, the artistes and singers considered requesting TVB's consent to be futile or feared that seeking consent would be detrimental to their careers.

As a result of the above, the CA found that TVB had imposed exclusivity on singers and artistes. Due to the "no-obligation-to-use-clause," TVB was not bound to make any actual use of an artiste's services and did not in fact fully engage significant numbers of artistes and singers it contracted with. This enabled TVB to "warehouse" them at low cost. The CA found that the above provisions and policies had the effect of foreclosing rivals' access to an essential input for TV programme production. Such foreclosure was found to produce significant harm on TV viewers as end consumers by causing a deterioration of quality of rivals' programme offerings. The CA imposed a penalty of HKD 900,00 (around USD 115,000) on TVB.

Court of First Instance's 2016 judgment

The framework for competition analysis to be applied was set out in the Guidelines to the Application of the Competition Provisions of the Broadcasting Ordinance, which were applicable in the broadcasting industry prior to the Competition Ordinance coming into force in December 2015. It applies a sequential methodology comprising three broad stages:

- defining the relevant market
- assessing market power, and
- identifying an anti-competitive purpose or effect in the relevant market.

Justice Lam considered that the appropriate standard of proof is the balance of probabilities.

Market definition

While TVB agreed with the CA's definition of the downstream market as the "all TV viewing market," it contended that the CA erred in failing to define the relevant upstream market since the allegation was that conduct in such market impaired competition in the downstream market. TVB wanted to include in the definition of upstream market new or aspiring artistes and singers, and artistes not currently contracted with Hong Kong TV broadcasters.

However, the judge held that the central focus remains on evaluating whether the contested conduct has an anti-competitive effect in a particular relevant market – in this case, the downstream market. It is not essential to formally define the upstream market in every case where input foreclosure is the underlying theory of harm, nor is there a general mandatory requirement in competition law to carry out a formal market definition exercise. Further, by applying a substitutability analysis to determine the size of the available pool of talent for producers of TV programmes in Hong Kong, it was unlikely that a local broadcaster could rely significantly on new artistes or high value artistes not under contract with any TV broadcasters to participate in entertainment programmes to drive rating and advertising revenue, as it was found on the evidence that it takes time to nurture new talents.

Market power

Justice Lam rejected that the proper assessment of market power needed to be based on revenue. He remarked that assessing market power depends on the nature of the competition being studied. For broadcasters, this was best reflected in their share of viewership, since both free to air (FTA) and pay TV broadcasters were found to compete with each other to maximise viewership – the former to attract higher advertising revenue, and the latter to attract subscription fees.

The Broadcasting Ordinance defines dominance in terms of the ability "to act without significant competitive restraint from its competitors and customers." Thus, Justice Lam agreed that the relevant test is whether TVB was able to behave independently of its rivals and ultimately consumers, either by profitably raising prices or, in a FTA context, profitably reducing production cost. This is in line with international practices and is also the test favoured by the Hong Kong Competition Commission in its guidelines. If a broadcaster can reduce the quality of its programming without suffering a significant drop in viewership, this would be an indication of the extent of its market power. On the evidence, 40% of all households in 2009 did not have a pay TV subscription. They would not necessarily respond to a small drop in quality of TVB's programmes by switching to pay TV given cost and other considerations.

The CA also based its finding of market power on other factors including

- the fact that TVB's market share was significantly higher than that of its rivals
- high barriers to entry and exit from the market, and
- the absence of any real countervailing buyer or supplier power.

Proportionality of remedies

Justice Lam held that the CA had imposed disproportionate remedies that went beyond what was necessary to redress the anti-competitive harm found. The judge held that there was no reason for requiring TVB to abandon all restrictive clauses and policies in relation to all artistes on all types of contracts – i.e., serial-based, minimum one-show or singer contracts – when releasing artistes on the minimum one-show commitment contracts could already bring the infringing system to an end.

