
China's Revised Anti-Unfair Competition Law

Matthew Murphy and Joyce Chng

MMLC Group

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In 2014, the National People's Congress authorised the State Administration for Industry and Commerce (SAIC) to issue a draft revision of the Anti-Unfair Competition Law of the People's Republic of China, which was first enacted in 1993. However, since then, the Anti-Unfair Competition Law has not been updated to reflect the current market realities of China, despite enormous economic changes and current complex competition situations. Therefore, the Anti-Unfair Competition Law revision, which has been released for public comments due 25 March 2016, illustrates China's consistent effort in working towards the establishment of a comprehensive legal system to protect competition and intellectual property in its economy.

The Anti-Unfair Competition Law in its current form includes provisions regarding trademark and trade secret protection, abuse of administrative power restricting competition, and the prohibition of commercial bribery and counterfeiting. While the statute is directed primarily at fraudulent or deceptive commercial activities, it also prohibits different types of monopolistic conduct, including:

1. the abuse of authority by utilities to eliminate competition;
2. the administrative restrictions on competition from enterprises in other jurisdictions;
3. the sale of commodities below cost to drive away competitors except under limited circumstances;
4. the tying of a sale on one product to another; and
5. collusion in bidding.

However, in its current form, the Anti-Unfair Competition Law remains vague in certain parts encouraging wide degrees of interpretation, and has been criticised for its lenient penalties. Therefore the Anti-Unfair Competition Law draft seeks to address these issues as well as further strengthen protection for goodwill, refine its bribery provisions, enhance the authorities' powers, and further prevent abuse of an advantageous position. In doing so, the revision has accepted many different contributions, including competition enforcement officers from local administrations for industry and commerce such as Jiangsu, Zhejiang, Shanghai and Guangdong, and also law professors from various universities such as Beijing University, Renmin University, Wuhan University and Beijing University.

Types of conduct constituting unfair competition

Firstly, under Article 2, the term 'unfair competition' refers to a business operator's acts that violate the provisions of the revised Anti-Unfair Competition Law, infringe upon the lawful rights and interests of another business operator or any consumers and disturbs

market order. This provision seems to be a catch-all provision, as it is extremely broad and therefore vague, specifically the term ‘disturb market order’, which is not defined. Further, the focus should not be on avoiding disturbing the market order, but on the fundamental objectives of the Anti-Monopoly Law, which is to safeguard competition and to promote the development of a market economy. Furthermore, according to Article 2, a business operator refers to a natural person, legal person and any other organisation engaging in or involved in commodities production, marketing or provision of services. However, this definition fails to include the conduct of employees, therefore to avoid potentially creating a loophole allowing a business owner to avoid liabilities by encouraging an employee to engage in acts prescribed in Chapter 2 of the Anti-Unfair Competition Law, the definition should include acts of employees or acts as agents with the knowledge of its employer. Therefore, it would be helpful if the term ‘unfair competition’ could be further refined to eliminate any reservations surrounding Article 2.

Under the revised Anti-Unfair Competition Law, Article 5 provides a business operator shall not implement the following acts of market confusion by using commercial marks:

1. using without authorisation another’s famous commercial mark, or a commercial mark similar to another’s famous commercial mark, thereby causing market confusion;
2. prominently using its own commercial mark that is identical with or similar to another’s famous commercial mark, thereby misleading the public and causing market confusion;
3. using another’s registered trademark or unregistered well-known trademark as an identifier in its enterprise name, thereby misleading the public and causing market confusion; and
4. using a tradename of a famous enterprise and enterprise group’s name or its abbreviation as the character element included in a trademark or the main part of a domain name, thereby misleading the public and causing market confusion.

Compared to the current Anti-Unfair Competition Law, Article 5 is noticeably more extensive, and seeks to further define commercial mark as a mark distinguishing commodity producers or business operators, including but not limited to a unique name, package, decoration, shape of a product, trademark, name or its abbreviation of an enterprise and enterprise group, trade name, the main part of a domain name, website name, webpage, person’s name, pseudonym, stage name, or channel program’s name or logo and so on, in terms of famous enterprises’ products.

Therefore, not only does Article 5 extend the list of acts of market confusion using commercial marks, it also reflects current market realities by defining ‘commercial mark’ extensively to include acts done online to enable any additional conduct not otherwise specified to be captured under the Anti-Unfair Competition Law. Furthermore, Article 13 of the revised Anti-Unfair Competition Law provides for the use of network technology or application service to engage in acts that may affect user choices, which further emphasises the advanced approach taken by the drafters of the revised Anti-Unfair

Competition Law, as it has adequately recognised and addressed modern issues.

However, a further improvement for Article 5 could be to include a definition of the term ‘famous’ and ‘well-known’ in order to improve the Anti-Unfair Competition Law’s consistency with the *WIPO Joint Recommendation Concerning Provisions on the Protection of Well-Known Marks* and *The Agreement on Trade-Related Aspects of Intellectual Property* (TRIPS). For example, under TRIPS, ‘well-known’ is provided for under Article 16 (2) where it states members shall take account of the knowledge of the trademark in the relevant sector of the public, including knowledge in the Member concerned which has been obtained as a result of the promotion of the trademark. Furthermore, it is recommended the thresholds for ‘misleading’ consumers and ‘causing market confusion’ be specified in order to add further clarity to Article 5 of the Anti-Unfair Competition Law.

Additionally, Article 6 of the revised Anti-Unfair Competition Law compared to its current form has been further defined and extended, and provides that a business operator shall not implement the following acts of unfair trading, by using its relative dominance:

1. restricting the transaction partners of the other party in the trade, without proper reasons;
2. restricting the other party in the trade to purchasing the commodities designated by it, without proper reasons;
3. restricting the transaction conditions between the other party in the trade and another business operator, without proper reasons;
4. overcharging or unreasonably demanding the other party in the trade to provide other economic benefits; or
5. attaching other unreasonable trading conditions.

