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I. CONCURRENCE OF REGULATIONS AND CONFLICTS IN ENFORCEMENT

As competition for Chinese internet information services is getting fiercer, violations of the law have also gradually increased. For example, irregular business management and infringement of users' lawful rights and interests have taken place from time to time. As a result, the Ministry of Industry and Information Technology ("MIIT") published the Provisions on Standardizing the Internet Information Service Market Order (the "Provisions") on December 29, 2011. The Provisions establish specific prohibition rules, including Articles 5 and 40, on illicit competition and infringement of users' lawful rights and interests that are all common in the internet field.

The Provisions have, to a great extent, specified the rights and obligations for internet business operators as well as those governing the relations between such operators and users. Significantly, the Provisions also standardize the competition order in the internet industry, pushing forward the healthy development of the industry and protecting the lawful rights and interests of consumers.

It is understandable that MIIT, as the regulator of the information industry, has laid down regulations to supervise the internet industry. Yet, since the regulations published by MIIT include not only supervision over internet technologies, but also over the internet market and information service providers, there is potential for conflict and overlap between the industry-specific regulations and competition law, understood in a wide sense, encompassing the rules of both the Anti-Monopoly Law and the Anti-Unfair Competition Law in China. Conflicts between competition supervision by MIIT and law enforcement by the authorities responsible for cases brought under the Anti-Monopoly Law or the Anti-Unfair Competition Law will also be triggered.

Acts of illicit competition in the internet field might violate the Anti-Unfair Competition Law. Though the Anti-Unfair Competition Law is mainly targeted against the conduct of public service enterprises, according to the general terms of Article 2 of that law, it also regulates competition among internet operators and protects the market order. Thus, concurrence of regulations has occurred between industry-specific regulations, including the Provisions, and competition law. In such cases, the behavior by an internet company may not only breach industry-specific regulations, but may also infringe competition law and be deemed illicit competition. If such an operator turns out to have a dominant market position, then it may also constitute monopolistic conduct under the Anti-Monopoly Law.

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For example, a software company fabricates and spreads false information, or intentionally exaggerates or defames the software provided by its competitors. This conduct breaches Article 5(2) of the Provisions and infringes the prohibition rules of the Anti-Unfair Competition Law. Another example is that, as Article 7 of the Provisions stipulates, an internet information service provider shall not refuse, delay, or suspend the supply of internet information services or products to users without any valid reasons, and shall not prescribe a limit on users to use or not to use any designated internet service or product. If that operator were in a dominant market position, then its behavior may amount to a refusal to deal under the Anti-Monopoly Law.

The many terms and conditions showing the concurrence of legal provisions and overlap of enforcement are as as follows:

A. License for Telecommunications

Article 12 of the Telecommunications Regulation provides that when examining the applications for operating basic telecom services, MIIT shall take into consideration elements such as state security, the telecom network security, the sustainable use of telecom resources, environmental protection, and competition in the telecom market, etc.

B. Abuse of a Dominant Market Position

1. Interconnection in Telecommunications

Under Article 17 of the Telecommunications Regulation, leading telecom operators shall not refuse requests of interconnection and interoperability by other telecom operators and private network operators. The concept of "leading telecom operators" refers to those which control the essential telecom infrastructures, enjoy relatively large shares in the telecom market, and are capable of having a substantial impact on other telecom operators' access into the telecom market.

2. Telecom Services

Under Article 41 of the Telecommunications Regulation, when providing telecom services, telecom operators shall not:

- restrict telecom users in any manner to use only designated businesses;
- restrict telecom users to buy any designated telecom terminal equipment or reject the use of other telecom terminal equipment with network access license but self-contained by users; or
- refuse, delay, or suspend the supply of telecom services to users without any valid reasons.

Under Article 42 of the Telecommunications Regulation, in the management of any telecom business, telecom operators shall not:

- restrict telecom users in any manner in selecting telecom services legally provided by other telecom operators;
- offer unreasonable cross-subsidies to their various businesses; or
- provide telecom business or services below cost and commit illicit competition in order to exclude competitors.

