MEDIA ALERT
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Draft Amendment To The Anti-Unfair Competition Law Pending Final Review

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The Legislative Affairs Office of the State Council of PRC recently published a draft amendment to the Anti-Unfair Competition Law ("AUCL") for public consultation from Feb 26 to March 25. The draft is currently under review by the Standing Committee of the NPC, and it is anticipated that the amendment would be enacted by the Standing Committee of the NPC later this year.

This is the first draft amendment that has been submitted to the Standing Committee in the past 24 years since the original AUCL was promulgated in 1993. During the past two decades, there have been repeated callings for amendments to the AUCL in consideration of the rapid evolvement of the economy and technology, which has remarkably altered the overall competition environment, market scale, and business model from the time when the law was first made. As a result, whilst the adherence to the basic principles of fairness, equality, and good faith as well as observance to the commercial moralities have been maintained, the current draft represents a material change to the original law: it is almost a re-wrote.

The draft reflects some major modifications on a number of issues of concern to the society, including commercial bribery, protection of trade secrets, Internet-related unfair competition, powers of the administrative enforcement authorities, and the applicable administrative penalties (including a significant increase on the monetary penalty that could be imposed).

Commercial Bribery

Commercial bribery is a key focus of this amendment. Apart from the parties to a transaction, third parties that are able to exert influence on the transaction with their authority are also prohibited from accepting any bribery. In addition, the bribery committed by an employee to obtain opportunity of transactions or competitive advantages for his or her employer would be considered attributable to the employer unless it can prove that the bribery is an individual act of the employee.
Protection of Trade Secrets

The protection of trade secrets has also been expanded in that it would be deemed as misappropriation of a trade secret for an incumbent or a former employee of the holder of the trade secret to obtain the trade secret by theft, bribery, coercion or other improper means. Furthermore, government officials and professionals such as lawyers and accountants are strictly obliged to keep confidential the trade secrets they have access to when duly carrying out their duties.

Internet-Related Unfair Competition

In response to intangible disputes on the Internet which has attracted extensive public attention as the basis of new business model, the amendment provides that business operators are prohibited from utilizing technical measures to influence the choices of consumers or to disturb the legitimate operation of other business. Moreover, the amendment enumerates activities that fall into the categories of online unfair competition.

Enforcement and Administrative Penalties

The scope of authority of the competent authorities has been significantly expanded. In particular, business operators in violation of provisions of conducts such as commercial bribery, misappropriation of trade secrets, defamation and many others can be subject to an administrative fine of up to RMB 3 million, compared to RMB 20,000 in the existing law.

Remarkably, in light of China's recent efforts in building up a social credit system, the draft amendment also authorizes the administrative enforcement authorities to record the unfair competition conducts in the social credit system, and publish the same.

In summary, the AUCL is no longer perceived as a supplemental approach to the IP protection, rather, it emerges as an independent commercial law regulating various aspects of business transactions to discipline the market. It should be widely applicable to companies in all sectors. Since the current draft is quite condensed, the Supreme Court may issue a judicial interpretation to interpret applications of the law from a judicial perspective shortly after the enactment of the amendments. In any case, regulations against commercial bribery, misappropriation of trade secrets and online business have been intensified and may significantly impact the operation of multinational companies in China.

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