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## China proposes a revamp to its Anti-Unfair Competition Law

Changes relevant to companies' business  
practices

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# China proposes a revamp to its Anti-Unfair Competition Law

Changes relevant to companies' business practices

On 25 February 2016, the Legislative Affairs Office of the State Council issued a new draft of the amended Anti-Unfair Competition Law ("**Draft**") for public comment. The Draft entails 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 the Chinese law with international legal standards, codify the majority view in Chinese jurisprudence, and modernize the AUCL through the adoption of an array of brand-new principles and provisions.

The AUCL as it stands is a potpourri of provisions covering a variety of legal fields. Not surprisingly therefore, if adopted, the Draft's updated provisions would have a significant impact in the fields of intellectual property ("**IP**"), antitrust and anti-bribery in China.

## **IP: streamlined and modernized**

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 the majority view in Chinese jurisprudence.

The Draft proposes to replace the list of unfair competition acts contained in the AUCL's current version with a list that would prohibit creating "market confusion" by way of:

- using similar or identical well-known '*commercial logos*' without permission
- misappropriating registered or well-known signs as business names or
- using well-known trade names or abbreviations in trademarks or domain names.

The impact of this new formulation would be to expand the current scope of IP-related unfair competition acts by giving a very broad, non-exhaustive definition to the term "commercial logo." This term would encompass all

features that differentiate products, "including but not limited" to packaging, decoration, shape, abbreviations, webpages, pen names, stage names etc. This would mean that the Chinese trademark unfair competition would protect the right of publicity and begin to lean more towards continental European 'open' standards of unfair competition, or even common law tort of passing off.

As to trade secrets, the current version of the AUCL only explicitly prohibits third parties with actual or constructive knowledge of trade secret theft to obtain, use or disclose those trade secrets. The Draft codifies case law by adding that third parties are furthermore not allowed to *license* such misappropriated trade secrets to others. The Draft also increases the administrative fines for trade secret infringement to RMB 100,000 - 3 million, and allows the burden of proof to be shifted to the defendant as soon as the claimant can establish a presumption of infringement.

## **Antitrust: new concept of a "relatively advantageous position" and codification**

The Draft brings sweeping reforms to the articles of the AUCL that are relevant to Chinese antitrust/competition law.

To begin with, the Draft proposes to delete a range of antitrust provisions such as those on administrative monopolies, predatory pricing and tying from the AUCL, since they are already regulated in the more specialized provisions of the Anti-Monopoly Law. This deletion of largely overlapping provisions across laws reduces uncertainty and should therefore be welcome.

The remaining antitrust-related rules are grouped into a new provision, prohibiting unfair competition through abuse of a "relatively advantageous position." This is a (relatively, though not entirely) new concept in China, seemingly drawing heavily on German – and, to a lesser extent – Japanese and Korean competition laws. The provision attempts to address situations where an entity is not (yet) dominant, but its trading partners significantly depend on it, and have difficulties in switching to a competitor. If found to be in a "relatively advantageous position," a range of broadly formulated prohibitions apply, such as the imposition of

unreasonable conditions and restrictions on the trading partners' business dealings with third parties (potentially territorial restrictions on distributors, for example), exclusive purchasing, etc.

While the "relatively advantageous position" concept could potentially be beneficial to small(er) companies, it risks creating a new level of rather opaque compliance obligations and imposing additional burden on companies doing business in China.

Another set of reforms in the competition law sphere can be found in the Draft's new rules on unfair competition in the Internet space.

Drawing on the courts' experience from, *inter alia*, the *Qihoo 360 v Tencent* and *Tencent v Sogou* cases, the Draft proposes to codify some of the existing case law by prohibiting four types of conduct deemed unfair competition in the Internet arena. These proposed rules were previously developed by Chinese courts on the basis of a vague, general provision of the AUCL. In that sense, the codification can be seen as an improvement, if it turns out to increase legal certainty and predictability. At the same time, however, the Internet sector is an industry with fast-moving technologies and business practices and, as such, the Draft risks to address 21<sup>st</sup> century problems with 20<sup>th</sup> century-style black letter regulation.

As to sanctions, the Draft provides for increased fines of up to five times of illegal revenues. If those revenues cannot be determined, a statutory fine ranging between RMB 100,000 - 3 million could be imposed.

### **Anti-bribery: harmonization with international principles**

As China's anti-corruption campaign continues unabated, the Draft introduces a number of significant changes to bring anti-bribery laws in line with well-recognized international standards.

Whereas 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 bring Chinese law into consistency with the US Foreign Corrupt Practices Act and other hallmark legislation by making clear that (1) bribes can be made in any form that provides value; (2) an offense is committed once a promise has been made, regardless of whether any benefits actually exchange hands; and (3) bribes cannot be paid to or via third parties who are likely to influence a transaction.

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. The Draft states that where an employee engages in bribery in a manner that creates business opportunities or competitive advantages for a company, the bribery should be considered corporate conduct. The new language allows the business operator to proffer a defense, supported by evidence that the bribe conduct is against the company's interest. However, the Draft offers no defense for a company's lack of knowledge of the bribe conduct, or the enactment of a compliance program to prevent such conduct.

As to the sanctions for commercial bribery, the AUCL currently provides for an administrative fine of 10,000 to 200,000 RMB, plus the confiscation of "illegal income". The term "illegal income" often caused confusion as to whether "income" constituted revenue or profit. The Draft attempts to clarify this confusion by setting the penalty for commercial bribery at 10% - 30% of illegal revenue, without a separate administrative fine.

With respect to how multinational companies handle and resolve enforcement actions by local authorities, two provisions of the Draft may raise eyebrows. The Draft provides for a fine of 20,000 to 200,000 RMB where a company "refuses to provide relevant materials or information . . . conceals . . . or otherwise refuses or impedes the investigation conducted by the supervision and inspection agency." Yet there is no clarity as to the proper scope of information that the authorities may seek in furtherance of their investigation, or how the subject of an investigation may challenge that scope.

Moreover, the Draft now provides that an injunction ordering cessation of the illegal activities *must* be issued to entities guilty of commercial bribery. This means that the enforcement authorities – the State Administration for Industry and Commerce and its local offshoots – will no longer have any margin of discretion and will be forced to issue an injunction in each case. Such a provision may require targets of investigation to re-evaluate the risks of settlement with enforcement authorities in order to end an investigation.

### **Conclusion**

The Draft may be viewed as an effort by the Chinese government to modernize and increase the effectiveness of the Chinese unfair competition legislation. Comments on the Draft can be submitted until 25 March 2016, after which the Draft may either be amended another time, or directly sent over to the Standing Committee of the National People's Congress for approval.

This alert is written as a general guide only. It should not be relied upon as a substitute for specific legal advice.

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