3. Price Regulation

MIIT is responsible for setting price and charge standards for the basic telecom services, and must supervise those prices and charges. In turn, the National Development and Reform Commission ("NDRC") is responsible for examining and approving the prices of telecom businesses.

4. Illicit Competition

Under Article 5 of the Provisions, internet information service providers shall not conduct any of the following types of behavior that infringe the lawful rights and interests of other internet information service providers:

- maliciously interfere with the services on user terminals offered by other internet information service providers or the download, installation, operation, and updating of products including software relevant to internet information services;
- fabricate and spread false information to cause damage to the lawful rights and interests of other internet information service providers, or defame the services or products provided by other internet information service providers;
- maliciously cause incompatibility with services or products offered by other internet information service providers;
- deceive, mislead, or force users to use or not to use services or products offered by other internet information service providers; or
- maliciously change or deceive, mislead, or force users to change parameters of services or products offered by other internet information service providers.

5. Consumer Protection

Under Article 7 of the Provisions, internet information service providers shall not engage in any of the following behaviors that will infringe lawful rights and interests of users:

- refuse, delay, or suspend supply of internet information services or products to users without any valid reasons;
- restrict users to use or not to use their designated internet information services or products without any valid reasons;
- deceive, mislead, force, or adopt any other methods to provide users with their internet information services or products;
- provide users with internet information services or products that are inconsistent with their advertisement or guarantee;
- arbitrarily change the service agreements or business specifications, reduce quality of services, or increase responsibilities for users;
- fail to inform and explain to users on their own initiative that the services or products offered by other internet information service providers are incompatible; or
- change users' browser configurations or other settings without informing them or without their consent.

According to the Telecommunications Regulation and the Provisions, MIIT supervises and regulates the telecom businesses and internet information services throughout China. As stipulated, MIIT is entitled to regulate market competition in the internet industry in terms of market access, prices, competition between internet enterprises, protection of consumers' rights and interests, etc. Yet, this prerogative conflicts with competition law enforcement in the telecom and internet industries as carried out by the enforcement authorities under the Anti-Monopoly Law and the Anti-Unfair Competition Law.

II. INCONSISTENCY IN THE RULES ABOUT SANCTIONS

According to the Provisions, if an internet information service provider engages in illicit competition or monopolistic conduct, it shall be ordered to correct such conduct, and will be warned and fined between RMB 10,000 and 30,000 (approximately US$ 1,600 and 4,800; EUR 1,200 and 3,600) by the relevant telecom administration.

In contrast, according to Article 72 of the Telecommunications Regulation, fines imposed for illicit competition or monopolistic conduct shall be between RMB 100,000 and 1 million (approximately US$ 16,000 and 160,000; EUR 12,000 and 120,000).

As for illicit competition, the principal difference in legal liabilities in the Anti-Unfair Competition Law and industry-specific regulatory provisions is that the Anti-Unfair Competition Law precisely sets out the civil liabilities for damages caused. Under that law, the administrative liabilities mainly include three possible types of action by the administrative authorities: ordering the cessation of the illegal conduct, confiscating any illegal income, and imposing a fine. The amount of the fine can be determined in two ways: (1) an amount between the actual illegal income and three times that figure, and (2) an amount between RMB 10,000 and 200,000 (approximately US$ 1,600 and 32,000; EUR 1,200 and 24,000).

The sanctions for abuses of a dominant market position under the Anti-Monopoly Law include the confiscation of the illegal income and the imposition of a fine between 1 percent and 10 percent of the sales revenues in the previous year.

In short, there are differences in the regulations in terms of illicit competition or abuses of a dominant position to eliminate competition conducted by the operators and infringement of consumers' interests, especially in terms of the amount of the fine to be imposed. In general, towards certain types of monopolistic or unfair competition conduct, competition law sets much more stringent penalties than the industry-specific regulations. At the same time, among the sectoral regulations, differences on the amount of the fine also exist between those to be imposed on internet enterprises and those to be imposed on telecom enterprises. As a result of the special market status of the Chinese telecom industry, laws have set much more far-reaching penalties for telecom enterprises than for normal internet enterprises.