Conclusions

This case is of considerable significance to competition enforcement in Hong Kong, as it is the first antitrust case decided by the President of Hong Kong's new Competition Tribunal.

While the Decision was struck out on constitutional grounds, Justice Lam upheld the entirety of the competition analysis by the CA – except the proportionality of the remedies – and confirmed that TVB's practices were anti-competitive.

The judge found that the "no original voice policy" rendered rivals' programmes less appealing to TV viewers, and imposed a direct cost on rivals by requiring them to dub acquired programmes. Similarly, the "no promotion policy" exacted a direct cost on rivals in the form of extra advertising and promotional expenses incurred to promote a drama series. The "no Cantonese policy" also reduced the quality of the interviews with singers on rival TV stations, thus impairing rivals' ability to compete with TVB. On the balance of probabilities, restricting artistes' services were found to have a high potential of causing harm to consumers by resulting in a deterioration of quality of rivals' self-produced TV programmes for which artistes services are a key input.

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Face lift for China's Telecommunications Catalogue after 13 years

On 28 December 2015, China's Ministry of Industry and Information Technology (MIIT) issued the revised Classification Catalogue of Telecommunications Businesses (2015 Edition) (2015 Catalogue) which came into effect on 1 March 2016. While a draft was circulated for public comments in 2013 (2013 Draft Catalogue), this is the first official 'face lift' since the 2003 version (2003 Catalogue).

The 2015 Catalogue retains the general classifications set forth in the Telecommunications Regulations. Regulated services requiring a telecoms business operating permit are divided into basic telecommunications services (BTS) and value-added telecommunications services (VATS). Within these categories are sub-classifications into Type I and Type II services. The 2015 Catalogue maintains this framework but revises descriptions and sub-classifications of certain services. In short, the 2015 Catalogue introduces incremental change rather than the radical overhaul the thirteen-year time lapse would appear to have merited.

Below we discuss key revisions and new developments in the 2015 Catalogue in relation to cloud computing, e-commerce, and when an Internet Content Provider (ICP) permit is necessary.

Cloud computing

There is currently no "hard law" in China providing a clear or comprehensive definition for cloud computing services. However the State Council's Opinion on Promoting the Creativity and Development of Cloud Computing and Cultivating New Information Industry Ecology and the Guidelines on the Construction of Cloud Computing Comprehensive Standardization System (collectively, Guidelines) can serve as a useful reference point. Under the Guidelines, cloud computing refers to centralized management and dynamic allocation of computing, storage, software and other resources through networks, so that information technology capability can be provided on demand.

Cloud computing services are classified into three main subcategories: Infrastructure-as-a-Service (IaaS), Platform-as-a-Service (PaaS) and Software-as-a-Service (SaaS).

It is understandable that the 2003 Catalogue was ill-adapted to regulating cloud computing services given the limited awareness and deployment of cloud computing technologies at the time. IaaS and PaaS arguably fell under the description of Internet Data Centre (IDC) services in the 2003 Catalogue, meaning that in practice, service providers offering IaaS and PaaS needed to apply for and obtain an IDC VATS Permit. However, it was not clear whether a SaaS provider also required a VATS Permit. Technically SaaS services are hosted by an IDC provider, so there was an argument that a SaaS provider itself did not need to hold an IDC VATS Permit. On the other hand, some local MIIT branches appeared to take the position that SaaS was regulated as a type of ICP service and required an ICP VATS Permit.

The 2013 Draft Catalogue introduced a new category called the Internet-based Resources Collaboration (IRC) services designed to cover all types of cloud computing services. However, this gave rise to a new issue: part of IaaS and PaaS were still caught by the description of IDC services and any IaaS or PaaS service provider (not providing SaaS) would have been under the onerous burden to apply for and obtain VATS Permits covering both IDC and IRC services.

The 2015 Catalogue attempted to solve this new issue by placing IRC services as a sub-category under IDC services in the 2015 Catalogue. While this makes clear that IaaS and PaaS providers must apply for and obtain an IDC VATS Permit, there remains confusion as to which VATS Permit SaaS providers should apply for.

