

Legal Commentary

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Highlights of the Draft Revision to the Anti-Unfair Competition Law

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On November 22, 2022, the State Administration for Market Regulation (“**SAMR**”) issued for public comments a draft revision to the *Anti-Unfair Competition Law of the People’s Republic of China* (the “**Draft Revision**”, the “**AUCL**”), which reflects the government’s ongoing efforts against unregulated unfair competition activities emerging in tandem with fast-evolving market forces that continue to give rise to new business forms and models.

The AUCL, first coming into force in 1993, has been revised and amended in 2017 and 2019, respectively, which focused on following aspects: The 2017 revision pinpointed the scope of parties taking bribes in business activities as individuals or entities that work for or entrusted by the transaction counterparty or can influence the transaction, excluding the counterparty itself; it also added rules to regulate unfair competition using the Internet and increased the amount of fines. The 2019 amendment focused on enhancing provisions for trade secrets protection. Likewise, the Draft Revision, representing what would be the third revision or amendment to the AUCL, with 48 articles as opposed to the current 33 articles, demonstrates a number of highlights: It refines rules to address unfair competition in the digital economy; it improves rules against existing types of unfair competition, including enhanced provisions against misleading commercial acts and false promotions, explicitly prohibits taking bribes in transaction activities, and strengthens systems for trade secrets protection; it adds new types of unfair competition, such as acts that harm fair trade and malicious transactions; it improves the legal liability section by introducing penalties on some unfair competition acts while reasonably adjusting the degree of punishment for certain violations. This commentary provides a summary and analysis of the focuses and highlights of the Draft Revision.

Refined rules to address unfair competition in the digital economy

Most significantly, the Draft Revision further specifies unfair competition acts existing in the digital economy, refining rules to regulate the acquisition and use of data and online unfair competition through the use of algorithms and technologies. These changes involve nearly ten articles in the Draft Revision, reflecting the great importance Chinese lawmakers attach to maintaining fair competition and data protection in the digital economy. Article 4 of the Draft Revision directly provides the overarching principle that the State

intends to establish and improve the rules for fair competition in the digital economy, and that business operators may not use data and algorithms, technologies, capital advantages, or platform rules to engage in unfair competition. With respect to specific practices, in addition to traffic hijacking, improper interference, and malicious incompatibility that are already prohibited under the current AUCL, the Draft Revision would establish new types of illegal practices such as malicious transactions, influencing user choices, misleading users by using keyword association, by setting false operation options or by other means, intercepting or blocking other operators' pages without justified reasons, hindering the normal provision of online services or products, improper acquisition or use of commercial data, and big data-enabled price discrimination.

Meanwhile, given the complexity of determining unfair competition in the digital economy and the need for greater institutional foreseeability and greater consistency in law enforcement, Article 21 of the Draft Revision sets out several considerations when determining whether an act constitutes unfair competition, which include: (1) the impact on the lawful rights and interests of consumers and other business operators and on public interests; (2) whether such means as force, coercion and fraud are used; (3) whether the act contravenes industry practices or business ethics; (4) whether the act contradicts the principles of fairness, reasonableness and non-discrimination; and (5) the impact on technological innovation, industry development, and the Internet ecosystem.

As indicated above, the Draft Revision uses multiple provisions to regulate new types of unfair competition in the digital economy. Both platform providers and business operators using the platforms should pay close attention to these provisions and accordingly reassess their compliance in regard to relevant issues in their contract execution, performance, and daily operations.