Therefore, while Article 6 in its current form is general and vague, the revised form is extended and further includes a definition of ‘relative dominance’ to provide specificity and clarity. However, Article 6 can be further improved by adding definitions for terms such as ‘relative dominant position’ and ‘unfair trading’. While the term ‘relative dominant position’ has been defined in the Explanation accompanying the Notice from the Legislative Affairs Office of the State Council as ‘comparatively dominant positions in trading’, it is so broad that it is nearly impractical, as it would include a wide range of entities and add unnecessary effort for enforcement agencies. Therefore, a definition specifying such terms would add to the comprehensiveness of the revised Anti-Unfair Competition Law, and will be a significant improvement from its current form.

Furthermore, the five categories under Article 6 of the Anti-Unfair Competition Law are already included under the Anti-Monopoly Law. Therefore, Article 6 adds an uncertain element regarding when and what business conduct is prohibited. While the Anti-Monopoly Law includes requirements to establish a claim in connection to the five categories, Article 6 allows for any activity by a dominant market player that is deemed unacceptable by the relevant enforcement agencies to be prohibited. Therefore,

consistency with the Anti-Monopoly Law needs to be established in order to create legislation harmony and allow for the effective process of eliminating illegal behaviour by dominant market players.

Administrative enforcement

Under Article 3 of the revised Anti-Unfair Competition Law, it is provided that the administrative departments of industry and commerce of the people's governments at or above the county level, shall exercise supervision over, and inspects of, acts of unfair competition; where laws or administrative rules and regulations provide otherwise, relevant departments may also exercise supervision and inspection in accordance with those provisions.

Therefore, this provision clarifies the enforcement authority of the Anti-Unfair Competition Law to be the SAIC. It seeks to address conflicts arising under the current Anti-Unfair Competition Law where various other agencies such as the General Administration of Quality Supervision, Inspection and Quarantine (AQSIQ), and the Ministry of Culture and Pricing Bureaus had authority if separately specified under applicable law or regulations.

Administrative enforcement penalties

Under the revised Anti-Unfair Competition Law, the administrative enforcement penalties have increased considerably in order to significantly increase deterrence. For example, the current Anti-Unfair Competition Law include penalties under Article 21 of merely a fine not less than one time but not more than three times the illegal earnings. However, under Article 18 of the revised Anti-Unfair Competition Law, if a business operation violates the provisions of Article 5, the supervision and inspection department shall order cessation of the illegal acts and confiscate illegal merchandise, and impose a fine of less than five times the amount of illegal revenue if the illegal revenue is more than RMB 50,000, and in serious cases, may revoked the business' license; impose a fine of less than RMB 250,000 if there is no illegal revenue or if the illegal revenue is less than RMB 50,000; impose a fine of more than RMB 100,000 and less than RMB 1,000,000 according to circumstances, if the illegal revenue cannot be calculated. Therefore, these are significantly higher penalties in comparison to the current Anti-Unfair Competition Law.

Furthermore, under Article 23 of the current Anti-Unfair Competition Law, the penalty for abusing a monopoly status includes a fine of not less than RMB 50,000 but not more than RMB 200,000. In comparison, the revised Anti-Unfair Competition Law provides for the same penalty under Article 19, but with a fine of more than one time and less than five times the amount of illegal revenue; imposes a fine of more than RMB 100,000 and less than RMB 3,000,000 according to the circumstances. These penalties are significantly higher, especially when combined with potential civil remedies; therefore it

could potentially force a company into insolvency, which may exceed the harm to competition. Therefore, it is recommended the relevant enforcement agencies exercise caution and duties of fairness when considering an appropriate penalty. However, the revised Anti-Unfair Competition Law is commended for its higher penalties, as it will increase deterrence and further allow the authorities a wider range of penalties to choose from.

General Recommendations

While the revised Anti-Unfair Competition Law seems complete in its revision, it may be lacking provisions providing for evidence, such as discovery of evidence, evidence preservation and preliminary injunctions. This is particularly important in current market reality as a significant number of illegal activities are now being conducted online. Therefore, due to the move from the traditional and physical market to the online world, there needs to be further guidelines providing for this new, but increasingly dominant, area.

Further, as many China lawyers know, it has been difficult to force an enterprise name change in the local SAIC offices based only on Article 5 of the Anti-Unfair Competition Law as such a enterprise name has been approved by them, as local protectionism has often been a factor. Further, many local officials are only willing to force a name change, when the entity involved is engaged in counterfeiting or the selling of knockoff products involving the trademark owner's registered or unregistered trademark. It is doubtful whether Article 5 of the revised Anti-Unfair Competition Law will be enough to motivate SAIC officials to take action against entities that adopt another's trademark or name as part of their own name, even though they may not be engaged in counterfeiting. It is hoped that the Article 5 can be enhanced in this regard, by putting the onus on SAIC officials to diligently police this area of the law, as it remains as one of the most unsatisfactory areas of trademark law in China, and allows for brand dilution as well as confusion to prosper.

Conclusion

China can be seen to be working hard towards a comprehensive administrative enforcement system over intellectual property rights and competition law. The revised Anti-Unfair Competition Law illustrates its advanced approach towards recognising and addressing issues within its current form, such as extending the types of conduct constituting unfair competition, including additional provisions dedicated towards addressing acts done online to reflect contemporary society, and increasing penalties to increase deterrence. Therefore, this will further contribute in protecting intellectual property and competition in China's economy. It is anticipated that SAIC will receive significant constructive feedback from major brand owners as well as industry groups over the next few weeks.