On a plain reading, the description of IRC services in the 2015 Catalogue captures all types of cloud computing services, so on the face of it SaaS service providers would also need to apply for an IDC VATS Permit. The question is whether this would be realistic or practical given that most SaaS providers are software houses and do not have the necessary experience or facilities (e.g., server warehouses) available to support an application for an IDC VATS Permit. Under such circumstances, there is currently another interpretation of the 2015 Catalogue in the market that IRC services should be read as only encompassing IaaS and PaaS. SaaS providers would require an ICP VATS Permit if any of the services provided fell under the description of ICP services. The latter interpretation would make more sense legally and practically, but it would still be advisable to check with local MIIT officials before launching any SaaS product given the lack of clarity in the law.

The 2015 Catalogue does not make any substantial regulatory changes for foreign investment in cloud computing (or telecoms in general). China made no specific commitment to open up the IDC service market when it joined the World Trade Organization (WTO) and practically speaking it has proved very difficult (if not impossible) for foreign invested enterprises (FIEs) to obtain an IDC VATS Permit (except for a Hong Kong/Macau invested joint venture where the foreign investor qualifies under the Closer Economic Partnership Arrangements between the Mainland and Hong Kong/Macau). In addition, although ICP services were specifically listed in the commitments when China joined the WTO, in practice it has also proved very difficult (even with the cap on foreign investment fixed at 50%) for a foreign invested joint venture to obtain an ICP VATS Permit.

E-commerce

Perhaps the biggest disappointment in the 2015 Catalogue is the lack of progress in e-commerce regulation. The concept of what constitutes "e-commerce" has never been clarified under the law. According to the Circular on the Relevant Issues concerning the Examination, Approval and Administration of Foreign Investment Projects in Internet and Vending Machine Sales (Internet and Vending Machine Circular), provision of a third party platform on which other parties can transact (e.g., an eBay or Taobao-type model which brings buyers and sellers together) requires a VATS Permit, which in practice has been interpreted as an ICP VATS Permit. Provision of a self-owned platform for sales of self-owned products on the other hand is seen as an online extension of the bricks-and-mortar sales channel and only requires an ICP record filing (ICP Filing).

However, MIIT has never officially endorsed (nor refuted) the Internet and Vending Machine Circular. According to the recently promulgated Circular on Removing the Restrictions on Foreign Equity Ratios in Online Data Processing and Transaction Processing (Ecommerce) Business (E-commerce Circular), MIIT in fact considers that operational e-commerce should be regulated under the separate VATS category of On-line Data Processing and Transaction Processing Services (OTP) and requires prior procurement of the corresponding VATS Permit. Many commentators have since taken the view that the concept of e-commerce should also refer to third party platforms, and that going forward, operators of third party platforms should apply for the OTP VATS Permit rather than the ICP VATS Permit.

To date, the only industry where the E-commerce Circular has been enforced effectively is that of the so-called “traditional” third party platforms, where physical goods are sold by sellers over the platform (e.g., an eBay or Taobao-type model). Most major third party platforms have obtained the OTP VATS Permit in addition to the ICP VATS Permit. For non-traditional third party platforms, the picture is even more confusing as seen in the following two examples:

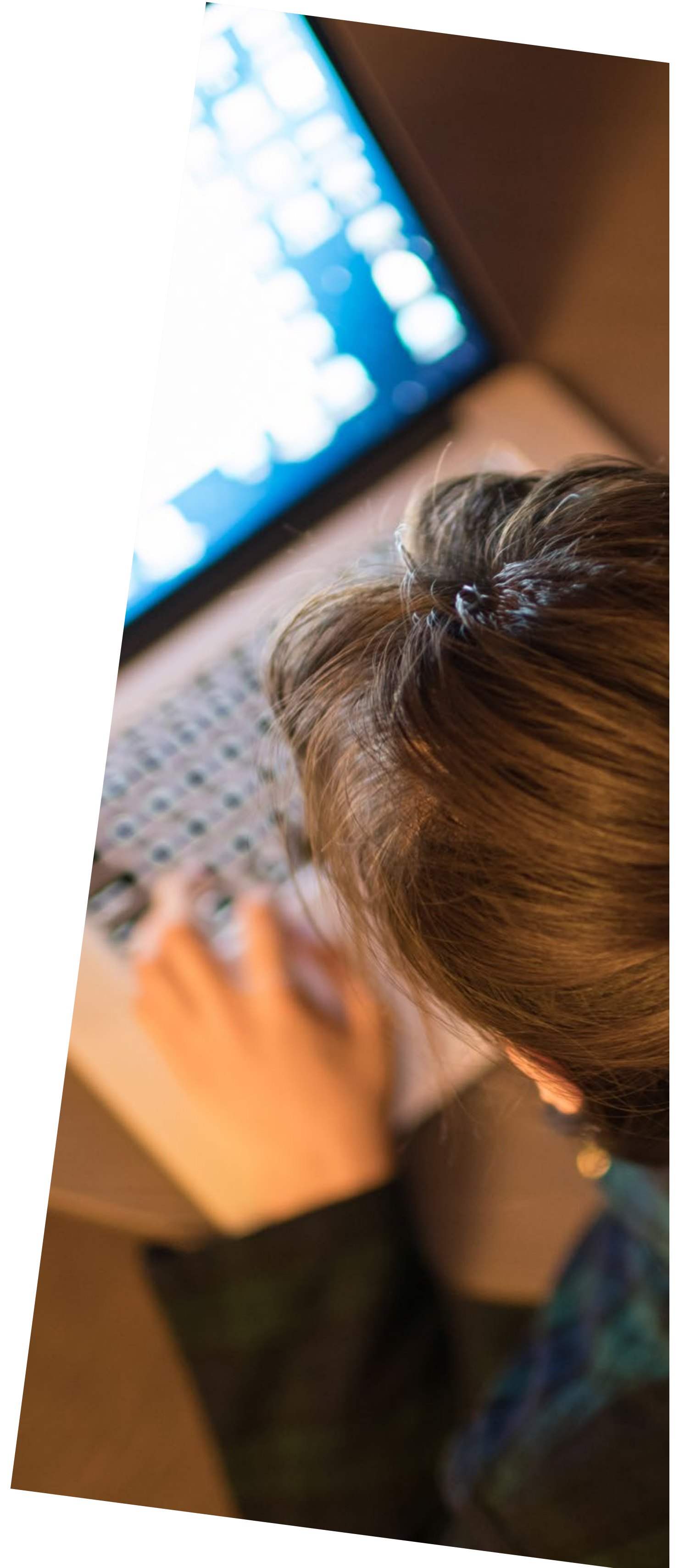
– Online travel agency services. While such services appear to provide a third party platform for travel services, most providers of online travel agency services in China have only obtained an ICP VATS Permit, and have not obtained the OTP VATS Permit.

– Online finance business. According to the Promoting the Healthy Development of Online Finance Guidance Opinions jointly issued by MIIT and nine other State Council departments, third party online finance platforms must have either obtained a VATS Permit or conducted an ICP Filing. However it is unclear if an ICP Filing may be enough to satisfy the regulatory requirement, or if the wording used is shorthand and that in fact the platforms also need “whichever type of consent may be required by law.” A number of providers of third party platforms for online finance services have only conducted an ICP Filing. The question is whether MIIT has tacitly given ground in the financial services area in the same way that MOFCOM does not pursue approvals for the establishment of certain financial sector FIEs.

ICP services

Conflict with the ICP Measures

ICP services are another area demonstrating the complex and outdated regulatory environment for China telecommunications. The key problem is that the relationship between the Telecommunications Catalogue and the Internet Information Services Administrative Measures (ICP Measures) and the application of the rules in practice have never been made clear.