More stringent enforcement of commercial bribery

The Draft Revision tightens rules against commercial bribery in the following four aspects:

- Counterparty returns as a potential bribed party. Article 8 of the Draft Revision provides that a business operator may not, by itself or instigate others to, bribe the counterparty in a transaction or any of its employees by offering money or valuables or by any other means. This means that the counterparty itself would again be included as a potential bribed party. The 1993 AUCL provides that, where a business operator secretly pays kickbacks to the transaction counterparty, be it an entity or individual, off the books, the operator will be punished for offering bribes; where the counterparty, be it an entity or individual, secretly accepts kickbacks or other benefits off the books, the counterparty will be punished for accepting bribes. By comparison, the 2017 AUCL sets forth the potential bribed parties, which include employees of the transaction counterparty but exclude the counterparty itself. Whether to include the “counterparty” as a bribed party has been a difficult issue in unfair competition law enforcement. On the one hand, business to business payments are normally a market practice resulting from equal, voluntary negotiations between the transaction parties. Commercial arrangements not involving a “power-for-money deal”, namely the essence of bribery, should not be deemed as commercial bribery. For example, “secret” payments that are made “off the books” caused by accounting errors should not be considered commercial bribery. On the other hand, however, business to business arrangements with

special market entities, such as hospitals, may still cause problems. For example, providing equipment for free with bundled consumables sales as a condition may cause a hospital to skip procurement through open tenders or even lead to collusive bidding or internal corruption within the hospital. Given that, the AUCL is still a useful tool to resolve such systematic problems concerning these special entities. The Draft Revision restores the “transaction counterparty” as a potential bribed party, but still needs to strike a balance given the above two considerations, with the elements to establish illegality to be further clarified in subsequent rules for implementation.

- Provisions are added to prohibit and punish the act of accepting bribes in transactions, which is explicitly specified as an unfair competition practice. A prohibitive provision is introduced in Article 8 of the Draft Revision that “no entity or individual may accept bribes in transaction activities”. The legal liability for accepting bribes is prescribed in Article 29.2 that, where a business operator or any of its employee accepts bribes in transaction activities, if laws and administrative regulations have laid down relevant provisions to punish the act of accepting bribes in certain types of transactions, such provisions shall prevail; if laws and administrative regulations are silent, the bribed party will be punished in accordance with provisions to penalize the bribing party. Article 29.2 provides an alternative means to punish a bribed party that falls short of the standard of criminal prosecution, which would facilitate smooth transition between administrative and criminal penalties against a bribed party, as well as the two-way transfer of cases between judicial organs and administrative organs.
- Article 8 of the Draft Revision stresses that “instigating others” to engage in bribery also constitutes commercial bribery, which lays a more solid basis for punishing business operators who offer bribes through distributors or other third parties.
- The maximum fine for commercial bribery is raised from RMB 3 million to RMB 5 million.

The above changes reflect stronger efforts of market regulators to crack down on commercial bribery, which, after coming into force, would pave the way for a new level in law enforcement against commercial bribery.

Aiding unfair competition underlined as a regulatory focus

Another highlight of the Draft Revision lies in stricter constraints on the provision of aid to unfair competition. In the *Provisions on Prohibition of Unfair Competition Acts on the Internet (Draft for Comment)* released by the SAMR in August 2021, business operators are prohibited from aiding others in committing unfair competition acts over the Internet. The Draft Revision underlines the prohibition against aiders who in fact indirectly engage in unfair competition.

Article 2 of the Draft Revision provides a general principle that business operators must not aid other persons in committing any act of unfair competition, with specific requirements set forth in the following provisions: (1) Misleading commercial acts: A business operator may not sell goods that are misleading or facilitate misleading acts by providing storage, transportation, delivery, printing, concealment, premises, etc. (Article 7.2); (2) False commercial promotion: A business operator may not help another business operator in conducting any false or misleading commercial promotions by way of organizing false

transactions, fictitious evaluations or otherwise, or provide planning, production, release or other services for false promotion (Article 9.3); (3) **Trade secrets**: A business operator may not help others to violate confidentiality obligations or the right owners' requirements for keeping confidential trade secrets by obtaining, disclosing, using, or allowing any other party to use such trade secrets (Article 10). The legal liability of aiders of unfair competition is the same with that of those who directly commit unfair competition acts, meaning that they may be ordered to cease the illegal acts, have their illegal gains and articles used for illegal activities confiscated, be fined, have their business license revoked, etc.