In addition, there is another difference in the legal liabilities imposed by industry-specific regulations and those in competition law. As mentioned, the latter provides a right for injured operators or consumers to claim civil compensation for damages, while the sectoral regulations focus on administrative liabilities. This difference in the way law enforcement and legal remedies is construed is a reflection of competition law as market-supervising law, while the Telecommunications Regulation and the Provisions are considered as pure administrative regulations.

III. CONFLICTS COORDINATION

At present, the Chinese information industry is confronted with cross-intervention by industry-specific control and the application of the Anti-Monopoly Law and the Anti-Unfair Competition Law. Though both forms of intervention aim to protect the competition order, there are significant differences. For example, the Telecommunications Regulation not only contains specialized rules on market access, telecom pricing, and telecom resources, but also more generally protects fair competition of interconnection, interoperability, service quality, universal service, and network security practices. In turn, competition law deals with conducts like abuse of network advantages, concerted practices to restrict competition, and unfair internet competition.

In regulatory terms, industry-specific regulation mainly focuses on direct intervention into enterprise conducts such as market access and the setting of prices, while competition law indirectly regulates enterprise behavior by targeting conduct that eliminates or restricts competition or amounts to unfair competition.

Moreover, a large part of the industry-specific regulation concerns conduct to be examined and approved by the relevant organizations, and is therefore mainly *ex ante* regulation. In contrast, competition law aims to sanction monopolistic conduct by market players, mainly *ex post*. (For instance, the Anti-Unfair Competition Law does not have *ex ante* merger control provisions that require examination and approval for concentrations between business operators.)

As a result, the information industry needs dual regulation by both sectoral regulations and competition law, and these two –as mentioned above– have conflicts and overlap in terms of concurrence of provisions, jurisdiction, law enforcement procedures, and legal liabilities. How to coordinate the relations between sectoral regulations and competition law and make both of them more suitable for the development of the Chinese information industry is worth investigating and studying.

A. Legal Provisions

For the regulation of monopolistic conduct in the information industry, the relationship between the Anti-Monopoly Law and the Telecommunications Regulation is that between a general law and a special law. Since the Telecommunications Regulation is specifically directed at businesses in the telecom field, it is much more targeted and "special" than the Anti-Monopoly Law, which can be generally applied. If both the Telecommunications Regulation and the Anti-Monopoly Law cover the same issue, the former shall be applied because of the principle of special laws' priority over general laws. That is, if there is a provision in the Telecommunications Regulation, it shall apply. If there is none, the provisions in the Anti-Monopoly Law shall apply.

In the field of anti-unfair competition, the same principle—that special laws take priority over general laws—applies to the relationship between the Provisions and the Anti-Unfair Competition Law. The latter was enacted in 1993. At that point in time, the legislative purpose was primarily to regulate the real economy emerging in the initial phase of the establishment of the market economy. With the maturity of the new economy and the development of the internet, illicit competition in the internet has become more and more frequent. Various new types of anticompetitive methods have emerged, beyond the types listed in the Anti-Unfair Competition Law. In fact, market practices increasingly are far away from the expectations of the drafters of the Anti-Unfair Competition Law, especially in the internet field. It has turned out to

be more and more difficult for the judges to play their role to "create laws." The types of illicit conduct listed in the Provisions are basically a summary of the real development of the internet, while the provisions in the Anti-Unfair Competition Law rarely cover these particular types of anticompetitive actions in the internet space.

Yet, at the same time, lower-ranked norms should not conflict with higher-level norms. Therefore, the Telecommunications Regulations and the Provisions shall not breach the spirit of the Anti-Monopoly Law. According to such doctrine, the coordination between the Anti-Monopoly Law and the rules of industry oversight by MIIT can be achieved under the currently applicable rules.

B. Enforcement Bodies

In law enforcement, jurisdiction between MIIT and the antitrust enforcement agencies should be clarified first, to avoid conflicts in the exercise of enforcement powers. The clarification of what conduct shall be regulated by MIIT or the antitrust enforcement authorities, and the boundaries between their supervision powers, are the bases to guarantee the absence of conflicts. The following aspects shall be distinguished:

1. General and Special Supervision Powers

General supervision powers pertain to the antitrust enforcement authorities, while MIIT has special supervision powers. Based on the intrinsic characteristics of the telecom industry, MIIT is entitled to issue certain relevant measures to tackle restrictions of competition, including in relation to market access and exit, the settlement of fees for interconnection and interoperability, the lease cost for key facilities or mandatory access, prohibition of cross-subsidies, and the regulation of universal service obligations. All these measures are rather specialized and targeted. In turn, the Anti-Monopoly Law regulates, in a general and abstract sense, anticompetitive conduct including abuses of network advantages, harmful concentrations between business operators, acting-in-concert that restricts competition, and administrative monopolies.