Under the ICP Measures, whether an ICP VATS Permit is required is determined by a straightforward criterion: whether the online information is provided to users for consideration or free of charge. If it is provided for consideration, the provider would need to apply for and obtain an ICP VATS Permit; if not, only an ICP Filing would be required. Unfortunately this criterion has never been referenced in the various iterations of the Telecommunications Catalogue, giving rise to much confusion.

The 2015 iteration does not help to resolve this issue: it introduces new sub-categories under ICP services such as search engine services (online database search and retrieval, in WTO-speak), information community platform services and information real-time exchange services. Currently, most of these services in China are provided free of charge to users (e.g., WeChat or Weibo). Applying the 'consideration' principle under the ICP Measures, such services should not require an ICP VATS Permit. However, this is clearly not the case under the 2015 Catalogue.

Similarly, based on the ICP Measures, a paid-for newspaper subscription website should require an ICP VATS Permit. In practice, though, MIIT currently only requires an ICP Filing if the newspaper is only selling its own product.

Catch-all category

Traditionally, when it is not clear which category of the Telecommunications Catalogue should apply to a specific real-world telecommunications service, MIIT has tended to classify such service under "ICP Services". For example, it was generally thought (before the promulgation of the E-commerce Circular) that the provision of a third party platform was subject to an ICP VATS Permit even though technically speaking it had nothing to do with providing content. The new sub-categories introduced by the 2015 Catalogue show that MIIT is trying to make the scope of ICP VATS more specific. Nevertheless at the rapid pace at which technology is developing, MIIT may still end up having to use ICP VATS Permit as a 'catch-all' category to bring new forms of telecommunications services within its regulatory ambit.

Consistent with its role as a catch-all category, ICP is the category which has undergone the most substantial expansion of any BTS or VATS category. From the original 2003 Catalogue's focus on content provision, online gaming, commercial information and positioning services, the category now includes

- information distribution platforms and delivery services (e.g., SnapChat or video-on-demand services like Tudou)
- search and retrieval services (e.g., Baidu)
- information community platform services such as Facebook (banned in China) or WeChat
- instant messaging services and interactive voice response services (e.g., WeChat)
- information protection services, and
- public service subscriber platform virus query and removal or spam blocking services.

This is a wide scope, as spam protection providers and network security services traditionally would not see themselves as part of the same industry sector as content providers.

Conclusions

The key question on everyone's lips is why it is took so long for this Catalogue to appear, when it has only introduced relatively minor changes to the overall scheme and contents of the 2003 Catalogue. The 2015 Catalogue has failed to grasp the thornier problems of interpretation (notably cloud computing and e-commerce) and leaves industry participants in the dark about where certain key services sit in the regulatory scheme. It may cheer up domestic players with an eye on the resale market, but there is nothing in the 2015 Catalogue to suggest any breakthrough for foreign investment in the sector and indeed nothing to rival the changes brought about by liberalization in the China (Shanghai) Free Trade Zone.

In short, there have been some minor improvements and updates and moving around of pieces, but nothing remotely meeting the weight of expectation in the market after such a long gestation period.

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MOFCOM lifts merger control conditions on 2012 Walmart acquisition

On 8 June 2016, the Chinese Ministry of Commerce (MOFCOM) released its decision to lift the conditions it had imposed on Walmart's acquisition of 33.6% of the shares in Newheight Holdings. That acquisition in 2012 gave Walmart corresponding rights over Yihaodian, one of China's best-known e-commerce supermarkets, through a reported "variable interest entity" (VIE) structure.

MOFCOM's 2012 remedy decision

MOFCOM's 2012 decision seemed to rely on a complicated theory whereby, through the indirect acquisition of a majority shareholding in Yihaodian, Walmart would somehow leverage its position as a major bricks-and-mortar supermarket worldwide and increasingly in China into the online retail space, and from there into the area of certain value-added telecommunications services (VATS).