The above provisions would impose greater obligations on platform providers to supervise and examine unfair competition on their platforms. The provisions would also raise the bar for other companies and service providers to examine compliance of their services in a more prudent manner. Also, the protection of trade secrets is further consolidated in the Draft Revision.

Enhanced legal liability and increased cost of violations

With respect to legal liability, the Draft Revision introduces penalties for some unfair competition acts while reasonably adjusting the degree of punishment for certain violations.

I. Expand the scope of application of punitive damages and statutory damages

Under the current AUCL, punitive damages only apply to "trade secrets infringement committed by a business operator in bad faith", where, if the circumstance is grave, the amount of compensation may be determined as between one time and five times the actual losses suffered by the right holder as a result of the infringement or the benefits gained by the infringer from the infringement (Article 17.3). The Draft Revision would expand the scope of application of punitive damages to all types of unfair competition that are "in violation of the provisions of this Law". In addition, as opposed to the current AUCL where the statutory damages of up to RMB 5 million only applies to misleading commercial acts and trade secrets infringement (Article 17.4), such punitive damages would apply to all types of unfair competition under the Draft Revision.

II. Introduce legal liability for certain illegal acts

The Draft Revision introduces penalties for newly added types of unfair competition such as practices that impair fair trade, malicious transactions, and new types of online unfair competition practices. It also sets out legal liabilities for aiding the misleading acts and false promotions. On the basis of the current AUCL, Article 29 of the Draft Revision pursues liability against parties who take bribes in commercial transactions by imposing penalties on accepting bribes in transactions.

III. Impose heavier punishment for certain illegal acts

On the whole, the Draft Revision raises the upper limit of fines for unfair competition practices, with the maximum limit reaching RMB 5 million for violations such as trade secrets infringement, commercial defamation, abuse of a comparative dominant position, malicious transactions, and online unfair competition practices. Where the circumstances are particularly serious and of an extremely grave nature, thereby severely impairing the fair competition order or public interests, the business operator who carried out the corresponding unfair competition act may also have its illegal gains

confiscated, be fined in the amount between 1% and 5% of its sales of the preceding year, be ordered to suspend business operations, or have its relevant business permits or business licenses revoked. The business operator's legal representative, principal in charge, and directly responsible person may also be personally subject to fines of between RMB 100,000 and RMB 1 million.

IV. Reduce punishment for certain illegal acts

Under the Draft Revision, the minimum fine for false promotion is reduced from RMB 200,000 to RMB 100,000 to better serve law enforcement realities and ensure congruence between punishment and wrongdoing. Also, Article 41 sets out special circumstances where exemption from punishment is available: if the business operators concerned have reached a settlement on the assumption of civil liability for the unfair competition act in question or if a people's court has adjudicated on civil liability and the act in question causes no harm to the fair competition order or public interests. In these instances, an investigation that has been initiated may be terminated; or, if an investigation has been concluded, an exemption from penalty will be granted.

In addition to the above highlights, the Draft Revision also delineates the features of commercial promotion and distinguishes it from advertising (Article 9); puts forward the concept of "comparative dominant position" to better protect the rights and interests of small and mid-sized operators in the market (Articles 13 and 47); and enhances protection of personal privacy and personal information (Article 25). The Draft Revision represents a significant revision to the current AUCL in that new types of unfair competition are brought under its umbrella for regulation, while a higher and broader perspective is adopted to re-examine the impact on public interests and business ethics in addition to protecting the rights and interests of business operators and consumers. The AUCL has served as a fundamental basis for market regulation over many years. It is our hope and belief that, after thorough consultation, discussion, and deliberation of the Draft Revision, a newly revised AUCL will be adopted to further optimize the regulatory scope spanning all links of the industrial and commercial chain, so as to safeguard an operable business environment and promote a better social order for fair competition.

Important Announcement

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