2. Hierarchical Structures of Supervision

In the field of the physical telecom transmission networks,[2] MIIT has oversight over issues such as whether access to facilities must be shared, whether subsidies are to be granted for facilities to be installed or operated, and whether competitors and other companies are to be granted access to a network and, if so, at what price (for wholesale and retail customers). Besides the physical layer,[3] there is an "application layer"[4] which enables consumers to use the internet in various manners. As a general rule, MIIT does not exercise supervision over the application layer, but instead leaves that space to the antitrust enforcement authorities.[5]

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[2] Most of these "network layers" models divide the increasingly packet-based internet world into at least four distinct layers: (1) content layer; (2) applications layer; (3) logical/code layer; and (4) physical/infrastructure layer. *See* Adam Thierer, *Are "Dumb Pipe" Mandates Smart Public Policy? Vertical Integration, Net Neutrality and the Network Layers Model*,3J. ON TELECOMM. & HIGH TECH. L.275.

[3] The physical layer consists of the basic hardware transmission technologies of a network. It defines the means of transmitting raw bits rather than logical data packets over a physical link connecting network nodes.

[4] The applications layer represents the inventions that enable consumers to use the internet in different ways. *See* Philip J. Weiser, *Regulatory Challenges and Models of Regulation*, 2(1) J. ON TELECOMM. & HIGH TECH. L. 4 (2003).

[5] *Id.*

3. Types of Conduct

In the examination of a concentration between business operators in the information industry, MIIT examines the licenses, while the Ministry of Commerce focuses on the substantive examination of whether the concentration will have an anticompetitive effect upon the relevant market. In order to ensure a scientific review of the concentration, the examinations by the two ministries can be carried out independently.

As for abuses of dominance, the market must be subdivided into two categories, and each category shall be subject to different regulatory measures. For markets with effective competition, only the application of antitrust regulations is necessary. For markets without effective competition, sectoral regulations should apply. In that regard, it should be made clear that the process of market segmentation is actually a process to establish the boundaries for regulation that requires close cooperation between MIIT and one of the antitrust enforcement authorities, the State Administration for Industry and Commerce ("SAIC"). The two authorities should draw up and adjust lists for both competitive and non-competitive markets and regularly evaluate these lists.

In addition, for certain types of conduct, both MIIT and the antitrust enforcement authorities may have supervision powers, if the illegality of the conduct is particularly conspicuous.

IV. CONCLUSION

Hence, I believe that we can actively establish a mechanism of concurrent yet cooperative jurisdiction, where the antitrust enforcement authorities and MIIT will be encouraged to coordinate their functions and communicate information. Both SAIC and MIIT will work toward facilitating and maintaining orderly competition in the internet industry. Both of them will mutually assist each other and cooperate in the promotion of supervision. For example MIIT is, relatively-speaking, more specialized and much closer to the enterprises in the sector. It has better know-how and more information on the internet industry. When SAIC comes to a decision related to the regulation of the internet industry, it should be approved by MIIT in advance so that the decision also makes sense from the industry point of view. Conversely, when MIIT adopts a penalty decision, it should seek prior assessment and suggestions from SAIC about the competition effects.

From the systemic perspective, therefore, the two agencies should have sufficient communication and exchanges of information between them, and should coordinate before implementing their respective regulatory measures so as to avoid inconsistency, overlap and a vacuum in regulation and enforcement. For example, the two agencies could establish an information exchange, consultation, and negotiation mechanism and draft a memorandum of understanding or work guide and so on.[6]

[6] Wu Huasheng, *Study on the Power Distribution between China's Anti-Monopoly Law Enforcement Authorities and Industrial Regulators*, ECON. L. FORUM 129-146 (2011).