As a result, MOFCOM imposed a number of conditions to its merger control clearance:

– Newheight Shanghai (a Newheight Holdings subsidiary) is only entitled to use its online platform for its own sales (i.e., not for sales of third-party goods)

– Newheight Shanghai is prohibited from allowing its online platform to be used by other vendors without a VATS business permit, and

– Walmart shall not use a VIE structure to engage in VATS through Yihaodian.

Under MOFCOM's Relevant Issues concerning the Examination, Approval and Administration of Foreign Investment Project in Internet and Vending Machine Sale, providing an online platform through which third parties can trade their goods would be deemed an activity requiring a VATS business permit (it was widely thought to be an "Internet content provider service" at the time) with a cap on foreign investment of 50%. Through the acquisition, Walmart would have indirectly acquired a majority in Yihaodian, thereby exceeding the cap.

New 2016 decision

In its decision from 30 May 2016 – made public on 8 June – MOFCOM decided to lift the conditions imposed in its 2012 decision. MOFCOM's reasoning was as follows. First, MOFCOM found that Walmart had been in full compliance with the conditions imposed in the 2012 decision.

Second, MOFCOM surveyed the current competitive situation in the market. It held that new policies since 2014 have liberalized certain VATS markets, and that this would attract new entrants into the market. This refers to the decision by the telecoms and Internet regulator – the Ministry of Industry and Information Technology – in June 2015 to open up operational e-commerce to foreign investment, such that it is now permitted for foreign investors to own 100% of an operational e-commerce entity.

Given that regulatory change, it would have seemed somewhat incongruous to have contrived to apply restrictions that effectively denied Walmart the benefit of the liberalization.

Third, MOFCOM found that Yihaodian's market position had not grown as fast as the overall market.

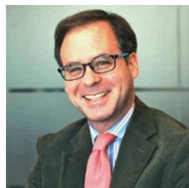
Impact of the new decision

MOFCOM's decision to lift the remedies imposed in the *Walmart/Newheight* case did not come as a surprise. In the past few months, MOFCOM has issued a number of decisions where it lifted remedies from past conditional merger clearance decisions, or agreed to change them to the parties' benefit.

Some of the decisions to lift or alter remedies were made public, for example the decisions on the remedies in *Google/Motorola Mobility*, *Western Digital/Hitachi Storage* and *Seagate/Samsung Hard Disk*. Other decisions do not appear to have been published as such, reportedly for example a remedy from the *Mitsubishi Rayon/Lucite International* transaction.

The importance of this set of decisions lifting or changing past remedies goes beyond the particular companies involved. It can also be interpreted as a learning process by MOFCOM – either as a recognition that the remedies were effective and indeed removed the concern the authority had when issuing conditional clearance or, perhaps more likely, as an indirect admission that some of the remedies were not particularly necessary or effective and – having allowed the "dust to settle" – it is now time to lift those conditions.

Back in 2012, the *Walmart/Newheight* remedies in particular seemed to have been driven by a last minute regulatory intervention based on policy/strategy considerations, beyond pure antitrust concerns. Looking at this from a positive perspective, the fact that MOFCOM lifted these conditions arguably shows that the authority is willing to have a fresh look at, and to make necessary adjustments to, previous decisions.



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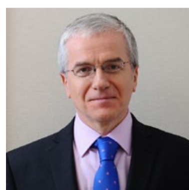

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Hantao v. Baidu – 'scraping' third-party information as unfair competition

On 26 May 2016, the People's Court in Shanghai's Pudong New Area handed down its judgment in *Hantao v. Baidu*, in which Baidu was sued for inappropriately using information uploaded on dianping.com, a Hantao-owned website and app.

The court decided in favor of the plaintiff, and laid out a possible analytical framework for assessing unfair competition aspects in the production, collection and use of information in the Internet space.

Background and findings

Hantao operates dianping.com, a classified information site that provides independent consumer reviews of local services such as restaurants, hotels etc. Baidu is the leading search provider in China, and also provides online mapping (Baidu Map) and Q&A (Baidu Zhidao) services. Baidu was found to have "scraped" consumer reviews from dianping.com (i.e., appropriating some of the dianping.com content through its search technology), and presented dianping.com consumer reviews in Baidu Map and Baidu Zhidao without the authorization of Hantao.

The Pudong court decided that the unauthorized use of consumer reviews from dianping.com violated Article 2 of the Anti-Unfair Competition Law (AUCL). The AUCL has a broad scope, which includes specific prohibitions on various types of unfair practices. For practices that do not fall under the specific prohibitions in the AUCL, past cases suggest that the courts tend to apply the catch-all clause in Article 2, which requires companies to honor the general principles of willingness, equality, fairness, honesty and good faith, and widely-recognized commercial ethics.

Consistent with past cases, since the specific prohibitions in the AUCL did not apply, the court in *Hantao v. Baidu* relied upon Article 2 of the AUCL to decide the case. In this case, the court examined how Article 2 applies to the production, collection and use of information. In particular, the court indicated that there are three requirements for conduct to amount to unfair competition: the companies in question are competitors; the plaintiff suffered a loss as a result of the conduct; and the conduct is not legitimate.

In relation to the first requirement, the court followed "traditional" Article 2 "case law" which reads a requirement that the plaintiff and defendant be competitors into the law. Similar to past Internet cases, the Pudong court took a broad approach in finding a competitive relationship, holding that companies from different sectors may be considered competitors for the purposes of the AUCL. The decision suggests that, in the Internet sector, companies that target the same group of consumers may be viewed as competitors, regardless of the nature of the specific services they provide.

In relation to the second requirement, the court found that Baidu had collected consumer reviews from dianping.com, and presented some of them in full on Baidu Map and Baidu Zhidao. This practice allowed Baidu users access to the consumer reviews without visiting dianping.com. As a result, the court held Hantao had suffered losses of user visits and potential business opportunities.

Collection and use of third-party information

The court's analysis was most interesting in relation to the third requirement. Here, the court evaluated the legitimacy of Baidu's collection and use of information by looking at the following factors: (1) whether the information at stake had commercial value and conferred a competitive advantage; (2) how difficult was the information to obtain and what costs Hantao incurred in that regard; (3) whether Hantao's original collection and use of the information violated the law, commercial ethics or public interests; and (4) whether Baidu's use of the information was legitimate.

On (1), the court considered consumer reviews to be valuable resources and to confer a competitive edge upon Hantao. In particular the court found that, through the accumulation of consumer reviews, Hantao managed to assist consumers in making informed decisions and provide vendors with feedback from consumers.

On (2), the court found Hantao to have invested a significant amount of time and effort in setting up a functioning consumer review system and accumulating consumer reviews.

On (3), the court considered that Hantao's original acquisition, holding and use of the consumer review information did not violate the law or commercial ethics.

On (4), Baidu was found to collect consumer reviews from dianping.com and use some of them in full in its own products. According to the court, Baidu's collection and use of the dianping.com information was a "free ride" on Hantao's efforts, and thus ran against well-recognized commercial ethics and the principles of honesty and good faith. Interestingly, the court also indicated that an alternative solution, which Baidu had adopted for one of the earlier mobile versions of Baidu Map, would not breach the law: providing only a limited number of consumer reviews; copying only parts of the reviews; and including a link to the original source at dianping.com.

Impact of ruling

The *Hantao v. Baidu* judgment is interesting as it focuses on a rather novel issue. In the past, most "scraping" cases in the Internet sphere brought under Article 2 of the AUCL focused on the (undue) appropriation of content "owned" or created by competitors – for example, video streaming available on a website (see our alert on a recent "ad block" case here). In this case, in contrast, the "scraped" content was not "owned" by the plaintiff Hantao, but was produced by users of dianping.com (i.e., everyday consumers).

To rule on the "scraping" issue, the court in *Hantao v. Baidu* focused on the four-factor analysis described above. A key element in the court's analysis was that Hantao had made significant efforts in the collection and use of the original information, even if the authors of the reviews were individual consumers. Although the court's finding may have been fact- and case-specific (for example, the court considered the dianping.com reviews to reduce the "information asymmetry" vis-à-vis consumers), the judgment contains some upbeat language on the positive effects of producing, collecting and using consumer-related information by Internet players.

The Pudong court found Hantao's investment into building up the consumer review system on dianping.com as worthy of protection. Interestingly, the court also used language reminiscent of the provisions in the Anti-Monopoly Law, finding that Baidu "has strong technical capabilities and a leading market position… [and] achieved the purpose of excluding competitors by exploiting the results of other websites at extremely low cost." But, for the most part, the court's arguments were similar to judgments in past Internet cases under the AUCL, focusing on Baidu's "free-riding" (other cases referred to the seemingly more general concept of "interference").

As with many of the past AUCL cases, one driver behind the court's findings in *Hantao v. Baidu* may have been the recognition that Internet players often make significant upfront investments which they need to recoup at one point. Hence, courts at times provide some protection for past investments and existing business models under the Article 2 "case law."

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Right to be forgotten denied in the Chinese court

On 9 December 2015, the Beijing Intermediate People's Court refused to recognise that there is a "right to be forgotten" under Chinese laws in *Ren Jiayu v. Beijing Baidu Network Technology Company Limited.*

However, the fact that this issue was expressly raised and discussed in the Chinese court highlights that litigants and courts in China have kept themselves apprised of data privacy developments elsewhere in the world.

Fact background

The facts are relatively simple. In a nutshell, the claimant (a teacher) filed this lawsuit to request a major Chinese search engine, Baidu, to remove autocomplete search words showing or suggesting that he was previously employed by a particular education service company (his former employer). He complained that his former employer had a bad reputation and the availability of these search words had caused damage to his name and reputation. He asked for the information "to be forgotten."

Court's reasoning and decision

The court considered that the gist of the case was whether the search engine had damaged the claimant's rights to his name and reputation, and whether there was a more general "right to be forgotten" under Chinese laws as argued.

On the first question, the court found that the autocomplete search words did not infringe the complainant's rights to his name and reputation, mainly for the reasons that: (1) the search words were objective factual descriptions and were not defamatory; and that (2) the search words were developed automatically based on web users' query rate and search frequency, and were not created or controlled by the search engine.

The court could have stopped here and dismissed the claim. However, interestingly, it went on to discuss the claimant's plea for a right "to be forgotten." The court expressly acknowledged that this concept of right to be forgotten was a creature of the EU court jurisprudence and that there had been discussion among Chinese academics as to the importation of this right into China. However, the court recognised that this right to be forgotten is not provided for or categorised under Chinese laws. As a general rule, if a person seeks protection of some kind of personal rights which are not explicitly provided for under Chinese laws, the person must be able to show that such personal rights are legitimate rights and are necessary for the law to protect.

Here, the court found that the claim for a right to be forgotten had failed these two criteria. It considered that the claim was essentially asking the court to make a verdict that the claimant's former employer had a bad reputation, which the court was not in a position to do so. Also, the judges considered that the claimant was effectively trying to conceal his prior employment information to his potential students or clients. The court's view was that it is in the interest of the public (including the claimant's potential students and clients) to have such information available.

Conclusions

In contrast to the situation in EU, the right to be forgotten is denied in the US for conflict with the right to freedom of speech. In China, while in this case recognising that this "right to be forgotten" is not expressly provided for under Chinese laws, the Beijing court seemed to have left open the possibility of offering some kind of protection if the circumstances justify it.

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